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July 14, 2020

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VIA ELECTRONIC TRANSMISSION to Katie.L.Otanez@usace.army.mil

Re: Enbridge Pipelines Permit Request Army Corps File Number **LRE-2010-00463-56-A19**.

Dear Chief Kuhne:

On behalf of the Chippewa Ottawa Resource Authority (CORA), I am submitting the following comments and attachment in response to the Enbridge Energy joint permit application for tunnel construction beneath the Straits of Mackinac, Army Corps permit number LRE-2010-00463-56-A19. CORA fully supports the attached comments by the Bay Mills Indian Community and is requesting that the Army Corps deny this application outright.

CORA is composed of five Indian Tribes signatory to the March 28, 1836 Treaty of Washington (7 Stat. 491): Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, and Little Traverse Bay Bands of Odawa Indians. In the 1836 Treaty these tribes reserved off-reservation fishing rights in the Great Lakes including the Straits of Mackinac that have been confirmed by the federal courts, see United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), aff'd. 653 F.2d 277 (6th Cir. 1981), cert. denied, 454 U.S. 1124 (1981).

CORA asserts that the application submitted by Enbridge is grossly inadequate and lacks the critical information required to grant a permit. As stated in comments submitted by the non-profit group For Love of Water (FLOW) and co-signed by CORA, the purpose, scope and nature of the federal action is major, complex and highly controversial and will significantly affect the human and natural environment and therefore a full environmental impact statement must be required pursuant to the National Environmental Policy Act (NEPA).

Impacts to the Treaty fishery shared by the five CORA tribes are thoroughly outlined in the attached comments by Bay Mills Indian Community and CORA reiterates the requirement by Army Corps to conduct government-to-government consultation with the CORA tribes.

CORA is asking the Army Corps to carefully consider the information supplied by Bay Mills Indian Community and FLOW. If you have any other questions or would like more information, please do not hesitate to contact me or Mike Ripley (906)632-0043 or via email jteneyck@chippewaottawa.org or mripley1@chippewaottawa.org .

Respectfully,

Jane A. TenEyck, Executive Director
Chippewa Ottawa Resource Authority

Cc: CORA Board

COMMENTS OF BAY MILLS INDIAN COMMUNITY
SEEKING THE DENIAL OF ENBRIDGE'S APPLICATION FOR A PERMIT FOR THE LINE 5 TUNNEL AND PIPLELINE PROJECT UNDER SECTION 404 OF THE CLEAN WATER ACT AND SECTION 10 OF THE RIVERS AND HARBORS ACT

Application Number LRE-2010-004653-56-A19

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND AND DESCRIPTION OF THE PROJECT 4

III. REQUEST FOR GOVERNMENT-TO-GOVERNMENT CONSULTATION 7

A. Consultation 8

B. Regular Meetings and Consultation Record 9

C. Best Management Practices 9

IV. PUBLIC PARTICIPATION AND PUBLIC HEARING REQUEST 10

V. THE CORPS MUST COMPLETE AN EIS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT BEFORE APPROVING THIS PROJECT 11

A. Legal Background 11

B. The Context of the Enbridge Project Requires the Corps to Prepare an EIS. 13

C. The Intensity of the Project Requires Preparation of an EIS. 15

1. The cumulative impacts and precedential impact of this action are significant. 16

a. Continued operation of dual pipelines pending tunnel construction 16

b. Climate change impacts from fossil fuels 19

c. Risks associated with housing other utilities in tunnel 21

d. Other pending projects on Line 5 and ongoing impacts of Line 5 22

2. The effects on the quality of the human environment are likely to be highly controversial. 22

3. Project construction poses a significant, potential threat to fish spawning grounds. 23

4. Potential wetlands impacts require further consideration in an EIS. 25

5. Potential floodplain impacts require further consideration in an EIS. 31

6. The Project involves unique and uncertain risks that require further consideration. 33

7. The Project threatens a violation of federal, state, and local laws 33

VI. CULTURAL RESOURCES 35

A. The Corps must undertake consultation with Bay Mills and other Tribal Nations under Section 106 of the NHPA. 36

B. Bay Mills' spiritual, cultural, and economic dependence on the Straits of Mackinac and the Great Lakes is threatened by the Project. 36

C. The Corps must undertake additional evaluation of the impacted cultural resources before deciding whether a permit is appropriate. 38

VII. THE ENBRIDGE PROJECT WILL ADVERSELY IMPACT ENDANGERED AND THREATENED SPECIES AND MUST NOT BE APPROVED UNTIL FURTHER EVALUATION. 41

A. The Endangered Species Act 41

B. The Corps Must Evaluate the Project's Impact on Endangered and Threatened Species. 45

1. The Corps must communicate with FWS to identify all protected species that might be adversely affected by the proposed project. 45

2. The Corps must prepare or supervise preparation of a biological assessment of the effects the project will have on protected species in the area. 46

3. The Corps must consult with FWS and the FWS must prepare a biological opinion. 47

4. Enbridge's application raises significant concerns about the Project's impact on federally-listed species that the Corps must address in consultation with FWS. 47

5. NEPA requires the Corps to consider the impact on species protected by the Michigan Endangered and Threatened Species Act. 49

VIII. THE PROJECT DOES NOT COMPLY WITH SECTION 404 OF THE CLEAN WATER ACT. 51

A. The Application is Grossly Deficient and Fails to Demonstrate that the Proposed Project Meets Any of the Requirements of Section 404. 51

B. Enbridge's Wholly Inadequate Alternatives Analysis Does Not Demonstrate that a Tunnel Beneath the Great Lakes is the Least Environmentally Damaging Practicable Alternative. 52

1. Enbridge has made inconsistent statements about the Project's purpose. 53

a. If the Project's purpose is to alleviate an environmental concern to the Great Lakes, then there are less damaging alternatives. 54

b. If the Project's basic purpose is to transport oil, it is not water dependent and the Corps must presume there are less damaging alternatives. 54

2. Enbridge has not provided sufficient descriptions of the alternatives. 57

a. In its application to the Corps, Enbridge inaccurately assumes a tunnel under the Straits is the only alternative. 58

b. Enbridge's presentation of the "no action" alternative is misleading. 58

c. Enbridge fails to compare the impacts to aquatic resources of all appropriate alternatives. 60

d. Prior considerations of alternatives prepared in the context of the Tunnel Agreements are also incomplete and inadequate. 60

C. The Application Does Not Demonstrate that the Project Likely Will Comply With Water Quality Standards. 63

1. The Project will disrupt an extremely sensitive freshwater ecosystem: The Great Lakes and shoreline wetlands. 63

2. The Project's construction will impact water quality. 65

3. The potential for an oil pipeline spill in the Great Lakes is an unacceptable risk. 66

D. There is No Showing that the Project is in the Public Interest. 69

1. Enbridge failed to provide the Corps with the information it needs to determine that the benefits of the Project outweigh the costs. 69

2. The Corps should not rely on the Tunnel Agreements to determine whether the Project is in the public interest. 70

3. Permitting this Project extends the lifetime of the entire Line 5 Pipeline, maintaining unacceptable oil spill risks and perpetuating harmful greenhouse gas emissions. 71

4. Lack of need for oil and gas over the lifespan of the Project undermines any statement of benefits. 73

E. The Corps Must Independently Verify All Information Provided by Enbridge. 74

IX. SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899 75

X. CONCLUSION 78

I. INTRODUCTION

On May 15, 2020, the Corps issued a public notice inviting the public to comment on an application for the Enbridge Line 5 tunnel and pipeline relocation project ("Enbridge Project" or "Project"), submitted by Enbridge Energy, Limited Partnership ("Enbridge") pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344, and section 10 of the River and Harbors Act, 33 U.S.C. § 403. On May 28, 2020, the Corps extended the comment deadline from June 4 to July 14, 2020.

On behalf of the Gnoozhkekaaning, "Place of the Pike," or Bay Mills Indian Community ("Bay Mills"), we request that the Corps deny the permit application outright. Alternatively, the Corps should pause consideration of the application until it gathers critical information needed to make a decision consistent with its obligations for government-to-government consultation, and ensures compliance with the Clean Water Act, the National Environmental Policy Act, the National Historic Preservation Act, the Endangered Species Act, and Bay Mills' treaty rights.

Bay Mills has a long-standing and critical interest in the waters of the Great Lakes, the Straits of Mackinac, and the surrounding region. As one of the signatories to the 1836 Treaty of Washington, which ceded territory to the United States for the creation of the State of Michigan, Bay Mills reserved the right to fish, hunt, and gather throughout the territory—including in the Great Lakes and the Straits of Mackinac. Furthermore, as described in detail below, the area has deep cultural, religious, and economic significance to the Tribe. As a result, Bay Mills is very concerned about the implications of Enbridge's application.

As an initial matter, Bay Mills urges the Corps to deny the permit based on Enbridge's poor handling of its June 18, 2020 pipeline accident[1] in the Straits involving significant damage to an anchor support. Many questions remain unanswered about the accident including when it happened, what happened, how it happened, what environmental impacts resulted, and what measures will be taken to ensure that a spill does not occur. Available information reveals Enbridge's failure to cooperate with officials and share required communications with the State of Michigan[2] or Tribal Nations, and its singular focus on prioritizing profits over people and precious resources. The Ingham County Circuit Court deemed the situation so pressing that it issued a Temporary Restraining Order shutting down Line 5 on June 25, 2020. In reaching its decision to grant the request for emergency relief, the Court reasoned that "the severe risk of harm" from an oil spill was "so substantial and irreparable, and endangers so many communities and livelihoods and the natural resources of Michigan, the danger far exceeds the risk of financial loss to the defendants."[3]

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[1] Letter, Governor Gretchen Whitmer to CEO Al Monaco, Enbridge Energy (June 19, 2020), Exhibit A.

[2] *Id.*

[3] Temporary Restraining Order, *Nessel v. Enbridge Energy*, *Ltd.*, *et al*, No. 19-474-CE (Ingham County Cir. Ct. Michigan, June 25, 2020), Exhibit B. *See also* Brief in Support of Motion for

While Enbridge may present the tunnel as the solution to the risks posed by the current, aging, and precarious pipeline, the Corps should be wary of this Trojan Horse. Along with the purported gift of the tunnel comes (1) the continued operation of the existing, risky pipeline for at least 5 more years, (2) the ongoing harms to the treaty-protected rights and resources caused by the repeated spills and leaks along the length of the Line 5 pipeline, (3) a 99-year commitment to fossil fuels and the resultant climate change, and (4) the environmental consequences attendant with constructing a tunnel beneath the Straits, withdrawing millions of gallons of water from and then discharging treated wastewater into the Straits, and filling wetlands. Enbridge's rushed, chaotic, and incomplete submission of its permit materials and the ongoing safety problems with its Line 5 pipeline operation do not instill confidence in Enbridge's ability to proceed with this Project in a way that protects the precious Great Lakes resource.

Enbridge's Joint Permit Application, submitted to the Michigan Department of Environment, Great Lakes, and Energy ("EGLE") and the Corps, reflects a disregard to the application requirements and, more importantly, the protection of the precious Great Lakes ecosystem. Indeed, EGLE sent Enbridge a letter on May 4, 2020 deeming the application incomplete and seeking additional information.[4] The Corps also requested that Enbridge provide basic information that was missing, including: clarifying the purpose and need for the proposed fill in one of the wetlands; providing key drawings of the proposed tunnel; and, providing a decommissioning plan for the existing dual pipelines.[5] In response, Enbridge submitted a series of updated materials—halfway through the allotted public comment period—that are not clearly labeled or easily accessible on the EGLE website[6] and, most importantly, do not correct the defects identified by EGLE and the Corps.

Preliminary Injunction, Exhibit C and Motion For a Temporary Restraining Order, *Nessel v. Enbridge Energy*, *Ltd*., *et al*, No. 19-474-CE (Ingham County Cir. Ct. Michigan), Exhibit D. Note that while the Court subsequently allowed the west line of the dual pipelines to open temporarily for investigation purposes, it has not yet ruled on the pending preliminary injunction motion.

[4] Letter from Joseph Haas, District Supervisor to Paul Turner, Enbridge ("EGLE May 4 Letter") (May 4, 2020), Exhibit E.

[5] Letter from Kerrie Kuhne, Army Corps of Engineers to Paul Turner, Enbridge Energy, Limited Partnership ("Corps April 14 Letter") (April 14, 2020), Exhibit F.

[6] An agency must make available to the public, "in a form that allows for meaningful comment," the information it relies on in reaching a permitting decision. *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (quoting *Engine Mfrs. Ass'n v. E.P.A.*, 20 F.3d 1177, 1181 (D.C. Cir. 1994)). It is not obvious that is happening here.

Before the Corps reaches a decision on the Enbridge Project permit application, the Corps should require Enbridge to submit substantially more detail about its plans. And then, before reaching a decision on a revised application, the Corps must:

- Complete the required government-to-government consultation with Bay Mills and other Tribal Nations, including consultation on the Project's impact to treaty and cultural resources and threatened and endangered species.
- Undertake formal consultation with the U.S. Fish and Wildlife Service ("FWS") about the impacted threatened and endangered species that inhabit the area.
- Prepare an environmental impact statement ("EIS"), consistent with the National Environmental Policy Act ("NEPA").

Indeed, Courts have made clear that the NEPA process and ESA consultation must occur prior to the authorization of a pipeline.[7]

Furthermore, Enbridge's application must be denied because it fails several aspects of the analysis required under the Clean Water Act ("CWA"). First, Enbridge's analysis of alternatives to the Project is woefully deficient. For this Project, the CWA requires the Corps to presume that there are alternatives to this Project that are less damaging to aquatic resources. Enbridge's permit application does not include an alternatives analysis sufficient to overcome this presumption—including its failure to consider the alternative of decommissioning pipelines through the Straits entirely.

Enbridge also fails to demonstrate that the Project is in the public interest. Indeed, the opposite is true—the reasonably foreseeable detriments far outweigh any possible benefit of the tunnel. Approval of this project would be a commitment to the continued operation of Line 5 in the region and through the Straits. The Great Lakes basin is home to more than 30 million people, holds 84% of North America's fresh surface water, and 20% of the world's fresh water.[8] The risk of a catastrophic oil spill is real, especially considering that Line 5 currently crosses 290

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[7] See *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, -- F.Supp.3d --, 2020 WL 3634426, *8 (D.D.C. July 6, 2020) (vacating the Corps' decision to grant Dakota Access an easement and ordering DAPL shut down within 30 days); *Standing Rock Sioux Tribe*, *et al. v. U.S. Army Corps of Engineers*, *et al.*, -- F. Supp.3d --pray 2020 WL 1441923 (D.D.C. March 25, 2020)(requiring the Corps to prepare a full Environmental Impact Statement); *Army Corps of Engineers*, *et al. v. N. Plains Res. Council*, *et al.*, 591 U.S. -- (S. Ct. July 6, 2020)(upholding the application of lower court's injunction to the Keystone XL pipeline for failure of the Corps to undertake Section 7 consultation under the ESA before approving Nationwide Permit 12).

[8] EPA Website, "Facts and Figures about the Great Lakes," https://www.epa.gov/greatlakes/facts-and-figures-about-great-lakes

rivers and streams.[9] A spill would have devastating direct, indirect, and cumulative environmental impacts and would impair or destroy the hunting, fishing, gathering, and other rights of the 1836 Treaty Tribes. Further, the life-cycle greenhouse gas emissions associated with the continued transportation of oil and gas through the pipeline would contribute significantly to climate change at a time when oil prices are declining[10] as a result of many factors including the recognition that it is necessary to accelerate the move away from fossil fuels to clean energy. Even if it was necessary or made sense for Enbridge to continue transporting oil and gas through the region, Enbridge has not earned the requisite level of trust to risk the well-being of "communities and livelihoods and the natural resources" in the region.[11]

II. BACKGROUND AND DESCRIPTION OF THE PROJECT

Enbridge's Line 5 is part of Enbridge's Lakehead Pipeline System, a network of fourteen pipelines carrying Canadian tar sands and crude oil nearly 2,000 miles.[12] Line 5 is a 645-mile pipeline that originates in Superior, Wisconsin and terminates in Sarnia, Ontario, Canada.[13] Line 5 transports almost 23 million gallons per day of light crude oil, light synthetic crude, and natural gas liquids. Enbridge has not indicated the maximum capacity of Line 5. At the Straits of Mackinac, Line 5 splits into two 20" pipelines that extend 4.5 miles along the lakebed of Lake Michigan (the "dual pipelines"). This section of Line 5 was built in 1954. The pipeline is showing its age with portions of the protective coating wearing away and other cracks and leaks along the length of it.[14] In 2017, Enbridge acknowledged that its maintenance activities damaged Line

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[9] Great Lakes Indian Fish and Wildlife Commission, "Cumulative Impacts of Pipeline Construction Draft Report," 9 (June 24, 2020) (unpublished manuscript) (on file with Great Lakes Indian Fish and Wildlife Commission).

[10] *See, e.g.*, Hiroko Tabuchi, *Fracking Firms Fail*, *Rewarding Executives and Raising Climate Fears*, NEW YORK TIMES (July 12, 2020), https://www.nytimes.com/2020/07/12/climate/oil-fracking-bankruptcy-methane-executive-pay.html ("Almost 250 oil and gas companies could file for bankruptcy protection by the end of next year, more than the previous five years combined, . . . [and] oil demand will begin falling permanently by decade's end."); David Sheppard, *Why the Market is Not Buying the Idea of a Big Rebound in Oil*, FINANCIAL TIMES (July 8, 2020). https://www.ft.com/content/27d2f876-61d4-4995-ab5e-73553a44ccd9 (noting that any upcoming oil growth—if it occurs—is likely to be short).

[11] Temporary Restraining Order, *Nessel v. Enbridge Energy*, *Ltd., supra* 3, p.5.

[12] Enbridge Lakehead Pipeline System Map, https://insideclimatenews.org/sites/default/files/Enbridge-Lakehead-System-529px.png

[13] About Line 5-Enbridge Inc, https://www.enbridge.com/projects-and-infrastructure/public-awareness/line-5-michigan/about-line-5

[14] Attorney General Nessel's Brief in Support of Motion for Preliminary Injunction, *Nessel v. Enbridge*, *supra* 3, p.2, n.1 (citing https://www.freep.com/story/news/local/michigan/2017/11/14/enbridge-discloses-dozens-

5 in the Straits of Mackinac.[15] In September 2019, in the process of conducting geological work for the proposed Line 5 tunnel, Enbridge got a drill rod stuck and did not report it to EGLE for two months.[16] Most recently, on June 18, 2020, Enbridge reported to the State of Michigan that an anchor support was damaged and resulted in Enbridge shutting down the pipeline.[17]

Concerns about the safety of the aging Line 5 became more pressing in 2010, in the aftermath of Enbridge's catastrophic Line 6B pipeline spill of approximately 840,000 gallons of crude oil near Marshall, Michigan. The Line 6B spill contaminated Talmadge Creek, a 30-35 mile span of the Kalamazoo River, and floodplains, wetlands, and islands.[18] The cleanup of the Kalamazoo River spill cost at least $1.2 billion dollars over a six-year period and required more than 2000 personnel.[19] In the consent decree settling the enforcement action for Enbridge's Line 6B spill, the federal government required that Enbridge take action to reduce the risk of an oil spill into the Great Lakes from Line 5.[20] Required steps included the installation of anchor supports to keep the pipeline stable in light of shifting lakebed conditions that have caused the pipeline to be suspended above the lakebed in several places. The installation of the anchor supports has led to its own set of problems, [21] most recently the June 18, 2020 accident which led Enbridge to shut down a portion of Line 5.

In an effort to maintain its preferred routing of Line 5 under the Straits of Mackinac, and respond to safety concerns, Enbridge proposed building a tunnel under the lakebed to house the pipeline. The massive, proposed Project would run underneath the Straits of Mackinac in Lake Michigan at the juncture of Lake Michigan and Lake Huron. The project entails the complete replacement of the dual pipelines with a new 30" pipeline and the relocation of the pipeline in a $500 million tunnel to be constructed underneath the lakebed. The tunnel, which would span approximately 3.6 miles, would cross the Straits of Mackinac and connect at Point La Barbe in Michigan's Upper Peninsula to McGulpin Point in Michigan's Lower Peninsula.

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more-gaps-straits-mackinac-pipelines-protective-coating/863490001/). Disclosures of worn off pipeline coating have happened on multiple occasions, including in 2017 and in 2020.

[15] *Id.*

[16] *Id.* at 2.

[17] *Id.*

[18] EPA, Region V, Pollution/Situation Report #166 8 (Oct. 29, 2012), https://archive.epa.gov/region5/enbridgespill/pdfs/web/pdf/20121025_sitrep_166.pdf.

[19] Comments on Enbridge Line 3 Permit Application (filed by Earthjustice on behalf of Sierra Club, Honor the Earth, Friends of the Headwaters, Minnesota Interfaith Power & Light and MN350) (citing Carol Linnitt, Official Price of the Enbridge Kalamazoo Spill, A Whopping $1,039,000,000, The Narwhal (Aug. 26, 2013), https://thenarwhal.ca/official-price-enbridge-kalamazoo-spillwhopping-1-039-000-000), Exhibit G, p. 2.

[20] *US v. Enbridge Energy*, Civ. No. 1:16-cv-00914, Consent Decree, https://www.epa.gov/sites/production/files/2017-06/documents/enbridgeentered-cd_0.pdf

[21] Letter, President Levi D. Carrick Sr., Bay Mills Indian Community to Lt. Col. Dennis P. Sugrue, District Commander, U.S. Army Corps of Engineers, Detroit District, Exhibit H.

According to Enbridge, the tunnel would be 18- to 21-feet-in diameter and would sit underneath the lakebed of the Straits of Mackinac at depths at least 10 feet below the top of rock or 60 feet below the mud line, whichever is shallower. Notably, in other permit submissions and in public representations, Enbridge has indicated that the tunnel would sit at least 60 feet below the lakebed and up to 250 feet below the lakebed.[22]

As explained in Enbridge's application materials and the Corps' public notice, Enbridge would remove approximately 364,000 cubic yards of material from underneath the lakebed to construct the tunnel.[23] The material would be disposed of in an upland location. The tunnel would be constructed using a tunnel boring machine. Pre-cast concrete segmental lining would be installed as the tunnel is constructed, and the annular space outside the tunnel's concrete lining would be filled with low-permeability grout.

The Enbridge Project would involve the filling and disturbance of wetlands and other land. A launch portal would be constructed in the southern work area to provide for the tunnel boring machine's entry point at McGulpin Point and a circular shaft would be constructed on the northern side, Point La Barbe, for the tunnel boring machine's exit. In addition, the Project would involve widening of an existing road, Boulevard Drive, and the filling of a wetland to provide a construction and staging area to the north of the North Straits facility.

The Project also requires securing several other permits including a National Pollution Discharge Elimination System ("NPDES") permit, for the withdrawal of four million gallons of water per day from Lake Michigan and the discharge of five million gallons of wastewater to Lake Michigan.[24] To facilitate this use of lake water, Enbridge will construct four water intake structures—two on each side of the Straits.[25] One of the southern water intake structures would also include a discharge pipe that would "intermittently" discharge treated water. In addition, in Wetland 8, two outfall structures would be constructed for treated water. Outfall 002 would require 55 cubic yards of aggregate fill in a wetland area. Outfall 003 would require 44 cubic yards of aggregate fill in a different wetland area. According to Enbridge's application, the two outfalls would result in a fill of 0.02 acres of wetland. In total, according to Enbridge, the Project will impair .10 acres of wetlands permanently and .03 acres of wetlands temporarily. Enbridge initially asserted that wetland mitigation was unnecessary, but then EGLE requested the submission of a wetland mitigation plan. As a result, Enbridge supplemented its

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[22] In re Enbridge Energy, Limited Partnership, Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, 3, Case No. U-20763, Michigan Public Service Commission (Apr. 17, 2020), https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t000000BRSuOAAX

[23] Army Corps of Engineers, Public Notice Re Enbridge Energy, LP No. LRE-2010-00463-56-A19, at 2 ("Public Notice") (May 15, 2020).

[24] *See* Enbridge Energy Tunnel Project NPDES permit application (HNY-TBJC-PNK8V) (Apr. 15, 2020).

[25] Public Notice, 2.

application on June 8, 2020 to provide a plan to reduce the invasive species, *Phragmites australis*, and install perimeter barriers to prevent unauthorized off-road vehicle damage.[26]

In addition to constructing the tunnel and a new pipeline, Enbridge proposes two options for decommissioning the dual pipelines—both of which leave some portion of the pipeline in the lake bottom:

> the pipeline would be purged, cleaned, and abandoned in place, or . . . the pipeline would be cleaned, and exposed portions of the pipeline between the 65-foot depth contours would be removed.[27]

To date, Enbridge has not submitted a biological assessment or completed a Cultural Resources Phase II or Phase III Report. Neither Enbridge nor the Corps has completed a biological assessment to date; Enbridge has indicated that several endangered and threatened species may be or will likely be adversely impacted by the Project, including the Northern Long-Eared Bat (threatened), Dwarf Lake Iris (threatened), Houghton's Goldenrod (threatened); Gray Wolf (endangered); Rufa Red Knot (threatened); and the Piping Plover (endangered).[28] The Corps has not completed an environmental assessment or environmental impact statement for the Project.

III. REQUEST FOR GOVERNMENT-TO-GOVERNMENT CONSULTATION

As one of the signatories to the 1836 Treaty of Washington (7 Stat. 491), which ceded territory to the United States for the creation of the State of Michigan, Bay Mills has requested, and continues to request consultation with the Corps about the proposed Project. Under the 1836 Treaty, the Tribes reserved the right to hunt, fish, and gather throughout the territory—including in the Great Lakes and the Straits of Mackinac. The 1836 Treaty is a legally binding agreement between sovereign nations that acknowledges and establishes respective political and property relations as well as confirms each nation's rights and privileges.[29] Bay Mills' reserved off-reservation treaty rights in the Great Lakes, including the Straits of Mackinac, have been confirmed by federal courts.[30]

Due to the magnitude of the proposed construction and the far reaching impacts that the construction and continued operation of Enbridge's Line 5 will have on Bay Mills' treaty

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[26] Letter, Paul Turner, Enbridge, to Joseph Haas, EGLE (June 8, 2020), Exhibit E.
[27] Public Notice, 2-3.
[28] Enbridge Energy Supplemental Information: Great Lakes Tunnel Project, ("Supplemental Information"), 12-14 and Appendix A, GLTP_JPA_Supplemental Info_20200406_Final.pdf.
[29] *See*, *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699, 203 L.Ed. 2d 846 (2019) (A treaty is "essentially a contract between two sovereign nations.").
[30] *See United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), aff'd. 653 F.2d 277 (6th Cir. 1981), cert. denied, 454 U.S. 1124 (1981).

protected resources, Bay Mills restates its request for ongoing government-to-government consultation between the Corps, Bay Mills, and other impacted Tribal Nations.[31]

A. Consultation

Consultation is a process that supports Tribal sovereignty and self-determination and affirms the rights of Indian Tribes to self-governance. Consultation helps ensure that the United States is meeting its federal trust responsibilities to Tribal Nations. The United States' obligations and unique legal relationship with Tribal Nations begins with the U.S. Constitution, Article I, Section 8 and Article IV and extends through treaties, statutes, executive orders, and court decisions.

The Corps' Tribal Consultation Policy, October 4, 2012, reflects many of the key principles articulated in the statutes, court decisions, and policy directives addressing consultation:

> [o]pen, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the Corps that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands.[32]

Similarly, Bay Mills considers consultation as the process of seeking, discussing, and seriously considering the views of Bay Mills, and seeking agreement with Bay Mills on the development of regulations, rules, policies, programs, projects, plans, property decisions, and activities that may affect Tribal Resources, historic properties, contemporary cultural practices, and those persons under Tribal jurisdiction. This requires true government-to-government contact between the agency, government, or department and Bay Mills, where high level Agency representatives meet with Tribal leaders as well as staff.

These definitions are consistent with federal court rulings and describe direct interaction with the affected Tribal Nation, an exchange of views on the project or decision, and the aspiration to reach agreement on a course of action.[33] To be sure, a letter inviting

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[31] Letter, President Bryan Newland, Bay Mills Indian Community, to Charles Simon, Chief, Regulatory Office, Army Corps of Engineers, Detroit District (May 27, 2020), Exhibit I. The first consultation meeting is scheduled for July 21, 2020.

[32] *See* US Army Corps of Engineers Tribal Consultation Policy Mem. §3(b) (Oct. 4, 2012), https://planning.erdc.dren.mil/toolbox/library/MemosAndLetters/MemoTribalConsultationPolicy1Nov2012.pdf.

[33] *See* 2013 US Army Corps of Engineers Tribal Consultation Policy and Related Documents: Corps' Tribal Nation Community of Practice and the Corps Tribal Policy Principles, https://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/.

consultation followed by a briefing given to Bay Mills by the Corps does not constitute consultation.

B. Regular Meetings and Consultation Record

Bay Mills seeks regular meetings at an agreed upon interval. These Coordination Meetings will serve to clarify how Bay Mills' and the Corps' jurisdictions or responsibilities apply to this given issue. Coordination Meetings will serve as fora for sharing data or making agreements on data sharing responsibilities and data collection. Coordination Meetings may also be used as an opportunity for Bay Mills to provide input on processes such as development of agency, government, or departmental plans. Coordination Meetings may at times involve only staff and may also involve Bay Mills decision makers and government officials.

The parties should agree that meeting notes, minutes, shared documents, and any recorded audio or video files will be maintained in common between the Tribe and the Corps. Culturally or spiritually sensitive information provided by Bay Mills should remain confidential or returned to Bay Mills upon request unless otherwise agreed to in writing by Bay Mills.

C. Best Management Practices

In addition to the above requirements for consultation, Bay Mills suggests the following Best Management Practices for the Corps' engagement:

- Multiple contacts that begin early in the planning process and continue throughout the evaluation of the Project.
- Multiple convenient venues for consultation, such as the local Corps' office and locations close to Bay Mills' headquarters and the area of the proposed Project.
- Formal and informal meetings.
- Designation and active engagement of a Corps Tribal Liaison.
- The Corps staff continue to foster and value relationships with relevant Tribal staff.
- An early effort to identify the areas of concern to Bay Mills.
- Provide Bay Mills full and candid information and data prior to the first meeting and each meeting thereafter.
- An open-ended and flexible agenda.
- A successful result is viewed as partners arriving at an agreement, although reaching an agreement is not an end in and of itself.

IV. PUBLIC PARTICIPATION AND PUBLIC HEARING REQUEST

Bay Mills restates its request for a public hearing, as previously made in writing.[34] The Clean Water Act establishes an expectation of public participation in permitting decisions. Section 404 allows the Corps to issue permits "after notice and opportunity for public hearings."[35] The Corps' implementing regulations further provide: "[A]ny person may request, in writing, . . . that a public hearing be held . . . . Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing."[36] In addition, the Corps' public notice indicates that "[a]ny person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider this application."[37]

Bay Mills notes that Enbridge has made public participation more difficult here by submitting voluminous, and often inappropriate, documents; EGLE noted its concerns with the submissions in its May 4, 2020 letter to Enbridge,

> The materials, as submitted when compiled, total over 350 pages in length and are 86 MB in size. This is a very large sized document. EGLE requests that Enbridge edit submitted materials for precision and relevance to actual proposed construction . . . .
>
> EGLE is requesting refining of materials for appropriate public noticing.[38]

In addition, the continuous addition of documents to the file during the public comment period and the lack of coherent organization of the documents on either the Corps' website or EGLE's website has hampered public participation. Further, none of the documents, including the public notice, were available in languages other than English.

Based on the significant impacts involved and the controversial nature of the Enbridge Project, a public hearing should be held. To ensure accessibility of the meeting, it should be held in person when it is safe to do so. Failure to provide an in-person hearing will deprive members of the public of opportunities to effectively communicate their concerns, engage in dialogue with the Corps, and draw support from others physically present in the same room. Moreover, virtual hearings do not allow for full public participation, especially in communities

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[34] Letter, President Bryan Newland, Bay Mills Indian Community, to Charles Simon, Chief, Regulatory Office, Army Corps of Engineers, Detroit District (May 27, 2020), Exhibit I; Letter, Bay Mills Indian Community, et al, to Kerrie Kuhne (May 26, 2020), Exhibit J.
[35] 33 U.S.C. § 1344(a).
[36] 33 C.F.R. § 327.4(b).
[37] Public Notice, 4.
[38] EGLE May 4 Letter, *supra* 4.

along the pipeline route, because rural communities lack full access to high speed internet and cell phone service.[39]

V. THE CORPS MUST COMPLETE AN EIS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT BEFORE APPROVING THIS PROJECT.

Before a decision can be made regarding Enbridge's 404 permit application, the National Environmental Policy Act[40] ("NEPA") requires that the Corps prepare an environmental impact statement ("EIS") to fully understand the environmental impacts of this major federal action. To date, the Corps has not prepared an environmental assessment or an EIS. The Project threatens the Great Lakes ecosystem; tribal hunting, fishing, and gathering rights; endangered and threatened species; cultural resources; and much more. The EIS will also provide an opportunity to consider the cumulative impacts of this project including the possibility of oil spills along the entire Line 5 and the climate change impacts of continued reliance on fossil fuels.

As a federal district court recently stated with respect to the Corps' permitting an oil pipeline beneath water resources, "[w]hen it comes to NEPA, it is better to ask for permission than forgiveness."[41] Here, too, the Corps must prepare an EIS before proceeding any further with Enbridge's permit application.

A. Legal Background

NEPA is our "basic national charter" for environmental protection.[42] NEPA implements the precautionary principle to think first, then act by requiring agencies, "to the fullest extent possible . . . [u]se all practicable means, consistent with the requirements of [NEPA] and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."[43] Among the statute's goals are to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken," and to "help public officials make decisions that are based on [an]

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[39] *See* Ted Roelofs, *Need Broadband in Michigan? Rural Life Can Mean You're Out of Luck*, BRIDGE, Nov. 28, 2017, https://www.bridgemi.com/michigan-government/need-broadband-michigan-rural-life-can-mean-youre-out-luck (showing, for example, that in Mackinac County, 60 percent of the population lacks broadband access); *see also* Josephine Wolff, *Our Internet Isn't Ready for Coronavirus*, NEW YORK TIMES, March 17, 2020, https://www.nytimes.com/2020/03/17/opinion/coronavirus-broadband-internet-work-from-home.html.

[40] 42 U.S.C. § 4321-4347.

[41] *Standing Rock Sioux Tribe*, -- F.Supp.3d --, 2020 WL 3634426, *8.

[42] 40 C.F.R. § 1500.1.

[43] *Id*. § 1500.2(f).

understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."[44]

To achieve these objectives, NEPA requires all federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment."[45] According to regulations promulgated by the Council on Environmental Quality ("CEQ"), an agency created by Congress to implement NEPA, the term "major Federal action" includes "actions with effects that may be major and which are potentially subject to Federal control and responsibility."[46] Major federal actions include "[a]pproval of specific projects," such as "actions approved by permit or other regulatory decision as well as federal and federally assisted activities."[47] The term "Major reinforces but does not have a meaning independent of significantly."[48]

The EIS must describe, among other things: (1) the environmental impact of the proposed action, and (2) any adverse environmental effects that cannot be avoided should the proposal be implemented.[49] CEQ regulations require that the "lead agency" supervise the NEPA analysis,[50] and determine whether a proposed action significantly affects the environment and whether an EIS is required. The lead federal agency may first prepare an environmental assessment ("EA").[51] An EA must provide sufficient evidence and analysis to determine whether to prepare an EIS.[52] The lead agency must take a 'hard look' at the relevant environmental concerns and alternatives to the proposed action.[53] If an EA concludes that there are no potentially significant impacts to the environment, the federal agency must provide a detailed statement of reasons why the project's impacts are insignificant and issue a finding of no significant impact ("FONSI").[54]

NEPA requires federal agencies to analyze a project and all of its connected, cumulative, and similar actions together in a single EA or EIS before the project is allowed to proceed.[55]

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[44] 40 C.F.R. § 1500.1(b)–(c).
[45] 42 U.S.C. § 4332(2)(C).
[46] 40 C.F.R. § 1508.18 (2020).
[47] *Id.* § 1508.18(b)(4).
[48] *Id.* § 1508.18.
[49] 42 U.S.C. § 4332(2)(C)(i), (ii).
[50] Lead agencies are selected according to the following factors, among others: "(1) Magnitude of the agency's involvement; (2) Project approval/disapproval authority; (3) Expertise concerning the action's environmental effects; (4) duration of the agency's involvement; and the (5) Sequence of the agency's involvement." 40 C.F.R. § 1501.5(c).
[51] *Id.* § 1508.9.
[52] *Id.*
[53] *Id.*
[54] *Id.* § 1508.13.
[55] *Id.* § 1508.25.

"Actions are connected if they: (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously; or (iii) [a]re interdependent parts of a larger action and depend on the larger action for their justification."[56] If the agency concludes in an EA that a project may have significant impacts on the environment, then an EIS must be prepared.[57] To determine whether a proposed action may significantly affect the environment, the agency must consider both the context and intensity of the proposed action, including whether the project will take place in "ecologically critical areas," and whether the project will affect endangered species.[58]

NEPA also mandates that the lead agency consider "the degree to which the action is related to other actions . . . with cumulatively significant impacts . . . ."[59] NEPA defines "cumulative impact" to mean "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[60] A federal action will significantly affect the environment "if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts."[61] NEPA requires that a reviewing agency consider in the same EIS any "connected" actions, including actions that are "interdependent parts of a larger action" and "depend on the larger action for their justification."[62]

The CEQ regulations require a give and take between an agency and members of the public.[63] Federal agencies must give the public as much information as is practicable, so that the public has a sufficient basis to address those areas that the agency must consider in preparing the environmental assessment.[64]

B. The Context of the Enbridge Project Requires the Corps to Prepare an EIS.

In determining whether to prepare an EIS as opposed to an EA, the Corps must consider a range of factors to determine whether the impacts would be "significant" enough to warrant

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[56] *Id.* § 1508.25 (a)(1).
[57] *Id.* § 1501.4.
[58] *Id.* §§ 1508.27 (a), (b).
[59] *Id.* § 1508.27(b)(7).
[60] *Id.* § 1508.7.
[61] *Id.* § 1508.27(b)(7).
[62] *Id.* § 1508.25(a)(1)(iii).
[63] *Id.* § 1500.1(b) ("public scrutiny [is] essential"); *id.* § 1500.2(d) (the agency must "encourage and facilitate public involvement"); *id*. § 1506.6 (the agency must "[m]ake diligent efforts to involve the public" in preparing environmental documents, give "public notice of . . . the availability of environmental documents so as to inform those persons . . . who may be interested or affected," and "solicit appropriate information from the public.").
[64] *Id.* § 1501.4.

a full EIS.[65] NEPA regulations require consideration of two broad factors: "context and intensity."[66] Context refers to the setting in which the proposed action takes place.[67] When evaluating "context," the Corps must consider "society as a whole (human, national), the affected region, the affected interests, and the locality."[68] An assessment of context includes considerations of short- and long-term effects.[69]

The Enbridge Project is part of the Line 5 pipeline which transports fossil fuels from northern Wisconsin through Michigan and into Canada. The Line 5 pipeline currently crosses 290 streams and rivers and the Straits of Mackinac at the connection of Lake Michigan and Lake Huron.[70] The Lake Michigan-Huron system "forms the largest lake in the world by volume, containing 8% of the world's surface freshwater."[71] And, the Great Lakes provide the largest source of surface freshwater in the United States. The Straits is also a critical place for recreation, commercial shipping, and fishing.[72] The Project area is also home to several threatened and endangered species and "species of concern," as discussed below.

As discussed throughout these comments, the Great Lakes are an integral part of Bay Mills' identity and play a fundamental role in the economic, cultural, traditional, spiritual, and historical significance of tribal Treaty rights in the Great Lakes. Since time immemorial, the robust ecosystem of the Great Lakes has allowed for trading and harvesting of many different traditional medicines and food sources. Maple sugar, berries, mushrooms, and wild rice (*manoomin*) are staples to traditional diets of Bay Mills Indian Community.[73] In addition, many other important plants such as Northern white cedar (*giizhik*), a sacred plant, and black ash (*aagimaak*) (both been used for medicine and making canoes), items of clothing, baskets, and ricing sticks (*for harvesting manoomin*) are found throughout many of the wetland habitats along the 645 miles of land and water that the Enbridge Line 5 pipeline traverses.[74]

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[65] *Id.* § 1508.27.
[66] 42 U.S.C. § 4332(2)(C).
[67] 40 C.F.R. § 1508.27(a).
[68] *Id.*
[69] *Id.*
[70] Great Lakes Indian Fish and Wildlife Commission, "Cumulative Impacts of Pipeline Construction Draft Report," 9 (June 24, 2020) (unpublished manuscript) (on file with Great Lakes Indian Fish and Wildlife Commission).
[71] Complaint, *Nessel v. Enbridge*, No. 19-474-CE (Ingham County, June 26, 2019) (quoting Independent Risk Analysis, 26, https://mipetroleumpipelines.com/sites/mipetroleumpipelines.com/files/document/pdf/Straits_Independent_Risk_Analysis_Final.pdf).
[72] Michigan Technological University, *Independent Risk Analysis for the Straits Pipelines*, 26 (September 15, 2018).
[73] M. Nieves Zedeño, et al., Univ. of Ariz. Tucson, Bureau of Applied Research in Anthropology, Traditional Ojibway Resources in the Western Great Lakes 49 (2001).
[74] *Id*. at 51.

The affected interests include the protection of the right to fish, hunt, gather, and pray, and the protection of the fisheries and wildlife habitat, held by Bay Mills. As described below, the fisheries—protected by Treaty—not only could be devastated by an oil spill, but also will be impacted by the Enbridge Project plan to withdraw 4 million gallons per day and discharge 5 million gallons per day of wastewater during the course of the tunnel construction. In addition, local residents and tourists who use the resource would be impacted by a spill or other impacts. Considering the unique and sensitive Project area and the broad reliance on the resource, the context of the Project necessitates the preparation of an EIS.

C. The Intensity of the Project Requires Preparation of an EIS.

According to NEPA regulations, intensity means "the severity of the impact," and involves examining ten factors:

> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
>
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.[75]

The presence of even "one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances."[76]

Several of the intensity factors are relevant to the Enbridge Project and require further consideration and support the need to prepare an EIS. In addition to the issues raised in this section, the impacts to cultural resources (*see infra, VI)* and threatened and endangered species (*see infra, VII)* necessitate preparation of an EIS.

1. The cumulative impacts and precedential impact of this action are significant.

The Corps must consider the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[77] It must consider other foreseeable actions, even if they will be undertaken by another agency.[78] Further, the Corps must consider whether the proposed action "may establish a precedent for future actions with significant effects."[79]

When viewed in the context of past, present, and reasonably foreseeable actions, the Enbridge Project poses many concerns that merit further review. First, the approval of the tunnel will result in the continued use of the dual pipelines for the next five to ten years. Second, the commitment to a tunnel with a 99-year lease will result in a continued reliance on fossil fuels in a time of climate change. Third, Enbridge currently has several other pending permit applications for Line 5 in the region, and this permit approval must be considered in the context of the cumulative impacts of the other Line 5 impacts.

a. Continued operation of dual pipelines pending tunnel construction

The Corps must consider the impact that approving the Enbridge Project will have on the use of the existing, aging, and problematic dual Line 5 pipelines that sit under the Straits of

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[75] 40 CFR § 1508.27(b).
[76] *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005).
[77] 40 CFR § 1508.7.
[78] *Id.*
[79] 40 CFR § 1508.27(b)(6); see *Anglers of the Au Sable v. US Forest Service*, 565 F. Supp. 2d at 832 (concluding that the "Forest Service has engaged in none of the sophisticated analysis of precedent" exemplified by *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1211 (9th Cir. 2004)).

Mackinac for several more years before the tunnel is constructed.[80] Enbridge's inadequate maintenance of the pipeline in Lake Michigan and problematic events have been documented, and include, in part:

- Anchor supports have been damaged and caused the shutdown of the pipeline.[81]
- Anchor strike or strikes have damaged the pipeline.[82]
- The pipeline coating has worn off leaving the pipeline less protected.[83]
- Abandoned bore rods pose uncertain risks.[84]

The potential environmental impacts posed by allowing the existing pipeline to continue transporting oil for the next 5-10 years must be considered. The ecological and economic consequences of an oil spill in the Great Lakes are staggering, as documented extensively in multiple reports,[85] and discussed *infra* at VIII.C.3. Moreover, the Project's decommissioning plan for the dual pipelines includes keeping (at least in part) the dual pipelines in place. The potential impacts of leaving the dual pipelines in the Straits requires careful evaluation.

The Corps has a well-recognized obligation under NEPA to analyze oil spills when considering a Section 404 permit application. In *Stop the Pipeline v. White*, the Corps was required to analyze oil spills in issuing a Section 404 permit for an oil pipeline.[86] In *Sierra Club v. Sigler*, the court struck down a Corps EIS for a dredging project that would allow increased oil tanker access in a port because the spill analysis did not analyze the "worst case" scenario of an oil tanker spill.[87] In *Standing Rock v. Army Corps of Engineers*, the Corps was required to

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[80] The December 2018 Third Tunnel Agreement between Governor Snyder, state agencies and Enbridge provides that Enbridge may continue its use and operation of the existing Line 5 until the tunnel and new tunnel pipeline is operational. Third Agreement, Sec. 4.1, 4.2d

[81] See Temporary Restraining Order, *Nessel v. Enbridge Energy*, *Ltd., supra* 3.

[82] Attorney General Nessel's Brief in Support of Motion for Preliminary Injunction, Nessel v. Enbridge, *supra* 3, p. 2, n.2 (citing https://www.mlive.com/news/2017/10/enbridge_line_5_damage_2014_de.html)

[83] *Id*. at 2 n.1 (citing https://www.freep.com/story/news/local/michigan/2017/11/14/enbridge-discloses-dozens-more-gaps-straits-mackinac-pipelines-protective-coating/863490001/). Disclosures of worn off pipeline coating have happened on multiple occasions, including in 2017 and in 2020.

[84] "Enbridge won't clean up debris left in Straits of Mackinac until spring," MLIVE (December 6, 2019), https://www.mlive.com/news/grand-rapids/2019/12/enbridge-wont-clean-up-debris-left-in-straits-until-spring.html

[85] David J. Schwab, Statistical Analysis of Straits of Mackinac Line 5: Worst Case Spill Scenarios (2016), http://graham.umich.edu/media/pubs/Mackinac-Line-5-Worst-Case-Spill-Scenarios.pdf.

[86] 233 F. Supp. 2d 957, 967 (S.D. Ohio 2002).

[87] 695 F.2d 957, 968 (5th Cir. 1983).

prepare an EIS and account for the limitations in a pipeline's leak detection system, an "operator's serious history of incidents," and the worst-case scenario of an oil discharge.[88]

Enbridge has a very troubling record of oil spills and an unimpressive record of pipeline maintenance. In addition to being responsible for the largest terrestrial spill of crude oil in U.S. history,[89] the catastrophic Kalamazoo spill on Line 6B, described above, Enbridge has had more than 30 spills along Line 5.[90] Many of these spills have occurred in close proximity to waterways, including Lake Superior, Lake Michigan, and Lake Huron.

As noted above, the section of Line 5 that crosses the Straits of Mackinac has had a history of problems including the most recent problem on June 18, 2020, when Enbridge reported that one of the anchor supports, installed in 2018, had been significantly damaged. Enbridge was forced to shut down the pipeline. Then, despite the State of Michigan's request that the pipeline remain shut down until Enbridge shared the findings of its accident investigation with Michigan, Enbridge opened a portion of the pipeline without further consultation.

This unacceptable response to a significant pipeline event is particularly concerning in light of the very serious, likely consequences of a "worst case" discharge from Line 5 into the Straits of Mackinac. As discussed *infra* at VI.C.4, the "worst case" spill would impair water quality, damage significant portions of the Great Lakes shoreline, harm key fisheries, and impact tourism.

In addition, Enbridge has shown a lack of regard for its commitments established in the 2017 Consent Decree with the federal government, which required maintenance work along the entire Lakehead Pipeline system. Recently, EPA fined Enbridge $6.7 million for failing to meet its obligations, stating in part:

> In addition, EPA identified numerous instances in which Enbridge failed to comply in a timely manner with Consent Decree provisions relating to certain intersecting or interacting features on Lakehead System pipelines. More specifically, Enbridge

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[88] -- F. Supp. 3d --, 2020 WL 1441923, at *9-16 (D.D.C. Mar. 25, 2020). Similarly, the Minnesota Court of Appeals deemed a state agency's approval of an environmental impact statement about the construction of *another* Enbridge pipeline project in the Great Lakes to be arbitrary and capricious because no modeling had been done to address the impact of an oil spill into the Lake Superior watershed. *In re Enbridge Energy*, 930 N.W.2d 12, 27-28 (Minn. App. 2019).

[89] Grobbel Environmental & Planning Associates, Comments on Application No. 2014-01071-TJH (Feb. 21, 2019) at 19, Exhibit K.

[90] Using Pipeline Hazardous Materials Safety Administration ("PHMSA") data, Beth Wallace, National Wildlife Federation, compiled an interactive ArcGIS map of the spill locations along Enbridge's Line 5: https://www.arcgis.com/apps/View/index.html?appid=f817f5abad9a4cb09e942c1941fd0060 (last accessed June 24, 2020).

> failed to complete timely identification and evaluation of thousands of "shallow dent" features on Lakehead System pipelines to determine whether such dents met dig selection criteria specified in Paragraph 58 and Table 5 of the Consent Decree. As a result, Enbridge failed to excavate and repair or mitigate shallow dents with indications of metal loss, cracking, or stress risers, as contemplated by Paragraph 58 of the Consent Decree. Between the date of entry of the Consent Decree and March 30, 2019, Enbridge conducted at least ten different ILIs that triggered a duty to look for intersecting dent/corrosion features. EPA assessed stipulated penalties in the amount of $3,075,000 for such violations ("the Third Set of Stipulated Penalties").[91]

Enbridge's conduct should give the Corps pause and requires a deeper evaluation of the potential impacts of this project through an EIS.

b. Climate change impacts from fossil fuels

A key characteristic of the Project is that it carries fossil fuels that contribute to greenhouse gas emissions, which harm Michigan's natural resources and exacerbate climate change. With this Project, Enbridge would extend the lifetime of Line 5, and its corresponding greenhouse gas emissions, for 99 years. Further, it remains unclear whether Enbridge will expand the capacity of the pipeline with this Project, increasing the intensity of corresponding emissions for each of those years. Greenhouse gas emissions are a proper subject of NEPA analysis—and a necessary subject of a cumulative impacts analysis when an agency considers permitting a pipeline.[92] An EIS is necessary to address impacts from climate change.

The Line 5 pipeline carries light crude oil, light synthetic crude, and natural gas, which each place a major carbon burden on the environment.[93] Without major reductions in these emissions, the increase in annual average global temperatures relative to preindustrial times

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[91] Letter, Matthew Russo, Assistant Regional Counsel, EPA Region 5 to Steptoe & Johnson (Counsel to Enbridge), *US v. Enbridge Energy*, Civ. No. 1:16-cv-00914, Consent Decree, Demand for Payment of Stipulated Penalties (May 8, 2020), attached as Exhibit L.

[92] *Indigenous Envtl. Network v. U.S. Dept. of State*, 347 F. Supp. 3d 561, *578-79 (D. Mont. 2018); *see also Indigenous Envtl. Network v. U.S. Dep't. of State*, 2019 WL 652416, *4-5 (D. Mont. Feb. 15, 2019) (recognizing that omitting an analysis of greenhouse gas emissions from pipelines in an EIS was an "error [that precluded informed decision-making and public participation based on complete information").

[93] It is also unclear whether Enbridge might consider transporting tar sands oil through Line 5; a potential spill involving tar sands oil would further harm the Great Lakes ecosystem and this possibility of its transport through Line 5 must be clarified and studied. *See, e.g.*, Keystone XL FSEIS at 3.13-10 (2014) (noting the difference between tar sands oil and other forms of crude because it precipitates out of water and leaves behind heavy bitumen which can sink to the bottom), https://keystonepipeline-xl.state.gov/finalseis/.

could reach 5°C or more by the end of this century.[94] Even with major reductions, there will likely be a 2°C increase.

Climate change is not just about rising global temperature. Climate change also impacts seasonal precipitation in the Great Lakes, likely leading to wetter winters and springs, which lead to an increase in flooding. In turn, flooding causes structural damage to properties and homes and limits the ability to recreate in outdoor places where there is a higher water level.

The Great Lakes are starting to see the impacts of climate change with rapid changes in the water levels.[95] Water levels of Lake Michigan and Lake Huron have already risen above their peak monthly water level last year.[96] The record lake levels from the summer of 2019 led to increased height of the wave impact and accelerated erosion. As the Corps acknowledged, "[m]any homeowners and communities have been caught off-guard with the dramatic increase in erosion along the coastline, with numerous homes lost to the collapsing bluff."[97]

With fluctuations in the lake levels and temperature as a casualty of climate change, there likely will be habitat alteration. Several endangered and threatened species, discussed *infra* at VII, may suffer from climate-related habitat loss, habitat fragmentation, competition from invasive species, threats from new and emerging diseases, and altered ecological processes.[98] There likely also will be changes in fish productivity and the physiological state of fish because fish are sensitive to changes in water temperature. Climate change likely will exacerbate existing stressors on fishing, such as invasive species and contamination. Tribal and recreational fishing will be impacted. Subsistence and commercial fishing of tribal members are discussed *infra* at V.C.3. Recreational fishing in the region provides ecosystem services values ranging from $0.3 to over $1.0 billion per year, according to recent estimates.[99] Similarly,

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[94] Environmental Law & Policy Center, An Assessment of the Impacts of Climate Change on the Great Lakes, 7 (2019), available at http://elpc.org/wp-content/uploads/2019/03/Great-Lakes-Climate-Change-Report.pdf (hereinafter "ELPC Climate Change Report") (citing U.S. Global Change Research Program (USGCRP) (2017). Climate Science Special Report: Fourth National Climate Assessment, Volume I, [Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)]. Washington, DC: USGCRP. doi: 10.7930/J0J964J6).
[95] US Army Corps of Engineers Detroit Dist., Monthly Bulletin of Lake Levels for the Great Lakes, July 2020, *available at* http://lre-wm.usace.army.mil/ForecastData/MBOGLWL-combined_bulletin_and_backpage.pdf.
[96] *See id.* at 2.
[97] US Army Corps of Engineers Detroit Dist., High Water Impacts on Coast Erosion (2020), *available at* https://www.lre.usace.army.mil/Media/News-Stories/Article/2190986/high-water-impacts-on-coastal-erosion/.
[98] ELPC Climate Change Report at 34.
[99] ELPC Climate Change Report at 44 (citing Loomis, J. & Richardson, L. (2008)). Technical documentation of benefit transfer and visitor use estimating models of wildlife recreation, species and habitats. Department of Agricultural and Resource Economics. Fort Collins, CO:

recreational birding in the Great Lakes, which has an annual value of over $3 billion per year, could be negatively impacted by climate change by altering habitats and migratory patterns.[100] Lack of snow and ice from the warming of increased emissions lessens the public's ability to participate in winter activities like snowshoeing, snowboarding, snowmobiling, skiing, and ice fishing.[101] And, indeed, climate change "increasingly threatens indigenous communities' livelihoods, economies, health, and cultural identities by disrupting interconnected social, physical, and ecological systems.[102]

The Project's transport of fossil fuels will perpetuate and exacerbate climate change. Enbridge's application, however, lacks consideration of the greenhouse gas emissions that are associated with the oil and gas that the pipeline will transport. Also missing are the effects from the other possible third-party companies that would locate utilities within the tunnel.[103] Both the Corps and the public need more information from Enbridge about the potential emissions associated with the Project.

c. Risks associated with housing other utilities in tunnel

Enbridge states that the tunnel would potentially house other utilities.[104] However, American Transmission Company ("ATC"), an electric utility with lines currently crossing the Straits, has suggested that the addition of electric lines is not economical, practical, or safe:

> Safety. ATC does not believe that installing high voltage electric lines in close proximity to high pressure oil or gas lines is a good idea.
>
> Practicality. A cable capable of transmitting 138,000 volts is physically large and would need several splices or joints to cross the entire Straits. Each splice location would need significant space in the tunnel for welders. Nothing we have seen suggests that a reasonably sized tunnel would be feasible.

Colorado State University, av*ailable at* http://dare.colostate.edu/tools/benefittransfer.aspx; Melstrom, R.T. & Lupi, F. (2013). Valuing recreational fishing in the Great Lakes. North American Journal of Fisheries Management, 33(6), 1184-1193; Ready, R.C., Poe, G.I., Lauber, T.B., Connelly, N.A., Stedman, R.C., & Rudstam, L.G. (2018). The potential impact of aquatic nuisance species on recreational fishing in the Great Lakes and Upper Mississippi and Ohio River Basins. Journal of Environmental Management, 206, 304-318).

[100] ELPC Climate Change Report at 45.

[101] *Id*.

[102] Fourth National Climate Assessment, Vol. 2, Summary Findings, 7 (2018), https://nca2018.globalchange.gov/

[103] Application at 34.

[104] Public Notice, Sheet 33 of 38.

Economics. Increasing the size of the tunnel to accommodate both oil and electric lines would dramatically increase its cost.[105]

The Corps needs to gather more information about the potential risks and environmental impacts of having electric wires in the tunnel.

d. Other pending projects on Line 5 and ongoing impacts of Line 5

The Corps should not consider this Enbridge Project in isolation but, instead, consider it in the context of other pending or recent projects, permit applications, and impacts of Line 5. Currently, there are multiple other pending permit approvals for other pipeline work on Line 5, including (1) an application for re-location of a 41-mile-long portion of Line 5 pipeline in Wisconsin, in response to a lawsuit filed by the Bad River Band;[106] (2) an application for a special use permit in the Chequamegon-Nicolet National Forest;[107] and (3) permits for stream crossings and other pipeline activity in Michigan.[108] Like the Project, each of these projects has impacts on wetlands, shoreline, and aquatic ecosystems. The Corps should consider the cumulative impacts of these projects collectively before approving the Enbridge Project.

2. The effects on the quality of the human environment are likely to be highly controversial.

The Corps must consider "[t]he degree to which the [the project's] effects on the quality of the human environmental are likely to be controversial."[109] When courts consider the controversial nature of the impacts to the human environment, they evaluate conflicting opinions about the size, nature, and impacts of the project.[110] First, as discussed below, there is

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[105] ATC Letter to CORA re Straits Cable Replacement Project (April 30, 2019), Exhibit M.
[106] Multiple Wisconsin agencies are considering permits relating to this pipeline relocation. For instance, the Wisconsin Department of Natural Resources will evaluate a wetland fill and waterway impact/crossing permit application, https://dnr.wi.gov/topic/eia/enbridge.html; Public Service Commission of Wisconsin is reviewing proposed real estate acquisitions related to the relocation.
[107] Troy R. Thompson, US Forest Service Hydrogeological Assessment of the Enbridge Pipeline Section on the Chequamegon-Nicolet National Forest: Technical Report at 1, USDA Forest Service, Region 9 (2019).
[108] *See e.g.,* 36-Enbridge Tributary to Paint River HDD-Crystal Falls Twp.(pipeline replacement), https://miwaters.deq.state.mi.us/nsite/map/results/detail/-8046601131437211620/documents; Enbridge Line 5 West Mile Creek Geohazard Mitigation Project-Garfield Twp (installation of boulder riffles in floodplain), https://miwaters.deq.state.mi.us/nsite/map/results/detail/7869628370450812816/documents
[109] 40 C.F.R. § 1508.27(b)(4).
[110] *See Partners in Forestry Co-Op, Inc. v. U.S. Forest Serv.*, 638 Fed. Appx. 456 (6th Cir. 2015) (action is "controversial" when there is a disagreement as to the size, nature, or effect of an action that casts substantial doubt on the adequacy of the agency's methodology and data);

well-documented controversy surrounding alternatives analyses for the tunnel prepared by Enbridge and the State of Michigan.[111] Multiple lawsuits have challenged the safety of the Line 5 crossing and the proposed tunnel at the Straits of Mackinac,[112] including two lawsuits involving the Michigan Attorney General. In addition, approximately 3,000 commenters have already expressed opposition to the Enbridge Project through the pending Michigan Public Service Commission permit application process;[113] many of these comments raise concerns that will prove relevant in the Corps' analysis of the scope, nature, and impact of the project. Further, while Enbridge has consistently downplayed the impacts of the Project and risks associated with Line 5, both the Corps and EGLE have requested more information about the impacts, highlighting the need to get more information. An EIS will enable the Corps to flesh out the analysis and document more clearly the environmental impacts of the alternatives.

3. Project construction poses a significant, potential threat to fish spawning grounds.

As discussed above, in exchange for the agreement to cede territory to the United States, the Tribes reserved the right to hunt, fish, and gather throughout the territory—including in the Great Lakes and the Straits of Mackinac. The right to fish has been fiercely protected by the Bay Mills Indian Community and other tribes, including through litigation that resulted in critical legal decisions upholding that right.[114] Bay Mills defends its legal right because the right to fish, and the need for a natural environment in which fish can thrive, is of the utmost importance to the tribe and its members.

Consistent with the Tribal Nations' legal right to fish, the State of Michigan and the signatory tribes to the 1836 Treaty entered into a consent judgment in 1985 regarding management of the Great Lakes fishery. That agreement affirmed that the State and the Tribal Nations must work together to protect the Tribal Nations' treaty fishing rights and manage the

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Nat'l Parks Conservation Ass'n v. Semonite, 916 F.3d 1075, 1078-80 (D.C. Cir. 2019); *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Engineers, et al.*, -- F. Supp.3d --, 2020 WL 1441923 (D.D.C. March 25, 2020).

[111] *See infra*, VIII.B.

[112] *See, e.g., In the Matter of Petitions of Straits of Mackinac Alliance, et al., No. 18-010808* (EGLE admin.) (challenging the permits to install screw anchors); *Natl. Wildlife Fed'n. v. Dept. of Transp.,* Case No: 2:17-cv-10031 (E.D. MI) (challenging approval of spill response plans); *Nessel v. Enbridge Energy*, No. 19-474-CE (Ingham County Cir. Ct. MI) (seeking to cease operation of the pipeline).

[113] Case Docket, Michigan Public Service Commission, Case No. U-20763, https://mi-psc.force.com/s/case/500t000000UHxxLAAT/application-for-the-authority-to-replace-and-relocate-the-segment-of-line-5-crossing-the-straits-of-mackinac-into-a-tunnel-beneath-the-straits-of-mackinac-if-approval-is-required-pursuant-to-1929-pa-16-mcl-4831-et-seq-and-rule-447-of-the-michigan-publ

[114] *See People v. LeBlanc*, 248 N.W. 2d 199 (Mich. 1976); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

Great Lakes fishery in a manner that respected tribal and state interests. The Tribal Nations and the State have worked together to protect the Great Lakes ever since.

Commercial and subsistence fishing remain the primary occupation of members of Bay Mills. More than half of Bay Mills member households rely on fishing for their income.[115] Bay Mills' fishing rights in the area of the Project likely will be impacted by Project construction, including the large volumes of water withdrawals and discharges of the wastewater and the shoreline disturbances. Lake whitefish (*Coregonus clupeaformis*) is a primary target species of the Chippewa Ottawa Resource Authority ("CORA"), which includes Bay Mills, Grand Traverse Band of Ottawa and Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, the Sault St. Marie Tribe of Chippewa Indians, and the Little River Band of Ottawa Indians. CORA tribes rely on the region for its commercial fishery. As explained in a declaration by Dr. Mark Ebener, Fishery Assessment Biologist, Inter-Tribal Fisheries and Assessment Program, CORA,

> Nearly the entire area of Northern Lake Michigan and Northern Lake Huron is lake whitefish habitat that is used by all life stages. Lake whitefish eggs are laid on shallow rocky/gravel areas in water less than 10 ft. deep typically from late October through early December where they incubate throughout the winter. Young lake whitefish hatch just after ice out from mid to late April through mid to late May. These young lake whitefish occupy very shallow sandy areas less than 5 ft. deep adjacent to the spawning shoals through roughly early July. Thereafter, the young lake whitefish move to deeper water. Juvenile and adult lake whitefish live throughout Northern Michigan and Northern Huron occupying waters of typically 30 to 200 ft. deep.
>
> Northern Lake Michigan and Northern Lake Huron are very productive areas for lake whitefish with biomass levels typically exceeding 10 million pounds annually. Statistical catch-at-age estimates of the total biomass of lake whitefish age-4 and older in Northern Lake Michigan and Northern Lake Huron ranged from 10 to 47 million pounds annually and averaged 28 million pounds during 1986-2014. The annual CORA commercial harvest from Northern Lake Michigan and Northern Lake Huron ranged from 1 to 4 million pounds and averaged 3 million pounds during 1986-2014. Lake whitefish harvests from Northern Lake Michigan and Northern Lake Huron made up 37% to 76% of the total annual CORA commercial lake whitefish harvest from the 1836 ceded waters and averaged 58% during 1986-2014. Thus, Northern Lake Michigan and Northern Lake Huron are very important fishing grounds for the CORA fishery and the habitat in these areas produces more than ten millions of pounds of lake whitefish annually for harvest by the tribes.
>
> Lake whitefish sustain themselves solely through natural reproduction, but spawning does not take place throughout Northern Lake Michigan and Northern

[115] Affidavit of Bryan T. Newland, Petition to Intervene by Bay Mills Indian Community in MPSC Case No. U-20763, Exhibit N.

> Lake Huron. Rather lake whitefish spawning is concentrated in shallow rock and gravel areas adjacent to the shorelines. As such, lake whitefish spawning sites would be highly vulnerable to an oil spill. In the Northern Lake Michigan area specific spawning locations include the areas around Green Island, Pt. aux Chenes, and Epoufette along the southern shore of the Upper Peninsula of Michigan and along the shoreline of the northern Lower Peninsula of Michigan from Cecil Bay and Big Stone Bay west to Waugoshance Point and then south through Sturgeon Bay. In Northern Lake Huron lake whitefish spawn along nearly the entire southern Upper Peninsula shoreline from Detour west to just north of St. Ignace wherever there are small rocky and gravel areas. Lake whitefish also spawn in large aggregations from Cheboygan, Michigan southeast along the northeastern portion of the Lower Peninsula of Michigan to 40 Mile Point; again wherever rocky and gravel areas are found along the shoreline. [116]

Lake whitefish spawning sites would be highly vulnerable to a spill, because whitefish egg and larval whitefish are highly susceptible to changes in water temperature, chemistry, oxygen, and turbidity. Spilled oil makes it physically difficult for fish and eggs to breathe and simultaneously poisons them. Lake whitefish are not the only species with spawning sites that would be highly vulnerable to a spill.[117] Spawning grounds and nearshore nursery habitats of many species may be permanently degraded by these water quality changes. The Corps should prepare an EIS to fully evaluate the impacts to tribal fisheries.

4. Potential wetlands impacts require further consideration in an EIS.

The Corps should prepare an EIS to thoroughly analyze the direct and indirect impacts of this Project on emergent, forested, and coastal wetlands. Enbridge's Joint Permit Application and supplemental submissions do not provide sufficient information to determine the impact of the Project on wetlands. Similar to its treatment of several application issues, Enbridge also has provided conflicting information across permit materials and application processes.

Initially, Enbridge asserted that, the Project will only impact a total of .11 acres of wetlands—with .08 acres of wetlands suffering permanent impacts and .03 acres of temporary impacts.[118] Then, Enbridge revised its figures to indicate that 0.10 acres would be permanently

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[116] Mark P. Ebener, Fishery Assessment Biologist, Inter-Tribal Fisheries and Assessment Program, CORA, Declaration (July 14, 2016), 3-4, ("Ebener Report"), Exhibit O.
[117] Goodyear Spawning Atlas for the Great Lakes, ArcGIS map available at https://www.arcgis.com/home/webmap/viewer.html?webmap=8e951782d20340708ced556274a18941 (last modified Jan. 29, 2018). Species occurrence data were collected from the Atlas of Spawning and Nursery Areas of Great Lakes Fishes (Goodyear et al. 1982) and compiled into an interactive map by Lacey Mason, Institute for Fisheries Research at the University of Michigan.
[118] Application, 11.

impacted and .03 acres would be temporarily impacted, for a total of .13 acres.[119] Enbridge also acknowledges that it has not completed surveys for 5.2 acres of the south side and planned to do so in spring 2020; to date, Bay Mills has not seen any updated reports on wetland impacts. This missing information is critical because it will determine Enbridge's obligations under its Section 404 permit and Section 401 certification before EGLE.[120]

Second, Enbridge downplays the impact of the project to coastal wetlands. As identified by the Great Lakes Coastal Wetland Monitoring Program (GLCWMP), there are four coastal wetlands adjacent to the Project area—two of which lie mere feet from the boundary (Figure 1). The farthest of the coastal wetlands is only approximately 0.4 miles from the Project boundary. Though not directly in the Project area, it is apparent that these sensitive ecosystems will be impacted by the proposed construction. Although Enbridge is not asking to directly fill portions of these wetlands, disturbance from heavy machinery and blasting, and effluent discharge would disrupt these ecosystems.

[119] In fact, Enbridge's updated Joint Permit Application, actually contains both the 0.11 figure and the .13 figure. See HNY-NHX4-FSR2Q V4, 10, 12 (June 17, 2020), https://miwaters.deq.state.mi.us/nsite/site/2746869251480183093/documents

[120] As noted in the Public Notice Joint Permit Application form, "EGLE may impose as a condition of any wetland permit, . . . , compensatory mitigation. The wetland mitigation requirement may be waived for projects affecting less than one-third of an acre of wetland if no reasonable opportunity for mitigation exists." Public Notice, 13.

Figure 1. Recognized Great Lakes coastal wetlands (green polygons) and Environmental Areas (signified by white arrows) adjacent to north side project area.[121]

Third, the wetlands within the project area on the north side could also be considered coastal alvar. The coastal alvar habitats found in several places around the Great Lakes region are covered by thin layers of soil or consist of bare limestone rock (Figure 2). Alvars occur mainly in the Great Lakes region from the Upper Peninsula of Michigan to northern Lake Huron east across Manitoulin Island, following the escarpment to New York. Variations of alvars exist with shoreline alvars occurring at the water's edge. Because of erosion, and relatively less severe and shorter periods of drought, the vegetation of shoreline alvars is different from that of plateau alvars. The shoreline's alvars have many mesic prairie or prairie/fen species including the dominant grasses. The Project area also includes Great Lakes cobble beach. Both of these ecotypes include a host of rare, endemic plant species, including, but not limited to Houghton's Goldenrod and Dwarf Lake Iris. According to Michigan Natural Features inventory, alvar is state ranked: S1 – critically imperiled.[122]

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[121] Coastal Wetlands Website, www.coastawetlands.org and https://www.michigan.gov/documents/deq/lwm_ea_list_by_county_268678_7.pdf

[122] Albert, D.A., J.G. Cohen, M.A. Kost, B.S. Slaughter, and H.D. Enander. 2008. Distribution Maps of Michigan's Natural Communities. Michigan Natural Features Inventory, Report No. 2008-01, Lansing, MI. 166 pp.

Figure 2. Prevalence of alvar within Michigan.

The wetland delineation reports from the north shore project area document the potential existence of alvar. More investigation is needed to determine the presence of alvar and the potential impacts of the project on alvar. Many soil borings from these wetlands reference very shallow limestone gravel, thin layers of duff followed by limestone gravel, thin layers of muck followed by refusal of the soil corer (perhaps because of limestone bedrock), and in one instance, no soil core/soil pit was dug because too many Dwarf Lake Iris were present.

Fourth, Enbridge does not adequately describe the impacts of increasing the base and surface width of Boulevard Drive. Enbridge has not provided plans depicting the final grade of Boulevard Drive and where surface runoff will be siphoned and drained. Enbridge does not discuss how runoff will be treated to remove debris. Nor does Enbridge address how the rate of runoff will be controlled for erosion and sedimentation. Enbridge fails to explain how it will minimize the harmful effects of road expansion along the Straits' northern coast and emergent

wetlands. Detailed construction plans will enable the Corps to evaluate how the movement of water in the system will change, impacting wetlands, the floodplain, and Lake Michigan.

Fifth, the dewatering process used to create the tunnel shaft may result in a drawdown of groundwater and could have impacts on groundwater wells and wetlands. Enbridge's application barely mentions these issues. The Corps must consider these potential impacts in an EIS before the Corps approves the Project.

Sixth, Bay Mills is concerned about the impacts of the Project on Wetland 3 ("W3"). As described in the Stantec Wetlands and Waterways Delineation Report, submitted by Enbridge:

> Wetland W3 is a large wetland consisting of PEM, PSS, and PFO wetland types. This wetland begins within the Line 5 ROW approximately 2,000 feet south of Highway US 2. It extends south along a former lake plain that slopes gently toward the Straits. Scattered uplands are present within this large wetland complex. These upland areas were not mapped due to the complexity associated with areas that contain wetland/upland mosaic.[123]

Enbridge plans to fill W3 but has not provided sufficient justification of the need to fill this wetland. It merely provides that it will "provide access around the existing North Straits Facility to a construction and staging area to the north of the facility."[124] In addition to the lack of justification for filling W3, Enbridge's original application failed to address its methods of trenching for W3. In response, the Corps requested further information;[125] it is unclear whether Enbridge provided it.

Regarding restoration, Enbridge stated: "The crossing of Wetland 3 will be restored to original contours, seeded with an emergent wetland seed mix, and is expected over time to return to its natural state. Enbridge will monitor disturbed areas for invasive species."[126] But, in Appendix B of its Environmental Protection Plan, Enbridge provides examples of its seed mix of generic non-native species.[127] Given the extensive wetland surveys, Enbridge should be able to provide a local native seed list, and provide maps as to where site-specific mixes would be used.

The Corps indicated concern with Enbridge's potential use of open trench methods in W3. Specifically, the Corps wrote:

> Clarify whether open trench methods may be used within Wetland 3. If you propose to use open trench methods within Wetland 3, clarify why directional

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[123] Stantec, Wetlands and Waterways Delineation Report—Great Lakes Tunnel Project, 6 (October 22, 2019), GLTP_Wetland_Report_Final_20191022 v.1.
[124] Public Notice, 2.
[125] Corps April 14 Letter.
[126] Public Notice, 37.
[127] Enbridge Environmental Protection Plan, Appendix B.

> drilling under the wetland is not practicable, and provide drawings of the trench and temporary spoils sidecasting areas in the wetland, with all dimensions shown.[128]

The public notice indicates that "tie-ins may be performed via traditional open trench or trenchless methods (e.g., HDD)."[129] It then states, "[i]f the north side tie-in is completed via a trenchless technique, it may extend outside the LOD, under W3" and will result in "no ground disturbance to W3."[130] There is no discussion of the possible impacts to W3 caused by the activity under W3 even if there is no ground disturbance. The Corps cannot approve the Section 404 permit without further consideration of the impacts to W3.

Seventh, Enbridge's permit application also is incomplete because it lacks an adequate wetland mitigation plan notwithstanding EGLE's and the Corps' request. Michigan law "require[s] mitigation to compensate for unavoidable wetland impacts" in the form of restoration of previously existing wetlands, the creation of new wetlands, the acquisition of approved credits from a wetland mitigation bank, or, in some circumstances, the preservation of existing wetlands.[131] Under Michigan law, EGLE may waive the mitigation condition here only if "[t]he permitted wetland impact is less than 1/3 of an acre *and* no reasonable opportunity for mitigation exists."[132]

As part of its permit application, Enbridge was required to provide a detailed conceptual mitigation plan or an explanation of why the mitigation requirement should be waived. Instead, Enbridge stated that the total wetland impact area is 0.13 acres and requested a waiver, ignoring the requirement to provide a mitigation plan or an explanation of why mitigation is not required. EGLE considered this insufficient, and the agency asked for a mitigation plan.[133] Deep into the public comment period, Enbridge provided some additional—and conflicting—information. In one document dated June 17, 2020, Enbridge explained why it was not proposing mitigation.[134] But in a letter to EGLE dated June 8, 2020, Enbridge suggested that it would perform a modest mitigation—the removal of *Phragmites australis*, an invasive

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[128] Corps April 14 Letter, p. 2.
[129] Public Notice, 37.
[130] Public Notice, 32.
[131] Mich. Admin. Code R. 281.925(4).
[132] Mich. Admin. Code R. 281.925(3)(a)(1) (emphasis added).
[133] EGLE May 4 Letter, *supra* 4.
[134] Enbridge Energy Tunnel Project NPDES permit application (HNY-TBJC-PNK8V) (June 17, 2020). While the document is dated June 17, 2020, it does not appear to have been added to MiWaters.deq.state.mi/us, where EGLE keeps permit application materials and makes them available for the public, until June 23, 2020. *See* https://miwaters.deq.state.mi.us/nsite/site/2746869251480183093/documents. This is representative of the moving target that is Enbridge's application and the way that materials are difficult for members of the public to adequately review during the comment period.

species.[135] Much like other parts of Enbridge's application materials, this is unclear and insufficient. If Enbridge removes Phragmites, it should do so before any disturbance to the area is permitted. Enbridge conducted plant surveys for their geotechnical boring in 2018, identifying invasive plant areas. These areas should get special consideration regardless of disturbance or fill, and the public and the agencies would benefit from having access to the plant meander survey data and species lists generated from these assessments.

Wetlands mitigation itself is a last resort—required where impacts are "unavoidable"—and yet Enbridge takes the waiver of mitigation for granted.[136] Enbridge's approach is especially troubling here because there are at least two threatened species in the vicinity of the Project: Houghton's Goldenrod and Dwarf Lake Iris.[137] Under the CWA, the Corps cannot condone noncompliance with state water quality requirements, including wetlands protection.[138]

5. Potential floodplain impacts require further consideration in an EIS.

An EIS is also needed to consider the impacts of the Project on floodplains in the area. The floodplain surrounding the north project area has been classified and protected as part of the Coastal Barrier Resources System ("CBRS"). The Coastal Barrier Resources Act[139] ("CBRA")

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[135] Letter from Paul Turner, Enbridge Energy, to Joseph Haas, Michigan Department of Environment, Great Lakes, and Energy, dated June 8, 2020.

[136] Mich. Admin. Code R. 281.925(4). In contrast, when Enbridge prepared the 2018 Report for Michigan, it acknowledged potential mitigation measures for wetlands, including restoration and compensatory mitigation. 2018 Report at 55. Even then, "[g]enerally accepted engineering practices and common wetland policy regulations" call for mitigation "such as near-site replacement wetland construction and/or wetland preservation at compensation ratios *resulting in a net increase in wetland acreage.*" Grobbel Environmental & Planning Associates, Comments on Application No. 2014-01071-TJH (Feb. 21, 2019) at 7, Exhibit K. The Detroit District of the Corps also generally requires mitigation "at a ratio greater than 1:1" to "adequately compensate for unavoidable adverse impacts." 2008 Mitigation Guidelines and Requirements, Detroit District, U.S.A.C.E (2008) at 1.

[137] EGLE May 4 Letter, *supra* 4.

[138] *See* 40 C.F.R. 230.10(b).

[139] 16 U.S.C. § 3501. The Coastal Barrier Improvement Act of 1990 (CBIA), Pub. L. No. 101-591, 104 Stat. 2931 (codified as amended at 16 U.S.C. § 3503 (2012)) expanded the Coastal Barrier Resources System (CBRS) to include undeveloped coastal barriers along the Florida Keys, Great Lakes, Puerto Rico, and U.S. Virgin Islands. § 3, 104 Stat. at 2931. The CBIA also created a new category of coastal barriers called "otherwise protected areas" (OPAs), which are held and managed by a qualified organization, primarily for wildlife refuge, sanctuary, recreational, or natural resource conservation purposes. § 12, 104 Stat. at 2940; U.S. Fish & Wildlife Serv., *CBRA Legislation and Testimony*, http://www.fws.gov/ecological-services/habitat-conservation/cbra/Act/Legislation.html (explaining legislative changes to the CBRA).

was designed to protect biologically rich coastal barriers/communities by prohibiting the use of federal dollars to develop such coastal features.

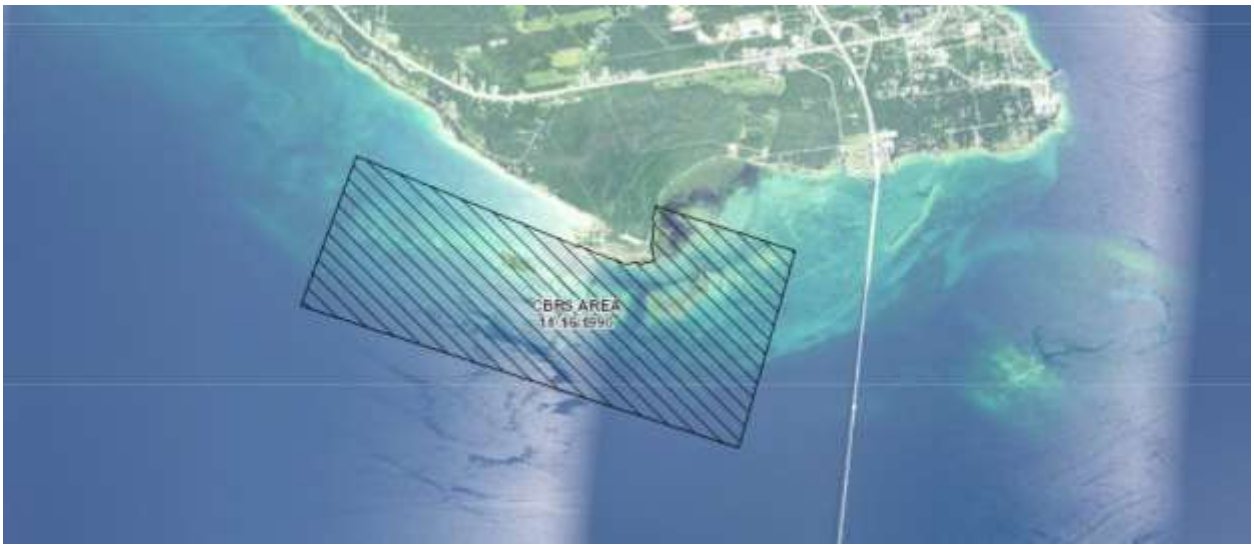

Figure 3. Map of CBRS area available in FEMA's National Flood Hazard Layer (NFHL) Viewer.

Enbridge's failure to demonstrate the requisite understanding and care for Michigan's unique and treasured natural resources is reflected in its plans for this area that has earned federal distinction as part of the Coastal Zone Barrier System. Enbridge simply notes:

> Construction activities in these areas involve cut and fill for road improvements of the existing Boulevard Drive for construction access. Enbridge will comply with local floodplain development permitting requirements and coordinate with the local floodplain manager.
>
> A section of Boulevard Drive that is proposed for improvements in the eastern portion of the north side LOD is located within a Coastal Barrier Resources System (CBRS) buffer zone . . . .[140]

Then, after acknowledging that the CBRA prohibits federal funding in these designated areas, Enbridge asserts, "Development can still occur within the CBRS, as long as private developers or other non–federal parties bear the full cost (FEMA 2019)."[141]

In other words, Enbridge essentially will pay to avoid the underlying purpose of the CBRA. Enbridge proposes to bury these features—the very ones the CBRA meant to protect—under 16 inches of fill. Enbridge has not explained the need for filling this area. Enbridge's application states that 3,630 cubic yards of material would be used to fill much of the project area within the 100-year floodplain. Enbridge does not adequately justify the need for this

[140] Supplemental Information, 8-9.
[141] *Id.*

activity, nor does it provide any assurance that construction site runoff, even in the event of severe rain and flooding, will not lead to direct discharge (either via direct overland flow or via the mapped state and federally regulated stream) of excessive sediment, slurry, oils/grease, etc. The Corps should not approve this Project without gathering more information and analyzing the impacts of the activity in the floodplain. There should be continual state and federal oversight, documentation, and reporting set up for these concerns.

6. The Project involves unique and uncertain risks that require further consideration.

Tunnel construction under the Straits of Mackinac raises additional and uncertain risks that necessitate preparation of an EIS. First, as a cross-section profile of the Straits [Figure 4] submitted by Enbridge illustrates, Enbridge will drill through and place the tunnel in a valley deep in the middle of the Straits. Enbridge has indicated that it will locate the tunnel at a depth between ten feet below the top of the rock and sixty feet below the mud line—whichever is shallower. As the cross-section shows, this means that where the tunnel is in the valley of the Straits, the drilling and tunnel likely will be in sediment (glacial till) *above* the bedrock layer. More information and assessment are needed to understand how Enbridge will drill through that area safely, particularly considering the relatively high water pressures at that point in the Straits. The Corps also needs to evaluate the potential release of drilling fluids into Lake Michigan during the tunnel drilling process through fractures caused by the pressure of the drilling process.

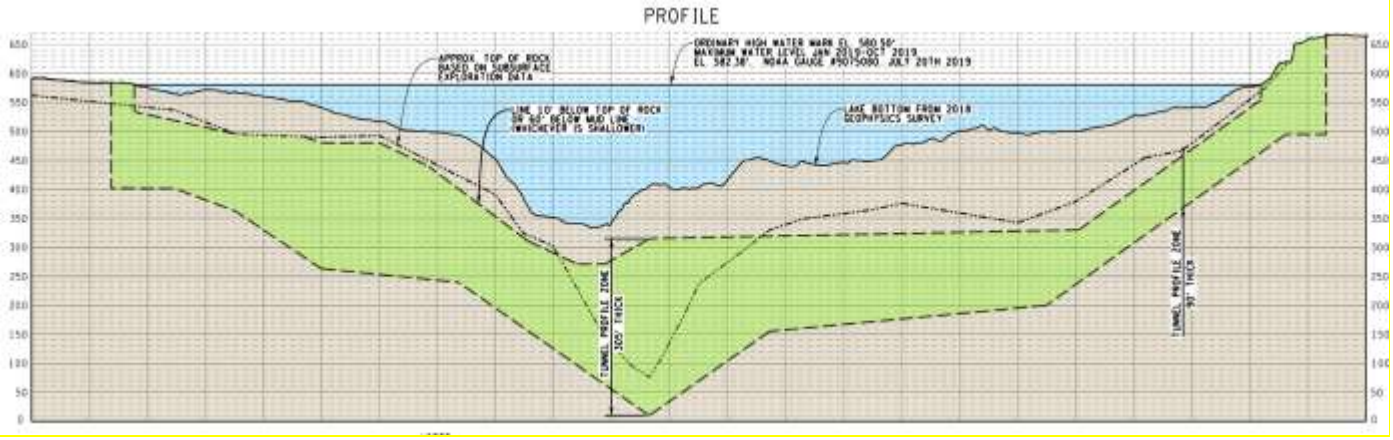

Figure 4. Profile of Straits at Project location. The green area shows where the tunnel might be built. The dotted line that makes a sharp "v" into the green area in the center indicates the approximate top of bedrock.[142]

7. The Project threatens a violation of federal, state, and local laws.

Considering that the proposed Enbridge Project may lead to violations of several applicable federal and state environmental standards, an EIS is needed to further evaluate the

[142] Enbridge Application, GLTP_JPA_figures_20200402 v4.pdf, 4.

proposal. This section highlights some, but likely not all, of the laws that the Corps should consider before approving the Project.

- Michigan Water Quality Standards: As discussed in the CWA section, *infra*, Michigan's water quality standards include antidegradation rules which protect existing uses—including fish consumption and indigenous aquatic life and wildlife. Enbridge's permit application materials do not demonstrate that the Enbridge Project will satisfy Michigan's antidegradation rules.

- Endangered Species Act: *See* VII, *infra*. Prior to approving the Project, the Corps should undertake consultation with the FWS and should ensure that the impacted endangered and threatened species can be appropriately protected or it should deny the permit application.

- Endangered and Threatened Species Act of Michigan: In addition to the species in the project area that are protected under the ESA, several more species in the area are protected under the Endangered and Threatened Species Act of Michigan. The Corps should undertake a deeper analysis and work with the Michigan Department of Natural Resources to ensure that there will not be a "take" of the Michigan-specific protected species. Further, the Corps should make sure that the Project will not result in violations of the Michigan statutory and regulatory protections for species that are listed on both the federal and state lists.

- Coastal Barrier Resources Act:[143] As discussed, *supra* at V.C.6, Enbridge's plans will occur in close proximity to protection coastal barrier zones, which means the Corps should ensure compliance with the CBRA through a deeper review of the impacts through the preparation of an EIS.

- Michigan Environmental Protection Act ("MEPA"):[144] It is possible that approval of the Project will interfere with the State of Michigan's ability to protect its natural resources and the public trust in those resources. MEPA mandates that the administrative agencies and courts determine the "alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources" and to identify "a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare."[145]

- Great Lakes Submerged Lands Act ("GLSLA"):[146] Boring a tunnel through the bedrock and soils beneath the Straits is an excavation, alteration, or modification of the lake bottomlands subject to the GLSLA, which requires permitting. The unpermitted

[143] 16 U.S.C. § 3503 (2018).
[144] MCL 324.1705.
[145] MCL 324.1705(2).
[146] MCL 324.32501.

"excavat[ion] or fill[] or in any manner alter[ation] or modifi[cation of]" any of those unpatented lake bottomlands is prohibited.[147] Michigan holds in public trust the lake bottomlands and made lands in the Great Lakes,[148] including lands accessed by drilling[149] and soils underlying the Great Lakes.[150] "[P]ermission given by the Corps . . . has no effect upon the separate right and duty of [Michigan] to protect and conserve the submerged lands."[151]

- 1836 Treaty of Washington: Bay Mills maintains treaty right in the entire region that Line 5 crosses, including the Straits. The Corps must consider the impact the Proposal will have on Bay Mills' treaty rights and protect those rights.

VI. CULTURAL RESOURCES

Before the Corps can grant Enbridge's permit application, which threatens Bay Mills' identity and its way of life and is centered in the Straits of Mackinac, it must consider the impacts of the Project on cultural resources;[152] it must also consult with Bay Mills concerning the impacts and mitigate the impacts to cultural resources under the NHPA and NEPA.

Due consideration of tribal resources should be grounded in Bay Mills' expertise and understanding of its connection to the resource.[153] The Straits, and the Great Lakes more broadly, are central to Bay Mills' spiritual history and current way of life, and are not valued on the basis of individual sites alone but on the interconnectedness of the land, water, and people. To look at it any other way is like 'missing the forest for the trees.'

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[147] MCL 324.32510.
[148] MCL 324.32502.
[149] MCL 324.32503.
[150] *Glass v. Goeckel*, 703 N.W.2d 58, 65, 88 (Mich. 2005) (citing *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).
[151] *Obrecht v. Nat'l Gypsum Co.*, 105 N.W.2d 143, 147 n.4 (Mich. 1960).
[152] Although neither NEPA nor the NHPA define cultural resources by regulation, the National Park Service describes cultural resources as "an aspect of a cultural system that is valued by or significantly representative of a culture, or that contains significant information about a culture. A cultural resource may be a tangible entity or a cultural practice. Tangible cultural resources are categorized as districts, sites, buildings, structures, and objects for the National Register of Historic Places, and as archeological resources, cultural landscapes, structures, museum objects, and ethnographic resources for NPS management purposes. *See* National Park Service Management Policies, 157 (2006), https://www.nps.gov/policy/MP_2006.pdf#page=167.
[153] *See id. at* § 800.4(c)(1) ("The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.").

The Corps currently lacks adequate information to assess the impacts of Enbridge's Project on cultural resources.

A. The Corps must undertake consultation with Bay Mills and other Tribal Nations under Section 106 of the NHPA.

The NHPA was created to "foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony."[154] The NHPA has been characterized as a "stop, look, and listen" statute that requires agencies to fully consider the effects of its actions on historic, cultural, and sacred sites.[155] Section 106 of the NHPA requires that prior to issuance of any federal funding, permit, or license, agencies must take into consideration the effects of that "undertaking" on historic properties.[156] The Advisory Council on Historic Preservation ("ACHP") promulgated rules to implement the NHPA, and it authorized federal agencies to develop "counterpart regulations" and obtain ACHP's approval; notably, the Corps' implementing regulations have never been approved by the ACHP, which means that the ACHP regulations govern.[157]

Agencies "must *complete* the section 106 process *prior* to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license."[158] Section 106 requires the Corps to consult with Tribal Nations *before* it makes a decision on a federal undertaking.[159] Agency officials must consult with tribes "that attach religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies *regardless of the location of the historic property*."[160] Consultation is also designed to "seek ways to avoid, minimize or mitigate any adverse effects on historic properties."[161]

B. Bay Mills' spiritual, cultural, and economic dependence on the Straits of Mackinac and the Great Lakes is threatened by the Project.

The Great Lakes and the Straits of Mackinac have profound cultural significance to Bay Mills. According to the oral histories of the tribe, the creation of North America began with a flooded Earth. The animals that survived that Earth received instructions from the Creator to swim deep beneath the water and collect soil that would be used to recreate the world. All of

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[154] *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105 (D.C. Cir. 2006) (*citing* 16 U.S.C. § 470-1(1*)); Comm. To Save Clevelands Huletts v. US Army Corps of Engineers*, 263 F. Supp.2d 776, 788 (N.D. Ohio 2001)(citing 36 CFR § 800.15).
[155] *See, e.g., Te-Moak Tribe of Western Shoshone v. Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 606 (9th Cir. 2010).
[156] 54 U.S.C. § 306108; 36 CFR § 800.1
[157] *Comm. To Save Clevelands Huletts*, 263 F. Supp.2d at 791.
[158] 36 C.F.R. § 800.1 (emphasis added).
[159] 36 C.F.R. § 800.2(c)(2)(i); *see also Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999).
[160] 36 CFR § 800.2(c)(2)(ii) (emphasis added).
[161] 36 CFR § 800.1

the animals failed, but the body of the muskrat, the last animal that tried, resurfaced carrying a small handful of wet soil in its paws.

According to the history, the Creator used the soil collected and rubbed it on the Great Turtle's back, forming the land that became known as Turtle Island, the center of creation for all of North America. It is believed that the Great Turtle emerged from the flood in the Straits of Mackinac. Because the creation of North America took place in the Great Lakes, the Great Lakes are considered the heart of Turtle Island and as such, the heart of North America. The word "Mackinac" is, in fact, derived from the original name of the Great Turtle from the Ojibwe story of Creation. The Straits is more than a waterway; they are a place of ongoing spiritual significance to the way of life of Bay Mills since time immemorial.

The Straits and the Great Lakes watershed play a fundamental role in the economic, cultural, traditional, and spiritual identity of Bay Mills. Considering the religious and cultural significance of Bay Mills' relationship to the broader ecosystem and the potential impact that an oil spill could have on these special resources, the entire area should receive special protection.

The ACHP has recognized that large scale properties, comprised of multiple, linked features" can constitute a "cohesive 'landscape.'"[162] Accordingly, the ACHP committed to working with the National Park Service ("NPS") to "[p]romote the recognition and protection of Native American traditional cultural landscapes both within the federal government and the historic preservation community . . . ."[163] The NPS defines "cultural landscapes" as "a geographic area, including both cultural and natural resources and wildlife or domestic animals therein, associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values."[164] The Corps should respect that, for Bay Mills, the Straits of Mackinac is a cultural landscape, and the Corps should prioritize consultation and information-gathering.

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[162] Native American Traditional Cultural Landscapes Action Plan (2011), https://www.achp.gov/sites/default/files/guidance/2018-06/NativeAmericanTCLActionPlanNovember232011.pdf

[163] *Id.*

[164] NPS, Preservation Briefs # 36. Two particularly relevant examples of cultural landscapes relate to the Straits of Mackinac and the surrounding area. First, "historical vernacular landscapes" have "evolved through use by the people whose activities and occupancy shaped that landscape." Second, "ethnographic landscapes" contain "a variety of natural and cultural resources that associated people define as heritage resources." https://www.nps.gov/tps/how-to-preserve/briefs/36-cultural-landscapes.htm

C. The Corps must undertake additional evaluation of the impacted cultural resources before deciding whether a permit is appropriate.

The Corps must undertake consultation and gather more information prior to issuing the permit. The first step is for the Corps to determine the "area of potential effects"[165] ("APE") of the federal undertaking. The APE includes the area within which an undertaking "may directly or indirectly cause alterations in the character and use of historic properties . . . "[166] When defining the APE, the Corps must look to the ACHP regulations for guidance.[167] Then, the Corps must identify historic properties[168] within the APE that could potentially be affected.[169] Next, the Corps must evaluate the historic significance of such sites, and determine whether they are included or eligible for inclusion in the National Register of Historic Places. [170] To complete a proper evaluation of cultural resources under NHPA and NEPA, the Corps should undertake consultation with Bay Mills. In addition, under NEPA, the Corps must take a "hard look" at the cultural resources and other unique characteristics of the project area,[171] and should proceed with preparation of an EIS accordingly. As explained below, at a minimum, it is likely that the Project will directly impact a burial ground.

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[165] 36 CFR § 800.4(a)(1).

[166] *Id.* at § 800.16(d).

[167] *See Comm. To Save Clevelands Huletts*, 263 F. Supp.2d at 792 *(*"The Corps, accordingly, cannot rely on its own regulations to define the scope of its notice obligations or to define the "permit area" governing the circumstances giving rise to those obligations.")(citations omitted); *see also Colo. River Indian Tribes,* 605 F.Supp. 1425, 1437 (C.D. CA 1985)(finding that the Corps could not rely upon its own regulations, under 33 C.F.R. § 325, App. C, in place of the ACHP's regulations, because the "permit area" was more narrowly defined than the area to be considered under the ACHP's regulations.).

[168] Historic property is defined as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria." 36 C.F.R. § 800.16(l)(1).

[169] *Id*. at § 800.4(b).

[170] The criteria for evaluating National Register eligibility are "worded in a manner to provide for a wide diversity of resources." Eligible properties include those "associated with events that have made a significant contribution to the broad patterns of our history," "associated with the lives of persons significant in our past," and "that have yielded, or may be likely to yield, information important in prehistory or history." 36 C.F.R. § 60.4.

[171] *Anglers of the Au Sable v. US Forest Service*, 565 F. Supp. 2d 812, 826-827 (2008) (rejecting the Forest Service assertions that it had taken a "hard look" at the project's impact on unique recreational aspects of the area).

Based on Enbridge's current application materials, the Corps should either deny the permit now or undertake additional review in consultation with Bay Mills and other Tribal Nations. First, at this point, there is no delineation of the "area of potential effects,"[172] but Enbridge seems to focus on an area within 164 feet of the existing Line 5 right of way in some places and one mile of the area in others.[173] The Cultural Resources Phase I Report ("Phase I Report")—prepared for Enbridge by Commonwealth Heritage Group—acknowledges that the Corps has not yet independently evaluated the area of potential effects. A Phase I report is cursory and designed to identify potential sites that are listed on the National Register for Historic Properties ("NRHP"). Without a proper understanding of the area of potential effects of the Project, it is impossible to identify and evaluate the relevant cultural resources.

Second, while even Enbridge's own narrowly defined area of potential effects and the contents of the Phase I Report demonstrate the rich connection of Bay Mills and other Tribal Nations to the area; it also substantiates the need for further investigation for the presence of cultural resources. The Phase I report recognizes that at the time that Europeans entered the Straits of Mackinac in the 1600s, 6,000-7,000 members of the Chippewa (Ojibwa) and Ottawa Indians lived there, and there was agricultural activity, a village, and a cemetery.[174] In addition, the Phase I Report discusses the Fort Michilmackinac site and notes that regular archaeological digs have unearthed over one-million artifacts.[175] The Phase I Report also recognizes strong evidence of fall-spawning fish and gill-net technology.[176]

The currently available information, as laid out in the Phase I Report, raises concerns and highlights the need to do more investigation. For instance, Enbridge acknowledges that background research reveals that there are a total of "nine previously recorded terrestrial cultural resources" within a one-mile radius of the dual pipelines in the Straits of Mackinac;[177] it also notes that none have been evaluated for NRHP listing.[178] In addition, the Phase I Report indicates that three unverified sites may cross into the project areas and are associated with tribal cultural traditions.[179] The Phase I Report specifically mentions the possibility of a Native

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[172] The area of potential effects is defined as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." 36 CFR § 800.16(d).
[173] Commonwealth Heritage Group, Phase I Cultural Resources Survey for the Enbridge Mackinac Straits Project, 1 (August 2019).
[174] *Id.*at 10-11.
[175] *Id.*
[176] *Id.*
[177] Supplemental Information, 9.
[178] *Id.*
[179] Commonwealth Heritage Group, Phase I Cultural Resources Survey for the Enbridge Mackinac Straits Project, 20-22 (August 2019).

American burial ground at Point La Barbe, within one mile of the North Straits Project area.[180] The Phase I Report also makes clear that there are likely additional sites, which means that further study is appropriate. Even if the Phase I report had a clear understanding of the existing sties, it would be inappropriate for an initial report to reach a conclusion about the likelihood of adverse effects. Eventually, after more clarity is gained about the scope of the project area and the additional potential NRHP eligible sites, then a Phase II report can be prepared to detail the likely adverse impacts. Before the Corps can approve this permit, it must undertake a deeper review of the potential cultural resources impacted by the Enbridge Project.

Third, Enbridge's various permit submissions provide conflicting information that necessitates independent assessment. As illustrated below, the figure on the left indicates site 20MK15 to be located on the SE corner of the point, at the corner of the road. "The SHPO record, which is based on historical documentation, indicates the site was the location of a precontact (likely Woodland period) Native American burial mound."[181] The figure on the right indicates that the proposed storm water outfall location (Outfall 002) under the NPDES permit will be located in the same location.[182]

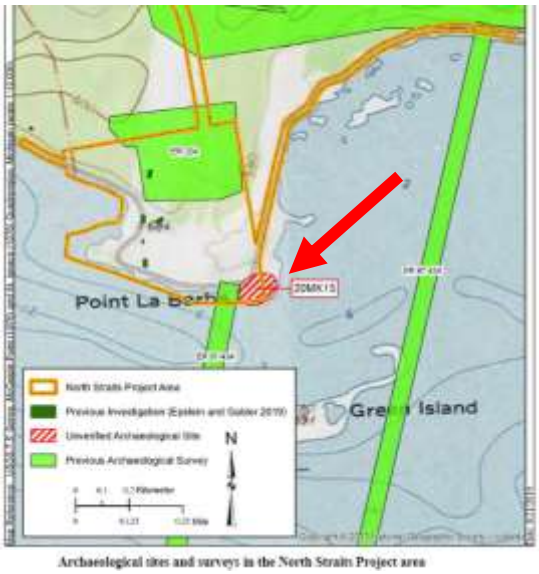

Figure 5 Cultural Resource Phase I Survey

Figure 6. Enbridge NPDES Permit Application[183]

Within the last week, Bay Mills received access to a map that consolidated all project-related activity into one master map. The comprehensive, layered map is the only effective way to see the interaction of the separately permitted activities. This document should have been made

[180] *Id.* at 20.
[181] *Id.*
[182] *See* NPDES GLTP 04152020 (Figures 1-3); Construction Water Management_NPDES_GLTP_Final_04152020.
[183] *Id*.

widely available from the outset so that the public had adequate information to comment on Enbridge's permit application.

VII. THE ENBRIDGE PROJECT WILL ADVERSELY IMPACT ENDANGERED AND THREATENED SPECIES AND MUST NOT BE APPROVED UNTIL FURTHER EVALUATION.

A. The Endangered Species Act

The Endangered Species Act (ESA) is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[184] Under the ESA, all federal agencies must afford ESA-protected species "the highest of priorities," and "to halt and reverse the trends toward species extinction, whatever the cost."[185] The ESA requires coordination with expert wildlife agencies so activities which undermine ESA goals can be avoided.

The ESA is administered by two expert wildlife agencies—the Department of Interior's Fish and Wildlife Service (FWS) and the Department of Commerce's National Marine Fisheries Service (NMFS). The FWS has primary responsibility for terrestrial and freshwater organisms, while the NMFS is responsible for marine wildlife such as whales and anadromous fish such as salmon. Thus, for this Project, FWS is the relevant agency.

To fulfill the ESA's conservation mission, species in decline must be identified or "listed."[186] Congress describes five factors that imperil the continued existence of species: (1) present or threatened destruction, modification, or curtailment of habitat (2) overutilization for commercial, recreational, scientific, or educational purposes, (3) disease or predation, (4) inadequacy of existing regulatory mechanisms, and (5) other natural or manmade factors.[187] Depending on how dire a species' status is due to one or a combination of the above factors, a species will be listed as "threatened" or "endangered."[188]

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[184] *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).
[185] *Tenn. Valley Authority*, at 174, 184.
[186] 16 U.S.C §§ 1533(c); 1533(b)(1)(A) FWS and NMFS can independently list a species after reviewing "the best scientific and commercial data available" concerning the species' status; 1533(b)(3)(A) Citizens can also petition wildlife agencies to list a species. Wildlife agencies have 90 days to decide whether the petitioned action may be warranted."; 1533(b)(3)(B) If the FWS finds action might be warranted, it has 12 months to dismiss the petition or begin the listing process.
[187] 16 U.S.C § 1533(a)(1).
[188] 16 U.S.C § 1533(a); § 1532(6): "The term ''endangered species'' means any species which is in danger of extinction throughout all or a significant portion of its range[.]"; § 1532(12): "The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

The ESA recognizes that species conservation is futile without habitat conservation.[189] Listing triggers a concurrent obligation on the FWS to designate a species' "critical habitat."[190] Critical habitat includes the specific geographic areas a species inhabits at the time of listing which contain "physical and biological features" that are "essential to the conservation of the species," and "which may require special management considerations or protection."[191] A species does not have to occupy an area for it to be designated critical habitat if the FWS concludes it is essential to the species' conservation.[192]

Agencies are responsible for determining if their actions may affect listed species or designated critical habitat.[193] When considering the effects of an action, the agency must include "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action that will be added to the environmental baseline."[194] The first step in fulfilling this obligation is a request to the FWS for information on whether any listed species or critical habitat may be present in the area the agency's action would effect.[195] If the FWS advises listed species and/or critical habitat may be present, the acting agency must prepare a "biological assessment" (BA).[196] An acting agency may delegate this duty to "any person," provided the agency supervises the process.[197] Preparing a BA is an investigative exercise, forcing an agency to catalogue an action's range of potential adverse effects on listed species and critical habitat.[198] Whatever the conclusion, the BA must be communicated to the relevant FWS in writing.[199] If, as a result of preparing a biological assessment, the acting agency finds an action is *not* likely to adversely affect listed species or critical habitat, and the FWS concurs with the assessment in writing, the acting agency has satisfied its ESA obligations.[200] If the BA reveals adverse effects *are* likely, the acting agency must engage the FWS in formal consultation.[201]

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[189] 16 U.S.C. § 1531(b): "The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved[.]"
[190] 16 U.S.C § 1533(a)(3)(A).
[191] 16 U.S.C § 1532(5)(A)(i).
[192] 16 U.S.C § 1532(5)(A)(ii).
[193] 16 U.S.C. § 1536(a)(2); (c)(1).
[194] *Id*.
[195] 50 C.F.R. § 402.02(c).
[196] 50 C.F.R. § 402.12(d)(2).
[197] 50 C.F.R. 402.12(b); *State of Idaho By & Through Idaho Pub. Utilities Comm'n v. I.C.C.*, 35 F.3d 585, 597 (D.C. Cir. 1994); *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1253-54 (10th Cir. 2003).
[198] 50 C.F.R. 402.12(a)-(b).
[199] 50 C.F.R. § 402.12(j).
[200] 50 C.F.R. § 402.14(b)(1).
[201] 50 C.F.R. § 402.14(a).

Upon receipt of a "likely to adversely impact" BA, the FWS prepares a "biological opinion."[202] The biological opinion is another investigative process document through which the FWS determines if an action is likely to jeopardize listed species or destroy or adversely modify critical habitat.[203] A species is jeopardized when the likelihood of its survival and recovery in the wild are appreciably reduced due to decreased reproduction, population, and distribution.[204] Habitat is destroyed or adversely modified when a "direct or indirect alteration . . . appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species."[205] If the FWS issues a "jeopardy" opinion, the acting agency must explore if there are reasonable alternatives to the action which avoid jeopardy.[206] An acting agency "shall make no irreversible or irretrievable commitment of resources with respect to the agency action" that would "foreclose the formulation or implementation" of any reasonable alternatives.[207] Should the FWS issue a "no jeopardy" opinion, the action can proceed, usually with recommendations from the FWS on how to further reduce the action's negative effects. The FWS may also issue an "incidental take statement" authorizing a quantified or qualitatively defined amount of otherwise unlawful "take."[208]

"Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.[209] The FWS has defined *harm*, as it appears in the definition of *take*, to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[210] The ESA prohibits any person or entity from "taking" endangered species.[211] The FWS can elect to extend the prohibition on take to threatened species through blanket rulemaking or on an ad hoc basis.[212]

Agency action that "may affect" listed species or critical habitat cannot lawfully proceed until consultation requirements are met.[213] The proposed action is conditional on the acting agency's receipt, integration, and assessment of the applicable wildlife agency's feedback on the proposed project.[214] "*Following* the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7

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[202] 50 C.F.R. § 402.14(c)-(g).
[203] 50 CFR § 402.14(h).
[204] 50 C.F.R. § 402.02.
[205] *Id*.
[206] 16 U.S.C. § 1536(b)(3)(A); 50 CFR § 402.14(h)(2).
[207] 50 C.F.R. § 402.09; 16 U.S.C. § 1536(d)
[208] 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).
[209] 16 U.S.C. § 1532(19).
[210] 50 C.F.R § 17.3; 50 CFR § 222.102.
[211] 16 U.S.C. § 1538(a)
[212] 16 U.S.C § 1533(d)
[213] 50 C.F.R. §§ 402.14; 402.15.
[214] *Id*.

obligations and the Service's biological opinion."[215] The feedback may take the form of a "no-jeopardy" biological opinion and associated ITS, or a "jeopardy" biological opinion with reasonable prudent alternatives.[216] While awaiting feedback, an acting agency cannot make permanent commitments with respect to its action that change the baseline conditions that existed when consultation was initiated.[217] Pursuant to the FWS and NMFS joint regulations:

> After initiation or reinitiation of consultation required under section 7(a)(2) of the Act, the Federal agency [acting agency] and any applicant shall make no irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid violating section 7(a)(2). This prohibition is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.[218]

The requirement that a wildlife agency's feedback must precede agency action is reflected in the FWS and NMFS Endangered Species Consultation Handbook (the "Handbook").[219] The Handbook is clear that consultation is not satisfied until the wildlife agency has issued its evaluation of a proposed action, concurring or otherwise.[220] Before the wildlife agency's feedback is communicated to the acting agency, the 7(d) prohibition applies.[221]

Courts will enforce the consultation requirements if an agency fails to satisfy its obligations under Section 7(a)(d).[222]

The Section 7(a)(2) duty to consult does not terminate when a biological opinion is issued. Both the acting agency and the FWS must reinitiate consultation if an action may affect

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[215] 50 C.F.R. § 402.15(a)(emphasis added).
[216] *Id.*
[217] 50 C.F.R. 402.09.
[218] *Id*.
[219] U.S. FISH AND WILDLIFE SERVICE AND NATIONAL MARINE FISHERIES SERVICE, ENDANGERED SPECIES CONSULTATION HANDBOOK (1998).
[220] *Id*. at 2-9.
[221] *Id.*
[222] *See, e.g., Watersheds Project v. Kraayenbrink*, 623 F.3d 472 (9th Cir. 2011)(enjoining BLM's revised grazing regulations granted because BLM failed to consult with FWS); *National Parks Association Conservation v. Jewell*, 62 F. Supp. 32 7 (D.D.C. 2014)(vacating Office of Surface Mining's 2008 stream protection rule because it relied on a biological opinion from 1996 and FWS was not consulted); *Conner v. Buford*, 848 F.2d 1441 (9th Cir. 1988)(enjoining Forest Service from allowing surface-disturbing activity in connection with oil and gas leases until FWS prepared sufficient biological opinion analyzing the effects of the lease, not just the lease sale).

listed species or critical habitat in a manner or to a degree not previously considered because of changed circumstances, modifications to the action, or new information.[223]

Finally, it is important to note that, for the entire range of ESA activities, including, but not limited to, the listing process, Section 7 consultation, habitat conservation planning, recovery and enforcement, FWS will and must consult with tribal governments when developing plans and regulations that may affect tribal rights, trust resources, or lands.[224]

B. The Corps Must Evaluate the Project's Impact on Endangered and Threatened Species.

Before taking action on Enbridge's application, the Corps must evaluate the impact the project will have on species that are protected by the Endangered Species Act. As discussed above, this obligation flows directly from the ESA which mandates that the Corps first work with FWS to identify any endangered or threatened species that might be adversely affected by the project. Then, if it is determined that the proposed project will adversely affect protected species, the ESA requires the Corps to consult formally with FWS to understand and address those effects, and to use that information in making its decision to grant or deny Enbridge's permit.

The Corps' obligations under the ESA are also reflected in NEPA. As stated in NEPA, when determining whether to prepare an EIS, an agency must examine a variety of factors including "the degree to which the action may adversely affect an endangered or threatened species or it habitat that has been determined to be critical under the Endangered Species Act of 1973."[225]

1. The Corps must communicate with FWS to identify all protected species that might be adversely affected by the proposed project.

Under the ESA, the first step in the Corps' evaluation of the impact of Enbridge's proposed project on protected species is requesting information from FWS about what species may be present in the project area that might be adversely affected.[226]

Enbridge has already identified fourteen federally-listed species known to occur within 1.5 miles of the proposed site.[227] In its application materials, Enbridge includes information

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[224] U.S. Fish & Wildlife Service Consultation Handbook, October 2018 at 47, 43 https://www.fws.gov/TCG.pdf, https://www.fws.gov/endangered/what-we-do/tribal-faq.html.
[225] 40 CFR § 1508.27(b).
[226] 16 U.S.C. § 1536(c)(1).
[227] *See* Supplemental Information, pp. 12-14 and Exhibit A. In these materials, Enbridge identifies an additional 24 species that are listed by Michigan's Department of Natural Resources as endangered, threatened or of special concern.

purporting to assess the impact that its project would have on each of the species.[228] Enbridge claims that "[n]o designated critical habitat for federally listed species is present within the Project area."[229] Enbridge also categorizes each of the federally-listed species according to the effect Enbridge believes the project will have on them using the categories: "likely to adversely affect," "may affect but not likely to adversely affect," and "no effect." The six species that Enbridge identifies in the first two categories are:

Likely to adversely affect

- Northern Long-Eared Bat (*Myotis septentrionalis*) — threatened
- Dwarf Lake Iris (*Iris lacustris*) — threatened
- Houghton's Goldenrod (*Solidago houghtonii*) — threatened

May affect but not likely to adversely affect

- Gray Wolf (*Canis rufus*) — endangered
- Rufa Red Knot (*Calidris canutus rufa*) — threatened
- Piping Plover (*Charadrius melodius*) — endangered

This information must be independently reviewed and evaluated in concert with FWS and any additional protected species potentially affected by the project must be identified.

2. The Corps must prepare or supervise preparation of a biological assessment of the effects the project will have on protected species in the area.

Because Enbridge has already acknowledged that several federally-listed species are in the vicinity of the project area, a biological assessment evaluating the potential effects of the project on the federally-listed species is required.[230] Indeed, as part of this process, the Corps has already requested a biological assessment from Enbridge.[231]

The BA should consider the potential adverse effects on *all* listed species that the FWS determines are in the area of the proposed project, including those for which Enbridge has made a "no effect" determination, as well as any other protected species in the area that are not included in Enbridge's analysis. For example, the federally endangered Hine's Emerald

[228] Supplemental Information, Exhibit A.
[229] *Id.* at 12.
[230] 50 C.F.R. 402.12(a)-(b).
[231] Corps April 14 Letter, p.2.

Dragonfly is also present in Mackinac County. [232] The BA must also include an evaluation of the impact of the project on the protected species' critical habitats.

Although the Corps must prepare or supervise the preparation of the BA, it is important to note that Enbridge has already acknowledged that the project may affect at least six federally-listed species and that the project will likely adversely affect at least three of them. Thus, the BA will almost certainly conclude that the proposed project is likely to adversely impact species protected under the ESA.

3. The Corps must consult with FWS and the FWS must prepare a biological opinion.

Because Enbridge has already acknowledged that the Project will adversely affect federally-listed species, the Corps will have to initiate "formal consultation" with FWS after completion of the BA.[233] Pursuant to the formal consultation process, the FWS must then prepare a biological opinion about the effects of the project on the federally-listed species identified as being present in the area.[234] No action can be taken on Enbridge's application until the formal consultation process has been completed.[235]

4. Enbridge's application raises significant concerns about the Project's impact on federally-listed species that the Corps must address in consultation with FWS.

Although the full impact of this project on endangered or threatened species will not be understood until the BA is completed and FWS completes its biological opinion, there are already significant concerns about the project's effects on protected species based on the information that Enbridge has provided to the Corps.

First, Enbridge has acknowledged the project could result in a take of the northern long-eared bat. Unlike many of its relatives that prefer to roost upside down, the northern long-eared bat prefers to squeeze its body into crevices until only its nose and the tip of its unusually long ears protrude. In spring and summer, the Northern Long Eared Bat tunnels into depressions in the bark of dead trees or the loose bark of living trees. An agile flier, this bat echolocates for insects and is capable of capturing prey in mid-air or resting on vegetation.

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[232] Fish and Wildlife Service Website, https://www.fws.gov/midwest/endangered/insects/hed/hedch.html. In 2013, Enbridge was required to prepare a Habitat Conservation Plan for this species in connection with maintenance work on Line 5. *See* Docket No. FWS-R3-ES-2013-N051. The Corps, in consultation with FWS, must determine whether the Dragonfly, and any other federally protected species, will be affected by the Project.
[233] 50 C.F.R. § 402.14(a).
[234] 50 C.F.R. § 402.14(c)-(g).
[235] 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

Should construction-related tree removal occur in the summer months, Enbridge concedes it is possible northern-long eared bats will be harassed or killed.[236] Enbridge states, however, that because there are no known roosts or hibernacula within or adjacent to the project area, any "take" is permitted by the FWS's "Programmatic Biological Opinion on Final 4(d) Rule for the Northern Long-Eared Bat and Activities Excepted from Take Provisions" issued in 2016.[237] But, Enbridge's position is based on factual statements about the lack of roosts and hibernacula in the project area that must be independently evaluated by FWS before the Corps can determine any possible impact on the northern long-eared bat.

Second, Enbridge also acknowledges that thousands of stems of dwarf lake iris and Houghton's goldenrod will be cleared as a result of construction at the project site.[238] Dwarf Lake Iris are petite flowers that only bloom in the porous, sandy soils and moist air of the Great Lakes Region. Their deep violet petals radiate from a stout stem stretching 2 inches above the ground, dotting the landscape like ready-cut corsages. Houghton's Goldenrod is also native only around the Great Lakes. Neighbor to the Dwarf Lake Iris, Houghton's Goldenrod grows closer to the water where wet beach abuts land. Houghton's Goldenrod towers over the Dwarf Lake Iris at 2 feet, displaying around 600 completely yellow, tiny flowers in clusters.

Enbridge states that 7,757 dwarf lake iris and 3,777 Houghton's goldenrod stems will be lost. Here again, Enbridge's factual assertions must be independently evaluated and the FWS must be consulted to determine the true extent of the impact on these plant species. Indeed, the Corps has requested Enbridge to substantiate its claim about the number of stems of each species that will be affected.[239]

With respect to addressing the adverse impact on these plant species, Enbridge simply states that it will "consider" mitigation measures to compensate for the loss of these protected species.[240] In response, the Corps has requested that Enbridge provide a plan to mitigate the impact on the dwarf lake iris and Houghton's goldenrod. This mitigation plan must then be evaluated in consultation with FWS. Furthermore, if the Corps, in consultation with FWS, considers imposing mitigation conditions on an approval of Enbridge's application, such an approval would amount to significant federal action requiring environmental review under NEPA.[241]

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[236] *Id.* at 13.
[237] *Id.*
[238] *Id.*
[239] Corps April 14 Letter, p.2.
[240] *Id.*
[241] *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 46 (D.C. Cir. 2015) (reaffirming that the Corps' authorization of "take of endangered species in connection with pipeline construction and operation across jurisdictional waters, and doing so only on the conditions that Enbridge take mitigating conservation measures and monitor species impact for the anticipated useful life of the pipeline, was regulatory approval amounting to significant federal action requiring environmental review under NEPA.")

The adverse impact on the plant species is important to address because both of the plants grow on critically imperiled wetlands within the project area. The wetlands within the project area on the north side could be characterized as coastal alvar. The coastal alvar habitats found in several places around the Great Lakes region are covered by thin layers of soil or consist of bare limestone rock. Alvars include a host of rare, endemic plants species including, but not limited to, Houghton's Goldenrod and Dwarf Lake Iris. The Michigan Natural Features Inventory of Michigan State University ranks alvars as "critically imperiled." Thus, Enbridge's proposed project affects critically imperiled wetlands that host rare and threatened plants.

Finally, two of the species that Enbridge claims may be affected but not likely to be adversely affected—the gray wolf and the piping plover—are endangered and, therefore, deserve particular consideration. Perhaps the most iconic apex predator of the American wilderness, the gray wolf plays an important part in maintaining ecosystem health. As gray wolves hunt, populations of elk, deer, and other prey species are kept in balance. The gray wolf once roamed two thirds of North America, but human persecution in the lower forty-eight states nearly obliterated this species. Gray wolves use a sophisticated system of body language and facial expressions to maintain hierarchal relationships within their family groups.

The Piping Plover is a shorebird that shares the weight and shape of a tennis ball. During the spring and summer when it breeds, the Piping Plover sports a black collar around its brownish-gray body and a black-tipped, bright orange, stubby beak. Piping Plovers nest just beyond the mean high-water line and feed on marine invertebrates. Increasing coastal development and climate change has impaired this species' ability to thrive.

With respect to the gray wolf, Enbridge claims that the project area includes "suitable habitat" but the mobility of the species ensures that there will be no adverse impacts.[242] With respect to the piping plover, Enbridge states that because no construction activity will occur on the adjacent shoreline, there will be no impacts on the suitable nesting or foraging habitat for the piping plover.[243] But, Enbridge also concedes that some plovers that use the area as a stopover or nesting habitat may avoid the area due to construction and increased human activity. And, Enbridge further concedes that there is some potential for mortality as a result of collisions with construction equipment.[244] The Corps and the FWS must independently evaluate Enbridge's claims about the gray wolf and the piping plover and determine the impact that the proposed project might have on these endangered species.

5. NEPA requires the Corps to consider the impact on species protected by the Michigan Endangered and Threatened Species Act.

As discussed in Section V.C.7, *supra*, because the tunnel project may lead to violations of several applicable federal and state environmental standards, NEPA requires that the Corps complete an EIS to further evaluate the proposal. The Endangered and Threatened Species Act

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[242] *Id.*, Exhibit A, p. 32.
[243] *Id.*, Exhibit A, p. 29.
[244] *Id.*

of Michigan is one of the statutes that is implicated by this project and should be considered as part of the EIS.

The Michigan statute provides additional protections to endangered and threatened species.[245] Under Michigan's law, the Department of Natural Resources conducts investigations on fish, plants and wildlife to "determine management measures necessary for their continued ability to sustain themselves successfully."[246] Based on its determinations, the Department promulgates a list of species that are determined to be endangered or threatened within the state.[247] The Department also identifies species of "special concern." The "special concern" designation applies to declining or relict species in the state that need protection to prevent them from becoming threatened or endangered.

Like the federal ESA, Michigan's statute prohibits the taking, possessing, transporting, importing, exporting, processing, selling or destroying endangered or threatened species.[248] This prohibition includes species that appear on Michigan's state list *and* those that appear on the federal lists of endangered and threatened species.[249]

In addition to the fourteen federally-listed species, Enbridge has identified an additional twenty-four species that are listed by Michigan's Department of Natural Resources as endangered, threatened or of special concern.[250] As part of an EIS under NEPA, the Corps must evaluate the adverse effects of the tunnel project on these species.

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As demonstrated above, any analysis of the context and intensity of the Enbridge Project necessitates an EIS and Section 7 consultation with the FWS prior to approval of the application. When the Corps moves forward with the NEPA analysis, it must undertake a rigorous analysis of alternatives and their environmental impacts. As discussed below, nothing

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[245] MCL 324.36501 *et seq.*
[246] MCL 36503(1).
[247] *Id.*
[248] MCL 36505(1).
[249] *Id.*
[250] *Id.*, Exhibit A. The additional 24 species that are listed by Michigan's Department of Natural Resources as endangered (E), threatened (T) or of special concern (SC) are: peregrine falcon (E), common loon (T), common tern (T), calypso bulbosa (T), Lake Huron tansy (T), hills pondweed (T), pine-drops (T), Lake Huron locust (T), delicate vertigo (T), American bittern (SC), black tern (SC), bald eagle (SC), osprey (SC), black-crowned night heron (SC), marsh wren (SC), little brown bat (SC), lady's slipper (SC), butterwort(SC), Sprague's pygarcita (SC), grizzled skipper (SC), widespread column (SC), vertigo cristata (SC), vertigo pygmaea (SC), Great Lakes physa (SC). *See* https://mnfi.anr.msu.edu/species/animals.

that Enbridge has submitted to date includes a willingness to examine alternatives; in the absence of this critical information, the Corps should deny the permit.

VIII. THE PROJECT DOES NOT COMPLY WITH SECTION 404 OF THE CLEAN WATER ACT.

The goals of the CWA include "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[251] To that end, the CWA prohibits the discharge of soil or other materials into navigable waters unless authorized by a permit issued by the Corps.[252] The CWA provides strict substantive limits on approving projects that degrade water quality or harm aquatic uses. First, the Corps may not issue a permit under Section 404 if there is any "practicable alternative" to the project with less impact on the aquatic ecosystem.[253] Second, the Corps cannot issue the permit unless there is a demonstration that any discharge from the project "will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern,"[254] or if any discharge will result in significant adverse effects to water quality, "including but not limited to effects on municipal water supplies, . . . fish, . . . [and] recreational, aesthetic, and economic values."[255] Third, the Corps must determine that the project is in the "public interest" by weighing all "relevant" considerations and balancing all probable impacts of the proposed action against its alleged benefits.[256] Moreover, the Corps must independently verify all the information in the application.[257] Critically, the Corps' "review may not be 'piecemeal.'"[258] Taken together, these requirements create a "very strong" presumption "that the unnecessary alteration or destruction of (wetlands) should be discouraged as contrary to the public interest."[259]

A. The Application is Grossly Deficient and Fails to Demonstrate that the Proposed Project Meets Any of the Requirements of Section 404.

Enbridge's application consists of generic and conclusory statements that do not provide the information the Corps needs to evaluate the Project under Section 404. Enbridge has not clearly defined the purpose of the Project, it has not shown that the Project as proposed is the practical alternative with the least impact on the aquatic ecosystem, that the Project will

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[251] 33 U.S.C. § 1251(a)(1).
[252] 33 U.S.C. § 1344(a); 33 C.F.R. §§ 322.3, 323.3.
[253] 40 C.F.R. § 230.10(a).
[254] *Id*. § 230.1(c).
[255] *Id*. § 230.10(c).
[256] 33 C.F.R. § 320.4(a).
[257] *See, e.g.*, *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004); *see also* 40 C.F.R. §1506.5(a) ("The agency shall independently evaluate the information submitted and shall be responsible for its accuracy.").
[258] *Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir. 1982).
[259] *Id*.

comply with the CWA, or that the Project is in the public interest. Enbridge must still provide several descriptions and more complete analyses, including but not limited to:

- All reasonable alternatives, including system alternatives, route alternatives, and alternative construction methods;
- Impacts to aquatic resources associated with all reasonable systems alternatives, route alternatives, and alternative construction methods;
- A "no action alternative," which includes the potential decommissioning of the dual pipelines without construction of a new pipeline or tunnel;
- A wetland mitigation plan in accordance with Mich. Admin. Code R. 281.925(4);
- Impacts to water quality, including with respect to the withdrawals and discharges of millions of gallons of water into and out of the Straits; and
- A justification of the public need for the Project for the Corps' public interest analysis in accordance with 33 C.F.R. § 320.4(a).

Enbridge has not provided nearly enough information to allow the Corps to even begin its independent evaluation of the application and independent verification of the claims therein. The deficiencies in the application also make meaningful comment by the public on whether the Project complies with Section 404 impossible. The Corps must deny the permit application or order Enbridge to supplement the application with the necessary information for evaluation of the Project and provide another opportunity for public review and comment.[260]

B. Enbridge's Wholly Inadequate Alternatives Analysis Does Not Demonstrate that a Tunnel Beneath the Great Lakes is the Least Environmentally Damaging Practicable Alternative.

Enbridge's application does not demonstrate that the Project is the least environmentally damaging practicable alternative, as required by the Corps' regulations.[261] The Corps must conduct an alternatives analysis and determine what projects "are available and

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[260] In contrast to the woefully inadequate information presented in Enbridge's application, "[p]ublication of an EIS, both in draft and final form, also serves a larger informational role . . . and . . . significantly, provides a springboard for public comment." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The "springboard" here is deficient. Not only is there no EIS, but the application materials Enbridge has provided are insufficient to give the public the assurance that the Corps is considering the environmental concerns that it must in its decision-making process. *Id*.

[261] 40 C.F.R. § 230.10(a).

capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[262]

To conduct an alternatives analysis, the Corps needs more than the six-page summary Enbridge submitted that assumes one option—the construction of a tunnel—is the only alternative. Without a complete alternatives analysis, the Corps must reject Enbridge's application. Even if Enbridge submits a complete alternatives analysis, the Corps may only grant a permit if Enbridge shows that there is no practicable alternative with a less adverse aquatic environmental impacts.

1. Enbridge has made inconsistent statements about the Project's purpose.

To conduct any review of the Project's alternatives, the Corps must first determine the purpose of the Project.[263] This is made more difficult by Enbridge's presentation of different purported purposes for this Project to different agencies. Even if Enbridge were clear and consistent in defining the purpose, the Corps would not be bound by Enbridge's characterization of the project.[264]

Enbridge informs the Michigan Public Service Commission ("MPSC"): "The purpose of the Project is to alleviate an environmental concern to the Great Lakes raised by the State of Michigan relating to the approximate four miles of Enbridge's Line 5 that currently crosses the Straits of Mackinac."[265] The concern referenced therein is the risk of adverse impacts that would result from an oil spill from Enbridge's current pipeline through the Straits.[266]

But, with respect to the Section 404 permits, Enbridge states a different purpose: "The purpose of the proposed work is to transport light crude oil and liquid natural gas between the upper and lower peninsulas of Michigan."[267]

Regardless of which description—if either—appropriately states the purpose of this Project, Enbridge has not demonstrated that the Project as proposed is the least environmentally damaging practicable alternative.

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[262] *Id*. § 230.10(a)(2).
[263] *Id*.
[264] *See Smereka v. Glass*, 945 F.2d 405 (6th Cir. 1991); *see also Sierra Club v. Van Antwerp*, 362 F. App'x 100, 106 (11th Cir. 2010).
[265] Enbridge Energy, Application for Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac at 1, MPSC Docket No. U-20763 (April 17, 2020), https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t000000BRSuOAAX.
[266] *See id.* at 11-12.
[267] Public Notice at 3.

a. If the Project's purpose is to alleviate an environmental concern to the Great Lakes, then there are less damaging alternatives.

If the Project's purpose is to *reduce* the environmental risk associated with an oil spill in the Straits, there is an obvious alternative: not transporting oil underneath or through the Straits. An alternative to replacing the dual pipelines with a pipeline in a tunnel is to simply remove the dual pipelines. This would almost certainly be a less damaging alternative, and Enbridge must analyze the environmental impacts and practicability of this alternative.

Approving this Project would lock in the short-term risks attendant with the existing dual pipelines, because Enbridge plans to continue to operate them for at least 5 more years that it takes to construct the Project. Just looking at the story of the dual pipelines during the instant comment period reveals the danger inherent to a "build tunnel now, decommission dual pipelines later" plan. On June 18, 2020, the dual pipelines experienced damage that was still "of unknown origin" approximately a week later.[268] A state court recognized that "[t]he severe risk of harm that may result" from the continued operation of the dual pipelines "is so substantial and irreparable, and endangers so many communities and livelihoods and the natural resources of Michigan, the danger far exceeds the risk of financial loss to defendants if the west pipe of Line 5 is shut down pending hearing."[269]

Moreover, Enbridge has not presented a demonstration of the public need for the transportation of oil and natural gas at all, let alone in this location.[270] This omission strengthens the case for removing the dual pipelines without replacing them with a tunnel in the Straits. The oil currently transported through the dual pipelines originates in Canada, joins Line 5 in Superior, Wisconsin, and then Line 5 terminates in Sarnia, Ontario, Canada; it does not uniquely serve the communities on either side of the Straits.

b. If the Project's basic purpose is to transport oil, it is not water dependent and the Corps must presume there are less damaging alternatives.

Alternatively, if the Project is meant to transport oil and natural gas, then the Corps must first address whether the Project is "water dependent." Whether the basic purpose of a project is "water dependent" guides the Corps' analysis of alternatives. Projects that are not "water dependent," like this one, face a presumption that there are practicable alternatives with less adverse aquatic environmental impacts.[271]

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[268] Temporary Restraining Order, *Nessel v. Enbridge Energy*, *Ltd., supra* 3.
[269] *Id.*
[270] This omission also derails the required public interest analysis, *infra* at VIII.F. 33 C.F.R. § 320.4(a)
[271] *Id*. § 230.10(a)(3).

For a water dependency analysis, the Corps first defines the "basic purpose" of the project.[272] The "basic purpose" of a project may be less specific than the project's "overall purpose;" the basic purpose it "the activity associated with the project."[273] Second, the Corps must determine whether the "basic purpose" of the project is "water dependent."[274] If the Project is not water dependent, then there is a presumption that "practicable alternatives that do not involve special aquatic sites" are available, "unless clearly demonstrated otherwise."[275] Special aquatic sites are sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes.[276]

Here, if the basic purpose is something other than reducing the risks associated with the dual pipelines, then the basic purpose of the Project is to transport oil and liquid natural gas.[277] Transporting oil and natural gas is not water dependent.[278] Enbridge, however, has proposed a

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[272] *See Smereka v. Glass*, 945 F.2d 405 (6th Cir. 1991) (determining that the Corps did not act irrationally when it "implicitly rejected" an applicant's characterization of a home construction project as water dependent when considering alternatives); *see also Sierra Club v. Van Antwerp*, 362 F. App'x 100, 106 (11th Cir. 2010) (recognizing that the Corps had correctly defined the purpose of a Project as "to extract limestone" and determined that it was not water dependent)

[273] *Schmidt v. U.S. Army Corps of Engineers*, No. 2:08-CV-0076, 2009 WL 579412, at *12 (W.D. Mich. Mar. 5, 2009) (citing *Florida Clean Water Network v. Grosskruger*, 587 F. Supp. 2d 1236, 1243-44 (M.D. Fla. 2008).

[274] 40 C.F.R. § 230.10(a)(3).

[275] *Id.* § 230.10(a)(3); *see also Sierra Club v. Van Antwerp*, 362 F. App'x 100, 106 (11th Cir. 2010) (noting that the applicant "must rebut the presumption by clearly demonstrating that a practicable alternative is not available").

[276] 40 C.F.R. § 230.3(m); *id*. § 230.41.

[277] Similarly, the basic purpose of a limestone mine is mining limestone, regardless of the permit applicant's preferred mining location. *Sierra Club v. Van Antwerp*, 362 F. App'x at 106. In *Sierra Club v. Van Antwerp*, the court recognized that the Corps had correctly defined the purpose of a project as the extraction of limestone, but then acted arbitrarily and capriciously by concluding that the project was water dependent. The court rejected the idea that, although the extraction of limestone is not always water dependent this particular project was water dependent because of its location, and vacated the section 404 permit.

[278] *See Delaware Riverkeeper Network v. Sec'y of Pennsylvania Dep't of Envtl. Prot.*, 870 F.3d 171, 180 (3d Cir. 2017) (recognizing that "[i]n the context of the federal regulatory scheme . . . [an] agency will presume that the applicant can select a different pipeline route or other alternative that does not affect an aquatic site"); *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008) (recognizing that a proposed gold mine is not water dependent even if the applicant wishes to mine in a watershed because not all gold mining requires access or proximity to water); *City Club of New York v. U.S. Army Corps of Eng'rs*, 246 F. Supp. 3d 860, 870 (S.D.N.Y. 2017) ("A project whose fundamental goal is to provide park and performance space is not water dependent, regardless of whether the [applicant] prefers to build

Project that will go from a wetland, travel for almost 4 miles beneath a fresh water lake system, and then emerge into a wetland area. During construction, the Project will fill and disturb wetlands, in addition to withdrawing 4 million gallons of water per day and discharging 5 million gallons of wastewater to Lake Michigan.[279] Accordingly, the Corps must apply a presumption that practicable alternatives exist that would not involve special aquatic sites.

Enbridge failed to provide any information about alternatives that do not involve aquatic sites. That is not because there are no such alternatives. Practicable alternatives that do not involve aquatic sites and which must be examined here include transporting the oil by rail or by truck.[280] Michigan already "has a robust railroad system" with rail lines "situated near oil production centers and refineries."[281] A report prepared by London Economics International LLC examined the location of oil production in relation to available transportation, including Line 5, and then analyzed the cost of alternative transportation methods for Michigan oil producers using publicly-available data sources for pipeline tariffs and rail and truck shipment costs.[282] The report concluded that rail and truck alternatives would be feasible and the impact to Michigan crude oil producers could be "minimal."[283] Removing the dual pipelines and discontinuing the transport of oil between the peninsulas is another alternative. The rail, truck, and/or pipeline removal alternatives and their impacts to aquatic sites must be analyzed by the

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such space on a pier."); *see also Sierra Club v. Van Antwerp*, 709 F.Supp.2d 1254, 1261 (S.D. Fla. 2009) (noting that dams and marinas are water dependent) (quoting Army Corps of Engineers Standard Operating Procedures for the Regulatory Program (October 15, 1999)), *aff'd*, 362 Fed. App'x 100 (11th Cir. 2010).

[279] *See* Public Notice at 2; NPDES Application Form at 8-9. Here, the impacts to wetlands mean that the project will "involve special aquatic sites." 40 C.F.R. 230.3(m). Notably, other waters in the project area may be "special aquatic sites," too. For example, because the water levels of the Great Lakes have risen in recent years, some shoreline areas may be inundated with water to the extent they are "vegetated shallows," pursuant to 40 C.F.R. 230.43. There are also trout refuges in northern Lake Michigan and northern Lake Huron, within the range of waters that could be impacted by an oil spill. *See* Institute for Fisheries Research, Michigan DNR, & University of Michigan, Lake Trout Management Units and Refuges (Nov. 5, 2018), https://www.michigan.gov/documents/dnr/mi_reg_greatlake_trout_486995_7.pdf. And the entire project area is in the ceded territory that the 1836 Treaty Tribes, including Bay Mills, continue to have rights for fishing and wildlife resources.

[280] London Economics International LLC, Michigan Crude Oil Production: Alternatives to Enbridge Line 5 for Transportation at 12-13 (2018), https://www.watershedcouncil.org/uploads/1/2/6/3/126321286/lei-enbridge-line-5-michigan-oil-production-8_23_2018.pdf (hereinafter "LEI Report").

[281] *Id*. at 13.

[282] *Id*. at 5.

[283] *Id*. at 30.

Corps, with the presumption that any transportation method not involving special aquatic sites is a less damaging practicable alternative.

2. Enbridge has not provided sufficient descriptions of the alternatives.

In conducting its CWA analysis, the Corps must consider systems alternatives, route alternatives, and alternative construction methods.[284]

Just as in the NEPA analysis, the range of viable alternatives for consideration under the CWA cannot be arbitrarily constricted by adopting an overly narrow definition of the project's overall purpose.[285] Enbridge and the Corps "may not define the project purpose narrowly 'in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable.'"[286] And yet, Enbridge's application to the Corps and the Corps' Public Notice signal that might be exactly what is happening here.

In its Public Notice, the Corps has stated that the purpose "is to transport light crude oil and liquid natural gas between the upper and lower peninsulas of Michigan."[287] This is misleading; the oil to be transported originates in Canada, joins Line 5 in Superior, Wisconsin, and then Line 5 terminates in Sarnia, Ontario, Canada. There is no crude oil production in the Upper Peninsula.[288] The geographic specificity of upper to lower peninsulas is too narrow of a way to define the Project.

Even if the overall purpose of the project is to transport oil between the upper and lower peninsulas of Michigan, more alternatives exist than Enbridge addressed.

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[284] *See* Mich. Admin. Code R. 281.922a(6) (defining "feasible and prudent alternative" broadly to include alternative locations, configurations, sizes, construction technologies, layouts and designs); *see also Black Warrior Riverkeeper, Inc. v. Alabama Dep't of Transp.*, No. 2:11-cv-267, 2016 WL 233672 (M.D. Al. Jan. 19, 2016) at *40 (noting the consideration of multiple alternative locations and multiple alternative designs for a proposed highway project).
[285] *Del. Riverkeeper Network v. U.S. Army Corps of Eng'rs*, 869 F.3d 148, 157 (3d Cir. 2017).
[286] *See Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 912 (9th Cir. 2018) (quoting *Sylvester v. U.S. Army Corps of Eng'rs*, 882 F.2d 407, 409 (9th Cir. 1989). *Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989, 1002 (9th Cir. 2013) ("[T]he Corps may not manipulate the project purpose so as to exclude alternative sites...."). The Corps also is not restricted by Enbridge's preliminary negotiations with Michigan's government under its prior leadership. *See Nat'l Parks Conservation Ass'n v. Semonite*, 311 F. Supp. 3d 350, 376-77 (D.D.C. 2018) (quoting *Sierra Club v. USACE*, 772 F.2d 1043, 1054 (2d Cir. 1985).
[287] Public Notice at 3.
[288] LEI Report at 8.

a. In its application to the Corps, Enbridge inaccurately assumes a tunnel under the Straits is the only alternative.

In the six-page section of Enbridge's application titled "Alternative Analysis and Minimization of Impacts Report," Enbridge treats a tunnel between the upper and lower peninsulas as a foregone conclusion.

Enbridge acknowledges but does not analyze three potential system alternatives to a tunnel: "installing a replacement segment across the Straits utilizing horizontal drilling (HDD) methods"; "placing a pipe inside a larger, secondary containment pipe"; "no action alternative."[289] Other system alternatives go unacknowledged by Enbridge, including rail and truck. All of these alternatives must be fully analyzed, including their impacts on water quality, before the Corps can issue a section 404 permit.

With respect to the tunnel, Enbridge acknowledges but does not analyze two different methods for constructing a tunnel using a Tunnel Boring Machine (TBM): (1) portal entry or (2) shaft entry[290] Enbridge acknowledges considering a few route alternatives for the tunnel: it mentions four different locations for the tunnel entrance on the north side of the Straits and "multiple locations" for the tunnel entrance on the south side of the Straits.[291] Again, these alternatives—and others—must be fully analyzed, including their impacts on water quality.[292]

b. Enbridge's presentation of the "no action" alternative is misleading.

Enbridge purports to present a "no action alternative" under which the tunnel would not be constructed and the dual pipelines would continue to operate.[293] That, however, is all

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[289] Enbridge Energy, Great Lakes Tunnel Project: Alternative Analysis and Minimization of Impacts Report, LRE-2010-00463-56-A19, at Sheet 34 (hereinafter, "Enbridge Tunnel Alternatives Summary").

[290] Enbridge Tunnel Alternatives Summary at Sheet 36. On June 17, 2020, well into the public comment period for this Project, Enbridge purported to supplement its alternatives analysis to its Joint Application. Letter from Paul Turner, Enbridge, to Joseph Haas, Michigan Dept. of Environment, Great Lakes, and Energy (June 17, 2020), re Submission No. HNY-NHX4-FS42Q. First, a late submission on such a crucial piece of the application should be the basis for an extended public comment period. Second, the document uploaded to EGLE's website on June 17, 2020 with "AltAnalysis" in its title is another 6-page, equally deficient summary of alternatives. *See Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) (describing an agency's obfuscation of technical information during public comment periods as "serious procedural error").

[291] Enbridge Tunnel Alternatives Summary at Sheet 35-36.

[292] *See* Corps April 14 Letter, (stating the need for Enbridge to provide more details regarding the open trench or trenchless (horizontal directional drilling) methods of construction and the practicability of directional drilling).

[293] Enbridge Tunnel Alternatives Summary at Sheet 34.

that Enbridge says about the no action alternative. There is no discussion of environmental impacts or whether the continued operation of the dual pipelines is a logical result of no action.

An alternatives analysis cannot be complete without consideration of the "no action" alternative. As the CEQ instructs, in reference to alternatives analyses conducted as part of an EIS pursuant to NEPA: "it is difficult to think of a situation where it would not be appropriate to address a 'no action' alternative. Accordingly, the regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act."[294] Further, "[w]here a choice of 'no action' by the agency would result in predictable actions by others, this consequence of the 'no action' alternative should be included in the analysis."[295] Uncertainty regarding what would happen in the absence of an agency action supports the discussion of multiple no action alternatives.[296]

Here, in addition to the continued operation of the dual pipelines, the Corps should consider the *decommissioning* of the dual pipelines as a no action alternative.

To the extent the dual pipelines continue to operate under a "no action" alternative, state and federal laws require their safe operation. For example, at the state level, the Michigan Environmental Protection Act prohibits the unpermitted pollution, impairment, or destruction of air, water, or other natural resources.[297] And at the federal level, Enbridge may only operate the Dual Pipelines under a PHMSA-approved plan to mitigate or prevent a substantial threat of a worst case discharge of oil.[298]

Litigation about the continued operation of the dual pipelines—and whether their continued operation satisfies Michigan law—is ongoing. Michigan's Attorney General is currently seeking the permanent decommissioning of the dual pipelines in the Ingham County Circuit Court.[299] It is possible that the Court will either enjoin the operation of the dual pipelines or order their decommissioning.[300]

Therefore, under a "no action alternative," it is possible that operation of the dual pipelines would cease. The environmental impact of continued operation of the dual pipelines could be high. Notably, the dual pipelines no longer rest on the bottom of the Straits and are

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[294] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026-27 (Mar. 23, 1981); *see also* 40 C.F.R. 1502.14(d).
[295] 46 Fed. Reg. 18,026-27.
[296] *Indigenous Envtl. Network*, 347 F.Supp.3d at 575 (recognizing the appropriateness of considering three no action alternatives in the absence of the Keystone pipeline).
[297] *See* MCL 324.1703(1).
[298] 33 U.S.C. § 1231(j).
[299] Complaint at 3, *Nessel v. Enbridge Energy LP, et al.* Case No. 19-474 (2019).
[300] *See* Press Release, Attorney General, Nessel Files Motions After Enbridge Discloses Damage to Line 5 Pipeline (June 22, 2020), https://www.michigan.gov/som/0,4669,7-192-26847-532633--,00.html.

susceptible to anchor strikes, which can result in a spill.[301] For this reason, the continued operation of the dual pipelines is not necessarily what would occur in a true "no action alternative." A report prepared for the State of Michigan supports the conclusion that the dual pipelines can be decommissioned with little disruption to the supply of oil.[302] The Corps must fully consider the no action alternative and its environmental impacts.

c. Enbridge fails to compare the impacts to aquatic resources of all appropriate alternatives.

Nowhere has Enbridge provided an analysis of impacts to aquatic resources such as fish, wetlands, and water quality from the construction and operation of any of the alternatives, let alone the full range of alternatives that should be considered. It is imperative that the Corps conduct this comparative analysis before granting a Section 404 permit. Enbridge's failure to provide sufficient information for the Corps to compare all of the alternatives and their impacts to aquatic resources is an independent reason to deny Enbridge's application.

d. Prior considerations of alternatives prepared in the context of the Tunnel Agreements are also incomplete and inadequate.

Before the section 404 permit application process for this Project began, two reports were prepared for the State of Michigan comparing a tunnel to other replacements for the dual pipelines. Both reports reveal numerous alternatives to the Project that merit consideration. Enbridge did not include these reports—or the alternatives considered by them—in its application to the Corps, which suggests further problems with the completeness of Enbridge's application. Neither report, however, does or could function as a substitute for the Corps' CWA-required alternatives analysis. Specifically, neither report considers a full range of alternatives, a sufficient analysis of environmental and water quality impacts, or even a tunnel matching the description of the Project proposed here. Moreover, neither report included proper tribal consultation.[303] These reports highlight the need to evaluate a more robust range of alternatives and reinforce the deficiencies of Enbridge's submitted, 6-page alternatives analysis.

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[301] *See* Kelly House, Enbridge Line 5 Shut Down After Anchor Support Incurs 'Significant Damage,' Bridge (June 19, 2020), https://www.bridgemi.com/michigan-environment-watch/enbridge-line-5-shut-down-after-anchor-support-incurs-significant-damage; Jim Malewitz, Report: Tug Dragged 6-ton Anchor for Days After Denting Line 5 Pipeline, Bridge (June 5, 2019), https://www.bridgemi.com/michigan-environment-watch/report-tug-dragged-6-ton-anchor-days-after-denting-line-5-pipeline.

[302] *See* Letter from Levi Carrick, Sr., Bay Mills Indian Community, et al, to Governor Snyder, Re: Tribal Comments on Dynamic Risk Draft Alternatives Analysis (Aug. 1, 2017), https://turtletalk.files.wordpress.com/2017/08/tribal-comments-on-dynamic-risk-draft-alternatives-assessment.pdf

[303] *See* Dynamic Risk Assessment Systems, Inc., Alternatives Analysis for the Straits Pipelines PR-1 (2017), https://mipetroleumpipelines.com/document/alternatives-analysis-straits-pipeline-

In 2017, Dynamic Risk Assessment Systems, Inc., prepared a report evaluating six alternatives to the Dual Pipelines ("Dynamic Risk Report").[304] The six alternatives were: (1) constructing one or more new pipelines that do not cross the open waters of the Great Lakes and decommissioning the existing dual pipelines; (2) using existing alternative pipelines that do not cross the open waters of the Great Lakes and decommissioning the existing dual pipelines; (3) using alternative transportation methods, such as rail, tanker trucks, or barges, and decommissioning the dual pipelines; (4) replacing the dual pipelines with a new pipeline that is either installed in a 10-12 foot diameter tunnel or with a conventional trenched installation; (5) maintaining the existing dual pipelines; and (6) eliminating the transportation of all petroleum and natural gas products through the Straits segment of Line 5.[305] Notably, *four of the alternatives in the Dynamic Risk Report would not involve pipelines transporting oil across the waters of the Great Lakes*. These must be fully analyzed.

In 2018, Enbridge prepared a report addressing the feasibility of three alternatives to "replace" the Dual Pipelines "with a new pipeline" ("2018 Report").[306] In the 2018 Report, Enbridge considered a pipeline (1) placed in an underground tunnel below the straits; (2) installed across the Straits using an open-cut method that includes secondary containment; and (3) installed below the Straits using horizontal directional drilling.[307] This report also cannot replace the Corps' alternatives analysis. Each alternative is presented with conclusory language and insufficient information for review by the Corps or the public.

First, the lists of alternatives alone, particularly in the Dynamic Risk Report, demonstrate the deficiencies of Enbridge's application to the Corps. There are numerous alternatives that must be considered and, as the Dynamic Risk Report acknowledges, there are additional alternatives not addressed by the report.[308]

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final-report (hereinafter "Dynamic Risk Report") ("This report does not address feedback arising from the Tribal Consultations since Dynamic Risk was not a party to that process."). Tribes provided comments on a draft of at least one of the reports, but comments do not substitute consultation. Letter from Levi Carrick, Sr., Bay Mills Indian Community, et al, to Governor Snyder, Re: Tribal Comments on Dynamic Risk Draft Alternatives Analysis (Aug. 1, 2017).

[304] *See generally* Dynamic Risk Report.

[305] *Id.* at ES-1 – ES-2.

[306] Enbridge, Alternatives for Replacing Enbridge's Dual Line 5 Pipelines Crossing the Straits of Mackinac 1 (2018), https://www.enbridge.com/~/media/Enb/Documents/Projects/line5/ENB_Line5_AltEvaluation_Report_June15.pdf (hereinafter "2018 Report").

[307] *See* 2018 Report at 26 (acknowledging that the report is merely "preliminary," noting that a more detailed assessment of "potential risk events," their "probability of occurrence," and how to mitigate them would be necessary).

[308] Dynamic Risk Report at ES-2 (stating the report did not analyze "mixed alternatives").

Second, neither report considered the Project Enbridge now seeks to construct: a *much larger* tunnel project.[309] Enbridge here proposes an 18-21 foot-diameter tunnel.[310] The earlier considered tunnels would have a 10-foot internal diameter and a 12-foot outside diameter.[311] Changed environmental impacts would necessarily follow increasing the tunnel size. For example, increasing the tunnel size would increase the amount of soil and rock materials extracted from beneath the Straits.

Even if the Project and the tunnel considered in the reports were the same—which they are not—there are additional environmental risks to be considered.[312] The 2018 Report flagged potential risks of tunneling without doing a complete assessment of the likelihood of those risks or their potential impacts in the Straits. These tunneling risks include "groundwater flooding of the tunnel," "potential hazards from explosive gases, including methane and hydrogen sulfide," and "excessive water inflow and tunnel instability" where there are karst features.[313] The integrity of the tunnel may not be as sound as Enbridge implies in its application—which begs the question of oil spill risks.

Moreover, the Project presented to the Corps has an additional feature: other infrastructure may be co-located in the tunnel.[314] The 2018 Report stated that a tunnel that could accommodate "third-party services/assets" or the "co-locating different types of infrastructure" would have "specific risks" that had not been analyzed and that "it would be critical to understand before design and engineering begins."[315] Enbridge must present the Corps with both a description of the risks of a larger tunnel that co-locates a pipeline and other infrastructure and an explanation of why that alternative is less environmentally damaging than a smaller tunnel.

Third—and critically for a CWA alternatives analysis—the reports did not address all environmental impacts or impacts to water quality. For example, the Dynamic Risk Report looked at oil spill scenarios for some but not all alternatives. And where it considered oil spills, the report's "worst-case" oil spill scenario assumed that the spill would occur at the time of

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[309] *See, e.g.*, *id.* at 3-13. The Dynamic Risk Report reveals many other differences between the tunnel contemplated therein and the Project in Enbridge's application to the Corps. The Dynamic Risk Report stated that a tunnel would cost $153 million to construct and that construction would take 27 months. *Id.* at 3-17. Compare that to the Project's estimated cost of at least $500 million, with several years of construction. Enbridge acknowledges that a change in tunnel size is a "scope change" of such a "magnitude" that it could be an impossible change shortly before construction. 2018 Report at 22.
[310] Public Notice at 1.
[311] 2018 Report at 21.
[312] *See id*. at 26.
[313] *See id*.
[314] Enbridge Tunnel Alternatives Summary at Sheet 33.
[315] 2018 Report at 22.

year when no fish spawning or migratory patterns are happening in the area—and that the effects of an oil spill would not persist in the area to a time of year when those species rely on the habitat—even though there are spawning areas and habitats of importance to migratory species in the range of an oil spill.[316]

Similarly, the cursory environmental impacts section of the 2018 Report identifies impacts on water quality that have not been addressed in Enbridge's application to the Corps or properly analyzed and compared to alternatives anywhere. The construction of a tunnel could expose aquatic organisms "to potential toxins/contaminants"; could pull small aquatic organisms into the water intake hose and through the pump; could contaminate surface and groundwater; "could disrupt recreational boaters or sport fishermen" in the open waters of the Straits; and "could alter hydrology and ecosystem function" of wetlands, among other things.[317] These are all water quality impacts that have not been fully addressed or compared to the water quality impacts of alternatives.

The purpose of an alternatives analysis is to determine whether an alternative to the proposed project would be less environmentally damaging. Here, even the incomplete alternatives analyses done to-date suggests that a non-tunnel alternative would be less environmentally damaging—as the Corps must presume. The Corps cannot allow Enbridge to proceed until the Corps conducts a proper and comprehensive alternatives analysis that addresses *all* alternatives and the potential adverse impacts to water quality from them.

C. The Application Does Not Demonstrate that the Project Likely Will Comply With Water Quality Standards.

Enbridge's application does not demonstrate that discharges from its project will comply with water quality standards. Failure to show that the Project will comply with water quality standards and be sufficiently protective of waterways to comply with CWA's requirements makes the Project ineligible for a permit under section 404.[318]

1. The Project will disrupt an extremely sensitive freshwater ecosystem: The Great Lakes and shoreline wetlands.

The Project will be constructed beneath the point at which Lake Michigan and Lake Huron connect as one of the largest fresh surface water sources in the world, and along the shores of that water system. The Great Lakes collectively provide drinking water to approximately 34 million people across the United States and Canada, have a $7 billion per year regional fisheries industry, and provide habitat to more than 170 species of fish.[319]

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[316] Dynamic Risk Report at PR-8.
[317] 2018 Report at 50-56.
[318] 40 C.F.R. § 230.10(c).
[319] ELPC Climate Change Report at 1, 5 (2019).

Enbridge has made no effort to study or assess how the effects of climate change could increase the risks the Project poses to the Great Lakes. Climate change is linked to more intense rain and storm events, which can increase erosion where the Project proposes to enter and exit the Straits. The water levels of Lake Michigan and Lake Huron are already higher than average and in some places reaching record levels, according to the Corps' data.[320] But potential changes to water levels and/or increased erosion do not appear to have factored into Enbridge's assessments concerning whether boring a tunnel beneath the lakes will impact the lake bottom and what amount of pressure on the tunnel will guarantee it the tunnel's integrity. Higher temperatures and longer dry periods, exacerbated by climate change, have the potential to reduce soil moisture to levels that can be harmful to buried pipe infrastructure through subsidence.[321] The more extreme weather events associated with climate change impact ice cover and wave height in the Great Lakes, as well as the integrity of the shoreline. Unstable banks along the shoreline can expose and threaten the integrity of the Project, increasing the risk of spills.[322] The application fails to look into any of these considerations.

Environmentally sensitive areas also neighbor the project area. As identified by the Great Lakes Coastal Wetland Monitoring Program, there are four coastal wetlands adjacent to the project area—two of which lie mere feet from the boundary.[323] The farthest of the coastal wetlands is less than one half mile from the project boundary. Though not directly in the project area, these sensitive ecosystems will be impacted by the proposed construction. Enbridge is asking to directly fill portions of these wetlands. Disturbance from heavy machinery and blasting, as well as effluent discharge, would disrupt these ecosystems. These disruptions run contrary to the work funded by the U.S. Environmental Protection Agency's Great Lakes Restoration Initiative. The protection of these coastal wetlands is a goal of the Initiative, which aims to increase the acres of coastal wetlands along the Great Lakes that are restored, protected, or enhanced over the next five years.[324] Enbridge has made no effort to consider impacts to wetlands adjacent to the Project and the filled wetlands, and this is another fatal omission in the application. See section V.C.4 above for additional discussion of these wetlands.

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[320] U.S. Army Corps of Engineers, Monthly Bulletin of Lake Levels for the Great Lakes (July 2020), http://lre-wm.usace.army.mil/ForecastData/MBOGLWL-combined_bulletin_and_backpage.pdf

[321] ELPC Climate Change Report at 21.

[322] *See, e.g.*, J. M. Castro et al., U.S. Fish & Wildlife Serv., Risk-Based Approach to Designing and Reviewing Pipeline Stream Crossings to Minimize Impacts to Aquatic Habitats and Species, 31 River Res. & Applications 767, 769 (2015), Exhibit P.

[323] Coastal Wetlands Website, www.coastawetlands.org and https://www.michigan.gov/documents/deq/lwm_ea_list_by_county_268678_7.pdf.

[324] U.S. Envtl. Prot. Agency, Great Lakes Restoration Initiative Action Plan III: Fiscal Year 2020 – Fiscal Year 2024 at 21 (Oct. 2019), https://www.epa.gov/sites/production/files/2019-10/documents/glri-action-plan-3-201910-30pp.pdf.

2. The Project's construction will impact water quality.

The Corps may only issue a Section 404 permit if the Project will not cause or contribute to violations of any applicable state water quality standard.[325] Michigan's water quality standards apply to the Great Lakes, the connecting waters, and all other surface waters of the state.[326] As part of its water quality standards, Michigan has antidegradation rules which require the maintenance and protection of "the level of water quality necessary to protect existing uses."[327] Protected uses in the Great Lakes include, "[a]t a minimum," "[w]armwater fishery," "[o]ther indigenous aquatic life and wildlife," and "[f]ish consumption," as well as "coldwater fisheries."[328] To the extent the Project's impacts on water quality diminish the use of the waters for fish, fisheries, and fish consumption, the Project cannot comply with water quality standards.

The construction of the Project could impact aquatic organisms and their habitat, as well as water quality. Drilling the tunnel's entrances, and then drilling beneath the Straits' floor, will likely cause increased runoff and turbidity, altering the behavior of fish and benthic organisms.[329] Water intake structures associated with the Project can pull aquatic species in through their pumps or impinge species on filters, especially in the dense habitats of shallow near shore areas.[330] Water outfall structures may cause turbidity to receiving areas, yet Enbridge does not plan to use a turbidity curtain and has not explained how the outfalls will not lead to excess turbidity.[331] The temperatures Enbridge has identified in its application for a NPDES permit are also cause for concern, as they may result in a violation of Michigan's water quality standards for temperature.[332] Enbridge must provide the Corps with information about these impacts and how water quality can be protected during construction.

Many other potential water quality impacts have not been adequately addressed. Enbridge has not provided sufficient information regarding the management of fluids and wastes generated from the shaft construction and the potential impacts on wetlands and Lake Michigan. Enbridge has indicated that "wastewater will be generated at the north side during construction of a retrieval shaft that is necessary to remove the TBM upon completion of the tunnel." [333] In addition, Enbridge has indicated that the fluids and wastes generated from the

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[325] 40 C.F.R. § 230.10(c)(1).
[326] Mich. Admin. Code R. 323.1041.
[327] Mich. Admin. Code R. 323.1098.
[328] Mich. Admin. Code R. 323.1100(1), (7).
[329] 2018 Report at 51. Note that runoff will likely continue after construction, because Enbridge plans to have a permanent hardscape on the north side—in close proximity to Lake Michigan.
[330] *Id*.
[331] Application at 13.
[332] *Compare* Enbridge Energy Tunnel Project NPDES permit application (HNY-TBJC-PNK8V) (April 15, 2020), *with* Mich. Admin Code 323.1070.
[333] Narrative Description_Construction Flow Diagram_North Side_NPDES_GLTP05182020.

shaft construction will be sent to a Slurry Treatment Facility. It also indicates that there will be a construction wastewater sump to hold wastewater streams. According to Enbridge's supplemental map submission, the construction stormwater pools are located across the street from the road and in very close proximity to Lake Michigan. In addition, Enbridge's Environmental Protection Plan figures show open piles of ditch spoil,[334] which poses a risk to adjacent wetlands and ultimately Lake Michigan in a rain or flooding event. Similarly, Enbridge does not provide sufficient detail regarding the management of construction-related dust, but only says it will use wetting as appropriate and based on site-specific conditions;[335] a fugitive dust plan is imperative considering the close proximity to Lake Michigan and other valuable resources. Before the Corps can issue the permit, it must ensure that these Project-related activities will not degrade water quality.

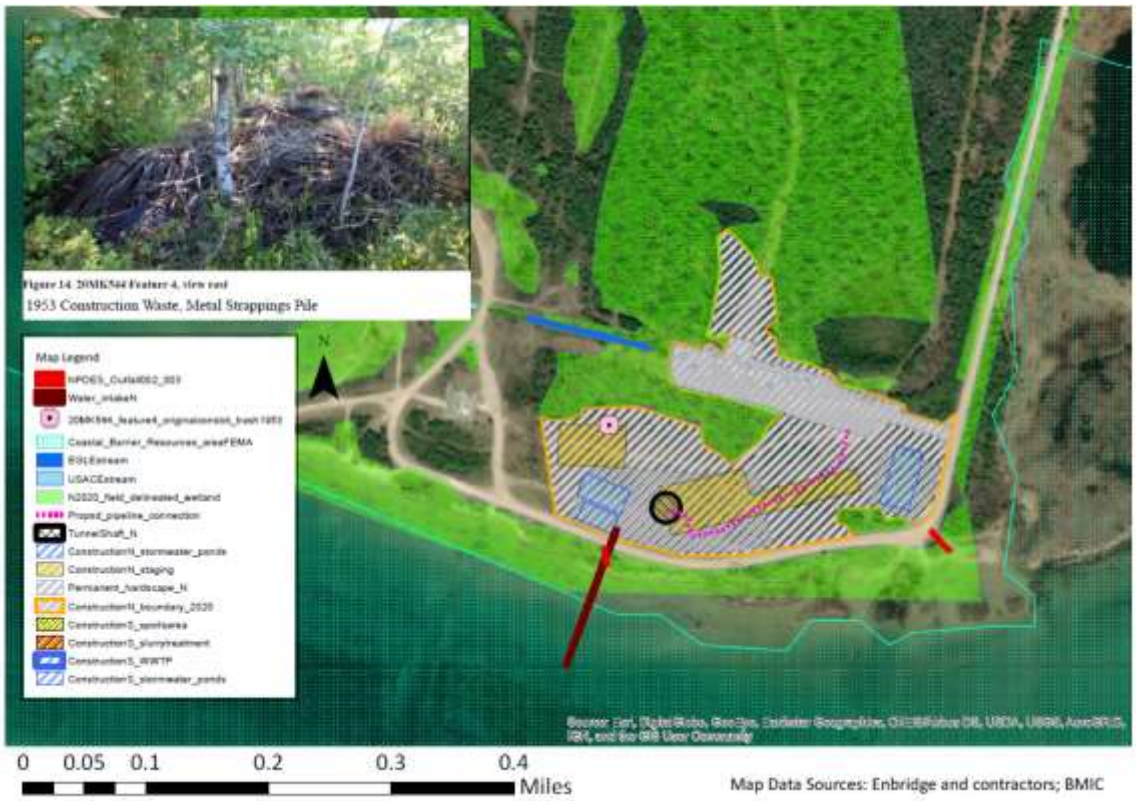

Figure 7. Proposed Tunnel Project Construction.

3. The potential for an oil pipeline spill in the Great Lakes is an unacceptable risk.

In its application, Enbridge only briefly acknowledges the potential for an oil spill, noting, "[t]he Tunnel will be constructed with a structural lining, providing secondary containment to prevent any leakage of fluids from Line 5 or utilities into the lakebed or the Straits."[336] The potential for an oil spill merits more than passing reference from an applicant

[334] EPP_Figures_ALL.pdf
[335] Environmental Protection Plan, 7.
[336] Joint Application at 9.

that seeks to embed a nearly 4-mile pipeline, carrying 540,000 barrels of oil per day, below the largest freshwater system in the world.

The Line 5 system has experienced more than 30 spills, and a spill in the Straits must be considered.[337] At least two spill scenarios must be addressed: (1) the possibility of a spill from the dual pipelines, because the construction of the Project locks in the continued use of the dual pipelines for the duration of the Project's construction; and (2) the possibility of a spill from the Project itself.

Enbridge has stated that "incorrect operation" is a "credible threat" that could lead to an oil spill from a tunnel, i.e., the Project.[338] It then dismisses the likelihood of operator errors as "negligible."[339] This is shortsighted. Operator errors remain possible and part of Enbridge's history, including in at least one of the spills along Line 5 and as a factor in the magnitude of the 2010 Kalamazoo Spill.[340] Enbridge "has a long history of pipeline ruptures, system and *operator failures, poor inspection practices and inadequate staff training*," as evidenced by the more than 600 releases from its pipeline network just in the time period of 1999 to 2008.[341]

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[337] Using Pipeline Hazardous Materials Safety Administration ("PHMSA") data, Beth Wallace, a National Wildlife Federation pipeline safety specialist, compiled an interactive ArcGIS map of the spill locations along Enbridge's Line 5: https://www.arcgis.com/apps/View/index.html?appid=f817f5abad9a4cb09e942c1941fd0060 (last accessed June 24, 2020); *see also* Drew YoungeDyke, Line 5 Oil Pipeline System Spanning Michigan Has Had 29 Known Spills, Nearly Doubling the Number Previously Believed to Have Occurred, National Wildlife Federation (April 24, 2017), https://www.nwf.org/Latest-News/Press-Releases/2017/4-24-17-Line-5-Oil-Pipeline-System-Spanning-Michigan-Has-Had-29-Known-Spills (announcing the release of the map). Since the map was released in April 2017, additional spills that have occurred have been added to it. The spill map also likely undercounts spills from Line 5 because regulatory requirements for reporting spills have varied over the decades, and did not require reporting to the federal government during the 1980s. Garrett Ellison, Enbridge Line 5 Has Spilled at Least 1.1M Gallons in Past 50 Years, MLive (April 26, 2017), https://www.mlive.com/news/2017/04/enbridge_line_5_spill_history.html. The first year for which data was available is 1968. *Id*.

[338] 2018 Report at 60.

[339] *Id.*

[340] *See* ArcGIS map, *supra* n. 90.

[341] Grobbel Environmental & Planning Associates, Comments on Application No. 2014-01071-TJH (Feb. 21, 2019) at 19, 23, Exhibit K; *see also* Nat'l Transp. Safety Bd. ("NTSB"), PB2012-916501, Enbridge Incorporated Hazardous
Liquid Pipeline Rupture and Release, Marshall, Michigan, July 25, 2010 at xii (July 10, 2012), https://www.ntsb.gov/investigations/AccidentReports/Reports/PAR1201.pdf ("NTSB Report") (noting that Enbridge's operators twice pumped additional oil through the Line 6 pipeline after it ruptured, amounting to 81 percent of the total release).

Pipeline operating companies repeatedly underestimate the risks of oil spills. For example, TransCanada provided a spill risk assessment to regulators before constructing the Keystone Pipeline. It estimated a spill of more than 50 barrels of oil to occur not more than once every seven to 11 years over the length of the pipeline in the United States—and then the pipeline had three major spills in just three years, from 2015 to 2017.[342] Courts caution against reliance on pipeline companies' optimism. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, the federal court found the Corps' reliance on and defense of a pipeline company's leak detection system and operator's safety record was arbitrary and capricious; there were reasons to doubt that leak detection system "would function as claimed."[343] The Great Lakes are too valuable a resource for the Corps to dismiss the threat of an oil spill and rely on operator optimism.

A spill in the Straits could damage an enormous area. Researchers at the University of Michigan conducted a quantitative analysis of computer modeling of 840 oil spill cases in the Straits using a "worst-case discharge" from Line 5.[344] They found that more than 1,000 kilometers of Lake Huron and Lake Michigan shorelines and specific islands are vulnerable to an oil release. [345] In three quarters of the cases, the models predicted an open water oil patch of at least 200 km^2 within five days.[346]

Any analysis of an oil spill is incomplete without consideration of the impacts on tribes and their treaty-reserved fishing, hunting, and gathering rights. Northern Lake Michigan and Northern Lake Huron are productive areas for several species of fish that tribes, including Bay Mills, continue to harvest and that would be impacted by an oil spill. The 1836 Treaty Tribes retain reserved rights to fish, hunt, and gather in the Project area.[347] For example, Northern Lake Michigan and Northern Lake Huron produce more than ten million pounds of lake whitefish annually for harvest by tribes.[348] An oil spill in the Straits would have a negative effect

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[342] Valerie Volcovici, *Keystone's Existing Pipeline Spills Far More than Predicted to Regulators*, Reuters (Nov. 27, 2017), https://www.reuters.com/article/us-usa-pipeline-keystone-spills/keystones-existing-pipeline-spills-far-more-than-predicted-to-regulators-idUSKBN1DR1CS.
[343] -- F.Supp.3d --, 2020 WL 1441923, *13; *see generally id*. at *9-16.
[344] David J. Schwab, Statistical Analysis of Straits of Mackinac Line 5: Worst Case Spill Scenarios (2016), http://graham.umich.edu/media/pubs/Mackinac-Line-5-Worst-Case-Spill-Scenarios.pdf.
[345] *Id.* at 10.
[346] *Id.*
[347] Bay Mills is a signatory to the March 28, 1836 Treaty of Washington ("1836 Treaty"). 7 Stat. 491. In the 1836 Treaty, Bay Mills reserved off-reservation fishing, hunting, and gathering rights in the Great Lakes, including the Straits of Mackinac, which have been confirmed by the federal courts. *See United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd*. 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).
[348] Ebener Report, Exhibit O, at 4. Tribes, including Bay Mills, retained fishing rights in the Great Lakes pursuant to an 1836 Treaty with the federal government. The Chippewa Ottawa Resource

on the lake whitefish fishery.[349] The same is true of lake trout, a species whose population tribes, the federal government, and the Michigan government have been working to promote and protect for decades.[350] Yellow perch, walleye, and round whitefish also spawn and inhabit areas in and around the Straits and would be hurt by an oil spill from the project.[351] When an oil spill harms these fish species, it will also harm the tribes that have retained their rights to fish these species pursuant to the 1836 Treaty.

D. There is No Showing that the Project is in the Public Interest.

The Corps must determine that the project is in the "public interest" by considering all of "the probable impacts, including cumulative impacts" and carefully weighing all relevant factors.[352] The benefits of a project "must be balanced against its reasonably foreseeable detriments."[353] The balancing "should reflect the national concern for both the protection and utilization of important resources," [354] and the protection of the Great Lakes, the largest freshwater system in the world, is of undoubtedly high concern. A "[f]ull evaluation of the general public interest requires" the Corps" to give "due consideration" to "Indian religious or cultural sites."[355]

1. Enbridge failed to provide the Corps with the information it needs to determine that the benefits of the Project outweigh the costs.

The Corps' regulations list approximately twenty public interest factors, including:

> conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production,

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Authority ("CORA") is an intertribal management body for the fishing tribes that are part of the 1836 Treaty.

[349] *Id*.

[350] *Id*. at 5; *see also* Consent Decree at 21-25, United States v. Michigan, Case No. 2:37-cv-26 (W.D. Mich. Aug. 7, 2000).

[351] Ebener Report, Exhibit O, at 7.

[352] 33 C.F.R. § 320.4(a); *see also Schmidt v. U.S. Army Corps of Engineers*, No. 2:08-CV-0076, 2009 WL 579412, at *1 (W.D. Mich. Mar. 5, 2009) (upholding the Corps' denial of a section 404 permit where the Corps determined that a project that would fill about a half-acre of wetland was "contrary to the overall public interest").

[353] 33 C.F.R. § 320.4(a).

[354] *Id*.

[355] 33 C.F.R. § 320.4(e).

mineral needs, considerations of property ownership and, in general, the needs and welfare of the people."[356]

As part of the public interest balancing, the Corps must consider "[t]he relevant extent of the public and private need for the project."[357] Enbridge has not provided the Corps with information about how Project construction will impact shoreline erosion, cultural and historic properties, and impacts to water quality and fish habitat. Enbridge has not provided the Corps with sufficient information to conduct a public interest balancing evaluation.

2. The Corps should not rely on the Tunnel Agreements to determine whether the Project is in the public interest.

The Corps is not bound by any other agency's determination to greenlight the Project.[358] Enbridge asserts, "[t]he Tunnel is being pursued in accordance with the Tunnel Agreement that was executed by Enbridge and the [Mackinac Straits Corridor] Authority" in 2018, and that the Agreement was entered in furtherance of the state statute that created the Authority.[359] The legislation and Tunnel Agreement, however, do not replace or eliminate any portion of the permitting process; indeed, the Tunnel Agreement acknowledged that Enbridge would apply for all relevant permits. Nor do they merit any deference in the Corps' public interest analysis.

Even if the Corps wanted to consider the State of Michigan's position on the Project, it would not find a clear answer. Enbridge points the Corps to support for the Project, but fails to acknowledge state-level opposition. The current governor and attorney general have stated opposition to the Project.[360] The attorney general also has a pending lawsuit in which she seeks an injunction requiring Enbridge to cease operations of the dual pipelines in the Straits.

Moreover, even if Michigan agencies ultimately grant other permits for this Project, the CWA requires the Corps to "independently weigh[] the benefits against the costs" to determine whether the Project is in the public interest.[361]

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[356] 33 C.F.R. § 320.4(a).
[357] 33 C.F.R. § 320.4(a)(i).
[358] *Nat'l Parks Conservation Ass'n v. Semonite*, 311 F. Supp. 3d 350, 376-77 (D.D.C. 2018) (quoting *Sierra Club v. USACE*, 772 F.2d 1043, 1054 (2d Cir. 1985).
[359] Application at 9.
[360] *See* Comments of Attorney General Dana Nessel in Opposition to Request by Enbridge Energy, Limited Partnership for Declaratory Ruling, MPSC Case No. U-20763 (May 13, 2020), https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t000000BYRc7AAH.
[361] *Nat'l Parks Conservation Ass'n v. Semonite*, 311 F. Supp. 3d at 377; *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1054 (2d Cir. 1985) (not requiring deference to state environmental agency in public interest analysis).

3. Permitting this Project extends the lifetime of the entire Line 5 Pipeline, maintaining unacceptable oil spill risks and perpetuating harmful greenhouse gas emissions.

Permitting this Project will have enormous costs in the form of extending the lifetime of the Line 5 pipeline. Enbridge is seeking a 99-year lease for the tunnel that would be built as part of this Project and that would "replace" the dual pipelines. In contrast, Michigan's Attorney General seeks the decommissioning of the dual pipelines. By permitting this Project, the Corps would be staking a position that oil needs to traverse a sensitive segment of the Great Lakes and travel through the pipeline that leads to and away from the Straits for approximately a century. The Corps must consider the costs of operating the entire Line 5 pipeline as part of this public interest balancing.

Extending the lifetime of the pipeline by 99 years extends the period of time during which:

- Bay Mills continues to be harmed by a pipeline on culturally significant lands and waters of the Straits, where the creation of North America occurred, according to tribal history;
- Tribal Nations continue to be harmed by a pipeline in the ceded territories, where they have reserved treaty rights and about which they were never consulted;
- Greenhouse gas emissions from oil production and consumption continue;
- The Great Lakes continue to be exposed to an unacceptable risk of an oil spill;
- Three other inland lakes that Line 5 crosses continue to be exposed to the unacceptable risk of an oil spill;[362]
- The 290 rivers and streams that Line 5 crosses continue to be exposed to an unacceptable risk of an oil spill;[363]
- Tribal fisheries continue to be exposed to an unacceptable risk of an oil spill;[364]

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[362] Great Lakes Indian Fish and Wildlife Commission, "Cumulative Impacts of Pipeline Construction Draft Report," 9 (June 24, 2020) (unpublished manuscript) (on file with Great Lakes Indian Fish and Wildlife Commission)
[363] *Id*.
[364] Ebener Report at 1, 3 (noting '[b]efore I get into specifics, I will point out that the commercial fisheries and some fish populations in the Prince William Sound area of Alaska have not recovered from the oil spill of the Exxon Valdez in 1989 . . . I suspect we would see the same effect here

- Tribal members who engage in treaty harvest activities in the vicinity of Line 5 continue to be exposed to health and safety risks because oil spill and explosion incidents can result in air quality impacts and, in some cases, death;[365] and

- Waters and lands that spilled oil could flow to due to a spill along Line 5 continue to be exposed to an unacceptable risk of an oil spill.[366]

It is not a matter of "if" a pipeline will spill oil, but a matter of "when." Data from PHMSA, reveals that pipeline spills or leaks occur approximately every other day in the U.S. The U.S. Forest Service's review of PHMSA data showed that from 2004 to 2017, there were an average of 186 incidents involving crude oil pipeline systems in the United States each year, averaging 42,517 barrels of crude oil released per year.[367] Twenty-nine percent of that oil was never recovered from the environment.[368]

In addition to the costs attendant with extending the lifetime of the Line 5 pipeline, there are costs associated with the construction and operation of this Project. These costs include the risks and harms to species, wetlands, water quality, cultural resources, and tribal fisheries detailed throughout these comments.

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in the 1836 Treaty-ceded waters of Lakes Huron and Michigan as a consequence of a leak from Line 5. It would be naïve to believe otherwise."); Mich. Dept. of Health & Human Servs., *MDCH Lifts "Do Not Eat" Fish Consumption Advisory for the Kalamazoo River*, https://www.michigan.gov/mdhhs/0,5885,7-339--282243--,00.html (June 28, 2012) (recognizing that fish consumption advisories were in place for 2 years as a result of crude oil exposure after the Kalamazoo oil spill).

[365] *See, e.g.*, Joseph Riesterer, *The Enduring Legacy of the 2010 Kalamazoo River Oil Spill*, BELT MAGAZINE (July 12, 2019) https://beltmag.com/kalamazoo-river-line-6b-oil-spill/ (noting that health risks from the spill from Enbridge's pipeline through Marshall, Michigan forced nearby residents to evacuate); John Myers, *Enbridge Must Pay $2.4 Million for Fatal Explosion*, DULUTH NEWS TRIBUNE (Aug. 18, 2010), https://www.duluthnewstribune.com/business/2300949-enbridge-must-pay-24-million-fatal-explosion (noting the deaths of pipeline workers in Clearbrook, Minnesota, when oil leaking from an Enbridge pipeline ignited).

[366] Great Lakes Indian Fish and Wildlife Commission, "Cumulative Impacts of Pipeline Construction Draft Report," 2 (June 24, 2020) (unpublished manuscript) (on file with Great Lakes Indian Fish and Wildlife Commission) (recognizing that because "crude oil can be highly mobile in water," any river that intersects with the pipeline, downstream lakes, and the land along those waterbodies may be impacted by spilled oil).

[367] Troy R. Thompson, US Forest Service Hydrogeological Assessment of the Enbridge Pipeline Section on the Chequamegon-Nicolet National Forest: Technical Report at 4, USDA Forest Service, Region 9 (2019).

[368] *Id*.

The Corps must consider all of these costs.

4. Lack of need for oil and gas over the lifespan of the Project undermines any statement of benefits.

In contrast to the weighty costs of the Project, any potential benefits are few and temporary. Enbridge's application depends on the assumption that there is a need for the oil and natural gas to be transported by the Project. There is no demonstration of the need for this oil and gas, let alone for the need for these fuels over the entire lifetime of the Project.

Planning to continue relying on oil and natural gas, let alone for an additional 99 years, is *contrary* to the public interest, as discussed *supra* V.C.1.b and VIII.D3. It is also contrary to the State of Michigan's renewable energy goals.[369] And the recent decrease in demand for oil during the coronavirus pandemic reveals what a dubious proposition it is to assume an economy based on oil is a benefit.[370]

Even assuming oil and natural gas are a necessary component of the energy market, there is still little showing of public or private need. First, the Project would not significantly benefit Michigan oil producers. In recent years, oil production in Michigan has been flat or declining.[371] There are no crude oil producers in Michigan's Upper Peninsula, and Lower Peninsula oil production accounts for just a "tiny" volume (about 1.5%) of the oil used in Detroit, Toledo, and Sarnia area refineries.[372] Transitioning the transportation of all Michigan-produced crude oil to rail or truck, if neither the Project nor the dual pipelines were in service, would only minimally affect the profitability of Michigan crude oil producers.[373]

Second, the Project is not necessary to benefit Michigan propane consumers. Enbridge may argue that the Project and the perpetuation of Line 5 is to needed to meet the propane needs of Upper Peninsula residents. Natural gas liquids taken from Line 5 are processed into propane, and 25% of Upper Peninsula residents rely on propane.[374] However, the Line 5 pipeline is not the only way to transport propane and natural gas liquids. A task force convened by the governor of Michigan "identified a number of robust and diverse alternative supply

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[369] Mich. Comp. Laws § 460.1001(2).
[370] *See supra* n. 10.
[371] LEI Report at 6; *see also Id*. at 8 (noting that production has been flat for almost 20 years, following a decade of declining production).
[372] LEI Report at 30.
[373] LEI Report at 30.
[374] Executive Order 2019-14.

options for delivery to the Michigan market."[375] It determined that additional storage infrastructure and rail upgrades could provide alternatives for propane supply and delivery.[376]

The only other benefit that Enbridge has stated is the short-term hiring of approximately 200 workers for Project construction, and the corresponding spending of worker payroll for housing, food, fuel, entertainment, and other items in the local area.[377] In contrast, the temporary employment that could accrue from decommissioning the dual pipelines has not been calculated.

These uncertain and temporary benefits do not outweigh the costs of Project construction and operation, as well as the costs of maintaining unacceptable oil spill risks along Line 5 and perpetuating harmful greenhouse gas emissions.

E. The Corps Must Independently Verify All Information Provided by Enbridge.

In reviewing the Project, the Corps is obligated to independently evaluate the—very limited—information Enbridge has presented in its application.[378] Extensive additional work is needed here to assess, among other things:

- The purported need for the Project;
- The validity of Enbridge's representations about the scope of the Project's impacts to wetlands, and why Wetlands 3 will be impacted;
- The accuracy of information about elevation of the Great Lakes water and the average water depth, in light of the Great Lakes' water levels reaching historic highs and the Project's proposed locations along the shoreline and under the surface of the water;[379]
- The basis for Enbridge's statement that it "does not anticipate any impact to the lake bottom or the existing pipeline from settlement caused by tunnel construction;"[380]

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[375] Dep't of Environment, Great Lakes, and Energy, Upper Peninsula Energy Task Force Committee Recommendations: Part I – Propane Supply at 8 (April 17, 2020).
[376] *Id*.
[377] Antidegradation Report at 4.
[378] 40 C.F.R. §1506.5(a); *see also Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1265–68 (S.D. Fla. 2009) (finding that the Corps failed to independently evaluate the practicability of alternatives to the proposed project).
[379] Application at 13.
[380] Enbridge Energy, Construction Sequence, Methods, Timing and Equipment: Great Lakes Tunnel Project, LRE-2010-00463-56-A19, at Sheet 38.

- The impacts of the Project on fish and other species; and
- Whether the alternatives to the Project are practicable and less environmentally-damaging than the Project.

Skepticism of Enbridge's representations is warranted for multiple reasons. First and foremost is how much information is missing from Enbridge's application. Second, Enbridge has made inconsistent representations about this project. For example, Enbridge assured the Michigan government that it would seek all required governmental approvals and permits for the Tunnel,[381] and then it turned around and argued that at least one of those approvals was not actually required.[382] As another example, Enbridge's various permit submissions provide conflicting information about whether the proposed storm water outfall (Outfall 002) will be located on a precontact period Native American burial ground.[383] Third, Enbridge's record of spills and leaks from its pipeline network is disturbing. Not only was Enbridge responsible for the 2010 Kalamazoo River Spill that went undiscovered and unaddressed for over 17 hours, damaging wetlands and miles of the Kalamazoo River,[384] but Enbridge's Line 5 itself has been the source of more than 30 spills.[385] Given the scale of the Project and the risks involved in it, the Corps must fulfill its duty to independently verify all of Enbridge's claims.

IX. SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899

Enbridge has also applied for a permit under Section 10 of the Rivers and Harbors Act of 1899 ("Section 10"). Section 10 vests the Corps with the authority to evaluate proposed construction projects in the navigable waters of the United States:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity

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[381] Tunnel Agreement between the Mackinac Straits Corridor Authority and Enbridge, attached to Enbridge's Application to MPSC as Exhibit A-5, p. 1.
[382] Enbridge's arguments to MPSC; *see also* Alternatives Report, attached to Enbridge's Application to MPSC as Exhibit A-9, p. 7 (marked as p. 3 in original report).
[383] *See supra* n. 181-182.
[384] NTSB Report at xii; Mem. from Staff to Members of H. Comm. on Transp. & Infrastructure, 111th Congr., Hearing on "Enbridge Pipeline Oil Spill in Marshall Michigan" (Sept. 14, 2010).
[385] Garrett Ellison, *Enbridge Line 5 has Spilled at Least 1.1M Gallons in Past 50 Years*, MLIVE (Apr. 26, 2017), https://www.mlive.com/news/2017/04/enbridge_line_5_spill_history.html.

> of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.[386]

Under the Corps' regulations, a permit is required under Section 10 for work in or affecting the navigable waters of the United States.[387] A tunnel constructed under a navigable water of the United States is explicitly identified in the regulations as requiring a Section 10 permit.[388]

To decide whether a Section 10 permit should be issued, the Corps must undertake the same "public interest review" that is required in its evaluation of Enbridge's request for a permit under Section 404 of the Clean Water Act.[389] This review requires a "careful weighing" of all the relevant factors related to the probable impact the proposed activity will have on the public interest.[390] In this evaluation, "[t]he benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments."[391] The regulations include over twenty factors that may be relevant to the Corps' balancing analysis. And, the regulations further provide that the decision to approve or deny a permit request "should reflect the national concern for both protection and utilization of natural resources."[392] A permit shall issue only if the "public interest review" determines that the benefits outweigh the detriments of the proposal.[393]

As with its request for a permit under the Clean Water Act, Enbridge's request for a Section 10 permit must be denied because Enbridge has filed to demonstrate that the Project is in the public interest. First, as discussed throughout these comments, Enbridge has failed to provide the Corps with critical information necessary to determine whether the benefits of the Project outweigh the cost. Specifically, Enbridge has failed to provide sufficient information about how the Project will impact: shoreline erosion, cultural resources, and historic properties; water quality and fish habitat; and, endangered and threatened species and their critical habitats. Without this information, the Corps cannot conduct the public interest analysis required by its regulations.

Second, the information that has been provided demonstrates that the costs of this Project far outweigh the benefits. Approving the Project would needlessly extend the lifetime

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[386] 33 U.S.C. § 403.
[387] 33 C.F.R. § 322.3(a).
[388] *Id.* ("For purposes of a section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.").
[389] 33 C.F.R. § 320.4(a)(1); *see also Van Abbema v. Fornell*, 807 F.2d 633, 636 (7th Cir. 1986).
[390] *Id.*
[391] *Id.*
[392] *Id.*
[393] *Van Abbema,* 807 F.2d at 638, *citing* 33 C.F.R. § 320.4(a).

of the entire aging Line 5 pipeline including the dual pipelines that run through the Straits and would continue to do so during the construction. As a result, Bay Mills would have to continue to endure the indignity of having an aging, corroding pipeline infrastructure endanger the culturally significant lands across its ceded territory and in the waters of the Straits; this indignity carries with it a grave risk to the lives and livelihoods of the members of the Bay Mills community and other tribal nations. And, the millions of people in the region who enjoy the waters of the Great Lakes and the 290 rivers and streams that Line 5 crosses would continue to be subjected to the unacceptable risk of an oil spill. In exchange, Enbridge would simply continue to profit at the expense of others. It is apparent that the costs are great and it is only Enbridge who benefits.

Furthermore, as discussed earlier, NEPA requires the Corps to "study, develop, and describe appropriate alternatives to recommended courses of actions in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[394] Thus, the alternatives analysis that must be conducted to assess Enbridge's request for a permit under Section 404 of the Clean Water Act must also be conducted as part of the evaluation of the Section 10 permit application. As discussed *supra* VIII.B, Enbridge's alternatives analysis is wholly inadequate and, for this additional reason, the Section 10 permit must be denied.

[394] 42 U.S.C. § 4332; *see also Van Abbema,* 807 F.2d at 637-38 (discussing the need for an alternatives analysis in the consideration of a permit application under Section 10 of the Rivers and Harbors Act).

X. CONCLUSION

Even from the underwhelming information submitted by Enbridge in its Section 404 Permit Application, the Corps should recognize the overwhelming potential harms to the Great Lakes and the people, fish, flora, and wildlife that depend on the resource and deny the application for the Enbridge Project.

Respectfully submitted,

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