STATE OF WISCONSIN
WISCONSIN DIVISION OF HEARINGS AND APPEALS

IN THE MATTER OF:	DHA Case No.:	DNR-25-002
Permit # IP-NO-2020-2-N00471, Water Quality Certification, and Coverage under WPDES General Permit No. WI-S067831-06 issued to Enbridge Energy, LP, and the Department of Natural Resources Environmental Impact Statement for Enbridge Energy's Line 5 Segment Relocation Project in Ashland, Bayfield, and Iron Counties	Docket Nos.:	DNR-24-048 DNR-24-049
	Administrative Law Judge:	Angela Chaput Foy
	Agency:	Department of Natural Resources

PETITIONER BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA'S POST-HEARING BRIEF

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INTRODUCTION

The Wisconsin Department of Natural Resources ("DNR") violated the law when it authorized Enbridge Energy LP ("Enbridge") to construct the Line 5 Segment Relocation Project ("Project"). DNR did not have sufficient information to issue the permits in November 2024 due to a lack of baseline data and a failure to conduct necessary analyses. Additionally, information in the record, combined with testimony presented at the contested case hearing, demonstrates that this Project will cause significant adverse environmental impacts if allowed to proceed. Further, Enbridge was not eligible to receive certain permit coverage, including under Wis. Stat. § 30.12 for riparian landowners and Construction Stormwater General Permit coverage. The Bad River Band of Lake Superior Chippewa brings this challenge pursuant to Wis. Stat. §§ 227.42, 30.209, and 281.36(3q) to protect natural and cultural resources and uses for Band members.

The Bad River Band of Lake Superior Chippewa ("Band") is a sovereign federally recognized Tribal Nation with treaty-guaranteed reservation lands in Northern Wisconsin located downstream of the 41-mile Project Area encircling the Reservation ("Project Area"). The Band retains recognized off-reservation treaty rights in much of Northern Wisconsin, including in the Project Area, where its members continue traditional cultural and subsistence lifeways. Chairman Tr. 1301:7-18, 1308:5-10. The northern third of what became Wisconsin was ceded by various Bands of the Lake Superior Chippewa in three nineteenth-century treaties between these Tribal Nations and the United States. While these lands became part of the State of Wisconsin, the Bands retained reservation lands and the right to hunt, fish, gather, and engage in traditional activities in the ceded territory. The Band has a governmental responsibility to its citizens to ensure that the natural and cultural resources of its traditional homeland are preserved in perpetuity.

In 1953, Enbridge's predecessor, Lakehead, built Line 5 to move petroleum from Western Canada to the eastern portion of the country, cutting through Northern Wisconsin, the Band's Reservation, the Upper Peninsula of Michigan, the Straits of Mackinac, where Lakes Huron and Michigan converge, and the Lower Peninsula of Michigan before terminating in Sarnia, Ontario. Ex. 910. As Line 5 traverses Northern Wisconsin, it crosses twelve miles of the Band's Reservation. Ex. 904, at 12. The Band had no say in whether the pipeline would be built through its territory when originally sited—that decision was made for the Band by the Bureau of Indian Affairs. Ex. 807, at 30.

In 2010, Enbridge spilled nearly one million gallons of crude oil into Talmadge Creek near the Kalamazoo River in Michigan, into the traditional homelands of the Nottawaseppi Huron Band of Pottawatomi. Ex. 910, at 34; Ex. 904, at 287. The destruction caused by that disaster, still being remediated today, gave rise to concerns in the Band's membership and Council about the safety of Line 5 through the Reservation. Ex. 910, at 34-35. In 2013, Enbridge's lease for specific tracts of land within the Reservation expired, and Enbridge submitted an application for a lease for those tracts. The Band and Enbridge began discussions regarding the potential for a new lease for the pipeline across Band property. *Id* at 15. Unable to reach an agreement, the Band did not approve Enbridge's application and initiated a trespass action seeking ejectment of Enbridge from the Band's property. *Id* at 16. Enbridge then proposed the Line 5 Segment Relocation Project around the Reservation, forty-one miles of newly laid pipe cutting through hundreds of waterways and rare and high-quality wetlands around and upstream of the Reservation. Exs. 631, 633 Finding of Facts ("FoF") ¶¶ 1, 31, 32, 63-76.

The Band requested that DNR deny Enbridge's application for a wetland and waterway permit, water quality certification, and stormwater general permit coverage in numerous

comments and letters submitted to the agency throughout the permitting process. *See e.g.*, Exs. 901, 910. The Band also repeatedly communicated concerns and shared information with DNR during consultation and technical meetings. Ex. 807, at 177-78. The Band maintains that Enbridge has failed to carry its initial burden to demonstrate the Project will not cause significant adverse impacts to wetlands, wetland functional values, waterways, and the public interest in waterways, in order to obtain a permit from DNR in the first instance. In this contested case proceeding, the Band has met its burden of proof to show that DNR lacked adequate credible evidence to conclude the proposed Project would not result in significant adverse impacts to area wetlands and waterways, would not violate state water quality standards, and would comply with stormwater discharge requirements. The Band respectfully requests that the Wisconsin Division of Hearings and Appeals ("Division") overturn DNR's improper decision to authorize construction of the Line 5 Segment Relocation Project.

FACTUAL BACKGROUND

I. PROCEDURAL HISTORY OF THE LINE 5 PROJECT

On February 11, 2020, Enbridge applied to the DNR for permits, certifications, and authorizations to construct its 41.1 miles of thirty inch diameter crude petroleum and natural gas liquids ("NGLs") pipeline project (known as "Line 5") through hundreds of waterways and wetlands in Bayfield, Ashland, and Iron Counties. *See* Ex. 631, FoF ¶¶ 1, 3 (Wetland and Waterbody Permit ("WWP")); Ex. 633, FoF ¶¶ 1, 3 (Water Quality Certification ("WQC")). The construction area for the Project includes the permanent right-of-way ("ROW"), temporary workspace ("TWS"), and additional temporary workspaces ("ATWS"). Exs. 631, 633, FoF ¶ 35. The ROW would be used for pipeline installation and maintained after construction. *Id*. at ¶¶ 35, 38. The TWS is immediately adjacent to the permanent ROW and facilitates pipeline construction, including spoil storage and equipment operations. *Id*. at ¶ 35. The ATWS are near

or adjacent to the permanent ROW and TWS and are used at discrete locations for additional project components, such as equipment staging and material fabrication. *Id*. Most of the Project would occur on private land, except for an approximately 7.5-mile segment on Iron County Forest land. *Id*. at ¶ 42.

DNR issued a notice of pending application and public hearing, dated June 8, 2020, and scheduled a public informational hearing and Environmental Impact Statement ("EIS") scoping meeting on July 1, 2020. *Id*. at ¶ 12. During the public hearing, DNR received comments on the Project permit application and scope of the planned EIS. *Id*. at ¶ 14. In addition to oral comments, DNR received over 2,100 written comments between June 8 and July 11, 2020. *Id*. Between August 2020 and January 2021, DNR held technical meetings with staff from the Bad River Band of Lake Superior Chippewa and the Great Lakes Indian Fish and Wildlife Commission ("GLIFWC") to share information. *Id*. at ¶ 16. Between August 2020 and October 2020, DNR and the Bad River Band of Lake Superior Chippewa held three government-to-government consultation meetings. *Id*. at ¶ 17.

The Band provided early comments on the proposal in July 2020. Ex. 854. On December 10, 2021, the Band also provided comments on an advanced version of the Draft EIS ("DEIS") DNR shared through government-to-government consultation. Ex. 901. In that letter, the Band identified numerous issues with the DEIS and urged DNR to remedy the issues prior to releasing the DEIS to the public. *Id*. DNR released the DEIS on December 16, 2021, without addressing those issues. Exs. 631, 633, FoF ¶ 19; Exs. 904–905. On February 2, 2022, the DNR held a virtual Public Hearing on the DEIS. Exs. 631, 633, FoF ¶ 20. Over 160 individuals testified at the hearing, and over 32,000 written comments were received during the public comment period that concluded on April 15, 2022. *Id*. Comments concerned the completeness and accuracy of the

DEIS, impacts on the Bad River watershed, long-term impacts on wetlands, the potential impacts from a petroleum release or spill, impacts on wildlife, and impacts on groundwater, among other topics. *Id*. The Bad River Band's comments addressed each of these subjects, placing special emphasis on its concerns related to the protection of wetland ecosystems, waterways that support fisheries, floral and faunal biodiversity, and the traditional uses of cultural materials found in wetlands and waterways. Exs. 901, 910. DNR released the Final EIS ("FEIS") on September 6, 2024. Ex. 807. The FEIS expanded upon many subjects and added new sections purporting to address many of the concerns raised in public comment. *Id*.

DNR issued Enbridge a wetland permit under Wis. Stat. § 281.36, a waterway permit under Chapters 30.12, 30.20, and 30.123, a WQC under Wis. Admin. Code NR § 299.01 *et seq*., and a certificate of coverage under the Wisconsin Pollution Discharge Elimination System General Permit for Construction Site Storm Water on November 14, 2024. Exs. 631, 633. The WWP and the WQC contain identical findings of fact and nearly identical conditions, although in different orders. *Id*. The Band challenged DNR's decision and filed for a contested case hearing on December 12, 2024. *See* Bad River Band's Pet. for a Contested Case, Dec. 12, 2024. Several environmental organizations also petitioned for a contested case hearing on DNR's decisions. Environmental Organizations' Pet. for a Contested Case, Dec. 12, 2024. The Department granted both requests on January 2, 2025, consolidating the petitions and referring nine issues to the Division for a single contested case proceeding. Letter from Mark Aquino, Assistant Deputy Sec'y, Wis. DNR, to Rob Lundberg and Anya Janssen, Att'ys for Pet'rs (Jan. 2, 2025).

The Division issued a Notice of Hearing on February 18, 2025, and stayed DNR's authorizations pending review on February 28, 2025 (Notice of Prehearing Conference and

Order for Publication; Order on Continuing Statutory Stays of Permitted Activities). On April 15, 2025, the Division issued an order clarifying the nine issues referred for hearing by stating that the review may include modifications for select issues (Order on Enbridge's Mot. Regarding Potential Modification of the Permit). Following this, on April 25, 2025, the Division issued notice that the contested case hearing would commence on August 12, 2025, and conclude on October 3, 2025 (Notice of Contested Case Hr'g and Order for Publication). The contested case hearing proceeded in Ashland and Madison, Wisconsin, with each party presenting its case and examining the other's witnesses. The Division issued a Post-Hearing Order on Briefing on October 9, 2025, setting simultaneous briefings to proceed on November 10, 2025, and November 24, 2025 (Post-Hr'g Order on Briefing).

II. IMPACTS FROM THE LINE 5 PROJECT

Building the Project would require different construction methods and several stages to complete. Ex. 807, at 103-117. Along the Project route, pipe placement would require a combination of blasting and digging trenches, as well as drilling tunnels to house the pipe. *Id.* at 109-110 (trenching); 294-296 (blasting); 96 (bore tunneling); 495-500 (direct impacts). Numerous other activities would be carried out to facilitate the Project, including driving heavy construction equipment, clearing vegetation and grading soil levels, staging construction materials and spill response equipment, placing matting and erosion control devices, stockpiling soils, blasting for ROW access, reburying trenches with existing soils and fractured rock as well as imported sand, seeding and planting select locations, removing matting and heavy equipment, and restoring disturbed sites – often to different conditions than before construction. *Id*. at 495-500. All of these activities bring with them a range of impacts, some of which are discussed in more detail here.

Clearing vegetation and ground disturbing activities along the forty-one-mile route would expose soils. *Id*. at 105-106. This would expose the ground to more direct snowmelt and precipitation, leading to increased runoff and erosion. *Id*. at 318, 325-327; Ex. 202, at 35, 37 (discussing canopy cover, erosion, and snowmelt as assessed in the literature); Ex. 243, at 20:1-17 ("During and immediately following precipitation and snow melt events, rates of runoff will be higher due to the loss of vegetation interception of precipitation."), Ex. 302, at 22 ("grasslands have a lower roughness coefficient than forest, which, by itself, would result in higher runoff velocities"); Wuolo Tr. 3145-3152 (Wuolo discussing runoff increases as a result of canopy loss); Ledder Tr. 1124:17-19 (discussing erodibility of red clay plain in northern Wisconsin).

Trench clearing and excavation cause a range of impacts to surface and subsurface hydrology. Exs. 631, 633, FoF ¶ 52, 62(e); *see also* Ex. 807, at 521, 524, 533, 535; Bonin Tr. 399:23-405:12, 432:12-434:6; Ex. 242, at 18:5-12, 39:10-15, 42:1-5. This is particularly true where blasting is used to induce fractures in bedrock. *See e.g.*, Ex. 807, at 525, 533, 536 ("During blasting, parent bedrock material may be permanently removed from the trenched area, which could permanently alter the hydrology of the wetland and the recharge/discharge capabilities."); Bonin Tr. 416:20-417:22, 419:8-420:18; Ex. 242, at 27:18-28:14, 31:9-11; Bratton Tr. 1685:7-1686:8, 1688:22-1692:16.

Compaction would also result from the movement and placement of heavy equipment, especially in soft or moist soil. Ex. 807, at 521, 525; Ex. 202, at 38; Greenberg Tr. 1879:5-9; Storlid Tr. 2863:14-2865:24; Almendinger Tr. 828:4-829:15. Such compaction can lead to changed ground surface topography, runoff patterns, groundwater percolation and flows, and vegetation and seed recovery. Ex. 807, at 525; Ex. 243, at 32:19-36:20; Greenberg Tr. 1879:10-1880:12.

Matting would be installed early in the construction process with the goal of reducing impacts from heavy equipment travel. Ex. 807, at 121 ("During the initial ROW clearing process, matting would be installed where needed to ensure stable work conditions and to reduce impacts."); Storlid Tr. 2866:21-24 (198 out of 249 acres in the right of way have a medium or high compaction-prone designation). However, it also has its own impacts. Ex. 243, at 32:19-36:20; Storlid Tr. 2864; Almendinger Tr. 829:8-831:16; Tillison Tr. 1363:4-1364:8. While it is meant to reduce vehicle-caused soil rutting, it has instead created soil depressions as wide as the matting when used in similar wetland terrain in the Bad River watershed. Ex. 209, at 110; Greenberg Tr. 1876:22-23, 1880:21-1881:4, 1885:4-17, 1888:8-16. When driven over, it has also been documented to push water and soil from underneath the mats, discharging into adjacent areas, including wetlands. Ex. 209, at 109; Ex. 210, at 2153-3156; Greenberg Tr. 1881:9-22, 1885:18-1886:16.

Similar to matting, Best Management Practices ("BMPs") and Erosion Control Devices ("ECDs") are intended to reduce construction impacts, especially related to soil erosion. However, these require proper sizing, installation, and maintenance to achieve this goal. Ex. 807, at 122. Given the Project's scale, this means many opportunities for BMP and ECD failure and lower efficacy than planned, leading to greater runoff and erosion impacts. Greenberg Tr. 1899:19-1900:4, 1902:9-1904:17; Jacobson Tr. 3895:2-6.

Placing BMPs and ECDs during frozen conditions can limit proper installation, resulting in less ability to slow flow and sediment. Greenberg Tr. 1902-1909. Sudden thaws can further diminish the efficacy of devices placed during frozen conditions, requiring simultaneous inspection and potential reinstallation across all areas of the forty-one-mile Project that have disturbed soils at that time. *Id*. Similarly, the permits here require inspection of all BMPs before

and after rain events greater than 0.5 inches. Ex. 631, Condition ¶ 101. Both thaw and precipitation events would require significant staff time all at once to inspect and repair. Greenberg Tr. 1892:21-23 ("It takes a lot of work to install ECDs and BMPs correctly.").

Mercury is already present in the Project area, mainly due to atmospheric deposition. Ex. 807, at 244; Ex. 127, at 25:15-21; Ex. 210, at 906-07. When in methylated form, mercury can be absorbed by living things and is a potent neurotoxin. Ex. 127, at 26:1-4; Ex. 210, at 16 (noting mercury impairment and fish consumption advisories in Band waters). Disturbing soils and changing water levels in wetlands facilitates the process of mercury methylation. Ex. 127, at 2:18-21, 26:1-17; Ex. 242, at 15:28-16:3; Ex. 210, at 906.

Horizontal Directional Drilling ("HDD") presents the unique risk of releasing drilling fluid. Ex. 807, at 346; Ex. 243 at 42:5-17. The WWP and WQC both explicitly state: "It is likely that the Project will experience an inadvertent release (IR) during one or more of the proposed trenchless installations." Exs. 631, 633, FoF ¶ 60(j). This could introduce a sudden influx of sediment into wetlands and waterways, either directly or via discharge into an upland area, which is then carried in runoff. Minser Tr. 4013-4015. An HDD release reaching wetlands or waters has the potential to impact aquatic life. Callan Tr. 5254:7-5255:7.

Once constructed, the pipeline ROW would be regularly cleared of vegetation to facilitate inspection, maintenance, and repair, and would become a prioritized site for additional electric utility construction. Ex. 631, Condition ¶ 208; Exs. 631, 633, FoF ¶ 44(c); Wis. Stat. § 1.12(6)(a). The Project would result in the permanent loss of forested and shrub-covered wetlands and uplands. It would also result in ongoing disturbance to the ROW, increased runoff, and increased risks of erosion and invasive species. Ex. 631, 633, FoF ¶¶ 44(c), 62(g); Ex. 807, at 128, 619. The operating pipeline would risk petroleum releases, which would create

devastating impacts on waters, soils, ecosystems, and human health. Ex. 807, at 671. The eventual decommissioning of the pipeline would also have an impact. Ex. 807, at 117-18, 659, 824-26 (all discussing decommissioning existing pipeline); Tillison Tr. 1323:19-1325:3 (discussing decommissioning of existing pipeline as well as eventual decommissioning of rerouted pipeline); Ex. 910, at 68 (Band's DEIS comments articulating DNR's lack of consideration of eventual decommissioning of rerouted pipeline).

III. THE LINE 5 PROJECT'S IMPACTS ON WISCONSIN'S WETLANDS

The Project will cause severe and irreversible impacts on wetlands with exceptional vegetation communities and individual highly-rated wetland functional values. *See generally,* Exs. 200, 244, 249. The Project's impacts on wetlands are determined by assessing the preconstruction condition of the wetlands, the Project's impacts, the severity of the disturbance, and proposed minimization and mitigation to reduce the severity of impacts. To assess wetland boundaries and quality, Enbridge conducted wetland delineations and Wetland Rapid Assessment Method ("WRAM") reviews in the Project Area during the growing seasons in 2019 and 2020. Exs. 647 (2019 Delineation), 648 (2020 Delineation). Delineations follow the methods in the United States Army Corps of Engineers Wetland Delineation Manual (1987) and relevant state-specific guidance. Ex. 244, at 12:18-13:14. A WRAM is a standardized approach to characterize wetland condition and wetland functional values that relies on trained professionals recording observable characteristics. Ex. 244, at 18:9-23. Approximately fifty percent of the wetland delineations and WRAM evaluations Enbridge undertook in 2019 were completed between October 1st and October 19th. Exs. 631, 633, FoF ¶ 27. In the northern part of the state where the Project is located, vegetation may be senesced or dead at this time of year, making it difficult to assess floristic conditions fully. *Id*. In all, Enbridge delineated and identified approximately 101.1 acres of wetlands within the Project Area. *Id*. at ¶ 31.

Additionally, between August and September 2022, Enbridge conducted timed meander surveys on approximately 10% of wetlands determined to have medium to high overall functional value, based on the delineations completed in 2019-2020. Exs. 649, 453. Of the 101.1 acres of wetlands, approximately 28.1 acres were identified as palustrine emergent ("PEM"), 10.2 acres were palustrine scrub-shrub ("PSS"), and 62.8 acres were palustrine forested ("PFO"). Exs. 631, 633, FoF ¶ 31. Forested wetland ecosystems provide more and higher-quality functions than PSS wetlands, and PSS generally offer more functions than PEM wetlands. *See* Ex. 244, at 30:12-22 (discussion of significant differences between forested and emergent landscapes). The most common wetland plant communities in the Project Area were hardwood swamp (58.9 acres), fresh (wet) meadow (native subtype, 24.7 acres), and shrub-carr (7.0 acres). Exs. 631, 633, FoF ¶ 31. Many of the wetlands in the Project Area that would be impacted by construction are wetlands connected to Areas of Special Natural Resource Interest ("ASNRI"). *Id*. at ¶ 40.

The Project would result in over 101 acres of direct wetland impact from clearing and pipeline installation. *Id*. at ¶ 36. Direct Project-related disturbance within wetlands would occur throughout the construction area, along access roads, and at valve sites. *Id*. Project activities that would result in direct impacts to wetlands during construction include wetland conversion from forested and scrub-shrub wetlands to emergent wetlands, grading, trenching, blasting, placement of construction matting, placement and storage of temporary spoils, and equipment/vehicle access. *Id*. Enbridge will maintain wetlands in the permanent fifty-foot pipeline ROW corridor (thirty-foot corridor for HDD crossings) as PEM wetlands by periodically clearing vegetation. *Id*. at ¶ 38. For this, approximately 30.0 acres of PFO wetland and 3.9 acres of PSS wetland would be permanently converted and maintained as PEM wetland. *Id*. Additionally, Enbridge plans to disturb approximately 6.3 acres of wetlands as a result of site preparation associated with

trenchless installation (HDD or direct bore) and 76.4 acres via open-cut trenching. *Id*. at ¶ 37. Enbridge has only provided information about "candidate blasting sites" and may use blasting at sites along seventeen miles of the proposed route. Ex. 306, at 12; Ex 242, at 27:11-14. Outside of the permanent corridor, approximately 32.8 acres of PFO wetland, 6.3 acres of PSS wetland, and 28.14 acres of PEM wetland would be impacted in the TWS and ATWS as part of construction. *Id*. at ¶¶ 39, 58.

Clearing, grading, excavation, drilling, blasting, stockpiling, pipeline installation, and backfilling of wetlands can alter vegetation, soils, hydrology, and groundwater-surface water interaction, including by disrupting natural seeps and springs. *Id*. at ¶ 52. Changes to hydrology will alter vegetation composition in a wetland and wildlife habitat. Ex. 244, at 42:23-27; Callan Tr. 5217:1-7. Moving personnel and equipment from site to site, construction activities, and the permanently maintained Project corridor will create ideal conditions for invasive and nonnative species, which is a risk that can never be entirely eliminated. Ex. 807, at 521 (direct effects), 524 (excavation and spoil), 525 (matting), 526 (blasting), 528 (wetland conversion), 532-533 (floral diversity); Storlid Tr. 2873:24-2876:13; Ex. 210, at 2237-2248. Preferential deer browse—deer eating preferred native saplings—may also reduce the competitiveness of woody vegetation in wetlands against any nonnative species. Nedland Tr. 4908:14-4909:9. There will be months in the time between initial clearing and the first monitoring period in which nonnative and invasive vegetation may establish itself in wetlands. Storlid Tr. 2873:24-2876:13

Enbridge plans to restore PFO and PSS wetlands in the TWS and ATWS through a combination of natural reforestation (i.e., stump sprouting, root sprouting, and natural recruitment) and supplemental bare root stock plantings. Ex. 630, at 1718-1790 (Wetland and Waterbody Restoration and Post Construction Monitoring Plan ("Restoration Plan")).

Additionally, Enbridge's restoration plan incorporates vegetation performance standards that mirror those applicable to restored wetland mitigation sites, and Enbridge must meet these standards for restoration of wetlands in the ATWS and TWS to be considered "complete." *Id*. at 1738-39; *see also* Ex. 233, at 7. Enbridge must restore preexisting elevations and hydrology in wetlands. Exs. 631, 633, FoF ¶ 54. Enbridge collected Light Detection and Ranging ("LiDAR") data regarding elevations along the route. That data provides preconstruction elevation levels to an accuracy of +/- four centimeters. *Id*. at ¶ 43.

Restoration of wetlands cleared and graded in the TWS and ATWS is unlikely, and DNR states that it will take at a minimum "multiple decades" to restore wetland functions, particularly in hardwood swamps with high-value functions. *Id*. at ¶ 39; Ex. 244, at 26:12-28 (discussing old-growth hardwood swamps in the Project Area). DNR found that the time between conversion and restoration to preconstruction conditions would also result in a "temporary" loss of wetland functional values. *Id*. Enbridge purchased 46.09 credits from the Poplar River Mitigation Bank Site and 2.76 credits from the 46 North Mitigation Bank site for a total of 48.85 mitigation credits. Ex. 235. These credits are meant to compensate for permanent losses in wetland functions in the approximately thirty acres of forested wetlands in the fifty-foot ROW corridor to be permanently converted to an emergent wetland. Exs. 631, 633, FoF ¶ 58. These credits are also meant to compensate for the losses in function resulting from construction in 32.8 acres of forested wetlands and 6.3 acres of PSS wetlands outside the ROW in the TWS and ATWS that Enbridge will clear, grade, trench, and blast through, but "allow to revert" over many decades. Ex. 630, at 1727. Enbridge and DNR consider impacts to wetlands in the TWS and ATWS "temporary." Exs. 631, 633, FoF ¶ 39. Credits are also intended to compensate for impacts on and the conversion of many acres of shrub and emergent wetlands. *Id*.

In the WWP and the WQC, DNR requires that Enbridge implement the Wetland and Waterbody Restoration and Post-Construction Monitoring Plan and the Wetland Compensatory Mitigation Strategy. Ex. 631, Conditions ¶ ¶ 206, 242; Ex. 633, Conditions ¶ ¶ 47, 148. DNR found that the Project, if constructed in accordance with the Permit and the Restoration Plan, would not result in significant adverse impacts to wetland functional values, including wildlife habitat, flood protection, shoreline protection, groundwater recharge and discharge, and recreation:

> The Department has determined the Project, if constructed in accordance with this permit, will not result in significant adverse impacts to wetland functional values, including, wildlife habitat, flood protection, shoreline protection, groundwater recharge and discharge, and recreation. The Project will avoid, minimize, restore, and mitigate wetland impacts . . . Areas of temporary wetland excavation and fill will be restored, areas of temporary wetland conversion will naturally regenerate over time (supplemented with native bare root stock plantings), and wetland mitigation will be completed through the purchase of credits. Except for the habitat conversion associated with the permanently converted PSS and PFO, wetland functional value impacts are expected to be short in duration.

Exs. 631, 633, FoF ¶ 59

IV. THE LINE 5 PROJECT'S IMPACTS ON WISCONSIN SURFACE WATERS

Approximately 200 navigable waterways are present within the Project Area. *Id*. at ¶ 63. Enbridge largely holds easements for properties at waterway crossings and only holds property in fee simple at a subset of waterway crossings. Exs. 110, 312, 568, 622, 638. Approximately thirty navigable waterways would be crossed using trenchless methods (HDD or direct bore), and seventy would be crossed via open-cut trenching and dredging to install the pipeline. Exs. 631, 633, FoF ¶ 64. As permitted, work would require the placement of structures and deposits in many waterways. *Id*. at ¶ 71-74. Construction activities would include the installation of approximately 187 temporary clear span bridges ("TCSBs") over navigable waterways. *Id*. at ¶ 68. The remaining 100 waterways would not be directly crossed by the pipeline installation, but

would be located within the permanent ROW corridor, TWS, ATWS, access roads, and pipeyards. *Id*. at ¶ 65. These remaining 100 waterways may be crossed by temporary bridges or existing crossings (fords, bridges, culverts) or avoided during construction. *Id*. Approximately sixty-one navigable waterways would be crossed by temporary access roads. *Id*. at ¶ 66. Enbridge would use existing crossings, modify existing crossings by adding temporary timber mats, gravel, or rock, and may place new temporary crossings. *Id*. Approximately twenty-six navigable waterways (seven perennial, eleven intermittent, eight ephemeral) may require blasting to accommodate pipeline installation, though that number isn't final. *Id*. at ¶ 67. Risks associated with construction in waterways primarily include increased sedimentation and erosion, as well as potential inadvertent releases from HDD operations. *Id*. at ¶ 60.

STANDARD OF REVIEW

In this action, the Petitioners have the burden to prove by a preponderance of the evidence that DNR's decision to authorize the Project does not meet the requirements of Wis. Stat. §§ 30.12, 30.123, 30.20, 281.36, Wis. Admin. Code NR §§ 102, 103, 150, 216, 299, 320, 329, 345, and 350; Amended Scheduling Order 3, ¶ 2 (April 25, 2025); *see also* Wis. Admin. Code NR § 2.13(3)(b).

"An applicant must demonstrate" that its proposal complies with standards protecting Wisconsin's navigable waters and wetlands. *U.S. Army Corps of Eng'rs, Water Quality Certification for Expanded Confined Disposal Facility ("Confined Disposal")*, No. 3-LM-95-616, 1997 Wisc. ENV LEXIS 11, at *60 (Wis. Div. Hearings & Appeals July 14, 1997) (citing Wis Stat. §§ 30.12, 30.123, 30.20, 144.025); *Clean Wisconsin, Inc. v. Wis. Dep't of Nat. Res.*, No. 2018AP59, 2019 WL 1976467, at *3 (Wis. Ct. App. Jan. 16, 2019) (discussing that Wis. Stat. § 144.025 preceded Wis. Stat. §§ 281.11 and 281.12, authorizing NR §§ 102 and 103); Wis.

Admin. Code NR § 103.05(3) ("These procedures are promulgated under ss. 281.11, 281.12 (1), 281.15, 281.36").

To establish that DNR unlawfully authorized this Project, Petitioners must provide "a clear preponderance of [] credible evidence [that] indicates" that the information Enbridge provided DNR about the Project's impacts "does not have a sufficient credibility upon which to make engineering [and technical] decisions" required to approve the permit. *Confined Disposal*, No. 3-LM-95-616, at *60-62, *54 ("The unrebutted expert testimony of [petitioner's expert] is dispositive in demonstrating that the project proponent has not shown compliance with [standards]."); Amended Scheduling Order 3, ¶ 2. To be sufficiently credible, Enbridge's and DNR's technical assessments must "prove [their] credibility when matched with real-world observed data." *Confined Disposal*, No. 3-LM-95-616, at *62.

Furthermore, as the movant requesting permit modification be added to the issues for hearing, Enbridge bears the burden of showing that any modifications are necessary and adequate to cure any permit deficiencies. *Sterlingworth Condo. Ass'n, Inc. v. State Dep't of Nat. Res.*, 205 Wis. 2d 710, 726, 556 N.W.2d 791, 796 (Ct. App. 1996) (stating that "the moving party has the burden of proof, including not only the burden of going forward but also the burden of persuasion" in administrative hearings); Order on Enbridge's Mot. Regarding Potential Modification of the Permit 5 (April 15, 2025) ("if appropriate under the circumstances and supported by a preponderance of the evidence in the record, a potential result of the hearing may be modification of the permit...It will be up to the parties to present evidence and make legal arguments at the hearing in support of their position.").

As for facts disputed at the contested case hearing, "[i]t is for the ALJ to determine the weight and credibility of the evidence." *Meteor Timber, LLC v. Wis. Div. of Hearings &*

Appeals, 2022 WI App 5, ¶ 21, 400 Wis. 2d 451, 969 N.W.2d 746. "Weight" refers to the degree of reliance or persuasive value the factfinder assigns to admitted evidence. "[A]n agency or hearing examiner shall not be bound by common law or statutory rules of evidence[,]" but there are broad contours of how the Division has previously evaluated weight and expert credibility. Wis. Stat. § 227.45(1).

An expert's credibility is a factor in determining the weight assigned to their testimony. *See Chuck Bye*, No. IP-NO-2008-35-70931, 2011 Wisc. ENV LEXIS 3, at *7 (Wis. Div. of Hearings & Appeals July 27, 2011) (crediting the expert's testimony over the applicant's lay opinion because it was "more credible" and therefore "must be given greater weight"). An expert's experience and specialized knowledge may also enhance the weight of their testimony. *See Jeanette & Kimbal Goluska*, No. DNR-14-047, 2015 Wisc. ENV LEXIS 6, at *9-10 (Wis. Div. Hearings & Appeals Oct. 5, 2015) (emphasizing that the ALJ credited testimony from an experienced lakes biologist whose professional expertise enhanced the reliability and persuasiveness of the evidence). Consistency among witnesses is another factor that ALJs consider in evidentiary weight assignment. *See Dep't of Nat. Res. Decision Regarding the City of Clintonville's Notice of Intent to Apply for the Land Recycling Loan Program*, No. IH-02-08, 2002 Wisc. ENV LEXIS 13, at *2-4 (Wis. Div. Hearings & Appeals Nov. 27, 2002) (finding witnesses credible where their testimony was consistent and mutually corroborating).

ARGUMENT

I. ACTIVITIES AUTHORIZED BY THE PERMIT DO NOT MEET WETLAND PERMITTING STANDARDS UNDER WIS. STAT. § 281.36(3N)(C) AND WIS. ADMIN. CODE NR § 103[1]

The DNR's decision to issue Enbridge a WWP under § 281.36(3n)(c) is unlawful because the agency arbitrarily and erroneously found that the Project will not have significant adverse impacts on wetland functional values. Wis. Stat. § 281.36(3n)(c)(3); Wis. Admin. Code NR § 103.03. Wetlands provide vital functions that improve public health, quality of life, biodiversity, and recreational and educational opportunities for all citizens of the State of Wisconsin. Wis. Admin. Code NR § 103.01. It is for this reason that wetland statutes, rules, and orders "shall be liberally construed in favor" of protecting "human life and health, fish and aquatic life, scenic and ecological values." Wis. Stat. § 281.11; Wis. Admin. Code NR § 103.05(3) ("These procedures are promulgated under ss. 281.11, 281.12 (1), 281.15, 281.36, 281.37, and 283.001, Stats."). Protection of these resources is the responsibility of the DNR. *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73. Impacts on wetlands and the discharge of wetland fill are prohibited unless the permit applicant meets legal requirements. Wis. Stat. § 281.36(3b)(b).

A. The Standards Governing Wetland Individual Permits Are Substantive, Mandatory, and Require Thorough Review

Enbridge's proposal to impact at least 101 acres of valuable Wisconsin wetlands must pass muster under the substantive and mandatory standards of Wis. Stat. § 281.36. DNR must make credible conclusions regarding the Project's net environmental effects that are supported by thorough evaluation and documentation of wetland impacts. *Meteor Timber*, 2022 WI App 5.

[1] This addresses DNR granted issue 1, which incorporated Band Petition issues 1-3, 5, and 7.

To issue a wetland individual permit, DNR must make three independent and mandatory findings under the plain text of Wis. Stat. § 281.36(3n)(c). First, DNR must find that the Project is the least environmentally damaging practicable alternative. *Id*. at § 281.36(3n)(c)(1). DNR must apply "a level of scrutiny . . . commensurate with the severity of the environmental impact of the project" before selecting the least environmentally damaging practicable alternative. *Id*. at § 281.36(3n)(a)(3). Here, there are many high-quality wetlands and unique ecosystems, and the level of scrutiny meriting evaluation of alternatives and the proposed route should also be high. Second, DNR must determine that the Project proponent takes all practicable measures to minimize the adverse impacts to wetland functional values. *Id*. at § 281.36(3n)(c)(2). Third, DNR must determine that "the proposed project will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences." *Id*. at § 281.36(3n)(c)(3).

To determine whether Enbridge's Project will cause significant adverse impacts, Wis. Stat. § 281.36(3n)(b) requires that the DNR carefully study the net positive or negative environmental impact of the proposed Project before issuing a wetland-fill permit to Enbridge. *Meteor Timber*, 2022 WI App 5, ¶ 4. Specifically, DNR must consider:

1. The direct impacts of the proposed project to wetland functional values;
2. The cumulative impacts attributable to the proposed project that may occur to wetland functional values based on past impacts or reasonably anticipated impacts caused by similar projects in the area affected by the project;
3. Potential secondary impacts of the proposed project to wetland functional values;
4. The impact on functional values resulting from the mitigation that is required under sub. (3r); and
5. The net positive or negative environmental impact of the proposed project.

Wis. Stat. § 281.36(3n)(b).

If DNR does not have sufficient or credible information enabling the agency to make proper technical judgments about the net positive or negative environmental impact of the

proposed Project, then DNR's conclusion that the Project will not have significant adverse effects is without basis, and the agency must deny the WWP and WQC. *Meteor Timber*, 2022 WI App 5, ¶¶ 54, 56; *Confined Disposal*, No. 3-LM-95-616, at *52, *62. DNR's evaluation of impacts must consider all impacts of the Project on wetlands and their functions. Enbridge and DNR may not limit the scope of review to direct fill of wetlands alone; they must consider all impacts to wetlands resulting from the Project proposal as a whole. *Kohler Co. v. Wis. Dep't of Nat. Res.*, 2024 WI App 2, ¶¶ 2-3, 410 Wis. 2d 433, 3 N.W.3d 172. For the reasons that follow, DNR's approval of Enbridge's proposal fails to meet the rigorous standards of Wis. Stat. § 281.36(3n)(b) and (c).

B. DNR Improperly Authorized Impacts to Unknown Wetlands

DNR has granted Enbridge a prospective authorization to fill or alter any wetland it encounters in the field, regardless of whether the wetland has preconstruction data or analysis, and report the final total of wetland impacts to DNR after the fact. Ex. 631, Condition ¶ 234; Ex. 633, Condition ¶ 74. "Wis. Stat. § 281.36(3n)(b) and (c) require the DNR to consider the entire project, including its secondary impacts on [wetland functional values], its impacts on water quality, and any significantly adverse environmental consequences." *Kohler Co.*, 2024 WI App 2, ¶ 40. DNR's open-ended approval of wetland impacts violates this standard because it authorizes impacts that DNR and Enbridge have failed to document and consider until *after* the permit issued.

DNR's wetland expert Allison Willman testified that the agency "need[s] to know where [] high-quality wetlands are so we can work [...] to avoid" impacts. Willman Tr. 4192:14-17. Willman also testified that there are many "very high-quality wetlands" in the Project Area, and Expert Thompson found that many more likely remain unidentified. *Id*. at 4197:14-15 ("we do indeed have very high-quality wetlands in the project area"); Ex. 200, at 176-177. Willman

testified that she has no reason to doubt that additional wetland features are in the Project corridor. Willman Tr. 4170:8-10 ("Ms. Thompson was correct in her determinations ultimately that there is probably additional wetlands out there."). In fact, DNR endorsed Expert Thompson's work by requesting Enbridge add the wetlands she and MNRD identified to the wetland impact table. Ex. 450, at 1 (Issue 1); Ex. 807, at 499; Callan Tr. 5026:7-5028:14. Enbridge declined, citing a lack of GPS data accompanying the request. Ex. 807, at 499; Callan Tr. 5028:15-22. That information request was then turned into a preauthorization to impact any wetland feature Enbridge may encounter during construction, so long as Enbridge reports the "actual" acreage and location of impacted wetlands to DNR after the fact. Ex. 631, Condition ¶ 234; Callan Tr. 5029:4-5031:5. The purpose of this condition was to "get an accurate assessment of impacted wetlands associated with the project" that DNR lacked at the time of permit issuance. Callan Tr. 5299:18-23.

An unbounded authorization to affect any wetland features that Enbridge has not previously identified, reviewed, or subjected to agency and public review fails to meet § 281.36(3n)(b)'s requirement to assess all impacts of the entire Project. *Kohler Co.*, 2024 WI App 2, ¶¶ 3, 36, 40, 42. DNR's freewheeling condition would allow Enbridge to cause unlimited impacts to unknown wetlands without any agency or public scrutiny, simply a list of impacts after the fact. That is the exact opposite of Wis. Stat. § 281.36(3n)(b)'s *a priori* focus on wetland impacts. *Id*. at ¶ 40. DNR's improper condition preauthorizing impacts to unknown wetlands illustrates that the baseline information about the Project's impacts is not sufficient to fully characterize its net positive or negative environmental impact on wetland functional values, nor to determine the scope of the Project's significant adverse impacts. *Meteor Timber,* 2022 WI App 5, ¶ 4. Because DNR failed to evaluate all impacts to wetlands along the entire Project, the

agency impermissibly issued the permit in the first instance. Wis. Stat. § 281.36(3n)(b), (c); *Kohler Co.*, 2024 WI App 2, ¶¶ 3, 36, 40, 42.

C. To Determine Whether Enbridge's Wetland Restoration Plan Will Successfully Restore Wetland Functions Post-Construction, the Division Should Look to Wis. Stat. § 281.36(3r), (3t), and Wis. Admin. Code NR § 350.

DNR erroneously concluded that the Project would not cause significant adverse impacts to wetland functional values based, in part, on Enbridge's inadequate plan to restore the 32.8 acres of forested wetland, 6.3 acres of scrub-shrub wetland, and 28.14 acres of emergent wetland in the TWS and ATWS that the company will "allow to revert" to their preconstruction condition. Ex. 630, at 1728; *see also* Exs. 631, 633, FoF ¶¶ 39, 46(a)-(g) ("Improper wetland restoration or sedimentation would result in long-term impacts."); Exs. 631, 633, FoF ¶¶ 54-57 ("Enbridge has proposed, and the conditions in this permit require, wetland restoration to minimize long-term impacts to wetlands that are temporarily impacted by the pipeline construction.")

DNR's regulations and Wisconsin's wetland statute provide standards for assessing the restoration of wetland functional values at restored mitigation sites. Wis. Stat. § 281.36(3r), Wis. Admin. Code NR § 350. These standards provide a framework to determine whether Enbridge's Restoration Plan in fact restores the wetland functions it purports to restore. Wetland mitigation plans, which include plans to restore wetlands, lacking the "necessary" baseline data are invalid. *Meteor Timber*, 2022 WI App 5, ¶ 56.

To ensure that efforts to restore wetlands actually restore the functions lost in an impacted wetland, applicants must collect "[b]aseline studies of wetlands that will be affected by the discharges and of sites for mitigation projects." Wis. Stat. § 281.36(3t)(d). Further, the statute requires that DNR consider the size, location, type, quality, and functional values performed by the impacted wetlands and the feasibility that restored wetlands will compensate for these

impacts. *Id*. at § 281.36(3t)(f). Permittee-managed on-site restoration is the least preferred type of mitigation under the statute. *Id*. at § 281.36(3r)(b).

The Project, as authorized, will cause significant adverse impacts to wetland functional values. DNR concluded that the Project will not have significant adverse impacts on wetland functional values, determining that impacts to wetlands in the TWS and ATWS are temporary because they will be restored at some later date. Exs. 631, 633, FoF ¶¶ 39, 46, 54-59. Enbridge's Restoration Plan purports to restore functions lost to the Project's construction impacts through restoring elevation, soils, hydrology, and vegetation post-construction. *Id*. By claiming to address impacts to wetlands through on-site restoration rather than off-site mitigation, Enbridge avoids further obligation to purchase mitigation credits for the cleared TWS and ATWS areas outside the right-of-way because it can classify those impacts as temporary. Ex. 630, at 1798 (listing Enbridge's mitigation ratios for "temporary" losses and "permanent" wetland losses). Purchasing such credits may be more expensive because a higher mitigation ratio is required for out-of-watershed mitigation credits. *Id*.; Wis. Stat. § 281.36(3r)(ag). And based on DNR's testimony, credits in this region are in short supply, underscoring the need for adequate restoration of wetland functions that the Project will eliminate in order to maintain those functions in the affected watershed. Nedland Tr. 4887:2-25-4889:1-16.

Mitigation sites aim to restore wetlands, meet performance standards, and generate credits purchasable to cover the type of impact that would result from this Project. *See* Wis. Admin. Code NR § 350.003(22) ("'Mitigation' means the restoration, enhancement, creation, or preservation of wetlands to compensate for adverse impacts to other wetlands."). Enbridge plans to mitigate Project impacts through long-term maintenance similar to that required of a mitigation site. *Compare*, Ex. 630, at 1738-39 (vegetation performance standards for restored

wetlands) *and* Ex. 233, at 19 (vegetation performance standards for restored mitigation site at the Poplar River mitigation bank). The only substantive difference is that no credits will be generated by Enbridge's restoration in the formal sense; rather, Enbridge avoids further obligation to purchase additional mitigation credits for permanent impacts through its promise to "timely" restore the "temporal" losses of wetland function. Wis. Admin. Code NR § 350.003(39); Ex. 630, at 1798. It follows that the standards establishing a framework for evaluating the success of restored wetland sites also inform DNR's conclusions regarding the viability of Enbridge's Wetland Restoration Plan. Ex. 630, at 1718-1790. However, because Enbridge's Restoration Plan lacks sufficient and technically credible baseline data regarding the size, location, type, quality, and functional values of the impacted wetlands, DNR's reliance on the Restoration Plan to find that the Project will not cause significant adverse impacts to wetland functional values is a legal error. *Meteor Timber*, 2022 WI App 5, ¶ 56; *Confined Disposal*, No. 3-LM-95-616, at *52; Exs. 631, 633, at ¶ ¶ 39, 46(a)-(g), 54-59.

D. The Restoration Plan Will Not Restore Wetland Functional Values

DNR relies on the Restoration Plan to conclude that the Project will not have significant adverse effects on wetland functional values and to approve the Project under § 281.36(3n)(c). Ex. 631, 633, FoF ¶ 59. The Restoration Plan, however, fails to address permanent impacts to wetland functions for three reasons. First, it mischaracterizes permanent impacts to functional values as temporary. *Id*. Second, the Restoration Plan does not have sufficient baseline information about wetlands to ensure restoration of wetlands which Enbridge will "allow to revert" to preconstruction condition. Third, and relatedly, Enbridge does not have sufficient baseline data about wetland hydrologic conditions to ensure successful implementation of the Restoration Plan's hydrologic performance standards for wetlands. The WWP is invalid because DNR's finding that the Project will not have significant adverse impacts rests on its

demonstrably erroneous presumptions about the adequacy of the wetland Restoration Plan. Neither DNR nor Enbridge ameliorated any of these concerns through hearing testimony.

1. *The Proposed Impacts to Wetland Functional Values are Not Temporary*

DNR erroneously concluded that the Project will not have significant adverse effects on wetland functional values. To support this conclusion, DNR found that the Project's impacts on 39.1 acres of PFO and PSS wetlands and 28.1 acres of emergent wetlands outside the ROW are "temporary" because Enbridge will attempt to restore their preconstruction condition decades after clearing, trenching, blasting, and HDD and related activities. *Id*. ("The Department has determined the Project, if constructed in accordance with this permit, will not result in significant adverse impacts to wetland functional values. . . Areas of temporary wetland excavation and fill will be restored, areas of temporary wetland conversion will naturally regenerate over time.").

The Project will permanently downgrade wetland functionality in these 39.1 acres of highly developed PFO and PSS wetlands and in any highly functional emergent wetlands found in the TWS and ATWS. DNR's conclusion that these impacts are "temporary" ignores the relevant legal definition of a temporary impact and is undermined by DNR's own wetlands experts' testimony on the stand.

Wis. Admin. Code NR § 350.003(39) states:

> "Temporary impacts" means adverse impacts to wetlands that are not permanent and are the result of a permitted or exempt project and meet one or more of the following requirements:
>
> (a) Only occur during the non-growing season.
> (b) Result in negligible impacts to wetland function or area.
> (c) Restore preexisting wetland function at or soon after the conclusion of the permitted or exempt activity.

A note to the rule states: "Temporary impacts may include, but are not limited to, open trenching, timber mat placement, or temporary vegetation clearing."

Consideration of preconstruction wetland quality is essential to determining the severity and longevity of impacts. Thompson Tr. 2296:23-2297:18 ("If you don't think about [functional values identified in a wetland preconstruction] you are not going to get a good result."). To evaluate baseline wetland quality and monitor performance, DNR uses methods such as floristic quality assessments using wetland timed meander surveys. *See* Wis. Admin. Code NR § 350.005(2)(a); Jarosz Tr. 4354:16-4356:10 (discussing floristic quality assessment methodology). Timed meander surveys and floristic quality assessments provide wetland scientists with information about a wetland's functionality. *Id*. Thompson Tr. 2175:10-24; Willman Tr. 4181:20-4182:8. Vegetation is an important metric for assessing impacts on wetland function because it provides information about other functions, soils, and hydrology. Willman Tr. 4247:24-4248:22; Jarosz Tr. 4307:11-24.

In timed meander surveys, DNR uses "C-Values" to measure overall disturbance to wetlands using vegetation as a proxy because it is "the most obvious sign of wetland condition" and can inform an assessor about disturbance to functional values in place of more intensive sampling methods. Willman Tr. 4247:8-19. Assessment of wetland vegetation is also used to assign a "wetland indicator score which is anywhere from obligate to facultative to upland; that score can tell DNR a lot about the hydrology of the site." Jarosz Tr. 4356:21-4357:2. Species highly tolerant to disturbance will have low C-Values, while species least tolerant to disturbance will have the highest C-Values. Thompson Tr. 2205:20-25. C-Values are averaged to obtain a Mean C-Value for the wetland, indicating its level of disturbance and functionality. *Id*. at 2206:16-2207:9. This can be enhanced by including information about percent vegetation cover and producing a "weighted Mean-C." *Id*. DNR testified that a Mean-C of 5 is considered to be notably high, and DNR has never observed a Mean-C score approaching 8. Willman Tr. 4272:5-

21; Jarosz Tr. 4373:22-23. DNR uses C-Values to determine floristic quality benchmarks, which indicate the quality and functionality of a wetland, ranging from poor to exceptional, based on its vegetation. *See* Ex. 453, at 4. Exceptional-quality hardwood swamps are those with a Mean-C of 6.2 or above. *Id*.

Once cleared of vegetation, graded, trenched, and blasted through, the Project Area wetlands will be in a very different state than what currently exists. Ex. 244, at 36:19-37:27. DNR acknowledges in the WWP and the EIS that the non-ROW wetlands "allowed to revert" to preconstruction functionality will take decades or a lifetime to recover. Exs. 631, 633, FoF ¶ 39; Willman Tr. at 4315:13-16 ("[A]nytime we impact the soils and the hydrology and the vegetation, it's going to be very difficult to restore exactly what was there within my lifespan.")

Expert Alice Thompson, whom DNR wetland staff consider an exceptional wetland ecologist and wetland restoration expert, testified that the Project's impacts on wetlands in the TWS and ATWS will permanently devalue many wetland functions, and the way DNR accounts for wetland functions and vegetation makes restoration even more unlikely. Ex. 244, at 37:9-27; Jarosz Tr. 4353:21-22 (stating Alice Thompson is "an exceptional wetland ecologist."); Willman Tr. 4257:9-14 (describing Thompson's DNR-published handbook on wetland restoration as "a very well-respected and well-known document that she wrote that wetland restoration practitioners in our state should be aware of."); Watermolen Tr. 3660:11-17 (discussing work editing Alice Thompson's DNR-published wetland restoration handbook and Expert Thompson's expertise in wetland science and restoration). Similarly, DNR testimony acknowledges that restoration is an extremely difficult and long-term process. Willman 4265:3-24. Multiple experts acknowledged that impacts to wetland seeps and springs will be extremely difficult, if not impossible, to restore, Ex. 127, at 15:17; 33:9-14; Ex. 242, at 18:18-24. This is

especially true where Enbridge has yet to even identify those features. Ex. 631, Condition ¶ 28; Exs. 631, 633, FoF ¶ 52 ("Enbridge is required…to characterize existing seeps and springs…"); *see also* Ex. 242, 17:6-23. No restored wetlands considered in a far-reaching DNR study achieved "exceptional" quality, and very few even achieved "good" quality. Willman 4264:11-19.

According to the timed meander survey Enbridge submitted, there are forty-seven wetlands along this route with exceptional floristic quality, including thirty-six "Exceptional" hardwood swamps, and many more with highly rated functions and vegetation communities. Ex. 453, at 226-227. Enbridge's proposed Project will severely degrade these previously undisturbed environments with a host of damaging construction activities. Enbridge only provided DNR with detailed vegetation information for approximately 10% of the wetlands that will be affected by the Project. *Id*. at 8. Enbridge is capable of gathering 100% of the data for the entire Project corridor, given its substantial resources and its willingness to conduct such a survey in years 1, 3, and 5 of post-construction monitoring. Ex. 630, at 1730; Willman Tr. 4257:15-4258:4. But even within this limited dataset, Enbridge identified thirty-three hardwood swamp wetlands of "exceptional" quality. Ex. 453, at 226-227. Based on the testimony and information in the record, these exceptional wetland environments will permanently lose functionality that will be neither restored nor mitigated if the Project is allowed to proceed.

DNR's conclusion that impacts on wetlands along the route will be "temporary" ignores the clear definition of temporal impacts stated in the text of NR § 350.003(39). Exs. 631, 633, FoF ¶¶ 39, 46, 54-59. Enbridge will construct during the growing season. Ex. 807, at 525. The impacts on wetland functional values are not "negligible" because they will permanently downgrade wetland functionality. Preexisting wetland function will not be restored at or soon

after the conclusion of the permitted activity. DNR acknowledges that wetlands may take multiple decades to recover, and testimony indicates many high-quality wetlands will never recover. Exs. 631, 633, FoF ¶ 39. Restoration of substantially degraded functionality after multiple decades, or even a lifetime, is flatly not the restoration of "preexisting wetland function at or soon after the conclusion of the permitted or exempt activity." Wis. Admin. Code NR § 350.003(39). DNR's assessment of the Project's net environmental impact to conclude that there will be no significant adverse impacts on wetland functional values rests on the assumption that wetland impacts will be "temporary." Exs. 631, 633, FoF ¶¶ 39, 46, 54-59. That assumption is not technically credible and is not matched with "real world observed data" about the viability of restoring the highly functional wetlands that the Project may impact. *Confined Disposal*, No. 3-LM-95-616, at *49. DNR's approval of the permit is therefore unlawful. *Meteor Timber*, 2022 WI App 5, ¶¶ 54, 56;

2. *The Restoration Plan's Vegetative Performance Standards are not Credible because they are not matched with Appropriate Preconstruction Data*

DNR's conclusion that the Project will not have significant adverse impacts relies on the success of Enbridge's Restoration Plan for the wetlands outside the ROW. Exs. 631, 633, FoF ¶¶ 39, 46, 54-59. Whether that plan is successful comes down to the implementation of its vegetation performance standards because vegetation is a proxy for a wetland's function and level of disturbance. Jarosz Tr. 4356:21-4357:2; Willman Tr. 4247:8-19. The poor-quality data Enbridge collected regarding preconstruction wetland quality, type, size, and functionality are a poor match for DNR's vegetation performance standards. Enbridge's delineations, WRAM assessments, and timed meander surveys do not set an appropriate baseline against which vegetation performance standards in the Restoration Plan can be implemented. Thus, DNR cannot make credible technical determinations regarding the Project's compliance with wetland

water quality standards, nor the Project's net environmental effect and whether it will result in significant adverse impacts to wetland functional values. *Meteor Timber,* 2022 WI App 5, ¶ 4.

The Restoration Plan's vegetation performance standards are divided into three tiers based on Enbridge's overall wetland quality rating of high, medium, or low. Ex. 630, at 1738-39. The standards restrict the ratio of native to nonnative vegetation and limit increases over baseline preconstruction vegetation cover. *Id*. As for ratios, overall high-quality wetlands must be 90% native vegetation and no more than 10% nonnative vegetation; medium-quality 80% native to 20% nonnative; and low-quality 70% native to 30% nonnative. *Id*. The Restoration Plan also prohibits increases in nonnative vegetation cover to 5%, 10%, and 15% over preconstruction baselines in overall high, medium, and low-quality wetlands, respectively. *Id*. Because these standards cannot be implemented with the preconstruction wetland data Enbridge provides, there is no way to ensure that wetland functional values will be restored postconstruction in wetlands Enbridge will impact outside the ROW.

First, delineation data alone are inadequate for implementing vegetation performance standards because delineations focus on defining wetland boundaries rather than characterizing the floristic condition within wetlands. The performance standards cannot be implemented without adequate preconstruction data on the floristic condition of the wetland interior.

Second, Enbridge assigned overall rankings to each wetland upon conclusion of its Wetland Rapid Assessment Methodology review. Overall rankings are inconsistent with DNR guidance and obscure the value of individual wetland functions. Not all wetlands perform all functions. Using cumulative wetland ratings to assign performance standards results in less protective performance standards being applied to overall low and medium-rated wetlands with higher-rated individual functions.

Third, Enbridge's use of the Braun-Blanquet method to record preconstruction vegetation cover prevents implementation of the specific integer percentages DNR determined necessary to restore wetland vegetation and associated functionality post-construction.

Without proper baseline data, there is no possibility that the Restoration Plan can ensure adequate restoration of wetland functions. DNR cannot evaluate the net positive or negative impact of the Project based on this information, nor can it make credible technical judgments about compliance. Exs. 631, 633, FoF ¶¶ 39, 46, 54-59. The agency's conclusion that the Restoration Plan addresses the Project's significant impacts on the wetlands in the TWS and ATWS lacks a credible basis and does not meet the standard of § 281.36(3n)(b) and (c). *Meteor Timber,* 2022 WI App 5, ¶ 4.

a. Wetland delineation data

Data produced in delineations has limited use for designing substantive wetland restoration standards for the interior of a wetland. Ex. 244, at 12:18-13:14. Wetland delineation is focused on determining the line between dominant wetland vegetation and dominant upland vegetation and documenting characteristics of hydrology in a wetland. Thompson Tr. 2335:13-20; Jarosz Tr. 4356:21-4357:2. Once a delineator determines certain criteria are met to call an area a wetland, further delineation is not necessary, and additional descriptive wetland data need not be collected. Thompson Tr. 2163:22-2164:3; Willman Tr. 4142:24-4143:8; Jarosz Tr. 4354:16-25. Delineations are less robust than timed meander surveys, which require a full evaluation of the wetland interior and survey area. Thompson Tr. 2175:17-2176:5; Jarosz Tr. 4354:16-25.

Enbridge conducted two delineations, one in 2019 and the other in 2020. Approximately 50 percent of the wetlands Enbridge delineated in 2019 were completed between October 1st and October 19th. In the northern part of the state, where the Project is located, vegetation may be

senesced or dead at this time of year, making floristic conditions difficult to fully assess during this period. Exs. 631, 633, FoF ¶ 27. In total, the delineations covered over 700 wetlands, representing a much larger assessment in a relatively short timeframe, given the scope of the proposed impacts. *See e.g.*, *Meteor Timber,* 2022 WI App 5 (concerning a single wetland site). Time of year is an important consideration in wetland delineation because delineations represent a snapshot in time. Thompson Tr. 2161:22-23. To fully characterize a wetland, particularly wetlands of high quality, multiple snapshots enhance mitigation planning. *See* Jarosz Tr. 4307:15-17. Because the delineation data are on the border rather than in the interior of wetlands, they do not provide a baseline for characterizing impacts on vegetation in the interior. The strict performance standards requiring adherence to specific integer percentages of native versus nonnative cover and disallowing the introduction of new invasive species within the wetland interior cannot be adequately implemented or monitored using preconstruction data that is limited to the wetland boundary.

b. Overall rankings

Contrary to DNR guidance, Enbridge assigned overall wetland functional value ratings for each wetland from low-invasive, low, medium, and high-quality wetlands. Ex. 807, at 489. In the Restoration Plan, stricter standards apply depending on the overall quality rating Enbridge assigned to the wetland. Ex. 630, at 1738-39. High-quality wetlands and medium-quality wetlands with high floristic function are subject to the highest standards. *Id*. However, as DNR has repeatedly acknowledged, there are many high rated functions within medium and low-quality wetlands that are left unprotected by the arbitrary assignment of overall function. Ex. 807, at 489 ("It is the DNR's opinion that an averaged or single WRAM rating is also not adequate for the proposed project; some functions are not going to be 'High' given the landscape context of each wetland assessment area, and that rating could therefore skew and misrepresent a

cumulative WRAM rating ") Thompson Tr. 2186:2-10; Willman Tr. 4166:11-25. Enbridge's use of overall functional value ratings is an improper one-size-fits-all approach that will lead to significant adverse effects on many highly rated individual wetland functions in wetlands across the Project Area. Thompson Tr. 2244:16-2245:10 (discussing an improperly rated "low quality" wetland with documented exceptional vegetation metrics).

Moreover, how Enbridge arrived at the overall functional value rating is non-transparent, outdated, and riddled with errors. Ex. 807, at 490. Enbridge states that it arrived at an average of the eight functions identified in the WRAM sheet to assign overall functionality. *Id*. at 489. But wetlands rated exactly the same across all eight functions can be rated differently overall in the final wetland and waterbody impact table. Thompson Tr. 2187:25-2188:11 (showing that two wetlands with the exact same ratings for each of the eight individual functions have different overall ratings). DNR and Band Expert Alice Thompson identified numerous errors in wetland functional value ratings. Ex. 807, at 490; Willman, Tr. 4164:10-15; Ex. 244, at 76:7-20. Many wetlands were erroneously rated lower than they should be. Ex. 244, Tbl. at 33; Ex. 807, Tbl. 5.8-4 at 490. Even for the exceptional wetlands Enbridge does identify, it is unclear whether the most protective wetland restoration performance standards apply, as those wetlands may be rated incorrectly. Thompson Tr. 2245:19-20. Expert Thompson identified many wetlands rated "exceptional" in the timed meander survey that are subject to vegetation performance standards for low-quality wetlands due to Enbridge's failure to integrate wetland assessment data. For those exceptional wetlands, restoring functionality is even less likely. *Id* at 2245:24-2246:2.

The vegetation performance standards in Enbridge's Restoration Plan are arbitrarily applied based on a non-transparent aggregate wetland rating process riddled with errors. The Restoration Plan is not focused on protecting and restoring individual wetland functional values.

DNR has no credible basis to conclude that setting performance standards based on aggregate ratings of wetland function will prevent significant adverse impacts to individual wetland functional values because overall ratings obscure the Project's true net environmental impact to individual wetland functions. *Meteor Timber*, 2022 WI App 5, ¶ 56; *Confined Disposal*, No. 3-LM-95-616, at *52. Indeed, record and testimonial evidence clearly establishes it is more likely than not that the Project will cause significant adverse impacts to wetlands and their functions, given the Restoration Plan's implementation problems.

c. Braun-Blanquet Vegetation Cover Class System

Enbridge's timed meander survey recorded wetland vegetation data for each species it identified using the Braun-Blanquet Cover Class system—a system that is incompatible with the Restoration Plan's performance standards, which are expressed in integer percentages. Using the Braun-Blanquet "bucket" system, Enbridge recorded only the midpoint value in a range of vegetation cover percentages divided into six classes for any species it encountered in a surveyed wetland. Ex. 453, at 3. Using this system, the vegetation cover of a species can vary up to 25% without moving into another cover class. *Id*.; Ex. 244, at 59:23-60:11; Jarosz Tr. 4368:1-4369:12. For example, no matter if a species covers 5%, 10%, 18% or 24% of a survey area, the surveyor records the midpoint value of the 5%-25% range, or 15%. *Id*. Minnesota uses this system. Ex. 453, at 3, fn. 7. Wisconsin does not. Jarosz Tr. 4366:10-14. Use of the Braun-Blanquet system can hide the true value of a wetland's vegetative community. Ex. 250; Thompson, Tr. 2216:16-20. DNR notes in the EIS that the weighted Mean-C evaluation for Project Area wetlands is rendered inaccurate by the use of the Braun-Blanquet system. Ex. 807, at 493.

DNR has recorded vegetation data using integer percentages, also referred to as "absolute cover," for over twenty years. Jarosz Tr. 4366:10-14. Using the integer system, a team of

wetland scientists estimates vegetation cover for each species encountered in the timed meander survey. Jarosz Tr. 4365:8-15. To do this, each member of the observation team visually estimates the vegetation cover of each species within a defined survey area, then discusses the estimates among the observers, compares them to visual references, and arrives at an integer percentage to record for the observed species. Willman Tr. 4662:1-4365:15; Thompson Tr. 2371:20-2372:10. These percentages can be any number between 1-100, unlike the data using the Braun-Blanquet system. Jarosz Tr. 4365:8-12. The Braun-Blanquet system is far more subjective than the DNR's integer system. Braun-Blanquet requires only a single visual estimate with no discussion among observers, or the required use of more objective measurements such as line transects and grid quadrats. *See* Thompson Tr. 2413:18-25. Determining integer percentage vegetation cover is not a subjective process but a mixed-methods scientific approach that follows a defined protocol to reduce bias and error. Willman Tr. 4662:1-4365:15.

The Restoration Plan's ratio standards and prohibition on increases over baseline are expressed in integer percentages. Ex. 630, at 1738-1739. If Enbridge exceeds the integer percentage vegetation ratios or the integer percentage restrictions on increases in nonnative vegetation over baseline, it is required to engage in active management of nonnative species. *Id*. Exs. 631, 633, FoF ¶ 62(e); Ex. 631, Condition ¶ 83(e). However, as Expert Thompson discussed extensively, active management of nonnative vegetation would not be triggered until post-construction monitoring recorded a change in cover class, which may permit a 25% increase in nonnative vegetation before management is triggered. Ex. 244, at 59:23-60:11 (discussing example of common buckthorn in wasm002f, a wetland with highly rated functions in Ashland County). Because of this, standards restricting the growth of nonnative species to 5%, 10%, and 15% over baseline for high, medium, and low-quality wetlands, respectively, cannot be

implemented. DNR has judged that standard to be necessary to prevent significant adverse impacts on wetlands. Exs. 631, 633, FoF ¶ 54.

Enbridge implicitly concedes that its use of the Braun-Blanquet system to record preconstruction wetland data is problematic and improperly characterizes wetlands by proposing to use the absolute integer system post-construction. Intervenor Enbridge's Notice of Proposed Modifications, Oct. 1, 2025. This attempt to try to match the performance standards to real-world observed data through post-hoc permit modification will not succeed, and Enbridge has provided no evidence to the contrary. As Expert Thompson discussed in her testimony, using absolute integer percentages to record vegetation cover post-construction will not fix the problem with the preconstruction data recorded using cover classes. Ex. 244, at 60:11-61:8.

As she summarized, unless coverage of a given species preconstruction was truly the midpoint of the Braun-Blanquet class range, the preconstruction baseline is still inaccurate when applied to an absolute integer system. *Id*. at 55:4-6. Exceedances beyond the integer percent restrictions in the Restoration Plan may still occur undetected. *Id*. at 55:19-21. For example, a wetland Enbridge designated as overall "high quality" with 6% cover of common buckthorn preconstruction would be reported as 15% common buckthorn cover preconstruction. *Id*. at 61:25-26. Post-construction, even if Enbridge records an integer cover of common buckthorn at 16% in that wetland, that 10% increase would be recorded as an increase of just 1%. *Id*. at 61:27-62:2. This exceedance of both the vegetation cover native to nonnative ratio standard and the standard restricting increases to specific integer percentages above preconstruction levels would go undetected. *Id*. at 56:6-10. Enbridge has the burden to prove its proposed modifications cure permit deficiencies, and it has not rebutted Expert Thompson's testimony regarding the impracticability of Enbridge's proposed modification. *Sterlingworth*, 205 Wis. 2d at 721;

Confined Disposal, No. 3-LM-95-616, at *52 (Petitioners' unrebutted expert testimony relied on to find that DNR had no guarantee of reasonable assurance).

Through questioning, DNR suggests that for wetlands lacking preconstruction timed meander survey data, the Restoration Plan's ratio standards are sufficient to restore wetland functional values post-construction. Thompson Tr. 2307:20-2312:22. For one, Enbridge was fully capable and indicated willingness to conduct a timed meander survey for the entire corridor so there are no practicability barriers to conducting such survey preconstruction. Ex. 630, at 1731 ("During Year 1 monitoring, Enbridge will also conduct a modified timed-meander survey in each wetland within the mainline corridor."). But more importantly, DNR's approach is facially irrational. Take a high-quality wetland that was not included in the timed meander survey but with 2% cover of an invasive species preconstruction as an example. If an 8% increase in nonnative vegetation cover occurs in that high quality wetland post construction, it would meet the 90% / 10% native to nonnative species ratio requirement. However, it would exceed the 5% limit on increases in nonnative species that would otherwise apply if the wetland had preconstruction timed meander survey data cataloguing the presence or absence of nonnative species.

In other words, DNR's interpretation of this standard is that where the agency has less information about wetlands, the rules allow greater proliferation of nonnative species. That is not an approach that complies with basic rules of agency reason and the requirement to liberally construe § 281.36 and NR § 103 toward wetland protection policy objectives. Wis. Stat. § 281.11; Wis. Admin. Code NR § 103.03. DNR's head-in-the-sand proposal for wetlands Enbridge did not survey also disincentivizes additional agency review where impacts may be greater, which is the opposite of what the statute requires. Wis. Stat. § 281.36(3n)(a). The goal of

statutes and regulations protecting wetland functional values is not to authorize projects that impact wetlands. It is to protect wetlands. DNR determined that absolute integer percentage restrictions on nonnative species cover increases are necessary to prevent the proposed Project's significant adverse impacts on wetland functional values. The agency cannot now say that a less restrictive standard is permissible where the agency knows less about a wetland's preconstruction functionality.

Enbridge does not have sufficient baseline information about vegetation in wetlands preconstruction to implement the ratio standard or the restriction on increases over preconstruction vegetation cover. Because those standards cannot be implemented with the preconstruction data, the Restoration Plan will not restore wetland functional values post-construction.

The Parties' testimony and evidence in the record show that DNR has no credible basis to conclude that the Restoration Plan will restore wetland functions post-construction and prevent the Project's significant adverse impacts to wetland functional values. *Meteor Timber*, 2022 WI App 5, ¶ 56; *Confined Disposal*, No. 3-LM-95-616, at *52.

3. *DNR's Finding that the Restoration Plan will Restore Wetland Functional Values is Erroneous Because Preconstruction Hydrological Data is Incompatible with Hydrological Performance Standards and Restoration Requirements*

Hydrology performance standards in the Restoration Plan do not have sufficient information to be implemented successfully. Ex. 631, Condition ¶ 240 ("Except where permanent wetland fill material is authorized, all wetlands shall be restored to pre-existing elevations and hydrology as specified in the ECP. Preconstruction wetland elevation data shall be utilized to ensure post-construction wetland elevations are properly restored."). Hydrology is the "master variable" in a wetland, and it is heavily influenced by grade, elevation, existing

hydrologic flow, and vegetation. Willman Tr. 4259:9-14. Without the appropriate hydrology, a wetland ceases to be such. *Id*. DNR testified that the terms of the WWP require Enbridge to restore preconstruction elevation and hydrology, but Enbridge will be unable to do so. Callan Tr. 5217:5-7; Haller Tr. 5021:8-18 (discussing permit standard and stormwater general permit standard for elevation and hydrological restoration).

First, DNR recommended that elevations be restored to an accuracy of +/- 4cm to meet this standard. Nedland Tr. 4906:4-7; *see also* Ex. 630, at 1724. However, the final plan requires only that elevations and grades be restored "as near as practicable," without specifying an acceptable range of changes. Ex. 630, at 1739. Elevation and grade govern the flow of surface water through a wetland, and improper restoration could significantly impact this "master variable." Ex. 302, at 22 ("grasslands have a lower roughness coefficient than forest, which, by itself, would result in higher runoff velocities"); Wuolo Tr. 3145-3152 (Wuolo discussing runoff increases as a result of canopy loss); Ledder Tr. 1124:17-19 (discussing erodibility of red clay plain in northern Wisconsin).

Second, Enbridge plans to monitor hydrologic changes by assessing a series of "hydrologic indicators." Ex. 630, at 1737. For one, these indicators can only tell you about whether or not surface hydrology is present. Thompson Tr. 2241:12-25. Subsurface hydrology, particularly in this region, is critically important to wetland function. *See* NR § 103.03(1)(b); Almendinger Tr. 819:1-23; Ex. 807, at 520, 525; Ex. 106, at 8; Ex. 242, 27:20-25; Ex. 242, 11:3-5. Apart from crayfish burrows, which will not be present in this region of Wisconsin, none of the indicators provide information about groundwater. Thompson Tr. 2241:18-2242:2.

Third, the plant surveys Enbridge plans to conduct may provide additional information about hydrology. But DNR's list of groundwater indicator species is focused on southern species

not found in this region. Ex. 251. Furthermore, Enbridge intends to plant certain groundwater species, which may frustrate detection of a true change. *Id*. Enbridge's preconstruction wetland vegetation data has limited utility for designing and implementing performance standards. Delineations are focused on whether an area is or is not a wetland—they do not characterize the groundwater or surface water characteristics of a wetland beyond the parameters determining a wetland's border. Thompson Tr. 2241:23-2242:24.

Finally, these data points regarding hydrology are now over 5 years old; by the time first-year monitoring begins, this data will be even older. Exs. 453, 647, 648. Enbridge may be able to note on paper certain differences between wetlands, but whether these actually represent substantial or insubstantial changes in the real world cannot be determined with an appropriate amount of certitude considering the high-quality wetlands the Project may affect. *Confined Disposal*, No. 3-LM-95-616, at *49, *62 (Technical assessments must "prove [their] credibility when matched with real-world observed data.")

Proposals to impact high-quality wetlands merit a high degree of scrutiny. Enbridge provided data regarding delineations, meander surveys, and WRAM assessments. These efforts are valuable and provide important information about wetland quality. However, this significant Project would impact highly functional wetlands. That there are many thousands of pages of analysis does not change the facts: DNR determined that specific requirements are necessary to prevent significant adverse impacts to wetland functional values. Those requirements cannot be implemented, and this Project will have significant adverse permanent impacts on rare and high-quality wetlands and the important and varied individual wetland functions they provide. Accordingly, DNR's determination that Enbridge provided reasonable assurances that the Project would comply with wetland protection standards and that the Project will not have significant

adverse effects is not credible, based on inadequate information not matched with real world data, and unlawful. *Meteor Timber*, 2022 WI App 5, ¶ 56; *Confined Disposal*, No. 3-LM-95-616, at *49.

II. WETLAND COMPENSATORY MITIGATION REQUIRED BY THE PERMIT DOES NOT MEET STATE WETLAND MITIGATION REQUIREMENTS UNDER WIS. STAT. § 281.36(3N)(D) AND (3R) AND WIS. ADMIN. CODE NR § 350.[2]

Enbridge's Wetland Mitigation Strategy fails to meet the requirements of Wis. Stat. § 281.36(3n)(d) and Wis. Stat. § 281.36(3r). Enbridge plans to compensate for impacts to the 34 acres of wetlands in the ROW that will be permanently maintained as PEM and for the so-called "temporary" losses in function in 39.1 of PSS and PFO and 28.14 acres of PEM wetlands in the TWS and ATWS "allowed to revert to preconstruction wetland cover type." Ex. 630, at 1796.

Section 281.36 has a mandatory requirement for wetland mitigation: "[T]he department shall require mitigation under the program established under sub. (3r) for wetland individual permits it issues under this subsection." Wis. Stat. § 281.36(3n)(d)(1). "'Mitigation' means the restoration, enhancement, creation, or preservation of wetlands to compensate for adverse impacts to other wetlands." Wis. Admin. Code NR § 350.003(22). While mitigation is necessary for all projects, satisfying mitigation requirements it is not sufficient for DNR to issue a wetland individual permit. Indeed, the statute explicitly rejects such a "pay-to-play" scheme: "This subsection does not entitle an applicant to a wetland individual permit or any other approval in exchange for conducting mitigation." Wis. Stat. § 281.36(3n)(d)(1). In other words, the mitigation program does not permit otherwise avoidable impacts but seeks compensation for unavoidable ones.

[2] This addresses DNR granted issue 2, which incorporated Band Petition issue 4.

The statute provides options for accomplishing compensatory mitigation with explicit preferences. Wis. Stat. § 281.36(3r); Wis. Admin. Code NR § 350.004(2). Purchasing mitigation credits from an approved mitigation bank within the same "HUC-8 watershed" is the first option. A "HUC-8" watershed is a geographic area of land over which water drains to a common outlet, such as a river or lake, as defined by the United States Geological Survey using an eight-digit "hydrologic unit code." NR § 350.003(19). A "Mitigation Bank" is:

> "[A] system of accounting for wetland loss and compensation that includes one or more sites where wetlands are restored, enhanced, created, or preserved to provide credits to be subsequently applied or purchased in order to compensate for adverse impacts to other wetlands."

Wis. Admin. Code NR § 350.003(23)

If no credits are available in the same HUC-8 watershed, next comes credits from the same "bank service area," and if no such banks exist, then credits from banks within the same basin, with diminishing returns the farther away the selected mitigation bank is from the affected HUC-8 watershed. Wis. Stat. § 281.36(3r)(a)(1). After that, participation in the "In-Lieu Fee Subprogram" ("ILF") is preferred. *Id*. at § 281.36(3r)(b). Under that program, "payments are made to the department or another entity for the purposes of restoring, enhancing, creating, or preserving wetlands or other water resource features." *Id*. at § 281.36(3r)(e). In-watershed mitigation is preferred because it is the geographic area where the impacted wetlands provide their services and functions. Maintaining water filtration, flood control, and habitat preservation functions as close as possible to preconstruction conditions is the goal; wetland restoration away from the area where functions are lost does not accomplish that goal.

Last in line is on-site restoration, where the applicant "[c]omplet[es] mitigation within the same watershed or within one-half mile of the site of the discharge." *Id*. at § 281.36(3r)(a)(3). DNR may deviate from statutory preferences "if the department determines it would better serve

natural resource goals, such as retaining flood water, improving or restoring wildlife habitat, or more closely matching the impacted wetland type." *Id*. at § 281.36(3r)(ag); Wis. Admin. Code NR § 350.004(3).

Mitigation credits must replace the functions impacted by a project in addition to the acreage affected. The statute requires that the DNR's rules contain "[s]tandards for comparing wetlands that will be restored, enhanced, created, or preserved . . . to the wetlands that will be adversely affected by discharges" which includes consideration of size, location, type, and quality of the wetlands and the functional values performed by the wetlands. Wis. Stat. § 281.36(3t)(f). It also includes "baseline studies of wetlands that will be affected by the discharges and of sites for mitigation projects." *Id*. at § 281.36(3t)(d). As for how to calculate credits based on baseline studies of wetland acreage and quality, "the minimum ratio shall be at least 1.2 acres for each acre affected by the discharge." *Id*. at § 281.36(3r)(d)(1); Wis. Admin. Code NR § 350.005(2)(b). Project proponents must take a whole-project focus when assessing impacts rather than narrowly focusing on the site of direct discharge. *Kohler Co.*, 2024 WI App 2, ¶¶ 3, 36, 40, 42. Higher ratios may be justified depending on the scope of the impacts. Wis. Admin. Code NR § 350.005(2)(b)(1). No permit may be issued until the appropriate mitigation plan is approved, which must include proof of credit purchase, a restoration plan for temporary and secondary impacts, and timing requirements. Wis. Admin. Code NR § 359.004(6); *Meteor Timber,* 2022 WI App 5, ¶ 56.

DNR determined that Enbridge's purchase of 48.85 compensatory mitigation credits mitigates impacts to the permanently cleared right of way and the so-called temporary impacts to wetlands that are "allowed to revert." Ex. 630, at 1796; Ex. 635. Enbridge selected one of the mitigation banks prior to any formal evaluation of impacts by Enbridge or DNR. Nedland Tr.

4889:5-22. DNR did not consider in-lieu fee mitigation beyond stating that no current sites exist in the watershed. *Id*. at 4835:9-13; 4846:12-21. That does not prevent the agency from establishing such a site, however. *Id*. at 4846:22-25. DNR does not thoroughly explain its decision to authorize mitigation from out-of-watershed mitigation banks in terms of how it better serves natural resource goals versus other options. *See* Wis. Stat. § 281.36(3r)(ag); Wis. Admin. Code NR § 350.004(3).

The compensatory mitigation strategy Enbridge ultimately followed fails to comply with statutory and regulatory requirements. Wis. Stat. § 281.36(3n)(d), (3r). The mitigation strategy must rely on sufficient baseline data regarding preconstruction conditions and the impacts of the permitted activity. *Meteor Timber*, 2022 WI App 5, ¶ 56. The baseline data Enbridge provided for the purposes of mitigation credit calculation misrepresents potential impacts and preordained Enbridge's preferred mitigation bank and credit purchases by diluting the baseline wetland quality data.

First, DNR and Enbridge both admit that the company likely undercounted wetlands. *Supra* I.A. The credit ratios are underinclusive of any missed wetlands or newly encountered wetlands that Enbridge constructs through and reports to DNR about after the fact. Ex. 631, Condition ¶ 234.

Second, Enbridge and DNR erroneously categorize numerous impacts as temporary. *Supra* I.D.1. As discussed, the impacts to wetland functional values will be permanent. These impacts must be compensated at a higher ratio. Ex. 630, at 1798. For example, temporal losses of function in forested wetlands that Enbridge assigns an overall high rating are compensated at 0.5 credits per acre of temporary disturbance and at 2.0 credits per acre of permanent loss. *Id*.

Third, by basing wetland mitigation credit ratios on overall functional values, high-functioning wetlands are proposed to be improperly mitigated, with lower credit values reflecting poorly functioning restored wetlands. *Supra* I.D.2. This means severe impacts to many highly rated individual functions in wetlands that Enbridge has designated as Low, Low-Invasive, or Medium are arbitrarily compensated at lower ratios. Ex. 630, at 1798. Enbridge further dilutes wetland quality and function by combining Medium- and Low/Low-Invasive quality wetlands into a single category for purposes of creating credit ratios. *Id*.

To illustrate the problem with overall ratings, consider wirc014f, a hardwood swamp, which is improperly rated low. Thompson Tr. 2171-2183 (explaining illustrative example of improper rating of wirc014e and 014f). For the so-called "temporary loss" of wetland function during construction, Enbridge determined the mitigation credits required to be 0.25 credits per acre of disturbance in overall "low" wetlands. Ex. 630, at 1798.

Wetland wirc014f provides "high" water-quality protection functions according to Enbridge's WRAM assessment. Ex. 648, at 5358. It also has "Exceptional" floristic integrity, suggesting that some of the other functions in the WRAM assessment may be underrated. *Id*.; Ex. 453, at 227. But because it is rated "Low" overall, the 0.22 acres of direct construction impacts are compensated at 0.25 credits, meaning to compensate for clearing, trenching, and permanently downgrading this wetland's ability to provide water quality services, Enbridge only needs to purchase 0.055 mitigation credits. Ex. 775, at 199, Row 927, Column: Temporary Wetland Impacts – Construction; Ex. 630, at 1798. If Enbridge compensated adequately for the permanent loss of this 0.22-acre hardwood swamp's high-quality functions, it would be required to purchase 0.44 mitigation credits at a rate of 2 credits per acre. This rate should apply because these functions will be permanently degraded once Enbridge clears the forest, alters the

elevation, disturbs the soil, and changes the hydrology. *Id*. At a minimum, these impacts should be compensated at the rate of permanent conversion to an emergent wetland because decades-long recovery of functional values does not meet the definition of a temporary impact. As a result of Enbridge's use of overall ratings, it effectively gets a 40% to 125% discount on mitigation credit purchases.

Calculating credits based on overall quality ratings is not an approach DNR's wetland coordinator could remember seeing in his career, and its effect is to lower the amount of credits required to compensate for impacts to highly rated wetland functional values. Nedland Tr. 4897:5-4898:25. The end result of Enbridge's dilution of individual functions with overall ratings and its nesting-doll approach to calculating mitigation ratios based on those improper ratings will result in the permanent loss of many important, highly rated wetland functions in the Project Area watershed.

Fourth, Enbridge's mitigation credits are not proper surrogates for the losses in wetland function in the highly functional Project Area wetlands. Mitigation plans must provide baseline information on the type and quality of wetlands at mitigation sites to ensure that the credits purchased correspond to the impacts of construction on wetlands. Wis. Stat. § 281.36(3t). The significance of impact is determined by the degree of disturbance and the preconstruction quality and sensitivity of the wetlands. *Id*.; Nedland Tr. 4891:16-4892:13. DNR's mitigation coordinator testified that DNR usually looks to wetland type as a surrogate for functional value, and this is the only instance he could recall using an overall wetland rating approach. *Id*. All parties agree that this Project will impact and convert many acres of high-quality wetlands of varied types to lower-quality emergent wetlands. Here, the credits Enbridge purchased to compensate for the permanently converted ROW wetlands and the so-called "temporarily converted" non-ROW

wetlands primarily consist of emergent wetlands in mitigation banks far outside the watershed but still within the Lake Superior Basin. Ex. 244, at 66:1-26; 68:5-69:2; Ex. 224, at 002; Ex. 21 at 4. The forested wetland credits Enbridge purchased correspond to a very young forest or to forests struggling to successfully establish trees. Ex. 244, at 66:1-26; *see* Ex. 233, at 19 (showing need to plant more trees to meet standards at Poplar River); Ex. 225, at 33 (discussing establishment of forest where none exists to generate credits); Nedland Tr. 4900:14-4901:15.

In other words, Enbridge is compensating for the so-called "temporary loss" of highly functional forested wetland by purchasing credits at a substantially discounted rate that corresponds to wetlands that do not yet exist or that are almost as degraded as the Project Area wetlands would be post-construction. Nedland Tr. 4899:10-25. Setting aside the fact that preconstruction functions in the impacted wetlands will never be restored, these mitigation sites are far from the relevant HUC-8 watersheds, are severely degraded, and in their current state do not serve the functions presently served by wetlands in the construction corridor. Even over the short term, clearing and grading of wetlands and the corresponding impacts to wetland functions in the corridor are not mitigated by Enbridge's credit purchases. To compensate for the so-called "temporary" losses in function in wetlands "allowed to revert," Enbridge purchased credits corresponding to very young forests that are supposed to "eventually develop into a fully functioning hardwood swamp," but are not there yet. *Id*. at 4899:24-25.

These mitigation sites also use berms and may never develop into wetlands with high-quality functions akin to the impacted wetlands. *Id*. at 4896:1-5. Allison Willman, DNR's wetlands expert, and Expert Thompson, recognized by DNR as a restoration expert, have testified that berms prevent successful restoration in most cases. Willman Tr. 4250:6-18; 4257:9-14 (describing Thompson's wetland restoration handbook as "a very well-respected and well-

known document."); Ex. 244, at 67:24-68:1-2. That is borne out in the data provided regarding both mitigation sites—the Mean-C of the so-called forested sites at the Poplar River mitigation bank site has been stagnant at 3.19 for two years. Nedland Tr. 4901:3-12; Ex. 233, at 51. Wetland wirc014f has almost twice that, with a Weighted Mean-C value of 6. Ex. 453, at 193. And that may be an undervaluation due to Enbridge's decision to use the Braun-Blanquet method. *See* Ex. 250. Relatedly, the final performance standards for the Poplar River site require a vegetation cover of 80% native to 20% nonnative. Ex. 233, at 7. That ratio corresponds to the performance standard for medium-quality wetlands in Enbridge's Restoration Plan for wetlands, Enbridge will "allow to revert." Ex. 630, at 1738-39. So even when these mitigation sites are considered fully "restored," they would still be rated "medium-quality" under Enbridge's Restoration Plan's performance standard. That is not a proper surrogate to replace a decades-long loss of highly functional hardwood swamp in the Project Area.

The credits Enbridge purchased are an inadequate surrogate for the functions served by the wetlands the Project will impact. The losses of function will not be mitigated by the wetland mitigation sites Enbridge selected. DNR's finding of fact that the credit purchases adequately offset any significant adverse impacts to wetland functional values is not supported by the record. Accordingly, DNR has not met the requirements of Wis. Stat. § 281.36(3n)(d) or (3r).

III. DNR IMPROPERLY PERMITTED ACTIVITIES IN NAVIGABLE WATERS[3]

DNR's decision to issue Enbridge a WWP under sections of Wis. Stat. Chapter 30 was unlawful for three reasons. First, DNR granted Enbridge a WWP under Wis. Stat. § 30.12, despite Enbridge not holding riparian ownership of all relevant waterway crossings as that section requires. Second, DNR incorrectly found that the proposed activities would be consistent

[3] This addresses DNR granted issues 3-5, which incorporated Band Petition issues 8-10.

with, rather than detrimental to, the public interest. Finally, DNR issued the waterway permit before taking the required steps regarding threatened and endangered species. Each of these necessitates the reversal of the Project permit under Chapter 30.

Chapter 30 of Wisconsin's statutes governs the protection of the public interest in Wisconsin's surface waters. Wisconsin holds the surface waters of the state in trust for all citizens. *State v. Bleck*, 114 Wis. 2d 454, 338 N.W.2d 492 (1983). Section 30.12 governs deposits and structures on the bed of navigable waters, which it limits to riparian owners. Wis. Stat. §§ 30.12(3m)(a), (c). Section 30.20 regulates the removal of bed material. Section 30.123 governs the construction and maintenance of bridges and culverts to allow passage over navigable waters. DNR may not issue a permit under §§ 30.12, 30.20, or 30.123 if the regulated activities would be detrimental to or inconsistent with the public interest. DNR is authorized to weigh relevant policy factors, including preservation of the natural beauty of state waters, the public's full use of the waters, and the convenience of riparian owners. *Sterlingworth*, 205 Wis. 2d 710.

A. DNR Cannot Permit Project Structures and Deposits in Navigable Waters Where Enbridge is not the Riparian Owner.

Enbridge is not a riparian owner of real property adjacent to all the navigable waters along the proposed route. Per the text of Wis. Stat. § 30.12, Enbridge cannot place structures and deposits in those navigable waterways where it is a mere easement holder. *See* Pet'rs' Joint Mot. and Br. for Summ. J. The plain text of Wis. Stat. § 30.12 applies specifically to riparian owners, not easement holders. Wis. Stat. § 30.12(3m)(a). The Statute further applies specifically to permitted activities that are solely for the riparian owner's use and benefit; these limits are meant to prevent unnecessary degradation and alienation of the public's interest in navigable surface waters. *Id*.

Enbridge is not eligible for a WWP under Wis. Stat. § 30.12 because Enbridge is not a riparian owner at numerous waterway crossings where it plans to place structures and deposits on the bed of waterways. *See* Pet'rs' Joint Mot. and Br. for Summ. J.; Exs. 110, 312, 568, 622, 638; Tillison Tr. 1395:13-1396:7 (discussing her familiarity with property ownership in the Project Area). Accordingly, DNR erroneously granted Enbridge a permit under Wis. Stat. § 30.12.

Enbridge cannot become eligible for a § 30.12 permit by unilaterally transferring its WWP to each riparian owner along the Project or by adding each riparian owner as a "co-applicant" to this permit post-hoc. *See* Ex. 312 (containing three agreements with landowners signed in May 2025); Intervenor Enbridge's Notice of Proposed Modifications 2. Enbridge does not possess such authority. Wis Stat. § 30.208(3)(e) ("*the department* shall render a decision issuing, denying, or *modifying* the permit…") (emphasis added). In fact, Enbridge tacitly admits this in its Oct. 1st filing, proposing "riprap and other permanent structures shall only be installed…after a separate permit has been issued…that includes riparian owner(s) as co-permittees…" Notice of Proposed Modifications 2.

Crucially, though, even under new hypothetical "co-permittee" permits, the proposed Project is for Enbridge's use, not that of other riparian owners along the proposed route. Wis. Stat. § 30.12(3m)(a) ("for the owner's use"); Exs. 631, 633, FoF ¶¶ 1, 4, 6; Ex. 807, at 31-32 ("The Project will allow Enbridge to continue uninterrupted deliveries"). The purpose of the Project, and of seeking a Chapter 30 WWP, is to continue the operation of Enbridge's Line 5 pipeline. *Id*. Even assuming Enbridge's claims of a general public benefit from the pipeline, that is not a purpose akin to a pier or other structure meant to further a riparian owner's access and use of their waterfront property, as § 30.12 contemplates. Where Enbridge is not a riparian owner, DNR improperly granted coverage under Wis. Stat. § 30.12.

B. Enbridge's Project and the Permitted Activities Do Not Meet the Public Interest Requirements Outlined in Chapter 30.

DNR's decision to authorize the Project is not consistent with the public interest because the proposed construction activities will be detrimental to Wisconsin's surface waters. Chapter 30 authorizes various activities in navigable waters under a public-interest standard. The standards vary slightly but, in general, require that Project activities be consistent with, or at least not detrimental to, public interest. Wis. Stat. §§ 30.12(3m)(c)2; 30.123(8)(c)3; 30.20(2)(c). Protection of the public's interest in navigable water requires evaluating, amongst other things, "potential ecological impacts includ[ing] direct impacts on water quality and sediment quality alteration, as well as direct and indirect influences on flora and fauna. For this very reason, the consideration of cumulative impact' must be taken into account." *Sterlingworth*, 205 Wis. 2d at 721. No applicant, even a riparian owner, has "a right to the issuance of a permit if it is detrimental to the public interest." *R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 29, 244 Wis. 2d 497, 628 N.W.2d 781 (citing Wis. Stat. §§ 30.12, 30.13, and 30.20).

The Line 5 Project's impacts on the public interest in Wisconsin waterways are far more severe than the impacts DNR found detrimental to the public interest in *Sterlingworth*. In *Sterlingworth*, DNR denied a permit application to increase the number of boat slips at a condo association's marina on a navigable inland lake. The court found substantial evidence to conclude that the marina would cast shadows and increase boat traffic, thereby detrimentally affecting the public interest in the lake's ecological and scenic values. 205 Wis. 2d at 727-30. Here, the Project will have long-term impacts on the public interest in waterways by altering vegetation and grading, increasing runoff and erosion, causing inadvertent releases, and risking an oil spill. *See supra* Factual Background II. The clearing of vegetation near waterways, especially large old-growth trees like cedars, will impact those waterways in multiple ways,

including increasing runoff and erosion into waterways and decreasing habitat for aquatic life. Ex. 202, at 37-39; Ex. 302, at 22; Wuolo Tr. 3145:7-3152:5; Callan Tr. 5254:7-5255:7. Heavy equipment driving over temporary clear span bridges will compact soil as traffic, personnel, and equipment pass over the 187 crossings where they will be used over the long course of construction. Ex. 202, at 55; Ex. 243, at 50:22-51:6.[4] Compaction leads to more erosion and decreased ability to restore streambank vegetation. Greenberg Tr. 1903:13-24. Should the Project be approved, this area would also be prioritized for colocation of future utility projects. *See* Ex. 807, at 71 (discussing connected corridors as priority locations for new projects). These activities would impact the viewshed and scenic beauty of these waterways because Enbridge will clear many hardwood swamps with exceptional vegetation communities surrounding pristine streambeds and maintain them as low-quality emergent wetland forever. Band members use many potentially impacted plants and animals, such as cedar, for traditional cultural practices. The Project not only risks traditional cultural resources but will also limit access to them. Blanchard Tr. 1295:8-1297:5, 1300:17-1301:13; Ex. 204A; Tillison Tr. 1387:21-1390:2; Ex. 910, at 6, 44.

Enbridge's lack of riparian ownership at numerous waterway crossings also undermines DNR's public interest determination. DNR's finding that dredging for the Project is consistent with the public interest relies on DNR improperly authorizing the placement of structures into waterways under Wis. Stat. § 30.12. Exs. 631, 633 FoF ¶ 74(b); *see supra* III.A. More broadly, Enbridge's lack of riparian ownership weighs even more strongly against the Project being in the

[4] While Enbridge lay witness Barry Simonson stated he had not encountered issues with compaction from such bridges on previous Enbridge projects, Simonson Tr. 3195:19-3196:2, he also gave no indication that he is experienced in assessing soil compaction. Rather, he described his role as a "manager" and "director" of pipeline construction operations for Enbridge. *Id*. at 3169:24-3170:13.

public interest. This is because Enbridge has no private riparian rights in many of the waterways that must be weighed alongside the Project's severely negative consequences for the public interest in Wisconsin's surface waters. For these reasons, the proposed activities are not consistent with the public interest in Wisconsin's surface waters, and DNR unlawfully granted Enbridge an individual Chapter 30 permit.

C. Enbridge Did Not Receive All Necessary Incidental Take Permits or Demonstrate Avoidance of Impacts to Endangered and Threatened Species Before DNR Reviewed and Issued the Wetland and Waterway Permit.

Enbridge did not receive an Incidental Take Permit ("ITP") or demonstrate avoidance of impacts for Braun's holly-fern (*Polystichum braunii*) and sweet colts-foot (*Petasites sagittatus*), before DNR reviewed and issued a Chapter 30 permit. DNR failed to consider the impacts of the Project on endangered resources at the time of issuance and could not properly evaluate the Project's impacts to conclude that it would not impact endangered resources. Regulations implementing Chapter 30 require DNR to consider and address all potential impacts on endangered or threatened ("T&E") species before determining a permit application complete and before issuing a permit. Wis. Admin. Code NR § 329.04(3)(a)2. (implementing individual permits under Ch. 30.12); NR § 345.04(3)(a)2 (implementing dredging permits under Ch. 30.20); NR § 320.06(3)(a)(2) (implementing bridge and culvert permits under Ch. 30.123).

The Project proponent must show that the Project will protect endangered resources to comply with Wis. Stat. § 29.604. The Division has previously found DNR unlawfully approved a project when the petitioner presented unrebutted evidence that the proponent lacked an ITP and that a confined disposal facility off Green Bay would impact endangered resources if approved. *Confined Disposal*, No. 3-LM-95-616, at *54. This procedural limitation requires that DNR identify and resolve any impacts to T&E species before permitting any action that may harm those species, and even before reviewing a project proponent's complete permit application.

In *Confined Disposal*, the Division held that DNR's approval of a permit was unlawful for violating Wis. Stat. § 29.604. No. 3-LM-95-616 at *62. One of the Division's express holdings was that should the decision to overturn the permit due to water quality standard compliance issues be reversed on appeal, any future permit must contain a condition for endangered resources protection. In holding that any future permit needs an endangered resource plan to be valid, independent of the satisfaction of all other legal requirements on appeal, *Confined Disposal* necessarily implies that a permit lacking endangered resources protection is invalid, independent of a project's satisfaction of other standards. In other words, a take permit does not require a WQC to be valid when issued, but an authorization to affect surface waters needs a plan to protect endangered resources to be complete and valid. DNR's approval of the Project's WWP is invalid because the agency did not consider impacts to endangered resources when the Project was approved.

DNR found that the Project would impact Braun's holly-fern, a species protected under Wis. Stat. § 29.604. Ex. 236, at 2; Ex. 237, at 4; Rowe Tr. 5113:22-5115:22; Ex. 631, Condition ¶ 87; Ex. 807, at 572-573. While Enbridge at first only identified one plant on private land, Expert Thompson and Band staff identified an additional fern within the Project Area on public land in 2021. Ex. 200, at 6, 12-13, 28-29, 75-76, 87, 114-115, 127-128, 139, 164, 244; Ex. 244, at 68:5-23. In further surveys in 2022 and 2023, Enbridge then identified seven plants on public land. Ex. 807, at 573. When the WWP was issued on November 14th, 2024, Enbridge did not yet have an ITP for impacts to BHF. Ex. 631, Condition ¶ 84. ("All construction activities shall be conducted in accordance with the avoidance and minimization measures for rare species as stated in Enbridge's Incidental Take Permit/Authorization that will be required as part of the Project."); Ex. 807, at 573 ("As take of these individuals cannot be avoided, Enbridge anticipates applying

for an incidental take permit/authorization (Section 1.4.3.14).”). In fact, public comment on the ITP did not open until May 2025, and the ITP was not issued until September 2025, after the hearing in this contested case was underway. Rowe Tr. 5149:1-23. Enbridge’s proposed modifications, noting that an ITP for BHF was issued, do nothing to cure this issue. Intervenor Enbridge’s Notice of Proposed Modifications 4.

Similarly, DNR identified sweet colts-foot that a planned access road would impact. Ex. 236, at 3; Ex. 237, at 10; Ex. 244, 68:25-69:27; Ex. 235; Rowe Tr. 5122:8-15. This led Enbridge to agree to abandon the planned access road with colts-foot present. Ex. 236, at 3; Ex. 237, at 10; Rowe Tr. 5122:16-21. However, this plant is highly sensitive to even slight changes in water table elevations, and this population is adjacent to planned trenching and dewatering nearby, upgradient of the plants, which risks altering the hydrologic condition of the rest of the wetland. *see* Ex. 235, at 1 (noting that sweet colts-foot is “vulnerable to changes in hydrology, WDNR guidance states to ‘Avoid locating landings, staging areas, or access routes on or near known populations.’ And ‘Minimize disturbance to hydrology, including soil disturbance from rutting.’); Ex. 244, at 68:25-69:27; Ex. 235; *see also* Ex. 127, at 21:15-21; Ex. 807, at 310; Bonin Tr. 408:14-410:7 (discussing trench dewatering). There are no permit conditions related to sweet colts-foot. Band Expert Thompson has pointed out risks to the plant for years. Ex. 200, at 13-14, 115-116. DNR has not taken sufficient steps to avoid impacts on the colts-foot population.

Because these identified and outstanding potential impacts to Braun’s holly-fern and sweet colts-foot were not resolved before determining the application complete and issuing a Chapter 30 permit, DNR violated its own regulations when it issued the waterway permit. Just as in *Meteor Timber*, DNR should have “den[ied] the permit as incomplete” and just as in *Confined Disposal*, the Division should hold the permit unlawful accordingly. *Meteor Timber*, 2022 WI

App 5, ¶ 66 (interpreting nearly identical procedural provisions in Wis. Stat. § 281.36); *Confined Disposal*, No. 3-LM-95-616, at *63 ("There is not "reasonable assurance" in the record that sec. 29.415, Stats., relating to the protection of endangered resources will be complied with.")

IV. DNR LACKS REASONABLE ASSURANCE THAT THE PROPOSED PROJECT WILL COMPLY WITH STANDARDS ENUMERATED IN WIS. ADM. CODE NR § 299.04. [5]

DNR improperly granted a WQC for the Project because it lacks reasonable assurance that the proposed Project would comply with the standards enumerated in Wis. Admin. Code NR § 299.04. Ex. 633 (state WQC); *Confined Disposal*, No. 3-LM-95-616, at *62 (holding because a model "did not have sufficient credibility upon which to make engineering decisions" and "failed to prove its credibility when matched with real-world observed data" the applicant did "not provide 'reasonable assurance' [of compliance] within the meaning of sec. NR 299.04(1).").

Separate from this state proceeding, Enbridge is required to obtain a permit from the United States Army Corps of Engineers to dredge and fill waters of the United States. 33 U.S.C. § 1344. To obtain that permit, the Clean Water Act also requires that Enbridge obtain a certification from the State of Wisconsin that the Project would comply with water quality standards. *Id*. at § 1341. To obtain that certification, Enbridge must prove to DNR's satisfaction that there are "reasonable assurance" that the proposed activities would comply with water quality standards applicable to surface waters and wetlands that are designed to protect the public interest and trust in water resources. Wis. Stat. § 281.15; Wis. Admin. Code NR §§ 299.04(1), 102-103.

DNR has water quality standards applicable to the state's surface waters and wetlands, and DNR must certify compliance with both to approve a WQC. Wis. Admin Code NR § 103

[5] This addresses DNR granted issue 6, which incorporated Band Petition issue 11.

provides water quality standards for wetlands. As discussed *supra* in Section I.A-D, Enbridge did not present DNR with adequate and accurate information regarding wetland functional values outlined in NR § 103.03. DNR did not make credible judgments about the Project's reasonable assurance of compliance with wetland water quality standards.

Wis. Admin. Code NR § 102 defines specific categories of surface waters, their uses, and the criteria applicable to them. Narrative criteria—or criteria that do not mandate specific numeric thresholds for violation—apply to deposits, debris, and substances that may cause toxic or harmful effects. Narrative criteria are more adaptable to local environmental conditions, such as variation in natural background sedimentation. The Department also has numeric criteria for dissolved oxygen, total phosphorus, pH, temperature, and acute and chronic toxicity that are based on a variety of technical factors and designed to protect fish and aquatic life. And NR § 105.07 has specific criteria to address bioaccumulative substances such as mercury.

DNR's determination that Enbridge provided reasonable assurances of compliance is not based on credible technical analysis because Enbridge did not provide DNR with adequate background data on water quality in surface waters. *See* Ledder Tr. 1071:22-1072:8. The Band's concern is not only with the physical parameters of water quality, but also with supporting designated uses. Ex. 209, at 13-15. For the Band, conserving ecosystems where wild rice can thrive is critically important. Tillison Tr. 1314:2-4. The Marengo River and Beartrap Creek watersheds are identified by the Band as priority watersheds because they support wild rice waters in the Kakagon and Bad River Sloughs. Ex. 209, at 14; Tillison Tr. 1387:21-1393:14; *see also* Thompson Tr. 2256:5-7. There are six primary watershed challenges for the Marengo River Watershed, including unstable hydrologic conditions in the system, excess sediment, terrestrial habitat fragmentation and alteration, loss and fragmentation of aquatic habitat, excess nutrients,

and high bacteria count, all of which pose risks for sensitive ecosystems supporting traditional uses like wild rice harvesting. Ex. 209, at 14; Tillison Tr. 1392:1-1393:11; Ex. 238, at 1322-1323. The Project's changes to the landscape may exacerbate these risks even over the short term. It is critical that water quality standards are properly assessed using credible background data. *Compare* Ex. 807, at 846 (FEIS referencing 2012 version of Marengo River Watershed Action Plan) *with* Ex. 238, at 1310 (Band witness including current 2022 Action Plan).

Further, DNR did not have reasonable assurance that Project activities would comply with Chapter 30's public interest requirements, as required by Wis. Admin. Code NR § 299.04(1)(b)6. *See supra* III.B. Likewise, while DNR included one condition related to the Band's water quality standards, regarding dewatering discharges, the Department has no plans or mechanism to monitor or enforce this requirement. Callan Tr. 5242:18-21 ("We would have to seek an injunction"). Because the WQC, Ex. 633, contains identical findings of fact and nearly identical conditions to those in the WWP, Ex. 631, the deficiencies outlined in Sections I-III above also make the WQC fatally deficient.

For these reasons, DNR did not possess reasonable assurance to determine that Project activities will meet state water quality standards as required under Wis. Admin. Code NR § 299.04. *Confined Disposal*, No. 3-LM-95-616, at *63.

V. DNR IMPROPERLY GRANTED COVERAGE UNDER WISCONSIN'S STORMWATER CONSTRUCTION DISCHARGE GENERAL PERMIT[6]

DNR improperly granted coverage under WPDES General Permit No. WI-S067831-06 ("GP"). Ex. 770. Not only is this Project unprecedented in its size for GP coverage, but the proposed Project also does not meet the conditions required for coverage under the GP. Yarrington Tr. 3849:16-17 ("I have never reviewed a project this large before."). The Project is

[6] This addresses DNR granted issue 9, which incorporated Band Petition issue 12.

not eligible for GP coverage because it falls within three different exclusions: 1.2.2, 1.2.3, and 1.2.5. Ex. 770, at 5.

Wisconsin regulates stormwater discharges from construction sites under the General Permit to Discharge Under the Wisconsin Pollution Discharge Elimination System, WPDES Permit No. WI-S067831. Coverage under the construction site stormwater general permit is most appropriate where the pollution source is less than significant, complies with the terms of the general permit and Wis. Admin. Code NR § 216, uses the best available pollution control technology, and the effluent standards mirror those in NR § 216. Ex. 770, at 4. If any of these conditions are not met, then an individual permit may be necessary to control stormwater discharges. Substantively, NR § 216 requires that project proponents prepare site-specific plans that reduce runoff of sediments, erosion, and discharges of nuisance materials into waters of the state.

Subsection 1.2.2 of the GP excludes activities and discharges that affect wetlands, unless DNR determines that those activities and discharges comply with NR § 103.03. *Id*. As part of meeting the requirements of this subsection, Enbridge must provide documentation of wetland presence in the Project Area. *Id*. This Project will affect wetlands. Exs. 631, 633, FoF ¶ 36. Yet, Enbridge's inadequate preconstruction wetland data makes it impossible for DNR to assess the Project's compliance with this requirement to be covered under the GP. *Supra* I.

Subsection 1.2.3 excludes activities and discharges that affect endangered and threatened species, unless DNR determines that those activities and discharges comply with relevant requirements in Wis. Stat. § 29.604 and Wis. Admin. Code NR § 27. *Id*. Despite this, DNR approved GP coverage nearly 10 months before issuing an ITP for Braun's holly-fern in September 2025. *See supra* III.C.; Rowe Tr. 5149:1-23. Additionally, trench dewatering

activities still pose a risk of harming a sweet colts-foot population. *See supra* III.C.; Ex. 244, at 68:25-69:27; Ex. 235. Again, Enbridge's proposed modifications related to ITP do not remedy this deficiency. Issuing an ITP nearly 10 months after authorizing GP coverage, as well as continuing to threaten impacts to sweet colts-foot, demonstrates that GP coverage was improperly granted based on this subsection.

Finally, GP subsection 1.2.5 excludes discharges that DNR determines have "reasonable potential to cause or contribute to an excursion above any applicable water quality standards." Ex. 770, at 5. All Wisconsin water must meet general standards, including preventing "color, odor, taste or unsightliness…in such amounts as to interfere with public rights in waters of the state" and "substances…in amounts which are acutely harmful to animal, plant or aquatic life." Wis. Admin. Code NR § 102.04(1)(c)-(d). These narrative standards can be triggered by different levels of sediment in different water bodies. Similarly, each wetland's functional values would be affected differently based on the combination of sediment release size and location, along with the particular combination of functional values supported.

DNR determined that fluid releases from horizontal directional drilling are likely. Exs. 631, 633, FoF ¶ 60(j). Further, DNR considered the potential for concentrated sediment release from such fluid releases. Ex. 807, at 349-350. If such releases occur directly into waterways or wetlands, or if stormwater flushes those sediments into them, sediment levels harmful to aquatic life are possible. Callan Tr. 5254:18-23, 5255:1-7. Through the stormwater team's review of HDD techniques planned for the Project, and DNR's acknowledgement of the likelihood of sediment-laden HDD fluid releases, DNR knew such releases had a reasonable potential to violate the state's sediment water quality standards. Ex. 51, at 7:21-22, 9:36-10:2. For these

reasons, Enbridge must apply for an individual permit for discharges otherwise covered by the GP.

VI. DNR FAILED TO INCLUDE A COMPLETE ENVIRONMENTAL ANALYSIS AS REQUIRED BY WIS. STAT. § 1.11(2)(C) AND WIS. ADM. CODE NR §§ 150.30(2)(F), (G), AND (H).[7]

DNR failed to comply with WEPA due to many gaps in background information and analysis. DNR has the responsibility to review and disclose Project impacts under the Wisconsin Environmental Policy Act ("WEPA"). When conducting an EIS, as here, DNR must provide a detailed statement of the potential impacts of taking an action—in this case, permitting and otherwise authorizing the Project. Wis. Stat. § 1.11(2)(c); Wis. Admin. Code NR § 150.30. WEPA is a procedural statute; it does not dictate agency outcomes. Nevertheless, the agency must take a "hard look" at environmental effects. *Clean Wisconsin v. Pub. Serv. Comm'n*, 2005 WI 93, ¶ 189, 282 Wis. 2d 250, 700 N.W.2d 768. A genuine analysis of the proposed activities and their environmental consequences, based on hard data, is required, while remote or speculative analysis is not required. *Wis. Env't Decade, Inc. v. Pub. Serv. Comm'n*, 105 Wis. 2d 457, 313 N.W.2d 863 (Ct. App. 1981). An EIS must furnish the information reasonably necessary under the circumstances to inform agency decisionmaking. *Clean Wisconsin v. Pub. Serv. Comm'n*, 2005 WI 93. DNR's rules implementing WEPA, codified in NR § 150, ensure decision-makers and the public have information to consider environmental effects. Wis. Admin. Code NR § 150.01. Those rules govern the process for determining scope, content, publication of a draft EIS and final EIS, and requirements for public engagement. *Id*. at § 150.30.

DNR's WEPA review lacked certain crucial information and analysis, meaning it could not have adequately taken a hard look at and disclosed foreseeable environmental consequences.

[7] This addresses DNR granted issue 8, which incorporated Band Petition issue 13.

While not exhaustive, some examples of DNR's failure to meet this obligation are discussed below. First, gaps in wetland information and analysis prevented DNR from adequately considering the Project's impacts on wetlands. This included mischaracterizing present wetland conditions, discounting impacts on both the surface and essential subsurface hydrology, and overestimating the efficacy of restoration and mitigation of impacts. *See supra* I.

DNR failed to gather or assess a holistic picture of the Project's sediment impacts. DNR received piecemeal assessments from Enbridge's consultant RPS regarding sediment from HDD fluid releases and waterway trenching. Ex. 843, at 3-6; Ex. 1001, at 3-5; Horn Tr. 4733:3-4738:1. DNR combined these with its own limited analysis of sediment release from upland Project areas. Ex. 807, at 325-338. As Noah Greenberg explained, these pieces failed to provide a full and accurate picture of sediments that the Projects would mobilize, preventing an adequate assessment of sediment impacts in the FEIS. Greenberg Tr. 1920:15-1940:2.

Further, Enbridge did not submit an erosion and sediment control plan and other requirements under the GP that DNR considered detailed enough to review until July 2024. Ex. 47, at 3:2-4. After this, DNR decided it needed to bring in several additional staff. *Id*. at 2:31-36. Just after DNR released the FEIS on September 6, the newly expanded stormwater team began meeting weekly and continued doing so until October 23rd. *Id.* at 4:7-9. As previously stated, this Project was larger than any Ms. Yarrington has previously reviewed. Yarrington Tr. 3848:16-17; *see also* Ex. 47, at 2:24 (referring to the "project's complexity"). Rather than this being one project of many in a single stormwater technician's review portfolio, this Project required the undivided focus of six DNR stormwater staff for multiple months. Yarrington Tr. 3823:16-3824:2; Ex. 47, at 5:10-18. Yet, the timing of Enbridge's submittal of information and DNR's

review meant that the FEIS did not assess the environmental consequences of the Project's stormwater discharge plans considered under the GP.

Petitioners in this case, as well as GLIFWC, raised concerns about the impacts of mercury should this Project proceed, including the risk of increased mercury methylation. Mednick Tr. 3571:20-3574:6; Ex. 921, at 24, 120; Ex. 914, at 776; Ex. 241, at 12:17-18; Tillison Tr. 1381:5-1383:8. DNR did not analyze impacts from methylmercury in the FEIS. Ex. 214, at 25:15-23; Mednick Tr. 3571:20-23. Enbridge's new proposed sample method does not correct this lack of consideration by DNR. *See* Intervenor Enbridge's Notice of Proposed Modifications 5-6.

Finally, the FEIS did not adequately consider decommissioning as a necessary component of the proposed Project's lifecycle. *See supra* Factual Background II.; Ex. 910, at 68; Tillison Tr. 1323:19-1325:3. If the rerouted pipeline were built, it would someday reach its end of life. That point requires certain decommissioning activities to safely shutter the pipe. DNR did not consider this foreseeable stage of the rerouted pipeline. The record in this matter contains numerous examples, including those above, where DNR failed to meet its duty under WEPA.

VII. MODIFICATION OF THE PERMIT IS NOT PERMISSIBLE[8]

Enbridge cannot save its permit by proposing post hoc modifications. The amended hearing notice in this case states that modification of the permit with relation to issues one through six will be considered if "supported by a preponderance of the evidence." Order on Enbridge's Mot. Regarding Potential Modification of the Permit 5. Enbridge, through its attorneys, filed a list of proposed modifications to DNR's permit conditions two days before the close of oral hearings in October. But Enbridge did not present evidence on the necessity or

[8] This addresses modification as it pertains to granted issues 1-6 as clarified in the Order on Enbridge's Motion Regarding Potential Modification of the Permit (April 15, 2025).

adequacy of its proposals. Not only did these modifications escape any public notice and comment period, but they also escaped any cross-examination and evaluation by Petitioners or DNR. Still, Enbridge submitted this list at the eleventh hour with the hope that the ALJ would implement these conditions and save its permit from any "question about state requirements or permitting standards." Intervenor Enbridge's Notice of Proposed Modifications 1.

Wisconsin law prohibits such an outcome where Enbridge (i) could not—in any circumstance—satisfy its evidentiary burden as to modification for several uncurable flaws; and (ii) did not satisfy its evidentiary burden as to modification for any flaw.

Modification of a permit is limited to situations where a permittee can show, by a preponderance of the evidence, that modifications would bring the entire permit into compliance with Wisconsin law. *Kohler Co.*, 2024 WI App 2, ¶ 83 (concluding that ALJ did not have authority to modify permit where it also concluded that "DNR did not have sufficient information to issue the permit" in the first place). This evidentiary burden requires thorough examination and consideration of the modifications during the contested case, with post hoc modifications only occurring when the potential modifications are specifically listed in the notice of the contested case or are thoroughly discussed and supported by evidence throughout the hearing. *Clean Wisconsin, Inc. v. Wis. Dep't of Nat. Res.,* 2021 WI 71, ¶ 7, 398 Wis. 2d 386 N.W.2d 346 (sufficient evidence existed supporting ALJ's imposition of two specific conditions, which were the center of the contested case and exhaustively discussed); *In the Matter of WPDES Permit No. Wi-0061794-4-1 Issued To B&D Dairy Farm, LLC*, 2021 WL 9031862, at *11-12 (May 18, 2021) (adopting DNR's modified schedule where the specific modified schedule was listed as an issue in the notice of hearing and thoroughly discussed); *In the Matter of the Application By the Village of Egg Harbor For A Permit To Place A Structure On, Dredge,*

and Grade Over 10,000 Square Feet On the Bank of Green Bay, Located In the Village of Egg Harbor, Door County, 2008 WL 5648667, at *3 (Nov. 25, 2008) (approving ALJ's selection of "Revised Plan C" where that plan was "discussed at length by witnesses" and DNR had "reviewed both Plan C and Revised Plan C and determined that either plan met all applicable Chapter 30 standards."); *In the Matter of Two Chapter 30 Permits Issued To the Polk County Parks Department For Riprap and Dredging On the Apple River At Or Near the Woodley Dam Site In Polk County,* 2008 WL 4918734, at *4 (Aug. 6, 2008) (adding a condition that was "based upon the testimony of a DNR dam safety engineer").

This burden is consistent with the requirement that an ALJ base their decision upon what the parties—including DNR—had sufficient opportunity to examine. *See Vill. of Thiensville v. Dep't of Nat. Res.*, 130 Wis. 2d 276, 283, 386 N.W.2d 519 (Ct. App. 1986) (stating an ALJ "may not examine what the agency had no opportunity to examine.").

There is no amount of evidence that a permittee could present to satisfy the evidentiary burden required to modify a permit when DNR lacked the information to issue it in the first place. *Kohler Co.*, 2024 WI App 2, ¶ 84. This is because no amount of modification to permit conditions can save the Project's approvals when "there is no valid permit to amend" in the first place. *Meteor Timber*, 2022 WI App 5, ¶ 90 (permittee failed to cite "any law supporting the proposition that the Department is authorized to issue an amended permit when there is no valid permit to amend."). Where a permit suffers any such incurable flaw, it must be entirely rejected. *Id.*

Enbridge has not met its burden as to modifying any flaws and cannot meet its burden as to several uncurable flaws.

A. The Permit's Fatal Flaws Cannot Be Cured

While none of the Project's authorizations can be remedied based on the evidence put forward by Enbridge, several flaws cannot be remedied no matter what evidence Enbridge might have provided at the hearing. These latter category flaws—like the flaws in *Kohler* and *Meteor Timber*—are fatal, requiring the entire permit be struck down. *See* Pet'rs' Joint Resp. To Enbridge's Mot. To Include Modification 9-11.

In *Kohler*, a permittee sought to overturn an ALJ's refusal to modify a permit after the ALJ concluded that "DNR did not have sufficient information to issue the permit." *Kohler Co.*, 2024 WI App 2, ¶ 83. There, the court held that the ALJ was correct in refusing to modify the denied permit. *Id.* While it officially held that the ALJ was correct in doing so due to a lack of notice regarding modification, it made sure to note that the "ALJ did not err by not revising the DNR's permit after concluding that the agency improperly issued the permit in the first place." *Id.* No conditions or modifications to a permit's conditions would remedy a lack of sufficient information to authorize the permit. The only remedy would be for DNR to restart its process.

As in *Kohler*, the *Meteor Timber* court rejected the position that an ALJ must modify a permit rather than reject it. *Meteor Timber,* 2022 WI App 5, ¶ 6. There, the ALJ concluded that DNR's mitigation plan "lacked necessary soils and hydrology data as well as hydrology performance standards." *Id.* This lack of vital baseline information made the permit invalid from the start and forbade the "Department [from] issu[ing] an amended permit." *Id.*

The Project's authorizations are fatally flawed because of DNR's failure to (i) gather sufficient data and analysis regarding impacts on the wetlands, *supra* I.; (ii) gather sufficient baseline data regarding Enbridge's restoration and mitigation plans, *supra* I.D., and Enbridge's lack of necessary riparian ownership at many water crossings. *supra* III.A. These flaws required DNR to go about the permitting process entirely differently from the start and—like the lack of

appropriate baseline information in *Kohler* and *Meteor Timber*—cannot be remedied by post hoc modifications. Where no modification would remedy these flaws, striking down the permit is required. *Kohler Co.*, 2024 WI App 2, ¶ 83; *Meteor Timber,* 2022 WI App 5, ¶ 6.

Despite this precedent and statutory background, Enbridge seeks to cover its foundational flaws by arguing that an uncurable permit need not end the ALJ's consideration. Previously, Enbridge argued that an ALJ may step into DNR's shoes and issue a permit that "is not limited" by DNR's underlying permit. Intervenor Enbridge's Reply in Supp. of Mot. for Modification 10. Enbridge argues this way by citing heavily excerpted statutory provisions and inapposite caselaw. *Id*. at 10-11. As discussed in Petitioners' prior briefing on this issue, neither basis supports Enbridge's conclusion. Pet'rs' Joint Resp. to Enbridge's Mot. to Include Modification 8-13.

First, Enbridge's heavily excerpted recitations of Wisconsin's statutes do not support its conclusion that an ALJ may step into the shoes of an agency and issue modifications to cure DNR's unlawful decision to authorize a project. Enbridge argues that the ALJ may "'modif[y]' the Permit, including to correct deficiencies determined in a contested case." *Id.* at 11 (internal quotes and alteration in original). When arguing this, Enbridge cited Wis. Stat. §§ 281.36(3q)(b)(1-2) and 30.209(1m)(a)1–2. *Id*. However, neither statute supports Enbridge's proposition. Instead, both state that "any interested person may file a petition with the department for administrative review within 30 days after […] modification of any" individual permit. Wis. Stat. §§ 281.36(3q)(b)(1-2); 30.209(1m)(a)1–2. These provisions do not empower an ALJ to modify; instead, they limit the scope of DNR decisions subject to administrative review. Crucially, Wisconsin courts have already rejected Enbridge's reading of these statutes. *Kohler Co.*, 2024 WI App 2, ¶ 79 (declining to sanction the understanding that an ALJ "stood in

the shoes of the DNR as the final decision maker") (cleaned up). Thus, these statutes do not authorize the ALJ to modify a permit to correct fatal deficiencies determined in a contested case.

Next, Enbridge has cited inapposite case law, primarily relying upon *Clean Wisconsin, Inc. v. DNR* and *Sea View Ests. Beach Club, Inc. v. DNR*. Neither case compels the proposition Enbridge has espoused.

Clean Wisconsin is not applicable here where Enbridge seeks modification to save the legality of its permit. The *Clean Wisconsin* court dealt with a permit already found to be legally valid—even absent modification. In *Clean Wisconsin*, the underlying contested case centered entirely on the possible addition of two conditions to an otherwise sufficient permit. *Clean Wisconsin*, 2021 WI 71, ¶ 4. The legality of the entire permit was not in question. *Id.*

By contrast, this is not the situation currently before the Division. Enbridge itself has indicated a lack of confidence in the Project's legality, queuing up the question of modification for the Division long before the merits of the original conditions were ever discussed. Additionally, the *Clean Wisconsin* ALJ did not modify the permit; instead, the ALJ ordered DNR to modify the permit, far from what Enbridge's specific redlines request here. Thus, as the *Kohler* court found, *Clean Wisconsin* is inapposite. *Kohler Co.*, 2024 WI App 2, ¶ 82 (discussing *Clean Wisconsin* and concluding it to be unsupportive of the proposition that an ALJ may modify an unlawful permit).

Sea View is also not applicable here. There, the question before that court was whether a reviewing circuit court could defer to an ALJ when DNR expressly adopted an ALJ's decision. *Sea View Ests. Beach Club, Inc. v. State Dep't of Nat. Res.*, 223 Wis. 2d 138, 146, 588 N.W.2d 667 (Ct. App. 1998). Here, there is not yet an ALJ decision for DNR to adopt. That distinction is vital and has been used by other courts to distinguish *Sea View. Buettner v. Wis. Dep't of Health*

& Fam. Servs., 2003 WI App 90, ¶ 8, 264 Wis. 2d 700, 663 N.W.2d 282 (distinguishing *Sea View* "because the Department of Natural Resources (DNR) expressly adopted the hearing examiner's decision as its own."). Thus, case law previously cited by Enbridge does not support this tribunal in intervening to save a permit found to be unlawful.

B. Enbridge Did Not Satisfy Its Evidentiary Burden

As the party that moved to add the issues of permit modification, Enbridge bears the burden of showing that the modifications are both necessary and adequate to remedy the legal deficiencies. *Sterlingworth*, 205 Wis. 2d at 726. Enbridge has not done that here.

Enbridge proposed thirteen modifications in total, spread between its WWP and WQC. As an initial matter, if the ALJ finds flaws with conditions other than those Enbridge has proposed to modify, the Project's authorizations must be struck down.

Still, the ALJ must also reject the thirteen modifications Enbridge proposed. Enbridge's last-minute submission of modifications circumvented adequate review and discussion by the parties and the ALJ. Enbridge's attorneys filed these modifications with only two days left in the hearing. This was after all Enbridge witnesses had testified, and Enbridge offered no opportunity to discuss the necessity and adequacy of its proposed modifications. There was no meaningful opportunity for the parties to develop the record on these modifications or for the ALJ to assess how these modifications would address flaws within the Project's WQC and WWP. DNR itself did not even make a determination as to whether these conditions would be permissible or address the flaws with these conditions. When asked about Enbridge's proposed modification, the DNR staff person who signed the WWP and WQC said he had only seen that proposal the day prior and could not speak to it in any detail. Callan Tr. 5307:21-5308:16, 5314:6-11. This lack of process and associated evidence cannot satisfy the evidentiary standard required to support an ALJ's modification to the Project's authorizations.

Even if procedural flaws are ignored, the preponderance of the evidence on the record does not support the imposition of these modifications. *See* discussion of specific proposed modifications *supra* I.D.2.iii, III.A, III.C, and VI.

CONCLUSION

Several years and many thousands of pages have been devoted to this Project. That fact demonstrates the complexity and significance of this Project, but not its legal adequacy. Demonstrated compliance with the numerous statutory and regulatory requirements is the only way to show that. As the Petitioners demonstrated during the hearing, and as the Band demonstrates here, Enbridge failed to meet many such requirements. For that reason, the Bad River Band respectfully requests that the Division reverse DNR's permit, certification, and other approvals related to this Project.

I. PROPOSED CONCLUSIONS OF LAW

1. The proposed Project will not meet the standards in Wis. Stat. § 281.36(3n) and Wis. Admin. Code NR § 103.

2. The proposed Project will not meet wetland compensatory mitigation requirements under Wis. Stat. § 281.36(3r) and Wis. Admin. Code Ch. NR § 350.

3. The proposed dredging activities in navigable waters will not meet the standards in Wis. Stat. § 30.20, and Wis. Admin. Code NR § 345.

4. The proposed placement of structures on the bed of navigable waters does not meet the standards in Wis. Stat. § 30.12 and Wis. Admin. Code. NR §§ 328 and 329.

5. The proposed placement of TCSBs over navigable waters does not meet the standards in Wis. Stat. § 30.123 and Wis. Admin. Code NR § 320.

6. DNR lacks reasonable assurance that the proposed Project will be conducted in a manner that will comply with the standards enumerated in Wis. Admin. Code NR § 299.04.

7. DNR improperly granted coverage under WPDES General Permit No. WI-S067831-06 ("GP"), because the proposed Project does not meet the conditions required for coverage under the GP.

8. The Department failed to comply with the WEPA, Wis. Stat. § 1.11.

Based on the foregoing, the Band requests the Division reverse the permit, water quality certification, WEPA compliance determination, and other authorizations granted for the Project.

Respectfully submitted this 10th day of November 2025

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