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July 11, 2020

Wisconsin's Green Fire Comments on Enbridge Pipeline Line 5 Relocation Project Waterway and Wetland Permit and Environmental Impact Statement Scope

Thank you for this opportunity to comment on the Waterway and Wetland Permit (WP-IP-NO-2020-2-X02-11T12-18-51) and scope of the Environmental Impact Statement (EIS). Wisconsin's Green Fire (WGF) is a statewide conservation organization formed in 2017 with a mission to support the use of science in natural resource decision making. Our members have extensive experience in natural resource management, science, education, law, and other fields. Our review team includes people with Wisconsin Department of Natural Resources (DNR) experience who have reviewed and issued hundreds of waterway and wetland permits. Our team also includes people who have worked in the Lake Superior basin in regulatory and resource management fields.

Executive Summary

The Environmental Impact Statement (EIS) should be developed based on exact information on the route, water crossings, and wetland impacts. The exact route of the Line 5 Relocation project has not been established, since negotiations with landowners continue and the Enbridge application for a Public Interest Determination for authorization to condemn property is before the Public Service Commission of Wisconsin. The EIS should include robust evaluations and consideration of the unique unstable watersheds and hydrology in the Lake Superior basin which can/could lead to flooding and catastrophic events. These watershed factors impact structural stability of the pipeline, increase the risk of spills, and affect spill response. Furthermore, the construction of the pipeline could easily exacerbate hydrological impacts and watershed stability. Finally, the information submitted by Enbridge in the Waterway and Wetland Permit application is incomplete. The permit decisions and conditions should be informed by the actual site-specific plans and the analysis of the EIS. Wisconsin's Green Fire recommends that a second public comment period be held on the permit application after the EIS is complete and the applicant submits complete site-specific plans and information for each

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waterway and wetland crossing. Without this input opportunity, the public is denied the right to review and comment on the actual defined project.

A. Comments on Waterway and Wetland Permit Application

1. Waterway Permit Application

The Chapter 30 waterway permit application from Enbridge is incomplete because it does not provide construction detail for specific river and stream crossings and does not provide enough information for the public to review and comment on those specific crossings during this comment period.

We were struck by the lack of information in the submittal by Enbridge. Enbridge proposes to cross over 180 waterways or water courses, yet it provides no site plans for individual waterway crossings, only “typical” designs of how the pipeline may cross any individual waterway, apparently leaving the design work for contractors at some future date or as they encounter individual waterways. These “typical” designs are laid out in the Environmental Protection Plan (EPP) which is dated December, 2019, and referred to in the permit application. The Environmental Impact Report (EIR) submitted by Enbridge notes that field surveys for waterway crossings and wetland impact areas are not complete.

Even though Enbridge may supply more information to the DNR as surveys continue, we question how the public would review and provide input since the public comment period on the permit closes July 11? How can the EIS adequately evaluate the water crossings when specific information has not been provided? The lack of information provided by the company is unacceptable. The public would be required to provide more extensive information in a request for even one water crossing.

The public should see how the specific plans take into account the varied conditions of waterways, including the White River, Marengo River, Brunsweiler River, Trout Brook, Silver Brook, Bad River, Tylers Forks, Potato River, Vaughn Creek, and all navigable streams. Even though (presumably) Enbridge may supply more information to the DNR as work continues to survey and finalize the proposed route, it is unclear how the public would receive notice of these plans and have an adequate opportunity for review/ input given that this public comment period on the permit closes July 11.

The company’s April response to the DNR March 6, 2020 request for more information still did not include simple but necessary information for each stream crossing such as:

- Is the stream in question navigable per state standards?
- What are the stream dimensions?
- What is the stream bank composition, height and slope? What are the bottom characteristics?
- What crossing method does the company propose for the specific river or stream and what are the site characteristics of the crossing location?
- How does the company plan to stabilize the bed and banks after construction?
- What site-specific erosion controls are needed? How will the particular challenges of soil, slope, and hydrology of the Lake Superior basin watersheds be addressed?

Many of the streams are trout water or tributary to trout water and as such should be off limits to work from Sept 15 to May 15 to protect trout spawning redds. Many of the streams are designated as Outstanding Resource Waters or Exceptional Resource Waters and as such merit special treatment to prevent degradation. Enbridge should note how they propose to protect these designated waters on a case by case basis.

The company proposes to blast through the bottom of at least nine streams, including Vaughn Creek in Iron County (see Blasting Plan within Environmental Protection Plan in EIR). Up to ten miles of blasting could occur in areas of shallow bedrock. We contend that it is not appropriate to blast any stream bed and it would be a dangerous precedent. Blasting would damage the stream bed, possibly damage spawning habitat, impede navigation, and could expose fissures in bedrock and change hydrology. The EPP also notes that the blasting contractors would be responsible to address any damage to private wells. How will Enbridge and its contractors evaluate wells and address damage? We share the concern expressed by other organizations about blasting and fractures to bedrock with possible affects to wells, groundwater, and surface water hydrology.

The company proposes to use wet cuts in some yet-to-be identified waterway crossings. These need to be identified up front as wet cuts are environmentally damaging and in many cases may be inappropriate due to flow below the stream bed. The company should have identified sites where wet cuts are proposed prior to DNR review so that all impacts could be considered. Other methods should be considered where appropriate.

In sections 5 of the narrative response to DNR dated April 1, 2020, the company states that there will likely be minimal short term or long-term negative impacts. This statement is vague and further shows that Enbridge has not properly evaluated the proposed crossings and appears to be unaware of the fragility of the clay soils and steep topography that shapes the

waterways in the Lake Superior clay region. The company needs to provide a site-specific plan for minimizing impacts, be able to describe what short and long term impacts are expected, and provide a thorough discussion on remediation for any long-term impacts.

No monitoring plan for crossings is presented. The company needs to prepare a strong monitoring program with clear reporting requirements and there needs to be a clear regulatory response for failure to monitor and repair. Without such a plan, how will the public have confidence in the actions of the company and its contractors, and how will the public have confidence in DNR oversight?

Public Access for Navigation

The State of Wisconsin Constitution and Wisconsin's Public Trust Doctrine sets forth the rights of the public to navigate public waters, which include fishing, hunting, recreation, and other public trust uses, as long as one enters at a public access point and keeps one foot in the water (with reasonable ability to walk around obstructions). However, the felony trespass law, 2019 Wisconsin Act 33, amended Wis. Stat. § 943.143 such that the public's right to navigate at pipeline waterway crossings could be impacted. The law makes it a felony to intentionally enter the property of an energy provider without consent; energy provider property is defined to include oil distribution systems. Wisconsin's Green Fire is very concerned about the potential curtailment of public trust rights. WGF is grateful that Midwest Environmental Advocates (MEA) explains this legal issue in their comments on the Enbridge Line 5 project. WGF agrees with MEA's comment:

To ensure that the rights of the public under Wisconsin's Public Trust Doctrine are not infringed, DNR 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.

We agree with MEA that otherwise, the permit must be denied because it does not meet statutory requirements for maintaining the public interest.

2. Wetland Permit Application

The wetland permit application states that most of the wetland impacts will be temporary. However, there is significant acreage converted from forested to other wetland types. The DNR's March 6, 2020 letter requesting more information from Enbridge, asks how wetlands will be monitored to ensure revegetation, surface elevations, and water flow is not impacted. Further, it asks Enbridge to state how the impacts would be addressed and corrected if

revegetation growth becomes impeded, surface elevations become altered, and / or water flow becomes obstructed.

The Enbridge April 1, 2020 response to the DNR includes this response to data request #5 as follows:

Enbridge will monitor wetlands impacted by construction in accordance with U.S. Army Corps of Engineers (USACE) and WDNR monitoring requirement yet to be defined for the Project. Enbridge will continue to consult with the WDNR and USACE regarding post-construction wetland monitoring requirements.

The Enbridge response to DNR indicates that as of the time of permit application, the company does not have a monitoring plan to determine whether revegetation growth becomes impeded, surface elevations become altered, and/or water flow becomes obstructed. Likewise, it appears the company does not have a plan to address and correct those impacts. Rather, the company is relying on government agencies for direction. For such a large and expensive project with extensive wetland impacts that are proposed as temporary in the permit application, the company needs to have a plan to monitor and address impacts before permits can be granted.

Failure to provide these plans at this time means that again, the public will have no opportunity to review and comment since the public comment period will be closed. **Our Wisconsin's Green Fire review team cannot remember an instance in our careers in which an applicant would be allowed to express intent to comply with permit requirements absent a specific plan, as satisfying the requirements for a complete application.**

In its March 6, 2020 request for more information, DNR asked that Enbridge prepare a separate Wetlands Practicable Alternatives Analysis (PAA) section. Is the Enbridge response to data request #5 (April 1, 2020) to be considered the sum total of the PAA for the permit application?

Again, our review team's experience is that a PAA is a site-specific extensive consideration of alternatives and methods to minimize impacts, which appears to be lacking in this submittal.

Construction and mitigation plans must be developed for each individual wetland crossed, including how to address affected hydrology and wetland plant communities. Given the lack of mitigation plans, it is reasonable to wonder if the company has a plan to mitigate these issues, rather than relying on an undefined monitoring process. Their intent needs to be clearly spelled out. It appears there is no long-term plan to address invasive species introduction, problems with revegetation, head cuts, gully formation, slumping, and altered hydrology affecting wetland functional values.

The Enbridge response to data request #19 suggests that wetland field surveys for the 2020 growing season were not complete for this permit application. This would again argue for the fact that the permit application is not complete. **WGF recommends extending the public comment period until these deficiencies are met, or denying the permit.**

B. Scope of the Environmental Impact Statement

1. The EIS needs to address the Lake Superior Red Clay Watershed and Instability

The EPP states that “unstable banks will be reshaped to prevent slumping” as a practice for stream crossings. Unstable banks and slumps are common in the Lake Superior clay region even without construction activities. The EIS should include a robust treatment of the specific watershed conditions in the Lake Superior region that create unstable conditions in the rivers and streams. There have been significant studies and planning efforts over the past decades addressing the challenging hydrological conditions in the area, under the local term “slow the flow.” Comments from other organizations include extensive discussion of these efforts. We include some additional citations at the end of this comment letter.

It is notable that in 2013, the U.S. Environmental Protection Agency (EPA) approved a nine key element watershed action plan for the Marengo River watershed under the EPA’s Nonpoint Source Program (Bad River Watershed Association, 2013). The plan was developed through an extensive partnership that included the Bad River Watershed Association (now Superior Rivers Watershed Association), Bad River Band of Lake Superior Tribe of Chippewa, Wisconsin DNR, US Forest Service, U.S. EPA, County Land and Water Conservation Departments, and several others. The government sponsor was the Bad River Tribe working with the EPA with support by Wisconsin DNR. These plans are unusual outside of the context of a TMDL (Total Maximum Daily Load – a plan typically done to model nutrient inputs and determine how to reduce nutrients in agricultural and urban watersheds). The federal attention and partnerships in the Marengo plan highlights the level of interest and acknowledgment among many levels of government and local citizens of the unique regional hydrological degradation in the watershed.

The EIS should address how these watershed conditions, and patterns of increasingly large rain events, affect pipeline water crossings and overall stability, safety, increased risk of spills, and spill response in this remote region. **The Chapter 30 waterway permit and the wetland permit**

should be **informed** by the EIS treatment of watershed considerations and resulting stream characteristics in this region.

Steep Slopes: (EIR section 6.3.7.2)

Treatment of steep slopes in the EIR is not adequate for the EIS. Steep slopes need to be addressed in terms of the geomorphology and soils in the region and the risk of instability for a pipeline, leading to increased risk of failure. Studies on slumping processes in the Lake Superior red clay region are included in the references. Slumping events along waterways in which the stream energy erodes coarser material at the bottom of the bluff or slope are extreme. Engineering options to stabilize clay banks have met significant challenges and often are not successful. Stream banks and crossings are particularly unstable in this region, particularly with increasing storm intensity.

Flooding:

The Lake Superior basin experienced intense flooding in the summers of 2012, 2016, and 2018. The damage to road and other infrastructure experienced at those times would make it difficult or impossible to respond in a timely manner to a leak or spill. In addition, the rapid rise of water in rivers, streams, gullies, and along roads would make it impossible to contain a spill in a meaningful way. One member of our review team was part of the DNR's response team to the spill on the Nemadji River following a train derailment south of Superior, WI on June 30, 1992. Heavy rain, but not of flood intensity, followed the spill. The rapid rise in the Nemadji River, with similar hydrology to the red clay rivers further east, hampered spill containment, and most of the benzene and other aromatic hydrocarbon mixtures flushed into Superior Bay and Lake Superior. Heavy rains and flooding are not uncommon in the region. The EIS should address how these rain events and the flashy waterways in the red clay region, could contribute to spill risk and spill response.

2. The EIS needs to address Environmental Justice, High Quality Resources, and Risk of Spills

The proposed Line 5 reroute is in response to the Bad River Band of Lake Superior Chippewa non-renewal of its lease across tribal lands, and potential damage to tribal resources. The proposed reroute in no way mitigates those concerns; it only amplifies them as many more waterways that flow into the Bad River and Lake Superior are crossed by the proposed route. In addition, the proposed reroute would cross through Objbwe ceded territories and therefore

government to government consultation with the tribes is critical. Lake Superior and the high-quality rivers, streams, and wetlands that feed it are irreplaceable. **The EIS should address the high quality waters and habitats at risk from spills and other disruptions, as well as the environmental justice aspects of this proposal.**

Alternative routes, including the “No Action Alternative” that protect tribal rights and cultural resources should be given thorough consideration. A summary of existing natural resource designations/high quality resources should be provided, as is noted in extensive comments provided to DNR by other organizations. Enbridge should provide details on how spills at critical locations along the pipeline (such as crossing above Copper Falls State Park) would be prevented, minimized, responded to. The EIS needs to include a robust evaluation of spill potential from pipeline operation. This should include: potential volumes based on shut off procedures and locations, and the challenges and costs, citing who would bear those costs, of spill response in this region, and plans for spill response during severe weather events.

3. Additional Comments for the EIS

Buffers

Section 4.5 of the EIR (Specialized Construction) describes the plan to leave 20-foot buffers on all stream banks during initial clearing. However, the DNR Best Management Practices (BMPs) for Forestry suggest a 100-foot riparian buffer for trout streams. Forestry BMPs include 100 foot riparian buffers for all streams with a width greater than three feet, and a 35-foot buffer for streams less than 3 feet wide (Publication FR-093 2010). Enbridge should follow the buffers in the DNR Forestry BMPs.

Invasive Species Management

Section 4.7 of the EIR (Invasive Species Management) describes the practice of cleaning equipment before arriving on site. Enbridge should clarify that they will also require equipment cleaning between sites.

Threatened and Endangered Species:

Construction should be avoided during wood turtle nesting season (late May), hatching (mid-July through mid-September) in wood turtle nesting habitat. The project plan should include a thorough survey for wood turtles and other key T and E species such as bats.

C. Summary of our Findings and Conclusions

- The permit application for waterway crossings and wetland impact by Enbridge should not be considered complete and the comment period should not be closed without Enbridge providing detailed plans and evaluation for each particular water crossing and wetland impact.
- The public should have adequate opportunity to review and comment on the water permit applications.
- The wetland permit application should include details on responses if revegetation growth becomes impeded, surface elevations become altered, and / or water flow becomes obstructed. The applicant also needs to provide the Wetlands Practicable Alternatives Analysis (PAA) section.
- Once complete, the public should have adequate opportunity to review and comment on the wetland permit applications.
- The waterway and wetland permit decisions and conditions should be informed by the EIS. We appreciate that the DNR has indicated the intent to issue no permit decisions until the EIS complete. However, the public will not be able to review and comment on specific waterway and wetland plans unless another public comment period is held.
- The EIS should include robust evaluations of watershed processes, significant water and terrestrial resources, and spill potential and response.
- Within the EIS, section 5.1.3, on environmental justice, should include a comprehensive discussion of ways this project specifically impacts Indigenous (minority) communities and low-income populations. For example, the WI Department of Transportation (DOT) web site lists the following criteria for environmental justice considerations in the EIS process.
 - To avoid, minimize or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects on minority populations and low-income populations
 - To ensure the full and fair participation by all potentially affected communities in the transportation decision-making process
 - To prevent the denial of, reduction of or significant delay in the receipt of benefits by minority and low-income populations.

If DNR does not have environmental justice criteria for an EIS of this nature, they could be developed or adapted from DOT or other state or federal EIS guidance documents.



Thank you for the opportunity to provide input into the scope of the EIS and to comment on the submittals for the Waterway and Wetland permit. We appreciate the difficult job of evaluating the submittals by Enbridge under statutory time frames and sorting through the comments and information provided by the public.

We truly hope the DNR affords the public the opportunity to review and comment on the permit application when the site-specific information submitted by Enbridge includes the information needed to evaluate whether the plans meet permitting standards.

For further information on these comments, please contact:

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