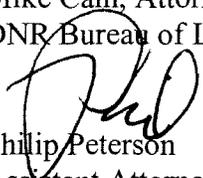


**CORRESPONDENCE/MEMORANDUM**

**DEPARTMENT OF JUSTICE**

Date: June 18, 2007

To: Mike Cain, Attorney  
DNR Bureau of Legal Services

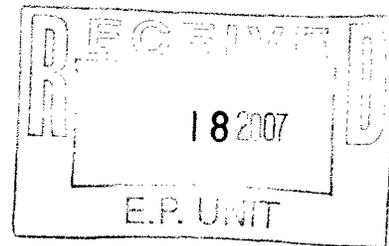
From:   
Philip Peterson  
Assistant Attorney General

Subject: Wisconsin Wetlands Association, Inc. v. DNR (Enbridge Energy)  
Case No. 06-CV-4339 (Dane County Circuit Court)

Attached to this memo is a copy of the decision of Judge Niess denying the petition for judicial review. Judge Niess concludes that DNR's record is adequate and that DNR's decision not to prepare an EIS is reasonable. Thanks for all your efforts, those of Dave Siebert, and those of DNR staff in this matter. That effort led to the attached success on judicial review. Thanks.

Attachment

c: Dave Siebert



STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 9

DANE COUNTY

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WISCONSIN WETLANDS ASSOCIATION, INC.,  
RIVER ALLIANCE OF WISCONSIN, LORI GRANT,  
FRIENDS OF ST. CROIX HEADWATERS,  
AND SCOTT PETERSON,

Petitioners,

v.

Case No. 06 CV 4339

STATE OF WISCONSIN DEPARTMENT  
OF NATURAL RESOURCES

Respondent.

---

**DECISION AND ORDER**

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STATEMENT OF THE CASE

In this §227.52, Stats., judicial review, petitioners challenge the November 27, 2006 decision by respondent State of Wisconsin Department of Natural Resources ("DNR") that an Environmental Impact Statement ("EIS") is not required by Wisconsin's Environmental Policy Act ("WEPA") §1.11 and Wis.. Admin. Code § NR 150.01 *et seq.* in reasonably considering and evaluating the environmental effects of Endbridge Energy LP's project constructing two petroleum-related pipelines in an existing right-of-way extending diagonally across Wisconsin for 321 miles from Superior to near Whitewater. Petitioners seek an order reversing that decision, and remanding this case to the DNR with an order to either prepare an EIS or a new Environmental Assessment ("EA") that meets the requirements of WEPA. Petitioners additionally request the court to vacate the Chapter 30 permit and water quality certifications that have been issued to Endbridge Energy, LP based upon the DNR's allegedly deficient WEPA analysis, and award attorney's fees.

The certified administrative record has been provided, the issues have been fully briefed, and no party has requested oral argument. Accordingly, the petition is ripe for decision. The court has reviewed the administrative record, the

briefs and other submissions of the parties, and the applicable case law. Based upon that review, and for reasons more fully set forth below, the petition is denied.

### PRELIMINARY MATTERS

At the outset, two issues are raised by respondent DNR and Endbridge Energy, LP. Respondent DNR avers that this court lacks jurisdiction over any challenge to the Chapter 30 permit and water certifications, because petitioners have failed to file a petition for judicial review under Chapter 227 of the Wisconsin statutes specifically directed at and identifying the permit and water certifications. This issue is mooted by the court's decision here rejecting petitioners' essential premise for invalidating the permit and certifications, i.e. noncompliance with WEPA, and is accordingly not decided.

Endbridge Energy, LP moves to strike certain exhibits to the Affidavit of Brent Denzin, on the grounds that they improperly introduce evidentiary matters outside the administrative record. That motion is denied. To be sure, §227.57 (1), Stats., limits this Court's review of the DNR's decision in this case to the record developed at the administrative level. That said, some of the exhibits sought to be stricken are in fact contained in the administrative record. Those that are not are simply not relied upon by the Court in this decision.

### APPLICABLE LEGAL STANDARDS CONTROLLING THIS JUDICIAL REVIEW

The "separation of powers" doctrine requires that the courts' participation in establishing environmental policy in Wisconsin be nonexistent. On the other hand, the courts' role in enforcing environmental laws adopted by the appropriate policymaking bodies in this state (the legislative and executive branches) is an important one, albeit quite limited. *Cf. Clean Wisconsin, Inc. v. Public Service Commission*, 282 Wis. 2d 250, 306, 700 N.W.2d 768 (2005). Our Supreme Court provides a succinct but comprehensive statement of that role in *State ex rel. Boehm v. DNR*, 174 Wis. 2d 657, 665-667, 497 N.W. 2d 445 (1993):

[1]  [2]  The purpose of WEPA is to insure that agencies consider environmental impacts during decision making. *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*, 79 Wis.2d 409, 416, 256 N.W.2d 149 (1977) ( *WED III* ); *City of New Richmond v. Wisconsin Dept. of Natural Resources*, 145 Wis.2d 535, 542, 428 N.W.2d 279 (Ct.App.1988). WEPA is procedural in nature and does not control agency decision making. Rather, it requires that agencies consider and evaluate the environmental consequences of alternatives available to them and undertake that consideration in the framework provided by sec. 1.11, Stats. *WED III*, 79 Wis.2d at 416, 256 N.W.2d 149; *New Richmond*, 145 Wis.2d at 542, 428 N.W.2d 279.

[3]  WEPA requires that all state agencies prepare an EIS for "every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment...." Section 1.11(2)(c), Stats. Thus, only if it is a major action significantly affecting the quality of the human environment is an EIS to be conducted. Wisconsin's Environmental Decade, Inc. v. Wisconsin Dept. of Natural Resources, 115 Wis.2d 381, 394, 340 N.W.2d 722 (1983). In the instant case, the DNR concluded that an EIS was not required because the landfill proposal was not a major action which would significantly affect the quality of the human environment.

[4]  We must first determine the appropriate standard of review for a negative EIS determination by a state **\*666** agency. The test as to whether an EIS should be conducted is one of reasonableness and good faith. Wisconsin's Environmental Decade, Inc. v. Dept. of Industry, Labor & Human Relations, 104 Wis.2d 640, 644, 312 N.W.2d 749 (1981); WED III, 79 Wis.2d at 423, 256 N.W.2d 149. The often repeated two-part test of this reasonableness and good faith standard is as follows:

First, has the agency developed a reviewable record reflecting a preliminary factual investigation covering the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of the action proposed; second, giving due regard to the agency's expertise where it appears actually to have been applied, does the agency's determination that the action is not a major action significantly affecting the quality of the human environment follow from the results of the agency's investigation in a manner consistent with the exercise of reasonable judgment by an agency committed to compliance with WEPA's obligations?

WED III, 79 Wis.2d at 425, 256 N.W.2d 149.<sup>FN2</sup>

FN2. Other cases which have quoted and applied this two-part test include: New Richmond, 145 Wis.2d at 542-43, 428 N.W.2d 279; Town of Centerville v. Dept. of Natural Resources, 142 Wis.2d 240, 246-47, 417 N.W.2d 901 (Ct.App.1987); Wisconsin's Environmental Decade, Inc. v. Dept. of Natural Resources, 115 Wis.2d 381, 391, 340 N.W.2d 722 (1983); Wisconsin's Environmental Decade, Inc. v. Dept. of Natural Resources, 94 Wis.2d 263, 268-69, 288 N.W.2d 168 (Ct.App.1979).

[5]  Accordingly, we first review the adequacy of the record developed by the DNR. We examine the record to see whether the DNR considered relevant areas of environmental concern and whether the DNR conducted a preliminary factual investigation of sufficient depth to **\*667** permit a reasonably informed preliminary judgment of the environmental consequences of the proposed action. WED III, 79 Wis.2d at 425, 256 N.W.2d 149. We conclude that the record in this case reflects a sufficient preliminary investigation into the relevant areas of environmental concern to permit a reasonably informed preliminary judgment as to the environmental consequences of the proposed landfill. The record exceeds that which was envisioned by WED III.

[6]  [7]  The record produced by the agency need not follow any particular form. WED III, 79 Wis.2d at 425 n. 15, 256 N.W.2d 149. All it must do is "reveal in a **\*\*450** form susceptible of meaningful evaluation by a court the nature and results of the agency's investigation and the reasoning and basis of its conclusion." *Id.* The record need not contain a primary document supporting each conclusion.

While this court's mandate on judicial review of an EIS denial by DNR under WEPA mirrors that of the Court of Appeals, the appellate courts owe no deference to the trial court's conclusions. Rather, appellate review examines the record independently to determine whether (1) the DNR has adequately developed a reviewable record reflecting a sufficient preliminary investigation of relevant areas of environmental concern and (2) the DNR's denial followed from the results of the DNR's investigation in a manner consistent with the exercise of reasonable judgment, given a deferential standard of review. *City of New Richmond v. DNR*, 145 Wis. 2d 535, 543 and 548, 428 N.W. 2d 279 (Ct.App. 1988). Because the Court of Appeals is essentially uninterested in whether this court is right or wrong in this case, see *Stafford Trucking Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W. 2d 79, 82 (Ct.App. 1981), the Court's discussion here will be abbreviated, especially given petitioners' presumed preference for speed over prolixity at the trial court level.

#### ADEQUACY OF THE RECORD

There can be little doubt as to the adequacy of the record in this case under the test set forth above in *Wisconsin's Environmental Decade* and *Boehm*, even granting petitioners' argument that there is some duplication of documents in the approximately 7300-plus pages (not to mention compact discs) that constitute the official record. The precise manner in which a reviewable record is assembled is a matter for the sound discretion of the DNR. *Wisconsin's Environmental Decade, supra*, at 442. Here, the record contains photographs, maps, public comments, responses to public comments, diagrams, discussion by the various agencies involved and their employees, and descriptions/evaluations of soil conditions, flora, fauna, endangered species, threatened species, interests of private landowners, forest lands, tribal interests, rivers, streams, surveys, mitigation plans, protocols for all stages of construction, and more.

The administrative record in this case also includes an Environmental Assessment (EA) prepared by the DNR in conjunction with the United States Army Corps of Engineers under Wis. Admin Code § NR 150.02(9), which requires the assessment to identify the proposed actions's effect on the environment, consider alternatives, and provide evidence as to whether the proposed action is a major action requiring preparation of an EIS.

As in *City of New Richmond, supra* at 546-547, the extent of the DNR's investigation here is in sharp contrast to the actions of the PSC found to be inadequate in *Wisconsin's Environmental Decade* and the record assembled by

the DNR exceeds that envisioned by the *Wisconsin's Environmental Decade* court.

The DNR's decision eschewing an EIS thus satisfies the first prong of *Wisconsin's Environmental Decade's* test. If this type of record is inadequate in the eyes of petitioners, their recourse is political, not legal, because this record easily satisfies the current law as interpreted by a higher courts.

### REASONABLENESS OF THE DNR'S DECISION

The second prong, i.e. the reasonableness of the DNR's determination that the 321 mile petroleum pipeline project bisecting Wisconsin is not a major action significantly affecting the environment, presents a closer question, especially when, at first blush, the natural reaction of the casual observer is "How can that be?" However, once again, when analyzed under the controlling case law, the DNR's decision must stand.

We begin with the higher courts' directive:

"In determining the reasonableness of the DNR's decision that an EIS is not required, we defer to the technical expertise of the department. [Citation omitted] This is particularly appropriate here because the DNR is the state agency possessing staff, resources, and expertise in environmental matters. [Citation omitted] Courts are ill-equipped, for example, to determine whether a given level of dioxin introduced into the food chain represents a significant environmental issue. It is possible that any change in our environment may be viewed as a "major action" by the public. Nonetheless, the language in WEPA sec. 1.11 maintains a distinction between major actions requiring an EIS and non-major matters that do not. We must rely on the department for its expertise in making such technical scientific determinations as long as it acts reasonably based on an adequately developed record."

*City of New Richmond*, 145 Wis. 2d at 548. See also *Boehm*, 174 Wis. 2d at 666. Moreover, if the DNR's determination was reasonable and made in good faith, it is immaterial that this court might have reached a different conclusion from the same record.

"Once an agency has made its fully informed and well-considered decision, a reviewing court may not interfere with [the] agency decision not to prepare an EIS."

*Larsen v. Munz Corp.* 167 Wis. 2d 583, 606-07, 482 N.W. 2d 332 (1992).

"The test is not whether this court ... would have ordered an EIS for this project; rather, the test is whether the ... decision not to prepare an EIS was reasonable under the circumstances."

*Id.* at 608.

The DNR regulations promulgated under WEPA define "major action" as "an action of such magnitude and complexity that the action will have significant effects upon the quality of the human environment..." Wis. Admin. Code §NR 150.02(16). "Significant effects", in turn, are defined as "considerable and important impacts of major state actions on the quality of the human environment." *Id.* at §NR 150.02 (25). The defense briefs substantially highlight the determination by the DNR that the pipeline project is not a "major action", and thus exempt from the EIS requirement, demonstrating how this conclusion follows from the assembled record. See "Responding Brief of Respondent Wisconsin Department of Natural Resources" ("DNR brief"), pages 14, 19-23, and "Endbridge Energy Limited Partnership's Response to Initial Brief for Petitioner" ("Endbridge Brief"), 19-40. Those arguments will not be repeated here, but suffice it to say that the court agrees that they show a reasonable and good faith conclusion flowing from the developed record. To pass muster on judicial review, the DNR's determination need not be the only reasonable conclusion, or even the most reasonable conclusion. If it is but one reasonable conclusion among several, the court must sustain it.

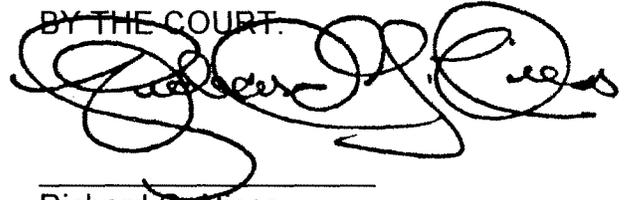
Petitioners repeatedly attack the substantive adequacy of the DNR's Environmental Assessment (EA) in their challenge to the DNR's determination that no EIS is required. However, as Endbridge Energy points out, these are two separate issues, the latter being properly before the court and the former not, since it was not pleaded in the Petition for Review. (Endbridge brief, page 19-20, n. 7) It is not this court's role to evaluate the adequacy of the EA's contents here, but only the reasonableness of the DNR's conclusion that an EA is all that WEPA requires for this pipeline project. *Clean Wisconsin Inc., supra*, at 376; see also *Larsen v. Munz Corp.*, 167 Wis. 2d 583, 482 N.W.2d 332 (1992). Even so, the defense briefs largely dispense with petitioners' substantive objections to the EA, such that this court would be hard-pressed to find the EA deficient under WEPA, even conceding petitioners' argument that the document is far from perfect.

### CONCLUSION

The petition for review is denied. Under the test first articulated in *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*, 79 Wis. 2d 409, 256 N.W. 2d 149 (1977) and subsequently reaffirmed in multiple cases, the record prepared by the DNR is adequate and its decision not to prepare an EIS was reasonable.

Dated this 14th day of June, 2007.

BY THE COURT.

A handwritten signature in black ink, appearing to read "Richard G. Niess", written over a horizontal line.

Richard G. Niess  
Circuit Judge

CC: Attorney Brent Denzin  
Attorney Thomas M. Pyper  
Assistant Attorney General Philip Peterson

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH

DANE COUNTY

~~2006 DEC 21 AM 8:43~~

DANE CO. CIRCUIT COURT

WISCONSIN WETLANDS ASSOCIATION, INC.  
222 S. Hamilton Street #1  
Madison, Wisconsin 53703

RIVER ALLIANCE OF WISCONSIN  
306 East Wilson Street Suite #2W  
Madison, WI 53703

LORI GRANT  
1034 Hillside Ave  
Madison, WI 53705

FRIENDS OF ST. CROIX HEADWATERS  
8590 East Flowage Lane  
Gordon, WI 54838

SCOTT PETERSON  
8590 East Flowage Lane  
Gordon, WI 54838

Petitioners,

v.

DEPARTMENT OF NATURAL RESOURCES,  
101 S. Webster Street  
Madison, Wisconsin 53703

Respondent.

010CV4339

CASE NO.

CASE CODE: 30607

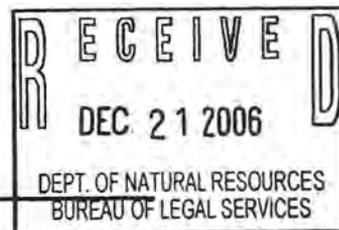
Administrative Agency Review

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PETITION FOR REVIEW

The Petitioners, Wisconsin Wetlands Association ("WWA"), River Alliance of Wisconsin ("RAW"), Lori Grant, Friends of St. Croix Headwaters ("FOSCH"), Scott Peterson, by their attorneys, Midwest Environmental Advocates, Inc., petition this Court pursuant to Wis. Stat, § 227.52, *et seq.* for review of the final decisions of the Department

of Natural Resources (“DNR”) in the following matters: 1) the DNR’s certified finding, dated November 27, 2006, that an Environmental Impact Statement (“EIS”) is not required by Wisconsin’s Environmental Policy Act (“WEPA”), Wis. Stat. § 1.11, and Wis. Admin. Code Ch. NR 150 (hereinafter “Final EA”); and 2) the DNR’s approval of the Chapter 30 permits and Water Quality Certification for Enbridge Energy, Inc. (“Enbridge”) to construct two pipelines from Superior, Wisconsin to Delavan, Wisconsin. In support of this petition, Petitioners state:

### **PETITIONERS**

1. Wisconsin Wetlands Association (WWA) is a 501(c)(3) tax-exempt non-profit organization dedicated to the protection, restoration and enjoyment of wetlands and associated ecosystems through science-based programs, education and advocacy.

WWA’s office is at 222 S. Hamilton St., #1, Madison, WI 53703.

2. WWA is a membership organization with more than 1300 members. WWA members use and enjoy wetland areas that are impacted by the proposed Enbridge pipeline expansion. For example, in addition to member’s general support for protection of wetland areas along the pipeline corridor, WWA hosts wetland field trips for members in Dane, Douglas, and other counties that are impacted by the pipeline expansion.

3. On November 11, 2006, WWA, in collaboration with Midwest Environmental Advocates and River Alliance of Wisconsin, submitted public comments to DNR regarding the Environmental Assessment (herein “Enbridge Draft EA”) and preliminary negative determination for Stage 1 of Enbridge’s Southern Access Expansion Program.

4. WWA members are aggrieved by the impacts to 1,265 acres of wetlands, DNR's determination that an EIS was not required, and issuance of chapter 30 permits and water quality certification based on an inadequate WEPA analysis.

5. The River Alliance of Wisconsin (RAW) is a 501(c)(3) tax-exempt non-profit, non-partisan group with its primary office at 306 E. Wilson Street, Suite 2W, Madison, Wisconsin, 53703. RAW is a membership organization with more than 2,000 citizen, organization, and business members dedicated to advocating for the protection, enhancement and restoration of Wisconsin's rivers and watersheds.

6. RAW members use and enjoy rivers that are impacted by the Enbridge pipeline expansion.

7. On November 11, 2006, RAW, in collaboration with Midwest Environmental Advocates and WWA, submitted comments to DNR regarding the Enbridge Draft EA for Stage 1 of Enbridge's Southern Access Expansion Program.

8. RAW members are aggrieved by the impacts to 242 waterways, DNR's determination that an EIS was not required, and issuance of chapter 30 permits and water quality certification based on an inadequate WEPA analysis.

9. On November 15, 2006, both WWA and RAW attended a meeting between DNR Secretary Hassett and Wisconsin conservation organizations that discussed concerns over the Enbridge Draft EA.

10. Petitioner Lori Grant is the Policy Program Manager at River Alliance of Wisconsin and resides at 1034 Hillside Avenue Madison, Wisconsin, 53705.

11. As Policy Program Manager, Ms. Grant has worked with 42 statewide and local conservation organizations, led a successful effort to classify 38 northern Wisconsin

ivers as Outstanding Resource Waters and an additional 7 rivers as Exceptional Resource Waters (effective date of new classifications, December 1, 2006).

12. As a result of her work, four more of the proposed project river crossings are now classified as ORW (Amnicon, Upper St. Croix, Totogatic, Thornapple), and one more is now classified as ERW (Flambeau).

13. Ms. Grant uses and enjoys the Totogatic and Flambeau Rivers, among other rivers that are impacted by the proposed pipeline construction. Specifically, Ms. Grant paddles and canoes on portions of rivers that are crossed by the Enbridge pipeline corridor.

14. Ms. Grant's enjoyment of the Totogatic, Flambeau, and other Wisconsin rivers may be adversely affected by pipeline construction.

15. Petitioners Friends of the St. Croix Headwaters (herein "FOSCH") is a 501(c)(3) tax-exempt non-profit organization. FOSCH is a member-based organization staffed by a group of citizen-volunteers dedicated to advocating for the protection and preservation of the upper St. Croix River and its watershed. FOSCH's mailing address is 8590 East Flowage Lane, Gordon, Wisconsin 54838.

16. FOSCH has been designated as a "Qualified River Management Organization" by the Wisconsin DNR, which means it has received DNR grants for its work protecting the upper St. Croix River. FOSCH works on water monitoring, invasive species control, land acquisition, and protective designations for the upper St. Croix River, including areas that will be crossed by the proposed Enbridge pipeline.

17. Petitioner Scott Peterson is the president of FOSCH and owns property at 8590 East Flowage Lane, Gordon, Wisconsin, 54838.

18. Due in part to FOSCH's efforts, the upper St. Croix River was re-classified as an Outstanding Resource Water in 2006.

19. The proposed Stage 1 Enbridge pipeline construction will cross the newly designated upper St. Croix River.

20. Petitioners FOSCH and Mr. Peterson use and enjoy the portion of the St. Croix River Headwaters that will be impacted by the proposed Enbridge pipeline expansion.

21. Petitioners FOSCH and Mr. Peterson would be adversely affected by any impact to the upper St. Croix River from the construction of the Enbridge pipeline.

22. DNR released the Draft EA on October 31, 2006 for public comment.

23. After the DNR spent over a year negotiating in private with Enbridge about this project, they gave the public a mere 14 days to submit comments on the Enbridge Draft EA.

24. Midwest Environmental Advocates, and petitioners WWA and RAW collaborated to submit joint comments on the Enbridge Draft EA on November 11, 2006 (herein "Petitioners' Comments").

25. Among other concerns, the Petitioners' Comments addressed the Enbridge Draft EA's limited scope of analysis, incomplete impacts analysis, inadequate alternatives analysis, and unreasonable preliminary determination that the project would have no significant impact on the environment.

26. DNR received at least 41 other public comments on the Enbridge Draft EA.

27. On November 27, 2006, DNR released the Final EA and a final determination that the Enbridge pipeline expansion would have no significant impacts on the

environment and that an Environmental Impact Statement was not necessary. With the November 27, 2006 final determination, DNR approved all Chapter 30 permits, with conditions, and granted State Water Quality Certification.

28. Pursuant to Wis. Stat, § 227.52, *et seq.*, Petitioners are aggrieved by the November 27, 2006 DNR determinations.

### **RESPONDENT**

29. Respondent DNR is an agency of the State of Wisconsin that has been delegated the authority to protect Wisconsin's navigable waterways by determining whether to approve wetland fill proposals and permits for pipeline stream crossings, as well as the central state agency to carry out the policy of WEPA. DNR's address is 101 S. Webster Street, Madison, Wisconsin 53703.

### **FACTS**

#### **A. Enbridge Energy, Inc.'s Proposed Southern Access Expansion Program**

1. In May, 2005, Enbridge approached DNR with a proposal to expand Enbridge's pipeline capacity in the Midwest to meet their projections of growing demand for oil.

2. Enbridge owns and operates two existing pipelines along an 80-foot permanent right-of-way from Superior to Delavan, Wisconsin (herein "Enbridge pipeline corridor"). The first of the two pipelines was constructed in 1968; the second was constructed in 1998. Final EA p. 7.

3. Enbridge originally proposed to construct eight additional “loops” on to the existing 1998 pipeline. The loops would provide approximately 124,000 barrels per day (“bpd”) in additional capacity.

4. The May 2005 proposal also included a future expansion from Delavan, Wisconsin to the Spearhead pipeline in Flanagan, Illinois.

5. Between May, 2005 and May, 2006, Enbridge corresponded with DNR regarding the details of the proposed expansion.

6. By May, 2006, Enbridge had broken the project into two segments or stages starting in Superior, Wisconsin and ending in Flanagan, Illinois, where the pipeline would then connect to Enbridge’s existing Spearhead pipeline.

7. In Stage 1, Enbridge proposes to construct two 321-mile pipelines from Superior to Delavan, Wisconsin. One 42-inch pipeline will transport crude oil and diluent chemicals and one 20-inch pipeline will return the diluent chemicals used to transport the crude oil. Final EA p. 5, 7.

8. According to Enbridge’s *Summary Purpose and Need for Enbridge Expansion Projects in Wisconsin Prepared to Supplement Inquiries from Environmental Agencies*, dated November 14, 2006, the Stage 1 expansion is expected to increase capacity by 146,000 bpd.

9. According to Enbridge’s Environmental Project Description for Stage 2, Enbridge proposes to begin construction of Stage 2 in 2008 and will create a new right-of-way from Delavan, Wisconsin to Flanagan, Illinois.

10. When completed, the Southern Access Expansion Program is estimated to deliver 400,000 bpd to refineries in the Midwest. Final EA p. 7, 19.

11. On May 30, 2006, Enbridge filed applications for Chapter 30 permits, and State Water Quality Certification (“WQC”) for the Stage 1 pipeline expansion project from Superior to Delavan, Wisconsin. (See DNR Chapter 30/WQC Finding of Facts).

**B. DNR’s Environmental Assessment is Limited to Stage 1**

12. Since Enbridge’s May 2005 presentation to DNR, the plan for the Southern Access Expansion Program has been to connect Enbridge pipelines in Superior, Wisconsin to Enbridge’s Spearhead pipeline in Flanagan, Illinois, and ultimately to Southern Illinois/St. Louis area.

13. Between May, 2005 and the release of the Final EA on November 27, 2006, Enbridge has consistently promoted their plans to expand the Southern Access pipeline to Flanagan, Illinois through press releases, letters to DNR, an Environmental Project Description, and website descriptions.

14. DNR recognizes the plan to connect Superior, Wisconsin and Flanagan, Illinois in both the Enbridge Draft EA and Final EA. Final EA p. 7.

15. Due in part to the existing 80-foot right-of-way and “regulatory streamlining,” Enbridge proposed to use the existing right-of-way from Superior to Delavan (“Stage 1”) and construct a new right-of way from Delavan to Flanagan (“Stage 2”).

16. Stage 1 and Stage 2 are part of the same project—the Southern Access Expansion Program.

17. Both Stage 1 and Stage 2 are required to meet the 400,000 bpd capacity that is set forth as the Purpose and Need of the project in the Final EA. Final EA p. 20.

18. Without Stage 2, the increased capacity will only be 146,000 bpd.

19. DNR received reports from Enbridge discussing environmental impacts of both Stage 1 and Stage 2 of the pipeline expansion.

20. Specifically, in March, 2006, Enbridge submitted an “Environmental Project Description” for “Stage 2” of the Southern Access Expansion Program, entitled the “Delavan to Flanagan Project” to DNR. The project description identifies a pipeline route, and briefly dismisses long-term impacts of the Delavan to Flanagan connection.

21. Stage 1 and Stage 2 were separated to avoid addressing the combined impacts of both Stages of development.

22. According to Enbridge’s May 2006 Environmental Impact Report (“EIR”):

*One disadvantage of [using routes through Wisconsin] is that, . . . , they would essentially be greenfield routes through Illinois. However, this disadvantage was determined to be inconsequential because during the planning stages Enbridge’s project scope was altered to make the Delavan pump station near Whitewater in Rock County, Wisconsin the end point of the STAGE 1 Project.*

EIR p. 4 (emphasis added).

23. Despite attempts to reduce the scope of the WEPA analysis, Stage 1 and Stage 2 are two parts of the same project-- Southern Access Expansion Program. Final EA p. 7

24. Although the DNR recognized this connection, they produced a Final EA that only analyzed the impacts from Stage 1 of the expansion project:

DNR considered whether to also evaluate the impacts of a potential Phase 2 pipeline project, which would continue south from the Delevan pump station into Illinois. This route would include approximately 30 miles of pipeline in Wisconsin. However, Enbridge has not notified DNR that they are preparing to apply for permits for this additional project. Instead, the company notes that development of this pipeline will depend upon two factors: whether oil field development will expand to produce additional supplies in the near future, and whether demand for this additional supply

would warrant the additional capacity provided by an additional length of pipeline. Therefore, this EA does not address that potential project.

Final EA p. 113

25. Despite the fact that Stage 2 permit applications have not been submitted, Enbridge has notified DNR of its plans to construct a pipeline connecting Delavan to Flanagan in 2008 and submitted project descriptions that could be used to assess Stage 2 environmental impacts.

26. Enbridge gave the DNR documents describing Stage 2, including: a Stage 2 Environmental Project Description, proposed routes from Delavan, Wisconsin to Flanagan, Illinois, timelines for Stage 2 construction, letters to landowners addressing land purchases along the new right-of-way, and Enbridge's repeated reference to the Superior-Flanagan connection in DNR correspondence.

27. Without Stage 2, Enbridge cannot complete the ultimate objective of the Southern Access Expansion Program—to connect Superior to Flanagan, and other refineries in Illinois.

28. Enbridge cannot meet its objective of expanding 400,000 gallons into refineries in Illinois without constructing the Stage 2.

29. Nevertheless, the Final EA does not address Stage 2 impacts.

**C. DNR's Environmental Assessment Ignores Impacts From Construction Pipe yards.**

30. According to a June 7, 2006 Letter from Mr. Shaun Kavajecz, Enbridge Supervisor of Environment and Business Development, to officials at the DNR Service Center in Wausau, Wisconsin, Enbridge is applying for permits to construct pipe yards

separately so that the yards are “independent of the overall WEPA Assessment process, following the advice of WDNR’s Office of Energy.”

31. As construction staging areas, pipe yards are high traffic, potentially high disturbance areas. Vegetation clearing may be required and gravel pads may be needed if the pipe yards are located in wetlands.

32. The Stage 1 pipeline cannot be built without construction pipe yards.

33. Nevertheless, the Final EA does not analyze the impacts of construction pipe yards that will service the proposed Stage 1 construction.

#### **D. Southern Access Expansion Program Stage 1 Impacts**

34. Even excluding Stage 1 pipe yard construction and Stage 2 impacts, the Southern Access Expansion Program could have a significant environmental impact.

35. Two 321 mile, 6 feet deep, 4 to 6 feet wide trenches will be dredged to accommodate installation of the pipes.

36. While the two pipelines will be placed in an existing right of way, Enbridge proposes to clear a continuous 100-foot wide swath of land for “temporary workspace” adjacent to the existing 80-foot permanent right-of-way.

37. Along with the cleared 100-foot work space, Enbridge will grade and clear 40 feet of an existing permanent right-of-way. Final EA p. 13.

38. The total construction area will be 140 feet wide and 321 miles long, or approximately 3,900 acres of land.

39. During construction, Enbridge will clear all vegetation from 1,265 acres of wetlands and 1,930 acres of forest.

40. The pipeline will cross 242 rivers, at least 19 of which are Exceptional or Outstanding Resource Waters, and 74 miles of wetlands. EA, p. 5. Exceptional or Outstanding Resource Waters are considered some of the best, most pristine waters in Wisconsin.

*(i) Impacts to Forestland*

41. According to the Final EA, the clearing of 1,930 acres of forestland will contribute to forest fragmentation, habitat loss, temporary increase in soil erosion and runoff, increased soil temperatures, soil mixing, and soil compaction. Final EA p. 33-34.

42. Although the forests are supposed to be reseeded after construction, the efficacy of revegetation efforts on the 1,930 acres is still unknown:

On page 3-28 of Enbridge's EIR, they indicate that 'all of the land outside of the existing right-of-way will be restored, reseeded and allowed to revert to its preconstruction state.' *However, the Revegetation Plan is vague on the issue as to what extent and where active restoration of the temporary workspace will occur.*

Final EA p. 32-33.

43. Private landowners, owning land on approximately 300 miles of the corridor, will have the option of re-planting trees that are cleared.

44. According to the Final EA:

. . . it cannot be asserted that temporary workspace will revert to its preconstruction state without landowner consent and without the commitment to active restoration along some portions of the corridor.

Final EA p. 32-33.

45. DNR does not know how many landowners will elect to re-plant trees.

46. Moreover, according to the Final EA, regrowth could take “a few decades for younger forest patches, to more than 100 years for areas with mature trees.” Final EA p. 6

47. According to the Final EA, the permanence of forest clearing impacts depends on the forest type and ecology of the site. Final EA p. 33.

48. The Final EA does not address the estimated age of the trees that will be cleared. Specifically, DNR did not assess how many mature trees (needing 100 or more years to grow back) will be impacted by the construction.

49. Despite the lack of information regarding the forest type, ecology, and age of the forestland that will be cleared, DNR found that the impacts will not be significant.

*(ii) Impacts on Rare Plant Communities*

50. The DNR admits that it has not fully analyzed the impacts to rare plant life:

This effort is incomplete: additional surveys may be completed prior to disturbance along the pipeline route as construction progresses; and monitoring by environmental inspectors during construction may also identify rare species. In this respect, WDNR continues to work with Enbridge to identify and address potential rare plant impacts as described below.

Final EA p. 36.

51. The Final EA goes on to claim:

In their 25 August correspondence to Enbridge regarding [Enbridge’s Mitigation Plan], WDNR indicated that there are many listed and special concern plant species that may occur throughout the length of the project. The rare plant survey completed in Douglas County provides an adequate assessment of potential impacts in the survey area, *but not other counties*. Incidental observations during the wetland delineations as proposed in [Enbridge’s Mitigation Plan] *may not be an adequate method for identifying rare plant species* because the tendency is to focus only on associated dominants, ignore microhabitats, and does not address upland species. The Plan does not propose additional surveys.

Final EA p. 37.

52. In the Final EA, DNR recognizes the need for further review of wetland delineation for rare natural communities, screening for potentially suitable habitat, and further consultation with DNR. Final EA p. 37-38.

53. Despite the need for more information regarding the presence of rare plants, DNR determined that there would be no significant impacts to rare plant communities.

*(ii) Sedimentation*

54. The clearing of upland open space and forestland and stream bank construction will increase soil erosion, fragment and remove wildlife habitat, and leave areas vulnerable to invasive species. Final EA pp. 23, 36, 37.

55. Soil loss reduces the chances of re-vegetation and pollutes surrounding wetlands and waterways.

56. Additionally, according to the Final EA, “[i]ncreased sedimentation and turbidity from the proposed construction have the greatest potential to adversely affect fisheries resources.” Final EA p. 66.

57. Trout spawning is particularly harmed by increased sedimentation.

58. The proposed pipeline will cross, and increase sedimentation in, 18 trout streams. Final EA p. 6.

59. In DNR’s Fiscal Estimate Worksheet for the Non-agricultural Performance Standards, drafted in October, 2001, DNR claims that approximately 10,000 acres of land are under construction in Wisconsin each year. DNR, *Fiscal Estimate for Non-agricultural Performance Standards*, Attachment 2, p. 5, October 2001, [www.wiparks.net/org/water/wm/nps/pdf/rules/NR151\\_fiscal\\_estimate\\_appendix2.pdf](http://www.wiparks.net/org/water/wm/nps/pdf/rules/NR151_fiscal_estimate_appendix2.pdf). (last visited December 13, 2006).

60. According to the DNR website:

From an average construction site, 30 tons of sediment per acre is eroded into nearby waterways. Due to these high erosion rates (lack of vegetation) and high delivery rates (efficient ditches and storm sewers), construction sites are by far the largest source of sediment that pollutes the water resources of Wisconsin.

*See DNR Website, Construction Site Erosion Control and Storm Water Management, [www.dnr.wi.gov/org/water/wm/nps/stormwater/const.htm](http://www.dnr.wi.gov/org/water/wm/nps/stormwater/const.htm) (last visited December 13, 2006).*

61. Based on the estimated 10,000 acres of construction, the 3,900-acre construction site is the size of approximately 40% of the State's construction sites combined.

62. Given the risk of 30 tons of sediment per acre, the potential for soil loss on a 3,900-acre construction site could be significant.

63. However, the Final EA does not include any data, figures, or statistics that estimate the amount of soil that could erode from the construction area over the course of construction.

64. Similarly, the Final EA does not set forth a threshold of "significance" for sedimentation caused by upland construction and waterway crossings.

65. In Petitioners' Comments on the draft EA, they raised concerns about the lack of hard data that estimates impacts from the clearing and/or grading of up to 3,900 acres of land. The comments identified sediment loss models, such as SLAMM model, that are commonly used to estimate soil loss on other Wisconsin construction sites.

66. Despite the lack of data regarding the amount of erosion to expect, the Final EA claims that the use of "best management practices" (herein "BMPs"), such as silt

fencing and straw bales, and well-timed construction will “minimize” the impacts that erosion and sedimentation will have on waterways and wetlands.

67. In the past, DNR has estimated that silt fencing is capable of removing only 30% to 50% of construction site sediment. Similarly, sediment traps were considered 50%-70% effective at removing sediment. DNR, *Fiscal Estimate Worksheet for the Non-agricultural Performance Standards*, Attachment 2, p. 6 October 2001.

68. The Final EA does not include data, studies, or figures estimating the efficacy of these BMPs.

69. Despite the lack of data on the amount of erosion to expect or the efficacy of mitigation measures, the Final EA states that the impact will not be “significant.”

70. Bank construction and waterway crossings are also potentially significant sources of sedimentation. Final EA p. 66.

71. The wet trench crossing method excavates a trench through the stream using draglines or backhoes operating from one or both banks, causing bottom material to be picked up by currents and transported downstream. The bottom disturbance can increase sedimentation and turbidity. Final EA p. 58.

72. Additionally, when using the wet trench crossing method, Enbridge needs to clear a 7,500 square foot “extra workspace” on each side of the waterway. The extra work space will be at least 50 feet from the bank “where conditions permit.” Final EA p. 59.

73. Enbridge plans to cross 202 waterways using the wet trench method. Final EA p. 58.

74. Dry crossing methods are available, and will be used on 22 crossings. Dry crossing methods reduce sedimentation.

75. According to the Final EA:

Mitigative measures that will decrease the impacts to waterways include wet trenching in waterways only if they have no flow. If flow is present, dry crossing techniques will likely be required, which will decrease the amount of sediment that enters the waterway.

Final EA p. 65.

76. However, the Enbridge chapter 30 permits do not include conditions that require dry trenching when flow is present.

77. Furthermore, the Final EA does not explain why dry crossing methods are not used for all waterway crossings that will have flow. Final EA p. 56-59.

*(iii) Wetland Impacts*

78. Results from the wetland delineation reported in the EA identified 757 wetland crossings along the Stage 1 pipeline corridor. This accounts for approximately 68.6 corridor miles or 23% of the corridor. Final EA pp. 6, 81.

79. Total wetland impacts were estimated at 1,266 acres, including 361 acres of wetland impacts from discharges of dredged or fill material associated with the installation of the two pipes, and 905 acres of wetland impacts from vegetation removal and construction activity within the proposed 100-foot wide temporary workspace area. Final EA p. 81.

80. Approximately 262 acres of forested wetlands will be cleared for construction (Final EA p. 81), including tamarack and black spruce forest, and bogs, which are identified by DNR as rare natural communities. Final EA p. 35.

81. Other wetland communities to be impacted include approximately 625 acres of wet meadow wetlands, 274 acres of scrub-shrub wetlands, and 105 acres of emergent. Final EA p. 81.

82. Enbridge will disturb 2 cubic yards of soil per foot of pipeline, or approximately 1,448,482 cubic yards over the 321-mile corridor, to dig the pipeline trench. Final EA p. 19.

83. The 42-inch and 20-inch pipes, with support structures and sandbags, will permanently fill part of the pipeline trench.

84. Enbridge proposes to backfill the trench with wetland soils, using a tiered method of replacement where possible to restore wetland topsoil, and to regrade the site to pre-construction contours. Final EA pp. 5, 37, 104.

85. Restoration of the site will not restore microtopography.

86. The EA describes Enbridge's commitments to revegetate the restored wetlands when feasible. However, Enbridge's reseeded efforts depend on landowner's desire to reseed wetland areas. Landowners may choose to keep the forested wetland area in a non-forested state. Final EA p. 33-34.

87. Pipeline construction can adversely affect soils through increased soil erosion, soil compaction, rutting, loss of soil productivity, alteration of surface drainage patterns and temporary changes to the wetland's capacity to control erosion and floods. Final EA pp. 25, 83.

88. Changes in soil structure have the potential to substantially alter site hydrology due to compaction, plugging of springs and seeps, altering the course of surface flow, breaking through confining layers, or affecting depth to groundwater.

89. Changes in hydrology and disturbance of naturally developed soil microtopography can substantially alter the types of plants a wetland area can support. Vegetation canopy structure, in turn, often dictates the suitability of a site for wildlife and invertebrate forage and breeding.

90. Vegetation clearing, trenching, grading, and backfilling can destabilize the soil surface and increase erosion. Final EA p. 25.

91. Wetlands that at first may appear similar can perform different functions. See DNR, Wetlands Website, <http://www.dnr.state.wi.us/org/water/fhp/wetlands/functions.html> (last visited December 20, 2006).

92. Wetlands that provide low value for one function (e.g., floral diversity), may still rank as high in value for one or more other functions (e.g., water quality improvement or flood/stormwater retention).

93. Wetland functional assessments are used to evaluate the significance of impacts to wetland functions at a given site, and the adequacy of proposals to compensate (mitigate) for the loss of wetland functions.

94. Wisconsin wetland functional assessments examine physical, chemical and biological factors and recognize the following wetland functional values when reviewing projects with wetland impacts: floral diversity; wildlife habitat; fisheries; flood/storm water retention; water quality improvement; shoreline protection; groundwater recharge/discharge; and aesthetics/recreation.

95. The results of wetland functional assessments can also be used iteratively in the permitting process to identify additional measures that should be considered practicable for minimization of impacts to wetland functions.

96. The Final EA indicated that functional assessment analyses were completed for all wetlands associated with Areas of Special Natural Resource Interest (ASNRI). This included 11% of wetlands to be disturbed along the project corridor. Final EA p. 79.

97. The Final EA did not address site-specific wetland functions and values for the remaining 89% of the wetlands to be impacted along the corridor or acknowledge the need for further review.

98. Table 1 EIT of the Wetland Delineation Report indicates that some of these wetlands are larger, and may be of equal or higher quality and functional value, than the ASNRI associated wetlands along the route. These include an estimated: 36 wetland areas (10.16 miles of crossing) containing “communities of primary concern;” 18 wetland complexes (totaling 7.34 miles of crossing) described as containing “high quality” wetlands communities; and 18 wetland complexes (totaling 3.68 miles of crossing) described as containing “diverse” wetland communities.

99. Conversion of wetland forests to another wetland type substantially alters floristic composition and wildlife habitat values and has the potential to change site-hydrology due to the loss of evapotranspiration (uptake and release of water) by the trees. Changes to site hydrology can alter the ability of other plants to establish and/or persist.

100. The Final EA did not analyze: 1) the extent of wooded wetland acres to be cleared per complex; 2) the pre-disturbance functional values of the wetlands to be

cleared, 3) the plant/tree composition of the sites to be cleared, or 4) the hydrologic impacts of removing trees from wooded wetlands.

101. Additionally, removal of wetland plants and trees often attracts invasive or nuisance plants that can alter floristic quality and wildlife habitat and threaten adjacent wetlands.

102. According to the DNR Wetland Water Quality Training Workshop materials, construction methods and timing are routinely considered within the scope of alternatives to avoid and minimize wetland impacts. DNR, Wetland Water Quality Training, November 18, 2005, [http://dnr.wi.gov/org/water/fhp/wetlands/mitigation/documents/training\\_111805\\_pp\\_nr103.pdf](http://dnr.wi.gov/org/water/fhp/wetlands/mitigation/documents/training_111805_pp_nr103.pdf) (last visited December 20, 2006).

103. The EA indicates that best management practices will be used to minimize wetland impacts, including the use of the push/pull method to reduce the width of the temporary workspace in forested wetlands and in other wetland areas, “when conditions allow.” Final EA p. 89-90.

104. The EA indicates that the feasibility for the use of the push-pull method, and associated reductions in clearing of temporary workspace will be determined on-site, at each location during construction. Final EA p. 90

105. The EA does not discuss the potential use of directional drilling (installing pipe by boring underneath the soil-surface rather than excavation of an open trench) as a practicable construction alternative to minimize wetland impacts.

106. Directional drilling has been successfully employed to minimize the wetland impacts of other pipeline projects in the state and nation.

107. Enbridge proposes the use of substantially more temporary workspace area to install the Stage 1 pipeline than was required to install the existing pipeline in 1998. The Final EA for Enbridge's 1998 34-inch pipeline (Lakehead SEP II project), required 95 feet of total workspace, including the 80-foot permanent easement, and 15 feet of temporary workspace outside the existing right-of-way. The current proposal seeks 140 feet of total workspace, including 100 feet of temporary workspace outside the permanent right-of-way. Final EA p. 14.

108. The EA did not justify why substantially more temporary workspace was necessary to install the Stage I line than was required to install the SEP-II line in 1998.

109. Enbridge has proposed to compensate for the 262 acres of forested wetland impacts at a 0.5 to 1 ratio. Appropriate compensation would be determined by the Corps, in consultation with USEPA, USFWS and WDNR. Final EA p. 90.

110. However, the 0.5 to 1 ratio for compensatory mitigation is not a condition of the chapter 30 permits or wetland water quality certification.

111. In two separate letters to the U.S. Army Corps of Engineers, but copied to and on file with DNR, the U.S. Environmental Protection Agency (herein "EPA") objected to the issuance of federal permits for Stage 1 because the incomplete wetland mitigation plans do not adequately address the "extensive" loss of wetlands. Furthermore, U.S. EPA suggested that the land needed to compensate the wetland impacts could be "unprecedented." Letters from Kevin M. Pierard, Chief, U.S. EPA Region V Watersheds and Wetlands Branch to Colonel Michael F. Phanning, District Engineer, U.S. Army Corps of Engineers, October 11, 2006 and November 9, 2006.

112. At the time DNR released the Final EA and concluded there would be no significant adverse environmental impacts, the DNR did not have a final compensatory mitigation plan for this project. The location(s) and potential for replacement of lost wetland functions were unknown when the DNR made its final determination. Final EA p. 90.

113. DNR did not consider the adequacy or potential efficacy of compensatory wetland mitigation in its water quality certification review or Final EA.

114. Despite the lack of information regarding impacts to wetland functions, DNR determined that the wetland impacts are not significant.

*(iv) Impacts to Wildlife Habitat*

115. The Final EA claims that clearing 1,930 acres of forestland and 262 acres of forested wetlands could also impact wildlife habitats. Final EA p. 38.

116. The Final EA identifies a variety of threatened and endangered species that will be potentially impacted by the construction. Final EA p. 38-39.

117. According to the Final EA:

Clearing vegetation will reduce cover, nesting, and foraging habitat for some species, and may also cause mortality of some individuals of small, slower moving species. The most important secondary impacts that can result from linear developments is forest fragmentation, which reduces the available habitat for forest interior species, creates barriers to wildlife movement, increased predation and allows edge species to penetrate deeper into forest patches and interiors..

Final EA p. 38.

118. Throughout the Final EA impacts analysis for threatened and endangered wildlife, DNR notes the need for more study. Specifically, the Final EA claims that impacts analysis and/or mitigation plans were forthcoming for impacts to: Kirtland's

Warblers (“[m]ost of the pipeline route through forested land is on private or county land that has not been surveyed.” Final EA p. 40); Bald Eagles (“Enbridge proposes to work with the FWS to determine what mitigation, if any, will be necessary to avoid adverse effects on the bald eagle.” Final EA p. 40); Gray Wolves (“ . . .the exact locations of these sites remain unknown unless the area is thoroughly searched.” Final EA p. 41); Western Slender Grass Lizards (“Enbridge is currently in consultation with the WDNR to define the nature and extent of potential incidental take and measures to avoid or minimize take, including restoration of the workspace and restricted activities during portions of the year.” Final EA p. 43); Dragonflies (“ . . .the timing and methodology use for the surveys was not optimal to adequately determine the presence of these species at or downstream of the project site.” Final EA p. 44); Red Shouldered Hawks (“Segments of the pipeline route that weren’t included in these previous surveys may require surveys in the spring of 2007.” Final EA p. 46); and other rare birds (WDNR recommends further study. Final EA p. 40).

119. Specifically, the identification of elusive species, such as the Western Slender Grass Lizard, strongly suggests a larger population in the area.

120. Without identifying impacts, the Final EA relies on future studies, hypothetical permit conditions, and on-site plan development to “minimize” impacts to threatened and endangered species. Final EA p. 40.

121. The Final EA does not identify avenues for the public to participate in the future impact assessments.

122. The Final EA does not set a threshold for how much habitat loss is “significant.”

123. According to the Final EA, the pipeline construction will also increase the threat of invasive species. Final EA p. 63.

124. Specifically, the Final EA does not provide data, studies, or figures that identify the increase in invasives as a result of past pipeline projects, including the 1968 and 1998 projects along the same right-of-way.

125. The Final EA notes efforts to “minimize” the presence of invasive species. Final EA p. 63.

126. The Final EA does not provide data or analysis that addresses the efficacy of the measures to prevent colonization by invasive species post-construction. Nor does it identify any requirements that would mitigate the impacts of colonization by invasive species.

127. The EA fails to acknowledge that removal of trees from wooded wetlands facilitates the colonization of the invasive wetland plant Reed Canary Grass, which is known to preclude succession to forested communities.

128. Additionally, the loss of vegetation on waterway banks will impact habitat for aquatic life, by removing shade and decreasing the source of future in-stream habitat once the vegetation dies and falls into the stream.

129. Loss of bank vegetation could increase water temperature and reduce amount of woody debris for future habitats.

130. The Final EA does not analyze the impact that increased water temperature or loss of woody vegetation will have on aquatic habitat.

131. Despite the need for future study, the Final EA found that the impacts on wildlife habitats would not be significant.

*(v) Pipeline Ruptures and Spills*

132. In addition to the impacts stemming from pipeline construction, the ongoing use of the pipeline will place Wisconsin's most pristine waters at risk of contamination from pipeline spills.

133. As noted in the Final EA, Enbridge has experienced six spills in Wisconsin since 1999. Final EA p. 64.

134. The Final EA does not address Enbridge pipeline spills from similar pipelines in Minnesota and Canada.

135. Among other Enbridge pipeline ruptures, a 34-inch-diameter steel pipeline owned and operated by Enbridge ruptured in a marsh near Cohasset, Minnesota on July 4, 2002.. Approximately 6,000 barrels (252,000 gallons) of dirty crude oil were released from the pipeline as a result of the rupture. See National Transportation Safety Board, *Rupture of Enbridge Pipeline and Release of Crude Oil near Cohasset, Minnesota, July 4, 2002*, Pipeline Accident Report NTSB/PAR-04/01, Adopted June 23, 2004, at iv, [www.nts.gov/publictrn/2004/PAR0401.pdf](http://www.nts.gov/publictrn/2004/PAR0401.pdf) (last visited December 20, 2006).

136. Additionally, the Final EA did not address the potential for additional pipeline corrosion due to its proximity to the new Arrowhead-Weston 345kV transmission line. Approximately 44 miles of the proposed Enbridge pipeline will share a corridor with the Arrowhead-Weston ATC 345 kV transmission line. Final EA p. 14.

137. Without proper cathodic protection, pipelines may corrode when exposed to stray voltage from transmission lines.

138. The Final EA does not address protections that will be taken to assure pipeline integrity on segments that are adjacent to the Arrowhead-Weston ATC transmission lines.

*(vi) Impacts on the Ceded Territory*

139. In addition to general environmental impacts, the Enbridge pipeline expansion may threaten tribal rights associated with environmental protection in the Ceded Territory.

140. Impacts to wild rice harvesting and other tribal uses of waterways within the Ceded Territory may increase the significance that the pipeline's impact on the human environment.

141. The Final EA does not address impacts to wild rice waters or other natural resources of cultural significance.

142. Additionally, the substance of any Voight Commission consultation was not addressed in the Final EA.

143. Furthermore, the Final EA claims that 115 archeological sites exist on the corridor. Final EA p. 112.

144. The Final EA claims that DNR undertook "Native American consultation," it does not identify if any of the sites carry cultural significance.

145. Due to the lack of discussion in the Final EA, the public was not able to formally review, consider, and comment on impacts that infringe on treaty rights on the Ceded Territory and, therefore, the true impact on the human environment.

146. Despite the lack of discussion, DNR determines that these impacts are insignificant.

*(vii) Secondary Impacts*

147. The Southern Access Expansion Project will increase extraction efforts in the Alberta Tar Sands. Final EA p. 114.

148. Extraction operations are harmful to the environment, including impacts to Athabasca River habitat due to increasing withdrawals; heavily polluted tailings ponds; regional air pollution; groundwater drawdown and wetland impacts; loss of forest productivity; forest bird and woodland caribou habitat fragmentation; acidification of freshwater lakes; effectively converting a relatively clean and efficient energy source into a dirty energy source that is currently not used efficiently and creates upward pressure on natural gas prices. Final EA p. 114.

149. As discussed in a prior EA draft, “to a large extent, the Alberta government has not carried out promised reviews of impacts and potential mitigation and restoration methods.” Draft EA “Secondary Impacts” Discussion.

150. According to an Enbridge handout entitled “*Southern Access*” *Expansion Program, A North American solution to energy reliability and security of crude petroleum supply*, dated October, 2005, extraction operations may impact an area approximately the size of West Virginia.

151. Moreover, the process of extracting crude oil from tar sands requires increased use of natural gas and other energy sources. According to a prior EA draft:

Oil extraction from these sands is a very energy-intensive process, requiring three times the energy to extract the petroleum than is required for conventional petroleum extraction via wells. At projected Year 2030 levels of development, extracting 5 million barrels per day of this oil would require a volume of clean natural gas each year that equals the volume of natural gas needed to heat every home on Canada for about 2 ½ years.

EA Draft “Secondary Impacts” Discussion.

152. The above concerns were not included in the Final EA.

153. The Final EA does not analyze the estimated supply of natural gas and the environmental impacts of extracting natural gas for tar sand extraction.

154. The Final EA does not establish criteria for determining the significance of the impacts in Alberta, nor does it analyze the additional impact created by the Southern Access Expansion Project.

155. The Final EA does not propose mitigation for the increase environmental impact in Albert associated with increased extraction of 400,000 bpd from the tar sands.

156. Additionally, the Final EA does not analyze the impacts stemming from increasing the supply of petroleum by 400,000 bpd.

157. Current levels of petroleum combustion are contributing to global climate change.

158. Increased supply and use of petroleum would likely increase the Midwest states’ contribution to global climate change.

159. The Final EA does not address the amount of usable petroleum that would be generated from 400,000 bpd of crude oil.

160. The Final EA did not address the secondary impacts that the increased supply of petroleum generated by the Stage 1 expansion would have on global climate change.

*(viii) Cumulative Impacts*

161. In addition to the direct Stage 1 impacts, the “human environment” near the pipeline corridor will also be impacted by the Arrowhead-Weston ATC corridor extending from Douglas to Marathon County.

162. DNR conducted an Environmental Impact Statement for the Arrowhead-Weston ATC Corridor which identified impacts to waterways, wetlands, and forestland near the Enbridge pipeline corridor.

163. The Arrowhead-Weston ATC corridor runs adjacent to the Enbridge right-of-way for approximately 130 miles, including 44 miles where the pipeline and ATC line share a corridor.

164. Aside from recognizing the up to 300 foot span of open space that will be created when the Enbridge and ATC right-of-ways directly abut each other. Final EA p. 32.

165. DNR did not include impacts from the Arrowhead-Weston right-of-way construction in the Final EA.

166. Additionally, the Stage 1 impacts may be heightened by past and future logging projects near the pipeline corridor.

167. The Final EA does not address the impact the reasonably foreseeable logging projects will have on the human environment surrounding the pipeline corridor.

168. Similarly, Stage 1 impacts on wetlands may be heightened by past and future wetland fill projects.

169. The Final EA does not address the impact of past and current wetland fill projects on the wetland areas impacted by the Stage 1 pipeline construction.

170. The Final EA does not address the cumulative impacts of the two existing pipelines in the 80-foot permanent right-of-way.

**E. The Final EA Alternatives Analysis**

171. According to the Final EA, a “No Action” Alternative is not feasible because:

If the project were not built as proposed, it is likely that *Enbridge or another pipeline company or companies would develop proposals to construct pipelines along different corridors*. Depending on the route or routes chosen, this would entail the clearing of substantial new areas of land surface and the creation of new areas of forest, grassland and wetland habitat fragmentation. Construction and maintenance could open new areas to invasion by invasive, non-native plant species.

Final EA p. 19-20.

172. The Final EA does not analyze the impacts of maintaining current levels of crude oil distribution from the Canadian tar sands.

173. The Final EA does not analyze sources of petroleum outside of the Canadian tar sands.

174. The Final EA route and transportation alternatives analysis assumes 400,000 bpd and does not consider alternatives that supply less capacity.

175. Specifically, the Final EA Alternatives analysis does not address the 124,000 bpd “eight loop” expansion project that Enbridge originally presented to DNR in May 2005. The May 2005 project consisted of eight “loop” additions to the existing 1998 Enbridge pipeline.

176. The proposed Stage 1 expansion is anticipated to increase capacity by 146,000 bpd.

177. The original looping project was expected to increase capacity by 126,000 bpd, yet would only require approximately 40-60 feet of temporary work space along 133 miles of the existing Enbridge pipeline corridor--far less than the 321-mile, 140-foot work space for the proposed project.

178. The Final EA does not analyze the option of reducing the proposed capacity and using alternative modes of transport.

179. The Final EA does not address the impact that the growing use of hybrid technology will have on future petroleum demand. Instead, the Final EA claims:

At this time, conservation measures such as stringent fuel economy standards, widespread use of public transit, expanded bicycle paths, and other measures have not received adequate public support to eliminate the desire by many for additional petroleum supplied to the Midwest refineries area.

Final EA p. 22.

## ISSUES

### **ISSUE ONE: DNR VIOLATED WEPA BY FAILING TO EVALUATE ENVIRONMENT IMPACTS FROM STAGE 2 OF THE SOUTHERN ACCESS EXPANSION PROGRAM**

180. Petitioners reallege and incorporate herein each paragraph of this petition and further allege the following:

181. DNR is required to comply with the provisions of WEPA, Wis. Stat. § 1.11 *et seq* (2005).

182. Under section 1.11, Wis. Stat., DNR is required to consider the full scope of the project's impacts during the Environmental Assessment.

183. After receiving clear indication that Enbridge intends to continue the pipeline expansion to Flanagan, Illinois, DNR was required to include these impacts in the Final EA.

184. By segmenting the project into two separate reviews, DNR ignores impacts associated with the new permanent right-of-way and construction activity, in violation of Wis. Stat § 1.11 *et seq.*

185. Because the DNR failed to comply with WEPA, this Court should set aside the DNR's certified finding that it was in compliance or remand the case to the agency to complete the environmental assessment and/or environmental impact statement, pursuant to Wis. Stat. § 227.57(4), (5), and (8).

**ISSUE TWO: DNR VIOLATED WEPA BY FAILING TO ADEQUATELY ADDRESS STAGE 1 DIRECT IMPACTS AND MITIGATION MEASURES IN THE FINAL EA.**

186. Petitioners reallege and incorporate herein each paragraph of this petition and further alleges the following:

187. The DNR violated WEPA, § 1.11, *et seq.*, by failing to base its negative EIS decision on a reasonably informed preliminary factual investigation of the project.

188. The final EA does not cover the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences that the Southern Access Expansion Program will have on wetland functions, waterway sedimentation, and wildlife and plant communities, among other areas of concern.

189. The Final EA proposed to study and mitigate impacts, outside of the WEPA process.

190. Because the DNR failed to comply with WEPA, this Court should set aside the DNR's certified finding that it was in compliance or remand the case to the agency to complete the environmental statement, pursuant to Wis. Stat. § 227.57(4), (5), and (8).

**ISSUE THREE: DNR VIOLATED WEPA BY FAILING TO CONSIDER ALL CUMULATIVE AND SECONDARY IMPACTS**

191. Petitioners reallege and incorporate herein each paragraph of this petition and further alleges the following:

192. DNR is required to consider all short-term and long term impacts, including secondary effects.

193. DNR is required to consider the cumulative impacts of repeated actions of the same type or occurring in the same location.

194. The Final EA failed to consider all secondary and cumulative impacts.

195. By failing to consider all secondary and cumulative impacts, DNR violated subsections section 1.11, *et seq.*, and NR 150.22(2)(a)(1), (2), Wis. Admin. Code.

196. Because the DNR failed to comply with WEPA, this Court should set aside the DNR's certified finding that it was in compliance or remand the case to the agency to complete the environmental statement, pursuant to Wis. Stat. § 227.57(4), (5), and (8).

**ISSUE FOUR: DNR VIOLATED WEPA BY FAILING TO ADQUATELY ASSESS PRACTICABLE ALTERNATIVES, INCLUDING THE NO-ACTION ALTERNATIVE**

197. Petitioners reallege and incorporate herein each paragraph of this petition and further alleges the following:

198. The Final EA does not consider practicable alternatives that meet the Southern Access Expansion Programs purpose and need but involve smaller expansions.

199. By failing to consider all practicable alternatives, including a true “no-action” alternative, DNR violated section 1.11, *et. seq.*, and section NR 150.22(2)(e), Wis. Admin. Code.

200. Because the DNR failed to comply with WEPA, this Court should set aside the DNR’s certified finding that it was in compliance or remand the case to the agency to complete the environmental statement, pursuant to Wis. Stat. § 227.57(4), (5), and (8).

**ISSUE FIVE: DNR’S APPROVAL OF CHAPTER 30 PERMITS AND WATER QUALITY CERTIFICATION IS UNREASONABLE BASED ON THE FINAL EA.**

201. Petitioners reallege and incorporate herein each paragraph of this petition and further allege the following:

202. DNR is required to satisfy the requirements of WEPA before granting permits to dredge rivers and wetlands. Wis. Stat. § NR 150.03. By failing to meet WEPA requirements before approving Chapter 30 permits and Water Quality Certification, DNR’s approval of these permits and certification is void.

**WHEREFORE**, Petitioners request that the Court grant the following relief pursuant to sections 1.11 and 227.57 of Wisconsin’s Statutes:

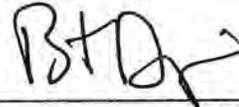
1. That the Court set aside or remand the DNR’s November 27, 2006, decision that an EIS is not required for the DNR to comply with the Wisconsin Environmental Policy Act , Wis. Stat. § 1.11, and Wis. Admin. Code Ch. NR 150.

2. That the Court set aside or remand the DNR's approval of Enbridge's Chapter 30 permits and Water Quality Certification for the Southern Access Expansion Program Stage 1 until the DNR complies with Wisconsin's Environmental Policy Act.
3. That the Court stay the November 27, 2006 EA determination, Chapter 30 permit approval, and Water Quality Certification, pending the resolution of this review.
4. That the Court require Respondent to pay all of Petitioners' costs and fees.
5. That the Court provide whatever additional relief is appropriate, irrespective of the form of this petition, pursuant to Wis. Stat. § 227.57(9).

Dated this 21<sup>st</sup> of December, 2006.

Attorneys for Petitioners,

**MIDWEST ENVIRONMENTAL ADVOCATES, INC.**



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