

BAD RIVER BAND OF LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS

CHIEF BLACKBIRD CENTER

P.O. Box 39 • Odanah, Wisconsin 54861

May 10, 2024

Colonel Eric Swenson
Army Corps of Engineers
St. Paul District
332 Minnesota St., Suite E1500
St. Paul, MN 55101

Re: Notice of Public Hearing for Enbridge Line 5 Wisconsin Segment Relocation Project

Colonel Swenson,

I am writing on behalf of the Bad River Band of Lake Superior Chippewa (Bad River Band or Band) regarding the Army Corps of Engineers' (Corps) Public Notice issued on May 2, 2024 of a Public Hearing for the Enbridge Line 5 Wisconsin Segment Relocation Project of the Army Permit Application (Public Notice). In this Public Notice, the Corps announces a public hearing to be held in Ashland, WI, on June 4, 2024, regarding the Enbridge Line 5 Relocation Project (Proposed Project). The Band has serious concerns regarding the Public Notice and a Public Hearing and Comment Period at this time. First, a Public Hearing is entirely premature, as the state of Wisconsin has not yet issued a certification under Section 401 of the Clean Water Act (CWA) and the Band has not had an opportunity to review. This certification is a pre-requisite for a CWA Section 404 permit and the underlying information must inform the Section 404 analysis. Second, 15 days is not enough time to review, much less prepare for a Public Hearing and Public Comment on, a Draft Environmental Assessment, Draft Section 404(b)(1) Guidelines evaluation, and Draft Public Interest Review (collectively the DCDD). The Band, and the public, need more than 15 days to review the information in order to provide meaningful input at the public hearing.

The Corps must postpone publishing a Draft EA until after the State of Wisconsin has issued a Section 401 certification and the Band has had an opportunity to review. As a pre-requisite to obtaining a Section 404 permit, Enbridge must obtain a state certification that the Proposed Project will comply with the state's water quality standards. 33 U.S.C. § 1341(a)(1) (Section 401(a)(1)). Under Wisconsin law, the state certification for Section 401 is embedded in the state wetland permit, which has not yet been issued. WI ST 281.36(3b)(a). The state analysis of the Proposed Project's impacts to water quality is an essential component of a Draft EA and the public interest review. Proceeding to publish the Draft EA and take public comment before the Section 401 process is complete will leave out fundamental information on the Proposed Project's environmental impacts and whether it is in the public interest. The Corps

Colonel Eric Swenson
Army Corps of Engineers
May 10, 2024
Page 2 of 3

must hold off until it has the information from the state certification process before moving forward with environmental review.

The Corps must also allow the Bad River Band to analyze the impacts the Proposed Project will have on waters within the Bad River Reservation and include the Band's analysis in a Draft EA and draft public interest analysis. Section 401(a)(2) affords downstream jurisdictions the opportunity to weigh in on proposed projects if they may affect the water quality of their state. 33 U.S.C. § 1341(a)(2) (Section 401(a)(2)). The Band, as a tribe treated similar to a state CWA Sections 303(c), 419 and 401, has repeatedly expressed concerns to the Corps and the Environmental Protection Agency (EPA) that the proposed construction and operation of the pipeline will likely adversely impact the Band's jurisdictional waters. The Band is relying on the Corps and EPA to ensure that the Clean Water Act plays out as written and intended – where the state and downstream jurisdictions have the opportunity to review, object, and participate in an evidentiary public hearing outlined in Section 401 *prior to* the analysis or issuance of a Section 404 permit.

The Corps must delay publishing the DCDD and delay the public comment period until the Section 401 process plays out not only as a matter of law, but also as a practical matter. The Section 401(a)(2) public hearing allows the Bad River Band, EPA, and the public to present evidence on the impacts from the Proposed Project to water quality. This evidence must be included in any environmental analysis for Section 404. Indeed, if the evidence presented at the hearing demonstrates that the Proposed Project cannot comply with applicable water quality standards, then the Corps cannot issue a Section 404 permit. Going forward with publishing a Draft EA without information from the state analysis under Section 401 and the Band and EPA's analysis under Section 401(a)(2) is a clear example of the Corps getting ahead of itself. The Band cannot speculate on the final information or final analysis that may accompany the state's Section 401 certification, nor is the Band required to start that process until the state certification has been issued. The Corps must hold off on publishing the DCDD and delay the public hearing until the Section 401 process has fully played out.

The Corps also does both the Band and the public a huge injustice by providing the DCDD only 15 days prior to the public hearing. This timeframe is clearly not enough time for meaningful review. The Corps must allow at least 45 days for review of the DCDD prior to the public hearing. The DCDD encompasses a trio of documents that should have extensive information on the Proposed Project's impacts. The Band needs additional time to work with our Natural Resources Department staff and experts in order to fully review the draft documents, analyze the project impacts, and provide substantive information in public comment. The public will also need additional time to weigh in on the project's impacts to the public interest. A 15 day review period is simply not enough time for a meaningful public hearing.

The contents of the Public Notice is also severely problematic as a matter of public policy and flies in the face of the public interest. There is no definitive date for when the DCDD will be published, there is a severely limited review period prior to the public hearing, and the current proposed deadline of July 5th for written comments is a practical limitation on public

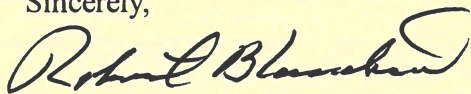
Colonel Eric Swenson
Army Corps of Engineers
May 10, 2024
Page 3 of 3

engagement. The Public Hearing itself is also extremely limited in both time and physical capacity. This extreme limitation almost confirms that the Public Hearing is merely a box-checking exercise and not an opportunity for meaningful input. It also limits members of the public who may want to engage in this hearing and will exclude people from participating. The Corps needs more time to prepare for a public hearing that is truly public and must delay the current proposed deadlines.

We also reiterate the importance of a thorough environmental review for this Proposed Project and again insist that the Corps prepare a full Environmental Impact Statement to evaluate the impacts from the pipeline. The Proposed Project will have enormous impacts to the Bad River watershed, the Bad River Band, and the treaty protected resources that the Band and its members rely on in the area. The impacts from construction – which include trenching wetlands, blasting rock areas, and horizontal directional drilling – can devastate wetlands and other aquatic resources, permanently alter the watershed, and negatively impact groundwater. Given that the Corps is already hastily moving forward with the Draft EA prior to having all the information from the Section 401 process, a full EIS is the only way to capture and evaluate all the impacts from the Proposed Project.

The Band has previously expressed numerous concerns about the Proposed Project to the Corps. We have also requested information from federal agencies, including the Corps, regarding the Proposed Project and its impacts. To date, we are still waiting for responses on several of our requests. A separate communication will follow outlining the Band's outstanding requests to the federal government regarding the Proposed Project. The Corps must delay publishing the DCDD and postpone the public comment period until these issues are resolved. Please reach out to the Director of the Mashkiiziibii Natural Resources Department, Naomi Tillison (nrdirector@badriver-nsn.gov) to discuss these issues further.

Sincerely,



Chairman Robert Blanchard

cc: Bill Sande, U.S. Army Corps of Engineers, St. Paul District,
William.M.Sande@usace.army.mil

Debra Shore, Environmental Protection Agency, Administrator Region 5, shore.debra@epa.gov

Jenn Tyler, Environmental Protection Agency, Region 5, tyler.jennifer@epa.gov

Dave Pfeifer, Environmental Protection Agency, Region 5 Watersheds and Wetlands Branch
Manager, pfeifer.david@epa.gov