

BAD RIVER BAND OF LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS

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via email to: CEMVP-L5WSR-PN-Comments@usace.army.mil

Bill Sande
St. Paul District, Army Corps of Engineers
CEMVP-RD
180 Fifth Street East, Suite 700
Saint Paul, MN 55101-1678

Re: Comments on the Section 404 and Section 10 Permit Application for the Enbridge Line 5 Pipeline Segment Relocation Project, Army Corps of Engineers, St. Paul District, File No. MVP-2020-00260-WMS

Mr. Sande,

The Bad River Band of Lake Superior Chippewa (“Bad River” or “Band”) respectfully submits the following comments to the Army Corps of Engineers, St. Paul District’s Public Notice, issued on January 6, 2022, on the permit application from Enbridge Energy for the Line 5 Segment Relocation Project.

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 Band previously requested that the Army Corps of Engineers (“Corps”) rescind the Public Notice and revise it before releasing it for public comment due to the numerous deficiencies throughout the document. Letters to Col. Karl Jansen from Bad River Band (March 4, 2020) (Attachments A and B). The Band expressed concerns that the Public Notice did not accurately describe the project activity, did not assess the full geographical scope of the project, lacked critical data to determine the project’s impacts, and failed to accurately describe the Corps’ jurisdiction. The Band also requested the Corps re-initiate consultation under the Endangered Species Act due

to federally listed threatened and endangered species and their critical habitat, other fish and wildlife species and their critical habitat located within Ojibwe homelands and ceded territory, as well as the court-ordered re-listing of the gray wolf as an endangered species. The Band is renewing its request for the Corps to correct the factual discrepancies and release another Public Notice for comment. The Band and the Mashkiiziibii Natural Resources Department (“MNRD”) prepared this comment letter based on the information in the current version of the Public Notice and permit application. 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. There are also inconsistencies between the application materials Enbridge provided to the Wisconsin Department of Natural Resources (“WDNR”) and those provided to the Corps, which raises questions about the accuracy of the information. The Bad River Band submits this comment letter in order to meet the Corps’ 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.

The Band is reiterating the need for the Corps to prepare an Environmental Impact Statement (“EIS”) under the National Environmental Policy Act (“NEPA”) due to the project size, the federal determination process for treaty harvest effects, differences between state and federal law, impacts to the Bad River Band’s water quality standards, and likely environmental impacts through several of the Corps’ jurisdictional waters. The scope of the Corps’ environmental review must include the operation and decommissioning of the existing Line 5 segment that runs through the Reservation in addition to the construction, operation, and eventual decommissioning of the proposed pipeline. These comments highlight some of the severe deficiencies in the Public Notice and the application that should be addressed before the Corps can conduct a full environmental analysis of the project impacts. The need for a full federal environmental review becomes more apparent as more information becomes available. On March 21, 2022, just one day before this comment deadline, the Minnesota Department of Natural Resources revealed Enbridge breached three aquifers as part of the construction of its Line 3 replacement project.¹ The impacts of the aquifer breaches are severe and highlight the need for further data collection, transparency between the Corps, Enbridge, and the public, and for a thorough environmental review. Based on the current application, information available, and the Public Notice, the Corps cannot issue a Section 404 or Section 10 permit for this project. The Bad River Band looks forward to participating in a robust review of the environmental and cultural impacts of the project as part of the EIS process.

I. THE CORPS’ DE MINIMIS EFFECT DETERMINATION PROCESS FOR ESTABLISHED TREATY RIGHTS

The Corps has a trust responsibility to ensure that this project will not interfere with the Band’s Reservation property or treaty-guaranteed usufructuary rights. Here, the Band identifies the history of its established treaty rights for a home, and established treaty rights which it holds in common with other tribal signatories to the 1842 Treaty, throughout the project area. To help that the Corps actions are consistent with the Band’s treaty rights, reserved rights, and statutory rights, we also would like to meet with the Corps to discuss these issues. We have proposed

¹ Minnesota Department of Natural Resources, Line 3 Replacement Project, <https://www.dnr.state.mn.us/line3/index.html> (accessed March 22, 2022).

calendar dates at the end of this letter. We look forward to engaging with the Corps to analyze the proposed Line 5 reroute project's impacts to the Band's treaty rights both on and off the Bad River Reservation.

A. The Bad River Band and 1842 Territory Members Have Rights Established Under Treaties with the United States

The Band's connection to this watershed runs deep in its history and culture. The Band signed treaties with the United States in 1837 and in 1842 ceding territory in Wisconsin and parts of Michigan and Minnesota. The tribes party to the 1837 and 1842 Treaties, including the Bad River Band of Ojibwe, explicitly retained rights to hunt, fish, and gather on ceded territory, along with other usual and customary practices. Treaty with the Chippewa, 7 Stat. 536 (1837) ("1837 Treaty") and Treaty with the Chippewa, 7 Stat. 591 (1842) ("1842 Treaty") (referencing the "usual privileges of occupancy"). The District Court for the Western District of Wisconsin summarized reserved rights in interpreting the 1837 and 1842 Treaties this way: "[The 1837 and 1842 treaties] grant the [Ojibwe] the right to live on the ceded lands as they had lived before the treaties were signed. That way of life included hunting, fishing, trapping, and gathering wild rice and maple sap as a means of providing food for themselves . . . in addition to having a place of residence." *United States v. Bouchard*, 464 F. Supp. 1316, 1358 (W.D. Wis. 1978), *aff'd* in relevant part and *rev'd* on other grounds *sub nom. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983). The usufructuary rights retained by the Ojibwe Tribes in these treaties are known as "reserved rights" because, under the established reserved-rights doctrine of federal Indian law, Indian treaties grant rights not to tribes, but rather to the United States. The inherent sovereign rights of tribes are retained unless they have been explicitly relinquished via treaty. *See United States v. Winans*, 198 U.S. 371, 381-82 (1905) (recognizing that a treaty is "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*, No. 74-cv-313-bbc, 2015 WL 5944238, at *2 (W.D. Wis. Oct. 13, 2015) (recognizing that Ojibwe Tribes "*retained* their hunting rights, including the right to hunt at night, when they ceded thousands of acres of northern Wisconsin to the United States in the early part of the nineteenth century") (emphasis in original).

Tribal members from the Bad River Band and other tribes continue to exercise their treaty rights throughout this region, including hunting, fishing, gathering, and other customary practices. *See e.g. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 758 F. Supp. 1262, 1275 (W.D. Wis. 1991) (holding that tribes have an "undisputed usufructuary right to gather forest products.").

At the time the Band and the United States negotiated the 1837 and 1842 Treaties, United States policy was to remove tribes to land west of the Mississippi. However, the Bad River Band avoided removal and retained their off-reservation rights 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.

The present-day Bad River Reservation is in Northern Wisconsin and is part of the Bad River Watershed on the southern shore of Lake Superior. Several rivers from upstream subwatersheds – the Potato, Tyler Forks, Upper Bad, Marengo, and White Rivers – all flow downstream into the Bad River. The Bad River, White River, Potato River, Marengo River, Brunsweler 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.

1. 1842 Treaty Territory Uses

The 1842 Treaty specifically reserved “the right of hunting on the ceded territory, with the other usual privileges of occupancy[.]” See 1842 Treaty, Art. II. The history surrounding the Ojibwe Tribes’ 1837 and 1842 Treaties demonstrates that the tribes recognized that their reserved usufructuary rights included the rights to hunt, fish, and gather. That same history shows that the tribes also retained the right to conserve and protect the key species they relied upon for their livelihood, to maintain healthy populations of those species, and to ensure their continued existence. Thus, for example, tribal representatives stated during the 1837 Treaty negotiations “[t]hat you”—meaning the United States and its citizens— “may not destroy the [Wild] Rice in working the timber.” *Ojibwe treaty statement, 1864, U.S. Commission of Indian Affairs*, Original manuscript in the Wisconsin Historical Society Archives (SC-O 40), English Version, at 5. Similarly, recognizing the implications of the United States planned lumbering activities, tribal representatives explicitly retained their right to conserve and protect the oak and maple trees from which the Ojibwe derived important food sources and other values. *Id.* at 4. (“I will sell him the Pine Timber as he requests me to . . . [but] I hold in my hand the Maple Timber, also the Oak Timber[.] . . . These I do not sell.”); see also Negotiations for the *Chippewa Treaty of July 29, 1837*, reprinted in Ronald N. Satz & Laura Apfelbeck, *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective* app. 1, at 142 (1996) (journal of 1837 treaty negotiations documenting tribal negotiator’s statement that, “[o]f all the country that we grant you we wish to hold on to a tree where we get our living . . . The Chiefs will now show you the tree we want to reserve. This is it (placing an oak sprig upon the Table near the map).”).

Federal courts have routinely interpreted the 1837 and 1842 Treaties as a “grant the Indians the right to live on the ceded lands as they had lived before the treaties were signed.” The Ojibwe reserved to themselves the “right to make a moderate living off the land and from the waters in and abutting the ceded territory and throughout that territory by engaging in hunting, fishing, and gathering as they had in the past and by consuming the fruits of that hunting, fishing, and gathering, or by trading the fruits of that activity for goods they could use and consume in realizing that moderate living.” *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 653 F. Supp. 1420, 1426 (W.D. Wis. 1987). At the time the treaties were signed, the Ojibwe made use in various ways of almost all the flora and fauna in the region. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 653 F. Supp. at 1426-29 (listing mammals, birds, fish, plants, plant materials, and other resources the Ojibwe used at the time of signing the Treaty of 1837 and the Treaty of 1842).

The Bad River Band and its members, as well as members of other tribes that were signatories to the 1842 Treaty, continue to exercise their treaty rights to hunt, fish and gather the same resources throughout the ceded territory as many of our relatives did that came before us.

2. *The Band's Treaty-Protected Water Rights*

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 the tribes 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, for the purposes of, the reservation, they continue to exist, *Arizona*, 373 U.S. at 600, whether or not they 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 the aquifer south and southeast of the reservation for drinking water. 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.

B. The Federal De Minimis Effect Process to Consider the Bad River Band’s Treaty Rights

The Corps previously has examined projects’ impacts on tribal treaty rights as part of the consideration on whether or not to grant an individual permit under Section 10 of the Rivers and Harbors Act. In *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, a federal court upheld the Corps’ denial of a permit to construct a salmon farm in Puget Sound because the project would have a more than *de minimis* impact on tribal treaty rights. 931 F. Supp. 1515 (W.D. Wash. 1996). The court found that the “Corps owes a fiduciary duty to ensure that [tribal] treaty rights are not abrogated or impinged upon” in administering its permitting programs. *Id.* at 1520. Significantly, the court found that Corps’ conclusion that the project would affect the Lummi Nation’s geographical right to access tribal treaty rights was enough to support denying the project. *Id.* at 1522.

At the District level, the Corps followed *Northwest Sea Farms* when it reviewed, and denied, a Section 404 permit for the Gateway Pacific Terminal in Cherry Point, Washington. *See Gateway Pacific Terminal Denial Memo*, May 9, 2016 (Attachment C). The Seattle District denied the permit after reviewing first-hand evidence from tribal fishermen that the project would interfere with their ability to fish in their treaty-reserved areas. *Id.* at 7-8. The Seattle District also reviewed an expert report that examined the project's overall impact on tribal fishing activities. *Id.* at 10-11. The District concluded the terminal would have more than a *de minimis* impact on tribal treaty rights and supported its decision based on tribal members' testimony and other supporting evidence demonstrating that the project presence in itself would infringe on tribal members' ability to fish. *Id.* at 21-23. In denying the permit, the Seattle District also rejected arguments that mitigation would be enough to reduce the project's impacts so that it would not have a more than *de minimis* impact on tribal treaty rights. The District concluded that "[o]nly an act of Congress can eliminate a part of the Lummi's [treaty-protected] fishing grounds." *Id.* at 28. The applicant's mitigation proposal altered the tribal fisherman's fishing practices and fishing locations. The District found the mitigation plan would "still continue[] to impair or limit the Lummi's access to its [treaty-protected] fishing grounds" and that "even with the [applicant's] proposed mitigation, there would still be impediments to fishing because the physical presence of the wharf and trestle interferes with the Lummi's [treaty-protected] fishing." *Id.* at 30. "The pier itself eliminates a geographic area where fishing and crabbing occurs, which I find to be greater than *de minimis*. That alone is sufficient to be a greater than *de minimis* impact on the Lummi's tribal treaty rights." *Id.*

The Bad River Band, as well as other signatories to the 1842 Treaty, retain and exercise treaty rights to resources within the 1842 ceded territory. The proposed re-route project is wholly within the watershed that provides instream flows and groundwater that support the Band's hunting, fishing, and ceremonial purposes, and within the 1842 ceded territory. The project area also public land where tribal members exercise their treaty-protected hunting and gathering rights. To identify, and understand, the review the process and general types of information that the Corps would need to properly analyze the adverse impacts of the agency decisions, or other actions, to the Band's treaty rights, we suggest a meeting.

The Band also has concerns about how the proposed pipeline route will impact treaty rights vis-à-vis a state law. Wisconsin has enacted a law making it a felony to trespass on a pipeline right of way. *See Wis. Stat. § 943.143*. The result of this law is that the presence of a pipeline route through state and public land where tribes exercise treaty rights will effectively criminalize access to those areas. Tribal members will also be burdened with increased travel times and may have to take new routes to their traditional gathering and hunting sites because of the illegality of crossing Enbridge's right-of-way. *See infra* at VII.B. The Band requests to consult with the Corps on the impacts to treaty resources that will result from the proposed project.

II. THE CORPS MUST CONSIDER THE CURRENT LINE 5 LITIGATION IN RELATION TO THE PROPOSED PROJECT

Line 5 has been operating through the Bad River Reservation since 1953. The Corps must consider the current operation of Line 5 and current litigation between the Band and Enbridge as part of a federal EIS. The Public Notice fails to include the crucial fact that Enbridge currently

operates Line 5 in trespass. The Corps needs a fuller understanding of the line's current legal situation to compare and evaluate the proposed project.

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. *See* Section III.C.3.a. *infra*. 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.

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 D). The Council resolved in 2017 and 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 E). 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 (D. W.D. Wis. July 23, 2019), ECF No. 1 ("Bad River Complaint") (Attachment F).

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 required removal of the pipeline upon their expiration, which is now several years past due. *See* Bad River Bands' Mem. of Law in Supp. of Its Mot. for Partial Summ. J. and for Summ. J. on Defs' Countercl., 3:19-cv-00602 (D. W.D. Wis. Feb. 17, 2022), ECF No. 172 (Attachment G). The Corps' environmental analysis must reflect that Enbridge does not have the required easements to operate Line 5 in its current location, and any decommissioning plans and timelines must reflect that. The Band's success in litigation will affirm that Enbridge must remove the existing segment of Line 5 that runs through the Reservation. Also, decommissioning the current Line 5 need not wait until construction of the proposed project, but rather may need to start on a timeline that is dictated by the outcome of the litigation, regardless of the status of the proposed 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 Reservation 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. The Corps' environmental review must consider the present and future impacts and risks of the current Line 5, as it is inextricably intertwined with the proposed project.

III. THE CORPS MUST PREPARE A FULL ENVIRONMENTAL IMPACT STATEMENT IN ACCORDANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

The Corps must prepare an independent federal EIS prior to any decision-making on whether to issue a Section 404 or Section 10 permit to Enbridge for the Line 5 project. NEPA requires review of Federal actions “significantly affecting the quality of the human environment” including a detailed statement on environmental impacts, unavoidable adverse environmental effects, project alternatives, short-term uses vs long-term productivity, and any irreversible and irretrievable commitment of resources. 43 U.S.C. § 4332(2)(C). As written, the Public Notice does not contain sufficient information or analyses to meet this standard of environmental review and the Corps cannot issue a permit based on the available information. Based on the project context, the project application materials, and the Public Notice, the Corps must prepare a full federal EIS.

A. The Corps Has a Duty to Meet Other Federal Requirements

The Corps has other Clean Water Act (“CWA”) requirements that it must meet before it can issue a permitting decision. The Corps must complete an analysis under EPA’s CWA Section 404(b)(1) Guidelines before it can make a decision on whether to issue a Section 404 Permit. *See* 40 C.F.R § 230.5; Section IV. *infra*. The Corps must also comply with CWA Section 401 for state water quality certification and it cannot issue a permit without one. 33 U.S.C. § 1341(a)(1). The Corps also must comply with other federal statutes in this permitting process, such as the Endangered Species Act, *see* Section V. *infra*, and the National Historic Preservation Act. *See* Section VI. *infra*. This suite of federal laws affords a broad analysis of the impacts the project will have on the environment, including water quality, endangered and threatened species, and cultural and historic resources.

The Corps is the Bad River Band’s federal trustee and has an independent duty to consider the impacts the project will have on the Band’s treaty rights, as well as other issues unique to tribal and Indigenous communities. Specifically, the Band is concerned about Missing and Murdered Indigenous Women – a social plague that seems to increase at pipeline construction sites. The Band has a task force to raise awareness about this issue and we ask all our federal trustees to work to address and prevent this terrible threat our tribal communities face. The Corps must also conduct an independent analysis on the environmental justice (“EJ”) impacts of the project consistent with Executive Order 12,898. 59 Fed. Reg. 7629 (Feb. 16, 1994); *see also* E.O. 13985 (Advancing Racial Equity); E.O. 14008 (Tackling the Climate Crisis). These comments address these issues below. In order to meet the broad array of other federal requirements, the Corps must conduct its own independent review.

The Corps has a duty to evaluate the impacts of the proposed project within its jurisdiction. This includes informing the public of what impacts the project will have on jurisdictional waters and the location of those waters. The Public Notice fails even this basic function because it does not identify the Corps’ jurisdictional waters and the impacts to those waters. The Band has inquired about the number of waterways and wetlands that are included in the Corps’ Public Notice because the actual impacts to waters within the Corps’ jurisdiction is still unclear due to conflicting information in the Corps 404 process and the Wisconsin state environmental review process. To

date, the Corps has not fully or publicly clarified why there are discrepancies between the Public Notice issued for the Section 404 permit and the project documents that have been provided in the Wisconsin state environmental review process.

The Corps cannot rely on Wisconsin state processes to meet its federal responsibilities. The Wisconsin Department of Natural Resources has prepared a state Draft Environmental Impact Statement (“state DEIS”) as part of the state permitting process for state wetland fill and waterway impact and crossing permits under Wis. Stat. §§ 30.123, 30.19, 20.20, 281.36. The Bad River Band has expressed repeated concerns with the state process and the state DEIS, including failure to accurately describe the project and its proposed impacts, failure to include underlying data, failure to provide analyses supporting conclusions on impacts in the DEIS, and failure to consider cultural resources. Even though the state DEIS is deeply flawed, the Band will still submit comments to WDNR to preserve its rights in the state process. The preparation of the state DEIS, however, does not relieve the Corps of its duty to conduct an independent environmental analysis on the project’s impacts.

The Band has also notified both the Corps and WDNR about the inconsistencies between the Corps’ Public Notice and the state DEIS with respect to impacts to wetlands and waterways. Although the Corps suggests that the discrepancies are due to differences in jurisdictional areas, the Corps still must define its jurisdictional areas and evaluate the impacts to the environmental, cultural, and historical resources in the project area.

Ultimately, the Corps must complete an environmental analysis that meets its multiple federal responsibilities before it can make a permitting decision. The Corps cannot defer nor rely on a state level analysis.

B. The Project Requires an Environmental Impact Statement

NEPA requires a review of Federal actions that “significantly affect[] the quality of the human environment[.]” 42 U.S.C. § 4332(2)(C). The analysis must include environmental impacts, project alternatives, and any irreversible and irretrievable commitment of resources. *Id.* NEPA regulations, and the Army Corps regulations implementing NEPA, provide a process for developing environmental review documents. *See* 40 C.F.R. § 1501 et seq (1978); 33 C.F.R. pt. 325 App. B (1978).² Based on these regulations and federal case law, the proposed re-route of the Line 5 pipeline requires a full EIS.

The Corps must “prepare an Environmental Impact Statement ‘[i]f any ‘significant’ environmental impacts might result from the proposed agency action.’” *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 440 F. Supp. 3d 1, 13 (D.D.C. Mar. 5, 2020) (citing *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002)). “In order to determine whether its

² The Council on Environmental Quality (“CEQ”) revised NEPA regulations. 85 Fed. Reg. 43304 (July 16, 2020). CEQ is now in the process of reviewing those regulations pursuant to Executive Order 13990 (Jan. 20, 2021) and has extended the deadline for agencies to update their implementing NEPA regulations to September 14, 2023. 86 Fed. Reg. 34154 (June 29, 2021). As of the date of this comment letter, the Corps has not updated their implementing NEPA regulations at 33 C.F.R. pt. 325. Accordingly, the 1978 NEPA regulations are still applicable to this permitting process.

actions may result in ‘significant’ environmental impacts — and therefore whether it must prepare an EIS — an agency must examine both the ‘context’ and the ‘intensity’ of the action.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 471 F. Supp. 3d 71, 76 (D.D.C. July 6, 2020). Both the context and the intensity of the proposed project lead to significant environmental impacts that must be assessed in a federal EIS.

The Corps’ review must consider the context of the proposed pipeline project including the watershed as a whole and the project’s impacts to the wetlands, waters, and the human and biological communities that rely on those resources. *See* 40 C.F.R. § 1508.27(a). The watersheds that encompass the proposed project area are ones of extraordinary ecological and hydrological function. The waterways include unique waters such as Lake Superior and the Kakagon-Bad River Sloughs. Lake Superior is important on multiple scales, from local to international. The Kakagon-Bad River Sloughs also are of international significance. MNRD Other Waters Report (Attachment H) at 2 (“MNRD Other Waters Report”). The Band has identified many of these waterways as Outstanding Tribal Resource Waters for both their unique qualities and their cultural significance to the Bad River Band. *See* MNRD Water Quality Standards Report (Attachment I) (“MNRD WQS Report”). EPA has also recognized the Bad River and the Kakagon-Bad River Sloughs as Aquatic Resources of National Importance “because they are economically significant; their unique characteristics have been identified and designated for protection under international, national, state, and tribal law; and these waterbodies are integral to maintaining and enhancing the quality of the Nation’s waters.” Letter to Col. Karl Jansen, USACE, from Tera Fong, EPA R5, *Re: Public Notice MVP-2020-00260-WMS / Enbridge Line 5 Wisconsin Segment Relocation* (March 16, 2022) at 2 (Attachment J) (“EPA Letter”). The Kakagon-Bad River Sloughs wetland complex is designated as a Ramsar International Treaty Convention Wetland of International Importance. MNRD Other Waters Report at 2 (Attachment H); EPA Letter at 2 (Attachment J). The context of this unique area alone, which is important on state, regional, national, and even international levels, necessitates that the Corps must conduct a full EIS for the proposed project.

The intensity factors also all point the Corps to prepare an EIS. The intensity factors “refer[] to the severity of impact.” 40 C.F.R. § 1508.27(b). The factors at issue in the proposed project include: the degree the proposed action affects public health or safety, “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas,” the “degree to which the effects on the quality of the human environment are likely to be highly controversial,” the “degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks,” whether the action is related to other actions with cumulatively significant impacts, the degree to which the action “may cause loss or destruction of significant scientific, cultural, or historical resources,” the degree to which action may affect endangered or threatened species, and “[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” *Id.* at § 1508.27(b)(2)-(10). Triggering any one of the factors may be sufficient to require development of an EIS. *Standing Rock Sioux Tribe*, 440 F. Supp. 3d at 14 (quoting *National Park Conservation Association v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019)).

The proposed project area is a unique geographical area, as described in the context above. The watersheds are of unique importance, in part, because of intense hydrological connections

between surface waters and groundwaters, and the ecosystems they travel through, such as aquifers, wetlands, rivers, and streams. All these waters eventually reach Lake Superior – the largest freshwater lake in the world by volume. The proposed project will likely adversely affect this special hydrological network. The unique hydrology of the region also supports plants and wildlife that are essential to the cultural practices of the Bad River Band. Indeed, the proposed project is located wholly within the ceded territory of the Bad River Band and other tribes who were signatories to the 1842 Treaty, and the area contains many treaty-reserved resources. Some of these treaty resources are located within the waters and wetlands that the proposed project will directly destroy. *See* MNRD Wildlife Report (Attachment K) (“MNRD Wildlife Report”); MNRD Non-Local Beings Program Report (Attachment L) (“MNRD NLBP” Report”). The area is also home to delicate ecosystems that support threatened and endangered species. MNRD Threatened and Endangered Species Report (Attachment M) (“MNRD T&E Report”). The proposed project will have an adverse effect on the unique characteristics of the region, including the wetlands, rivers, and waters. MNRD Other Waters Report (Attachment H); MNRD Wetlands Report (Attachment N) (“MNRD Wetlands Report”); *See also* Thompson & Associates Wetland Services, *Review of Enbridge Line 5 Wisconsin Segment Relocation Project*, at 2-3 (March 3, 2022) (Attachment O) (“T&A”). These impacts will also affect those that depend on the water resources to live in the area, including threatened and endangered species.

The Bad River Band and its tribal members also rely on the hydrology of the region for drinking water. The proposed project threatens public health and safety, will likely be highly controversial, and will involve unique risks to the communities downstream of the project area. The project involves construction techniques, such as open cut/trenching, Horizontal Directional Drilling (“HDD”), and steep slope grading, that will adversely affect the waters in the region. These impacts range from sediment runoff from construction sites that can degrade the quality of surface waters, including wetlands, streams, and rivers, to aquifer breaches that can contaminate groundwater resources, to permanent changes in surface and groundwater flows. Indeed, the severity of threats to groundwaters and aquifers recently came to light in the case of Enbridge’s Line 3 replacement project. *See* Jeffrey Broberg, *Addendum #1 to Report on Line 5* (March 22, 2022) (Attachment P) (Broberg Addendum). The Minnesota Department of Natural Resources (“MNDNR”) revealed that there were three total aquifer breaches related to the construction of Line 3, and that over 262 million gallons of water were lost as a result of those breaches (32.6 million gallons at Clearbrook, 9.8 million gallons at LaSalle, and 219.6 million gallons at Mile Post 1102.5). *See* Broberg Addendum, Attachment 1 (Attachment P). Because this information was just made public, the Band has not had an opportunity to evaluate the information released by MNDNR and Enbridge, including the impacts a similar breach could have to the Bad River Band and its groundwater resources.

These construction risks comprise only some of the direct construction impacts. Additional associated impacts from construction include building and maintaining construction sites, access roads, and storage areas that will have a cumulative impact on the entire project area. There are also impacts resulting from the operation of the proposed project. Operating a pipeline through the region subjects the watersheds to the risks of an oil spill that can contaminate the areas’ waters, including drinking water for the community. The Corps must prepare an EIS to disclose these risks and analyze the environmental impacts that construction, operation, and maintenance of the pipeline will have on downstream communities.

The proposed project also “threatens a violation of ...[tribal] ...requirements imposed for the protection of the environment.” *Id.* at § 1508.27(2)-(10). As explained in Section IV.I.1. *infra*, the Bad River Band is a downstream entity that has Treatment as a State Status under the CWA. The Band has established water quality standards, with water quality criteria, designated uses, and an antidegradation policy under the CWA that apply to waters within and that flow through the exterior boundaries of the Reservation. *Id.*; MNRD WQS Report (Attachment I). The Band has concerns that the proposed project will impact the water quality within the Reservation. EPA shares that concern. The EPA found “that the Application does not adequately consider, mitigate, and address potential impacts to downstream State and Tribal federally approved WQS.” EPA letter, Encl. 1 at 13. Although Section 401 of the CWA provides an avenue for EPA and Bad River to review the project’s impacts on downstream waters, both the EPA and Bad River need additional information to conduct that review. *See* 33 U.S.C. § 1342(a)(2). If anything, the Corps must prepare an EIS to evaluate impacts to water quality standards to allow for an efficient water quality certification review under Section 401.

C. The Environmental Impact Statement Must Capture All of the Project’s Impacts

The Bad River Band expects the Corps to provide a notice of intent to prepare a federal EIS and plans to participate in the scoping process. The Band identified the following non-exhaustive list of impacts at this stage given the information in the Public Notice, the information in the application, and the long list of information that is lacking before the Band can make an informed comment on the full range of environmental impacts.

1. The Current Operation of Line 5 Through the Reservation

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. Enbridge, formerly Lakehead, has been operating Line 5 through the Reservation since 1953. Since that time, the Bad River Band has discovered several environmental conditions in the pipeline route that can lead to environmental disasters from a potential oil spill and other activities associated with the operation and maintenance of the pipeline. MNRD Other Waters Report, Attachment 10 (Attachment H). The impacts from the current operation of Line 5 should be included in the EIS 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 Line 5 from operating illegally on Reservation lands. Bad River Complaint at 33-47 (**Attachment F**). 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. Bad River Complaint at 35-36 (Attachment F).

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) (hereinafter “Meander Report”) (Attachment Q). 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.” Meander Report at 113 (Attachment Q). 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).” Meander Report at 118 (Attachment Q).

Although the Meander Report 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 (Attachment Q). The lack of access to remote sites means that “cleanup will involve gaining access in a virtually roadless area.” Meander Report at 157 (Attachment Q). 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.” Meander Report at 157 (Attachment Q). 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 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.” Meander Report at 140 (Attachment Q).

Second, the Band has also encountered areas of Line 5 where the pipeline is exposed due to soil erosion. *Enbridge Line 5 Issues Within the Bad River Reservation* at 3-4 (Feb. 2020); MNRD Other Waters Report, Attachment 10 (Attachment H); *see also* Bad River Complaint at 48-52 (Attachment F). 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 undeveloped areas.

The existing data demonstrates that the operation of Line 5 poses an imminent threat to the Bad River Reservation and the waters the pipeline crosses. 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 an EIS for a baseline analysis. These threats result from naturally occurring environmental conditions in the watersheds. 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. Not only is the situation within the Reservation 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 the Bad River watershed, which has similar environmental baselines that have resulted in the looming disaster of the current Line 5 route. 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 re-route in only a matter of time. Any environmental analysis must consider the present and future impacts and risks of the current Line 5, as it is inextricably intertwined with the proposed project. *See also* EPA letter, Encl. 1 at 19 (Attachment J) (recommending that disposition of the pipeline within the Reservation be considered together with the proposed project as a connected action).

2. Purpose and Need

The Purpose and Need for the proposed project in the Public Notice is so narrow that only the proposed project will meet the stated objective, which is directly contrary to the requirements of NEPA. "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 (and even out of existence)...If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role" *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 Public Notice: "Enbridge's stated purpose for its WIL5R 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." Public Notice at 3. 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 Ass'n v. Rural Utilities Serv.*, 21-cv-096-wmc, 2022 WL 136829, *15, 16 (W.D. Wis. Jan. 14, 2022) (citing *Simmons* at 666). The purpose in the Public Notice is too specific and must be modified to be broader.

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); *see also Simmons*, 120 F.3d at 666. The current purpose and need in the Public Notice is constructed so narrowly that selection of the project proponent's preferred alternative is a foreordained conclusion. The Corps must analyze and draft a purpose and need statement reflective of the broader goals of the project and in compliance with NEPA rather than accepting Enbridge's purpose and need statement at face value.

3. Alternatives Analysis

The analysis of alternatives is at the heart of NEPA. *See e.g., Conn. Fund for the Env't, Inc. v. U.S. Gen. Serv. Admin.*, 285 F. Supp. 3d 525, 533 (E.D.N.Y. Jan. 11, 2018). "Before the Corps issues a Section 404 permit, it must determine that there is 'no practicable alternative' to the proposed activity 'which would have less adverse impact[s] on the aquatic ecosystem.'" *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers*, 2021 WL 430054, *3 (D.D.C. Feb. 7, 2021) (citing 40 C.F.R. § 230.10(a)). The Corps must ensure that the alternatives analysis in the EIS meets the requirements of NEPA. There should only be one no action alternative, which

is to decommission the current Line 5, and a full range of alternatives must be considered and fully analyzed.

a. The No Action Alternative Must Be Decommissioning Line 5

One of the alternatives that must be considered in the EIS is the “No Action” alternative. 33 C.F.R. pt. 325, App. B.7.a. The current statement of the No Action alternative in the Public Notice include[es] “continued transport of oil and gas through Line 5, and discontinued transport of oil and gas through Line 5.” Public Notice at 6. However, the “No Action” alternative for the EIS must be limited to the decommissioning and removal of the current Line 5 pipeline. Enbridge is currently operating Line 5 through the Bad River Reservation in trespass. *See* Section II. *supra*. 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.

The permit application contemplates two “No Action Alternatives.” Enbridge Environmental Impact Report, Section 3.1.1, at 22 (March 2020) (“EIR”). Enbridge first assumes that if the reroute were not constructed, that the “No Action Alternative” would be “Continued operation of Line 5 within the Bad River Reservation.” *Id.* The second “No Action Alternative” is “Decommissioning Line 5.” *Id.* Although the application 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 flagrantly ignores the purpose of the lawsuit. Bad River Complaint, at 4 (Attachment F). The Enbridge application 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 failure to get consent from individual landowners. *See* Bureau of Indian Affairs Right of Way Determination Letters for Tract No. 430 R 154 & 430 3H308 (Attachments R & S). 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 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 to continue operating Line 5, it “would have to reach an agreement with the Bad River Band regarding the easements on the [Reservation] parcels and the associated lawsuit.” EIR at 22. The Corps must limit the No Action Alternative to decommissioning Line 5 not just because it is the only lawful option, but also because it is quite possibly inevitable in the event Bad River prevails in its lawsuit. It is also possible given that the State of Michigan has revoked Enbridge’s easement to operate a segment of Line 5 across the Straits of Mackinac.

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. The Corps must limit the No Action Alternative for the EIS and analyze the appropriate range of alternatives based on a broader project purpose and need.

b. The EIS Must Analyze a Reasonable Range of Alternatives

The artificially narrowed purpose and need severely limited the range of alternatives Enbridge considered in its permit application. Enbridge 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 Natural Gas Liquids ("NGLs"), then there are other alternatives that Enbridge and the Corps must consider meeting those needs. The Corps must address the range of practicable alternatives in the EIS.

The study and development of alternatives must be described in adequate detail in an EIS. 40 C.F.R. § 1502.14(a), (c). "NEPA requires agencies to 'rigorously explore and objectively evaluate all reasonable alternatives' to a proposed plan of action that has significant environmental effects." *Nat. Res. Defense Council v. U.S. Forest Service*, 421 F.3d 797, 813 (9th Cir. 2005) (internal citations omitted).

Enbridge's 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 without any analysis of the actual impacts. EIR at 27-28. Enbridge similarly concludes that the system alternatives – such as transportation via other pipelines, truck, rail, and tanker – are not feasible with only a cursory analysis. *Id.* at 22-24. 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." *Id.* at 22.

Other entities, however, have developed 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 possible impacts on Eastern Canadian 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 T). 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 12-13. 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 other pipeline systems because "[t]here is currently no pipeline system that services the same product delivery and receipt points that Enbridge's Line 5

system services and/or existing pipeline systems designed to accommodate both crude oil and NGL products.” EIR at 22. Enbridge did not consider the use of Line 78. Instead, Enbridge concluded that “[t]o fulfill the same purpose as Enbridge’s existing Line 5 system, including deliveries to Rapid River, MI and receipts at Lewiston, MI, a new pipeline and/or multiple pipelines would be required.” *Id.* at 22. 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. Any existing pipeline alternatives are unnecessarily and summarily dismissed.

Enbridge 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.” *Id.* at 23. 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. 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. Enbridge conveniently ignored practical solutions such as this as an alternative to the Line 5 re-route.

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 upper and lower Michigan. EIR at 22. 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 protect water resources by shutting down a segment of Line 5. Mich. Pub. Serv. Comm’n, *Michigan Propane Security Plan: Ensuring Resilience Without Line 5* (Mar. 11, 2021) (Attachment U). “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) (Attachment V). The Michigan Department of Environment, Great Lakes, and Energy developed the Task Force Report 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 (PDF pagination).

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 W). The MDOT 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 MDOT 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 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.* 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, MDOT 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 Corps must consider a full range of alternatives to the project as part of an EIS. As presented in Enbridge's EIR, the alternatives analysis is unduly narrow and contrary to the purposes of NEPA. If the purpose and need are drawn more broadly, and in compliance with NEPA, then a more appropriate range of reasonable alternatives can be considered. 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.

4. Pipeline Construction, Operation, and Decommissioning

The scope of the federal EIS must include the lifetime of the pipeline, including construction, operation, and decommissioning of the proposed project. As explained throughout this letter, the impacts to the area resulting from project construction can be severe. So can the impacts from the operation of the pipeline. The current Line 5 pipeline running through the Bad River Reservation is over 70 years old and operating well past its predicted life. 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 II. *supra*. 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 remains.

The Corps has a duty to analyze and consider the impact an oil spill have on the entire project area. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 132 (D.C.C. 2017). The Corps also has a duty to consider the impacts an oil spill will have on treaty-protected resources. *Id.* at 134. Enbridge’s EIR does not provide any information on the likelihood of a spill, spill modeling, or an analysis on the risks an oil spill will have on the affected area. To the extent the EIR addresses spills, it is only in the context of spill prevention through monitoring and using “intelligent valve placement.” EIR at 55-59. The Corps has a duty to evaluate the actual spill risks and impacts and cannot rest on prevention as a means to avoid discussing the environmental impacts from an oil spill in the watershed.

The Corps must also consider the effects of decommissioning the proposed Line 5 segment as part of its NEPA review. There is no mention in 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 EIS 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.

5. *Environmental Justice*

The Corps’ evaluation of environmental impacts requires a framework to include the disproportionate exposures for Native American and Indigenous communities to pollutants from the oil and gas industry. This includes the need for 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, the Corps 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, the Corps 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 Corps’ environmental review necessarily requires separate considerations under the United States trust responsibility to protect tribal members. Specifically, the Corps must address

the growing problem of violence against Indigenous women and girls.³ 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.

The Corps must take seriously its trust responsibility to the Bad River Band, and it cannot delegate this serious issue to the state. Representatives of the Wisconsin MMIW task force have cited concerns about the proportional increase in violence in the Bakken Oil Fields as oil and gas operations increased. The state DEIS, however, dismissed 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.⁴ 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.⁵

In Ashland and Iron Counties, without the United States exercising its trust responsibility as outline above, the state and counties retain criminal jurisdiction over sex crimes, including crimes occurring on reservation lands. The last two decades have seen significant increases in prosecutions for drug crimes and a corresponding narrowed focus and expertise of local law

³ 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).

⁴ 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>.

⁵ See *id.*, generally.

enforcement to drug crimes, almost exclusively. The capacity of local law enforcement to respond to rapid social change and an uptick in crimes of sexual violence, including trafficking was not at all addressed in the state DEIS. Moreover, the strategies used by local law enforcement to respond to drug crimes, including the use of confidential informants, specifically, 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 confidentially protecting a confidential witness. More specifically, 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 Corps must conduct a clear-eyed assessment of this issue, in consultation with the Band, as part of developing a federal EIS.

6. *Cumulative Impacts*

The Corps must take into account that the purpose of this project is to extend the life of Line 5 well into the future. The Corps must disclose and analyze the cumulative impacts that this extension will have on the region. 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 X). The Reservation and watershed are already facing numerous environmental stressors from other impending projects and past industrial contamination. The Corps must describe the cumulative impact of this project on top of these other adverse environmental effects from other projects and past pollution. 40 C.F.R. § 1508.7.

Specifically, the Corps must address (1) this project in the context of other ongoing projects, (2) the project's construction methods, (3) the emissions this project will create and extend, (4) this project's harmful impacts to the exercise of treaty rights and the resources that support them, (5) sediment deposition that will result from pipeline construction and maintenance and its effect on water quality, (6) this project's plan to fragment forests and the habitats they support, (7) and reasonably foreseeable future construction on the Line 5 system.

Federal courts have identified five components of meaningful cumulative impacts analysis. For the Line 5 segment relocation project the Corps must analyze:

- (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.

Grand Canyon Tr., 290 F.3d at 345

The Corps’ analysis cannot be conclusory and the agency cannot follow a “checkbox” approach to analyzing the cumulative impacts of the project. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989 (9th Cir. 2004). The Corps “must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum.” *Grand Canyon Tr.*, 290 F.3d at 342. This includes analyzing “the damage already wrought by the construction” of the pipeline and other projects. *Am. Rivers v. FERC*, 895 F.3d 32, 55 (D.C. Cir. 2018). The Corps’ analysis should include the impacts associated with potential oil spills or hazardous liquid releases and the project’s emissions.

As noted throughout this comment letter, the Public Notice 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 NEPA process. The Bad River Band hopes the Corps adequately considers 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 the Corps must consider as part of a federal EIS.

a. Other Ongoing Construction Projects

The Corps must assess cumulative impacts of this project on top of the adverse environmental impacts of other projects in the region. The extractive industry is already causing harm to Reservation lands, the Bad River watershed, ceded territories, and regional animals, birds, fish, insects, plants, trees, air, water, and soils. The Corps must assess the impacts of this project in the context of the following projects and environmental stressors. The following list is an example of projects within ceded territory that the Corps must consider:

- 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 MNRD Tribal Historic Preservation Officer Report (Attachment LL) (“THPO Report”), Attachment #4. Such degradation will impact cultural and historic properties important and necessary to Ojibwe culture.
- 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 #8 to THPO Report).⁶ This explosion released toxic discharge into

⁶ <https://www.csb.gov/husky-energy-refinery-explosion-and-fire/>

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 #6 to MNRD THPO Report); *see also* Project Descriptions and Maps, (Attachment # 7 to THPO Report).

The severe impacts of the project will accumulate atop the impacts of other projects. The Corps must acknowledge and assess these cumulative impacts in detail.

b. Construction Methods

Rather than provide site-specific data or identify areas where specific construction techniques will be used, 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 and this could have serious impacts on their water quality. *See e.g., T&A* at 50 (Attachment O). 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 41 miles, the number of wetlands and waterway crossings are densely compacted. The Corps must evaluate and analyze the cumulative impacts to wetlands, waterways, and groundwater resulting from construction of the proposed project in the watershed.

c. Cumulative Impacts to Global and Regional Climate

The Public Notice does not mention the project's greenhouse gas emissions or any of the detrimental effects they have on the global and regional climate. The Corps cannot avoid that extending the life of the Line 5 system has serious climate consequences. The Corps 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 Y). The cumulative burden of this project should not be measured in terms of the amount of new consumption. Rather, the Corps should focus on the cumulative impacts to the environment associated with allowing Line 5's shipment of fossil fuels and their subsequent combustion to continue. This project is contributing 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 Z). This project prevents that from happening and thus contributes to the continued emission of greenhouse gasses and resulting cumulative contributions to climate change. Climate change is a global problem that has grievous regional environmental effects. The Corps does not acknowledge, much less analyze,

these effects in the Public Notice. The Corps must consider the cumulative effects of the project on climate change in a federal EIS.

d. Exercise of Treaty Rights

The project also inflicts cumulative burdens on the exercise of treaty rights. As previously described, the Corps has a federal trust relationship with Tribal Nations, including the Bad River Band. *See* Section I. *supra*. This relationship requires that the Corps not diminish treaty rights and resources. *Id.* This project may have a chilling effect on the exercise of tribal treaty rights and harm to species of flora and fauna that tribal members depend on for that exercise. *Id.* The Corps 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. Further, the project's contribution to climate change has a cumulative effect on the Band's ability to continue to use treaty resources and continue to maintain the Reservation as a viable homeland. *See* Section I. *supra*; Section IV. *infra*. The Corps must evaluate the impacts the project will have on treaty resources and the Reservation as a homeland as part of a federal EIS and in accordance with its trust responsibility to the Bad River Band.

e. Sedimentation

Enbridge will use many construction methods for this project that 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 AA). The project applicant 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, the applicant does not discuss the cumulative impacts of these discharges. 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. The Corps must include an evaluation of the project's cumulative effects on water quality given the immense sediment loading it could cause. The Corps should conduct this evaluation in a federal EIS.

f. Forest Fragmentation

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. The Corps 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 41 miles of Wisconsin's forest ecosystem in such a drastic way merits appropriate analysis. The Public Notice discusses possible impacts to wildlife resulting from forest fragmentation in a general way, *see e.g.*, Public Notice Table 1 and Section 3, but this analysis does not account for this project's contribution to rapidly declining global and regional biodiversity

(Attachment X). 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 BB). Deer overpopulation leads to diminished forest cover, biodiversity, and habitat quality through effects such as preferential browsing. *Id.* Deer are already overpopulated in this region and allowing them to expand their habitat will result in diminished forest regeneration and biodiversity. See also Section IV.C. *infra*. 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.

g. Extending the Life of Line 5

If this project is approved, it will extend the life of this aging pipeline system well into the future. It is almost a certainty that other segments of this pipeline will need to be replaced in the near future given the declining integrity of the Line 5 system. The environmental impacts of these future segment replacement projects will be cumulative to the impacts of the project now under consideration.

7. Connected Actions

Finally, the project should be considered in conjunction with the proposed Line 5 Tunnel project. See Public Notice for *Proposed pipeline tunnel under the Straits of Mackinac between Mackinaw City and Saint Ignace*, U.S. Army Corps of Engineers (May 15, 2020) (Attachment CC). NEPA regulations define connected actions as two proposals that “are closely related and therefore should be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(1). The reroute project is connected to the tunnel project, and vice versa, because neither can proceed without the other. Oil from Alberta, Canada will not be able to reach its destination in Sarnia, Ontario without the ability to cross through or around *both* the Bad River Reservation and the Straits of Mackinac. Further, the Environmental Protection Agency noted in a March 16, 2022, letter to Col. Karl Jansen that “[the EPA] believe[s] removal, decommissioning in place, or a combination thereof, of the existing pipeline is connected to the routing of the pipeline.” EPA Letter, Encl. 1 at 19 (Attachment J). The project “cannot or will not proceed unless other actions are taken previously or simultaneously” on the Line 5 Tunnel project and therefore the Corps should consider the projects together in a single EIS. 40 C.F.R. § 1508.25(a)(1)(ii).

IV. THE PROPOSED PROJECT DOES NOT MEET THE STANDARDS OF THE CLEAN WATER ACT

Initially, the Corps must clearly identify all the waters of the U.S. that will be impacted by the proposed project. The Corps’ previous jurisdictional determination left out multiple waters that should have been considered jurisdictional under the Clean Water Act. Further, a federal court decision from August 2021 vacated the previous rule that the Corps’ jurisdictional determination was based on. Although the Public Notice states that Enbridge asked the Corps to treat all waters as jurisdictional, the Corps has yet to map out all the jurisdictional waterways that the project

would impact. Importantly, such a determination and map must not only include all waterways directly impacted by the project along the route, but also all secondary impacts related to the project, including impacts in the right-of-way, access roads, pumping stations, and construction staging sites.

The Corps cannot issue a Section 404 or Section 10 permit unless the proposed project meets the requirements set forth in the Clean Water Act Section 404(b)(1) Guidelines. 33 U.S.C. § 1344(b). The Guidelines require the Corps to make factual determinations and means to prevent or minimize the effects of the proposed project. 40 C.F.R. §§ 230.10, 230.11. The Guidelines recognize that “the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines.” 40 C.F.R. § 230.1(d). “The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.” *Id.* The Guidelines also prohibit a permit if the discharge of dredged or fill material “will cause or contribute to significant degradation of the waters of the United States.” *Id.* at (c). A permit also may not be issued “unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.” *Id.* at (d). The Public Notice and the materials in the application do not provide enough information for the Corps to make the required considerations set forth in the 404(b)(1) Guidelines. The application and Public Notice are severely deficient in disclosing and examining the direct and secondary effects of the proposed project. Significantly, “[i]nformation about secondary effects on aquatic ecosystems shall be considered prior to the time final section 404 action is taken by permitting authorities.” *Id.* at §230.11(h)(1) (emphasis added). The Corps cannot issue a Section 404 permit based on the information available. The Corps must solicit accurate data from the applicant such that the Corps, the Band, and the public in general, can comment on the impacts the proposed project will have under the Section 404(b)(1) Guidelines. Accordingly, the Corps should prepare its own EIS.

A. The Public Notice Does Not Accurately Describe or Consider Impacts to Wetlands.

The Corps’ Public Notice must contain an accurate description of wetlands through the entire project area to make factual determinations on the effects of the project as required by the 404(b)(1) Guidelines. Only when the Corps has the underlying information can it evaluate the impacts and whether they result in an “irreversible loss of valuable aquatic resources.” The lack of wetland data is also concerning because an incomplete or inaccurate picture of wetland impacts has the domino effect of resulting in inadequate mitigation of wetland impacts, which is explicitly required under the 404(b)(1) Guidelines. 40 C.F.R. §§ 230.41, 230.91 *et seq.* The current mitigation plan is based on incomplete information and is deficient.

The Public Notice, and the documents used to inform it, inadequately assesses wetlands. These failures mean that Public Notice commenters are unable to meaningfully comment on these discussions beyond pointing them out. As importantly, these failures deprive Corps decisionmakers of essential information when considering whether to permit Enbridge to discharge dredged or fill material into wetlands. Without this information the Corps is unable to “[d]etermine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms.” 40 C.F.R. §

230.11(e). The Corps' environmental review must reconsider wetland as well as related impacts and proposed mitigation in light of these many deficiencies.

The Public Notice inadequately describes the wetlands that exist in the area of the proposed project. Deficiencies in the Notice and underlying data include gaps in data; flaws in functional assessments; undervaluing of wetlands quality, diversity, and function; and unexplained differences in wetland delineations. Further Corps environmental review must resolve these issues.

1. There Are Numerous Gaps in Data and Maps

Numerous data gaps exist in the Public Notice and the underlying documents informing it. Most fundamentally, no comprehensive list of wetland delineations exists. Multiple surveys require synthesis by any person reviewing the Public Notice or the state DEIS, revealing discrepancies between datasets. T&A at 2-3 (Attachment O); MNRD Wetlands Report at 2-3, 7 (Attachment N). The Corps, WDNR, and the applicant's sources reach different totals of wetland acres impacted, calling into question the true extent of acres impacted. *See* Bad River Band March 4, 2022, letter to Corps (discussing wetland and waterway discrepancies) (Attachment B); T&A at 34 (Attachment O). In fact, the Corps' Public Notice identifies two different numbers of acres of wetlands that will be impacted – 101.10 acres and 59.3 acres – with no clear distinction between the two. Public Notice (compare Tables 1 and 4); *see* Bad River Band March 4 letter (Attachment B); T&A at 33 (Attachment O).

MNRD, GLIWFC, and outside contractors documented additional wetland acres and waterways within the survey boundary that were 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 (Attachment N). MNRD and GLIFWC also submitted field data to both the Corps and WDNR indicating that the numbers of wetlands and waterway crossings are greater than those identified by the applicant or either agency, well before the state DEIS and the Public Notice were published. Memoranda from Great Lakes Indian Fish & Wildlife Comm'n (June 8, 2021) (Attachment DD). Yet, despite this documented field data, neither the Corps nor WDNR have updated their maps or estimates of impacts to wetlands and waterways to reflect the actual impacts on the ground.

The Public Notice and underlying reports also rely on outdated or inappropriate data sources. These include reliance on the Wisconsin Wetland Inventory rather than actual wetland delineations to determine acreage impacts, MNRD Wetlands Report at 2, and reliance on Madeline Island Weather Station rather than closer, longer running, and more representative stations to get a picture of Ashland County rainfall. MNRD Wetlands Report at 4 (Attachment N).

Prior to the Corps' development of an EIS, the Band asks that the Corps meet with MNRD staff to discuss data staff possess and data still needed, all of which should be incorporated into a federal EIS. MNRD Wetlands Report at 1 (Attachment N). After meeting to discuss these issues, the Corps should conduct or require any additional data gathering and analysis necessary to develop a thorough federal EIS.

2. *Wetland Functional Assessments Fail to Transparently Assess Function*

No table in the Corps Public Notice or the state DEIS summarizes the value of a wetland into high, medium, or low function, meaning Band staff and contractors cannot see the overall assessment used to assign mitigation value. T&A at 33 (Attachment O). 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. T&A at 4-24 (Attachment O). A Corps EIS must require and incorporate transparent assessment of wetland functional values.

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

The Public Notice, and the data it relies upon, undervalue wetland quality, diversity, and function. This has a serious effect on any evaluation of the impacts the project will have on the function of the aquatic ecosystem as required by the 404(b)(1) Guidelines. For example, fieldwork in Iron County Forest land showed that the Public Notice's description of "isolated hardwoods and conifers in better drained areas adjacent to incised drainageways," Public Notice at 6, "in no way captures" many wetlands in the area. T&A at 24 (Attachment O). The Corps must conduct a field analysis and update the description of wetlands before it can make factual determinations on the project's impacts to them.

The Public Notice is also misleading in presenting the wetland qualities. The wetland assessment and mitigation scheme lumps medium and low-quality wetlands together. See T&A at 25-31 (Attachment O). 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, Encl. 1 at 16 (Attachment J), to numerous impacts, including disruption of mucky soils, changes in subsurface hydrology, soil compaction, and loss of microtopography. T&A at 25, 30-31 (Attachment O). Commenters cannot evaluate the overall value assigned to each wetland, and permit decision makers cannot ascertain realistic impact levels and necessary mitigation levels. T&A at 31 (Attachment O); see EPA letter, Encl. 1 at 16-19 (Attachment J). The Corps should develop documents for its EIS that summarize impacts based on wetland function as well as list each wetland's assigned quality. MNRD Wetlands Report at 4-5 (Attachment N).

The Corps must also gather information on and discuss high-quality wetlands. See EPA letter, Encl. 1 at 17 ("*Lack of Adequate Identification of High-Quality Wetlands*") (Attachment J). The state DEIS contains multiple flaws in its description and designation of high-quality wetlands. These flaws include the system used to determine high quality and the lack of attention to available data. The failure to accurately and adequately assess wetlands highlights the importance of the Corps conducting a separate environmental review of the proposed project.

First, the DEIS considers a wetland high quality based on global and state rankings deeming the wetland imperiled or critically imperiled. DEIS at 204. This is nonsensical; such a ranking does not equate to, nor even describe a wetland's quality. The Corps must not rely on this same flawed approach in its own analysis. 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 quality designation maintains wetland quality. *Id.* However, forested wetlands provide unique functions and species communities that emergent wetlands do not. *See e.g.*, EPA letter, Encl. 1 at 15-16 (Attachment J).

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 the WDNR nor the applicant conducted the review necessary to base a high-quality determination on species composition. *Id.*; EPA letter, Encl. 1 at 17 (Attachment J). This is a startling admission with no stated rationale. In order to base a decision on this more accurate method for determining high quality wetlands, the applicant, the Corps, and/or WDNR must actually conduct field reviews to support their conclusions. The Corps must also make the underlying data to support those determinations public.

The application materials overlook other wetland qualities too. These qualities include downstream benefits of wetlands, and the wooded uplands that abut them, that extend and connect beyond the proposed pipeline corridor. *See e.g.*, T&A at 34 (Attachment O). The Corps must more robustly consider the quality and functions of wetlands in developing a federal EIS. Any conclusions must be based on field work or other supporting evidence and the underlying data must be made available to the public.

4. *There are Unexplained Differences in Wetland Delineations*

There are unexplained differences in wetland delineations provided to the Corps. This issue is made worse due to the lack of a single, comprehensive delineation dataset. *See* Section IV.A.1. *supra*. 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 at 31-32 (Attachment O). 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. T&A at 32 (Attachment O); MNRD Wetlands Report at 7 (Attachment N). 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.” MNRD Wetlands Report at 7 (Attachment N). The Corps must require clear explanations for re-delineations and lack of delineations and incorporate that into its EIS.

Without a baseline analysis and full, accurate, and supported wetland delineations, the Corps, other governmental entities, and the public are unable to assess the wetland impacts of the proposed projects. Failure to provide this information is contrary to NEPA. The Corps 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 federal EIS.

B. The Corps and the applicant inadequately define specific impacts to wetlands.

The information the Corps relies on inadequately defines specific environmental impacts to wetlands. This information fails to include impacts to wetlands from blasting and horizontal directional drilling (“HDD”) and disturbance of wetland soils and microtopography. The Corps must resolve these issues as part of its EIS.

Enbridge proposes bedrock blasting in wetlands with seeps, springs, microtopography, and a state threatened plant. *See e.g.*, T&A at 12, 14, 25-28 (discussing many examples of wetlands proposed for blasting) (Attachment O). Blasting in these locations is very likely to harm seeps and water flow, sensitive soils, and a state threatened plant. T&A at 12, 24, 32-33, 36, 39, 44 (Attachment O). For example, Thompson & Associates found that “[b]lasting and trenching this wetland [wirb1007] will drastically harm the rare features it presents.” T&A at 24 (Attachment O). It appears neither the applicant nor the Corps attempted to quantify, minimize, or mitigate the short- and long-term impacts of blasting. T&A at 44 (Attachment O); *see* EPA letter, Encl. 1 at 8-9 (Attachment J). The Corps must assess the specific impacts to each wetland targeted for blasting.

The Corps 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 at 45-46 (Attachment O); Jeffrey Broberg, Report on Line 5 at 7 (“Broberg Report”) (Attachment EE). Enbridge’s current fluid release response plan “is geared more towards terrestrial clean up with waterbody clean up seeming like an afterthought.” MNRD Fisheries Report at 2 (Attachment FF). A lost drilling bit or leak underground may require excavation of an HDD site, including wetlands. T&A at 46 (Attachment O). The three-page, bare bones plan for the “inadvertent release” of drilling fluid lacks any site specificity. *Id.* 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.*; *see also* EPA letter, Encl. 1 at 12 (Attachment J). The Band has not seen the contractor’s plan in the event of a release. T&A at 51. 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. T&A at 46 (Attachment O). The many risks of HDD must be considered in a Corps EIS.

The applicant and the Corps fail 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 at 44 (Attachment O). 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. T&A at 45 (Attachment O). The Corps must assess these disturbance risks and impacts.

C. The Corps inaccurately describes wetland impacts as temporary.

The Corps and Enbridge improperly classify many impacts as temporary. Wetland conversion, tree clearing, blasting, and soil disturbance all have long term, if not permanent, impacts. Pipeline maintenance corridors require permanent conversion of forested wetlands to emergent. *See e.g.*, EPA letter at 6, Encl. 1 at 15 (Attachment J). “[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 at 32-33 (Attachment O). 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. T&A at 4-24, 46 (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 O). These shifts also impact wildlife. *Id.* Similarly, impacts to wetland quality and functions can be just as detrimental to the overall environment and should be discussed and analyzed as impacts. *See e.g.*, EPA Letter, Encl. 1 at 6, 7, 12, 16, 18-19 (Attachment J). The loss of forested wetlands also harms flood protection. MNRD Wetlands Report at 5 (Attachment N).

Before the Corps can classify any impacts as temporary, the Corps must fully examine all impacts to wetlands. The 404(b)(1) Guidelines outline several factors to consider in determining loss of values to a wetland. These include damage or destruction of habitat, adversely affecting biological productivity, and altering substrate and water movement. Altering a wetland can also interfere with filtration functions or aquifer recharge. 40 C.F.R. § 230.41(b). None of the factors to consider are distinguished between permanent and temporary. The Guidelines further recognize that wetlands impacts can have trickledown effects: “[w]hen disruptions in flow and circulation patterns occur, apparently minor loss of wetland acreage may result in major losses through secondary impacts.” *Id.* The Corps must evaluate the project’s impacts to wetlands before determining which impacts are temporary. As demonstrated above, and as the Guidelines contemplate, some of the impacts may have long lasting effects. *See id.* at § 230.11(g), (h) (determination of cumulative effects on the aquatic ecosystem and determination of secondary effects on the aquatic ecosystem). Only after the Corps has reviewed and disclosed all impacts to wetlands can it examine whether and which impacts are temporary or long term. The Corps’ EIS must also disclose how it determined which impacts are temporary or long term and how it evaluated each impact.

D. The Corps Must Reassess the Mitigation Requirements for the Proposed Project due to the Insufficient Assessment of Wetlands and Wetland Impacts.

The Corps’ environmental review must completely reassess what mitigation the proposed project requires. The severely deficient assessment of wetlands and wetland impacts creates uncertainty as to how many wetland acres must be mitigated for, as well as what wetland qualities and functions must be compensated. This also calls into question the proper mitigation ratios. Based on the current information in the Public Notice and the application materials regarding

mitigation, the Corps cannot issue a permit: “no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.” 40 C.F.R. § 230.10(d). The proposed mitigation is not enough to minimize the potential adverse impacts of the project on the aquatic ecosystem. Further, the Corps has not made, and cannot make, the mitigation findings required by Subpart J of the 404(b)(1) Guidelines without accurate baseline information. *Id.* at § 230.93(a)(1) (“The district engineer must determine the compensatory mitigation to be required in a DA permit, *based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity*”) (emphasis added). Once the Corps has accurate baseline data, it must turn to a full assessment of mitigation requirements.

Because of the outstanding questions on the acres of wetlands present and impacted, the appropriate mitigation plan is impossible to determine. *See* EPA letter, Encl. 1 at 16. First, the discrepancy between Army Corps and WDNR figures on wetlands make the number of mitigation acres required even more unclear. Second, the state DEIS appears to disregard many impacts to wetland type, quality, and function, thus undercounting the need of mitigation acreage. T&A at 32-36 (Attachment O). The Public Notice also lumps medium and low-quality wetlands together, which further undermines any accounting of wetland quality, function, and acreage. Public Notice at 8-9. Third, the lack of clarity around whether and to what extent impacts to wetlands are temporary or permanent compounds the issue. *See* MNRD Wetlands Report at 2, 3, 9 (Attachment N); EPA letter, Encl. 1 at 6 (Attachment J). Fourth, the Public Notice and application materials contemplate Enbridge being able to alter, and increase, wetland impacts after permit approval. Their ability to adjust the work corridor width in wetlands without Corps approval creates further uncertainty in the number of total impacts to wetlands. *See* T&A at 35 (Attachment O); EPA letter, Encl. 1 at 12 (Attachment J).

The failure to separately identify wetlands based on wetland qualities and functions has the additional problem of clouding the appropriate mitigation ratios required. This further undermines the connection of any current mitigation proposals to reality. *See* EPA letter, 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 J); T&A at 34 (Attachment O). This conflation undermines any attempt to mitigate the “highest potential overall general functional value.” Enbridge, Compensatory Wetland Mitigation Strategy at 6; *see also* T&A at 33 (Attachment O). This leads to mitigation ratios that are not commensurate with the wetland impacts proposed.

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. However, purchasing scrub-shrub credits for forested wetland impacts will result in a loss of forested wetlands in the watershed and the time lag to fulfill in-lieu fee credits is too great. *See* MNRD Wetlands Report at 9-10 (Attachment N).

Finally, the Corps must consider how or even whether impacts to treaty rights from wetland disturbance can be mitigated. The proposed project risks harming numerous treaty-protected species, including:

- giizhik or northern white cedar
- godotaagaagaans or blue bead lily
- jiiibegob or leatherwood
- miishijiminagaawanzh or swamp red currant
- 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 at 7-9 (Attachment O). The Corps 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 and if greater than *de minimis* impacts to treaty rights can be avoided.

All of these issues create great uncertainty in trying to set a mitigation plan for the proposed project. In the Corps' review, "[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 Wetlands Report at 5 (Attachment N).

Current Corps and applicant documents lack sufficient information and analysis for the Corps to make 404 permitting findings, necessitating further review. The Corps must examine the deficiencies related to wetlands identified here and in the attached reports. To ameliorate these deficiencies, the Corps must ensure collection of any additional data needed and properly analyzed all data to determine the full extent of wetland impacts in a Corps EIS.

E. The Public Notice Does Not Accurately Describe or Consider Impacts to Waterways.

Discussion of surface waters by the Corps lacks details and relies on incomplete environmental data. Because of this, the applicant and the Corps discuss environmental effects to all waterways in very general terms. Reliance on this overly general analysis would result in greater impacts than anticipated, and unknown impacts, due to limited data and analysis. The 404(b)(1) Guidelines require the Corps to make factual determinations on water circulation, downstream flows, and normal water fluctuation. 40 C.F.R. § 230.11(b). These include potential diversion, obstruction of flow, alterations of bottom contours, and other significant changes in the hydrologic regime. *Id.* Based on the Public Notice and the application materials, the Corps does not have enough data to make these factual findings.

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.

These interactions cannot be generalized within the project area. The 404(b)(1) Guidelines require the Corps to consider cumulative effects and secondary effects of the proposed project on the ecosystem. *Id.* at § 230.11(g), (h). 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. “Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.” *Id.* at § 230.11(g)(1). This proposed project is a prime example where piecemeal changes can have a big impact. The project also has the potential to permanently alter the hydrology in the region. *Id.* at § 230.11(h)(2) (“Some examples of secondary effects on an aquatic ecosystem are fluctuating water levels”). A Corps EIS must be prepared to assess site- and activity-specific waterway data and analysis. The Corps must also use site-specific data to evaluate both cumulative and secondary effects the project will have on the region.

F. The Discussion of Waterways Lacks Necessary Details.

The Corps’ and the applicant’s discussions of waterways lack necessary details to form either a baseline analysis or to model how the project may impact waterways. *See* EPA letter, Encl. 1 at 15 (Attachment J). 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 and potential petroleum spills. A federal EIS must improve the discussion of each of these topics.

1. Basic Waterway Characteristics Are Lacking

The Corps must collect and incorporate sufficient basic waterway characteristics to enable it—and other government entities and the public—to then 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 3, 6 (Attachment H); *see also* MNRD Environmental Report at 6 (Attachment GG). Other important elements include the presence of groundwater recharge zones and the erosion potential at soil transition zones. MNRD Other Waters Report at 2 (Attachment H). The Wetland and Waterbody Crossing Table should “clearly show...proposed impact type, waterbody identifier, size of impact, and a notes section that details changes to proposed activities that might lead them to be included/excluded from permitting and the date those changes were made *and* the date information was shared with the Corps.” MNRD Other Waters Report at 6 (Attachment H). This basic information is essential to then understand project impacts and avoid or mitigate for such impacts.

2. The Public Notice Lacks Robust Consideration of Unique Waters

The Public Notice materials lack consideration commensurate with unique waters such as Lake Superior and the Kakagon-Bad River Sloughs. Lake Superior requires a description of current conditions appropriate for this body of water that is important on multiple scales, from local to international, from spiritual and cultural to economic. Additionally, the Corps’ environmental review must discuss specific petroleum spill risks and consequences—short and

long term—to the lake, including in different seasons. The Sloughs must receive accurate and robust description, including their full size, many uses, and waterways that flow in and out. 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 2, 8 (Attachment H); *see also* EPA letter at 2-6 (discussing determination that the Sloughs are an Aquatic Resource of National Importance) (Attachment J).

3. *The Public Notice Lacks Adequate Consideration of Waterway Impacts*

The Public Notice and application materials lack adequate consideration of impacts to waterways from pipeline construction and operation. This includes impacts from HDD and potential petroleum spills. The 404(b)(1) Guidelines specifically require an analysis of contaminants that may be introduced to the ecosystem as a result of the proposed project. 40 C.F.R. § 230.11(d). Although Enbridge, in its optimism, claims that the risk of an oil spill is low, the risk is not zero. Further, the construction methods for HDD introduce foreign liquids into the ground as part of the process. 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 IV.B. *supra*; EPA letter, Encl. 1 at 12 (Attachment J). The Corps must also consider the real risks of an aquifer breach or release of drilling fluid from HDD construction. *See* Section IV.B. *supra*. 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 EE). 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 grave risks and impacts of an oil spill require specific, quantitative assessment. 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 water in waterways, etc.). MNRD Other Waters Report at 8 (Attachment H). The federal EIS also must consider in detail the risks and impacts of relocating the pipeline to an area with much greater groundwater recharge than the existing pipeline route. MNRD Other Waters Report at 2, 3 (Attachment H); Broberg Report at 1, 11 (Attachment EE).

The Corps 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 EE). 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 Public Notice 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 EE). The Corps 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 EE). “Added sedimentation could greatly affect the populations of fish downstream.” MNRD Fisheries Report at 2 (Attachment FF). The Corps 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. Even though Enbridge claimed it would collect soil borings in its EIR, *id.* at 52, no such data is included in the Corps’ Public Notice or in any other application materials. 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 the Corps cannot reasonably assume Enbridge, if granted permits, will abide by and successfully implement its construction plan and all required environmental protections (*see* Attachment HH).⁷

The Corps must develop an EIS which provides 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.

G. The Corps and Applicant Rely on Incomplete Waterways Data.

The Corps and applicant rely on incomplete waterways data. The Corps must require additional data gathering that is made available to the public. The Corps must also fully review and incorporate existing sources of data as part of the EIS.

⁷ See e.g. Nicholas Pfofi, *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>.

1. *The Corps Must Gather Additional Data*

The Corps must require 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 2, unknown water conditions, uses of waters, *id.* at 7, and site-specific analyses on construction, operation, and maintenance impacts. *Id.* at 2, 8; *see also* EPA letter, Encl. 1 at 15 (Attachment J). Perhaps most essential, the Corps and the applicant must gather baseline water quality data, especially for those waters classified as Outstanding Tribal Resource Waters, Outstanding Resource Waters, or Exceptional Resource Waters by the Band or Wisconsin. *See* EPA letter, Encl. 1 at 4-5, 13-16 (Attachment J). Additionally, the Corps must resolve the still-conflicting waterway crossing data. *See* MNRD Other Waters Report at 6 (Attachment H). The Corps must gather all these lacking data for inclusion in a federal EIS.

2. *The Corps Must Review and Fully Incorporate Existing Sources*

The Corps can draw on numerous existing sources to improve the assessment of waterway conditions and impacts in a federal EIS. These include:

- USGS 2015 report about studying and modeling the groundwater and surface water interactions in the Bad River watershed. *See id.* at 3. (Attachment #4 to MNDR Other Waters Report).
- Marengo River Watershed Action Plan. *See id.* at 4. (Attachment #6 to MNDR Other Waters Report).
- Lake Superior Biodiversity Conservation Strategy, A Biodiversity Assessment for Lake Superior, Volume I: Lakewide Assessment and the relevant Regional Plans⁸ *See id.* (Attachment #8 & #9 to MNDR Other Waters Report).
- Other websites that describe designations that apply to the Kakagon and Bad River Sloughs complex should be referenced, including:
 - o National Park Service's National Natural Landmark webpage: <https://www.nps.gov/subjects/nnlandmarks/site.htm?Site=KASL-WI> (Attachment #2 to MNDR Other Waters Report).
 - o National Audubon Society's Important Bird Area (IBA) webpage: <https://www.audubon.org/important-bird-areas/kakagon-bad-river-wetlands-forest-corridor> (Attachment #3 to MNDR Other Waters Report).

Current Corps and applicant materials lack details and adequate data in discussing waterways. The Corps must examine the deficiencies related to waterways identified here and in the attached reports. To remedy these deficiencies, the Corps must collect—or require the

⁸ 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>

applicant to collect—the additional data needed and properly analyze and discuss each issue in detail to determine the full extent of waterway impacts in a Corps EIS.

H. The Proposed Project Does Not Meet Other Requirements in the 404(b)(1) Guidelines.

Further, the application and the Public Notice fail to consider the other impacts as required by the Section 404(b)(1) Guidelines. These include cumulative impacts (§ 230.11(g)), secondary effects on the aquatic ecosystem (§ 230.11(h)), threatened and endangered species (§ 230.30), impacts to fish and aquatic organisms (§230.31), other wildlife (§ 230.32), drinking water supplies (§ 230.50), recreational and commercial fisheries (§ 230.51), water-related recreation (§ 230.52), aesthetics (§ 230.53), and national parks (§ 230.54). The MNRD staff have identified specific areas where there is a lack of data and where more information is needed for these considerations.

I. The Project May Violate the Bad River Band’s Water Quality Standards.

The project, as proposed, will go through, over, and under numerous waters that flow directly into or are directly connected to the 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 uses under the Band’s antidegradation policy) and support numerous tribally designated uses. The Corps must follow procedures set out in the Clean Water Act designed to protect the Band’s water quality, and functions and uses supported by the waters, and must deny the permit for this project if no mitigating conditions can satisfy the Band’s water quality standards.

1. *Bad River has TAS and approved WQS.*

The Corps and Enbridge must comply with the Band’s duly promulgated water quality standards (WQS). *See Bad River Water Quality Standards*, (Attachment #1 to MNRD WQS Report (Attachment I)) (“MWQS”); 33 U.S.C. § 1341(a)(2); 40 C.F.R. § 230.10(b)(1); *see also* 33 U.S.C. § 1313 (state water quality program). The EPA approved the Band for “treatment as a state” (“TAS”) under the CWA in 2009. *See MNRD WQS Report (Attachment I)*; *see also* 33 U.S.C. § 1377(e). EPA approved the Band’s water quality standards in 2011. *See id*; *see also Water Quality Standards Regulations: Bad River Band of the Lake Superior Chippewa Tribe*, EPA.⁹ The Band has numerous water quality criteria derived to protect designated uses, which in turn protects the use and enjoyment of on-reservation resources by Bad River Band members. *See MWQS Section F (Attachment #1 to MNDR WQS Report (Attachment I))*. These uses include usual and customary uses of Reservation waters such as fishing and recreation, as well as spiritual and cultural uses. *See id*.

The project has the potential to violate the Band’s water quality standards based on the information available. The Band’s standards have three components: (1) designated uses of

⁹ *Water Quality Standards Regulations: Bad River Band of the Lake Superior Chippewa Tribe*, Environmental Protection Agency, <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-bad-river-band-lake-superior-chippewa-tribe> (last accessed March 22, 2022).

waterways, (2) water quality criteria derived to protect those uses and existing uses, and (3) an antidegradation policy preserving the integrity of high-quality waters. 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 # 3 to MNRD WQS Report.
- The Kakagon and Bad River Sloughs coastal wetland complex¹⁰ supports manoomin or the wild rice (W1) use¹¹ among many other uses. These wetland complexes are Aquatic Resources of National Importance (ANRI). EPA Letter at 2-5 (Attachment J).
- 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/or 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.

MWQS Section G (specific waterbody classification) (Attachment #1 to MNRD WQS Report (Attachment I)).

The Corps, in coordination with the Bad River Band, must evaluate whether this project will cause or contribute to a violation of these designated uses and their established water quality criteria. Although the Corps and the applicant have not provided enough data for the proposed project to fully assess the scale of water quality violations it will cause, examples of criteria that MNRD anticipates this project would violate include, but are not limited to, the following:

- 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 MWQS Section E.6.ii.c.

¹⁰ One of the many designations that the Kakagon and Bad River Sloughs coastal wetland complex has is a Wetland of International Importance under the Convention on Wetlands (also known as a Ramsar site):

https://rsis.ramsar.org/ris/2001_(see Attachment #1 to MNRD Other Waters Report (**Attachment H**))

¹¹ The lower reaches of Bear Trap Creek support manoomin and is part of the Kakagon/Bad River Sloughs coastal wetland complex.

- Temperature as described in MWQS Section E.6.ii.g.
- Turbidity as described in MWQS Section E.7.iii.
- 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 MWQS Section E.6.ii.e.

See MNRD WQS Report at 4 (Attachment I); see also attachment #1 to MNRD WQS Report (Attachment I).

The examples provided above should not be construed as a comprehensive summary of the Band's water quality criteria that may be impacted by the proposed project.

Finally, the Band's water quality standards also have an antidegradation component that the project will likely interfere with. The Band's antidegradation policy is meant to prevent interference with the quality of special aquatic sites. MNRD considers **any** lowering of the quality of these waters that does not meet the requirements of the Band's antidegradation policy and procedures to be a violation of the Bad River Band water quality standards. The antidegradation policy of the Band's WQS (Attachment #1 to MNRD WQS Report, at 8 (Attachment I)) describes three categories of high-quality waters and designates waters within the Reservation Boundaries. There are numerous waters that the Band designated as high-quality on the Reservation that this project will impact through construction and operation:

- Chi minosingbii or Outstanding Tribal Resource Waters (OTRWs), which are roughly equivalent to EPA's regulatory definition of Tier 3 waters. Waters designated as OTRWs include surface waters of the Reservation that are identified as high quality and constitute a significantly important cultural and ecological resource. These waters are recognized as being largely pristine and important for the cultivation of wild rice or the spawning of lake sturgeon, or have other special resource values, and, therefore, that water quality shall be maintained and protected in all cases without degradation. New or increased discharges will not be permitted. Waters designated as Chi minosingbii (OTRWs) include: Kakagon Slough and the lower wetland reaches of its tributaries that support wild rice, Kakagon River, Bad River Slough, Honest John Lake, Bog Lake, a portion of Bad River, from where it enters the Reservation through the confluence with the White River, and Potato River (refer to provision E.2.iii. of MWQS).
- Chi minosibii or Outstanding Resource Waters (ORWs), which are roughly equivalent to EPA's regulatory definition of Tier 2.5 waters. Waters designated as ORWs include surface waters of the Reservation that are identified as high quality and culturally important to the Band for the fisheries and ecosystems they support. New or increased discharges may be permitted provided that the new or increased discharge is necessary in accordance with the Band's Antidegradation Policy and does not result in a change in background conditions or negatively impact designated uses or existing uses; however, no new or increased discharges of bioaccumulative chemicals of concern will be permitted. Waters

designated as Chi minosibii (ORWs) include: a portion of Bad River, from downstream the confluence with the White River to Lake Superior, White River, Marengo River, Graveyard Creek, Bear Trap Creek, Wood Creek, Brunsweler River, Tyler Forks, Bell Creek, and Vaughn Creek (refer to provision E.2.ii. of MWQS).

- Anishinaabosibiing or Exceptional Resource Waters (ERWs), which are roughly equivalent to EPA's regulatory definition of Tier 2 waters. Any surface waters not specifically classified as OTRWs (Chi minosingbii) or ORWs (Chi minosibii) are classified as ERWs (Anishinaabosibiing). Exceptional Resource Waters are of high quality and culturally important for the ecosystems they support. Additional details are provided in provision E.2.i. of the WQS. Examples of ERWs include tributaries to Brunsweler and Marengo Rivers and many wetlands.¹²
- Additionally, a map prepared by Great Lakes Indian Fish and Wildlife Commission (GLIFWC) is attached that shows the high-quality watercourses designated under the Band's WQS or the State's WQS and the proximity to the proposed project (Attachment #6 to MNRD WQS Report). Please note that this map does not include the other waters designated as high quality under the Band's WQS or the State's WQS, such as high-quality wetlands. Also note that this map only includes the distances (in river miles) between the proposed project and the larger watercourses within the Reservation boundaries, such as the Mashkii-ziibii (Bad River, an OTRW), and it does not include the distances between the proposed project and the smaller watercourses within the Reservation boundaries, such as Trout Brook (an ERW), Zhooniyaa-ziibiins (Silver Creek, an ERW) and Billy Creek (an ERW).

See also, MNRD WQS Report at 2 (Attachment I).

The Clean Water Act requires the Corps and the applicant to comply with the Bad River Band Water Quality Standards. Section 401 of the CWA mandates the Corps follow a specific process aimed at ensuring that the project does not interfere with the Reservation's water quality and uses supported by them. The Corps must evaluate the project's impacts to the waters that flow through the Bad River Reservation as part of its environmental review.

2. EPA's "May Affect" determination and the 401(a)(2) process.

The Band intends on taking part in the process outlined in Section 401(a)(2) of the CWA to ensure that the project will not violate its water quality standards. After the WDNR decides whether or not to issue a water quality certification, EPA has the opportunity to determine whether the project "may affect" downstream water quality for the Band. At that point the Band will review the state's data leading up to its water quality certification determination, EPA's findings, and any of its own information to make a final determination of whether the project will violate the Band's water quality standards. Ultimately, the Corps cannot issue a Section 404 or Section 10 permit if it will cause or contribute to a violation of the Band's water quality standards. 40 C.F.R. §

¹² Please note that MNRD will be preparing an additional map (or set of maps) to illustrate the connection between the proposed project location and wetlands designated as ERWs under the Band's WQS.

230.10(b)(1), (c). Based on the information currently available in the Public Notice and in the application, the Band believes that it is very likely that the project would violate the Band's water quality standards. See MNRD WQS Report at 5-6 (Attachment I). These preliminary findings require the Corps to fully evaluate the project's impacts to the Band's water quality standards. That information should be included and further developed in a federal EIS.

J. The Project is Not in the Public Interest

The project is contrary to the public interest. The Corps is obligated to conduct a "public interest review" as part of the permit process. *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1524 (10th Cir. 1992); see 33 C.F.R. § 320.4(a). The Corps can deny a Section 404 permit if the project is not in the public interest. 33 C.F.R. § 323.6(a). The public interest review must include "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1). Most of the public interest factors weigh against the proposed project. This comment letter incorporates the Band's general environmental concerns, high consequences to wetlands, fish and wildlife values, recreation, water supply and conservation, and water quality. The Band has, through this comment letter and through its current litigation against Enbridge, demonstrated that the project does not serve the welfare of the community in the project area. There are also severe risks to the Band's cultural and historic resources in the area. Although the public interest analysis involves weighing factors, Enbridge has not demonstrated that any public interest factors weigh in its favor. The economic benefits are speculative at best and must be thoroughly analyzed in a federal EIS. Enbridge has also failed to demonstrate that the project is required to meet energy needs that cannot be met by other means. Enbridge even fails when it comes to considerations of property ownership given that its current pipeline is operating through the Bad River Reservation in trespass.

The project's detrimental effects to the area far outweigh proposed benefits. Enbridge also has not demonstrated there is an actual need for the proposed re-route. As described in Section III.C.3. *supra*, Enbridge has not considered all possible alternatives to the project. See *id.* at § 320.4(a)(2). Based on the available information in the Public Notice and in the application, the project is contrary to the public interest.

V. ENDANGERED SPECIES ACT CONSULTATION IS LACKING AND NOT TRANSPARENT

The Corps is required to consult with U.S. Fish and Wildlife Service ("FWS") pursuant to Section 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531 et seq. ("ESA"), because the Line 5 reroute may affect federally listed endangered/threatened species or designated critical habitat. In addition, the Corps must analyze impacts associated with the project and any incidental take of species in its NEPA analysis. See *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 46 (D.C. Cir. 2015) (the Corps' authorization of "take of endangered species in connection with pipeline construction and operation across jurisdictional waters, and doing so only on the conditions that Enbridge take mitigating conservation measures and monitor species impact for the anticipated useful life of the pipeline, was regulatory approval amounting to significant federal action requiring environmental review under NEPA."). Following formal consultation with FWS, the agency requesting or initiating consultation must determine "whether and in what

manner to proceed with the action in light of its Section 7 obligations and the Service’s biological opinion.” 50 C.F.R. § 402.15(a).

Here, the Corps determined that the Line 5 reroute is not likely to adversely affect the listed species Canada Lynx, Gray Wolf, and Northern Long-Eared Bat, or critical habitat for these species. The Corps also stated that the FWS has issued a concurrence. *See* Letter from William Sande, USACE, to Sara Quamme, USFWS (Oct. 22, 2020) (Attachment II); Email from Nick Utrup, USFWS, to William Sande, USACE (Feb 23, 2021) (Attachment JJ). The Corps also determined that the project would have no effect on Fassett’s Locoweed, Piping Plover or Rufa Red Knot, or critical habitat for these species (*see* Attachment II).

The Corps’ analysis and subsequent determinations about impacts to threatened and endangered species are incomplete, premature, and inappropriate due to the lack of transparency about the methodology and data underlying its decisions. In addition, the lack of consultation with the Bad River Band and other affected tribes is inconsistent with the Corps’ responsibilities under NEPA, the ESA, Executive Order 13175, and the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights (“Treaty Rights MOU”). For example, had the Corps or FWS consulted with the Bad River Band, we could have discussed the importance of Lake Sturgeon to the Band and its members. In response to a listing petition for Lake Sturgeon, the FWS announced “that the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted for the lake sturgeon due to potential threats associated with the following: ...dredging and channelization, and contaminants...habitat fragmentation, [and] the species’ life-history characteristics.” Endangered and Threatened Wildlife and Plants; 90-Day Findings for Three Species, 84 Fed. Reg. 41691, 41693 (Aug. 15, 2019). Because of this omission, the Band has not had an opportunity to analyze this project’s impacts on lake sturgeon.

The Corps must re-initiate consultation with both the FWS and the Bad River Band on federally listed endangered and threatened species and their critical habitat within ceded territory. The Corps must also disclose and examine the impacts the project will have on federally listed endangered and threatened species as part of a federal EIS.

A. Public Notice on Impacts to Threatened and Endangered Species is Inadequate.

As the Band has already informed the Corps in separate correspondence, dated March 4, 2022, the Public Notice was inadequate with respect to potential impacts to listed species and critical habitat. The materials provided to the public do not include any information on basis for the FWS’ concurrence on the Corps’ determinations, and Enbridge’s reports on Protected Species Survey and Consultation were marked confidential and were not provided for public review and comment. Further, the Corps’ Public Notice does not mention either the gray wolf or Fassett’s Locoweed. After the Band requested additional information, the Corps did provide further documentation related to impacts to listed species, but the scant information and analysis was inadequate to support the Corps’ findings, or for FWS to have issued a concurrence. In addition, to the extent the Corps plans to rely upon the state’s DEIS, MNRD has determined that the state DEIS is extremely deficient in data, analysis, and avoidance protocols. *See* MNRD T&E Report.

B. Consultation on the Gray Wolf and other Species was Inadequate

The Band also has informed the Corps that additional consultation is required in order for the Corps to analyze the impacts to off-reservation resources for which the Band, and other Ojibwe Bands, have retained treaty-protected usufructuary rights. As discussed in Sections I of this comment letter, the Treaties of 1837 and 1842, and subsequent court cases interpreting those treaties, have clarified that the Wisconsin Ojibwe Bands are entitled to one-half of the harvestable surplus of off-reservation natural resources in the territories ceded under these treaties. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. 1400, 1426 (W.D. Wis. 1990). There have been numerous controversies surrounding the exercise of these rights, most recently related to the Gray Wolf.

The Corps claims that it has already consulted FWS about the project's impacts to the Gray Wolf, but there have been a number of dramatic changes in the past 24 months that require additional consultation with the FWS and the Band. First, FWS acted to remove Gray Wolves in Wisconsin from the list of endangered and threatened species under the ESA, effective January 4, 2021. Just a few weeks later, on February 22, WDNR held a court-ordered wolf hunt which 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 KK). 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.

Despite the poorly regulated hunt in February 2021, as required under state law, WDNR attempted to hold a second wolf hunt in November 2021. The planned hunt was effectively stopped by a court order of the Dane County Circuit Court, due to deficiencies in the state's regulation and oversight of the wolf hunt. *Great Lakes Wildlife All. v. Wis. Nat. Res. Bd.*, 2021CV002301 (Dane Cnty. Cir. Ct. Oct. 22, 2021). In February of 2022, the FWS' rule delisting the Gray Wolf was overturned by a federal court decision, which resulted in Gray Wolves being relisted. *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, the Corps is required to both consult with FWS about the project's impacts to the species, and make the information related to its assessment of impacts and consultation with FWS accessible to the public.

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 consultation with FWS and the Bad River Band. The Gray Wolf, or ma'iingan, is a species of great spiritual, cultural and ecological significance to the Band. The management of this species has been the subject of recent and widespread controversy and litigation. Absent additional consultation with both FWS and the Band, the Corps simply does not have the information necessary to assess the project's cumulative impacts on this species and its habitat, and thus its "no effect" determination is

meaningless. Further, the public does not have the information necessary to provide meaningful input.

In addition to renewed consultation with both FWS and the Band on the Gray Wolf, consultation with the Band is required with regard to the project's potential impact on other listed species, both on- and off- reservation. MNRD has relevant data about the Canada Lynx, Gray Wolf, Piping Plover, and Bald Eagle, including data related to habitat for these species. *See* MNRD T&E Report (Attachment M). The complete lack of information that was provided by the Corps and the applicant about the Fassett's Locoweed, Piping Plover, and Rufa Red Knot renders MNRD (and the public) unable to provide meaningful comments on the determinations related to those species, or on the Karner Blue Butterfly and Rusty Patched Bumblebee. MNRD also has information that the survey methods used by Enbridge to locate the wood turtle were flawed, likely resulting in an undercount of the species. *Id.* at 2. The wood turtle, while not federally listed, is under review for listing by the FWS, which determined that substantial scientific or commercial information indicates that listing may be warranted based all five listing factors under Section 4(a)(1) of the ESA. 80 Fed. Reg. 56423, 56431 (Sept. 18, 2015).

Finally, we remind the Corps that it also is required to consult with the Band on other species that will be impacted, not only those that are listed under the ESA. At the time the treaties were signed, the Ojibwe made use in various ways of almost all the flora and fauna in the region. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 653 F. Supp. at 1426-29. Thus, the cumulative impact of the proposed project on the Band's rights in *all* impacted species must be considered. Pursuant to the Treaty Rights MOU, which the Department of Defense, Department of Interior, and Environmental Protection Agency all signed in 2021, interagency cooperation in efforts to consider tribal treaty and reserved rights early in the decision-making process is necessary to ensure that federal agency actions are consistent with constitutional, treaty, reserved and statutory rights. The Band calls on the Corps to engage in such interagency cooperation and fully consider the potential impacts of this fraught, controversial, and ill-advised project proposal.

VI. THE CORPS HAS NOT ADEQUATELY CONSULTED WITH THE BAND ON ITS CULTURAL AND HISTORIC PROPERTY UNDER SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

Section 106 of the National Historic Preservation Act (NHPA) requires the Corps to make a reasonable, good faith effort to consult with the Band on the project's impacts to cultural and historic resources. 54 U.S.C. § 306108. The Corps must consult with the Band on all matters concerning its cultural and historic property to determine and adequately analyze the impacts to the Band and its resources.

The procedural deficiencies in the Corps' consultation with the Band has led the Corps to carry out its NHPA responsibilities in a flawed and underinclusive manner. The Corps has too narrowly defined the federal undertaking, misinterpreted the Area of Potential Effect ("APE"), and has not made a good faith effort to identify the Band's cultural property in consultation with the Tribal Historic Preservation Officer ("THPO"). 36 C.F.R. § 800.16(y) (undertaking); 36 C.F.R. § 800.16(d) (APE); 36 C.F.R. § 800.4 (identification of cultural property). Many of the problems in

the Corps' analysis could be rectified through adequate consultation and implementation of the THPO's Statement of Work the Band sent to the Corps on in May 2021 and resent in July 2021. *See Proposed Statement of Work (Attachment #2 to MNRD THPO Report (Attachment LL)).*

A. Consultation is Inadequate

Thus far, the Corps has not demonstrated a reasonable and good faith effort to identify historic properties. 36 C.F.R. § 800.4(b). The Corps has failed to respond to the Statement of Work that was provided by the Band, which provides a detailed overview of the evaluation necessary to fully assess the impacts of this project on historic properties and landscapes. The Corps must thoroughly investigate the eligibility of lands and properties potentially affected by the project for inclusion in the National Register of Historic Places to determine what kind of impacts the project may have. *See Tribal Historic Preservation Officer Report, Mashkiiziibii Natural Resources Dept., at 2, (March 22, 2022) ("MNRD THPO Report") (Attachment LL).* To the extent the Corps has shown any interest in assessing cultural impacts, it has relied only upon the biased and inadequate information provided by Enbridge, the project proponent. *See Public Notice at 2 (referencing Appendix Q, the Dirt Divers report).*

The analysis provided by Enbridge's cultural resources contractor, Dirt Divers, is inadequate and the Corps cannot rely on it to fulfill its NHPA obligations. The THPO has determined "that the Dirt Divers Report is not acceptable and that documentation standards have not been met." MNRD THPO Report at 2 (Attachment LL); *see also*, 36 C.F.R. § 800.11. The report's methodology primarily consists of reviewing maps available online to the public, archaeological analysis which the report admits does not usually recognize sites of cultural significance to Tribal Nations, and "oral interviews" with an unknown number of unidentified persons. The Band was not made aware that Dirt Divers would be conducting such a study on the Band's citizens, or within the Band's Reservation and ceded territory. The Band was never notified about human subjects' research on its members and never evaluated the methods or gave permission for such research. Further, the Band has had negative interactions with the contractor. MNRD THPO Report at 2 (Attachment LL).

Despite the Band's stated concerns, the Corps has done no analysis of whether the Contractor is qualified to opine on the Band's cultural resources. Analysis of the Band's cultural resources cannot be made by the applicant alone, without input from the Band. The Dirt Divers report is deeply flawed and misguided. The Corps has a federal trust responsibility to ensure that the cultural resources assessment is adequate. The Band must be formally consulted on whether the Enbridge contractor is qualified, and the Band's opinion is that Dirt Divers produced a deficient and culturally inaccurate report. The Corps must carry out its own analysis in consultation with the Band, including to implement the Statement of Work the Band submitted to the Corps.

B. The Corps Defines the Scope of the Federal Undertaking Too Narrowly.

The Corps has improperly narrowed the scope of the APE, and thus its NHPA review, to the fill and construction activities on either side of the proposed pipeline. *See Public Notice at 1 ("Activity").* The Corps reached this conclusion without proper consultation with the Band under Section 106. *See MNRD THPO Report at 4-5 (Attachment LL).* As a result, the APE as identified

by the Corps—the construction area—is underinclusive of important historic and cultural property that the Corps must analyze.

The federal undertaking before the Corps is the decision on whether to issue a permit for the construction of a new pipeline segment around the perimeter of the Reservation. This will expose new areas of the Bad River Watershed to environmental harm. The very reason the Band is seeking to evict Line 5 from the Reservation is to avoid the impacts of this pipeline on its important cultural property and habitat. This permit, if granted, will extend the risks this pipeline poses to the Band's property and culture well into the future. The Corps cannot ignore the facts – this pipeline poses serious risks to the entire Bad River watershed and the Band's Reservation. The APE should reflect that.

This pipeline would have new and distinct environmental impacts to the Band's cultural resources and property that are not confined to the project corridor. Under the NHPA, the Corps' review must extend to include the direct, indirect, and cumulative impacts of construction and operation of the project on the Band's cultural and historic properties. 36 C.F.R. § 800.5. This necessarily includes an evaluation of how those impacts will diminish access to important sites essential to Ojibwe culture and the exercise of treaty rights.

Further, this pipeline will extend the tens of millions of metric tons of emissions Line 5 facilitates every year well into the future. This indirect impact is relevant to the project's effects on the Band's cultural property because climate change will irreversibly change the Reservations' habitat and environment. Some cultural sites are associated with the unique feeling of being present there or special animals or plants that are found in only certain areas of the Reservation and ceded territory. Climate change, which this pipeline will contribute to, will disrupt the ecosystem on the Band's Reservation, making it impossible for the Band's citizens to access and maintain special sites key to the Band's cultural heritage. These impacts merit careful consideration in this process. MNRD THPO Report at 3 (Attachment LL); *see also* Treaty Rights MOU at 2 (“the Parties recognize the need to consider and account for the effects of their actions on the habitats that support treaty-protected rights, including how those habitats will be impacted by climate change.”).

The Corps must also consider the cumulative effects of this project on cultural property when combined with the impacts of other projects in the area. 36 C.F.R. § 800.5. These include the disruptive effects of the Xcel transmission line, hazardous liquid leaks from oil tankers and steel plants, and runoff and mercury deposition from new and historic mining in the region. MNRD THPO Report at 3 (Attachment LL). The THPO report said it best: “[i]n all [the Band is] witnessing a mass degradation of [its] historical homelands, disruption of [its] traditional lifeways, and diminished access to cultural sites. The Corps must acknowledge and assess these cumulative impacts in detail” in a federal EIS. *Id.*

To date, the Corps and applicant have demonstrated that they are relying on inappropriate methods that result in an underinclusive analysis of the impacts to the Band's cultural and historic property.

C. The Corps has not properly identified the Bad River Band's Cultural Property.

Finally, the Corps has not consulted the Band on the proper identification of cultural properties within the project route and properties the project could potentially affect. *See* MNRD THPO Report at 5-6 (Attachment LL). The route will cross through and may affect numerous historic allotments that are found along the project route. Gravesites and hunting, fishing, and gathering sites as well as artifacts could be found at these locations and may be affected by the project. *See* MNRD THPO Report at 6; *see also* Regional Allotment Map, Tribal Historic Preservation Office, (March 20, 2022) (Attachment #9 to MNRD THPO Report (Attachment LL)). In addition, it will also cut through two high-quality unique wetlands known as the Kakagon and Bad River Sloughs. Section III.B. *supra*. The Band considers these wetlands as Outstanding Tribal Resource Waters because of their cultural significance. There are also other cultural sites that this project may affect such as the Bad River Falls and the Madigan and Waverly Beaches that the Corps has not acknowledged at all.

The historical significance of the Reservation and the entire Bad River Watershed turns upon the inherent historical and cultural significance of the property. These sites are key to the vitality of the Ojibwe culture and important to the cultural heritage of the entire Nation and must be protected in this process. As the THPO report states, much of the traditional territory of the Band has been ceded to the United States. MNRD THPO Report at 5 (Attachment LL). What land remains retains and supports the Band's culture. It is important to preserve these sites so that the Ojibwe culture can flourish and continue into the future. The NHPA process is designed to ensure that federal undertakings do not irreversibly damage cultural sites and resources like the ones that could be adversely affected by this process. If the Corps properly considers all of the direct, indirect, and cumulative impacts on the Band's homelands and people, it will conclude that the project will cause such damage. Yet, the Corps is choosing to ignore these effects and what they mean for the preservation of historic and cultural property. Compliance with NHPA's Section 106 requirements is not and cannot be a simple ministerial act. The Corps has a fiduciary relationship with the Bad River Band as a federally recognized tribe, and mandatory duties under NHPA, including to consult in good faith with the Band. The Corps must carry out its responsibilities under NHPA with this relationship in mind.

VII. **WDNR'S DRAFT ENVIRONMENTAL IMPACT STATEMENT LACKS SUFFICIENT DATA AND ANALYSIS TO ASSESS THE ENVIRONMENTAL IMPACTS OF THE PROPOSED PROJECT.**

As the Public Notice indicates, Enbridge submitted its permit application jointly to the Corps and the WDNR. Thus, the Corps must conduct a clear-eyed assessment of the state permitting process as part of the Corps' consideration of the proposed project. Unfortunately, the state's DEIS currently lacks sufficient data and analysis to assess the environmental impacts of the proposed project.

In June 2020 WDNR announced it would prepare an environmental impact statement to inform both permit decisionmakers and the public about the proposed project. WDNR began this process by holding a public comment period in June and July 2020 on the scope of its EIS, receiving over 2000 written comments. WDNR then retained a consultant to assist in preparing a

DEIS. WDNR provided an advanced draft to the Band in November 2021, as well as other tribes, GLIFWC, and federal agencies. The Band, GLIFWC, and the Red Cliff Band of Lake Superior Chippewa all sent letters in response urging WDNR to delay public release of the draft until WDNR corrected major deficiencies in the DEIS. Instead, WDNR released its DEIS in December 2021 for public comment without addressing any of the deficiencies the tribes identified.

A. General Deficiencies

The state DEIS contains many deficiencies. These include 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. In many places, the DEIS lacks sufficient, accurate, or sometimes even 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

- Section 1.6.3.2.1 *Downstream Status (Bad River Reservation)*, despite meaning to discuss tribal authority under the Clean Water Act, fails to discuss both the Band's authority under Section 518(e) and its water quality standards. Instead, the one paragraph section only discusses the current route of the pipeline through the reservation, the lawsuit to remove it, and Enbridge responding by proposing this relocation project. DEIS at 16.
- 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.
- 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 route information. *See* DEIS 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.

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 7.
- Some sections seem to draw verbatim from applicant documents or rely heavily on applicant claims.

This comment letter does not cover all state DEIS deficiencies in detail. For a fuller discussion, the Band would gladly share our comments on the DEIS once they are submitted to WDNR. We also encourage the Corps to review comments submitted by GLIFWC, other tribes, federal agencies, and other interested and knowledgeable organizations and individuals. Overall, the state’s DEIS lacks sufficient data and analysis to assess, and inform the public of, the environmental impacts of the proposed project.

These comments draw on data from the state DEIS but only because other data is also lacking. The Band will submit comments on the DEIS to preserve its rights in the state permitting process and has asked the WDNR to revise and reissue the DEIS for public comment once the document’s numerous fundamental flaws are corrected. These numerous flaws also strongly suggest against the Corps relying on the state’s DEIS. The Corps should instead produce its own independent EIS, so as to avoid reliance on this flawed document and to ensure the Corps meets its treaty, trust, statutory, and regulatory obligations.

B. Consideration of Felony Trespass

The Corps must consider its trust responsibility to tribes separate from the state permitting process in evaluating this project, especially when the state may actively interfere with tribal members’ rights and ability to gather treaty-protected resources on public lands. Wisconsin has a state specific law that makes it a felony to trespass on the right of way of an oil pipeline. *See* Wis. Stat. § 943.143. As GLIFWC explained in its April 13, 2021, letter to WDNR 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.” GLIFWC Letter 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.*; Wis. Stat. § 939.50(3)(h).

The state process and the DEIS acknowledges the felony trespass law “could create impediments” to hunting, fishing, and gathering. DEIS at 242. Enbridge also expressly plans to prohibit public access to the right-of-way during construction. DEIS at 150. There is no consideration in the DEIS on how this exclusion will impact people seeking to exercise treaty-reserved or public access rights, or alternatively how the prohibition on public access will be modified to facilitate exercise of such rights. The state of Wisconsin has not considered how the

project will affect tribal treaty rights. And the state's history indicates that it may continue to hinder tribal treaty rights.¹³

Wisconsin's felony trespass law also poses risks to anyone utilizing navigable waterways under Wisconsin's Public Trust Doctrine. Under the Doctrine, everyone has the right to enter any navigable water in Wisconsin from a public access point and engage in activities such as navigation, hunting, fishing, and other recreational activities. Like the treaty rights issue, someone crossing the pipeline easement in a public trust water (or on public lands for that matter) could expose themselves to harassment by Enbridge employees and contractors, as well as potential arrest by law enforcement. Such individuals might also not exercise their rights under the Public Trust Doctrine for fear of such harassment or arrest. The Corps' environmental review must assess this potential infringement on public trust rights.

The Corps, as the Band's federal trustee, must ensure this project will not infringe on the exercise of treaty rights due to Wisconsin's felony trespass law. This is not something that can be delegated to state agencies. There are several chilling effects of this law that the Corps must consider: the actual loss of treaty resources, the burden that tribal members must bear to access treaty resources, and the risks that the law harms public trust rights to state navigable waterways and public lands.

CONCLUSION

The Corps must address all of the issues identified in this letter and the attached reports as part of the Line 5 re-route permitting process. Given the range and extent of the likely significant impacts from the proposed project, a Federal EIS is necessary for the Corps to adequately assess this project. Based on the available information, the Corps cannot issue a Section 404 or a Section 10 permit at this time. Because of the numerous concerns articulated throughout this submission and the high level of public interest in the proposed project, the Band also requests that the Corps hold a public hearing on its public notice under 33 C.F.R. part 327. Additionally, the Band looks forward to government-to-government consultation with the Corps on the issues identified in this submission and other project impacts. As stated at the beginning of the letter, the Band would like to schedule a meeting with the Army Corps on this matter. The Band proposes the following dates:

Week of May 9, 2022
Week of May 16, 2022

If you have any questions or would like to arrange a technical discussion with MNRD staff, please reach out to Naomi Tillison, MNRD Director, nrdirector@badriver-nsn.gov, 715-682-7123, ext 1561. Thank you and we look forward to working with the Corps to appropriately assess this proposed project.

¹³ There is a long history of harassment and violence, beyond the threat of arrest and legal penalties, against tribal members attempting to exercise these rights. *See generally* Larry Nesper, *The Walleye War: The Struggle for Ojibwe Spearfishing and Treaty Rights* (University of Nebraska Press 2002).

Sincerely,

s/ Mike Wiggins, Jr.

Mike Wiggins, Jr.

Bad River Tribal Chairman

Cc: Bill Sande, Project Lead, St. Paul District of the Army Corps of Engineers,
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