



October 7, 2021

Wisconsin Department of Natural Resources
ATTN: Ben Callan
101 South Webster Street
Madison, WI 53707-7921
Benjamin.Callan@wisconsin.gov

RE: Request for DNR to Require Enbridge to Apply for an Individual Storm Water Permit

Dear Mr. Callan,

Please find below a request that DNR require Enbridge Energy to apply for an individual storm water permit for the Line 5 Relocation Project. Enbridge has applied for general WPDES Permit No. WI-S067831-5, but based on the nature of the project, an individual permit would be more appropriate. Please let us know if you have any questions.

Sincerely,

Ellen Thurston, *Law Clerk Emeritus*
Autumn Ruleau, *Law Clerk*
Rob Lee, *Staff Attorney*
Midwest Environmental Advocates
612 W Main St, Suite 302
Madison, WI 53703
(608) 251-5047 x. 8
rlee@midwestadvocates.org

Debra Cronmiller, *Executive Director*
League of Women Voters of Wisconsin

Elizabeth Ward, *Chapter Director*
Sierra Club Wisconsin

Phyllis Hasbrouck, *Organizer*
350 Madison

MIDWEST ENVIRONMENTAL ADVOCATES, LEAGUE OF WOMEN VOTERS OF WISCONSIN, SIERRA CLUB WISCONSIN, AND 350 MADISON’S REQUEST THAT THE DNR REQUIRE ENBRIDGE TO APPLY FOR AN INDIVIDUAL STORM WATER PERMIT

The Enbridge Line 5 Relocation Project (the Project) is a 41-mile hazardous liquid pipeline, creating a 95-to-120-foot-wide swath of construction¹ across natural areas with incredibly important functional and cultural value. The DNR should require Enbridge to obtain an individual permit because:

1. The construction has a reasonable potential to contribute to the exceedance of wetland and water quality standards;
2. The construction cannot comply with terms of the general permit;
3. The Project does not comply with federal standards; and
4. Tribal interests and water quality standards are not taken into consideration.

This is a massive undertaking that will disturb 733 wetlands, 297 water bodies, 66 non-water points², and cross about 60 different soil series.³ The length of the pipeline and acreage disturbed by its construction may lead to many significant issues surrounding storm water runoff and protection of Wisconsin’s waters. The Project will affect not only adjacent and neighboring landowners, but also the hydrologic cycle, causing significant disruptions to ecosystem services during major rainfall events.⁴ The DNR should require Enbridge to apply for an individual storm water permit to ensure adequate conditions to prevent these adverse impacts and to allow for public comment on the myriad storm water issues that inevitably arise during pipeline construction at this scale.

THE DNR SHOULD REQUIRE ENBRIDGE TO APPLY FOR AN INDIVIDUAL STORM WATER PERMIT

Wis. Admin. Code NR § 216.25 explains the situations in which the department can require an individual permit for storm water discharges. These situations include instances where the point source is a “significant contributor of pollution,”⁵ which is defined as “a person who discharges to waters of the state pollutants that contribute to or have the reasonable potential to contribute to an exceedance of a water quality standard,”⁶ and where the point source does not meet the

¹ Line 5 Wisc. Segment Relocation Project, *Water Resources Application for Project Permits Supplemental Information*, 5 (2020) available at <https://permits.dnr.wi.gov/water/SitePages/DocSetView.aspx?DocSet=WP-IP-NO-2020-2-X02-11T12-18-51>.

² Line 5 Wisc. Segment Relocation Project Storm Water Pollution Prevention Plan, *Wetland and Waterbody Delineation Reports and Consultation*, 11-12 (2020), available at <https://permits.dnr.wi.gov/water/SitePages/DocSetView.aspx?DocSet=WP-IP-NO-2020-2-X02-11T12-18-51>.

³ Line 5 Wisconsin Segment Relocation Project, *Environmental Impact Report*, 61 (2020), https://www.enbridge.com/~/_media/Enb/Documents/Projects/Wisconsin/L5Wis%20Water%20Resources%20Supplemental/L5R_EIR_Update%2020200828_Redline_Part1.pdf?la=en, [hereafter, “EIR”].

⁴ Wis. Dep’t of Nat. Res., *Regulating Wetland Impacts*, (last visited June 17, 2020), <https://dnr.wisconsin.gov/topic/Wetlands/permits>.

⁵ Wis. Admin. Code NR § 216.25(3)(a).

⁶ Wis. Admin. Code NR § 216.002(29).

requirements of NR 216 or the general permit.⁷ The following sections explain why the DNR should require Enbridge to obtain an individual storm water permit for the Project.

I. THE POINT SOURCE HAS A REASONABLE POTENTIAL TO CONTRIBUTE TO THE EXCEEDANCE OF WETLAND AND WATERWAY QUALITY STANDARDS.

The Project has a reasonable potential to contribute to the exceedance of wetland and waterway water quality standards (WQS). The 915.5 acres of land disturbing activity⁸ in combination with severe storm events becoming more common due to climate change will likely lead to pollution of waterways and wetlands from sediment present in storm water runoff. While Enbridge has an erosion control plan, there are still issues relating to control measures used depending on soil type, time it takes for vegetation regrowth, and rainfall events that occur while construction is ongoing.

Wetlands are vitally important to the protection of waterways through water filtration, water temperature regulation, and flood control, and they act as habitats to many different species.⁹ Wis. Admin. Code NR ch. 103 lists the water quality standards (WQS) that must be met to protect the functional value of wetlands, including the ability of the wetland to regulate water fluctuation, filtration of any substances that would affect the quality of waters of the state, habitat for organisms and transient wildlife, as well as recreational, cultural, and aesthetic value.¹⁰ This section states that no fill, other solids, or any materials shall be present that may have significant adverse impacts to wetlands or public rights to use wetlands.¹¹ All conditions that are needed to support functional value of wetlands shall also be protected.¹² 147.02 acres of the overall 915.5 acres disturbed by the Project are wetlands with 10.02 being permanently filled and 33.9 being converted.¹³ This is an enormous area of vital importance to the integrity of the hydrologic cycle in the area, the disruption of which will create more problems with pollution throughout the waters of the state.

Wis. Admin. Code NR § 102.04 provides WQS for surface waters in Wisconsin:

“(a) Substances that will cause objectionable deposits on the shore or in the bed of a body of water, shall not be present in such amounts as to interfere with public rights in waters of the state.

(b) Floating or submerged debris, oil, scum or other material shall not be present in such amounts as to interfere with public rights in waters of the state.

⁷ Wis. Admin. Code NR § 216.25(3)(b).

⁸ Line 5 Wisconsin Segment Relocation Project, *Storm Water Construction General Permit Application*, 5 (2020), available at <https://permits.dnr.wi.gov/water/SitePages/DocSetView.aspx?DocSet=SW-GP-NO-2020-2-X09-23T11-31-30&Loc=undefined>. [hereafter Permit Application]

⁹ Wis. Admin. Code NR § 103(2)(e)1-6.

¹⁰ Wis. Admin. Code NR § 103.

¹¹ Wis. Admin. Code NR § 103(2)(a)-(b).

¹² Wis. Admin. Code NR § 103(2)(e).

¹³ *EIR*, *supra* at 98.

(c) Materials producing color, odor, taste or unsightliness shall not be present in such amounts as to interfere with public rights in waters of the state.

(d) Substances in concentrations or combinations which are toxic or harmful to humans shall not be present in amounts found to be of public health significance, nor shall substances be present in amounts which are acutely harmful to animal, plant or aquatic life.”¹⁴

Even with the use of erosion control devices and best management practices laid out in the Project documents, there is still a high chance that the sediment runoff during pipeline construction and implementation of these practices will lead to an exceedance of these WQS. Sediment from storm water runoff from the Project’s construction site, whether or not it includes other pollutants such as nitrogen, phosphorous, oil, gas, or debris, may interfere with public rights in waters of the state. The sediment may create increased turbidity causing unsightliness, destroy spawning habitat for aquatic life, and cause “objectionable deposits” on riverbeds. While the Project documents state that any runoff would only cause minor sedimentation runoff, the interconnectedness of Wisconsin’s waters through tributaries can compound the minor water quality issues and create major problems downstream. In a study of sediment budgets for water quality along the Colorado River, the researchers discovered that even minor sediment discharges from ungauged tributaries led to major cumulative effects.¹⁵ There is no substantive discussion of this possibility in the Project’s documents.

While Enbridge will be revegetating areas that have been disturbed, the ability of this vegetation to prevent erosion will take significant time to reach the full potential. This may not be a major problem in areas with more permeable soils, but, as noted above, there are 60 different soil series present throughout the length of this project. During the growing period, there is a high chance of storm water discharges that will pollute waterways and wetlands through erosion of sediment. Due to the size of this project and delays that are common with this type of work, it is likely that this sort of pollution will occur at a large scale that will affect water quality in the area and downstream.

One example of an opportunity for significant deterioration of water quality is the timing of cleanup, which includes installation of temporary erosion control devices. Cleanup will begin within 72 hours of backfilling the trench where the pipeline is placed, but the “final grading, topsoil replacement, seeding, and installation of permanent erosion control structures” may take up to 20 days.¹⁶ The possibility that even a minor rainfall event on this disturbed land will cause erosion of sediment that will be transported into waterways and wetlands is very high. Enbridge

¹⁴ Wis. Admin. Code NR § 102.04(1)(a)-(d).

¹⁵ Ronald E. Griffiths and David J. Topping, *Importance of measuring discharge and sediment transport in lesser tributaries when closing sediment budgets*, *Geomorphology* 296 (2017) 59–73, 72 (2017), <http://dx.doi.org/10.1016/j.geomorph.2017.08.037>.

¹⁶ Line 5 Wisconsin Segment Relocation Project, *Enbridge Environmental Protection Plan*, 10 (2020), available at <https://permits.dnr.wi.gov/water/SitePages/DocSetView.aspx?DocSet=WP-IP-NO-2020-2-X02-11T12-18-51>. [hereafter EPP]

also states that damaged erosion control devices will be fixed within 24 hours of discovery,¹⁷ but it could take days to find the damage, particularly because storm events that impact erosion controls may also wash out access roads, which can take weeks to fix repair. Enbridge has not established how they plan to access sites to survey for, much less repair, damage. The plan should state an overall time limit for fixing these issues without the leniency of setting the time limit based on when the issue is discovered.

II. THE CONSTRUCTION IS NOT IN COMPLIANCE WITH THE TERMS AND CONDITIONS OF WPDES PERMIT NO. WI-S067831-5.

Enbridge submitted many documents explaining the Project's aims and construction techniques, but it has missed requirements necessary for approval under the general storm water permit.

A. The Erosion Control Plan is Not Site Specific.

Wis. Admin. Code NR § 216.46(3) states that “[t]he erosion control plan shall be completed prior to the submittal of a notice of intent to the department and shall be updated as appropriate pursuant to s. NR 216.50.”¹⁸ Most importantly, the Project documents have site-specific plans for only 12 stream crossings.¹⁹ While the Environmental Protection Plan (EPP) laid out in Attachment 7 of the Storm Water Pollution Prevention Plan and the Environmental Impact Report (EIR) detail management strategies Enbridge will be employing to prevent these problems, the documents are not site specific in all the plans to implement them,²⁰ a requirement of NR 216.²¹ The Project specifically says that it will produce site-specific information after approval of permit, but, as stated above, the information must be submitted with the application in order for the permit to be approved. The Project will be crossing 94.9 acres of compaction-prone soils²² and Enbridge does not explicitly say how this will change depending on each location.

If the Project's control techniques are so varied that Enbridge struggles to provide site-specific information, it is reasonable to require Enbridge to submit an individual storm water permit to allow for input from the public on ways to appropriately implement best practices.

B. The Project Does Not Meet the Post-Construction Performance Standards Exemption.

The general storm water permit requires compliance with Wis. Admin. Code chs. 216 and 151. NR § 151.121(2)(a) states, “[a] post-construction site with less than 10 percent connected imperviousness, based on the area of land disturbance, provided the cumulative area of all impervious surfaces is less than one acre...” is exempt from post-construction performance standards for above ground utilities.²³ The Project application checked a box saying that it meets

¹⁷ *Id.* At 5.

¹⁸ Wis. Admin. Code NR § 216.46(3).

¹⁹ *See generally EIR.*

²⁰ *EPP, supra* at 1.

²¹ Wis. Admin. Code NR § 216.46(1).

²² *EIR, supra* at 86.

²³ Wisc. Admin. Code NR § 151.121(2)(a)-(c).

this exemption requirement, but the other information on the same page of the application conflicts with this statement. The cumulative impervious area after land disturbing activity is one percent of the 915.5 acres of the project which comes out to 9.15 acres.²⁴ This is a glaring example of Enbridge's lack of compliance with the requirements of the general permit.

C. Climate Change May Render Current Best Management Practices Useless.

Section 2.9.1.1 of the general permit requires the discharger to design best management practices (BMPs) to address "[t]he expected amount, frequency, intensity, and duration of precipitation."²⁵ Section 2.9.1.2 also requires consideration of the nature of storm water runoff, which includes expected flow from impervious surfaces as well as slopes and site draining features.²⁶ Because of Enbridge's failure to account for climate change in the Project's application materials, Enbridge has not fulfilled either of these requirements. There is no mention of how the increase in frequency and intensity of major storm events will affect erosion control measures. For example, recent large storm events have led to massive slumping along riverbanks and increased head-cutting that leads to abrupt ravine formation. These climate-related events will have a major impact on erosion control and storm water runoff planning, especially in protection of culturally and economically important natural resources. Because of the importance of certain resources, such as waters for fishing, that are spread throughout the proposed route, there needs to be opportunity for the public to comment on the Project's storm water management plans.

There are a few portions of the erosion control measures that would work under historic conditions but are not workable based on the data about increased rainfall and major storm events. For example, the five tons per year sediment performance standard for BMPs may be possible if climate effects are ignored, but it does not reflect real world conditions. Enbridge's climate data comes from a 2019 study,²⁷ but climate change data as of 2020 presented by the DNR and University of Wisconsin – Madison suggest that rainfall is increasing and will continue to increase over the next century.²⁸ The Governor's Report from the Wisconsin Initiative on Climate Change Impacts (WICCI) states that the frequency and intensity of storms are increasing as well.²⁹ These studies show that data on which Enbridge's BMPs are based is changing. BMPs need to be updated more frequently to keep up with climate models, and Enbridge's management plan is likely out of date already.

²⁴ *Permit Application, supra* at 5.

²⁵ Wis. Dep't of Nat. Res., *General Permit to Discharge Under the Wisconsin Pollution Discharge Elimination System*, No. WI-S067831-5, 9 (2016), <https://dnr.wi.gov/topic/stormwater/documents/WI-S067831-5.pdf>.

²⁶ *Id.*

²⁷ *EIR, supra* at 57.

²⁸ Wis. Dep't of Nat. Res. & Univ. of Wis. - Madison, *Final Project Report: The Wisconsin Rainfall Project: Current and Future Rainfall Information for Infrastructure and Planning*, 1 (2021) (document on file with authors).

²⁹ Wisconsin Initiative on Climate Change Impacts, *Report to the Governor's Task Force on Climate Change*, 9-10 (2020) (document on file with author).

III. THE DNR HAS THE AUTHORITY TO IMPOSE MORE STRINGENT STANDARDS NECESSARY TO MEET FEDERAL LAWS AND REGULATIONS.

The DNR has prepared a draft of NR 216 that brings it into compliance with 40 CFR 122, 123, and 127 and clarifies application requirements for general and individual permits.³⁰ Even if these sections were not added or amended, Wis. Stat. § 283.31(3)(d)(1)-(2), quoted above, provides the DNR with the authority to impose more stringent standards that are necessary to meet federal laws and regulations.³¹ The relevant changes are analyzed below.

Wis. Admin. Code NR § 216.21(2)(b)1 will be amended to remove the exclusion of post-construction monitoring requirements for access roads from industrial storm water discharge permits, an exclusion that is inconsistent with federal law. Enbridge lists over 100 access roads, either new or existing but need improvements, in the EIR that are included in the federal requirements and forthcoming state regulations.³² The Project's EPP and EIR make no mention of site-specific construction details or analysis of how much land disturbance will occur during the construction and improvements of these roads. Because there are such a large number of access roads that the Project will be improving and building that could lead to storm water runoff, management plans need to be developed more completely to explain how the Project will meet this federal and forthcoming state requirement.

The draft of NR 216 includes a requirement, also included in the Clean Water Act, that the applicant identify waters that are impaired and Exceptional and Outstanding Resource Waters, *including waters that are downstream*.³³ This is a vital component of the management plans because any storm water discharge and erosion that occurs at the site will flow downstream and affect these important waters. As of now, Enbridge does not substantively account for the downstream effects of the Project, and the effects it does include are only mentioned in passing.³⁴ Enbridge's surveys focus very narrowly on the construction sites and not on the interconnectedness of the wetlands and waterways outside the Project's surveys which the Project will be disturbing. Both upstream and downstream features may exacerbate the erosion that occurs during storm events, and Enbridge needs to thoroughly analyze these issues in the management plans.³⁵

³⁰ Wis. Dep't of Nat. Res. (Draft) Wis. Admin. Code NR § 216, 1 (2021), <https://dnr.wisconsin.gov/sites/default/files/topic/Rules/WT0919DraftRule2.pdf>. [hereafter Draft 216]

³¹ *Clean Wisconsin, Inc. v. Wisconsin Dep't of Nat. Res.*, 2021 WI 71, ¶ 2, 961 N.W.2d 346, 348 (based on Wis. Stat. § 283.31(3)-(5), DNR has the broad yet explicit authority to impose more stringent conditions on the WPDES permit for concentrated animal feeding operations).

³² *EIR, supra* at 25-28.

³³ *Draft NR 216, supra* at 1.

³⁴ *See generally, EIR.*

³⁵ Wis. Admin. Code NR § 103.08(3)(c).

IV. ENBRIDGE DOES NOT CONSIDER TRIBAL INTERESTS IN THE PERMIT APPLICATION.

As our previous comment discussed,³⁶ Enbridge's EIR makes no mention of the effects this construction will have on the Ojibwe's off-reservation treaty rights. Because this rerouting project runs through treaty-ceded territory, there must be a detailed analysis of the effects the storm water runoff will have on these rights. Without the opportunity for comments from Tribal members, as members of the public who use streams creeks and rivers to fish and harvest wild rice, federally recognized and enforceable rights may be overlooked. This is distinct from the government-to-government consultation between Wisconsin and Ojibwe Tribes.

While the Bad River Band's (Tribe) promulgated water quality standards apply to waters within the borders of their reservation, "[t]he Tribe notes that waters upstream of the Bad River Reservation can affect the waters of the Bad River Reservation. It is the Tribe's intent that these Tribal water quality standards be applied to the fullest extent of the Tribe's jurisdictional control and to protect the waters of the Bad River Reservation from any impacts regardless of the location of the source of those impacts."³⁷ This means that any project that affects the waters within the Reservation's borders need to ensure that the downstream effects do not lead to the exceedance of the Tribe's WQS. The unique aspects of these standards are the Exceptional and Outstanding Resource Waters, Outstanding Tribal Resource Waters, and protections for culturally significant resources within the narrative standards.

The Tribe's Exceptional and Outstanding Resource Water standards are almost equivalent to the EPA's definitions but tend to be more protective.³⁸ If storm water discharge from the Project will enter any of these waters, Enbridge needs to ensure that it meets the Tribe's requirements. The narrative criteria are unique to the Tribe's WQS. It does not allow for discharges that "settle to form objectionable deposits; float as debris, scum, oil, or other matter forming nuisances; [or] produce objectionable color, odor, taste, or turbidity[.]"³⁹ The Tribe also strictly prohibits water quantity and quality that will have a negative effect on wild rice, wildlife, and any other flora or fauna that is culturally important to their Tribe.⁴⁰ Overall, the Tribe's WQS is more stringent with fewer exceptions than state and federal WQS. As of now, Enbridge's application materials do not make any mention of Tribal WQS, and there is no way to determine whether the Project is meeting or needs to meet the Tribe's requirements.

³⁶ Midwest Environmental Advocates, *Comments on Water Resources Application for Project Permits Number WP-IP-NO-2020-2-X02-11T12-18-51 and the Scope of the Environmental Impact Statement for Enbridge's Proposed Line 5 Wisconsin Segment Relocation Project*, 30 (2020), <https://midwestadvocates.org/assets/resources/Line-5-Permit-Comments.pdf>.

³⁷ Bad River Band of Lake Superior Tribe of Chippewa Indians, *Water Quality Standards*, Resol. No. 7-6-11-441, 2-3 (2011), https://www.epa.gov/sites/production/files/2014-12/documents/bad_river_band_wqs.pdf.

³⁸ *Id.* at 5-6.

³⁹ *Id.* at 14.

⁴⁰ *Id.* at 14.

V. EVEN IF THE DNR DOES NOT APPROVE THIS REQUEST, THE DNR SHOULD REQUIRE ENBRIDGE'S STORM WATER MANAGEMENT PLANS TO BE MUCH MORE SPECIFIC AND REQUIRE THIRD-PARTY MONITORING.

The DNR should require Enbridge to update its storm water management plans so they are site-specific to the natural areas it will alter. As explained above, Enbridge's current permit is not specific enough to avoid environmental harm. For example, Enbridge has recently updated their Wetland and Waterbody Crossing Tables.⁴¹ In its update, Enbridge identified 27 designated trout streams and their perennial tributaries.⁴² These updates are a start on site-specific plans that would help mitigate its environmental damage; however, the Project updates are not nearly specific enough. Enbridge failed to classify any of the remaining wetlands, streams, rivers, swales, ditches, or ponds with any site-specific classification, which are numerous.⁴³

Next, the DNR should require Enbridge to implement a third-party monitoring system. As explained above, Enbridge stated it will fix erosion control devices within 24 hours of discovery.⁴⁴ However, this is a long and linear project which means the damage could go days or weeks unnoticed. Therefore, requiring a third-party monitor would result in faster identification of these issues and prevention of further environmental damage.

⁴¹ EIR, *supra* note 3, at 93.

⁴² *Id.* at 103.

⁴³ Wetland and Waterbody Crossing Table, available at <https://permits.dnr.wi.gov/water/SitePages/DocSetView.aspx?DocSet=WP-IP-NO-2020-2-X02-11T12-18-51#k=#s=51>

⁴⁴ EPP, *supra* note 16, at 5.