

This case and controversy pertains to an oil and gas pipeline which has cut across the forests, fields, rivers and wetlands of Northern Wisconsin for over 70 years. It is commonly referred to as "Line 5" and has become an issue of much concern throughout the Northern region of Wisconsin and the Upper Midwest.

Uncontested Facts and Procedural Posture

The following is the Court's interpretation of uncontested facts, with citations to the court record omitted.

Line 5 is a 645 mile segment of a large pipeline, described by respondent-interested person Enbridge Energy, Limited Partnership (Enbridge) as "the world's longest liquid petroleum pipeline system." The pipeline spans more than 3,200 miles, transporting 30% of North American petroleum production, 40% of U.S. imports, and 65% of U.S. bound Canadian exports. The Line 5 segment originates in Superior, Wisconsin, traverses Douglas, Bayfield, Ashland and Iron Counties in Wisconsin, Michigan's Upper and Lower Peninsulas, and ends near Sarnia, Ontario. While the pipeline predominantly carries heavy crude oil, Line 5 also transports light crude and natural gas liquids. Line 5 provides crude oil for four states and two Canadian provinces.

Petitioner Bad River Band of Lake Superior Chippewa Indians (Bad River) is a federally recognized Tribal nation with a reservation in Northern Wisconsin, spanning portions of Ashland and Iron Counties. The Bad River Reservation was established in 1854 under the Treaty of LaPointe. The Bad River Band was a signatory to the earlier 1842 Treaty, which ceded lands that became the State of Wisconsin, while retaining off-reservation rights to use and access resources in the ceded territory.

In 1953, part of Line 5 was built on the Bad River Reservation land pursuant to a series of easements or other agreements. It appears undisputed that in January 2017, Bad River communicated that it would not renew the easements and subsequent negotiations over the easements were ultimately unsuccessful. In 2019, Bad River sued Enbridge in federal

court alleging that Line 5 operates in trespass of reservation lands without valid easements. The district court ordered Enbridge to cease operations on certain parcels by June 16, 2026, and both parties have appealed; the appeal remains pending before the Seventh Circuit. See *Bad River Band of Lake Superior Chippewa Indians v. Enbridge Energy Co.*, 2023 WL 4043961 (W.D. Wis. June 16, 2023), Case Nos. 23-2309, 23-2467 (7th Cir.). As of the date of this Decision, Line 5 is presently in operation across the Bad River Reservation and, by order of the Federal District Court, the order to cease operation of Line 5 on the Bad River Reservation by June 16, 2026 is stayed until that appeal is resolved.

In 2019, Enbridge initiated this current reroute project to construct a new 41 mile segment of pipeline to relocate Line 5 off of the reservation. This construction required certain DNR approvals: 1) a wetland and waterway permit; 2) a water quality certification under the Clean Water Act; and 3) coverage under a stormwater general permit. Enbridge submitted its permit applications on February 11, 2020 to the Wisconsin Department of Natural Resources (DNR). The permit process was a lengthy and detailed procedure. The resulting Environmental Impact Statement (EIS) was released September 6, 2024. Bad River, together with Non-Governmental Organizations (NGOs) as interested parties aligned with Bad River's interest, provided significant input and information into the creation of the EIS. The EIS is about 900 pages in length, with thousands of additional pages of supporting appendices. On November 14, 2024, the DNR issued the combined Wetland and Waterway Permit #IPNO-2020-2-N00471, and granted a Wisconsin's General Permit to Discharge, WPDES Permit No. WI-S067831-6.

On December 12, 2024, Bad River exercised its right to request a contested case at the administrative level challenging the DNR's permits. On January 2, 2025, the DNR reviewed and consolidated the contested case petitions and granted a hearing on the nine issues raised by Bad River and the other interested petitioners herein. After consolidation of issues and parties the matter was referred to the Division of Hearings and Appeals.

The contested case hearing began with public testimony on August 12, 2025, and the evidentiary hearing started on September 3rd and continued through October 3, 2025. More than 30 witnesses testified, most of whom were experts (25 experts) representing numerous disciplines, all pertaining to the issues related to the reroute. On February 13, 2026, the Administrative Law Judge (ALJ) issued a decision upholding the permits and certifications, with some modifications, concluding that DNR's permits were issued appropriately. The ALJ's decision constitutes the final decision of the DNR. Wis. Stat. § 227.46(3)(a); Wis. Admin. Code § NR 2.155(1).

As part of this appeal to the Circuit Court, petitioners have asked that the DNR's permits currently in place be stayed. The Court has received extensive briefing on the issue of a stay and has conducted two oral argument hearings totaling several hours.

Burden of Proof and Initial Review Standard Regarding the Issuance of a Stay

A judicial review of a DNR permitting process, in the context of a request to stay permits, requires the Court to keep steadfast in mind the limited nature of its review. "In a challenge to a DNR decision, "[d]eveloping a factual record ... is essential, because [§ 227.57] *limits* judicial power over administrative decisions to review of the agency's actions, based on the record developed before the agency." *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, ¶ 7, 335 Wis. 2d 47, 56, 799 N.W.2d 73, 77 (emphasis added).

When a party to this limited review requests a stay or prohibition of permits that have already been granted, Wis. Stat. § 227.54 provides the general authority for stays in judicial review proceedings. This provision grants courts discretionary authority to issue stays during judicial review of agency decisions, but it does not establish a specific burden of proof standard for obtaining such relief. The statute's permissive language indicates that the decision to grant a stay rests within the court's discretion based on the circumstances of each case. However, this Court does not view that discretion to be unbridled or subject to the passionate outcry of either party. Rather, the Court needs to be reminded of the limited nature of its authority regarding the ultimate merits of the case.

With a lack of clarity in the statutes and case law regarding the specifics of the burden of proof and what considerations bear on the propriety of granting a stay, the parties to this action agree on very little, but seem to acquiesce to the notion that the moving party must be able to show some degree of eventual success on the merits to be eligible for a stay. However, they do not agree to what extent the petitioners need to establish this element. Petitioners believe a simple showing of a reasonable likelihood of success is all that is needed, while respondent prefers a more heightened standard, namely “a strong showing that it is likely to succeed on the merits” citing *Waity v. LeMaheiu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263 (2022) for the proposition that the standard to be applied for a stay is more analogous to a stay pending appeal under Wis. Stat. § 808.07.

Petitioners correctly argued at the hearing on April 16, 2026 that the reasonable likelihood of success analysis is viewed inversely proportional to the amount of irreparable harm alleged. Petitioners alleged numerous examples of irreparable harm ranging from denial of treaty rights to the threat of criminal prosecution and to irreversible environmental harm.

Petitioners argue that the heightened standard of issuing a stay when applying Wis Stat. § 808.07 as a guide is inappropriate, mostly because this appeal is not from a court decision, but rather an administrative proceeding. While that is true, the administrative proceeding here was the evidentiary trial of the case. The ALJ was the receiver of evidence and the finder of fact duly ordained with all the authority to weigh the credibility and believability of the witnesses and evidence as a whole. The Circuit Court now sits as an appellate court and not the trial court. This appeal is analogous to an appeal to the Court of Appeals from the Circuit Court. Because the ALJ stood as the ultimate fact finder and original gate keeper for the evidence, the job of the Circuit Court now is to act as the first line of appellate review. Therefore, this Court believes that the standard for stay after a fact finding has occurred more closely resembles an appeal from the Circuit Court to the Court of Appeals. Therefore, to effectively support a stay of permits that have already been granted after a full hearing, the Court will require petitioners to make a strong showing of likely success on the merits. The burden on petitioners begins there.

With this standard in mind, this Court will abide by the following: “When reviewing the likelihood of success on appeal, circuit courts must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis. For questions of statutory interpretation, appellate courts consider the issues de novo.” *Waity v. LeMahieu*, 2022 WI 6, ¶ 53, 400 Wis. 2d 356, 390, 969 N.W.2d 263, 279 (citation omitted). While this Court must first consider the weight of petitioners' claims relating to a strong showing of eventual success, it is still obligated to view that factor in conjunction with the alleged irreparable harm.

When reviewing the likelihood of success on appeal, “the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay.” *Gudenschwager*, 191 Wis. 2d at 441. Thus, the greater the potential injury, the less a movant must prove in terms of success on appeal. However, “the movant is always required to demonstrate more than the mere possibility of success on the merits.” *Id.*

Waity, ¶ 54.

This inverse proportionality standard is not easily quantifiable. *Waity* is the most recent case that addresses the issue and the *Waity* court at times seems uncertain what the correct standard may be. It is clear, however, that a singular focus on the strength of petitioners' claim in this limited review case does not go far enough. A sliding scale between making a “strong showing that [it is] likely to succeed on the merits of the appeal” (*Waity*, ¶ 51) to a bottom baseline of showing “more than the mere possibility of success on the merits” (*Id.*, ¶ 54) after considering the alleged irreparable harm is apparently the standard.

The four factors a court must review when considering a stay are:

- (1) whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal;
- (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury;
- (3) whether the movant shows that no substantial harm will come to other interested parties; and

(4) whether the movant shows that a stay will do no harm to the public interest.

See *State v. Scott*, 2018 WI 74, ¶ 46, 382 Wis. 2d 476, 914 N.W.2d 141.

....

The relevant factors "are not prerequisites but rather are interrelated considerations that must be balanced together.: *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

Waity, ¶ 13.

The interplay of these four factors would be clearer if the ultimate strength of petitioners' claims were made more readily apparent. As explained below, many of the disputed issues appear to be disagreements with the ALJ's fact finding. "[A] circuit court cannot simply input its own judgment on the merits of the case and conclude that a stay is not warranted." *Cnty. of Dane v. Pub. Serv. Comm'n of Wisconsin*, 2022 WI 61, ¶ 79, 403 Wis. 2d 306, 347, 976 N.W.2d 790, 810. Furthermore, this matter is not analogous to a temporary restraining order put in place to maintain the status quo pending a trial. The trial in this case is over. The battle of expert opinion and lay testimony and even public input is complete. The parties were given ample opportunity to influence the EIS, flood the record with information, studies and opinions. The attorneys were given an opportunity to call witnesses, argue their cases and brief the issues. The evidence was weighed by a duly qualified disinterested administrative law judge who rendered an extremely thorough and lengthy decision. This Court's review is "confined to the record" before it and is not influenced by the great weight of public opinion.

A party to these proceedings who disagrees with the ALJ's findings of fact or interpretation of the evidence presented at the contested hearing bears a heavy burden to convince a reviewing court that those conclusions are in error. This is because Wis. Stat. § 227.57(6) prohibits the court from substituting its own judgment of the evidence for the judgment of the ALJ. To put this plainly, even if after this Court reviews the record and comes to a determination that differs from the conclusions of the ALJ's determination of the evidence, it cannot overrule the ALJ's findings as long as there is substantial evidence within the

record that supports the ALJ's determinations. *Id.* This high hurdle is raised even higher when a petitioner seeks a stay of the duly authorized permits pending a full review, essentially because the inability to convince the fact finder of the strength of their case last year does not grant petitioners a new right to reargue the evidence in the appeal. What petitioners ask of the Court is exceptionally significant considering the ultimate burden of proof which awaits them in the review process, considering how courts look at the substantial evidence test.

"Substantial evidence does not mean a preponderance of the evidence." *Meteor Timber*, 400 Wis. 2d 451, ¶ 21 (citation omitted). Instead, "[a]n agency's findings are supported by substantial evidence if a reasonable person could arrive at the same conclusion as the agency." *Clean Wis., Inc. v. PSC*, 2005 WI 93, ¶46, 282 Wis. 2d 250, 700 N.W.2d 768.

Kohler Co. v. Wisconsin Dep't of Nat. Res., 2024 WI App 2, ¶ 16, 410 Wis. 2d 433, 445–46, 3 N.W.3d 172, 178.

Treaty Rights Issue as an Irreparable Harm

Some of the irreparable harm arguments posed by petitioner Bad River now incorporate a treaty rights related concept that goes beyond allegations of harm to wetlands, streams and navigable waterways. This particular "harm" claim will be addressed first.

The issue of interference with a Tribe's treaty rights is a serious allegation that under normal circumstances would stand alone in a separate legal action. However, this issue is raised here in the context of seeking a stay of the DNR permits. The primary focus of treaty rights arguments alleges that Tribal members' access to the public land in the ceded territory to exercise rights to gather, hunt and fish will be irreparably harmed if Line 5 is allowed to proceed and, because there are certain criminal penalties that can ensue after the rather wide-ranging change the legislature made when Wis. Stat. § 943.143(2) was enacted in 2019, Tribal members may be subject to criminal prosecution if they enter Enbridge's easement land located in the Iron County forest.

No one has suggested that the treaty rights issue here extends to private land subject to this dispute, but only to Iron County public forest land. While the argument suggesting

these rights will be interfered with if Line 5 continues to be built, it is not well supported by a showing of broad impact to many or most of the Tribal members. While that is not determinative, there are many uses of county forest land which could arguably interfere with treaty rights, such as fire lanes, ATV, ski and other trails, timber sales, prescribed burns and the like. Electric utility lines cross public land throughout Northern Wisconsin. The same argument Bad River applies here would likely apply to these other uses of public land. The Tribe did not counter or dispute Enbridge's assertion that the percentage of public land affected by Line 5 is less than 1% of the total area of Iron County public land accessible to Tribal members or, for that matter, any member of the public. It is difficult to reconcile this single easement in a limited area with concepts of "irreparable" harm or interference.

While the allegations regarding interference with protected rights on public land in the county forest may in fact be real, there is no particular indication that the aforementioned trespass statute applies the same to public land. Wisconsin law permits the DNR to "grant easements for a right-of-way for public or private roads or public utility lines" on state forest land where such use "does not conflict with the planned development of the forest." Wis. Stat. § 28.02. County forests in Wisconsin are public land managed for multiple purposes. The statutory framework governing public land includes provisions reserving "to the people the right of access to such lands." Wis. Stat. § 24.11. This Court is unpersuaded that any member of the public exercising their right to access public land, including Tribal members exercising their respective treaty rights to hunt, gather or recreate, would be subject to prosecution under Wis. Stat. § 943.143 if they are exercising on otherwise public land. Counsel for Enbridge suggested at oral argument that the public's access during construction would be limited or prohibited during a construction phase and such denial would most likely be reasonable to avoid injury or worse to an unwary bystander. It would also be limited in time and space.

This Court is also concerned that raising a treaty rights issue into this litigation may go beyond the scope of review under Wis. Stat. Ch. 227. It does not appear that Bad River raised this issue with the ALJ as one of the original contested issues in dispute. There is a

reference to cultural and, therefore, treaty impacts outlined in the final EIS (Doc. 61) and it appears the ALJ took that into consideration in her decision. If the issue was not factually developed at the contested case hearing, it is difficult for the Court to consider the issue now. *Bunker v. LIRC*, 2002 WI App 216, 257 Wis. 2d 255, 650 N.W.2d 864. At this stage of the proceeding, the Court cannot determine if the issue is alleged to be an error of law or an unsupported evidentiary error, or simply illustrative of an irreparable harm.

Furthermore, raising an argument of “irreparable harm” based on a “what if” scenario is not always sufficient. Some kind of causal link is still needed. While this request is a stay for purposes of an appeal, there are still similarities with underlying requests for injunctive relief.

When seeking an injunction, a plaintiff must show a sufficient likelihood that the defendant's future conduct will cause the plaintiff irreparable harm. *Pure Milk Prods. Co-op v. National Farmers Org.*, 90 Wis.2d 781, 800, 280 N.W.2d 691 (1979).

Allen v. Wisconsin Pub. Serv. Corp., 2005 WI App 40, ¶ 30, 279 Wis. 2d 488, 504–05, 694 N.W.2d 420, 429.

The requirement in this case to show that petitioners "will," not "may," be irreparably harmed strongly infers that a causal connection must exist. The alleged causation regarding treaty rights interference has been explained to this Court as: 1) Tribal members will not be able to exercise their rights fully within the easement area and 2) Tribal members may be prosecuted for entering the easement area. As explained above, the Court is not persuaded that the prosecution threat under Wis. Stat § 943.143 is fully applicable upon otherwise public land and the alleged inability to access certain public land for limited periods of time and limited areas is not the standard to show irreparable harm. If the petitioners' arguments were correct, the creation, replacing or repairing of any road, bridge, structure or trail upon any public land in the ceded territory would constitute the same interference, more or less, than what is being argued here. Because this Court believes the *Waity* standards for considering a stay are more appropriate, the movant needs to show that it *will* suffer irreparable harm, not that it *may* suffer it for limited periods of time in limited places. *Waity*, 388 (emphasis added).

Remaining Irreparable Harm Issues

Bad River and the NGOs allege numerous examples of irreparable harm to the environment if a stay is not granted and Enbridge is allowed to continue with its current permits. Arguments about the correct application of law or alleged misapplication of the law are reviewed de novo. Wis. Stat. § 227.57(11). Arguments disagreeing with the factual findings or the ALJ's reliance on the evidence are viewed differently. This is an administrative review under legal constraints on the extent of the Court's jurisdiction. The Court is well aware that cutting a particular tree means that that exact tree will not regrow. Digging soil and moving it means that some of the soil will not be placed back in the same spot. Blasting or drilling through a rock means the rock will never be the same. Those arguments may carry weight in situations where a temporary restraining order is sought in a case where the merits have not been litigated and maintaining the status quo carries much more importance, but in cases of a review under Wis. Stat. Ch. 227, the primary standard of review is not what might happen to the easement area, but rather, did the ALJ consider those effects and impacts on the environment, apply the law correctly and was there substantial evidence in the record to support the ALJ's factual conclusions. To view the issue otherwise would effectively give petitioners a fresh opportunity to relitigate those contested issues and facts to obtain temporary relief, without the scrutiny of cross-examination. That is not the law in these cases, whether it be in the final review or during pendency to consider a stay. The standard must relate back in part to the ultimate likelihood of success in a limited review case, not exclusively whether there will be adverse environmental impacts.

Environmental impacts and consequences cannot be avoided when anything is built or constructed on the earth. The more correct question is: can the petitioners convince this Court that the ALJ did not properly consider those effects and apply the facts to the law appropriately? "The purpose of WEPA is to insure that agencies consider environmental impacts during decision making." *State ex rel. Boehm v. DNR*, 174 Wis. 2d 657, 665, 497 N.W.2d 445 (1993). *Friends of Blue Mound State Park v. Wisconsin Dep't of Nat. Res.*, 2025 WI App 63, ¶ 26, 418 Wis. 2d 450, 465, 27 N.W.3d 228, 236. Much of the alleged

environmental irreparable harm was litigated at the contested case hearing. Those considerations proved unpersuasive to the ALJ.

With that focus and understanding of what this Court ultimately is required to consider, it is also helpful to keep in mind the duty thrust upon the DNR when considering the use of and protecting and preserving Wisconsin water resources. The duty to uphold both the legislative intent and constitutional mandate is a substantial one. As petitioners eloquently point out in one of their briefs, “[t]he laws at issue in this case are not intended to ensure Enbridge receives its permit.” Doc. 160, p.12. That is true. But it is equally true that the current state of the law is not to prevent the Enbridges of the world from ever receiving a permit. The policy and law of this state does not exist in full support of one camp over the other. The policy and law is far more nuanced. One need only look to the first chapter of the Wisconsin Statutes to see the competing public policies at work. Wis. Stat. § 1.11 sets our state's progressive and honored history of environmentalism while Wis. Stat. § 1.12 sets our realistic energy policy. Even our historical foundations of free and open access to Wisconsin's navigable waters as enshrined in our constitution (See Art. IX, § 1) was not always viewed as a shield to environmental degradation. The public trust doctrine in Wisconsin originally focused on protecting commercial navigation and pecuniary uses of navigable waters. See generally, *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W.2d 514 (1952). The contemporary public trust doctrine explicitly includes environmental protection as a core state duty as codified in Wis. Stat. § 281.31:

To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state's water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. The purposes of the regulations shall be to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.

These dramatically different concerns are required to be considered when anyone requests certain permits from the DNR. The overriding policy of the state is in recognition of the current needs of society and the need for a clean environment. Public and private organizations that wish to use, access or build upon our natural resources must use all

practicable means and measures to create and maintain conditions under which humans and nature can exist in reasonable harmony and fulfill the social, economic, and other requirements of present and future generations. It is intellectually dishonest to not recognize these competing interests. There is little doubt that if the current Line 5 were to rupture at or near the Bad River in its current location on the Bad River Reservation, the result could be an environmental catastrophe. The same could be said if a rupture occurred on the planned reroute near a navigable river or stream. On the other hand, probably every person in the two courtrooms on April 16, 2026 who were either participating or listening to the oral arguments arrived in a motor vehicle fueled with gas that was transported through a pipeline, drove over roads and bridges that were built in and over wetlands and navigable waterways and live in a residence made of wood from cut trees that may have come from public land and heated with gas or fuel oil transported again through a pipeline. Curtailing a people's source of fuel without an immediate and viable alternative is not an easy proposition. Pipelines, roads and rails will, by their very nature, eventually intersect with wetlands, rivers and lakes. The questions to their existence are rarely, if ever, couched in absolutes of yes or no, but rather, where and how. These are commonsense acknowledgements and are representative of the tensions which now run high between those that want Line 5 shut down and those that support its reroute.

The NGOs do raise a curious and interesting proposition regarding Wisconsin's constitutional right to the public waters as "forever free." Wis. Const., Art IX, §1. "The Reroute will deprive Petitioners' members and the public of access to navigable waters and otherwise prevent the fullest use of those waters during construction." Petitioners-Interested Persons' Suppl. Br., Doc. 179, p.14-15. There does not appear to be case law on this point pertaining to this public trust constitutional right. However, considering that the Court can use its own common sense to consider the literally hundreds of bridges, break walls, wharfs and bulkhead projects constructed in the state over these many decades, during which there were periods of time when swimming, fishing and recreating near such sites during construction were restricted or prohibited, and yet no case law has been developed. It seems unlikely that during otherwise authorized construction within the trust waters of the state, reasonable safety precautions would temporarily override the

public's right to access a portion of the waterways. Without greater support in the law, the Court will not extend the concept of irreparable harm caused by a temporary denial of access to a portion of a navigable waterway.

Contested Case Issues and Irreparable Harm

As referenced above, the parties stipulated and limited the issues at the contested case hearing to the following:

Issue 1: Whether activities authorized by Permit #IP-NO-2020-2-N00471 meet state requirements and wetland permitting standards under Wis. Stat. § 281.36(3n)(c) and Wis. Admin. Code Ch NR 103 or whether additional or modified conditions are required.

Issue 2: Whether wetland compensatory mitigation required by Permit #IP-NO2020-2-N00471 meets state wetland mitigation requirements under Wis. Stat. § 281.36(3r) and Wis. Admin. Code Ch. NR 350 or whether additional or modified conditions are required.

Issue 3: Whether structures and deposits in navigable waters authorized by Permit #IP-NO-2020-2-N00471 meet state requirements and waterway permitting standards under Wis. Stat. § 30.12 or whether additional or modified conditions are required.

Issue 4: Whether the removal of material from the beds of navigable waters authorized by Permit #IP-NO-2020-2-N00471 meets state requirements and waterway permitting standards under Wis. Stat. § 30.20 or whether additional or modified conditions are required.

Issue 5: Whether temporary clear span bridges authorized by Permit #IP-NO-2020- 2-N00471 meet state requirements and waterway permitting standards under Wis. Stat. § 30.123 or whether additional or modified conditions are required.

Issue 6: Whether activities authorized by Permit #IP-NO-2020-2-N00471 meet state water quality certification standards under Wis. Admin. Code § NR 299.04 or whether additional or modified conditions are required.

Issue 7: Whether the Department's Final EIS described the purpose of the proposed project and reasonable alternatives to the proposed project in accordance with Wis. Stat. § 1.11(2)(c)3. and Wis. Admin. Code §§ NR 150.30(2)(b) and (e).

Issue 8: Whether the EIS contained a complete environmental analysis in accordance with Wis. Stat. § 1.11(2)(c) and Wis. Admin. Code §§ NR 150.30(2)(f), (g), and (h).

Issue 9: Whether the construction activities proposed in the notice of intent meet the terms and conditions for coverage under the WPDES Construction Site Stormwater General Permit No. WI-S067831-6.

Bad River alleges that "[t]he Band, its interests, and those of its members will be irreparably harmed by the Project's severe impacts to wetlands and waterways." Petitioners' Brief, Doc. 160, p. 29. This argument relies substantially on the Final Environmental Impact Statement (FEIS) to support the negative and harmful effects that likely could befall the Bad River's members, reservation lands and public lands subject to treaty rights in the ceded territory. The FEIS that DNR produced is meant to provide the agency's analysis of the direct, indirect, and overall impacts of its decision to permit Enbridge's project. Wis. Stat. § 1.11(2)(c); Wis. Admin. Code §§ NR 150.30(1)(b), (2)(g). While Bad River is challenging the FEIS, because it was relied on by the DNR and the ALJ to grant and affirm the DNR permits, Bad River also relies heavily on the FEIS findings to support the negative impacts delineated therein. While Bad River insinuates that the ALJ's consideration of the FEIS on both wetland and waterways and to the Band's cultural and treaty impacts is an error of law, the Court has not been provided with specifics as to why the ALJ's characterizations of the FEIS constitutes legal error rather than an evidentiary finding of fact supporting certain conclusions. The ALJ's Findings of Fact, Conclusions of

Law and Order, in Section IV pertaining to issues 7 and 8 of the contested hearing, recognized that there would be environmental degradation.

The law provides that reasonable alternatives be considered, but the Department is not required to evaluate every potentiality. *Clean Wisconsin*, ¶ 191. “No matter how exhaustive the discussion of environmental impacts in a particular EIS might be, a challenger can always point to a potentiality that was not addressed.” *Id.* (quotations omitted). The evidence presented supports the conclusion that the Department’s EIS contained a project purpose and provided alternatives to the project in accordance with the law. The Petitioners have not met their burden to establish, by a preponderance of the evidence, that these elements of the EIS were legally deficient.

ALJ’s Order, Doc. 8, p. 41, pertaining to Issue 7.

The ALJ further found as to Issue 8 related to the FEIS and the impacts to petitioner:

The arguments presented by the Petitioners on this issue highlight the Petitioners’ disagreement with the Department’s characterizations of temporary impacts and Enbridge’s characterizations of wetlands and their functional values. The Band also raises the issue of timing – for example, much of the information that the Department needed to grant the water quality certification was not provided by Enbridge until summer and early fall of 2024, and the EIS was published in September 2024, so the Department could not have had a holistic picture of the Project’s sediment impacts. These arguments fall short and lack evidentiary support. An EIS is required to provide a genuine analysis of the proposed activities and their environmental consequences, based on hard data. *Wis. Env’t Decade, Inc. v. Pub. Serv. Comm’n*, 105 Wis. 2d 457, 313 N.W.2d 863 (Ct. App. 1981). The Petitioners have not proven that this analysis did not occur here.

Id., p. 42, pertaining to Issue 8.

At this stage of review, it has not been shown to the Court’s satisfaction that these are clearly errors of law, but rather, factual reliances made by the ALJ that petitioners continue to contest. Considering the deference the Court must give the ALJ regarding its factual findings, it is very difficult to issue a full stay of permits primarily because petitioners disagree with the ALJ’s findings.

When a record the size of the one developed in this case over many years is now subject to review, the Court is somewhat handicapped to make bold pronouncements about whether the ALJ did or did not evaluate the issues correctly. Petitioners carry the ultimate

burden and it appears much of petitioners' complaints are fact based. Even when some environmental harm can be shown to be likely, as long as that environmental concern was taken into consideration by the DNR and the ALJ and found to be mitigated enough to grant permits, the existence of those continuing disputes are not sufficient to issue a full stay.

Alleged Errors of Law

There are allegations of errors of law made by petitioners and the NGOs that require careful consideration. As stated earlier, the Court is fully aware of the fact which appears to be conceded, that the construction of Line 5 will have impacts to the environment to one extent or another. Whether the ALJ committed an error of law when considering those impacts is an issue the Court eventually reviews de novo. With that understanding, the alleged errors of law, if they exist, are not afforded the same deference as factual disagreements.

Petitioners and NGOs both dispute the DNR and ALJ interpretation of the interplay between Wis. Stat. §§ 30.12 and 30.20 et al, claiming the issuance of Ch. 30 permits were based on erroneous legal conclusions and should be reversed and remanded. This relates to issues 3, 4 and 5 of the contested case. It appears all parties reasonably conceded that Wis. Stat. § 30.12 permits are only granted to riparian owners. The ALJ substantially addressed the issue of whether Enbridge can obtain § 30.12 permits as an easement holder and not as a riparian owner, as follows:

It is clear that § 30.12 permits are exclusively granted to riparian owners. Riparian rights are non-transferable; they are tied to the ownership of the land abutting the water. Wis. Stat. § 30.133 prohibits severing riparian rights to non-riparians. A riparian owner generally cannot convey or lease out these specific rights to a non-riparian through an easement or other agreement. However, in prior circumstances, the Department has allowed the riparian owner to provide formal written authorization or be a co-applicant for the § 30.12 permit. For complex waterway projects, it is common for a commercial entity to be the primary driver and one applicant for a § 30.12 permit, and then the riparian owner is included as another co-applicant to satisfy the statutory requirement that the person with the underlying right to the shoreline is consenting to the bed disturbance. (See Callan, Tr. at 5197-5198) The riparian owner must stay attached to the permit to provide the legal authority for the structure to exist at that specific location. In *Movrich v. Lobermeier*, the Wisconsin Supreme Court clarified that while the public has the right to use the water, the right to place a structure on

the bed belongs to the riparian owner *or those with their express permission*. 2018 WI 9, ¶ 24, 379 Wis. 2d 269, 905 N.W.2d 807 (2018).

ALJ Order, Doc 8. p. 28.

This Court is alerted to a proffered argument by the DNR suggesting a history of granting permits for the primary benefit of the easement holder so long as the riparian owner is a co-applicant. Arguments akin to “that’s the way we have done it in the past” is hardly a strong legal ground upon which to stand. However, the ALJ and the DNR suggest that the court in *Movrich v. Lobermeier*, *supra*, provides legal cover for such a position. To analyze this, the Court is presuming that the waterways in question that may be subject to Ch. 30 permits are rivers and streams subject to the trust doctrine. The Court also assumes that these waterways are natural and not man-made. It is well settled law in Wisconsin that riparian owners hold qualified title to the beds of navigable streams and rivers.

[C]ommon law in Wisconsin provides that a riparian owner holds qualified title to the geographical center of a navigable stream. *State v. Trudeau*, 139 Wis.2d 91, 101, 408 N.W.2d 337 (1987) (citing *Muench v. Pub. Serv. Comm’n*, 261 Wis. 492, 501–02, 53 N.W.2d 514, 55 N.W.2d 40 (1952)). It follows that since a riparian owner holds qualified title to the center of the stream, where a riparian owner holds qualified title to both shores of the stream, the riparian owner has qualified title to the entire bed of the stream as well.

FAS, LLC v. Town of Bass Lake, 2007 WI 73, ¶ 11, 301 Wis. 2d 321, 331–32, 733 N.W.2d 287, 292.

The public trust doctrine vests the ownership of land *under lakes*—i.e., lake beds—in the state. By contrast, the public trust doctrine in Wisconsin gives riparian owners along navigable streams a qualified title in the stream beds to the center of the stream, while the state holds the navigable waters in trust for the public. In reality, the state effectively controls the land under navigable streams and rivers without actually owning it.

Rock-Koshkonong Lake Dist. v. State Dep’t of Nat. Res., 2013 WI 74, ¶ 78, 350 Wis. 2d 45, 82, 833 N.W.2d 800, 819.

Movrich did not deal with a natural lake or stream, but rather a man-made flowage, which meant that a riparian owner may not necessarily own the bed of the flowage which was the case in *Movrich*. The ALJ apparently relied upon the following language in *Movrich* to

support the proposition that as long as the easement owner includes the riparian owner in the Ch. 30 permit application, the statute will be satisfied:

We conclude that, as to the pier issue, Movriches have failed to establish that they are entitled to those riparian rights that are incidental to property ownership along a naturally occurring body of water where the lakebed is held in trust by the state or that the public trust doctrine creates an exception to Lobermeiers' property rights in the waterbed that is sufficient for placement of Movriches' pier on Lobermeiers' property. Therefore, Lobermeiers may prevent Movriches from installing a pier onto or over Lobermeiers' property **without their permission**. Emphasis added.

Movrich v. Lobermeier, 2018 WI 9, ¶ 55, 379 Wis. 2d 269, 298, 905 N.W.2d 807, 820–21.

Here the ALJ's reliance is on a case in which there was clearly a dispute between private property interests. The ALJ's reliance on *Movrich* to extend the language of Wis. Stat. § 30.12(3m)(a) is suspect.

For a structure or deposit that is not exempt under sub. (1g) and that is not subject to a general permit under sub. (3), and for a structure or deposit for which the department requires an individual permit under sub. (2m) or s. 30.206 (3r), a riparian owner may apply to the department for the individual permit that is required under sub. (1) in order to place the structure for the owner's use or to deposit the material.

Wis. Stat. § 30.12(3m)(a).

Both Enbridge and the DNR comfortably claim that issuing § 30.12 permits with co-applications with the corresponding riparian owners has been commonplace, but neither can cite a case or statute directly authorizing such a practice. If *Movrich* is the best reliance there is, this practice may be on tenuous legal footing.

Enbridge is still in the process of obtaining § 30.12 permits. Until those permits have been issued, Enbridge could not effectively begin construction near the locations where such permits are needed. Nevertheless, as this Court mentioned on the record on February 26, 2026, one of its concerns at this stage is where the reroute passes under, over or on the public trust waters of Wisconsin. These are highly sensitive areas, not only for Bad River, which relies on these waters, but also for all the citizens of this state. The Bad River and

its headwaters and tributaries are a unique and special place. On this narrow legal issue, the irreparable harm near this waterway which cannot easily be rectified by other means or remedied at law is weighed against the need to show a strong likelihood of success. The intersection of these two factors regarding the ALJ's reliance on *Movrich* to substantially support her modification to allow co-applicants to solve an obvious legal problem is sufficient for this Court to conclude that Bad River and the NGOs have shown more than a mere possibility of success on the merits and it is satisfied that they can make an adequately strong showing of success on the merits on this issue.

Allegation of Temporary vs. Permanent

Petitioners assert the ALJ erred for not making a finding that tree clearing is either temporary or permanent. However, it is this Court's opinion that the ALJ need only make factual findings on the statutory criteria at issue and provide the basis of the decision in sufficient detail for a reviewing court to evaluate. *Clean Wis., Inc. v. PSC Wis.*, 2005 WI 93, ¶ 145, 282 Wis. 2d 250, 700 N.W.2d 768. It is not a requirement to address every issue raised by a party, as long as the record supports the final conclusion. Here it goes without saying that to cut a tree means that particular tree is forever gone. That is a given, but it is obviously not determinative from the point of view of a permanent versus a temporary impact. The issue before the ALJ was whether the DNR's mitigation plans and suggestions complied with Wis. Stat. § 281.36 and Wis. Admin. Code Ch. NR 350. The ALJ seemed to resolve that issue and upheld the DNR's mitigation approach, even though petitioners obviously objected to such mitigation (ALJ Decision at 24-25). A fair inference is that the ALJ rejected petitioners' temporary versus permanent theory by weighing conflicting expert testimony and made a reasoned finding. Again in this regard, the Court views this issue as more of an honest disagreement with the evidence, not a recognizable error of law. Wis. Admin. Code § NR350.003(39) defines temporary impacts as follows:

"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.

Note: Temporary impacts may include, but are not limited to, open trenching, timber mat placement, or temporary vegetation clearing.

In its decision, the ALJ addressed the vegetative clearing issue, which this Court interprets as including the cutting of trees, as follows:

Here, the Petitioners raise concerns about specific impacts that the Project will cause to wetland functional values including vegetative clearing, soil compaction despite the use of construction mats, trenching, blasting, sheet piling that could breach aquifers, and inadvertent releases of drilling mud. They assert that the impacts will be direct, significant, and permanent. Additionally, they raise concerns over cumulative impacts and potential secondary impacts, including the production of methylmercury (a neurotoxin), impacts to hydrologically connected wetlands, and oil spills... Both the Department's recognition that almost any land-disturbing activity (absent projects limited to conservation and restoration) creates an initial net negative impact and the mandate in Kohler to consider the "entirety of the project" necessitate an evaluation that considers both minimization and mitigation. If the Department were barred from considering the restorative effects of mitigation under Wis. Stat. § 281.36(3r) when determining overall functional outcomes, then § 281.36(3r) would be rendered meaningless. Here, the Department examined impacts to wetland functional values, water quality, and the environment, and after requiring avoidance and minimization where possible, the Department then integrated these factors into its mitigation requirements¹⁵ in the permit, concluding that the Project in total will not result in a significant adverse impact and will comply with Wis. Stat. § 281.36(3n)(c)3. ¹⁶ The Petitioners have not met their burden to show that the Department's determination – that when reviewing the totality of the Project including mitigation, the Project will not cause significant impacts to wetland functional values, water quality, or the environment – was improper.

ALJ Decision, Doc. 8, p. 23-24.

The reasonable inference is that the ALJ concluded that tree cutting is part of vegetative clearing and, by implication, concluded that the cutting is temporary in nature, presumably because trees can be replanted or regenerate on their own as part of a wetland restoration. To claim that an error of law occurred in this regard is simply not a reasonable reading of the ALJ decision. In any case, this Court cannot at this stage conclude this is an error of law situation as opposed to a factual dispute.

Petitioners and NGOs also argue that Enbridge is being allowed by the DNR to circumvent Wis. Stat. § 30.12 permits by applying for dredging permits under § 30.20 et al and §

30.208(3)(f). This relates to issue 4 in the contested case. Petitioners are concerned that § 30.20 offers a convenient end around to § 30.12. The parties dispute that Enbridge's intended use of horizontal drilling to place the rerouted pipe line under certain navigable waterways or wetlands requires certain Ch. 30 permits. Enbridge claims petitioners failed to adequately raise this issue at the contested hearing. If so, the issue is likely waived in this proceeding. Regardless, petitioners cite no authority suggesting placement of a pipe line under a waterway requires a permit under Wis. Stat. § 30.12.

Permits under § 30.20 do not statutorily require a riparian owner to apply. Petitioners do not like that arrangement, but fail to convince this Court why the statute does not apply to these permits. The ALJ found that the DNR had closely studied the issue and requested multiple construction plan modifications to minimize impacts to the waterways along the reroute. Unlike the legal issue pertaining to the riparian owner and the proper applicant, the petitioners' primary concerns with the ALJ's and the DNR's determination that certain permits do not require a riparian owner because they fall under § 30.20 appears to be substantially a disagreement about the ALJ's findings of fact and the ALJ's belief that petitioners did not meet their burden of proof at the contested case proceeding.

Furthermore, the ALJ affirmed the § 30.20 dredging permit, finding the proposed activities consistent with the public interest. See ALJ Decision, Doc.8, p. 29-32. Based on the portion of the record submitted to the Court to date, it appears the ALJ was able to make a reasoned determination that matters such as blasting are common enough in the project area in the past and that the DNR and Enbridge were taking steps consistent with the public interest as required by § 30.20. Disagreeing with a factual determination will not be sufficient, considering the deference given to the ALJ in this arena. At this stage of the Court's review prior to the full record being filed, it is satisfied that the ALJ's decision appears to have sufficient details to establish that the DNR's interpretation was reasonable.

Petitioners' positions regarding the DNR's wetland permitting process amount to little more than disagreeing with the factual findings by the ALJ, with a few exceptions. Petitioners

first argue that the ALJ wrongly placed the burden of persuasion on them to show why they believed the permit was unlawful. (See Doc. 47, p. 10-11.) First, the DNR is correct to point out that “it is black-letter law that ‘[t]he burden in a [Wis. Stat.] ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action.’ *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984).” DNR Brief, Doc. 75, p.8. The ALJ commented on wetland delineation and quality and then focused on the adverse impacts the project will have, including vegetative clearing, soil compensation, trenching, blasting, breaches to an aquifer, horizontal drilling, oil spills, mercury release and overall site mitigation. Petitioners disagree significantly with much of what the ALJ relied on, but they have failed to convince the Court at this stage of the review that the disagreements are errors of law rather than factual disputes and strength of evidence issues. As stated several times, those arguments alone will not be sufficient to stay permits.

Petitioners claim here, amongst many things, that the ALJ was without sufficient information to issue the wetland permits. That very argument was apparently made to the ALJ and was denied, in the ALJ’s opinion, because the petitioners were unable to meet their burden. The same can be said for the arguments against permits for dredging under Wis. Stat. § 30.20. The ALJ concluded that petitioners failed to demonstrate by the evidence presented that the DNR’s determination that “public interest” standard was not met.

Petitioners’ allegations relating to the water quality certifications, the storm water permits and the violation of the Wisconsin Environmental Policy Act suffer the same misgivings. Claiming an error of law exists while wrapping the argument in the cloak of a factual disagreement is not persuadable to the Court when it considers whether to issue a stay.

Furthermore, this Court will not grant a stay based on assertions that the ALJ did not cite sufficiently to the record when it does not have the complete record before it. The DNR will issue a wetland permit upon determining that all the following apply: 1) The proposed project represents the least environmentally damaging practicable alternative taking into

consideration practicable alternatives that avoid wetland impacts. 2) All practicable measures to minimize the adverse impacts to wetland functional values (WFVs) will be taken. 3) The proposed project will not result in significant adverse impact to WFVs, in significant adverse impact to water quality, or in other significant adverse environmental consequences. Wis. Stat. § 281.36(3n)(c)1.3. § 281.36 of the statutes reflects Wisconsin's wetland permitting focus on the potential and real impacts to WFVs such as the functions, benefits, and uses wetlands provide, which may include flood retention, groundwater recharge, sediment filtration, shoreline protection, habitat, recreation and the like. Wis. Admin. Code § NR 103.03(1). Wis. Stat. § 227.47(1) provides that "findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence." Obviously, the requirement is not to cite to every bit of evidence in the record to support a proposition. In a case of this magnitude, such a requirement would result in decisions being hundreds of pages in length. The Court agrees with the analysis of the DNR and Enbridge in this regard.

The remaining issues raised by petitioners pertaining to compliance with the Endangered Species Act, water quality standards and storm water permits lack sufficient basis to show an error of law sufficient to establish a likelihood of success, again because the allegations appear to be fact based rather than based on an error of the law.

As to the idea raised by petitioners that the ALJ lacks authority to modify permit conditions, this argument is baseless. Wisconsin law is clear that an ALJ can modify permits if supported by the record. *Clean Wis., Inc. v. DNR*, 2021 WI 171, 398 Wis. 2d 386, 961 N.W.2d 346 (2021). Petitioners apparently do not dispute that an ALJ can modify a permit, including by altering permit conditions. Instead, they argue that the modifications here are barred by *Kohler Co. v. DNR*, 2024 WI App 2, 410 Wis. 2d 433, 3 N.W.3d 172 and *Meteor Timber, LLC v. DHA*, 2022 WI App 5, 400 Wis. 2d 451, 969 N.W.2d 746. Unlike *Kohler* and *Meteor*, in this case the ALJ simply added criteria to a permit based on the evidence presented, rather than issuing a permit and allowing modification subsequent thereto after more information was obtained.

Conclusion

This Court has determined that the best standard by which to judge whether a stay is appropriate after a contested case hearing under Wis. Stat. § 227.54 is to consider the ALJ decision as a final decision for appeal, analogous to an evidentiary trial at the circuit level similar to stays pending appeal under Wis. Stat. § 808.07 and to look at the *Waity* factors: 1) movant needs a strong showing of likely success on the merits; 2) movant establishes that it will suffer irreparable harm if a stay is not granted; 3) the movant shows no substantial harm will come to other interested parties; and 4) whether the movant shows that a stay will do no harm to the public interest. As to the final factors, because the stay issued by the federal court to allow Enbridge to continue use of Line 5 on the Reservation past the June, 2026 deadline, no substantial harm will result to gas and oil users in other areas, because Line 5 will remain open for the time being.

Under certain circumstances, Enbridge could very well succeed on its request for a bond. The Line 5 project is being litigated in multiple courts at the state and federal levels. There is no particular end in sight to the litigation. However, the stay the Court is entering today falls substantially parallel to Enbridge's need to obtain other permits for particular locations on the reroute of Line 5. These additional permits were needed regardless of this Court's action. Therefore, at this juncture the Court will not order a bond against petitioner.

ORDER

The request for a stay is substantially denied and partially granted. Enbridge's permits previously granted are stayed only in relation to work areas along Line 5 for which Enbridge is required to obtain additional permits under § 30.12 that require a riparian owner. Construction at or near those sites are stayed until further order of the Court. Otherwise, the remaining permits and authority to act on those permits are unaffected and the request to stay those portions is denied.