

JAMES COORS,
1218 Sweetbriar Road
Madison, WI 53705,

FILED

JUN 10 2016

DANE COUNTY CIRCUIT COURT

COURTE OREILLES LAKES ASSOCIATION,
INC.

16CV1564

P.O. Box 702
Hayward, WI 54843-0702, and

Case Code: 30607, 30701
Administrative Agency Review

LAC COURTE OREILLES BAND OF THE
LAKE SUPERIOR CHIPPEWA,
13394 W. Trepania Road
Hayward, WI 54843

DNR

JUN 10 2016

**OFFICE OF THE
SECRETARY**

Petitioners,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES, and NATURAL RESOURCES BOARD
101 South Webster Street
Madison, Wisconsin 53707

Respondents.

PETITION FOR JUDICIAL REVIEW

Pursuant to Wis. Stat. §§ 227.40, 227.52-.57 and 806.04, James Coors and the Courte Oreilles Lakes Association, Inc. and the Lac Courte Oreilles Band of the Lake Superior Chippewa, on behalf of their respective members, petitions the Court to: (1) review the Department of Natural Resources' ("DNR") decision not to promulgate

required site specific water quality criteria for Lac Courte Oreilles, or in the alternative, (2) the DNR's unreasonable delay in promulgating procedures for site specific criteria (administrative rule package WT-17-12); (3) declare Wis. Admin. Code § NR 102.06(4)(b)1. and 3. Invalid; and (4) declare that certain pollution discharges to Lac Courte Oreilles are point source discharges.

In support of this petition, Petitioners allege as follows:

PARTIES

1. Petitioner James Coors is a resident of Dane County and a property owner on Lac Courte Oreilles. The DNR's actions and inactions at issue in this matter contribute to unlawful and harmful water pollution in Lac Courte Oreilles, which negatively impacts Mr. Coors' property value and recreational activity.

2. Petitioner Courte Oreilles Lakes Association ("COLA") is a not for profit corporation formed to represent the interests of more than 600 members and property owners on Lac Courte Oreilles. COLA was formed to protect and enhance the quality of the Courte Oreilles Lakes, their shorelands and surrounding areas, while respecting the interests of property owners and the public. The DNR's actions and inactions at issue in this matter contribute to unlawful and harmful water pollution in Lac Courte Oreilles, which negatively impacts COLA members' property value and recreational activity.

3. Petitioner, Lac Courte Oreilles Band is one of six bands of the Lake Superior Chippewa Indians. The Tribe represents its approximately 7,600 members'

interests in the exceptional spiritual, cultural, and subsistence importance of Lac Courte Oreilles, the eastern one-third of which is located within the Tribe's reservation boundaries, and all of which is located within an area covered by the 1837 Treaty Territory in which the Tribe has reserved fishing, hunting and gathering rights. The DNR's actions and inactions at issue in this matter contribute to unlawful and harmful water pollution in Lac Courte Oreilles, which negatively impacts the Tribe and its members' property, fishing, hunting, subsistence, and recreational interests.

4. Respondent DNR is an independent agency of the State of Wisconsin, created under Wis. Stat. § 15.34, and under the direction of the Natural Resources Board, whose principal office is located at 101 South Webster Street, Madison, Dane County, Wisconsin, and which has the responsibility for the regulation of sources of water pollution pursuant to Wis. Stat. chs. 281 and 283.

VENUE

5. Venue is proper in Dane County Circuit Court pursuant to Wis. Stat. §§ 227.40(1) and 227.53(1)(a)3. because one of the petitioners, James Coors, is a resident of Dane County, and pursuant to Wis. Stat. §§ 801.50(2)(c) and (3) because the DNR resides and does substantial business in Dane County and Petitioners designate Dane County.

PHOSPHORUS POLLUTION AND ADVERSE EFFECTS ON PETITIONERS' INTERESTS

6. Lac Courte Oreilles is located in Sawyer County and has a total surface area of approximately 5,039 acres and approximately 25 miles of shoreline. The maximum depth of the lake is 90 feet and the average depth is 34 feet.

7. Lac Courte Oreilles is one of only five inland two-story lakes known to support both cisco and whitefish, which are cold-water species requiring colder well-oxygenated water in a lower (deeper) depth of the lake. Cisco and whitefish are prey for gamefish such as walleye, muskellunge and northern pike. Lac Courte Oreilles currently produces record muskellunge and large walleye, smallmouth, and northern pike. A muskellunge from the lake was once the world- record holder. However, without the cisco and whitefish populations in the lake, the game species are smaller and fewer – significantly impairing the lake as a sport fishery.

8. Current pollution levels in the lake threaten cisco and threaten (or have already eliminated) whitefish, and as a result, the larger game species in the lake. Nutrient loading (including phosphorus) to a lake reduces dissolved oxygen, which in turn reduces both prey and game species of fish. Nutrient loading also causes algal mats and growth of invasive curly leaf pondweed, which prevent or reduce the ability to swim, boat, or fish and reduce native plant species.

9. Biologic impairment of Lac Courte Oreilles occurs at total phosphorus concentrations higher than 10 ug/L, including because dissolved oxygen concentrations drop below 6 mg/L in deeper waters, reducing oxythermal habitat for cold water fish, negatively impacting cisco and lake whitefish and the game species that rely on them.

10. Petitioners, and their respective members, are adversely affected by phosphorus pollution in Lac Courte Oreilles. Establishing sufficient water quality criteria to ensure that water pollution is below levels that would impair the use of the lake as a fishery and recreational lake is central to protecting the lake. Other regulatory requirements and programs depend on setting the correct criteria as a preliminary step.

11. Section 281.15, Wis. Stats., requires the DNR to promulgate water quality standards for state waters. First, the use for each water body must be determined. Then, the water quality necessary to protect the designated uses must be protected by establishing sufficiently stringent water quality criteria, which are effectively maximum pollution standards.

12. According to Wisconsin (and federal) law, water quality criteria must be sufficiently stringent to “protect the public interest, which include the protection of the public health and welfare and the present and prospective future uses of such waters for public and private water systems, propagation of fish and aquatic life and wildlife, domestic and recreational purposes and agriculture, commercial, industrial and other legitimate uses.” Wis. Stat. § 281.15(1). If any of those potential uses conflict, DNR is directed to protect the “general public interest” over any others. *Id.*

13. When establishing the water quality criteria, DNR is required to “[d]evelop a technical support document which identifies the scientific data utilized, the margin of safety applied and any facts and interpretations of those data applied in deriving the water quality criteria...” Wis. Stat. § 281.15(2)(e).

14. DNR adopted criteria for phosphorus in November, 2010. *See* Clearinghouse Rule 10-035, Wis. Admin. Reg. No. 659, Nov. 2010.

15. Section NR 102.06(4)(b)1., Wis. Admin. Code, codifies a maximum phosphorus concentration (criterion) of 15 microgram per liter ($\mu\text{g}/\text{L}$) for stratified, two-story fishery lakes, including Lac Courte Oreilles. For a shallow, non-stratified lowland drainage lake, DNR established a criterion of 40 $\mu\text{g}/\text{L}$. Wis. Admin. Code § NR 102.06(4)(b)3. Although not a distinct water body, DNR has applied the 40 $\mu\text{g}/\text{L}$ criterion to Musky Bay in Lac Courte Oreilles, while applying the 15 $\mu\text{g}/\text{L}$ concentration to the rest of the lake.

16. Pursuant to Wis. Admin. Code § NR 102.06(7), the criteria set forth in the Administrative Code “may be modified by rule for a specific surface water segment or waterbody” and “adopted in place of the generally applicable criteria in [NR 102.06] where site-specific data and analysis using scientifically defensible methods and sound scientific rationale demonstrate a different criterion is protective of the designated use of the specific surface water segment or body.” Section 227.12, Stats., provides that any five people may petition for a rule.

17. On March 30, 2016, Petitioners submitted a rulemaking petition to the

DNR seeking a rule setting a site specific criteria for phosphorus in Lac Courte Oreilles. A copy of the petition is attached as Exhibit A.

18. On May 11, 2016, DNR employee Susan Sylvester wrote a letter to COLA purporting to deny the rulemaking petition on behalf of the Department of Natural Resources. The letter denies the petition's request for a site specific water quality criteria pursuant to NR 102.06(7) because the DNR purportedly prefers to instead adopt a general rule (designed "Rule Package WT-17-12") that it contends "will result in a streamlined process for developing site specific criteria," before deciding any site specific requests. A copy of the letter is attached as Exhibit B.

19. The foregoing facts are incorporated by reference into each of the following claims.

**FIRST CLAIM: REVIEW OF AGENCY ACTION (Wis. Stat. § 227.52)
The Letter from Susan Sylvester Was Not Authorized By Law**

20. DNR was required to either deny COLA's rulemaking petition in writing, with a brief statement of the reason for denial, or proceed with the requested rulemaking. Wis. Stat. § 227.12(3).

21. The Natural Resources Board is authorized to promulgate regulations for the DNR and has not delegated that authority. Pursuant to Wis. Stat. § 15.34(1), the DNR is under the direction and supervision of the Natural Resources Board.

22. No statute, regulation, or order from the Natural Resources Board authorized employee Susan Sylvester, nor any other employee, to decide rulemaking petitions.

23. The Natural Resources Board met on April 13, 2016, but did not address the rulemaking petition and, specifically, did not authorize Ms. Sylvester to deny the rulemaking petition.

24. There was no lawful authority for the May 11, 2016, letter from Ms. Sylvester purporting to deny Petitioners' rulemaking petition.

25. Pursuant to Wis. Stat. § 227.57(4), the Court should remand for further agency action consistent with statute and regulations regarding rulemaking by the Natural Resources Board.

**SECOND CLAIM (IN THE ALTERNATIVE): REVIEW OF AGENCY ACTION (Wis. Stat. § 227.52)
DNR's Denial of Petitioners' Petition Is Premised on Erroneous Interpretations of Law, Is Outside The Range of Discretion Delegated by Law, and is Arbitrary and Capricious.**

26. Even if the Court does not find that Ms. Sylvester's letter was unauthorized by law, the Court should nevertheless find that it is an erroneous interpretation of law, is arbitrary and capricious, and that it was outside the discretion delegated to the agency.

27. The Natural Resources Board adopted Wis. Admin. Code § NR 102.06(7) in 2010. That provision provides that site specific criteria may be adopted when specific predicates are met: the site-specific data and analysis demonstrate a different criterion is protective of the designated use of the specific surface water segment or waterbody. The rule does not require that the DNR first adopt a separate general rule to "streamline" site specific determinations as a predicate to setting site specific criteria.

Nor does the rule authorize the DNR staff to deny requests for site specific criteria based on the staff's preference for a different rulemaking to precede site specific criteria.

28. The Sylvester letter's decision to delay adopting any site specific criteria until the DNR first adopts Rule Package WT-17-12, which the letter acknowledges will not occur until mid-2018 or later, means that no site specific criteria can be adopted until 2019 or later – nearly ten years after NR 102.06(7) was adopted specifically allowing site specific criteria.

29. DNR's decision to delay any site specific criteria for a decade constructively denies the public the protection of site specific criteria, even when the standards in NR 102.06(7) are met, and even when site specific criteria are needed to comply with Wis. Stat. § 281.15 to protect the current and future uses of the water body, including the public interest in propagation of fish and aquatic life.

30. The Court should remand the DNR's decision to deny the petition pursuant to Wis. Stat. § 227.57(5) and (8).

**THIRD CLAIM (IN THE ALTERNATIVE): REVIEW OF AGENCY
INACTION (Wis. Stat. § 227.52)
DNR's Delay In Promulgating WT-17-12, And Therefore Delaying All Site
Specific Criteria Determinations for a Decade, Is Arbitrary and Capricious**

31. Even if the Court denies Petitioners relief on the First and Second Claims, above, the Court should nevertheless find that DNR's failure to timely promulgate Rule Package WT-17-12, which the Sylvester letter claims is a predicate for site specific criteria determinations, is unlawful.

32. Although the Governor and Natural Resources Board approved the scope statement for WT-17-12 on October 12, 2012, no further rulemaking steps have been completed in the nearly four years since. No initial rules have been written. No public comment period has been held. And no rule language has been provided to the Natural Resources Board for consideration and adoption.

33. Even if DNR immediately expedited the rulemaking process from this point forward, the rulemaking process established by statute would take many more months and no site specific criteria would be considered for years.

34. The DNR's failure to finalize Rule Package WT-17-12 constitutes an "[a]dministrative decision... by... inaction... negative in form" that is subject to review by the court in this case pursuant to Wis. Stat. § 227.52. The Court should review the agency's inaction and compel immediate and prompt completion of WT-17-12.

FOURTH CLAIM (IN THE ALTERNATIVE): DECLARATORY JUDGEMENT (Wis. Stat. § 227.40)

The Phosphorus Standards In Wis. Admin. Code § NR 102.06(4)(b)1. and 3. Are Unlawful

35. If the Court does not require that DNR quickly adopt site specific criteria for Lac Courte Oreilles pursuant to Claims 1 through 3, above, the existing criteria in Wis. Admin. Code § NR 102.06(4)(b) will apply.

36. Those existing standards, however, do not protect the public interest, including the protection of the waters for propagation of fish and wildlife in Lac Courte Oreilles, and therefore violate Wis. Stat. § 281.15(1).

37. The Court should review and declare the standards in Wis. Admin. Code § NR 102.06(4)1. and 3. unlawful.

**FIFTH CLAIM: REVIEW OF AGENCY ACTION (Wis. Stat. § 227.52) and
DECLARATORY JUDGMENT (Wis. Stat. § 806.04)
The Sylvester Letter Relies on An Erroneous Interpretation of Law To Conclude that
All Phosphorus Pollution to Lac Courte Oreilles is “Nonpoint” Pollution.**

38. The May 11, 2016, Sylvester letter purports that the DNR denied Petitioners’ petition, in part, because “Musky Bay is impaired due to nonpoint pollution” and that a non-regulatory planning process “is a more efficient path to improving water quality” than through regulatory procedures.

39. A significant source of nutrient pollution in Lac Courte Oreilles, including Musky Bay, are cranberry growing operations that discharge polluted water through canals and other discrete conveyances into the lake.

40. “Nonpoint pollution” as used in the Sylvester letter, refers to pollution that does not come from a “point source” as defined in Wis. Stat. § 283.01(12). *See* Wis. Stat. § 281.65(2)(b)^a. Section 283.01(12) defines a point source as follows:

"Point source" means either of the following:

(a) A discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants may be discharged either into the waters of the state or into a publicly owned treatment works except for a conveyance that conveys only storm water.

^a Wis. Stat. § 281.01(12) states: "Nonpoint source" means a land management activity which contributes to runoff, seepage or percolation which adversely affects or threatens the quality of waters of this state and which is not a point source as defined under s. 283.01 (12).

(b) A discernible, confined and discrete conveyance of storm water for which a permit is required under s. 283.33 (1).

41. The Wisconsin statutory definition of a point source discharge clearly defines the discernible, confined, and discrete conveyances carrying pollutants from the cranberry growing operations into Lac Courte Oreilles as a “point source.”

42. The Court should review DNR’s determination that there are only nonpoint source discharges to the lake, and declare that the cranberry growing operation polluted discharges through discernible, confined, discrete conveyances are point sources, pursuant to Wis. Stat. §§ 227.52 and 806.04.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully requests judgment in its favor as follows:

1. Find and declare the DNR’s denial of Petitioners’ petition seeking site specific criteria for Lac Courte Oreilles to be arbitrary, capricious, unreasonable and/or unlawful.
2. In the alternative,
 - a. find that DNR’s delay in promulgating Rule Package WT-17-12, which DNR contends is a prerequisite to establishing site specific criteria, is unreasonable, unlawful, and outside the discretion afforded to DNR and order DNR to complete the rulemaking without any further delay, establish all necessary interim deadlines, and maintain jurisdiction to

ensure that the DNR complies with such orders pursuant to Wis. Stat. § 227.57(9); and

- b. Declare Wis. Admin. Code § NR 102.06(4)(b)1. and 3. unlawful pursuant to Wis. Stat. § 227.40.
3. Find that DNR's determination that pollution to Musky Bay is from nonpoint pollution sources to be erroneous, and declare that the pollution discharges from discrete conveyances on the cranberry operations meet the definition of a "point source" in Wis. Stat. § 283.01(12)(a);
4. Award costs and attorneys' fees pursuant to Wis. Stat. § 814.245; and
5. Grant such other relief as the Court may deem just and equitable.

Dated this 11th day of June, 2016.

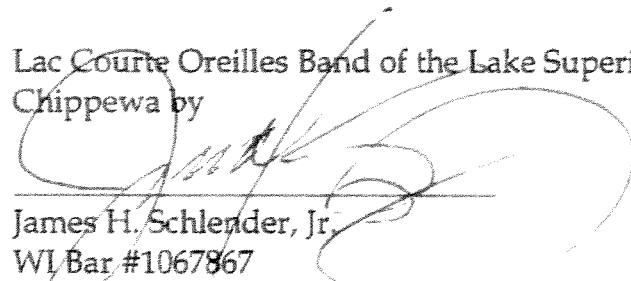
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