Bad River Band Of Lake Superior Tribe Of Chippewa Indians

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Via email to CEMVP-WiL5R-CDD-Comments@usace.army.mil and DoD SAFE File Share

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Re: Comments on the Draft Environmental Assessment, Draft Section 404(b)(1) Guidelines Evaluation, and Draft Public Interest Review for the Enbridge Energy Wisconsin Line 5 Relocation Proposal

Mr. Sande,

The Bad River Band of Lake Superior Chippewa ("Bad River" or "Band") submits the following comments to the Army Corps of Engineers ("Corps" or "Army Corps"), St. Paul District, on the Draft Environmental Assessment, Draft Section 404(b)(1) Guidelines Evaluation, and Draft Public Interest Review ("DCDD") for the Line 5 Relocation Proposal ("Proposed Project" or "Proposed Reroute").

The Bad River Band is a federally recognized tribe in Northern Wisconsin, located wholly within the Lake Superior Basin and majority within the subbasin of the Bad River – Mashkiiziibii – for which our Tribal Nation is named. The Bad River Reservation is also directly adjacent to Lake Superior. The Anishinaabe, of which our Tribe of Ojibwe is a part, have lived in this area for several hundred years, moving from the east as described in our migration story to find the place where food grows on water. The Bad River Band and its people maintain a reciprocal relationship with the natural environment. Anishinaabe people see the waters, trees, animals, plants, birds, and even the air as an extension of a large community. This community is at the center of Anishinaabe culture and life. The Band has a solemn responsibility to preserve our homeland, our environment, our culture, our treaty-protected resources, and our distinct lifeways for the coming seven generations. It is for this reason that the Band objects to the Proposed Reroute of Enbridge's Line 5 pipeline around the Reservation.

The Band has continuously flagged that basic information to evaluate the environmental and cultural impacts of the Proposed Reroute Project on the Bad River watershed, the Bad River Reservation, and Lake Superior is severely lacking. Despite a lengthy letter in response to the Army Corps Public Notice in January 2022, which flagged many of these deficiencies, the Draft Combined Decision Document ("DCDD") is woefully inadequate. The DCDD and its appendices fail to include basic data on environmental baselines, fail to include specific evaluations of environmental impacts, fail to include construction methodology and how it will impact the

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surrounding environment, and fail to include the most up-to-date and accurate information. The scope of review of impacts from pipeline construction, maintenance, and operation is also artificially and unreasonably narrow. To the extent that the DCDD does recognize impacts to area waters and wetlands, it does so in a cursory manner and casually dismisses foreseeable and likely adverse impacts without any reasoning or data-based justification.

These omissions are not minor. Inadequate baseline information will necessarily lead to inaccurate or underestimated impacts from the Proposed Reroute because the comparison to measure those impacts is incorrect. A narrow scope will fail to reveal severe impacts from the Proposed Reroute that may occur downstream, or just slightly outside of the pipeline corridor, even if those impacts are foreseeable. And the haphazard review of environmental impacts leads to conclusions that the Proposed Reroute will only have minor impacts. These issues are exacerbated by the fact that the applicant, Enbridge Energy, has left out critical information essential to evaluating the impacts of the Proposed Reroute. For example, despite the company proposing to blast through at least 8 miles of wetlands and streams, there is absolutely no proposed blasting plan, no analysis of the environmental impacts that it will cause, and not even a final list of blasting locations.

Our Mashkiiziibii Natural Resources Department ("MNRD") has spent a significant amount of time and resources to evaluate the impacts of the Proposed Reroute. And even though the information made available to them was incomplete or inaccurate, MNRD staff, along with outside experts, have made several findings that the environmental and cultural impacts from the Proposed Reroute will be significant.[1] MNRD staff conducted preliminary reviews in spite of the fact that the Army Corps posted incomplete information in its initial publication of the DCDD and then later switched out several documents without notice to the public and without comparison documents to demonstrate what was changed. It was only after several inquiries were made did the Corps finally provide to the public a list of which documents were switched out. Both the findings from MNRD staff and outside experts, and the convoluted process that has ensued, demonstrate that the Corps must prepare an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA") to fully understand and analyze environmental impacts.

The most grievous failure of the DCDD, however, is its flagrant dismissal of consideration of the Bad River Band's treaty rights and treaty-protected resources. The Proposed Reroute, although outside of the Reservation, is still within treaty-reserved ceded territory. The Corps made every effort to avoid the fact that granting a pipeline permit will turn the pipeline corridor into a pipeline right-of-way under Wisconsin law, and thus Bad River and other Ojibwe tribal members may be criminally prosecuted for felony trespass if they try to exercise their treaty rights in ceded territory. Turning Band members into potential criminal defendants for exercising treaty rights along the Proposed Reroute only happens if the Corps grants this permit. This disregard for treaty rights is explained further in this letter, as are the environmental and cultural impacts that the Proposed Reroute project will have on treaty-protected resources.

[1] MNRD Departmental Reports and expert reports are attached to this comment letter and incorporated by reference throughout the letter (Attachments A-N).

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The following comments, in combination with reports from MNRD staff and outside experts, highlight numerous deficiencies in the DCDD. Because so much data and information are lacking, the Band reserves the right to update these comments if and when more information becomes available. Based on the current DCDD, appendices, and earlier versions of the application and supporting materials, the Corps cannot issue a Section 404 Permit under the Clean Water Act ("CWA") or a Section 10 Permit under the Rivers and Harbors Act for this Proposed Reroute Project. The Bad River Band looks forward to participating in a comprehensive review of the significant impacts of the Proposed Reroute Project as part of a federal EIS.

I. THE CORPS MUST EVALUATE THE PROPOSED REROUTE'S IMPACT ON TREATY RIGHTS AND FULFILL ITS TRUST RESPONSIBILITY

A. The Corps Failed to Evaluate the Proposed Reroute's Impacts on Treaty Rights.

The Bad River Band of Lake Superior Chippewa and our members retain treaty rights under the Treaties of 1837, 1842, and 1854 and continue to exercise their rights on the Reservation and throughout the ceded territory. *See* Treaty with the Chippewa, 7 Stat. 536 (1837) ("1837 Treaty") and Treaty with the Chippewa, 7 Stat. 591 (1842) ("1842 Treaty"); *see also U.S. v. Bouchard*, 464 F.Supp. 1316, 1358 (W.D. Wis. 1978) ("[The 1837 and 1842 treaties] grant the [Ojibwe] the right to live on the ceded lands as they had lived before the treaties were signed. That way of life included hunting, fishing, trapping, and gathering wild rice and maple sap as a means of providing food for themselves . . . in addition to having a place of residence."). The signatory tribes, including the Bad River Band, are, with certain limited exceptions, entitled to 50% of the available treaty resources in the ceded territory. An extensive background of the Band's treaty rights was provided in our March 2022 letter to the Army Corps. *Comments on the Section 404 and Section 10 Permit Application for the Enbridge Line 5 Pipeline Segment Relocation Project, Army Corps of Engineers, St. Paul District, File No. MVP-2020-00260-WMS*, 2-6 (March 22, 2022) ("Band's 2022 Comment Letter").

Despite flagging issues that the Proposed Reroute Project presented to the Band and our treaty rights, the Corps ignored them in the DCDD. The Corps has a duty to evaluate this Proposed Project's impacts to treaty rights and it has failed to meaningfully do so in the DCDD and in violation of its responsibilities under NEPA, CWA, the National Historic Preservation Act ("NHPA"), and its own consultation policy. *See* U.S. Army Corps of Engineers – Civil Works, Tribal Consultation Policy, 4 (Dec. 6, 2023) ("Corps Tribal Consultation Policy"); *see also White House, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, (January 26, 2021).[2] The Corps must independently evaluate whether the agency's decision to permit the Project will improperly modify or abrogate the Band's treaty rights. *N.W. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F.Supp. 1515, 1520 (W.D. Wash. 1996) (holding that federal agencies cannot modify the scope or nature of treaty rights through permitting, only Congress has such authority).

The most egregious failure of the Corps' public interest analysis is the agency's summary dismissal of the Band's concern related to Wisconsin's recently enacted felony trespass law and its

[2] *Available at*: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/

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impact on land use. DCDD § 7.13. Wisconsin Bill SB 386/AB 426 made it a felony to trespass on a pipeline right-of-way in the State of Wisconsin. The permanent right-of-way corridor encircles the Reservation. *See* Wis. Stat. § 943.143; *see also* DCDD at 8 (map of proposed pipeline segment and accompanying right of way). This will deter the Band's members, as well as other tribal members with treaty-protected rights to ceded territory, from accessing areas of the ceded territory for hunting, fishing, gathering, and other treaty-based activities. *See* DCDD at 109 (displaying increased travel times to access treaty sites).[3] In effect, the Corps is acquiescing to restricting the available area for the exercise of treaty rights as a function of the pipeline corridor and the felony trespass law.

The Corps dismisses these concerns by stating the permit does not convey property rights and that the Corps does not have jurisdiction regarding the enforcement of state law. DCDD at 109. This rationalization misses the point. The conveyance of property rights is not the litmus test triggering the Corps' trust responsibility to the Band. Corps Tribal Consultation Policy at 4 ("USACE shall work to meet its trust responsibilities, protect trust resources, and obtain Tribal views of trust and treaty responsibilities for actions related to USACE, in accordance with provisions of treaties, laws, and Executive Orders as well as principles lodged in the Constitution of the United States."). And while the agency does not administer state laws, a fundamental aspect of the trust responsibility is ensuring that the enforcement of state law is not in conflict with federal treaty rights retained by tribes.

Enbridge's assurance that it will not interfere with the exercise of treaty rights is beside the point. It is not Enbridge's decision whether to pursue a felony prosecution against a treaty harvester who may find themselves in Enbridge's right of way encircling the Reservation. Historically, the State of Wisconsin has aggressively enforced its fish, game, and criminal code against tribal members without regard to their federal rights. *See, generally,* Larry Nesper, *The Walleye War: The Struggle for Ojibwe Spearfishing and Treaty Rights* (2002) ("Nesper Report") (Attachment N). Here, the Corps completely fails to analyze how approval of this permit hands the state a new and powerful tool to obstruct tribal members' exercise of treaty rights. The Corps must ensure that its decision to permit construction activity, required for building the Project, will not affect the ability of tribal members to continue exercising their federal treaty rights. If the Corps permits this Proposed Project without evaluating and mitigating its severe impacts on treaty rights and access, it will have failed to fulfill its obligation as a federal trustee to uphold treaty rights.

B. The Corps Failed to Evaluate the Proposed Reroute's Impacts on Treaty-Protected Resources

The DCDD also completely fails to adequately assess the impacts the Proposed Reroute will have on treaty-resources within the pipeline corridor. This Proposed Project would be located within ceded territory and its impacts would affect treaty resources by eliminating high quality habitat and wetlands. The proposal to permanently convert certain wetlands from high quality forested wetlands to emergent wetlands will create a new "forest edge" along the entire route that

[3] The Great Lakes Indian Fish and Wildlife Commission is also submitting comments in response to the Corps' Public Notice of the DCDD that further explain the impact that the Proposed Project will have on treaty rights and treaty-reserved resources in ceded territory.

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will affect treaty resources and harvesting activity. The DCDD wrongly assumes that forest fragmentation and the edge effect will have a positive impact on biodiversity. Scientific literature demonstrates that forest edge can create ideal habitat for deer populations that preferentially graze on native species, allowing invasives to take hold. *See* MNRD Non-Local Beings Report (Attachment G). The Corps ignores how the new forest edge created around the entire Reservation will increase the presence of invasives and alter the availability of treaty-protected resources. *Id*.

The Corps not only fails to explore how its decision will degrade species and habitat, it also ignores the consequent effect to human use of the ecosystem. The Proposed Project's ecological impacts will affect the Band's and its members' ability to exercise our treaty right to live as Anishinaabe in our homeland. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 653 F. Supp. 1420, 1426 (W.D. Wis. 1987); Treaty with the Chippewa, 7 Stat. 591 (1842) (referencing the "usual privileges of occupancy"); *see also* Nesper Report (discussing tribal understanding of homeland when the 1854 Treaty was signed). The Corps does not discuss how mortality to fish and wildlife as well as dramatic ecological changes to the forested habitat around the reservation will affect the interest of the Band in hunting, fishing, gathering, and other traditional activities. Attempting to address the Band's concerns, the Corps points the Band to Section 10.4 of the DCDD, which similarly dismisses these issues with a reference back to the Corps' impact analysis. DCDD at 107 (directing tribes to the public interest and 404(b)(1) analysis); *see also* DCDD at 82 (directing tribes to Section 10.4).

The Corps also does not discuss the unique water-related activities that the Band and its members engage in near areas the pipeline will affect. These include gathering materials for handicrafts, ceremonies in the bush, river and stream fishing, and hunting deer and other species. *See, e.g.,* Kyle Whyte, *et al*., *Oral History Report on History, Culture, and Subsistence Pertaining to the Area to be Affected by the Proposed Reroute of Line 5* (Jan. 27, 2023) ("Oral History Report"), at 8 ("I interact with the upper watershed for a number of reasons. First and foremost, ceremonially."), at 12 ("That's our garden. That garden, that's where . . . the food grows for us, the food that grows on water, the food that swims down below, and the water that we drink."). The Proposed Project will alter the habitat and ecology of the entire area, changing the availability of faunal and floral species essential to traditional activities and altering the areas where the Band can encounter these treaty-reserved resources. The Corps' assessment of human uses dismisses the Band's perspective and derogates its treaty rights in the process.

C. The Corps Cannot Ignore its Trust Responsibility to the Bad River Band

The Corps is also ignoring the impacts that the current Line 5 pipeline is having, and the Proposed Reroute will have, on the Bad River Band Reservation. The Corps does not acknowledge or discuss the U.S. District Court for the Western District of Wisconsin's Order holding that Enbridge is in trespass on the Band's Reservation. *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Rsrv. v. Enbridge Energy Co., Inc.*, 626 F.Supp.3d 1030, 1048 (W.D. Wis. 2022) (Attachment O). The Court subsequently held that the Band is entitled to a disgorgement of profits to the Band and that Enbridge must remove the Line 5 Segment from the Reservation by June 16, 2026. *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Rsrv. v. Enbridge Energy Co., Inc.*, No. 19-CV-602-WMC, 2023 WL 4043961, at *19 (W.D. Wis. June 16, 2023) (Attachment P). The Court's order is clear: Enbridge has been trespassing on the Band's Reservation since 2013 and the Band is entitled to relief.

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In the June 2023 Order, the Court enjoined Enbridge from operating the pipeline beyond June 16, 2026. *Id.* at *20. The Court reasoned that equitable considerations counseled against an immediate shutdown and that the company should be given some opportunity to produce an alternative to on-reservation transport of oil. *Id*. at *19. This equitable caveat to the Court's Order is not a license for Enbridge to trespass indefinitely, nor is it a hall pass for the Corps to rush to permit the company's Proposed Reroute plan. No matter the Corps' decision, Enbridge must shut down the pipeline on the Reservation by June 16, 2026: "[a]t the expiration of three years from the date of this order, therefore, Enbridge must have decommissioned Line 5 on the 12 affected parcels, as well as arranged removal of any sidelined pipe and remediation of area." *Id.*

The Corps must acknowledge in the DCDD that Enbridge is in trespass of the Band's sovereign lands and the consequence of that trespass is that it must shut down on-Reservation operation of Line 5 by June 2026. We would like to remind the Corps, that even though this permit application is specific to potentially building a pipeline Reroute, that the Corps duty is to fulfill its trust responsibility to the Bad River Band to protect our lands and resources, not to Enbridge to build a pipeline. As the federal trustee, the Corps must imbue the protection of treaty rights and resources through all aspects of this permit review. By closing its ears to the Band's concerns related to treaty rights and preliminarily finding that the Proposed Project will not have an environmental or cultural impact, the Corps falls far short of its trust obligations. The Band reiterates that the Corps must conduct a full analysis of the pipeline corridor's impact on treaty resources, including conducting an ethnobotanical survey.

II. THE DCDD DOES NOT MEET THE STANDARDS OF THE CLEAN WATER ACT

The DCDD contains several flaws that severely hinder the Corps' ability to make a full analysis of the impacts under the CWA Section 404(b)(1) Guidelines. The lack of information also restricts our ability to evaluate whether the Proposed Project will adversely affect the Band's federally approved water quality standards as a downstream jurisdiction under CWA Section 401(a)(2). These defects also limit our ability to make a fully informed public comment, especially on the technical information required under the Guidelines to evaluate impacts on waters, wetlands, wildlife, and plant life. At the outset, baseline data and site-specific information are lacking, which limits our comparison. To make matters worse, the actual impacts of the Proposed Reroute construction, maintenance, and operation are understated or mischaracterized to make the impacts appear "temporary" when they will be permanent or long-term. The MNRD staff and experts worked with this limited information in the DCDD to analyze impacts on the watershed and areas connected to it[4] and identified several areas where more information is needed, or where the information we currently have leads to the conclusion that the Proposed Reroute poses unacceptable adverse impacts to the aquatic ecosystem. We reserve the right to update this information if and when more data is available, preferably through the development of a federal EIS.

[4] There are different boundaries defining the Bad River Watershed. When using the Lower Bad River (LS09) as defined by the Band and WI DNR, the Proposed Project falls outside of the boundaries of the Bad River Watershed . This is different than the Bad River Watershed boundary used in the DCDD. However, the entire project falls within the Lake Superior Basin, all of which has a hydrological connection to the Reservation through the Lake, and especially through watercourses outside of the watershed in Bayfield, Ashland, and Iron Counties (https://apps.dnr.wi.gov/water/watershedDetail.aspx?code=LS09&Name=Lower%20Bad%20River).

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A. The DCDD Misclassifies and Understates the Impacts on Wetlands.

The DCDD analysis of the Proposed Reroute's impacts on wetlands is fatally flawed at the outset because the described impacts on wetlands are completely misrepresented. The DCDD identifies the majority of impacts to wetlands as "temporary," which is a blatant misstatement of what the Proposed Project's impacts to wetlands will be. The DCDD rests on the erroneous assumption that wetlands will "naturally revert back" after they are dredged and/or filled after construction is finished. This is either a complete misunderstanding of how wetland ecosystems in this region work, or a misleading representation of the extent to which wetlands will be disturbed.

The DCDD severely underestimates the impacts on wetlands that construction will have via "mitigative measures," such as matting, and completely avoids analyzing the long-term impacts of such measures. These matting, or "mitigative measures" can have impacts that are likely not "temporary" or may need active restoration in order to revert. The DCDD assumption that impacts on wetlands are "temporary" also fails to recognize that after construction some wetlands will necessarily be converted from one wetland type to another wetland type. However, converting one wetland type to another wetland type is a permanent conversion with a fundamental change in wetland functions and uses.

This "temporary" misclassification of wetland impacts is pervasive through the description and evaluation of all of the methods of pipeline construction and maintenance of the pipeline right-of-way. Further, in order to have "temporary" impacts, there needs to be a timeline by which to measure what is "temporary." The DCDD claims that construction will only take 12-14 months, DCDD at 10, but does not clearly articulate restrictions on construction in waterways or habitat areas to avoid impacts to species, nor does it take into account seasonal construction delays. The DCDD is also vague about when restoration will actually begin throughout the region. So, what is described on paper as a short-term disturbance may actually be a long-term disturbance once real-world and site-specific factors are considered. Additionally, temporary is relative. Although the DCDD assumes temporary impacts equate to short-term impacts, some wetlands will take years, even decades to recover or "revert back" to their functions pre-construction. *See* Thompson & Associates Wetland Services ("Thompson") (Attachment A) at 5, 14; MNRD Wetlands Report at 7 (Attachment K).

The Corps cannot assume that the impacts to wetlands will be "temporary" based on unsubstantiated assumptions and the Corps must recognize that many of the impacts classified as "temporary" will actually be permanent. Summarily dismissing impacts on wetlands because they are mislabeled as "temporary" fails to recognize the extent to which wetlands and waters will be impacted by the project. This mismatch alone renders the analysis of the Proposed Project's impacts on wetlands in the DCDD futile. Specific evaluations of the impacts on wetlands pursuant to the Section 404(b)(1) Guidelines are provided in the next section, Infra II.C., but this misclassification is pervasive throughout the DCDD and the Corps' analysis under the Section 404(b)(1) Guidelines.

B. The DCDD Fails to Disclose Construction Methods of the Proposed Reroute That Will Adversely Impact Waters and Wetlands

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There are severe deficiencies in the DCDD that do not allow for a full evaluation of the impacts the Proposed Project will have on the aquatic ecosystem under the 404(b)(1) Guidelines. For example, the construction methods and mitigation and minimization efforts proposed are not fully explained, so the DCDD does not disclose or evaluate the impacts that construction and associated mitigation or minimization will have on area wetlands and waters.

The most egregious example is the lack of any consideration of the impacts that blasting as a construction method will have on wetlands and waters. First, the list of areas to be blasted is not final. The DCDD explains that "[i]n-stream blasting locations are subject to change based on on-site geotechnical investigation." DCDD at 53. The likely implication is that more areas will be blasted than were initially identified. Second, there is no blasting plan in the DCDD, which means that there is no disclosure or discussion in the DCDD about the impacts that blasting will have on the aquatic ecosystem. Although the DCDD repeatedly references Appendix 6 as part of Enbridge's Blasting Plan, the Plan itself is nonexistent. Instead of disclosing the final list of sites that would need to be blasted and disclosing what the blasting plan itself will be, the Corps and Enbridge kick the can down the road to blasting contractors. The contractors, then, "would create a site-specific blasting plan for any area determined to require blasting" and examine "environmental variables that would be recorded closer to the time of the blast." *Id*. Only after that would there be a consideration of "environmental and site-specific conditions that exist, as well as methods, materials, and locations of all explosives to be used for blasting." *Id*. These considerations would be well outside of public review, outside of the Corps' required environmental review, and outside of the Corps' permitting timeframe.

This omission is even more glaring when you consider the actual geographic areas to be blasted. At least three proposed blasting locations are over one mile in length, and five locations are over ½ mile in length. *Id*., App. 6 at 5. The Blasting Plan also reveals, although not overtly, that these proposed blasting locations are densely populated. The Blasting Plan does not provide a map, so we worked with experts to produce one based on the limited information provided in the DCDD and the Blasting Plan. *See* LimnoTech Report (Attachment B) at 12, fig. 9. On the table in the Blasting Plan, the distance between proposed Area 4 and proposed Area 1 is 3.36 miles, with 2.75 miles of that proposed to be blasted. The distance between Area 8 and Area 5 is 5.41 miles, with 4.18 miles of that proposed to be blasted. So, between milepost 22.54 and milepost 32.76, a total of 6.93 miles are preliminarily listed as potential blast locations, for which the DCDD evaluates absolutely none of the actual site-specific impacts. And of these potential blasting locations, the DCDD anticipates in-stream blasting in at least 17 streams. DCDD at 62. This dense blasting proposal is also bound to have significant cumulative impacts on the aquatic environment, which is not disclosed or evaluated.

Despite having absolutely no site-specific information about blasting impacts, no blasting plan that discloses blasting methodology, including likely contaminants, and no synchronized final list of blasting locations, the Corps moves forward with a 404(b)(1) Guidelines analysis and concludes that construction impacts will be minor and short term. *Id*. at 53 (impacts to substrate would be minor and short term), *Id*. at 62 (small organisms and those close to blast sites will experience mortality but impacts to fish and other aquatic organisms would be minor and temporary), *Id*. at 66-67 (blasting in wetlands may alter hydrology but states that avoidance and minimization measures are sufficient). Blasting, however, is likely to pose significant impacts and will adversely impact the ecosystem. The DCDD and the Blasting Plan fail to address blasting in

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wetlands and the potential to increase total suspended solids in wetlands and change flow rates at seeps. LimnoTech at 16-17. In wetland areas, species mortality will be significant, especially given the lengthy distance of the proposed blasting sites. Site visits by MNRD staff and experts show several species inhabit this region of proposed blasting sites. *See* Thompson at 8-9, fig. 5; MNRD Wetlands Report at 9; MNRD Wildlife Report (Attachment I) at 3.

The proposed blasting locations are also co-located with aquifers or other groundwater resources that will likely be impacted by blasting. LimnoTech at 16-17, figs. 6, 7, 9. Yet there is no disclosure or discussion in the DCDD about blasting impacts to aquifers, wells, or other water sources. Without a blasting plan, the Corps cannot evaluate potential contaminants from blasting material and how they will impact wetlands and waters. We don't know what materials will be used, how the blasting will physically take place, the depth to which blasting will occur, and how the blasting materials will be cleaned up afterward. Bedrock subject to blasting may contain blasting agent residues and natural residues that may degrade water quality. Blasting agent residues may include constituents of concern such as nitrates, fuel oil, perchlorate, mercury, RDX, HMX, and PETN. Blasted bedrock may have natural residues, such as uranium, iron, lead, or copper. Blasting may also expose bedrock that contains sulfur to atmospheric oxygen, moisture, or other elements that result in harmful compounds, such as sulfuric acid. *Id*. at 16. This information is especially important as Enbridge is proposing to blast within at least 17 streams, where blasting debris or contaminants would be exposed directly to water resources. DCDD at 62; *id*., App. 6 at 4. We also have no analysis on how blasting will impact area aquifers and whether fissures or other cracks may form as a result of blasting that will alter groundwater or surface water to groundwater flow. Blasting has the potential to alter groundwater hydrology by creating new bedrock fractures which can impact wetlands and groundwater sources. MNRD Wetlands Report at 9, 31; MNRD Fisheries Report (Attachment F) at 1. Blasting near wells, septic tanks, or underground storage tanks may release additional contaminants into the groundwater. LimnoTech at 16-17. All of this information is necessary before the Corps can make a determination on the impacts the Proposed Reroute will have on the aquatic ecosystem.

The manner in which the Corps and the applicant have described and evaluated the impacts of blasting on the aquatic ecosystem is beyond deficient. There is no information on which the Band, much less the Corps, can examine what the impacts to wetlands and waters will be as a result of blasting. Both the DCDD and the Blasting Plan defer disclosing site-specific impacts until after the permit is issued, which puts the cart before the horse and results in absolutely no environmental review or opportunity for the Band and the public to weigh in. Ultimately, the final blasting plans are not approved by the Corps, but by Enbridge. DCDD, App. 6 at 8-9 (*e.g.*, "[m]aximum diameter of explosive may be no larger than 2 inches unless approved by Enbridge"). This process would completely circumvent the purposes of the Section 404(b)(1) Guidelines, which is to disclose and evaluate potential impacts from proposed projects.

Even without any information on blasting as a construction method, the Corps still manages to make a preliminary determination that the impacts of blasting will be minor in its 404(b)(1) Guidelines Evaluation. However, the Corps simply cannot make a preliminary determination without any factual support. The Corps cannot rely on the Blasting Plan to make this determination. The Blasting Plan, as vague as it is, is already inconsistent with state regulations on blasting. LimnoTech at 22. Even a cursory review of possible blasting impacts demonstrates that there will be significant impacts on water quality, wildlife, and area waters and wetlands in

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general. The Corps must require a site-specific blasting plan prior to issuing a permit and must make that plan available for public review. The Corps must also thoroughly evaluate the impacts that blasting will have on water quality, water quantity, wildlife, treaty resources, and the aquatic ecosystem prior to issuing a permit.

C. The Proposed Project Does Not Comply With the Section 404(b)(1) Guidelines.

Even though the impacts are undercounted, and wetlands are undervalued, the limited information in the DCDD still demonstrates that the Proposed Project does not comply with the Section 404(b)(1) Guidelines. The Corps cannot issue a Section 404 or Section 10 permit unless the Proposed Project meets the requirements set forth in the CWA Section 404(b)(1) Guidelines. 33 U.S.C. § 1344(b). "Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." 40 C.F.R. §230.1(c). The guiding principle of the Guidelines is that degradation or destruction of special aquatic sites "is considered to be among the most severe environmental impacts" and "that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources." *Id.* at § 230.1(d).

The first step in implementing the Guidelines is to determine whether there are practicable alternatives in order to avoid impacts on wetlands and special aquatic sites. *Id.* at § 230.5(c) and 230.10(a). For projects located in special aquatic sites that are not water dependent to "fulfill its basic purpose…practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise." *Id.* at § 230.10(a)(3). If there are no other least environmentally damaging practicable alternatives ("LEDPA"), the Corps must then make an evaluation of the proposed project's impacts on the proposed site. *Id.* at § 230.5(d)-(i). The next step is minimization, and the Corps must "identify appropriate and practicable changes to the project plan to minimize the environmental impact of the discharge[.]" *Id.* at § 230.5(j). If there are no alternatives to the proposed project site and if the project will have impacts on wetlands and special aquatic sites, the Corps must then require compensatory mitigation. *Id.* at § 230.91 *et seq*.

A simple application of the Guidelines to this Proposed Project demonstrates why it should not, and cannot, be permitted. There are clearly project alternatives that will be least damaging to the environment that involve almost no additional construction and will still meet the applicant's end goals. And notwithstanding the depreciation and undercounting of wetland impacts, the DCDD still demonstrates that there will be unacceptable adverse impacts to wetlands and waterways as a direct result of project construction and operation. All of the Factual Determinations the Corps concludes in the DCDD as applied to the Section 404(b)(1) Guidelines are unfounded and must be re-evaluated. The Corps also cannot make a Determination of Compliance with the Section 404(b)(1) Guidelines based on the information in the DCDD.

1. There are less environmentally damaging practicable alternatives

The Proposed Line 5 Reroute Project is entirely unnecessary as there are practicable alternatives that both the applicant and the Corps summarily dismiss because they do not fit the very narrow purpose that Enbridge crafted. The Corps must examine if there are practicable

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alternatives to the proposed discharge that may have fewer damaging consequences. 40 C.F.R. § 230.5(c). As part of this analysis, the Corps has already determined that the Proposed Project is not water dependent, DCDD at 26, and thus "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. *Id.* at § 230.10(a)(3). And "no discharge or dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." *Id.* at § 230.10(a). Practicable alternatives include activities that do not discharge dredge or fill at all or discharge at other locations. *Id.* at § 230.10(a)(1)(i). An "alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* at § 230.10(a)(2).

a. The Corps' basic purpose for analyzing alternatives is flawed.

The DCDD is a combined decision document intended to meet both the requirements of NEPA and the CWA. The 404(b)(1) Guidelines contemplate the fact that both NEPA and the 404(b)(1) Guidelines require an alternatives analysis, and that there may not be perfect overlap between the two sets of implementing regulations. "On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines." *Id.* at § 230.10(a)(4). The DCDD attempts to meet both requirements within a combined alternatives analysis (Section 5) but falls far short of meeting the requirements under each statute.

For the purposes of examining alternatives under the 404(b)(1) Guidelines, the Corps must establish a "basic purpose" in order to come up with an adequate range of alternatives. 40 C.F.R. § 230.10(a)(1), *City Club of NY v. U.S. Army Corps of Eng'rs*, 246 F.Supp.3d 860, 885 (S.D.N.Y. 2017) ("Whether the project under review would be located within a 'special aquatic site' as defined in the Guidelines is a key factor in the Corps' analysis of practicable alternatives"). The DCDD, after making the determination that the project is not water dependent defined the "overall project purpose is to relocate approximately 12 miles of the existing Line 5 pipeline within the Bad River Band Reservation with new pipeline located entirely outside the boundaries of the Reservation at approximately the same capacities provided by Enbridge's existing Line 5 pipeline." DCDD at 26. Instead of using that purpose in Section 5 to select alternatives for its analysis, the Corps uses the following site selection and screening criteria: "capacity to transport crude oil and NGLs at approximate capacities provided by Enbridge's existing Line 5 to reach identified delivery/receipt points, safety, land access or availability, costs, logistics, technology, and environmental impacts, including impacts to WOTUS." *Id*. at 34.

The Corps unnecessarily narrowed the basic purpose under the 404(b)(1) Guidelines, which had a domino effect of summarily dismissing alternatives that would be least environmentally damaging. As an initial matter, the Corps must synchronize the basic purpose of the Proposed Project with the range of alternatives considered. The Corps must also reevaluate the practicability of alternatives under the basic purpose. Under the basic purpose that the Corps already described in the DCDD, there are available LEDPAs.

b. The no action alternative is the LEDPA.

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The Corps summarily dismisses the least environmentally damaging practicable alternative: the No Action alternative. *Id*. at 35-37. Of the two No Action Alternatives contemplated in the DCDD, the Pipeline System Alternative is a fully practicable alternative. The Band and others have repeatedly demonstrated that Enbridge's existing infrastructure will be able to transport crude oil and NGLs in the event of a Line 5 Shutdown. *See, generally*, *Likely Market Response to a Potential Shutdown of Line 5*, PLG Consulting (Oct. 2023) ("PLG Report") (Attachment U), *see also infra* IV.B. The usage of existing infrastructure clearly meets the basic purpose of the Proposed Project to relocate the pipeline outside the Band's Reservation and transport at approximately the same capacities. This No Action will be less costly than new construction, will utilize existing technology, is logistically feasible, and will meet overall project purposes.

However, the DCDD swiftly dismisses this alternative as not reasonable based only on Enbridge's word that "there is no existing pipeline system designed to transport both crude oil and NGL products from Enbridge's Superior Terminal to delivery and receipt points provided by the existing Line 5 system." DCDD at 34-35. The Band, and other parties, have examined existing infrastructure and have provided viable solutions that the Corps must independently examine. Although the Corps states that the Pipeline System Alternative does not meet the purpose and need because they "would either need to interconnect to Enbridge's system at or near Enbridge's Superior Terminal to transport products being delivered to receipt points provided by Line 5," *Id*. at 34, the Corps fails to seriously examine what those systems could look like. The DCDD further claims that existing pipelines "is not reasonable or practicable because of logistical and technological limitations," but does not explain what those limitations are. *Id*. at 46. The treatment of this alternative in the DCDD is slim simply because the applicant doesn't want to seriously consider it.

The Corps must also seriously consider a No Action Alternative where Line 5 is inoperable. As mentioned throughout this comment letter, the Corps egregiously omitted in the DCDD that there is a federal court order declaring that Line 5 be shut down by June 2026 because it is illegally trespassing through the Bad River Band's Reservation. The Corps, however, seems preoccupied as to whether the private company Enbridge will have a replacement to Line 5 as part of its analysis: "[a]lternately, shutting down or terminating use of Line 5 within the Reservation, without a replacement means of transport would not meet the purpose and need or overall project purpose." *Id*. at 34. It is not the duty of the Corps to consider whether or not Enbridge will have a replacement for Line 5 prior to shutdown as part of its alternatives analysis. Nor can the Corps frame the No Action Alternative solely as leaving Line 5 operational and then dismiss it "because it would not be entirely outside the Bad River Band Reservation." *Id*. at 46. To the contrary, the Corps must actually consider the shutdown as a foreseeable event regardless of whether the Corps grants this permit.

It is clear that the best, and practicable, alternative is the No Action Alternative. If one of the goals of the 404(b)(1) Guidelines is avoidance, then the No Action Alternative will fully meet that goal. Further, the 404(b)(1) Guidelines set up the presumption that "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3). The Corps, by promptly dismissing the Pipeline System Alternative, has not rebutted that presumption. The Corps must fully examine and seriously consider the No Action Alternatives.

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c. The applicant and the Corps failed to provide and evaluate less environmentally damaging alternatives.

The Corps has not adequately evaluated the alternative construction routes. We pointed out in our previous comment letter that the alternative routes Enbridge provided appear to either be infeasible or deliberately drawn to exacerbate impacts. Band's 2022 Comment Letter at 14-18. The DCDD does not remedy any of the concerns we identified in 2022. Synthesizing the alternatives demonstrates that some of the impacts that render one alternative not viable because it will have a bigger environmental or social impact, are avoided in other alternatives. MNRD Environmental Report at 6-7, 19, 24 (Attachment E). For example, MNRD staff identified that the majority of impacts from Alternative 2 are avoided in Alternative 3. *Id.*. So the impacts associated with Alternative 2 appear to be artificially inflated or could be otherwise avoided. Alternative 3 could also be routed to avoid waterbodies. The Corps and the applicant have failed to seriously provide alternatives that consciously avoid environmental and social impacts. Other route alternatives must be proposed and thoroughly evaluated.

There are route alternatives that will take the pipeline outside of the watershed, and which may avoid high quality wetlands and avoid several water bodies present in the proposed route. Rather than contemplate other routes, the DCDD assumed that less damaging practicable alternatives should "focus[] on minimizing the length of the pipeline to the extent practicable, while also minimizing the environmental impacts." DCDD at 37. However, avoiding high quality wetlands and waterbodies, especially for a project that is not water dependent, should be a paramount alternative worth considering. The Corps must critically evaluate the alternatives presented in the DCDD and actively consider modifications to route alternatives that would actually minimize impacts.

2. The Proposed Project will have unacceptable adverse impacts on the aquatic ecosystem

The Proposed Reroute will impact area waters, wetlands, wildlife, and plant life. For the Bad River Band, these categories are interconnected. Although these comments do refer to specific evaluations required under the 404(b)(1) Guidelines, our review is holistic in nature to reflect our cultural values and worldview. Impacts from the construction, maintenance, and operation of the Proposed Reroute will be felt throughout the entire watershed and the Corps cannot compartmentalize those impacts.

a. The Proposed Project Will Have Unacceptable Adverse Impacts on Water Quality.

The Proposed Project will have impacts on the physical and chemical components of area waters and wetlands as well as have impacts on human use characteristics. Both Subpart C and Subpart F of the Section 404(b)(1) Guidelines contemplate impacts on water quality via impacts to substrate, particulates, turbidity, salinity, water circulation, water fluctuation, water supplies, and fisheries. 40 C.F.R. part 230, Subpart C and F. With respect to overall water quality, the 404(b)(1) Guidelines also prohibit the issuance of a permit if it "causes or contributes, after

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consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard." 40 C.F.R. § 230.10(b)(1).

The Corps' analysis under Subpart C and Subpart F is not, and cannot be, a fair measurement of what the impacts of the Proposed Project will be to water quality because there is no baseline from which to measure those impacts. Enbridge has not provided an accurate baseline of what the current water quality is in the project area. In order to conduct a thorough analysis under the Section 404(b)(1) Guidelines, the Corps must require water quality sampling in streams, wetlands, groundwater areas, and wells, and the sampling must be representative of the seasonal conditions and annual variations in the project area. Water quality sampling must also represent current conditions and should not rely on outdated data. The Band offers these comments absent a representative baseline of water in the area.

i. Water

The 404(b)(1) Guidelines have several sections and evaluations that address areas of water quality broadly. 40 C.F.R. pt. 230, Subsections D, F. The Bad River Band will address water holistically in a manner that is both in line with our worldview and cultural values and which also reflects the scientific interconnectedness between different water sources in this region. The relationship between surface water, groundwater, and drinking water in the Bad River watershed is well established. Impacts that alter "water clarity, nutrients and chemical content, physical and biological content, dissolved gas levels, pH, and temperature," can be experienced not only in the receiving water but can travel to other waters in the area. 40 C.F.R. § 230.22(a). These changes "and the addition of contaminants can reduce or eliminate the suitability of water bodies for populations of aquatic organisms, and for human consumption, recreation, and aesthetics." *Id*. at § 230.22(b).

Neither the DCDD nor the applicant have disclosed an adequate way to measure impacts on the area's waters. As previously mentioned, the baseline sampling for waters is inadequate. The purpose of establishing a baseline is to have something from which to measure what the impacts will be, and also to establish a standard to return to in the event water quality is impacted and needs to be remediated. The applicant has only completed one sample of baseline water quality.[5] DCDD at 57. This is wholly deficient because it is an incomplete picture of water quality. A baseline for water quality cannot be established with one or two sampling events as groundwater and surface water quality fluctuate over seasonal timeframes and can vary due to rainfall or other short-term changes. Thompson at 19, LimnoTech at 18, Wright Water Engineers, Inc. ("Wright Water") (Attachment C), MNRD Other Waters Report (Attachment J) at 8. *See generally*, MNRD WQS Report (Attachment L). The applicant also has not sampled in wetlands at all. "Since water levels in wetlands are not predictable, mapping wetland sample locations is equally unpredictable." DCDD at 57. However, if the applicant actually conducted sampling throughout the seasonal year, they would have a rough idea of how wetland waters fluctuate seasonally. Thompson, LimnoTech, MNRD Wetlands Report at 7-8, 13-14, 19, 21.

[5] The Revised Appendix 3, which was provided in the middle of the comment period, references a 2024 Water Quality Monitoring Report, but that report only includes 2023 sampling data from the 2023 Water Quality Monitoring Report. In the event there is updated sampling data, it has not been provided to the Band for review.

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Rather than collect the necessary data to establish a baseline as part of the application, Enbridge instead proposes a Water Quality Monitoring Plan (Appendix 8) "to document water quality prior to construction, during active construction, and following construction." DCDD at 56. Enbridge's proposal to collect baseline data along the way, *Id*. at 56-57, is similar to building a car as you drive it. This would result in a failure to disclose or analyze the impacts to water quality standards as part of the 404(b)(1) Guidelines evaluation, which must happen before a permit is issued. Further, the Water Quality Monitoring Plan itself is faulty. The Plan does not address pre- or post-construction water testing for private wells and water sources utilized for construction activities and it does not provide parameters for additional sampling. The Plan's sampling for fracouts is deficient and the groundwater elevation monitoring plan is deficient and inconsistent. The timing for reporting is also faulty because it is too long to be responsive for on-the-ground or current conditions. LimnoTech at 17-18; MNRD Wetlands Report at 8; MNRD Other Waters Report at 9. All of these concerns need to be addressed in an updated Water Quality Monitoring Plan.

Currently, there is no information on impacts to aquifer water quality resulting from construction. The Corps requested information from Enbridge, specifically to "assess the potential for shallow confined aquifers within the project area and develop considerations and actions to minimize potential impacts to aquifers." DCDD at 58. But that information should be available prior to publication of the DCDD so the public can see and have the opportunity to comment on impacts to aquifers. The only acknowledgment about impacts to aquifers in the DCDD is that "[c]onfined aquifer breaches can occur during construction where construction activities extend deep enough to penetrate the confining layer above an aquifer, such as during an HDD or when sheet piling is installed to facilitate trench excavation." *Id*. The DCDD is silent as to the impacts that blasting may have on aquifers, despite their presence in blasting areas. *See* LimnoTech at 16-17.

The initial findings presented in the DCDD categorize most of the Proposed Reroute "as having a 'low likelihood' of encountering shallow aquifers with artesian conditions," a handful as 'moderate likelihood' and no areas as 'high likelihood.' DCDD at 70. Given Enbridge's track record on Line 3 in Minnesota, and the fact that Enbridge hired the same consulting firm that worked on Line 3 to study aquifers for Line 5 construction, any information from the same consulting firm should be examined with scrutiny. Findings from an independent analysis of the DCDD and Appendix 18 do not mirror the claims in the DCDD. The findings from Appendix 18 do not align with known conditions along the Proposed Reroute. LimnoTech at 19. There are also significant risks with HDD near confined aquifers that are disclosed in other reports but are not explicitly disclosed or evaluated in the DCDD. *Id*. at 19-21. For example, the HDD crossings at Silver Creek and the White River are referred to as "significant" and "challenging" with high risks of fracture. *Id*. at 20. The LimnoTech Report highlights several risks associated with HDD construction in areas with aquifers that are not evaluated in the DCDD. *Id*. at 19-21.

Information in the DCDD is also deficient in determining impacts to wells or drinking water sources. As an initial matter, the location of wells in the databased Enbridge used may not be accurate. LimnoTech at 13. To the extent that Enbridge and the Corps consider impacts to wells, they only do so in the event that pipeline operations contaminate private wells. But even Enbridge's approach to contamination to private wells demonstrates their flippant consideration, which is to pay for a filtration system and "[i]f remediation and/or replacement of the well is not

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possible, Enbridge has reported that they would work directly with the landowner to evaluate further alternatives, which may include purchase of the property." DCDD at 69. So rather than gathering data and analyzing possible impacts to people's drinking water prior to receiving a permit, Enbridge has offered to buy them out in the event of a mishap.

There is also no discussion of impacts that aquifer breaches will have on water quantity, which the 404(b)(1) Guidelines list as a consideration. 40 C.F.R. § 230.50(b). The Corps must require boring samples at closer intervals throughout the Proposed Reroute to more accurately understand the depth of soils and potential aquifer encounters. This information is especially important because a significant portion of the pipeline south of the Bad River Reservation has an elevated potential for aquifer breaches. LimnoTech at 12, fig. 9. Impacts to water quantity via aquifer breaches can span beyond private wells and affect large areas of the watershed.

The Corps' analysis of impacts to water under the 404(b)(1) Guidelines is severely deficient and the Corps cannot issue a Section 404 permit without additional information from the applicant. Further, this information must be presented to the public for review, especially as it involves potential contamination to area waters. At a minimum, the Corps must require a baseline sample of waters and wetlands that is reflective of seasonal conditions. The Corps must fully consider impacts of pipeline construction, maintenance, and operation on both water quality and water quantity. This includes requiring a blasting plan prior to permit issuance to evaluate blasting contaminants and site-specific blasting impacts to groundwater, aquifers, and other water sources. Based on the current review, it is likely that the project will have adverse impacts on water—both water quality and water quantity.

ii. Hydrology

The interactions between surface water and groundwater in the Proposed Reroute area must be fully evaluated in order to properly understand and analyze the impacts the Proposed Project will have on the hydrology of the region. The Proposed Reroute may impact regional hydrology by altering the circulation and fluctuations of water flow. The 404(b)(1) Guidelines require a consideration of "physical movements of water in the aquatic ecosystem" and "[n]ormal water fluctuations in a natural aquatic system consist[ing] of daily, seasonal, and annual tidal and flood fluctuations in water level." 40 C.F.R. § 230.23(a) and § 230.24(a). Impacts to consider for physical movements of water in the aquatic ecosystem may include changing water flow, obstructing water flow, or changing water direction. Id. at § 230.23(b). Changing normal water fluctuations can result in severe impacts, such as "prolonged periods of inundation, exaggerated extremes of high and low water, or a static, nonfluctuating water level." Additional impacts include changing salinity patterns, altering erosion or sedimentation rates, aggravating water temperature, and upsetting the nutrient and oxygen balance. "[T]hese modifications can alter or destroy communities and populations of aquatic animals and vegetation, induce populations of nuisance organisms, modify habitat, reduce food supplies, restrict movement of aquatic fauna, destroy spawning areas, and change adjacent, upstream, and downstream areas." Id. at § 230.24(b)

As an initial matter, there is no reliable or current baseline data on groundwater from which to measure potential impacts. The hydrotechnical report prepared for the Proposed Reroute used outdated static groundwater level data (with some measurements dating back to 1954). It also used sampling data from different years and different seasons, which is not conducive to establishing a

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continuous baseline. The report also contained plain errors in groundwater depth where it misinterpreted the groundwater level to be 120 feet below ground surface when it was 15 feet below ground surface. LimnoTech at 13. The Corps must require a baseline that uses accurate current (real-time) groundwater condition data. The geotechnical boring logs should also be provided in order to make an accurate assessment of groundwater resources.

We have several concerns about the possibility of alterations to area hydrology, especially after recent Enbridge disasters during the construction of Line 3 in Minnesota. MNRD Environmental Report at 4, 6, 13; MNRD Wetlands Report at 8, 25. HDD construction raises concerns about alterations to hydrology that may be long-term. Despite recent aquifer breaches resulting from recent Enbridge pipeline construction, Enbridge provided a lackluster Aquifer Analysis and HDD Design (DCDD Appendix 18). Appendix 18 did not identify any areas as having a "high likelihood" of encountering artesian conditions along the route, despite known conditions. There are also several HDD crossings that are at risk of hydrofracture. LimnoTech at 19-20.

The DCDD also fails to consider the impact that the Proposed Project will have on changing surface water flows. Wright Water at 5-12. Site visits to areas along the Proposed Reroute reveal dense vegetation along water bodies and mixed forest with dense understory vegetation in upland areas. The areas also contain forest litter and duff layers in forested areas. *Id*. at 6-8. These areas serve an important role in the ecosystem during precipitation and storm events. Quite simply, rain and precipitation are able to filter through or run off of several layers before hitting the ground or going through evapotranspiration. Hitting forest canopy or understory reduces the kinetic energy available for erosion. But in order to construct the Proposed Reroute, these forested areas and understory will be cleared. Removal of trees and understory along the Proposed Reroute corridor will have a measurable effect on rainfall-runoff hydrology by removing canopy. *Id*. at 8. Further, if constructed, the right-of-way corridor will be maintained free from woody or forested vegetation. Converting forested areas to maintain a right-of-way will result in up to a 100% increase in stormwater runoff from precipitation events as a long-term impact. *Id*. at 5, 9.

The impact on surface water flows raises several concerns about construction timing. It is not clear whether construction will be seasonal or continuous. The difference in surface water runoff will be highest directly after construction. *Id*. at 9. And most of the precipitation in the area is during April through October when vegetation is in leafout such that clearing vegetation during this time will have a large impact on surface water runoff. *Id*. at 9. It is also not clear in the DCDD or supporting documents how this change in surface water runoff will impact groundwater recharge, and whether groundwater recharge is seasonally dependent. None of these considerations are addressed, even though the surface water and groundwater impacts could be severe.

The Corps must address several concerns in order to understand and evaluate the impacts the Proposed Reroute will have on area hydrology. A baseline of current water quality and water hydrogeology must be established based on seasonal and annual conditions. The Corps must also require current geotechnical testing and independently review geotechnical data. The Corps also should develop a water balance for the right-of-way under existing conditions and post-project

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conditions in order to measure and project the Proposed Project's impacts on area hydrology and water quality.

iii. Substrate

Impacts on the substrate of the project area are greatly underestimated. "Substrate of the aquatic ecosystem underlies open waters of the United States and constitutes the surface of wetlands." 40 C.F.R. § 230.20(a). Construction through streams, waters, and wetlands would necessarily alter the substrate of those areas with almost every proposed construction method. The DCDD relies on the assumption that construction impacts on wetlands will be temporary because the areas will somehow naturally revert to pre-construction conditions. This erroneous assumption ignores real foreseeable impacts on wetlands and waterway substrate, especially changes in elevation. "Discharges which alter substrate elevation or contours can result in changes in water circulation, depth, current pattern, water fluctuation, and water temperature." *Id.* at § 230.20(b).

The Band is concerned that construction will alter the substrate along the pipeline corridor. Of particular concern to the Band and MNRD staff is mounding over pipeline areas. The DCDD simply assumes that "natural deposition would be anticipated to restore" the layer over the trench line. DCDD at 53. However, the current Line 5 pipeline that operates through the Reservation still obviously demonstrates mounding such that you can clearly see an elevation change tracking the pipeline route. MNRD Wetlands Report at 4-6. So not only is a change in elevation and contour foreseeable, but it is also very likely. The DCDD also assumes that "[t]he applicant would visually assess the area disturbed by excavation and compare surface substrate to adjacent, undisturbed substrate for adaptive management of restoration." DCDD at 52. However, there is no adaptive management plan for how the substrate would be restored. Mounding presents several concerns to changes in water quality, water fluctuation, water temperature, water uses, and the interaction between surface water and groundwater flows. MNRD Wetlands Report at 4-5. The Corps must disclose and analyze the foreseeable and likely impacts of mounding on area waters and wetlands resulting from pipeline construction and maintenance. The Corps must also require an adaptive management plan that outlines the criteria for which substrate will be evaluated and the methodology that will be used for adaptive management.

Blasting as a construction method also raises serious questions about the impacts on the substrate of the areas blasted, especially because there is no actual blasting plan, nor are there any site-specific analyses of the proposed areas to be blasted. *See supra* at II.B. Blasting may alter the substrate by creating cracks, fissures, or other instabilities that were not present before. Blasting may also create severe environmental impacts on the substrate through backfilling blasted areas around the pipeline. The Blasting Plan vaguely states that blasting may be required through areas with bedrock, but there is no discussion on what happens to that bedrock and whether it will be used to backfill over the pipe. This will be a complete change in substrate as either the rock will be porous and create a French drain, or the backfill will be a mixture of material that did not exist in that location. Either of those backfill methods is a complete and permanent change in the substrate. Thompson at 40-41. This emphasizes the need for the Corps to require a site-specific analysis for all areas proposed to be blasted, as well as a blasting plan to disclose possible impacts to waters and wetlands. The Corps must also review blasting impacts as a whole, as many of the blast sites are very close together and many of the proposed blasting areas are greater than ½ mile in length. The impacts of blasting on substrate alone are significant and should require an EIS.

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The DCDD also undercounts other construction related impacts on substrate, such as construction matting. Although the DCDD hastily acknowledges that there will be a temporary effect on physical substrate due to "temporary side-casting of dredged material and construction access and workspace matting," it does not seriously consider impacts associated with matting. DCDD at 52. The Corps simply states that the matting is temporary and is a minimization measure "to minimize rutting and disperse compaction pressure from heavy equipment." *Id*. As mentioned above, *supra* II.A. and II.B., there is no actual timeframe for how long construction will take and how long matting will be left onsite. Matting can smother wetlands and compact soils, which are severe changes to the substrate. The longer matting is left in place the more it will have detrimental, and perhaps devastating, impacts on wetland substrate. These impacts are not only foreseeable but also likely. MNRD staff have identified areas on the Reservation where Enbridge conducted maintenance activities that used matting as a minimization measure and severely compacted the soil and altered the elevation of the substrate. This resulted even though the matting was used for less than 90 days, which is the Corps' threshold for "temporary." MNRD Wetlands Report at 5-6; MNRD Environmental Report at 5-6.

Purposefully altering substrate can have severe adverse impacts on the aquatic ecosystem. However, natural substrate alterations, such as natural river erosion and river meandering are inherent to this ecoregion and are indicators of a healthy river system. Unfortunately, to facilitate man-made intrusions into the river systems like the Proposed Reroute, purposeful alterations to substrate may be proposed. In this instance, the proposed bank stabilization efforts are a serious concern for the Band. Site visits with MNRD staff and experts depict areas along the Proposed Project corridor at proposed crossing locations that are naturally prone to erosion. Wright Water at 10, fig. 6. Although natural erosion is a preferable way to manage the ecosystem, the Proposed Project will increase erosion along area waterways. The increased runoff capacity due to removed vegetation along the corridor will result in a higher volume of water moving at greater velocity. *Id*. at 10. Soil compaction from construction may also increase runoff and erosion. *Id*. at 10-11. This artificially induced erosion may increase naturally occurring bank instability for the purposes of the Proposed Project.

The naturally occurring erosion that threatens the existing Line 5 pipeline on the Reservation demonstrates that bank instability is not only a foreseeable but also a likely impact of pipeline construction and maintenance. The Corps states that they requested and reviewed "engineering and constructability assessments of each waterbody crossing to assess which crossing techniques would be appropriate to propose, to verify that the crossing could be successfully completed, and to identify any site-specific challenges or considerations that should be accounted for such as shallow bedrock, visual indicators of existing bank instability, and/or other constructability factors." DCDD at 52-53. However, plans to address the "visual indicators of existing bank instability" are not included in the DCDD. We have direct experience with erosion within the Proposed Project area and how it may impact pipeline safety and we must be consulted on site-specific challenges in areas identified as possibility having bank instability. The Corps must also require and make public the list of factors used to evaluate the likelihood of bank instability throughout the Proposed Reroute. By likely increasing erosion through construction and maintenance of the pipeline corridor, and then having to install bank stabilization measures to "deal with" that increased erosion, Enbridge is doubling down on the adverse impacts the Proposed Project will have on the ecosystem.

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Despite all of the above, the Corps makes the preliminary determination that "construction related effects to substrate would be minor and short term." *Id*. at 53. However, the Corps and the public need more information to assess impacts to water and water quality under the 404(b)(1) Guidelines. The Corps must require a baseline water quality assessment, an independent analysis of construction impacts to aquifers along the Proposed Reroute, and a more concrete timeline of proposed construction, including contingencies for necessary pauses to construction due to fish spawning and other factors. The Corps must also require and disclose an adaptive management plan and restoration plan for areas that are permanently altered due to construction matting left in place for too long. These analyses are best served in an EIS because the impacts are significant.

iv. Water contaminants, suspended particulates, turbidity

The DCDD fails to consider the impacts the Proposed Project will have on water contaminants and suspended particulates. Appendix 7 – Sediment Discharge Modeling Report – underrepresents sediment transport and its impacts on area waters. Wright Water at 18-20. First, its modeling is limited to a construction period of June to August, which is not reasonable and also not founded. Second, it does not consider the long term impacts of removing vegetation from the Proposed Project corridor. The removal of vegetation along the Proposed Reroute corridor will increase erosion. *See infra* II.C.2.ii. This will likely result in sediment loading from areas adjacent to water courses where vegetation will be removed and will lead to long term adverse water quality impacts. Wright Water at 12. These impacts are likely to be long term. Even though some understory may return, the continued maintenance of the pipeline will require routine clearing. *Id.* at 11-12. The short-term and long-term introductions of sediment via erosion must be evaluated.

The DCDD does not consider that HDD-related frac-outs may release suspended particulates and increase turbidity in receiving waters and wetlands. The Corps assumes that HDD construction will be successful and "are not anticipated to have sedimentation impacts since there would not be in-stream disturbance." DCDD at 54. The Corps, however, must also consider Enbridge's track record on pipeline construction in Line 3, where 63 percent of HDD-installed water crossing construction resulted in a frac-out. Wright Water at 21; LimnoTech at 9, 19, Attachment 1 (Line 3 Inadvertent Return Summary Table); MNRD Environmental Report at 13, 16-17. Frac-outs are not only a foreseeable event, they are also likely and must be evaluated prior to issuing a Section 404 permit.

The Corps must also consider the impacts that frac-outs will have on construction staging and placement areas that are located within or adjacent to wetlands. The DCDD claims that TSS concentrations resulting from frac-outs were modeled and that the models showed a low rate of deposition. DCDD at 55. However, the DCDD does not disclose what is in the drilling mud or other HDD related fluids. So even if the modeling demonstrated a low rate of deposition, we still don't know what the actual impact is. This is especially concerning as many types of HDD related drilling fluids contain PFAS, which can have a big impact even in small concentrations. LimnoTech at 14.

The Corps cannot deny that frac-outs are a foreseeable impact, especially given the rate of frac-out instances in the recent construction of Line 3 in Minnesota. DCDD at 56. There are areas of concern where HDD construction methods are likely to experience fracout or failure. LimnoTech at 20-21. Even if the Corps manipulates its review to exclude frac-outs as a direct

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consideration, it still must consider frac-outs as a secondary effect on the aquatic ecosystem. 40 C.F.R. §230.11(h)(1). Secondary effects are discussed below, *infra* II.C.2.d., and the Corps must consider frac-out-related impacts to the aquatic ecosystem under the 404(b)(1) Guidelines.

The Corps also fails to consider blasting related materials and debris in its analysis of suspended particulates and turbidity. This is especially concerning because we do not know what impacts explosive materials may have on area waters. *See supra* II.C. The bedrock itself may also present particulate matter or impact water turbidity. However, without a blasting plan or any site-specific information on blasting locations, the Corps cannot evaluate the impacts of blasting as it is required to do under the Section 404(b)(1) Guidelines. Without information on frac-outs, HDD-related fluid materials, and blasting-related materials and debris, the Corps cannot reach the conclusion that construction will result in only short-term increases in sedimentation and turbidity. The Corps must require this information and evaluate the impacts in an EIS.

b. The Proposed Project will have unacceptable adverse impacts to wetlands.

The 404(b)(1) Guidelines recognize wetlands as special aquatic sites that "possess[] special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values." 40 C.F.R. §230.3(m). Because of the value of wetlands, the Guidelines recognize them as "significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region." *Id.* The loss of values when wetlands are lost can be immense. *Id.* at § 230.41(b). Ultimately, "[w]hen disruptions in flow and circulation patterns occur, apparently minor loss of wetland acreage may result in major losses through secondary impacts." *Id.* at § 230.41.

The DCDD and the accompanying documents simply fail to consider the impacts that the Proposed Reroute will have on wetlands throughout the area. The Thompson Report (Attachment A) extensively reviews likely impacts the Proposed Reroute will have on wetlands within and adjacent to the pipeline corridor. The Thompson Report also identifies several areas where more data collection or more information from the applicant is needed in order to make an assessment of impacts on wetlands. The following section identifies a few of the Proposed Reroute's biggest impacts to wetlands that will degrade wetland function and other values that make wetlands a special aquatic site under the Section 404(b)(1) Guidelines. The following section also identifies areas where information is missing that would inform whether or not the Corps has adequately evaluated the Proposed Reroute under the Section 404(b)(1) Guidelines. The Corps must review the Thompson Report for additional information.

The DCDD also fails to consider the interaction between groundwater and surface water, and the impacts that wetland disturbance can have on groundwater sources. The LimnoTech Report (Attachment B) discusses the interactions possibly present in this region and along the Proposed Reroute. LimnoTech at 6-7. Groundwater is a particularly important aspect of wetlands in this ecoregion, which "are subject to irreversible alteration by construction activities that modify their hydrogeologic settings by changing their interaction with groundwater which can result in either excess groundwater discharge, flooding and drowning the plants that grow in them, or excess infiltration into sand and gravel, sandstone, or fractured rock aquifers that would result in permanent drying out of the wetlands." *Id*. at 7. The LimnoTech Report also features helpful maps

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because no hydrology comprehensive visual mapping was provided by the applicant or in the DCDD. *Id*., fig. 8 at 11 (map showing 90 areas of groundwater seeps and groundwater-influenced wetlands along the Proposed Reroute). The Corps must review both the Thompson Report and the LimnoTech Report for a more comprehensive scope of the deficiencies in the data, the flawed analyses, and the likely impacts on wetlands from the Proposed Reroute. The following is a brief overview of major issues flagged by the Thompson Report, LimnoTech Report, and MNRD Staff. The Corps must continue to require data from Enbridge and must conduct further analysis as required under the Section 404(b)(1) Guidelines.

i. Baseline information

Accurate baseline data is necessary for the evaluation of impacts on wetlands and the ecosystems that the wetlands support. Unfortunately, the information provided by Enbridge, and that is referenced in the DCDD and its supporting documents, is incomplete. The Band has flagged these insufficiencies several times for the Corps. However, the data is still incomplete. For example, the timed meander surveys still do not capture all the necessary information to evaluate impacts. Thompson at 15-18.

The data we have received is either inaccurate, undervalued, or inconsistent. For example, the methodology used in the first instance to gather baseline data may not accurately depict baseline conditions. LimnoTech at 16. Further, some of the data we were provided is undervalued. In the baseline analysis, the functional ratings of wetlands are conflated, which can lead to a domino effect of undervaluing wetlands. Thompson at 11-14, MNRD Wetlands Report at 14-18. Other data is inconsistent, such as data regarding seeps in or near wetland areas. Thompson Report at 9-10, MNRD Wetlands Report at 18-19. The Band was further hindered in evaluating data because the time to review such data was severely limited. The Corps adjusted several documents related to wetland evaluations midway through the public comment period and without notifying the public until several days later. A full analysis of accurate and reviewed data is necessary for a full analysis under the 404(b)(1) Guidelines.

ii. Construction impacts

Impacts on wetlands from construction are not fully identified. MNRD Wetlands Report at 5-7, MNRD Environmental Report at 4-6. Even with the limited information provided in the DCDD and supporting documents regarding trenching, there are severe impacts on wetland areas. For example, backfilling of trenched wetlands is not addressed, even though it may have severe impacts. Wetland soils are specifically layered and the information regarding backfill after trenching does not take this into account. Thompson Report at 6. There are also still several unknowns about the impacts of trenching on wetland areas. There is no specific information on dewatering, including where the water goes or how it is stored or filtered. *Id*. at 5. This raises the question of what the impacts will be on adjacent wetlands that suddenly have to deal with a change in water.

We are particularly concerned about blasting as a construction method. This concern is exacerbated by the lack of site-specific information on blasting sites and the lack of a blasting plan. *See supra* II.C. The DCDD identifies several wetlands with "shallow bedrock and high groundwater and seeps." DCDD at 66. However, blasting impacts on wetlands, as well as whether

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blasting will alter area hydrology, have yet to be identified. Thompson at 38-39. The lack of site-specific information on blasting areas makes it nearly impossible to complete an evaluation of blasting to wetlands under the Section 404(b)(1) Guidelines. There is also no specific information on how blasted areas are backfilled, including what material will be used. There are serious concerns that backfilling in blasted areas with bedrock has the opportunity to create French drains, which will permanently alter wetland hydrology. *Id*. at 38. The list of potential or likely blasting locations is also inconsistent. More "likely" blasting locations are included in Appendix 15 Wetlands and Waterbody Impact Table than are included in the Table in Appendix 6 Blasting Plan. *Id*. at 37-39. This means not only do we not know what the impacts of blasting will be, but we also don't know the area the blasting will cover such that the impacts might be much greater than initially proposed.

The impacts of HDD construction on wetlands are also not fully disclosed or evaluated. Concerns about HDD construction include the risk of frac-outs or failure in wetland areas. LimnoTech at 14-15. Frac-outs in wetland areas are not directly addressed, especially for wetland areas that are adjacent and used for pipeline setup and staging where HDD drilling fluid or other contaminants may be stored.

The Corps should require a crossing method decision flow chart to accurately assess minimization techniques for crossing wetland areas. Blasting will have severe impacts on wetland areas, even with the very speculative information provided in the DCDD. HDD crossings may not be any better. Appendix 2 – Pipeline Minimization Designs – actually has conflicting statements about minimization. In one paragraph, HDD reduces/minimizes impacts, in another, it may increase impacts due to the additional workspace required for drilling and pipe string fabrication. LimnoTech at 15. There is no way to accurately evaluate construction method impacts on wetlands without adequate information. But even using the limited information we have, construction in wetlands will have unacceptable adverse impacts.

iii. Wetland hydrology

Wetland hydrology in this region is intimately tied to groundwater. In the Lake Superior Clay Plain, area wetlands at various elevations interact with streams or groundwater. In the Superior Mineral Ranges, area wetlands in this region occur in shallow bedrock. LimnoTech at 7. Because groundwater mapping and construction mapping were not available in the DCDD or any of its appendices, our experts created maps that help contextualize impacts from the Proposed Project. See *Id*., figs. 4, 5, 9. Reading the HDD construction map in fig. 5 in comparison with the ecoregion map in fig. 9 demonstrates a colocation of HDD construction in the Lake Superior Clay Plain. And reading the blasting map in fig. 9 in comparison with the ecoregion map in fig. 4 demonstrates a general overall colocation of blasting construction in the Superior Mineral Ranges. Wetlands in both the Lake Superior Clay Plain and the Superior Mineral Ranges are susceptible to irreversible damage by construction activities that alter hydrogeologic settings. The impacts from HDD construction and blasting construction must be evaluated in the context of each ecoregion in order to fully disclose and analyze the impacts the Proposed Project will have on wetland hydrology.

iv. Wetland habitat

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The value that wetlands contribute, especially in this region, to habitat is barely acknowledged in the DCDD and supporting documents. Several field visits have allowed Thompson and MNRD staff to document species that live within wetland habitats. Thompson at 8-9. Specific concerns regarding impacts on species within the habitat are discussed *infra* II.C.2.c. These wetlands also support habitat for plant species, many of which are cultural resources for Bad River Band members. For example, Black Ash and Northern White Cedar are known cultural resources, *see infra* V., and will take years to recover. But Enbridge and the Corps do not fully evaluate the impacts that the Proposed Reroute will have on Black Ash or Cedar. The Band has requested an ethnobotanical survey for species within the pipeline corridor, but to date that request has not been fulfilled. *See* MNRD THPO Report (Attachment M). An ethnobotanical survey will document the species within the corridor that are important to the Band, as well as help document the habitat that is necessary for those species to survive. The same information will help inform an analysis of the Proposed Reroute's impacts on wetland habitats. MNRD Wetlands Report at 28-29.

Another concern is forest fragmentation through forested wetlands and forests adjacent to wetlands. Logging has not normally been done in wetland areas in this region. Thompson at 9. As a result, there are a lot of mature trees in the area that can act as buffer zones. There is no analysis of how forest fragmentation will impact wetland habitat.

v. "Natural reversion" and wetland restoration

The DCDD already undervalues impacts on wetlands by attempting to classify impacts as "temporary" rather than permanent. As discussed at the outset, this misclassification is severe. *See supra* II.A. The Corps estimates approximately 30.06 acres of forested and 6.31 shrub wetlands would be permanently converted to emergent cover and permanently maintained to be clear of woody vegetation. DCDD at 66. In addition to those permanent conversions, the Corps estimates that 28.11 acres of emergent, 32.76 acres of forested, and 6.31 acres of shrub wetlands "would be allowed to naturally revert to pre-project wetland types." *Id*. at 66. However, the assumption that impacts would be "temporary" is not founded on site-specific information. MNRD Wetlands Report at 6-7. There are intact high quality forested wetlands and intact black ash hardwood forests in the area, which will not naturally revert for decades. Thompson at 5, 14, 18-19. These will amount to permanent conversions

The DCDD ignores the realistic impacts of "natural reversion." The DCDD and its appendices do not consider invasive species that may thrive in unmanaged wetlands as they are "naturally reverting." *See* MNRD Non-Local Beings Report. Further, the DCDD and supporting documents lack performance standards, which present issues for wetland restoration. Without baseline performance standards for wetlands, there is no ability to properly remediate wetlands. Thompson at 22-24 (monitoring strategy and protocol need baseline standards to be effective), *Id*. at 24-27 (lack of performance standards), *Id*. at 27-28 (need baseline information and performance standards to determine corrective or remediation actions). Post-construction monitoring methods are not clear, and it is not clear when restoration work in wetlands begins. LimnoTech at 16-17. The timing of when wetland restoration actually happens may have dire consequences for wetlands that have been smothered or compacted for extended periods of time due to construction.

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These assumptions on "natural reversion" and the lackluster means to identify wetland restoration cannot support a finding that the project will not have an unacceptable adverse impact to the ecosystem. These assumptions can have dire consequences to wetland hydrology, and the hydrology of the area as a whole.

vi. Current documents are not enough

None of the documents that accompany the DCDD remedy any of the above identified concerns. Appendix 3 – the Wetland and Waterbody Restoration and Post Construction Monitoring Plan – was actually revised midway through the comment period, and the public was not notified that it was revised, nor were we provided a version identifying the changes until several days after the fact. Thompson addresses the deficiencies in Appendix 3, which echo several concerns with baseline data, wetland identification, wetland functional assessments, wetland restoration, wetland monitoring, and wetland performance standards. Thompson at 18-28. The LimnoTech Report also identifies issues in Appendix 3, flagging that proposed monitoring may not be feasible, aspects of monitoring or evaluation are unclear, and that methodology may not depict baseline conditions. LimnoTech at 15-16. The Environmental Protection Plan in Appendix 1 is similarly deficient in addressing our concerns. Thompson at 40-41.

Appendix 11 – High Quality Wetland Avoidance and Minimization Evaluation – is similarly flawed because the assumptions that the Appendix rests on are not justified. *See* Thompson at 39-40; LimnoTech at 18-19; Wright Water at 15-16; MNRD Wetlands Report at 20. Accurately identifying baseline data for wetlands within the Proposed Reroute corridor is essential to identifying what the impacts to wetlands will be from the Proposed Reroute project. This information will have a domino effect as it informs Section 404(b)(1) Guidelines analysis on whether the Proposed Reroute will have unacceptable adverse impacts, as well as what minimization or mitigation efforts are required.

The Corps' preliminary conclusion that wetland functions are accurately identified and that the proposed avoidance and minimization measures are sufficient are unfounded. DCDD at 65, 67. In order to accurately and fully evaluate the impacts the Proposed Reroute will have on wetlands, the Corps must require additional information and conduct an additional evaluation of impacts under the Section 404(b)(1) Guidelines. The data should include at a minimum: accurate baseline standards, a full scope of permanent impacts to wetlands, site-specific analyses on construction methods and construction impacts to wetlands, a full analysis of the relationship between wetlands and groundwater, an ethnobotanical survey of culturally important species in wetland habitats, data-based performance standards, and a site-specific and data-driven remediation plan. A preliminary review of the DCDD and its supporting documents indicates that the Proposed Reroute will have unacceptable adverse impacts, and also that the impacts are significant under NEPA. The data and evaluations will be best served as part of an EIS.

c. The Proposed Project will have unacceptable adverse impacts on fish, wildlife, and plant species.

There are many relatives that depend on the wetlands, waterways, and forested areas located throughout the Proposed Reroute. This ecosystem supports a variety of plant and animal species that are both ecologically and culturally important to maintaining the health of the

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watershed. The MNRD also works diligently to understand and document non-local beings (otherwise known as "invasive" species) to manage the impact they can have on the ecosystem. An initial evaluation of the considerations to fish, wildlife, and plant species within the DCDD demonstrates that there is much more information necessary before the Corps can make a determination that the impacts to fish, wildlife, and plant species will be temporary or minor.

Inherent to our concerns about the Proposed Reroute's impacts on fish, wildlife, and plant species, is the devaluing and permanent conversion of wetlands that serve as habitat to many of these species. Habitat alteration will result in a "loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem." 40 C.F.R. §230.32(b). The permanent conversion of wetlands from one type to another may mean that some species will not survive or thrive in that converted environment. We have serious concerns about displacement, which the Corps appears to arbitrarily dismiss as only having a minor impact on species. Another concern that is inherent throughout our initial review of impacts to fish, wildlife, and plant species, is habitat fragmentation due to the pipeline corridor. Habitat fragmentation will exist as long as the pipeline is maintained and impacts from fragmentation or alteration should be seriously considered. *See* MNRD Wildlife Report.

i. Threatened and endangered species

As an initial matter, the DCDD limits consideration of threatened and endangered species to the federal list. However, the 404(b)(1) Guidelines explicitly recognize that some states maintain threatened and endangered species lists in addition to the one maintained by the federal government. 40 C.F.R. § 230.30(a). Under the Guidelines, consideration of threatened and endangered species is not as limited as it is portrayed in the DCDD. The Corps must evaluate species on the state endangered and threatened list. The MNRD identified Species of Greatest Conservation Needs and species on the National Heritage Inventory working list that require additional consideration in order to prevent further decline. *See* MNRD Wildlife Report at 4-6.

The Band also has serious concerns about the Proposed Reroute's impacts on federally listed threatened and endangered species in the pipeline corridor and within ceded territory generally. The Band's concerns within the framework of the Endangered Species Act are discussed *infra* VI. The scope of considerations of impacts to threatened and endangered species under the Section 404(b)(1) Guidelines, however, is broader than what is required under formal Section 7 consultation under the ESA. The Corps must consider that impacts may include "impairment or destruction of habitat," and that elements that are crucial to survival to consider include "adequate good quality water, spawning and maturation areas, nesting areas, protective cover, adequate and reliable food supply, and resting areas for migratory species." 40 C.F.R. § 230.30(b). The Corps' evaluation of impacts on the habitat of threatened and endangered species under the 404(b)(1) Guidelines is not limited by the confines of the ESA. Accordingly, the Corps must collect data on state-listed species, species of greatest conservation needs, and species on the natural heritage inventory, and evaluate the impacts the Proposed Reroute will have on those species.

ii. Fisheries

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The DCDD barely discloses information related to fisheries. The Corps presents no independent fish sampling and also does not include a species-specific analysis of fisheries present throughout the watershed that may be impacted by the Proposed Reroute. There is barely an acknowledgment that trout streams will be crossed via HDD. DCDD at 60. The DCDD glosses over impacts on fisheries from construction and pipeline maintenance. HDD construction may pose impacts to fish as a result of frac-outs, which can impact fish eggs. Other alterations to water must also be considered, such as changes to groundwater and surface water interaction as a result of blasting or other ways in which the aquifer could be breached. The Corps must also consider the continued presence of the pipeline on area groundwater. Pipeline operation may heat surrounding groundwater. These concerns are outlined in the MNRD Fisheries Report.

In the event the Corps does eventually permit the Proposed Reroute, it must condition the permit such that absolutely no construction work may take place during state-designated fishery restrictions. This condition must supersede any state waiver that the state may grant, especially if the Corps is going to make a finding that the impacts will be minimal. In the event the Corps does not condition the permit with this restriction, the impacts to fisheries may be much greater than disclosed or evaluated in the DCDD.

iii. Wildlife

Wildlife will be affected by the Proposed Reroute construction. In addition to concerns about displacement and habitat fragmentation, MNRD Wildlife staff identified noise impacts and blasting impacts as an adverse effect on wildlife. MNRD Wildlife Report at 3. Blasting is of particular concern because of severe impacts on benthic invertebrates, which may result in mass die-offs within the stream system. MNRD and Thompson field visits have documented several species within wetlands, such as frogs and salamanders. Thompson at 8-9. Blasting will also impact other burrowing or slow-moving animals, for which blasting will be fatal.

The Corps must require a site-specific blasting plan and use that information to disclose and evaluate the full range of impacts resulting from blasting. The Corps must also conduct a literature review of pipeline construction-related blasting impacts on wildlife.

iv. Non-local beings (invasive species)

The 404(b)(1) Guidelines recognize that changes in the environment may introduce "undesirable plant and animal species at the expense of resident species and communities," and that lowering species diversity may disrupt the ecosystem and reduce biological productivity. 40 C.F.R. § 230.32(b). The DCDD, however, swiftly dismisses concerns about invasive species along the Proposed Reroute or minimizes the possible impacts. MNRD staff identified several concerns with how Non-Local Beings will be managed during the construction and remediation of the Proposed Reroute. *See* MNRD Non-Local Beings Report.

Appendix 13 – Invasive and Noxious Species Management Plan – does not have standards or best management practices for reporting non-local beings populations introduced, established, treated, or suppressed/eradicated. Further, management practices are vague because they lack site-specific conditions or concerns. Tackifiers and herbicides are proposed as possible methods of management, but neither the tackifier nor herbicide is identified. Rather, those decisions are left

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to environmental inspectors or construction contractors. These materials must be identified, disclosed to the public, and evaluated as part of the environmental review. This is especially important as some tackifiers contain PFAS and herbicides may impact other plants and wildlife within ceded territory. Given the possible impacts to area waters via PFAS contamination and area plants and animals, the Band must be consulted on which materials are chosen.

In addition to vague management practices, the DCDD and Appendix 13 lack accountability for species management. There is no accountability for inspecting or cleaning equipment and it is left up to contractors to execute vague BMPs. This is especially concerning as Appendix 13 states that the BMPs could be disregarded if inconvenient. The Proposed Reroute could exacerbate existing invasive species concerns. There are also other plants of concern, such as water hemlock, which can be toxic. There should be measures to keep Enbridge and its contractors accountable so as not to make existing conditions worse.

The Invasive and Noxious Species Management Plan is similarly vague and ineffective for post-construction monitoring or prevention. Disturbed soil in wetland areas is a perfect environment for Non-Local Beings to move in and take over. The Corps must require site-specific information on invasive species management. The Corps must also require full disclosure of what methods, including related chemicals, will be used for management.

These highlighted MNRD concerns demonstrate that the Proposed Reroute will have severe adverse impacts on wildlife, fisheries, and plant species. Many of the impacts have not been seriously considered by the Corps. The Corps' preliminary determination that effects on wildlife would be minor and temporary is unfounded. The Corps must collect baseline data and conduct a full analysis of impacts pursuant to the Section 404(b)(1) Guidelines.

d. The Proposed Project Will Have Adverse Cumulative and Secondary Effects on the Aquatic Ecosystem.

As this letter demonstrates throughout, the Proposed Project is situated in a unique interconnected watershed where it would cause a vast range of impacts if allowed to be constructed. The 404(b)(1) Guidelines require the Corps to assess impacts "that are attributable to the collective effect of a number of individual discharges…even if the impact of a particular discharge may constitute a minor change in itself." 40 C.F.R. § 230.11(g)(1). The Corps must predict such effects, including by collecting information and soliciting information from other sources. *Id*. at § 230.11(g)(2). Secondary effects are those that "do not result from the actual placement of the dredged or fill material." *Id*. at § 230.11(h)(1). The DCDD fails to adequately consider the cumulative and secondary nature and effect of these numerous impacts the Proposed Project would have.

The Band has provided extensive information on a range of impacts that will have cumulative and secondary effects. Such information has been provided in our 2022 comment letter, in technical and government-to-government meetings, and in the MNRD staff and expert reports included with this letter. Please review all of these sources for necessary information to carry out a thorough and fulsome assessment of cumulative and secondary effects. Some cumulative and secondary effects the Corps must assess include, but are not limited to:

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Impacts from Construction

- HDD: The impacts of HDD can not only derive from the drilling methods themselves but from the release of fluid, the clearing of large pipe pull-back/assembly areas as well as the likelihood of HDD failure requiring additional HDD crossings. MNRD Environmental Report at 10-17. Subsurface inadvertent returns have the potential to directly impact aquifer characteristics by reducing the amount of open pore space (i.e., porosity) and the ability to transmit water (i.e., permeability) due to the intrinsic properties of the drilling fluid. In addition, groundwater quality may be affected due to the undesirable or unknown chemicals/ingredients associated with drilling fluid. LimnoTech at 15. HDD also requires water, and both sourcing that water and disposing of that water in the region may have impacts on water quantity and water quality.
- Blasting: Blasting will have several impacts. Blasting will result in plant and animal mortality. *See* Thompson at 38-39; MNRD Wildlife Report at 3. Blasting may create new groundwater channels through new fissures in bedrock, altering area hydrology. Blasting may also alter surface-groundwater interactions by potentially creating a French drain effect around the pipeline. Thompson at 38) These changes to hydrology have the potential to drain or flood wetlands. Blasting may also release particulates or contaminants, either through natural exposure from blasted bedrock or from blasting agent residue. These changes to hydrology have potential to change the chemical and/or physical properties of streams, which will adversely affect fish communities. MNRD Fisheries Report at 1. Construction areas that are on or adjacent to wetlands will impact wetlands by altering stream flow, placing matting on wetlands, and compacting wetland soils.
- All construction methods will impact sensitive hydrology: seeps, groundwater/surface water interaction, and aquifer recharge.

Impacts on Wetland Function and Type

- Wetlands permanently converted from one type to another due to the maintenance of the pipeline right-of-way will have irreversible changes to wetland functions. This can have a domino effect on water quality, flooding, species habitat, and treaty rights. Inadequate accounting of wetland functional values means the effects will be even greater.
- Wetland restoration methods may have both short- and long-term impacts that alter wetland quality. The time delay for "natural" reversion of wetlands opens the door to invasive species, which either will take over local species or will require management via destructive methods such as herbicides. Some wetlands will likely never return to pre-construction quality and those impacts must be accounted for.

Impacts from Pipeline Maintenance

- Maintaining the pipeline right-of-way ("ROW") will create an edge effect that will harm many species. The ROW will break up habitat connectivity, DCDD p. 92.
- The ROW will require continual clearing of vegetation for aerial inspection, which can impact surface water-groundwater interactions, water quality, and other impacts to water.
- The pipeline may occasionally require excavation for visual inspection and/or repair, resulting in future construction impacts.

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- Maintenance activities may require repeated access to remote areas, which can impact wetlands and other waters.

Impacts from Pipeline Operation

- The Proposed Project will carry crude oil and NGLs. Impacts from spills, releases, or ruptures must be considered, especially given Enbridge's history of spills.
- Oil spill response will require additional impacts.
- NGL releases may be volatile or result in combustion.

Decommissioning the Line 5 Pipeline

- Pipeline removal will have environmental impacts from equipment
- Impacts of leaving the pipeline in place must also be considered

Impacts on Treaty Rights

- Loss or limitation on accessing certain areas within ceded territory
- Loss of plant and animal treaty resources through direct mortality and changes in their habitats
- Discharges of sediment, drilling fluid, petroleum releases, and deposition in downstream waters within the Bad River Band Reservation
- Changes in water flow, surface water-groundwater interactions, or water temperature may impact aquatic species

Other Environmental Impacts

- Changes in wetland type, increased erosion, and changes to surface water-groundwater interactions may impact the ecosystem's ability to respond to extreme weather events or increase precipitation.
- Legacy of disturbance and pollution in the area.
- Release of pollution and greenhouse gasses from construction and operation, as well as refining and burning of petroleum carried through the pipeline
- Must also consider impacts from other regulated activities, not just those within the Corps jurisdiction. Examples include logging and other construction that impacts wetlands in the watershed.

The Corps must redo its assessment of cumulative and secondary effects on the aquatic ecosystem, taking into account the many different effects the Band and others have identified, as part of a federal EIS.

3. Mitigation under the 404(b)(1) Guidelines is insufficient

As noted above, Enbridge and the Corps have failed to comply with the Section 404(b)(1) Guidelines regarding the obligations of Enbridge to fully delineate, map, and assess impacts to wetlands and aquatic resources from the Proposed Project. Further, the DCDD fails to provide the information necessary to ensure that the requirements of the Guidelines concerning minimization

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and compensatory mitigation are met. Even with the information provided in the DCDD, Enbridge's application cannot, as currently set forth, meet the requirements of the Guidelines. The dismal state of the information and failure to comply with the Guidelines dictates a full EIS in order to develop the necessary information and make it publicly available and it necessitates significant changes to the permit application. A permit cannot be issued on this record.

a. The DCDD does not demonstrate that wetland impacts have been adequately minimized.

As set forth above, the Guidelines require any permit applicant to first avoid and minimize wetland impacts. 40 C.F.R. pt. 230, Subpart H. Even if there will be some impact, that impact must be to the smallest amount of wetland resources, with the smallest impact on wetland values, and with the most temporary impact on wetland values. Enbridge's proposal fails. First, the lack of adequate identification of wetlands and the very close proximity between construction and wetlands produces significant risks that construction will harm wetlands simply because construction crews will be unaware of the precise location of wetlands. Thompson at 4-5, 19; MNRD Wetlands at 19. As the Thompson Report elaborates, construction techniques, especially the proposed trenching and blasting, will not minimize wetland impacts. For example, the use of various proposed sediment controls and attempts to control hydrology during construction will introduce invasive species. *Id*. at 5-6, 19-21. Blasting impacts are not fully identified. *Id*. at 37-39. Soil impacts, including compaction from heavy equipment and trenching that will compress mucky soils have not been properly identified and their impacts have been downplayed. *Id*. at 6-8, 21-22. As noted in both the Thompson and MNRD Reports, the use of timber mats, in addition to potentially introducing invasives, has been shown to have much more significant and long-lasting damage from construction than has been identified by Enbridge. Overall, there is simply inadequate detail to determine that Enbridge has in fact minimized the effects of construction and minimized the wetlands that will be affected by the Proposed Project.

b. The DCDD does not disclose or provide for adequate compensatory mitigation.

After minimizing as much as possible, if wetland impacts still occur, the project applicant must provide mitigation for those impacts. First, it is critical to restate that the adequacy of compensatory mitigation cannot be assessed without full disclosure and accuracy regarding wetland delineation—both extent and type—and accuracy of identification of wetland impacts, whether temporary or permanent and comprehensiveness of the identification of impacts, for example, hydrology, water quality, wetland type conversion, etc. As detailed above and in the accompanying expert reports, there has not been full disclosure and there has not been accurate disclosure of wetland impacts from the Proposed Project in any of these and other applicable categories. MNRD Wetlands Report at 14-18; *See also, generally*, Thompson. Without an adequate assessment of the amount, size, and type of wetland impacts, it is impossible for the Corps or the public to fully understand and assess whether the compensatory mitigation offered by Enbridge is adequate under the law.

Nonetheless, what is disclosed and known to date, demonstrates that the compensatory mitigation proposed is woefully inadequate and does not meet the basic requirements of the Guidelines.

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The objective of compensatory mitigation is to ensure that, for any wetlands impact that cannot be avoided, whether temporary, long-term, or permanent, any lost aquatic resource or environmental functions are fully compensated and replaced (often referred to as wetland or aquatic resource "values"). 40 C.F.R. § 230.93(a)(1). Compensatory mitigation, whether from a wetland bank, in lieu fee program, or permittee-responsible mitigation project, must fully replace the wetland type and values, within the watershed and as close to the impacts as possible. The mitigation must address temporal losses as well; losses to wetland values that cannot be quickly and readily restored (e.g. forested or scrub-shrub wetlands of a type affected here.) 40 C.F.R. § 230.93(b). Mitigation within the affected smallest scale watershed encompassing the affected wetlands is preferred because it better ensures that the values lost are restored in place and where the change will have the smallest impact on the environment and the affected ecosystem's flora and fauna. *See, generally, id*. at § 230.93.

In assessing mitigation, the Corps will consider all aspects of the affected wetland's function on the landscape and within the watershed (e.g. water quality, flood control, habitat, and overall ecological functioning) and must include non-wetland riparian areas and uplands that may also be served by the affected wetland. *Id.* The mitigation must consider the area hydrology affected and historic and human resources (e.g. use by the Tribe for subsistence and/or cultural purposes.) *Id.*[6] Site selection must ensure that the mitigation site provides for all the lost functions considering hydrological, soil, and other physical characteristics, and watershed-scale features such as aquatic habitat diversity and connectivity. *Id.* In-kind mitigation is always preferred and if out-of-kind mitigation must be resorted to, the loss must then be compensated at a higher ratio *and* can only be utilized if the district engineer determines that out-of-kind will serve the aquatic resource needs of the watershed. Finally, the timing of mitigation shall, to the maximum extent practicable, be in advance of the impact on wetlands. *Id*. at § 230.93(m).

For any proposed mitigation, the project applicant must prepare a detailed plan that includes performance standards, monitoring, and long-term maintenance protocols. *Id*. at § 230.94. The performance standards portion of the plan must be designed and disclosed in detail such that they will allow the Corps and the public to understand whether the mitigation is successful and/or whether the project applicant is complying with the law and the mitigation requirements. *Id*. at § 230.95. Monitoring, for an extended period both during and after the development of the mitigation site, is critical, again to ensure that the mitigation actually replaces lost values and that the applicant is complying with the law. *Id*. at § 230.96. This is particularly crucial and of particular concern because the Corps has, for decades, struggled to ensure that mitigation actually replaces lost wetland values. The Corps has a relatively poor record concerning successful mitigation, even after the development of the Guidelines in 2008 to attempt to address the problem. *See*, U.S. Gov't Accountability Off., GAO-05-898, Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory

[6] It must be emphasized that treaty rights and treaty-protected resources in ceded lands cannot be "mitigated" elsewhere. Mitigation must consider if the mitigation efforts are also within ceded territory and whether those mitigation efforts include the same resources that would be available to tribal members on the lands that are affected by the Proposed Reroute. Mindless or cost-based mitigation efforts may negatively impact treaty reserved rights. Further, these mitigation efforts do not account for temporal loss of treaty-protected resources are lost for years or generations.

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Mitigation Is Occurring (2005) (Attachment V); and Joseph A. Morgan and Palmer Hough, *Compensatory Mitigation Performance: The State of the Science*, 37 National Wetlands Newsletter 5 (2015) (Attachment W).

c. The wetland banks proposed for mitigation are inadequate and do not provide mitigation in accordance with the guidelines.

Enbridge proposes to mitigate the impacts that they disclose (again, Enbridge has significantly underreported wetland impacts both in the number of wetlands and also as to type), by purchasing credits from existing banks. While banks can be a valid method of securing mitigation, here they are not adequate. First, none of the Lake Superior Bank Service Area credits are available in the watershed where the impacts will occur. All of the three banks are too far to the west (Douglas County) to be within the watershed where ecological values will be lost, which means that any benefits from the wetland banks will not accrue to the wildlife and humans that depend on the wetlands that will be destroyed or altered by the Proposed Project. They are too far from the affected wetlands to positively affect water quality, flooding, wildlife, shoreline protection, fish and aquatic life, and groundwater processes. Thompson at 7-8, 35-37. The Lake Superior connections to the affected wetlands on this Proposed Project are within the waters protected by the arch of the Apostle Islands, while the bank wetlands are west of this area. *Id.* This issue goes to the very core of the principles of compensatory mitigation and is a complete failure of the intent and purpose of the Clean Water Act and the Guidelines at the outset. If bank credits are not available within the area where values will be lost, Enbridge must propose and provide compensatory mitigation that actually replaces those values east of the Apostle Islands arch. The Proposed Project cannot proceed unless and until that mitigation is fully secured in compliance with the Guidelines.

Second, even if banks in the Lake Superior Bank Service Area could be used, and they cannot, there are not enough credits to provide the compensatory mitigation necessary for the Proposed Project under the Guidelines. Primarily, there are very few forested wetland credits available in the three banks. There are currently (as of Aug. 19, 2024) three Lake Superior Mitigation Banks: Bluff Creek, Moonshine Road, and Poplar River. All three are in Douglas County (50-60 miles west of the project). Bluff Creek has zero forested credits while Moonshine Road is a City of Superior Bank site and is not available. Poplar River in the Town of Lakeside currently has 9.02 acres of forested credits. This does not satisfy even the low mitigation ratios proposed by Enbridge. Thompson at 7-8. *See also* MNRD Wetlands Report at 16. It also appears that none of the banks will provide replacement of wild rice values, critical to Bad River.

Third, the type of credits available does not provide the equivalent wetland and aquatic resource values as will be lost from the Proposed Project. A number of the forested wetlands that will be destroyed or damaged by the Proposed Project are either rare or extremely important to Bad River for cultural and subsistence reasons. Those rare and important forested wetland ecosystems are not available in any of the three banks in question. Rare wetlands that will be adversely affected by the Proposed Project include Coniferous swamps with white cedar, seep wetlands, a bog wetland, and mature black ash swamps that will not be replaced with a like community in this mitigation plan. *See e.g.*, Thompson at 8-12, 17-18, MNRD Wetlands Report at 7.

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For the banks in question, there is a lack of available data to determine if the bank sites have been successful, what species have actually been planted, and whether they are suitable for the mitigation of the forested wetlands. For example, the Poplar River Mitigation As Built Plan is available on Regulatory In-Lieu Fee and Bank Information Tracking System ("RIBITS") and it notes that after a series of berms were installed to establish hydrology, trees (saplings) were planted with a tree plow in 2020. The tree species included yellow birch, tamarack, balsam fir, black willow, silver maple, Eastern white cedar, and quaking aspen. **No** black ash were planted, a tree that is important to Bad River. Out of a total of 6500 trees planted, 500 were Eastern white cedar—or 7.6% of the total. While the plan says that the Eastern white cedar were planted, no green clumps indicating cedar trees are visible in a search on aerial photos on Google Earth and the Douglas County GIS website, planted trees are not visible in 2021, or 2022. Thompson at 36. Further, there are no follow-up monitoring reports on the RIBITS website as of August 19, 2024 so it is impossible to verify if white cedar was planted, where, how large the area is, and whether the plantings have been properly maintained and have survived. *See also id*., figs. 14-20 at 48-52. The available data on the sites also demonstrate poor soils for mitigation success and replacement of lost values from the Proposed Project. Much of the soils for wetlands damaged or destroyed by the Proposed Project are hydric, mucky soils whereas information on some of the banks shows soils that have been historically farmed that are not organic. *Id*. at 36-39. This will plainly adversely affect wetland mitigation at those sites.

Overall, if the banks are to be used, the mature and rare wetlands, including Coniferous swamps with Northern white cedar (*Thuja occidentalis*) that will be damaged or destroyed by the Proposed Project, are not being replaced with a like community in this mitigation plan (*see* Section on Timed Meander Data below for correct total of acres of Coniferous Swamp). The Open bog community will not be replaced in kind. Black ash (*Fraxinus nigra*) swamp, one of many species of cultural importance to Bad River will not be restored. The plan to use bank credits (even for the underrepresented wetland impact numbers used by Enbridge) does not meet the most basic requirements of the Guidelines for compensatory mitigation and cannot be approved.[7]

d. The mitigation ratios are incorrect.

The mitigation ratios are far too small and will not adequately compensate for the lost wetland and aquatic resource values and this is true for multiple reasons. Thompson, *generally*, at 34-35.

First, again, the amount of wetland impacts is grossly undercounted as are types of wetlands affected. Properly delineating wetlands and properly identifying the correct number and type of wetlands affected will necessarily increase the mitigation obligation and attendant ratios. Relatedly, the DCDD undervalues "medium" value wetlands by lumping them with low-value wetlands and thereby under-compensates for the losses associated with medium-value wetlands. *Id*. at 34-35. Many medium value wetlands have high value portions or particular high value or

[7] Pointing to in lieu fee does not address any of these issues and in fact is even more problematic. There is even less assurance that rare or important forest species and ecosystems will be replaced and certainly not within the lifetimes of current tribal members and likely not for the Seventh Generation. And even though in lieu fee within the correct Service Area should fall within ceded territory, there is no assurance that this will occur where tribal members actually can and do exercise their treaty rights. It is completely improper to simply pay into in lieu fee funds when treaty rights are at risk.

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rare or exceptional characteristics meaning that compensating them with low value vastly depresses the ratios that should apply. *Id.* and see also at 13-14; MNRD Wetlands Report at 15. To appropriately mitigate for actual wetland and aquatic resource lost values, there should be no lumping together of categories, and even if the Corps continues to allow lumping or grouping it is far more proper to include medium value with high value wetlands in order to ensure that the Guidelines requirements of mitigating for actual loss of high value characteristics or portions of wetlands is met. Thompson at 13-14, 39-40. Also concerning categories of wetlands identified, the Corps must break out and add a category for "exceptional" or "exceptional/rare" wetlands in order to ensure that lost values will actually be compensated and replaced. *Id*. at 34.[8] Correcting for each of these errors and oversights will and must substantially increase the mitigation ratios to be imposed on Enbridge for the Proposed Project's adverse impacts on wetlands.[9]

Second, the mitigation ratios must also be substantially increased due to the problems outlined above with the available banks (or the use of in-lieu fee) not having enough in quantity or quality of wetland credits to adequately compensate for loss of forested wetlands and loss of species of critical importance to Bad River and the exercise of their treaty rights. This includes increasing ratios for **each** of the following (and each reason for increase is additive): banks are out of affected watershed; banks do not have enough credits to mitigate for impacts overall; banks do not have enough forest credits; forested credits in banks that may be available do not include important species or ecosystems (black ash, white cedar, coniferous bog); lack of demonstrated wild rice resources at the banks. For in lieu fee, each of these categories must result in increased ratios over and above the bank ratios, as in lieu fee introduces even less certainty that losses will be mitigated. *Id*. at 37. (And again, in lieu further jeopardizes treaty-protected resources, which cannot be lost in this process.)

Third, the mitigation ratios must be increased for the temporal losses that will obviously occur from the Proposed Project and the proposed mitigation. The Guidelines make clear that mitigation **shall** to the maximum extent practicable (a standard that has not been demonstrated/met in the DCDD) be in advance of or concurrent with the damage. 40 C.F.R. § 230.93(m). And, to the extent that it is not practicable, the Corps **shall** require additional compensatory mitigation to offset temporal losses. *Id.* None of the losses from the Proposed Project, even those deemed "temporary" will be mitigated right away. Many of the losses are permanent (e.g. coniferous bogs or seeps), including where a wetland may still exist but replaced with a different wetland type (e.g., a forested wetland has been replaced with an emergent wetland. Thompson at 34. Ratios must be increased in those instances and counted as "permanent" losses. The ratios must be increased commensurate with a recognition that forested wetlands and scrub-shrub wetlands at mitigation sites will not provide the same resource values (if they ever do) for many decades and in some instances at least 100 years. Thompson at 5, 18, 34-35; MNRD Wetlands Report at 7. Some of the affected areas by the Proposed Reroute are old growth or approaching old growth or are of exceptional or rare quality. *See, e.g.,* Thompson at 9, and figs. 1-3. Adverse effects to those forested areas must be compensated at the very highest ratios. Finally, the so-called "passive" restoration proposed within the corridor, in addition to simply being highly unlikely to succeed as claimed (e.g. resprouting grossly overstated, Thompson at 31), will also result in temporal impacts

[8] The DCDD also simply fails to identify some high-quality wetlands, e.g. coniferous swamps. Thompson at 15-16.

[9] *See also* Thompson at 33 regarding inadequate ratios for stream impacts.

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as that type of "restoration" if it occurs at all, will take time, in many instances decades. *Id*. at 34; MNRD Wetlands .

Fourth, forest fragmentation from the Proposed Project must be compensated with higher ratios, a fact that does not appear to be recognized or discussed in the DCDD. Forest fragmentation is a loss of resource value both in terms of the raw amount of habitat and values lost, but also in the attendant negative impacts of disconnectedness for species, increased edge effects, and the changes that brings to ecosystem values and increased likelihood of invasive species intrusion. *Id*. at 9.

Fifth, seeps and springs cannot be mitigated at all and to the extent they are allowed to be affected (they should not be) the ratios should be the highest available for these impacts. *Id*. at 9-10.

There is no mitigation ratio provided for blasting impacts, particularly to high-value wetlands. *Id*. at 34.

The Corps must first go back to the information and substantially revise the number and type of wetlands affected by the Proposed Project, properly and separately identify and group the impacts by low, medium, high, and exceptional value wetlands, properly identify both the type and length of all temporal impacts, properly assess the availability and inadequacy of bank and in lieu fee credits, and then substantially revise the mitigation ratios for the Proposed Project upward.

e. The mitigation/restoration plans, protocols, and monitoring are either entirely absent or inadequate.

As noted above, to meet the requirements of the Guidelines Enbridge must prepare a detailed and accurate plan for all aspects of the required compensatory mitigation and the plan must include protocols for providing the mitigation as well as assessing compliance with and success of the mitigation. That assessment must also necessarily include a detailed monitoring protocol that is designed to assess the adequacy and success of the mitigation, whether maintenance is needed/occurring, and overall compliance with the mitigation requirements.[10] The DCDD fails on all counts for the mitigation planning. Another area the DCDD fails is the monitoring of post-construction restoration along the actual areas disturbed by the Proposed Reroute to determine whether the impacts are actually limited to those anticipated or whether, as we suspect, impacts to wetlands are greater than currently estimated.

The plan in the DCDD includes no discussion of what is or is not "practicable" regarding restoration, a required component for the Corps' assessment of compliance with the Guidelines. *Id*. at 21, 28, 31. Therefore, basic information to even assess compliance with the Guidelines is missing. There are insufficient specifics included for the mitigation/restoration plans at all, including a live planting plan. *See id*. at 21. There are insufficient monitoring protocols for the easement. *Id*. at 22-24. There are insufficient performance standards for the Timed Meander Survey. *Id*. at 24-27. There is no supporting evidence provided or monitoring protocol to check

[10] Also addressed here is the failure of the DCDD to include plans and protocols for monitoring ground-truth-identified impacts on wetlands to ensure that if those impacts are greater than currently estimated, they are mitigated. *See e.g.* Thompson at 23-24.

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and ground truth in the presumptions that emergent wetlands in the Project corridor will retain wetland values or that post-construction recovery or restoration will occur as anticipated. *Id*. at 14, 24, 30. *See also*, overall critique of overall lack of monitoring in MNRD Wetlands Report at 9 (noting recent example of Enbridge Line 3 where there has been wholly inadequate monitoring by Enbridge and what monitoring has occurred demonstrates failures of mitigation and presumptions that affected mitigation decisions.) There is no discussion regarding how use of in lieu fee will be monitored or assessed to ensure that the credits sufficient to actually replace lost values will in face materialize. [11]

The details of the plan and monitoring protocols are either entirely absent or at best half-baked. This is a problem that the Corps has struggled with for the last 20 years and it must be rectified here. The mitigation plan cannot be approved in its current state. The Corps must require significantly more detail regarding the what, where, and when of mitigation (i.e., what will be planted or restored, when it will be planted or restored and what the temporal lag time will be) and must require real monitoring at frequent intervals over an extended period of time (each season of each year for at least 20 years) to ensure compliance and success of the mitigation. The Corps must also require a detailed maintenance plan that includes schedules of maintenance to follow monitoring intervals (replanting as necessary; control of invasives immediately upon being reported; very precise and detailed adaptive management for the "passive" restoration areas to ensure presumptions are correct, or corrected). Further, wetlands impacts that cannot be restored need to be addressed through mitigation and the mitigation plan should have a section identifying how they will be addressed. Anything less fails to meet the Guidelines and the Proposed Project cannot be approved.

D. The Proposed Project Will Have Adverse Effects to the Bad River Band's Water Quality Standards

The Bad River Band has status as treatment in a similar manner as a state ("TAS") under the CWA and has EPA-approved water quality standards ("WQS"). 33 U.S.C. § 1377(e) (TAS authorization); 33 U.S.C. § 1313 (state water quality program). *See also* 33 U.S.C. § 1341(a)(2) (state water quality certification). EPA approved the Band's TAS status in 2009 and the Band's WQS in 2011. The Band has been operating a WQS program since that time for waters within the Bad River Reservation Boundaries. An overview of the Band's WQS Program is described in the MNRD Water Quality Standards Report. MNRD WQS Report at 2-6.

Section 401(a)(2) of the CWA affords the Band, as a downstream jurisdiction with EPA-approved WQS, an opportunity to evaluate and determine whether proposed upstream projects will impact the Band's water quality within the Reservation. *Id*. at 6. The Band fully intends to participate in the 401(a)(2) process, but the current version of the DCDD does not provide enough information to evaluate proposed impacts. Ultimately, the Section 404(b)(1) Guidelines state that a Section 404 permit may not be issued if it causes or contributes to violations of any applicable water quality standard. 33 C.F.R. § 230.10(b)(1).

[11] And, of course, this part of the mitigation plan also suffers from the overall failure to properly identify all wetlands affected and all types and magnitude of impacts from the Proposed Project.

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MNRD staff and other experts have identified innumerable concerns above that the Proposed Reroute will have on all areas of the aquatic ecosystem, including streams and wetlands and the groundwater and surface waters that interact with those streams and wetlands that are outlined above. We have also identified potential impacts to our federally-approved WQS and several of the aforementioned concerns about impacts to waters are incorporated in this section.

At the outset, the Bad River Band's approach to water quality is holistic and we have Outstanding Tribal Resource Waters, Outstanding Resource Waters, and Exceptional Resource Waters. The Band's WQS also accounts for cultural designated uses, which applies to all waters within the exterior boundaries of the Reservation. MNRD WQS Report at 4. We have concerns as to whether the Proposed Project will meet our Band WQS. Impacts on wetlands that are upstream, especially the permanent conversion of wetlands, may have a detrimental effect on downstream waters that are connected to upstream wetland complexes. Loss of wetland functions will impact tribal water quality, and attainment of tribal uses and will interfere with the maintenance of the Reservation's high quality waters. *Id*. at 7. The Proposed Project is likely to have severe adverse effects on upstream wetlands, but neither the applicant nor the Corps has evaluated what the downstream impacts of loss of wetland functions will be.

We also have concerns about pollutants or other human-induced changes to waters that result in changes to habitat. Under the Band's WQS, pollutants or human-induced changes to waters, the sediments of waters, or area hydrology that result in changes to natural biological communities and wildlife habitat shall be prohibited. *Id*. at 5. MNRD is extremely concerned about the possibility of PFAS, mercury, and other bioaccumulants entering the watershed and the Bad River Reservation as a result of construction from the Proposed Reroute. *Id*. at 12. There are already concerns about mercury as there are surface waters in the region with mercury impairments and mercury-related fish consumption advisories. *Id*. at 12. Construction may exacerbate those concerns by releasing radionuclides, asbestos, or other constituents that adversely impact waters as a result of blasting bedrock. *Id*. at 12-13, MNRD Other Waters at 22; MNRD Environmental at 25. Blasting may also cause changes in the watershed that result in chemical reactions that mobilize toxic compounds such as sulfuric acid which may impact both surface water and groundwater for extended periods of time. Construction may also introduce other contaminants via blasting agent residue or HDD fluids. LimnoTech at 16.

These preliminary concerns highlight the need for more information. MNRD has several outstanding questions regarding the Proposed Project that need to be answered before we can fully evaluate the impacts the Proposed Project will have on our water quality standards. MRND Report at 18-19. We need a full disclosure of impacts from the Proposed Project to determine all the ways they will impact the Band's WQS. *See id*. at 8-9. Given the lack of information that MNRD has identified throughout this comment letter, the Corps' preliminary conclusion that impacts from the Proposed Reroute would not cause an exceedance of the Bad River Band's WQS is unfounded. *Id*. at 13-14.

III. THE DCDD DOES NOT MEET THE STANDARDS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

The initial evaluation of the Proposed Reroute's impacts under CWA Section 404(b)(1) Guidelines demonstrates that it will have unacceptable adverse effects on the aquatic ecosystem.

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The Band and our MNRD staff made this determination even with incomplete data and inadequate analyses from Enbridge and the Corps. As discussed previously, there are several areas where data is missing, where evaluations are incomplete or inconsistent with the data, and where the impacts to the region are not fully disclosed or discussed. The Corps cannot conduct an evaluation of the environmental impacts of the Proposed Reroute without sufficient information. The impacts already disclosed, even if partially, rise to the level of significance and the Corps must prepare an Environmental Impact Statement under NEPA to fully evaluate the environmental effects of the Proposed Reroute.

A. The DCDD Improperly Followed Outdated NEPA Regulations

The DCDD improperly relies upon outdated and superseded NEPA regulations. *See* DCDD at 21 ("The Corps is preparing this draft EA in compliance with the NEPA (85 Fed. Reg. 43,304 (July 16, 2020))"). The Council on Environmental Quality ("CEQ") updated these regulations in April 2022, 87 Fed. Reg. 23,453, (and again on May 1, 2024, shortly before the DCDD was released, 89 Fed. Reg. 35,442).

The Corps should follow the regulations in effect at the time it takes an action or decision. *See N.J. Conservation Found., et. al. v. FERC*, USCA Case #23-1064, 6 n. 1 (D.C. Cir. July 30, 2024) ("*NJCF*") ("we cite and apply the regulations in effect at the time of the [agency's] orders.") (citing *Ctr. for Biological Diversity*, 67 F.4th 1176, 1181 n.2. (D.C. Cir. 2023)).[12] Here, that means the DCDD should have been drafted to follow and cite CEQ's regulations as amended in 2022, and future NEPA documents produced in reviewing the Line 5 reroute proposal must follow the regulations as they stand after July 1, 2024.[13] Alternatively, the Corps must then follow the 1978 regulations. This version of the regulations was in effect when the Corps received Enbridge's application for the project in February 2020. Additionally, the Corps' own NEPA implementing regulations, 33 C.F.R. pt. 325 Appendix B, were promulgated based off CEQ's 1978 regulations.[14]

CEQ made key changes to NEPA regulations relevant to the DCDD and the deficiencies the Band has identified. First, the 2022 amendments restored how agencies develop a project's purpose and need. Rather than the 2020 regulation's requirement to base purpose and need on applicant goals and an agency's authority, the current version enacted in 2022 instead provides a wider range of factors, to ensure adequate consideration of the public interest and a reasonable range of alternatives. Given the issues identified below with the DCDD's purpose and need, the fact that the Corps followed the outdated 2020 regulations makes the current purpose and need statement materially deficient. Second, the 2022 amendments restored specific consideration of

[12] Note the Band mentioned these changing NEPA regulations in our 2022 comment letter on the Corps' Public Notice for the Proposed Reroute. Band's 2022 Comment Letter at 9, n. 2.

[13] *See* CEQ, Memorandum Regarding Implementation of Updated National Environmental Policy Act Regulations, 1 (June 28, 2024) ("Agencies may apply these regulations to ongoing activities and environmental documents begun before July 1, 2024, such as when doing so will make the process more efficient, or where the regulations implement provisions of the 2023 NEPA amendments, which were effective upon enactment.")

[14] *See id*. ("An agency's existing NEPA procedures remain in effect until the agency revises its procedures consistent with 40 C.F.R. § 1507.3. Agencies should read their existing procedures in concert with the final rule to ensure they are meeting the requirements of both wherever possible. To the extent that there is conflict between an agency's NEPA procedures and the CEQ regulations, the CEQ regulations generally will apply.")

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indirect and cumulative environmental effects. This change has bearing on the DCDD's consideration of the scope of its review and how it considered indirect and cumulative effects.

The Corps must redo its NEPA analysis using the CEQ regulations currently in force, which now includes both the 2022 and 2024 updates. The Corps should do this as part of preparing a federal EIS for the Proposed Reroute.

B. The Corps Must Prepare an Environmental Impact Statement

The Corps must prepare an independent federal EIS prior to any permit decision for the Line 5 Proposed Reroute Project. "NEPA requires an EIS if any significant impacts "*might* result" from the proposed action, not only when [an agency] definitively concludes that a significant impact *will* result." *City of Port Isabel v. FERC*, No. 23-1174, p. 15 (D.C. Cir. Aug. 6, 2024) (emphasis in original) (quoting *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002)); *see also* 42 U.S.C. 4336(b)(1). "In order to determine whether its actions may result in 'significant' environmental impacts…an agency must examine both the 'context' and the 'intensity' of the action." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 471 F.Supp.3d 71, 76 (D.D.C. July 6, 2020). The 1978 NEPA regulations used this framework of evaluating the context and intensity of an action to determine its significance. 40 C.F.R. § 1508.27(d) (1978). While the 2020 regulations deleted this language, the 2024 amendments reinstated it. 40 C.F.R. § 1501.3(d) (July 1, 2024). Both the context and the intensity of the Proposed Project demonstrate the likelihood of significant environmental impacts that must be assessed in a federal EIS. Based on the information the Band possesses regarding the watershed, the project application materials, and the insufficient information and analysis in the DCDD, the Corps must prepare a full federal EIS.

1. The context, intensity, and significance of the Proposed Project require preparation of an EIS

As demonstrated throughout this letter and the attached MNRD and expert reports, the Proposed Project risks significant impacts on the Bad River watershed and the broader Chequamegon Bay area.

The context of the project makes clear the need for a federal EIS. The Proposed Project would pass through an incredibly culturally and ecologically unique area, which relies on a delicate balance of water-dependent ecosystems. *Supra* II; *infra* V; MNRD Environmental Report; MNRD Wetlands Report; MNRD Other Waters Report; *See generally,* MNRD Threatened & Endangered Species ("T&E") Report (Attachment H); MNRD WQS Report. The Band has unique and serious environmental justice concerns, *infra* III.H, and Enbridge is seeking to force the continued operation of Line 5 through the Bad River watershed even after a sovereign Tribal Nation made clear its desire otherwise. *See* Band's 2022 Comment Letter, Attachment D. The Corps also refuses to consider multiple relevant pieces of context, such as how the Proposed Reroute would entrench greenhouse gas emissions and the continued operation of Line 5. These impacts would not only be during construction but would continue for years and even decades to come, which the DCDD does not accurately and realistically assess. *Supra* II; *see also* Thompson at 5, 7, 14-15, 31, 34; MNRD Wetlands Report at 8, 9, 15.

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The intensity of the project also demonstrates the need for the Corps to prepare an EIS. The Proposed Project:

- poses grave risks to public health and safety, particularly via potential drinking water supply impacts, LimnoTech at 4, 7-8; MNRD Other Waters Report at 20, petroleum leak and explosion risks, *see* Accufacts, Inc. ("Accufacts") (Attachment D), and exacerbation of the MMIR epidemic. *Infra* III.H.
- endangers parks and other state-protected lands, many acres of wetlands, Thompson; MNRD Wetlands Report, and sites of critical cultural, ecological, and sacred importance. *Infra* V.; MNRD Environmental Report.
- risks violating the Band's EPA-approved water quality standards. *Supra* II.D. Similarly, Enbridge may not be able to prove the Proposed Reroute will be consistent with the various Wisconsin permits and other state requirements it must meet.
- presents negative effects, the extent of which are highly uncertain because the information Enbridge and its consultants have provided to the Corps, the Band, and the WDNR has been inconsistent and inadequate, leading to numerous significant questions about the true extent of potential impacts. MNRD Environmental Report at 4, 22-24, 26. The Band has identified much greater impacts from the Proposed Project than Enbridge or the Corps has yet recognized or adequately considered. *See, generally,* MNRD staff and expert reports (Attachments A-N).
- will affect resources eligible for listing in the National Register of Historic Places. *Infra* V., MNRD THPO Report, Nesper Report.
- may impact multiple endangered or threatened species, and the Corps has yet to complete consultation with the Fish and Wildlife Service regarding potential impacts to two T&E species. *Infra* VI.
- will likely adversely affect environmental justice communities. *Infra* III.H.
- Endangers the Band's treaty-protected reservation homeland, as well as the treaty-protected rights to use the lands and waters of northern Wisconsin and Lake Superior. *Supra* I.A.

To adequately consider the significance of these context and intensity factors, the Corps must prepare its own federal EIS for the Proposed Project.

Even under the provisions in effect from 2020 until earlier this year, the Proposed Project is a significant federal action requiring an EIS. 40 C.F.R. 1501.3(b) (2022). This version of the regulations directed agencies to consider the potentially affected environment and the degree of the effects. *Id*. The Proposed Reroute would affect a uniquely important environment locally as well as nationally and internationally. This includes the Kakagon-Bad River Sloughs – a wetland of great importance to the Band and recognized as such by the EPA and under international treaties. Band's 2022 Comment Letter at 10. Other factors in the area's environmental importance include swaths of largely undeveloped forested lands, the existence of treaty-protected resources, and Lake Superior and the Apostle Islands National Lakeshore just downstream. The degree of the effects would also be extensive and largely adverse. These include (i) short- and long-term impacts to wetlands and waters; (ii) myriad adverse effects; (iii) petroleum (oil or NGL) release harmful to health/safety; and (iv) a likelihood the project will violate state and Band water quality standards.

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Supra II.D; *infra* III.G. Thus, even under the previous significance framework, the reroute proposal must be assessed via a federal EIS.

2. Effects cannot be mitigated below a significant level

Any mitigation the Corps proposes is inadequate to lessen potentially significant environmental effects. While CEQ regulations and guidance provide for mitigation in the NEPA review process,[15] it would be inappropriate here for multiple reasons. First, as discussed above and in the introduction, much of the analysis of the DCDD relies on flawed information. This makes even determining the proper scale of mitigation impossible.

Next, Enbridge's proposal for compensatory mitigation for wetland impacts only adds to the fatal deficiencies of any attempt at mitigation. Flaws include inaccurate wetland functional assessments and rankings, improper mitigation credit ratios, and utilizing a credit bank with insufficient available credits located in a different watershed two counties, and up to 60+ miles away from proposed impacts. Thompson at 7-8, 28-37; *see also supra* II.C. All of this means this proposed bank will not mitigate any of the lost wetland functions within the affected watersheds that flow into the Band's Reservation. Finally, Enbridge will potentially impact many sites and ecosystems that are irreplaceable and of deep importance to the Band and its members. *Supra* I.A.; Infra V. Given this, no mitigation exists to make up for such impacts. These critically important places and the connections that Band members hold with them simply must not be impacted. Accordingly, the Corps must proceed to produce its own EIS for the Proposed Reroute.

3. More and better information is needed to carry out NEPA review

To reiterate, before the Corps prepares the necessary federal EIS, it must ensure it has accurate and complete information on which to base its NEPA review. Through the Corps review process – including during this public comment period on the DCDD – the Band has identified and pointed out repeated instances of missing, outdated, or conflicting information, and had to make numerous requests to correct these issues. MNRD Environmental Report at 4, 22-24, 26. Not only does this hamper any effective review and input from the Band and others, but it violates statutory requirements of NEPA enacted last year. 42 U.S.C. §§ 4332(D), (E) (2023) ("(D) ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document; (E) make use of reliable data and resources in carrying out this Act."). Given these numerous errors in and absences of data and information, the Corps cannot and should not rely solely upon Enbridge-provided information, as it is not a "reliable data source." 42 U.S.C. 4336(b)(3)(A) (2023). Thus, the Corps must work with Enbridge, the Band, and other regulators to ensure the Corps has all necessary information and analysis, and that it is accurate and complete, before proceeding with a federal EIS. This will help the Corps to reach a "'fully informed and well-considered decision,'" as NEPA requires. *NJCF* at 11-12 (quoting *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)).

[15] *See* 40 C.F.R. §§ 1501.6(a)(2); (d); 1505.2(c) (2024); CEQ, Memorandum Regarding Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact (January 14, 2011).

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C. The Corps' Improperly Skewed and Limited Purpose and Need Prevents an Adequate NEPA Review

In the DCDD the Corps improperly limited and skewed the project purpose and need in favor of Enbridge's preferred outcome. The Corps compounds this error by then repeatedly incorrectly restating the purpose and need, leading to deficient and inconsistent analysis of the status quo and reasonable alternatives. Due to these cascading errors, the Corps must prepare a federal EIS with an unbiased, clearly defined, and applied purpose and need.

When an agency prepares an environmental document under NEPA, it "shall include a statement of purpose and need that briefly summarizes the underlying purpose and need *for the proposed agency action*." 42 U.S.C. § 4336a(d) (emphasis added). The emphasized language makes clear that the purpose and need centers on the agency action, not on the project an applicant wishes to undertake. An agency cannot adopt a narrow statement of purpose and need that "prioritize[s] [the] applicant's goals above or to the exclusion of other relevant factors," such as "effectively carrying out the agency's policies and programs or the public interest." *National Environmental Policy Act Implementing Regulations Revisions*, 87 Fed. Reg. 23,453, 23,458 (Apr. 20, 2022). An agency cannot adopt a statement of purpose and need so narrow that only this Proposed Project would fulfill it. *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011). Rather, agencies have a "duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project." *Nat'l Wildlife Refuge Ass'n v. Rural Utils. Serv.*, 580 F.Supp.3d 588, 613 (W.D. Wis. 2022) (citing *Simmons v. U.S. Army Corps of Eng'rs,* 120 F.3d 664, 669 (7th Cir. 1997)); *see also* 87 Fed. Reg. at 23,459 ("Always tailoring the purpose and need to an applicant's goals . . . could prevent an agency from considering alternatives that do not meet an applicant's stated goals, but better meet the policies and requirements set forth in NEPA and the agency's statutory authority and goals."). Ultimately, a purpose and need statement "should look at the general goal of an action, rather than a specific means to achieve that goal." *Nat'l Wildlife Refuge Ass'n v. Rural Utilities Serv.*, 2022 WL 136829, *15, 16 (W.D. Wis. Jan. 14, 2022) (citing *Simmons* at 666).

Unfortunately, the Corps begins Section 3 of the DCDD presenting a purpose and need already slanted towards Enbridge's goals. DCDD at § 3.2 ("to transport crude oil and NGLs entirely outside the Bad River Reservation at approximately the same capacities provided by Enbridge's existing Line 5 pipeline"). As the DCDD progresses, the purpose and need then gets distorted into precisely what caselaw warns against: a purpose so narrow that only Enbridge's preferred alternative can fulfill it. In Section 5, the Corps slips in additional geographic requirements, stating, "[t]o meet the purpose and need, these pipelines would either [sic] need to interconnect to Enbridge's system at or near Enbridge's Superior Terminal to transport products being delivered to receipt points provided by Line 5." *Id.* at § 5.3.1; *see also* § 5.5. But the purpose and need in Section 3.2 does not require petroleum to be transported via pipeline or that it must travel from Enbridge's Superior terminal to reach all the current delivery points. The new constraints the Corps adds have the effect of making reasonable alternatives no longer viable.

The Corps' Project Purpose – used to guide its Clean Water Act 404(b)(1) assessment rather than its NEPA review – shows similar flaws. *See supra* II. Section 3.3's Basic Project Purpose is general, the "[t]ransportation of crude oil and NGLs." DCDD at 25. However, on the next page, the Corps similarly narrows the Overall Project Purpose to replacing "approximately 12 miles of

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the existing Line 5 pipeline within the Bad River Band Reservation with *new pipeline* located entirely outside the boundaries of the Reservation at approximately the same capacities provided by Enbridge's existing Line 5 pipeline." *Id.* at § 3.5 (emphasis added). This quiet addition requiring a new pipeline to accomplish the purpose disqualifies any alternative that relies upon existing pipelines or non-pipeline means to transport crude oil and NGLs.

All these limitations point to Enbridge's preferred project as the only viable option. This reality fatally undermines the point of a purpose and need statement as part of a meaningful and sufficient environmental review. The DCDD's flawed purpose and need then guarantees that a limited range of alternatives are considered, and that Enbridge's preferred alternative wins out. The Corps must correct this error by presenting a revised statement of purpose and need as part of a federal EIS that accomplishes the goals and requirements of NEPA, rather than only those of Enbridge.

1. Failure to discuss or consider decisions in the Bad River Band v. Enbridge litigation undermines the DCDD's consideration of alternatives

The Corps' failure to even mention the decisions in the Band's lawsuit to end Enbridge's trespass and nuisance within the Reservation materially undercuts the consideration of alternatives – especially the No Action Alternative. The Corps repeatedly mentions the lawsuit, *see e.g. id.* at 9; 20; 25, yet somehow never mentions that a federal judge has ruled in that case that Enbridge has been trespassing through the Reservation for over 10 years and must shut down Line 5 by June 2026, or sooner if conditions at the Bad River pipeline crossing continue to deteriorate. *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Rsrv. v. Enbridge Energy Co., Inc.*, 626 F.Supp.3d 1030, 1048 (W.D. Wis. 2022) (Attachment O); *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Rsrv. v. Enbridge Energy Co., Inc.*, No. 19-CV-602-WMC, 2023 WL 4043961, at *19 (W.D. Wis. June 16, 2023) (Attachment P); *see also supra* I.C., II.C. The Corps skirts the issue by moving right on to give cursory consideration to existing pipelines as well as alternative transportation methods. Had the Corps mentioned the current disposition of the lawsuit, it would have then had to present a more accurate status quo for the No Action Alternative: if Enbridge does not receive all necessary permits for its Proposed Reroute, it must shut down and decommission Line 5.

2. The flawed purpose and need improperly limits review of alternatives

The analysis of alternatives is at the heart of NEPA. *See e.g., Conn. Fund for the Env't, Inc. v. U.S. Gen. Serv. Admin.*, 285 F. Supp. 3d 525, 533 (E.D.N.Y. Jan. 11, 2018). "Before the Corps issues a Section 404 permit, it must determine that there is 'no practicable alternative' to the proposed activity 'which would have less adverse impact[s] on the aquatic ecosystem.'" *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers*, 2021 WL 430054, *3 (D.D.C. Feb. 7, 2021) (citing 40 C.F.R. § 230.10(a)). Improperly limiting the project's purpose and need has the cascading effect of limiting the range of alternatives analyzed for the project. The purpose and need statement "necessarily dictates the range of 'reasonable' alternatives." *Carmel-By-The Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *see also Simmons*, 120 F.3d at 666. NEPA prohibits agencies from "restrict[ing] its analysis to those 'alternative means by which a particular applicant can reach his goals.'" *See Simmons*, 120 F.3d at 669 (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986)). The Corps itself acknowledges that "[t]he overall

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project purpose must be defined to allow for consideration of meaningful alternatives," DCDD at 27, yet here the Corps has instead stacked the deck against any reasonable alternative to Enbridge's preferred Line 5 relocation proposal.

Unfortunately, the same cursory alternatives consideration we highlighted in our 2022 comments on the Corps' Public Notice is repeated here. *See supra* II.C.1. As stated above, the No Action Alternative glaringly fails to mention the impending shuttering of Line 5 due to a federal court order. Further, because of the increased narrowing of the purpose and need when discussing pipelines system alternatives in Sec. 5.3.1, otherwise viable alternatives are swiftly cast aside. *See* Infra IV.B. Similarly, Section 5.3.2.1 – transport by rail – somehow fails to mention Sarnia, Ontario as a main delivery and receipt point for Line 5 petroleum, even though Sarnia is the terminus for Line 5 and the location of the main refineries that utilize the petroleum Line 5 transports. This omission allows the Corps to quickly dismiss this transportation alternative since the section only discussed the lack of adequate rail lines at smaller, intermediate delivery points in Michigan.

This quick turn away from existing pipelines and other transport methods gives no space to discuss two important opportunities that No Action Alternatives present. First, these alternatives would allow Enbridge to comply with its legal obligation to shut down and decommission Line 5 through the Reservation. To date, these are Enbridge's only viable options to meet its legal obligations while continuing to transport crude oil and NGLs. In the four and a half years since submitting applications for the Proposed Project, Enbridge still has not provided sufficient information to demonstrate it can meet all legal requirements to undertake this massively disturbing Proposed Reroute Project. Relatedly, these No Action Alternatives would not disturb any waters under Corps jurisdiction, meaning they should be given much more robust consideration as less impactful to aquatic ecosystems before moving forward with permitting the devastating and long-term impacts to waters of the non-water-dependent reroute proposal.

3. The route alternatives Enbridge does not prefer appear designed to be rejected

Unfortunately, the DCDD contains further issues regarding the route alternatives Enbridge proposed. *See* DCDD at § 5.4. MNRD Staff noted unexplained proposed impacts to a sensitive area (including wetlands, schools, state parks, etc.) in one route alternative, while another route alternative would avoid that area but proposed to impact another area that the first would avoid. *See supra* II.C.1. These differing proposed impacts from one alternative to the next seem to show the ability to avoid such impacts in all alternatives. *Id*. Had Enbridge designed its route alternatives accordingly, those routes would have been more difficult for the DCDD to reject so quickly in comparison to Enbridge's preferred route. Setting up route alternatives to fail in this way – whether or not that was the intent – undermines the efficacy of comparing the action alternatives.

All of these errors demonstrate that the DCDD fails to "rigorously explore and objectively evaluate all reasonable alternatives" as NEPA requires. *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005) (internal citations omitted). To ensure an adequate exploration and evaluation of alternatives, the Corps can and should include alternatives "beyond the goals of the applicant or outside the agency's jurisdiction because the agency concludes that they are useful

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for the agency decision maker and the public to make an informed decision." 87 Fed. Reg. at 23,459. The Corps must ensure that the alternatives analysis in its EIS meets the requirements of NEPA and must begin by rooting this analysis in a proper statement of purpose and need.

D. The Scope of Review is Severely Limited

The DCDD severely limits its scope of review in several problematic ways. NEPA clearly states that an EIS should include discussion of reasonably foreseeable effects of a proposed action, including those that cannot be avoided. 42 U.S.C. § 4332(2)(C*); see also* 40 C.F.R. §§ 1508.1(i), (ii); *NJCF* at 6 n. 1. "A thorough discussion of an action's environmental consequences 'forms the scientific and analytic basis for the comparisons' in the analysis of alternatives, including the No Action Alternative." *NJCF* at 11 (quoting 40 C.F.R. § 1502.16(a)). The Corps must ensure it includes such thorough discussion of all reasonably foreseeable effects in its federal EIS.

The Corps attempts to limit this scope of review for effects to areas in and around the Waters of the United States the Proposed Reroute would cross. DCDD at 21-22. This blindered view is at odds with DCDD discussions about benefits to the region from jobs and provision of propane for heating, as well as a purpose and need centered on transporting petroleum to and from points hundreds of miles apart. *See, eg*., *id.* at 25-26, 76-77. The Corps must expand its scope to evaluate all commensurate reasonably foreseeable effects.

First, the project area must be expanded geographically to include associated activities, such as the pipe yard in Douglass County, MNRD Environmental Report at 9, and the current operation of Line 5 within the Reservation. Impacts from these sites are inextricably bound up in Enbridge's proposal to reroute Line 5, and so effects from those sites must be considered too.

Second, the scope must expand temporally to consider the ongoing corridor maintenance that will be required over the lifetime of the pipeline as well as the eventual disturbances when decommissioning the line. Our 2022 comments on this point remain valid. Band's 2022 Comment Letter at 18-19. Specific ongoing effects to consider include 1) personnel and equipment continuing to access the pipeline right-of-way to remove vegetation using herbicides and machinery for the life of the pipeline, MNRD Environmental Report at 6; MNRD Wildlife Report at 4; MNRD Wetlands Report at 29, 2) recurrent use of matting in sensitive soils, MNRD Environmental Report at 7-8, 3) a range of impacts from anomaly digs another maintenance activities, as the Band has experienced many times within the Reservation, *id.* at 6, and 4) the potential need to fully replace failed HDD crossings. Thompson at 41. All such effects must be taken into account.

Relatedly, impacts from the initial construction will persist long into the future and must be considered accordingly. Wetland and waterway functions and uses will certainly be compromised throughout the construction period. The DCDD states construction will last 12-14 months but is not clear if that timeline is consecutive or might be broken up by seasonal restrictions or delays due to personnel, equipment, weather, or other logistics. The DCDD is also unclear if restoration work will begin immediately once a specific wetland or waterbody crossing is completed, or if restoration would wait until all construction activity concludes. Clearly answering these timing questions is essential to understand the true scope of such functional impacts.

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Some waters will permanently lose functions and uses. The DCDD states wetlands will be restored "as near as possible to preconstruction contours and elevations." DCDD at 16. This qualified language leaves room for some contour and elevation changes to persist and cause permanent effects, which must be accounted for. Some such impacts the Corps admits to a certain extent, such as permanent conversion of wetland type. Other function impacts it misses entirely. *Supra* II.A. "Natural" restoration is likely to take years or even decades to restore plants and ecosystems – if they ever return to their pre-construction function. *Id*. Similarly, construction will also change critical hydrology in sensitive ecosystems, such as disturbing wetland microtopographies, creating crowning above trenched pipelines, changing groundwater seeps, and altering groundwater flows due to trenching and blasting. Thompson; LimnoTech at 17; Wright Water at 6-13; MNRD Wetlands Report at 11. The Corps must assess these effects as well.

Finally, the scope must include assessing the aggregate impact of construction methods. *See* Band's 2022 Comment Letter at 23. This must include the full scope of HDD impacts (contra DCDD at 15): clearing the right-of-way, impacts to the large pipe pull-back areas, and likely "inadvertent releases." Thompson at 10-11, 14, 16, 22-23, 31-32, 39, 41; MNRD Environmental Report at 11-19. Similarly, bridging of waterways would have impacts from grading and placing of bridge structures. DCDD at 15; MNRD Environmental Report at 12-13; MNRD Other Waters Report at 7. Blasting may bring disturbances to surrounding plant and animal communities as well as changes to water flows. *See* MNRD Environmental Report at 26 (citing MNRD Other Waters Report, MNRD Wetlands Report, Thompson, LimnoTech).

The Corps must assess *all* reasonably foreseeable effects – including but not limited to all those discussed in this section, as well as throughout this comment letter and the numerous reports attached to it. Including all these reasonably foreseeable effects will be essential to the Corps producing an adequate federal EIS to guide its decision-making in this permit review process.

E. The Corps Has Incorrectly Limited Review of Direct, Indirect, and Cumulative Impacts

As discussed in Section III.A., the Corps improperly prepared its analysis under the NEPA regulations as amended in 2020. *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304 (July 16, 2020). The 2020 NEPA regulations did away with the requirement to consider indirect and cumulative environmental effects, however, the 1978 NEPA regulations and the 2022 NEPA regulations do require such consideration. Accordingly, the DCDD's analysis of cumulative and secondary effects is improperly narrow and omits critical information. Thus, the Corps' preliminary determination that regulated activities associated with the Proposed Line 5 Reroute Project would have a minor long-term effect on the aquatic ecosystem is based upon insufficient information.

1. Analysis of other ongoing projects is insufficient

The DCDD acknowledges that additional effects not immediately caused by the proposed action may alter the environment. The Corps briefly addresses off-road vehicle use, increased temporary turbidity, downstream sediment transport, erosion, changes to stream bed and bank profiles, increases in total suspended solid loads, water quality exceedances, drilling mud spills, and runoff from soil stockpiles. In addition, the Corps briefly mentions pipeline maintenance

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activities, two Xcel Energy transmission lines, and decommissioning the existing Line 5; but indicates that any effects are not expected to be significant.

The Corps bases its determination on an extremely limited analysis. First, the Xcel projects will contribute to waterway degradation, both temporary and permanent, as well as forest fragmentation, plant and animal disturbance, and maintenance access. This is in addition to the blasting, trenching, and filling activity associated with reroute construction and attendant degradation of waterways, and 'temporary' effects from mats placed upon wetlands during construction. Further, decommissioning activities associated with the existing Line 5 pipeline within the Bad River Reservation are reasonably foreseeable regardless of whether or not the permits are granted. The Corps conducted no analysis of that activity.

Second, ORV activity is a major economic driver in Wisconsin - particularly Northern Wisconsin - accounting for 4.2 billion dollars in 2023; with an expectation that this industry will continue to grow based on production of ORVs in Wisconsin and continuing increases in ORV registration.[16] ORV use can cause and contribute to erosion, stream sedimentation, damage to stream banks and wetlands, noise disturbance to wildlife, increase in oil and other ORV fluids in waterways, and destruction of property.[17] A new, 41-mile corridor will foreseeably invite ORV activity, whether authorized or not, and the long-term effects of that activity on plants, animals, waterways, and cultural resources need to be analyzed.

Finally, and as raised in our 2022 comment letter, significant mining exploration and activity are both currently occurring and being proposed in Michigan's Upper Peninsula, Northern Wisconsin, and Minnesota. The negative effects on the watershed from these activities are reasonably foreseeable, given the region's long history of mining, and a potential resurgence of region-wide mining activities should be considered as part of the cumulative impact analysis.

2. Analysis of construction methods is deficient

As discussed at length elsewhere in this comment, there is insufficient information about construction methods, particularly blasting, trenching, and potential frac-outs. Blasting along a 41-mile corridor will have long-term and irreversible effects in some, if not all, locations where it is used. Trenching has the potential to disrupt waterways, vegetation, and the use of adjacent areas. Frac-outs and attendant release of drilling mud into wetlands or waterways should be assumed and the activities required to excavate, remove, test, and dispose of large amounts of contaminated soils in wet, remote, heavily wooded areas should be analyzed. Merely assuming that frac-outs will rarely occur is an insufficient basis to determine the project's cumulative impacts on the watershed. Further, the puncture and introduction of sediment or other pollutants into aquifers and

[16] *See* Lee, Daniel, *The Economic Impact of the Industry and ATV UTV Riders in Wisconsin During Calendar Year of 2023* (March 14, 2024), available at: https://outdoorrecreation.wi.gov/Documents/Research%20Library%20Page%20files/Wisconsin/Economic%20Impact%20of%20ATV%20UTV%20in%20Wisconsin%202023.pdf

[17] *See, e.g.,* Courtney Everett, *Amid growth of ATVs in Wisconsin, concerns over lacking enforcement,* WISCONSIN PUBLIC RADIO (Sept. 25, 2020), https://www.wpr.org/environment/amid-growth-atvs-wisconsin-concerns-over-lacking-enforcement.

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areas with groundwater close to the surface should be analyzed, including potential catastrophic or long-term effects from construction activities.

3. There is no analysis of greenhouse gas emissions

The Corps maintains that it is not required to consider the implications of continued operation of Line 5 with regard to greenhouse gas emissions or its contributions to climate change. The Corps states that "the downstream uses of the natural gas liquids or crude oil are outside the Corps limited authority. Further, these effects are not anticipated to change because of the Corps regulatory authority." DCDD at § 7.5. However, this ignores the requirement for Enbridge to remove Line 5 from the Bad River Reservation by 2026, so continued operation of the pipeline, at least in the near term, is directly related to the Corps' regulatory authority to approve or disapprove Enbridge's permit application. Nevertheless, the Corps admits that wetlands and streams are affected by changes in temperature, flooding, drought, and severe storms that are directly linked to climate change. *Id.* at § 9.4. We also note that Lake Superior is steadily warming, as is the regional air temperature and lake ice coverage has generally been low over the past decade.[18] However severe the impacts to the watershed, ecosystem, and long-term viability of the species that depend upon it, the Corps refuses to consider or analyze this Proposed Project's role in the entrenchment of fossil fuel combustion, direct resultant greenhouse gas emissions, and their relationship to climate change. The Corps should evaluate this Proposed Project's potential contribution to greenhouse gas emissions and climate change as a reasonably foreseeable effect of its decision to approve or deny Enbridge's permit application.

4. Analysis of the Band's treaty rights is inadequate

As discussed in depth in Sections [xx] of this comment letter, the Corps has closed its eyes to this Proposed Project's reasonably foreseeable cumulative effects related to the Band's exercise of its on- and off-reservation treaty rights. These cumulative effects include the ongoing threat of an oil spill, degradation of waterways and attendant impacts to fish and other aquatic species the Band members depend upon, changes to flora and fauna caused by construction activities, conversion of the forest along the pipeline right-of-way, increase in invasive species, potential increase in ORV and maintenance vehicle traffic and its resulting effects on waterways, plant and animal life, and limitations on Band members' access to treaty-protected resources. One clear example of the cumulative impacts of this pipeline is Wisconsin's criminalization of tribal members' exercise of their treaty-protected usufructuary rights if they happen to come across the pipeline-right-of-way, and the chilling effect Wisconsin's trespass law may have on Band members. It is not clear how far into the past the Corps is required to look with regard to the Band's treaty rights, but decades of activism and litigation have been necessary for the Band to regain its legally protected rights to off-reservation treaty resources. The Proposed Project's negative effects on those resources must be analyzed in accordance with NEPA, the NHPA, the federal trust responsibility, and multiple federal regulations, directives, MOUs, and Executive Orders. The Corps' abdication of its duty to assess cumulative effects on the Band's treaty rights

[18] *Lake Superior Climatology: Sustained Assessment of the Great Lakes*, GLISA (2024), https://glisa.umich.edu/sustained-assessment/superior-climatology/ (last accessed Aug. 30, 2024).

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from this project, if approved, is the subject of considerable consternation to the Band, as has been repeatedly expressed to the Corps throughout this review process.

5. Analysis of sedimentation is incomplete

The Corps acknowledges that dredge and fill of wetlands, water crossings, clearing and devegetation of the corridor, erosion from soil stockpiles, grading and road construction, construction of transmission lines, and other activities associated with the Proposed Project will result in sedimentation, but brushes off these effects as temporary. An analysis of the cumulative effects of the sedimentation over a multiple-year period is required for the entire affected watershed and should also include an analysis of permanent and increasing sedimentation from likely maintenance and ORV activity along the right-of-way. This analysis will be impossible without appropriate background data which should be collected over an appropriate time period and analyzed in an EIS.

6. Analysis of forest fragmentation is limited

The Corps recognizes that the pipeline corridor would result in permanent fragmentation of forested areas and permanent alteration of some wetland functions. Because this project is slated for a heavily forested area, rich in wetlands, the Corps shrugs off the effects "based on the magnitude of undeveloped forested and scrub shrub wetland habitats and the lack of information to suggest more than minimal cumulative functional losses." DCDD at § 9.4. We acknowledge that the area is heavily forested but that is the appropriate ecosystem to protect the watershed from contaminants and provides unparalleled habitat for birds, fish, and wildlife. The area is still recovering from logging, mining, and other extractive practices. The full impacts of forest fragmentation – like increases in invasive species and decreases in biodiversity – should be carefully considered before approval of a massive infrastructure project like this one. These large contiguous forest areas are critical for biodiversity and carbon capture, and none of the functions of the intact ecosystem were analyzed. Incremental decisions like this one eat away at a region's ecological integrity, and the cumulative impact analysis is meant to inform just this type of federal decision.

7. Reasonably foreseeable operation of Line 5 is not analyzed

As previously discussed in this comment and in our March 2022 comment letter, continued operation of Line 5, including through the Straits of Mackinac, is directly related to this permitting decision. The continued operation of Line 5 threatens the integrity of the largest freshwater resource on earth and its unique ecosystem. The lack of analysis of further decades of operation of this pipeline is a glaring and unconscionable oversight and must be thoroughly analyzed in a full federal EIS.

F. <u>The DCDD Improperly Dismisses Connected Actions</u>

This includes both Enbridge's proposed Line 5 tunnel project under the Straits of Mackinac and the current section of Line 5 due to be decommissioned within the Band's Reservation. These omissions prevent proper consideration of the effects of the Proposed Reroute along with these other actions. The Corps must correct its connected action analysis as part of a federal EIS.

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The Corps must consider "whether there are connected actions, which are closely related Federal activities or decisions that should be considered in the same NEPA review." 40 C.F.R. § 1501.3(b) (2024).[19] Actions are connected if they "(1) [a]utomatically trigger other actions that may require NEPA review; (2) [c]annot or will not proceed unless other actions are taken previously or simultaneously; or (3) [a]re interdependent parts of a larger action and depend on the larger action for their justification." *Id*. at (b)(1)-(3). "To assess whether actions are connected, and thus must be considered together, we consider whether they have 'substantial independent utility' and whether they overlap temporally." *City of Port Isabel*, No. 23-1174, at 21 (quoting *City of Bos. Delegation v. FERC*, 897 F.3d 241, 252 (D.C. Cir. 2018)). "[P]rojects have substantial independent utility for purposes of the connected-action inquiry only when both projects are independently useful." *City of Port Isabel* at 22. Temporal overlap "generally asks whether the projects are 'either under construction' or 'pending before [an agency] for environmental review and approval' at the same time." *City of Port Isabel* at 23 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1308 (D.C. Cir. 2014). The purpose of the connected action regulation is to prevent the Corps from segmenting projects and failing to "address the true scope and impact of the activities that should be under consideration." *City of Port Isabel* at 21 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

Previous cases provide instructive examples of how to assess whether actions are connected. In *Delaware Riverkeeper*, the D.C. Circuit found that a pipeline capacity expansion project was "physically, functionally, and financially connected and interdependent" to three other expansion projects that were either under construction or awaiting permits along the same pipeline at the same time. At 1308. The Court required FERC to consider all these projects as connected actions in its NEPA review. *Id*. In *Port Isabel*, the D.C. Circuit found connected actions where a carbon capture and sequestration ("CCS") system was proposed as an add-on to a liquid natural gas export terminal. At 22-23. The Court made this determination because the CCS system was entirely dependent on the terminal for its utility and was simultaneously pending before FERC. *Id*. at 22-23. Similar to the examples cited, both Enbridge's proposed tunnel project and its decommissioning of Line 5 within the Reservation are actions connected to the Proposed Reroute. Unfortunately, the DCDD improperly rejects this fact. *See* DCDD at 21, 31, 33.

The Corps reaches its conclusion for the tunnel project by claiming, amongst other things, that "[t]he two actions are more than several hundred miles apart, and each action could and would proceed in the absence of the other. Each action is independently justified and has a separate origin and purpose." DCDD at 21. However, these considerations are either irrelevant or incorrect for the connected action analysis. While it is true that the Proposed Reroute and tunnel are located hundreds of miles apart, each is a necessary segment of Enbridge's Line 5 to fulfill the pipeline's purpose of carrying Albertan oil to Michigan and ultimately Ontario. Without either section, Line 5 becomes a useless, stranded asset. If the Proposed Reroute is not built by the time the pipeline is shut down within the Reservation (no later than June 2026), the tunnel will serve no purpose for a shuttered pipeline. Similarly, if the State of Michigan succeeds in its easement revocation and shutdown of the Straits dual pipelines and the tunnel project is not permitted and built in time, the Proposed Wisconsin Reroute will be part of a pipeline that cannot reach the vast majority of

[19] While CEQ revised its NEPA regulations multiple times in the last 5 years, language on assessing connected actions has remained substantively the same despite being renumbered. *See* 40 C.F.R. § 1508.25(a)(1) (prior to Sept. 2020); 40 C.F.R. § 1501.9(e)(1) (Sept. 2020 - June 2024).

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refineries it supplies. Additionally, Army Corps Districts are simultaneously considering whether to permit the Proposed Reroute and tunnel proposals. Thus, the Proposed Reroute and tunnel projects lack substantial independent utility and overlap temporally, requiring consideration as connected actions.

For the impending decommissioning of Line 5 within the Reservation, the Corps rejects any connections by disclaiming any authority over the decommissioning and arguing future impacts to WOTUS would be separate and unknown. *See* DCDD at 33. Again, the Corps' rationale here misses the proper analysis. As discussed elsewhere, the Corps' failure to acknowledge the impending court-ordered shutdown of Line 5 within the Reservation hinders its analysis. That section of Line 5 will shut down by June 2026. Enbridge proposed the reroute in response to the Band's efforts to shut down and remove Line 5 from the Reservation and watershed. *See* DCDD at 9, 20. If the on-Reservation segment were not being shut down, the Proposed Reroute would have no independent utility and would not move forward. Enbridge is seeking necessary authorizations so that it can construct the Proposed Reroute while the shutdown of the existing pipeline through the Reservation is approaching. The Environmental Protection Agency affirmed the connection of these actions, telling the St. Paul District in 2022 that "removal, decommissioning in place, or a combination thereof, of the existing pipeline [within the Reservation] is connected to the routing of the pipeline." Band's 2022 Comment Letter, Attachment J. Thus, the Proposed Reroute and Reservation decommissioning projects also lack substantial independent utility and overlap temporally, requiring consideration as connected actions. The Corp must redo its connected action analysis to correct these errors and should do so as part of preparing its own federal EIS.

G. The DCDD Fails to Adequately Consider the Risk of an Oil Spill or Natural Gas Liquid Release

The Corps must consider the risks and impacts of both oil spills and natural gas leaks as part of its environmental analysis of the Proposed Reroute. The Corps argues that operational spills and leaks are outside their purview to consider. DCDD at 30-31. However, the Corps' duty of taking a hard look at environmental consequences under NEPA requires an examination of "both the probability of a given harm occurring *and* the consequences of that harm if it does occur." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 132 (D.D.C. 2017) (quoting *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 482 (D.C. Cir. 2012)). Even though the Corps dismissed the risk of an oil spill by claiming the "probability of [a] . . . release" would be "extremely remote," DCDD at 80, the impacts must be considered regardless of the likelihood. *See Standing Rock*, 255 F.Supp.3d, at 132 (holding "that even though a spill was not certain to occur at Lake Oahe, the Corps still had to consider the impacts of such an event on the environment."). The Band's concerns about the risk of an oil spill are even more heightened due to Enbridge's history of previous spills. Accufacts at 4. Notably, the Corps' analysis should address the "real-world possibility of significant human errors or technical malfunctions" that may exacerbate the risks of a spill. *Standing Rock*, 255 F.Supp.3d, at 1049.

1. There is not enough information in the DCDD to evaluate the risks of or responses to an oil spill or NGL release

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The Corps "reviewed information about measures to mitigate the risk of spills from the project" and relied on Enbridge's Oil Spill Report to come to the conclusion that "the probability of an oil release for the proposed re-location [sic] project is extremely remote." DCDD at 79, 80. However, these assumptions were based on better-than-ideal responses, rather than real-world scenarios. First, the analysis assumes that identification of a rupture happens immediately when remote identification is not always timely and may take several hours. Accufacts at 4. The Corps and the DCDD must consider a more realistic timeframe in responding to an oil spill, and also one that is based on Enbridge's previous track record with oil spills. *See also id.* at 6-7.

Additionally, neither the Applicant nor the Corps considered the real-world impact NGLs would have on an oil spill response. The pipeline is expected to carry 80,000 bpd of NGLs, in addition to crude oil, such that NGLs will be released when there is an oil spill. DCDD at 86-87. However, the DCDD is completely silent as to the impacts of a natural gas release. The unique properties and volatility of NGLs, which include propane and butane, make releases of those substances particularly dangerous for cleanup. Accufacts at 6. This can also delay oil spill responses due to volatility, especially if the flow within the pipeline at the time of a leak or rupture is a mix of oil and NGLs. Yet none of this is disclosed or evaluated in the DCDD.

The DCDD and its related documents, as well as any earlier materials from the applicant, make it impossible for the public to review whether the Proposed Reroute's oil spill analysis and cleanup plans are adequate. There is no pipeline elevation profile along the Proposed Reroute, which makes it difficult to determine how materials flowing through the pipeline will respond at different points of a leak or rupture. Because NGL liquids have a different weight than crude, the elevation will dictate how the pipeline leaks oil and NGLs. Accufacts at 6. The lack of an elevation profile also makes it difficult to determine whether the proposed valve placements along the Proposed Reroute are adequate to address oil spill detection and response concerns. Accufacts at 7-8.

The Corps must examine the possibility and likelihood of an oil spill as a result of the Proposed Reroute. Even if the possibility is remote, which for Enbridge is not a given, the Corps still has a duty to analyze what the environmental impacts will be. Further, mere compliance with the Pipeline and Hazardous Materials Safety Administration minimum regulations is not enough to assure that pipeline ruptures and leaks will not happen. *See* Accufacts at 3-4 (listing multiple pipeline ruptures that met regulatory compliance). The Corps cannot ignore that a leak or rupture during pipeline operation will impact environmental resources as part of the environmental review of a Proposed Project.

2. The Corps must evaluate impacts of oil spills on treaty rights

As part of its analysis of environmental impacts, the Corps must also consider potential spill impacts on treaty resources. *Standing Rock Sioux Tribe*, 255 F.Supp.3d at 132-134. Pursuant to the United States's treaty obligation and trust responsibility to federally recognized tribes, federal agencies should "integrate consideration of tribal treaty and reserved rights into agency decision-making and regulatory processes." Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights, 2 ("Treaty Rights MOU").

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Here, the Corps has an obligation to ensure the Line 5 relocation does not infringe on the Band's treaty rights. As discussed previously, the Lake Superior Chippewa retained the rights to use nearly all animal and plant species in the territory they ceded to the U.S., along with other usual and customary practices. *See supra* I; *see also* 1837 Treaty; 1842 Treaty). The Band and its members continue to exercise and rely on these treaty rights, maintaining relationships with the resources throughout and downstream of the Proposed Reroute. By failing to thoroughly consider the impacts of oil spills on treaty-protected resources, the Corps evades its responsibilities to protect the Band's treaty rights.

H. The Corps' Environmental Justice Review is severely lacking

Executive Order 12898 and 14096 provide standards the Corps must follow when undertaking an environmental justice ("EJ") analysis. Exec. Order 12898, *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7,629 (Feb. 16, 1994) ("EO 12898"); Exec. Order 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*, 88 Fed. Reg. 25,251 (Apr. 16, 2023) ("EO 14096"). These executive orders require the Corps to not only identify EJ concerns but actually address disproportionately high and adverse human health or environmental effects of its permitting action. EO 14096 at Sec. 2 (defining environmental justice). The Corps' guidance implementing these orders states the agency's goal of "fair treatment and meaningful involvement" of all people to ensure that "no group bear[s] a disproportionate burden of both environmental *harms* and environmental *risks*" of a federal permitting decision. *See* Memorandum from U.S. Army Corps of Eng'rs, *Implementation of Environmental Justice and the Justice40 Initiative*, 2 (Mar. 15, 2022). Additionally, the effects of climate change fall disproportionately on tribal communities whose cultures and livelihoods are intertwined with the environment. The Corps is required to give special consideration to these climate justice concerns as well. Exec. Order 14008, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7,619 (Feb. 1, 2021). These executive orders task the Corps with identifying and addressing public health and environmental effects and risks that disproportionately impact the Band and its members. *See also* Exec. Order 13990, "*Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*," 86 Fed. Reg. 7,037 (Jan. 20, 2021). EJ concerns can trigger the requirement to prepare an EIS because they exacerbate the severity of environmental and human health effects for certain populations, increasing the significance of a Project's environmental impacts. *City of Port Isabel v. FERC*, No. 23-1174, 2024 WL 3659344, at *5–6 (D.C. Cir. Aug. 6, 2024).

In its environmental justice analysis, the Corps takes a myopic view of the Proposed Project's disproportionate adverse impacts to the Band while emphasizing its benefits. The agency is only considering EJ impacts in a one-mile radius around the pipeline even though the Proposed Project will create EJ concerns for all disadvantaged downstream communities. Wright Water at 13. Impacts to area hydrology and water quality can extend more than one-mile downstream. Oil spill risks are discussed throughout this letter. It is important to note, however, that NGL release risks are not considered and may have greater impacts than a one-mile radius – especially risks to safety as a combustible product and risks to health as it contributes to air volatility. This Environmental Justice analysis is especially deficient when considering alternatives to the Proposed Reroute. Specifically, the Corps fails to seriously consider the alternative with the fewest disproportionate effects: the No Action Alternative. This true No Action Alternative has the least environmental justice concerns based on the Corps' own analysis. If the Corps decides to not issue

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federal permits to Enbridge and the existing pipeline is decommissioned, the impacts to the three environmental justice census tracts Enbridge and the Corps identified would be reduced to zero, which is the Band's preferred alternative. DCDD at 129. To the extent that environmental justice considerations are considered for other route alternatives, the Environmental Justice Plan still fails. Appendix A to the Environmental Justice Plan (Appendix 12 of the DCDD) explicitly weighs environmental justice impacts against environmental impacts:

> While socioeconomic and EJ impacts are important in the selection of a route, they must also be weighed against the environmental impacts found in the EIR and the Draft Environmental Impact Statement. A route avoiding most social impacts may not be preferred when impacts to wildlife, wetlands, and other environmental factors are considered.

Environmental Justice Commitment Plan, Appendix A at 37.

Although the comparison itself is not egregious, it is if you consider that route alternatives may have been explicitly drawn to be rejected. As explained, *see supra* II.C.1., MNRD staff have identified discrepancies between route alternatives that suggest they may have been drawn specifically to increase impacts to wetlands and waters in a manner that made them unreasonable, even though other route alternatives avoided the same impacts. In an environmental justice analysis, this route gerrymandering must be disclosed and explicitly analyzed for impacts to environmental justice communities.

Further, the Corps analysis is biased because it disclaims jurisdiction to consider the Project's disproportionate effects while emphasizing its benefits. *See e.g.* DCDD at 130, 109. For example, the DCDD lists benefits to the economy and small businesses to support its conclusion that the Proposed Project complies with the agency's EJ mandates and is in the public interest. *See id*. at 130 (discussing a "positive" impact to the economy and jobs); *see also id*. at 77 (discussing increases to local tax revenues). But just as the Corps does not have jurisdiction to "convey and alter property rights," or consider "operation of the pipeline," it also does not have jurisdiction over business activities or local tax revenues, yet the agency considers these benefits anyway to support its conclusions. The Corps cannot have it both ways in its EJ analysis, it cannot disregard impacts to the Band as outside the scope of its review while expanding that scope to consider local benefits. *Id*. at 76, 130. The Corps must conduct an unbiased review of this Project's disproportionate impacts that considers all the EJ concerns the Proposed Project will create, even those outside of a one-mile area from the Proposed Project's centerline.

This Proposed Project will exacerbate disproportionate environmental burdens faced by the Band and its members. There are EJ concerns with the Proposed Project's greenhouse gas emissions, potential spills, increased flooding, and water quality degradation. Climate change has already dramatically increased flooding around the Reservation, causing damage to cultural properties, damaging roads, disrupting businesses and livelihoods, and harming the Band's members. *See e.g.,* Flood Damage 2016, Bad River Band (July 2016).[20] This Proposed Project will not only hasten climate change but will also create ideal conditions for more flooding by eliminating tree canopy and compacting surfaces. Wright Water at 5-12. These conditions will

[20] *Available at*: https://www.badriver-nsn.gov/wp-content/uploads/2019/12/2016Flood_FloodDamage.pdf

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negatively affect the area's hydrology and water quality. *See id.* Further, the pipeline could cause a catastrophic oil spill, drilling fluid release, and erosion affecting the entire area. *See id*. at 4 (identifying crude oil release among foreseeable effects). Floods, oil spills, and water quality degradation may adversely affect environmental justice populations outside of the one-mile impact area the Corps identifies. *Id.* at 13. The Corps must consider EJ concerns resulting from this Project's positive and negative direct, indirect, and cumulative impacts to properly assess compliance with EO 12898 and related orders.

The Band repeatedly asked the Corps to consider the disproportionate human health consequences of the Proposed Project to the Band's members who rely on subsistence practices. *See* Band' s 2022 Comment 2022 Letter at 19-20. However, the Corps does not identify or address potential EJ impacts that will result from the Proposed Project's alteration of ecosystems that support plants and animals with traditional uses. DCDD at 110. The Corps has not developed any facts in the DCDD to support its conclusion that the Proposed Project "is not expected to result in a disproportionately high adverse impact to minority or low-income populations [engaged in subsistence practices] due to the abundance of similar forested/shrub habitat in the near vicinity." *Id*. at 29. The Corps has not conducted any specific analysis of subsistence resources used by the Band's members in the pipeline corridor or in the supposedly "similar" wetlands. The Corps has also explicitly declined the Band's requests to evaluate plants via an ethnobotanical survey.

Moreover, the DCDD fails to demonstrate that the Corps takes the problem of human trafficking near Enbridge's work sites seriously. The Band raised these concerns in its March 2022 Comment Letter to the Corps. Band's 2022 Comment Letter at 20-22. There are many recent incidences of human trafficking and violence against women by employees and contractors on fossil fuel projects. *See e.g.,* Candice Brand, *Exploiting More Than the Land: Sexual Violence Linked to Enbridge Line 3 Pipeliners*, Truthout (March 16, 2021),[21]; *See also e.g.,* Sarah Rieger, *2 workers on Enbridge's Line 3 pipeline arrested in sex trafficking sting*, CBC News (Jul. 1, 2021).[22] But the Corps simply accepts Enbridge's human trafficking plan and disclaims jurisdiction to evaluate the issue further. Such a plan was also in place for the Line 3 project in Minnesota, but it did not prevent an increase in human trafficking. *Id*. As the Band stated in its 2022 Comment Letter, the Corps should exercise its discretion to require Enbridge to demonstrate that it has a plan to work with local authorities and that there are adequate resources available to prevent an increase in human trafficking and support victims. Training Enbridge staff regarding reporting is not sufficient to address this problem.

Enbridge's Environmental Justice Commitment Plan, DCDD, Appendix 12 ("EJ Plan"), does not address any of the effects discussed in this comment. The Plan's "commitments" to address EJ concerns (at least the ones it even acknowledges) will not be effective. Most of the measures identified are conditions that Enbridge already must comply with, such as environmental conditions in its permit, and are not tailored to address disproportionate effects. *See* EJ Plan at 3.

Finally, the Corps' comment process for the Proposed Project presented unjust obstacles to public participation. The Corps process is meant to provide accessible, frequent, and meaningful

[21] *Available at*: https://truthout.org/articles/exploiting-more-than-the-land-sex-violence-linked-to-enbridge-line-3-pipeliners/

[22] *Available at*: https://www.cbc.ca/news/canada/calgary/enbridge-line-3-sex-trafficking-arrests-1.6087743

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opportunities to comment on the agency's proposal and influence its final decision. EO 14096 at Sec. 3(ix)(C); EO 12898 at Sec. 3-301. For the DCDD, the Corps initially provided only a month for written public comment and scheduled a public hearing only 15 days after the public notice was posted. The Corps then changed information in the DCDD throughout the public comment period. The continuous changes to the information about the DCDD hindered the public and the Band's ability to provide comments responsive to the Corps' proposed action. As noted throughout this letter, there is also information still missing in the DCDD. Without a full analysis of the Proposed Project's impacts the public and the Band cannot adequately comment. The Corps' process for public participation does not comply with the executive orders on environmental justice.

The Corps' analysis of this project's disproportionate impacts fails to comply with the mandates of the environmental and climate justice executive orders. The Corps should initiate a properly scoped EIS process for this permit so that it can adequately address all of this Proposed Project's EJ concerns.

IV. THE PROPOSED REROUTE PROJECT IS NOT IN THE PUBLIC INTEREST

The Corps' public interest review is intended to evaluate the Proposed Project's probable impacts, including cumulative impacts of proposed activity and its intended use on the public interest. 33 C.F.R. § 320.4(a). "The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments." 33 C.F.R. § 320.4(a). The District Engineer cannot grant a permit for activity that would not comply with the Section 404(b)(1) Guidelines, or if the District Engineer determines that the Proposed Project would be contrary to the public interest. 33 C.F.R. § 320.4(a).

A. The Proposed Project is Not in the Public Interest

General criteria to consider in evaluation of the Proposed Project include the extent of public and private need, the "extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited," and "[w]here there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work." § 320.4(a)(2)(i)-(iii). The public interest analysis in the DCDD completely glosses over these criteria in a light already favorable to the applicant. DCDD at 88.

In objectively weighing these criteria, they weigh against the Proposed Project. There is an "unresolved conflict as to resource use" when it comes to the area wetlands and hydrology, which will be permanently impacted by construction, maintenance, and operation of the Proposed Project. And there are practicable reasonable alternative methods to accomplish the objective of the Proposed Project, which would avoid the unresolved conflict. *See supra* II.C.1, III.C.2. The DCDD also does a hurried analysis of the benefits and/or detrimental effects of the Proposed Reroute on public and private uses. The regulations require a consideration of the benefits and/or detrimental effects "*to which the area is suited*." *Id.* at § 320.4(a)(2)(iii) (emphasis added). The DCDD does not describe "to which the area is suited," and if the Corps were to examine that balance without bias, it would have to consider how the area is suited for use by the Bad River Band and our members because the Proposed Reroute crosses ceded territory and negatively

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impacts treaty-protected resources. The Corps also fails to seriously consider the environmental detriments of the project, as explained at length in *supra* II. And as explained below, the Corps cannot only rely on economic benefits without also recognizing the likely economic harm that the Proposed Project may bring to the region.

B. The Corps Should Conduct an Independent Review of the Economic Needs of the Proposed Project.

In the DCDD, the Corps presumed Enbridge, because it is a private enterprise, conducted "appropriate economic evaluations" and that the Proposed Reroute is "economically viable, and needed in the marketplace." DCDD at 76; 33 C.F.R. § 320.4(q). However, the Corps should not defer to Enbridge's economic analysis. The Corps' implementing regulations permit the district engineer to forego this presumption and conduct an independent review "of the need of the project from the perspective of the overall public interest." 33 C.F.R. § 320.4(q). The Corps should do so here, as expert findings challenge and contradict this presumed viability and need.

The Corps should not rely on the applicant's claim of economic need for the Proposed Project and must instead conduct an independent evaluation. In the Band's trespass and public nuisance suit against Enbridge*, multiple* experts suggested "several options for replacing" the existing Line 5 pipeline. *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Company, Inc.*, No. 19-CV-602-WMC (W.D. Wis. 2022) ("*Bad River Band*"), Expert Report of Sarah Emerson at 1 (Attachment Q). Line 78, which is currently operating below capacity, could be used to offset the Line 5 shutdown. *Id.* at 24-6. Increasing transportation by ship and rail is also a viable option. *Id.* at 12-15. Experts also suggested reversing the direction of Line 9, which has already been done twice and will not require additional capital costs. *Bad River Band*, Expert Report of Graham Brisben at 54 (Attachment R). A projected decline in global oil and NGL demands may also lessen reliance on the Line 5 pipeline. *See Bad River Band*, Expert Rebuttal of Jill Steiner at 40-41 (Attachment S). Considering the significant expertise that has already demonstrated that Line 5 is not needed in the marketplace, the Corps must independently consider the economic need and economic impacts of the Proposed Reroute.

Even Enbridge's experts admitted there is capacity in the current system to absorb Line 5 products. *Bad River Band,* Expert Report of Neil Earnest at 64-5 (Attachment T). For instance, some refineries "can make up any shortfall in crude oil receipts with crude oil delivered by rail or tanker." *Id.* An Enbridge expert also identified several refineries with idle rail facilities capable of transporting oil. *Id.* at 54.

A subsequent report from PLG Consulting confirmed alternate routes to transport Line 5 products to refineries. Within months of a Line 5 shutdown, 87% of products will be transported to refiners. *See* PLG Report. The PLG Report underlines that numerous Line 5 replacement options exist because the "sophisticated and large energy firms" have been creating "contingency plans" for the past six years in preparation for "a Line 5 shutdown." *Id.* at 8. Thus, the shutdown of the Line 5 pipeline would not create a drastic shock because of this resilience already present in the market.

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In addition to conflicting expert reports regarding the economic need of Line 5, the applicant also failed to consider the cumulative economic impacts of the project. The Corps has a duty to independently conduct a cumulative impacts analysis of Line 5. 33 C.F.R. § 320.4(a)(1). This means the applicant must weigh the "benefits which reasonably may be expected to accrue for the proposal" against the "reasonably foreseeable detriments." *Id.* Failure to consider an economic impact could undermine the presumption and prompt an independent review. *Cf. Hoosier Env't Council, Inc. v. U.S. Army Corps of Eng'rs*, 105 F. Supp.2d 953, 1011 (S.D. Ind. 2000) (determining the specific finding that economic benefits accrued from the project indicated the Corps considered and balanced the economic impacts of the project).

Rather than weighing cumulative impacts, the DCDD primarily focused on the Proposed Project's economic benefits while disregarding its possible negative impacts. The DCDD did not adequately weigh the "demand for short-term housing" or that the "[s]upply of housing and other goods may not meet the short-term demand in the local area." DCDD at 75-76. Enbridge also failed to address the Proposed Project's strain on the regional economy due to construction, permanent right of way, or petroleum spills. Tourism is a lynchpin for local businesses, many of which offer activities and adventures in the Great Lakes and surrounding areas. Such businesses could face financial loss and countless jobs would be put in jeopardy due to the Proposed Project. The Corps cannot ignore that the company's financial interests are at odds with local businesses which also contribute to the local economy. Because of this conflict, the Corps must prepare an independent review of the economic need of the Proposed Project.

C. The Corps Did Not Weigh Wetlands Accurately or Adequately in the Public Interest Review

The Public Interest factors state that "the unnecessary alteration or destruction of [wetlands] should be discouraged as contrary to the public interest" 33 C.F.R. § 320.4(b)(1). Relevant to the evaluation of the Proposed Reroute in this area, wetlands considered to perform functions important to the public interest include: wetlands that have significant natural biological functions, wetlands where alteration of which "would affect detrimentally natural drainage characteristics, sedimentation patterns…current patterns or other environmental characteristics," and wetlands which are groundwater discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas. *Id.* § 320.4(b)(2)(i), (iii), (vi). Wetland areas, wetland complexes, and larger wetland ecosystems serve the public interest. And "the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources," such that evaluations of the public interest may include complete or interrelated wetland data. *Id.* § 320.4(b)(3).

The Corps skips all of this analysis in the public interest review in the DCDD and simply concludes that the Proposed Reroute's impacts on wetlands would be temporary, minimized, and would have minor long-term effects from a public interest perspective. As MNRD Staff and experts have noted, the impacts on wetlands will very likely be permanent, and the destruction of wetlands and wetland functions will not be adequately minimized or mitigated. *Supra* II.A., II.C.2.b., II.C.3.a. Further, if the Corps were to actually evaluate the Proposed Reroute's impact on wetlands as described in the Corps' own public interest regulations, it would find that this large area of wetlands that would be permanently converted does serve the public interest in the Bad River watershed and in the Lake Superior Basin. The cumulative impacts to wetlands from the

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Proposed Project will be immense as nearly a 100 acres of wetlands are trenched or blasted, and then permanently converted to different wetland functions. The Corps cannot issue a permit for special wetlands unless the Corps has made a determination that the benefits outweigh the damages. The Corps has made a preliminary determination that there will be a minor impact to wetlands, but the Corps' can only reach that conclusion if it severely undercounts the Proposed Project's detrimental impact to wetlands.

D. The Corps Failed to Adequately Consider Other Elements Of the Public Interest

The Corps rushes through several factors of the public interest analysis that warrant further consideration. Several of the factors relating to environmental harms are erroneously dismissed because they are based off of faulty assumptions that the Proposed Reroute will have minor impacts. These include greenhouse gas emissions, air quality, hazardous materials, oil spills, flood hazards, fish and wildlife, water and conservation, and water quality. DCDD §§ 7.5, 7.6, 7.10, 7.11, 7.16, 7.17. The Corps must analyze the impacts the Proposed Project will have on the public interest in environmental harms after it has properly evaluated the full spectrum of those harms, as outlined above in *supra* II.

The Corps quickly, and incorrectly, dismisses the Proposed Reroutes impacts to historic and cultural values by claiming it complied with consultation requirements under Section 106 of the National Historic Preservation Act and claiming that it could not find resources in the area that were eligible for listing in the National Register of Historic Places. DCDD §§ 7.7, 7.8. As explained below, *infra* V., the Corps has not complied with either Section 106 consultation, nor has it properly evaluated historic sites. However, the Corps must give due consideration to "effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, historic properties*...including Indian religious or cultural sites*." § 320.4(e)(emphasis added). The bar for evaluation of the cultural and historic sites as it relates to the public interest is very low, and yet even then the Corps has not cleared it in the DCDD. The Corps must re-evaluate the public interest in cultural and historic values in consultation with the Bad River Band.

The Corps also artificially inflates the public interest need for energy development. DCDD § 7.18. The flaw is two-fold: the Corps erroneously relies on the presumption that the proposal is necessary in the marketplace, and the Corps ignores that the product can still be transported via alternative routes or methods. Alternative routes can still fulfill the energy needs that Enbridge claims they need to meet. Based on this information, the Corps cannot make a preliminary determination that the Proposed Reroute is in the public interest. The Corps also cannot make a preliminary determination that the benefits outweigh the detriments. The Corps must conduct another public interest analysis once all the environmental data and analyses are complete so it can see the full spectrum of the benefits and detriments of the Proposed Reroute.

V. THE CORPS HAS NOT MET ITS OBLIGATIONS UNDER THE NHPA

The Corps must complete adequate consultation under the National Historic Preservation Act with the Band before it may authorize the Project. 54 U.S.C. § 302706. Consultation is not complete because the Corps has either failed or rejected to gather information the Band offered. The Band has repeatedly urged the Corps to accept additional information and has requested

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additional NHPA consultation, throughout this permitting process. *See* MNRD THPO Report at 3-4. There are several issues outstanding that the Corps must resolve before concluding that NHPA consultation is complete. Additionally, the Corps' scope of review is overly narrow and excludes eligible properties. The Corps has not taken into account all the direct, indirect, cumulative, and foreseeable adverse effects of this Proposed Project. The Corps may not issue any federal permits for the Proposed Reroute until the agency completes Section 106 consultation and rectifies the procedural and substantive deficiencies in its treatment of the Band's traditional cultural properties.

A. The Corps Must Follow Part 800 Regulations to Comply with the NHPA.

Section 106 of the National Historic Preservation Act ("NHPA") requires that the Corps consult with the Band regarding the Project's potential adverse effects to historic properties eligible for listing in the National Register of Historic Places. Consultation under NHPA is mandatory and the Corps does not have the discretion to ignore the Band's input on the Proposed Project's effects to traditional religious and cultural properties. Section 306108 requires that that the Corps consider all effects to eligible historic properties before authorizing an "undertaking," here, a CWA Section 404 and a Rivers and Harbors Act Section 10 permit to Enbridge for its Proposed Reroute. 54 U.S.C. § 306108.

The Advisory Council on Historic Preservation ("ACHP") regulations govern the conduct of federal agencies with respect to Section 106. 36 C.F.R. pt. 800; 54 U.S.C. 304108. Those regulations should govern the Corps review of this permit application, not "App C." DCDD at 23.[23] The Corps has recently proposed to update its regulations such that they comply with the mandates of NHPA. Processing of Department of the Army Permits; Procedures for the Protection of Historic Properties, 89 Fed. Reg. 9,079 (Feb. 9, 2024). To properly consult with the Band, the Corps must follow the standards set forth in the ACHP's regulations in Pt. 800 instead of applying App C. The Corps should reevaluate the effects of this Project in an EIS under a proper scope and consistent with the consultation requirements of the ACHP's regulations.

B. The Corps' Process for Consulting with the Bad River Band Does Not Comply with NHPA

Section 106 consultation "must recognize the government-to-government relationship between the Federal Government and Indian tribes" and is to be "conducted in a manner sensitive to the concerns and needs of the Indian tribe." 36 C.F.R. § 800.2(c)(2)(ii)(C). The goal of consultation is to seek agreement with the consulting THPOs regarding the nature, scope, and resolution of adverse effects. *See* 36 C.F.R. § 800.2(d). The Corps may not authorize this project without appropriate consultation. This includes consultation regarding properties that are off-Reservation. 36 C.F.R. § 800.2(c)(2)(ii)(C).

Here, the Corps has treated consultation as an information sharing exercise, selectively incorporating feedback from the Band in furtherance of authorizing the Project. In addition, the Corps conducted almost all early consultation jointly with eighteen different THPOs. *See* DCDD, App. 16 at 1-3 (noting a bi-weekly THPO meeting without discussing which tribes attended). The

[23] The Corps' own regulations concerning historic preservation do not comply with the statutory mandates of Section 106. 33 C.F.R. Pt. 325, Appendix C ("App. C"). There are several examples where the Corps' regulations conflict with Part 800.

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Corps failed to conduct individual consultation with the Band until March 21, 2021. *Id*. at 3. Tribes are not interchangeable and the Band's concerns and interests regarding historic properties may be distinct, or even in opposition, to the concerns and interests of other tribes.

The Corps made significant determinations regarding the Project's impacts and scope without consulting the Band early in the process. ACHP's regulations provide that "[c]onsultation should commence early in the planning process, in order to identify and discuss relevant preservation issues…" 36 C.F.R. § 800.2(c)(2)(ii)(A). The Corps initiated consultation after it determined the scope of review and after the applicant finished first drafts of the Phase I Archaeological Survey and Traditional Cultural Resources Survey. *See* DCDD, App. 16 at 1 (discussing initial meeting with THPOs was after the Corps received the Phase I Archaeological Survey and DDTCRS). The process for investigating cultural resources and historic properties must include the tribe at *all* steps. These historic property reviews should have been prepared in consultation with the Band rather than shared with the Band once finished. Information sharing is not sufficient to satisfy Section 106.

The Band repeatedly complained to the Corps that the scope of these reviews was too narrow to assess all of this Project's effects to historic properties. The Band also raised substantive and methodological concerns with Enbridge's surveys. *See* MNRD THPO Report at 3-4 (discussing comments over four years regarding the scope and substance of the Corps' review). This consultative feedback came too late to influence these documents. Sharing the finished product with the Band after the fact does not rectify the fundamental error that Enbridge and the Corps prepared early historic property documentation without tribal consultation.

The Corps' request for historic property documentation from the Band does not remedy the agency's failure to consult individually with the Band early in the process. Consultation is not satisfied when an agency simply sends a "request for the Tribe to gather its own information about all the sites in the areas." *Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1118 (S.D. Cal. 2010). The Corps only requested that the Band prepare an oral history report after it raised objections to the scope and content of Enbridge's flawed documentation. *See* MNRD THPO Report at 1 (discussing problems with consultation timeline). In addition, the Corps inappropriately narrowed the scope of the oral history report provided by the Band. The Corps rejected the Band's original scope of work, which included additional interviews, archival research, an ethnobotanical survey, and a riparian archaeology survey. *See* Letter from Army Corps to Bad River Band, 2020-00260-WMS, 5 (March 25, 2022) (Attachment X) (declining to conduct additional historical investigation and limiting oral history interviews to a maximum of 25).

The Band considers a broadened cultural resources survey necessary to properly document all effects of this Proposed Project. The agency stated that it would only consider those aspects of the report that touch on historic properties within its unlawfully narrow Area of Potential Effect ("APE")—an APE determined with no tribal consultation. *Id*. ("I encourage you to revise the proposed interview scope to a level commensurate with gathering information on the identification of historic properties within the APE for the proposed undertaking, considering the degree of Federal involvement, past studies, and the potential effects of the regulated activity on historic properties. Based on these factors, I consider an appropriate number of interviews to be approximately 25.") *Id*. Additionally, the Corps was prepared to move forward with the Proposed

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Project if the Band could not quickly negotiate a funding agreement with the applicant. *Id*. ("If my staff and I do not receive a response within this timeframe for consideration, we will conclude you do not intend to conduct interviews and we will continue our consultation with you using the information and data already gathered in the identification of historic properties, including the applicant-provided revised reports and all information received from consulting parties."). *Id*.

The fact that the Corps accepted an oral history report from the Band does not relieve the Corps of the obligation to conduct robust consultation regarding this Proposed Project's impacts on historic properties. The Corps must conduct additional investigations and prepare documentation of all historic properties under a proper scope and in consultation with the Band. The Corps should withdraw Enbridge's pending permit application and initiate an EIS to rectify the severe procedural errors in the Section 106 consultation process for this Proposed Project.

C. The Corps Failed to Incorporate Consultation from the Band into its Draft Decision

The Section 106 process has four steps: (1) initiation, (2) identification, (3) assessment, (4) resolution. The Corps' draft decision document treats these four steps as ministerial box-checking exercises and does not adequately incorporate or address the Band's concerns regarding historic properties. 33. C.F.R. § 800.3-800.6.

1. Initiation

The Corps' initiation of consultation with the Band is inadequate because the Corps improperly defined the undertaking. Misidentifying the federal undertaking can result in an unlawfully narrow consultation process with the THPO. For this Proposed Project, the Corps defines the undertaking as "[t]he proposed WI L5R activities requiring Corps authorization," which "includes the permanent discharge of fill material into 998 square feet (0.02 acre) of wetlands, and temporary discharges into 101.1 acres of wetlands and 0.20 acre of non-wetland waters (i.e., streams, swales, and ditches) to construct the proposed WI L5R pipeline." DCDD at 11, 80. The Corps definition of the undertaking for purposes of Section 106 consultation and NHPA review is too narrow. The Corps' definition ignores the primary motivating purpose of Enbridge in seeking a permit: to construct the entire 41-miles of the Line 5 segment relocation project and operate it indefinitely. Due to the misidentification of the undertaking, the Corps' subsequent analysis is flawed.

The Corps also misidentified the APE. At the identification step, the Corps is required to determine if there are eligible properties within that area potentially affected by the Proposed Project. The Corps is required to establish the APE in consultation with tribes that may have historic or cultural associations with the site in question. The Corps must gather data, seek information from consulting parties, and gather information from Indian tribes to assist in identifying properties, even those located off tribal lands, which may be of religious and cultural significance to them and eligible for listing in the NRHP. ACHP regulations define the APE as:

> [T]he geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature

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of an undertaking and may be different for different kinds of effects caused by the undertaking.

36 C.F.R. § 800.16

Here, the Corps defined the APE as the 100-meter radius around the undertaking, which in turn was narrowly defined to only include specific fill activities. DCDD at 24. The Corps reached this conclusion without consulting with the Bad River THPO on the scope of Section 106 consultation. What little input the THPO was able to provide, the Corps summarily disregarded. Indeed, rather than extensively review documentation and information identified in § 800.4(c)(1), the Corps only acquiesced to receiving an oral history report after months of requests by the Band. *See* MNRD THPO Report at 3-4 (discussing past comments); Letter from Army Corps to Bad River Band, 2020-00260-WMS (March 25, 2022). Even then, the scope of that report was restricted by the Corps to only discuss "jurisdictional" activities and provided for a limited sample size. Had the Corps properly incorporated consultation into its determination of the undertaking to include the entirety of the pipeline and included all of the pipeline's effects, as consultation urged, then it could have accurately assessed this project. *See* Letter from Band to Army Corp (July 8, 2021) (Attachment Y). At minimum, the APE should include those properties potentially affected by permanent changes to rivers and adjacent wetlands, as described *supra* II.C.2. The APE should also consider property potentially impacted by a future oil spill or NGL release. This would include all eligible properties downstream of the pipeline within the watershed. The Corps should carry out additional consultation with the Band on the appropriate APE before authorizing this project.

2. Identification

Once the Corps defines the APE, the agency "shall" take steps to identify properties within the APE, incorporating information gathered from tribes and in consultation with THPOs. 54 U.S.C. § 302706. In identifying properties, the Corps' level of effort should reflect the potential effects of the undertaking and the level of federal involvement. 36 C.F.R. § 800.4. Once the Corps identifies traditional properties in consultation with the Band, it must apply the national register criteria to evaluate their eligibility and historic significance. 36 C.F.R. § 60.4. National Park Service, U.S. Dep't of Interior, *National Register Bulletin #38: Guidelines for Evaluating and Documenting Traditional Cultural Properties*, 13 (1992) ("NR No. 38"); National Park Service, *How to Apply the National Register Criteria for Evaluation*, National Register Bulletin No. 15 (1990). Evaluation of historic significance should be from the perspective of the Band and ensure that the Corps is not dismissing eligible properties for ethnocentric reasons. NR No. 38 at 11, 25 ("The word 'our' in this criterion may be taken to refer to the group to which the property may have traditional cultural significance, and the word 'history' may be taken to include traditional oral history as well as recorded history.").

Bad River, Potato River, Bear Trap Creek, Silver Creek, and adjacent culturally significant wetlands, are all eligible for listing. As discussed in the Nesper Report, these sites are associated with significant persons, the broad patterns of the Band's history, primarily the Band's history of treaty rights advocacy, and maintain environments critical to the preservation of historic artforms. *Id*. at 10-17. Additionally, the Mixed-Blood Allotments at Mile Marker 18.9 are eligible for listing. *Id*. at 20-21. These allotments are associated with the lives of individuals who were integral to the historic treaty negotiation that led to the creation of the Bad River Reservation. *Id*. These areas can

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be considered part of the Band's historic homelands and could potentially be restored to the Band in a fee to trust process. *Id*. Each of these properties are eligible under NR No. 38 and the eligibility criteria. The Corps should also conduct additional reviews of other water crossings that are potentially significant and eligible, as discussed in the report of the Bad River THPO. MNRD THPO Report at 5. *See also* Oral History Report, App. 5 (Table of Findings).

The Corps ignored the Band's concerns regarding identification of historic properties for ethnocentric reasons. *See* NR No. 38 at 13. The Corps does not, for example, adopt the perspective of the Band in evaluating the significance of various water crossings. These perspectives can include the effects of being present in wetlands, waters, and rivers, and interacting with seasonal fisheries, aquatic species, and plants. The Corps states that while water is sacred from a tribal perspective, that does not render it eligible for listing. DCDD at 108 ("The Corps recognizes it is frustrating for tribes to hear that water itself does not meet the criteria to be eligible as a historic property under the [NHPA]."). As the Nesper Report discusses, the Corps misunderstands the significance of the particular waters, rivers, and wetlands that constitute the historic homeland and preserve the cultural traditions of the Bad River Band. Nesper Report at 3. These waters are integral to the Band's understanding of our own history, our oral tradition, and our cosmology. The fact that the significance of the and various riverine sites is derived from the Band's oral tradition and cultural associations with particular waters is no reason to dismiss their eligibility. NR No. 38 at 13. The very point of Section 106's mandate to consult with tribes before authorizing projects is to ensure that the Corps is not glossing over Indigenous properties it would otherwise consider insignificant and ineligible. The Corps prioritized expediency rather than engaging with the Band's identification of eligible properties.

The Corps fundamentally ignores the mandates of Section 106 and the ACHP's regulations that govern consultation at the identification stage. The Corps is required to undertake this process in a way that facilitates genuine incorporation of the Band's perspective into identifying properties. In the end, the Corps found that only a single traditional cultural property, the Potato River, is eligible for listing. As a result of the deficiencies at the identification stage, the Corps has not fulfilled its obligations under Section 106. The Corps should reassess eligibility with proper consultation.

3. Assessment

The Corps has not properly identified the Project's adverse effects to eligible properties in consultation with the Band. The adverse effects analysis that the Corps undertook in the DCDD is flawed because it does not include all of the potential adverse effects to historic properties eligible for listing. The ACHP's regulations state:

> An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse

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> effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

36 C.F.R. § 800.5

As a result of its ethnocentric and underinclusive eligibility determinations, the Corps is not considering certain significant traditional cultural properties eligible. Thus, it fails to analyze the project's effects to *all* potentially affected properties. The Corps must broaden its investigation, include eligible properties discussed in this comment within the scope of its review, and then review the pipeline's effects.

The Corps' assessment of effects is erroneously limited to assessing the direct effects of construction activities to the Band's traditional cultural properties: dredging and filling wetlands, impacts associated with construction vehicles, conversion of wetlands, and potential sedimentation or other pollution effects. The Corps dismisses these effects stating there are similar cultural properties in the area that support the same uses. *See* DCDD at 110 ("Many culturally important plant species are ubiquitous throughout the ceded territory and would remain available for harvest and use."). But the Corps does not justify its conclusion because it fails to describe where these areas are or their cultural attributes. The Corps also ignores that these areas are not interchangeable. Band Members have described their uses and patterns on the landscape and rivers where families have fished, gathered, hunted, and lived on for hundreds of years. This is the fundamental difference between Band members living along the rivers and areas in this region and a private company with the applicant's financial structure. The land and water is reserved, necessarily, for people uses. There is nowhere else to go and there is no substitution or rearranging resources. In contrast, the private company is financially structured to go anywhere. Moreover, the Corps' effects analysis is not inclusive of all of the foreseeable effects of the pipeline to historic properties and does not mention indirect or cumulative effects at all. The Corps ignores Enbridge's primary motivation in seeking federal permits: to build and maintain an operational pipeline. The indirect effect of issuing Enbridge a Section 404 and Section 10 permit is to allow Enbridge to complete its project. Yet, the Corps ignores all the effects associated with the pipeline's maintenance and operation to historic properties. The pipeline will permanently change river patterns and alter adjacent wetlands. It will also continue to expose the Reservation to the risk of an oil spill. It will accelerate climate change by facilitating large amounts of greenhouse gas emissions. The right-of-way will interfere with the aesthetics of properties eligible for listing. And the presence of the pipeline right-of-way around the Reservation will hinder access to sacred and cultural sites used for ceremonial and treaty-based purposes. The only effects the Corps assesses are the possible removal of cedar trees from the Potato River site and alteration of archaeological resources near Silver Creek. The Corps ignores all other foreseeable effects of the Proposed Project and closes its eyes to the real consequences of this pipeline for the historic integrity of the Band's cultural property and heritage.

4. Resolution

The Corps' resolution of adverse effects is a meaningless exercise because the agency resolves the artificial effects that it constructed, over a limited area pursuant to a flawed consultation process. But even taking the resolution analysis at face value, it fails to stand on its own legs. As for the cedar trees potentially affected by the pipeline at the Potato River, the Corps'

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proposed resolution gestures at Enbridge's discretionary commitment to avoid the trees if construction permits. DCDD at 124. This does not ensure that the trees will be preserved, and it also ignores the fact that the trees will be rendered inaccessible as a result of the pipeline right-of-way, an effect that the Corps does not acknowledge, much less resolve. *See* Wis. Stat. § 943.143. Likewise, the Corps proposed fencing off site 47AS0442. DCDD at 104. This does little to address the possible effects to other historic objects and properties that the site could still yield. The Corps resolution analysis does not address all of the effects of this Proposed Project on historic properties.

The Corps consultation process was flawed from the start. The agency predetermined that the NHPA review would be so narrow as to eliminate consideration of the Band's valid concerns about the Projects adverse effects to the integrity of its historic property. The Band was not consulted until after the Corps set the scope of review and conducted initial investigations into eligibility and effects. The flawed analysis the Corps did prepare regarding eligibility, effects, and resolution does not address the Band's concerns. The Corps should reinitiate consultation with the Band and prepare an EIS to rectify the ethnocentric perspective and flawed eligibility and effects analysis in the Corps' NHPA review for this Proposed Project.

VI. THE CORPS HAS NOT MET THE REQUIREMENTS OF THE ENDANGERED SPECIES ACT

A. The Corps Has Not Included the Bad River Band in ESA Consultation

The Corps is required to consult with U.S. Fish and Wildlife Service ("USFWS") pursuant to Section 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531 et seq. ("ESA"), because the Line 5 Proposed Reroute may affect federally listed endangered or threatened species or designated critical habitat. Following formal consultation with USFWS, the agency requesting or initiating consultation must determine "whether and in what manner to proceed with the action in light of its Section 7 obligations and the Service's biological opinion." 50 C.F.R. § 402.15(a).

In the Corps' initial public notice in 2022, the Corps made a determination that the Proposed Reroute was "not likely to adversely affect" the Canada Lynx, Gray Wolf, and Northern Long-Eared Bat. The Band flagged that the Corps' initial determination was made without consulting the Bad River Band and relied on inadequate information. Band's 2022 Comment Letter at 43-45. The Band also flagged that had the Corps and USFWS consulted with the Band on listed or proposed to be listed species within ceded territory, the Band could provide information on culturally important species, such as Lake Sturgeon. *Id*. at 43. Unfortunately, the Corps has not addressed any of the issues that we flagged for previous ESA consultations, nor has the Corps included the Band in any current ESA consultations.

Since the initial Corps Public Notice, the listing status for the northern long-eared bat has changed from threatened to endangered and the tricolored bat is now proposed to be listed as threatened. DCDD at 98. Due to these changes, the Corps has re-initiated formal Section 7 consultation for the northern long-eared bat and the tricolored bat. DCDD at 98-99. The Band was not made aware of or included in this reinitiation of formal Section 7 consultation. MNRD T&E Report at 6. Nor has the Band had a chance to review the Revised Biological Assessment alluded to in the DCDD. The lack of consultation with the Band, especially for this reinitiation of formal consultation, is a brazen dismissal of the comment letter we sent the Corps in March 2022.

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This action is still inconsistent with the Corps' responsibilities under NEPA, the ESA, the Treaty Rights MOU, and Executive Order 13175, *Consultation and Coordination With Indian Tribal Governments*, 65 Fed. Reg. 67,249 (Nov. 09, 2000). The Corps must include the Bad River Band on federally listed threatened and endangered species and their critical habitat within ceded territory.

Consultation with the Band is especially important as the revised Biological Assessment is partially based on new USFWS guidance, which recommended that impacts be evaluated "using a new combined species, range-wide determination keys (DKey)." DCDD at 99. The Corps does not disclose in the DCDD, or any of its attachments, the Corps' analysis or the methodology it used in conjunction with the new guidance. It is possible that the methodology or the manner of assessments may have changed. Excluding the data, methodology, and analysis from the DCDD does not cure any of the issues surrounding transparency we flagged in our March 2022 letter.

B. The Corps Must Include Additional Information in the Evaluation of Threatened and Endangered Species

The Bad River Band MNRD staff, as well as GLIFWC staff, are dedicated to ensuring our relatives in the watershed and within ceded territory are protected to the best of our abilities. We do try to keep track of our relatives, especially those in danger of being listed as threatened or endangered, within the area. This includes conducting field visits and evaluating data, research, and other information. The MNRD staff have been continuously requesting consultation on threatened and endangered species to help federal agencies understand the true impacts of their actions and ESA determinations on the species in our region. The Corps (and USFWS) must consider the following information as it evaluates the environmental impacts of the Proposed Reroute.

1. Ma'iingan (the Gray Wolf)

The Bad River Band previously submitted several concerns about the impacts the Proposed Reroute will have on ma'iingan (the Gray Wolf). Band's 2022 Comment Letter at 44. At the time of our 2022 letter, the horrific state wolf hunt had already taken place in 2021 and the USFWS had just relisted Gray Wolves by court order. *See Defenders of Wildlife v. Fish and Wildlife Service*, 21-cv-003344 (N.D. Cal. Feb. 10, 2022). Data on the population post-wolf hunt must be collected, disclosed, and analyzed. The devastating hunt likely had long-term impacts on the population, and further consultation is needed. However, the DCDD omits the wolf hunt and does not consider the impact it had on the ma'iingan population in Wisconsin. The DCDD appears to also rely on cursory data on wolves, rather than actually engaging with MNRD staff on the issue. Despite our requests, MNRD staff have yet to officially consult with the Corps and USFWS on this issue. The Band renews our request to consult with both USFWS and the Corps on the project's impacts to Gray Wolves.

2. Rusty Patched Bumble Bee

The Corps must collect data, evaluate, and consider impacts the Proposed Reroute will have on the Rusty Patched Bumble Bee. The Rusty Patched Bumble Bee is listed as endangered. Endangered and Threatened Wildlife and Plants; *Endangered Species Status for Rusty Patched*

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Bumble Bee, 82 Fed. Reg. 3,186 (Jan. 11, 2017). There is a newly discovered population within the Lake Superior basin and there is at least one hive within 10 miles of the proposed pipeline corridor. Further evaluation is necessary before the Corps can make a determination of impacts to this species. *See* MNRD Threatened & Endangered ("T&E") Report (Attachment H).

3. Monarch butterflies

Monarch Butterflies are a candidate species proposed for addition to the list of threatened and endangered species. *Review of Species That Are Candidates for Listing as Endangered or Threatened*, 88 Fed. Reg. 41,560, 41,570 (June 27, 2023). In 2020, the USFWS determined that the monarch butterfly warranted listing, but that there were higher priority listing actions. *Id*. This does not preclude the monarch butterfly from being listed in the future as candidate species are continuously evaluated. The Corps must gather data and consider the possibility of this determination as part of its analysis of the Proposed Reroute's impacts. *See* MNRD T&E Report at 5.

4. Additional species

Consultation with the Band is required with regard to the Proposed Reroutes potential impact on other listed species, both on- and off- Reservation. In addition to the Gray Wolf, the Rusty Patched Bumble Bee, and the Monarch Butterly, the MNRD has relevant data about the Canada Lynx, Piping Plover, and Rufa Red Knot, including data related to habitat for these species. *See* MNRD T&E Report. The Band has also requested to consult regarding non-listed but culturally important species and their critical habitats.

The Corps and USFWS must include the Bad River Band as it goes through formal consultation under the ESA on the impacts that the Proposed Reroute will have on relatives within the watershed and within ceded territory. The Corps must also collect additional data about threatened and endangered species that will be impacted and disclose their analysis of the impacts the Proposed Reroute will have on those species in a federal EIS.

CONCLUSION

The Corps has not met any of the statutory obligations set forth under the Clean Water Act, the National Environmental Policy Act, the National Historic Preservation Act, or the Endangered Species Act. The information in the DCDD and accompanying appendices were grievously deficient in accurately or adequately disclosing and evaluating the impacts to the environment from the Proposed Project. Findings from MNRD Staff and experts using the criteria in the Section 404(b)(1) Guidelines demonstrate that the Corps' preliminary conclusions that the Proposed Project will only have minor impacts are unfounded. Even using the limited baseline data and vague information, the Proposed Project will have unacceptable adverse impacts individually and in combination with known and probable impacts on the aquatic ecosystem. Further, proposed efforts to mitigate impacts to the aquatic ecosystem are insufficient. Our evaluation of the DCDD and the disclosed impacts to the environment therein also substantiate our concerns that the impacts from the Proposed Project are significant and the Corps must prepare an EIS under NEPA. Based on information available in the DCDD the Corps cannot issue a Section 404 or Section 10 permit at this time.

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The Band again emphasizes the need, and now the requirement, for the Corps to prepare a federal EIS on the Proposed Reroute Project. The Band also requests Government-to-Government Consultation on the issues identified in this comment. The Band also reiterates our position that Section 106 consultation is not complete on this federal undertaking. We look forward to meeting with you to discuss these issues and concerns.

If you have any questions or would like to arrange a technical discussion with MRND staff, please reach out to Naomi Tillison, MNRD Director, nrdirector@badriver-nsn.gov, 715-682-7123, ext 1561. Thank you and we look forward to working with the Corps on this matter.

Please see the signature page attached.

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Sincerely,

Robert Blanchard
Bad River Tribal Chairman

8-30-24
Date

Cc: Bill Sande, Project Lead, St. Paul District of the Army Corps of Engineers, William.M.Sande@usace.army.mil

Colonel Eric Swenson, St. Paul District of the Army Corps of Engineers, Eric.R.Swenson@usace.army.mil

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