

CLEAN WATER ACTION COUNCIL OF NORTHEAST WISCONSIN

P.O. Box 9144  
Green Bay, WI 54308;

FRIENDS OF THE CENTRAL SANDS

P.O. Box 56  
Coloma, WI 54930;

MILWAUKEE RIVERKEEPER  
1845 N Farwell Avenue, Suite 100  
Milwaukee, WI 53202; and

WISCONSIN WILDLIFE FEDERATION

213 N Main Street  
P.O. Box 460  
Poynette, WI 53955

Petitioners,

v.

WISCONSIN DEPARTMENT OF NATURAL  
RESOURCES,

101 South Webster Street  
P.O. Box 7921  
Madison, WI 53707-7921;

DANIEL MEYER, in his official capacity as  
Secretary of the Wisconsin Department of  
Natural Resources,

101 South Webster Street  
P.O. Box 7921  
Madison, WI 53707-7921; 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,

101 South Webster Street  
P.O. Box 7921  
Madison, WI 53707-7921

Respondents.

Case No. \_\_\_\_\_

Case Codes:

30607(Admin. Agency Review)

30701(Declaratory Judgment)

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## SUMMONS

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THE STATE OF WISCONSIN to each person named above as a Respondent:

You are hereby notified that the Petitioners named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in Wis. Stat. ch. 802., to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the Statutes. The answer must be sent or delivered to the Court, whose address is 901 North 9th Street, Milwaukee, WI 53233 and to the Petitioners' attorneys, Sarah Geers and Tressie Kamp, Midwest Environmental Advocates, whose address is 612 West Main Street, Suite 302, Madison, Wisconsin 53703. You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 17th day of November, 2017.

Midwest Environmental Advocates

Electronically signed by Sarah Geers

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## PETITION FOR JUDICIAL REVIEW AND DECLARATORY JUDGMENT

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### INTRODUCTION

1. Clean Water Action Council, Friends of the Central Sands, Milwaukee Riverkeeper, and Wisconsin Wildlife Federation (collectively, “Petitioners”) bring this Petition for Judicial Review and Declaratory Judgment to defend the Wisconsin Department of Natural Resources’ (“DNR”) authority to protect public health and the environment via issuance of water pollution permits and proper enforcement of water pollution laws and regulations.

2. Petitioners also bring this action to enforce state law that requires administrative agencies such as DNR to follow the rulemaking process in Chapter 227, Wis. Stats., when making policy statements of general application that have the effect of law. Administrative rulemaking procedures allow citizens and citizen groups such as Petitioners to submit public comment and otherwise meaningfully participate in said process. Wisconsin law does not permit agencies to change policy through private contracts or settlement agreements with regulated entities and without public involvement or government oversight.

3. Finally, Petitioners bring this action to defend the science-based interpretations of law outlined in DNR’s “Feed Storage Area Runoff Controls for CAFOs” guidance and Calf Hutch Lots memo.

4. Petitioners respectfully request that this Court reverse DNR’s decision to enter into an illegal settlement agreement with the Dairy Business Association (“DBA”) and reverse DNR’s decision to rescind for all purposes the above-referenced guidance. Further, Petitioners ask this Court to declare that DNR lacks authority to enter into contracts or settlement

agreements with private entities that make policy changes of general application, which purport to have the effect of law.

### **PETITIONERS**

5. Clean Water Action Council (“CWAC”) members suffer the effects of concentrated animal feeding operation (“CAFO”) pollution in northeast Wisconsin, and for years have advocated for more stringent environmental protections. These advocacy efforts include tracking and commenting on CAFO water pollution permits, conducting water quality monitoring, and educating the public about the impacts of such pollution. Wallander Aff. CWAC and its members also participate in advocacy efforts to improve state and federal agency regulation of CAFOs by participating in workgroups and petitioning agencies to address water quality problems. Wallander Aff.

6. Friends of the Central Sands (“FOCS”) is dedicated to promoting a healthy Central Sands landscape and has focused much of its effort on water quality and quantity issues in the Central Sands. FOCS members use and enjoy the ground and surface water resources that are uniquely susceptible to contamination due to the sandy, porous soil in the Central Sands area of Wisconsin. Clarke Aff. Robert Clarke, director of FOCS, owns property on Pleasant Lake, which he reasonably believes may be affected by nearby CAFOs. Clarke Aff., ¶¶ 5, 9.

7. Milwaukee Riverkeeper members are dedicated to improving water quality in the Milwaukee River Basin, which is directly threatened by CAFOs in the basin. Impaired waters in the basin have led to significant efforts on the part of Milwaukee Riverkeeper members to improve water quality. These efforts are effective only with recognition of and action to address the contribution of CAFO pollution to water degradation. Nenn Aff.

8. Wisconsin Wildlife Federation (“WWF”) has members throughout the state who invest significant time and resources to protect water resources and wildlife habitat, and advocate for water protections. WWF members advocate for legislation, make financial contributions, and otherwise act to protect Wisconsin’s waters from CAFO pollution and other pollution sources. Meyer Aff.

9. For the above reasons, Petitioners all have members with substantial interest in safe ground and surface water where they reside, work and recreate. To protect these interests, Petitioners moved to intervene in the declaratory judgment action initiated by the DBA against the DNR. Clarke Aff., ¶ 12; Nenn Aff., ¶ 11; Meyer Aff., ¶ 9; Wallander Aff., ¶ 9. The settlement agreement between DBA and DNR that resolved the declaratory judgment action impairs the interests of Petitioners and their members.

## **RESPONDENTS**

10. Respondent DNR is an agency of the State of Wisconsin, located at 101 South Webster Street in Madison, Wisconsin 53703. The Wisconsin Legislature charged DNR with implementing the water discharge permitting program in Chapter 283, Wisconsin Statutes, and the DNR has authority to issue pollution discharge permits under said statutes.

11. Respondent Daniel Meyer is sued in his official capacity as the Secretary of the DNR. The DNR Secretary is the highest-ranking Department official, with oversight of the statutes, administrative codes and policies referenced herein.

12. Respondent Mark Aquino is sued in his official capacity as the DNR’s Director of the Office of Business Support and Science. This high-ranking position reports to the DNR Secretary and as such also has oversight of the statutes, administrative codes and policies referenced herein.

## **JURISDICTION AND VENUE**

13. This Court has jurisdiction to hear this matter pursuant to Wis. Stat. § 227.40, which states in part that “the exclusive means of judicial review of the validity of a rule shall be an action for declaratory judgment as to the validity of the rule brought in the circuit court for the county where the party asserting the invalidity of the rule resides or has its principal place of business . . . A declaratory judgment may be rendered whether or not the plaintiff has first requested the agency to pass upon the validity of the rule in question.”

14. The Settlement Agreement at issue in this case is a final agency decision reviewable pursuant to Wis. Stat. § 227.52. When the validity of a rule is material to a proceeding for judicial review of an administrative decision, a court may rule upon the validity of such rule within that proceeding. Wis. Stat. § 227.40(2)(e).

15. Venue is appropriate in this Court pursuant to Wis. Stat. §§ 227.40 and 227.52 because Milwaukee Riverkeeper, one of the Petitioners to this matter, has its principal place of business in Milwaukee County.

## **LEGAL AND FACTUAL BACKGROUND**

### **The Clean Water Act and Wisconsin Pollutant Discharge Elimination System Program**

16. The Wisconsin Legislature charged DNR with implementing the water discharge permitting program in Chapter 283, Wisconsin Statutes. The Legislature also delegated to DNR the authority to promulgate regulations consistent with the statutory framework, e.g., Wis. Admin. Code ch. NR 243 regulating water discharges from CAFOs. These water pollution statutes and rules, once approved by the U.S. Environmental Protection Agency (“U.S. EPA”), make up the Wisconsin Pollution Discharge Elimination System (“WPDES”) program. DNR

issues water discharge permits consistent with the WPDES program statutes and rules, and the minimum requirements in the federal Clean Water Act.

17. The federal Clean Water Act authorizes states with U.S. EPA-approved water discharge permitting programs to issue federally-enforceable Clean Water Act permits. 33 U.S.C. § 1342. In Wisconsin, DNR obtained EPA approval to operate the WPDES program as a federally-delegated Clean Water Act permitting program. In order for Wisconsin to maintain its state-run Clean Water Act permitting program, DNR must issue permits and implement the WPDES permits in compliance with the federal Clean Water Act and regulations promulgated thereunder. 33 U.S.C. § 1251 et seq., 40 C.F.R. part 122.

**DNR Feed Storage Area Runoff and Calf Hutch Area Guidance for CAFOs**

18. In 2016, DNR released a draft guidance document, Feed Storage Area Runoff Controls for CAFOs, attached hereto as Exhibit A. DNR indicated that the guidance was developed in response to U.S. EPA communications, in which U.S. EPA explained that “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 Limitation Guideline for Concentrated Animal Feeding Operations.” (Exh. A at 2.)

19. In a March 4, 2016, letter to DNR, U.S. EPA Region 5 explained its concerns regarding VTAs associated with feed storage area runoff at CAFOs. U.S. EPA stated:

During compliance evaluation inspections at Wisconsin CAFOs, Region 5 has documented discharge of manure, litter, and process wastewater pollutants from VTAs to waters of the United States. These discharges are not compliant with the federal ELG or Wisconsin Administrative Code nor are such discharges authorized by the Wisconsin Pollutant Discharge Elimination System (WPDES) CAFO permits.

(Exh. B.)

20. The “Feed Storage Area Runoff Controls for CAFOs” guidance explained that CAFO projects under review by DNR would be required to meet the “no discharge” standard at the time of permit issuance or reissuance as required by state and federal law. (Exh. A.) CAFOs that were already operating with VTAs and a WPDES permit were given time to evaluate their options until permit reissuance at which time the CAFO had to provide interim measures until the CAFO could put in place a long-term solution. (Exh. A.)

21. On March 9, 2016, DNR issued a memo with the subject Calf Hutch Lots. The Calf Hutch memo summarized evidence of surface water and groundwater contamination from CAFOs with calf hutch areas, which was based, in part, on findings from U.S. EPA site visits and runoff sampling. (Exh. C.) DNR explained that calf hutch lots are part of the CAFO production area, as defined in Wis. Admin. Code § NR 243.03(54), and subject to the “no discharge” standard under current federal and state law. (Exh. C.) The Calf Hutch memo further explained that WPDES permitted CAFOs or permit applicants with calf hutch areas must be able to demonstrate that this part of the production area complies with surface water and groundwater quality standards and federal and state “no discharge” limits. (Exh. C.)

#### **Dairy Business Association lawsuit against DNR**

22. The DBA filed a declaratory judgment action against the DNR on July 31, 2017, and filed an amended summons and complaint on September 8, 2017, adding as defendants Kurt Thiede and Mark Aquino in their official capacities at DNR.

23. DBA alleged that DNR lacked the authority to require all CAFOs to apply for a water discharge permit unless a CAFO proposes to discharge or actually discharges pollutants to navigable waters. (Exh. D, Count I.)

24. DBA further alleged that two DNR guidance documents were invalid on the basis that those policies were in fact rules that were not promulgated in accordance with rulemaking procedures. (Exh. D, Counts II and III.)

25. On October 2, 2017, Petitioners moved to intervene in the declaratory judgment action initiated by DBA. Clarke Aff.; Wallander Aff.; Nenn Aff.; Meyer Aff.

26. On October 18, 2017, two days before DNR's deadline to answer DBA's amended summons and complaint, DBA filed a Notice of Voluntary Dismissal with the Brown County Circuit Court. (Exh. E.) On or about October 19, 2017, Petitioners learned that the DBA lawsuit had been dismissed.

#### **DBA-DNR Settlement Agreement**

27. On or about October 19, 2017, DBA and DNR entered into an out-of-court Settlement Agreement in which the parties agreed that DBA would voluntarily dismiss its declaratory judgment action in exchange for a commitment by DNR to modify certain policies regarding DNR's regulation of CAFOs. (Exh. F.)<sup>1</sup>

28. In the Settlement Agreement, DNR agreed to withdraw its guidance document, "Feed Storage Area Runoff Controls for CAFOs," which described how feed runoff controls could be designed and operated to meet regulatory requirements. (Exh. F, ¶ 4.c.ii.)

29. DNR further agreed "that VTAs, when designed and constructed in compliance with [NRCS] Standard 635 (January 2002) and Wis. Admin. Code § NR 243.15 as part of permanent runoff control systems constitute valid and lawful runoff control systems consistent with accepted management practices, and discharges to navigable waters from production areas

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<sup>1</sup> The Settlement Agreement is not dated, but the electronic file obtained from the Wheeler Report refers to October 19, which is the date on which Petitioners obtained the document, *available at* [http://www.thewheelerreport.com/wheeler\\_docs/files/1019dbaagreement.pdf](http://www.thewheelerreport.com/wheeler_docs/files/1019dbaagreement.pdf).

at CAFOs with such control systems may be permitted under the [WPDES] permit program.” (Exh. F, ¶ 4.c.iii.)

30. More broadly, DNR also agreed, “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.” (Exh. F, ¶ 4.c.iii.)

31. On information and belief, DNR has not submitted the Settlement Agreement to the Natural Resources Board for its review and approval, nor has DNR complied with other rulemaking procedures pursuant to Chapter 227.

32. On November 16, 2017, DNR notified all CAFO WPDES permittees that it has formally withdrawn the “Feed Storage Area Runoff Controls for CAFOs” guidance and “has also formally rescinded any past statement that calf hutch lots are included within the definition of ‘reviewable facilities or systems’ under s. NR 143.03(56).” (Exh. G.)

### **Agency Rulemaking Requirements**

33. DNR’s authority to promulgate rules is limited by the rulemaking procedures in Chapter 227 and the bounds of authority that the Wisconsin Legislature delegates to DNR. *State ex rel. Castaneda v. Welch*, 2007 WI 103, ¶ 26, 303 Wis. 2d 570, 735 N.W.2d 131. The rulemaking process requires DNR to prepare a statement of scope, to obtain approval from the Governor and the Natural Resources Board, to prepare an economic impact analysis, and to hold a public hearing and allow for public comment, among other requirements. Wis. Stat. § 227.10 *et seq.*

34. Pursuant to Wis. Stat. § 227.10, an agency statement of general policy that meets the definition of a rule must be promulgated in accordance with statutory rulemaking procedures.

*Cholvin v. Wis. Dep't of Health and Family Servs.*, 2008 WI App 127, ¶ 21, 313 Wis. 2d 749, 758 N.W.2d 118. A court shall invalidate any agency rule that was not promulgated in compliance with the rulemaking procedures in Chapter 227. Wis. Stat. § 227.40(4)(a).

**COUNT 1 – SETTLEMENT AGREEMENT CONSTITUTES UNLAWFUL RULE**

35. A state agency must “promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.” Wis. Stat. § 227.10(1).

36. The Settlement Agreement meets the definition of a rule because it is “(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*, 313 Wis. 2d 749, ¶ 22 (quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)); Wis. Stat. § 227.01(13).

37. “[T]o be of general application, a rule need not apply to all persons within the state. 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.” *Citizens for Sensible Zoning, Inc.*, 90 Wis. 2d at 814-15.

38. The Settlement Agreement amounts to a statement of policy or general order and contains policies “of general application” because it purports to bind DNR to a legal interpretation that applies to any CAFO that applies for and obtains a WPDES permit. *See Cholvin*, 313 Wis. 2d 749, ¶¶ 23-25.

39. The Settlement Agreement “has the effect of law” because “the interest of individuals in a class can be legally affected through enforcement of the agency action.” *Cholvin*, 313 Wis. 2d 749, ¶ 26. The Settlement Agreement terms prohibit DNR from presuming the

presence or future occurrence of a CAFO production area discharge, which any CAFO in the state could rely on to oppose DNR enforcement action or proposed permit terms or conditions. Conversely, if a resident or U.S. EPA raised concerns about discharges from calf hutches or VTAs used to treat feed runoff, DNR ability to address these concerns would be limited by the terms of the Settlement Agreement.

40. For example, DNR's ability to address feed storage area runoff is limited by the Settlement Agreement term providing that VTAs designed in accordance with NRCS Standard 635 (January 2002) and § NR 243.15 "constitute valid and lawful runoff control systems consistent with accepted management practices, and discharges to navigable waters from production areas at CAFOs with such control systems may be permitted under [WPDES] permit program." (Exh. F, ¶ 4.c.iii.) Similarly, the Settlement Agreement requires DNR to rescind the Calf Hutch memo and DNR's determination that calf hutch lots are "reviewable facilities or systems," which impairs DNR's ability to require CAFOs to design their facilities to comply with the state and federal "no discharge" standard, and surface water and groundwater quality standards. These terms of the Settlement Agreement limit DNR authority to regulate potential CAFO discharges from the production area, and DNR's ability to require CAFOs to modify feed storage runoff control systems or calf hutch areas.

41. DNR is already consistently applying the policy per the Settlement Agreement in draft CAFO WPDES permits. Several days after DNR entered into the Settlement Agreement, it posted public notice of intent to issue or reissue five (5) WPDES permits to CAFOs in Kewaunee County, WI. Wallander Aff., ¶ 10. At least four (4) of these CAFOs are permitted to use vegetated treatment areas for feed storage runoff and at least two (2) are allowed to maintain calf

hutch areas without submitting plans and specifications that demonstrate these areas meet the “no discharge” standard. Wallander Aff., ¶ 10.

42. Additionally, DNR made clear its intent to apply this policy uniformly across an entire class when DNR sent notice to all CAFO WPDES permittees of DNR’s plan to implement the Settlement Agreement terms by rescinding prior legal interpretations and following the Settlement Agreement terms when issuing and enforcing permits. (Exh. G.)

43. Further, the Settlement Agreement has the effect of law because it authorizes DBA to enforce its terms, as DBA interprets those terms, by taking legal action against DNR.

**COUNT 2 – SETTLEMENT AGREEMENT IS INVALID BECAUSE IT CONFLICTS WITH THE LAW AND DNR FACTUAL FINDINGS**

44. This court must invalidate the terms of this Settlement Agreement that purport to require DNR to implement an unlawful interpretation of existing statutes and rules. Wis. Stat. § 227.57. DNR may not issue rules, decisions or orders that conflict with the law. Wis. Stat. §§ 227.10, 227.11(2)(a), 227.57. These Settlement Agreement terms are outside the range of discretion delegated to DNR by law, and are inconsistent with an officially stated agency policy or prior agency practice. Wis. Stat. § 227.57(5), (8).

45. DNR provided guidance to the regulated community regarding compliance with state and federal law through DNR’s “Feed Storage Area Runoff Controls for CAFOs” guidance and Calf Hutch memo. These documents did not modify any existing law, but provided options to CAFOs for compliance with federal and state law. In contrast, the Settlement Agreement requires DNR to reject the legal interpretations outlined in the Calf Hutch memo and Feed Storage Area guidance, and binds DNR to a legal interpretation that conflicts with existing statutes and rules.

46. The “Feed Storage Area Runoff Controls for CAFOs” guidance explained that DNR had been permitting CAFOs to operate with VTAs that did not reliably ensure compliance with the state and federal “no discharge” limit. (Exh. A at 2.) The rationale in this guidance explains that DNR’s prior practice of authorizing VTAs to treat feed storage area runoff did not comply with the law. The guidance provided a non-exhaustive list of options that a CAFO could employ to meet the state and federal “no discharge” limit. (Exh. A at 3.) DNR’s “Feed Storage Area Runoff Controls for CAFOs” guidance is consistent with DNR’s obligation to issue a WPDES permit only if DNR is satisfied that the facility’s discharges will comply with effluent limitations, groundwater protection standards, and any more stringent limitations necessary to comply with any applicable federal law or regulation. Wis. Stat. § 283.31(3); *see also* Wis. Admin. Code § NR 243.13(1).

47. The Settlement Agreement requires DNR to rescind its “Feed Storage Area Runoff Controls for CAFOs” guidance, including the summarized findings of U.S. EPA inspections and field operations that demonstrated VTAs designed in accordance with NRCS 635 do not reliably ensure “zero discharge” of pollutants to navigable waters. (Exh. A at 2.) In conflict with this evidence and U.S. EPA’s interpretation of the federal Clean Water Act, the Settlement Agreement provides that VTAs designed in compliance with the outdated NRCS Standard 635 “constitute valid and lawful runoff control systems” and that “discharges to navigable waters from production areas at CAFOs with such control systems may be permitted under the [WPDES] permit program.” (Exh. F, ¶ 4.c.iii.) This directly conflicts with the federal and state “no discharge” limit, which does not authorize discharges from such runoff control systems under any circumstance. *See* Wis. Admin. Code § NR 243.15(2), Note (“In accordance with s. NR 243.13(2), operations are not allowed to discharge pollutants to navigable waters

under any circumstance or storm event from parts of the production area where manure or process wastewater is not properly stored or contained by a structure. Wastewater treatment strips, grassed waterways or buffers are examples of facilities or systems that by themselves do not constitute a structure.”).

48. DNR’s Calf Hutch memo summarized evidence from U.S. EPA that calf hutch areas produce process wastewater, which can pollute surface water and groundwater. (Exh. C.) It did not present a new or different DNR policy or change DNR’s interpretation of existing law. The memo explained that under existing regulations, calf hutch areas are part of the “production area” at a CAFO, as that term is defined in Wis. Admin. Code § NR 243.03(54). The Calf Hutch memo summarized existing law along with evidence demonstrating the risk that calf hutch areas pose to water quality and public health.

49. The Settlement Agreement prohibits DNR from including calf hutch lots in the definition of “reviewable facility or system,” as that is defined in Wis. Admin. Code § NR 243.03(56). (Exh. F, ¶ 4.d.) This Settlement Agreement term is in direct conflict with the plain language definition of a CAFO production area, which includes “runoff control structures, feed and other raw materials storage, permanent spray irrigation or other land application systems, groundwater monitoring systems, 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).

50. The Settlement Agreement also purports to overrule findings regarding surface water and groundwater pollution concerns that summarize DNR and U.S. EPA evidence and experience with calf hutch lots. If the Settlement Agreement prohibits DNR from relying on those findings when issuing WPDES permits, then these Settlement Agreement terms conflict

with DNR's duty to issue permits only if those permits contain conditions "necessary to achieve compliance with surface water and groundwater quality standards." Wis. Admin. Code § NR 243.13(1), Wis. Stat. § 283.31(3), (4).

**COUNT 3 – DNR LACKS AUTHORITY TO ENTER POLICY-MAKING SETTLEMENT AGREEMENT**

51. The Legislature provides in no uncertain terms that all agency policy statements of general application must be promulgated by rule. This requirement applies even if the policy in question evolves from an individual case in which the agency participated. *See* Wis. Stat. § 227.11(2)(c).

52. Administrative agency authority is defined by statute and is limited to that authority expressly granted or necessarily implied. *Froebel v. Wis. Dep't of Natural Res.*, 217 Wis. 2d 652, 663, 579 N.W.2d 774 (Ct. App. 1998). Any doubt about the existence of an agency's implied authority should be resolved against the exercise of such authority. *Id.* at 663-64.

53. There is no express or implied grant of authority in Chapter 227 or DNR's enabling statutes granting DNR power to make policy changes of general application by contract or settlement agreement. In fact, the plain language of Wis. Stat. §§ 227.10 and 227.11 explicitly denies the existence of such authority.

**WHEREFORE**, Petitioners respectfully requests that this Court:

- A. Invalidate paragraphs 4.c.ii, 4.c.iii, and 4.d of the Settlement Agreement, Exh. F, on the basis that these provisions constitute agency rules that were not promulgated in accordance with the Chapter 227, Wis. Stat., rulemaking procedures;

- B. Invalidate paragraphs 4.c.ii, 4.c.iii, and 4.d of the Settlement Agreement, Exh. F, on the basis that these provisions conflict with existing statutes and rules;
- C. Reverse DNR's decision dated November 16, 2017, Exh. G., that implements DNR's purported obligations under the challenged terms of the Settlement Agreement; and
- D. Declare that DNR lacks authority to enter into contract with a private entity, including via a settlement agreement, if such contract or agreement includes terms that represent a statement of agency policy of general application that applies to a class that is broader than the parties to the contract or settlement agreement.

Dated this 17th day of November, 2017.

Electronically Signed by Sarah Geers

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