**BY THE COURT:**

**DATE SIGNED: June 6, 2025**

Electronically signed by Ann N. Knox-Bauer
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT TAYLOR COUNTY

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,

Petitioner

vs.

Case number: 25-CV-22

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

GREEN LIGHT WISCONSIN LLC,

Interested Party.

DECISION ON PETITIONER'S MOTION FOR STAY OF ENFORCEMENT OF AGENCY ACTION

The petitioner, Lac du Flambeau Band of Lake Superior Chippewa Indians, makes this motion for an injunction or stay of the Department of Natural Resources' decision to grant the interested party, Green Light Wisconsin LLC, a general construction site storm water permit for exploratory drilling in the Chequamegon National Forest within Taylor County. It is not the approval of the general construction site storm water permit that is being contested by the petitioner. Rather, the petitioner contends that the DNR violated its own regulations by not requiring the issuance of an Industrial Facility Storm Water Discharge Permit, and it seeks a stay of the general permit in order to allow the court to determine whether in fact, the DNR's decision should be reversed.

Wis. Stat. § 227.54 provides that a "reviewing court may order a stay upon such terms as it deems proper." Wisconsin courts have held that injunctions in these situations are not be issued lightly and the cause must be substantial. Temporary injunctions should be issued only when necessary to preserve the status quo upon a showing of a reasonable

probability of success on the merits. Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513 (1977). There are four factors considered by a court when deciding whether to issue a preliminary injunction. First, the petitioner must show: 1) that the movant is likely to suffer irreparable harm if an injunction is not issued; 2) the movant has no other adequate remedy at law; 3) an injunction is necessary to preserve the status quo; and 4) the movant has a reasonable probability of success on the merits. Kennedy v. Wisconsin Elections Commission, 413 Wis. 2d 509, 512 (2024). See also Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty, 370 Wis. 2d 644 (2106).

The petitioner has the burden of showing that it will likely suffer irreparable harm if the injunction is not granted. However, there was no evidence or testimony presented to show that the safeguards required by the general construction site storm water discharge permit will not adequately address storm water discharges, and that an industrial site permit would provide additional necessary protections. The petitioner asserts that the area in question has great cultural and environmental significance, and there is no doubt about that fact. However, there has been nothing presented by the petitioner that indicates the area cannot be adequately protected by the general permit issued by the DNR. While the court acknowledges the petitioner's significant sovereign usufructuary rights, and that there is likely no monetary remedy, the factors the court has to consider do not weigh in favor of the motion to stay the enforcement of the DNR's actions.

From a technical stand point, the petitioner has not shown that the DNR's decision to issue the general construction site storm water permit will not provide adequate protection from run-off, and that only an industrial site storm water permit would protect the area during the drilling. It is this causal failure that is the primary reason that the court is declining to issue the requested preliminary injunction.

Another integral question here is whether petitioner has a reasonable likelihood of success in proving that the DNR's determination that an industrial facility storm water permit is not necessary violates Wisconsin law. The petitioner contends that the Green Light project is a Tier 2 mining facility and therefore requires an industrial facility storm water discharge permit pursuant to NR section 216.21(2)(b)3.a. That section states as follows: "(t)his subchapter only applies where storm water runoff has come into contact with any overburden, raw material, intermediate product, finished product, by-product or waste material located on the site of the operations."

While Wisconsin courts have ended the practice of deferring to administrative agencies' conclusions of law, the court should give due weight to the experience, technical competency, and specialized knowledge of an administrative agency. Tetra Tech EC, Inc., v. Wis. Department of Revenue, 382 Wis. 2d 496 (2018). In reviewing an agency decision under Wis. Stat. §277, the court should uphold that decision unless the agency has erroneously interpreted a provision of the law. Clean Water Inc., v. Wis. Department of Natural Resources, 398 Wis. 2d 433, 442 (2021).

As indicated by counsel during argument and set forth by affidavit of Matthew Jacobson, the DNR storm water specialist, there will be no discharge from the project site relating to the drilling—all industrial materials from the drilling will be contained. Jacobson's affidavit indicates that the coverage under the Tier 2 Industrial permit would not provide "any material difference in protections, " and that "Potential sources of storm water contamination are adequately addressed by the CSGP. Further, that any water discharge is not covered by either an industrial or general storm water permit; rather, waste water is governed by a separate "dewatering" or wastewater permit.

According to the DNR, an industrial storm water discharge permit would be needed when there is a potential for discharge of storm water that would come into contact with drilling materials. But in this case, there is not overburden caused by discharge; rather it is soil disturbance caused by excavation of the sumps—a situation which, according to the DNR, is adequately addressed by a general storm water permit.

Wisconsin also does not consider nonferrous exploratory mining to be mining. Wis. Stat. § 293.01(9) defines mining as "all or part of the process involved in the mining of nonferrous metallic minerals, other than for exploration…." According to the affidavit submitted from Molly Gardner, the DNR's metallic mining coordinator, mineral exploration is covered by Wis. Stat. § 293.21 and since the Green Light project is not a mining operation, it requires an exploration license under that section.

Petitioner also argues that Green Light's proposed activities constitute a Tier 2 facility, and therefore NR 216.21(2)(b)(3)(a) follows SIC 1000-1099, and includes exploratory mining operations. However, to the extent that Green Light's activities would fall into a category Tier 2 as listed in the regulation, this requirement is the exact opposite of what is actually provided for in Wisconsin statutes. The DNR only has authority as delegated by the legislature. Therefore, when there is a conflict between statutes and administrative regulations, the statute will preempt the regulation. Wis. Stat. § 227.10(2).

The petitioner argues that the very fact that an injunction would not be issued and that the drilling would occur is in itself irreparable harm because the action seeking to be prohibited will have been done already. The court will assume for a moment that it does issue the injunction pending a determination of the merits of the case. The petitioner is not contesting the DNR's issuance of the general construction site storm water discharge permit and hasn't shown how the potential issuance of a more restrictive permit would safeguard against the harms that they are alleging may occur if Green Light is allowed to drill under the existing permit.

In Westinghouse v. Free Sewing Machine, 256 F. 2d 806 (7th Circuit 1958), the district court did not issue a preliminary injunction and the appellate courts upheld that decision, stating that issuance of the injunction would have effectively decided the case upon its merits in favor of the moving party. It is true that at the temporary injunction stage, the requirement of irreparable injury can be met simply on the basis that without a temporary injunction to preserve the status quo, the permanent injunction sought would be rendered futile. Werner, 80 Wis. 2d at 520. However, if it appears that the "plaintiff is not entitled

to the permanent injunction which his complaint demands, the court ought not to give him the same relief temporarily." Id.

Based upon the foregoing, the petitioner's request for a preliminary injunction is hereby denied.