IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE BAD RIVER RESERVATION

Plaintiff,

v.

ENBRIDGE ENERGY COMPANY, INC., and ENBRIDGE ENERGY, LP

Defendants.

ENBRIDGE ENERGY, LP

Counter-Plaintiff,

v.

BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE BAD RIVER RESERVATION and NAOMI TILLISON, in her official capacity

Counter-Defendants.

Case No. 3:19-cv-00602

Judge William M. Conley
Magistrate Judge Stephen Crocker

ENBRIDGE'S OPPOSITION TO THE BAD RIVER BAND'S MOTION FOR PERMANENT INJUNCTION

INTRODUCTION

The Band's Motion for Permanent Injunction urges the Court to do two things. First, it asks the Court to conclude that because erosion recently occurred near the Line 5 pipeline, the Line faces "imminent" danger of rupture and release of oil—and thus, contrary to the Court's prior determination, a public nuisance exists. Second, the Motion seeks a drastic remedy: immediate and indefinite closure of a critical, international energy pipeline. Despite having to prove both liability and grounds for an injunction, the Band has done neither. The Motion must therefore be denied.

No release of oil is "ready to take place," "happening soon," or "real and immediate." The Band argues that the potential for additional erosion is the imminent threat. This is wrong; the alleged threat is a pipeline rupture and subsequent oil spill. But the conditions at the Meander do not create either an emergency or an imminent threat of a pipeline rupture and subsequent oil spill. It is uncontested Line 5 remains completely buried at the Meander.[1] It is also uncontested Line 5 is fully supported along its length, which means there are no unsupported spans. And even if exposure or spanning were occurring—which they are not—mere exposure or spanning does not cause harm to the pipeline or cause a rupture. Experts for both parties agree that an aerial span of at least 99 feet (the "critical span")[2] is the relevant type of integrity threat that could expose the pipeline to the threat of rupture.

The Band offers no evidence or analysis to support a claim of imminent spanning, rupture, and spill. The Band cannot prove that a critical span is imminent because the science of river

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[1] Enbridge capitalizes the term to refer to the meander feature of the Bad River that was the focus of trial.

[2] As used in this brief, the "critical span" is the length of unsupported pipe that increases the vulnerability of the pipe to an unsafe level where, ignoring built-in safety factors, permanent damage to the Line is possible.

morphology, the mathematics of statistical probabilities, and the engineering calculations of the applicable critical span demonstrate that a critical span is highly unlikely to occur any time this year or before the Spring of 2024. Enbridge's internal experts put the probability of a critical span occurring during 2023 at .032%. Independent river morphologist Hamish Weatherly, who evaluates pipeline conditions like those present at the Meander approximately 100 times a year, puts the probability of a critical span occurring before March 2024 at less than 1%. In its Motion, the Band presents no evidence that any spanning, much less a critical span, is likely or imminent.

Moreover, if any significant spanning were to become likely in the future, it would be observed and dealt with well before any rupture or release could occur. Enbridge is closely monitoring the Meander, including through 24/7 video cameras, photographs, drone flights, aerial patrols, and a tight grid of monuments that mark five-foot increments of any erosion moving towards the pipeline. The events that typically cause erosion—high flows and then receding waters on the Bad River—are predicted by the National Weather Service (NWS) up to 10 days in advance, and Enbridge is and has been closely monitoring those forecasts. Enbridge's 2021 "Monitoring and Shutdown Plan" (the "Plan") that was implemented several years ago was designed so that Line 5 will be shut down and purged before any pipe exposure and well before a potentially dangerous critical span could develop. Enbridge submits ample evidence it would follow this Plan. The Band presents no evidence that Enbridge would disregard it.

Enbridge's Plan requires action preemptively before either of the two types of erosion the Band identifies could potentially create pipeline integrity risks. If sloughing of the bank occurred after floodwaters receded, as it did at times this Spring, erosion would occur in a manner that Enbridge could directly observe and react to well before a critical span could form. And if a large storm event that the Band fears were to occur, Enbridge would prepare well before it arrived, as

Enbridge did before the 1-in-10-year event that occurred the week of April 10, when it implemented purge preparation activities but no actual purge because no conditions came close to triggering a purge. Under its Plan, Enbridge will purge and shut down the pipeline well in advance of erosion occurring beneath the pipeline (and at which time there would be *no* exposure or span). And even if a span did develop during flooding, Enbridge submits evidence as part of this Opposition, which was also the subject of testimony at trial, that no critical span occurs to the Line when it is submerged until it is undermined for 265 feet due to the water's buoyancy. In all events, Enbridge would purge and empty the Line days before the waters create any type of span of critical concern. In the face of these undisputed facts, the Band offers nothing but counter-factual speculation.

And even assuming there was a legitimate safety concern, which there is not, the proper response would not be to shut down the pipeline altogether—upon which industry, homes, and businesses in the Midwest and central Canada depend—without any abatement and without any mention of restarting operations. Instead, the reasonable response should be to let the operator and landowner (Enbridge owns the land on which the erosion closest to the Line recently occurred) protect its land and assets by implementing erosion prevention measures, including short-term or temporary measures that could be installed promptly and during the spring and summer months this year. To that end, Enbridge recently submitted to the Band a project proposal, commonly used and approved in similar erosion scenarios, to install temporary sandbags on the riverbank where it is now closest to the Line. This project would only occur on land Enbridge owns: the sandbags would be lowered by helicopter, requiring no overland access through the Band's property. They would support the riverbank and prevent future erosion from occurring. The sandbags can be installed by the end of May if the Band approves. The details of the proposed sandbag project are

described herein, complete with evidence that projects such as this are commonly approved not only by permitting authorities, such as the U.S. Army Corps of Engineers, but also by the Band itself. The Band, however, has not taken immediate action to approve this eminently reasonable, temporary solution to its concerns. This lack of urgency from the Band is hardly consistent with the claim that a "grave" emergency is occurring that requires the Line to be immediately shut down and kept shut permanently. Surely, if such an emergency were truly upon us, the Band would permit reasonable actions to address and prevent it, just as it does to protect its roads and bridges from erosion, and just as it permits tribal landowners to protect their properties from erosion.

The Court should also take into account that Enbridge is operating in full compliance with Pipeline and Hazardous Materials Safety Administration ("PHMSA") pipeline safety standards. Yet PHMSA is aware of the same material facts on which the Band bases its Motion and has not determined that the situation at the Meander warrants shutdown or any other regulatory intervention. The Band's Motion does not even acknowledge PHMSA, much less that the Band has brought its concerns to PHMSA's attention. By contrast, Enbridge continuously updated PHMSA with all the relevant data and details of erosion at the Meander, including very recent photos and other information submitted on the very day the Band filed its Motion. The agency's response has been to take no form of corrective action, let alone order a shutdown of the Line. If PHMSA determined that an imminent hazard was at hand, it had plenary authority to order Enbridge to close and purge the Line. It has not. In rendering its decision on the Band's extraordinary Motion, the Court should give significant weight to PHMSA's response, especially because PHMSA was presented with the same material facts that the Band presents to the Court.

For these reasons, and those detailed below, the Court should deny the Band's requested injunction.

LEGAL STANDARD

"A permanent injunction . . . is not provisional in nature, but rather is a final judgment." *Plummer v. Am. Inst. of Certified Pub. Accts.*, 97 F.3d 220, 229 (7th Cir. 1996). "[W]hen the plaintiff is seeking a permanent injunction, . . . the issue is not whether the plaintiff has demonstrated a reasonable *likelihood* of success on the merits, but whether he has *in fact* succeeded on the merits." *Id.* (citing *Amoco v. Vill. of Gambell,* 480 U.S. 531, 546 n.12 (1987)). "A plaintiff cannot obtain a permanent injunction merely on a showing that he is likely to win when and if the merits are adjudicated." *Chathas v. Local 134 Int'l Bhd. of Elec. Workers*, 233 F.3d 508, 513 (7th Cir. 2000); *Plummer*, 97 F.3d at 229.

FACTS AND BACKGROUND

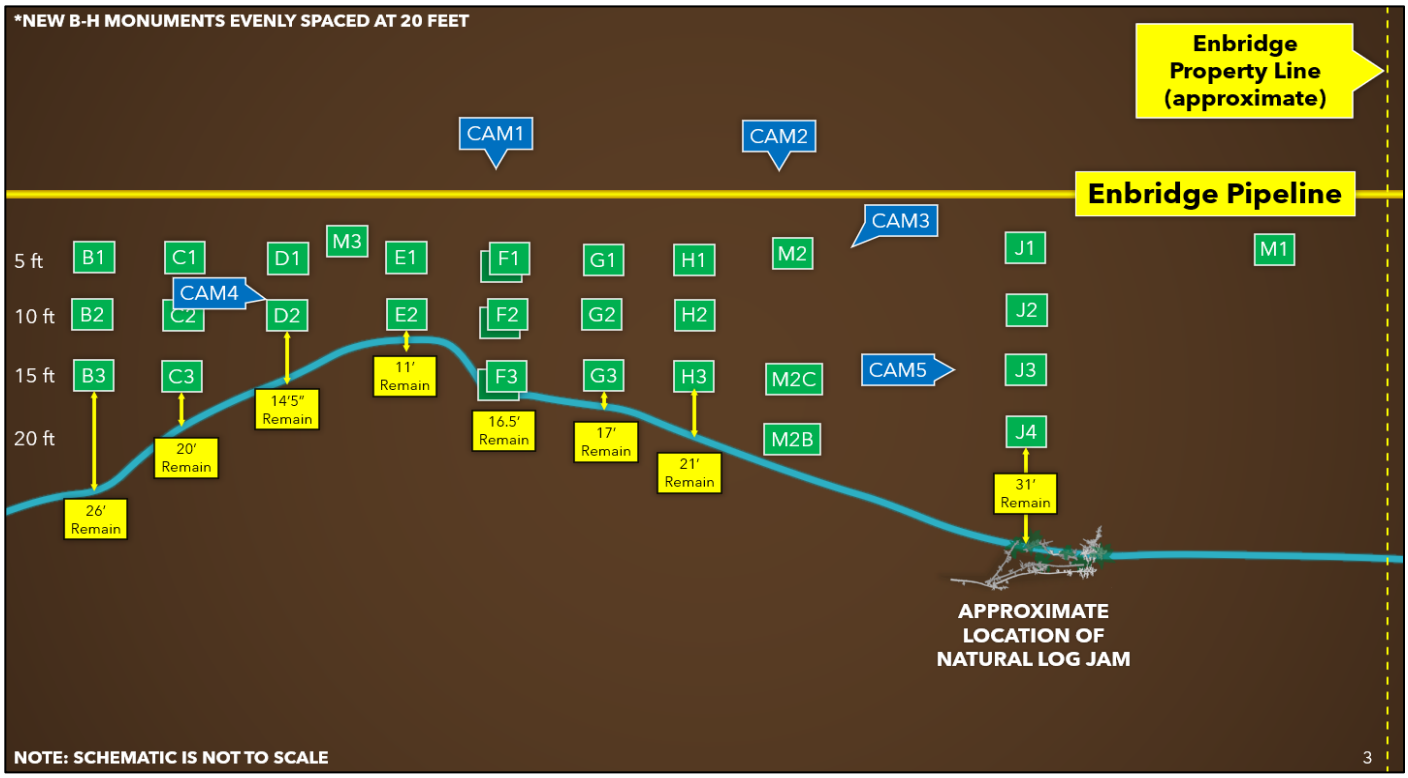
A. The Court's Prior Analysis of the Band's Nuisance Claim

At trial, the Court observed that "[u]nder current conditions, therefore, the court has yet to find that the Band has established that a public nuisance is imminent at the meander." Dkt. 612 at 6 (emphasis added). This Court explained (1) no imminent threat of a rupture exists at the Meander and (2) "Enbridge *has* made, and continues to make, efforts to prevent a rupture of Line 5 at the meander." *Id.* at 6–7 (emphasis in original). In balancing the equities, this Court explained that the following factors weigh against granting any injunctive relief, among others: the Band's demand that the Court only consider its preferred option of immediate shutdown, and the "significant economic impacts" to regional and international markets if supply of petroleum products from Line 5 were discontinued. *See id.* at 10–12. As detailed below, this Spring's erosion should not cause the Court to change these findings, which remain correct, and the Band could easily permit erosion prevention work to move forward, which it has not.

B. Current Conditions at the Meander

The current conditions at the Meander do not pose any imminent threat of rupture. Line 5 remains *entirely* buried, covered, and supported. Dkt. 654 ("Duncan Decl.") ¶ 28. This Spring's flooding and receding of the river caused erosion—but this level of erosion did not cause an exposure or unsupported span. The erosion is concentrated in an area approximately 40-feet-wide around the D, E and F monuments (the "F-D Area"). *Id.* ¶ 21. The bank is at its narrowest point along the E series, where the bank is approximately 11 feet from the pipe. *Id.* ¶ 22. Elsewhere, the distance to the pipeline is greater, as seen in **Duncan Figure 2**, below. Thus, Line 5 remains fully covered and supported at all locations, where the pipeline's average depth of cover is more than six feet—79 inches of ground cover directly above the pipeline (or buried roughly 6.5 feet below top of bank). *Id.* ¶¶ 28, 44. Much more would need to occur before the pipeline would be at risk.

Duncan Figure 2. Schematic of Current Meander Bank and Monuments



During the weeks of April-May 2023, which are the primary focus of the Band's motion, Enbridge provided continuous updates to PHMSA—the federal agency charged by Congress with jurisdiction over pipeline safety—regarding conditions at the Meander, including the very erosion the Band describes in its Motion. *See* Dkt. 638 ("Stafford Decl.") ¶¶ 3–4. Enbridge provided PHMSA detailed reports regarding the erosion that has occurred, measurements of the distance between the riverbank and the pipeline, hydrographs of the river, photographs, and other relevant information associated with the high-flow events, including on the same day that the Band filed its motion. *Id.* ¶ 3. From time-to-time PHMSA has requested additional information, which Enbridge has always provided, but at no time has PHMSA directed Enbridge to shut down the Line, purge it, or take any other action. *Id.* ¶¶ 4–5.

At the time the Band filed its motion on May 9, 2023, no material erosion was occurring. *See* Duncan Decl. ¶ 26. Flow in the Bad River was at or below usual levels. *See id.* Since the Band filed its motion, no material erosion at the Meander has occurred. *Id.* There is no evidence that the Line is in danger of imminent rupture.

C. <u>Enbridge Monitoring and Proposed Erosion Prevention Plan</u>

Enbridge closely monitored high flow events and erosion that occurred during April-May 2023. As depicted in Duncan Figure 2, above, prior to this Spring Enbridge had enhanced its monitoring by installing 21 additional monuments. *Id.* ¶ 3. These monuments enhanced the grid used to closely track erosion. *Id.*

Enbridge has also been monitoring the Meander in other ways. Enbridge regularly mines additional sources of information, including Bad River flow rates, forecasts, snow melt and precipitation data, and bank-loss risk level modeling. *See id.* ¶¶ 4–7. These efforts increase

Enbridge's ability to detect and predict erosion in smaller increments and with more precision and to respond quickly, if needed. *See id.*

None of the high-flow events from April-May 2023 took Enbridge by surprise. The National Weather Service ("NWS") accurately forecasts each event days before it occurs. *Id*. ¶¶ 4–5. Enbridge's Pipeline Integrity ("PI") department closely monitors the NWS's 10-day river level probabilities chart, which forecasts the Bad River's likely river height and velocity. *Id.* ¶ 4. Enbridge's PI department circulates this monitoring and modeling information to all pertinent personnel regularly, as conditions warrant, so they can react promptly, if and as needed. *Id.* ¶ 5.

At no time during or following the high flow events did the conditions at the Meander come close to triggering a shutdown or purge under either Enbridge's 2021 Plan or under Enbridge's "last, final offer" plan (filed at Dkt. 616 and 616-2). Nevertheless, in an abundance of caution, during the high flow events occurring in April-May, Enbridge undertook purge preparation activities to minimize the time needed to execute a purge in the highly unlikely event conditions changed significantly. This included staging purge devices[3] at the closest facility and placing personnel on 24/7 standby status during the 1-in-10 year flood that occurred the week of April 10, 2023. *See* Dkt. 643 ("Teitelbaum Decl.") ¶¶ 3–4.

During the high-flow events of April-May 2023, Enbridge shared with the Band the results of its monitoring, with daily or more frequent updates of conditions at the Meander, reports of erosion that had occurred, and photographs from drones and the stationary cameras at the Meander. *See* Duncan Decl. ¶¶ 5, 9. In these communications, Enbridge also offered many times to hold expert-to-expert discussions with the Band's representatives, but the Band did not take Enbridge up on any of these offers. **Exhibit 1** at 1 (5/5/23 email between A. Holdren and N. Tillison).

[3] As the Court may remember, the tools placed into the pipe, including to push the liquids downstream, are called "pigs." Dkt. 608 (10/26/22 PM Trial Tr.) at 69:17–71:8 (Trent Wetmore).

Instead, on May 4, 2023, the Band declared that pursuant to its own purge-and-shutdown plan Enbridge must purge and shut down the Line. *See id.* at 2–3; *see also* Duncan Decl. ¶ 63. Enbridge again offered to discuss the Band's concerns. The Band again ignored Enbridge's offer.

On May 8, 2023, Enbridge arranged for boats to take its representatives, Band representatives, and an EPA representative to the Meander to take field measurements and assess conditions first-hand. *See id.* ¶ 13; Dkt. 640 (Eberth Decl.) ¶¶ 3–4. At no time during this site visit did the Band claim that the situation posed an "emergency." *Id.* ¶ 5. Enbridge also explained that the Band's concerns could be addressed by promptly reinforcing the riverbank with sandbags, which would stop or slow erosion. *Id.* ¶ 6. Nevertheless, the Band filed its "emergency" motion the next day.

Immediately after the filing—the same day, in fact—Enbridge submitted an application to the Band for permission to install sandbags on the riverbank, particularly at the F-D Area. *See* Duncan Decl. ¶¶ 55–56, Duncan Figure 4. This area is located entirely on Enbridge fee owned land. *Id.* ¶ 56. Enbridge included in its application an offer to install sandbags in any location that the Band requested. *Id.* On May 11, the MNRD expressed that it needed further information before it could review the proposed project. Dkt. 636 ("Molina Decl.") ¶ 11. Enbridge received questions from the MNRD on May 12, and responded the very next day. *Id.* ¶ 14. After a request for an estimated timeline for approval, the MNRD indicated it could not provide one until Enbridge answered more questions. *Id.* Enbridge complied with this request. *Id.* On May 15, Enbridge and MNRD representatives met to discuss the application. *Id.* ¶ 15. Enbridge thoroughly prepared and assembled personnel from numerous groups to answer any questions the Band had regarding the project. *Id.* But MNRD gave neither an indication of how long a review would take, nor whether it would approve the project. *Id.* Instead, the Band used the meeting to ask questions that

appear unrelated to water quality assessments, such as "[h]ow will the sandbags be filled with sand?" and "[h]ow much do the sandbags weigh when wet?" *Id.* Meanwhile, Enbridge is preparing to install the sandbags if the Band provides permission, and anticipates the project could be installed by the end of May if promptly approved. *Id.* ¶ 16; Duncan Decl. ¶¶ 57, 61.[4]

Six days after submitting the sandbags application, Enbridge presented an additional option to the Band. On May 15, 2023, Enbridge submitted an application to install a tree revetment, which mimics the natural logjam that was a focus of trial testimony, and which has prevented material erosion during the high flow events of April-May 2023. (Enbridge has previously submitted two natural revetment projects to the Band, which were both denied, *see* Trial Ex. 1457); *see* Molina Decl. ¶ 20. This project would be located only on Enbridge fee owned land.[5]

In addition to both of these options, Enbridge's May and September 2022 riprap proposals remain pending with the Band. After trial, the Band took the position that the May 2022 proposed project was "incomplete" and never rendered any final decision on it. *Id.* ¶¶ 12–13. The Band also has never rendered a decision on the September 2022 riprap project. *Id.* The Band, despite multiple requests by Enbridge, never agreed to meet with Enbridge to discuss either of these projects. *Id.*

Neither before nor since trial has the Band undertaken or proposed any erosion prevention projects of its own at the Meander. Nor has the Band requested that Enbridge perform any erosion prevention work. Nor has it agreed to provide the approval needed for Enbridge to perform *any*

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[4] Enbridge expects to receive the other necessary permits—from the Wisconsin Department of Natural Resources and U.S. Army Corps—quickly. Molina Decl. ¶ 21.

[5] The Band argues that the Band should not be "penalized for its reluctance to adopt Enbridge's erosion mitigation proposals," in part, because it would "involve an intensification of Enbridge's trespass on those lands." Dkt. 629 at 12–13. This is wrong. Because Enbridge owns this parcel at the Meander, there is no issue of any alleged trespass. And as described later in this brief, the Band routinely protects its own infrastructure from erosion, and also routinely permits tribal landowners to protect their land against erosion, with an expedited permitting process and minimal requirements.

of the numerous erosion-control measures that Enbridge has proposed to the Band through more than a dozen applications. *See* Duncan Decl. ¶¶ 52–53. Nor has the Band agreed to the installation of any emergency flow-restriction devices (EFRDs), even though Enbridge submitted an application to install a "check valve." *Id.* ¶ 50. While the Band may claim it is considering these plans, its failure to approve *any* of them, or take any action on its own, hardly seems consistent with its claim of imminent catastrophe.

ARGUMENT

The Band's nuisance claim, upon which this Motion is predicated, has two elements: (1) unreasonable interference with public rights, health, safety, or welfare; or if not presently occurring, interference must be imminent; and (2) the defendant must have caused the nuisance. *See Michigan v. U.S. Army Corps of Eng'rs*, 758 F.3d 892, 900 (7th Cir. 2014) ("*Asian Carp II*"). *See also* Dkt. 360 at 53; Dkt. 612 (throughout).

The Band cannot prove either of these elements because: (1) the Band has not—and cannot—demonstrate "imminence;" (2) the Band has not allowed Enbridge to take any measures to abate the alleged nuisance, even on a temporary basis; and (3) the Band asks the Court to reach a conclusion that PHMSA, after learning the exact same facts, declined to reach.

Even if the Band could prove public-nuisance liability (which it cannot), "a finding of liability on a defendant's part does not automatically give rise to an entitlement to injunctive relief." *Liebhart v. SPX Corp.*, 998 F.3d 772, 779 (7th Cir. 2021); *see also Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."). Because "jurisprudence distinguishes between matters of right and matters of remedy," the Band must *separately* and *additionally* prove it is entitled to an injunction. *See Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 972–73 (10th Cir. 2019); *Chathas*, 233 F.3d at 513 (it is only "[t]he *predicate* for a

permanent injunction . . . that [plaintiffs] ha[ve] prevailed on the merits.") (emphasis added). It has not proved it is entitled to an injunction.

"Permanent injunctive relief is appropriate if the applicant demonstrates '(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'" *Liebhart*, 998 F.3d at 779 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). An injunction issues relief "*only* as necessary to protect against otherwise irremediable harm." *Id.* (citation omitted) (emphasis added). The Band cannot show irreparable harm. The injunction factors all weigh against relief. And the requested injunction would be contrary to federal law. The Motion must be denied.

I. Because There Is No Imminent Threat, the Band's Motion Fails

A. There is No Imminent Threat of Pipeline Failure

"Imminence" requires the alleged, future harm of a pipeline failure at the Meander be "real and immediate."[6] The new facts presented by the Band do not alter what this Court has already explained: "that the Band has [not] established that a public nuisance is imminent at the meander." Dkt. 612 at 6.

1. The Pipe Remains Safe, Fully Supported and Buried, and It Remains Highly Unlikely That Scouring Will Suddenly Create a Critical Span

The Band must establish by a preponderance of the evidence that a rupture of the pipeline is imminent. *See Asian Carp II,* 758 F.3d at 904–06 (no nuisance, in part, because the carp were not imminently "about to pass" barriers). Unable to satisfy this standard, the Band instead claims

[6] *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 781 (7th Cir. 2011) ("*Asian Carp I*"), (citing *Missouri v. Illinois*, 200 U.S. 496, 518 (1906)); *Harrison v. Ind. Auto Shredders Co.,* 528 F.2d 1107, 1122 (7th Cir. 1975) (a "standard of imminent and dangerous harm").

that additional erosion *could* occur at the Meander. But erosion, without more, will not cause a rupture. And the Band offers *no* evidence on the critical point of how erosion alone could threaten the integrity of the pipeline, when that threat would occur, how likely it is, or whether it could or would be prevented. As demonstrated below, the threat of future erosion alone is not enough to prove its nuisance claim and obtain an injunction to shut down the pipeline indefinitely.

The relevant risk of damaging the pipeline at the Meander is if a significant unsupported span of the pipeline develops; mere exposure of the pipeline is not enough. *See* Dkt. 612 at 4–5. Both parties' experts agreed that the Line at the Meander can withstand a **99-foot aerial span** before the pipe suffers stresses that could cause permanent bending and eventually, rupture.[7] *See* Dkt. 606 (10/24/22 PM Trial Tr.) at 53:21–54:6 (an aerial span of less than 99 feet is still within the "elastic zone, [which] means there's no risk of pipe yield or breaking due to the span itself.") (Band expert Mark Weesner).

Such a significant amount of erosion is highly unlikely to occur anytime soon, and it is certainly not imminent. Enbridge pipeline reliability supervisor Mr. Len LeBlanc calculated the probability of a "critical span" occurring at any point in 2023 at .032%. Dkt. 637 ("LeBlanc Decl.") ¶ 6. Mr. Weatherly puts the probability of a critical span occurring before March 2024 at less than 1%. Dkt. 642 ("Weatherly Decl.") ¶¶ 4, 13.

Each of Enbridge's experts, who have significant experience applying engineering and probabilistic assessments to evaluate both pipeline integrity threats and river movement, conclude that the pipeline does not constitute an imminent threat, and does not "warrant a purge and/or shutdown of the pipeline in the foreseeable future in the area of the Meander." Duncan Decl. ¶¶ 27, 37 ("There is no imminent threat to the integrity of Line . . . ."); Weatherly Decl. ¶ 14 ("It is

[7] The submerged allowable span is much longer, approximately 265 feet. Duncan Decl. ¶ 43.

thus my opinion . . . that there is not an "emergency" or "imminent threat" of a release at the Meander.").

Even the Band's *own* expert at trial, Mark Weesner, on the threat of pipeline spanning—the only Band expert who had any experience working for a pipeline operator, and yet lacked any experience calculating the span length at which steel is susceptible to damage—testified that in an attempt to be overly conservative at the Meander, he believed Line 5 would become "unsafe to operate" when a span of at least 62 feet exists (even though he acknowledged there is no threat of pipeline damage at this point). Dkt. 606 (10/24/22 PM Trial Tr.) at 60:24–61:11. Thus, even the Band's own expert believes the mere threat of future erosion is not a basis to suspend operations under current conditions. Mr. Weesner conspicuously does not submit any testimony supporting the Band's motion. Therefore, the Band has not proven that an imminent threat exists, and accordingly the Band's claim fails.

2. Enbridge's Plan Would Prevent a Line 5 Release Even if Spanning Occurred

There is also no imminent threat of pipeline rupture because Enbridge will *preemptively purge and shut down* the Line well in advance of any potential rupture. *See* Duncan Decl. ¶¶ 47–48. Due to Enbridge's 24/7 monitoring of the Meander, Enbridge has the capability to respond in accordance with its Plan, and thus, any flooding and erosion has not, and would not, catch Enbridge by surprise. *See id.* ¶ 5.

Enbridge's 2021 Monitoring and Shutdown Plan calls for a shutdown and purge well before any potentially dangerous span could occur. *See* Dkt. 616-1 at ECF p. 6 (Enbridge's Plan); Dkt. 615 (12/23/22 Duncan Decl.) ¶¶ 7–8; Dkt. 616 at 4–5.[8] Enbridge will initiate a purge and shut-

[8] Enbridge filed a Motion for Protective Order on February 22, 2023, seeking to keep sealed its Shutdown Plan and both parties' respective proposed plans. Dkt. 619. To avoid revealing specific details and the inner workings of its plan, Enbridge references the Plan here, but does not mention specific locations, actions, or thresholds to avoid sealing and redacting the brief.

down procedure in accordance with its Plan prior to *any* exposure of the pipe, let alone *any* spanning. *See id.*; *see also* Teitelbaum Decl. ¶¶ 5–7. Enbridge would begin to purge where there would still be a distance of 5 feet between the pipe and the bank at the narrowest area.[9]

This Court has previously stated that "given heightened monitoring [], it remains likely that Enbridge would be able to recognize the risk of an imminent failure in time to shut down the current 14-mile stretch of vulnerable pipeline between shutoff valves *and* to purge its contents, so that more dubious, large-scale containment and recovery efforts would not be necessary." Dkt. 612 at 7 (emphasis in original). Nothing the Band has presented contradicts this finding. *See* Dkt. 639 (Burdeaux and LaMont Decl.) ¶¶ 14, 20 (Enbridge has been taking actions to protect the pipeline from any threat developing in a manner that complies with all PHMSA regulations applicable to the Band's claim). The Band has introduced no evidence—because none exists—that Enbridge would depart from its Plan. This fact is fatal to the Band's claim of imminence. *See Asian Carp II,* 758 F.3d at 905 (no nuisance where the Army Corps can and would "respond to more urgent threats if and when they arise").[10]

Additionally, to ensure it can act quickly, Enbridge has committed to conducting certain purge staging activities in advance of any high flow event that forecast to occur. *See* Teitelbaum

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[9] In order for a critical span to occur, Enbridge's Pipeline Integrity Reliability team determined that, because erosion occurs in the shape of an arc and not linearly, the top of the erosion-arc must be at least four (4) feet *beyond* the pipeline. This means that if a purge were initiated at a point where there was still 5 feet between the pipe and bank at the narrowest point, an additional nine (9) feet of erosion must occur at that area of erosion, as well as substantial, additional erosion laterally, in order to create a critical span. *See* LeBlanc Decl. ¶ 7; Duncan Decl. ¶ 41.

[10] Significantly, the triggers and requirements in the Plan are merely the floor of Enbridge's preemptive action in an effort to define some clear thresholds. Duncan Decl. ¶ 48. As described by Enbridge's Manager of PI Engineering, who is a primary participant in monitoring the Meander and executing the Plan, Enbridge might recommend preemptive action under other circumstances different than or *before* the Monitoring and Shutdown Plan's thresholds, and would do so if appropriate. *Id.* For example, PI will recommend a purge if the conditions are met under Enbridge's proposed plan (Dkt. 616-2), which calls for a purge based upon a high flow event detected and a much smaller *potential* span. *Id.* ¶ 49. Simply put, Enbridge will not wait to act if the conditions warrant earlier action. *See id.* The conditions here, however, do not warrant such action. *Id.* ¶¶ 27–28.

Decl. ¶ 3. In fact, it has already done so: during the 1-in-10-year flooding event during the week of April 10, 2023, Enbridge staged purge "pig" devices at the closest appropriate facility; placed relevant personnel on 24/7 standby status; confirmed that the purging contractor is available to conduct a purge, with the necessary equipment; and ensured that the nitrogen gas needed to purge the line is available to be brought on site. *Id.* ¶ 4. None of the high flow events in April-May 2023, including the 1-in-10-year event that occurred the week of April 10, 2023, have come close to triggering a purge and shutdown of the Line. Nevertheless, these preparedness activities mean that if conditions ever called for a purge of the Line, Enbridge could do so in approximately 40 hours. *See id.* ¶¶ 6–7.

Finally, the Band challenges the adequacy of Enbridge's Plan, by suggesting without any evidence that Enbridge will not have enough time to completely empty the Line before a critical span occurs. But Enbridge's PI designed its Plan and its erosion-monitoring monuments precisely with such concerns in mind. The monuments were designed to be high enough to remain visible during even a 1-in-500 year event, and the 24/7 monitoring by cameras permits real-time reaction in the event that any monuments are lost as a result of a flood. *See* Dkt. 601 (10/26/22 AM Trial Tr.) at 134:22–135:6 (Deb Tetteh-Wayoe) (describing the height of the monuments), *see* Duncan Decl. ¶¶ 3, 8 (describing Enbridge's monitoring of the monuments); Dkt. 629 at 4 (Band motion discussing erosion caused by sloughing).

Further, in the worst-case event that the Band hypothesizes where a large storm event causes so much erosion of the bank that the Line swiftly became exposed and/or spanned while underwater (as opposed to sloughing following the flood), Enbridge could still complete a purge well in advance of any critical span developing. *See* Duncan Decl. ¶¶ 42–43. While the flooding is ongoing and the river stays at heights above where the pipe is located, the hypothetically-

spanned pipe would remain submerged, which greatly increases the critical span length to *265 feet* before any spanning threat to the pipe exists. *Id.* It takes numerous days for floodwaters, even in the relatively smaller events like the ones that occurred in April and May 2023, to recede below the bank where the pipe is located. *See id.* Thus, Enbridge has ample time—even in the most unlikely, worst-case scenarios—to complete a purge, emptying the Line of any product, well before any threat of rupture exists so that even if a rupture were to occur, there would be *no release of product.* *Id.*

3. PHMSA Sees No Imminent Threat

PHMSA, the federal agency with jurisdiction over pipeline safety under the Pipeline Safety Act (PSA)[11], is fully informed of the facts in the Band's Motion and has taken no steps to prevent Line 5 from continuing to operate. Throughout the high flow events of April-May 2023, and as recently as May 9, Enbridge communicated with PHMSA about conditions at the Meander (with photographs), the erosion that has taken place, and the closest distance of the pipeline to the Meander. *See* Stafford Decl. ¶¶ 3–4. Enbridge will continue to keep PHMSA informed of relevant developments. After being informed of the same core facts on which the Band relies upon in its Motion, PHMSA did not order a shutdown, and did not issue any other form of corrective action order. *Id.* ¶ 5.

The Band could have contacted PHMSA about an alleged emergency. Instead of seeking the views of this expert agency, the Band filed an alarmist "emergency" motion trying to persuade the Court that an environmental catastrophe will result unless it purges and indefinitely shuts down Line 5. But this is exactly what PHMSA, presented with the same facts and indisputably possessing the requisite authority, has declined to do.

[11] *See* 49 U.S.C. §§ 60101–43.

PHMSA is staffed by well-qualified experts with experience in pipeline safety. It is their mission to enforce PHMSA's extensive safety regulations (*e.g.*, 49 C.F.R. § 195), and to prevent environmental harm from unsafe pipeline operations. *See* 49 U.S.C. § 60102(a). Congress has mandated that, when implementing pipeline policy, PHMSA's Administrator must "assig[n] and maintai[n] safety as the *highest priority*, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in pipeline transportation and hazardous materials transportation." 49 U.S.C. § 108(b) (emphasis added). Its expert determination that the risk of a pipeline breach is insufficiently great to warrant shutting down the pipeline is entitled to great deference.[12] This is particularly true in circumstances such as these, where the party seeking extraordinary relief has provided no evidence that it has even bothered to consult with the appropriate agency before making the request.

Further, Congress has vested PHMSA with express authority to issue an emergency order requiring closure of a pipeline when an unsafe condition or practice "constitutes or is causing an imminent hazard." 49 U.S.C. § 60117(p); 49 C.F.R. § 190.236 (implementing the PIPES Act of 2016, which amended the PSA). And PHMSA, which actively enforces the PSA and its extensive safety regulations adopted under it, has not hesitated to exercise that authority where it has determined that doing so is warranted by the facts. *In the Matter of Colonial Pipeline Company*,

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[12] *See Asian Carp I*, 667 F.3d at 789–90 (finding the court was "comparatively ill situated to solve" the Asian carp problem when a "powerful array of expert federal and state actors" were already engaged and "[t]he last thing we need is an injunction operating at cross-purposes with their efforts or imposing needless transactional costs that divert scare resources from science to bureaucracy"); *see also Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 830–31 (9th Cir. 2002) (rejecting '"drastic' proposals" of requested injunction because "[i]n a variety of settings, including protection of the environment, the Ninth Circuit has shown considerable deference for factual and technical determinations implicating substantial agency expertise"), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157–58 (2010); *United States v. Arkansas*, 794 F. Supp. 2d 935, 983 (E.D. Ark. 2011) (finding injunction unnecessary where regulatory agency required and would evaluate action plan, noting that "[i]n determining whether to exercise the Court's equitable discretion to enter an injunction in a case such as this one, where Congress has provided a regulatory scheme, the Court should consider the regulatory scheme at issue and the enforcement mechanisms provided therein").

U.S. DEP'T OF TRANSP., Am. Corrective Action Order, *available at* https://primis.phmsa.dot.gov/comm/reports/enforce/documents/220165005H/220165005H_Amended%20Corrective%20Action%20Order_10132016_text.pdf (Oct. 13, 2016); *In the Matter of Bridger Pipeline, LLC,* U.S. DEP'T OF TRANSP., Corrective Action Order, *available at* https://primis.phmsa.dot.gov/comm/reports/enforce/documents/520155003H/520155003H_Corrective%20Action%20Order_01232015_text.pdf. (Jan. 23, 2015) (both requiring that a pipeline operator close or keep closed a pipeline segment due to an imminent risk to life, property, or the environment).

This Court should not substitute the Band's erroneous speculations on safety for the expert views of PHMSA. As the Western District of Michigan Court recently stated with respect to Line 5, Congress vested PHMSA "with exclusive jurisdiction to issue an emergency order requiring pipeline closure" based on safety concerns. *See Michigan v. Enbridge Energy, LP*, 571 F. Supp. 3d 851, 860 (W.D. Mich. 2021) (emphasis added). *See also* Dkt. 207 at 76–79; Dkt. 323 at 15–20.[13]

In addition, this attempt by the Band to impose its own shutdown plan and safety standards on Enbridge contravenes federal law. *See* Dkt. 360 at 51 (summary judgment order finding the Band's claim would be barred to the extent it was "seeking to impose specific pipeline safety standards on Enbridge").[14] On May 4, 2023, the Band demanded that Enbridge shut down Line 5

[13] Enbridge incorporates by reference its prior arguments on this point in its Opposition to the Band's Motion for Partial Summary Judgment (Dkt. 207) and its Reply in support of Enbridge's Motion for Partial Summary Judgment (Dkt. 323).

[14] In its order on summary judgment, the Court cited *Am. Energy Corp. v. Texas E. Transmission, LP*, 701 F. Supp. 2d 921, 925, 927 (S.D. Ohio 2010), which held that a claim seeking injunctive relief against a pipeline company that would require it to "develop and implement a mitigation plan to protect its pipelines" was not preempted by PSA. However, the mitigation plan at issue in *Am. Energy Corp.* concerned the plaintiff's mining rights. Here, the Band's monitoring and shutdown plan is meant to address only safety standards—which is preempted by the PSA.

based on the Band's own shutdown plan, which it purported to unilaterally impose on Enbridge. *See* **Exhibit 1** at 2–3. The Band's proposed plan is based on a safety standard that the Band has manufactured, dictating when Enbridge must execute a permanent shutdown and purge, and when it may restart. These are squarely issues of pipeline safety under PHMSA's exclusive jurisdiction. *See, e.g.,* 49 C.F.R. §§ 190.233(a), 190.239 (PHMSA can suspend or restrict the use of Line 5 if the Associate Administrator finds that it "is or would be hazardous to life, property, or the environment . . . ."); 49 C.F.R. § 190.236 (authority to issue emergency orders to shut down pipelines for imminent hazards); 84 Fed. Reg. 14715, 14716 (April 11, 2019) ("*Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Flooding, River Scour and River Channel Migration*") ("[i]f an operator determines outside force damage (*e.g.,* earth movement or floods) is a threat to the pipeline, the operator must take steps to minimize the probability of damage and the consequences of a release under these regulations.").[15] Enforcement of the Band's standard for requiring a shutdown would squarely supersede Congress's assignment of safety enforcement responsibility to PHMSA—which has made its own, real-time expert assessment of Line 5's safety at the Meander and which retains the right to make regulatory determinations as to the Line's continued safety.

Finally, the Transit Treaty, which has been invoked by the Government of Canada with respect to the Band's actions, is yet another factor weighing against action by the Court without the concurrence of PHMSA. Article V of the Treaty expressly provides for PHSMA's role in any *temporary* safety-related shutdown and restart based on any actual or threatened natural disaster. *See Agreement Between the Gov't of Canada and the Gov't of the United States of America*

[15] PHMSA issues advisory bulletins that explain how to interpret its regulation mandates. As interpretation of the regulations, those bulletins are entitled to deference. *See generally Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714–15 (1985).

Concerning Transit Pipelines, art. V(1), Jan. 28, 1977, 28 U.S.T. 7449, 1977 WL 181731 ("Transit Treaty") ("In the event of an actual or threatened natural disaster, an operating emergency or other demonstrable need *temporarily to reduce or stop for safety or technical reasons* the normal operation of a Transit Pipeline . . . the flow of hydrocarbons through such Transit Pipeline may be temporarily reduced or stopped in the interest of sound pipeline management . . . by or *with the approval of the appropriate regulatory authorities of the Party in whose territory such disaster, emergency or other demonstrable need occurs.*") (emphasis added). That "appropriate authority" in the United States to determine if a temporary stoppage is warranted is unquestionably PHMSA.

Further, any non-temporary stoppage of Line 5 is not contemplated by the Transit Treaty and would violate this country's Treaty obligations. *See* Dkt. 207 at 110–12; Dkt. 323 at 22–23; Dkt. 593 at 3–4.[16] The goal of the Treaty is "to ensure the uninterrupted transmission by pipeline through the territory of one Party of hydrocarbons not originating in the territory of that Party, for delivery to the territory of the other Party." Transit Treaty, Opening Recital. The Band's requested permanent injunction—shutting down Line 5 without an order from PHMSA, and without bilateral agreement between the United States and Canada—would plainly violate the Treaty's goal of protecting Transit Pipelines such as Line 5 from "measures, other than those provided for in Article V [concerning temporary closures for defined reasons], which are intended to, or which would have the effect of, impeding, diverting, redirecting or interfering with in any way the transmission of hydrocarbon in transit." Transit Treaty, Art. II(1). If the Treaty were read to allow the sweeping and permanent pipeline closure sought by the Band, Article II and the entire goal of the Treaty to ensure continued operation of Transit Pipelines, would be effectively nullified.

[16] Enbridge incorporates by reference its prior arguments on this point in its Opposition to the Band's motion for partial summary judgment (Dkt. 207), its Reply in Support of Enbridge's Motion for Partial Summary Judgment (Dkt. 323), and its Bench Memorandum Regarding the Transit Treaty (Dkt. 593).

Likewise, the Band cannot rely on Article IV of the Treaty to support its Motion. That Article provides for the right of either nation to impose non-discriminatory environmental regulations affecting pipelines through "appropriate governmental authorities having jurisdiction over" such Pipelines. Article IV is plainly not intended to authorize either nation to permanently close a particular Transit Pipeline or supersede the Treaty's primary purpose of protecting the operation of such pipelines. Rather, it merely underscores that Transit Pipelines, like other pipelines, are subject to appropriate safety and environmental rules imposed by duly authorized agencies such as PHMSA, which the Band is effectively asking this Court to ignore. The Band's Motion makes clear that its goal is clearly not environmental regulation, but simply to close the pipeline.

B. The Band Continues to Block Enbridge's Attempts to Prevent Erosion from Occurring

To prevail, the Band must also establish the Band provided Enbridge a reasonable opportunity to abate the alleged threat.[17] It has steadfastly refused to do so. The Band has failed to approve every single remediation project proposed to prevent the risk of further erosion at the Meander, and has refused every offer Enbridge has made to discuss what modifications to the proposed projects would be necessary or desirable to make them approvable. Molina Decl. ¶ 2 ("To date, the Band has not permitted any of these projects to proceed."); *see* Dkt. 612 at 10; Duncan Decl. ¶¶ 53–61 (discussing low impact projects the Band has taken no action on); *see* Dkt.

[17] *See* Dkt. 602 (10/27/22 AM Trial Tr.) at 18:19–21 (public nuisance federal common law "seems to include an obligation by the plaintiff in a public nuisance suit to work to a solution"); *id.* at 28:8–11 ("[M]y reading of the case law is that a factor is whether or not the plaintiff is working cooperatively."); *id.* at 29:11–15 ("The relief from the public nuisance is equitable in nature, and you have to look no further than the Seventh Circuit's two decisions [in *Asian Carp*] to understand that the plaintiff has responsibilities as well."), *id.* at 28:17–29:5 (the Band has "the power to do something about [the Meander], should they exercise it to remediate that risk, and the common law recognizes that when a plaintiff comes claiming public nuisance, they have responsibilities themselves to fairly approach it.") (Conley, J.)

600 (10/25/22 AM Trial Tr.) at 110:11–111:8 (discussing May 2022 riprap application) (Dir. Tillison); Trial Ex. 1457 (Enbridge summary exhibit of Meander project denials); Dkt. 602 (10/27/22 AM Trial Tr.) at 8:24–9:2 ("[T]he court was also very clear that there's obligations on both sides to try to work out solutions, and the Tribe is uninterested in any kind of solution.") (Conley, J.). Nothing has materially changed since the Court made these comments because the Band has not approved any remedial measures.

The Band argues its unreasonable failure to approve an erosion measure must be excused because it is too late—it argues no work can be done now but must wait until "low-flow conditions" are present—"that is, in late summer or fall." Dkt. 629 at 8–9.

This is wrong. On May 9, 2023, Enbridge submitted to the Band its application to install sandbags, filled with local sand, temporarily on the riverbanks to support and protect it from erosion. *See* Molina Decl. ¶ 4; Molina Exhibit A (Cover Letter & Project Submittal). The project consists of 3'x3'x3' sandbags stacked 3-4 high along the riverbank. *See id.*; Duncan Decl. ¶ 56; Duncan Figure 4. The installation of sandbags does not require low flow conditions. The sandbags would be lowered into place, and later removed, by a helicopter to minimize environmental impacts. *Id.* ¶ 55. This could occur, for example, in the current conditions and those likely to exist over the next month or so. Molina Decl. ¶ 6. These sandbags would substantially reduce the threat of further erosion and spanning. Duncan Decl. ¶ 57 ("[T]hese sandbags would materially slow, if not stop, erosion in the area where the greatest erosion has been occurring"); Weatherly Decl. ¶ 17 (same). The sandbags are highly unlikely to cause any kind of negative effect on water quality. *Id.* ¶ 18. These types of sandbag projects are routinely permitted across the country. *See* Dkt. 641 (Storlid Decl.) ¶ 5. Enbridge's proposal only calls for installation of sandbags on *Enbridge's own property.* Molina Decl. ¶ 16; Duncan Decl. ¶¶ 55–57. The Band routinely permits landowners to

install erosion prevention materials and expedites the approval. *See, e.g.,* Trial. Ex. 898 (MNRD personnel discussing landowner's shoreline riprap project that does not require antidegradation permitting); *see also* **Exhibit 2** (10/17/18 MNRD email showing list of landowners permitted for installing erosion prevention projects). Yet despite the Band claiming that an imminent catastrophe is about to occur at the Meander, the Band has, to date, not permitted the sandbags to be installed.

Additionally, on May 15, 2023, Enbridge submitted a new tree revetment proposal that would be located solely on Enbridge property and would provide a lower-impact means of preventing future erosion. Molina Decl. ¶ 19; Duncan Decl. ¶ 58. This project uses only trees to recreate a natural logjam, like the one naturally formed at the Meander (and has been effective since 2019).[18] That the natural logjam has continued to protect the bank from virtually any erosion for roughly 3 years in the area behind it is strong evidence that a tree revetment or other erosion prevention project can work without causing any material adverse impacts. This project is also similar to tree revetment projects that the MNRD's own consultant told the Band would stop erosion at the Meander with minimal environmental impacts. *See* Trial Ex. 1054 at 8, 15 (5/6/21 Memorandum from Band consultant Ben Lee of Fish Creek proposing tree revetment project that would be the "best alternative" for halting channel migration "over the next few years"); *see also* Dkt. 600 (10/25/22 AM Trial Tr.) at 82:12–83:16 (Dir. Tillison). Like the sandbag project, Enbridge could begin the revetment *shortly after the Band approves it*.[19] *See* Duncan Decl. ¶ 58.

[18] *See* Dkt. 599 (10/24/22 AM Trial Tr.) at 136:21–137:15 (Band expert Jon Jones testifying the natural logjam at meander has "contributed to the slowing or stopping erosion"), *id.* at 141:24–142:9 (a tree revetment project to mimic the natural logjam would "provide slowing down of erosion") (Jon Jones).

[19] Based on past experience, Enbridge would expect to receive the additional permits – once the Band has approved – within a few days but several weeks at the latest. *See* Molina Decl. ¶ 21.

And it could be installed within five to six weeks (and while Enbridge continues its re-route of Line 5 around the Reservation). Molina Decl. ¶ 22.

Enbridge remains eager to address the root cause of the Band's concerns—the potential for future erosion. There remains ample time and opportunity to install erosion control measures that can effectively withstand future erosion, including this Spring. *See* Dkt. 602 (10/27/22 AM Trial Tr.) at 9:18–11:17 ("[Y]ou haven't established sufficient likelihood of that happening ***before some remediation could be accomplished***.") (Conley, J.) (emphasis added). Enbridge has had great success at quickly installing bank protection measures in much more exigent circumstances than exist here. For example, Enbridge PI assumed responsibility of a pipeline (following an acquisition) crossing the Greybull River (a tributary of the Big Horn River in Wyoming), which had less than one foot of bank covering the Line along the river. *See* Duncan Decl. ¶ 62. Enbridge installed riprap rock to reinforce the bank, which withstood flooding from a 1-in-10 year event during a massive, 500-year event on the Yellowstone River without exposing the Line. *Id.*

The Band has multiple options before it *right now* that *can and will* prevent future erosion of the riverbank and those projects can be implemented as soon as the Band permits them. Thus, the Band cannot prove its nuisance claim without providing Enbridge this reasonable opportunity to remediate.

II. The Band Will Not Suffer Irreparable Harm if Its Requested Relief is Denied Because There Are Alternative Methods to Prevent Any Harm from Occurring

The Band similarly cannot show that it would suffer "irreparable harm" if its requested injunction is denied. This is so for multiple key reasons.

A. Enbridge's Plan and Preemptive Risk Mitigation Actions Ensure No "Irreparable Injury" Would Result Even if an Unsupported Span Developed

First, Enbridge's monitoring and preemptive action will prevent irreparable injury well in advance of any current or future spanning threat. As mentioned above, even if substantial erosion

were sudden and immediate and ultimately exposed the pipe (or created a span), all of which is highly unlikely, no irreparable harm will occur because Enbridge would purge and shutdown the affected 14-mile segment of the Line well before any critical exposed span length could occur. *See supra* Section I.A.2; Dkt. 612 at 7. Courts in similar circumstances have denied injunctive relief on precisely these grounds. *See, e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. CV 16-1534 (JEB), 2021 WL 2036662, at *58 (D.D.C. May 21, 2021) (denying injunctive relief where tribes failed to "account for Dakota Access's PHMSA-approved response plans, which are aimed at promptly mitigating and remediating any large hypothetical spill that might reach the lake"); *Manzanita Band of Kumeyaay Nation v. Wolf*, 496 F. Supp. 3d 257, 264–65, 268 (D.D.C. 2020) (finding plaintiff's irreparable-harm argument "undermined by . . . measures in place" to "mitigate" any harm, of disturbing burial sites, including surveys, re-surveys, consultation, and additional protocol).

B. The Band Has Control and Ability to Prevent Harm by Permitting Erosion Prevention Measures

Second, the Band could also easily avoid its claim of irreparable injury simply by permitting Enbridge to take, or by itself taking, action to mitigate erosion. As demonstrated above, the Band has taken no such action of its own and also has prevented Enbridge from taking any action against the very conditions about which the Band complains. This Court has concluded that "**the Band has not yet shown that its specific shutdown and purge plan, much less an immediate shutdown of Line 5, is the best or even a reasonable way to prevent a catastrophic rupture of Line 5 in the near term**." Dkt. 612 at 12 (emphasis added). The Band still has not done so, and offers no additional evidence that would alter this finding.

The Band has control over whether Enbridge can obtain the permits needed to safeguard the Line through erosion control. *See* Dkt. 602 (10/27/22 AM Trial Tr.) at 33:24–25 ("I think the

evidence is pretty overwhelming that at this point it is up to the Band.") (Conley, J.); *id.* at 27:15–21 ("I mean, the Tribe is in the position to control this. . . . [and] that's a factor in deciding whether I find a public nuisance here, it is ultimately up to the Tribe what they will allow to occur on the reservation.") (Conley, J.). And the Band has only used its authority to "reject[] opportunities to collaborate with Enbridge on potential remediation plans at the meander." Dkt. 612 at 10.

To date, the Band has not permitted Enbridge the opportunity to install *any* reasonable project that could be meaningful in reducing the "irreparable harm" of which it complains, even a temporary sandbag project aimed directly at preventing the erosion in the exact location where it is occurring. *See* Dkt. 608 (10/26/2022 PM Trial Tr.) at 181:12–17 ("[T]he Band is willing to [risk further erosion] -- and that is what it's doing -- because you're not getting the purge -- the shutoff and purge plan that you propose . . . .") (Conley, J.). Nor has the Band or its experts suggested a single erosion prevention project the Band would approve even though such projects are routinely implemented on the Bad River and numerous other wilderness rivers throughout the country. In sum, an injunction may "only" be ordered "as necessary to protect against otherwise irremediable harm." *Liebhart*, 998 F.3d at 779. As demonstrated above, the potential harm is anything but "irremediable." Enbridge's preventive Plan ensures this is so, but the Band too can simply permit remediation.

Finally, injunctive relief "must be the only way of protecting the plaintiff from harm." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989) (citing *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982)). "Irreparable harm[] presupposes the absence of an available remedy for relief, whether administrative or judicial." *Sink v. Morton*, 529 F.2d 601, 604 (4th Cir. 1975). Because the Band has the authority to permit a solution (one that the parties do not dispute can be effective) and because Enbridge has undertaken its own action to

prevent the threat of any rupture and release, injunctive relief is *not* "the only way of protecting the plaintiff from harm," *Instant Air*, 882 F.2d at 801; *see also Manzanita Band of Kumeyaay Nation*, 496 F. Supp. 3d at 264–65 (denying injunction where plaintiffs' "irreparable harm theory [was] undermined by Government measures in place to avoid and mitigate any harm to their religion and culture").

III. The Equities Favor Enbridge

The Band asks this Court not to balance the equities. *See* Dkt. 629 at 10–11. The Band's selective plucking from *LAJIM* hides how that case actually requires the opposite: "District courts should apply the traditional equitable factors to determine the necessity of injunctive relief." *LAJIM, LLC v. Gen. Elec. Co.*, 917 F.3d 933, 945 (7th Cir. 2019). Not to mention, the Band's forget-the-balancing argument has been, and remains, unfavorable to its Motion, especially where the Band has still not granted Enbridge *any* opportunity to address the risk of further erosion. *See* Dkt. 612 at 10–13.

A. The Band Refuses to Provide Enbridge an Opportunity to Abate the Nuisance

Recognizing that the Band might return to this Court to ask for an immediate shutdown if conditions at the Meander worsened, this Court imposed on the Band two clear conditions it must meet to alter the equitable balancing and possibly obtain injunctive relief:

> I expect the Band to behave in a way that demonstrates that they're working towards a solution rather than continuing to explain to Enbridge why no solution is adequate. And at minimum, I would expect the EFRDs to be put in place.

Dkt. 602 (10/27/22 AM Trial Tr.) at 32:22–33:3 (Conley, J.).

This Court should contrast the evidence before it of Enbridge's persistent efforts and overtures, discussed above, to reach a solution at the Meander with the Band's refusal to meaningfully engage or act.

The record plainly reveals that the Band, like the plaintiffs in *Asian Carp II*, insists on "implementing one particular solution" namely, a permanent shutdown of Line 5 from the Reservation, while refusing much less extreme alternative measures. *See* Dkt. 612 at 11 ("the MNRD appears to have failed to weigh the flaws in those alternatives against the risks of a possible pipeline failure at the meander, which could obviously result in a far greater environmental disaster than anything proposed by Enbridge as remediation"); *see also* Dkt. 602 (10/27/22 AM Trial Tr.) at 31:16–31:19 ("Here you're insisting that a dramatic action is required now while you have the ability to approve less dramatic action to reduce the risk.") (Conley, J.). And like the plaintiffs in *Asian Carp II*, the Band has not made an "unusually strong showing" for its insistence on a particular solution, and the Court should refuse to exercise its discretion to enjoin Enbridge from continuing to operate Line 5. *See id.* at 12:9–16 ("[T]he Tribe is creating almost a catch-22. They're not willing to consider any form of remediation, and they're also not willing to adopt a shutoff plan except for their version of the shutoff plan . . . ."), *id.* at 16:17–22 ("I'm just not convinced that there isn't a way to remediate, and I think it is true that the Tribe at this point is not interested in any remediation."), *id.* at 31:17–19 ("Here you're insisting that a dramatic action is required now while you have the ability to approve less dramatic action to reduce the risk."); *id.* at 12:2–8 ("As you said, the Seventh Circuit recognized that there was a risk, and yet it wasn't sufficient to adopt the only option that was being offered by the plaintiff, and that's the same thing I'm being presented with. I'm being given one option here.") (Conley, J.).

Since any nuisance, if one were counterfactually assumed to exist, can be redressed by simpler means like the work that Enbridge proposes to do, the Court should not order a purge and indefinite shutdown. The Seventh Circuit rejected such an uncompromising approach in *Asian Carp II* (758 F.3d at 905–06), and this Court should do the same. *See also Harrison*, 528 F.2d at

1110, 1118, 1123 (reversing permanent injunction based on nuisance claim, because the defendant business was entitled to a reasonable period of time to correct any defects not of imminent or substantial harm and "even as the trial was going on, the company was making further attempts at rectifying any discomfort the shredder might cause the neighborhood.").

The Band argues that its "homeland and the resources it has fought so hard to maintain" are at stake, and the public's interest in clean Lake Superior water favor an injunction. *See* Dkt. 629 at 11, 15–17. It is hard to fathom how allowing the bank to erode without any protection or remediation measures of the type the Band routinely uses and permits to protect far less critical infrastructure can be seen as the Band protecting its resources. While the Band seeks an injunction from this Court on the basis that further erosion of the bank poses a threat, it is the Band that has created (or at a minimum, exacerbated) this threat, by failing to address (or allowing Enbridge to address) the conditions at the Meander.

B. The Public's Interest in Continued Operations and Compliance with Federal Pipeline Safety Standards Require Denying the Band's Injunction

The public has a substantial interest in keeping Line 5 operational. Courts routinely recognize that the public has numerous powerful interests in pipelines, including an interest as end-consumers of crude oil. *See Guardian Pipeline, L.L.C. v. 295.49 Acres of Land*, No. 08-C-0028, 2008 WL 1751358, at *23 (E.D. Wis. Apr. 11, 2008) ("Denying Guardian's motion [for injunctive relief] would also operate against the public interest, potentially limiting the natural gas available to citizens of the region in which the pipeline is to run, and/or contributing to already high natural gas prices.") (citation omitted); *Texas E. Transmission Corp. v. Giannaris*, 818 F. Supp. 755, 760–61 (M.D. Pa. 1993) ("[G]ranting injunctive relief will be in the public interest. Enjoining [landowners] from impeding Plaintiff's access to the pipelines will further the federally protected goal that gas lines be adequately tested and maintained."); *Williams Pipe Line v. City of*

Mounds View, 651 F. Supp. 551, 570 (D. Minn. 1987) ("The public has at least three important interests at stake here: an interest in safety, an interest in the continued operation of petroleum pipelines, and an interest in the maintenance and enforcement of uniform federal pipeline safety standards").

The testimony at trial demonstrates that an immediate shutdown of Line 5 would result in extreme market turmoil and upheaval, felt both in the United States and Canada, without any adequate alternatives to minimize this impact. *See, e.g.,* Dkt. 610 (10/28/2022 PM Trial Tr.) at 113:25–114:6 ("propane is the key concern" because there are simply no pipeline alternatives to Line 5 to transport natural gas liquids, or NGLs) (Neil Earnest); *see* Dkt. 604 (10/31/2022 AM Trial Tr.) at 142:6–25 (immediate shutdown absent operational re-route would result in substantial impacts on households, especially low-income households, and significant job and economic losses in multiple states and in Canada) (Corbett Grainger). *See also Guardian Pipeline, L.L.C.*, 2008 WL 1751358, at *23 (avoiding a scenario where the court could "potentially limit[] the natural gas available to citizens of the region . . . and/or contributing to already high natural gas prices. The 'need for natural gas supply' is a 'substantial public interest.'"); *Williams Pipe*, 651 F. Supp. at 570 ("[Fuel] shortages may result in higher prices and may also necessitate more dangerous means of transporting petroleum products, such as trucking. Williams has shown that any unnecessary delay in restarting the pipeline will cause irreparable harm.").

The Court has already weighed the evidence concerning the Band's unsupported theory that alternative supply channels could soften the blow from a Line 5 shutdown. *See* Dkt. 612 at 10 ("Similarly, in this case, the Band has downplayed the potential for significant economic impacts of its preferred solution (a shutdown of Line 5)."). The Band's experts did not have the requisite expertise to analyze the feasibility of any such alternatives, nor did they address the

"stranded asset" consequence that would result. *See* Response to Band PFOF ¶¶ 67–68. This left the Court with impractical and unrealistic alternatives that will not mitigate market chaos. Enbridge need not repeat all the trial evidence and testimony here as no new evidence is offered by the Band on this point with the Motion.

Moreover, even the Band and its economic impact witnesses believed at trial that an injunction ordering immediate shutdown would not provide the market sufficient time to respond.[20] Rather, they assumed the existence of a transition of period of a year or so during which steps could be taken to develop transportation alternatives to Line 5, such as the installation of transloaders and the construction of rail infrastructure. *See* Response to Band PFOF ¶¶ 64, 67, 74–76, 81 (explaining that proposed Band solutions do not consider the time required to implement any solution). Enbridge's experts demonstrated that these assumed transportation alternatives would take many more years to develop, if at all; and that closing off the 540,000 barrels per day that Line 5 would be a significant economic blow to the United States and Canada. *See id.*; *see* Dkt. 610 (10/28/22 PM Trial Tr.) at 116:20–118:116 (explaining that the supply chains are in

[20] *See, e.g.*, Dkt. 604 (10/31/22 AM Trial Tr.) at 41:21–42:17 (Band expert Sarah Emerson agreeing that there would be significant disruptions in the following days and weeks following a Line 5 shutdown without "a heads up of some period of time"); Dkt. 603 (10/28/22 AM Trial Tr.) at 32:5–13 (the Court agreeing that no expert contends that if Line 5 shuts tomorrow, no hardship will occur) (Conley, J.); *id.* at 60:9–12 (Band expert Brisben agreeing that he has no opinion on the impacts on fractionators if Line 5 closed tomorrow); *id.* at 7:16–8:2 (R. Kanji) ("[T]o fully replicate the supply chain, some of the alternatives might take more along the order of 12 to 18 months. That's why we have suggested, to be conservative, a 12-to-18-month -- perhaps, you know, the Court might want to go to 2 years for a shutdown period, but anything longer than that, we would submit, is unnecessary to meet the market concerns."); *id.* at 83:18–22 (testifying that her proposed alternatives "would not crop up immediately in the wake of a Line 5 shutdown but would come into being as soon as four months after the shutdown") (Steiner); Dkt. 604 (10/31/22 AM Trial Tr.) at 70:17–22 (testifying that Sarnia would need "enough notice" to obtain crude from other sources" in order to "not experience shortages") (Emerson); *id.* at 7:11-7:22, 12:3-12:7 (testifying that no one transportation modality could itself replace Line 5 and the time needed to get temporary possible replacements for Line 5 would take one to three years out from a shutdown (Band exert Chris Barber); Dkt. 605 (11/1/22 Trial Tr.) at 31:14–31:20 (R. Kanji) ("[T]wo years as an outside is a very realistic reflection of what -- not only what people say will be done but what has been done in the marketplace . . . we think that sort of time period would be one that balances the concerns with economic effects with the rights of the Tribe.").

turmoil, and "it's going to be chaos if Line 5 closes in the propane markets") (Earnest). But now the Band claims, on the basis of the testimony of their experts, that an immediate shutdown will cause no significant disruptions, shortages or price spikes. That is pure fantasy. It is also squarely inconsistent with what the Band's own experts testified to at trial. *See, e.g.*, Dkt. 604 (10/31/22 AM Trial Tr.) at 41:21–42:17 (Band expert Sarah Emerson agreeing that there would be significant disruptions in the following days and weeks following a Line 5 shutdown); Dkt. 603 (10/28/22 AM Trial Tr.) at 75:18–22 (same) (Band expert Jill Steiner); *id.* at 46:21–24 (same) (Brisben).

The Court shared Enbridge's concerns regarding economic impacts and supply shortfalls should Line 5 be shut down too precipitously. *See, e.g.,* Dkt. 602 (10/27/22 AM Trial Tr.) at 29:17–22 ("[T]he extraordinary relief that you're asking for, which is essentially to shut down what at this point is still a vital part of the delivery of oil in most of North America -- and the impacts will be felt . . . .") (Conley, J.).[21] In its November 2022 order, this Court acknowledged that "in this case, the Band has downplayed the potential for ***significant economic impacts*** of its preferred solution (a shutdown of Line 5)." Dkt. 612 at 10. And since trial, Line 5 has been running at near-capacity. *See* Dkt. 644 ("Samuel Decl.") ¶ 4. A purge and indefinite Line 5 shutdown will quickly and significantly impact refineries and end consumers alike. *See* Dkt. 645 (Canadian Chamber of Commerce Decl.) ¶ 9 (informing of the consequences of a shutdown to businesses); Dkt. 649 (Shell Canada Ltd. Decl.) ¶¶ 5–6 (because "Line 5 is the only pipeline

[21] *See also* Dkt. 603 (10/28/2022 AM Trial Tr.) at 24:17-21 (recognizing that the "international markets are roiled" and the Court "is concerned of the market also panicking" should the Line be shutdown in the near term); *id.* at 15:13–18 ("and I am concerned about a disruption in the available oil if I were to shut it down in the time period you're talking about, a year to 18 months or 18 months to 24 months."); *id.* at 110:3-5 (same); *id.* at 14:5–17 ("it is a zero-sum game, particularly, at this point, globally with respect to supply. . . . but it doesn't address the fact that you're essentially taking a portion of that resource at a time where there are shortfalls worldwide and reducing it."); Dkt. 605 (11/01/2022 AM Trial Tr.) at 26:22–27:11 ("If you lived in Ontario, you may be talking about fairly difficult choices being made, at least in the near term. . . . I really didn't hear any contrary information that the impacts, at least in the near term, are going to be substantial for natural gas needs in that part of Canada.") (Conley, J.).

capable of carrying natural gas liquids from Alberta to Ontario," a Line 5 shutdown would "force the shutdown of refinery process units, which will decrease the supply of fuel (gasoline, distillate, and jet fuel) refined by our refinery."); Dkt. 646 (Imperial Oil Decl.) ¶ 5 ("As a result of any injunction, if Line 5 should remain out of service beyond several days, production rates at Imperial's two Ontario refineries will be significantly reduced, which would result in shortfalls of gasoline, diesel, and jet fuel in southern Ontario within approximately one week."); Dkt. 647 (PBF Energy Decl.) ¶ 7 (explaining how consumers and workers would be "irreparably harmed" by a shutdown of Line 5); Dkt. 648 (Plains Decl.) ¶ 5 (explaining a Line 5 shutdown would result in the closure of Plains fractionator facilities); Dkt. 650 (Suncor Energy Decl.) ¶ 5 (describing the "the consequences to Suncor, our customers, and other affected parties" form a Line 5 shutdown); Dkt. 651 (Superior Decl.) ¶ 6 (declaring that a shutdown creates a risk of residents losing essential services to fuel their homes and run their businesses); Dkt. 652 (United Decl.) ¶ 4 (explaining that a shutdown of Line 5 will cause the "shutdown of United's refinery"); Dkt. 653 (Cenovus Energy Decl.) ¶ 4 (detailing the potential loss of supply to the Toledo region if a shutdown was implemented); *see also* **Exhibit 3** (Letter from Canadian Propane Assoc. to Judge Conley, May 16, 2023). This Court can and should weigh these significant impacts, especially in light of Enbridge's persistent efforts—and the Band's refusal—to implement a reasonable solution that would avert any environmental crisis.

Finally, two institutional public-interest concerns also militate against injunction. First, the governments of the United States and Canada are engaged in ongoing negotiations under the Transit Treaty because Canada has invoked dispute resolution under the Treaty. Issuance of an injunction would no doubt give Canada more reason to argue that the United States is in violation of the Treaty by allowing a tribe to successfully force the closure of a pipeline on purported safety

grounds notwithstanding the terms of the Treaty. *See Government of Canada Statement on the 1977 Canada-U.S. Transit Pipelines Treaty as it relates to Line 5 on the Bad River Band Reservation in Wisconsin*, *available at* https://twitter.com/CanEmbUSA/status/1658458115174440967?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Etweet (May 16, 2023). Second, because PHMSA has the express authority to shut down pipelines when they pose an imminent hazard, principles of comity and restraint counsel deferring to PHMSA and allowing it to exercise its shut-down authority if and when it becomes necessary. *See* supra at Section I.A.3.

IV. If the Court Grants Any Injunction, Enbridge Requests a Stay Pending Appeal

If the Court orders any injunctive relief, Enbridge respectfully requests that the Court stay enforcement of that order pending appeal. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers*, 533 F. Supp. 3d 701, 716–17 (W.D. Wis. 2021), *rev'd on other grounds,* 46 F.4th 552 (7th Cir. 2022) (granting permanent injunction; "stay[ing] enforcement of the judgment for 30 days to allow the parties to appeal;" and adding that "[t]he court will, if requested, grant a stay pending appeal"). A stay is warranted based on all the arguments above. In particular, given PHMSA's exclusive authority to shut down Line 5 on an emergency basis, an injunction would both be unnecessary and would raise substantial questions about the interplay between this Court and an expert agency's executive authority. An injunction would raise substantial foreign-policy concerns, given the ongoing bilateral negotiations between the United States and Canada under the Transit Treaty. And an injunction would have immediate and injurious effects on the public interest, as shown at trial and above.

CONCLUSION

WHEREFORE, this Court should deny the Band's Motion for Permanent Injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 16, 2023, I served the foregoing document on all counsel of record using the Court's ECF system.

/s/ Justin B. Nemeroff