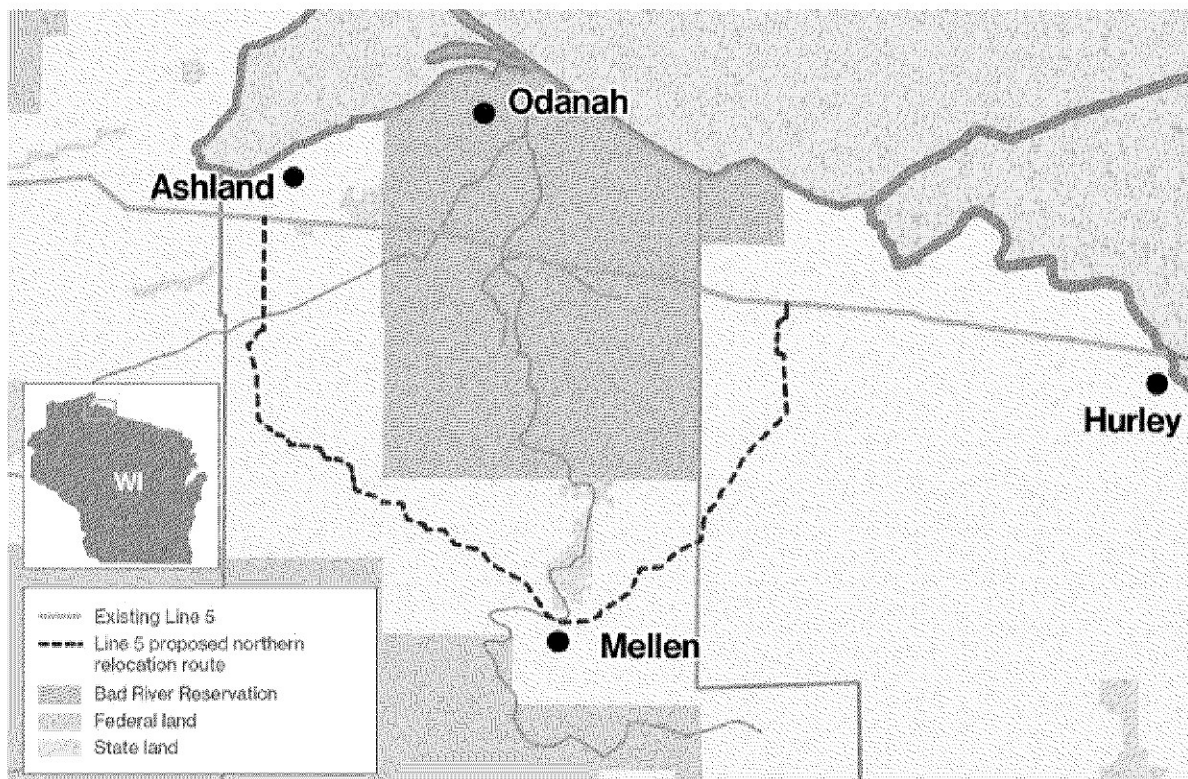


OVERVIEW AND STATUS OF SECTION 401 DOWNSTREAM PROCESS FOR RELOCATION

This document provides a brief overview of the so-called “downstream process” under Clean Water Act (CWA) Section 401 as it relates to permitting the relocation of Enbridge’s Line 5 liquid pipeline outside of the Bad River Band’s Reservation (the “Relocation”) (see map below).



In February 2020, Enbridge submitted its application to the U.S. Army Corps of Engineers (“USACE”), St. Paul District for an individual CWA Section 404 permit and Rivers and Harbors Act Section 10 permit. In January 2022, USACE issued public notice for the application and, as we detail below, EPA submitted comments that the Relocation “will have a substantial and unacceptable adverse impacts” to the Band’s downstream water quality. In response, Enbridge and USACE attempted to engage EPA to address/resolve the agency’s downstream concerns. EPA agreed to bi-weekly meetings beginning in Fall 2023 to discuss such concerns, and as a result of those meetings, many of EPA’s concerns have been addressed.

While USACE was prepared to issue the 404 permit, the Band and EPA invoked the neighboring jurisdiction review process under CWA Section 401, which includes a hearing in which EPA must submit to USACE “its evaluation and recommendation(s) concerning [the Band’s] objection.” 40 C.F.R. § 121.15(c). EPA should share with Enbridge any remaining downstream issues in advance of the hearing, to allow for resolution of those issues promptly, or alternatively, conclude that the Relocation will not result in adverse impacts to downstream water quality.

Downstream Review Process

The Wisconsin Department of Natural Resources (WDNR) issued CWA section 401 water quality certification for the Relocation on November 14, 2024. In accordance with CWA § 401(a)(2) and 40 C.F.R. § 121.13(b), EPA determined on December 13, 2024, that a discharge from the proposed relocation “may affect” the Band’s water quality, setting in motion the downstream (or “neighboring jurisdiction”) review process.¹

Pursuant to 40 C.F.R. § 121.14, on February 11, 2025, the Band formally “objected” to WDNR’s CWA Section 401 water quality certification contending that the proposed Relocation “will affect” the quality of the Band’s waters, aquatic resources, and wetlands, so as to violate the Band’s water quality requirements. The Band also requested a public hearing pursuant to CWA Section 401(a)(2).

The downstream review regulations provide no set timeframe for USACE to schedule the hearing, following receipt of the Band’s objection; however, USACE recently indicated that the hearing will be held in the next 30-60 days. USACE must provide notice of the hearing at least 30 days in advance, 40 C.F.R. § 121.15(b), and USACE regulations require that the public hearing will be held within the Bad River Reservation. *See* 33 C.F.R. § 325.2(b)(1)(i).

Importantly, at the hearing, EPA’s Regional Administrator “shall submit to [USACE] its evaluation and recommendation(s) concerning the objection.” 40 C.F.R. § 121.15(c). USACE must consider recommendations from the Band and EPA, and any additional evidence presented to USACE at the hearing, and determine whether additional permit conditions are necessary to ensure that any discharge from the Relocation will comply with the Band’s water quality requirements. *Id.* § 121.15(d). If additional permit conditions cannot ensure the discharge will comply with the Band’s water quality requirements, then USACE cannot issue the 404 permit. *Id.* § 121.15(e).

Previous Correspondence and Interactions with EPA

EPA Initially Identified Potential Adverse Effects from Construction of the Relocation. On March 16, 2022, EPA notified USACE that the proposed discharge of fill material into wetlands and waterbodies “may result in substantial and unacceptable adverse impacts” to the Bad River and Kakagon-Bad River Sloughs wetland complex.” On April 14, 2022, EPA notified USACE that the wetland and waterbody fill discharges during construction “will have a substantial and unacceptable impact.”

Since 2022, Enbridge sought to engage EPA Region 5 to discuss/resolve downstream issues identified in EPA’s letters. Bi-weekly meetings began in Q3 of 2023. Enbridge worked through various plans and issues with EPA at those meetings. Much of the discussion to date has focused on materials submitted to EPA years ago. The bi-weekly meetings ended in Q2 2024.

- Enbridge made clear at the bi-weekly meetings (as detailed below) that the Relocation will not result in adverse effects to water quality on the Reservation, and extensive plans and mitigation are in place to ensure no adverse effect occurs.
- EPA has not identified any specific outstanding downstream issues or otherwise expressed to Enbridge which, if any, EPA comments remain unaddressed.

¹ While Section 401 provides for a downstream process, its use is extremely rare – it has only been initiated with respect to one other project, the Polymet mine in Minnesota. That downstream process resulted in USACE denying the mine permit due to the potential for increased mercury (and other) contamination to downstream tribal waters.

Downstream Issues Have Been Fully Addressed. As opposed to the Polymet mine (which resulted in disturbance of existing/known Mercury and minerals flowing directly into downstream waters), the Relocation will not result in the release of any chemical pollutant. Note that, in Polymet, existing Mercury levels already exceeded downstream Tribal water quality standards. Construction of the Relocation, however, will not disturb any existing contamination (like the Mercury associated with Polymet).

- *Total Suspended Solids (TSS).* The primary water quality parameter at issue with the Relocation is TSS impacts arising from the release of sediment during construction activities in and near waters, which EPA and the Band assert could degrade water quality and species habitat. Construction in waters is expected to be complete within 20-32 hours for each crossing. Large watercourses will be crossed via Horizontal Directional Drill (HDD) that will avoid direct construction impacts (including TSS) to the waterbody.
 - To analyze and quantify TSS impacts resulting from in-stream construction, Enbridge commissioned the RPS Group (now part of Tetra Tech) to conduct sediment dispersion modeling from construction activities. RPS has performed such work for the Federal Government and utilized a model it jointly developed with USACE to simulate sediment impacts – the model is widely used in the United States and internationally to assess sediment releases. The modeling confirms that any and all TSS levels from construction will be lower than the Band's water quality standard for TSS before any water enters the Reservation. The TSS levels from construction are less than what naturally occurs during storm-related events.

Enbridge's Final Plans for Construction Address EPA's Comments. For example, Enbridge's Post-Construction Monitoring and Sampling Plan is one of the most extensive ever prepared for a pipeline project. To ensure that there is no adverse impact to water quality, Enbridge will take samples pre-, post-, and during construction to test water quality parameters, including for TSS and other parameters (e.g., macroinvertebrates required by EPA).

EPA Concluded the USACE's Reissuance of Two Regional General Permits (RGPs) (for Utility and Minor Discharges) Would Not Result in Downstream Effects to the Band's Waters. On January 20, 2023, USACE issued a public notice concerning renewal of two RGPs for use in Wisconsin and Minnesota. As a result of the proposed renewals, the Band initiated a 401 downstream hearing process, asserting that the RGPs will result in an adverse effect to water quality on the Band's Reservation. The RGPs allow for construction similar to that occurring from the Relocation – temporary, localized impacts within waterbodies upstream of the Reservation. In its comments submitted to USACE, EPA stated that it did not believe that RGPs would result in an adverse effect to the Band's water quality. Based on EPA's comments, USACE issued the final RGPs in August 2024, concluding that the conditions set forth in the RGPs were adequate to not violate the Band's water quality standards. EPA should similarly find no adverse effect to the Band's water quality resulting from the Relocation.

To allow the permitting process to proceed efficiently, EPA should share any outstanding downstream issues now to allow for quick resolution before the hearing, or provide documentation for the record concluding that the Relocation has addressed EPA's concerns and will not result in an adverse effect to downstream water quality.