

**BAD RIVER BAND OF LAKE SUPERIOR
CHIPPEWA INDIANS, CLEAN WISCONSIN,
SIERRA CLUB, 350 WISCONSIN, and LEAGUE OF
WOMEN VOTERS OF WISCONSIN,**

Petitioners,

vs.

Consolidated Case Nos.:

2026CV000008

2026CV000010

**WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,**

Respondent,

Case Code: 30607

Administrative Agency
Review

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

Interested Person.

**THE BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA'S
POST-HEARING BRIEF ON THE MERITS**

The Bad River Band of Lake Superior Chippewa (“Band”) asks this Court to follow its mandate under Wisconsin Statute § 227.57 and reverse, set aside, and remand Wisconsin Department of Natural Resources’ (“DNR”) illegal authorizations for the Line 5 Reroute Project (“the Project”). DNR’s decisions rely on misinterpretations and misapplications of Wisconsin law and regulation that are fatal to the Project authorizations.

This case is about DNR’s duty to follow Wisconsin law. The Band does not ask this Court to go beyond its reviewing role under Chapters 30, 281, and 227. The Court’s decision here is not about whether Line 5 can continue operating. It likewise is not about the droughts, floods, and wildfire smoke Northern Wisconsin has been experiencing, made more intense and erratic by increased greenhouse gases in the atmosphere. Nor is it about the number of pages in

the administrative record. The Band simply asks that the Court enforce the clear requirements of Wisconsin statutes and rules. Where the Court finds errors of legal interpretation or erroneous application of facts to law, it must reverse, set aside, and remand DNR's illegal authorizations as Wisconsin Statute § 227.57 directs.

STANDARD OF REVIEW

Courts review questions of law de novo. Wis. Stat. § 227.57(11); *see also Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21. This is true whether it is a question of statutory or regulatory interpretation, or whether particular facts meet a legal standard. *Farm Credit Bank of St. Paul v. F & A Dairy*, 165 Wis. 2d 360, 367, 477 N.W.2d 357 (Ct. App. 1991); Wis. Stat. § 227.57(5). Courts may not cede the authority and duty to say what the law is to an administrative agency. *Tetra Tech*, 2018 WI 75, ¶ 54. Where statutory or rule language is plain, the court must apply that language as written and may not allow agency practice to add exceptions the legislature did not include. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶ 44–46, 271 Wis. 2d 633, 681 N.W.2d 110. Further, courts must harmonize regulatory language with statutory language, if possible, and resolve any conflict in favor of the statute. *See, e.g., Town of Ledgeview v. Livestock Facility Siting Rev. Bd.*, 2022 WI App 58, ¶ 10, 405 Wis. 2d 269, 983 N.W.2d 695.

Even where a legal question requires reviewing facts found during the administrative process, the question is not the length of the agency's decision record under review, but rather whether the facts found meet the relevant legal standard. Wis. Stat. §§ 227.57(6), (8); *Town of Centerville v. Wis. Dep't of Nat. Res.*, 142 Wis. 2d 240, 251–52, 417 N.W.2d 901 (Ct. App. 1987). If this Court finds DNR misread the governing statutes, ignored its own rules, or acted outside the discretion delegated to it by law, the Court must reverse, remand, or set aside DNR's permitting decision. Wis. Stat. §§ 227.57(5), (8).

ARGUMENT

I. DNR CANNOT AUTHORIZE STRUCTURES UNDER AN INAPPLICABLE STATUTORY PROVISION

DNR can only authorize placing structures and materials on the beds of navigable waters via Wisconsin Statute § 30.12. Section 30.12 requires a permit from DNR or authorization by the legislature before a person may “[d]eposit any material or place any structure upon the bed of any navigable water.” Wis. Stat. § 30.12(1). Conversely, section 30.20 requires a contract with DNR or authorization by the legislature to “remove any material from the bed of a navigable lake or from the bed of any outlying waters.” Wis. Stat. § 30.20(1). On its face, section 30.20 does not apply to the placement of materials or structures. And section 30.12 applies to “*any*” material or structure placed on the bed of a navigable water. *Id.* § 30.12(1) (emphasis added). “Any” includes temporary structures. *See Cassidy v. Wis. Dep’t of Nat. Res.*, 132 Wis. 2d 153, 160, 390 N.W.2d 81 (Ct. App. 1986) (“Undefined nontechnical words in a statute are to be given their ordinary and accepted meaning.”).

The Court should reject DNR and Enbridge’s invitation to collapse these two provisions together. It is a “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.” *James v. Heinrich*, 2021 WI 58, ¶ 23, 397 Wis. 2d 517, 960 N.W.2d 350 (quoting *Kungys v. United States*, 485 U.S. 759, 778 (1988)). DNR and Enbridge’s arguments would erase section 30.12, thus running afoul of clear statutory language and the legislature’s intent. Both parties’ refusal to reckon with section 30.12’s applicability to all structures—when arguing that section 30.20 is sufficient—gives away the weakness of their arguments. DNR Br. on the Merits of the Pets. for Judicial Review 17–21 (Doc. 195); Enbridge Br. on the Merits 90–98 (Doc. 197). Enbridge attempts to distract with DNR’s regulations. Enbridge Merits Br. 94. But the agency does not have the authority to rewrite the statutory requirement via regulation or

practice. *See Gillen v. City of Neenah*, 219 Wis. 2d 806, 823, 580 N.W.2d 628 (1998) (a “cardinal rule of statutory interpretation [is] that a specific statute takes precedence over a general statute”); *State ex rel. Kalal*, 2004 WI 58, ¶ 46 (“Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation.”); Decision and Order Regarding Mot. to Stay 18 (Doc. 192) (“Stay Order”) (“Arguments akin to ‘that’s the way we have done it in the past’ is hardly a strong legal ground upon which to stand.”).

At oral argument, Enbridge also raised a slippery slope fallacy rather than addressing the statutory language. But a structure—no matter how briefly it may be placed upon a navigable water’s bed—is a structure. By contrast, section 30.20 already authorizes implements such as a shovel or excavator bucket to “remove any material from the bed of a navigable...water.” Wis. Stat. § 30.20(1). In any case, the outer bounds of section 30.12 are not relevant here: both the ALJ and DNR’s permit found that the temporary structures incidental to dredging Enbridge proposes here are “structures.” Findings of Fact, Conclusions of Law, and Order 26–29 [AR 002985–88] (“ALJ Order”); Wetlands and Waterways Permit, Finding of Fact (“FoF”) ¶ 71 [AR 076665–66] (“WWP”). All parties have referred to them as such throughout this litigation. *See, e.g.*, Enbridge Resp. to Stay Mot. 5 (Doc. 37); DNR Supp. Resp. to Mot. to Stay 11 (Doc. 75). Thus, as the Band stated at oral argument, the Court need not engage in a definitional exercise to decide what a structure is when the agency has held that these temporary structures are “structures.” Agreeing with DNR and Enbridge on this issue would require this Court to ignore the clear language of section 30.12 and overturn the agency’s factual finding that these temporary structures are “structures.”

Because section 30.12 requires riparian ownership to place materials or structures in navigable waters, DNR acted beyond its authority in granting Enbridge such authorization where

it was not the riparian owner at the time of its permit application. Wis. Stat. § 30.12(1g). Section 30.12 also requires that the structures be “for the owner’s use.” *Id.* § 30.12(3m)(a). Since section 30.12 covers all structures and materials, § 30.12(3m)’s use requirement likewise applies in any case where an applicant applies for an individual permit to place structures—whether they be permanent or temporary. *See State ex rel. Kalal*, 2004 WI 58, ¶ 46 (statutory language is read “not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results”). Where Enbridge lacks riparian ownership, the inquiry into its eligibility should end. But if this Court were to analyze whether the structures satisfy section 30.12(3m)(a), it should find that they fail on the use requirement as well.

The primary purpose of Enbridge’s structures is to support its pipeline. Any incidental benefit they may have for the riparian owner in terms of erosion control is just that—incidental. Enbridge would not install these structures if it were not building a pipeline. We have no indication the riparian owners would choose to place these temporary or permanent structures on their own. These structures are not for the riparian owners’ use. *See also* Band’s Reply Br. to Mot. for Stay 13–15 (Doc. 160).

In addition, the question as to whether non-riparians are eligible to place permanent structures in Wisconsin’s navigable waters is not moot. This question is and has always been broader than the use of co-applicants. *See, e.g.,* Band’s Pet. for Judicial Review ¶ 48 (Doc. 2) (“DNR committed reversible error, misinterpreted the law, deviated from procedure, and abused its discretion by authorizing Enbridge to place structures and deposit materials in waterways because the company is not a ‘riparian owner’ of all necessary areas where it plans to undertake

these activities, a basic requirement of authorizing the Project.”); *see also* Stay Order 14.

Resolving this question would provide DNR with much-needed clarity.

Further, the co-applicant question itself remains live. Enbridge still does not own the property at the unnamed tributary to the Brunsweler River. Exemption Determination for UNT of Brunsweler River 1, Ex. C to Third Drake Decl. (Doc. 213) (addressing DNR’s exemption determination to Kevin Roth, Dale Roth, and Jason Roth, the “Riparian owner”). DNR issued an exemption to the actual riparian owner, which Enbridge now relies on to claim it may proceed with construction. While Enbridge no longer uses the label “co-applicant,” the agreement’s structure remains the same, now labeled as an exemption instead of a permit co-applicant. If this Court does find this issue moot, it can and should still decide it, as it falls within Wisconsin’s exceptions allowing for review of moot issues. *See* Band Opp. to Enbridge Mot. to Lift Partial Stay 9–11 (Doc. 228); Interested Persons’ Opp. to Enbridge Mot. to Lift Partial Stay 11–13 (Doc. 226).

The statutory language is clear. The Band is not attempting to impute a riparian owner requirement into section 30.20. It is DNR that has been palming its deck of cards to argue that structure placement is somehow removal of material, and that only section 30.20 applies. But DNR is no magician, and its magic trick fails. This Court must find that both sections 30.12 and 30.20 exist for a reason, and that each means what it says. To do otherwise would belie the legislature’s intent, fly in the face of well-trodden rules of statutory construction, and greenlight an administrative agency’s override of statutory law.

II. DNR LEGALLY ERRED IN PERMITTING THE PROJECT’S WETLAND IMPACTS AND MITIGATION

As the Band has previously made clear, DNR erred by mis-categorizing decades-long and potentially permanent wetland impacts as “temporary” under its rules. Band Br. on the Merits

26–33 (Doc. 190); Band Reply Br. on the Merits 29–33 (Doc. 205). DNR further erred by incorporating data it itself found not adequate into its significance determination under sections 281.36(3n)(b)–(c). Band Merits Br. 34–37; Band Merits Reply Br. 33–34. While these findings rely on facts, the Band raises legal errors—DNR incorrectly found these facts met the standards for permit issuance under Wisconsin Statute § 281.36(3n)(c).

Enbridge continues to refuse to reckon with the Band’s wetland expert Alice Thompson’s identification of missed wetlands. The Band shared reports that included this information with DNR before it issued Project permits. These reports provided specific information about locations of missed wetlands in relation to known features along the Project route. *See, e.g., A. Thompson Expert Report, Attch. D 2, 4 [AR 017660, 62]* (“The forest trail AR 083...had an unreported wetland at just west of the trail and within the survey corridor approximately 385 feet north of Casey Sag Road. (BE Wetland 1, Line1).”). That is why DNR then directed Enbridge to add these wetlands to its impact table. *See Pet.-Interest Person’s Opening Br. on the Merits 12–14 (Doc. 191)*. As Environmental Petitioners previously articulated, Petitioners need not do DNR and Enbridge’s work of delineating all wetlands for them—nor could Petitioners do so, given many wetlands are located on private lands. *Id.* at 19–20; A. Thompson Expert Report 7 [AR 017497]. Petitioners need only show that information necessary for permit issuance was missing, which Expert Witness Thompson’s reports demonstrate. *See Meteor Timber, LLC v. Wisconsin Div. of Hearings & Appeals*, 2022 WI App 5, ¶¶ 4–6, 52–56, 400 Wis. 2d 451, 969 N.W.2d 746; *Kohler Co. v. Wis. Dep’t of Nat. Res.*, 2024 WI App 2, ¶¶ 53, 76, 78, 410 Wis. 2d 433, 3 N.W.3d 172; A. Thompson Expert Report, Att. D 2, 4–13, 281; Att. E 11–12 (AR 017660, 662–71; 693–4).

Unaccounted-for wetlands cause particular concern because, as the Court recognized at the August 20th hearing, the appearance and wetness of wetlands shift throughout the year. Enbridge has also given no indication it is sending trained wetland delineators out with construction crews to identify and avoid any wetlands not included in Permit Table 1. Thus, it is unclear how Enbridge is ensuring that it is not causing additional wetland impacts as it clears, trenches, blasts, and drills. This makes plain why Wisconsin law requires identification and assessment of all wetland impacts *prior* to wetland disturbance and *prior* to permit issuance, rather than the post hoc notification that the Project permit greenlights. *See* WWP Condition ¶ 234 [AR 076646].

Additionally, DNR's regulations concerning mitigation credits must be read along with and conform to statutory requirements. *See, e.g., Town of Ledgeview*, 2022 WI App 58, ¶ 10. Here, state law requires avoiding, minimizing, or mitigating wetland impacts to prevent significant adverse impacts, Wis. Stat. §§ 281.36(3n)(c)–(d), and requires a minimum ratio of at least 1.2 credits per acre of wetland disturbance. *Id.* § 281.36(3r)(d)1. DNR's lackadaisical review and approval of Project wetland mitigation based on information “not adequate for the project” flies in the face of its statutory directive. *See* Band Merits Br. 34–37; Band Merits Reply Br. 33–34. DNR's own regulations do not and could not overcome this. Neither §§ NR 350.003(39) nor 350.005(4) makes the clearing, trenching, drilling, and blasting of forested wetlands in the Project's path “temporary” impacts. *See* Band Merits Br. 26–33; Band Merits Reply Br. 29–33. These regulations merely outline how DNR can determine impacts are temporary and require mitigation for them. Approving wetland mitigation based on inappropriate legal definitions and data DNR found inadequate cannot meet the Legislature's directive to ensure wetland impacts are accurately understood and mitigated.

Finally, the Court is correct that inadequate wetland mitigation credits is a correctable error—but it is not harmless. Inadequate mitigation of impacts to wetland functional values means that DNR’s significance determination under section 281.36(3n)(c) is incorrect and unsubstantiated. Band Merits Br. 25–26. This is a problem akin to what the *Meteor Timber* court prohibited: DNR cannot rely on lacking data to sign off on an applicant’s plan to mitigate wetland impacts. *See Meteor Timber*, 2022 WI App 5, ¶¶ 4–6, 52–56. This error necessitates reversing DNR’s wetland permit and remanding for DNR to determine the proper credits and ensure Enbridge secures them.

DNR’s wetland permitting decision must be set aside, reversed, and remanded to DNR for correct interpretation and application of its own rules.

III. DNR’S FEIS FAILS THE “RULE OF REASON” AND FAILS TO TAKE A HARD LOOK AT PROJECT IMPACTS

DNR’s FEIS failed to take a hard look at Project impacts because it relied on impermissible actions and incomplete data. *See* Band Merits Br. 38–40; Band Merits Reply Br. 34–35. While DNR need only meet the “rule of reason” in terms of the detail or comprehensiveness of its FEIS, *Clean Wisconsin, Inc. v. Pub. Serv. Comm’n of Wisconsin*, 2005 WI 93, ¶ 191, 282 Wis. 2d 250, 700 N.W.2d 768 (quoting *New York v. Kleppe*, 429 U.S. 1307, 1311 (1976)), relying on such actions and data cannot be reasonable.

DNR included impermissible actions in waterways and wetlands analysis. DNR incorrectly assumed it could permit Enbridge to place temporary and permanent waterway structures meant to mitigate sediment and erosion impacts even though Enbridge was not the riparian owner. This scheme violates section 30.12. *See* Band Merits Br. 14–21; Band Merits Reply Br. 2–22; *supra* Part I. Similarly, DNR approved Enbridge’s wetland mitigation plan that was based on flawed data, meaning DNR couldn’t properly assess the significance of wetland

impacts under section 281.36(3n)(c)(3) or under the Wisconsin Environmental Protection Act (“WEPA”). Band Merits Br. 32–33, 39; Band Merits Reply Br. 34; *supra* Part II. Because DNR relied on illegal actions in assessing the Project’s impacts, its impact analysis in the FEIS is fundamentally flawed. DNR acted unreasonably and abused its discretion.

The FEIS also fails because it could not have based its assessment of stormwater and erosion impacts on sufficient information. *See* Band Merits Br. 38–40; Band Merits Reply Br. 34–35. The timeline stormwater staff laid out for reviewing and requesting this information from Enbridge—reaching into October 2024—makes clear that DNR finalized and released its FEIS too early to consider this essential information. *See* Band Merits Br. 39–40; Band Merits Reply Br. 35. Lacking this information is not a trivial matter—the Project is clearing, trenching, blasting, and drilling through over 41 linear miles of northern Wisconsin, plus additional workspaces and valve sites, all subject to stormwater impacts. DNR did not have this information in hand by September 6, 2024, when the FEIS was published—let alone early enough to meaningfully influence DNR’s environmental analysis. As with the FEIS’s consideration of impermissible actions, the assessment of stormwater impacts was not reasonable and did not constitute the necessary hard look given this timeline.

Because of these flaws in DNR’s environmental impact analysis, the FEIS and WEPA compliance determination must be set aside and remanded to DNR.

IV. THE WATER QUALITY CERTIFICATION AND STORMWATER GENERAL PERMIT MUST BE SET ASIDE

The Water Quality Certification and Stormwater General Permit also fail to comply with Wisconsin law. Both authorizations hinge upon the validity of DNR’s findings that 1) the Project complies with requirements for placing structures in waterways, and 2) that DNR assessed the impacts to wetland functional values and properly assigned the requisite mitigation and

restoration requirements. *See* Wis. Admin. Code §§ NR 299.04(1)(b)3, 6; *see also* Band Merits Br. 37–38; Band Merits Reply Br. 37–38. The temporary and permanent waterway structures contemplated by the Project are part of Enbridge’s plan to comply with surface water quality standards related to erosion, sediment, and stormwater. WWP FoF ¶¶ 70–72. Wetland functional values are the basis of Wisconsin’s wetland water quality standards. *See* Wis. Admin. Code § NR 103.03. Thus, if the Court finds for the Band on either its section 30.12 or its wetland functional values claims, the findings underpinning the Water Quality Certification and General Permit fail. *See* Wis. Admin. Code §§ NR 299.04(1)(b)3, 6 (requiring “reasonable assurances” that proposals comply with wetland and surface water quality standards and “public interest and public rights standards related to water quality” in order to issue a water quality certification); *see also* Stormwater General Permit, 1.2.2, 1.2.5, at 4 [AR 102569] (stating that it is inapplicable to any project that threatens to contribute to exceedances of state wetland and surface water quality standards). Both authorizations must be set aside.

CONCLUSION

The question posed to this Court is whether DNR fulfilled Wisconsin statutory requirements when it issued these permits to Enbridge. Regardless of this Court’s decision, the pipeline will continue to operate through the Band’s Reservation. *See Bad River Band v. Enbridge*, 2026 WL 2198120, at *23 (7th Cir. July 30, 2026) (vacating injunctive relief requiring Enbridge to cease pipeline operation through the Band’s Reservation by June 16, 2026). This Court’s duty, as established in Wisconsin Statute § 227.57, is to reverse or set aside illegal agency action. That duty cannot be overcome by concerns about energy provision, arguments that the agency’s own regulations or past practice matter more than the statute, or refusal to reckon with statutory language. Any one of DNR’s failures is enough to find that its Project

approvals were unlawful. DNR's permits must be reversed, set aside, and sent back to the agency for new decision-making based on correct understanding and application of Wisconsin law.

Respectfully submitted this 11th day of September 2026,

/s/Robert Lundberg

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