STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In Re: Permit # IP-NO-2020-2-N00471, Water Quality Certification, and Coverage under WPDES General Permit No. WI-S067831-06 issued to Enbridge Energy, LP, and the Department of Natural Resources Environmental Impact Statement for Enbridge Energy's Line 5 Segment Relocation Project in Ashland, Bayfield, and Iron Counties.	DHA Case No. DNR-25-0002 (DNR Case Nos. 24-048 and 24-049)

ENVIRONMENTAL PETITIONERS' POST-HEARING RESPONSE BRIEF

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INTRODUCTION

This case is about the Department of Natural Resources (DNR) inappropriately issuing permits and approvals authorizing the Reroute. Enbridge erroneously frames the Division of Hearings and Appeals' (DHA) decision as either upholding DNR's decisions or shutting down Line 5. Enb. Br. 2. The potential shutdown of Line 5 across the Bad River reservation where Enbridge has been trespassing for more than a decade, however, is irrelevant to whether Enbridge's proposed Reroute meets Wisconsin's permitting standards. Enbridge is not entitled to agency approvals because it has separate legal problems of its own making that limit its ability to continue profiting off aging fossil fuel infrastructure.

Reflecting this sense of entitlement, Enbridge suggests Petitioners act in bad faith by not suggesting enough fixes to help the Reroute comply with permitting standards or otherwise improve the wetland and waterway permit (Ex. 631, hereinafter "Permit"). *See* Enb. Br.1-2. That is not our job—it is Enbridge's job to propose a plan that meets legal standards, and DNR's job to apply those permit standards to reach a decision that comports with the law. Enbridge and DNR failed to do their jobs. DNR's erroneous decisions must be reversed.

BURDEN OF PROOF

The burden of proof in this case is straightforward and established by agency regulations governing this proceeding. Env't Pet. Br. 2; DNR Br. 3. Despite this, Enbridge cites inapposite cases to contend Petitioners' burden is heightened or different from an ordinary preponderance standard. Enb. Br. 8. *In re R.T.D.-T.* dealt with the appellate review of a civil parental rights termination proceeding governed by Wis. Stat. § 48.415(1)'s specific burden-shifting framework regarding parental abandonment, rather than a DNR contested case hearing. 2017 WI App 1, 372

Wis. 2d 834, 890 N.W.2d 49.[1] *Oneida Seven Generations Corp. v. City of Green Bay* is inapplicable because it was an appellate review of a municipality's decision to reverse a grant of variance applying the substantial evidence standard, not a contested case hearing applying a preponderance standard. 2015 WI 50, ¶¶1-3, 362 Wis. 2d 290, 865 N.W.2d 162.

ARGUMENT[2]

I. THE REROUTE DOES NOT MEET THE PERMITTING STANDARDS IN § 281.36 AND THE PROPOSED MITIGATION IS INADEQUATE.

Environmental Petitioners have met their burden of showing that the proposed Reroute does not meet the permitting standards in § 281.36(3n)(c)2-3. *See* Env't Pet. Br. 3-4. DNR and Enbridge's counterarguments to each of these issues are unavailing.

A. DNR Lacked Information Necessary to Consider the Location, Extent, or Quality of Wetlands Impacted by the Reroute.

DNR lacked critical information about the location, extent, and quality of wetlands that the Reroute would impact. DNR could not assess impacts to wetland functional values (WFV) without this information and thus could not adequately apply permitting standards when issuing this permit. *Meteor Timber*, *LLC v. DHA*, 2022 WI App 5, ¶65, 400 Wis. 2d 451, 969 N.W.2d 746 ("To assert…that [DNR] had completed its statutorily required assessment without the information required to make the assessment is illogical."). Permit modification or post-construction investigation cannot fix these information deficits, and arguments that this information is not missing or needed are unavailing.

i. DNR does not know the location and extent of wetlands the Reroute would impact and this defect is not fixed by a permit condition requiring submission of this information after construction is complete.

[1] It also was an unpublished, single-judge appellate decision, meaning it is not precedential. A party may cite an unpublished opinion from a single judge regarding Chapter 48 (the "Children's Code") as persuasive authority only. Wis. Stat. § 809.23(3)(b)-(c); Wis. Stat. § 752.31(2)(e).

[2] Like our opening brief, this brief is organized according to the nine issues granted. Unlike that opening brief, however, related issues are organized under single headings.

DNR relied on Enbridge's delineations to assess the location and extent of wetland impacts, despite acknowledging those delineations missed wetlands, and Enbridge's refusal to add wetlands identified by Ms. Thompson to the wetland impacts table. Env't Pet. Br. 4-6. Rather than declining to issue a permit unless and until it had adequate information, DNR inserted a permit condition requesting information about the extent and location of wetland impacts *after* construction is complete. *Id*. This is precisely what *Meteor Timber* says DNR is not authorized to do, because "it would eviscerate the statutory process[.]" 2022 WI App 5, ¶64.

DNR does not now say the delineations are accurate. DNR Br. 26. DNR maintains that the delineations are adequate because proper methods appear to have been followed. *Id*., 27. That is insufficient because credible, documented information has been presented to DNR indicating those delineations failed to identify wetlands. Env't Pet. Br. 5; *Clean Wis. v. DNR.*, 2021 WI 72, ¶17, 398 Wis. 2d 433, 961 N.W.2d 611 (holding DNR "cannot ignore concrete, scientific evidence of potential harm to waters of the state") (internal quotations and citations omitted).

Enbridge contends "most projects" finish with fewer wetland impacts than authorized by the permit, as an apparent excuse for this informational gap. Enb. Br. 34. It cites the testimony of Mr. Callan for this proposition; however, Mr. Callan did not say that. He merely gave a single example of a permit where a condition like Condition 234 was used, because there was, for that project, an expectation that impacts might decrease once built. Tr. 5298:12-18. No similar expectation was expressed for *this* project. Indeed, Mr. Callan was specifically asked if the reason for including Condition 234 was to capture potential overcounting of wetland impacts, i.e., an expectation that impacts might decrease once built, and he instead stated the purpose was to "get an accurate assessment of impacted wetlands associated with the project." Tr. 5299:18-23. Again, that is precisely what DNR is supposed to do *before* it issues a wetland permit.

ii. DNR does not have accurate information about WFV because Enbridge undervalued them based on its WRAMs.

Environmental Petitioners established that Wetland Rapid Assessment Methodology (WRAM) assessments done by Enbridge's consultants undervalued wetlands. Env't Pet. Br. 6-8.

DNR does not argue the WRAMs are substantively accurate, which would be impossible given DNR's documented disagreements with how Enbridge identified WFV based on the WRAMs. *Id*. Despite this, Enbridge contends that DNR "generally agreed the WRAM assessments were done correctly," citing the testimony of DNR witness Alison Willman. Enb. Br. 35. Ms. Willman stated: "Generally, the applicant did follow the established methodology for completing these [W]RAMs, although…based upon the data that they collected, I did have differences in the opinion with the assigned [WFV] on several different [W]RAMs that were conducted…." Tr. 4164:8-16. DNR did not agree the assessments were done correctly; it explicitly disagreed with them. The final environmental impact statement (EIS) speaks for itself; over half the WRAMs reviewed undervalued wetlands. Ex. 807, 490-91. Tellingly, DNR only found one instance of a wetland feature potentially being overvalued by Enbridge—the errors almost exclusively went one direction. *Id*. (wetland ID: wasc035e_w). Suggesting Ms. Willman testified that the WRAMs were "done correctly" is not supported by the record.

DNR notes WRAMs are not always done for Office of Energy projects. DNR Br. 28. This is beside the point; here, WRAMs were done and relied on by DNR for regulatory purposes, i.e., assessing WFV of impacted wetlands. Undervaluing WFV undermines other aspects of the proposed plans, including the monitoring plan, performance standards, and mitigation requirements, which are based on understanding baseline WFV. Env't Pet. Br. 7-8. It also means DNR did not have sufficient information to consider impacts to WFV when issuing the permit. *Meteor Timber,* 2022 WI App 5, ¶¶64-65.

B. The Reroute Would Result in Significant Adverse Impacts to WFV and Other Significant Adverse Environmental Impacts.

i. Direct impacts

1. Clearing

Clearing forested wetlands would cause significant direct impacts on WFV that would take decades, at a minimum, to be restored. Env't Pet. Br. 9-10. These are thus not impacts that would be restored "soon after" Reroute construction is complete. *Id*. (quoting Wis. Admin. Code NR § 350.003(39) (definition of "temporary" impacts)). DNR nonetheless categorizes this direct impact as "temporary." Ex. 631, 31, Finding of Fact (FoF) 36.[3] Enbridge contends DNR's regulations "categorize" tree clearing as a temporary impact. Enb. Br. 39. This is not correct. The regulation gives a straightforward definition that, in relevant part, defines temporary impacts as ones that restore WFV "at or soon after" the permitted activity is completed. Wis. Admin. Code NR § 350.003(39)(c). The text of the regulation does not categorize any particular impacts as being temporary or not. Enbridge's argument is instead based on the rule *notes,* without citing any authority for the proposition that notes are dispositive as to meaning. *See* Env't Pet. Br. 10, n.6.

Further, even if the rule notes were taken as evidence of the rule's meaning, the note under the definition of "temporary impacts" merely indicates tree clearing may be a potential example of a temporary impact, and only if it is otherwise consistent with the regulatory definition of "temporary." Wis. Admin. Code NR § 350.003(39), NOTE ("temporary impacts may include…temporary vegetative clearing"). The notes are not a definitive classification of clearing trees from forested wetlands as a "temporary" impact. DNR erred by treating impacts that will not be restored "soon after" construction as merely temporary.

[3] DNR argues it has discretion to require mitigation for temporary impacts. DNR Br. 45 (*citing* Wis. Admin. Code NR § 350.005(4)). The impacts in question are not temporary, however, so whether DNR has discretion whether to require mitigation for temporary impacts is irrelevant.

2. Soil compaction and construction mats

Persistent soil compaction is likely here, given compaction prone soils, use of heavy machinery, limited efficacy of construction mats in preventing compaction in wetland soils, and the failure of natural alleviation to reduce compaction over time. Env't Pet. Br. 10-12. Compaction of wetland soils will alter hydrology and impair revegetation. *Id.*

Enbridge cites Mr. Wuolo's testimony for the proposition that wetlands soils are *resistant* to compaction because they are saturated between pore spaces, thus increasing pore pressure. Enb. Br. 42. This claim is inconsistent with not just Environmental Petitioners' witness testimony, but also the opinions of other Enbridge witnesses, and the study cited by Mr. Wuolo himself, that wetland and/or saturated soils are *more* susceptible to compaction. Tr. 826:12-827:5; Ex. 303, 55 ("wetlands that have hydrology near the ground surface and/or consist of organic soils may experience greater soil compaction when construction mats are used."); Ex. 315, 6 ("the use of heavy equipment is discouraged…when soils are moist…as elevated moisture reduces soil strength and increases the risk of compaction"). Even if pore space saturation did make soil resistant to compaction, dewatering trenches in wetlands would have the precise effect of reducing pore pressure, as Mr. Wuolo agreed. Tr. 828:4-829:1, 3129:20-3130:3.

Enbridge contends soil compaction will not occur because heavy vehicle traffic would be limited to a three-to-four day excavation period. Enb. Br. 42. This ignores that matting creates a travel lane for heavy vehicles along the route, which will be necessary for more than the direct excavation period, e.g., the high volume of traffic from horizontal directional drilling (HDD) locations. Tr. 3959:14-3960:4. Enbridge's plans instead say the trench would only be open for three days, which is not the same thing as limiting vehicular access to three days. Ex. 879, 14.

3. Trenching

Trenching would disrupt wetland hydrology by creating new, permanent preferential

subsurface flow paths caused by differences in pre- and post-construction permeability of the trench fill material. Env't Pet. Br. 12-13. Trench breakers will at best limit preferential flows and will not avoid the impact these flows have on wetland hydrology. *See infra* II.B.

Enbridge claims Mr. Bonin agreed with Mr. Wuolo that trench fill would return to preconstruction levels of permeability. Enb. Br. 41. In fact, Mr. Bonin merely agreed that some compaction does occur with time, but only after confirming his opinion that trench fill materials will *never* compact enough to return to their original condition. Tr. 460:9-16. Mr. Bonin testified to the *opposite* of the opinion Enbridge attempts to ascribe to him. *See* Tr. 399:9-402:12.

4. Blasting

Enbridge proposes blasting lengthy sections of wetlands to construct the pipeline trench. This blasting would create fractures beyond the excavation zone that would cause persistent alteration of wetland hydrology. Env't Pet. Br. 13, 45-55. Enbridge contends this cannot happen based on a mistaken presentation of blast physics and reliance on blast plans and regulations that on their face do not concern water resource protection. Enb. Br. 43-46; *see infra* II.B.

5. Sheet piling and aquifer breaches

Aquifer breaches cause adverse environmental impacts, including to wetland hydrology. Env't Pet. Br. 13-18. Enbridge caused multiple breaches building Line 3 by installing sheet piling that encountered artesian conditions. Ex. 807, 314-15. Here, Enbridge proposes to sheet pile miles of the proposed route. Env't Pet. Br. 14. Combined with conditions suggestive of artesian conditions, there is significant risk of an aquifer breach. Env't Pet. Br. 13-18.

The sheet pile that caused aquifer breaches on Line 3 were installed to depths no greater than 30 feet, and as shallow as 22 feet. Ex. 807, 314-15. DNR says "nothing in the record suggests that Enbridge will drive sheet pile to comparable depths for the Line 5 project." DNR Br. 43. Yet, sheet piling is *typically* driven to depths of 30 feet. Ex. 375, 27:22. Enbridge has made no

meaningful statement, much less commitment, that it would limit depth beyond what is typical, and indeed its experts agreed that the depth to which sheet piling is used is a function of site conditions and thus a decision made during construction. Env't Pet. Br. 14. There is no basis for this assumption that sheet pile use would be at some unspecified shallow depth.

Enbridge says it learned lessons from Line 3. However, Enbridge's search for artesian conditions focused almost entirely at HDD locations, where it was already doing geotechnical investigations. Ex. 816, 11, 91; Tr. 2938:7-2939:6, 3021:13-17. There was no comprehensive investigation done in sheet pile locations; instead, only hand auguring too shallow to identify the presence of artesian conditions was conducted. Enb. Br. 48 (hand auguring only 10-12 feet deep). Enbridge says sheet piling will be "used differently" than on Line 3, but without any explanation of how. *Id*. It cites the testimony of Mr. Simonson for this proposition, but his testimony contains no substantive description of how sheet piling would be used differently here or a commitment to use sheet piling at shallower depths. Tr. 3264:8-3270:1.[4]

Facing this reality, Enbridge now states that nothing more could have been done. Enb. Br. 48.[5] Instead, Enbridge proposes to look for artesian conditions, but only after the right of way is cleared. This does not successfully avoid wetland impacts. Env't Pet. Br. 17-18.

6. Enbridge's proposed restoration will not avoid or minimize direct impacts.

Enbridge's proposed restoration plans rely on overly optimistic views of how successful initial restoration will be, inadequate monitoring plans, and vague corrective action plans. Env't Pet. Br. 19-22. This section focuses on one aspect of restoration that DNR highlights.

DNR highlights what it describes as a "require[ment] to segregate wetland topsoils and

[4] This is the citation for the combined transcript and is equivalent to Enbridge's citation to Simonson Tr. 155:8-161:1.
[5] Petitioners' witnesses established that more could have been done to characterize artesian conditions in the sheet piling locations without clearing the right of way, and without creating risk of an aquifer breach. Tr. 823:12-824:19, 1014:14-1015:11, 1672:6-1675:15.

organic materials to facilitate restoration." DNR Br. 31, citing Ex. 631, 22; *see also* DNR Br. 34. Presumably a reference to Permit Conditions 226-30, this overstates the extent to which soil segregation will even occur, much less aid wetland restoration. Ex. 631, 22. These conditions contain important caveats. Condition 227 provides that in wetlands with standing water, Enbridge is only required to segregate as much of the organic layer "as possible…." *Id.*[6] Segregating soils in these conditions is unlikely to succeed. Tr. 2230:8-2231:1.

ii. The Reroute would cause significant secondary impacts to WFV.

1. Methylmercury

Dr. Almendinger testified extensively about the well-documented mechanisms by which mercury is converted into toxic methylmercury in wetlands under certain conditions. Env't Pet. Br. 22. Contrary to Enbridge's assertions, this is not a novel or speculative theory. Tr. 844:18-846:1 (Dr. Almendinger testifying how Dr. Horn acknowledges the "conventional wisdom" that wetlands are known sites of methylmercury production). DNR and Enbridge mount criticisms that are irrelevant or unsupported by the record.

First, Enbridge claims the issue was not raised early enough to constitute a potential secondary impact on WFV. Enb. Br. 28. In addition to the fact that Dr. Almendinger first raised this issue in 2022 (Ex. 960, 69), Enbridge cites no authority for the proposition that whether wetland permitting standards are met is a question based solely on arguments presented in the petition for contested case hearing initiating the proceeding. This position is directly contrary to the regulations governing this proceeding, which provide that "[e]vidence submitted at the time of hearing need not be limited to matters set forth in pleadings, petitions or applications. If variances of this nature occur, then the pleadings, petitions or applications shall be considered amended by

[6] Condition 223 provides that "[g]rading in wetlands, including topsoil stripping, shall be limited to the trench line."

the record." Wis. Admin. Code. NR § 2.14(2).

Second, Enbridge notes the Reroute would not add new mercury or make sulfate additions to the environment. Enb. Br. 28-29. The issue is conversion of existing mercury to toxic methylmercury; it is not and never has been that Enbridge is adding "new" mercury. Enb. Br. 28. No one claims the Reroute would add sulfate to wetlands. Both points are *non sequiturs*. Third, Enbridge contends that water levels would not change in wetlands enough to cause methylation to occur. Enb. Br. 29. Yet, this is precisely the likely result of clearing, trenching, blasting, and sheet piling through countless wetlands along the Reroute. Enbridge's argument rests on the assumption that a likely effect will not occur. *See* Tr. 843:1-11. Fourth, Enbridge claims research relied on by Petitioners shows that any methylmercury produced would demethylate in situ, so downstream impacts would be limited. Enb. Br. 29. We are not concerned solely with downstream impacts, but impacts in the wetland where the methylmercury is produced, e.g., reduction in wetland water quality and habitat functioning. It is also a misleading statement, because, as Dr. Almendinger specifically testified: "It's true that in-situ demethylation was large, but nonetheless methylation (i.e., the production of toxic mercury) was larger, so that there was indeed a *net* release of MeHg downstream into the food chain." Ex. 127, 27:15-18. Methylmercury production is a significant, overlooked problem, and these attempts to dismiss it as some kind of fringe theory do not withstand scrutiny.

2. DNR does not have credible information about the risk of an oil spill.

There is no reasonable disagreement that the effects of an oil spill of any significant size would be catastrophic. It would also lead to clear violations of wetland water quality standards (WQS) and impairment of WFV. *See* Wis. Admin. Code NR §103.03(2)(b).[7] The risk of an oil spill

[7] Contrary to Enbridge's assertion, concerns about an oil spill are directly relevant to wetland WQS. Enb. Br. 40.

is thus of paramount importance. Mr. Godfrey provided a risk assessment; however, as Environmental Petitioners explained in our opening brief, his report suffers numerous methodological flaws and is not reliable. Env't Pet. Br. 25-27. Enbridge makes no effort to rehabilitate Mr. Godfrey's credibility. Instead, Enbridge pivots to argue DNR nonetheless adequately evaluated and considered the risk of an oil spill occurring because Petitioners did not provide their own independent analysis of the risk of an oil spill occurring. Enb. Br. 49. This argument fails for the simple reason that DNR relied on Mr. Godfrey's unreliable assessment. *See* Ex. 631, 40, FoF 62(b) (adopting Mr. Godfrey's spill risk numbers). It is DNR's job to consider potential secondary impacts, and here that consideration was dependent on Enbridge furnishing good, credible information. It did not do so; therefore, DNR failed to adequately consider secondary impacts when issuing the Permit.

iii. Mitigation will not compensate for impacts to WFV.

The amount of mitigation required by law depends on the quality and acreage of wetlands impacted. Wis. Admin. Code NR § 350.005(2). DNR does not possess adequate information about the location, extent, or quality of wetlands that would be impacted. *See supra* I.A; Env't Pet. Br. 4-9. Thus, the amount of mitigation DNR required in this case is insufficient.

iv. The purported economic effects of the Reroute are not relevant to any permitting standard Environmental Petitioners are contesting.

The purported economic effects of the Reroute are not and never have been relevant to any of Environmental Petitioners' claims. Env't Pet. Br. 29-30. Perhaps understanding this is now obvious, Enbridge asserts we have "conceded" that the economic benefits are large and create a demonstrable economic public benefit, a finding only relevant to an unchallenged aspect of the permitting scheme. Enb. Br. 31. Not challenging a permit standard does not concede it has been

met. Enbridge's effort to confuse the matter is an obvious attempt to get irrelevant economic policy arguments before DHA. Mr. Brannon's testimony should not be considered.

C. The Proposed Mitigation Does Not Meet the Compensation Amount Requirements in DNR's Mitigation Rules.

For reasons explained above, the amount of mitigation required does not meet the basic requirements of Wis. Admin. Code NR § 350.005(2). *See supra* I.B.iii.

II. ENBRIDGE IS INELIGIBLE FOR A § 30.12 PERMIT AND THE REROUTE DOES NOT MEET APPLICABLE STANDARDS UNDER §§ 30.20 OR 30.123.

A. Enbridge is Ineligible for a § 30.12 Permit.

i. Enbridge must have a validly issued § 30.12 permit for all structures and materials it proposes to place within navigable waters.

Section 30.12 applies to any structure or material placed into a navigable water. Wis. Stat. § 30.12(1); Env't Pet. Br. 33-34. DNR erroneously alleges that § 30.12 does not apply because the installation of the pipeline will occur "underneath streambeds." DNR Br. 51. This framing would only be cogent if pipeline installation did not first require dredging of waterway beds.[8] Because the beds are dredged before pipeline structures and materials are installed, the pipeline is not being installed "underneath" anything. Moreover, even if DNR's framing were correct for the placement of the pipeline itself, there are plenty of other structures – dams, flumes, rip rap, etc. – that will be placed on the bed of the waterway.

ii. Enbridge must demonstrate that it is eligible for an individual permit under § 30.12 before DNR may assess whether Enbridge's proposed activities meet the standards for permit issuance.

To be eligible for an individual permit under § 30.12, an applicant must demonstrate that it is the riparian owner of properties where structures and deposits will be placed in navigable

[8] For instance, trenchless construction activities like HDD and Direct Bore do not require the disturbance of the beds of navigable waters and, thus, could be considered activities that occur "underneath streambeds."

waters, and that the structures and deposits will be placed for the riparian owner's use. Wis. Stat. § 30.12(3m)(a); Env't Pet. Br. 31-32. DNR and Enbridge argue that because the proposed structures and deposits are consistent with the public interest, Enbridge must be eligible for permits under § 30.20. DNR Br. 51-54; Enb. Br. 49-51; Wis. Stat. § 30.20(2)(c). This argument puts the cart before the horse. Simply put, whether Enbridge can meet substantive permitting standards is only relevant if Enbridge is eligible to apply for that permit. Enbridge is ineligible.

iii. Enbridge conflates DNR's § 30.12 general and individual permit authority.

Section 30.12(3) provides limited circumstances under which DNR may issue a general permit for structures and deposits placed in navigable waters. *See* Wis. Stat. § 30.12(3)(a). The legislature has not granted DNR authority to issue a general permit under § 30.12 to a non-riparian for the purpose of constructing an oil pipeline or any other linear infrastructure project.

iv. Enbridge conflates all "long linear projects" without distinguishing between those permitted under § 30.025 and those permitted under § 30.12.

Enbridge alleges that enforcing § 30.12's riparian ownership requirements "would require every long linear infrastructure company to condemn every riparian property abutting necessary—but short-term—in-stream work." Enb. Br. 56. This is incorrect. Utility facilities that are eligible to apply for long linear infrastructure permits under § 30.025 (e.g., natural gas pipelines, sewerage systems, telecommunication utilities, and high-voltage transmission lines)[9, 10] are also eligible for "any permit that the utility facility may require." Thus, not all utility projects need to meet the riparian ownership and use requirements of § 30.12.

[9] Section 30.025 allows "any person proposing to construct a utility facility to…submit one application for permits together with any additional information required by the department." Wis. Stat. § 30.025(1s)(a). "Utility facility" is narrowly defined to mean "a project, as defined in s. 196.49 (3) (a), or a facility, as defined in s. 196.491 (1) (e)." Wis. Stat. § 30.025(1b)(c). Any person who applies to construct a utility facility that meets the standards of § 30.025(1s) "is eligible to apply…for any permit that the utility facility may require and to receive such permit." Wis. Stat. § 30.025(1s)(b).

[10] Section 196.49 applies only to public utilities as defined in Wis. Stat. § 196.01(5).

Enbridge's proposed reroute, however, does not qualify for permits under § 30.025 because Enbridge is not a "public utility" as defined by § 196.49(3)(a), and it is not building a "facility" as defined by § 194.491(1)(e). Therefore, it is not true that enforcing § 30.12's riparian ownership and riparian use requirements in this instance would drastically alter the permitting standards for "every long linear infrastructure company."

v. Enbridge misrepresents the language of § 30.208(3)(f) and DNR's power to issue conditions under § 30.20.

Enbridge attempts to argue that § 30.208(3)(f), which grants DNR authority to issue permits with conditions to make a proposed activity consistent with the public interest, also grants DNR authority to issue permits for structures and deposits "incidental to dredging" under § 30.20. Enb. Br. 53-56. What Enbridge fails to mention is that § 30.208(3)(f) only applies in situations where DNR does not issue a permit within the statutory timeframe. Most importantly, § 30.208(3)(f) does not apply to threshold eligibility issues.

Enbridge also asserts DNR's authority "to place structures and materials under a statute other that Section 30.12 can be *implied*…." Enb. Br. 55 (citing *Clean Wis. v. DNR*, 2021 WI 71, ¶25, 398 Wis.2d 386, 961 N.W.2d 346) (emphasis added). Enbridge is incorrect. *Clean Wisconsin* stands for the proposition that "an agency may rely upon a grant of authority that is *explicit but broad* when undertaking agency action[.]" *Id*. (emphasis added). Furthermore, § 227.10(2m) prohibits agencies from imposing permit conditions unless they are explicitly authorized. The purpose of permit conditions is to limit the scope of construction activities and the impacts therefrom,[11] not for DNR to exercise authority the legislature explicitly reserved for itself. *See* Wis. Stat. § 30.12(1). DNR's general authority to issue permit conditions is not a back door for DNR

[11] For instance, DNR properly conditions dredging activities by imposing time restrictions to avoid fish spawning seasons. *See* Ex. 622 (including a "Timing Restriction Dates" column); Ex. 631, 15, Cond. 129.

and regulated entities to evade regulatory requirements. Because the legislature has not created an explicit exception for placing structures and materials in navigable waters under § 30.20, DNR cannot simply decide to permit activities that are expressly regulated under § 30.12 as implicitly authorized by or "incidental" to activities under § 30.20.

vi. Section 30.133 applies to all conveyances of riparian rights, except in instances explicitly described by statute.

Wisconsin courts have historically held riparian rights could not be conveyed by easement, and easement holders could not be considered "riparian owners." *See Cassidy v. DNR*, 132 Wis. 2d 153, 390 N.W.2d 81 (Ct. App. 1986); *de Nava v. DNR*, 140 Wis. 2d 213, 409 N.W.2d 151 (Ct. App. 1987). The legislature codified these holdings in § 30.133, overturning the Wisconsin Supreme Court's decision in *Stoesser v. Shore Drive P'ship*, 172 Wis. 2d 660, 494 N.W.2d 204 (1993). 1993 Wis. Act 67. That enactment has been subsequently upheld. *See, e.g.*, *ABKA Ltd. P'ship v. DNR*, 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854; *Berkos v. Shipwreck Bay Condo. Ass'n,* 2008 WI App 122, 313 Wis. 2d 609, 758 N.W.2d 215. Enbridge's argument that § 30.133 only applies to boat docking facilities contravenes the plain text, context, and structure of chapter 30. Enb. Br. 58-59. The reason § 30.1335(1)(a) is specifically referenced in § 30.133(1) is manifest from the text itself. Placing things in navigable waters is primarily regulated under § 30.12, so it makes sense the legislature would specify when § 30.133 applies to the placement of a boat docking facility outside of § 30.12. The use of the word "any" in § 30.133(1) removes all doubt. *See* Env't Pet. Br. 33-34 (discussing the word "any" in § 30.12(1)'s prohibition on placing structures or materials in navigable waters).[12] Other than the right of access to navigable waters and conveying rights from riparian properties within the boundary of a federal hydroelectric

[12] For more on the legislative history of § 30.133, see Environmental Petitioners' brief in support of its motion for summary judgment.

project, § 30.133 prohibits the conveyance of *any* riparian right to place *any* structure or material in a navigable water. That, in turn, is crucial statutory context for understanding who may be considered a "riparian owner" under § 30.12. *See* Env't Pet. Br. 32. Enbridge is not a riparian owner under § 30.12 at many locations along the Reroute. *Id.* 36-42. Unless Enbridge becomes a riparian owner at those locations, it is ineligible to even apply for, much less receive, authorization to place structures or materials in navigable waters for the Reroute.

B. The Proposed Removal of Material from Navigable Waters is Inconsistent with the Public Interest.

Section 30.20 only permits the removal of material from navigable waters if it is consistent with the public interest. Wis. Stat. § 30.20(2)(c). This activity is generally referred to as dredging, and involves "any part of the process of the removal or disturbance of material from the bed of navigable waters." Wis. Admin. Code NR § 345.03(5). Enbridge's brief predominantly discussed blasting in its wetlands section. *See* Enb. Br. 43-46. While blasting impacts to wetlands are regulated under § 281.36, *see supra* I.B.i.4, blasting is also part of the removal process and, as Mr. Callan indicated during his live testimony, is therefore regulated under § 30.20. *See* Tr. 5275:12-19. As established in our opening brief, blasting the beds of navigable waters risks significant impacts to the public interest that the Department of Safety and Professional Services (DSPS) does not regulate, that DNR cannot adequately assess based on existing information, and that permit conditions will not avoid. Env't Pet. Br. 46-55.

Although the physics of blasting cannot be reasonably disputed, Enbridge erroneously suggests that "the geometry of a blast is a 45-degree cone upwards from the bottom of the drilled blasthole towards the free face, or relief." Enb. Br. 43. Enbridge's own expert made clear, however, that "up and out" is simply the direction rubblized rock will travel and the resulting geometry of the area that can be excavated. Tr. 4554:2-14; *see also* Ex. 306, 38. Blasting waves "radiate

spherically from the blast charges in all directions." Tr. 4554:13-14. These forces create the potential for fracturing bedrock beyond the excavation zone, which has not been adequately evaluated, particularly where blasting will occur in waterways and wetlands. Blasting in navigable waters will impact hydrology, which is inconsistent with the public interest. Env't Pet. Br. 47-51.

Neither DSPS regulations nor the general blasting plan provide any meaningful protection for navigable waters. *See* Env't Pet. Br. 53-55. The only permit condition that even approaches remediation of blasting impacts to navigable waters is the requirement that trench breakers be installed. Ex. 631, 14, Cond. 127. Trench breakers alone, however, will not ensure that preconstruction hydrology is restored and impacts to navigable waters sufficiently mitigated. *See contra id.;* Enb. Br. 42. Trench breakers are useful for one purpose—slowing the movement of water in the trench parallel to the pipeline. *See, e.g.*, Ex. 807, 303; Tr. 402:13-403:7. Even then, trench breakers are "primarily [intended] as an erosion control feature…." Tr. 1677:21-22. Trench breakers do nothing to prevent water from moving vertically or perpendicularly through the trench. Ex. 129, 15:14-18, 18:11-12; Tr. 403:15-18.

Fractured bedrock also enables water to go around trench breakers. Tr. 1678:17-24. Mr. Davidsavor testified that the efficacy of trench breakers is tied to his erroneous opinion that damage to the rock mass outside the trench would be limited. Tr. 4541:10-16. But the rock is already significantly fractured, which blasting will exacerbate. *See* Env't Pet. Br. 50-51. Trench breakers alone simply do not ensure pre-construction hydrology will be restored, further demonstrating why Permit conditions are ineffective at addressing blasting impacts to navigable waters. *See* Env't Pet. Br. 12-13.

Finally, the placement of some structures and materials in navigable waters is incidental to the proposed dredging, but Enbridge has the legal import of that fact backwards. Enb. Br. 53-56.

DNR's determination that dredging is consistent with the public interest is based in part on Enbridge being able to install structures on the beds of navigable waters. *See* Ex. 631, 45, Conclusion of Law (CoL) 2 ("[T]he proposed dredging activities in navigable waters, if conducted in accordance with the conditions of this permit, meet the standards in s. 30.20…."). But that does not mean Enbridge automatically gets to place those structures and materials so it can engage in dredging. Rather, since Enbridge is ineligible for a permit to place those structures and materials, dredging cannot be accomplished in a manner that is consistent with the public interest. *See* Wis. Stat. § 30.20(2)(c).

C. DNR Did Not Have Necessary Information to Evaluate Whether the Placement of TCSBs Will Be Detrimental to the Public Interest.

For the reasons stated in Environmental Petitioners' opening brief, the record demonstrates DNR did not have the necessary information to determine the installation of approximately 187 temporary clear span bridges (TCSBs) over navigable waterways will not be detrimental to the public interest under § 30.123(8)(c)3. Env't Pet. Br. 55-56. No factual or legal arguments in either DNR's or Enbridge's opening briefs overcome the failure to perform site specific evaluations or the failure to evaluate impacts associated with earthen dams. DNR's decision to authorize TCSBs for the Reroute under § 30.123 was therefore in error.

III. WQC SHOULD BE DENIED BECAUSE DNR LACKS REASONABLE ASSURANCE THAT THE REROUTE WILL COMPLY WITH WQS.

As Environmental Petitioners established in our opening brief, DNR lacks reasonable assurance that the Reroute will comply with WQS because Enbridge's water quality monitoring plan (WQMP) and reports are insufficient, baseline data and analyses are inadequate, and DNR's corresponding review is incomplete. Env't Pet. Br. 57-58, 61-68. Neither DNR nor Enbridge offers counterarguments that cure these deficiencies. Moreover, there is a reasonable potential for the

Reroute to violate WQS. Environmental Petitioners have therefore carried their burden of proof by a preponderance of the evidence that the water quality certification (WQC) should be denied.

A. Enbridge's WQMP and Reports Do Not Assure Compliance with WQS.

DNR admits construction of the Reroute would, if "[l]eft unregulated," likely result in significant adverse impacts to water quality due primarily to an increase in total suspended solids (TSS). DNR Br. 40-41. DNR is apparently convinced that Enbridge's plans to monitor water quality during and after construction will ensure that "water quality issues… are identified and remediated." *Id.*, 41. This conviction is misleading and inconsistent with the reasonable assurance standard for granting WQC. NR § 299.04 requires DNR to determine, at the time it receives a request for WQC, whether it has reasonable assurance that a proposed project *will comply* with WQS. The law does not allow DNR to grant WQC upon a mere assumption that "water quality issues," i.e., potential exceedances of WQS, will be remedied as they arise. When, as here, DNR anticipates WQS violations, it must deny WQC. *See* DNR Br. 41; Wis. Admin. Code NR §§ 299.01(2)(a), 299.05(3)(e).

Enbridge's plan for comparing pre- and post-construction water quality fails to ensure compliance with WQS. Enbridge improperly cites to Ms. Ledder for the contention that "paired upstream and downstream samples…facilitates assessment of Project impacts against state [WQS]." Enb. Br. 22-23. Enbridge's omission of Ms. Ledder's accompanying criticism is telling. Tr. 1163:15-21 (Ms. Ledder reiterates her criticism regarding the WQMP's lack of a criteria for determining differences in each water quality parameter sampled); *see also* Tr. 1059:25-1060:2, 1066:2-9, 1078:8-12. Neither Enbridge nor DNR can ascertain project impacts to water quality, let alone resulting WQS violations, especially of the narrative TSS standard, by comparing pre- and post-construction water quality samples from up- and downstream locations without a predetermined criteria for assessing any differences. Env't Pet. Br. 66.

B. Baseline Water Quality Data and Analyses Do Not Support DNR's Reasonable Assurance Determination for WQC.

DNR does not dispute the necessity of adequate baseline information for its WQC determination. *See* DNR Br. 55-56. Rather, the dispute arises from what constitutes an adequate baseline. Ms. Ledder testified that an adequate baseline consists of water quality data collected over a sufficient period of time under various conditions to establish the characteristics of water resources pre-construction. Env't Pet. Br. 58.[13] Ms. Ledder's commonsense definition of baseline water quality is bolstered by her academic credentials and 30 years of water quality expertise. *See* Ex. 128, 1-2; Ex. 102, 3, 21-24; *see also* Env't Pet. Br. 58. DNR misconstrues this scientifically sound definition as Environmental Petitioners' "attempt to contrive their own." DNR Br. 56-57. In fact, DNR staff and witness Ms. Haller agree with Ms. Ledder that an adequate water quality baseline for the Reroute would include data from the past five or 10 years that account for seasonal variations. Ex. 443, 1; Tr. 4930:23-4931:3.[14] DNR's account of past agency requirements for baseline water quality distracts from their duty in this matter. *See* DNR Br. 57. A water quality baseline is not sufficient simply because it is consistent with what DNR has required for other WQC determinations. Instead, a water quality baseline for the Reroute must be commensurate with the project impacts, even if the scale of the project is atypical.[15]

DNR's claim that it "sought and obtained an uncommon level of particularly useful preconstruction information to evaluate the potential effects of Enbridge's construction activities"

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[13] Ms. Ledder never once asserted that Enbridge is required to comply with the Wisconsin consolidated assessment and listing methodology (WisCALM) for Wisconsin's delegated Clean Water Act program. Tr. 1255:6-11; *see contra* DNR Br. 57. Enbridge was the one to claim, erroneously as it turns out, that its water quality monitoring data was collected in accordance with WisCALM. Ex. 830, 8.

[14] DNR may not have been seeking "an academic research level study of collecting data." DNR Br. 57; Tr. 4938:12-14. However, DNR did ask Enbridge to do its "due diligence" of establishing a pre-construction water quality baseline, which, for this type of project, would be data from "the most recent five years or ten years throughout different times of the seasons." Tr. 4937:23-4938:20.

[15] *See, e.g.*, Tr. 3514:22-25, 3823:13-3824:10, 3849:11-24, 4966:14-16.

is demonstrably false. DNR Br. 57-58. For one, the information DNR relied on to grant the WQC was not "particularly useful" given the data's temporal and spatial deficiencies. *See* Env't Pet. Br. 61-64. Enbridge claims to have "analyzed virtually all available historical water quality data" to supplement[] baseline information…." Enb. Br. 20. In truth, Enbridge only analyzed historical water quality data from 20 sample sites (28,376 out of 397,720 available data points). Ex. 830, 17; Ex. 119, 27. The limited breadth of Enbridge's analysis notwithstanding, the historical water quality data itself is incomplete and unrepresentative. *See* Env't Pet. Br. 63-64. The adequacy of a water quality baseline depends on its corresponding objective. When, as here, the objective is to establish a baseline from which to assess project impacts to water quality, logic dictates an adequate baseline comprises data from the water resources along the Reroute. That is not so here with respect to the historical data. *Id.*

Additionally, Enbridge provided flawed analyses of the deficient data, which DNR then relied on. Env't Pet. Br. 64-66. Dr. Horn testified to characterizing the "natural background" of water quality for the purpose of later determining "whether or not the downstream sample is *significantly different* than the upstream sample…." Tr. 4691:24-4692:5 (emphasis added). Enbridge claims Dr. Horn "used natural variability to contextualize impacts" and that his understanding of the range of variability, however inflated it may be, has no bearing on DNR's WQC determination. Enb. Br. 27. Dr. Horn's finding of high natural variability was central to his conclusion that project impacts to water quality would be "minimal in the context of natural variability (to the point they would be difficult or even impossible to identify and/or measure)." Ex. 376, 12:14-15. DNR granted Enbridge WQC based on its review of the available information and analyses, including Dr. Horn's (*see, e.g.*, Ex. 807, 325, 339-43; Tr. 3602:23-3603:8, 3648:19-20, 4963:3-14), which therefore had bearing on DNR's determination.

Finally, even if DNR determined the final WQMP was sufficient, DNR did not review the baseline water quality data Enbridge collected in conformance with the plan. Env't Pet. Br. 66-68.

C. The Reroute Has Reasonable Potential to Violate WQS.

Enbridge erroneously claims "evidence presented at the final hearing shows there is no reasonable potential for any Project activities…to exceed [WQS]." Enb. Br. 9. Contrary to Enbridge's assertion, the Reroute has reasonable potential to violate, *inter alia*, the following WQS: narrative WQS for TSS (Wis. Admin. Code NR § 102.04(1)); public interest and public rights standards related to water quality (*see* Wis. Admin. Code NR § 299.04(b)(6));[16] and WQS that protect WFV (Wis. Admin. Code NR § 103.03).

Multiple witnesses testified to the potential for discharges of sediment and releases of drilling fluid during construction to result in exceedances of Wisconsin's narrative WQS for TSS. *See* Tr. 1104:14-19, 1105:3-6, 4695:5-13, 5254:18-5255:7. DNR witness Ben Callan also testified that construction of the Reroute, including trenching through navigable waters, would impact the public interest in those waterways: "It could affect water quality. It could affect navigation. It could affect habitat." Tr. 5173:11-17; *see also* Tr. 5183:14-25 (Mr. Callan testified to public interest impacts from construction in navigable waterways, such as "disruption to fish and wildlife activity[,]" "impacts to access or public use navigation[,]" and "potential suspended solid water quality concerns."); Tr. 5192:3-20 (Mr. Callan testified to potential public interest impacts from TCSBs, including public use impacts and suspended solid water quality concerns.). Furthermore, Ms. Thompson and Dr. Almendinger testified to project impacts to WFV, including to critical habitat (Tr. 2227:24-2228:8, 15-25, 2229:1-5, 2231:2-20, 2232:3-22), wetland hydrology (Tr.

[16] Enbridge misreads Petitioners' challenge as "limited to the standards promulgated under Wis. Stat. § 281.15" excluding "public interest standards found in Wis. Stat. chs. 30…." Enb. Br. 18, 18 n.7. Our petition for contested case hearing and opening brief in this matter clearly show otherwise. *See, e.g.*, Env't Pet. for Contested Case Hr'g 20-23, 30-31; Env't Pet. Br. 46-56.

835:2-21), and from soil compaction (Tr. 827:11-829:1, 2230:19-2231:1).

IV. DNR VIOLATED WEPA BY FAILING TO TAKE A "HARD LOOK" AT THE PURPOSE OF, REASONABLE ALTERNATIVES TO, AND ENVIRONMENTAL IMPACTS OF THE REROUTE IN THE EIS.

A. DNR's Adoption of Enbridge's Narrow Purpose of the Project Is Not Supported.

DNR adopted Enbridge's stated purpose of the Reroute: continued delivery of oil and natural gas liquids through Line 5.[17] DNR Br. 7. DNR justifies this narrow purpose by explaining it is its "practice to draft the project purpose based on the applicant's stated purpose, because neither the [Wisconsin Environmental Policy Act (WEPA)] nor Wis. Admin. Code ch. NR 150 provide a basis for [DNR] to invalidate an applicant's project purpose." DNR Br. 7. However, neither WEPA nor NR ch. 150 provide any *support* for DNR's "practice" of treating an applicant's stated purpose as the project purpose, either. DNR regulations do, however, define "alternatives" as "other actions or activities which may be reasonably available to achieve the same *or altered purpose* of the proposed action or project, including the alternative of no action" (Wis. Admin. Code NR § 150.03(2) (emphasis added)), and specifically require consideration of alternatives "that might avoid all or some of the adverse environmental effects of the project." Wis. Admin. Code NR § 150.30(2)(e). Undoubtedly, a "no action" alternative, i.e. not issuing the permits, resulting in the hybrid transport of Line 5's product, would achieve an altered purpose and avoid some, if not all, of the environmental impacts of the Reroute and therefore had to be considered.

B. DNR's EIS Failed to Consider Reasonable Alternatives to the Reroute.

Consideration of a hybrid alternative would not require DNR to engage in "remote" or "speculative analysis," nor would that consideration be "fruitless or…impossible." *See Clean Wis. Inc. v. PSC*, 2005 WI 93, ¶191, 282 Wis. 2d 250, 700 N.W.2d 768. The PLG Report identifies a

[17] At the hearing and in briefing, DNR notes that it added "additional information" to Enbridge's stated purpose related to propane use in Wisconsin in the final EIS. Tr. 3566:12-18*; see* DNR Br. 7.

hybrid alternative, where Line 5's product is transported via a combination of truck, rail, barge, and other pipelines, as the most likely and cost-effective outcome of a no action alternative. *See* Ex. 123, 8-17. The PLG Report has done the analysis, and DNR has an obligation to consider the impacts of that alternative in the EIS.

In addition to a list of reasonable alternatives, an EIS must include "an explanation of the criteria used to discard certain alternatives from additional study." Wis. Admin. Code NR § 150.30(2)(e). DNR "briefly considered but did not assess" non-hybrid alternative modes of transport because, DNR claims, it "does not have the ability to implement these alternatives." DNR Br. 8. While DNR cannot implement the hybrid or any other alternative mode of transport, it does have the ability to implement a no action alternative, i.e. not issuing decisions for the Reroute. DNR's position that it need not "assess" alternatives it does not have the ability to implement would render its obligation to consider a no action alternative toothless. *See* Wis. Admin. Code NR § 150.03(2) ("including the alternative of no action" in the definition of "[a]lternatives"). Despite this position, DNR *did* discuss alternative modes of transportation as part of its no action alternative analysis, specifically the use of rail, barge, truck, and other pipelines individually. Ex. 807, 148-153. A hybrid alternative was not even mentioned in the EIS and DNR never explained why, in violation of NR § 150.30(2)(e).

C. DNR Failed to Conduct the Complete Environmental Analysis Under WEPA.

DNR and Enbridge dedicate considerable space in their initial briefs describing DNR's WEPA review for the Reroute, including discussion of agency staffing, the number of pages included in the EIS and its appendices, and noting instances where DNR sought information from Enbridge in preparing the EIS. *See* Enb. Br. 66-69; DNR Br. 2, 5-6. Regardless of the number of pages included or amount of time DNR spent on the EIS, no arguments in either DNR's or Enbridge's opening briefs excuse the inadequacies of DNR's WEPA review. *See* Env't Pet. Br. 72-

73 (inexhaustive list of DNR's failures to adequately describe the human environment that will be affected, mischaracterizations of direct, secondary, and cumulative impacts, and where DNR failed to identify missing information). DNR failed to appropriately describe "the human environment that will likely be affected," evaluate "direct, secondary and cumulative effects," and identify and describe the relevance of "information that is incomplete or unavailable" as required by Wis. Admin. Code NR § 150.30(2)(f),(g), and (e).

It stands to reason that a project with potential impacts as significant as the Reroute's would necessitate "one of—if not the—most comprehensive and exhaustive environmental reviews in state history" (Enb. Br. 1), but the amount of environmental review is irrelevant if DNR did not do it right. Here, DNR unreasonably limited the purpose of the project, ignored reasonable alternatives, and failed to account for environmental impacts. DNR's environmental review did not meet the requirements of WEPA and DNR's decisions based on that review are invalid.

V. DNR UNLAWFULLY GRANTED ENBRIDGE COVERAGE UNDER THE GP.

Petitioners have proven by a preponderance of the evidence that DNR unlawfully granted Enbridge coverage under General Permit No. WI-S067831-06 (GP). Env't Pet. Br. 73-75; Band Br. 58-61. Neither DNR nor Enbridge offers counterarguments that rebut Petitioners' claims proving the Reroute is ineligible for GP coverage on, *inter alia*, the following grounds: (a) the Reroute would result in significant adverse impacts to WFV in violation of Wis. Admin. Code NR § 103 and GP § 1.2.2 (*see supra* I.B, III.C; Env't Pet. Br. 73-74; Band Br. 59); (b) the Reroute would affect threatened and endangered species contrary to GP § 1.2.3 (Env't Pet. Br. 73; Band Br. 59-60); and (c) the Reroute has a reasonable potential to violate WQS counter to GP § 1.2.5 (*see supra* III.C; Env't Pet. Br. 74-75; Band Br. 60-61).

CONCLUSION

For these reasons, DHA should reverse DNR's authorization of the Reroute.

Respectfully submitted this 24th day of November 2025.

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