

*Delivered via electronic mail*

August 30, 2024

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**RE: Comments on Enbridge Line 5 Wisconsin Segment Relocation Project Draft Environmental Assessment, Clean Water Act Section 404(b)(1) Guidelines Evaluation, and Public Interest Review, App. Ref. # MVP-2020-00260-WMS**

Dear Colonel Swenson:

Midwest Environmental Advocates, Clean Wisconsin, Sierra Club Wisconsin, 350 Wisconsin, and River Alliance of Wisconsin submit these comments on the U.S. Army Corps of Engineers' draft environmental assessment, Clean Water Act Section 404(b)(1) Guidelines evaluation, and public interest review for Enbridge Energy LP's proposed project to relocate a segment of Line 5 around the Bad River Reservation in northern Wisconsin.

We would like to thank the Corps for extending the public comment period. Given the short amount of time the public was afforded to analyze the draft document prior to the public hearing in Ashland, Wisconsin, and the significant updates to the supporting information the Corps appended to the DCDD after the public hearing concluded, the additional time to provide written comments was useful.

Please do not hesitate to reach out to Midwest Environmental Advocates Staff Attorney Rob Lee with any questions or concerns using the contact information in the signature block below.

Sincerely,

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**COMMENTS ON ENBRIDGE LINE 5 WISCONSIN SEGMENT RELOCATION PROJECT  
DRAFT ENVIRONMENTAL ASSESSMENT,  
CLEAN WATER ACT SECTION 404(b)(1) GUIDELINES EVALUATION,  
AND PUBLIC INTEREST REVIEW,  
APP. REF. # MVP-2020-00260-WMS**

These comments are organized according to the U.S. Army Corp of Engineers’ (“the Corps”) organization of its draft environmental assessment, Clean Water Act (“CWA”) Section 404(b)(1) Guidelines evaluation, and public interest review (“DCDD”) to ensure the Corps considers each section in the proper context. Information contained in each section of these comments may be relevant to other sections of the DCDD, however. Cross references between interrelated sections have been included but are not exhaustive, and the Corps should consider how all the information provided in these comments may be otherwise relevant to its ongoing review of Enbridge Energy LP’s proposal to relocate a segment of Line 5 around the Bad River Reservation in northern Wisconsin (“the Reroute”).

As detailed throughout these comments, the DCDD’s preliminary determinations regarding the Reroute, if finalized, would be arbitrary and capricious. The DCDD altogether fails to contend with extremely important issues based on an unlawfully narrow scope of environmental review and a definition of purpose and need that is blatantly contrary to applicable case law. These threshold issues have led to deficiencies throughout the document, including but not limited to the alternatives analysis, public interest review, and the secondary and cumulative impacts analysis. For those issues the DCDD does analyze, the Corps makes preliminary determinations based on inadequate or incomplete information, as well as promises to gather, provide, and act on information that is needed to assess environmental impacts now.

Contrary to the Corps’s preliminary determination, the Reroute will result in significant impacts to the human environment, and a full environmental impact statement (“EIS”) must be prepared. However, even with the preparation of an EIS, the currently available information, limited as it is, makes clear that Enbridge’s Department of the Army (“DA”) permit application does not meet applicable standards for issuance and should be denied.

**SECTION 1.0 – INTRODUCTION AND OVERVIEW**

**1.1 Applicant Name**

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**1.2 Activity Location**

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### **1.3 Project Description**

[CROSS REFERENCES: §§ 3.1, 3.2, 4.3]

### **1.4 Proposed Avoidance and Minimization Measures**

[CROSS REFERENCES: §§ 5.7, 6.3, 6.4, 6.5]

### **1.5 Jurisdictional Determination**

The Corps's discussion of its previous, now invalid, jurisdictional determination and how that would have only applied to 11% of the proposed project route instead of the 18% the Corps is currently considering inappropriately suggests the Corps is doing more than required. The fact is that Enbridge waived the jurisdictional determination under Section 404 and the Corps must assume the waters in question are jurisdictional. The Corps's previous, invalid jurisdictional determination is irrelevant to the DCDD in general and to the Corps's determination of "sufficient control and responsibility" more specifically.

### **1.6 Proposed Compensatory Mitigation**

[CROSS REFERENCE: § 8.0]

### **1.7 Existing Conditions and Applicable Project History**

The Corps should amend Section 1.7 of the DCDD to better reflect the applicable project history. For example, the Bad River Band's (or "the Band") federal lawsuit against Enbridge does include a claim for trespass due to easement expiration, but that lawsuit also includes a claim for public nuisance because significant erosion has exposed Line 5 where it crosses the Bad River. Developments in that federal lawsuit, discussed in Section 3.1 below, should be included in Section 1.7, and the entire DCDD should be updated to take into account those developments. The Corps should also overview Line 5's history of oil spills since the DCDD repeatedly references Enbridge's oil spill modeling and analysis.<sup>1</sup>

[CROSS REFERENCE: § 3.1]

### **1.8 Permit Authority**

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<sup>1</sup> See, e.g., Ellison, Garret, *Enbridge Line 5 has spilled at least 1.1M gallons in past 50 years*, MLive.com (Apr. 26, 2017), available at [https://www.mlive.com/news/2017/04/enbridge\\_line\\_5\\_spill\\_history.html](https://www.mlive.com/news/2017/04/enbridge_line_5_spill_history.html).

## **SECTION 2.0 – SCOPE OF REVIEW**

### **2.1 Determination of Scope of Analysis for National Environmental Policy Act (NEPA)**

The DCDD states that “[t]he Corps is preparing this draft EA in compliance with the NEPA (85 Federal Register 43304 (July 16, 2020)) for the federal action.”<sup>2</sup> The referenced National Environmental Policy Act (“NEPA”) regulations were promulgated during the Trump Administration and did not become effective until September 14, 2020, more than seven months after Enbridge filed its permit application for the Reroute with the Corps. The Biden Administration has since promulgated new regulations that became effective on July 1, 2024, and supersede the 2020 regulations.

There is no compelling reason to apply the 2020 NEPA regulations to Enbridge’s permit application. Those regulations did not apply when Enbridge applied for permits and will not apply when the Corps makes permitting decisions. In addition, exactly which NEPA regulations the Corps is applying is not clear. For example, in the heading for Section 8.0 on page 89, the DCDD references provisions in the Code of Federal Regulations that no longer exist. 40 CFR § 1508.20 was a provision in the applicable NEPA regulations prior to 2020, but the 2020 NEPA regulations repealed that provision.<sup>3</sup>

The Corps should comply with the most currently promulgated NEPA regulations, apply this version consistently to its entire NEPA review, and update the DCDD accordingly. Such an approach is entirely appropriate even though these regulations were promulgated after Enbridge filed its permit application. The 2020 NEPA regulations were promulgated after Enbridge filed its permit application, yet the Corps exercised its discretion to apply those regulations to the Reroute, an ongoing NEPA review commenced before September 14, 2020.<sup>4</sup> That same discretion should be exercised here to apply the 2024 NEPA regulations to the Reroute.<sup>5</sup> At the very least, the Corps should not only identify which NEPA regulations it intends to comply with, but also explain why it chose that version of the NEPA regulations and apply them consistently. Failure to do so would be arbitrary and capricious.

#### ***NEPA Scope Considerations Broader than the WI L5R proposal***

We respectfully disagree with the Corps’ analysis regarding connected actions. As established below in Section 3.2, the Corps’ decision regarding the Reroute does impact the fate of Line 5, there would be no point in continuing to pursue the Line 5 tunnel project, which is downstream of and therefore entirely dependent on the reroute.

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<sup>2</sup> DCDD, p. 21.

<sup>3</sup> Compare 85 Fed. Reg. 43304 (July 16, 2020) with 43 Fed. Reg. 55990 (Nov. 29, 1978).

<sup>4</sup> See 40 C.F.R. § 1506.13 (September 2020).

<sup>5</sup> See 40 C.F.R. § 1506.12 (2024).

### ***NEPA Scope Considerations for the LSR proposal***

The Corps' scope of analysis under NEPA is inappropriately narrow and fails to achieve NEPA's dual purposes of "ensuring that (1) agency decisions include informed and careful consideration of environmental impact, and (2) agencies inform the public of that impact and enable interest persons to participate in deciding what projects agencies should approve and under what terms."<sup>6</sup>

Importantly, federal agencies must consider the environmental impacts of their decisions within their authority to prevent. In *Department of Transportation v. Public Citizen*, the U.S. Supreme Court held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."<sup>7</sup> Conversely, however, where agencies have the duty or discretion to prevent environmental impacts stemming from their actions—i.e., have "the power to act on whatever information might be contained in the EIS"—those impacts must be analyzed.<sup>8</sup>

Appendix B to 33 CFR pt 325 requires the Corps to establish the scope of NEPA review for projects like the Reroute based on both "the impacts of the specific activity requiring a DA permit *and* those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review."<sup>9</sup> The Corps has sufficient "control and responsibility for portions of the project beyond the limits of the Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are the cases where the environmental consequences of the larger project are essentially products of the Corps permit action."<sup>10</sup>

The Corps only has the discretion to grant the permit for which Enbridge has applied when applicable statutory and regulatory requirements are met, including both CWA § 404(b)(1) Guidelines under 33 U.S.C. § 1344(b) and 40 CFR pt. 230, and the public interest review under 33 CFR § 320.4.<sup>11</sup> Although review under the 404(b)(1) Guidelines is limited to the direct, indirect, and cumulative impacts stemming from the regulated activities, the public interest review is not so limited. Indeed, 33 C.F.R. § 320.4 provides that "[t]he decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity *and its intended use* on the public interest."<sup>12</sup>

The Corps is therefore required to consider impacts beyond the immediate construction of the Reroute as part of the public interest review. The Corps must look to the purpose of the Reroute

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<sup>6</sup> *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 36 (D.C. Cir. 2015) (citing *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004)).

<sup>7</sup> *Pub. Citizen*, 541 U.S. at 770.

<sup>8</sup> *Id.* at 768.

<sup>9</sup> 33 CFR pt. 325, app. B § 7.b(1).

<sup>10</sup> *Id.* § 7.b(2).

<sup>11</sup> See *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) ("Corps regulations require that a permit shall issue only after a general 'public interest review' determines that the benefits outweigh the detriments of a proposal.").

<sup>12</sup> (emphasis added).

and determine whether it is, on balance, in the public interest considering the appropriate, national context. As discussed in Section 3.2 below, the Corps has arbitrarily defined the purpose and need for the Reroute even more narrowly than Enbridge's proposed definition, and certainly more narrowly than authorized under applicable case law. Under an appropriately defined purpose and need for the Reroute, and analyzing all public interest factors congruently on a national scale, the impact of both the proposed activity *and its intended use* provide the Corps with ample authority to deny Enbridge's application and thus prevent impacts from both the construction and operation of Line 5.

Since the Corps has the power to act on information about impacts beyond those stemming from specifically regulated activities, the Corps's "involvement is sufficient to turn an essentially private action into a Federal action . . . [because] the environmental consequences of the larger project are essentially products of the Corps permit action." As a result, the Corps has "sufficient control and responsibility" over those impacts and they must be analyzed.<sup>13</sup>

The determinations that regulated activities are mere links in a corridor type project and that only 18% of the Reroute is comprised of those links and uplands in the immediate vicinity are unavailing. Such considerations are only "[t]ypical factors to be considered in determining whether sufficient 'control and responsibility' exists."<sup>14</sup> Those factors are neither dispositive nor exhaustive and cannot overcome the Corps' power to act based on the results of its public interest review. In any event, the Corps erroneously interprets and applies the factor of "[w]hether aspects of an upland facility in the immediate vicinity . . . affect the location and configuration of the regulated activity."<sup>15</sup> There are no reasonable alternatives to the Reroute that involve the construction of a pipeline and avoid jurisdictional waters. Virtually the entire route therefore applies to the location and configuration of the proposed crossings, and is within the control and responsibility of the Corps.<sup>16</sup>

The Corps must analyze those issues for which it has disclaimed responsibility, including but not limited to oil spills, "inadvertent" releases from horizontal directional drilling ("HDD"), aquifer breaches, and greenhouse gas ("GHG") emissions from construction as well as from upstream and downstream sources. These issues must not only be analyzed for the Reroute, but also for those reasonable and practicable alternatives available under an appropriately defined purpose and need.

[CROSS REFERENCES: §§ 3.2, 6, 7, 8]

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<sup>13</sup> *Pub. Citizen*, 541 U.S. at 768.

<sup>14</sup> 33 CFR pt. 325, app. B § 7.b(2).

<sup>15</sup> *Id.* § 7.b(2)(i), (iii).

<sup>16</sup> *See id.* § 7.b(2)(ii); 7.b(3).

## **2.2 Determination of the Corps' Action Area for Section 7 of the Endangered Species Act (ESA)**

[CROSS REFERENCE: § 10.2]

## **2.3 Determination of the Corps' Permit Area for Section 106 of the National Historic Preservation Act (NHPA)**

[CROSS REFERENCE: § 10.3]

### **SECTION 3.0 – PURPOSE AND NEED**

#### **3.1 Purpose and Need for the Project as Provided by the Applicant**

The DCDD states that Enbridge's stated purpose and need for the Reroute is "to continue transporting crude oil and natural gas liquids ("NGL") through its Line 5 pipeline, a portion of which would be relocated around the Bad River Reservation."<sup>17</sup> According to the DCDD, Enbridge's impetus for the Reroute is "the relief requested by the Bad River Band" in its "federal lawsuit against Enbridge for operating its pipeline on allotment parcels within the Bad River Reservation without valid easements."<sup>18</sup> That case, *Bad River Band v. Enbridge Energy*, Case No. 3:19-cv-00602-wmc (W.D. Wis.), involves more than claims of Enbridge continuing to operate Line 5 across the Bad River Reservation in trespass, however. The Band also filed suit for public nuisance because Line 5 is at risk of rupture where it crosses the Bad River, often referred to as "the meander."

Importantly, this subsection, like the entire DCDD, fails to account for developments in that case and its logical impact on the purpose and need for the Reroute.<sup>19</sup> Enbridge's initial impetus for the Reroute may have been in response to the relief the Band requested in its federal lawsuit, but relief has since been granted in that case and has not been stayed.<sup>20</sup> Specifically, the Western District of Wisconsin held that, after previously finding that Enbridge had been trespassing on the Reservation, after balancing the equities involved, Enbridge must shut down Line 5 where it operates across the Reservation in June 2026.<sup>21</sup> The court so ordered in recognition of the Reroute and explicitly held that its order stands regardless of whether Enbridge accomplishes the Reroute before June 2026.<sup>22</sup> In addition, the district court held, notwithstanding the June 2026 shutdown

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<sup>17</sup> DCDD, p. 25.

<sup>18</sup> *Id.*

<sup>19</sup> The DCDD mentions *Bad River Band v. Enbridge Energy*, Case No. 3:19-cv-00602-wmc (W.D. Wis.) multiple times without ever acknowledging the district court's June 26, 2023 decision and order. DCDD, §§ 1.7, 4.3.

<sup>20</sup> Opinion and Order, *Bad River Band v. Enbridge Energy*, Case No: 3:19-cv-00602-wmc, Doc. 684 (W.D. Wis., June 16, 2023).

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.* at 51.



order, that the situation at the meander could deteriorate to the point that Enbridge must shutdown Line 5 prior to June 2026.<sup>23</sup>

Accordingly, the status quo is the district court's order that Enbridge shut down Line 5 in June 2026 or sooner if the situation at the meander further deteriorates. The purpose and need for the Reroute, insofar as it relates to the Band's federal lawsuit against Enbridge, is now because of the relief *granted*, not the relief *requested*. And while the district court's order is under appeal from both the Band and Enbridge, any consideration of potential reversal of the relief granted, in whole or in part, at this juncture should be in the alternative.

[CROSS REFERENCES: §§ 1.3, 1.7, 3.2, 4.1, 4.3]

### **3.2 Purpose and Need for the Project as Defined by the Corps**

"The Corps' defined purpose and need for the proposed WI L5R project is to transport crude oil and NGLs entirely outside the Bad River Reservation at approximately the same capacities provided by Enbridge's existing Line 5 pipeline."<sup>24</sup> This definition, which is even narrower than Enbridge's defined purpose and need, restricts the purpose and need for the Reroute to the point that the Corps has arbitrarily excluded any alternatives that do not accomplish Enbridge's specific goals. Further, this subsection, like the entire DCDD, fails to account for developments in that case and its logical impact on the purpose and need for the Reroute.<sup>25</sup>

We agree that the Corps defined purpose and need for the Reroute must "allow[] for the consideration of a meaningful range of alternatives under the 404(b)(1) Guidelines."<sup>26</sup> However, we respectfully disagree that "the needs of the applicant" is an appropriate limiting principle for determining the range of reasonable alternatives. In *Van Abbema v. Fornell*, the Seventh Circuit Court of Appeals noted "that the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals."<sup>27</sup>

The Corps should properly define the *general* purpose and need for the Reroute and then analyze all feasible or reasonable alternatives that meet that need and purpose. To be sure, the range of alternatives the Corps must consider is not infinite, but the Corps cannot restrict the purpose and need for the Reroute only to include those alternatives that accomplish Enbridge's goals. The purpose and need should not be so specific as to exclude reasonable, practicable alternatives that would otherwise meet the general goals of the Reroute but do not accomplish Enbridge's stated goal of continuing to operate Line 5, which is exactly what the Corps has done here.

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<sup>23</sup> *Id.* at 35.

<sup>24</sup> DCDD, p. 25.

<sup>25</sup> *See supra* § 3.1.

<sup>26</sup> *Id.* at 26.

<sup>27</sup> 807 F.2d 633, 638 (7th Cir. 1986) (emphasis in original).

The general purpose and need for the Reroute, defined more broadly than simply a means by which Enbridge can accomplish its goals, is the continued transportation and delivery of crude oil and natural gas liquids to those markets Line 5 currently serves. Importantly, accomplishing this goal does not necessitate the continued operation of Line 5—Enbridge’s stated purpose and need for the Reroute. The Reroute, however, is necessary for Enbridge to accomplish its stated purpose and need of continuing operating Line 5, and the Corps cannot ignore this reality. Recent developments in the Bad River Band’s case make this abundantly clear.

The Corps cannot ignore developments in the Bad River Band’s federal lawsuit against Enbridge, its impact on the purpose and need for the Reroute, and what that means in terms of the Corps’s authority to evaluate the adverse impacts of the Reroute and reasonable and feasible alternatives thereto. The district court’s decision has been appealed and cross-appealed to the Seventh Circuit Court of Appeals, but the status quo is the district court’s order that Enbridge shut down Line 5 in June 2026 or sooner if the situation at the meander further deteriorates. If any part of the federal court’s June 2023 decision holds, it is most likely to be the finding of trespass. Even the U.S. Department of Justice has weighed in at the appellate stage and agreed that Enbridge is trespassing.<sup>28</sup> The only disagreement, except from, of course, Enbridge, seems to be what to do about Enbridge’s ongoing refusal to cease its trespass. But even if the June 2026 deadline were extended, at some juncture the equities will shift against Enbridge because of its ongoing trespass and Line 5 will be shut down. There simply is no future where Enbridge gets to continue operating Line 5 indefinitely without rerouting it, and a reroute requires approval from the Corps.

The result is that, contrary to the Corps’s assertions in Section 4, the potential fate of Line 5 is very much within the Corps’s scope of review.<sup>29</sup> This is the case regardless of whether the applicant has proposed regulated activities related to a shutdown or whether the Corps has authority over decommissioning or the operation of the pipeline. The Corps must determine the purpose and need for the Reroute in the appropriate context.

In the first instance, the Corps must consider the status quo and the likelihood that Line 5 will shut down in 2026 or sooner without the Reroute, which depends upon the issuance of permits from the Corps. To ensure the continued operation of Line 5, Enbridge needs to reroute the pipeline. Enbridge has said so itself.<sup>30</sup> While a decision from the Corps to grant the permits is not alone a sufficient condition precedent to building the Reroute and therefore continuing the operation of Line 5, it is certain a necessary condition precedent. All things equal, Line 5 will shutdown without the Reroute. The DCDD fails to contend with this issue at all, and the continued failure to do so would render any resulting decisions arbitrary and capricious.

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<sup>28</sup> Brief of the United States as Amicus Curiae Supporting Partial Reversal, *Bad River Band v. Enbridge Energy*, Case No: 23-2309, Doc. 92 (7th Cir. Ct. App. April 8, 2023).

<sup>29</sup> See DCDD, §§ 4.1, 4.3.

<sup>30</sup> DCDD, p. 25 (“Enbridge’s stated purpose for its WI L5R project is to continue transporting crude oil and NGLs through its Line 5 pipeline . . .”) (emphasis added).

In the alternative, the Corps could consider a scenario where Line 5 does not shutdown in 2026 but nevertheless does shutdown at a later date. However, this is speculative and unnecessary given the only difference is a later shutdown. Under no reasonable scenario, however, will Line 5 continue to operate indefinitely without authorization from the Corps.

The Corps's narrow definition of the purpose and need for the Reroute to merely "transporting crude oil and NGLs entirely outside the Bad River Reservation at approximately the same capacities provided by Enbridge's existing Line 5 pipeline" is therefore entirely inadequate and inappropriately restricts the Corps's review to the exclusion of reasonable, practicable alternatives. This might accomplish Enbridge's specific goal with the reroute—continuing to operate Line 5—but the reroute is not necessary to accomplish the general goal of transporting crude oil and NGLs for delivery and ultimate use.

Given the proper, expanded scope of the Corps's review, we also call on the Corps to exercise its discretion to independently review the economic need for the Reroute, which is further addressed in Section 7.3 below.

[CROSS REFERENCES: §§ 1.3, 3.1, 3.3, 7.3]

### **3.3 Basic Project Purpose, as Determined by the Corps**

The basic project purpose should be defined by the Corps as "Transportation *and delivery* of crude oil and NGLs." Enbridge is not proposing to build 41 miles of pipeline to transport 540,000 gallons of crude oil and natural gas liquids per day to nowhere. The Reroute has no purpose but for its connection to the rest of Line 5, and, as established immediately above, Line 5 will not continue to operate indefinitely without the Reroute. Put another way, the purpose of the Reroute is to transport petroleum products so that they can continue to be delivered for ultimate downstream combustion.

[CROSS REFERENCES: §§ 3.1, 3.2, 3.5]

### **3.4 Water Dependency Determination**

We agree with the Corps's determination that the Reroute is not water dependent.

[CROSS REFERENCE: § 3.4]

### **3.5 Overall Project Purpose, as Determined by the Corps**

Section 3.5 of the DCDD essentially restates the Corps' determination of the purpose and need for the Reroute from Section 3.2, and contextualizes that determination within the ability to consider a meaningful range of alternatives. Again, contrary to case law, the DCDD defines the purpose and need for the Reroute to the point of excluding any alternatives that do not accomplish Enbridge's specific goals. The general purpose and need for the Reroute is the

continued transportation and delivery of crude oil and natural gas liquids to those markets Line 5 currently serves.

[CROSS REFERENCE: §§ 3.1, 3.2, 3.3]

## **SECTION 4.0 – PUBLIC INVOLVEMENT**

### ***Legal Background***

The CWA and the Rivers and Harbors Act (“RHA”) safeguard the integrity and navigability of the nation’s waters. CWA Section 404 authorizes the Corps to permit only those discharges of dredged or fill material into waters of the U.S. (“WOTUS”) that will not cause unacceptable adverse impacts to the aquatic ecosystem.<sup>31</sup> RHA Section 10 charges the Corps with the duty to prohibit unauthorized obstruction or alteration of any navigable WOTUS.<sup>32</sup> Permit decisions made pursuant to either statute constitute federal actions subject to NEPA compliance.

NEPA directs federal agencies to not only inform but also involve the public regarding decision-making processes.<sup>33</sup> The purpose of NEPA is satisfied when federal agencies make informed decisions based in part on public input.<sup>34</sup> DA permit applicants are required to supply additional information upon request to inform the Corps’s public interest review and, where applicable, CWA Section 404(b)(1) Guidelines compliance determinations.<sup>35</sup> The Corps must then independently evaluate and verify environmental information submitted by the applicant during the NEPA review process.<sup>36</sup>

### **4.1 Overview of Public Involvement**

This section opens with remarks on Enbridge’s incomplete DA permit application and consequently limited public involvement in the Corps’s underinformed decision-making process. Following is a discussion of activities and impacts that are within the Corps’s jurisdiction to review and regulate despite their erroneous claims to the contrary.

#### ***Application Incompleteness***

Enbridge’s CWA Section 404 and RHA Section 10 DA permit application remains incomplete with vital information gaps, rendering the Corps’s determinations, however preliminary, premature and inaccurate. Detailed engineering plans and specifications may not be necessary for a

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<sup>31</sup> 33 U.S.C. § 1344; 40 C.F.R. § 230.1(a), (c).

<sup>32</sup> 33 U.S.C. § 403.

<sup>33</sup> 40 C.F.R. §§ 1500.1(a), 1506.6 (Sept. 14, 2020).

<sup>34</sup> *Id.* §§ 1500.1(a), 1500.3(b), 1503.1, 1503.4. *See also Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 36-37 (D.C. Cir. 2015) (NEPA serves “twin purposes of ensuring that (1) agency decisions include informed and careful consideration of environmental impact, and (2) agencies inform the public of that impact and enable interested persons to participate in deciding what projects agencies should approve and under what terms.”).

<sup>35</sup> 33 C.F.R. § 325.1(e).

<sup>36</sup> 40 C.F.R. § 1506.5(a)-(b) (this regulatory obligation is the same with minimal variation in both 2020 and 2024 versions).

completeness determination.<sup>37</sup> However, Enbridge's DA permit application lacks minimum requirements sufficient for public notice regarding descriptions and plans for construction and discharges in WOTUS.<sup>38</sup>

The Corps distinguishes between information necessary for an application's completeness determination which is less than what is required for permit decision-making.<sup>39</sup> In the first instance, neither the Corps nor the public can conduct adequate environmental review of a DA permit application without complete information about Enbridge's construction plans. This is especially relevant for members of the public who wish to review and provide technical feedback on particularly complex and controversial aspects of the Reroute. Enbridge's application and the Corps's corresponding environmental documents, for instance, do not include GIS files or full sets of geotechnical information upon which to base such review and input. Consequently, expert public input is restricted and the Corps's preliminary decisions underinformed.

Where, like here, essential information is missing or inadequate, it is the Corps's responsibility to obtain and make available to the public additional information from Enbridge. By failing to do so, the Corps relies on, without independently verifying, Enbridge's flawed and/or incomplete data and findings with limited public input. This violates the Corps's NEPA obligations.

The following is a non-exhaustive list identifying key pieces of information that are missing and/or have not been independently verified, as evidenced by the DCDD:

- The General Blasting Plan in Appendix 6 of the DCDD is too vague for the Corps or the public to comprehend and review the full scope of potential impacts. In December 2022, the Corps requested additional information and analysis from Enbridge regarding potential adverse impacts from blasting in wetlands and waterways and corresponding risk minimization and mitigation plans. Enbridge's response is glaringly deficient, as described in Section 6, and it is difficult to comprehend the Corps's acceptance thereof. Without detailed information as requested, it is impossible for the Corps to independently verify Enbridge's findings, let alone conduct an environmental review of impacts from blasting as required by NEPA. At a minimum, this deficiency substantiates the need for a full EIS. As it stands, the Corps lacks requisite information to justify issuing the DA permit.

[CROSS REFERENCES: §§ 6.3, 6.4, 7.2, 7.10]

- Enbridge also fails to provide the total acreage of wetlands that would be bisected and thus impacted by the Reroute. Further lacking is information about water flow direction, velocity, and seasonal variation, all of which is required for every single wetland in order for the Corps to determine the significance of potential environmental impacts. Instead,

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<sup>37</sup> 33 C.F.R. § 325.1(d)(1).

<sup>38</sup> *Id.* See Section II(b) of MEA and Clean Wisconsin's March 22, 2022 comments in response to the Corps's public notice of Enbridge's Permit Application No.: MVP-2020-00260-WMS for an earlier discussion of application incompleteness.

<sup>39</sup> DCDD § 4.1 at 26.

the Corps yields to Enbridge's unsupported assumption without independently verifying that impacts to wetlands will be minor. For a discussion of impacts to wetlands and Enbridge's missing and/or problematic corresponding plans and analyses, see Section 6. Once again this demonstrates an EIS is the appropriate level of NEPA review and, if properly evaluated, should lead to permit denial.

[CROSS REFERENCES: §§ 6.3, 6.5, 7.6, 7.11, 10.12]

- Baseline hydrologic data is absent from Enbridge's application materials and the Corps's DCDD. Enbridge's proposal to monitor groundwater in select wetlands for a short duration immediately prior to construction fails to establish adequate baseline data from which to assess and then mitigate post-construction damages. Without this baseline information, it is impossible for the Corps to make informed decisions about the Reroute's hydrologic impacts. Once wetland hydrology is altered, it cannot be fully restored. Even partial restoration requires severely intrusive engineering methods. At a minimum, the Corps should require more geotechnical borings at much higher frequencies along the entire route, which alone would cause extensive damage,<sup>40</sup> before it considers permitting pipeline construction through ecologically sensitive ecosystems and watersheds. The Corps should similarly obtain from Enbridge aerial thermal imagery of the entire proposed Reroute, which is necessary to gauge the location and characteristics of underground seeps.<sup>41</sup> Only after this type of baseline data is gathered and analyzed through a comprehensive EIS will the Corps and the public gain sufficient understanding of groundwater systems and the Reroute's potential impacts thereto.

[CROSS REFERENCES: §§ 6.3, 6.5, 7.2, 7.6, 7.10, 7.11]

- Relatedly, Enbridge included too few geologic data points to facilitate a satisfactory understanding and corresponding risk assessment of aquifers. The geology of Wisconsin's post-glacial landscape varies greatly over short distances. This factor complicates even the most competent risk assessment for confined aquifer breaches. Enbridge's current data points, which include geotechnical borings two miles apart,<sup>42</sup> are thus insufficient for determining the locations and types of aquifers along the proposed Reroute. This is especially concerning for the northern Wisconsin region where a combination of gravel and sandstone aquifers confined by a clay layer in close proximity to contiguous forested uplands produces artesian conditions.<sup>43</sup> Enbridge has adopted, and the Corps seemingly

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<sup>40</sup> As Enbridge acknowledges in DCDD, Appendix 2 at 3.

<sup>41</sup> Enbridge should conduct aerial thermal imagery flyovers in November or March, during which the ground is cold but snow cover is minimal, allowing the location and characteristics of groundwater seeps to be captured.

<sup>42</sup> DCDD Appendix 18 at 93.

<sup>43</sup> Grace E. Graham et al., *Wisconsin Geological and Natural History Survey, Inventory And Analysis Of Flowing Artesian Wells in Bayfield County, Wisconsin* (Jan. 19, 2024), available at <https://wgnhs.wisc.edu/pubshare/WOFR2024-01.pdf>; Mary Griggs Burke Center for Freshwater Innovation, Northland College, *Aversion to Diversion: Wisconsin's Artesian Resources and Implications for Future Withdrawals*

embraces, an approach that assumes there is low risk of confined aquifer breaches but for evidence to the contrary. For reasons articulated herein and further detailed in Sections 6.6 and 7.16, this approach is wholly inadequate and does not meet the Corps's burden to independently verify project impacts. In this case, given the state's geologic heterogeneity and region's artesian conditions, the Corps should assume high risk of damage to aquifers and deny the DA permit unless Enbridge can prove and the Corps can verify otherwise.

[CROSS REFERENCES: §§ 6.6, 7.16, 7.22]

The remaining topics are discussed elsewhere; cross references provided here:

- Direct, indirect, cumulative effects [CROSS REFERENCES: §§ 2.1, 5.0, 6.0, 7.0, 8.0, 9.0]
- Purpose and need, overall project purpose [CROSS REFERENCE: § 3.0]
- Alternatives [CROSS REFERENCES: §§ 5.0, 6.1]
- Less damaging crossing methods [CROSS REFERENCES: §§ 5.0, 6.1, 7.0]
- Mitigation [CROSS REFERENCE: § 8.0]
- Water quality [CROSS REFERENCES: §§ 6.0, 7.17, 10.1]
- Effects to aquatic resources [CROSS REFERENCES: §§ 6.0, 7.0, 9.0]
- Tribal treaty rights [CROSS REFERENCE: § 10.4]
- Environmental Justice [CROSS REFERENCES: §§ 10.4, 10.15]
- Endangered and threatened species [CROSS REFERENCES: §§ 7.10, 10.2]
- Climate change [CROSS REFERENCES: §§ 7.5, 7.11, 9.0]
- Oil spills [CROSS REFERENCES: §§ 6.0, 7.5, 9.0]
- Economic concerns [CROSS REFERENCE: § 7.3]
- Decommissioning or shutting down Line 5 [CROSS REFERENCES: §§ 2.1, 3.0, 5.3, 7.3, 7.5]

## **4.2 Additional Issues Raised by the Corps**

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## **4.3 Comments Regarding Activities and/or Effects Outside of the Corps's Scope of Review**

The purpose of the draft EA contained within the DCDD is to determine the significance of the Reroute's environmental impacts for the Corps to either proceed with an EIS (the appropriate level of NEPA review in this case) or issue a finding of no significant impact ("FONSI").<sup>44</sup> When making that significance determination, the Corps is required to consider "effects or impacts" that are "reasonably foreseeable and have a reasonably close causal relationship to the proposed

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(Fall 2021), available at [https://www.northland.edu/wp-content/uploads/2022/01/Aversion-to-Diversion-white-paper\\_web-V3\\_FINAL\\_Jan-2022\\_Hyperlinked.pdf](https://www.northland.edu/wp-content/uploads/2022/01/Aversion-to-Diversion-white-paper_web-V3_FINAL_Jan-2022_Hyperlinked.pdf).

<sup>44</sup> 40 C.F.R. §§ 1501.3(a)(2), 1501.5, 1508.1(h).

action.”<sup>45</sup> Both activities discussed below, HDD frac-outs and aquifer breaches, would be direct effects of the proposed action: construction of the Reroute. Both activities are therefore within the Corps’s jurisdiction to regulate, must be considered during the NEPA analysis, public interest review, and 404(b)(1) Guidelines compliance determination, and should inform the Corps’s permit decision-making.

### ***HDD Crossings and Foreseeable Frac-Outs***

The public’s concern about Enbridge releasing drilling fluids (frac-outs) along the Reroute is reasonable and warranted. In neighboring Minnesota, Enbridge used HDD methods to cross 21 sites during the Line 3 Pipeline Replacement Project in December 2020 through September 2021.<sup>46</sup> Enbridge released drilling fluids at 12<sup>47</sup> of those sites, with 28 reported spill incidents.<sup>48</sup> This means Enbridge caused frac-outs more often than not (57% failure rate) when using HDD crossing methods. The failure rate of frac-outs at river crossings alone was 80%.<sup>49</sup>

The Corps mischaracterizes releases of drilling fluids as “inadvertent” and thus “not foreseeable” activities within its jurisdiction to regulate.<sup>50</sup> Inadvertent does not equal unforeseeable. Regardless of Enbridge’s intentions, the frequency with which frac-outs occurred when the same company used the same crossing methods in a neighboring state justifies the Corps treating releases of drilling fluid, however inadvertent, as reasonably foreseeable. We question, though, whether impacts that occur more than a majority of the time as a necessary consequence of that activity is even “inadvertent.”

Construction of the Reroute would certainly be the direct cause of any frac-outs. See Section 6.3 for a discussion on regulating drilling fluid releases as discharges that would harm water quality.

In response to their failures on Line 3/93, Enbridge proposes design modifications that will supposedly reduce frac-out risk for the Reroute in Wisconsin.<sup>51</sup> Design modifications include increasing HDD bore lengths and adjusting bore angles to increase drilling depths for more soil confining capacity.<sup>52</sup> Enbridge’s willingness to modify HDD designs operates as an admission that frac-outs are indeed foreseeable. The Corps should not only regulate these foreseeable releases as discharges but is also responsible for independently verifying Enbridge’s proposed design modifications when assessing risk and evaluating the Reroute’s environmental impacts. It is

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<sup>45</sup> 40 C.F.R. § 1508.1(g).

<sup>46</sup> See generally State of Minnesota, Minnesota Pollution Control Agency, *In the Matter of Enbridge Energy, Limited Partnership, Stipulation Agreement* (October 2022), available at <https://services.pca.state.mn.us/api/v1/wimn/sites/documents/document?documentId=3753349>; see also Waadookawaad Amikwag, *Frac Outs* (last visited Aug. 30, 2024), <https://waadookawaadamikwag.org/frac-outs>. Note: Line 3 was replaced with Line 93; references to both or Line 3/93 throughout refer to the same pipeline.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> DCDD § 4.1 at 30.

<sup>51</sup> DCDD § 6.6.1 at 71.

<sup>52</sup> *Id.*



possible that drilling deeper might mitigate surface impacts, but it is far from clear that the risk of underground impacts from HDD will be reduced and not simply hidden.

[CROSS REFERENCES: §§ 6.3, 7.5, 7.12]

### ***Aquifer Breaches***

As explained above in Section 4.1, the unsupported assumption of low risk of aquifer breaches is invalid for NEPA review and does not support permit issuance. Two specific issues related to aquifer breaches in Enbridge's deficient application and the Corps's flawed analysis are identified here.

First, Enbridge's proposed design to reduce frac-outs during HDD crossings is at odds with its own scheme to reduce risk of confined aquifer breaches. On the one hand, Enbridge plans to increase the bore lengths for HDD crossings, which will maximize drilling depths in an attempt to "increase the safety factor and minimize the likelihood for an inadvertent return"<sup>53</sup> (or at least attempt to minimize the damage if a frac-out does occur at those depths). On the other hand, "[c]onfined aquifer breaches during construction are most likely to occur where the construction activities extend deep enough to penetrate the confining layer above an aquifer." The Corps recognizes HDD as one type of construction activity that extends deep enough to pierce an aquifer.<sup>54</sup> Coupled with Enbridge's plan to HDD even deeper, at least for the crossings at Silver Creek and the White River, the risk of aquifer breaches increases.

Next, the risk assessment for aquifer breaches relied upon by Enbridge and the Corps is fatally flawed. Enbridge hired two consultants to perform risk assessments for aquifer breaches along the proposed Reroute. Both acknowledge the geologic diversity of this area, although Enbridge and the Corps ignore Lake Superior Consulting's conclusion based on the "limited amount of information between well logs identified through this study and geotechnical boring locations" to "limit the depths of [construction] to avoid any potential unidentified aquifers."<sup>55</sup>

The consultant that Enbridge and the Corps do rely on, Barr Engineering, claims there are "no areas identified as having 'High Likelihood' of encountering artesian conditions along the project route." This claim, however, is based on well records and geotechnical borings that were not made available to the public, making it difficult if not impossible for the public and the Corps to verify Barr's interpretations and findings.

Even with the scant information available it is clear Barr's data is unreliable. The same criteria Barr used for assessing risk of aquifer breaches along the Reroute would have failed to flag a risk at the site of Enbridge's largest aquifer breach during Line 3/93 construction near the Fond Du

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<sup>53</sup> *Id.*

<sup>54</sup> DCDD § 6.3.3 at 58.

<sup>55</sup> DCDD Appendix 18 at 6.

Lac Reservation (Mile Post 1102.5).<sup>56</sup> One of Barr’s high risk criteria, proximity to a boring location that indicates possible presence of a confined aquifer, is particularly misleading. For instance, the nearest pre-construction boring location to the Fond du Lac aquifer breach site showed a confined aquifer, but it was one mile away, therefore the site of the breach was not flagged as ‘high risk.’ After the breach, however, another boring location installed directly adjacent to the breach site failed to indicate the presence of a confined aquifer. Data from boring locations are not reliable sources from which to assess risk of aquifer breaches, and even less so when boring locations are widely dispersed in a geologically heterogeneous and artesian rich area as northern Wisconsin.

The Corps artificially narrows its jurisdictional scope by defining impacts related to aquifer breaches as discharges outside of their regulatory control. Setting aside the unresolved question of regulating aquifer discharges, an aquifer breach directly caused by construction of the Reroute fits squarely within the Corps’s scope of NEPA review as a reasonably foreseeable effect. For more detailed comments regarding the impacts to private water supplies, water conservation, and property ownership, see Sections 6 and 7.

[CROSS REFERENCES: §§ 4.1, 6.3, 6.6, 7.16, 7.22]

## **SECTION 5.0 – ALTERNATIVES ANALYSIS**

### **5.1 Overview**

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### **5.2 Site Selection/Screening Criteria**

As established in Section 3, the Corps’s definition of the purpose and need for the Reroute is arbitrarily narrow and prevents the Corps from considering the full range of reasonable alternatives, including practicable alternatives that would have fewer and lesser environmental impacts. The Corps’s refusal to analyze alternatives outside of its narrowly defined purpose and need for the Reroute, “such as alternate sources of energy for public consumption”,<sup>57</sup> is therefore arbitrary and capricious as well. Since the purpose and need for the Reroute must not be defined in a way that excludes any alternatives that do not accomplish Enbridge’s specific goals,<sup>58</sup> alternate sources of energy for public consumption other than Line 5 are a vital piece of the Corps’s alternatives analysis.

The current exclusion of alternative sources of energy for public consumption suggests that the Corps’s consideration of an alternative’s ability “to reach identified delivery/receipt points” is limited only to those alternatives that will deliver petroleum products at the same capacity to

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<sup>56</sup> This site fails 3 out of 4 of Barr’s high risk criteria: (1) it is not in a valley with a deeply incised coldwater stream; (2) it is not a topographic low; and (3) it does not have spring/stream formation at the base of an aerially extensive highland.

<sup>57</sup> DCDD, p. 34.

<sup>58</sup> *Van Abbema*, 807 F.2d at 638.

Line 5 on the eastern side of the Bad River Reservation for further transportation. Indeed, the DCDD even analyzes alternative petroleum transport modes of truck and rail based on the ability “to transport the quantities of crude oil and NGLs currently transported to receipt points by Line 5.”<sup>59</sup> The DCDD also states that action alternatives “are limited to those that would connect the existing L5 pipeline west and east of the Band River Band Reservation.”<sup>60</sup> Such a limitation is inconsistent with the appropriately defined purpose and need for the Reroute because it ensures that only alternatives that involve rerouting Line 5 are under consideration.

[CROSS REFERENCE: § 3]

### **5.3 No Action Alternative**

The Corps’s determination that shutdown is unreasonable is entirely a product of its arbitrarily narrow definition of the purpose and need for the Reroute. Shutting down Line 5 is a practicable, reasonable alternative that is consistent with the appropriately defined purpose and need for the Reroute. In fact, as discussed in Section 3.1, a federal court has ordered a shutdown in June 2026 even if the Reroute cannot be built beforehand. A shut down is therefore reasonable *per se* and alternate sources of product and modes of transportation should be considered if practicable.

To be reasonable and meet the purpose and need for the Reroute, a no action alternative must certainly transport and deliver approximately the same amount of crude oil and natural gas liquids to the markets Line 5 currently serves. However, such alternatives do not have to utilize the existing Line 5. Perhaps more importantly, the practicability of alternative sources of product and modes of transportation cannot be analyzed individually. Such analyses are sure to yield determinations that those alternatives are separately impracticable and are not particularly helpful. We therefore do not comment on the Corps’ individual analysis of pipeline system alternatives and transportation by rail or truck.

Together, however, those alternate sources of product and modes of transportation do meet the appropriately defined purpose and need for the Reroute and are practicable. We therefore do comment on the Corps’s analysis of hybrid no-action alternatives below.

[CROSS REFERENCE: § 3.1]

#### **5.3.1 Pipeline System Alternatives**

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#### **5.3.2 Alternative Transport Modes**

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<sup>59</sup> DCDD, p. 35.

<sup>60</sup> *Id.* at 36-37.

### 5.3.2.1 Transportation by Rail

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### 5.3.2.2 Transportation via Truck

#### ***Hybrid No-Action alternatives***

This paragraph of the DCDD should be converted into a separate subsection of the alternative analysis because a hybrid no-action alternative is the least environmentally impactful and most practicable, reasonable alternative to the Reroute that is consistent with the overall purpose and need.

In October 2023, PLG Consulting released a report titled “Likely Market Responses to a Shutdown of Line 5” that demonstrates the practicability of the hybrid no-action alternative.<sup>61</sup> The report explains that, “[w]ith advance notice, the markets can be expected to [adapt to a Line 5 shut down] without supply shortages or price spikes.”<sup>62</sup> That is because “North American energy markets are dynamic and constantly adapting to change.”<sup>63</sup>

The companies participating in Line 5 products and markets are sophisticated and large energy firms that regularly evaluate and anticipate risks and market changes. Therefore, it’s not surprising that for at least the past six years, contingency plans have been developed by key refineries and other businesses whose supply chains may be altered in the event of a Line 5 shutdown.<sup>64</sup>

The conclusion of the PLG Consulting report is that “there is a range of commercially viable and operationally feasible supply chain alternatives for each of the end use destinations and markets that would be affected by a Line 5 shutdown.”<sup>65</sup> Using a combination of existing infrastructure, i.e., a hybrid no-action alternative, such as existing pipeline systems, waterborne deliveries, and transportation via rail, all but 13% of Line 5’s existing crude oil supply can be replaced.<sup>66</sup> The remaining supply can be replaced with relatively modest improvements to existing rail infrastructure.<sup>67</sup> Much of the natural gas liquid supply can be replaced by a combination of transportation via rail and fully utilizing storage capacity to meet peak winter demands for propane, with the remaining supply to be replaced by modest improvements to existing rail infrastructure.<sup>68</sup>

Under an appropriately defined purpose and need for the Reroute, the Reroute does not appear to be needed at all, and the hybrid no-alternative approach is both reasonable and practicable.

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<sup>61</sup> PLG Consulting, *Likely Market Responses to a Shutdown of Line 5* (Oct. 2023), available at <https://plgconsulting.com/white-paper-likely-market-responses-to-a-line-5-shutdown/>.

<sup>62</sup> *Id.* at 8.

<sup>63</sup> *Id.* at 6.

<sup>64</sup> *Id.* at 8.

<sup>65</sup> *Id.* at 9.

<sup>66</sup> *Id.* at 10.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 14-17.

That there may be costs and logistical issues associated with the hybrid no-alternative approach does not render it impracticable. All alternatives have associated costs and logistical issues. The question is whether those alternatives are cost-prohibitive, and the PLG Consulting report makes clear the hybrid no-action alternative is not cost prohibitive, especially when compared to the costs of the route alternatives that the Corps found to be practicable in Section 5.4. Further, the no-action hybrid alternative avoids the impacts to water resources that the identified action alternatives would cause. Since there is a practicable, reasonable alternative to the Reroute that would have less environmental impacts, Enbridge's application should be denied.

[CROSS REFERENCE: § 5.4]

#### **5.4 Action Alternative**

As established immediately above, hybrid alternatives that require some investment in pipeline and rail infrastructure are practicable, and the Corps's preliminary determination that there are not "economically feasible transportation alternatives other than rerouting the existing pipeline outside the boundaries of the Bad River Reservation" is arbitrary and capricious.<sup>69</sup> If the Corps determines that any hybrid alternative could potentially require approval from the Corps because it involves a regulated activity, that alternative should be evaluated as an action alternative.

Regarding the routes identified as action alternatives in Section 5.4, such alternatives may be secondary considerations to a practicable, reasonable hybrid alternative that does not involve the continued, indefinite operation of Line 5. Nevertheless, the Corps's analysis of those alternative routes is inadequate.

The Corps has preliminarily determined that each identified alternative route is both reasonable and practicable, but dispenses with each as having more environmental impacts than Enbridge's preferred alternative. In each instance, that preliminary determination is based on either the quantity (in terms of acreage) of impacted water resources or the proximity of the alternative route to the Bad River Reservation. These considerations alone do not establish that these alternative routes would be more environmentally damaging than Enbridge's proposed alternative.

Although the DCDD identifies the acreage of water resources that will be impacted, it fails to qualify the value of those water resources. That more acres of wetlands, for example, will be impacted does not account for the ecosystem services different types of wetlands provide. Impacts in terms of acreage may be indicative, but are not dispositive. The Corps even recognizes the importance of high quality wetlands in Section 5.7.2. Simply put, the Corps needs to engage in a qualitative analysis of those impacts for each alternative route in addition to the quantitative analysis provided to be able make an informed decision about those breadth of those impacts.

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<sup>69</sup> DCDD, p. 36.

The only instance where the Corps attempts to qualify those impacts is based on proximity to the Bad River Reservation because the alternative route contemplated (RA-01) crosses waters that flow downstream to the Reservation.<sup>70</sup> But all the alternative routes identified are in the Bad River watershed and cross waters that flow downstream to the Reservation. Without more, proximity to the Bad River Reservation does not necessarily establish that an alternative route will have more or less environmental impacts.

The Corps's analysis of each alternative route is cursory and makes preliminary determinations that are unsupported. This is especially problematic because the Corps has determined each alternative route to be both reasonable and practicable. As such, the Corps must do more to establish, not simply assert, that those alternative routes would result in greater environmental impacts. Otherwise the Corps's alternative analysis is inadequate for purposes of NEPA and 404(b)(1) Guidelines compliance.

[CROSS REFERENCES: §§ 5.3, 5.4.1, 5.4.2, 5.4.3, 5.4.4, 5.7.2]

#### **5.4.1 Route Alternative RA-01**

[CROSS REFERENCE: § 5.4]

##### **5.4.1.1 Alternative RA-01 Variants**

[CROSS REFERENCE: § 5.4]

#### **5.4.2 Route Alternative RA-02**

[CROSS REFERENCE: § 5.4]

#### **5.4.3 Route Alternative RA-03**

[CROSS REFERENCE: § 5.4]

#### **5.4.4 Applicant's Preferred Alternative**

[CROSS REFERENCE: § 5.4]

### **5.5 Summary of Corps Alternatives Analysis**

[CROSS REFERENCES: §§ 5.2-5.4]

### **5.6 Least Environmentally Damaging Practicable Alternative**

Based on the information provided throughout Section 5 of these comments, we respectfully disagree that the Corps has established the Reroute is the least environmentally damaging practicable alternative that would meet the purpose and need for the Reroute. The DCDD fails to meaningfully evaluate the full range of practicable alternatives due to the Corps's arbitrary

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<sup>70</sup> *Id.* at 40.

definition of the purpose and need for the Reroute, which essentially makes the determination the Reroute is the least environmentally damaging practicable alternative a foregone conclusion. Enbridge's goal of continuing to operate Line 5 is not the only means by which to fulfill the purpose and need for the Reroute, and the Corps must better analyze all practicable alternatives and their environmental impacts before determining which practicable alternative is the least environmentally damaging.

[CROSS REFERENCES: §§ 5.1-5.5, 6.1]

## **5.7 Additional LEDPA Avoidance and Minimization Sequencing**

### **5.7.1 Crossing Method Alternatives**

[CROSS REFERENCE: § 4.3]

### **5.7.2 Alternative Crossing Locations for High Quality Wetlands**

[CROSS REFERENCE: § 6.8]

### **5.7.3 Alternative White River Crossing Methods**

[CROSS REFERENCE: § 4.3]

### **5.7.4 Alternative White River Crossing Locations**

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## **SECTION 6.0 – EVALUATION OF THE DISCHARGE OF DREDGED AND FILL MATERIAL IN ACCORDANCE WITH SECTION 404(b)(1) GUIDELINES**

In the DCDD, the Corps walks through the Section 404(b)(1) Guidelines (“the Guidelines”) in (mostly) the sequence prescribed by regulation.<sup>71</sup> Accordingly, these comments follow that sequence as well. In doing so, several themes emerge.

Impacts are understated, avoidance measures are inadequate, monitoring proposals are not well designed, performance standards are vague or inadequate, and options for corrective action are underwhelming.

What this shows is that the Corps lacks the information it needs to conclude the standards for approving an application to discharge to wetlands are met. The application should be denied, or, in the alternative, the Corps should at least conduct a full EIS.

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<sup>71</sup> 40 C.F.R. § 230.5.

## 6.1 Finding of Practicable Alternatives and Least Environmentally Damaging Practicable Alternative (40 CFR 230.10(a))<sup>72</sup>

No discharge of dredged or fill material is permitted into WOTUS if there is a practicable alternative which would have less adverse impact on the aquatic ecosystem.<sup>73</sup> Practicable alternatives that the Corps must consider include a no discharge (or no-action) alternative and discharges to other locations.<sup>74</sup> An alternative is practicable if it is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”<sup>75</sup> Further, for projects that are not water dependent, “practicable alternatives that do not involve discharge to special aquatic sites are presumed to be available, *unless clearly demonstrated otherwise.*”<sup>76</sup>

The Corps here largely summarizes its NEPA alternatives analysis at Section 5 of the DCDD. The Corps’s preliminary determination is that no-action alternatives do not meet the overall project purpose, there are no practicable alternatives that avoid discharges to special aquatic sites, and there are no alternatives that would be less environmentally damaged than the route favored by Enbridge.<sup>77</sup>

The Guidelines anticipate that the alternatives analysis conducted under NEPA may provide the information needed to conduct the alternative analysis under the Guidelines:

For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.<sup>78</sup>

The Corps’s reliance on its alternatives analysis from Section 5 of the DCDD to provide the information needed to conduct the alternatives analysis required under the Guidelines is thus consistent with the Guidelines. However, this merely reveals that the defects and omissions in the Corps’s NEPA alternatives analysis carry over into its application of the permitting Guidelines, as well.

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<sup>72</sup> Examine practicable alternatives to the proposed discharge, that is, not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences (§ 230.10(a)). 40 C.F.R. § 230.5(c).

<sup>73</sup> 40 C.F.R. § 201.10(a).

<sup>74</sup> 40 C.F.R. § 230.10(a)(1).

<sup>75</sup> 40 C.F.R. § 230.10(a)(2).

<sup>76</sup> 40 C.F.R. § 230.10(a)(3) (emphasis added).

<sup>77</sup> DCDD, p.51.

<sup>78</sup> 40 C.F.R. § 230.10(a)(4).



Given this, the comments in response to Section 5, above, are incorporated here as part of our comment on the Corps's alternatives analysis in Section 6.1. But there is a point we emphasize here.

As the Corps acknowledges, the Reroute is not water dependent.<sup>79</sup> This means practicable alternatives that do not discharge to special aquatic sites are presumed to exist, unless the permit applicant, Enbridge, clearly demonstrates otherwise.<sup>80</sup> To be clear, this puts the burden on Enbridge to prove alternative sites do not exist.

. . . the issue is not, as [the permit applicant] claims, whether the Corps is able to prove the existence of available sites but rather is whether the plaintiff, as the applicant, has provided evidence to prove the unavailability of alternative sites which would be subject to less impact than would be the proposed development.<sup>81</sup>

For non-water dependent projects, this burden to show practicable alternatives is heightened.<sup>82</sup>

Despite this heightened standard, the Corps simply observed that linear projects like pipelines may need to cross WOTUS and did not modify its assessment of what level of demonstration is required from Enbridge to conclude there are no practicable alternatives.<sup>83</sup> However, it would read 40 CFR § 230.10(a)(3) out of the Guidelines to conclude that a project that is not water dependent is treated the same as one that is water dependent simply because it is a sufficiently long linear project. Contrary to the Corps's suggestion, there is no implied exemption for linear projects to the requirement that applicants for projects that are not water dependent must rebut the presumption of practical alternatives with a clear demonstration otherwise. The Corps has thus failed to meaningfully apply the Guideline's clear presumption.

## **6.2 Candidate Disposal Site (40 CFR 230.11(f))<sup>84</sup>**

The Corps is required to delineate the candidate disposal site, consistent with 40 CFR § 230.11(f). That subsection provides, in relevant part:

Each disposal site shall be specified through the application of these Guidelines. The mixing zone shall be confined to the smallest practicable zone within each specified disposal site that is consistent with the type of dispersion determined to be appropriate by the application of these Guidelines.

A "mixing zone" is "a limited volume of water serving as a zone of initial dilution in the immediate vicinity of a discharge point where receiving water quality may not meet quality standards or

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<sup>79</sup> DCDD, pp.25-26.

<sup>80</sup> 40 C.F.R. § 230.10(a)(3).

<sup>81</sup> See *Korteweg v. U.S. Army Corps of Eng'rs*, 650 F. Supp. 603, 604 (D. Conn. 1986). See also, *Schmidt v. U.S. Army Corps of Eng'rs*, 2009 U.S. Dist. LEXIS 17060, at \*42 (W.D. Mich. 2009).

<sup>82</sup> See *Hough v. Marsh*, 557 F. Supp. 74, 83 (D. Mass. 1982) ("the fact that the project is not water-dependent should necessitate a more persuasive showing than otherwise concerning the lack of alternatives.").

<sup>83</sup> DCDD, p.26.

<sup>84</sup> Delineate the candidate disposal site consistent with the criteria and evaluations of § 230.11(f). 40 C.F.R. § 230.5(d).

other requirements otherwise applicable to the receiving water.”<sup>85</sup> The Guidelines provide a range of factors that the Corps must consider in determining the acceptability of a proposed mixing zone.<sup>86</sup>

Despite the clear mandate to identify disposal sites and the mixing zone within each candidate disposal site, and to confine the mixing zone to the smallest practicable zone based on the sub. (f)(2) factors, the Corps says essentially nothing about this matter.

The DCDD simply identifies the WOTUS where a discharge is proposed as the disposal sites and names several factors it “is considering.”<sup>87</sup> No proposed mixing zones are discussed, much less found acceptable via application of the listed factors.

There is thus no way to determine whether the proposed mixing zones—if any have even been proposed—are being confined to the smallest practicable zone as required by the Guidelines. This omission of key information is problematic. It also limits the ability of the Corps to fully consider the Reroute’s environmental impacts, and thus to properly apply the permitting standards.<sup>88</sup>

### **6.3 Potential Impacts on the Physical and Chemical Characteristics of the Non-Living Environment (Subpart C, 40 CFR Part 230).<sup>89</sup>**

Subpart C lists potential impacts on the physical and chemical characteristics of the aquatic ecosystem that the Corps must consider when making factual determinations and findings of compliance or non-compliance with the permitting standards in 40 CFR § 230.10. The Corps must therefore both adequately assess these potential impacts when reaching its factual determinations and properly apply those determinations to the relevant permitting standards.

#### **6.3.1 Substrate**

“The substrate of the aquatic ecosystem underlies open waters of the United States and constitutes the surface of wetlands. It consists of organic and inorganic solid materials and includes water and other liquids or gases that fill the spaces between solid particles.”<sup>90</sup> The substrate can be affected in various ways by discharge of dredged or fill material:

Discharges which alter substrate elevation or contours can result in changes in water circulation, depth, current pattern, water fluctuation and water temperature. Discharges may adversely affect bottom-dwelling organisms at the site by smothering immobile forms or forcing mobile forms to migrate. Benthic forms present prior to a discharge are unlikely to recolonize on the discharged material if it is very dissimilar from that of the discharge site. Erosion, slumping, or lateral

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<sup>85</sup> 40 C.F.R. § 230.3(h).

<sup>86</sup> 40 C.F.R. § 203.11(f)(2).

<sup>87</sup> DCDD, p.52.

<sup>88</sup> Section 6.10; 40 C.F.R. § 230.10(b)(1) (requiring consideration of water quality impacts “after consideration of disposal site dilution and dispersion”).

<sup>89</sup> Evaluate the various physical and chemical components which characterize the non-living environment of the candidate site, the substrate and the water including its dynamic characteristics (subpart C). 40 C.F.R. § 230.5(e).

<sup>90</sup> 40 C.F.R. § 230.20(a).

displacement of surrounding bottom of such deposits can adversely affect areas of the substrate outside the perimeters of the disposal site by changing or destroying habitat. The bulk and composition of the discharged material and the location, method, and timing of discharges may all influence the degree of impact on the substrate.<sup>91</sup>

The Corps has preliminarily determined that impacts to substrate would be temporary and minor. This understates the duration and severity of the impacts to substrate the Reroute would cause.

The planned activities to grade, trench, dewater, blast, and otherwise manipulate the surface of wetlands and waterways lying within the Reroute's path will undoubtedly "alter substrate elevation or contours[.]"

To nonetheless find that these impacts will be temporary and minor, the Corps relies on Enbridge's assertions that it will: use construction matting to minimize dispersion and rutting; excavate and store soils, boulders, rocks, and trees, so they can be placed back in their pre-construction condition; follow remediation plans to address bank erosion; and, for locations requiring blasting, restore streambeds and contours to their "near pre-construction" state.<sup>92</sup> Where deemed necessary, Enbridge "would create" a site-specific blasting plan.<sup>93</sup> Where fine silts are "displaced," it is assumed "natural deposition" will restore this layer.<sup>94</sup> Enbridge says it will "visually assess" the disturbed area for "adaptive management of restoration."<sup>95</sup> This discussion references additional planning documents in Appendices 3 and 5, which are the Wetland and Waterbody Restoration and Post-Construction Monitoring Plan and Specific Drawings for Channel Remediation, respectively.

At root, the problem with these plans to avoid impacts to substrate and then restore the affected area to pre-construction elevation and contours is that, considering the scope and intensity of these land-disturbing activities, it is much easier said than done. The foreseeable and likely result of the Reroute is impacts that are neither temporary nor minor.

***Construction Would Adversely Alter Site Substrate and Plans to Avoid Impacts to Substrate are Undeveloped and Insufficient***

Unsurprisingly, other agencies, including the Environmental Protection Agency ("EPA"), have voiced concerns about the effect of blasting. The General Blasting Plan says nothing about how impacts to substrate will be minimized or avoided. Indeed, it says very little about environmental impacts avoidance, at all. The section entitled "Environmental" is simply a conclusory statement that special attention will be given to making sure the Environmental Protection Plan ("EPP") is followed.<sup>96</sup> But the EPP does not discuss how blasting will be conducted to reduce impacts to the surface of wetlands. The following section on "In-Stream Blasting" similarly contains nothing but

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<sup>91</sup> 40 C.F.R. § 230.20(b).

<sup>92</sup> DCDD, p.52.

<sup>93</sup> DCDD, p.53.

<sup>94</sup> DCDD, p.53.

<sup>95</sup> DCDD, p.52.

<sup>96</sup> DCDD, Appendix 6, p.11.

conclusory statements that best management practices (“BMPs”) will be followed and impacts will be subject to restoration.<sup>97</sup> This leaves us with a stated commitment to develop site-specific blasting plans later that would “include details and calculations regarding environmental variables[.]”<sup>98</sup> It is a plan to have a plan, in other words.

This is no small omission. Blasting will inevitably alter the contours and microtopography of the wetlands crossed by the Reroute. It would also fracture bedrock beyond the immediate pipeline laydown area. Blasting is understood to fracture and fragment rock beyond the immediate blasting area, known as the “fragmentation zone.”<sup>99</sup> Those blasting impacts to the substrate will alter how water flows on and through the surface by creating new channels from the surface to groundwater (and vice versa) including in wetlands adjacent to the trench, and in uplands. But it is hard to know how extensive these impacts will be—much less how Enbridge would avoid, detect, or correct these impacts—with only a vague, general blasting plan. BMPs Enbridge otherwise mentions are of little use here. For example, trench breakers may have some efficacy in other contexts, but they will not control flow in the discrete fracture zone if it extends beyond the trench itself, which is a near certainty. In short, absent a comprehensive, non-theoretical plan for minimizing those impacts, the Corps is not able to fully consider substrate impacts as required by the Guidelines, or determine that impacts would be minor or temporary.

Where necessary to cross a wetland with standing water, Enbridge would use a “push/pull” method to place the pipeline.<sup>100</sup> This involves a backhoe digging a trench, the pipeline section being “push-pulled,” or possibly floated into position and then sunk.<sup>101</sup> A backhoe would then backfill the trench “to restore the wetland” (apparently with non-segregated soil).<sup>102</sup> The use of the “push/pull” method will undoubtedly destroy the existing surface contours in the wetland, which is not going to be readily restored by a backhoe backfilling the trench.

Grading, trenching, and dewatering will require significant physical modifications of the site substrate. This should not be controversial, and we do not understand Enbridge or the Corps to find otherwise; rather, we understand the thrust of the DCDD to be that whatever impacts these activities do cause, they will be restored. This brings us to the next issue.

***Plans to Restore Surface Elevations and Contours to Pre-Construction Conditions are Undeveloped and Insufficient***

Enbridge’s plan to restore surface contours to their pre-construction condition fares little better.

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<sup>97</sup> DCDD, Appendix 6, p.11.

<sup>98</sup> DCDD, p.53, Appendix 6, p.6.

<sup>99</sup> Sim, Y., Cho, GC. & Song, KI. Prediction of Fragmentation Zone Induced by Blasting in Rock. *Rock Mech Rock Eng* 50, 2177–2192 (2017). <https://doi.org/10.1007/s00603-017-1210-6>

<sup>100</sup> DCDD, Appendix 1, pp.24-25.

<sup>101</sup> DCDD, Appendix 1, pp.24-25.

<sup>102</sup> DCDD, Appendix 1, pp.24-25.

Excavating, segregating, transporting, storing, and then replacing soils, debris, rocks, and trees to closely mimic the pre-construction conditions is a tall task. Enbridge’s plan for managing the soil is cursory, and downplays the risk of loss of organic matter, the spread of invasive species, and the inability to restore the disturbed area to anything approximating the pre-construction conditions.

In wetlands with standing water, Enbridge acknowledges that soil segregation is typically not practicable, so the best Enbridge can commit to is to attempt to segregate what it can of the organic topsoil layer.<sup>103</sup> This is significant because it will likely mean the loss of organic matter in these areas where soil cannot be segregated and replaced following construction. That loss limits revegetation, impairs the wetland’s functioning as critical habitat for wildlife, and essentially guarantees that construction will cause permanent impacts.

More generally, Enbridge would not be able to exactly restore the pre-construction microtopography, which was naturally developed over thousands of years to create these wetlands. Even *approximating* the pre-construction surface elevations contours—which is all Enbridge commits to doing—would not be simple or easy. Given this, one would expect a detailed plan to restore surface elevations and contours, with strong, objective metrics for success or failure, and a reassuring plan for remedial actions to fix any errors.

Instead, Enbridge’s plan amounts to repeated conclusory assertions that it will restore the disturbed area as near as practicable to pre-construction conditions, an assertion the Corps repeats throughout its DCDD, as well, in support of finding that impacts would be minor and temporary. However, little information about how pre-construction conditions will be restored is provided.

The EPP provides that backfilling will follow pipe installation.<sup>104</sup> Where soils were segregated, the subsoil will “be replaced” and then the topsoil will be spread “uniformly” over the area where it was removed from.<sup>105</sup> “[R]easonable attempts will be made to return the subsoil to its pre-construction density.”<sup>106</sup> If the native soil cannot be replaced, then clean sand will be used.<sup>107</sup>

In wetland areas where trenches are backfilled, Enbridge says that subsoils will not be allowed to be mounded above the elevation of the ground adjacent to the trench, and then segregated topsoil will be spread no more than 12 inches above the adjacent undisturbed soil, although in unsaturated wetlands Enbridge might choose a different height.<sup>108</sup> Of course, in wetlands with standing water, Enbridge has acknowledged that soil segregation would be unlikely to occur. That is all the EPP has to say about backfilling methodology.

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<sup>103</sup> DCDD, Appendix 1, p.10.

<sup>104</sup> DCDD, Appendix 1, p.12.

<sup>105</sup> DCDD, Appendix 1, p.12.

<sup>106</sup> DCDD, Appendix 1, p.12.

<sup>107</sup> DCDD, Appendix 1, p.12.

<sup>108</sup> DCDD, Appendix 1, p.12.

There is more on “Cleanup and Rough/Final Grade,” yet this contains just general explanations of what grading and clean up are, some timelines for completion, and the repeated claim that Enbridge will restore disturbed areas to pre-construction conditions.<sup>109</sup> No explanation is given for how final grading will be done to restore the pre-construction conditions, beyond stating that topsoil will be returned.

The EPP does have another section on “Land Leveling Following Construction”; however, this section says nothing substantive, stating, in its entirety:

Following the completion of the pipeline, the construction ROW will be restored to its pre-construction conditions, as practicable. Should uneven settling or documented surface drainage problems occur following the completion of pipeline construction and restoration, Enbridge will take appropriate steps to remedy the issue.<sup>110</sup>

The Corps points to the Wetland and Waterbody Restoration Plan, too, in stating that site conditions would be restored to their pre-construction condition.<sup>111</sup> For wetlands, however, the “wetland restoration” section of this plan is cursory and gives no additional information about how surface elevations and contours will be restored.<sup>112</sup> For other waterbodies, the Restoration Plan largely references back to the EPP and eight streambed-specific restoration plans contained there and summarizes their content.<sup>113</sup> This section tracks and repeats some of what has been said above, regarding soil segregation.<sup>114</sup>

In sum, then, we are left with the impression that Enbridge proposes to simply move segregated soils back to where they were, using heavy equipment to move and regrade the affected areas. This highly general plan does not inspire confidence that site conditions will be restored to their pre-construction conditions. This might be permissible if Enbridge proposed an ironclad plan to monitor for any deviations from pre-construction conditions and respond accordingly with effective actions to fix those deviations. Instead, these aspects of the proposed plan are also deficient.

***The Monitoring, Performance Standards, and Corrective Actions Enbridge Would Use to Address Impacts to Substrate are Undeveloped and Would Create Additional Environmental Risk***

The proposed post-construction monitoring plans are vague, subjective, and would not capture impacts to substrate that impair wetland functioning by altering vegetation and hydrology.

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<sup>109</sup> DCDD, Appendix 1, p.12.

<sup>110</sup> DCDD, Appendix 1, p.13.

<sup>111</sup> DCDD, p.53.

<sup>112</sup> DCDD, Appendix 3, p.7.

<sup>113</sup> DCDD, Appendix 3, pp.18-19

<sup>114</sup> DCDD, Appendix 3, pp.18-19.

Enbridge has collected elevation data along the construction corridor.<sup>115</sup> Following construction, the general monitoring approach for Year 1 post-construction in wetland areas would include evaluations of site topography.<sup>116</sup> Enbridge would observe elevation changes affecting wetland hydrology through visual comparison with surrounding areas.<sup>117</sup> In Years 2 through 6, Enbridge would “revisit” areas where topography had been affected by crowning and subsidence.<sup>118</sup> For waterbodies crossed by pipeline installation, Enbridge would “visually monitor” each waterbody during the growing season and document, among other things, “streambed characteristics and composition of the substrate[.]”<sup>119</sup>

The wetland performance standards relevant to substrate are similarly vague and subjective. Enbridge’s plan merely includes an “[a]dditional restoration criteria” of “[w]etland topography is restored as near as practicable to baseline conditions and/or similar to the topography of adjacent undisturbed wetland areas.”<sup>120</sup> The comparison with baseline conditions would be based on the pre-construction data mentioned above.<sup>121</sup>

So, either wetland topography will be restored to pre-construction conditions, or it will be “similar to” nearby wetlands. That is the performance standard that, if not met, would trigger the need for additional restoration work. It is hard to imagine a more subjective criteria that could more easily be met. All Enbridge must do is visually assess the impacted wetlands and either find it looks like the wetland before they installed the pipeline, or that it is “similar to” adjacent wetlands that were not disturbed by construction.

For other waterbodies, the “waterbody success criteria” includes a criterion relevant to substrate. “[T]he composition of the bed substrate approximates the preconstruction baseline conditions and/or adjacent undisturbed bed areas[.]”<sup>122</sup> As noted, the EPP merely provides that “[s]hould uneven settling ... occur following the completion of pipeline construction and restoration, Enbridge will take appropriate steps to remedy the issue.”<sup>123</sup> This is a vague, subjective performance standard.

The Corps seems to understand that the entirety of the plan to monitor and assess whether substrate in wetlands and/or waterbodies have been affected is to “visually assess” the disturbed area, and compare it to adjacent, undisturbed areas for “adaptive management of restoration”.<sup>124</sup> This is not sufficient.

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<sup>115</sup> DCDD, Appendix 3, p.3.

<sup>116</sup> DCDD, Appendix 3, p.8.

<sup>117</sup> DCDD, Appendix 3, p.8.

<sup>118</sup> DCDD, Appendix 3, p.10.

<sup>119</sup> DCDD, Appendix 3, p.20.

<sup>120</sup> DCDD, Appendix 3, p.16.

<sup>121</sup> DCDD, Appendix 3, p.16.

<sup>122</sup> DCDD, Appendix 3, p.21.

<sup>123</sup> DCDD, Appendix 1, p.13.

<sup>124</sup> DCDD, p.52.

Making matters worse, the “corrective actions” purportedly available to remedy deviations from the pre-construction conditions are either too vague to be meaningful or would only exacerbate the environmental risks presented by the Reroute.<sup>125</sup> Thus, rather than creating confidence that, eventually, the substrate would be put back to its pre-construction elevation and contour, these plans create additional reason for concern, further undermining the Corps’s conclusion that impacts would be minor and temporary.

The corrective actions are described only very generally, making it hard to know precisely how Enbridge would correct impacts to wetland and waterway substrate that were not addressed during initial restoration attempts.<sup>126</sup> But what methods are described are notable for the new risks they present to the environment. Indeed, these risks are acknowledged by Enbridge, which notes that the risk of additional impacts caused by additional restoration may weigh in favor of taking no action, despite failure to meet performance criteria, i.e., despite observing that the wetland and waterways substrate is not functioning in its pre-construction capacity. Amongst other concerns, this would plainly result in impacts to wetland functioning that are in no sense “temporary.”

For example, Enbridge might engage in “[r]egradation or recontouring to address topography or hydrology issues.”<sup>127,128</sup> That would involve moving heavy equipment back out to the construction corridor and, again, disturbing the surface of wetlands. Enbridge acknowledges that such work would likely result in additional wetland impacts and thus implicate the Corps’s permitting requirements for discharge of dredge or fill material to WOTUS.<sup>129</sup> It should be obvious that impacts to wetlands simply cannot be temporary if their surface, i.e., substrate, is repeatedly altered by construction activities. In case one might think this is only a measure of last resort, it is worth noting that Enbridge mentions how it would respond to topography-related issues *four* times in this short section, each time stating that corrective actions would include regrading and recontouring, without mentioning any other interventions as options.<sup>130</sup> In other words, the Corps can reach no conclusion other than that, if initial restoration does not work, the risk of which is high, then Enbridge will either engage in risky regrading and recontouring activities, or do nothing, letting impacts to wetland and waterbody functioning caused by substrate impacts

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<sup>125</sup> DCDD, Appendix 3, pp.21-22.

<sup>126</sup> DCDD, Appendix 3, pp.21-22.

<sup>127</sup> DCDD, Appendix 3, p.21.

<sup>128</sup> Impacts to substrate must be assessed, in part, because, they can “result in changes in water circulation, depth, current pattern, water fluctuation and water temperature.” 40 C.F.R. § 230.20(b). Given this, many of these concerns also bear on our comments below regarding hydrological impacts. See Comment Section 6.3.3., 6.3.4., 6.3.5. Here we emphasize that each wetland is a product of its hydrology, soils, and vegetation. You alter one of these characteristics, and you have a different wetland than the one nature created, or perhaps you have no wetland at all anymore. Impacts to substrate thus create a *permanent* change in a wetland, not a temporary impact that can be waved away as insignificant.

<sup>129</sup> DCDD, Appendix 3, p.21.

<sup>130</sup> DCDD, Appendix 3, p.21.



persist.<sup>131</sup>

Our concerns are all consistent with scientific evaluations of pipeline construction impacts to site soils. Several studies have documented short- and long-term negative impacts of pipeline installation on upland and wetland soil profiles and vegetation. Brehm and Culman (2022) prepared a systematic literature review of available studies and concluded that the majority of studies found pipeline installation resulted in soil degradation via increased compaction and soil mixing, among other factors. Also, the studies showed that pipeline construction also led to decreased soil productivity and water infiltration for many years after installation.<sup>132</sup> Olson and Doherty (2012) found similar negative impacts to soils and vegetation in southeastern Wisconsin wetland areas crossed by pipelines. The study found that the soils within the pipeline corridor are drier and more compact than undisturbed soil profiles adjacent to the Right of Way (“ROW”), even eight years after construction.<sup>133</sup>

Taken together, the plans to avoid, restore, monitor, and correct impacts to wetland and waterway substrate are underwhelming. Indeed, it is hard to avoid the conclusion that Enbridge’s plan is simply to trench and blast through these wetlands and waterways, backfill with soil, and hope there are no lasting impacts, at least no impacts that would trigger additional remedial actions. This does not provide the Corps the information it needs to conclude that substrate impacts would be minor and temporary, and any such determination made without this information would be arbitrary and capricious.

### 6.3.2 Suspended Particulates/Turbidity

“Suspended particulates in the aquatic ecosystem consist of fine-grained mineral particles, usually smaller than silt, and organic particles.”<sup>134</sup> Suspended particulates may enter waterbodies from dredge and fill activities, causing elevated levels of suspended particulates in those waterbodies.<sup>135</sup>

These new levels may reduce light penetration and lower the rate of photosynthesis and the primary productivity of an aquatic area if they last long enough. Sight-dependent species may suffer reduced feeding ability leading to limited growth and lowered resistance to disease if high levels of suspended particulates persist. The biological and the chemical content of the suspended

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<sup>131</sup> Related to this, Enbridge’s plan states that in waterbodies “[a]s part of Enbridge’s routine/normal operational activities, no routine post-construction maintenance or work is anticipated to be conducted... however, Enbridge will generally maintain a 50-ft-wide operational corridor along the pipeline in an herbaceous state to facilitate aerial monitoring and pipeline access.” DCDD, Appendix 3, p. 19. This maintenance will involve additional people and equipment routinely entering the corridor, with likely impacts to purportedly restored surface elevations and contours.

<sup>132</sup> Brehm, T., & Culman, S. (2022). Pipeline installation effects on soils and plants: A review and quantitative synthesis. *Agrosystems, Geosciences & Environment*, 5, e20312. <https://doi.org/10.1002/agg2.20312>

<sup>133</sup> Erik R. Olson, James M. Doherty, The legacy of pipeline installation on the soil and vegetation of southeast Wisconsin wetlands, *Ecological Engineering*, Volume 39, 2012, Pages 53-62, ISSN 0925-8574, <https://doi.org/10.1016/j.ecoleng.2011.11.005>.

<sup>134</sup> 40 C.F.R. § 230.21(a).

<sup>135</sup> 40 C.F.R. § 230.21(a).

material may react with the dissolved oxygen in the water, which can result in oxygen depletion. Toxic metals and organics, pathogens, and viruses absorbed or adsorbed to fine-grained particulates in the material may become biologically available to organisms either in the water column or on the substrate. Significant increases in suspended particulate levels create turbid plumes which are highly visible and aesthetically displeasing.<sup>136</sup>

The DCDD acknowledges the Reroute would likely cause increased sedimentation and turbidity, but the Corps has tentatively determined that effects would be minor and short-term. This conclusion largely turns on two determinations: the BMPs described in the EPP will reduce the amount of sedimentation and turbidity, and Enbridge’s modeling suggests impacts would be temporary and geographically limited in scope.

The BMPs Enbridge plans to use have some value; however, they would neither eliminate sedimentation and turbidity caused by pipeline installation nor necessarily confine increases in sedimentation and turbidity to short-term impacts only. Stormwater and erosion control BMPs can help reduce impacts during pipeline installation. However, open trenching through wetland areas is very vulnerable to a multitude of potential problems, especially in wet weather. It goes without saying that much of the open trenching of the existing soil from a wetland area will not be able to be conducted “in the dry” given pipeline scheduling, seasonal surface and shallow ground water tables, etc. Therefore, trench dewatering will be necessary and is difficult to manage especially in remote areas. Localized sedimentation and erosion potential will be high in all areas of open trenching in wetland areas. The temporary stockpiling of the various soil layers will be particularly susceptible to erosion during heavy rainfall events and perimeter silt fencing will not be adequate to prevent temporary impacts to the work corridor and adjacent areas.

We know these problems are real because when oil and gas pipelines were installed in other locations, increased sedimentation followed, and persisted for as much as four years.<sup>137</sup> This is despite the use of BMPs, including many of the same ones Enbridge proposes here. BMPs can fail to avoid sedimentation and turbidity because: the right BMPs are planned, but they are not installed correctly; the wrong BMPs are used for the site conditions; or BMPs were not properly maintained.<sup>138</sup> Indeed, at other Enbridge pipeline construction projects, amongst the many legal issues that have arisen, sediment control structures and dewatering structures were not maintained or otherwise failed, allowing water with high suspended sediment/turbidity to flow into wetlands, in violation of Minnesota law. Those violations resulted in a stipulation agreement between Enbridge and the Minnesota Pollution Control Agency. That stipulation required Enbridge to perform, in relevant part, remedial activities to address their legal violations,

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<sup>136</sup> 40 C.F.R. § 230.21(b).

<sup>137</sup> Betcher et al, *Pipeline Impacts to Water Quality: Documented Impacts and Recommendations for Improvement* (2019), pp. 4-5 (citing various studies of water quality impacts of pipeline construction). Available online at <https://www.tu.org/wp-content/uploads/2019/10/Pipeline-Water-Quality-Impacts-FINAL-8-21-2019.pdf>. See also, Trout Unlimited and West Virginia Rivers, *Reducing Impacts of Pipelines Crossing Rivers and Streams* (2022), at 2-3 (same). Available online at <https://wvrivers.org/wp-content/uploads/2020/06/streamcrossingreport.pdf>.

<sup>138</sup> Betcher et al, p. 5.

including a requirement to “perform maintenance activities to repair, replace or enhance the non-functional dewatering BMPs identified in the violation[.]”<sup>139</sup> Enbridge has proposed to use the same structures and technologies for this Line 5 relocation. The assumption, then, that the use of BMPs eliminates risks of medium to long-term impacts to water quality from sedimentation and turbidity is not supported by the observed effects of past pipeline construction projects, including recent Enbridge pipeline construction projects.

### 6.3.3 Water

“Water is the part of the aquatic ecosystem in which organic and inorganic constituents are dissolved and suspended. It constitutes part of the liquid phase and is contained by the substrate. Water forms part of a dynamic aquatic life-supporting system. Water clarity, nutrients and chemical content, physical and biological content, dissolved gas levels, pH, and temperature contribute to its life-sustaining capabilities.”<sup>140</sup>

Discharge of dredge or fill material can:

change the chemistry and the physical characteristics of the receiving water at a disposal site through the introduction of chemical constituents in suspended or dissolved form. Changes in the clarity, color, odor, and taste of water and the addition of contaminants can reduce or eliminate the suitability of water bodies for populations of aquatic organisms, and for human consumption, recreation, and aesthetics. The introduction of nutrients or organic material to the water column as a result of the discharge can lead to a high biochemical oxygen demand (BOD), which in turn can lead to reduced dissolved oxygen, thereby potentially affecting the survival of many aquatic organisms. Increases in nutrients can favor one group of organisms such as algae to the detriment of other more desirable types such as submerged aquatic vegetation, potentially causing adverse health effects, objectionable tastes and odors, and other problems.<sup>141</sup>

The Guidelines anticipate discharge activities can harm water quality in a range of ways, many of which are implicated by the Reroute.

The risk of impacts to water quality from sedimentation and turbidity have been discussed above.<sup>142</sup>

The DCDD acknowledges the risk of an “in-stream inadvertent return” from HDD and Enbridge’s plan to monitor water quality in the event such a return occurs, including sampling every two hours until it has been “successfully stopped or contained[.]”<sup>143</sup> While we elsewhere criticize the

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<sup>139</sup> State of Minnesota, Minnesota Pollution Control Agency, *In the Matter of Enbridge Energy, Limited Partnership, Stipulation Agreement* (October 2022), at Part 8.b(f). Available online at <https://services.pca.state.mn.us/api/v1/wimn/sites/documents/document?documentId=3753349>.

<sup>140</sup> 40 C.F.R. § 230.22(a).

<sup>141</sup> 40 C.F.R. § 230.22.

<sup>142</sup> See Section 6.3.2.

<sup>143</sup> DCDD, pp. 57-58.

Corps's position that such returns are not "foreseeable action[s]", we reiterate here that when such discharges occur, they *will* harm water quality in jurisdictional waters, even if Enbridge's response plans are generally successful, and no amount of water quality monitoring will undo that harm. Thus, we disagree with the Corps that the significant risk of water quality impacts from inadvertent returns does not bear on the Corps's determinations regarding whether the Reroute meets permitting standards.

It should be uncontroversial that an oil or gas spill, even a small one, would be disastrous to waters throughout the entire watershed. As with the Corps's treatment of inadvertent releases from HDD, we fundamentally disagree that the Corps must blind itself to the notion that the very substance the pipeline is intended to carry might spill into the surrounding waters, particularly when there is so much evidence that spills can and do happen.

The Corps notes EPA's "may affect" and "will affect" letters, raising concerns that the Bad River and the Kakagon-Bad River Sloughs wetland complex will suffer "substantial and unacceptable adverse impacts" from discharges of sediments, fuel, lubricants, drilling fluids, and blasting contaminants, amongst others.<sup>144</sup> The Corps, however, then merely states that it has been meeting regularly with EPA to discuss these concerns.<sup>145</sup> Waving away the significant concerns raised by EPA regarding impacts to water quality is hardly sufficient and undermines the Corps's preliminary determination that impacts to water will be minor and short-term only.

Perhaps most fundamentally, tracking impacts to water quality will be nearly impossible without adequate baseline water quality data. Enbridge proposes to follow a Water Quality Monitoring Plan to track and remedy impacts to water quality and collected baseline water quality data in 2023.<sup>146</sup> The Corps should be under no illusion that baseline water quality has been established for the wetlands and streams sampled by Enbridge in 2023.<sup>147</sup> It did *not* "establish water quality to assist in comparing associated water quality parameters during active construction and following construction."<sup>148</sup> It is *not* true that "[this] pre-construction data will allow Enbridge to more accurately evaluate any changes in water quality that may occur pre-, mid- and post-construction."<sup>149</sup> Most of those sampled parameters will vary substantially during a normal year, and the samples collected are insufficient to establish a baseline for purposes of future comparison. For example, total suspended solids and turbidity can vary by several orders of magnitude over just a few hours, when a large storm occurs. Only if samples are collected repeatedly before, during, and after several storm events can you begin to understand that parameter's "baseline".

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<sup>144</sup> DCDD, p. 58.

<sup>145</sup> DCDD, p.58.

<sup>146</sup> DCDD, Appendix 8.

<sup>147</sup> Sampling results are reported in DCDD, Appendix 9.

<sup>148</sup> DCDD, p. 56.

<sup>149</sup> DCDD, Appendix 9, p. 23.

In sum, between sedimentation and turbidity impacts, the risk of inadvertent releases, oil spills, EPA will affect/may affect determinations concerning discharges of fuel, lubricants, drilling fluids, and blasting contaminants, and the paucity of comprehensive baseline water quality data, the Corps's conclusion that impacts to water would be minor and temporary is not supported by the available evidence.

### 6.3.4 Current Patterns and Water Circulation

“Current patterns and water circulation are the physical movements of water in the aquatic ecosystem.”<sup>150</sup> Discharge and fill activities can disturb current patterns and water circulation “by obstructing flow, changing the direction or velocity of water flow, changing the direction or velocity of water flow and circulation, or otherwise changing the dimensions of a water body.”<sup>151</sup> This disturbance can cause adverse changes to “[l]ocation, structure, and dynamics of aquatic communities; shoreline and substrate erosion and deposition rates; the deposition of suspended particulates; the rate and extent of mixing of dissolved and suspended components of the water body; and water stratification.”<sup>152</sup>

As stated in the preceding sections, the proposed construction activities pose significant risks that pre-construction conditions in wetlands and waterbodies will not be fully restored, resulting in permanent—or at least long-lasting—changes to the disturbed area's substrate.<sup>153</sup> This can readily alter the current patterns and water circulation in these waterways and cause the adverse changes contemplated by the Guidelines.

The DCDD acknowledges that installation of a pipeline would affect stream morphology but has preliminarily determined that impacts would be minor and short term.<sup>154</sup> The Corps identifies two bases for this conclusion. First, pipeline installation occurs over no more than two days, so direct impacts from active construction, i.e., methods to divert water flow to facilitate dry crossing, are temporary. Second, that stream beds and banks will be restored to pre-construction elevations and contours and “stream flow are proposed to resume upon completion of each waterway crossing.”<sup>155</sup> The DCDD then generally cites the restoration plans in the Wetland and Waterbody Restoration and Post-Construction Monitoring Plan.<sup>156</sup>

However, there are problems with each basis for concluding that impacts will be minor and temporary.

Simply because construction is intended to be limited to a day or two does not mean that impacts caused by that construction will be so limited in time. This is because, as noted above, restoring

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<sup>150</sup> 40 C.F.R. § 230.23(a).

<sup>151</sup> 40 C.F.R. § 230.23(b).

<sup>152</sup> 40 C.F.R. § 230.23(b).

<sup>153</sup> See Section 6.3.1.

<sup>154</sup> DCDD, p. 59.

<sup>155</sup> DCDD, p. 59.

<sup>156</sup> DCDD, Appendix 3.

disturbed wetlands and waterways to a pre-construction condition is easier said than done, and every phase of the construction, restoration, monitoring, and corrective action plan contains omissions or relies on vague assertions undermining the conclusion that impacts would persist only as long as active construction.<sup>157</sup> Simply put, Enbridge’s plans for restoring waterways do not give the Corps the information it needs to conclude that current patterns and water circulation would be preserved despite the pipeline construction process.

### **6.3.5 Normal Water Fluctuations**

“Normal water fluctuations in a natural aquatic system consist of daily, seasonal, and annual tidal and flood fluctuations in water level.”<sup>158</sup> Normal water fluctuations can be altered by discharge of dredge or fill material:

... resulting in prolonged periods of inundation, exaggerated extremes of high and low water, or a static, nonfluctuating water level. Such water level modifications may change salinity patterns, alter erosion or sedimentation rates, aggravate water temperature extremes, and upset the nutrient and dissolved oxygen balance of the aquatic ecosystem. In addition, these modifications can alter or destroy communities and populations of aquatic animals and vegetation, induce populations of nuisance organisms, modify habitat, reduce food supplies, restrict movement of aquatic fauna, destroy spawning areas, and change adjacent, upstream, and downstream areas.<sup>159</sup>

The Corps has preliminarily determined that impacts to normal water fluctuations would be minor and short term.<sup>160</sup> The basis for this determination is the same as the preceding section: the construction activities (including trenching, damming, blasting, backfilling, etc.) will take only one or two days and then stream bed and bank elevations will be restored to pre-construction conditions.

Given this, the same shortcomings in that analysis apply here.<sup>161</sup> The impacts that those construction activities would have on the prevailing hydrological regime are neither easily avoided nor repaired for reasons explained above. What the Guidelines illustrate is that the proposed pipeline installation activities will impact the surface of wetlands and waterways (the substrate) in ways that will alter hydrology in these waters, and that alterations to hydrology will subsequently impact aquatic life in the disturbed areas. These are fragile, natural ecosystems, and altering one characteristic affects the whole. This subsection of the Guidelines reflects the Corps’s correct and nuanced understanding of this reality; however, their application of the Guidelines here is disconnected from that understanding.

### **6.3.6 Salinity Gradients**

[THIS SECTION INTENTIONALLY LEFT BLANK]

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<sup>157</sup> See Sections 6.3.1., 6.3.2.

<sup>158</sup> 40 C.F.R. § 230.24(a).

<sup>159</sup> 40 C.F.R. § 230.25(b).

<sup>160</sup> DCDD, p.59.

<sup>161</sup> See Section 6.3.4.

## **6.4 Potential Impact on the Biological Characteristics of the Aquatic Ecosystem (Subpart D, 40 CFR 230.20)<sup>162</sup>**

As in the previous section, the Corps must evaluate characteristics of the area that would be disturbed, assess how those characteristics would be impacted, and rely on those impact assessments when reaching the findings of fact necessary to determination of permitting standards are met. In short, it is impacts to these characteristics that the Corps must consider in applying the permitting standards.

### **6.4.1 Threatened and Endangered Species**

The Guidelines observe that discharges of dredge or fill material can harm these critical species in three ways. First, by directly killing them.<sup>163</sup> Second, by impairing or destroying habitat for threatened or endangered species. The Guidelines note that:

Elements of the aquatic habitat which are particularly crucial to the continued survival of some threatened or endangered species include adequate good quality water, spawning and maturation areas, nesting areas, protective cover, adequate and reliable food supply, and resting areas for migratory species. Each of these elements can be adversely affected by changes in either the normal water conditions for clarity, chemical content, nutrient balance, dissolved oxygen, pH, temperature, salinity, current patterns, circulation and fluctuation, or the physical removal of habitat[.]<sup>164</sup>

Third, by “facilitating incompatible activities.”<sup>165</sup>

The Guidelines provide that where Endangered Species Act (“ESA”) Section 7 Consultation occurs, the Secretary of the Interior’s conclusions regarding the discharge’s impact to threatened and endangered species and their habitats shall be treated as final.<sup>166</sup>

The Corps initiated formal Section 7 Consultation regarding the Northern Long-Eared Bat and Tricolor Bat on May 10, 2024. As of the May 20, 2024 publication date of the DCDD, that consultation is ongoing.<sup>167</sup>

As such, the Corps is not able to reach any conclusions, even tentative ones, regarding impacts to these protected bat species. We observe that this subsection of the Corps’s application of the Guidelines is unique in that it, correctly, does not contain a preliminary determination as to the extent or duration of impacts. It should be uncontroversial that the Corps must wait for the Section 7 consultation to be completed before any permits may issue, but this also draws into

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<sup>162</sup> Identify and evaluate any special or critical characteristics of the candidate disposal site, and surrounding areas which might be affected by use of such site, related to their living communities or human uses (subparts D, E, and F). 40 C.F.R. § 230.5(f).

<sup>163</sup> 40 C.F.R. § 230.30(b)(1).

<sup>164</sup> 40 C.F.R. § 230.30(b)(2).

<sup>165</sup> 40 C.F.R. § 230.30(b)(3).

<sup>166</sup> 40 C.F.R. § 230.30(c).

<sup>167</sup> DCDD, pp. 60, 99.

question how the Corps purports to find that permitting standards are met when an informational gap as significant as whether the Reroute would further imperil two protected bat species remains outstanding.

#### **6.4.2 Fish, crustaceans, mollusks, other aquatic organisms**

“Aquatic organisms in the food web include, but are not limited to, finfish, crustaceans, mollusks, insects, annelids, planktonic organisms, and the plants and animals on which they feed and depend upon for their needs.”<sup>168</sup> The Guidelines recognize that aquatic organisms are sensitive to even small changes to one of myriad components of the natural environment, and that disturbance of one part of the web of life can reverberate throughout the entire ecosystem.

The discharge of dredged or fill material can variously affect populations of fish, crustaceans, mollusks and other food web organisms through the release of contaminants which adversely affect adults, juveniles, larvae, or eggs, or result in the establishment or proliferation of an undesirable competitive species of plant or animal at the expense of the desired resident species. Suspended particulates settling on attached or buried eggs can smother the eggs by limiting or sealing off their exposure to oxygenated water. Discharge of dredged and fill material may result in the debilitation or death of sedentary organisms by smothering, exposure to chemical contaminants in dissolved or suspended form, exposure to high levels of suspended particulates, reduction in food supply, or alteration of the substrate upon which they are dependent. Mollusks are particularly sensitive to the discharge of material during periods of reproduction and growth and development due primarily to their limited mobility. They can be rendered unfit for human consumption by tainting, by production and accumulation of toxins, or by ingestion and retention of pathogenic organisms, viruses, heavy metals or persistent synthetic organic chemicals. The discharge of dredged or fill material can redirect, delay, or stop the reproductive and feeding movements of some species of fish and crustacea, thus preventing their aggregation in accustomed places such as spawning or nursery grounds and potentially leading to reduced populations. Reduction of detrital feeding species or other representatives of lower trophic levels can impair the flow of energy from primary consumers to higher trophic levels. The reduction or potential elimination of food chain organism populations decreases the overall productivity and nutrient export capability of the ecosystem.<sup>169</sup>

Changes to wetland and waterways surface contours and elevation can affect their continued capacity to support aquatic life.<sup>170</sup> As explained above, the Corps’s conclusion that wetland and waterbody restoration efforts would consistently restore disturbed areas to their pre-construction condition is in error. Given this, the Corps’s corresponding conclusion that impacts would be minor and temporary fails to properly assess the risk to aquatic organisms from alterations to the substrate in the affected areas.

Increased sedimentation and turbidity can harm and kill organisms by smothering eggs, depleting oxygen, and other means of physical interference with their normal activities. The Corps’s confidence that such sedimentation and turbidity increases will be minor and short term is

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<sup>168</sup> 40 C.F.R. § 230.31(a).

<sup>169</sup> 40 C.F.R. § 230.31(b).

<sup>170</sup> See *e.g.*, 40 C.F.R. § 230.20(b).



unwarranted. Thus, there is a corresponding overconfidence that impacts to aquatic organisms will be minimized.

Blasting will kill some organisms in the immediate blasting area, as the Corps acknowledges.<sup>171</sup> The Corps relies on the blasting plans as a reason to believe these impacts will be minimized. However, as noted above, the general blasting plan says very little about protecting the environment generally.<sup>172</sup> It says nothing about protecting aquatic organisms. Instead, it says site-specific plans will be created later. It is thus not reasonable to conclude that the impacts of blasting on aquatic life will be only minor and short-term.

An oil spill of any size would render affected waters incapable of supporting many types of aquatic life.

In sum, because the Corps understates the risk of impacts to site substrates, increased sedimentation and turbidity, and risks from blasting, it also understates the harm to aquatic life. These points are further discussed, below, in noting how degradation of conditions in wetlands will impact their ability to act as habitat for critical plant and animal species.<sup>173</sup>

### **6.4.3 Other Wildlife**

“Wildlife associated with aquatic ecosystems are resident and transient mammals, birds, reptiles, and amphibians.”<sup>174</sup> As with aquatic organisms, the Guidelines reflect the reality that subtle changes to the aquatic ecosystem can affect other wildlife in numerous ways:

The discharge of dredged or fill material can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem. These adverse impacts upon wildlife habitat may result from changes in water levels, water flow and circulation, salinity, chemical content, and substrate characteristics and elevation. Increased water turbidity can adversely affect wildlife species which rely upon sight to feed, and disrupt the respiration and feeding of certain aquatic wildlife and food chain organisms. The availability of contaminants from the discharge of dredged or fill material may lead to the bioaccumulation of such contaminants in wildlife. Changes in such physical and chemical factors of the environment may favor the introduction of undesirable plant and animal species at the expense of resident species and communities. In some aquatic environments lowering plant and animal species diversity may disrupt the normal functions of the ecosystem and lead to reductions in overall biological productivity.<sup>175</sup>

The Reroute would adversely impact wildlife in many of these ways. The Corps acknowledges that construction activities will drive birds and mammals away from the area, while those less able to move, including herptiles, “may experience mortality,” i.e., die.<sup>176</sup> This is notable because

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<sup>171</sup> DCDD, p.62.

<sup>172</sup> See Section 6.3.1.

<sup>173</sup> See Section 6.5.2.

<sup>174</sup> 40 C.F.R. § 230.32(a).

<sup>175</sup> 40 C.F.R. § 230.32(b).

<sup>176</sup> DCDD, p.62.

Wisconsin is not insulated from the alarming decline in amphibians globally. “Amphibian declines are a global biodiversity crisis.”<sup>177,178</sup> Habitat loss is the largest single cause of decline.<sup>179</sup> Land managers in Northern Wisconsin must therefore consider the changing environment to preserve our remaining amphibians.<sup>180</sup>

The Reroute would result in habitat loss for multiple reasons. First, permanent conversion of forested wetlands would result in the direct loss of habitat for wildlife dependent on this type of ecosystem to survive. Simply put, this conversion is really the destruction of a forested wetland, and thus the loss of habitat for all wildlife that rely on that type of forested wetland for its survival.

Second, alteration of seeps would degrade habitat for wildlife that depend on them, including amphibians. Seeps are an important wildlife habitat for a couple of reasons. The biggest one is that it provides a consistent source of open water, which can be important in the winter when other water sources are frozen over, or in dry years when other nearby surface waters are dried up. Seeps also support the first early spring vegetation (since the microclimate stays warmer, providing an important food source during that time of year, particularly for animals emerging from hibernation. Indeed, given the unique microclimate created at seeps, they also support rare and unique ecosystems, which could support rare vegetation and wildlife that depend on the vegetation. In some instances, seeps may support vegetation throughout the winter, which would be an important food source. Seeps are particularly important for amphibians because they provide a fish-free area to lay eggs. In sum, the likely alteration to pre-construction hydrology in areas with seeps and/or groundwater fed wetlands would harm wildlife, generally, and could be disastrous for amphibians in particular.

The Corps relies on Enbridge’s claims that it will restore all construction areas to their pre-construction hydrology, including in areas with seeps.<sup>181</sup> Given the low likelihood that Enbridge would effectively restore wetland hydrology generally, much less in areas with seeps, the risk of habitat loss or degradation for sensitive species is high.

Third, the Reroute would result in habitat fragmentation. The Corps acknowledges this but concludes that impacts to low interspersed species would be minor and temporary because “larger tracts of similar habitat” would not be altered by the Reroute.<sup>182</sup> As for high interspersed

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<sup>177</sup> United States Geological Survey, Amphibian Monitoring and Research Initiative, The State of Amphibians in the United States. Available online at <https://armi.usgs.gov/sota/>.

<sup>178</sup> This problem requires urgent attention, because “amphibian declines may be more widespread and severe than previously realized.” Adams MJ, Miller DAW, Muths E, Corn PS, Grant EHC, Bailey LL, et al. (2013) Trends in Amphibian Occupancy in the United States. PLoS ONE 8(5): e64347. <https://doi.org/10.1371/journal.pone.0064347>

<sup>179</sup> *State of the Amphibians*, see note 36.

<sup>180</sup> Donner, Deahn & Ribic, Christine & Beck, Albert & Higgins, Dale & Eklund, Dan & Reinecke, Susan. (2015). Woodland Pond Salamander Abundance In Relation To Forest Management And Environmental Conditions In Northern Wisconsin. *Journal of North American Herpetology*. 34-42. 10.17161/jnah.vi1.11904.

<sup>181</sup> DCDD, p.63.

<sup>182</sup> DCDD, p.63.

species, the Corps seems to suggest that that these species would *benefit* from the Reroute due to increased edge effects.<sup>183</sup>

The Corps's conclusion that effects to wildlife would be minor and temporary or, in some cases, "longer lasting" is not supported by sufficient analysis. Given that the conversion of the wetlands in the pipeline corridor is permanent, and this corridor will be subject to ongoing maintenance activities, it is hard to understand "longer lasting" as anything other than an inartful euphemism for "lasting as long as the pipeline does."

Moreover, the DCDD provides an underwhelming summary of what habitat fragmentation and edge effects are, and does not provide a very serious assessment of which sensitive species (*e.g.*, "neo-tropical migrant" birds) might be affected. Similarly, the DCDD acknowledges that "the conversion of forest and shrub habitat within the proposed permanent pipeline corridor may alter movement, migration and increase exposure and predation of some species[,] but without naming any particular species."<sup>184</sup> The Corps's treatment of impacts to low interspersed species as minor based on the notion that other areas would not be impacted is speculative and underexplained.

## **6.5 Potential Impacts on Special Aquatic Sites (Subpart E, 40 CFR Section 230)**

### **6.5.1 Sanctuaries and Refuges**

The designated State Natural Areas the Corps references in the DCDD, including the Copper Falls State Natural Area, White River Boreal Forest State Natural Area, and White River Breaks State Natural Area, are important places in Wisconsin.<sup>185</sup> Given this, the Corps's conclusion that these areas are simply too far away from the Reroute to be at risk of harm is underexplained. Habitat impacts, water quality impacts, water flow impacts, etc., can and would all extend outside of the construction corridor itself, indicating that places like Copper Falls, being just a half-mile from corridor, would be at risk of harm. Enbridge's cursory finding to the contrary is out of step with the value of these places and the loss that would be experienced if they were adversely affected by the Reroute.

### **6.5.2 Wetlands**

Wetlands are environmentally critical for reasons too numerous to list. They reduce the incidence and severity of flooding; they improve water quality; they provide habitat for plants and animals, including threatened and endangered species; they are carbon sinks; and they provide significant recreational opportunities like kayaking, fishing, birding, and hiking. It is hard to overstate their

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<sup>183</sup> DCDD, p.63.

<sup>184</sup> DCDD, pp.62-63.

<sup>185</sup> DCDD, p.64.

value on the landscape. Both federal and state law recognize the immense functional value of wetlands and prohibit unpermitted discharges to wetlands.<sup>186</sup>

These protections are critical here because Wisconsin has lost roughly half of the 10 million acres (about twice the area of New Jersey) of wetlands that existed prior to modern human development, *i.e.*, building roads, large-scale land conversion for agriculture. The wetlands we have remaining are thus precious and must be protected.

The Guidelines reflect how discharges to wetlands degrade or destroy wetland functional values:

The discharge of dredged or fill material in wetlands is likely to damage or destroy habitat and adversely affect the biological productivity of wetlands ecosystems by smothering, by dewatering, by permanently flooding, or by altering substrate elevation or periodicity of water movement. The addition of dredged or fill material may destroy wetland vegetation or result in advancement of succession to dry land species. It may reduce or eliminate nutrient exchange by a reduction of the system's productivity, or by altering current patterns and velocities. Disruption or elimination of the wetland system can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systems, by interfering with the filtration function of wetlands, or by changing the aquifer recharge capability of a wetland. Discharges can also change the wetland habitat value for fish and wildlife as discussed in subpart D. When disruptions in flow and circulation patterns occur, apparently minor loss of wetland acreage may result in major losses through secondary impacts. Discharging fill material in wetlands as part of municipal, industrial or recreational development may modify the capacity of wetlands to retain and store floodwaters and to serve as a buffer zone shielding upland areas from wave actions, storm damage and erosion.<sup>187</sup>

We reiterate our disagreement with the Corps's classification and assessment of wetland impacts. The Corps determines that only .02 acres of wetland would be permanently impacted, while 36.37 acres of forested and shrub wetlands in the Reroute corridor would be permanently converted to emergent wetlands, and 39.07 acres of forested and shrub wetlands in the "temporary" workspace would be temporarily impacted.<sup>188</sup>

The Corps is not properly assessing the likely impact to wetland functional values from the Reroute in areas it is classifying as "conversion." The Corps is also not properly assessing impacts to wetland functional values it is classifying as "temporary."

***Impacts caused by "Conversion" of Wetlands Would not be Minor***

The Corps's evaluation of the impacts to wetland functional values from permanent conversion from forested and shrub wetlands to emergent wetlands relies on the assumption that post-construction site conditions would support thriving emergent wetlands. There are myriad reasons to doubt this.

We have already cataloged reasons that impacts to wetland substrate are unlikely to be either

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<sup>186</sup> See Wis. Stat. § 281.36; Wis Admin. Code § NR 103.03.

<sup>187</sup> 40 C.F.R. § 230.41(b).

<sup>188</sup> DCDD, p.66.

minor or short-term above.<sup>189</sup> In areas where surface elevations and contours are not properly restored to pre-construction conditions, it is not clear that emergent wetlands, or any wetlands, will redevelop and achieve functioning consistent with the “conversion” classification, which anticipates a fully functioning emergent wetland. And impacts to wetland substrate would immediately raise concerns about impacts to wetland hydrology in the areas slated for wetland conversion.

Some reasons the Reroute will permanently impact site hydrology have already been touched on above, in the sections on impacts to substrate, water flow and circulation, and normal water fluctuations.<sup>190</sup> The clearing, blasting, trenching, backfilling and other construction activities are significant enough, both as to their intensity and scale, that impacts to hydrology will undoubtedly follow. Blasting is likely to create fractures in the bedrock that alter site hydrology in ways that escape the naked eye, and Enbridge has provided no real explanation of how it will blast without creating these impacts. Blasting and the other construction activities would affect elevation and contours in the wetlands and would disrupt the natural flow of surface and groundwater into wetlands, including those fed by seeps and high groundwater tables. Indeed, the Corps acknowledges that these activities can alter site hydrology, and that other agencies have raised concerns about this reality.<sup>191</sup> So, there does not appear to be disagreement that the construction activities are likely to impact hydrology.

Where the Corps’s evaluation errs is its assessment that Enbridge’s proposed restoration, monitoring, and remedial activities would avoid any permanent hydrological impacts. Based on the information presented, the Corps cannot conclude that these plans would restore site hydrology to pre-construction hydrological conditions, and therefore cannot conclude that the Reroute would avoid unacceptable impacts to wetland functioning.

We have already explained why steps taken to avoid impacts to wetland substrate, restore impacts that are not avoided, and efforts to take “corrective action” should restoration fail will not work.<sup>192</sup> Indeed, some of these concerns are heightened for wetlands, given the inability to sequester soils and the proposed use of the “push/pull” method of pipeline installation in wetlands with standing water. Given that, impacts to site hydrology caused by impacts to substrate would logically persist as well.

The Corps relies on Enbridge’s plan to restore site hydrology through monitoring, application of performance standards, and corrective actions to conclude that impacts to wetland hydrology will not impair wetland functioning.<sup>193</sup> Each of these aspects of Enbridge’s plan, however, suffers from basic problems that make it impossible for the Corps to credibly rely on them for its

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<sup>189</sup> See Section 6.3.1.

<sup>190</sup> See Sections 6.3.1, 6.3.4, 6.3.5.

<sup>191</sup> DCDD, p.66.

<sup>192</sup> See Section 6.3.1.

<sup>193</sup> DCDD, pp. 66-67.

conclusions regarding wetland impacts.

Enbridge’s monitoring plan involves installing pairs of wells upgradient and downgradient from the pipeline and, later, a third well in the area excavated for the pipeline itself.<sup>194</sup> It would do so at 13 proposed locations along the proposed pipeline. Data would be collected shortly before construction in the upgradient and downgradient wells and shortly after for the third well in the pipeline corridor.<sup>195</sup>

The monitoring plan has several deficiencies. This is notable because hydrological monitoring is Enbridge’s response to concerns raised by other agencies that the proposed pipeline installation would impair wetland hydrology, particularly in areas with seeps or groundwater discharge wetlands.

First, the hydrological monitoring plan does not have meaningful baseline data, which is necessary for monitoring results to have any value. Instead, groundwater monitoring wells “will be installed in 2024[.]”<sup>196</sup> It is unclear if any such wells have been installed to date. But that point is almost immaterial. To develop a view of prevailing hydrological conditions in these wetlands, data would be needed starting in a time frame earlier than just before proposed construction—which is what Enbridge’s plan appears to be.<sup>197</sup> Further, the monitoring wells proposed to be installed in the actual construction corridor would not go in until after trench backfilling and final grade establishment.<sup>198</sup> Definitionally, those wells cannot capture baseline data; they can only capture post-construction data.

Second, wells are proposed to be installed in representative areas, only, meaning that many wetlands will not be subject to hydrological monitoring at all 13 well locations have been proposed, relative to 733 wetlands that were identified in the construction corridor.<sup>199</sup> Moreover, it is not clear that these will be the actual monitoring locations, because many of them are on private land and thus all Enbridge commits to is “attempt to acquire landowner permission” to site groundwater wells in those locations.<sup>200</sup>

Third, Enbridge says it will “attempt” to identify a reference wetland for hydrology.<sup>201</sup> However, given the number and variety of wetlands that would be impacted, and their varying baseline hydrological characteristics, it is difficult to see how a single reference wetland could yield meaningful data into hydrological trends.

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<sup>194</sup> DCDD, Appendix 3 pp. 12-13.

<sup>195</sup> *Id.*

<sup>196</sup> DCDD, Appendix 3 p.13.

<sup>197</sup> DCDD, Appendix 3, p.13 (initial data to be collected in “the first frost-free period prior to construction”).

<sup>198</sup> DCDD, Appendix 3, p.13.

<sup>199</sup> DCDD, p.64; Appendix 3, Attachment A (proposed well locations).

<sup>200</sup> DCDD, Appendix 3, p.9.

<sup>201</sup> DCDD, Appendix 3, p.13.

The hydrological performance standards are either vague or insufficient to maintain baseline hydrology in impacted wetlands. Enbridge lists an “additional restoration criteria” as “there is no evidence of adverse changes to baseline hydrology[.]”<sup>202</sup> This is vague and subjective. Further, given that there will not be adequate baseline hydrological data to compare post-construction wetlands with, this criterion is even more flimsy. A slightly more specific performance standard is provided for the groundwater monitoring wells, yet this too is vague and insufficient. It states, in its entirety:

Wetland hydrology monitoring via monitoring wells will be considered successful if the in-trench and down-gradient well water table elevations are within 20 percent of the up-gradient water table elevations and exhibit similar fluctuations as compared to the reference monitoring well water table elevation changes.<sup>203</sup>

The 20% figure is not explained. And it is not clear what “similar” means, in reference to fluctuations in water levels relative to the reference wetlands. Small changes in water table elevation can have enormous impacts on wetland functioning. Particularly in areas with seeps and/or groundwater discharge to wetlands, subtle alterations to pre-construction hydrology can fundamentally alter the vegetation that grows, the organisms that can thrive there, and other wetland characteristics. In other words, subtle hydrological alterations can utterly change the type of wetland in that area, or even whether it is a wetland at all. Again, with the expected permanent impacts to soil profiles and decreased infiltration, shallow ground water fed wetlands most likely will never function similarly to the undisturbed systems.

It is also not explained why the in-trench wells and down-gradient wells are compared with the up-gradient wells for purposes of the performance standard. This is not a way to track temporal changes from pre-construction conditions; it is a way to track difference between groundwater levels around the pipeline after construction. It is not explained why this comparison, rather than deviations from pre-construction conditions, is what would trigger corrective actions to “restore” impacted sites. Put differently, if the “final goal” is to restore pre-construction hydrology, and to avoid alterations to baseline hydrology, as Enbridge says it is, then why isn’t the success of restoration predicated on a comparison of pre- and post-construction hydrology?

Perhaps the explanation is that, given the absence of any meaningful baseline data, Enbridge would not be able to capture deviations from pre-construction hydrological conditions in impacted wetlands, in any event. All it is going to be able to do is compare post-construction wetlands to one another, and to other wetlands not impacted by the construction, which may not be a meaningful point of comparison. This all but guarantees that adverse alterations to hydrology will neither be captured by monitoring, nor result in failures to meet the hydrologic performance standards. Indeed, the design defects in this approach to hydrological monitoring seem almost guaranteed *not* to identify adverse hydrological impacts. This renders Enbridge’s plan for

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<sup>202</sup> DCDD, Appendix 3, p.13.

<sup>203</sup> DCDD, Appendix 3, p.13.

hydrology almost meaningless, and the Corps's reliance on it to find impacts to wetlands are minor and short term is thus fundamentally misguided.

If this were not bad enough, Enbridge's plans for corrective action if hydrological performance standards are not met are also problematic.

As an initial matter, Enbridge only commits to monitoring for three years following construction, observing that if performance standards are still not met by that time, then it "may" extend monitoring and or "investigate" reasons for the alterations in site hydrology.<sup>204</sup> This is vague, noncommittal, and does not inspire confidence that Enbridge intends to continue working as long as it takes to achieve full wetland functioning.

Further, the corrective actions proposed to address issues with site hydrology suffer the same flaws as those for addressing impacts to the substrate, i.e., topography. See Section 6.3.1. This is because it is the exact same corrective actions proposed—regrading and recontouring—for both issues with topography and hydrology.<sup>205</sup> In some ways, the plan to respond to hydrological impairments to wetland functioning are even more vague. The only reference focused on hydrology in this section states: "Changes in hydrology can also prevent successful restoration. If impacts on hydrology are identified, Enbridge will take actions to restore the hydrology."<sup>206</sup> This is a completely superficial plan. All that is really proposed is regrading and recontouring, with no explanation for how this would go better than it did during initial restoration efforts. For the Corps to rely on this to determine that impacts to wetlands will be minor and short term is another fundamental mistake.

This point is heightened by the fact that Enbridge has impacted hydrology in other pipeline construction projects, and then failed to readily correct them using the same recontouring and regrading actions they propose here. At the Line 3/93 Walker Brook crossing, Enbridge encountered massive and ongoing problems with groundwater destabilizing the entire valley. Although Enbridge did not report the existence of seeps before choosing the route and commencing construction there, they later reported that natural seeps had existed in the area. During and after construction, groundwater seeps on both sides of the valley threatened to destabilize the entire hillslope and compromise pipeline integrity. Enbridge executed multiple failed attempts to control the groundwater emergence; their final engineering "solution" is extremely intrusive and permanently changed the hydrology of the riparian wetlands on both sides of this valley.<sup>207</sup> This undermines the notion that in places where hydrology is impacted, simple corrective actions are available to Enbridge to quickly and tidily address the problem.

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<sup>204</sup> DCDD, Appendix 3, p.13.

<sup>205</sup> DCDD, Appendix 3, p.21-22.

<sup>206</sup> DCDD, Appendix 3, p.22.

<sup>207</sup> Technical Memorandum to: U.S. Army Corps of Engineers, Minnesota Department of Natural Resources, Minnesota Pollution Control Agency, *Line 3 Replacement Project Walker Brook Long-Term Groundwater Management Plan (Rev 4)* (Oct. 13, 2022).



After soils and water, the third main element of a wetland is, of course, vegetation. Indeed, wetland functioning turns on the vegetation that is present. Change the plants, and you have changed the wetland, and how it functions.

Impacts to site substrate and hydrology, discussed above, can also impair revegetation in impacted wetlands. If organic soils are lost, or hydrology changes, then certain wetland plant species may no longer be supported in those areas.<sup>208</sup>

Any large linear construction project is going to create a risk of invasive species penetration. Indeed, studies of past pipeline construction projects have revealed increased invasives penetration following construction. Brehm and Culman (2022) summarized multiple studies reaching the similar conclusion that pipeline construction ends with “with invasive species thriving in disturbed areas, reducing plant diversity and resulting in difficulty of native species reestablishment after pipeline installation.”<sup>209</sup> This was corroborated by Olson and Doherty (2012) who studied pipeline construction impacts in Southeast Wisconsin and concluded that in naturally diverse wetlands, pipeline construction increased the spread of invasives and decreased the the richness of plant diversity.<sup>210</sup>

The Reroute is no different and, indeed, in some respects potentially worse. That is because permanent conversion to emergent wetlands from forested and shrub wetlands in the pipeline corridor requires ongoing maintenance, i.e., clearing vegetation. That requires people and vehicles to periodically and repeatedly traverse the pipeline corridor, meaning that, for as long as this pipeline would operate, the risk of invasives spread would be high. The likely result would not be conversion to pristine emergent wetland, but a lower quality emergent wetland with lower functional values.

Enbridge’s revised Wetland and Waterbody Restoration and Post-Construction Monitoring Plan now adds vegetative performance standards stating that no new invasive species may be introduced, and no existing invasive species may be spread by the Project.<sup>211</sup> In addition to the fact that these performance standards were added *after* the Corps issued the DCDD, and thus were not a basis for the Corps’s preliminary determination that wetland impacts will be minor and temporary, these conclusory performance standards add little value to the plan. It is of course good to indicate that successful restoration of site vegetation requires that invasives will not be introduced or spread. Yet, this does not actually provide further information about how Enbridge would prevent or manage the introduction of invasive plant species, beyond what is already provided for in the Invasive and Noxious Species Management Plan. That plan contains some sensible practices that can reduce the extent to which invasive species spread. However, they cannot eliminate the spread, as demonstrated by the fact that other pipeline construction projects have experienced greater invasives penetration following construction, and those

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<sup>208</sup> Brehm and Culman (2022), pp.11-14. See *supra* n. 132.

<sup>209</sup> Brehm and Culman (2022), pp.13.

<sup>210</sup> Olson and Doherty *supra* note 133.

<sup>211</sup> DCDD, Appendix 3, pp.15-16.

projects presumably used many of the same, if not the exact same, precautions identified in the Invasive and Noxious Species Management Plan. Given this, the Corps lacks the information it needs to conclude that invasive species will not significantly degrade the quality of the post-construction wetlands in the ROW.

Given our many concerns about the efficacy of the plan to restore and maintain conditions in the affected wetlands, we simply do not believe the Corps has sufficient information to conclude that an emergent wetland will thrive in these areas. If it does not, then this is not conversion to emergent wetlands, but to something else, perhaps not even a wetland at all, i.e., permanent impairment or elimination of wetland functioning.

We also question the weighting of the loss of wetland functional values in this conversion, even if successful beyond what seems possible. More details are below, in our discussion of the sufficiency of the proposed mitigation.<sup>212</sup>

***The Impacts the Corps Assesses to be Temporary would Likely be either Permanent or Long-Lasting Enough that they cannot be Classified as Temporary.***

The areas where wetland impacts would purportedly be temporary are in the workspace areas adjacent to where a pipeline would be installed. The central conclusion underlying this “temporary” classification is that once construction is complete the workspace areas where people, heavy machines, equipment, materials, and other items were moved and stored would bounce back to their pre-construction condition completely and swiftly, resulting in mere temporal loss of wetland functional values. This conclusion is not tenable. Instead, the more likely result is long-lasting or even permanent reduction in wetland function.

Site hydrology will be adversely altered, with only insufficient plans to avoid impacts, restore site conditions, monitor for adverse alterations, or engage in corrective actions. This includes alterations or destruction of seeps and groundwater discharge wetlands. While some of those adverse alterations would be likely to follow from activities like blasting and trenching, which would not directly occur in the workspaces in the way they would in the pipeline laydown area itself, those activities can also put hydrology at risk in the adjacent wetlands. Blasting will create fracture zones throughout the construction zone, thereby permanently affecting hydrology in those adjacent wetlands.<sup>213</sup> Further, any use of heavy equipment and materials puts sensitive seeps at risk, and problems created may not be immediately observed by environmental monitors. It is also critical to stress that what is being discussed is a hydrologically intertwined ecosystem. Thus, impacts to hydrology in the pipeline corridor would affect hydrology in the directly adjacent wetlands.

Vegetation may take many years to return to their pre-construction state, if ever. Even Enbridge acknowledges that vegetation impacts will “last longer” than “one or two growing seasons” in

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<sup>212</sup> See Section 8.

<sup>213</sup> See Section 6.3.1.

forested, scrub-shrub wetlands.<sup>214</sup> Indeed, if you cut down a 40-year tree, it would take 40 growing seasons to replace those vegetation impacts. Importantly, it is not sufficient to note that new plants may revegetate; there is a world of difference in terms of wetland functioning between a wetland populated by mature trees and 2-year-old saplings, even if it is the same tree species. These realities are glossed over, undermining the notion that impacts are merely temporary.

Invasives penetration would increase, degrading the wetlands relative to their pre-construction condition. Vegetation will thus not be the same, reducing floristic integrity and degrading wetland functions relative to pre-construction levels. Susceptibility for continual introduction of invasive species is high, especially with the on-going ROW maintenance activities and equipment access.

Enbridge also has not shown how it would avoid longer-term impacts to these areas from the ongoing maintenance activities in the corridor. If Enbridge intends to permanently maintain a ROW, that will entail people and machines moving in and out of the area to remove vegetation, spray herbicides, etc. Those people and machines could quite easily impact the adjacent areas. Further, if herbicides or other chemicals are intended for use, there is no apparent plan to avoid herbicide drift, or even to evaluate what impact herbicide drift would have. Enbridge should be required to provide a realistic long-term maintenance plan that details *all* expected activities that will need to be conducted in the ROW for review and analysis by the Corps.

These alterations to hydrology and vegetation will also have direct adverse effects on the capacity of these wetlands to serve as critical habitat for aquatic species and other wildlife.<sup>215</sup>

None of these impacts would be sufficiently limited in duration to count as mere temporary impacts.

***The Corps also understates the Reroute's Cumulative and Secondary Effects to Aquatic Ecosystems.***

The Guidelines require the Corps to make findings of fact concerning cumulative and secondary impacts to aquatic ecosystems.<sup>216</sup> The DCDD includes a separate section on cumulative and secondary effects, which we comment on, below, and thus this comment section emphasizes secondary impacts to wetland resources that are not sufficiently evaluated in the DCDD.<sup>217</sup>

“Secondary effects are effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material.”<sup>218</sup>

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<sup>214</sup> DCDD, Appendix 3, p.6.

<sup>215</sup> See Sections 6.4.1, 6.4.2, 6.4.3.

<sup>216</sup> 40 C.F.R. §§ 230.11(g), (h)

<sup>217</sup> See Section 9.

<sup>218</sup> 40 C.F.R. § 230.11(h).

In addition to directly impacting the wetlands in the corridor, the Reroute will bisect a large number and acreage of wetlands. The total acreage of wetlands bisected by the Reroute is not given.<sup>219</sup> This is a problem because these bisected wetlands may be impacted by construction of the pipeline, creating potential secondary wetland impacts that must be evaluated and considered. “When disruptions in flow and circulation patterns occur, apparently minor loss of wetland acreage may result in major losses through secondary impacts.”<sup>220</sup> Unless the Corps understands the water flow direction, velocity and seasonal variation in *every single wetland*, it simply cannot conclude confidently there would be no disruptions in flow and circulation patterns, especially given the grave concerns already discussed about potential permanent impacts to hydrology in the construction areas. The conservative approach would be for the Corps to assume there will be secondary impacts, unless and until Enbridge proves that there will not be. Instead, Enbridge is allowed to assume that minor acreage loss – temporary or permanent – will not cause significant secondary impacts. That does not support a finding that secondary impacts will be minor.

The Corps concludes that cumulative impacts will be minor, apparently because the area it surveys has not experienced a numerically high amount of requests to permanently fill wetlands in the period from 2001 to the present.<sup>221</sup> Given this, it is implied that the wetland impacts caused by the Reroute will not have a significant cumulative effect on the environment. This is a superficial and arbitrary frame for the inquiry. Wisconsin has lost over half of the wetlands it had prior to colonization. The cumulative impact of disturbing the wetlands remaining in relatively undeveloped areas like Northern Wisconsin, not to mention wetlands near critical water resources like the Kakagon Sloughs, and Lake Superior itself, do not become smaller because, since 2001, permanent fill requests have been modest in acreage. Rather, this inquiry must be understood in its true historical and geographic context, which dates much further back than to 2001.

### **6.5.3 Mud Flats**

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### **6.5.4 Vegetated Shallows**

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### **6.5.5 Coral Reefs**

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<sup>219</sup> The Corps does identify that 153,502 acres of wetlands are present in the 7 HUC-10 watersheds the Reroute would cross. DCDD, p.94.

<sup>220</sup> 40 C.F.R. § 230.41(b). See also 33 C.F.R. § 320.4(b)(3).

<sup>221</sup> DCDD, 95.

## 6.5.6 Riffle and Pool Complexes

The Corps notes that 13 waterways have perennial flow that may support riffles and pools.<sup>222</sup> These waterway features singled out in the Guidance as one of the special aquatic site that must be considered, given their ecological value within waterways.

Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a steaming flow, a smooth surface, and a finer substrate. Riffle and pool complexes are particularly valuable habitat for fish and wildlife.<sup>223</sup>

These special aquatic sites can be impacted by discharges in numerous ways, degrading or eliminating their value.

Discharge of dredged or fill material can eliminate riffle and pool areas by displacement, hydrologic modification, or sedimentation. Activities which affect riffle and pool areas and especially riffle/pool ratios, may reduce the aeration and filtration capabilities at the discharge site and downstream, may reduce stream habitat diversity, and may retard repopulation of the disposal site and downstream waters through sedimentation and the creation of unsuitable habitat. The discharge of dredged or fill material which alters stream hydrology may cause scouring or sedimentation of riffles and pools. Sedimentation induced through hydrological modification or as a direct result of the deposition of unconsolidated dredged or fill material may clog riffle and pool areas, destroy habitats, and create anaerobic conditions. Eliminating pools and meanders by the discharge of dredged or fill material can reduce water holding capacity of streams and cause rapid runoff from a watershed. Rapid runoff can deliver large quantities of flood water in a short time to downstream areas resulting in the destruction of natural habitat, high property loss, and the need for further hydraulic modification.<sup>224</sup>

The Corps concludes that impacts to riffle and pool complexes are anticipated to be minor and temporary.<sup>225</sup> This conclusion is based on the same impact avoidance and restoration activities described above, *e.g.*, dams and other practices intended to reduce erosion, monitoring to identify changes to stream morphology, etc.<sup>226</sup> Since we are deeply skeptical that these efforts will effectively avoid impacts, monitor for impacts, and restore observed impacts, we are skeptical that impacts to these important waterway features will not occur.

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<sup>222</sup> DCDD, p.68.

<sup>223</sup> 40 C.F.R. § 230.45(a).

<sup>224</sup> 40 C.F.R. 230.45(b); DCDD, p.68.

<sup>225</sup> DCDD, p.69.

<sup>226</sup> DCDD, pp.68-69.

## **6.6 Potential Effects on Human Use Characteristics (Subpart F, 40 CFR Section 230)**

### **6.6.1 Municipal and Private Water Supplies**

“Municipal and private water supplies consist of surface water or ground water which is directed to the intake of a municipal or private water supply system.”<sup>227</sup> Discharges can affect water supplies by rendering them unpalatable or unsafe to drink.<sup>228</sup>

The Corps acknowledges that there are private wells nearby, including ones within just 150 feet of the Reroute.<sup>229</sup> To the extent the Reroute impacts the functioning of any private well, either in terms of flow or potability, Enbridge would “work with” the landowner to restore the well’s functioning.<sup>230</sup> This is a rather vague and noncommittal statement that is hard to evaluate. Enbridge appears to anticipate that certain issues, like a petroleum spill, could make it hard to remediate an existing well; therefore, it is proposed that Enbridge could simply purchase the property with the affected well.<sup>231</sup> As touched on below, this does not resolve the problem, because it fails to fully respect the property rights of the landowners near the Reroute. See Section 7.22.

With regard to potential risk to aquifers, the Corps concludes that impacts are unlikely, based on Enbridge’s assessment of where aquifer breaches occurred along Line 3/93 in Minnesota.<sup>232</sup> As we discuss further below, there are numerous reasons to doubt that Enbridge has now figured out how to avoid aquifer breaches based on this assessment. See Section 7.16.

### **6.6.2 Recreational and Commercial Fisheries**

“Recreational and commercial fisheries consist of harvestable fish, crustaceans, shellfish, and other aquatic organisms used by man.”<sup>233</sup> The Corps has preliminarily determined that impacts to recreational and commercial fishing would be minor and short-term.<sup>234</sup> There is little analysis of why impact to fisheries would be expected to be minor and short-term, other than a suggestion that impacts would be limited to temporary restrictions in access during construction.<sup>235</sup> This conclusion is thus underexplained. Further, it ignores the massive risk to both recreational and commercial fisheries in the region caused by the prospect of an oil spill, aquifer breaches, and other related impacts to waters posed by the Reroute.

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<sup>227</sup> 40 C.F.R. § 230.50(a).

<sup>228</sup> 40 C.F.R. § 230.50(b).

<sup>229</sup> DCDD, p.69.

<sup>230</sup> DCDD, p.69.

<sup>231</sup> DCDD, p.69.

<sup>232</sup> DCDD, p.70.

<sup>233</sup> 40 C.F.R. § 230.51.

<sup>234</sup> DCDD, p.71.

<sup>235</sup> DCDD, p.71.

We discuss how the Reroute would affect Wisconsin's public trust waters in Section 7.9. Wisconsin's constitution guarantees that all citizens have a right to use and enjoy public trust waters, and this includes recreational fishing.

We discuss how the Reroute would affect tribal treaty reserved rights in Section 10.4.

### **6.6.3 Water-related Recreation**

"Water-related recreation encompasses activities undertaken for amusement and relaxation. Activities encompass two broad categories of use: consumptive, e.g., harvesting resources by hunting and fishing; and non-consumptive, e.g. canoeing and sight-seeing."<sup>236</sup>

The comment here largely mirrors that in the previous subsection. The Corps determines impacts would be minor and short-term, again on the belief that any limits to access would last only as long as the construction process and there would be no other impacts to water-related recreational opportunities.<sup>237</sup> Again, this understates and ignores the risk of harm to waters supporting these recreational opportunities posed by the Reroute.

We discuss how the Reroute would affect Wisconsin's public trust waters in Section 7.9. Wisconsin's constitution guarantees that all citizens have a right to use and enjoy public trust waters, and this includes recreational activities like fishing, kayaking, swimming, and aesthetic enjoyment.

We discuss how the Reroute would affect Tribal Treaty reserved rights in Section 10.4.

### **6.6.4 Aesthetics**

"Aesthetics associated with the aquatic ecosystem consist of the perception of beauty by one or a combination of the senses of sight, hearing, touch, and smell. Aesthetics of aquatic ecosystems apply to the quality of life enjoyed by the general public and property owners."<sup>238</sup>

The Corps has preliminarily determined that impacts to aesthetics are expected to be minor, although permanent in some cases, given the permanently maintained ROW.<sup>239</sup> This conclusion is underexplained, although the Corps does note that "trenchless pipeline crossings" would limit aesthetic impacts.<sup>240</sup> The limitation with this analysis is that it presumes the Reroute will not "degrade water quality [or] disrupt natural substrate and vegetational characteristics[,] which the Guidelines explicitly contemplate as causes of loss of aesthetic value of an aquatic ecosystem."<sup>241</sup>

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<sup>236</sup> 40 C.F.R. § 230.52.

<sup>237</sup> DCDD, p. 71.

<sup>238</sup> 40 C.F.R. 230.53(a).

<sup>239</sup> DCDD, p. 72.

<sup>240</sup> DCDD, p. 72.

<sup>241</sup> 40 C.F.R. 230.53(b).

Given our comments elsewhere that the Reroute would cause impacts to water quality, substrate, and vegetation, we view this omission as significant.<sup>242</sup>

### **6.6.5 Parks, National and Historical Monuments, National Seashores, Wilderness Areas, Research Sites, and Similar Preserves.**

“These preserves consist of areas designated under Federal and State laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value.”<sup>243</sup> Discharges “may modify the aesthetic, educational, historical, recreational and/or scientific qualities thereby reducing or eliminating the uses for which such sites are set aside and managed.”<sup>244</sup>

The Corps has preliminarily determined that effects to Copper Falls State Park and the North Country National Scenic Trail would be minor and temporary.<sup>245</sup> This determination appears premised on the notion that there would be no direct impacts to these areas and that impairments to access would be temporary and limited to the duration of construction.<sup>246</sup> However, since Copper Falls State Park is a mere half-mile from the proposed route, it should be obvious that significant effects would follow from an oil spill at that location, or even from less dramatic problems like altered hydrological functioning or habitat fragmentation. The impacts to parks that the Guidelines contemplate are not limited to mere access and traffic considerations, but anything that would compromise the uses for which those areas are set aside. Undoubtedly, effects from the Reroute could extend beyond half a mile, and thus this risk of harm deserves more than the cursory treatment contained in the DCDD.

Separately, the Corps acknowledges that the National Park Service (“NPS”) has raised concerns about the two critical protected areas in Wisconsin, the Apostle Islands National Lakeshore and Kakagon Sloughs.<sup>247</sup> Indeed, it appears the NPS requested a range of information to understand the risks the Reroute poses to these areas, including an oil spill analysis developed specifically for the Apostle Islands.<sup>248</sup> In response, the Corps states that oil spills are outside its “purview to consider.”<sup>249</sup> Similarly, the Corps concludes that because the Reroute would happen “many miles distant” from the Apostle Islands and Kakagon Sloughs that the Reroute would not be anticipated to affect those areas.<sup>250</sup> Because we believe the Corps should be considering the risk of an oil spill as part of this analysis, and should be considering the very real and foreseeable risk of watershed-wide effects of the Reroute, we fundamentally disagree with this cursory

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<sup>242</sup> See Sections 6.3.1, 6.3.2, 6.3.3, 6.5.2.

<sup>243</sup> 40 C.F.R. 230.54(a).

<sup>244</sup> 40 C.F.R. 230.54(b).

<sup>245</sup> DCDD, p. 72.

<sup>246</sup> DCDD, p.72.

<sup>247</sup> DCDD, p.73.

<sup>248</sup> DCDD, p.73.

<sup>249</sup> DCDD, p.73.

<sup>250</sup> DCDD, p.73.



explanation. Given the value of the Apostle Islands National Lakeshore and the Kakagon Sloughs, this analysis is wholly insufficient.

## **6.7 Evaluation and Testing (Subpart 6, 40 CFR 230)<sup>251</sup>**

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## **6.8 Actions to Minimize Adverse Effects (Subpart H, 40 CFR 230)<sup>252</sup>**

The Guidelines require the Corps to consider changes to the project plan to avoid environmental impacts, based on the methods of minimization provided in Subpart H (40 CFR §§ 230.70-230.77.) Here, the Corps summarizes its position that total avoidance of impacts is not practical and that proposed construction methods, such as use of construction matting and wetland and waterbody crossing methods, will avoid impacts to the extent practicable. The Corps also credits Enbridge's monitoring and restoration proposals.<sup>253</sup> The Corps also cross references to its alternatives analysis in Section 5 of the DCDD.

This approach does not satisfy the requirement that the Corps fully consider minimization strategies.

First, the Corps does not here go through the specialized methods of minimization in subpart H. This leaves us guessing as to whether the Corps considered requiring changes to the Reroute based on these methods of impact minimization. For example, the Corps must consider whether impacts to plants and animals could be minimized by “[s]electing sites or managing discharges to prevent or avoid creating habitat conducive to the development of undesirable predators or species which have a competitive edge ecologically over indigenous plants or animals[.]”<sup>254</sup> But the DCDD does not discuss this, or any of the other minimization methods provided in the Guidelines. Perhaps we are to assume that consideration of these methods is implied or suggested elsewhere in the DCDD. However, the public should not need to be left guessing as to whether the Corps applied its own Guidelines to a decision as momentous as this. For this reason alone, the Corps has not met the requirement of this subsection.

Second, as there are flaws in the alternatives and impact minimization analyses the Corps simply summarizes and cross-references here, the conclusion that the Reroute properly minimizes impacts is subject to the same criticisms we raise in the sections addressing those analyses. See Sections 5, 6.

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<sup>251</sup> Evaluate the material to be discharged to determine the possibility of chemical contamination or physical incompatibility of the material to be discharged (§ 230.60). 40 C.F.R. § 230.5(h); If there is a reasonable probability of chemical contamination, conduct the appropriate tests according to the section on Evaluation and Testing (§ 230.61). 40 C.F.R. § 230.5(i).

<sup>252</sup> Identify appropriate and practicable changes to the project plan to minimize the environmental impact of the discharge, based upon the specialized methods of minimization of impacts in subpart H. 40 C.F.R. § 230.5(j).

<sup>253</sup> DCDD, pp. 73-74.

<sup>254</sup> 40 C.F.R. § 230.75(b).

## **6.9 Factual Determinations (Subpart B, 40 CFR 230.11).<sup>255</sup>**

This section of the DCDD contains the Corps's factual determinations as to short-term and long-term impacts of the proposed discharge.

The Corps concludes impacts to the physical substrate would be minor and short-term.<sup>256</sup> We disagree and do not believe the Corps has sufficient evidence to conclude otherwise. See Section 6.3.1.

The Corps concludes impacts to water circulation, fluctuation and salinity would be minor and short-term.<sup>257</sup> We disagree and do not believe the Corps has sufficient evidence to conclude otherwise. See Section 6.3.3, 6.3.4., 6.3.5., 6.3.6.

The Corps concludes impacts to suspended particulates and turbidity would be minor and short-term.<sup>258</sup> We disagree and do not believe the Corps has sufficient evidence to conclude otherwise. See Section 6.3.2.

The Corps concludes impacts to the aquatic ecosystem and organisms would be minor and short-term.<sup>259</sup> We disagree and do not believe the Corps has sufficient evidence to conclude otherwise. See Section 6.3.4, 6.3.5.

The Corps concludes impacts to the proposed disposal site would be minor and short-term.<sup>260</sup> We disagree and do not believe the Corps has sufficient evidence to conclude otherwise. See Section 6.3.2.

The Corps concludes the Reroute would cause only minor long-term effects (cumulative effects).<sup>261</sup> We disagree and do not believe the Corps has sufficient evidence to conclude otherwise. See Sections 6.5.2 (cumulative impacts to aquatic ecosystem), 9.

The Corps concludes the Reroute would cause only minor long-term effects (secondary effects).<sup>262</sup> We disagree and do not believe the Corps has sufficient evidence to conclude otherwise. See Sections 6.5.2 (secondary impacts to aquatic ecosystem), 9.

We also note the Guidelines require the Corps to review the factual determinations required in section "to determine whether the information in the project file is sufficient to provide the documentation required by [the Guidelines]."<sup>263</sup> We do not observe any explicit review of this

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<sup>255</sup> Make and document Factual Determinations in § 230.11. 40 C.F.R. § 230.5(k)

<sup>256</sup> DCDD, p. 74.

<sup>257</sup> DCDD, p. 74.

<sup>258</sup> DCDD, p. 74.

<sup>259</sup> DCDD, p. 74.

<sup>260</sup> DCDD, p. 74.

<sup>261</sup> DCDD, pp. 74-75.

<sup>262</sup> DCDD, p. 75

<sup>263</sup> 40 C.F.R. § 230.5(g).

question in the DCDD. As such, we further question the Corps's assessment that it is in possession of sufficient information and evidence to reach these factual conclusions.

### **6.10 Determination of Compliance with the Section 404(b)(1) Guidelines (40 CFR 230.10(a-d) and 40 CFR 230.12.<sup>264</sup>**

In this section of the DCDD, the Corps makes its findings of compliance with the requirements for discharge, based on the factual determinations discussed in the previous section.

The restrictions on discharge provide that “no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. . . . Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include”:

- (1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.
- (2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;
- (3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or
- (4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.<sup>265</sup>

Based on the facts reviewed in the sections above, the Corps has preliminarily determined that no significant adverse effects would occur on the resources described in (1)-(4).<sup>266</sup> Because we believe this factual record is incomplete, the efficacy of Enbridge's plans are vastly overstated, and the impacts to the environment vastly understated, we urge the Corps to revisit this determination and instead determine that the Reroute would cause significant degradation of WOTUS, the proposed discharge does not include all required impact minimization methods and/or the Corps does not have sufficient information to conclude that the Reroute will comply with the Guidelines.<sup>267</sup>

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<sup>264</sup> Make and document Findings of Compliance (§ 230.12) by comparing Factual Determinations with the requirements for discharge of § 230.10. 40 C.F.R. § 230.5(l)

<sup>265</sup> 40 C.F.R. § 230.10(c).

<sup>266</sup> DCDD, p.75.

<sup>267</sup> 40 C.F.R. § 230.12(a)(3). For reasons expressed elsewhere, we do not believe the alternatives analysis is comprehensive or sufficient, and the Corps cannot permit the Reroute on that basis, as well. 40 C.F.R. § 230.10(a). See Section 5.

## SECTION 7.0 – PUBLIC INTEREST REVIEW (33 CFR 320.4)

### 7.1 Evaluation of General Criteria

If the Corps properly evaluates and balances the costs and benefits of the Reroute, it will find the is not in the public interest because it will cause major irreparable harm and provide little economic benefit to the public. The Corps is required to evaluate and balance the direct, indirect, and cumulative effects of regulated activities on the public interest.<sup>268</sup> Determining the activities' effect on the public interest requires the Corps to weigh all factors which are relevant to the particular case.<sup>269</sup> Further, the regulations specify the decision "should reflect the national concern for both protection and utilization of important resources."<sup>270</sup> To properly evaluate and balance the probable impacts of a regulated activity and its intended use on the public interest, the Corps must consistently consider the national importance of a project's impacts on each public interest factor.

Here, the Corps has failed to evaluate all the public interest factors within the national context. This led the Corps to overstate the benefits and understate the harms.

For example, when evaluating the project's economic impacts, the Corps relied on Enbridge's assertion about the economic need for the project. Where the Corps should be considering the project's impact on the national market, it relies on the Enbridge's assertions on international need. The applicant's assertions about need for the project are likely international, not national, due to their status as a Canadian multinational company and the international nature of the pipeline. The Corps has failed to acknowledge that the applicant's economic assumptions do not align with the scope of analysis required by its regulations. The Corps must acknowledge this inconsistency and determine if the project is needed in the national energy market.

Further, the Corps relied on Enbridge's international perspective concerning the economic need for the project but came to a regional conclusion concerning the economic impacts of the construction. Instead of evaluating the need for the project in the national energy market as is required by regulation, the Corps evaluated the project's impacts on the local economy. This inconsistency in scale makes the project look far more attractive than it is. As discussed later in § 7.3, The Corps must evaluate the national economic need for the project to come to a rational conclusion about the benefits the project will provide.

Conversely, the Corps looked at energy demand on the national level.<sup>271</sup> There, the Corps considered how much petroleum is used relative to other energy sources within the national energy mix.<sup>272</sup> The Corps observed generally that petroleum is widely used in the U.S. but did not

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<sup>268</sup> 33 C.F.R. § 320.4(a)(1).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Supra* § 7.18.

<sup>272</sup> *Id.*

draw any conclusions about this project's specific impacts on the national market for petroleum. Generalizations about national use of petroleum cannot be appropriately compared to regional level conclusions about this specific project's impacts on the economy.

While the Corps overstated the economic benefits by using an inconsistent scale, it understated the environmental detriments. For example, the Corps looked too narrowly at the project's impact on wetlands. It characterized the effects to wetlands as discrete changes that would neither influence one another nor accumulate.<sup>273</sup> However, it should have considered the interconnected nature of wetlands and the national concern for preserving the integrity of these interconnected systems. Only when the Corps considers all the impacts of this project within the national context can it appropriately weigh the impacts against one another.

Where, such as here, the regulations require a balancing of many factors, it is important that each factor is evaluated on the same scale. Using a single scale allows each factor to be assigned its proper weight. Here, the Corps evaluated some factors on a local or discrete location level and others on a national scale, which is inconsistent with the regulatory objective. To avoid arbitrary decision making, the Corp must correct these inconsistencies, evaluate the effects to all factors on the national scale, and then balance the effects to each.

Once the Corps corrects these mistakes it will find this project is not in the public interest. For example, when the economic factor is viewed within the national context, discussed below in Section 7.3, it cuts against a finding of public interest. The tax benefits that will occur locally during construction are not significant to the national economy.<sup>274</sup> Additionally, research suggests that crude could be delivered to all the markets served by Line 5 through existing transport mechanisms, thus the pipeline reroute is not necessary even in the context of the national market for crude.<sup>275</sup>

Further, if the Corps views the impacts to wetlands within the national context, it will find the impacts are major and further illustrate why the project is not in the public interest. For example, instead of viewing the proposed fill of wetlands as minor, discrete changes, it should view them as fractures in an interconnected web of wetlands. Minor changes to any part of this web can constitute major adverse impacts to the whole, creating a cascade of destruction. The destructive effects to wetlands have been discussed at length throughout these comments and include but are not limited to changing the flow of water, destroying and fragmenting critical wildlife habitat, increasing the risk of major flooding events, and destruction of cultural, scenic and recreational values.

The following sections explain where the Corps understated negative impacts of the regulated activity and overstated the economic benefits. If the Corps considers and rectifies these mistakes

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<sup>273</sup> *Supra* §§ 6, 7.6, 7.10.

<sup>274</sup> *Supra* § 7.3.

<sup>275</sup> *Id.*

and then reevaluates and balances each public interest factor, it will find the project is not in the public interest and the permit should be denied.

## **7.2 Conservation**

The Corps cannot conclude there will be “no adverse impacts on conservation” because the proposed plans to avoid, restore, monitor, and correct impacts to wetlands are insufficient to ensure wetland values are conserved.<sup>276</sup> Further, compensatory mitigation does not appropriately replace the unique values of the permanently lost and converted wetlands.

Even though the Corps’s Regulatory Program is focused on conservation of WOTUS, the Corps has arbitrarily preliminarily determined that the project will not impact conservation. This conclusion is arbitrary because it is based on the Corps’s assumption that Enbridge will restore the wetlands to pre-construction conditions and replace the value of temporarily and permanently impacted wetlands with compensatory mitigation.

As previously discussed at length in Section 6, Enbridge’s plans are insufficient for the Corps to conclude that restoration to pre-construction conditions will occur. This is because the efficacy of surface contour restoration is overstated, the plans lack restoration mechanisms for layers of soil beneath the surface, the blasting plans are incomplete, and there is insufficient baseline hydrologic data to compare with post-construction monitoring.

Given the Corps’s regulatory authority over wetland conservation, it should have readily identified that restoring the contours of the substrate is not something that can be guaranteed and further that restoration of surface contours is a gross oversimplification of wetland conservation. More specifically, the permeability and composition of the substrate under the surface critically influences how water moves and flows in a wetland. The applicant’s restoration plans do not address how they will, or whether it is even possible to remediate the inevitable changes to the permeability of the soil caused by the construction activity.

Additionally, even if the plans did contain subsurface restoration methods, the Corps still could not rationally conclude that there will be no impacts because it lacks baseline data. To determine if the wetlands have lost their function, each wetland’s hydrology should be monitored for multiple years. Water levels and flow directions vary based on the season and the weather. Therefore, taking measurements for a short period of time, as proposed by Enbridge, will not provide enough data to gauge whether there has been a change post-construction. Simply put, Enbridge’s plan for acquiring baseline data is designed to make it impossible to determine whether the project has caused adverse changes post construction.

For example, wetlands containing the headwaters of streams that flow into larger rivers are not replaceable by other wetlands of equal size. The health and integrity of headwaters impact the ecosystem functions of downstream rivers, lakes, and wetlands. Once the Corps corrects its

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<sup>276</sup> DCDD § 7.2.

insufficient analysis of the impacts to wetlands as discussed here and in Sections 6 and 7.6, it will find the regulated activity will have major significant long-term impacts to wetland conservation.

[CROSS REFERENCES: §§ 1.4, 6, 7.6, 8.0]

### **7.3 Economics (33 CFR 320.4(q))**

The Corps cannot rely on Enbridge’s assertion that the project is economically viable and needed in the marketplace because alternative evidence suggests the project is not needed. While 33 C.F.R § 320.4(q) permits the Corps to assume the economics of a project are viable when the applicant is a private enterprise, it further states that in appropriate cases the district engineer may make an independent review of the need for the project. Here, the district engineer should conduct an independent review because economic evidence contrary to Enbridge’s assertions exists.

For example, an independent analysis conducted by PLG Consulting suggests that if Line 5 shuts down, the energy market will adapt fast enough to avoid supply shortages or price spikes.<sup>277</sup> This report shows that a range of commercially viable and operationally feasible options to serve all markets currently served by Line 5 already exists.<sup>278</sup> Further, this report explains that 87% of the crude oil transported by Line 5 could be immediately transported to the same 10 refineries currently served by Line 5 through existing water and rail transportation and unused capacity in other pipelines.<sup>279</sup> Lastly, long-term trends toward lower demand for refined crude products suggest that utilizing existing and more flexible forms of crude transportation may be more cost effective than building out new pipeline infrastructure that will become obsolete before the end of its useful life.<sup>280</sup>

Where the Corps receives particularized objections to the material it has relied upon in its review, it must undertake independent effort to verify or discredit the challenged material.<sup>281</sup> Here, the PLG Consulting report,<sup>282</sup> which shows how the energy market will adapt without Line 5, rebuts Enbridge’s assertions that this project is economically needed. Additionally, the Corps is importantly relying on Enbridge’s discredited assertions about the economic need for the project. Since the Corps is relying on Enbridge’s discredited economic assertions, it must independently verify the economic need for the project.

Further, the Corps acknowledges that, “the issuance of a DA permit would have no effect on consumer demands for fossil fuels.”<sup>283</sup> Since the issuance of the permit will have no effect on

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<sup>277</sup> PLG Consulting, *Likely Market Responses to a Line 5 Shutdown*, 8 (Oct. 2023).

<sup>278</sup> *Id.* at 40-42.

<sup>279</sup> *Id.* at 73.

<sup>280</sup> *Id.* at 12.

<sup>281</sup> See *Van Abbema v. Fornell*, 807 F.2d 633, 640 (7th Cir. 1986) (holding that when THE CORPS receives particularized objections, it must undertake some independent effort to verify or discredit the challenged material).

<sup>282</sup> PLG Consulting, *Likely Market Responses to a Line 5 Shutdown* (Oct. 2023).

<sup>283</sup> DCDD § 4.1, pg. 30.

consumer demand, and long-term demand for fossil fuels is predicted to go down, the conclusion that the project is in the interest of the national economy is suspect. Declining demand for fossil fuels does not support the conclusion that brand new fossil fuel transportation infrastructure should be permitted. The Corps must consider this important aspect of the problem, and rationally explain why building new fossil fuel infrastructure is in the national economic interest in the face of declining demand.

Lastly, the Corps's consideration of the economics is limited to the benefits that would result from construction. However, a decision is unlawful if it fails to disclose all the project's environmental costs such that the project seems more attractive.<sup>284</sup> Here, the Corps considered the tax benefits from construction, but failed to disclose the social cost of carbon or the economic costs associated with water contamination or destruction of recreational value. The DCDD drastically overstates the economic benefits and diminishes any concern regarding environmental costs. The result is a document that makes the project seem vastly more attractive than it is.

#### **7.4 Aesthetics (33 CFR 320.4(a))**

[CROSS REFERENCE: § 6.6.4]

#### **7.5 General Environmental Concerns (33 CFR 320.4(a))**

The Corps must consider the impact of the project on general environmental concerns. Some general environmental concerns relevant to this specific project include the impacts of GHG emissions on climate, inadvertent releases of drilling fluid from HDD, and oil spills. The Corps declined to address each of these issues in the DCDD to the proper extent because it claims these environmental concerns are outside of its jurisdiction. However, each is relevant to the impact of this project on the public interest and should be addressed by the Corps. Once the Corps properly considers GHG emissions, inadvertent releases of drilling fluid, and oil spills, it will find this project is contrary to the public interest.

The Corps must consider the downstream effects of the GHG emissions associated with the continued operation of Line 5 because the proposed activity is a legally relevant cause of those effects. "If an agency 'has no ability to prevent a certain effect due to that agency's limited statutory authority over the relevant action, then that action cannot be considered a legally relevant cause of the effect...'"<sup>285</sup> Where the agency has the authority to prevent a certain effect, the action is a legally relevant cause of the effect, and the agency must consider it.

Here, the Corps has declined to consider downstream effects of GHG emissions related to the continued operation of Line 5, maintaining that pipeline operation is outside of its jurisdiction.

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<sup>284</sup> See *Sierra Club v. Sigler*, 695 F.2d 957, 983 (5th Cir. 1983) (finding the colonel's decision to issue a permit unlawful because the important and significant environmental costs were omitted from the EIS such that the colonel could not carefully weigh all of the factors required).

<sup>285</sup> *Red Lake Band of Chippewa Indians v. United States Army Corps of Eng'rs*, 636 F. Supp. 3d 33, 42 (D.D.C. 2022) (quoting *Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 36, 47 (D.C. Cir. 2016)).



However, with the court ordered shutdown in place, the pipeline will not continue to operate without the DA permit. While policy is driving down the demand for fossil fuel products in the long-run,<sup>286</sup> construction of a new segment of Line 5 may delay the achievement of policy goals and support fossil fuel reliance in the short term. Since the Corps holds the power to prevent this new segment of Line 5 from being built by denying the permit as contrary to the public interest and Line 5 will not continue to operate without this new segment, the Corps has the power to prevent the GHG emissions from line 5 in the short-term.

Further, the downstream GHG emissions related to the pipeline's operation are identifiable and reasonably foreseeable because the quantity of crude and gas transported in the pipeline is known and its end users readily identifiable based on historic use of Line 5 products. Since the Corps can quantify and prevent the effects of downstream emissions associated with continued operation, these effects must be considered.

Additionally, the Corps has further understated the adverse impacts of the regulated activity on the public interest by declining to consider how inadvertent releases of drilling fluid during HDD negatively impact wetlands, waterways, and floodplains. The Corps policy requires them to consider all reasonably foreseeable detriments when making a permitting decision.<sup>287</sup> Although they are called “inadvertent,” releases of drilling fluid during HDD are foreseeable and harmful to the sites where they occur, therefore The Corps must consider them.

For example, during construction of Line 93 in Minnesota, Enbridge used 21 HDD crossings and releases of drilling fluids occurred at 12 of the crossing sites, with 28 spill incidents. This adds up to a failure rate of 57%, meaning drilling fluid is inadvertently released more often than not. Where a detrimental effect occurs often, it cannot be described as unforeseeable. Further, when these releases occur, they fill the wetlands from the bottom up and change them in a way such that they no longer function. Where the wetlands can no longer function as they should, the Corps must consider them degraded or destroyed.

Lastly, the Corps understated the adverse impacts of the project on the public interest by failing to consider oil spills in the evaluation and balancing of the public interest factors. Even though the Corps maintains concerns regarding oil spills related to the entire pipeline are outside its jurisdiction, it still must consider these concerns in its public interest review because the DA permit is a legally relevant cause of the effects of future Line 5 oil spills.

As previously mentioned, where an agency has the regulatory authority to prevent a certain effect, the permitted action is a legally relevant cause and the agency must consider the effect. Since Line 5 will not continue to operate without the DA permit, the Corps can prevent future oil spills from line 5 by denying the permit as contrary to the public interest.

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<sup>286</sup> *Supra* § 7.3, 8.

<sup>287</sup> 33 C.F.R. § 320.4(a).

Once the Corps properly considers the detrimental effects of GHG emissions associated with continued operation of the pipeline, inadvertent releases from HDD, and oil spills it will find this project is not in the public interest.

[CROSS REFERENCES: §§ 4.3, 7.3, 8]

## **7.6 Wetlands (33 CFR 320.4(b))**

The Corps has understated the detrimental effects of this project on wetlands, which makes it look far more attractive than it is. As detailed in Section 6, the Corps is overconfident in the applicant's plan to return the substrate to pre-construction conditions and thus has understated the magnitude of the adverse impacts to the physical and chemical composition of wetlands and the functional services they provide for wildlife and humans.

For example, the Corps's characterization of the impacts as minor assumes that Enbridge will be able to restore the wetlands to pre-construction conditions. However, the applicant's plans are slim at best and only address repairing surface contours. Even if restoring surface contours was possible (wetland microtopography develops naturally over thousands of years and cannot be mimicked by a backhoe)<sup>288</sup> this plan fails to consider how changes to the subsurface soil also impacts the functionality of the wetlands by altering the flow of water. Furthermore, the Corps has preliminarily approved the applicant's monitoring plans which will not accurately indicate whether detrimental changes have occurred because it lacks adequate baseline hydrologic data. The Corps must re-evaluate the applicant's plans in light of the criticisms laid out here and in Section 6 to appropriately assess the magnitude of the detrimental impacts on wetlands.

Here, the Corps has mischaracterized the project's adverse impacts to wetlands as minor by relying on Enbridge's inadequate restoration plans and by failing to recognize how minor changes to wetlands accumulate to form major impairments to the wetland system. The Corps regulations require it to recognize that minor alterations to wetlands can cumulatively result in major impairment of wetland resources because of their interconnected nature.<sup>289</sup> Therefore, if the project will result in minor long-term impacts to each discharge site, then cumulatively major impairment to wetland resources may result which is discouraged by regulation as contrary to the public interest. The Corps must re-evaluate and explain why the "minor long-term effects on wetlands" will not result in major impairment of the interconnected wetland system.

Further, even if after re-evaluating the Corps erroneously finds that the impacts to wetlands are minor, it still has not articulated a rational connection between the fact that there will be minor long-term effects on wetlands and the conclusion that the project is in the public interest. The Corps's regulations state that, "most wetlands constitute a productive and valuable public resource, the unnecessary alteration and destruction of which should be discouraged as contrary

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<sup>288</sup> *Supra* § 6.3.

<sup>289</sup> 33 C.F.R. § 320.4(b)(3).

to the public interest.”<sup>290</sup> Here, the Corps has preliminarily determined there will be minor alterations and destruction to wetlands which according to regulation is contrary to the public interest. Therefore, the Corps must explain why it can rationally find the project is in the public interest when there are the minor adverse impacts to wetlands.

Additionally, the Corps has failed to acknowledge that the introduction of the pipeline itself is a permanent change to the wetlands it will run through. The unnecessary alteration of wetlands is discouraged because minor changes may cumulatively result in major impacts to wetland services. Here, the Corps has failed to consider how the pipeline's physical presence is a minor change to the wetland's substrate which may cumulatively result in major impairment of the chain of wetlands it traverses under. If after re-evaluating the magnitude of the impacts the Corps still finds that the impacts are minor, then it must further articulate why the minor effects will not cumulatively result in major impairment pursuant to its regulations.

[CROSS REFERENCES: §§ 1.2, 1.3, 1.4, 1.6, 6, 6.3, 6.8]

### **7.7 Historic Properties (33 CFR 320.4(e))**

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### **7.8 Cultural Values (33 CFR 320.4(e))**

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### **7.9 Scenic/Recreational Values (33 CFR 320.4(e))**

The Corps must consider the detrimental impacts of the proposed project on the values associated with Wisconsin’s Public Trust waters even though the Corps does not control the administration of state law. The Corps’s regulations require that, “due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, historic properties, national landmarks and such other areas as may be established under federal or state law for similar and related purposes.”<sup>291</sup> The Corps must give full consideration to the project’s detrimental effects on the values associated with Wisconsin’s Public Trust waters because these resources are established under state law for similar and related purposes as the other places enumerated in the regulation.

For example, in the Wild and Scenic Rivers Act, Congress declared that some rivers of the Nation possess “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic cultural or other similar values,” and that “they shall be protected for the benefit and enjoyment of present and future generations.”<sup>292</sup>

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<sup>290</sup> 33 C.F.R. § 320.4(b)(1).

<sup>291</sup> 33 C.F.R. § 320.4(e).

<sup>292</sup> 16 U.S.C. § 1271.

Similarly, Wisconsin's Public Trust Doctrine provides that navigable waters are held in trust by the state for the benefit of the public for navigation purposes including hunting, fishing, recreation, and enjoyment of scenic beauty.<sup>293</sup> Like the Wild and Scenic Rivers Act, the Wisconsin Constitution recognizes the values associated with outstanding natural resources by establishing that the navigable waters of the state "shall be common highways and forever free[.]"<sup>294</sup> Further, Wisconsin's navigable waters are protected through Wisconsin Statute Chapter 30, which requires the Wisconsin Department of Natural Resources ("DNR") to consider the impacts of permitted activities on the Public Trust values associated with navigable waters of the state.<sup>295</sup> The Public Trust values are thus incorporated into Wisconsin DNR's public interest analyses.<sup>296</sup> Both the Wild and Scenic Rivers Act and the Wisconsin Public Trust Doctrine enshrine the value of generational use and enjoyment of outstanding waterways in the law.

The Corps has not fully considered the detrimental effects of the permitted activity on the value of Public Trust waters because it has declined to assess the detrimental impact of the Felony Trespass Law (2019 Wisconsin Act 33) on use of those waters. This law criminalizes engaging in traditional recreational uses on public trust properties where an oil pipeline operates unless the person has both a right to be there and permission from the pipeline operator.<sup>297</sup>

Here, the Corps has preliminarily concluded that the project's impact on recreation will be "minor and short-term" because no "permanent barriers" will be constructed. However, since recreational use of public waters where an oil pipeline is located is criminalized, the construction of a pipeline creates a permanent legal barrier.

The Corps's regulations do not define barrier, however, the plain meaning of barrier is something that impedes, separates, or blocks passage (material or immaterial).<sup>298</sup> Here, the Felony Trespass Law would become a barrier to recreation if the pipeline were constructed. Engaging in traditional recreational activities in the waters where the oil pipeline operates would constitute an illegal trespass and thus be punishable as a felony. Regardless of the application of the statute by state and local law enforcement and prosecutors, the risk of felony conviction would impede or block recreationalists from using the public trust waters crossed by the pipeline. The Corps cannot rationally conclude that the value of these trust waters is not permanently diminished by this barrier. Where recreationalists are prevented from entering the waters out of fear of felony charges, it can hardly be said that those waters are still "forever free".

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<sup>293</sup> See, e.g., *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393 (1923), *Muench v. Public Service Commission*, 261 Wis. 492, 511-512, 53 N.W.2d 514 (1952).

<sup>294</sup> Wisconsin Constitution Art. IX, § 1.

<sup>295</sup> See, e.g., Wis. Stat. § 30.12(3m)(c)(2); *Sterlingworth Condo Association v. DNR*, 205 Wis.2d 710, 729-730, 556 N.W.2d 791 (1996) (finding that DNR must consider the cumulative impact of permitting regulations on the state's navigable waters).

<sup>296</sup> *Id.*

<sup>297</sup> 2019 Wis. Act 33, §§ 7-8; Wis Stat. § 943.143 (criminalizing entrance to any public property with an oil pipeline including public waters).

<sup>298</sup> Merriam Webster, Barrier, Merriam-Webster.com Dictionary (2024).

Since the project would create a permanent barrier to recreation, the Corps must reconsider the project's impact on recreation before making a final public interest determination. The fact that the regulated activity creates a permanent barrier does not rationally lead to the conclusion that scenic and recreational value will only be temporarily impacted.

[CROSS REFERENCES: §§ 7.4, 6.6.2, and 6.6.3]

### **7.10 Fish and Wildlife (33 CFR 320.4(c))**

The Corps cannot rationally conclude that there will be no adverse impacts to wildlife because it has not concluded the ESA Section 7 Consultation. As detailed in Sections 6 and 10.2, The Corps's guidelines provide that where Section 7 consultation occurs, the Secretary of Interior's conclusions regarding the discharge's impact to the threatened and endangered species and their habitats shall be treated as final.<sup>299</sup>

Here, the Corps has indicated that it initiated formal Section 7 consultation, but the DCDD states that consultation is ongoing. Since the Secretary's conclusions regarding threatened and endangered species are treated as final, the Corps must wait until the Secretary makes these conclusions before it can determine the project's impact on wildlife within the public interest review. Considering that the DCDD does not forecast final decisions, conclusions here on the project's impacts on wildlife are arbitrary without the conclusion of the Section 7 consultation. For the public to meaningfully comment on this factor in the public interest review, the Corps must conclude the Section 7 consultation and provide the Secretary's findings here.

Additionally, the Corps cannot rationally conclude there will be only minor adverse impacts to other fish and wildlife because, as already extensively discussed throughout these comments, it has inaccurately characterized the impacts to the physical and chemical characteristics of the wetlands and waterways affected.<sup>300</sup>

Construction activities will directly impact wildlife by driving mobile organisms like birds and mammals away from the area, while less mobile creatures, such as herptiles, are likely to experience mortality.<sup>301</sup> Also, the Corps guidelines recognize that subtle changes to the aquatic ecosystem can affect wildlife in many ways including through the destruction and fragmentation of habitat and the introduction of invasive species.<sup>302</sup>

For example, as previously detailed in Section 6, seeps are important hydrologic features of wildlife habitat because they provide a consistent source of open water during the winter or dry seasons. However, permanent destruction of seeps may result from construction activities. During Enbridge's construction of Line 93 in Minnesota, natural seeps were identified at the

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<sup>299</sup> 40 C.F.R. § 230.30(c).

<sup>300</sup> *Supra* § 6.4.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

Moose Lake crossing in Aikin County, however, they proceeded with construction and caused some of the seeps to dry up.<sup>303</sup>

Here, Enbridge again overstates their competence and understanding of the risk of permanent hydrological damage which will put wildlife at risk. This project uses the same technologies and approaches used for Line 3/93 where permanent damage was caused to wildlife habitat. Likewise, destruction of seeps is just one example of how the Corps understated the project's impacts to the physical environment and consequently understated the impact to wildlife. As detailed in Section 6, the Corps is overly confident that the substrate is restorable to pre-construction conditions, reliant on incomplete baseline data and blasting plans, and has preliminarily approved insufficient monitoring plans.

Since the Corps has failed to accurately acknowledge the magnitude of the adverse impacts to wetlands and waterways, it has likewise misstated the impact to wildlife. Therefore, the Corps must reassess the severity and permanence of the impact on wildlife, and when it does, it will find the project is not in the public interest.

[CROSS REFERENCES: §§ 6.3, 6.4.2, 6.4.3, 10.2]

### **7.11 Flood Hazards (33 CFR 320.4(l))**

The Corps must evaluate the short-term effects of the project on flood hazards and explain why flooding will not be affected in the long-term. The Corps regulations direct the district engineer to "avoid to the extent practicable, long and short-term significant adverse impacts associated with the occupancy and modification of floodplains..."<sup>304</sup>

Here, the Corps has preliminarily concluded the project does not increase the risk of flooding because the regulated activities are temporary, and the wetlands will continue to provide flood attenuation once they are restored to pre-construction conditions. In making this conclusion, the Corps both failed to consider the short-term impacts to flood hazards and inadequately evaluated long-term effects.

For example, with regard to short-term flood risks, the Corps has not evaluated the risk of flooding during construction or considered flood risks while vegetation in the area restores to natural conditions. Further, climate change is causing more intense and frequent storm events which result in flooding. If a 500 or 1,000 year flood event occurred while the reroute was under construction or while vegetation was still recovering, the wetlands would not provide proper flood attenuation. The adverse impacts of flood events on the public interest are major. For example, a major flood event in 2016 devastated the Bad River Band by causing millions of dollars in damages to Tribal roads and cutting off road access for emergency personal trying to reach

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<sup>303</sup> See To: Minnesota Department of Natural Resources (MDNR) Minnesota Pollution Control Agency (MPCA) From: Enbridge Line 3 Replacement Team Re: Moose Lake Groundwater Investigation Report – Revision 4.

<sup>304</sup> 33 C.F.R. § 320.4(l)(2).

affected people.<sup>305</sup> Therefore, pursuant to their regulatory obligations, the Corps must consider the unavoidable risks of a devastating flood event which could occur in the short-term.

Additionally, the Corps must further consider the project's long-term effects on flood hazards. In concluding that there will be no long-term impacts to flooding, the Corps has assumed the wetlands will return to their pre-construction condition. However, as previously discussed in Sections 6, 7.6, & 7.10 the re-vegetative and hydrological restoration plans supplied by the applicant are not sufficient to ensure the wetlands will return to pre-construction condition. Merely restoring the original contours of the land on the surface does not ensure that deeper levels of soil still perform their original ecosystem services. Since the wetlands cannot perform their flood attenuation function properly unless they are fully restored, the Corps must consider the long-term risk of flooding given the likely event that the wetlands are not able to be fully restored.

### **7.12 Floodplain Values (33 CFR 320.4(I))**

The Corps cannot rationally conclude impacts to floodplains will be minor and temporary without detailed studies on all floodplains to be crossed. The Corps's regulations state:

For those activities which in the public interest must occur in or impact upon floodplains, the district engineer shall ensure to the maximum extent practicable, that the impacts of potential flooding on human health, safety, and welfare are minimized, the risk of flood losses are minimized, and whenever practicable the natural and beneficial values served by floodplains are restored and preserved.<sup>306</sup>

To ensure, to the maximum extent practicable, the natural and beneficial values served by floodplains are restored and preserved, the Corps must require the applicant to provide baseline flood risk information for all crossing sites.

Here, rivers and streams such as Bay City Creek, Brunswailer River, Silver Creek, Beartrap Creek, Krause Creek, and unnamed tributaries are unnumbered Zone A floodplains. The Corps correctly notes that these floodplains are mapped, but they do not have an assigned base flood elevation ("BFE"). BFE shows how high the water may rise during a 100-year flood. Without baseline elevation information for each of these crossing sites, The Corps cannot rationally conclude that construction will not adversely impact flood risks in these areas. If no baseline flood risk information exists, there will be no basis for comparison to post construction conditions. Therefore, the Corps cannot ensure that the floodplains are "restored" or "preserved." This strategy effectively ensures that detrimental impacts will be impossible to identify after construction is complete because current risks are not fully understood.

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<sup>305</sup> Bad River Band of Lake Superior Chippewa, *Flood Damage July 2026*, 2016Flood\_FloodDamage.pdf (badriver-nsn.gov).

<sup>306</sup>33 C.F.R. § 320.4(I).

Additionally, to ensure to the maximum extent practicable the natural and beneficial values served by floodplains are restored and preserved, the Corps must consider the adverse impacts to floodplains associated with inadvertent releases of drilling fluid during HDD. Despite the Corps's opinion that inadvertent releases are not reasonably foreseeable risks, inadvertent releases are not only foreseeable but they are inevitable.

For example, as previously discussed in Section 7.4, during Enbridge's construction of Line 93 in Minnesota, releases of drilling fluid occurred 57% of the time when HDD was used overall and 80% of the time when HDD was used for river crossings.<sup>307</sup> These numbers indicate not only that the risk of releases is foreseeable, but also that they occur the majority of the time when similar circumstances are present meaning they are inevitable. The Corps must balance the reasonably expected benefits against the reasonably foreseeable detriments,<sup>308</sup> therefore the Corps must consider the adverse impacts of drilling fluid releases because they are reasonably foreseeable.

Here, Enbridge plans to cross floodplains using HDD and the Corps has preliminarily concluded impacts to floodplains will be minor and temporary. However, if the Corps adequately considers the risk of drilling fluid releases, it will find that releases cause long-term impacts to the natural and beneficial values served by floodplains. For instance, the emplacement of drilling fluid into the soils and sediments of stream floodplains changes how water flows in those locations. Where the flow of water changes in floodplains, they may no longer adequately mitigate major floods. Since use of HDD poses a foreseeably risk to the function of the floodplains crossed, the Corps must consider this risk when determining if the project is in the public interest.

Further failing to consider reasonably foreseeable risks would lead the Corps to an unlawful decision. An agency makes an unlawful decision when it fails to consider an important aspect of the problem.<sup>309</sup> The foreseeable and inevitable risk of inadvertent releases of drilling fluid is an important aspect of the problem because Enbridge plans to cross floodplains using HDD. Therefore, a final decision by the Corps concluding that impacts to floodplains will be minor and temporary without consideration of the significant risks that inadvertent yet foreseeable releases of drilling fluid pose to floodplains would be unlawful.

### **7.13 Land Use (33 CFR 320.4(a)(1))**

The Corps must acknowledge and consider the effects of the Felony Trespass Law on Tribal access to treaty protected resources that the Great Lakes Indian Fish & Wildlife Commission ("GLIFWC") identified. If the agency can prevent an effect through proper exercise of jurisdiction, then it should consider the effect when deciding whether to issue a permit.<sup>310</sup> As previously stated in §

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<sup>307</sup> See State of Minnesota, Minnesota Pollution Control Agency in the Matter of: Enbridge Energy, LP Stipulation agreement.

<sup>308</sup> 30 C.F.R. § 320.4(a)(1).

<sup>309</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (finding where an agency has entirely failed to consider an important aspect of the problem its decision is arbitrary and capricious).

<sup>310</sup> *Red Lake Band of Chippewa Indians v. United States Army Corps of Eng'rs*, 636 F. Supp. 3d 33, 42 (D.D.C. 2022) (quoting *Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 36, 47 (D.C. Cir. 2016)).



7.9, the Felony Trespass Law will create a legal barrier to use of the corridors where the pipeline exists. But for the issuance of the DA permit for pipeline construction on ceded territory, the Felony Trespass Law would not create a legal barrier to access to Bad River and other Ojibwe treaty protected resources identified by GLIFWC. Since this barrier will not exist without the issuance of the DA permit, The Corps can prevent this detrimental effect. Therefore, even though The Corps cannot control state enforcement of the law, it must still consider the deterrent effect the law has on Tribal access to treaty protected resources, as indicated by the Band.

[CROSS REFERENCES: §§ 9.1, 10.4]

#### **7.14 Navigation (33 CFR 320.4(o))**

The Corps must consider the barrier to navigation that the Felony Trespass Law creates to corridors where the pipeline is proposed to be built. The Corps's regulatory duty is not fulfilled unless proper weight is given to this factor because "protection of navigation in all navigable waters of the United States continues to be a primary concern of the federal government."<sup>311</sup>

Here, the Corps has arbitrarily preliminarily concluded that there will be no adverse effects to navigation because the project does not involve the creation of any "barriers to navigation, commercial or recreational."<sup>312</sup> As previously discussed in Sections 7.9 and 7.13, the pipeline and the Felony Trespass Law together would create a permanent legal barrier to the use of waters, including navigation, where there is a pipeline. While the Corps cannot control how the state law is enforced, it must consider the effects that the law could have on navigation to ensure it fulfills its regulatory duty to protect navigation in WOTUS.

#### **7.15 Shoreline Erosion and Accretion (33 CFR 320.4(a)(1))**

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#### **7.16 Water Supply and Conservation (33 CFR 320.4(m))**

Enbridge's aquifer analysis and trench dewatering plans are insufficient to ensure the project does not adversely affect the availability of water for neighboring landowners, and proper wetland function. The Corps's policy requires efficient use of water resources in all actions which involve the significant use of water or that significantly affect the availability of water for alternative uses.<sup>313</sup> The Corps cannot ensure that the project uses water efficiently and leaves water available for alternative uses because it has insufficient data on how much water will be affected by the project. Therefore, the Corps must require the applicant to study the geologic conditions of every

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<sup>311</sup> 33 C.F.R. § 320.4(o)(3).

<sup>312</sup> DCDD § 7.14, pg. 83.

<sup>313</sup> 33 C.F.R. § 320.4(m).

drill site, to ensure no aquifer breaches will occur and examine the effects of trench dewatering further to ensure water is conserved for the proper functioning of wetlands.

Here, the Corps has preliminarily concluded the applicant will satisfy these water conservation goals based on Enbridge's aquifer analysis and findings that breaches can be avoided. However, this aquifer analysis is an insufficient basis for the Corps to conclude that no such breach will occur. The widely dispersed geotechnical borings Enbridge relies on will not adequately indicate prior to construction whether there is a confined aquifer at each drill site. Post-glacial landscapes which have unconsolidated sediments overlying the bedrock can be extremely heterogeneous over short distances meaning the geology changes quickly from place to place. Quick changing geology means that the widely dispersed data points do not provide an accurate map of all the aquifers which may be encountered along the project route. Since the Corps has insufficient data to determine where there may be confined aquifers, it cannot confidently assume Enbridge will not carelessly pierce one.

Gathering baseline data and assessing the risk to aquifers is especially crucial given Enbridge's documented track record for carelessly breaching aquifers and failing to swiftly report or remedy the damage. For example, during construction of Line 93 in Minnesota, Enbridge breached an aquifer next to the Fond du Lac Reservation (Mile Post 1102.5). The breach here resulted in the discharge of 263.1 million gallons of ground water onto the Fond Du Lac Reservation and the Stoney Brook watershed.<sup>314</sup> Unplanned discharges of ground water at this quantity altered the aquatic habitat and caused adverse effects to wild rice and other flora and fauna of cultural importance to the Fond Du Lac Band.<sup>315</sup> Further, it took Enbridge 7 months to implement and carry out its plan to repair the aquifer.<sup>316</sup>

The nearest geotechnical boring to the breach at Mile Post 1102.5 was a private well one mile away which did not indicate prior to construction that there was a confined aquifer in the area. Despite Enbridge's perception that the risk of breach was low, a breach occurred because the geological conditions changed between the nearest boring and the drill site. Breaches like the one at Mile Post 1102.5, further confirm that the Corps cannot confidently assume the risk of breach is low where Enbridge has not provided detailed aquifer studies for every drill site.

Like in Minnesota, Wisconsin's post-glacial landscape also has unconsolidated sediments overlying the bedrock and quick changing geology. Therefore, similar to the Mile Post 1102.5 breach site, it's likely that Enbridge's aquifer analysis will not accurately predict the risk of an aquifer breach. To be certain that a breach would not occur, extensive study of geology along the entire length of the project would be necessary, which in and of itself would be extremely intrusive to the natural environment.

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<sup>314</sup> *Comprehensive Enforcement Resolution Agreement for Milepost 1102.5*, 4 (Oct. 17, 2022), 2022-10-17-11025-comp-enf-agreement-fullyexecuted.pdf (state.mn.us).

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 2-3.

The Corps has preliminarily concluded that the risk of the applicant piercing an aquifer has been minimized, but this conclusion is based on data which is not representative of the diverse geological terrain. Considering water conservation is a major national objective, and the consequences of a breached aquifer can be devastating for water availability, the Corps cannot reasonably rely on such limited data to make its permitting decision. Because Enbridge has previously pierced aquifers, like in nearby Minnesota with catastrophic outcomes, the Corps should be particularly skeptical of relying on its analyses here.

Additionally, the Corps must consider the effect of trench dewatering on water conservation because water is essential to the function of wetlands. The Corps regulations recognize that “[w]ater is an essential resource, basic to human survival, economic growth, and the natural environment.”<sup>317</sup> Therefore, when considering a project’s impact on water use, the Corps must not only consider how the project affects water quantity necessary for human consumption, but also the water supply necessary for proper functioning of the natural environment.

Here, the Corps has only considered how a potential aquifer breach would impact the availability of water for human consumption. To be consistent with policy, the Corps must consider the negative impact trench dewatering may have on the availability of water in the wetlands. Specifically, the Corps must recognize the possibility that far more water will need to be removed in trench dewatering than expected because of the large scale of the project and the water-rich nature of the environments to be crossed. Contrary to the preliminary conclusion that water conservation will not be adversely affected, once the Corps considers the effects of this project on the availability of water in wetlands it will see the potential for adverse impacts is high.

For example, during construction of Line 3/93 in Minnesota, Enbridge planned to use in-trench dewatering.<sup>318</sup> However, the water that collected in the trenches was very muddy and pumping it out into wetlands or sediment control structures would have violated state water quality standards.<sup>319</sup> To avoid violation, Enbridge had to switch to a wellpoint dewatering system which uses far more groundwater and draws down the water table over a much larger area.<sup>320</sup> Enbridge’s switch to wellpoint dewatering in that case required them to increase their groundwater appropriations permit by 10 times.<sup>321</sup> Further, when the water table is drawn down over a larger area, it may be slower to recover or never fully restored, resulting in stress to vegetation and aquatic organisms.

Similarly to the construction in Minnesota, the applicant here has proposed to use in-trench dewatering and will be working in a complex, unpredictable, and water rich environment. However, Enbridge has failed to explain why the more water-intense wellpoint dewatering will

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<sup>317</sup> 33 C.F.R. § 320.4(m).

<sup>318</sup> See Minnesota DNR, *Enbridge Line 3 Replacement Project Water Appropriation Permit Amendment*, No. 2018 – 3420, (June 4, 2021) 04june2021-update-trench-watering-decisions.pdf (state.mn.us).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

not become necessary here as it was in Minnesota. Further, if the Corps had considered the possibility that this project may also require wellpoint dewatering, it would find that the adverse impacts to water conservation would be major. Major adverse impacts may result because the water table is drawn down over a much larger area, resulting in less predictable recharging of groundwater essential for the wetland's proper function.

[CROSS REFERENCES: § 6, Appendix 18]

### **7.17 Water Quality (33 CFR 320.4(d))**

First, the Corps's preliminary conclusion on impacts to water quality is arbitrary and premature because state and neighboring jurisdiction CWA Section 401 water quality certifications ("WQC") have not been completed. "Certification of compliance with applicable ... water quality standards required under provisions of Section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations."<sup>322</sup> Further, the Corps regulations provide that where federal, state, or local certifications are denied, the district engineer will deny the permit as contrary to the public interest, or deny the permit without prejudice, indicating that except for the certification denial permit could be issued.<sup>323</sup> In making the public interest determination, the Corps's regulations direct the district engineer to weigh the public interest factors according to the project's nature.<sup>324</sup> Given that this permit is for the discharge of dredge and fill material into WOTUS, water quality should be of the utmost importance.

Here, the Corps has stated it will not issue a final permit decision until the CWA § 401 process has concluded. However, it has also preliminarily determined that effects to water quality will be "minor, localized, and temporary," and the project is in the public interest.<sup>325</sup> The Corps made these conclusions based on sedimentation modeling provided by the applicant, not based on Section 401 WQCs. A conclusion that ignores the requirements of the agency's regulations is not a reasonable decision. The Corps made a conclusory determination that impacts to water quality will be minor and temporary before it received the necessary and dispositive certifications from WDNR and neighboring jurisdictions such as Bad River Band.

Secondly, an agency cannot simply ignore an important aspect of the problem in a permitting decision. While the Corps has stated the permit will be conditioned on the implementation of a Water Quality Monitoring Plan, it has failed to address what will happen when the monitoring plan shows adverse effects to water quality. Water quality standards are meant to protect the health and livelihood of communities by ensuring access to clean water. However, a plan, like the one the Corps has preliminarily approved, which seeks to monitor and monetarily compensate when things go wrong ignores the purpose of the standards all together. The Corps cannot ignore

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<sup>322</sup> 33 C.F.R § 320.4(d).

<sup>323</sup> 33 C.F.R. § 320.4(j).

<sup>324</sup> 33 C.F.R. § 320.4(a)(1).

<sup>325</sup> DCDD § 7.17, pg. 85.

the possibility that the monitoring plan will show adverse effects after construction, so it must address preventative and restoration measures too.

[CROSS REFERENCES: §§ 6.3.3, 6.6.1, 6.8, 10.1]

### **7.18 Energy Needs (33 CFR 320.4(n))**

The Corps must analyze the energy need for this project independent from the applicant's assertion that the project is economically viable. Energy projects are subject to 33 C.F.R. § 320.4(n) which states that, "energy conservation and development are major national objectives." Energy need is a public interest factor distinct from 33 C.F.R § 320.4(q) which permits the Corps to rely on the economic assertions of private enterprise to establish economic need for the project. The Corps must give independent effect to their regulation's energy provision, which is also consistent with prior agency interpretation.<sup>326</sup>

For example, in the past, when conducting a public interest review, the Corps has concluded that a project would "support the United States consumers' energy demands."<sup>327</sup> In making that conclusion, the Corps stated that it relied on "detailed information and testimony" provided by the applicant regarding the need for the project, demand for petroleum, and the benefits of the project.<sup>328</sup> In that case, the Corps did not rely on the applicant's assertion that the project was economically viable to conclude that the project would support the energy demands of the U.S.

However, here, the Corps has merely preliminarily concluded that the project would allow Enbridge to continue transporting NGLs and light crude oil to customers without trespassing on the Bad River reservation. The Corps has not addressed whether this project is necessary to support the U.S. energy needs. Unlike in prior cases, the Corps has not reviewed detailed information and testimony regarding the demand for petroleum. Instead, the Corps has assumed there is need for the project pursuant to their authority under the economic provision of their regulations. Therefore, the Corps has not given independent effect to each of its regulatory provisions as is required. Economic costs and benefits are not synonymous with energy costs and benefits and the Corps cannot treat them as such.

If the Corps considers this project within the context of the national interest in energy, it will find the project is not needed. As previously discussed in Sections 7.1 and 7.3, studies of the national market for crude and NGL show that demand for refined crude products is declining in the long-run and alternatives to transport the same products already exist. Since alternative means to

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<sup>326</sup> The rule against superfluities establishes that statute[s] [and regulations] must be interpreted to effectuate all their provisions, so that no part is rendered superfluous. *Hibbs v. Winn*, 542 U.S. 88, 89 (2004); *See Kisor v. Wilkie*, 588 U.S. 558, 575 (2019) (incorporating the "traditional tools of construction" in determining a regulation meaning is appropriate).

<sup>327</sup> *Red Lake Band of Chippewa Indians v. United States Army Corps of Eng'rs*, 636 F. Supp. 3d 33, 71 (D.D.C. 2022).

<sup>328</sup> *Id.*

transport the same products already exist and long-term demand for those products is declining, it is neither rational nor prudent to build new pipeline infrastructure.

### **7.19 Safety and Impoundment Structures (33 CFR 320.4(k))**

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### **7.20 Food and Fiber Production (33 CFR 320.4(a)(1))**

[THIS SECTION INTENTIONALLY LEFT BLANK]

### **7.21 Mineral Needs (33 CFR 320.4(a)(1))**

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### **7.22 Consideration of Property Ownership (33 CFR 320.4(g))**

The Corps cannot make a reasonable and reasoned decision about the impacts to property ownership without further studying the effects of the project on ownership of adjacent land. The Corps's regulations state that, "authorization of work in WOTUS granted by a DA permit does not convey a property right, nor authorize any injury to property or invasion or infringement of other rights."<sup>329</sup> While the Corps is not required to remedy property disputes, it still must consider whether injuries to property are in the public interest.

Here, the Corps has preliminarily concluded that the regulated activities will have negligible impacts on property ownership because the applicant has proposed to buy the property of adjacent landowners if their wells become contaminated beyond repair. While it is true that the Corps is not required to assist in property disputes, it must evaluate the applicant's plan to buy irreparable properties and thus consider the adverse financial and psychological impacts on the public interest.

For example, where an adjacent landowner no longer has potable water because of the permitted activities, they may be forced to sell their property to the applicant. This plan leaves the landowners little choice or leverage in the sale of their properties making it unlikely for landowners to obtain pre-contamination market values. Additionally, landowners forced by unlivable conditions to sell may not be adequately compensated for the sentimental value of their property or the stress and burden of forceful eviction from their homes.

Further, the Corps cannot begin to appreciate the magnitude of the project's effects on property ownership without further examination of private wells near the project site. Here, the Corps has preliminarily concluded based on nothing more than Enbridge's word that effects will be negligible. Without knowledge of how many private wells would be at risk of contamination

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<sup>329</sup> 33 C.F.R. § 320.4(g).

within 400 feet of the project, the Corps cannot rationally conclude the risk to property ownership is negligible.

Additionally, the applicant's analysis of impacts to potable wells and aquifers is based on DNR well data. This database is useful; however, it is far from exhaustive and older wells which have not had a report submitted will not appear in the database. The applicant has also proposed to burden the well owners with the responsibility of requesting pre and post construction testing. Since the Corps does not have enough information to determine which wells are at risk of contamination, it cannot ensure well owners have sufficient notice to request the necessary testing.

[CROSS REFERENCES: § 6.6.1]

### **7.23 Needs and Welfare of the People (33 CFR 320.4(a)(1))**

The Corps's determination that the Reroute is in the public interest is arbitrary because the benefits of the project do not outweigh the reasonably foreseeable detriments. Under 33 C.F.R. § 320.4(a)(1) a project is in the public interest if the benefits which may be expected outweigh the reasonably foreseeable detriments. Additionally, this balancing process requires the Corps to consider all factors which are relevant to the unique project.<sup>330</sup>

Here, the Corps has evaluated 22 public interest factors and preliminarily concluded with respect to each factor the project's foreseeable impact. The Corps preliminarily concluded that this project will adversely affect six public interest factors: aesthetics, wetlands, scenic and recreational value, fish and wildlife, floodplain values, and water quality. Further, of the 22 factors analyzed, the Corps could only conclude that the project would positively impact one, economics. The remaining factors the Corps claims will not be impacted at all.

Setting aside the insufficiencies of the Corps's economic assumptions, the Corps has failed to explain how benefits accruing from one factor outweigh adverse impacts to six other factors. Additionally, the Corps has adamantly maintained that its jurisdiction is limited to regulated activities in WOTUS and adjacent uplands. If the Corps is primarily concerned with impacts to WOTUS, then it is hard to understand how adverse impacts to water quality, water recreation, wetlands, and aquatic wildlife do not outweigh temporary tax benefits to the regional economy. Further, as detailed in Section 7.1, where the Corps views each of the factors consistently with the national concern in mind, it will find that the economic benefits are miniscule compared to the detrimental impacts to wetlands, water quality, fish and wildlife, aesthetics, scenic and recreational value, and floodplains.

While it is true that the Corps has characterized the adverse impacts it identified as "minor" or "temporary," this does not necessarily mean they do not cumulatively outweigh the economic benefits. After all, the Corps's own regulations recognize the interconnected nature of wetlands

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<sup>330</sup> *Id.*

and direct them to consider how even minor alterations to these ecosystems can cumulatively result in major adverse impacts.<sup>331</sup>

Additionally, the Corps does not provide a proper metric for comparison of the project's economic benefits. Throughout the decision document, the Corps consistently characterizes the adverse impacts as "minor" or "major." However, when it comes to economics, the Corps simply states there will be benefits without characterizing them as major or minor. This failure makes it difficult if not impossible to reconcile the connection between the Corps's preliminary conclusion and the facts presented as rational.

To avoid arbitrary decision making, the Corps must articulate an explanation for its action including a rational connection between the facts found and the preliminary decision made. As it stands, the Corps has not made any rational connection between the fact that adverse impacts will result in six of the public interest factors, and the conclusion that this project is in the public interest.

## **7.24 Public and Private Need**

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### **SECTION 8.0 – MITIGATION (33 CFR 320.4(r), 33 CFR Part 332, 40 CFR 230.70-77, 40 CFR 1508.20 and 40 CFR 1502.14)**

Compensatory mitigation may be required for unavoidable impacts to ensure the Guidelines are met, and to ensure the proposed discharge is not contrary to the public interest.<sup>332</sup> Mitigation is a critical component of managing discharges to WOTUS, because unavoidable impacts often occur, and only compensatory mitigation can avoid net loss of wetland functioning in the watershed. Given this, a failure in the approach to mitigation will result in resource impacts that the Guidelines—and statutes which they implement—are intended to avoid.

The approach to mitigation for the Reroute goes wrong from the outset, because the characterization and scale of un-avoided impact are understated. Enbridge proposes compensatory mitigation for: permanent fill of .02 acres of wetland, temporary impacts to 66.18 acres of wetland in workspace areas that will purportedly quickly revert to prior functioning, and conversion of 33.92 acres of wetland from Palustrine scrub-shrub ("PSS") and Palustrine forested wetlands ("PFO") to Palustrine Emergent Marsh ("PEM").<sup>333</sup> Enbridge then proposes to purchase mitigation bank credits to compensate for these impacts.<sup>334</sup>

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<sup>331</sup> 33 C.F.R. § 320.4(b)(3).

<sup>332</sup> 33 CFR §§ 332.1(c)(3), (d).

<sup>333</sup> DCDD, Appendix 4, p.5.

<sup>334</sup> DCDD, Appendix 4, p.7.



As discussed above, however, the un-avoided impacts are expected to be more significant than this.<sup>335</sup> What the Corps describes as temporary impacts in the construction corridor will not be temporary, but permanent loss of wetland functioning. Rather than quickly and entirely reverting back to their prior functioning, we have documented numerous reasons these wetlands could be impaired permanently, including blasting fractures that interfere with site hydrology and, therefore vegetation and habitat functioning. Site soils will be compacted and degraded. Corridor maintenance will introduce invasives, reducing the quality and diversity of vegetation. The notion that that these wetlands will be the same as they were after construction is a fantasy not supported by Enbridge's past plan or its track record building other pipelines. Given this, what is classified as mere temporal loss in these construction areas is indeed permanent, and would need to be categorized as such for purposes of compensatory mitigation.

Further, the proposed permanent conversion in the ROW will impair wetland functioning more significantly than the mitigation anticipates. As discussed above, installation of the pipeline will do more than simply change some of the vegetation in the ROW. It will impact site soils and hydrology in profound and lasting ways.<sup>336</sup> Invasives penetration will increase rapidly. Maintenance in the corridor will require repeated clearing and/or use of herbicides. These impacts will undermine the functioning of these waters in ways that are belied by their characterization as mere conversion.

Given these fundamental issues, the proposed compensatory mitigation is wholly insufficient. Purchasing credits from mitigation banks can be an effective mitigation approach in some cases, but it does not work when the impacts to be compensated for are so radically understated.

This underscores why the mitigation ratios are insufficient, if not meaningless, here. They are assigned for impacts that do not describe the likely outcome if the Reroute is allowed to proceed. Even if one assumes that the impacts are somewhat accurately described, the ratios would be insufficient given the level of risk presented by the Reroute. This is because, despite the Corps's protestations, events like oil spills, aquifer breaches, problems from HDD, etc., are all foreseeable outcomes that would devastate wetland values. Even setting those risks aside, the in-place mitigation proposed by Enbridge, to restore site conditions to their pre-construction state, is speculative, vague, and largely duplicative of plans that have encountered significant problems elsewhere. See Section 6. Given this, the Corps can and should decline to fully credit Enbridge's proposed in-place mitigation and minimization strategies, but instead assign a lower weight to them given their inherent risk of failure. This would mean anticipating considerably higher un-avoided impacts requiring compensatory mitigation than the DCDD currently does.

We also question whether purchasing credits from the Poplar River Mitigation Bank site will compensate for losses from the Reroute, given the geographic distance involved, and the absence

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<sup>335</sup> See Section 6.5.2.

<sup>336</sup> See Section 6.

of any showing that the wetlands to be compensated for are commensurate to the wetlands at that bank site.

All the foregoing applies with equal force to the Corps's determination that mitigation for streams is not required.<sup>337</sup> Because the Reroute will impact site substrate and hydrology, there are significant reasons to suspect that Enbridge will be unable to fully restore the impacted streams to the pre-construction condition.<sup>338</sup> If and when that happens, only compensatory mitigation would be able to avoid net loss of function from these aquatic systems.

## **SECTION 9.0 – CONSIDERATION OF CUMULATIVE AND SECONDARY EFFECTS**

The Corps's consideration of Cumulative and Secondary effects of the Reroute in the DCDD does not satisfy the requirements of NEPA, nor does it provide adequate information for the Corps to make a public interest determination, much less an affirmative one, for Enbridge's proposal. Both CWA Section 404 and NEPA require the Corps to consider the cumulative environmental effects of a proposed agency action.

NEPA's implementing regulations require the Corps to discuss "environmental effects of the proposed action and alternatives" when preparing an Environmental Assessment.<sup>339</sup> "[E]nvironmental "effects" means "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable."<sup>340</sup>

Additionally, CWA regulations require the Corps to make a determination regarding the "cumulative effects on the aquatic ecosystem" of the proposed permitting action, defined as "changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material."<sup>341</sup> The regulations explain that "[a]lthough 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."<sup>342</sup>

In the DCDD, the Corps recognizes the broad regulatory definitions of "cumulative effects," using the same language as 40 CFR § 1508.1(i): " effects on the environment which result[] from the incremental effects of the action when added to other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."<sup>343</sup> Yet the Corps's DCDD only "focuses on the effects on wetlands and waterbodies"<sup>344</sup>

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<sup>337</sup> DCDD, p.90.

<sup>338</sup> See Section 6.

<sup>339</sup> 40 C.F.R. § 1501.5.

<sup>340</sup> 40 C.F.R. § 1508.1(i).

<sup>341</sup> 40 C.F.R. § 230.11(g).

<sup>342</sup> 40 C.F.R. § 230.11(g)(1).

<sup>343</sup> DCDD at § 9.0.

<sup>344</sup> DCDD at § 9.0.

ignoring other cumulative and secondary effects of permitting the Reroute. This is not enough to satisfy the Corps' statutory obligations.

The Corps's limited discussion of cumulative and secondary environmental effects of the Reroute in the DCDD is unsurprising given the Corps erroneously limited the of its scope of review for the proposed action *generally*. Therefore, its focus on cumulative impacts of only wetlands and waterways is insufficient. The foundational scoping errors are discussed more fully in Sections 2 and 3 above and fatally undermine the Corps's conclusion that the no action alternatives would result in no direct, secondary, or indirect effects to WOTUS.<sup>345</sup>

Analyzing no action alternatives, the Corps combines several scenarios that might occur in the absence of Corps action, including "leaving the existing Line 5 in place" and several alternative modes of transporting product currently delivered by Line 5.<sup>346</sup> As discussed in Section 3 above, the Corps's assumptions about the purpose and need of the proposed project unduly limit the Corps's alternatives analyses, and those insufficiencies also render the Corps's cumulative and secondary effects analysis insufficient.

Importantly, the DCDD fails to account for information that must change the Corps's approach to describing the environmental effects of any of the scenarios included in the Corps's analysis of no action alternatives, or comparing those effects with the effects of the proposed project. In June 2023, the U.S. District Court for the Western District of Wisconsin found in favor of the Band River Band in a lawsuit against Enbridge, finding that the company is trespassing on land belonging to the Band. To remediate the trespass, the district court ordered Enbridge to disgorge profits to the Band and critically, to cease operation of Line 5 on specific portions of the Band's Tribal territory before June 16, 2026, and to "arrange prompt, reasonable remediation at those sites."<sup>347</sup> This order provides a date certain by which Enbridge will not be able to use the existing Line 5 without the Reroute constructed and operational. By ignoring this sunset date, the Corps's DCDD creates a false baseline by which, throughout the document, the Corps compares the effects of the proposed project, resulting in flaws regarding both 1) wetland and waterbody impacts that are specially discussed in the document, and 2) several environmental effects that are not discussed, or insufficiently discussed, in the DCDD.

For example, any impacts to WOTUS from the Reroute should be compared to a no action alternative where the entirety of the existing Line 5 is no longer operating in less than 22 months and decommissioned shortly thereafter. This would presumably result in positive environmental effects to WOTUS, particularly when considering the risks of spills from the pipeline. The issue of flaws related to the alternatives analysis are discussed in depth in Section 5, above.

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<sup>345</sup> See DCDD at § 9.1.

<sup>346</sup> See DCDD at § 5.3.

<sup>347</sup> Amended Final Judgement in a Civil Case, 2, *Bad River Band v. Enbridge Energy*, Case No. 3:19-cv-00602-wmc (W.D. Wis.)

The faulty analysis of no action alternative also results in a flawed analysis of the environmental effects of the Reroute in other ways, particularly regarding GHG emissions and climate change. Critically for both the Corps's public interest determination and its NEPA review, the oil and gas market is already poised to adapt to a shutdown of Line 5, a posture that has only improved since the district court's order. In fact, the PLG Consulting report, concludes that with advance notice of a Line 5 shutdown, like the one dictated by the District Court order, markets will quickly adapt and "can be expected to do so without supply shortages or price spikes."<sup>348</sup> This conclusion means that there will be no detriment to the public interest related to oil and gas supply if the Corps does not take action on Enbridge's permits. It also means that environmental effects related to GHGs and climate change are not an all or nothing proposition—there will be some effects related to the alternative transportation modes, some of which are discussed in Section 5 of the DCDD. However, the Corps must also examine the long-term impacts related to GHGs and climate change that may result from the alternatives.

Specifically, the Corps must consider the GHG and climate change implications of permitting the proposed project against the expected effects from alternatives. The construction of a new, 41-mile segment of Line 5, as well as the related action proposed by Enbridge at the Straits of Mackinac, will almost certainly extend the life expectancy of the pipeline. The Corps must consider this impact of its permitting action on the attainment of climate commitments, both within the U.S. and globally.<sup>349</sup> Even though the short- and medium-term GHG and climate impacts of denying the Reroute will likely be minimal or non-existent due to the market's existing preparedness to adapt and maintain supply, the Corps must consider the potential long-term implications of approving new fossil fuel infrastructure at this time. The market's flexibility in adapting to a shutdown of Line 5 through alternative transport modes is indicative of its ability to adapt to future contraction of the fossil fuel industry as the U.S., Canada, and the global community accelerate efforts to decarbonize economies. A pipeline is a much less adaptable transport mode than the other alternatives acknowledged in the DCDD and further explained in the PLG Consulting report.

The remainder of this section will address specific concerns with the Corps's analysis of environmental effects in the DCDD. The aforementioned, underlying concerns are relevant to the Corps's entire analysis of the cumulative effects of the Reroute and are only addressed below in specific instances.

## **9.1 Direct, Indirect, & Secondary Effects**

The Corps's discussion of direct effects in the DCDD is insufficient, even without considering the issues regarding scope and alternatives discussed above. The Corps states that direct and indirect

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<sup>348</sup> PLG Consulting, *supra* note 53, at 8.

<sup>349</sup> On January 20, 2021 President Biden reentered the U.S. into the Paris Agreement, which commits signatories to holding global average temperature increases to well below 2°C above pre-industrial levels with a target of limiting the increase to 1.5°C

effects on wetlands and streams are discussed throughout the document,<sup>350</sup> but that does not justify limiting specific discussion of direct impacts in the DCDD.

### ***Direct Effects***

Additionally, the descriptions of the direct effects that *are* included in Section 9.1 of the DCDD are incomplete. For example, the Corps claims all temporary impacts to wetlands will be restored after construction, except for 33.91 acres of wetlands permanently maintained clear of woody vegetation on the right of way corridor.<sup>351</sup> This change in wetland type will result in a loss of functional value, as discussed in Section 6 above, that must be considered, not glossed over because some form of wetlands will be restored. Another example of direct effects that are not discussed in Section 9.1 of the DCDD is GHG emissions from construction activity. These impacts are mentioned in Section 7.5 of the DCDD but are omitted from the Corps's discussion of direct environmental effects and therefore are not contextualized appropriately.

### ***Indirect and Secondary Effects***

The indirect and secondary effects discussed in the DCDD are not discussed sufficiently and there are many effects, some of which will be raised here, that are not contemplated at all. Regarding the former, the Corps recognizes that the corridor being perpetually maintained free of woody vegetation will “result in habitat segmentation, especially in forested wetlands[,]”<sup>352</sup> but does not examine the environmental effects of that result in any meaningful way. Instead of a mere mention, this analysis should consider what, if any, impacts may result from the identified habitat fragmentation. Specific concerns about potential indirect and secondary effects of wetland conversion include the potential for invasive species to establish and spread via the corridor and for increased deer browsing along the corridor which would impact habitat for all wildlife in the area. The Corps also recognizes that the newly cleared corridor may induce off-road vehicle use in places that had not previously been accessible. The Corps fails to consider, however, how that potential increased recreational activity would affect ecosystems or communities, nor does it consider implications of Wisconsin's Felony Trespass Law (2019 Wisconsin Act 33) on off-road vehicle users, other recreationists, or local community members.

A noncomprehensive list of the indirect and secondary environmental effects the Corps failed to consider in the DCDD include:

- Any potential secondary effects resulting from the many places (the total acreage of which is unknown) where the Reroute would bisect wetlands. As discussed in Section 6.5.2 above, bisected wetlands may be impacted by construction of the pipeline, creating potential secondary wetland impacts that must be evaluated

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<sup>350</sup> DCDD at §9.1.

<sup>351</sup> See DCDD at § 9.1.

<sup>352</sup> DCDD, p. 92.

- Any potential environmental effects on resources downstream from the proposed reroute, including the Kakagon and Bad River Sloughs, recognized as a National Natural Landmark and by Ramsar as a Wetland of International Importance,<sup>353</sup> Copper Falls State Park, and nearby trout streams. The Corps’s analysis of indirect and secondary impacts should take particular note of any potential impacts from sedimentation, flood, or spill risk on these and other important cultural and recreational resources; and
- Potential indirect or secondary effects of flooding from the Reroute or its construction. See Sections 6 and 7.

These are just several among a myriad of impacts that may flow from those already identified by the Corps, all of which must be considered as indirect or secondary effects of the Reroute. It is the Corps’s responsibility to describe the environmental effects of a proposed action, and the DCDD barely scratches the surface of potential impacts to the land and waters surrounding the proposed Reroute when discussing indirect and secondary effects.

#### ***Other Present and Reasonably Foreseeable Future Actions***

The Corps’s discussion for other present and reasonably foreseeable future actions is similarly lacking the necessary detail or appropriate scope to satisfy the Corps’s obligations. Again, the effects are not discussed in enough detail to support an opinion about the consequences of those effects, and the discussion is wholly lacking any meaningful analysis of many effects, some of which will be highlighted here.

One issue the DCDD *does* discuss is the potential relocation of two transmissions lines along the corridor for the Reroute, but it is unclear how these projects are related to the reroute, particularly whether they will be built if the Reroute is not approved. As reasonably foreseeable related future actions, these transmission line proposals merit the Corps’s consideration in other sections of the DCDD, for example, in discussions related to aesthetic or habitat effects.

A glaring omission in this section of the DCDD is any discussion of the very real risks of oil spills, along the rerouted segment and along the rest of the 70-year-old pipeline if its lifespan is extended because of Corps permitting actions. Oil spills occur often enough to be reasonably foreseeable. In fact, Line 5 has spilled at least 29 times in the last 50 years, releasing more than 1.1 million gallons of oil into the environment.<sup>354</sup> Thankfully, none of these spills have been catastrophic, but their frequency leaves no doubt that another spill, enabled by the Corps’s action, is not only foreseeable, but likely. Oil spills are not a question of if, but when, where, and how much. The impacts of a catastrophic spill, while dictated by local conditions, are not without precedence to inform analysis by the Corps. In 2010, Enbridge was responsible for one of the largest inland oil spills in U.S. history when its Line 6B in Michigan ruptured and spilled oil for 17 hours until a local utility reported it to Enbridge. In fact, Enbridge’s own actions resulted in

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<sup>353</sup> Ramsar Sites Information Service, Kakagon and Bad River Sloughs, <https://rsis.ramsar.org/ris/2001> (last visited Aug. 28, 2024).

<sup>354</sup> Ellison, *supra* note 1.

hundreds of thousands of additional gallons of oil being released than otherwise would have been.<sup>355</sup> In the end, over a million gallons of oil devastated 38 miles of the Kalamazoo River. The risk of spills, from small leaks to major ruptures like the Kalamazoo spill, must be thoroughly explained and considered by the Corps.

Another category of reasonably foreseeable effects omitted from the DCDD is the effects of GHGs and climate change. While, as discussed above, the short- and medium-term effects on GHG emissions are likely minimal given the current availability of market alternatives to transport Line 5's product, permitting the Reroute has the potential to lead to long-term GHG and climate impacts.

Current Council on Environmental Quality ("CEQ") guidance on consideration of GHG and climate impacts under NEPA require agencies to properly (1) quantifying all the reasonably foreseeable GHG emissions associated with the proposed action and its alternatives, and (2) contextualizing and accurately describing the effects related to those estimated emissions.<sup>356</sup> The Corps should conduct a thorough review of the upstream and downstream impacts that could result from an extended life expectancy of the entire Line 5 pipeline as a result of the Reroute. These impacts should be quantified to facilitate consideration of the long-term impacts of the Reroute in relation to national and international climate targets. They should also be contextualized, describing both the effects of the Reroute in terms of overall GHG emissions and the potential result of those effects on the environment.

## 9.2 Geographic and Temporal Scope

The geographic scope of the Corps's review of the Reroute is defined in the DCDD as the seven 10-digit HUC watersheds the Reroute would cross. However, in describing numerous effects of the Reroute throughout the DCDD, the Corps does not adhere to its own defined scope. For example, when discussing the indirect effects of turbidity and sediment transport due to construction activities, the Corps simply notes that the "magnitude and duration of these effects depends on the crossing method, topography, and soils at the crossing location."<sup>357</sup> This is not a description of the effects at all—merely an acknowledgement that there will be impacts, without any attempt to quantify or qualify them. The Corps should instead take a serious look at the potential of sedimentation and turbidity to impact downstream resources. While the geographic and temporal scope should be expanded to include potential impacts related to climate change, for example, the Corps does not even adhere to its already limited scope when discussing many

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<sup>355</sup> See Nat'l Trans. Safety Board., Pipeline Accident Report: Enbridge Incorporated, Hazardous Liquid Pipeline Rupture and Release, Marshall Michigan, JULY 25, 2010 (2012), <https://www.nts.gov/investigations/AccidentReports/Reports/PAR1201.pdf> (last visited on Aug. 1, 2024).

<sup>356</sup> National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1201 (Jan. 09, 2023) [hereinafter CEQ Guidance Change], <https://www.federalregister.gov/documents/2023/01/09/2023-00158/national-environmental-policy-act-guidance-on-consideration-of-greenhouse-gas-emissions-and-climate>.

<sup>357</sup> DCDD at § 9.1.

of the effects of the proposed action. This flaw in the DCDD must be rectified to provide the Corps and the public with a more accurate explanation of the environmental effects of the Reroute.

### **9.3 Affected Environment**

The Corps's description of the effected environment in the DCDD is limited to waterway impacts, but as explained above and throughout this comment letter, the consequences of the Reroute are much broader reaching. First, the waterways are discussed in terms of total acreage of proposed discharge and fill, but there is no discussion of the nearby environment that will be affected. Again, there is no discussion of important resources like the Kakagon Sloughs or Copper Falls State Park. There is no discussion of how impacts to the waterways might affect the ecology of the area more broadly.

Second, the affected environment considered by the Corps needs to be expanded to include upstream and downstream impacts from extraction and end-use of the products conveyed by Line 5, and the impacts of extending the life expectancy of the pipeline as a result of the Reroute. Taking into account the likely market responses to a shutdown discussed above, the Corps's alternatives analysis must also consider the upstream and downstream GHG and climate change impacts of potential long-term market adjustments away from fossil fuel resources in the absence of Line 5.

### **9.4 Environmental Consequences**

The Corps's summary discussion of environmental consequences is marred by inadequacies of the limited scope of its review and failure to recognize the imminent shutdown of the existing Line 5 on the Bad River Reservation, regardless of the Corps's action here. One glaring omission is the Corps's lacking consideration of how the proposed action would impact Treaty rights held by the Bad River and other Bands of Lake Superior Chippewa as discussed below in Section 10.4. Accordingly, this section must be amended to account for the appropriate scope of review.

### **9.5 Mitigation to Avoid, Minimize, or Compensate for Cumulative Effects**

[CROSS REFERENCES: §§ 6, 8]

### **9.6 Conclusion Regarding Cumulative Impacts**

The Corps's conclusion that cumulative impacts of the Reroute "have been preliminarily determined to be less than significant"<sup>358</sup> is undermined by the numerous flaws explained, generally or in detail, in this section. The Corps must expand the narrow scope of its review of environmental impacts of the proposed action and must rectify deficiencies in its cumulative effects analysis accordingly. The Corps's cumulative effects analysis must account for foreseeable market responses to a shutdown of Line 5 when comparing effects of the proposed action against

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<sup>358</sup> DCDD at § 9.6.



no action alternative and incorporate potential positive environmental effects of Line 5 ceasing operation. Long-term effects related to GHGs and climate change must also be accounted for and described to ensure a sufficient analysis of the cumulative impacts of the WI L5R.

## **SECTION 10.0 – COMPLIANCE WITH ENVIRONMENTAL LAW AND POLICIES**

### **10.1 Section 401 of the Clean Water Act (33 USC Section 1342), Water Quality Certification (33 CFR 320.4(d))**

The Corps correctly identifies Wisconsin as the certifying authority under CWA Section 401(a)(1) and acknowledges that Wisconsin has yet to issue the WQC requested by Enbridge. Neither has the Bad River Band had the opportunity to object to the DA permit as a neighboring jurisdiction pursuant to CWA Section 401(a)(2). As the Corps made clear, it is barred from permitting the Reroute under CWA Section 404 until both of these processes are complete.

Nevertheless, concerns submitted to the Corps in May 2024 by MEA, Clean Wisconsin, et al. regarding the Corps's premature analysis, public notice, and hearing remain valid.<sup>359</sup> Chief among them is the claim that the Corps is not able to determine the significance of the Reroute's environmental impacts without 401 WQC decisions from Wisconsin and the Band. Absent sufficient evaluation of impacts to water quality and compliance with state and Tribal water quality standards, the very purpose of the EA is frustrated. A deficient draft EA that fails to fully assess such impacts further restricts the public's ability to review and comment on substantive findings.

The Corps is similarly unable to conduct a satisfactory public interest review without both jurisdiction's WQCs. When evaluating compliance with state and Tribal water quality standards pursuant to the public interest review, the Corps considers WQCs conclusive. The Corps therefore is not able to conclusively determine whether the Reroute is in the public interest without WQC decisions from Wisconsin and the Band. Nor are members of the public able to advise whether the Reroute is in their own interest until WQC decisions are made.

[CROSS REFERENCES: §§ 6.6, 7.17]

### **10.2 Endangered Species Act of 1973 (16 USC 1531)**

Congress passed the federal ESA with the goal to preserve endangered and threatened species.<sup>360</sup> Federal agencies are prohibited from authorizing actions likely to jeopardize the continued existence of endangered or threatened species or destroy or adversely modify such species' habitats.<sup>361</sup> Agencies are directed to utilize "best scientific and commercial data available" in

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<sup>359</sup> Letter from MEA, Clean Wisconsin, et al., re U.S. Army Corps of Engineers Line 5 Public Hearing to Col. Swenson, U.S Army Corps of Engineers (May 14, 2024).

<sup>360</sup> 16 U.S.C. § 1531(c)(1).

<sup>361</sup> 16 U.S.C. § 1536(a)(2).

fulfilling these requirements.<sup>362</sup> The best available science provision has been interpreted to ensure the ESA is not “implemented haphazardly, on the basis of speculation or surmise.”<sup>363</sup> Agencies are precluded from “unreasonably relying on certain sources to the exclusion of other, better scientific evidence.”<sup>364</sup>

In November 2022, the White House CEQ and the White House Office of Science and Technology Policy released joint guidance for incorporating Traditional Ecological Knowledge (“TEK”) into federal agency policy and decision-making. The guidance specifically calls for federal agencies to apply TEK regarding relevant species locations, behaviors, habitats, and changes over time as best available science when making determinations under the ESA.<sup>365</sup>

The Corps relied on an Official Species List (“OSL”) generated through U.S. Fish and Wildlife Service’s (“USFWS”) IPaC tool to identify federally listed threatened or endangered species that may be present within the Reroute area.<sup>366</sup> The Corps’s findings therefrom regarding the Reroute’s impact to threatened species are problematic because they are too narrow in scope, fail to incorporate TEK in accordance with federal policy, lack supporting documentation and explanation, and were noticed prematurely pending USFWS concurrence decisions and formal ESA Section 7 consultation.

First, the Corps correctly defines “action area” as “all areas to be affected directly *or indirectly* by the Federal action and *not merely the immediate area involved in the action.*”<sup>367</sup> However, the Corps interprets too narrowly the ESA action area for the Reroute. The “federal action” which may affect the action area is issuance of a DA permit under CWA Section 404 and RHA Section 10. The DA permit would allow Enbridge to construct the entire Reroute, not just 18% of the line the Corps claims to have regulatory authority over. Likewise, if the Corps denies the DA permit, Enbridge would be barred from constructing the Reroute in its entirety, not just the 18%.

Even if the Corps maintains this illogical regulatory partition, an ESA action area clearly extends outside the area immediately impacted by the action. Either way, in this case, the action area is properly defined as the entire Reroute area, and the Corps cannot escape nor inappropriately narrow its regulatory obligations under the ESA. The Corps is therefore required, as it acknowledges albeit contradictorily, to consider all consequences of the Reroute to threatened or endangered species and their habitats, including those that may occur outside of the immediate Reroute area.<sup>368</sup>

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<sup>362</sup> *Id.*

<sup>363</sup> *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

<sup>364</sup> *Oceana, Inc. v. Ross*, 321 F. Supp. 3d 128, 142 (D.C. Cir. 2018).

<sup>365</sup> Memorandum from Arati Prabhakar, Office of Sci. and Tech. Policy and Brenda Mallory, Council on Env’t Quality on Guidance on Indigenous Knowledge to Heads of Federal Departments and Agencies (Nov. 30, 2022).

<sup>366</sup> DCDD § 10.2 at 98.

<sup>367</sup> 50 C.F.R. § 402.02 (emphasis added).

<sup>368</sup> *Id.* § 402.02; DCDD § 2.2 at 23.

Next, given the location of the proposed Reroute through Ojibwe ceded territory where Bad River and other Bands of Lake Superior Chippewa hold treaty protected rights to hunt, fish, and gather, it is especially prudent that the Corps consider TEK held by the Bands and their members before making conclusions about the Reroute's impact to threatened and endangered species and their habitats. Aside from Mashkiziibii Natural Resource Department's ("MNRD") gray wolf plan, which the Corps "reviewed," the DCDD lacks any discussion of the Corps's efforts to seek out or incorporate TEK in the ESA context.<sup>369</sup>

In addition to the wolf plan, MNRD also published a piping plover report in 2022 that documents nesting piping plover activity on the south shore of Lake Superior.<sup>370</sup> If the Corps incorporates this report and subsequently consults with the Band and its member knowledge holders on this endangered species, it may lead to a reversal of the Corps's "no effect" determination made pursuant to the ESA for piping plover. Another publicly available TEK resource for this region is GLIFWC's Climate Change Vulnerability Assessment, which contains extensive information about species' presence on reservations and in the ceded territory and species' vulnerability to climate change as witnessed over time.<sup>371</sup> It is possible that incorporation of this and other TEK resources and consultations could alter the Corps's findings that the Reroute is "not likely to adversely affect" lynx and gray wolf. The Corps's apparent failure to utilize these and other available TEK resources and consult with the Indigenous Knowledge holders is contrary both to federal policy and ESA requirements.

Furthermore, without documentation and explanation to support the "no effect" determinations for piping plover, rufa red knot, and Fassett's locoweed, the Corps appears to implement the ESA haphazardly based on speculation or surmise. The Corps explained its use of USFWS's IPaC tool to generate an OSL, which indicated possible presence of piping plover, rufa red knot, and Fassett's locoweed along the proposed Reroute. Absent thereafter is any explanation or further documentation validating that construction of the Reroute would not affect those species, a determination which does not require USFWS consultation. As a result, the public is unable to review and comment on the Corps's methods. The incomplete information the Corps provides in this regard suggests improper reliance on USFWS's IPaC tool to the exclusion of other sources or methods for assessing impacts to species and habitats, such as TEK.

Lastly, the Corps published the DCDD while ESA Section 7 consultation with USFWS for northern long-eared bat and tricolored bat was ongoing and while USFWS's concurrence determination for gray wolf was pending. The public has no knowledge of either's status since the DCDD was published. By prematurely releasing the DCDD without these updates, the Corps denied the

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<sup>369</sup> DCDD § 10.2 at 99.

<sup>370</sup> Destiney Elder-Hall & Nolan Kerr, Mashkiziibii Natural Resources Department, *Chequamegon Point Piping Plover 2022 Season Report* (2022), [https://www.badriver-nsn.gov/wp-content/uploads/2022/09/PIPL\\_Season\\_Report\\_2022.pdf](https://www.badriver-nsn.gov/wp-content/uploads/2022/09/PIPL_Season_Report_2022.pdf).

<sup>371</sup> Climate Change Team, Great Lakes Indian Fish and Wildlife Comm'n, *Aanji-bimaadiziimagak o'ow aki: Climate Change Vulnerability Assessment Version 2* (January 2023), <https://glifwc.org/ClimateChange/VulnerabilityAssessment.html>.

public a meaningful opportunity to review and comment on ESA related matters and made preliminary determinations based on incomplete information.

[CROSS REFERENCES: §§ 2.2, 6.4, 7.10]

### **10.3 Section 106 of the National Historic Preservation Act (NHPA) (54 USC 300101 et seq.)**

Congress passed the National Historic Preservation Act (“NHPA”) with a goal to preserve and steward the nation’s historic property.<sup>372</sup> For federal undertakings, including proposed projects requiring federal permits, Section 106 of NHPA compels federal agencies to consult with affected parties in order to consider and minimize effects to historic properties located within the “area of potential effects” (“APE”).<sup>373</sup> APEs are geographic areas wherein federal undertakings may alter the character or use of historic property.<sup>374</sup> APEs are “influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.”<sup>375</sup> Federal agencies must consider all reasonably foreseeable effects to historic property within an APE, including cumulative effects whether direct or indirect as well as those that occur after and/or are farther removed in distance from the undertaking.<sup>376</sup>

In addition to consulting with state and Tribal historic preservation offices (“SHPO/THPO”), federal agencies are also required to involve the public in Section 106 reviews.<sup>377</sup>

The views of the public are essential to informed Federal decision-making in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties [and] the likely interest of the public in the effects on historic properties[.]<sup>378</sup>

NHPA regulations allow federal agencies to follow public involvement requirements under NEPA to satisfy Section 106 “if they provide adequate opportunities for public involvement consistent with [NHPA regulations].”<sup>379</sup>

In the DCDD, the Corps details its consultation process with both Wisconsin SHPO and Bad River THPO during its NHPA Section 106 process. It is up to the Band whether the Corps’s NHPA consultation process was conducted adequately. While the Wisconsin SHPO concurred with the Corps’s findings of no effect to architectural properties, standing structures, or archeological sites,<sup>380</sup> the Corps failed to satisfy the public involvement requirement under Section 106. Given

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<sup>372</sup> 54 U.S.C. § 300101. Note: in 2014, NHPA was move from U.S.C. Title 16 to Title 54.

<sup>373</sup> *Id.* § 306108; 36 C.F.R. §§ 800.1; 800.4.

<sup>374</sup> 36 C.F.R. § 800.16(d).

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* § 800.5(a)(1).

<sup>377</sup> *Id.* § 800.3(e).

<sup>378</sup> *Id.* § 800.2(d)(1).

<sup>379</sup> *Id.* § 800.2(d)(3).

<sup>380</sup> DCDD § 10.3.2 at 104.

the Corps's absent public involvement component under Section 106 or accompanying explanation, the Corps presumably substitutes the NEPA public involvement process to satisfy NHPA. In this case, however, it is not a satisfactory substitution due to the deficiencies with the NEPA public involvement process. See Section 4.1 for a list of reasons why. As a result, the Corps's analysis of effects to historic properties in Wisconsin is incomplete.

[CROSS REFERENCES: §§ 4.1, 10.4]

## 10.4 Tribal Trust Responsibilities

As a federal agency subject to the Federal Trust Doctrine, the Corps owes a duty to Bad River and other Bands of Lake Superior Chippewa to protect their treaty rights, lands, and resources.<sup>381</sup> Ojibwe Tribal leaders reserved rights for their members to hunt, fish, and gather on lands ceded to the U.S. government in a series of treaties in 1837, 1842, and 1854.<sup>382</sup> Treaties are supreme laws of the land on par with statutes like NHPA and should be accorded due deference.

Even accepting the Corps's limitation in not fitting Nibi (water) into the definition of historic property under NHPA, the Corps is not absolved of its federal trust obligation to respect and protect the Band's treaty rights and resources. The Band implicitly reserved a right to water sufficient to fulfill the purposes of treaty rights to hunt, fish, and gather on ceded territory.<sup>383</sup> To merely "recognize" the cultural importance of water to the Anishinaabe people and work "diligently to ensure proposed regulated impacts to waters are considered and minimized *to the extent possible*"<sup>384</sup> is not nearly enough to satisfy the Corps's federal trust duty to Bad River and other Bands of Lake Superior Chippewa. Worse is the Corps's proposed solution to condition the permit with post-construction monitoring requirements, which are worthless without adequate baseline data from which to assess and restore damages post-construction. See *supra* Section 4.1 for more on inadequacies of baseline data.

Instead, the Corps's should prioritize consideration of impacts to treaty protected natural resources in Ojibwe ceded territory, which the Reroute would traverse, over the suspect economic need of a foreign corporation. The Band in its official capacity along with individual Tribal members and Indigenous organizations with support from water protectors and organizers, youth groups, Reroute-adjacent landowners, environmental, legal, and other nonprofit organizations, nonpartisan grassroots groups, scientific experts, religious groups, healthcare professionals, business networks, and more have testified and submitted written comments to the Corps detailing the unacceptable, irreversible adverse impacts the Reroute would have on the surrounding environment.

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<sup>381</sup> See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Seminole Nation v. United States*, 316 U.S. 286 (1942)

<sup>382</sup> Treaty with the Chippewa, Chippewa-U.S., art. 5, July 29, 1837, 7 Stat. 536; Treaty with the Chippewa, Chippewa-U.S., art. 2, Oct. 4, 1842, 7 Stat. 591; Treaty with the Chippewa, Chippewa-U.S., art. 11, Sept. 30, 1854, 10 Stat. 1109.

<sup>383</sup> *Winters v. United States*, 207 U.S. 564 (1908).

<sup>384</sup> DCDD § 10.4 at 108 (emphasis added).

Such adverse impacts are detailed at length throughout the entirety of these comments. See particularly Section 7.13 for a discussion of the legal barrier to access the Corps would create if it permits the Reroute. Authorizing Enbridge to construct the Reroute would trigger application of Wisconsin's Felony Trespass Law (2019 Wisconsin Act 33), which criminalizes entry onto an energy provider's property without (1) lawful authority and (2) the energy provider's permission.<sup>385</sup> Tribal members are authorized by treaty to hunt, fish, and gather on ceded territory that would become Enbridge's 'property' for the purpose of this law. And yet Tribal members would risk penalty charges for exercising their treaty rights in those traditional spaces. For instance, GLIFWC identified and the Corps acknowledged the removal or restriction of tribal access to the Potato River along with 43.4 acres plus a 7.29 mile barrier to Iron County forest lands. Even with an empty promise from Enbridge to allow tribal members' access to these lands, the law as triggered by the Corps's permitting decision would effectively chill tribal members' exercise of the same treaty rights the Corps is charged with protecting.

When the Band resolves to remove Line 5 from their watershed, the Corps is obliged to respond accordingly. Nothing short of denying the DA permit will fulfill the Corps's trust duty in this matter.

[CROSS REFERENCES: § 4.1, 7.13]

### **10.5 Fish and Wildlife Coordination Act (FWCA) (16 USC 661)**

The Fish and Wildlife Coordination Act ("FWCA") requires federal agencies to consult with USFWS and state agencies before permitting a project that would modify "for any purpose whatever," the waters of "any stream or other body of water."<sup>386</sup> The Corps may have followed the consultation requirements, but it did not do so with adequate information or findings regarding impacts to fish and wildlife species. The FWCA requires such consultation "with a view to the *conservation* of wildlife resources by *preventing loss of and damage to* such resources."<sup>387</sup> As explained in Section 6.4, the Reroute is the antithesis of wildlife conservation and would irreversibly damage such resources.

[CROSS REFERENCES: § 6.4]

### **10.6 National Environmental Policy Act of 1969 (42 USC 4231 – 4347)**

See Sections 2, 4, 5, 8, 9 for a discussion on how the Corps's overall NEPA review is deficient and unsupportive of DA permit issuance for the Reroute. For reasons stated herein, we urge the Corps to proceed with a full EIS. Furthermore, the Corps's environmental review should be consistent with the federal policy to meaningfully incorporate TEK during the NEPA process.<sup>388</sup> The Corps

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<sup>385</sup> Wis. Stat. § 943.143.

<sup>386</sup> 16 U.S.C. § 662(a).

<sup>387</sup> *Id.* (emphasis added).

<sup>388</sup> Guidance on Indigenous Knowledge Memo, *supra* note 365, at 6.

should give due regard to the special expertise and relevant perspectives held by Indigenous Knowledge bearers.

[CROSS REFERENCES: §§ 2, 4, 5, 8, 9]

### **10.7 Section 176(C) of the Clean Air Act (CAA) General Conformity Rule Review (42 USC 7401 – 7671 Section 176(c))**

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### **10.8 Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), Essential Fish Habitat (EFH)**

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### **10.9 Coastal Zone Management Act (CZMA)**

The Coastal Zone Management Act (“CZMA”) aims to preserve and protect the nation’s coastal zone resources for current and future generations.<sup>389</sup> Congress leaves it up to states to adopt coastal zone management programs.<sup>390</sup> Federal permit applicants proposing to conduct activity that would affect coastal zone resources must include in their application materials a certification that the activity will be consistent with the state’s coastal zone management program.<sup>391</sup> States then have six months to make a consistency determination. If a state objects to an applicant’s certification, the federal agency is precluded from issuing the permit.<sup>392</sup>

As a coastal Great Lakes state, Wisconsin developed the Wisconsin Coastal Management Program (“WCMP”) pursuant to the CZMA.<sup>393</sup> Much like the federal CMZA, WCMP sets out to preserve and protect the state’s coastal areas for current and future generations.<sup>394</sup> It also gives due consideration to ecologically connected and impacted inland resources.<sup>395</sup> Since the Reroute would affect Wisconsin’s coastal zone resources,<sup>396</sup> the Corps needs the state’s consistency determination before issuing the DA permit. Wisconsin held a public hearing and public comment period but has not yet determined whether the Reroute is consistent with the WCMP.

Unfortunately, Enbridge’s application incompleteness and the Corps’s failure to independently verify environmental information provided impedes the state’s ability to sufficiently review for consistency. For instance, the Corps does not substantively address the probability of an oil spill,

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<sup>389</sup> 16 U.S.C. § 1452(1).

<sup>390</sup> *Id.* §§ 1452(2); 1454.

<sup>391</sup> *Id.* § 1456(c)(3)(A).

<sup>392</sup> *Id.*

<sup>393</sup> Wis. Dep’t of Admin, Div. of Intergovernmental Rel., Wis. Coastal Mgmt. Program: A Strategic Vision for the Great Lakes (2007).

<sup>394</sup> *Id.* at 7.

<sup>395</sup> *Id.*

<sup>396</sup> See 350 Wisconsin et al. letter to Michael Friis, Wis. Coastal Mgmt. Program (Aug. 2024) for a detailed account of the Reroute’s impacts to Wisconsin’s coastal zone resources.

a foreseeable consequence of constructing the Reroute, especially given Enbridge's poor history of spills, which would devastate Wisconsin's coastal zone resources. See Sections 6 and 7.5 for a discussion on how oil spills are indeed within the Corps's jurisdiction to consider when making DA permit decisions. See Section 4.1 about application incompleteness generally.

Based on the information available to date, Wisconsin should not find the Reroute consistent with the WCMP.<sup>397</sup>

[CROSS REFERENCES: §§ 4, 6, 7.5]

### **10.10 Wild and Scenic Rivers Act**

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### **10.11 Effects on Corps Civil Works Projects (33 USC 408)**

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### **10.12 Corps Wetland Policy (33 CFR 320.4(b))**

See Sections 4.1, 6, and 7.6 for a discussion on the Reroute's impacts to wetlands and the Corps's flawed analysis thereof.

[CROSS REFERENCES: §§ 4.1, 6, 7.6]

### **10.13 Executive Order 13175: Consultation and Coordination with Indian Tribal Governments**

Executive Order 13175 contains language recognizing Tribal sovereignty, reaffirming the federal government's trust duties to Native Nations, and directing federal agencies to honor Tribal treaty rights.<sup>398</sup> It is imperative for the fulfillment of these duties that federal agencies engage in meaningful government-to-government consultations with Tribes. Without which, Tribal sovereignty is not respected nor is the federal trust obligation satisfied. For reasons identified in Sections 10.4 and 10.15, the Corps's authorization for the Reroute directly implicates Tribal sovereignty and would dishonor Ojibwe treaty rights. The Corps should continue consultation with the Bad River and other affected Bands of Lake Superior Chippewa to the Bands' satisfaction.

### **10.14 Executive Order 11988: Floodplain Management**

See Sections 6.3.5, for a discussion of how the Reroute will alter normal water fluctuations and Section 7.12 regarding floodplain values specifically.

[CROSS REFERENCES: §§ 6.3.5, 7.12]

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<sup>397</sup> See *id.* at 13 for a chart detailing the Reroute's inconsistencies with the WCPM.

<sup>398</sup> [Federal Register :: Consultation and Coordination With Indian Tribal Governments](#) (2)(a); 3(a)



### **10.15 Executive Order 12898: Environmental Justice**

Environmental justice seeks to redress past and ongoing discriminatory policies that by design exclude Indigenous communities, communities of color, low-income communities, and more from political, regulatory, and legal processes to protect human and environmental health. The result is an inequitable society where frontline environmental justice communities are disproportionately burdened with adverse effects of environmental hazards.

The Biden administration recently renewed the nation’s promise of justice for all, defining justice to include clean air and water and a climate-resilient environment.<sup>399</sup> For the multitude of reasons identified in these comments, the Reroute, if permitted, would have detrimental environmental impacts that would be disproportionately borne by Tribal communities in the area.

Some of these impacts, as the Corps identified, include violation of Tribal reserved treaty rights to hunt, fish, and gather in the ceded territory. See Section 10.4 for more. Another issue raised by Tribal members, Indigenous organizations, water protectors, and others is the exacerbation of the Missing and Murdered Indigenous Women/Relatives crisis. The influx of construction workers has in the past lead to an increase in sexual and other violence committed by these men against Indigenous women, children, and others. This pattern is expected to follow if the Corps authorizes the Reroute. These environmental justice concerns deserve more than a cursory acknowledgement from the Corps as it makes its federal permitting decisions.

[CROSS REFERENCES: § 10.4]

### **10.16 Executive Order 13112, as Amended by Executive Order 13751, Invasive Species**

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### **SECTION 11.0 – CONCEPTUAL SPECIAL CONDITIONS**

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### **SECTION 12.0 – FINDING AND DETERMINATIONS – RESERVED**

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<sup>399</sup> Revitalizing Our Nation’s Commitment to Justice for All, E.O. 14096 (April 21, 2023) available at [2023-08955.pdf \(govinfo.gov\)](#).