Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In Re: 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.

DHA Case No. DNR-25-0002
DNR Case Nos. 24-048 and 24-049

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The PARTIES to this proceeding are:

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PROCEDURAL HISTORY

On November 14, 2024, the Wisconsin Department of Natural Resources (Department) issued a combined Wetland and Waterway Individual Permit #IP-NO-2020-2-N00471, along with a Water Quality Certification and coverage under the Wisconsin Pollution Discharge Elimination System (WPDES) general permit No. WI-S067831-0, to Enbridge Energy, LP (Enbridge) for Enbridge's Line 5 Segment Relocation Project in Ashland, Bayfield, and Iron Counties (Project). On December 12, 2024, the Bad River Band of Lake Superior Chippewa (Band), by its attorneys, Earthjustice, and 350 Wisconsin, League of Women Voters of Wisconsin, and Sierra Club, by their attorneys, Midwest Environmental Advocates, and Clean Wisconsin (collectively Environmental Petitioners), filed Petitions for a Contested Case Hearing with the DNR pursuant to Wis. Stat. §§ 227.42, 30.209, and 281.36(3q). By letter dated January 2, 2025, the Department granted the requests for a contested case hearing on nine issues raised by the Petitioners.

On January 24, 2025, the case was forwarded to the Division of Hearings and Appeals (DHA). Administrative Law Judge (ALJ) Angela Chaput Foy was assigned to the matter. On February 28, 2025, the ALJ issued an order staying the activity, Project, and coverage under the discharge permit pursuant to Wis. Stat. §§ 30.209(1m)(c) and 281.36(3q)(d). Pursuant to due notice, a prehearing conference was held on March 31, 2025, and a scheduling order was issued on April 7, 2025.

On April 15, 2025, an order was issued clarifying the language of the nine issues for hearing. The issues for hearing, as clarified, are:

(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.

(2) Whether wetland compensatory mitigation required by Permit #IP-NO-2020-2-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.

(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.

(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.

(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.

(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.

(7) Whether the Department's Final Environmental Impact Statement (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).

(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).

(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.

A final prehearing conference was held with the parties on July 22, 2025, to address logistics of the hearing with the parties. In accordance with the scheduling order, the parties filed prepared testimony pursuant to Wis. Admin. Code § NR 2.14(5) on August 11, 2025. The prepared testimonies were marked as exhibits and admitted at the hearing.

Pursuant to due notice, a hearing was held in person on August 12, September 3, September 5, September 8-9, September 15-18, September 22-26, and September 29-October 3, 2025. The hearing was held at the Northwood Technical College Conference Center in Ashland, Wisconsin on August 12 and September 15-18, 2025. The other hearing days were held at the Hill Farms State Office Building in Madison, Wisconsin. Each day of hearing was also available by Microsoft Teams video for remote observation by the public. The hearing was transcribed by court reporters. All parties filed post-hearing briefs as closing arguments. Their initial briefs were filed on November 10, 2025, and their response briefs were filed on November 24, 2025.

The record in this matter includes the transcript[1] from the hearing and Exhibits 1-6, 9-17, 19, 21, 23, 25, 28, 32-38, 40-42, 46-55, 100-110, 114, 115, 115A, 115B,[2] 116-123,[3] 126-131, 200-202, 204, 204A, 209-210, 220-241, 242, 242A, 243, 244, 244A, 249-253, 301-312, 314-324, 325, 325A, 326-336, 339-340, 342-344, 346-347, 350, 352, 352A, 353, 354, 354A, 355, 355A, 356-361, 364, 364A, 365, 369-370, 373-388,[4] and 400-1011.[5]

FINDINGS OF FACTS

1. Enbridge Energy, LP (Enbridge) is a North American energy infrastructure company. It delivers energy sources such as wind, solar, hydrogen, geothermal, crude oil, and natural gas. Enbridge's Mainline Pipeline System spans over 3,200 miles and transports approximately three million barrels of crude oil per day. The U.S. portion of the Mainline, known as the Lakehead System, includes 1,552 miles of pipeline in Wisconsin. (Ex. 378 at 1-3).

2. Line 5 of the Lakehead System is a 645-mile-long 30-inch pipeline that originates at Enbridge's terminal in Superior, Wisconsin and traverses Michigan, terminating near Sarnia, Canada. Line 5 transports an average of 540,000 barrels of feedstock each day, which is fractionated and/or refined into propane, butane, gasoline, diesel fuel, jet fuel, and other products. Line 5 is unique in that it has the equipment to transport both crude oil and natural gas liquids. It was built in 1953 by Enbridge's predecessor. (Ex. 378 at 3-4; Ex. 636 at 8; Ex. 910; Ex. 631 at 29)

3. The Bad River Band of Lake Superior Chippewa (Band) is a federally recognized sovereign Tribal Nation with treaty-guaranteed reservation lands in Northern Wisconsin. Additionally, the Band retains off-reservation treaty rights to hunt, fish, gather, and engage in traditional activities. (Chairman, Tr. at 1301, 1308)

4. Twelve miles of Line 5 passes through the Band's Reservation. (Ex. 378 at 4-5; Ex. 904 at 12)

5. In 2013, Enbridge's lease of land within the Reservation for Line 5 expired, and Enbridge submitted an application to renew the lease. (Ex. 910)

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[1] The 29 transcripts from the 19 days of hearing were consolidated into one document and Bates numbered. Citations to the transcript in this decision reference the Bates page number of this consolidated transcript (Tr.), and include the name of the witness testifying (Witness, Tr. at Bates page #).

[2] Exhibit 115 referred to a Blasters' Handbook; 115 is the cover page of the handbook. The admission of the handbook is limited to the two excerpts, 115A and 115B.

[3] Exhibits 110, 114, 116, 118, and 120 each have subparts, and all subparts of these exhibits were also admitted into evidence.

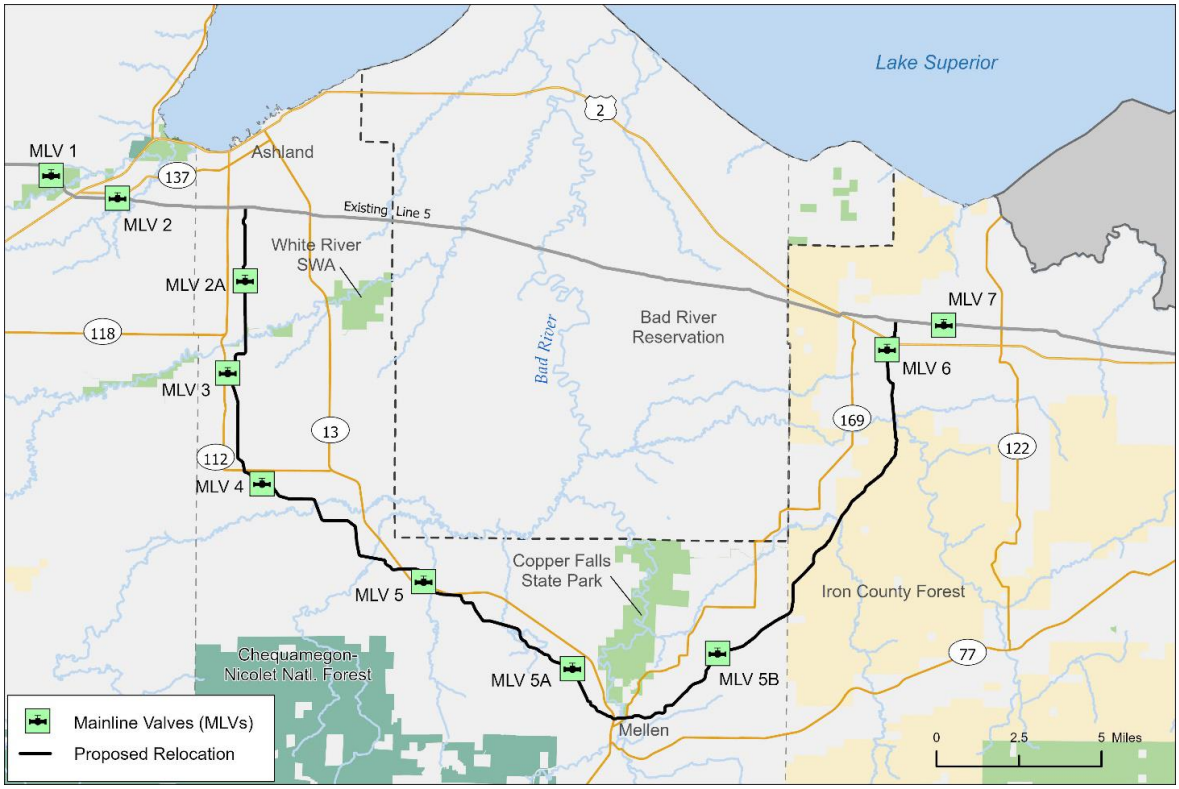
[4] Exhibits 354, 355, and 383 each contain a document and a video. The video is the "A" version of these exhibits.

[5] Pinpoint citations to page numbers of exhibits in this decision reference the Bates page number of the exhibit.

6. The Band raised concerns about the safety of Line 5 with Enbridge, following an Enbridge crude oil spill in the homelands of the Nottawaseppi Huron Band of Pottawatomi in 2010 in Michigan. Enbridge and the Band began discussions of the potential new lease but were unable to reach an agreement. In January 2017, the Band initiated an action seeking Enbridge's ejectment from the Band's property. (Ex. 636 at 8; Ex. 378 at 6; Ex. 904 at 287; Ex. 910 at 15-16, 34-35)

7. Following litigation, Enbridge was ordered to discontinue use of the portion of Line 5 that crosses the Reservation by June 16, 2026.[6] (Ex. 378 at 6)

8. Enbridge developed the Line 5 Wisconsin Segment Relocation Project (Project) to reroute a segment of Line 5 so that the line is entirely outside the Reservation. The Project involves constructing 41.1 miles of the 30-inch diameter pipeline through Bayfield, Ashland, and Iron Counties. The proposed 41.1 miles of new pipeline and 10 new mainline block valves of the Project would replace approximately 20 miles of existing Line 5 pipeline. It crosses the cities of Ashland and Mellen and the towns of Gingles, Marengo, Morse, White River, Anderson, Gurney, Saxon, and Eileen. Most of the Project would occur on private land, except for approximately 7.5 miles on Iron County Forest land. (Ex. 378 at 7; Ex. 631)



(Figure 1.1-2, Enbridge's proposed relocation route and location overview, Ex. 807 at 29)

[6] Each party appealed the order to the Seventh Circuit Court of Appeals, and a decision is still forthcoming. *Bad River Band v. Enbridge Energy Co., Inc.,* 2023 WL 4043961 (W.D. Wis. June 16, 2023).

9. The Project requires Enbridge to clear land along the Project right-of way (ROW) and temporary workspaces, construct access roads, excavate trenches, install and bury the pipeline, and restore the sites. The ROW would be used for pipeline installation and maintained after construction. Most of the new pipeline for the Project would be laid by digging a long trench and lowering the pipe into it. (Ex. 807, §§ 2.5-2.6; Ex. 630 at 72-74; Ex. 631; Ex. 633)

10. Significant portions of the Project's route have been largely undisturbed by human impact in the last century. The proposed route intersects numerous wetlands. It is located within the Fish Creek-Frontal Chequamegon Bay, White River, Marengo River, Headwaters Bad River, Tyler Forks, Potato River, and Bad River-Frontal Lake Superior watersheds. Many wetlands within the Project route are high-quality and exhibit high functional values and high floristic integrity. They are sensitive to disturbances of soils, hydrology, and vegetation. (Willman, Tr. at 4145:18-23; Ex. 807 at 499-500)

11. The Project also plans to use several methods to cross waterbodies and wetlands. Trenching would occur to construct the pipeline at approximately 70 waterway crossings. Most of the trenching would be completed with a backhoe or a wheel-type excavator, but blasting would also occur where necessary to bury the pipeline to the required depth. Additionally, horizontal directional drilling (HDD) and the direct bore method are planned to cross some waterways. HDD and direct bore are subsurface, so they avoid directly impacting surface features. HDD requires drilling a pilot hole and then enlarging the hole through successive ream borings. Direct bore uses a micro tunnel boring machine to drill the path for the pipe. (Ex. 807 at 88-102, 109-114; Ex. 630 at 23-29, 72-74)

12. Once the pipeline is installed, the Project plans call for Enbridge to bury it and then restore the area. Burying the pipeline includes backfilling with material removed from the trench, excess rock from blasting, or clean granular fill such as sand. Restoration includes grading, seeding, and stabilization. (Ex. 630 at 15-16, 74; Ex. 831; Ex. 630 at 74-80)

13. On December 17, 2019, Enbridge met with the Wisconsin Department of Natural Resources (Department) for a required pre-application meeting. The Department provided Enbridge with information including the Department's authority, the need to complete an Environmental Impact Statement (EIS), the need to avoid and minimize wetland impacts, the need to appropriately limit waterway impacts, and the need to comply with protections for endangered and threatened species and habitats. (Ex. 631 at 25)

14. On February 11, 2020, Enbridge applied to the Department for permits, certifications, and authorizations needed to construct the Project, including:

    a. A water quality certification under the Clean Water Act, which would certify that the Department had reasonable assurances to conclude that the Project would not violate Wisconsin water quality standards; and

b. An individual wetland and waterway permit authorizing construction activities such as trenching, dredging, HDD, blasting, and site restoration. (Ex. 631; Ex. 633; Ex. 769; Ex 650)

15. As part of its application, Enbridge also submitted an Environmental Impact Report to the Department, which provided a description of the Project and Enbridge's analysis of the potential environmental effects of the Project. (Ex. 631 at 25)

16. Beginning in 2020 and continuing through 2024, the Department had continuous, ongoing, and frequent communication and meetings with Enbridge, its consultants, and local, state, and national environmental advocacy organizations regarding the Project. (Ex. 809 at 7)

17. On June 8, 2020, the Department posted a Notice of Pending Application and Public Hearing on the EIS that it planned for the Project. On July 1, 2020, the Department held a hearing on the completeness of Enbridge's permit application and the scope of the proposed EIS. In addition to oral comments at the hearing, the Department received over 2,100 written comments. (Ex. 633; Ex. 846)

18. In August 2020, Enbridge submitted a revised Environmental Impact Report. (Ex. 631 at 25)

19. On September 23, 2020, Enbridge filed its Notice of Intent for coverage under the storm water general permit, which would authorize discharges of storm water associated with the Project. (Ex. 699)

20. Beginning in 2020 through 2024, the Department and Enbridge engaged in a review of the Project, which included the Department requesting additional information and Enbridge responding with information, data, and revisions to its plans. (Exs. 401-422; Exs. 424-425; Ex. 443; Ex. 446; Ex. 506; Exs. 510-513; Exs. 518-537; Exs. 544-562; Ex. 688; Exs. 690-692; Exs. 861-896; Ex. 1001; Exs. 1007-1010)

21. Enbridge submitted wetland delineations to the Department that were conducted by Environmental Resource Management, Inc. (ERM), a professional wetland consultant, for the entire 41-mile Project route. The delineations were conducted along a corridor of approximately 300 to 500 feet along the route, expanding significantly wider than the pipeline ROW, staging areas, temporary workspaces, and access routes. Field work for the first field surveys occurred between August and October 2019, and a second set of surveys was conducted between May and July 2020. Enbridge delineated and identified approximately 101.1 acres of wetlands within the Project area. Approximately 28.1 acres were identified as palustrine emergent (PEM), 10.2 acres were palustrine scrub-shrub (PSS), and 62.8 acres were palustrine forested (PFO). The most common wetland plant communities were hardwood swamp (58.9 acres), fresh (wet) meadow (24.7 acres), and shrub-carr (7.0 acres). (Ex. 807 at 484; Ex. 587 at 5; Ex. 684 at 4; Ex. 631 at 30-31)

22. Enbridge also conducted the Department's Wetland Rapid Assessment Methodology (WRAM) for each wetland identified. WRAMs provide a standardized approach to

characterize wetland condition and functional values based on observable characteristics. Enbridge assigned an overall functional value based on a compilation of the ratings from the individual functional value categories. The Department does not recommend a single, overall WRAM rating approach, but instead assigns individual ratings to each functional value category. Enbridge assessed approximately 26.0 acres of wetland as high functional value, 57.1 acres of medium functional value, 10.1 acres as low functional value, and 8.0 acres of low-invasive functional value. Based on Enbridge's WRAM assessments, almost half of the PFO and PSS wetlands that would be permanently cleared provide a "High" wildlife habitat functional value and "High" floristic quality. Almost one quarter of the wetlands provide "High" or "Exceptional" flood and stormwater storage, water quality protection, and ground water processes functional values. (Ex. 631 at 30-31)

23. Beginning in September 2020, the Department completed field investigations throughout the proposed Project area, and continued these field investigations in August 2021, March 2023, June 2023, July 2023, and October 2023, to independently evaluate wetland boundaries, wetland quality and functions, waterway characteristics, potential geohazards, and potential environmental impacts of the Project. Additionally, Department fisheries staff completed field surveys within portions of the Project area in July and August 2023. (Ex. 631 at 30)

24. The Department contracted with a third-party environmental consulting firm, TRC Environmental Corporation (TRC), to help prepare the draft EIS, and the Department collaborated with TRC to coordinate information gathering and analysis. (Ex. 50 at 4; Ex. 52 at 3)

25. Between November 2020 and August 2021, the Department held five joint technical meetings with staff from the Band, the Red Cliff Band of Lake Superior Chippewa, the Lac du Flambeau Band of Lake Superior Chippewa, and the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) on topics to be included in the draft EIS. (Ex. 809 at 3)

26. Between November 2020 and October 2021, the Department sent Enbridge formal information requests for additional information, and Enbridge provided responses and additional information. (Ex. 809 at 3; Ex. 52 at 3)

27. In May 2021, the Department communicated with Ashland County regarding the Project. (Ex. 809 at 3)

28. In August and September 2021, the Department met with the Wisconsin Department of Agriculture, Trade, and Consumer Protection to receive input on sections of the EIS addressing agricultural resources. (*Id.*)

29. Beginning in November 2021 and continuing through 2024, the Department communicated with the Wisconsin Department of Administration's Wisconsin Coastal Management Program to coordinate federal consistency with the state and the U.S. Army Corps of Engineers (USACE). (*Id.*)

30. On November 18, 2021, the Department shared an advance copy of the draft EIS with tribal governments including the Band, federal agencies, and GLIFWC. On December 10, 2021, the Band and GLIFWC submitted preliminary comments to the Department on the draft EIS. (*Id.*; Ex. 633; Ex. 901; Ex. 809 at 3; Ex. 52 at 3)

31. On December 16, 2021, the Department released the draft EIS, posted it on the Department web page, and initiated the public comment period, which ran until April 15, 2022. (Ex. 809 at 4; Exs. 904-905)

32. On February 2, 2022, the Department held a virtual public hearing on the draft EIS. Over 160 individuals testified and over 32,000 written comments were received during the public comment period. Department staff compiled, digitized, and reviewed all of the public comments it received. The Department then ended its contract with TRC and began its work to prepare the final EIS. (Ex. 809; Ex. 631; Ex. 633; Ex. 50 at 5; Ex. 52 at 7)

33. On May 25, 2022, the Department met with the U.S. Environmental Protection Agency (EPA) to discuss EPA's comments to the draft EIS and to discuss how to address the comments. (Ex. 809 at 4)

34. On June 8, 2022, the Department met with the EPA and the USACE to further discuss the draft EIS. (*Id.*)

35. In July 2022, Enbridge and its consultants met with the Department, USACE, and the federal Pipeline and Hazardous Material Safety Administration (PHMSA) to present Enbridge's general approach to their spills analysis. In September 2022, Enbridge submitted a draft Water Quality Monitoring Plan for the Project to the Department and USACE. (*Id.* at 5; Ex. 495)

36. Between August and September 2022, Enbridge performed timed meander surveys for the subset of wetlands it determined to be of medium to high overall functional value from the delineations and WRAM assessments. During the timed meander surveys, Enbridge applied cover classes instead of absolute cover levels, as described by the Department's timed meander survey protocol.[7] Additionally, Enbridge used the midpoint of each cover class to assign coverage values in the Floristic Quality Assessment Calculators. Based on Enbridge's timed-meander survey, approximately two-thirds of the PFO wetlands that would be permanently cleared by the Project have a known Floristic Quality Index rating of "High" or "Exceptional." Of the wetlands surveyed during the timed meander surveys, 55% indicated an "Exceptional" Coefficient of Conservatism (mean C-value) rating and 27% indicated a "High" mean C-value rating. To avoid underestimating the functional value of wetlands when reviewing results from Enbridge's assessments, the Department selected the highest documented functional value

[7] Enbridge used the Braun-Blanquet cover class scale. The Braun-Blanquet method groups values into classes, and each class is then assigned a score. In contrast, absolute cover refers to the exact percentage of ground area covered by a species. (*See* Thompson, Tr. at 2246-2248)

assessment or floristic value calculation as representative of the accurate wetland conditions. (Ex. 631 at 30-31)

37. Beginning in October 2022 and continuing through April 2024, the Department resumed its technical meetings with the Band staff and GLIFWC, to share information and discuss how to address tribal comments. In 2023 and 2024, the Department requested additional information regarding natural resources and cultural resources from the Band and GLIFWC. The Department also reviewed and relied on reports and information that GLIFWC published on its website or in documents available for the public. (Ex. 809 at 4, 6)

38. Beginning October 2022 and continuing through January 2024, the Department and USACE made additional formal information requests to Enbridge, seeking additional information for environmental impact analyses, and Enbridge responded. (*Id*. at 6)

39. Enbridge contracted with RPS Group and DNV GL USA to conduct a spills analysis. The consultants modeled the risk and potential effects of oil spills from the Project route and alternative routes, as well as inadvertent releases of HDD fluids (also called frac-outs) and sediment discharged during pipeline construction at stream crossings. In December 2022, Enbridge met with the Department, USACE, PHMSA, and the EPA to present the analytical methods and preliminary findings of the spills analysis. (Ex. 809 at 5)

40. In May 2023, the Department entered into an agreement with the U.S. Geological Survey (USGS) to provide expertise for evaluating erosion, sediment dispersion, and oil spill modeling work. The USGS advised the Department on the effects of spills on water resources within the Bad River watershed. (Ex. 809 at 5; Ex. 50 at 5-6)

41. In July 2023, Enbridge submitted an update to its Environmental Justice Commitment Plan that included an Environmental Justice Assessment report and a summary of Enbridge's community outreach. (Ex. 809 at 6)

42. Between June and November 2023, Department staff visited numerous sites along the Project route and the surrounding area, including the Reservation, to corroborate information submitted by Enbridge, to better understand proposed construction activities, to view potentially impacted resources, and to collect environmental information. Staff from the Mashkiiziibii Natural Resources Department, the natural resources department for the Band, accompanied Department staff on several of these visits. In November 2023, the Department contracted with a member of the Band, who was also a former Tribal Historic Preservation Officer, to review the Department's drafted materials related to cultural resources and Ojibwe worldviews. (*Id*.)

43. In October 2023, PLG Consulting published a report (PLG Report) containing an overview of the North American hydrocarbon supply chain, an analysis of the markets currently supplied by Line 5, and a discussion of alternative supply chain and market options for Line 5 products. (Ex. 123)

44. On December 11, 2023, Midwest Environmental Advocates (attorneys for Sierra Club, 350 Wisconsin, and League of Women Voters of Wisconsin) provided the PLG Report to the Department. On January 31, 2024, 350 Wisconsin, League of Women Voters of Wisconsin, Sierra Club, and Clean Wisconsin (collectively the "Environmental Petitioners") met with the Department to discuss the PLG Report. (Mednick, Tr. at 3594; Ex. 122, Ex. 2, Ex. 121)

45. On February 2, 2024, Enbridge submitted a revised Water Quality Monitoring Plan to the Department. (Ex. 809 at 6)

46. Between February and July 2024, Enbridge submitted additional information to the Department including site-specific erosion and sediment control plans and maps, details on proposed temporary clear span bridges, site-specific drawings showing proposed bank stabilization methods and channel remediation, a Wetland and Waterbody Restoration and Post Construction Monitoring Plan, and an Invasive and Noxious Species Management Plan. (*Id*.; Ex. 487; Ex. 438)

47. Between March and May 2024, the Department communicated with Tribal Historic Preservation Officers regarding tribal cultural resources. (Ex. 809 at 7)

48. On September 6, 2024, the Department published its final EIS. The 898-page document, with its comment response document, WEPA Compliance Determination, and 36 appendices (constituting 7,020 additional pages), also addressed public comments including many of those raised by the Band and GLIFWC and contained the Department's determination that the EIS satisfied the Department's obligations under WEPA and ch. NR 150 of the Wisconsin Administrative Code. (Exs. 807-845)

49. On November 14, 2024, the Department granted the permit, certification, and coverage that Enbridge required for construction of the Project.

    a. The Department issued Enbridge a combined individual Wetland and Waterway Permit #IP-NO-2020-2-N00471, which contains 78 findings of fact and 250 conditions authorizing the construction activities necessary for the Project. The permit includes both general conditions and specific conditions governing HDD, dewatering, prevention and mitigation of invasive species, protection of endangered species, control for erosion and sediment, blasting, waterways, beaver dams, temporary clear span bridges, temporary work structures, permanent bank stabilization structures, dredging, wetlands, construction matting, restoration, and post-construction monitoring. It also requires Enbridge to implement the Environmental Construction Plan dated October 2024, which includes the Invasive and Noxious Species Management Plan, the Erosion Control Plans, and the Compensatory Mitigation Strategy that it approved, in addition to requiring compliance with the Endangered Resources Review. (Ex. 631)

    b. The Department issued Enbridge a Water Quality Certification pursuant to the Clean Water Act, which contains 78 findings of fact and 231 conditions for the Department to confirm that the Project will comply with Wisconsin's water

quality standards.[8] The certification conditions govern notification of commencing and completing discharge, access by the Department, construction, erosion and sediment control practices, equipment used for the Project, minimizing the impact on fish spawning, wetland protections, prevention and mitigation of invasive species, preventive measures, dewatering, water quality monitoring, restoration, independent environmental monitors, and water quality specifically in waterways. Additionally, the certification is limited to the work described in Enbridge's application and Environmental Construction Plan and like the individual permit, it requires Enbridge to implement the Environmental Construction Plan dated October 2024, which includes the Erosion Control Plans, Compensatory Mitigation Strategy, Invasive and Noxious Species Management Plan, and Water Quality Monitoring Plan. (Ex. 633)

c. The Department issued Enbridge a certificate of permit coverage under the Wisconsin Pollution Discharge Elimination System (WPDES) General Construction Site Storm Water Runoff Permit No. WI-S067831-06, which requires all erosion control and stormwater management activities to be done in accordance with the terms and conditions of the general permit. It also mandates that Enbridge follow the Construction Site Erosion Control Plan and Storm Water Management Plan that was submitted as part of its application. (Ex. 655)

50. On December 12, 2024, the Band filed a petition for a contested case hearing with the Department. Also on December 12, 2024, the Environmental Petitioners filed a petition for a contested case hearing with the Department.

51. On January 2, 2025, the Department reviewed and consolidated the petitions and granted a contested hearing on nine issues raised by the Band and Environmental Petitioners.

52. On August 12, 2025, pursuant to due notice, the hearing in this matter began. Members of the public had the opportunity to provide testimony pursuant to Wis. Admin. Code § NR 2.08 at the beginning of the hearing, on August 12, 2025, in Ashland, and on September 3, 2025, in Madison. On August 12, 2025, 46 interested individuals testified. On September 3, 2025, three more individuals testified. The members of the public came from a variety of backgrounds, some with experience in related industries. They presented views that both supported and opposed the Project. Positions varied widely, encompassing support for Enbridge, the need for the fuel Line 5 transports, and potential economic benefits the construction may bring to the area, as well as serious critiques of pipelines, concerns of oil spills based on past Enbridge projects, and calls for alternative fuel sources. (Tr. at 53-264, 360-374)

[8] The U.S. Army Corps of Engineers (USACE) assessed the Project's impact to water quality within the Reservation pursuant to Section 401(a)(2) of the Clean Water Act. USACE conducted a Section 401(a)(2) hearing on May 13-14, 2025. (Ex. 210, Ex. 329-330)

DISCUSSION

Enbridge Energy, LP (Enbridge) owns and operates the Mainline Pipeline System, which spans over 3,200 miles and transports approximately three million barrels of crude oil per day. The U.S. portion of the Mainline, known as the Lakehead System, includes 1,552 miles of pipeline in Wisconsin. Line 5 of the Lakehead System is 645 miles long beginning in Superior, Wisconsin and terminating near Sarnia, Canada. Twelve miles of Line 5 crosses land belonging to the Bad River Band of Lake Superior Chippewa (Band). The Band is a federally recognized sovereign Tribal Nation with treaty-guaranteed reservation lands in Northern Wisconsin and off-reservation treaty rights to hunt, fish, gather, and engage in traditional activities. In 2013, Enbridge's lease for the use of the Band's land for Line 5 expired. While Enbridge applied to renew the lease, Enbridge and the Band were unable to reach an agreement on the terms, and following litigation, Enbridge was ordered to discontinue use of the portion of Line 5 that crosses the Band's Reservation.

Accordingly, Enbridge developed a plan to reroute Line 5 outside of the Reservation. The Line 5 Wisconsin Segment Relocation Project (Project) involves constructing 41.1 miles of the 30-inch diameter pipeline around the Reservation through Bayfield, Ashland, and Iron Counties. Beginning in 2020, Enbridge applied to the Wisconsin Department of Natural Resources (Department) for permits, coverage, and certifications needed to construct the Project, which the Department ultimately granted in 2024 following an extensive investigation, review, and revision process.

This case involves the Petitioners'[9] challenge of the Department's decisions to grant Enbridge an individual Wetland and Waterway permit, Water Quality Certification, and coverage under the Wisconsin Pollution Discharge Elimination System (WPDES) Construction Site Stormwater General Permit to Enbridge for construction of the Project. Prior to making the permit and certification decisions, the Department completed an Environmental Impact Statement (EIS) for the Project, which is also challenged. As a threshold matter, this administrative proceeding is confined to whether the Department's determinations to grant the permit, certification, and coverage were supported by evidence and consistent with applicable law. It is not so broad as to include a policy debate. The proceeding is limited to the factual record and the Department's permitting authority. The Department's permitting authority is limited to that which has been delegated by statute. *George J. Capoun Revocable Trust v. Ansari*, 2000 WI App 83, ¶ 7, 234 Wis. 2d 335, 342, 610 N.W.2d 129, 133 (Ct. App. 2000).

The Petitioners were granted a contested case hearing on nine issues related to these Department determinations. The permits, certification and EIS, will each be addressed in turn. This decision will address each Department decision in the context of the related issues for hearing as follows:

I. Individual Wetland Permit

[9] Clean Wisconsin, 350 Wisconsin, League of Women Voters of Wisconsin and Sierra Club (collectively "Environmental Petitioners"), together with the Band, are referred to as the Petitioners.

Issue 1: Whether activities authorized by the permit meet state requirements and permitting standards.

Issue 2: Whether wetland compensatory mitigation required by the permit meets state wetland mitigation requirements.

II. Individual Waterway Permit

Issue 3: Whether structures and deposits in navigable waters authorized by the permit meet state requirements and permitting standards.

Issue 4: Whether the removal of material from the beds of navigable waters authorized by the permit meets state requirements and permitting standards.

Issue 5: Whether temporary clear span bridges authorized by the permit meet state requirements and permitting standards.

III. Water Quality Certification

Issue 6: Whether activities authorized by the permit meet state water certification standards.

IV. Environmental Impact Statement

Issue 7: Whether the Department's Final Environmental Impact Statement (EIS) described the purpose of the proposed Project and reasonable alternatives in accordance with the law.

Issue 8: Whether the EIS contained a complete environmental analysis in accordance with the law.

V. WPDES Construction Site Stormwater General Permit

Issue 9: Whether the construction activities proposed in the notice of intent meet the terms and conditions for coverage under the general permit.

VI. Modified Permit Conditions

Pursuant to Wis. Admin. Code § NR 2.13(3), the Petitioners have the burden of proving each identified issue by a preponderance of the evidence. This standard requires the Petitioners to establish that the Department's determinations more likely than not failed to comply with the applicable statutory and regulatory standards. If the Petitioners prove by a preponderance of the evidence that the Department lacked sufficient credible evidence consistent with the law, then the Department's determinations are not lawful. *See Meteor Timber, LLC, v. Wis. Dept. of Hearings & Appeals,* 2022 WI App 5, ¶ 54, 400 Wis. 2d 451, 969 N.W.2d 746 (Ct. App. 2021).

I. Individual Wetland Permit

The 41-mile route of the Project intersects numerous wetlands and waterways. It is undisputed by the parties that the Project route is rich with wetlands, many of which exhibit high functional values. Wetlands are areas where water is at, near, or above the land surface long

enough to support aquatic or hydrophytic vegetation and have soils that are indicative of wet conditions. Wis. Stat. § 23.32(1). Flood water storage and moderation, groundwater recharge and discharge, filtration of sediments and pollutants, shoreline stabilization, and habitat protection are important functions of wetlands. Wis. Admin. Code § NR 103.03. Wisconsin law integrates protecting water quality with wetland permitting by the Department, and the permitting process emphasizes avoidance, minimization, and mitigation of wetland impacts.

The Project involves clearing forests, sheet piling, blasting, and trenching, each of which can cause adverse impacts to wetland functional values and water quality. The activities, size, and scope of the Project require Enbridge to obtain an individual permit from the Department. The general process to apply for an individual permit includes meeting with the Department and submitting an application that includes an analysis of practicable alternatives;[10] a wetland delineation; detailed project plans showing proposed fills, access, and grading; a narrative discussing the alternatives considered; and a preliminary mitigation strategy. Then, following a public hearing and public comment period, the Department decides whether to grant the permit. *See* Wis. Stat. § 281.36; Wis. Admin. Code § NR 300.07.

In making the decision, the Department must determine whether the project uses the least environmentally damaging practicable alternative, whether the project uses all practicable measures to minimize adverse impacts, and whether the project will not result in significant adverse impacts to wetland functional values or water quality. Wis. Stat. § 281.36(3n). If the Department issues an individual permit, compensatory mitigation is required to offset unavoidable wetland impacts. Wis. Stat. § 281.36(3n)(d). Mitigation options include purchasing credits from an approved wetland mitigation bank, purchasing in-lieu fee credits from the Department, or conducting and being responsible for its own mitigation in the same watershed. Wis. Admin. Code § NR 350.004.

In this case, on November 14, 2024, the Department issued Enbridge combined Wetland and Waterway Permit #IP-NO-2020-2-N00471, containing 250 conditions, which when followed authorizes the construction of the Project. (Ex. 631) The Petitioners challenge the Department's grant of the permit, arguing that the Department did not have adequate information to determine whether wetland permitting standards have been met. They argue that the Project will cause significant direct, cumulative, and secondary impacts and that the mitigation required by the permit is insufficient.

The Department granted the Petitioners a contested case hearing on two issues related to wetlands and the permit. Each are addressed below. The evidence in the record is sufficient to establish by a preponderance of the evidence that the activities authorized by the permit and the compensatory mitigation required by the permit meet the legal requirements and wetland permitting standards.

[10] The analysis must identify that the project (1) avoids adverse wetland impacts were possible, (2) minimizes impacts to the greatest extent practicable, and (3) does not create other significant adverse environmental consequences. Wis. Stat. § 281.36(3m)(b).

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.

Wis. Stat. § 281.36(3n)(c) requires that in order to issue an individual wetland permit, the Department must find that a proposed project causing a discharge is in compliance with water quality standards and that all of 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 will be taken.
3. 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.

Wis. Stat. § 281.36(3n)(c).

Chapter NR 103 of the Wisconsin administrative code establishes water quality standards for wetlands. It provides the framework for the Department to evaluate activities that may impact wetland functional values. Activities must not result in significant adverse impacts on a wetland's functional values, which include storm and flood water storage and moderation; hydrologic functions such as groundwater discharge and recharge; filtration of sediments, nutrients, or toxic substances; shoreline protection against erosion; habitat for fish, wildlife, and aquatic organisms; and recreational, cultural, and scientific uses. Wis. Admin. Code § NR 103.03(1). A project proponent must demonstrate that no practicable alternative exists that would avoid adverse impacts to wetlands. Wis. Admin. Code § NR 103.08(4)(a)1.

The Petitioners argue that permitting standards were not met in three ways. First, they assert that the Department relied on inadequate information about the location, acreage, and quality of wetlands that will be impacted, and as a result, it lacked information necessary to determine whether permitting standards had been met. Second, they argue that measures to minimize impact to wetland functional values were not taken. Third, they argue that the Project will result in significant adverse impacts to wetland functional values, water quality, and the environment in violation of Wis. Stat. § 281.36(3n)(c)3. Each argument will be addressed in turn.

A. Whether the Department had adequate information about the location, acreage, and quality of wetlands to be impacted by the Project to determine whether permitting standards were met.

A wetland delineation is a survey conducted primarily to identify the boundaries of wetlands based on hydrology, soil, and vegetation. (Willman, Tr. at 4142:24-25, 4143:1-10) This survey method was developed by the U.S. Army Corps of Engineers (USACE) and is required by Wis. Stat. § 281.36(2m). It consists of both field work and a review of resources. The field work involves observing and documenting hydrophytic vegetation, observing and documenting

hydrologic indicators, and sampling and evaluating soils, which are then translated into an identified wetland boundary using GPS-located paired sample points (one documenting wetland and the other documenting upland). (Ex. 587 at 7-10) The survey also reviews resources that indicate the potential presence of wetlands including the Wisconsin Wetland Inventory, soil maps developed by the United States Department of Agriculture Natural Resources Conservation Service, topographic maps, aerial photographs, and antecedent precipitation data. (Willman, Tr. at 4146:14-25, 4147:1-11)

The wetland delineation methodology followed by Enbridge was consistent with the Department's requirements: each wetland identified contained paired sample points and was supported by individual Wetland Determination Data Forms, which identified and documented hydrology, vegetation, and soils. (Willman Tr. at 4151-4153, 4155, 4158; Exs. 591-612, 648) Enbridge's delineations identified wetlands that were not present in the Wisconsin Wetland Inventory, verifying that Enbridge's consultants had traversed the landscape to identify all possible wetlands in the Project area and did not just rely on written resources. (Willman, Tr. at 4159, 4173)

Enbridge's consultants also completed the Department's Wetland Rapid Assessment Methodology (WRAM) for each wetland it identified. WRAM is a tool to assess the functional values of a wetland and qualitatively evaluate the floristic condition of a wetland.[11] It includes observations of wildlife, vegetation surveys, flood and stormwater storage and retention, and groundwater process information. (Willman, Tr. at 4161) The Department does not require WRAM assessments, and it does not usually receive WRAM assessments, or the detailed information that they contain, when evaluating projects for permits. (Callan, Tr. at 5166)

In 2022, Enbridge's consultants also completed timed meander surveys for 73 of the identified wetlands where WRAM assessments indicated moderate to high quality resources. (Ex. 649 at 3) Timed meander surveys are conducted by traversing a wetland in timed intervals and recording observations of vegetation, which are then translated to cover percentages by species. (Willman Tr. at 4182) The survey provides information about the composition and quality of the plant community in the wetland and the functional values it supports, and it refines the coverage percentages of species documented in the WRAM assessments. (Willman, Tr. at 4182-4183). Like WRAM assessments, the Department does not require timed meander surveys, and it does not usually receive timed meander surveys, or the detailed information they contain, when evaluating projects for permits. (*See* Callan, Tr. at 5167)

The Department then, as part of the preparation of the EIS, critiqued the information that Enbridge provided and interpreted the data and findings for a more meaningful review and understanding of the information. For example, in the EIS, the Department presented Enbridge's overall WRAM score characterization of wetlands, and it also reported out the individual WRAM ranking by functional values, expressed in acres and percentages. (Ex. 807 at 419-493) This process allowed the Department to consider functional values independently. (Willman, Tr. at 4180-4181) Additionally, the Department also considered, and reported in the EIS, information

[11] Floristic integrity is not a wetland functional value, but a way of describing the vegetation. *See* Wis. Admin. Code §§ NR 103.03(1), 350.003(17)

from field studies conducted by the Mashkiiziibii Natural Resources Department.[12] (Ex. 807 at 469-473) Finally, the Department considered additional information for wetlands with the highest functional values and presented it in the EIS. For those "high" wetlands that would be crossed by more than 100 feet of pipeline, the Department provided individual functional value ratings and a narrative describing natural communities and anticipated Project impacts. (Ex. 807 at 474-485) For other "high" ranking wetlands with less pipeline crossing, the EIS contains individual functional value ratings and acreages of impacts. (*Id.* at 485-489). This information allowed the Department a more in-depth understanding of the highest value resources in the area so that it could work with Enbridge to avoid and minimize impacts. (Willman, Tr. at 4191-4192)

Despite the wetland delineations, WRAM assessments, timed meander surveys, and the analysis identified in the EIS, the Petitioners argue information was missing from the Department's analysis. Specifically, they say the Department did not confirm wetland boundaries or investigate areas Ms. Alice Thompson, an experienced environmental and wetland consultant with expertise in wetland delineation, described as "missed wetlands" based on her field review in 2023. (Ex. 244; Ex. 200) Additionally, the Petitioners argue that the WRAMs provided by Enbridge were inadequate. They assert that the Department should have conducted a field review of each WRAM instead of reviewing a subset of 15, which revealed inconsistencies and understated wetland functional values. (Willman, Tr. at 4163-4165) They also dispute Condition 234 in the permit, which provides, "You shall submit the final acreage of actual wetland impacts associated with this Project within 30 days of Project completion," arguing that the acreage should be known in advance, not after the wetlands are impacted. (Ex. 631 at 23)

Regarding the Petitioners' claim that wetlands were missed, the permit specifies in Condition 205, "No wetlands may be disturbed beyond the area specifically described in Permit Table 1." (Ex. 631 at 20)[13] If the Project impacts other wetlands, that is unauthorized by this permit. Enbridge would need to seek additional authorization from the Department. (Haller, Tr. at 5030; Callan, Tr. at 5298-5299). Additionally, on cross-examination, Ms. Thompson admitted that what she identified as "missed wetlands" were actually potential wetlands. (Thompson, Tr. at 2352-2353) She did not complete a soils analysis, which is required under the USACE delineation manual.

Regarding the WRAM assessments, the Petitioners did not establish that WRAMs were required. Mr. Scott Storlid, a wetlands expert with Stantec Consulting Services, Inc., testified that he reviewed them, visited the Project route, and found the assessments accurate. (Storlid, Tr. at 2695, 2726-2727, 2743) Additionally, the Department established that it does not require WRAMs, that it did its own analysis from the data sheets submitted with these assessments, and

[12] The Mashkiiziibii Natural Resources Department is the natural resources department for the Band, similar to how the Wisconsin Department of Natural Resources works for the State of Wisconsin. (Tillison, Tr. 1312-1313)

[13] Permit Table 1 identifies each wetland or waterbody impacted by the Project by ID, milepost, latitude, longitude, project component name (e.g., mainline ROW, access road, etc.), proposed pipeline crossing method (e.g., HDD, trench, direct bore), whether blasting is anticipated, any acreage of temporary wetland impacts, any acreage of permanent wetland conversion, any acreage of permanent wetland fill, its watershed location, the depth of the ordinary high water mark, in addition to other information. (Ex. 639)

that these assessments were not the only information it relied on in assessing the wetlands that may be impacted by the Project.

Regarding Condition 234's mandate to report the final acreage of impacts, this does not authorize Enbridge to impact additional wetlands. As described above, no wetlands may be disturbed beyond what is specifically described in Permit Table 1. However, it was clear from testimony that actual wetland boundaries may change from season to season. In that regard, it would be appropriate for Enbridge to report what acreage was actually impacted at the time the work is done, which is what is required by this condition.

The evidence presented includes an EIS with a thorough examination of the wetland resources that would be affected by the Project. It also includes WRAM assessments (with supporting data sheets), timed meander surveys, and other data defining wetland boundaries, documenting plant communities, wetland functional value ratings, and floristic integrity. Department staff made site visits to Project locations. (Haller, Tr. at 4925) They included permit conditions to address specific concerns. (*See e.g. id.* at 4984, 4997, 5008) Department staff testified that before issuing the permit, they requested additional information from Enbridge, which included revisions to Enbridge's water quality monitoring plan, until they were satisfied that permitting standards were met. (*See* Haller, Tr. at 4980, 4987, 5013) The Petitioners have not met their burden to establish that the Department did not have sufficient information about the location, acreage, and quality of the wetlands as required by Wis. Stat. § 281.36 to evaluate and determine whether the permitting standards were met.

In their critique of Enbridge's wetland assessments, the Petitioners disapproved of Enbridge's use of the Braun-Blanquet method instead of absolute cover to assess the cover and abundance of a plant species. (Thompson, Tr. at 2198-2199, 2246-2248). Braun-Blanquet is a method used to estimate the cover within an area, assigning categories with a numeric scale. It allows for comparison of species and repeatable results. Absolute cover is the actual percentage of the ground surface covered by a specific plant species. (*Id.*) Enbridge proposed modifying the permit and water quality certification to clarify that it will use absolute cover, not Braun-Blanquet, for post-construction monitoring. The proposed modification relates to Condition 242 of the permit (Ex. 631 at 23) and Condition 148 of the water quality certification (Ex. 633 at 20),[14] which provides:

> You shall implement the ECP's Wetland and Waterbody Restoration and Post-Construction Monitoring Plan. This plan incorporates native seed mix as well as bare root stock to reestablish wetland vegetation.

The proposed ***modification*** to the condition states:

> You shall implement the ECP's Wetland and Waterbody Restoration and Post-Construction Monitoring Plan *(the "Wetland Restoration Plan")*. This plan incorporates native seed mix as well as bare root stock to reestablish wetland vegetation. *Notwithstanding anything in the Wetland Restoration Plan to the*

[14] Condition 242 of the permit (Ex. 631 at 20) and Condition 148 of the water quality certification (Ex. 633 at 20) are identical. The proposed modification to the language is also identical.

contrary, the absolute cover method shall in all cases be used instead of the Braun-Blanquet cover classes to record species cover/abundance where and as specified in the Wetland Restoration Plan for post-construction monitoring. Braun-Blanquet shall not be used for post-construction monitoring.

Regarding this proposed change, testimony from Department staff and the Petitioners' experts established that absolute cover is preferred over the Braun-Blanquet method because it is more specific. (Jarosz, Tr. at 4383; Callan, Tr. at 5312) With this evidence, the proposed modification is appropriate for post-construction monitoring.

B. Whether measures to minimize impacts to wetland functional values were taken.

Wis. Stat. § 281.36(3n)(c)2. requires that "all practicable measures to minimize the adverse impacts to wetland functional values will be taken." Here, Enbridge incorporated minimization measures in its plans, and the Department ensured additional minimization measures were taken by requiring Enbridge to continue to explore reductions, by requiring Enbridge to materially modify its plans to implement minimization measures, and by conditioning further protective practices in permit conditions both before, during, and after construction.

The Petitioners argue that Enbridge should have taken additional measures, but did not, and as a result, the Department should not have found that Enbridge took all practicable measures to avoid wetland impacts. The additional measures offered by the Petitioners include a more thorough investigation for artesian conditions to avoid aquifer breaches, avoiding springs along the Project route by better identifying spring locations, a commitment to monitoring soil compaction levels pre- and post-construction to be able to respond to compacted soils, a commitment to the temporary suspension of construction on vulnerable soil during wet conditions to avoid harm to site soils, and sourcing timber mats from the construction corridor to limit invasive spread. (Ex. 450; Ex. 807)

The record does not support the Petitioners' position, as they failed to demonstrate by a preponderance of the evidence that such additional measures would minimize impacts to wetland functional values. Regarding the above additional measures the Petitioners allege should have been included, the Petitioners did not establish (a) that these measures could actually be implemented without causing additional impacts, (b) that implementing these measures would result in fewer functional value impacts, and (c) that implementing these measures would still allow the Project to meet its purpose. For example, Condition 28 of the permit specifies, "Any springs encountered in the ROW that cannot be avoided by construction must be characterized (i.e., location and flow rate) and documented prior to disturbance. These springs shall be restored to pre-existing flow regimes and conditions as required by the Department." (Ex. 631 at 4) This echoes the Petitioners' call to avoid springs along the Project route, and it accounts for additional springs that may only be discovered once vegetation has been cleared. The Petitioners have not established what additional practicable measures should have been taken to identify and avoid springs that would not cause additional impacts and how these measures would result in fewer wetland functional value impacts.

In reviewing the evidence presented, the Department required significant measures to minimize impacts to functional values in the form of precise, enforceable conditions. These include making route adjustments to the most sensitive areas, specifying construction methods such as controlled blasting setbacks or the use of trenchless crossings where appropriate, implementing timing restrictions and advanced planning to reduce disturbances, and requirements for restoration, monitoring, and contingency procedures. The Petitioners have not established that the Department failed to require that all practicable measures to minimize impacts to wetland functional values were taken to comply with Wis. Stat. § 281.36(3n)(c)2.

C. Whether the Project will result in significant adverse impacts to wetland functional values, water quality, or the environment in violation of Wis. Stat. § 281.36(3n)(c)3.

Wis. Stat. § 281.36(3n)(c)3 requires that "The proposed project will not result in significant adverse impacts to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences." The parties dispute how this statute applies to the Department's permitting process.

The Petitioners assert that the statute imposes a substantive constraint. They contend that the Department must determine what level of wetland impact is the lowest practicable by comparing multiple design, routing, and construction alternatives, and then selecting the option that actually minimizes functional loss. The Band also argues that the Department cannot apply the statute in isolation from the Band's treaty rights. They argue that wetland functional values such as hydrology, vegetation, and wildlife habitat are directly tied to hunting, fishing, and gathering. Finally, the Petitioners also assert that these minimization steps are separate from mitigation, and the Department must exhaust practicable minimization before relying on mitigation. They argue that the Department improperly accepted Enbridge's preferred design, failed to require additional construction methods or rerouting, and treated mitigation as a substitute for stricter minimization.

The Department and Enbridge assert that the language of the statute must be read in context. Wis. Stat. § 281.36(3n)(c)2 requires that "all practicable measures to minimize the adverse impacts to wetland functional values will be taken." This "minimum adverse effect" means the lowest impact that is practicable, not just what is theoretically possible. Practicability includes technical feasibility, safety, reliability, and cost considerations. The statute does not mandate the elimination of all impacts. Finally, they contend that minimization and mitigation are integrated, which allows the Department to consider both minimization and mitigation when evaluating overall functional outcomes because mitigation is part of determining whether the Project's net effect on wetland functional values is minimized.

In *Kohler Co. v. Wisconsin Department of Natural Resources,* 2024 WI App 2, 410 Wis. 2d 433, 3 N.W.3d 172 (Ct. App. 2023), the court of appeals examined the application of Wis. Stat. §§ 283.36(3n)(b) and (c) and concluded that it required the Department to consider the entirety of a proposed project when addressing a wetland individual permit. *Id.,* ¶ 3. It found that § 281.36(3n)(c)3 requires the Department "to evaluate, for example, secondary impacts of a proposed project to [wetland functional values] and the net positive or negative environmental impact of the proposed project." *Id.,* ¶ 38 (internal quotations omitted). While that case affirmed

an ALJ's decision to reverse the Department's wetland permit, its analysis of significant adverse impacts focused on the Department's findings and conditions in the permit, specifically that there were no conditions in the permit addressing the adverse impacts to wildlife. *Id.,* ¶ 31. Additionally, the ALJ found, based on specific testimony from Department staff, that the Department did not consider whether the use of chemicals and contaminates in operating the golf course would reach groundwater and wetlands. *Id.,* ¶ 32.

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.

Unlike the permit in *Kohler,* here the Department evaluated the impacts of concern raised by the Petitioners and conditions in the permit largely address them. The Permit notes that the Project will result in 101.1 acres of direct, temporary impact from clearing. (Ex. 631 at 31) Vegetation clearing is addressed in conditions 32, 43, 57, 60, 139, and 216. (*Id.*) The amount of vegetation clearing was also considered in evaluating the alternative routes for the Project. (*Id.* at 27-28) Soil compaction was addressed in conditions 55, 219, and 236. (*Id*.) Trenching was addressed in conditions 37, 170, 193, and 203. (*Id*.) Additionally, the permit noted that 76.4 acres would be disturbed via open-cut trenching. (*Id.* at 31) Blasting is addressed in conditions 123-127. (*Id*.) Sheet piling is addressed in condition 181, 196, and 221. (*Id*.) Inadvertent releases from drilling are not permitted under the permit, and contingencies for them are addressed in conditions 37, 49, and 107. Similarly, the permit acknowledges the direct impacts, cumulative impacts, and potential secondary impacts to wetland functional values as a result of the Project activities. (*Id.* at 32-33) In the EIS, the Department addressed, acknowledged, and considered how the Project's route or potential secondary impacts could affect the Band exercising treaty-protected activities (*Id.* at 155-265, 632, 790) The Department then evaluated the Project as a whole, as required by *Kohler*, and determined, "Overall, the relationship between Enbridge's short-term use of Wisconsin's environment and the long-term productivity of Wisconsin's environment would be a net negative," similar to "almost any other land disturbing activities." (Ex. 631 at 33) Therefore, the permit requires specific compensatory mitigation, required to compensate for impacts to wetland functional values under Wis. Stat. § 281.36(3r). (Ex. 631 at 33, 37-38)

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 requirements[15] 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.

One potential secondary impact of concern that the Petitioners raise is the potential for construction of the Project to increase methylmercury, a neurotoxin. The median value of mercury observed in the surface water of the Bad River Tribal Lands is more than two-fold greater than the wildlife criteria and human thresholds for total recovered mercury in water supply under the state of Wisconsin standards, which is to say there is a significant amount of mercury already in this system. (Almendinger, Tr. at 885-886) Methylmercury is a mercury ion with a methyl group (a carbon and three hydrogen) attached to it, and it is a potent neurotoxin. (*Id.* at 840). Wetlands have an inventory of mercury and sulfate. (*Id.* at 876-877) When the water table decreases, sediments are exposed to air and oxidize sulfur to sulfate. When the water table rises again, the soil is depleted of oxygen and sulfate-reducing bacteria thrive. These bacteria use the accumulated sulfate and convert it into sulfide. During this metabolic process, the bacteria transfer a methyl group to mercury, creating methylmercury as a byproduct, which becomes bioavailable and may enter the food chain. (*See id.* at 841-842, 995; Ex. 101) Microbes and sunlight can also cause demethylation, and methylation is inhibited by both high and low sulfur levels. (Almendinger, Tr. at 842, 847) The Petitioners assert that studies have demonstrated that changes in the water levels of wetlands can increase methylation, and since the pipeline construction could change water levels in wetlands, the construction could increase methylmercury concentrations. (*Id.* at 842-843) However, wetlands are subject to natural changes in water levels annually. (*Id.* at 877) The studies that the Petitioners' expert relied on focused on how sulfate additions to wetlands, or how droughts lasting up to nine months and causing large 18-inch drops in water table elevation, altered methylmercury production. (*Id.* at 840, 998) Here, the Petitioners are not alleging that the Project will load sulfate in any way, nor are they alleging it will cause droughts like those in the studies. (*Id.* at 878) The most the expert could say was that construction "could" increase methylation, but he was not able to indicate the likelihood or what change, if any, could be attributable to the Project instead of natural variation, or how that impact could be measured. (*See id.* at 878-879, 885, 995, 998) Without that link to show that the change in methylmercury is caused by the Project, the concern is insufficient to find that the Project *will* result in the significant adverse impact of increased methylmercury.

Based on the preponderance of the evidence presented, the Petitioners did not demonstrate that the activities authorized by the permit related to wetlands did not meet state requirements and wetland permitting standards, nor did they establish that the Department did not have adequate information to determine whether the permitting standards were met.

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[15] The specific mitigation requirements are discussed in Issue 2.

[16] Ms. Haller, an environmental analysis and review specialist for the Department, testified that after Enbridge incorporated comments and changes that the Department identified as important to protect public rights features, protect water quality, and protect fisheries and wildlife habitat in the final version of its plans, then she was able to say that the Project was "not going to result in significant environmental consequences." (Haller, Tr. at 4919, 5013)

Issue 2: Whether wetland compensatory mitigation required by Permit #IP-NO-2020-2-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.

To ensure that unavoidable wetland losses are offset by the restoration, enhancement, or creation of other wetlands, the law requires wetland compensatory mitigation. Wis. Admin. Code Ch. NR 350. Wis. Stat. § 281.36(3r) requires the Department to establish and maintain a wetland mitigation program. The program requires applicants to compensate for unavoidable adverse impacts to wetlands.

The use of a wetland mitigation bank is generally preferred over the use of the state's in-lieu fee program and permittee-led mitigation. Wis. Stat. § 281.36(3r)(b); Wis. Admin. Code §§ NR 350.004(4), 350.005(2)(b) (assigning mitigation banks a lower standard mitigation ratio compared to the in-lieu fee program) (*see also* Storlid, Tr. at 2773) The wetland mitigation banking program is a system designed to offset unavoidable wetland losses by allowing a project owner to purchase credits from restored sites. Once a restored site gets approval from the USACE and the Department, the site sells credits to permittees that require compensatory mitigation. The purpose is to try to ensure no net loss of wetlands by offsetting impacts. (*Id.* at 2773-2774) Wisconsin is divided into 12 watershed-based service areas, and a bank can generally only sell credits to projects located within its specific service area. Wis. Admin. Code §§ NR 350.003(2), 350.003 note, 350.004. The USACE determines whether a credit is available to be purchased. 33 C.F.R. §§ 332.8(o)(8) and (9); Wis. Stat. § 281.36(3w)(b). (Storlid, Tr. at 2774) Credits are characterized by location and plant community type, and the system encourages replacement that matches both the type and location of the impacted area. *See* Wis. Admin. Code §§ NR 350.05(2), 350.004(2) (Storlid, Tr. at 2775-6) If a similar plant community is not available, then the ratios are elevated. (*Id.*)

Chapter NR 350 then establishes standards and procedures for wetland compensatory mitigation. The Department must determine the amount of mitigation required for adverse impacts "on a case-by-case basis based on the quality and type of wetlands impacted, the duration of the impacts, the measure of lost wetland function, and the location of the proposed mitigation." Wis. Admin. Code §§ NR 350.005(1)-(2). The loss of wetland function as a result of the permitted activities must be compensated for with "an appropriate mitigation amount." *Id.* The amount of credits required is expressed as a ratio – an amount of credit to be purchased per acre of wetland function impacted. (*Id.* at 2380) Only the ratio for direct impact (permanent loss of a wetland) is set in the regulations. Pursuant to Wis. Admin. Code § NR 350.005(2), the Department multiplies the acreage of direct impact by the mitigation ratio 1.2 if the permittee is purchasing credits from a mitigation bank, requiring a minimum of 1.2 credits per 1 acre of direct impact. Ratios for other impacts are left to the Department to determine. (*Id.* at 2380-2381) The Department *may* determine that mitigation is required for secondary impacts or temporary impacts to wetlands, but it is not mandated, nor is the compensation ratio fixed. Wis. Admin. Code §§ NR 350.005(3) and (4). (Thompson, Tr. at 2383)

The Petitioners assert that the amount of mitigation required under the permit does not meet the basic requirements of Wis. Admin. Code § NR 350.005(2) because the amount of

mitigation required depends on the quality and acreage of wetlands impacted. Because they assert that the Department did not have adequate information about the location, extent, or quality of wetlands that would be impacted, the amount of mitigation the Department required is insufficient.

For the Project, Enbridge calculated the total amount of direct, permanent impact as 0.02 acres. (Ex. 630 at 1796-1800; Thompson, Tr. at 2385-2386) The total amount of conversion impact, converting one type of wetland to another type (e.g. forested wetland is being converted to low-lying vegetation in the permanent ROW and subject to monitoring) is 30.03 acres. The total amount of temporary impact, where the wetland will be impacted by construction and then permitted to return, is 32.76 acres. (Ex. 630 at 1796-1800) Enbridge then assigned different mitigation ratios to different types of wetlands, i.e. emergent, scrub-shrub, and forested, and subdivided these categories into different community types. Additionally, they separated wetlands that were graded high from medium and lower graded wetlands. Enbridge calculated that it should purchase a total of 35.13 credits, pursuant to the ratios. (*Id.*; Storlid, Tr. at 2777) After reviewing the credits available from the banks, Enbridge adjusted the total to 43.87 credits; they elevated the amount when the credits were out of kind. This was needed, e.g. for forested to emergent or shrub-carr to emergent in the ROW. (Storlid, Tr. at 2778) The Department reviewed the plan and requested 4.98 additional credits, requiring a total of 48.85 credits to be purchased by Enbridge. (*Id.* at 2778; Ex. 635 at 8, Ex. 224 at 64)

Enbridge purchased the credits from two compensatory mitigation banks, 46 North and Poplar River. (*Id.;* Thompson, Tr. at 2253) The Band's wetland expert, Ms. Thompson, a senior scientist and experienced wetland delineator, testified that she believed Enbridge's compensatory mitigation was insufficient. (Thompson, Tr. at 2142, 2150) Ms. Thompson expressed concerns that the 46 North Bank is a very young bank without verified tree plantings and demonstrated success, and it is 30 miles west of the start of the Project route in Ashland County. (*Id.* at 2253-2255; Exs. 224-226) She expressed concerns that the Poplar River Bank is even further, 60 miles from the Project, and that the first tree planting at the bank failed. (*Id.* at 2256-2260; Exs. 221-223, 227-234) Overall, she criticized Enbridge merging functions into one value, and also merging the categories of wetlands, which she believed downgraded their quality, which affected what credits were purchased. (*Id*. at 2260-2261)

However, on cross examination, Thompson confirmed that she did not know whether the Department only relied on Enbridge's averages, the merging of categories, when it reviewed the mitigation plan, or if it considered additional information. (*Id*. at 2274-2275) She also admitted that compensatory mitigation does not require a like community for a community replacement, nor does it require a one-to-one replacement for the impacted functional values. The credit basis is not broken down into individual functional values. (*Id.* at 2320-2321) Additionally, she agreed that the two banks were authorized by the USACE to release credits and that there are no mitigation banks selling credits located in the Bad River watershed, which she would prefer. (*Id.* at 2324, 2326-2327)

The exact compensation ratios to be used for this Project are in the Department's discretion. The evidence shows that the Department reviewed Enbridge's plans and then sought adjustments, requiring additional credits to purchased. The credits were purchased from banks

regulated by the USACE, which authorized the release of the credits that Enbridge purchased. The banks are in the Lake Superior bank service area, which is the service area for the Project. The Petitioners have not established that the wetland compensatory mitigation required by the permit fails to meet the requirements under Wis. Stat. § 381.36(3r) and Wis. Admin. Code Ch. NR 350.

II. Individual Waterway Permit

Chapter 30 of the Wisconsin Statutes, with chapter NR 320 of the administrative code, regulates activities in or over navigable waters to protect public rights, navigation, and water quality. The permit for the Project authorizes activities under sections 30.12, 30.20, and 30.123 of the Wisconsin Statutes. Each of these three statute sections shall be addressed separately below.

As a preliminary matter, the parties dispute whether a Wis. Stat. § 30.12 permit (governing structures in a waterway) is required for Wis. Stat. § 30.20 activities (governing dredging in a waterway), i.e. whether a structure permit is necessary because structures are temporarily put in the waterway before dredging can occur. The distinction is relevant because riparian ownership is required for a permit under § 30.12, but riparian ownership is not an element for permits under § 30.20.

Since the primary activity in a § 30.20 permit is dredging, any minor or temporary structures or deposits that are integral to the dredging process is covered under the same permit. *See* Wis. Admin. Code § NR 345.03(5) (defining dredging to include "any part of the process"); Wis. Admin. Code § NR 345.04(2)(c)5 (confirming installation of temporary control measures are authorized under the dredging permit). This clarifies that while the activities for this Project require a permit authorized under § 30.12 and § 30.20, Enbridge must meet the eligibility criteria where a § 30.12 permit is required (for permanent structures below the ordinary high water mark), but it does not need to meet the elements of § 30.12 in each location it is also authorized to dredge under § 30.20.

The Department granted the Petitioners a contested case hearing on three issues related to the Project crossing waterways. In the context of the three issues certified for hearing in this matter, the Petitioners allege that Enbridge is not eligible for the § 30.12 permit because Enbridge is not a riparian owner, that the permit is not in the public interest (or the Department did not have enough information to determine if it was in the public interest), and that Enbridge lacks a necessary incidental take permit.

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.

Wis. Stat. § 30.12 generally prohibits anyone from depositing any material or placing any structure upon the bed of any navigable water without a permit. The construction plan for the Project includes several activities that require placing structures and depositing materials into

navigable waters below the ordinary high-water mark. The Department issued Enbridge the permit authorizing these activities in November 2024. (Ex. 631)

Under Wis. Stat. § 30.12(3m)(a), the Department may grant a permit to a riparian owner to build or maintain structures "for the owner's use." There are two aspects of this statute at issue in this case: whether Enbridge can bring on a riparian owner to have eligibility for a permit and whether Enbridge's Project activities would be for the riparian owner's use.

The Petitioners assert that Enbridge is not a riparian owner, so it lacks eligibility for a § 30.12 permit authorizing structures and deposits in waterways. Wis. Stat. § 30.12(3m)(a). The Band asserts that Enbridge bringing on riparian owners as co-applicants does not cure Enbridge's ineligibility, because the permitted structure must be for the riparian owner's own use, and a riparian right cannot be transferred to a non-riparian owner. Wis. Stat. § 30.12(3m). *See R.W. Docks & Slips v. State,* 2001 WI 73, ¶ 20-22, 244 Wis. 2d 497, 628 N.W.2d 781; *Anchor Point Condominium v. Fish Tale Pro.*, 758 N.W.2d 144, 150 (2008).

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).

Here, Mr. Ben Callan, Director of the Waterways Program in the Division of External Services for the Department, testified that when the Department inquired whether Enbridge had riparian owner consent, Enbridge responded in November 2023 that they did have the required riparian consent. (Callan, Tr. at 5198, 5305-5306; Ex. 519 at 50) Enbridge filed Shoreline Protection Agreements, also referred to as Co-Applicant Agreements. (Ex. 312) Additionally, at the hearing, Enbridge proposed modifying the permit to require that Enbridge make the riparian owner a co-applicant for crossings where permanent bank stabilization measures would be used, otherwise Enbridge would not be authorized to place bank stabilization measures below the ordinary high-water mark. (Callan, Tr. at 5307-5309) Mr. Callan confirmed that this requirement would be the Department's preference. (*Id.*)

The proposed modification relates to Condition 182 of the permit (Ex. 631 at 19) and Condition 209 of the water quality certification (Ex. 633 at 26),[17] which provides:

> Bank stabilization structures shall be installed following the design plans in the Wetland and Waterway Restoration and Post-Construction Monitoring Plan in the ECP, as conditioned in this [permit/WQC], and as approved by the Department.

The proposed *modification* to the condition states:

> Bank stabilization structures shall be installed following the design plans in the Wetland and Waterway Restoration and Post-Construction Monitoring Plan in the ECP, as conditioned in this [permit/WQC], and as approved by the Department. *With respect to the crossings of Bay City Creek at FeatureID sase006p, Beartrap Creek at FeatureID sasb007i, Little Beartrap Creek at FeatureID sasa0471i, the unnamed tributary to the Brunsweiler River at FeatureID sasc1006p; and the unnamed tributary to the Marengo River at FeatureID sase1015i, riprap or other permanent structures shall only be installed below the OHWM after a separate permit has been issued under Wis. Stat. s. 30.12 that includes the riparian owner(s) as co-permittees for those specified crossings*.

Including a requirement for the riparian owner to be a co-applicant to a permit before permanent structures are installed below the ordinary high-water mark would provide clarity and transparency, and it would ensure compliance with Wis. Stat. § 30.12(3m)(a). It requires a separate § 30.12 permit, which would include the riparian owner as a co-applicant to concretely record the riparian owner's express consent, before any permanent structures would be installed in the waterway below the ordinary high-water mark. The Department confirmed that this would be its preference.

The proposed modification references five specific waterway crossings. These are the crossings that Enbridge anticipates installing permanent structures below the ordinary high-water mark as erosion control measures. However, testimony at the hearing indicates that the plans previously included a sixth location. (Watts, Tr. at 2513; Drake, Tr. at 2574) The modification is appropriate, and supported by the evidence, anywhere Enbridge anticipates installing a permanent structure in the waterway below the ordinary high-water mark. While the plans currently provide for these permanent structures at the five locations identified, the requirement is not limited to only those five locations, and the actual **modification** to the permit and water quality certification shall reflect that.

> Bank stabilization structures shall be installed following the design plans in the Wetland and Waterway Restoration and Post-Construction Monitoring Plan in the ECP, as conditioned in this WQC, and as approved by the Department. **Permanent structures shall only be installed below the OHWM after a**

[17] Condition 182 of the permit (Ex. 631 at 19) and Condition 209 of the water quality certification (Ex. 633 at 26) are identical with the exception of "as conditioned in this permit" and "as conditioned in this WQC". The proposed modification to the language is also identical.

separate permit has been issued under Wis. Stat. §. 30.12 that includes the riparian owner(s) as co-permittees.

Under these circumstances, this modification is appropriate and supported by a preponderance of the evidence in the record.

The second issue raised by the Petitioners is if Enbridge has riparian owner co-applicants, whether the Project then is for the owner's use. The term "owner's use" has been broadly interpreted to encompass activities, including commercial, industrial, or utility projects, that the owner has legally authorized to occur on their land. (*See* Callan, Tr. at 5197-5198) There is some support for this broad interpretation, albeit limited. In *ABKA Limited Partnership v. DNR*, that court confirmed that the Department has the authority to regulate structures based on their impact to the public trust, that the actual riparian owner must be a party to the permit, and that the regulated activities are not limited to personal recreation but extend to economic and commercial development. 2002 WI 106, 255, Wis. 2d 486, 648 N.W.2d 854 (2002). Wis. Stat. § 30.12(3m)(d)2. expressly mentions that the Department may not prohibit the issuance of individual permits for commercial purposes, in that instance referring to solid piers. In this interpretation, there is no restriction that the "owner's use" must be personal use, instead the focus is on the requirement for authority to use. And here, the specific permitted activity is for bank stabilization, which the owners have a long-term interest in.

With the modification discussed above to require a separate permit with the riparian owner as a co-applicant where permanent structures are installed below the ordinary high-water mark, the specific authority for use of the land would be clear. The Petitioners established that this separate permit is 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.

Wis. Stat. § 30.20 generally prohibits anyone from removing or dredging any material from the bed of a natural navigable lake or navigable stream without a permit. The Department is required to issue an individual permit if it finds "that the issuance of the permit will be consistent with the public interest in the lake or stream." Wis. Stat. § 30.20(2)(c).

The Department determined that the proposed dredging is consistent with the public interest in navigable waters. (Haller, Tr. at 4963-4964, 4996-4997) The permit authorizes in-stream activities associated with trenching up to 72 waterbodies. (Ex. 308) Enbridge has identified that up to 26 waterways may require some blasting. (Ex. 381 at 20; Ex. 308 at 2) However, most of the waterways to be trenched are intermittent or ephemeral. (Ex. 385 at 36). Trenching may be done using either "dry crossing" or "open cut" techniques. Dry crossing involves placing dams, usually sandbags, to temporarily isolate a work zone from the rest of the waterway, with a pump to maintain downstream water flow. (Ex. 307 at 20-25). The "open cut," also called "wet trench" does not. The permit requires work zone isolation in any waterway with standing water. (Ex. 631 at 19) The permit also requires a civil survey to be completed of the stream bed, after isolation, to provide a baseline for restoration. (Ex. 630 at 1724) The stream

bed substrate above shallow bedrock must be excavated and segregated before any trenching or blasting is done, and the stream bed and banks must be restored to original elevations and features. The permit limits the duration of any impacts to 24-48 hours, depending on the size of the waterway. (Ex. 631 at 42) Additionally, the pipeline will be buried to limit any impact of the waterway to the public interest in use, recreation, or natural scenic beauty.

Three specific concerns raised by the Petitioners include (A) impacts caused by blasting, (B) whether the permit is consistent with the public interest, and (C) Enbridge's failure to obtain an incidental take permit before it obtained the waterway permit. Each of these shall be addressed in more detail.

A. Blasting

The Environmental Petitioners take issue with the permit allowing Enbridge to remove material from the bed by blasting. They assert blasting risks significant impacts to the public interests because it will create and extend fractures in bedrock beyond the trench, which could create new hydrological connections. They argue that the Department has not adequately assessed these risks because they do not know all locations that blasting could occur and they lack geotechnical information to analyze the blasting impacts.

The Environmental Petitioners' expert geologist, Mr. B.J. Bonin, opined that blasting would have a larger effect and larger impact than Enbridge or the Department discussed because the blasted rock will be much more conducive to infiltration of water. (Bonin, Tr. at 415-417) He expressed concerns over the use of sheet piling and the risk that it may pierce an artesian aquifer. (*Id.* at 484-485) Similarly, Dr. Jesse Hampton, another of the Environmental Petitioners' experts, expressed criticism of the lack of site-specific information for blast locations prior to the permit being issued. (Hampton, Tr. at 674-675)

On cross-examination, Mr. Bonin agreed that the Department only allowed the use of sheet piling where it was necessary for personal safety during construction. (Bonin, Tr. at 488-489, 501, refencing Ex. 631 at 20 (condition 196)) He also admitted that the Department and Enbridge made an effort to assess the risk of sheet pilings piercing an aquifer. (The EIS contained an aquifer analysis, which found artesian groundwater conditions at Vaughn Creek at a depth of 128 feet and at Billy Creek at a depth of 42.5 feet. (Bonin, Tr. at 489-494, referencing Ex. 816, Ex. 824 at 517, 1202)) Enbridge also hired Lake Superior Consulting to determine the likelihood of encountering artesian conditions, and the study found a potential at 80-90 feet. (Bonin, Tr. at 496) Finally, Barr Engineering analyzed data and classified areas of the project in terms of risk for encountering artesian conditions, and in areas of medium risk or higher, recommended additional investigation. (Bonin, Tr. at 497-499, referencing Ex. 313, Ex. 807 at 91) Enbridge completed this recommended investigation, which included using hand probes and hand augers to assess the potential for confined aquifer conditions in areas that may require sheet pile. (Bonin, Tr. at 500, referencing Ex. 816 at 4)

The strength of Dr. Hampton's criticism also weakened on cross. He agreed that Enbridge should not have been required to provide site-specific blast plans prior to permitting and agreed that Enbridge is required to generate these site-specific plans prior to blasting. (Hampton, Tr. at

676-677) A majority of the data and site-specific information that both Bonin and Hampton advocate the Department should have reviewed prior to permitting not only has not been required in other projects, it also would only be available once the vegetation was cleared from the right-of-way, and it would not be appropriate for this clearing to occur prior to permitting.

The Petitioners have not established that the permit conditions permitting blasting fail to meet the state requirements and waterway permitting standards.

Nonetheless, Enbridge proposed a modification to the permit to provide for additional geotechnical borings prior to sheet piling to further investigate potential artesian conditions to further mitigate risk. Enbridge contractors conducted geotechnical borings to characterize the subsurface geology in areas where HDD transects were anticipated. (Bratton, Tr. at 1662) Dr. John Bratton, Senior Science Officer at Limno Tech, opined that this analysis was insufficient to detect all artesian conditions along the Project route. (*Id.* at 1662-1663) Mr. Barry Simonson, Director of Projects for Enbridge, proposed that Enbridge could perform additional geotechnical borings before using sheet pilings. (Simonson, Tr. at 3201) Mr. Callan, Waterways Program Director, agreed that this modification would reduce the risk of breaching an artesian aquifer from sheet piling and give the Department more assurance. (Callan, Tr. at 5310)

The proposed modification relates to Conditions 196 and 221 of the permit (Ex. 631 at 20, 22), and Conditions 61 and 223 of the water quality certification (Ex. 633 at 10, 27).[18] Condition 196 of the permit and Condition 61 of the water quality certification provides:

> You shall minimize the width of the trench through [waterways/wetlands] as specified in the ECP. Where support is needed in the trench due to depth, soil type, or soil saturation, use of trench boxes shall be considered first. Sheet piling shall only be used where necessary for personnel safety.

The proposed *modification* to the condition states:

> You shall minimize the width of the trench through [waterways/wetlands] as specified in the ECP. Where support is needed in the trench due to depth, soil type, or soil saturation, use of trench boxes shall be considered first. Sheet piling shall only be used where necessary for personnel safety. *Prior to using sheet piling, you shall conduct geotechnical borings at the location of the anticipated use of sheet piling deeper than the expected depth of the sheet piling to assess potential Artesian conditions at that site. If Artesian conditions are encountered at a depth that would give rise to a risk of an Artesian aquifer breach, a construction method shall be used at that location that does not require the use of sheet piling*.

[18] Condition 196 of the permit (Ex. 631 at 20) and Condition 223 of the water quality certification (Ex. 633 at 27) are identical and relate to waterways. Condition 221 of the permit (Ex. 631 at 22) and Condition 61 of the water quality certification (Ex. 633 at 10) are identical are relate to wetlands. All four conditions are identical with the exception of the reference to "wetland" or "waterway." The proposed modifications to the language of all four Conditions are also identical.

Based on the testimony from Dr. Bratton, Mr. Simonson, and Mr. Callan, the preponderance of the evidence supports the modification of the permit and water quality certification in this manner because it would further reduce the risk of breaching an artesian aquifer.

B. Public Interest

The Band further contends that the permitted activities generally fail to meet the "public interest" standard under Wis. Stat. Chapter 30. Their argument is not limited to waterways, but focuses on many aspects of the Project, such as clearing vegetation, that could have a long impact on the area. This argument is unpersuasive. First, while it introduces broad environmental concerns and claims to be addressing Issues 3, 4, and 5, it is not tied to the specific issues identified for hearing, i.e., structures and deposits, removal of material from beds, and temporary clear span bridges. Second, the Band's argument is not based on specific evidence. The Petitioners have not provided evidence linking construction activities to a violation of Wis. Stat. §§ 30.12, 30.20, or 30.123, or countering the evidence presented by the Department of their assessment of what was in the public's interest.

In reviewing the public interest standard, the Department looked "at the potential effects associated with water quality, with public use navigation access and habitat, fisheries, wildlife habitat and then aesthetics, natural scenic beauty." (Callan, Tr. at 5170) It looked at each of the aspects individually, and then also looked at the potential for the project to be part of a broader, cumulative effect. (*Id.*) The Department requested additional construction plan details and modifications to construction techniques to minimize impacts. (*Id.* at 5171) For example, the Department looked for ways to further reduce or eliminate impacts to the Project's crossing high quality trout cold water systems. (*Id.*) It also looked for ways to ensure that there would not be a permanent or long-term impact associated with the regulated activity, which included making water crossings as perpendicular to the resources as possible, isolating the work zone to mitigate total suspended solids downstream, and ensuring that there were not sensitive components in the location of the crossing such as pools, riffles, or runs. Duration of the impacts was relevant to its analysis, because "the longer the disruption occurs, the more likely [it is] that there will be a conflict with a public trust issue." (*Id.* at 5176, 5184) The Department required work zone isolation systems to ensure that construction activities below the ordinary high-water mark are isolated from the normal flow and habitat of the remainder of the water resource. (*Id.* at 5177) The Department concluded that the removal of material from the bed of the waterway is consistent with the public interest. (*Id.* at 5172-5173) It determined that if the construction is done according to the plans and the conditions of the permit, the impacts would not be sustained or have long-term effects on a resource. (*Id.* at 5184) The Petitioners failed to provide evidence showing that this determination was inconsistent with applicable legal standards.

C. Timing of the Incidental Take Permit

Finally, the Band asserts that Enbridge did not receive all necessary incidental take permits or demonstrate avoidance of impacts to endangered and threatened species *before* the Department reviewed and issued the wetland and waterway permit. The Band is correct that pursuant to Wis. Admin. Code §§ NR 329.04(3)(a)2 (implementing individual permits under §

30.12), NR 345.04(3)(a)2 (implementing individual permits under § 30.20), and NR 320.06(5)(h) (implementing bridge permits under § 30.123), a project must either receive an incidental take authorization under Wis. Stat. § 29.604, or avoid impacts to endangered or threatened species, *before* the Department may consider the application for the waterway permit complete.

The evidence in this case focused on potential impacts to two plant species, Braun's holly fern and sweet coltsfoot. Sweet coltsfoot is a threatened plant found in marshes and forests or swamp openings. (Rowe, Tr. at 5122) It was found along an existing forest road that Enbridge planned to use during construction, but Enbridge modified its plans and elected to not use that access road. (*Id.* at 5121-5122; Drake, Tr. at 2538-2539) Because of the modified plans, no further action or incidental take permit was required for sweet coltsfoot. Braun's holly fern is a state-threatened plant that is found in woodlands, typically in seepages or ravines, and as part of the endangered resources review, it was found within the Project area. (Rowe, Tr. at 5113-5114) Additional surveys were conducted, and as part of the Department's review, it determined that two plants of this species would be directly impacted by Project activities and could not be avoided. (*Id.* at 5115-5116) Enbridge applied for, and received, an incidental take permit for Braun's holly fern. (*Id.,* referencing Ex. 386). The application process includes submitting a conservation plan to the Department, which outlines the project activities, the species being impacted, what those impacts are, and it includes alternative actions and minimization and mitigation measures. (Rowe, Tr. at 5116) Enbridge developed a conservation plan to relocate the plant to an adjacent area outside the Project workspace and monitor it after replanting. (Drake, Tr. at 2538)[19]

The combined wetland and waterways permit was issued on November 14, 2024. (Ex. 631) The incidental take permit was issued on September 3, 2025. (Ex. 386) The wetland and waterways permit contained a condition requiring all construction activities to be conducted in accordance with "Enbridge's Incidental Take Permit/Authorization that will be required as part of the Project." (Ex. 631 at 10, condition 84) The Band argues that this condition is insufficient because the incidental take permit was required before the application for the wetland and waterways permit could be considered complete.

The Band has not established that the Project activities impacting Braun's holly fern are regulated under Wis. Stat. §§ 30.12, 30.20, and 30.123, which apply exclusively to navigable waters. Evidence from the hearing and the incidental take permit reference that the construction activities at the site of this species are in a wetland, with no further evidence suggesting the presence of navigable waters at these locations. (Ex. 386 at 1 (referencing the reduced construction right-of-way width for wetlands at the site of Braun's holly fern); Thompson, Tr. at 2227-2228) In the absence of such evidence, the Band fails to show that Wis. Admin. Code §§ NR 329.04(3)(a)2, 345.04(3)(a)2 and NR 320.06(5)(h) are applicable here, and as a result, that the incidental take permit was required before the waterways permit could be issued.

[19] Threatened and endangered plants are not regulated on private lands. The occurrence in this Project is on public lands, and the proposed relocation is to adjacent public lands, so the relocated plant would still be regulated. (Rowe, Tr. at 5118-5119) While the relocation site is usually selected in a desk review, here, Enbridge and a Department botanist went into the field to review and determine the relocation site. (*Id.* at 5119)

Additionally, Enbridge proposed modifying the permit to clarify that the incidental take permit has been issued. The proposed modification relates to Condition 84 of the permit (Ex. 631 at 10), Finding of Fact 77 of the permit, (*Id.* at 44-45) and Finding of Fact 77 of the water quality certification (Ex. 633 at 48).[20] Condition 84 of the permit provides:

> 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.

The proposed *modification* to the condition states:

> 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 *has been obtained and/or* will be required as part of the Project.

Finding of Fact 77 provides:

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

The proposed *modification* to the finding of fact adds to the end: *Enbridge has obtained an Individual Incidental Take Permit for Braun's Holly Fern*.

Including information that the incidental take permit has been issued provides clarity, and it incorporates the conditions of the Incidental Take Permit into the enforceable conditions of the construction permit. Under these circumstances, a clarifying modification is appropriate.

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.

Wis. Stat. § 30.123 generally prohibits anyone from constructing or maintaining a bridge or culvert in, on, or over navigable waters. The Department is required to issue an individual permit if it finds that the bridge will not materially obstruct navigation, will not materially reduce

[20] Finding of Fact 77 of the permit (Ex. 631 at 44-45) and Finding of Fact 77 of the water quality certification (Ex. 633 at 48) are identical. The proposed modification to the language is also identical.

the effective flood flow capacity of a stream, and will not be detrimental to the public interest. Wis. Stat. § 30.123(8)(c).

The construction plans for the Project include the installation of approximately 187 temporary clear span bridges (TCSBs), and the permit issued by the Department provides for these TCSBs. (Ex. 631; Ex. 633) Conditions 152-169 detail the installation, signage, removal, inspection, monitoring, and maintenance of TCSBs. (Ex. 631 at 16-17) Additionally, the permit specifies that it does not authorize any in-stream supports for TCSBs. (*Id.*) Condition 100 requires TCSBs as a best management practice prior to beginning in-water work where grading will occur prior to installation. (*Id.* at 12) Condition 129 limits the placement and removal of TCSBs, and any in-water work, to specific times to minimize adverse impacts on fish movement, fish spawning, and egg incubation periods. (*Id.* at 15) The Department found that the TCSBs will not materially obstruct navigation, because they will span from bank to bank and not have any in-stream supports and Enbridge will allow safe portage around restricted areas of the ROW to anyone navigating public waterways. (*Id.* at 43) The Department also found that the TCSBs will not materially reduce the effective flood flow capacity of any streams because they will be temporary, not be installed during high water levels or flooding, and not require dredging for installation or removal. (*Id*.) Finally, the Department found that the TCSBs will not be detrimental to the public interest because of the limited disruption to navigation and recreation, placement and removal timing is specified by the permit to avoid impacts to aquatic species, and the use of TCSBs will minimize impacts to water quality, aquatic habitat, and anticipated flows. (*Id.* at 44)

The Environmental Petitioners argue that TCSBs can impact surface waters through soil compaction and redistribution, pollutants from vehicles, and blocking high water flow. They argue that the Department erred by not requiring site-specific evaluations prior to issuing the permit. However, the Petitioners fail to identify any statutory or regulatory authority that mandates such evaluations. To the contrary, Wis. Stat. § 30.123(8)(c) mandates that the Department shall issue an individual permit if it finds (1) that the bridge will not materially obstruct navigation, (2) that the bridge will not materially reduce the effective flood flow capacity of a stream, and (3) the bridge will not be detrimental to the public interest. The Department made each of these findings in the permit, and as a result it was required to issue the permit instead of demanding evaluations. Consequently, the Petitioners' critique of the Department's process fails to meet their burden of proof.

III. Water Quality Certification

In Wisconsin, a water quality certification is required under Section 401 of the Clean Water Act when a project requires a federal license or permit for an activity that may result in a discharge to waters of the United States. 33 U.S.C. § 1341; Wis. Stat. §§ 281.11 and 281.12; Wis. Admin. Code § NR 299.03. Projects that require an individual wetland and waterway permit require a water quality certification review as part of the permit process to be sure the project will meet specific water quality certification standards. The standards are the baseline rules established by the Department to protect the state's waters. They include specific limits, either in numeric or narrative form. The Water Quality Certification is a project-specific document from the Department certifying that a proposed activity does not significantly degrade the state's water

resources. After an applicant applies for a federal permit, if the project affects Wisconsin water, then the Department performs a water quality certification review comparing the project plans to the water quality standards. If the Department denies certification, the federal permit cannot be issued. If the Department finds that the proposal will not cause a violation of Wis. Admin. Chapters NR 102 or 103, the Department grants the certification with conditions to ensure that the standards are met.

Here, the Department granted Enbridge a Water Quality Certification, with 231 conditions for the Department to confirm that the Project will comply with Wisconsin's clean water quality standards.

Then, the Petitioners were granted a contested case hearing on one issue related to water quality standards:

> **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.**

Wis. Admin. Code § NR 299.04 requires the Department to "determine whether it has reasonable assurance that the proposed activity will:

> (a) Result in any discharge; and
> (b) Comply with the following water quality standards:
> 1. Effluent limitations adopted under s. 283.13, Stats., and 33 USC 1311, for categories of discharges;
> 2. Water based related effluent limitations adopted under s. 283.13 (5), Stats., and 33 USC 1312;
> 3. Water quality standards adopted under s. 281.15, Stats., and 33 USC 1313;
> 4. Standards of performance adopted under s. 283.19, Stats., and 33 USC 1316;
> 5. Toxic and pretreatment effluent standards adopted under s. 283.21, Stats., and 33 USC 1317;
> 6. Public interest and public rights standards, related to water quality, set forth in ss. 30.03, 30.10, 30.11, 30.12, 30.123, 30.13, 30.15, 30.18, 30.19, 30.195, 30.196, 30.20, 30.202, 30.206, 30.21, 31.02, 31.05, 31.06, 31.07, 31.08, 31.12, 31.13, 31.18, 31.23, 88.31 and 281.15, Stats., and made applicable by 33 USC 1341 (d);
> 7. Any other appropriate requirements of state and federal law as provided in ss. 281.17 (10) and 281.36 and 33 USC 1341 (d)."

Here, the Petitioners assert that the Department lacked reasonable assurance that the Project will comply with the enumerated standards.

The Band asserts that conserving ecosystems where wild rice can thrive is critical. (Tillison, Tr. at 1314) The Marengo River and Beartrap Creek watersheds are priority watersheds for the Band because they support wild rice waters in the Kakagon and Bad River sloughs. (*Id.* at 1387-1393, 2256; Ex. 209) Unstable hydrologic conditions in the watershed, excess sediment, terrestrial habitat fragmentation and alteration, loss and fragmentation of aquatic habitat, excess

nutrients, and high bacteria count all pose risks to these sensitive ecosystems. (Tillison, Tr. at 1392-1393; Ex. 209 at 14; Ex. 238 at 1322-1323) The Band is concerned that the Project's changes to the landscape could exacerbate these risks. The Environmental Petitioners argue that the Department lacks reasonable assurances that the Project will comply with the water quality standards because the baseline data is insufficient and because Enbridge inflated natural variability and understated localized Project impacts.

While the Band expresses concern regarding potential impacts, they have failed to provide evidence demonstrating that the authorized activities will, in fact, violate state water quality standards. The fears that they express are fears; they lack evidence showing that these changes will occur and impact water quality. Similarly, the Environmental Petitioners argue that more baseline data should be required, or that the data should be analyzed in a different manner, but they have failed to establish that such steps are required.

The Department's certification review was extensive, and it required modifications to Enbridge's Water Quality Monitoring Plan before the certification could be given. Macaulay Haller is an environmental analysis and review specialist for the Office of Energy in the Department. (Haller, Tr. at 4919) She reviews wetland and waterway permit applications for utility energy projects. (*Id*.) She previously worked in the Department's water evaluation section, and in that role, she prepared and reviewed water quality monitoring plans. (*Id.* at 4920) Working with the Department's staff in storm water, fisheries, wetland, forestry, and wildlife, and working with USACE and the Environmental Protection Agency, she reviewed Enbridge's water quality monitoring plan, beginning in January 2023. (*Id.* at 4922-4924) Additionally, she made two site visits along the Project route in June and October 2023, and she visited another Enbridge project site in Illinois in winter 2023, to observe the construction of a large pipeline crossing a waterway. (*Id.* at 4925) She reviewed Enbridge's Water Quality Monitoring Plan to see if she could affirm that the Project activities meet state water quality certifications. (Ex. 495) Initially, it did not.

The Department requested additional information from Enbridge and requested modifications to the plan. In 2023, Enbridge visited the 204 waterways in the Project area, collected upstream and downstream samples from each containing sufficient water, and analyzed each sample for approximately thirty chemical, physical, and biological parameters. (Ledder, Tr. at 1152-1153) Additionally, Enbridge collected samples from each of the 435 wetlands crossed by the Project that had standing water. (Ex. 829 at 13-14) Enbridge then repeated this sampling in 2024. Enbridge also analyzed available historical water quality data from federal, state, and tribal entities, collecting nearly 30,000 additional stream-specific data points. (Ex. 830 at 15-17)

The Department identified sediment as the primary water quality parameter of concern, and the Department, Enbridge, and their consultants analyzed each sediment source and modeled using conservative assumptions. (Ex 843 at 93-185; Ex. 376 at 38-39) The Department modeled potential erosion over various construction durations and concluded that the Project's anticipated sediment discharges will comply with water quality standards. The Department and Enbridge also evaluated other parameters including water surface temperature, dissolved oxygen, pH, phosphorus, nitrogen, bacteria, per- and polyfluoroalkyl substances (PFAS), polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs), and heavy metals, including

mercury. (Ex. 376) Again, the analysis concluded that the Project would comply with water quality standards. (*Id.*)

Following the exchange of this information and the modifications to the plan, which included adding the baseline sampling in 2023 and 2024, requiring monitoring of all 204 waterways in the Project area, adding over 20 additional water quality parameters for analysis, and implementing a Quality Assurance Project Plan, the Department then concluded it had reasonable assurance that the Project will comply with Wisconsin's water quality standards by requiring that Enbridge monitor water quality as detailed in the Water Quality Monitoring Plan. (Callan, Tr. at 5233; Haller, Tr. at 4969-4972, 4978-4979, 5009-5013; Ex. 633; Ex. 829; Ex. 554) The Petitioners failed to establish that the information the Department reviewed was so incomplete or inaccurate that reasonable assurance could not be reached.

IV. Environmental Impact Statement

Wis. Stat. § 1.11, also known as the Wisconsin Environmental Policy Act (WEPA), requires all state agencies to determine whether a proposed action significantly affects the quality of the human environment, and if the answer is affirmative, then it must prepare an Environmental Impact Statement (EIS). Wis. Stat. § 1.11(2)(c). Wis. Admin. Code § NR 150.30 outlines the procedures for EIS analysis; it specifies how the Department evaluates major actions that may significantly affect the environment.

An EIS is an informational tool that allows an agency to take a "hard look" at the environmental consequences of a proposed action. *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin,* 2005 WI 93, ¶ 189, 282 Wis. 2d 250, 375. An EIS does not compel a particular decision. *Id.,* ¶ 188. When an EIS is challenged, it is assessed in light of the "rule of reason." *Id.,* ¶ 191. It is required to contain "only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible." *Id.*

The Department granted the Petitioners a contested case hearing on two issues related to the EIS. The Petitioners allege that the Department improperly described the purpose of the Project, failed to consider all reasonable alternatives to the Project, and that the EIS contained an incomplete environmental analysis. For the reasons stated below, the Petitioners' arguments fail.

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).

Wis. Admin. Code § NR 150.30(2)(b) requires an EIS to contain a "description of the purpose of the proposed project." In the Final EIS, the Project Purpose & Need is described in Section 1.3:

> Enbridge's stated purpose for the proposed project is to continue transporting crude oil and NGLs [natural gas liquids] through its Line 5 pipeline, while decommissioning that portion of the line that crosses the Bad River Reservation.

(Ex. 807 at 31) That EIS section continues to discuss the specific products that Line 5 transports and volume of those products. (*Id.*)

The Petitioners argue that the Project's purpose is overly narrow, and by defining the Project narrowly, the Department implied an outcome and limited its consideration of alternatives. By framing the purpose only as a means for *Enbridge* to transport *its Line 5 products*, the Department did not consider what the Petitioners believe to be the most likely outcome if Line 5 were shutdown, which is transportation of the Line 5 products by multiple modes, a hybrid use of existing pipelines, rail, and waterborne alternatives.

It has been the Department's standard practice to state the applicant's project purpose in an EIS. (Mednick, Tr. at 3564) Dr. Adam Mednick, Environmental Analysis and Review Specialist-Advanced and WEPA Coordinator for the Department testified that neither Wis. Stat. § 1.11 or Wis. Admin. Code § NR 150 "provides any direction, basis, or means for the Department to discern public purpose from a private proposed project." (*Id.* at 3565; Ex. 50 at 1) Adopting the applicant's proposed purpose in this instance is appropriate because the Department's role is to evaluate the impacts of the private proposal, not a government-proposed undertaking.

The Petitioners do not specifically state how they believe the Department should have stated the Project's purpose, nor have they established that the Department's stated purpose in the EIS, which was also Enbridge's stated purpose, was unlawful. Instead, they argue it was framed too narrowly, which then limited the alternatives considered. Specifically, the Environmental Petitioners argue that the EIS considered the alternatives of other existing pipelines, rail, and waterborne alternatives independent of each other, but should also have considered these alternatives as a combined hybrid alternative.

Wis. Stat. § 1.11(2)(c)3. requires that "[a]lternatives to the proposed action" be included in an EIS. Similarly, Wis. Admin. Code § NR 150.30(2)(e) requires an EIS to contain a "list of reasonable alternatives to the proposed project, particularly those that might avoid all or some of the adverse environmental effects of the project, including a description of proposed preventive and mitigating measures and an explanation of the criteria used to discard certain alternatives from additional study." The Final EIS contained an analysis of route alternatives, a discussion of alternatives to the proposed Project, and a "No Action Alternative Analysis," which is consideration of the effects anticipated if the Department did not approve sufficient permits for the Project. (Ex. 807 at 4)

In the EIS, the Department identified that alternatives to the Project included transporting Line 5 products by other existing pipelines, rail, and water. However, the Department also determined that these alternatives were outside the scope of the EIS. (Ex. 807 at 147) Whether considered independent of each other, or in a hybrid combination, they still exceed the scope of the EIS. As the Department explained, it does not have the ability to compel Enbridge to use another form of transport, Enbridge does not have the means for these other forms of transport, and the Department cannot compel the public to consume alternative energy or practice energy conservation. (Ex. 807 at 147; Ex. 50 at 11) It is unnecessary for the Department to consider the separate alternatives also as a hybrid alternative when it has determined that it exceeds the scope of the EIS and the Petitioners have not challenged the scope.

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.

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).

Wis. Admin. Code § NR 150.30(2) identifies the required content of an EIS. It mandates that an EIS "emphasize environmental issues relevant to the evaluation of the action and provide a level of detail commensurate with the complexity of the action." It continues to list the requirements, specifically incorporating Wis. Stat. § 1.11(2)(c), and includes the following:

> (f) A description of the human environment that will likely be affected by the proposed project and alternatives to the proposed project.
>
> (g) An evaluation of the probable positive and negative direct, secondary and cumulative effects of the proposed project, and alternatives to the proposed project, on the human environment, including all the following:
>
> 1. Effects on scarce resources such as: archeological, historic or cultural resources, scenic and recreational resources, prime farm lands, threatened or endangered species, and ecologically critical areas.
>
> 2. A summary of the adverse environmental effects which cannot be avoided.
>
> 3. Consistency with plans or policies of local, state, federal, or tribal governments.
>
> 4. The relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources.
>
> 5. The potential to establish a precedent for future actions or to foreclose future options.
>
> 6. The degree of risk or uncertainty in predicting environmental effects or effectively controlling potential deleterious environmental impacts, including those relating to public health or safety.
>
> 7. The degree of controversy over the effects on the quality of the human environment.

> (h) Identification of information that is incomplete or unavailable and a description of the relevance of such information.

Wis. Admin. Code §§ NR 150.30(2)(f)-(h).

The Petitioners argue that the Department failed to appropriately (1) describe the human environment to be affected, (2) evaluate direct, secondary, and cumulative effects, and (3) identify and describe the relevance of information that is incomplete or unavailable.

The EIS in this case included a description of the human environment to be affected by the Project and alternatives to the Project, as required by Wis. Admin. Code § NR 150.03(2)(f). The Department did an in-depth review of the affected human environment. (Callan, Tr. at 5199-5200) Table 3.2-1 lists the many components and functions of the human environment considered, including noise, air quality, climate, geology and groundwater, surface water quality, and public health and safety. (Ex. 807 at 135) A description of these components are then discussed in chapters 4-7 of the EIS. Additionally, it considered three route alternatives and a No Action alternative, and the effects of these alternatives, in the EIS. (Ex. 807 at 142-153, 824-844; Callan, Tr. at 5202)

The EIS also included an evaluation of direct, secondary, and cumulative effects as required by Wis. Admin. Code § NR 150.30(2)(g). As the Department pointed out as examples in its brief, Sections 5.1-5.4 describe temporary direct effects of construction activities. Sections 5.5-5.15 describe long-term direct, indirect, and cumulative environmental and socioeconomic effects of the relocated pipeline's construction and operation. Section 5.16 describes the discrete effects specified in Wis. Admin. Code §§ NR 150.30(2)(g)1.-8. (Ex. 807)

Finally, the EIS identified gaps in information that was available, and how it was relevant as required by Wis. Admin. Code § NR 150.30(2)(h). For example, the Department did not have a traditional baseline survey for waterway conditions, and in response, requested additional information from Enbridge and created new models or used existing models to predict impacts to receiving waters. (Ex, 807 at 414; Watermolen, Tr. at 3620-3621) Similarly, the Department identified that the route had not been extensively surveyed as it relates to the distribution and abundance of wildlife species, and the Department developed occupancy models to predict the most likely locations for species along the different proposed routes. (Ex. 807 at 576)

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.

V. WPDES Construction Site Stormwater General Permit

To protect the waters of Wisconsin, the Department has "all authority necessary to establish, administer and maintain a state pollutant discharge elimination system." Wis. Stat. § 283.001(2); *Clean Wisconsin, Inc. v. Wis. Dept. of Nat'l Res.,* 2021 WI 71, ¶ 17, 398 Wis. 2d 386, 961 N.W.2d 346 (2021). The law prohibits discharging pollutants into the state's water without a discharge permit. Wis. Stat. §§ 283.31(1) and 283.37. Discharges of storm water associated with construction sites are included in this requirement for a permit. Wis. Stat. § 283.33(1)(am).

The Wisconsin Pollutant Discharge Elimination System (WPDES) general permit is issued by the Department to cover a category of dischargers with similar wastewater release characteristics.[21] Wis. Stat. § 283.35; Wis. Admin. Code § NR 205.08. The general permit is designed to cover multiple facilities or projects that perform similar operations, produce similar types of wastewater, employ similar treatment processes, and are subject to similar effluent limitations and monitoring requirements. The permit includes standard requirements, pollutant discharge limitations, monitoring, reporting, and best management practices (BMPs) to protect human health and water quality. To obtain coverage under an existing WPDES general permit, an applicant must determine if their discharge activity meets the specific application and eligibility criteria outlined in the general permit, submit a notice of intent to the Department, and after Department review, if coverage is granted, the applicant must then follow all conditions and requirements of that general permit. Wis. Admin. Code §§ NR 205.08(3), 216.43(1).

To obtain coverage, an applicant must demonstrate that it can comply with the permit's terms and conditions and relevant storm water regulations. Wis. Admin. Code §§ NR 216.43, 216.44. To do so, an applicant may utilize an erosion control plan containing the elements required by Wis. Admin. Code § NR 216.46 and a storm water management plan containing the elements required by Wis. Admin. Code § NR 216.47. An erosion control plan must contain (1) details about the construction activities and setting for the project identified in Wis. Admin. Code § NR 216.46(4); (2) a detailed site map that describes the specific features and measures being used to reduce erosion at each site under Wis. Admin. Code § NR 216.46(5); and (3) descriptions of the BMPs being installed to reduce erosion and sediment discharge according to Wis. Admin. Code § NR 216.46(6). This information must be provided on a site-specific basis, and it also must meet the performance standard for sediment, which requires that an applicant install BMPs sufficient to reduce soil and sediment discharge to no more than 5 tons of sediment per acre per year. Wis. Admin. Code §§ NR 216.46(1), 216.46(2), 151.11. A storm water management plan must describe the technical basis for the BMPs installed during construction to control total suspended solids and peak flow, enhance infiltration, maintain and restore protective areas, and reduce petroleum in runoff following construction. Wis. Admin. Code § NR 216.47(2).

An applicant may not be eligible for coverage under the general permit, and instead must obtain an individual permit, when the storm water discharges will be a significant source of pollution such that it has a reasonable potential to violate the water quality standards in Wis.

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[21] Consistent with the authority provided in Wis. Stat. § 283.85(1) and Wis. Admin. Code § NR 216.003, the Department issued the most recent Wisconsin Pollutant Discharge Elimination System (WPDES) Construction Site General Permit No. WI-S067831.6 on September 30, 2021. (Ex. 770)

Admin. Code chapters NR 102-105, 140, and 207; when the storm water discharges will not comply with the regulations for constructions sites in Wis. Admin. Code subchapter II of NR 216; or when the storm water discharges will not comply with the terms and conditions of the general permit.

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.

The Project here may result in discharges from construction activities at wetland and waterbody crossings, as well as runoff from land disturbed by construction. Enbridge filed its Notice of Intent for coverage under the general permit on September 23, 2020. (Ex. 699) Initially, the Department's review team included Amy Minser, Matt Jacobsen, and Samantha Whitens, and the team was supervised by Shannon Haydin. (Haydin, Tr. at 3513) Minser is a storm water engineer in the central office for the Department. She developed a technical standard on behalf of the Department for horizontal directional drilling (HDD). (*Id*. at 3520) Jacobsen works out of the Department's Ashland office and has worked for years in Northern West Central Wisconsin. (*Id*. at 3516). He has seen similar projects and is familiar with the geomorphology and resources in the Project's area. (*Id*.) Whitens is a water resources engineer in the Office of Energy with the Department. (Whitens, Tr. at 3745) Shannon Haydin is the stormwater section manager in the Watershed Bureau, in the Division of External Services for the Department. She supervises the central office policy team, a statewide group working to implement the storm water program. (Haydin, Tr. at 3506-3507) After reviewing Enbridge's initial submission, the Department review team members expressed concerns that it lacked the required level of detail. (*Id*. at 3511) For example, Enbridge identified the BMPs that it planned to use during the course of construction of the Project, but it did not include much detail as to where each of the BMPs would be employed, leaving much for the contractors to decide during construction based on field conditions. (*Id.* at 3511-3512) The Department shared these concerns with Enbridge and requested additional information over the course of several years, including through the EIS process.

After Enbridge submitted much more detailed plans to the Department in July 2024, the Department expanded its team to six members to review Enbridge's submissions for coverage under the general permit, adding Melissa Yarrington, Pete Wood, and Chris Linskens. (Haydin, Tr. at 3514-3517) Yarrington is the Department's construction and industrial stormwater program coordinator, and she works out of the Department's Wausau office. (*Id*. at 3516) She has experience with some of the same resources that would be involved with the Project's construction. (*Id.*) Wood is an engineer in Southeast Wisconsin and has been with the Department for more than 30 years. (*Id*. at 3516-3517) He has reviewed thousands of projects in his career. (*Id*.) Linskens is an engineer out of Northeast Wisconsin, and he has experience working in the private sector in addition to working for the Department. (*Id*. at 3516-3517) He also has experience with the Departments Drinking and Groundwater Program. (*Id.*) The goal of the expanded team was to fully vet the Project, compare it to the standards required by law, and confirm whether coverage under the general permit could be issued. (*See id*. at 3514-3515)

The expanded Department team engaged in frequent team meetings, meeting at least once a week, and engaged in a back and forth with Enbridge raising concerns, requesting additional information, and requesting revisions to Enbridge's Erosion and Sediment Control Plan (the ESCP) and Stormwater Pollution Prevention Plan (the SWPPP). Enbridge provided approximately weekly updated submissions to the Department. (*See* Haydin, Tr. at 3518, 3526) The team divided up segments of the plans and aspects of the Project. (*Id.*) Segments were divided mile marker to mile marker, and team members were also assigned areas of expertise to focus on. (*Id.* at 3520) For example, Minser was the Department's expert on HDD, so she reviewed all work related to HDD. (*Id.*) Whitens focused on the valve sites because she had experience with Office of Energy projects and the construction of substations. (*Id.* at 3521; Whitens, Tr. at 3752) Haydin, the supervisor, testified that she was impressed with the detailed work of the team; they created a safe space for members to raise concerns or red flags. (Haydin, Tr. at 3519) Whitens testified that the group was "a good sounding board," and she was able to ask questions, receive feedback to comments, and discuss questions and comments with other individuals with different experience levels. (Whitens, Tr. at 3750) To methodically review the Project, Minser catalogued all comments raised by members of the Department's team in an excel spreadsheet. (Ex. 804). She then tracked the comments with Enbridge's responses until each comment or concern raised by the team was addressed in a satisfactory manner. (*Id*., Haydin, Tr, at 3528) As a result of the process, Enbridge revised site maps to add new BMPs or other measures to reduce possible sedimentation or runoff at specific pipeline segments. (Yarrington, Tr. at 3808-3809) Additionally, Enbridge incorporated redundant BMPs in some instances to further reduce sedimentation or to provide backup should BMPs fail. (*Id.*) The Department ultimately granted Enbridge coverage for the Project on November 14, 2024, concluding that Enbridge's Erosion and Sediment Control Plan and Stormwater Pollution Prevention Plan met all of the required elements of Wis. Admin. Code §§ NR 216.46 and 216.47. (Ex. 655)

The Petitioners were granted a contested case hearing on one issue related to the coverage granted under the general permit. The Petitioners allege that the Department improperly granted coverage because the construction activities proposed in the notice of intent do not meet the terms and conditions for coverage under the general permit. For the reasons stated below, the Petitioners' arguments fail.

The Petitioners argue that Enbridge must apply for an individual permit and that coverage under the general permit was not properly granted. They assert that three different exclusions in the general permit apply to the Project, making coverage under the general permit improper. First, § 1.2.2 of the general permit excludes activities and discharges that affect wetlands, unless the Department determines that those activities and discharges comply with Wis. Admin. Code § NR 103.03. The Petitioners argue that the Department lacked the information necessary to determine and assess the Project's compliance with Wis. Admin. Code § NR 103.03. Enbridge responds that there will be no water quality violations.

Second, § 1.2.3 of the general permit excludes activities and discharges that affect endangered and threatened species, unless the Department determines that those activities and discharges comply with the requirements of Wis. Stat. § 29.604 and Wis. Admin. Code Ch. NR 27. The Project's construction activities may pose a risk to sweet coltsfoot and Braun's holly

fern. The Petitioners argue that the incidental take permit for Bruan's holly fern was issued in September 2025, ten months after coverage under the general permit was granted, and the activities still threaten sweet coltsfoot, and as a result, the Department should have denied coverage. Enbridge argues that the Petitioners have not shown that the activities regulated under the storm water general permit will have these impacts. The Department's review team examined whether the Project's associated stormwater discharges complied with the applicable requirements for the protection of endangered and threatened species. (*See* Haydin, Tr. at 3533)

Third, § 1.2.5 of the general permit excludes discharges the Department determines have "reasonable potential to cause to contribute to an excursion above any applicable water quality standards." (Ex. 770 at 5) The water quality standards, Wis. Admin. Code §§ NR 102.04(1)(c)-(d), are narrative, not numerical. In response to the Petitioners' third argument regarding water quality standards, Enbridge points out that the Petitioners conceded that they did not identify a single water quality standard that would be violated by the Project. (Greenberg, Tr. at 2052; Ledder, Tr at 1142)

Finally, the Petitioners argue that an inadvertent release from HDD could harm aquatic life and has a reasonable potential to violate the state's sediment water quality standards. (Callan, Tr. at 5254-5255). The Department contends that any such discharges are not permitted – they would be treated as spills. (Yarrington, Tr. at 3809)

While the parties each called witnesses to give testimony to support their claims, the most compelling testimony came from the Department's storm water review team and the methodical manner in which they reviewed the Project submissions for coverage. Each member of the team explained their qualifications and brought expertise to the review of the standards. They each testified that they raised any concerns that they had, and that in the end, Enbridge addressed those concerns by providing additional information or revising its plans. Moreover, after they scrutinized the plans, they each agreed to confer coverage under the general permit. (Ex. 804; Haydin, Tr. at 3528-3529; Whitens, Tr. at 3762-3763; Yarrington, Tr. at 3824-3825, 3843; Jacobson, Tr. at 3886; Minser, Tr. at 3940-3941, 3993; Linskens, Tr. at 4099; Wood, Tr. at 4122) The Petitioners have failed to satisfy their burden; they have not established, by a preponderance of the evidence, that the authorized construction activities do not meet the terms and conditions for coverage under the general permit. (Ex. 655)

VI. Modified Permit Conditions

On March 28, 2025, Enbridge filed a motion seeking to include whether the permit may be modified as an issue for hearing. The parties filed briefs to argue their position on the motion and also offered some discussions of their positions on the motion at the prehearing conference on March 31, 2025. On April 15, 2025, the undersigned ALJ issued an order on the motion. Relying primarily on Wis. Stat. § 227.44(2)(a), Wis. Admin. Code § NR 2.12(1)(a), *Clean Wisconsin, Inc. v. DNR,* 2021 WI 71, 398 Wis. 2d 386, 961 N.W.2d 346, and *Kohler Co. v. Wis. Dept. of Nat. Res.,* 2024 WI App 2, ¶¶ 79-86, 410 Wis. 2d 433, 3 N.W.3d 172, the ALJ denied the motion to add an additional issue for hearing and issued an order clarifying the issues, specifically stating that "the issues in this case will be clarified to provide notice that, 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."

Towards the conclusion of the hearing, on October 1, 2025, Enbridge filed notice of its intent to request modifications of the combined wetlands and waterway permit and water quality certification, specifying five separate modifications. Four of these modifications have been discussed above: (1) clarifying that absolute cover shall be used for characterizing species in post-construction monitoring instead of Braun-Blanquet (Issue 1); (2) specifically requiring a separate § 30.12 permit with riparian owners as co-applicants for permanent bank stabilization structures (Issue 3); (3) requiring additional geotechnical borings prior to sheet piling to further investigate potential artesian conditions to further mitigate risk; and (Issue 4) (4) clarifying that the incidental take permit for Braun's holly fern has been issued (Issue 4). These modifications, as discussed above, have been found to be supported by a preponderance of the evidence in the record and appropriate under the circumstances.

Enbridge proposed one other modification that has not yet been addressed herein, which is related to the method for sampling mercury. The proposed modification relates to Condition 145 of the wetlands and waterways permit (Ex. 631 at 16) and Condition 143 of the water quality certification (Ex. 633 at 20),[22] which provides:

> You shall perform water quality monitoring in accordance with the ECP's Water Quality Monitoring Plan .

The proposed ***modification*** to the condition states:

> You shall perform water quality monitoring in accordance with the ECP's Water Quality Monitoring Plan. *Notwithstanding anything in the Water Quality Monitoring Plan (Appendix O to the Environmental Construction Plan) ("WQMP"), all mercury sampling from and after the date of this decision shall be performed using US EPA Method 1631E or another method approved by the department in writing*.

There is insufficient evidence in the record to support this modification. While it may be a clarification or even beneficial, there was not testimony from witnesses about the impact of this modification. Mr. Callan of the Department testified that he "saw" the proposed modification but clarified that he was not an expert on mercury testing or the sensitivity of it. (Callan, Tr. at 5313). The Water Quality Monitoring Plan is complex, and without additional evidence, it is unclear how this modification changes the monitoring or how experts would view the change. (Ex. 630 at 886). As a result, this modification is not ordered here.

No other party requested modifications. The Band responded to Enbridge's requested modifications in its closing brief and characterized the modifications as changes to save errors in the permit. But the modifications here are not of that nature. The modifications ordered here are not used to correct a situation where the Department did not have sufficient information. *See*

[22] Condition 145 of the permit (Ex. 631 at 16) and Condition 143 of the water quality certification (Ex. 633 at 20) are identical and relate to waterways. The proposed modification to the language of the conditions is also identical.

Sierra Club v. Wis. Dept. of Nat. Res., 2025 WI App 39, ¶ 70, 417 Wis. 2d 90, 135-136, 24 N.W.3d 157, 180-181 (discussing *Meteor Timber, LLC v. DHA,* 2022 WI App 5, 400 Wis. 2d 451, 969 N.W.2d 746 (2021), and *Kohler Co.*, 410 Wis. 2d 433, 3 N.W.3d 172). No finding was made here that the Department was missing information at the time it conducted its review of the permits or certification.

All of the arguments presented by the parties were carefully considered by the undersigned ALJ. The courts have recognized that an administrative decision-maker "is not required to make findings that respond to every issue the [Petitioners] raised in its request." *Peace Lutheran Church & Acad. v. Vill. of Sussex*, 2001 WI App 139, ¶ 33, 246 Wis. 2d 502, 631 N.W.2d 229. Thus, any arguments and evidence on the record that were not specifically mentioned were determined to not merit comment in the decision.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has the authority to hear this case and issue a final decision pursuant to Wis. Stat. § 227.43(1)(b) and Wis. Admin. Code § NR 2.155(1). Review is limited to the portions of the petition the Department determined met the applicable jurisdictional requirements. Wis. Admin. Code § NR 2.055.

2. The Petitioners bear the burden of proof on the issues by a preponderance of the evidence. Wis. Admin. Code §§ NR 2.13(3)(b) and HA 1.17(2).

3. The 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.

4. The wetland compensatory mitigation required by Permit #IP-NO-2020-2-N00471 meets state wetland mitigation requirements under Wis. Stat. § 281.36(3r) and Wis. Admin. Code Ch. NR 350.

5. The structures and deposits in navigable waters authorized by Permit #IP-NO-2020-2-N00471, as modified by this order, meet state requirements and waterway permitting standards under Wis. Stat. § 30.12.

6. 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.

7. The temporary clear span bridges authorized by Permit #IP-NO-2020-2-N00471 meet state requirements and waterway permitting standards under Wis. Stat. § 30.123.

8. The activities authorized by Permit #IP-NO-2020-2-N00471 meet state water quality certification standards under Wis. Admin. Code § NR 299.04.

9. Four modifications to Permit #IP-NO-2020-2-N00471 are appropriate and supported by a preponderance of the evidence in the record. This permit shall be modified to (1) clarify that absolute cover shall be used for characterizing species in post-construction monitoring instead of Braun-Blanquet; (2) specify that a separate § 30.12 permit with riparian owners as co-applicants is required prior to installing permanent bank stabilization structures; (3) require additional geotechnical borings prior to sheet piling to further mitigate risk; and (4) clarify that the incidental take permit for Braun's holly fern has been issued.

10. The Department's Final Environmental Impact Statement 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).

11. The Final Environmental Impact Statement 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).

12. 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.

ORDER

For the reasons set forth above, IT IS ORDERED:

1. That the Department's decision to issue the combined individual Wetland and Waterway Permit #IP-NO-2020-2-N00471 is AFFIRMED.

2. That the Department's decision to issue a Water Quality Certification pursuant to the Clean Water Act is AFFIRMED.

3. That the Department's decision to issue Enbridge coverage under the Wisconsin Pollution Discharge Elimination System (WPDES) General Construction Site Storm Water Runoff Permit No. WI-S067831-06 is AFFIRMED.

IT IS FURTHER ORDERED that Wetlands and Waterway Permit #IP-NO-2020-2-N00471 is modified as follows:

Condition 242 shall be amended to read:

> You shall implement the ECP's Wetland and Waterbody Restoration and Post-Construction Monitoring Plan (the "Wetland Restoration Plan"). This plan incorporates native seed mix as well as bare root stock to reestablish wetland vegetation. Notwithstanding anything in the Wetland Restoration Plan to the contrary, the absolute cover method shall in all cases be used instead of the Braun-Blanquet cover classes to record species cover/abundance where and as specified in the Wetland Restoration Plan for post-construction monitoring. Braun-Blanquet shall not be used for post-construction monitoring.

Condition 182 shall be amended to read:

> Bank stabilization structures shall be installed following the design plans in the Wetland and Waterway Restoration and Post-Construction Monitoring Plan in the ECP, as conditioned in this permit, and as approved by the Department. Permanent structures shall only be installed below the OHWM after a separate permit has been issued under Wis. Stat. §. 30.12 that includes the riparian owner(s) as co-permittees.

Condition 196 shall be amended to read:

> You shall minimize the width of the trench through waterways as specified in the ECP. Where support is needed in the trench due to depth, soil type, or soil saturation, use of trench boxes shall be considered first. Sheet piling shall only be used where necessary for personnel safety. Prior to using sheet piling, you shall conduct geotechnical borings at the location of the anticipated use of sheet piling deeper than the expected depth of the sheet piling to assess potential Artesian conditions at that site. If Artesian conditions are encountered at a depth that would give rise to a risk of an Artesian aquifer breach, a construction method shall be used at that location that does not require the use of sheet piling.

Condition 221 shall be amended to read:

> You shall minimize the width of the trench through wetlands as specified in the ECP. Where support is needed in the trench due to depth, soil type, or soil saturation, use of trench boxes shall be considered first. Sheet piling shall only be used where necessary for personnel safety. Prior to using sheet piling, you shall conduct geotechnical borings at the location of the anticipated use of sheet piling deeper than the expected depth of the sheet piling to assess potential Artesian conditions at that site. If Artesian conditions are encountered at a depth that would give rise to a risk of an Artesian aquifer breach, a construction method shall be used at that location that does not require the use of sheet piling.

Condition 84 shall be amended to read:

> 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 *has been obtained and/or* will be required as part of the Project.

Finding of Fact 77 shall be amended to read:

> The Project, if constructed in accordance with this permit and protection measures required and recommended by the Department's Office of Energy Endangered Resources Energy Liaison, will avoid and minimize impacts to endangered resources. Enbridge is required by this permit to use upland seed mixes that contain ≥99% native species (use of *Lolium perenne* is acceptable). Most recommended actions will be followed by Enbridge using a native seed mix as part of restoration as well as completing tree clearing during winter months.

> For those state-listed endangered resources that cannot be avoided, an Individual Incidental Take Permit will be issued or a Broad Incidental Take Permit that has already been issued will ensure take of those species is minimized pursuant to Wisconsin's Endangered Species Law (29.604, Wis. Stats.). Enbridge has obtained an Individual Incidental Take Permit for Braun's Holly Fern.

IT IS FURTHER ORDERED that the Water Quality Certification issued to Enbridge on November 14, 2024, is modified as follows:

Condition 148 shall be amended to read:

> You shall implement the ECP's Wetland and Waterbody Restoration and Post-Construction Monitoring Plan (the "Wetland Restoration Plan"). This plan incorporates native seed mix as well as bare root stock to reestablish wetland vegetation. Notwithstanding anything in the Wetland Restoration Plan to the contrary, the absolute cover method shall in all cases be used instead of the Braun-Blanquet cover classes to record species cover/abundance where and as specified in the Wetland Restoration Plan for post-construction monitoring. Braun-Blanquet shall not be used for post-construction monitoring.

Condition 209 shall be amended to read:

> Bank stabilization structures shall be installed following the design plans in the Wetland and Waterway Restoration and Post-Construction Monitoring Plan in the ECP, as conditioned in this WQC, and as approved by the Department. Permanent structures shall only be installed below the OHWM after a separate permit has been issued under Wis. Stat. §. 30.12 that includes the riparian owner(s) as co-permittees.

Condition 223 shall be amended to read:

> You shall minimize the width of the trench through waterways as specified in the ECP. Where support is needed in the trench due to depth, soil type, or soil saturation, use of trench boxes shall be considered first. Sheet piling shall only be used where necessary for personnel safety. Prior to using sheet piling, you shall conduct geotechnical borings at the location of the anticipated use of sheet piling deeper than the expected depth of the sheet piling to assess potential Artesian conditions at that site. If Artesian conditions are encountered at a depth that would give rise to a risk of an Artesian aquifer breach, a construction method shall be used at that location that does not require the use of sheet piling.

Condition 61 shall be amended to read:

> You shall minimize the width of the trench through wetlands as specified in the ECP. Where support is needed in the trench due to depth, soil type, or soil saturation, use of trench boxes shall be considered first. Sheet piling shall only be used where necessary for personnel safety. Prior to using sheet piling, you shall conduct geotechnical borings at the location of the anticipated use of sheet piling deeper than the expected depth of the sheet piling to assess potential Artesian

conditions at that site. If Artesian conditions are encountered at a depth that would give rise to a risk of an Artesian aquifer breach, a construction method shall be used at that location that does not require the use of sheet piling.

Finding of Fact 77 shall be amended to read:

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

All other provisions of Permit #IP-NO-2020-2-N00471 not directly modified here are AFFIRMED.

Dated at Madison, Wisconsin on February 13, 2026.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: Angela C Foy

Angela Chaput Foy
Administrative Law Judge

NOTICE OF APPEAL RIGHTS FOLLOW ON THE NEXT PAGE.

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to ensure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wis. Admin. Code § NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to ensure strict compliance with all its requirements.