

THE HO-CHUNK NATION
P.O. Box 667
Black River Falls, WI 54615

Petitioner,

Case No. _____

Case Code: 30607

Administrative Agency Review

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES
101 S. Webster St.
Madison, WI 53703

Respondent.

PETITION FOR JUDICIAL REVIEW

The Ho-Chunk Nation (“Petitioner”), by its attorneys Sarah Geers and Tressie Kamp, Midwest Environmental Advocates, petition this Court, pursuant to Wis. Stat. §§ 281.36(3q)(h)1 and 227.52, for review of the decision of the Wisconsin Department of Natural Resources (“DNR”) to issue a Wetland Individual Permit No. IP-WC-2016-42-00902 to Chris Mathis, Meteor Timber LLC (“Meteor Timber Permit”), attached hereto as Exhibit A. For the reasons provided below, Petitioner asserts that DNR’s issuance of the Meteor Timber Permit violates Wis. Stat. ch. 281 and Wis. Admin. Code ch. NR 103.

PETITIONER

1. The Ho-Chunk Nation is a sovereign tribal nation that is not located on any single contiguous land base, such as a reservation, but has significant tribal and trust land throughout Wisconsin. There are many Ho-Chunk members throughout the state, and their history and culture is tied to Wisconsin. Ho-Chunk members and lands are in Adams, Clark, Crawford,

Dane, Eau Claire, Jackson, Juneau, La Crosse, Marathon, Monroe, Sauk, Shawano, Vernon & Wood counties.

2. Before the Nation was forced to sell its lands in the early 1800s, the Ho-Chunk territory extended from Green Bay, beyond Lake Winnebago, to the Wisconsin River further west and to the south to the Rock River in Illinois. When the Ho-Chunk people returned to their land in Wisconsin, they practiced a seasonal, itinerant economy based on hunting, farming, fishing, and gathering.

3. The Meteor Timber Permit authorizes a discharge to wetlands in Monroe County, adjacent to the southern border of Jackson County. This project area is about 5-15 miles from the Sand Pillow Village community to the east of Black River Falls, the Blackdeer Homestead of Ho-Chunk Nation members, and the Blue Wing Community in Tomah. Ho-Chunk members live not only in these communities, but throughout this area.

4. The Nation's government is dedicated to protecting its people and its lands for this and future generations. The expansive and permanent destruction of the landscape, including wetlands, for industrial sand mines threatens the Nation's people, land, and cultural heritage. Central to the Ho-Chunk culture and religion is the belief that all parts of nature including air, water, and wildlife have rights. The Ho-Chunk Nation amended its constitution to establish the rights of nature, "Ecosystems and natural communities within the Ho-Chunk territory possess an inherent, fundamental, and inalienable right to exist and thrive." The Ho-Chunk Nation's territory includes all lands held by the Nation or its people, or by the U.S. for the benefit of the Nation or its people, "including but not limited to air, water surface, subsurface, natural resources and any interest therein." The Ho-Chunk Nation Constitution, Art. I, sec. 1.

RESPONDENT

5. Respondent DNR is an agency of the State of Wisconsin, which is located at 101 South Webster Street in Madison, Wisconsin 53703. The DNR has been delegated the authority to issue wetland permits pursuant to Wis. Stat. § 281.36.

JURISDICTION AND VENUE

6. The DNR decision at issue is an administrative decision that is reviewable under Wis. Stat. §§ 227.52 and 281.36.

7. Venue is proper in this Court pursuant to Wis. Stat. §§ 227.53(1)(a)3 because Petitioner is a sovereign tribal government within Wisconsin. The property affected by the decision is located in Monroe County, Wisconsin.

8. This Petition is timely filed pursuant to Wis. Stat. §§ 227.53(1)(a)2m and 281.36(3q).

BACKGROUND

9. DNR has authority to issue wetland permits for discharges into wetlands in Wisconsin pursuant to Wis. Stat. § 281.36.

10. Unless a wetland discharge is exempt or covered by a general permit, any person proposing to discharge fill material into wetlands in Wisconsin must apply to DNR for a wetland individual permit. Wis. Stat. § 281.36(3m)(a).

11. An application for a wetland individual permit must include an analysis of practicable alternatives that will avoid or minimize adverse impacts to wetland functional values and that will not result in any other significant adverse environmental consequences. *See* Wis. Stat. § 281.36(3m)(b).

12. An applicant for a wetland individual permit must propose a compensatory mitigation plan that will replace the wetland functional values impacted by the proposed project, but a mitigation plan does not entitle the applicant to a wetland individual permit or any other approval in exchange for conducting mitigation. *See Wis. Stat. § 281.36(3n)(d).*

13. “[D]uring the period between the date on which the application . . . is submitted and the date on which a decision [on the permit] is rendered,” DNR must review the applicant’s analysis of practicable alternatives. *See Wis. Stat. § 281.36(3n)(a).*

14. This alternatives review shall be limited to those practicable alternatives that are at the site of the discharge or located adjacent to that site if the applicant demonstrates that the proposed project will result in a “demonstrable economic public benefit.” *Wis. Stat. § 281.36(3n)(a)1.a.*

15. In the practicable alternatives review, DNR must consider the direct, cumulative, and secondary impacts of the proposed project to wetland functional values, as well as the impact of the applicant’s mitigation plan on wetland functional values, and the net positive or negative environmental impact of the proposed project. *See Wis. Stat. § 281.36(3n)(b).*

16. In the practicable alternatives review, DNR must impose a level of scrutiny and demand an amount of information from the applicant commensurate with the severity of the environmental impact of the project, as determined by DNR. *See Wis. Stat. § 281.36(3n)(a)3.*

17. Prior to issuing a wetland individual permit, DNR must make the following findings, pursuant to *Wis. Stat. § 281.36(3n)(c)*:

- a. “The proposed project represents the least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid wetland impacts.”

- b. “All practicable measures to minimize the adverse impacts to wetland functional values will be taken.”
 - c. “The proposed project 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.”
18. To protect all present and prospective future uses of wetlands, DNR must consider the following factors in making determinations concerning permit review and approval:
- (a) Wetland dependency of the proposal;
 - (b) Practicable alternatives to the proposal which will avoid and minimize adverse impacts to wetlands and will not result in other significant adverse environmental consequences;
 - (c) Impacts which may result from the activity on the maintenance, protection, restoration or enhancement of standards under s. NR 103.03;
 - (d) Cumulative impacts attributable to the proposed activity which may occur, based upon past or reasonably anticipated impacts on wetland functional values of similar activities in the affected area;
 - (e) Potential secondary impacts on wetland functional values from the proposed activity; and
 - (f) Any potential adverse impacts to wetlands in areas of special natural resource interest as listed in s. NR 103.04.
 - (g) Any potential adverse impact to wetlands in environmentally sensitive areas and environmental corridors identified in areawide water quality management plans.

Wis. Admin. Code § NR 103.08(3).

19. The Meteor Timber Permit authorizes a discharge to wetlands in an Area of Special Natural Resource Interest (“ANSRI”) because those wetlands provide habitat for threatened and endangered species. Exh. A, Findings of Fact 10.b; Wis. Admin. Code § NR 103.04(6).

20. DNR issued Wetland Individual Permit No. IP-WC-2016-42-00902 to Meteor Timber on May 19, 2017, that authorizes Meteor Timber to discharge fill into 16.25 acres of wetlands. Exh. A.

STANDARD OF REVIEW

21. This Court reviews DNR decisions based on the record before DNR, except in cases of alleged irregularities in procedure before the agency. Wis. Stat. § 227.57(1).

22. DNR's expertise, technical competence, specialized knowledge, and discretionary authority are entitled to due weight when its decisions are subject to judicial review. Wis. Stat. § 227.57(10).

23. This Court will remand this matter to DNR if it finds that either "the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure." Wis. Stat. § 227.57(4).

24. The Court must set aside DNR's action if it depends on any finding of fact that is not supported by substantial evidence in the record. Wis. Stat. § 227.57(6).

25. The Court must set aside or modify DNR's action if DNR erroneously interpreted a provision of law and a correct interpretation compels a particular action. Wis. Stat. § 227.57(5).

ISSUES FOR REVIEW

26. The Petitioner challenges DNR's issuance of the Meteor Timber Permit on the basis that it violates the law, including but not limited to Wis. Stat. §§ 281.36(3m)(b), (3m)(i), (3m)(j), (3n)(a), (3n)(a)1., (3n)(b), (3n)(c), and (3n)(d). The Meteor Timber Permit is premised on an erroneous interpretation of law, contains findings of fact that are not supported by substantial evidence in the record, is based on facts that compel denial of the permit, and DNR's issuance of the permit is outside the range of discretion delegated to the agency by law. Wis. Stat. § 227.57(5)-(8).

Issue 1: DNR issued the Meteor Timber Permit in violation of Wis. Stat. §§ 1.11, 281.36(3m), (3n)(b), (3p), and Wis. Admin. Code § NR 103.03(1), 103.08(3) because DNR did not complete the statutorily required review prior to permit issuance.

1. Petitioners reallege and incorporate herein each preceding paragraph of the petition.

2. DNR did not have sufficient information to consider the Wis. Stat. § 281.36(3n)(b) factors in its analysis of the impacts to wetland functional values as a result of the proposed discharge. *See also* Wis. Admin. Code §§ NR 103.03(1), 103.08(3). Specifically, DNR did not have sufficient information to analyze the impact on functional values from the required compensatory mitigation, and the net positive and negative environmental impact of the proposed discharge. Wis. Stat. 281.36(3n)(b)4-5.

3. Wisconsin Stat. § 281.36(3n)(a) requires DNR to complete review of the permit application after submission of the application and *before* rendering a decision. As conditions of the Meteor Timber Permit, DNR requested additional information necessary to assess both the impact of proposed mitigation and the net impacts of the project.

4. DNR has no authority to include permit conditions that require an applicant to submit information after permit issuance that DNR needs to consider the permit application and make a decision to approve or deny the permit.

5. DNR's request for necessary information as conditions of the Meteor Timber Permit also violates the notice and comment requirements in Wis. Stat. § 281.36(3m), (3p).

6. DNR lacked at least the following information relevant to factors it was required to consider prior to issuing the Meteor Timber Permit:

- a. DNR did not have sufficient information regarding mitigation plan performance standards and financial assurances. Exh. A, Mitigation Conditions 15, 16, 18, 20-23, 25, 29.

- b. DNR did not know the total number of acres of land removed from cranberry beds and the total acres that will be in industrial use. Exh. A, Net Impact Condition 1.
- c. DNR lacked complete information about the types and amounts of chemicals that would no longer be in use through the elimination of cranberry farming operations. DNR also lacked complete information about the types and amounts of chemicals necessary to be used in establishment and management of mitigation areas. Exh. A, Net Impact Condition 2.
- d. DNR did not have sufficient information to determine the likelihood of success of the proposed Wildlife Underpass. Exh. A, Net Impact Condition 3.
- e. DNR lacked sufficient information in the application to evaluate the restoration plan for the Old Town Road. Exh. A, Net Impact Condition 4.
- f. DNR needed more information regarding the drawdown of the reservoir areas not part of the compensatory mitigation plan. Exh. A, Net Impact Condition 5.
- g. DNR required more information about the Habitat Mitigation and Management plan for unidentified threatened or endangered species. Exh. A, Net Impact Condition 6.
- h. DNR did not have a wetland delineation, vegetation survey, invasive species management plan, or conservation easement for part of the mitigation plan proposal, namely the MTN8268 property proposed to be included in the preservation area. Exh. A, Net Impact Condition 6.
- i. DNR was unable to determine the credits that would be generated by the proposed cranberry bed mitigation and preservation mitigation areas. Exh. A, Mitigation Condition 3.

j. DNR did not know what soil characteristics are present in the cranberry beds, or the extent of soil disturbance and sanding within the beds. Exh. A, Mitigation Condition 11.

7. Because DNR lacked sufficient information to weigh factors for required permit findings, DNR's decision to issue the Meteor Timber Permit is not based on substantial evidence in the record, is outside the range of discretion delegated to DNR by law, and the facts available to DNR required it to deny the permit as a matter of law. Wis. Stat. § 227.57(6)-(8).

Issue 2: DNR issued the Meteor Timber Permit in violation of Wis. Stat. § 281.36(3n)(d) because the mitigation plan is incomplete and does not compensate for wetland impacts associated with this project.

27. Petitioners reallege and incorporate herein each preceding paragraph of the petition.

28. DNR's approval of the Meteor Permit violates Wis. Stat. § 281.36(3n)(d) because the mitigation plan submitted to DNR will not compensate for direct impacts to wetlands.

29. Meteor Timber's mitigation plan was incomplete at the time DNR issued the Meteor Timber Permit for reasons mentioned above and as evidenced by the litany of mitigation plan elements that Meteor Timber must submit to DNR following permit issuance. *See* Exh. A, Mitigation Plan Conditions 1-38; *See also*, Exh. A, Net Impact Conditions 1-7.

30. Proposed plans to mitigate or offset these impacts are insufficient, because they are either facially inadequate, of speculative efficacy, or are based on only partially-completed planning.

31. DNR acknowledges that the mitigation plan may not compensate for the direct loss of wetlands, in part due to unanswered questions about Meteor Timber's proposed mitigation. Exh. A, FoF 14.

32. Moreover, Meteor Timber's reliance on the preservation of existing wetlands as a mitigation strategy also violates DNR policy and Wis. Stat. § 281.36(3n) because the mitigation fails to compensate for the destruction of rare, imperiled wetlands.

33. DNR's issuance of the Meteor Timber Permit based on an incomplete and insufficient compensatory mitigation plan is outside of the range of discretion delegated to DNR and the deficient compensatory mitigation plan compels DNR to deny the wetland permit as a matter of law. *See* Wis. Stat. § 227.57(7), (8).

Issue 3: DNR issued the Meteor Timber Permit in violation of Wis. Stat. § 281.36(3n)(c) and Wis. Admin. Code § NR 103.08(4)(a)3 because permit findings and the record do not support DNR's finding that the proposed project will not result in significant adverse impacts.

34. Petitioners reallege and incorporate herein each preceding paragraph of the petition.

35. The application and the findings of fact in the Meteor Timber Permit are not consistent with the finding required for permit issuance that the "proposed project 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." Wis. Stat. § 281.36(3n)(c); *see also* Wis. Admin. Code § NR 103.08(4)(a)3.

36. The Petitioner submits that the following facts in the application and Meteor Timber Permit conflict with the finding that the proposed project will not result in significant adverse impacts to wetland functional values or in other significant adverse environmental consequences:

- a. The White Pine-Red Maple Swamp community type will be impacted by the discharge authorized in the Meteor Timber Permit. This community type "is imperiled in Wisconsin due to restricted range, few populations or occurrences,

steep declines, severe threats, or other factors.” Exh. A, FoF 15; *see* Wis. Admin. Code § 103.03(1)(e)-(g).

- b. Direct impacts from the loss of the White Pine-Red Maple Swamp “is expected to be irreversible and has high significance.” Exh. A, FoF 15; *see* Wis. Admin. Code § NR 103.08(3)(c).
- c. The Meteor Timber Permit will result in the destruction of high value wetlands, which have an exceptional floristic integrity and quality, human use values, wildlife habitat, and groundwater processes, and high fish and aquatic life, and water quality protection, and medium flood and storm water support. Exh. A, FoF 10; *see* Wis. Admin. Code § NR 103.08(3)(c).
- d. The Meteor Timber Permit may result in significant cumulative impacts. Exh. A, FoF 19; *see* Wis. Admin. Code § 103.08(3)(d). “The rail corridor will result in fragmentation of habitat. Wildlife underpasses and track crossings are proposed to compensate for this impact, however, the efficacy of these actions has not been proven.” Exh. A, FoF 18a. “Approving a permit to fill 16.25 acres of wetland, 13.37 of those acres being an exceptional quality White Pine-Red Maple Swamp, an imperiled wetland plant community, may lead to increased applications to fill rare, sensitive and valuable wetland plant communities. Impacts to this rare plant and animal community could result in future impacts to similar quality plant and animal communities.” Exh. A, FoF 18b.
- e. The Meteor Timber Permit is expected to have highly significant secondary impacts that will be permanent and irreversible. Exh. A, FoF 17; *see* Wis. Admin. Code § NR 103.08(3)(e). Actions proposed to offset secondary impacts to wetland

functional values “are not likely to fully compensate for secondary impacts to impacted wetlands.” Exh. A, FoF 17. These secondary impacts include increased disturbed fringe and wildlife habitat fragmentation, increased edge effects, decreased connectivity, decreased core habitat, and impacts to wetland functional values due to hydrology modification from the rail corridor construction and rerouting the stream. Exh. A, FoF 16.

- f. It is unlikely that compensatory mitigation will compensate for the loss of 13.37 acres of exceptional quality White Pine-Red Maple Swamp “due to the uncertainty of the success of the permittee-responsible cranberry bed restoration project and the potential degradation of the preservation area as a result of the proposed rail spur and dry plant.” Exh. A, FoF 14.
- g. The Meteor Timber Permit authorizes a discharge to wetlands in an Area of Special Natural Resource Interest (“ANSRI”) because those wetlands provide habitat for threatened and endangered species. Exh. A, FoF 10.b.; Wis. Admin. Code § NR 103.04(6). The destruction and fragmentation of this large ANSRI will result in significant adverse environmental impacts to wetland functional values and those impacts are unlikely be offset by the methods proposed to compensate for that habitat loss. Wis. Stat. § 281.36(3n)(b), (c); Wis. Admin. Code § NR 103.08(3)(f), (4); Exh. A, FoF 18.b. (“The rail corridor will result in fragmentation of habitat. Wildlife underpasses and track crossings are proposed to compensate for this impact, however, the efficacy of these actions has not been proven.”).

37. The above findings of fact demonstrate that DNR's decision to issue the Meteor Timber Permit is not supported by substantial evidence in the record. Wis. Stat. § 227.57(6). These findings of fact compel DNR to deny the Meteor Timber Permit as a matter of law. Wis. Stat. § 227.57(7)

Issue 4: DNR issue the Meteor Timber Permit in violation of Wis. Stat. § 281.36(3n)(a)1.a and (3n)(c)1 because the project will not have a demonstrable public economic benefit and does not represent the least environmentally damaging practicable alternative.

38. Petitioners reallege and incorporate herein each preceding paragraph of the petition.

39. DNR's finding that this project represents the least environmentally damaging practicable alternative is based on the erroneous finding that the Meteor Timber project will have a demonstrable economic public benefit. Wis. Stat. § 281.36(3n)(a)1.a. DNR's determination that the Meteor Timber project will have a demonstrable public economic benefit is not supported by substantial evidence in the record.

40. The facts in Meteor Timber's application do not demonstrate an economic public benefit for reasons including, but not limited to, those articulated in the public comments attached hereto as Exhibit B.

41. Further, Meteor Timber did not provide, and DNR did not conduct, an adequate analysis of off-site practicable alternatives in violation of Wis. Stat. § 281.36(3n)(a).

42. Finally, because the DNR does not have enough information to fully weigh the net positive or negative environmental impacts of the proposed project, the potential environmental benefits of compensatory mitigation or additional environmental projects do not support a finding that this is the least environmentally damaging practicable alternative.

REQUEST FOR STAY

43. A stay is necessary to prevent significant adverse impacts and irreversible harm to the environment. *See* Wis. Stat. § 281.36(3q)(d).

44. Petitioner requests a stay pursuant to Wis. Stat. § 227.54 to preserve the status quo pending resolution of Petitioner’s challenge to the Meteor Timber Permit.

45. The discharge authorized by the Meteor Timber Permit requires another permit from the U.S. Army Corps of Engineers before Meteor Timber may fill wetlands pursuant to the Meteor Timber Permit. Thus, Petitioner asks this Court to preserve the status quo and preserve Petitioner’s right to review of DNR’s decision.

46. The wetlands have highly significant functional values that benefit the surrounding environment, and this project would permanently destroy those wetlands.

47. As discussed above, DNR found that the proposed project would cause significant and irreversible direct, secondary and cumulative impacts to wetland functional values.

48. DNR’s own factual findings demonstrate that a stay is necessary to prevent significant adverse impacts and irreversible harm to the environment.

49. DNR has already concluded that the loss of 13.37 acres of imperiled White Pine-Red Maple Swamp will “be irreversible and has a high significance.” Exh. A, FoF 15.

WHEREFORE, Petitioners request that this Court grant the following relief pursuant to Wis. Stat. §§ 227.52, 227.54, and 227.57:

- A. Stay the effectiveness of the Meteor Timber Permit including the discharge of fill into or disturbance of wetlands at issue in the permit pending resolution of this Petition for Judicial Review, Wis. Stat. §§ 227.54, 281.36(3q)(d);
- B. Reverse DNR’s decision to issue the Meteor Timber Permit because it violates Wis. Stat. §§ 281.36(3m)(b), (3m)(i), (3n)(a), (3n)(a)1., (3n)(b), (3n)(c), and (3n)(d), is outside the

range of discretion delegated to the agency by law, and DNR's findings are not supported by substantial evidence in the record, Wis. Stat. § 227.57(6), (8);

- C. Set aside DNR's finding that Meteor Timber's project will have a "demonstrable public economic benefit," see Wis. Stat. § 281.36(3n)(a)1.a, because that finding is not supported by substantial evidence in the record, Wis. Stat. § 227.57(6);
- D. Set aside DNR's finding that Meteor Timber's project represents the "least environmentally damaging practicable alternative," see Wis. Stat. § 281.36(3n)(c)1, because it depends on the erroneous finding that the project will have a demonstrable public economic benefit, and without that finding it is not supported by substantial evidence in the record, Wis. Stat. § 227.57(6); and
- E. Set aside DNR's finding that the Meteor Timber Permit, as issued, "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," Wis. Stat. § 281.36(3n)(c)3, because it is not based on substantial evidence in the record and the facts compel denial of the Meteor Timber Permit as a matter of law, Wis. Stat. § 227.57(6), (7).

Respectfully submitted this 19th day of June, 2017

MIDWEST ENVIRONMENTAL ADVOCATES

Two handwritten signatures in black ink. The first signature is on the left and the second is on the right. Both are written over horizontal lines.

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