

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

DANE COUNTY

JAMES COORS, et al.,
Petitioners,

v.

Case No. 16-CV-1564
Administrative Agency Review: 30607

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES, et al.,

Respondents,
and

WISCONSIN STATE CRANBERRY
GROWERS ASSOCIATION,

Intervenor-Respondent.

STIPULATION

Petitioners James Coors, Courte Oreilles Lakes Association, Inc., and Lac Courte Oreilles Band of the Lake Superior Chippewa (“Petitioners”) brought this action by petitioning the Court, pursuant to Wis. Stat. §§ 227.40, 227.52-.57, and 806.04, 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) review the DNR’s 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. DNR disputes these allegations.

The parties wish to settle this matter by agreement and, therefore, enter into this stipulation (“Stipulation”). This Stipulation resolves Petitioners’ first through fifth claims as set forth in the Petition for Review filed June 10, 2016.

IT IS STIPULATED AND AGREED by the Petitioners, DNR and the Natural Resources Board (“Board”) (“Respondents”), and Intervenor Wisconsin State Cranberry Growers Association (as to claim five only), that Petitioners’ claims one through four¹ and the Wis. Stat. ch. 227 portion of claim five² shall be stayed and, upon completion of certain conditions contained herein, dismissed. The parties further agree that the declaratory judgment portion of claim five shall be dismissed without prejudice. The following terms and conditions govern this agreement:

1. The Circuit Court for Dane County, Wisconsin (“the Court”) has jurisdiction over the parties and the subject matter of this action.

¹ FIRST CLAIM, Review of Agency Action (Wis. Stat. § 227.52), The Letter from Susan Sylvester Was Not Authorized by Law; 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; 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; FOURTH CLAIM (In the Alternative), Declaratory Judgment (Wis. Stat. § 227.40), The Phosphorus Standards in Wis. Admin. Code § NR 102.(4)(b)1. and 3. Are Unlawful. See Pet. for Judicial Rev. at 7-11 (June 10, 2016).

² 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. Pet. for Judicial Review at 11-12 (June 10, 2016).

2. This Stipulation shall apply to and be binding on the parties and on the successors and assignees of the parties.

3. The Stipulation shall incorporate the following terms, conditions, and deadlines relating to the development of a proposed phosphorus site-specific criteria (“SSC”) for Lac Courte Oreilles in Sawyer County, Wisconsin:

a. DNR agrees to propose a phosphorus SSC for Lac Courte Oreilles, inclusive of the East, Central, and West Basins and Stuckey Bay, Musky Bay, Chicago Bay, Brubaker Bay, Anchor Bay, and Northeast Bay, as authorized by Wis. Admin. Code § NR 102.06(7).

b. DNR will propose a scope statement for the development of a proposed phosphorus SSC for Lac Courte Oreilles. The development of a proposed phosphorus SSC for Lac Courte Oreilles will help inform and is related to the overall rulemaking effort associated with WT-17-12 (draft rule Wis. Admin. Code ch. NR 119) involving procedures for establishing phosphorus SSCs, and may be used by DNR to demonstrate the level of analysis that is needed when developing a phosphorus SSC. DNR agrees to submit a scope statement for the development of a proposed phosphorus SSC for Lac Courte Oreilles to the Governor for approval no later than May 15, 2017, in accordance with Wis. Stat. § 227.135(2). At least two weeks prior to presenting the scope statement to the Governor, DNR shall share the scope statement with the Petitioners and Intervenor-Respondent for review and comment.

c. If the Governor approves the scope statement, within 30 days of that approval DNR will submit an electronic copy of the statement to the Legislative

Reference Bureau for publication in the Wisconsin Administrative Register in accordance with Wis. Stat. § 227.135(3). DNR will also provide a copy of the statement to the Secretary of Administration on the same day it submits the statement to the Register.

d. Within 60 days of publication of the scope statement in the Wisconsin Administrative Register, DNR will submit the scope statement to the Board for approval in accordance with Wis. Stat. § 227.135(2).

e. If the Board approves the scope statement, DNR agrees to develop a proposed phosphorus SSC for Lac Courte Oreilles as expeditiously as practicable, and no later than 150 days after Board approval of the scope statement. DNR acknowledges that the Courte Oreilles Lakes Association and its environmental consultant LimnoTech, Inc., have recommended a total phosphorus SSC for Lac Courte Oreilles of 10 parts per billion (“ppb”) as measured on a lakewide average, and may provide supplemental data during the course of the rulemaking process. DNR will evaluate and consider the data and rationale submitted by Courte Oreilles Lakes Association and LimnoTech, Inc. as the agency prepares its proposed SSC, as well as any other data or information submitted by Petitioners or other members of the public.

f. Counsel for DNR will notify counsel for Petitioners via email of the completion of each step identified in subparagraphs 1.3.b. through e. above.

g. DNR will meet with Petitioners within 30 days of calculating the proposed SSC for Lac Courte Oreilles. The parties at that time will discuss the status

of the overall rulemaking effort, dismissal of the remaining portions of the case, consistent with paragraph 9 below, and an estimated timeline for the remaining steps in the rulemaking process. DNR will develop that estimated timeline in consultation with Petitioners.

h. DNR will move through the remaining rulemaking process as expeditiously as possible, consistent with the requirements of the statutory and regulatory frameworks governing the rulemaking process. Petitioners can track the progress of the remaining rulemaking effort through the Wisconsin Legislature administrative rules website. If the Petitioners are not satisfied that the DNR is proceeding with the remaining rule steps in good faith and as expeditiously as possible consistent with the estimated schedule, the Petitioners may seek Court involvement as specified in Paragraphs 6 through 9.

4. Nothing in this Stipulation waives Petitioners' right to challenge the procedural development or sufficiency of any phosphorus SSC for Lac Courte Oreilles promulgated pursuant to the process established by this agreement, or otherwise. Nothing in this Stipulation waives any defenses Respondents may have to any such challenge.

5. Nothing in this Stipulation prevents or prohibits Petitioners from submitting to DNR, at any time, a new petition for rulemaking for SSC on Lac Courte Oreilles, or from filing a court action related to the new petition, should the SSC for Lac Courte Oreilles fail to be promulgated as a final rule, become unreasonably delayed, or contain criteria that in the reasonable judgment of Petitioners is

insufficiently protective of Lac Courte Oreilles. Nothing in this Stipulation waives any defense Respondents may have to any such petition or action.

6. The parties agree that the stipulated deadlines in Paragraph 3 may be reopened in the event that there are circumstances beyond DNR's control that delay compliance with the stipulated timeline, despite DNR's reasonable efforts to fulfill its obligations. Events beyond the control of DNR for purposes of this Stipulation include, but are not limited to, actions taken or comments submitted by the Governor, the Legislature, or the U.S. Environmental Protection Agency during the rulemaking process. DNR shall make all reasonable efforts to minimize delays in fulfilling its obligations.

7. Should DNR claim an event which constitutes an event beyond its control that may unreasonably delay the stipulated timeline, counsel for DNR shall notify the Petitioners' counsel via email and U.S. Mail of the existence of and facts supporting the claim within 15 days of the events giving rise to such claim. The parties shall make a good faith effort to develop a revised timeline. If the parties cannot reach an agreed-upon resolution to develop a revised timeline within 30 days after receipt of the electronic copy of the notice, any party may move this Court to resolve the dispute.

8. In the event of a dispute between the parties concerning the interpretation or implementation of any other aspect of this Stipulation or the Order for Partial Stay and Partial Dismissal, the disputing party shall provide the other parties with a written notice via email and U.S. Mail outlining the nature of the

dispute and requesting informal negotiations. If the parties cannot reach an agreed-upon resolution of the dispute within 30 days after receipt of the electronic copy of the notice, any party may file a motion with this Court to resolve the dispute.

9. Upon DNR's completion of the steps identified in subparagraphs 3.a through 3.g., above, the Parties agree that the remaining portions of the petition for judicial review be dismissed. Petitioners will notify the court of the completion of the steps in 3.a. through 3.g. above within 30 days of the meeting held pursuant to subparagraph 3.g. After dismissal, should the parties fail to resolve a dispute regarding the interpretation or implementation of any remaining aspect of this Stipulation or the Order for Partial Stay and Partial Dismissal, the Petitioners reserve their right to reinitiate litigation regarding claims one through four and the Wis. Stat. ch. 227 portion of claim five. Should that occur, the parties agree that it would be in the interests of judicial economy to seek leave of this Court to hear this matter. Respondents agree not to challenge the timeliness of claims one through four and the Wis. Stat. ch. 227 portion of claim five should Petitioners ask this Court to resume litigation or grant them relief from judgment after dismissal. Otherwise, Respondents and Intervenor-Respondent reserve all other claims and defenses that are available. Petitioners reserve their right to bring the declaratory judgment portion of claim five at any time, in any venue.

10. All notices required to be sent to any party as provided herein shall be provided to each undersigned attorney, unless notice is provided to the parties that a different person should receive the notice.

11. The parties agree that this Stipulation sets forth the entire understanding of the parties with respect to the subject matter herein.

12. An Order for Partial Stay and Partial Dismissal may be entered incorporating the terms of this Stipulation without further notice.

Dated this 31st day of March, 2017.

PINES BACH LLP



CHRISTA O. WESTERBERG
State Bar #1040530

122 W. Washington Avenue, Ste 900
Madison, Wisconsin 53701
(608) 251-0101
(608) 251-2883 (Fax)
cwesterberg@pinesbach.com

LAW OFFICE OF SIVERTSON AND
BARRETTE, P.A.

ALF E. SIVERTSON
Admitted Pro Hac Vice

1465 Arcade Street
Saint Paul, Minnesota 55106
(651) 778-0575
Alf.sivertson@sivbar.com

Attorneys for James Coors and Courte
Oreilles Lakes Association, Inc.

Dated this 3rd day of ^{April}
March, 2017

D. Linehan

DYLLAN LINEHAN
State Bar #1104751

Attorney for Lac Courte Band of the Lake
Superior Chippewa

Lac Courte Oreilles Band of
Lake Superior Chippewa Indians
13394 W. Trepania Road
Hayward, Wisconsin 54843
(715) 634-7423
(715) 634-8934 (Fax)
Dyllan.Linehan@lco-nsn.gov

Dated this __ day of March, 2017.

BRAD D. SCHIMEL
Wisconsin Attorney General

DAVID P. ROSS
Assistant Attorney General
State Bar #1038401

Attorneys for Respondents Department of
Natural Resources

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8940
(608) 267-2778 (Fax)
rossdp@doj.state.wi.us

Dated this ___ day of March, 2017

DYLLAN LINEHAN
State Bar #1104751

Attorney for Lac Courte Band of the Lake
Superior Chippewa

Lac Courte Oreilles Band of
Lake Superior Chippewa Indians
13394 W. Trepania Road
Hayward, Wisconsin 54843
(715) 634-7423
(715) 634-8934 (Fax)
Dyllan.Linehan@lco-nsn.gov

Dated this 31st day of March, 2017.

BRAD D. SCHIMEL
Wisconsin Attorney General



DAVID P. ROSS
Assistant Attorney General
State Bar #1038401

Attorneys for Respondents Department of
Natural Resources

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8940
(608) 267-2778 (Fax)
rossdp@doj.state.wi.us

Dated this 31ST day of March, 2017.

DEWITT, ROSS & STEVENS SC



RONALD R. RAGATZ
State Bar #1017501

Attorney for Wisconsin Cranberry Growers
Association (as to Claim 5 only)

2 East Mifflin Street, Ste 600
Madison, Wisconsin 53703-2865
(608) 252-9351
(608) 252-9243 (Fax)
rrr@dewittross.com