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**DELIVERY – Via Electronic Mail and Electronic Submission**

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**RE: BAY MILLS INDIAN COMMUNITY’S COMMENTS ON THE DRAFT  
ENVIRONMENTAL IMPACT STATEMENT FOR THE LINE 5 TUNNEL  
PROJECT**

Gnoozhekaaning, “Place of the Pike,” or Bay Mills Indian Community (“Bay Mills”) provides these comments on the Draft Environmental Impact Statement (“Draft EIS”) issued by the U.S. Army Corps of Engineers (the “Corps”) on May 30, 2025. Bay Mills submits these comments both as a sovereign Tribal Nation and a consulting Tribal Nation in the Section 106 Process under the National Historic Preservation Act (“NHPA”). Bay Mills relied on Tribal expertise, Bay Mills’ Biological Services Department, the Great Lakes Indian Fish and Wildlife Commission, and the expertise of retained experts<sup>1</sup> when preparing these comments.

The Corps prepared this Draft EIS pursuant to the National Environmental Policy Act (“NEPA”)<sup>2</sup> during its evaluation of Enbridge Energy, Limited Partnership’s (“Enbridge” or the “Applicant”) application for a permit pursuant to Section 404 of the Clean Water Act (“CWA”)<sup>3</sup>, and Section 10 of the River and Harbors Act (“RHA”).<sup>4</sup> Enbridge seeks to construct a massive new infrastructure project (the “Project” or “Line 5 Tunnel Project”) beneath the lakebed of the Straits of Mackinac (“the Straits”) so that it may continue to transport fossil fuels through the Straits, a place that is sacred to Tribal Nations, including Bay Mills. The Project will have

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<sup>1</sup> See Curriculum vitae of: Richard Kuprewicz (Attachment A); Brian J. O’Mara (Attachment B); Alice Thompson (Attachment C); Gennaro G. Marino (Attachment D); and John Bratton, PhD of LimnoTech (Attachment E).

<sup>2</sup> 42 U.S.C. § 4321 *et seq.*

<sup>3</sup> 33 U.S.C. § 1344.

<sup>4</sup> 33 U.S.C. § 403.

undeniable and unavoidable impacts on the Straits of Mackinac, a cultural and treaty-protected landscape.<sup>5</sup>

When a major federal action has the potential to significantly affect environmental quality, as the Project does here, federal agencies are required by statute to draft detailed statements that “consider every significant aspect of the environmental impact of a proposed action.”<sup>6</sup> The EIS process should prevent effects from being “overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast,”<sup>7</sup> while also “serv[ing] as an environmental full disclosure tool by providing information to the public about the environmental costs involved in a particular project.”<sup>8</sup> Specifically, the EIS must contain a detailed discussion and analysis of the “reasonably foreseeable environmental effects” of the proposed action and “a reasonable range of alternatives” to the action.<sup>9</sup> Here, the CWA and NHPA also demand careful analysis of the Project and consideration of alternatives.<sup>10</sup> As detailed throughout these comments, the Draft EIS is flawed, fails to offer and consider real alternatives, and omits key pieces of information. The environmental and cultural effects of the Project demand permit denial.

Pursuant to the President’s unsubstantiated declaration of a national energy emergency, the Corps rushed publication of its Draft EIS and failed to provide sufficient time for the public to review and comment on the voluminous document and for the Corps to fully consider those comments.<sup>11</sup> While the Draft EIS is largely silent about the decision to fast-track the Project based on the purported energy emergency, the decision permeates every section and has enormous consequences particularly with regard to the incomplete Section 106 process and the entirely undeveloped mitigation measures. But the Corps’ application of its Detroit District’s Special Emergency Procedures to this Project rendered the review timeline largely irrelevant: The Special Emergency Procedures predetermined project approval. Adherence to the procedures will cause

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<sup>5</sup> Bay Mills is the modern-day successor in interest to the bands of Ojibwe people who were identified by the negotiators for the United States as living near Sault Ste. Marie in the Treaty of Washington of March 28, 1836, 7 Stat. 491.

<sup>6</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978).

<sup>7</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) 349 (citation omitted).

<sup>8</sup> *Minnesota Pub. Int. Rsch. Grp. v. Butz*, 541 F.2d 1292, 1299 (8th Cir. 1976).

<sup>9</sup> 42 U.S.C. § 4332(C).

<sup>10</sup> *See, e.g.*, 40 C.F.R. § 230.10(a)(3); 36 C.F.R. § 800.6(a).

<sup>11</sup> *See* U.S. Army Corps of Eng’rs, EIS Updated Schedule, at 5 (Mar. 21, 2024) (identifying a 60-day public comment period on the Draft EIS and a total of 175 days for USACE and Cooperating Agency review and revisions before publication of the Final EIS). While the entire set of documents and correspondence exchanged during the EIS preparation and Section 106 process are a part of the administrative record, Bay Mills refers to and incorporates certain parts of the record throughout these comments.

the Corps to violate its treaty trust responsibility in this matter, something the Corps is prohibited from doing.<sup>12</sup>

As is, the Draft EIS is fatally flawed. It defines the Project purpose and need too narrowly for a true hard look<sup>13</sup> at the Project's effects or consideration of real alternatives, including those that do not permanently destroy wetlands, alter lakebed geology, and turn the center of Bay Mills' creation and an important cultural site into a massive, polluting construction site for at least the next six years, all in the service of a foreign oil company. Once tunnel construction begins, the harm will be irreversible. While the Draft EIS does identify some of the Project's impacts, the Corps' analysis still misses crucial aspects that reveal that the impacts will be considerably worse, including the perpetuation of oil spill risks throughout the Great Lakes watershed, the climate impacts from building a massive new fossil fuel infrastructure project, and the disproportionate impacts on Tribal Nations. The other side of the coin, the claimed "benefit" of secondary attainment provided by the tunnel, carries its own set of risks; the outdated assertion that the tunnel is foolproof is wrong. The benefit of this massive undertaking flows to Enbridge by allowing it to continue the operation of Line 5 in the Straits despite the Michigan Attorney General's shut down order and other public efforts to stop the flow of oil in the Great Lakes. As discussed further below, the Corps has bent over backwards throughout the development of the Draft EIS to advance Enbridge's corporate interests to the detriment of the treaty-protected rights of Tribal Nations and the protection of the Great Lakes for all who depend on them.

Even with the substantial flaws in the Draft EIS, the Corps has all of the information it needs for full permit denial. Already in the course of the Project, Enbridge demolished a historic property, causing an area that it planned to use as a "staging area" to be made into a parking lot in an evasion of NHPA's Section 106 requirements. This anticipatory demolition alone demands permit denial. Moreover, permit denial is supported by the massive undertaking that will have long-lasting environmental, cultural, and economic impacts on Tribal Nations, local communities, and the Great Lakes.

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<sup>12</sup> The United States has a trust responsibility that consists of the highest moral obligations that it and all federal agencies must meet to ensure the protection of Tribal resources and Treaty Rights. *See Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (noting that the United States "has charged itself with moral obligations of the highest responsibility and trust"); *see* Dep't of Interior Secretarial Order No. 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Tribes and Individual Indian Beneficiaries, at 1 (Aug. 20, 2014), <https://perma.cc/H79W-RDTV>. Due to the trust responsibility, it is well settled that the Corps may not permit any project that will infringe on Tribal rights. U.S. Army Corps of Eng'rs, Civ. Works, *Tribal Consultation Policy*, at 4 (Dec. 2023), <https://perma.cc/6RC2-PFHW> ("As a matter of Federal law, only Congress has the authority to abrogate or interfere with tribal treaty rights, which has not been delegated to USACE. USACE cannot authorize, approve, or carry out any activities which would result in a violation of a Tribal treaty right.").

<sup>13</sup> NEPA requires "that agencies take a 'hard look at environmental consequences'" and "provide for broad dissemination of relevant environmental information." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976)).

For the reasons below, any final decision by the Corps short of a permit denial will be unlawful.

**I. THE CORPS IS UNLAWFULLY FAST-TRACKING THE PERMITTING PROCESS BASED ON AN UNSUBSTANTIATED AND UNLAWFUL “EMERGENCY.”**

On January 20, 2025, President Trump issued Executive Order (“E.O.”) 14156 and declared, with no factual support, a “national emergency” on the basis that “insufficient energy production” created a threat to the United States.<sup>14</sup> In an indication that there was no imminent emergency, the Detroit District of the Corps waited four months<sup>15</sup> before issuing Special Emergency Processing Procedures in response to the President’s declaration. The Detroit District then publicly announced that it would apply these procedures to the Line 5 Tunnel Project because, in the District’s view, it met the criteria for an energy-related emergency “specifically due to the transportation of crude oil and natural gas liquids.”<sup>16</sup> Beyond the basic fact that Line 5 transports crude oil and natural gas liquids, however, the Corps failed to justify why expediting the permitting of a years-long construction project benefiting a Canadian corporation<sup>17</sup> would alleviate the national emergency claimed in the executive order, or align with the definition of an emergency found in the Clean Water Act, the Endangered Species Act, or Corps’ regulations.

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<sup>14</sup> The President’s unsubstantiated declaration made pursuant to the National Emergencies Act (“NEA”), 50 U.S.C. § 1601 *et seq.*, that directs federal agencies to invoke emergency procedures where an emergency does not exist is itself unlawful. *See* 50 U.S.C. §§ 1621(a), 1631.

<sup>15</sup> Compare with the Corps’ Jacksonville District’s authorization of emergency permitting procedures just seven days after Hurricane Milton and Hurricane Helene in October 2024. U.S. Army Corps of Eng’rs Jacksonville Dist., *Emergency Permitting Procedures for Hurricanes Helene and Milton in Florida* (Oct. 17, 2024), <https://www.saj.usace.army.mil/Media/News-Releases/Article/3938445/emergency-permitting-procedures-in-effect-for-hurricanes-helene-and-milton-in-f>.

<sup>16</sup> U.S. Army Corps of Eng’rs, MFR on the Application of Executive Order No. 14156 to LRE-2010-00463-56-A19 (1145), Enbridge Line 5 Tunnel Regulatory Permit Application and Use of Emergency Permitting Procedures Pursuant to 33 C.F.R. Sec. 325.2(e)(4), at 4 (Apr. 14, 2025).

<sup>17</sup> *See* Meghan Potkins, *Enbridge’s Profit More Than Doubles to \$1.3 Billion*, Financial Post (Nov. 1, 2024), <https://financialpost.com/commodities/energy/oil-gas/enbridge-profit-more-than-doubles>. Line 5 is part of Enbridge’s Mainline System, “the largest crude oil pipeline network in North America.” *Id.* It transports crude oil and natural gas liquids (“NGL”) produced in Alberta, Canada, to refineries in Sarnia, Ontario, Canada. Some NGLs, including propane, are delivered to domestic energy markets in Michigan, but these deliveries occur in Rapid River, Michigan, in the central Upper Peninsula, *before* Line 5 crosses the Straits of Mackinac—the propane not removed from Line 5 in Rapid River is delivered to refineries in Sarnia, Ontario. *See* PLG Consulting, *Likely Market Responses to a Shutdown of Line 5*, at 34-37 (Oct. 2023), <https://plgconsulting.com/download/17355/?tmstv=1698181529> (incorporated herein).

For the reasons outlined below, both the President’s declaration of a national energy emergency and the Corps’ application of its Special Emergency Processing Procedures as applied to the Line 5 Tunnel Project are unlawful.<sup>18</sup>

**A. There Is No National Energy Emergency.**

No “energy emergency” exists in the United States.<sup>19</sup> Neither the President in his declaration nor the Corps in its implementation of emergency procedures presented data to suggest that the United States is experiencing an emergency relating to high energy prices, national security, energy exports, or electric grid instability. Available data supports the opposite conclusion:

- In March 2024, the U.S. Energy Information Agency (“EIA”) reported that the “United States produce[d] more crude oil than any country, ever.”<sup>20</sup> The EIA predicts that the United States will continue producing record quantities of crude oil and natural gas through at least 2026.<sup>21</sup>
- The United States exports surplus energy because its production is at an all-time high. Before President Trump took office, the U.S. was already producing more oil and gas than at any other time in the nation’s history.<sup>22</sup> In 2024, the United States “shattered” records with roughly 4.7 billion barrels of crude oil produced.<sup>23</sup>
- The U.S. Strategic Petroleum Reserve currently holds “approximately 1,206 days of supply of total U.S. petroleum net imports,” far exceeding (without including

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<sup>18</sup> In further support of this argument, Bay Mills incorporates fully herein its prior correspondence on this issue. See Letter from Whitney Gravelle, President of Bay Mills, to Shane McCoy, U.S. Army Corps of Eng’rs (May 29, 2025).

<sup>19</sup> The Michigan Attorney General, and several other states, agree. Complaint, *Washington v. Trump*, No. 25-cv-00869 (W.D. Wash. May 9, 2025), ECF No. 1.

<sup>20</sup> Erik Kreil, *United States Produces More Crude Oil Than Any Country, Ever*, U.S. Energy Info. Admin. (Mar. 11, 2024), <https://www.eia.gov/todayinenergy/detail.php?id=61545>; see also Mickey Francis, *In 2024, the United States Produced More Energy Than Ever Before*, U.S. Energy Info. Admin. (June 9, 2025), <https://www.eia.gov/todayinenergy/detail.php?id=65445>.

<sup>21</sup> U.S. Energy Info. Admin., *Short-Term Energy Outlook* (June 10, 2025), <https://www.eia.gov/outlooks/steo/data/browser>.

<sup>22</sup> Erik Kreil, *United States Produces More Crude Oil Than Any Country, Ever*, U.S. Energy Info. Admin. (Mar. 11, 2024), <https://www.eia.gov/todayinenergy/detail.php?id=61545>.

<sup>23</sup> Kimberly Peterson, *U.S. Crude Oil Production Established a New Record in August 2024*, U.S. Energy Info. Admin. (Nov. 26, 2024), <https://www.eia.gov/todayinenergy/detail.php?id=63824>; Robert Rapier, *U.S. Oil Production Shattered Records Again in 2024*, OilPrice.com (Dec. 26, 2024), <https://oilprice.com/Energy/Crude-Oil/US-Oil-Production-Shattered-Records-Again-in-2024.html>.

private inventory) the 90 days of import protection required by the International Energy Agency.<sup>24</sup>

- Oil prices and gas prices remain low.<sup>25</sup>
- While production capacity is high and expected to remain steady, demand for transportation fuels is expected to decrease. The Rhodium Group, a leading independent energy research firm, found that by 2027, “demand for transportation fuels (which accounts for about 70 percent of U.S. petroleum consumption) will be 8 to 12 percent below 2019 levels, and that by 2030, demand will be 10 to 15 percent below 2019 levels.”<sup>26</sup>

Due to the high volume of energy production and the availability of reserves in the United States, any claim of an energy emergency is unfounded. Further, renewable energy is expected to contribute one quarter of electricity generation in 2025.<sup>27</sup> Yet E.O. 14156 excludes solar or wind from its definition of energy resources.<sup>28</sup> If an emergency actually existed, the executive order would include all energy sources, not just those that create a profit for the fossil fuel industry.

The false claim of emergency also does not support the Corps’ implementation of emergency procedures under the Clean Water Act, the Endangered Species Act, or the Corps’ own regulations.<sup>29</sup> The Clean Water Act contemplates emergency action only to stop further harm of

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<sup>24</sup> U.S. Dep’t of Energy, *SPR Quick Facts*, <http://www.energy.gov/ceser/spr-quick-facts> (last visited June 20, 2025).

<sup>25</sup> See U.S. Energy Info. Admin., *Short-Term Energy Outlook: Real Prices Viewer* (June 10, 2025), <https://www.eia.gov/outlooks/steo/realprices>; see also U.S. Energy Info. Admin., *Gasoline and Diesel Fuel Update: U.S. Regular Gasoline Prices* (June 17, 2025), <https://www.eia.gov/petroleum/gasdiesel> (U.S. average gasoline price of \$3.14 per gallon, \$0.30 lower than a year ago); U.S. Dep’t of Energy, Alternative Fuels Data Center, *Average Annual Retail Fuel Price of Gasoline 1950-2023*, <https://afdc.energy.gov/data/10641> (showing gasoline price of \$3.15-\$3.35 per gallon in 2023 dollars during 1950s); Bureau of Transp. Stat., *Motor Fuel Prices – May 2025* (June 3, 2025), <https://www.bts.gov/newsroom/motor-fuel-prices-may-2025-0> (showing May 2025 average gas prices lower relative to April 2025 and May 2024).

<sup>26</sup> Lauren Kubiak et al., NRDC, *The Case Against New Offshore Oil and Gas Leasing on the Outer Continental Shelf*, at 2 (May 2022), <https://www.nrdc.org/sites/default/files/case-against-new-offshore-oil-gas-leasing-ocs-ib.pdf> (citing data from the Rhodium Group).

<sup>27</sup> U.S. Energy Info. Admin., *Short-Term Energy Outlook*, at 2 (June 2025), [https://www.eia.gov/outlooks/steo/pdf/steo\\_full.pdf](https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf).

<sup>28</sup> See Exec. Order 14156 § 8(a) (defining “energy” or “energy resources” to mean “crude oil, natural gas, lease condensates, natural gas liquids, refined petroleum products, uranium, coal, biofuels, geothermal heat, the kinetic movement of flowing water, and critical minerals.”).

<sup>29</sup> Nor does it support implementation of emergency procedures pursuant to 36 C.F.R. § 800.12(b)(2) to expedite the NHPA Section 106 process. See Gravelle letter, *supra* note 18 (incorporated fully herein).

imminent and substantial endangerment to the health or welfare of a person or for emergency reconstruction activities.<sup>30</sup> Likewise, the Endangered Species Act implementing regulation invoked by EO 14156 as the basis for this exercise of “emergency” authority, 50 C.F.R. § 402.05, is grounded in situations involving “bona fide” emergencies,<sup>31</sup> including “acts of God, disasters, casualties, national defense or security.”<sup>32</sup> The Corps’ regulations reflect the same definition of an emergency, allowing for emergency permitting procedures when necessary to avoid “an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship.”<sup>33</sup>

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<sup>30</sup> 33 U.S.C. §§ 1364(a), 1344(f), 1323(a); *see also Rsr. Mining Co. v. Env’t Prot. Agency*, 514 F.2d 492, 537 (8th Cir. 1975) (finding the EPA’s use of its emergency powers under the CWA unreasonable “[i]n the absence of an imminent hazard to health or welfare”); *Swinomish Indian Tribal Cmty. v. Skagit Cnty. Dike Dist. No. 22*, 618 F. Supp. 2d 1262, 1268 (W.D. Wash. 2008) (finding that “[a county dike district’s] actions cannot be considered ‘emergency reconstruction’” when the district had been aware of issues with tidegates for months before taking action to repair them); *Am. Whitewater v. U.S. Army Corps of Eng’rs*, No. 24-CV-00284, 2025 WL 1142311, at \*1 n.1 (W.D.N.C. Mar. 20, 2025) (emergency reconstruction of damaged rail lines was justified under the CWA in response to damage caused by Hurricane Helene, “one of the most devastating storms in North Carolina history”).

<sup>31</sup> *See* 51 Fed. Reg. 19938 (June 3, 1986) (the preamble to the Federal Register notice in which 50 C.F.R. § 402.05(a) was published reinforcing that it was intended for situations involving “bona fide” emergencies in which the standard consultation process was impossible).

<sup>32</sup> 50 C.F.R. § 402.05(a); *see also Friends of Merrymeeting Bay v. U.S. Dep’t of Com.*, 810 F. Supp. 2d 320, 329 (D. Me. 2011) (finding that it would be arbitrary and capricious for National Marine Fisheries Service to approve the use of emergency consultation without evidence “that the need for repair of [a dam that year] was unexpected and that delaying the repair would cause at least a potential loss of property”); *Defs. of Wildlife v. U.S. Army Corps of Eng’rs*, No. 20CV142, 2022 WL 18456141, at \*7 (S.D. Miss. Nov. 22, 2022) (finding the Corps acted arbitrarily and capriciously by using emergency consultation as a routine response to openings of a spillway, which “are expected, and the Corps is capable of, and has in fact planned for”); *Wash. Toxics Coal. v. U.S. Dep’t of Interior, Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 1195 (W.D. Wash. 2006) (“The overwhelming impression conveyed by [the ESA regulation’s] examples of ‘emergency’ and by the general-purpose ordinary language meaning of ‘emergency’ itself includes the element of surprise and unexpectedness.”); *Forest Serv. Emps. for Env’t Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241, 1257 (D. Mont. 2005) (finding that “under the ESA framework, emergency consultation is intended to be the exception, not the rule [and] is meant for unexpected exigencies”).

<sup>33</sup> 33 C.F.R. § 325.2(e)(4); *see La. Env’t Action Network v. U.S. Army Corps of Eng’rs*, No. 06-cv-2020, 2006 WL 8456327, at \*5 (E.D. La. Apr. 27, 2006) (finding the Corps properly identified an emergency situation when Hurricane Katrina “created conditions requiring immediate action to prevent irreparable damage to the environment and serious threats to life or safety”).

The President and the Corps acted outside the scope of their authority by declaring, and then implementing, emergency procedures to shorten the technical and environmental review under circumstances that do not even come close to an emergency.

**B. The Detroit District's Application of Its Special Emergency Processing Procedures to the Line 5 Tunnel Project Is Unlawful.**

Even if there were an energy emergency in the United States, which there is not, the Detroit District unlawfully instituted the use of Special Emergency Processing Procedures in the Line 5 Tunnel Project. Parroting the language of Corps regulations, the Detroit District claimed that the Project is subject to special emergency permitting procedures

to address an energy supply situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures.<sup>34</sup>

The Detroit District's special emergency permitting procedures are unlawful as applied to the Tunnel Project because the Corps' outcome is predetermined by its emergency procedures. Pursuant to the Detroit District's written procedures, the only course of action available to the Corps is to issue a permit for the "corrective action." The Corps cannot both comply with procedures that *require* "corrective action" and still consider permit denial, including by selecting a No Action Alternative and/or by taking a hard look at the environmental consequences of the project.

The Corps' use of Special Emergency Processing Procedures in this matter fails for several other reasons. The Corps does not and cannot state that an emergency exists. Instead, the Corps asserts that the permitting of the Tunnel Project—the corrective action—is required in less time than normal to address an "energy supply *situation*" that will result in "unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship." However, Corps regulations are clear that an emergency—not an undefined "situation"—must exist to invoke emergency procedures. For the reasons stated in Section I.A above, there is no emergency; the President's declaration remains completely unsubstantiated in fact and based only on political talking points. The Corps likewise failed to provide data or any other single piece of confirming evidence to support its claim that an emergency exists – that there is anything in existence as of April 2025 that will hazard life, cause property loss, or result in an "immediate" and "significant" economic hardship. The Corps' use of emergency procedures pursuant to its regulations when no emergency exists is unlawful.

Even if an emergency existed, no evidence suggests that the Tunnel Project would address it. First, the Project is a long-term construction project that the Draft EIS estimates could take *six years*, a forgiving estimate that fails to adequately consider delays for any reason (e.g., equipment

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<sup>34</sup> U.S. Army Corps of Eng'rs, Public Notice regarding Use of Special Processing Procedures for Review of the Enbridge Line 5 Tunnel Project, at 1 (Apr. 15, 2025) (citing 33 C.F.R. § 325.2(e)(4)).



failures or weather).<sup>35</sup> A construction timeline that spans over half a decade undermines the Corps' claims that the Tunnel Project is a response to an emergency, which is an "*immediate*" or "*unforeseen*" economic hardship requiring urgent corrective action. Second, the Corps only advanced these alternatives that contemplate the same amount of product continuing through Line 5: (1) the Applicant's Preferred Alternative, the Tunnel Project, which purports to replace the currently operating Dual Pipelines and will not increase capacity; (2) the No Action Alternative, which assumes that the Dual Pipelines will continue to operate if the permit were to be denied; and (3) the placement of an engineered gravel/rock protective cover over the existing Dual Pipelines, which would not alter the current product flow. The Line 5 Tunnel Project is not essential to responding to an energy emergency because it does not increase domestic energy production or the speed of its transportation.<sup>36</sup>

Instead, the Tunnel Project will significantly draw on energy resources, as opposed to ameliorating an emergency situation. The Draft EIS estimates that the Project will expend more than 4.5 million gallons of fuel for operating equipment and transportation during the construction process, a number that only includes commuting construction workers, truck hauling, and construction equipment.<sup>37</sup> Construction will require 17,638 megawatt-hours (MWh) each year (which the Draft EIS downplays by expressing as equivalent to 2.5% of the energy usage of three counties).<sup>38</sup> Tunnel operation will continue to require energy usage, estimated to be 404.1 MWh of energy per year.<sup>39</sup> While the Draft EIS indicates that there will be no impact on the local energy grid's ability to meet the demand, it fails to adequately articulate the environmental impacts from the "truck-mounted power plants," including the sizes, makes, models and years of the generators—all of which impact emissions. Further untold amounts of resources would be expended on manufacturing heavy equipment, including the manufacturing of the Tunnel Boring Machine required to build the Project, all of which the Corps omits from consideration. The executive order does not support the Corps' decision to fast-track an energy-guzzling project for the same energy transportation capabilities that exist currently.

The Corps acted arbitrarily in applying the emergency procedures to the Line 5 Tunnel Project. Thirty days is insufficient time for the public to review and comment on the document and the Corps failed to allot sufficient time for themselves to fully consider those comments. Further, and as evidenced within the Draft EIS, as well as in the NHPA Section 106 process and the Corps' Treaty Rights Analysis, the Corps is moving forward with its permitting decision despite an

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<sup>35</sup> See DEIS Vol. 2, Appendix F1.2.1

<sup>36</sup> See *supra* note 17.

<sup>37</sup> DEIS Vol. 1, Table 4.13-1 (Energy Demand).

<sup>38</sup> Put another way, the average U.S. household consumes about 10,500 kilowatt hours (kWh) of electricity per year. See U.S. Energy Info. Admin., *Use of Energy Explained: Energy Use in Homes* (last updated Dec. 18, 2023), <https://www.eia.gov/energyexplained/use-of-energy/electricity-use-in-homes.php>. The same rate of electric consumption that the Applicant intends to use to power construction of the tunnel project each year could also power 1,680 homes. This is not indicative of an energy emergency.

<sup>39</sup> DEIS Vol. 1, Table 4.13-1 (Energy Demand).

incomplete Section 106 process and undeveloped mitigation measures, and it is not following the full four-step Section 106 process set forth in 36 C.F.R. Part 800.<sup>40</sup>

The Corps' decision in this matter will be unlawful if it is made pursuant to the emergency procedures.

## **II. THE CORPS SHOULD DENY THE PERMIT DUE TO ENBRIDGE'S VIOLATION OF SECTION 110(K) OF THE NATIONAL HISTORIC PRESERVATION ACT.**

Earlier in the NEPA and NHPA processes, Enbridge designated property that it planned to use as a "staging area" for the Project. The property was part of registered archaeological sites and had been identified for additional archaeological surveys in this permitting process—until Enbridge transferred ownership of the property and financially induced Emmet County to turn it into a parking lot, adversely affecting the historic site. Consequently, the Corps must deny the Project on Section 110(k) grounds.

Section 106 of the NHPA requires the Corps to consider a project's effects on historic properties as part of the permitting decision-making process.<sup>41</sup> Section 110(k) of the NHPA provides assurance—*through the consequence of a permit denial*—that the Corps will have time to complete the Section 106 process before an applicant causes an adverse effect to historic property. The statute provides,

Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of section 306108 of this title, *has intentionally significantly adversely affected a historic property* to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.<sup>42</sup>

Section 110(k) prohibits applicants from circumventing the Section 106 process for their own benefit—exactly as Enbridge did here.

At the time Enbridge filed its Joint Permit Application, it owned parcel 300-24, located at 360 Headlands Road in Emmet County, Michigan (the "Property").<sup>43</sup> The Property was identified for use as a "staging area" in Enbridge's initial design plans.<sup>44</sup> It was a historic property and Bay

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<sup>40</sup> See Gravelle letter, *supra* note 18 (incorporated fully herein).

<sup>41</sup> 54 U.S.C. § 306108.

<sup>42</sup> 54 U.S.C. § 306113 (emphasis added); *see also* 36 C.F.R. § 800.9(c).

<sup>43</sup> See Enbridge's Joint Permit Application for a Permit for the Line 5 Tunnel and Pipeline Project, at 226-27 (Apr. 8, 2020).

<sup>44</sup> See, e.g., Line 5 Tunnel Project Plans Compilation (Attachment F).

Mills incorporates fully herein its July 8, 2024 correspondence describing the significance of the area.<sup>45</sup>

Enbridge intentionally, significantly, and adversely affected the Property by entering into a Real Estate Exchange Agreement with Emmet County wherein it agreed to transfer ownership of the Property in exchange for the receipt of another parcel of land from Emmet County, and then fund construction of a parking lot on it.<sup>46</sup> Enbridge transferred ownership of the Property on April 19, 2023.<sup>47</sup> Within a year, in April of 2024, when Bay Mills’s experts visited the site and observed that trees had been cleared and the land leveled for construction of the parking lot, the Property’s integrity had been significantly damaged.

There can be no doubt that Enbridge’s actions at the Property were intentional.<sup>48</sup> First, Enbridge made significant financial inducements to Emmet County in exchange for an agreement that a parking lot would be constructed on the Property. The Property that Enbridge provided to the County was valued significantly higher than the property that Enbridge received in exchange—by nearly \$185,000.<sup>49</sup> “As an additional inducement in support of Emmet County agreeing to the property exchange,” Enbridge paid the County \$1.5 million.<sup>50</sup> In exchange for the financial

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<sup>45</sup> See Letter from Whitney Gravelle, President of Bay Mills, to Katie Otanez, U.S. Army Corps of Eng’rs, at 2-3 (July 8, 2024); *see also* Letter from Jaime Loichinger, Advisory Council on Hist. Pres. to Shane McCoy, U.S. Army Corps of Eng’rs (Dec. 20, 2024) (fully incorporated herein).

<sup>46</sup> Real Estate Exchange Agreement (Dec. 2022) (Attachment G). Note that Tri-State Holdings, LLC is a subsidiary of Enbridge that was created for the sole purpose of owning and holding properties on Enbridge’s behalf. *See* OpenCorporates, *Enbridge Inc Has Subsidiary Tri-State Holdings, LLC*, [https://opencorporates.com/companies/us\\_mi/801266192](https://opencorporates.com/companies/us_mi/801266192) (last visited June 24, 2025); Enbridge’s Joint Permit Application, *supra* note 43, at 5.

<sup>47</sup> See Emmet County Public Records Search, Record Details for 360 Headlands Rd, <https://bsaonline.com/?uid=353> (enter “360 Headlands Rd,” click “Search,” and select the single search result) (last visited June 24, 2025) (indicating a sale date of April 19, 2023). Note, too, that by April 30, 2024, Enbridge had publicly announced its contractors and indicated they were ready to begin construction of the tunnel. *See* Enbridge, *Enbridge Chooses Contractors for Construction of Great Lakes Tunnel* (Apr. 30, 2024), <https://www.enbridge.com/media-center/media-statements/enbridge-chooses-contractors-for-construction-of-great-lakes-tunnel>.

<sup>48</sup> The Corps’ conclusion otherwise is both contrary to the evidence before it and the result of its failure to meaningfully investigate the transfer and destruction of the Property. *See* MFR regarding Enbridge Land Exchange with Emmet County, at 6-7 (Oct. 22, 2024) (stating that the required intent includes whether the “applicant intentionally significantly adversely affect[ed] the historic property or allow[ed] someone else to do so when it had the legal power to stop such action,” and whether “the applicant destroy[ed] or degrade[d] a historic property or allow[ed] someone else to do the same with the intent to evade the Section 106 process.”).

<sup>49</sup> See Letter from Whitney Gravelle, President of Bay Mills, to Katie Otanez, U.S. Army Corps of Eng’rs, Att. E (July 8, 2024).

<sup>50</sup> *Id.*; Real Estate Exchange Agreement, *supra* note 46 ¶ 8.

inducements, Emmet County explicitly agreed to use a portion of the \$1.5 million to construct a parking lot on the Property.<sup>51</sup>

The “Parking Lot Improvements” are outlined in the Real Estate Exchange Agreement and implicate Enbridge as follows:<sup>52</sup>

- Tri-State / Enbridge provided the County with plans and cost estimates for the construction of paved parking lot improvements on 360 Headlands Road.
- Tri-State / Enbridge agreed to “facilitate collaboration by Enbridge with the County on the design and construction details of the parking lot.”
- If Enbridge required adjustments to the parking lot plans that resulted in additional costs, Tri-State agreed to provide the additional funding.
- The County agreed to “withhold construction activities on the parcel until the design and construction details [had] been approved by Enbridge.”

Further, the Real Estate Exchange Agreement indicates that Enbridge intends to seek approvals for haul routes and a road vacation on its newly acquired lots and that the “County agrees to facilitate collaboration” between the Emmet County Road Commission and Tri-State / Enbridge.<sup>53</sup>

Enbridge knew that the property was subject to Section 106 and that its subcontractors intended to conduct follow-up archaeological survey work at the site; it should not have entered into any real estate exchange agreement before the Section 106 process was complete. Alternatively, Enbridge should have included terms in the Real Estate Exchange Agreement that preserved the archaeological significance of the parcel at issue. Instead, Enbridge negotiated and entered into an Agreement that included terms detailing parking lot improvements at the site—in effect, requiring action that destroyed any archaeological integrity.

Lastly, Enbridge’s actions indicate that it attempted to conduct the land swap as quietly as possible. For example, it did not update its defined LOD when it transferred ownership of the site in 2023, but continued to allow all parties—including the Corps and those in the Cooperating Agency and Section 106 processes—to operate as though no change in ownership or character of the Property had occurred.<sup>54</sup> It was Bay Mills—not Enbridge—who first alerted the Corps to

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<sup>51</sup> Real Estate Exchange Agreement, *supra* note 46, ¶ 7.

<sup>52</sup> *Id.* ¶ 6.

<sup>53</sup> *Id.*

<sup>54</sup> The Corps’ preliminary permit area was defined in June 2021 as “the tunnel, construction activities within the limits of disturbance (LOD) (including excavation, clearing and filling, equipment access, materials staging, construction of support structures and facilities, process water and stormwater treatment areas, outfall structures, and widening of Boulevard Drive).” MFR regarding Permit Area and Area of Potential Effects, at 4 (Mar. 8, 2024) (emphasis added)

construction occurring at the Property after Bay Mills representatives noticed extensive ground-disturbing activities when attending nearby archeological survey work. The updated Project Plans on the Corps' public website *still* do not show the ground-clearing work that took place at the Property, hiding that fact from the public.<sup>55</sup>

Enbridge's actions constitute anticipatory demolition of an historic property under Section 110(k), and the Corps must deny the permit on this basis.<sup>56</sup>

### **III. THE DRAFT EIS IS FUNDAMENTALLY FLAWED.**

Chapters 1 and 2 lay the foundation for an EIS that defers to the Applicant and disregards the Corps' obligations to uphold Treaty Rights and protect Tribal resources. In Chapter 1, the Corps defined the scope of analysis so narrowly that it excludes reasonably foreseeable effects of the Proposed Project. It also failed to justify a need for the massive undertaking, with a purpose statement that ensures only the goals of the Applicant are advanced. The sub-alternatives that relate to decommissioning the existing pipeline and the selection of EMPSs serve only to advance the Applicant's goal to continue the flow of oil through the Straits. The sub-alternatives will have considerable impacts on the Straits and will extend the impacts of the Project past the time the replaced pipeline is operational.<sup>57</sup> As a result of these deficiencies, the Alternatives Analysis set forth in Chapter 2 is irreparable.

#### **A. Bay Mills' Comments on Chapter 1: Purpose and Need**

##### **1. *Section 1.5: Scope of Analysis***

The Draft EIS defines the project scope so narrowly that it effectively excludes the direct, indirect, and cumulative effects of the Proposed Project, leading to a pre-determined outcome. The Draft EIS advances a scope of analysis that is limited to the following:

- Construction of the proposed Tunnel between the tunnel-boring machine (TBM) entry and exit portals;
- Associated construction activities, equipment use, and materials staging within the Project construction footprints, including site restoration;
- Transport and disposal of spoils material;

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(quoting email from Corps to consulting parties (June 3, 2021)). The Corps' March 8, 2024 MFR is consistent with its earlier findings. *Id.*; *see also* Email from Rich Kern, Enbridge Energy (June 17, 2022) (Attachment G, at 23).

<sup>55</sup> U.S. Army Corps of Eng'rs, *Project Information*, Fig. 4a, Line 5 Tunnel EIS, <https://www.line5tunneleis.com/project-information> (last visited June 24, 2025).

<sup>56</sup> 54 U.S.C. § 306113; 36 C.F.R. § 800.9(c).

<sup>57</sup> Bay Mills will provide comments on the effects of the decommissioning and EMPS sub-alternatives through the Section 106 process.

- Select operation and maintenance activities related to the Tunnel and structures within it;<sup>58</sup> and
- Decommissioning of the existing Dual Pipelines as proposed by the Applicant.

Even though the Project entails the replacement of an oil pipeline through a proposal driven by spill concerns, and purports to minimize the risk of an oil spill from an anchor strike, the scope does not include an analysis of oil spills. The glaring omission of operational oil spills in the Corps' analysis runs directly counter to the Acting Assistant Secretary of the Army for Civil Works Jaime Pinkham's directive to include the topic.<sup>59</sup> In the Draft EIS, the Corps states in two identical footnotes that it complied with Secretary Pinkham's directive by considering "potential impact on navigation of an oil spill resulting from construction activities" but excluding as out of scope "oil spill risks or impacts associated with operation of the pipeline."<sup>60</sup> The Corps' misreading of Secretary Pinkham's directive does not pass the straight face test. Secretary Pinkham's memorandum specifically directed the Corps to consider the threat and impact of an oil spill on the Tribe's treaty rights and referred to Bay Mills' and other Tribal Nations' comments submitted on that issue as direct support of that policy direction. Those relevant Tribal comments urged the Corps to consider the risk and impact of operational oil spills at the Straits crossing and throughout ceded territory.<sup>61</sup> By referencing these Tribal comments, Secretary Pinkham was clearly directing the Corps to consider oil spills along existing sections of Line 5 *and within the tunnel during its operation*. Bay Mills reiterates those comments and incorporates them fully herein. The Corps' scope further omits any consideration of climate impacts from the Project, even the extremely limited review it committed to during the EIS process,<sup>62</sup> even though the Project perpetuates the reliance on fossil fuels with the construction of the infrastructure project. Last, the Corps' scope omits the engineering and design considerations of the Tunnel Project in violation of NEPA<sup>63</sup> and

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<sup>58</sup> The Corps' scope is vague in identifying the "select operation and maintenance activities" and the "structures" within its scope are likewise vague and undefined. For example, it is unclear whether "structures" within the tunnel includes utility lines.

<sup>59</sup> Jaime Pinkham, Acting Assistant Secretary of the Army for Civil Works, *Policy Direction on the Enbridge Energy Line 5 Permit Application Environmental Impact Statement (EIS)* (Jan. 7, 2025).

<sup>60</sup> DEIS Vol. 1, at n.43, n.47.

<sup>61</sup> See Bay Mills' Comments on the Corps' Preliminary Draft Chapters 1 and 2 and Appendix, at 5-6 (May 17, 2024); Bay Mills' and Other Tribal Nations' Joint Letter re: Treaty Implications of the USACE's Consideration of Enbridge's Proposed Great Lakes Tunnel Project Permit Application (Aug. 2, 2024).

<sup>62</sup> See Bay Mills' Comments on the Corps' Preliminary Draft Chapters 1 and 2 and Appendix, at 6-7 (May 17, 2024); Bay Mills' Comments on the Safety & Reliability Technical Form (Nov. 7, 2024).

<sup>63</sup> See 42 U.S.C. § 4332 (requiring that the Corps provide a detailed statement on alternatives that are, among other things, "technically and economically feasible."). The Corps' choice to omit any operational spill risk and impact analysis notably conflicts with the Corps' own

the Corps' direct statutory obligation—unique to the Chief of Engineers and Secretary of the Army—to approve project plans under the RHA.<sup>64</sup>

This narrow scope of analysis is not without consequence. As evidenced by Chapter 2, this narrow scope prevented the Corps from conducting a reasonable Alternatives Analysis in violation of NEPA. The limited scope will also prevent the Corps from conducting a fulsome public interest analysis pursuant to 33 C.F.R. § 320.4.<sup>65</sup> The scope further disregards the impacts the Proposed Project will have on rights protected under the 1836 Treaty, which created a trust responsibility that the Corps must uphold in its permitting decision.

Next, the limited scope prevented adequate consideration of the effects of the Proposed Project in Chapter 3. The Draft EIS fails to consider the environmental impacts of oil spills during the operation of the Project and along Line 5 that will impact the Great Lakes Basin, including those from tie-in locations directly on either side of the tunnel which threaten wetlands and shorelines; greenhouse gas emissions and climate change impacts, as well as connected permitting actions occurring on Line 5.<sup>66</sup> It further takes a limited look at the effects the Corps does include.

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understanding of their NEPA obligations in other districts, which readily analyzed operational oil spill risk for other pipeline projects. *See* U.S. Army Corps of Eng'rs New Orleans Dist., *Environmental Assessment: Section 408 Evaluation of Bayou Bridge Pipeline Project* (Oct. 2017); U.S. Army Corps of Eng'rs Omaha Dist., *Dakota Access Pipeline Lake Oahe Crossing Project Draft Env't Impact Statement* (Sept. 2023) (see in particular the EIS's reliance on Appendix G, a Corps commissioned analysis of spill scenarios that include a full bore rupture); U.S. Army Corps of Eng'rs Omaha Dist., *Line 84 Missouri River HDD Project* (Feb. 2024); U.S. Army Corps of Eng'rs Alaska Dist., *Final Env't Impact Statement: Nanushuk Project* (Nov. 2018). Litigation concerning the Corps' NEPA analysis of non-pipeline projects likewise supports the conclusion that analyzing catastrophic *operational* failure of project infrastructure is a NEPA obligation. *See Orutsararmuit Native Council v. U.S. Army Corps of Eng'rs*, 751 F. Supp. 3d 971, 982 (D. Alaska 2024) (“[A] scenario's low probability of occurrence does not automatically render it a speculative worst case scenario insulated from further NEPA analysis. Federal Defendants therefore erred under NEPA by eliminating a catastrophic spill from consideration. . . . The two purposes of NEPA require the consideration of a large tailings spill[.]”).

<sup>64</sup> *See* 33 U.S.C. § 403 (providing, in relevant part, that “it shall not be lawful to build or commence the building of any [structure] in any . . . navigable river . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.”).

<sup>65</sup> The Corps' public interest review must evaluate, among other things, the probable impacts, foreseeable detriments, and cumulative effects of an activity. 33 C.F.R. § 320.4(a). This includes factors like conservation, general environmental concerns, historic properties, fish and wildlife values, water supply and conservation, water quality, and the needs and welfare of the people. *Id.*

<sup>66</sup> Specifically, the Draft EIS fails to address another project proposed in the Great Lakes Basin by the same Applicant, along the same pipeline, with a permit pending at the same time: the Line 5 Segment Relocation Project. The Relocation Project and the Tunnel Project are logically interdependent. *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1307, 1315 (D.C. Cir.

Bay Mills has submitted extensive comments on the scope of the EIS and incorporates those comments fully herein.<sup>67</sup>

Additionally, the Corps' limited scope omits review of the Tunnel Project engineering and design plans. Had the Corps critically reviewed the engineering plans of the tunnel structure and its design plans, it reasonably could have determined that the Applicant's Preferred Alternative was not practicable in the Alternative Analysis.<sup>68</sup> This is critical where, as here, the plans have never before been implemented in the same manner as proposed by the Applicant.<sup>69</sup> Tunnels can be safely constructed, and hazardous liquids pipelines exist, but Enbridge's proposal *combines* a hazardous liquids pipeline with a confined underground environment beneath a lakebed. As set forth in Section IV, below, any suggestion that the Applicant's project plans are foolproof is both outdated and wrong. The Corps' refusal to engage in a detailed evaluation of the engineering of the Tunnel Project naturally prevents it from fully understanding the environmental risks posed by

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2014); *see also* *Hammond v. Norton*, 370 F. Supp. 2d 226, 253 (D.D.C. 2005). Per a federal court order, a segment of the Line 5 pipeline through the Bad River Band's Reservation in Wisconsin must shut down a year from now; halting the flow of oil through Line 5 (a scenario that this Draft EIS wholly fails to consider). *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 \*2 (W.D. Wis. June 16, 2023). The Relocation Project is Enbridge's answer to that shutdown order: a new pipeline segment to keep Line 5 operating. Only if the Corps—and numerous state agencies—approve both the Relocation Project and the Tunnel Project will Line 5 continue operating.

<sup>67</sup>See Bay Mills Scoping Comments, at 28-42 (Oct. 14, 2022); Bay Mills' Comments on the Corps' Preliminary Draft Chapters 1 and 2 and Appendix, at 4-8 (May 17, 2024); *see also* EPA Scoping Comments, at 18-27 (Oct. 7, 2022) (providing detailed recommendations for the DEIS relating to, among many issues, climate change and oil spills, including impact assessment, prevention, preparedness, and response plans); SHPO Scoping Comments, at 7-8 (Oct. 14, 2022) (setting forth its recommendations for the DEIS including that the Corps "Identify and analyze the short-, long-term, and cumulative effects of the proposed action and risks associated with the action to traditional use of the Straits as a cultural landscape and TCP, and the ability of Tribes to exercise treaty rights" and "Ensure that the scope is sufficient to capture direct, indirect, and cumulative impacts to cultural resources in the entire Straits watershed.")

<sup>68</sup> The Corps is not without guidance on engineering or tunneling projects. *See, e.g.*, U.S. Army Corps of Eng'rs, Engineer Manual 1110-2-2901, Tunnels and Shafts in Rock (May 30, 1997) (instructing that "[d]esign concepts must be developed to a degree sufficient to assess the cost and impact of the facility, and "show-stoppers" must be found, if present. Show-stoppers are insurmountable constraints, such as environmental problems (infringement on National Park treasures or endangered species, required relocation of villages, etc.) or geologic problems (tunneling through deep, extensively fractured rock, hot formation waters, noxious or explosive gases, etc.)).

<sup>69</sup> The Corps does not point to any example of this unique design in the Draft EIS. *See, e.g.*, DEIS Vol. 1, at 3-152–3-153 (recognizing that "TBMs are primarily used for transit projects.").



the project and accurately reporting the risks to the public, dooming the sufficiency of its EIS from the start.

The Corps' regulations are clear that for a permit issued pursuant to Section 10 of the RHA, "a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody," and therefore must be reviewed.<sup>70</sup> The Corps' complete deference to the Applicant and other agencies, such as the Pipeline and Hazardous Materials Safety Administration<sup>71</sup>, such as the Pipeline PHMSA or the EGLE Oil, Gas, Minerals Division which will have authority over a spill in the proposed tunnel,<sup>72</sup> ignores its own statutory obligation.

## **2.      *Section 1.6: Cooperating Agency Involvement***

Bay Mills requests that Tribal Nations be removed from inclusion in Table 1-3. As set forth fully in prior correspondence, incorporated fully herein, the Corps' key decisions relating to its jurisdiction, scope of analysis, and project purpose were designed merely to advance the Applicant's goal to continue the flow of oil through the Straits; the Corps closed off meaningful dialogue with the Cooperating Agencies, including the Tribes; the Corps failed to integrate its federal commitments to uphold Tribal treaty rights; and the Corps abdicated its federal treaty-trust responsibilities to Tribal Nations in favor of approving the project under the guise of an emergency.<sup>73</sup> The Corps failed to adequately engage with the Tribal Nation Cooperating Agencies in the EIS process and should not now bolster its process by referencing Tribal involvement.

## **3.      *Section 1.8.1: Project Need***

The Corps' statement of Project Need fails to reasonably explain why the Tunnel Project is needed. It is devoid of critical analysis and fails to meaningfully address the expert testimony, historical record, and independent reports provided by Bay Mills that counter the Applicant's profit-driven position that this massive undertaking is needed.<sup>74</sup> Instead, the Corps goes out of its way to identify a need for the Project that advances the Applicant's goals of continuing the flow of oil through the Straits. As a result, the Corps' statement of Project Need is unreasonably narrow and unlawfully constrains the Alternatives Analysis.

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<sup>70</sup> See 33 C.F.R. § 322.3.

<sup>71</sup> DEIS Vol. 1, at Table 1-2.

<sup>72</sup> *Id.* Notably, this is the first time the Corps identified this Division of EGLE as having authority over a spill in the tunnel. The Draft EIS, however, fails to include any details about notification or clean-up, a dangerous omission in light of the explosion risk following a release in the pipeline. See Section IV.M.

<sup>73</sup> See Letter from Tribal Nations to Lt. Col. Wallace W. Bandeff Commander, U.S. Army Corps of Eng'rs, Detroit District (Mar. 21, 2025).

<sup>74</sup> See Bay Mills Scoping Comments, at 17-20 (Oct. 14, 2022); Bays Mills Comments on the Corps' Draft List of Alternatives, at 14-15 (Dec. 12, 2023); Bay Mills' Comments on Draft Chapters 1 and 2, at 8-11 (May 17, 2024).

**Section 1.8.1.1** inappropriately and inaccurately relies on the terms of the Third Agreement between the State of Michigan and the Applicant. The Corps relies on the language in the Agreement that the Tunnel Project is “expected to eliminate the risk” of an oil spill in the Straits.<sup>75</sup> In reality, and as evidenced by Section IV.M below, this assumption of risk elimination is wrong. Moreover, the Third Agreement requires Enbridge to “compl[y] with all applicable laws and regulations”; it does not allow for the short-circuiting of any aspect of permitting, including the determination of purpose and need.<sup>76</sup>

**Section 1.8.1.2** is flawed and fails to demonstrate any need for the product. First, the Corps cites the Applicant’s geographically narrow desire to transport product only from the north side of the Straits to the south, but then justifies the continued demand for the product transported through the entirety of the existing Line 5, by relying on a U.S. Energy Information Administration report.<sup>77</sup> That report looks well beyond the Straits crossing and considers a national demand for a wide range of petroleum products—much more than what is transported by Line 5—through the year 2050.<sup>78</sup> Further, Line 5 products benefit Canada and contribute little to the nation’s demand.<sup>79</sup> While small amounts of natural gas liquids currently flowing through the pipeline are processed in Superior, Wisconsin and Rapid River, Michigan—both locations north of the Straits crossing—the vast majority of the natural gas liquids terminate in Sarnia, Ontario.<sup>80</sup>

Second, the Corps ignores evidence undermining statements in the Draft EIS that product transported through Line 5 is needed.<sup>81</sup> And, as a result of constraining the alternatives analysis only to situations where the *same* amount of the *same* product continues under any scenario, the Corps’ justification for the need to continue product transportation is irrelevant.

Last, even if the Corps’ justifications surrounding the need for the products currently flowing through Line 5 are accepted, nowhere does the Corps explain how “product need” supports the *Applicant’s* desire to transport that product in a specific way, on a specific route, between specific termini, to a specific Canadian refinery.

**Section 1.8.1.3** fares no better. The Corps unreasonably defined “minimizing environmental risk” to mean only two very specific types of risk: reducing anchor strikes and providing secondary containment.<sup>82</sup> However, there are numerous environmental risks associated

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<sup>75</sup> Third Agreement Between the State of Michigan et al., and Enbridge Energy, at 4 (Dec. 2018).

<sup>76</sup> *Id.* at 7.

<sup>77</sup> Draft EIS Vol. 1, at 1-14.

<sup>78</sup> See Bay Mills Comments to the Corps’ Draft List of Alternatives, at 14-15 (Dec. 12, 2023).

<sup>79</sup> PLG Consulting, *Likely Market Responses to a Shutdown of Line 5* 35-38 (Oct. 2023), <https://plgconsulting.com/executive-summary-likely-market-responses-to-a-line-5-shutdown>.

<sup>80</sup> *Id.* at 37.

<sup>81</sup> See Bay Mills Scoping Comments, at 17-19 (Oct. 14, 2022) (incorporated fully herein).

<sup>82</sup> DEIS Vol. 1, at 1-15; see also *id.* at 4-189 (referring to the risk of an anchor strike as “unlikely”).

with the existing pipeline operation that the Tunnel Project exacerbates, as well as new risks posed by the construction and continued operation of the Project. The Corps' narrow definition of environmental risks spotlights the risks of just the No Action Alternative, and not the risks of all of the alternatives, which artificially and unlawfully constrains the analysis.

The focus on minimizing the risks of *the Dual Pipelines* in the Straits excludes from consideration the risks associated with the Proposed Project and its perpetuation of the use of the rest of Line 5. This sets up an imbalance in Draft Chapter 2 where the Corps' first screening criterion claims to reduce a current risk without regard for future consequential risks.

For example, the continued operation of the line does not "minimize" the environmental risks associated with climate change. This includes the real-world impacts of climate change on Tribal Nations, which they are already experiencing.<sup>83</sup> Nor does the continuation of the line "minimize" the risk of oil reaching the Great Lakes, a risk which will exist for as long as the line is in operation. In short, the only way to "minimize" the environmental risks associated with the flow of fossil fuels through the Straits is to end it.

Further, the defined "environmental risk[s]" of "reducing anchor strikes" and "providing secondary containment" are environmental concerns solely related to *oil spills and product release*. This fact lays bare the Corps' biased manipulation of its environmental analysis. Such a constrained and Applicant-serving definition of "environmental risk" sets up an analysis that focuses on the environmental risks of the status-quo Dual Pipelines while, perversely, ignoring as "out of scope" the corresponding environmental risks associated with the Applicant's preferred alternative.<sup>84</sup> A clearer abdication of the Corps' responsibility to act as neither a proponent nor opponent of the project<sup>85</sup> is difficult to imagine.

Bay Mills incorporates fully herein its prior comments addressing the Corps' statement of need.<sup>86</sup>

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<sup>83</sup> Bay Mills Scoping Comments, at 38-41 (Oct. 14, 2022); Bay Mills' Comments on Environmental Justice, at 12-15 (Jan. 5, 2024).

<sup>84</sup> Such a shoehorned definition of environmental risk in the statement of purpose is not only illogical, it is unlawful. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (rejecting agency's argument that their purpose to facilitate an "exchange" of land could not encompass a "purchase," or what the court described as an "exchange" of private land for federal funds. The Ninth Circuit reasoned that to interpret the purpose statement to only mean a "land-for-land" exchange would run afoul of the standards for an appropriate purpose and need statement.).

<sup>85</sup> 33 C.F.R. § 320.1(a)(4) ("The Corps is neither a proponent nor opponent of any permit proposal."); 33 C.F.R Part 325 App'x B § 9(b)(5) (same).

<sup>86</sup> *See* Bay Mills' Comments on Draft Notice of Intent (May 5, 2022); Bay Mills' Scoping Comments, at 17-20 (Oct. 14, 2022); Bay Mills' Comments on the Corps' Draft List of Alternatives, at 13-17 (Dec. 12, 2023); Bay Mills' Comments on Draft Chapters 1 and 2, at 8-10 (May 17, 2024).

#### 4. Section 1.8.2: Project Purpose

The Corps defines the purpose statement so narrowly that it leaves room for only one result: the construction of a tunnel through the Straits of Mackinac.<sup>87</sup> By defining the purpose as providing transportation of fuels between the North Straits Facility and Mackinaw Station, the Corps unreasonably limits the geographic location of the Project or any alternative to the Straits, in disregard of the importance of this location to Tribal Nations. By specifying the type and amount of fossil fuels to be transported in the purpose statement, the Corps unreasonably limits the ways that purported energy needs can be met in the future and disregards climate change impacts that are already being experienced in the region, which disproportionately impact Bay Mills and other Tribal Nations.<sup>88</sup> The Corps' constrained stated purpose removed any alternative from the Draft List that is not centered at the Straits, including the no-action alternative where the Dual Pipelines cease operation.<sup>89</sup> Yet, non-Straits alternatives were critically important to include for review in the Corps' analysis of alternatives; alternatives that are geographically removed from the Straits area would have different impacts to Bay Mills' treaty rights and resources or its cultural resources in the area. The narrowly defined purpose statement resulted in the Corps rejecting almost all possible alternatives to the Project, including ones that would result in less environmental impact, less impact to cultural resources, and less impact to treaty rights.

The Corps' purpose statement unlawfully eliminated serious consideration of any non-tunnel alternative.<sup>90</sup> In fact, the only two non-tunnel options that were advanced—adding

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<sup>87</sup> See *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016) (“[A] statement of purpose and need ‘will fail if it unreasonably narrows the agency’s consideration of alternatives so that the outcome is preordained.’” (internal citation omitted)); see also *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997) (stating that it is contrary to NEPA for agencies “to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence)”; *Coal. for Advancement of Reg’l Transp. v. Fed. Highway Admin.*, 576 F. App’x 477, 487 (6th Cir. 2014) (stating that an agency “cannot define a project’s purpose and need so narrowly that it contravenes NEPA’s mandate to evaluate reasonable alternatives” (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991))); 33 C.F.R. Part 325 App’x B § 9(b)(4) (directing the Corps to “exercise independent judgment in defining the purpose and need for the project from both the applicant’s and the public’s perspective” (emphasis added)).

<sup>88</sup> See *supra* note 83.

<sup>89</sup> Even if the Corps accepts the premise that transport of product is necessary, it is not bound by the Applicant’s preferred route to accomplish this general goal. “An agency cannot restrict its analysis to those ‘alternative means by which a particular applicant can reach *his* goals.’” *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 669 (7th Cir. 1997) (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986)). The Corps has “the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.” *Id.*; see also 33 C.F.R. Part 325 App’x B § 9(b)(5).

<sup>90</sup> An agency “may not define the objectives of its action in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency’s action, and the EIS would

engineered gravel/rock as a protective cover to the existing Dual Pipelines and the No Action Alternative in which the Dual Pipelines continue operating—do not pass the straight-face test as viable considerations. It appears that the Corps advanced these alternatives only to add something other than the tunnel to the list. Indeed, the Corps emphasized that the *one* No Action Alternative that was carried forward did not meet the Purpose Statement and that it was only carried forward for analysis because the Corps was obligated to do so.

The Corps' development of its Purpose Statement is inconsistent with its obligations pursuant to NEPA.<sup>91</sup> The Corps simply adopted the Applicant's goal.<sup>92</sup> The Straits are a sacred place and the Corps' approach is also inconsistent with Section 106 of the NHPA.<sup>93</sup> The Corps has ignored that the Straits is the center of Bay Mills' and other Tribal Nations' creation story, and an accepted Traditional Cultural Landscape, when it moved forward with a Purpose Statement that allows for the continued flow of fossil fuels through the Straits. The Draft EIS

ignores that the Straits is the center of Bay Mills's, and other Tribal Nations', creation story. Bay Mills' cultural ways of life are place-based, and once adversely impacted or destroyed, are irreplaceable. Construction of an oil project is intrinsically destructive; therefore, the proposed project in the proposed location will cause serious multi-generational adverse impacts on the Tribal Communities in the Straits that cannot be mitigated or restored.<sup>94</sup>

Construction of any fossil fuels infrastructure project is intrinsically destructive; this Project will cause serious multi-generational and permanent adverse impacts on the Tribal Nations and their members who rely on the Straits, as will be further documented in Bay Mills' comments on the Project's impacts to Treaty Rights. Avoiding these impacts is essential, and the Corps failed to do so.

Under the Corps' constrained view, and as the U.S. Environmental Protection Agency ("EPA") explained in prior comments, the Corps' Purpose Statement "limits the range of risk-elimination options" because it ensures the continued flow of oil through the Straits.<sup>95</sup> That assurance, in turn, carries the continual risk of an oil spill into the Great Lakes Basin. The risk of a spill from Line 5 does not start and stop on either side of the Straits. The pipeline continues, and a spill at or near the Straits would still impact the coastal wetlands and water; a spill anywhere along the line has the very real potential to reach the interconnected waters of the Great Lakes

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become a foreordained formality." *Citizens Against Burlington, v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (majority opinion by then Circuit Judge Clarence Thomas).

<sup>91</sup> 42 U.S.C. § 4321 *et seq.*

<sup>92</sup> *But see Simmons*, 120 F.3d 664.

<sup>93</sup> *See* Bay Mills' Comments to the Corps' Draft List of Alternatives, at 10-11, 16 (Dec. 12, 2023).

<sup>94</sup> *Id.* at 16.

<sup>95</sup> *See* EPA Comments on the Corps' Draft List of Alternatives, at 3 (Dec. 12, 2023).

Basin—preemptively defeating the purpose of “minimizing environmental risk”<sup>96</sup> under a less-constrained definition.

## **B. Bay Mills’ Comments on Chapter 2: Alternatives and Appendix E**

Chapter 2 sets up an Alternatives Analysis that excludes relevant and necessary alternatives, including those most consistent with the Corps’ obligations to uphold Treaty rights and protect Tribal resources. In Chapter 2, the Corps identifies three screening criteria it used to select which alternatives it would carry forward for detailed analysis in the EIS: “1) whether the alternative meets purpose and need; 2) whether the alternative is reasonable and practicable; and 3) whether the alternative would result in lesser environmental impact than the Applicant’s Preferred Alternative.”<sup>97</sup> The Corps then defines each of these criteria even more narrowly, screening out alternatives that should be carried forward. These screening criteria, and the Corps’ application of them, are inappropriate. Chapter 2 does not leave the Corps with *alternatives* to consider so much as variations on the proposed tunnel and existing Dual Pipelines.

### **1. Section 2.1.3: USACE Public Interest Review**

The Draft EIS indicates that the requisite public interest review, based on information contained in the EIS, will be documented in the ROD.<sup>98</sup> Because the Corps will address the public interest review for the first time in its final decision document, the ROD, the public will not have the opportunity to comment on the public interest analysis. The DEIS lacks the necessary information to support a public interest review under 33 C.F.R. § 320.4(a) and the Clean Water Act. The benefits of a project “must be balanced against its reasonably foreseeable detriments.”<sup>99</sup> The balancing “should reflect the national concern for both protection and utilization of important resources,”<sup>100</sup> and the protection of the Great Lakes, the largest freshwater system in the world, is of undoubtedly high concern. A “[f]ull evaluation of the general public interest requires that due consideration be given” by the Corps to “Indian religious or cultural sites.”<sup>101</sup> Nothing in the DEIS will enable the Corps to properly critically analyze and compare the benefits and costs of the Proposed Project.

### **2. Section 2.2: Development of Alternatives**

The Draft EIS indicates that the Corps considered Tribal input in its initial identification of a wide range of alternatives for screening. While Bay Mills and other Tribes provided comments on the Corps’ Draft List of Alternatives during the screening process, the Corps did not meaningfully consider the input. In fact, Bay Mills identified several steps it recommended the

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<sup>96</sup> See Bay Mills’ Scoping Comments, at 28-35 (Oct. 14, 2022) (detailing the extent of oil spill risk associated with continuing to operate Line 5).

<sup>97</sup> DEIS Vol. 1, at 2-3.

<sup>98</sup> DEIS Vol. 1, at 1-13.

<sup>99</sup> 33 C.F.R. § 320.4(a).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* § 320.4(e).

Corps take to make an informed and reasoned decision about which alternatives to carry forward into the EIS for review, including.<sup>102</sup>

- Determine the impacts of the Proposed Project, and alternatives, on treaty rights and treaty resources.
- Complete the Section 106 process prior to developing the NEPA alternatives to more fully understand the adverse effects of the Proposed Project and the Alternatives on the Straits and other historic properties.
- Pursuant to the Clean Water Act guidelines, affirm that the basic purpose of the project is not water dependent.
- Revise its scope of analysis, articulate a need for the project, and revise its purpose statement in a manner that does not unduly constrain consideration of the alternatives.

The Corps bypassed each of these recommendations. It should not now use the fact that Tribes submitted comments that it disregarded during the development of alternatives to bolster its Alternative Analysis in the Draft EIS.

### **3. Section 2.2.1: Screening Criteria**

The Draft EIS “systemically screened” alternatives using a “sequential three-tiered approach: 1) whether the alternative meets purpose and need; 2) whether the alternative is reasonable and practicable; and 3) whether the alternative would result in less environmental impact than the Applicant’s Preferred Alternative. If an alternative failed to meet a screening criterion, USACE did not screen the alternative against subsequent screening criteria.”<sup>103</sup> This approach functionally screened out all alternatives that did not cross the Straits and ensured that reasonable alternatives not centered on the Straits would not compete in the analysis with the Tunnel Project.

#### **a. Screening Criterion 1 Unreasonably Narrows the Corps’ Consideration of Alternatives So that the Outcome Is Preordained.**

Criterion 1, whether the alternative meets the purpose and need, fails for the same reasons that the purpose statement in Chapter 1 is flawed. The statement of purpose “unreasonably narrows the agency’s consideration of alternatives so that the outcome is preordained.”<sup>104</sup> Within Criterion

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<sup>102</sup> See generally Bay Mills’ Comments on the Corps’ Draft List of Alternatives (Dec. 12, 2023); *id.* at 2.

<sup>103</sup> DEIS Vol. 1, at 2-3.

<sup>104</sup> See *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016) (quoting *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013)); see also *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997) (stating that it is contrary to NEPA for agencies “to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence)”; *Coal. for Advancement of Reg’l*

1, the Corps identified three “[r]elevant considerations”: 1) providing for transport between Enbridge’s North Straits and Mackinaw Station facilities; 2) maintaining Line 5’s existing capacity; and 3) minimizing environmental risks (which narrowly refers to reducing the risk of anchor strikes and providing secondary containment) and providing for safe transport.<sup>105</sup> The Corps uses each of these to “define competing ‘reasonable alternatives’ out of consideration (and even out of existence).”<sup>106</sup> Criterion 1 screens out reasonable alternatives presented for consideration by Bay Mills, the Michigan State Historic Preservation Office (“SHPO”), and the U.S. EPA in comments on the draft list of alternatives.<sup>107</sup> The Corps functionally screened out the requisite No Action Alternative under Criterion 1. Even when viewed through the “lens of its stated goal,” the Corps failed to advance a reasonable alternative that achieves minimizing the environmental risk associated with the transport of oil through the Straits<sup>108</sup>—the only way to do so is to stop the flow of oil.

Draft Chapter 2’s Criterion 1 runs afoul of controlling statutes and regulations. First, the treatment of the No Action Alternative is inconsistent with NEPA’s requirement for a No Action Alternative. The single No Action Alternative that the Corps considers does not meet Criterion 1. The Corps nominally adheres to the legal requirement to consider this alternative by carrying it forward; however, having functionally screened it out with an unduly narrow purpose and need criterion, the Corps has all but guaranteed it will approve this Project, before even completing its review.

As Bay Mills has repeatedly informed the Corps,<sup>109</sup> there are multiple possible No Action Alternatives, and they should all have advanced to consideration in the Draft EIS. Where there is uncertainty regarding what could happen in the absence of agency action, multiple No Action Alternatives should be considered.<sup>110</sup> In the absence of agency action here, Enbridge may cease to operate Line 5 in the Straits for numerous reasons, including, for example: an injunction against

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*Transp. v. Fed. Highway Admin.*, 576 F. App’x 477, 487 (6th Cir. 2014) (stating that an agency “cannot define a project’s purpose and need so narrowly that it contravenes NEPA’s mandate to evaluate reasonable alternatives” (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991))).

<sup>105</sup> DEIS Vol. 1, at 2-3.

<sup>106</sup> *Simmons*, 120 F.3d at 666.

<sup>107</sup> Bay Mills’ Comments on the Corps’ Draft List of Alternatives, at 21-25 (Dec. 12, 2023); SHPO Comments, Table 1 at 1-2, 5, 9-10 (Dec. 12, 2023); U.S. EPA Comments, at 2-3 (Dec. 12, 2023); *see also* Bay Mills’ Comments, at 13-17 (Dec. 12, 2023).

<sup>108</sup> *See Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 576-77 (D.C. Cir. 2016) (holding that Fish and Wildlife Service’s failure to consider a reasonable alternative that would achieve its stated goal of reducing harm to bats violated NEPA).

<sup>109</sup> *See, e.g.*, Bay Mills’ Scoping Comments, at 21 (Oct. 14, 2022).

<sup>110</sup> *See, e.g., Indigenous Env’t Network v. U.S. Dep’t of State*, 347 F. Supp. 3d 561, 575 (D. Mont. 2018) (recognizing the appropriateness of considering three no action alternatives in the absence of the Keystone pipeline), *vacated as moot*, No. 17-cv-29, 2022 WL 22900787 (D. Mont. Sept. 27, 2022).



the operation of the Dual Pipelines in the Straits as part of the ongoing litigation brought by the Michigan Attorney General under the public trust doctrine; and/or a shutdown of the entire Line 5 if, as ordered by a federal court, it ceases operation of a segment in Wisconsin that is in illegal trespass on Tribal land.<sup>111</sup> Bay Mills provided the Corps with information about these possible No Action Alternatives that lead to no pipeline being operated in the Straits. But the Corps did not screen them, let alone properly consider them as No Action Alternatives.

Second, with Criterion 1, the Corps screened out alternatives that do not cross the Straits of Mackinac, functionally treating the Project as water dependent with disregard for the legal requirements of the CWA:

Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not “water dependent”), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.<sup>112</sup>

The Draft EIS does not indicate whether the Corps considers the Proposed Project water dependent. In a “Comment Matrix” provided to Cooperating Agencies on April 17, 2024, the Corps stated that it “will document its determination of water dependency in the Record of Decision,” insulating it from Cooperating Agency and public comment and undermining the determination’s intended impact on alternative screening and analysis.<sup>113</sup> In that same Comment Matrix, the Corps says that it “has determined the basic purpose of the project,” but nowhere does it share what that basic purpose is. It is possible that the Corps considers its extremely detailed and narrowly defined Purpose Statement in Chapter 1 to be the “basic purpose”—but as it does not say so, there is no way for commenters to know, and moreover, substituting the Purpose Statement for the basic purpose would be inconsistent with case law.<sup>114</sup>

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<sup>111</sup> See *Nessel v. Enbridge Energy, LP*, No. 21-cv-01057 (W.D. Mich.); *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co.*, 626 F. Supp. 3d 1030, 1037 (W.D. Wis. 2022); see also State of Michigan, Notice of Revocation and Termination of Easement (Nov. 13, 2020), <https://perma.cc/68T4-LP2E>.

<sup>112</sup> 40 C.F.R. § 230.10(a)(3).

<sup>113</sup> The Corps appears to double down on this belated evaluation of water dependency in the Draft EIS. See 2-4 n.6.

<sup>114</sup> Consider how a court recognized that the basic purpose of a limestone mine is mining limestone, regardless of the permit applicant’s preferred mining location. *Sierra Club v. Van Antwerp*, 362 F. App’x 100, 106-07 (11th Cir. 2010). In *Sierra Club v. Van Antwerp*, the court recognized that the Corps had correctly defined the purpose of a project as the extraction of limestone but acted arbitrarily and capriciously by concluding that the project was water

As applied, Criterion 1 treats the Proposed Project as water dependent by screening out all alternatives that do not “provide for transport of pipeline products between Enbridge’s existing North Straits and Mackinaw Station facilities.”<sup>115</sup> This is how the Renewable Energy Alternative and all alternatives that avoid crossing the Straits were screened out. Accordingly, the Corps carries forward zero alternatives that do not involve special aquatic sites, as even the single improperly-defined No Action Alternative carried forward threatens the Straits with an oil spill.

If, however, the Corps recognizes that the Project is not water dependent, it should have followed applicable regulations and considered alternatives that do not involve a discharge into a special aquatic site.<sup>116</sup> The Corps did not apply the legally required presumption that practicable alternatives not involving special aquatic sites exist unless the Applicant “clearly demonstrated otherwise,” nor did the Corps itself make such a demonstration.

Third, Criterion 1 narrows the range of alternatives so much that Draft Chapter 2 disregards the legal requirements of NHPA, which states that the Corps must carry forward a “broad range of alternatives” and modifications “that could avoid, minimize, or mitigate adverse effects on historic properties.”<sup>117</sup> The resulting list of alternatives can hardly be said to be “broad.” Moreover, nowhere in Draft Chapter 2 are historic properties acknowledged, let alone considered. If analysis of the alternatives developed under these narrow screening criteria proceeds, the Corps will foreclose its ability to consider a reasonable range of alternatives in the Section 106 process, violating NHPA.

b. Screening Criterion 2 Defines and Applies “Reasonable” and “Practicable” in Overly Narrow Ways.

Criterion 2 purports to screen out alternatives that are not reasonable and practicable; however, it functions as a doubling down on the Corps’ approach of only considering alternatives that fit its narrowly defined purpose and scope. Very few alternatives remain available to be screened after Criterion 1. Still, as applied, Criterion 2 screens out almost everything that is not the Applicant’s preferred alternative.

In Draft Chapter 2, the Corps defines “reasonable” in a way that points back to the overly narrow scope and purpose statements. The Corps relies on its own NEPA implementation guidance, 33 C.F.R. Part 325, Appendix B § 9(b)(5)(a), to define “reasonable alternatives” as “those that are feasible,” and further that “feasibility must focus on the accomplishment of the

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dependent. The court rejected the idea that, although the extraction of limestone is not always water dependent, this particular project was so because of its location, and it vacated the Section 404 permit. *Id.* at 107. Similarly, in *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers*, 524 F.3d 938, 947 (9th Cir. 2008), the court recognized that a proposed gold mine was not water dependent, even if the applicant wished to mine in a watershed, because not all gold mining requires access or proximity to water.

<sup>115</sup> See DEIS Vol. 1, at 2-3; DEIS Vol. 2, Appendix E.

<sup>116</sup> 40 C.F.R. § 230.10(a)(3).

<sup>117</sup> 36 C.F.R. §§ 800.1(c), 800.6(a).

underlying purpose and need (of the Applicant or the public).”<sup>118</sup> The Corps glosses over its statutory obligations under the RHA to independently determine feasibility of the Applicant’s project plans. Further, although this definition allows the Corps to define reasonableness in relation to public need, the Corps has not done so as it has not determined a public need for the project—likely because, as Bay Mills and others have pointed out, there is no public need for the Project. Instead, the Corps applies this definition by pointing back to the flawed purpose and need statement of the Applicant.

In Chapter 2, the Corps purports to define “practicable” as the CWA does: “an alternative [is] practicable ‘if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.’”<sup>119</sup> However, the Corps selectively applied this definition to the alternatives and did so in a way that made little sense. Table E-1 shows that the Corps leaned heavily on the “logistics” part of this definition to inconsistently screen out alternatives that are not the Applicant’s preferred alternative. This table reflects that several Transport Method Alternatives are screened out by Criterion 2 due to logistics—namely, that new infrastructure would be required.<sup>120</sup> By this reasoning, the Applicant’s preferred alternative should also be screened out—the infrastructure for this entirely new undertaking is not in place and new construction is necessary—which, as even the flawed Draft EIS makes clear, would be massively disruptive with severe and long-lasting consequences. The inconsistent and illogical application of Criterion 2 makes it clear that the Corps is a proponent of the Applicant’s proposal.<sup>121</sup>

c. Screening Criterion 3 Is Ill-defined and Improperly Applied.

Criterion 3, “whether the alternative may have less environmental impacts than the Applicant’s Preferred Alternative,” is defined too narrowly. The Corps’ definition of “environmental impacts” is limited to:

Project footprints and best available information (geographic information system (GIS) data, aerial photography, surveys, etc.) to characterize natural and cultural resources within each alternative. This included presence of wetlands and surface waters, vegetation communities, proximity to residences and other sensitive receptors such as schools, and proximity to parks and other publicly used spaces.<sup>122</sup>

First, Criterion 3 is too narrow because it excludes key environmental impacts from consideration, such as the Tribal fishery and climate change. The Corps should have included climate change as a relevant consideration for any screening criterion about environmental

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<sup>118</sup> DEIS Vol. 1, at 2-4.

<sup>119</sup> DEIS Vol. 1, at 2-1 (quoting 40 C.F.R. § 230.10(a)(2)).

<sup>120</sup> DEIS Vol. 1, at 2-3; DEIS Vol. 2 at Appendix E, Table E-1.

<sup>121</sup> Additionally, the application of Criterion 2 is suspect because it screens out all alternative “Excavated Material Placement Sites and Temporary Off-site Laydown Areas and Haul Route Sub-Alternatives” that are not the Applicant’s preferred alternative. DEIS Vol. 2, at E-19–E-21.

<sup>122</sup> DEIS Vol. 1, at 2-4.

impacts. For example, whether the Project or alternative is consistent with the climate goals of Michigan (a 28 percent reduction below 2005 levels in GHGs by 2025 and carbon neutrality by 2050)<sup>123</sup> is a relevant consideration under NEPA.<sup>124</sup> Climate change, which disproportionately impacts Tribal communities, is an important consideration that the Corps unlawfully ignored.<sup>125</sup>

Second, Criterion 3 was applied too early in the process; the Corps screened alternatives by comparing the amount or character of wetlands or cultural resources impacted before relevant fieldwork was complete. For example, fieldwork was still being conducted to understand the scale of wetland impacts at issue here.<sup>126</sup> The same is true for cultural and historic resources because studies were ongoing and the NHPA process had not (and still has not) concluded. It appears that instead of understanding and critically evaluating the environmental impacts of the Project or any of the alternatives, the Corps has merely done a “back of the napkin review” to compare alternatives.

A set of well-defined screening criteria about environmental and cultural impacts—and one that is applied when more information is available—would have aided the Corps and the public in evaluating alternatives to a proposed project. Some alternatives that the arbitrary and capricious Criterion 1 screened out would readily have met Criterion 3 (namely, the Renewable Energy Alternative and Existing Pipeline Infrastructure Alternative).

#### **IV. THE EFFECTS OF THE TUNNEL PROJECT SUPPORT A PERMIT DENIAL**

NEPA requires that the Corps identify all “reasonably foreseeable environmental effects” of the proposed project.<sup>127</sup> And while the Corps identifies some effects in Chapters 3, the chapter strictly adheres to the Corps’ inappropriately and narrowly defined scope of analysis. Consequently, the Corps’ analysis in Chapter 4 omits crucial aspects that reveal that the effects will be considerably worse than what is presented. Further, the effects are segregated in a way that

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<sup>123</sup> Michigan Exec. Directive No. 2020-10, Building a Carbon-Neutral Michigan (Sept. 23, 2020), <https://www.michigan.gov/whitmer/news/state-orders-and-directives/2020/09/23/executive-directive-2020-10>.

<sup>124</sup> 42 U.S.C. § 4332(i) (noting that all federal agencies shall, “consistent with the provisions of this chapter, recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment”).

<sup>125</sup> *See generally* 42 U.S.C. § 4331 (setting forth a national policy to, among other objectives, “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations” and “preserve important historic, cultural, and natural aspects of our national heritage”).

<sup>126</sup> Letter from Charles Simon, Regul. Branch Chief, U.S. Army Corps of Eng’rs, to Gina Lee, Enbridge Energy, at 1 (Dec. 21, 2022) (stating the Corps’ determination that “a new wetland delineation and jurisdictional determination are needed”); *see also* Monthly Cooperating Agency Meeting Minutes (May 16, 2024) (identifying ongoing fieldwork).

<sup>127</sup> 42 U.S.C. § 4332(2)(C)(ii).

allows the Corps to put blinders on to the integrated impacts of the Tunnel Project throughout the environment. For example, a collapse or washout of sediment from the TBM has the potential to have devastating impacts on the fish population in the Straits by coating gills of the fish or breeding areas, which would disproportionately impact Tribal resources and economics. By segregating its review of issues, or disregarding issues completely, the Corps violated its statutory responsibility and its regulatory obligations to assess the direct, indirect, and cumulative impacts of its permitting project.<sup>128</sup>

The Corps' defined Area of Analysis in each section of Chapters 3 is vague and limited based on the Corps' narrowly defined scope of analysis.<sup>129</sup> It further fails to adequately address the baseline conditions of the No Action Alternative when considering and comparing the effects of the Action Alternatives.<sup>130</sup> While the Corps presumes that in the No Action Alternative the "Applicant could continue to operate the Dual Pipelines in the Straits," the Corps should include as a baseline, for comparison of the environmental effects, the reality that Enbridge may cease operation of Line 5 in the Straits.<sup>131</sup> The Corps must be transparent about all of the ways that a shutdown could occur when referring to the No Action Alternative, including:

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<sup>128</sup> Bay Mills incorporates herein all comments that it submitted on the Corps' technical forms. *See* Bay Mills' Comments on the Environmental Justice Technical Form (Jan. 9, 2025); Bay Mills' Comments on the Safety & Reliability Technical Form (Nov. 7, 2024); Bay Mills' Comments on the Air Quality, Greenhouse Gases, and Climate Change Technical Form (Dec. 2, 2024); Bay Mills' Comments on the Water Resources Technical Form (Aug. 22, 2024); Bay Mills' Comments on the Socioeconomics Technical Form (Sept. 26, 2024); Bay Mills' Comments on the Biological Technical Form (Jul. 25, 2024); *see also* 40 C.F.R. §§ 230.40–230.45.

<sup>129</sup> For example, Section 3.5.1 limits the Area of Analysis to biological resources on and "adjacent to" the proposed construction footprints. This description would benefit from a map, as Bay Mills and other Cooperating Agencies have repeatedly suggested. *See* Bay Mills' Comments on Water Resources Technical Form, at 2 (Sept. 26, 2024); Bay Mills' Comments on the Socioeconomics Technical Form, Att. at 1 (Sept. 26, 2024). The Area of Analysis further fails to take into account the direct, indirect, and cumulative impacts of the Project due to the Corps' limited defined Scope of Analysis.

<sup>130</sup> For example, Table 4.2-1, Summary of Key Issues for Land Use and Recreation, should include a column for the No Action Alternative. *Cf.* Table 4.14-1, Summary of Key Issues for Reliability and Safety.

<sup>131</sup> *See* Suzanne Mattei et al., *Enbridge Should Consider Closing It's Old, Troubled Line 5 Pipeline*, Inst. for Energy Econ. and Fin. Analysis, (Jan. 2025), [https://ieefa.org/sites/default/files/2025-01/Updated%20Authors-Enbridge%20Should%20Consider%20Closing%20Line%205\\_Report\\_January%202025\\_Final.pdf](https://ieefa.org/sites/default/files/2025-01/Updated%20Authors-Enbridge%20Should%20Consider%20Closing%20Line%205_Report_January%202025_Final.pdf).

- Enbridge complies with or is forced to comply with the Notice of Revocation and Termination of the 1953 easement and ceases to operate the Dual Pipelines in the Straits.<sup>132</sup>
- A court enjoins the operation of the Dual Pipelines in the Straits in the ongoing litigation brought by the Michigan Attorney General.<sup>133</sup>
- Enbridge ceases to operate Line 5 (including the Dual Pipelines in the Straits) because it is forced to comply with a federal court order that held Enbridge in trespass and required that the pipeline be shut down within three years of June 16, 2023.<sup>134</sup>
- Enbridge ceases to operate Line 5 (including the Dual Pipelines in the Straits) by 2040, consistent with its own depreciation study for the current pipeline system—much sooner than the expiration of its easement to operate the Tunnel Project (which would be for 99 years).<sup>135</sup>
- A release of oil from the currently operating Dual Pipelines causes a shutdown like that which occurred in 2020 when the Dual Pipelines were damaged and ordered to be shut down completely for a week and one of the Dual Pipelines was ordered to be shut down for 78 days. A release of product from the pipelines would likely cause a much longer period of a shutdown.

Additionally, Bay Mills objects to the reliance throughout Chapters 3 and 4 on the visual surveys without a description of how the survey conditions were impaired or otherwise unreliable. For example, the balloon survey, used to define the limit of visual effects for the APE, was impeded

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<sup>132</sup> See State of Michigan, Notice of Revocation and Termination of Easement (Nov. 13, 2020), <https://perma.cc/68T4-LP2E>.

<sup>133</sup> See *Nessel v. Enbridge Energy, LP*, No. 21-cv-01057 (W.D. Mich.).

<sup>134</sup> Enbridge was found liable of trespass on the Bad River Band Reservation by a federal court and was “enjoined to cease operation of Line 5 on any parcel within the Band’s tribal territory on which defendants lack a valid right of way and to arrange reasonable remediation at those sites within three years” (by June 16, 2026). *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co.*, 626 F. Supp. 3d 1030, 1037 (W.D. Wis. 2022); *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., Inc.*, No. 19-CV-602, 2023 WL 4043961, at \*20 (W.D. Wis. June 16, 2023).

<sup>135</sup> Enbridge Energy, LP, *Enbridge May 2021 Depreciation Study Update*, at 2 (May 21, 2021), <https://perma.cc/DB29-X7E6>; see also Sheri McWhirter, *Line 5 Tunnel Could Be a ‘Stranded Asset’ in 20 years, Report Suggests*, MLIVE (Jan. 20, 2022), <https://www.mlive.com/public-interest/2022/01/line-5-tunnel-could-be-a-stranded-asset-in-20-years-report-says.html>.

by thick smoke from Canadian wildfires that significantly reduced visibility at the Straits.<sup>136</sup> The Corps must be transparent about the limitations of the survey methods.

**A. Sections 3.1.3 & 4.1.3: Indigenous Knowledge / Traditional Ecological Knowledge**

The Corps represents that it “incorporated” Traditional Ecological Knowledge (“TEK”) and Indigenous Knowledge (“IK”) “into relevant research sections.”<sup>137</sup> The Corps overstates its use of TEK and IK by broadly gesturing to its inclusion but failing to specify where and when such knowledge was obtained and how it was actually incorporated. The Corps should consistently attribute TEK and IK to Tribal knowledge holders throughout the Draft EIS in all places where it was supposedly incorporated.

**B. Sections 3.2 & 4.2: Land Use & Recreation**

The Corps’ description of land use omitted a discussion of Enbridge’s Section 110(k) violations, described above in Section II. The omitted information supports a full permit denial that must be considered by the Corps.

**C. Sections 3.3 & 4.3: Aesthetics**

The analysis in the Draft EIS of impacts to aesthetics is fundamentally hindered by the Corps’ unsupportable reliance on minimum impact ranges and its refusal to analyze or disclose actual effects of the Project. For example, the visual renderings of the north construction site are grossly misleading, displaying only 90-foot cranes when the proposed construction cranes are up to 434 feet tall.<sup>138</sup> The Draft EIS also does not meaningfully discuss or provide renderings of “the red flashing and steady state lights”<sup>139</sup> on the cranes, nor how such lighting would affect aesthetics in dark sky, evening, and morning conditions, including at Headlands International Dark Sky Park. And as described below in Section IV.IV.K, the noise modeling on which the Draft EIS relies assumes an inappropriately low Sound Power Level of 100dBA (and blast charge). Yet the discussion of the soundscape in Section 4.3.3.1.2 does not even mention this assumption, and instead simply states that “blasting activities, though intermittent, would also increase ambient noise levels.”<sup>140</sup> The Draft EIS also appears to exclude from analysis any disclosure of the noise generated by the TBM, as opposed to horizontal directional drilling (“HDD”).<sup>141</sup> Finally, the Draft EIS states that it does not analyze “changes in olfactory attributes” because they are

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<sup>136</sup> See Letter from Whitney Gravelle, President of Bay Mills to Charles Simon, U.S. Army Corps of Eng’rs, at 11 (Jan 22, 2024).

<sup>137</sup> DEIS Vol. 1, at 3-3.

<sup>138</sup> DEIS Vol. 1, at 4-26–4-27.

<sup>139</sup> *Id.* at 4-29.

<sup>140</sup> *Id.* at 4-30.

<sup>141</sup> See *id.* at 4-147 (listing non-blasting noise sources).

“subjective.”<sup>142</sup> But the subjectivity of how tolerable or intolerable an environmental effect may be does not relieve the Corps of its legal obligation to consider and disclose those effects to the public.

In sum, none of the constituent parts of the aesthetics analysis are sufficient to fulfil the Corps’ obligations to actually consider and disclose to the public the foreseeable impacts of the Project.<sup>143</sup> Accurately portraying such large, far-reaching impacts to aesthetic resources is essential not only for fulfilling the Corps’ NEPA obligations, but for its forthcoming treaty rights analysis.

#### **D. Sections 3.4 & 4.4: Water Resources**

The Corps cannot issue a Section 404 or Section 10 permit unless the proposed project meets the requirements set forth in the Clean Water Act Section 404(b)(1) Guidelines.<sup>144</sup> The Guidelines require the Corps to make factual determinations and intend to prevent or minimize the effects of the proposed project.<sup>145</sup> The Guidelines recognize that “the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.”<sup>146</sup> The Guidelines also prohibit a permit if the discharge of dredged or fill material “will cause or contribute to significant degradation of the waters of the United States.”<sup>147</sup> A permit also may not be issued “unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.”<sup>148</sup>

The Corps’ Water Resources sections are lacking. The baseline conditions fail to acknowledge the rare and exceptional quality of the wetlands and have insufficient tunnel boring information to fully evaluate the groundwater-related issues. The Effects sections understate resource impacts. Here, Bay Mills comments specifically on groundwater and wetlands. In Section 4.5.3 below, Bay Mills’ has included comments on outfalls and stormwater ponds that are also responsive to the Water Resources sections.

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<sup>142</sup> *Id.* at 4-24.

<sup>143</sup> The Draft EIS indicates that there will likely be impacts to the soundscape and viewscape of islands within the Straits TCL, including Green Island and Mackinac Island, but the Corps’ inadequate blast noise contour maps and visual renderings (or lack thereof) fail to demonstrate the reasonably foreseeable impacts in an honest, publicly digestible way.

<sup>144</sup> 33 U.S.C. § 1344(b).

<sup>145</sup> 40 C.F.R. §§ 230.10, 230.11.

<sup>146</sup> *Id.* § 230.10(d).

<sup>147</sup> *Id.* § 230.10(c).

<sup>148</sup> *Id.* § 230.10(d).



## 1. *Groundwater*

The Draft EIS does not take the hard look required under NEPA for several groundwater-related issues. These issues include groundwater migration pathways and artesian aquifers, dewatering, tunnel geology, and contaminant releases. Bay Mills' further incorporates fully herein the Expert Report of LimnoTech, Attachment H.

First, the Draft EIS fails to take a hard look at the creation of groundwater migration pathways and artesian aquifers. The construction of the tunnel will involve boring through fractured and brecciated rock layers, as well as blasting activities to access these features. This construction activity will link together previously disconnected pockets and zones of groundwater in aquifers, which can increase groundwater flow into the tunnel during and after construction. The Draft EIS fails to adequately analyze the impacts of voids, pockets, and zones.

Appendix G3.4.1.1 includes calculations showing a tunnel infiltration rate of 625,633 gallons of water per day;<sup>149</sup> however, this calculation is likely too low in many tunnel segments based on the occurrence of voids, fractures, and high permeability zones. Similarly, the Draft EIS includes calculations for groundwater infiltration during operations of as much as 21,000 gallons per day;<sup>150</sup> this figure is also too low “given the dimensions of the tunnel, portal, and shaft, and the highly porous and fractured nature of rock formations.”<sup>151</sup> Enbridge's plans to respond to groundwater infiltration must reflect a higher, more accurate figure. Even under the surprisingly low estimates, significant drawdown will occur and is not fully accounted for. The Draft EIS also fails to consider artesian aquifers in upland areas adjacent to the Straits. The breaching of these aquifers could lead to the uncontrolled discharge of groundwater into the tunnel and access feature and decrease water availability in nearby wells and wetlands.

These omissions and underestimates are problematic considering that other tunnel failures have resulted from uncontrolled groundwater infiltration. For example, the Draft EIS notes that

The Detroit River Outfall #2 project is an example of a project that became overwhelmed by large groundwater inflows. The initial tunneling process progressed without issue until the TBM encountered an area with considerable groundwater inflow and pressure where the water entered around the precast concrete tunnel lining (PCTL), making it difficult to backfill the gap around the PCTL (Wallis 2009).<sup>152</sup>

The Draft EIS omits any explanation of how the Tunnel Project will avoid the same fate—a partially bored tunnel and machinery abandoned in the Straits. The suggestion that probing ahead of the tunnel or other excavation techniques could prevent similar overwhelming groundwater infiltration does not hold water. Considering the complete lack of information about the actual

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<sup>149</sup> DEIS Vol. 2, at G-79.

<sup>150</sup> DEIS Vol. 1, at 4-54.

<sup>151</sup> LimnoTech Report, at 20.

<sup>152</sup> DEIS, Vol. 1, at 3-154.

geological conditions at the depth of the tunnel, the conditions in the Straits will be more challenging than those experienced in the Detroit River. The Detroit River Outfall No. 2 was only a quarter of the length of the Tunnel Project, yet it still experienced such severe groundwater inflows with hazardous gases that it was necessary to abandon the project. The Corps' lack of analysis on this issue undermines the DEIS and a permit decision.<sup>153</sup>

The Draft EIS acknowledges that “during HDD installation of the water intake pipe, approximately 20,000 gallons of drilling fluid (primarily consisting of water and bentonite with additives such as lubricants and greases) could be released at the interface of the HDD and the lakebed,”<sup>154</sup> but the basis for the estimate is unclear and the actual amount of drilling fluid release may be substantially higher. This will lead to greater environmental impacts, including to spawning sites.<sup>155</sup>

Second, the Draft EIS fails to take a hard look at the impacts of dewatering. Although the Draft EIS states that the dewatering associated with the Project would not result in long-term impacts to the aquifer or wetlands, this position is not supported.<sup>156</sup> The dewatering method has not been determined, and the dewatering system has not been designed. The Draft EIS recognizes that there are uncertainties in the amount and duration of drawdown and the nature of groundwater influences on wetlands at the North Shore site. This analysis is incomplete, in part because the basic assumptions were flawed. For example, the Applicant performed groundwater modeling for the proposed portal, but the model does not reflect the installation of dewatering well points outside the diaphragm walls, though this possibility is mentioned in the Draft EIS.<sup>157</sup> The inputs into the applicant's model were not conservative; instead, they included overly optimistic assumptions about wetland impacts and overly optimistic assumptions about ongoing tunnel and shaft leakage. As a result, the simulated groundwater withdrawal rates and associated drawdowns are likely too low. Additionally, given the complexity of geology and other considerations, the assumptions about tunnel boring duration may be too optimistic. A longer duration would likely mean additional filtration and drawdown. The assertion that drawdown would not result in long-term impacts to the aquifer or wetlands is not supported by the information presented in the Draft EIS and fails to take the requisite hard look required by NEPA.

Third, another concern that the Draft EIS fails to take a hard look at is the upward movement (upconing) of higher-density, saline, and sulfidic groundwater into extraction wells and tunnel infrastructure. Besides creating disposal challenges and potentially impacting nearby water supply wells, this water will accelerate corrosion of tunnel linings, bolts, brackets, supports, railings, ladders, walkways, wiring, sensors, pumps, fittings, and potentially the pipeline itself.

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<sup>153</sup> LimnoTech Report, at 14-15; DEIS Vol. 1, at 3-154–3-155.

<sup>154</sup> DEIS Vol. 1, at 4-76.

<sup>155</sup> LimnoTech Report, at 19. Additionally, HDD drilling fluid, which is prone to inadvertent releases to groundwater and surface water, may contain per- and polyfluoroalkyl substances (PFAS) in proprietary additives, which can bioaccumulate in animals and humans. *See* Glüge, *infra* note 185185.

<sup>156</sup> DEIS Vol 1., at 4-44.

<sup>157</sup> *Id.* at 4-43–4-44; DEIS Vol. 2, Appendix F at F-15–F-16.

The upconing of higher-density, saline, and sulfidic groundwater may also cause the dissolution of the bedrock (especially, limestone) itself. Dissolution of the bedrock (i.e., creating new voids and cavities underground) may subsequently lead to damage to the pipeline infrastructure and structural integrity of the tunnel. Additionally, if these cavities become large enough or connect with other voids/cavities, the overlying ground may collapse. Additionally, the groundwater contains dangerous dissolved gases, such as methane and hydrogen sulfide. Dewatering activities may create environmental and human health risks, including those associated with the discharge of contaminated groundwater and the venting of explosive or toxic gases.

Although the Draft EIS acknowledges the potential for direct effects on groundwater quality from contaminants during tunnel construction and three of the decommissioning sub-alternatives, it does not sufficiently analyze them and relies on an area of analysis that is too small. Hydrogeological measurements and simulations conducted as part of the tunnel permit application and design process rely on overly optimistic assumptions about vertical and horizontal extents of tunnel dewatering and other hydrogeological impacts (e.g., grouting of voids). As a result, the characterization of impacts on water yield and water quality in existing private and public water supply wells and potentially future aquifer suitability for well construction—especially in the vicinity of the South Shore site—may be inadequate. Fate and transport modeling should be done to show where these contaminants would travel and what resources they would impact. As the Draft EIS acknowledges, groundwater is an important source of drinking water for Michiganders and provides important ecosystem services, which could be threatened by contaminants. More information is needed to fully assess these effects of the Project.

Fourth, the Draft EIS fails to take a hard look at the geology along the proposed path of the tunnel. More than half of the geotechnical borings that were advanced as part of the tunnel design did not penetrate to the full depth of the tunnel, particularly in the deepest tunnel sections.<sup>158</sup> Without adequate geotechnical data, the tunnel boring machine will be flying blind in the areas of the greatest pressures and depths. Pressurized boring and probing ahead of the tunnel boring machine are not adequate replacements for actual geotechnical information. Further, the overall competence of the rock through which the tunnel will be bored, and into which access approaches and shafts will be blasted, is highly problematic. The geotechnical data that *is* present in boring logs shows consistent low core recovery and common voids, fractures, and brecciated zones encountered during drilling. Voids present construction and operational risks related to sealing the tunnel from groundwater and dangerous gas infiltration, as well as threats to the structural integrity of the tunnel due to adjacent voids that go undetected or that may expand following construction. The existing geotechnical information does not pass the hard look test required by NEPA.

Fifth, the DEIS fails to take a hard look at potential contaminant releases due to tunnel failure. As discussed below, there are significant safety risks associated with shaft or tunnel failure. The failure of the shaft or tunnel would also likely release pipeline fluids. Such fluids could leak into surrounding aquifers and surface waters via the voids, fractures, and brecciated conduits described earlier, contaminating bedrock aquifers, overburden aquifers, and surface water. Slow leaks could go undetected for long periods. Catastrophic failures could impact aquifers deep beneath the Straits, making cleanup nearly impossible and resulting in slow seepage into surface

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<sup>158</sup> DEIS Vol. 1, Figure 4.14-1, at 4-191.

water that would be carried to both Lake Michigan and Lake Huron based on the highly variable currents in the Straits.

Finally, the groundwater analysis in the Draft EIS is incomplete without acknowledging and taking into account Enbridge's history of impacting aquifers and failing to report or remedy those impacts. In 2021, while working on another pipeline project styled as a "replacement" or "reroute" in Minnesota, Enbridge breached an aquifer, leading to the uncontrolled flow of groundwater.<sup>159</sup> This exemplifies the dangers that can occur from geological conditions during large-scale construction projects. Even more troubling is Enbridge's record in responding to this aquifer breach—it admitted that it delayed notifying the relevant agency.<sup>160</sup> The Corps should take into account Enbridge's track record when dealing with unplanned for events during construction.

## 2. *Special Aquatic Sites*

The Draft EIS fails to include all of the direct, indirect, and cumulative impacts to wetlands, and it understates the quality of wetlands that will be impacted. Bay Mills attaches and incorporates Alice Thompson's Expert Comments, Attachment I. Bay Mills' comments are also informed by the Bay Mills Biological Services Department.

The wetlands at issue are ecologically unique, provide a habitat for threatened species, and contain culturally significant plants. Wetlands identified as W8, W10, W13, W19, W22, W29, and W30 have coastal fen species, including Northern white cedar, Kalm's St. John's wort, *Juncus balticus*, little bluestem, Houghton's goldenrod, false asphodel, shrubby cinquefoil, and dwarf lake iris.<sup>161</sup> Coastal fen is a rare natural community that generally is (or should be) afforded more protections in permitting processes. Houghton's goldenrod and dwarf lake iris, listed as threatened species, are abundant in the wetlands the Project will permanently impair, and they will be destroyed.

Plants in these wetlands, such as wiingashk, also known as sweetgrass, have cultural significance and importance to Bay Mills and other Tribal Nations. Ms. Thompson and Bay Mills' scientists observed and documented sweetgrass blooming in W8 and W18 during the May 2023 delineation—but sweetgrass is not represented in Stantec's data sheets and report, and the Draft EIS fails to account for it.<sup>162</sup>

The Corps previously announced that the Project would involve placement of fill into "a total of approximately 0.13 acre of wetlands."<sup>163</sup> Bay Mills explained to the Corps that this was a

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<sup>159</sup> Office of Minn. Attorney General, *Enbridge Admits It Breached Aquifer in Line 3 Construction, Will Pay Fine and Perform Environmental Restoration* (Oct. 17, 2022), [https://www.ag.state.mn.us/Office/Communications/2022/10/17\\_Enbridge.asp](https://www.ag.state.mn.us/Office/Communications/2022/10/17_Enbridge.asp).

<sup>160</sup> *Id.*

<sup>161</sup> Thompson Report, at 21-22.

<sup>162</sup> *See, e.g., id.* at 14.

<sup>163</sup> Notice of Intent To Prepare a Draft Environmental Impact Statement for the Line 5 Tunnel Project, Mackinac and Emmet Counties, Michigan, 87 Fed. Reg. 50,076 (Aug. 15, 2022).

gross undercounting and, after a new delineation, it became clear that at least 11 times as many acres of wetlands would be permanently impaired.<sup>164</sup> Although the Corps and Enbridge took steps to correct the previously inaccurate wetland delineation, they have focused on quantification of wetlands within a limited study area to the exclusion of understanding the quality of the wetlands. The Michigan Rapid Assessment Method (MiRAM) is a state-specific tool to determine the “functional value” of a particular wetland and assign a rating level to that wetland as compared to others.<sup>165</sup> Functional assessments are helpful to evaluate wetland functions and wetland mitigation. The Draft EIS omits the fact that the wetlands at issue here would all be ranked as “exceptional ecological value” using MiRAM because they are within 1,000 feet of the ordinary high water mark of Lake Michigan, and most of the wetlands meet other criteria that make a wetland exceptional in Michigan, such as habitat for threatened and endangered species.<sup>166</sup> This matters. The Project would destroy wetlands of exceptional value—a result that should be avoided. As addressed below in Section V, the Project would neither avoid nor even mitigate the destruction of these wetlands, and no efforts would be made to salvage or transplant the rare species found in them.

Not only does the Draft EIS understate the value of the wetlands, but it also understates the ways they will be impaired, failing to take the hard look at effects that NEPA requires. First, the Draft EIS fails to account for how the high volume of traffic on Boulevard Drive from truck hauling and construction will affect the wetlands, in particular W8, W12, W13, and W18. The North Side of the Project will see 240 truck trips along a gravel road (which is currently rarely used) each day over a six-year construction period.<sup>167</sup> These truck trips will cause dust and sedimentation to pollute the wetland habitats, destroying coastal, threatened, and culturally significant plant species.<sup>168</sup> Second, wetlands are sensitive to groundwater drawdown, which will occur here during tunnel boring, *see* Section IV.D.1.<sup>169</sup> Sustained groundwater drawdown could contribute to shifts in plant communities and affect Stream 01, which is habitat for the federally endangered Hine’s emerald dragonfly.<sup>170</sup> Third, there are additional pollution risks from the overtopping of the stormwater ponds that the Applicant plans to use during construction, a spill of construction-related fluids, an oil spill during operation, and discharges from Outflow 003 into a

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<sup>164</sup> DEIS Vol. 1, at 4-49 (noting 1.53 acres will be permanently impacted within the construction footprint, not including permanent impacts outside of the footprint).

<sup>165</sup> Mich. Dep’t of Nat. Res. & Env’t, *Michigan Rapid Assessment Method for Wetlands User’s Manual* (July 23, 2010), <https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Programs/WRD/Wetlands/michigan-rapid-assessment-method-wetlands-manual.pdf>.

<sup>166</sup> Thompson Report, at 23-24; *id.* at Att. 1.

<sup>167</sup> DEIS at 4-115. Note that throughout the process, work has been done to roadways without the appropriate permits or notification. *See* Bay Mills’ Comments on Stantec Wetlands Delineation Report, at 9 (Dec. 22, 2023) (noting that work had been done to the Mackinac County Road that impacted protected wetlands and hydrology and that it had been done without requisite permits).

<sup>168</sup> Thompson Report, at 29-30.

<sup>169</sup> *Id.*, *see also* Limnotech Report at 19.

<sup>170</sup> Thompson Report, at 26.

coastal wetland.<sup>171</sup> Fourth, it is unclear whether the construction layout has been fully planned, and it may not be designed to avoid wetland impacts; sub-alternatives to the construction layout were not considered in the Draft EIS.<sup>172</sup> These wetlands effects are detailed in Ms. Thompson's report.

### **E. Sections 3.5 & 4.5: Biological Resources**

The Corps' Biological Resources sections are lacking. The baseline conditions omit rare and protected species, and the effects sections understate resource impacts.

**Section 3.5.** The Project will affect more rare and protected species than the Draft EIS acknowledges. First, the Draft EIS fails to address state-listed species. This omission is inconsistent with Clean Water Act regulations and NEPA.<sup>173</sup> State-listed plants have been identified at the LODs and EMPSs (Richardson's sedge, flat-stemmed rush, and walking fern), yet are ignored in the Draft EIS. More state-listed birds are recorded in Cornell Lab of Ornithology's eBird than appear in Table 3.5-5.<sup>174</sup>

Second, there has been no comprehensive Rare Species Review for the entire Project area. The two Rare Species Reviews that have been conducted are overly narrow. The first review, No. 2103, was conducted in 2018 for LODs that are now outdated, and it only summarized rare plants and natural communities, omitting rare animals.<sup>175</sup> The second review, No. 4893, was completed in 2024 and only incorporated the EMPSs, not the full project site.<sup>176</sup> Consequently, species are omitted from the Draft EIS. For example, the Michigan Natural Features Inventory ("MNFI") includes an occurrence of a rare dragonfly (the incurvate emerald dragonfly) on the north side that appears nowhere in the Draft EIS or underlying documents. As another example, Draft EIS Section 3.5.4 (Aquatic Organisms) incorrectly omits the presence of the Great Lakes physa snail, which is a state-listed "species of special concern" that MNFI has documented along the Lake Michigan shoreline, directly at the location of Outfall 001.

Third, Section 3.5.3 (Natural Communities), should include the rare species associated with each natural community. For example, per MNFI, rare animals for Limestone Bedrock Glade

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<sup>171</sup> See *id.* at 25.

<sup>172</sup> *Id.* at 24-25.

<sup>173</sup> 40 C.F.R. § 230.30.

<sup>174</sup> Cornell Lab of Ornithology, eBird, *Mackinac, Michigan Bird List* (last updated June 28, 2025), <https://ebird.org/region/US-MI-097/bird-list>. Additionally, because eBird may obscure records due to the sensitivity of protected species, there may be additional birds that will be impacted. See Cornell Lab of Ornithology, eBird, *Sensitive Species in eBird* (Aug. 22, 2022), <https://support.ebird.org/en/support/solutions/articles/48000803210-sensitive-species-in-ebird>.

<sup>175</sup> Mich. Nat. Features Inventory, Mich. State Univ. Ext., *Rare Species Review No. 2103 – Enbridge Line 5 Straits of Mackinac Regulatory Applicability Analysis, Environmental Impact Report (Emmet & Mackinac counties, MI)* (Feb. 8, 2018).

<sup>176</sup> Mich. Nat. Features Inventory, Mich. State Univ. Ext., *Rare Species Review No. 4893 – The Great Lakes Tunnel Project – Straits of Mackinac* (Mar. 14, 2024).

include: *Flexamia delongi* (leafhopper, state special concern); *Prosapia ignipectus* (red-legged spittlebug, state special concern); *Pyrgus wyandot* (grizzled skipper, state special concern); *Vallonia albula* (land snail, state special concern); *Vertigo elatior* (tapered vertigo, state special concern); *Vertigo hubrichti* (Hubricht's vertigo, state special concern); *Vertigo nylanderi* (deep-throat vertigo, state special concern); *Vertigo paradoxa* (land snail, state special concern); and *Vertigo pygmaea* (crested vertigo, state special concern).

Fourth, the draft Biological Assessment, Appendix I to the Draft EIS, is incomplete. This draft is dated April 2, 2025, and Bay Mills provided responsive comments on May 6, 2025, which it incorporates herein.

Finally, Bay Mills provided important primary resources to the Corps during the development of the Draft EIS that the Corps does not include in its references.<sup>177</sup> Had the Corps reviewed these resources, each informed by expert independent scientists and data, the Draft EIS would be more informed of current conditions and would recognize more extensive effects from the Project.<sup>178</sup> In addition to the historic aerials that Bay Mills previously raised, we are now aware of publicly available 1938 and 1939 aerial imagery of the site.<sup>179</sup> These images provide a snapshot of the project site prior to major land disturbance, and they provide previously unconsidered historic context to the affected environment.

**Section 4.5.3.** The Project effects that the Draft EIS does acknowledge are ones that would be devastating to this ecologically unique and culturally important landscape: the removal of vegetation in approximately 17 acres of natural communities;<sup>180</sup> day and night construction activities for more than six years, including lighting, noise, and vibrations that would alter species' behaviors;<sup>181</sup> the loss of federally endangered and threatened species' habitats;<sup>182</sup> and the

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<sup>177</sup> Bay Mills' Comments on the Biological Technical Form (July 25, 2024).

<sup>178</sup> Bay Mills' Comments on the Biological Technical Form, Attachment (July 25, 2024). Bay Mills recommended the following data sources that do not appear in the references section of the Draft EIS: historic aerials on [earthexplorer.usgs.gov](https://earthexplorer.usgs.gov); the Michigan Tribal Climate Change Vulnerability Assessment and Adaptation Planning: Project Report (Inter-Tribal Council of Michigan, December 2016); and data sources from the Hiawatha National Forest. *See also* U.S. EPA National Coastal Condition Assessment; U.S. Geological Survey's ample fisheries work, including their research on historic Great Lakes Coregonine spawning locations; the Midwest Invasive Species Network; data from Cooperative Invasive Species Management Areas (CISMA), including local conservation districts and Three Shores.

<sup>179</sup> Nat'l Archives Catalog, *Index to Aerial Photography of Emmet County, Michigan 1*, <https://catalog.archives.gov/id/122660386> (last visited June 30, 2025); Nat'l Archives Catalog, *Index to Aerial Photography of Emmet County, Michigan 3*, <https://catalog.archives.gov/id/122660762> (last visited June 30, 2025).

<sup>180</sup> DEIS Vol. 1, at 4-72, Table 4.5-3.

<sup>181</sup> *Id.* at 4-73.

<sup>182</sup> *Id.* at 4-78–4-80, Table 4.5-4.

diminishment of habitat for migratory birds.<sup>183</sup> Many effects are missed from the Draft EIS due to the incomplete view of rare and protected species that it considered in the baseline conditions, as described above. Additional effects that the Draft EIS fails to take a hard look at include: the water treatment additives and their effects; the fate of solid wastes, like bentonite from the water treatment process; the potential overtopping of stormwater retention ponds on the landscape; sucking and impingement of aquatic organisms at the water intakes; and an uncritical acceptance of EGLE's nearly five-year-old review of effects on aquatic organisms and spawning habitat from water discharges and thermal pollution.<sup>184</sup> Additionally, drilling fluids often include PFAS,<sup>185</sup> and those should be disclosed in the EIS.

Planning for stormwater and its effects is another example of the Draft EIS's shortsightedness, either due to the document being rushed to completion or the Applicant's inadequate planning. The Draft EIS says that the stormwater design and the ponds' dimensions have not been finalized.<sup>186</sup> This is not acceptable for a NEPA document that is supposed to disclose impacts to the public for comment. At a minimum, the stormwater ponds should be designed to accommodate a 500-year rainfall event. From the maps, it does not look like there is room for stormwater ponds of that size. The Draft EIS also says that these stormwater ponds will drain into Lake Michigan through outfalls.<sup>187</sup> On the north side, the outfall uses a pipe that would cross wetlands. From the figures, it also looks like the south side water treatment plant and the stormwater ponds would share the same outfall; it is unclear whether the outfall is big enough to accommodate full stormwater ponds plus treated water effluent (which, based on the NPDES permit, allows for up to one million gallons per day of treated water effluent—so one million gallons plus a full stormwater pond).<sup>188</sup>

**Section 4.5.4.** The Draft EIS underestimates the environmental consequences and overstates the habitat benefits of the Engineered Gravel/Rock Protective Cover Alternative. The area has a history of shifting sediments and washouts, and so the gravel or rock may not stay in place atop the Dual Pipelines. It is unlikely that many fish species would reap a spawning habitat benefit because the rock placement would be where the pipeline is exposed, at greater depths than the spawning grounds for many fish species. Also, the Draft EIS omits potential *negative* effects of rock placement to native biota, such as the potential for the rock cover to become surface area for zebra and quagga mussels to colonize or increased habitat for invasive gobies.

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<sup>183</sup> *Id.* at 4-80–4-81.

<sup>184</sup> *See id.* at 4-77 (relying on EGLE's NPDES permit that expires on October 1, 2025).

<sup>185</sup> *See, e.g.,* Juliane Glüge, et al., *An Overview of the Uses of Per- and Polyfluoroalkyl Substances (PFAS)*, at 22, Env't Sci. Process Impacts (Dec. 2020), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7784712/pdf/nihms-1650485.pdf>.

<sup>186</sup> DEIS Vol. 2, Appendix F, at F-30.

<sup>187</sup> *Id.*

<sup>188</sup> Mich. EGLE Permit No. MI0060278, Authorization to Discharge Under the National Pollutant Discharge Elimination System (Jan. 29, 2021).



## **F. Sections 3.6 & 4.6: Cultural Resources**

The Corps should explain that the terms “Traditional Cultural Place” (“TCP”) and “Traditional Cultural Landscape” (“TCL”) refer to similar concepts and use only one acronym throughout the Draft EIS, or it should explain that the terms are used interchangeably. Although the Corps vaguely states that “the term ‘cultural resource’ covers a wide range of resource types,”<sup>189</sup> it should explicitly state that for Tribal Nations, cultural resources include biological and environmental resources, consistent with TEK and IK that Tribal Nations have provided to the Corps throughout the NEPA and Section 106 processes.

### **1. Section 3.6.1: Permit Area and Area of Potential Effects.**

Bay Mills reiterates its longstanding objection to the Corps’ unlawful use of 33 C.F.R. Part 325 Appendix C, including the Corps’ unlawful designation of a “Permit Area” pursuant to Appendix C, and incorporates fully herein its previous comments.<sup>190</sup>

### **2. Section 3.6.2: Cultural Resource Identification Efforts.**

In the Corps’ list of identification efforts, it omitted from consideration Bay Mills’ report written in collaboration with Algonquin Consultants, Inc.: *The Heart of the Turtle: A Traditional Cultural Property Study of the Straits of Mackinac, Michigan, with Recommendations as to its Eligibility for Listing in the National Register of Historic Places* by Mario Battaglia and Rebecca Hawkins, with review by Thomas F. King. The Corps should identify and review this report. It should also specify that surveys of the north and south LODs were completed using canines specifically trained in resource detection.

### **3. Section 3.6.5: Traditional Cultural Places.**

The Corps should correct the Draft EIS to clarify that not only did Tribal Nations provide “input” on the TCL/TCP,<sup>191</sup> they *documented* the TCL/TCP—*prior* to NSA’s forthcoming documentation. The Draft EIS should also state that the Michigan State Historic Preservation Office concurred with Tribal Nations on the TCL/TCP’s eligibility for listing.

The Draft EIS should also more specifically detail the “deep cultural significance of the Straits landscape”<sup>192</sup> by including the TEK and IK that, for many Tribal Nations, the Straits is also directly connected to their *ethnogenesis* and *Creation story*. Therefore, for many of the Tribal

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<sup>189</sup> DEIS Vol. 1, at 3-75.

<sup>190</sup> See Bay Mills’ Comments on the Corps’ Permit Area and Area of Potential Effects (Jan. 22, 2024); Letter from Whitney Gravelle, President of Bay Mills, to Charles Simon, U.S. Army Corps of Eng’rs, regarding Sec. 106 Reinitiation (Nov. 22, 2022); Bay Mills’ Comments on Enbridge’s Unanticipated Discovery Plan (Nov. 22, 2022); Letter from Whitney Gravelle, President of Bay Mills, to Jaime Pinkham, U.S. Army Corps of Eng’rs, at 2 (Aug. 31, 2022).

<sup>191</sup> See DEIS Vol. 1, at 3-81.

<sup>192</sup> *Id.*

Nations connected to the Straits, it is a profoundly sacred space and significant location in their history, akin to the concept of the “Garden of Eden” found in some Western creation stories.

#### **4. Sections 4.6.3 & 4.6.4.**

The Corps’ word choice of “lessen[ed] the attractiveness”<sup>193</sup> of the lands and waters for ceremonial purposes should be revised to “lessen[ed] the suitability.” “Attractiveness” is inappropriate because it implies a subjectivity and appears dismissive and minimizing of the impacts to Tribal cultural practice. In contrast, “suitability” is an objective and quantifiable status.

In Section 4.6.4, a citation or internal DEIS reference should be included to support the questionable contention that the gravel protective cover alternative “might improve fish habitat.”

#### **G. Sections 3.7 & 4.7: Treaty Rights**

Bay Mills intends to submit declarations setting out the adverse and unlawful harms that the Project and its construction will inflict on their treaty rights and treaty resources. Although the Draft EIS misses crucial aspects of the full scope of the Project’s impacts, many of the impacts that are acknowledged are identified as unavoidable adverse impacts to recreation.

In Section 3.7, the Corps must correct its misstatement of the rights explicitly reserved in the 1836 Treaty of Washington. The Corps unduly describes the treaty-reserved right of the “usual privileges of occupancy” as merely the “right to use traditional lands and waters for *subsistence* activities.”<sup>194</sup> This statement is not only overly simplistic, but it also suggests a limitation on the treaty right that is inconsistent with binding caselaw.<sup>195</sup>

#### **H. Sections 3.8 & 4.8: Geology**

As emphasized throughout these comments, the Corps completely failed to consider the inadequacies of the Applicant’s geological data collection. As a result, the Corps made unsupported assumptions throughout the Draft EIS about the geological conditions in the Straits. For example, the Corps included its long-advanced claim that the tunnel will be bored entirely

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<sup>193</sup> *Id.* at 4-90.

<sup>194</sup> *Id.* at 3-82.

<sup>195</sup> *United States v. Michigan*, 471 F. Supp. 192, 213 (W.D. Mich. 1979) (stating that Article XIII of the 1836 Treaty of Washington “constitutes an explicit reservation of a right broad enough to *include* the taking of fish from the Great Lakes for subsistence *and commercial purposes*” (emphasis added)). Notably, the court’s affirmation that the treaty right includes commercial fishing in no way implies that its interpretation is exhaustive of all the rights reserved in the treaty, and so the Corps should not correct its misstatement merely by including “and commercial.” Instead, the Corps should simply recite the exact treaty language.

through bedrock.<sup>196</sup> Bay Mills refers to Sections D and M and incorporates fully herein the Expert Report of LimnoTech<sup>197</sup> and opinions of Brian O’Mara.<sup>198</sup>

## **I. Sections 3.9 & 4.9: Soils**

The Corps conducted a narrow review and failed to critically analyze the effects of the Tunnel Project on soils. Bay Mills addresses soils in Section D above on wetlands and in Section V below on the wetland mitigation bank.

## **J. Sections 3.11 & 4.11: Air Quality**

Greenhouse gas emissions (“GHG”) and other climate-related impacts are reasonably foreseeable environmental effects of the Proposed Project—the construction of infrastructure that will perpetuate the transport of 540,000 barrels of fossil fuels per day for the next century.<sup>199</sup> As such, Bay Mills and other commenters, including the U.S. EPA, provided comments throughout the EIS process supporting a review of climate impacts from the Tunnel Project.<sup>200</sup> The Corps indicated during the EIS process that as part of its analysis of air quality, it would consider, “to a limited extent, climate change,” and greenhouse gas emissions from tunnel construction and operation.<sup>201</sup> In other words, the Corps planned a modest, but insufficient, analysis of greenhouse gas emissions.

Now, in an about-face to render the Draft EIS even less transparent about the Project’s effects, the Draft EIS omits any evaluation of GHG and climate change, and is missing the disproportionate effects that air quality, GHG and climate change have on environmental justice communities, including Tribal Nations.<sup>202</sup> The Corps failed to reasonably justify why it determined that these entire topics were no longer applicable. In a footnote, the Corps indicated that it

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<sup>196</sup> *Contrast* DEIS Vol. 1 at 3-15, with MPSC Test. of Brian O’Mara, Tr. Vol. 18 at 2755 (Attachment J) (describing how the boring conducted in the deepest part of the Straits did not encounter rock and was abandoned, creating a geological unknown at a critical point along the tunnel path).

<sup>197</sup> Attachment H.

<sup>198</sup> O’Mara test., *supra* note 196.

<sup>199</sup> *See, e.g.*, DEIS Vol. 1, at 3-145–3-146; *see also id.* at 3-143 (stating that “approximately 97 percent of Line 5’s [natural gas liquids] are transported south of the Straits to the fractionator in Sarnia, Ontario”).

<sup>200</sup> *See, e.g.*, Bay Mills’ Scoping Comments, at 38-42 (Oct. 14, 2022); Bay Mills’ Comments on Environmental Justice, at 12-15 (Jan. 5, 2024); U.S. EPA Comments on Draft Chapters 1 and 2 and Appendix, at 18-21 (May 14, 2024).

<sup>201</sup> U.S. Army Corps of Eng’rs, MFR on NEPA and Public Interest Review Scope of Analysis for Enbridge Line 5 Tunnel, at 10 (June 28, 2023).

<sup>202</sup> *See, e.g.*, Bay Mills’ Scoping Comments, at 38-42 (Oct. 14, 2022); Bay Mills’ Comments on Environmental Justice, at 12-15 (Jan. 5, 2024); U.S. EPA Comments on Draft Chapters 1 and 2 and Appendix, at 18-21 (May 14, 2024).

“removed [the topic of GHGs and climate change] from consideration within the EIS consistent with Executive Order (EO) 14154, *Unleashing American Energy*” and the rescission of various other executive orders.<sup>203</sup>

The Corps, however, cannot reconcile completely omitting this issue from consideration with its statutory obligation to analyze reasonably foreseeable adverse environmental effects of the proposed Project, which necessarily includes effects from climate change.<sup>204</sup> It is reasonably foreseeable that the construction of the Tunnel Project and the transport of petroleum products through the pipeline will result in greenhouse gas emissions that will have severe climate impacts. These impacts include the synergistic effects of a reliance on the fuels that are transported through Line 5. Overlooking any climate impacts of the Proposed Project at any stage runs contrary to the Corps’ obligations in a NEPA review.<sup>205</sup>

As such, and as set forth extensively in Bay Mills’ Scoping Comments, the Corps must consider climate change impacts when analyzing the reasonably foreseeable environmental effects of permitting an oil pipeline. Bay Mills’ Scoping Comments detail how construction-related

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<sup>203</sup> DEIS Vol. 1, at 1-6.

<sup>204</sup> See generally 42 U.S.C. § 4321 (identifying a purpose to “promote efforts which will prevent or eliminate damage to the environment and biosphere”); 42 U.S.C. § 4331(b) (setting forth a national policy to, among other objectives, “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations” and “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences”); see also *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1249-50 (D.N.M. 2018) (stating that an agency should consider “the potential impacts of the full amount of greenhouse gas emissions which are indirect effects” of a potential project and summarizing supporting cases); *Indigenous Env’t Network v. U.S. Dep’t of State*, 2019 WL 652416, at \*4-5 (D. Mont. Feb. 15, 2019) (recognizing that omitting an analysis of greenhouse gas emissions from pipelines in an EIS was an “error [that] precluded informed decision-making and public participation based on complete information”); *Birckhead v. Fed. Energy Reg. Comm’n*, 925 F.3d 510, 520 (D.C. Cir. 2019) (explaining, in the context of quantifying GHG emissions, that “NEPA also requires the [agency] to at least attempt to obtain the information necessary to fulfill its statutory responsibilities”).

<sup>205</sup> See Council on Env’t Quality, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196 (Jan. 9, 2023) (“NEPA reviews should consider the ongoing impacts of climate change and the foreseeable state of the environment, especially when evaluating project design, siting, and reasonable alternatives.”); See also *Sierra Club v. FERC*, 867 F.3d 1357, 1371-75 (D.C. Cir. 2017) (invalidating EIS for gas pipeline because it failed to consider impacts of burning transported gas); *Columbia Riverkeeper v. U.S. Army Corps of Eng’rs.*, 706 F. Supp. 3d 1127, 1136-37 (W.D. Wash. 2020) (concluding that the Corps’ review under NEPA of a fracked gas-to-methanol refinery was arbitrary and capricious because the Corps failed to consider the “reasonably foreseeable indirect cumulative effects of the Project’s greenhouse gas emissions,” which included “increased fracking (and attendant emissions)”), *appeal dismissed*, 2021 WL 3116067 (9th Cir. June 16, 2021).

impacts to climate change will include emissions from the use of a tunnel-boring machine and other electric and diesel-powered equipment, as well as from the production and installation of construction materials such as steel and concrete.<sup>206</sup> According to expert Peter A. Erickson, construction will cause 87,000 metric tons of carbon dioxide equivalent (“CO<sub>2</sub>e”) emissions.<sup>207</sup> Operation-related impacts to climate change will also occur due to the Project’s ventilation fans, sump pump, tunnel service vehicle, and lighting.<sup>208</sup> Operational impacts are calculated to emit at least 520 metric tons of CO<sub>2</sub>e annually.<sup>209</sup> Additionally, the products transported by the Project will release GHG emissions when produced, processed, and combusted.<sup>210</sup> Based on the amount of crude oil and natural gas liquids that the Project would transport, it will be associated with an additional 87 million metric tons of CO<sub>2</sub>e annually.<sup>211</sup> The Corps’ should incorporate Mr. Erickson’s full set of calculations into its EIS.

These numbers translate to real-world impacts—none of which will cease when the last piece of construction equipment leaves the Straits. Northern Michigan is already experiencing climate-related impacts such as increased flooding, wildfires and poor air quality, droughts, heat waves, and expanding impacts of pests and pathogens. Wildfires burning across Canada have caused air quality in the upper Midwest to degrade to a “very unhealthy” level—impacting even this permitting process as the smoke-filled air limited visibility during the balloon study—and residents have been advised to limit time spent outdoors.<sup>212</sup> Ice cover on the Great Lakes is forming later and melting sooner, which alters fish habitats.<sup>213</sup> In its Scoping Comments, Bay Mills identified specific ways that climate change is impacting treaty-protected resources that are vitally important, and reiterates those impacts here:<sup>214</sup>

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<sup>206</sup> Bay Mills Scoping Comments, at 37-38 (Oct. 14, 2022); see ELPC and MiCAN’s comments on Draft EIS (June 30, 2025) (describing in depth Peter Erickson’s analysis of the Project’s impacts on GHG emissions).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 37.

<sup>209</sup> *Id.* at 38.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> See, e.g., Ellie Katz, *Hazy Days: Wildfire Smoke Brings Air Quality Alert to Northern Michigan*, Interlochen Pub. Radio (June 27, 2023), <https://www.interlochenpublicradio.org/2023-06-27/hazy-days-wildfire-smoke-brings-air-quality-alert-to-northern-mich>; see also *Heavy Wildfire Smoke Over the Sault Sparks Another Warning*, SooToday (June 30, 2023), <https://www.sootoday.com/local-news/heavy-wildfire-smoke-over-the-sault-sparks-another-warning-7218460>.

<sup>213</sup> See U.S. EPA, *Climate Change Indicators: Great Lakes Ice Cover* (last updated Jan. 15, 2025), <https://www.epa.gov/climate-indicators/climate-change-indicators-great-lakes-ice-cover>.

<sup>214</sup> Bay Mills Scoping Comments, at 39-41 (Oct. 14, 2022); see also Comments of Environmental Law & Policy Center and Michigan Climate Action Network to the United States

- **Lake Whitefish**—adikameg—is held in sacred regard and is part of Tribal Nations’ oral histories. This fish is one of the primary commercial and subsistence fish for tribal fishers. But Lake Whitefish is a cold-water species, and “[i]t is widely recognized that climate change leads to the warming of their habitat.” With climate change, fish habitats are impacted by warming waters, and a weakened natural ecosystem creates opportunities for invasive species.
- **Walleye**—ogaa—supports tribal commercial and subsistence fisheries. As the climate warms, walleye populations will become less sustainable. As the warming climate has increased the water temperatures of inland lakes, walleye populations are already declining, and additional population losses are expected under projected climate scenarios.
- **Harvesting maple syrup**—zhiiwaagamizigan—is a traditional practice, and maple syrup is considered a medicine, a traditional food, and a gift that brings about a new season of life. Sugar maple is also an important part of the health of Michigan forests, providing ecosystem benefits such as healthy soil that can support other species, water filtration and purification, and landslide protection. Climate change will cause changes in temperature and precipitation in the region that will threaten the tree species. Increasing aridity due to climate change will hurt the sugar maple, and it will compound other forest stressors such as invasive species, insect pests and plant disease, and the likelihood of severe wildfire.
- **Loons**—maang—are culturally significant as one of the seven primary clans of the Anishinaabe. Loons also are ecologically important as top trophic-level predators in lake habitats. Already, climate change has caused or contributed to loon population loss, and it is projected to have further negative effects on loons by reducing breeding habitats in Michigan and increasing the frequency and intensity of botulism outbreaks. As a result, climate change will drastically reduce the loon population in Michigan.
- **Wild rice**—manoomin—is an irreplaceable cultural, spiritual, nutritional, and commercial resource and is sacred to Bay Mills and other Tribal Nations in the Upper Midwest and Great Lakes region. Warmer temperatures are likely to harm wild rice and contribute to population reductions. Climate change-induced alterations in precipitation regimes will likely lead to flooding and high-water levels in the spring when wild rice is vulnerable to flooding, and drought conditions later in the season that can impede harvesting. Climate change will also indirectly impair wild rice by improving habitat conditions for species that damage wild rice waters and worsening pathogen and pest infestations.

GHG emissions wreak havoc on the climate, changing temperature and precipitation patterns and devastating natural resources that are culturally, spiritually, and economically

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Army Corps of Engineers, Detroit District, on the Draft Environmental Impact Statement for the Enbridge Line 5 Tunnel Project (June 30, 2025).

important to Bay Mills and other Tribal Nations. The Tunnel Project permit would not produce GHG emissions in the region for only a few years, or the amount of time it takes to construct the tunnel. The Corps must consider that its permitting decision may extend the life of an oil pipeline, resulting in GHG emissions, for another *99 years*.

Even if the Corps severely limits its climate analysis in the EIS to construction-related impacts (which Bay Mills strongly disagrees with and maintains would be a violation of the Corps' duty to consider reasonably foreseeable environmental effects of the Project), it cannot escape the fact that construction-related GHG emissions will disproportionately affect Bay Mills and other Tribal Nations in the region in the ways outlined above. Whether climate change impacts are viewed in the context of the period of construction or the life of the pipeline, the fact remains that climate change is uniquely burdensome on Tribal Nations because it impacts their treaty rights in ways that will continue—and worsen—into the foreseeable future.

#### **K. 3.12 & 4.12: Noise & Vibration**

The Draft EIS lacks critical information and analysis regarding the vibration and noise impacts of the tunnel construction process. Bay Mills' further incorporates fully herein the Expert Report of Gennaro G. Marino, Attachment K. First, Stantec's Ambient Sound Survey report<sup>215</sup> explains that every day there will be up to three blasts on the south side and three blasts on the north side during daylight hours until that phase of construction is completed. However, the report omits information about or analysis of the potential maximum charge of the blasts. Instead, it indicates that there will be a week of blast tests to assess the acceptable level of blasting but provides no details about how the testing will determine whether the total simultaneous charge is acceptable. Missing test information includes: blasting sequence, locations of blast sites, locations of seismograph monitors, and ground vibration threshold. Second, neither the Stantec report nor the Draft EIS considers that the maximum Peak Particle Velocity threshold for surrounding structures will differ based on the nature of the structure: modern industrial facilities will have a different threshold than historical buildings (such as the McGulpin Lighthouse) or cultural resources.

The evaluation of the blast-induced noise impacts is also flawed. First, the model relies on an inappropriate assumption of a Sound Power Level of 100dBA, which is too low—a small dynamite charge has a Sound Power Level of 140dBA. As a result, the noise study does not accurately reflect the likely noise propagation intensities. Second, the comparison of ambient sound levels to modeled noise propagation is based on too few monitors and missing low-resident noise environments. Even based on the limited monitoring considered, and modeling results based on a small, unrealistic blast, the north side daytime blast will exceed the baseline ambient noise monitored areas ML01, 02, and 03 and even reach or exceed levels on the south side monitored areas for ML07 and 08. For the south side, the assumed blast exceeded the baseline levels for all monitored areas (ML05, 06, 07, 08, and 09) with the blast noise extending to the north side and reaching the ambient noise level at least for the area for ML01. This means that based on these submitted predictions, and the Corps' own criteria, unacceptable blast disturbances will exist, and

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<sup>215</sup> Stantec, *Ambient Sound Survey and Area of Potential Impact Assessment*, at 1 (Oct. 18, 2023); see also DEIS Vol. 1, at 4-154.

the frequency of the exceeded blast noise can be up to double in an area if the blasting is carried out during the same period of time on the north and south sides.

## **L. Sections 3.13 & 4.13: Socioeconomics**

The Corps identified the topic of environmental justice as an area of concern in its Notice of Intent and continued to develop evidence relating to the topic throughout the EIS process.<sup>216</sup> Yet in the Draft EIS, the Corps “removed this topic from consideration” based on E.O. 14154 and the rescission of various executive orders.<sup>217</sup>

### **1. *Pursuant to NEPA, the Corps must consider the effect of the Project on Tribal Nations.***

The Corps’ decision to remove its environmental justice analysis from the EIS is unlawful. The Corps cited the revocation of executive orders but failed to explain why information relating to the impact of the Project particular to Tribal Nations was stricken despite having created a record involving these analyses as they relate to Tribal Nations’ unique statuses as governments. Regardless of the appropriateness of the removal of the environmental justice analysis, the Corps’ obligation to honor its trust obligations to Tribal Nations remains. Included in that trust obligation is the need to consider how harm to any portion of the Straits, a recognized TCP, by way of construction through and disturbance of a sacred and cohesive landscape, harms the whole landscape and the Tribal Nations’ ability to experience the TCP.

Further, the Corps failed to address its independent statutory obligations under NEPA to consider the Project’s effect on the most impacted communities. NEPA provides that, “to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter.”<sup>218</sup> The policy set forth in NEPA is clear that “all Americans” are ensured

safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; [and] (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice.<sup>219</sup>

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<sup>216</sup> Notice of Intent, 87 Fed. Reg. 50076 (Aug. 15, 2022); Resource Analysis Technical Form on Environmental Justice (Nov. 20, 2024).

<sup>217</sup> DEIS Vol. 1, at 1-6.

<sup>218</sup> 42 U.S.C. § 4332(1).

<sup>219</sup> *Id.* § 4331(b)(2)-(4).



Further, in enacting NEPA, “Congress recognize[d] that each person should enjoy a healthful environment.”<sup>220</sup>

The Corps cannot ensure that all people enjoy a healthy environment while ignoring that the Project will harm Tribal communities that rely on the Project area. Adhering to the policies of NEPA requires that the Corps understand the range of impacts across communities. By striking its environmental justice analysis from the Draft EIS, it failed to follow its statutory obligations under NEPA.

Further, the Corps gave every indication that it was going to conduct an environmental justice analysis in its EIS, and evidence was developed on this issue. Environmental justice is a topic that was addressed by Bay Mills and other commentors and Cooperating Agencies in the Scoping Process and throughout the NEPA process.<sup>221</sup> Enbridge submitted an Environmental Justice Plan and Assessment, which is a part of the Corps’ record along with the Tribal response to Enbridge’s submissions.<sup>222</sup> Because environmental justice has been implemented into the Corps’ NEPA analysis, and is thereby a part of the administrative record, the Corps must satisfy its environmental justice obligations to address the issues in its EIS.<sup>223</sup>

The Corps made a commitment to take a hard look at the environmental justice impacts of permitting the Tunnel Project and conduct a fulsome environmental justice analysis, and it must now follow through on that commitment. The Corps’ environmental justice analysis should include the impacts that will be uniquely experienced by Tribal Nations in the event that a spill of contaminants occurs during construction, disposal activities, and operation. Bay Mills relies on this area’s immense ecosystem for spiritual, cultural, and economic purposes; thus, even if eventually cleaned up, a spill of contaminants would cause immediate and immeasurable harm to Bay Mills. The environmental justice analysis should also consider the climate impacts from the construction and operation that will disproportionately fall on the Tribal Nations.

## **2. *The Corps’ Socioeconomic sections fail to take a hard look at the impacts of the Project on Tribal Nations.***

The Corps’ Socioeconomic sections—which are not a substitute for a fulsome environmental justice analysis—omitted the specific harms and risks to fisheries and medicinal plants from the Tunnel Project and alternatives. Fish and fishing are an integral part of Bay Mills citizens’ subsistence and livelihood. Over half of Bay Mills households rely on fishing for some

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<sup>220</sup> *Id.* § 4331(c).

<sup>221</sup> *See, e.g.*, DEIS Vol. 2, at 75-78; Bay Mills’ Scoping Comments, at 10-12.

<sup>222</sup> Bay Mills’ Comments on Environmental Justice (Jan. 5, 2024); GLIFWC Comments on Environmental Justice (Jan. 30, 2024).

<sup>223</sup> *See Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004) (holding that when a federal agency “exercise[s] its discretion to include the environmental justice analysis in its NEPA evaluation,” the environmental justice claim then “arises under NEPA and the APA, rather than [Exec. Order 12,898]” and “is properly subject to ‘arbitrary and capricious’ review under the APA.”).

or all of their income. Any impact to waters and fisheries that reduces access to fish will disproportionately burden Bay Mills citizens by drastically reducing household incomes. Reduced incomes, in turn, lead to food insecurity and health disparities. Traditional fishing knowledge is also part of Bay Mills' culture, passed from generation to generation, and fish are an important food used in ceremonies. Lake Whitefish, Lake Trout, and other fish are used in cultural traditions for naming, feasting in celebration of children, ghost suppers, burial ceremonies, and more. Impacts to waters and fisheries infringe on their treaty-protected rights to fish in the waters of Lakes Michigan and Huron and continue their traditional lifeways.

And for the little attention the Draft EIS does pay to Tribal socioeconomic impacts, it grossly understates both the certainty and the severity of the impact. Section 4.13.3.1.5 states:

Tribal Nations have asserted that construction activities may make areas surrounding the construction sites less suitable for hunting, gathering, and fishing, including the cultural practices associated with these activities.<sup>224</sup>

This misrepresents the Tribal Nations' assertions. Bay Mills and other Tribal Nations have asserted that construction activities *will* make surrounding areas *unsuitable* for the exercise of treaty-reserved rights. And this is inconsistent with the Corps' more certain understanding about construction impacts, as articulated elsewhere in the Draft EIS:

Construction activities within the proposed construction footprints, including the presence of workers and production of construction noise from blasting and construction equipment usage, *would cause* a direct, detrimental impact to recreational activities occurring on land areas surrounding the footprints. This *would include* disturbance to birding and other passive recreational and cultural/spiritual experiences along both shorelines of the Straits.<sup>225</sup>

The Corps must correct its inconsistent and misleading equivocation about the certainty of adverse impacts when treaty-protected activities are concerned. Further, the Corps' discussion of "food production" in Chapter 3.13.3.6 discusses wild rice but gives short shrift to other key natural world cultural resources and the relationships that Tribal Nations maintain with them. The DIES should add more meaningful text about other edible or medicinal lake and shoreline resources, including but not limited to the following:

- Week'eh / Sweet Flag (a culturally important wetland / riverine / lacustrine plant)
- Anaakan / Reeds
- Apakweshk / Cattails
- Giizhik / Cedar
- Apakwanagemag / Red Pine, White Pine
- Min / Berries (wild blueberry, wild cranberry, etc.)
- Bawaji-zhigaagawaanzhiig / Wild Leek

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<sup>224</sup> DEIS Vol. 1, at 4-181.

<sup>225</sup> *Id.* at 4-10–4-11.

- Various mushrooms, medicinal roots, and plant parts (not specifically identified due to their sensitivity)

Notably, the Corps failed to include in the Draft EIS a framework to evaluate food consumption for both sustenance and spiritual purposes, or economic reliance on the fisheries. A formal framework would have captured the importance of daily and seasonal consumption patterns of wild-caught or gathered foods and medicines. The Corps must undertake an examination of the types and frequencies of religious events or ceremonies and on-site non-consumptive uses. Without a framework or analysis guided by the Tribal Nations, the Corps will fail in its statutory obligations to ensure that the policies of NEPA reach the most affected communities.

The Corps additionally omits consideration of violence against Indigenous women as water keepers. Women are responsible for maintaining and protecting water for their community, praying to the water, and caring for the water during ceremonies. Women carry sacred water teachings and pass them on to the next generation. Women, therefore, are likely to exercise their first amendment right speaking out against the proposed Project and are more likely to experience violence as a result. The Corps should require the Applicant to submit a plan for its approach to upholding Tribal members' rights to protest and further protecting protestors from violence from law enforcement and Enbridge employees, including sub-contractors.<sup>226</sup>

Lastly, the Draft EIS omits the resulting harm from the Project on women in the Anishinaabe culture. Bay Mills incorporates fully herein its comments previously submitted on this topic.<sup>227</sup> This component of an environmental justice analysis is necessary.

### **3. *The Corps' consideration of MMIW is woefully inadequate.***

It is well-documented that pipeline construction projects attract workers from outside an existing community, which in turn increases the rates of assault, rape, and homicide.<sup>228</sup> As U.S. EPA stated, "[s]ince the oil boom" (a period that included projects managed by Enbridge),

Native communities have reported increased rates of human trafficking, sex trafficking, and missing and murdered Indigenous women in their communities.

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<sup>226</sup> In Minnesota, Enbridge actually paid law enforcement to police protests against the Line 3 pipeline. Alleen Brown & John McCracken, *Documents Show How a Pipeline Company Paid Minnesota Millions to Police Protests*, Grist (Feb. 9, 2023), <https://grist.org/protest/enbridge-line-3-pipeline-minnesota-public-safety-escrow-account-invoices>.

<sup>227</sup> Bay Mills' Comments on Environmental Justice, at 9-10 (Jan. 5, 2024); Bay Mills' Comments on the Corps' Environmental Justice Technical Form (Jan. 9, 2025).

<sup>228</sup> See Bay Mills Scoping Comments, at 59 (citing *Violence from Extractive Industry 'Man Camps' Endangers Indigenous Women and Children*, Univ. of Colo. Boulder (Jan. 29, 2020), <https://www.colorado.edu/program/fpw/2020/01/29/violence-extractive-industry-man-camps-endangers-indigenous-women-and-children>); Julia Stern, *Pipeline of Violence: The Oil Industry and Missing and Murdered Indigenous Women*, Immigr. & Hum. Rts. L. Rev. (May 28, 2021), <https://lawblogs.uc.edu/ihr/2021/05/28/pipeline-of-violence-the-oil-industry-and-missing-and-murdered-indigenous-women>; see also U.S. EPA Scoping Comments, at 13-14.

Temporary housing facilities, referred to as ‘man camps,’ have accommodated the large influx of predominantly male workers in the resource extraction industries. . . . Overall, the potential for harm from ‘man camps’ is exacerbated when such camps are on or near Indigenous peoples’ communities.<sup>229</sup>

The harm against communities is exacerbated by the fact that Tribal Nations are “denied the ability to prosecute non-Indian perpetrators, and both a lack of resources and help from the federal government impedes investigations and prevents tribes from providing Native women with the protection and help they deserve.”<sup>230</sup>

The U.S. EPA specifically recommended that the Corps: (1) assess and disclose the progress and effectiveness of Missing and Murdered Indigenous Women (“MMIW”) and human trafficking prevention programs implemented by Enbridge and other pipeline companies, and take lessons learned from the Line 3 replacement project to ensure that future Enbridge projects, including the proposed Line 5 tunnel project, better protect indigenous people; and (2) evaluate best practices for protecting indigenous populations, and require specific commitments from Enbridge,<sup>231</sup> such as a process for conducting background checks on their sub-contractors. The Draft EIS makes a short note of these recommendations, referring to the issue as a “short-term” concern during construction.<sup>232</sup> While the Draft EIS indicates that the Applicant will be required to develop and submit a MMIW Plan and acknowledges that Enbridge’s MMIW Plan in the Line 3 matter failed,<sup>233</sup> its only solution is to state that “man camps” would not be used for the Project. But merely housing workers differently does not mitigate the risks the workers themselves pose to Indigenous women, and the Corps provided no explanation for its apparent suggestion that it would. The Corps must undertake an analysis that determines the impact that the Project will have on violence against Indigenous women and girls, as well as whether and how law enforcement and Enbridge will coordinate with each other, provide victim services, and engage in outreach and communications responses.<sup>234</sup>

Rather than seriously consider the topic, the Corps indicated that the Applicant would prepare

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<sup>229</sup> U.S. EPA Scoping Comments, at 13-14.

<sup>230</sup> See Whitney Gravelle, *Opinion: Michigan Tribes Call Out Violence Against Women*, Detroit News (May 19, 2020), <https://www.detroitnews.com/story/opinion/2020/05/20/opinion-michigan-tribes-call-out-violence-against-women/5216361002>.

<sup>231</sup> U.S. EPA Scoping Comments, at 14.

<sup>232</sup> DEIS Vol. 1, at 4-179.

<sup>233</sup> *Id.* (noting that “multiple construction workers taking part in this project were arrested in human trafficking stings in February 2021 and June 2021”).

<sup>234</sup> For example, Enbridge was required in its Line 3 construction work to “develop and implement a Human Trafficking Prevention Plan in coordination with the Department of Commerce, the Minnesota Human Trafficking Taskforce, MIAC [Minnesota Indian Affairs Council], and all Minnesota Tribes that wish[ed] to participate.” EPA Scoping Comments, at 14.

an Anti-trafficking/Missing and Murdered Indigenous Women (MMIW) Plan for the Project, which would involve coordination with Tribal Nations and include commitments such as conducting outreach in the Project area, sharing Project information (i.e. timelines, projected workforce needs) with government officials, Tribal communities, law enforcement, business leaders, and anti-trafficking organizations, and providing human trafficking awareness training and education to workers. Once finalized, the MMIW Plan would be submitted to the USACE.<sup>235</sup>

The Corps noted that “the implementation of this plan . . . may not prevent [the risks] completely” as evidenced, in part, by Enbridge’s implementation of a similar plan in the Line 3 matter. Further, Enbridge’s Environmental Justice Plan and Assessment were deficient, and it is not likely that an MMIW Plan produced by Enbridge would be any more effective. Bay Mills incorporates fully herein its comments on Enbridge’s Environmental Justice Plan and Assessment, GLIFWC’s comments on the same, and the references cited in Bay Mills’ Comments on the Corps’ Environmental Justice Technical Form.

#### **M. Sections 3.14 & 4.14: Reliability & Safety**

The data relied on by the Corps in Sections 3.14 and 4.14 is misleading,<sup>236</sup> lacking in relevant detail,<sup>237</sup> and incomparable to the Proposed Project.<sup>238</sup> The Corps failed to critically analyze whether Enbridge’s technical and design plans adequately account for risks that doomed other tunneling projects in the Great Lakes—particularly those encountered during the construction of the Detroit River Outfall tunnel.<sup>239</sup> And the Corps failed to consider the key aspects

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<sup>235</sup> DEIS Vol. 1, at 4-179.

<sup>236</sup> See, e.g., *id.* at 3-154 (“A 2017 study states that 48 worldwide fatalities have been attributed to explosions in tunnelling projects using TBMs (Belle and Foulstone 2015)”). The Belle and Foulstone study is from two Australian coal-mining experts and is focused on Earth Pressure Balance TBMs used in “soft ground” with pressures of up to seven atmospheres. Notably lacking from the study’s calculations of injuries and fatalities are Great Lakes disasters, including the Lake Huron explosion in 1971, which caused 22 fatalities, and the Milwaukee explosion in 1989, which caused three fatalities. The omission of these two disasters is concerning as they occurred in the Great Lakes region and would increase the total fatalities by over 50 percent.

<sup>237</sup> See, e.g., *id.* § 4.14.3.2.1, at 4-197 (referencing the risk of an explosion *only* in relation to a methane gas buildup and, even then, failing to adequately consider Enbridge’s lack of a comprehensive foam firefighting suppression system); see also MPSC Test. of Brian O’Mara, Tr. Vol. 18, at 2674-75 (Attachment J). On this point, it is shocking that the Corps prefers the Applicant’s inadequate passive fire suppression system over one that would save workers’ lives. See DEIS Vol. 1, at 4-192 (“The TBM would have a refuge chamber capable of accommodating a minimum of 20 personnel in the event of a fire, *with a 2-hour fire rating.*” (emphasis added)).

<sup>238</sup> See, e.g., *id.* § 4.14.3.2.2, at 4-197 (examining PHMSA data concerning *buried* pipelines, not pipelines routed through tunnels).

<sup>239</sup> “The Detroit River Outfall #2 project is an example of a project that became overwhelmed by large groundwater inflows.” DEIS Vol. 1, at 3-154. The tunneling process was overcome with

of the Applicant's project plans, including the experimental design of routing a hazardous liquids pipeline through an underground V-shaped tunnel. The Corps severely downplayed risks by uncritically adopting assumptions advanced by the Applicant. In short, the Corps failed to use reliable data and resources in these sections to ensure the integrity of the EIS and—due to its adherence to its limited scope of analysis—disregarded its statutory obligation to critically and independently review the Applicant's technical plans.<sup>240</sup> The inadequacies and omissions in Sections 3.14 and 4.14 support permit denial.

Throughout this section, Bay Mills relies on and fully incorporates expert testimony submitted in a hearing before the Michigan Public Service Commission that directly counters—and raises numerous serious concerns about—the Applicant's data sources and design plans.<sup>241</sup> The Applicant provided snippets of testimony favorable to its position during the EIS process, and the Corps referenced the Final Order in the MPSC matter. In reviewing this material, however, the Corps cannot uncritically accept the findings made by the Commission. The MPSC evaluated the proposed project pursuant to Public Act 16 of 1929, MCL 483.1 *et seq.* and the Commission's Rules of Practice and Procedure, Mich. Admin. Code R. 792.10447 (Rule 447), neither of which apply to the federal permitting process.

Further, the MPSC decision was contingent upon the understanding, asserted by the MPSC Staff, that “the potential issues identified by the Tribes will be *granted due attention* given the *rigor of the EIS process* and the stakeholders involved. Consistent with this view, the Commission should make any approval contingent on approval from other state and federal permitting agencies, including [USACE].”<sup>242</sup> The Commission made its approval determination “conditioned upon Enbridge obtaining the required governmental permits and approvals,” including from the

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water at a rate of 4,000 gallons per minute, and the groundwater was laden with hydrogen sulfide gas that “overwhelmed the ventilation system.” *Id.*; see also William Hansmire et al., *Slurry TBM Tunnel in Rock, the Modified Detroit River Outfall No. 2*, Soc'y for Mining, Metallurgy & Expl. (Attachment L).

<sup>240</sup> See 42 U.S.C. § 4332(D)-(E) (requiring that the Corps ensure the professional integrity of its EIS, including the scientific integrity, and use reliable data and resources); 33 U.S.C. § 403 (requiring that the work be recommended by the Chief of Engineers); see also *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1034 (10th Cir. 2001) (stating that “agencies must take a hard look at the environmental consequences of proposed actions utilizing public comment and the best available scientific information” (internal quotation marks and citation omitted)).

<sup>241</sup> Bay Mills attaches excerpts of testimony and exhibits to these comments (Attachments J and M). Further testimony is available on the MPSC docket. *In re Application for the Authority to Replace and Relocate the Segment of Line 5*, Case No. U-20763 (Mich. Pub. Serv. Comm'n), <https://mi-psc.my.site.com/s/case/500t000000UHxxLAAT/in-the-matter-of-the-application-for-the-authority-to-replace-and-relocate-the-segment-of-line-5-crossing-the-straits-of-mackinac-into-a-tunnel-beneath-the-straits-of-mackinac-if-approval-is-required-pursuant-to-1929-pa-16-mcl-4831-et-seq-and-rule-447>.

<sup>242</sup> Order at 199, *In re application of Enbridge Energy, LP*, No. U-20763 (Mich. Pub. Serv. Comm'n Dec. 1, 2023) (quoting MPSC Staff reply brief) (emphasis added).

Corps.<sup>243</sup> The Corps must heed the testimony raising concerns about the tunnel design and geological concerns.

The Corps' obligations pursuant to NEPA and Section 10 of the RHA demand that the it rely on accurate scientific and technical data, independently determine whether the Project is feasible and practicable in the Alternatives Analysis, and recommend project plans only following a review by the Chief of Engineers.

### **1. Sections 4.14.3.1.1: Tunnel Construction**

The Corps failed to take a hard look at the geological data compiled by the Applicant and made inaccurate assumptions; as a result, the Corps' discussion about tunnel construction lacks scientific integrity. For example, the Corps assumed that an explosion or asphyxiation from methane gas was "unlikely."<sup>244</sup> Bay Mills' expert identified two problems with this conclusion based on a review of Enbridge's Geotechnical Data Report ("GDR"). First, Enbridge's GDR indicates that methane was found in 19% of the groundwater samples tested. Given the small number of samples tested, it is likely that more methane will be encountered in areas that have not been tested. Second, of the 24 samples submitted for testing, 23 of those samples were flagged as having problematic data by the lab—either they were not preserved properly, they were not tested in a timely manner, they exceeded their holding time, or their laboratory internal quality control procedures failed.<sup>245</sup> In short, all but one of the samples indicating a lack of methane were questionable. It is apparent from the Draft EIS that the Corps simply deferred to the Applicant without evaluating the underlying data. Methane is in the Great Lakes, and based on insufficient testing, Enbridge's identification of methane is likely low.

The Corps' assumption that methane causing an explosion risk is "unlikely" is further unsupported by the geology under the Straits and examples of other tunneling projects in the Great Lakes that encountered methane and other hazardous gasses. The Corps failed to disclose that the Applicant's "tunnel explosion study" was modeled only a pinhole leak, not a worst case scenario rupture of the pipeline, and was conducted by a firm that the State of Michigan once terminated over a conflict of interest involving continued work with Enbridge while completing a Michigan Independent Risk Analysis.<sup>246</sup> Bay Mills incorporates fully herein the MPSC testimony of Brian O'Mara that details all of the problems with the Applicant's geological exploration that the Corps failed to adequately consider, including:<sup>247</sup>

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<sup>243</sup> *Id.* at 309.

<sup>244</sup> DEIS Vol. 1, at 4-192.

<sup>245</sup> MPSC Test. of Brian O'Mara, Tr. Vol. 18, at 2757-58 (Attachment J).

<sup>246</sup> See Notice of Termination of Professional Services from Bill Schuette, Mich. Attorney General to Det Norske Veritas (DNV) (June 20, 2017), <https://www.michigan.gov/psab/-/media/Project/Websites/psab/archive/media/Termination-of-DNV-GL-as-Independent-Contractor-for-Line-5-Risk-Analysis.pdf>.

<sup>247</sup> See generally O'Mara test., *supra* note 245.

- The proposed tunnel structure is vulnerable to damage following a high-pressure explosion and fire.
- A fuel-rich flame and intense heat could cause spalling of the concrete tunnel lining, which would expose the underlying steel and make the steel vulnerable to the fire and heat. Incidents of spalling in transportation tunnels are well-documented. A fire resulting from a hazardous liquids pipeline would be orders of magnitude stronger than a vehicle fire.
- Enbridge’s passive fire suppression system is not sufficient to address the risk of a fire following an explosive event.
- Methane will be present within the tunnel. Dissolved methane could be introduced any time during the excavation of saturated rock and sediment by the tunnel boring machine and indefinitely by the never-ending seepage of groundwater into the tunnel.
- An explosion could cause the product to overcome the hydrostatic pressure outside the tunnel and migrate into the waters of the Straits.

The Corps’ failure to address the geological opinions raised by Mr. O’Mara undermines a decision to permit this project.

## 2. *Sections 3.14.3.2 and 4.14.3.2*

The Draft EIS isolates the Corps’ review of the operation of the tunnel from the operation of the pipeline and, contrary to its statutory obligations under NEPA and the RHA, fails to critically review the Applicant’s technical and design plans. As a result, the Corps lacks any basis for a recommendation pursuant to the RHA. While the tunnel structure may prevent *one* specific risk,<sup>248</sup> the Tunnel Project creates its own set of risks specific to the operation of the pipeline *within* the proposed tunnel. The Draft EIS omits consideration of the totality of the design.

The Corps failed to adequately account for an explosion risk within the tunnel during operation of the pipeline. An explosion within the tunnel could be caused by a hydrocarbon release from the pipeline that generates a heavier-than-air vapor release, which then settles in the low spots of the tunnel and is ignited by an electrical spark within the air/fuel cloud.<sup>249</sup> Bay Mills’ expert,

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<sup>248</sup> The Corps defined “minimizing environmental risks” to include, in part, the risk of anchor strikes, yet at the same time characterized the risk of anchor strikes as “unlikely.” DEIS Vol. 1, at 1-15, 4-189. It defies logic to replace what the Corps characterized as an unlikely risk with a massive new project that carries numerous risks to the environment, historic properties, and human safety—during both its construction and operation. In short, the Draft EIS illustrates that the tunnel is not the solution.

<sup>249</sup> MPSC Test. of Richard Kuprewicz, Tr. Vol. 10, at 1327-28 (Attachment M).



Richard Kuprewicz, previously testified how the risks and engineering concerns can lead to a catastrophic explosion:

It is important to note that crude oil, and especially propane, in a confined space can generate a tremendous amount of pressure, especially upon detonation. Propane has a broad flammability range coupled with a lower autoignition temperature which makes this material easier to detonate or explode. In this way, propane differs from water or other materials that are typically transported through pipelines.<sup>250</sup>

The Corps failed to address Mr. Kuprewicz's expert opinion on the reliability and safety of routing a hazardous liquids pipeline through a tunnel of the Applicant's design. Mr. Kuprewicz, a chemical engineer with nearly fifty years of experience in the oil and gas industry, and extensive experience in emergency response and pipeline incident command, identified several additional concerns about the proposed Project including: (1) the possibility of failure at the girth welds and heat-affected zones; (2) the use of Class 1, Division 2 electrical equipment; and (3) Enbridge's complete over-reliance on the computational pipeline monitoring system and failure to consider impacts of human error on pipeline monitoring.<sup>251</sup> The Corps' failure to address the technical opinions raised by Mr. Kuprewicz undermines a decision to permit this project.

Further, the Corps' approach to the reliability and safety of the Applicant's technical plans is one-sided and exemplifies its goal to advance the Project at all costs.<sup>252</sup> The Corps blindly relied on the testimony of MPSC Staff and the 2017 Dynamic Risk Report to downplay "the risks associated with construction and operation of pipelines and tunnels."<sup>253</sup> This reliance is outdated. The Dynamic Risk Report considered a sealed annulus tunnel design—a tunnel completely filled with concrete to secure the pipeline; not the open tunnel design that is now advanced in the Applicant's plans.<sup>254</sup> It also assumed favorable rock conditions—conditions that are now known

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<sup>250</sup> *Id.* at 1329.

<sup>251</sup> *Id.* at 1328-29, 2630-32, 2635-43.

<sup>252</sup> *See id.* at 2643 (identifying what he termed "Space Shuttle Syndrome," which is "when people ignore or underestimate risk to drive to a preordained decision to the point where they dismiss or ignore very real risk in favor of going forward with a project").

<sup>253</sup> DEIS, Vol. 1, at 3-152 (notably segregating its review of pipelines *and* tunnels instead of more accurately reviewing the design of a pipeline *in* a tunnel).

<sup>254</sup> Dynamic Risk Assessment Systems, Inc., *Alternatives Analysis for the Straits Pipeline Final Report*, at 3-58–3-59, App'x E (Oct. 26, 2017) ("In the open annulus configuration, the interior of the tunnel is open to the interior surface, while in the case of the sealed annulus, the opening between the pipe and tunnel wall is filled with an impermeable cement bentonite grout material. For the Straits tunnel installation design, a sealed annulus configuration was selected, since it provides redundant support around the pipe, and additional containment around the pipeline. It is deemed therefore, that this design is consistent with the objective of preventing spills from entering the waters of the Great Lakes.").

not to exist along the tunnel path.<sup>255</sup> It also considered the wrong type of manufacturing specifications relating to the Applicant's plans.<sup>256</sup> The Corps further omitted from consideration comments submitted by the Tribal Nations identifying flaws and shortcomings in the Dynamic Risk Report, incorporated fully herein.<sup>257</sup>

Last, the Corps relied on only a narrow review of risks associated with the operation of traditional buried pipelines. To counter the risk of release from a traditional buried pipeline, Enbridge relies on measures implemented by its Control Center. Yet Enbridge has a history of irreputable failures from its Control Center and from its over-reliance on Computational Monitoring Systems.<sup>258</sup> The most recent incident occurred during this EIS process: On November 11, 2024, the Wisconsin DNR received a report from Enbridge of a two-gallon spill of crude oil from Enbridge's Line 6 at its Cambridge Station.<sup>259</sup> On November 14, 2024 Enbridge revised the estimated spill quantity from two gallons to 126 gallons. On December 13, 2024, Enbridge *again* revised the estimated spill quantity to 69,300 gallons. The spill was not detected by any of Enbridge's monitoring systems implemented throughout its Lakehead Pipeline System—systems it claims will be implemented here—rather, it was first reported by an Enbridge employee who noticed a pooling of oil on the ground.

The Draft EIS fails to critically analyze Enbridge's leak detection systems, including reliance on its SCADA-based systems, CPM leak detection system, and the 10-minute rule in consideration of Enbridge's operating history and in light of the recent incident. The Draft EIS omits an analysis of how failures in monitoring may impact operation of the Project, including the necessity for complete reliance on a remote SCADA system since the pipeline would be isolated in the Applicant's tunnel design, and an uncritical acceptance that the tunnel structure would not fail in the event of a fire if a release is not detected by the remote monitoring systems.<sup>260</sup>

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<sup>255</sup> *Id.* at 3-59 (“Good rock conditions and minimal water inflow are anticipated at the Straits based on the Geotechnical Report”); *c.f.* DEIS Vol. 1, at 4-43 (“Based on the geotechnical data currently available, the rock along the proposed Tunnel alignment is highly fractured and permeable, increasing the risk of groundwater flow into the Tunnel.”).

<sup>256</sup> *Id.* at 3-5 (“Longitudinally welded carbon steel manufactured to API 5L-X65 is adopted for this concept design.”); *c.f.* Kuprewicz test. *supra* note 249, at 1340 (describing Enbridge's use of X70 pipeline for its project and the history of failures in X70 pipes).

<sup>257</sup> Tribal Comments on Dynamic Risk Draft Alternatives Analysis (Aug. 1, 2017), <https://perma.cc/284W-S57Q> (incorporated fully herein and in Bay Mills' Comments on the Draft List of Alternatives (Dec. 12, 2023)).

<sup>258</sup> *See generally* Kuprewicz test. *supra* note 249 249.

<sup>259</sup> *See* Danielle Kaeding, *Enbridge Submits Final Report to Federal Regulators on Oil Spill in Jefferson County*, Wis. Pub. Radio (Jan. 13, 2025), <https://www.wpr.org/news/federal-regulators-release-final-report-on-enbridge-spill-in-jefferson-county>; *see also* U.S. Dep't of Transp. PHMSA, Accident Report No. 20240288-40402 (Dec. 11, 2024), [https://www.wpr.org/wp-content/uploads/2025/01/20240110\\_99\\_PHMSA\\_Suppl\\_Final\\_Rpt.pdf](https://www.wpr.org/wp-content/uploads/2025/01/20240110_99_PHMSA_Suppl_Final_Rpt.pdf).

<sup>260</sup> O'Mara test. *supra* note 245, at 2668-78.

## V. MITIGATION MEASURES ARE INCOMPLETE AND INADEQUATE.

Even with a limited scope of analysis and serious omissions in the analysis of effects as detailed above, the Draft EIS underscores that the Tunnel Project will cause detrimental and generational impacts to the Tribal Nations. Bay Mills supports total avoidance of this harm through permit denial.

As drafted, the mitigation measures identified in Chapter 5 are meaningless. The Applicant's Spill Response Plan and measures listed in Table 5-1 lack any implementation or oversight details. The compensatory mitigation measures in Section 5.2 are undeveloped and lack details.<sup>261</sup> The Corps' formal consultation with the U.S. Fish and Wildlife Service pursuant to the Endangered Species Act will occur "at a later date," but under its Special Emergency Procedures, this consultation does not need to occur until the emergency is "under control"—an impossible measure of time when *no emergency actually exists*.<sup>262</sup>

Bay Mills' comments address the Corps' lack of serious mitigation relating to Project impacts, including the impacts that the Corps failed to consider based on adherence to its limited scope of analysis.<sup>263</sup> Additionally, Bay Mills reiterates some specific comments on mitigation below:

- Construction activities that generate turbidity or involve water discharge should be avoided or halted in the late fall, when lake trout and whitefish spawn, and in early spring, when the ice melts. The Draft EIS acknowledges detrimental effects on aquatic organisms from continuous noise and vibration from the TBM and says, "[t]o minimize these detrimental effects, the Applicant could avoid, to the extent practicable, TBM construction within [certain distances] from the shore . . . during the whitefish spawning season, which typically occurs during nights between mid-October to early December."<sup>264</sup> Suggesting the possibility of avoided impacts is not mitigation. The Applicant should be *required* to cease all TBM construction during whitefish spawning seasons. The Draft EIS fails to discuss mitigation for impacts to fish species that have spawning periods during other times of the year. For example, there are many fish, as well as amphibians, that spawn throughout the spring.
- The turbidity curtains used should be Type III turbidity barriers. Type II turbidity barriers are susceptible to tide and wave damage and are therefore inappropriate in the Great Lakes. Any barriers used should be frequently inspected.
- Wetlands mitigation is a last resort; wetlands impacts can be avoided here through permit

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<sup>261</sup> DEIS Vol. 1, at 5-20 (noting that the "Applicant states that it has purchased 0.26 acre of mitigation credits to date" without any further information about the purchase).

<sup>262</sup> See *supra* Section I.

<sup>263</sup> See *supra* Section III.

<sup>264</sup> DEIS Vol. 1, at 4-75–4-76.

denial. Where impacts are “unavoidable,” mitigation is required.<sup>265</sup> When wetland mitigation is the only option, it must follow the principles of good mitigation: support an equivalent wetland community within the same watershed and be compensatory.<sup>266</sup> The Applicant’s plan to mitigate wetland impacts at a 2:1 ratio within the Carp River Wetland Mitigation Bank can hardly be considered mitigation here.<sup>267</sup> This Project would permanently impair coastal wetlands, whereas the mitigation bank is inland, over 45 miles away. The soils in the mitigation bank are different than in the wetlands in the Straits. The mitigation bank could not support the threatened plants—Houghton’s goldenrod and dwarf lake iris—that would be destroyed by the Project. And the mitigation plan itself, relying on wetland hydrology maintained by berms and water control structures in perpetuity, is a flawed concept that is entirely inadequate to replace the wetlands of exceptional ecological value that will be lost if this Project is permitted.<sup>268</sup>

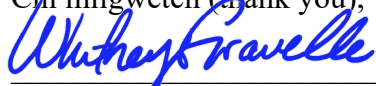
There are likely many more missed opportunities for mitigation of this harmful Project, especially for harms to Tribal Nations. Bay Mills will offer additional feedback on mitigation through the Section 106 of the National Historic Preservation Act process.

## VI. CONCLUSION

The Draft EIS only serves to underscore the devastating impacts that the Tunnel Project will have on Tribal communities, northern Michigan, and the Great Lakes. Within the Draft EIS, and throughout this permitting process, the Corps has failed to honor its treaty-based obligations to Tribal Nations and has failed to justify its deviation from its statutory and regulatory obligations.

The Corps—and the Applicant—claim to want to protect the Great Lakes. The only way to protect the Great Lakes from these impacts, including an oil spill in the worst possible spot, is to stop the flow of oil through the Straits. Yet the Corps did not even consider that option based on its narrow Purpose and Need and laser-focused screening criteria that advanced only those options that are centered on the Straits. The Corps’ Draft EIS is fundamentally and irretrievably flawed.

Should you have any questions, please do not hesitate to contact the Bay Mills Legal Department at [rliebinger@baymills.org](mailto:rliebinger@baymills.org).

Chi miigwetch (thank you),  
  
Whitney Cravelle, President  
Bay Mills Indian Community

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<sup>265</sup> Mich. Admin. Code R. 281.925(4); *see also* 40 C.F.R. § 230.10(b) (Under the CWA, the Corps cannot permit violations of state water quality requirements, including wetlands protection.).

<sup>266</sup> Thompson Report, at 30.

<sup>267</sup> *Id.* at 30-32.

<sup>268</sup> *Id.*