

Nos. 23-2309, 23-2467

**UNITED STATES COURTS OF APPEALS
FOR THE SEVENTH CIRCUIT**

BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE
BAD RIVER RESERVATION,
Plaintiff-Appellee, Cross-Appellant,

v.

ENBRIDGE ENERGY COMPANY, INC. and ENBRIDGE ENERGY, L.P.,
Defendants-Appellants, Cross-Appellees.

ENBRIDGE ENERGY COMPANY, INC. and ENBRIDGE ENERGY, L.P.,
Counter-Plaintiffs, Appellants/Cross-Appellees,

v.

BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE
BAD RIVER RESERVATION, and NAOMI TILLISON,
Counter-Defendants, Appellees/Cross-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin,
No. 3:19-cv-602 (Hon. William M. Conley)

**AMICUS CURIAE BRIEF OF CLEAN WISCONSIN IN SUPPORT
OF THE BAD RIVER BAND AND REVERSAL IN PART**

Brett Korte
Evan Feinauer
Clean Wisconsin
634 West Main Street
Madison, Wisconsin 53704
608-251-7020
Counsel for Clean Wisconsin as Amici Curiae

Appellate Court No: 23-2309, 23-2467

Short Caption: Bad River Band of the Lake Superior Tribe of the Chippewa Indians v. Enbridge Energy Co., Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Clean Wisconsin, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Brett Korte Date: 10/18/2023

Attorney's Printed Name: Brett Korte

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 634 West Main Street, Madison, WI 53704

Phone Number: 608-251-7020 Fax Number: _____

E-Mail Address: bkorte@cleanwisconsin.org

Appellate Court No: 23-2309, 23-2467

Short Caption: Bad River Band of the Lake Superior Tribe of the Chippewa Indians v. Enbridge Energy Co., Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Clean Wisconsin, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Evan Feinauer Date: 10/18/2023

Attorney's Printed Name: Evan Feinauer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 634 West Main Street, Madison, WI 53704

Phone Number: 608-251-7020 Fax Number: _____

E-Mail Address: efeinauer@cleanwisconsin.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST	1
INTRODUCTION	1
ARGUMENT	5
I. A Rupture of Line 5 Would Cause Catastrophic, Irreversible Harm Requiring an Injunction to Immediately Cease Operation of Line 5.....	5
A. A Rupture of the Line 5 Crude Oil Pipeline Would Be Devastating to the Bad River and Lake Superior Watersheds.....	7
i. Freshwater Systems.....	10
ii. Fish.....	11
iii. Birds.....	12
iv. Marsh Grasses (e.g., Wild Rice and Manoomin).....	14
v. Economic Impacts of a Rupture.....	16
B. A Single Storm or Series of Storm Events Could Create the Conditions for a Rupture at Any Point.....	18
C. Enbridge’s Track Record Should Engender the Court’s Caution.....	19
II. The Environmental and Economic Harm that the Continued Trespass Could Cause Requires the Court to Weight the Public Interest Factor in Favor of Issuing an Immediate Injunction.....	25
A. Irreversible Environmental Harms Outweigh Potential Economic Impacts in the Public Interest Factor Analysis.....	25
B. America’s International Commitments Recognize a National Interest in Protecting Wisconsin’s Natural Resources.....	26
III. The Proposed Reroute of Line 5 May Never Occur Because It Would Cause Significant Environmental Harm.....	29
CONCLUSION	33
FORM AND LENGTH CERTIFICATION	34

TABLE OF AUTHORITIES

Cases

Amoco Prod. Co. v. Village of Gambell
 480 U.S. 531 (1987)..... 25

Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control
 992 F.2d 145 (8th Cir. 1993)..... 26

Downstate Stone Co. v. United States
 651 F.2d 1234 (7th Cir. 1981)..... 26

LAJIM, LLC v. Gen Elec. Co.
 917 F.3d 933 (7th Cir. 2019)..... 25

Liebhart v. SPX Corp.
 998 F.3d 772 (7th Cir. 2021)..... 6

Michigan v. U.S. Army Corps of Eng'rs
 667 F.3d 765 (7th Cir. 2011)..... 6

Nat'l Wildlife Fed'n v. Burford
 835 F.2d 305 (D.C. Cir. 1987)..... 26

Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs
 472 F.3d 1097, 1101 (9th Cir. 2006)..... 26

Su v. Johnson
 68 F.4th 345 (7th Cir. 2023)..... 7

Treaties

Convention on Wetlands of International Importance Especially as Waterfowl
 Habitat, Ramsar, Iran, Feb. 2, 1971,
 996 U.N.T.S. 245, 11 I.L.M. 963 (1972)..... 28

Great Lakes Water Quality Agreement, U.S. – Can., 33 U.S.T. 1590, T.I.A.S. No.
 9957 (Nov. 22, 1978), revised by Protocol Amending the Great Lakes Water
 Quality Agreement, U.S. – Can., 35 I.L.M. 708 (Feb. 18, 1987)..... 27

Treaty Between the United States and Great Britain Relating to Boundary Waters
 between the United States and Canada, United Kingdom - U.S., 36 Stat.
 2448, T.S. No. 548 (Jan. 11, 1909)..... 27

Wisconsin Constitution

WIS. CONST. art. I, § 26..... 11

Other Authorities

BAD RIVER TRIBE, *Kakagon and Bad River Sloughs Recognized as a Wetland of International Importance* (Aug. 22, 2019), <http://www.badriver-nsn.gov/kakagon-and-bad-river-sloughs-recognized-as-a-wetland-of-international-importance/> 28, 29

BAD RIVER TRIBE, *Manoomin*, <http://www.badriver-nsn.gov/natural-resources/manoomin/>..... 15

Danielle Kaeding, *Wisconsin Regulators, Residents Question Pipeline Spill Enbridge Failed To Report For Over A Year*, WISC. PUB. RADIO (March 31, 2021), <https://www.wpr.org/wisconsin-regulators-residents-question-pipeline-spill-enbridge-failed-report-over-year>..... 24

Drew YoungeDyke, *Seven Years Later, Kalamazoo River Oil Spill Cleanup Still Ongoing*, NATIONAL WILDLIFE FEDERATION (2017), <https://www.nwf.org/Latest-News/Press-Releases/2017/6-9-17-Seven-Years-Later-Kalamazoo-River-Oil-Spill-Cleanup-Still-Ongoing>..... 22

Frank Vaisvilas, *Wild rice harvest season, central to Ojibwe in Wisconsin, begins* (Sept. 6, 2023), <https://www.jsonline.com/story/news/local/wisconsin/2023/09/06/wild-rice-harvest-season-central-to-ojibwe-in-wisconsin-begins/70727698007/#:~:text=That%20food%20is%20manoomin%2C%20Ojibwe,is%20unique%20in%20the%20world>..... 14

Garret Ellison, *Enbridge Line 5 has spilled at least 1.1M gallons in past 50 years*, MICHIGAN LIVE (Apr. 26, 2017), https://www.mlive.com/news/2017/04/enbridge_line_5_spill_history.html.... 19

GLIFWC *Comments on the Line 5 Reroute dEIS*, Great Lakes Indian Fish & Wildlife Comm’n (April 25, 2023)..... 31

Holly S. Embke et al, *Fishing for food: Quantifying Recreational Fisheries Harvest in Wisconsin Lakes*, 45 FISHERIES (2020)..... 12

James E. Almendiner, *Memorandum to Midwest Environmental Advocates* (Mar. 8, 2022), attached to *Comments of Midwest Environmental Advocates, Clean Wisconsin, Honor the Earth, and Sierra Club of Wisconsin on the Draft EIS*

for Enbridge Line 5 in Northern Wisconsin (April 15, 2022), available at:
https://widnr.widen.net/s/dlvxl5hmq/el5_deis-comments_email_various_withattachments..... 10, 18

Jeff Alexander and Beth Wallace, *SUNKEN HAZARD: AGING OIL PIPELINES BENEATH THE STRAITS OF MACKINAC AN EVER-PRESENT THREAT TO THE GREAT LAKES*, NATIONAL WILDLIFE FEDERATION (2012),
https://www.nwf.org/~media/pdfs/regional/greatlakes/nwf_sunkenhazard.ashx#:~:text=In%20this%20report%2C%20National%20Wildlife,of%20lakes%20Michigan%20and%20Huron 20

Kirsti Marohn, *Enbridge faces criminal charge, more fines over Line 3 construction*, MINN. PUB. RADIO NEWS (Oct. 17, 2022),
<https://www.mprnews.org/story/2022/10/17/enbridge-faces-criminal-charge-more-fines-over-line-3-construction>..... 24

Lake Superior, MICH. DEP’T OF ENV’T, GREAT LAKES, AND ENERGY,
<https://www.michigan.gov/egle/about/organization/water-resources/great-lakes-coordination/lake-superior>.....3

Mashkiiziibii: Bad River Band of the Lake Superior Tribe of Chippewa, BAD RIVER TRIBE, <https://www.badriver-nsn.gov/>1

Mel White, *Birding in Wisconsin*, (Apr. 28, 2016),
<https://www.audubon.org/news/birding-wisconsin>..... 13

MINN. DEP’T OF NAT. RES., MINNESOTA DEPARTMENT OF NATURAL RESOURCES UPDATE ON LINE 3 AQUIFER BREACH INVESTIGATION AND ENFORCEMENT (March 1, 2022), <https://files.dnr.state.mn.us/features/line3/dnr-update-line-3-aquifer-breach-investigation-and-enforcement-3-21-22.pdf> 24

MINN. DEP’T OF NAT. RES., *Lake Superior State Water Trail*,
<https://www.dnr.state.mn.us/watertrails/lakesuperior/index.html>..... 3

Nathan Denzin, *Wisconsin’s wild rice harvest and the threats of climate change*, WISC. PUB. BROADCASTING SERVICE (Sept. 29, 2023),
<https://pbswisconsin.org/news-item/wisconsins-wild-rice-harvest-and-threats-of-climate-change/#:~:text=Wild%20rice%2C%20or%20manoomin%20in,people%20in%20this%20area%20live>..... 15

NAT’L OCEANIC & ATMOSPHERIC ADMIN., *Great Lakes ecoregion*,
<https://www.noaa.gov/education/resource-collections/freshwater/great-lakes-ecoregion#:~:text=The%20large%20lakes%20are%20Superior,system%20for%20clean%20drinking%20water>..... 10

NAT'L PARK SERV., *National Natural Landmarks: Kakagon Sloughs*,
<https://www.nps.gov/subjects/nlandmarks/site.htm?Site=KASL-WI>.....3

NAT'L TRANSP. SAFETY BD., ENBRIDGE INC. NATURAL GAS PIPELINE RUPTURE (May 4,
 2020),[https://www.nts.gov/investigations/
 AccidentReports/Reports/PIR2201.pdf](https://www.nts.gov/investigations/AccidentReports/Reports/PIR2201.pdf) 24

NAT'L TRANSP. SAFETY BD., ENBRIDGE INC. NATURAL GAS TRANSMISSION PIPELINE
 RUPTURE AND FIRE (Aug. 1, 2019), [https://www.nts.gov/investigations/
 AccidentReports/Reports/PIR22002.pdf](https://www.nts.gov/investigations/AccidentReports/Reports/PIR22002.pdf)..... 23

NAT'L TRANSP. SAFETY BD, PIPELINE ACCIDENT REPORT: ENBRIDGE INCORPORATED,
 HAZARDOUS LIQUID PIPELINE RUPTURE AND RELEASE, MARSHALL MICHIGAN,
 JULY 25, 2010 (2012), [https://www.nts.gov/investigations/AccidentReports/
 Reports/PAR1201.pdf](https://www.nts.gov/investigations/AccidentReports/Reports/PAR1201.pdf) 21, 23

RAMSAR SITES INFORMATION SERVICE, *Kakagon and Bad River Sloughs*,
<https://rsis.ramsar.org/ris/2001>.....4, 28, 29

Red Cliff Band of Lake Superior Chippewa's Dep't of Nat. Res., *Red Cliff's
 Comments on WNDR's draft Environmental Impact Statement for Enbridge's
 Proposed Line 5 Project* (March 18, 2022)..... 31

Sally Cole-Misch, *How Would Oil Spills Affect the Great Lakes?*, INT'L JOINT
 COMMISSION (Dec. 10, 2018), [https://ijc.org/en/how-would-oil-spills-affect-
 great-lakes](https://ijc.org/en/how-would-oil-spills-affect-great-lakes) 10, 11

*The Safety of Hazardous Liquid Pipelines (Part 2): Integrity Management: Hearing
 Before the Subcomm., On R.R., Pipelines, & Hazardous Materials of the H.
 Comm. on Transp. & Infrastructure*, 111th Cong. (2010) (statement of
 Richard Adams, Vice President, U.S. Operations, Liquids Pipelines, Enbridge
 Pipelines)..... 22

U.S. ARMY CORPS OF ENG'RS, TREATY RIGHTS AND SUBSISTENCE FISHING IN THE U.S.
 WATERS OF THE GREAT LAKES, UPPER MISSISSIPPI RIVER, AND OHIO RIVER
 BASINS 2 (2012),
https://glmris.anl.gov/documents/docs/Subsistence_Fishing_Report.pdf..... 11

U.S. DEPT' OF STATE, *Fact Sheet: Ramsar Convention on Wetlands As released by the
 Bur. Of Oceans and Int'l Env'tl and Sci. Affairs, Dep't of State, August 18,
 1998*, [https://1997-
 2001.state.gov/global/oes/fs_ramsar980818.html#:~:text=The%20United%20S](https://1997-2001.state.gov/global/oes/fs_ramsar980818.html#:~:text=The%20United%20S)

tates%2C%20which%20joined,%2C%20Georgia%2C%20Florida%20and%20Wisconsin 28

U.S. ENV'T PROT. AGENCY, *Case Summary: EPA Orders Enbridge Inc. to Perform Additional Dredging to Remove Oil from Kalamazoo River, Mich.*, <https://www.epa.gov/enforcement/case-summary-epa-orders-enbridge-inc-perform-additional-dredging-remove-oil-kalamazoo>..... 21

U.S. ENV'T PROT. AGENCY, *Enbridge Spill Response Timeline*, <https://www.epa.gov/enbridge-spill-michigan/enbridge-spill-response-timeline> 22

U.S. ENV'T PROT. AGENCY, *Lake Superior*, <https://www.epa.gov/greatlakes/lake-superior>..... 11

U.S. ENV'T PROT. AGENCY, *Sensitivity of Freshwater Habitats*, <https://archive.epa.gov/emergencies/content/learning/web/html/freshwat.html#:~:text=In%20calm%20water%20conditions%2C%20the,different%20sensitivities%20to%20oil%20spills>..... 10

U.S. ENV'T PROT. AGENCY, *What is the GLQA?*, <https://www.epa.gov/glwqa/what-glwqa#:~:text=The%20Great%20Lakes%20Water%20Quality,actions%20that%20improve%20water%20quality>..... 28

WISC. DEP'T OF NAT. RES., *Birding and Bird Conservation*, <https://dnr.wisconsin.gov/topic/wildlifehabitat/birding> 13

WISC. DEP'T. OF NAT. RES., FISHERIES STAFF, <https://dnr.wisconsin.gov/topic/Fishing/people>.....11

WISC. DEP'T OF NAT. RES., *Game Species in Wisconsin*, <https://dnr.wisconsin.gov/topic/wildlifeHabitat/game.html>..... 13

WISC. DEP'T OF NAT. RES., ONE MILLION AND COUNTING: WISCONSIN REACHES NEW MILESTONE IN AVIAN CITIZEN SCIENCE (2020), <https://dnr.wisconsin.gov/newsroom/release/38256> 12

WISC. DEP'T OF NAT. RES., *Program Goals & Strategies for Fisheries Management and Fisheries Research*, <https://dnr.wisconsin.gov/sites/default/files/topic/Lands/FMStrategicPlan.pdf> 11

WISC. DEP'T OF NAT. RES., *R3 Resources*, <https://dnr.wisconsin.gov/Education/OutdoorSkills/R3resources>

STATEMENT OF INTEREST

For over 50 years, Clean Wisconsin, formerly Wisconsin's Environmental Decade, has advocated to protect its members' interests in the air they breathe, water they drink, and beautiful, natural places they enjoy.¹ Among those places are Wisconsin's rivers, streams, wetlands, and two Great Lakes. The Lake Superior region provides a range of ecological services and is critical to three culturally treasured pastimes and ways of life in Wisconsin: hunting, fishing, and wild rice harvesting. Given Clean Wisconsin's many members who live in or otherwise enjoy Northern Wisconsin, we are directly interested in the serious risk of catastrophic harm caused by continued operation of Enbridge's Line 5 pipeline and urge the Court to grant injunctive relief commensurate to that risk.

INTRODUCTION

The Bad River Band of Lake Superior Chippewa's (the Band) reservation, located along Lake Superior's shores in Wisconsin's North Woods, faces a critical threat: the imminent rupture of Enbridge's Line 5 crude oil pipeline. A rupture would contaminate the ecosystems of Lake Superior and the surrounding region, which is largely wild and undeveloped, encompassing more than 500 miles of pristine rivers and 30,000 acres of wetlands.² These intricately connected lands

¹ All parties to this appeal have consented to the filing of this brief. Counsel for Clean Wisconsin certify that this brief was not written in whole or in part by counsel for any party, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amicus curiae contributed money that was intended to fund preparing or submitting the brief.

² *Mashkiiziibii: Bad River Band of the Lake Superior Tribe of Chippewa*, BAD RIVER TRIBE, <https://www.badriver-nsn.gov/> (last visited Oct. 17, 2023).

contain an array of finely calibrated habitats home to native fish such as walleye and sturgeon, wild rice (“manoomin” in Ojibwe), iconic birds such as the loon, and many other charismatic species including the grey wolf, black bear, moose, red fox, and, of course, badger, all of which hold cultural significance for the people of Wisconsin.

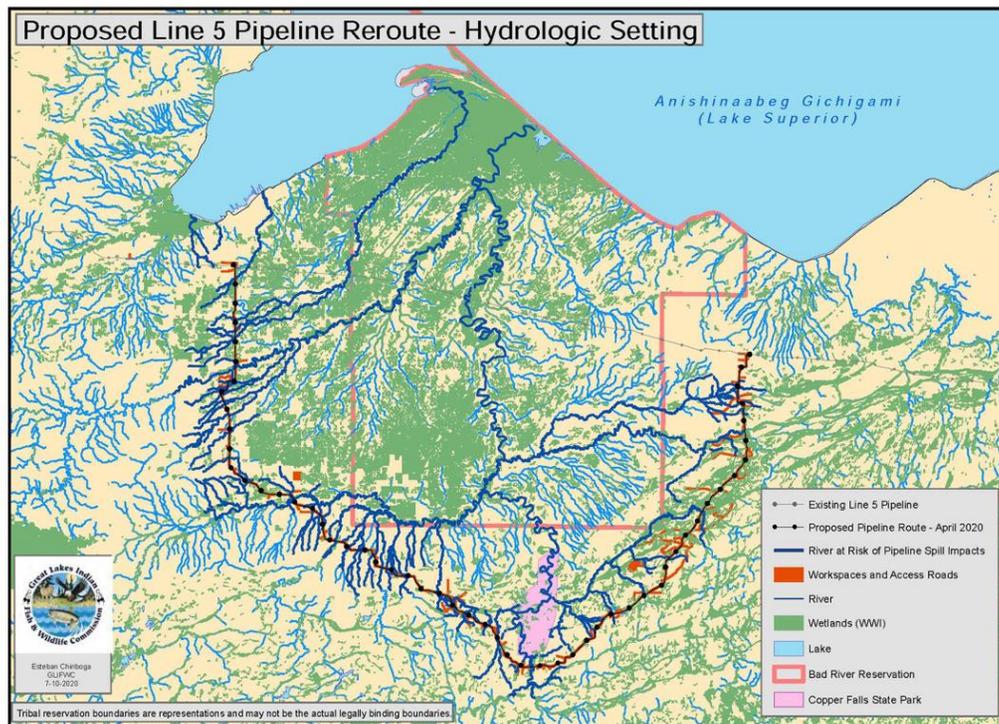


Image 1: Map of Line 5’s current path and proposed northern relocation route. (Source: Great Lakes Indian Fish and Wildlife Commission)

The district court found, and Enbridge does not dispute, that if Line 5 remains operational, a rupture at a part of the Bad River known as the “meander” is sufficiently close to occurring that Enbridge must act to abate the nuisance.³ Oil

³ A104; Bad River.Br.92.

from a rupture at the meander would make its way down the full length of the Bad River into Lake Superior.⁴

The ecosystems threatened by a rupture of Line 5 are irreplaceable. Lake Superior is the guardian of 10% of the world's freshwater.⁵ Its waters are pristine. With a predominantly forested watershed and exceptionally clean aquatic environment, the healthiest of the Great Lakes is a critical source for drinking water.⁶ It would be a tragedy if this national treasure was decimated by a foreseeable oil spill.

And it is not just Lake Superior at risk. Half a century ago, the U.S. identified the Kakagon and Bad River Sloughs (the Sloughs) as an outstanding ecosystem.⁷ And for good reason. They are home to the last extensive coastal wild rice beds along the Great Lakes, several rare and threatened species, and critical stopover

⁴ R606 at 106-07.

⁵ MINN. DEPT OF NAT. RES., *Lake Superior State Water Trail*, <https://www.dnr.state.mn.us/watertrails/lakesuperior/index.html> (last visited Oct. 17, 2023).

⁶ *See Lake Superior*, MICH. DEPT OF ENV'T, GREAT LAKES, AND ENERGY, <https://www.michigan.gov/egle/about/organization/water-resources/great-lakes-coordination/lake-superior> (last visited Oct. 17, 2023).

⁷ NAT'L PARK SERV., *National Natural Landmarks: Kakagon Sloughs*, <https://www.nps.gov/subjects/nlandmarks/site.htm?Site=KASL-WI> (last visited Oct. 17, 2023).

habitat for migratory birds.⁸ The Ojibwe people have relied on the Sloughs for centuries for subsistence hunting, fishing, and wild rice harvesting.⁹

The district court's forced easement threatens Lake Superior, the Sloughs, and other natural systems that underpin Wisconsin's economy, pastimes, and culturally treasured ways of life with irreparable harm. The environmental devastation that would occur in the event of a spill, leak, or rupture of the Line 5 pipeline must inform this Court's review.

In particular, the pending catastrophic environmental harm is relevant to the Court's analysis of the appropriate relief for the Band's public nuisance and trespass claims. While the Band's sovereign right to protect the integrity of its land alone requires immediate cessation of Enbridge's trespass, the public interest in preventing irreparable environmental harm further weighs in favor of immediate injunctive relief. Providing the Court with additional information about this potential harm and other important context can aid it in properly analyzing these issues. This brief will therefore explain:

- 1) That the district court properly found a rupture is imminent and would cause substantial and unreasonable interference with a public right, but failed to provide a remedy that actually abates this public nuisance. An immediate injunction to stop operation of Line 5 is necessary due to:

⁸ RAMSAR SITES INFORMATION SERVICE, *Kakagon and Bad River Sloughs*, <https://rsis.ramsar.org/ris/2001> (last visited Oct. 17, 2023) [hereinafter RSIS].

⁹ *See Id.*

- a. The magnitude of environmental and other harms a rupture would cause;
 - b. A rupture coming as soon as the next moderate flooding event; and
 - c. Enbridge's consistent track record of failing to respond to clear and foreseeable risks of pipeline spills.
- 2) That the district court also properly found Enbridge in trespass, but likewise failed to enter the proper remedy, again, an injunction ordering the immediate shutdown of Line 5, which is necessary due to:
- a. The public interest in avoiding the environmental and economic impacts of a spill; and
 - b. The important foreign policy interests in and commitments to maintaining a pristine ecosystem in Northern Wisconsin, reflecting the public's profound interest in safeguarding the state's water resources.
- 3) That connecting the length of the delayed injunctive relief to completion of a reroute of Line 5 around the Band's territory is unreasonable given the significant possibility the proposed reroute never occurs or takes much longer than three years, rendering relief that sanctions Enbridge's continued operation of Line 5 for three years an unjustified continuation of a wrong.

ARGUMENT

I. A Rupture of Line 5 Would Cause Catastrophic, Irreversible Harm Requiring an Injunction to Immediately Cease Operation of Line 5.

As the district court articulated, to prevail on a public nuisance claim when the threatened nuisance is not presently occurring, the plaintiff must show "(1) the

activity or circumstances complained of would be a substantial and unreasonable interference with a public right; and (2) the activity is ‘imminent.’”¹⁰ The district court found a rupture of Line 5 would “unquestionably” satisfy the first part of this standard, and that a rupture is imminent because “a Line 5 rupture at the meander is now ‘sufficiently close to occurring’ such that Enbridge must take new actions to abate the nuisance.”¹¹ When considering whether, and in what form, to order injunctive relief, the district court asked “whether: (1) an injunction is necessary to prevent irreparable harm; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) the balance of hardships between the plaintiff and defendant; and (4) the public interest would not be disserved by a permanent injunction.”¹²

Despite asking the right questions, the injunctive relief granted by the district court—ordering Enbridge to implement a monitoring and shutdown plan—is insufficient given the magnitude and irreversibility of the harm a rupture would cause, both to the Band and the entire region of Wisconsin. In other words, the district court failed to enter a remedy that “that will be effective to abate the public nuisance.”¹³

¹⁰ A102, citing *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 781 (7th Cir. 2011) (“*Asian Carp I*”).

¹¹ A102-04.

¹² *Id.* at 106, citing *Liebhart v. SPX Corp.*, 998 F.3d 772, 779 (7th Cir. 2021).

¹³ *Asian Carp I*, 667 F.3d at 781 (7th Cir. 2011).

Appellate courts review a district court's grant of injunctive relief for abuse of discretion.¹⁴ The district court's remedy fails to abate the public nuisance or serve the public interest, and is therefore an abuse of discretion for at least three reasons: (1) it is undisputed that a catastrophic rupture of Line 5 would devastate the Bad River and Lake Superior watersheds; (2) normal spring weather conditions, a single storm, or series of storms could create the conditions for a rupture at any time; and (3) Enbridge's track record does not engender confidence it can operate Line 5 without a spill or rupture until June 2026.

A. A Rupture of the Line 5 Crude Oil Pipeline Would Be Devastating to the Bad River and Lake Superior Watersheds.

Declining to order an immediate shutdown of Line 5 was an abuse of discretion because the district court's remedy was "based on evidence regarding economic consequences of a Line 5 closure" but ignored the public interest in avoiding catastrophic environmental damage and the associated economic harm.¹⁵ If Line 5 remains operational until it ruptures, petroleum would likely reach Lake Superior, the Sloughs, and their wild rice beds, before spill control measures can be implemented.¹⁶ In a "full-bore release of oil into the Bad River during spring flood conditions when the riverbanks are overtopped",¹⁷ as Enbridge's expert explained,

¹⁴ *Su v. Johnson*, 68 F.4th 345, 357 (7th Cir. 2023).

¹⁵ *See* A111.

¹⁶ R299 at 54.

¹⁷ R268-2 at 139.

“heavy black oil” would traverse the “entire length of the Bad River” into Lake Superior.¹⁸

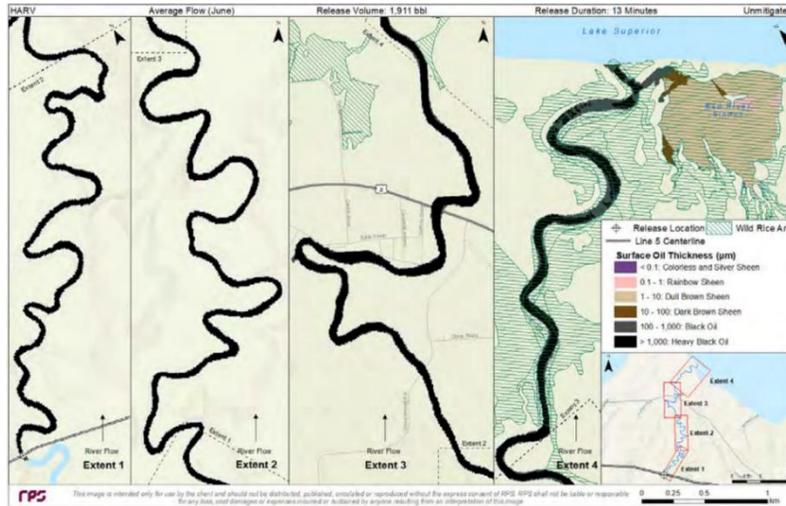


Image 2: Enbridge’s model showing maximum surface oil thickness over three days for the historical average release volume scenario in average river flow conditions. BA85.

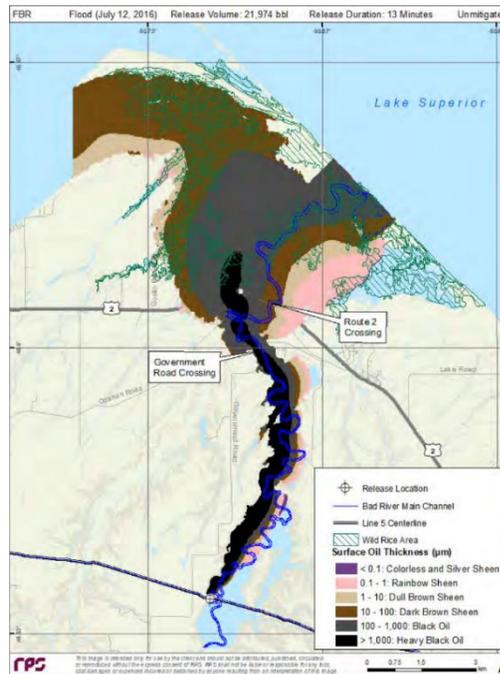


Image 3: Enbridge’s model showing maximum surface oil thickness over three days for the full-bore rupture conditions in flood river conditions. BA83.

¹⁸ R299 at 56.

Even in a “smaller volume-release scenario” (10-percent of full-bore release) where Enbridge conducts spill response at *all seven* control points perfectly, Enbridge’s expert predicts “a continuous sheen of oil” will reach Lake Superior.¹⁹ Alarmingly, even with a very small spill (334 barrels), Enbridge does not plan to begin mitigation efforts until miles of the Bad River are already devastated.²⁰ In any possible scenario, the sheer magnitude of the economic and ecological wreckage that would ensue requires immediate injunctive relief to abate this imminent public nuisance.



Image 4: Bad River flooding Spring 2023. R627 at 2.

¹⁹ See R606 at 106-07.

²⁰ R299 at 54.

The perils of oil spills are well documented. “Petroleum spills are the greatest long-term, catastrophic threat to our natural resources that can result from pipeline installation and operation.”²¹ It is impossible to delineate all the potential adverse outcomes from a rupture of Line 5. Oil clings to sediment, banks, and debris, profoundly disturbing the ecological function and balance of plant and animal life.²² Below, we highlight just some of the myriad impacts of a Line 5 rupture.

i. Freshwater Systems

Recovery from oil spills in freshwater lakes, like Lake Superior, takes years.²³ A pipeline rupture so near the Great Lakes heightens the risk of contaminating drinking water, especially “when currents transport crude oil.”²⁴ The Great Lakes harbor approximately 90% of the U.S.’s freshwater,²⁵ and serve as the primary

²¹ James E. Almendinger, *Memorandum to Midwest Environmental Advocates* at 7 (Mar. 8, 2022), attached to *Comments of Midwest Environmental Advocates, Clean Wisconsin, Honor the Earth, and Sierra Club of Wisconsin on the Draft EIS for Enbridge Line 5 in Northern Wisconsin* (April 15, 2022), available at: https://widnr.widen.net/s/dlvxl5hmqwq/el5_deis-comments_email_various_withattachments [hereinafter Almendinger].

²² R268 at 138.

²³ U.S. ENV’T PROT. AGENCY, *Sensitivity of Freshwater Habitats*, <https://archive.epa.gov/emergencies/content/learning/web/html/freshwat.html#:~:text=In%20calm%20water%20conditions%2C%20the,different%20sensitivities%20to%20oil%20spills> (last visited on Oct. 13, 2023).

²⁴ Sally Cole-Misch, *How Would Oil Spills Affect the Great Lakes?*, INT’L JOINT COMMISSION (Dec. 10, 2018), <https://ijc.org/en/how-would-oil-spills-affect-great-lakes> (last visited Oct. 13, 2023).

²⁵ NAT’L OCEANIC & ATMOSPHERIC ADMIN., *Great Lakes ecoregion*, <https://www.noaa.gov/education/resource-collections/freshwater/great-lakes-ecoregion#:~:text=The%20large%20lakes%20are%20Superior,system%20for%20clean%20drinking%20water> (last visited on Oct. 17, 2023).

source of clean drinking water for nearly 40 million people.²⁶ Lake Superior stands out as a crucial reservoir of unpolluted freshwater because it “has not experienced the same levels of development, urbanization and pollution as the other Great Lakes.”²⁷

ii. Fish

Fishing is a constitutionally protected right in Wisconsin,²⁸ and a cornerstone of Wisconsin’s culture and economy. A staggering one out of three Wisconsinites fish,²⁹ catching nearly 70 million fish each year.³⁰ Tribal members practice subsistence fishing in Wisconsin’s ceded territories.³¹ Recreational fisheries in Wisconsin contribute at least as much to Wisconsin freshwater fish consumption as

²⁶ Cole-Misch, *supra* note 24.

²⁷ U.S. ENV’T PROT. AGENCY, *Lake Superior*, <https://www.epa.gov/greatlakes/lake-superior> (last visited on Oct. 17, 2023).

²⁸ WIS. CONST. art. I, §. 26.

²⁹ WISC. DEP’T. OF NAT. RES., FISHERIES STAFF, <https://dnr.wisconsin.gov/topic/Fishing/people> (last visited Oct. 17, 2023).

³⁰ WISC. DEP’T OF NAT. RES., *Program Goals & Strategies for Fisheries Management and Fisheries Research*, <https://dnr.wisconsin.gov/sites/default/files/topic/Lands/FMStrategicPlan.pdf> (last visited on Oct. 17, 2023).

³¹ U.S. ARMY CORPS OF ENG’RS, TREATY RIGHTS AND SUBSISTENCE FISHING IN THE U.S. WATERS OF THE GREAT LAKES, UPPER MISSISSIPPI RIVER, AND OHIO RIVER BASINS at 2 (2012), https://glmr.is.anl.gov/documents/docs/Subsistence_Fishing_Report.pdf (last visited Oct. 17, 2023).

commercial supplies do.³² In other words, half of the freshwater fish that Wisconsinites eat is fish that they catch themselves.

The waters of the Bad River, Lake Superior, and their interconnected streams, springs, and wetlands are vital to our culturally important fish species. Oil spills' effects on fish are "spatially and temporally far-ranging."³³ Young fish are highly vulnerable to contamination, leading to issues like stunted growth, skeletal deformities, enlarged livers, and heart and respiratory challenges.³⁴ Since most fish spawn only once a year, an oil spill that injures young fish can be cataclysmic and lead to population declines.³⁵ Impacts on fish populations "radiate throughout an ecosystem" as fish play a crucial role in the food chain.³⁶ An oil spill's impact on fish would directly impact the people of Wisconsin.

iii. Birds

Wisconsin ranks second in the nation for birdwatching and boasts a thriving bird monitoring, conservation, and citizen science community.³⁷ Many Wisconsinites also

³² See Holly S. Embke et al, *Fishing for food: Quantifying Recreational Fisheries Harvest in Wisconsin Lakes*, 45 FISHERIES (2020).

³³ R268-2 at 130.

³⁴ *Id.*

³⁵ *Id.* at 159.

³⁶ *Id.* at 131.

³⁷ WISC. DEP'T OF NAT. RES., ONE MILLION AND COUNTING: WISCONSIN REACHES NEW MILESTONE IN AVIAN CITIZEN SCIENCE (2020), <https://dnr.wisconsin.gov/newsroom/release/38256> (last visited Oct. 17, 2023).

enjoy hunting game species such as the ruffed and sharp-tailed grouse.³⁸ Wisconsin is a refuge for waterfowl, wading birds, and shorebirds.³⁹ The Apostle Islands in Lake Superior alone host nesting habitat for more than 150 species.⁴⁰

Sadly, birds face severe challenges when oil coats their habitats. It only takes a few drops of oil on feathers or eggs to cause damage. When oil coats feathers, it “reduces insulation, waterproofing, buoyancy, and flight abilities” (see *Image 5*). This is often lethal. Birds die from “drowning due to lack of buoyancy,” ingesting oil when they preen oiled feathers or feed on oiled food, starvation and infection, and absorbing oil into their tissues. The effect of oil on birds is “especially detrimental during nesting periods” which most birds start in the spring, when a risk of rupturing is greatest.⁴¹

Bird species cannot escape spills. Waterfowl—including cranes, duck, geese, herons, swans, and loons—depend on wetland and riparian ecosystems such as the Sloughs.⁴² Birds of prey, like eagles and songbirds, that live near freshwater are

³⁸ See WISC. DEP’T OF NAT. RES., *Game Species in Wisconsin*, <https://dnr.wisconsin.gov/topic/wildlifeHabitat/game.html> (last visited Oct. 17, 2023).

³⁹ See WISC. DEP’T OF NAT. RES., *Birding and Bird Conservation*, <https://dnr.wisconsin.gov/topic/wildlifeHabitat/birding> (last visited Oct. 17, 2023).

⁴⁰ Mel White, *Birding in Wisconsin* (Apr. 28, 2016), <https://www.audubon.org/news/birding-wisconsin> (last visited Oct. 13, 2023).

⁴¹ See R268-2 at 132.

⁴² *Id.*

also “commonly oiled” during spills.⁴³ A rupture of Line 5 would be devastating for Wisconsin’s birds and residents who enjoy them.



Image 5: Canada goose in oil after Enbridge’s oil spill in the Kalamazoo River in 2010. (Source: MLive Media Group)

iv. Marsh Grasses (e.g., Wild Rice or Manoomin)

Wild rice, also called manoomin, holds exceptional cultural and ecological significance. It is a cherished staple for the Ojibwe, Menominee, Ho-Chunk, and other Indigenous peoples in Wisconsin.⁴⁴ Wild rice is a vital part of Wisconsin’s

⁴³ *Id.*

⁴⁴ See Frank Vaisvilas, *Wild rice harvest season, central to Ojibwe in Wisconsin, begins* (Sept. 6, 2023), <https://www.jsonline.com/story/news/local/wisconsin/2023/09/06/wild-rice-harvest-season-central-to-ojibwe-in-wisconsin-begins/70727698007/#:~:text=That%20food%20is%20manoomin%2C%20Ojibwe,is%20unique%20in%20the%20world> (last visited Oct. 117, 2023).

cultural heritage and an essential food source.⁴⁵ Each year, the Band's members participate in an annual harvest of wild rice, "a traditional event of long-standing cultural importance" (*see Image 6*).⁴⁶ Wild rice also has enormous ecological value: it protects water quality and provides habitat for fish and waterfowl.⁴⁷ The Band's reservation lands were intentionally chosen for their "wealth of fish, game, and wild rice, . . . a nutritional staple for members of the Tribe for generations beyond memory."⁴⁸

Stalked plants, like wild rice, in the Sloughs are particularly vulnerable to oil spills. Oil coats their leaves and stalks, inhibiting growth and respiration. As waters recede, more of the plant is exposed to toxic oil, contaminating the surrounding soil and affecting the plants from the roots.⁴⁹ The harm inflicted by a spill from Line 5 would devastate the Sloughs' wild rice, and the invaluable traditions it supports.

⁴⁵ Nathan Denzin, *Wisconsin's wild rice harvest and the threats of climate change*, WISC. PUB. BROADCASTING SERVICE (Sept. 29, 2023), <https://pbswisconsin.org/news-item/wisconsins-wild-rice-harvest-and-threats-of-climate-change/#:~:text=Wild%20rice%2C%20or%20manoomin%20in,people%20in%20this%20area%20live> (last visited Oct. 17, 2023).

⁴⁶ *Id.*

⁴⁷ WISC. DEP'T OF NAT. RES., *Wild Rice Strategic Analysis*, <https://dnr.wisconsin.gov/topic/EIA/WRMSA.html> (last visited Oct. 17, 2023).

⁴⁸ BAD RIVER TRIBE, *Manoomin*, <http://www.badriver-nsn.gov/natural-resources/manoomin/> (last visited Oct. 16, 2023).

⁴⁹ *Id.* at 140.



*Image 6: Bad River Band members harvesting wild rice in the Sloughs.
(source: Bad River Department of Natural Resources)*

v. *Economic Impacts of a Rupture*

Protecting Wisconsin's natural resources is not merely a matter of environmental stewardship; it is a linchpin for the state's economic vitality and the well-being of its residents. Healthy ecosystems lie at the heart of Wisconsin's tourism-driven economy, intertwined with cherished hunting and fishing traditions.

Wisconsinites love to be outdoors. Wisconsin residents hunt 2.5 times the national rate and fish at double it.⁵⁰ People from around the country come to experience Wisconsin's pristine landscapes and bountiful waters. Wisconsin ranks

⁵⁰ WISC. POL'Y F., *Under the Gun on Conservation Funding*, <https://wispolicyforum.org/research/under-the-gun-on-conservation-funding/> (last visited Oct. 16, 2023).

second in the nation for out-of-state hunters and third for out-state-anglers.⁵¹

Beyond their cultural significance, these activities inject more than \$6 billion to the state's economy and support thousands of jobs.⁵² License sales from out-of-state visitors support the maintenance of over 600 public properties spanning 680,000 acres, fund wardens, cover wildlife damage to crops, and support protection of endangered species.⁵³

An oil spill in Northern Wisconsin would decimate the region's hunting and fishing and the tourism that depends on it. Local economies would not only suffer in the immediate aftermath of a spill but would also grapple with the lingering effects. The Town Chair of La Pointe—which encompasses Madeline Island—shared his fear: “everyone reads about the spill. Very few people cover the cleanup.”⁵⁴

Oil spills create cascading impacts on the environment that are hard, if not impossible, to unwind. The district court noted that for a large oil spill at the meander, “it would be impossible to undo the damage with remediation efforts, an injunction or monetary penalties.”⁵⁵ Unfortunately, the district court's assessment

⁵¹ *Id.*

⁵² WISC. DEP'T OF NAT. RES., *R3 Resources*, <https://dnr.wisconsin.gov/Education/OutdoorSkills/R3resources#:~:text=These%20activities%20also%20pump%20over,Wisconsinites%20have%20come%20to%20expect> (last visited on Oct. 17, 2023).

⁵³ *See* WISC. DEP'T OF NAT. RES., *WHAT THE EVIDENCE SUGGESTS FOR THE FUTURE OF FISHING AND HUNTING LICENSE SALES IN WISCONSIN* at 3 (2016), <https://widnr.widen.net/content/gtsuoa3dtg/pdf/SS1164.pdf> (last visited on Oct. 13, 2023).

⁵⁴ R679 at 190:7-8.

⁵⁵ A104.

of whether granting an injunction *now* would serve the public interest failed to see the complete picture, instead focusing only on the economic impacts of an immediate shutdown. The district court abused its discretion by failing to give sufficient weight to the profound public interest in averting environmental disaster and its far-reaching economic consequences. In doing so, it enabled Enbridge to continue exposing the entire region to unreasonable risk for three more years.

B. A Single Storm or Series of Storm Events Could Create the Conditions for a Rupture at Any Point.

The district court’s decision to grant a three-year timeline for injunctive relief is an abuse of discretion. It contradicts the urgent need for an immediate shutdown to abate the imminent public nuisance of a Line 5 rupture. Pipeline ruptures at stream crossings are “particularly acute” and Enbridge’s buried pipeline was not designed to endure flowing water.⁵⁶ Severe erosion of the Bad River highlights the looming threat to Line 5’s integrity. The shoreline of the Bad River eroded more in a single series of storms this past spring than what currently remains between Line 5 and the river.⁵⁷

Furthermore, there is an unsettling trend of more frequent and less predictable storms in the region. This year alone there were three major flooding events: “[O]ne of those . . . was a little less than the equivalent of a ten-year flow event. Two of the

⁵⁶ Almendinger, *supra* note 21, at 7.

⁵⁷ R679 at 90: 1-4.

[flood] events were a little less than a five-year return frequency event.”⁵⁸ Despite being “ten-year” or “five-year” storms, all three of those events happened within a single year.

Delays due to the remoteness of the spill location or flood conditions may also limit the ability of Enbridge or others to access the spill area, making critical and time-sensitive prevention and/or cleanup activities challenging or impossible.⁵⁹ Ignoring the likelihood of an imminent rupture by giving Enbridge three years to operate Line 5 with a modestly modified plan is an abuse of discretion by the district court.

C. Enbridge’s Track Record Should Engender the Court’s Caution.

Enbridge has a long history of pipeline failures. It has proven time and time again that it cannot be trusted to safeguard the environment around its rights of way. Line 5 alone has spilled at least 30 times in the past 50 years and released 1.1 million gallons of crude oil (*see Image 7*).⁶⁰ Terrifyingly, just one of these spills is known to have been identified by leak detection systems.⁶¹ Others were discovered by members of the public or Enbridge staff on the ground.⁶² Fortunately, these were

⁵⁸ *Id.* at 90: 17-19.

⁵⁹ R606 at 99-105.

⁶⁰ Garret Ellison, *Enbridge Line 5 has spilled at least 1.1M gallons in past 50 years*, MLIVE MEDIA GROUP (Apr. 26, 2017), https://www.mlive.com/news/2017/04/enbridge_line_5_spill_history.html (last visited Oct. 16, 2023).

⁶¹ *Id.*

⁶² *Id.*

not located at major waterways. A rupture at the meander would be categorically distinct from previous Line 5 spills due to the hydrology and ecology of the region discussed above, as well as its potential magnitude.

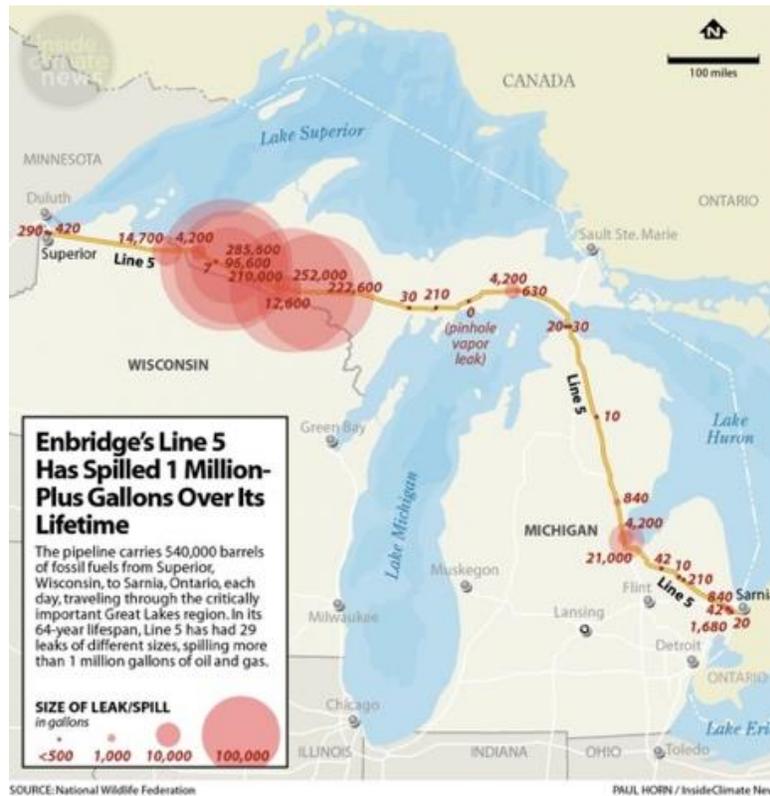


Image 7: Map showing Line 5's oil spills during the pipeline's 68-year lifetime. (Source: National Wildlife Federation)

Line 5 is not the only Enbridge pipeline that has ruptured, however. Less than 15 years ago, Enbridge was responsible for one of the largest and most costly inland oil spills in U.S. history, devastating 38 miles of the Kalamazoo River watershed.⁶³

⁶³ Jeff Alexander and Beth Wallace, *SUNKEN HAZARD: AGING OIL PIPELINES BENEATH THE STRAITS OF MACKINAC AN EVER-PRESENT THREAT TO THE GREAT LAKES*, NATIONAL WILDLIFE FEDERATION at 7 (2012), https://www.nwf.org/~media/pdfs/regional/great-lakes/nwf_sunkenhazard.ashx#:~:text=In%20this%20report%2C%20National%20Wildlife,of%20lakes%20Michigan%20and%20Huron (last visited OCT. 18, 2023).

In 2010, Enbridge's Line 6B ruptured and poured oil into the Talmadge Creek in Marshall, Michigan, and reached the Kalamazoo River.⁶⁴ Enbridge misinterpreted the alarms indicating a loss of pressure as merely a column separation (a bubble in the line).⁶⁵ For approximately 17 hours, the spill continued unimpeded, dumping (an initially reported) 843,000 gallons⁶⁶ of oil into the water (*see Image 8*).⁶⁷ Worse, to overcome the supposed column separation, Enbridge repeatedly increased the pressure of oil flowing through the pipe.⁶⁸ This resulted in pumping an additional 683,000 gallons of crude oil—81% of the total amount spilled through the ruptured pipeline.⁶⁹ Enbridge did not stop until it was notified by a local utility that there was a major rupture.⁷⁰

⁶⁴ R268-2 at 134.

⁶⁵ NAT'L TRANS. SAFETY BD., PIPELINE ACCIDENT REPORT: ENBRIDGE INCORPORATED, HAZARDOUS LIQUID PIPELINE RUPTURE AND RELEASE, MARSHALL MICHIGAN, JULY 25, 2010 (2012) at 2-5, <https://www.nts.gov/investigations/AccidentReports/Reports/PAR1201.pdf> (last visited on Oct. 18, 2023) [hereinafter NTSB].

⁶⁶ As was later determined, this initial estimate was likely understated by several hundred thousand barrels. U.S. Env't Prot. Agency, *Case Summary: EPA Orders Enbridge Inc. to Perform Additional Dredging to Remove Oil from Kalamazoo River, Mich.*, <https://www.epa.gov/enforcement/case-summary-epa-orders-enbridge-inc-perform-additional-dredging-remove-oil-kalamazoo> (last visited Oct. 16, 2023).

⁶⁷ *Id.*

⁶⁸ *Id.* at 94.

⁶⁹ *Id.* at 2.

⁷⁰ NTSB, *supra* note 65, at 10.

Merely ten days before the Kalamazoo disaster, Enbridge testified before the U.S. House Transportation and Infrastructure Committee that they could detect a leak “almost instantaneously.”⁷¹ This did not happen.



Image 8: Aerial shot, Kalamazoo River cleanup effort. (Source: MLive Media Group)

The Kalamazoo River ecosystem and people who depend on it dealt with the repercussions of the spill long after Enbridge ended its cleanup in the fall of 2014.⁷² Local efforts continued for more than seven years.⁷³ Kalamazoo is a cautionary tale for what can happen when Enbridge knows there is potential for catastrophe but

⁷¹ *The Safety of Hazardous Liquid Pipelines (Part 2): Integrity Management: Hearing Before the Subcomm., On R.R., Pipelines, & Hazardous Materials of the H. Comm. on Transp. & Infrastructure*, 111th Cong. (2010) (statement of Richard Adams, Vice President, U.S. Operations, Liquids Pipelines, Enbridge Pipelines), available at <https://www.govinfo.gov/content/pkg/CHRG-111hrg57487/html/CHRG-111hrg57487.htm>.

⁷² See U.S. ENV'T PROT. AGENCY, *Enbridge Spill Response Timeline*, <https://www.epa.gov/enbridge-spill-michigan/enbridge-spill-response-timeline> (last visited on Oct. 16, 2023).

⁷³ Drew YoungeDyke, *Seven Years Later, Kalamazoo River Oil Spill Cleanup Still Ongoing*, NATIONAL WILDLIFE FEDERATION (2017), <https://www.nwf.org/Latest-News/Press-Releases/2017/6-9-17-Seven-Years-Later-Kalamazoo-River-Oil-Spill-Cleanup-Still-Ongoing> (last visited Oct. 18, 2023).

does not stop the flow of oil.⁷⁴ In its post-spill report, the National Transportation Safety Board (NTSB) found that “[t]he rupture and prolonged release were made possible by [Enbridge’s] pervasive organizational failure.”⁷⁵ NTSB determined Enbridge was aware of a stress fracture in the section of Line 6B that burst and did nothing.⁷⁶ Here, again, Enbridge is aware that Line 5 at the meander is dangerously close to rupture and is, again, continuing to pump crude oil through the pipeline.

It does not seem Enbridge has learned anything since 2010. NTSB investigated a 2019 Enbridge natural gas pipeline rupture and fire in Danville, Kentucky, and found safety issues including “nonconservative assumptions used to calculate the potential impact radius, incomplete evaluation of the risks caused by a change of gas flow direction, limitations in data analysis related to in-line inspection tool usage, incomplete assessment of threats and threat interactions, and missed opportunities in training and requalification practices.”⁷⁷ Following a 2020 natural

⁷⁴ The Kalamazoo spill released heavy crude oil whereas Line 5 carries light crude oil. While heavy crude oil does not evaporate as fast as light crude oil, it tends to sink to the bottom of rivers and lakes. In contrast, light crude oil will not sink but rather will spread over the surface of the water and “travel downstream with the velocity of the river.” Thus, the floating light crude oil “has the highest potential for immediately damaging the Kakagon-Bad River Slough complex.” R268-2 at 137-38.

⁷⁵ NTSB, *supra* note 65, at xii.

⁷⁶ *Id.*

⁷⁷ NAT’L TRANSP. SAFETY BD., ENBRIDGE INC. NATURAL GAS TRANSMISSION PIPELINE RUPTURE AND FIRE (Aug. 1, 2019), <https://www.nts.gov/investigations/AccidentReports/Reports/PIR22002.pdf> (last visited Oct. 18, 2023).

gas pipeline rupture in Hillsboro, Kentucky, the NTSB similarly found “Enbridge’s pre-rupture analyses did not appropriately consider uncertainties.... As a result, Enbridge determined that no immediate action was needed to mitigate the identified geohazard threat and therefore did not take necessary actions before the rupture.”⁷⁸

Closer to home, Enbridge waited more than a year to notify state environmental regulators of a spill from one of its pipelines in Fort Atkinson, Wisconsin.⁷⁹ Enbridge was first alerted to the release on April 26, 2019 but waited until July 31, 2020 to let the Wisconsin DNR know, despite state law requiring immediate reporting.⁸⁰ In 2022, the Minnesota DNR completed its investigation of three aquifer breaches that occurred during Enbridge’s construction of its Line 3 Replacement Project⁸¹ and the company is facing criminal charges over its delay in notifying state agencies about those breaches.⁸² Enbridge’s past failures and

⁷⁸ NAT’L TRANSP. SAFETY BD., ENBRIDGE INC. NATURAL GAS PIPELINE RUPTURE (May 4, 2020), (last visited on Oct. 18, 2023).

⁷⁹ Danielle Kaeding, *Wisconsin Regulators, Residents Question Pipeline Spill Enbridge Failed to Report For Over A Year*, WISC. PUB. RADIO (March 31, 2021), <https://www.wpr.org/wisconsin-regulators-residents-question-pipeline-spill-enbridge-failed-report-over-year> (last visited Oct. 16, 2023).

⁸⁰ *Id.*

⁸¹ MINN. DEP’T OF NAT. RES., MINNESOTA DEPARTMENT OF NATURAL RESOURCES UPDATE ON LINE 3 AQUIFER BREACH INVESTIGATION AND ENFORCEMENT (March 1, 2022), <https://files.dnr.state.mn.us/features/line3/dnr-update-line-3-aquifer-breach-investigation-and-enforcement-3-21-22.pdf> (last visited Oct. 18, 2023).

⁸² Kirsti Marohn, *Enbridge faces criminal charge, more fines over Line 3 construction*, MINN. PUB. RADIO NEWS (Oct. 17, 2022), <https://www.mprnews.org/story/2022/10/17/enbridge-faces-criminal-charge-more-fines-over-line-3-construction> (last visited Oct. 16, 2023).

alarming responses to spills demonstrates the compelling public interest in abating the public nuisance of Line 5 and compels an injunction ordering immediate shutdown.

II. The Environmental and Economic Harm that the Continued Trespass Could Cause Requires the Court to Weigh the Public Interest Factor in Favor of Issuing an Immediate Injunction.

Despite finding a clear trespass and that a Line 5 rupture is imminent, the district court's fashioned remedy gives Enbridge an additional three years to pump crude oil through Bad River territory before it ends its infringement on the Band's sovereign rights. The district court justified this delay by reference to the purported economic impacts associated with an immediate shutdown. However, the district court abused its discretion by failing to consider the environmental impacts of a spill and the economic impacts associated with it. The gamble this delayed relief takes with the environment and economy of Northern Wisconsin is unwise and, moreover, inconsistent with the standard for injunctive relief applied in the Seventh Circuit.

A. Irreversible Environmental Harms Outweigh Potential Economic Impacts in the Public Interest Factor Analysis.

“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.... [T]herefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.”⁸³ This Court has long considered

⁸³ LAJIM, LLC v. Gen Elec. Co., 917 F.3d 933, 944 (7th Cir. 2019) (citing Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987)).

“ensuring that our natural resources are carefully preserved, conserved, or utilized” a “weighty public interest.”⁸⁴ Other Circuits have affirmed similar principles.⁸⁵ Here, as detailed above, the health of the Bad River and Lake Superior ecosystems constitute a “weighty public interest” that should be protected by an immediate injunction. While there would be some economic consequences of an immediate shutdown, those do not offset the potential decades of environmental (and economic) harm that will follow a catastrophic rupture of Line 5. The district court abused its discretion when it ignored these concerns. Clean Wisconsin urges the Court to properly consider the public’s interest in protecting our irreplaceable natural resources.

B. America’s International Commitments Recognize a National Interest in Protecting Wisconsin’s Natural Resources.

Enbridge and Canada point to one bilateral treaty between the U.S. and Canada as a sufficient reason to deny the Band injunctive relief that ends Enbridge’s wrongdoing. While the Band’s brief dispels any notion that the Transit Treaty governs in this instance, it is worth noting the U.S.’ international commitments that recognize the importance of protecting the vital natural resources of the

⁸⁴ *Downstate Stone Co. v. United States*, 651 F.2d 1234, 1242 (7th Cir. 1981).

⁸⁵ *See e.g.*, *Se. Alaska Conservation Council v. U.S. Army Corps of Eng’rs*, 472 F.3d 1097, 1101 (9th Cir. 2006) (“the public interest strongly favors preventing environmental harm.”); *Arkansas Peace Ctr. v. Arkansas Dep’t of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993) (characterizing the “public interest in protecting the environment” as “important”); *Nat’l Wildlife Fed’n v. Burford*, 835 F.2d 305, 326 (D.C. Cir. 1987) (upholding an injunction that “serve[d] the public interest in protecting the environment from any threat of permanent damage” despite inconveniences to the Department of the Interior and other parties holding interests).

Sloughs and Lake Superior watershed. The U.S.’ commitments on the global stage require protecting those resources from harm. The public interest—as reflected in multiple international agreements—supports preventing any spill in the Bad River and Lake Superior watersheds.

The U.S. and Canada have longstanding bilateral and global commitments to protect the Great Lakes and the Sloughs complex. Pre-dating the Transit Treaty, the two countries signed the Boundary Waters Treaty of 1909, which applies to waters “along which the international boundary between the United States and... Canada passes,” such as Lake Superior.⁸⁶ In the Boundary Waters Treaty, the parties agree that “waters flowing across the boundary shall not be polluted on either side to the injury of health or property of the other.”⁸⁷ Here, the U.S. has an obligation to ensure that Lake Superior is not polluted by a foreseeable rupture and catastrophic oil spill.

In addition to the Boundary Waters Treaty, which covers all U.S.-Canada boundary waters, the two countries executed the Great Lakes Water Quality Agreement specifically to restore and protect the Great Lakes in 1972.⁸⁸ The

⁸⁶ Treaty Between the U.S. and Great Britain Relating to Boundary Waters between the United States and Canada, United Kingdom–U.S., 36 Stat. 2448, T.S. No. 548 (Jan. 11, 1909), available at <https://www.ijc.org/sites/default/files/2018-07/Boundary%20Water-ENGFR.pdf> (last visited Oct. 18, 2023).

⁸⁷ *Id.*

⁸⁸ Great Lakes Water Quality Agreement, U.S.-Canada., 33 U.S.T. 1590, T.I.A.S. No. 9957 (Nov. 22, 1978), revised by Protocol Amending the GLWQA), U.S.-Can., 35 I.L.M. 708 (Feb. 18, 1987), available at <https://binational.net/agreement/full-text-the-2012-great-lakes-water-quality-agreement/>.

countries updated it in 2012 to ensure the “chemical, physical, and biological integrity” of the Great Lakes, including by “strengthen[ing] measures” to prevent ecological harm and “habitat degradation.”⁸⁹ There is hardly a more anticipatable ecological harm than the catastrophic rupture that will occur if Line 5 is operational when it becomes exposed.

Finally, the U.S. is a party to the Ramsar Convention, an intergovernmental treaty for wetland conservation.⁹⁰ In joining the convention, the U.S. committed to all 160 contracting countries (including Canada) to “implement wise . . . wetlands management” of designated sites.⁹¹ In 2012, the Kakagon-Bad River Slough complex was recognized as a Wetland of International Importance and is one of just 41 U.S. Ramsar sites.⁹² Ramsar describes the Sloughs as a “largely undeveloped wetland complex . . . harbor[ing] the largest natural wild rice bed on the Great Lakes.”⁹³ It notes they are home to endangered and threatened species including

⁸⁹ See U.S. ENV'T PROT. AGENCY, *What is the GLQA?*, <https://www.epa.gov/glwqa/what-glwqa#:~:text=The%20Great%20Lakes%20Water%20Quality,actions%20that%20improve%20water%20quality> (last visited on Oct. 16, 2023).

⁹⁰ Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Ramsar, Iran, Feb. 2, 1971, 006 U.N.T.S. 245, 11 I.L.M. 963 (1972).

⁹¹ U.S. DEPT OF STATE, *Fact Sheet: Ramsar Convention on Wetlands As Released by the Bur. Of Oceans and Int'l Env't'l and Sci. Affairs, Dep't of State, August 18, 1998*, https://1997-2001.state.gov/global/oes/fs_ramsar980818.html#:~:text=The%20United%20States%2C%20which%20joined,%2C%20Georgia%2C%20Florida%20and%20Wisconsin (last visited Oct. 16, 2023).

⁹² BAD RIVER TRIBE, *Kakagon and Bad River Sloughs Recognized as Wetland of International Importance*, <http://www.badrivernsn.gov/kakagon-and-bad-river-sloughs-recognized-as-a-wetland-of-international-importance/> (last visited on Oct. 18, 2023).

⁹³ RSIS, *supra* note 8.

the grey wolf and Canada lynx, provide “necessary and rare feeding, resting, and nesting habitat for . . . birds, and [are] one of the two remaining sites for the endangered Piping Plover.”⁹⁴ The wetland complex is also important for “subsistence trapping, hunting, [and] fishing.”⁹⁵ Spanning over 10,000 acres, the Sloughs are the first Ramsar site owned by a Tribe.⁹⁶ This complex is critical to supporting Lake Superior’s biodiversity and fisheries.⁹⁷

The U.S.’ commitment to these bilateral and international agreements and treaties highlight the country’s strong public interest in ensuring these precious habitats and water resources are preserved and protected.

III. The Proposed Reroute of Line 5 May Never Occur Because It Would Cause Significant Environmental Harm.

Enbridge’s proposed reroute of Line 5 should not affect the Band’s injunctive relief. Canada urges the court to delay any shutdown order until Enbridge obtains all necessary permits, completes construction, and brings the reroute into operation.⁹⁸ Not only would this remedy allow a public nuisance to go unabated and force the Band to endure an even longer court-sanctioned trespass, but it is also doubtful Enbridge will complete its proposed reroute expediently, or ever.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ BAD RIVER TRIBE, *supra* note 92.

⁹⁷ *Id.*

⁹⁸ Canada.Br.29.

Enbridge's proposed reroute poses especially significant environmental risks,⁹⁹ prompting substantial interest and comments from various stakeholders, including federal agencies, tribes, and concerned citizens. The 41-mile route would cross over 70 waterbodies under Clean Water Act (CWA) jurisdiction, and 534 wetlands.¹⁰⁰ Many of these water crossings are immediately upstream of the Band's vital drinking water source.¹⁰¹

The Environmental Protection Agency (EPA) has notified the Army Corps of Engineers (the Corps) that this reroute "will result in substantial and unacceptable adverse impacts" on the Sloughs wetland complex.¹⁰² Tellingly, EPA stated that it "does not believe there is sufficient information to conclude that the proposed project is the least environmentally damaging practicable alternative," a requirement necessary for CWA permitting.¹⁰³ Other agencies have also expressed serious concerns about the project's ecological impacts. The National Park Service highlighted that the reroute could harm the Apostle Islands National Lake Shore on Lake Superior.¹⁰⁴ The Apostle Islands include critical spawning ground for

⁹⁹ See Trial.Exs.348, 354.

¹⁰⁰ Trial.Ex.356.

¹⁰¹ Trial.Ex.349

¹⁰² Trial.Ex.356.

¹⁰³ *Id.*

¹⁰⁴ Trial.Exs.348, 354.

commercially and culturally important fish and habitat for endangered species.¹⁰⁵

The Great Lakes Indian Fish & Wildlife Commission and multiple Tribes worry the reroute would adversely affect water quality and aquatic resources, including in Lake Superior, and threaten treaty-reserved hunting, fishing, and gathering rights of Indigenous peoples.¹⁰⁶

State and federal permitting processes require federal and state agencies to weigh the public interest in environmental preservation and protection. Enbridge must obtain numerous permits, approvals, and reviews from agencies such as the Wisconsin DNR, the Corps, and the EPA, as well as CWA approvals from downstream states and Tribes such as the Bad River. The proposed reroute's potential threat to pristine ecosystems such as the Sloughs, Brownstown Falls, and Cooper Falls State Park are of paramount importance to permitting agencies. And there is significant public interest in the reroute process. The Wisconsin DNR received 32,000 public comments on its draft environmental impact statement alone.¹⁰⁷

In sum, permitting 41-miles of a new crude oil pipeline through Ashland, Bayfield, and Iron counties in Wisconsin, if it succeeds at all, will be a long and

¹⁰⁵ Trial.Ex.348 at 1.

¹⁰⁶ Trial.Ex.349; *GLIFWC Comments on the Line 5 Reroute dEIS*, Great Lakes Indian Fish & Wildlife Comm'n (April 25, 3033), available at: https://widnr.widen.net/s/9fbzv8mjwm/el5_deis-comments_tribal_glifwc; Red Cliff Band of Lake Superior Chippewa's Dep't of Nat. Res., *Red Cliff's Comments on WNDR's draft Environmental Impact Statement for Enbridge's Proposed Line 5 Project* (March 18, 2022), available at: https://widnr.widen.net/s/lhhp9kfwgg/el5_deis-comments_tribal_redcliffband.

¹⁰⁷ Trial.Ex.350.

tenuous process. Even if government approvals are ever obtained, construction of a rerouted pipeline through Northern Wisconsin is likely going to end up in court and, if history is any guide, these challenges will take years to resolve, an inevitability that Enbridge is already preparing for.¹⁰⁸

To underscore this, to date, no state or federal agency has granted Enbridge any of the underlying permits needed to effectuate its proposed reroute. Hence, the district court found that there is “little realistic prospect of a reroute proceeding” within the next five years.¹⁰⁹

Indeed, Enbridge itself openly admitted to the district court that it is uncertain if and when the reroute will occur.¹¹⁰ And in its opening brief on appeal, Enbridge does not even try to argue that the reroute will be completed by any particular time, despite an Enbridge trial witness having pegged the “expected completion date” at “three to five years,”¹¹¹ which, as noted above, the district court found to be implausible. Enbridge’s former Senior Environmental Advisor called Enbridge’s projections “more optimism than realism.”¹¹² Moreover, Enbridge has been forced to abandon pipeline projects entirely because of its inability to secure environmental permitting.¹¹³

¹⁰⁸ See Trial.Exs.331, 370, 371.

¹⁰⁹ A123.

¹¹⁰ R598 at 24 (citing R529 at 107-108, 111-112).

¹¹¹ R608 at 32:12-14.

¹¹² R564 at 47:5.

¹¹³ Trial.Ex.336A.

Enbridge faces a formidable challenge in obtaining permits for this highly controversial reroute, given continued opposition from Wisconsin residents, diverse stakeholders, and federal agencies. In light of this, a remedy tied to speculation around completion of a reroute of Line 5 only results in a forced easement of the Band's lands. The district court abused its discretion in issuing such a remedy.

CONCLUSION

Enbridge is creating a public nuisance and is in trespass. Understanding the magnitude and irreversibility of the harm caused by the public nuisance, and the public interest in avoiding this harm should have led the district court to the inescapable conclusion that immediate injunctive relief is necessary. It was an abuse of discretion for the district court to grant delayed injunctive relief. This Court should reverse that portion of the lower court's ruling and order the relief sought by the Band.

Dated: October 18, 2023

Respectfully Submitted,

s/ Brett Korte

Brett Korte

Evan Feinauer

Clean Wisconsin

634 West Main Street

Madison, Wisconsin 53704

608-251-7020

Counsel for Clean Wisconsin

as Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limit imposed by Circuit Rule 29 because it contains 6,723 words, excluding material exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the type-face and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5-6) and Circuit Rule 32(b) because it has been prepared in a proportionally-spaced 12-point Century Schoolbook typeface using Microsoft Word.

Dated: October 18, 2023

/s/ Brett Korte

Brett Korte

Counsel for Clean Wisconsin