Delivered via electronic mail

July 11, 2020

Wisconsin Department of Natural Resources
101 South Webster Street
Madison, WI 53707
DNROEEAComments@wisconsin.gov

RE: Line 5 Wetland & Waterway Permits / EIS Scoping Comments

To Whom It May Concern:

Enclosed are the comments of Midwest Environmental Advocates and the undersigned organizations on Water Resource Application for Project Permits Number WP-IP-NO-2020-2-X02-11T12-18-51 and the scope of the Environmental Impact Statement the Wisconsin Department of Natural Resources will prepare for Enbridge’s proposed construction of a new segment of Line 5 in northern Wisconsin. Please let us know if you have any questions.

Sincerely,

Rob Lee, Staff Attorney / Shaffer Fellow
Andrea Gelatt, Staff Attorney
Rob Lundberg, Attorney / EJW Fellow
Grayson Bethel, Law Clerk
Alex Spitzer, Law Clerk
Nora Baty, Law Clerk
Thea Valmadrid, Legal Intern
Midwest Environmental Advocates
rlee@midwestadvocates.org
(608) 251-5047 x. 8

Elizabeth Ward, Chapter Director
Sierra Club – John Muir Chapter

Gail Nordheim, President
350 Madison Board of Directors

Jennifer Giegerich, Government Affairs Director
Wisconsin Conservation Voters

Raj Shukla, Executive Director
River Alliance of Wisconsin

Katie Nekola, General Counsel
Clean Wisconsin

Mary and Stephen Ploeser, Co-chairs
League of Women Voters
Upper Mississippi River Region ILO

Mark Borchardt, Chairman
80 Feet is Enough!

Peggy Creer, President
League of Women Voters of Milwaukee

William W. Heart, President
Wild Rivers Chapter, Trout Unlimited
COMMENTS ON WATER RESOURCES APPLICATION FOR PROJECT PERMITS NUMBER WP-IP-NO-2020-2-X02-11T12-18-51 AND THE SCOPE OF THE ENVIRONMENTAL IMPACT STATEMENT FOR ENBRIDGE’S PROPOSED LINE 5 WISCONSIN SEGMENT RELOCATION PROJECT

Midwest Environmental Advocates, Sierra Club – John Muir Chapter, 350 Madison, Wisconsin Conservation Voters, River Alliance of Wisconsin, Clean Wisconsin, 80 Feet is Enough!, the Wild Rivers Chapter of Trout Unlimited, League of Women Voters – Upper Mississippi River Region Inter League Organization, and League of Women Voters of Milwaukee respectfully submit these comments on Enbridge Energy, LP’s (“Enbridge”) Water Resources Application for Project Permits (“WRAPP”) Number WP-IP-NO-2020-2-X02-11T12-18-51 and Scope of the Environmental Impact Statement (“EIS”) that the Wisconsin Department of Natural Resources (“DNR”) intends to prepare for the Line 5 Wisconsin Segment Relocation Project (hereafter “New Line 5 Segment” or “the Project”). As detailed below, Enbridge has failed to provide DNR, and therefore the public, with information necessary to determine that the WRAPP is complete, much less assess whether Enbridge has met the statutory and regulatory requirements for permit issuance. This lack of information will also prevent DNR from adequately preparing an EIS and analyzing the full impacts to the human environment.

The informational requirements that must be met to obtain the permits and approvals necessary to construct a hazardous liquid pipeline through the northern Wisconsin landscape are commensurate with the scope and complexity of the Project, as well as the substantial risks to invaluable resources like Lake Superior and the Kakagon-Bad River Sloughs, not to mention people. If Enbridge is unable to meet those informational requirements, it should not be given a pass, especially given its concerning environmental record. On the contrary, DNR should exercise its authority to slow the process down, give Enbridge more time to gather and submit all the requisite information, exhaustively analyze all actual and potential adverse impacts to the environment and public health, and then solicit robust public input before even considering whether to grant any permits for the Project. If Enbridge is intent on moving forward now with only the information currently submitted and publicly available, then its WRAPP should be denied.

THE EXACT ROUTE OF THE NEW LINE 5 SEGMENT HAS YET TO BE DETERMINED

Before engaging the WRAPP and Scope of the EIS directly, it is important to acknowledge that the exact route of the New Line 5 Segment has yet to be determined. As Enbridge indicated in the Proof of Ownership filed as part of the WRAPP, voluntary negotiations with landowners to obtain the necessary temporary and permanent easements needed for construction are ongoing. Enbridge also indicated that it has submitted a Public Interest Determination Application to the Public Service Commission of Wisconsin (“PSC”) for authorization to condemn

---

1 All WRAPP documents are cited according to the numbers assigned to them as of July 4, 2020. For ease of reference and in anticipation that those document numbers may change, the list of documents as it existed on DNR’s ePermitting website at that time has been attached.

2 Proof of Ownership, Application File No. 62.
those property interests it cannot obtain through voluntary negotiations.³ In a June 19, 2020 filing in the PSC Docket used to process that application, Enbridge admitted that it still has yet to complete voluntary negotiations and acquire all the necessary property interests.⁴ Enbridge intends to notify the PSC whether it has acquired all the necessary property interests by July 31, 2020.⁵

If Enbridge is able to acquire the necessary property interests through voluntary negotiations, the route of the New Line 5 Segment will almost assuredly change. That is because it is highly unlikely that Enbridge is engaging in voluntary negotiations with those landowners on the identified route who have refused to sell. Many of those landowners have even obtained legal counsel and requested to intervene in the PSC Docket.⁶ In addition, Enbridge indicated that it will need to consult with DNR to confirm the environmental feasibility of the final route, which suggests that the route will indeed change if voluntary negotiations are successful.⁷

If Enbridge is not able to acquire the necessary property interests, it will have to proceed with its Public Interest Determination Application before the PSC, a process that will take months. In the event that the PSC grants Enbridge’s application, the proposed route would likely stay the same. However, there is no guarantee that the PSC will grant that application, meaning Enbridge would again have to attempt voluntary negotiations with landowners along a different route, only without the threat of eminent domain looming large.

Without knowing the exact route, it is impossible for Enbridge to provide all the required information, or for DNR to determine whether waterway and wetland individual permitting standards will be met or to analyze the full environmental impacts that will result from the Project. A different route means that identified waterways and wetlands will be crossed at different locations, and/or that different waterways and wetlands will be impacted altogether. Enbridge’s WRAPP will have to be amended to reflect these changes. Such an amendment will require DNR to revisit its completeness determination and should result in an additional public hearing and comment period so that the public can weigh in on the updated information. DNR should also proceed cautiously with the preparation of the EIS and only hold a public hearing and comment period on a Draft EIS after the exact route of the Project has been definitely determined and DNR has adequate time to review all associated environmental impacts. The failure to do so may result in an inadequate EIS and may require DNR to repeat steps in the environmental review and permitting processes.

³ Id.; see Application of Enbridge Energy, Limited Partnership, for a Determination pursuant to Wis. Stat. § 32.02(13) that the Proposed Real Estate Interest Acquisitions Associated with the Relocation of Line 5, Located in Ashland County and Iron County, Wisconsin, are in the Public Interest, PSC Docket No. 9230-PI-101 [hereafter, “PSC Docket”].
⁴ Applicant’s Modified Motion for Stay, PSC Docket, REF # 392361.
⁵ Id.
⁶ Compare Riparian Owners, Application Doc. No. 64 with PSC Landowners’ Request for Intervention & Contested Case Hearing, PSC Docket, REF # 389776, pp. 2-3.
⁷ Applicant’s Modified Motion for Stay, p. 2.
WATER RESOURCES APPLICATION FOR PROJECT PERMITS

I. WATERWAY INDIVIDUAL PERMIT

To complete the New Line 5 Segment, Enbridge will need to cross nearly 200 navigable waters. That requires installing temporary bridges across navigable waters for access to work sites, grading steep banks when necessary for bridge placement and other activities, and trenching (i.e., dredging) and backfilling navigable waters for pipeline placement. To engage in these activities, Enbridge has applied to DNR for a waterway individual permit under Wis. Stat. §§ 30.123 (bridges), 30.19 (grading), and 30.20 (dredging), as well as applicable administrative regulations contained in Wis. Admin. Code NR chs. 320 (bridges), 341 (grading), and 345 (dredging).8

Applications for waterway individual permits require the submission of a WRAPP, which must contain all information requested on that application form and accompanying instructions.9 DNR regulations also require certain information to be submitted in order to determine compliance with permitting standards. The failure to provide all that information means that the permit application is incomplete.10 And an incomplete application means that DNR cannot assess compliance with permitting standards. Without all this information, DNR has no choice but to deny Enbridge’s WRAPP.

A. Enbridge has Failed to Provide Site-Specific Information Necessary to Determine that the WRAPP is Complete or Complies with Waterway Individual Permitting Standards

DNR regulations, the WRAPP, and applicable application instructions require that applicants for a waterway individual permit provide certain types of information regardless of whether the application is for a permit to construct bridges across, grade banks of, or dredge in navigable waters. For example, all applicants must provide ownership documentation, photographs of existing site conditions, site maps, plans and specifications, and more. Enbridge has failed to provide any information in certain instances, and incomplete or inadequate information in other instances. This failure can be directly attributed to the fact that the exact route of the Project has yet to be determined and that field surveys have yet to be completed even for the proposed route. As a result, the WRAPP is incomplete and cannot be assessed for compliance with waterway individual permitting standards.

8 Water Resources Application for Project Permits, Application Doc. No. 72 [hereafter, “WRAPP”].
i. Ownership Documentation

Each of the application instructions require Enbridge to submit ownership documentation in the form of a deed, land contract, or current property tax statement/receipt.\(^{11}\) DNR regulations also explicitly require the submission of ownership documentation for grading applications.\(^{12}\) Enbridge cannot provide this ownership documentation because it does not own all the property interests along the identified route. As established above, voluntary negotiations with landowners are ongoing, and if those negotiations are unsuccessful Enbridge will have to proceed with its Public Interest Determination Application to the PSC for authorization to condemn those property interests.\(^{13}\) And again, approval of that application is not guaranteed. Until those property interests are obtained and Enbridge provides ownership documentation to DNR, the WRAPP is incomplete and cannot be granted.

ii. Photographs & Field Surveys

Section 7 of the WRAPP requires applicants to “[p]rovide photographs of the ‘before’ condition.”\(^{14}\) Each of the application instructions also require Enbridge to submit photographs “that clearly show the on-the-ground conditions of the existing project areas.”\(^{15}\) Those instructions request, if possible, that a “person stand near the project area for size reference.”\(^{16}\) But DNR regulations explicitly require photographs with size references for grading applications.\(^{17}\) Since all but one of the 186 waterway crossings will require grading, a size reference must be included in nearly every set of photographs for the Project area.\(^{18}\)

Providing photographs of the exact location of each waterbody crossing is extremely important for determining impacts to waterways. Photographs allow DNR to understand and analyze existing site conditions including but not limited to vegetation, bank grades, in-stream substrate, fish and wildlife habitat, and potential for navigational use. The information provided in photographs allows DNR to analyze compliance with permitting requirements and impose permit conditions limiting adverse environmental impacts as much as possible. Finally, photographs


\(^{12}\) Wis. Admin. Code NR § 341.04(1).

\(^{13}\) See supra, pp. 1-2.

\(^{14}\) WRAPP.

\(^{15}\) Bridge Application Instructions, p. 1; Grading Application Instructions, p. 1; Dredging Application Instructions, p. 2.

\(^{16}\) Id.

\(^{17}\) Wis. Admin. Code NR § 341.04(2).

\(^{18}\) Attachment D – Revised Waterbody Crossing Table, Application Doc. No. 6 [hereafter, “Waterbody Crossing Table”].
confirm that field surveys have been conducted at exact waterway crossing locations, a task that is appropriately accomplished by WRAPP applicants.

Based on the Waterbody Survey Identification Numbers in the provided Waterbody Forms and Photos that correspond to the Feature Unique Identification Numbers in the Revised Waterbody Crossing Table, Enbridge has only supplied photographs for 123 of 186 proposed waterway crossings, or approximately 66 percent.\(^{19}\) That number roughly corresponds to Enbridge’s admission in the Environmental Impact Report (“EIR”) that it has only completed field surveys for approximately 70 percent of the proposed waterway crossings.\(^{20}\) Of the photographs that were supplied for the 123 waterbodies, only 44 have a size reference.\(^{21}\) That number characteristically includes photographs that depict any manmade objects (e.g., roads, vehicles, surveying gear, drainage pipes, foot bridges, etc.) as potential size references in addition to those photographs that depict people, even when such objects or people are only partially depicted.

Furthermore, many of the photographs that have been provided were not taken at the exact proposed crossing locations. The Bad River crossing (sasb006p) provides a useful example.\(^{22}\) The latitude and longitude provided in the Revised Waterbody Crossing Table is 46.33579907, -90.653778, yet the latitude and longitude provided in the Waterbody Forms and Photos is 46.336610, -90.654267.\(^{23}\) Although these locations are near each other, they are in completely different bends of the Bad River. The map provided below illustrates this problem and the Revised Aerial Maps confirm that the exact proposed crossing location corresponds to the location in the Revised Waterbody Crossing Table, not the location in the Waterbody Forms and Photos.\(^{24}\) Thus, Enbridge has failed to provide photographs that clearly show the on-the-ground, preexisting conditions of the proposed Bad River crossing.


\(^{20}\) Revised Environmental Impact Report, Application Doc. No. 57, p. 97 [hereafter, “EIR”]. That Enbridge has not completed all field surveys is confirmed in Attachment B – Revised Aerial Maps Full Set, Application Doc. No. 1 (identifying portions of the route where surveys are still needed) [hereafter, “Revised Aerial Maps”].

\(^{21}\) See generally, Waterbody Forms and Photos.

\(^{22}\) Photographs of two other sections of the Bad River (Waterbody Survey Identification Numbers sasd004p and sasb001p) are provided in the Waterbody Forms and Photos, but neither of those are near the proposed crossing location. See Waterbody Forms and Photos, Part 3, pp. 72-74, 163-165.

\(^{23}\) Compare Waterbody Forms and Photos, Part 3, p. 160 with Waterbody Crossing Table.

\(^{24}\) Revised Aerial Maps, p. 27.
Although not exhaustive, other waterbody crossings for which photographs have been provided but were not taken at the exact crossing location include Beartrap Creek (sasb007i), the Potato River (sird001p), and Vaughn Creek (sird016p). For certain locations, it is difficult to confirm whether provided photographs are at the exact proposed crossing location because Enbridge updated the form it uses and omitted the latitude and longitude on the most recent version.

In addition, photographs of single locations have been provided for waterways that will be crossed at multiple locations without identifying which crossing was photographed. For example, Gehrman Creek will be crossed twice for Access Road 069, but only one set of photographs is provided. The Waterbody Survey Identification Number provided for Gehrman Creek in the Waterbody Forms and Photos is sasw008. However, in the Waterbody Crossing Table, Gehrman Creek is listed twice as sasw002_x1 and sasw008_x2, with latitudes and longitudes that are approximately 472 feet apart. Even assuming that the photographs correctly depict one crossing location, this means that photographs have not been provided for the other crossing location. Since 18 of the waterways for which photographs have been provided are proposed to be crossed at 40 different locations, up to 22 additional waterway crossings may not have actually been surveyed or photographed.

---

25 Compare Waterbody Forms and Photos, Part 1, p. 26 (Beartrap Creek) and Waterbody Forms and Photos, Part 4, p. 179 (Potato River) and Waterbody Forms and Photos, Part 4, p. 228 (Vaughn Creek) with Waterbody Crossing Table.

26 Compare, e.g., Waterbody Forms and Photos, Part 1, p. 26 (using a form revised on April 6, 2015 that includes latitude and longitude for Beartrap Creek) with, e.g., Waterbody Forms and Photos, Part 1, p. 56 (using a form updated on September 20, 2019 that omits latitude and longitude for the White River).
Based on the foregoing, even fewer than 123 of the 186 waterway crossings have actually been surveyed or photographed. As such, Enbridge’s WRAPP is incomplete and cannot be granted. We encourage DNR to examine the rest of the photographs provided to determine if they were taken at the exact proposed crossing location and require Enbridge to complete field surveys and supplement its application accordingly. The failure of Enbridge to do so must result in the denial of its WRAPP.

iii. Site-specific plans and specifications

Site-specific plans and specifications are required to build bridges and temporarily cross, grade the banks of, and dredge navigable waters. These plans and specifications are meant to describe the exact activities that will occur at each waterway crossing location and explain the practices that will be implemented to avoid impermissible environmental impacts based on existing site conditions. The lack of this site-specific information is conspicuously absent from the WRAPP, renders it incomplete, and requires denial unless remedied. What follows is not exhaustive, but merely includes examples of where site-specific plans and specifications are required but have not been provided. We encourage DNR to revisit the WRAPP and identify additional instances where required information is missing.

a. Bridges – material obstruction of navigation

To grant a waterway individual permit for construction of a bridge across any navigable water, DNR must find that the “bridge . . . will not materially obstruct navigation.” Application instructions require, among other things, site-specific project plans and specifications that show the “[c]learance provided over the normal water level.” These instructions also point out that “[a] clearance of 5 feet is generally required.” Since Enbridge indicates in the Waterbody Crossing Table that it will have to bridge and temporarily cross 185 waterways, it must provide this information for each waterway crossing so DNR can determine whether navigation will be materially obstructed. Otherwise, the WRAPP is incomplete.

Although the Waterbody Crossing Table does identify the proposed type of bridges that will be used at each waterway crossing, i.e., timber mat or rail car, Enbridge has failed to provide any plans or specifications for bridges as they will be installed at each waterway crossing. Enbridge instead provides general discussions of timber mat and rail car bridge construction and only includes a generic diagram of timber mat bridge construction. There is no diagram for the installation of rail car bridges despite the fact that the Waterbody Crossing Table proposes to

28 Bridge Application Instructions, p. 2; see also Wis. Admin. Code NR § 320.04(3) (requiring a minimum clearance of five feet unless certain conditions are met).
29 Id.
30 EIR, pp. 45-46; EIR Attachment D – Environmental Protection Plan, Application Doc. No. 57, pp. 23, Figure 12 [hereafter, “EPP”].
bridge 16 waterways using that method.\textsuperscript{31} This information is insufficient to render the WRAPP complete or determine impacts to navigational uses.

DNR even recognized that the provided information was insufficient and requested that Enbridge supplement its application accordingly.\textsuperscript{32} DNR pointed out that Table 4.5-1 in the EIR notes that typical span type bridges “[m]ay cause interference on navigable waterways” and asked Enbridge to confirm that “bridges will comply with the requirements NR 320.04(3), Wis. Admin. Code, if a 5-foot clearance is not maintained.”\textsuperscript{33} In response, Enbridge simply stated that it “intends to comply with the requirements in NR 320.04(3), Wis. Admin. Code” and “will work with the WDNR to establish reasonable portage or alternative access, if less than 5 feet of navigation clearance is proposed.”\textsuperscript{34}

Wis. Admin. Code NR § 320.04 requires a minimum of five feet of clearance for bridges placed across navigable waterways. However, DNR \textit{may} allow less than five feet of clearance only when \textit{all of the following apply}:

(a) The waterway is known to have little or no navigation or snowmobile use.  
(b) The waterway is not anticipated to have navigational use by other than lightweight craft.  
(c) The owner provides a portage over or around the bridge or culvert.  
(d) The reduced clearance would not be detrimental to the public interest.\textsuperscript{35}

Enbridge’s response clearly does not provide enough information for a determination that all four factors apply, which is a necessary prerequisite for DNR to even consider exercising its discretionary authority to allow less than five feet of clearance. Wis. Admin. Code NR § 320.04 requires information specific to each waterway, i.e., Enbridge must identify those waterways that will be bridged with less than five feet of clearance for navigation, demonstrate that those waterbodies have little or no navigation or snowmobile use, and demonstrate that the only anticipated navigational use is by lightweight craft.

Enbridge admits that it has not identified those waterways that will be bridged with less than five feet of clearance.\textsuperscript{36} What information Enbridge does provide, however, indicates that navigation could be obstructed for a significant period of time, particularly during the peak recreational season in northern Wisconsin. For example, Enbridge indicates that “the Contractor will install

\textsuperscript{31} See generally, EIR and EPP.  
\textsuperscript{32} Enbridge L5 Relocation — DNR Additional Information Request, Application Doc. No. 54, p. 4 (Request #13) [hereafter, “Additional Information Request”].  
\textsuperscript{33} Additional Information Request, p. 4 (Request #13) (citing EIR, p. 46).  
\textsuperscript{34} Enbridge narrative responses to DNR request for additional information, Application Doc. No. 55, p. 12 (Data Request Question #13 Response) [hereafter, “Response to Additional Information Request”].  
\textsuperscript{35} Wis. Admin. Code NR § 320.04(3).  
\textsuperscript{36} Response to Additional Information Request, p. 12 (stating Enbridge “will work with the WDNR to establish reasonable portage or alternative access, if less than 5 feet of navigation clearance is proposed”) (emphasis added).
equipment bridges during clearing activities and will not remove them until construction access is no longer required, typically during the restoration phase on [sic] construction.” Construction is anticipated to begin in early 2021, and while the New Line 5 Segment is expected to be in service during the third quarter of 2021, restoration efforts may continue for an indefinite amount of time after that to achieve compliance with permit conditions and landowner agreements. As such, even if Enbridge does identify those waterways that will be bridged with less than five feet of clearance and provides enough site-specific information to make the requisite demonstrations, portages around those bridges must be provided to ensure that navigation is not materially obstructed. Providing “alternative access” does not comply with the requirements of Wis. Admin. Code NR § 320.04(3)(c).

As it stands, Enbridge has not provided enough information to render the WRAPP complete. Without this information, DNR cannot make a finding that bridging the waterways identified in the application will not materially obstruct navigation and should therefore deny the waterway individual permit application. At worst, DNR should only allow bridges over navigable waterways to be constructed if a minimum of five feet of clearance is provided.

b. Grading – erosion control plans

To grant a waterway individual permit to grade the banks of navigable waters, DNR must find that the proposed activity “will not cause environmental pollution, as defined in s. 299.01(4).” Wis. Stat. § 299.01(4) defines “environmental pollution” as “the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.” Controlling erosion that may result from land disturbing activities such as grading the banks of navigable waters is vital to ensuring that environmental pollution does not result. As such, grading applications must include site-specific erosion control plans. The failure to include site-specific erosion control plans renders a permit application incomplete.

37 EIR, p. 45.
38 EIR, p. 18.
40 We note that land grading activities authorized under a stormwater discharge permit pursuant to Wis. Stat. § 283.33 are exempt from the permit requirements of Wis. Stat. § 30.19. Wis. Stat. § 30.19(1m)(f). We also note that Enbridge intends to apply for a discharge construction stormwater permit under Wis. Admin. Code. NR ch. 216, which implements Wis. Stat. § 283.33. EIR, p. 19. However, Enbridge has yet to file a permit application for a stormwater discharge permit. See Wis. Dep’t of Nat. Res., Enbridge Projects in Wisconsin, https://dnr.wi.gov/topic/eia/enbridge.html (accessed July 9, 2020) (noting that “Enbridge is working with DNR staff and a permit application has not yet been filed”). Furthermore, not only has Enbridge signaled its intent to apply for a waterway individual permit to grade the banks of navigable waters, EIR, p. 18, it has done just that, WRAPP, p. 1 (showing that Enbridge selected “Grading”). As such, it must comply with applicable permitting requirements for grading. Finally, even if Enbridge does apply for a stormwater discharge permit, it must still develop the same site-specific erosion control plans. Wis. Admin. Code NR § 216.46; see also Wis. Admin. Code NR § 341.05(1) (incorporating Wis. Admin. Code NR § 216.46).
41 Wis. Stat. § 30.19(4)(c)2.
42 Wis. Admin. Code NR § 341.04(5) (citing Wis. Admin. Code NR § 341.05, which requires site-specific erosion control plans).
Enbridge has failed to submit site-specific erosion control plans for any of the 185 waterway crossings that will involve grading. Instead, general discussions of erosion control practices that may be implemented throughout the entire construction right-of-way have been provided in the EIR and the EPP. Although the EPP identifies silt fence, straw bales, biologs, seeding, mulch, erosion control blankets, cat tracking, and slope breakers as potential erosion control devices, provides examples of how those erosion control devices are implemented in the form of diagrams, and even discusses some of the conditions that may warrant the implementation of such erosion control devices, that does not satisfy the requirement of a site-specific erosion control plan.

To satisfy that requirement, Enbridge must develop an erosion control plan for each of the 185 waterway crossings that will involve grading. That requires describing existing site conditions such as surface and subsurface soils, bank slopes, drainage patterns, flood plain boundaries, identification of ordinary high water marks, and more, and then incorporating them into a grading site map. Descriptions of the activities that will occur at each waterway crossing such as the area of land disturbing construction activity, the area of soil disturbance in square feet, the volume of earth to be added or removed in cubic yards, the location where any dredged or excavated materials will be disposed, and the location of erosion controls and bank stabilization practices must also be provided and incorporated into a grading site map. Expected post-construction site conditions such as drainage patterns, bank slopes, and self-sustaining vegetation that ensure bank stability, maintain fish habitat, and filter pollutants must be described as well.

Some relevant site-specific information is dispersed throughout the application materials. For example, the Waterbody Forms and Photos does indicate the dominant substrate of each waterway and the Soil Survey Geographic Database maps provide information on soils and bank slopes when used in conjunction with the relevant county soil survey. Bank slopes may also be roughly approximated based on the provided topographical maps. But none of that information has been incorporated into an actual erosion control plan or grading site map.

Much of this information has yet to be obtained, not to mention provided to DNR and included in the application materials, because Enbridge has not completed field surveys for every

43 The Waterbody Crossing Table indicates that all but one of the 186 impacted waterways will involve grading.
44 EIR, pp. 43-44; EPP, pp. 5-7.
45 EPP, pp. 5-7.
46 EPP, Figures 4-11.
47 EPP, pp. 5-7.
48 See Wis. Admin. Code NR § 341.05(2).
49 Id.
50 Id.
52 Attachment A – Revised Topographical Maps Full Set, Application Doc. No. 68.
proposed waterway crossing.\textsuperscript{53} Enbridge has not identified the area of soil disturbance or volume of earth to be added or removed at each location, the exact location where excess dredged and excavated materials will be disposed (except vague mentions of spreading excess materials in upland areas of the construction site), or the locations where erosion controls and bank stabilization practices will be implemented. And, again, even if that information could be found dispersed throughout the application materials, it must be compiled into an erosion control plan that identifies those erosion controls and bank stabilization practices at particular waterway crossing locations and demonstrate why they are compatible with specific site conditions.

Without site-specific erosion control plans, DNR cannot determine the efficacy of the erosion controls and bank stabilization practices Enbridge will implement at each waterway crossing and whether the technical standards established pursuant to Wis. Admin. Code NR ch. 151, subch. V will be met.\textsuperscript{54} Therefore, DNR cannot make the requisite finding that contamination to receiving waters will not result and cannot grant Enbridge’s permit application.

c. **Dredging - blasting of Vaughn Creek and other waterways**

Enbridge identifies Vaughn Creek, an exceptional resource water and class II trout stream, as a location that may require in-stream blasting if traditional construction methods are unable to penetrate bedrock.\textsuperscript{55} DNR should reject this proposal outright as inconsistent with the public interest and prohibit Enbridge from engaging in any in-stream blasting whatsoever.\textsuperscript{56} The entire purpose of blasting is to fracture bedrock, which has the potential to alter hydrogeologic conditions in the stream and may result in increased outflow to groundwater, thereby reducing in-stream flow. Habitat loss and food chain disruption for sensitive aquatic species such as trout can also result. If Enbridge is unable to cross Vaughn Creek using traditional construction methods, it should make good on its statement that it “will explore every possibility to avoid the use of blasting” and reroute the Project to a location of Vaughn Creek that can be crossed using those traditional methods.\textsuperscript{57}

To the extent DNR is inclined to entertain Enbridge’s proposal to engage in in-stream blasting, Enbridge has not provided enough information to analyze the potential adverse impacts. Although nine waterways are identified for potential blasting, Enbridge makes clear that blasting locations are subject to change based on on-site geotechnical investigations.\textsuperscript{58} Those geotechnical investigations should be conducted and the exact waterway crossing locations requiring in-stream blasting identified before such drastic measures are even considered.

\textsuperscript{53} See supra, p. 5.
\textsuperscript{54} See Wis. Admin. Code NR § 341.05(3)(b).
\textsuperscript{55} EIR Attachment E – Blasting Plan, Application Doc. No. 57, p. 10-11 [hereafter, “Blasting Plan”]. We note again that Vaughn Creek (sird016p) was not surveyed and photographed at the exact proposed crossing location, see supra, p. 6, which makes Enbridge’s proposal to engage in blasting there even more problematic.
\textsuperscript{56} See Wis. Stat. § 30.20(2)(c) (requiring DNR to find that authorizing a permit to remove material from the bed of a navigable water is consistent with the public interest).
\textsuperscript{57} See Blasting Plan, p. 10.
\textsuperscript{58} Id.
Furthermore, site-specific blasting plans should be developed before blasting on those waterways is approved. Certain environmental variables relevant to blasting may not be able to be recorded until closer to the time of the blast, but many site conditions and associated impacts can be identified and analyzed well in advance.\(^5\)

As it stands, DNR should not provide Enbridge with a blanket approval to engage in such a potentially destructive activity without knowing exactly those navigable waters where blasting will take place, knowing the potential environmental impacts that may result based on site-specific conditions, or being able to evaluate and approve site-specific blasting plans in advance.

B. DNR Cannot Grant a Waterway Individual Permit Unless Enbridge Consents to the Public Engaging in Public Trust Uses on Energy Provider Property

As DNR is well aware, everyone has the right to enter any navigable water from a public access point and engage in public trust uses, including navigation, hunting, fishing, and other recreational activities, in the entire navigable water as long as they keep their feet wet.\(^6\)

However, recent legislation may impact the ability of the public to access those portions of navigable waters intersected with oil pipelines. To ensure that the rights of the public under Wisconsin’s Public Trust Doctrine are not infringed, DNR, as trustee of public trust resources,\(^6\) must require that Enbridge provide authorization for the public to access those portions of navigable waters through which the New Line 5 Segment will pass. The refusal to provide that authorization would be detrimental to the public interest, which Wisconsin courts have interpreted as including public trust uses.\(^6\) In that case, Enbridge’s application must be denied.

2019 Wisconsin Act 33 amended Wis. Stat. § 943.143 to make it a Class H felony, punishable by up to six years in prison, a $10,000 fine, or both, for anyone who “intentionally enters an energy provider property without lawful authority and without the consent of the energy provider that owns, leases, or operates the property.”\(^7\) Energy provider is defined as “[a] company that operates a[n] . . . oil, petroleum, refined petroleum product . . . distribution system.”\(^8\) Energy provider property is defined as “property that is part of an . . . oil, petroleum, refined petroleum product . . . generation, transmission, or distribution system and that is owned, leased, or operated by an energy provider.”\(^9\) Since energy provider property includes any property that is part of an oil distribution system and that is operated by an energy provider, a person may be

---

\(^5\) See id. at 6.
\(^6\) See, e.g., Doemel v. Jantz, 180 Wis. 225, 193 N.W. 393 (1923); but see Wis. Stat. § 30.134 (allowing the use of exposed shore areas of navigable waters to bypass an obstruction).
\(^7\) See, e.g., Lake Beulah Mgmt. Mist. v. Wis. Dep’t of Nat. Res., 2011 WI 54, ¶¶ 4, 46, 63, 335 Wis. 2d 47, 799 N.W.2d 73.
\(^8\) See Wis. Stat. §§ 30.123(8)(c)3, 30.19(4)(c)1, 30.20(2)(c) (all requiring DNR to find that issuance of the permit will not be detrimental to the public interest); Sterlingworth Condo. Ass’n v. Wis. Dep’t of Nat. Res., 205 Wis. 2d 710, 556 N.W.2d 791 (Ct. App. 1996) (interpreting Wis. Stat. § 30.12(3m(c)2, which also contains the “detrimental to the public interest” standard, as including an evaluation of public trust uses).
\(^8\) Wis. Stat. § 943.143; see also Wis. Stat. § 939.50(3)(h) (establishing the penalty for Class H felonies).
\(^9\) Wis. Stat. § 943.143(1)(b).
guilty of a Class H felony for engaging in traditional public trust uses in those portions of navigable waters through which the New Line 5 Segment will pass once the line becomes operational.

The language of Wis. Stat. § 943.143 can be broken up into two major parts, which can then be divided into subparts or elements. The first part of the statute is the crime itself—intentionally entering energy provider property. Subparts of the crime include (1) the mens rea element, intentionally; and (2) the actus reus element, entering an energy provider property. The second part of the statute is the exception to the crime, which requires the actor to have both (1) lawful authority to enter the energy provider property; and (2) the consent of the energy provider to enter that property.

The mens rea element is defined in statutory law:

“Intentionally” means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word “intentionally.”

Importantly, a person does not need to intend to commit a crime. In other words, to have the requisite intent, a person only has to know they are engaging in the actus reus, or conduct, that constitutes the crime. Here, that means entering a portion of a navigable waterway and knowing that an oil pipeline is operating beneath it. Below ground hazardous liquid pipelines such as Line 5 are often marked where they pass underneath waterways. A person who is simply exercising their right to enjoy public trust uses in those portions of navigable waterways may therefore be subject to felony prosecution unless they qualify for the exception to the crime, which requires the person to have both lawful authority to be on the property and permission from the energy provider.

As established above, the public already has “lawful authority to enter” those portions of navigable waters through which the New Line 5 Segment will pass under Wisconsin’s Public Trust Doctrine. However, the exception to the crime is only triggered if there is also consent from the energy provider. Unless Enbridge provides such consent, authorizing the construction of the Project in navigable waters could inhibit public trust uses, which would clearly be detrimental to the public interest and contrary to not only statutory standards for permit issuance, but also the Wisconsin Constitution.

---

66 Wis. Stat. § 939.23(3).
67 Wis. Stat. § 939.23(5).
68 Wis. Stat. § 943.143(2).
69 Wis. Const., art. IX, § 1. Although Wisconsin courts may interpret Wis. Stat. § 943.143(2) to avoid constitutional implications, see, e.g., Milwaukee Branch of NAACP v. Walker, 2014 WI 98, ¶ 63, 357 Wis. 2d 469, 851 N.W.2d 263 (citations omitted), no court has had the opportunity to do so, and in any event, reaching that question would likely involve a person being prosecuted under that statute and defending themselves at considerable expense just for engaging in traditional public trust uses.
II. WETLAND INDIVIDUAL PERMIT

In considering whether to grant a wetland individual permit for a discharge of dredged or fill material into a wetland, DNR must evaluate impacts to wetland functional values, including a proposed project’s cumulative and potential secondary impacts to those values. Under these standards, DNR must evaluate, among others things, a project’s impacts to wetlands’ capacity for storm and flood water retention, hydrologic function, habitat for aquatic organisms and wildlife species, and “[r]ecreational, cultural, educational, scientific and natural scenic beauty values and uses.”

To grant a permit, DNR must make an affirmative finding that the proposed project complies with water quality standards because it “will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences.” To evaluate these impacts, DNR must consider impacts to these wetland functional values to “protect all present and prospective future uses of wetlands.”

As explained below, DNR cannot make these findings here because Enbridge has failed to submit a complete application and has failed to meet basic standards for permit issuance, including submitting a sufficient mitigation plan. These failures mean that DNR must deny the permit or, at minimum, require Enbridge to supplement its application and then impose stringent permit conditions.

A. Enbridge’s Wetland Individual Permit Application is Incomplete

Enbridge’s wetland individual permit application is incomplete for at least three reasons. First, and as established above, Enbridge has not determined the final route for the New Line 5 Segment and thus, the full extent of potential impacts to wetlands along the final route are unknown. Second, even as to the route proposed in its current application for a wetland individual permit, Enbridge admits that it has not completed surveys and wetland delineations for at least 30 percent of the Project route. Thus, the location of, and impacts to, those undelineated wetlands and unsurveyed upland areas are as yet unknown. Third, Enbridge has not identified the wetlands that it proposes to blast, even though it predicts 10 miles of blasting in an area where it has already identified many wetlands.

For these reasons, Enbridge’s application is incomplete, the public has not been provided a meaningful opportunity to comment on the WRAPP, and DNR cannot fully evaluate the necessary statutory and regulatory standards that must be satisfied. Since DNR cannot make the required determinations necessary for permit issuance, Enbridge’s application must be denied.

70 See Wis. Stat. § 281.36(3m), (3n); Wis. Admin. Code NR §§ 103.08(3); 103.03(1)-(2) (defining wetland water quality standards and criteria to assure their maintenance and enhancement).
71 Wis. Admin. Code NR § 103.03.
72 Wis. Stat. § 281.36(3n)(c).
73 Wis. Admin. Code NR § 103.08(3).
74 See supra, pp. 1-2.
i. **Enbridge has not finished its field surveys and existing survey information is incomplete**

Enbridge has not fully identified impacts to wetlands along the proposed route as part of the WRAPP. Just as Enbridge has failed to complete field surveys for all the waterway crossings,\(^75\) Enbridge admits that it has not yet completed the necessary field surveys to delineate the wetlands along that proposed route and has approximately 30 percent remaining.\(^76\) When DNR asked for this information in its Additional Information Request, Enbridge simply responded that it “will submit an addendum wetland delineation report for areas surveyed in 2020 upon completion of field surveys.”\(^77\) That information still has not been provided to DNR, meaning it has not been provided to the public either. As a result, the public is unable to comment on the delineation of or anticipated impacts to these additional wetlands.\(^78\)

In areas where Enbridge was unable to complete wetland field surveys, Enbridge’s EIR relies on Wisconsin Wetland Inventory (WWI) data.\(^79\) These WWI maps are prepared from high altitude imagery combined with soil surveys, previous wetland inventories, and field work.\(^80\) As Enbridge notes, these maps are not a substitute for field surveys, but are simply one tool to be used by the field crews for their verification efforts:

> Because ground conditions change and because the criteria used to identify wetlands for mapping purposes may be different than that currently required by the [U.S. Army Corps], wetland maps can only be used as a guide to aide in identifying potential wetlands. This data was given to field crews to ensure accurate data collection and field verification.\(^81\)

Thus, as Enbridge acknowledges, use of the WWI data is an insufficient substitute for field surveys, and the public and DNR cannot fully evaluate the Project’s impacts to wetlands without them.

Finally, even where field surveys have been conducted, they appear to be incomplete. As part of these field surveys, the crews should catalogue and note upstream and downstream features that could lead to significant erosion during large storm events as a result of the impacts to wetlands.\(^82\) In order to properly evaluate impacts to wetland functional values, DNR must understand the landscape features that are likely to affect Enbridge’s ability to restore the

---

\(^{75}\) See supra, p. 5.

\(^{76}\) EIR, pp. 100, 102. See also Wis. Stat. § 281.36(3m)(a) (regarding wetland delineation).

\(^{77}\) Response to Additional Information Request, p. 14 (Data Request Question #19 Response).

\(^{78}\) In early July, we asked a DNR employee working on the Project whether DNR had received these field surveys and as of the submission of this comment letter, had not heard either way.

\(^{79}\) EIR, pp. 100, 102.

\(^{80}\) Delineation Report, Application Doc. No. 20, p. 9 [hereafter “Delineation Report”].

\(^{81}\) Id.

\(^{82}\) Wis. Admin. Code NR § 103.08(3)(c) (explaining the need to evaluate impacts that may affect “the maintenance, protection, restoration or enhancement of” wetland water quality standards like hydrologic function, erosion control and storm and flood water storage).
affected wetlands. The information included in the permit file does not appear to include these features.

ii. Enbridge does not identify the wetlands subject to blasting

Enbridge has also failed to provide enough information to determine the anticipated impacts to wetlands along the New Line 5 Segment because it does not explain which wetlands will require blasting to construct the pipeline. Instead, Enbridge explains only that it will be blasting “in wetlands with shallow depth to bedrock,” which does not provide any detail about those wetlands subject to blasting—and as explained immediately above, Enbridge has not fully delineated the wetlands to be impacted by the Project. Rather than provide this critical information, Enbridge intends to provide “[a] more accurate prediction of potential blasting locations . . . closer to the time of construction and when on-site geotechnical data is gathered and analyzed.” Thus, Enbridge asks DNR to grant it a permit without providing key information to evaluate impacts to wetlands. The impacts to wetlands and surrounding landscape will likely be much more significant by disrupting existing hydrologic connections, and significantly impacting vegetation, wildlife, and other ecosystem characteristics. In addition, restoration of wetlands subject to such blasting will require more intensive work than those where explosives have not been used and the landscape impacts will be greater. The public and DNR are unable to analyze the impacts to wetlands from the proposed blasting and the permit cannot be granted based on this incomplete information.

B. DNR’s Assessment of the Project’s Impacts to Wetland Functional Values Must Include an Assessment of the Project’s Impacts in Combination with Anticipated Severe Storm and Intense Rainfall Events

DNR must consider direct, cumulative, and potential secondary impacts to wetland functional values as well as the net environmental impact of the proposed project when evaluating a wetland individual permit. These impacts include past impacts as well as indirect effects. Thus, DNR’s evaluation of the Project must include the historic loss of wetlands and the Project’s anticipated impacts in conjunction with the likely intense rainfall events that are reasonably anticipated to occur over the next decades—that is, while Enbridge is constructing, and mitigating for the impacts of, its Project.

83 Response to Additional Information Request, p. 16. Enbridge has identified wetlands between mile markers 17 and 41 as the area where blasting will occur, but has not identified which of those wetlands will be subject to blasting. Blasting Plan, p. 5; see also, EIR Attachment H – Wetland and Waterbody Crossing Tables, Application Doc. No. 57, Table H-1.
84 Blasting Plan, p. 5.
85 See Wis. Stat. § 281.36(3n)(b).
86 See id. As courts have explained in the context of evaluating an agency’s analysis under the National Environmental Policy Act or, the Wisconsin Environmental Policy Act, cumulative impacts “are those that result from the ‘incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.’” Hoosier Envtl. Council, Inc. v. Army Corps of Eng’rs, 105 F. Supp. 2d 953, 979 (S.D. Ind. 2000) (quoting 40 C.F.R. § 1508.7).
The Project area experienced extremely high rainfall events in 2012, 2016 and 2018. In particular, a 2016 storm in the Project area caused widespread flooding and landscape changes, in addition to tragic loss of life, numerous injuries, and loss of homes and other property damage. DNR must take into account information such as the likely increase in high rainfall storm events as well as other anticipated impacts of climate change when evaluating the Project’s impacts to wetlands.

These recent high intensity rainfall events will recur in Wisconsin more frequently as the climate continues to change. We understand that DNR is currently working with others, including the Wisconsin Initiative on Climate Change Impacts, to predict future rainfall intensity over the next several decades. Those data and models should be used when evaluating the impacts of Enbridge’s Project on wetland functional values.

Enbridge has chosen an area for its Project that has unique soil conditions, steep slopes, and, in general, an unstable and erosion-prone landscape. The Project area has already lost significant acres of wetlands through previous land use choices. Parts of the Project will affect wetlands located in the clay plain where “water runs off the impermeable clay soils very quickly.” It also will impact areas where the clay plain meets sandy soils, which are unstable areas, susceptible to erosion.

DNR cannot grant Enbridge’s wetland individual permit application if the Project will result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality, or other significant adverse environmental consequences. Enbridge, however, proposes to fill and permanently convert wetlands in an area where wetland loss is known to increase runoff, erosion, and sedimentation and, due to the instability of the area, creates a negative feedback loop that leads to further erosion and flooding. This means that the construction and operation of Enbridge’s New Line 5 Segment will have significant adverse impacts to hydrologic

91 See, e.g., Wisconsin Wetlands Association, p. 6 (“The direct and indirect loss of wetland storage is widespread across Wisconsin’s [Lake Superior Basin]. It makes the system ‘flashy’ by increasing the volume and velocity of water that moves downstream during storm events. This further exacerbates channel erosion, incision, and flooding, creating a negative feedback loop that renders the natural and built environments in the [Lake Superior Basin] less capable of handling rain and snowmelt with each passing storm.”)
conditions in the area, including increasing erosion, sedimentation, and water levels through impacts to wetlands. These impacts are amplified by the intense rainfall events that are reasonably anticipated to occur during the construction and mitigation phases of the Project. Removing wetlands from this landscape, given those rains, will therefore have a significant impact on wetland functional values. As such, DNR cannot ensure that the Project will meet wetland water quality standards when the Project’s impacts to wetlands are considered in conjunction with the anticipated, more intense rainfall events in the coming years. Consequently, DNR cannot grant Enbridge a wetland individual permit because it fails to meet statutory and regulatory standards.

At a minimum, and as discussed below, Enbridge must submit a robust wetland mitigation plan that compensates for these temporary and permanent impacts to wetland functional values, considering the recent and anticipated high intensity rainfall events in the area.

C. DNR Must Require Enbridge to Submit a Complete Mitigation Plan and Mandate Stringent Conditions to Ensure that Wetland Mitigation is Fully Completed and Effective

As established above, DNR cannot grant Enbridge’s wetland individual permit if the Project will result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality, or other significant adverse environmental consequences. Wetlands in the Project area offer important functional values that are recognized by DNR regulations, including storm and flood water storage and retention. The New Line 5 Segment has the potential to inhibit these functional values that can mitigate the impacts of large storm events. Despite these potential impacts, Enbridge has failed to submit a mitigation plan as required. For that reason, DNR should deny the permit. If, however, despite the inadequacies of Enbridge’s application, DNR is inclined to grant the permit, DNR must include stringent conditions that ensure Enbridge’s wetland mitigation plan is as robust as possible.

An “adequate” mitigation plan must include, in relevant part, performance standards and a description of pre-project baseline conditions including soils and hydrologic conditions. An applicant must also submit a post-construction monitoring plan that is “sufficient to assess trends in wetland function at the site and the degree to which the performance standards for the site are met.”

Enbridge has not yet provided information on baseline conditions, including hydrologic conditions, necessary to meet these regulatory standards for a mitigation plan. Enbridge’s cursory discussion of mitigation in the EIR and EPP does not constitute a “plan” and primarily

92 See Wis. Admin. Code NR § 103.03(2).
93 Id.
94 See Wis. Admin. Code NR § 103.03(1).
95 Wis. Admin Code NR § 350.08(3); see also Wis. Admin. Code § NR 350.09(3)(b), (4)(b) (requiring performance standards and management plans for all mitigation plans).
relies on revegetating some of the disturbed wetlands without any specifics about ongoing monitoring to ensure that the wetlands will actually be restored. DNR requested information on how Enbridge will ensure that revegetation, surface elevation, and water flow will not be impacted, but Enbridge did not respond, instead answering, “Enbridge will continue to consult with the WDNR and USACE regarding post-construction wetland monitoring requirements.”

Because Enbridge has not provided a plan for monitoring their mitigation practices and ensuring its proposed mitigation is complete and effective, it is important that DNR require such a mitigation plan that provides for a post-construction monitoring plan and sets stringent conditions that Enbridge must abide by in their mitigation efforts. A robust, wetland mitigation plan for this Project must include, at minimum: (i) actions to minimize impacts and stabilize areas upstream and downstream of and within the Project; (ii) sufficient erosion control; (iii) performance standards that ensure the success of the mitigation efforts combined with long-term monitoring; and (iv) adequate off-site mitigation.

i. **Enbridge’s mitigation plan must include actions to minimize impacts and stabilize areas upstream and downstream of the Project and within the Project area**

Enbridge must account for the fact that it has proposed its Project in a landscape where historic land use practices, significant storm events, soil composition, and hydrology make the entire area prone to instability. The New Line 5 Segment will have a landscape-level impact because of its linear shape and location in the watershed. To minimize disturbance, Enbridge should be required to minimize impacts to forested and shrub/scrub wetlands by limiting the construction workspace to 80 feet. Enbridge proposes a uniform, typical 95-foot construction workspace for wetlands. DNR should require Enbridge to limit impacts in forested, shrub/scrub wetlands by decreasing that workspace wherever possible. In addition, any mitigation plan must ensure that Enbridge takes mitigation action to stabilize the areas upstream of the Project area, using existing mapping and upcoming watershed analyses to determine the best areas to preserve, so that when there are subsequent, significant rain events the landscape has sufficient capacity to absorb the water without causing catastrophic damage and erosion to the areas disturbed by installation of the New Line 5 Segment.

ii. **Enbridge’s mitigation plan must include sufficient erosion control measures**

DNR must require that Enbridge implement sufficient erosion controls after grading and wetland vegetation removal to ensure that those controls are sufficient in the event of a significant rain event. Vegetative cover helps prevent erosion in wetlands, and Enbridge must remove wetland vegetation to construct the pipeline. Enbridge’s independent environmental monitor should be

---

97 Response to Additional Information Request, p. 13.
98 Again, we note that the public is unable to comment on Enbridge’s complete application during this comment period on the wetlands and waterways permit application given this lack of information.
99 EIR, p. 31.
allowed to require additional erosion control measures where necessary to protect wetlands. Enbridge must also be required to act quickly to repair failed silt fences and temporary erosion and sediment control devices (ECD). In its EIR, Enbridge explains that “[a]ll non-functional ECDs will be repaired, replaced, or supplemented within 24 hours after discovery, or as soon as practicable following discovery.” This current plan gives Enbridge too much latitude to delay fixing issues with their ECDs. Enbridge should be required to engage in ongoing monitoring of the Project so that all non-functional ECDs are replaced within 24 hours, and not given a pass because it fails to promptly discover them. A quicker response requirement will limit negative impacts to wetlands and downstream areas caused by the failure of ECDs.

iii. The plan must contain performance standards that ensure the success of the mitigation efforts combined with long-term monitoring

The monitoring plan must also ensure the success of Enbridge’s mitigation by requiring Enbridge to respond to mitigation setbacks during construction, in the immediate clean up phase, and throughout its wetland mitigation efforts.

Enbridge proposes to seed in affected wetland areas that need revegetation following construction, but does not provide a monitoring plan to verify the effectiveness of seeding and revegetation. Instead, Enbridge simply states that it “will monitor the success of revegetation efforts in restored areas in accordance with conditions identified in the applicable Project permits and/or licenses.” These conditions must be stringent to ensure the success of the mitigation plan. For example, DNR should require that Enbridge’s independent environmental monitor take photographs and videos to document the construction and mitigation work and share that documentation with DNR to ensure proper oversight during construction, clean up, and mitigation. In addition, DNR must mandate that the independent environmental monitor has a stop work order to allow DNR and other regulatory agencies to address environmental issues before work continues.

Thus, during construction, DNR must require inspection of the areas that have already been disturbed before any anticipated large rain event and within 24 hours after any storm event that produces a half inch or more of rain. Storm events can wash away topsoil and newly seeded areas, so it is important that Enbridge commit to taking action to respond to any damage that occurs while the impacted wetlands are recovering. Requiring this inspection will allow Enbridge and DNR to assess and respond to damage caused to already disturbed and remediated wetlands from these large storm events. While the need for inspection of wetlands is of utmost importance, given the characteristics of the region, DNR should require surveillance of the entire pipeline route after storm events, not just the segments of the route that cross wetlands.

100 EPP, p. 5.
101 EIR, p. 43.
102 This requirement tracks the stormwater permit regulations that require documented inspections within 24 hours of a rainfall event of half an inch or greater. See Wis. Admin. Code NR § 216.46(9).
DNR must also ensure that the time frame for Enbridge’s mitigation plan corresponds to the time required to restore the wetlands. In forested and shrub-dominated wetlands, the impact to wetland functional values will last decades due to the recovery time of these vegetation types. Enbridge’s mitigation plan must have performance standards that require Enbridge to be responsible for mitigation until the wetlands are fully recovered. DNR must also require that Enbridge provides financial assurances to ensure that it will meet its obligations. This monitoring and financial responsibility must be commensurate with known recovery times of the scrub-shrub and forested wetlands that Enbridge proposes to impact with its Project.

iv. The mitigation plan must justify the use of off-site mitigation

Enbridge’s mitigation plan must also include clear and stringent requirements related to any use of off-site mitigation. Its current plan is insufficient because it relies on off-site mitigation without meeting the standards applicable to that kind of mitigation. To satisfy Wisconsin’s wetland compensatory mitigation requirements, DNR must find that Enbridge has shown that “it is not practicable or ecologically preferable to conduct an on-site mitigation project” before allowing offsite mitigation, including the purchase of mitigation credits. Enbridge has explained that it will purchase mitigation bank credits and possibly use an in-lieu fee subprogram, but does not explain why it is not ecologically preferable or practicable to conduct on-site mitigation. Though it names the Poplar River Mitigation Bank as an option for purchasing credits, Enbridge does not ensure that it has identified sufficient mitigation to compensate for the impacts of its proposed activities, suggesting only that it has found credits that “could at least partially satisfy likely Project compensatory mitigation requirements.” This information is unclear and does not ensure that Enbridge will be able to mitigate to meet its obligations.

It is also unclear what compensation ratios Enbridge plans on using for mitigation and how many mitigation bank credits will be needed. The credit ratio should be high here because the Project involves, among other impacts, permanent conversion of forested and shrub/scrub wetlands, and the landscape has experienced historic loss of wetlands. Enbridge does not give conclusive information or analysis on what ratio they plan on using, instead saying, “Enbridge proposes to use baseline compensation ratios for impacts to emergent, forested, and scrub-shrub wetland types used for previous Enbridge pipeline projects. Enbridge will continue to work with the WDNR and the USACE to consider additional factors that may result in adjustment of baseline compensation ratios.” As far as how many mitigation bank credits will be needed, Enbridge does not give any estimate whatsoever. Enbridge does estimate the acreage of impacts, both

---

103 Wis. Admin. Code NR § 350.04(3); see also Wis. Stat. § 281.36(3r) (explaining that the in-lieu fee program may only be used if DNR determines that it will better serve natural resource goals).

104 EIR, p. 102.

105 Id.


107 EIR, p. 102.
temporary and permanent, but does not estimate the acreage of compensation or the amount of credits needed to properly mitigate.108

Without a mitigation plan or any key details about a plan, DNR cannot grant the permit because it cannot ensure that the Project will not have significant adverse impacts on important wetland functional values.

D. Any Wetland Mitigation Plan Must Address the Possibility of An Oil Spill or Leak and the Emergency Response that Will Address Impacts to Wetlands

Wetland water quality standards prohibit oil contamination of wetlands. “[O]il and other material may not be present in amounts which may interfere with public rights or interest or which may cause significant adverse impacts to wetlands.”109 DNR may not grant a wetland individual permit unless it is satisfied that Enbridge’s Project complies with this and other water quality standards.110

Enbridge does address risks to wetlands from a spill during construction that could affect compliance with the wetland water quality standards. In its EPP, Enbridge has a specific emergency response action related to wetlands and waterbodies, including requiring the contractor to have available absorbent booms and pads to recover and contain released materials and to excavate any contaminated soils.111

The goal of wetland mitigation is to compensate for the functional loss resulting from wetland impacts.112 To avoid impacts to wetland functional values and ensure compliance with wetland water quality standards, DNR should also require Enbridge to take action to prevent adverse wetland impacts in the event of a spill or leak during operation and maintenance of the New Line 5 Segment.113

Enbridge has a poor track record of leaks and spills.114 In addition, one of Line 5’s twin pipelines under the Straits of Mackinac was recently shut down because of damage to the pipeline.115

109 Wis. Admin. Code NR § 103.03(2)(b).
110 Wis. Stat. § 281.36(3n)(c).
111 EPP, p. 32. See also EPP § 29, EIR at 27-32, EIR 55-60 (General Spill Response Plan).
113 See Wis. Stat. § 281.36(3m), (3n) (requiring consideration of cumulative and secondary impacts from a project).
Moreover, during a 2010 oil spill, Enbridge lacked sufficient supplies or personnel to respond, and these failures exacerbated the environmental contamination.\footnote{See National Transportation Safety Board, Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release, Executive Summary, available at https://www.ntsb.gov/investigations/AccidentReports/Pages/PAR1201.aspx (explaining that environmental impacts from the pipeline rupture were exacerbated because of lack of “availability of well-trained emergency responders with sufficient response resources”).} These events mean that DNR must seriously consider the impacts of a possible oil spill, Enbridge’s response plan, and whether permitting a pipeline to run under, through, and upstream of important wetlands is consistent with DNR’s wetland water quality standards.

DNR should review Enbridge’s Spill Response Plan for Line 5, including for the New Line 5 Segment, and ensure that it adequately protects wetlands along the pipeline and downstream of the pipeline. Although it will do so to protect large waterways, Enbridge has not committed to installing remotely controlled valves that could limit an oil spill and resulting impacts to wetlands in the event of a spill or leak.\footnote{EIR, p. 57 (discussing PHMSA regulations).} DNR should require Enbridge to install remotely controlled valves in key areas of the New Line 5 Segment to reduce impacts to wetlands. It must also require Enbridge to model a spill in different portions of the New Line 5 Segment to ensure that spill response equipment like booms, absorbent material, and other necessary resources are appropriately stored and available throughout the region so that a spill can be quickly contained and remediated. DNR should ensure that this Spill Response Plan includes the requirement of a local spill-response coordinator in the area and regular and adequate training of local spill-response contractors and emergency responders so that they know where the pipeline is located and understand how to quickly respond to a spill and quickly contain and address impacts to wetlands and other waterways.

II. DNR SHOULD HOLD AN ADDITIONAL PUBLIC HEARING AND COMMENT PERIOD SPECIFICALLY FOR THE WRAPP IF AND WHEN IT IS UPDATED WITH COMPLETE INFORMATION AND AFTER THE EIS IS COMPLETE

A. The Public Is Deprived of the Opportunity to Comment on the WRAPP with the Benefit of All the Information Necessary to Determine Compliance with Permitting Standards

Based on the foregoing, the WRAPP is inarguably incomplete and DNR’s determination to the contrary was premature. As a result, DNR prematurely held the public hearing and comment period. Unless another public hearing and comment period is held once Enbridge submits all the requisite information, the public will be deprived of its statutory right to comment on a complete permit application.

Statute dictates when public hearing and comment periods are required for wetland and waterway individual permitting applications. Under both Wis. Stat. § 281.36(3m)(j)1 and Wis. Stat. § 30.208(4)(a), DNR is required to hold a public comment period after a notice of pending
application is provided to interested members of the public. Public hearings may be held at the request of the applicant, the request of any person, or at DNR’s behest. Notice of the public hearing may be included in the notice of pending application, but must otherwise be provided within 15 days after the request for a public hearing is submitted or DNR decides to hold a public hearing. Notices of pending applications must be provided within 15 days after the date of closure. The date of closure is the date that DNR notifies the applicant that the permit application is complete or if DNR fails to do so within specified time limits.

Read together, it is clear that the statutorily required public hearing and comment period cannot be held until a permit application is complete. Although there are statutory deadlines for making decisions, nothing requires DNR to determine that an application is complete if it has not received all the requisite information. For example, once DNR receives a WRAPP, it has 30 days to review the application and determine whether or not it is complete or to request additional information. If DNR requests additional information, it has 10 days after receiving that information to again determine whether the application is complete and notify the applicant. Should the applicant fail to provide all the information required in the original additional information request, DNR is not obligated to determine that the application is complete.

Here, DNR determined that the application was incomplete and requested that Enbridge provide additional information. Enbridge purported to provide that additional information, but it was largely inadequate as exemplified by Enbridge’s response to DNR’s request for confirmation of compliance with Wis. Admin. Code NR § 320.04(3)(c) establishing minimum bridge clearance requirements and DNR’s request for additional wetland delineations. DNR was well within its authority to maintain that the application is incomplete and double down on its request for additional information. For whatever reason, DNR declined to do so and instead decided to move forward processing Enbridge’s application.

Any public hearing and comment period held before the application is complete does not fulfill the statutorily prescribed procedural requirements for permit issuance. That said, nothing prevents DNR from holding additional, preliminary public hearings and comment periods, which is precisely what the July 1, 2020 public hearing and current comment period should be considered. We encourage DNR to hold an additional public hearing and comment period on the WRAPP to comply with the statutory order of operations outlined above, but, as discussed immediately below, at least not until a Draft EIS is made publicly available.

118 Wis. Stat. § 281.36(3m)(g)1-2; Wis. Stat. § 30.208(3)(a)-(b).
119 Wis. Stat. § 281.36(3m)(h); Wis. Stat. § 30.208(3)(c).
120 Wis. Stat. § 281.36(3m)(g1); Wis. Stat. § 30.208(3)(a).
121 Wis. Stat. § 281.36(3m)(c)-(f); Wis. Stat. § 30.208(2).
122 Wis. Stat. § 281.36(3m)(c); Wis. Stat. § 30.208(2)(a).
123 Wis. Stat. § 281.36(3m)(d); Wis. Stat. § 30.208(2)(b).
124 Id.
125 Additional Information Request.
126 See supra, p. 8.
127 See supra, p. 15.
B. The Public is Deprived of the Opportunity to Comment on the WRAPP with the Benefit of the EIS

State agencies are required to prepare an EIS under the Wisconsin Environmental Policy Act (WEPA) for “major actions significantly affecting the quality of the human environment.” The purpose of an EIS is twofold: (1) to ensure agency decision-making based on all the available information related to environmental impacts; and (2) to ensure informed public participation in the decision-making process. With respect to the second purpose, the federal act that WEPA was modeled after, the National Environmental Policy Act, has been referred to as “an environmental full disclosure law.” By holding the public hearing and comment period on the WRAPP before the environmental review process is farther along, DNR has effectively deprived the public of the opportunity to bring the information contained in the EIS to bear on the heart of DNR’s authority over the Project—the wetland and waterway permits.

DNR stated in its Notice of Pending Application that it does not intend to issue either a wetland or waterway individual permit until the EIS is complete. However, this only satisfies the first purpose of WEPA, i.e., informed agency decision-making. It does not satisfy the second purpose of WEPA of informed public participation in the decision-making process. In the past, DNR has at least waited to hold a public hearing and comment period on WRAPPs for major projects requiring the preparation of an EIS until after a Draft EIS had been prepared. DNR should have done so here.

To be sure, the public will have an additional public hearing and comment period on the Draft EIS for the Project once that draft is prepared. While comments submitted on the Draft EIS that are relevant to the WRAPP could inform DNR’s decision on that application, and to some extent DNR is incentivized to consider how the information in those comments actually does impact its analysis of permitting standards, that is not the same as being required to “consider all of the comments in the formulation of the final decision on the application.” When it comes to comments submitted on a Draft EIS, DNR is only required to summarize and respond to those comments and may incorporate information from those comments into the Final EIS. DNR is not necessarily required to consider how that information impacts the agency actions giving rise

---

128 Wis. Stat. § 1.11(2)(c).
133 See Wis. Admin. Code NR § 150.30(3)(c).
134 Wis. Stat. § 30.208(4)(a); Wis. Stat. § 281.36(3m)(j)1.
135 Wis. Admin. Code NR § 150.30(4)(b).
to the EIS. And although DNR can satisfy the public input requirements of WEPA by satisfying the public input requirements for the WRAPP, the reverse is not true.

Furthermore, DNR has already made a preliminary determination that it will grant the wetland and waterway permits with modifications. Making such a preliminary determination on an incomplete application is entirely inappropriate. The only task before DNR at that point in time was to determine whether or not the WRAPP was complete, not to determine whether permitting standards will be met if certain modifications are imposed before the public had an opportunity to provide input. This makes it seem as though granting the permits is a foregone conclusion and suggests the presence of the exact sort of administrative inertia that will result in comments submitted on the Draft EIS that are relevant to the WRAPP not being given due weight. DNR should combat this perception by holding an additional public comment period on the WRAPP once the Draft EIS is made publicly available.

C. DNR Has the Authority to Toll the Date of Closure for Wetland and Waterway Permit Applications and Should Exercise that Authority

As noted in the Introduction, we encourage DNR to exercise its ample authority to slow the regulatory process and ensure the submission and an exhaustive analysis of all the necessary information as well as robust public input. There are indeed statutory deadlines for processing WRAPPs, but those deadlines must be interpreted in conjunction with DNR’s other statutory duties—namely, those duties set forth in WEPA. That is precisely what DNR did when it promulgated regulations for time limits on wetland and waterway permitting decisions. If DNR did not have the authority to wait to take major actions significantly affecting the human environment until after an EIS is prepared, WEPA would be effectively nullified.

Wis. Admin. Code NR § 300.04 reiterates the 30-day requirement for DNR to make its completeness determination established in Wis. Stat. § 281.36(3m)(c) and Wis. Stat. § 30.208(2)(a), and establishes an overall deadline for permitting decisions. However, Wis. Admin. Code NR § 300.05(3)(a) clearly provides DNR with the authority to toll those deadlines and not count working days between the date DNR makes a decision to prepare an EIS and the date it issues a WEPA compliance determination. In addition, DNR does not have to count those working days between the date it requests that applicants provide additional information and the date that additional information is provided. DNR may not be able to toll statutory deadlines indefinitely, but these provisions provide DNR with well over a year to issue and prepare an EIS and then make permitting decisions with the aid of that EIS.

136 Wis. Stat. § 1.11(2)(d); Wis. Admin. Code NR § 150.30(3)(d) (“Holding a public hearing as required by another statute fulfills the hearing requirement.”).
137 Notice of Pending Application, p. 1.
138 120 calendar days for permitting decisions under Wis. Stat. § 281.36; 105 calendar days for permitting decisions under Wis. Stat. ch. 30 when there is no public hearing; 150 calendars for permitting decisions under Wis. Stat. ch. 30 when there is a public hearing.
139 Wis. Admin. Code NR § 300.05(3)(b).
Other regulations seem to prevent DNR from making WRAPP completeness determinations until the environmental review process is significantly underway if not entirely complete. For example, Wis. Admin. Code NR § 310.14(4)(b) provides that DNR “may not determine an application is complete unless the department determines that the applicant has provided all information necessary for any environmental analysis required under ch. NR 150.” Wis. Admin. Code NR § 103.08(1k)(b) provides that an application for a wetland individual permit “may not be considered complete until the requirements of [WEPA] have been met.”

DNR has already seemingly availed itself of this authority in this very permitting process. Since Enbridge provided its response to DNR’s Additional Information Request on April 1, 2020, DNR only had until April 11, 2020 to determine whether that additional information was adequate and thus that the WRAPP was complete. Nevertheless, DNR waited until June 8, 2020—68 days later—to issue the Notice of Pending Application and schedule the public hearing and comment period. If DNR were required to rigidly comply with the statutory deadlines, the date of closure would have been triggered on April 11, 2020, and the Notice of Pending Application should have been provided on April 26, 2020. How then did DNR accomplish this feat? The answer is simple: It has the authority to toll the statutory deadlines. DNR should exercise that authority.

**SCOPE OF THE ENVIRONMENTAL IMPACT STATEMENT**

We thank DNR for exercising its discretionary authority under Wis. Admin. Code NR § 150.30(1)(f)2 to provide the public with the opportunity to comment on the scope of the EIS that will be prepared for the New Line 5 Segment. In order to ensure the EIS informs all agency actions related to the New Line 5 Segment, DNR must ensure the scope of the EIS is broad and thorough enough to evaluate all impacts to the unique landscapes, watersheds, and other environmentally sensitive resources implicated by the Project.

Below are issues that DNR should include in the EIS. The issues are covered in the order in which they fit within DNR’s Draft EIS Outline. Many of the comments below will not provide scientific and technical data because we are confident that other commenters are providing DNR those resources in their comments. However, those topics are included to emphasize the importance of their inclusion in the EIS.

Before discussing specific issues to include in the EIS, it is important to note that Line 5 was originally constructed in 1953, which predates the passage of WEPA. Thus, the environmental and other impacts of Line 5 being constructed and operating through the Bad River watershed and surrounding landscape were never subject to full environmental review. Similarly, the broader impacts of the entire line, as well as impacts from the refining and combustion of the petroleum products the line transmits, have not been assessed through this frame. DNR

---

140 Wis. Stat. § 281.36(3m)(c)-(f); Wis. Stat. § 30.208(2).
141 Wis. Stat. § 281.36(3m)(g1); Wis. Stat. § 30.208(3)(a).
therefore has an obligation to subject the New Line 5 Segment and Line 5 itself to the rigorous environmental review process now required under Wisconsin law, particularly because the New Line 5 Segment will facilitate the continued operation of Line 5.143

I. Project Overview and Regulatory Process

In the assessment of crude oil and natural gas liquids supply and demand, the EIS must clearly delineate the geographic scope of the supply and demand of the Project. Exactly how much of each substance, raw or refined into other petroleum products, e.g., propane, does Line 5 supply to Wisconsin? Exactly how much of each substance does Line 5 supply to other jurisdictions along the pipeline? Enbridge must provide this information to DNR so that it properly evaluates the short and long term “economic advantages and disadvantages of this proposal” to the people of Wisconsin and the greater Midwest and Great Lakes regions.144

II. Project Description

Several areas must be addressed in assessing the proposed Project and the operational procedures of Line 5. The EIR prepared by Enbridge states it will decommission the segment of Line 5 the proposed New Line 5 Segment will replace by disconnecting it, purging the line of combustibles, and sealing the ends of the pipeline.145 The EIS should assess the long-term impacts of leaving the decommissioned segment in the ground versus removing the pipeline and returning the surrounding area to its prior condition, as is required by now-expired easements within the Bad River Reservation.146 Further, DNR must similarly evaluate impacts of the eventual decommissioning or replacement of the New Line 5 Segment, and the full extent of Line 5 in Wisconsin, once it is no longer in use.

DNR must also examine the impacts of Enbridge’s plans for operating and maintaining the New Line 5 Segment. The human and environmental health hazards of chemical constituents of the crude oil and any additives carried through Line 5 must be considered to understand impacts in the event of a spill. DNR must also obtain more information on Enbridge’s proposed methods and procedures to be used to maintain the pipeline right-of-way, such as spraying herbicides or cutting vegetation. The EIR only briefly discusses maintenance of permanent rights-of-way, and contains no information regarding plans or methods to control vegetation in those areas.147

143 See Wis. Admin. Code NR § 150.30(2)(g) (requiring EISs to include an evaluation negative direct, secondary, and cumulative effects of proposed projects).
144 Wis. Stat. § 1.11(2)(c)6.
145 EIR, p. 15.
147 EIR, p. 105.
III. Project Alternatives

While the EIR offers several alternative pipeline routes and alternative methods of transporting the 22,680,000 gallons per day (GPD) that Line 5 carries, it fails to consider an alternative where this Project is not needed and Line 5 could be decommissioned. In the context of evaluating alternatives, DNR must evaluate the demand projections for the oil that Enbridge proposes to transport through the New Line 5 Segment. Demand for transportation from western Canada may fall in the coming months and years because of a decline in overall market demand and because of energy conservation measures, growth in renewable energy capacity, and/or economic downturn. It is important to consider this alternative in addition to other ways to meet demand and deliver petroleum products to sites in Michigan and Sarnia, Ontario. 148

IV. Affected Environment—Detailed Description

A detailed description of the overall Bad River watershed as well as the specific sub-watersheds should consider the numerous unique characteristics of areas the Project will impact. These include numerous flashy streams, easily erodible soils, steep grades in the upper watershed, high levels of sedimentation, extensive and internationally significant wetlands, and the ultimate receiving water of Lake Superior. There are ongoing analyses to characterize the watershed and identify solutions to the degraded conditions there. 149 DNR should wait until those analyses are completed later this year before finalizing its EIS and certainly before considering approving a Project that will propose to impact wetlands and waterways rather than seek to restore them.

V. Direct, Secondary, and Cumulative Effects of the Proposed Project and Alternatives

We begin with a note regarding the geographic scope of impacts considered before discussing specific issues to include in this section. DNR must evaluate impacts to the entire Project area and not just along the pipeline construction work zone. As water, air, plants, and animals do not respect such a narrow view, it is paramount that DNR consider impacts to the Lake Superior watershed, the surrounding airshed, and the broader expanse of the ecosystems and ranges of animals present in the proposed Project area. This means also considering the larger Ojibwe treaty-ceded territory through which many plants and animals in the Bad River watershed range. To properly consider all direct, secondary, and cumulative effects, this broader geographic scope is essential.

Beyond the geographic scope, there are many issues that should be included in this section of the EIS, and we provide the following discussion on select topics identified in the Draft EIS Outline to encourage DNR to fully consider related impacts.

148 EIR, p. 23.
A. Ecologically Significant Areas

Areas such as the Kakagon-Bad River Sloughs, Copper Falls State Park, and Lake Superior must be studied with particular attention, given their unique ecological and cultural roles in the region. Any potential detrimental impacts must be clearly identified so that the EIS can properly inform all decisions that might impact these unique sites.

B. Tribal Treaty Rights and Resources

While DNR’s Draft Outline raises this issue, the EIR fails to mention Ojibwe treaty rights at all, despite the fact that the entire New Line 5 Segment would cut through treaty-ceded territory, as does the entirety of Line 5 in Wisconsin. Eleven Ojibwe tribes hold the legal right to hunt, fish, and gather numerous plants and animals throughout this territory.\(^{150}\) Any impacts to the animals and plants reserved by the Tribes must be robustly considered in collaboration with the Great Lakes Indian Fish and Wildlife Commission (“GLIFWC”) and the Tribes. Further, attention must be paid to potentially impeded access for tribal members wishing to harvest treaty resources, especially given the potential for criminal repercussions to tribal harvesters under the 2019 Wisconsin Act 33.\(^{151}\)

C. Green House Gas Emissions—Climate Change

Considerations of greenhouse gas emissions must be robust, considering all stages of production, including extraction, transportation, processing, and end use. Equally important is to consider climate change impacts to local and regional communities. Numerous reports detail impacts in the area such as coastal erosion, northward shifts in forest ranges, warming of inland waterways, and more frequent and intense storms.\(^{152}\) Here too, many treaty-protected resources face harm, such as wild rice.\(^{153}\) Broader climate change impacts are also crucial to consider, including effects on agricultural production, human physical and mental health, and ecosystem-wide impacts.

D. Health

Given the predicted continued presence of COVID-19 into 2021, the EIS should also consider the increased potential risks to public health from the influx of workers in the region to complete construction activities. Enbridge already employs many out of state workers in the area, who


\(^{151}\) See supra, p. 12-13.


often travel back to their home states on weekends. This pattern increases the risk of infections in the area, and the potential strain on local health care facilities.

There is also a documented connection between pipeline projects and the epidemic of Missing and Murdered Indigenous Women and Girls. As Tribes, the State, and the federal government have all recognized this grave epidemic and prioritized taking action to address it, the EIS should also consider how the Project might affect and contradict these governmental priorities.

E. Invasive Species

It is important to consider the likelihood of the spread of invasive species through both the construction process and maintenance of rights-of-way to allow continued pipeline access. Both construction and maintenance activities will fragment wetlands and plant communities. This fragmentation, as well as equipment moving along the pipeline corridor, allows invasive species to proliferate in the Project area. A robust assessment of the measures necessary to prevent the spread of invasive species should be included.

F. Restoration Effectiveness

The EIS should consider the potential success of proposed or likely restoration methods.

G. Environmental Justice

Potential harms to the Bad River Band and all eleven Ojibwe tribes with treaty reserved rights must also be considered through the lens of environmental justice. Part of the Bad River Band’s reasoning for requiring Enbridge to remove Line 5 from the Reservation is because of the ongoing danger it presents to the Tribe’s waters and natural and cultural resources, as well as the way of

158 See EIR, pp. 42, 52, 54.
life dependent on those resources (or relatives).\textsuperscript{159} Enbridge’s decision to propose rerouting the pipeline further upstream in the same watershed would actually cross even more tributaries that then flow through the Reservation than the existing Line 5. The New Line 5 Segment therefore endangers not just the waters and wild rice beds downstream of the current Line 5 location, but the entire length of the Bad River and numerous other waterways within the Reservation. As stated above, the proposed New Line 5 Segment also endangers treaty ceded territory and resources for all eleven Ojibwe bands with legal rights in the area surrounding the Bad River Reservation, putting them ecologically, economically, nutritionally, culturally, and spiritually at risk of harm.

The issue of Missing and Murdered Indigenous Women and Girls must also be considered through the lens of environmental justice, given the disproportionate impacts faced by Indigenous female-identifying persons.

Consideration of the environmental justice implications for all residents near the New Line 5 Segment’s path must also be made. Residents now in the Project path may not be able to move to avoid the whole range of potential harms and impacts outlined in these and other comments. These reasons could include economic, health, and other limitations.

\textbf{H. Income and Employment}

Tourism, hunting, fishing, and gathering wild rice are all important economic activities for the region. Impacts to these both from construction of a New Line 5 Segment as well as spill and erosion risks posed by operation and maintenance of the Line must be considered.

\textbf{I. Residential Areas and Property Values}

Not only should impacts to properties where the New Line 5 Segment would pass or abut be considered, but broader impacts to property values should be considered based on proximity to the pipeline and associated spills or other environmental harms. Related issues include the loss of property tax revenue to local governments and increased expenditures due to externalities such as road wear.

\textbf{J. Safety}

While Enbridge outlines numerous safety procedures related to leak detection and spill response in the EIR,\textsuperscript{160} the company’s safety record on Line 5 and elsewhere is concerning.\textsuperscript{161} The EIS should robustly consider the reality of Enbridge’s past safety practices along with its stated procedures. It should also require Enbridge to model the likely impacts of a spill in this watershed

\textsuperscript{159} See generally Complaint in Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Inc., 3:19-cv-00602, p. 3 (W.D. WI July 23\textsuperscript{rd}, 2019).

\textsuperscript{160} EIR, pp. 55-60.

\textsuperscript{161} See supra, p. 22, n. 114.
under different conditions (seasons, extreme weather events, spill volume, location, etc.) so that the EIS can properly address those impacts.

The issue of Missing and Murdered Indigenous Women and Girls and its connection to pipeline construction projects must also be considered as an issue of personal safety and violence.

K. Soils and Topography

While others groups with more technical expertise on this topic will likely provide more detailed comments, we do wish to reiterate the importance of considering the potential for slumping and general instability of red clay and sandy soils present in the proposed Project area. The likely response of these soils to construction impacts and potential for ongoing erosion of these soils around the pipeline should be included. The EIS should also assess what techniques are needed to prevent erosion or slumping of these soil types, prevent growth of nick points within and downstream of the Project area, and to protect aquatic habitats from sediment.

L. Vegetation

In addition to wild rice, the EIS should consider, in coordination with GLIFWC and the Bad River Band, other treaty-protected plants and tribal medicines that may be impacted. The relative difficulty and likelihood of success of revegetation efforts along the proposed New Line 5 Segment should also be considered.

M. Water Resources

Impacts to artesian aquifers and wells in the Project area should be assessed. Further, all public and private wells within at least 1200 feet of the proposed Project need to be identified and catalogued, particularly those drilled prior to 1988 for which there may not be construction information. Then potential impacts to all currently and newly catalogued wells can be assessed.

N. Wetlands

Particular attention should be paid to the effectiveness of restoration efforts proposed in wetlands, including those that will be converted from forested and shrub/scrub wetlands to emergent wetlands, as well as the success, failure, and adequacy of mitigation projects required for wetlands.

O. Weather

Impacts from increasing extreme weather events based on current data trends must be taken into account, to understand how these events will affect the proposed New Line 5 Segment.
VI. Summary of Short-term, Long-term, and Unavoidable Effects

This section should robustly consider the adverse environmental impacts, as well as the economic advantages and disadvantages, which cannot be avoided if this Project is undertaken. Also, a clear discussion of the relationship between short-term environmental uses and longer-term environmental health and productivity is essential.

VII. Other Issues and Concerns

In considering Enbridge’s spill response planning, particular consideration should be paid to the unique difficulties posed to respond swiftly and adequately to an oil spill in the Bad River watershed. Many areas downstream of the proposed Project within the Reservation, especially the Bad River-Kakagon Sloughs, are difficult or impossible to access by car or truck. Spill response in inclement weather or during winter would only compound that difficulty. Recent flood events, especially in the summer of 2016, have shown the likelihood of road washouts in the watershed. Were a pipeline rupture to occur during such a flood event, it would significantly slow spill response, allowing more time for oil to contaminate the watershed and potentially Lake Superior.

Some of these same factors make discovery of smaller leaks by Enbridge employees or third parties that much more difficult. Cleanup of spills would also be challenging in this landscape, especially the wetland-rich lower watershed where attempts to clean up a spill could be just as damaging as the oil itself. All of these difficulties should be considered in the EIS.

CONCLUSION

Enbridge’s WRAPP is inarguably incomplete, and thus cannot be granted until all requisite information is submitted and analyzed for compliance with applicable statutory and regulatory permitting standards. The WRAPP also cannot be granted until DNR satisfies its statutory duty to provide the public with a hearing and comment period on a complete application. The July 1, 2020 public hearing and this comment period do not satisfy that duty, although we value the opportunity to provide input at this preliminary stage. Furthermore, the purposes of WEPA will not be fulfilled unless the public has an opportunity to comment on the WRAPP after the Draft EIS is made publicly available and with the benefit of the information contained therein. Without that opportunity, even the most exhaustively researched and clearly communicated EIS that includes analyses of all the issues identified above and more will not provide the public with the intended benefit.
**Application Files**

**Stage: Review**

<table>
<thead>
<tr>
<th>File Name</th>
<th>File Size</th>
<th>Created</th>
<th>Modified</th>
<th>File Link</th>
</tr>
</thead>
<tbody>
<tr>
<td>AttachB_Aerial_full_set_revised_4-1-20.pdf</td>
<td>33,741K</td>
<td>4/20/2020</td>
<td>4/20/2020</td>
<td>Download Item</td>
</tr>
<tr>
<td>AttachB_Aerial_MapsSet1of3_N00471.pdf</td>
<td>12,539K</td>
<td>2/12/2020</td>
<td>2/12/2020</td>
<td>Download Item</td>
</tr>
<tr>
<td>AttachB_Aerial_MapsSet2of3_N00471.pdf</td>
<td>13,387K</td>
<td>2/12/2020</td>
<td>2/12/2020</td>
<td>Download Item</td>
</tr>
<tr>
<td>AttachB_Aerial_MapsSet3of3_N00471.pdf</td>
<td>13,347K</td>
<td>2/12/2020</td>
<td>2/12/2020</td>
<td>Download Item</td>
</tr>
<tr>
<td>AttachD_WaterbodyCrossingTable_N00471.pdf</td>
<td>155K</td>
<td>2/12/2020</td>
<td>2/12/2020</td>
<td>Download Item</td>
</tr>
<tr>
<td>AttachC_WaterbodyCrossingTable_revised_4-1-20.pdf</td>
<td>107K</td>
<td>4/20/2020</td>
<td>4/20/2020</td>
<td>Download Item</td>
</tr>
<tr>
<td>AttachF_WetlandDelineationReport_ConsentCommunication.pdf</td>
<td>216K</td>
<td>2/12/2020</td>
<td>2/12/2020</td>
<td>Download Item</td>
</tr>
<tr>
<td>AttachG_WetlandDelineationReport_ConsentCommunication.pdf</td>
<td>263K</td>
<td>2/12/2020</td>
<td>2/12/2020</td>
<td>Download Item</td>
</tr>
<tr>
<td>AttachI_WetlandDelineationReport_ConsentCommunication.pdf</td>
<td>12009K</td>
<td>2/12/2020</td>
<td>2/12/2020</td>
<td>Download Item</td>
</tr>
<tr>
<td>AttachM_WetlandDelineationReport_ConsentCommunication.pdf</td>
<td>43584K</td>
<td>2/12/2020</td>
<td>2/12/2020</td>
<td>Download Item</td>
</tr>
</tbody>
</table>

- **File Size:** The size of each file in kilobytes (KB).
- **Created:** The date the file was created.
- **Modified:** The date the file was last modified.
- **File Link:** A link to download the file.