

*Courte Oreilles Lakes Association, Inc.*

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

Kris Sivertson  
President

Telephone  
715-210-0818

**Respond To: 3690 South Elco Road  
Fall Creek, WI 54742**

March 23, 2016

Susan L. Sylvester  
Director – Water Quality Bureau/Water Division  
Wisconsin Department of Natural Resources  
101 S. Webster Street  
P.O. Box 7921  
Madison, WI 53707 - 7921

Re: Courte Oreilles Lakes Association (COLA)-Site Specific Criterion (SSC) Proposal

Dear Ms. Sylvester:

As you know from the April 23, 2015, joint letter to you from me and Dan Tyrolt of the Conservation Department of the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians (the “Tribe”), both COLA and the Tribe have been working to address the WDNR/EPA comments in a revised SSC proposal for total phosphorus for Lac Courte Oreilles (LCO). LCO is an outstanding resource water (ORW). Wis. Admin. Code § NR 102.10(1m)(a)17. The lake is also a stratified two-story cold water fishery lake. Wis. Admin. Code § NR 102.06(2)(i). As a stratified two-story fishery lake, the current total phosphorus criterion for LCO is 15 ug/L. Wis. Admin. Code § NR 102.06(4)(b)1. COLA and the Tribe have compiled site-specific data and analysis using state-of-the-art scientifically defensible methods and sound scientific rationale to demonstrate that a lake-wide average total phosphorus criterion of 10 ug/L is necessary to protect LCO’s designated uses, the designation as an outstanding resource water, and the stratified two-story cold water fishery. This change in the total phosphorus criterion is authorized by Wis. Admin. Code § NR 102.06(7) and is encouraged by WDNR as part of the administrative record for adoption of Wis. Admin. Code § NR 102.06(4)(b)1.

The “Phosphorus Site-Specific Criterion Proposal for Lac Courte Oreilles” (“Proposal”) is now complete. I have enclosed the Proposal with this letter. The salient points of the Proposal are as follows:

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- The water quality required for full attainment of the designated and existing uses is not supported by the existing 15 µg/L total phosphorus criterion for cold water two-story fishery lakes such as LCO, nor are the uses supported by the 40 µg/L total phosphorus criterion applied by WDNR to Musky Bay.
- LCO is one of only five lakes in Wisconsin that has historically supported both cisco and whitefish. However, cisco and whitefish populations are threatened in LCO. Population estimates are low, data demonstrate suitable habitat is severely impacted, and documented LCO whitefish mortality was observed in 2015.
- Recreational uses in Musky Bay are impaired as a result of excessive algal mats and aquatic vegetation, preventing or negatively impacting boating, swimming and fishing.
- Musky Bay has experienced recent winterkills of fish, with the most frequent observations of any Sawyer County lake.
- The muskellunge population in LCO, once self-sustaining, is now limited by poor levels of reproductive success. Data demonstrate that spawning areas in Musky Bay experience depressed dissolved oxygen levels. Current LCO muskellunge populations are estimated to be only 20%-30% of the targeted goal for the lake.
- WDNR's current assessment approach (WisCALM) is not consistent with the intent of protecting ORWs. The approach would allow total phosphorus to average greater than 22.5 µg/L in LCO before listing it as impaired based on phosphorus data.
- Because LCO is of exceptional spiritual, cultural and subsistence importance to the Lac Courte Oreille Band of Lake Superior Chippewa Indians, the destruction of LCO, as documented by this science, is of particular concern to the Tribe.
- The impact of a changing climate threatens to further exacerbate algal productivity and reduce habitat.

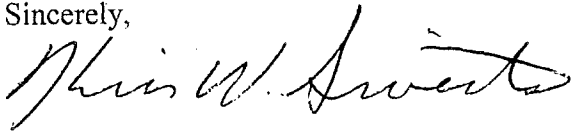
To initiate the WDNR's rule making process, I have enclosed the "Joint Petition Of The Courte Oreilles Lakes Association, Inc. And The Lac Courte Oreilles Band Of The Lake Superior Chippewa Indians To Promulgate A Rule Establishing A Total Phosphorus Lake-Wide Average Criterion Of 10UG/L For Lac Courte Oreilles," along with COLA's resolution approving the Proposal and submitting it to the WDNR for rule making.

Unfortunately, LCO is on the verge of an irreversible decline in water quality. On behalf of COLA and the Tribe, I therefore respectfully request that the WDNR initiate its rule making process to advance the Proposal within sixty (60) days of the date of this letter. COLA and the

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Tribe, along with their consultants and legal advisors are prepared to support the WDNR in the rule making process. Should you have any questions in the meantime, please do not hesitate to contact me.

Sincerely,



Kris Sivertson  
President, COLA

cc: Russell Rasmussen, Water Division Administrator  
Robin Nyffeler, WDNR Attorney  
Brian Weigel, Section Chief Water Evaluation Section  
Kristi Minahan, Water Evaluation Section  
Andrew Craig, Nonpoint Source Planning Coordinator  
Dr. John Lyons, WDNR Fisheries Research  
Jeff Kampa, WDNR Fisheries Research  
Dan Baumann, Secretary's Director WDNR  
Alex Smith  
Aaron Larson  
Tinka Hyde, EPA Region 5, Chicago  
Dan Tyrolt, LCO Tribe Conservation Department  
Kekek Stark, LCO Tribal Legal Counsel  
Alf E. Sivertson, COLA Legal Counsel  
David Bender, COLA Outside Legal Counsel  
COLA Board

**RESOLUTION OF COLA DIRECTORS APPROVING SSC, SUBMITTING SSC TO WDNR, AND COMPELLING PERFORMANCE BY WDNR IF NECESSARY**

WHEREAS, LimnoTech has completed the phosphorus Site Specific Criteria Proposal for Lac Courte Oreilles (the "SSC"); and

WHEREAS, the SSC establishes, using site-specific data and analysis with state-of-the-art scientifically defensible methods, modeling, and sound scientific rationale, that a total phosphorus criteria of 10 ppb is necessary to protect LCO as an outstanding resource water and a stratified two-story cold water fishery.

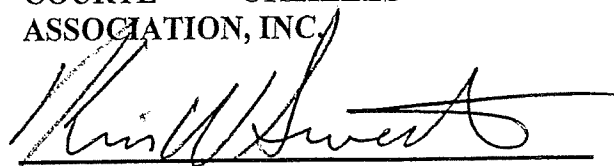
NOW, THEREFORE, IT IS RESOLVED, that COLA approves the SSC and that the SSC shall be submitted to the Wisconsin Department of Natural Resources (the "Department") with a request that the Department initiate its emergency rule making process or its APA rule making process to advance the SSC proposal within 60 days of the WDNR's receipt of the SSC.

RESOLVED FURTHER, that if the Department fails to initiate its emergency rule making process or its APA rule making process to advance the SSC proposal within 60 days of the Department's receipt of the SSC, then the President of COLA is authorized to enter into a legal services agreement with Dave Bender of the McGillivray, Westerberg and Bender law firm in Madison to initiate legal action to compel performance on the part of the Department.

Approve: 7

Oppose: 0

COURTE OREILLES LAKES  
ASSOCIATION, INC.



By: Kris Sivertson  
Its: President

3/4/16

**JOINT PETITION OF THE COURTE OREILLES LAKES ASSOCIATION, INC. AND THE LAC COURTE OREILLES BAND OF THE LAKE SUPERIOR CHIPPEWA INDIANS TO PROMULGATE A RULE ESTABLISHING A TOTAL PHOSPHORUS LAKE-WIDE AVERAGE CRITERION OF 10 UG/L FOR LAC COURTE OREILLES**

**TO THE DEPARTMENT OF NATURAL RESOURCES:**

**THE UNDERSIGNED** hereby petition for the promulgation of an interim emergency rule pursuant to Wis. Stat. §§ 227.24(1)(a), 227.12(1), 281.12 and 281.15 and a permanent rule pursuant to Wis. Stat. §§ 227.10, 227.12(1), 281.12 and 281.15 that modifies the current total phosphorus criterion for Lac Courte Oreilles of 15 µg/L and Musky Bay (a historic bay on Lac Courte Oreilles) of 40 µg/L to a *lake-wide average* of 10 µg/L:

**THE GROUNDS** for this petition are as follows: Lac Courte Oreilles (“LCO”) is an outstanding resource water (ORW). Wis. Admin. Code § NR 102.10(1m)(a)17. LCO is also a stratified two-story cold water fishery lake. Wis. Admin. Code § NR 102.06(2)(i). As a stratified two-story cold water fishery lake, the current total phosphorus criterion for LCO is 15 µg/L. Wis. Admin. Code § NR 102.06(4)(b)1. The Department of Natural Resources (“DNR”) has applied a separate 40 µg/L total phosphorus criterion for Musky Bay. The Courte Oreilles Lakes Association, Inc. (“COLA”) and the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians (the “Tribe”) enclosed with this Petition, and incorporate herein, the “Site Specific Phosphorus Criterion Proposal for Lac Courte Oreilles” (the “Proposal”) that compiles site-specific data and analysis using state-of-the-art scientifically defensible methods and sound scientific rationale to demonstrate that a *lake-wide average* total phosphorus criterion of 10 µg/L is necessary to “to restore and protect the highest attainable aquatic life and recreational uses for this unique two-story cold water fishery and ORW,” and protect the exceptional spiritual, cultural and subsistence importance of LCO to the Tribe. Proposal at pp. 1-2, 52. This standard is necessary to “protect the public interest, which includes the protection of the public health and welfare and the present and prospective future use of such waters for public and private water systems, propagation of fish and aquatic life and wildlife, domestic and recreational purposes and agricultural, commercial, industrial and other legitimate uses.” Wis. Stat. § 281.15(1).

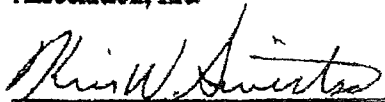
**THE PETITIONERS’** interest in the request is as follows: (1) the Tribe’s interest is to protect the exceptional spiritual, cultural and subsistence importance of LCO as the eastern third of LCO is located within the Tribe’s reservation boundaries and the off-reservation portion of LCO is located within the 1837 Treaty Territory that reserves and protects the Tribe’s fishing, gathering and hunting rights; and (2) COLA and the five COLA Petitioners below represent all property owners on LCO whose interest is protecting the highest attainable aquatic life and recreational use of LCO.

**THE AUTHORITY OF THE DEPARTMENT** to act is: (1) the Treaty of 1837, 7 Stat. 536, which recognizes that the right to hunt, fish, and gather includes a right to habitat protection, because the most fundamental prerequisite to exercising the right to harvest natural resources is the existence of natural resources to be taken. In the implementation of this right, *Lac Courte Oreilles v. State of Wisconsin (LCO VI)*, 707 F. Supp. 1034 (W.D. Wis. 1989) establishes that the State does not have the unfettered discretion to exercise its management prerogatives to the detriment of the tribes’ treaty reserved rights; (2) Wis. Stat. § 281.12(1) that

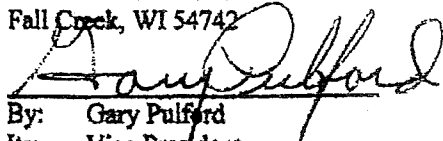
gives the DNR general supervision and control over waters of the state; (3) Wis. Stat. § 281.15, that requires the DNR to establish water quality standards providing, at a minimum, protection of the uses and prospective future uses of the waters, fish and aquatic life, public health and welfare, domestic and recreational purposes, and requires DNR to update such standards every three years; and (4) Wis. Admin. Code § NR 102.06(7) that permits the adoption of a site-specific criterion in place of the generally applicable criterion when "...site-specific data and analysis using state-of-the-art scientifically defensible methods and sound scientific rationale to demonstrate a different criterion is protective of the designated use of the specific surface water segment or waterbody." Emergency rule making and general rule making under the Wisconsin Administrative Procedures Act ("WAPA") is also authorized by Wis. Stat. 227.24(1)(a) and Wis. Stat. 227.12(1) respectively.

Dated this 23rd day of March, 2016.

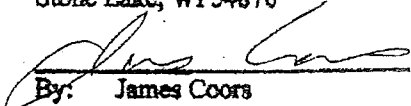
**Courte Oreilles Lakes  
Association, Inc.**



By: Kris W. Sivertson  
Its: President  
3690 South Elco Road  
Fall Creek, WI 54742



By: Gary Pulford  
Its: Vice President  
15790 West Victory Heights Circle  
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By: James Coors  
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By: Mark Lastrup  
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15244W Circle Road  
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By: Kevin Horrocks  
Its: Board Member  
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**Lac Courte Oreilles Band of the  
Lake Superior Chippewa**



By: Michael J. Isham Jr.  
Its: Chairman  
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