



National Wildlife Federation scoping comments – Notice of Intent to Prepare a Draft Environmental Impact Statement for the Enbridge Line 5 Tunnel Project

Thank you for the opportunity to comment on the scope of the Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) for U.S. Army Corps of Engineers (USACE) Project LRE-2010-00463-56-A19. These comments provide National Wildlife Federation's (NWF) call for a robust EIS, including an assessment of alternative transportation options, for Enbridge Energy's proposal to construct an oil pipeline tunnel through the bottomlands of the Great Lakes to prolong the life of the 70-year-old Line 5, bringing additional risk to the Great Lakes, wildlife and Tribal Nations.

We first call on the USACE to build out a scope of review to include a full review of construction methods, a review of current and projected need as well as a review on alternatives beyond to continued use of Line 5. These aspects of Enbridge's proposal are not being fully considered under the Michigan Department of Environment, Great Lakes, and Energy (EGLE) or the Michigan Public Service Commission (MPSC) permits due to Enbridge's extensive efforts to greatly limit how each agency considers this project. Critical assessment of the proposed design, environmental and climate impacts, the risk and planned construction protocols have not yet been reviewed. Without a full review and an extension of scope, no agency is considering the core risks or impacts from this project, which leaves communities, Tribal nations, wildlife and our natural resources at risk.

With NWF's comments, we will focus on three core requirements that need to be included in any EIS process for Enbridge's proposal:

- USACE must evaluate current and projected need for Line 5 that includes an assessment of state and federal energy transition efforts, policies and executive orders that advance our society from a fossil fuel driven economy to one that has a focus on clean and renewable energy sources.
- An EIS must account for potential impacts to Tribal rights.
- USACE must evaluate direct and indirect impacts to wildlife

In addition to the above areas, NWF is a signor and fully supports the comments submitted by the Oil and Water Don't Mix coalition, which call for:

- USACE must perform a comprehensive alternatives analysis, including analysis of alternative methods and locations for transport of oil currently routed through Line 5.

- Cumulative impacts of this project, including climate impacts and related projects along the path of Line 5, must be fully considered.
- USACE must thoroughly review the complex geological and hydrogeological conditions in the Straits of Mackinac and remedy the inadequacy of existing geotechnical studies.
- USACE must assess risks of damaging potential archaeological and cultural sites near the tunnel profile in partnership with the Michigan State Historic Preservation Office (SHPO) and relevant Tribal Historic Preservation Offices (THPO).
- USACE must thoroughly evaluate the risk of explosion both during construction and during operation once construction is completed.
- USACE must consider the full history of environmental and safety violations committed by Enbridge as it considers potential environmental impacts of the project.

The NWF has extensive concerns around Enbridge's proposed oil tunnel and calls on USACE to fully fulfill its duty under NEPA to protect our natural resources, Tribal Nations, wildlife and communities

- **USACE must evaluate current and projected need for Line 5 that includes an assessment of state and federal energy transition efforts, policies and executive orders that advance our society from a fossil fuel driven economy to one that has a focus on clean and renewable energy sources.**

In the three years since Enbridge proposed extending the life of Line 5 with their tunnel proposal, regional and national policies have made large strides in energy policy to transition towards a clean energy economy. In addition to governmental commitments to a clean energy transition, we also see utilities, auto makers and many other major corporations making complementary commitments. It is the duty of the USACE to take these factors into account when considering any future fossil fuel projects, especially one that poses significant risks to Tribal Nations, wildlife and our fresh drinking water sources.

According to the Council on Environmental Quality's NEPA Implementing Regulations, an EIS "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."¹ Courts have interpreted this as requiring the agency to assess projected need to determine the necessity of the proposed project. With respect to construction of a bridge, for example, the Sixth Circuit found a purpose and need statement to be adequate where it was supported by a "detailed study of existing traffic, safety, and other cross-river mobility problems, and described the use of extensive socioeconomic data and state-of-the-art modeling of future travel conditions to project future transportation needs of the region."²

Similarly, the Ninth Circuit approved a purpose and need statement for a proposed freeway where it "examined projected population growth, housing demand, employment growth, transportation mileage, and transportation capacity deficiencies. These metrics were then used

¹ 40 C.F.R. § 1502.13

² Coal. for Advancement of Reg'l Transp. v. Fed. Highway Admin., 576 F. App'x 477, 488 (6th Cir. 2014).

to establish the 'underlying purpose and need' and to determine whether a previously proposed freeway was still necessary."³ In one case regarding the construction of a dam, the Fourth Circuit approved of the agency's purpose and need statement where need for water supply was based on "population and development trends and projections in the area," noting that dam water storage was required to meet this demand.⁴

Courts have found impact statements to be inadequate where they fail to consider projected need. In one case involving a proposed toll road, the Court found that the impact statement did not "adequately justify its reliance on projected needs and thus fail[ed] to observe procedures required by law" where the impact statement's estimation of future transportation needs was flawed.⁵ In another case, the Court found an EIS conducted by the USACE to be arbitrary and capricious where the USACE failed to reanalyze an EIS after projected need for water decreased substantially.⁶

In addition to the purpose and need requirement, NEPA requires agencies to conduct a cost-benefit analysis as part of their impact statement. Every statement must include details on "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity."⁷ Therefore, low demand for a product and its resultant low economic benefit as well as the availability of alternatives should be weighed against any ensuing environmental harm, which should consider both harm and risk during construction and operation.

An EIS must account for potential impacts to Native American Interests.

The NWF believes this should not be limited to the potential impacts of Tribal rights found within the state of Michigan, but rather all Tribal Nations along the Line 5 route including the Bad River Band of Lake Superior Chippewa. There are two ongoing cases of Line 5 trespass that are highly likely to result in the shut down of the current Line 5 prior to Enbridge's proposed alternatives. USACE must weigh the likely harm and impact an approval of any extension of Line 5, either through the Tunnel proposal or Enbridge's proposal to reroute Line 5 through Bad River Bands protected waters but off their reservation, will have on Tribal rights in both Michigan and Wisconsin. The USACE should also weigh the harm and impact of prolonging the life of Line 5 against the removal of Line 5 altogether. The advancement or approval of either Enbridge expansion proposal is likely to influence susiqant decision making, requiring the USACE to greatly broaden the weight of impacts any decision on the Line 5 tunnel will have on Enbridge's

³ Protecting Arizona's Res. & Child. v. Fed. Highway Admin., 718 F. App'x 495, 499 (9th Cir. 2017)

⁴ Webster v. U.S. Dep't of Agric., 685 F.3d 411, 423 (4th Cir. 2012)

⁵ Sierra Club, Illinois Chapter v. U.S. Dep't of Transp., 962 F. Supp. 1037, 1043 (N.D. Ill. 1997)

⁶ All. to Save the Mattaponi v. U.S. Army Corps of Engineers, 606 F. Supp. 2d 121, 128-30 (D.D.C. 2009)

⁷ 42 U.S.C.A. § 4332. In other words, NEPA requires "long-term environmental costs be weighed against immediate benefits." Sierra Club v. Morton, 510 F.2d 813, 827 (5th Cir. 1975)

proposal to reroute Line 5 around the Bad River Bands reservation, but still directly within their Treaty protected waters.

The USACE has a duty to carry out an adequate assessment of Tribal Rights in an EIS, which requires analyzing impacts on specific resources covered by a Treaty. This may include impacts outside of a reservation on ceded territory. The requirement to account for treaty rights in the EIS is separate from the requirement to consult with tribes.

An EIS must address the proposed action's potential impacts on tribal treaty rights.⁸ In *Standing Rock Sioux Tribe*, the court found that an environmental assessment (EA) of the Dakota Access Pipeline (DAPL) prepared by USACE failed to acknowledge "the impact of an oil spill on the Tribe's fishing and hunting rights despite Plaintiff's efforts to flag the issue," rendering the USACE's EA inadequate.⁹ An EIS adequately evaluates potential impacts on Native American treaty rights where it thoroughly acknowledges all possible ways the proposed action might affect resources covered by a treaty and discusses the probability of such events occurring.¹⁰

The 1836 Treaty of Washington provides the Ottawa and Chippewa nations "the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement." State and federal courts have held that this language continues to protect the tribes' rights to fish in ceded territories.¹¹ Thus, an assessment of potential impacts to resources protected by treaty rights cannot be limited to the boundaries of reservations.

USACE Must Evaluate Direct and Indirect Impacts to Wildlife

Federal regulation as well as federal case law provides a well established foundation for the EIS to account for impacts to endangered and threatened species and for the indirect impacts of greenhouse gas emissions. Under NEPA, federal agencies must "to the fullest extent possible" include in every EIS "the environmental impact of the proposed action," and "any adverse environmental effects which cannot be avoided should the proposal be implemented."¹² "The phrase 'to the fullest extent possible' is not 'accidental nor hyperbolic; all relevant environmental factors must be considered."¹³

⁸ *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 134 (D.D.C. 2017)

⁹ The court also held that the EA's environmental justice analysis was inadequate. *Id.* at 140.

¹⁰ *No Oilport! v. Carter*, 520 F. Supp. 334, 356-57 (W.D. Wash. 1981)

¹¹ *U.S. v. State of Mich.*, 653 F.2d 277, 278-79 (6th Cir. 1981); *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976)

¹² 42 U.S.C.A. § 4332 (West)

¹³ "" *Westlands Water Dist. v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1157, 1177 (E.D. Cal. 2002), *aff'd in part, rev'd in part and remanded*, 376 F.3d 853 (9th Cir. 2004) (quoting *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 787, 96 S.Ct. 2430, 49 L.Ed.2d 205 (1976))

It is well established that an EIS must account for high degrees of “adverse effects” to threatened and endangered species.¹⁴ In *Environmental Defense Center v. Bureau of Ocean Energy Management*, the Ninth Circuit held that a “finding of adverse effects [to endangered or threatened species]...[was] prima facie evidence that an EIS should have been prepared.”¹⁵ Thus in *Westlands*, the Eastern District of California found that a draft EIS which neglected to discuss a preferred action’s direct effects on endangered species failed to comply with the requirements of NEPA. *Westlands*, 275 F. Supp. 2d at 1177.

The requirements of the Endangered Species Act (ESA) are also worth noting; the ESA requires that federal agencies ensure that their actions are not likely to imperil the existence of any threatened or endangered species.¹⁶ Under the ESA, any agency proposing an action must ask the U.S. Fish and Wildlife Service whether any endangered or threatened species are likely to be present in area of the proposed action¹⁷; if so, the agency must prepare a biological assessment (BA) to determine whether the species is likely to be impacted by the proposed action.¹⁸ “The ESA specifically provides that the BA requirement can be fulfilled as part of the procedural requirements established by NEPA....When an agency prepares an EIS, it is complying with the BA requirement, provided that one of the environmental impacts discussed is the impact on threatened and endangered species.”¹⁹ Thus in the absence of a separate BA, an environmental assessment or EIS *must* account for impacts to endangered and threatened species.

1. *Wildlife Broadly*

Not only must the EIS account for substantial impacts to endangered and threatened species, it must also discuss impacts to wildlife in general. NEPA requires federal agencies to take a “hard look” at the environmental impacts of a proposed action—a standard which requires “considering all foreseeable and direct and indirect impacts.”²⁰ Such impacts include ecological effects (that is, impacts to the interaction and relationship between a species and it’s environment).²¹ In *Center for Biological Diversity v. Bureau of Land Management*, the Northern District of California found that the Bureau had failed to take the requisite “hard look” at the project in question’s impact on invertebrates endemic to the area, thus failing to comply with NEPA’s requirement that agencies “consider every significant aspect of the environmental

¹⁴ *Env’tl. Prto. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1010 (9th Cir. 2006) (“If an action adversely affects an endangered species or its habitat, then preparation of an EIS may be needed”); *Nat. Res. Def. Council v. Nat’l Park Serv.*, 250 F. Supp. 3d 1260 (M.D. Fla. 2017).

¹⁵ *Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 879 (9th Cir. 2022)

¹⁶ 16 U.S.C. §§ 1536(a)(2)

¹⁷ 16 U.S.C. § 1536(a)(1)

¹⁸ *Montana Wilderness Ass’n v. Fry*, 310 F. Supp. 2d 1127, 1148 (D. Mont. 2004)

¹⁹ *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1219–20 (11th Cir. 2002)

²⁰ *N. Alaska Env’tl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir.2006) (internal quotation marks omitted)

²¹ *See, e.g., Sierra Forest Legacy v. U.S. Forest Serv.*, 652 F.Supp.2d 1065, 1086 (N.D.Cal.2009)

impact of a proposed action.”²² Noting that the “Affected Environment” chapter of the Bureau’s EIS “set[] the ‘baseline’ for the environmental analysis that [was] the heart of the EIS,” the Northern District held that it was “important that the baseline be accurate and complete. If numerous species [were] omitted from the environmental baseline, neither the Court nor the public [could] be assured that the BLM took a ‘hard look’ at the environmental impacts on those species.”²³

Thank you for this opportunity to comment on such an important issue facing the Great Lakes, wildlife, communities and our climate. In addition to the above comments, the NWF fully supports the comments submitted by the Environmental Protection Agency, Honor the Earth, Oil and Water Don’t Mix, MI Tribes, For Love of Water, Environmental Defence Canada as well as the over 10,000 NWF members and supporters that have individually submitted comments calling for increased scrutiny over Enbridge and this proposal.

²² *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1163 (N.D. Cal. 2006) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978))

²³ *Ctr. For Biological Diversity*, 422 F. Supp. 2d at 1163