IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

COURTE OREILLES LAKES
ASSOCIATION, INC.
14703W Highland Road
Hayward, WI 54843, and the

LAC COURTE OREILLES BAND OF THE
LAKE SUPERIOR CHIPPEWA,
13394 W. Trepania Road
Hayward, WI 54843,

Plaintiffs,

v.

ROSALIND C. ZAWISTOWSKI, as TRUSTEE of the
ZAWISTOWSKI JOINT REVOCABLE TRUST,
6607 North Potato Road
Stone Lake, WI 54876,

Defendant.

Case No. 3:24-cv-128

COMPLAINT

Plaintiffs Courte Oreilles Lakes Association, Inc., and the Lac Courte Oreilles Band of the Lake Superior Chippewa ("Plaintiffs"), by their attorneys, Pines Bach LLP and Sivertson and Barrette, P.A., as a Complaint against Defendant Rosalind C. Zawistowski, as Trustee of the Zawistowski Joint Revocable Trust ("Defendant"), allege as follows:

INTRODUCTION

This is a citizen enforcement action for illegal point source discharges of pollutants from Defendant's cranberry marsh operations into Lac Courte Oreilles (the "Lake"), Sawyer County, Wisconsin, in violation of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq*.

JURISDICTION & VENUE

1. This Court has original jurisdiction over Plaintiffs' claim pursuant to 28 U.S.C. § 1331 because the cause of action arises under Clean Water Act § 505(a), 33 U.S.C. §1365(a)(1).

2. Venue in this Court is appropriate under 33 U.S.C. § 1365(c) and 28. U.S.C. § 1391(b)(1) and (2) because Defendant resides in this judicial district and the events giving rise to the claim occurred in this judicial district.

3. Pursuant to 33 U.S.C. § 1365(b)(1)(a), Plaintiffs gave notice to Defendant of the violations alleged in this Complaint on December 14, 2023, by personal service. Copies of the notice were also served on the Administrator of the United Stated Environmental Protection Agency ("EPA"), the Region V Administrator of the EPA, the Wisconsin Department of Natural Resources ("WDNR") on December 14, 2023, by certified mail, return receipt requested. The return receipts show delivery to each of these officials and offices on December 22, 2023, December 21, 2023 and December 18, 2023, respectively.

4. At least sixty days have passed since service and receipt of Plaintiffs' notice letter and, on information and belief, neither the EPA, the U.S. Department of Justice, nor the State of Wisconsin has commenced or is diligently prosecuting a civil or criminal action in a federal or state court, an administrative action, or any other action against Defendant to address the specific violations of the laws, regulations, standards, limitations or orders at issue in this Complaint prior to the commencement of this action.

PARTIES

5. Plaintiff Courte Oreilles Lake Association, Inc. ("COLA") is a not-for-profit corporation whose mailing address is P.O. Box 702, Hayward, Wisconsin 54843-0702, and whose physical address is care of its President, Chris Bedwell, 14703W Highland Road, Hayward, WI 54843. Plaintiff is a "person" under CWA § 502(5), 33 U.S.C. § 1362(5), and a "citizen" under CWA § 505(g), 33 U.S.C. § 1365(g). COLA represents the interests of more than 600 members and property owners on Lac Courte Oreilles (the "Lake"), Sawyer County, Wisconsin. COLA was formed to protect, preserve, and enhance the quality of the Courte Oreilles Lakes (including Lac Courte Oreilles), their shorelands, and surrounding areas, while respecting the interests of property owners and the public. Members of COLA use the waters of Lac Courte Oreilles for fishing, swimming, boating, and enjoyment of the lake's scenic beauty, among other uses.

6. Plaintiff Lac Courte Oreilles Band of the Lake Superior Chippewa (the "Tribe") is one of six bands of the Lake Superior Chippewa Indians. The Tribe represents its approximately 7,600 members' interests in the exceptional spiritual, cultural, and

subsistence importance of Lac Courte Oreilles, the eastern one-third of which is located within the Tribe's reservation boundaries, and all of which is located within an area covered by the 1837 Treaty Territory in which the Tribe has reserved fishing, hunting, and gathering rights. The Defendant's actions at issue in this matter contribute to harmful water pollution in Lac Courte Oreilles, which negatively impacts the Tribe and its members' property, fishing, hunting, subsistence, and recreational interests.

7. The interests of COLA and its members have been, are being, and, unless the relief requested herein is granted, will continue to be adversely affected by Defendants' continuous and intermittent discharge of pollutants into Lac Courte Oreilles, which harm aquatic ecosystems, recreational opportunities, and aesthetic enjoyment of the Lake. CWA enforcement will protect, preserve, and enhance the quality of Lac Courte Oreilles, furthering COLA's mission and protecting the Tribe's interests.

8. Plaintiffs have no plain, speedy or adequate remedy at law. Additionally, Plaintiffs' injuries are fairly traceable to Defendant's actions. These injuries are actual, concrete, and imminent.

9. Defendant Rosalind C. Zawistowski, as Trustee of the Zawistowski Joint Revocable Trust ("Defendant"), is a "person" under CWA § 502(5), 33 U.S.C. § 1362(5). The trust formed in 2012 under the laws of the State of Wisconsin, and its address is 6537 North County Road E, Stone Lake, Wisconsin. Defendant owns and operates two cranberry marshes located on Musky Bay on Lac Courte Oreilles. Defendant discharges effluent from both marshes into Musky Bay through man-made channels.

LEGAL BACKGROUND

10. The goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

11. Section 301(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1362(12), prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless in compliance with certain enumerated sections of the law. Among other things, section 301(a) prohibits point source discharges not authorized by the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to CWA § 402, 33 U.S.C. § 1342.

12. Navigable waters are defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Lakes, including Lac Courte Oreilles, fall within the definition of "waters of the United States." *See* 40 C.F.R. § 230.3(o).

13. A "pollutant" includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

14. The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

15. Although irrigation return flows are exempt from the CWA's permit requirements, 33 U.S.C. § 1362(14), 40 C.F.R. § 12.3(f), the exemption does not apply to the effluent discharges at issue in this case because, *inter alia*, a substantial number of the Defendant's discharge events are for non-irrigation purposes. The exemption applies only to "discharges composed *entirely* of return flows from irrigated agriculture." 33 U.S.C. § 1342(l)(1) (emphasis added).

16. The Wisconsin Department of Natural Resources ("WDNR") administers the NPDES program through Wisconsin Pollution Discharge Elimination System ("WPDES") permitting in the State of Wisconsin. Wis. Stat. § 283.11.

17. The WDNR requires a point source to obtain a WPDES permit for discharges of pollutants into navigable waters. Wis. Stat. § 283.31(1); Wis. Admin. Code ch. NR 217.

18. Section 505(a) of the CWA, 33 U.S.C. § 1365(a)(1), authorizes any citizen to "commence a civil action on his own behalf…against any person…who is alleged to be in violation of… an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a).

19. An effluent limitation is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources," 33 U.S.C. § 1362(11), which includes the WPDES effluent limitations established by Wis. Stat. § 283.13.

20. The citizen must in good faith allege "a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57, 108 S. Ct. 376, 381, 98 L. Ed. 2d 306 (1987). Defendant's violations complained of herein are both continuous and intermittent.

21. Section 505(d) of the CWA, 33 U.S.C. § 1365(d), provides that a court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate."

22. In accordance with section 505(a) of the CWA, 33 U.S.C. § 1365(a), a civil penalty may be assessed for each violation of the CWA alleged herein. 40 C.F.R. § 19.4 tbl. 1; *see also* 33 U.S.C. § 1319(d).

FACTUAL BACKGROUND

Lac Courte Oreilles and COLA

23. Lac Courte Oreilles is the eighth largest natural drainage lake in Wisconsin, with a surface area of 5,139 acres and approximately 25 miles of shoreline. Its average depth is 34 feet, reaching 95 feet at its deepest point. It is in Sawyer County about eight miles south of Hayward, Wisconsin:

24. Lac Courte Oreilles is at the base of the Upper Couderay River Watershed, and water from Lac Courte Oreilles travels through an outlet to Little Courte Oreilles Lake, then into the Couderay River. The Couderay River empties into the Chippewa River, which eventually flows through Eau Claire, Wisconsin, and into the Mississippi River near Pepin, Wisconsin. Lac Courte Oreilles is a "water of the United States" as that term is used in 40 C.F.R. § 230.3(o); *see also Sackett v. Env't Prot. Agency*, 598 U.S. 651, 678-79 (2023).

25. As a stratified two-story fishery lake in Wisconsin, the WDNR has established a total phosphorus limit on Lac Courte Oreilles of 10 micrograms per liter (ug/L). Wis. Admin. Code § NR 102.06(7)(b)4. Due to its highly sensitive and special character, Lac Courte Oreilles is classified as an Outstanding Resource Water, *id.* § NR

102.10(1m)(a), a designation reserved for less than 1% of Wisconsin's 15,000 lakes and impoundments.

26. Tourists, property owners, anglers, and outdoor enthusiasts, including many COLA members, historically have enjoyed opportunities to fish, swim, boat, and recreate on Lac Courte Oreilles. Lac Courte Oreilles is a major economic driver in the region, with annual tourism of 84,000 visitor days contributing between $11 and $15 million to the local economy each year. In addition, property owners including COLA members historically have enjoyed stable and/or rising property values, with real property values surrounding the lake exceeding $331 million total.

27. The Tribe's interests in Lac Courte Oreilles transcend those of COLA. The Treaty of 1837 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. To fully understand the loss of this natural resource, one must understand the significance it has for the Lac Courte Oreilles people. Prior to French explorers' arrival in the mid-1600s, this body of water was named Odaawaa-Zaaga'iganiing (Lake of the Ottawa) by the original inhabitants of the area; the name it is still referred to by the Lac Courte Oreilles people. Historically, this precious body of water provided the anishinaabeg (original man) or Lac Courte Oreilles Ojibwe people with all the resources needed to sustain a community. Fish species such as muskellunge, walleye and panfish were bountiful and considered gifts from the creator. From a Tribal perspective, it is nearly impossible to

quantify the loss of the Lac Courte Oreilles habitat. Tribal members harvest fish, hunt waterfowl, trap, and gather aquatic medicines from this lake. But just as important are the spiritual and physiological connections this lake represents to the people of Odaawaa-Zaaga'iganiing.

28. Excess levels of nutrients in a lake (i.e. nutrient loading), including phosphorus, cause a variety of problems, ranging from premature eutrophication (aging of a lake) to the proliferation of aquatic invasive species. Nutrient loading fosters the excessive growth of aquatic plants and algae. When this organic matter decays in lower levels of the lake, it consumes dissolved oxygen and reduces habitat for lake fish.

29. As a stratified two-story fishery lake, Lac Courte Oreilles historically supported a self-sustaining population of both cisco and whitefish, which are species requiring colder, well-oxygenated water in a lower (deeper) depth of the lake. Cisco and whitefish are prey for game fish such as walleye, muskellunge, and northern pike. Lac Courte Oreilles currently produces record muskellunge and large walleye, smallmouth, and northern pike, making it a major destination as a sport fishery. A muskellunge from the lake was once the world record-holder.

30. Whitefish and cisco require both cool temperatures and sufficient levels of dissolved oxygen for survival, conditions which together form a limited band of suitable habitat within lake water. Dissolved oxygen levels less than 6 mg/L seriously jeopardize the growth and survival of whitefish and cisco. Both species die at dissolved oxygen concentrations of less than 3 mg/L.

31. In August and September of 2016, Lac Courte Oreilles experienced the largest cold-water fish kill ever documented on the lake. Hundreds of whitefish and cisco were reported dead and floating on the water over the course of 26 days. Data collected at the time of the fish kill shows the band of suitable habitat for whitefish and cisco in Lac Courte Oreilles had shrunk to less than 0.1 and 0.22 meters in width, respectively, due to depressed dissolved oxygen levels. Another significant fish kill occurred in July 2015. In 2022, there were an estimated 68-84 days where there was no suitable habitat for these species.

32. Muskellunge use shallower areas of the lake to lay eggs. Musky Bay is one such shallow area, and it has historically provided premier musky spawning habitat. But excessive phosphorus and sediment discharged into Musky Bay have accelerated algae and plant growth, which creates a low dissolved oxygen environment. The musky eggs suffocate in this environment, reducing the overall population of muskellunge in the lake. Muskellunge no longer naturally reproduce in the lake because of this.

33. Overall, the whitefish and cisco populations in Lac Courte Oreilles have dropped to dangerously low levels. Without whitefish and cisco in the lake, game species like muskellunge, walleye, smallmouth and northern pike are smaller and fewer—significantly impairing the lake as a sport fishery.

34. Excess nutrients also reduce lake water clarity and foster algal blooms and the rapid growth of aquatic invasive species, such as curly leaf pondweed and Eurasian water milfoil. Frequent and persistent algal blooms, algal mats and thickets of curly leaf

pondweed have plagued Musky Bay on Lac Courte Oreilles. This bay on Lac Courte Oreilles is adjacent to where Defendant maintains its cranberry operation.

35. Algal blooms and invasive aquatic plants prevent or reduce the ability to swim, boat, fish, or otherwise recreate due to their organic mass. More importantly, their proliferation inhibits the growth of native plant species that are the life blood of a healthy lake.

36. In 2022, total phosphorus levels were 18.8 ug/L in Musky Bay, 13.8 ug/L in Lac Courte Oreilles' West Basin, 12.7 ug/L in the Central Basin, and 12.7 ug/L in the East Basin. The five-year lakewide average was 15.3 ug/L.

37. Phosphorus is a "pollutant" as that term is defined in the CWA.

General Practices of Cranberry Operations

38. Cranberries are a water-intensive agricultural crop which typically require cool, moist environments for production. In Wisconsin, cranberries are frequently grown in marshes divided into individual bogs, surrounded, and bisected by earthen dikes and adjacent to a fresh water source, such as a lake. Cranberry operations also rely heavily on fertilizers rich in phosphorus and other nutrients to enhance cranberry production.

39. Cranberry growers use fresh water from a source such as a lake to flood cranberry bogs for multiple purposes throughout each year. These include (i) to protect the plants from frost (by sprinkling) or freezing (by flooding) in the spring and/or fall months, (ii) to control pests throughout the growing season, (iii) to harvest the mature cranberries in the fall, (iv) to create a protective layer of ice over the cranberry vines once

winter sets in, and (v) to deliver sand—a root medium—to the plants. After flooding the bog, the excess water, along with chemicals and organic materials in the water, is typically discharged back to the fresh water source. Cranberry production's heavy reliance on fresh water for multiple distinct purposes is the reason many marshes are located near lakes, rivers, and other fresh water sources, for both intake and discharge purposes.

40. A cranberry operator typically utilizes a series of channels, ditches, canals, or pipes connected to the fresh water source to flood or sprinkle the bogs for various purposes and subsequently drain or pump the water back to its source. The channels, ditches, canals, and pipes may vary widely in width, depth, and design.

41. Multiple feet of fresh water per acre may be drawn into the cranberry bog each time the cranberry operator floods it (an "Intake Event"). The fresh water may be held in the bog for varying lengths of time before being drained or pumped back to its source as a discharge ("a Discharge Event"). Depending on the reason for the Intake Event, the Discharge Event may release approximately the same amount of water as the amount taken in, plus chemicals and organic materials gathered from the bog.

42. A cranberry operator may sprinkle the bog to protect the plants and berries from frost during the spring and/or fall months. Frost damages growing cranberries and reduces overall crop yields by rupturing cell walls. Overhead sprinkling raises the air temperature above the vines temporarily, typically in the early morning, before radiant heat from the sun warms air temperatures. Water sprinkled for the purpose of frost

protection is typically allowed to drain back to the source as the sprinklers operate during the duration of the frost event (a "Frost Protection Discharge"). A Frost Protection Discharge releases roughly the same amount of water that was drawn into the bog, along with chemicals and organic materials gathered from the bog. The number of Frost Protection Discharges varies from year to year depending on local temperatures.

43. Water may also be drawn into the bog for freeze protection. In this scenario, an operator floods and covers the cranberry vines 10-12 inches deep. The flood water is left on the bog for the duration of the freeze event, i.e. below 30 degrees Fahrenheit. The freeze event may last several days, after which the water is released back to its source (a "Freeze Protection Discharge"). A Freeze Protection Discharge releases roughly the same amount of water that was drawn into the bog, along with chemicals and organic materials gathered from the bog. The number of Freeze Protection Discharges varies from year to year depending on local temperatures.

44. A cranberry operator may draw or pump water into the bog through overhead sprinklers during the growing season for the purpose of supplying the crop with water for plant growth. These intakes may occur roughly 0-3 times per year, depending on the amount of rainfall occurring in the growing season. The water may be held in the cranberry bog for several days before being released back to its source, along with chemicals and organic materials gathered from the bog, as an Irrigation Discharge.

45. A cranberry operator floods each bog once per year for the purpose of mechanically harvesting the cranberries. A flood of several feet of water causes mature

cranberries to detach from the plants and float to the surface, where they are gathered by specialty harvest machinery. The operator then releases the water back to its source at the conclusion of harvest, along with chemicals and organic materials gathered from the bog (a "Harvest Discharge").

46. Lastly, a cranberry operator floods each bog as soon as the ground starts freezing to form a protective, insulating layer of ice under which the cranberry plants may survive the winter. This winter protection flooding may occur more than once if, for example, there is a mid-winter thaw that melts the ice and requires a new flooding to form another protective ice layer. The operator maintains the ice layer over the bog for the duration of the winter, until it melts and is released in mid to late spring, along with chemicals and organic materials gathered from the bog.

47. Every second to fourth year, the operator may also intermittently flood over the top of the winter protective layer to thicken the ice to support the weight of a truck. Trucks may then be used to distribute sand over the ice layer. Sand is an important root medium for cranberry plants. The ice layer, when melted in the spring, facilitates the physical transfer of the sand to the rooting zone of the cranberry bed. Whole cranberry marshes or selected bogs may require about one inch of sand every second to fourth year. Sanding typically occurs in late January through early March.

48. Each spring, when the protective ice layer melts, the cranberry operator releases the water back to the lake, along with chemicals and organic materials gathered from the bog (a "Winter Protection Discharge"). In sanding years, the Winter Protection

Discharge is even greater due to the thicker ice layer. The discharged effluent typically contains residual phosphorus and other nutrients from the cranberry plants, as well as sand, plant debris, and other sediment that did not fully settle to the bottom of the marsh when the ice melted. The sand and plant debris are also typically high in phosphorus concentrations.

49. The Discharge Events described herein are caused for industrial and/or mechanical purposes, including frost protection or harvest, and not for the purpose of irrigating the cranberry crop.

50. The effluent of each Discharge Event contains phosphorus and other nutrients that were not fully absorbed during the growing season, as well as sand, organic matter or other sediment. The level of phosphorus and other nutrients discharged varies throughout the year depending on nutrient availability and the Discharge Event's proximity in time to fertilizer application.

51. Defendant engages in the practices identified above at the cranberry bogs operated adjacent to Musky Bay, using water from Lac Courte Oreilles, which result in Discharge Events into Lac Courte Oreilles, through a man-made channel and a man-made ditch, as further detailed below.

Defendant's CWA Violations

52. The Zawistowski Trust owns and operates two cranberry bogs, totaling 96 acres, which are adjacent to Musky Bay, in the West Basin of Lac Courte Oreilles. The east Zawistowski Trust marsh is located along County Highway E, while the west

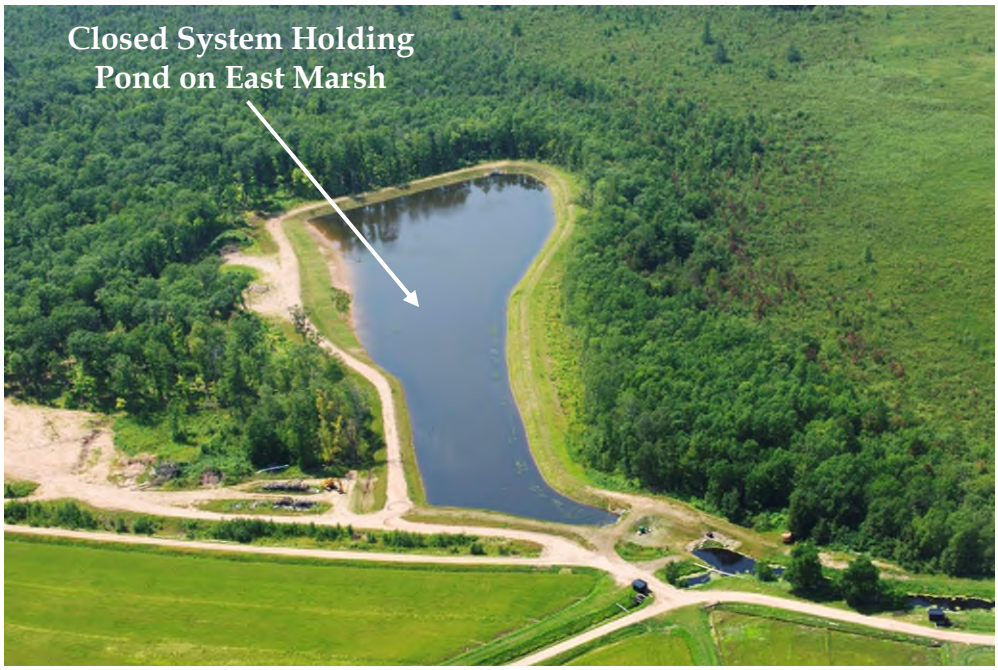
Zawistowski Trust marsh is located along a road called Thors Lane. The east and west marshes on Musky Bay are depicted in the following picture:

53. The east Zawistowski Trust marsh, originally constructed in 1939, is connected to Lac Courte Oreilles through a 20-foot-wide man-made channel (the "East Zawistowski Channel") that runs alongside the length of the marsh and then extends 75 feet before emptying into Musky Bay. In addition, running east and west approximately 100 feet along the northernmost edge of the east Zawistowski Trust marsh is a man-made ditch (the "Northern Zawistowski Ditch") that also empties into Musky Bay. The East Zawistowski Channel and the Northern Zawistowski Ditch merge just as they enter Musky Bay. As such, they are "point sources" as that term is defined in the Clean Water Act.

54. The East Zawistowski Channel and the Northern Zawistowski Ditch are depicted in the following picture:

55. Since 1939, Defendant has caused hundreds of Discharge Events from the east Zawistowski Trust marsh through the East Zawistowski Channel and the Northern Zawistowski Ditch as they merge and enter Musky Bay and release water containing excessive phosphorus and other chemicals and materials into Lac Courte Oreilles.

56. In 2014, the Zawistowski Trust completed construction of a "closed system" on its east marsh that is designed to accept discharge water in a holding pond for use repeatedly instead of being discharged back into Musky Bay. A closed system is a best management practice of the cranberry industry. The closed system on the east Zawistowski Trust marsh is depicted by the following picture:



57. However, despite this closed system, Defendant still has Discharge Events into Musky Bay from the east marsh. The following Discharge Events from the East Zawistowski Channel and the Northern Zawistowski Ditch occurred on or around the following dates:

Date	Total Phosphorous (ppb)
10/14/2019	150
10/15/2019	130
10/16/2019	99
10/17/2019	130
5/12/2020	40
9/29/2020	280
10/5/2020	50
10/6/2020	25
10/7/2020	34
10/8/2020	56
10/9/2020	27
10/5/2021	120
10/11/2022	190
10/12/2022	40

10/13/2022	34
10/6/2023	300
10/10/2023	440
10/11/2023	430

58. The west Zawistowski Trust marsh is connected to Lac Courte Oreilles by a series of canals and ditches that run alongside the individual bogs and empty into a 30-foot-wide man-made channel (the "West Zawistowski Channel") that extends approximately 400 feet before emptying into Musky Bay. The West Zawistowski Channel is a "point source" as that term is defined in the Clean Water Act.

59. In addition, running parallel to the West Zawistowski Channel is a ditch (the "West Zawistowski Wetland Ditch") that runs through a culvert under Thors Lane and continues through a tag alder wetland before emptying into Musky Bay. The West Zawistowski Wetland Ditch is a "point source" as that term is defined in the Clean Water Act.

60. The West Zawistowski Channel and the West Zawistowski Wetland Ditch are depicted in the following picture:

61. Historically, since the purchase in 1940 and subsequent production of cranberries on the west Zawistowski Trust marsh, the West Zawistowski Channel was used for Discharge Events that released water containing excessive phosphorus into Lac Courte Oreilles. In the early 2000s, that changed when the Zawistowski Trust constructed the West Zawistowski Wetland Ditch through the tag alder wetland. But Defendant's Discharge Events from the West Zawistowski Wetland Ditch have continued to be

monitored. For example, Discharge Events over the past five years from the West Zawistowski Wetland Ditch have occurred on or around the following dates, as measured at the culvert under Thors Lane or where the ditch meets the lake:

Date	Total Phosphorus (ppb)
4/20/2019	59
5/5/2019	58
10/12/2019	95
10/14/2019	82
10/15/2019	74
10/16/2019	340
10/17/2019	160
5/12/2020	50
9/19/2020	110
10/5/2020	79
10/6/2020	88
10/7/2020	160
10/8/2020	150
10/9/2020	150
3/24/2021	65
10/11/2021	210
10/12/2021	390
10/14/2021	470
10/15/2021	110
4/29/2022	220
10/20/2022	190
10/22/2022	110
10/20/2023	450

62. Defendant did not have a WPDES permit which permitted the discharges described above.

63. Defendant's illegal point source discharges of phosphorus pollutants from its cranberry marsh operations into Lac Courte Oreilles have been continuous and done

with full knowledge of the adverse consequences to the water quality of the lake. In 2006, the State of Wisconsin and 12 property owners on Lac Courte Oreilles brought a public nuisance action against William Zawistowski ("Zawistowski") for degrading Musky Bay with phosphorus-laden water during Discharge Events. *State v. Zawistowski*, Sawyer County Case No. 04CV75, 2006 WL 6622279 (Wis. Cir. Apr. 05, 2006). While the state and the property owners technically lost the case because the circuit court believed there must be 100 percent loss of use and enjoyment of Musky Bay to establish a public nuisance (as opposed to just a partial loss that the court determined), the court found that the Discharge Events are through "distinct ditches" and that "[e]ach ditch or canal is manmade and are connected to Musky Bay." *Id.* at *3. The court found that these ditches and canals "…now act as the *point source* for much of the phosphorus discharged into Musky Bay." *Id.* at *16 (emphasis added).

64. The court further found that the interference in use was "likely expanding in size and duration" and, if found to be a nuisance, would constitute a "substantial threat to the public health or safety." *Id.* at *26, *35. Because of this, the court stated that Mr. Zawistowski "can no longer hide behind the veil of self-imposed ignorance to the effects his cranberry operation is having on Musky Bay," and if he continues "…he does so at his own risk." *Id.* at *36.

65. William Zawistowski was the husband of Rosalind Zawistowski before his death late last year. At the time of his death, they were both trustees of the Zawistowski Trust.

66. Despite the circuit court's warning in 2006, Mr. Zawistowski and the Defendant have continued to discharge phosphorus from the point sources on Musky Bay, and there is a reasonable likelihood that the Defendant will do so in the future.

COUNT 1
Violation of the Clean Water Act

67. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 66 herein.

68. Defendant has violated and is violating section 301(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1342, and Wis. Stat. § 283.31, which prohibit discharges of pollutants without a NPDES permit, by intermittently and continuously discharging phosphorus and other pollutants from point sources into Lac Courte Oreilles without a permit.

69. On information and belief, Defendant's violations will continue until Defendant obtains and complies with a NPDES permit for the discharges. 33 U.S.C. §§ 1311(a), 1342.

70. Defendant is subject to civil penalties under CWA §309(d), 33 U.S.C. §1319(d), of up to $66,712 per day for each violation occurring since April 20, 2019. 40 C.F.R. §19.4 tbl. 1.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, the Courte Oreilles Lakes Association, Inc. and the Lac Courte Oreilles Band of the Lake Superior Chippewa, request judgment against the Defendant:

A. For a declaratory judgment that Defendant has violated and is violating the CWA by discharging phosphorus through point sources into waters of the United States without a NPDES permit;

B. For injunctive relief requiring the Defendant to immediately apply for, obtain, and comply with the terms of a NPDES permit to prevent further illegal point source discharges into Lac Courte Oreilles;

C. For civil penalties for Defendant's illegal, unpermitted point source discharges into Lac Courte Oreilles in the amount of $66,712 per violation per day pursuant to 33 U.S.C. § 1319(d) and adjusted for inflation by 40 C.F.R. § 19.4;

D. For the reasonable costs, fees and disbursements of this action (including attorney fees), pursuant to 33 U.S.C. § 1365(d); and

E. For such other relief as the Court may deem just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure.

Respectfully submitted this 28th day of February, 2024.

PINES BACH LLP

s/ Christa O. Westerberg

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