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TO THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES

In the Matter of the February 4, 2025, Grant of Coverage under WPDES General Permit No. WI-S067831-06 for Metallic Mining Exploration

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MAR 06 2025

**Petition for Contested Case Hearing**

DEPT. OF NATURAL RESOURCES  
BUREAU OF LAND SERVICES

The Lac du Flambeau Band of Lake Superior Chippewa Indians (hereinafter “LDF,” “Tribe,” and/or “Petitioner”), by its undersigned attorneys, hereby petitions and requests that a hearing be held as a contested case under Wis. Stat. § 227.42. This request is made pursuant to Wis. Stat. §§ 227.42 and 283.31(1), and Wis. Admin. Code §§ NR 2 and NR 216. Wisconsin law provides a right to a contested case hearing if four elements are met: (1) a substantial interest of the person is injured in fact or threatened with injury by agency action or inaction; (2) there is no evidence of legislative intent that the interest is not to be protected; (3) the injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and (4) there is a dispute of material fact.<sup>1</sup> Each of those elements is met here and this petition should be granted.

**I. The agency action or inaction which is the basis for the request for a hearing:**

The Tribe brings this petition to challenge the Wisconsin Department of Natural Resources’ (the “DNR”) unlawful inaction and failure to require an industrial facility storm water permit for storm water discharges associated with Green Light Wisconsin’s (“GLW”) proposed metallic mining exploration in the Bend Deposit authorized in its February 4, 2025, grant of coverage under WPDES General Permit No. WI-S067831-06.<sup>2</sup>

Petitioner “is a self-governing, federally recognized Indian tribe that exercises sovereign authority over its members and its territory.”<sup>3</sup> The Tribe signed treaties with the United States in 1837 and 1842, which ceded millions of acres of Tribal land in portions of present day Minnesota, Wisconsin, and Michigan, while explicitly retaining Tribal rights to hunt, fish, and gather in the Ceded Territory.<sup>4</sup> The Lac du Flambeau Indian Reservation (the “Reservation”) was

<sup>1</sup> Wis. Stat. § 227.42(1).

<sup>2</sup> Exhibit 1.

<sup>3</sup> *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp. 2d 969, 971 (W.D. Wis. 2000).

<sup>4</sup> See 1854 Treaty Authority, *The Right to Hunt and Fish Therein*, available at <https://www.1854treatyauthority.org/images/ToHuntandFish.updated2020.pdf> (last visited Mar. 4, 2025); Treaty with the Chippewa, 7 Stat. 528 (Jan. 17, 1837); Proclamation, June 15, 1838); Treaty with the Chippewa, 7 Stat., 591. (Oct. 4, 1842; Proclamation, Mar. 23, 1843).

established by treaty in 1854, whereby the United States set aside land in northern Wisconsin to create a permanent homeland for the Tribe.<sup>5</sup>

The Bend Deposit is a mineral deposit located on federal lands within the Chequamegon-Nicolet National Forest, in an area known as the Medford District, in Taylor County, Wisconsin.<sup>6</sup> The Bend Deposit is within the 1837 and 1842 Ceded Territory, which historically and presently has been used for cultural, spiritual, and subsistence-related purposes by Tribal members exercising their treaty rights to hunt, fish, gather, and access those lands.<sup>7</sup>

The Bend Deposit is located in a region of incredible environmental importance with a unique and vulnerable biodiversity that is crucial to the vitality of natural resources in the area. The North Fork of the Yellow River flows around the Bend Deposit before it joins the Yellow River, which is the main tributary feeding into Chequamegon Waters Flowage. Two nearby wetlands, including sedge meadows, lowland hardwood swamps, and a seasonal ephemeral pond, provide “nurseries for fish and wildlife, purifiers for lakes, rivers and groundwater, and storage for floodwaters.”<sup>8</sup> Those wetlands have been identified as “highly susceptible” by DNR guidance documents.<sup>9</sup> One of the wetlands extends within the protective area of the North Branch of the Yellow River,<sup>10</sup> which is an area specifically “established to minimize impacts from runoff coming from developed areas before it reaches sensitive resources.”<sup>11</sup>

The area of the Bend Deposit is also home to several endangered and threatened species that rely on the unique ecosystem in the area for survival. Those species include the American Goshawk, the American Water Shrew, the White Adder’s-mouth, the Bog Bluegrass, the Wood Turtle, and the Northern Long-Eared Bat (“NLEB”).<sup>12</sup> The DNR has determined that several of those species are specifically vulnerable to habitat destruction, damage to nests or nesting areas, and/or physical harm in conjunction with GLW’s proposed exploratory mining project.<sup>13</sup> The Bend Deposit is also in the area of Manoomin (Wild Rice) beds, a protected species under Wisconsin law, that Tribal members have historically harvested from, a practice that continues to this day.<sup>14</sup>

The Tribe and its members also utilize the area surrounding the Bend Deposit for cultural and historical purposes, as it is adjacent to Big and Little Indian Farms, a historic site recognized

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<sup>5</sup> See Treaty with the Chippewa, 10 Stat. 1109, Art. 11 (Sept. 30, 1854; Proclamation Jan. 10, 1855).

<sup>6</sup> Exhibit 2.

<sup>7</sup> For a detailed discussion of the Tribe’s uses of the ceded territory, see section II below.

<sup>8</sup> Wisconsin DNR, *Wetlands Benefit People and Nature*, available at <https://dnr.wisconsin.gov/topic/Wetlands#:~:text=Wetlands%20are%20nurseries%20for%20fish,greenhouse%20gas%20fueling%20climate%20change>. (last visited Mar. 4, 2025).

<sup>9</sup> Exhibit 4.

<sup>10</sup> Exhibit 5.

<sup>11</sup> Exhibit 4.

<sup>12</sup> This information, except that pertaining to the Northern Long-eared Bat, was contained in the October 9, 2024, Endangered Species Review Letter, which was previously uploaded on the public DNR website and later taken down due to confidentiality concerns.

<sup>13</sup> *Id.*

<sup>14</sup> See Wisconsin DNR, *Wild Rice Harvesting*, at <https://dnr.wisconsin.gov/topic/wildlifehabitat/rice> (last visited Mar. 5, 2025).

on the national register with cultural significance to the Tribe.<sup>15</sup> The site is known to be surrounded by historic Indian trails as well as burial sites that overlap with the Bend Deposit itself and contain evidence as to the pre-colonial cultural practices of tribes in the area. The site holds great spiritual importance and is particularly vulnerable to damage from development in the area, as the nearby, undisturbed burial site thought to be associated with Big Indian Farm is yet to be fully studied.<sup>16</sup>

The Bend Deposit itself is comprised mostly of copper with significant gold and minor amounts of silver, with an estimated total of 4.23 million tons of ore.<sup>17</sup> In July 2021, GLW acquired Aquila Resources and their Wisconsin assets, including in the Bend Deposit. Most of the minerals in the Bend Deposit are federally owned and managed by the U.S. Forest Service (“USFS”). There is a 40-acre parcel of land (“Soo Line parcel”) within the Chequamegon-Nicolet National Forest, with private mineral rights owned by Soo Line Railroad Company (d.b.a. Canadian Pacific Railway). GLW has obtained a mineral lease from Canadian Pacific Railway to prospect on this parcel. USFS still owns the surface estate of the Soo Line parcel.

Wisconsin law requires “all persons intending to engage in exploration, or who contract for the services of drillers for purposes of exploration” to apply for and obtain an exploration license from the DNR.<sup>18</sup> Applicants for exploration licenses must also submit to the DNR an exploration license Notice of Intent (“NOI”) in advance of the anticipated commencement of exploratory drilling.<sup>19</sup> The DNR then approves, conditionally approves, or denies the NOI, which, if approved, remains in effect for 1 year from the date of approval.<sup>20</sup> Lastly, explorers must notify the DNR at least 48 hours before commencing exploratory drilling on a specified parcel.<sup>21</sup>

Exploratory mining operations are also subject to permitting requirements under the Wisconsin Pollutant Discharge Elimination System (“WPDES”) laws and regulations enforced by the DNR. Specific WPDES permits for stormwater discharge are required for, among other discharges: (a) discharges of stormwater associated with construction sites; and (b) discharges of stormwater associated with certain industrial activities.<sup>22</sup>

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<sup>15</sup> National Archives Catalog, *Wisconsin SP Big Indian Farms*, <https://catalog.archives.gov/id/106782606> (last visited Mar. 6, 2025).

<sup>16</sup> See A.A.A. Schmirler, *Wisconsin's Lost Missionary: The Mystery of Father Rene Menard*, *The Wisconsin Magazine of History*, Vol. 45, No. 2 (Winter, 1961-1962), pp. 99-114 (available at <https://www.jstor.org/stable/4633714?seq=1>) (last visited Mar. 5, 2025); see also H. Curran, *The Disappearance of Father Menard*, available at <https://riblakehistory.com/Rib%20Lake%20History%2010000-10099/10051-Disappearance%20of%20Father%20Menard,%20by%20Harry%20Curran,%209%20pgs.pdf> (last visited Mar. 5, 2025); Wisconsin Historical Society, *Map of Taylor County Drawn to Accompany an Article by Ray Bundick, 'The disappearance of Father Menard,'* available at <https://www.wisconsinhistory.org/Records/Image/IM98213> (last visited Mar. 5, 2025).

<sup>17</sup> Exhibit 3.

<sup>18</sup> Wis. Stat. § 293.21(2); Wis. Admin. Code § NR 130.105(1).

<sup>19</sup> Wis. Stat. § 293.21(4) (requiring notice 10 days in advance); Wis. Admin. Code § NR 130.109 (requiring notice 30 days in advance).

<sup>20</sup> Wis. Admin. Code § NR 130.109(4)-(5).

<sup>21</sup> Wis. Admin. Code § NR 130.109(6).

<sup>22</sup> Wis. Stat. § 283.33(1)(a), (am).

Instead of an individual permit for point source discharges to waters of the state, including stormwater discharges, the DNR may alternatively issue a general permit “applicable to a designated area of the state authorizing discharges from specified categories or classes of point sources.”<sup>23</sup> Industrial discharges that require an industrial facility storm water permit, instead of or in addition to a general permit, include but are not limited to discharges originating from “Tier 2 Industrial Facilities,” such as metallic mining, which require an industrial discharge storm water permit if stormwater runoff comes into contact with any “overburden, raw material, intermediate product, finished product, by-product or waste material located on the site of the operations.”<sup>24</sup>

In April of 2023, GLW submitted its final exploration license NOI for exploratory drilling in the Bend Deposit to the DNR.<sup>25</sup> GLW’s plan for exploration drilling includes up to 8 boreholes (totaling 7,190 feet) from 6 drill sites. The DNR conditionally approved GLW’s NOI in May 2023<sup>26</sup> and renewed GLW’s exploration license in June 2024.<sup>27</sup> The conditionally approved NOI contemplated exploratory drilling in winter of 2022/2023, which GLW later amended to winter of 2024/2025.

On February 4, 2025, the DNR granted GLW coverage under storm water general permit No. WI-S067831-06 for construction site related discharges into waters of the state, allowing GLW to move forward with its proposed project of exploratory metallic mining in the Bend Deposit.<sup>28</sup> In doing so, the DNR unlawfully determined that the discharge caused by GLW’s exploratory mining would be exclusively governed by the regulations related to construction site storm water runoff, and would not require an industrial storm water discharge permit.<sup>29</sup> The DNR’s failure to properly interpret and apply Wisconsin law and its own regulations pose a serious threat to the invaluable natural resources surrounding the Bend Deposit.

## **II. The substantial interests injured or threatened with injury by agency action or inaction:**

The Bend Deposit is located within the ceded territory of the Tribe and poses a direct threat of injury to the Tribe’s treaty-guaranteed usufructuary rights. As a signatory party to the Treaties of 1837 and 1842, the Tribe, along with other Bands of Lake Superior Chippewa, ceded vast swaths of territory to the United States in exchange for certain guarantees, including the right for Tribal members to continue to exercise usufructuary rights in the Ceded Territory, through the continued practice hunting, fishing, and gathering in the area.<sup>30</sup> The off-reservation usufructuary rights “reserved by the Chippewa in the treaties of 1837 and 1842 continue to be effective today” and vest Tribal members with “greater rights to hunt, fish, and gather in the

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<sup>23</sup> Wis. Stat. § 283.35(1).

<sup>24</sup> Wisconsin Admin. Code § NR 216.21(2)(b)3.a. (Table 4).

<sup>25</sup> Exhibit 7.

<sup>26</sup> Exhibit 3.

<sup>27</sup> Exhibit 8.

<sup>28</sup> Exhibit 1.

<sup>29</sup> *Id.*; Exhibit 10.

<sup>30</sup> *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F.Supp. 1420, 1426 (W.D. Wis. 1987)

ceded territory than [those of] non-Indians.”<sup>31</sup> Those rights apply to activities by Tribal members in public lands, such as the Chequamegon-Nicolet National forest.<sup>32</sup> Where limited exceptions such as private landownership do not apply, the Tribe also has “the right to exploit virtually all natural resources in the ceded territory as they did at treaty time” and may use “all of the methods of harvesting employed in treaty times and those developed since.”<sup>33</sup>

The exercise of usufructuary rights in the Ceded Territory is vital to the subsistence and cultural vitality of the Tribe and its members generally. Tribal members, historically and presently, use the natural resources in the Ceded Territory for “food, clothing, shelter, religious, commercial, or other purposes.”<sup>34</sup> Because of the deep cultural importance of their traditional homelands, Tribal members “enjoy a unique historical and cultural connection to the land.” As such, there is perhaps no authority “more central to the economic security, or the health or welfare of the tribe” than a tribe’s authority to control land use.”<sup>35</sup>

The critical importance of off-reservation usufructuary rights to the Tribe is demonstrated through Tribal laws that govern off-reservation resource exploitation and promote environmental protection and preservation in general. Particularly relevant here, the Tribe’s Off-Reservation Conservation Code aims to “[p]rovide an orderly system for tribal control and regulation of hunting, fishing and gathering on the off-reservation lands ceded by the tribe” and to “[p]rovide a means to promote public health and safety and the conservation and management of fish, wildlife and plant populations in the ceded territory.”<sup>36</sup>

This foundational interest in the protection of natural resources is documented and reinforced throughout other areas of Tribal law. The Tribe’s Constitution declares the following “Powers and Duties of the Tribal Council”:

To regulate the use and disposition of tribal property to protect and preserve the tribal property, wildlife and natural resources of the Lac du Flambeau Band of Lake Superior Chippewa Indians, to cultivate Indian arts, crafts, and culture, to administer charity, to protect the health, security, and general welfare of the Tribe.<sup>37</sup>

This provision vests the Tribal government with the responsibility to ensure that the natural resources of the Tribe are protected so that Tribal members can gather resources for food, medicinal purposes, and other cultural and ceremonial uses.

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<sup>31</sup> *Id.* at 1429.

<sup>32</sup> See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 758 F.Supp. 1262, 1266 (W.D. Wis. 1991) (“National forests in the ceded territory cover approximately 1,400,000 acres.”).

<sup>33</sup> *Supra* n. 30 at 1430, 1435.

<sup>34</sup> *Id.* at 1424.

<sup>35</sup> *Brendale v. Confederated Tribes and Bands of Yakima*, 492 U.S. 408,458 (1989) (Blackmun, J., concurring in part and dissenting in part).

<sup>36</sup> Lac du Flambeau Off-Reservation Conservation Code at § 26.103.

<sup>37</sup> Lac du Flambeau Const., art. VI, § 1(a). (All of the Tribal laws and policies cited in this Petition are available to the public at <https://www.ldftribe.com/pages/23/Court-Ordinances/>).

Additionally, the Tribe's Conservation Code states a general purpose to "provide for the conservation and management of fish, game, lakes, streams and other natural resources of the Tribe's reservation for the present and future use and enjoyment of tribal members."<sup>38</sup> The Tribe's "Reservation Water and Shoreline Protection and Enhancement Ordinance" seeks to "provide for the protection, enhancement, and management of the Lac du Flambeau Reservation's lakes, streams, and ponds and their shorelines in order to assure present and future use and enjoyment of these resources by tribal members and such others as the Tribe shall permit."<sup>39</sup> And the Tribe's Land Use Ordinance aims to "promote the health, safety and general welfare of the Lac du Flambeau Community while recognizing the Anishinaabe obligation to honor and protect the natural and cultural resources of the Lac du Flambeau Reservation."<sup>40</sup>

The Tribe's own laws are replete with iterations of the Tribe's inherent authority to protect its members and territory, and that authority's inextricable connection to the protection and utilization of natural resources within the Reservation and the ceded territory. This substantial interest in the environment and ecosystem is injured, undermined, and threatened by the DNR's failure to properly regulate GLW's mining operations within the Ceded Territory.

### **III. The basis for a finding that there is no evidence of legislative intent that the interest is not to be protected:**

The Tribe's inherent interests and authority to protect its members and land, water, and natural resources within its territory have been documented and reinforced countless times by the federal government.<sup>41</sup> This recognition began with treaty-making, through which Congress demonstrated a national policy to treat tribes as nations and insulate their rights from state intrusion.<sup>42</sup> Treaties are the "supreme Law of the Land" throughout the United States, taking precedence over state laws.<sup>43</sup> Specifically, the 1837 and 1842 treaties explicitly addressed and ensured the Tribe's usufructuary rights in the ceded territory would continue, notwithstanding land cessions by the Tribe to the United States. The ratifications of those treaties demonstrate an unmistakable legislative intent to safeguard the Tribe's connection to natural resources in the ceded territory, and the Tribe's interest in utilizing and protecting those natural resources through the exercise of off-reservation usufructuary rights.

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<sup>38</sup> Lac du Flambeau Conservation Code § 20.101.

<sup>39</sup> Lac du Flambeau Reservation Water and Shoreline Protection and Enhancement Ordinance § 23.101.

<sup>40</sup> Lac du Flambeau Land Use Ordinance § 62.101.

<sup>41</sup> See also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188 (1999) (upholding usufructuary rights under the treaties of 1837 and 1842 in Minnesota, "consistent with the Court of Appeals for the Seventh Circuit's earlier decision holding that the Chippewa retained those same rights with respect to the ceded land located in Wisconsin.").

<sup>42</sup> *Worcester v. Georgia*, 31 U.S. 515, 551-57 (1832).

<sup>43</sup> United States Const. art. VI, cl. 2; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, No. 21-1817, 2022 WL 3355076 (7th Cir. Aug. 15, 2022).

The Tribe's interests are also consistent with Wisconsin and federal laws that aim to protect wetlands,<sup>44</sup> water quality,<sup>45</sup> historic sites,<sup>46</sup> burial sites,<sup>47</sup> and threatened and endangered species.<sup>48</sup> The Tribe brings this petition to protect those interests that, but for the DNR's unlawful and deficient grant of coverage to GLW, would be consistent with and protected under state and federal law. There is no evidence of legislative intent to the contrary.

Furthermore, "in addition to any other right provided by law," Wisconsin Statute section 227.42 allows Petitioner to request a contested case hearing to challenge an agency action or inaction, such as the DNR's faulty grant of coverage for GLW's metallic mining exploration under the construction site stormwater general permit and failure to require coverage under the industrial facility stormwater permit.

**IV. The injury to the person requesting the hearing is different in kind or degree from the injury to the general public caused by the agency action or inaction:**

The injury caused and threatened by the DNR's unlawful failure to enforce state law and regulations aimed at minimizing pollution and preventing environmental harm threatens the Tribe's interests to the fullest extent, in a manner not shared by the general public.

As discussed in detail in section II, above, the Tribe seeks to prevent injury to the land and natural resources on and around the Bend Deposit. That injury is unique, in both kind and degree, to the Tribe as a signatory party to the treaties of 1837 and 1842, which memorialize and enforce the Tribe's interest in and connection to its historical territory.

The Tribe's distinct connection to its traditional homelands, including the Ceded Territory, and all the plants, animals, and natural resources found therein cannot be overstated. Any injury to the land and natural resources in the ceded territory poses a direct threat to the Tribe's ability to practice and maintain its culture, its traditions, and its very existence. The same is true for the cultural sites interwoven with the land itself, which connect the Tribe to its history and allow for the ongoing education and cultural practices of Tribal members.

**V. There is a dispute of material fact, and the disputed facts are:**

**a. GLW needs an industrial storm water discharge permit for discharges associated with metallic mining exploration in the Bend Deposit because metallic mining exploration is an industrial activity under Wisconsin law.**

GLW's proposed metallic mining exploration in the Bend Deposit would result in storm water discharges that require coverage under the industrial facility storm water permit.<sup>49</sup> DNR regulations require an industrial storm water permit for "point sources which discharge storm

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<sup>44</sup> See e.g. Wis. Stat. 281.01 *et seq.*; 40 CFR § 230.41 *et seq.*

<sup>45</sup> *Id.*; see also 33 U.S.C. § 1251 *et seq.*; Wis. Stat. § 283.001 *et seq.*

<sup>46</sup> See e.g. Wis. Stat. 44.01 *et seq.*; 25 U.S.C. §§ 3001-13; Wis. Stat. 157.01 *et seq.*

<sup>47</sup> *Id.*

<sup>48</sup> Wis. Stat. 29.604; 16 U.S.C. §§ 1531-1544.

<sup>49</sup> Exhibit 9.

water associated with industrial activity to the waters of the state.”<sup>50</sup> Qualifying industrial sites are defined in the regulations with corresponding Standard Industrial Classification (“SIC”) codes. For purposes of NR 216, the DNR relies on the SIC codes from the 1987 edition of the Standard Industrial Classification Manual to define industrial facilities subject to industrial storm water permit requirements under subchapter II.<sup>51</sup> Metal mining is categorized as a “Tier 2” facility, denoted by SIC code range 1000-1099.<sup>52</sup> The 1987 edition of the Standard Industrial Classification Manual defines “mining” as “all establishments primarily engaged in mining” of which “[e]xploration and development of mineral properties are included.”<sup>53</sup> Furthermore, the 1987 SIC Manual defines “Major Group 10” as metal mining, including “establishments primarily engaged in...exploring for metallic mineral (ores).”<sup>54</sup> And the SIC codes for the entirety of Major Group 10 (1011 through 1099) fall into the DNR’s definition of Tier 2 facilities requiring an industrial storm water discharge permit.<sup>55</sup>

Moreover, the 1987 SIC Manual states that “[w]hen performed by operators of the properties, exploration under preliminary phases of operation should be classified according to the type of ore expected to be found.”<sup>56</sup> Assuming that GLW, the operator of the proposed exploration activities, expects to find copper at the Bend Deposit, the proposed exploration should be classified according to SIC code 1021 for copper ores and any associated storm water discharges thereby regulated under an industrial storm water discharge permit.<sup>57</sup> The same would be true if GLW commences exploration activities for gold and/or silver ores, which are classified under SIC codes 1041 and 1044, respectively.<sup>58</sup> Even if GLW is not considered an “operator[] of the properties,” and instead hires outside contractors to complete the exploration, any contractor’s work is still covered under SIC code 1081 and any storm water discharges associated with the exploration would therefore subject to an industrial storm water discharge permit.<sup>59</sup>

The DNR ignored the language and mandate of its own regulations in concluding that GLW would not require an industrial storm water discharge permit for metallic mining exploration in the Bend Deposit. When made aware of this issue, the DNR erroneously stated that “[e]xploration drilling is not a mining operation, and therefore is not an activity that would be covered under metal mining in table 4 of NR 216.21(2)(b)3.a. Wis. Adm Code.”<sup>60</sup> DNR’s conclusion and subsequent inaction misinterprets the language of NR 216, ignores the definitions of the 1987 SIC Manual that have been incorporated into NR 216, and violates WPDES permit

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<sup>50</sup> Wis. Admin. Code. § NR 216.21(1).

<sup>51</sup> *Id.* at NR 216.002(28).

<sup>52</sup> Wis. Admin. Code § NR 216.21(2)(b)3.a., Table 4.

<sup>53</sup> See 1987 SIC Manual, available at [https://www.waterboards.ca.gov/water\\_issues/programs/storm\\_water/docs/industrial/sic\\_manual\\_1987.pdf](https://www.waterboards.ca.gov/water_issues/programs/storm_water/docs/industrial/sic_manual_1987.pdf) (last visited Mar. 5, 2025) at p. 39.

<sup>54</sup> *Id.* at p. 40.

<sup>55</sup> *Id.* at pp. 40-42; Wis. Admin Code § NR 216.21(2)(b)3.a., Table 4.

<sup>56</sup> *Supra* n. 53 at p. 40.

<sup>57</sup> *Id.*; Wis. Admin Code § NR 216.21(2)(b)3.a., Table 4.

<sup>58</sup> *Supra* n. 53 at p. 41; Wis. Admin Code § NR 216.21(2)(b)3.a., Table 4.

<sup>59</sup> See *supra* n. 53 at p. 41 (stating that SIC code 1081 includes “[e]stablishments primarily engaged in performing metal mining services for others on a contract or fee basis, such as...mine exploration”).

<sup>60</sup> Exhibit 10



requirements. As a result, the DNR’s inaction places the natural resources and ecosystem on and around the Bend Deposit at risk by failing to require the distinct method of pollution prevention that the industrial storm water discharge permit is meant to provide.

**b. Exploratory mining in the Bend Deposit will cause storm water to come into contact with “overburden or raw materials” or by-product or waste material on the site of the operations.**

Because GLW’s proposed exploratory mining in the Bend Deposit constitutes a Tier 2 facility under NR 216, an industrial storm water discharge permit is required insofar as storm water discharges associated with the mining will “come into contact with overburden, raw material, intermediate product, by-product, and or waste material located on the site of the operations.”<sup>61</sup> Storm water discharges associated with GLW’s metallic mining exploration will, absent an adequate storm-resistant shelter, come into contact with overburden, raw material, intermediate product, by-product, and/or waste material at the site of exploration operations.<sup>62</sup> Any such discharges are subject to industrial facility storm water permit requirements under subchapter II of Wisconsin Administrative Code NR 216.

DNR regulations state that “[a]ny person who owns or operates an industrial activity with a storm water discharge subject to [an industrial facility stormwater permit] that does not qualify for a no exposure certification...shall prepare and implement [a storm water pollution prevention plan].”<sup>63</sup> This requirement covers “all potential source areas of storm water contamination,” including but not limited to: (a) storage and maintenance areas for material handling equipment; (b) material handling sites including storage, loading, unloading, transportation, or conveyance of any raw material, finished product, intermediate product and by-product or waste areas; (c) storage areas for raw materials, finished and intermediate products including tank farms; (d) disposal or application of wastewater; (e) areas of significant soil erosion; (f) vehicle maintenance and cleaning areas; and (g) any other areas capable of contaminating stormwater runoff.<sup>64</sup>

GLW plans to conduct metallic mining exploration in the Bend Deposit using diamond coring operations, beginning by drilling through the “unconsolidated glacial overburden down to solid bedrock.”<sup>65</sup> The removed overburden, which is the soil overlaying the mineral ore deposits, will be stockpiled for use during sump backfilling and reclamation.<sup>66</sup> Soil stockpiles will only be stabilized by “perimeter erosion controls” (i.e., silt socks, which, by their nature, would not prevent contaminated stormwater runoff) if the stockpile will exist for greater than seven

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<sup>61</sup> Wis. Admin. Code § NR 216.21(2)(b)3.a.

<sup>62</sup> See Wis. Admin. Code § NR 216.21(3).

<sup>63</sup> Wis. Admin. Code § NR 216.27(1).

<sup>64</sup> Wis. Admin. Code § NR 216.27(3)(e).

<sup>65</sup> Green Light Metals, *Revised Notice of Intent to Drill* (Feb. 15, 2023) at p. 6, available at [https://dnr.wisconsin.gov/sites/default/files/topic/Mines/GLW\\_Bend\\_Revised\\_NOI\\_February\\_15\\_2022.pdf](https://dnr.wisconsin.gov/sites/default/files/topic/Mines/GLW_Bend_Revised_NOI_February_15_2022.pdf) (last visited Mar. 6, 2025).

<sup>66</sup> *Id.* at 10.

days.<sup>67</sup> Additionally, “anchored tarps” will only be placed over stockpiles that are “left inactive for significant periods of time.”<sup>68</sup>

GLW acknowledges areas of significant soil erosion associated with their proposed exploration activities, with “the drill sites represent[ing] the most significant disturbances.”<sup>69</sup> GLW calculated the total soil loss to be 2.6 tons per acre (not including soil stockpiles located on the drill sites), with a total of 1.4 tons per acre of sediment discharge.<sup>70</sup> GLW further contemplates the potential for “disturbed and/or stockpiled soil/sediment” to “erode and migrate towards water features.”<sup>71</sup> Nothing in these plans would prevent storm water from coming into contact with the overburden removed at the site of exploration operations.

Furthermore, according to GLW’s most recent Erosion Control Plan, GLW’s exploratory mining activities will include the construction of 6 drill sites and accompanying sumps.<sup>72</sup> GLW will construct the sumps with a backhoe, and “[e]xcavated soils (sub-soil and top-soil) will be segregated and stockpiled separately near the pit for use during sump backfilling and reclamation, respectively.”<sup>73</sup> GLW anticipates that it will need to employ storm water management practices related to its sump construction and “intermittent disturbances associated with clearing, site preparation and moving vehicles/equipment along the temporary access routes and at the drill sites,” because these activities may expose soil and sediment to “migrate toward down slope waterways and wetlands.”<sup>74</sup> The sub-soil and top-soil it excavates during sump construction and site preparation activities constitutes overburden that may come into contact with storm water runoff.<sup>75</sup>

Because GLW’s own proposals reveal that their exploratory mining at the Bend Deposit will cause storm water to come into contact with overburden, and metallic mining exploration is an industrial activity, an industrial storm water discharge permit is required before commencing drilling operations absent a “no exposure” exemption from the DNR, which GLW has not requested or obtained.<sup>76</sup> This factual determination is essential to the question of WPDES permit applicability.

**c. The DNR’s deficient grant of coverage fails to ensure adequate protection for nearby historic and cultural sites.**

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<sup>67</sup> Green Light Metals, *Soil Loss Calculations* (Jan. 14, 2025), available at: <https://permits.dnr.wi.gov/water/SitePages/DocSetViewDet.aspx?DocSet=SW-GP-NO-2025-61-X01-20T18-06-06> (last visited Mar. 6, 2025).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Green Light Metals, *Response to DNR re NOI*, (April 14, 2023) at p. 2, available at <https://dnr.wisconsin.gov/sites/default/files/topic/Mines/Green%20Light%20Wisconsin%20NOI%20Additional%20Information%2004-17-2023.pdf> (last visited Mar. 6, 2025).

<sup>72</sup> Exhibit 11

<sup>73</sup> *Id.*

<sup>74</sup> Exhibit 12

<sup>75</sup> See *Clean Wisconsin, Inc. v. Public Serv. Comm’n of Wis.*, 2024 WI App 74 ¶ 81 (Oct. 8, 2024) (defining “overburden” to include “soils and plants above the [layer of] sand” mined for fracking).

<sup>76</sup> Wis. Admin. Code § NR 216.21(3)(b)3.

Wisconsin law requires the DNR to consider “whether any proposed action of the [ ] agency will affect any historic property that is a listed property, on the inventory or on the list of locally designated historic places.”<sup>77</sup> The DNR is authorized to “deny or impose conditions on a permit, license, authorization, variance, exception or award of financial assistance...in order to reduce any adverse effect on historic property.”<sup>78</sup> In issuing its February 4, 2025, grant of coverage to GLW, the DNR relied upon a 2023 conditional approval of GLW’s exploration license NOI to drill, in which the DNR concluded that “[t]he project is not expected to impact any known archaeological or historic resources.”<sup>79</sup> This conclusion is factually and legally incorrect and opens the door to irreparable damage from GLW’s mining activities to cultural and historic sites of great importance to the Tribe.

First, as mentioned above, the Bend Deposit is adjacent to Big Indian Farm, a site listed on the national registry with great significance to the Tribe. It is thought to be the site of a historic Tribal village, with nearby Indian trails and burial sites that are yet to be surveyed. While the Big Indian Farm site as listed on the national registry is located over 200 feet from the Bend Deposit, the nearby burial site associated with Big Indian Farm is thought to be located in an area of higher ground, directly within the boundaries of the Bend Deposit. Despite not being listed as a formal historic site on the state or national registry, and regardless of whether it is formally marked or tended to, the burial site is entitled to legal protection under Wisconsin law, which aims to “[b]alance the interests of scientists, landowners, developers and others with an interest in a burial site, including those with a kinship interest and those with a general cultural, tribal or religious affiliation with the burial site.”<sup>80</sup> Those legally protected interests reflect those of the Tribe and should entitle the burial site to heightened consideration and protection by the DNR.

Moreover, as discussed in sections prior, the Bend Deposit sits within the Ceded Territory of the Tribe, which the Tribe has a legally enforceable right to access and utilize. The DNR failed to consider or account for the historic and cultural significance of the area to the Tribe, or to consult with the Tribe on this issue as required by Wisconsin law and DNR policy.<sup>81</sup> Failure to properly identify and account for historic sites and resources in the area of the Bend Deposit further indicates that the DNR’s grant of coverage to GLW is deficient and insufficient to protect the environment and features of the surrounding area.

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<sup>77</sup> Wis. Stat. § 44.40(1).

<sup>78</sup> Wis. Stat. § 44.40(4).

<sup>79</sup> Exhibit 3.

<sup>80</sup> See 85 Wis. Act 316, available at <https://www.wisconsinhistory.org/pdfs/hp/HPR-1985-WI-Act-316.pdf> (last visited Mar. 5, 2025).

<sup>81</sup> See Executive Order #18, *Relating to an Affirmation of the Intergovernmental Relationships Among the State of Wisconsin and Tribal Nations Located within the State*, available at <https://evers.wi.gov/Pages/Newsroom/Executive%20Orders/EO%20018%20relating%20to%20affirmation%20of%20the%20intergovernmental%20relationship%20among%20the%20state%20of%20Wisconsin%20and%20Tribal%20Nations%20located%20within%20the%20state.pdf> (last visited Mar. 5, 2025); see also Wisconsin DNR, *Policy Regarding consultation with American Indian Tribal Nations in Wisconsin*, available at <http://witribes.wi.gov/docview.asp?docid=6024&locid=57> (last visited Mar. 5, 2025).

**d. The DNR’s deficient grant of coverage fails to ensure adequate protection for nearby wetlands.**

Wisconsin law also requires the DNR to minimize adverse environmental effects of industrial activities by requiring specific permits for certain discharges into wetlands.<sup>82</sup> As discussed above, two wetlands near the Bend Deposit are categorized as “highly susceptible” pursuant to DNR guidance documents.<sup>83</sup> And one of the wetlands extends within the protective area of the North Branch of the Yellow River.<sup>84</sup> In issuing its February 4, 2025, grant of coverage to GLW, the DNR relied upon a prior finding that GLW’s proposed exploratory mining “will not result in a discharge of fill material into wetlands.” But the DNR’s conclusion was made in the context of the general construction site permit, not the industrial storm water discharge permit, and therefore fails to accurately consider the type of discharge likely to flow from the Bend Deposit. As the DNR’s regulations recognize, industrial discharges are a separate and more severe category of pollution which, absent the proper permit and associated mitigation measures, place nearby wetlands at enhanced risk of contamination.<sup>85</sup> The Tribe accordingly disputes DNR’s material factual determination that GLW’s proposed exploratory mining will not result in a discharge of fill material into wetlands.

**e. The DNR’s deficient grant of coverage fails to ensure adequate protection for threatened or endangered species in the area.**

Finally, Wisconsin law requires the DNR to comply with the endangered and threatened species protections mandated by state and federal law.<sup>86</sup> The DNR previously concluded that GLW’s proposed exploratory mining at the Bend Deposit would have possible impacts on three such species: the Wood Turtle, the American Goshawk, and the American Water Shrew, requiring follow up actions by GLW as to the Wood Turtle and recommending follow up actions by GLW as to the American Goshawk and American Water Shrew.<sup>87</sup> That assessment is deficient for two reasons.

First, the DNR’s analysis is in the context of a general permit for construction site discharges, rather than an industrial storm water discharge permit for industrial discharges. The DNR has not analyzed the effects of industrial discharges on endangered species near the Bend Deposit, leaving those species vulnerable to harm should GLW’s exploratory mining proceed as planned. Second, the DNR’s analysis fails to account for the presence of the Northern Long-Eared Bat (“NLEB”) in the area, a federally listed endangered species.<sup>88</sup> The NLEB is known to

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<sup>82</sup> Wis. Admin. Code § NR 281.36.

<sup>83</sup> Exhibit 4.

<sup>84</sup> Exhibit 5.

<sup>85</sup> See generally Wis. Admin. Code § NR 216.20 *et seq.*

<sup>86</sup> See Wis. Stat. § 29.604; Wis. Admin. Code § NR 27 *et seq.*

<sup>87</sup> See *supra* n. 12.

<sup>88</sup> See Wis. Admin. Code § NR 27.01 (incorporating the federal endangered and threatened species list into the DNR’s list); See also USFWS, *Northern Long-eared Bat* at <https://www.fws.gov/species/northern-long-eared-bat-myotis-septentrionalis> (last visited Mar. 6, 2025).

have habitat in the Chequamegon-Nicolet National Forest, in the area of the Bend Deposit.<sup>89</sup> In analyzing potential impacts on the NLEB, the Wisconsin DNR only considers documentation of maternity roosts and hibernacula as evidence of NLEB in a specific area.<sup>90</sup> In contrast, the USFS makes similar assessments based on a broader analysis of “potential roosting habitats.”<sup>91</sup> The DNR’s failure to apply federal standards to analyzing the presence of a federally-listed endangered species puts the NLEB at risk of harm from destructive, pollution-generating projects like that at issue here.

Accordingly, the Tribe disputes DNR’s conclusion of material fact that recommendations related to threatened and endangered species will function as adequate protection.

**VI. The statute or administrative rule other than s. 227.42, Stats., if any, which accords a right to a hearing:**

Wis. Stat. § 281.48(5) states “The department may and upon written complaint shall make investigations and conduct hearings and may suspend or revoke any license...” Additionally, Wisconsin state law provides a cause of action to “any person, county, city, village or town” to “recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered, so far as necessary to protect the complainant’s rights and to obtain an injunction to prevent the same.”<sup>92</sup> This statute represents additional authority for the Tribe’s right to a hearing because, as described above, the Tribe will experience particularized injury should GLW’s exploratory mining proceed as planned.

**Conclusion**

For all the foregoing reasons, and those contained in the accompanying exhibits and documents, the Tribe requests that the DNR grant its petition for a contested case hearing.

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Andrew Adams III (WI Bar #1052371)

Samantha Hermsen Sanchez

Ellen Currier

HOGEN ADAMS PLLC

1935 County Road B2 W., Suite 460

Saint Paul, MN 55113

Phone: 651-842-9100

Facsimile: 651-842-9101

Email: aadams@hogenadams.com

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<sup>89</sup> See USDA, Kidrick Vegetation Project, Appendix E – Wildlife Biological Evaluation, available at <https://www.fs.usda.gov/project/?project=50889&exp=overview> (last visited Mar. 5, 2025).

<sup>90</sup> Exhibit 13.

<sup>91</sup> *Supra* n. 89.

<sup>92</sup> Wis. Stat. § 823.01.

shermensanchez@hogenadams.com  
ecurrier@hogenadams.com

*Attorneys for Petitioner Lac du Flambeau  
Band of Lake Superior Chippewa Indians*