IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RED LAKE BAND OF CHIPPEWA INDIANS, et al. Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendants and ENBRIDGE ENERGY, LIMITED PARTNERSHIP Defendant-Intervenor.	Civil Action No. 1:20-cv-03817-CKK

ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

OTHER CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

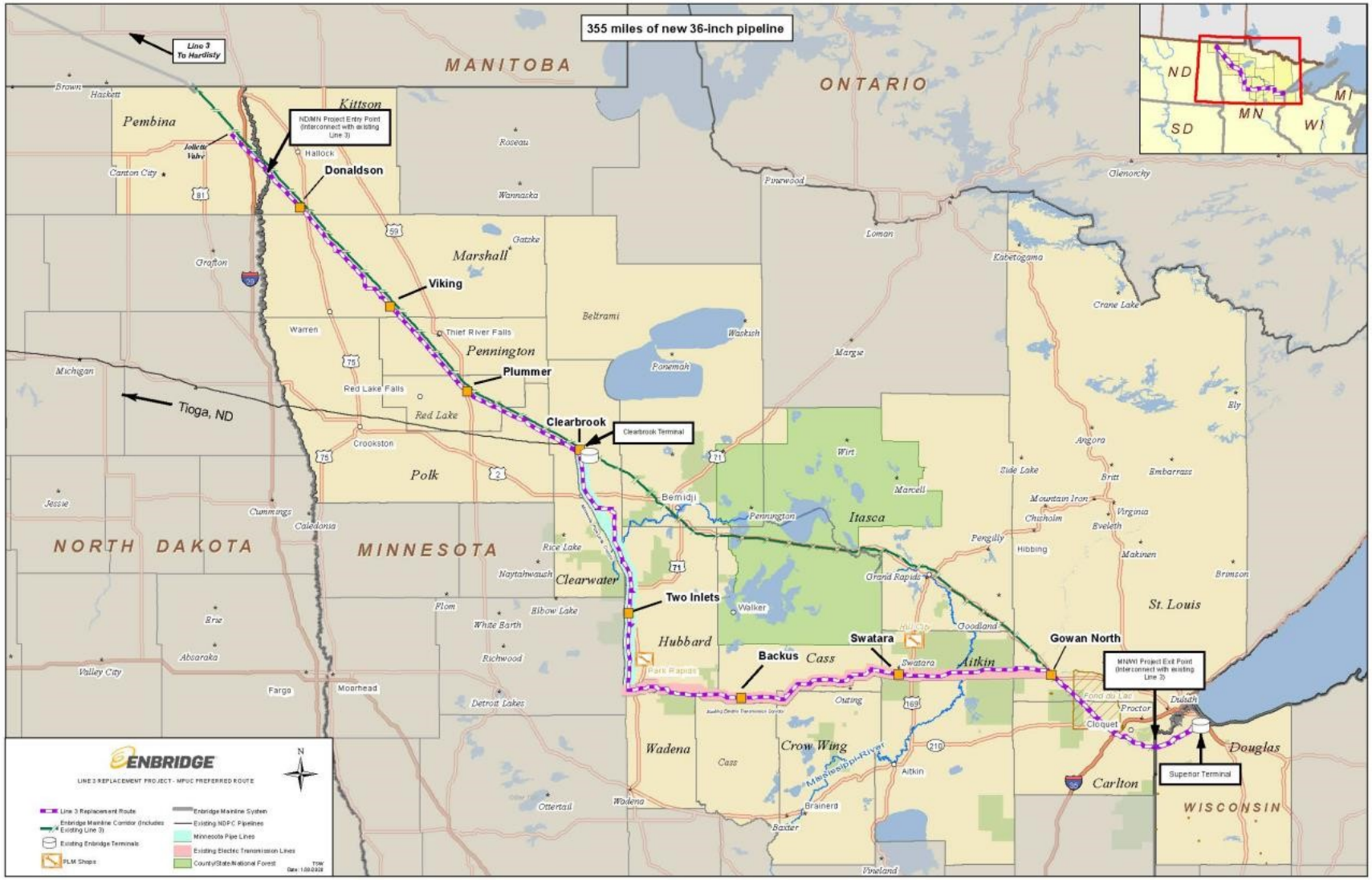
OTHER

ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF ACRONYMS AND ABBREVIATIONS

ALJ	Administrative Law Judge
AMIP	Avoidance, Mitigation, and Implementation Plan
CEQ	The Council on Environmental Quality
Commission	Minnesota Public Utility Commission
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
DOC-EERA	Minnesota Department of Commerce, Energy Environmental Review and Analysis
EA	Environmental Assessment
EA-SOF	Environmental Assessment and Statement of Findings
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
FONSI	Finding of no significant impact
LEDPA	Least environmentally damaging practicable alternative
LIUNA	Laborers' District Counsel of Minnesota and North Dakota
MPCA	Minnesota Pollution Control Agency
NEPA	The National Environmental Policy Act
NRDC	National Resources Defense Council
RHA	Rivers and Harbors Act
ROW	Right of Way
SCADA	Supervisory control and data acquisition
UA	United Association

PROJECT MAP


355 miles of new 36-inch pipeline
Line 3 To Hardisty
MANITOBA
ONTARIO
NORTH DAKOTA
MINNESOTA
Donaldson
Viking
Plummer
Clearbrook
Clearbrook Terminal
Two Inlets
Backus
Swatara
Gowan North
Superior Terminal
Tioga, ND
Pembina
Kittson
Marshall
Pennington
Polk
Beltrami
Itasca
Hubbard
Cass
Aitkin
Crow Wing
Wadena
Carlton
Douglas
St. Louis
WISCONSIN
ND
SD
MN
WI
MI
ENBRIDGE

INTRODUCTION

Enbridge[1] must replace Line 3, an aging oil pipeline that traverses almost 1100 miles from Edmonton, Alberta to Superior, Wisconsin. Originally built in the 1960s, Line 3 has deteriorated to the point where Enbridge has been forced to reduce flow by half and step up environmentally intrusive inspection and maintenance to ensure safe operation. For the past six years, State, federal, and Tribal regulators have been studying Enbridge's proposed "Line 3 Replacement," which will replace the aging Line 3 with stronger, modern pipe and significantly improve safety and operational efficiency.

In November, Enbridge received the last of a suite of authorizations needed to start construction on the remaining portion of the Line 3 Replacement (the "Project")—a permit from the U.S. Army Corps of Engineers ("Corps") issued under section 404 of the Clean Water Act (CWA) and sections 10 and 14 of the Rivers and Harbors Act (RHA) (the "Permit"), necessary for construction of the Project in Minnesota. The Permit is the product of five years of study by the Corps. It captures the extensive work done by the Project's primary regulators—the Minnesota Public Utilities Commission (the "Commission") and the Minnesota Pollution Control Agency (MPCA)—and reflects the Corps' independent review of those agencies' comprehensive analyses, which included extensive input from tribal authorities to avoid and minimize impacts to environmental, cultural and historic resources.

Plaintiffs oppose the Project and have challenged it at every turn. They challenged the Commission's environmental impact statement (EIS) for the Project, arguing among other things that the EIS failed to adequately evaluate the potential effect of oil spills. The Minnesota Court of Appeals rejected most of their arguments but remanded the EIS for additional analysis of the

[1] "Enbridge" refers to Defendant-Intervenor Enbridge Energy, Limited Partnership.

effect of oil spills on Lake Superior watershed, which has been completed. Plaintiffs also challenged MPCA's comprehensive water quality certification for the project, assailing the agency's conclusion that the approved construction methods for crossing streams and wetlands constituted the least degrading alternative. A State administrative law judge has rejected those arguments, too.

Plaintiffs have repackaged these contentions and now assert them against the Corps. They say the Corps ignored the potential effect of oil spills and that the Corps should have evaluated different routes and crossing techniques. Plaintiffs are wrong on each point:

- The Corps *did* consider the effect of oil spills, a fact amply documented in the Corps' Environmental Assessment and Statement of Findings (EA-SOF) for the Project;
- Responsibility for selecting the pipeline's route belongs to the Commission, not the Corps; and
- The Corps worked closely with Enbridge and State agencies to identify the least environmentally degrading crossing techniques for each waterbody crossing, which MPCA made mandatory conditions of the Permit through CWA Section 401.

Plaintiffs' main issue appears to be that the Corps referenced and relied on State analyses rather than duplicating that work. But nothing in the regulations preclude that. In fact, the regulations command it. *See* 33 C.F.R. § 325, App. B; 40 C.F.R. § 1506.2.

The plain deficiency in Plaintiffs' claims is reason enough to deny their motion for a preliminary injunction. But there are others. The harms Plaintiffs claim they will suffer are neither certain nor irreparable. And the Commission already has rejected Plaintiffs' contention that constructing the Project would cause greater harm to the environment than continued operation of the existing Line 3. In fact, the Commission ruled to the contrary, finding that the risks of continued operation along with the economic harm to Enbridge would exceed any harms Plaintiffs might experience. For this reason alone, the public interest overwhelmingly favors

continued construction. A stay would prolong the operation of existing Line 3, would put thousands out of work, and delay critical tax revenue to COVID-strained local governments.

The Court should deny Plaintiffs' motion.

BACKGROUND

I. The Line 3 Replacement Project

Enbridge's Line 3 is a crude oil pipeline that runs 1,097 miles from Edmonton, Alberta to Superior, Wisconsin. Ex. 1, Declaration of Barry Simonson ¶ 4. It is an integral part of Enbridge's Mainline System. *Id.* ¶ 6. But it is old and has deteriorated. Built in the 1960s, Line 3 historically has transported up to 760,000 barrels per day. In recent years, to lower the risk of failure, Enbridge reduced the volume of oil it pumps through the pipeline by half and stepped up inspection and maintenance. *Id.* ¶ 7.

Enbridge concluded in 2013 that Line 3 needed to be replaced. *Id.* ¶ 8. Although Enbridge could manage integrity threats through inspection and repair (known as "integrity digs"), those integrity digs are environmentally intrusive and disturb local landowners. *Id.* And the reduced capacity diminished operational efficiency. *Id.* ¶ 7. A new pipeline would be safer, would reduce the need for intrusive inspection, and would restore capacity Line 3 used to deliver. *Id.* ¶ 8, 10.

In part to address the integrity issues with the existing Line 3, in 2017 Enbridge and the U.S. government executed a Consent Decree obligating Enbridge to reduce flow through existing Line 3 and to retire and decommission the pipeline as expeditiously as practicable following the receipt of required permits and approvals for the Line 3 Replacement. *Id.* ¶ 9.

So Enbridge began work to design and secure regulatory approval for the Line 3 Replacement Project. The Project will replace the existing 34-inch diameter Line 3 pipeline and will upgrade associated equipment and facilities. *Id.* ¶ 11. The new pipeline will be wider (36

inches in diameter) and thicker (35% greater yield strength) and will be built using modern pipeline design, manufacturing, materials, coating, and installation techniques. *Id.* The wider diameter pipe will allow Enbridge to move the same volume of oil more efficiently. *Id.* ¶ 13. And the stronger and more modern pipe would allow Enbridge to do so more safely. *Id.* ¶ 11. When finished, the Project will restore Line 3's average annual capacity to 760,000 barrels of crude oil per day, ensuring that Enbridge can continue to safely transport crude oil from Canada to users in Minnesota and Wisconsin. *Id.* ¶ 10.

The U.S. portion of the Line 3 Replacement has been undertaken in phases. *Id.* ¶ 14. The shorter segments in Wisconsin and North Dakota have been approved and are now complete. *Id.* The final phase of the Project, and the one at issue here, is the replacement of approximately 282 miles of the existing pipeline with approximately 340 miles of new pipeline and associated facilities in Minnesota. *Id.* ¶ 15. Like the original Line 3, the Line 3 Replacement runs from the North Dakota/Minnesota border down to the Minnesota/Wisconsin border, crossing portions of multiple counties and the Fond du Lac Band of Lake Superior Chippewa reservation. *Id.* ¶ 8, 15. Approximately 90 percent of that route is co-located with other Enbridge pipelines, third-party pipelines or utilities, roads, railroads or highways. *Id.* ¶ 15.

II. Regulatory Review and Approval

Typical for a project its size, the Line 3 Replacement required extensive regulatory review by multiple governmental authorities. *Id.* ¶ 19. In 2014, Enbridge started that process. It worked with federal, State, Tribal, and local authorities to design the Project to minimize impacts to the environment, *id.* ¶ 17, and in November 2020, after years of careful study by State and federal regulators, has secured the approvals needed to start work on the segment that crosses Minnesota. *Id.* ¶ 39.

A. State Authorizations and Litigation

1. Certificate of Need and Route Permit

In Minnesota, the Commission is responsible for certifying the need for oil pipelines and selecting their routes. Minn. Stat. 216B.243 (certificate of need authority) and Minn. Stat. 216G.02 (route selection authority). In April 2015, Enbridge submitted applications with the Commission for the Certificate of Need and Route Permit. Ex. 1 ¶ 20. The Commission then began its work, and directed the Minnesota Department of Commerce, Energy Environmental Review and Analysis (DOC-EERA) to develop a comprehensive Environmental Impact Statement (EIS). *Id.*

The agencies' initial steps included extensive public outreach to gather information that would help inform their analysis of alternative pipeline routes and the human and environmental impacts of each. *Id.* ¶ 21. In August 2015, staff from the Commission and DOC-EERA conducted 15 public information meetings in 10 different counties along Enbridge's proposed route. *Id.* The agencies provided an opportunity for comment on route alternatives from July through September 2015, and in February 2016, the Commission granted contested case proceedings to address those questions. *Id.*

Plaintiffs here participated in those proceedings, which were held during the fall of 2017 over sixteen public hearings in eight different cities and two weeks of evidentiary hearings. *Id.* ¶ 22. In April 2018, after full briefing, the ALJ issued a comprehensive report, which included over 1400 findings of fact and conclusions of law. *Id.* The ALJ recommended a route and a series of proposed conditions. *Id.*

In parallel, DOC-EERA was soliciting public comment and analyzing the Project to prepare the EIS. *Id.* ¶ 24. It prepared a draft EIS and put it out for public comment on May 15, 2017. *Id.* In June 2017, the agency held 22 public information meetings in 22 counties to

discuss the draft. *Id.* During that process, the agency considered thirty possible route combinations. *Id.* ¶ 25. It analyzed reasonably foreseeable environmental, economic, and sociological impacts; mitigation; potential oil spill impacts; various safety, efficiency, reliability, and environmental benefits of the Project. *Id.* DOC-EERA finalized its EIS on February 12, 2018, and on May 1, 2018, and after extensive review, the Commission found the EIS adequate. *Id.*

Over the next several months, the Commission evaluated the alternatives identified in the EIS and the findings in the April 2018 ALJ report to identify the best route for the project. *Id.* ¶ 26. The Commission held oral argument in June 2018, and in October 2018, the Commission issued its approved route, which captured numerous modifications to Enbridge's originally proposed route to minimize potential effects of the Project on cultural and environmental resources. *Id.*

The Plaintiffs in this case challenged the EIS in the Minnesota Court of Appeals, raising a number of issues that are similar to the claims raised in this case. *Id.* ¶ 27. On June 3, 2019, the Minnesota court rejected nearly all of Plaintiffs' arguments. *See In re Applications of Enbridge Energy, Limited Partnership,* 930 N.W.2d 12 (2019). It concluded that the EIS sufficiently identified alternatives, used an appropriate methodology to analyze potential oil spill impacts, and adequately analyzed potential impacts on historic and cultural resources and the relative impacts of alternative routes. *Id.* at 36. The court, however, remanded the matter to the agency for it to more fully evaluate the potential impact of an oil spill on the Lake Superior watershed. *Id.*

Minnesota DOC-EERA did so. It further analyzed potential oil spill impacts within the Lake Superior watershed and prepared a revised EIS that concluded that even an unmitigated

release of oil was unlikely to reach Lake Superior in any measurable amount within the 24-hour worst-case model. Ex. 1 ¶ 28. After another round of public notice and comment, the Commission issued an Order on May 1, 2020 finding the revised EIS adequate and approving the certificate of need and route permit for the Project. *Id.* ¶¶ 28–29. With that order, the designated route the Commission approved is the only route Enbridge can use to construct the Project under Minnesota law. *Id.* ¶ 29.

In August 2020, Plaintiffs again sought review in the Minnesota Court of Appeals, challenging the Commission's analysis of the potential environmental effects of an oil spill and various aspects of the Commission's findings and conclusions, including the approved route. *Id.* ¶ 30. But Plaintiffs did not seek a stay of the Commission's orders at that time. Instead, they waited three months, filing a motion for a stay on November 25 (the day before Thanksgiving). The Commission ordered expedited briefing and heard argument on December 4, 2020. After hearing argument, the Commission denied the motion and issued a written order explaining its reasons a few days later. Ex. 2 (Comm'n Order)

In its order, the Commission specifically rejected the contentions Plaintiffs make here about the harm that would result if construction proceeds. The Commission specifically found that the steps the Commission had taken to identify and avoid historic tribal resources and the conditions that it and the MPCA placed on construction would mitigate any harm to the environment or historic tribal resources.

Most significantly, the Commission found that delaying construction would enhance, not reduce the risk of harm to the environment. "There is substantial evidence in the record regarding the rapidly deteriorating condition of Existing Line 3, which increases the chances of an accidental oil spill on that pipeline, chances that will be greatly reduced with the construction

of the state-of-the-art Project." Ex. 2, Comm'n Order at 6. Delaying construction would prolong the period during which oil would be transported "through Existing Line 3, by truck, or by rail—all of which carry substantially more risks than transportation through a new pipeline." *Id.* What's more, held the Commission, "granting a stay would require Enbridge to conduct many more integrity digs to keep Existing Line 3 operable," which themselves "impact[ ] the land "in a manner that is comparable to new pipeline construction." *Id.*

As they do here, the Red Lake Band and the White Earth Band emphasized the potential harm to their lands associated with construction. But the Commission broadened the lens:

> The Leech Lake Band of Ojibwe, whose Reservation contains 46 miles of Existing Line 3, has continuously represented to the Commission that the current situation with that pipeline is untenable and Existing Line 3 must be replaced as soon as possible. The Commission finds that prolonged operation of Existing Line 3 has the potential to inflict irreparable harm on the Leech Lake Band of Ojibwe and the public through continued environmental impacts from that pipeline.

Id.

The Commission denied Plaintiffs' motion to stay. Plaintiffs sought reconsideration, which the Commission denied, and on December 29, 2020, Plaintiffs filed a Motion for Stay Pending Appeal in the Minnesota Court of Appeals. *Id.* That motion is fully briefed and awaits decision. *Id.*

2. CWA Section 401 Water Quality Certification

CWA Section 401 requires applicants for a federal permit anticipated to result in discharges to navigable waters to obtain certification from relevant State and Tribal agencies that the discharge will comply with applicable state water quality standards. 33 U.S.C. § 1341. Enbridge needed to secure two Section 401 certifications for the Minnesota portion of the Line 3

Replacement—one from the State of Minnesota, and one from the Fond du Lac Band of Lake Superior Chippewa, through whose reservation the Project passes.

a. MPCA Section 401 Certification

Enbridge requested Section 401 certification from the MPCA in October 2018 and submitted a revised request on November 15, 2019. Ex. 1, Simonson Decl. ¶ 33. On March 2, 2020, the MPCA issued a preliminary determination and a draft certification for public comment. *Id.*

After receiving public comments, the MPCA granted a contested case hearing before an administrative law judge (ALJ) to consider several factual contentions raised by the Plaintiffs here, specifically their contentions that proposed stream and wetland crossings would have permanent, not temporary, impacts on water quality, and that MPCA's approved crossing methods were not the least degrading alternatives. *Id.* ¶ 34. After hearing testimony from Plaintiffs' experts, including Dr. Triplett, who has submitted a declaration in support of this motion, the ALJ rejected each of Plaintiffs' contentions in a written recommendation issued on October 16, 2020, which the MPCA adopted on November 9, 2020. Ex. 3, MPCA Findings of Fact and Conclusions of Law and Order.

On the duration of impacts, the ALJ considered the litany of arguments and theories Plaintiffs advanced and rejected them all. As to wetlands, "Joint Petitioners have failed to meet their burden of demonstrating that the 'MPCA cannot conclude that Enbridge's impacts on wetlands will be temporary.'" Ex. 3, Att. A Minnesota Office of Administrative Hearings Case No. OAH 60-2200-36909, ALJ's Findings of Fact, Conclusions of Law, and Recommendation, Oct. 16, 2020 at 31. The record, held the ALJ, amply supported the MPCA's determination about the scope of temporary and permanent impacts and that the permanent impacts "will not result in the loss of any existing uses due to compensatory mitigation." *Id.* As to stream

crossings, the ALJ confirmed MPCA's conclusions that the direct effects of open-trench methods would be temporary and would not degrade water quality and rejected the testimony of various Plaintiffs' experts that indirect effects would be longer lasting. *Id.* at 18-21

Also relevant here, the ALJ rejected Plaintiffs' arguments that the various methods approved for crossing each stream and wetland were not the "least degrading" alternative. The ALJ started by noting the rigor of MPCA's review. "Throughout 2019 and 2020, the MPCA had a cross-section of subject matter experts . . . review the proposed crossing methods" and "required the company to provide site-specific justifications for each proposed crossing." *Id.* at 21-22. Through that process, the agency rejected some of Enbridge's original proposals. "Among other things, Enbridge reduced the number of open cut crossings (from 21 to 8); agreed to use a less-degrading, modified dry crossing method at 9 streams; added 2 HDD crossings; and adopted BMPs to further minimize impacts from the proposed crossings." *Id.* As to the one crossing Plaintiffs chose to challenge in detail—the LaSalle Creek crossing—the ALJ methodically analyzed testimony from competing experts and found that MPCA's approval of a dry open-cut crossing was well supported. *Id.* at 25.

On November 12, 2020, the MPCA issued its Section 401 certification for the Project. Ex. 1 ¶ 35. The MPCA determined that there is reasonable assurance that the Project will not violate applicable water quality standards, provided that Enbridge complies with the conditions imposed by MPCA to avoid, minimize, and mitigate Project impacts. *Id.* Among those conditions are requirements to use the specific crossing methods approved by MPCA along the route approved by the Commission.

On November 30, 2020, Plaintiffs challenged the MPCA's Section 401 certification in the Minnesota Court of Appeals. *Id.* ¶ 36. That litigation is pending. *Id.*

b. Fond du Lac Band Section 401 Certification

Enbridge applied for a Section 401 Certification from the Fond du Lac Band of Lake Superior Chippewa, which issued a certification with conditions on April 15, 2019. *Id.* ¶ 32, Ex. 4, Dept. of the Army Environmental Assessment and Statement of Findings, App. B. That certification has not been challenged. Ex. 1 ¶ 32.

B. The Challenged Corps Authorizations

The Project's route has been selected to avoid environmental and cultural resources as much as possible. But, like nearly all linear infrastructure projects, portions of the Project will unavoidably cross some wetlands, streams, and rivers and thus require a permit from the Corps to authorize the discharge of dredged or fill material into "waters of the United States" under Section 404 of the CWA and crossings of navigable-in-fact waters under Section 10 of the RHA. Ex. 1 ¶ 38. The Project also crosses the Corps' Lost River Flood Control Project and thus required authorization from the Corps under Section 14 of the RHA (33 U.S.C. § 408 ("Section 408")). *Id.*

In 2015, Enbridge applied to the Corps' St. Paul District for an individual permit, and Enbridge submitted a revised application on September 21, 2018. *Id.* After two years of consideration and deliberation, extensive coordination with State, Tribal, and federal agencies, and two public comment periods, the Corps issued the Permit on November 23, 2020. *Id.* ¶ 39. The Permit authorizes the temporary discharge of dredged or fill material into approximately 1,049.58 acres of wetlands, permanent discharge of dredged or fill material into approximately 9.97 acres of wetlands, and the crossing of 227 waterbodies. *Id.* The Permit also authorizes the crossing of three RHA Section 10 waters and grants permission to alter the Lost River Flood Control Project. *Id.* It includes numerous conditions—including conditions imposed by MPCA

and the Fond du Lac Band through CWA Section 401—to minimize and mitigate impacts to streams and wetlands.

The Corps documented its extensive analysis in an Environmental Analysis and Statement of Findings (EA-SOF). Ex. 4. The EA-SOF summarizes the Corps' extensive evaluation of the Project and includes, among other things:

- The Corps' evaluation under NEPA and CWA regulations of the Project's potential effects on the environment, and the Corps' explanation for its conclusion that the Project would not have a significant environmental impact;
- The Corps' evaluation under both NEPA and the CWA of permissible alternatives to the project;
- The Corps' extensive analysis under the National Historic Preservation Act of potential effects of the project on cultural resources.

The Corps' assessment of Project effects included an extensive evaluation of the potential effects of oil spills. Ex. 4, App. E at 10-17. The Corps noted that Enbridge conducted a study on failure probabilities related to potential pinhole leaks, which concluded that pipelines monitored with supervisory control and data acquisition systems, in conjunction with computational pipeline monitoring or model-based leak detection systems, greatly lower the potential for long undetected releases. *Id.* at 10. The Corps also referenced the State's EIS, which assessed worst-case scenarios and accidental releases at eight representative sites across northern and central Minnesota. *Id.* at 10-12. The Corps, in turn, looked at the sites studied by the State in determining the most similar circumstances for purposes of analyzing the Lost River crossing. *Id.* The Corps then provided a detailed discussion on the potential effects of an accidental release on the aquatic environment and on the human environment, concluding that the effects of a potential crude oil release on the aquatic and human environments would be no greater than the effects of continuing to operate the existing Line 3. *Id.* at 12-15.

The Corps also explained its consideration of alternatives to the Project. It compared the proposed Line 3 Replacement with various no-action alternatives, such as the use of trucks or rail to move oil, and alternatives involving the continued use of Line 3, the replacement of Line 3 in the existing trench, and combinations thereof. Based on this analysis, the Corps concluded that the proposed Line 3 Replacement was the least environmentally damaging practicable alternative (LEDPA). Ex. 4 at 18-27. The Corps did not consider alternative routes for building the new pipeline, because that is not the Corps' job. That responsibility belongs to the Commission, and the only route for building a new pipeline was the one it approved. And the Corps explained that it had conducted extensive discussions with Enbridge and state agencies to identify the least environmentally damaging method for crossing jurisdictional waters.

The Corps also consulted extensively with Tribal Nations to evaluate the potential for the project to effect historic and cultural resources. Ex. 4 at 109-25. The Corps and tribal representatives conducted a comprehensive Tribal Cultural Resources Survey, involving field visits, consultation meetings, and interviews with Tribal elders. *Id.* at 110-13. A cultural resource management training was held at Fond du Lac tribal college with at least six Tribes participating. *Id.* at 112. After this extensive process, which included input and participation by dozens of tribes and the Minnesota State Historic Preservation Officer, the Corps determined that the Project "would not adversely affect historic properties." *Id.* at 53, 119. And to ensure the Project would not inadvertently affect historic and cultural resources, the Corps required Enbridge to comply with the Avoidance, Mitigation, and Implementation Plan ("AMIP"), which was implemented protection measures for resources identified by the Tribes. *Id.* at 54. The AMIP ensures that tribal monitors, under the direction of the Fond du Lac Tribe, are onsite

during construction and have authority to stop work to allow for the evaluation of a site. *Id.* at 123.

III. Construction Status

To timely commence and complete the Project, upon receipt of the Permits, Enbridge authorized its contractors to begin work on five pipeline spreads.[2] Ex. 1 ¶¶ 55-56. Construction began around December 1, 2020, and is expected to take approximately seven to nine months. *Id.* at ¶¶ 56–57. Work must continue on schedule to be completed by an in-service date in the fourth quarter of 2021 due to season and weather-related conditions that prohibit work during certain times of year to protect resources. *Id.* ¶ 57.

The Line 3 Replacement will be constructed using state-of-the-art construction methods and will follow a typical sequential process which includes: survey and staking, clearing and site preparation, pipe stringing, bending, welding, coating, trenching, lowering-in, backfilling, hydrostatic testing, cleanup, and restoration. *Id.* at ¶ 58. In most areas, these construction processes will proceed in an orderly assembly-line fashion with construction crews moving along the construction workspace. *Id.* at ¶ 59. Construction crews will use temporary access roads for ingress/egress to the Project workspace where travel down the ROW is not feasible. *Id.* Facility construction will follow the same initial sequential process as pipeline construction, including survey and staking, clearing, and site preparation. *Id.*

The pipeline will typically be installed using conventional trenching techniques, subject to the extensive conditioning set forth in the Permit, including MPCA and Fond du Lac Band Section 401 conditions. *Id.* For example, all in-stream work activities will be minimized to the

[2] A "spread" is a separate construction segment. Ex. 1 ¶ 55. Construction of the Project involves five spreads across Minnesota and into Wisconsin. *Id.* Work authorized by the Permits is performed in spreads to minimize the possibility of erosion and potential discharges to waterbodies caused by weather events and to reduce temporal impacts. *Id.*

extent practicable on an area and time duration basis. *Id.* at ¶ 60. In-stream trenching will only be conducted during periods permitted by the appropriate regulatory agencies and applicable permits. *Id.* These timing restrictions include winter construction requirements through wetlands; seasonal prohibitions on activities in wetlands; wild rice timing restrictions; bat and other critical habitat restrictions and restrictions on work within certain waterbodies. *Id.*

Continuing Project work during the winter season is critical to successful implementation of these conditions. *Id.* ¶ 61. The MPCA concluded that construction during the winter would cause fewer impacts from heavy construction equipment use and travel along the construction ROW. *Id.* The Project work can be completed with minimal ground disturbance, protecting underlying vegetation and upper layers of wetland surfaces from disturbances. *Id.* Construction of twenty-three miles of the Project is limited to the winter season to best protect resources and wetlands. *Id.* If work cannot be completed during the winter season, it would need to be postponed until the next winter season. *Id.*

As of January 15, 2021, Project work has included clearing, preparing the route, mobilization of necessary construction equipment, installation of security fence panels and temporary power, erecting temporary shelters, building access roads, digging bore pits, hauling pipe to the ROW, bending pipe, welding, coating, ditching, excavation of utility trenches, excavation and pouring foundations for facilities, and other preliminary facilities work. *Id.* ¶ 63. Trenching and lowering-in of pipe began the first week of January in spread 1. *Id.* ¶ 64. Trenching began in spreads 2-5 by the second week of January. *Id.* Lowering-in of pipe began in spread 3 this week, and is projected to begin in spreads 2, 4, and 5 by the end of January. *Id.*

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008); *Sherley v. Sebelius,* 644 F. 3d 388, 392 (D.C. Cir. 2011).

Plaintiffs seeking a preliminary injunction must establish that: (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20. "The moving party bears the burden of persuasion," *Hospitality Staffing Solutions, LLC v. Reyes*, 736 F. Supp. 2d 192, 197 (D.D.C. 2010), and must demonstrate by a "clear showing" that they are entitled to such relief. *Winter*, 555 U.S. at 22.

Before the Supreme Court's decision in *Winter*, some courts weighed these factors on a "sliding scale," allowing "an unusually strong showing on one of the factors" to overcome a weaker showing on another. *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009) (quoting *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 361 (D.C. Cir. 1999)). It is not settled in this Circuit whether *Winter* precludes a sliding scale approach. *See Sherley*, 644 F. 3d at 392; *Figg Bridge Eng'rs, Inc. v. Fed. Highway Admin.*, No. 20-cv-2188 (CKK), 2020 WL 4784722, at *3 (D.D.C. Aug. 17, 2020). Nevertheless, "one thing is clear: a failure to show a likelihood of success on the merits alone is sufficient to defeat the motion." *Wisconsin Voters Alliance v. Vice President Pence*, No. 20-cv-3791 (JEB), 2021 WL 23298, at *2 (D.D.C. Jan. 4, 2021) (citing *Ark. Dairy Coop. Ass'n, Inc. v. USDA*, 573 F.3d 815, 832 (D.C. Cir. 2009); *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 281 F. Supp. 3d 88, 99 (D.D.C. 2017), *aff'd on other grounds*, 897 F.3d 314 (D.C. Cir. 2018)). The best reading of *Winter* is that it requires Plaintiffs to satisfy each factor, but this Court need not reach that question here because Plaintiffs fail to satisfy any of the *Winter* factors.

ARGUMENT

I. Plaintiffs Are Not Likely to Succeed on the Merits.

A party seeking a preliminary injunction must make a "clear showing" that it is likely to succeed on the merits. *Winter*, 555 U.S. at 22. "[L]ikelihood of success is an independent,

freestanding requirement for a preliminary injunction." *Sherley*, 644 F.3d at 393. Failure to show a likelihood of success on the merits alone is sufficient to defeat a plaintiff's motion. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534, 2017 WL 908538, at *4 (D.D.C. Mar. 7, 2017). If a plaintiff does not show a likelihood of success on the merits, "the Court need not consider the remaining three factors of the preliminary-injunction." *Id*.

Here, Plaintiffs argue that they are likely to show that the Corps violated both NEPA and the CWA (1) by failing to consider the effects of potential oil spills and (2) by failing to consider alternatives to the Project. Plaintiffs are wrong in both respects.

A. Legal Background

1. NEPA

NEPA requires federal agencies to identify and evaluate in advance the likely environmental impact of proposed actions. In general, federal agencies must take a "hard look" at the environmental consequences of proposed actions before taking them, so that they know those consequences in advance. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). The Council on Environmental Quality (CEQ) has promulgated regulations that provide guidance for all federal agencies in carrying out their NEPA responsibilities, *see* 40 C.F.R. pts. 1501-08, and the Corps has promulgated its own complementary regulations to govern its specific process for complying with NEPA, *see* 33 C.F.R. § 325 App. B.

When the proposed federal action will have a "significant impact" on the environment, the agency must prepare an EIS. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11. And to determine whether the action exceeds that threshold, the agency prepares an Environmental Assessment—a concise public document that "provide[s] sufficient evidence and analysis for determining whether an [EIS] is needed," including a brief discussion of reasonable alternatives. 40 C.F.R. §§ 1501.4(b)-(c), 1508.9. If the agency finds its action would not have a significant impact, it

must prepare a "finding of no significant impact" (FONSI) that explains the reasons for the agency's conclusion. *Id.* §§ 1501.4(e), 1508.13.

One of the first steps in this process is for the agency to define the scope of its proposed action, which dictates the scope of the agency's analysis. The scope of the agency's proposed action depends on those activities that are subject to the agency's control and responsibility. NEPA's requirements apply only to "actions with effects that may be major and which are potentially *subject to Federal control and responsibility*." 40 C.F.R. §§ 1500.3, 1508.18 (emphasis added).

The Corps' NEPA regulations specify that the focus of the NEPA review for a CWA section 404 permit is the activity subject to the Corps' regulatory authority—*i.e.*, the discharge of dredged or fill material for which federal authorization is sought. As explained in the preamble to the Corps rules:

> NEPA requires Federal agencies to consider the direct and indirect consequences of Federal actions, not State or private actions. When the Federal action is the issuance of a 404 permit, then the activity which would be authorized by the permit is the subject of the NEPA document. The Corps authorizes the discharge of dredged or fill material in 404 permits. Therefore, *the activity the Corps studies in its NEPA document is the discharge of dredged or fill material.*

53 Fed. Reg. 3120, 3121 (Feb. 3, 1988) (emphasis added). The preamble thus explains that "NEPA does not expand the authority of the Corps to either approve or disapprove of activities outside the waters of the United States." *Id*. So even though Corps permits may be essential for the construction of a larger project, the scope of the Corps' action for NEPA purposes does not include effects of the project from activities outside the Corps' control. *See also Nat. Res. Def.*

Council, Inc. v. EPA, 822 F.2d 104, 128 (D.C. Cir. 1987) (NEPA review need only consider issuance of discharge permit under the CWA and not other aspects of the project).[3]

In the specific context of linear infrastructure projects, these regulations appropriately prevent the "small handle"[4] of federal authorization for stream crossings from transforming State projects into federal projects. *See Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015) (holding that the Corps was not required to prepare a NEPA analysis of the entire pipeline when verifying NWPs for a 485-mile oil pipeline crossing over 2,000 waterways); *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015) (holding that the various federal easements and approvals, including verification of numerous section 404 permits, along the length of a 593-mile oil pipeline did not trigger NEPA analysis for the entirety of the pipeline).

Consistent with the policy against using limited federal involvement to "federalize" State projects, regulations direct the Corps to rely on State environmental analyses wherever possible. Since 1978, CEQ's regulations have encouraged federal agencies to cooperate with States to reduce duplication of effort, and its most recent regulations clarify that this cooperation includes

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[3] *See also, e.g., Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 195 (4th Cir. 2009) ("fact that the Corps' § 404 permit is central to the success of the valley-filling process [as part of a coal mine] does not itself give the Corps 'control and responsibility' over the entire fill"); *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116-17 (9th Cir. 2000) (*abrogated on other grounds by Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011) (Corps' NEPA review of CWA permit need not include the effects of the larger development project); *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 272-73 (8th Cir. 1980) (Corps' NEPA review of Rivers and Harbors Act permit authorizing transmission line river crossing was required to consider only those parts of the power line that affected navigable waters, not the entire transmission line project); *Save The Bay, Inc. v. U.S. Corps of Eng'rs*, 610 F.2d 322, 327 (5th Cir. 1980) (NEPA review of Corps permit authorizing discharge of dredged material for construction of facility's wastewater pipeline not required to consider overall impacts of facility).

[4] *See* Cong. Research Serv., *Oil and Natural Gas Pipelines: Role of the U.S. Army Corps of Engineers*," at 6, n.14 (June 2017) ("For a project such as an oil pipeline, in which only discrete segments are federalized, the Corps is described as having a 'small federal handle' based on the analogue that the pipeline is the pan and the federal role is limited to a small handle.").

the use of State analyses: "To the fullest extent practicable unless specifically prohibited by law, agencies shall cooperate with State, Tribal, and local agencies to reduce duplication between NEPA and State, Tribal, and local requirements, *including through use of studies, analysis, and decisions developed by State, Tribal, or local agencies*." 40 C.F.R. § 1506.2(b) (2020) (emphasis added). The Corps' regulations say so, too: "The district engineer should, whenever practicable, incorporate by reference and rely upon the reviews of other Federal and State agencies." 33 C.F.R. pt. 325, App. B §7.b.

2. Clean Water Act

Section 404 of the CWA requires the Corps to evaluate the location of proposed discharges under guidelines developed by the Corps and the U.S. Environmental Protection Agency (EPA). 33 U.S.C. § 1344(b). These guidelines—the "404(b)(1) Guidelines"—require the Corps, among other things, to determine whether a permit applicant has demonstrated that the proposed discharge constitutes the least environmentally damaging practicable alternative. 40 C.F.R. § 230.10(a). An alternative is practicable if it is "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)(2). The range of practicable alternatives can further be limited by the choices of other governmental agencies with primary responsibility for a project. The Corps need not consider alternatives that other agencies, State or federal, have ruled out. *See Hoosier Envtl. Council v. U.S. Army Corps of Eng'rs*, 722 F.3d 1053, 1060-61 (7th Cir. 2013) (holding that Corps' decision not to consider highway routing alternatives ruled out by State and federal highway agencies was proper); *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1447 (1st Cir. 1992) (finding that Corps need not duplicate analysis of State agency and EPA, which concluded that certain alternatives were impracticable); *accord Friends of Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1063 (D.C. Cir. 2017) (holding, under

NEPA, that federal agencies need not reanalyze alternatives rejected by responsible State agencies).

3. Standard of Review for Plaintiffs' Merits Claims

The Court reviews the Corps' actions here under the familiar arbitrary and capricious standard. "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." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98 (1983). As this Court has stated, the "standard is deferential in order to guard against 'undue judicial interference' with the lawful exercise of agency discretion and prevents 'judicial entanglement in abstract policy disagreements which courts lack both the expertise and information to resolve.'" *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 58, 63 (D.D.C. 2010) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004)), *aff'd in part, rev'd in part on other grounds*, 661 F.3d 1147 (D.C. Cir. 2012). "When an agency 'is evaluating scientific data within its technical expertise,' an 'extreme degree of deference to the agency' is warranted." *Nat'l Comm. for the New River v. F.E.R.C.*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *B & J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004)). The lack of "ideal clarity" in an agency's decision does not make it arbitrary or capricious. *Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 497 (D.C. Cir. 2016). The court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.

29, 43 (1983) (citing *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

B. The Corps Considered the Potential Effects of Oil Spills.

Plaintiffs argue the Corps failed to meet its NEPA duty, because it did not consider the effects of potential oil spills. They say the obligation to consider the effect of spills for a project like this is settled law. Plaintiffs are wrong, both factually and legally.

1. Plaintiffs Have Overlooked the Corps' Discussion of the Effects of Potential Oil Spills in the Decision Document.

Plaintiffs assert that "[t]he Corps' Decision Document is entirely void of any analysis of the risks of and potential harms associated with oil spills from the Project." Doc 2-2, Pls.' Mem., at 15. This statement is simply not true.

The Corps discusses the effects of potential oil spills in considerable depth in Appendix E of the EA-SOF, which is the Corps' EA for the Lost River Crossing authorization under section 408. This document addresses various aspects of the overall reliability and safety of the pipeline as it relates to potential oil spills, consistent with the Corps' authority under section 408 and incorporates by reference relevant aspects of the technical reports and comprehensive oil spill analyses conducted at the state level.

For example, the first section addresses the potential for pinhole releases of oil from the pipeline. In this analysis, the Corps considers Enbridge's 50-page study on pinhole release risk, and concludes that "pipelines monitored with supervisory control and data acquisition (SCADA) systems, in conjunction with computational pipeline monitoring or model-based leak detection systems, greatly lower the potential for long undetected releases." Ex. 4, App. E at 10.

Next, the Corps evaluates worst-case discharge spill scenarios. In this section, the Corps considers the state's oil spill modeling efforts, referencing at times the oil spill analysis

conducted by the state (EIS Sections 10.3 and 10.4), and the Assessment of Accidental Releases, an approximately 1,000-page technical report prepared by expert consultants. *Id.* at 10. To assist in assessing potential impacts associated with a worst-case release, Enbridge provided maximum spill volume estimates based on response times, valve locations, and pipeline volumes at eight representative sites assuming a complete pipeline rupture. The Corps considers this analysis, and compares the characteristics of the representative sites to the Lost River crossing, including watercourse width, hydrology features, and identified uses. *Id.* at 10-11. For example, the Corps notes that: "[t]he Lost River crossing … is similar to several previously modeled watercourses that were assessed [in the Assessment of Accidental Releases]. …Other watercourses that were previously simulated with this width were the Mississippi River at Palisade (sinuous channel through forest), the Mississippi River at Ball Club (sinuous channel through marsh and forest), and the Shell River to Twin Lakes (sinuous channel through marsh and forest)." *Id.* at 11.

After assessing the worst-case scenario, the Corps considered the potential effects of an accidental release on both the aquatic and human environments. Incorporating portions of the Assessment of Accidental Releases (sections 9.5.1 and 9.5.2), the Corps addressed the potential effects of a crude oil release on benthic invertebrates, fish, amphibians, reptiles, birds, and semi-aquatic mammals. *Id.* at 12-13. These analyses also consider the effect of an accidental release on wild rice, human use and occupancy patterns, recreational activities, and water supply. *Id.* at 13-14.

The Corps also considers spill prevention, leak detection, and spill response measures. For spill prevention, the Corps refers to Enbridge's integrity management program as a key component to preventing crude oil releases and incorporates analysis from section 10.5.1.1.1 of

the state EIS. *Id.* at 15. For leak detection, the Corps summarizes some of the leak detection systems in place and refers to state EIS section 10.5.3.1 for additional details. *Id.* As to spill response, the Corps considers the challenges response teams may face to containing a spill, such as remote locations, aquatic environments, and winter conditions and refers to section 10.5.3.2 of the state EIS. *Id.* at 15-16. The Corps also mentions the oil spill containment, recovery and clean-up techniques and equipment described in and 10.6 of the state EIS. *Id.*

In the last section, the Corps describes the July 2010 release near Marshall, Michigan and considers the significant investments Enbridge has made to improve safety and reliability. *Id.* at 16. "Based on the findings and recommendations of the National Transportation Safety Board investigation into the Marshall incident, and Enbridge's own investigation, Enbridge has made significant changes to improve the safety and reliability of its operations." *Id.* at 16. For example:

- Revised and enhanced all Control Center procedures related to decision-making, handling pipeline start-ups and shut-downs, leak detection system alarms, communication protocols, and suspected column separations.
- Established a Pipeline Control Systems and Leak Detection department, doubling the number of employees and contractors dedicated to leak detection and pipeline control.
- Between 2010 and 2016, Enbridge ramped up its pipeline integrity programs to improve system safety and reliability. Enbridge conducted more than 900 in-line inspections, over 14,000 digs, and approximately 340 miles of pipeline replacement on the entire Enbridge pipeline system.
- Developed and launched the first annual Operational Reliability Review in 2013, creating a new standard for open and transparent communications with internal and external stakeholders about [Enbridge's] safety and reliability performance ….
- Developed the Emergency Responder Education Program, an online training tool, to help emergency responders and 911 call center personnel quickly and effectively respond to a pipeline emergency.
- Bolstered emergency response and preparedness efforts by holding 360 company-wide exercises, drills, and equipment deployment events in 2015, and 320 in 2016.

- Created the E3RT, a company-wide team of employees trained in emergency response and the Incident Command System, to respond to large-scale, long-term incidents beyond the response capacity of a single region or business unit.

Id. at 16-17. The Corps concludes that these measures, along with Enbridge's spill prevention and leak detection measures, "will reduce the risk of a spill resulting in environmental and human impacts." *Id.* at 17.

Plaintiffs appear to have overlooked all of this.

2. The Corps' Consideration of the Potential Effect of Oil Spills Was More Than Sufficient to Satisfy Its NEPA Responsibility.

a. The Corps Need Not Consider Effects of "Operation" When Evaluating Effects of "Construction."

The Corps need not consider the environmental consequence of potential oil spills in evaluating construction related impacts that would be authorized under Section 10 and Section 404 permits, because those potential effects are beyond the scope of the Corps' regulatory authority. Plaintiffs challenge that position, but the Court need not resolve that question, because, in any event, the Corps *did* consider the potential effect of spills in its section 408 analysis, which it made part of the EA-SOF for its section-10 and section-404 authorizations. The Corps' position is well grounded.

First, the Corps' position is harmonious with its regulations' command to prevent the "small handle" of Corps authority over crossings of jurisdictional waters from transforming what is fundamentally a State authorization into a federal one. *See* 33 C.F.R. Part 325, App. B § 7.b.2 (Whether "the regulated activity comprises 'merely a link' in a corridor type project," is one factor the Corps must consider to determine whether it has "control and responsibility for portions of the project beyond the limits of Corps jurisdiction"). There is no federal agency responsible for (and Congress does not regulate) the construction and operation of oil pipelines. *Sierra Club v. United States Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 34 (D.D.C. 2013) ("there

is no comprehensive federal permitting system governing domestic oil pipelines"). Nor is there federal discretion to control otherwise private activity on private property. *Id.* at 32 ("federal agencies do not 'allow' or 'permit' construction of a domestic oil pipeline on privately owned land"); *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 273 (8th Cir. 1980) ("the fact that part of the [project] will cross [federal jurisdiction] does not suffice to turn this essentially private action into federal action."). Corps regulations and policy specifically assert jurisdiction only over the jurisdictional waters and connected action areas. *See* 33 C.F.R. Part 325, App. B § 7.b; Standard Operating Procedures for the Corps Regulatory Program, at 16-17 (July 2009). They do not authorize the Corps to regulate the operation of pipelines, and spills occur, if at all in connection with pipeline operation, long after construction-related activities the Corps has authorized are complete.[5]

Second, the Corps need only consider environmental effects that are proximately caused by actions subject to its jurisdiction and control. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004). The section-10 and section-404 permits authorize discharges and crossings associated with the construction of the pipeline across jurisdictional waters. Whether spills occur depend entirely on the operation of the pipeline, which is well beyond the Corps' regulatory jurisdiction. "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the

[5] This is not to say that oil spills are not regulated. The Corps, however, does not have the authority to address spills or leaks from pipelines. Oil spills, to the extent they occur, are operational impacts caused by the failure of an oil pipeline. These operational impacts are addressed by other agencies. For example, the Environmental Protection Agency and the Coast Guard address oil spills through the Oil Pollution Act. The Department of Transportation regulates pipeline transportation of hazardous liquids, including crude oil and petroleum products, and the Pipeline and Hazardous Materials Safety Administration reviews oil spill response plans and comprehensively regulates the integrity of onshore oil pipelines, among other things.

effect." *Pub. Citizen*, 541 U.S. at 770. And where an agency is "not the legally relevant cause of effects, it cannot be required to conduct review on those effects." *See id.* at 768.

b. The Cases Cited by Plaintiffs are Distinguishable.

Plaintiffs' argument that it is settled law that the Corps must consider effects of oil spills when issuing permits is wrong. The cases on which Plaintiffs rely are inapplicable, because the Corps in those cases had much broader authority over the projects than the Corps has here.

Plaintiffs' reliance on Judge Boasberg's decision in *Standing Rock Sioux Tribe* is particularly misplaced. *See* Pls.' Mem. at 15-16 (citing *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101 (D.D.C. 2017)). In that case, the Corps granted an easement under Section 408 and the Mineral Leasing Act, which gave the Corps considerably greater power over the operation of the proposed pipeline. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 116. By contrast the Section 404 and Section 408 authorizations for the Line 3 Replacement involve almost exclusively temporary construction related impacts and do not convey a permanent interest in Corps property. That distinction alone makes *Standing Rock Sioux Tribe* inapplicable.

The other cases on which Plaintiffs rely are similarly inapposite. For example, *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846 (9th Cir. 2005), involved the Corps' authorization of a permanent extension of a refinery pier into navigable-in-fact waters—an activity central to the overall project. In *Ocean Advocates*, the State evaluated limited aspects of the project, but did not address oil spill risk. Had the State done so (as Minnesota did here), the court suggested, further NEPA analysis of spills likely would have been unnecessary. *See* 402

F.3d at 870 (citing *City of Carmel–By–The–Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1162-63 (9th Cir.1997)).[6]

Of the cases Plaintiffs cite, *Stop the Pipeline v. White*, 233 F. Supp. 2d 957 (S.D. Ohio 2002), is most closely analogous to the Corps' approach, and that case supports the Corps' position. There, the Corps prepared an EA in connection with its issuance of a CWA section 404 permit authorizing the installation of a petroleum products pipeline extending 149 miles from Kenova, West Virginia to Columbus, Ohio. Environmental groups argued that the Corps never specifically assessed the risk to the environment posed by potential leaks and spills from the pipeline, and that the Corps inappropriately deferred to a report prepared by another agency on all safety issues. The court rejected this claim and held "[a]n agency may fulfill its obligations under NEPA to conduct an independent evaluation of environmental impacts by reviewing and relying on the information, data and conclusions supplied by other federal or state agencies. NEPA in fact encourages lead agencies to obtain comments from other agencies with relevant expertise." 233 F. Supp. 2d at 967–68. The same holds true here, where the Corps has appropriately utilized State analyses.

c. The Corps Adequately Analyzed Potential Spills.

Plaintiffs do not explain why the Corps' discussion of spills in the EA-SOF was inadequate. And Plaintiffs cannot provide that explanation for the first time in a reply brief. *See Herbert v. Architect of Capitol*, 920 F. Supp. 2d 33, 44 (D.D.C. 2013) ("[I]t is well-established that the Court need not consider arguments raised for the first time on reply."). Instead, they cite

[6] *Sierra Club v. Sigler*, 695 F. 2d 957 (5th Cir. 1983) is similar. There, the Corps issued "five permits," including an RHA section 10 permit, "authorizing the deepening of the [Galveston, TX] channel and construction of [an] oil terminal, tank farm, and pipeline system." 695 F. 2d at 963. Because of its more substantial regulatory role, the Corps prepared an EIS and considered the potential for spills.

an example of what the Corps should have done, but even that example illustrates that the Corps got it right.

In *Atchafalaya Basinkeeper*, for example, the Corps took the same basic approach it took here. *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 2020 WL 1450750, at *6-7, *13 (M.D. La. Mar. 25, 2020). There, as here, the Corps authorized an oil pipeline under both CWA section 404 and section 408. And there, as here, the Corps included a substantial analysis of potential spills as part of its section 408 analysis and incorporated that analysis into its section 404 analysis. The district court rejected arguments from environmental groups that the Corps' reliance on its section 408 work was not good enough.

C. The Corps' Consideration of Spills Also Satisfied Its CWA Obligations.

Plaintiffs also argue that the Corps' alleged failure to consider the potential effects of spills undermines its analysis of alternatives and the public interest under Corps CWA regulations. But the Corps identified the potential for spills as a consideration in its public interest review, Ex. 4 at 51, and compared the likelihood of spills from pipelines the effect of spills from trucks and trains, *id.* at 19-20. Plaintiffs have not demonstrated a likelihood of success on this point.

D. The Corps Appropriately Considered Alternatives.

Plaintiffs argue they are likely to prevail on their claim that the Corps failed to adequately evaluate alternatives as required by NEPA and the 404(b)(1) Guidelines. They claim the Corps should have evaluated routing alternatives that the Commission already has rejected and construction techniques the MPCA put off limits in its Section 401 water quality certification. The foundation for both pillars of this argument is Plaintiffs' assertion that "federal agencies must conduct their own independent review of projects under NEPA and have no authority to

defer to a state agency's conclusion in whole or in part." Pls.' Mem. at 20 (citing 40 C.F.R. § 1506.3). Plaintiffs again are wrong.

As explained above (at 22), both the CEQ and Corps regulations specifically direct the Corps to cooperate with State regulators to reduce duplication. 40 C.F.R. § 1506.2(b), (c); 33 C.F.R. pt. 325, App. B § 7.b. And in case after case, federal courts have rejected invitations to require federal agencies to resuscitate alternatives that responsible State or coordinate federal agencies have rejected. *Supra* at 24.

For example, in *Friends of Capital Crescent Trail*, the D.C. Circuit upheld the Federal Transit Administration's decision to limit its NEPA alternatives analysis for the Purple Line to the alternative Maryland had approved and the no-build option. *See* 877 F.3d at 1064. The court explained that Maryland's elimination of other alternatives "narrowed FTA's role: Its ultimate decision was to decide whether or not to fund the preferred alternative." *Id.* at 1063. "Agencies need not reanalyze alternatives previously rejected." *Id.*

Likewise, in *Hoosier Environmental*, the Seventh Circuit upheld against NEPA challenge the Corps' decision to eliminate from its analysis an alternative the Federal Highway Administration and the Indiana Department of Transportation had ruled out. *See* 722 F.3d at 1059-61. "The Corps of Engineers," the court explained, "is not responsible for the interstate highway system." *Id.* at 1059. It need not "reinvent the wheel" to consider alternatives rejected by the primary regulatory decision-makers. *Id.* at 1061. Doing so "would usurp the responsibility that federal and state law have assigned to federal and state transportation authorities. The wetlands tail would be wagging the highway dog." *Id.*[7]

[7] *See also, e.g., Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 521 (9th Cir. 1994) (rejecting argument that NEPA required federal agency to revisit prior state determinations and noting that "NEPA mandates state and federal coordination of environmental

The Corps' consideration of routes and crossing techniques for the Line 3 Replacement fits comfortably within this authority. The Corps lacked any authority to usurp the Commission's responsibility for siting oil pipelines in the State of Minnesota, so it was not obligated to revisit alternatives the Commission had rejected. And it was entirely appropriate for the Corps, having participated in MPCA's evaluation of specific proposed crossing techniques, to abstain from revisiting those decisions. Indeed, because MPCA made construction along the approved route using the approved crossing techniques conditions of its Section 401 certification, those conditions became conditions of the Corps permit from which the Corps could not deviate. 33 U.S.C. § 1341(d); *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 645-46 (4th Cir. 2018).

II. Plaintiffs Have Not Demonstrated Irreparable Harm.

"This Circuit sets 'a high standard for irreparable injury.'" *Tolson v. Stanton*, 844 F. Supp. 2d 53, 58 (D.D.C. 2012) (quoting *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 297 (D.C. Cir. 2006)). To constitute "irreparable harm," the injury alleged must be "both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief." *Figg Bridge Eng'rs, Inc. v. Fed. Highway Admin.*, No. CV 20-2188 (CKK), 2020 WL 4784722, at *6 (D.D.C. Aug. 17, 2020) (quoting *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015)). Harm that is merely "feared" to "occur at some indefinite time" is insufficient for injunctive relief.

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review [and] the absence of a more thorough discussion in the EIS of alternatives that were discussed in and rejected as a result of prior state studies does not violate NEPA"); *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1447 (1st Cir. 1992) ("[T]he Corps is not required under [the 404(b)(1) Guidelines] to duplicate the analysis conducted by [State regulator] and EPA."); *Advocates For Transportation Alternatives, Inc. v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 2d 289, 308 (D. Mass. 2006) ("When conducting its practicable alternatives analysis, the Corps is entitled to rely on information contained in a[] … state-required Environmental Impact Report.").

Baumann v. D.C., 655 F. Supp. 2d 1, 7 (D.D.C. 2009) (denying injunction where the court was required to guess what "may" occur "if" an investigation continued). Indeed, it is "bedrock law that injunctions 'will not issue to prevent injuries neither extant nor presently threatened, but only merely feared.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 41 (D.D.C. 2013). Nor can the plaintiff rely on conclusory allegations threatened harm. *Merriweather v. Lappin*, 680 F. Supp. 2d 142, 144 (D.D.C. 2010); *Nichols v. Agency for Int'l Dev.*, 18 F. Supp. 2d 1, 5 (D.D.C. 1998). She must "substantiate the claim [of] irreparable injury." *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 39 (D.D.C. 2013).

Irreparable injury cannot be presumed from the alleged violation of an environmental law. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544–45 (1987); *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 324 (D.C. Cir. 1987). General harm to the environment is not sufficient to show concrete injury-in-fact under Article III. *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). It certainly will not suffice to establish irreparable injury. Courts in this circuit have found irreparable harm in cases involving alleged violation of environmental laws only where the plaintiffs themselves would suffer a concrete, certain, and irreparable injury traceable to the alleged violation. *See, e.g.*, *Fund for Animals v. Norton*, 281 F.Supp.2d 209, 221 (D.D.C. 2003) (finding irreparable harm based on aesthetic harm that actions "would cause plaintiffs"); *Fund for Animals v. Clark,* 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (finding irreparable harm based on "aesthetic injury the individual plaintiffs would suffer"); *see also Nat'l Wildlife Fed'n*, 835 F.2d at 325 (finding irreparable harm where plaintiffs "specifically identif[ied] locations where its members' interests are threatened by [defendant's] actions").

Plaintiffs here point to the environmental impacts of construction. They note that 9.97 acres of wetlands would be permanently impacted by the Project, and, based on opinions offered

by Dr. Triplett, they argue that construction authorized in wetlands will permanently alter wetland hydrology and cause a cascading series of environmental harms. Pls.' Mem. at 23.[8] Plaintiffs' contentions about the hydrological effects of construction in wetlands are the same ones they litigated in the contested case before the MPCA, and that the ALJ rejected. As here, Plaintiffs presented to the ALJ Dr. Triplett's opinion that impacts to wetlands would be more permanent and extend beyond the Project right-of-way. Compare Ex. 3, att. A at 28-34 *with* Pl. Ex. L ¶ 27. And as here, Dr. Triplett specifically assailed mitigation plans that would compensate for construction-related impacts and restore environmental uses and opined that construction would permanently destabilize streams. *Compare* Ex. 3, att. A at 20 *with* Pl. Ex. L ¶ 19 *and* Ex. 3, att A at 32 *with* Pl. Ex. L at ¶ 18.

The ALJ rejected these theories. He considered claims about the alleged long-term effects of pipeline construction and found them unpersuasive, concluding that impacts (except for the roughly 10 acres of permanent fills) would be temporary and confined to the workspace. Ex. 3, att. A at 32. He found mitigation plans sufficient and concerns about long-term effects of bank destabilization unsupported. *Id.* at 20-21, 32. These findings are preclusive and cannot be relitigated here. *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) ("[W]hen a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.").[9]

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[8] Plaintiffs submitted a supplemental declaration from Dr. Triplett on Jan. 13. That declaration merely describes ongoing construction and re-states opinions offered in her Dec. 23 declaration.

[9] The lack of complete mutuality is not a bar because the estopped parties – Plaintiffs - were parties to the Commission proceedings. *Aufderhar v. Data Dispatch, Inc*., 452 N.W.2d 648, 650 (Minn. 1990) (recognizing non-mutual defensive collateral estoppel provided that the issue is identical to the one in the prior adjudication, there was a final judgment on the merits,

What's more, the Corps reached identical conclusions, which Plaintiffs do not challenge. Like MPCA, the Corps concluded that, apart from the 10 acres of permanent fills, various impacts to wetlands would be minor and short-lived. Ex. 4 at 29-32, 37-39. Plaintiffs do not claim that these conclusions were arbitrary, capricious or contrary to law.[10]

Plaintiffs also have failed to demonstrate that the actual permanent effects of project construction will cause actual irreparable injury to their members' interests. One Sierra Club member describes construction that will occur near her property and expresses fear that "destruction of wetlands" near her property would "impair aesthetic and spiritual interests." Pl. Mem. Ex. I ¶ 9. Plaintiffs characterize these effects as "permanent destruction," Pl. Mem. at 24, but neither the declarant nor the Plaintiffs assert that any of the actual permanent fill activities authorized by the Permit would occur anywhere near the declarant's property.

Plaintiffs also assert that pipeline construction will harm resources of cultural significance. Pl. Mem. at 23-24. But the Corps specifically concluded that the Project "would not adversely affect historic properties." Ex. 4 at 53, 119. Plaintiffs do not challenge that conclusion as arbitrary, capricious, or contrary to law. Plaintiffs go on to argue that construction already has affected previously unidentified cultural resources. Pl. Mem. at 24. But the Corps specifically accounted for that possibility and, through the AMIP, put measures in place to

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and the estopped party was a party to the prior adjudication and given a full and fair opportunity to be heard.

[10] Plaintiffs invite the Court to infer the areas cleared for construction will remain permanently free of vegetation, stating "Enbridge will remove vegetation along the entire route of the pipeline so that a 10-foot wide swath will remain entirely vegetation-free, while an additional 20-foot width would remain tree-free." Pl. Mem. at 10 (citing EA-SOF at 36). But as the Corps explains (on the same page Plaintiffs cite), "[t]his temporarily impacted area would be allowed to revegetate after construction and would be monitored to ensure the wetland restoration is progressing towards forested wetland." Ex. 4 at 36.

protect those resources.[11] Sections 4.2.2 and 4.2.3 of the AMIP give Tribal Monitors authority to stop work if they conclude that construction would harm cultural resources.

To satisfy their burden that they will suffer irreparable harm absent an injunction, they must show that harm is certain to occur. *Figg Bridge Eng'rs, Inc.*, 2020 WL 4784722, at *4. The Permit itself ensures cultural resources should not be harmed at all.

III. The Balance of Harms and the Public Interest Weigh Against an Injunction.

To prevail on their motion for a preliminary injunction, Plaintiffs must demonstrate that the balance of the equities tips in their favor and that the injunction would serve the public interest. *Winter*, 555 U.S. at 20, 23-24; *Cayuga Nation v. Zinke*, 302 F. Supp. 3d 362, 374 (D.D.C. 2018); *Heart 6 Ranch, LLC v. Zinke*, 285 F. Supp. 3d 135, 144 (D.D.C. 2018) (denying relief where the balance of harms were in equipoise). When "balanc[ing] the competing claims of injury, the court must "consider the effect of each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (citations omitted). The court should give "particular regard for the public consequences in employing the extraordinary remedy of [injunctive relief]." *Ctr. for Pub. Integrity v. United States Dep't of Def.*, 411 F. Supp. 3d 5, 14 (D.D.C. 2019). In *Winter*, the decisive factor was the Supreme Court's determination that a preliminary injunction was contrary to the public interest. 555 U.S. at 24. ("[E]ven if plaintiffs have shown irreparable injury … any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors."). Thus, where more harm would come from

[11] The AMIP includes protocols for unanticipated discoveries. If an unanticipated site is encountered, notification will be provided. So, for example, when survey crews encountered a previously unidentified structure on the ROW in early December, Enbridge notified the Fond du Lac Tribal Historic Preservation Officer ("THPO"). Ex. 1 ¶ 49. The THPO then followed the appropriate protocols pursuant to the AMIP. *Id.* A temporary stop work order was verbally issued, and all activities at the location ceased. *Id.* An official written stop work order followed. *Id*. A Tribal Monitoring Team is now preparing a report of findings for review by the Corps. *Id.*

enjoining an activity than from letting it continue, an injunction should not issue. *Id.* That is the case here.

Plaintiffs argue that an injunction would not injure the Corps, Pls.' Mem. at 25, but that overly simplistic view ignores the injuries that would result to Enbridge, the environment, State and local communities, and the Tribes that support this Project.

Indeed, the *key* reason for the Line 3 Replacement is to improve public safety and protection of the environment by replacing an aging crude oil pipeline operating at reduced capacity, with a large number of identified pipe defects and anomalies, with a new pipeline constructed with the latest construction practices, technology and materials. Ex. 1 ¶¶ 7–11. As the record amply demonstrates, Line 3 is deteriorating at an accelerating rate, and its continued operation poses a far greater risk of accidental release and resulting environmental damage than the Replacement Project. Ex. 4 at 23; *see also* Ex. 1 at ¶ 67. Were Line 3 to continue in operation, Enbridge would need to conduct an increasing number of integrity repairs, which themselves are environmentally intrusive and so disrupt local landowners. Ex. 4 at 22 (concluding that maintaining existing Line 3 would require approximately 6,250 integrity digs over the next 15 years in Minnesota); *see also* Ex. 1 ¶ 66. For example, Enbridge would need to conduct an estimated 484 digs within the Chippewa National Forest and on the Leech Lake and Fond du Lac Reservations, impacting 45 acres of land. Ex. 1 ¶ 71, Ex. 4 at 22.

These facts are of paramount importance. When these very Plaintiffs asked the Commission to stay its authorizations, citing as irreparable harm the same construction-related effects they complain about here, the Commission found that continued Line 3 operation posed far greater risk to the environment and was contrary to the public interest, and thus denied the Plaintiffs' request for a stay:

> The Commission carefully considered the potential negative impacts that the construction and operation of the Project could have on the environment and the public throughout this proceeding and concluded that ***the risks of continuing to transport oil through Existing Line 3 are greater than those caused by construction and operation of the Project***. The Commission's prior decisions establish ***significant mitigation measures that should reduce the negative impacts of construction and operation of the Project***. The Commission also concludes that ***granting a stay would cause its own environmental impacts that must be weighed against those of construction, along with significant economic impacts***. Considering all these factors, the Commission concludes that the balance of harms weighs against the Motion.

Ex. 2 at 7 (emphases added). These conclusions, too, are entitled to preclusive effect and cannot be re-litigated here. *Univ. of Tennessee*, 478 U.S. at 799.

Significantly, even a relatively short injunction would cause significant delays in completion of the Project. To best protect certain types of wetlands, Enbridge must complete construction in the winter months, when those wetlands are frozen solid. Ex. 1 ¶ 61. If Enbridge is prevented from completing construction in these areas this winter, it would likely need to wait until next winter to do so, delaying the in-service date for the Line 3 Replacement by a year or more. *Id.*

Environmental harm, and the risk of greater harm, would accumulate during that period of delay, while existing Line 3 continues to operate. Enbridge would need to conduct additional integrity digs—at least 20 over the next six months—with attendant impacts to landowners and the environment. *Id.* at ¶ 70. Oil that would have moved through the higher-capacity Line 3 Replacement would instead move by truck or by rail, which carries substantially more risks than transportation through a new pipeline. *Id.* ¶ 72. And delay of the Line 3 Replacement would delay the significant improvements in energy efficiency it would deliver. The new 36-inch pipeline "would result in significant energy savings" as compared to the existing 34-inch pipe because "the oil moves more slowly in the wider line, reducing friction and the energy required

to pump the oil." Ex. 4 at 25; *see also* Ex. 1 ¶ 13. "The proposed 36-inch pipeline . . . would save 108 gigawatt hours of energy a year in Minnesota and reduce the annual CO2 emissions by 74,000 metric tons assuming an annual throughput of 760,000 bpd." Ex. 4 at 25.

Timely completion of the Project is also critical to ensure the future adequacy, reliability and efficiency of energy supply to Enbridge's customers, and, as a result, to the people of Minnesota and neighboring States. Ex. 4 at 58 (recognizing that the Project would support U.S. consumers' energy demands); Ex. 1 ¶ 73 (delay in Line 3 Replacement Project threatens the reliable delivery of crude oil to refiners and their customers). The Project "would have long term beneficial effects on the Midwest region's energy needs." Ex. 4 at 58; *see also id.* at 60 (noting that the Project provides benefits to the Midwest by ensuring that the region continues to have access to affordable energy and other refined products); Ex. 1 ¶ 67 (noting similar determinations made by the Fond du Lac Band and Leech Lake Band).

A preliminary injunction also would stifle the Project's substantial positive economic stimulus for the State and local communities, Tribes, and customers. The Project will generate jobs, create tax revenue, and provide a $2 billion boost to the Minnesota economy during design and construction, with $1.5 billion of that in Enbridge spending alone. Ex. 1 ¶¶ 81-82, Ex. 4 at 49 (concluding the Project will "have a beneficial effect on the local and regional economies"). As of January 15, 2021, there are approximately 5,222—mostly union—workers already on the job. Ex. 1 ¶ 80.[12] By January 30, 2021, another 150 workers will be added. *Id.* These are high

[12] For example, as of November, 2020, there are approximately 680 UA-represented employees working on the Project, with another 40-50 UA-represented workers expected to join within the next three weeks. Ex. 5, United Assoc. Decl. ¶ 13. In addition, there are nearly 1,200 Laborers' District Council of Minnesota and North Dakota ("LIUNA") members on the Project. Ex. 6., LIUNA Decl. ¶ 5; *see also id.* ¶¶ 2-3, 5 (stating that an injunction would cause severe and irreparable harm to hundreds of LIUNA members and thousands of other workers on the Project).

paying positions, over half of which are filled by local Minnesotans. Ex. 1 ¶ 79. These highly-specialized positions can require a great deal of planning and expense before a worker comes to the site, Ex. 5 ¶16, and these jobs are even more critical now given the difficult economic circumstances as a result of the COVID-19 pandemic. Ex. 6 ¶ 6.

Project payroll to workers is estimated at over $334 million. *Id.* ¶ 81. If the Line 3 Replacement is delayed by six months, 90 percent of these jobs would be lost. *Id.* ¶ 80. Even a temporary delay of construction would be potentially catastrophic for the workers on the Project because they would not only be deprived of the wages and benefits they anticipated earning through their long-term work on the Project, but may be left in an economically worse position than before construction began, having expended significant resources preparing for the construction and moving to the vicinity of the jobsite. Ex. 5 ¶ 20. This harm is compounded by the COVID-19 pandemic, which caused many of the currently employed workers on the Project to be out of work for extended periods of time. *Id.* ¶ 21. Thus, there would be significant harm to thousands of individuals who have made arrangements to work on the Project for its duration, often at great personal expense. Ex. 6 ¶ 8-9.

The economic benefits of the Project extend beyond the construction jobs created by Enbridge. *See* Ex. 8, Decl. of B. Hanson, APEX. The University of Minnesota Duluth Bureau of Business and Economic Research projected the creation of over 8,600 jobs, representing a significant contribution to the local economy. Ex. 8 ¶ 8.[13] The Project will provide 1,600 local supplier and service spin-off jobs and another 2,800 indirect jobs in the hospitality sector,

[13] Testimony filed by Brian Hanson, CEO of the Area Partnership for Economic Expansion on October 12, 2017 in the matter of Enbridge Line 3 project. https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={2095255F-0100-CE39-B466-E46FF06ADFEB}&documentTitle=201710-136505-10.

generating $162 million for the local economy. Ex. 7, Norr Decl. ¶ 11; Ex. 8 ¶¶ 9-11; Ex. 1 ¶ 79, 81. The over 2,100 non-local construction workers will spend a portion of their income on local goods and services, including in the retail and hospitality sectors, increasing revenues for those services during the construction period. Ex. 4 at 49; Ex. 1 ¶81.

This economic boost comes during a critical time as the local communities face high unemployment rates due COVID-19. Ex. 7 ¶ 15. As recognized by Jobs for Minnesotans:

> [s]ince Project construction commenced in December 2020, over 4000 workers have been placed along the corridor in these [struggling] counties and others. These workers are staying in hotels, motels and other lodging facilities, frequenting stores, convenience gas stations and other service providers, and eating at local restaurants. This influx of workers has generated substantial economic activity, leading to significant local and state tax revenues, as a result of their employment.

Ex. 7 ¶ 16. If the Project is enjoined, there would be significant economic harms to a region already devastated by the pandemic. Ex. 8 ¶ 12.

Finally, State and county tax revenues, including labor, sales tax and property tax, are expected to increase. *Id.* ¶ 82. Minnesota, for example, would receive approximately $98 million in income tax receipts. *Id.*; Ex. 4 at 49. This Court, in *Natural Resources Defense Council v. Kempthorne*, 525 F. Supp. 2d 115, 127 (D.D.C. 2007), denied a preliminary injunction for an energy project where the stay would "impose considerable hardship," including delay of State and local taxes. The same holds true here. The Project's economic benefits to the State and local communities, as well as thousands of workers, would be delayed, and potentially lost, if the Permit is enjoined.

Finally, the economic harms that would be borne by Enbridge as a result of a stay are severe. The total potential costs for a delay due to a stay of six months are estimated at over $332 million. Ex. 1 ¶ 75. These costs include maintaining a sufficient labor and facilities crew,

security, carrying costs, property taxes, monitoring the ROW, and costs to maintain the yards and extended leases. *Id.* The estimate also includes approximately $20.4 million in one-time costs related to demobilization and remobilization. *Id.* ¶ 76. If work is halted as a result of the Permit being enjoined, Enbridge would need to secure the equipment and construction areas prior to demobilizing. *Id.* Security would be required on the ROW to ensure that pipe is not compromised during any down time and until all equipment can be moved back to construction yards. *Id.* In addition, erosion control maintenance would be needed in all locations where the ROW has been cleared. *Id.* Finally, Enbridge is at risk for cost increases if there is a delay in the Project, including additional capital costs and carrying charges caused by a potential delay of the in-service date. *Id.* ¶ 77.

Plaintiffs claim that the court cannot consider these harms because it is well established that 'economic loss does not, in and of itself, constitute irreparable harm.'" Dkt. 2-2 at 25 (quoting *Wisconsin Gas Co. v. Fed. Energy Regul. Comm'n*,758 F.2d 669, 674 (D.C. Cir. 1985). But that argument gets the standard wrong. It is Plaintiffs' burden to show irreparable harm, and monetary harm can factor into the balance of the equities. *See, e.g., Amoco Prod. Co. v. Vill. of Gambell, AK,* 480 U.S. 531, 545 (1987) (denying injunction, finding injury to environment was "not at all probable" and "on the other side of the balance of harms was the fact that the oil company petitioners had committed approximately $70 million to exploration"); *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 43 (D.D.C. 2013) (denying injunction, finding that environmental organizations "failed to demonstrate the harms that they allege with specificity" while pipeline company had committed major resources to the project, including extensive efforts to comply with state and federal environmental regulations).

These environmental and economic harms from an injunction sharply outweigh Plaintiffs' speculative assertions of harm absent a stay. *Supra* at 39-41. Project delays resulting from the requested injunction would substantially increase the costs of construction for Enbridge, prevent necessary environmental and energy improvements and benefits, and cause economic harm to the State and local communities, as well as the thousands of individuals already on the job. The balance of the harms and the public interest in the Project tip overwhelmingly against an injunction.

IV. Plaintiffs Must Post a Substantial Bond.

In the event that this Court grants an injunction, Federal Rule of Civil Procedure 65(c) requires the posting of security. Plaintiffs have made no showing that posting an appropriate bond would be a financial hardship that would preclude them from obtaining judicial review of the Permit. Pls.' Mem. at 13-14. On the contrary, Sierra Club has annual revenue exceeding $150 million and net assets of over $80 million.[14] Accordingly, Plaintiffs should be required to post a bond in the amount of at least $1 million to cover Project costs if Enbridge is wrongfully required to stop construction. *See* Ex. 1 ¶ 75.

CONCLUSION

Plaintiffs fail on each element necessary to justify the extraordinary remedy of a preliminary injunction. The Court should deny Plaintiff's Motion and allow construction of this important infrastructure project to proceed.

[14] Sierra Club IRS Form 990 (2019), https://www.sierraclub.org/sites/www.sierraclub.org/files/2019%20Sierra%20Club-990_Final.pdf

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Respectfully submitted,

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TABLE OF EXHIBITS

1	Declaration of Barry Simonson
2	Commission Order Denying Motion for Stay Pending Appeal, December 9, 2020
3	MPCA November 9, 2020 Findings of Fact, Conclusions of Law and Order on Contested Case, OAH 60-2120-36909 attaching ALJ Findings of Fact, Conclusions of Law and Recommendation, dated October 16, 2020
4	Department of the Army Environmental Assessment and Statement of Findings, dated November 23, 2020 with Appendix B – Individual Water Quality Certifications 2014-01071-CLJ and Appendix E – Environmental Assessment, 408 Request to Install Line 3 Replacement Pipeline Across the Lost River
5	Declaration of David L. Barnett, UA
6	Declaration of Kevin Pranis, LIUNA
7	Declaration of Nancy Norr, Jobs for Minnesotans
8	Declaration of Brian Hanson, Area Partnership for Economic Expansion (APEX)