KEWEENAW BAY INDIAN COMMUNITY

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2020 TRIBAL COUNCIL

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July 10, 2020

Ben Callan, NR Program Manager
WDNR Division of External Services
PO Box 7921
Madison, WI 53707-7921

Via e-mail to DNROEEAComments@wisconsin.gov

RE: Wetland and Waterway Permit Application to Relocate Enbridge Line 5

Dear Mr. Callan,

The Keweenaw Bay Indian Community (the "Community") supports the technical comments submitted by Great Lakes Indian Fish and Wildlife Commission on the Enbridge Energy application for a wetland fill and waterway impact/crossing permit (WP-IP-NO-2020-2-X02-11T12-18-51), which are enclosed and incorporated by reference.

The Community is successor in interest to the L'Anse Band of Chippewa Indians of Lake Superior, a signatory of the 1842 Treaty of LaPointe, Oct. 4, 1842, 7 Stat. 591 (the "1842 Treaty"), which ceded over 10,000,000 acres of land to the United States, including the western half of the Upper Peninsula and Northern Wisconsin. Article 2 of the 1842 Treaty provided that "[t]he Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy . . . ." In 1854, the United States and the Chippewa Indians of Lake Superior signed the Treaty with the Chippewa at La Pointe, Sept. 30, 1854, 10 Stat. 1109 (the 1854 Treaty"). Under Article 11, the right to hunt and fish within the ceded territory was reaffirmed. A treaty is a legally binding agreement between sovereign nations. *See Herrera v. Wyoming*, 139 S. Ct. 1686, 1699, 203 L.ED.2d 846 (2019). Treaties with Tribes "must be interpreted as the Indians would have understood them." *People v. LaBlanc*, 248 N.W.2d 199, 203-204. The 1842 Treaty and the 1854 Treaty remain in effect today, and the Community continues to rely on the rights protected in both treaties for subsistence, religious, and cultural practices of its members, and to further the economic well-being of its members. In the very simplest of terms, treaty rights are *essential* to the Community's way of life.

Enbridge's Line 5 has been in operation since 1953 and transports oil across Minnesota, Wisconsin, and Michigan through the 1842 ceded territory. It crosses the Paint River and the Ontonagon River watershed in Michigan, which is within the ceded territory and within the Community's traditional fishing grounds. Line 5 poses release risks to Lake Superior and its

watershed in multiple locations, and any release from Line 5 within the ceded territory would negatively impact the Keweenaw Bay Indian Community and its members; such impacts could last generations.

We appreciate your careful consideration in this matter.

Sincerely,

Warren C. Swartz, Jr.
President

Enc.

cc: Danielle Webb, Tribal Attorney
Evelyn Ravindran, KBIC NRD Director
Shannon DesRochers, KBIC Great Lakes Resource Specialist

GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION
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Keweenaw Bay Community	Lac Courte Oreilles Band	St. Croix Chippewa	Mille Lacs Band
Lac Vieux Desert Band	Lac du Flambeau Band	Sokaogon Chippewa	

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Re: Wetland and Waterway Permit Application to Relocate Enbridge Line 5

Dear Mr. Callan:

The Great Lakes Indian Fish and Wildlife Commission (GLIFWC) is an intertribal agency exercising delegated authority from 11 federally recognized Ojibwe (or Chippewa) tribes in Wisconsin, Michigan and Minnesota.[1] Those tribes have reserved hunting, fishing and gathering rights in territories ceded in various treaties with the United States. GLIFWC's mission is to assist its member tribes in the conservation and management of natural resources and to protect habitats and ecosystems that support those resources.

Enclosed are GLIFWC staff comments on the Enbridge Energy application for a wetland fill and waterway impact/crossing permit (WP-IP-NO-2020-2-X02-11T12-18-51). This permit is required for Enbridge to proceed with the relocation of its Line 5 pipeline.

General Comments

As an initial matter, the Public Notice's statement that the Department of Natural Resources (DNR) has made a tentative determination to approve the waterways and wetland permit with modifications is premature. A tentative determination should be made only after more complete information has been provided by the applicant and after the Environmental Impact Statement (EIS)

[1] GLIFWC member tribes are: in Wisconsin -- the Bad River Band of the Lake Superior Tribe of Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin, Sokaogon Chippewa Community of the Mole Lake Band, and Red Cliff Band of Lake Superior Chippewa Indians; in Minnesota -- Fond du Lac Chippewa Tribe, and Mille Lacs Band of Chippewa Indians; and in Michigan -- Bay Mills Indian Community, Keweenaw Bay Indian Community, and Lac Vieux Desert Band of Lake Superior Chippewa Indians.

process has been completed. To make a tentative decision prior to receiving adequate information on the character of the project and its potential impacts presupposes a decision. Decision making, even when tentative, discourages input to the process because it appears that the decision making process has been constrained.

While a tentative decision should have waited until the completion of the EIS, at the very least it should have waited until the project is fully defined. On April 1, 2020, the route centerline and access roads were substantially changed. Given that Enbridge has still been unable to obtain easements for approximately 25% of the line and does not have the right of eminent domain, it is likely that the route centerline will change once again. It is impossible to identify the necessary permits, potential impacts, and appropriate conditions for those permits if a substantial portion of the route is undefined.

In addition to likely route alterations, even the already proposed route waterways and wetlands are substantially undocumented. The area of the proposed project is a hydrologically complex system of interconnected streams and wetlands (Figure 1). The data made available by Enbridge on April 1 shows that approximately 30-37% of the project workspace has not been surveyed for waterways, wetlands or cultural resources (30% according to Enbridge Water Resources Application for Project Permits (WRAPP), 37% according to Enbridge GIS data). Given that Enbridge indicates that endangered resources are being surveyed incidental to waterway and wetland surveys, one can assume that 30-37% of the workspace remains to be surveyed for those species.

Finally, even in the surveyed areas, whether particular waterways are subject to a Chapter 30 permit has not been determined. The type of waterway crossing proposed appears to be dependent on the state navigability status. However, the state navigability of waterways has not been determined for most waterways that may be crossed. The state jurisdictional status of waterways needs to be determined so that resources can be surveyed in those areas and appropriate crossing methods proposed.

Given the incomplete information provided in the WRAPP application, the waterways and wetlands permitting process should be halted and re-started from the beginning once the project is more completely described.

In addition to the incomplete information provided, it has been difficult to access the appropriate information. For example, the permit application documents on the DNR website are not named logically or in any standard format. This makes tracking new information as it is added to the site extremely difficult. In addition, the names of files do not always match the contents of the file. For example, the 2019 GIS data file includes changes to the preferred route information that were made in 2020. There is no way for a reviewer to know that the information has changed. Another example is that the wetlands depicted in updated maps do not always correlate to the appropriate field data sheet.

The problems described above must be rectified before a thorough review can be conducted.

As stated above, the timing of this comment period is problematic because we are asked to comment on permit application materials before the project is well defined and the EIS for the proposed project has been completed. Therefore, information on alternatives are not available to compare stream and wetland impacts between routes, cumulative effect analysis is not available to guide mitigation of wetland fill, and the list of impacted wetlands and rivers is in flux, which makes it impossible to provide

feedback on determinations of navigability. Despite these obstacles, we have attempted to develop technical comments based on the available information. Those more specific comments follow.

New access roads identified as existing

Not all access roads proposed by Enbridge in the permit application are existing. Some will require new ground disturbance. Unfortunately, Enbridge appears to have mis-classified some roads as existing, when in fact they are not. For example, the Enbridge Water Resources Application for Project Permits Supplemental Information (WRAPP) narrative, Table 3.1.3-1:"Proposed Access Roads" shows AR-080 as existing. Wetland and stream crossing tables and figures also show access road AR-080 crossing multiple wetlands and streams (Figure 2). In the field this spring, we were unable to find any evidence of this road, either on foot on the ground, in aerial photographs, or in high resolution Lidar elevation data. Additional examination of aerial photography and Lidar data suggest that other roads that are listed as existing by Enbridge do not actually exist on the ground. Enbridge should identify how it has determined that access roads currently exist.

The number of access roads is also of concern particularly because of the number of stream and wetland crossings they require. An alternatives analysis in an EIS might disclose redundancies in proposed access roads and highlight more efficient methods of pipeline construction. This would reduce the number of access roads and minimize the impacts of the proposed project.

Unclear jurisdictional status of waterways

Table 5.1-1 of the WRAPP, "Summary of Waterbodies Crossed by the Project" claims that there are 62 "ephemeral" waterbodies impacted by the project. Attachment D, "Waterbodies Crossed or Affected by the Project Facilities" identifies those streams classified as "ephemeral." In the field we examined a small subset of those waterbodies and found that some had flowing water that was not associated with recent precipitation. For example, during a dry period in April 2020, we found waterbody sird010e (Figure 2) in Iron County, which Enbridge defines as "ephemeral" flowing briskly within a well-defined stream channel. In addition to on-the-ground observations, Enbridge field data sheets indicate flowing and standing water in many of the streams Enbridge defines as "ephemeral". Most of those streams would be defined as "intermittent" under the new WOTUS rules. In those new rules "The term intermittent means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts)." While the WOTUS rules relate to federal jurisdiction and Wisconsin has different criteria for determining state jurisdiction, it is unclear how the definitions and information used by Enbridge contribute to identifying either federal or Wisconsin jurisdiction. To determine jurisdiction the state should do a navigability determination on all waterways. Absent this information, the state should assume that all potentially impacted water channels visible on maps or on the ground are navigable and regulate them as such.

Lack of water quality information

Pipeline construction has the potential to increase sedimentation and turbidity to streams. Fuel spills may pollute local waters. Drilling and trenching in the highly mineralized environment of the Penokee Hills has potential for releasing heavy metals into waterbodies. Forest clearing along the

right-of-way will increase water temperatures. Baseline water quality information should be collected for the stream crossings and be available for review as part of this permit application.

Lack of site-specific fish and wildlife information

Pipeline construction will alter stream habitats by trenching through the stream bed, clearing vegetation from riparian areas, and habitat alteration. The applicant has not conducted detailed surveys for biota that live at the locations that the pipeline would cross. It is likely that native mussel species will be impacted by stream trenching and sedimentation. The applicant must survey the stream crossings and document mussel beds so that impacts to these animals can be avoided. The applicant should collect data on fish and macroinvertebrate communities in these streams, many of which are classified as trout streams in order to properly assess the impacts of the proposed pipeline project. Finally, it appears that mammal and bird observations that the applicant includes in the wetland functional assessment worksheets are basic at best and apparently conducted by staff without wildlife expertise. For example, some sheets note that a “bird” was observed, without any other information on its species or that a “deer” was spotted. A project of this importance requires a more rigorous approach to wildlife surveys than the applicant has provided to date. In addition, vegetation in forested wetlands is proposed to be cleared to accommodate the right-of-way. This clearing will cause stream temperatures to increase and potentially impact cold water habitats in trout streams. The applicant should collect baseline temperature data in the impacted streams so that these temperature impacts can be quantified and the amount of cold water habitat loss can be calculated.

Inadequate wetland delineation

As previously stated, wetland delineations have not been completed for much of the project. In addition, the delineations that are available were completed in September and October of 2019. During this time of the year, many understory plants, orchids for example, have become dormant and become very difficult to identify. This timing means that the functional assessments for wetlands are inadequate because they do not include information that might have been available earlier in the growing season. For example, groundwater indicator species such as marsh marigold, common in the Penokees in spring would not likely be detected in September or October. Incomplete wetland functional assessments will lead to inadequate minimization and mitigation of impacts.

Inadequate description of wetland impacts

Wetland delineations are being done for the right-of-way and workspace but not outside the footprint of those areas. This scale of data collection is appropriate for assessing direct impacts (fill) but is not useful for assessing potential indirect or secondary impacts. Indirect wetland impacts that are likely at the proposed project include wetland fragmentation, disruption of wetland hydrology and siltation of adjacent wetlands. More specifically, construction of the pipeline will alter portions of larger wetland complexes. The permit application materials do not describe how these wetland alterations in the right-of-way affect the functions and values of the larger complex. In fact, the wetland maps released by Enbridge in April 2020 generally show few or no wetlands outside the footprint of the work areas despite wetlands being abundant. For example, "Delineated Wetlands and Waterbodies map Page 38 of 48" of Attachment B (Figure 3) shows very few wetland polygons on a landscape that the Wisconsin Wetland Inventory and aerial photos show is full of wetlands. Such a depiction hinders evaluation of indirect impacts to wetlands by the project.

The applicant characterizes some wetland impacts as "temporary." "Temporary" impacts to wetlands often take many years for recovery and expose a wetland to hydrologic conversion and invasion by exotics. It is rare that a "temporarily" impacted wetland will regain its full functional value for many years, if ever.

As previously described, some forested wetlands will be permanently cleared for the pipeline right-of-way. This permanent conversion of wetland type should be described and appropriate mitigation for the loss of forested wetlands be required.

We look forward to working with the DNR as the permitting process moves forward. Please contact me (esteban@glifwc.org) or John Coleman (jcoleman@glifwc.org) or at 608-263-2873 with any questions.

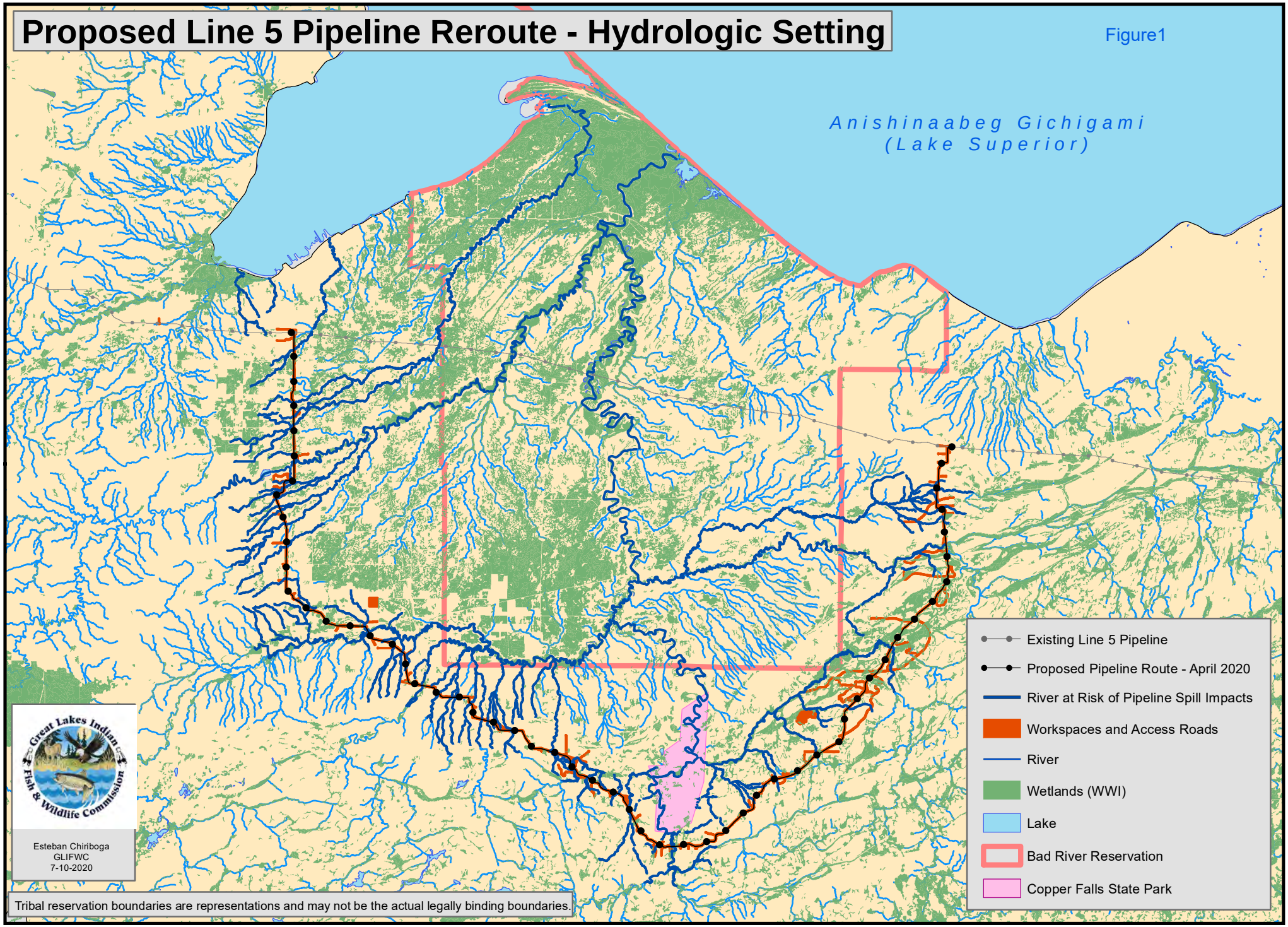
Sincerely,

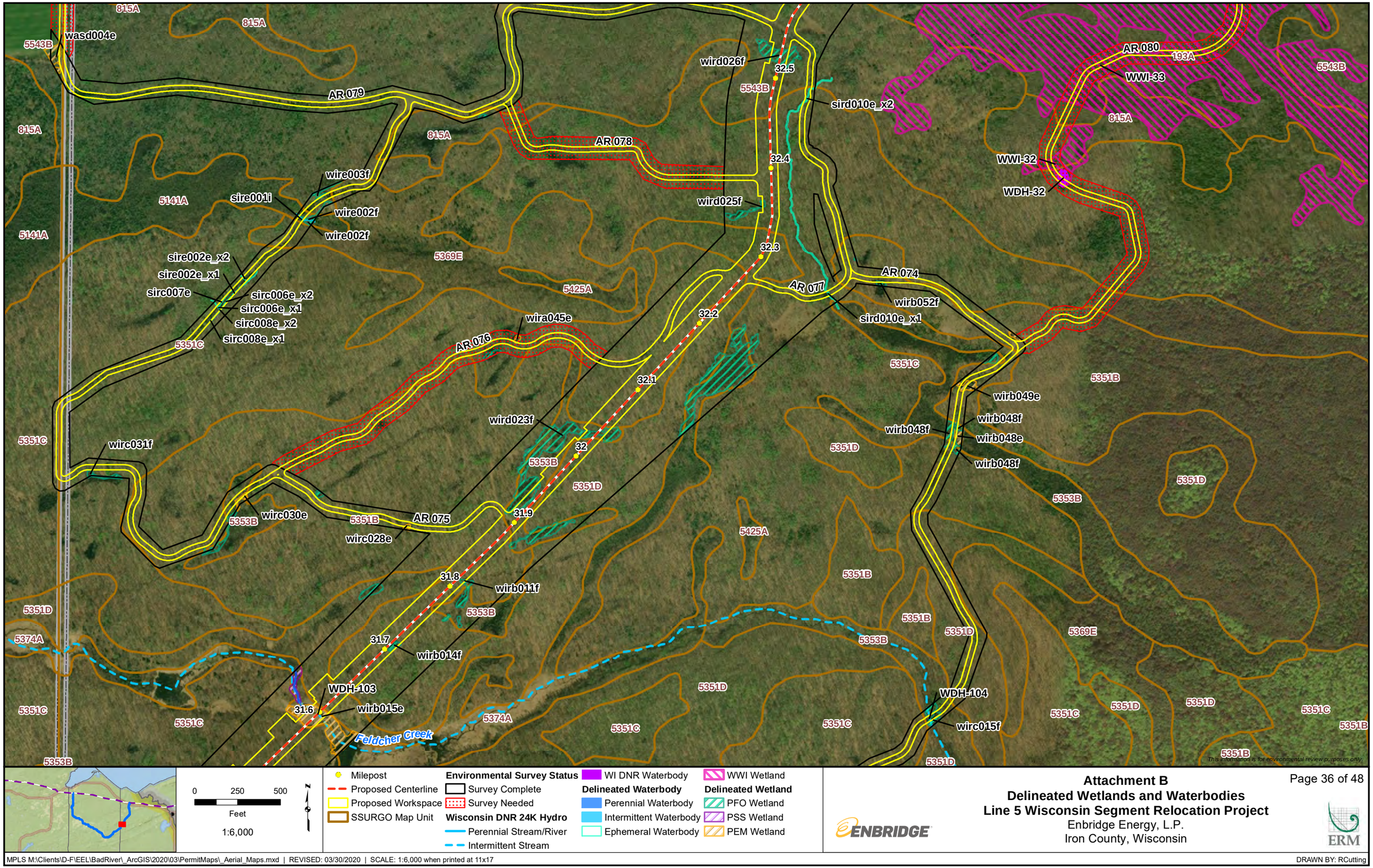
Esteban Chiriboga
GLIFWC Environmental Specialist

cc. Lindsay Tekler, WDNR Energy Project Liason
Jonathan Gilbert, GLIFWC Biological Services Director
Ann McCammon Soltis, GLIFWC Director of Intergovernmental Affairs
John Coleman, Environmental Section Leader

Proposed Line 5 Pipeline Reroute - Hydrologic Setting

Figure1





Attachment B
Delineated Wetlands and Waterbodies
Line 5 Wisconsin Segment Relocation Project
Enbridge Energy, L.P.
Iron County, Wisconsin

Figure 2. Stream sird010e mapped as "ephemeral" and disconnected from wetlands. Wisconsin Wetland Inventory data show this stream as connecting two wetland complexes.

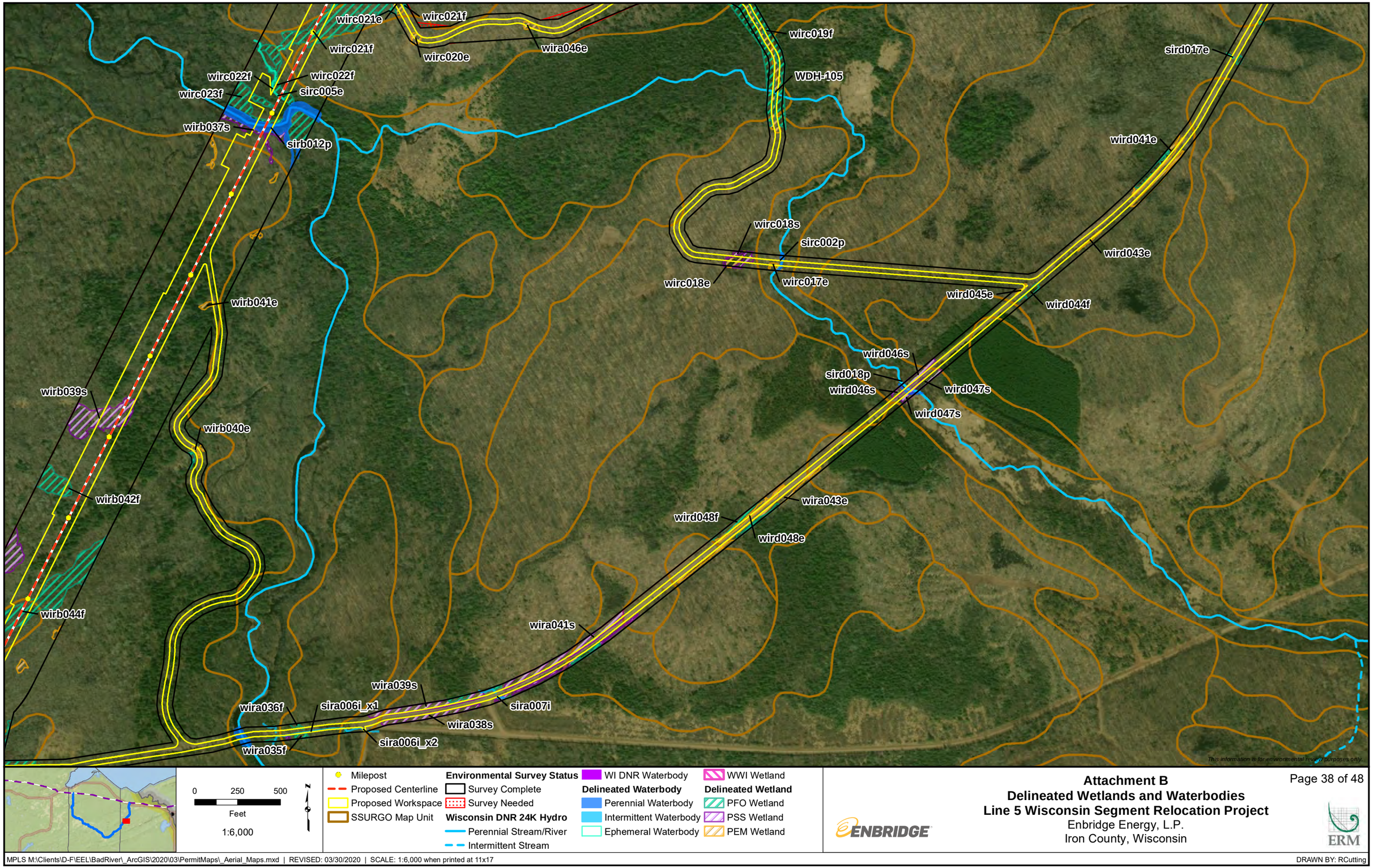


Figure 3. Area mapped without wetland context in a landscape that is approximately 25% wetland according to the Wisconsin Wetland Inventory.

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Via e-mail to DNROEEAComments@wisconsin.gov

RE: Scoping Comments on Proposed Relocation of Enbridge Line 5

Dear Mr. Callan,

The Keweenaw Bay Indian Community (the "Community") supports the scoping comments submitted by Great Lakes Indian Fish and Wildlife Commission on the Proposed Relocation of the Enbridge Line 5 project, which are enclosed and incorporated by reference.

The Community is successor in interest to the L'Anse Band of Chippewa Indians of Lake Superior, a signatory of the 1842 Treaty of LaPointe, Oct. 4, 1842, 7 Stat. 591 (the "1842 Treaty"), which ceded over 10,000,000 acres of land to the United States, including the western half of the Upper Peninsula and Northern Wisconsin. Article 2 of the 1842 Treaty provided that "[t]he Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy . . . ." In 1854, the United States and the Chippewa Indians of Lake Superior signed the Treaty with the Chippewa at La Pointe, Sept. 30, 1854, 10 Stat. 1109 (the 1854 Treaty"). Under Article 11, the right to hunt and fish within the ceded territory was reaffirmed. A treaty is a legally binding agreement between sovereign nations. *See Herrera v. Wyoming*, 139 S. Ct. 1686, 1699, 203 L.ED.2d 846 (2019). Treaties with Tribes "must be interpreted as the Indians would have understood them." *People v. LaBlanc*, 248 N.W.2d 199, 203-204. The 1842 Treaty and the 1854 Treaty remain in effect today, and the Community continues to rely on the rights protected in both treaties for subsistence, religious, and cultural practices of its members, and to further the economic well-being of its members. In the very simplest of terms, treaty rights are *essential* to the Community's way of life.

Enbridge's Line 5 has been in operation since 1953 and transports oil across Minnesota, Wisconsin, and Michigan through the 1842 ceded territory. It crosses the Paint River and the Ontonagon River watershed in Michigan, which is within the ceded territory and within the Community's traditional fishing grounds. Line 5 poses release risks to Lake Superior and its watershed in multiple locations, and any release from Line 5 within the ceded territory would

negatively impact the Keweenaw Bay Indian Community and its members; such impacts could last generations.

We appreciate your careful consideration in this matter.

Sincerely,

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cc: Danielle Webb, Tribal Attorney
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Enclosed are GLIFWC staff scoping comments on the Proposed Relocation of the Enbridge Line 5 Pipeline project. GLIFWC staff are pleased that the Department of Natural Resources (DNR) is seriously considering the effects of additional pipeline construction and operation by developing a full Environmental Impact Statement (EIS). At this stage of the EIS, GLIFWC comments are general in nature. As the process moves forward, we expect that additional comment and interaction with the DNR will occur.

[1] GLIFWC member tribes are: in Wisconsin -- the Bad River Band of the Lake Superior Tribe of Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin, Sokaogon Chippewa Community of the Mole Lake Band, and Red Cliff Band of Lake Superior Chippewa Indians; in Minnesota -- Fond du Lac Chippewa Tribe, and Mille Lacs Band of Chippewa Indians; and in Michigan -- Bay Mills Indian Community, Keweenaw Bay Indian Community, and Lac Vieux Desert Band of Lake Superior Chippewa Indians.

General Scoping Comments

Spatial Extent of Analysis

The Line 5 pipeline transports crude oil and natural gas liquids from Superior, Wisconsin to Sarnia, Ontario. Therefore, this project is regional in scope and the impacts of this project should be described at local and regional scales. From GLIFWC's perspective, the impacts of pipeline projects on the 1842 and 1836 ceded territories should be conducted. Cumulative effect analysis should also include the 1837 ceded territory (Map 1). The EIS should evaluate potential impacts not only in the right-of-way (effects of pipeline construction) but also in lands and waters downgradient to the right-of-way (Map 2). The Area of Potential Effect (APE) for cultural resources around the right-of-way should be established early in the EIS process. On a local level, not even the route of the new pipeline is defined. The route has changed from the original application to the April 1 revision and has not yet been definitively determined because of easement uncertainties. Impacted resources cannot be identified if the route is not identified. Prior to final scoping of the project and development of an EIS the proposed project location must be fully defined.

On a broader scale, the DNR should use information developed for pipeline environmental impact assessments in Minnesota and Michigan projects because these proposals present similar permitting and environmental challenges as the Line 5 reroute project.

If the Line 5 reroute moves forward, the section of Line 5 that crosses the Bad River reservation would be decommissioned. This activity is a connected action to the reroute proposal. Therefore, all activities associated with decommissioning sections of Line 5 should be included in the EIS and the environmental consequences of those activities should be quantitatively assessed.

Project Purpose and Need

The applicant has stated their purpose and need in the Environmental Impact Report (EIR). Enbridge assumes that transportation of oil must continue and that it is a benefit to northern Wisconsin. Specifically, the applicant states that Line 5 supplies propane to northeast Wisconsin via a facility located in Rapid River Michigan. No data is provided to support this claim. The EIS should evaluate the statements and assumptions by the applicant that ongoing flow of oil through Line 5 is a benefit to Wisconsin.

The applicant states that it will not move forward with a project that does not meet its purpose and need. That is Enbridge Energy's choice, but it has no bearing on how the State of Wisconsin views the project from an environmental perspective (the purpose of the EIS). The purpose and need of this pipeline must be defined by the DNR, not by the applicant.

History of Pipeline Safety and History of Enbridge Energy

Enbridge Inc. has a questionable environmental record. From 1999 to 2010, Enbridge pipelines have spilled over 7 million gallons of crude oil in over 800 different incidents across the United States and Canada (National Wildlife Federation, 2012). The combined environmental effect of these incidents to wetlands, surface and ground waters has not been quantified. The most notorious spill involves a ruptured pipeline that spilled over a million gallons of heavy crude oil into the Kalamazoo River in the lower peninsula of Michigan in 2010. Cleanup activities at this site are ongoing and the total cost to the environment exceeds $767 million. The largest crude oil spill in the United States occurred at Enbridge Line 3 pipeline near Grand Rapids, Minnesota where approximately 1.7 million gallons of crude oil were spilled, much of it into the Prairie River. Line 5 itself has spilled approximately 1 million gallons of oil in approximately 30 separate incidents (Map 3). For example, a spill in the Hiawatha National Forest that occurred sometime around 1980 was never properly cleaned up by Enbridge. Elevated levels of petrochemicals were detected by field surveys in 2011 in the soil and in groundwater. The U.S. Forest Service has no record that Enbridge ever notified them of this release from Line 5 and remediation activities will need to continue at the site for the foreseeable future. A significant oil spill is a probable negative effect of the proposed project, with many negative direct, secondary and cumulative impacts to be considered in the EIS.

Enbridge's history of environmental failures should also be considered when evaluating its safety and engineering claims. The opinions of the applicant regarding the safety of a new pipeline, the effectiveness of leak detection systems, and the applicant's commitment to emergency response cannot be taken at face value. Recent oil spills at new pipelines cast doubt on the applicant's claims that a new pipeline can operate more safely simply due its age. These claims must be evaluated for feasibility and ease of implementation.

Socioeconomics and Environmental Justice

The Line 5 reroute is a highly controversial project. The project would be located in the off-reservation ceded territory of the Ojibwe (also referred to as "Anishinaabeg"), which is subject to a formal treaty entered into between the United States and the Lake Superior Ojibwe Tribes. In the Treaty of 1842, the bands reserved rights to the lands and waters which were necessary to carry out their traditional ways of life. The Ojibwe depend on a clean and healthy environment for their cultural existence and sovereign way of life. For over 150 years following the signing of the treaties, the State of Wisconsin failed to recognize its responsibilities related to the bands' reserved rights and wrongly enforced its laws, criminalizing the Anishinaabeg engaging in traditional activities. The effect of this policy was to attempt to divorce the Anishinaabeg from their traditional waters; however, the Tribes sued the State in the *Lac Courte Oreilles v. Wisconsin* case, and the Tribes prevailed. In that case, the Court ruled that the reservation of rights included the plants, wildlife, fish and other categories of items that the bands were harvesting at the time of the signing of the treaties. The Court took testimony on the extent of the Tribes' harvesting, and developed the following list:

As of 1837 and 1842, the Chippewa exploited virtually every resource in the ceded territory. Among the mammals the Chippewa hunted at treaty time were white-tailed deer, black bear, muskrat, beaver, marten, mink, fisher, snowshoe hare, cottontail rabbit, badger, porcupine, moose, woodchuck, squirrel, raccoon, otter, lynx, fox, wolf, elk, and bison.

Among the birds the Chippewa hunted were ducks, geese, songbirds, various types of grouse, turkeys, hawks, eagles, owls, and partridges. Among the fish the Chippewa harvested were, in Lake Superior, whitefish, herring, chubs, lake trout and turbot; and, in-shore, suckers, walleye, pike, sturgeon, muskie, and perch. The Chippewa also harvested a large number of plants and plant materials, including: box elder, sugar maple, arum-leaved arrow-head, smooth sumac, staghorn sumac, wild ginger, common milkweed, yellow birch, hazelnut, beaked hazelnut, nannyberry, climbing bitter-sweet, large-leaved aster, Philadelphia fleabane, dandelion, panicled dogwood, large toothwort, cucumber, Ojibwe squash, large pie pumpkin, gourds, field horsetail, bog rosemary, leather leaf, wintergreen, Labrador tea, cranberry, blueberry, beech, white oak, bur oak, red oak, black oak, corn, wild rice, Virginia waterleaf, shell bark hickory, butternut, wild mint, catnip, hog peanut, creamy vetchling, navy bean, lima bean, cranberry pole bean, lichens, wild onion, wild leek, false spikenard, sweet white water lily, yellow lotus, red ash, white pine, hemlock, brake, marsh marigold, smooth juneberry, red haw apple, wild strawberry, wild plum, pin cherry, sand cherry, wild cherry, choke cherry, highbush blackberry, red raspberry, large-toothed aspen, prickly gooseberry, wild black currant, wild red currant, smooth gooseberry, Ojibwe potato, hop, Virginia creeper, riverbank grape, red maple, mountain maple, spreading dogbane, paper birch, low birch, downy arrowwood, woolly yarrow, white sage, alternate-leaved dogwood, wool grass, great bulrush, scouring rush, sweet grass, Dudley's rush, marsh vetchling, sweet fern, black ash, balsam fir, tamarack, black spruce, jack pine, Norway pine, arbor vitae (white cedar), hawthorn, shining willow, sphagnum moss, basswood, cat-tail, wood nettle, slippery elm, and Lyall's nettle, poison ivy, winterberry, mountain holly, sweet flag, Indian turnip, wild sarsaparilla, ginseng, spotted touch-me-not, blue cohosh, speckled elder, hound's tongue, marsh bellflower, harebell, bush honeysuckle, red elderberry, snowberry, highbush cranberry, white campion, yarrow, pearly everlasting, lesser cat's foot, common burdock, ox-eye daisy, Canada thistle, common thistle, daisy fleabane, Joe-Pye weed, tall blue lettuce, white lettuce, black-eyed Susan, golden ragwort, entire leaved groundsel, Indian cup plant, fragrant goldenrod, tansy, cocklebur, bunch berry, tower mustard, marsh cress, tansy-mustard, squash, wild balsam, apple, hare's tail, wood horsetail, prince's pine, flowering spurge, golden corydalis, giant puffball, wild geranium, rattlesnake grass, blue flag, wild bergamot, heal-all, marsh skullcap, white sweet clover, reindeer moss, northern clintonia, Canada mayflower, small Solomon's seal, star-flowered Solomon's seal, carrion flower, twisted stalk, large flowered bellwort, ground pine, Canada moonseed, heart-leaved umbrella-wort, yellow water lily, great willow-herb, evening primrose, Virginia grape fern, yellow

> ladies' slipper, rein orchis, adder's mouth, bloodroot, white spruce, common plantain, Carey's persicaria, swamp persicaria, curled dock, shield fern, female fern, sensitive fern, red baneberry, Canada anemone, thimble-weed, wild columbine, gold thread, bristly crowfoot, cursed crowfoot, purple meadow rue, agrimony, large-leaved aven, rough cinquefoil, marsh five-finger, smooth rose, high bush blackberry, meadow-sweet, steeple bush, goose grass, small cleaver, small bedstraw, prickly ash, balsam poplar, large toothed aspen, quaking aspen, crack willow, bog willow, pitcher-plant, butter and eggs, cow wheat, wood betony, mullein, moosewood, musquash root, cow parsnip, sweet cicely, wild parsnip, black snakeroot, Canada violet, American dog violet, speckled alder, sweet gale, goldthread, bluewood aster, horseweed, Canada hawkweed, fragrant goldenrod, shin leaf, sessile-leaved bellwort, slender ladies' tresses, and starflower.
>
> The Chippewa harvested other miscellaneous resources, such as turtles and turtle eggs.

The most important game for the Chippewa was the white-tailed deer (*Lac Courte Oreilles v. Wisconsin*, 653 F.Supp. 1420, 1426-28 (W.D.Wis. 1987)).

The Ojibwe also harvest all species of trout found in inland streams, including rainbow and brook trout, and the Tribes regulate the harvesting of these fish pursuant to bag limits and method restrictions found in their Off-Reservation Conservation Code. According to the Anishinaabeg, these plants, wildlife, and fish are not considered resources or commodities, but rather they are considered beings with agency and rights. As relatives who depend on these beings, the Anishinaabeg have a responsibility to harvest these beings in order to carry out their cultural existence, and according to the teachings and traditions of their ancestors. While the Anishinabeg do not consider the plants, wildlife, and fish living in their traditional territories as resources, for the purposes of the EIS, they should be classified by the State as "cultural resources." The EIS should evaluate the positive and negative impacts, including direct, indirect and cumulative impacts, to these beings or cultural resources, to the probable effects of the proposed project, including the probable impacts in the construction, maintenance and failures (e.g. oil spill) of the proposed project.

The standards articulated in *Lac Courte Oreilles* case currently limit the bands' off-reservation treaty-reserved harvesting rights in Wisconsin to public lands and those lands which are held as open MFL and Forest Croplands. Over time, the bands' ability to exercise their rights, and live up to their cultural responsibilities, has been impacted by environmental degradation and privatization of public lands. Privatization of public lands impacts the locations upon which the bands can exercise their rights; environmental degradation impacts the variety of species that may be present on a particular site and the quality of those harvested beings. Some species that the bands harvest are more sensitive to environmental conditions, and have become more difficult to find on public lands. This project has already resulted in the conversion of land from public to private ownership, directly impacting the bands' ability to exercise their reserved rights

in certain locations, and access the cultural resources found there. The construction and maintenance of the infrastructure of the proposed project is likely to lead to contribute to degradation of water quality, including permanent changes to water temperature and permanent or temporary changes in turbidity and other metrics, which will affect the availability and quantity of the cultural resources harvested by the Ojibwe in the off-reservation areas of affect. Oil spills are also likely, given the history of Enbridge operations. Many cultural resources of the Ojibwe are likely to be damaged or destroyed by oil spills. A reduction in appropriate habitat due to oil spills is likely to contribute to movement of wildlife and fish out of affected zones. In addition to the direct and secondary effects, the analysis should also include an analysis of the cumulative impact to the Tribes' ability to carry out their way of life, as reserved in treaties made with the United States, in terms of the privatization of public lands and overall environmental degradation due to changes in land and water use within the ceded territories following the signing of the treaties.

One of the most controversial aspects of this project is where it is located. Many of the public comments during the public hearing on July 1, 2020, address this controversy. The Bad River Indian Reservation serves as the terminus of the Bad River watershed. The area of the Bad River watershed in comparison to its slope leads many to liken it to a bowl. In this water-rich environment, the waters rush to Lake Superior from the highlands above, and through the Bad River Indian Reservation. The Bad River Indian Reservation is home to the Bad River Band of Lake Superior Chippewa. This reservation was created as a result of an agreement made by the United States to provide the Lake Superior Ojibwe Bands permanent homelands, places from which they would never be removed. The Bad River Anishinaabeg still live on the Bad River Indian Reservation. The slope of the land contributes to a fast flow rate, which is faster in times of high water. All of the concerns articulated above and related to environmental degradation and its impact on water quality, and secondary impacts to the various plants, wildlife, and fish from the construction, maintenance and eventual failure, and likely catastrophic oil spill, carry over to this context. For the on-reservation interests, however, the stakes are much higher due to the political and social context as the Bad River Indian Reservation as the only permanent homeland for the Bad River Band of Lake Superior Chippewa. An oil spill from the proposed project would certainly affect the Bad River people. Due to the geography and hydrology, cleanup and restoration would be difficult, if not impossible. The Bad River is a wild river with few landings or other access points. The Bad River centers the community and provides an abundance of food, medicine, recreational and cultural/spiritual purposes for the community. A careful analysis into the direct, secondary and cumulative impacts to the health, welfare and safety of the Bad River Ojibwe people must be included in the EIS.

The analysis of impacts to the Lake Superior Chippewa interests must be done in the context of government-to-government consultations with the Tribal Government. It is entirely inappropriate to rely on contractors hired by the company for this evaluation and the failure to engage in government-to-government consultations on this essential aspect of the EIS would violate agreements in the LCO case stipulations and state policy.

Assessment of Impacts to Surface and Groundwater

The threat of an oil spill is a major concern. The EIS should document the environmental effects of past oil spills and assess the risk of a spill in the water-rich Lake Superior region.

The EIS must include a detailed fate and transport model that illustrates the potential spatial extent of downgradient impacts of a failure of Line 5. The area of analysis should include downgradient areas along the entire length of Line 5 in the Lake Superior basin. This information is necessary to evaluate the risk of spilled oil reaching Lake Superior as well as the risk of spilled oil impacts to the Bad River Reservation and Copper Falls State Park (Map 2). This information is also needed to assess potential impacts to other public lands (e.g. State Forests) and private lands, drinking water sources, trout streams, wells, etc. The fate and transport modeling must include results obtained through analyzing a variety of scenarios. These should include a range of crude oil spill sizes (small incidents to catastrophic failures) and a variety of climatic (spring flood, high and low flow conditions, extreme rainfall events, etc.) and temporal (spills over frozen ground, spills under frozen rivers, etc.) variables.

Included in the analysis should be information on how the applicant would respond to oil spills along the new section of pipeline. Information should include the locations of access points to streams and wetlands for oil spill response crews, locations of response staff and equipment and the amount of time that it would take for crews to arrive. This information will inform the assessment of potential environmental effects from oil spills.

The EIS must include an evaluation of hydrologic changes caused by the installation and presence of the pipeline. For example, pipelines often alter stream courses that intersect the right-of-way by causing new channels running roughly parallel to the pipeline. In addition, the construction of the pipeline and the associated clearing of vegetation will increase the risk of erosion and sedimentation in all water crossings. Geomorphological assessments of the proposed construction areas are needed to determine which stream courses would be altered and any changes to streams and wetlands that might occur from increased erosion and sedimentation.

The EIS must include an assessment of remediation and cleanup techniques that could be employed along the route for both physical (water, wetlands, etc.) and biological resources (plants and animals), with a review of the effectiveness of each technique. The EIS should also quantitatively assess the possible changes to surface and groundwater that may result from a spill.

The water quality assessment should pay special attention to any impacts that might affect Lake Superior. This analysis should be done in the context of the Great Lakes Water Quality Agreement (GLWQA) between Canada and the United States. For example, Article 6 of the GLWQA calls for notification of other parties to the agreement of activities that may impact the waters of the Great Lakes, including pipelines.

A cumulative assessment of existing impacts from pipeline construction and pipeline spills on surface and groundwater should be conducted. The scale of this cumulative effects

analysis cannot be so narrow as to constrain meaningful data collection. All crude oil pipelines in Wisconsin should be included in the analysis. From GLIFWC's perspective, all crude oil pipelines in the ceded territories must be part of this analysis. This assessment should include information on fate and transport of spilled oil from the two major pipeline corridors in the state.

Finally, surface and groundwater quality must be established for all stream and wetlands potentially impacted by the pipeline construction and operation through a robust baseline data collection program. Water quality data should be of sufficient statistical power so as to allow for detection of changes due to pipeline operation.

Fisheries, Wildlife and Ecologically Sensitive Areas

Oil is toxic to aquatic and terrestrial organisms. Inventories of fisheries and wildlife communities in or near the proposed pipeline corridor should be conducted early in the EIS process to establish the existing condition and so that any resources at risk can be considered in the EIS. Establishing baseline is also critical to analyzing the impacts of construction and risk of spills. These inventories should include fisheries and biotic integrity analyses for all stream crossings. Freshwater mussel surveys are needed in all stream crossing locations.

Identification of ecologically sensitive areas in or near the proposed pipeline corridor should be conducted so that those areas can be avoided, or appropriate protective measures can be implemented. Some species and ecological systems are more sensitive than others to ground disturbance during construction or to oil spills. Those species and systems, in particular, need to be identified.

The applicant has not conducted plant, fish and wildlife surveys of the quality necessary for this proposed pipeline reroute. Data collection has thus far been restricted to the right-of-way and has consisted mostly of casual observations. The natural heritage inventory has been accessed but this is simply a repository of past observations. A dedicated effort to survey for threatened and endangered species along the proposed route and downgradient areas potentially impacted by a spill should be required.

Creating a new corridor is likely to harm plant, fish and wildlife communities. Several ma'iingan, or wolf, packs live within the project area. Ma'iingan are classified as Endangered Species within the Endangered Species Act. Despite their endangered status, ma'iinganag in Wisconsin die due to illegally poaching more often than any other cause of death (Treves, 2017). A new corridor just outside of the Bad River Indian Reservation may attract ma'iinganag, leaving them more vulnerable to illegal poaching. The corridor would also transect several cold water trout streams, removing the tree cover from a span of around 50 feet in the riparian area of each stream crossed. Consistent riparian tree cover is essential for the maintenance of water temperatures needed by native trout species. The impact to the trout communities living in these waters, already impacted by climate change, needs to be considered.

Wetland Impacts and Wetland Mitigation

Construction and expansion of pipelines involves wetland fill and hydrologic alteration that will affect wetland functions and values. Each wetland crossing requires a detailed functional assessment. This assessment is critical because wetland mitigation is not simply a replacement of acres, it is also a replacement of wetland function. GLIFWC's review of the wetland information provided by the applicant to date indicates does not provide the level of information necessary for replacement of wetland function.

The applicant has also indicated that there is a category of wetland impacts called "temporary." There is no such thing as a temporary wetland impact. Any section of wetland that is excavated or undergoes soil compaction during pipeline installation is a wetland impact. Other types of wetland impact like vegetation clearing, are secondary impacts. The DNR should clearly establish these categories in the EIS.

Mitigation for wetland impacts that cannot be avoided will be required. However, the effectiveness of wetland mitigation, both through the use of wetland banks or rehabilitation of drained wetlands is questionable, particularly for forested wetlands. The EIS should describe the effectiveness of wetland mitigation measures and assess whether all lost functions and values of lost wetlands are likely to be replaced.

Invasive Species

The ground disturbance created during construction and maintenance of the pipeline provides a foothold for invasive species that can spread to adjacent areas. The movement of equipment and materials along the linear corridor will transport invasive species into new areas of land and water. The impact of the spread of invasive species and possible preventative measures that could be implemented should be articulated during the EIS process.

Climate Change

Oil transported by Line 5 contributes to existing CO2 emissions into the atmosphere and exacerbate global climate change. Potential impacts of climate change have been well documented for Wisconsin through work of the Wisconsin Initiative on Climate Change Impacts (WICCI). Potential impacts on the Lake Superior Basin have been described through the work of the Lake Superior Partnership Working Group. Furthermore, the impacts on forest ecosystems have been described by the Northern Institute of Applied Climate Science (NIACS) of the USDA. Finally, GLIFWC has worked to describe the vulnerability of species important to tribes in a Climate Change Vulnerability Assessment. The EIS should examine the effects that this project will have on carbon emissions as well as the effect on the climate change adaptation strategies that have been suggested for Wisconsin and the Lake Superior region.

Transportation Networks and Connected Actions

The EIS should describe the combined impacts of the pipeline reroute with other proposed projects in the area. Transmission line reroutes and road construction are examples. Furthermore, the EIR indicates that a substantial number of access roads will be used during pipeline construction. The EIS must clearly define the new roads that would be constructed, the existing roads that would be improved, and assess the impacts of these activities. The EIS should also identify which roads would be used in the future by Enbridge to conduct maintenance on the pipeline as these would be considered permanent features of the pipeline.

Analysis of a Full Range of Construction Techniques

The applicant has outlined a series of construction techniques that would be used when crossing streams and wetlands. Despite the navigability of most waters not being defined, for the most part, the applicant intends to use temporary dams and trenching techniques to cross waterbodies. Enbridge has proposed the use of horizontal directional drilling (HDD) for use at only 6 of those water crossings. It is clear that HDD has the potential to be more environmentally beneficial technique for water crossings. The EIS should assess the possible environmental benefits of using the HDD method for all stream and wetland crossings. It is likely that this method would provide greatly increased environmental protections that more conventional crossing methods. In addition, the crossing of waterways by access roads is inadequately addressed in the EIR.

It is important to note that it is the responsibility of the applicant to accurately describe the project they propose. Because crossings of waterways by the proposed pipeline and by access roads are inadequately and inaccurately described in the EIR and waterways permit application, the WDNR should assume that all waterways are navigable unless data clearly indicate the contrary. This determination must be made by the WDNR and not the applicant.

The proposed reroute construction fails to include necessary engineering design alternatives that could be implemented to protect the environment in the event of an oil spill. These engineering alternatives include construction of berms along the right-of-way that would direct oil away from waterbodies or the construction of detention ponds that could capture spilled oil before it would enter a natural waterbody. The EIS should examine the benefits of these engineering controls so that if the project is permitted, it can most effectively protect waterways and wetlands.

Alternatives Analysis

Enbridge has outlined four alternative routes for the Line 5 reroute. However, all field data collection and attempts to acquire easements from landowners have focused on the preferred alternative. The applicant has stated that the other routes have been assessed but there is no information to support that claim. The EIS should provide a quantitative analysis of each of the alternative routes so that the least environmentally damaging alternative can be selected. The

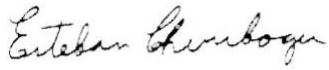
alternatives analysis should consider potential impacts to sensitive habitats, public lands, Lake Superior, etc.

Financial Assurance

As previously discussed, spills of oil are not uncommon. Cleanup and remediation are costly and require long periods of time to complete. The EIS should describe, in detail, the types of financial assurance that Enbridge will be required to provide to ensure that the public is not burdened with cleanup and remediation costs.

We look forward to working with the DNR as the EIS process moves forward. Please contact me at 608-263-2873 with any questions.

Sincerely,



Esteban Chiriboga
GLIFWC Environmental Specialist

cc. Lindsay Tekler, WDNR Energy Project Liaison
Jonathan Gilbert, GLIFWC Biological Services Director
Ann McCammon Soltis, GLIFWC Director of Intergovernmental Affairs
John Coleman, GLIFWC Environmental Section Leader

Sources Cited

National Wildlife Federation, 2012, "The Anatomy of Enbridge's Once and Future Oil Spills, www.nwf.org.

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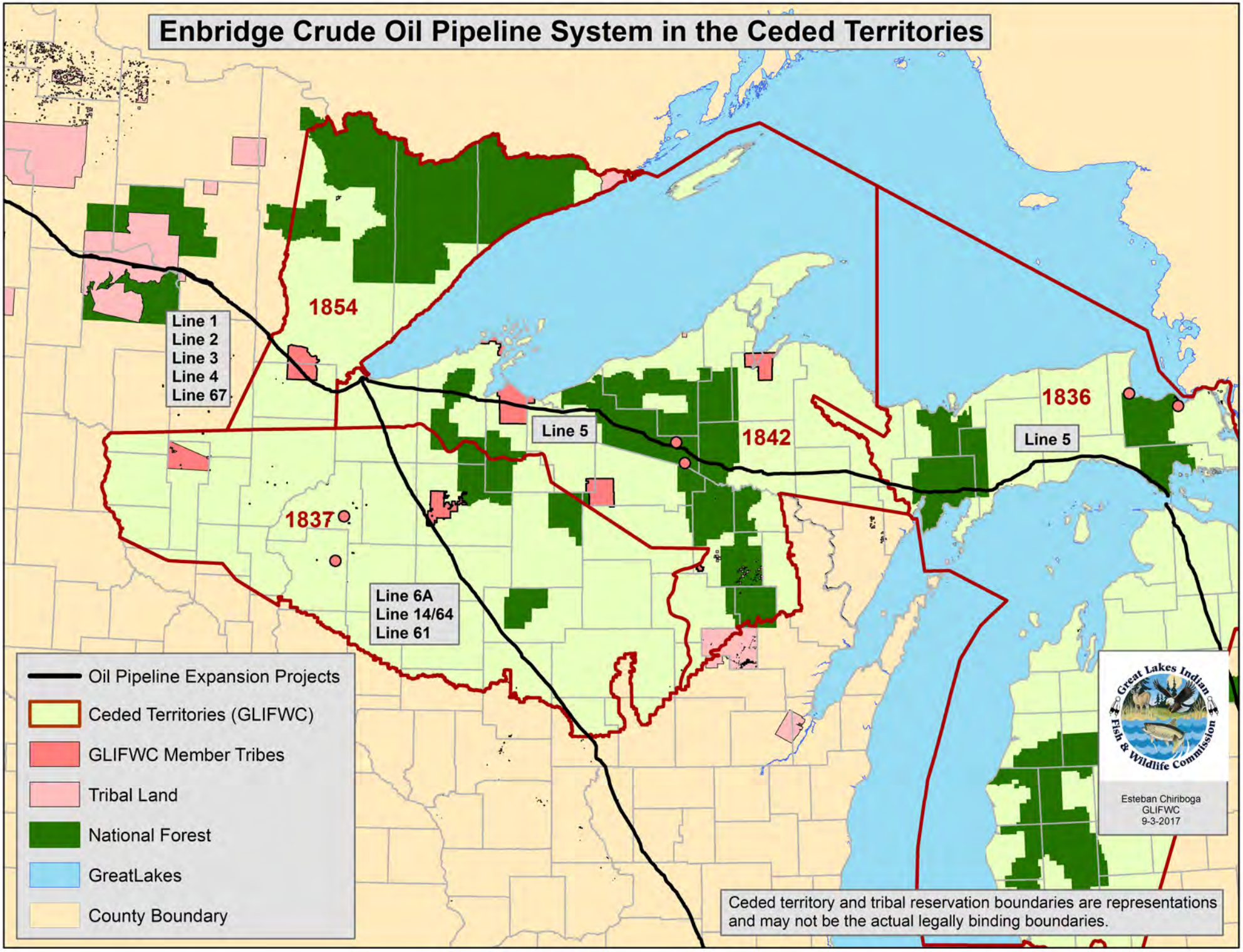
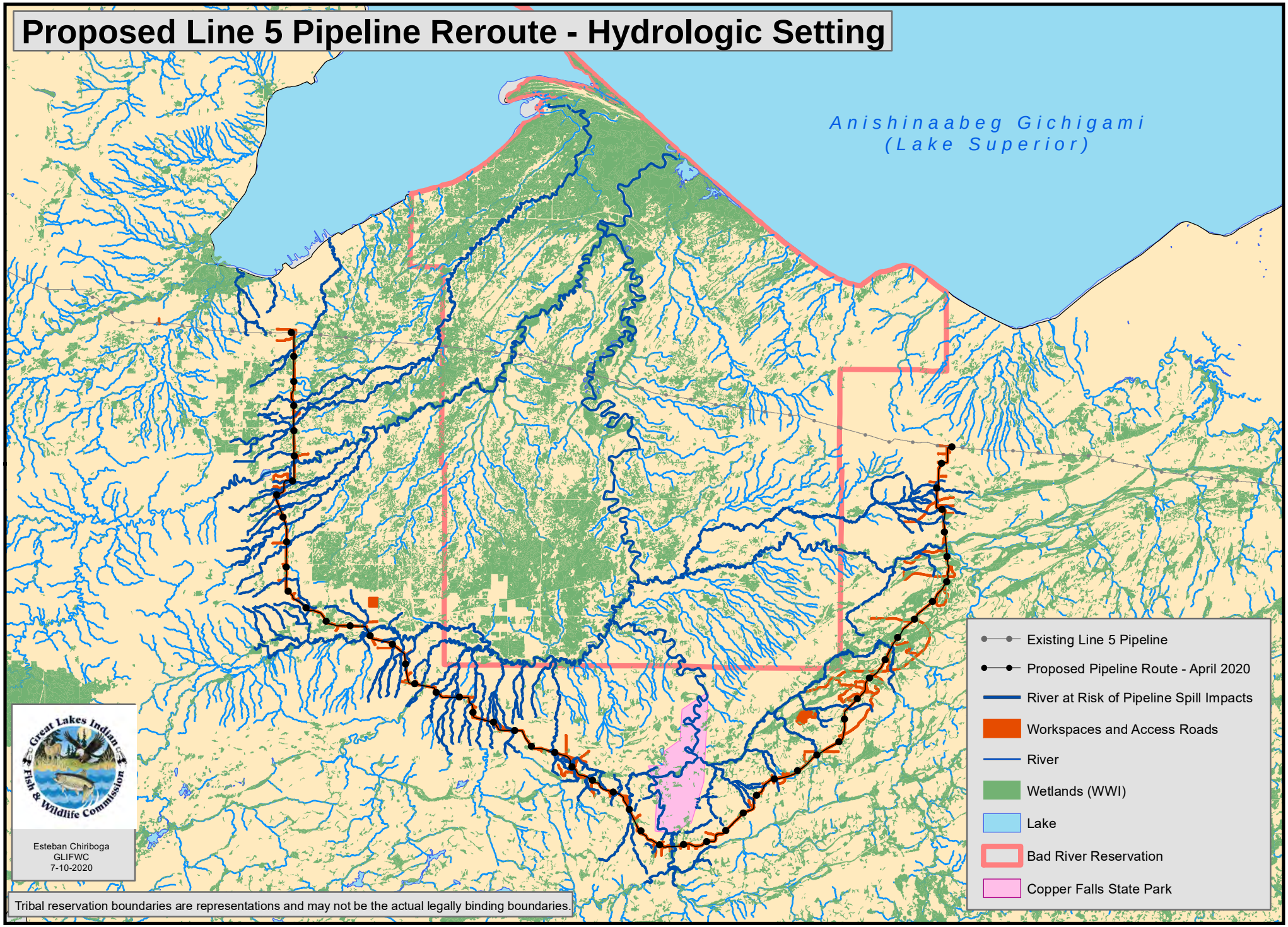
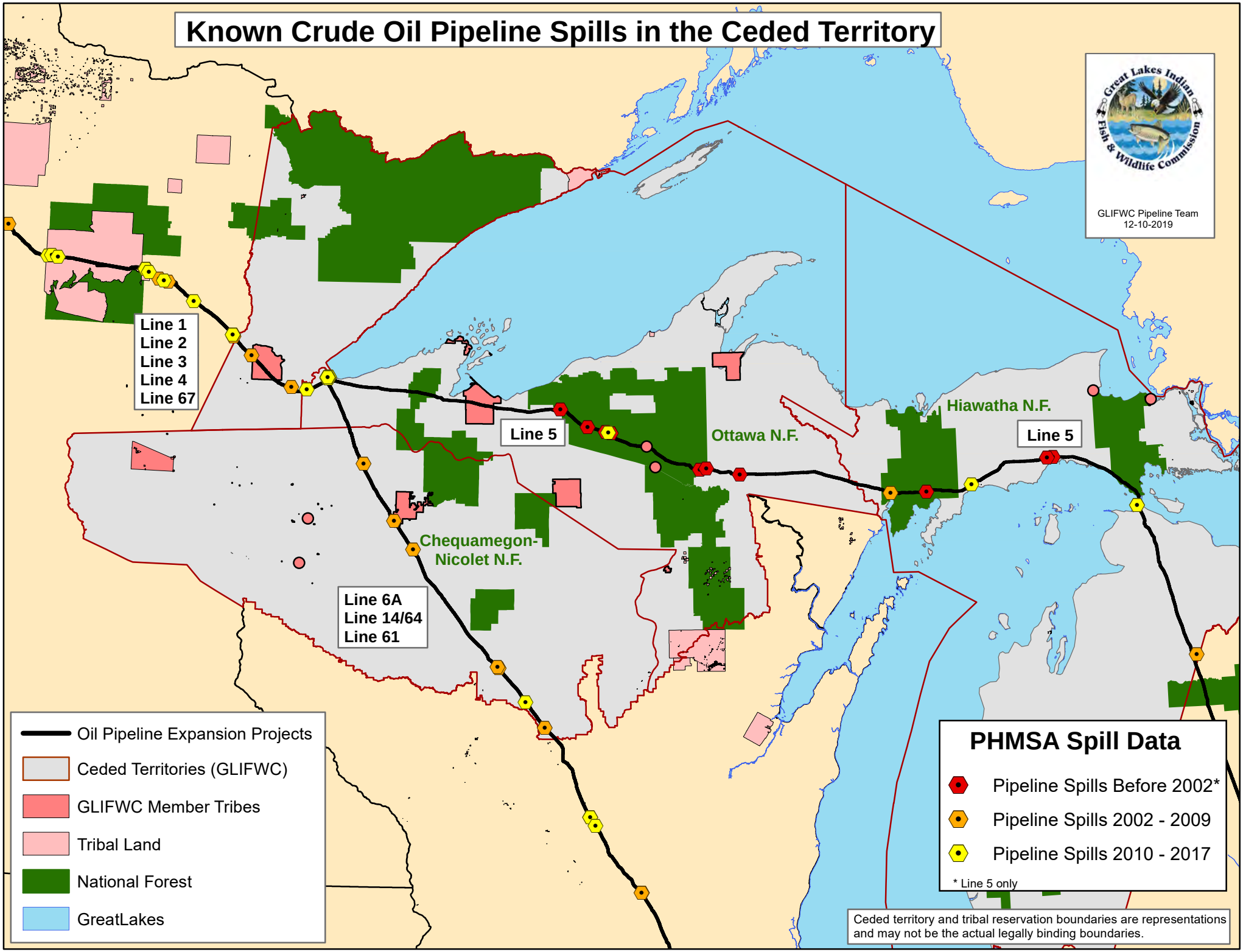
Treves, et. al, 2017, Grey wolf mortality patterns in Wisconsin from 1979 to 2012, J of Mammalogy, 98(1):17-32.


Enbridge Crude Oil Pipeline System in the Ceded Territories
1854
1842
1836
1837
Line 1
Line 2
Line 3
Line 4
Line 67
Line 5
Line 5
Line 6A
Line 14/64
Line 61
Oil Pipeline Expansion Projects
Ceded Territories (GLIFWC)
GLIFWC Member Tribes
Tribal Land
National Forest
GreatLakes
County Boundary
Great Lakes Indian Fish & Wildlife Commission
Esteban Chiriboga
GLIFWC
9-3-2017
Ceded territory and tribal reservation boundaries are representations and may not be the actual legally binding boundaries.

Proposed Line 5 Pipeline Reroute - Hydrologic Setting



Known Crude Oil Pipeline Spills in the Ceded Territory