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Re: Bay Mills Indian Community's Comments on the Supplemental Draft Environmental Impact Statement for the Line 5 Tunnel Project

Gnoozhekaaning, "Place of the Pike," or Bay Mills Indian Community ("Bay Mills") provides these comments on the Supplemental Draft Environmental Impact Statement ("Supplemental DEIS") issued for public comment by the U.S. Army Corps of Engineers (the "Corps") on November 13, 2025. Bay Mills submits these comments as a consulting Tribal Nation in the Section 106 Process under the National Historic Preservation Act ("NHPA"). Bay Mills relied on Tribal expertise, Bay Mills' Biological Services Department, the Great Lakes Indian Fish and Wildlife Commission, and the knowledge of retained experts when preparing these comments.[1] Bay Mills incorporates all prior comments on the draft chapters and appendix and the initial DEIS into these comments.[2]

Enbridge, the Applicant, seeks to construct a massive new infrastructure project (the "Line 5 Tunnel Project" or "Project") beneath the lakebed of the Straits of Mackinac ("the Straits") to continue transporting fossil fuels through the area. The Project crosses the Straits, which is sacred to Bay Mills and other Tribal Nations as the center of creation and a place of ongoing spiritual and cultural significance. It is also home to many species, natural resources, treaty resources, and cultural resources that are important to Bay Mills. The Project and the continued operation of the Line 5 pipeline thus pose serious threats to Bay Mills' reserved treaty rights; cultural, religious, and economic interests; and the health and welfare of its citizens.

[1] *See* Bay Mills' Comments on the DEIS, Att. B (curriculum vitae of Brian O'Mara) (June 30, 2025); *id*., Att. E (curriculum vitae of John Bratton, PhD, of LimnoTech).

[2] *See* Bay Mills' Comments on the Corps' Preliminary Draft Chapters 1 and 2 and Appendix (May 17, 2024); Bay Mills' Comments on the DEIS (June 30, 2025) (incorporated fully herein).

To obtain federal approval for the Project, Enbridge submitted an application to the Corps for a permit pursuant to Section 404 of the Clean Water Act ("CWA"),[3] and Section 10 of the River and Harbors Act ("RHA").[4] After determining that an environmental impact statement was required under the National Environmental Policy Act ("NEPA"),[5] the Corps prepared a DEIS. The Corps also initiated the required NHPA Section 106 review process to take into account the effect of the Project on historic properties.[6] Then, a few months later, the Corps published a Supplemental DEIS to analyze another alternative to the Project.

The Supplemental DEIS suffers from all the same flaws as the DEIS and underscores that the Corps' permitting process is far from an objective comparison of the Tunnel Project and alternatives. *First*, the Corps continues to unlawfully apply the unsupported claim of an energy emergency to the Line 5 Tunnel Project, which advances the permit to a predetermined decision of approval. *Second*, the Corps' Supplemental DEIS does not comply with NEPA, the RHA, and the NHPA and their implementing regulations because it carries forward its constrained scope of analysis and purpose and need statements, lacks on-the-ground wetlands data or cultural resources information, completely omits analysis of environmental justice and climate impacts, and treats technical data relating to the Project and alternatives inconsistently. In addition to presenting an analysis without any cultural resources information, the Supplemental DEIS dismisses the Tribal Nations' deep connections to the Straits of Mackinac and their treaty-protected rights, including "the usual privileges of occupancy," such as the inherent rights to fish, hunt, gather, and conduct ceremonies in perpetuity. As a result, the Corps cannot fairly or accurately compare the effects of the Horizontal Directional Drilling ("HDD") alternative with the Project and must gather more information before proceeding.[7]

Third, even with its omissions and flaws, the Supplemental DEIS reinforces that the CWA requires the Corps to **deny** Enbridge's permit application for the Tunnel Project. The Corps has yet to make (or at least disclose) the requisite determination of whether the Project is water-dependent, but permit denial is appropriate regardless of its determination. Assuming that the

[3] 33 U.S.C. § 1344.

[4] 33 U.S.C. § 403.

[5] 42 U.S.C. § 4321 *et seq*.

[6] 54 U.S.C. § 306108.

[7] The Corps must do so through meaningful consultation with Tribal Nations, something it completely failed to do both before publishing the Supplemental DEIS, which resulted in huge gaps of information and rendered the document largely worthless in all areas of Tribal concern, and during the Tribal Consultation meeting held on December 2, 2025, where the comments of Tribal representatives seemed to land in a "black box" without clear resolution. *See* Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000) (charging agencies with engaging in "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications); *see also* Presidential Memorandum on Tribal Consultation, 2009 Daily Comp. Pres. Doc. 887 (Nov. 5, 2009), https://perma.cc/2TGR-YFRG; USACE Civ. Works, *Tribal Consultation Policy* (Dec. 2023).

Corps correctly determines that the Project is not water-dependent,[8] the Corps has failed to apply the required presumption that practicable alternatives to the project that do not involve special aquatic sites are available, and Enbridge has failed to demonstrate otherwise. Even if the Corps determines that the Project is water-dependent, which it is not, the Supplemental DEIS reveals that there may be an alternative with less adverse effects on the aquatic ecosystem, requiring permit denial.[9]

At minimum, and considering the magnitude of permitting a Project in the Great Lakes, the Corps should develop additional alternatives, including those practicable, non-aquatic alternatives proposed by Bay Mills and other Tribal Nations, and gather adequate information to properly compare each alternative to the Project. If it decides not to do further comparison and rely on the existing record, however, the Corps must deny Enbridge's permit application for the Project.

I. SUMMARY OF CONSTRUCTION USING THE HDD INTERSECT METHOD

The HDD alternative relies on the use of the HDD intersect method to drill a borehole, or tunnel, beneath the Straits through which Enbridge would route a 30-inch diameter pipeline to continue the operation of Line 5 in a place that is sacred to Tribal Nations. The Corps had considered but dismissed the alternative as technically infeasible in its May 30, 2025 DEIS, but then abruptly changed course and requested additional information from the Applicant specific to the HDD alternative.[10] Based on that recently submitted information from the Applicant, the Corps determined that construction using the HDD alternative would be carried forward for analysis.[11]

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[8] *See* Bay Mills' Comments on the DEIS, at 25–26 (June 30, 2025) (citing *Sierra Club v. Van Antwerp*, 362 F. App'x 100, 106–07 (11th Cir. 2010) (where the court vacated Section 404 permits on the basis, in part, that the Corps acted arbitrarily and capriciously when it concluded that a mining project was water dependent based on the applicant's preferred location, and then further failed to apply the presumption that practicable alternatives to the project were available and failed to shift the burden to the applicant to demonstrate that there were no practicable alternatives to mining in the area); *Bering Strait Citizens for Resp. Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008) (where the court recognized that a proposed gold mine was not water dependent, even if the applicant wished to mine in a watershed, because not all gold mining requires access or proximity to water)).

[9] *See* 40 C.F.R. § 230.10(a)(1). While it is possible that the HDD alternative may have fewer adverse impacts, as discussed in these comments, the Supplemental EIS lacks the critical information needed to make that assessment. Accordingly, Bay Mills' comments explain that given the information that is available, the Corps must deny the permit application for the Project. If, at a later time, the Applicant sought a permit for any alternative, Bay Mills would expect the Corps to prepare an environmental impact statement and thoroughly review those impacts at that time.

[10] *See* U.S. Army Corps of Eng'rs, MFR on Screening of Horizontal Direction Drilling Alternative for the Enbridge Line 5 Tunnel Project Environmental Impact Statement (Sept. 16, 2025).

[11] According to the Corps, Enbridge acknowledged that the HDD method is technically feasible but claimed in a letter dated September 4, 2025 (Attachment A) that it should not be carried forward as a practicable alternative in the EIS analysis because it is not "available." In asserting this position, Enbridge falsely claimed that the State of Michigan "will only allow the Tunnel Project" and "has refused to authorize" alternatives that do not serve utilities or provide secondary containment. While the Corps was

There are two overlapping phases of construction associated with the HDD intersect method, described by the Applicant in Appendix F to the Supplemental DEIS. First, a borehole would be drilled under the Straits. Construction during this phase would involve a "micro-tunnel boring machine," as well as other heavy equipment, and would require a workspace for a drill rig on both the north and south sides of the Straits.[12] The drilling would commence from both the north and south shorelines, first with a 12.25-inch pilot hole, excavating from both shores, and intersecting at a middle point. Once the drill bits intersect, both would then travel back to the north side, requiring an additional workspace for the purpose of removal. The borehole size would then be increased with additional drilling to a minimum of 42 inches. While drilling is occurring, a drilling fluid slurry would circulate under pressure through the drilling tools to lubricate the drill bit, remove drill cuttings (excavated material), and stabilize the borehole.[13]

While construction of the HDD tunnel is ongoing, the pipe segments would need to be fully assembled and the pipeline tested so that it could be threaded into the borehole once completed. The Corps advances two sub-alternatives relating to this aspect.[14] Sub-Alternative 1 proposes assembling the pipeline on the south side of the Straits, traversing areas of land such as French Farm Lake Flooding State Wildlife Management Area and the eastern portion of Headlands International Dark Sky Park, along with the use of an existing right-of-way (ROW).[15] Sub-Alternative 2 proposes assembling the pipe segments on the north side of the Straits, traversing areas such as the Hiawatha National Forest.[16] Both sub-alternatives would require completely clearing a path stretching four miles long and 80 feet wide for the pipeline assembly and associated storage for felled trees.[17] Once cleared, the path—whether on the north or south side of the

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right to dismiss these arguments, Enbridge's brazenly overstated position still requires a response. First, Enbridge provided information about the HDD intersect method to the Corps in 2023 and more recently responded to information requests—none of which the State of Michigan reviewed when it enacted Act 359 or entered into the Agreements contemplating the tunnel. Further, Act 359 and the Tunnel Agreements conditioned the construction of a utility tunnel on agency approvals, and the agreements rightly do not limit the reviews that permitting agencies, like the Corps, are required by law to complete. In fact, the Order issued by the Michigan Public Service Commission approving the tunnel project, did not permit third-party utilities to occupy the proposed tunnel, a fact that Enbridge ignores. Note that the Michigan Supreme Court is reviewing the Michigan Public Service Commission tunnel project approval on other grounds.

[12] Suppl. DEIS, App. F, at F-12; *see generally id*. at F-3–F-15.

[13] *Id*. at F-12.

[14] *See id.* at F-3 (noting that the location of the proposed pipeline assembly area and associated timber storage areas is the distinguishing factor between the two sub-alternatives, and that the overall construction process and operation of the pipeline post-construction would be the same under either sub-alternative).

[15] Suppl. DEIS, at 4-4; *see also* App. F, Fig. F-1 (HDD Installation Sub-Alternative 1: Pipeline Assembly Area South).

[16] Suppl. DEIS, at 4-7; *see also* App. F, Fig. F-2 (HDD Installation Sub-Alternative 2: Pipeline Assembly Area North).

[17] Suppl. DEIS, App. F, at F-15.

Straits—would be matted and leveled. The pipeline would be assembled from 80-foot sections and would be welded and tested along either sub-alternative path.[18] A substantial portion of the sub-alternative footprints do not coincide with the existing limits of disturbance ("LOD") for the Tunnel Project and instead utilize distinct footprints for construction, laydown, and staging.

The Supplemental DEIS estimates that construction of the borehole using the HDD method would take approximately 24 months to complete, and that welding and testing the pipeline and inserting it into the final borehole would take less than one month to complete.[19]

II. THE CORPS' APPLICATION OF THE ENERGY EMERGENCY TO LINE 5 UNLAWFULLY UNDERMINES THE PERMITTING PROCESS.

For the reasons stated in Bay Mills' June 30, 2025 comments,[20] the Corps determined that the Line 5 Tunnel Project fits within the terms of Executive Order 14156, which claimed—without any support—that an "energy emergency" exists in the United States and applied emergency procedures to the permitting process.[21] The Corps' application of emergency procedures to the permitting process is unlawful.

When the Detroit District invoked emergency procedures under Section 404 of the CWA,[22] they were required to consider whether there was an "emergency," as defined by Corps regulations at 33 C.F.R. § 325.2(e)(4), that the Line 5 Tunnel Project would alleviate. To date, the Corps has failed to articulate a reasonable basis for the existence of an emergency under the regulations. Instead, the Corps applies circular reasoning by pointing back to Executive Order 14156 to claim that an emergency exists. But not only does the executive order lack any factual basis for its declaration of an emergency, its terms give the Corps discretion to determine whether to apply the emergency treatment to the Line 5 matter at all.[23] Further, and as previously detailed, the Detroit District's special emergency permitting procedures are not objective and are inconsistent with the

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[18] *Id*.

[19] *See* Suppl. DEIS, at F-13; *see also*, Suppl. DEIS, App. F, Fig. F-4 (HDD Installation Alternative Construction Sequence). Note, however, that the Applicant's articulation of the construction sequence is vague, and the Corps omitted from the Supplemental DEIS any documentation or discussion of the consequences and necessary contingencies for any setback during the construction process (whether caused by human error, inadvertent drilling fluid loss during construction, or unpredictable weather conditions in Northern Michigan) that would impact the sequence of drilling, pipeline assembly and testing, and the final threading of the pipeline.

[20] Bay Mills' Comments on the DEIS, at 4–10 (June 30, 2025).

[21] *See* U.S. Army Corps of Eng'rs, Public Notice, Use of Special Processing Procedures for Review of the Enbridge Line 5 Tunnel Project (Apr. 15, 2025) (citing Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025)).

[22] 33 U.S.C. § 1344.

[23] Exec. Order No. 14156, 90 Fed. Reg. 8433, 8434 (Jan. 20, 2025) (instructing the Army Corps to "identify planned or potential actions to facilitate the Nation's energy supply that *may be* subject to emergency treatment" (emphasis added)).

CWA and the Corps' regulations requiring that it consider other outcomes of the permitting process.[24]

The Corps continues to apply emergency procedures in a way that favors the Applicant's desire to expedite and limit the permit review and hampers the public's preparation of comments. The Corps shifted and shortened the timeline for public comment on the Supplemental DEIS multiple times rather than provide adequate time for Tribal Nations and the public to study the new alternative. The Corps moved the publication date for the Supplemental DEIS several times and published it significantly earlier than originally expected. It also departed from the 30-day comment period announced in the published Supplemental DEIS and, instead, suddenly set a 22-day public comment period.[25] When pressed about the discrepancy, the Corps cited the "energy emergency" invoked by Executive Order 14156. Twenty-two days is an insufficient amount of time for adequate review of the Supplemental DEIS considering the additional deadlines set by the Corps in this permitting process, deadlines in related Line 5 state and federal processes, and the Thanksgiving holiday. Bay Mills' representatives and other Consulting Parties raised all of these concerns in advance, but the Corps flatly rejected them.

However, despite claiming an emergency, the Corps expended resources (even during a historically long government shutdown) to request technical information from the Applicant and prepare a nearly 200-page supplemental document analyzing a new alternative. Yet, when Tribal Nations requested that the same consideration be given to alternatives that do not risk a spill of contaminants into the waters of the Straits or infringe on their Tribal treaty rights, the Corps claimed that their hands were tied. Clearly, as shown by taking the time to gather new information and draft a supplemental EIS document, the Corps *can* dial back the rushed and chaotic EIS schedule when it chooses to do so.

III. THE SUPPLEMENTAL DEIS DOES NOT CURE THE CORPS' FAILURE TO ANALYZE A ROBUST SET OF ALTERNATIVES UNDER THE NHPA, NEPA OR SECTION 10 OF THE RHA.

The Supplemental DEIS incorporates the same foundational flaws as the DEIS—an improperly narrow scope of analysis and limited purpose and need statements—that poison every part of the alternative analysis, including the analysis of the HDD alternative. As a result of continuing with its constrained approach, the Corps does not meet the obligations of the NHPA, NEPA, or Section 10 of the RHA that require review of a robust set of alternatives. Indeed, its Supplemental DEIS does not present a new alternative to the Proposed Project so much as another

[24] *Compare* U.S. Army Corps of Eng'rs, Public Notice, Use of Special Processing Procedures for Review of the Enbridge Line 5 Tunnel Project (Apr. 15, 2025) (requiring that the Corps take no other action except to permit the "corrective action requiring a permit."), *with* 33 C.F.R. § Pt. 325, App. B (1978) ("The decision options available to the Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or deny the permit.").

[25] The Corps first emailed a written schedule to Consulting Parties that indicated the Supplemental DEIS would be released on December 12, 2025. The Corps then represented to participants at a Staff Level Tribal Consultation meeting on November 4 that it intended to release the Supplemental DEIS the week of November 17 and would set a 30-day comment period. The Supplemental DEIS that was published on November 13 also provided for a 30-day comment period.

variation on the Applicant's goal to transport fossil fuels from the north to the south side of the Straits. The HDD alternative is clearly nothing more than the use of a different tunneling technique that continues the flow of oil through the Straits, continues the risk of contaminants reaching the waters of the Straits, and infringes on Tribal treaty rights. By failing to correct the flawed foundation of its approach and advancing yet another alternative that poses these risks, the Corps continues to violate its statutory obligations in the permitting process.

A. The Flawed Scope of Analysis and Purpose and Need Taint the Corps' Alternative Analysis.

The Corps' overly narrow definition of a scope of analysis and Project purpose evades any analysis of the most crucial impacts of the undertaking: the perpetuation of oil spill risks throughout the Great Lakes watershed; the climate impacts from continuing reliance on fossil fuels; and the disproportionate impacts that will fall on Tribal Nations under the Project or any of the Corps' alternatives. First, the scope of analysis is so narrow that it effectively excludes the direct, indirect, and cumulative effects of the Proposed Project, aiming for a pre-determined outcome of permit approval. Even though the Project was proposed due to spill concerns, and purports to minimize the risk of an oil spill from an anchor strike, the scope excludes any analysis of oil spills. This glaring omission in the Corps' analysis runs directly counter to the Acting Assistant Secretary of the Army for Civil Works Jaime Pinkham's directive to include the topic.[26]

Second, the Corps' purpose and need statement violates NEPA. NEPA jurisprudence is clear that the purpose of a project may not be so narrow as to effectively rule out other alternatives from the get-go.[27] As discussed extensively in Bay Mills' past comments, by defining the purpose as providing transportation of fuels between the North Straits Facility and Mackinaw Station, the Corps unreasonably limits the geographic location of the Project, in disregard of the importance of the Straits to Tribal Nations.[28] The Corps' constrained stated purpose removed the possibility of any alternative that is not centered at the Straits, including the no-action alternative where the Dual Pipelines cease operation. Accordingly, it is no surprise that the Supplement DEIS merely advances another variation on the pipeline-through-the-Straits alternative. The Corps' improperly narrow purpose has resulted in a set of alternatives that perpetuate the risks of oil spills in the Straits and harm to Tribal Nations. On top of that, the Corps' statement of need in the DEIS fails to demonstrate any need for the fossil fuels product; no studies or reports demonstrate that the products transported by the Line 5 pipeline (especially at its current capacity) are needed in the region.[29] To get around the lack of need for the Project in this exact location, the Corps relies on a

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[26] Jaime Pinkham, Acting Assistant Secretary of the Army for Civil Works, Policy Direction on the Enbridge Energy Line 5 Permit Application Environmental Impact Statement (EIS) (Jan. 7, 2025).

[27] *See, e.g.*, *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997) ("If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act." (citing 42 U.S.C. § 4332(2)(E))); *Save the Colorado v. Semonite*, No. 18-cv-03258, 2024 WL 4519201, at *2, 29 (D. Colo. Oct. 16, 2024) (finding that an overly narrow purpose and need statement violated NEPA).

[28] *See* Bay Mills' Comments on the DEIS, at 20 (June 30, 2025).

[29] *See* Bay Mills' Scoping Comments, at 18.

U.S. Energy Information Administration report that considers a national demand for a wide range of petroleum products. The Corps' flawed approach to developing the purpose and need serves only Applicant's profit-driven goals—at the expense of the Great Lakes and Tribal Nations' interests.[30]

B. The Corps Violates the NHPA By Failing to Analyze a Broad Range of Alternatives.

The NHPA directs the Corps to carry forward a "broad range of alternatives" and modifications "that could avoid, minimize, or mitigate adverse effects on historic properties."[31]

Bay Mills has repeatedly informed[32] the Corps that the misalignment of its NHPA and NEPA reviews will result in a failure to fulfill its Section 106 obligation to "develop and evaluate alternatives . . . that could avoid, minimize, or mitigate adverse effects to historic properties."[33] The Supplemental DEIS does not right the ship. To the contrary, it demonstrates that even under a supposed emergency order and at this late stage of permit review, after the completion of its DEIS and Assessment of Effects, the Corps can (but chose not to) develop and evaluate alternatives that might avoid, minimize, or mitigate the Tunnel Project's adverse effects to the Straits Traditional Cultural Landscape ("TCL") and other historic properties. The Corps' analysis of the HDD alternative specifically demonstrates its authority to consider alternatives that are not proposed in Enbridge's permit application, and thus outside the Corps' purported jurisdiction to permit. Despite this demonstrated capacity and authority, the Corps has refused to develop and consider any alternatives—such as those that do not cross the Straits of Mackinac—that could meaningfully avoid, minimize, or mitigate the documented adverse effects to the Straits TCL and other historic properties. This consideration and analysis are the purpose and mandate of the NHPA.[34]

The Corps' ongoing failure to comply with Section 106 is further demonstrated in its failure to document in the Supplemental DEIS how the impacts to historic properties from the HDD alternative and sub-alternatives differ from—or potentially avoid, minimize, or mitigate—adverse

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[30] *See* Bay Mills' Comments on the DEIS, at 17–22.

[31] 33 U.S.C. §1344(b); *see also* 36 C.F.R. §§ 800.1(c), 800.6(a).

[32] *See, e.g.*, Letter from Whitney Gravelle, President of Bay Mills to Charles Simon, U.S. Army Corps of Eng'rs (Nov. 22, 2022); Bay Mills' Comments on the Draft List of Alternatives, at 10–11 (Dec. 12, 2023); Bay Mills' Comments on the Corps' Preliminary Draft Chapters 1 and 2 and Appendix, at 24–25 (May 17, 2024); Letter from Tribal Nations to Lt. Col. Wallace W. Bandeff, U.S. Army Corps of Eng'rs, at 3–4 (Mar. 21, 2025).

[33] 36 C.F.R. § 800.6(a).

[34] *Or.-Cal. Trails Ass'n v. Walsh*, 467 F. Supp. 3d 1007, 1072 (D. Colo. 2020) ("Whether or not different routes could be elevated to formal action alternatives, it is still useful to consider them when deciding whether to issue the permit. The point of the NHPA is to require agencies 'to stop, look, and listen before proceeding when their action will affect national historical assets.' . . . Thus, . . . an agency could legitimately conclude, 'We see your need for this project but you have not persuaded us that you need to build the project precisely *there*; permit denied.'" (internal citation omitted)).

effects of the Project.[35] Of course, to do this comparative analysis, the Corps would need to understand the alternatives' adverse effects.

But the Corps has not made the effort to do so. Rather, it has thus far failed to complete anything remotely adequate to document the HDD alternatives in its NHPA or NEPA review. The HDD sub-alternatives would utilize distinct footprints for construction, laydown, and staging. A substantial portion of the HDD alternative and sub-alternative footprints do not coincide with the existing LODs for the Project. This area has not been surveyed for historic properties, including archaeological sites, locations of Ancestors' remains, or other contributing resources to the Straits TCL (including culturally significant plants and other treaty-protected resources). Accordingly, the Corps has not assessed the potential effects of the HDD alternative and sub-alternatives on the historic properties already identified in the Section 106 process or on other historic properties potentially located within the sub-alternatives area of potential effect. This, of course, means that the Corps is unable to determine whether the HDD alternative will avoid, minimize, mitigate, or increase adverse effects on historic properties, such as the Straits TCL. The Corps likewise failed to do this documentation and analysis for the other alternatives in the DEIS.

The Corps is required to evaluate alternatives or modifications that are outside its power to permit, and the Corps is required to *add* such alternatives to its analysis even after its publication of the DEIS and throughout its ongoing NHPA review. Moreover, the Corps is required to document how the alternatives it *did* analyze would avoid, minimize, or mitigate the Tunnel Project's adverse effects to historic properties. The Corps has done none of these things in relation to, or informed by, the Section 106 process, despite the evidence that integration of Section 106 into the Corps' alternatives analysis is fully within its discretion, authority, and capacity. The Corps had, and still has, the opportunity to resolve its ongoing failure to comply with Section 106. Unfortunately, it has not yet done so and continues to abdicate its NHPA obligations in the Supplemental DEIS.

C. The Corps Continues to Violate NEPA by Failing to Take a Hard Look in Its Comparison of Alternatives.

The Corps' Supplemental DEIS does not comport with NEPA, which requires rigorous evaluation of the Project and its alternatives. NEPA codifies a national commitment to protecting and promoting environmental quality.[36] It also aims to "preserve important historic, cultural, and

[35] *Compare* Suppl. DEIS, at 4-40–4-41 (no discussion of comparative impacts) *with id.* at 4-44 ("[P]otential deformation or geological shifts would likely be less than those described for the proposed Tunnel Project . . . .") *and id.* at 4-55 ("[I]mpact on roadway capacity on most of the roads would be similar to or less than the results shown for the Applicant's Preferred Alternative . . . .") *and id.* at 4-80 ("While the amount of fuel required . . . is unknown, it would likely be less than that anticipated for the Applicant's Preferred Alternative . . . .").

[36] 42 U.S.C. § 4331, *et seq*.; *see Comité Dialogo Ambiental, Inc. v. FEMA*, No. 24-cv-01145, at 7 (D.P.R. Sept. 30, 2025) ("[NEPA] is intended to help public officials make decisions that are based on understanding of environmental consequences" (quoting *W. Watersheds Proj. v. Grimm*, 921 F.3d 1141, 1143–44 (9th Cir. 2019)) (Attachment B).

natural aspects of our national heritage."[37] To fulfill these goals, NEPA requires all federal agencies, including the Corps, to prepare an EIS for all "major Federal actions"—such as the Proposed Project—"significantly affecting the quality of the human environment."[38] The EIS is designed to inform the Corps' understanding of the environmental consequences of its decision and requires it to "study, develop, and describe" alternatives to the proposed action.[39] The EIS should play a critical role in ensuring that the agency takes a "hard look at the environmental consequences" of the Project and the public has access to the "information about the environmental consequences."[40] Further, "the preparation of an 'EIS thus helps [e]nsure the integrity of the process of decision, providing a basis for comparing the environmental problems raised by the proposed project with the difficulties involved in the alternatives.'"[41] In doing so, NEPA requires that Federal agencies, including the Corps, "make use of reliable data and resources" and "ensure the professional integrity, including scientific integrity, of the discussion and analysis."[42]

The Supplemental DEIS is deficient in many ways, including by ignoring or omitting critical information, required by law and needed to understand the environmental consequences of the HDD alternative and sub-alternatives:

- **Cultural resources:** The Supplemental DEIS includes virtually no information about the impacts to cultural resources, merely acknowledging that cultural resource studies do not exist for significant portions of the area impacted by the HDD alternative without filling the gap.[43]

- **Wetlands:** The use of only the National Wetland Inventory ("NWI") to determine wetland impacts undoubtedly introduces error in these calculations. The NWI often uses outdated imagery to manually digitize photo-interpreted wetland boundaries. It is common for the NWI to be incorrect both by classifying upland as wetland and vice versa.[44]

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[37] 42 U.S.C. § 4331(b)(4).

[38] 42 U.S.C. § 4332(C).

[39] 42 U.S.C. § 4332(F).

[40] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976)); *see also Comité Dialogo Ambiental*, at 7.

[41] *Comité Dialogo Ambiental*, at 7 (quoting *Dubois v. U.S. Dep't of Agric*., 102 F.3d 1273, 1285–86 (1st Cir. 1996)).

[42] 42 U.S.C. § 4332(D)–(F).

[43] Suppl. DEIS, §§ 3.6, 4.6.

[44] For example, the proposed pipeline assembly area on the north side of the Straits utilizes an existing utility ROW that cuts through large swaths of wetland. According to NWI, however, the majority of the ROW is classified as upland, even in areas with wetland surrounding the ROW. It is likely that wetland still exists in the ROW, and upland classification could simply be an error of photo interpretation. This exact outcome occurred directly north of Enbridge's north-side valve station, where site-specific wetland

- **Impact to species:** The Corps failed to query the Michigan Natural Features Inventory database for threatened and endangered species along the HDD project corridor. The pipeline assembly area for Sub-Alternative 2 runs directly adjacent to the documented bald eagle nest, yet impacts to bald eagles are not documented in the Supplemental DEIS.[45] In addition, the Supplemental DEIS makes assumptions that the presence of plant species on the south side of the Straits are the same as on the north side, which is not only incorrect but reflects the egregious lack of care put into the document.

- **Climate:** The Supplemental DEIS avoids analyzing climate impacts or even using the word "climate."

- **Environmental justice:** The Supplemental DEIS ignores environmental justice considerations, including impacts unique to Tribal Nations, and relies on the flawed Missing and Murdered Indigenous Women Plan again.[46]

- **Geotechnical data:** The Supplemental DEIS does not grapple with its inability to analyze environmental consequences because it is missing the needed geotechnical information for the depth at which the HDD will place the pipeline.

When the Supplemental DEIS identifies environmental consequences, it glosses over them. For example, it notes the potential for inadvertent drilling fluid returns "through factures [sic] in overlying soils or rock during drilling, which could allow slurry/pressurized drilling fluid to enter nearby groundwater resources."[47] Notably, while Enbridge has done no geotechnical investigations to evaluate the rock at the depth at which the HDD would occur, it is likely that the boring for the HDD will encounter fractures in the rock—based even on the limited investigations completed for the Project.[48] The Supplemental DEIS also acknowledges that "conditions could be encountered that could result in a loss of drilling fluid returns that would prompt the need for contingency actions, which could require additional water of an unknown quantity."[49] According to the Supplemental DEIS, if more water is needed, a water intake structure will need to be built (which may take weeks and require additional permitting); yet it does not explain what will be

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delineation in 2023–2024 determined existing wetland (Wetland 3) within the pipeline ROW even though the NWI currently classifies the area as upland. Site-specific wetland surveys are needed to fully and accurately quantify the wetland impacts of the HDD alternative.

[45] Suppl. DEIS, at 4-31. Notably, Enbridge's own comments on the DEIS recognize the need to abstain from activity near an active bald eagle nest: "1. The applicant will coordinate with USFWS to ensure compliance with the Bald and Golden Eagle Protection Act. 2. Blasting will not be done within 0.5-miles of an active bald eagle nest. Certain construction activities cannot occur within 660 feet of an active bald eagle nest." Enbridge's Comments on the DEIS, Comment No. 46 (June 30, 2025).

[46] *See* Bay Mills' Comments on the DEIS, at 51–53 (June 30, 2025).

[47] Suppl. DEIS, at 4-87.

[48] *Id.* at 4-18–4-19.

[49] *Id.*, App. F, at F-13.

done in that interim period to protect the groundwater and surface water. Finally, the Supplemental DEIS inappropriately downplays the harm posed by bentonite slurry and unnamed additives that would be released during the drilling process.[50] The Supplemental DEIS notes that drilling fluid returns are most common near the entry points for boring, while downplaying the risks to these critical aquatic areas, fish, and benthic organisms, and not providing sufficient explanation of what mitigation might prevent these harms.

Even with the Corps' failure to gather sufficient data to evaluate the impacts of the HDD alternative, as discussed in Section III, *infra*, the Corps has pointed out a number of ways in which the HDD would result in less adverse impacts than the Applicant's Preferred Alternative.

D. The Corps' Evaluation of the Technical Feasibility of the Project and the Alternatives Is Flawed and Internally Inconsistent.

NEPA requires the Corps to consider the engineering and design considerations of the Tunnel Project and alternatives,[51] and the RHA requires approval of project plans by the Chief of Engineers and Secretary of the Army.[52] The Corps must ensure the scientific integrity and use of reliable data in its EIS.[53] Agencies must rely on the best available scientific information.[54] In evaluating the Project and alternatives, the Corps' DEIS and the Supplemental DEIS lack the requisite level of rigor and integrity. Without sufficient explanation or legal or factual support, the Corps has persistently ignored critical information about the technical infeasibility of the Project, choosing instead to only pursue information about the HDD alternative.

The Corps' decision to act on new information related to the HDD alternative reflects an internal inconsistency and lack of scientific integrity. When Bay Mills' experts presented evidence

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[50] The Corps must disclose the harm that Tribal Nations have experienced due to the unintended consequences of HDD construction activities—including by Enbridge—such as artesian aquifer breaches and inadvertent releases of drilling mud. Enbridge's Line 3 pipeline, for example, spilled drilling fluid at least 28 times, with the largest release being up to 9,000 gallons in a wetland near the Mississippi River, resulting in a state investigation and millions of dollars in penalties levied on the company. *See* Minn. Pollution Control Agency, *Minnesota State Agencies and Fond Du Lac Band Announce Enbridge Enforcement Resulting in $11M in Payments, Environmental Projects, and Financial Assurances* (Oct. 17, 2022), https://www.pca.state.mn.us/news-and-stories/minnesota-state-agencies-and-fond-du-lac-band-announce-enbridge-enforcement-resulting-in-11m-in; Rilyn Eischens, *Enbridge Line 3 Drilling Fluid Spills: What We Know So Far*, Minn. Reformer (Aug. 16, 2021), https://minnesotareformer.com/2021/08/16/enbridge-line-3-drilling-fluid-spills-what-we-know-so-far/.

[51] *See* 42 U.S.C. § 4332 (requiring that the Corps provide a detailed statement on alternatives that are, among other things, "technically and economically feasible").

[52] *See* 33 U.S.C. § 403 (providing, in relevant part, that "it shall not be lawful to build or commence the building of any [structure] in any . . . navigable river, or other water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army").

[53] *See* 42 U.S.C. § 4332(D)–(E).

[54] *See Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1034 (10th Cir. 2001) (stating that "agencies must take a hard look at the environmental consequences of proposed actions utilizing public comment and the best available scientific information" (internal quotation marks and citation omitted)).

questioning the technical feasibility of the Project, the Corps flatly ignored it. Yet, when the Applicant presented new information about the technical feasibility of the HDD alternative that differed from what was relied upon in a 2018 Report[55] cited by the Corps, the Corps investigated further. Notably, this "new" information was first presented by Enbridge in September 2023 when it informed the Corps that it had updated information that changed its conclusions from the 2018 Report about the HDD alternative.[56] Despite having the information since 2023, the Corps' 2025 DEIS still only relied on the 2018 Report. According to the Corps' Memorandum for the Record ("MFR"), Enbridge's DEIS comments noted that failure.[57] The Corps then went back to gather more information from Enbridge and changed its determination, ultimately finding that the HDD alternative met its screening criteria and prepared a Supplemental DEIS.[58]

Bay Mills and other commenters have repeatedly explained that the Tunnel Project is not feasible and will have massive impacts—contrary to the outdated 2018 Report's and the Corps' DEIS analysis. But the Corps has yet to critically evaluate these concerns. First, the 2018 Report's feasibility determination relied only on a desktop study and two vertical boreholes, and noted the need for "detailed geotechnical investigations" before tunnel planning and design could move forward.[59] When Enbridge subsequently undertook a geological investigation, however, it was inadequate to accurately determine the conditions, particularly at the deepest part of the Straits.[60]

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[55] Enbridge Energy, *Report to the State of Michigan: Alternatives for Replacing Enbridge's Dual Line 5 Pipelines Crossing the Straits of Mackinac* (June 15, 2018) (MPSC Doc. U-20763-0003) ("2018 Report").

[56] Importantly, Enbridge prepared the 2018 Report, upon which the Corps later relied in its development of alternatives, to support its advocacy for the tunnel with the State of Michigan. The report considered three alternatives to replace the Dual Pipelines by installing a new pipeline: (1) in an underground tunnel below the Straits; (2) across the Straits using an open-cut method that includes secondary containment; or (3) below the Straits using the HDD method. The report ruled out the HDD as infeasible. It found that the tunnel and open-cut methods were both feasible but then incorrectly determined that the tunnel was estimated to have the "least impactful construction process—would have no impact to the shore[] lines or lakebed." *Id*. at 63. In reality, the tunnel will have a massive impact on the shoreline and sacred places for Tribal Nations.

[57] *See generally* U.S. Army Corps of Eng'rs, MFR on Screening of Horizontal Direction Drilling Alternative for the Enbridge Line 5 Tunnel Project Environmental Impact Statement (Sept. 16, 2025).

[58] Ironically, the Supplemental DEIS fails to adequately support its conclusion that the HDD method would be feasible. It seems to base its conclusion on just one fact—that the HDD boring can proceed from both sides of the Straits to extend the possible distance of the HDD reach. It does not address that HDD typically occurs at markedly shallower depths than this proposed alternative. The Corps notes, at 3-26, that the complete "lack of geotechnical data available for this alternative raises the uncertainty of encountering unstable conditions such as pockets of gas, groundwater, or voids," but at the same time omits information from the Supplemental DEIS as to how the HDD method would advance to completion if faced with such obstacles. *See, e.g*., Suppl. DEIS, § 3.8.

[59] 2018 Report, at 2, 19–20.

[60] *See* Bay Mills' Comments on the DEIS, Att. J, Test. of Brian O'Mara, at 2755 (June 30, 2025); *see also* McMillen Jacobs Associates, Technical Memorandum, Subject: Draft Geotechnical Exploration Level of Effort for the Line 5 Replacement Tunnel, at 3 (Jan. 13, 2021) ("[D]ue to a significant number of borings

Similarly, the 2018 Report assumed the availability of competent rock (rock above the tunnel that could sustain the high pressure of the Straits without collapsing) particularly at the greatest depths.[61] However, even Enbridge's incomplete boring logs, conducted after the 2018 Report was issued, show that the rock quality in the Straits is extremely poor and far from a "competent" designation; it is essentially gravel.[62]

Additionally, the 2018 Report's conclusion that the risk of product from the tunnel reaching the waters of the Straits is "negligible" and "considered virtually zero" is carried over from the 2017 Dynamic Risk Report, which considered a *completely different tunnel design*—one with a "sealed annulus."[63] By 2020, when Enbridge submitted its tunnel permit applications, it had departed from the sealed annulus, and instead opted to advance an open tunnel design. No basis exists to conclude that the risk of product from an open tunnel design reaching the waters of the Straits is negligible or "considered virtually zero."[64] To the contrary, Bay Mills presented expert testimony identifying scenarios in which product could reach the waters of the Straits from a catastrophic failure of the tunnel.[65] The Corps, however, has ignored the evidence and continues to rely on the outdated and unsubstantiated claim of secondary containment as a cure-all. Far from ensuring the scientific and technical accuracy of its EIS documents, the Corps has put blinders on to the impacts of its decision. The Corps' selective reevaluation is contrary to its statutory duty under the RHA and NEPA.

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terminating before the tunnel invert near the middle portion of the alignment, there are portions of the alignment where the rock quality and conditions within the tunnel have not been directly investigated. This lack of data spans the majority of the length of the middle half of the tunnel alignment.").

[61] 2018 Report, at 20.

[62] *See* Bay Mills' Comments on DEIS, Att. J, Test. of Brian O'Mara, at 2756 (June 30, 2025) ("I went through every bore hole and every core log and I actually did my own analysis, and they had rock quality designation values of zero for more than 25 percent of the rock that was out there, which I've never seen rock that bad. That's essentially saying the rock is gravel, it has no continuity, it is not competent, it is not massive, it is highly fractured, and so that would rank as a very poor quality rock. If you have a score of 50 or less, it's poor. So most of the rock out there is a very, poor to very poor quality, and there's very little of it . . . anywhere near to 100 or over 90, which is the best quality.").

[63] Dynamic Risk Assessment Systems, Inc., *Alternatives Analysis for the Straits Pipeline Final Report*, at 3-58–3-59 (Oct. 26, 2017) ("In the open annulus configuration, the interior of the tunnel is open to the interior surface, while in the case of the sealed annulus, the opening between the pipe and tunnel wall is filled with an impermeable cement bentonite grout material. For the Straits tunnel installation design, a sealed annulus configuration was selected, since it provides redundant support around the pipe, and additional containment around the pipeline. It is deemed therefore, that this design is consistent with the objective of preventing spills from entering the waters of the Great Lakes.").

[64] *See* DEIS Vol. 1, at 4-198 ("Under these assumptions, no product is expected to be released into the waters of the Straits.").

[65] Bay Mills' Comments on the DEIS, Atts. J, M (June 30, 2025).

IV. THE CORPS MUST DENY THE PERMIT UNDER THE CWA.

The Corps continues to ignore its statutory obligations under the CWA and the regulatory requirements set out in the CWA Guidelines—an issue Bay Mills has raised on numerous occasions.[66] The CWA aims to "restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material."[67] Section 404(b) of the CWA and the implementing regulations aim to protect special aquatic sites from harmful discharges and filling of wetlands by establishing a permitting process and imposing key presumptions that disfavor permit approval if there are practicable alternatives that avoid special aquatic sites or cause less adverse impacts.

First, when the Corps analyzes a permit application involving a special aquatic site,[68] it must independently define the basic purpose of the project.[69]

> Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.[70]

The Corps has failed to follow the process set forth in regulations known as the CWA Guidelines. It failed to define the Project's basic purpose, failed to apply the required presumption for non-water-dependent activities, and failed to require Enbridge to demonstrate that practicable alternatives not involving special aquatic sites are unavailable. A fossil fuels pipeline is not a water dependent project;[71] therefore, the Corps must apply the presumption that practicable alternatives not involving special aquatic sites are available, unless clearly demonstrated otherwise by the

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[66] *See, e.g.*, Bay Mills' Comments on the Corps' Draft List of Alternatives, at 12–13 (Dec. 12, 2023); Bay Mills' Comments on the Corps' Preliminary Draft Chapters 1 and 2 and Appendix, at 17–18 (May 17, 2024); Bay Mills' Comments on the DEIS, at 25–26 (June 30, 2025).

[67] 40 C.F.R. § 230.14.

[68] Defined at 40 C.F.R. §§ 230.40–230.45.

[69] 40 C.F.R. § 230.10(a)(3).

[70] *Id*.

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

applicant.[72] The HDD alternative continues the flow of oil through the Straits, involves boring a hole under the Great Lakes, and will cause detrimental impacts to the special aquatic sites at the Straits, including wetlands. In analyzing the HDD alternative in the Supplemental DEIS, the Corps once again fails to presume that alternatives not involving special aquatic sites are available.

Second, if the Corps somehow determines that the Project is water dependent, which it should not, it still must deny the permit if there are alternatives that have less adverse impacts to the aquatic environment. The CWA Guidelines "require that the Corps' administrative record *proves* that 'there is [no] practicable alternative to the proposed discharge which would have *less adverse impact* on the aquatic ecosystem.'"[73] "Unless the administrative record 'clearly' demonstrates that the action authorized by the permit is in fact the LEDPA [least environmentally damaging practicable alternative], the guidelines deprive the Corps of authority to issue [the] permit."[74]

Thus, the Corps may only issue the Applicant's permit for the Tunnel Project if the administrative record proves that it is the LEDPA.[75] It is not. The actual LEDPA, a no-action alternative where the Dual Pipelines cease operations, has long been advanced by Bay Mills, and should be considered in the Corps' alternative analysis—but was unlawfully eliminated based on the Corps' improperly narrow purpose and need statement.[76] Nevertheless, even under a constrained approach, the Corps' Supplemental DEIS suggests that the HDD alternative may have less adverse impacts than the Project, including to wetlands and the shoreline,[77] which the Supplemental DEIS indicates will be "temporary."[78] HDD will also generate a fraction of the

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[72] *Id*.

[73] *Save the Colorado*, 2024 WL 4519201, at *2 (citing 40 C.F.R. § 230.10(a)) (emphasis added).

[74] *Id*. (citing 40 C.F.R. § 230.10(a)(3); 40 C.F.R. § 230.12).

[75] 40 C.F.R. § 230.10(a) ("Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."); *see also Utahns for Better Transp. v. U.S. Dep't of Transp*., 305 F.3d 1152, 1192 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) (holding that the Corps acted arbitrarily and capriciously in granting the applicant's permit on the basis that it failed to adequately consider impacts to the environment, including impacts on wildlife, caused by the project).

[76] *See* Bay Mills' Scoping Comments, at 21–22 (Oct. 14, 2022).

[77] When the Corps considers whether the Project is the LEDPA, it cannot limit its assessment of the environmental impacts to the navigable waters and adjacent wetlands. Because it must consider whether the other practicable alternatives would have less adverse impact on the aquatic system *and* do not have "other significant adverse environmental consequences," under 40 C.F.R. § 230.10(a), it must do the same for the Project. Otherwise, it cannot make an educated comparison. *See also Utahns for Better Transp. v. U.S. Dep't of Transp*., 305 F.3d at 1192 (agency decision arbitrary and capricious because it limited geographic scope of impacts to wildlife contrary to Clean Water requirements).

[78] *See, e.g.*, Suppl. DEIS, at 4-16.

amount of excavated material, require substantially less transport and disposal of that material,[79] need significantly less water,[80] and most likely require less energy.[81] The HDD alternative also will take one third of the time to complete and cost considerably less than the Tunnel Project.

The full scope of the HDD's environmental impacts, however, remains unexamined by the Corps. For example, the Corps failed to adequately document or analyze the impact on wetlands under this alternative. The Corps only relied on the National Wetlands Inventory which often uses outdated imagery to manually digitize photo interpreted wetland boundaries and introduces error in wetland impact calculations. The Corps further dismissed impacts to wetlands as "minimal" by glossing over the impacts to species who rely on this habitat—a serious concern that warrants, and is required to be subject to, far closer scrutiny. And routing a pipeline through the Straits will perpetually create a risk of a spill of contaminants reaching the Straits, particularly at the ends of the pipeline nearest each shoreline. The Corps continues to fail to apply the required presumption that a practicable alternative that does not harm the special aquatic sites exists. As a result, the Corps failed to advance any alternative that is not dependent on crossing the Straits and will not detrimentally impact special aquatic sites. The Corps' analysis of the HDD alternatives continues its abdication of the duty to apply the process set forth in the CWA Guidelines. Accordingly, a Section 404 permit issued on the basis of the Corps' glaringly inadequate analysis in this record would violate the CWA.

Based on the information available to date, there are significant ways in which the HDD alternative, and each sub-alternative, may have less adverse impacts on the aquatic environment than the Applicant's Preferred Alternative. Still, other impacts remain unknown due to the rushed preparation of the Supplemental DEIS. A proper comparison of the HDD alternative cannot be completed until the Corps undertakes appropriate wetlands delineations and cultural surveys for the area impacted by the HDD alternative, including each sub-alternative for the pipeline layout.

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[79] The Tunnel Project would excavate 532,000 bank cubic yards ("BCY") of material. Enbridge's Comments on the DEIS, Comment No. 82. Note that Enbridge updated the total amount of excavated material that was listed in the DEIS, which states that it would excavate 431,000 BCY. DEIS Vol. 1, at 4-94. This material would be transported to several storage areas by truck and would require at least 162 truck trips per day on the north side of the Straits and 120 truck trips per day on the south side. *Id.* at 4-111. In comparison, the HDD alternative would excavate 10,200 cubic yards of waste (a number that includes excavated bedrock plus drilling mud). Supp. DEIS, at F-15. Importantly, the DEIS uses bank cubic yards while the Supplemental DEIS uses cubic yards. Expressing the volume in terms of bank cubic yards reflects an underestimate of the ultimate volume of excavated material because the volume of material will expand once excavated—and no longer in place and under pressure. *See Handbook for Calculation of Bond Amounts*, Chapter 2-13-14 (Oct. 2020), https://www.osmre.gov/sites/default/files/pdfs/directive1005_AppendixA.pdf (defining bank cubic yards, loose cubic yards, and compacted cubic yards, and explaining the impact that excavation has on material volume).

[80] *Compare* DEIS, at 4-46 (up to 2 million gallons per day for two years), *with* Suppl. DEIS, at F-13 (60,000 gallons per day for a far shorter timeframe).

[81] Suppl. DEIS, at 4-80, Table 4.13-1 ("While the amount of fuel required for commuting construction workers, truck hauling, and operation of construction equipment is unknown, it would likely be less than that anticipated for the Applicant's Preferred Alternative (see Section 4.13.3.1.6 of the May 2025 Draft EIS), as construction would take place within a shorter timeframe and involve fewer workers").

And, importantly, the HDD alternative, like the Project, involves the transportation of fossil fuels across the Great Lakes—in contravention of the CWA Guidelines.

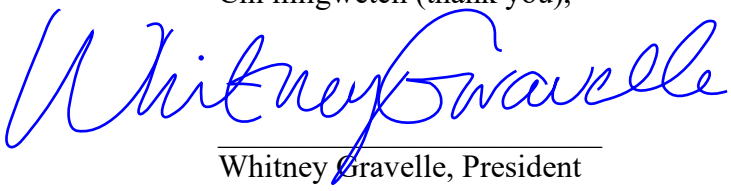
V. CONCLUSION

Considering that the health of the Great Lakes and the many people and species that rely on them are at stake, including Bay Mills' and other Tribal Nations' lifeways, the Corps could have—and should have—used the Supplemental DEIS to right its wrongs in the permitting process. It should have looked beyond the Straits to consider alternatives that do not continue the flow of oil through an aquatic area of cultural, economic, and spiritual importance to Bay Mills and other Tribal Nations. Instead, the Corps adhered to its narrow purpose and need statements, advanced another geographically constricted alternative, took only a cursory look at some of the harms that this alternative would cause, and failed again to honor its trust responsibility to Tribal Nations by omitting any cultural resource information for the HDD alternative. Bay Mills continues to support total avoidance of harms that will be caused by Enbridge under either the Tunnel or HDD alternative through permit denial.

The Corps has unlawfully failed to thoroughly examine the impacts of the HDD alternative—much as it failed to do so with the Tunnel Project and other alternatives that it discarded—and therefore cannot support any permit decision based on this record. The Corps should have advanced alternatives that do not involve special aquatic sites, like the Straits and nearby wetlands and shorelines, and required that Enbridge rebut the presumption of practicability—which it has yet to do. The Corps' Supplemental DEIS, even with its flaws and omissions, underscores that there may be practicable alternatives that are likely to be less environmentally damaging to the Straits area. The CWA demands that the Corps deny the permit on those grounds.

Should you have any questions, please do not hesitate to contact the Bay Mills Legal Department at rliebing@baymills.org.

Chi miigwetch (thank you),



Whitney Gravelle, President
Bay Mills Indian Community

Attachment A

ENBRIDGE

Enbridge
915 North Eldridge Parkway,
Suite 1100
Houston, TX 77079

September 4, 2025

VIA EMAIL

Lt. Col. Wallace W. Bandeff
Detroit District Commander
U.S. Army Corps of Engineers, Detroit District
441 East Jefferson Avenue
Detroit, MI 48226-2146

Re: Enbridge Line 5 Tunnel Project

Dear Colonel Bandeff:

The Great Lakes Tunnel Project ("Tunnel Project") is and remains Enbridge's preferred and only alternative. The sole reason that Enbridge submitted an application to the U.S. Army Corps of Engineers ("USACE") for the Tunnel Project is because the State of Michigan ("State") entered into an agreement with Enbridge for a State-owned, multi-use utility Tunnel under the Straits that provides secondary containment to eliminate the potential for a release to the Great Lakes. In 2018, the State and Enbridge executed the Tunnel Agreement and Third Agreement, contractually requiring Enbridge to construct the Tunnel Project for the State. In 2018, the State also enacted legislation, Public Act 359, that created the Mackinac Straits Corridor Authority ("MSCA") and delegated to it authority to "exercise[e] public and essential governmental functions" to acquire a utility Tunnel "for the benefit of the people of [Michigan]." *Id.* at Sec. 14b, 14a(5).

Enbridge cannot pursue an HDD alternative to replace the existing Line 5 Dual Pipelines because the State mandated (contractually and legislatively) the Tunnel Project. As a result, the HDD is not "available" and thus is not a practicable alternative that should be carried forward for detailed EIS analysis. The Section 404(b)(1) guidelines explain that an alternative must be "practicable," and can be practicable only "if it is *available* and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a) (emphasis added). An alternative is "available" only if it is "reasonably obtainable." *Shrimpers & Fishermen of the RGV v. U.S. Army Corps of Engineers*, 56 F.4th 992, 999 (5th Cir. 2023). A "mere, unsupported theoretical possibility of acquiring the alternative … does not constitute a showing that the alternative [ ] is reasonably obtainable." *Id.* (quoting *City of Shoreacres v. Waterworth*, 420 F.3d 440, 449 (5th Cir. 2005)).

Courts conclude that an alternative is not available if third parties, law, or other restrictions prevent an applicant from pursuing that alternative. For example, in *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers*, 636 F. Supp. 3d 33, 67-68 (D.D.C. 2022), which involved a challenge to the permit for Enbridge's Line 3 replacement project, the court rejected several alternatives as being impracticable due to their unavailability. Specifically, the existing Line 3 route was not "available" because existing easements for that route were set to expire. *Id.*

Several other proposed routes were also not "available and capable of being done" because the State had previously rejected them, and as a result, Enbridge had no legal authority to construct them. *Id.*[1]

The evidence on the record – as reflected in the Agreements, Public Act 359, and the State's issuance of an easement for the tunnel – confirms that the State will only allow the Tunnel Project. By way of these actions, the State has refused to authorize any replacement to the Line 5 Dual Pipelines that is not a tunnel. In executing the Tunnel Agreement and Third Agreement, and enacting Public Act 359, the State rejected other alternatives that do not serve multiple utilities or provide secondary containment, including an HDD alternative. The State also found in the Third Agreement that the Tunnel Project will "eliminate the risk of a potential release from Line 5 at the Straits" because a tunnel provides secondary containment. The State found this to be "in furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State." And because the Tunnel Project would achieve these purposes and be owned by the State, the State was able to issue an easement for the tunnel to the MSCA. It is not expected that a similar authorization can be reasonably obtained for an HDD, as it would run directly counter to the State's Agreements and Legislation that require a multi-use utility tunnel with secondary containment to minimize environmental risk. For this reason, the HDD alternative is unavailable and should not be carried forward as a practicable alternative in USACE's EIS analysis.

Enbridge notes that this issue has arisen because of how the Tunnel Project's Purpose is currently defined in the Draft EIS. Specifically, Sections 1.8.1.3 and 2.2.1 of the EIS state that "minimizing environmental risk" means "anchor strike prevention *and/or* secondary containment." However, the State has made clear that secondary containment is mandatory to minimize environmental risk in furtherance of the State's perception of its public trust obligations.[2] If the Purpose statement accurately reflected the fact that secondary containment must be provided by an alternative, then the HDD would appropriately be rejected for that reason, in addition to the

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[1] *See also Back Bay Restoration Found., Ltd. v. U.S. Army Corps of Engineers*, 2020 WL 1068629, at *3 (E.D. Va. Mar. 4, 2020) (alternatives were impracticable where the sites were owned by other entities and would have to be purchased and rezoned before being used for the project); *Nw. Env't Def. Ctr. v. Wood*, 947 F. Supp. 1371, 1378 (D. Or. 1996) (alternative project site not practicable where obtaining the site would involve a complex process of acquiring three separate parcels owned by different parties); *Sierra Club v. U.S. Army Corps of Engineers*, 935 F. Supp. 1556, 1577-78 (S.D. Ala. 1996) (alternative sites not available where landowners were unwilling to make additional or alternative lands available for the project).

[2] Enbridge notes that the Draft EIS, at page 1-15, mentions that comments were received that the Tunnel Project "would not provide secondary containment because there is a risk that methane in the substrate or a leak from the new pipeline could result in an explosion that would destabilize the proposed Tunnel ..." and could result in the "potential for loss of secondary containment." The Draft EIS further accurately states that Enbridge asserts, on the basis of evidence, that "there is virtually no risk of explosion in the Tunnel." The Tunnel Project, at the time of construction, unequivocally provides secondary containment through a pre-cast concrete liner, which the State has required under the Agreements and for turn-over of ownership to the MSCA.

fact that it is not available.[3] And a purpose statement can be dictated by binding agreements, like those between Enbridge and the State.[4]

Separately, in working to answer USACE's Data Request no. 52, Enbridge has learned of the logistical challenges in obtaining the necessary land use authorizations for the required 4-mile HDD pullback area. Engineers have explained that the pullback area must be straight and have minimal curvature within the bend radius of the pipeline. As a result, the pullback area must be aligned along a narrowly defined corridor that is restricted based on pipeline curvature. To achieve the needed pullback area, Enbridge would be required to obtain all necessary land use authorizations along a precise corridor, which would include private landowners, public landowners, road crossings, and crossings of existing utilities. Enbridge has no expectation that all such authorizations within the defined 4-mile pullback area can be obtained in a reasonable time period to allow for construction of an HDD, rendering the HDD pullback logistically infeasible. *See, e.g., City of Los Angeles v. Fed. Aviation Admin.*, 63 F.4th 835 (9th Cir. 2023) (alternative was infeasible because of uncertainty about airport authority's ability to acquire/access land in developed area with multiple owners).

For the reasons described above, Enbridge respectfully requests that USACE exclude the HDD alternative from detailed EIS analysis and proceed to issue the Final EIS that is appropriately focused on the Tunnel Project and the tunnel sub-alternatives that are currently studied in the Draft EIS.

We would appreciate the opportunity to meet with you to discuss this issue further.

Sincerely,

Laura Sayavedra

Laura Sayavedra
Senior Vice President

cc: Shane McCoy

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[3] Enbridge notes that agencies may refine a project's purpose between the Draft EIS and Final EIS in order to more clearly articulate the project's goals. See, e.g., *City of Carmel-by-the-Sea v. United States Department of Transportation*, 123 F.3d 1142, 1156 (9th Cir. 1997) (affirming agency's modification to Purpose statement ""to more clearly state the project goals" that had always existed.); see also *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 876 (9th Cir. 2022).

[4] *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 876 (9th Cir. 2022) (BOEM's narrow purpose and need statement did not violate NEPA because it was driven by settlement agreements related to the proposed action and those agreements "naturally affected" the project's purpose).

Attachment B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

COMITÉ DIALOGO AMBIENTAL, INC., *et al.*, **Plaintiffs,** v. FEDERAL EMERGENCY MANAGEMENT AGENCY, *et al.*, **Defendants.**	**CIVIL NO.** 24-1145 (JAG)

MEMORANDUM AND ORDER

GARCIA-GREGORY, D.J.

Pending before the Court are Plaintiffs' Motion for Summary Judgment, Docket No. 46; and Defendants' Cross-Motion for Summary Judgment, Docket No. 62. For the following reasons, Plaintiffs' Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**, and Defendants' Cross-Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**.

I. Standing

Article III of the U.S. Constitution limits the jurisdiction of federal courts to actual cases and controversies. *Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc.*, 958 F.3d 38, 46 (1st Cir. 2020). "A case or controversy exists only when the party soliciting federal court jurisdiction (normally, the plaintiff) demonstrates such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012) (cleaned up). Therefore, "plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*,

568 U.S. 398, 408 (2013) (cleaned up). "For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue." *Dep't of Com. v. New York*, 588 U.S. 752, 766 (2019); *see Rumsfeld v. Forum for Acad. & Inst'l Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.") (citation omitted).

As applicable here,

> In order to ground a claim of associational standing (that is, standing to bring suit on behalf of its membership), [Plaintiffs] must show three things: (i) that individual members would have standing to sue in their own right; (ii) that the interests at stake are related to the organization's core purposes; and (iii) that both the asserted claim and the requested relief can be adjudicated without the participation of individual members as named plaintiffs.

Maine People's All. And Nat. Res. Def. Council v. Mallinckrodt, Inc., 471 F.3d 277, 283 (1st Cir. 2006). Specifically, "plaintiffs must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Katz*, 672 F.3d at 79 (cleaned up); *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992) ("To survive the [] summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by [the challenged] activities . . . but also that one or more of [Plaintiffs'] members would thereby be directly affected apart from their special interest in th[e] subject.") (cleaned up).

It is uncontested that the interests at stake in this litigation are related to Plaintiffs' core purposes, *see* Docket No. 1 at 8-17, and that the claim can be adjudicated without the participation of individual plaintiffs as named plaintiffs. Thus, the Court need only determine whether an individual member of Plaintiffs' organizations would have standing to sue in their own right.

A. Constitutional Requirements

The standing inquiry involves constitutional concerns and prudential concerns. First, "[t]he irreducible constitutional minimum of standing entails three elements." *Dantzler*, 958 F.3d at 47 (cleaned up). "[A] plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling."[1] *Dep't of Com.*, 588 U.S. at 766 (cleaned up). Here, Defendants do not contest the injury-in-fact requirement, Docket No. 62-1 at 15, but in any case the Court finds that they have met this requirement so the Court will only address traceability and redressability.

1. Traceability

As is the case here, "when a plaintiff alleges a 'procedural injury'—including the failure to comply with [the National Environmental Policy Act ("NEPA")]—the causation and redressability requirements are relaxed . . . [but] only in the sense that a plaintiff need not establish the likelihood that the agency would render a different decision after going through the proper procedural steps." *WildEarth Guardians v. U.S. Forest Serv.*, 70 F.4th 1212, 1216 (9th Cir. 2023) (cleaned up). Plaintiffs "need not show that the agency action would have been different but for the procedural violation." *Mass. Coal. for Immigr. Reform v. U.S. Dep't of Homeland Sec.*, 752 F. Supp. 3d 13, 18 (D.D.C. 2024) (cleaned up).

"The traceability or causation element requires the plaintiff to show a sufficiently direct causal connection between the challenged action and the identified harm. That connection cannot

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[1] "These standing requisites must be proved with the manner and degree of evidence required at the successive stages of the litigation." *Mallinckrodt, Inc.*, 471 F.3d at 283. At the summary judgment phase, Plaintiffs bear the burden of showing the existence of standing by a preponderance of the evidence.

be overly attenuated." *Dantzler*, 958 F.3d at 47 (cleaned up). It is enough to show that the asserted injury is "fairly traceable" to the defendant's action; proximate causation is not needed. *Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 923 F.3d 209, 222 (1st Cir. 2019).

Defendants claim that Plaintiffs cannot meet the traceability requirement because the injuries asserted are the result of actions by third parties. Docket No. 62-1 at 14-17. The Court disagrees. While it is true that the causation "requirement forces plaintiffs to show that their injury fairly can be traced to the challenged action of the defendant, and not . . . some third party not before the court," Plaintiffs can still show causation by "showing that third parties will likely react in predictable ways to the defendant's conduct." *Mass. Coal. for Immigr. Reform*, 752 F. Supp. 3d at 29 (cleaned up). "The key inquiry is whether the defendant's actions were a substantial factor motivating the decisions of the third parties that were the direct source of the plaintiff's injuries. Article III demands far less than statistical certainty; it asks only for *de facto* causality." *Id.* at 29-30.

Here, Defendants' decision as to how to channel billions of dollars in federal disaster aid, without which Puerto Rico would not have had the necessary resources to reestablish power in the island, would be a substantial factor motivating the decisions of the third parties that were the direct source of the plaintiff's injuries, i.e. the entities that operate the different components of the electrical power system in Puerto Rico. *Sierra Club v. Glickman*, 156 F.3d 606, 614 (5th Cir. 1998) ("[T]he relevant inquiry in this case is whether [the defendant] has the ability through various programs to affect the [ ] decisions of those third part[ies] to such an extent that the plaintiff's injury could be relieved.") (cleaned up). FEMA's funding decisions "exert[] a determinative [] effect on the third-party conduct that directly causes the injury." *WildEarth Guardians*, 70 F.4th at 1217 (cleaned up); *see also id.* ("The injury was caused by development carried

out by third parties, but the [defendant] regulated whether that development could occur.") (citation omitted). Plaintiffs' "theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties." *Dep't of Com.*, 588 U.S. at 768 (citations omitted). Thus, Plaintiffs meet the traceability requirement.

2. Redressability

Turning to the redressability of Plaintiffs' asserted injuries, this "element of standing requires that the plaintiff [show] that a favorable resolution of [its] claim would likely redress the professed injury. This means that it cannot be merely speculative that, if a court grants the requested relief, the injury will be redressed." *Dantzler*, 958 F.3d at 47 (cleaned up). The First Circuit has found that "[i]n cases of alleged procedural harm . . . plaintiffs receive special treatment. The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 27 (1st Cir. 2007) (cleaned up). As such, Plaintiffs "need not demonstrate that [their] entire injury will be redressed by a favorable judgment, [but they] must show that the court can fashion a remedy that will at least lessen its injury." *Dantzler*, 958 F.3d at 47 (citations omitted); *see Katz*, 672 F.3d at 72 ("To satisfy [the redressability] requirement, the plaintiff need not definitively demonstrate that a victory would completely remedy the harm.") (cleaned up). In cases like the present action, where a plaintiff asserts a procedural injury, redressability is an "undemanding burden." *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108, 1120 (9th Cir. 2004). In these cases, "[a]ll that is required . . . is some

possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Impson*, 503 F.3d at 28 (cleaned up).

Because Plaintiffs' claims center around the "inadequacy of a government agency's environmental studies under NEPA[, they] need not show that further analysis by the [agency] would result in a different conclusion. It suffices that, as NEPA contemplates, the [agency's] decision could be influenced by the environmental considerations that NEPA requires an agency to study." *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001) (citation omitted). Plaintiffs have shown that:

> In the aftermath of Hurricanes Irma and Maria, multiple studies analyzed the best ways to rebuild Puerto Rico's energy system. The universal conclusion was that widespread adoption of distributed solar and storage could create an energy future for Puerto Rico that was not only more resilient against future storms, but was also cleaner, more affordable, more equitable, and offered economic opportunities for Puerto Rican communities.

Docket No. 46-2 at 11-12. The Court finds this is sufficient to show that Defendants' decision could be influenced by environmental considerations that must be studied under NEPA.

Accordingly, the Court finds that Plaintiffs have standing to pursue this suit.

II. Merits

Having found that Plaintiffs have standing to pursue this case, the Court now turns to the merits of the Parties' motions. Plaintiffs contend that Defendants violated NEPA by (1) failing to consider distributed renewable energy alternatives, (2) failing to engage with public comments proposing renewable energy alternatives, (3) failing to adequately examine the environmental harms associated with rebuilding the fossil fuel grid, (4) relying on undefined mitigation measures or promises of future tiering as substitutes for taking a hard look at environmental impacts, (5) refusing to prepare an EIS for the proposed projects, and (6) failing to undertake additional NEPA

review in light of significant new information undermining the agency's decision. Docket No. 46-2.

NEPA "declares a broad national commitment to protecting and promoting environmental quality." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1285 (1st Cir. 1996) (citations omitted). It "is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *W. Watersheds Project v. Grimm*, 921 F.3d 1141, 1143-44 (9th Cir. 2019) (citation omitted). "Congress, in enacting NEPA, meant to insure a fully informed and well-considered decision." *Dubois*, 102 F.3d at 1284 (cleaned up).

"The primary mechanism for implementing NEPA is the Environmental Impact Statement (EIS) . . . [which] is an action-forcing procedure, designed [t]o ensure that this commitment is infused into the ongoing programs and actions of the Federal Government." *Id.* at 1285 (cleaned up). As such, NEPA requires the preparation of an EIS "[w]hen a major federal agency action will have significant environmental effects." *Nantucket Residents Against Turbines v. U.S. Bureau of Ocean Energy Mgmt.*, 100 F.4th 1, 9 (1st Cir. 2024) (citations omitted). "The EIS helps satisfy NEPA's 'twin aims': to ensure that the agency takes a 'hard look' at the environmental consequences of its proposed action, and to make information on the environmental consequences available to the public, which may then offer its insight to assist the agency's decision-making through the comment process." *Dubois*, 102 F.3d at 1285-86 (cleaned up). The preparation of an "EIS thus helps [e]nsure the integrity of the process of decision, providing a basis for comparing the environmental problems raised by the proposed project with the difficulties involved in the alternatives." *Id.* (cleaned up).

"Judicial review of agency decisions under NEPA . . . is provided by the [Administrative Procedure Act], which maintains that an agency action may be overturned only when it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006) (cleaned up). "The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions, *and* that its decision is not arbitrary or capricious." *Dubois*, 102 F.3d at 1284 (cleaned up).

In reviewing FEMA's decision not to prepare an EIS, the Court must consider "whether the agency has taken a hard look at the consequences of its actions, based [its decision] on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant." *Barnes v. Fed. Aviation Admin.*, 865 F.3d 1266, 1269 (9th Cir. 2017) (cleaned up). "[O]ne challenging a decision *not* to prepare an EIS must show a substantial possibility that agency action could significantly affect the quality of the human environment. If the record reveals such a 'substantial possibility' with sufficient clarity, the agency's decision (not to produce an EIS) violates NEPA." *Sierra Club v. Marsh*, 769 F.2d 868, 870-71 (1st Cir. 1985) (cleaned up).

Here, Plaintiffs challenge FEMA's decision not to prepare an EIS in relation to two Programmatic Environmental Assessments ("PEA"): (1) Utility Repair, Replacement, and Realignment ("Utilities PEA"), and (2) Public Facilities Infrastructure Recovery and Resiliency ("Public Facilities PEA"). The Court shall address each challenge in turn.

A. Utilities PEA

In the present case, it is uncontested that the projects encompassed by the Utilities PEA constitute a "major Federal action" under NEPA. Moreover, the record shows that "substantial questions are raised as to whether [the projects at issue] . . . *may* cause significant degradation of some human environmental factor." *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864-65 (9th Cir. 2005) (cleaned up). We do not see how FEMA could argue that there is no substantial possibility that the projects contemplated by the Utilities PEA could significantly affect the quality of the human environment. Most Puerto Ricans depend on an electrical power infrastructure that relies primarily on fossil fuels. Docket Nos. 46-1, ¶ 2; 46-6 at 13. The record amply shows that the existing infrastructure has proven inadequate, unreliable, and extremely vulnerable to weather events, events whose effects will be more severe in the future due to climate change.[2] Thus, any funding decisions as to how to reestablish electricity in Puerto Rico would significantly affect that quality of the human environment, especially considering that, as FEMA itself recognizes, "[f]ailure of these [utility] systems can cause injury, loss of life, and

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[2] *See* Docket Nos. 46-6 at 14 ("PREPA's transmission and distribution (T&D) systems, a majority of which are above ground[,] were particularly vulnerable to the high winds, torrential rains, and erosion-related landslides associated with the recent hurricanes . . . electric power generation facilities are tied to each other using high voltage overhead transmission lines that run over mountainous terrain. Due to the physical location of these electrical connections, they are subjected to hurricane force winds and are most likely to fail, as experienced during Hurricane Maria."), 15 ("Transmission lines in the center of the island were severely impacted, as high winds were tunneled through the changes in terrain and tore down large transmission lattice towers. Historical storm tracks . . . suggest similar impacts can be expected in the future."), 99 ("Puerto Rico's electrical grid was vulnerable before the hurricanes due to a fragile system, dependency on fossil fuels, lack of skilled workers, and outstanding debt."); 49-1 at 15 ("Experts predict that extreme weather will continue to jeopardize electric power systems. The need to transition to renewable power sources [] is immediate . . . Rather than repairing a grid that does not provide sustainable or reliable power, communities should evaluate and shift to new solutions.").

environmental issues." Docket No. 46-6 at 116;[3] *see also* Docket No. 46-6 at 188 ("The mission of [FEMA] is to reduce the loss of life and property and protect our institutions from all hazards by leading and supporting the nation in a comprehensive, risk-based emergency management program of mitigation, preparedness, response, and recovery."). This is sufficient to require the preparation of an EIS, especially since the Court agrees that the Utilities PEA and accompanying finding of no significant impact ("FONSI") failed to offer adequate explanations—merely offering conclusory statements not supported by studies, analysis, or data—as to why FEMA disregarded the comments submitted by Plaintiffs and made a finding of no significant impact. Docket No. 46-2 at 19-22; *see Ohio v. Env't Prot. Agency*, 603 U.S. 279, 297 (2024) (finding that the agency's response to the petitioners' comments was legally insufficient because it failed to meaningfully address the issue raised).

Additionally, "[w]hether a project has significant environmental impacts, thus triggering the need to produce an EIS, depends on its 'context' (region, locality) and 'intensity' ('severity of impact')." *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019) (citation

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[3] The Utilities PEA also states:

> For example, failing transmission lines may start fires or present an electrocution risk, or waste systems may discharge pollutants into waterways. Should utility systems fail, local governments may be unable to provide critical services including fire suppression, emergency communication, power generation, potable water, and wastewater treatment. Additionally, the lack of utilities such as electricity and water can be life-threatening for at-risk populations like the elderly, young, and the sick. In an effort to restore these services and/or mitigate these impacts, federal agencies led by FEMA may provide funds for utility system restoration, replacement, upgrade, expansion, redesign, or relocation.

Docket No. 46-6 at 116.

omitted). The Court agrees that several intensity factors support the preparation of an EIS. The agency's decision is significant since it will affect the vast majority of Puerto Rico. Continued reliance on the existing energy infrastructure will affect public health and safety considering the frequent power outages caused by the aging infrastructure. The projects will also likely affect park lands, ecologically critical areas, and protected species considering that transmission lines run through some of these areas/habitats. Additionally, continuing to rely on the current infrastructure may pose uncertain or unknown risks to the human environment. It could also establish a precedent for future actions with significant effects: if FEMA funding continues to be channeled to fossil fuel-based infrastructure, it is unlikely that Puerto Rico will have the resources to pursue renewable energy alternatives in the near future.

The Court is not persuaded by FEMA's argument that it was not obligated to analyze other alternatives that were not submitted by project applicants. Adopting this argument would effectively allow an agency to bypass NEPA's requirements merely because an applicant did not provide alternatives. *See also Dubois*, 102 F.3d at 1291[4] ("NEPA requires the agency to try *on its own* to develop alternatives that will mitigate the adverse environmental consequences of a proposed project. In respect to alternatives, an agency must *on its own initiative study all alternatives that appear reasonable and appropriate* for study at the time, and must also look into other significant alternatives that are called to its attention by other agencies, or by the public during the comment period afforded for that purpose.") (cleaned up) (emphasis added). And it would allow FEMA to flout

[4] While this case addresses the adequacy of an EIS, the EA also requires consideration of alternatives and it would feel incongruous to require the agency to develop and study reasonable alternatives on its own initiative at the EIS stage and not at the EA stage, since the EA is the document that will allow agencies to decide whether an EIS is required under NEPA.

its obligations under NEPA to make decisions based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. The case law is clear that "[a]n EA must include brief discussions of the need for the proposal, *of alternatives*[,] and of the environmental impacts of the proposed action and alternatives." *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Eng'rs*, 636 F. Supp. 3d 33, 46 (D.D.C. 2022) (cleaned up) (emphasis added); *see United States v. Coal. for Buzzards Bay*, 644 F.3d 26, 38 (1st Cir. 2011); *McGuinness v. U.S. Forest Serv.*, 741 F. App'x 915, 927 (4th Cir. 2018); *Hapner v. Tidwell*, 621 F.3d 1239, 1244 (9th Cir. 2010); *Sierra Club v. Espy*, 38 F.3d 792, 802 (5th Cir. 1994).

The Court also rejects Defendants' argument that the renewable energy alternatives did not meet the purposes and need of the Utilities PEA, or that these alternatives were not feasible. First, the Utilities PEA states:

> The purpose of this action is to provide grant funding to restore damaged utilities and increase their resiliency for future weather events . . . The need for the action is to *re-establish a safe and reliable network of utilities* (through repair, *replacement*, or relocation) in order to reconnect the communities affected by the storm with safe and efficient delivery of energy, water, sewer service, and communications, and help reduce the potential for future damages by upgrading damaged utilities in accordance with current engineering codes and standards. The grant funding is necessary to address these concerns and reduce the damage and disruption caused by future disasters throughout the Commonwealth.

Docket No. 46-6 at 116 (emphasis added). FEMA's FONSI also stated that "[t]he types of utilities projects covered under this PEA involve repair, restoration, *replacement*, and hazard mitigation of the Commonwealth's utility and communications systems." Docket No. 46-6 at 189 (emphasis added). The Court cannot find that these statements limited FEMA's analysis to rebuilding the electrical power infrastructure as it was before Hurricanes Irma and Maria. Moreover, this narrow

reading would contravene the purpose of NEPA's aim to protecting and promoting environmental quality. The record clearly shows that renewable energy alternatives were reasonable and feasible. *See* Docket Nos. 46-1 at 2-5; 46-6 at 5-67, 97-106. Thus, FEMA violated NEPA by failing to consider renewable energy alternatives, especially since this issue was presented to FEMA during the public comments period. *See* Docket Nos. 46-1 at 6; 46-2 at 20; *see Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) ("[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response."). Thus, FEMA should have considered renewable energy alternatives.

The Court is also unpersuaded by Defendants' claim that it must accord substantial weight to the preferences of the applicant. Puerto Rico's own Central Office for Recovery, Reconstruction and Resiliency ("COR3") prepared a report titled *Build Resilient Communities, Modernize Infrastructure, and Restore the Natural Environment* that reflected the desire to transform the energy system by "[d]evelop[ing] an energy system that is customer-centric, affordable, reliable, and scalable; *incorporates more renewables, microgrids, and distributed energy resources*: and can drive new businesses and employment opportunities and support residents' well-being." Docket No. 46-6 at 99 (emphasis added). Similarly, the December 2017 Build Back Better Report submitted by *inter alia* the Puerto Rico Electric Power Authority and Puerto Rico Energy Commission states:

> The Government of Puerto Rico views the recovery effort as an opportunity to *transform* the Island by implementing solutions that are cost-effective and forward-looking, harness innovative thinking and best practices, and revitalize economic growth. The Governor is sharing this economic and disaster recovery plan consistent with his vision: 'To build the new Puerto Rico to meet the current and

> future needs of the people through *sustainable* economic development and social transformation; transparent and innovative approaches to governance; *resilient, modern, and state-of-the-art infrastructure*; and a safe, educated, healthy, and *sustainable* society.'

Docket No. 46-6 at 74 (emphasis added).

As to Defendants' reliance on mitigation measures to make a finding of no significant impact, "[a]s a general rule, the regulations contemplate that agencies . . . should not rely on the possibility of mitigation to avoid the EIS requirement." *Marsh*, 769 F.2d at 877. Mitigation measures can only support a finding of no significant impact if "imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal." *Id.* (citation omitted). As the First Circuit has stated that

> If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such possible mitigation does not obviate the need for an EIS[, which] is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

Id. (citation omitted). On several instances, the Utilities PEA does not include mitigation measures although FEMA concluded that the alternative would have potential impacts; and in other instances, the proposed mitigation measures are conclusory or insufficiently specific.[5] Thus,

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[5] *See, e.g.*, Docket No. 46-6 at 128 (as to the potential impacts to geology, FEMA found that Alternatives 2 and 3 could cause soil disturbances and changes to topography, but concluded the impact would be negligible to minor without providing support for this statement or proposing mitigation measures), 138 (finding that "[c]ompensatory mitigation may offset adverse impacts to wetlands" without specifying the measures contemplated), 140 (finding that "[c]ompensatory mitigation could offset adverse impacts to wetlands" without specifying the measures contemplated), 143 (notes that the alternative "would have short-term negligible impact on floodplains and floodways due to the actions covered by this PEA, mitigation measures, and compliance with local and federal permit requirements" but fails to specify the measures contemplated), 146 (notes that "[c]oordination with PRDNER and PRPB will occur prior to any work and limit impacts to the extent possible" but fails to specify the measures contemplated), 163 (fails to specify mitigation measures and, instead, shifts the burden to the applicant to "determin[e] the best

FEMA's reliance on such measures to support its finding of no significant impact is improper as it relates to the Utilities PEA.

Accordingly, the Court finds that the record establishes that the projects can significantly affect the human environment and Defendants' contrary conclusion lies outside the legally permissible bounds laid by NEPA. Thus, Defendants must prepare an EIS.[6]

B. Public Facilities PEA

It is also uncontested that the projects included in Public Facilities PEA constitute a "major Federal action" under NEPA. The projects similarly raise substantial questions as to whether they may significantly affect the quality of the human environment. Thus, any funding decisions as to how to restore public facilities, which provide critical services to the people of Puerto Rico, could significantly affect the human environment. *See* Docket No. 46-6 at 221 ("More resilient and upgraded public facilities will allow services to remain open during future disaster events, which will enable quicker emergency response times, increase public safety, reduce injury and death, and increase survivability."), 224-225, 282 ("An interruption of public service or utilities can adversely impact public health.").

However, Plaintiffs challenge to FEMA's decision not to prepare an EIS for the Public Facilities PEA is premised on the argument that FEMA did not adequately consider reasonable renewable energy alternatives to rebuilding the energy infrastructure in the island. The Public

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method of minimizing impacts to local populations."), 171 (fails to specify mitigation measures and, instead, shifts the burden to the applicant to "coordinat[e] with service providers and construction managers to minimize impacts to public services and the communities they support.").

[6] Because the Court finds that FEMA must prepare an EIS in relation to the Utilities PEA, it need not address whether FEMA should have undertaken additional NEPA review in light of significant new information undermining the agency's decision to proceed with rebuilding Puerto Rico's frail electricity grid.

Facilities PEA does consider a renewable energy alternative: the use of microgrids. Docket No. 46-6 at 227, 230, 293, 309. But more importantly, the purpose of the Public Facilities PEA does not encompass restoring or replacing the energy infrastructure in the island,[7] and Plaintiffs do not identify language in the Public Facilities PEA that limits the reestablishment of power in governmental facilities to fossil fuel powered electricity. Moreover, upon review of the Public Facilities PEA, the Court finds that it adequately identifies potential environmental impacts and provides adequately specific information about mitigation measures to counteract such impacts.[8]

Accordingly, the Court finds Plaintiffs have not established by a preponderance of the evidence that FEMA violated NEPA by failing to prepare an EIS in relation to the Public Facilities PEA.[9]

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[7] "The purpose of the programmatic actions considered herein is to restore Puerto Rican public facilities and their functions to meet the post-disaster needs of subrecipients and increase the resiliency of them in response to future disaster events." Docket No. 46-6 at 221. Public facilities covered by this PEA include emergency response facilities, non-profit houses of worship and churches, publicly owned and non-profit higher education facilities, state and municipal government offices, public housing communities, judiciary buildings, correction facilities, public recreation facilities, libraries, archives, museums, and certain PRIDCO facilities. Docket No. 46-4 at 221-22. It does not cover public utilities like the electrical infrastructure. While the PEA includes a section on public utilities, that section is about the impacts of the public facilities projects on utilities like electricity, not about how to restore, replace, or repair the energy infrastructure.

[8] In the section arguing that FEMA failed to take a hard look at the environmental consequences of the alternatives, Plaintiffs only reference a few pages from the Public Facilities PEA. The Court finds that FEMA's assessments in the Public Facilities PEA regarding impacts to air quality and endangered species are more robust than those in the Utilities PEA and include a more thorough discussion of specific mitigation measures to address these adverse impacts.

[9] Plaintiffs also argue that FEMA violated NEPA by failing to prepare a comprehensive EIS encompassing the projects in both the Utilities PEA and the Public Facilities PEA. However, because the Court found that the Public Facilities PEA was adequate and the preparation of an EIS was not mandated by NEPA, the Court need not address this argument. In any case, the Utilities PEA and the Public Facilities PEA do not constitute an overall project to reestablish power to the island since the Public Facilities PEA does not encompass restoring or replacing the energy infrastructure in the island. Similarly, Plaintiffs' claim that FEMA should have undertaken additional NEPA review in light of significant new information undermining the agency's decision to proceed with rebuilding Puerto Rico's frail electricity grid is also denied because the Public Facilities PEA does not encompass restoring or replacing the energy infrastructure in the island.

CONCLUSION

For the following reasons, Plaintiffs' Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. Defendants' Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. The case is hereby remanded for FEMA to prepare an EIS in relation to the Utilities PEA. Judgment shall be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this Tuesday, September 30, 2025.

s/ Jay A. Garcia-Gregory
JAY A. GARCIA-GREGORY
United States District Judge