Bad River Band Of Lake Superior Tribe Of Chippewa Indians

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101 S. Webster St., Madison, WI 53707

Re: Comments on the Draft Environmental Impact Statement for the Proposed Enbridge Line 5 Relocation Project, Wisconsin DNR File No. WP-IP-NO-2020-2-X02-11T12-18-51

Mr. Mednick,

The Bad River Band of Lake Superior Chippewa ("Bad River" or "Band") respectfully submits the following comments to the Wisconsin Department of Natural Resources ("WDNR" or "Department") on its Draft Environmental Impact Statement ("DEIS") for the Line 5 Segment Relocation Project ("Project") issued on December 16, 2021.

The Bad River Band is a federally recognized tribe in Northern Wisconsin, located wholly within the Lake Superior Basin and majority within the sub-basin of the Bad River – Mashkiiziibii – for which our Tribal Nation is named. The Bad River Reservation is also directly adjacent to Lake Superior. The Anishinaabe, of which our Tribe of Ojibwe are a part, have lived in this area for several hundred years, moving from the east as described in our migration story to find the place where food grows on water. The Bad River Band and its people maintain a reciprocal relationship with the natural environment. Anishinaabe people see the waters, trees, animals, plants, birds, and even the air as an extension of a large community. This community is at the center of Anishinaabe culture and life. The Band has a solemn responsibility to preserve our homeland, our environment, our culture, our treaty-protected resources, and our distinct lifeways for the coming seven generations. It is for this reason that the Band objects to the reroute of Enbridge's Line 5 pipeline around the Reservation.

The Bad River Band has been involved throughout WDNR's permitting process. The Band submitted comments on scoping for the EIS on July 11, 2020. Unfortunately, the issues the Band raised in its scoping comments have not been incorporated or addressed in the DEIS. The Band also previously requested that WDNR rescind the DEIS and revise it before releasing it for public comment due to the numerous deficiencies throughout the document. Letter from Bad River Band to WDNR, dated Dec. 10, 2021. The Band requested that WDNR not release its DEIS for public comment until obtaining accurate data from the applicant and performing a thorough analysis of the proposed project's full impacts. The Band verbally renewed this request in the February 2, 2022, Public Hearing. The Band continues to make this request for WDNR to correct the factual discrepancies, lack of transparency, and lack of analyses and to release an updated version of the DEIS for public comment. The Band and the Mashkiiziibii Natural Resources Department ("MNRD") prepared this comment letter based on the information in the current version of the

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DEIS. As several of the MNRD staff noted, the lack of data and other information presented barriers to the ability to comment fully on the environmental, cultural, and social impacts of the proposed project. The Bad River Band submits this comment letter in order to meet WDNR's imposed deadline. However, the Band reserves the right to update this comment letter and the underlying MNRD staff reports, attachments, and expert reports as additional information becomes available.

In Wisconsin, agencies prepare environmental impact statements under the Wisconsin Environmental Policy Act. Like NEPA, WEPA is an "environmental full disclosure law," *Wisconsin's Environmental Decade v. Dep't of Natural Resources*, 94 Wis. 2d 263, 271, 288 N.W.2d 168 (Ct. App. 1979), meant to inform two key groups—the public and government decision-makers—about the environmental impacts of an agency action under consideration. Michel Best & Friedrich LLP Land and Resources Practice Group, *Wisconsin Environmental Law Handbook*, Fourth Edition, Scarecrow Press (2007) at 38. WEPA requires release of a draft EIS for public comment, Wis. Admin. Code § NR 150.30(3)(c). WDNR must respond to those comments as part of the final EIS. Wis. Admin. Code § NR 150.30(4)(b). Thus, a Draft EIS must provide adequate and accurate information if it is to meaningfully inform the public and provide an opportunity to comment.

For reasons outlined in the December 2021 letter, and the reasons outlined below, the Band finds the data and information available on the proposed project insufficient to solicit meaningful public comment to the WDNR. The DEIS sorely lacks data on the proposed project's environmental impacts. Without an accurate description of baseline information and the project's impacts, neither the Band nor any member of the public can meaningfully comment on the DEIS. Further, without accurate data, the WDNR cannot assess the project's actual impacts. As such, the DEIS is inadequate under WEPA. WDNR cannot move forward until it releases a revised DEIS consistent with the principles of WEPA for the public and agency decisionmakers to evaluate the environmental impacts of permitting the project.

I. THE DEIS MUST FULLY ANALYZE THE PROJECT'S IMPACTS ON THE BAD RIVER BAND'S TREATY RIGHTS.

The Band's connection to the region runs deep in its history and culture. The Band signed three treaties with the United States – one in 1837, a second in 1842, and a final treaty in 1854. In the 1837 and 1842 treaties, the Bad River Band and other Ojibwe tribes ceded territory to the United States but retained usufructuary rights and occupancy privileges in the ceded lands and waters. This territory now constitutes much of present-day Wisconsin, Minnesota, and the Western Upper Peninsula of Michigan. The Ojibwe signed a final treaty in 1854 with the United States which created various reservations, including the Bad River Reservation, as permanent homelands for the Ojibwe people. The members of the Bad River Band still occupy, care for, and rely upon the Reservation and the abundant resources in the ceded territory for their livelihood today.

The proposed project route is located wholly within territory that the tribes ceded in the 1842 treaty with the United States. Treaty with the Chippewa, 7 Stat. 591 (1842) ("1842 treaty"); Compare *Map of the Mineral Lands Upon Lake Superior Ceded to the United States by the Treaty*

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*of 1842 With the Chippewa Indi*ans, Gray, A. B. (Andrew Belcher), U.S. War Dep't (1845) (Attachment A) with *Project Route Maps*, Attachment A to DEIS. As a result, this project may severely impact the ability of tribal members of many Ojibwe tribes to exercise their off-reservation treaty rights. The project will also negatively affect important resources that tribal members hunt, fish, and gather to make a livelihood. However, the DEIS does not adequately describe or evaluate the impacts of the project on the Band's reserved usufructuary treaty rights.

The usufructuary rights retained by the Ojibwe tribes in these treaties are known as "reserved rights" because, under United States Supreme Court precedent, Federal-Indian treaties grant rights to the United States and retain those not granted for signatory tribes. *United States v. Winans*, 198 U.S. 371, 381-82 (1905) ("[Federal Indian Treaties are] not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted."); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 2015 WL 5944238, at *2 (W.D. Wis. 2015) (same). Only an act of the United States Congress or a subsequent treaty can diminish or modify a reserved usufructuary right. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 201-202 (1999). The 1842 treaty, and the rights it guarantees, are federal law. State law that conflicts with these rights is preempted under the Supremacy Clause. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979).

WDNR may not allow this project to unlawfully diminish tribal treaty rights by destroying treaty resources and cutting off access to important hunting, fishing, and gathering grounds in the ceded territory. The DEIS, however, fails to analyze the burdens this project may impose on the exercise of treaty rights so WDNR cannot make that finding. The DEIS must be withdrawn and reissued with sufficient information to comment on this permitting decision's impact on the Band's treaty rights, including whether it unlawfully modifies or impairs the Band's treaty-protected rights. Further, the DEIS must provide sufficient data and analysis to determine if this project will unlawfully interfere with the Band's right to a livable homeland.

A. <u>This Project May Not Impair or Restrict Access to Harvestable Treaty-Protected Resources.</u>

The State of Wisconsin may not interfere with the Band's treaty rights in permitting this project – either by restricting access to areas where Band members access treaty resources or by impermissibly diminishing those resources. The DEIS currently lacks enough information for the Band to adequately comment on whether this project will unlawfully infringe on the Band's usufructuary rights in the 1842 treaty territory. The following discussion provides a starting point for WDNR, but the agency must conduct its own thorough analysis of this project's impacts to treaty rights and provide sufficient information for the Band to comment on these issues.

1. Fair Share Rights

The Band's reserved treaty rights include the right to hunt, fish, and gather various flora and fauna in the ceded territory. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 653 F. Supp. 1420, 1426 (W.D. Wis. 1987); Treaty with the Chippewa, 7 Stat. 591 (1842) (referencing the "usual privileges of occupancy"); *See also*, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 653 F. Supp. at 1426-29 (listing mammals, birds, fish, plants,

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plant materials, and other resources the Ojibwe used at the time of signing the 1842 treaty). The 1842 treaty guarantees that the Wisconsin Ojibwe Bands are entitled to an equal share of all harvestable treaty resources in the ceded territory to the signatory Ojibwe tribes, unless a different proportion of the harvestable share of a specific species is agreed upon by the state and the bands. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. 1400, 1418 (W.D. Wis. 1990). The treaties between the Ojibwe and the Federal government impose on WDNR the duty to regulate non-member conduct, here Enbridge's, in such a way that that it does not, in language or effect, discriminatorily harm the tribal harvest or favor the non-Indian harvest. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 707 F. Supp. 1034, 1060 (1989). Accordingly, WDNR must adequately consider and analyze the populations, habitat, health, abundance, and uses of the species and other resources subject to the 1842 treaty that may be affected by the Line 5 segment relocation project. *See id*. at 1039-52; *see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. at 1403-13.

As outlined throughout this letter, this project will have numerous direct and indirect impacts to treaty resources in the ceded territory. These impacts may unlawfully diminish the Band's share of harvestable resources. *See* MNRD Wildlife Report (Attachment B), MNRD Threatened and Endangered Species Report (Attachment C), MNRD Fisheries Report (Attachment D); *see also* Section VIII & IX Waterways and Wetlands *Infra* at 34, 42. Despite this, the DEIS ignores these impacts entirely. The DEIS must be reissued with more information and analysis about whether this project will infringe – in language or effect – on the Ojibwe tribes' harvest of treaty-protected resources.

2. Geographic Access Rights

The DEIS also completely fails to analyze how the pipeline right of way, which is directly tied to the project, will totally foreclose access to certain areas of the ceded territory and make it more difficult to access others. Wisconsin's felony trespass law, which makes it a felony to access the pipeline right of ways, creates a de facto restriction on access to tribal treaty rights. Due to the felony trespass law, no matter where the project is located within the ceded territory, it will impact Bad River and other Ojibwe treaty rights. *See* Wis. Stat. § 943.143. As GLIFWC explained in its April 13, 2021, letter to WDNR (Attachment E), a 2019 bill expanded the applicability of felony trespass "to include lands in which oil pipeline companies operate . . . [including] the Right-Of-Ways (ROW) pipelines use to cross through public and private lands." *Id.* at 4. This change in the law exposes tribal members exercising treaty rights on public lands near such a pipeline to a Class H felony, risking up to 6 years in prison and a $10,000 fine. *Id.* at 4; Wis. Stat. § 939.50(3)(h). The DEIS acknowledges the felony trespass law "could create impediments" to hunting, fishing, and gathering only "[i]f enforced by law enforcement and county district attorneys." DEIS at 212. Unfortunately, there is a long history of harassment and violence against tribal members attempting to exercise these rights, beyond the threat of arrest and legal penalties.[1] For example, after the *Lac Courte Oreilles* decision legally confirmed the continued existence of Ojibwe treaty rights in Wisconsin, many people verbally and physically threatened and assaulted tribal members attempting to exercise these rights. Perceived or actual trespasses along the

[1] *See generally* LARRY NESPER, THE WALLEYE WAR: THE STRUGGLE FOR OJIBWE SPEARFISHING AND TREATY RIGHTS (2002).

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proposed project by those exercising treaty rights risk similar altercations that stand to prevent tribal members from accessing harvestable resources in the ceded territory. WDNR must ensure permitting this project will not infringe on the geographic component of the Band's treaty rights as a result of Wisconsin's felony pipeline right-of-way trespass law.

The proposed project also creates restrictions on state-owned and other public lands where tribal members access treaty protected resources. This pipeline will cross 108 acres of Iron County Forest land. DEIS at 244. It will also be within 140 feet of the southernmost boundary of the Copper Falls Area of Special Natural Resource Interest, located in Copper Falls State Park. DEIS at 247. Pipeline construction, operation, and maintenance may prevent tribal members from accessing these lands to exercise their treaty rights. In Section 6.6.1 *Trespass/Injury*, for example, WDNR briefly details Enbridge's plan to prohibit public access to the right-of-way during construction, which makes sense for safety purposes. However, this section fails to discuss how this exclusion will impact people seeking to exercise treaty-reserved rights, or alternatively how the prohibition on public access will be modified to facilitate exercise of such rights. Further, Enbridge's Draft Environmental Justice Commitment Plan states, "Enbridge will not impede the lawful exercising of the right to hunt, fish, or gather on property open to the public." DEIS Appendix O at 4. However, "[t]he DEIS does not make clear what parts of the right-of-way would be considered 'open to the public,' and whether Enbridge could make changes to access along the Line 5 right-of-way in the future. Without this information it is impossible to effectively evaluate the direct, indirect, and cumulative impacts of the project on access to treaty resources." Letter from U.S. Environmental Protection Agency to Adam Mednick, WI Environmental Policy Act Coordinator, WI Dep't of Natural Resources (March 21, 2022) ("EPA Letter to WDNR") at 9 (Attachment F). WDNR must evaluate how it will ensure that treaty rights are not unlawfully restricted by a third party in this permitting process.

Construction and operation of the project would also change the landscape and the ecology of the region. For example, Enbridge plans to permanently convert forested wetlands to emergent wetlands. The conversion of wetlands will alter habitat for some treaty-protected resources such as cedar. There are other culturally-important harvested species that are dependent upon forested habitat (both wetland and upland) along the route. White birch, maple, leatherwood, ironwood, wild leeks, wild ginger are a few examples. The abundance of these resources for the seventh generation would be impacted anywhere the pipeline corridor converts forested lands to open lands. Additionally, non-local beings are more easily transported along the pipeline corridor during maintenance, and their introduction could alter the habitat in forest lands adjacent as they spread and further impact treaty harvest. It may also alter the hydrology of the region that supports fish species. The DEIS fails to disclose or analyze how changes in the ecology due to construction, operation, and maintenance of the right of way may impact treaty resources. To the extent these habitat conversions change the ecology of the region and eliminates or impacts fish habitat, it could amount to an interference with the Band's usufructuary rights. WDNR must analyze these habitat conversions, and the associated changes to uses and functions supported by wetlands and other waters, to ensure they do not infringe on treaty-protected resources and limit the geography of where those resources are located.

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The current DEIS fails to analyze important aspects of the Band's treaty rights and how this project may affect them. WDNR must fully disclose and thoroughly evaluate the many impacts that this project will have on the Band's usufructuary treaty rights in a new, revised, DEIS.

B. The DEIS Must Provide Sufficient Data and Analysis to Determine if this Project Will Unlawfully Interfere with the Band's Right to a Livable Homeland

At the time the Band and the United States negotiated the 1837 and 1842 land cession treaties, United States policy was to remove tribes to land west of the Mississippi. However, the Bad River Band avoided removal by negotiating a third and final treaty with the United States in 1854. The 1854 treaty was signed at La Pointe on September 30, 1854. Treaty of LaPointe, Signed Sept. 30, 1854, Ratified Jan. 10, 1855, 10 Stat. 1109 ("1854 Treaty"). This Treaty formally abandoned a Presidential Removal Order issued in 1850 and established permanent homelands (reservations) for the Ojibwe in Wisconsin, Michigan, and Minnesota. This treaty also did nothing to diminish the previously retained usufructuary and occupancy rights in the ceded territory.

The present-day Bad River Reservation is in Northern Wisconsin and mostly within the Bad River Watershed on the southern shore of Lake Superior. As previously stated, the project is routed just outside the perimeter of the Reservation and through territory the Band ceded in the 1842 treaty. Several rivers from upstream subwatersheds – the Potato, Tyler Forks, Upper Bad, Marengo, and White Rivers – all flow downstream into the Lower Bad River watershed. The Bad River, White River, Potato River, Marengo River, Brunsweiler River, Tyler Forks River, Beartrap Creek, Vaughn Creek and many tributaries also flow through the Bad River Reservation. The presence of these waterways, and the unique hydrology and geology of the area mean that both surface waters and groundwaters feed the Bad River Reservation. Any negative direct, indirect, cumulative, and reasonably foreseeable impacts resulting from this project on water quality or quantity will directly affect the Band's reservation because of the hydrological connectivity of this area.

Under federal caselaw, tribes generally have federally reserved rights to enough water to fulfill the purposes of their reservations. *See Winters v. United States*, 207 U.S. 564, 576-77 (1908). In *Winters*, the Supreme Court of the United States recognized that when Congress approved an agreement between the United States and various tribes in present day Montana to establish the Fort Belknap Reservation as a homeland, the tribes did not surrender prior rights to water necessary to make the reservation livable. *Id*. at 576 ("The Indians had command of the lands and the waters, [] command of all their beneficial use, whether kept for hunting, and grazing roving herds of stock, or turned to agriculture and the arts of civilization[.] Did they give up all this?") (citations omitted). The Court ruled that when Congress ratified the agreement with the tribes, it included an implied reserved water right to fulfill the agricultural purposes of the reservation. *Id*. at 577. Since *Winters*, other courts have applied this doctrine. *See also Arizona v. California*, 373 U.S. 546, 600 (1963) (finding that five tribal reservations had reserved water rights effective at the time the United States created their reservations). These reserved water rights also apply to groundwaters that supply tribal reservations. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist*., 849 F.3d 1262, 1268 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 469 (2017). Significantly, once tribal reserved rights are established at the time of, and for the purposes of, the reservation, they continue to exist, *Arizona*, 373 U.S. at 600, whether or not they

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have been historically accessed or used, *Agua Caliente*, 849 F.3d at 1272. *See Cohen's Handbook of Federal Indian Law*, Section 19.01[1] (2012) (Indian reserved water rights "are not lost to non-use"). These rights exist even if they have not yet been quantified, as is the case for the Bad River Band. The Bad River Band relies on instream flows for hunting, fishing, and ceremonial purposes. The Band also relies on groundwater for drinking water, including portions of the aquifer south and southeast of the Reservation. Even though the Band's water rights have not yet been determined, the Band has a basic right to drinking water as part of the occupation of its homeland.

The project's location upstream of the Bad River Reservation means it has the potential to impact waters that flow downstream onto the Reservation. The project's location in Fish Creek and Montreal River watersheds also means it has the potential to impact waters within the Reservation that are connected to these areas. The waterways the project proposes to cross feed into or are connected to valuable on-Reservation waters that support the exercise of treaty rights and the livability of the Reservation. These waterways and wetlands support ecosystems rich in fish, unique flora and fauna, and vital drinking water resources – all essential to the ability of the Bad River Band's people to continue to live on their Reservation and exercise their treaty-reserved rights. The DEIS fails to account for the environmental impacts the project will have on the Reservation, including Reservation waterways, and the effects on treaty resources within those waterways.

WDNR has not disclosed in the DEIS the full range of impacts the project will have on tribal treaty rights – those include the Band's usufructuary water rights and the right to a livable Reservation under the 1854 treaty. Without a full disclosure of these impacts, WDNR cannot ensure that this project is consistent with federal law. The project's impacts may result in unlawful impairment of tribal treaty rights and these potential effects merit careful evaluation in the DEIS. The WDNR must reissue this DEIS with an appropriate assessment of this project's impacts on the exercise of treaty rights in the ceded territory and on the Bad River Reservation's livability.

II. THE DEIS DOES NOT ANALYZE THE PROJECT'S COMPLIANCE WITH THE STATE OF WISCONSIN'S WATER QUALITY STANDARDS.

WDNR may not issue a wetlands permit without certifying that this project complies with state water quality standards. However, WDNR cannot make that finding because the DEIS does not provide complete information about the state's water quality standards. Nor does the DEIS provide information on the project's water quality impacts, much less analyze whether those impacts violate state water quality standards.

Federal and state law require WDNR to analyze the projects' impacts to water quality in order to avoid and minimize water quality degradation. Before the Army Corps of Engineers can consider whether to issue Enbridge a Clean Water Act permit for the project, Enbridge must obtain a certification from Wisconsin that the project will comply with the state's water quality standards. 33 U.S.C. § 1341 ("Section 401 Certification"). In Wisconsin, issuance of a wetlands permit constitutes a state Clean Water Act Section 401 water quality certification. Wis. Stat. § 281.36(3b). As part of the wetlands permit process, WDNR must make a "finding that a proposed project causing a discharge is in compliance with water quality standards." Wis. Stat. § 281.36(3n)(c).

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This includes determining whether "the proposed project will [] result in significant adverse impact to water quality."

Together, these statutes require that the WDNR *evaluate*—and not simply summarize—the water quality impacts, and potential water quality standards violations, associated with this project in the DEIS. *See Kohler v. Wis. Dep't of Nat. Res.*, Case. No. 2019 CV 199, 7 (Sheboygan Cty. Cir. Ct. 2021); *see also* Wis. Admin. Code NR § 103.03(1)(a)-(g). This evaluation extends beyond the impacts associated with fill material and includes indirect, and cumulative, water quality impacts. Put simply, "the Department is required to make a determination that the project will not result in significant adverse impacts. It is unable to do so based on incomplete information." *In the Matter of Wetland Individual Permit IP-SE-2017-60-00631*, 2019 WL 1755710, at *18 (Wis. Div. of Hearings and Apps. 2019). Similarly, the DEIS for the Line 5 re-route lacks a significant amount of information about how the impacts of pipeline construction, operation, and maintenance will affect water quality. WDNR must close these information gaps on water quality in a revised DEIS.

A. The DEIS must describe the water quality standards applicable to the project's proposed and alternative waterbody crossings.

WDNR cannot evaluate the project's effects on water quality without knowing the water quality standards that apply to each waterbody the proposed and alternative project routes will cross or affect. *See* Wis. Admin. Code NR § 102.01-102.30 (water quality standards, criteria, uses, and antidegradation requirements). Section 6.10.1 of the DEIS lists the project's proposed waterbody crossings and the crossings associated with each alternative. DEIS at 180. WDNR, however, does not provide information anywhere about the applicable water quality standards for these waters. The proposed crossings table fails to (1) enumerate the uses of each waterbody, (2) discuss their present status as impaired or in attainment of water quality, (3) describe applicable criteria for turbidity or sedimentation and other indicators. *See* Wis. Admin. Code NR § 102.04. Further, the proposed crossings table only cursorily discusses the antidegradation designations for some select waterbodies. *See* Wis. Admin. Code NR § 102.05(1). This project will cross numerous waterbodies with an Outstanding Resource Water (ORW) or an Exceptional Resource Water (ERW) designation and affect many more. Concerning these impacts, the DEIS states that "[t]he ORW/ERW status of the waterways that would be crossed by the proposed route are listed in the table in Volume II Appendix G and shown on maps in Volume II Appendix G." DEIS at 91. However, Appendix G does not have a map and the table in Appendix G is similarly lacking information about uses and criteria. Further, WDNR does not even list the water quality classifications for waters crossed by the alternative routes. Consequently, there is no way to compare the water quality impacts across alternatives.

WDNR cannot determine compliance with water quality standards without actually knowing which standards apply. Moreover, without this information, the Band and the public are unable to comment intelligently on this project's water quality implications. WDNR must articulate the water quality standards, criteria, uses, and antidegradation designation (if relevant), applicable to waters and wetlands crossed by the proposed and alternative routes. If current conditions are not known, then additional data and information must be collected and accurately

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mapped. Without this information, there is no way to know whether this project will comply with water quality standards.

B. The DEIS does not evaluate whether pipeline construction, operation, and maintenance will violate water quality criteria and interfere with designated uses.

Sections 6.10.2 and 6.10.3 describe, in a general manner, the negative effects of sedimentation, siltation, erosion, knickpoints, and head cutting. DEIS at 196-197. But the DEIS does not detail how WDNR and Enbridge plan to ensure these impacts will not lower water quality or interfere with designated uses. For example:

- The DEIS states that Enbridge will make use of best management practices to reduce sedimentation without specifying what those management practices are or evaluating whether they are effective. The DEIS also does not describe how and whether such best management practices will vary across proposed crossing sites and alternatives routes.

- The DEIS does not describe specific erosion control methods Enbridge will use and how they are responsive to particular conditions and water quality criteria at each crossing.

- The DEIS states that knickpoints will not affect erosion—and therefore, presumably, will not affect water quality—but fails to state how it reached that conclusion.

- The DEIS does not state what "proper post construction stabilization" is and how it will prevent sedimentation and erosion from head cutting.

Waterway crossing methods proposed in Table 6.10.1-1 lack sufficient detail and explanation for the public and the Band to meaningfully comment. DEIS 182-190. The DEIS does not indicate whether Enbridge will be able to change crossing methods based on site specific conditions and whether there will be any environmental review required for such decisions. In addition, there is no specific discussion of the possible impacts associated with trench, open cut, or HDD methods at each waterbody crossing. These construction methods have known risks that the DEIS should spell out with detail for each waterbody crossed. What's more, the significance of a "not applicable" designation in the crossing method column is not detailed anywhere. How Enbridge plans to cross these waterbodies and what environmental review will take place for construction methods at these sites remains unknown. Without adequate information about the water quality impacts of the various crossing methods Enbridge intends to employ, WDNR will be unable to determine if those methods will comply with water quality standards. The failure of the DEIS to evaluate the impacts of pipeline construction are further described in Section VII.A *infra* 24-29.

WDNR must also consider the indirect water quality impacts of Enbridge's plans to maintain a permanent access right-of-way along the pipeline route. Enbridge plans to permanently convert forested wetlands to emergent wetlands in order to maintain access to the pipeline segment for maintenance projects. *see* DEIS at 200 (Table 6.11-1); *see also* DEIS at 206. Maintenance

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projects could involve heavy machinery, workers, and other ground and soil disturbing activity. Maintenance projects could also require numerous site visits. WDNR must analyze whether these disturbances will create erosion, runoff, or other contamination or changes that violates applicable water quality standards. Moreover, converting forested wetland to emergent wetland in the maintenance ROW may create increases in temperature in various streams because of reductions in shade. The DEIS acknowledges this possibility but fails to evaluate whether such increases may violate water quality standards related to maintaining suitable water temperatures for aquatic flora and fauna. DEIS at 216 (Section 6.14.2.1); *See also e.g.*, Wisc. Admin. Code NR § 102.245 (temperature criteria for limited aquatic life communities).

Finally, WDNR must analyze the operational impacts of the pipeline—including the impacts of the project's emissions and the possibility of an oil spill—in the context of water quality standards. The DEIS must provide sufficient information to determine if these operational impacts will result in water quality standard violations. Currently, the wetlands and surface water sections both lack any discussion of these operational impacts and whether they will interfere with the project's compliance with water quality standards.

The DEIS must fully explore and disclose whether the impacts of the proposed project and its alternatives will result in a violation of water quality criteria or a significant degradation of water quality. The DEIS must provide enough information to compare the specific impacts at particular streams, wetlands, and crossings against the water quality standards applicable to those waters. Without that information it will be impossible to determine if this project will violate water quality standards.

C. The DEIS does not assess whether the project will unlawfully lower water quality of waters currently meeting or exceeding water quality standards.

The DEIS fails to provide enough information for WDNR to evaluate whether the project will unlawfully lower water quality. The project cannot lower the water quality of any water of the state unless "such a change is justified as a result of necessary economic and social development, provided that no new or increased effluent interferes with or becomes injurious to any assigned uses made of or presently possible in such waters." Wisc. Admin. Code NR § 102.04(1)(a). The DEIS does list certain waters in the crossing table as Outstanding Resource Waters ("ORWs") and Exceptional Resource Waters ("ERWs") under NR 102.05(1)(b). Further the DEIS lists certain streams as trout streams subject to special aquatic life criteria under NR § 102.04(4)(b). However, the DEIS fails to actually *evaluate* whether the construction and operation of the project will lower water quality in these areas.

For example, Wisconsin lists Beartrap Creek as an ORW. Wis. Admin. Code NR § 102.10. WDNR recognizes this creek as an Area of Special Natural Resource Interest (ASNRI). DEIS at 182, Table 6.10.1-1. This creek flows into the Kakagon-Bad River Sloughs wetland complex, a wetland of international importance, and the lower reaches of the creek support wild rice. The DEIS plainly states that the project may impact the Sloughs, such as through sediment laden runoff harming water quality, aquatics, and habitat. DEIS at 199. However, the DEIS does not include a specific discussion or evaluation of whether the proposed project will lower water quality in Beartrap Creek and if water quality will continue to support existing uses.

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Wisconsin also lists the Marengo River as an ORW, Wis. Admin. Code NR § 102.10, and as an ASNRI. DEIS at 184, Table 6.10.1-1. The Marengo River is also listed on WDNR's CWA 303(d) impaired waters list—restricting recreational use due to pathogens. The DEIS does not mention this existing impairment.[2] The DEIS does note at that "[m]any of the streams within the project area (preferred route and alternatives) are located in the Marengo River watershed or have similar characteristics to the Marengo River watershed and therefore could be more susceptible to erosion." DEIS at 197. Despite this mention, the DEIS does not present a conclusion or specific evaluation of whether the water quality in Marengo River will be lowered and if water quality will continue to support uses. MNRD staff could only identify a general and conclusory statement that an oil spill in any of the surface waters the project proposes to cross "would temporarily impair water quality within a relatively short upstream and longer downstream distance. The duration of impairment would vary depending on the volume of spill and could last from several weeks to months." DEIS at 272. Furthermore, the DEIS does not include an evaluation to demonstrate that the proposed project would not worsen or delay timely remediation of Marengo River's existing 303(d) impairment. *See* EPA letter to WDNR at 13 (Attachment F).

These analyses do not pass muster under the antidegradation provision of WDNR's surface water regulation. Under NR § 102.04(1)(a), WDNR must have enough information in the DEIS to evaluate (1) whether water quality will be lowered by the construction, maintenance, and operation impacts of the project at the ORW, ERW, or trout stream site(s), and (2) conduct an analysis of whether the lowering of water quality is justified by social and economic considerations. The DEIS must be revised to include specific impact information and water quality analysis at all sites the project will cross or affect that are specially designated as ERWs, ORWs, and fish and aquatic life waters. *See* NR § 102.10, 102.11, 102.13.

III. THE DEIS FAILS TO ANALYZE THE PROJECT'S CONSISTENCY WITH THE BAD RIVER BAND'S TRIBAL WATER QUALITY STANDARDS.

The project, as proposed, will go through, over, and under numerous waters that flow directly into or are directly connected to waters within the Bad River Band's Reservation. The impacts from construction, maintenance, and operation may violate the Band's established water quality standards. The waters within the Band's Reservation are of high quality (as designated under the Band's antidegradation policy) and support numerous tribally designated uses.

The EPA approved the Bad River Band to be treated as a state ("TAS") under the Clean Water Act in 2009. *See* 33 U.S.C. § 1377(e). Pursuant to that designation, the Band adopted designated uses, water quality criteria, and an antidegradation policy for Reservation waters in 2011.[3] *See* Attachment 1 to MNRD Water Quality Standards Report (Attachment G). WEPA requires WDNR to evaluate the project's consistency with the Band's policies – including the Band's water quality code. A DEIS must "discuss the probable positive and negative direct, secondary, and cumulative effects of the proposed project, and alternatives to the proposed project,

[2] Wisconsin Dep't of Natural Resources, Impaired Waters in Watershed (LS12), available at https://dnr.wi.gov/water/watershedImpaired.aspx?code=LS12 (last accessed April 14, 2022).

[3] As a TAS with approved water quality standards, the Bad River Band is a downstream jurisdiction under Section 401 of the Clean Water Act. The Band fully intends on participating in the federal permitting process as an affected jurisdiction.

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on the human environment, including . . . [c]onsistency with plans or policies of local, state, federal, or **tribal governments**." Wisc. Admin. Code NR § 150.30(g) (emphasis added). Despite this requirement, there is no discussion of how this project might hinder the implementation of the Band's water quality policy. Section 10.1 of the DEIS, which discusses the consistency of this project with state and federal policy, totally omits consideration of the Band's water quality policy. DEIS at 331-332. This is despite the fact that this pipeline will be routed around and upstream of the Reservation and largely within the Bad River Watershed—hydrologically connected waters feeding into the Bad River Reservation and its jurisdictional waters. WDNR must revise the DEIS to include an evaluation of the project's consistency with the Band's water quality code and the associated uses, criteria, and designations promulgated under it.

The DEIS includes a cursory discussion of tribal sovereignty and tribal water quality standards, but this discussion is nowhere near enough to provide WDNR with the appropriate information to analyze this project's consistency with the policies of the Band's government. *See* DEIS at 16; *see also* MNRD WQS Report at 2-6 (Attachment G). This project has the potential to interfere with all three aspects of the Band's water quality standards – designated uses, water quality criteria, and the tribal antidegradation policy. This interference must be explored in the EIS in consultation with the Bad River Band.

Here, the Band provides a preliminary analysis of the potential impacts of this project on the Band's Reservation water quality. This preliminary and non-exhaustive analysis should not be used to supplement or supplant thorough review by WDNR and Enbridge of these issues.

The designated uses that apply to surface waters within the Reservation boundaries are described in provisions F and G of the Band's WQS and include cultural (C1), wild rice (W1), wildlife (W2), aquatic life and fish (A), cold water fishery (F1), cool water fishery (F2), recreational (R), commercial (C2), navigation (N), and wetland (W3). MNRD WQS Report at 3-4 (Attachment G); *see also* Attachment 1 to MNRD WQS Report (Tribal Water Quality Standards). The W3 designated use applies to wetlands, focuses on the functions, and services that wetlands provide, such as storm water retention, groundwater recharge, low flow augmentation, and preserving wildlife habitat. Examples of the designated uses assigned to waters within the Reservation that originate upstream of the Reservation and which the proposed project would cross or otherwise could be impacted include:

- Cold water fisheries (F1), such as Potato River, Vaughn Creek, Winks Creek, Trout Brook, and Tyler Forks River, and cool water fisheries (F2), such as White River and Marengo River and the other trout streams shown on the Designated Trout Stream map, Attachment 4 to MNRD WQS Report (Attachment G).

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- The Kakagon and Bad River Sloughs coastal wetland complex[4] supports manoomin or the wild rice (W1) use[5] among many other uses.

- The cultural (C1) designated use applies to all waters within the exterior boundaries of the Reservation, such as the Bad River and numerous wetlands. This designated use is described as water-based activities essential to maintaining the Band's cultural heritage including, but not limited to, ceremony, subsistence fishing, hunting, and harvesting. This use includes primary and secondary contact and ingestion.

- The Bad River, Potato River, and many other watercourses support the navigation (N) use.

- The commercial (C2) designated use supports the use of water in propagation of fish fry for the Tribal Hatchery and irrigation of community agricultural projects. Kakagon Sloughs is an example of a surface water with this use.

- The majority of waters support the recreational (R) use.

For these waters, the MNRD WQS Report at 4 (Attachment G) identifies the following non-exhaustive list of criteria that may be violated by the project:

- Water quantity and quality that may limit the growth and propagation of, or otherwise cause or contribute to an adverse effect to wild rice, wildlife, and other flora and fauna of cultural importance to the Tribe shall be prohibited (refer to criterion E.6.ii.c of the Band's WQS Attachment 1 to MNRD WQS Report (Attachment G).

- Temperature as described in criterion E.6.ii.g of the Band's WQS Attachment 1 to MNRD WQS Report (Attachment G).

- Turbidity as described in criterion E.7.iii of the Band's WQS Attachment 1 to MNRD WQS Report (Attachment G).

- Pollutants or human-induced changes to waters, the sediments of waters, or area hydrology that results in changes to the natural biological communities and wildlife habitat shall be prohibited as described further in criteria E.6.ii.e of the Band's WQS Attachment 1 to MNRD WQS Report (Attachment G).

The WDNR also lists the Kakagon-Bad River Sloughs wetland complex as a state ORW, Wis. Admin. Code. NR § 102.10, even though the Sloughs sit entirely within the Reservation and are regulated by the Band's water quality standards. WDNR recognizes the complex as an area of special natural resource interest (ASNRI). DEIS at 274. This is also a wetland of international

[4] One of the many designations that the Kakagon and Bad River Sloughs coastal wetland com-plex has is a Wetland of International Importance under the Convention on Wetlands (also known as a Ramsar site): https://rsis.ramsar.org/ris/2001.

[5] The lower reaches of Bear Trap Creek support manoomin and is part of the Kakagon/Bad River Sloughs coastal wetland complex.

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importance under the Ramsar convention. *Id*. The DEIS plainly states that the project may create "[s]ediment laden runoff [that] can affect water quality, aquatics, and habitat" in the Kakagon-Bad River Slough. DEIS at 199. The DEIS then concludes, without any genuine analysis, that water quality will not be lowered. WDNR reasons that undefined "modern erosion and sediment control" and Enbridge's "special care and consideration" will prevent mass sediment loading of these important aquatic sites. *Id*. The agency concludes that given background sediment loading "it is unlikely that the project would have an adverse effect on the sloughs." *Id*. The data and analysis that WDNR relied on to reach this conclusion is not provided. The DEIS repeats this kind of conclusory analysis in other areas concerning special designation waters. *See e.g.,* Sections 6.10.4-6.10.8.

WDNR must include a separate analysis of the consistency of this project with tribally designated uses and implementing criteria at the crossings specified in the MNRD WQS Report (Attachment G). This analysis must be carried out for all methods of crossing and account for operational and maintenance impacts. Further, the WDNR must conduct this analysis for each alternative in the EIS. MNRD stands ready to assist the WDNR in carrying out its mandate to evaluate this project's consistency with the Band's water quality code. In addition to analyzing the project's impacts to uses and criteria, WDNR must also conduct an antidegradation analysis based on the Band's antidegradation policy. MNRD WQS Report at 2-3 (Attachment G).

In all, the DEIS does not provide enough information to the WDNR to evaluate this project's compliance with state water quality standards or with the Band's water quality standards. Further, the dearth of information makes it impossible for the Band and the public to comment intelligently on this proposal's water quality implications. The DEIS must be reissued with thorough review of this project's potential to violate water quality standards and lower water quality.

IV. THE DEIS MUST INCLUDE AN ACCURATE DISCUSSION ON THE BAD RIVER BAND'S CURRENT LAWSUIT AGAINST ENBRIDGE, INC.

The Bad River Band is familiar with the operation of Line 5 and its potential to harm treaty-protected resources and the Bad River Reservation. Enbridge, formerly Lakehead, has operated Line 5 through the Bad River Reservation since 1953. Despite this long operational history, the DEIS contains very little information about the current operation of Line 5 and has only a brief discussion of the current litigation between the Bad River Band and Enbridge. Significantly, the DEIS fails to mention that Enbridge is currently operating Line 5 in trespass. WDNR needs a fuller understanding of this litigation to compare and evaluate the proposed project and alternatives. WDNR must also correct any factual and legal inaccuracies present in the DEIS.

Although Line 5 has been operating through the Reservation for many years, it can only do so with legal permission from the Bad River Band and the Bureau of Indian Affairs in the form of easements. In 2013, several of Enbridge's easements expired and the Band decided not to renew them. Quite simply, this means Enbridge illegally operates Line 5 in trespass through the Reservation and has done so since the easements expired in 2013.

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The Band decided not to renew these easements, in part, because of the dangers a pipeline spill poses to wetlands, waters, and the Reservation community. 2017 Tribal Council Resolution (Attachment H). The Council resolved in 2017 and reaffirmed in 2019 to not renew the Line 5 easements, and also directed Band staff to take all lawful action to remove Line 5 from the Bad River watershed, not just the reservation. *Id*; 2019 Tribal Council Resolution (Attachment I). Enbridge and the Bad River Band entered into mediation from June 2017 to July 2019 but could not reach an agreement. The Bad River Band filed a lawsuit seeking to order removal of the pipeline in federal district court in 2019. Complaint, Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge, Inc., et al., 3:19-cv-00602 (W.D. Wis. July 23, 2019), ECF No. 1 ("Bad River Complaint") (Attachment J).

The Band's lawsuit seeks to enforce the Band's decision to not renew the easements and the duty on Enbridge to remove the pipeline. In fact, the easements themselves require removal of the pipeline upon their expiration, which is now several years past due. *See* Bad River Band Mem. of Law in Supp. of its Mot. for Partial Summ. J. and for Summ. J. on Defs' Countercl., 3:19-cv-00602 (W.D. Wisc. Feb. 17, 2022), ECF No. 172 (Attachment K). The DEIS must reflect that Enbridge does not have the required easements to operate Line 5 in its current location. The result is that sections throughout the DEIS are inaccurate with respect to decommissioning plans and timelines. In Section 2.6.16, DEIS at 80, the DEIS ignores that the potential outcome of Bad River's lawsuit against Enbridge will require Enbridge to remove the existing segment of Line 5 that runs through the Bad River Reservation. In the same section, the DEIS assumes that decommissioning of the current Line 5 can begin once construction of the re-route is complete. This plainly ignores the Bad River Band's litigation and possibility that decommissioning may need to start on a timeline that is dictated by the outcome of the litigation, regardless of the status of the proposed re-route project. Despite the expired easements and the Band's clear resolve to remove Line 5 from both the reservation and the watershed, Enbridge flouts the law and contractual obligations requiring pipeline shutdown and removal.

Should the Band's lawsuit succeed, Enbridge must cease operating Line 5 through the Reservation and remove it. However, to fully comply with the repeated resolutions of the Band, Enbridge must remove the pipeline from the entire Mashkiigon-ziibi (Bad River) watershed. Enbridge's proposal to locate the pipeline around and upstream of the Bad River Reservation still unreasonably interferes with the Band's treaty-protected rights to fish, hunt, and gather, and to control the use of its lands consistent with public health, safety, and welfare. A revised DEIS must consider the present and future impacts and risks of the current pipeline, as it is inextricably intertwined with the proposed project. The DEIS must consider the litigation and Band resolutions as part of the baseline situation, and the Band must be consulted in the description of the lawsuit and analysis of how it impacts the proposed project.

V. THE ALTERNATIVES ANALYSIS IN THE DEIS IS TOO NARROW AND BASED ON AN INACCURATE BASELINE.

The Bad River Band sent a letter to WDNR in December 2021 with a request that WDNR correct the alternatives analysis in the DEIS before releasing the DEIS for public comment. The Band specifically requested the WDNR correct the DEIS to include only one "no action alternative" and that it must be to decommission the pipeline. However, WDNR published the

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DEIS without changing the alternatives section. Further, the DEIS' stated purpose and need is narrowly construed. This improperly inhibits the scope of alternatives considered and analyzed for the DEIS. To the extent the DEIS does analyze a range of alternatives, the analyses are conclusory and not supported in the DEIS. WDNR must correct these severe deficiencies in the DEIS.

A. The DEIS "No Action" Alternative Ignores the Fact that Line 5 is Currently Operating Without Legal Authority.

Surprisingly, there is no acknowledgment in the DEIS that Enbridge is currently operating Line 5 through the Bad River Reservation in trespass. *See supra* Section IV at 14. Enbridge has failed to secure easements from both the Bad River Band, as well as individuals, along the pipeline route. The "No Action Alternative" must reflect this severe legal defect and be limited to decommissioning the current Line 5 pipeline.

In Section 3.3, the DEIS contemplates two "No Action Alternatives." DEIS at 101. First, the DEIS assumes that if the reroute were not constructed, that the "no action alterative" would be "Continued operation of Line 5 within the Bad River Reservation." DEIS at 101. The second "no action alternative" is "Decommissioning Line 5." DEIS at 101. Although the DEIS states that "Which scenario would occur under the No Action Alternative depends on the outcome of the lawsuit to remove Line 5 from the Bad River Reservation," it still flagrantly ignores the purpose of the lawsuit. DEIS at 101. The DEIS also ignores that the Bureau of Indian Affairs has also rejected Enbridge's requests to renew easements for continued operation of the pipeline due to objections from both the Bad River Band and individual landowners. Bureau of Indian Affairs Right of Way Determination Letter for Tract No. 430 R 154 (Attachment L); Bureau of Indian Affairs Right of Way Determination Letter for Tract No. 430 3H308 (Attachment M). The Band's lawsuit is not the only impediment Enbridge is facing for continued operation. The status quo described in the No Action Alternative should be the decommissioning of Line 5 through the Bad River Reservation, recognizing Enbridge's failure to secure several easements through those lands.

The failure to accurately curtail the No Action Alternative to decommissioning the current Line 5 pipeline has the rippling effect of undermining any analysis of the effects of the no action alternative. Even if the No Action Alternative assumed that Enbridge could continue the illegal operation of Line 5 through the Reservation, this would severely skew the alternatives analysis because the No Action Alternative establishes the baseline against which the effects of the action alternatives are measured.

B. The Purpose and Need of the Project is Unlawfully Narrow.

The Purpose and Need for the proposed project in the DEIS is so narrow that only the proposed project will meet the stated objective, which is directly contrary to the requirements of WEPA.[6] "While statements of purpose are meant to narrow reasonably the alternatives analyzed

[6] Regulations and case law implementing and interpreting the National Environmental Policy Act ("NEPA") have bearing on the implementation and interpretation of WEPA. "[B]ecause WEPA is patterned after NEPA, NEPA case law is persuasive authority with respect to the interpretation of WEPA," especially where a section is patterned after and identical to provisions in NEPA. *WED v. PSC*, 79 Wis. 2d 161, 174, 255 N.W.2d 917 (1977). One of the

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in the EIS to some manageable number, 'one obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration.'" *Nat'l Wildlife Refuge Ass'n v. Rural Utilities Serv.*, 21-cv-096-wmc, 2022 WL 136829, *15 (W.D. Wisc. Jan. 14, 2022) (citing *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997)). This narrow construction is exactly what appears in the DEIS. "Enbridge's stated purpose for the Proposed Project is to continue transporting crude oil and natural gas liquids (NGLs) through its Line 5 pipeline, a portion of which would be relocated around the Bad River Reservation in order to end transmission through the reservation." DEIS at 4. This purpose is drawn so narrowly such that the products are sent through Line 5 specifically. Courts have interpreted that the purpose statement "should look at the general goal of an action, rather than a specific means to achieve that goal." *Nat'l Wildlife Refuge* at *16 (citing *Simmons* at 666). The purpose in the DEIS is certainly too specific and must be modified to be broader.

Further, WDNR has the duty to scrutinize the project proponents' stated purpose rather than accept it at face value. Courts have "specifically cautioned against adopting a beneficiary's purpose, finding instead that agencies have 'the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.'" *Nat'l Wildlife Refuge* at *17 (citing *Simmons* at 669). The DEIS, however, does not even attempt to veil accepting Enbridge's contentions verbatim: "***According to Enbridge*** the project would allow it to continue to provide efficient and economic petroleum transportation for their customers, and to supply propane to the region." DEIS at 4 (emphasis added). The DNR must evaluate and modify the purpose and need statement in the DEIS in order to comply with WEPA.

Severely, and improperly, limiting the purpose and need of a project has a cascading effect of limiting the range of alternatives considered and analyzed for that project. The purpose and need statement "necessarily dictates the range of 'reasonable alternatives.'" *Carmel-By-The Sea v. U.S. Dept. of Transp.* 123 F.3d 1142, 1155 (9th Cir. 1997). "[H]ow and agency fashions its purpose and need statement can naturally include certain alternatives to the project while excluding others. And, certainly, an agency may through inventive articulation 'contrive a purpose so slender as to define competing reasonable alternatives out of consideration' and thereby defeat the very underpinnings of NEPA." *Nat'l Wildlife Federation v. U.S. Army Corps of Engineers*, 20-cv-00443-dwd, 2022 WL 195332, *6 (S.D. Ill. Jan. 22, 2022) (citing *Simmons* at 666). Indeed, the alternatives analysis in the DEIS is lackluster and focused almost entirely on varying route alternatives that would continue the use of Line 5.

Enbridge's purpose and need is constructed so narrowly that selection of the project proponent's preferred alternative is a foreordained conclusion. DNR must analyze and draft a purpose and need statement reflective of the broader goals of the project rather than accepting Enbridge's purpose and need statement at face value. The consequence of this narrow construct is that the DEIS fails to consider a reasonable range of alternatives for the project.

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early WEPA cases incorporated numerous U.S. Supreme Court NEPA rulings. *WED V v. PSC*, 98 Wis. 2d 682 (Ct. App. 1980) (Based on NEPA, purpose of EIS is to take "hard look", *Id*. At 690 (citing *NY NRDC v. Kleppe*, 429 U.S. 1307 (1976)); does not require "remote and speculative analysis, *Id* (citing *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519 (1978)), and "statute must be construed in light of reason" *Id*. (citing *NRDC v. Morton*, 458 F.2d 817 (D.C. Cir. 1972)).

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C. The DEIS Fails to Analyze a Reasonable Range of Alternatives.

The artificially narrowed purpose and need severely limited the range of alternatives WDNR considered in the DEIS. WDNR did not develop other possible alternatives that did not meet Enbridge's very specific "purpose and need" but might meet other possible alterations of the purpose and need. These alterations of the purpose and need could include not disrupting energy supplies or ways to get the products currently traveling through Line 5 to market. If the purpose and need were drawn more broadly, such as to transport oil and NGLs, then there are other alternatives that WDNR must consider to meet those needs. Rather, WDNR accepted Enbridge's conclusion that there is no alternative to Line 5, so they are cornered into constructing the re-route segment and the question is only which route. This is contrary to WEPA and must be addressed in the DEIS.

The study and development of alternatives must be described in adequate detail in an EIS. *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*, 79 Wis.2d 161, 255 N.W.2d 917 (1977). In Wisconsin, the evaluation of alternatives "is absolutely critical" to WEPA. *WED II v PSC*, 79 Wis. 2d 161, 176 (1977). "The agency must 'study, develop, and describe' alternatives…to assure that alternatives are adequately explored in the initial decision-making process, to provide an opportunity for those removed from that process to evaluate the alternatives, and to provide evidence that the mandated decision-making process has taken place." *Wisconsin's Env't Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis. 2d 161, 175-76, 255 N.W.2d 917 (1977), *holding modified by State ex rel. Town of Delavan v. Cir. Ct. for Walworth Cty.*, 167 Wis. 2d 719, 482 N.W.2d 899 (1992) (citing *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974); *Trout Unlimited v. Morton*, 509 F.2d at 1285-86; *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109, 1114 (1971)).

1. The No Action Alternative Is Not Adequately Analyzed.

As stated above, WDNR must define the No Action Alternative as decommissioning of the pipeline and DNR must analyze the impacts of that No Action in the DEIS. The continued operation of Line 5 is also a continuation of Enbridge's trespass on the Bad River Reservation and the illegal operation cannot be a viable No Action Alternative. Indeed, even Enbridge acknowledges that the continued operation as a No Action "would require an agreement or judgement in the lawsuit between the Bad River Band of Lake Superior Chippewa and Enbridge [] that would allow Enbridge to maintain Line 5 in operation across the reservation." DEIS at 67. WDNR must limit the No Action Alternative to one No Action (the lawful one) and conduct an environmental analysis based on the decommissioning of Line 5 in the DEIS.

The DEIS analysis of the No Action alternative is also lackluster at best. First, the heading "Relocation with removal of existing pipeline" assumes that relocation is inevitable as part of decommissioning, which is improper. DEIS at 61. Second, Enbridge refuses to analyze the impacts of decommissioning the pipeline: "According to Enbridge, removal of the pipeline is outside the scope of their project and given the numerous considerations affecting the cost of removal, Enbridge was unable to provide a cost estimate for this hypothetical scope of work." DEIS at 61. And to the extent that Enbridge does analyze the impacts of decommissioning the pipeline, it does so in a cursory fashion. Enbridge only completed "a desktop analysis of the

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environmental features that that are crossed by the existing Line 5 pipeline within the Bad River Tribe's Reservation based on publicly available information." DEIS at 61. The DEIS then just lists a table of environmental features, the unit measure, and then a number. DEIS at 61. There is absolutely no analysis of the impacts of this No Action Alternative. WDNR must require an analysis of the No Action and also disclose the data on which any determinations of impacts are based.

Even if the DEIS included the continuing trespass of Line 5 through the Reservation as a No Action Alternative, it does not model, analyze, or explain the impacts of the continued operation of the pipeline. For example, the DEIS simply assumes that continuing to operate the pipeline as constructed "would avoid the negative environmental, socioeconomic and cultural effects described in Chapter 6, as well as the additional risk of potential pipeline spills described in Chapter 7, and many of the environmental justice effects described in Chapter 8 (especially those associated pipeline construction and operation [*sic*])." DEIS at 319. However, the DEIS completely lacks any information of the current environmental or cultural effects of the pipeline on the Reservation. The current segment of Line 5 is operating well past its expected 50-year service life and is vulnerable to leak and/or spill due to exposure, and other factors. However, rather than examine the spill risks to the continued operation of Line 5, the DEIS simply concludes that "the No Action alternative would result in no change to the current risk and potential effects of spills from Line 5 pipeline [*sic*]." DEIS at 324. The DEIS makes that conclusion without disclosing or discussion what the current risks are. The DEIS should have included an independent analysis of oil spill modeling and response plans, as well as worst case scenario modeling on all substances that flow through that section of Line 5. Further, the conclusory assumption that continued operation of the pipeline will avoid environmental justice effects is a glaring omission of the concerns the Bad River Band has expressed to the State, the Corps, and throughout its current litigation to remove the pipeline from the Reservation.

2. WDNR Must Require a Full and Complete Analysis of Project Alternatives.

WDNR also fails to study and develop alternatives "in adequate detail in [the] EIS. *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*, 79 Wis.2d 161, 255 N.W.2d 917 (1977). The purpose of the alternatives analysis in the EIS is "to provide an opportunity for those removed from that process to evaluate the alternatives, and to provide evidence that the mandated decision-making process has taken place." *Wisconsin's Env't Decade*, 79 Wis. 2d 161, 175-76, 255 N.W.2d 917 (1977). WDNR fails to meet this standard with the current alternatives analysis in the DEIS.

The alternatives analysis very broadly, and briefly, discusses three pipeline route alternatives and "system alternatives" that mentions other modes of transportation. Of the pipeline route alternatives, all three of them were rejected from further consideration in a single paragraph and without any analysis of the actual impacts. DEIS at 64. Further, these route alternatives were dismissed without disclosing any of the underlying documents that form the basis for these decisions. WDNR and Enbridge must disclose the data and analysis for these alternatives in order for the public to comment. Failure to do so undercuts the purpose of alternatives analyses in WEPA, which is to provide the public an opportunity to evaluate the alternatives and to provide evidentiary support for these decisions.

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The DEIS similarly concludes that the system alternatives – such as transportation via other pipelines, truck, rail, and tanker – are not feasible without disclosing the underlying documents and analyses that support those determinations. DEIS at 67. The conclusory dismissal of system alternatives further highlights how the narrow purpose and need improperly skewed the range of alternatives considered and analyzed. For example, Enbridge summarily dismissed the alternative of switching to an existing pipeline "due to geographic considerations, capacity limitations, and infeasibility of reconfigurations to transport the additional Line 5 volumes of light crude and NGLs." DEIS at 67.

Other entities, however, are able to develop possible alternatives that were wholly rejected by Enbridge. A report prepared in January 2022 for Environmental Defence Canada examines Alternatives for Crude Oil Supply to Ontario and Quebec Refineries and Associated Impacts on Ontario and Quebec Refined Product Markets in the event of the shutdown of Line 5. Meyers Consulting, LLC, *Potential Enbridge Line 5 Closure: Alternatives for Crude Oil Supply to Ontario and Quebec Refineries and Associated Impacts on Ontario and Quebec Refined Product Markets* (Jan. 2022) ("Alternatives Report") (Attachment N). This report highlights the possibility of using Enbridge's Line 78 as an existing alternative to transport part of the product traveling through Line 5 in the event of shutdown. The Alternatives Report notes that both Line 5 and Line 78 deliver product to Sarnia, Ontario. *Id.* at 8. The Alternatives Report then evaluates the possibility of Line 78 to increase capacity in the event of a Line 5 shut down to continue delivery of product to Sarnia. *Id.* at 12. Ultimately, the Alternatives Report concludes that Line 78 will be able to pick up some, if not most, of the product that Line 5 transports into Ontario. *Id.* at 13. Enbridge, however, summarily rejects the possibility of using Line 78 in the event of a Line 5 shutdown because it is not "geographically situated *to serve all of the receipt and delivery points that are served by Line 5's routing* from Superior, through the Upper and Lower Peninsulas of Michigan, to Sarnia. Line 5, for example, delivers NGLs to Rapid River, Michigan in the Upper Peninsula, where Line 5 product is converted to propane, which is used for home and commercial heating as well as other uses." DEIS at 67 (emphasis added). This conclusion highlights that the purpose and need is so specific, which is to maintain operation of Line 5, such that Enbridge's preferred alternative is preordained. Not only is the alternative dismissed unnecessarily, but it is also dismissed without supporting analyses or documentation.

The DEIS similarly dismisses other system alternatives in broad strokes. Significantly, Enbridge dismisses the possibility of transportation by rail wholesale because "there are no existing railroad routes that connect Enbridge's Superior Terminal to delivery locations, such as the Plains Midstream De-propanization Facility in Rapid River, Michigan or receipt locations, such as the Lewiston, Michigan facility." DEIS at 70 and 321. This again highlights how the narrow purpose and need of the project has unduly influenced the consideration and analysis of alternatives to the proposed project. Enbridge rejected the "technically feasible" rail alternative because of "the environmental impacts, safety and environmental risks, logistics, and high costs associated with this alternative." DEIS at 322. Ultimately, the narrow purpose and need also stunted the development of practical alternatives that might incorporate multiple transportation systems. The Alternatives Report acknowledged that perhaps not all of Line 5's product could be transported by Line 78 and proposed other options, such as transport by rail and other methods, to make up the difference. Alternatives Report at 13-15 (Attachment N). Enbridge conveniently ignored practical solutions such as this as an alternative to the Line 5 re-route.

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The narrow purpose and need also artificially limited the consideration of alternatives to those that would singularly transport both crude oil and NGLs, and to those that would service unspecified locations in Michigan. DEIS at 4. Enbridge concludes in the DEIS that "[n]o existing Enbridge pipeline is routed in a manner to transport Line 5 quantities of oil and NGLs to and from these points in Michigan. *For this reason alone*, no existing Enbridge pipeline can serve as a feasible alternative to Line 5." DEIS at 67 (emphasis added). This is also partially why Enbridge rejected Line 78 as a possible alternative: "It is also infeasible to reconfigure Line 78 and stations to transport NGLs, given that demand requires the pipeline to be slated for 100% crude oil service." DEIS at 68. To support the requirement that the project must support areas in Michigan, Enbridge argues that the Rapid River location "supplies a significant percentage of the total Upper Peninsula propane demand[.]" DEIS at 67. This is an insincere and meritless limitation.

Although Enbridge may not be thinking of creative solutions for alternatives to transport crude oil and NGLs in the event of a Line 5 shut down, the customers that Enbridge is purporting to protect in Michigan are doing just that. The State of Michigan published a MI Propane Security Plan in March 2021 as part of the State's consistent goal to shut down Line 5. Mich. Pub. Serv. Comm'n, *Michigan Propane Security Plan: Ensuring Resilience Without Line 5* (Mar. 11, 2021) ("MI Propane Plan") (Attachment O). "The State of Michigan has a comprehensive, five-step plan to ensure a secure propane supply for Michigan families and businesses when Line 5 shuts down." *Id.* at 2. This plan identifies several state agencies and stakeholders who are addressing Michigan's propane independence in the event of a Line 5 shut down. This list includes conducting a Statewide Energy Assessment, establishing an Upper Peninsula Energy Task Force, and establishing an inter-department Workgroup on Propane Energy Security. *Id.* at 1. The five-step Plan includes steps to find alternative sourcing options, coordinate responses to potential propane shortages and price gouging, and maximizing propane efficiency through weatherization and transitioning to renewable energy and electrification. *Id.* at 2-6.

The Upper Peninsula Energy Task Force also developed Recommendations for Propane Supply in April 2020 to address possible propane shortages. Dep't of Environment, Great Lakes, and Energy, *Upper Peninsula Energy Task Force Committee Recommendation: Part 1 – Propane Supply* (April 17, 2020) ("UP Task Force Report") (Attachment P). The Task Force Report was developed by the Michigan Department of Environment, Great Lakes, and Energy and it made 14 recommendations that Michigan could take in response to a disruption of propane supply in Michigan. The recommendations include addressing storage capacity, diversifying supply infrastructure, such as building out railroads to increase supply, monitoring disruptions, and protecting consumers from high costs and price gouging resulting from disruptions. The Task Force recommendations also attached a report detailing an analysis of propane supply alternatives for Michigan. *Id.* at 31-147.

In examining other alternatives to Line 5, the Michigan Department of Transportation (MDOT) also prepared a report to examine Propane by Rail in Michigan's Upper Peninsula in November 2021. Mich. Dep't of Transportation, *Propane by Rail in Michigan's Upper Peninsula* (Nov. 30, 2021) ("MDOT Report") (Attachment Q). The MI DOT report identified ways to increase delivery of propane by rail with existing and new infrastructure. *Id.* at 26-33. As part of the report, the MI DOT found that "pipeline transportation provides fewer options." *Id.* at 13. In fact, Line 5 limited propane delivery to the Upper Peninsula. "The Plains LPG Service plant in

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Rapid River is the only access point to the pipeline in the Upper Peninsula. Natural gas liquids must be sequenced with oil shipments. Retailers interviewed for this study mentioned instances where the Rapid River facility ran out of propane and closed for periods of time. According to these individuals, reliability has at times been an issue." *Id.* at 13. It seems then that the development of alternative modes of transport for propane, separate from the transport of crude oil, would better serve communities in Michigan currently serviced by Line 5. In comparing the costs of developing the rail system to meet the needs of the Upper Peninsula, the MI DOT found that "[r]ail is not necessarily more expensive than pipeline if it allows retailers to benefit from a more direct supply chain." *Id.* at 14.

Overall, Enbridge failed to analyze a proper range of alternatives to the project. The analyses that did actually appear in the DEIS were conclusory and unsupported by data and documentation at best, and at worst were made little sense. For example, in the very brief analysis of the spill impacts of a transport by rail alternative the DEIS states:

> The risk of spill by train is lower than trucks. Based on the amount of oil spilled (per billion-ton-miles) trucks are worse than pipeline, worse than rail, and worse than ship. The environmental impact of rail spills has historically been better than trucks, better than pipeline, and better than ship. This is again due to the route of the trains. Trains typically traverse through developed, more urban areas. While they have lower risk to environmental impact, they are second highest in human death and destruction. Trucks having the highest level of human death and destruction. DEIS at 324.

WDNR must completely redo its alternatives analysis, starting with constructing a purpose and need for the project that is independent of Enbridge's purported purpose. If the purpose and need are drawn more broadly, and to be in compliance with WEPA, WDNR must include in the DEIS a full range of reasonable alternatives to be consistent with the requirements of WEPA. These may include product sent through other companies' pipelines, transportation by rail, a mix of different system alternatives, or replacing the product running through Line 5 with renewables, that would meet the purpose and need. WDNR must also conduct a complete analysis of the alternatives and make the documents and data underlying those analyses available to the public for comment.

WDNR must also limit the No Action Alternative to the decommissioning of Line 5 and give serious consideration to the impacts of a Line 5 shutdown in the DEIS. Not only is the decommissioning No Action the only lawful No Action proposed, but it is also quite possibly inevitable in the event Bad River prevails in its lawsuit. It is also possible given than the State of Michigan has revoked Enbridge's easement to operate Line 5. Although the effect of decommissioning might affect supply of crude oil to their end destinations, even Enbridge acknowledges that "[t]he extraction and refining of crude oil would occur regardless of whether the proposed route is constructed and operated since there are other ways for crude oil to reach markets." DEIS at 325.

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VI. THE SCOPE OF THE DEIS SHOULD INCLUDE THE CURRENT OPERATION OF LINE 5.

The Bad River Band is in the unique position of having on the ground experience and witnessing first-hand the effects of a pipeline through the Bad River watershed. Line 5 has been in operation through the Reservation since 1953. Since that time, the Bad River Band has discovered several environmental conditions from a potential oil spill or other activities associated with the operation and maintenance of the pipeline. Attachment 15 to MNRD Other Waters Report (Attachment R). The impacts from the current operation of Line 5 should be included in the DEIS as a baseline operation.

First, the Bad River is naturally prone to meandering and the river can change course over time. This natural process is important for a healthy river system. The existing presence and operation of the Line 5 pipeline at this location, however, poses a threat to the Bad River. This concern was one of many that the Band expressed in its lawsuit to remove Enbridge for operating illegally on Reservation lands. Bad River Complaint at 33-47 (Attachment J). The Bad River meander has resulted in the River moving closer to a portion of the pipeline buried under the River. The distance between the meander and Line 5 continues to shrink, and at a rapid pace. Between 2015 and 2019 (the year Bad River filed the lawsuit) the distance from the meander to the pipeline shrunk from 80 feet to 28 feet. *Id.* at 35-36.

As the Bad River continues to meander, the Line 5 pipeline will become exposed, thus changing the forces on that pipeline segment, and increasing the potential for a catastrophic oil spill. A third-party engineering report partially published in January 2022 evaluated the environmental impacts of a Line 5 oil spill at the location of the Bad River meander. Wright Water Engineers, Inc., Engineering Evaluation of the Bad River Meander adjacent to Enbridge Line 5 and Related Water Resources Issues (Jan. 2022) ("Meander Report") (Attachment S). The firm "found that damage to the Line 5 pipeline resulting in oil release would have severe environmental impacts to the Bad River and downstream aquatic resources under a variety of scenarios." *Id.* at 113. The Meander Report modeled several spill scenarios and "[u]nder all four oil release scenarios evaluated, oil was transported all the way to Lake Superior and the Bad River Sloughs (at approximately river mile 16)." *Id.* at 118.

Although the Meander Report (Attachment S) focused on the single location of where the meander may expose the current placement of Line 5, it also highlighted several issues that would be relevant for consideration of any potential oil spill near water resources in the Bad River watershed. For example, in the event of an oil spill, containment in the region would be difficult due to access issues, especially during flood conditions or during the presence of snow or ice. "Consequently, a rapid and successful response to a damaged pipeline would be challenging, which increases the probability of difficulties and delayed implementation of spill containment and pipeline repairs." Meander Report at 119. The lack of access to remote sites means that "cleanup will involve gaining access in a virtually roadless area." *Id.* at 157. As such, "[p]rojecting the impact of an oil spill must include both the direct effects of the spill and the collateral damage produced by the cleanup activities." *Id.* at 157. The Meander Report also considered that the flow status of the Bad River can have an impact on how an oil spill will affect the local ecosystem: "Floating oil will come into contact with plants at the water surface, causing

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damage to emergent vegetation…Further, as flood waters recede, more plant stalk area is exposed to oil. When flooded areas dry out, the floating oil will contaminate soils, exposed shallow bars in sloughs and wetlands, channel banks, and previously inundated floodplains." *Id.* at 140.

Second, the Band has also encountered areas of Line 5 where the pipeline is exposed due to soil erosion. MNRD Other Waters, Attachment 15 (Attachment R); *See also* Bad River Complaint at 48-52 (Attachment J). Changes in hydrology of surface waters, in large part due to the construction or prior maintenance activities associated with the pipeline, have exacerbated the issue of soil erosion. Exposed pipeline has an increased chance of rupture and requires more repair work, which increases disturbances of largely underdeveloped areas. *See* EPA letter to WDNR at 24 (Attachment F).

The current pipeline provides a cautionary example. Along a tributary to Denomie Creek within the Reservation, "[t]he pipeline crossing east west interrupted flow patterns that were historically north south and created a new drainage feature that ran alongside the pipeline." *See* Thompson & Associates Wetland Services, *Review of Enbridge Line 5 Wisconsin Segment Relocation Project*, at 3, 51 (March 3, 2022) ("T&A Report") (Attachment T). The new drainage feature, or rerouted drainages, interacted with a beaver impounded draining, increasing the amount of water traveling down Slope 18 before flowing into the Denomie Creek tributary at the base of the slope. This increase in water volume contributed to erosion, exposing the pipeline to the surface, creating instability and necessitating repairs. These repairs, along with the necessary access to this remote site to inspect and maintain them, resulted in impacts to the natural and cultural resources, including changes in wetland uses and functions. This example shows how pipeline-caused changes to surface and sub-surface flow create long term consequences even decades after pipeline construction.

Despite the plethora of existing data on the current operation of Line 5 and the imminent threats posed to Line 5 by naturally occurring environmental conditions, the DEIS does not include any of this information as part of its baseline analysis. And even though the DEIS assumes that one possible No Action Alternative could be the continued illegal operation of Line 5 through the Bad River Reservation, it does not have any description or analysis of the environmental impacts from that baseline operation. This omission is not only contrary to WEPA, but also contrary to common sense. The Bad River meander demonstrates clearly that the hydrology of the region can rapidly change the landscape within the Bad River watershed as part of the river's natural process. The current data on the meander – such as how it has changed over time – and the risks that an oil spill at the meander poses to the local ecosystem right now should be included as part of the DEIS for a baseline analysis. The situation that the Band's MNRD staff are seeing on the ground right now with the current operation of Line 5 will be the future of the Line 5 reroute in only a matter of time.

WDNR should require an analysis of the current and future operation of Line 5 to be included in the overall environmental analysis of the proposed project reroute, as they are inextricably intertwined. Not only is it representative of the existing scenario on the ground, but it should also shed light onto the future environmental impacts of the proposed reroute. Enbridge's proposal to locate the pipeline around and upstream of the Bad River Reservation keeps it within

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the Bad River watershed, which has similar environmental baselines that have resulted in the looming disaster of the current Line 5 route.

VII. THE DEIS DOES NOT FULLY CONSIDER THE ENVIRONMENTAL IMPACTS OF PIPELINE CONSTRUCTION AND OPERATION.

The DEIS must consider the impacts that construction of the pipeline will have on area wetlands and waterways, as well as the impacts the operation of the pipeline will have on the region. In an era where pipeline construction has resulted in severe aquifer breaches, as with Line 3 construction in Minnesota, or pipeline operation has resulted in catastrophic oil spills, as with the Line 6B failure in Kalamazoo, these impacts must be analyzed as a possible reality facing the Bad River Band. Despite the history of construction and operational failures, the DEIS only conducts a cursory review of the potential impacts of pipeline construction and operation. WDNR must collect additional information from the project applicant on pipeline construction methods, and the DEIS must actually analyze the adverse environmental impacts of pipeline construction and operation.

A. The DEIS Does Not Adequately Disclose or Analyze Environmental Impacts from Pipeline Construction.

The DEIS lacks a specific analysis of the impacts pipeline construction will have on wetland and waterway resources. The DEIS spills a lot of ink describing the various proposed construction methods (Section 2.5.2, DEIS at 34-36) for the pipeline but does not detail how those specific construction methods will impact the surrounding environment. There are several flaws in the DEIS that inhibit the full environmental impacts analysis required.

First, the DEIS only speculates which construction method will be used for each wetland and waterway crossing because there is no site-specific data to support a definitive construction method for each crossing. Although there are preliminary construction plans, the DEIS states that construction methods may change based on site specific analysis. For example, the DEIS states that blasting may be required in some sites, DEIS at 34, 42, 150-51, or that HDD may or may not be used in some sites. *Id*. at 30-31, 35-36. The applicant should have provided the proposed construction method for each crossing based on site-specific details as part of the application, or at least prior to the development of the DEIS.

The closest the DEIS gets to any site-specific details for construction is a brief discussion of different soil types along the pipeline route – compaction-prone, erosion-prone, droughty, rocky and shallow bedrock – and a list of the acreage for each soil type within the preferred route and alternative routes. The DEIS, however, does not even map out where the soils occurred along the route, or list which soils were present at each waterbody crossing. DEIS at 88. It appears the WDNR accepted the applicants' desktop review of soils using the Soil Survey Geographic Database but did not require site specific data collection or even a mapped soil profile for HDD or blasting crossing areas. DEIS at 85. Despite knowledge that the soils throughout the project area varied widely, Enbridge did not gather site specific soil data for the DEIS. This runs counter to the DEIS stating that "[t]he textures of soils developed over bedrock vary widely. Similarly, soils developed in river valleys vary widely because of the active processes of erosion and deposition

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mixing and remixing soils of various textures. Site specific soil data such as would be generated from soil borings was not part of the data evaluated for this DEIS." DEIS at 86. The general discussion of soil types within the pipeline route is not enough information to conduct an environmental analysis of the impacts that pipeline construction will have at each crossing. WDNR cannot conduct an accurate or adequate assessment of the environmental impacts without a full disclosure of the site-specific conditions that justify each construction method.

Second, the DEIS does not discuss or analyze what the specific impacts to each waterway crossing will be based on the proposed construction method. This is particularly important for crossings that involve either HDD drilling, direct bore, or blasting as part of the construction techniques. HDD, direct bore, and blasting both have the potential to severely impact groundwater resources. There are three aquifers within the area of the proposed route, as well as in the alternative routes – the Copper Falls Aquifer (Copper Falls Formation), the Lake Superior Sandstone Aquifer and the Fractured Crystalline Rock Aquifer. DEIS at 84. As of 1995, the USGS determined that all of the community and private supply wells within the Bad River Reservation are supplied by "either the buried glacial sand and gravel deposits of the Copper Falls Formation or in Precambrian sandstone." DEIS at 85. As discussed below, both HDD and blasting construction techniques will alter soils and bedrock throughout the project area.

In general, the DEIS' failure to disclose the site-specific details of each wetland and waterway crossing undercuts any ability for WDNR, or the public, to analyze the environmental impacts of pipeline construction on each wetland and waterway crossing. This is exacerbated by the applicant's failure to determine exactly which construction method will be used for which wetland and water crossing. Rather than generally describe soil conditions throughout the project area and speculate as to which construction method may or may not be used for each crossing, the WDNR must require site specific data and analysis for each wetland and waterway crossing. This includes a sampling, disclosure, and evaluation of the soils and other environmental conditions at each wetland and waterway crossing, especially where blasting or HDD or Direct Bore are proposed. This analysis must include the likelihood that each construction method may impact groundwater resources, including a breach from groundwater to the surface, or a breach between groundwater resources that were not previously connected.

Further, the DEIS lacks a cumulative impacts analysis of all the construction methods proposed for the proposed pipeline route. As discussed below, the individual impacts from each construction method may be severe. The cumulative impacts from trenching, HDD/Direct Bore, and blasting will be much worse. WDNR must conduct a cumulative impacts analysis of all construction methods for all wetland and waterbody crossings for the proposed project after it receives site specific data for all crossings.

1. Environmental Impacts from HDD and Direct Bore

The DEIS fails to describe the environmental impacts from HDD and direct bore construction methods (collectively "HDD") on wetlands and waterways.[7] First, the DEIS does not

[7] HDD and direct bore are different construction methods. DEIS at 36 (comparing HDD with Direct Bore). However, both methods involve trenchless installation methods and have direct impacts underground through either a "guiding bore" or other boring machine or mechanism. For the purposes of this comment letter they are

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commit to which crossings will use HDD. The DEIS proposes that the "HDD construction method could be used to cross wetlands because it does not typically result in the disturbance of riparian vegetation." DEIS at 35. Although the DEIS proposes certain waterways to be crossed using HDD, *see* Table 6.10.1-1 Proposed Route Waterway Crossings, DEIS at 182-90, the DEIS also claims that the crossing method may change based on geotechnical data. *see* DEIS at 35. This general approach does not explain why HDD is used in some wetland and waterway areas and not others. It also does not account for the fact that HDD is not an appropriate method for all areas and that the applicant must look at site-specific conditions to ensure HDD is feasible. WDNR should require the applicant disclose why HDD is the chosen method for some crossings but not others. WDNR should also require the disclosure and analysis of the alternative construction method proposed in the event HDD is not feasible in order for WDNR to evaluate the environmental impacts from pipeline construction.

Because the DEIS only takes a general approach to where HDD would be an appropriate crossing method, the DEIS does not disclose or analyze the impacts of HDD on specific wetland and waterbody crossings. WDNR should require a site-specific analysis of each site where HDD construction is proposed in order to evaluate the environmental impacts.

The DEIS even completely ignores the general adverse impacts of HDD construction. One severe potential impact of HDD construction is the breach of an aquifer. However, the DEIS summarily dismisses the possibility of such a catastrophe. DEIS at 168. This conclusion is especially surprising given that the HDD construction of Enbridge's Line 3 pipeline in Minnesota resulted in three separate aquifer breaches. Minnesota Department of Natural Resources, *DNR Update on Line 3 Aquifer Breach Investigation and Enforcement* (Mar. 21, 2022), Attachment 1 to Addendum Report of Jeffrey Broberg on Line 5 (March 22, 2022) ("Broberg Addendum Report") (Attachment U). The DEIS acknowledges only one aquifer breach as part of Line 3 construction. DEIS at 167. WDNR has not evaluated, nor incorporated, information released by the Minnesota Department of Natural Resources regarding the Enbridge Line 3 Breaches into the DEIS. This is especially significant given the revelation that one of the Line 3 aquifer breaches was the result of bore hole testing. For Line 5, Enbridge conducted a limited number of bore hole testing at potential HDD crossing sites. The geotechnical bores for HDD for Vaughn Creek was "terminated due to artesian conditions." DEIS Appendix J at 14. This indicates that the scenario that led to one of the Line 3 aquifer breaches is present at the Vaughn Creek crossing and that Enbridge has proposed HDD drilling for that crossing. If the pipeline is installed using HDD at this particular crossing, the community around this Line 5 crossing will likely face the same devastating aquifer breach Line 3 caused in Minnesota. Unfortunately, WDNR appears to accept wholesale Enbridge's limited explanation for the one aquifer breach it admitted to in the DEIS, as well as the conclusory statement that if the contractors follow the proposed construction plan that there will be no adverse impacts. DEIS at 167-68. The DEIS also summarily dismisses the possibility or likelihood of adverse environmental effects in the event other construction events go awry. For example, the DEIS ignores the environmental effects of the potential loss of drilling mud or if the drill bit gets "stuck in the hole." DEIS at 169. The DEIS admits that materials could be spilled during construction but does not disclose the impacts of that potential spill. DEIS at

referenced in tandem. WDNR has a responsibility to analyze the environmental impacts of all proposed construction methods through all jurisdictional wetland and waterbody crossings.

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168. Even though the DEIS acknowledges that these events may happen, it does not discuss the actual impacts. WDNR, and the applicant, cannot arbitrarily dismiss these events and the adverse environmental impacts they may have.

The DEIS also immediately assumes that "[i]ndirect impacts, long-term impacts, and cumulative impacts to geological materials or the biological environment are not anticipated from directional drilling methods." DEIS at 169. This assumption is not based on any environmental analysis. Further, the cumulative impacts of multiple HDD sites have not been assessed. "The wetland and waterway crossing table submitted as part of the wetland and waterway permit request lists 148 features that would be crossed using HDD methods. Of those 148 features 121 are wetlands and 27 are water bodies. The table lists five locations where direct bore would be implemented. Of those five locations, two are wetlands and three are waterways. DEIS at 169. However, the DEIS lacks any analysis of how conducting HDD drilling in that many waterways will impact the project area. The conclusion that no impacts are anticipated from HDD also seems to be contrary to on-the-ground experience in Minnesota with Line 3, where HDD construction methods have resulted in three aquifer breaches. Attachment 1 to Broberg Addendum Report (Attachment U). WDNR must require site-specific data to justify why HDD is appropriate for each crossing, conduct a site-specific impacts analysis of HDD drilling at each crossing, and also conduct a cumulative impacts analysis of the series of HDD sites within the project area.

2. Environmental Impacts from Blasting

The DEIS fails to consider or analyze environmental impacts from pipeline construction using blasting methods. The first failure of the DEIS is the lack of specificity of where blasting may be required: "At a limited number of waterbody crossings local geological conditions would result in possibly requiring excavation into bedrock in order to install pipeline." DEIS at 34, App. E at 4. The proposed blasting plan acknowledges that "[a] more accurate prediction of potential blasting locations will be available once on-site geotechnical data is gathered and analyzed." DEIS App. E at 5. The DEIS must identify the specific locations where blasting would be necessary in order to conduct an actual environmental impacts analysis for each blasting location, as well as to accurately evaluate cumulative impacts from blasting.

The second major failure is that both the applicant and WDNR kick the can down the road and fail to analyze the actual impacts of blasting in the DEIS. Instead, "Enbridge's blasting plan requires blasting contractors to prepare blasting plans specific to each area that requires blasting for excavation. *The site blasting plans are to address the environmental and site-specific conditions present at a given site*." DEIS at 150 (emphasis added). This means that the contractor, and not the project applicant, will evaluate the site-specific impacts of blasting locations. Enbridge's proposed blasting plan will only "provide guidelines and general requirements for blasting activities" and "blasting contractor(s) are required to develop their own blasting procedures and site-specific blasting plans[.]" DEIS App. E at 5. This not only improperly relieves Enbridge of its duties to disclose project impacts, it also allows them to circumvent the public review of what those impacts would be in an EIS. The proposed blasting plan then requires the contractor to submit plans to Enbridge and the contractor "will be required to coordinate with Enbridge's environment staff during initial planning to determine the potential to effect threatened and endangered species, as well as to implement measures to avoid impacts to identified species."

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DEIS App. E at 10. Activities impacting threatened and endangered species must be reviewed not by Enbridge, but by WDNR, or the Army Corps of Engineers for federally listed species, in order to determine that impacts will be avoided. Enbridge even goes so far as to release itself from liability from blasting incidents. DEIS App. E at 8 ("The blasting contractor(s) is responsible for the ultimate resolution of all damage claims resulting from blasting"). WDNR must require a blasting plan that outlines the proposed blasting plans, methods, and locations upfront, rather than passing those review requirements to a contractor. WDNR must also require a site-specific analysis of blasting impacts as part of the environmental review process.

The potential impacts are significant. "[B]lasting could create new preferential soil moisture movement or groundwater flow paths that could result in changes in the interconnections of a waterway and adjacent lands or changed [*sic*] in wetland hydrology from dewatering an area relative to conditions prior to the blasting… New fractures developed by blasting could also supply greater quantities of water to an area than prior to blasting, changing the local hydrology to wetter than prior to blasting." DEIS at 151, 166. "Blasting is a destructive process that permanently fractures the rock in the vicinity of the blasts." DEIS at 166. The severity of these impacts demonstrates why a site-specific analysis is so important in order to evaluate the full range of environmental impacts from construction. WDNR must require an analysis of the soil, bedrock, and hydrology of each proposed blasting site before it can conduct an environmental impacts analysis.

Overall, the proposed blasting plan and the DEIS both acknowledge that soil data has not been collected or evaluated in potential blasting sites. The blasting plan and potential blasting locations are based on a desktop review rather than a site-specific analysis. DEIS App. E at 4. No soil borings have been collected as part of the proposed blasting plan. Indeed, without this information it is unclear if blasting is even a feasible or justifiable construction method for each proposed crossing. *See* DEIS App. E at 5 ("A more accurate prediction of potential blasting locations will be available once on-site geotechnical data is gathered and analyzed."). This site-specific data and analysis are necessary to determine what the environmental impacts are. The WDNR must require the collection, disclosure, and evaluation of site-specific soil data as part of the DEIS.

The DEIS also fails to disclose the extent to which blasting may be required. For example, the DEIS only lists the areas where blasting may be required in the wetland and waterway crossing table, which is unreadable. DEIS at 151. Although the blasting plan lists some construction segments where blasting may be required, it does so in a broad and approximate manner. Rather than list specific sites, the blasting plan lists approximate mile post crossings, some of which span as long as 5.35 miles. DEIS App. E at 5. The DEIS also only summarily lists the number of possible blasting areas, without site specific analysis: "Of the 139 crossings where blasting is anticipated, 117 are in wetlands and 22 are waterways…Of the 22 waterways were [sic] blasting would be implemented, five were listed as perennial tributaries to trout streams, two were listed as Class II trout streams and the remainder were not classified. Of the 117 wetlands, four were listed as alder thickets, two as coniferous swamps, 26 as fresh (wet) meadows, 80 as hardwood swamps and five as shrub-carrs." DEIS at 151. This summary does not disclose what the impacts to each of those areas would be and is not sufficient for a DEIS.

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The DEIS also fails to evaluate the cumulative impacts of blasting throughout the project area. Despite the recognition that blasting impacts could be severe and alter the hydrology of the region, the DEIS claims that blasting "would not have direct impacts, indirect impacts, long-term impacts or cumulative impacts on the large-scale properties of any of the rock formations *(at the map scale)* along the possible routes, such as the rock strength, mineral content, water carrying capacity, solubility, unit geometry and others." DEIS at 165 (emphasis added). This statement plainly ignores the extent to which the project is proposing blasting as a construction method and the general impacts that blasting will have on each location.

The conclusion that there will be no direct, indirect, long-term, or cumulative impacts flies in the face of statements within the DEIS that acknowledge there will be impacts from blasting: "It is anticipated that there would be a local increase in the number of fractures in bedrock adjacent to blasting zones." DEIS at 166. "Long term impacts from blasting would include accelerated weathering of the local bedrock and soil forming processes due to increased capacity for movement of water through the material." *Id*. Also, "[b]lasted rock could have a higher capacity to convey water, increasing the possible rate of infiltration in unsaturated areas and increasing the rate of groundwater flow in saturated areas." DEIS at 165. These impacts are not insignificant as they may alter the hydrology of the entire region. The DEIS generally dismisses potential impacts to both the Copper Falls and Miller Creek formations without disclosing where blasting along the pipeline route will intersect with those groundwater formations. DEIS at 166-67. Nor does the DEIS explain why those impacts can be summarily dismissed. WDNR must connect the dots between these known impacts to bedrock and geology from blasting and the sites where blasting is a proposed construction method in a thorough environmental analysis.

The DEIS also fails to conduct an actual cumulative effects analysis that supports such a conclusion. The applicant proposes using blasting as a construction method for *139 crossings*, DEIS at 151, and for 20.7 total miles, DEIS Appx. E at 5. However, the DEIS simply claims "[a]s described above, the comparative impacts resulting from blasting bedrock was assess [sic] by determining the presence of soils having less than 60 inches to rock." DEIS at 166. However, the reference is empty as there is no comparative impacts analysis whatsoever. The DEIS then simply states that "[c]umulative impacts on bedrock from blasting in any of the routes are not anticipated." DEIS at 166. WDNR must require a cumulative impacts analysis that evaluates all of the proposed blasting sites in relationship to each other as well as the project.

Overall, the DEIS' findings that pipeline construction will not have adverse environmental impacts are conclusory and not supported by any analysis. The current discussion on construction impacts is generic and does not actually disclose the impacts to wetlands and waterways. Instead, the DEIS and the applicant attempt to refer to measures that might limit the impact, such as limiting water movement that are the result of a construction impact, in lieu of an actual environmental analysis. DEIS at 151. These mitigation promises, however, are not an actual analysis of the environmental impacts associated with the project. The WDNR must require site-specific data and analysis for the proposed construction method for each wetland and waterway crossing as part of its environmental analysis.

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B. The DEIS Does Not Adequately Disclose or Analyze Environmental Impacts from a Pipeline Spill.

The DEIS fails to disclose or analyze the potential environmental impacts of the operation of the pipeline, especially in the context of an oil spill. This is especially important given the condition of the current Line 5, which is operating well past its predicted life, and the extensive history that Enbridge has of oil spills in their operations. The threat of an oil spill is imminent. The risks of the current Line 5 pipeline are part of the reason why the Bad River Band declined to renew Enbridge's easements. *See* Section IV *supra* at 13. The Band's 2017 resolution acknowledged that the threat of an oil spill would be catastrophic to traditional cultural and sacred places, as well as to the flora, fauna, and other resources that rely on those waters and places. Decommissioning the current pipeline only alleviates the risk of an oil spill if the proposed relocation segment is not built. If the proposed relocation segment is built, however, the risk of an oil spill to the watershed, Kakagon-Bad River Sloughs, and Lake Superior remains.

This analysis is also important given the site of the proposed pipeline within the watershed. "The Bad River watershed is one of the largest watersheds in the Great Lakes Basin draining over 1,000 square miles." DEIS at 95. There are six major subwatersheds – Upper Bad River, the Lower Bad River, the White River, the Marengo River, Tyler Forks, and the Potato River – and the proposed route crosses through all of them. DEIS at 95. Beartrap Creek, the Wood Creek Slough, and the Kakagon River subwatersheds are also connected to the Kakagon Slough and Bad River Slough along the coast of Lake Superior. DEIS at 95. The Bad River Band is concerned about the impacts an oil spill will have on this incredible hydrological area.

The federal counterpart to WEPA, NEPA, requires federal agencies to analyze both the probability of a given harm occurring and the consequences of that harm if it does occur. *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 482 (D.C. Cir. 2012). "When the degree of potential harm could be great, i.e., catastrophic, the degree of analysis and mitigation should also be great." *Gov't of the Province of Manitoba v. Salazar*, 691 F.Supp.2d 37, 50 (D.D.C. 2010). When the evidence of the possibility of severe accidents is disputed, an agency must "admit that such accidents are possible," determine the probability of occurrence, and "discuss[ ] their potential effects." *Sierra Club v. Watkins*, 808 F. Supp. 852, 868 (D.D.C. 1991). Federal courts have found that NEPA requires analysis of the risk that a spill will occur and an assessment of the potential impacts of a spill on particular resources. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 133–134 (D.D.C. 2017) (EA inadequate because it did not describe the potential impacts of an oil spill on specific tribal hunting and fishing rights). Given the potentially catastrophic nature of an oil spill from the Project, NEPA also requires analysis of both the risk of a spill and its impact on important resources. The WDNR, in compliance with WEPA, must also conduct a worst-case scenario oil spill analysis with accurate baseline input from the Bad River Band.

The risk of an oil spill is not insignificant, and it is definitely not zero. As mentioned above, *see* Section IV *supra* at 14, the Bad River Band has firsthand experience of having a pipeline face increased spill risks due to exposure and other environmental factors. The same conditions that have exposed the current Line 5 pipeline are still present throughout the watershed. The DEIS acknowledges the soil conditions surrounding the pipeline are conducive to erosion

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through removal of soil by flowing water (fluvial erosion) and bank collapse (mass failure). DEIS at 92. "These two erosion processes are linked as fluvial erosion of the bottom of the bank creates a steeper bank angle or overhanging soil blocks which are more unstable and likely to collapse." DEIS at 92. The rivers can also carry "significant amounts of woody debris." DEIS at 96. "The lower watershed reflects a river carrying a significant load of sediment and capable of carrying a tremendous amount of water" and is "susceptible to rapid flow fluctuations and can move tremendous amounts of sand." DEIS at 96. This quick movement of sand and subsequent erosion can expose the pipeline, which can cause it to rupture or fail. The DEIS briefly acknowledges that exposure is a threat to pipeline rupture, but there is no analysis of the likelihood of a failure due to exposure.

Indeed, the DEIS acknowledges that pipeline exposure "is a common and dangerous scenario for pipeline operators." DEIS at 261. The DEIS then explains that "Pipelines can be exposed by migrating stream channels, downcutting of streams, ravines, and various other naturally []occurring events." DEIS at 261. "When a stream migrates, a section of pipeline that is not buried as deep as the pipeline was during the original installation under the stream, may become exposed. This exposure places that section of pipeline at greater risk to damage and failure by external influences." *Id.* There are several other factors that can expose a pipeline, which increases the likelihood of a spill. DEIS at 262-63 (listing ravine cut downs, large rain events, chutes, and flashy streams as potential hazards that can expose previously buried pipeline).

As described Section V *supra* at 22, the Bad River Band has first-hand experience on the risks of having an exposed pipeline within a river and within the watershed. The Meander Report outlined the risk of and the impacts from an oil spill from the existing Line 5 pipeline on the Bad River Reservation due to pipeline exposure. This analysis specifically examined the potential for an oil spill at the Bad River meander but serves as at least an example of the risk of an oil spill and the results of an oil spill in a familiar environment. Based on modeling, the Meander Report found that "oil was transported all the way to Lake Superior and the Bad River Sloughs[.]" Meander Report at 118 (Attachment S). Generally, the report found that "oil is likely to end up adhered to the banks and vegetation, dispersed in the water column and sediment, and floating on the water surface as it reaches Lake Superior and the Bad River Sloughs." *Id.* The Meander Report then details the projected impacts of an oil spill on several taxonomic groups, such as bacteria/microbial communities, algae, zooplankton, macroinvertebrates, amphibians, reptiles, fish, mammals, birds, and vegetation. *Id.* at 126-33. The Report further details specific impacts of an oil spill on key species and their habitat within the Bad River watershed, including Lake Trout, whitefish, walleye, Lake Sturgeon, yellow perch, freshwater mussels, eagles, and wild rice. *Id.* at 138-156. The re-route DEIS completely lacks any of these details and only generally states that risks may exist to rare species, mammals, fish, and plants. The DEIS does not disclose or analyze site specific and species-specific impacts of an oil spill in the region.

The DEIS, rather than evaluating the impacts of an oil spill within the project area, only claims that large spills are less likely to occur, and summarily lists factors that might cause such a large spill. DEIS at 256. However, Enbridge's history of oil spills should signal that WDNR must require a robust analysis of the impacts of an oil spill, and not just the likelihood that a spill will occur. The DEIS contains a brief summary of historical spills, Section 7.3, but only summarily

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lists reportable spills from 2020. The DEIS does not go back further in time, other than to describe the Kalamazoo Spill in 2010, nor does the DEIS explain what the effects of the 2020 spills were.

The DEIS also fails to examine the impact that small leaks may have on the area ecosystem, including to groundwater. "The smaller the leak, the more time it takes for an alarm to be triggered by these systems." DEIS at 260. This means that a "|pinhole leak, for example, could be undetected for days or a few weeks if the release volume rate were small and below detectable levels. Although the total volume of a release from a pinhole leak could be relatively large (e.g., up to a substantive spill size), in most cases the oil would likely remain within or near the pipeline trench where it could be contained and cleaned up after discovery. Detection would likely occur through visual or olfactory identification, either by regular pipeline aerial inspections, ground patrols, or landowner or citizen observation, in most cases before the release of a substantive volume of oil to environmental features on the land surface." DEIS at 260. Despite this acknowledgment, the DEIS fails to analyze the impacts of a pinhole leak, even though it is more likely and would be damaging to the surrounding ecosystem.

Both large and small oil spills pose a grave risk to the groundwater and aquifers that feed into the waters within the Bad River Reservation. On the surface, the DEIS acknowledges that the pipeline could impact the Copper Falls Aquifer through a spill but does not explain what those impacts would be. "If a significant petroleum release was to occur within the recharge area of the Copper Falls Aquifer, or to streams hydrologically connected to the aquifer, secondary impacts to the aquifer could occur." DEIS at 170. Secondary impacts to the Lake Superior Sandstone Aquifer could also happen over time after a spill. *Id.* However, the DEIS punts the analysis of how likely a leak will reach groundwater resources down the road: "The risk of groundwater contamination varies from location to location depending on the nature of the soils; underlying sediments; depth to groundwater; groundwater flow direction; local groundwater surface water interactions; magnitude of the spill; nature of the spilled material such as solubility in water, tendency to stick to soils, sediments or rock, evaporation rate, density compared to water (specific gravity), tendency to be changed or metabolized by soil and aquifer microorganisms, or the tendency to change through natural chemical processes; the toxicity of the spilled material; the length of time the material is in the environment and other factors." DEIS at 275. None of the information listed as affecting how a spill would affect groundwater resources are provided in the DEIS. As explained above, Enbridge did not conduct soil borings for blasting locations and the soil data used in the DEIS is based on a desktop review. Enbridge has also not disclosed the exact material flowing through the pipeline to determine how it will impact the environment. And even though the DEIS at least affirms that a pipeline spill could impact groundwater, it has no analysis whatsoever of what the impacts to the groundwater would be if petroleum or other pipeline products reach it.

The spill modeling is also inaccurate and not based on adequate baseline information. The model itself is limited to segments of the proposed pipeline route that could impact High Consequence Areas (HCAs). DEIS at 270. These HCAs, however, are not defined in the DEIS. Significantly, Enbridge claimed to have developed these HCA polygons with tribal nations. DEIS at 271. The Bad River Band, however, was never consulted on spill modeling or for any input on how an HCA polygon should be designed for modeling. This means that the HCA polygons are already limited and will exclude sensitive and significant resources for the Bad River Band. The exclusion of the Bad River Band from modeling also results in the exclusion of treaty resources

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from the evaluation. Enbridge's spill modeling methods in the DEIS must be independently reviewed and verified. WDNR must conduct its own spill modeling and analysis of environmental impacts from an oil spill.

The spill response plan in the DEIS is severely deficient and also excludes the Bad River Band. The Bad River Band is not listed as a downstream entity, DEIS at 265-66, nor is it listed as an entity to be notified in the event of a spill, DEIS Appendix E. This is an egregious omission. Surface waters that flow into the Bad River Reservation may be impacted by an oil spill, as well as groundwater and aquifers that the Reservation relies on for drinking water. Further, a spill response effort will likely need to access lands within the Reservation, for which it will need permission from the Band and to coordinate with MNRD.

The spill response plans are also not specific to the project area. The Meander Report noted that responding to an oil spill along the Bad River would be incredibly difficult: "Based on…many site visits to the Bad River meander and other locations along the Bad River, if river erosion resulted in damage to Line 5, an emergency response to a damaged pipeline at the meander neck would be very difficult." Meander Report at 118-19 (Attachment S). The Report also acknowledged that "[a]ccess to the Bad River downstream from the Line 5 crossing is also highly limited. Consequently, a rapid and successful response to a damaged pipeline would be challenging, which increases the probability of difficulties and delayed implementation of spill containment and pipeline repairs." *Id.* Yet, Enbridge has three response plants that are not specific to the project area. Nor do they provide information on issues unique to the watershed, such as access. DEIS at 266. This is despite the explicit acknowledgment that "physical and manual clean up in these [difficult to access] locations would be nearly impossible…Clean up and recovery would likely take years instead of days or weeks and long-term impacts to these areas could occur." DEIS at 268. WDNR must require a spill response plan that is appropriately tailored to the region, including addressing issues such as road access, access to Reservation lands, access to remote areas, and access to areas in foul weather events.

Overall, the disclosure and analysis of the impacts an oil spill will have on the region, including flora, fauna, wetlands, surface waters, and groundwaters, is woefully lacking. The spill modeling is also deficient, as it excludes the consideration of the Band's resources, including those protected by treaty. And the spill response plan inexplicably excludes the Bad River Band and the specific regional considerations for responding to an oil spill in such a unique and remote area. WDNR must require an actual analysis of the impacts an oil spill will have on the area's resources. WDNR must also conduct its own spill modeling, or independently verify Enbridge's proposed modeling in order to determine the likelihood of a spill and the impacts a spill will have on the area. Enbridge has a history of oil spills, and a robust spill analysis is necessary before this project can be permitted. WDNR must also require that Enbridge include the Bad River Band in any spill response planning.

VIII. THE DEIS FAILS TO ADEQUATELY DESCRIBE OR CONSIDER IMPACTS TO WETLANDS.

The DEIS inadequately assesses wetlands. The discussion of wetlands, of impacts to those wetlands, and of mitigation plans to compensate for those impacts all miss the mark. These failures

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mean that DEIS commenters are unable to review these discussions. As importantly, these failures deprive WDNR decisionmakers of essential information when considering whether to permit Enbridge to discharge dredged or fill material into wetlands.

Before issuing a wetland dredge or fill permit, WDNR must evaluate impacts to wetland functional values, including cumulative and potential secondary impacts to those values. *See* Wis. Stat. § 281.36(3m), (3n); Wis. Admin. Code NR §§ 103.08(3); 103.03(1)-(2). Under these standards, WDNR must evaluate among other things a project's impacts to wetlands' capacity for storm and flood water retention, hydrologic function, habitat for aquatic organisms and wildlife species, and "[r]ecreational, cultural, educational, scientific and natural scenic beauty values and uses." Wis. Admin. Code NR § 103.03. To grant a permit, WDNR must affirmatively find that the proposed project "will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences." Wis. Stat. § 281.36(3n)(c)3. A recent decision by the Wisconsin Court of Appeals demonstrates the impropriety of assessing the wetland impacts of a proposed project without the necessary data. *See Meteor Timber, LLC v. Wisconsin Division of Hearings and Appeals*, 2022 WI App 5, 969 N.W.2d 746 (affirming denial of improperly issued wetland fill permit because WDNR lacked adequate information to consider the net environmental impacts and lacked an adequate mitigation plan). The current DEIS lacks sufficient information and analysis for WDNR to make such a finding, necessitating a revised DEIS.

A. <u>The DEIS Inadequately Describes Wetlands.</u>

The DEIS inadequately describes the wetlands that exist in the area of the proposed project. Deficiencies include gaps in data; flaws in functional assessments; undervaluing of wetlands quality, diversity, and function; and unexplained differences in wetland delineations. A revised DEIS must resolve these issues.

1. There Are Numerous Gaps in Data and Maps

Numerous data gaps exist in the DEIS and the underlying documents informing it. Most fundamentally, no comprehensive list of wetland delineations exists. In reviewing the multiple delineation datasets, Band staff and consultants identified troubling discrepancies between datasets. *See* T&A Report at 3 (Attachment T); MNRD Wetlands Report at 6, Table MNRD-1 at 7 (Attachment V). WDNR, the Corps and the applicant's sources reach different totals of wetland acres impacted, calling into question the true extent of acres impacted. T&A Report at 40 (Attachment T). "[T]he impression is that the acres of impact are fluid and not repeatable from Table to Table." T&A Report at 37-38 (Attachment T).

MNRD, GLIWFC, and outside contractors documented additional wetland acres and waterways within the survey boundary left off wetland delineations as well as additional occurrences of Wisconsin's Natural Heritage Inventory species not reported by the company. MNRD Wetlands Report at 1. MNRD and GLIFWC also submitted field data to both WDNR and the Corps indicating that the numbers of wetlands and waterway crossings are greater than those identified by the applicant or either agency, well before the DEIS and the Public Notice were published. Memoranda from Great Lakes Indian Fish & Wildlife Comm'n (June 8, 2021)

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(Attachment W). Yet, despite this documented field data, neither WDNR nor the Corps have updated their maps or estimates of impacts to wetlands and waterways to reflect the actual impacts on the ground.

The DEIS also relies on outdated or inappropriate data sources. These include reliance on the no-longer-current 1992 Wisconsin Wetland Inventory rather than actual wetland delineations to determine acreage impacts, MNRD Wetlands Report at 2 (Attachment V), and Madeline Island Weather Station rather than closer, longer-running, and more representative weather station sites to get a picture of Ashland County precipitation. *Id.* at 5.

Prior to revising the DEIS, the Band asks that WDNR meet with MNRD staff to discuss data staff possess and data still needed, all of which should be incorporated into a new DEIS. *Id.* at 2. MNRD's past monitoring in the Bad River watershed indicates that "additional surveys of the water resources that will be impacted…are needed to fully and truly understand the potential impacts of the project. Lack of data in our under surveyed area does not equate to lack of [species] occurrence." *Id.* at 1. After meeting to discuss these issues, WDNR should conduct or require any additional data gathering and analysis necessary to prepare a new, adequate DEIS.

2. Wetland Functional Assessments Fail to Transparently Assess Function

No table in the Corps Public Notice or the DEIS summarizes the value of a wetland into high, medium, or low function, T&A Report at 39 (Attachment T), meaning Band staff and contractors cannot see the overall assessment used to assign mitigation value. *Id.* at 17; 39. MNRD and contractor field work revealed further errors in functional assessments of Iron County Forest land. These include misidentifying parcels as private land and failing to value local microtopography, groundwater recharge, and human use. *Id.* at 11-13. The revised DEIS must require and incorporate transparent assessment of assigned wetland functional values.

3. Wetlands are Undervalued in Quality, Diversity, and Function

The DEIS, and the data it relies on provided by Enbridge, undervalue wetland quality, diversity, and function. Section 5.11 *Wetlands* contains very general statements about the wetlands in the landscapes the project proposes to cross, concluding by understating and undervaluing the diversity and functions of the forested wetlands found throughout the proposed project area. *See e.g.,* T&A Report at 3-4, 29 (Attachment T). Fieldwork in Iron County Forest land showed, for instance, that the DEIS's description of "isolated hardwoods and conifers in better drained areas adjacent to incised drainageways," DEIS at 100-01, "in no way captures" many wetlands in the area. *Id.* at 29.

The DEIS presents misleading wetland quality assessments. The wetland assessment and mitigation scheme lump medium and low-quality wetlands together. *See* T&A Report at 30-36 (Attachment T). This systematic undervaluing of wetland quality and function undermines the assessment and mitigation process. Such undervaluing exposes forested wetlands with little disturbance or invasive species, *see* EPA letter to WDNR at 17 (Attachment F); Letter from U.S. Environmental Protection Agency Region 5 to Col. Karl Jansen, U.S. Army Corps of Engineers (March 16, 2022) ("EPA letter to Corps"), Encl. 1 at 16 (Attachment X), to numerous impacts,

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including disruption of mucky soils, changes in subsurface hydrology, soil compaction, and loss of microtopography. T&A Report at 30, 36, 39-40 (Attachment T). Commenters cannot evaluate the overall value assigned to each wetland, and permit decision makers cannot ascertain realistic impact levels and necessary mitigation levels. *Id.* at 36). WDNR should develop documents for public review that summarize impacts based on wetland function as well as list each wetland's assigned quality. MNRD Wetlands Report at 4-5 (Attachment V). The WNDR should also incorporate these documents into a revised DEIS.

The DEIS's discussion and designation of high-quality wetlands contains multiple flaws. *See* EPA letter to WDNR at 11 (Attachment F); EPA letter to Corps, Encl. 1 at 17 (Attachment X) ("*Lack of Adequate Identification of High-Quality Wetlands*") (Attachment X). These flaws include the system used to determine high quality and the lack of attention to available data. First, the DEIS, based on Enbridge's application materials, considers a wetland high quality based on global and state rankings deeming the wetland imperiled or critically imperiled. DEIS at 204. This is non-sensical; such a ranking does not equate to, nor even describe a wetland's high quality. T&A Report at 52-53 ("Relying on global and state rankings of 1 or 2 to identify high quality wetlands is not an appropriate use of these rankings…The ranking is not a determination that a given natural community is of high quality.") (Attachment T). The DEIS also relies on this flawed method to claim no significant loss of high-quality wetlands. The underlying logic is that converting a forested wetland deemed only "vulnerable" to an emergent wetland of that same designation maintains wetland quality. DEIS at 204. However, forested wetlands provide unique functions and species communities that emergent wetlands do not. *See e.g.,* EPA letter to WDNR at 15-16 (Attachment F); EPA letter to Corps, Encl. 1 at 15-16 (Attachment X). Even based on this flawed method, high quality forested seeps and mesic forested floodplain may exist in or near the proposed corridor. T&A Report at 56 (Attachment T).

The DEIS provides an alternative method to determine quality: "Also, wetlands would be considered high-quality if they contain a representative complement of native species." DEIS at 204. While this is a more appropriate method, neither WDNR nor the applicant conducted the review necessary to base a high-quality determination on species composition. *Id*; T&A Report at 52-53 (Attachment T); EPA letter, Encl. 1 at 17 (Attachment X). This is a startling admission with no stated rationale, especially because the delineation materials contain species composition information. T&A Report at 53 (Attachment T); s*ee also* MNRD Wetlands Report at 5 (Attachment V). Based on Thompson & Associates' desktop review, "few forested wetlands reviewed on the route…would *not* be considered high quality." T&A Report at 53 (emphasis added) (Attachment T). Their review identified multiple high quality wetland indicator species, including mature northern white cedar and wood turtle. *Id.* at 53-54. In order to base a decision on this alternative method for wetland quality wetlands, WDNR must actually conduct field reviews to support their conclusions. WDNR must also make the underlying data to support those decisions public.

The DEIS overlooks other wetland qualities too. While the DEIS concluded no mapped springs exist along the proposed routes, DEIS at 99, the delineation data and fieldwork prove the presence of springs and seeps within the proposed route. T&A Report at 4. WDNR must correct these plain discrepancies. The DEIS also ignores downstream benefits of wetlands, and the wooded uplands that abut them, that extend and connect beyond the proposed pipeline corridor.

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See e.g., T&A Report at 40 (Attachment T); EPA letter to WDNR at 13, 15 (Attachment F). Finally, the proposed pipeline passes through or adjacent to areas of global ecological significance according to the Wisconsin Conservation Opportunities Areas. T&A Report at 54-55 (Attachment T). The WDNR must revise its consideration of the quality and functions of wetlands in the DEIS. These revisions must be based on field work or other supporting evidence and the underlying data must be made available to the public.

4. Unexplained Differences in Wetland Delineations Exist

Unexplained differences exist in wetland delineations provided to DNR. This issue is made worse due to the lack of a single, comprehensive delineation dataset. *See* Section VIII.A.1. *supra* at 34. Some wetlands delineated in 2019 were re-delineated in 2020 without explanation. For example, Enbridge re-delineated a farmed wetland in Iron County. While the 2019 delineation shows a single, larger wetland (wird 017), the 2020 delineation instead shows two much smaller wetlands (wird1012e and wird1009e). T&A Report at 36 (Attachment T). The new delineation paperwork failed to explain the decision to re-delineate, appeared not fully filled out, and seemed to miss or ignore key indicators of a farmed wetland. *Id.* at 37; MNRD Wetlands Report at 7 (Attachment V). Apart from this example, "LiDAR topography and aerial imagery data suggest wetlands may exist where there is no evidence of data collection by the wetland delineation contractors." *Id.* at 7. WNDR must require clear explanations for re-delineations and lack of delineations and incorporate that into a revised DEIS.

Without a baseline analysis and full, accurate, and supported wetland delineations, WDNR, other governmental entities, and the public are unable to assess the impacts of the proposed projects to wetlands. Failure to provide this information is contrary to WEPA. WDNR must require a single wetland delineation data set for the entire project—including reasoning for any re-delineations or missing delineations—and correct the other baseline deficiencies in data and analysis necessary to describe wetlands before releasing a revised DEIS.

B. <u>The DEIS inadequately defines specific impacts to wetlands.</u>

The DEIS inadequately defines specific environmental impacts to wetlands. The DEIS fails to include impacts to wetlands from blasting, trenching, horizontal directional drilling ("HDD"), access roads, flooding, and disturbance of wetland soils and microtopography. A revised DEIS must resolve these issues.

Enbridge proposes bedrock blasting in wetlands with seeps, springs, microtopography, and a state threatened plant. *See* T&A Report at 7-9 (Attachment T) (discussing many examples of wetlands proposed for blasting). Blasting in these locations is very likely to harm seeps and water flow, sensitive soils, and a state threatened plant. *Id.* at 7, 17. For example, Thompson & Associates found that "[b]lasting and trenching this wetland [wirb1007] will drastically harm the rare features it presents." *Id.* at 29. It appears neither the applicant nor the DEIS attempted to quantify, minimize, or mitigate the short- and long-term impacts of blasting. *Id.* at 50; *see also* EPA letter to WDNR at 16 (Attachment F); EPA letter to Corps, Encl. 1 at 8-9 (Attachment X). WDNR must assess the specific impacts to each wetland targeted for blasting.

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Similarly, the DEIS's plan for trench breakers to control erosion and sub-surface water movement lacks definition. As conceived, the plan relies too heavily on the local site knowledge and judgement of contractors to avoid and remediate blasting impacts and other changes to local hydrology. T&A Report at 7 (Attachment T). The DEIS fails to adequately discuss standard breaker configurations, plans to ensure correct installation, and the expected functional lifetime of breakers. *See* MNRD Wetlands Report at 2 (Attachment V).

Further, trench restoration relies on what a contractor deems "practicable" in the field at that moment. DEIS at 201. Thompson & Associates found that:

> [t]he experience and ability of the contractors, equipment available, weather, season, there are these and many other factors that could limit the effort as "practicable". We know that thin soils, muck and organic soils, microtopography, seeps and post blasting hydrology are all factors that will limit the ability of the site to "restore" and will cause permanent impacts.

T&A Report at 7 (Attachment T); *see also* EPA letter to WDNR at 14 (Attachment F). Given these many variables, WDNR and Enbridge make a specious claim that full trench restoration will occur. Accordingly, a revised DEIS must assess the many variables at play in these trenching activities.

The DEIS must more robustly consider the many risks of HDD on wetlands. HDD carries a high risk—perhaps even expectation—of drilling fluid releases, which can harm fish and aquatic species and constitutes fill of waterways and wetlands. T&A Report at 51-52 (Attachment T); Jeffery Broberg, Public Comments on Enbridge Line 5 Wisconsin Segment (March 16, 2022) at 7 ("Broberg Report") (Attachment Y). Enbridge acknowledges but does not explain potential impacts to aquatic organisms due to a drilling fluid release. MNRD Fisheries Report at 2 (Attachment D). Enbridge must disclose any potential drilling fluid additives to allow for full environmental assessment of the process. *See* EPA letter to WDNR at 29 (Attachment F). Further, Enbridge must commit to report any drilling fluid release to state, federal, and tribal agencies. *Id*. A lost drilling bit or leak underground may require excavation of an HDD site, including wetlands. T&A Report at 51-52 (Attachment T). The three-page, bare bones plan for the "inadvertent release" of drilling fluid lacks any site specificity. *Id.* at 52. The plan must consider aquatic resources at risk in streams, and the unique topography and varying site conditions that make areas proposed for HDD difficult to access. *Id.* at 51; *see also* EPA letter to Corps, Encl. 1 at 12 (Attachment X). The Band has not seen the contractor's plan in the event of a release. T&A Report at 52 (Attachment T). Yet, as a sovereign government located downstream of this proposed project, the Band would also need to respond to any such release. Finally, HDD requires brush removal for a pipeline's lifetime, continually disturbing forested and shrub wetlands. *Id.* at 52. The many risks of HDD must be considered in a revised DEIS.

The DEIS requires an improved discussion of how access roads may impact wetlands, and in turn species, water flows, and treaty rights. As an initial matter, both the DEIS and Corps notice are unclear whether wetland impact tables include impacts from access roads. *Id.* at 38. For example, the DEIS states Enbridge will modify an access road to avoid a population of Sweet

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Coltsfoot, a state threatened species. DEIS at 216. However, building the road near the plant population could harm it due to proposed blasting and potential changes in hydrology. T&A Report at 5 (citing example of logging road harming population of Sweet Coltsfoot in Michigan due to changes in hydrology) (Attachment T). A new DEIS must consider access road impacts to hydrology. Such roads will in many cases require the removal of vegetation and could cause rutting, soil compression, and disruption of microtopography. *See* T&A Report at 12, 51 (Attachment T). Finally, the DEIS must assess potential for impacts to treaty rights from access roads. Such impacts could occur from road construction directly harming species or their habitat or from secondary effects such as detrimental changes in hydrology or increased deer browse through new or expanded road corridors. A revised DEIS must consider all of these issues.

The DEIS fails to adequately assess how flooding will impact construction and operation given the loss of wetland flood storage capacity. While Section 5.5.1 discusses *Flooding Trends*, the DEIS must consider specifically how the projected increased precipitation, extreme weather, and flooding will impact pipeline construction and operation, especially given the loss of wetlands and easily erodible soils in the basin.[8] Further, disturbing the microtopography and soil density of wetlands changes flood retention of the landscape. *See e.g.*, T&A Report at 11, 31, 32, 45 (Attachment T). The DEIS should also consider how this will impact the likelihood and scale of flooding events in workspaces along the proposed line.

The DEIS fails to adequately consider disturbances to wetland soils and microtopography. "[M]any wetlands in the project corridor exhibited mucky mineral, muck, or peat soils." T&A Report at 50 (Attachment T). Movement of construction equipment, movement and storage of soils, trenching, and blasting all will harm these soils, and their impacts may extend beyond the project corridor and far into the future. *Id*. Relatedly, microtopography "will be lost during construction by vegetation clearing, trenching, soil disturbance and construction equipment access. Sedimentation will also fill low points and level soils surfaces." *Id.* These disturbances will take many decades to recover, if at all, and will occur even with HDD. *Id.* at 51. The DEIS must assess these disturbance risks and impacts.

C. The DEIS inaccurately describes wetland impacts as temporary.

The DEIS improperly considers many impacts temporary. Wetland conversion, tree clearing, blasting, and soil disturbance all have long term, if not permanent, impacts. For instance, EPA recommends WDNR "[c]onsider impacts to 33.95 acres of wetlands resulting in the permanent conversion of forested and scrub-shrub wetlands as permanent, not temporary,

[8] *See* Northwest Regional Planning Commission, Northwest Wisconsin Flood Impact Study, HAZUS-MH Level 2 Analysis, pp. 1-3 (Nov. 2018), available at https://nwrpc.com/DocumentCenter/View/1494/Northwest-Wisconsin-Flood-Impact-Study?bidId=; Wisconsin Wetlands Association, Exploring the Relationship between Wetlands and Flood Hazards in the Lake Superior Basin, p. 6 (June 2018) available at https://wisconsinwetlands.org/wpcontent/uploads/2018/06/WetlandsFloodHazards_WWA_web.pdf ("The direct and indirect loss of wetland storage is widespread across Wisconsin's [Lake Superior Basin]. It makes the system 'flashy' by increasing the volume and velocity of water that moves downstream during storm events. This further exacerbates channel erosion, incision, and flooding, creating a negative feedback loop that renders the natural and built environments in the [Lake Superior Basin] less capable of handling rain and snowmelt with each passing storm."); *see also* USGS story map, Measuring the July 2016 flood in northern Wisconsin and the Bad River Watershed, available at https://wim.usgs.gov/geonarrative/badriver2016flood/.

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impacts." EPA letter to WDNR at 15 (Attachment F). Even abandonment of the current pipeline in place poses risks to wetlands that WDNR must assess. *See* EPA letter to WDNR at 6 (Attachment F). Pipeline maintenance corridors require permanent conversion of forested wetlands to emergent. *See e.g.*, EPA letter to Corps at 6, Encl. 1 at 15 (Attachment X); EPA letter to WDNR at 12, 15 (such conversion may increase water temperatures, which could impact aquatic species) (Attachment F). "[T]he use of the word "temporary" is misleading as the construction techniques of blasting and trenching will cause permanent (in our lifetime) impacts to existing functions in the workspace. Soils, hydrology, and topography will be altered despite the companies' assertions otherwise. The only permanent impact acknowledged is the fill of 0.02 acres of emergent wet meadow. This is a very narrow view of wetland loss." T&A Report at 38, also at 6-9 (Attachment T). In other cleared areas, old growth trees such as northern white cedar and black ash may not regrow in our lifetimes—if at all—due to factors such as increased deer browse and the northern shift of climatic zones. MNRD Wetland Report at 3-4 (Attachment V); T&A Report at 6, 9-29 (Thompson & Associates' review of Iron County Forest land shows the many permanent impacts from maintenance corridor conversion to emergent wetland, including the loss of northern white cedar, black ash, and sugar maple) (Attachment T). These shifts also impact wildlife. *Id*. Similarly, impacts to wetland quality and functions "can be just as detrimental to the overall environment as lost acreage and should be discussed and analyzed as impacts." MNRD Wetland Report at 4 (Attachment V); *see also* EPA letter to WDNR at 12 (Attachment F); EPA letter to Corps, Encl. 1 at 6, 7, 12, 16, 18-19 (Attachment X). The loss of forested wetlands also harms flood protection, as the tree cover would otherwise slow spring snowmelt and microtopography would provide flood retention capacity. MNRD Wetland Report at 5 (Attachment V).

Blasting impacts will only be prevented and restored to the extent practicable, as mentioned above. T&A Report at 7 (Attachment T). "[T]hin muck soils, microtopography, seeps, springs, native tree species, amphibian and rare species habitat, and many more features and functions will not rebound in a "temporary" time frame." *Id.* at 40-41.

> [E]ven the extent of the impacts cannot be accurately quantified at this time because they are likely to extend outside of the workspace. There just is no practicable way to restore some of these wetland types and to make it sound otherwise in the DEIS doesn't fully represent impacts for public review and comment. Additionally, there is no plan to do much more than smooth the dirt (adding the topsoil as a separate layer in some cases) and plant seeds in the other wetlands being impacted. This does not address the microtopographic variations exhibit[ed] currently in these wetlands…

MNRD Wetland Report at 3 (Attachment V); *see also* EPA letter to WDNR at 14 (Attachment F).

Before the WDNR can classify any impacts as temporary, a revised DEIS must fully examine all impacts to wetlands. Only after WDNR has reviewed and disclosed those impacts can it examine whether and which impacts are temporary or long term. The new DEIS must also

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disclose how it determined which impacts are temporary or long term and how it evaluated each impact.

D. A New DEIS Must Reassess the Mitigation Requirements for the Proposed Project Given the Insufficient Assessment of Wetlands and Impacts to Them.

A new DEIS must completely reassess what mitigation the proposed project requires. The insufficient assessment of wetlands and impacts to them create uncertainty as to how many wetland acres must be mitigated for, as well as what wetland quality and function must be compensated. This also calls into question the proper mitigation ratios. The proposed mitigation is not enough to minimize the potentially significant adverse environmental consequences of this proposed project. A revised DEIS must resolve these issues.

Because of the outstanding questions on the acres of wetlands present and impacted, the appropriate mitigation plan is impossible to determine. *See* EPA letter to Corps, Encl. 1 at 16 (Attachment X). First, the discrepancy between Army Corps and DEIS figures make the number of mitigation acres required unclear. T&A Report at 38 (Attachment T). Second, the DEIS appears to disregard many impacts to wetland type, quality, and function, thus undercounting the needed mitigation acreage. *Id.* at 42. The DEIS also lumps medium and low-quality wetlands together, which further undermines any accounting of wetland quality, function, and acreage. *See also* Section VIII *supra* at 34-37. Third, the lack of clarity around whether and to what extent impacts to wetlands are temporary or permanent compounds the issue. *See* MNRD Wetland Report at 3, 4 (Attachment V); EPA letter to WDNR at 15-16 (Attachment F); EPA letter to Corps, Encl. 1 at 6 (Attachment X). Fourth, the DEIS and application materials contemplate Enbridge being able to increase wetland impacts after permit approval, such as by expanding the work corridor width in wetlands without DNR approval. *See* T&A Report at 41 (Attachment T); EPA letter to Corps, Encl. 1 at 12 (Attachment X).

The failure to separately identify wetlands based on wetland qualities and functions clouds the necessary mitigation ratios. *See* EPA letter to WDNR at 17 ("An FQI is needed for each wetland so that the diversity, quality, and community can be recreated and appropriately mitigated if they cannot be restored to pre-impact conditions.") (Attachment F). This failure further undermines the connection of any current mitigation proposals to reality. *See Id.*; EPA letter to Corps, Encl. 1 at 16 ("the plan does not provide any scientific evidence or rationale for use of the proposed mitigation ratios, nor does the mitigation plan explain how those ratios were developed or determined.") (Attachment X); T&A Report at 17, 30, 36, 39-42, 59 (Attachment T). This conflation undermines any attempt to mitigate the "highest potential overall general functional value." Enbridge, Line 5 Wisconsin Segment Relocation Project: Compensatory Wetland Mitigation Strategy (Nov. 2021) at 6; *see also* T&A Report at 39 (Attachment T). This leads to mitigation ratios that "are not commensurate with the wetland impacts proposed." T&A Report at 59 (Attachment T).

Enbridge also proposes buying credits for scrub-shrub wetland or in-lieu fee credits to mitigate the loss of forested wetlands. This is because not enough forested wetland mitigation credits are available, even to meet the undervalued mitigation ratios currently proposed. *See* DEIS at 206; T&A Report at 59 (Attachment T). However, purchasing scrub-shrub credits for forested

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wetland impacts will result in a loss of forested wetlands in the watershed and the time lag to fulfill in-leiu fee credits is too great. T&A Report at *id.* (Attachment T).

Finally, the DEIS gives no consideration to whether or how impacts to treaty rights from wetland disturbance can be mitigated. *See* DEIS at 206. The proposed project risks harming numerous treaty-protected species across the wetland landscape, including:

- giizhik or northern white cedar
- godotaagaagaans or blue bead lily
- jiibegob or leatherwood
- miishijiiminagaawanzh or swamp red current
- pegyunagakwitz or balsam fir
- siba' or woodland horsetail
- ska'agonmins or muscle wood
- wica' or big-leaved avens
- wiigwaas or paper birch
- wiisagaak or black ash

T&A Report at 13-14 (Attachment T). WDNR must discuss with the Band, GLIFWC, and other tribes with treaty rights in ceded territory how, and even if, impacts to such species might be mitigated.

All of these issues create great uncertainty in trying to set a mitigation plan for the proposed project. In a revised DEIS "[t]he wetland mitigation section should clearly articulate how not only wetland type, but wetland function will be replaced on the landscape to ensure proper mitigation of impacts." MNRD Wetland Report at 5 (Attachment V).

The current DEIS lacks sufficient information and analysis for WDNR to make wetland permitting findings, necessitating a revised DEIS. The Band, other government agencies, and the public also cannot meaningfully comment on wetland impacts from the proposed project. WDNR must examine the deficiencies related to wetlands identified here and in the attached reports. To ameliorate these deficiencies, WDNR must ensure collection of any additional data needed and properly analyze all data to determine the full extent of wetland impacts in a reissued DEIS.

IX. THE DEIS FAILS TO FULLY DESCRIBE THE WATERWAYS IMPACTED.

Discussion of surface waters in the DEIS lacks details and relies on incomplete environmental data. Because of this the DEIS discusses environmental effects to all waterways in very general terms. Reliance on this DEIS would result in greater impacts than anticipated, and unknown impacts, due to its limited data and analysis. The importance of an accurate baseline of waterways in the project area cannot be understated. The proposed project is within watersheds that are very interconnected. As such, impacts to specific waterways may have impacts to other waterways or other water resources. Given the numerous impacts to waterways involved with this project, as well as the hydrology of the region, the consideration of cumulative and secondary effects is paramount. These interactions cannot be generalized within the project area. A revised DEIS requires site and activity-specific waterway data and analysis.

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Enbridge applied for a waterway individual permit under Wis. Stat. §§ 30.123, 19, 20 and Wis. Admin. Code NR Chs. 320, 341, and 345. These provisions require, amongst other things, that the proposed project not be detrimental to the public interest nor cause environmental pollution. The current DEIS lacks sufficient information and analysis for WDNR to make such findings and to assess waterway impacts. WDNR must prepare a revised DEIS to assess site- and activity-specific waterway data and analysis. The WDNR must also use site-specific data to evaluate both cumulative and secondary effects the project will have on the region.

A. The DEIS's Discussion of Waterways Lacks Necessary Details.

The DEIS's discussion of waterways lacks necessary details to form either a baseline analysis or to model how the project may impact waterways. *See* EPA letter to WDNR at 13 (Attachment F); EPA Corps letter, Encl. 1 at 15 (Attachment X). Missing elements include basic characteristics such as waterway quality, use, and size; robust consideration of unique waters such as Lake Superior and the Kakagon-Bad River Sloughs; and adequate consideration of HDD, potential petroleum spills, and exemptions to construction timing restrictions. A revised DEIS must improve the discussion of each of these topics.

1. The DEIS Lacks Basic Characteristics

The DEIS lacks adequate discussion of basic waterway characteristics. This shortcoming defeats the WDNR's ability—and that of other government entities and the public—to assess impacts. Necessary information includes more baseline information on waters affected, a complete list of water features impacted, water uses and cultural resources, a comparison of impacts of project alternatives, and discussion of watersheds. MNRD Other Waters Report at 11 (Attachment R). Other important elements include the presence of groundwater recharge zones and the erosion potential at soil transition zones. *Id.* at 2, 10. Section 6.10.5 *Inland Lakes* lacks descriptions of water quality conditions, water quality impairments, and uses supported by the lakes, amongst others. *Id.* at 2. Sections 5.10.6-10 largely fail to even discuss the extent of mapped streams, wetlands, and other surface waters such as lakes. *Id.* at 3-5. Section 5.10.5 *Floodplains* lacks a comprehensive description or list of floodplains relevant to the proposed project and alternatives. *Id.* at 3. The DEIS's assessment of natural lakes along the proposed project route fails to consider "how beavers can rapidly change the landscape along many of the perennial, intermittent, and ephemeral waterbodies the reroute proposed to cross. These natural changes could impact the way that the pipe interacts with the environment, and thus, how it effects the environment." *Id.* at 7; *see also* Section VII.A. *supra* at 24. These basic characteristics are critical to understanding how the proposed project will impact the project area.

2. The DEIS Lacks Robust Consideration of Unique Waters

The DEIS lacks consideration commensurate with unique waters such as Lake Superior and the Kakagon-Bad River Sloughs. *See* EPA letter to WDNR at 11 (Attachment F). Lake Superior, in Section 5.10.12, requires a description of current conditions appropriate for a Great Lake important on multiple scales, from local to international. MNRD Other Waters Report at 5 (Attachment R). Additionally, the DEIS must discuss specific petroleum spill risks and consequences—short and long term—to the Lake, including in different seasons. MNRD Other

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Waters Report at 9-10 (Attachment R); EPA letter to WDNR at 27 (Attachment F). The Sloughs must receive accurate and robust description, including its full size, *see* MNRD Other Waters Report at 5, many uses, *id*. at 6, and waterways that flow into it. *Id*. at 6-7 (Attachment R). Just as with Lake Superior, the international significance of the Sloughs necessitates greater examination of potential effects from a pipeline spill, including the role of seiche hydrology and impacts to manoomin (wild rice). MNRD Other Waters Report at 9 (Attachment R); *see also* EPA letter to Corps at 2-6 (discussing determination that the Sloughs are an Aquatic Resource of National Importance) (Attachment X); EPA letter to WDNR at 11 (Attachment F).

3. The DEIS Lacks Adequate Consideration of Waterway Impacts

The DEIS lacks adequate consideration of impacts to waterways pipeline construction and operation. "Physical, chemical, and biological stream functions will be lost during and post-construction. Examples include disrupted floodplain connectivity; disturbed groundwater and surface water interactions and instream flow dynamics; changes in water quality, temperature, and nutrients; and disturbance to fish and macroinvertebrate communities due to instream changes and elimination of riparian buffer." EPA letter to WDNR at 17 (Attachment F). Horizontal directional drilling (HDD), potential petroleum spills, and exemptions to construction timing restrictions all risk greater impacts to waterways.

The serious dangers of HDD to waterways require specific evaluation and accurate description, including potential impacts on downstream waters and lands from complications and failures of HDD. *See* Section VIII *supra* 34-37; EPA letter to WDNR at 14-15 (Attachment F); EPA letter to Corps, Encl. 1 at 12 (Attachment X). The construction methods for HDD introduce foreign liquids into the ground as part of the process. The DEIS must also consider the real risks of an aquifer breach or release of drilling fluid from HDD. *See* Section VIII *supra* 34-37. Section 6.8.1.5 says that "provided Enbridge follows its approved construction plan, an accidental impact to an artesian aquifer would be unlikely." DEIS at 168. There is a high probability of frac-outs that may result in inadvertent mud loss into the ground. This is based on review of the soils and sediments and bedrock composition. Broberg Report at 8-9 (Attachment Y). The risk of an aquifer breach resulting from HDD construction is not hypothetical. The Enbridge Line 3 replacement project resulted in three aquifer breaches to artesian wells that resulted in over 262 million gallons of water lost. The Minnesota DNR has not yet disclosed the impacts those breaches have had on area groundwater and the Band has not yet had the opportunity to review the technical reports that accompanied Minnesota's press release. It is evident, however, that the HDD construction method was flawed and resulted in two breaches, and boring resulted in one breach. These punctures collectively drained millions of gallons from aquifers that supply community members, including the Fond du Lac Band of Lake Superior Chippewa, with drinking water. The Corps must require an inventory of the material injected as part of the construction process in order to evaluate the possible impacts and adverse effects of a loss of drilling mud during construction.

The similar grave risks and impacts of an oil spill require specific, quantitative assessment. Although Enbridge, in its optimism, claims that the risk of an oil spill is low, the risk is not zero. A site-specific and quantitative analysis of potential environmental impacts due to oil spills must cover a range of scenarios, including size and location of potential spills along with a range of environmental and weather conditions (e.g., high flows, ice conditions, combined ice and flowing

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water in waterways, etc.). MNRD Other Waters Report at 8-9 (Attachment R). The DEIS must also assess Enbridge's ability to fund a major spill cleanup. EPA letter to WDNR at 6 (Attachment F). The DEIS also must consider in detail the risks and impacts of relocating the pipeline to an area with much greater ground water recharged than the existing pipeline route. MNRD Other Waters Report at 10 (Attachment R); Broberg Report at 1, 11 (Attachment Y).

A revised DEIS must also analyze the overall impacts that pipeline construction can have on the waters throughout the project area, including aquifers and other groundwaters. Project construction can change the waterway hydrology. One of the proposed construction methods includes trenching 8 to 10 feet deep in areas where groundwater may reach the surface. Broberg Report at 2 (Attachment Y). Trenching may also change stream flow: Annual and ephemeral streams could have their waterways diverted, changing the hydrology of perennial streams. This could add additional sedimentation to perennial streams during large rain and snow melt events. Another proposed construction method is blasting. In addition to impacting wetlands, blasting can have severe impacts to groundwaters. The DEIS states that "[c]are would be taken when blasting in the vicinity of water wells," DEIS at 42, but does not indicate any similar planning to avoid disturbing other waterways and water sources. Such other waterways include water sources for human populations, as well as plant and animal species, many of which are treaty-protected. Further, the DEIS and the application do not disclose site-specific impacts or analyses of blasting. This omission is startling given the risks associated with blasting, such as creating new surface water and groundwater inactions, with the possibility of redirecting groundwater flow. Broberg Report at 6 (Attachment Y). The WDNR must also gather data and consider the impacts of construction debris. Blasting without appropriate cover can increase dust and other sediments in the area. Broberg Report at 5 (Attachment Y). Added sedimentation could greatly affect downstream fisheries. *See e.g.*, MNRD Fisheries Report at 1 (Attachment D). The WDNR must require a site-specific analysis for each crossing method to evaluate the impacts construction will have on waterways. This includes soil sampling and gathering other data to determine whether blasting will be needed as part of construction, site-specific data on whether trenching will be required, and site-specific analyses of whether HDD can or should be used for certain waterway crossings.

Rather than collect site specific data, Enbridge has punted the review down the road in its application materials by failing to identify areas where blasting may be required up front. EIR at 39; *see also* T&A Report at 6-9. Even though Enbridge claimed it would collect soil borings in its EIR, *id*. at 52, no such data is included in the DEIS or in any other application materials for proposed blasting areas. And rather than providing an analysis of the likely adverse impacts of these construction methods, Enbridge instead points to minimization and mitigation for each method. EIR at 44 ("In each case and for each method, Enbridge will adhere to the measures specified in the [Environmental Protection Plan] and additional requirements identified in applicable permits and approvals from the USACE and the WDNR"). Unfortunately, Enbridge's failure to follow environmental laws during the construction of its Line 3 pipeline in Minnesota shows that WDNR cannot reasonably assume Enbridge, if granted permits, will abide by and

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successfully implement its construction plan and all required environmental protections. *See* EPA letter to WDNR at 17-18, 26 (Attachment F).[9]

Finally, Enbridge requested timing restriction waivers for waterbody bridge placement and removal. DEIS at 53. The DEIS must assess the impacts of granting this request on each waterbody for which it is sought.

A revised DEIS must contain adequate detail on the potential impacts of the proposed project to waterways. This must include gathering of site-specific data and an analysis of the impacts of each proposed construction method at each waterway crossing.

B. The DEIS Relies on Incomplete Waterways Data.

The DEIS relies on incomplete waterways data. WDNR must gather additional data and review and fully incorporate existing sources. A revised DEIS must incorporate this lacking yet essential waterways data and make the underlying data available for public review.

1. WDNR Must Gather Additional Data

The DEIS requires additional waterways data on many fronts. These additional data needs include potential impacts to waters meeting the definition of Areas of Special Natural Resource Interest, *see* MNRD Other Waters Report at 3, unknown water conditions, *see id*. at 7, uses of waters, *see id*. at 2, 3, 6, 11, and site-specific analyses on construction, operation, and maintenance impacts (Attachment R). *See id*. at 7; *see also* EPA letter to WDNR at 5 (Attachment F); EPA Corps letter, Encl. 1 at 15 (Attachment X). Perhaps most essential, WDNR and the applicant must gather baseline water quality data, especially for those waters classified as Outstanding Tribal Resource Water, Outstanding Resource Waters, or Exceptional Resource Waters by the Band or Wisconsin. *See* MNRD Other Waters Report at 11 (Attachment R); *see* EPA letter to WDNR at 12 (Attachment F); EPA letter to Corps, Encl. 1 at 4-5, 13-16 (Attachment X). Additionally, the WDNR must resolve the waterway crossing data that still conflicts with Corps numbers. WDNR must gather all of these lacking data for inclusion in a revised DEIS.

2. WDNR Must Review and Fully Incorporate Existing Sources

WDNR can draw on numerous existing sources, some already in its possession, to improve the assessment of waterway conditions and impacts in a revised DEIS. These include:

- Marengo River Watershed Action Plan. *See* MNRD Other Waters Report at 4 (Attachment R-1).

[9] *See e.g*. Nicholas Pfosi, *Enbridge fined $3.32 mln for failings in Line 3 replacement project*, Reuters (Sept. 16, 2021), available at Jennifer Bjorhus, *Enbridge crews punctured three aquifers during Line 3 oil pipeline construction, DNR says*, Star Tribune (March 21, 2022), available at https://www.startribune.com/enbridge-crews-punctured-three-aquifers-during-line-3-oil-pipeline-construction-dnr-says/600158140/; Kirsti Marohn, *DNR releases details of two more Line 3 aquifer breaches*, MPR News (March 21, 2022), available at https://www.mprnews.org/story/2022/03/21/dnr-releases-details-of-2-more-line-3-aquifer-breaches (Attachment Z).

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- Lake Superior Biodiversity Conservation Strategy, A Biodiversity Assessment for Lake Superior, Volume 1: Lakewide Assessment and the relevant Regional Plans.[10] *See* MNRD Other Waters Report at 4 (Attachment R-3).
- WDNR's Gateway to Basins and Watershed.[11] *See* MNRD Other Waters Report at 5.
- Lake Superior Lakewide Action and Management Plan. *See* MNRD Other Waters Report at 5 (Attachment R-7).
- Other websites that describe designations that apply to the Kakagon and Bad River Sloughs complex should be referenced, including:
    - National Park Service's National Natural Landmark webpage: https://www.nps.gov/subjects/nnlandmarks/site.htm?Site=KASL-WI (Attachment R-8)
    - National Audubon Society's Important Bird Area (IBA) webpage: https://www.audubon.org/important-bird-areas/kakagon-bad-river-wetlands-forest-corridor (Attachment R-9)
    - EPA's webpage containing the Lake Superior Lakewide Action and Management Plan (LAMP) as the Kakagon and Bad River Sloughs are classified as an Important Habitat Site: https://www.epa.gov/greatlakes/lake-superior-lamps (Attachment R-7)
    - The Tribe's webpage with a press release about the Wetland of International Importance designation: http://www.badriver-nsn.gov/kakagon-and-bad-river-sloughs-recognized-as-a-wetland-of-international-importance/ (Attachment R-10)
    - EPA's determination that the Bad River and Kakagon-Bad River Sloughs are Aquatic Resources of National Importance (ARNI). *See* MNRD Other Water Report at 6. (Attachment R)
- USGS 2015 report about studying and modeling the groundwater and surface water interactions in the Bad River watershed (note that the DEIS already includes this USGS report in the "sources cited" section). *See* MNRD Other Water Report at 6 (Attachment R-13).

The current DEIS lacks details and adequate data in its discussion of waterways. WDNR must examine the deficiencies related to waterways identified here and in the attached reports. To remedy these deficiencies, WDNR must collect—or require the applicant to collect—the additional data needed and properly analyzed and discuss each issue in detail to determine the full extent of waterway impacts in a reissued DEIS.

[10] All of these documents are available on Nature Conservancy Canada's webpage, https://www.natureconservancy.ca/en/where-we-work/ontario/our-work/lake-superior-assessment.html, and provided as Attachments 2, 3, & 4 to MNRD Other Waters Report (Attachment R)

[11] Wisconsin Department of Natural Resources. Gateway to Basins and Watersheds: https://dnr.wisconsin.gov/topic/Watersheds/basins

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X. THE DEIS'S CONSIDERATION OF IMPACTS TO FLORA AND FAUNA ARE WOEFULLY LACKING.

The DEIS repeatedly brushes off impacts to animals and plants, often with unsubstantiated claims. *See* MNRD Wildlife Report at 2 (Attachment B). Throughout the document, necessary data and independent analysis are inadequate or missing entirely. The WDNR cannot base its assessment of impacts to species—especially threatened and endangered species—on such lacking information. The WDNR must ensure necessary data, evidence, and scientific literature are gathered and reviewed. These materials must inform the new assessments of impacts to flora and fauna in a revised DEIS.

WDNR's duty requires a robust assessment of potential impacts to animals and plants. Not only does a thorough WEPA analysis necessitate such robust assessment, but many other statutes and regulations require such consideration. Wisconsin's surface water and wetland water quality standards require protection of habitat for aquatic life and wildlife. *See* Wis. Admin. Code. NR § 102.04(3), (9); NR § 103.03(1)(e), (f). Additionally, Wisconsin takes special interest in protecting certain species and groups of species. *See e.g.* Wis Stat. § 29.607 (wild rice); § 29.604 (endangered and threatened species). Finally, we remind WDRN that it must consider the impacts of the proposed project on the Band's treaty-reserved rights in *all* impacted species. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 653 F. Supp. at 1426-29. These and other legal requirements mean WDNR must specifically assess potential impacts to the many plants and animals in the path of the proposed project as part of a revised DEIS.

A. The DEIS Lacks Necessary Data and Analysis Related to Species Impacts.

The DEIS is extremely deficient in data and analysis, repeatedly stating specific information about various wildlife species is unknown. MNRD T&E Report at 6 (Attachment C). The applicant and the DEIS rely on the Natural Heritage Inventory, yet this is "an incomplete resource for determining which species may exist in northern Wisconsin." *Id.* at 1. The attached report on threatened and endangered species raises concerns regarding inadequately assessed impacts to over 20 threatened and endangered species. *Id.* at 2-6. These concerns include that no comprehensive assessment of eagle nest sites has been conducted, MNRD T&E Report at 6, that many occurrences of Braun's Holly Fern including on the proposed pipeline centerline were missed, MNRD T&E Report at 7 (Attachment C); T&A Report at 5 (Attachment T), and that many potentially impacted plant species were left out of the DEIS's threatened and endangered species discussion. MNRD T&E Report at 6-7 (Attachment C). Critically, the limited amount of sampling done to identify threatened and endangered species means that many species were likely undercounted or missed entirely. *Id.* at 6. Such sampling flaws occurred because certain species will only be active or visible for limited windows of time each year. *Id*. (examples discussed include wood turtles and loggerhead shrikes).

For species more broadly, the DEIS shows similar problems. The document contains no discussion of impacts to herptile movements and migration and to invertebrates with 1-year cycles for each generation. MNRD Wildlife Report at 2 (Attachment B). The DEIS also inadequately explores blasting impacts on wildlife including dust, soil vibration, and noise. *Id.* at 2. The discussion of impacts to fish and other aquatic organisms does not detail impacts due to a

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disruptions of groundwater/surface water interactions, such as from HDD, nor how sunken petroleum might impact aquatic ecosystems. MNRD Fisheries Report at 1, 2 (Attachment D). The DEIS's consideration of invasive species also suffers from a lack of raw and spatialized data, amongst other issues. *See generally* MNRD Non-Local Beings ("NLB") Report (Attachment AA). A revised DEIS must remedy these many glaring deficiencies in data collected and analyzed.

Manoomin (wild rice) is particularly important to the Band, as it is to other tribes as well as non-tribal members in the region. *See* MNRD Environmental Report at 15 (Attachment BB); EPA letter to WDNR at 23 (Attachment F). Accordingly, a revised DEIS must closely scrutinize the potential for impacts to manoomin, including from erosion, releases of oil or natural gas liquids, other changes in water quality, or changes in water quantity. *See e.g.*, MNRD Environmental Report at 15 (Attachment BB); MNRD Other Waters Report at 9 (Attachment R); EPA letter to WDNR at 7, 23, 24, 27 (Attachment F).

B. The DEIS Contains Numerous Unsupported Claims Related to Species Impacts.

Unsupported claims show up repeatedly in the DEIS. *See e.g.*, MNRD T&E Report at 6 (Attachment C). The DEIS contains unsubstantiated assumptions that noise will not have much of an impact on wildlife. MNRD Wildlife Report at 2 (Attachment B). Enbridge and the DEIS downplay the importance of the Bad River to the Lake Superior Lake Sturgeon population. MNRD Fisheries Report at 1 (Attachment D). The DEIS provides only vague and undetailed claims that appropriate avoidance protocols will be implemented to reduce or prevent harm to various species. MNRD T&E Report at 6 (Attachment C). The DEIS gives no rationale for excluding discussion of National Heritage Inventory species occurrences along project alternative routes. EPA letter to WDNR at 22 (Attachment F). Further, Enbridge writes off—with no justification—the displacing of wildlife as likely having little impact. MNRD Wildlife Report at 1 (Attachment B).

Repeatedly Enbridge claims all areas temporarily impacted by construction would be restored to preconstruction contours and elevations. However, "Enbridge's track record on the Bad River Reservation and along Line 3 shows that the company is often unable to restore habitats to their previous conditions." MNRD Wildlife Report at 2 (Attachment B). WDNR must scrutinize Enbridge's ability to meet this claim based on past practices, comprehensiveness of submitted plans, and resources committed to complete the claimed restoration. *Id*. at 1, 2. Doing so is critical to prevent long term habitat disturbance and loss. These are just a few examples of the claims that must be scrutinized and substantiated—or changed—in a revised DEIS.

C. A Revised DEIS Requires Additional Data and Analysis Related to Species Impacts.

As outlined above, the DEIS repeatedly lacks the necessary data and analysis to assess impacts to animals and plants due to the proposed project. To remedy these deficiencies, WDNR must take several steps including:

- Evaluate the type, amount, and sensitivity of aquatic and terrestrial habitat for each route alternative. MNRD Wildlife Report at 1 (Attachment B).

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- Redo surveys for species along the entire proposed route during the appropriate season for each species so as not to artificially undercount a species' presence. MNRD T&E Report at 1, 7 (Attachment C).
- Provide fisheries assessments within the past five years for each proposed stream crossing. MNRD Fisheries Report at 2 (Attachment D).
- Discuss "potential indirect and cumulative impacts to wild rice from each alternative" route. EPA letter to WDNR at 7-8 (Attachment F).
- Evaluate "likely impacts to inland and Lake Superior fisheries for all alternatives and consider protective measures." EPA letter to WDNR at 8 (Attachment F).
- Consider how removal of riparian vegetation could lead to increased light penetration into waterbodies, causing increased water temperature and potential fisheries impacts. EPA letter to WDNR at 12 (Attachment F).
- "Require biological…sampling before, during and after pipeline installation activities at important stream crossings to monitor potential impacts to stream communities." EPA letter to WDNR at 13 (Attachment F).
- Require Enbridge to follow best management practices to protect species—such as time-of-year restrictions—and to limit the introduction and spread of invasive species. EPA letter to WDNR at 22-23 (Attachment F).

D. Gray wolves must be assessed as a federal endangered species.

In February of 2022, a federal court overturned the U.S. Fish and Wildlife Service's rule delisting the Gray Wolf, resulting in Gray Wolves being relisted as an endangered species. *See Defenders of Wildlife v. Fish and Wildlife Service*, 21-cv-003344 (N.D. Cal. Feb. 10, 2022). Because the Gray Wolf has now been relisted, WDNR must assess the project's impacts to the ma'iingan as a federally listed species, in consultation with the Band as well as federal agencies. This assessment is particularly critical given the February 2021 wolf hunt which took place before the federal court's relisting order. That hunt lasted only three days but resulted in at least 218 wolves being killed – almost 100 more than the state-issued quota. The result of this disastrous hunt was that WDNR was unable to formulate an accurate wolf population estimate in 2021, due to disruption of population surveys, uncertainty with regard to unreported kills, and impact to the population caused by the death of wolves during breeding season and pack dispersal. *See, e.g.*, Memo from Keith Warnke and David MacFarland to Preston Cole and Todd Ambs on the Quota and License Numbers for Fall 2021 Wolf Harvest Season, p.4, Section (h) (Oct. 4, 2021) (Attachment CC). This hunt also subsumed the entire treaty-reserved share, which the Ojibwe tribes, including the Bad River Band, had sought to protect from state-licensed hunters. The rapid changes to the legal status of the Gray Wolf, the disastrous Wisconsin 2021 hunt and the resultant uncertainty with regard to the population, and the tribes' interest in the species both on- and off-reservation as a treaty-protected resource, necessitate additional assessment in a revised DEIS and consultation with the FWS, Corps, and the Bad River Band. In addition to renewed consultation with the Band on the Gray Wolf, WDNR must consultation with the Band regarding the project's potential impact on other species, both on- and off- reservation.

The DEIS glaringly lacks the data and analysis necessary to properly assess impacts to animals and plants. The WDNR cannot base its assessment of species impacts on such lacking

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information. The WDNR must ensure the necessary data are gathered and that these materials inform a new assessment of impacts to flora and fauna in a revised DEIS.

XI. THE DEIS FAILS TO ADEQUATELY ACCOUNT FOR CUMULATIVE IMPACTS OF THE PROJECT ON THE BAD RIVER WATERSHED.

WDNR failed to analyze the cumulative environmental impacts of the reroute project. NR § 150.30(g). The DEIS defines "cumulative impact" to mean "the overall impact on the environment resulting from the incremental impact of an action, when added to other past, present or reasonably foreseeable actions, regardless of who undertakes them." DEIS at 71. This proposal comes as habitat and water quality are declining regionally and greenhouse gas emissions are rapidly warming the global climate. *See e.g.*, Great Lakes Indian Fish & Wildlife Commission, Climate Change Vulnerability Assessment V.1 (April 2018) (Attachment DD). The Reservation, the ceded territory, and the Lake Superior watershed are already facing numerous environmental problems from other impending projects and past industrial contamination. This project stands to make those problems worse. WDNR must disclose and evaluate that such impacts from the pipeline may accumulate on top of others.

The DEIS must analyze the cumulative effects of (a) this project's harmful impacts to the exercise of treaty rights and the resources that support them, (b) this project in the context of other ongoing projects, (c) the project's construction methods, (d) sediment deposition that will result from pipeline construction and maintenance and its effect on water quality, (e) this project's plan to fragment forests and the habitats they support, and (f) the emissions this project will create by extending the life of the Line 5 pipeline.

Federal NEPA case law has established guideposts that should apply to this DEIS. *State ex rel. Boehm v. Wisconsin Dep't of Nat. Res.*, 174 Wis. 2d 657, 675 (1993) (holding that federal NEPA precedent informs WEPA interpretation). WDNR is required to holistically evaluate how the impacts of this project accumulate atop other past, present, and reasonably foreseeable environmental stressors in the project area. *See Grand Canyon Tr.*, 290 F.3d at 345.[12] WDNR's cumulative impacts analysis in the DEIS, however, is conclusory throughout and represents a "checkbox" approach. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004). WDNR "must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum" that ignores the environmental conditions on the ground. *Grand Canyon Tr.*, 290 F.3d 342 (D.C. Cir. 2002). The DEIS must analyze "the damage already wrought by the construction" and operation of Line 5 and its greenhouse gas emissions. *Am. Rivers v. FERC*, 895 F.3d 32, 55 (D.C. Cir. 2018). Moreover, the DEIS does not conduct any "substantive analysis of how the present impacts of those past actions would combine and interact with the added impacts of [WDNR's] licensing decision" to allow Line 5 to operate well into the future. *Id*.

[12] The EIS cumulative impact analysis must evaluate "(1) the area in which the effects of the proposed project will be felt; (2) the impacts expected in that area from the proposed project; (3) Other actions—past, present, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) Impacts or expected impacts from these other actions; (5) The overall impact if individual actions are permitted to accumulate."

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As noted throughout this comment letter, the DEIS and the application materials are woefully deficient, which hinders an informed assessment of the cumulative impacts the project will have. Cumulative impacts are an important and necessary consideration in the WEPA process. The Bad River Band hopes WDNR will adequately consider the serious cumulative burdens this project will impose on the Band and the public at large. The following is a non-exhaustive list of cumulative impacts WDNR must consider in a revised DEIS.

A. Exercise of Treaty Rights.

The project inflicts cumulative burdens on the exercise of the Bad River Band's treaty rights. As previously described, Wisconsin must not interfere with the Band's right to an equal share of treaty resources or the Band's right to exercise their treaty rights in usual areas. *See* Section I. *supra* at 2. The DEIS must analyze the impacts that the project will have on access to treaty resources, both directly and cumulatively, in consultation with the Bad River Band. Many of the following cumulative impacts will have an effect on the Band's treaty rights. For example, other ongoing projects are already diminishing the resources in ceded territory. The cumulative impacts from construction and operation can degrade water resources. And the pipeline's contribution to climate change has a cumulative effect on the Band's ability to use treaty resources. The DEIS must disclose and analyze all cumulative impacts and how they may affect treaty rights.

B. Other Existing and Planned Projects.

WDNR must assess the cumulative impacts of this pipeline project on top of the adverse environmental impacts of other projects in the region. Several other industrial projects are already causing harm to Reservation lands, the Bad River watershed, ceded territories, and the ecosystems within them. The projects and environmental stressors below are of the most serious concern to the Band, but there may be other projects in the region that will magnify impacts of the Line 5 segment relocation that are not in this list. At minimum, the DEIS should consider the following:

- The Wisconsin Public Service Commission is currently considering a permit that would enable the construction of the Xcel Transmission Line which will degrade land and water around the Reservation. *See* MNRD Tribal Historic Preservation Office Report ("THPO Report") (Attachment EE-5). Such degradation will impact cultural and historic properties important and necessary to Ojibwe culture. *Id*.

- In 2018 there was an explosion at the Husky Energy oil refinery in Superior, WI. Husky Energy Refinery Explosion and Fire, Chemical Safety and Hazard Investigations Board, 2018 (Attachment EE-9). This explosion released toxic discharge into Lake Superior, negatively affecting waters important to the economy and culture of the Band.

- There are numerous existing and new mining operations that are contaminating ceded territory waters in Lake Superior with mercury and toxic runoff. *Metallic Mineral Mining: The Process and the Price*, Great Lakes Indian Fish and Wildlife Comm'n (GLIFWC) (2016) (Attachment EE-7); *see also* Project Descriptions and Maps, (Attachment EE-8).

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- The proposed project would cross existing natural gas pipelines at seven locations. Potential cumulative impacts with these pipelines and crossings must be assessed.

The severe impacts of the pipeline relocation project will accumulate on the impacts associated with these other projects. The WDNR must acknowledge and assess these cumulative impacts in detail.

C. Construction Methods.

WDNR and Enbridge do not provide any data describing the environmental conditions at specific construction sites. The DEIS and the application materials also do not assess environmental impacts associated with the specific construction method Enbridge plans to use at each site. Instead, Enbridge's application materials default to a generalized table or equation of the environmental impacts from construction. For example, Enbridge plans to use blasting near numerous wetlands which could have serious impacts on water quality. *See e.g.*, T&A Report at 50 (Attachment T). The application also contemplates using HDD or Direct Bore methods under 154 wetlands and waterways. Appx. K to Line 5 Segment Relocation Project Application. The applicant also states that it plans to use open cut or open trench construction methods through 237 streams and other waterways. *Id*. In isolation these numbers might not mean much. But considering that the proposed pipeline project is forty-one miles, the number of wetlands and waterway crossings are densely compacted. WDNR must assess the cumulative impacts to the specific wetlands, waterways, and groundwater that this project may affect with its varying construction methods. This analysis must include cumulative impacts to water quality in the region, among other environmental effects.

D. Sedimentation and Erosion.

Enbridge's construction methods for this project will cause sedimentation and contribute to the cumulative degradation of water quality in this region. Sedimentation, even unintended, has the potential to lower water quality and degrade habitat in Tribal OTRWs, ORWs, and ERWs. *See* Ann McCammon Soltis, Great Lakes Indian Fish and Wildlife Comm'n, *Great Lakes Indian Fish and Wildlife Commission Environmental Monitoring Relevant to Lake Superior Basin* (Nov. 19, 2014) at 8 (discussing importance of sediments in determining water quality and ongoing need to assess Lake Superior for sediment contamination) (Attachment FF); *see also* EPA letter to WDNR at 11-12 ("Sediment laden runoff and any materials that accidentally spill from the proposed project could enter the sloughs through the connected tributary streams and may negatively impact water quality, aquatic life, and native habitat.") (Attachment F). The application discusses the sedimentation risks associated with HDD, grading, and exposing bare ground, construction on various types of soil, river crossings, erosion in waterways, and clearing vegetation. EIR at 107-108. However, there is no discussion on the cumulative impacts of these discharges.

A revised DEIS needs a greater assessment of the many forms of erosion impacts which would lead to increased sedimentation. For example, in Iron County Forest land and nearby private land, wooded uplands adjacent wetland complexes provide erosion control and water quality protection as well as wildlife habitat. T&A Report at 40 (Attachment T). The DEIS insufficiently considers cumulative impacts such as erosion across 120 feet of uplands—in many cases on the

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boundary of a wetland. *Id*. The DEIS also claims the size and current sediment loading of Lake Superior and the Kakagon-Bad River Sloughs would make any sediment impacts from the project minor. DEIS at 198-99. However, these statements contain minimal analysis to support the claim.

Additionally, in many cases the DEIS assumes not only that Enbridge's construction contractors will follow all erosion control measures, but that such measures will always be successful in preventing erosion and other construction impacts.[13] The DEIS claims Erosion Control Devices (ECDs) "would be regularly inspected and all non-functional ECDs would be repaired, replaced, or supplemented within 24 hours of discovery or as soon as practicable." DEIS at 201. Enbridge has not met this timetable when handling a few projects at a time within the Reservation. This failure calls into question Enbridge's ability to meet a 24-hour response deadline along a 41-mile project with hundreds of wetlands and waterway crossings to maintain. The DEIS must assess the empirical effectiveness of ECDs generally, and as employed by Enbridge and its contractors. The cumulative impacts analysis should assess whether sedimentation and erosion control are sufficient to prevent water quality reduction given background water quality in-stream and downstream.

E. Extending the Life of Line 5 and Cumulative Impacts to Global and Regional Climate.

The DEIS fails to analyze the cumulative impact that this project will have on climate change. WDNR cannot avoid that extending the life of the Line 5 system has serious climate consequences. The agency must analyze this project in terms of Line 5's historical and continuing GHG emissions and contributions to climate change. Line 5 already facilitates the emission of tens of millions of metric tons of CO2e into the atmosphere every year. *See* Testimony of Peter A. Erickson, Michigan Public Service Commission, Case No. U-20763, 6:12-13 (Attachment HH). The DEIS should not measure this project's contribution to climate change in terms of how many new customers it will serve. *See* Section 6.5. Rather, WDNR should focus on the cumulative impacts of allowing Line 5 to operate well into the future in light of the need to decarbonize. The pipeline re-route project will contribute to climate change by locking in the current rate of consumption of fossil fuels for decades to come. Scientists warn that we must stop consuming climate warming fuels all together and as soon as possible in order to ensure the sustainability of our planet. *See e.g.*, Letter from Peter Kalmus, et al., to Joseph R. Biden, Jr., President of the United States (Oct. 7, 2021) (Attachment II). Extending the lifeline of Line 5 ensures the opposite. Line 5 will contribute to the continued emission of greenhouse gasses and result in cumulative contributions to climate change. Climate change is a global problem that has grievous regional environmental effects. The DEIS barely acknowledges, much less analyzes, these effects. WDNR must reissue this DEIS with adequate discussion of this project's cumulative contributions to climate change over the course of its operational life.

Extending the life of Line 5 also has other impacts. Line 5 is an aging pipeline system and Enbridge will need to replace other segments given the declining integrity of the whole system.

[13] "Surface and gully erosion, channel incision, bank slumping, and other instabilities are common across the region." Wisconsin Wetlands Association, Exploring the Relationship between Wetlands and Flood Hazards in the Lake Superior Basin, 5 (June 2018), available at https://wisconsinwetlands.org/wpcontent/uploads/2018/06/WetlandsFloodHazards_WWA_web.pdf (Attachment GG)

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The environmental impacts of these future segment replacement projects will be cumulative to the proposed re-route project. WDNR should analyze the impacts that extending the life of this segment will have on the Line 5 system.

F. Forest Fragmentation and Biodiversity.

The project will cause forest fragmentation by permanently converting forested wetlands into emergent wetlands along the entirety of the pipeline route. *See* MNRD Wetlands Report at 9 (Attachment V). WDNR cannot view this conversion in a vacuum – climate change and continuing land development are causing a biodiversity crisis. *Grand Canyon Tr.*, 290 F.3d at 342. This project's proposal to change forty-one miles of Wisconsin's forest ecosystem in such a drastic way merits an analysis of what that change will do to the entire ecosystem. The DEIS discusses possible impacts to wildlife resulting from forest fragmentation in a general way, *see e.g.*, 6.14.4, but this analysis does not account for this project's contribution to rapidly declining global and regional biodiversity (Attachment DD). For example, this project may increase deer populations around the reservation by expanding the forests edge around the reservation boundary. *See* T&A at 12 (Attachment O); *see also* Alverson, Waller, Solheim, *Forests too deer: Edge Effects on northern Wisconsin*, Conservation Biology 2:348–358, (1988) (Attachment JJ). Deer overpopulation leads to diminished forest cover, biodiversity, and habitat quality through effects such as preferential browsing. *Id*. Deer are overpopulated in this region and allowing them to expand their habitat will result in diminished forest regeneration and biodiversity. *See also* Section VIII.B. *supra* at 37. WDNR must include and examine other impacts that forest fragmentation will have on the region. Any diminishment in forest habitat as a direct or indirect effect of this project will be cumulative to the biodiversity impacts of other projects in the region. This proposal is incomplete without an analysis that details the cumulative impacts of forest fragmentation on biodiversity and habitat in the project area.

The project will have severe cumulative impacts to the environment that the WDNR does not analyze in the DEIS. Without an appropriate accounting and evaluation of the cumulative impacts of this project, the Band and the public cannot comment on the full scope of this project's environmental consequences. WDNR must revise the DEIS and reissue it for more comment once it includes adequate information on the project's cumulative impacts.

XII. THE DEIS FAILS TO INCLUDE AN ADEQUATE EVALUATION OF THIS PROJECT'S IMPACTS TO CULTURAL RESOURCES.

WDNR must assess this project's direct, indirect, and cumulative impacts on "scarce resources such as: archeological, historic, or cultural resources." Wis. Admin. Code. NR § 150.30(2)(g)1. The project cannot proceed with the inadequate evaluation of archaeological, cultural, and historic resources presented in the DEIS. The DEIS's analysis is insufficient for three reasons. First, the assessment of the archaeological, cultural, and historic resources that this project may affect is too narrow. Second, the alternatives analysis in the DEIS does not allow the Band or the public to compare the culturally relevant impacts of this project between the alternative routes and the proposed route. Third, the Dirt Divers report has grave methodological flaws, poorly reasoned findings, and should not be relied upon in the DEIS.

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In all, the DEIS fails to evaluate this project's impacts to archaeological, historic, and cultural resources. As a result, this project may have grave and irreversible impacts to these critical resources. Given these issues, WDNR must change course and redo its cultural resources analysis. First, the WDNR should hold off on its consideration of the project's impacts to the Band's cultural and historic resources until federal-tribal consultation under Section 106 of the National Historic Preservation Act (NHPA) concludes. That will provide the Corps and the Band an opportunity to complete the Tribal Historic Preservation Officer's ("THPO") proposed Statement of Work (Attachment EE-1), which will comprehensively analyze the project's impacts to tribal cultural resources. In the interim, the WDNR should disregard Enbridge's cultural resources contractor's report as it is not approved by the Bad River Band. Next, WDNR should broaden the scope of its analysis to include other archaeological and historic resources. For example, it should include consideration of resources off-route and fully analyze the project's construction and operation impacts to all of the archaeological and historic sites that WDNR identifies and that could be identified during construction. WDNR should also require Enbridge to conduct field assessments for each of the project alternatives.

A. The DEIS must broaden its review of archaeological, historic, and cultural impacts.

The DEIS should take a broad view of this project's impacts to cultural, archaeological, and historic resources. Presently, the DEIS only analyzes a narrow set of impacts over a small sliver of the project's area of potential effect. Specifically, the DEIS only focuses on the project's impacts to archaeological, cultural, and historic resources within a 300-foot space around the project corridor or within the viewshed of the project area. *See e.g.,* DEIS at 235 (Table 6.19.2.2-1 *Archaeological and Burial Sites within 300 Feet of Limits of Disturbance*)*; see also* DEIS at 238 (Table 6.19.2.3-1 *Architectural Resources Identified within Viewshed of Project Area*). Currently, the DEIS' use of databases and applicant materials to account for important cultural sites near the route excludes other impacts that WDNR must consider. These databases and materials, for example, exclude information on confidential ceremonial sites, sites uncovered as a result of field surveys, and sites of cultural significance to the Band that are otherwise not registered in any database. WDNR should supplement its accounting of historic, cultural, and archaeological sites within the project area with information gathered as a result of the federal NHPA consultation process. The Band respectfully requests that WDNR stay consideration of the project's cultural impacts until the Army Corps and the Band can carry out the THPO's Statement of Work and NHPA consultation.

WDNR has a duty to assess the project's impacts to tribal cultural resources and thoroughly explain its conclusions in the DEIS. WDNR cannot workaround this independent obligation by incorporating a letter from the Band's Chairman to the Army Corps. The DEIS takes this letter out of context. The DEIS then incorporates it as an analysis or as a totality of the project's cultural resource impacts, which is severely inappropriate. Without an independent analysis, and without a consultation with the Bad River Band, WDNR is ignorant to the very real negative effects that this project will impose on archaeological, historic, and cultural property throughout the region and on the Reservation. These negative effects diminish the cultural heritage of Ojibwe people and of the United States as a whole. The follow are portions of the MNRD Tribal Historic Preservation Officer's Report to highlight why it is important for WDNR to broaden the scope of its review in analyzing cultural impacts. WDNR also has a duty to assess the project's impacts to

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tribal cultural resources and thoroughly explain the conclusions it reaches. MNRD THPO Report 3-5 (Attachment EE). However, the THPO's report should not be taken as conclusive analysis of this project's impacts and should not be cited in official permit documents.

1. Impacts to the Bad River Band's historic reservation.

The THPO considers the entire Reservation and Bad River Watershed a historic district. The area meets the necessary criteria under National Historic Register Bulletin #38. *See* Guidelines for Evaluating and Documenting Traditional Cultural Properties, National Historic Register Bulletin #38 (Attachment EE-2). The Reservation and the Bad River Watershed are "location[s] associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world" and it is home to many "location[s] where a community has traditionally carried out economic, artistic, or other cultural practices important in maintaining its historical identity" (Attachment EE-2 at1). However, the DEIS fails to consider the impacts of this project to the cultural resources found within and throughout the Reservation and instead narrowly focuses on the impacts at the site of construction. MNRD THPO Report at 3 (Attachment EE). This is error and the geographic scope of consideration must be broadened.

2. Impacts to the Band's cultural property.

The broader scope of consideration will allow the agency to get a complete image of the totality of this project's effects on irreplaceable cultural resources. This project will affect many gravesites, numerous sugar bush and hunting, fishing, and gathering sites found throughout the watershed and along the project route. The area also has special natural features key to the Band's history and culture. These sites are culturally important because they support rare plant and animal species and other natural objects necessary to the continuance of cultural traditions. The most unique wetland area in the watershed is the Kakagon and Bad River Slough. The Ramsar Convention's implementing body deemed this site a wetland of international importance (Attachment EE-3). Additionally, the Bad River Falls is a traditional site for fishing walleye, sturgeon, and musky. The Madigan and Waverly beaches yield culturally vital stones that are unique to the Bad River Reservation and watershed. Madigan and Elm Hoist have been the site of the Midewewin and Big Drum ceremonies. These are just a few of the areas supporting THPO's determination of the Reservation as a historic district. The proposed project will negatively impact the integrity of the historical, archeological, and cultural character of the area, in addition to changing the integrity of the location, and feeling and association of the area.

Further, the creation of a utility corridor will result in permanent changes to the landscape of the Band's homeland (aki). For example, forested wetlands intersected by a utility corridor will be converted permanently to emergent wetlands. DEIS at 200 (Section 6.11 - Wetlands). This will interfere with access to cultural sites and diminish a habitat that supports the Band's way of life. MNRD Wetlands Report at 9 (Attachment V). The permanent conversion of the utility corridor could also affect cultural sites yet to be uncovered, like the artifacts discussed previously. Without a cultural resources report that complies with documentation standards, these discoveries may be made too late.

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In addition to construction related impacts, WDNR must consider the operational impacts that the Project will have on cultural resources. These impacts include extending the emission of climate warming greenhouse gasses that will contribute to climate change and diminish cultural sites and habitats central to the Band's way of life. WDNR should also evaluate the cultural and historic impacts of potential hazardous liquid spills. The possibility of such a spill is not remote. Enbridge's Line 5 has already leaked over a million gallons of oil and hazardous liquids along its route (*see* Attachment EE-4).

Finally, WDNR must consider this project's cumulative long-term impacts to traditional and cultural properties and resources on the reservation and in the ceded territory. The extractive industry is already causing harm to Tribal lands, ceded territories, animals, birds, fish, insects, plants, trees, air, water, and soils. For example, the Wisconsin Public Service Commission is currently considering a permit that would enable the construction of the Xcel Transmission Line which will also degrade habitat around the perimeter of the Reservation (*see* Attachment EE-5). Such degradation will impact cultural and historic properties important and necessary to the Ojibwe culture. Further, the area is still reeling from the impacts of a crude oil storage tanker explosion in Superior, WI in 2018 (Attachment EE-9). In addition, Lake Superior and other waters are facing environmental degradation from the numerous operating and abandoned Mines in northern Minnesota, Wisconsin, and Michigan. *Great Lakes Mining*, Center for Biological Diversity (Attachment EE-6); *see also Metallic Mineral Mining: The Process and the Price*, Great Lakes Indian Fish and Wildlife Comm'n (GLIFWC, 2016) (Attachment EE-7); *see also* Attachments for Project Descriptions and Maps (Attachment EE-8). The cultural and historic impacts of the Project will accumulate on top of these other projects. In all we are witnessing a mass degradation of our historical homelands, disruption of our traditional lifeways, and diminished access to cultural sites. The WDNR must acknowledge and assess these cumulative impacts in detail.

3. Construction and operation impacts to historic architecture and archaeological resources.

Setting aside the limited geographic scope of the cultural resources analysis, WDNR does not even assess all of the impacts to the archaeological and historic sites that it identifies in the DEIS. The DEIS notes that there are several archaeological and historic architectural sites found on the proposed route. DEIS at 235 (Table 6.19.2.2-1 *Archaeological and Burial Sites within 300 Feet of Limits of Disturbance*)*; see also* DEIS at 238 (Table 6.19.2.3-1 *Architectural Resources Identified within Viewshed of Project Area*). But the DEIS does not discuss the specific construction and operational impacts the pipeline may pose to all of these individual sites. Instead, the DEIS lists general impacts that might occur as a result of pipeline construction, and only for National Register for Historic Places or "eligible sites" found in the Wisconsin Historic Places Database. The DEIS does not explain how it reached a determination that certain sites are "not eligible."[14] Notably, none of the sites associated with Indigenous peoples were deemed eligible by Enbridge contractors.

[14] "Areas identified as within the APE but outside of the [Limits of Disturbance ("LOD")] (note the APE has not been formally determined as of EIS publication) could be impacted by noise, alteration of the physical landscape, and

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Simply reiterating the findings of the project applicant is not enough to meet WDNR's WEPA obligations. The DEIS's analysis must extend to archaeological and historic properties that are identified in the DEIS even if they are not listed in the NRHP or eligible for listing. Further the DEIS must explain how it determined eligibility and whether the eligibility criteria will capture tribal cultural resources or not. The DEIS should also evaluate for each site identified the specific construction impacts associated with drilling, wetland conversion, and construction equipment as well as operational impacts related to maintenance, the project's emissions, and a potential oil spill.

The DEIS's deficient analysis of this project's impacts is clearly exhibited by the archaeological study by Environmental Resources Management. The findings of ERM turn a blind eye to the possibility that archaeological material could be found near the route but outside of the proposed utility corridor and buffer zone. For example, the archaeological survey found lithic scatter along the route, but ERM did not investigate whether there might be sites of importance in proximity to this archaeological discovery. DEIS at 235 (Section 6.18.2.2. *Archaeological investigations*). Lithic scatter is evidence of Paleolithic or Mesolithic occupation in the region. This finding could uncover other important archaeological sites outside of the narrow 300-foot buffer zone around the pipeline route. Rather than evaluate this possibility, the DEIS simply states:

> Site 47AS442 is considered a Late Archaic period lithic scatter, due to the recovery of an expanding stemmed hafted biface and two tertiary flakes from a single shovel test pit. The archaeologist recommends further evaluation if the site cannot be avoided by construction. The preferred alignment avoids the site by approximately 160 feet. No impacts to the site are anticipated.

DEIS at 236.

This is not sufficient to protect the important cultural and historical interests that the Band may have in any artifacts uncovered in and around the proposed route. The WDNR should disclose how it reached the conclusion that no impacts are anticipated for Site 47AS442 and other possible archaeological discoveries in proximity to the site. Further, the THPO's office needs more information about the site and any plans for future investigation.

The DEIS's conclusory analysis of the project's archaeological and historic impacts will not prevent irreversible harm to historic resources that WDNR must protect.

B. <u>The DEIS fails to evaluate the archaeological, historic, and cultural resource impacts of the project alternatives.</u>

The agency has not done any field analysis of the cultural, archaeological, and historic resources found along the project alternative routes. MNRD THPO Report at 6-7 (Attachment EE). WDNR must provide sufficient information associated with each alternative such that the

interruption of wildlife travel patterns. Each site identified a s within the LOD will likely be impacted by the above as well as direct pipeline installation methods, vegetation clearing (particularly sugar bushes and hunting sites) and construction traffic."

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public and the Band are afforded the opportunity to comment intelligently on this proposal. The DEIS states with candor that "no cultural resources field surveys for the Line 5 project were conducted along the other alternatives" and that it only considered cultural and historic sites that are *documented* within "a 120-foot buffer of the centerline." DEIS at 133 (5.18.1.1. Cultural Resources within the Proposed Route and Route Alternatives).

This approach to assessing cultural resources does not provide the public or the Band with adequate information to comment intelligently on this proposal. Without field survey data, the Band cannot compare the impacts of each alternative to the proposed route—which does have a field assessment. Often archaeological or historical sites are identified as a project is being built. Indeed, Enbridge's field survey of the project route identified 37 previously undocumented archaeological sites and six isolated finds. MNRD THPO Report at 5 (Attachment EE). As the THPO report notes, "[w]ithout field surveys of each alternative, it is impossible to know whether this is more or less than number of archaeological sites found in the alternative routes" and the Band is robbed of the opportunity to comment on this proposal with complete information. *Id*. A shorter route is not necessarily a less impactful route, even if the agency seems to assume so. For this reason, it is clear that the DEIS must be reissued with more complete field surveys of alternative routes.

1. The Dirt Divers Report is flawed.

Enbridge hired a tribal cultural resources consultant, Dirt Divers LLC, to produce a report on the cultural resources that may be impacted by the project. The Dirt Divers report is deeply flawed and should not be considered or incorporated in this DEIS.

The Dirt Divers Report is not inclusive of Ojibwe history and was completed using inappropriate and opaque methods. The Bad River Band would like to underscore that Dirt Divers is not affiliated with the Band in any way. Neither the Band, WDNR, nor the Corps have vetted Dirt Divers' qualifications and methodology to analyze cultural and historic resources. By all indications, the contractor relied on haphazard methods, such as utilizing interviews with an undisclosed number of unidentified "elders," and drawing unempirical conclusions from inferences the Band does not endorse. From these inferences the Dirt Divers report identified a total of just eleven cultural sites. Those sites include (1) maple sugar harvest areas, (2) a hunting, fishing, and gathering area, (3) an eagle tree site, and (4) multiple sites identified as "rock overlook." Dirt Divers classified two of these sites to be not significant. Dirt Divers also recommended boundary adjustments for five of the locations. Dirt Divers recommended minimal mitigation measures for the remaining four identified traditional cultural properties. The Dirt Divers Report also notes that the survey corridor was thoroughly examined by Tribal Cultural Resource Survey specialists, without any indication of who is considered a specialist and under what criteria. The Dirt Divers report discounts the historical significance of the entire Reservation and ignores the threats that the project poses to the Band's cultural heritage. In addition to these objections, the THPO notes in her report that there is no indication that the Dirt Divers report is consistent with National Register Bulletin # 38, Guidelines for Evaluating Traditional Cultural Properties. MNRD THPO Report at 6 (Attachment EE). Further, the DEIS and the Dirt Divers report lacks evaluation of the project's potential impacts to historic tribal allotments that are near the project route. *Id*.

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Rather than attempt to outsource the task of evaluating this project's impacts to the applicants cultural and historic resource contractors, WDNR should instead wait until the Band and the Army Corps complete the Section 106 consultation process. That process should include completion of the THPO's Statement of Work, which will provide a comprehensive analysis of the project's impacts to the Band's cultural heritage.

2. WDNR should stay consideration of the Band's cultural and historic property.

On May 28, 2021, the Band sent the Army Corps a Statement of Work and Activities (Attachment EE-1) for a cultural resource survey that includes interviews, data compilation, a literature review, a field survey, report writing, and an Ojibwe language specialist to assist in the identification of traditional and cultural resources. The THPO's Statement of Work and Activities is a mechanism for addressing the identified shortcomings of the Dirt Divers Report. The Band believes that carrying out the THPO's Statement of Work will result in a collaborative cultural resources report that meets federal documentation standards and the requirements of WEPA. The Band recommends that WDNR stay its consideration of the project's impacts to tribal cultural and historic properties until the Corps and the Band can adopt and complete the THPO's Statement of Work pursuant to the Section 106 consultation process.

In all, there are serious deficiencies in the way the DEIS considers the project's direct, indirect, and cumulative archaeological, historical, and cultural resource impacts. Like with other aspects of the DEIS, WDNR must *evaluate* these impacts and not simply list them and make unsupported conclusions. It is vital that the Band play a key cooperating role. Without adequate involvement of the Band, it is a certainty that this project will impose irreversible impacts to irreplaceable resources that could have been avoided with more careful analysis.

XIII. THE DEIS DOES NOT IDENTIFY A FRAMEWORK TO EVALUATE PUBLIC HEALTH OR TO CONSIDER THE EFFECT OF THE PROJECT ON THE MISSING AND MURDERED INDIGENOUS WOMEN EPIDEMIC

As part of its environmental analysis, WDNR must also disclose the disproportionate exposures for Native American and Indigenous communities to pollutants from the oil and gas industry and evaluate how this pipeline project will increase those impacts. There is a need to develop a public health risk assessment on the impacts that pipeline construction, and its changes to land and water resources, has on Indigenous communities. This includes, for example, developing a framework to evaluate food consumption. Without a formal framework for evaluating the importance of daily and seasonal consumption patterns of wild caught or gathered foods and medicines, WDNR will miss assessing environmental justice risks to Band members who rely on those food sources. This framework must extend to examining the types and frequencies of religious events or ceremonies and on-site non-consumptive uses. Without this framework or analysis, WDNR will avoid analyzing environmental justice impacts to the most highly exposed communities. A concerted effort is required to capture important data and translate this information for environmental justice and public health risk assessments. The Band made this exact request to the Army Corps of Engineers in its comment letter dated March 22, 2022. It is the Band's hope that this analysis can be done in collaboration between the state and the Army Corps.

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WDNR must consider other risks that the pipeline project poses to tribal members. Specifically, WDNR must address the growing problem of violence against Indigenous women and girls.[15] Because of the watershed's geographic location, the U.S. interstate highway, and the local history of violence against Indigenous women and girls, the Band is especially concerned about the welfare of our community.

None of the applicant's draft Human Trafficking Awareness and Prevention Program evaluate local data to assist in the prevention and repatriation of Indigenous women and girls, including trafficked women and girls. Nor does the draft Program analyze the impact the location of the proposed project will have on human trafficking. The draft Program even lacks any evaluation of coordinating law enforcement, providing victim services, or outreach and communications responses. In fact, the proposed Program is only a virtual training which informs Enbridge employees on ways to identify and report human trafficking. WDNR must require the development of a program that includes this information. Further, WDNR must require this plan be developed in conjunction with the Wisconsin MMIW task force and other tribal entities.

Representatives of the Wisconsin MMIW task force have already cited concerns about the proportional increase in violence in the Bakken Oil Fields as oil and gas operations increased. The DEIS, however, dismisses this concern as a scaling issue: "In terms of scale and duration, the proposed Line 5 relocation project is significantly smaller than the oil and gas extraction operations in the Bakken oil fields. Enbridge indicates that they would employ approximately 700 workers for the proposed project and that many of these would be hired from the local area." DEIS at 312. This response wholly misses the mark. Violence against Indigenous women and girls is violence against Indigenous women and girls. There must be a zero-tolerance policy regarding violence against women, the trafficking of women, and any form of sexual violence. The Corps must evaluate these impacts and consult with the Bad River Band and the MMIW Task Force as part of its permitting process.

This evaluation is further crucial because rural communities lack the infrastructure, leadership capacity and expertise to effectively respond to what would be a rapid change to social situations.[16] This was evident in the experience of the Three Affiliated Tribes at Fort Berthold Indian Reservation in North Dakota. The Tribes experienced an explosion in crimes against women and girls following the development of the Bakken oil fields, many of which went unpunished, and even uninvestigated.[17]

The DEIS must also consider the ability of local law enforcement in Ashland and Iron Counties to respond to an uptick in crimes of sexual violence that will result from the project. This

[15] Olivia Richardson, *Sex Trafficking Case Rise in Wisconsin, Which Kaul Says Could be Due to More Victims Coming Forward*, WUWM.com, Jan. 10, 2020; Rachel Monaco-Wilcox & Daria Mueller, *Under the Radar, Human Trafficking in Wisconsin*, 90 Wis. Law. (Oct. 2017); Mary Spicuzza, *Hundreds of Sex-Trafficking Cases Have Been Reported in Wisconsin, But the Real Number May be Higher According to a New Report*, Milwaukee Journal Sentinel, Jan. 9, 2020; and Diana Dombroski, *Human Trafficking Is All Over Wisconsin, But Subtle. You Might Have Seen Victims and Never Known*, Sheboygan Press (June 9, 2019).

[16] Kathleen Finn, Erica Gajda, Thomas Perin, and Carla Fredericks, *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J.L. & GENDER 1 (2017) 8, available at https://scholar.law.colorado.edu/articles/629.

[17] *See id.*, generally.

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includes strategies local law enforcement will or are able to use to respond to human trafficking. The DEIS must also consider the relationship that local law enforcement has with local Indigenous communities. Specifically, the strategies local law enforcement has used in the prosecutions of drug crimes has eroded the trust of the community in the effectiveness and impartiality of law enforcement. The lack of follow-through on the prosecution of crimes of violence within tribal communities is often attributed to law enforcement confidentiality protecting a confidential witness. For example, the Ashland County Sheriff's Department was recently subject to an internal investigation regarding the sexual misconduct of staff against female inmates in the jail and a federal lawsuit in which the county entered into a settlement agreement with several assault victims. The failure of that department to effectively police itself is a serious impediment to effective policing, which requires community trust.

The proposed project, if approved, would most certainly create conditions associated with increased demand for commercial sex trafficking. The DEIS fails to acknowledge the likelihood of increased sexual violence that the proposed project would facilitate. The DEIS further fails to acknowledge that American Indian women and girls from the Bad River, Red Cliff, Lac Courte Oreilles and Lac du Flambeau Tribal Nations are likely to be targeted as victims of sex trafficking associated with this project. Finally, insufficient analysis has been performed of the infrastructure and other systems in place to prevent the victimization of local girls and women, and especially American Indian girls and women, through trafficking, and the overall capacity of local law enforcement to effectively punish crimes of sexual violence. The WDNR must conduct an assessment of this issue, in consultation with the Band, and with the expertise of the United States Department of Justice, as part of the DEIS.

XIV. THE DEIS CONTAINS NUMEROUS DEFICIENCIES AND MUST BE REVISED AND REISSUED

WDNR's DEIS contains numerous general deficiencies. The DEIS contains omissions, outdated and inaccurate information, grammatical and typographical errors, missing or repeated text, a lack of neutral language, inadequate analysis of environmental impacts, and a failure to accurately describe the Band's treaty rights, water rights, and regulatory authority. These deficiencies demonstrate WDNR paid an insufficient level of attention in preparing this DEIS. The following is a non-exhaustive list of additional ways the DEIS is deficient. WDNR must correct these deficiencies in a revised DEIS and make it available for public comment.

A. General Deficiencies.

In many places, the DEIS lacks sufficient, accurate, or sometimes any information and analysis to assess the impacts of the proposed project. Although not all generalized deficiencies are accounted for in this list, select examples of different types of general deficiencies follow:

Omissions

- Table 1.6.2-1 *State Agencies Having Permit Authority* makes no mention of the Wisconsin Department of Administration's authority under the Coastal Zone Management Act. *Id*. at 12-13.

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- Appendix B of the DEIS is titled *Road Use Agreements* but contains only the Memorandum of Option for Right of Way and Easement Grant that Enbridge signed with Iron County regarding county forest land.

Outdated and Inaccurate Information

- The DEIS continues to rely on outdated maps and other specific route information. *See* Appendix A *Project Route Maps*.
- Discrepancies, inadequacies, or misrepresentations of data and information exist between related sections of the DEIS, like Sections 5.11 and 6.11 regarding Wetlands or Sections 5.14 and 6.14 regarding Threatened and Endangered Species.

Grammatical and Typographical Errors

- While such errors are less consequential in many places, they create real confusion about the project in some sections. For example, Section 1.6.1.1 says the "proposed route as well as the route alternatives cross federally owned lands," *id*. at 9, while Section 2.6.1 says the "proposed route would not cross federal…owned/managed lands." *Id*. at 38. This discrepancy creates confusion about the role federal land managers should play in the proposed project, and the potential for impacts to federal lands.
- Another example is the discrepancy in the pipeline crossing method proposed for waters, such as the Marengo River where Table 6.10.1-1 indicates direct bore method and p. 167 states "…at the HDD crossing of the Marengo River."

Missing or Repeated Text

- Multiple sections repeat nearly identical paragraphs of text, demonstrating a concerning lack of review when preparing the DEIS. *See e.g., id*. at 46, 49.

Lack of Neutral Language

- Positive language is used to describe oil extraction and pipeline construction while changes in land are described as "deformations." *Id*. at 81; *see* MNRD Other Waters Report at 8 (Attachment R); MNRD Environmental Report at 4 (Attachment BB).
- Some sections seem to draw verbatim from applicant documents or rely heavily on applicant claims. *See* EPA letter to WDNR (March 21, 2022) at 5, 11, 23 (Attachment F).

B. Inadequate Data and Analysis of Environmental Impacts.

The Mashkiiziibii Natural Resources Department ("MNRD") staff spent an exorbitant amount of time preparing reports analyzing the DEIS across several issue areas. All of the reports indicate a lack of data or supporting evidence across the DEIS such that analyzing the environmental impacts of the project is nearly impossible. Each of these reports identifies specific examples of the missing data necessary to even begin analyzing the environmental impacts. Many of the reports identify missing baseline information, including site specific data for wetlands, soils, water resources, plants, and species in the project area. Several reports identify the lack of field data or field work that is typically associated with gathering baseline information in order to assess project impacts. Indeed, much of MNRD's time was spent identifying information that it has requested from WDNR repeatedly, even before the DEIS was published for public comment, in order to determine the environmental impacts of the project. All of this information should have been included as part of the DEIS and made available prior to the public comment deadline. The

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purpose of WEPA is for full environmental disclosure, which is not present in this version of the DEIS. For this reason alone, the Band and MNRD staff once again request that WDNR revise the DEIS to include this information and re-issue the DEIS for public comment.

Another common theme throughout MNRD's reports is that many of the discussions about environmental impacts throughout the DEIS were conclusory and completely lacked any analysis whatsoever. The purpose of a DEIS is to inform the public and decision makers of the environmental impacts of a proposed project. The conclusions in this DEIS, however, were so broad that the actual environmental impacts were vague, and also not supported by any analysis. In many instances, it appeared as though WDNR did not supply its own analysis and merely accepted Enbridge's stated positions, claims, and analysis. *See also* EPA letter to WDNR at 5, 11 (Attachment F). Again, WDNR must correct the DEIS and reissue the DEIS for public comment only after it has supplied its own analyses of environmental impacts.

The Bad River Band details issue and resource specific impacts from the project throughout this comment letter, but the above general concerns are pervasive throughout the entire DEIS. Also, because additional information may be made available after the public comment deadline, the MNRD reserves the right to update these reports as necessary to include new information and incorporate how that information may impact Bad River's interests and resources.

C. Glaring Data Discrepancies Exist Between the DEIS and the Army Corps' Public Notice.

Serious discrepancies exist between data presented in the Army Corps' Public Notice for the proposed project and data presented in the DEIS. The two data sets contain contradictory numbers of waterways and wetlands impacted. The difference is quite drastic. For example, the applicant describes 201 waterbody crossings in its application materials while the Corps first identified only 57 waterbody crossings and now lists 71, and the DEIS lists 183. Similarly, the Corps' Public Notice identifies two numbers of wetlands that will be impacted – 101.09 acres and 59.3 acres – with no clear distinction between the two. Using the same tabulation method as the Corps, the DEIS identifies 101.02 acres impacted by the proposed project. *See* MNRD Wetlands Report at 9, Table MNRD-1 (Attachment V). Yet, MNRD staff review of applicant data showed 105.26 acres of impact. *Id*.

The discrepancies between the Corps Public Notice and the DEIS cause concern, especially because neither agency sufficiently explained why these differences exist. Even more surprising, the Corps and WDNR apparently ignored field data submitted by the Band and GLIFWC, *see e.g.*, June 8, 2021, GLIFWC Technical Memo (Attachment W), indicating greater numbers of wetlands impacted and waterways crossed than those identified by the applicant or either agency. Despite this field data, the WDNR has not updated its maps or estimated impacts to wetlands and waterways to reflect the actual impacts on the ground. Further, recent analysis by MNRD staff of Enbridge geographic information system (GIS) data shows discrepancies between wetland delineations given to the WDNR and Corps. Discrepancies include missing wetlands on one dataset appearing in the others, inexplicably resized wetlands, or otherwise under-mapping. WDNR must account for these discrepancies. The Band articulated these discrepancies, and many of our concerns about an inadequate environmental review, in a public comment letter submitted

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to the Army Corps on March 22 (Attachment KK). Based on the numerous inadequacies the Band has identified in the DEIS, the Band also requested that the Corps develop its own federal EIS.

D. The DEIS lacks consideration of the effects of eventual decommissioning of the proposed pipeline

WDNR must also consider the effects of decommissioning the proposed Line 5 segment as part of its environmental review. There is no mention in the DEIS or the application materials of how long the pipeline is proposed to be operational, nor is there any discussion of how long the pipeline will physically be able to operate. Enbridge is in the process of attempting to replace several aging pipelines throughout the Midwest built 50 to 70 years ago – or more. Line 3 in Minnesota was originally built in 1968 and the portion of Line 5 that goes through the Straits of Mackinac in Michigan was originally built in 1953. Indeed, Line 5 running through the Reservation was also built in 1953 and its age may be a risk factors for an oil spill. Yet, when faced with the likelihood of decommissioning the current Line 5 pipeline due to its unlawful presence on Reservation lands, Enbridge has failed to produce a plan that evaluates and considers the environmental impacts of the pipeline's removal. The DEIS must consider and evaluate when the proposed project will cease to be operational and what plans or measures Enbridge is taking to remove the infrastructure at the end of its operational life.

E. WDNR must assess stormwater discharges under an individual permit

The many risks of erosion and sedimentation associated with the proposed project lead the Band to join requests that WDNR evaluate stormwater discharges for the proposed project under an individual permit scheme pursuant to Wis. Admin. Code NR § 216.25. *See* Request from Midwest Environmental Advocates, League of Women Voters of Wisconsin, Sierra Club-Wisconsin Chapter, and 350 Madison, Request for DNR to Require Enbridge to Apply for an Individual Storm Water Permit (Oct. 7, 2021) (Attachment LL).

CONCLUSION

The Bad River Band remains seriously concerned about the lack of information in the DEIS. For example, there is no baseline information on the current operation of the Line 5 pipeline and associated impacts, there is no site-specific analyses for wetlands, waterways, or other environmental resources that will be impacted, and there is no analysis whatsoever of the project's environmental impacts on the region. Additional examples where the DEIS lacks data and independent analyses include a comprehensive evaluation of cumulative effects of the project's construction, maintenance, and operation phases. As written, WDNR cannot make a finding that this application or this project meets the goals of WEPA or the wetlands and waterways statutes. Significantly, this DEIS does not support a finding that this project will comply with Wisconsin's state water quality standards, as required by the Clean Water Act.

What is outstanding, however, is that the Bad River Band was not adequately included in this process or in the DEIS. The DEIS does not incorporate the feedback the Bad River Band has previously provided, including the red flag issues we raised in our December 2021 letter. The DEIS does not evaluate impacts the project will have to the Bad River Reservation or the Band's

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treaty rights. The DEIS does not analyze the project's impacts to the Bad River Band's water quality standards and connected waters. WDNR and Enbridge did not consult with the Bad River Band or the Tribal Historic Preservation Officer to consult on cultural, historic, and archeological resources. WDNR and Enbridge did not consult with the Bad River Band on spill risk modeling, assessment, or spill response plans. For these reasons alone, WDNR must revise and reissue a Draft Environmental Impact Statement that incorporates all of the Bad River Band's rights and resources.

Although the Bad River Band appreciates the tribal consultation opportunity held on April 11, 2022, we recognize that this meeting was not true consultation, but rather a listening session that provided WDNR an opportunity to hear concerns from tribal leaders. The Bad River Band requests that we continue government-to-government consultation meetings and technical meetings on this significant issue and request that you reach out to Naomi Tillison, Director of MNRD, at nrdirector@badriver-nsn.gov or Jessica Strand, Environmental Specialist, at environmental@badriver-nsn.gov to schedule future meetings to further discuss our comments.

Miigwech,

Mike Wiggins, Jr.
Bad River Tribal Chairman

Cc: Adam Mednick, Wisconsin Dep't of Natural Resources, AdamC.Mednick@Wisconsin.gov

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