Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the September 29, 2022, Approval of Howard Bros. Inc.'s Application of Septage on the Plummer 7 Lot, in the Town of Lac du Flambeau, County of Vilas, State of Wisconsin	DHA Case No. DNR-23-0001 DNR Docket No. 22-045 **DECISION**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 29, 2022, the Wisconsin Department of Natural Resources (WI DNR) issued a permit to Howard Bros. Inc. (Howard Bros.), approving Howard Bros.' request to engage in the spreading of septage to land (on a site known as the Plummer 7 Lot) located in the Town of Lac du Flambeau, County of Vilas, State of Wisconsin. Mr. Kyle Howard prepared the permit application on behalf of Howard Bros., which is located at 11548 Lemma Creek Road, Arbor Vitae, Wisconsin, 54568. The DNR approved the application on September 29, 2022. On October 27, 2022, the Lac du Flambeau Band of Lake Superior Chippewa Indians (Petitioner) submitted a petition for a contested case hearing to review the DNR's approval and, on November 16, 2022, the DNR granted the request on a single certified issue. On January 20, 2023, the DNR submitted a request for a hearing to the Division of Hearings and Appeals, along with the Petitioner's contested case hearing request. Prehearing conferences were held, the parties engaged in discovery, prehearing motions were heard, and (pursuant to due notice) a contested case hearing was held at the Vilas County Courthouse, Eagle River, Wisconsin 54521, from October 23, 2023, until October 26, 2023. Eric D. Défort, Administrative Law Judge, presided over the proceedings. The record closed on the expiration of the deadline for post-hearing reply briefs, January 5, 2024.

In accordance with Wis. Stat. § 227.44(2m), Wis. Stat. § 227.46(1), Wis. Admin. Code § NR 2.08(5), and Wis. Admin. Code § NR 2.12, the PARTIES to this proceeding are:

The Lac du Flambeau Band of Lake Superior Chippewa Indians, by
Attorneys Andrew Adams and Samantha Hermsen,
Hogen Adams PLLC
1935 County Road B2 W., Suite 460
Saint Paul, Minnesota 55113

State of Wisconsin, Department of Natural Resources by,
Attorneys Alixandra Burke and Katherine Hanson,
Division of Legal Services
101 South Webster Street
Madison, Wisconsin 53703

Howard Brothers Inc., by
Attorney Joseph Olsen
Michael Best & Friedrich LLP
1 South Pinckney Street, Suite 700
Madison, Wisconsin 53703

ISSUE FOR HEARING

Whether the Wisconsin DNR lawfully approved Howard Bros. Inc.'s application to land spread septage on the Plummer 7 lot, under Wis. Stat. § 281.48(4m) and Wis. Admin. Code § NR 113.07(3).

FINDINGS OF FACT

1. Howard Brothers, Incorporated (Howard Bros.), submitted a request to engage in the spreading of septage to a piece of land referred to as Plummer 7. The request / application is dated December 17, 2021. Plummer 7 is located in the Town of Lac du Flambeau, County of Vilas, State of Wisconsin. Mr. Kyle Howard prepared the Land Application Site Request Form (the application) on behalf of Howard Bros., which is located at 11548 Lemma Creek Road, Arbor Vitae, Wisconsin, 54568. He submitted the application to the Department of Natural Resources (WI DNR). (Exh. 8, Exh. 101, Howard testimony).

2. Directly to the north of Plummer 7 is Plummer 6. These sites are physically connected to one another and both sites are under the same ownership interest of the Howard Bros. (Canniff testimony, Howard testimony, Exh. 40, and Exh. 42).

3. In 2021, Howard Bros. purchased the business assets of the septage spreading company (Arbor Vitae Septic) that had been operating on Plummer 6 and took over that business' operation. (Howard testimony, Exh. 3).

4. Howard Bros.' application for the Plummer 7 site lists the neighboring / adjacent properties (which are not owned by Howard Bros.) as Residential, Forest, and Indian Land. (Exh. 101).

5. In support of the site approval application for Plummer 7, Mr. Howard provided the WI DNR with soil evaluations, zoning maps, and a real estate property tax bill for the proposed site. (Exh. 101, Exh. 108).

6. The soil evaluation (which was submitted by Mr. Howard) was performed by Mr. Mark Wallen, a certified soil tester. Mr. Wallen has been a certified soil tester since 1989. He examined the soils within 11 pits on the Plummer 7 lot and his soil evaluation included an assessment of the soil's color, texture, structure, and water loading rate. (Wallen testimony).

7. Mr. Fred Hegeman is the WI DNR's Statewide Wastewater Residuals Coordinator. In that role he serves as an advisor to other staff members. He is a professional engineer who earned a bachelor's degree in science, with a focus on water treatment and the use of soils for the treatment of water. At the WI DNR, he has worked with programs focused on septage and biosolids. Mr. Hegeman is familiar with the requirements of Wisconsin Administrative Code Chapter NR 113 and has been a certified soil tester since 1983. (Hegeman testimony).

8. Mr. Hegeman assisted the application reviewer (Alison Canniff) with the review of the Howard Bros.' application for the Plummer 7 site. And Mr. Hegeman reviewed the soil evaluation report (done by Mr. Wallen) and concluded that the soils at the Plummer 7 site had "adequate water movement" and are "great soils for land application" of septage, because of the amount of loam material in the uppermost horizons (layers) of the soil profiles. Accordingly, he indicated that the permeability rate did not exceed 6 inches per hour in the top 36 inches of the

soil and that there was no need to consider the water holding capacity because of the loam in the soil's composition, which is a permeability-limiting factor. (Hegeman testimony).

9. Ms. Stephanie Finamore is the Environmental Manager and Senior Scientist at Mi-Tech Services, a consulting firm. She served as the Petitioner's expert in this case. She had no opinion as to whether the Plummer 7 site is suitable for land application of septage. (Finamore testimony).

10. The parcels of land immediately adjacent to the Plummer 7 lot (on both the east and west sides of the lot) are owned by the Lac du Flambeau Band of Lake Superior Chippewa Indians (the Petitioner). (Exh. 40, Exh. 41, Labarge testimony). Moreover, these adjacent lands are wooded areas that are used by the tribe for hunting, gathering, recreational hiking, and biking. (Exh. 41, Johnson testimony, Labarge testimony, Hockings testimony, Virden testimony). These adjacent lands have recreational trails/wildlife corridors that have been cleared, are regularly maintained by the tribe, and are marked with many clearly posted signs that show that the area is open to members of the tribe and may be used by tribal members for hunting and trapping. (Exh. 47, Exh. 48, Virden testimony, Finamore testimony). The signs are visible from the public roadway. (Finamore testimony).

11. Local residents have observed tribal members hiking, hunting, gathering berries, and harvesting birch bark from their land and their trails. And local residents have observed that the tribe's trails are clearly marked and that the tribe's signs have been posted for at least twenty years. (Knauf testimony).

12. Wisconsin DNR Conservation Warden Timothy Ebert visited the Plummer 6 site (which is contiguous to Plummer 7 and also owned by Howard Bros.) in August of 2021 and, at that time, noticed litter items on that field. (Exh. 55).

13. Ms. Alison Canniff is the WI DNR's Septage Coordinator and she was the application reviewer for the Howard Bros. application for Plummer 7. (Canniff testimony). At the end of October of 2021, Ms. Canniff personally inspected Plummer 6. Prior to that inspection, she contacted Ms. Celeste Hockings (an employee of the Tribe's Natural Resource Department), and, consequently, Ms. Hockings joined Ms. Canniff during the inspection. (Hockings testimony, Canniff testimony). Additionally, Ms. Canniff drove past the tribal lands adjacent to Plummer 6 and 7 in her car but has never set foot on Plummer 7. (Canniff testimony).

14. During her October 2021 site visit to Plummer 6, Ms. Canniff only noticed minor amounts of toilet paper, while Ms. Hockings specifically noticed tampon applicators on the fields. (Canniff testimony, Hockings testimony).

15. The following year, on August 24, 2022, Mr. Howard told Mr. Hegeman that there was litter (in the form of hygienic wipes) being deposited on Plummer 6 and it was not degrading as rapidly as toilet paper. (Exh. 24B). And in that correspondence, Mr. Howard informed Mr. Hegeman that Howard Bros. was in the process of deploying a screen trailer to address the issue. *Id.* Mr. Hegeman immediately shared the above-referenced information with Ms. Canniff on August 24, 2022. *Id.* Furthermore, Mr. Hegeman consulted with Ms. Canniff about the issues raised in his correspondence with Mr. Howard and advised Ms. Canniff that (in Mr.

Hegeman's opinion) the site application was acceptable because these problems were being worked out. (Hegeman testimony).

16. On September 29, 2022, Ms. Canniff notified Howard Bros. that the application regarding Plummer 7 was approved and issued Howard Bros. a permit with a requirement of a 50-foot setback from the adjacent neighboring property lines and no setbacks for recreational areas. (Exh. 109, Canniff testimony).

DISCUSSION

Jurisdiction

The Division of Hearings and Appeals shall preside over the contested case hearing in place of the WI DNR. Wis. Stat. § 227.43(1)(b). The administrative law judge shall prepare findings of fact, conclusions of law, and a decision subsequent to each contested case heard. Wis. Admin. Code § NR 2.155(1). Unless the WI DNR petitions for judicial review as provided in Wis. Stat. § 227.46(8), this decision shall be the final decision of the WI DNR, but may be reviewed in the manner described in Wis. Admin. Code § NR 2.20. *Id.*

Legal Standards

The WI DNR's permitting authority is limited to that which has been delegated by statute. *George J. Capoun Revocable Trust v. Ansari*, 234 Wis. 2d 335, 341-342 (Wis. 2000). Moreover, agencies of the State of Wisconsin "are creatures of the state and their powers are only those ascribed to them by the state." *Silver Lake Sanitary Dist. v. Wisconsin Department of Natural Resources*, 2000 WI App 19, ¶ 8, 232 Wis. 2d 217, 221, 607 N.W.2d 50, 52. (Ct. App. 1999). "An agency or board created by the legislature has only those powers which are expressly or impliedly conferred on it by statute. Such statutes are generally strictly construed to preclude the exercise of power which is not expressly granted." *Browne v. Milwaukee Board of School Directors*, 83 Wis. 2d 316, 333, 265 N.W.2d 559 (Wis. 1978). Additionally, an agency is bound by the regulations that it has promulgated. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 119 (Ct. App. 1980). No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or validly promulgated administrative rule. *See* Wis. Stat. § 227.10(2m).

In its review of a septage spreading site approval request, the WI DNR may require a soil test and may enter and inspect the proposed site. Wis. Stat. § 281.48(4m)(a),(d). The WI DNR promulgated administrative rules that govern the disposal of septage. Wis. Admin. Code § NR 113.07. Those rules require that a site approval must be based on information "available to" the WI DNR at the time of the site request. Wis. Admin. Code § NR 113.07(3)(c)3.a. and those rules include numerous (and varied) requirements for land disposal of septage. *See* Wis. Admin. Code § NR 113.07(3). The relevant subsections of § NR 113.07(3) will be discussed in further detail within the analysis section of this decision.

Administrative rules carry the "force and effect of law" and it is generally accepted that the rules and regulations of administrative agencies are subject to the same principles of construction as those that apply to the construction of statutes. *Law Enforcement Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 488 – 489 (Wis. 1981). In the construction of Wisconsin laws, all words and phrases shall be construed according to common and approved usage; but technical words and phrases

and others that have a peculiar meaning in the law shall be construed according to such meaning. *See* Wis. Stat. § 990.01. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id*., ¶ 46. "Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id.* "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.* "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Id.* In examining the text of the statutes, "the plain meaning" of statutory language is generally the common, ordinary, natural, normal, or dictionary definition of a term. *Greenwald Fam. Ltd. P'ship v. Vill. of Mukwonago*, 2023 WI 53, ¶ 23, 408 Wis. 2d 143, 153, 991 N.W.2d 356, 361, *reconsideration denied*, 2024 WI 4, ¶ 23. Therefore, one may "consult a dictionary in order to guide our interpretation of the common, ordinary meanings of words," as would the average reader. *Id.* Furthermore, when "the legislature uses different terms in a statute – particularly in the same section – we presume it intended the terms to have distinct meanings." *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶ 29, 385 Wis. 2d 748, 773, 924 N.W.2d 153, 165 (Wis. 2019) (*citing Johnson v. City of Edgerton*, 207 Wis. 2d 343, 351, 558 N.W.2d 653 [Ct. App. 1996] and *Armes v. Kenosha Cty.*, 81 Wis. 2d 309, 318, 260 N.W.2d 515 [Wis. 1977]).

Finally, pursuant to Wis. Admin. Code § NR 2.13(3)(b), the Petitioner has the burden to prove its claims that the WI DNR's site approval was legally invalid. The applicable evidentiary burden of proof in this case is 'the preponderance of the evidence.' Wis. Admin. Code § HA 1.17(2). To prove by a preponderance of the evidence means that it is "more likely than not" that the examined action occurred. *State v. Rodriguez*, 2007 WI App 252, ¶ 18, 306 Wis. 2d 129, 141–42, 743 N.W.2d 460, 466 (*citing United States v. Saulter*, 60 F.3d 270, 280 [7th Cir. 1995]). This standard calls upon the trier of fact (judge or jury) to decide whether the existence of the fact is more likely than its nonexistence. Daniel D. Blinka, *Wisconsin Practice Series*, 7 Wis. Prac., Wis. Evidence § 301.1 (4th ed. 2021).

Analysis

The Petitioner asserts that five subsections of Wis. Admin. Code § NR 113.07(3) were violated by the WI DNR's site approval for Plummer 7.[1] Therefore, each of the five referenced subsections will be analyzed individually below.

i. Minimum Separation Distances for a Recreational Area, pursuant to Wis. Admin. Code § NR 113.07(3)(b)12, Table 3.

[1] Throughout its pleadings, the Petitioner repeatedly requests that this tribunal take action on the site approvals for Plummer 6 and Plummer 7. But this case (and the certified issue for hearing) arose only from the site approval for Plummer 7. As noted at the prehearing conference, the Petitioner did not seek judicial review of the DNR's certified issue for hearing (which involves only the site approval for Plummer 7). Thus, the objections to the site approval for Plummer 6 are not actionable because they go beyond the scope of this hearing.

The Petitioner asserts that the WI DNR failed to consider the recreational nature of the tribal lands adjacent to Plummer 7 and, therefore, the WI DNR erred when it approved the site without requiring 500-foot setbacks (separation distances) from those recreational areas. The law requires that any person who land-applies septage shall comply with the minimum separation distances and maximum slope requirements in Table 3 of Wis. Admin. Code Chapter NR 113. Wis. Admin. Code § NR 113.07(3)(b)12. And Table 3 specifies that the "Minimum distance to a residence, business or recreational area without permission from the owner or occupant" is 500 feet for land spreading of septage. Notably, there is no definition for "recreational area" in Wis. Admin. Code Chapter NR 113. Nevertheless, the law requires that a site approval must be based on information "available to" the WI DNR at the time of the site request. Wis. Admin. Code § NR 113.07(3)(c)3.a. And the law provides that the WI DNR may enter and inspect the proposed site. Wis. Stat. § 281.48(4m)(d).

The witnesses credibly testified that the tribal lands on both sides of Plummer 7 are used by tribal members for hiking, hunting, gathering berries, and harvesting birch bark from their land and their trails. Moreover, the testimony established that there are many physical signs on the properties that reference some of the activities that are open to members of the tribe (such as hunting and trapping), the signs are clearly posted throughout the properties, the signs have been in existence for at least twenty years, and some signs are visible from the public roadway. Though Ms. Canniff (the Wisconsin DNR's application reviewer) determined that a 50-foot setback / separation distance from the tribe's property was required, she did not investigate whether those adjacent properties were recreational properties. As noted earlier, she had the legal authorization to personally inspect the Plummer 7 site – which would have provided her with an opportunity to personally view the adjacent properties (from within the borders of the Plummer 7 site). But she did not do so. Moreover, Ms. Canniff had a direct line of communication with Ms. Celeste Hockings (an employee of the Tribe's Natural Resource Department – who accompanied Ms. Canniff on an inspection of Plummer 6 in October of 2021) and, thus, could have simply asked Ms. Hockings about the adjacent lands. Afterall, Ms. Canniff knew that the lands were owned by the tribe, given that Mr. Howard affirmatively informed Ms. Canniff of that fact in his application for site approval. But the preponderance of evidence demonstrates that Ms. Canniff was not interested in looking for the tribe's numerous posted signs or in asking Ms. Hockings about the recreational use of the adjacent tribal lands. This was revealed on cross-examination, where Ms. Canniff admitted that she only conducts research or diligence into whether an adjacent land and its use is recreational if it is identified in the application for site approval. (Canniff testimony). Logically, this means that if an applicant does not mention any recreational details about a neighbor's property in the application for septage-spreading site approval, then Ms. Canniff (on behalf of the Wisconsin DNR) will not inquire any further and, as a result, will not impose any of the separation distance / setbacks that the law requires for recreational areas. That practice results in an abandonment of the WI DNR's legal obligation to render a decision on the basis of available information. And it would be absurd to argue that information is 'available' only if a septage-spreading business applicant says that the information exists. If that were the case, there would be a powerful incentive for an applicant to underreport information about neighboring properties. Moreover, Ms. Canniff's practice (of only considering recreational property information of neighboring properties if, and only if, it is identified by the septage-spreading business applicant) constitutes a threshold, requirement, or standard – which is not codified in Chapter NR 113 and, therefore, is invalid. *See* Wis. Stat. § 227.10(2m).

On a seemingly related note, the WI DNR argues that no one provided it (the WI DNR) with information about the recreational activities on the adjacent tribal lands and, therefore, they argue that

it was correct to issue the site approval without any setbacks to account for the recreational areas on those adjacent lands. But this reveals the WI DNR's misunderstanding of the text of Wis. Admin. Code § NR 113.07(3). The text of the rule recognizes that the WI DNR has the burden of obtaining the available information for the initial site approval. Specifically, Wis. Admin. Code § NR 113.07(3)(c)3.a. states that a site shall be approved by the WI DNR based on information "available to" the WI DNR at the time of the site request. By contrast, Wis. Admin. Code § NR 113.07(3)(c)3.b. (in relevant part) recognizes two different methods of information gathering by stating that a site approval may be rescinded on the basis of information that "is provided or available" to the WI DNR. Since those two terms are in the same section and are different, they are presumed "to have distinct meanings." *Milwaukee Dist. Council 48*, 2019 WI at ¶ 29, 385 Wis. 2d 748. And as noted earlier, the law provides that the WI DNR may enter and inspect the proposed site. Wis. Stat. § 281.48(4m)(d). When read in context with each other, these closely related sources demonstrate that there are two ways that the WI DNR may obtain information: (a) the WI DNR may access available information or (b) someone may provide the information to the WI DNR. Thus, the deliberate choice of language in Wis. Admin. Code § NR 113.07(3)(c)3.a. places the burden of obtaining the available information on the WI DNR, not on anyone else. In this case, the information was available to the WI DNR – as discussed above. And the WI DNR's unwillingness to undertake the most basic of inquiries (to ask the owner of the neighboring property if the property is recreational and to look at the neighboring property from within Plummer 7) runs counter to the WI DNR's obligation to render a decision on the basis of available information.

In this case, the Wisconsin DNR never asked the tribe about the tribe's recreational activities on the tribal lands adjacent to the Plummer 7 site, never looked at those lands from the public roadway or from within Plummer 7 to determine whether it was a recreational area, and admitted that it had no intention of doing so because the applicant did not identify his neighbor's lands as recreational. Therefore, the WI DNR rendered its decision to approve the site without reviewing the available information needed to make appropriate decisions about separation distances, as required by Wis. Admin. Code § NR 113.07(3)(b)12, Table 3. And to be clear, the WI DNR's failure to ask for information about the recreational use of the property does not translate into the 'unavailability' of such information. Since the information was available to the WI DNR (as discussed above), it was an error to issue an approval with 50-foot setbacks instead of 500-foot setbacks from the adjacent tribal lands – which the preponderance of evidence established are recreational areas in their entirety.

Additionally, the WI DNR asserts that the term "area" (in the phrase "recreational area") in Wis. Admin. Code § NR 113.07(3)(b)12, ought to be ignored and replaced with the word "site." With that modification, the WI DNR urges that the definition for "recreational site" be applied.[2] But in construing the plain and ordinary language of an administrative rule, one is not at liberty to "disregard the plain, clear words" of the rule. *Kalal*, 271 Wis. 2d 633, ¶ 46. Since the word "area" was deliberately codified, no tribunal is at liberty to disregard that term. Accordingly, the WI DNR's argument is unpersuasive. As noted above, there is no definition for recreational area in the code. Therefore, the common and ordinary meaning of the term "recreational area" must be applied. The applicable dictionary definitions show that "recreation" is "refreshment of strength and spirits after work," a "means of refreshment or diversion," or a "hobby." Merriam-Webster Dictionary,

[2] Wis. Admin. Code § NR 113.03(50) defines "Recreational site" as a designated area clearly identified and maintained for the purpose of providing an opportunity for recreational activity.

https://www.merriam-webster.com/dictionary (last visited February 12, 2024).[3] And "area" is "the surface included within a set of lines" or "a particular extent of space or surface or one serving a special function: such as" (a) "a part of the surface of the body" or (b) "a geographic region." *Id.* And on the facts of this case, hiking, hunting, gathering berries, and harvesting birch bark are all recreational activities that are being conducted on the entirety of the tribal lands that are adjacent to the Plummer 7 lot. As a result, they are recreational areas.

And even if one were to impermissibly apply the definition of recreational site (rather than 'recreational area' – which was codified in Wis. Admin. Code § NR 113.07(3)(b)12, Table 3), the facts of this case satisfy that definition as well because the testimony showed that the adjacent tribal lands are used for recreational purposes (such as hiking, hunting, gathering, and harvesting birch bark), they are maintained for those purposes by the tribal government, and they are clearly identified for those purposes by the tribal government by the many visible signs that are posted throughout the properties. *See* Wis. Admin. Code § NR 113.03(50).

The WI DNR also asserts that a number of standards (which do not appear anywhere in Wisconsin Administrative Code Chapter NR 113) should apply to the definition of recreational area. For example, the WI DNR asserts that its practice is not to classify a large property as a recreational area, not to consider property open for hunting as a recreational area, and to ignore the setback requirements for lands that are considered by the Wisconsin DNR to be abundant across the State of Wisconsin. However, none of those proposed standards, requirements, or thresholds appear in Chapter NR 113. Therefore, the WI DNR cannot legally implement or enforce these uncodified standards, requirements, or thresholds because none of them are explicitly required or explicitly permitted by any statute or validly promulgated administrative rule applicable to this case. *See* Wis. Stat. § 227.10(2m).

In Howard Bros.' response to the testimony regarding the numerous physical signs that were posted by the tribe, Howard Bros. argued that entire parcels of land cannot be intentionally chosen, clearly identified recreational sites, without "further markings or identifiers." But there is no rule within Ch. NR 113 that specifies the number of signs or the type of evidence that is needed to prove that a piece of land is a recreational area or recreational site. As a result, the objection is unpersuasive.

Additionally, Howard Bros. argued that this administrative tribunal must defer to the Wisconsin DNR's legal interpretation of its code; specifically, that its code excludes the recreational activities that were discussed by the multiple witnesses above. But the law does not support that argument. Notably, Howard Bros. cites to *Tetra Tech* – where the Supreme Court of Wisconsin determined that allowing "an administrative agency to authoritatively interpret the law raises the possibility that our deference doctrine has allowed some part of the state's judicial power to take up residence in the executive branch of government." *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, ¶ 43, 382 Wis. 2d 496 (Wis. 2018). Because of that concern, the Court abrogated its doctrine of deference to an agency's interpretation of law. "We are leaving our deference doctrine behind because it is unsound in principle. It does not respect the separation of powers, gives insufficient consideration to the parties' due process interest in a neutral and independent judiciary, and 'risks perpetuating erroneous declarations of the law.'" *Id.*, ¶ 83. Furthermore, the Court held that "Today, the core judicial power ceded by our deference doctrine returns to its constitutionally-assigned

[3] Howard Bros. asserts that some of the tribe's recreational activities constitute methods of gathering food and, as a result, cannot be recreational. But no part of the dictionary definition excludes hiking the trails, harvesting birch bark, hunting, or gathering berries from things that are fun / recreational activities.

residence. Henceforth, we will review an administrative agency's conclusions of law under the same standard we apply to a circuit court's conclusions of law – de novo." *Id.*, ¶ 84.

Nevertheless, Howard Bros. asserts that due weight deference survived. But that is incorrect, given that the Court explicitly held that "'Due weight' is a matter of persuasion, not deference." *Id.*, ¶ 78. Furthermore, the Court pointed out that the then-current version of Wis. Stat. § 227.57(11) prohibited any deference to an agency's interpretation of the law when an agency action restricted a property owner's free use of their own property. *Id.*, ¶ 80. And after the *Tetra Tech* decision was issued, the Legislature codified the abrogation of deference to an agency's interpretation of law by amending Wis. Stat. § 227.57(11) to its current form (with 2017 Wisconsin Act 369 – effective December 16, 2018) which prohibits any deference to an agency's interpretation of law. Moreover, the statutes provide that no agency may seek deference in any proceeding based on the agency's interpretation of any law. Wis. Stat. § 227.10(2g). Based on these standards, Howard Bros.' claim that this administrative tribunal owes deference to the Wisconsin DNR's interpretations of law is not persuasive.

Further, Howard Bros. claims that the WI DNR may "informally apply its interpretation of 'recreational sites' as a condition to its site approval process." For support, Howard Bros. cites to cases where a broad but explicit statutory grant of authority gave the WI DNR the authorization to prescribe conditions for permits to assure compliance with water quality standards, without the need to promulgate such conditions by rule. *Maple Leaf Farms, Inc. v. State, Dept. of Natural Resources*, 2001 WI App 170, ¶ 30, 247 Wis. 2d 96 (Ct. App. 2001), *Clean Wisconsin, Inc. v. Wisconsin Dep't of Nat. Res.*, 2021 WI 71, ¶¶ 28 - 36, 398 Wis. 2d 386, 961 N.W.2d 346 (Wis. 2021). But the regulation in those cases is distinguishable from the regulation in this case, which is not broad and, instead, is prescriptive in that it requires a 500-foot separation distance (setback) from any recreational area. Wis. Admin. Code § NR 113.07(3)(b)12, Table 3. Moreover, Howard Bros. does not identify any statutory or regulatory grant of authority that would allow the Wisconsin DNR to define recreational areas or recreational sites to exclude the tribe's recreational areas and activities. Like the other uncodified standards that the WI DNR proposed in their brief, this uncodified standard would also be invalid. *See* Wis. Stat. § 227.10(2m).

Given that the available information was that the adjacent tribal lands are used for recreational purposes such as hiking, hunting, harvesting birch bark, and gathering berries, the law requires 500-foot setbacks from those properties in the absence of permission from the owner (the tribe) for a smaller setback. And since there was no evidence submitted that the tribe ever gave such permission, it was an error for the Wisconsin DNR to issue the site approval requiring only a 50-foot setback from those properties. The preponderance of the evidence proves that the Wisconsin DNR failed to consider the available information about the longstanding recreational use of the entirety of the tribal lands adjacent to the Plummer 7 site. Accordingly, the site approval was unlawful and, therefore, invalid because it is not in compliance with the separation distance / setback requirements of Wis. Admin. Code § NR 113.07(3)(b)12, Table 3.

ii. Soil Composition, pursuant to Wis. Admin. Code § NR 113.07(3)(b)1.

The Petitioner asserts that the WI DNR acted unlawfully in granting the site approval for Plummer 7 because (the Petitioner argues) that the site's soil composition does not meet the requirements of the agency's rules.

Septage may not be landspread on soils which have a permeability rate greater than 6 inches per hour within the top 36 inches, unless it is demonstrated that the soil has a water holding capacity of greater than 5 inches above the groundwater and bedrock. Wis. Admin. Code § NR 113.07(3)(b)1.

To support its argument, the Petitioner points out that there are several instances of "loamy fine sand" within the top 36 inches of soil and that the administrative code has assigned a permeability rate of greater than 6 inches per hour for loamy sand. Wis. Admin. Code § NR 113.07(3)(b)1, Textural Classification System Table. However, the Petitioner seems to ignore that the first layer of soil in each of the soil pits (which were all dug on Plummer 7 and examined) consists of sandy loam, which has an assigned permeability rate of 2 to 6 inches per hour. *Id.* Moreover, the WI DNR's expert witness (Statewide Wastewater Residuals Coordinator – Mr. Fred Hegeman) was particularly credible in his testimony that it was his opinion that the amount of loam material in the uppermost layers of the soil profile were sufficient to establish that the soils were more than adequate under the standards of Wis. Admin. Code § NR 113.07(3)(b)1. And the Petitioner's expert witness (Ms. Stephanie Finamore) did not offer an opinion that the WI DNR's findings on this point were incorrect. As a result, the Petitioner has not carried its burden to prove its claim that the soils at the Plummer 7 site were unsuitable.

iii. Litter, pursuant to Wis. Admin. Code § NR 113.07(3)(b)5.

The Petitioner argues that the WI DNR unlawfully granted site approval for Plummer 7, despite Howard Bros.' inability to spread septage in a litter free condition.

The law provides that all "landspreading fields shall be left in a litter free condition." Wis. Admin. Code § NR 113.07(3)(b)5. "Litter free" means the absence of nonbiodegradable material such as plastics or glass of 2 inches or greater in length on the soil surface. Wis. Admin. Code § NR 113.03(33).

Ms. Canniff completed an inspection of Plummer 6. She was accompanied by Ms. Hockings during that visit. During that visit, Ms. Hockings noticed tampon applicators on the fields. But Canniff only noticed minor amounts of toilet paper. Before that visit, WI DNR Warden Tim Ebert noticed "litter items" on the fields. It should be noted that the debris on Plummer 6 is consistent with the toilet paper, feces, and tampon applicator debris that was observed (by the public) on the public roadway adjacent to the entrance to the Howard Bros.' Plummer 6 and 7 sites – during the months of July, August, and September of 2022. (Stephenson testimony). And Mr. Howard later admitted to the WI DNR that hygienic wipes were being spread on the Plummer 6 field and were not degrading rapidly. (Exh. 24B).

In August of 2022, Mr. Hegeman (the WI DNR's Statewide Wastewater Residuals Coordinator) was concerned about the issue of debris around the Plummer 6 site and, as a result, he corresponded with Mr. Howard about it. (Howard testimony; Exh. 24B). Moreover, on August 24, 2022, Mr. Howard revealed to Mr. Hegeman that "a large number of wipes" were "being pumped from the tanks" and that they "linger on the field as they do not degrade as rapidly as toilet paper." (Exh. 24B). Mr. Howard also revealed that his company "had not been" using a "filter trailer," but were planning on doing so with the hope of collecting the aforementioned wipes. *Id.* Ultimately, Howard Bros. made a number of improvements to address this concern – they installed a lengthy tire track pad to help clean the truck tires of debris upon leaving the site, they improved the private access roadways to enhance tire cleanout, and they deployed a screen trailer to screen-out litter (such as wipes and

tampon applicators). (Howard testimony). Additionally, Mr. Howard instructed his septage truck operators to pick up any litter that they see on the fields. *Id.*

On these facts, Mr. Hegeman's concerns were raised before the site application was approved by Ms. Canniff, he obtained a commitment from Howard Bros. to implement tangible improvements to address the concerns about litter (which Howard Bros. ultimately carried out), and he immediately shared his findings with Ms. Canniff almost a full month before she issued her approval regarding the Plummer 7 site. Therefore, the WI DNR was concerned about Howard Bros.' ability to maintain the fields in a litter-free condition and had sufficient information to determine that appropriate steps were being taken to address that concern at the time of the approval for Plummer 7. Accordingly, the Petitioner has not met its burden to prove that the approval was unlawful on this basis.

iv. Pathogen Reduction, pursuant to Wis. Admin. Code § NR 113.07(3)(d).

The Petitioner argues that the WI DNR granted site approval for Plummer 7 without enforcing the requirement that animals be prevented from grazing on the land after septage is spread. The Petitioner explains that Howard Bros. failed (at some point) to comply with its duty to eliminate pathogens from the septage that it was spreading, which triggers an alternative means of pathogen reduction which requires the septage spreader to prevent animals from grazing on the land for 30 days after the application of septage.

With respect to septage spreading, the law requires that pathogens shall be reduced by one of two alternative methods. Wis. Admin. Code § NR 113.07(3)(d)1. First, a septage spreader may implement eight separate site restrictions (one of which requires that animals may not be allowed to graze on the land for 30 days after application of septage). *See* Wis. Admin. Code §§ NR 113.07(3)(d)1.a., NR 113.07(3)(d)2.a.-h. Second (and in the alternative), the septage spreader may implement four of the eight site restrictions (not including the one on animal-grazing) if the septage spreader chemically treats each container of septage such that it maintains a pH of 12.0 or higher for 30 minutes. *See* Wis. Admin. Code §§ NR 113.07(3)(d)1.b., NR 113.07(3)(d)2.a.-d.

The evidence in this case demonstrates that there was a reason to inquire whether Howard Bros. was achieving the pH level that was necessary to avoid triggering all eight of the site restrictions, including the one on animal grazing. Specifically, Mr. Hegeman testified that if septage is properly treated (by achieving a pH of 12.0) then the septage should not have a foul odor and, instead, should emit the smell of fresh concrete or ammonia. There is no dispute that witnesses testified that at times they could smell unpleasant odors in the area. But on this evidentiary record, that was insufficient to establish (by a preponderance of the evidence) that the pH level of the septage was below 12.0.

In August of 2021, WI DNR Warden Ebert conducted a site visit of Plummer 6 after Ms. Canniff had received septage-related complaints including a smell coming from the field. (Exh. 55 at 1). During his inspection, Warden Ebert observed that neither of the septage spreading trucks had a logbook of past activity onboard and both of the Howard Bros. employees who were operating those trucks admitted that checking the pH level of the septage "prior to spreading was not a regular practice." (Exh. 55 at 2). At the contested case hearing, Mr. Hegeman testified that this was not in compliance with the record keeping requirements of Wis. Admin. Code § NR 113.11, but that the WI DNR saw this as an opportunity to gain compliance. (Hegeman testimony). In October of 2021, Ms. Canniff provided some guidance to Mr. Howard on his liming practices and, as a result, Mr. Howard modified his pH testing practices. (Howard testimony). And the following year (on August 24, 2022),

Mr. Hegeman advised Mr. Howard of the WI DNR's concern over complaints of odors coming from Plummer 6. (Exh. 24B). Mr. Hegeman gave Mr. Howard some guidance on the proper calibration of pH meters and proper liming procedures. *Id.* At that time, Mr. Howard reported that some of his readings indicated a pH of 13.0. *Id.* Mr. Howard testified that he updated Howard Bros.' liming practices, purchased new pH meters, instituted a practice of recalibrating the pH meters twice a week (rather than only once a week), noted that his company adds lime to the trucks, collects septage, measures the pH readings, records those readings, and spreads the septage only if it reaches a pH of 12.0 and remains at that level for at least 30 minutes. (Howard testimony). As a result of his updated practices, he has received fewer odor complaints, he only received one odor complaint on the same day that he was actively spreading septage, and received no complaints more than 48 hours after any active spreading. *Id.* On the facts of this case, there is insufficient evidence to reliably prove (by a preponderance) that the pH level fell below 12.0 at any particular point in time. Accordingly, the Petitioner has not carried its burden to prove that Howard Bros. violated the pathogen reduction standards.

v. Threatened or Endangered Species or Historical Sites, pursuant to Wis. Admin. Code § NR 113.07(3)(b)(13).

Finally, the Petitioner asserts that the WI DNR unlawfully granted the site approval for Plummer 7 without consideration of the threatened or endangered species found on and around the parcel, nearby historical sites, or an explanation as to how septage spreading at Plummer 6 and 7 would not adversely affect those species or sites.

The law provides that septage may not be landspread where it is likely to adversely affect a threatened or endangered species or its designated critical habitat or a historical site. Wis. Admin. Code § NR 113.07(3)(b)(13). "Historical site" means any historic property listed under Wis. Stat. § 44.40(2)(a). Wis. Admin. Code § NR 113.03(25). Furthermore, the WI DNR recognizes the federal list of endangered species as part of the WI DNR's list and specifically cites to 50 CFR 17.11 for the federal list. *See* Wis. Stat. § 29.604(3)(a), Wis. Admin. Code § NR 27.03(1). Gray wolves in multiple states (including Wisconsin) are specifically listed as an endangered species in the federal code. *See* 50 CFR 17.11(h).

As to the issue of historical sites, the Petitioner concedes that the State's list of historical sites does not include any information regarding sites located on federally recognized tribal lands and asserts that the WI DNR should have contacted a Tribal Historic Preservation Officer to determine whether there were any historical sites that could be affected by the proposed septage activities on the Plummer 7 lot. However, that is not required by the applicable law because (as noted by the Petitioner) the State's list of historical sites does not include any sites on federally recognized tribal lands. Thus, the Petitioner's objection is to the Wisconsin laws. And this tribunal does not have any authority to change those laws.

As to the issue of threatened or endangered species, the Petitioner points out that witnesses testified that gray wolves have been spotted near Plummer 6. (Taylor testimony; Wandsneider testimony). Therefore, the Petitioner argues that the WI DNR ignored this evidence, failed to conduct any diligence, and failed to visit the site prior to issuing the approval for Plummer 7. But there was insufficient evidence to show that the WI DNR failed to consider whether any endangered species were likely to be adversely affected by the proposed activities on the Plummer 7 site. This issue was

insufficiently developed at the hearing. Accordingly, the Petitioner has not met its burden to prove that the approval was unlawful on this basis.

CONCLUSIONS OF LAW

1. The Petitioner, Lac du Flambeau Band of Lake Superior Chippewa Indians, met its burden to prove, by a preponderance of the evidence, that the WI DNR improperly granted the permit application for Plummer 7 because the permit did not comply with Wis. Admin. Code § NR 113.07(3)(b)12, Table 3.

2. The Petitioner failed to meet its burden to prove, by a preponderance of the evidence, that the WI DNR improperly granted the permit application on the basis of Wis. Admin. Code § NR 113.07(3)(b)1.

3. The Petitioner failed to meet its burden to prove, by a preponderance of the evidence, that the WI DNR improperly granted the permit application on the basis of Wis. Admin. Code § NR 113.07(3)(b)5.

4. The Petitioner failed to meet its burden to prove, by a preponderance of the evidence, that the WI DNR improperly granted the permit application on the basis of Wis. Admin. Code § NR 113.07(3)(d).

5. The Petitioner failed to meet its burden to prove, by a preponderance of the evidence, that the WI DNR improperly granted the permit application on the basis of Wis. Admin. Code § NR 113.07(3)(b)(13).

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the decision to grant the permit application is REVERSED.

Dated at Milwaukee, Wisconsin, on February 20, 2024.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
819 N 6th Street, Room 382
Milwaukee, WI 53203-1685
Telephone: (414) 227-4781
FAX: (414) 227-3818

By: _____

Eric D. Défort
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to ensure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to ensure strict compliance with all its requirements.