



May 16, 2018
Daniel Meyer (or his designee)
Secretary
Wisconsin Department of Natural Resources
PO Box 7921
Madison WI 53707-7921

RE: *Petitioners' response to Meteor Timber LLC's Petition for Review by the Secretary or the Secretary's Designee of the decision of the Administrative Law Judge in Case No. DNR-17-0013 and DNR -17-0014.*

Dear Secretary Meyer or his designee:

This letter responds to the petition submitted by Meteor Timber, LLC (Meteor Timber) to the Secretary of the Wisconsin Department of Natural Resources (DNR) on May 10, 2018. The Petitioners in the underlying matter are compelled to respond to Meteor Timber's extraordinary request before the Secretary makes his decision.

Meteor Timber's petition, invoking the process provided in Wis. Admin. Code § NR 2.20, requests action by the Secretary that exceeds authority granted under the governing statutes. Meteor Timber asks the Secretary to overturn a final decision issued by Judge Eric D. Défort, the administrative law judge in this matter. The Judge's decision is supported by legal and factual conclusions made following four (4) full days of expert testimony, hours of public testimony, and extensive legal briefing by all parties. Secretary Meyer was not present for that hearing.

Given the short timeline for the Secretary's review of Meteor Timber's NR 2.20 petition, this letter is brief and lacks much of the legal and factual explanation that the Secretary must consider if he decides to review Judge Défort's decision. The complexity and number of contested issues, coupled with the size of the record in this proceeding, would require explication beyond that possible here.

Petitioners note that Meteor Timber's Petition contains misstatements regarding Judge Défort's decision, the live testimony offered at the hearing and its significance, and the legal standards that govern issuance of wetland individual permits. Petitioners reserve their rights to more fully develop legal and factual arguments in subsequent briefing, and respectfully request that, if the Secretary does grant review, that he provide an opportunity for further briefing by all parties and consult with Judge Défort before modifying the decision.

In this letter, Petitioners highlight our central objections to Meteor Timber's request: that the relief requested goes beyond the Secretary's authority; undermines the integrity of the

contested case hearing process; ignores the role of the administrative law judge as an independent decision maker; and invokes a reading of NR 2.20 that would render it an illegal rule.

Meteor Timber asks the Secretary to immediately suspend and reverse Judge Défort's decision, even though he has not had any direct involvement in the case and was not present for the live testimony presented at the hearing. The more appropriate remedy is for Meteor Timber to seek review in circuit court pursuant to Wis. Stat. § 281.36(3q)(h)2, which provides for judicial review of an administrative law judge's ruling on a wetland individual permit.

A decision by the Secretary would be based on an incorrect interpretation of NR 2.20. The only way to reconcile section NR 2.20 with the surrounding regulations and Chapter 227 is to interpret section NR 2.20 as providing the Secretary with only limited review authority, and not the authority to overturn an administrative law judge's decision. If the Secretary had this authority, it would have to be conferred by statute, not administrative rule.¹

In the only published decision in which this provision was used by the DNR, the public intervenor challenged the rule and the court of appeals concluded that it was invalid as exceeding the DNR's statutory authority. *State Public Intervenor v. Wis. Dep't of Nat. Res.*, 177 Wis. 2d 666, 670, 503 N.W.2d 305 (Wis. Ct. App. 1993), overruled on other grounds by 184 Wis. 2d 407, 515 N.W.2d 897 (1994).² That case was overruled because the Supreme Court concluded that the public intervenor lacked standing, so the Court did not reach the issue of the validity of NR 2.20. However, the Supreme Court did note that the Secretary's review under NR 2.20 was very limited and deferential to the decision of the hearing examiner. To grant Meteor Timber's 2.20 petition would disregard deference due to the Division of Hearings and Appeals broadly and to the well-reasoned administrative decision in this case specifically.

Further, in the above-mentioned case, when the DNR secretary reviewed the decision of the hearing examiner, he met with the hearing examiner to discuss in a detailed fashion the reported findings of fact and conclusions of law. In several instances, the DNR secretary made what he termed "minor amendments" for the purpose of clarifying the hearing examiner's findings and only after a "detailed discussion with the Examiner to ensure that the new language conforms to the evidence presented before him." If any of those amendments had the effect of varying from the hearing examiner's findings of fact and conclusions of law, the DNR secretary was statutorily bound to include in his decision an explanation regarding the basis for each variance. See Wis. Stat. § 227.46(2); see also *State Public Intervenor v. Wis. Dep't of Nat. Res.*, 184 Wis. 2d 407, 417-18, 515 N.W.2d 897 (1994).

¹ In this regard, it is worth noting that Wis. Stat. § 281.36(3q)(h)2, the statutory section that specifically provides for judicial review of a hearing examiner's decision regarding a wetland permit, does not mention review under NR 2.20.

² The only other published case in which NR 2.20 was used was a case in which a petition under that provision was denied by the Secretary. *Sierra Club v. Wis. Dep't of Nat. Res.*, 2007 WI App 181, ¶6 n.5, 304 Wis. 2d 614, 621, 736 N.W.2d 918.

In another case discussing section NR 2.20, although not reaching the issue of its validity,³ the DNR took the position that the Secretary “is reluctant to exercise [her] power [under Wis. Admin. Code § NR 2.20] since the intent of the legislature was that the independent hearing examiner make the final decision in the case.” *Town of Two Rivers v. Wis. Dep’t of Nat. Res.*, 105 Wis. 2d 721, 737-38, 315 N.W.2d 377, 385 (Ct. App. 1981) overruled by *Milwaukee Metro. Sewerage Dist. v. Wis. Dep’t of Nat. Res.*, 126 Wis. 2d 63, 375 N.W.2d 648 (1985).

A limited interpretation of the Secretary’s review authority is consistent with related DNR regulations, such as Wis. Admin. Code § NR 2.155(1), which provides “Unless the department petitions for judicial review as provided in s. 227.46 (8), Stats., the decision shall be the *final decision of the department*, but may be reviewed in the manner described in s. NR 2.20.” (emphasis added). There is only one logical way to reconcile these two regulatory provisions. Section NR 2.20 provides the Secretary with limited review authority to order further briefing or the presentation of additional evidence. The legislature would not have provided an explicit method for the DNR to seek judicial review, in Wis. Stat. § 227.46(8), if the Secretary could simply overturn a decision of a hearing examiner. And the DNR would not have made the hearing examiner decision the final decision of the DNR, pursuant to section NR 2.155, if the Secretary could simply set aside the decision.

Meteor Timber does not make any valid objections to the hearing process nor can Meteor Timber assert it didn’t have a full opportunity to be heard on these issues before the independent decision maker. Meteor Timber has fully briefed these issues before Judge Défort, who made an impartial decision, based on all the legal and factual arguments presented. Judge Défort was well within his authority to reverse DNR’s issuance of these wetland permits. Meteor Timber could have asserted all issues outlined in their NR 2.20 petition during post-hearing briefing or in a motion for reconsideration before the Judge who has become an expert on the record in the subject case. If the DNR, or any other party, wants to seek reversal of the final decision of the administrative law judge, it may seek judicial review pursuant to Wis. Stat. § 281.36(3q)(h)2.

For the above reasons, the Petitioners respectfully request that the Secretary deny Meteor Timber’s request for review pursuant to NR 2.20. If the Secretary disagrees with the final decision of the independent decision-maker in this case, he may use the judicial review procedures explicitly provided by statute.

Sincerely,

/s/

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/s/

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cc:

³ See *State Pub. Intervenor v. Wis. Dep’t of Nat. Res.*, 177 Wis. 2d at 673 (holding that *Town of Two Rivers* did not reach issue of the rule’s validity).

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