

STATE OF WISCONSIN

CIRCUIT COURT  
Branch\_\_\_

MONROE COUNTY

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

Petitioner,

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

vs.

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

WISCONSIN DEPARTMENT OF  
NATURAL RESOURCES  
101 South Webster Street  
Madison, Wisconsin 53707

DANIEL MEYER, in his official capacity as  
Secretary of the Wisconsin Department of  
Natural Resources,  
101 South Webster Street  
Madison, WI 53707

Respondents.

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### **COMPLAINT AND PETITION FOR REVIEW**

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The Ho-Chunk Nation, by their attorneys Midwest Environmental Advocates, Inc., files this Complaint, pursuant to Wis. Stat. § 227.40, for review of Wis. Admin. Code ch. NR 2.20.

For the reasons provided below, the Ho-Chunk Nation asserts that Wis. Admin. Code ch. NR 2.20 exceeds the statutory authority of the agency and is therefore invalid.

The Ho-Chunk Nation also brings this action pursuant to Wis. Stat. § 227.52, petitioning for Judicial Review of the Department of Natural Resources' ("DNR") decision to grant

secretarial review, under Wis. Admin. Code § NR 2.20, of an Administrative Law Judge’s (“ALJ”) Decision and Order invalidating a pair of wetland individual permits.

### **PARTIES**

1. The Ho-Chunk Nation is a sovereign tribal nation with significant tribal and trust land throughout Wisconsin. Its principal Tribal Office Building is located at P.O. Box 667, Black River Falls, WI 54615.

2. Respondent DNR is an independent agency of the State of Wisconsin, created under Wis. Stat. § 15.34, whose principal office is located at 101 South Webster Street, Madison, Dane County, Wisconsin.

3. Respondent Daniel Meyer is the Secretary of DNR, whose principal office is located at 101 South Webster Street, Madison, Dane County, Wisconsin.

### **JURISDICTION AND VENUE**

1. Wis. Admin. Code ch. NR 2.20 is a “rule” under Wis. Stat. § 227.01(13) and its validity is therefore reviewable under Wis. Stat. § 227.40.

2. DNR’s decision to review the ALJ’s Decision and Order under Wis. Admin. Code. § NR 2.20 is an “administrative decision” under Wis. Stat. § 227.52 and therefore subject to judicial review pursuant to the provisions of Chapter 227.

3. 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 a rule within that proceeding. *See* Wis. Stat. § 227.40(2)(e).

4. Venue is proper in this Court pursuant to Wis. Stat. §§ 227.40(1) and 227.52(1)(a)3 because Petitioner Ho-Chunk Nation’s principal Tribal Office Building is in Monroe County and the Nation is therefore a resident of Monroe County. Furthermore, Ho-

Chunk Nation members reside in Sand Pillow Village Community to the east of Black River Falls, the Blackdeer Homestead of Ho-Chunk Members, Blue Wing Community in Tomah, and throughout the Monroe County area.

5. This petition is timely filed. *See* Wis. Stat. § 227.53(1).

### **BACKGROUND**

6. DNR has authority to issue wetland permits for discharges into wetlands in Wisconsin. *See* Wis. Stat. § 281.36.

7. Unless the discharge is covered by a wetland general permit or an exemption, any person wishing to proceed with a discharge into any wetland must obtain a wetland individual permit from DNR. *See* Wis. Stat. § 281.36(3m)(a).

8. On May 19, 2017, DNR issued a wetland individual permit to Meteor Timber LLC (“Meteor Timber”), authorizing Meteor Timber to fill 16.25 acres of wetland. A true and correct copy of the May 19, 2017 Permit is attached as **Exhibit A**.

9. On June 19, 2017, Clean Wisconsin petitioned for a contested case hearing pursuant to Wis. Stat. § 281.36(3q). A true and correct copy of Clean Wisconsin’s June 19, 2017 Petition is attached as **Exhibit B**.

10. On July 19, 2017, DNR granted Clean Wisconsin’s Petition for Contested Case Hearing. A true and correct copy of DNR’s letter granting review is attached as **Exhibit C**.

11. On October 27, 2017, DNR issued an amended individual wetland permit to Meteor Timber. A true and correct copy of the October 27, 2017 Permit is attached as **Exhibit D**.

12. On November 27, 2017, Clean Wisconsin petitioned for a contested case hearing pursuant to Wis. Stat. § 281.36(3q). A true and correct copy of Clean Wisconsin’s November 27, 2017 Petition is attached as **Exhibit E**.

13. On December 1, 2017, DNR granted Clean Wisconsin's Petition for Contested Case Hearing. A true and correct copy of DNR's letter granting review is attached as **Exhibit F**.

14. On December 8, 2017, DNR submitted a Request for Hearing to the Division of Hearings and Appeals, requesting that the two contested case hearings be consolidated into one proceeding. A true and correct copy of DNR's Request for Hearing is attached as **Exhibit G**.

15. On January 3, 2018, ALJ Eric D Défort ordered that the wetland fill authorized by the challenged permits be stayed pending resolution of the Contested Case Hearing. A true and correct copy of the Order is attached as **Exhibit H**.

16. On January 5, 2018, the Ho-Chunk Nation, represented by Midwest Environmental Advocates, moved to intervene in the Contested Case Hearing as co-petitioners, seeking invalidation of the wetland permits at issue. On January 11, 2018, ALJ Défort granted the Ho-Chunk Nation party status. True and correct copies of the Ho-Chunk Nation's Motion and ALJ Défort's Order are attached as **Exhibits I and J**, respectively.

17. A five-day hearing was held in Tomah, Wisconsin, from February 26 to March 2, 2018. Twelve expert witnesses provided live testimony at the hearing.

18. On May 4, 2018, ALJ Défort issued a Decision and Order, finding that DNR improperly granted the permits, and reversing DNR's decision to grant the permit applications. A true and correct copy of the Decision and Order is attached as **Exhibit K**.

19. On May 10, 2018, Meteor Timber filed a petition pursuant to Wis. Admin. Code ch. NR 2.20, requesting that DNR Secretary Meyer or the Secretary's designee review and immediately suspend ALJ Défort's Decision and Order. A true and correct copy of Meteor Timber's Petition is attached as **Exhibit L**.

20. On May 24, 2018, DNR Secretary Meyer granted Meteor Timber's Petition and selected as his designee DNR attorney Mark Herman to review ALJ Défort's Decision and Order. Secretary Meyer stated that the portion of the Decision ordering reversal of DNR's decision to issue the wetland permits shall remain in effect" until completion of Attorney Herman's review, but otherwise suspended ALJ Défort's Decision and Order pending Attorney Herman's review and modification or affirmation of said Decision and Order. A true and correct copy of Secretary's Meyer's letter granting the Petition is attached as **Exhibit M**.

21. On June 1, 2018, Meteor Timber filed a Petition for Judicial Review pursuant to Wis. Stat. § 227.52 in Monroe County Circuit Court. A true and correct copy of Meter Timber's Petition for Judicial Review is attached as **Exhibit N**.

#### **STANDARD OF REVIEW**

22. Judicial review of agency decisions is limited in scope and confined to the record on review. Wis. Stat. § 227.57. A court will reverse or remand an agency decision if it is based on an erroneous interpretation of law, erroneous exercise or discretion, or factual findings that are not supported by substantial evidence in the record. *Id.*

23. A court reviews the question of whether an administrative rule is authorized by statute de novo, giving no deference to the agency's interpretation. *Wis. Ass'n of State Prosecutors v. Wis. Emp't Rels. Comm'n*, 2018 WI 17, ¶31, 380 Wis. 2d 1, 907 N.W.2d 425; *Citizens Concerned*, 2004 WI 40, ¶10.

#### **COUNT 1 - WIS. ADMIN. CODE § NR 2.20 IS AN INVALID RULE BECAUSE IT EXCEEDS DNR'S STATUTORY AUTHORITY**

24. Administrative agencies have only those powers delegated to them by the legislature. *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep't of Nat. Res.* ("Citizens Concerned"), 2004 WI 40, ¶14, 270 Wis. 2d 318, 677 N.W.2d 612.

25. Agencies may only promulgate administrative rules that are authorized by statute, and no administrative rule may conflict with state law. Wis. Stat. §§ 227.10(2), 227.11(2)(a);

*Seider v. O'Connell*, 2000 WI 76, ¶24, 236 Wis. 2d 211, 225, 612 N.W.2d 659, 666.

26. A court *must* declare an administrative rule invalid if it finds the rule exceeds the statutory authority of the agency. Wis. Stat. § 227.40(4)(a).

27. Chapter 227 provides the statutory framework for contested case hearings and authorizes state agencies to promulgate certain rules with respect to those contested case hearings, e.g. Wis. Stat. § 227.46(3).

28. However, no provision in Chapter 227 or elsewhere authorizes DNR to promulgate or enforce an administrative rule that allows the DNR Secretary or Secretary's designee to review, much less reverse, the final order and decision of an administrative law judge after contested case hearing.

29. The Court must declare Wis. Admin. Code § NR 2.20 invalid because it is unauthorized by statute.

**COUNT 2 – DNR'S DECISION TO GRANT THE PETITION FOR REVIEW WAS UNAUTHORIZED**

30. DNR's decision to review the ALJ's Decision and Order under Wis. Admin. Code. § NR 2.20 is an "administrative decision" under Wis. Stat. § 227.52, and is therefore subject to judicial review pursuant to the provisions of Chapter 227.

31. A court must set aside or reverse an agency action if it finds that the agency erroneously interpreted a provision of law, or the agency's exercise of discretion is outside the range of discretion delegated to the agency by law or otherwise violates a statutory provision. Wis. Stat. §§ 227.57(5), (8).

32. DNR erroneously interpreted and violated provisions of Chapter 227 and acted outside the range of discretion delegated to the agency by law, when applying Wis. Admin. Code § NR 2.20 to allow DNR Attorney Herman to review and potentially reverse the final Decision and Order of the ALJ.

33. The Court must set aside or reverse DNR's decision to grant review of the ALJ's Decision and Order.

### **INTERESTS OF THE PETITIONER**

34. DNR's decision to grant Meteor Timber's request for review by the Secretary or Secretary's designee under Wis. Admin. Code. § NR 2.20 harms substantial interests of the Ho-Chunk Nation and interferes with and impairs the legal rights and privileges of the Nation and its members. Wis. Stat. § 227.40(1).

35. The Ho-Chunk Nation's substantial interests are harmed by DNR's application of NR 2.20 to review and potentially reverse the ALJ's Decision and Order invalidating the wetland individual permits described above, *supra* ¶¶ 8, 11. DNR review could potentially lead to reinstatement of those permits and, therefore, the permanent destruction of the rare, pristine wetlands that the Nation sought to protect via administrative challenge to the permits. *See* Exh. I.

36. The Ho-Chunk Nation has a direct interest in protecting the wetlands at issue from permanent destruction, and will be harmed by the destruction of pristine wetlands at issue. Ho-Chunk members and lands are in Adams, Clark, Crawford, Dane, Eau Claire, Jackson, Juneau, La Crosse, Marathon, Monroe, Sauk, Shawano, Vernon and Wood counties. 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 five to 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. The permits invalidated by the ALJ's Decision and Order authorized Meteor Timber to fill 16.25 acres of wetlands that DNR rated as having "human use values" of "exceptional" quality because these wetlands support rare and threatened animal species and have significant intrinsic value based on the rarity and exceptional quality of the wetland type. Exhs. A and D, Finding of Fact 10b.

37. 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 and its members would be injured by the direct, secondary and cumulative impacts of the Meteor Timber proposed project. Petitioner is thus also threatened by DNR's approval of the Meteor Timber Permit because, by the Agency's own admission, issuance of this permit "may lead to increased applications to fill rare, sensitive and valuable wetland plant communities." Exhs. and D, Finding of Fact 18b.

38. The Ho-Chunk Nation also has a substantial interest in DNR following statutory requirements in the issuance of wetland permits, having invested time and money to protect wetlands in the State of Wisconsin by supporting strong legal protections for wetlands and monitoring implementation of the State's wetland program, including the wetland fill permitting process under Wis. Stat. § 281.36. The Ho-Chunk Nation relies on DNR to complete the required review process in accordance with the law and are thus substantially injured by DNR's failure to complete the legally-required review process prior to issuance of the Permit.

39. The Ho-Chunk Nation's legal rights and privileges are impaired by being forced to defend the ALJ's ruling in an unauthorized review process. Statute provides a framework for wetland permits to be issued and potentially challenged by interested parties. Wis. Stats. §§ 281.36(3m), (3q) and 227.42. Those statutes do not authorize DNR to apply NR 2.20 as they seek to do in this matter. DNR's action therefore undermines Ho Chunk's right to participate in the administrative process as provided by Chapter 227 and Wis. Stat. § 281.36, and thereby threatens its legal rights and privileges.

### **REQUEST FOR STAY**

40. Petitioner requests a stay of DNR Attorney Herman's review of ALJ Défort's Decision and Order, pursuant to Wis. Stat. § 227.54, to preserve the status quo pending resolution of Petitioner's challenge to the validity of Wis. Admin. Code § NR 2.20.

41. A stay is appropriate here because the Ho-Chunk Nation is likely to prevail on the merits, given the absence of any explicit statutory authority for promulgation of NR 2.20. In fact, a Court of Appeals has already held that this rule is invalid because without statutory authorization, a ruling which would have resulted in this rule being removed from the administrative code already, but for reversal of that ruling on other grounds. *State Public Intervenor v. Wis. Dep't of Nat. Res*, 177 Wis. 2d 666, 503 N.W.2d 305 (Ct. App. 1993), *overruled by Public Intervenor v. Wis. Dep't of Nat. Res*, 184 Wis. 2d 407, 515 N.W.2d 897 (1994) (holding that the petitioner lacked standing and therefore not reaching the issue of NR 2.20's validity). The only relevant legislative change since that ruling was Act 21, which further restricted DNR and other administrative agency's rulemaking authority. Wis. Stats. §§ 227.10, .11.

42. A stay is necessary to protect the public interest because a stay will promote the integrity of the administrative review process as contemplated by statute and ensure that government entities are not acting beyond the scope of the authority granted by the public's legal representatives, the Legislature.

43. A stay here will not unduly burden respondents or Meteor Timber, because the parties have not yet invested significant attorney time or resources in the NR 2.20 process. The briefing schedule does not begin until July 23, 2018, approximately one month after the date of this Complaint.

44. Failure to stay proceedings, on the other hand, would require Petitioner to litigate the merits of the ALJ's Decision and Order while simultaneously litigating the question of whether DNR has any authority to review that Decision and Order in the first place. Requiring litigation on the merits of the case before establishing proper jurisdiction runs counter to established legal principles such as judicial economy and predictability.

45. A stay if further warranted because there is no adequate remedy at law.

**WHEREFORE**, Petitioner requests that this Court grant the following relief pursuant to Wis. Stats. §§ 227.40, 227.52, 227.54, and 227.57:

1. For the reasons detailed herein, stay the DNR's 2.20 review of the Meteor Timber permit to preserve the status quo pending resolution of Petitioner's challenge to the validity of Wis. Admin. Code § NR 2.20.

2. Continue the stay of the effectiveness of the Meteor Timber permit pending resolution of Petitioner's challenge to the validity of Wis. Admin. Code § NR 2.20, see Wis. Stat. § 227.54.

3. Declare that Wis. Admin. Code § NR 2.20 is unauthorized by law and therefore invalid;
4. Declare that DNR's decision to grant review of the Meteor Timber permit pursuant to Wis. Admin. Code § NR 2.20 is *ultra vires* and therefore invalid, Wis. Stat. §§ 227.57(4)-(8);
5. Order such interlocutory or final relief as is necessary to preserve the interests of Petitioner and other members of the public; and
6. For such other relief as the Court may deem just and equitable.

Dated this 25th day of June, 2018

MIDWEST ENVIRONMENTAL ADVOCATES

Electronically Signed by Tressie Kamp

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