STATE OF WISCONSIN | CIRCUIT COURT BRANCH 41 | MILWAUKEE COUNTY

CLEAN WATER ACTION COUNCIL OF NORTHEAST WISCONSIN, FRIENDS OF THE CENTRAL SANDS MILWAUKEE RIVERKEEPER, and WISCONSIN WILDLIFE FEDERATION

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, DANIEL MEYER, in his official capacity as Secretary of the Wisconsin Department of Natural Resources, and MARK D. AQUINO, in his official capacity as Director of the Office of Business Support and Science of the Wisconsin Department of Natural Resources,

Respondents.

Case No. 2017-CV-12861

Case Codes:
30607(Admin. Agency Review)
30701(Declaratory Judgment)

PETITIONERS' BRIEF IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

This case is about the Wisconsin Department of Natural Resources' (DNR) unlawful action to make policy and change the law in response to pressure from the Dairy Business Association (DBA). DNR issued these policy changes in a settlement agreement with DBA following DBA's lawsuit challenging aspects of DNR's Water Pollution Discharge Elimination System (WPDES) program to regulate large concentrated animal feeding operations, hereinafter "Settlement Agreement" or "Agreement."

Petitioners filed a joint petition for judicial review and declaratory judgment, pursuant to Wis. Stat. §§ 227.52 and 227.40, respectively. Instead of answering the petition, DNR moved this court to dismiss both the judicial review action and the declaratory judgment action. In

regard to the judicial review action, DNR's motion contends that the Settlement Agreement is not a "final agency decision" and therefore not reviewable under Wis. Stat. § 227.52. In regard to the declaratory judgment action, DNR's motion contends that the Settlement Agreement is also not a "rule" and therefore not reviewable under Wis. Stat. § 227.40. Petitioners agree with DNR that the Settlement Agreement is not a "final agency decision" for purposes of judicial review, and that the § 227.52 judicial review action should be dismissed.

However, this Court must deny DNR's motion to dismiss the declaratory judgment action and allow Petitioners to proceed with their challenge to the Settlement Agreement. As an initial matter, DNR's motion to dismiss the declaratory judgment action on the grounds that Petitioners failed to state a claim is not authorized in a Chapter 227 proceeding.[1] DNR's motion speaks directly to the merits of the declaratory judgment action—whether the Settlement Agreement is a rule. There is no factual dispute as to whether the Settlement Agreement was promulgated without following the statutory rulemaking procedures, it clearly was not. Thus, if this Court

---

[1] In *PRN Associates LLC v. Department of Administration*, the Wisconsin Supreme Court called into question whether a motion to dismiss that addresses the merits is an appropriate procedure in a Chapter 227 proceeding. 2009 WI 53, 317 Wis. 2d 656, 766 N.W.2d 559. While the Court did not definitively resolve the question, the court noted,

> "It is unclear whether dismissal for failure to state a claim is an appropriate procedure for dismissing a petition for judicial review of an agency decision.
>
> In *Wisconsin Envtl. Decade Inc. v. Pub. Serv. Comm'n*, we determined that the summary judgment procedure was inapplicable to proceedings for judicial review of an administrative decision. 79 Wis.2d 161, 170, 255 N.W.2d 917 (1977). We explained that Chapter 227 provides for review of an agency decision rat§her than a new trial of the merits of a new claim. *Id.* ("[J]udicial review of administrative decisions under ch. 227 envisages a review upon the [agency] record, and there is no trial de novo in the circuit court during such proceedings.") The summary judgment procedure was inapplicable in a Chapter 227 review because there were no new facts to be tested."

Id., ¶ 22 n.8.

finds that the Settlement Agreement constitutes a rule, then it is a *de facto* unlawful rule and Petitioners are entitled to the relief requested. DNR's motion to dismiss the declaratory judgment action is simply a veiled attempt to get the first and last word on the merits of Petitioners' claims.

Furthermore, the Settlement Agreement clearly does meet the definition of a rule. As is explained below, the Settlement Agreement is a "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency." *Cholvin v. Dep't of Health and Family Servs.*, 2008 WI App 127, ¶ 22, 313 Wis. 2d 749, 758 N.W.2d 118 (quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)).

LEGAL AND FACTUAL BACKGROUND

In order for this Court to determine whether the Settlement Agreement constitutes a "rule," it is critical to understand the underlying legal framework and how the Settlement Agreement modifies the law. The Settlement Agreement directs how DNR may interpret and apply clean water laws and permitting requirements to large concentrated animal feeding operations (CAFOs). The following sections provide a brief overview of this legal framework, CAFO permitting requirements, and the Settlement Agreement.

A. CAFO Permitting Framework

Wisconsin developed the WPDES program in order to implement federal Clean Water Act (CWA) requirements within the state. The WPDES program makes it illegal to discharge pollutants to the waters of the state without first obtaining a discharge permit. Wis. Stat. § 283.31(1). DNR has primary authority over the program and is responsible for issuing permits to facilities that propose to discharge pollutants to waters of the state; however, the U.S.

Environmental Protection Agency (EPA) maintains an oversight role to ensure that the program complies with the CWA. *See* Wis. Stat. § 283.001(2), *see also* 33 U.S.C. § 1342(d)(2); 40 C.F.R. §§ 123.62-.63.

Most large CAFOs are required to obtain WPDES discharge permits from DNR. Specifically, a CAFO must obtain a discharge permit if it has over 1,000 animal units and either land applies manure or stores manure or process wastewater in an "at or below grade" structure. Wis. Stat. § NR 243.11(3)(a).

In order to obtain a permit, a CAFO must submit a permit application that includes the plans and specifications for any proposed structure or system associated with the storage, containment, treatment or handling of manure or process wastewater. Wis. Admin. Code §§ NR 243.15(1), 243.16(1). All "reviewable facilities or systems" that are part of the CAFO's production area must be designed and constructed to meet the standard permit requirements for large CAFOs and the permit application must "include a written explanation" of how those permit requirements will be met. Wis. Admin. Code § NR 243.15(1)(a)3.

One standard permit requirement that applies to large CAFOs—and is particularly relevant to this case—is the "no discharge" limitation. The "no discharge" limitation provides that a CAFO may not discharge manure or process wastewater from its production area unless, among other things, the discharge originates from a properly designed and maintained "containment or storage structure." Wis. Admin. Code § NR 243.13(2)(a). DNR must include this limitation in WPDES permits and must also include conditions necessary to "assure compliance" with this limitation. Wis. Stat. § 283.31(3), (4); Wis. Admin. Code § NR 243.13.

B. DNR's Issuance of Vegetated Treatment Area and Calf Hutch Guidance

U.S. EPA conducts site visits at CAFO's in Wisconsin pursuant to its oversight role of DNR's implementation of the CWA. During these site visits, EPA inspected facilities, made field observations, and took water quality samples. EPA's findings from the site visits led EPA to determine that DNR was not implementing its CAFO permitting program consistent with state and federal law. (Petrs' Exh. B.) Specifically, EPA determined that DNR's regulation of Vegetated Treatment Areas (VTAs) and calf hutch lots at CAFOs did not assure compliance with the "no discharge" limitation. (Petrs' Exh. A-C.) EPA found that DNR was improperly applying a blanket assumption that VTAs and calf hutch lots do not discharge pollutants. EPA's investigations and water quality sampling results demonstrated that, contrary to DNR's assumptions, VTAs and calf hutch lots were discharging significant amounts of pollutants to waters of the state. (*Id.*)

In response to EPA's findings, DNR issued two guidance documents that clarified the appropriate permit application and review procedures for both VTAs and calf hutch lots. (Petrs' Exh. A, C.) DNR explained that VTAs and calf hutch lots are subject to the "no discharge" requirement, and that many of these facilities were not complying with that limit. (Petrs' Exh. A at 3, C.) As a result, DNR advised CAFO permittees that they would need to provide information and an engineering evaluation for calf hutch lots and VTAs to ensure that the facilities will comply with the "no discharge" requirement. (Petrs' Exh. A, C.)

Within each of the guidance documents, DNR explained that the purpose of these policies was to bring the CAFO permitting program into compliance with existing state and federal law, and specifically the "no discharge" limitation. In the VTA guidance, DNR explained:

> This guidance has been developed in response to U.S. EPA communications regarding the use of Wisconsin NRCS Conservation Practice Standard 635

> (NRCS 635) to design feed storage area runoff controls (feed runoff controls) for CAFOs in Wisconsin. U.S. EPA inspections and field observations have shown NRCS 635 does not reliably ensure no discharge of pollutants to navigable water, as required by the Federal Clean Water Act, and described in U.S. EPA's Effluent Limitations Guideline for Concentrated Animal Feeding Operations (CAFOs).

(Petrs' Exh. A at 3.)

Similarly, in the calf hutch letter, DNR explained that previously it did not require a detailed evaluation of calf hutch lots at CAFOs because "calf hutch lots were not considered a significant source of pollution on production areas." (Petrs' Exh. C at 1.) However, EPA water quality sampling uncovered significant pollutant discharges from calf hutch lots. (*Id.*) As noted in the calf hutch letter, calf hutch lots house calves in individual hutches, which also necessarily contain their manure and urine. (*Id.*) Thus, DNR had a duty under state and federal law to require CAFOs to submit information and engineering plans to demonstrate that calf hutch lots did not discharge manure and other pollutants in violation of the "no discharge" limit. (*Id.*)

In 2016, DNR began processing CAFO permit applications consistent with the VTA guidance and calf hutch letter. For example, in an April 1, 2016, letter to Ed Larson of Larson Acres, DNR requested more information from Larson Acres "to demonstrate compliance with ss. NR 243.13 and NR 243.15." (Petrs' Exh. D at 84 (also marked as Exh. F to the DBA complaint).) DNR explained:

> Discussions between the U.S. EPA and the DNR have highlighted concerns about the effectiveness of Vegetated Treatment Areas. It has been determined that CAFO feed storage runoff controls designed according to Wisconsin NRCS Standard 635 are no longer considered to provide a level of control adequate to meet the requirements of ch. NR 243. . . . VTAs specified in the Wis. NRCS 635 Standard are capable of discharging runoff and pollutants during larger storm events and are therefore typically not considered a "zero discharge" system. DNR will not approve plans for a permanent feed storage area or for feed storage area leachate and runoff controls which do not provide for "zero discharge."

(*Id.*)

C. Dairy Business Association Settlement Agreement with DNR

DNR entered into the Settlement Agreement at issue here after DBA brought a declaratory judgment action alleging that the VTA guidance and calf hutch letter constituted unlawful rules. (Petrs' Exh. D.) The Settlement Agreement between DNR and DBA dismissed the lawsuit, and required DNR to comply with several terms going forward. (Petrs' Exh. F.) These terms require DNR to formally withdraw and not use for any purpose the VTA guidance and calf hutch letter, which DNR conceded were unlawfully promulgated rules. (Petrs' Exh. F, ¶¶ 4.c.ii, 4.d.ii.)

The Settlement Agreement also includes several other provisions that limit how DNR can interpret and apply the WPDES program to CAFOs with VTAs or calf hutch lots. For example, the Agreement prohibits DNR from presuming the presence or future occurrence of a discharge from a CAFO production area to navigable waters. (Petrs' Exh. F, ¶ 4.c.iii.) It further provides that "DNR, in implementing its program authorities, shall take those actions necessary to determine if an actual discharge is occurring or will occur under the actual or projected site conditions." (Petrs' Exh. F, ¶ 4.c.iii.)

DNR developed a one-page "Implementation Points" memo that further explains how DNR interprets and will apply this provision to CAFOs.[2] (Petrs' Exh. H.) Specifically, DNR

[2] Petitioners submit these agency records to refute DNR's assertions regarding the Settlement Agreement. While declaratory judgment proceedings challenging agency rules are typically limited to the record on review, DNR has not produced such a record in this case due to the unique nature of the challenged agency action. Courts have considered additional relevant evidence in declaratory judgment proceedings when it is necessary to perform its judicial review function.

> We conclude that in declaratory judgment proceedings under sec. 227.05, Stats., the trial court must be free to accept relevant evidence to supplement the agency record if it appears necessary to perform its judicial review function. If the court is to act as more than a rubber-stamp of agency action as we believe it must, infra p. 811, the court must understand the issues involved in the rulemaking.

"agrees that when reviewing plans and specifications for [VTAs] at CAFOs, the DNR . . . won't require without site specific considerations that VTAs comply with standards other than NRCS Standard 635 dated January 2002." (Petrs' Exh. H.) Further, DNR agreed "that it won't presume discharges from VTAs at CAFOs [and] will evaluate VTAs based on actual discharges to navigable waters or projected/modeled discharges based on site specific considerations." (*Id.*)

The Settlement Agreement provision also limits how DNR may regulate calf hutch lots at CAFOs. The Settlement Agreement provides that "DNR shall not consider calf hutch lots to be included in the definition of 'reviewable facility or system,'" and that DNR's "determination that calf hutch lots are 'reviewable facilities or systems'" constitutes a rule. (Petrs' Exh. F, ¶¶ 4.d.i, ii.) DNR's Implementation Points memo provides that "calf hutch lots are not reviewable facilities and therefore plan and spec reviews of calf hutch lots at CAFOs are not required." (Petrs' Exh. H.)

Contrary to DNR's argument, the Settlement Agreement does not simply invalidate the challenged guidance documents and direct DNR to follow the law. These Settlement Agreement provisions bind DNR to follow an interpretation of its regulations that conflict with existing law, as explained in more detail below.[3]

> Particularly in a highly technical, complex area of rulemaking, such understanding is possible only if an adequate factual record is available to the court.

Liberty Homes, Inc. v. Dep't of Indus., Labor & Human Relations, 136 Wis. 2d 368, 379, 401 N.W.2d 805, 810 (1987).

[3] DNR has not addressed Petitioners' claim that DNR lacks the authority to enter into a binding policy-making agreement with a private party that modifies DNR's legal authority and duty under existing law.

ARGUMENT

The Settlement Agreement is a "rule" subject to review in this declaratory judgment action pursuant to Wis. Stat. § 227.40.

This Court should invalidate the Settlement Agreement because it is a policy statement that meets the definition of a rule and was not promulgated in accordance with rulemaking procedures.[4] Wis. Stat. §§ 227.01(13), 227.10(1), 227.40(4)(a). An agency action is a rule if it constitutes "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency." *Cholvin v. Dep't of Health and Family Servs.*, 2008 WI App 127, ¶ 22, 313 Wis. 2d 749, 758 N.W.2d 118 (quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)). DNR concedes that the Settlement Agreement constitutes an action "issued by the agency," but argues that it does not satisfy the other four elements, which we address in turn. (DNR Br. at 15-19.)

1. The Agreement is a regulation, standard, statement of policy or general order.

DNR relies on the *Schoolway Transportation* case, but this case supports Petitioners' position. The *Schoolway Transportation* Court analyzed two agency policies and determined that one policy was an unlawful rule because it interpreted ambiguous statutory requirements, and the other was not a rule because it simply restated a clear and unambiguous statutory directive. In this case, the Settlement Agreement is a rule because it interprets a complex legal framework—the CAFO WPDES program—and does not simply restate explicit statutory requirements. In fact, as explained below, the Agreement conflicts with DNR's authority and duty under its lawfully-promulgated rules.

[4] DNR does not dispute that this Settlement Agreement was issued without following rulemaking procedures in Chapter 227.

In *Schoolway Transportation*, the Court analyzed two Division of Motor Vehicles (DMV) policies, and concluded that DMV's policy interpreting its urban mass transportation statute, was a rule, and the other policy, regarding dual registration for busses, was not. *Schoolway Transp. Co., Inc. v. Div. of Motor Vehicles*, 72 Wis. 2d 223, 240 N.W.2d 403 (1976). The key distinction, according to the court, was whether the policies were consistent with a "clear and unambiguous" statutory directive. *Id.* at 232-33. The Court determined that the dual registration policy was not a rule because it merely corrected the DMV's prior legal position, which conflicted with a "clear and unambiguous" statute. *Id.* at 232.

In contrast, the Court concluded that the urban mass transportation policy was an invalid rule because the policy did not simply restate a clear statutory directive. *Id.* at 236-37. The Court noted that the DMV policy "relie[d] on the context of [the statutory chapter] in which the definition of urban mass transportation is contained to reach its conclusion that Schoolway's busses do not qualify." *Id.* at 237. The Court determined that such a policy "represents an interpretation of a statute within the meaning of sec. 227.01(4)." *Id.* The court further supported its conclusion by noting that the DMV's urban mass transportation policy was "in direct contrast to the manner in which the statute was previously administered by the" DMV. *Id.*

DNR misapplies this case by ignoring the discussion of the urban mass transportation policy and mischaracterizing the Settlement Agreement. While DNR claims that the guidance documents were unlawfully promulgated rules, DNR does not assert that the *substance* of these policies conflicts with any "clear and unambiguous" statutory duty. In fact, DNR does not present any argument that the substance of the VTA guidance and calf hutch letters conflicts with the law. Neither does DNR explain or cite legal authority for its conclusion that the Settlement Agreement terms are consistent with existing law.

According to *Schoolway Transportation*, it is the substance of the policies that controls. DNR asserts that the Agreement simply invalidated the guidance documents and brought "the agency's practices back in line with properly promulgated rules and statutory standards." (DNR Br. at 16.) DNR does not point to a statute or rule that prohibits DNR from presuming the presence or future occurrence of a discharge from a CAFO production area to navigable waters. (*See* Petrs' Exh. F, ¶ 4.c.iii.) Similarly, DNR does not cite the statute or rule that requires DNR "to determine if an actual discharge is occurring or will occur under the actual or projected site conditions" before requiring an evaluation of or modifications to a VTA. (*See id.*)

As explained below, these and other Settlement Agreement terms conflict with DNR's authority and duty and require DNR to interpret and apply the CAFO WPDES program in conflict with existing law. For example, the Agreement limits DNR's authority to include conditions in WPDES permits that assure compliance with effluent limits, including the "no discharge" limit. *See* Wis. Stat. § 283.31(3), (4); Wis. Admin. Code § NR 243.13(1). Further, these provisions conflict with DNR's authority pursuant to Wis. Admin. Code § NR 243.15(1)(a)3, (2), to require CAFOs to design and construct VTAs to meet effluent limits, and § NR 243.16(2) to require CAFOs to submit evaluations of existing VTAs based on factors including effluent limits and permit conditions. The Agreement term providing that "DNR shall not consider calf hutch lots to be included in the definition of 'reviewable facility or system,'" also conflicts with the plain language of existing rules. (Petrs' Exh. F, ¶ 4.d.i.); *see* Wis. Admin. Code § NR 243.03(56) (defining "reviewable facility or system").

In practice, DNR is implementing the Settlement Agreement in conflict with its WPDES regulations. Specifically, DNR is now waiving engineering evaluations for existing VTAs that it requested in draft WPDES permits before DNR entered into the Settlement Agreement. DNR

Fact Sheets for the Darlington Ridge Farms LLC (Darlington) and Kieler Farms Inc. (Kieler) WPDES permits initially requested an engineering evaluation to establish that their VTAs were meeting permit standards. (Petrs' Exh. I at 8, 23-24.) When DNR issued the permits, it removed the permit condition requesting an evaluation of these VTAs, explaining, "The requirement to evaluate the existing vegetated treatment area was removed due to the recent settlement with the Dairy Business Association." (Petrs' Exh. J at 1, 9.)

In contrast, DNR's prior policies, summarized in the VTA guidance and calf hutch lot letter, are consistent with existing law. Requiring CAFOs to evaluate whether VTAs comply with the "no discharge" requirement is consistent with DNR's authority pursuant to Wis. Admin. Code § NR 243.15(1)(a)3, (2) (providing that CAFOs must design and construct VTAs to meet effluent limits), § NR 243.16(2) (providing that DNR may require evaluations of existing VTAs based on factors including effluent limits and permit conditions), and Wis. Stat. § 281.31(3), (4) (requiring DNR to include conditions in WPDES permits that assure compliance with effluent limits).

DNR also has explicit authority to require CAFOs to submit engineering plans and specifications for calf hutch lots, as indicated in the calf hutch lot letter, because these are "reviewable facilities or systems." Wis. Admin. Code § NR 243.03(56) (defining "reviewable facilities or systems"), § NR 243.15, .16 (providing DNR with authority to require engineering plans for "reviewable facilities or systems"). Calf hutch lots clearly fall within the plain language definition of "reviewable facilities or systems," which includes "manure storage facilities, manure treatment or transfer systems, or other structures or systems associated with the storage, containment, treatment or handling of manure or process wastewater." Wis. Admin. Code § NR

243.03(56); *see supra* at 6 (explaining that calf hutch lots store and contain manure and process wastewater).

2. The Agreement is of general application.

"[T]o be of general application, a rule need not apply to all persons within the state." *Citizens for Sensible Zoning*, 90 Wis. 2d at 815-16. "Even though an action applies only to persons within a small class, the action is of general application if that class is described in general terms and new members can be added to the class." *Id.* at 816. In *Cholvin*, the Court determined that agency instructions for a disability screening test were rules "of general application" because the instruction "[did] not speak to a specific case, nor [was] it limited to an individual applicant." 313 Wis. 2d 749, ¶ 25. The Court further noted that the instruction was a rule even though it did not *affect* all members of the class because it *applied* equally to all applicants. *Id.*

Similarly, in *Wis. Elec. Power Co. v. Dep't of Natural Res.*, 92 Wis. 2d 222, 287 N.W.2d 113 (1980), the Court concluded that an EPA letter constituted a rule of general application because the letter required DNR to impose specified chlorine limits in WPDES permits for power plants. "This letter makes it clear that these chlorine limitations were recommended to apply to all of the power plants for which draft permits were submitted to the EPA, and the DNR uniformly imposed these limitations in the WPDES permits issued to Wisconsin Electric." *Id.* at 234. Even though the chlorine limits varied among permits issued to Wisconsin power companies, the limits were all determined based on the EPA letter. *Id.* at 235 ("Uniform application of the [EPA's] limitations does not mean that the chlorine limitations are always the same in each issued permit.").

DNR asserts that the Agreement "will not guide DNR's permitting decisions," DNR Br. at 2-3, but DNR's argument conflicts with the Agreement's provisions, DNR's implementation points memo, and DNR's actions on the Darlington and Kieler WPDES permits. The Agreement includes blanket statements about VTAs "at CAFOs with such control systems" and limits how DNR can interpret "reviewable facility or system" with regard to calf hutch lots." (Petrs' Exh. F, ¶¶ 4.c.iii, 4.d.i.) Another provision begins, "In determining the applicability or enforceability of Wis. Admin. Code § NR 243.13 to any regulated discharge to navigable waters from the production area at a CAFO" and essentially prohibits DNR using its general knowledge about VTA and calf hutch discharges in its regulation of specific CAFOs. (Petrs' Exh. F, ¶ 4.c.iii.) DNR's Implementation Points memo explains how this Agreement limits what DNR staff may request or require of a CAFO. (Petrs' Exh. H.)

Further, DNR's response to comments on the Darlington and Kieler draft WPDES permits indicates that the Settlement Agreement is being used in DNR's permitting decisions. (Petrs' Exh. J.) Regarding the Darlington WPDES permit, DNR indicated that Michael Best & Friedrich LLP asked DNR to remove the "requirement to submit an engineering evaluation for the existing vegetated treatment area." (Petrs' Exh. J at 1, 9.) In response to this comment, DNR agreed to remove that requirement, explaining

> In October of 2017, the department and the Dairy Business Association entered into a settlement. Per the settlement, the department will no longer require an evaluation of this VTA in this reissued permit.

(Petrs. Exh. J at 1, 9.) The Agreement clearly applies to any DNR's actions regarding CAFO WPDES permittees with VTAs or calf hutch lots, which is a "class" that can be "described in general terms" to which "new members can be added." *Citizens for Sensible Zoning, Inc.*, 90 Wis. 2d at 816.

3. The Agreement has the effect of law.

The *Cholvin* Court explained that an agency action has the effect of law "where the interest of individuals in a class can be legally affected through enforcement of the agency action." 313 Wis. 2d 749, ¶ 26. In *Wisconsin Electric Power Co.*, the Court concluded that the EPA letter had the effect of law because DNR applied that letter in legally enforceable WPDES permits. 92 Wis. 2d at 235.

Similarly, the Agreement has the effect of law because it affects the legal interests of a class of individuals through DNR's application of the Agreement in CAFO WPDES permits and related decisions. As explained above, the Agreement limits DNR's authority to require CAFOs to submit engineering plans and evaluations for existing and proposed VTAs and calf hutch lots. *See supra* at 10-12. It also limits DNR authority to require improvements to VTAs to address unauthorized pollution discharges in violation of the "no discharge" limit unless DNR can demonstrate that "an actual discharge is occurring or will occur under the actual or projected site conditions. (Petrs' Exh. F, ¶ 4.c.iii.) DNR is implementing and applying this Agreement in legally enforceable WPDES permits for existing CAFOs. (Petrs' Exh. J.)

DNR asserts that this Agreement does not have the effect of law "in that no citizens can suffer legal consequences for 'failing to comply' with the settlement agreement." (DNR Br. at 3.) But this is not a required showing. The Agreement has the effect of law because DNR applies it in legally enforceable WPDES permits, which affects CAFOs' legal interests and impairs Petitioners' interests.

4. The Agreement implements, interprets or makes specific legislation enforced or administered by DNR.

In *Wisconsin Electric Power Co.*, the court concluded that an EPA letter directing DNR to include specific chlorine limitations in WPDES permits for power plants was issued "to

implement, interpret or make specific legislation enforced or administered by the agency" because it was issued and implemented to govern the WPDES program, which DNR is charged with administering. 93 Wis. 2d at 235-36. That holding is directly analogous this Agreement, which interprets DNR's WPDES regulations and directs DNR to follow that interpretation when issuing WPDES permits to CAFOs. The Settlement Agreement provides that DNR cannot use the VTA or calf hutch guidance "for any purpose" when DNR exercises its WPDES regulatory authority over CAFOs. (*See* Petrs. Exh. F, ¶¶ 4.c.ii, 4.d.ii.) The Agreement further provides that DNR cannot regulate calf hutch lots as "reviewable facility or systems," which limits how DNR can interpret and apply one of its WPDES regulations for CAFOs. (*See* Petrs. Exh. F, ¶ 4.d.i.) Finally, the Agreement term that clearly interprets and limits existing WPDES rules provides, "In determining the applicability or enforceability of Wis. Admin. Code § NR 243.13 to any regulated discharge to navigable waters from the production area at a CAFO, DNR agrees that it may not presume the presence or future occurrence of such discharge. (Petrs' Exh. F, ¶ 4.c.iii.) Each of these provisions interprets and limits DNR's authority and duty to regulate CAFO discharges under the WPDES program.

DNR attempts to hide behind general language in the Agreement providing that DNR must follow existing law. (DNR Br. at 18.) But this general provision does not save DNR's argument where the other Settlement Agreement provisions conflict with existing statutes and rules. Further, it's clear from DNR's implementation of the Agreement that it is being applied in WPDES permits in conflict with existing law. (Petrs' Exh. J.)

CONCLUSION

For the foregoing reasons, this Court should deny Respondent DNR's Motion to Dismiss Petitioners' action for declaratory judgment pursuant to Wis. Stat. § 227.40 because the

Settlement Agreement is a "rule," and DNR does not provide any jurisdictional or procedural basis to dismiss the declaratory judgment action. This Court may dismiss the action for judicial review pursuant to Wis. Stat. § 227.52 as a basis for this court's review; however, such dismissal does not eliminate Petitioners right to review on all three counts in the Petition. Additionally, because DNR's Motion to Dismiss addresses the merits of Petitioners' arguments, this Court may grant the relief requested in the Petition for Declaratory Judgment or may direct the parties to submit additional briefing on the merits.

Dated this 23rd day of February, 2018.

Electronically Signed by Sarah Geers

Sarah Geers
SBN 1066948
sgeers@midwestadvocates.org
Tressie Kamp
SBN 1082298
tkamp@midwestadvocates.org
Midwest Environmental Advocates
612 W. Main St., Suite 302
Madison, WI 53703
608-251-5047

Attorneys for Clean Water Action Council, Friends of the Central Sands, Milwaukee Riverkeeper, and Wisconsin Wildlife Federation

CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the foregoing Petitioners' Brief in Opposition to Respondents' Motion to Dismiss the Petition for Judicial Review and Declaratory Judgment with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of February, 2018.

Electronically signed by

Sarah Geers