ATTACHMENT I

Bad River Band of Lake Superior Chippewa
Mashkiiziibii Natural Resources Department
72682 Maple Street
Odanah, WI 54861
715-682-7123

WATER QUALITY STANDARDS REPORT

Lorrie Salawater, Water Regulatory Specialist
Naomi Tillison, M.S., Mashkiiziibii Natural Resources Dept. Director

March 22, 2022

I. INTRODUCTION

This report was prepared by Lorrie Salawater and Naomi Tillison for purposes of submission to the United States Army Corps of Engineers ("Corps") Public Notice on the permit application for the Enbridge Line 5 Wisconsin Segment Relocation Project ("Project"). Lorrie Salawater is currently the Water Regulatory Specialist for Mashkiiziibii Natural Resources Department ("MNRD"), a role she has held since 2020. She has also held the prior positions of Fisheries Specialist (2 years), Invasive Species Coordinator (1 year), and GIS Tech (2 years) with MNRD. Naomi Tillison, M.S., is currently the MNRD Director, a role she has held since December 2016. Prior to that, she was the Water Resources Specialist, a role she started after being hired by the Bad River Band in October 2007.

II. RELEVANT DATA

Water quality and quantity data collected by MNRD or other agencies in rivers, streams, wetlands, and other water resources within the Bad River watershed and connected areas is relevant to this report along with data listed in other MNRD reports and data relevant to the uses of waters, including functions of wetlands.

As the Corps' Public Notice is an early step in its process (as described by the Corps in a meeting with MNRD on March 10, 2022), MNRD will continue to review existing data and identify additional data that may be necessary to collect to evaluate how the proposal may affect connected Reservation waters and compliance with the Band's water quality standards.

III. REVIEW

Parts of Corps' application materials reviewed for this section:

- Corps' Public Notice for MVP-2020-00260-WMS dated 1/6/22 and Corps' Public Notice of Extension 2 dated 2/23/22.
- Appendix N – Timing Restriction Waiver Request Form

There are many deficiencies within the documents available on the Corps' website and Wisconsin DNR's DEIS which made proper review limited.

IV. FINDINGS

Prior to proceeding with the substance this report, it is necessary to review the significance of the Band's water quality standards.

a. The Bad River Band's Water Quality Standards

The Band received treatment in a similar manner as a state (TAS) authority under the Clean Water Act (CWA) for a water quality standards (WQS) program (sections 303(c)/401/518(e)) in 2009 and the Tribal Council and EPA approved the Band's WQS in 2011 **(*see* Attachment 1)**. Like any WQS approved under the CWA, the Band's WQS include the designated uses that apply, the criteria derived necessary to protect the uses, and an antidegradation policy to ensure high quality waters (such as Outstanding Tribal Resource Waters) are protected from unnecessary

degradation and prevent water quality from being lowered below the minimum level necessary to fully support uses. The Band's WQS apply to waters within the Bad River Reservation boundaries, and the Reservation is located downstream of the proposed project. Permit decisions for proposed projects located upstream of the Reservation must consider the downstream WQS and evaluate the potential impacts on the waters within the Reservation boundaries to ensure the downstream WQS will be met.

The antidegradation policy of the Band's WQS ***(see* Attachment 1, p. 8)** describes three categories of high-quality waters and designates waters within the Reservation Boundaries as summarized below:

- Chi minosingbii or Outstanding Tribal Resource Waters (OTRWs), which are roughly equivalent to EPA's regulatory definition of Tier 3 waters. Waters designated as OTRWs include surface waters of the Reservation that are identified as high quality and constitute a significantly important cultural and ecological resource. These waters are recognized as being largely pristine and important for the cultivation of wild rice or the spawning of lake sturgeon, or have other special resource values, and, therefore, that water quality shall be maintained and protected in all cases without degradation. New or increased discharges will not be permitted. Waters designated as Chi minosingbii (OTRWs) include: Kakagon Slough and the lower wetland reaches of its tributaries that support wild rice, Kakagon River, Bad River Slough, Honest John Lake, Bog Lake, a portion of Bad River, from where it enters the Reservation through the confluence with the White River, and Potato River (refer to provision E.2.iii.).

- Chi minosibii or Outstanding Resource Waters (ORWs), which are roughly equivalent to EPA's regulatory definition of Tier 2.5 waters. Waters designated as ORWs include surface waters of the Reservation that are identified as high quality and culturally important to the Band for the fisheries and ecosystems they support. New or increased discharges may be permitted provided that the new or increased discharge is necessary in accordance with the Band's Antidegradation Policy and does not result in a change in background conditions or negatively impact designated uses or existing uses; however, no new or increased discharges of bio-accumulative chemicals of concern (BCCs) will be permitted. Waters designated as Chi minosibii (ORWs) include: a portion of Bad River, from downstream the confluence with the White River to Lake Superior, White River, Marengo River, Graveyard Creek, Bear Trap Creek, Wood Creek, Brunsweiler River, Tyler Forks, Bell Creek, and Vaughn Creek (refer to provision E.2.ii.).

- Anishinaabosibiing or Exceptional Resource Waters (ERWs), which are roughly equivalent to EPA's regulatory definition of Tier 2 waters. Any surface waters not specifically classified as OTRWs (Chi minosingbii) or ORWs (Chi minosibii) are classified as ERWs (Anishinaabosibiing). Exceptional Resource Waters are of high quality and culturally important for the ecosystems they support. Additional details are provided

in provision E.2.i. Examples of ERWs include tributaries to Brunsweiler and Marengo Rivers and many wetlands.[1]

- Webpage links are provided below for the Band's WQS and the Band's webmap that shows the high-quality water designations that are described above.

- Additionally, a map prepared by Great Lakes Indian Fish and Wildlife Commission (GLIFWC) is attached that shows the high-quality watercourses designated under the Band's WQS or the State's WQS and the proximity to the proposed project. Please note that this map does not include the other waters designated as high quality under the Band's WQS or the State's WQS, such as high-quality wetlands. Please note that this map only includes the distances (in river miles) between the proposed project and the larger watercourses within the Reservation boundaries, such as the Mashkii-ziibii (Bad River, an OTRW), and it does not include the distances between the proposed project and the smaller watercourses within the Reservation boundaries, such as Trout Brook (an ERW), Zhooniyaa-ziibiins (Silver Creek, an ERW) and Billy Creek (an ERW).

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

- Cold water fisheries (F1), such as Potato River, Vaughn Creek, Winks Creek, Trout Brook, and Tyler Forks River, and cool water fisheries (F2), such as White River and Marengo River and the other trout streams shown on the Designated Trout Stream map attached below. (Please note that this map was created in December 2020 and may not contain the most current set of access routes.)

- The Kakagon and Bad River Sloughs coastal wetland complex[2] supports manoomin or the wild rice (W1) use[3] among many other uses.

- The Cultural (C1) designated use applies to all waters within the exterior boundaries of the Reservation, such as the Bad River and numerous wetlands. This designated use is

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

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

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

described as water-based activities essential to maintaining the Band's cultural heritage including, but not limited to, ceremony, subsistence fishing, hunting, and harvesting. This use includes primary and secondary contact and ingestion.

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

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

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

The Band's WQS **(Attachment 1)** contain criteria (narrative and numeric) that were derived to protect the different designated uses provided by the surface waters. Although there is not enough data and information currently available for the proposed relocation project, examples of criteria that may be applicable to impacts anticipated include, but are not limited to, the following:

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

- Temperature as described in criterion E.6.ii.g.

- Turbidity as described in criterion E.7.iii.

- Pollutants or human-induced changes to waters, the sediments of waters, or area hydrology that results in changes to the natural biological communities and wildlife habitat shall be prohibited as described further in criteria E.6.ii.e.

A variety of examples have been provided above to help explain the relevancy of the Band's WQS. The examples provided above should not be construed as a comprehensive summary of the relevancy of the Band's WQS and tribal waters that may be impacted by the proposed project.

The Band's WQS **(Attachment 1)** intersect many other program areas or topics including, but not limited to, fisheries, wetlands, cultural resources, and wildlife. Information contained in the other reports prepared by Mashkiiziibii NRD staff are relevant to this report.

b. Section 401(a)(2)

The Corps' responsibilities to the Band under § 401(a)(2) of the CWA and the federal trust responsibility require careful evaluation of this Project's impacts to Reservation water quality. Under § 401(a)(2) of the Clean Water Act, the Corps must allow the Band the opportunity to fully investigate possible violations of its WQS before the Corps may issue this permit. MNRD cannot undertake this investigation until Wisconsin completes the § 401 certification process for the Project and reviews a more comprehensive environmental analysis from the Corps. Without such data MNRD will not be able to appropriately evaluate the Projects impacts and the water quality

certification process for the Project to move forward. At minimum, the Corps and the Band must consult on the following subjects:

- Evaluation of how the proposed project will impact high quality waters (i.e., OTRWs, ORWs, ERWs) is necessary. This evaluation must include an assessment of the necessity of the degradation to surface waters that will or has the potential to occur and if the projected water quality will be lowered below the minimum level required for the surface waters to fully support existing uses. This evaluation should assess impacts throughout the proposed project life, including the construction, operation and maintenance phases and should incorporate impacts associated with a potential oil spill. This evaluation should also consider climate change and how impacts may be magnified as we continue to experience more frequent extreme events, such as flooding and drought conditions. Accurate mapping of the surface waters is necessary for this evaluation.

- An analysis regarding how the Project will impact downstream Reservation water quality and the uses supported by the Reservation waters is necessary to assess compliance with the Band's water quality criteria. This scope of this evaluation should be throughout the project's life and include an evaluation of potential oil spills and the impacts of the emissions associated with this project. This assessment will also require accurate mapping of surface waters.

Once this analysis is concluded, the Band is entitled to a hearing before the Corps to assess the Project's compliance with the Band's water quality standards. 33 U.S.C § 1341(a)(2). This hearing will require the Corps to determine if there are water quality violations resulting from this project, and if so, whether they can be mitigated. If the impacts can be mitigated, the Corps must impose conditions on the § 404 permit to mitigate the Project's water quality impacts. If there are no conditions that can ensure compliance with the Band's water quality standards, then the permit must be denied.

c. Evaluation of Corps Materials

MNRD's review of the Corps' materials reveals many flaws with the agency's approach to protecting the Bands water quality standards. The Corps' materials and the applicant's materials give MNRD reason to believe that the project will violate the Band's water quality standards. The findings here are not conclusive and investigations are ongoing.

- State Section 401 Water Quality Certification (Section 5 of the Corps' public notice dated January 6, 2022) contains a description of the connection between a federal permit and State 401 certification. However, the Corps' notice does not contain correct information on the CWA 401(a)(2) process timeline (Army Corps, February 4, 2022) nor reference the Band's WQS **(Attachment 1)** beyond the vague language of "downstream neighboring jurisdiction."

- Table 1 in Section 2 (Specific Information) of the Corps' public notice dated January 6, 2022, summarizes the regulated wetland impacts for the proposed relocation project (based on wetland surveys completed to date) broken down by wetland type. The table indicates that there will be 33.95 acres of "temporary discharge areas (converted to

emergent wetland)" with the majority of this acreage (30.06 acres) categorized as forested wetlands. The paragraph above this table states "[t]he remaining 33.95 acres of wetlands, originally forested and scrub-shrub, are proposed to be maintained as emergent wetland within the permanently maintained right-of-way." This conversion from one wetland type (e.g., forested) to an emergent wetland in a "permanently maintained right-of-way" is a permanent impact or change as this conversion results in changes or losses of the functions and uses supported by the original wetland type. *see Letter to Col. Karl Jansen from Tera L. Fong*, (March 16, 2022) Environmental Protection Agency Region 5 at 6 (hereinafter "EPA Letter") **(Attachment 2)**. These changes cannot be fairly categorized as "temporary" given the permanent loss of function. *Id*. Such loss of function will impact downstream water quality, attainment of downstream uses, and interfere with the maintenance of the Reservation's high-quality waters. A federal EIS is necessary to inform permitting decisions and to comprehensively evaluate this substantial and permanent change proposed in wetland uses and functions including, but not limited to, the potential downstream water quality impacts and changes to uses and functions of downstream waters and high-quality waters as designated under the CWA authorities.

- Section 2 (Specific Information) of the Corps' Public Notice dated January 6, 2022, states that "USACE authorization is not required for crossing other waterways by horizontal directional drill (HDD) or direct bore methods of pipeline crossing because it does not result in a discharge of dredged or fill material, and because these waterways are not considered navigable waters of the United States." There are multiple waters that may be affected by this proposal that support navigation use. Furthermore, activities such as HDD have the potential to result in a discharge of dredged or fill material in Waters of the U.S. EPA Letter at 14 **(Attachment 2)**. A federal EIS is necessary to inform permitting decisions and to comprehensively evaluate the potential impacts of the project's activities in Waters of the U.S. and in downstream and connected waters.

- MNRD also discovered miscited materials and lacking information in Appendix N – Timing Restriction Waiver Request Form (referenced in the Corps PN dated 1/6/22 and available on the Corps' website). For example, the "names of waterways" and "waterway designations, if any" sections states, "Please see Supplemental Permit Information, including Appendix F." Appendix F on the Corps' website is titled "Draft Hydrostatic Test Plan, Rev 1" and does not contain the specified information. MNRD could not locate the "Supplemental Permit Information" appendix anywhere on the Corps' website.

V. FURTHER INFORMATION REQUIRED

Additional information is needed in order for MNRD to develop informed findings on project impacts and permitting decisions. We recommend that the Corps take the following steps.

- The Mashkiiziibii Water Quality Standards have not been considered in the materials reviewed. There is not any consideration for the downstream waters and how they will be affected by this proposed project. The Corps must include a firmer discussion of the Band's TAS status and WQS in future materials.

- Reclassification of any permanent conversion of wetland type as a permanent environmental impact. The applicant's proposed wetland conversions will result in the permanent loss of wetland function.

- A federal EIS is necessary to inform permitting decisions and evaluate the significant environmental impacts of the Project including the potential impacts to Reservation waters and waters connected to Reservation waters. A federal EIS is necessary for multiple reasons, including the serious and irreversible impacts of the Project on important waterways, inadequacies of the Wisconsin DNR's draft EIS, and the limitations of a state EIS. Such a statement would, in consultation with the MNRD, evaluate the current condition of the surface waters (rivers, wetlands, and other surface waters) that may be impacted by the Project and their capacity to support uses. Where current conditions are not known, then additional data and information must be collected to complete these evaluations. Accurate mapping of the surface waters is necessary for these evaluations.

- The federal EIS should investigate the potential for HDD and direct bore methods to result in a discharge of dredged or fill material in Waters of the U.S. and subsequent interference with the Band's water quality standards.

- The federal EIS should thoroughly evaluate environmental effects of the proposal, including the potential impacts from the construction, operation and maintenance phases and impacts associated with a potential oil spill. Additionally, the federal EIS should adequately evaluate the cumulative effects of the proposal.

- The Corps should hold public hearings throughout the process due to the intent of the Clean Water Act for public participation in decision-making, the value of citizen science and public knowledge on the uses of waters that may be affected by the proposed project and alternatives analyzed, and the level of interest in this proposal as demonstrated by public participation in the Wisconsin DNR's public hearing held in February 2022 and current and prior public comment periods. The first public hearing should focus on the scoping of a federal EIS.

MNRD underscores that the Corps cannot issue the Line 5 Segment Relocation Project permit until the Corps completes the § 401(a)(2) downstream water quality process and hearing as described in II.b. The Mashkiiziibii Natural Resources Department reserves the right to update this report once additional, and more accurate, data becomes available.

VI. REFERENCES & ATTACHMENTS

References

- U.S. Army Corps of Engineers, Public Notice for MVP-2020-00260-WMS (Jan. 6, 2022).

- U.S. Army Corps of Engineers, Public Notice for MVP-2020-00260-WMS (Feb. 23, 2022).

- Enbridge Energy, LP, Appendix N – Timing Restriction Waiver Request Form to Permit Application Materials.

- Bad River Band of Lake Superior Tribe of Chippewa, Mashkiiziibii Natural Resources Department. Bad River Water Quality Designations V2.0: Resource Designations as Set Form in the Antidegradation Policy in the Tribe's Water Quality Standards, available at https://www.arcgis.com/apps/View/index.html?appid=6f44c371217e4ee8b5f1c2c705c7c7c5

Attachments

Attachment 1. Bad River Band of Lake Superior Tribe of Chippewa, July 2011. Water Quality Standards, available at http://www.badriver-nsn.gov/wp-content/uploads/2020/01/NRD_WaterQualityStandards_2011.pdf

Attachment 2. *Letter to Col. Karl Jansen from Tera L. Fong*, (March 16, 2022).

Attachment 3. Bad River Band of Lake Superior Tribe of Chippewa, December 2020. Designated Trout Streams Along the Proposed Enbridge Line 5 Reroute, available at http://www.badriver-nsn.gov/wp-content/uploads/2020/12/Reroute_TroutStreams_85x11_port_Dagwaagin2020.pdf

Attachment 4. Bad River Band of Lake Superior Tribe of Chippewa, December 10, 2021. Letter to WDNR regarding Draft EIS from WDNR for the Proposed Enbridge Line 5 Reroute in Northern Wisconsin.

Attachment 5. Bad River Band of Lake Superior Tribe of Chippewa. Water Quality Certification and Water Quality Review Code (Chapter 324).

Attachment 6. Great Lakes Indian Fish and Wildlife Commission, January 2022. Proposed Line 5 Pipeline Reroute – Distance from the Proposed Pipeline to the Reservation Boundary in River Miles.

MNRD WATER QUALITY STANDARDS REPORT

ATTACHMENT 1

Bad River Band of the Lake Superior Tribe of Chippewa Indians
Water Quality Standards

Adopted by Resolution No. 7-6-11-441 of the Bad River Band of Lake Superior Tribe of Chippewa Indians.

Table of Contents

A. *Background.*

1. The history of the Bad River Band, as well as our future survival and growth, is inextricably intertwined with pure water. Anishinabe considers Nibi, Water, as the most sacred living part of our Mother, the Earth. Without water, there is no life. Water, is the life-blood of our Mother the Earth, and without healthy blood, illness prevails. Water is a finite resource, with its health being contingent on all sides of the environment that surrounds the water: above, below, and all around. Water is a primary component in the migration story of the Anishinabe people, and the migration story describes a search for a place where food grows on the water; that food is wild rice. The waters flowing throughout the entire Bad River Reservation provide a variety of sacred resources, such as Manomin (wild rice), Name (lake sturgeon), Ogaa (walleye), and other fish and game species, and serve as critical navigation routes that we rely upon for cultural, subsistence, health and economic well-being. Although water quality standards are set within certain borders; water knows no boundaries. It is a living, moving part of life that changes with its surrounding environment, and as it changes it carries the burdens and illnesses of past environments until it heals. Because the Tribe's cultural and spiritual identity, as well as the Tribe's health and welfare depend upon maintaining and advancing the pristine quality of Tribal waters, the promulgation and enforcement of these Tribal water quality standards are essential to us. The Tribe is promulgating these standards to protect our political integrity, economic security, and health and welfare.
2. It is the purpose for these Tribal water quality standards to prescribe minimum water quality requirements for the surface waters located within the exterior boundaries of the Bad River Reservation to ensure compliance with section 303(c) of the Clean Water Act (CWA).
3. The Bad River Tribe (Tribe) has a primary interest in the protection, control, conservation and utilization of the water resources of the Bad River Reservation, as exemplified in the original Treaty and the Bad River Constitution and ultimately recognized by the U.S. Environmental Protection Agency (EPA) on June 26, 2009, when it affirmed the Tribe's application for program authority. The program authority granted by EPA is in addition to the Tribe's historic hunting, fishing, gathering, and usufrucutuary rights, and is in addition to the Tribe's treaty rights. Accordingly, these Tribal water quality standards shall not be construed to abrogate independent Tribal rights to sufficient quantities and quality of water to support the flora, fauna, and cultural traditions of the Tribe.
4. It is the further purpose of these Tribal water quality standards to protect public health and welfare, enhance the quality of water, and serve the purposes of the CWA.

B. *Territory covered.* The provisions for these water quality standards shall apply to all surface waters within the exterior boundaries of the Bad River Reservation. The

Tribe notes that waters upstream of the Bad River Reservation can affect the waters of the Bad River Reservation. It is the Tribe's intent that these Tribal water quality standards be applied to the fullest extent of the Tribe's jurisdictional control and to protect the waters of the Bad River Reservation from any impacts regardless of the location of the source of those impacts.

C. *Applicability, administration and amendment.*

1. The water quality standards are applicable to the waters within the exterior boundaries of the Bad River Reservation as described in the Tribe's application for water quality standards program authorization as approved by EPA on June 26, 2009, and otherwise to the fullest extent of the Tribe's jurisdictional control.
2. These water quality standards shall provide the basis for all water management decisions affecting water quality within the Reservation boundaries, including, but not limited to, point-source permitting, non-point source controls and the physical alterations of water bodies including wetlands.
3. The Water Resources Program may recommend variances from water quality standards, on a case-by-case basis, that are consistent with the process contained in the Final Water Quality Guidance for the Great Lakes System, 40 CFR 132, Appendix F, Procedure 2. These recommended variances, however, are subject to final approval by the Bad River Tribal Council.
4. These water quality standards may be revised as the Tribe determines necessary consistent with the following:
    i. These water quality standards shall be reviewed every three years and may be subject to amendment or modification at such time or as the need arises. Any updates shall first be duly adopted by the Bad River Tribal Council (and so certified by the Tribe's Legal Counsel) and submitted to the Regional Administrator for review and approval.
    ii. Any potential modification of water quality standards shall be subject to public participation, consistent with the requirements of 40 CFR 131.20(b) and 40 CFR 25.
5. All other applicable provisions of 40 CFR 131 and 132 shall apply to the Tribe's water quality standards.
6. The incorporation of mixing zones into the issuance of permits under CWA Section 402 may be allowable on a case by case basis. Provision I describes additional details of the Tribe's mixing zone policy.
7. All numeric chronic criteria contained in these standards apply at all in-stream flow rates greater than or equal to the flow rate calculated as the minimum 7-consecutive day average flow with a recurrence frequency of once in ten years (7Q10). Narrative criteria apply regardless of flow. Numeric acute criteria shall apply regardless of flow. The 7Q10 low flow shall be calculated using methods recommended by the U.S. Geological Survey.

D. *Definitions.* Any term not defined here will have meaning consistent with the definitions in 40 CFR 132.

1. “Acute-chronic ratio (ACR)” is a standard measure of the acute toxicity of a material divided by an appropriate measure of the chronic toxicity of the same material under comparable conditions.
2. “Acute toxicity” is concurrent and delayed adverse effect(s) that results from an acute exposure and occurs within any short observation period which begins when the exposure begins, may extend beyond the exposure period, and usually does not constitute a substantial portion of the life span of the organism.
3. “Adverse effect” is any deleterious effect to organisms due to exposure to a substance. This includes effects which are or may become debilitating, harmful or toxic to the normal functions of an organism.
4. “Ambient conditions” is the measurable biological, chemical, and physical characteristics of Tribal waters and associated dependent biotic communities.
5. “Background conditions” means the biological, chemical, and physical conditions of a water body, including flow, that existed prior to a point or non-point source discharge(s) or would exist in the absence of such discharge(s)
6. “Bioaccumulative chemical of concern (BCC)” is any chemical that has the potential to cause adverse effects which, upon entering the surface waters, by itself or as its toxic transformation product, accumulates in aquatic organisms by a human health bioaccumulation factor (BAF) greater than 1000, after considering metabolism and other physicochemical properties that might enhance or inhibit bioaccumulation, in accordance with the methodology in appendix B of 40 CFR 132. Chemicals with half-lives of less than eight weeks in the water column, sediment, and biota are not BCCs. The minimum BAF information needed to define an organic chemical as a BCC is either a field-measured BAF or a BAF derived using the Biota-Sediment Accumulation Factor (BSAF) methodology. The minimum BAF information needed to define an inorganic chemical, including an organometal, as a BCC is either a field-measured BAF or a laboratory-measured Bioconcentration Factor (BCF). BCCs include, but are not limited to, the pollutants identified as BCCs in section A of Table 6 of 40 CFR 132.
7. “Carcinogen” is a substance which causes an increased incidence of benign or malignant neoplasms, or substantially decreases the time to develop neoplasms, in animals or humans. The classification of carcinogens is discussed in section II.A of appendix C to 40 CFR 132.
8. “Ceremonial and Religious water use” is an activity involving traditional Native American spiritual practices which may involve, among other things, ingestion of water or primary (direct) contact with water.
9. A “change in background” shall mean a change which can be measured or calculated with reasonable scientific certainty using accepted analytical methods as outlined in these Tribal water quality standards.
10. “Chronic toxicity” is concurrent and delayed adverse effect(s) that occurs only as a result of a chronic exposure.
11. “Council” or “Tribal Council” means the governing body of the Bad River

Band of the Lake Superior Tribe of Chippewa Indians.

12. "Criterion continuous concentration (CCC)" is an estimate of the highest concentration of a material in the water column to which an aquatic community can be exposed indefinitely without resulting in an adverse effect.
13. "Criterion maximum concentration (CMC)" is an estimate of the highest concentration of a material in the water column to which an aquatic community can be exposed briefly without resulting in an adverse effect.
14. "Cultural water use" means activities involving traditional Ojibwe (Chippewa) practices which includes ceremonies, harvesting, hunting and fishing, actual or historical.
15. "Designated uses" are those uses specified in water quality standards for each water body or segment whether or not they are being attained.
16. "Endangered or threatened species" are those species that are listed as endangered or threatened under section 4 of the Endangered Species Act.
17. "EPA" or "Agency" is the United States Environmental Protection Agency.
18. "Exceptional Resource Water" (Anishinaabosibiing or "good watering place") is a classification for waters considered to be of high quality and culturally important for the ecosystems they support. The purpose of this classification is to implement the Tribe's antidegradation policy. This classification is roughly equivalent to EPA's regulatory definition of a Tier 2 water under the Agency's antidegradation policy, though this classification may be more protective than the Agency's policy. Any surface water not specifically classified as Outstanding Tribal Resource Water or Outstanding Resource Water is classified as Exceptional Resource Water (Anishinaabosibiing).
19. "Existing uses" are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.
20. "Human cancer criterion (HCC)" is a Human Cancer Value (HCV) for a pollutant that meets the minimum data requirements for Tier I specified in appendix C of 40 CFR 132.
21. "Human cancer value (HCV)" is the maximum ambient water concentration of a substance at which a lifetime of exposure from either: drinking the water, consuming fish from the water, and water-related recreation activities; or consuming fish from the water, and water-related recreational activities, will represent a plausible upper-bound risk of contracting cancer of one in 100,000 using the exposure assumptions specified in the Methodologies for the Development of Human Health Criteria and Values in appendix C of 40 CFR 132.
22. "Human noncancer criterion (HNC)" is a Human Noncancer Value (HNV) for a pollutant that meets the minimum data requirements for Tier I specified in appendix C of 40 CFR 132.
23. "Human noncancer value (HNV)" is the maximum ambient water concentration of a substance at which adverse noncancer effects are not likely to occur in the human population from lifetime exposure via either: drinking

the water, consuming fish from the water, and water-related recreation activities; or consuming fish from the water, and water-related recreation activities using the Methodologies for the Development of Human Health Criteria and Values in appendix C of 40 CFR 132.

24. "Natural Background Conditions" are the expected conditions that exist in the absence of any impact from point or non-point source pollutants attributable to human activity or from physical alteration of wetlands attributable to human activity.
25. "Natural Biological Community" means the characteristic/expected biological community for a water body absent human-induced impacts to water bodies including wetlands.
26. "Non-point Source" means any source of pollution or substance to water quality that is not a point source.
27. "Outstanding Resource Water" (Chi minosibii or "large good river") is a classification for those waters so designated in the antidegradation policy that are considered to be of high quality and culturally important for the fisheries and ecosystems they support. This classification is more stringent than EPA's Tier 2 classification and could be described as a Tier 2.5 water under the Agency's antidegradation policy.
28. "Outstanding Tribal Resource Water" (Chi minosingbii or "best waters") is a classification for those waters so designated in the antidegradation policy that are considered largely pristine and constitute a significantly important cultural and ecological resource. These waters are important for the cultivation of wild rice or the spawning of lake sturgeon, or have other special resource values. This classification is roughly equivalent to EPA's Tier 3 classification under its antidegradation policy, though this classification may be more protective than the Agency's policy.
29. "Point Source" means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.
30. "Pollution" means a man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water.
31. "pH" is the negative logarithm of the effective hydrogen ion concentration in gram equivalents per liter; a measure of the acidity or alkalinity of a solution, increasing with increasing alkalinity and decreasing with increasing acidity.
32. "Primary contact recreation" is an activity where a person would have direct contact with water to the point of complete submergence, including but not limited to skin diving, swimming, and water skiing.
33. "Regional Administrator" is the Administrator of EPA's Region V.
34. "Reservation" is the Bad River Reservation, described in the Treaty of 1854 as follows: *Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-Che-se-be-*

we-she, running thence south to a line drawn east and west through the centre of township forty-seven north, thence west to the west line of said township, thence south to the southeast corner of the township forty-six north, range thirty-two west, thence west the width of two townships, thence north the width of two townships, thence west one mile, thence north to the lake shore, and thence along the lake shore, crossing Shag-waw-me-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground. Ke-Che-se-be-we-she is presently known as Graveyard Creek and Shag-waw-me-quon is now commonly spelled Chequamegon Point.

35. "Ricing" means the traditional harvest of wild rice for consumption and cultural use.
36. "Secondary Contact Recreation" is an activity (such as wading or fishing) where a person's water contact would be limited to the extent that bacterial infections of eyes, ears, respiratory, or digestive systems or urogenital areas would normally not occur.
37. "Surface Water" means all water above the surface of the ground within the exterior boundaries of the Bad River Reservation including but not limited to lakes, ponds, reservoirs, artificial impoundments, streams, rivers, springs, seeps and wetlands.
38. "Temperature" means water temperature expressed in Centigrade degrees (^{o}C).
39. "Toxicity" or "toxic" is the potential of a material, or a combination of that material and any other substance, to adversely affect organisms.
40. "Tribe" means the Bad River Band of the Lake Superior Tribe of Chippewa Indians.
41. "Turbidity" is the clarity of water expressed as nephelometric turbidity units (NTU) and measured with a calibrated turbidimeter.
42. "Water Resources Program" includes staff members comprising the Water Resources Program of the Tribe's Natural Resources Department.
43. "Wetland" means an area that is inundated or saturated at or near the surface caused by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in aquatic or saturated soil conditions, commonly known as hydrophytic vegetation.
44. "Wildlife Habitat" means the waters and surrounding land areas of the Reservation used by fish, other aquatic life and other wildlife at any stage of their life history or activity.

E. *General considerations.* The following general guidelines shall apply to the water quality standards and classifications set forth in the use designation sections.
    1. *Classification boundaries.* At the boundary between waters of different classifications, the water quality standards for the most sensitive classification shall prevail.

2. *Antidegradation Policy.* This antidegradation policy shall be applicable to all surface waters of the Reservation. The extent of the Tribe's dependence upon and interdependence with its natural resources, and especially its water resources, is unique. The water resources of the Tribe are integral to its members' health, welfare and economic security, as well as the economic and political integrity of the Tribe itself. The Tribe has depended on the ability of the natural resources, particularly the water resources, to provide cultural preservation and resources for consumption, subsistence, sustainable economic development. This Antidegradation Policy provides for the maintenance and protection of water quality to ensure that all designated and existing uses are met and maintained.
    i. For the purposes of implementing the provisions of this subsection, any surface waters not specifically classified as Outstanding Tribal Resource Waters (Chi minosingbii) or Outstanding Resource Waters (Chi minosibii) are classified as Exceptional Resource Waters (Anishinaabosibiing) and are roughly equivalent to EPA's regulatory definition of Tier 2 waters under the Agency's antidegradation policy. Exceptional Resource Waters are of high quality and culturally important for the ecosystems they support. Existing in-stream water uses and the level of water quality fully protective of the existing uses shall be maintained and protected, or improved in the case of a degraded stream. Where designated uses of the water body are impaired, there shall be no lowering of the water quality with respect to the pollutant or pollutants that are causing the impairment. Where the quality of the water exceeds that necessary to support the designated use, that quality shall be maintained and protected, or improved, unless the Tribe finds, after full satisfaction of inter-governmental coordination and public participation provisions of the Tribe's continuing planning process that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the Tribe shall assure water quality adequate to protect existing uses fully.
    ii. Surface waters of the Reservation that are identified as high quality and culturally important to the Tribe for the fisheries and ecosystems they support are Outstanding Resource Waters (Chi minosibii) and could be described as roughly equivalent to EPA's regulatory definition of Tier 2.5 waters under the Agency's antidegradation policy. New or increased discharges may be permitted provided that the new or increased discharge does not result in a change in background conditions or negatively impact designated uses or existing uses; however, no new or increased discharges of BCCs will be permitted. Where the quality of the water exceeds that necessary to support the designated use, that quality shall be maintained and

protected, or improved, unless the Tribe finds, after full satisfaction of inter-governmental coordination and public participation provisions of the Tribe's continuing planning process that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the Tribe shall assure water quality adequate to protect existing uses fully. Waters designated as Outstanding Resource Waters (Chi minosibii) include: a portion of Bad River, from downstream the confluence with the White River to Lake Superior, White River, Marengo River, Graveyard Creek, Bear Trap Creek, Wood Creek, Brunsweiler River, Tyler Forks, Bell Creek, and Vaughn Creek.

iii. Surface waters of the Reservation that are identified as high quality and constitute a significantly important cultural and ecological resource are designated as Outstanding Tribal Resource Waters (Chi minosingbii) and are roughly equivalent to EPA's regulatory definition of Tier 3 waters under the Agency's antidegradation policy. These waters are recognized as being largely pristine and important for the cultivation of wild rice or the spawning of lake sturgeon, or have other special resource values, and, therefore, that water quality shall be maintained and protected in all cases without degradation. New or increased discharges will not be permitted. Waters designated as Outstanding Tribal Resource Waters (Chi minosingbii) include: Kakagon Slough and the lower wetland reaches of its tributaries that support wild rice, Kakagon River, Bad River Slough, Honest John Lake, Bog Lake, a portion of Bad River, from where it enters the Reservation through the confluence with the White River, and Potato River.

iv. In those cases where the potential water quality impairment is associated with a thermal discharge is involved, this antidegradation policy and implementing method shall be consistent with these Tribal water quality standards and with section 316 of the Clean Water Act.

v. Modifications of a water body's antidegradation classification will be adopted in a manner consistent with the procedural requirements of C.4.ii.

3. *Antidegradation Implementation.*

i. Lowering of Water Quality: A lowering of water quality is defined as: the projected or observed diminished chemical, biological, or physical integrity of Reservation surface waters, including changes to water flow or water level; or, new or increased loading of any pollutant from any regulated existing or new facility, either point source or nonpoint source, for which there is a control document or reviewable action, as a result of any activity including, but not limited to:

a. Construction of a new regulated facility or modification of an

existing regulated facility such that a new or modified control document is required;

b. Modification of an existing regulated facility operating under a current control document such that the production capacity of the facility is increased;
c. Addition of a new source of untreated or pretreated effluent to an existing wastewater treatment works, whether public or private;
d. A request for an increased limit in an applicable control document; or
e. Other deliberate activities that, based on the information available, could be reasonably expected to result in an increased loading of any pollutant to any waters of the Bad River Reservation.

ii. Outstanding Tribal Resource Waters: No new or increased discharges or alterations of the background conditions are allowed to Outstanding Tribal Resource Waters; however, a short-term, temporary (no more than 6 months, and no more than necessary) lowering of water quality may be allowed provided that an entity seeking to engage in such discharge demonstrate that such discharge will arise entirely from one of the following and meets the Outstanding Tribal Resource Waters Antidegradation Demonstration and Outstanding Tribal Resource Waters Antidegradation Decision requirements below:
   a. Maintenance/repair of existing roads, bridges, boat landings, culverts, septic systems, or other similar structures; construction of buildings, wells, roads, or other similar structures.
   b. Response actions undertaken to alleviate a release into the environment of hazardous substances, pollutants, or contaminants which may pose an imminent and substantial danger to public health or welfare.
   c. Actions undertaken to restore culturally important species and their habitats.

4. *Antidegradation Demonstration.*
   i. An antidegradation demonstration must be submitted to the Water Resources Program by all of the following entities:
      a. Any entity seeking to lower water quality in a high quality water, which includes an Exceptional Resource Water or an Outstanding Resource Water;
      b. Any entity seeking to create a new or increased discharge of Lake Superior bioaccumulative substances of immediate concern in an Exceptional Resource Water;
      c. Any entity seeking to lower water quality in an Outstanding Tribal Resource Water on a short-term, temporary basis.

ii. The antidegradation demonstration for Exceptional Resource Waters shall include the following:
    a. Pollution Prevention Alternatives Analysis. Identify any pollution prevention alternatives and techniques that are available to the entity that would eliminate or significantly reduce the extent to which the increased loading results in a lowering of water quality.
    b. Alternative or Enhanced Treatment Analysis. Identify alternative or enhanced treatment techniques that are available to the entity that would eliminate or substantially reduce the lowering of water quality and their costs relative to the cost of treatment necessary to achieve applicable effluent limitations.
    c. Social or Economic Development Analysis. Identify the social or economic development and the benefits to the area in which the waters are located that will be diminished if the lowering of water quality is not allowed.
    d. Water Quality Assessment. Demonstrate that the resulting water quality will be protective of existing uses.
    e. Special Provision for Remedial Actions. Entities proposing remedial actions pursuant to the CERCLA, as amended, corrective actions pursuant to the Resource Conservation and Recovery Act, as amended, or similar actions pursuant to other Federal or State environmental statutes may submit information to the Water Resources Program that demonstrates that the action utilizes the most cost effective pollution prevention and treatment techniques available, and minimizes the lowering of water quality, in lieu of the information required in sections a. through e. above.

iii. The antidegradation demonstration for Outstanding Resource Waters shall include the following:
    a. Pollution Prevention Alternatives Analysis. Identify any pollution prevention alternatives and techniques that are available to the entity that would eliminate or reduce the extent to which the increased loading results in a lowering of water quality. Must identify that no increased loads of BCCs shall be discharged. Demonstrate that there will be achieved the highest statutory and regulatory requirements for new and existing pollution sources.
    b. Alternative or Enhanced Treatment Analysis. Identify alternative or enhanced treatment techniques that are available to the entity that would eliminate or substantially reduce the lowering of water quality and their costs relative to the cost of treatment necessary to achieve applicable effluent limitations.
    c. Social or Economic Development Analysis. Identify the social

or economic development and the benefits to the area in which the waters are located that will be foregone if the lowering of water quality is not allowed.

d. Water Quality Assessment. Demonstrate that the resulting water quality will be protective of existing uses and that discharges will not exceed water quality criteria.

e. Special Provision for Remedial Actions. Entities proposing remedial actions pursuant to the CERCLA, as amended, corrective actions pursuant to the Resource Conservation and Recovery Act, as amended, or similar actions pursuant to other Federal or State environmental statutes may submit information to the Water Resources Program that demonstrates that the action utilizes the most cost effective pollution prevention and treatment techniques available, and minimizes the lowering of water quality, in lieu of the information required in sections a. through d. above.

iv. The antidegradation demonstration for Outstanding Tribal Resource Waters shall include the following:

a. Identification of Applicable Category. Demonstrate the discharge will arise entirely from one of the categories listed in (E)(3)(ii).

b. Short Term, Temporary Assessment. Demonstrate the discharge will not lower the water quality beyond the short term, temporary criteria (no more than 6 months, and no more than necessary).

c. Showing of Necessity. Identify the project need and demonstrate increased loading is a necessity.

d. Pollution Prevention Alternatives Analysis. Identify any pollution prevention alternatives and techniques that are available to the entity that would eliminate or reduce the extent to which the increased loading results in a lowering of water quality. Must identify that no increased loads of BCCs shall be discharged. Demonstrate that there will be achieved the highest statutory and regulatory requirements for new and existing pollution sources.

e. Alternative or Enhanced Treatment Analysis. Identify alternative or enhanced treatment techniques that are available to the entity that would eliminate or substantially reduce the lowering of water quality and their costs relative to the cost of treatment necessary to achieve applicable effluent limitations.

v. Antidegradation demonstration materials must be submitted to the following address: Water Resources Specialist, Bad River Tribe's Natural Resources Department, P.O. Box 39, Odanah, WI 54861.

5. *Antidegradation Decision.*
    i. *Exceptional Resource Waters (Anishinaabosibiing) or Outstanding Resource Waters (Chi minosibii).* Once the Water Resources Program determines that the information provided by the entity proposing to increase loadings is administratively complete, the Water Resource Program shall use that information to determine whether the lowering of water quality is necessary, and, if necessary, whether the lowering of water quality will support important social and economic development in the area. If the proposed lowering of water quality is either not necessary or will not support important social and/or economic development goals, the Water Resources Program shall recommend to deny the request to lower water quality. The Tribal Council shall review the recommendation and decide whether to deny the request. If the lowering of water quality is necessary, and will support important social and economic development goals, the Water Resources Program shall recommend to approve all or part of the proposed lowering of water quality to occur as necessary. The Tribal Council shall review the recommendation and decide whether to approve all or part of the proposed lowering of water quality. In no event may the decision reached under this section allow water quality to be lowered below the minimum level required to fully support existing and designated uses. The decision shall be subject to the public participation requirements of 40 CFR 25.
    ii. *Outstanding Tribal Resource Waters (Chi minosingbii).* An automatic denial will be issued for any request to create any new or increased discharges or alterations of the background conditions to Outstanding Tribal Resource Waters, or where the request proposes to lower water quality in a manner that is not short-term or temporary (no more than 6 months), or where that lowering of water quality would continue for longer than necessary, or where that lowering of water quality would not arise entirely from the circumstances outlined in the Antidegradation Implementation requirements above. If the short term, temporary lowering of water quality is necessary, the Water Resources Program shall recommend to approve all or part of the proposed short term, temporary lowering of water quality to occur as necessary. The Tribal Council shall review the recommendation and decide whether to approve all or part of the proposed short term, temporary lowering of water quality. In no event may the decision reached under this section allow water quality to be lowered below the minimum level required to fully support existing and designated uses. The decision shall be subject to the public participation requirements of 40 CFR 25.
6. *Narrative Criteria*. In addition to the other requirements of these Tribal water quality standards, the below Narrative Criteria apply to all waters of the Bad

River Reservation. Failure to meet the below criteria constitutes an enforceable violations of these Tribal water quality standards, and no discharge that has the potential to create or support a violation of these Narrative Criteria shall be approved.

i. *Narrative criteria for aesthetic water quality.* All waters (including wetlands) within the Reservation shall be free from substances, attributable to wastewater discharges or pollutant sources resulting from other than natural background conditions, that:
    a. Settle to form objectionable deposits;
    b. Float as debris, scum, oil, or other matter forming nuisances;
    c. Produce objectionable color, odor, taste, or turbidity;
    d. Cause injury to, are toxic to, or produce adverse physiological responses in humans, animals, or plants;
    e. Produce undesirable or nuisance aquatic life;
    f. Produce nutrients or other substances that stimulate algal growth producing objectionable algal densities, nuisance aquatic vegetation, dominance of any nuisance species instream, or cause nuisance conditions in any other fashion; or
    g. Adversely affect the natural biological community of the waterbody.

ii. *General narrative criteria.* These criteria apply to all waters of the Reservation (including wetlands) except as otherwise noted.
    a. Pollutants shall not be present in concentrations that cause or may contribute to an adverse effect to human, plant, animal or aquatic life, or in quantities that may interfere with the normal propagation, growth and survival of indigenous aquatic biota. For toxic substances lacking published criteria, minimum criteria or values shall be calculated by the Tribe or U.S. EPA consistent with procedures specified at 40 CFR 132 Appendices A, B, C and D.
    b. Levels of radioactivity shall not exceed levels expected in Tribal waters under natural background conditions.
    c. Water quantity and quality that may limit the growth and propagation of, or otherwise cause or contribute to an adverse effect to wild rice, wildlife, and other flora and fauna of cultural importance to the Tribe shall be prohibited. This includes, but is not limited to, a requirement that sulfate levels shall not exceed concentrations causing or contributing to any adverse effects in waters, including those with a Wild Rice designated use.
    d. Natural hydrological conditions supportive of the natural biological community, including all flora and fauna, and physical characteristics naturally present in the waterbody shall be protected to prevent any adverse effects.

e. Pollutants or human-induced changes to waters, the sediments of waters, or area hydrology that results in changes to the natural biological communities and wildlife habitat shall be prohibited. The migration of fish and other aquatic biota normally present shall not be hindered. Natural daily and seasonal fluctuations of flow (including naturally occurring seiche), level, stage, dissolved oxygen, pH, and temperature shall be maintained.
f. Existing mineral quality shall not be altered by municipal, industrial and in-stream activities or other waste discharges so as to in any way impair the designated uses for a water body.
g. Temperature – No measurable change (increase or decrease) in temperature from other than natural causes shall be allowed that causes or contributes to an adverse effect to the natural biological community. For those waters designated as a Cold Water Fishery, there shall be no measurable increase in temperature from other than natural causes.
h. The presence of pollutants in quantities that result in bioaccumulation in aquatic organisms that may cause or contribute to an adverse effect to consumers of aquatic organisms shall be prohibited.

7. *Specific numeric criteria.* In addition to the other requirements of these Tribal water quality standards, the below Numeric Criteria apply to all waters of the Bad River Reservation. Failure to meet the below criteria constitutes an enforceable violations of these Tribal water quality standards, and no discharge that has the potential to create or support a violation of these Numeric Criteria shall be approved. These criteria apply to all waters (including wetlands), except as otherwise noted:
    i. Dissolved oxygen – Unless otherwise demonstrated through a use attainability analysis or site-specific criterion that aquatic life cannot be supported, a water body capable of supporting aquatic life shall have a daily minimum dissolved oxygen standard of 5 mg/L in all cases except waters designated as a Cold Water Fishery. For those waters designated as a Cold Water Fishery, the dissolved oxygen shall have a daily minimum of 6 mg/L at any time and 8 mg/L when and where early life stages of cold water fish occur. These criteria will not apply to the Kakagon Sloughs, Bad River Sloughs, and wetlands due to their natural conditions.
    ii. pH – No change is permitted greater than 0.5 units over a period of 24 hours for other than natural causes. The change, upward or downward, shall not result in an adverse affect on aquatic biota, fish or wildlife.
    iii. Turbidity – Shall not exceed 5 NTU over natural background turbidity when the background turbidity is 50 NTU or less, or turbidity shall not increase more than 10 percent when the background turbidity is more

than 50 NTU.

iv. Bacteriological Water Quality Criteria - The geometric mean of not less than 5 samples equally spaced over a 30-day period shall not exceed an *E. coli* count of 126 Colony Forming Units (CFU) per 100 milliliters (mL) for fresh waters. Any single sample shall not exceed an E. coli count of 235 CFU per 100 mL.

v. Modification of Criteria - The Tribe may revise criteria on a site-specific basis as necessary to reflect new scientific data or conditions specific to a given site or water body. Such modifications to water quality criteria shall assure that all designated and existing uses are protected. Revisions of site-specific criteria shall be consistent with those procedures found in EPA's "Water Quality Standards Handbook: Second Edition (EPA-823-B-94-005; August 1994 with some new information [June 2007] at Chapter 3), and 40 CFR 132, "Water Quality Guidance for the Great Lakes System." All modified criteria must be submitted to the Regional Administrator for approval. The Tribe shall adopt more stringent site-specific criteria where necessary to protect federal-listed threatened or endangered species consistent with 40 CFR 132 Appendix F, procedure 1. The Tribe may adopt more stringent site-specific criteria where necessary to protect state-listed threatened or endangered species consistent with 40 CFR 132 Appendix F, procedure 1. Such revisions shall be adopted using the procedure specified in 40 CFR 132 section 4. Modification of criteria will be adopted in a manner consistent with the procedural requirements of C.4.ii.

8. *Analytical methods.* The analytical testing methods used to measure or otherwise evaluate compliance with water quality standards shall to the extent practicable, be in accordance with the most recent editions of the following:

   i. "Guidelines Establishing Test Procedures for the Analysis of Pollutants" (40 CFR 136);

   ii. "Standard Methods for the Examination of Water and Wastewater" (published by the American Public Health Association, American Water Works Association, and the Water Pollution Control Federation);

   iii. Other or superseding methods published and/or approved by EPA.

F. *Designated uses.* The Tribe does not designate a public water supply use because the surface waters of the Reservation are currently not utilized as a drinking water supply. Where there are several designated uses for a waterbody, the applicable standard applied will be the criterion necessary to protect the most sensitive use. At the boundary between surface waters of different designated uses, the water quality criteria necessary to protect the more sensitive use or uses shall apply. The following designated uses shall apply to the various classes of surface waters within the exterior boundaries of the Bad River Reservation:

1. *Cultural (C1).* Water-based activities essential to maintaining the Tribe's cultural heritage, including but not limited to ceremony, subsistence fishing, hunting and harvesting. This use includes primary and secondary contact and ingestion.
2. *Wild Rice (W1).* Supports or has the potential to support wild rice habitat for sustainable growth and safe consumption.
3. *Wildlife (W2).* Supports the proper habitat for propagation of wildlife, which will allow the safe ingestion of any wildlife resources that provide a dietary food source for Tribal subsistence.
4. *Aquatic Life and Fish (A).* Supports conditions for a balanced aquatic community.
5. *Cold Water Fishery (F1).* Supports or has the potential to support the existence of cold water fishery communities and/or spawning areas. No thermal discharge to such waters will be allowed.
6. *Cool Water Fishery (F2).* Supports or has the potential to support the existence of cool water fishery communities and/or spawning areas for at least a portion of the year.
7. *Recreational (R).* Supports primary contact recreation and secondary contact recreation. This includes Tribal activities including water contact such as boating, hunting, fishing and harvesting. This use includes primary and secondary contact and ingestion.
8. *Commercial (C2).* Supports the use of water in propagation of fish fry for the Tribal Hatchery and/or irrigation of community agricultural projects.
9. *Navigation (N).* The water quality is adequate for navigation in and on the water.
10. *Wetland (W3).* An area that will be protected and maintained for at least some of the following uses: maintaining biological diversity, preserving wildlife habitat, providing recreational activities, erosion control, groundwater recharge, low flow augmentation, storm water retention, prevention of stream sedimentation, and the propagation of wild rice.

G. *Specific Classifications.* Specific classifications for surface waters of the Bad River Reservation are in Table 1:

TABLE 1: Specific designated uses of the Tribe's water resources.

WATER BODY	DESIGNATED USES APPLIED TO WATER BODIES						
	C1	W2	W1	A	R	F1	F2
Kakagon Slough	X	X	X	X	X		X
Sand Cut Slough	X	X	X	X	X		X
Bad River Slough	X	X	X	X	X		X
Honest John Lake	X	X		X	X		X
Wood Creek Slough	X	X	X	X	X		X
Bad River	X	X	X	X	X		X
Kakagon River	X	X	X	X	X		X
Brunsweiler River	X	X		X	X		X
White River	X	X		X	X		X
Marengo River	X	X		X	X		X
Potato River	X	X		X	X	X	X
Wood Creek	X	X	X	X	X		X
Bear Trap Creek	X	X	X	X	X		X
Graveyard Creek	X	X		X	X	X	
Bell Creek	X	X		X	X	X	
Morrison Creek	X	X		X	X		X
Newago Creek	X	X		X	X		X
Denomie Creek	X	X		X	X		X
West Branch Denomie Creek	X	X		X	X		X
Rins Creek	X	X		X	X		X
Silver Creek	X	X		X	X		X
Thornapple Creek	X	X		X	X		X

WATER BODY	C1	W2	W1	A	R	F1	F2
Meadow Creek	X	X		X	X		X
Elm Creek	X	X		X	X		X
Vaughn Creek	X	X		X	X	X	X
Upper Vaughn Creek	X	X		X	X		X
Winks Creek	X	X		X	X	X	
Cameron Creek	X	X		X	X		X
Sugarbush Creek	X	X		X	X		X
Billy Creek (T46N, R3W, Section 32)	X	X		X	X	X	
Billy Creek (T46N, R3W, Section 35	X	X		X	X		
Trout Brook	X	X		X	X	X	X
Tyler Forks	X	X		X	X	X	
Hanson Swamp	X	X		X	X		
Sugarbush Pond	X	X		X	X		
Alex Pond	X	X		X	X		
Wolf Pond	X	X		X	X		
Pictured Rock Lake	X	X		X	X		
Sugarbush Lake	X	X		X	X		
Lost Lake	X	X		X	X		
Moonshine Lake	X	X		X	X		
Bog Lake	X	X		X	X		

*The designated uses entitled Commercial (C2) and Navigation (N) apply to all waters. The designated use entitled Wetland (W3) applies to all wetlands. Waters not listed above will have the following designated uses: Cultural (C1), Wildlife (W2), Aquatic Life and Fish (A), and Recreational (R).

H. *Numeric water quality criteria.* Because of the Tribe's cultural, spiritual, economic, and thus political dependence and interdependence with the waters of the Bad River Reservation, the highest protection of these Tribal waters is essential to the protection of the health and safety of Tribal members, and for the survival and growth of the Tribe. Except where more protective criteria are specified in these Tribal water quality standards, the Bad River Tribe adopts by reference all of the numeric criteria and methodologies from the Great Lakes Guidance, 40 CFR 132.6, and Great Lakes Guidance shall be used to calculate all criteria. If these criteria are deemed not appropriate, Clean Water Act 304(a) criteria may be used. For all other pollutants where the Great Lakes Guidance methodology is not applicable, or where more stringent criteria is determined to be necessary for protection of Tribal surface waters, the applicable criteria will be the more protective value of either the provisions of these Tribal water quality standards or the most recent U.S. EPA published criteria recommendations as required by the Clean Water Act 304(a) or criteria developed applying methodologies and procedures acceptable under 40 CFR 131. Modification of criteria specified in the following tables will be adopted in a manner consistent with the procedural process described in Section C.4.

1. The acute water quality criteria for the protection of aquatic life in ambient water in Tables 2 and 3 shall apply to all waters with an Aquatic Life and Fish (A) designated use.

TABLE 2: Acute Aquatic Life Criteria that are not water characteristic dependent.

Acute numeric criteria for the protection of aquatic life

Parameter	**CMC (µg/L)**	**Conversion Factor (CF)**
Arsenic (III)	339.8[a,b]	1
Chromium (VI)	16.02[a,b]	0.982
Cyanide	22[c]	n/a
Dieldrin	0.24[d]	n/a
Endrin	0.086[d]	n/a
Lindane	0.95[d]	n/a
Mercury (II)	1.694[a,b]	0.85
Parathion	0.065[d]	n/a
Selenium*	19.34[a,b]	0.922

[a]$CMC=CMC^{tr}$

[b]$CMC^{d}=(CMC^{tr})CF$ The CMC^{d} shall be rounded to two significant digits.

[c]CMC should be considered free cyanide as CN.

[d]$CMC=CMC^{t}$

NOTES:

The term n/a means not applicable.

CMC is Criterion Maximum Concentration

CMC^{tr} is the CMC expressed as a total recoverable.

CMC^{d} is the CMC expressed as a dissolved concentration.

CMC^t is the CMC expressed as a total concentration.

* EPA is re-evaluating the national selenium criteria and the proposed criterion is subject to revision before final adoption of this water quality standards document.

TABLE 3: Acute Aquatic Life Criteria that are water characteristic dependent.

Acute aquatic life criteria that are hardness or pH dependent

Parameter	m_a	b_a	CF
Cadmium[a,b]	1.1280	-3.6867	0.8500
Chromium (III)[a,b]	0.8190	3.7256	0.3160
Copper[a,b]	0.9422	-1.7000	0.9600
Nickel[a,b]	0.8460	2.2550	0.9980
Pentachlorophenol[c]	1.0050	-4.8690	n/a
Zinc[a,b]	0.8473	0.8840	0.9780

[a] $CMC^{tr} = \exp\{m_A[\ln(\text{hardness})] + b_A\}$

[b] $CMC^d = (CMC^{tr})CF$. The CMC^d shall be rounded to two significant digits.

[c] $CMC^t = \exp m_A\{[pH] + b_A\}$ The CMC^t shall be rounded to two significant digits.

NOTES:

The term "exp" represents the base e exponential function.

The term "n/a" means not applicable.

CMC is Criterion Maximum Concentration.

CMC^{tr} is the CMC expressed as total recoverable.

CMC^d is the CMC expressed as a dissolved concentration.

CMC^t is the CMC expressed as a total concentration.

2. The chronic water quality criteria for protection of aquatic life in ambient water in Tables 4 and 5 shall apply to all waters with an Aquatic Life and Fish (A) designated use.

TABLE 4: Chronic Aquatic Life Criteria that are not water characteristic dependent.

Chronic Water Criteria for Protection of Aquatic Life in Ambient Water

Parameter	CCC (µg/L)	CF
Arsenic (III)	147.9[a,b]	1.0000
Chromium (VI)	10.98[a,b]	0.9620
Cyanide	5.2[c]	n/a
Dieldrin	0.056[d]	n/a
Endrin	0.036[d]	n/a
Mercury (II)	0.9081[a,b]	0.8500
Parathion	0.013[d]	n/a
Selenium*	5[a,b]	0.9220

[a]$CCC=CCC^{tr}$

[b]$CCC^{d}=(CCC)^{tr}CF$. CCC^{d} shall be rounded to two significant digits.

[c]CCC should be considered free cyanide as CN.

[d]$CCC=CCC^{t}$

NOTES:
The term "n/a" means not applicable.
CCC is Criterion Continuous Concentration.

CCC^{tr} is the CCC expressed as total recoverable.

CCC^{d} is the CCC expressed as a dissolved concentration.

CCC^{t} is the CCC expressed as a total concentration

* EPA is re-evaluating the national selenium criteria and the proposed criterion is subject to revision before final adoption of this water quality standards document.

TABLE 5: Chronic Aquatic Life Criteria that are water characteristic dependent.

Chronic aquatic life criteria that are hardness or pH dependent

Parameter	m_c	b_c	CF
Cadmium[a,b]	0.7852	-2.7150	0.8500
Chromium (III)[a,b]	0.8190	0.6848	0.8600
Copper[a,b]	0.8545	-1.7020	0.9600
Nickel[a,b]	0.8460	0.0584	0.9970
Zinc[a,b]	0.8473	0.8840	0.9860
Pentachlorophenol[c]	1.0050	-5.1340	n/a

[a]$CCC^{tr}=\exp\{m_c[\ln(\text{hardness})]+b_c\}$.

[b]$CCC^{d}=(CCC^{tr})CF$. The CCC^{d} shall be rounded to two significant digits.

[c]$CMC^{t}=\exp\{m_A[pH]+b_A\}$. The CMC^{t} shall be rounded to two significant digits.

NOTES:
The term “exp” represents the base e exponential function.
The term “n/a” means not applicable.
CCC is Criterion Continuous Concentration
CCC^{tr} is the CCC expressed as total recoverable.
CCC^{d} is the CCC expressed as a dissolved concentration.
CCC^{t} is the CCC expressed as a total concentration.

3. The Great Lakes water quality initiative methodologies for development of aquatic life criteria and values in Appendix A of 40 CFR 132 apply to all waters.
4. The human health cancer criteria for nondrinking water (HCV-nondrinking), and human health noncancer criteria for nondrinking water (HNV-nondrinking) from Tables 6 and 7 shall apply to all waters without a Cultural (C1) and/or Recreational (R) designated use. The criteria in Tables 6 and 7 are based on EPA’s recommended subsistence fish consumption rate of 142.4 g/day.

TABLE 6: Human Health Criteria, cancer values (µg/L)

	HCV - Drinking	HCV - Nondrinking
Benzene	9.1E+00	3.7E+01
Chlordane	9.7E-05	9.7E-05
DDT	1.5E-05	1.5E-05
Dieldrin	6.8E-07	6.8E-07
Hexachlorobenzene	4.8E-05	4.8E-05
Hexachloroethane	6.9E-01	7.1E-01
Methylene chloride	4.3E+01	3.7E+02
PCBs (class)	2.7E-06	2.7E-06
2,3,7,8-TCDD	9.1E-10	9.1E-10
Toxaphene	7.1E-06	7.1E-06
Trichloroethylene	1.8E+01	4.1E+01

TABLE 7: Human Health Criteria, noncancer values (µg/L)

	HNV - Drinking	HNV - Nondrinking
Benzene	1.50E+01	6.08E+01
Chlordane	1.49E-04	1.49E-04
Chlorobenzene	5.33E+01	8.73E+01
Cyanides	1.41E+02	1.98E+03
DDT	2.10E-04	2.10E-04
Dieldrin	4.36E-05	4.36E-05
2,4-Dimethylphenol	3.19E+02	9.95E+02
2,4-Dinitrophenol	4.90E+01	3.80E+02
Hexachlorobenzene	4.88E-03	4.88E-03
Hexachloroethane	7.75E-01	7.97E-01
Lindane	5.23E-02	5.26E-02
Mercury	1.94E-04	1.94E-04
Methylene chloride	1.46E+03	1.26E+04
2,3,7,8-TCDD	7.10E-09	7.10E-09
Toluene	7.41E+02	1.40E+03

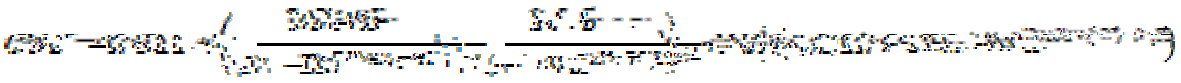
5. Since the Tribe does not have a public surface water supply use, but Tribal members may ingest untreated surface waters during tribal ceremonies, the human cancer criteria for drinking water (HCV-drinking), and human noncancer criteria for drinking water (HNV-drinking) from table 6 and 7 shall apply to the all waters with a Cultural (C1) and/or Recreational (R) designated use(s).
6. The Great Lakes water quality initiative methodologies for development of human health nondrinking water criteria and values in Appendix B and C of 40 CFR 132 apply to all waters.
7. The Great Lakes water quality initiative methodologies for development of human health drinking water criteria and values in Appendix B and C of 40 CFR 132 shall apply to all waters with a Cultural (C1) and/or Recreational (R) designated use(s).
8. The criteria for the protection of wildlife in Table 8 shall apply to all waters with a Wildlife (W2) designated use.

TABLE 8: Criteria for the protection of wildlife

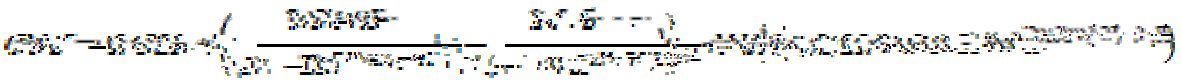
Parameter	**Criteria (µg/L)**
DDT and metabolites	0.000011
Mercury[a]	0.0013
PCBs (class)	0.00012
2,3,7,8,-TCDD	3.1E-09

[a]The mercury criterion includes methylmercury.

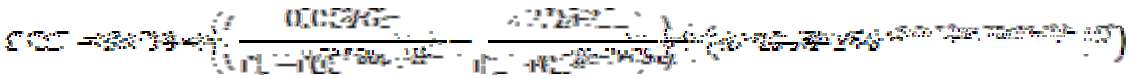
9. The Great Lakes water quality initiative methodologies for development of wildlife criteria and values in Appendix B and D of 40 CFR 132 apply to all waters.
10. Since 1999, when EPA published the last update to the national Ammonia criteria, additional science has emerged on species sensitivity to ammonia that has necessitated revision of the 1999 equations. The revised equations identified in the 2009 final draft EPA criteria for ammonia, published in the Federal Register (74 FR 69086, 12/30/09) are now in their ultimate final stages of development and approval. When the final criteria are published in the Federal Register, they will immediately take effect in the WQS and shall apply to all waters with an Aquatic Life and Fish (A) designated use. The acute and chronic criteria concentrations are expressed as functions of temperature and pH, such that values differ across sites, and differ over time within a site. Below are the proposed criteria (2009):
    i. The one-hour average concentration of total ammonia nitrogen (in mg N/L) does not exceed, more than once every three years on the average, the CMC calculated using the following equations:
        a. Where freshwater mussels are present:



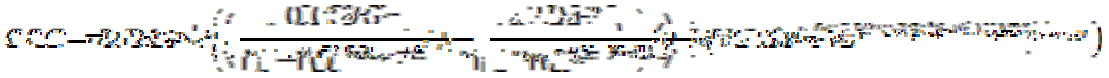
        b. Or where freshwater mussels are absent:



    ii. The thirty-day average concentration of total ammonia nitrogen (in mg N/L) does not exceed, more than once every three years on the average, the CCC calculated using the following equations:
        a. Where freshwater mussels are present and fish early life stages are present or absent:

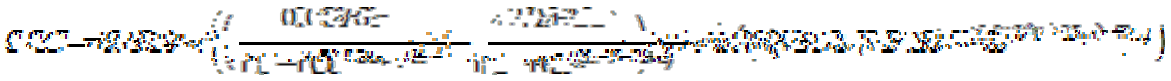


        b. Or where freshwater mussels are absent and fish early life stages are absent:



iii. The thirty-day average concentration of total ammonia nitrogen (in mg N/L) does not exceed, more than once every three years on the average, the CCC calculated using the following equation:

a. When freshwater mussels are absent and fish early life stages are present:



iv. In addition, the highest four-day average within the 30-day period should not exceed 2.5 times the CCC.

I. *Mixing Zones.* The incorporation of mixing zones into the issuance of permits under CWA Section 402 may be allowable as determined on a case by case basis. Mixing zones may be authorized on a case by case basis if demonstrated that a mixing zone is necessary and will not result in objectionable or damaging conditions. A mixing zone may be determined necessary where, after implementing all cost effective and feasible pollution controls and best management practices, it is still not possible to comply with the applicable numeric criteria without allowing for a limited area of dilution of the discharge in the receiving water.

1. A mixing zone shall not be authorized for:
   i. Discharges in Outstanding Tribal Resource Waters;
   ii. Thermal discharges in waters with a Cold Water Fishery designated use;
   iii. Discharges containing BCCs;
   iv. Discharges threatening endangered or threatened species and their habitats;
   v. Discharges threatening critical resource areas.
2. The following provisions must be met for an authorized mixing zone:
   i. The size of a mixing zone shall be limited to as small an area as practicable.
   ii. The size of a mixing zone shall conform to the time exposure responses of aquatic life.
   iii. Mixing zones for two or more sources shall not overlap.
   iv. A mixing zone shall ensure a zone of passage for mobile aquatic life is maintained.
   v. A mixing zone shall ensure spawning, nursery areas, and migratory routes are protected.
   vi. A mixing zone shall be free of the following in-zone conditions:
      a. Materials in concentrations that will cause acutely toxic conditions to aquatic life;

b. Materials in concentrations that settle to form objectionable deposits;
c. Floating debris, oil, scum, and other materials in concentrations that form nuisances;
d. Substances in concentrations that produce objectionable color, odor, taste, or turbidity; and
e. Substances in concentrations that produce undesirable aquatic life or result in a dominance of nuisance species.

vii. A mixing zone shall not interfere with the designated uses and existing uses of the receiving water or downstream surface waters.

viii. A mixing zone shall not result in significant human health risks.

ix. Water quality standards shall be met at every point outside of a mixing zone.

x. The methodology for determining the characteristics of a mixing zone shall be consistent with provision C.7. and with the procedures and guidelines in EPA's *Water Quality Standards Handbook* and the *Technical Support Document for Water Quality Based Toxics Control* and subsequent updates of the handbook and technical support documents.

J. *Severability.* If any provision or subprovision of these Tribal water quality standards or amendments thereto, or the application of any such provision to any person or circumstance is held to be invalid, the remainder of such provisions and subprovisions shall not be affected in any way by such finding.

MNRD WATER QUALITY STANDARDS REPORT

ATTACHMENT 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:
WW-15J

March 16, 2022

Col. Karl Jansen
District Commander
U.S. Army Corps of Engineers
St. Paul District, Regulatory Branch
180 Fifth Street East, Suite 700
Saint Paul, Minnesota 55101-1678

Re: Public Notice MVP-2020-00260-WMS / Enbridge Line 5 Wisconsin Segment Relocation

Dear Colonel Jansen:

The U.S. Environmental Protection Agency appreciates the opportunity to provide comments in response to the subject Clean Water Act (CWA) Section 404 public notice issued on January 6, 2022, for an application (Application) submitted by Enbridge Energy, Limited Partnership (Enbridge). An overview of EPA's recommendations is included below, and our detailed comments and recommendations are enclosed (Enclosure 1).

Enbridge proposes the permanent discharge of fill material into 0.02 acres of waters of the United States (WOTUS), and temporary discharges of dredged or fill material into 101.08 acres of wetlands and 0.20 acres of non-wetland WOTUS associated with the construction of the Enbridge Line 5 Wisconsin segment relocation (WI L5R) project. Enbridge plans to construct 72 pipeline crossings through federally jurisdictional waterbodies (rivers, streams, ditches, etc.) and impact 534 wetlands along the proposed route. The proposed WI L5R project would begin near the intersection of State Highway 137 and State Highway 112 in Ashland County, Wisconsin and extend to approximately the intersection of US Highway 2 and State Highway 169 in Iron County, Wisconsin. A project overview map is enclosed (Enclosure 2). The project would include impacts to the following 8-digit HUC watersheds:

- Bad-Montreal (HUC 04010302)
- Beartrap-Nemadji (HUC 04010301)

Consistent with the provisions of the 1992 CWA Section 404(q) Memorandum of Agreement between the EPA and Department of the Army[1], Part IV paragraph 3(a), and based on the

[1] CWA Section 404(q): Memorandum of Agreement between EPA and Department of the Army, August 11, 1992, https://www.epa.gov/cwa-404/cwa-section-404q-memorandum-agreement-between-epa-and-department-army-text#2, last visited March 10, 2022.

Application and related information that EPA reviewed, we believe that the proposed project "may result in substantial and unacceptable adverse impacts" to the Bad River and the Kakagon-Bad River Sloughs wetland complex, which EPA has identified as aquatic resources of national importance (ARNIs) and that are located within both the Bad-Montreal (HUC 04010302) and Beartrap-Nemadji (HUC 04010301) watersheds.

At present, EPA does not believe there is sufficient information to enable a conclusion that the proposed project is the least environmentally damaging practicable alternative (LEDPA), that the project would not result in violation of water quality standards or significant degradation of aquatic resources, or that the project would appropriately mitigate for unavoidable impacts to waters of the United States (WOTUS). EPA's comments address avoidance and minimization of pipeline installation related discharges to WOTUS; recommendations to address water quality and significant degradation concerns; and options for improving mitigation for any unavoidable impacts.

Impacts to Aquatic Resources of National Importance

An ARNI is a resource-based threshold used to determine whether a dispute between EPA and the Corps regarding individual permit cases are eligible for elevation under the 1992 MOA. Factors used to identify ARNIs include economic importance of the aquatic resource, rarity or uniqueness, and/or importance of the aquatic resource to the protection, maintenance, or enhancement of the quality of the Nation's waters.[2] The Bad River and the Kakagon-Bad River Sloughs are ARNIs because they are economically significant; their unique characteristics have been identified and designated for protection under international, national, state, and tribal law; and these waterbodies are integral to maintaining and enhancing the quality of the Nation's waters. The Kakagon-Bad River Sloughs wetland complex is designated as a Ramsar International Treaty Convention Wetland of International Importance.[3]

Economic Factors

EPA recognizes wetlands as important economic assets for the Nation. EPA notes that there is

> a wealth of natural products from wetlands, including fish and shellfish, blueberries, cranberries, timber and wild rice. Some medicines are derived from wetland soils and plants. Many of the nation's fishing and shellfishing industries harvest wetland-dependent species. In the Southeast, for example, nearly all the commercial catch and over half of the recreational harvest are fish and shellfish that depend on the estuary-coastal wetland system.[4]

The Ramsar Treaty Convention designation for the Kakagon-Bad River Sloughs as a Wetland of International Importance notes that this area includes a "largely undeveloped wetland complex

[2] EPA, Clean Water Act Section 404(q) Dispute Resolution Process, https://www.epa.gov/sites/default/files/2021-01/documents/404q.pdf, last visited March 10, 2022.
[3] Bad River and Kakagon Sloughs, https://rsis.ramsar.org/ris/2001, last visited March 10, 2022.
[4] EPA, Why are Wetlands Important? https://www.epa.gov/wetlands/why-are-wetlands-important, last visited March 10, 2022.

composed of sloughs, bogs, and coastal lagoons that harbor the largest natural wild rice bed on the Great Lakes." The designation further notes that these wild rice beds

> are becoming increasingly fragmented on Lake Superior - as the only remaining extensive coastal wild rice bed in the Great Lakes region, it is critical to ensuring the genetic diversity of Lake Superior wild rice. Tribal members frequent the area primarily for subsistence trapping, hunting, fishing, and to retain historic harvesting techniques; access to the area is strictly limited to Bad River tribal members and Bad River Natural Resources staff.[5]

In addition to the economic and cultural value of wild rice to the Bad River Band, the sloughs provide important habitat supporting many fish species integral to Lake Superior recreational and commercial fishing.[6] Bad River Band noted in 2019: "Comprising a significant portion of the remaining Lake Superior coastal wetlands, the Kakagon and Bad River Sloughs is critical to supporting the biodiversity of Lake Superior fisheries."[7]

Recognition of waterbodies as rare or unique

The Kakagon-Bad River Sloughs wetland complex is a Ramsar International Wetlands Convention site of International Importance.[8] According to the U.S. Fish and Wildlife Service, the Kakagon Slough is also a Nature Conservancy Priority Conservation area, a Wisconsin Legacy Place, a Wisconsin Bird Conservation Initiative Important Bird Area, a Wisconsin Wetlands Association Wetland GEM, and a Wisconsin Coastal Wetland Primary Inventory Site.[9] The Bad River Band has designated waters potentially impacted by this proposed project as having significant ecological and cultural significance. These waters upstream of and transecting the reservation have been designated as "Outstanding Tribal Resource Waters."[10]

Role of Kakagon-Bad River Sloughs as Integral to Nation's Waters

The Kakagon-Bad River Sloughs wetland complex has been recognized as performing important and irreplaceable functions within the Lake Superior Watershed. According to the Wisconsin Department of Natural Resources (WDNR), "The Bad River originates in Caroline Lake in east-central Ashland County and runs a meandering course northward to empty into Lake Superior."[11] The WDNR further notes, "The stream is considered a warm water sport fishery important for spawning walleye and lake sturgeon, as well as supporting migratory runs of trout and salmon

---

[5] https://rsis.ramsar.org/ris/2001.
[6] WDNR, Kakagon Slough, https://dnr.wi.gov/lakes/lakepages/LakeDetail.aspx?wbic=2891700, last visited March 10, 2022.
[7] Bad River Band, "Kakagon and Bad River Sloughs Recognized as a Wetland of International Importance," August 22, 2019, http://www.badriver-nsn.gov/kakagon-and-bad-river-sloughs-recognized-as-a-wetland-of-international-importance/, last visited March 10, 2022.
[8] https://rsis.ramsar.org/ris/2001, last visited March 10, 2022
[9] Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 99. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022.
[10] Bad River Band, "Kakagon and Bad River Sloughs Recognized as a Wetland of International Importance"; Bad River Band, Water Quality Standards, Table 1, Specific Designated Uses of the Tribe's Water Resources, https://www.epa.gov/sites/default/files/2014-12/documents/bad_river_band_wqs.pdf, last visited March 10, 2022.
[11] WDNR, Copper Falls State Park, Geology, https://dnr.wisconsin.gov/topic/parks/copperfalls/geology, last visited March 10, 2022.

species. Other fish found in the lower portion of the river include muskellunge, northern pike, rock bass, pumpkinseeds, bullheads, black crappies, smallmouth bass and yellow perch."[12] Based on information contained in the Application and the WDNR draft Environmental Impact Statement (DEIS), conducted in compliance with the Wisconsin Environmental Policy Act (WEPA)[13,] EPA has concerns that the introduction of excess sediment, fuels, lubricants, and drilling fluids associated with the 72 federally jurisdictional waterbody crossings, as currently proposed in the WI LR5 project, could enter the Bad River and Kakagon-Bad River Sloughs through the connected tributary streams, and may permanently and negatively impact water quality, aquatic life, and native habitat.[14]

Marengo River, a tributary to the Bad River, along with Trout Brook Creek are listed on the 303(d) list in Wisconsin as impaired for fecal coliform.[15] The Bad River Watershed Association's management plan for the Marengo River employs a management strategy, called "slow the flow" that recognizes that "reducing the volume and velocity of runoff to streams is critical to improving watershed health.[16] Bay City Creek (which flows directly to Lake Superior) is listed on the Wisconsin CWA section 303(d) list as impaired for phosphorus.[17]

EPA believes that the Kakagon-Bad River Sloughs and the Bad River are especially vulnerable to adverse impacts from the proposed project because several waters with a nexus to this watershed are already impaired and/or are susceptible to receiving high loads of sediment. Consistent with the provisions of the 1992 CWA Section 404(q) Memorandum of Agreement between the EPA and Department of the Army, Part IV paragraph 3(a), and for the reasons provided below, EPA believes the proposed project may have "substantial and unacceptable adverse impacts" on the Kakagon-Bad River Sloughs wetland complex and the Bad River, as ARNIs.

CWA 404 (b)(1) Guidelines, 40 C.F.R. § 230.10 (a)

Fundamental to the CWA Section 404(b)(1) Guidelines (Guidelines), 40 C.F.R. § 230.10(a), is that no discharge of dredged or fill material may be permitted if a practicable alternative to the proposed discharge exists that would have a less adverse impact on the aquatic environment. Based on our review of the Application, EPA believes there may be practicable alternatives to avoid and minimize impacts through revisions to the proposed pipeline installation plans that have not been fully evaluated. Such alternatives would include for all waterbodies, the use of trenchless

---

[12] WDNR, Water Detail, Bad River, Lower Bad River, Upper Bad River, https://dnr.wi.gov/water/waterDetail.aspx?WBIC=2891900, last visited March 10, 2022.
[13] This WDNR DEIS was prepared under the Wisconsin Environmental Policy Act; see Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022
[14] Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 199. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022.
[15] See U.S. EPA, How's My Waterway, Marengo River https://mywaterway.epa.gov/waterbody-report/WIDNR/WI10008273/2020; Trout Brook, https://mywaterway.epa.gov/waterbody-report/WIDNR/WI10005887/2020), last visited March 10, 2022.
[16] See WDNR, Nonpoint Pollution Webpage, Bad River Watershed Association, Marengo River Watershed Partnership Project, Watershed Action Plan, https://dnr.wi.gov/topic/nonpoint/documents/9kep/Marengo_Watershed-Plan.pdf, last visited March 10, 2022.
[17] See U.S. EPA, How's My Waterway, Bay City Creek, https://mywaterway.epa.gov/waterbody-report/WIDNR/WI6936105/2020), last visited March 10, 2022

waterbody crossings which do not require disturbing streambeds; this alternative would be especially important to evaluate for waterbodies that provide important ecological functions to the watersheds (e.g., trout streams, cold water streams). Waterbodies with ecologically important functions include: Beartrap Creek, Camp Four Creek, Feldcher Creek, tributaries of the Marengo River, Brunsweiler River, Trout Brook, Silver Creek, Krause Creek, Bad River, Gehrman Creek, and Vaughn Creek, all of which contribute to Kakagon-Bad River Sloughs. Additional geotechnical investigation on expanding the use of Horizontal Directional Drilling (HDD) should be explored to further reduce the potential of sedimentation impacts. We also recommend consideration of additional measures to reduce crossing-related impacts to project area waterbodies and wetlands, including, but not limited to: further minimizing the width of the Right of Way (ROW) in wetland and waterbody areas; using bio-engineering techniques, such as living-shoreline type features instead of riprap along with constructed features instead of riprap, at all waterbody crossing restorations; and water-inflated cofferdams where damming may be necessary to divert flow.

We request that the Corps evaluate the recommendations provided in the enclosure to determine whether modifications to the proposed pipeline installation plan can be made to avoid and minimize aquatic resource impacts to the maximum extent practicable. We look forward to continuing to work with you in identifying practical alternatives to reduce the environmental impacts of the project as currently proposed.

CWA 404 (b)(1) Guidelines, 40 C.F.R. §§ 230.10 (b) and 230.10 (c)

The Guidelines state that a discharge of dredged or fill material may not be permitted if it causes or contributes to violations of applicable water quality standards and no discharge should be allowed if it will cause or contribute to significant degradation of WOTUS. EPA believes that the proposed impact of the project to 101.08 acres of 534 wetlands along the proposed route and the construction of 72 federally jurisdictional waterbody crossings may have "substantial and unacceptable adverse effects" through the permanent and temporary diminishment of wetland and waterbody functions.

The Marengo River (a tributary to the Bad River) along with Trout Brook Creek are listed on the 303(d) list in Wisconsin as impaired for fecal coliform. Bay City Creek (which flows directly to Lake Superior) is listed on the 303(d) list in Wisconsin as impaired for Phosphorus. Lake Superior is listed on the CWA 303(d) list in Wisconsin as impaired for mercury and PCBs. EPA has concerns that proposed additional impacts to these aquatic resources and contributing waterbodies within the project area would exacerbate their already stressed condition and lead to further degradation. Bay City Creek is considered a Coldwater, Cool-Cold Headwater, Macroinvertebrate stream per the State of Wisconsin's Natural Community Determinations.[18] If the excess sediment causes a rise in water temperature, it could have an adverse impact through changes to the macroinvertebrate population that can strive in the stream. Excess sedimentation can affect Lake Superior Basin streams by potentially smothering important fish spawning areas for species such as brook trout and lake sturgeon and by altering stream hydrologic function that

[18] WDNR, Water Detail, Bay City Creek, Fish Creek Watershed, https://dnr.wi.gov/water/waterDetail.aspx?key=17627, last visited 3/11/22.

contributes to habitat degradation and can reduce a stream's ability to buffer effects from extreme flood events.

During pipeline installation, sediment concentrations and load rates can increase significantly compared to the baseline condition. Increased erosion and transport of sediments and other pollutants associated with pipeline installation can alter the flow rate of stream channels downstream, transport chemicals downstream, and adversely affect downstream aquatic ecosystems. Therefore, we recommend that the Corps require a monitoring plan to conduct biological and water quality sampling before construction, during construction and after construction until the site stabilizes, as part of a revised Application. Compliance with the monitoring plan should be included as a condition of CWA section 404 permit for this project. We also recommend that a condition be included that requires the permittee to develop a corrective action plan as part of their monitoring program, to address potential local and downstream impacts to aquatic communities from the pipeline installation and maintenance. We would like to continue working with you on these and other effective measures to better ensure protection of water quality, consistent with the Guidelines.

CWA 404 (b)(1) Guidelines 40 C.F.R. § 230.10(d)

Based on the information included with the Application, EPA is concerned that the mitigation proposed in the Application may not adequately compensate for the direct, cumulative, and temporal impacts to aquatic resources. EPA recommends the Applicant revise the proposed wetland mitigation plan to include a scientifically-based rationale for the mitigation ratios proposed. Further, we recommend that the Corps require a formal compensatory mitigation/waterbody restoration plan for impacts at all 72 federally jurisdictional waterbody crossings. Requiring this specificity in plans for compensatory mitigation/waterbody restoration will ensure adequate mitigation for all impacts to waterbodies to offset any potential functional losses and ensure consistency with the Guidelines. Additional detailed comments and recommendations on proposed mitigation are provided in Enclosure 1.

Next Steps

EPA appreciates the opportunity to comment on this Application and remains committed to continuing to work collaboratively with the Corps and the Applicant to address identified concerns. The intent of this letter is to continue coordination and communication between the St. Paul Corps District (Corps) and EPA Region 5 and provide a means to resolve any concerns about the project's ability to demonstrate compliance with the CWA Section 404(b)(1) Guidelines. EPA understands that the Corps will continue to analyze this project under the National Environmental Policy Act (NEPA). EPA would welcome the opportunity to serve as a cooperating agency as the Corps prepares their NEPA document.

I appreciate the attention that you and your staff have provided to this project. We welcome the opportunity to arrange a discussion of our comments. Should you have any questions, please do not hesitate to contact me directly by phone at (312) 886-6735 or by email at fong.tera@epa.gov or your staff contact Melissa Blankenship of my staff by phone at (312) 886- 9641 or by email at blankenship.melissa@epa.gov with any questions.

Sincerely,

Tera L. Fong
Division Director, Water Division

Enclosures

e-cc: Chad Konickson, Regulatory Branch Chief-St. Paul District
Rebecca Graser, Deputy Division Chief-St. Paul District
Bill Sande, Project Manager-St. Paul District
Ben Callan, Chief-Integration Services Section, Wisconsin DNR
Catherine Chavers, Chairwoman-Bois Forte Band of Chippewa
Kevin Dupuis, Chairman-Fond du Lac Band of Chippewa
Robert Deschampe, Chairman-Grand Portage Band of Chippewa
Faron Jackson, Sr., Chairman-Leech Lake Band of Ojibwe
Robert L. Larsen, President-Lower Sioux Indian Community
Melanie Benjamin, Chief Executive Officer-Mille Lacs Band of Ojibwe
Catherine Chavers, President-Minnesota Chippewa Tribe
Johnny Johnson, President-Prairie Island Indian Community
Darrell Seki, Sr., Chairman-Red Lake Band of Chippewa
Keith B. Anderson, Chairman-Shakopee Mdewakanton Sioux Community
Sara Dobesh, Coordinator- Shakopee Mdewakanton Sioux Community
Kevin Jensvold, Chairman-Upper Sioux Indian Community
Michael Fairbanks, Chairman-White Earth Band of Chippewa
Michael Wiggins, Chairman-Bad Rive Band of Lake Superior Cheippewa
Ned Daniels, Jr., Chairman-Forest County Potawatomi Community
Marlon WhiteEagle, President-Ho-Chunk Nation
Louis Taylor, Sr., Chairman-Lac Courte Oreilles Band of Lake Superior Chippewa
John Johnson, President-Lac du Flambeau Band of Lake Superior Chippewa
Ronald Corn, Sr., Chairman-Menominee Indian Tribe of Wisconsin
Tehassi Hill, Jr., Chairman-Oneida Nation of Wisconsin
Christopher Boyd, Chairman-Red Cliff Band of Lake Superior Chippewa
Robert VanZile, Chairman-Sokaogon Chippewa Community
William Reynolds, Chairman-St. Croix Chippewa Indians of Wisconsin
Shannon Holsey, President-Stockbridge-Munsee Community
Whitney Gravelle, Chairwoman-Bay Mills Indian Community
David M. Arroyo, Chairman-Grand Traverse Band of Ottawa and Chippewa Indians
Kenneth Meshigaud, Chairman-Hannahville Indian Community
John L. Lufkins, Executive Director-Inter-Tribal Council of Michigan

James Williams, Chairman-Lac Vieux Desert Band of Lake Superior Chippewa
Larry Romanelli, Ogema-Little River Band of Ottawa Indians
Regina Gasco-Bentley, Chairwoman-Little Traverse Bay Bands of Odawa Indians
Bob Peters, Chairman-Match-E-Be-Nash-She-Wish (Gun Lake) Band of Pottawatomi
Jamie Stuck, Chairman-Nottawaseppi Huron Band of the Potawatomi
Rebecca Richards, Chairwoman-Pokagon Band of Potawatomi
Theresa Jackson, Chief-Saginaw Chippewa Indian Tribe
Aaron A. Payment, Chairman-Sault Ste. Marie Tribe of Chippewa Indians

Enclosure 1-Detailed EPA comments on the Section 404 Permit Application for the Enbridge Line 5 Wisconsin Relocation Project

1. Project Background and Summary

The Applicant, Enbridge, is proposing the permanent discharge of fill material into 0.02 acres of Waters of the United States (WOTUS), and temporary discharges of fill material into 101.08 acres of wetlands and 0.2 acres of non-wetland WOTUS associated with the construction of the Enbridge Line 5 Wisconsin segment relocation project (WI LR5). Enbridge plans to construct 72 pipeline crossings through federally jurisdictional waterbodies and impact 534 wetlands along the proposed route. The project would replace 20 miles of existing pipeline, including 12 miles of existing pipeline within the Bad River Indian Reservation (reservation), with approximately 41 miles of new pipeline routed around the exterior of the Reservation. In addition, the Applicant proposes horizontal directional drilling (HDD) under the White River, a navigable WOTUS. Enbridge proposes to cease pipeline operation within the reservation once the proposed WI L5R pipe is in service.

The project would include impacts to the following 8-digit HUC watersheds:

- Bad-Montreal (HUC 04010302)
- Beartrap-Nemadji (HUC 04010301)

The following 12-digit HUC subwatersheds fall within the project area and are upstream of and transect the Bad River Reservation:

- Fish Creek – Frontal Chequamegon Bay (HUC 040103011105)
- Beartrap Creek – Frontal Chequamegon Bay (HUC 040103011101)
- Deer Creek – White River (HUC 040103020611)
- Meadow Creek (HUC 040103020610)
- Troutmere Creek-Marengo River (HUC 040103020404)
- Lower Brunsweiler River (HUC 040103020403)
- Marengo River (HUC 040103020405)
- Hardscrabble Creek – Bad River (HUC 040103020305)
- Lower Tyler Forks (HUC 040103020203)
- Potato River (HUC 040103020506)
- Vaughn Creek (HUC 040103020505)
- Devils Creeks – Bad River (HUC 040103020304)

EPA's longstanding position regarding the importance of tributary streams has been that

> Scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. [19]

Wetlands provide numerous functions that benefit downstream water quality. These functions include storage of floodwater, recharge of ground water that sustains baseflow, retention and transformation of nutrients, metals, and pesticides, and export of organisms or reproductive propagules to downstream waters. Wetlands can be connected to downstream waters through surface-water, shallow subsurface-water, and groundwater flows and through biological and chemical connections.[20]

2. The Proposed Project will Impact Aquatic Resources of National Importance

EPA believes the WI LR5 may have "substantial and unacceptable adverse impacts" on the Kakagon-Bad River Sloughs and the Bad River, aquatic resources of national importance (ARNIs). In addition to the discussion in our cover letter, EPA notes that watersheds impacted by this proposed project include international, national, tribal, and state-designated areas of importance.

The proposed project route would cross the White River, Billy Creek, and the Bad River. These waters enter Lake Superior through the Bad River Slough. Specifically, the White River enters the Bad River Slough approximately 26.3 river miles from the project site. The proposed route also crosses Beartrap Creek which enters Lake Superior through the Kakagon Slough, approximately 19 river miles downstream from the project site. The Kakagon-Bad River Sloughs wetland complex is a Ramsar International Wetlands Convention site of international importance and a National Landmark.[21] According to the U.S. Fish and Wildlife Service, the Kakagon Slough is also a Nature Conservancy Priority Conservation area, a Wisconsin Legacy Place, a Wisconsin Bird Conservation Initiative Important Bird Area, a Wisconsin Wetlands Association Wetland GEM, and a Wisconsin Coastal Wetland Primary Inventory Site. [22]

Wetlands that may be indirectly impacted by WI LR5 are habitat for several rare plants and animals. The project is situated upstream of a wetland complex that comprises more than 16,000 acres of diverse wetland habitats that support numerous species of rare plants and animals.[23]

---

[19] U.S. Environmental Protection Agency, "Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence." EPA/600/R-14/475F (2015).
[20] EPA, "Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence."
[21] https://rsis.ramsar.org/ris/2001, last visited March 10, 2022
[22] Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 99. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022.
[23] https://www.wisconsinwetlands.org/wp-content/uploads/2015/06/Kakagon-Bad-River-Sloughs.pdf , last visited March 10, 2022

According to the Ramsar International Convention on Wetlands webpage outlining the designation of the Kakagon and Bad River Sloughs as Wetlands of International Importance:

> The endangered Gray Wolf (*Canis lupus*) and threatened Canada Lynx (*Lynx Canadensis*) are two rare and elusive species known to inhabit the site. It provides necessary and rare feeding, resting, and nesting habitat for both migrating and local populations of birds, and one of the two remaining sites for the endangered Piping Plover (*Charadrius melodus*) is located immediately to the north at Long Island. The site also protects wild rice beds that are becoming increasingly fragmented on Lake Superior - as the only remaining extensive coastal wild rice bed in the Great Lakes region, it is critical to ensuring the genetic diversity of Lake Superior wild rice. [24]

Based on the Application and the Wisconsin Environmental Policy Act (WEPA) Draft Environmental Impact Statement (DEIS) prepared by the Wisconsin Department of Natural Resources (WDNR), EPA believes that sediment laden runoff from the WI LR5 project could enter the sloughs through the connected tributary streams, and may permanently and negatively impact water quality, aquatic life, and native habitat.[25]

According to the WDNR, "The Bad River originates in Caroline Lake in east-central Ashland County and runs a meandering course northward to empty into Lake Superior."[26] The WDNR further notes, "The stream is considered a warm water sport fishery important for spawning walleye and lake sturgeon, as well as supporting migratory runs of trout and salmon species. Other fish found in the lower portion of the river include muskellunge, northern pike, rock bass, pumpkinseeds, bullheads, black crappies, smallmouth bass and yellow perch."[27]

Copper Falls State Park (Copper Falls) is owned by the WDNR and was designated a State Natural Area in 2003.[28] Bad River enters the park approximately one river mile downstream of the closest proposed pipeline crossing of Bad River. According to the WDNR, Copper Falls landscape includes northern dry and dry-mesic forest along the shores of the Bad River. On the low terraces of the river are two oxbows, that support dry-mesic forest dominated by large white pine, sugar maple, red maple, and white ash. Other trees include hemlock, white cedar, paper birch, red oak, balsam fir, and white spruce. The understory is diverse because of the variation in topography. The steep slope along the west side of the river supports a sugar maple-hemlock forest, which has not been disturbed since at least 1916.[29] "There are 8.5 miles of river in the

---

[24] https://rsis.ramsar.org/ris/2001, last visited March 10, 2022.
[25] Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 199. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022.
[26] WDNR, Copper Falls State Park, Geology, https://dnr.wisconsin.gov/topic/parks/copperfalls/geology, last visited March 10, 2022.
[27] WDNR, Water Detail, Bad River, Lower Bad River, Upper Bad River, https://dnr.wi.gov/water/waterDetail.aspx?WBIC=2891900, last visited March 10, 2022.
[28] WDNR, Wisconsin State Natural Areas Program, Copper Falls, https://dnr.wi.gov/topic/Lands/naturalareas/index.asp?SNA=399, last visited March 10, 2022 (hereafter WDRN, Copper Falls Website).
[29] See WDNR, Copper Falls Website, https://dnr.wi.gov/topic/Lands/naturalareas/index.asp?SNA=399, last visited March 10, 2022.

park. One-half mile of river is closed to public access due to its high erosion potential and its value as a unique scenic resource for future generations."[30]

Bad River Band Outstanding Tribal Resource Waters and Outstanding Resource Waters

The Bad River Band has designated waters potentially impacted by this proposed project as having significant ecological and cultural significance. These waters upstream of and transecting the reservation have been designated as "Outstanding Tribal Resource Waters."[31] They would be crossed using the wet trench or dry crossing pipeline installation methods and include the Potato River and the Bad River.

> Surface waters of the reservation that are identified as high quality and constitute a significantly important cultural and ecological resource are designated as Outstanding Tribal Resource Waters (Chi minosingbii) and are roughly equivalent to EPA's regulatory definition of Tier 3 waters under the Agency's antidegradation policy. These waters are recognized as being largely pristine and important for the cultivation of wild rice or the spawning of lake sturgeon, or have other special resource values, and, therefore, that water quality shall be maintained and protected in all cases without degradation. New or increased discharges will not be permitted. [32]

The Bad River Band has designated waters potentially impacted by this proposed project as being culturally important to the Tribe for the fisheries and ecosystems they support. Waters designated as "Outstanding Resource Waters" that would be crossed using the wet trench or dry crossing pipeline installation method include tributaries of the Marengo River, Bear Trap Creek, Tyler Forks Creek, Brunsweiler River, and Vaughn Creek. The Band's federally approved water quality standards provide:

> Surface waters of the Reservation that are identified as high quality and culturally important to the Tribe for the fisheries and ecosystems they support are Outstanding Resource Waters (Chi minosibii) and could be described as roughly equivalent to EPA's regulatory definition of Tier 2.5 waters under the Agency's antidegradation policy. New or increased discharges may be permitted provided that the new or increased discharge does not result in a change in background conditions or negatively impact designated uses or existing uses; however, no new or increased discharges of Bioaccumulative Chemicals of Concern will be permitted. Where the quality of the water exceeds that necessary to support the designated use, that quality shall be maintained and protected, or improved, unless the Tribe finds, after full satisfaction of inter-governmental coordination and public participation provisions of the Tribe's continuing planning process that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing

---

[30] See WDNR, Copper Falls Website, https://dnr.wisconsin.gov/topic/parks/copperfalls/geology, last visited March 10, 2022.

[31] U.S. EPA, Bad River Band of Lake Superior Chippewa, Water Quality Standards, https://www.epa.gov/sites/default/files/2014-12/documents/bad_river_band_wqs.pdf, Table 1, Specific Designated Uses of the Tribe's Water Resources, last visited March 10, 2022.

[32] U.S. EPA, Bad River Band of Lake Superior Chippewa, Water Quality Standards, E.2.ii, https://www.epa.gov/sites/default/files/2014-12/documents/bad_river_band_wqs.pdf, last visited March 10, 2022.

such degradation or lower water quality, the Tribe shall assure water quality adequate to protect existing uses fully.[33]

Wisconsin Outstanding Resource Waters and Exceptional Resource Waters

Waters Wisconsin designated as "Outstanding Resource Waters" that would be crossed using the wet trench or dry crossing pipeline installation method include tributaries of the Brunsweiler River, Marengo River, Tyler Forks Creek, and the Potato River. According to Wisconsin's Water Quality Standards, waters designated as Outstanding Resource Waters may not be lowered in water quality.[34]

Surface waters which provide valuable fisheries, hydrologically or geologically unique features, outstanding recreational opportunities, unique environmental settings, and which are not significantly impacted by human activities may be classified in Wisconsin as "Exceptional Resource Waters."[35] Waters designated as Exceptional Resource Waters that will be crossed using the wet trench or dry crossing pipeline installation method include tributaries of the Bad River and Vaughn Creek. Waters designated as Exceptional Resource Waters that will be crossed using the HDD pipeline installation method include the White River.

3. Proposed Project Impacts and EPA Recommendations (40 C.F.R. §§ 230.10(c), 230.11)

Based on our review of the Application, it does not currently include adequate characterization of the project's secondary effects. This has resulted in significant underestimation of the scope of proposed project impacts.

Direct Wetland Impacts (40 C.F.R. §§ 230.10(c), 230.11(a) and (b))

According to the Application, once activities resulting in temporary discharges are completed, the Applicant proposes to allow 67.13 acres of wetlands (28.06 emergent, 32.76 forested, 6.30 scrub shrub) to revert to the original cover type. The remaining 33.95 acres of wetlands (originally forested (30.06) and scrub-shrub (3.89)) are proposed to be maintained as emergent wetland within the permanently maintained right-of-way:

> Following construction, Enbridge would maintain the permanent 50-foot-wide [Right of Way] ROW clear of woody vegetation to conduct aerial inspections and facilitate access for maintenance. In areas where the pipeline was installed via HDD and direct bore methods, the permanent operational ROW would be reduced from 50 feet to 30 feet.[36]

---

[33] U.S. EPA, Bad River Band of Lake Superior Chippewa, Water Quality Standards, https://www.epa.gov/sites/default/files/2014-12/documents/bad_river_band_wqs.pdf, last visited March 10, 2022.
[34] Chapter 102: Water Quality Standards for Wisconsin Surface Waters, https://www.epa.gov/sites/default/files/2014-12/documents/wiwqs-nr102.pdf. last visited March 10, 2022.
[35] U.S. EPA, State of Wisconsin Water Quality Standards, https://www.epa.gov/sites/default/files/2014-12/documents/wiwqs-nr102.pdf, last visited March 10, 2022.
[36] Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 22. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022.

Recommendation: Impacts to 33.95 acres of wetlands resulting in permanent conversion of forested and scrub-shrub wetlands to emergent wetlands should be considered as a permanent, not temporary impact, especially if the wetlands will be **permanently** maintained by the Applicant as emergent wetland within the right-of-way. We note additional comments below related to mitigation.

Direct Waterbody Impacts (40 C.F.R. §§ 230.10(c), 230.11(a) and (b))

The open cut (wet trench) and dry crossing methods of pipeline crossings result in temporary discharges of fill material into waters of the United States (WOTUS) pursuant to Section 404 of the Clean Water Act. According to the Application, the regulated activities include temporary discharges into approximately 0.20 acres below the plane of the ordinary high-water mark as part of pipeline construction activities, including trench backfill and the placement of temporary dams. The Applicant estimated the anticipated volume impact for each waterbody crossing based on a standard trench width of 18 feet wide at the top, 6 feet wide at the bottom, and 7 feet deep. This estimation does not account for crossings that will be more or less than exactly perpendicular to the waterbody. EPA notes that the actual volume will be dependent on site-specific conditions.

Recommendation: The Application should more accurately quantify and characterize the impacts for each of the specific 72 federally jurisdictional waterbody crossings. We also recommend the Application present an alternative for each crossing or certain groups of crossings where arriving at the proposed method is determined to not be feasible in the field. While the determination of the use of the alternative crossing method will not be determined until construction, the use of such alternative methods could result in significant changes to waterbody impacts as proposed in the Application. A summation of potential impacts that could result from these alternative crossing methods would be an important addition to the Application because high impact crossing methods have the potential to result in permanent waterbody functional loss. This information is necessary in determining adequate compensatory mitigation for impacts under the Clean Water Act Section 404 (b)(1) Guidelines.

Impacts to Impaired waters (40 C.F.R. §§ 230.10(c), 230.11(c) and (d))

Based on the Application and the WEPA DEIS prepared by WDNR, EPA believes that sediment laden runoff from the WI LR5 project could enter the Kakagon-Bad River sloughs through connected tributaries, and may negatively impact water quality, aquatic life, and native habitat. This sedimentation may impact and permanently degrade the watershed surrounding the proposed project. EPA believes that the Kakagon-Bad River Sloughs wetland complex and the Bad River are especially vulnerable because several waters with a nexus to this watershed are already impaired and/or susceptible to receiving high loads of sediment.

Pipeline installation can cause substantial erosion and sedimentation, which may increase instream turbidity and alter hydrology at the project site and downstream, negatively impacting aquatic life and habitat. Wetland conversion resulting from pipeline installation can often cause the loss of vital wetland functions and values.

The proposed project does not account for increased sedimentation and other discharges of pollutants that will occur in waters already impaired. For example, the Marengo River, a

tributary to the Bad River, along with Trout Brook Creek are listed on the 303(d) list in Wisconsin as impaired for fecal coliform.[37] The Marengo River Watershed is a significant focus area for highlighting important management strategies to reduce sedimentation in Wisconsin's Lake Superior Basin. The Bad River Watershed Association's management plan employs a management strategy, called "slow the flow" that recognizes that "reducing the volume and velocity of runoff to streams is critical to improving watershed health.[38] The Bad River Watershed's geologic characteristics, particularly the combination of steep topography and highly erodible soils, make the watershed more susceptible to receiving and transporting high loads of sediment.[39]Additionally, Bay City Creek (which flows directly to Lake Superior) is listed as impaired for Phosphorus on the Wisconsin CWA section 303(d) list.[40] EPA notes that the Application does not account for increased sedimentation and potential increased nutrient loading to Bay City Creek.

Recommendation: The Application should be revised to include more specific characterization of expected discharges of sediment to those waterbodies already impaired.

Secondary Impacts (40 C.F.R. § 230.10(c), 230.11(h))

The Application does not adequately discuss or account for secondary impacts as specified by the Guidelines. 40 C.F.R. § 230.11(h). Secondary impacts on an aquatic ecosystem are associated with the discharge of dredged or fill material, but do not result from the actual placement of the dredged or fill material. As proposed, the project would require the filling or converting of portions of wetlands that extend outside of the project footprint. In situations where a wetland would be partially filled or converted, EPA remains concerned that the remaining wetland acreage may experience declines in functions, values, and habitat quality; including but not limited to changes in hydrology and natural flow within the wetlands and spread of invasive species. Wetlands that are to be restored to "pre-existing conditions" will also face the challenges of the introduction of invasive species in their disturbed area, potentially spreading beyond the work area into the entire wetland complex. During the restoration process, native seed mixes or planted vegetation may exhibit genetic differences from vegetation onsite that could jeopardize the natives that have evolved to this site's specific microclimate, making the wetlands more vulnerable to degradation. Two plants that are the same technical species can originate thousands of miles apart and are adapted to exhibit different traits (*e.g.,* key phenotypic and phenological differences). These impacts would be multiplied every time planned, preventative, and emergency maintenance would occur. Additionally, the impacts to waterbodies resulting from proposed crossings will likely affect downstream resources. The Application does

---

[37] See U.S. EPA, How's My Waterway, Marengo River https://mywaterway.epa.gov/waterbody-report/WIDNR/WI10008273/2020; Trout Brook, https://mywaterway.epa.gov/waterbody-report/WIDNR/WI10005887/2020), last visited March 10, 2022.
[38] See WDNR, Nonpoint Pollution Webpage, Bad River Watershed Association, Marengo River Watershed Partnership Project, Watershed Action Plan, https://dnr.wi.gov/topic/nonpoint/documents/9kep/Marengo_Watershed-Plan.pdf, last visited March 10, 2022.
[39] Bad River Watershed Association, Marengo River Watershed Partnership Project, Watershed Action Plan, https://dnr.wi.gov/topic/nonpoint/documents/9kep/Marengo_Watershed-Plan.pdf, last visited March 10, 2022.
[40] See U.S. EPA, How's My Waterway, Bay City Creek, https://mywaterway.epa.gov/waterbody-report/WIDNR/WI6936105/2020), last visited March 10, 2022.

not clearly consider, describe, or analyze such indirect wetland or waterbody impacts, as required under the Guidelines.

Recommendation: The Application should be revised to include all of these indirect wetland and waterbody impacts. Additionally, we recommend that the Corps require monitoring of adjacent wetlands as a condition of the permit to determine the extent of secondary impacts and require additional mitigation if the analysis reveals adverse impacts to adjacent resources by the proposed activities.

The Application should be revised to specifically analyze the potential for effects to downstream waterbodies, such as, but not limited to, changes to the hydrogeomorphology and impacts of sedimentation and compaction from construction activities, to better determine if secondary impacts will occur to the remaining resources. Secondary effects to these downstream resources should be avoided and minimized to the maximum extent practicable. Should unavoidable secondary impacts remain, whether temporary or permanent, then EPA recommends additional compensatory mitigation be provided to offset those effects.

Secondary Impacts from Blasting (40 C.F.R. §§ 230.10(c), 230.11(h))

The draft Enbridge Blasting Plan (Blasting Plan) identifies 139 potential blasting areas, some of which may be required in-water. The Blasting Plan is general in nature. It currently does not address specific best management practices that would be employed at each blasting location to prevent irreversible damage to stream ecology and prevent migration of contaminants downstream that may result from the blasting. According to Enbridge, this is because "blasting for excavation or grading purposes is to be used only when deemed necessary by a construction expert after examination of the site and other reasonable means of excavation have been attempted and are unsuccessful in achieving the required results"[41] Any site-specific blasting plan would be submitted by the blasting contractors for Enbridge review. It does not appear that the Corps would have an opportunity to review each site-specific plan prior to blasting within federally jurisdictional wetlands and waterbodies. The Blasting plan states that:

> preliminary desktop reviews have been completed to identify subsurface conditions along the proposed route including soil types, rock outcrops, and bedrock formations. Upon review of these subsurface conditions, there have been locations identified where conventional trenching techniques will likely be inadequate, and blasting would potentially be required to install the pipeline…approximately 10 miles of blasting is assumed to be required for the Project, occurring mostly between construction mileposts 17 and 41.[42]

---

[41] Enbridge Line 5 Wisconsin Segment Relocation Project- Blasting Plan-Preliminary https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Enbridge/EnbridgeLine5/EIR_Att%20E_Blasting%20Plan.pdf?ver=SjZXYLC9eIeqjGkAsiNGbg%3d%3d, last visited March 10, 2022.

[42] Enbridge Line 5 Wisconsin Segment Relocation Project- Blasting Plan-Preliminary https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Enbridge/EnbridgeLine5/EIR_Att%20E_Blasting%20Plan.pdf?ver=SjZXYLC9eIeqjGkAsiNGbg%3d%3d, last visited March 10, 2022.

The Blasting Plan goes on to state that a "more accurate prediction of potential blasting locations will be available closer to the time of construction and when on-site geotechnical data is gathered and analyzed."[43]

EPA notes that a common blasting agent, ANFO, is a mixture of ammonium nitrate (AN) and fuel oil (FO). Nitrates and ammonium are readily soluble in water. Release of nitrogen compounds to surface and groundwater can contribute to spread of invasive species and harmful algal blooms. Elevated levels of nitrates can be toxic to aquatic freshwater fauna. Furthermore, in areas where wetlands occur in thin soils over impermeable bedrock, blasting can generate new preferential soil moisture movement and/or groundwater flow paths that can result in changes to wetland hydrology or even dewatering of wetland.[44]

Recommendation: The Application should be revised to discuss and account for potential secondary wetland and waterbody impacts from all of the proposed work. This includes the impacts from use of blasting. We also recommend that the Corps should condition the permit to require the Applicant to submit site-specific blasting plans where blasting would occur within federally jurisdictional wetlands and waterbodies.

4. **Cumulative Impacts and EPA Recommendations (40 C.F.R. §§ 230.10(c), 230.11(e) and (g))**

The Application does not adequately discuss cumulative impacts as specified in 40 C.F.R. § 230.11(g), which provides:

> Cumulative impacts are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems. Cumulative effects attributable to the discharge of dredged or fill material in WOTUS should be predicted to the extent reasonable and practical.

Section 7.3.3 *Water Resources*, of the Enbridge Line 5 Wisconsin Segment Relocation Project Environmental Impact Report (EIR) concluded that:

> the greatest potential for cumulative impacts would be with concurrent construction projects. Current other projects that may result in temporary water resource impacts that temporally overlap with the Line 5 Project include culvert replacement and resurfacing transportation projects, and trail expansion project and a broadband initiative project. Based on the temporary nature of the majority of the Line 5 Project impacts, the compensatory mitigation required for permanent Project impacts, and the limited

[43] Enbridge Line 5 Wisconsin Segment Relocation Project-Blasting Plan-Preliminary https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Enbridge/EnbridgeLine5/EIR_Att%20E_Blasting%20Plan.pdf?ver=SjZXYLC9eIeqjGkAsiNGbg%3d%3d, last visited March 10, 2022.

[44] Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 166. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022.

temporary impacts anticipated associated with concurrent projects in the region, construction and operation of the Project, when combined with other past, present, and foreseeable future projects, is not expected to result in significant cumulative impacts on water resources.[45]

The cumulative impacts analysis associated with water resources in the Application does not adequately address cumulative impacts, in part because it appears to mischaracterize many impacts as only being temporary in nature. The Application should be revised to provide a complete and thorough cumulative impacts analysis. Such an analysis will allow the Corps and EPA to make fully informed factual determinations about the project's compliance with the Guidelines. Included in the cumulative impact analysis should be the anticipated impact from the continuous disturbance of wetlands and waterbodies from construction and from planned, preventative, and emergency maintenance. The cumulative impacts analysis should include information about modifications to hydrology and degradation of water quality during and following construction and the associated consequences.

Recommendation: The Application should be revised to include a comprehensive evaluation of cumulative effects that will fully characterize the proposed watershed impacts, in addition to an inventory of specific measures that will be undertaken to avoid and minimize cumulative impacts resulting from this project.

5. Alternatives Analysis and EPA Recommendations (40 C.F.R. §§ 230.10(a) and 230.10(d))

Pipeline construction and installation does not require access to or siting within WOTUS to fulfill its basic purpose. Therefore, these activities are considered to be non-water dependent. The Guidelines provide that for non-water dependent activities, practicable alternatives which do not involve fill in WOTUS are presumed to be available unless clearly demonstrated otherwise in the application. Therefore, EPA looks to the Application to present a reasonable range of alternatives that avoid and minimize impacts to aquatic resources on-site. The amount of effort and detail in the analysis must be commensurate with the level of aquatic resources impacted. The Application presents several alternatives to the proposed reroute:

- No Action Alternative (no project alternative), including
  - continued transport of oil and gas through Line 5, and
  - discontinued transport of oil and gas through Line 5.
- System alternatives including switching to another existing pipeline, construct a new pipeline, and alternatives modes of transport including trucks, rail cars, and barges.
- Route Alternatives RA-01, RA-02, and RA-03.

The Guidelines provide the Corps and EPA with discretion for determining the necessary level of analysis to support a conclusion as to whether an alternative is practicable. Practicable alternatives are those alternatives that are "available and capable of being done after taking into

[45]Enbridge Line 5 Wisconsin Relocation Project-Environmental Impact Report https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Enbridge/EnbridgeLine5/L5R_EIR_Clean_2020-0316_Rev1.pdf?ver=I6YlkytZzDTVCc0lVdAumA%3d%3d, last visited March 10, 2022.

consideration cost, existing technology, and logistics in light of overall project purpose." 40 C.F.R. § 230.10(a)(2).

According to the public notice, the Environmental Protection Plan (EPP) describes planning, prevention, and control measures to minimize impacts resulting from spills of fuels, petroleum products, or other substances as a result of construction. Construction of the pipeline as proposed would use trenchless methods known as the HDD and guided bore methods, both collectively referred to as "drilling." Other than the proposed crossing of the White River, these methods do not require authorization from the Corps to cross wetlands or waterways.

The Applicant proposes to minimize wetland disturbance by reducing the construction right-of-way from 120 feet to 95-feet-wide in wetlands, where practicable, based on site-specific conditions. Additionally, the Applicant proposes to employ various protection measures to protect water quality during construction. Temporary erosion and sediment controls include but are not limited to, silt fence, straw bales, biologs, erosion control blankets, and slope breakers at site specific crossings. The Applicant also proposes to limit the duration of construction equipment operation within waterbodies to the area necessary to complete the crossing. Disturbed areas at waterway and wetland crossing would be restored and stabilized as soon as practical after pipeline installation. The EPP further outlines construction-related environmental policies, procedures, and protection measures to protect water quality.

Recommendation: First, as referenced in Section 3 above, the Application should be revised to more accurately quantify and characterize the impacts for each of the specific 72 federally jurisdictional waterbody crossings and present an alternative for each crossing or certain groups of crossings where arriving at the proposed method is determined to not be feasible in the field. While the determination of the use of the alternative crossing method will not be determined until construction, the use of such alternative methods could result in significant changes to waterbody impacts as proposed in the Application. This information is vital to evaluating compliance with the Guidelines.

Second, EPA recommends additional efforts, such as trenchless crossings, be employed to avoid and minimize impacts to the 14 streams that are either designated trout streams, tributaries to designated trout streams, and/or designated Area of Special National Resource Interest (ASNRI) streams by the WDNR, that are proposed to be crossed by the pipeline installation activities. These include:[46]

1. Beartrap Creek-sasb007i
2. UNT of Marengo River- sasd011p
3. UNT of Brunsweiler River- sasc1006p
4. UNT of Trout Brook- sasc1003p_x1
5. UNT of Silver Creek- sasd1015p
6. UNT of Silver Creek- sase005p_x2

[46] USACE Waterbody Crossing Table, https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Enbridge/EnbridgeLine5/USACE%20Waterbody%20Crossing%20Table%2020220222.pdf?ver=hnPBLFvuRp6ZHvfdU9G8Fw%3d%3d, last visited March 10, 2020.

7. UNT of Silver Creek- sasv004p
8. UNT of Krause Creek- sasv020p
9. UNT of Bad River- sasa008p
10. UNT of Gehrman Creek- sasa004p
11. Camp Four Creek- sasw005
12. UNT of Feldcher Creek- sirb010p
13. Feldcher Creek- WDH-103
14. UNT of Vaughn Creek- sird009p

EPA believes that using the HDD or other trenchless method for an expanded set of waterbody crossings may reduce sedimentation. Where the Application proposes HDD for waterbody crossings, the Application should also provide for thorough site analyses, including complete geotechnical analyses (ex. ground penetrating radar), boring tests, and fracture trace analyses to help prevent inadvertent returns of bentonite materials. EPA recognizes that sub-surface conditions are not entirely predictable, so it is imperative that the Applicant have a robust contingency plan in place to deal with inadvertent returns should they occur.

Finally, EPA recommends that the Applicant consider additional avoidance and minimization measures including further minimizing the width of the ROW in wetland and waterbody areas, consideration of bio-engineering techniques along with constructed features instead of riprap at all waterbody crossing restorations, and water-inflated cofferdams where damming may be necessary to divert flow.

6. Potential Significant Degradation of WOTUS and EPA Recommendations (40 C.F.R. § 230.10(c))

The Guidelines provide that no discharge of dredged or fill material shall be permitted if it will cause or contribute to significant degradation of WOTUS. 40 C.F.R. § 230.10(c). The Applicant proposes the permanent discharge of fill material into 0.02 acres of wetlands, temporary discharges of dredged or fill material into 101.08 acres of wetlands and 0.20 acres of non-wetland WOTUS. The proposed project includes plans to construct 72 crossings through federally jurisdictional waterbodies and impacts to 534 wetlands along the proposed route.

As noted in Section 1, wetlands provide numerous functions that benefit downstream water quality. These functions include storage of floodwater, recharge of ground water that sustains baseflow, retention and transformation of nutrients, metals, and pesticides, and export of organisms or reproductive propagules to downstream waters. Wetlands can be connected to downstream waters through surface-water, shallow subsurface-water, and groundwater flows and through biological and chemical connections.[47]

According to the WEPA DEIS prepared by WDNR, construction of a pipeline and associated clearing of vegetation would increase the risk of erosion and sedimentation in stream crossings.[48]

---

[47] U.S. Environmental Protection Agency. 2015. "Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence." EPA/600/R-14/475F.

[48] Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 196. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022.

"Impacts to fish and other aquatic species during construction and operation of the pipelines may include direct mortality from construction, habitat loss and alteration including increased sedimentation and turbidity, barriers to movement, and entrainment in construction water intakes."[49] Furthermore, "streambank erosion during construction has the potential to be a large contributor to downstream sedimentation and siltation."[50] EPA is concerned that the proposed activities may cause significant degradation by disrupting life stages of aquatic life, fish spawning, and wildlife dependent on these systems. Downstream, the Kakagon-Bad River Sloughs are home to many threatened and endangered species such as the piping plover, trumpeter swan, yellow rail, bald eagle, wood turtle, and ram's-head lady-slipper orchid.[51]

Recommendation: Robust site-specific pollution prevention plans, including best management practices for preserving aquatic resource integrity should be required for all waterbody and wetland crossings. These plans would ensure that the proper level of consideration is given to distinctively sensitive resources. We recommend these plans be provided prior to construction as a condition of the CWA section 404 permit.

7. Potential Violations of Federally Approved State and Tribal Water Quality Standards and EPA Recommendations (40 C.F.R. §§ 230.10(b)(1), 230.11(a) and (d))

The Guidelines state that "no discharge of dredged or fill material may be permitted if it causes or contributes, after disposal site dilution and dispersion, to violations of any applicable State water quality standards." 40 C.F.R. § 230.10(b)(1). Under the CWA, tribes who have been approved for Treatment in a Similar Manner as a State (TAS) under CWA section 303, 401, and 518, are treated in a similar manner as states for purposes of implementing the CWA section 303(c) program. Bad River Band has TAS for CWA sections 303, 401, and 518, and has federally approved WQS under section 303(c). Based on our review of the Application, we find that the Application does not adequately consider, mitigate, and address potential impacts to downstream State and Tribal federally approved WQS. Please reference Section 2 above for a discussion of the Bad River Band's Outstanding Tribal Resource Waters and Outstanding Resource Waters, and Wisconsin's Outstanding Resource Waters and Exceptional Resource Waters.

The Applicant proposes that the project cross non-wetland waterways using open cut (wet-trench), dry crossing (flume or dam-and-pump), and HDD methods of pipeline installation. The open cut and dry crossing methods result in temporary discharges of fill material into WOTUS. The White River, a navigable water of the United States and considered a unique and scenic high-quality trout stream and watershed[52], will be crossed via HDD. As mentioned above, blasting also may be necessary in areas with bedrock close to the surface.

---

[49] Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 221. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022.
[50] Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 197. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022.
[51] http://www.badriver-nsn.gov/natural-resources/threats/#:~:text=The%20Kakagon%2DBad%20River%20Sloughs,%2Dhead%20lady%2Dslipper%20orchid, last visited March 10, 2022.
[52] https://dnr.wisconsin.gov/topic/Lands/FisheriesAreas/2850whiteriverbayfield.html, last visited March 10, 2022.

Horizontal Directional Drilling

It is anticipated that fuels, oils, lubricants, and hydraulic fluids typically used for construction equipment, as well as drilling fluids could be introduced throughout the project site. The HDD drilling method includes the use of drilling fluid to lubricate the tunnel created by this method under a river. According to the public notice, drilling fluid consists primarily of water mixed with bentonite clay, and possibly also an additive. While normally this drilling fluid remains in the tunnel after installation, there is a potential for unexpected release of drilling fluid (drilling mud) into the soil during construction, which may migrate to the stream bed, exists.[53] Enbridge requires their contractors to implement a contingency plan should there be an inadvertent release, however they only list what the plan should include in their EPP, without any specific information about whether the Corps would have an opportunity to review the plans prior to pipeline construction:

- Procedure for notification of site, office, and Enbridge personnel
- Monitoring procedure for loss of circulation indicators
- Procedures for monitoring fluid pressure and ranges for acceptable annular pressure
- Decision points and procedures for suspending drilling operations
- Detailed descriptions of all monitoring (e.g., the annular pressure tool)
- An inventory of equipment and materials to be on-site for containment
- Containment methods in upland and wetland/waterbody locations[54]

The White River is the only federally jurisdictional waterway in which the HDD method is proposed to be used. Violations of state water quality standards for the White River may result if this method is permitted and not executed properly.

Blasting

As mentioned in Section 3 above, blasting may take place in approximately 139 areas along the pipeline route. Of the 22 WOTUS where blasting may be implemented in-water, five are listed as perennial tributaries to trout streams and two were listed as Class II trout streams. Nitrates and ammonium from the ANFO blasting agent are readily soluble in water. Release of nitrogen compounds to surface and groundwater can contribute to spread of invasive species and harmful algal blooms.[55] In areas where wetlands occur in thin soils over impermeable bedrock, blasting can generate new preferential soil moisture movement and/or groundwater flow paths that can result in changes to wetland hydrology or even dewatering of a wetland.[56]

---

[53] https://www.researchgate.net/publication/30481881_Review_of_environmental_issues_associated_with_horizontal_directional_drilling_at_water_crossings, last visited March 10, 2022.

[54] Enbridge Environmental Protection Plan https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Enbridge/EnbridgeLine5/EIR_Att%20D_Env%20Prot%20Plan.pdf?ver=RisLLyPzhZ7BubIEZzNEEA%3d%3d, last visited March 10, 2022.

[55] EPA, Harmful Algal Blooms, https://www.epa.gov/nutrientpollution/harmful-algal-blooms#cause, last visited March 10, 2022; EPA, Nutrient Pollution, https://www.epa.gov/nutrientpollution, last visited March 10, 2022.

[56] Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 166. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, March 10, 2022.

Conversion of forested wetlands to emergent wetlands

The conversion of 27.6 acres of forested wetlands to emergent wetlands may increase water temperatures. Removal of riparian vegetation could lead to increased light penetration into the waterbody, causing increased water temperature which could potentially impact fisheries.[57]

Cold Water Fishery stream crossings

The Potato River, Vaughn Creek, Billy Creek, and Tyler Forks Creek are designated as Cold Water Fishery (CWF) streams by the Bad River Band. These waterways support or have the potential to support the existence of CWF communities and/or spawning areas. For those waters designated as a CWF, no measurable increase in temperature from other than natural causes is allowed. [58] It is unclear whether water temperature monitoring is proposed in the application or would be required by the Corps as a permit condition.

Wisconsin's minimum limit for Dissolved Oxygen content in classified trout streams is listed as 7mg/L during the fish spawning season,[59] while Bad River Band has a more stringent Dissolved Oxygen minimum of 8mg/L for waters designated as a CWF during the early life stages of CWF. It is currently unknown whether the Corps will require monitoring for Dissolved Oxygen as a permit condition.

According to the draft EIS, construction could change the stream bottom profile, resulting in increased sedimentation or erosion at the site or further downstream. Additionally, wetland loss can lead to increased runoff, which in turn increases flooding and streambank erosion and may ultimately lead to habitat degradation from sedimentation. Removal of riparian vegetation could lead to increased light penetration into the stream, causing increased water temperature which could potentially impact fisheries.

Recommendation: The Application should be revised to include a monitoring plan with a network of real-time water quality monitoring stations to be installed upstream and downstream of river, stream, and wetland crossings, including on both State lands and, with the Bad River Band's approval, within the Bad River reservation, as a condition of a Corps permit. These monitoring stations ideally should be installed prior to construction to capture baseline data. Real-time water quality monitoring data should be made available to the public and accessible via a public website. At minimum, monitoring should continue until reestablishment of vegetation, or the wetlands have reverted to the original cover type. Monitoring stations should measure temperature, turbidity, specific conductance, pH, and dissolved oxygen, at a minimum. EPA also recommends that the Application be revised to include a plan for biological (fish and macroinvertebrate) sampling before, during and after pipeline installation activities at important waterbody crossings to monitor potential impacts to stream communities as a condition of a Corps permit. Furthermore, EPA recommends that a corrective action plan be developed as a condition of permit approval to address potential excursions of water quality standards or negative impacts to aquatic communities. EPA also recommends that any structures used in

[57] https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Enbridge/EnbridgeLine5/WI%20Permit%20App_02062020_Final_Redacted.pdf?ver=EW9ONJxUT69quLJzPx2Saw%3d%3d, last visited March 10, 2022.

[58] U.S. EPA, Bad River Band of Lake Superior Chippewa, Water Quality Standards, https://www.epa.gov/sites/default/files/2014-12/documents/bad_river_band_wqs.pdf, last visited March 10, 2022.

[59] Chapter 102: Water Quality Standards for Wisconsin Surface Waters https://www.epa.gov/sites/default/files/2014-12/documents/wiwqs-nr102.pdf, last visited March 10, 2022

constructing waterbody crossings should not impede/prevent the movement of aquatic life upstream or downstream and should be removed as soon as possible after construction is complete and after the area is restored. This should be included as a condition of the Corps permit.

Additionally, EPA recommends that the Corps include a condition in the permit that allows for review of the detailed HDD contingency plan prior to any HDD work.
Please see Section 3 above for recommendations regarding blasting activities.

8. Mitigation and EPA Recommendations (40 C.F.R. Part 230, 33 C.F.R. Part 332)

The Guidelines provide that an applicant must demonstrate that a sequence of steps will be followed to avoid and minimize impacts to the maximum extent possible and to compensate for any unavoidable losses. 40 C.F.R. § 230.10(d). Based on EPA's review of the Application, we believe the project as proposed does not adequately demonstrate all practicable avoidance measures were considered in accordance with 40 C.F.R. Part 230. As such, it is difficult to determine adequate compensatory mitigation at this time. While EPA has reviewed the proposed compensatory mitigation plan, we note that the plan does not provide any scientific evidence or rationale for use of the proposed mitigation ratios, nor does the mitigation plan explain how those ratios were developed or determined.

Recommendation: EPA recommends that a more comprehensive avoidance and minimization analysis be completed as part of the Application. Once this analysis is completed, EPA recommends that a more detailed and complete compensatory mitigation plan be developed as part of the Application. EPA requests review of the updated mitigation plan when it is provided to the Corps. Additionally, EPA has the following comments on the compensatory mitigation plan.

Lack of Pre- and Post- Work Condition Assessments

The Corps' public notice states that wetland areas temporarily impacted during construction would be restored to pre-construction contours and elevations. The Applicant proposes to provide compensatory wetland mitigation for project related permanent wetland fill, permanent conversion of scrub-shrub and forested wetlands to emergent wetlands, and temporal loss of wetland functions. Enbridge evaluated wetlands using the Wisconsin Wetland Rapid Assessment Method ("WRAM") value rating but opted out of the Floristic Quality Inventory (FQI) component of WRAM for each wetland.

While EPA understands that the Applicant attempted to provide conservative evaluations of resources that they propose to impact, omission of the FQI in the WRAM impedes assessment of pre- and post- work conditions. Assumption of quality is not a substitute for thorough assessment of the wetlands, and without an accurate assessment, the wetlands cannot be returned to pre-impact conditions. Open trenches are proposed for some high-quality wetlands that appear to be in a nearly unaltered state, free from invasive species. Based on the information in the Application, EPA was unable to identify a basis for assurance that the proposed work process will be able to return these high-quality wetlands to their original condition.

Recommendation: An FQI should be conducted for each wetland so that the diversity, quality, and community can be recreated and appropriately mitigated if they cannot be restored to pre-impact conditions.

Lack of Adequate Identification of High-Quality Wetlands

As stated in the WEPA DEIS prepared by WDNR, "detailed species composition on individual wetlands has not been reviewed for the proposed route or route alternatives. Therefore, a direct determination of high-quality based on species composition is not available."[60] Only dominant species were described. However, not every species that may be conservative, rare, or unique to these wetland systems will be a dominant species. Additionally, if only the dominant species are assessed in pre-impact conditions, restoration after impacts will only focus on those species and potentially decrease the diversity of those areas. As noted in the Bad River's Band's 2020 comment letter,[61] many species of plants are difficult to identify outside of a specific season (such as spring ephemerals) and outside of their blooming period (such as orchids).

Recommendation: The Applicant should ensure that the FQI is complete by making supplemental site visits during periods when difficult to identify species are most visible.

Lack of Secondary and Cumulative Impact Assessments

Additionally, FQIs are important to anticipate potential secondary and cumulative impacts as some wetland areas are expected to be continuously disturbed as maintenance and repair activities are anticipated to occur on the line and pose a threat of continued wetland degradation. The Guidelines require an accurate assessment of impacts to aquatic resources in order for the Corp and EPA to determine adequate compensatory mitigation.

Recommendation: EPA recommends that complete FQIs be taken to ensure that the effect of secondary cumulative impacts can be properly mitigated.

Wetlands Bank Credits

The Applicant proposes to compensate for the loss of wetland functions by purchasing wetland credits from the Poplar River Wetland Mitigation Bank and the Bluff Creek Wetland Mitigation Bank, both located in the Lake Superior Bank Service Area (BSA). The Applicant proposes purchasing a total of 33.35 mitigation credits, apportioned as 0.94 Palustrine Emergent (PEM) wetland credit, 2.39 credits Palustrine Scrub-Shrub (PSS) wetland credit, and 30.02 Palustrine Forested (PFO) wetland credit.
Applicant is proposing to purchase:

- 2.39 wetland bank credits for the 6.85 acres of temporary impact and 3.9 acres of permanent conversion of scrub-shrub wetlands

[60] Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 204. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022.
[61] Letter from Naomi Tillison, Natural Resources Director, Bad River Band, to Ben Callan, WDNR, July 11, 2020.

- 30.02 wetland bank credits for the 32.71 acres of temporary impact and 30.03 acres of permanent conversion of forested wetlands
- 0.94 wetland bank credits for 0.02 acres of permanent impacts to fresh wet meadow and 28.06 acres of temporary impacts to fresh wet meadow (24.65), sedge meadow (2.82), shallow marsh (0.28) and seasonally flooded basin (0.23).

The Guidelines require adequate compensatory mitigation to offset environmental losses resulting from unavoidable impacts to WOTUS and mitigation requirements must be commensurate with the amount and type of impacts associated with a particular permit. 40 C.F.R. § 230.93(a). The Mitigation Plan[62] does not provide any scientific evidence or rationale for use of the proposed mitigation ratios or how those ratios were developed or determined. The Mitigation Plan states that:

> the Line 5 Project will take place largely within new temporary workspace, which will be allowed to revert back to the preconstruction wetland type, and new permanent right-of-way, which Enbridge will maintain and convert from one wetland type to another in order to operate the proposed facilities. Only a small amount of permanent wetland loss will result from the Project. Based on this, and the mitigation ratio requirements from past projects, Enbridge has calculated proposed mitigation ratios for the Line 5 Project.

Recommendation: The Mitigation Plan should be revised to include a discussion of why the mitigation proposed, using the ratios identified, is considered a commensurate amount of compensation to offset the loss of function and quality of the impacted wetlands.

Lack of Compensation and Mitigation for each Proposed Waterbody Crossing

While the Application provided Stream Restoration Drawings and general channel remediation methods, no formal compensatory mitigation/waterbody restoration plans are being proposed for each of the 72 proposed federally jurisdictional waterbody crossings as part of the Application, despite anticipated functional losses that may occur during and post-construction. Considering physical, chemical, and biological functions will be lost during and post-construction (i.e. disrupted floodplain connectivity, disturbed groundwater and surface water interactions and waterbody flow dynamics, changes in water quality, temperature, nutrients, and disturbance to fish and macroinvertebrate communities due to waterbody changes and elimination of riparian buffer), compensatory mitigation for temporary impacts to waterbodies are necessary to offset any unavoidable adverse impacts to waterbodies and anticipated functional losses.

Recommendation: EPA recommends the Mitigation Plan include a scientifically based rationale for using the ratios proposed. An FQI should be calculated for each impacted wetland so that the diversity, quality, and community can be recreated and appropriately mitigated if they cannot be restored to pre-impact conditions. At minimum, the Mitigation Plan should include a discussion of why the mitigation proposed using the ratios identified is considered a commensurate amount of compensation to offset the loss of function and quality of the impacted wetlands. EPA also

[62] Enbridge Compensatory Wetland Mitigation Strategy, https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Enbridge/EnbridgeLine5/L5R_Mitigation_Plan_20211130.pdf?ver=ICqiMkh86AOT8LxF7Fi2aw%3d%3d, last visited March 10, 2022.

recommends the Corps require formal compensatory mitigation/waterbody restoration plans for impacts at all 72 federally jurisdictional waterbody crossings to ensure compliance with the Guidelines and consider mitigation for temporary impacts to waterbodies to offset any potential functional losses.

9. General Comments

Line 5 Pipeline Disposition within the Bad River Reservation

The WEPA DEIS prepared by WDNR, suggests removal of pipeline from the Bad River Band's Reservation will occur at the direction of Bad River pending the outcome of ongoing litigation between Bad River and Enbridge.[63] We believe removal, decommissioning in place, or a combination thereof, of the existing pipeline is connected to the rerouting of the pipeline.

Recommendation: EPA recommends that pipeline removal, decommissioning in place, or a combination thereof, be considered together with the proposed reroute and that these activities should be discussed with the rerouting as connected actions and part of a single project in the Corps' NEPA evaluation. Based on an initial scoping review and analysis in the WEPA DEIS prepared by WDNR, it appears the proposed action is likely to have significant direct, secondary, and cumulative aquatic resource impacts resulting from the pipeline removal and/or decommissioning. If the Corps is unable to identify measures to mitigate the impacts of the removal to less than significant, an EIS under NEPA may be required.

Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights

Bad River Band, Red Cliff Band, and Keweenaw Bay Indian Community have expressed concerns about the Enbridge Line 5 project in response to the WEPA DEIS prepared by WDNR,

---

[63] We note that the WEPA DEIS prepared by WDNR states:

> According to Enbridge, removal of the pipeline is outside the scope of their project and given the numerous considerations affecting the cost of removal, Enbridge was unable to provide a cost estimate for this hypothetical scope of work. Industry standard and Enbridge's past practice have been to leave decommissioned pipe undisturbed unless environmental circumstances require otherwise. Enbridge is obligated to remove certain segments of Line 5 on BIA trust parcels after easement expiration or two years of non-use. This would occur in consultation with interested landholders, and Enbridge anticipates leaving much of the pipeline in place after it is decommissioned. The remaining tracts have a perpetual easement and would remain in place after a reroute is constructed and operational. Enbridge has completed a desktop analysis of the environmental features that are crossed by the existing Line 5 pipeline within the Bad River Tribe's Reservation based from publicly available information. The results are provided below in Table 3.1-1. These features would be disturbed if the existing pipeline is physically removed from the Reservation. Some parcels that overlap segments of Line 5 within the Bad River Reservation are believed to hold a perpetual conservation encumbrance under the North American Wetlands Conservation Act (NAWCA), as these lands were acquired with grant funding or used as match during the early 2000's. Should the pipeline be removed within these parcels, the proposed land disturbance (wetlands and uplands) would need to be properly vetted through the U.S. Fish and Wildlife Service – Division of Bird Habitat Conservation to determine proper mitigation measures.

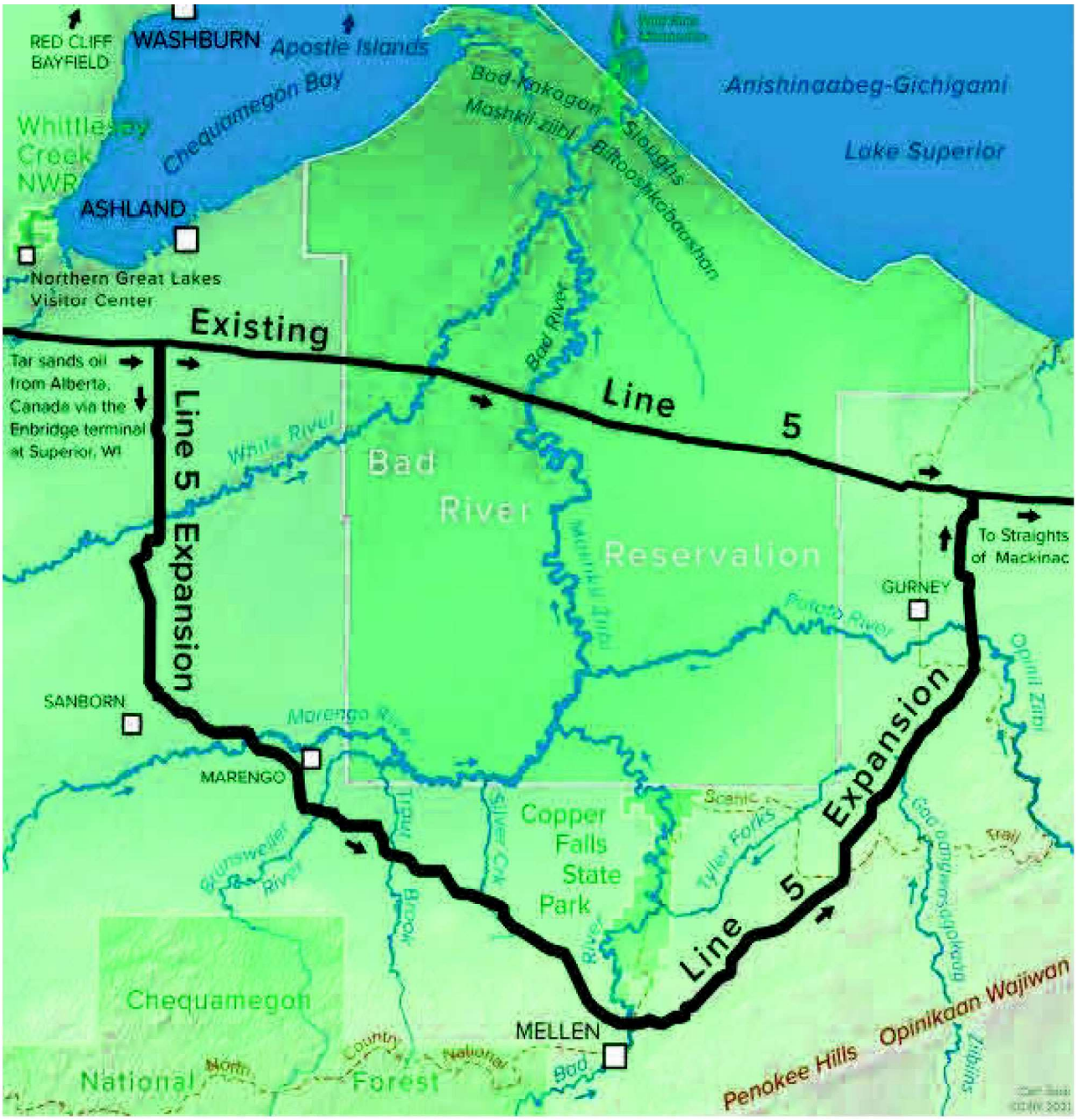
Draft Environmental Impact Statement: Proposed Enbridge Line 5 Relocation Project, December 2021, Vol. 1 at 61 and 231. https://widnr.widen.net/s/pmjdl6pbpd/el5_drafteis_dec2021_vol1-deis, last visited March 10, 2022.

public notice. EPA has had discussions with the Bad River Band regarding water quality concerns they have raised to WDNR and the Corps regarding this potential project.[64] We note that the Great Lakes Indian Fish and Wildlife Commission has also commented on the WEPA DEIS scoping document prepared by WDNR.[65] We note also that the Brothertown Indian Nation, a Native American people's group, has also commented.

Recommendation: EPA recommends that the proposed environmental impacts from this project on tribal nations and tribal treaty rights should be considered in the context of the 2021 *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Right*s (2021 MOU). Since the Department of Defense is a signatory to the MOU, we urge the Corps to "integrate consideration of tribal and reserved rights early into Parties' decision-making and regulatory processes to ensure that agency actions are consistent with constitutional, treaty, reserved, and statutory rights". We recommend that the Corps describe what actions it is taking to ensure that the permitting process for this project is consistent with the 2021 MOU. Specifically, the Corps should continue to engage in tribal consultation and perform a robust evaluation of potential impacts from this proposed project on reservation resources and reserved treaty rights in the 1837 and 1842 Treaty areas.[66]

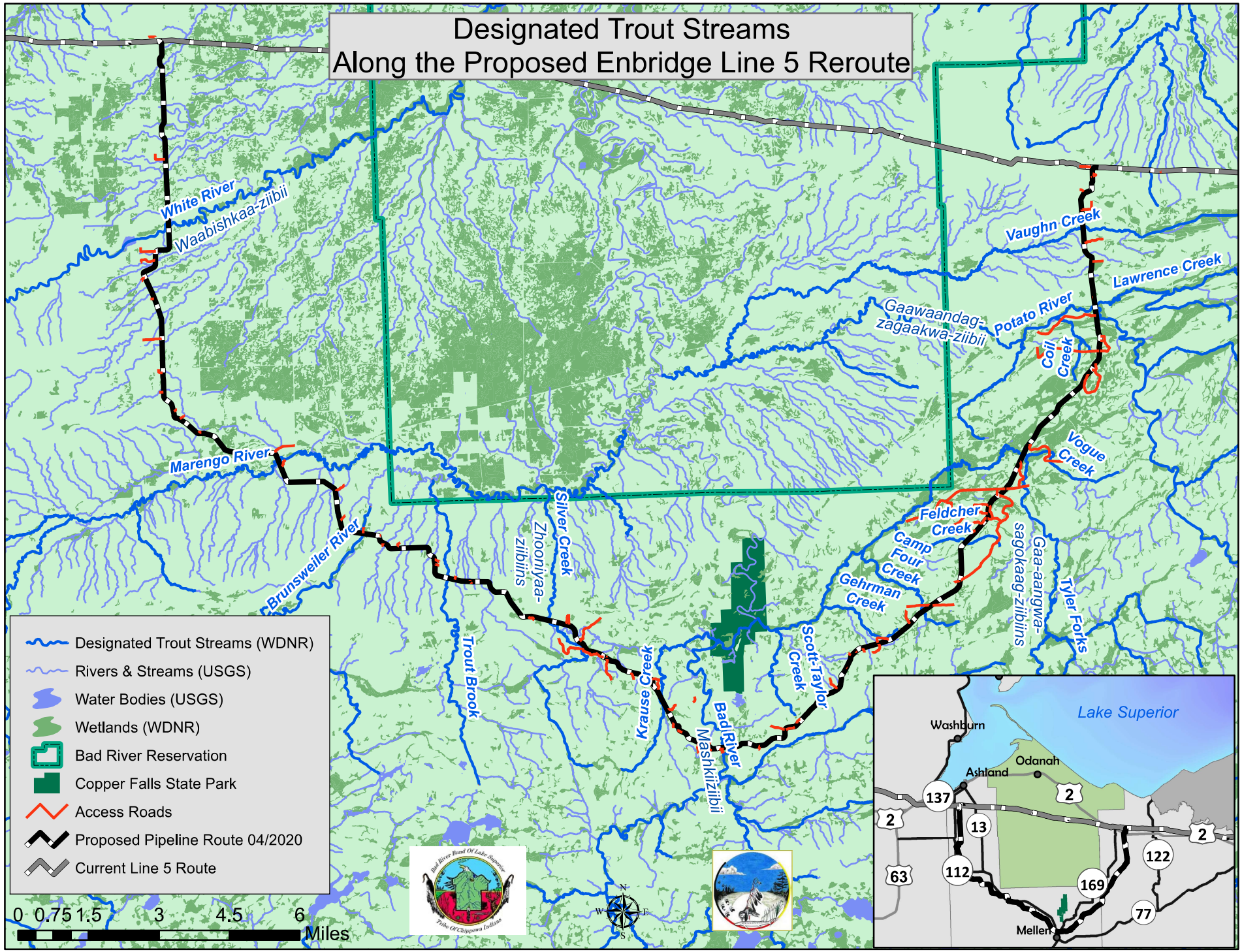
[64] https://widnr.widen.net/s/8gwlnwdcpb/enbridgel5badriverbandcommentsjuly2020, last visited March 10, 2022.
[65] https://widnr.widen.net/s/6jgp2nrqxv/enbridgel5glifwccommentsjuly2020, last visited March 10, 2022.
[66] https://glifwc.org/TreatyRights/TreatyChippewa07291837Web.pdf, and https://glifwc.org/TreatyRights/TreatyChippewa10041842Web.pdf, last visited March 10, 2022.

Enclosure 2-Overview of Line 5 Wisconsin Segment Relocation Project map courtesy of Carl Sack-GIS Faculty and Program Coordinator-Fond du Lac Tribal and Community College



MNRD WATER QUALITY STANDARDS REPORT

ATTACHMENT 3



Attachment 3 to MNRD WQS Report

MNRD WATER QUALITY STANDARDS REPORT

ATTACHMENT 4

Bad River Band Of Lake Superior Tribe Of Chippewa Indians

CHIEF BLACKBIRD CENTER Box 39 • Odanah, Wisconsin 54861

December 10, 2021

Secretary Preston Cole
Secretary
Wisconsin Department of Natural Resources (WDNR)
preston.cole@wisconsin.gov

Re: Draft EIS from WDNR for the Proposed Enbridge Line 5 Reroute in Northern Wisconsin

Dear Secretary Cole,

As a sovereign nation with regulatory authority over downstream waters within the Bad River Watershed, on-Reservation air quality, and an interest in the use and enjoyment of the sacred waters of *Anishinaabeg-Gichigami*, or Lake Superior, pursuant to treaties we signed with the United States, we are voicing our concerns related to the draft Environmental Impacts Statement (dEIS) prepared by the WDNR and their contractors on the potential Line 5 Reroute around the Bad River Reservation proposed by Enbridge Energy, LLC (henceforth, "company" or "applicant"). The Bad River Band of Lake Superior Tribe of Chippewa Indians (henceforth, "Tribe") is a federally-recognized Indian Tribe centered on the northern shores of Wisconsin and Madeline Island, where the Bad River Indian Reservation is located, but the Tribe also retains interest in ceded lands in Wisconsin, Michigan, and Minnesota. The proposed Line 5 Reroute falls within these ceded lands where the Tribe has retained usufructuary rights to use treaty resources. In addition, it threatens the water quality of the Tribe's waters downstream, over which the Tribe has regulatory authority as a sovereign nation and as delegated by the federal government under the Clean Water Act.

The staff of the Tribe's Mashkiiziibii Natural Resources Department (MNRD) have been charged with providing technical assistance to the Tribe in the protection, conservation, and management of Tribal natural resources, which includes those ceded resources. As such, I am submitting these comments after being updated by the MNRD that they alerted you that we would in an email on November 30, 2021. We believe these and other red flag issues raised from the initial tribal review of the dEIS *must* be addressed prior to a draft of the EIS being posted for public comment.

1. The information available in the document is incomplete and thus is inadequate to fully comment on the dEIS. First, the dEIS contains numerous omissions, outdated information, inaccuracies, grammatical, and typographical errors, and a failure to accurately describe the Tribe's Treaty Rights, Water Rights, and Regulatory Authority. This impedes the ability of the Tribe to properly assess and provide feedback on WDNR's assessment of the proposed project, as well as any member of the public's ability to assess and provide feedback on WDNR's assessment. Section 2 explains some of the omissions, outdated information, inaccuracies, grammatical and typographical errors. For this Section, following are two examples:

Telephone (715) 682-7123 ***Natural Resources Department*** Fax (715) 682-7118

- A significant amount of additional data submitted by the company that has key importance to environmental review was not appropriately publicly noticed, demonstrated by the noticeably incomplete and unfinished data in the previous public notices posted on the scoping of the draft EIS noted in the Tribe's July 10, 2020 Letter to WDNR.
- Importantly, and again, there is simply a failure to describe the Tribe's Treaty Rights, Water Rights, and Regulatory Authority described in the Tribe's July 10, 2020 Letter to WDNR, including references to specific fact situations adversely impacted by the proposed project. The Tribe described the following WDNR responsibility:
  - NR 150.04(2)(c) directs WDNR to develop agreements and understandings with federal agencies, where possible, "to minimize duplication in meeting environmental review requirements and establish a mechanism for resolution of interagency conflict." Here, where WDNR has not been delegated the authority for the United States to initiate consultation with the Bad River Band and a Federal Agency will be directly managing any regulatory activity none of Bad River or federal agencies with responsibilities for the safety and health of people and Treaty Rights and Water Rights and Uses, including safe drinking water, participated in meetings and review of draft chapters of the dEIS as a cooperating agency, though it was possible. That process importantly includes mechanisms or resolution of conflicts pursuant to agreements before public notice of a dEIS.

2. The dEIS currently includes either partial or out-of-date information or is lacking critical information in multiple sections throughout the document. Until information presented in the dEIS is updated and includes key pieces of information, it is impossible that the document can impartially present the information needed to fully understand the potential environmental impacts of the proposed project to the public. While we have not had time to complete a comprehensive review of the dEIS yet, there are some obvious areas where information is lacking, incorrect, or impartial (only presenting information from the company), including, but not limited to:

- Appendix H Wetland and Watercourse Crossing Maps contains outdated wetland delineation maps from the company revised 3/31/20, not even the newest version of the maps from 2020 which were published over a year ago. These maps show outdated route information, partial delineation information, and different access roads than submitted in subsequent documents. Additionally, it is our understanding that additional delineations are being requested by the Army Corps which might also alter current wetland numbers.
- The dEIS misrepresents impacts to threatened and endangered species along the proposed reroute, especially Braun's holly fern (BHF), of which only two occurrences were noted in the document, with the occurrence on public lands (where it is protected) as being outside of the proposed workspace. However, when reviewing the company's wetland delineation data we found a wetland rapid functional assessment that notes BHF and we visited that wetland in the field in 2021 and found two plants growing immediately on top of the proposed centerline (i.e., within the workspace). Additionally, we found at least 35 other individuals on public lands within or adjacent to the proposed workspace—many of which were clearly within the "survey area" according to Enbridge.
- The dEIS indicates that there is no "critical habitat" meeting the S1 and S2 designation for Wisconsin within the wetland areas being proposed for impact. However, field work and review of the company's data suggest that there may be wetlands that meet the definitions of "Mesic Floodplain Terrace," "Forested Seep", or "Clay Seepage Bluff" which are all S2 designations, so we believe that this warrants further investigation before a dEIS is published claiming all wetlands impacts will be to S3 or less important communities.

Telephone (715) 682-7123 *Natural Resources Department* Fax (715) 682-7118

3. The dEIS lacks acknowledgement and consideration of Bad River Band's Treatment as a State ("TAS") status under the Clean Water Act (CWA) and lacks a comprehensive assessment of potential impacts to the Tribe's downstream waters, including evaluating whether impacts would meet the Tribe's federally-approved Water Quality Standards (WQS). In Section 10.1 where the dEIS lists "Consistency with Other Plans and Policies" there is no mention of compliance with the Tribe's WQS. The mention of tribal TAS under CWA in Section 1.6.3.2 "Authority under the Clean Water Act" is very vague and does not go into detail regarding the Tribe's downstream authority or standards. Section 1.6.3.2.1 "Downstream Status (Bad River Reservation)" confusingly discusses the Tribe's decision and efforts to remove the illegally-operating pipeline from the Reservation and Watershed but fails to mention that Bad River Tribe has TAS for purposes of setting and implementing water quality standards (including CWA Section 401 certifications), much less include an analysis of the proposed project on tribal waters. It also fails to mention that the Tribe has EPA-approved WQS in place. The EPA-approved WQS apply to activities upstream which might impact waters within the Reservation, which include the proposed project (see Tribe's Water Quality Certification and Water Quality Review Code (Chapter 324), Tribe's WQS at http://www.badriver-nsn.gov/wp-content/uploads/2020/01/NRD_WaterQualityStandards_2011.pdf, and *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001)). As such, the proposed project's potential impact to the Band's established and codified water quality must be assessed. Not only should the Tribe's WQS be discussed in Sections 1 and 10, but also previous sections related to potential impacts to water quality.

These shortcomings should be addressed before this document is released to the public to allow for adequate disclosure of the potential consequences of the project and additional commenting by the public and by tribal technical staff. A very cursory review of the proposed dEIS demonstrates that greater collaboration and consultation with the Bad River Tribe is needed to remedy these insufficiencies. Please note that the WDNR can expect the Bad River Tribe to also reach out on the dEIS further on a government-level, as we are currently commenting related to items we have been briefed on by technical staff. Additionally, our "red flag" comment and review does not include all the final comments that we will have on the dEIS, technical or otherwise. If you have any follow-up questions on this letter, please contact our Natural Resources Director, Naomi Tillison, at nrdirector@badriver-nsn.gov or our Environmental Specialist, Jessica Strand, at environmental@badriver-nsn.gov.

Sincerely,

Michael Wiggins, Sr.
Tribal Chairman
Bad River Band of Lake Superior Tribe of Chippewa Indians

CC: Ben Callan, WDNR
Adam Mednick, WDNR
Gregory Pils, WDNR
David Siebert, WDNR
Todd Ambs, WDNR
Paul Winters, EPA

Telephone (715) 682-7123 *Natural Resources Department* Fax (715) 682-7118

MNRD WATER QUALITY STANDARDS REPORT

ATTACHMENT 5

WATER QUALITY CERTIFICATION AND WATER QUALITY REVIEW CODE OF THE BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS

CHAPTER 324

TABLE OF CONTENTS

Section 324.1: Definitions

Undefined terms that are defined in the Tribe's Water Quality Standards shall have the meaning assigned to them in that document.

(a) **"Clean Water Act"** (CWA) means the Federal Clean Water Act, 33 U.S.C. § 1251 et seq. (1972), as amended.

(b) **"Council"** or **"Tribal Council"** means the governing body of the Bad River Band of the Lake Superior Tribe of Chippewa Indians.

(c) **"Director"** means the Director of the Tribe's Natural Resources Department.

(d) **"EPA"** means the U.S. Environmental Protection Agency.

(e) **"General Permits"** means any and all Nationwide, Regional, General, and other permits written to cover multiple dischargers or activities that are similar in nature issued by the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, and the Wisconsin Department of Natural Resources.

(f) **"General Permit Review"** means review of any and all general permits as defined above.

(g) **"Groundwater"** means the supply of fresh water found beneath the Earth's surface, usually in aquifers.

(h) "**Minimal Impacts to Water Quality**" means that the proposed activity is shown by clear and convincing information to not cause any substantial water quality impacts to Reservation Waters and to have a high likelihood of complying with the Tribe's Water Quality Standards.

(i) **"Off-Reservation"** means all lands and waters outside of the exterior boundaries of the Tribe's Reservation.

(j) "**Public Emergency**" means a serious or dangerous situation that requires expedited action to avoid endangerment to human health, public safety or the environment, or to reestablish needed public services, which includes but is not limited to, extreme flooding conditions, wildfires, and tornadoes.

(k) **"Reservation"** means the Tribe's Reservation, described in the Treaty of 1854 as follows: *Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-Che-se-be-we-she, running thence south to a line drawn east and west through the centre of township forty-seven north, thence west to the west line of said township, thence south to the southeast corner of the township forty-six north, range thirty-two west, thence west the width of two townships, thence north the width of two townships, thence west one mile, thence*

north to the lake shore, and thence along the lake shore, crossing Shag-waw-me-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground. Ke-Che-se-be-we-she is presently known as Graveyard Creek and Shag-waw-me-quon is now commonly spelled Chequamegon Point.

(l) **"Reservation Waters"** means any surface water or groundwater located within the exterior boundaries of the Reservation.

(m) **"State"** refers to the State of Wisconsin and any other state that may issue proposed permits for activities that involve discharges that may affect Reservation waters.

(n) **"Surface Water"** includes all water naturally open to the atmosphere above the surface of the ground including but not limited to rivers, lakes, reservoirs, ponds, streams (including intermittent streams), impoundments, and wetlands. Surface water does not include waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria for this definition).

(o) **"Tribe"** and/or **"Tribal"** refers to the Bad River Band of the Lake Superior Tribe of Chippewa Indians.

(p) **"Tribe's Water Quality Standards"** means the water quality standards that apply to Reservation Waters that were adopted by Resolution No. 7-6-441 of the Tribe and which may be modified from time to time by the Tribe.

(q) **"USACE"** means the United States Army Corps of Engineers.

(r) **"Usufructuary Rights"** means the right for tribal members to use and enjoy the land and its resources.

(s) **"Water Quality Certification"** means certification under CWA Section 401(a)(1) that a proposed project or activity for which a federal license or permit is required is not expected to cause a violation of relevant water quality standards.

(t) **"Water Quality Review"** means a review of: (1) whether a discharge originating Off-Reservation may affect the quality of Reservation waters and potentially cause or contribute to non-compliance with the Water Quality Standards; or (2) whether a proposed General Permit adequately protects the quality of Reservation Waters.

(u) **"Water Quality Standards"** are standards that consist of a designated use or uses for the waters, water quality criteria for such waters, an anti-degradation policy, and other policies or standards.

(v) **"WDNR"** means the Wisconsin Department of Natural Resources.

(w) **"WDNR/EPA Memorandum of Agreement**" means the Memorandum of Agreement between the State of Wisconsin Department of Natural Resources and United States Environmental Protection Agency, Region V," approved February 4, 1974.

(x) **"Wetlands"** means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, sloughs, and similar areas.

(y) **"WRP"** means the Water Resources Program operating within the Tribe's Natural Resources Department.

(z) "WQS" means the Tribe's Water Quality Standards.

Section 324.2: Authority

This Code is enacted pursuant to the Tribe's inherent sovereign authority. The Tribe has a primary interest in the protection, control, conservation, and utilization of Reservation Waters, as exemplified in the Bad River Constitution and recognized by EPA when it granted the Tribe's application for treatment-as-state authority to develop and implement the Tribe's Water Quality Standards. The program authority granted by EPA is in addition to the Tribe's historic hunting, fishing, gathering, and usufructuary rights and its treaty rights. This Code shall not be construed to annul those independent Tribal rights, including the right to sufficient quantities and quality of water to support the flora, fauna, and cultural traditions of the Tribe.

Section 324.3: Purpose

Protecting the Reservation Waters is a primary goal of the Tribe. Water pollution endangers the health and welfare of Tribal members and residents of the Reservation. This Code establishes procedures and standards for the review of applications for Tribal Water Quality Certifications under CWA Section 401(a)(1), Tribal Water Quality Reviews under CWA Section 401(a)(2), and Tribal Water Quality Reviews of proposed federal and state permits that may affect the waters of the Bad River Reservation. This Code also establishes procedures for the Tribe's

review of federal and state general permits for their consistency with the Tribe's Water Quality Standards[1].

Section 324.4: Delegation and Scope of Responsibility of the Bad River Water Resources Program

(a) Responsibility. WRP shall have primary responsibility for the processing and initial review of applications for Tribal Water Quality Certifications as provided for under CWA Section 401(a)(1), Tribal Water Quality Reviews under CWA Section 401(a)(2), and Tribal Water Quality Reviews for proposed federal and state permits for Off-Reservation discharges that may affect Reservation Waters.

In performing their duties under this Code, the WRP and the Director may consult with other Tribal agencies, including the Tribal Historic Preservation Office, as appropriate.

(b) Discharges that Originate on the Reservation – Federal Permits. The Tribal Council is authorized to issue Tribal Water Quality Certification(s) to any applicant for a federal permit or license for discharges that originate or will originate within the Reservation. This authority pertains to all activities within the external boundaries of the Bad River Reservation regardless of land ownership. Non-Tribal as well as Tribal members are required to obtain a Tribal Water Quality Certification for discharges within the exterior boundaries of the Bad River Reservation.

(c) Off-Reservation Discharges that may Affect Reservation Waters – Federal Permits. The Director is authorized to communicate with the federal government regarding concerns with or objections to discharges that may affect Reservation Waters, to request a hearing with regard to such discharges, and to appear on behalf of the Tribe at such hearings.

(d) Off-Reservation Discharges that may Affect Reservation Waters – State Permits. The Director is authorized to communicate with the State where a potential discharge may originate and with EPA regarding concerns with or objections to potential discharges that may affect Reservation Waters, to request hearings with regard to such discharges, and to appear on behalf of the Tribe at such hearings.

---

[1] This Code does not address the review of proposed state licenses or permits for discharges on the Bad River Reservation because the state does not have the legal authority to issue licenses or permits on the Bad River Reservation.

(e) Permits and Licenses Reviewed. The Tribe's Water Quality Certification reviews and Water Quality Reviews shall be conducted to assess potential impacts to Reservation Waters associated with activities under proposed federal or state permits or licenses including, but not limited to, the following:

(1) "Dredge & Fill" Permits under CWA Section 404 including Nationwide Permits, General Permits, Letters of Permission, and Individual Permits;

(2) Discharge Permits under CWA Section 402 including all permits for discharges from point sources and permits for industrial and construction activities disturbing one (1) or more acres;

(3) Federal Energy Regulatory Commission hydropower licenses and related approvals;

(4) Rivers and Harbors Act § 9 and § 10 permits for activities that have a potential discharge into navigable waters;

(5) State Pollution Discharge Elimination System permits;

(6) State storm water permits;

(7) State permits regarding wetland impacts;

(8) State high-capacity well permits;

(9) State General Permits when adoption of such a permit may affect the quantity or quality of Reservation Waters.

Section 324.5: Reservation of Rights

The Tribe reserves the right to amend or repeal all or any part of this Code at any time. There shall be no vested private right of any kind created by this Code. All the rights, privileges, or immunities conferred by this Code or by acts done pursuant thereto shall exist subject to the power and determinations of the Tribe. Nothing in this Code shall be construed to constitute a waiver of the sovereign immunity of the Tribe or consent to the jurisdiction of any government or forum not expressly authorized to exercise jurisdiction under this Code.

Section 324.6: Interpretation

The provisions of this Code shall be interpreted in a manner that is consistent with the Tribe's Water Quality Standards, as now or hereafter amended, and with applicable provisions of the

CWA and its regulations. The provisions of this Code shall be interpreted in a manner consistent with the Tribe's conservation ethic, its history and culture of revering pure water as sacred, and its peoples' dependence on the health of the Reservation Waters including for securing food, medicine, and protecting the Tribe's political integrity, economic security, and health and welfare.

Section 324.7: Procedures for the Evaluation of Tribal Water Quality Certification Requests

The Tribe shall evaluate requests for Tribal Water Quality Certification under CWA Section 401(a)(1) according to the following process:

(a) Applications. Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge that originates on the Reservation, shall obtain Water Quality Certification from the Tribe. The WRP shall advise the USACE, EPA, and other federal agencies with jurisdiction in any such permit or license to direct applicants to submit application materials to the WRP and to otherwise comply with the applicable terms of this Code.

(b) Certification Request. Applicants shall request Water Quality Certification from the Tribe by sending a written application to the WRP at the following address:

Bad River Natural Resources Department
Attn: Water Resources Specialist
PO Box 39
Odanah, WI 54861

wqs@badriver-nsn.gov

(c) Application Contents. The application shall include the following:

(1) The name, address, telephone number, facsimile number, and email address of the applicant;

(2) A complete and accurate description of the applicant's proposed activity including any engineering or hand-drawn plans of the project site;

(3) A complete and accurate description of the potential discharge or discharges into or drawdown of groundwater or surface water that may result from the activity, including, but not limited to: potential discharges from the construction or operation of a facility; potential effects of pumping of groundwater or surface water; potential biological, chemical, thermal, physical (e.g., quantity), and other

characteristics and concentrations of the discharge; the location at which such discharge may enter groundwater or surface water;

(4) A complete and accurate description of the function and operation of equipment or facilities to treat or reduce wastes or other effluents that may be discharged including specification of the degree of treatment expected to be attained and any other actions taken to reduce or mitigate the proposed activity's effect on groundwater or surface water quality or quantity;

(5) The dates when the activity is proposed to begin and end, as well as the dates when the proposed discharge or draw-down will take place;

(6) A complete and accurate description of the methods and means being used or proposed to monitor the quality and quantity of the discharges or drawdowns, the operation of equipment or facilities employed in the treatment or control of wastes or other effluents, and effects of the discharges on ground water or surface water quality and quantity;

(7) A complete and accurate description of the potential impact of the discharge on Reservation water;

(8) A complete copy of the application for a federal permit or license;

(9) Other information relevant or important to the Tribe's consideration of its request, including a proposed Reduced Timeline (defined below) if the applicant believes it meets the requirements as provided in Section 324.7.h;

(10) Confirmation that the applicant shall provide the WRP access, if requested, for an inspection and review of any lands, waters, or facilities under the applicant's control relevant to the Tribe's review of the application;

(11) Any additional information required for an antidegradation analysis under the Tribe's WQS; and

(12) Any other information requested by the WRP as reasonably needed for its review of the application.

(d) Application Review. Upon receipt of the application the following reviews shall be conducted:

(1) Administrative Review: The WRP shall review the application for completeness and accuracy. If the WRP determines that the application is incomplete or inaccurate, or that additional information is required to analyze whether the proposed activity will cause or contribute to a violation of the Tribe's WQS, the WRP shall request the relevant additional or corrected information from the applicant within forty-five (45) days of the receipt of the application. If the WRP

determines that the application is complete and accurate, it shall issue a Public Notice for the application for Water Quality Certification (the "Comment Period") in accordance with the Bad River Band of Lake Superior Chippewa's Administrative Procedure: Notice of Intent to Adopt a Code or Availability of Draft Environmental Review Statement. All comments received by the WRP will be reviewed by the WRP. Comments may be sent to the applicant for a satisfactory response using the contact information provided by the applicant. The applicant shall submit its responses to the comments to the WRP.

(2) Technical Review: The WRP will conduct a technical review of the application materials and the applicant's responses to comments to evaluate whether the proposed activity will cause or contribute to a violation of the Tribe's Water Quality Standards (the "Technical Review"). If necessary or advisable, the WRP shall inspect lands, waters, or facilities relevant to its technical review of the application materials.

(e) Recommendation. At the end of the Technical Review, the WRP will make a Recommendation to the Director regarding the application together with the basis of that recommendation (the "Recommendation"). The Recommendation will be either to: (1) grant the Tribal Water Quality Certification unconditionally; (2) grant the Water Quality Certification with such conditions necessary or advisable to ensure compliance with the Tribe's WQS; or (3) deny the Water Quality Certification. The Director will then issue one of the three recommendations to the Tribal Council (the "Director's Concurrence"). The Director's Concurrence shall include a statement of the basis for the recommendation. The WRP shall present a copy of the Director's Concurrence to the Tribal Council.

(f) Decision. Within thirty (30) days of the Director's Concurrence, the WRP shall present the Recommendation to Tribal Council during a public meeting. Unless the Council asks the WRP for additional information that would take additional time to compile, at this meeting the Council will issue one of three Decisions (the "Decision"): (1) grant the Water Quality Certification unconditionally; (2) grant the Water Quality Certification with such conditions necessary or advisable to ensure compliance with Tribe's Water Quality Standards; or (3) deny the Tribal Water Quality Certification. After the Decision is reached, the WRP shall deliver a copy of the Tribal Council's Decision to the EPA, the federal permitting or licensing agency, and the applicant.

(g) Timeline. It is anticipated that the comment period, technical review, recommendation, and decision outlined in this Section 324.7 shall be completed within six (6) months of the receipt of an application (the "Timeline"). However:

i. If the applicant needs time to respond to WRP requests for additional or corrected information, or if the applicant does not respond within thirty (30) days to public comments, the six (6) month timeframe shall be extended by an amount equal to the time taken by the applicant for these purposes;

ii. If the Tribal Council asks the WRP for further information after the Recommendation has been presented, then the six (6) month timeframe shall be extended by an amount equal to the time needed to gather such information; or

iii. If the Tribe will not issue its decision within six (6) months, it shall so notify the EPA, the permitting or licensing agency, and the applicant. Such notification shall state that the Tribe is not waiving its right to make a decision regarding the request for Water Quality Certification and shall provide a revised timeframe for that decision.

(h) Reduced Timeline. The WRP shall determine if, and the extent to which, an applicant qualifies for a Reduced Timeline ("Reduced Timeline") within five (5) days of receipt of the applicant's application if the applicant includes in its application a proposed reduced time period for the Timeline. The Reduced Timeline may include reducing the time period for the Comment Period as described in Administrative Procedure Section 118.3.a.iii. and for the Applicant Review, Recommendation, and Decision. To qualify for a Reduced Timeline, applicant must demonstrate (1) the applicant has not unduly delayed submitting its application causing a need for a Reduced Timeline, and (2) the need for a Reduced Timeline arises out of at least one of the two following situations:

i. The proposed activity has been mandated by a Tribal or Federal order; or

ii. The proposed activity is in response to a Public Emergency and requires immediate authorization to avoid imminent endangerment to human health, public safety, or the environment, or to reestablish essential public services.

For activities that qualify under Section 324.7.h.ii or Section 324.7.h.iii, the applicant may request that the Director, rather than the Tribal Council, make the Decision, and for there to be no Director's Concurrence. In reviewing the proposal for a Reduced Timeline, the WRP or Director will decide to either: (1) adopt the proposed Reduced Timeline provided by the applicant; (2) set a different Reduced Timeline; or (3) not implement a Reduced Timeline.

(i) Reapplication Process. If an applicant disagrees with the determination of the Tribal Council, the applicant may reapply for Tribal Water Quality Certification. The applicant may choose to significantly alter the proposed project to avoid, minimize, and/or mitigate for the impacts to water resources that facilitated the Tribal Council's Decision. All reapplications shall follow the process set forth in this Section 324.7 for applications for Water Quality Certification.

Section 324.8: Inspection of a Facility or Activity that Does Not Require an Operating License or Permit

(a) Inspection of a facility or activity that does not require an operating license or permit. Where any facility or activity has received a Water Quality Certification pursuant to Section 324.7 in connection with the issuance of a license or permit for construction, and where such facility or activity is not required to obtain an operating license or permit, the WRP shall be afforded the opportunity to inspect such facility or activity prior to its initial operation for the purpose of determining if the manner in which such facility or activity will be operated or conducted will violate the WQS.

(b) Notification to licensing or permitting agency. After an inspection pursuant to Section 324.8.a, the WRP shall make a recommendation to the Director regarding whether operation of the proposed facility or activity will violate the WQS. If the Director determines that operation of the proposed facility or activity will violate the WQS, he or she shall so notify the applicant and the licensing or permitting agency and shall include recommendations as to remedial measures necessary to bring the operation of the proposed facility or activity into compliance with such standards.

(c) Termination of suspension. Where a licensing or permitting agency, following a public hearing, suspends a license or permit after receiving the Director's notice and recommendation pursuant to Section 324.8.b, the applicant may submit evidence to the Director showing the facility's or activity's operation or conduct thereof has been modified so as not to violate the WQS. If the Director determines that WQS will not be violated, he shall so notify the licensing or permitting agency.

Section 324.9: Review of a Facility or Activity that Requires a Separate Operating License or Permit

(a) Review of a facility or activity that requires a separate operating license or permit. If the WRP received notice of a federal license or permit—or renewal of a federal license or permit—required for the operation of a facility or activity that has received a Water Quality Certification with respect to the construction, the WRP shall review such notice and request any information needed to determine whether the operation of the facility or activity under the license or permit will comply with the WQS. Within the time allotted by the relevant federal regulation, and after reviewing relevant information, the WRP shall make a recommendation to the Director regarding whether or not there is reasonable assurance that there will be compliance with the WQS because of changes since the construction license or permit certification was issued regarding:

(i) the construction or operation of the facility or activity;
(ii) the characteristics of the waters into which such discharge is made;
(iii) the water quality criteria applicable to such waters; or
(iv) applicable effluent limitations or other requirements.

Within the time allotted by the relevant federal regulation, the Director shall notify that agency if he or she determines that there is no longer reasonable assurance that there will be compliance with the WQS.

Section 324.10: Water Quality Review Procedures for Discharges that Originate Off-Reservation (Federal Permits/Licenses)

The Tribe shall evaluate requests for Tribal Water Quality Review under CWA Section 401(a)(2) regarding proposed federal licenses or permits pertaining to discharges originating Off-Reservation that may affect Reservation Waters pursuant to the following procedures:

(a) Notification. The EPA, USACE, and other federal agencies shall notify the WRP if a permit or license is requested, including coverage under a General Permit, for a discharge that originates Off-Reservation and may affect the quality of Reservation Waters.

(b) Monitoring. To the best of the WRP's ability given resource and time constraints, the WRP shall monitor proposed federal permits or licenses relating to discharges that originate Off-Reservation and may affect Reservation Waters. If the WRP learns of such proposed permits, licenses, or such discharges, the WRP shall contact the EPA and the permitting or licensing agency to indicate the potential effect on Reservation Waters and therefore that the requirements of this Code and CWA Section 401(a)(2) must be met.

(c) Completeness Determination. Upon receipt of notification from a federal agency or otherwise becoming aware of a potential discharge that originates Off-Reservation that may affect Reservation Waters, the WRP shall evaluate the completeness and accuracy of the available information regarding the proposed discharge. If any information needed to evaluate the potential impact of the proposed discharge on Reservation Waters is not available to the WRP, it may request that information from EPA, the federal permitting or licensing agency, or the applicant.

(d) Water Quality Review, Recommendation, and Decision. The WRP shall conduct a Water Quality Review to analyze whether the proposed Off-Reservation discharge will result in a violation or violations of the Tribe's WQS or may adversely affect the quality of Reservation Waters, and will provide a recommendation to the Director regarding how to respond to the application and the basis for that recommendation. The Director will then make one of two decisions:

i. To notify EPA and the permitting or licensing agency that the Tribe does not object to the issuance of the permit or license; or
ii. To notify EPA and the permitting or licensing agency of the Tribe's objection to the issuance of the permit or license for the Off-Reservation discharge and

the basis for such objection. The objection will be in writing and will include a request for a public hearing on the matter.

In accordance with CWA Section 401(a)(2), the Director's decision regarding whether a proposed Off-Reservation discharge will affect Reservation waters in a manner that will violate the Tribe's WQS shall be made and communicated to the EPA and the permitting or licensing agency within sixty (60) days of receipt of notification of the proposed Off-Reservation discharge.

(e) Communication Regarding Objection. In the event that the Director communicates an objection to the EPA, the Director or the WRP shall appear at any public hearing held related to the objectionable permit or license and shall provide such written or verbal information as they determine necessary or advisable to protect Reservation Waters.

Section 324.11: Water Quality Review Procedures for Discharges that Originate Off-Reservation (State Permits/Licenses)

The Tribe shall make determinations and provide notifications regarding proposed state licenses or permits pertaining to Off-Reservation discharges that may affect Reservation Waters, as provided under the 1974 WDNR/EPA Memorandum of Agreement, pursuant to the following process:

(a) State Provision of Information. The WRP shall request that the State provide it with: (1) water-quality-based-effluent-level memoranda used to prepare the proposed permit decisions when those memoranda are prepared; and (2) copies of the proposed permit decisions at the same time they are provided to applicants. If possible, the Tribe shall enter into a Memorandum of Understanding or other agreement with the State for it to provide the above documentation to the Tribe on the above schedule.

(b) Applications. The State shall provide the WRP copies of the proposed permit decisions, including decisions regarding coverage under a General Permit or issuance of an Individual Permit, no later than when proposed permit decisions have been publicly noticed.

(c) Review Requests. The State shall provide notification of the proposed permits to be reviewed to the WRP at the following address:

Bad River Natural Resources Department
Attn: Water Resources Specialist
PO Box 39
Odanah, WI 54861
wqs@badriver-nsn.gov

(d) Monitoring. To the best of the WRP's ability given resource and time constraints, the WRP shall monitor proposed state permit processes relating to discharges that may affect Reservation waters. If the WRP learns of such proposed permits, the WRP shall contact the State and EPA to indicate the potential effect on Reservation waters and therefore that the requirements of this Code and the WDNR/EPA Memorandum of Agreement must be met.

(e) Completeness Determination. Upon receipt of notification from the State or otherwise becoming aware of a proposed permit related to a discharge that may affect Reservation Waters, the WRP shall evaluate the completeness and accuracy of the available information regarding the proposed discharge. If any information needed to evaluate the potential impact of the proposed discharge on Reservation waters is not available to the WRP, it may request the needed information from the State or the applicant.

(f) Water Quality Review, Recommendation, and Decision. The WRP shall conduct a Water Quality Review to analyze whether the proposed discharge originating Off-Reservation will result in a violation or violations of the Tribe's WQS or have other effects on Reservation Waters, and will provide a recommendation to the Director regarding how to respond to the State including the basis for that recommendation. The Director will then make one of three possible decisions:

i. To direct the WRP to notify the State that it does not have concerns with the proposed permit;

ii. To direct the WRP notify the State and the EPA of the Tribe's concerns with the proposed permit based on impacts to the Reservation Waters, the basis for such concerns, and any recommendations to address the concerns. The WRP shall provide the concerns and recommendations to the State in writing and may include a request for a public hearing on the matter; or

iii. To direct the WRP to notify the State of recommendations regarding the proposed permit even if the discharge is not anticipated to result in a violation of the Tribe's WQS. The recommendations will be in writing and may include a request for a public hearing on the matter.

(g) Timeline. All submittals shall be made to WDNR within thirty (30) days of the publication of public notice related to the proposed permit.

(h) State Response. If the State does not accept, in whole or in part, any of the Tribe's recommendations regarding the proposed permit, the State shall immediately notify the Director in writing of the reasons for doing so. Upon receiving such notice, the Director shall meet with the WRP to determine whether discussions with the State or EPA are advisable to protect Reservation Waters. If the Director determines that additional discussions with the WDNR and/or EPA are advisable, the Director or the WRP shall contact the WDNR and/or EPA regarding the proposed permit and the changes needed to protect the Reservation Waters. The Director may request EPA's involvement as described in 40 CFR 131.7 to address issues that may arise because of differing WQS on common bodies of water.

Section 324.12: Water Quality Review Procedures for General Permits

(a) General Permit Review. When developing General Permits or modifications to General Permits that may apply to potential projects that could result in discharges affecting Reservation Waters, federal agencies, including but not limited to the USACE and EPA, and state agencies, including but not limited to WDNR, shall provide the proposed General Permit or the proposed modification to the General Permit to the WRP for Water Quality Review.

(b) General Permit Initial Contact. Within 120 days of the passage of this Code, the WRP shall provide in writing a list of General Permits it will review to applicable federal and state agencies.

(c) General Permit Monitoring. To the best of the WRP's ability given resource and time constraints, the WRP shall monitor proposed federal and state proposed General Permits and proposed modifications to General Permits that could apply to proposed activities potentially effecting Reservation Waters. If the WRP learns of such proposed General Permits or proposed modifications to General Permits, the WRP shall contact the relevant federal or state agency to indicate the potential effect on Reservation Waters, and therefore that the requirements of this Code must be met.

(d) General Permit Water Quality Review. Upon receipt of the proposed General Permit or proposed General Permit modification, the WRP shall evaluate whether it provides for adequate protection of the Reservation Waters including protection against violations of the Tribe's WQS. If any information is needed to evaluate whether the proposed General Permit or proposed modification to General Permit adequately protects Reservation Waters, including protection against violations of the Tribe's WQS, the WRP may request that needed information from the relevant federal or state agency and may also request to meet and confer with the relevant agency.

(e) Water Quality Review, Recommendation, Decision, and Determination. The WRP shall conduct a Water Quality Review to analyze whether the proposed General Permit or proposed modification to General Permit adequately protects Reservation Waters, including protection against violations of the Tribe's WQS, and will provide a recommendation to the Director regarding how to respond to the federal or state agency including the basis of that recommendation. The Director will then make one of two possible determinations:

i. To direct the WRP to notify the federal or state agency that it does not have concerns with the proposed General Permit or the proposed modification to the General Permit; or

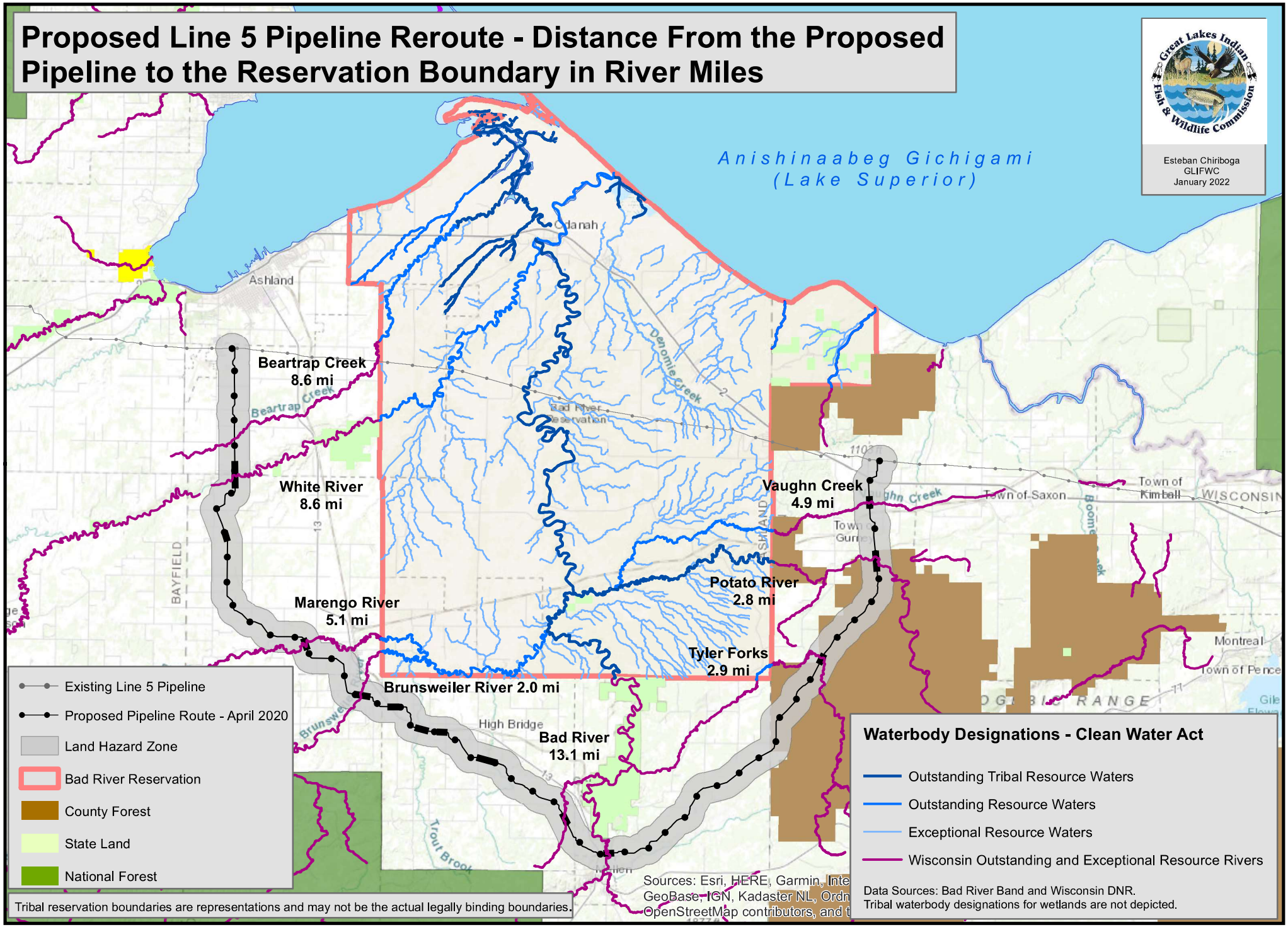
ii. To direct the WRP to notify the relevant federal or state agency of the Tribe's concerns with the proposed General Permit or modification to the General Permit based on impacts to the Reservation Waters, the basis for such concerns, and any recommendations to address such concerns. The WRP shall provide the concerns and recommendations to the federal or state

agency in writing and may request a meeting with the relevant federal or state agency regarding the matter to protect the Reservation Waters.

MNRD WATER QUALITY STANDARDS REPORT

ATTACHMENT 6

Proposed Line 5 Pipeline Reroute - Distance From the Proposed Pipeline to the Reservation Boundary in River Miles



Attachment 6 to MNRD WQS Report