

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

Item No. 2.D.

**SUBJECT:**

Request that the Board authorize a preliminary public hearing and comment period for the Statement of Scope for Board Order WY-21-20, for proposed rules affecting chapter NR 102 related to site-specific phosphorus criteria for Lac Courte Oreilles.

**FOR: August 2021 Board meeting****PRESENTER'S NAME AND TITLE:** Marcia Willhite, Water Evaluation Section Chief**SUMMARY:**

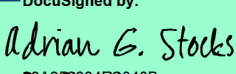
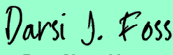

The Joint Committee for Review of Administrative Rules (JCRAR) has requested a preliminary public hearing and comment period on the scope statement for Board Order WY-21-20. If the preliminary hearing notice for Board Order WY-21-20 is approved by the board, the department will hold a preliminary public hearing and comment period on the scope statement. After the hearing is held and the public comment period closes, the department will bring the scope statement before the Board for approval. As required by statute, the department may not begin work on the content of the proposed rule until the scope statement is approved. The 30-month time frame for submission of a final rule to the legislature for approval expires on November 24, 2023.

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.

**RECOMMENDATION:** That the Board authorize a preliminary public hearing and comment period for the Statement of Scope for Board Order WY-21-20.

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

- ☒ Statement of Scope ☒ Notice of Hearing  
☒ Governor's Approval of Statement of Scope

Approved by	Signature	Date
Adrian G. Stocks, Water Quality Program Director		6/17/2021   11:02 AM CDT
Darsi J. Foss, Environmental Management Division Administrator		6/17/2021   12:12 PM CDT
Preston D. Cole, Secretary		6/18/2021   11:14 AM CDT

by Todd Ambs

cc: Board Liaison - AD/8

Department Tribal Liaison – AD/8

Program attorney – LS/8

Department rule officer – LS/8

**THIS PAGE WAS INTENTIONALLY LEFT BLANK.**

## **Notice of Preliminary Hearing on Statement of Scope**

The Department of Natural Resources announces that it will hold a preliminary public hearing on Statement of Scope SS 052-21 (Board Order WY-21-20) relating to site-specific phosphorus criteria for Lac Courte Oreilles. In accordance with s. 227.136, Wis. Stats., the DNR is seeking public comment and feedback on Statement of Scope SS 052-21 at the time and virtual location shown below.

### **Hearing Information**

Date: Aug. 19, 2021

Time: 9:00 a.m.

Virtual Location Link:

Join Zoom Meeting: <https://us02web.zoom.us/j/87375801787>

Meeting ID: 873 7580 1787

Dial in: 1 312 626 6799 US (Chicago region)

Find your local number: <https://us02web.zoom.us/u/kbnqzSxiD>

### **Rule Information**

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, to be protective of whitefish in the lake. 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.

### **Accessibility**

For the hearing or visually impaired, non-English speakers, or those with other personal circumstances which might make communication at the meeting/hearing difficult, DNR will, to the maximum extent possible and with reasonable advance notice, provide aids including an interpreter, or a non-English, large-print, or recorded version of hearing documents. To access these resources, please contact the email address or phone number listed below as soon as possible.

### **Appearances at the Hearing and Submittal of Written Comments**

The public has the opportunity to testify at the hearing. To register and join the hearing online or by phone, use the information provided above. Pre-registration is also available and is strongly encouraged if you plan to provide spoken comments during the hearing. To pre-register, either use the Zoom link above or download and complete the fillable [Hearing Appearance form](#) and send it to [Kristi.Minahan@wisconsin.gov](mailto:Kristi.Minahan@wisconsin.gov).

Comments on the scope statement must be received on or before August 19, 2021. Written comments may be submitted by U.S. mail, E-mail, or through the internet and will have the same weight and effect as oral statements presented at the public hearing. **Written comments and any questions on the proposed statement of scope should be emailed (preferred) or mailed to:**

[Kristi.Minahan@wisconsin.gov](mailto:Kristi.Minahan@wisconsin.gov) or [DNRAAdministrativeRulesComments@wisconsin.gov](mailto:DNRAAdministrativeRulesComments@wisconsin.gov)

Department of Natural Resources

Attn: Kristi Minahan – WY/3

P.O. Box 7921

101 S. Webster Street,

Madison, WI 53707-7921

The Statement of Scope may be reviewed, and comments made at

[https://docs.legis.wisconsin.gov/code/scope\\_statements/comment](https://docs.legis.wisconsin.gov/code/scope_statements/comment).

# 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:  
  
6793A7BA427C46D...  
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))  
DOA State Budget Office ([SBOAdminRules@spmail.wi.gov](mailto:SBOAdminRules@spmail.wi.gov))  
Emma Esch, DNR ([emma.esch@wisconsin.gov](mailto:emma.esch@wisconsin.gov))  
DSPS ([DSPSAdminRules@wisconsin.gov](mailto:DSPSAdminRules@wisconsin.gov))  
Mark Kunkel, DWD ([markd.kunkel@dwd.wisconsin.gov](mailto:markd.kunkel@dwd.wisconsin.gov))  
Kara Koonce, PSC ([kara.koonce@wisconsin.gov](mailto:kara.koonce@wisconsin.gov))  
Carl Bryan, DPI ([carl.bryan@dpi.wi.gov](mailto:carl.bryan@dpi.wi.gov))  
Bradford Steine, DATCP ([bradford.steine1@wisconsin.gov](mailto:bradford.steine1@wisconsin.gov))