

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

In the Matter of Wetland Individual Permit IP-WC-2016-42-00902, issued to Meteor Timber LLC, for Wetland fill or disturbance near Rudd Creek, in the Town of Grant, County of Monroe, State of Wisconsin

Case No. DNR-17-0013

In the Matter of Amended Wetland Individual Permit IP-WC-2016-42-00902, issued to Meteor Timber LLC, for wetland fill or disturbance near Rudd Creek, in the Town of Grant, County of Monroe, State of Wisconsin

Case No. DNR-17-0014

FINDINGS OF FACT

1. On May 4, 2018, the State of Wisconsin, Division of Hearings and Appeals, issued a decision (Decision) in the above-captioned matters.
2. On May 10, 2018, Meteor Timber LLC filed a petition pursuant to § NR 2.20(1), Wis. Adm. Code for review (Petition) of the decision in the above-captioned matters. A copy of the Petition is attached hereto.
3. Attorney Mark A. Herman is employed by the Department of Natural Resources, had no involvement with the hearing before the Division of Hearings and Appeals resulting in the Decision, and had no involvement in the issuance of a permit in these matters.
4. I have appointed Attorney Herman as my designee to review the Decision. Attorney Herman has reviewed the Petition, submissions of interested parties, and met with attorneys for Meteor Timber and attorneys for Clean Wisconsin, Inc., and the Ho-Chunk Nation; Attorney Herman recommends that the Decision be reviewed based upon the information received.


CONCLUSIONS OF LAW

1. The Petition was filed within the time required by § NR 2.20(1), Wis. Admin. Code.
2. The Secretary of the Department of Natural Resources has the authority to review contested case decisions pursuant to § NR 2.20(3), Wis. Admin. Code.

ORDER

1. I hereby appoint Attorney Mark A. Herman as my designee (Designee) to conduct a review of the Decision.
2. Unless otherwise directed by the Designee, the parties shall submit briefs on the following schedule:
 - a. Initial brief of Meteor Timber, LLC, shall be due on July 23, 2018.
 - b. Responsive briefs of Clean Wisconsin, Inc., and the Ho-Chunk Nation shall be due on October 9, 2018.
 - c. Reply brief of Meteor Timber, LLC, shall be due on October 29, 2018.
3. The scope of the review shall include any of the contents of the Decision, including, but not limited to, the Findings of Fact, Conclusions of Law, and the reasoning contained in the Decision, and any evidence or arguments presented to the hearing examiner in the Decision.
4. The portion of the Decision ordering the reversal of the decisions to grant the permits in the above-captioned matters shall remain in effect until the Decision is reviewed and modified or affirmed by the Designee. In all other respects the Decision is hereby suspended until the Decision is reviewed and modified or affirmed by the Designee, pursuant to § NR 2.20(5), Wis. Adm. Code.

Dated and mailed this 24th day of May, 2018.


Daniel L. Meyer
Secretary

DNR

MAY 10 2018

OFFICE OF THE
SECRETARY

BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

In the Matter of Wetland Individual Permit IP-WC-2016-42-00902, issued to Meteor Timber LLC, for wetland fill or disturbance near Rudd Creek, in the Town of Grant, County of Monroe, State of Wisconsin

Case No. DNR-17-0013

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In the Matter of Amended Wetland Individual Permit IP-WC-2016-42-00902, issued to Meteor Timber LLC, for wetland fill or disturbance near Rudd Creek, in the Town of Grant, County of Monroe, State of Wisconsin

Case No. DNR-17-0014

**METEOR TIMBER LLC'S PETITION FOR REVIEW BY THE
SECRETARY OR SECRETARY'S DESIGNEE**

I. INTRODUCTION

Meteor Timber, LLC ("Meteor Timber"), by its attorneys, Weld Riley S.C. and Foley & Lardner LLP, submits this petition pursuant to Wis. Admin. Code § NR 2.20. Meteor Timber requests the Secretary of the Wisconsin Department of Natural Resources ("DNR" or "Department") review and modify the Findings of Fact, Conclusions of Law, and Order, dated May 4, 2018, in this contested case proceeding ("Decision"). A copy of the Decision is attached at Tab 1.

Meteor Timber does not seek this review lightly. Review by the Secretary is both justified and necessary in this case, given the potential long-term damage to the wetland program if the Decision is adopted as the final decision of the Secretary pursuant to Wis. Adm. Code § NR 2.20. First, numerous Findings of Fact in the Decision are not based upon substantial evidence in the record. Of the 32 Findings of Fact in the Decision, 9 are directly contradicted by conditions in the permits cited for those findings. Other findings—such as the finding that the

permit should have required 40 inches of organic material—misstate the actual testimony of the witness cited for that finding. Still other findings were made based upon statements made in email documents from non-testifying Department staff, and were contrary to the sworn testimony provided by the Department at the hearing. Most troubling, the Decision made these contra-factual findings without actually acknowledging the testimony of the Department's five witnesses (or of five other witnesses at the hearing), but based almost solely on the testimony of a former Department staffer who drafted permit conditions and made decisions on the requirements of the mitigation plan that she subsequently testified against. While the hearing examiner's determinations as to witness credibility are given deference, no such deference is allowed for gross misstatements of the record.

Second, based upon these significant factual errors, the Decision errs as a matter of law in finding that (i) issuance of the October 27, 2017 permit ("Amended Permit") was contrary to Wis. Stat. § 281.36(3m)(i); (ii) that Meteor Timber's mitigation plan was not "adequate" as a matter of law; and (iii) that the mitigation plan would not compensate for the loss of wetland functional values, pursuant to Wis. Stat. § 281.36(3n)(c)(3). Specifically, the Decision held that the Amended Permit was issued without several of pieces of information necessary to evaluate the environmental impacts of the project—even though that permit contains separate Findings of Fact confirming that each of the requested items had been received by the Department. Decision, pp. 4-6 (Tab 1). Likewise, without citing, or apparently reviewing, the final August 25, 2017 Mitigation Plan ("Final Mitigation Plan"), the Decision concluded that the plan would not compensate for impacts to wetland functional values because it lacked hydrology performance standards and was for that reason inadequate—even though, as noted by the Amended Permit, the plan itself specifically provides for a 10% hydrology performance standard based on data developed from the property. Final Mitigation Plan, Sec.

4.3.1 (Tab 2.1). The Division also found that because the plan did not require “40 inches of organic material” that it was inadequate and would not compensate for wetland functional values, even though the Department lacks any express authority to include such a requirement, and such a standard is not required for other wetland mitigation projects. Moreover, such a standard is not included in the list of wetland functional values set forth at NR 103.03, Wis. Adm. Code. Finally, the Decision concluded that the Department lacked authority to issue the Amended Permit—notwithstanding the fact that the Department issued that permit following all of the procedures for issuing a permit in Wis. Stat. § 281.36(3m)(i), and contested case review is specifically allowed for “modified” permits, pursuant to Wis. Stat. § 281.36(3q).

In reaching these conclusions, the Decision adopts two positions with far-reaching implications for the Department beyond just this matter. If the Decision’s holding that a wetland created or restored for mitigation must be essentially identical to the original wetland in terms of depth of organic matter is adopted as the Secretary’s position under Wis. Admin. Code § NR 2.155, that holding could severely limit the type of projects eligible for mitigation in the future. The holding could also severely limit the development of wetland mitigation banks under the Department’s wetland mitigation program. Likewise, if the Decision’s holding that the Department now lacks authority to issue any amended wetland permit, even if all of the requirements for issuance of a new permit are followed, then numerous modified and amended permits previously issued by the Department will become invalid overnight.

Given the fundamental errors of fact and law set forth in the Decision, as well as the far-reaching impact of the Decision outside this discrete matter on numerous existing amended wetland permits, Meteor Timber asks that the Secretary suspend the Decision and grant review of the evidence pursuant to Wis. Admin. Code § NR 2.20(3). Meteor Timber further

requests that such review address the remaining issues in case DNR-17-0014 upon which Petitioners did not carry their burden of proof in the hearing.

II. BACKGROUND

A. Meteor Timber's Wetland Permit Application and Departmental Review

This project began in June 2015, when Meteor Timber was looking for potential locations for a trans-loading facility along the Union Pacific rail corridor. A forester with Meteor Timber contacted DNR staff regarding the AK Knapp Site ("Site") about how best to evaluate potential mitigation options if a project was proposed for that Site. After numerous visits to the Site by DNR employees, and the submission of multiple mitigation plans, the Department issued a permit under Wis. Stat. § 281.36(3n) for the project on May 19, 2017 ("Original Permit"). Exh. 239 (Tab 3).

After further discussions with the DNR and the submission of documentation required by the Original Permit, Meteor Timber submitted a revised mitigation plan in August 25, 2017, which was ultimately approved by the DNR as the Final Mitigation Plan. Because the Final Mitigation Plan required revision to three Original Permit conditions, the DNR issued the Amended Permit on October 27, 2017, after fulfilling each of the steps required for public notice and public comment for issuance of a wholly new permit. Exh. 240 (Tab 4). That Amended Permit also included Findings of Fact specifically affirming that certain items requested by the Original Permit had been submitted and that the conditions requesting those documents had been satisfied.

Both permits were challenged by Clean Wisconsin. On June 19, 2017, the DNR granted Clean Wisconsin's petition for a contested case hearing regarding issuance of Wetland Individual Permit IP-WC-201642-00902 to Meteor Timber for wetland fill or disturbance (Case No. DNR-17-0013) dated May 19, 2017. On December 1, 2017, the DNR granted Clean

Wisconsin's petition for a contested case hearing regarding issuance of the Amended Permit to Meteor Timber (Case No. DNR-17-0014) dated October 27, 2017. At the hearing on these cases, the Division identified the following issues for review:

Case No. DNR-17-0013

1. Whether the DNR had sufficient information to consider the factors used in the review contained in Wis. Stat. § 281.36(3n)(b).
2. Whether the DNR complied with Wis. Stat. § 281.36(3n)(d) regarding mitigation.
3. Whether the proposed project will result in significant adverse impacts to wetland functional values, in significant adverse impacts to water quality, or in other significant adverse environmental consequences.
4. Whether the proposed project represents the least environmentally damaging practicable alternative.

Case No. DNR-17-0014

1. Whether the amended permit complies with Wis. Stat. § 281.36(3m) and (3n).
2. Whether the DNR properly amended Environmental Impact Condition 3.c. of the original permit.
3. Whether the amended permit authorizes the filling of, or authorizes mitigation credit for, wetlands subject to a U.S. EPA Administrative Compliance Order on Consent. Decision, p. 2 (Tab 1).

The Ho-Chunk Nation subsequently intervened in the proceeding as a party, represented by Midwest Environmental Advocates.

B. The Decision

The Division's 9-page Decision addressed three of the four issues presented in Case No. DNR-17-0013, and one issue from Case No. DNR-17-0014. While Meteor Timber disputes the Decision's findings regarding the Original Permit and DNR-17-0013, this petition for review specifically addresses the Decision's findings of fact and conclusions of law regarding

the Amended Permit and DNR-17-0014. This petition for review addresses the following sections of the Decision:

Finding of Fact 18-27 held that permit conditions were outstanding or not addressed by Meteor Timber in both the Original and Amended Permits, and therefore the DNR should not have issued either permit to Meteor Timber.

Finding of Fact 19 held that “Both permits were issued without a detailed description of the total number of acres of land to be removed from cranberry beds and the total number of acres of land to be converted to industrial use.”

Finding of Fact 20 held that “Both permits were issued without a detailed description of ‘all chemicals and amounts to be eliminated through elimination of existing cranberry operations as well as all chemicals and amounts to be used in establishment and management of any mitigation, restoration or preservation areas and any adjacent areas to the rail, dry plant and access roads proposed.’”

Finding of Fact 21 held that “Both permits were issued without justification submitted to the DNR Ecologist ‘to support efficacy of the design of the open top channels between railroad ties including but not limited to: the size, number and location of the open top channels’ and information that supports ‘the use of the proposed design by the range of reptile, amphibian and mammal species expected to exist in the project area.’”

Finding of Fact 22 held that “Both permits were issued without a ‘restoration plan for the Old Town Road’ that needed to ‘include: detailed plans for where the excavated material will be placed, appropriate erosion control and stabilization methods, a seed mix that includes appropriate native, non-invasive species, and a monitoring and management plan for establishment of the native species and long term control of any invasive species.’”

Finding of Fact 23 held that “Both permits were issued without a ‘detailed plan for the drawdown of the reservoir areas not part of the compensatory mitigation’ and the plan needed to ‘include details on: execution of the drawdown, removal of control structures and dikes, description of the target wetland communities, re-vegetation including any seed mix to be used, and a monitoring and management plan for establishment of the target wetland communities and long term control of invasive species.’”

Finding of Fact 24 held that “Both permits were issued without a ‘habitat mitigation and management plan that must not be in conflict with the wetland compensatory mitigation plan.’”

Finding of Fact 25 held that “Both permits were issued without ‘a wetland delineation of the MTN8268 property’ submitted to the ‘Department Wetland Management Specialist for approval to accurately document the amount of wetland and upland in the MTN8268 preservation area.’”

Finding of Fact 26 held that “Both permits were issued without ‘a detailed vegetation survey for the wetland area’ in order ‘to accurately document the existing condition of the wetland in the MTN8268 area.’”

Findings of Fact 27 and 28 are based upon two emails provided during the hearing relating to a request for information on the realignment of Rudd Creek, and testimony of Meteor Timber witness David Simons.

Finding of Fact 29 held that “Hydrology is critical to successful wetlands restoration” but that “both permits were issued without a performance standard for hydrology for the mitigation plan.”

Finding of Fact 30 states that “both permits were issued without adequate soils data for the mitigation plan.”

Finding of Fact 31 held that “After the first permit was issued, Meteor Timber submitted inadequate soil data because it was proposing to deposit 10 inches, or less, of organic material as a substitute for what should have been 40 inches of material. Without the appropriate soil base, the replacement vegetation will not survive.”

Finding of Fact 32 held that “Again, without the necessary soils and hydrology data, there is nearly a zero percent likelihood that the mitigation plan would compensate for the loss created by the proposal to fill the existing wetlands.” *See also* Finding of Fact 13 (“Furthermore, without the necessary soils and hydrology data, there is nearly zero percent likelihood that the mitigation plan would compensate for the loss created by the proposal to fill the existing wetlands”).

Based upon these findings, the Decision held that the DNR did not have an adequate mitigation plan as required by Wis. Stat. § 281.36(3n)(d) and the procedures in Wis. Stat. § 281.36(3n)(b); that “the DNR did not have the necessary information to assess the net positive or negative environmental impact of the proposed project at the time that hit [sic] issued the permits” as required by Wis. Stat. § 281.36(3n)(c); and that “the proposed project will most certainly result in significant adverse impacts to wetland functional values because it will not compensate for the loss,” contrary to Wis. Stat. § 281.36(3n)(c)3.

Based on this analysis, Conclusion of Law 10 holds that “[a]s to Case No. DNR-17-0014, the amended permit did not comply with Wis. Stat. § 281.36(3m), (3n).”

III. GROUNDS FOR REVIEW

A. Meteor Timber is Adversely Affected by the Decision.

Meteor Timber was the permit applicant for IP-WC-2016-42-00902, and participated as a party to the contested case on the Original Permit and Amended Permit in that proceeding. Meteor Timber is adversely affected by the Decision and the reversal of the

Department's decision to issue the Amended Permit. Meteor Timber is adversely affected by the Decision because the Division's Decision is not based on substantial evidence, is contrary to law, and is contrary to longstanding Department practice.

With respect to the Amended Permit, Meteor Timber is adversely affected by the Decision's erroneous finding of fact and law that the DNR lacked information necessary to consider the net positive or net negative environmental impacts of the project. Meteor Timber specifically provided that information to the DNR, and the Amended Permit, on its face, acknowledges receipt of that information.

With respect to the Amended Permit, Meteor Timber is adversely affected by the Decision's erroneous Finding of Fact that the mitigation plan, which Petitioners' witness Vincent Mosca described as "ambitious and comprehensive," was not "adequate" because it required less than 40 inches of organic material for the mitigation Site and included a hydrology standard based on monitoring required by the Amended Permit.

With respect to the Amended Permit, Meteor Timber is adversely affected by the Decision's finding that the DNR lacks authority to issue amended permits pursuant to Wis. Stat. § 281.36(3)(m)(i).

With respect to the Amended Permit, Meteor Timber is adversely affected by the Decision's numerous Findings of Fact that are contrary to the conditions of the Amended Permit, and the testimony and exhibits set forth in the administrative record.

B. The Decisions Errs as a Matter Of Law in Finding That the Department Lacked Information Necessary to Assess the Net Positive or Net Negative Impacts of the Project on Wetland Functional Values.

The Decision held that permit conditions were outstanding or not addressed by Meteor Timber in both the Original Permit and Amended Permits. Decision, Finding of Fact ("FOF") 18-27 (Tab 1). However, the Decision completely ignored the text of the Amended

Permit itself, which includes additional findings of fact that explicitly state that the conditions of the Original Permit were satisfied by Meteor Timber. As noted below, the Decision ignores numerous Findings of Fact in the Amended Permit that note the date that Meteor Timber satisfied the outstanding conditions related to land specifications, chemical use, open top channels for wildlife, a restoration plan, a reservoir drawdown plan, a wetland delineation, an invasive species plan, and hydrology information. The failure of the Decision to acknowledge specific conditions of the wetland permit that stated that the items identified as outstanding were in fact submitted and deemed satisfied by the DNR is a fundamental error of law. For that reason, the Decision to reverse the permit grant should be overturned.

Specifically, the Decision found that “[a]s to both permits, the DNR specifically admitted that it did not have sufficient information to determine the net positive or negative environmental impact under Wis. Stat. § 281.36(3n)(b)5.” Decision, FOF #18 (Tab 1). In fact, the DNR designated a section in both permits titled and underlined as follows: “Conditions necessary to allow Department consideration of the applicant's proposals respective to ‘net positive or negative environmental impact’ under s. 281.36(3n)(b)5., Wis. Stats.” Decision, FOF #18 (Tab 1). However, the Decision ignores the Amended Permit’s Findings of Fact that found that Meteor Timber had satisfied every requirement within that section. Exh. 240, FOF #46-57 (Tab 4). The following describes each condition as it corresponds to the paragraph number in the Amended Permit in the “Conditions necessary to allow Department consideration of the applicant's proposals respective to ‘net positive or negative environmental impact’ under s. 281.36(3n)(b)5., Wis. Stats” section in turn.

Condition 1: The Decision found: “Both permits were issued without a detailed description of the total number of acres of land to be removed from cranberry beds and the total number of acres of land to be converted to industrial use.” Decision, FOF #19 (Tab 1). The Amended Permit identifies this requirement as being

satisfied: "As required by Condition 1 of the section entitled 'Conditions necessary to allow Department consideration of the applicant's proposals respective to 'net positive or negative environmental impact' under s. 281.36(3n)(b)5., Wis. Stats.' (Environmental Impact Conditions) of this permit, detailed project information has been submitted and accepted by the Department." Exh. 240, FOF #46 (Tab 4).

Condition 2: The Decision found: "Both permits were issued without a detailed description of 'all chemicals and amounts to be eliminated through elimination of existing cranberry operations as well as all chemicals and amounts to be used in establishment and management of any mitigation, restoration or preservation areas and any adjacent areas to the rail, dry plant and access roads proposed.'" Decision, FOF #20 (Tab 1). The Amended Permit identifies this as being satisfied: "As required by Condition 2 of the Environmental Impact Conditions of this permit, detailed information on chemical uses eliminated and proposed has been submitted and accepted by the Department." Exh. 240, FOF #47 (Tab 4).

Condition 3: The ALJ found: "Both permits were issued without justification submitted to the DNR Ecologist 'to support efficacy of the design of the open top channels between railroad ties including but not limited to: the size, number and location of the open top channels' and information that supports 'the use of the proposed design by the range of reptile, amphibian and mammal species expected to exist in the project area.'" Decision, FOF #21 (Tab 1). The Amended Permit identifies this as being satisfied: "As required by Condition 3.(a) of the Environmental Impact Conditions of this permit, a monitoring plan has been submitted and accepted by the Department." Exh. 240, FOF #48 (Tab 4); "The Department has determined that justification provided by the permittee in the Response Summary is sufficient to support the efficacy of the design of the open top channels required under Condition 3.(c) of this permit." Exh. 240, FOF #49 (Tab 4); "As required by Condition 3.(d) of the Environmental Impact Conditions of this permit, a monitoring plan has been submitted and accepted by the Department." Exh. 240, FOF #50 (Tab 4).

Condition 4: The ALJ found: "Both permits were issued without a 'restoration plan for the Old Town Road' that needed to 'include: detailed plans for where the excavated material will be placed, appropriate erosion control and stabilization methods, a seed mix that includes appropriate native, noninvasive species, and a monitoring and management plan for establishment of the native species and long term control of any invasive species.'" Decision,

FOF #22 (Tab 1). The Amended Permit identifies this as being satisfied: "As required by Condition 4.(a) of the Environmental Impact Conditions of this permit, a restoration plan has been submitted and accepted by the Department." Exh. 240, FOF #51 (Tab 4).

Condition 5: The ALJ found: "Both permits were issued without a 'detailed plan for the drawdown of the reservoir areas not part of the compensatory mitigation' and the plan needed to 'include details on: execution of the drawdown, removal of control structures and dikes, description of the target wetland communities, re-vegetation including any seed mix to be used, and a monitoring and management plan for establishment of the target wetland communities and long term control of invasive species.'" Decision, FOF #23 (Tab 1). The Amended Permit further identifies this as being satisfied: "As required by Condition 5.(a) of the Environmental Impact Conditions of this permit, a reservoir drawdown plan has been submitted and accepted by the Department." Exh. 240, FOF #52 (Tab 4).

Condition 6: The ALJ found: "Both permits were issued without a 'habitat mitigation and management plan that must not be in conflict with the wetland compensatory mitigation plan.'" Decision, FOF #24 (Tab 1). The Amended Permit further identifies this as being satisfied: "In a separate regulatory process, the Department has granted the Permittee Incidental Take Permit (ITP) with conditions related to conservation measures to minimize the adverse effect on endangered species. Following the conditions of the ITP would result in compliance with Conditions 6.(a) and (b) of the Environmental Impact Conditions of this permit." Exh. 240, FOF #53 (Tab 4).

Condition 7(a): The ALJ found: "Both permits were issued without 'a wetland delineation of the MTN8268 property' submitted to the 'Department Wetland Management Specialist for approval to accurately document the amount of wetland and upland in the MTN8268 preservation area.'" Decision, FOF #25 (Tab 1). The Amended Permit states: "As required by Condition 7.(a) of the Environmental Impact Conditions of this permit, a wetland delineation of the preservation area of the MTN8268 property has been submitted and accepted by the Department." Exh. 240, FOF #54 (Tab 4).

Condition 7(b): The ALJ found: "Both permits were issued without 'a detailed vegetation survey for the wetland area' in order 'to accurately document the existing condition of the wetland in the MTN8268 area.'" Decision, FOF #26 (Tab 1). The Amended

Permit states: "As required by Condition 7.(b) of the Environmental Impact Conditions of this permit, a vegetation survey of the wetland on the MTN8268 property has been submitted and accepted by the Department. This information can be found in permittee's Response Summary." Exh. 240, FOF #55 (Tab 4).

In addition, the Decision held that both permits were issued without a performance standard for the hydrology plan. Decision, FOF #29 (Tab 1). However, the Amended Permit addresses hydrology several times, stating: "As required by Mitigation Plan Condition 8 and 10 of this permit, the hydrology performance standards in both the preservation mitigation area and the permittee-responsible cranberry bed restoration mitigation area has been satisfactorily addressed. The standards can be found in Section 4.3.1 and Section 14.2 of the Final Plan." Exh. 240, FOF #36 (Tab 4); "As required by Mitigation Plan Condition 9 of this permit, a remedial action plan for hydrology has been submitted and accepted by the Department. This plan can be found in Section 4.3.2 of the Final Plan." Exh. 240, FOF #37 (Tab 4); "As required by Condition 14 of this permit, a plan to maximize groundwater flow-through under the rail spur to maintain hydrology in the wetland has been submitted and accepted by the Department." Exh. 240, FOF #45 (Tab 4).

Finally, in addition to the Decision ignoring a number of Findings of Fact in the Amended Permit, with no explanation for doing so, the Decision also failed to read sections of the Original and Amended Permits in their entirety. The Decision states that "[a]lthough the applicant, Meteor Timber, submitted a mitigation proposal, the DNR concluded that such plan 'may not compensate for the direct loss of 13.37 acres of exceptional quality White Pine — Red Maple Swamp.'" Decision, FOF #12 (Tab 1). However, that section (of both permits) goes on to state that "[i]f the permittee-responsible mitigation project is fully successful as defined by the conditions of this permit and evaluated by the required performance standards in the final,

Department approved wetland compensatory mitigation plan, the mitigation could compensate for the direct wetland loss.” Exh. 239, FOF #14 (Tab 3); Exh. 240, FOF #14 (Tab 4). In addition, the Decision cites to both the Original and Amended Permits to state that the proposed project would result in an irreversible and highly significant loss of wetland. Decision, FOF #14 (Tab 1). However, both permits state that “[t]he proposed project, if constructed in accordance with this permit and all of the conditions of this permit will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences.” Exh. 239, FOF #24 (Tab 3); Exh. 240, FOF #24 (Tab 4).

The Decision held that the Original and Amended Permits were missing critical information that was required by permit conditions. However, the Decision failed to acknowledge that Findings of Fact within the Amended Permit explicitly state that those very conditions had been satisfied by Meteor Timber. Such a blatantly selective reading of the Amended Permit is a clear error of law, and this finding of the Decision should therefore be overturned.

C. The Decision’s Conclusion that the Mitigation Plan is “Inadequate” --Based on a Lack of Hydrology Performance Standards and Insufficient Organic Material--is Not Based on Substantial Evidence and is Erroneous as a Matter of Law.

The Decision holds that “both permits were issued without a performance standard for hydrology for the mitigation plan.” Decision, FOF #29 (Tab 1). This finding is on its face contradicted by Finding of Fact 36 of the Amended Permit. That finding states that “the hydrology performance standards in both the preservation mitigation area and the permittee responsible cranberry bed restoration mitigation area has been satisfactorily addressed. The

standards can be found in Section 4.3.1 and Section 14.2 of the Final Plan.” Exh. 240, FOF #36 (Tab 4); Final Mitigation Plan, Secs. 4.3.1 (Tab 2.1) and 14.2 (Tab 2.2).

Section 14.2.1 of the Final Mitigation Plan indeed does establish a hydrology performance standard, specifically, within 10% variability range of the duration of consecutive days at a water table determined by reference wells on the property, demonstrated for two consecutive growing seasons. Final Mitigation Plan, Sec. 14.2.1 (Tab 2.2). While the Decision asserts that the plan lacks a performance standard for hydrology for the restoration area, that finding is directly contrary to the Amended Permit and the Final Mitigation Plan.

The Decision also states that the Final Mitigation Plan submitted for the project was inadequate because it proposed 10 inches of organic material “for what should have been 40 inches of material.” Decision, FOF #31 (Tab 1). This conclusion misstates Petitioners’ witness Patricia Trochlell’s own testimony. In her pre-filed testimony, Ms. Trochlell testified that she “estimated” 17 inches of organic material was present on the edge of the wetland, and that 40 inches of material would be “typical.” Pre-filed testimony of P. Trochlell, 10:211-216 to 11:217-221 (Tab 5.2). Further, Ms. Trochlell testified that the Wisconsin law and DNR’s wetland mitigation guidelines do not specify the hydrology standards for white pine-red maple swamps. Hearing testimony of P. Trochlell, 3:04:47 to 3:05:26. Ms. Trochlell never testified that 40 inches of organic material was in fact present on the property—she did not take soil borings to make this determination. The only evidence in the record of the depth of organic material is in Section 10.11.1 of the Final Mitigation Plan, which notes that the organic material on the property averaged 28.43 inches. Final Mitigation Plan, Sec. 10.11.1 (Tab 2.3). The Decision further misstates the depth of material to be applied under the plan: as set forth in evidence presented at the hearing, between 9.8 and 12.9 inches of organic material would be applied to the Site. Exh. 337 (Tab 6).

Essentially, the Decision establishes a requirement that in order for a mitigation plan to be “adequate” it must require placement of the same depth of organic matter as the wetland to be filled. This is a significant shift in policy for the wetland mitigation program. As noted in a study issued by the Department, created wetlands have significantly less organic soil carbon than reference wetlands. Exh. 331, p.11 (Tab 7). If an “adequate” mitigation plan requires equivalent organic soils in created wetlands, based on the Department’s own research, very few created wetlands would meet this standard. This would significantly limit options for wetland mitigation throughout the State going forward.

This novel requirement is not expressly authorized by statute or by the Department’s regulations. For that reason, inclusion of this specific requirement in the permit would have violated Wis. Stat. § 227.10(2m), and the Department would have been prohibited by statute from including a condition in a permit requiring an identical depth of organic material to the reference wetland. Depth of organic material is not identified within the list of wetland functional values evaluated by permits under NR 103.03, Wis. Adm. Code—meaning there is no express authority for the Department to include a requirement in a wetland permit related to depth of organic material. Under Wis. Stat. § 227.10(2m), the Department lacks authority to include such a provision in a wetland permit. The Division erred as a matter of law in ruling that the Department was required by law to do something that it is expressly prohibited from doing by Wis. Stat. § 227.10(2m). This holding was outside the jurisdiction of the hearing officer to make, and should not stand on review under Wis. Admin. Code § NR 2.20.

In addition, the Decision cites to Exhibits 21 and 22 to hold that the DNR did not receive adequate hydrologic information from Meteor Timber. Decision, FOF #27-28 (Tab 1). But as addressed in testimony at the hearing, both documents were prepared for different permits issued to this project—not the wetland permit IP-WC-2016-42-00902.

Exhibit 21 (Tab 8) is a memorandum written by Barton Chapman, a DNR employee. The memorandum subject is Meteor Timber – Hydrologic and Hydraulic Analyses, IP-WC-2016-42-01514, 01516 to 01524 and IP-WC-2017-42-00141, which references Stream Realignment Individual Permits. As set forth in the caption on this petition, the contested case hearing was a review of permit IP-WC-2016-42-00902, a wetland individual permit. Permit IP-WC-2016-42-01514, 01516 to 01524 and IP-WC-2017-42-00141 are a Stream Realignment Individual Permits for Rudd Creek, which were not the subject of this contested case hearing. Moreover, the Stream Realignment Individual Permits were not challenged by any party. Exhibit 22 (Tab 9) is email correspondence between David Simons, a witness for Meteor Timber, and Pamela Biersach, a DNR employee, that also relates to the stream realignment permit alone.

After Clean Wisconsin entered Exhibits 21 and 22 into evidence, counsel for DNR asked Mr. Simons if the permit referenced in Exhibit 21 and 22 was part of the contested case hearing. Hearing testimony of D. Simons, 1:28:05 to 1:29:50. Mr. Simons answered that the permits referenced in Exhibit 21 and 22 related to permits that were separate and apart from the wetland individual permit at issue in the contested case hearing. Hearing testimony of D. Simons, [to].

That the Decision not only relies on evidence that is not relevant to the case, but ignores testimony from both Meteor Timber and the DNR that directly refutes the application of the evidence, is a fundamental error of fact. Neither Pamela Biersach nor Barton Chapman, the authors of Exhibits 21 and 22, testified at the hearing. The only testimony at the hearing regarding these documents was that they related to different permits, and not to the wetland permits at issue in this proceeding. The Decision's citation to Exhibits 21 and 22 as a basis for

findings of fact on the wetland permit amounts to an error of law. For that reason, the holding that Meteor Timber did not provide sufficient information on hydrology should be overturned.

D. The Division's Finding that the Department Cannot Issue Amended Wetland Permits is Contrary to Statute and Longstanding Department Practice

Wis. Stat. §§ 281.36(3m) and (3n) provide the requirements for DNR issuance and review of permit applications for wetland individual permits. The Amended Permit was reviewed and issued by the DNR pursuant to each of the requirements found in Wis. Stats. §§ 281.36(3m) and (3n), including the requirements to provided public notice and opportunity to comment. To state that in this instance the DNR did not have the authority to issue an amended permit, would be akin to stating that the DNR does not have authority to issue permits at all. Such a holding could not have been intended, and would obviously have far-reaching effects on wetland permitting in Wisconsin.

Additionally, Wis. Stat. § 281.36(3q)(b)(1) specifically allows for the administrative and judicial review of "the issuance, denial, or *modification* of any wetland individual permit issued under this section" (emphasis added). The legislature would not have provided authority to review modified wetland permits if the legislature had not authorized DNR to issue modified wetland permits. The term "modify" is synonymous with "amend", and Wis. Stat. ch. 281 does not define "modification." Miriam-Wester Dictionary online (<https://www.merriam-webster.com/dictionary/amend>); Oxford English Dictionary online (<https://en.oxforddictionaries.com/definition/amend>). In fact, the DNR has amended, *i.e.* modified, numerous permits since 2012. To allow the Decision to stand would mean that all of those permits are similarly invalid.

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IV. RELIEF REQUESTED

For all of the reasons articulated above, Meteor Timber requests that the Secretary review and immediately suspend the Division's Decision in this matter, and:

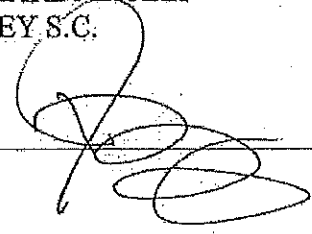
- (a) find that the record, as demonstrated by the Amended Permit included the information required by the Division to determine the net environmental benefits of the mitigation plan;
- (b) determine that the Final Mitigation Plan was "adequate" under Wis. Admin. Code § NR 350.08;
- (c) reverse the decision that the Department lacks authority to amend wetland permits under the process utilized in this case, which was the full process for public notice and comment for a new permit;
- (d) make findings regarding the two issues raised in DNR-17-0014 for which evidence was presented at the hearing but with the Decision fails to address; and
- (e) reverse the finding that the DNR improperly granted the permit because the mitigation plan was inadequate under Wis. Stat. § 281.36(3n)(d).

Meteor Timber further requests that the Secretary exercise his authority pursuant to Wis. Admin. Code § NR 2.20(5) to immediately, and in writing, suspend the effective date of the decision.

Dated this 10th day of May, 2018.

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