BEFORE THE
WISCONSIN DEPARTMENT OF NATURAL RESOURCES

In the matter of Waterway and Wetland Permit and Water Quality Certification under No. IP-NO-2020-2-N00471, and Coverage Under WPDES General Permit No. WI-S067831-06 Issued to Enbridge Energy, LP

Case No.:

PETITION FOR A CONTESTED CASE HEARING PURSUANT TO WIS. STAT. §§ 30.209, 227.42, AND 281.36(3q)

To the Department of Natural Resources:

The Bad River Band of Lake Superior Chippewa (the "Band" or "Bad River Band"), by its attorneys, Earthjustice, hereby requests a contested case hearing[1] regarding the Wisconsin Department of Natural Resources ("DNR") decisions to issue Enbridge Energy, LP ("Enbridge") a wetland and waterway permit, water quality certification, and certificate of coverage under Wisconsin's construction site stormwater runoff general permit for the proposed construction of a 41-mile new section of the Line 5 petroleum pipeline ("Project"). Enbridge proposes to build the Project around and directly upstream of the Band's Reservation. The Bad River Band requests that DNR's decisions be stayed pending the hearing, pursuant to Wis. Stat. §§ 30.209(1m)(c) and 281.36(3q)(d). The Band further requests that this contested case hearing be held in Ashland, WI, and commits to appear and present information supporting its objections. True and correct copies of the contested decisions are attached to this petition as Exhibit 1.

I. PETITIONER

Petitioner Bad River Band of Lake Superior Chippewa is a federally recognized Tribal Nation with a Reservation located in northern Wisconsin. The Band's government resides at 72682 Maple Street, Odanah, Wisconsin 54861. The Band's Reservation is located wholly within the Lake Superior Basin and partially within the watershed of the Bad River— "Mashkiiziibii"—for which the Tribal Nation is named. The Bad River Reservation also is connected hydrologically to other watersheds flowing into Lake Superior, such as the Fish Creek Watershed. The Anishinaabe, of which the Tribe of Ojibwe is a part, have lived in this area for several hundred years, moving from the east as described in their migration story to find the place where food grows on water. The Bad River Reservation is directly adjacent to Lake Superior and includes the Kakagon and Bad River Sloughs—internationally recognized wetlands where the Band's members harvest wild rice, called "manoomin" in the Ojibwe language. The proposed Line 5 reroute is

[1] The Band is simultaneously filing a Petition for Judicial Review in Ashland County Circuit Court regarding these same decisions as well as DNR's failure to comply with the Wisconsin Environmental Policy Act ("WEPA").

located wholly within territory that the Band, and other Ojibwe tribes, ceded to the United States in an 1842 treaty, while retaining usufructuary rights. Treaty with Chippewa, 7. Stat. 591 (1842) ("1842 Treaty"). Band members continue to exercise treaty-protected rights including fishing, trapping, hunting, and gathering within the Reservation and ceded territories. The Band has a solemn responsibility and legal right to preserve its homeland, environment, waters, culture, treaty-protected resources, and distinct lifeways.

II. AGENCY ACTION OR INACTION WHICH IS THE BASIS FOR THE REQUEST FOR A HEARING

Petitioner requests a hearing on multiple DNR decisions authorizing Enbridge to construct the Project, including placing structures in, bridging, dredging, and driving on the bed of navigable waterways, authorized under Ch. 30, discharging fill in wetlands, authorized under Wis. Stat. § 281.36, and discharging construction stormwater, authorized under General Permit No. WI-S067831-06. Petitioner also requests the hearing on DNR's certification of water quality standards, authorized under NR Ch. 299, and certification of compliance with the Wisconsin Environmental Policy Act ("WEPA"), under Wis. Stat. § 1.11 and NR Ch. 150. Under these decisions, Enbridge may trench, drill under, and blast through at least 101.1 acres of high-quality wetlands and 186 waterways. Specifically, the Band requests a hearing on whether DNR's decisions violate permitting and environmental review standards.

III. THE BAND'S SUBSTANTIAL INTERESTS INJURED OR THREATENED WITH INJURY BY AGENCY ACTION ARE DISTINCT FROM INJURY TO THE GENERAL PUBLIC

The Bad River Band's actual and threatened injuries are different in kind or degree from the injury to the public caused by DNR's actions. As a sovereign, federally recognized Tribal Nation with treaty rights located in and around the Mashkiiziibii (Bad River) Watershed and Lake Superior, the Band and its people are uniquely situated to bear the brunt of the Project's harmful effects. The Band's Mashkiiziibii Natural Resources Department ("MNRD") has expended considerable governmental resources scrutinizing the Project. If constructed, the Project will surround the Band on three sides—all directly upstream of the Reservation—and will jeopardize the Band's rights within its Reservation, the territory adjoining the Reservation, and Lake Superior. The waters, plants, fish, and wildlife in the area do not know or adhere to jurisdictional boundaries. The Band's substantial interests are injured or threatened with injury because there is a reasonable concern that the activities authorized by DNR will impair waters; water-dependent ecosystems; and designated uses for aquatic life, culture, fisheries, recreation, wetlands, and manoomin, amongst others, along the Project route and downstream within the Bad River Reservation. The Band also is reasonably concerned that activities authorized will damage numerous treaty-protected and culturally important plants, mammals, fish, and birds, and interfere with Band members' rights and ability to access treaty-protected lands and waters in the ceded territory.

The Anishinaabe maintain a reciprocal relationship with the environment – the waters, trees, animals, plants, birds, and air are an extension of a large community at the center of Anishinaabe culture and life. The Band has a solemn responsibility and the legal right to preserve its homeland, environment, culture, treaty-protected resources, and distinct lifeways. The Band

exercises regulatory authority over lands and waters within the Reservation under its inherent sovereign authority. Additionally, the Band is treated in a similar manner as a state under the Clean Water Act and has EPA-approved water quality standards for Reservation waters. 33 U.S.C. § 1377(e) (TAS authorization); § 1313 (state water quality program). The Band's regulatory efforts seek to protect cultural and other existing uses and incorporate their Anishinaabe worldview to the extent possible. The Band also retains interest in lands and waters across ceded territories in Wisconsin, Michigan, and Minnesota. The proposed Line 5 reroute is located wholly within the 1842 ceded territory where the Band and other Ojibwe tribes retain usufructuary rights that they continue to exercise today. 1842 Treaty, 7. Stat. 591.

DNR's decisions will permit Enbridge's Project construction activities just upstream and upland from, and otherwise hydrologically connected to, the Bad River Reservation. These activities threaten cultural, human, social, and socioeconomic values as well as management of natural resources. The Project risks damaging the extraordinary ecological resources and unique biodiversity present in the watershed, including the Bad River and Kakagon Sloughs, which have been recognized as a Wetland of International Importance, and according to the National Park Service "may be the largest freshwater estuarine system of this size, type and quality in the world."[2]

The Sloughs, and the densely interconnected network of rivers, streams, and wetlands that replenish them are a thriving refuge for innumerable flora and fauna. This includes, but is not limited to, the Potato River (*Gaawaandag-zagaakwa-ziibii*), Tyler Forks River (*Gaa-aangwasagokaag-ziibiins*), Bad River (*Mashkii-ziibii*), Brunsweiler River, Marengo River, White River, Vaughn Creek and Beartrap Creek. Many threatened, endangered, and treaty-protected species rely on these habitats, including yellow rail, piping plover, manoomin, northern white cedar (*giizhik*), balsam fir (*pegyunagakwitz*), and black ash (*wiisagaak*). The Sloughs complex supports some of the last remaining manoomin beds on the Great Lakes, which Band members protect and harvest using ancestral methods, pursuant to federally protected rights. Manoomin is a rich source of protein and carbohydrates and a primary basis of the Band's sustenance. The watersheds also support other species of mammals, reptiles, fish, waterfowl, and migratory birds, as well as medicinal and edible plants. Manoomin harvest is also a traditional event of long-standing cultural importance and is celebrated annually at the Band's Manoomin Celebration Powwow. The Band has a right to protect the health of its Reservation as an enduring homeland as well as the right to the protection of traditional uses of the ceded territory, including the right to access the territory to fish, hunt, trap, gather, and conduct cultural activities.

The Project activities authorized in DNR's permits and authorizations, unless halted, pose an imminent and distinct threat of irreversible damage to the Band's significant interests in its Reservation, Lake Superior, and surrounding territory.

IV. FACTUAL BACKGROUND

[2] *See* Geroge J. Kraft, et al., Nat'l Park Serv., *Assessment of Coastal Water Resources and Watershed Conditions at Apostle Islands National Lakeshore (Wisconsin)* 49 (April 2007), https://npshistory.com/publications/apis/nrtr-2007-367.pdf.

Enbridge owns and operates Line 5, a 645-mile pipeline that transports crude oil and natural gas liquids ("NGLs") from Superior, WI, to Sarnia, Ontario, Canada. Line 5 runs through northern Wisconsin, the Bad River Reservation, and the Upper and Lower Peninsulas of Michigan before entering Canada. The Lakehead Pipeline Company ("Lakehead"), Enbridge's predecessor, built Line 5 in 1953. Line 5 currently crosses approximately 12 miles of the Band's Reservation. Historically, Lakehead and Enbridge operated Line 5 on the Reservation pursuant to easements originally issued by the Bureau of Indian Affairs ("BIA"), in which the Band has an interest, with renewals issued by the BIA and the Band. Several of Enbridge's easements expired in 2013. The Band chose not to consent to the renewal of these easements due to concerns over oil spills, climate change, pollution, and community health.[3]

Enbridge continues to operate the pipeline across the Reservation despite the expiration of the easements. The Band filed an action against Enbridge in 2019 seeking an order to remove the pipeline from the Reservation. On September 7, 2022, the United States District Court for the Western District of Wisconsin ruled for the Band and found that Enbridge was operating Line 5 in illegal trespass. *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Rsrv. v. Enbridge Energy Co., Inc.*, 626 F. Supp. 3d 1030 (W.D. Wis. 2022). In an order issued June 16, 2023, the court directed Enbridge to cease operating the 12-mile segment across the Reservation by June 16, 2026, among other remedies. *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 *1 (W.D. Wis. June 16, 2023). Enbridge and the Band appealed the decision to the United States Court of Appeals for the Seventh Circuit. The case is pending.

On February 11, 2020, Enbridge submitted an application to DNR seeking permits to conduct construction activity in high-quality wetlands and rivers, springs, streams, and other waters connected to its proposed route. Enbridge proposes to permanently alter at least 101.1 acres of high-quality wetland and 186 waterways (many of which are high-quality or flow into high-quality waterways) to build this new pipeline segment. These rich aquatic areas support habitat for numerous plants and wildlife. The majority of waters that the Project crosses and effects are hydrologically connected to Lake Superior and the Kakagon and Bad River Sloughs—large, unique wetlands on the Reservation that support vast stands of manoomin, provide critical migratory bird habitat, and support other unique and diverse species and habitats. Enbridge also proposes to alter wetlands and disturb waterways in the Iron County Forest, public land located in territory ceded by numerous Ojibwe nations in Wisconsin. Pursuant to treaties with the United States, the Band and its members retain the right to engage in hunting, fishing, gathering, and cultural practices on public lands in the ceded territory like the Iron County Forest. DNR's authority to regulate the environment, including permitting this Project, does not supersede the Band's treaty rights or the treaty activities of its members.

[3] *See* Removal of Lakehead Pipeline Company (now Enbridge line 5) Pipeline from Bad River Lands and Watershed, Res. No. 1-4-17-738 (Jan. 4, 2017), https://www.badriver-nsn.gov/wp-content/uploads/2019/11/Pipeline_Resolution_Line5_Removal_2017.pdf; Removal of Lakehead Pipeline Company (now Enbridge line 5) Pipeline within the Reservation and Waabishkaa-ziibi (White River), Potato River (Gaawanndog-ziibiinis), Tyler Forks Gaa-aangwasagokaag-ziibiinis), and Mashkii-ziibi (Bad River) Watershed, Res. No. 10-30-19-226 (Oct. 30, 2019), https://www.badriver-nsn.gov/wp-content/uploads/2020/02/NRD_EnbridgeRemoval_Resolution_201910.pdf

On June 8, 2020, DNR issued a Notice of Pending Application and intent to prepare Draft and Final Environmental Impact Statements ("DEIS" and "FEIS" respectively) for the Project. The notice discussed the authorizations required for building structures, dredging and filling, bridging, and use of motor vehicles in waterways, as well as for filling, converting, and construction work in wetlands. DNR determined that its permitting decision regarding the Project is a major action that significantly affects the quality of Wisconsin's environment. DNR sought public comment on the proposal and the scope of the EIS. The Band submitted comments on the notice of pending application on July 11, 2020. DNR held a public hearing on its Notice of Pending Application on July 1, 2020. The agency received over 2,000 comments, most of which took issue with the completeness of Enbridge's wetland and waterbody permit applications, public interest-related concerns, and the scope of DNR's EIS.

The Band held several consultations and technical meetings with DNR in 2020 and 2021. Additionally, pursuant to DNR's consultation procedures, the Band reviewed a preliminary version of the Draft Environmental Impact Statement ("DEIS"). The Band submitted preliminary comments on the DEIS to DNR on December 10, 2021. The comments asserted that DNR did not have adequate or up-to-date data to properly characterize the impacts of the Project and urged the agency to conduct additional review and consultation with the Band before publicly releasing the DEIS.

DNR publicly released the DEIS for the Project on December 16, 2021. The agency held a virtual public hearing on February 2, 2022. The public comment period then concluded on April 15, 2022. DNR received over 32,000 written comments on the EIS and 160 oral comments during a 10-hour virtual public hearing. The comments raised similar concerns about the completeness of Enbridge's application and the scope of the EIS.

The Band submitted comments on the DEIS on April 15, 2022. The Band raised concerns regarding the scope of the EIS, inadequate baseline data, and DNR's analyses of environmental impacts, water quality, alternatives, wildlife, cultural resources, environmental justice, and public health. MNRD prepared and attached a series of technical reports concerning these subjects.

In 2022-2024, MNRD and DNR held more technical meetings and consultations, and the Band submitted additional comments to DNR. During this period, DNR also required Enbridge to submit additional information. During public comment, MNRD raised concerns about the adequacy of baseline wetland and waterway data the Department used to analyze the Project's impacts. In comments, MNRD also alerted DNR that functional values will be lost when Enbridge converts forested wetlands and other high-quality wetlands to low-quality, less ecologically diverse, emergent wetlands. MNRD also commented that some wetlands may never recover from construction-related impacts.

DNR released the FEIS on September 6, 2024, along with a determination of WEPA compliance. Regarding its analysis of wetland and waterway functional values and characteristics, DNR states in the FEIS that the "available data were incomplete in the sense of a traditional baseline survey" and that "[t]he resulting modeled data layers were limited in accuracy by the quality and applicability of the model to the project area and by what data were used for the modeling exercise." The modeling did not include the rarest, small habitats on the landscape

because the resolution of the modeling was too coarse to include them. These smaller, rare habitats oftentimes are the appropriate habitats for rare, threatened, or endangered species. MNRD raised this concern with DNR in technical meetings.

DNR acknowledges in the FEIS that pipeline construction in waterways and wetlands will result in take of Braun's Holly Fern (*Polystichum braunii*), a state-listed threatened species. FEIS at 546-547. MNRD has repeatedly requested that DNR require Enbridge to avoid taking any endangered and threatened species, including this rare plant species, as well as Sweet Colt's-foot (*Petasites sagittatus*) another state-listed threatened species, and Butternut (*Juglans cinera*) a special concern species. Enbridge has not acquired an incidental take permit for any of these species. The FEIS also states that the impacts to wetlands Enbridge plans to convert are temporary because wetland functional values in converted wetlands will be restored post-construction. The Permit states that full restoration may, in some circumstances, take multiple decades.

On November 14, 2024, DNR issued the Project's wetland and waterway permit, water quality standards compliance certification, and a certificate of coverage under the Wisconsin Stormwater Discharge General Permit ("Stormwater GP"). *See* DNR Docket # IP-NO-2020-2-N0047 (wetland and waterway permit); Docket # IP-NO-2020-2-N00471 (water quality certification ("WQC")); WPDES Permit No. WI-S067831-6 (Stormwater GP). The wetland and waterway permits are combined into a single permit document. The water quality certification is a separate action DNR must take to certify that the wetland and waterway permit comply with Wisconsin's water quality standards before federal permitting may proceed. The stormwater discharge certificate of coverage affirms that Enbridge will follow the conditions of the state's Stormwater GP. The permits and water quality certification each contain numerous conditions that DNR states will ensure the Project's impacts will stay within the limits DNR has set. Conditions in the permits and certification repeatedly cite and incorporate Enbridge's Environmental Construction Plan ("ECP"), a roughly 3,000-page document including numerous attachments and sub-attachments.

With respect to waterways, the permit states Enbridge will dredge and fill waterways during trench construction and backfilling. DNR also approved Enbridge's plans to build structures in waterways, such as dams, dewatering equipment, and staging areas necessary for construction. The permit states Enbridge will build and then remove bridges and roadways to move equipment to and from construction sites and it allows for grading at select locations. DNR also permitted Enbridge's use of construction vehicles in waterways. As for wetlands, the permit states Enbridge plans to place temporary matting, excavate and backfill trenches and bore pits in wetlands, place permanent fill in wetlands, and convert high-quality forested wetlands to low-quality emergent wetlands.

To build the new segment of Line 5, Enbridge will use trenching, blasting, and drilling in the beds of waterways and wetlands. Trenching involves excavating material from the bed of a navigable water or wetland and placing the excavated material on timber matting, separated by soil type and other characteristics, placing the pipe into the trench, and then backfilling with the spoils. Enbridge will also use blasting if it encounters geohazards such as boulders or bedrock. Blasting will reduce large features such as boulders or bedrock outcrops into more fine material when backfilled into the trench. Enbridge also proposes using horizontal directional drilling

("HDD") pipeline installation methods at 13 river and stream crossings, as well as direct bore at other crossings. The HDD method drills a path beneath a waterway using a "reamer" accompanied by drilling fluid comprised of chemical additives, clay, and water pumped into the area displaced by the drill. If the pressure inside a drill path exceeds groundcover pressure it will cause drilling fluid to seep through loose soil and geological crevices and discharge into surface waters. Drilling fluid releases are also possible at the entry and exit points of the HDD path. In the findings of fact in the wetland and waterway permit, DNR states that "[i]t is likely that the Project will experience an inadvertent release ("IR") during one or more of the proposed trenchless installations." MNRD and the Band's prior comments have raised concerns related to the risk of drilling fluid releases from HDD throughout this permitting process. DNR also approved Enbridge's stormwater management strategy, which requires the company to implement conditions and best management practices in the Wisconsin Stormwater GP that aims to reduce runoff pollution from construction sites.

Enbridge's wetland mitigation plan states the company will purchase wetland bank service credits to compensate for the loss of functional values in damaged wetlands the company cannot practicably restore. These credits are generated when a wetland bank preserves or restores wetlands in a relevant "bank service area," restricting development and conversion. The number of credits that are required to compensate for wetland losses is determined by wetland mitigation ratios. The ratio is higher for permanent impacts and lower for temporary ones. The FEIS and the DNR permits use wetland mitigation ratios that categorize decades-long losses of functional values as temporary impacts. The FEIS and the DNR permits also combined wetlands with medium and low functional values, thus applying the same mitigation ratios for both categories of functional value, which does not account for higher functional values. Further, the proposed mitigation banks are located outside of the affected watersheds where impacts would occur.

Because the current Line 5 pipeline runs through the Bad River Reservation, the Band has firsthand knowledge of the harms that pipeline construction, maintenance, and operation can cause to the Bad River Watershed's fragile habitats and communities. The Band has experienced disturbances caused by maintenance activities, such as digs conducted to look at anomalies in the pipeline. This includes significant impacts from the prolonged use of construction matting over wetlands and sensitive soils. Prolonged use of matting can be due to repetitive access through sensitive habitats and maintenance activities occurring longer than planned due to design and implementation failures. MNRD has also described to DNR its concern that the existing Line 5 disrupts surface and groundwater flows, causing erosion, sedimentation, and increasing pipeline failure risk – such as in 2019 when approximately 49 feet of Line 5 was exposed and approximately 40 feet was left unsupported from below. The existing pipeline also is placed near a natural meander of the Bad River and MNRD has alerted DNR to the risks this poses to on-Reservation waters, communities, and Lake Superior. Maintenance of the Line 5 corridor also increases invasive species (both in species richness and species distribution) due to human activity that carries species to other areas of the corridor. The Band included this information in comments on the U.S. Army Corps' Draft Environmental Assessment in August 2024, which the Band also shared with DNR.

Many of these impacts could also occur along the proposed reroute. In particular, the alteration of surface hydrology and groundwater flow due to the installation of the pipe will likely

cause environmental impacts along the reroute. Changes to surface hydrology can lead to changes in the size of drainage basins and watershed boundaries, the erosion of soils, and the exposure of the pipeline. Additionally, given the instability of soils in the Bad River Watershed, it is highly likely that erosion issues that arise along the reroute will require more than basic maintenance.

V. LEGAL BACKGROUND

A. DNR's Permitting Process for Wetlands and Waterway Individual Permits

1. *Wetlands*

Under Wisconsin law, DNR may only issue a wetland fill permit if DNR determines that:

1. The proposed project represents the least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid wetland impacts.

2. All practicable measures to minimize the adverse impacts to wetland functional values will be taken.

3. The proposed project will not result in significant adverse impacts to wetland functional values, in significant adverse impacts to water quality, or in other significant adverse environmental consequences. Wis. Stat. §§ 281.36(3n)(c)(1)-(3).

4. The discharge will comply with all applicable water quality standards. Wis. Stat. § 281.36(3b)(b); *see* NR Ch. 103.

DNR must evaluate a project's direct, secondary, cumulative, and mitigation impacts to wetland functional values, net positive or negative environmental impact, and its impact to public trust prior to issuing a permit. Wis. Stat. § 281.36 (3n)(b); *see also* Wis. Admin. Code §§ NR 103.03(1)-(2); 103.08(3) (defining wetland water quality standards and criteria and factors to consider to ensure their maintenance and enhancement); § NR 300.03(11) (Note); Wisconsin Constitution, article IX, section 1. The impacts that DNR must evaluate include storm and flood water retention, hydrologic function, filtration of sediment, habitat for aquatic organisms and wildlife species, and recreational, cultural, educational, scientific, and natural scenic beauty values and uses. Wis. Admin. Code §§ NR 103.03(1)-(2). Special consideration is given to Areas of Special Natural Resource Interest. Wis. Admin. Code §§ NR 103.04; 103.08(3)(f); (4)(b) (directing consideration of possible adverse effects to wetlands in ASNRI, and disallowing consideration of potential functional values in mitigation projects). Cumulative impacts to wetland functional values include "past impacts and reasonably anticipated impacts caused by similar projects in the area." Wis. Stat. § 281.36(3n)(b)2.

DNR must possess adequate data in order to carry out its required assessments and determinations. *See Meteor Timber, LLC v. WI Div. of Hearings and Appeals*, 2022 WI App 5, 969 N.W.2d 746 (affirming denial of improperly issued wetland fill permit because DNR lacked adequate information to consider the net environmental impacts and lacked an adequate mitigation plan). Put simply, "the Department is required to make a determination that the project will not

result in significant adverse impacts. It is unable to do so based on incomplete information." *In the Matter of Wetland Individual Permit IP-SE-2017-60-00631*, 2019 WL 1755710, at *18 (Wis. Div. of Hearings and Apps. 2019); *see also* FEIS at 474.

Permit applicants must mitigate any unavoidable wetland impacts. Wis. Stat. § 281.36(3n)(d); NR Ch. 350. DNR mitigation rules provide standards for comparing and assessing short and long-term success of mitigation projects and banks. Wis. Stat. § 281.36(3t). Under these rules, DNR must assess alternatives and conduct baseline studies of impacted wetlands and mitigation sites to ensure suitability.

Section 281.36(10) makes clear that a wetland permit does not obviate the need for other permits an applicant may need to move forward with construction, such as for stormwater runoff, Wis. Stat. § 281.33, high-capacity groundwater pumping, § 281.34, pollution discharge, NR Ch. 283, Wis. Admin. Code § NR 200.03(1), and groundwater protection. Wis. Stat. § 299.31; NR Ch. 140; NR Ch. 160. DNR must assess wetland water quality impacts for any point source discharge to wetlands. Wis. Admin. Code §§ NR 103.06(2); 103.08(1).

2. *Waterways*

DNR issued a permit for several activities under Ch. 30: a permit for removal of beds under navigable waters (Wis. Stat. § 30.20), a permit for structures and deposits in navigable waters (Wis. Stat. § 30.12), and a permit for constructing bridges and culverts in navigable waters (Wis. Stat. § 30.123).

DNR issues a permit under § 30.12 or § 30.123 if it determines that the structure, deposit, or bridge will not (1) materially obstruct navigation; (2) be detrimental to the public interest; or (3) materially reduce the flood flow capacity of the stream. Wis. Stat. §§ 30.12(3m)(c), 30.123(8)(c). Further, to place structures or deposits into a navigable water, the applicant must be a riparian owner. Wis. Stat. § 30.12(3m)(a); *De Nava v. DNR*, 140 Wis. 2d 213, 409 N. W. 2d 151 (Ct. App. 1987). A permit for removal of material from the bed of a waterway must be consistent with the public interest. Wis. Stat. § 30.20(2)(c). The public interest encompasses many considerations, *see* Wis. Stat. § 281.15(1); Wis. Admin. Code §§ NR 102.01(2); 103.01(2), including consideration of Wisconsin's constitutional Public Trust Doctrine, encompassing the right to navigation, hunting, fishing, recreation, and scenic beauty. Wisconsin Constitution, article IX, section 1. Several chapters of DNR's administrative code provide additional requirements and procedures for Chapter 30 permits. *See* NR Chs. 300, 320, 328, 329, 345, 347. For instance, these regulations prohibit DNR from issuing a permit until the applicant demonstrates the project avoids impacts to endangered or threatened species or the project receives an incidental take permit pursuant to Wis. Stat. § 29.605. Wis. Admin. Code §§ NR 320.06(3)(a)2.; 328.06(1)(b); 328.36(1)(b); 329.04(3)(a)2; 345.04(3)(a)2. Further, activities affecting the waters of the state are subject to water quality standards in NR Chapters 102-105.

3. Water Quality Standards.

DNR cannot issue a wetland or waterway permit without evaluating a project's impacts to Wisconsin's water quality standards. *See* Wis. Stat. § 281.36(3n)(c) (requiring a finding that "a

proposed project causing a discharge is in compliance with water quality standards"); Wis. Admin. Code §§ NR 102.01-102.02 (stating that water quality standards apply to all surface waters in Wisconsin and are intended to "protect the use of water resources for all lawful purposes" and "serv[e] as a basis for decisions in . . . permitting . . . activities that impact water quality"). The Band, as a downstream jurisdiction with Treatment as a State status and EPA-approved and enforceable water quality standards, will assess whether the Project will affect its water quality standards in a federal forum pursuant to Section 401(a)(2) of the Clean Water Act (CWA). 33 U.S.C. § 1344(a)(2).

B. Wisconsin Environmental Policy Act

WEPA is an "environmental full disclosure law," *Wisconsin's Env't Decade v. Dep't of Nat. Res.*, 94 Wis. 2d 263, 271, 288 N.W.2d 168 (Ct. App. 1979), requiring agencies to develop a "detailed statement," or Environmental Impact Statement ("EIS"), for "major actions significantly affecting the quality of the human environment." Wis. Stat. § 1.11 (2)(c). DNR's WEPA regulations are meant to "assure that the department decisionmakers, other decisionmakers, and the interested public have information to be able to fully consider the short- and long-term effects of department…actions on the quality of the human environment." Wis. Admin. Code § NR 150.01. DNR's WEPA regulations at § NR 150.30 lay out the steps for preparing an EIS. Federal regulations and court decisions guide the implementation of WEPA. Wis. Stat. § 1.11(2)(c); Wis. Admin. Code § NR 150.04(1), *State ex rel. Boehm v. Wisconsin Dep't of Nat. Res.*, 174 Wis. 2d 657, 675 (1993) (holding that federal NEPA precedent informs WEPA interpretation).

The EIS's purpose is to inform people of anticipated effects and alternatives to the Project. Wis. Admin. Code § NR 150.30(1)(b); (2)(d)-(g). WEPA requires, at base, the consideration of six items in an EIS: "(1) The environmental impact of the proposed action; (2) Any adverse environmental effects which cannot be avoided should the proposal be implemented; (3) Alternatives to the proposed action; (4) The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; (5) Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; and (6)…details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages and disadvantages of the proposal." Wis. Stat. § 1.11(2)(c). Ultimately, though, an EIS does not compel any particular decision by DNR. *Clean Wisconsin, Inc. v. Public Service Com'n,* 2005 WI 93, ¶¶ 189, 203, 282 Wis.2d 250, 700 N.W.2d 768. While DNR may rely on information from an applicant, DNR is ultimately responsible for the accuracy and completeness of the EIS. Wis. Admin. Code § NR 150.30(1)(d); (2)(h).

C. Construction Storm Water General Permit Coverage

The WPDES Construction Site Storm Water Runoff Permit provides standard requirements that any person must follow to have a discharge from a construction project covered under this general permit. *See* Wis. Stat. § 281.33(3)(a)1; NR Ch. 216 sub. III; General Permit No. WI-S067831-06. This general permit does not cover other types of discharges, including from construction materials. Stormwater GP at §§ 1.1.3; 2.9.7. The permit requires the proper use of a range of best management practices, *id.* at § 2.9.1-6, as well as the development of site-specific

erosion control and stormwater management plans. *Id.* at § 3. The permit relies on these and other requirements to ensure compliance with water quality standards. *Id.* at § 4.1.

A number of situations exclude a discharge from coverage under the general permit, such as where discharges affect wetlands and do not meet wetland water quality standards, *id.* at § 1.2.2; affect endangered and threatened species, *id*. at § 1.2.3; or have a reasonable potential to lead to an exceedance of a water quality standard. *Id.* at § 1.2.5. DNR has the authority to withdraw coverage under this general permit and instead require an individual permit. *See* Wis. Stat. § 283.35(3); Wis. Admin. Code § NR 216.51(5); Stormwater GP at §§ 1.1.5; 4.8.4; 5.7. Reasons for withdrawing general permit coverage include that the discharge is a significant contributor of pollution or is not in compliance with the terms and conditions of NR 216 or the general permit. *Id*.

VI. ISSUES FOR REVIEW AND DISPUTES OF MATERIAL FACTS

The following are the specific issues for which the Band requests a contested case hearing on the legality of DNR's approvals of the Project, as well as the disputes of material fact that relate to each issue. The Band is entitled to a contested case hearing on all issues for the following reasons.

A. DNR Failed to Comply with Wis. Stat. § 281.36 in Issuing the Wetlands Permit

DNR violated Wis. Stat. § 281.36 by failing to adequately consider all required factors, by inappropriately finding that all standards were met, and by approving an inadequate mitigation plan. Wis. Stat. §§ 281.36(3n)(b)-(d), (3r); NR Chs. 103, 350. Many of these violations stem from a failure to adequately assess current wetland conditions as well as the actual direct, secondary, and cumulative impacts the Project will have on wetlands. *See* FEIS at 474. These failings mean DNR could not have reasonably found that the Project will take all practicable measures to minimize adverse impacts to wetland functional values, that the Project will not result in significant adverse impacts to wetland functional values, to water quality, or to other aspects of the environment, and that proposed mitigation is adequate. Wis. Stat. §§ 281.36(3n)(c)2-3.

1. Issue One: DNR failed to assess all permanent impacts to wetlands.

First, DNR's assessment of wetland impacts is deficient due to an inaccurate categorization of the vast majority of impacts as "temporary." While the permit states that restoration of cleared wetlands will take "at least a decade, and in some circumstances multiple decades," DNR goes on to assert that "wetland functional value impacts are expected to be short in duration." This latter statement is further undermined by DNR's requirement of monitoring these wetlands for at least 15 years after construction finishes. WQC Condition 131.

DNR's erroneous categorization of permanent impacts to wetlands as temporary makes a proper assessment under §§ 281.36(3n)(b)–(d) and (3r) impossible. Many of these impacts, especially on forested and scrub/shrub wetlands, will last multiple decades at a minimum. The FEIS recognizes that "it would take multiple decades to re-grow to pre-construction conditions, even with active and long-term restoration efforts. Restoration of floristic composition, floristic

species richness, or pre-construction functionality after disturbance can be exceptionally difficult and can take several decades." FEIS at 474. Activities including tree clearing, soil disturbance, and right-of-way maintenance (including access) risk impacts that these wetlands will not recover from in our lifetimes, if ever. To better account for some of these impacts, EPA recommended in 2022 that DNR consider wetland conversion as "permanent, not temporary impacts."[4] In the pipeline corridor, continued clearing of trees and other woody vegetation would take place as long as the pipeline is in operation, involving herbicides, mowing, cutting, and other practices that will continue to impact the corridor as well as the other wetlands and waters it borders. *Id.* at 53 (discussing long-term maintenance); *id.* at 503 (discussing permanent conversion of wetlands in the Project's right-of-way); *id.* at 599 (discussing herbicide use). If constructed, the pipeline corridor would also be prioritized to place future utility projects such as electrical transmission lines, leading to an increased likelihood of ongoing impacts and a decreased likelihood that these wetlands will ever recover to their pre-construction conditions and be able to support the same functions. *See* Wis. Stat. § 1.12(6)(a). Additionally, the presence of the buried pipeline and access roads is likely to permanently disrupt hydrologic connectivity both on the surface and underground. *See e.g.* FEIS at 498 (discussing hydrologic impacts of backfilling); *id.* at 508 (discussing hydrologic impacts and consequent effects to floral and faunal communities); *id.* at 362 (discussing impacts of creating more access roads with impervious surfaces).

Even in wetlands, where cleared old-growth trees are allowed to regrow, this critical flora may not regrow in our lifetime—or at all–due to factors such as the northern shift of climatic zones, disruption of wetland hydrology, and creating paths for the spread of invasive species and deer browse. *See* FEIS at 549 (discussing edge effects); *id.* at 790 (discussing shifting climatic zones and impacts to forests); *id.* at 456 (discussing hydrologic functions). MNRD observed rapid spread of non-native species along a one-mile access road for work Enbridge conducted recently within the Reservation. The loss of northern white cedar, black ash, and sugar maple are additional permanent impacts that harm flood protection, wildlife, and culturally important and treaty-protected harvesting. Forested wetlands have greater wildlife diversity and trees provide food and shelter for arthropods, which serve as the building block of a food web.[5] Birds require trees for nesting, perching, and cover. Tree clearing for conversion can also impact water quality and aquatic species by increasing water temperature, in addition to pipeline operation increasing soil and groundwater temperatures surrounding the pipeline. The huge range and ongoing nature of impacts means the allocation of "temporary" and "permanent" impacts must be reassessed.

DNR erred by mischaracterizing wetland impacts as temporary when such impacts will last for decades with minimal guarantees of eventual restoration. These permanent impacts will have grievous consequences for flood control, hydrologic function, habitat protection, biodiversity, and cultural and treaty-protected uses in the ceded territory and on the Reservation.

The FEIS is also invalid on the basis that it incorporates DNR's incorrect analysis.

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[4] U.S. Env't Protection Agency Region 5, Comments Letter on the State Draft Environmental Impact Statement for the Proposed Enbridge Line 5 Relocation Project in Ashland, Bayfield, Douglas, and Iron Counties, Wisconsin 15 (March 21, 2022), https://widnr.widen.net/s/wpx8fhcpk7/el5_deis-comments_federal_usepa

[5] Bad River Band of Lake Superior Tribe of Chippewa Indians, Comment Letter on Enbridge Energy, LLC Line 5 Relocation around the Bad River Reservation regarding the WDNR Wetland and Water Crossing Permits and the EIS Scoping 7 (July 11, 2020) (citing Welsch et. al), https://widnr.widen.net/s/8gwlnwdcpb/enbridgel5badriverbandcommentsjuly2020

This issue raises the following disputes of material fact:

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 34: "The Project will result in in approximately 0.023 acres (998.2 square feet) of permanent wetland fill from the construction of new, permanent access roads to mainline valve sites (MLVs) 1, 4, and 5. The wetland at MLV 1 is described as a lower quality Fresh (Wet) Meadow located within actively pastured farmland. The wetland at MLV 4 is described as a lower quality Fresh (Wet) Meadow located within a roadside ditch surrounded by a road and agricultural land; the wetland is dominated by native vegetation. The wetlands at MLV5 are described as medium quality Fresh (Wet) Meadow and Shrub-Carr located within a depression of a hay field that is regularly maintained and adjacent to a gravel road; the wetlands are dominated by native vegetation, with little invasive plant species."

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 36: "The Project will result in 101.1 acres of direct, temporary wetland impact from clearing and pipeline installation."

iii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 37: "Of the 101.1 acres of wetlands that will be temporarily impacted by the project, approximately 6.3 acres will be disturbed as a result of site preparation associated with trenchless installation (horizontal directional drill (HDD) or direct bore), 76.4 acres will be disturbed via open-cut trenching, and 2.6 acres will be blasted to accommodate pipeline installation. The remaining wetlands would be impacted from construction activities within the TWS and ATWS."

iv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 38: "A permanent, 50-foot pipeline ROW corridor (30-foot corridor for HDD crossings) will be maintained in wetlands as part of the project along the pipeline. Approximately 30.0 acres of PFO wetland and 3.9 acres of PSS wetland will be permanently converted and maintained as PEM wetland. Enbridge proposes to mitigate for the permanent loss of wetland functional values through Wetland Compensatory Mitigation."

v. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 39: "Outside of the permanent corridor, approximately 32.8 acres of PFO wetland and 6.3 acres of PSS wetland will be temporarily converted to PEM wetland in the TWS and ATWS as part of construction. These PFO and PSS wetlands will be restored by a combination of natural reforestation (i.e., stump sprouting, root sprouting, and natural recruitment) and supplemental bare root stock plantings. These restoration methods are designed to restore shrub and forested wetlands in the temporary workspace to their pre-construction wetland types. Full restoration of these wetlands will likely require at least a decade, and in some circumstances multiple decades, depending on the age and establishment of the shrub and forested systems pre-construction. The time between conversion and restoration to pre-construction conditions will result in a temporal loss of wetland functional values. Enbridge proposes to mitigate for the temporal loss of wetland functions through Wetland Compensatory Mitigation."

vi. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 46 concerning the functional values likely to be impacted by the Project.

vii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 57: "Construction disturbance associated with the Project will impact floristic composition and integrity of wetlands, including fragmentation of forested areas; reduction in the size, integrity, and diversity of plant communities; temporal loss in the return of pre-construction condition and functions; and an increased risk of introducing or spreading invasive species. Enbridge has proposed, and the conditions in this permit require, wetland restoration to minimize long-term impacts to wetlands that are temporarily impacted by the pipeline construction."

viii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 58: "Enbridge proposes to mitigate impacts to wetlands through a Compensatory Wetland Mitigation Strategy dated September 2021, revised in May and October 2024. Compensatory mitigation is proposed for permanent wetland fill, conversion of scrub-shrub and forested wetlands to emergent wetlands, and for temporal loss of wetland functions . . . Mitigation would include the purchase of a minimum of 35.14 mitigation credits for the Project from approved wetland mitigation banks in the Lake Superior Wetland Mitigation Service Area. If in-kind credits are available, Enbridge is required by the conditions of this permit to purchase these credits first, which would constitute 2.84 credits for wet meadow impacts, 2.43 credits for scrub-shrub impacts, and 29.87 credits for forested impacts. Additional mitigation credits would need to be acquired if out-of-kind mitigation is utilized in the Lake Superior Bank Service Area (or from the Wisconsin Wetland Conservation Trust in-lieu fee program). The Department has considered wetland mitigation under Chapter 281.36(3n)(d), Wis. Stats., and Chapter NR 350, Wis. Adm. Code. The Department has consulted with the U.S. Army Corps of Engineers (USACE) on its review of a wetland compensation mitigation plan. The Department requires compensatory mitigation for wetland losses associated with the Project and has determined that the proposed mitigation would compensate for the wetland functional values lost due to permanent fill, conversion of wetland types, and temporal impacts from construction. Enbridge is required by the conditions of this permit to obtain and provide proof of appropriate compensatory mitigation credits prior to starting any land-disturbing activities, including clearing."

ix. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 59: "The Department has determined the Project, if constructed in accordance with this permit, will not result in significant adverse impacts to wetland functional values, including, wildlife habitat, flood protection, shoreline protection, groundwater recharge and discharge, and recreation. The Project will avoid, minimize, restore, and mitigate wetland impacts. The restricted ROW width and temporary pipeline construction activities will diminish functional values in the temporary workspaces until the Project is complete and the wetlands are restored. PEM wetlands in the permanent ROW will be maintained and PSS and PFO wetlands in the temporary workspaces will be reestablished. Areas of temporary wetland excavation and fill will be restored, areas of temporary wetland conversion will naturally regenerate over time (supplemented with native bare root stock plantings), and

wetland mitigation will be completed through the purchase of credits. Except for the habitat conversion associated with the permanently converted PSS and PFO, wetland functional value impacts are expected to be short in duration."

x. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 62: "The Department has determined that the proposed Project, if constructed in accordance with this permit, will not result in other significant adverse environmental consequences, including impacts to habitat, native species, recreation, and aesthetics."

2. Issue Two: DNR failed to evaluate impacts against an appropriate baseline.

DNR undercounts and undervalues wetlands while minimizing the impact of the proposed construction activities. Wis. Stat. § 281.36(3n)(b). DNR's water quality determinations regarding the Project's impacts on wetlands are not based on a complete and accurate picture of wetland quantity, quality, and impacts and amount to conjecture.

MNRD, GLIWFC, and outside contractors have documented additional wetland acres and waterways within the survey boundary that were not included in wetland delineations, *see* Wis. Admin. Code § NR 103.08(1m), as well as additional occurrences of Wisconsin's Natural Heritage Inventory species not reported by the company. MNRD and the Great Lakes Indian Fish and Wildlife Commission ("GLIFWC") also submitted field data to both DNR and the Corps indicating that the numbers of wetlands and waterway crossings are greater than those identified by the applicant or DNR. The FEIS states that "available data were incomplete in the sense of a traditional baseline survey" and that "[t]he resulting modeled data layers were limited in accuracy by the quality and applicability of the model to the project area and by what data were used for the modeling exercise." FEIS at 388. Instead, DNR relies on an after-the-fact notification system for any unassessed wetlands or springs Enbridge discovers during construction, demonstrating the agency understands the insufficiency of the wetland data. *Id.* at 473; Wetland and Waterway Permit Conditions 28, 212; WQC Conditions 11, 53, 74. DNR permitted the Project without reviewing its impact on these wetlands.

Additionally, DNR failed to adequately consider or guard against impacts to Areas of Special Natural Resource Interest ("ASNRI") as NR Ch. 103 requires. Wis. Admin. Code §§ NR 103.04; 103.08(3)(f); 4(b); FEIS at 415-16, 494. Numerous ASNRI are at risk of impacts from the Project, including but not limited to Beartrap Creek, White River, Marengo River, Brunsweiler River, Trout Brook, Billy Creek, Silver Creek, Krause Creek, Bad River, Scott-Taylor Creek, Gehrman Creek, Camp Four Creek, Feldcher Creek, Tyler Forks River, Vogue Creek, Potato River, and Vaughn Creek, as well as some smaller unnamed streams that are being crossed. The White River Boreal Forest, Copper Falls State Park, and the Sloughs are all downstream. Modeling was not adequate to assess impacts on these Areas, especially due to the lack of specific sediment or petroleum spill modeling done for Beartrap Creek, the Kakagon side of the Sloughs, and the Bad River Slough. Further, MNRD and other support staff have noted gaps in DNR's mapping of ASNRI, which may have exacerbated the undercounting and under-analysis of impacts on ASNRI.

Moreover, the wetland assessments that Enbridge undertook do not present an accurate picture of floristic integrity and functional value. Enbridge delineated many wetlands it proposes

to affect between October 1-19, 2019. Wetland and Waterway Permit Finding of Fact 27. This small snapshot is outside of peak season for species indicative of high-quality wetlands. Further, Enbridge did not use DNR's standard method for assessing quality and functional values, which assesses each functional value individually. Instead, Enbridge assigned an overall functional value for the entire wetland. The data DNR and Enbridge did collect, much of which was originally submitted by MNRD, indicates that there are numerous high-quality and exceptional-quality wetlands that the Project will affect but are undervalued and under-protected. These wetland delineations also use methods that fail to capture important details like microtopography. The full scope of the Project's wetland impacts is unknown because of the severe gaps in DNR and Enbridge's data and flawed methodology.

This faulty baseline is then incorporated into and exacerbated by faulty assessment of wetland impacts. Building access roads and staging areas as well as placing timber matting to allow construction equipment to pass will degrade wetlands and DNR does not fully capture these impacts. While DNR points to placing timber matting in wetlands as a means to reduce impacts, the Band has shared examples of Enbridge's work on the existing Line 5 on the Reservation where matting created significant and long-lasting impacts. FEIS at 500-501 (discussing matting only in terms of temporary impact). DNR and Enbridge assume that matting will create suitable, level areas to store spoils and move vehicles. In reality, it is certain Enbridge will encounter stumps, geohazards, and varied soil layers that will cause uneven elevation on timber mats and possibly increase unpredictable sedimentation risks. Further, the ECP acknowledges that there will be situations where multiple mats will need to be stacked on top of each other due to mats sinking into the soil. Removal may then require probing the soils to determine if all mats are indeed being removed. Fieldwork by MNRD and contractors has verified that there are wetlands with standing water that are to be blasted or trenched where impacts from matting and dewatering will likely be severe.

Some impacts may lead to unforeseeable consequences that are left unconsidered, such as scattering woodchips in wetlands. Wetland and Waterway Permit Condition 217. Moreover, clearing wetland plants in construction areas will increase erosion and affect hydrological conditions and microtopography, altering the biological suitability of many wetlands to host important species and causing loss of functional values like flood control and filtration. Enbridge will conduct maintenance activities in the right-of-way for decades creating long-lasting impacts that could permanently alter wetlands. DNR fails to consider and does not fully analyze the impact of these activities.

Construction methods including blasting, trenching, and drilling will also adversely impact wetlands. The blasting activities DNR authorized Enbridge to undertake are high-risk and DNR fails to fully consider or mitigate blasting's irreparable changes to waterway and wetland substrates that cannot be restored to pre-construction conditions. For example, blasting can create new surface water and groundwater interactions or redirect groundwater flow. DNR states Enbridge anticipates blasting in approximately 26 navigable waterways in addition to acres of wetlands. Wetland and Waterway Permit Finding of Facts 67. But there are likely to be more sites subject to blasting if circumstances require. *See* FEIS at 68.

Trenching wetlands and waterways will require Enbridge to store spoils on construction matting surrounding the dredged area. Enbridge's ECP and DNR's conditions fail to control for mobility of mucky soils, as well as the potential for changes to the physical and biological characteristics of soil during the storage period. Wetland and Waterway Permit Condition 228; WQC Condition 70. Once stored soils are placed back into wetlands, if they have physical and biological changes due to storage, the altered soils will impact the quality and value of the filled wetland. This will alter the suitability for certain plants and aquatic species and hydrologic conditions and flow paths. Significantly, any mossy or peaty soils disrupted by dredging will likely not be restored to preconstruction conditions because it will take too long to reestablish the appropriate biological conditions for growth—if such conditions can be re-established at all.

Enbridge will dewater trenches during the construction of the Project. Dewatering may be necessary if groundwater infiltrates the trench making pipeline placement more difficult. Enbridge may need to pump water out of the trench and discharge it to surface water. This risks increasing sedimentation, turbidity, introducing polluting agents, and causing erosion in the receiving water—impacts DNR fails to consider or arbitrarily dismisses. Wetland and Waterway Permit Condition 90. The permits state that dewatering activities may not violate the Band's water quality standards but provide no concrete monitoring conditions that ensure this condition is implemented. Enbridge also plans to install erosion control devices along the pipeline corridor, but it will be impractical to inspect or repair all erosion control measures along the 41-mile length of the pipeline should a malfunction, rainfall, or flooding event occur. WQC Condition 20, 24; Wetland and Waterway Permit Condition 101.

Finally, HDD is likely to cause discharges of drilling mud into wetlands, an impact DNR acknowledges is "likely" to occur in one or more of the HDD crossings. Yet, the agency fails to adequately consider or control these likely discharges and fails to impose effluent limitations. Conditions that aim to address these releases are unrealistic. Because of the inaccessibility of many HDD corridors, it is impractical for vacuum trucks to access many of the sites where drilling mud releases may occur, which will exacerbate impacts from such unpermitted releases. Wetland and Waterway Permit Condition 50.

DNR's wetland permit will not prevent the Project's deleterious impacts to wetlands because it relies on incomplete and methodologically flawed analysis. Wetland and Waterway Permit Condition 20; WQC Condition 12. Despite these serious effects, site-specific analysis of the true extent of Project impacts is lacking. DNR must gather sufficient site-specific data and analyze the impacts of each proposed construction method to be able to accurately determine whether the Project will result in significant environmental harms.

The FEIS is also invalid on the basis that it incorporates DNR's incorrect analysis.

This issue raises the following disputes of material fact:

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 28: "The Department reviewed a subset of randomly selected wetland WRAMs in greater detail. Enbridge assigned an overall functional value to each wetland based on a compilation of the ratings from the individual functional value categories. The Department's

standard WRAM process does not recommend a single, overall WRAM rating approach, but instead assigns individual ratings to each distinct functional value category. Enbridge assessed approximately 26.0 acres of wetland as high functional value, approximately 57.1 acres of medium functional value, approximately 10.1 acres as low functional value, and approximately 8.0 acres of low invasive functional value."

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 29: "In between August 2022 and September 2022, Enbridge performed timed meander surveys for the subset of wetlands determined to be of medium to high overall functional value from the delineations completed in 2019-2020. During the timed meander surveys, Enbridge applied cover classes instead of absolute cover levels, as described in the Department's Timed Meander Survey protocol. Enbridge also used the midpoint of each cover class to assign coverage values in the Floristic Quality Assessment Calculators."

iii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 31: "Enbridge delineated and identified approximately 101.1 acres of wetlands within the Project Area. Of the 101.1 acres of wetlands, approximately 28.1 acres were identified as palustrine emergent (PEM), 10.2 acres were palustrine scrub-shrub (PSS), and 62.8 acres were palustrine forested (PFO). The most common wetland plant communities were hardwood swamp (58.9 acres), fresh (wet) meadow (native subtype, 24.7 acres), and shrub-carr (7.0 acres)."

iv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 32: "Based on WRAM assessments conducted by Enbridge, almost half of the PFO and PSS wetlands that will be permanently cleared provide a "High" wildlife habitat functional value and "High" floristic quality. Almost one quarter of the wetlands provide "High" or "Exceptional" flood and stormwater storage, water quality protection, and ground water processes functional values. Based on Enbridge's timed meander survey, approximately two-thirds of the PFO wetlands that will be permanently cleared by the proposed project will have a known Floristic Quality Index rating of "High" or "Exceptional." Of the wetlands surveyed during the timed meander surveys, 55% indicated an "Exceptional" Coefficient of Conservatism (mean C-value) rating and 27% indicated a "High" mean C-value rating."

v. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 33: "Different methodologies used to evaluate wetland condition and functional value can and do produce differing characterization for the same wetlands. To avoid underestimating the functional value of wetlands when reviewing results from these methodologies, the Department selected the highest documented functional value assessment or floristic value calculation as representative of the accurate wetland conditions."

vi. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 34.

vii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 39.

viii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 43: "Enbridge captured civil survey and Light Detection and Ranging (LiDAR) elevation data along the Project ROW in 2020 and 2023. These data will be used as a baseline for restoration of preconstruction elevations."

ix. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 44: "Pursuant to 281.36, Wis. Stats., the Department considered all the following factors when it assessed the impacts to wetland functional values" then listing the functional values considered."

x. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 48: "The amount of permanent wetland fill has been minimized to the extent practicable, taking into consideration the factors for valve siting and placement. Each mainline valve requires a permanent access road for operational, maintenance, and emergency access. Wetland impacts from access roads have been minimized to the extent practicable to maintain safe ingress/egress of operation equipment as well as emergency equipment (e.g., fire trucks)."

xi. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 49: "The Department has determined that if all conditions of this permit are complied with that all practicable measures to minimize adverse impacts to wetland functional values will be taken."

xii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 52: "Excavation, drilling, blasting, stockpiling, pipeline installation, and backfilling can alter groundwater discharge through seeps and springs. Enbridge is conducting hydrology monitoring in select high quality wetlands with shallow bedrock and high groundwater and seeps. Enbridge is required by the conditions of this permit to characterize existing seeps and springs and restore those features to pre-existing conditions."

xiii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 53: "Enbridge proposes and is required by the conditions of this permit to minimize direct impacts of the construction by minimizing the amount of permanent wetland fill, utilizing existing access roads where practicable, reducing the width of the construction workspace in wetlands from 120 feet to 95 feet, utilizing construction matting in travel areas of the corridor, segregating topsoil and subsoil, limiting stump grubbing, grinding, and grading to the trench line, locating staging and additional spoil areas at least 50 feet from wetlands where practicable, limiting the duration of an open trench, maintaining hydrology through the utilization of trench breakers, restoring seeps and springs, and implementing site-specific sediment and erosion control measures as required for compliance with WPDES Construction Site Storm Water permitting."

xiv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 54: "Enbridge proposes and is required by the conditions of this permit to minimize

continuing impacts to wetland functional values by restoring wetlands to their pre-existing wetland soil profiles, elevations, and hydrology post-construction. Enbridge is required by the conditions of this permit to install monitoring wells prior to construction to collect baseline hydrologic data for high quality wetlands, wetlands within shallow bedrock and high groundwater and seeps, and wetlands proposed for blasting to ensure restoration of appropriate wetland hydrology. The Restoration and Post-Construction Monitoring plan in the Environmental Construction Plan (ECP) also includes active supplemental planting in disturbed wetlands. PEM wetlands will be seeded to provide temporary cover and supplemental perennial native revegetation. PFO wetlands in the temporary workspace will be seeded to provide temporary cover and planted with a combination of rootstock of balsam fir, black spruce, red maple, swamp white oak, tamarack, white pine, or yellow birch. Trees will be planted at a density of 100-300 stems per acre."

xv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 60: "The Department has determined the Project, if conducted in accordance with the conditions of this permit, will not result in significant adverse impacts to water quality, including surface water and groundwater."

xvi. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 62.

xvii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 67: "Approximately 26 navigable waterways (7 perennial, 11 intermittent, 8 ephemeral) may require blasting to accommodate pipeline installation."

xviii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 77: "The Project, if constructed in accordance with this permit and protection measures required and recommended by the Department's Office of Energy Endangered Resources Energy Liaison, will avoid and minimize impacts to endangered resources. Enbridge is required by this permit to use upland seed mixes that contain ≥99% native species (use of Lolium perenne is acceptable). Most recommended actions will be followed by Enbridge using a native seed mix as part of restoration as well as completing tree clearing during winter months. For those state listed endangered resources that cannot be avoided, an Individual Incidental Take Permit will be issued or a Broad Incidental Take Permit that has already been issued will ensure take of those species is minimized pursuant to Wisconsin's Endangered Species Law (29.604, Wis. Stats.)."

3. Issue Three: DNR performed an inadequate assessment of functional values.

Tied in with DNR's faulty assessment of the duration and true nature of impacts, the agency also failed to ensure that "all practicable measures to minimize impacts to wetland functional values will be taken" and that "[t]he proposed project will not result in significant adverse impact to wetland functional values." Wis. Stat. §§ 281.36(3n)(c)2-3. Before issuing a wetland dredge or fill permit, DNR must evaluate impacts to wetland functional values, including cumulative and potential secondary impacts to those values. *See* Wis. Stat. § 281.36(3n)(b); Wis. Admin. Code §§ NR 103.08(3), 103.03. DNR must evaluate, among other things, a project's impacts to

wetlands' capacity for storm and flood water retention, hydrologic function, habitat for aquatic organisms and wildlife species, and "[r]ecreational, cultural, educational, scientific and natural scenic beauty values and uses." Wis. Admin. Code § NR 103.03.

DNR undervalues or does not know the quality, diversity, and function of wetlands. For example, Enbridge did not use an ecological evaluation method accepted by DNR for functional value and impact assessment, yet DNR relied on Enbridge data. Wis. Admin. Code § NR 103.08(2). Further, DNR ignores the long-term and permanent hydrologic and water quality effects of converting forested areas to managed rights-of-way, as well as the slow and uncertain recovery of wetlands outside the right-of-way. The loss of wetland microtopography leading to a loss of multiple wetland functions is also ignored.

One of the functional values DNR must protect is hydrologic function, including "dry season streamflow, the discharge of groundwater to a wetland, the recharge of groundwater from a wetland to another area and the flow of groundwater through a wetland." Wis. Admin. Code § NR 103.03(1)(b). Yet DNR is only now requiring Enbridge to gather the basic information needed to understand critical wetland hydrology. Even without this data, it is obvious that disturbances to surficial aquifers and bedrock fracture zones are likely to change the seasonality of groundwater discharge – increasing it in already high flow periods and reducing it in already low flow periods. This will in turn harm aquatic habitat. Given this, DNR could not have known the impacts of trenching, blasting, and other construction activities on values including hydrologic function when it issued the wetland permit and water quality certification.

DNR also did not account for the functional value of wetlands as habitat. The cleared and maintained pipeline corridor will disrupt the connectivity of critical habitats for species, including those that are threatened and endangered, resulting in isolated populations that will suffer from low genetic diversity, putting these populations at risk.

DNR's decision to authorize Enbridge to build the Project without properly characterizing functional values via baseline conditions, effects, remediation, and mitigation will harm the Band's substantial interests, including in flood control, preservation of habitat, water quality, and its cultural, recreational, educational, and scientific interests in preserving wetlands in the ceded territory. Wis. Stat. §§ 281.36(3n)(c)2-3; Wis. Admin. Code § NR 103.03.

The FEIS is also invalid on the basis that it incorporates DNR's incorrect analysis.

This issue raises the following disputes of material fact:

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 28.

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 32.

iii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 34.

iv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 36.

v. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 38.

vi. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 39.

vii. The Band disputes Waterway and Wetland Permit and WQC Finding of Fact 44.

viii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 46.

ix. The Band disputes Waterway and Wetland Permit and WQC Finding of Fact 49.

x. The Band disputes Waterway and Wetland Permit and WQC Finding of Fact 54.

xi. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 59.

xii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 77.

4. Issue Four: DNR's requirements for wetland restoration and mitigation are ineffective and inadequate.

The lack of baseline understanding of the current functional values of wetlands and the lack of proper categorization of impacts create cascading issues. These foundational flaws mean DNR cannot draw sound conclusions about whether Enbridge's post-construction remediation and mitigation measures are adequate to protect functional values, water quality, and other aspects of the environment. Wis. Stat. §§ 281.36(3n)(c)2-3, (d), (3r). Consequently, permit and certification conditions meant to ensure restoration and mitigation, as well as the plans incorporated into the conditions, are insufficient to restore and replace lost wetland values.

The incomplete baseline sets DNR's restoration and mitigation analysis up for failure because, without an accurate accounting of functional values, DNR cannot ensure that preconstruction conditions have been restored. Moreover, the monitoring conditions meant to ensure preconstruction restoration are not sufficient because they are limited to a small number of wetland sites that are not representative of all wetlands affected. There are also no conditions requiring continued maintenance and monitoring should preconstruction restoration standards not be met.

There is good reason to believe that Enbridge cannot comply with conditions requiring restoration of trenched, blasted, and otherwise disturbed wetlands because the proposed restoration measures will take decades and have demonstrably impractical planting conditions and timelines. *See e.g.*, Wetland and Waterway Permit Condition 125; WQC Conditions 144, 147. Some wetland functions will be practically impossible to restore. Enbridge's wetland construction activity will disrupt the flow of seeps and springs that feed surface waters. Once conditions such as aquitards and preferential flow paths along sub-surface anomalies are altered, seeps and springs, and the physical and biological functions they support, cannot be practicably restored as required by the permit. Wetland and Waterway Permit Condition 28; WQC Condition 11. Additionally, blasting bedrock and dredging soil will alter hydrology and elevation by creating new flow pathways and soil profiles and changing physical and biological characteristics of the substrate. WQC Condition

144; Wetland and Waterway Permit, Condition 125. Importantly for the Band, restoration plans do not anticipate nor require replanting culturally important tree species like Black Ash, Maple, and Northern White Cedar. Yet plans do include non-wetland species such as the White Pine. These realities will make it impossible for Enbridge to restore wetlands to preconstruction conditions.

DNR does not provide sufficient monitoring and post-construction review conditions to ensure that restored wetlands and affected construction sites comply with conditions. The permit does not authorize work after the completion and restoration of a Project site. DNR does not require easements to specifically allow Enbridge to conduct waterway and wetland restoration and management activities until its responsibility is terminated for that property, meaning Enbridge may lose access to sites it is meant to restore and monitor. This suggests that easily anticipated impacts of ongoing maintenance, operation, and eventual decommissioning were not taken into account and are more likely to happen. DNR's decision to issue these Project approvals does not consider such real and unavoidable future effects to wetlands. As such, DNR failed to adequately evaluate wetland effects that would occur as a direct effect of the Project.

As for mitigation, the ratios are underweighted. DNR inappropriately combines low and medium-quality wetlands into a single mitigation ratio even though there are distinct differences in function, with some medium-quality wetlands being highly functional for certain values. Where DNR recognized that it was undervaluing functional values in wetlands, it did not correspondingly adjust the mitigation ratios upward. Further, it appears that the wetland banks Enbridge proposes to use may not have adequate credits available. Making matters worse, the mitigation credits Enbridge relies on to replace permanently filled and permanently converted wetlands are out-of-kind and/or nonrepresentative mitigation credits generated by underdeveloped wetlands that will take decades to reach the appropriate quality, if they ever do. Importantly for the Band, these mitigation areas also do not anticipate planting culturally important tree species like Black Ash, Maple, and Northern White Cedar. Further, the mitigation banks Enbridge plans to use are well outside of the watersheds where wetlands—and their numerous functional values—will be lost. The conditions in the permit relating to restoration and mitigation are irrational and do not account for the reality of the Project's impacts.

Because of the outstanding questions on the acres of wetlands present and impacted, and what functional values they have, the appropriate remediation conditions and mitigation plan are currently impossible to determine. DNR has disregarded many impacts on wetland type, quality, and function, leading to undercounting the needed mitigation acreage and the practicability of restoration. DNR has compounded these errors by relying on flawed, inadequate restoration and mitigation plans. Because Enbridge has not provided sufficient information, DNR cannot find that Enbridge has met the requirement to avoid, minimize, or mitigate wetland impacts for each wetland impacted. Wis. Stat.§ 281.36(3n); Wis. Admin. Code § NR 103.08(4).

The FEIS is also invalid on the basis that it incorporates DNR's incorrect analysis.

This issue raises the following disputes of material fact

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 38.

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 39.

iii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 43.

iv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 44(d): "The mitigation that is required to compensate for impacts to wetland functional values under 281.36(3r). Compensatory mitigation is proposed for permanent wetland fill, conversion of PSS and PFO to PEM wetlands, and for temporal loss of wetland functions" and providing the mitigation ratios."

v. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 52.

vi. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 53.

vii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 54.

viii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 55: "Enbridge is required by the conditions of this permit to operate vehicles and equipment in wetlands on construction matting or during stable ground conditions where operation will not result in soil rutting, mixing, or compaction; avoid placing excavated wetland soils directly on wetlands; minimize the width of the trench through wetlands to the extent practicable; plant supplemental bare root stocks in forested wetlands that are cleared for temporary workspaces; and conduct well monitoring at discrete locations along the trench line."

ix. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 56: "Enbridge is required by this permit to restore wetlands directly impacted by the Project to pre-existing elevations and hydrology; utilize a wetland seed mix that was developed in coordination with USEPA; perform post-construction monitoring, implement appropriate and effective BMPs in accordance with the Department's Construction Storm Water Permit; and plant bare root stocks in forested wetlands that are cleared for temporary workspaces."

x. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 57.

xi. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 58.

xii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 59.

xiii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 62.

5. Issue Five: The Project will result in significant adverse impacts to water quality.

As discussed in numerous other issues in this petition, and incorporated by reference herein, the Project as permitted is likely to violate many of Wisconsin's water quality standards and the Band's. The current water quality conditions for the Project area do not adequately account for impacts to water quality from construction as well as the inadequate restoration and mitigation plans. The Project as proposed and permitted means that wetland water quality is likely to be significantly impaired by the Project.

The FEIS is also invalid on the basis that it incorporates DNR's incorrect analysis.

This issue raises the following disputes of material fact:

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 60.

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 61: "The Department has determined the Project, if conducted in accordance with the conditions of this permit, will comply with water quality standards and protect surface water resources for all designated uses."

6. Issue Six: Enbridge lacks necessary WPDES and dewatering permits.

DNR failed to assess the need for additional permits along with the wetlands dredge and fill permit. Wis. Stat. § 281.36(10). DNR should have assessed the need for a Wisconsin Pollution Discharge Elimination System permit for the discharge of drilling mud from discrete conveyances created by horizontal directional drilling into waters of the state, including wetlands. Wis. Stat. § 283.31(1); Wis. Admin. Code §§ NR 103.06(1)(b), (2). DNR found that drilling mud discharges are "likely" but has not set limits on effluent, imposed necessary conditions, or characterized the potential impact of these discharges to water quality. Wetland and Waterway Permit Finding of Fact 60(j); Wis. Stat. §§ 283.31(1), (3), (4); 283.01(12), (13), (20); Wis. Admin. Code § NR 200.03(1). DNR has also failed to follow the notice and comment procedures regarding its proposal to authorize Enbridge to discharge drilling mud effluent from a point source into the waters of the state. Wis. Stat. §§ 283.39-49; Wis. Admin. Code. § NR 200.10.

Similarly, DNR failed to assess the Project's need for a dewatering permit. Enbridge and DNR recognize more than 100,000 gallons of groundwater can be pumped from trenches at construction sites, but Enbridge has not obtained the necessary dewatering permits from DNR. FEIS at 284; Wis. Stat. § 281.34; Wis. Admin. Code § NR 812.09(4)(a). Some of the dewatering may also take place within groundwater protection areas, which DNR must consider. Wis. Stat. § 281.34(1)(am).

The FEIS is also invalid on the basis that it incorporates DNR's incorrect analysis.

This issue raises the following disputes of material fact:

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 60(j): "HDD releases – It is likely that the Project will experience an inadvertent release (IR) during one or more of the proposed trenchless installations. Most IRs occur near entry

and exit workspaces and the severity will be reduced by following the requirements in DNR Technical Standard 1072. Continuous monitoring and immediate cessation and containment during an IR in water resources, followed by comprehensive restoration, will reduce the water quality impact. Drilling fluid ingredients are not expected to affect groundwater water quality. Enbridge is required by this permit to only use drilling mud and drilling mud additives that have been approved for use by the Department."

7. Issue Seven: The Project will result in other significant adverse environmental consequences.

Permit and Certification conditions will not prevent other significant adverse consequences to wetlands, some of which may be unpredictable and are under-analyzed in the FEIS. Numerous conditions are overly optimistic and broad; nominally prohibiting pollution without providing real mechanisms for monitoring and enforcement. Throughout, conditions vaguely reference Enbridge's Environmental Construction Plan ("ECP"), a roughly 3,000-page document, without specifying a page or section. This creates considerable opportunity for inappropriate applicant discretion, confusion, and incorrect application of conditions and the ECP, leading to unaccounted-for impacts. The requirement of three independent environmental monitors ("IEMs") does not alleviate concerns about unforeseen consequences or incorrect application of control measures. IEM qualifications are not clearly identified. Further, IEMs are hired by Enbridge and DNR with no involvement or vetting by the Band. Finally, because there are only three monitors available at any one time, it will be difficult if not impossible to monitor all activities and sites, especially considering some activities, like HDD, require more monitoring than others.

Some activities contemplated by the permit also lack the necessary and legally required review. As discussed elsewhere and incorporated here, Enbridge must obtain, and DNR must scrutinize, the company's plans to discharge drilling mud into waters of the state, dewater more than 100,000 gallons of groundwater per day, and take threatened species. Because activities and impacts have not been properly assessed via other necessary permits, significant consequences are likely from these unpermitted activities. Further, Enbridge can potentially extend the permit for a total of 7 years, which would prolong active construction impacts, changing and increasing their effects on the surrounding environment. DNR also does not evaluate the potential impacts of decommissioning in conjunction with the long-term impacts of the pipeline, yet the combined consequences could be severe.

Moreover, DNR has not provided a full analysis of impacts on the many plants and animals in the path of the proposed Project. Many impacted species are protected by state law, federal law, and treaty-reserved rights, but DNR is missing necessary data and independent analysis to evaluate impacts in Chapter 281 and functional value requirements relating to biological integrity. Wisconsin's surface water and wetland water quality standards require protection of habitat for aquatic life and wildlife. Wis. Admin Code §§ NR 102.04(3), (9), 103.03(1)(e)(f). Further, Wisconsin has special protections for manoomin, Wis. Stat. § 29.607, and endangered and threatened species. *Id.* at § 29.604. More information is needed about the full scope of this Project's consequences for plants and animals.

DNR's analysis of oil spill risk understates the risk of spills, potential impacts, and clean-up costs and measures. DNR blindly accepts, without justification, Enbridge's unrealistically low estimate of the risk of an oil spill of 0.00317 spills of any size over 20 years. If any spills do occur, Enbridge must clean up the spill "to the greatest extent practicable," meaning that there will still be severe consequences for wetlands should a spill occur. WQC Condition 108. Significant and adverse impacts to water quality, including surface water and groundwater will happen in the event of a spill along the proposed Line 5 route

DNR also notes the potential for increase in PFAS from construction materials and equipment. Even a small increase can be significant, as the PFAS water quality standard is measured in parts-per-trillion.

These issues remain unresolved and DNR has not imposed practicable or coherent conditions that will address the significant adverse consequences to wetlands the Project will create.

The FEIS is also invalid on the basis that it incorporates DNR's incorrect analysis.

This issue raised the following disputes of material fact:

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 53.

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 54.

iii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 55.

iv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 60.

iii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 62.

iv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 77.

B. DNR Failed to Comply with Wis. Stat. Ch. 30 in Issuing the Waterway Permit

1. Issue Eight: Enbridge is not a riparian owner, so is not eligible for a § 30.12 permit.

DNR violated § 30.12 by authorizing Enbridge to deposit materials and place structures in waterways because the company is not a "riparian owner" of the areas where it plans to build, a basic requirement of authorizing the Project. Wis. Stat. §§ 30.12(1), (3m)(a); Wis. Admin. Code §§ NR 300.03(1), 329.03(13). While Enbridge holds easements to construct and operate the pipeline, it does not possess sufficient ownership to deposit materials and place structures on waterway beds.

Additionally, DNR did not assess nor permit a deposition of drilling mud on the bed of waterways under § 30.12, despite acknowledging the likelihood of such releases.

The FEIS is also invalid on the basis that it incorporates DNR's incorrect analysis.

This issue raises the following disputes of material fact:

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 70: "Impacts to water quality and aquatic habitat from pipeline installation across waterways are minimized if the construction zone is isolated using a dam and pump or flume system or crossed via trenchless methods (boring). Adjacent to waterways, Enbridge is required by the conditions of this permit to maintain sediment control measures 20 feet from the stream prior to ground disturbing activities and to restore streambanks as near as practicable to preconstruction contours and elevations."

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 71: "Pursuant to 30.12, Wis. Stats., the Department finds all of the following will be met by the placement of temporary structures on the bed of waterways…"

iii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 72: "Pursuant to 30.12, Wis. Stats., the Department finds all of the following will be met by the placement of permanent structures on the bed of waterways:"

2. Issue Nine: Granting the Ch. 30 permit is not in the public interest.

DNR improperly found that authorizing Enbridge to undertake construction activities for the Project in Wisconsin waterways is in the public interest, in violation of Wisconsin statute chapter 30 and DNR's public trust duties. Wis. Stat. §§ 30.12, 30.123, 30.20, 30.29, 30.208; Wis. Admin Code § NR 300.07.

Many of the conditions that demonstrate the likelihood of other significant environmental consequences above are equally relevant to proper consideration of the public interest and are incorporated by reference here. DNR has required that Enbridge restore blasted areas to preconstruction hydrology and elevations. Wetland and Waterway Permit Condition 125. However, as discussed above, Enbridge's plan to destroy seeps and springs; disrupt groundwater; and disturb pools, riffles, and runs will change hydrologic conditions and streambed elevations making it difficult to achieve preconstruction hydrology at any site, and impossible at some. Wetland and Waterway Permit Conditions 141, 143; WQC Condition 172. Additionally, blasting can create new surface water and groundwater interactions or redirect groundwater flow.

Conditions requiring no long-term impacts to waterway beds from work zone isolation or flow bypass systems fail to recognize that these impacts are inflicted on waterways in the context of Enbridge's other impacts. Work zone isolation and flow bypass will cause cascading environmental impacts associated with initial and later-stage construction activities as discussed in wetland issues above. Wetland and Waterway Permit Condition 177; WQC Condition 204. If a stream bed has unique substrate features (cobbles, boulders, riffles), the permit requires that the

bed be returned to preconstruction conditions, but that will be impossible with the need to blast through geohazards and level timber matting by removing boulders, stumps, and other material. Wetland and Waterway Permit Condition 200; WQC Condition 227. Construction activities will remove boulders and other materials, uncompact and recompact soils, and alter microtopography in such a way that restoration of bed and bank elevations and slopes will not be practicable. Wetland and Waterway Permit Condition 204; WQC Condition 173. Additionally, the fact that Enbridge is not a riparian owner weights the public interest even more strongly against the Project—Enbridge has no riparian rights that must be balanced with the public interest and public trust consequences of the Project.

DNR equivocates regarding numbers (e.g., "Approximately 26 navigable waterways may require blasting"). DNR cannot fully evaluate the water quality effects of the Project if it doesn't know how many waterbodies will be crossed by the Project or without knowing which construction method will be used for each crossing. Trenching can change in-stream flow, and at many sites requires placing water diversion structures which Enbridge is not eligible to do. Horizontal directional drilling and direct boring can produce drilling fluid releases where pressurized mud escapes along fractures, killing vegetation and imperiling aquatic life. Despite these serious effects, site-specific analysis of construction methods is lacking. Many of these impacts are also left unassessed in other required permitting processes such as for point source discharge of drilling mud, high-capacity dewatering, and incidental take of threatened species. DNR must gather site-specific data and analyze the impacts of each proposed construction method to be able to determine whether the Project will result in impermissible harm to the public interest.

DNR has not provided a full analysis of the impacts on the many plants and animals in the path of the Project that stem from disruptions to surface water. Many impacted species are protected by state law, federal law, and tribal treaties, but DNR is missing necessary data and independent analysis to evaluate impacts in compliance with WEPA, Chapter 30, and other Wisconsin statutes. Wisconsin's surface water and wetland water quality standards require protection of habitat for aquatic life and wildlife. Wis. Admin Code §§ NR 102.04(3), (9), 103.03(1)(e)(f). Further, Wisconsin has special protections for manoomin, Wis. Stat. § 29.607, and endangered and threatened species. *Id.* at § 29.604. DNR must do more to analyze how changes in hydrological, physical, and biological conditions to waterways associated with the Project will be addressed, mitigated, and monitored and how they will impact waterways and protected species.

As discussed in Issue Two, DNR failed to adequately consider or guard against impacts to ASNRI as NR 103 requires. Wis. Admin. Code §§ NR 103.04, 103.08(3)(f), 4(b); FEIS at 415-16, 494.

The FEIS is also invalid on the basis that it incorporates DNR's incorrect analysis.

This issue raises the following disputes of material fact:

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 60.

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 61.

iii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 62.

iv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 67.

v. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 70.

vi. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 71.

vii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 72.

viii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 73: "Pursuant to 30.123, Wis. Stats., the Department finds all of the following will be met by the placement of temporary bridges across waterways."

ix. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 74: "Pursuant to 30.20, Wis. Stats., the Department has determined the dredging of waterways is consistent with the public interest in navigable waters."

x. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 77.

3. Issue Ten: Enbridge lacks a necessary incidental take permit.

By issuing Enbridge a Ch. 30 permit without an incidental take permit concerning threatened and endangered species, Enbridge has failed to meet the requirements of Ch. 30. Wis. Stat. § 29.604; Wis. Admin. Code §§ NR 320.06(3)(a)2., 328.06(1)(b), 328.36(1)(b), 329.04(3)(a)2., 345.04(3)(a)2. DNR may not authorize wetland or waterway disturbances resulting in the take of an endangered or threatened species unless the applicant obtains an incidental take permit. Enbridge has not acquired a permit for incidental take and thus lacks an essential precondition of its wetland and waterway permit. Further, the cleared and maintained pipeline corridor will disrupt connectivity of critical habitats for species—including those that are threatened and endangered.

DNR acknowledges that Project construction will result in the take of Braun's Holly-Fern that cannot be avoided, necessitating Enbridge to apply for an incidental take permit. FEIS at 546-47. DNR omits and fails to consider Project impacts on other threatened plant species, such as butternut. The FEIS fails to disclose individual butternut trees within the Project workspace, or closely adjacent to the Project workspace, that MNRD and GLIFWC previously mapped. FEIS at 546. DNR omitted the Butternut individuals and instead concluded that "the plants are outside the proposed project workspace and that there would be no impacts to this species." DNR similarly discounts the impacts that the Project will have on threatened species, such as the Sweet Colt's-foot. Sweet Colt's-foot is highly sensitive to water quality and changes of hydrology in the wetlands where they are found, such that any impacts to the wetland where the populations are located could cause mortality or long-term detrimental impacts to those species. Although DNR acknowledges the sensitivity of Sweet Colt's-foot, the FEIS fails to acknowledge any possible impacts to Sweet Colt's-foot from construction. Rather, DNR wholly dismisses the possibility of

detrimental impacts by stating that construction via HDD will "avoid[] direct impacts to this waterbody" connected to Sweet Colt's-foot. FEIS at 547. This is in conflict with DNR's finding that inadvertent releases from HDD are likely to occur.

DNR has also failed to make public, or at least provide to the Band, the Endangered Resource Review conducted as part of the Project review. FEIS at 545; Wetland and Waterway Permit Conditions 85, 86, 87. Without this information, it is impossible to determine if DNR accurately and adequately considered impacts to other threatened and endangered species.

No FEIS has been prepared for the required incidental take permit.

This issue raises the following disputes of material fact:

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 71.

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 72.

iii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 73.

iv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 74.

v. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 77.

C. Water Quality Certification

1. Issue Eleven: DNR Failed to Comply with State Water Quality Standards in Issuing the Water Quality Certification

DNR's certification that the Project complies with Wisconsin water quality standards is erroneous. Wis. Stat. § 281.36(3b); Wis. Admin Code. §§ NR 299.04-05. DNR must ensure that the Project will not adversely affect waters and wetlands by introducing pollutants, impacting aquatic life and wildlife, or interfering with hydrologic function. Wis. Admin Code §§ NR 102.04(3)-(9), 103.03(1)(a)-(g). Many of the issues listed above discuss impacts to water quality, which are incorporated by reference into this issue.

DNR must evaluate the Project's impacts on waterway and wetland water quality from an appropriate baseline. As discussed above, Enbridge and DNR have severe gaps in baseline data that fail to provide a full and accurate picture of the wetlands, waterways, and their functional values that may be affected by the Project. FEIS at 388. Without this information, DNR cannot draw sound conclusions about compliance with water quality standards that apply to each proposed waterbody crossing.

DNR is not providing appropriate measures to preserve water quality in waters and wetlands the Project will adversely affect. First, DNR assumes that functional values in wetlands will be restored and therefore water quality standards that hinge on those functional values will not be violated. But DNR mischaracterizes the decades-long loss of these functional values as

temporary impacts, when in reality these losses will have ongoing severe deleterious impacts on water quality in Wisconsin's surface waters. Additionally, DNR has not described how erosion control methods will achieve water quality criteria. Pipeline construction can increase sedimentation and turbidity flow to streams, cause releases of construction fuel or fluids that pollute waters, and destroy seeps and springs that are critical to ecological value and hydrologic function. Drilling and trenching can release heavy metals—especially in the highly mineralized Penokee Hills—and forest clearing along the right-of-way and the operation of the pipe itself will increase water temperatures. DNR also did not evaluate all risks to groundwater and associated impacts to water quality standards. These include increased sedimentation, groundwater withdrawals and the consequences for hydrologic function, the impact of storing spoils near the construction right-of-way, and alteration of seeps that determine groundwater-surface water connection. These also include the pipeline raising the temperature of soil and groundwater that comes into contact with the pipe. These temperature shifts will have permanent impacts not only on surrounding groundwater but on surface waters fed by groundwater, especially in cold and cool water systems already threatened by climatic shifts. DNR also failed to evaluate the impacts that blasting as a construction method will have on groundwater-surface water connections and how changing groundwater connections can alter surface water quality. Based on this and other deficiencies, DNR cannot find that the Project will comply with state water quality standards. Wis. Admin. Code § NR 299.04.

Finally, DNR has not imposed necessary conditions on Enbridge's HDD and trench dewatering proposals such that water quality in the waterways and wetlands crossed using these methods will be preserved. DNR determined that Enbridge is "likely" to discharge drilling mud from HDD pathways into waters of the state. Drilling mud discharges to surface waters could have severe impacts on the chemical, biological, and physical integrity of waterways and wetlands Enbridge proposes to cross with HDD. DNR has not set effluent limits on this point source discharge, nor characterized its effects to water quality as required in the water quality certification. Wis. Stat. § 283.13(5); Wis. Admin Code § NR 299.04(2). Additionally, DNR recognizes that in some areas of the Project, Enbridge's trench dewatering activities have the capacity to remove 100,000 gallons of groundwater per day. This impacts aquifers that recharge wetlands and waterways and are integrally related to their integrity. DNR has not imposed conditions on Enbridge's dewatering proposal in a dewatering permit and has not evaluated how the proposal will affect water quality. Wis. Admin. Code § NR 299.04(6).

The FEIS is also invalid on the basis that it incorporates DNR's incorrect analysis.

This issue raises the following disputes of material fact:

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 60.

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 61.

D. Construction Stormwater

1. Issue Twelve: DNR inappropriately granted coverage under its WPDES Construction Storm Water General Permit.

DNR improperly approved Enbridge's coverage under the Wisconsin Stormwater Discharge General Permit. Enbridge is not eligible for this coverage and must instead obtain an individual stormwater permit before building the Project. Wis. Stat. § 283.33; Wis. Admin. Code § NR 216.41. An individual stormwater permit is necessary to appropriately evaluate and address the Project's stormwater impacts. *See* Stormwater GP at § 1.2.2 (water quality standards); § 1.2.3 (endangered and threatened resources); § 1.2.4 (discharges violating water quality standards).

As discussed above, DNR mischaracterizes the Project's impacts and does not have sufficient information to evaluate losses of functional values in wetlands and its consequences for surface water quality. The Project is also likely to release construction materials including drilling mud, which are excluded from general permit coverage. Stormwater GP at § 1.1.3. DNR states that the Project will result in take of endangered and threatened species, but Enbridge still lacks an incidental take permit. DNR lacks sufficient information to conclude that the Project is eligible for coverage under the Stormwater GP. Similarly, DNR currently lacks adequate information to grant an individual WPDES stormwater permit for the Project.

As discussed in Issue Two, DNR failed to adequately consider or guard against impacts to ASNRI as NR 103 requires. Wis. Admin. Code §§ NR 103.04, 103.08(3)(f), 4(b); FEIS at 415-16, 494.

In the alternative, this Issue serves as a petition to DNR to withdraw coverage for the Project under the Stormwater GP and require an individual permit.

The FEIS is also invalid on the basis that it incorporates DNR's incorrect analysis.

This issue raises the following disputes of material fact:

i. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 53.

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 56.

iii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 60.

iv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 61.

v. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 77.

E. Wisconsin Environmental Policy Act

1. Issue Thirteen: DNR Failed to Comply with WEPA In Issuing the Permits.

The Project's FEIS does not comply with WEPA. Wis. Stat. § 1.11; Wis. Admin. Code §§ NR 150.20, 150.30. DNR lacked the necessary information to support its conclusions in the FEIS

regarding the Project's overall environmental impacts. As discussed extensively above and realleged here by reference, DNR has not conducted appropriate baseline surveys and mischaracterized the Project's impacts on waterways, wetlands, and water quality. Further, DNR has not done a WEPA review for permits that are necessary to complete this Project. This includes a WPDES permit authorizing effluent discharges of drilling mud from Enbridge's HDD operations and permits required for dewatering groundwater reserves. Additionally, DNR erred by tailoring the purpose and need statement to establish overly narrow alternatives for the Project and a deficient consideration of alternatives. Finally, DNR's scrutiny of risks and impacts associated with petroleum releases was insufficient. These large gaps in DNR's analysis amount to a failure to take a hard look at this Project's consequences for environmental and water quality.

This issue raises the following disputes of material fact:

i. All of the previous disputes of material fact stated in this petition are reincorporated. The FEIS's flaws are grounded in DNR's erroneous conclusions that the analysis underlying it was sufficient to meet the legal standards required to permit the Project.

ii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 6: "The Department considers the basic purpose of the Project to be continuing the transport of crude oil and natural gas liquids (NGLs) through Line 5 to Enbridge's existing delivery locations in approximately the same capacity as the existing line."

iii. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 25: "Enbridge identified and evaluated several alternatives as part of its proposed pipeline relocation project. Enbridge evaluated and presented its proposed Project and four route alternatives (RA-01, RA-02, RA-03, No Action) to the Department. Enbridge's evaluations were based on its stated approach of minimizing the length of the pipeline to the extent practicable, while also minimizing the environmental impacts to natural and cultural resources" and describing each alternative."

iv. The Band disputes Wetland and Waterway Permit and WQC Finding of Fact 62(b): "The Department estimates the long-term probability of a spill occurring along the proposed Line 5 route to be low, .00317 spills of any size over 20 years. Safety protocols and operational standards have also greatly reduced the frequency of spills. Enbridge will construct 10 new mainline block valves as part of the project. In the event of a spill, the valve sites on either side of the spill would be turned off, limiting the amount of oil that would be released into the environment. Continuous monitoring and control of Line 5 is carried out by Enbridge personnel and systems housed in an existing Control Center that is staffed by pipeline operators 24 hours per day. Enbridge's Control Center would notify local emergency responders to respond to the site of a suspected spill and, depending on the location of a potential incident along the pipeline route, emergency response timing would typically be 60 minutes or less. Depending on location and response, a spill may present lower risk to certain sensitive receptors. Physical monitoring would also be conducted through line patrols, either by air or on foot, in accordance with federal requirements."

VII. REQUEST FOR STAY

This Petition requests a stay of the Waterway and Wetland Permit and coverage under the Construction Site Storm Water Runoff General Permit pending resolution of this review of the legality of the decisions. The Project "shall be stayed pending an administrative hearing…if the petition contains a request for the stay showing that a stay is necessary to prevent significant adverse impacts or irreversible harm to the environment." Wis. Stat. §§ 30.209(1m)(c), 281.36(3q)(d). Petitioner incorporates by reference and realleges all objections and factual assertions included above.

Once the Project activities begin, adverse consequences will be significant and irreversible. Quite logically, once wetlands and waterways are dredged, trenched, blasted, compacted, and filled they cannot be immediately or fully restored. Numerous courts support this reality. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir.2000) (granting preliminary injunction against logging). For instance, numerous federal courts have held that removing trees is an irreparable harm for which no adequate remedy at law exists. *See e.g. Cronin v. US. Dep't of Agric.*, 919 F.2d 439,445 (7th Cir. 1990) (finding irreparable harm of logging a national forest outweighed the government's potential loss of revenue by not logging because "trees cut down this fall will not have grown back to their present height till most of the plaintiffs are dead"); *League of Wilderness Defs. / Blue Mountains Biodiversity Project v. Connaughton,* 752 F.3d 755, 764 (9th Cir. 2014) ("The logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage. The harm here, as with many instances of this kind of harm, is irreparable for the purposes of the preliminary injunction analysis.").

Similarly, the filling of wetlands is irreparable. *U.S. v. Malibu Beach, Inc.*, 711 F. Supp. 1301, 1313 (D.N.J. 1989) ("[T]here is no adequate remedy at law to compensate the public for the harm caused by the disposal of fill material into...wetlands...[that] serve a variety of critical functions, including providing a habitat for wildlife, a stop-over and feeding ground for migratory birds, and a nesting ground for the piping plover."); *see also U.S. v. Ciampitti*, 583 F. Supp. 483, 498 (D.N.J. 1984) ("Only if the [wetland] filling is immediately enjoined will the United States have the continuing benefit of these ecologically valuable lands.")

As this petition describes, the Project area would cut across a landscape of hundreds of waterways and wetland acres, which provide innumerable benefits to the Band including flood and water quality protection; hydrologic connectivity; drinking water supply; and support for the ecosystems, plant, and animal species as well as activities of critical cultural, subsistence, and treaty-protected importance to the Band's people. This landscape includes the Band's Reservation and Lake Superior—both of which are hydrologically connected to the Project Area.

Once Enbridge begins clearing trees and digging, drilling, and blasting through waterways and wetlands, the effects cannot be reversed. Naturally occurring ecological systems, once destroyed, cannot be put back together. If the permitted activities are allowed to proceed, they will destroy and disrupt these waterways and wetlands along a 41-mile arc - significantly harming the

hydrologic and ecological function of the entire watershed ringing the Band's permanent homeland. This includes clearing mature forested wetlands of exceptional importance to the Band that could not recover for multiple decades, as well as disrupting the beds, microtopographies, and hydrology of waterways and wetlands which are essential to supporting the unique plant and animal communities present at many sites across the Project. These impacts will permanently degrade these sites and will cause cascading impacts on these environments which the Band relies on in innumerable ways. Project activities will affect waters within the Bad River Band's Reservation and under the Band's jurisdiction and may also destroy, remove, or otherwise negatively impact resources of cultural importance within the proposed Project corridor and surrounding areas that are entirely within ceded territory. Project activities authorized under DNR's permits would gravely hinder the Band's ability to continue stewarding its Reservation and ceded territory to continue providing for its people. For these reasons, a stay of the permitted actions is warranted until the contested issues may be resolved on the merits.

VIII. BASIS FOR FINDING THAT THERE IS NO EVIDENCE OF LEGISLATIVE INTENT THAT THE INTERESTS ARE NOT TO BE PROTECTED

The Band's interests and authorities as a sovereign Tribal Nation are protected by the U.S. Constitution, federal treaties and statutes, and federal court decisions. These include protecting the health and welfare of the Band and its members, their lifeways, and the ecosystems on which they rely. Wisconsin also recognizes these sovereign interests through executive agency consultation policies and annual meetings with Tribal governments. *See e.g.,* Executive Order No. 18, *Relating to an Affirmation of the Intergovernmental Relationships among the State of Wisconsin and the Tribal Nations Located Within the State*, (April 9, 2019). DNR's permitting provisions identify tribes as potentially interested parties to be notified under Ch. 30 and § 281.36 permit processes. *See* Wis. Admin. Code. § NR 300.07(5) (note). DNR and the Band have engaged in government-to-government consultations and technical meetings regarding DNR's review of the Project. MNRD is also reviewing the proposed Project, including for compliance with the Band's water quality standards pursuant to Clean Water Act § 401(a)(2), 33 U.S.C. § 1341(a)(2).

Nothing in Wisconsin statutes §§ 1.11, 30.209, 227.42, 281.36(3q), or Wisconsin administrative code § NR 299.05(5) suggests a legislative intent that the Bad River Band's interests are not to be protected. Rather, the plain language of Wisconsin statutes § 30.209(1m)(a) and § 281.36(3q)(b) allows any interested person to file a petition for administrative review of a waterway crossing individual permit and wetland individual permit respectively. Further, under Chapter 281, the legislature expressed a clear intent to protect the public's interest in clean water and environmentally sound management. The stated purpose is "to organize a comprehensive program . . . for the enhancement of the quality management and protection of all waters of the state . . . allocating such effort and resources to accomplish the greatest result for the people of the state as a whole." Wis. Stat. § 281.11.

The Wisconsin Environmental Policy Act also declares an intent to encourage the consideration of the environment in agency decision-making, which is at the core of the Band's request for review in this Petition. The stated purposes of WEPA are "to declare a policy which will encourage productive and enjoyable harmony between man and his environment . . . prevent

or eliminate damage to the environment and biosphere and stimulate health and welfare of man." 1971 Wis. Act. 274, Section 1. Further, "the legislature recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." *Id.*

There is no evidence of legislative intent that the Band's interests are not to be protected.

IX. THE STATUTE OR ADMINISTRATIVE RULE OTHER THAN s. 227.42, Stats. WHICH ACCORDS A RIGHT TO A HEARING

Petitioner incorporates by reference and realleges all objects and factual assertions included above. A hearing is warranted on all of the above issues to resolve the disputed material facts and determine whether DNR's decisions complied with the laws protecting water, public health, and the environment. The Band has demonstrated it meets all requirements for a contested case hearing outlined in Wisconsin statute § 227.42 and Wisconsin administrative code § NR 2.05(5).

Additionally, Wisconsin statute § 30.209(1m) provides the right to a hearing for the Waterway Permit, and Wisconsin statute § 281.36(3q) provides the right to a hearing for the Wetlands Permit. The Bad River Band has met the three requirements of both statutes for a right to a hearing. First, the Band describes in this petition "objection[s] that [are] sufficiently specific to allow the department to determine which provisions of [chapter 30 and section 281.36] may be violated" if the proposed activity under the permit is allowed to proceed. Wis. Stat. §§ 30.209(1m)(b), 281.36(3q)(c). Second, the Band described "facts supporting the petition that [are] sufficiently specific to determine how the petitioner believes" the activity, as proposed, will violate chapter 30 and section 281.36. *Id.* Third, the Band provided "[a] commitment…to appear at the administrative hearing and present information supporting the petitioner's objection." *Id.*

Further, Wisconsin administrative code § NR 299.05 provides the right to a hearing to challenge the water quality certification. The Band has met the rule's requirements. First, the Band has provided "specific reasons why the proposed activity violates the standards under § NR 299.04(1)(b)." Wis. Admin. Code § NR 299.05(5). Second, the Band has demonstrated that its "interests are adversely affected by the department's determination." *Id.* Third, as above, the Band has agreed to "appear and present information supporting the petitioner's objections" at the hearing. *Id*.

X. RELIEF DESIRED

A. Stay the effectiveness of the Waterway Permit and Wetland Permit and coverage under the Construction Site Storm Water Runoff General Permit pending the resolution of this review;
B. Set aside the Waterway and Wetland Permit;
C. Set aside the Water Quality Certification;
D. Set aside the WEPA compliance determination; and
E. Set aside authorization under the Construction Site Storm Water Runoff General Permit.

Dated this 12th day of December 2024

EARTHJUSTICE

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***Applications for Pro Hac Admissions Forthcoming*