

LAC DU FLAMBEAU BAND OF  
LAKE SUPERIOR CHIPPEWA  
INDAINS  
418 Little Pines Road  
Lac du Flambeau, WI 54538

Petitioners,

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3:50pm  
ALL*

Case No.: \_\_\_\_\_  
Case Code: 30607

WI DEPT. OF  
NATURAL RESOURCES  
MAR 6 2025  
OFFICE OF THE  
SECRETARY

vs.

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

Respondent.

RECEIVED  
MAR 06 2025  
DEPT OF NATURAL RESOURCES  
BUREAU OF LEGAL SERVICES

**PETITION FOR JUDICIAL REVIEW**

Petitioner Lac du Flambeau Band of Lake Superior Chippewa Indians, by its undersigned attorneys, brings this Petition pursuant to Wis. Stat. § 227.52 for review of the Wisconsin Department of Natural Resources’ decision to grant coverage under the statewide Construction Site Storm Water Discharge General Permit to Green Light Metals Wisconsin, LLC for an exploratory mining project without requiring additional coverage under an Industrial Facility Storm Water Discharge Permit. A complete and accurate copy of the Department of Natural Resources’ decision (the “Grant of Coverage”) is attached to this Petition as **Exhibit A**.

For the reasons provided below, Petitioner asserts that the Department of Natural Resources’ failure to require additional coverage under an Industrial Facility Storm Water Discharge Permit violates Wis. Stat. §§ 283.31(1) and 283.33(1)(a) and Wis. Admin. Code § NR 216.21(2)(b)3.a.

Petitioner alleges and states as follows:

### **PARTIES**

1. Petitioner Lac du Flambeau Band of Lake Superior Chippewa Indians (the “Tribe” and/or “Petitioner”) is a self-governing, federally recognized Indian tribe that exercises sovereign authority over its members and its territory. The Tribe’s main government office is located at 418 Old Abe Rd., Lac Du Flambeau, Vilas County, Wisconsin 54538.

2. Respondent Wisconsin Department of Natural Resources (“DNR” and/or “Respondent”) 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 53703.

### **JURISDICTION AND VENUE**

3. The Grant of Coverage at issue is an administrative decision that is reviewable under Wis. Stat. § 227.52.

4. Venue is proper in this Court pursuant to Wis. Stat. § 227.53(1)(a)3 because the Tribe is a nonresident of Wisconsin<sup>1</sup> and the property affected by the Department’s decision is located in Taylor County, Wisconsin.

5. This petition is timely filed.

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<sup>1</sup> See, e.g., Wis. Stat. § 181.0103(12g) (defining a “foreign” entity as “an entity whose governing law is other than the law of this state”); see also *Wis. Dep’t of Nat. Res. v. Timber and Wood Products Located in Sawyer Cnty.*, 2018 WI App 6, ¶ 18, 379 Wis.2d 960, 906 N.W.2d 707 (acknowledging that Indian tribes are separate, sovereign powers pre-existing the Constitution).

## LEGAL BACKGROUND

### *Mineral Exploration Licensing*

6. Wisconsin Statute chapter 293 governs nonferrous metallic mining and related activities in the state. The chapter defines “mineral exploration” or “exploration” as “the on-site geologic examination from the surface of an area . . . for the purpose of searching for nonferrous metallic minerals or establishing the nature of a known nonferrous metallic mineral deposit,” and it “includes associated activities such as clearing and preparing sites or constructing roads for drilling” within this definition.<sup>2</sup> The definition of “mining” excludes “exploration,” drawing a distinction between the two terms for the purpose of licensing under this chapter.<sup>3</sup>

7. Chapter 293 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 DNR.<sup>4</sup> Applicants for exploration licenses must also submit a surety bond with a minimum value of \$5,000; DNR may increase the required bond amount at any time.<sup>5</sup>

8. In addition to the licensing and bond requirements, explorers must submit an exploration license Notice of Intent (“NOI”) to DNR before beginning exploratory drilling.<sup>6</sup> DNR may approve, conditionally approve, or deny NOIs.<sup>7</sup> If approved, the NOI remains in effect for one year from the date of approval.<sup>8</sup> Explorers must notify DNR at least 48 hours before beginning exploratory drilling on a specified parcel.<sup>9</sup>

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<sup>2</sup> Wis. Stat. § 293.01(5).

<sup>3</sup> *Id.* § 293.01(5).

<sup>4</sup> *Id.* § 293.21(2); Wis. Admin. Code § NR 130.105(1).

<sup>5</sup> Wis. Stat. § 293.21(3); Wis. Admin. Code. § NR 130.105(2)(b).

<sup>6</sup> Wis. Stat. § 293.21(4); Wis. Admin. Code § NR 130.109.

<sup>7</sup> Wis. Admin. Code § NR 130.109(4).

<sup>8</sup> *Id.* § NR 130.109(5).

<sup>9</sup> *Id.* § NR 130.109(6).

### *Storm Water Discharge Permitting*

9. Wisconsin Statute chapter 283 regulates the discharge of pollutants to waters of the state through the Wisconsin Pollutant Discharge Elimination System (WPDES) program, which is modeled after its federal counterpart under the Clean Water Act. The chapter prohibits the discharge of pollutants to waters of the state without a WPDES permit and grants DNR the authority to issue these permits.<sup>10</sup>

10. DNR may issue separate permits to individual point sources or a general permit (“GP”) “applicable to a designated area of the state authorizing discharges from specified categories or classes of point sources.”<sup>11</sup>

11. Point sources that discharge storm water into waters of the state may require an individual or general WPDES storm water discharge permit.<sup>12</sup> Wisconsin Administrative Code chapter NR 216 contains DNR’s regulations for WPDES storm water discharge permitting, including requirements for permittees to follow storm water pollution prevention plans and implement various best-management practices (“BMPs”) to reduce the amount of storm water runoff entering waters of the state.<sup>13</sup>

12. Point source discharges of storm water from construction sites with one or more acres of land disturbance, including areas of land that are part of a “common plan of development,” require a Construction Site Storm Water Discharge Permit.<sup>14</sup> DNR has issued General Permit No. WI-S067831-6 (the “Construction Site Storm Water Discharge GP”) for

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<sup>10</sup> Wis. Stat. § 283.31(1).

<sup>11</sup> *Id.* § 283.35(1).

<sup>12</sup> *See generally id.* § 283.33; *see also* Wis. Admin Code §§ NR 216.23 (authorizing storm water discharge GPs for certain industrial facilities), 216.41-.55 (establishing permitting scheme for storm water discharge permits, including GPs, for construction sites).

<sup>13</sup> *See, e.g.,* Wis. Admin. Code §§ NR 216.27 (requiring storm water pollution prevention plan for Industrial Storm Water Discharge Permits), NR 216.47 (requiring storm water management plan for Construction Site Storm Water Discharge Permits).

<sup>14</sup> Wis. Stat. § 283.33(1)(am); Wis. Admin. Code §§ NR 216.002(2), 216.42(1).

discharges of storm water associated with land disturbing construction activity. A complete and accurate copy of the Construction Site Storm Water Discharge GP is attached to this Petition as **Exhibit B**.

13. Point source discharges of storm water from certain industrial facilities require an Industrial Facility Storm Water Discharge Permit.<sup>15</sup> DNR has issued General Permit No. WI-S067857-5 (the “Industrial Facility Storm Water Discharge GP”) for storm water discharges associated with “Tier 2” industrial facilities. A complete and accurate copy of the Industrial Facility Storm Water Discharge GP is attached to this Petition as **Exhibit C**.

14. Chapter NR 216 categorizes industrial facilities by the Standard Industrial Classification (“SIC”) Code for the facilities’ operations.<sup>16</sup> For the purposes of this chapter, DNR relies on the 1987 edition of the SIC Manual.<sup>17</sup>

15. “Tier 2” industrial facilities include metal mining facilities denoted by SIC Codes 1000-1099.<sup>18</sup>

16. The 1987 SIC Manual defines “mining” as “all establishments primarily engaged in mining,” of which “[e]xploration and development of mineral properties are included.”<sup>19</sup> Furthermore, SIC Codes 1011-1099 constitute “Major Group 10,” which the 1987 SIC Manual defines as metal mining operations including “establishments primarily engaged in . . . exploring for metallic mineral (ores).”<sup>20</sup>

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<sup>15</sup> Wis. Stat. § 283.33(1)(a); Wis. Admin. Code § NR 216.21(1), (2).

<sup>16</sup> Wis. Admin. Code § NR 216.21(2).

<sup>17</sup> *Id.* at § NR 216.002(28); see *Standard Industrial Classification Manual 1987*, OFFICE OF MGMT. & BUDGET, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.waterboards.ca.gov/water\_issues/programs/stormwater/docs/industrial/sic\_manual\_1987.pdf (last visited Mar. 6, 2025).

<sup>18</sup> Wis. Admin. Code § 216.21(2)(b)3.a.

<sup>19</sup> *Standard Industrial Classification Manual 1987* at 39.

<sup>20</sup> *Id.* at 40.

17. The “Major Group 10” SIC Codes fall within the range of SIC Codes defining “Tier 2” metal mining facilities in Wis. Admin. Code § NR 216.21(2)(b)3.a.

18. “Tier 2” metal mining facilities require an Industrial Facility Storm Water Discharge Permit if their activities cause storm water to “come into contact with any overburden, raw material, intermediate product, finished product, by-product or waste material located on the site of the operations.”<sup>21</sup>

19. The Construction Site Storm Water Discharge GP “may be issued to existing holders of general or individual WPDES permits, resulting in multiple WPDES permits for some sites.”<sup>22</sup>

20. An industrial facility’s storm water discharges could require both a Construction Site Storm Water Discharge GP and an Industrial Facility Storm Water Discharge GP if the facility’s proposed activities disturb one acre or more of land and the Industrial Facility Storm Water Discharge GP does not otherwise regulate the land disturbing activities.<sup>23</sup>

21. To determine eligibility for coverage under the Construction Site Storm Water Discharge GP and/or the Industrial Facility Storm Water Discharge GP, owners and operators must submit a storm water discharge NOI at least 14 working days prior to initiating the discharge activity, and DNR may either grant or deny coverage.<sup>24</sup>

22. A grant of coverage under a GP is an agency decision subject to judicial review pursuant to Wis. Stat. § 227.52.

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<sup>21</sup> Wis. Admin. Code § NR 216.21(2)(b)3.a.

<sup>22</sup> Ex. B at § 1.4.

<sup>23</sup> *Id.*

<sup>24</sup> Wis. Admin. Code §§ NR 216.22(2), NR 216.44(1).

## FACTUAL BACKGROUND

### *Cultural, Historical, and Environmental Importance of the Bend Deposit Area*

23. The Bend Deposit is an underground mineral deposit of copper-, gold-, and silver-bearing sulfides. It underlies federal lands within the Chequamegon-Nicolet National Forest in Taylor County, Wisconsin.

24. The Bend Deposit is located in part of the Ojibwe Ceded Territory (the “Ceded Territory”), in which the Tribe and several other Lake Superior Bands retain usufructuary rights.<sup>25</sup>

25. This area holds incredible environmental importance with a unique and vulnerable biodiversity that is crucial to the vitality of natural resources in the area.

26. For example, 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>26</sup>

27. DNR guidance identifies those wetlands as “highly susceptible.”<sup>27</sup> A complete and accurate copy of this guidance document is attached as **Exhibit D**. One of the wetlands extends within the protective area of the North Branch of the Yellow River, which is an area specifically “established to minimize impacts from runoff coming from developed areas before it reaches sensitive resources.”<sup>28</sup>

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<sup>25</sup> See Treaty with the Chippewa, 7 Stat. 536, art. 5 (July 29, 1837; Proclamation June 15, 1838); Treaty with the Chippewa, 7 Stat. 591, art. 2 (Oct. 4, 1842; Proclamation Mar. 23, 1843).

<sup>26</sup> *Wetlands Benefit People and Nature*, WIS. DEP’T OF NAT. RES., <https://dnr.wisconsin.gov/topic/Wetlands#:~:text=Wetlands%20are%20nurseries%20for%20fish,greenhouse%20gas%20fueling%20climate%20change>. (last visited Mar. 4, 2025).

<sup>27</sup> *Guidance for the Establishment of Protective Areas for Wetlands in Runoff Management Rules*, WIS. DEP’T OF NAT. RES. BUREAU OF WATERSHED MGMT. (Apr. 2015) (Exhibit D).

<sup>28</sup> *Id.*

28. The area is also home to several endangered and threatened species that rely on its unique ecosystem for survival, including the American Goshawk, the American Water Shrew, the White Adder's-mouth, the Bog Bluegrass, the Wood Turtle, and the Long-Eared Bat.

29. DNR 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>29</sup>

30. The surrounding area contains Manoomin (Wild Rice) beds, a protected species under Wisconsin law that Tribal members historically harvested and continue to harvest.<sup>30</sup>

31. The Tribe and its members also use the surrounding area for cultural and historical purposes. The Bend Deposit is adjacent to Big and Little Indian Farms, a historic site recognized on the national register with cultural significance to the Tribe.<sup>31</sup>

32. The Bend Deposit is also surrounded by historic Indian trails and 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 and Little Indian Farms is yet to be fully studied.

#### *Mineral Rights in the Bend Deposit*

33. Jump River Joint Venture first drilled the Bend Deposit in the early 1990s. The U.S. Geological Survey studied the deposit in the late 1990s, and Aquila Resources drilled the

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<sup>29</sup> This information was contained in DNR's October 9, 2024, Endangered Species Review Letter to GLW, which was previously uploaded to the public DNR website and later taken down due to confidentiality concerns.

<sup>30</sup> *Wild Rice Harvesting*, WIS. DEP'T OF NAT. RES., <https://dnr.wisconsin.gov/topic/wildlifehabitat/rice> (last visited Mar. 5, 2025).

<sup>31</sup> *Wisconsin SP Big Indian Farms*, NATIONAL ARCHIVES CATALOG, <https://catalog.archives.gov/id/106782606> (last visited Mar. 6, 2025).



deposit again in the early 2010s. The deposit is estimated to contain about 4.23 million tons of copper, gold, and silver ore.

34. The U.S. Forest Service (“USFS”) owns and manages most of the mineral rights in the Bend Deposit. The Soo Line Railroad Company (d.b.a. Canadian Pacific Railway) privately owns the mineral rights to a portion of the deposit underlying a 40-acre parcel of land (the “Soo Line Parcel”) within the Chequamegon-Nicolet National Forest. USFS owns the surface estate of the Soo Line Parcel.

35. In July 2021, Green Light Metals Wisconsin, LLC (“GLW”), a subsidiary of Green Light Metals (“GLM”), acquired Aquila Resources and their Wisconsin assets. GLW obtained a mineral lease from Canadian Pacific Railway to conduct exploratory drilling in the Soo Line Parcel.

36. GLW anticipated conducting its exploratory mining project in the Soo Line Parcel (the “Bend Project”) in the late winter and early spring of 2025.

#### *Bend Project Licensing and Permitting Timeline*

37. USFS issued a Notice to Proceed in 2022 for GLW to conduct exploratory drilling and recently issued an updated Notice to Proceed in late winter 2025.

38. DNR issued a Metallic Mineral Exploration License to GLW in February 2022 and renewed the license in July 2022.

39. GLW submitted an exploration license NOI to DNR to begin exploratory drilling in the Soo Line Parcel in September 2022. It submitted a revised NOI in February 2023 and supplemental information in April 2023.

40. DNR conditionally approved the NOI in May 2023. A complete and accurate copy of this conditional approval is attached as **Exhibit E**.

41. DNR again renewed GLW's Metallic Mining Exploration license in June 2024, authorizing exploratory drilling in the Soo Line Parcel under the NOI it had conditionally approved in May 2023.

42. GLW submitted a storm water discharge NOI in January 2025 requesting coverage under the Construction Site Storm Water Discharge GP for stormwater discharges associated with land disturbing construction activity.

43. DNR issued the Grant of Coverage under the Construction Site Storm Water Discharge GP on February 4, 2025.<sup>32</sup>

*Proposed Plan of Operations for the Bend Project*

44. In the revised erosion control plan GLW submitted in conjunction with its storm water discharge NOI, GLW defined the Bend Project site's estimated area of disturbance to be 0.622 acres.<sup>33</sup> A complete and accurate copy of the erosion control plan is attached as **Exhibit F**.

45. The plan includes up to eight drillholes over six drill sites in the Soo Line Parcel.<sup>34</sup>

46. GLW estimated the area of disturbance outside the Bend Project site, on the portion of the Bend Deposit outside the Soo Line Parcel for which USFS owns both the surface estate and mineral rights, to be 1.51 acres.<sup>35</sup> The plan includes up to 9 infill drillholes and 6 reconnaissance drillholes over 13 drill sites outside the Soo Line Parcel.<sup>36</sup>

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<sup>32</sup> See Ex. A.

<sup>33</sup> Revised Erosion Control Plan at 1 (Jan. 31, 2025) (Exhibit F).

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

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

47. GLW described its plans in further detail in its exploration license NOI from February 2023. A complete and accurate copy of the exploration license NOI is attached as **Exhibit G**.

48. GLW plans to conduct the Bend Project in the Soo Line Parcel using diamond coring operations, beginning by drilling through the “unconsolidated glacial overburden down to solid bedrock.”<sup>37</sup>

49. GLW will stockpile the removed overburden, which is the soil overlaying the mineral ore deposits, for use during sump backfilling and reclamation.<sup>38</sup>

50. GLW will stabilize the overburden stockpiles using “perimeter erosion controls,” i.e., silt socks, only if the stockpile will exist for greater than seven days.<sup>39</sup> Additionally, it will cover overburden stockpiles with “anchored tarps” only if the stockpiles are “left inactive for significant periods of time.”<sup>40</sup>

51. GLW acknowledged areas of significant soil erosion associated with their proposed exploration activities, with “the drill sites represent[ing] the most significant disturbances.”<sup>41</sup> It 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>42</sup>

52. GLW further contemplated the potential for “disturbed and/or stockpiled soil/sediment” to “erode and migrate towards water features.”<sup>43</sup>

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<sup>37</sup> Ex. G at 6.

<sup>38</sup> *Id.* at 10.

<sup>39</sup> GLW’s Soil Loss Calculations (dated Jan. 14, 2025) are publicly available as part of their storm water discharge NOI materials 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>40</sup> See Soil Loss Calculations (*supra* n. 39).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> GLW’s Response to DNR regarding its exploration license NOI (dated Apr. 14, 2023) is publicly 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).

## ISSUES FOR REVIEW

**ISSUE 1: The proposed activities at the Bend Project site require an Industrial Facility Storm Water Discharge Permit under Wisconsin Administrative Code Chapter NR 216, Subchapter II, because metallic mining exploration constitutes a “Tier 2” industrial facility activity under Wis. Stat. § NR 216.21(2)(b)3.a.**

53. Petitioner realleges and incorporates herein each preceding paragraph of the Petition.

54. GLW’s proposed activities constitute metallic mining exploration, which is included in the activities of a “Tier 2” industrial facility as defined by the SIC Codes in Table 4 of Wis. Stat. § NR 216.21(2)(b)3.a.<sup>44</sup>

55. These proposed activities would result in storm water discharges that are not eligible for coverage under the Construction Site Storm Water Discharge GP.

56. DNR ignored the language of its own regulations in concluding that the Bend Deposit Project would not require an Industrial Facility Storm Water Discharge Permit.

57. Therefore, pursuant to Wis. Stat. § 283.33(1)(a) and Wis. Admin. Code § NR 216.21(2)(b)3.a, DNR should require GLW to apply for an Industrial Facility Storm Water Discharge Permit because the Bend Project constitutes a “Tier 2” industrial facility.

**ISSUE 2: The proposed activities at the Bend Project site require an Industrial Facility Storm Water Discharge Permit because they are likely to cause storm water to come into contact with “overburden, raw material, intermediate product, finished product, by-product or waste material located on the site of the operations” under Section NR 216.21(2)(b)3.a.**

58. Petitioner realleges and incorporates herein each preceding paragraph of the Petition.

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<sup>44</sup> The inclusion of metallic mining exploration within “Tier 2” industrial facility activities is appropriate because the SIC Codes in Table 4 of Wis. Stat. § NR 216.21(2)(b)3.a control the definition of these activities, not Wisconsin Statute chapter 293.

59. “Tier 2” industrial facilities in Table 4 of Wis. Stat. § NR 216.21(2)(b)3.a. are subject to the requirements of an Industrial Facility Storm Water Discharge Permit where storm water discharge would come into contact with specified contaminating materials.

60. Storm water discharges associated with GLW’s metallic mining exploration will come into contact with overburden, raw material, intermediate product, by-product, and/or waste material at the site of exploration operations absent an adequate storm-resistant shelter.

61. Nothing in GLW’s current storm water discharge management plan for the Bend Project will provide adequate storm-resistant shelter to prevent storm water from coming into contact with overburden removed at the site of operations.

62. Therefore, pursuant to Wis. Stat. § 283.33(1)(a) and Wis. Admin. Code § NR 216.21(2)(b)3.a, DNR should require GLW to apply for additional coverage under an Industrial Facility Storm Water Discharge Permit because the Bend Project will cause contaminating material to come into contact with storm water discharges.

**ISSUE 3: The deficient Construction Site Storm Water General Permit fails to ensure adequate protection for the cultural and historical sites that the Bend Project’s activities put at risk, especially without the additional requirements of an Industrial Facility Storm Water Discharge Permit.**

63. Petitioner realleges and incorporates herein each preceding paragraph of the Petition.

64. Wisconsin law requires 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>45</sup>

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<sup>45</sup> Wis. Stat. § 44.40(1).

65. 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>46</sup>

66. In issuing its February 4, 2025, grant of coverage to GLW, DNR relied upon the May 2023 conditional approval of GLW’s exploration license NOI, in which DNR concluded that “[t]he project is not expected to impact any known archaeological or historic resources.”<sup>47</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.

67. As stated in the Background Facts section above, the Bend Deposit is adjacent to Big and Little Indian Farms, 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 site as listed on the national registry is located over 200 feet from the Bend Deposit, the nearby burial site associated with Big and Little Indian Farms is thought to be located in an area of higher ground, directly within the boundaries of the Bend Deposit.

68. 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>48</sup> This legal

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<sup>46</sup> Wis. Stat. § 44.40(4).

<sup>47</sup> See Ex. E.

<sup>48</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).

protection applies here and requires DNR to apply heightened consideration of the Bend Project's potential effects to ensure the burial site's protection.

69. Moreover, the Bend Deposit is located within the Ceded Territory, which the Tribe's members have a legally enforceable right to access and utilize.

70. 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>49</sup>

71. Failure to properly identify and account for historic sites and resources in the Bend Deposit area further indicates that DNR's grant of coverage to GLW is deficient and insufficient to protect the environment and features of the surrounding area.

**ISSUE 4: The deficient Construction Site Storm Water General Permit fails to ensure adequate protection for the nearby wetlands that the Bend Project's activities put at risk, especially without the additional requirements of an Industrial Facility Storm Water Discharge Permit.**

72. Petitioner realleges and incorporates herein each preceding paragraph of the Petition.

73. Wisconsin law requires DNR to minimize adverse environmental effects of industrial activities by requiring specific permits for certain discharges into wetlands.<sup>50</sup>

74. As stated in the Factual Background section above, two wetlands near the Bend Deposit are categorized as "highly susceptible" pursuant to DNR guidance documents.<sup>51</sup>

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<sup>49</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*, <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 *Policy Regarding consultation with American Indian Tribal Nations in Wisconsin*, WIS. DEP'T OF NAT. RES., <http://witribes.wi.gov/docview.asp?docid=6024&locid=57> (last visited Mar. 5, 2025).

<sup>50</sup> Wis. Admin. Code § NR 281.36.

<sup>51</sup> See Ex. D.

75. In issuing its February 4, 2025, grant of coverage to GLW, DNR relied upon a prior finding that GLW’s proposed exploratory mining “will not result in a discharge of fill material into wetlands.”<sup>52</sup> But DNR made its conclusion in the context of the Construction Site Storm Water Discharge GP, not an Industrial Facility Storm Water Discharge Permit, and therefore failed to accurately consider the type of discharge likely to flow from the Bend Deposit.

76. As 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.

77. 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.

**ISSUE 5: The deficient Construction Site Storm Water General Permit fails to ensure adequate protection for the endangered species that the Bend Project’s activities put at risk, especially without the additional requirements of an Industrial Facility Storm Water Discharge Permit.**

78. Petitioner realleges and incorporates herein each preceding paragraph of the Petition.

79. Wisconsin law requires DNR to comply with the endangered and threatened species protections mandated by state and federal law.<sup>53</sup>

80. DNR previously concluded that the Bend Project 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>54</sup>

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<sup>52</sup> See Ex. A.

<sup>53</sup> See Wis. Stat. § 29.604; Wis. Admin. Code § NR 27 *et seq.*

<sup>54</sup> See *supra* n.29.



81. DNR made its conclusion in the context of the Construction Site Storm Water Discharge GP, not an Industrial Facility Storm Water Discharge Permit, and therefore failed to accurately consider the type of discharge likely to flow from the Bend Project.

82. 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.

83. DNR's analysis also fails to account for the presence of the Northern Long Eared Bat ("NLEB") in the area, a federally-listed endangered species that is also protected under state law by incorporation of the federal endangered species list.<sup>55</sup>

84. The NLEB is known to have habitat in the Bend Deposit area within the Chequamegon-Nicolet National Forest.

85. Analysis of the potential impacts on the NLEB would best be accomplished using the USFS analysis method of "potential roosting habitats."<sup>56</sup>

86. DNR's failure to apply federal standards to analyze 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.

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

## INTERESTS OF THE PETITIONER

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<sup>55</sup> See Wis. Admin. Code § NR 27.01 (incorporating the federal endangered and threatened species list into the DNR's list); see also *Northern Long-eared Bat*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/species/northern-long-eared-bat-myotis-septentrionalis> (last visited Mar. 6, 2025).

<sup>56</sup> See *Kidrick Vegetation Project, Appendix E – Wildlife Biological Evaluation*, U.S. Dep't of Agric., <https://www.fs.usda.gov/project/?project=50889&exp=overview> (last visited Mar. 5, 2025).

88. Petitioner realleges and incorporates herein each preceding paragraph of the Petition.

89. As a signatory party to the Treaties of 1837 and 1842, Petitioner, along with other Lake Superior Bands, 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, like hunting, fishing, and gathering.<sup>57</sup>

90. The Tribe's usufructuary rights apply to activities by Tribal members in public lands within the Ceded Territory, such as the Chequamegon-Nicollet National Forest where the Bend Deposit is located.<sup>58</sup> And the Tribe 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>59</sup>

91. The exercise of usufructuary rights in the Ceded Territory is vital to the ceremonial and cultural vitality of the Tribe and its members. Tribal members, historically and presently, use the natural resources in the Ceded Territory for "food, clothing, shelter, religious, commercial, or other purposes."<sup>60</sup> Tribal members enjoy deep cultural ties to the land itself. 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>61</sup>

92. The vital importance of off-reservation usufructuary rights to Petitioner is demonstrated through Tribal laws that reinforce the Tribe's inherent interest and authority to

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<sup>57</sup> *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F.Supp. 1420, 1426 (W.D. Wis. 1987)

<sup>58</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>59</sup> *Supra* n.53 at 1430, 1435.

<sup>60</sup> *Id.* at 1424.

<sup>61</sup> *Brendale v. Confederated Tribes and Bands of Yakima*, 492 U.S. 408, 458 (1989) (Blackmun, J., concurring in part and dissenting in part).

protect its members and the land, water, and natural resources that have been under the Tribe's stewardship since time immemorial.<sup>62</sup>

93. The Tribe's inherent interests and authority to protect its members and land, water, and natural resources within its current and traditional territory have also been recognized and reaffirmed at the federal level.<sup>63</sup>

94. The Tribe's substantial interest in the environment and ecosystem is the foundation of federally recognized tribal sovereignty. This implicates the Tribe's own governmental structure and practices.

95. Thus, the underregulated storm water discharges associated with the Bend Project threaten the Tribe's interests to the fullest extent, in a manner not shared by the general public.

#### **REQUEST FOR STAY**

96. Petitioner requests a stay pursuant to Wis. Stat. § 227.54 to preserve the status quo pending resolution of Petitioner's challenge to the Permit.

#### **SCOPE OF REVIEW**

1. DNR's Grant of Coverage is an administrative decision that is reviewable under Wis. Stat. § 227.52.

2. DNR's Grant of Coverage must be reversed, set aside, vacated, remanded, and/or modified for, *inter alia*, the following reasons:

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<sup>62</sup> See, e.g., LDF Const. art. VI, § 1(a) (vesting Tribal Council with authority "to regulate the use and disposition of tribal property to protect and preserve the tribal property, wildlife and natural resources of the [Tribe]"); LDF Tribal Code § 26.103 (stating purpose of Tribe's Off-Reservation Conservation Code 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>63</sup> See, e.g., *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.").

- a. The Bend Project’s proposed activities are included in the activities of a “Tier 2” industrial facility as defined by the SIC Codes in Table 4 of Wis. Admin. Code § NR 216.21(2)(b)3.a.
- b. The Bend Project’s proposed activities are likely to cause storm water to come into contact with “overburden, raw material, intermediate product, finished product, by-product or waste material located on the site of the operations” under Wis. Admin. Code § NR 216.21(2)(b)3.a.
- c. The Bend Project therefore requires coverage under an Industrial Facility Storm Water Discharge Permit.
- d. DNR erroneously determined that the Bend Project did not require coverage under an Industrial Facility Storm Water Discharge Permit.
- e. In doing so, DNR failed to consider the effects of industrial storm water discharges on areas of historic and cultural significance to the Tribe on and around the Bend Project site, or to consult with the Tribe on this issue as required by Wisconsin law and DNR policy.
- f. DNR also failed to consider the effects of industrial storm water discharges on sensitive wetlands on and around the Bend Project site.
- g. DNR further failed to consider the effects of industrial storm water discharges on endangered species on and around the Bend Project site.
- h. DNR violated Wis. Stat. § 283.33(1)(a) and Wis. Admin. Code § NR 216.21(2)(b)3.a by granting coverage under the Construction Site Storm Water Discharge General Permit without requiring additional coverage under the Industrial Facility Storm Water Discharge Permit.

**WHEREFORE**, Petitioner requests that this Court grant the following relief pursuant to Wis. Stat. §§ 227.52–.54 and .57:

1. Stay the effectiveness of the Grant of Coverage pending resolution of this Petition for Judicial Review;
2. Declare that the Grant of Coverage is reversed, set aside, vacated, remanded, or modified;
3. Order such interlocutory or final relief as is necessary to preserve the interests of Petitioner; and
4. For such other relief as the Court may deem just and equitable.

Dated: March 6, 2025

Respectfully submitted:

*Electronically signed by Andrew Adams III*

Andrew Adams III (WI Bar #1052371)

Samantha Hermsen Sanchez (seeking *pro hac vice* admission)

Ellen Currier (seeking *pro hac vice* admission)

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