

Petition for Judicial Review of WDNR's Rejection of COLA's and the LCO Tribe's Phosphorus Site Specific Criterion Proposal

– A Negotiated Settlement –

Overview:

COLA announced in a [press release on June 16, 2016](#) that the Wisconsin Department of Natural Resources (WDNR) rejected a request that WDNR undertake rulemaking that would have provided a more protective phosphorus standard for Lac Courte Oreilles (LCO). In response to [WDNR's rejection letter](#) in May, 2016, COLA and the LCO Tribe proceeded by filing for [judicial review](#) of this rejection in June, 2016 with the Dane County Circuit Court in Madison, WI.

The petition for judicial review asked that the court (1) review WDNR's decision-making process that led to the rejection of the site specific criterion for LCO; (2) declare that WDNR's delay in promulgating procedures for site specific criteria, as part of the overall rule-making process for the state, was unreasonable; (3) declare that the specific portions of Wisconsin Administrative Code & NR102 are invalid because they do not provide protection of fish and wildlife in LCO, and; (4) declare that certain pollution discharges to LCO are point source discharges and are, therefore, subject to permitting requirements under the Clean Water Act.

Shortly after the petition for judicial review was filed, the Wisconsin State Cranberry Growers Association (WSGA) was granted status as Intervenor. "Intervenor" is the term used for nonparties that join ongoing litigation because their rights may be affected. In this case, the most obvious reason for WSGGA's request to be granted Intervenor status was COLA's and the Tribes' claim that WDNR mistakenly determined that discharges from cranberry marshes are non-point rather than point sources of pollution.

Dane County District Court Judge, Valerie L. Bailey-Rihn, set Feb. 27, 2017 as the date for the scheduling conference, which initiated judicial proceedings.

Settlement Discussions:

There was extensive communication between the legal representative for COLA and the LCO Tribe, Christa Westerberg (Pines Bach LLP), and David Ross of WI's Department of Justice (DOJ). The DOJ represents the WDNR in this matter. Ron Ragatz, attorney with DeWitt, Ross & Stevens who represents WSCGA was also included in these discussions when appropriate. These parties initiated negotiations for a settlement that would eliminate the need for the court to formally rule on the issues outlined above.

COLA is seeking a 10 parts per billion (ppb) phosphorus standard for LCO, which, when achieved, will slow the accelerating eutrophication (aging) process of the lake, maintain current water clarity, maintain the greater LCO ecosystem, and protect and preserve the LCO two-story coldwater fishery in a warmer future.

Early in the negotiations, it became apparent the WDNR was undergoing a separate rulemaking process that involved revising temperature and dissolved oxygen (TDO) limits for cold-water fisheries such as LCO. WDNR's TDO revision was not part of the judicial review, but revising TDO standards is essential for protection of LCO as demonstrated by the [extensive fishkill](#) in August, 2016. It appeared that WDNR was considering and possibly in agreement with COLA's proposed TDO-6 (6 ppm dissolved oxygen concentration) at 66 degrees F and a 1 meter minimum habitat for the protection of LCO lake whitefish. COLA has generated convincing science concluding that the proposed TDO-6 standards would be protective of LCO's 2-story cold water fishery, and WDNR's revised TDO rulemaking is a testament to COLA's science and tenacity. The 10 ppb phosphorus and TDO-6 standards are intertwined, and both are essential for preservation of LCO's water quality.

The Settlement:

The [settlement, or "Petition Stipulation,"](#) was reached on March 31, 2017. It states that all claims that were the basis for the petition for judicial review are stayed, and, upon completion of the processes outlined below, shall be dismissed.

The settlement directly addressed the essential complaint by COLA and the LCO Tribe by stipulating that the WDNR agrees to propose a phosphorus SSC for LCO, including all basins and bays.

To initiate the SSC process, WDNR will first propose a scope statement for the development of a phosphorus SSC for LCO and present it to the Governor for approval by May 15, 2017. This scope statement will outline the focus and methodology to be used for the development of the phosphorus SSC for LCO as part of WDNR's overall rulemaking efforts. COLA and the LCO tribe will have the opportunity to review the proposed scope statement prior to submittal to the Governor.

If the Governor approves of the scope statement, within 30 days of that approval WDNR will submit the statement to Legislative Reference Bureau for publication in the Wisconsin Administrative Register. With 60 days of publication, the WDNR will submit the scope statement to the Natural Resources Board for approval.

If the NRB approves the scope statement, WDNR will begin to develop a phosphorus SSC for LCO within 150 days. WDNR acknowledges that COLA and its environmental consultant LimnoTech, Inc., have recommended a total phosphorus SSC for Lac Courte Oreilles of 10 parts per billion and that they may provide supplemental data during the rulemaking process. WDNR will evaluate COLA's/LimnoTech's data and rationale as it prepares the SSC.

DNR will meet with COLA and the LCO Tribe within 30 days of calculating the proposed SSC for LCO and discuss the status of the overall rulemaking effort. Upon completion of this step, the remaining portions of the petition for judicial review will be dismissed.

The settlement does not directly address claim five of the judicial petition, in which it was argued that the WDNR relied on an erroneous interpretation of law to conclude that all phosphorus pollution to LCO is “nonpoint” pollution. The settlement states that this claim will be dismissed without prejudice, and that COLA and the LCO Tribe reserve their right to bring the declaratory judgment portion of claim five in the future.