

**Wisconsin Department of Natural Resources  
Natural Resources Board Agenda Item**

**SUBJECT:**

Request that the Board approve the Statement of Scope for Board Order WY-21-20 and conditionally approve the public hearing notice and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse, for proposed rules affecting chapter NR 102 related to site-specific phosphorus criteria for Lac Courte Oreilles.

**FOR: October 2021 Board meeting**

**PRESENTER'S NAME AND TITLE:** Marcia Willhite, Water Evaluation Section Chief

**SUMMARY:**

The objective of the proposed rule is to address development of phosphorus site-specific criteria for a single lake, Lac Courte Oreilles, in Sawyer County. Lac Courte Oreilles is a state-classified Outstanding Resource Water and one of the small number of lakes in Wisconsin that support a coldwater (or "two-story") fishery. The lake straddles both state land and Tribal lands of the Lac Courte Oreilles Band of Lake Superior Chippewa.

Pursuant to s. NR 102.06(7), Wis. Adm. Code, and Wis. Stat. s. 281.15, the department has the authority to develop a site-specific criterion in place of the generally applicable phosphorus criterion in s. NR 102.06, Wis. Adm. Code, if site-specific, scientifically defensible data and analysis demonstrate a different criterion is necessary to protect the designated uses of the waterbody.

The department previously determined that the generally applicable phosphorus criterion of 15 ug/L is not protective for whitefish in the East Basin of the lake. The department proposed a rule for consideration by the Natural Resources Board that would have revised the lake's phosphorus criterion from the generally applicable 15 ug/L to 10 ug/L. In January 2020, the Board considered but did not approve that proposed rule and shortly thereafter the scope statement that authorized the department to consider rulemaking expired.

On June 10, 2020, the department received a new petition for promulgation of a permanent rule from the Courte Oreilles Lakes Association, Inc., and the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians. In the summer of 2020, new tools from the United States Environmental Protection Agency (EPA) became available for developing phosphorus criteria to maintain dissolved oxygen levels in coldwater fishery lakes like Lac Courte Oreilles.

By letter dated November 11, 2020, the department granted the petition to initiate rulemaking. This scope statement would allow that new rulemaking effort to begin.

A preliminary public hearing on this scope statement was held on August 19, 2021. A recording of the hearing is available at: [https://widnr.widen.net/s/wd6z7gj6xh/wy\\_wy2120pph\\_20210819](https://widnr.widen.net/s/wd6z7gj6xh/wy_wy2120pph_20210819). If the scope statement for WY-21-20 is approved, the department may begin drafting the rule language. As required by statute, the department may not begin work on the content of the proposed rule until the scope statement is approved. Once the rule is drafted, the department will seek public comment on the economic impact of the rule and on the proposed rule language. The 30-month time frame for submission of a final rule to the legislature for approval expires on November 24, 2023.

**RECOMMENDATION:** That the Board approve the Statement of Scope for Board Order WY-21-20 and conditionally approve the public hearing notice and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse.

**LIST OF ATTACHED MATERIALS (check all that are applicable):**

- Statement of Scope
- Governor's Approval of Statement of Scope
- Public Comments

Approved by	Signature	Date
Adrian G. Stocks, Water Quality Program Director	<small>DocuSigned by:</small> <i>Adrian G. Stocks</i>	9/9/2021   11:24 AM CDT
Darsi J. Foss, Environmental Management Division Administrator	<small>DocuSigned by:</small> <i>James Bellmer</i>	9/9/2021   11:37 AM CDT
Preston D. Cole, Secretary	<small>DocuSigned by:</small> <i>Todd Ambros</i>	9/9/2021   5:04 PM CDT

cc: Board Liaison - AD/8  
 Department Tribal Liaison - AD/8  
 Program attorney - LS/8  
 Department rule officer - LS/8

by Todd Ambros

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**CORRESPONDENCE/MEMORANDUM**

DATE: September 9, 2021

TO: All Members of the Natural Resources Board

FROM: Preston D. Cole, Secretary

SUBJECT: Background memo on preliminary public hearing and public comments received on the scope statement for Board Order WY-21-20, relating to site-specific phosphorus criteria for Lac Courte Oreilles

The Joint Committee for Review of Administrative Rules (JCRAR) requested a preliminary public hearing and comment period on the scope statement for Board Order WY-21-20. This memo summarizes the comments received at the preliminary public hearing and during the period for written public comments.

**Public Hearing**

The department held a virtual preliminary public hearing on the statement of scope on August 19, 2021 at 9:00 a.m.

- Eight members of the public attended the preliminary public hearing.
- No attendees provided testimony at the hearing. One registered in support and none registered as opposed.

A recording of the preliminary hearing is available at [https://widnr.widen.net/s/wd6z7gi6xh/wy\\_wy2120pph\\_20210819](https://widnr.widen.net/s/wd6z7gi6xh/wy_wy2120pph_20210819).

**Written Public Comment**

The public comment period ended on August 19, 2021. The department received two written comment letters, which are attached.

- Midwest Environmental Advocates supported approval of the scope statement.
- Wisconsin State Cranberry Growers Association (WSCGA) requested that the department reiterate its previous statements that cranberry operations are federally considered non-point sources that are not subject to WPDES permitting requirements and would therefore not be affected by the proposed rule. They further requested that the department remove WSCGA and local cranberry operations from the scope statement's list of entities that could potentially be affected by the proposed rule. The department maintains its earlier statements that this rule would not result in any regulatory or economic impact to non-point sources of phosphorus, including cranberry operations. However, the department has not revised the scope statement because this is not a measurable change that needs to be addressed to proceed with scope statement approval. Cranberry operations, like other non-point agricultural operations within the watershed and members of the lake association or Tribe, are parties that may be interested in this rulemaking effort even though they would not experience regulatory impacts.

**Drafter:** Kristi Minahan



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*Of Counsel*

August 19, 2021

Kristi Minahan

Wisconsin Department of Natural Resources

Bureau of Water Quality WY/3

101 S. Webster St.

PO Box 7921

Madison, WI 53707

Re: Comments on Statement of Scope SS 052-21

Ms. Minahan,

Midwest Environmental Advocates ("MEA") writes in support of the Department of Natural Resources moving forward with Statement of Scope SS 052-21 for Board Order WY-21-20, relating to a site-specific phosphorus criterion for Lac Courte Oreilles. On November 12, 2019, MEA submitted comments to the Department in support of a lower site-specific phosphorus criterion for Lac Courte Oreilles. We believe a site-specific standard is still warranted for the lake, as we agree with the Department that the current statewide criterion of 15 ug/L is not sufficiently protective. New modeling tools released by U.S. EPA in Summer 2020 for developing phosphorus criteria to maintain dissolved oxygen levels in coldwater fishery lakes like Lac Courte Oreilles bolster the rationale for undertaking this rulemaking anew.

Please feel free to contact Robert Lundberg at (608) 251-5047 ext. 6 or [rlundberg@midwestadvocates.org](mailto:rlundberg@midwestadvocates.org) and Andrea Gelatt at (608) 251-5047 ext. 5 or [agelatt@midwestadvocates.org](mailto:agelatt@midwestadvocates.org) to discuss any questions or concerns you may have about our comments.

Sincerely,

/s/

Robert Lundberg

Attorney / Equal Justice Works Fellow

[MIDWESTADVOCATES.ORG](http://MIDWESTADVOCATES.ORG)



Direct Dial: 608 252 9358  
Email: [jkl@dewittllp.com](mailto:jkl@dewittllp.com)

August 19, 2021

**VIA EMAIL**

Wisconsin Department of Natural Resources  
Kristi Minahan – WY/3  
P.O. Box 7921  
Madison, WI 53707-7921  
Email: [kristi.minahan@wisconsin.gov](mailto:kristi.minahan@wisconsin.gov)

RE: Comments on Statement of Scope SS 052-21, Board Order WY-21-20, Site-specific Phosphorus for Lac Courte Oreilles

Dear Ms. Minahan:

On behalf of the Wisconsin State Cranberry Growers Association (“WSCGA”), I am providing the following comments on the Statement of Scope SS 052-21 (Board Order WY-21-20), relating to site-specific phosphorous criteria for Lac Courte Oreilles.

The WSCGA represents approximately 160 of Wisconsin’s cranberry growers who grow more than 85% of the state’s cranberry crop. Cranberries are Wisconsin’s largest fruit crop and Wisconsin leads the nation in cranberry production. It is estimated that the state’s cranberry industry provides more than 3,400 jobs for Wisconsin residents and has a \$1 billion impact on the state’s economy.

WSCGA agrees with WDNR’s statement in Section 6. of the Statement of Scope that “[t]here are no regulated point source dischargers with WPDES (Wisconsin Pollutant Discharge Elimination System) permits that discharge pollutants to the lake, so establishing a site-specific criterion for the lake will not affect limitations in any WPDES permits.”

WSCGA asks that the Department recognize its previous determinations and statements that discharges from cranberry bogs are irrigation return flows and are, therefore, nonpoint sources that are not subject to WPDES permitting requirements. The Department clearly stated that cranberry production is federally classified as an agricultural non-point source of water pollution and cranberry operations are therefore not regulated under DNR’s Wisconsin Pollutant Discharge Elimination System (WPDES) discharge permit program in its responses to comments under Board Order No. WY-09-17. *See* “Public Comments and DNR Responses on: NR 102: Site-specific phosphorus for Lac Courte Oreilles in Sayer Co. (Natural Resources Board Order No. WY-09-17), Response 9, pg. 19, Dec. 19, 2019 (attached). Further, EPA “...concluded that discharges from cranberry bogs into waters of the United States are irrigation return flows not

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subject to NPDES permitting requirements.” See Letter from U.S. EPA to Ms. Kris Goodwill, Jan. 31, 2013 (attached).

As such, and consistent with the Department’s previous determinations related to similar actions to establish a site-specific criterion for Lac Courte Oreilles, this proposed rule will have no regulatory impact on cranberry growers.

Accordingly, WSCGA respectfully requests that the Statement of Scope, Section 6., be amended to remove the Wisconsin State Cranberry Growers Association and local cranberry operators from the list of all entities that may be affected by the proposed rule. See Statement of Scope, WY-21-20, Section 6., pg. 3.

**WSCGA further requests that the Department clearly state in its written responses to these hearing comments a reiteration of its previous statements that:**

**(1) cranberry operations are not regulated under the WPDES system and cranberry bogs are exempt from the Clean Water Act point source definition because cranberry bogs meet the exemption for return flows from irrigated agriculture; and**

**(2) promulgating a more stringent criterion for Lac Courte Oreilles lake will not result in any regulator requirement for an of the nonpoint sources of phosphorus to the lake – cranberry operations, other agricultural operations, or residential.** See “Public Comments and DNR Responses on: NR 102: Site-specific phosphorus for Lac Courte Oreilles in Sayer Co. (Natural Resources Board Order No. WY-09-17), Response 9, pg. 19, Dec. 19, 2019 (attached).

If you have any questions regarding these comments, please contact me on my direct line at 608-252-9358 or [jkl@dewittllp.com](mailto:jkl@dewittllp.com).

Very truly yours,

**DeWitt LLP**



Jordan K. Lamb  
JKL:jkl

Note to NRB:

This comment letter refers to a previous DNR response to comments document dated Dec. 19, 2019, a copy of which was attached to this letter. The lengthy attachment was removed for brevity but is part of the public record for board order WY-09-17.

# STATEMENT OF SCOPE

## Department of Natural Resources

**Rule No.:** WY-21-20

**Relating to:** Site-specific phosphorus criteria for Lac Courte Oreilles

**Rule Type:** Permanent

### 1. Finding/nature of emergency (Emergency Rule only):

The rule will be proposed as a permanent rule.

### 2. Detailed description of the objective of the proposed rule:

The objective of the proposed rule is to address development of phosphorus site-specific criteria for a single lake, Lac Courte Oreilles, in Sawyer County. Lac Courte Oreilles is a state-classified Outstanding Resource Water and one of the small number of lakes in Wisconsin that support a coldwater (or “two-story”) fishery. The lake straddles both state land and Tribal lands of the Lac Courte Oreilles Band of Lake Superior Chippewa.

Pursuant to s. NR 102.06(7), Wis. Adm. Code, and Wis. Stat. s. 281.15, the department has the authority to develop a site-specific criterion in place of the generally applicable phosphorus criterion in s. NR 102.06, Wis. Adm. Code, if site-specific, scientifically defensible data and analysis demonstrate a different criterion is necessary to protect the designated uses of the waterbody.

The department previously determined that the generally applicable phosphorus criterion of 15 ug/L is not protective for whitefish in the East Basin of the lake. In January, 2020, the department proposed a rule for consideration by the Natural Resources Board that would have revised the lake’s phosphorus criterion from the generally applicable 15 ug/L to 10 ug/L. At that time, the Board considered but did not approve that proposed rule and shortly thereafter the scope statement that authorized the department to consider rulemaking expired.

On June 10, 2020, the department received a new petition for promulgation of a permanent rule from the Courte Oreilles Lakes Association, Inc., and the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians. In the summer of 2020, new tools from the United States Environmental Protection Agency (EPA) became available for developing phosphorus criteria to maintain dissolved oxygen levels in coldwater fishery lakes like Lac Courte Oreilles.

By letter dated November 11, 2020, the department granted the petition to initiate rulemaking. This scope statement would allow that new rulemaking effort to begin.

### **3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:**

Existing rule language under s. NR 102.06(7), Wis. Adm. Code, specifies that the department may promulgate phosphorus site-specific criteria by rule. In addition to this existing code, the department has been working on two related rule packages:

- Rule package WT-17-12 would establish a standard protocol for establishing phosphorus site-specific criteria.
- Rule package WY-23-13 contains proposed criteria for coldwater lakes such as Lac Courte Oreilles. The oxythermal criteria in this rule are focused on oxygen levels to support coldwater fish.

The proposed rule for a Lac Courte Oreilles site-specific criterion is not contingent on, or duplicative of either of these draft rules, and it would be consistent with the processes outlined in those rules. The proposed rule for Lac Courte Oreilles would be applicable only to that lake.

The primary alternative to this rule proposal is to take no action. If a site-specific criterion is not developed for the lake to be protective of whitefish, then the existing statewide criterion for two-story fisheries of 15 ug/L total phosphorus will continue to apply. The statewide criterion of 15 ug/L has not been protective of the lake's fish and aquatic life designated use as a coldwater, two-story fishery lake, as evidenced by frequent low oxygen levels leading to fish kills in 2015 and 2016. While phosphorus levels alone are not responsible for the fish kills, the department has concluded that the current statewide criterion of 15 ug/L is not sufficiently protective of the aquatic life on this particular lake. Given this finding, in accordance with s. NR 102.06(7), Wis. Adm. Code, and Wis. Stat. s. 281.15, a site-specific criterion should be developed for this lake.

### **4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):**

Wis. Stat. s. 281.15 authorizes the department to promulgate by rule water quality standards for surface waters or portions of surface waters in the state: "The department shall promulgate rules setting standards of water quality to be applicable to the waters of the state, recognizing that different standards may be required for different waters or portions thereof." Pursuant to Wis. Stat. s. 281.15, water quality standards are comprised of designated uses and criteria. The department has promulgated designated uses and criteria for various pollutants and parameters in chs. NR 102 through 105. The statewide criteria for phosphorus that were approved by EPA are promulgated in s. NR 102.06. The technical support document for the statewide phosphorus criteria specifically states that two-story fishery lakes may be candidates for phosphorus site-specific criteria. Site-specific criteria are criteria developed for individual waterbodies or groups of waterbodies with characteristics that warrant different criteria from those promulgated statewide.

### **5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:**

The department estimates that approximately 350 hours of staff time will be required to complete the proposed rule. This includes staff time spent developing site-specific criteria for Lac Courte Oreilles, public hearings, and rules coordination.



**6. List with description of all entities that may be affected by the proposed rule:**

- Courte Oreilles Lakes Association, Inc. and local residents and businesses: The association petitioned the department to begin rulemaking efforts to promulgate a site-specific criterion for Lac Courte Oreilles.
- Lac Courte Oreilles Band of Lake Superior Chippewa: One-third of Lac Courte Oreilles is located within reservation boundaries, with the rest of the lake located within the ceded territory. The Tribe is a joint petitioner on this rulemaking petition.
- Wisconsin State Cranberry Growers Association and local cranberry operators: There are existing cranberry operations adjacent to Lac Courte Oreilles.
- There are no regulated point source dischargers with WPDES (Wisconsin Pollutant Discharge Elimination System) permits that discharge pollutants to the lake, so establishing a site specific criterion for the lake will not affect limitations in any WPDES permits. Any future permitted dischargers would be subject to the new criterion.

**7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:**

The Federal water quality standards regulation at 40 CFR 131.11(b)(1)(ii) authorizes states to adopt numeric water quality criteria that are “modified to reflect site-specific conditions.” 40 CFR Part 131 Subparts A and C include federal requirements for states for establishing and revising water quality standards. Revision of state water quality standards is subject to public participation procedures and EPA review and approval under 40 CFR 131.20. Wisconsin has authority under Wis. Stat. s. 281.15 to promulgate and revise water quality standards.

**8. Anticipated economic impact of implementing the rule (note if the rule is likely to have an economic impact on small businesses):**

Adoption of site-specific criteria for this location is not expected to involve any increased costs for any existing residences or businesses in the watershed and there are no expected economic impacts on small businesses. Adoption of a site-specific criterion is something that the lake association and the Lac Courte Oreilles tribe have requested. A site-specific criterion would provide area residents and businesses with a scientifically determined level of phosphorus for the lake that could be used as a guide for voluntary actions that could help to support the aquatic life in the lake. There are currently no regulated point source dischargers within the watershed that would be impacted by a site-specific criterion, and the adoption of a site-specific criterion would not impose any new regulatory pollution reduction requirements for nonpoint sources. Phosphorus levels in the lake are currently below the statewide phosphorus criteria.


If a lower site-specific criterion were adopted and the lake were listed as impaired in the future due to phosphorus levels that were above the new criterion, there still would be no new regulatory requirements for nonpoint sources. Discharges from any new point sources that became established in the watershed in the future would be required to meet the site-specific criterion, but these point sources would already be subject to more stringent requirements due to the status of the lake as an Outstanding Resource Water. The discharged wastewater from any new point sources would be required to be equal to or better than the background water quality of the lake. However, if the background water quality of the lake is not sufficiently protective, then the discharge concentration under the existing criterion may also be insufficiently protective.

With these considerations, the economic impact of this rule is expected to be “Minimal (Less than \$50,000 per year).”

**9. Anticipated number, month and locations of public hearings:**

The department anticipates holding one public hearing in summer 2022. The hearing may be an online hearing hosted through remote teleconferencing technology.

**Contact Person:** Kristi Minahan, Water Quality Standards Specialist, DNR  
Kristi.minahan@wisconsin.gov

DocuSigned by:  
  
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\_\_\_\_\_  
For Preston D. Cole, Secretary  
3/16/2021 | 10:22 AM CDT  
\_\_\_\_\_  
Date Submitted



# Tony Evers

Office of the Governor | State of Wisconsin

May 13, 2021

By Electronic Mail Only

Dear Secretaries and Agency Heads:

On this day, I approved the following statements of scope pursuant to Wis. Stat. § 227.135(2):

- A statement of scope by the Department of Natural Resources, submitted March 16, 2021, relating to site-specific phosphorus criteria for Lac Courte Oreilles (Wis. Admin. Code ch. NR 102); and
- A statement of scope by the Department of Natural Resources, submitted April 1, 2021, relating to regulations for the purpose of updating Wisconsin's water quality antidegradation policy and procedures (Wis. Admin. Code chs. NR 102, 106, 205, and 207); and
- A statement of scope by the Department of Safety and Professional Services, submitted March 16, 2021, relating to barbering licensure and practice outside of a licensed establishment (Wis. Admin. Code chs. SPS 50 and 60-65); and
- Both an emergency and permanent statement of scope by the Psychology Examining Board, submitted April 16, 2021, relating to a legislative update (Wis. Admin. Code chs. Psy 1-5); and
- A statement of scope by the Department of Workforce Development, submitted April 30, 2021, relating to worker's compensation treatment guidelines (Wis. Admin. Code ch. DWD 81); and
- A statement of scope by the Department of Workforce Development, submitted April 30, 2021, relating to worker's compensation minimum permanent partial disability ratings (Wis. Admin. Code ch. DWD 80); and
- A statement of scope by the Department of Workforce Development, submitted April 30, 2021, relating to minor and technical changes to the worker's compensation program (Wis. Admin. Code ch. DWD 80); and
- A statement of scope by the Department of Natural Resources, submitted March 29, 2021, relating to sturgeon spearing harvest regulations and gear use (Wis. Admin. Code ch. NR 20).

On this day, I approved the following proposed administrative rules pursuant to Wis. Stat. § 227.185:

- A proposed rule by the Department of Workforce Development, submitted April 14, 2021, relating to replacing derogatory or offensive terminology with current, inclusive terminology (Wis. Admin. Code chs. DWD 80, 272 and 277); and
- A proposed rule by the Public Service Commission, submitted April 29, 2021, relating to renewable resource tracking (Wis. Admin. Code ch. PSC 118); and
- A proposed rule by the Medical Examining Board, submitted April 26, 2021, relating to unprofessional conduct (Wis. Admin. Code ch. Med 10); and
- A proposed rule by the Psychology Examining Board, submitted March 31, 2021, relating to renewal and reinstatement of licenses (Wis. Admin. Code ch. Psy 4); and
- A proposed rule by the Department of Public Instruction, submitted April 23, 2021, relating to age waivers for general educational development tests (Wis. Admin. Code ch. PI 5); and
- A proposed rule by the Department of Public Instruction, submitted May 6, 2021, relating to revisions to pupil nondiscrimination procedures (Wis. Admin. Code ch. PI 9); and
- A proposed rule by the Department of Natural Resources, submitted April 23, 2021, relating to fish harvest in Lake Superior (Wis. Admin. Code chs. NR 20 and 25); and
- A proposed rule by the Department of Natural Resources, submitted April 14, 2021, relating to Lake Michigan whitefish management (Wis. Admin. Code ch. NR 25); and
- A proposed rule by the Department of Natural Resources, submitted April 15, 2021, relating to the 2021 migratory bird season (Wis. Admin. Code ch. NR 10); and
- A proposed rule by the Department of Natural Resources, submitted April 14, 2021, relating to contaminated sediment sites, the implementation of 2015 Wisconsin Act 204 (Wis. Admin. Code chs. NR 756 and 758); and
- A proposed rule by the Department of Agriculture, Trade and Consumer Protection, submitted November 5, 2020, relating to residential rental practices (Wis. Admin. Code ch. ATPC 134).

Please direct any questions about this letter to my deputy policy director, Katie Domina.

Sincerely,



Tony Evers  
Governor

cc: Ryan Nilsestuen, chief legal counsel ([ryan.nilsestuen1@wisconsin.gov](mailto:ryan.nilsestuen1@wisconsin.gov))  
Katie Domina, deputy policy director ([katherine.domina1@wisconsin.gov](mailto:katherine.domina1@wisconsin.gov))  
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