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ARMY CORPS OF ENGINEERS ST. PAUL DISTRICT

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PUBLIC HEARING

WI PH 2/27/2024

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Tuesday February 27, 2024

The Army Corps of Engineers, St. Paul Division, met in the Kakagon Room at the Bad River Lodge & Casino located at 73370 U.S. 2; Ashland, Wisconsin 54806, commencing at 8:10 A.M. and concluding at 2:01 P.M. CST with Chad Konickson, Presiding Officer.

PRESENT: Chad Konickson, Presiding Officer, Regulatory Division Chief

Elizabeth Moriarty, Senior Asst. District Counsel, U.S. Army Corps of Engineers, St. Paul District

Rebecca Graser, Regulatory Division Deputy

A.J. Kitchen, Lead Project Manager, St. Paul District

ALSO PRESENT: Robert Blanchard, Chairman for Band Leadership Connie Sue M. Martin, Facilitator on behalf of the Band

STENOGRAPHICALLY REPORTED BY: AnnaMaria H. Casper , RPR, RMR

OTR Job: 11228

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## 1 PROCEEDINGS 2 MR. KONICKSON: Good morning. My name 3 is Chad Konickson. I'm the Chief Regulatory Officer of the Army Corps of Engineers. 4 5 We are conducting this public hearing in response to an objection from the Bad River Band 6 7 of Lake Superior Chippewa under Section 401(a)(2) 8 of the Clean Water Act to the Corps' proposed reissuance of two Regional General Permits, Minor 9 10 Discharges and Utility General Permit, that are 11 for use within the watersheds neighboring the Bad 12 River Reservation. 13 We are conducting this public hearing in response to an objection from the Bad River Band 14 Lake Superior Chippewa under Section 401(a)(2) of 15 the Clean Water Act and the Band's subsequent 16 17 request for a hearing within the Band's 18 reservation. 19 The Band is a federally recognized tribe 20 and Sovereign Nation, and their reservation may be 21 downstream of projects that may be temporarily 22 authorized by these General Permits. 23 The Band is recognized as a "state" with neighboring jurisdiction pursuant to Section 24 25 401(a)(2) of the Clean Water Act.

1 The Band has offered to open the 2 proceedings today with a prayer, so I want to 3 recognize Gloria Wiggins to lead that prayer. MS. WIGGINS: (Speaking in Ojibwe.) 4 5 As I said, my name is Gloria Wiggins. I'm going to say a prayer. 6 7 Opening prayer by Ms. Wiggins in Ojibwe. 8 9 MS. GRASER: Thank you, Gloria. 10 My name is Becky Graser out of the St. 11 Paul District. I'm the Regulatory Deputy, and 12 I'll be facilitating today's hearing with Chad. 13 We have a representative from the Corps' Office of Counsel and Public Affairs. 14 15 We also have representatives from the Bad River Band and EPA to present their views. 16 17 Our court reporter, Anna, is here to 18 transcribe all verbal testimony. 19 Today's hearing is being conducted in 20 accordance with Code of Federal Regulations Title 21 33, Navigation in Navigable Waters, Part 325 and 22 327, and the Code of Federal Regulations Title 40 23 Part 121, which outlines the process for today's 24 hearing. 25 During the hearing, members of the Corps

team are not permitted to provide responses to questions or comments. However, all comments and information presented during this hearing will be considered when evaluating whether to re-issue the Regional General Permits and the watersheds neighboring the Bad River Band's reservation.

7 We ask that all speakers focus their 8 comments on the proposed use within the Bad River 9 reservation would or would not violate the Band's 10 water quality requirements and whether new 11 conditions could be added to the Regional General 12 Permits that would ensure compliance.

Comments expressing either support or opposition to the issuance of the Regional General Permits will not be informative to our decision on this matter. Rather, we must base our decision on substantive evidence related to applicable water from discharges regulated under the Clean Water Act.

Finally, each speaker is expected to provide their testimony independently without cross-examination of others. Similarly, we ask that those present allow each speaker the opportunity to share their views without interruption.

1 We will follow the agenda shown. In 2 addition to the submittal of verbal testimony 3 today, we are also accepting written comments from all members of the public until March 12th, 2024, 4 5 using the email address shown at the bottom of this slide. 6 Please note that all the times shown 7 here are tentative. Lunch recess will be at 8 9 approximately 12:00 P.M. and short recesses are 10 scheduled around 10:00 a.m. and 3:00 P.M. today. 11 I ask that all registered speakers be 12 present to provide testimony. 13 The hearing may adjourn earlier than 5:00 p.m. should all registered speakers present 14 15 complete their testimony. Speakers signing in with the Corps who did not pre-register to provide 16 17 testimony are welcome to register in person today. 18 We have a sign-in sheet at the back table. 19 Ad hoc speakers may have the length of 20 their testimony limited to ten minutes, but we may 21 further limit it to not more than three minutes 22 depending on the number of registered speakers present. In the event that a registered speaker 23 24 is unable to provide testimony today, they may 25 still provide written information to the Corps

1 using the email shown on the slide. 2 So next, a little bit of background, and 3 this is a very busy slide. I'm not going to read all of it. This is some background on why we're 4 5 here today. The Bad River Band has determined that 6 7 discharges into waters of the United States that 8 may be associated with projects eligible for authorization by the Minor Discharges Regional 9 10 General Permit and the Utility Regional General 11 Permit and watersheds, for which the Bad River 12 Band is the neighboring jurisdiction, will violate 13 Bad River Band's water quality standards. 14 Initially, the Band notified the Corps and the United States Environmental Protection 15 Agency, or EPA, of its objection to all eight 16 17 Corps' RGPs and, in February of 2023, requested a public hearing. Since that time, Bad River Band 18 has withdrawn its objection and request for a 19 20 public hearing for six out of the eight Regional 21 General Permits. 22 The Corps continues to suspend its 23 decision to re-issue the Utility Regional General Permit and the Minor Discharges Regional General 24 25 Permit within the rain watersheds to the Bad River Reservation until the 401(a)(2) process is
 concluded.

We're conducting this public hearing for the purpose of collecting information or evidence that we will consider related to the two proposed Regional General Permits' effects on water quality of the Bad River Band's waters.

8 The hearing will include testimony from 9 representatives of the Bad River Band, the U.S. 10 Environmental Protection Agency, and any 11 interested members of the public.

12 All testimony presented during the 13 hearing, including information submitted via 14 email, will be considered when evaluating whether 15 to re-issue the Utility Regional General Permit 16 and the Minor Discharges Regional General Permit 17 on the watersheds neighboring the reservation.

18 We expect all speakers to focus their 19 comments on the proposed use of either RGP, or 20 Regional General Permit, on whether the watersheds 21 neighboring the reservation would or would not 22 violate the Band's water quality requirements and 23 whether new conditions could be added to the RGPs 24 that would ensure compliance.

25

At the close of the comment period on

1 March 12th, 2024, the Corps will base our decision 2 on substantive evidence related to applicable 3 water quality impacts related to the Clean Water Act. 4 Possible outcomes of this process may be 5 to re-issue the Minor Discharges Regional General 6 7 Permit and the Utility Regional General Permit, 8 issue either RGP with added conditions, or the decision not to re-issue the Minor Discharges 9 10 Regional General Permit and the Utility Regional 11 General Permit within the watersheds neighboring 12 the Bad River reservation. 13 Lastly, I ask that all speakers who come to the podium begin by first introducing 14 themselves and spelling their last name for our 15 16 reporter. 17 With that, the first testimony today 18 will be from Tera Fong, Director of the Water Division of the U.S. Environmental Protection 19 20 Agency, Region 5. Ms. Fong will provide the EPA's 21 evaluation and recommendations with respect to the 22 Bad River Band's objections. 23 MS. FONG: Good morning, everybody. My name is Tera Fong. I am the Director of the Water 24 25 Division at EPA's Region 5 in Chicago.

1 It is a pleasure to be with you this morning. I would like to thank the Bad River Band of 2 3 Lake Superior Chippewa and the Corps of Engineers for facilitating and organizing this hearing. 4 5 I will present an overview of our recommendations with respect to the Bad River 6 7 Band's objections to two Regional General Permits 8 from the St. Paul District, the Minor Discharges and Utility Regional General Permits. 9 This is an overview. We have submitted 10 11 our full evaluation and recommendations document 12 to the Corps. Again, as the Corps mentioned, this 13 was originally an objection to eight. We commend the Band and the Corps for working out and 14 15 resolving six of the eight objections. 16 So a bit of a walk-through of my 17 presentation this morning. I'd like to start with -- okay, thank you. I'd like to start with a 18 summary of the conclusions of our evaluation and 19 20 recommendations and the details of how we got 21 there, including the 401(a)(2) process itself, what our evaluation is, including the analysis of 22 23 the Bad River Band's objection and supporting documentation from federal and state agencies, 24 25 and, finally, walking through EPA's prior 404

1 recommendations on the Regional General Permits. 2 Next slide. 3 So I'd like to briefly summarize the 401(a)(2) process, and the Corps will as well, but 4 5 I will reiterate a few key points. The 401(a)(2) process allows neighboring 6 7 jurisdictions, that includes states and tribes 8 that have received treatment in a similar manner as a state, to engage in the federal licensing or 9 10 permitting process where the EPA determines that a 11 discharge from an activity that is subject to 12 permit may affect their water quality. 13 Upon receiving an application associated with a Clean Water Act 401 certification from a 14 15 licensing or permitting agency, EPA has 30 days to determine whether discharges may affect the 16 17 quality of a neighboring jurisdiction's water 18 quality, and, if so, to notify them. The neighboring jurisdiction then has 60 19 20 days to determine whether the discharges will 21 affect its water quality so as to violate its 22 water quality requirements, and, if so, object in 23 writing and request a hearing. 24 EPA's obligation at such a hearing is to 25 provide our evaluation and recommendations

1 regarding the objection of the neighboring 2 jurisdiction at a hearing scheduled by the 3 permitting agency. Next slide, please. 4 5 So for today our task in this hearing is to submit our evaluation and recommendations 6 7 regarding the Bad River Band's objection to the 8 reissuance of the 404 Minor Discharges and Utility Regional General Permits. It is guided by our 9 10 review of the Band's objections to the Regional 11 General Permits themselves and supporting 12 documentation from the Corps, Wisconsin's 401 13 Water Quality Certification, and a general overview of publicly available surface water data. 14 15 Our key conclusion is that EPA's evaluation is that the information in the record 16 does not demonstrate that discharges from projects 17 18 under the Minor Discharges and Utility Regional General Permits will affect the quality of the 19 20 Band's water so as to violate any water quality requirements the information in the record does 21 not demonstrate the discharges from projects will 22 23 violate the Band's water quality requirements. 24 However, we reiterate the prior public 25 comments made to the Corps in an effort to provide

1 greater assurance that activities permitted by the 2 Corps outside of the reservation do not result in 3 violations of the Band's water quality requirements on the reservation. We believe that EPA's 4 5 recommendations are responsive to the Band's 6 concerns. 7 Next slide, please. 8 A bit of a history of the specific action, and the Corps went over this as well. 9 In 10 December 2022, the EPA sent a "may affect" letter 11 to the Band notifying them that discharges from 12 these Regional General Permits are expected to

occur and will affect the quality of the Band's

14 water so as to violate their water quality 15 requirements.

13

In February 2023 the Band did notify the EPA and the Corps that discharges related to the Regional General Permits will affect the quality of the Band's waters, so as to violate its downstream water quality requirements. The Band objected to the issuance of the permits and requested that the Corps hold a public hearing.

In November, the Band withdrew their objections to six of the Regional General Permits and maintained the focus of today's hearing, the Minor Discharges and Utility Regional General
 Permits.

3 Next slide, please. So the EPA relied on a wealth of 4 information and documentation in our evaluation 5 and recommendations. These included, but were not 6 7 limited to, the Band's objection letter providing 8 its "will affect" determination and supporting documents, the Wisconsin Department of Natural 9 Resources 401 Water Quality Certification for the 10 11 Regional General Permits, and supporting 12 documentation, the Corps' Record of Decision, 13 final Regional General Permits, historic permit data, and supporting documentation, evaluation of 14 publicly available surface water data within the 11 15 watersheds of concern and within the boundaries, our 16 17 previous 401 comments on the Regional General 18 Permits that we sent the Corps in September of 2022, and additional information that we 19 20 received from the Corps and Band during the 21 401(a)(2) process. 22 Next slide, please. 23 The key water quality concerns raised by the Band's objections included antidegradation 24 25 requirements, specifically the discharges in the

1 two Regional General Permits will not comply with 2 Tier 2 and Tier 3 of the Band's antidegradation 3 requirements; its narrative standards, specifically discharges that Regional General permits will result in 4 5 noncompliance with one or more tribal water criteria; designated uses, specifically that discharges from the 6 7 projects under the RGPs has the potential to increase 8 pollutant loading, which can harm the Band's cultural, wild rice, wetland, and other designated uses in down-9 10 stream Tribal waters; numeric standards, specifically 11 the discharges from projects under the Regional General 12 Permits, will result in an excess of turbidity and 13 associated parameters such as dissolved oxygen, pH 14 and bacteria. 15 The Utility Regional General Permit they had water quality impact concerns related to 16 17 preconstruction notification requirements, coordination processes, and the Corps' Regional 18 General Permit verification procedures. 19 The Band also raised concerns with 20 21 language raised in the Regional General Permit 22 conditions, specifically regarding tribal 23 coordination, may cause more than adverse --24 adverse minimal -- excuse me, may cause more than 25 minimal adverse effects on tribal rights language.

1 Excuse me for that.

2 And, lastly, the Band has concerns 3 related to tribal treaty rights, specifically that there is insufficient information regarding protection 4 5 of treaty rights uses within the five identified watersheds. 6 7 Next slide, please. So again, in conclusion, our evaluation 8 of the information presented in the objection did 9 10 not demonstrate that discharges under the Utility and Minor Discharges Regional General Permits will 11 12 affect the quality of the Tribe's water quality as 13 to violate any water quality requirements. The EPA does recognize that the variety 14 15 of activities eligible for coverage under these Regional General Permits and the extent of the 16 17 environmental settings in which they may occur 18 present uncertainty. In our evaluation and recommendations, we 19 20 evaluated the Band's claims and evaluated ways in which 21 the current conditions in the Regional General Permits 23 and the Wisconsin 401 Water Quality Certification may 24 address some of the Band's concerns. One example is how Wisconsin's 401 denial for special designation waters in 25

1 Wisconsin, specifically in areas of special natural resource waters, will result in individual 2 3 certifications and potential reconsideration of 401(a)(2). 4 Our evaluation of surface water data 5 shows all waters classified as an outstanding 6 7 tribal resource water or outstanding resource 8 water are classified by Wisconsin as areas of special interest -- did I lose the mic? Sorry --9 10 are classified by Wisconsin as areas of special 11 interest in waters upstream in the reservation 12 waters. 13 Because Wisconsin DNR denied 14 certification for the upstream waters, no Regional 15 General Permit activity that will affect those waters will occur without a project-specific 401 16 certification from Wisconsin. 17 18 Should I pause, or can you folks hear? 19 If Wisconsin subsequently grants certification 20 for a project located in the area of special interest 21 upstream of one of the Band's Outstanding Tribal 22 Resource Waters, EPA would notify the Band 23 pursuant to 401(a)(2) if it determines the discharge may affect the quality of the Band's 24 25 waters, including the downstream waters.

1 We are again reiterating the previous 2 public comments made by EPA to the Corps in an 3 effort to provide greater assurance that activities outside of the reservation do not 4 5 result in violation of the Band's water quality requirements on the reservation. 6 7 Next slide, please. Some of these prior recommendations that 8 we are reiterating here that we think are and may 9 10 be responsive to some of the Band's concerns 11 include preconstruction notification requirements 12 for the Minor Discharges Regional General Permit, 13 impact thresholds and eligibility restrictions for the Utility Regional General Permit, impact 14 15 thresholds for single and complete projects for the Utility Regional Permit, exclusions when a 16 17 project may cause more than minimal adverse 18 effects on tribal rights, and additional preconstruction notification requirements for 19 20 specified aquatic resources for both Regional 21 General Permits. 22 Next slide, please. 23 All right. So to elaborate a little bit 24 more on each of these. EPA again recommends that 25 the Minor Discharges Regional General Permit

1 includes the same listing of aquatic resources as 2 other Regional General Permits to determine 3 preconstruction notification and should be applied in watersheds of concern. 4 Regarding impact thresholds and 5 eligibility restrictions, we recommend 6 7 establishing impact thresholds based on the number 8 of waterbody crossings within an individual watershed or hydrological unit code, and we 9 10 recommend including the Regional General Permit's 11 preconstruction notification requirement for 12 certain new construction of pipeline projects 13 based on the size of the pipeline, the length of the pipeline, and quantity of material being 14 15 transported and the number of crossings. 16 We recommend impact threshold revisions for 17 single and complete projects, specifically to 18 revise impact thresholds to be applicable to 19 multiple crossings as part of an entire project. 20 EPA recommends that where a 21 preconstruction notification is required, the 22 Corps should initiate and establish a coordination 23 process with the Band to help ensure the project will cause no more than minimal adverse effects on 24 25 tribal rights.

1 We recommend the preconstruction 2 notification requirements for activities in wild 3 rice marshes, even those that are not state-designated, for cultural, nutritional, and 4 5 environmental importance to the Tribe. Then, preconstruction notification 6 7 requirements in streams, river riffle or pool 8 complexes, which are special aquatic sites, spawning areas during spawning season, and when 9 10 the waterbody is impacted and shared with another 11 state or tribe. 12 Thank you for the opportunity to be with 13 you today to present an overview of our evaluation and recommendations. Again, this is just a 14 15 summary, and we have provided our full evaluation 16 and recommendations document to the Corps. 17 Thank you for the opportunity to present 18 this morning, and I look forward to hearing from the Band and others throughout the day. Thank you 19 20 very much. 21 MS. GRASER: Thank you, Tera. 22 We will now move to the part of this 23 morning's hearing where we'll hear testimony from the Bad River Band. I understand that Connie Sue 24 25 has been asked to facilitate the various speakers

1 presenting on behalf of the Bad River Band, and we 2 would like to begin this morning by hearing from 3 the Honorable Chairman Robert Blanchard of the Bad River Band Lake Superior tribe to provide 4 5 testimony. MR. BLANCHARD: Hopefully everybody can 6 Are you okay in the back? Okay. 7 hear me. 8 Okay. Thank you. My name is Robert Blanchard. I'm the chairman of the Bad River 9 Band. My Indian, or spiritual name, is 10 11 Animiiki-Ogema Noondaw-Ogima Migizi. And what 12 that means in English is "Leader of the 13 thunderbird. I can hear the chief eagle." So I was given these names by two medicine men -- or 14 15 one medicine man and one spiritual woman from Canada, and the first one was given in a 16 17 sweatlodge many years ago. 18 And when I got the name, I -- I told my 19 mother what it was, and she says, you know, that's 20 the exact same name your great-grandfather had, 21 you know, so -- and when I came out of that sweat 22 lodge, and there was a mother and two cubs that 23 walked right in front of me, just walked, and walked out into the woods, you know, which was --24 25 I thought it was a great gift to me.

1 And the other name came from a spiritual lady; she is up in Canada. She is very spiritual 2 3 within her community. And when I took over being chair -- or when I came into being chair, I 4 5 thought, I think I need something to help me through this, you know, and so I asked her, and I 6 7 made my offerings to her, and she said give me 8 some time, so she went back home. And she travels 9 quite a bit up there, and she has certain places 10 that she goes, and she makes her offerings, and 11 she does her prayers. And one was a big lake --12 big clear lake, and she made her offering, and she 13 was doing her prayers, and she was going to take a picture of that surrounding, and she put her 14 15 camera up in her phone and she hit the button and it was on record, and you could hear this eagle 16 17 screaming in the background coming, and that's how 18 the name came to her. I knew right then what your name was. So I feel fortunate to receive those 19 20 names. 21 Welcome to Bad River, my home of 124,000 22 beautiful acres. We have a lot of clear water 23 that flows through our reservation, and it's very important to us as Indian people, as native 24

25 people. I myself go out and collect a lot of

medicines for myself that I use for myself, my family, my relatives, and my friends that need it. Although I'll try and find it for them, sometimes I have to go to Canada to get it because I can't find it here, but most of it comes from here.

One incident I could tell you about is 6 7 my grandfather, years ago, on my mother's side, 8 had eye problems, so he would go out and collect his medicine and prepare it, and he would use the 9 10 eye dropper and put it in his eye. And I never 11 knew what it was, but I would see him doing it 12 every morning because I was just little, about 13 four or five years old.

14 I had a problem with one of my eyes. 15 The muscle in it -- or the nerve in it, it wasn't tracking right, it would stay. So I went to the 16 17 doctor, and he sent me to the eye doctor, and 18 every week I'd go back to the eye doctor, and he looked, and he would pull out his finger. Well, 19 20 nothing really yet. And he says -- so all right, 21 so I contacted another medicine man in Canada, and 22 I talked to him about it, and I said I remember my 23 grampa doing that. He says I know just what it He told me, and he told me where to go get 24 is. 25 It's got to be someplace clean and clear, you it.

1 know, good water around it. So I went and got it 2 and prepared it the way he told me to, and I used 3 that medicine in my eye. And within a couple weeks, everything started coming back together. 4 5 My headaches were gone, my sight wasn't double vision anymore. And so my eye still bothers once 6 7 in a while, but I'll use that medicine. So we 8 need that.

9 And a lot of our medicines are connected 10 to clean water, clean environment, you know. When we collect it, a lot of it we get from Bad River, 11 12 comes out of Bad River, and we'll get -- go in and 13 get it from the shores. Some of it I go way out on the backroads and get it and try to get it 14 15 where there is not much traffic or anything like that so it's not -- so it's pure, you know. But 16 17 the main ingredient is clear water, you know. We 18 need that water.

And I've lived here all my life doing that, and I've only left here a little bit going to -- I went into the military, then I went to school. So, for the most part -- I'm not going to say how old I am, but all my life I've lived here, and, you know, I worked in various fields. My first part of my job was -- when I

1 first went to work, I went to school for mechanical design. So I worked in Duluth, 2 3 Minnesota, drove back home every night. Didn't take me long to figure out I wanted to be outside, 4 5 so I used my military training when I was trained as a combat engineer and I used that heavy 6 7 equipment stuff and found a job and did truck 8 driving and did all that for 35 years. 9 And when I was doing that, I traveled 10 backroads. And, again, my grandfather, he says, you know, there is a place up there, he said, 11 12 where the water runs cold and clear, he says, you 13 can drink it, and he told me where it was. And every day when I'd go up there and go past -- and 14 15 it took me a while to find it, but I felt I was guided to it by my ancestors, and I found that 16 17 water. And sure enough, there it was coming out of the ground. So I filled my thermos with it, 18 19 and I drank it. It was the best water you ever 20 tasted, and we would like to keep it that way; 21 so.... 22 Like I said, we have hundreds of miles 23 of streams and tributaries within the reservation

alone. Bad River, also known as Medicine River,as you'll see here, goes into the fresh -- largest

1 freshwater lake in the world, which is Lake 2 Superior. You know, it's beautiful down there. 3 Bad River has one of the most stringent water quality standards in the state of Wisconsin, 4 5 if not the entire native nations, and possibly the United States. Not included in this is the Bad 6 7 River watershed which covers thousands of miles of streams, rivers, tributaries. 8 9 And what happens to these watersheds 10 can and will affect the Ojibwe people. Any spill 11 or contamination will affect our wildlife, our 12 plant life, our food that grows on water, like our 13 wild rice. Our wildlife will get sick and die. We depend on some of them for food for our table 14 15 and bodies, for comfort. Our plants are medicine that heals us and our relatives. 16 17 Like I said, I myself go out and harvest 18 some of these medicines for my own and for my own relatives' healing, and I already told you the 19 20 story. 21 I talked with my staff while listening 22 to Minnesota versus Mille Lacs Band of Chippewa 23 with an Indian court in Washington DC and made some notes of our discussions, and I'm going to 24 25 read that part now. Around the Court case, many

1 talked and wrote about our treaty 2 responsibilities, having experts in water 3 resources, fisheries, wild rice, biologically-sound regulations, and the staff to 4 5 defend those regulations. Even though the Mille Lacs case is a 6 7 single territory and elected officials, and staff 8 approach the responsibilities the same way, I know we here at Bad River have a Natural Resource 9 10 Department that is second to none in their work 11 protecting the tribal resources for our 12 membership. 13 The second thought I came away with when preparing with staff this morning -- I'm going to 14 15 read -- I asked my staff to type this out when we were preparing this. This is a take-away from 16 17 federal agencies seeing happenings as unseen, but 18 every action affects connected waters. Rather than being restricted to the site where impacts 19 20 happen, as a result, our laws and water resource rules are based on characteristics of connected 21 22 waterways and their treaty uses. 23 You'll see and hear examples in the presentations today. You'll hear presentations 24 25 from Bad River's expert about the connected waters

1 that are necessary for our treaty resources. We 2 adopted our water quality standards to protect all 3 the resources we use. Our water quality standards have criteria that were developed to protect uses 4 5 such as wild rice, wildlife, fisheries, and cultural uses. Our water quality standards also 6 7 contain an antidegradation policy to protect our high quality waters and resources dependent on 8 9 them. 10 Today's presentations will demonstrate

10 Total, o provide will demonstrate 11 the two general permits as written will result in 12 significant impacts that will affect reservation 13 waters. Today's presentations will also provide 14 recommendations for modifications of the two 15 general permits to address our water quality 16 concerns.

17 So in closing, I hope you have a very 18 successful hearing today. My prayers are going 19 out to the creator to guide you through this 20 process. Thank you.

(Video played.)
I just want to say one thing about the
man in the red shirt. He is a good friend of
mine, and we fish a lot together every spring. We
get in on the Bad River, and we travel out to the

1 lake of Lake Superior and put our nets in the 2 lake. And we had a fish camp down there. It was 3 him, my dad, myself, and one of my friends. Every spring we'd go down there and fish because that 4 5 was important to us. Having that -- that clean water made it special for us, so I just wanted to 6 7 mention that. 8 MS. MARTIN: My name is Connie Sue Martin, the environmental counsel for the Band. 9 Ι 10 have held that role proudly since about 2004, I 11 think -- it's been a long time -- not that long, 12 2012. And I am here to facilitate the 13 presentation by the Band which has had its 14 treatment in the matter as a state designation 15 since it adopted stringent policies by the EPA to protect its water resources now and for future 16 17 generations. 18 In implementing and protecting its water quality resources, the Band should be considered 19 20 the expert in its determination that the Utility 21 RGP and Minor Discharges permit as proposed by the 22 Corps will affect the Tribe's water quality 23 requirements. That determination should be 24 dispositive. Our first technical presentation will be 25

1 by Chris McNerney, who will be coming up next, who 2 is the Water Program Resources Manager, second to 3 none, for our Band. Chris, would you spell your name for the 4 reporter when you start your presentation? 5 MR. MCNERNEY: Boozhoo. I'm Chris 6 7 McNerney, M-C-N-E-R-N-E-Y, and I am the Water 8 Resources Program Manager of the Natural Resources Department. 9 Today we are discussing a little bit of 10 11 information about the Bad River Reservation and 12 the Bad River's water quality standards. 13 Next slide. 14 So the -- the Bad River water quality 15 standards, as you may or may not know, we have heard a little bit already, the components of 16 17 those are designated uses for those water 18 resources criteria that protect those uses and then the Department antidegradation policy, which is 19 associated with our Outstanding Tribal Resource 20 21 Waters, Outstanding Resource Waters, and Exceptional Resource Waters. Often you hear those 22 23 as OTRW, ORW, or ERW. 24 Next slide. A little bit about Bad River 25

1 Reservation.

2 Next slide. 3 So the Bad River Band Reservation is a treaty-ceded territory. The Bad River Reservation 4 was created under the treaty of 1854, one of the 5 three treaties the Bad River Band of the Lake 6 7 Superior Tribe of Chippewa Indians signed with the United States. 8 9 The Tribe retains use of usufructuary

10 rights to the lands ceded between 1837 and 1842.
11 The treaties include lands in Michigan, Minnesota
12 and Wisconsin. The federal government has a
13 fiduciary trust responsibility to the Tribe under
14 these treaties. The size of the Bad River
15 Reservation is 124,655 acres, of which 196 of
16 those acres are located on Madeline Island.

Next slide.

17

18 The Bad River Reservation falls within 19 the Lake Superior basin. The reservation mainland 20 occupies a downstream portion of the USGS, Bad 21 River Band's subbasin, and the Beartrap Nemadji 22 subbasin.

23 The Tribe in the state of Wisconsin have
24 recognized the Bad River watershed at the
25 watershed boundary draining lands upstream of the

1 mainland reservation. This includes all of the 2 Bad River Montreal subbasin, upstream from 3 Kakagon, which is on the eastern side of that map, and the Beartrap subwatershed 12 from the Beartrap 4 5 Nemadji subbasin. The reservation falls within the Ashland and Iron Counties of Wisconsin. 6 7 Next slide. So a little bit about the water 8 resources on Bad River Reservation are 38 miles of 9 10 Lake Superior shoreline, 36 miles of shoreline on 11 the mainland, two of those are on Madeline Island; 12 52,554 acres of mapped wetlands. -- that's a lot 13 of wetlands. Of that, 48 acres are on Madeline Island. 545 acres of lakes and wetlands, 2 of 14 15 those acres on Madeline Island. And just over 475 miles of streams are located within the 16 17 reservation -- streams and rivers on the 18 reservation. The mainland reservation sits on the 19 20 downstream end of an approximately 1,000 square 21 mile watershed, most of which drains through the 22 Kakagon and Bad River Sloughs, a 23 hydrologically connected wetlands complex. 24 Main tributaries to the Bad River 25 include White River, Marengo River, Tyler Fork

1 River, and Potato River. The main tributaries to 2 the Kakagon River are the Wood Creek, Beartrap 3 Creek, and Sucker Creek. A lot of information on this slide. 4 5 There are extraordinary water resources on the Bad River Reservation. That's why this slide is so 6 7 busy. 8 Kakagon and Bad River Sloughs wetlands complex, it's a Wetland of International 9 10 Importance. The Ramsar site, World Blue Globe 11 Award winner, national natural landmark, important 12 habitat area, Wisconsin Wetland GEM™, Wisconsin 13 Bird Conservation Initiative and Important Bird Area, Wisconsin Land Legacy Place, TNC priority 14 15 conservation area, aquatic resources of national importance, approximately 13 percent of Lake 16 17 Superior's coastal wetlands. 18 Bad River and the White River support 19 self-sustaining populations of lake sturgeon along 20 with only two other waterways in the Lake Superior 21 basin. Our coldwater streams such as Tyler Forks 22 River, Potato River, Wood Creek, and Graveyard 23 Creek, support brook trout. 24 Unique lakes such as Oxbow Lake, Honest 25 John Lake, and Bog Lake. Bog Lake is on Madeline

1 Island. I do have a picture -- or a map coming up here that details a lot of these rivers. 2 3 Reservation waters support rare, threatened, and endangered species, including, but 4 5 not limited to, piping plover, grey wolves, wood turtle, yellow tail, rufa red knot, mayfly species 6 7 swamp-pink, Ram's Head Lady Slipper, and Hooker's Orchid. 8 9 A little bit about the hydrological 10 connections between the Bad River Reservation and 11 Lake Superior. 12 So due to the Lake Superior seiche 13 longshore currents, and other currents occurring in the Apostle Islands and Chequamegon Bay, 14 reservation waters not only flow into -- into the 15 lake but also have the lake flow into them. 16 17 USGS has documented the seiche pushing water upstream from the lake all the way to 18 Beartrap at Highway 2 and past Bad River at U.S. 19 20 Highway 2. 21 The Kakagon and Bad River Sloughs have a 22 daily fluctuation due to that seiche. 23 Depending on those prevailing currents, the water levels, and other seasonal factors, 24 25 water from streams and rivers along the Bayfield

1 Peninsula have been carried into Kakagon Bay on 2 out into the Apostle Islands near Madeline Island. 3 All right. Water quality standards. Next slide. 4 As has been stated, Bad River Band 5 obtained treaties in a similar manner as states 6 7 for Clean Water Act Sections 303 and 401 Program 8 authority from the U.S. Environmental Protection Agency on June 26, 2009. The Bad River Tribal 9 10 Council approved of those water quality standards 11 on July 6, 2011. 12 The Nibi Water is the lifeblood of our 13 mother, the earth. Nibi is a living, moving part of life that changes with its surrounding 14 15 environment. Nibi connects the past and the present with the faith of future generations. 16 Clean Water Act objective and goal. 17 18 That objective is to restore and maintain the chemical, physical, and biological integrity of 19 the Nation's waters. 20 21 Our goal for water quality provides for 22 the protection and propagation of fish, shellfish, 23 wildlife, and provides for recreation in and on the water wherever attainable. 24 25 Water quality standards establish water
1 quality goals and provide a regulatory basis for 2 the water quality management activities authorized 3 be the Clean Water Act. This is a core part of the water quality management programs. 4 Ιt 5 provides a legal basis to protect waters that may be impacted from uses upstream of reservation 6 7 It provides protection of designated water land. uses, cultural and traditional, and, as you heard 8 from Chairman Blanchard, it's a way of life. 9 Ιt 10 protects that way of life. It protects public 11 health and welfare, and enhances the quality of 12 water. Often you see water quality standards 13 depicted as a three-legged stool, right, easy to 14 15 remember, right. Each leg of that stool, right, is a main component of those water quality 16 17 standards: designated uses, criteria, and antidegradation. And I'll be breaking those down 18 individually. 19 20 All right. Designated uses. Those uses 21 specified in the water quality standard regulations for each waterbody or segment, whether 22 23 or not they are attained. 24 Goals, objectives, desired conditions of 25 a waterbody. These are the designated uses.

1 The function of, or activity, in a 2 water that is supported by a level of water 3 quality. Why are these designated uses important? 4 5 It establishes water quality goals for a specific waterbody and communicates these goals to the 6 7 public. 8 Identifying these designated uses are used to identify the right water quality criteria 9 10 to protect those uses. 11 Designated uses. A busy slide. I'm not 12 going to go over every single one of those, but I 13 will focus on a handful of them in the coming 14 slides. 15 For those designated uses, cultural, wild rice, wildlife quality, aquatic life, cold 16 17 water fishing, cool water fishing, recreational, 18 commercial, navigation, and wetland. 19 To highlight some of those designated 20 uses. Cultural-designated use is a water-based 21 activity essential to maintaining the Tribe's 22 cultural heritage, including, but not limited to, 23 ceremony, subsistence fishing, hunting, and harvesting. This use includes primary and 24 25 secondary contact and ingestion.

1 Wild rice supports or has the potential 2 to support the wild rice habitat for sustainable 3 growth and safe consumption. Recreational supports primary contact 4 5 recreation and secondary contact recreation. This includes tribal activities, including water 6 7 contact such as boating, hunting, fishing, and 8 harvesting. This use also includes primary and secondary contact and ingestion. 9 10 Wetland designated use. An area that 11 will be protected and maintained for at least some 12 of the following uses: maintaining biological 13 diversity, preserving wildlife habitats, providing recreational activities, erosion control, 14 15 groundwater recharge, low flow augmentation, stormwater retention, prevention of stream 16 17 sedimentation, and the propagation of wild rice. 18 Kakagon and Bad River Sloughs. Approximately 16,000 acres are a coastal wetland 19 20 complex. As I stated before, approximately 13 21 percent of all Lake Superior coastal wetlands and 22 over half of Lake Superior coastal wetlands are 23 within the Wisconsin portion of that basin. It's a large area of primary productivity for Lake 24 25 Superior. As I stated before, it's a Ramsar site,

1 Wetlands of International Importance. 2 Criteria. States and tribes shall adopt 3 criteria to protect designated uses in their water quality standards. Those types of criteria 4 5 protect human uses, human health criteria, and recreational criteria. 6 7 These criteria protect aquatic life uses, aquatic criteria and biological criteria. 8 9 There are nutrient and sedimentary criteria, narrative, and numeric criteria. 10 11 Again, these criteria protect designated 12 uses. There are waters, several of them, that 13 have multiple use designations. That criteria supports the most sensitive use. 14 I'll get into some examples of those 15 criteria. Narrative -- native criteria -- I'm 16 17 sorry. Narrative criteria for aesthetic water 18 quality. All waters, including wetlands, within 19 the reservation shall be free from substances 20 21 attributable to wastewater discharges or pollutant 22 sources resulting from other than natural 23 background conditions that: settle to form objectionable deposits; float as debris, scum, 24 25 oil, or other matter-forming nuisances; produce

1 objectionable color, odor, taste, or turbidity; 2 cause injury to, are toxic to, or produce adverse 3 physiological responses in humans, animals, and plants; produce undesirable or nuisance to aquatic 4 5 life; a criteria that produces nutrients or other substances that stimulates algal growth producing 6 7 objectionable algal densities and aquatic 8 vegetation; dominance of any nuisance species instream, or cause nuisance conditions in any 9 10 other fashion or adversely affect the natural 11 biological community of the waterbody. 12 This is another busy slide, and I am 13 going to discuss them, so more narrative criteria. 14 Water quality and quantity that may 15 limit the growth of, propagation of, or otherwise cause or contribute to adversely affect wild rice, 16 wildlife, and other flora and fauna of cultural 17 18 importance to the Tribe shall be prohibited. This includes, but is not limited to, a requirement 19 that sulfate levels shall not exceed 20 21 concentrations contributing to any adverse effects 22 in waters, including those with a wild rice 23 designated use. 24 Natural hydrological conditions 25 supportive of the natural biological community,

1 including all flora and fauna and physical 2 characteristics naturally present -- present in 3 the waterbody shall be protected to prevent any adverse effects. 4 5 Pollutants. The pollutants or human-induced changes to water, the sediments of 6 7 water, or area hydrology that results in changes 8 to the natural biological communities and wildlife habitat shall be prohibited. 9 10 The migration of fish and other aquatic 11 biota normally present shall not be hindered. 12 Natural daily and seasonal fluctuations of flow, 13 including naturally occurring seiche, level, stage, dissolved oxygen, pH, and temperature shall 14 15 be maintained. 16 Temperature. No measurable increase or 17 decrease in temperature from other than natural 18 causes shall be allowed that causes or attributes to an adverse effect to the natural biological 19 20 community. For those waters designated as 21 coldwater fisheries, there shall be no measurable 22 increase in temperature from other than natural 23 causes. 24 The presence of pollutants in quantities 25 that result in bio -- bioaccumulation in aquatic

organisms that may cause or contribute to an
 adverse effect to consumers of aquatic organisms
 shall be prohibited.

Numeric criteria. Turbidity shall not 4 exceed 5 NTU -- that's metric turbidity units --5 over natural background turbidity when the 6 7 background turbidity is 50 NTU or less, or 8 turbidity shall not increase more than 10 percent when the background turbidity is more than 50 NTU. 9 10 Bacteriological water quality criteria. 11 The genetic mean of not less than five samples of 12 equally spaced over a 30-day period shall not 13 exceed an E.coli count of 126 colony forming units per 100 milliliters for fresh waters. Any single 14 sample shall not exceed an E.coli count of 235 CFU 15 16 per 100 ml. 17 Other examples are dissolved oxygen, pH, 18 aquatic life, human health, and wildlife. 19 Antidegradation policies. The 20 antidegradation policy is a framework for 21 protecting and maintaining the existing uses. 22 It's applicable to all surface waters of the 23 reservation. Water resources of the Tribe are 24

25 integral to its members' health, welfare, and

1 economic security and political integrity of the 2 Tribe itself. 3 The Tribe has depended on natural resources, particularly the water resources, to 4 5 provide cultural preservation and resources for consumption, subsistence, and sustainable economic 6 7 development. 8 The antidegradation policy provides for the maintenance and protection of water quality to 9 10 ensure that all designated and existing uses are 11 met and maintained for the seventh generation. 12 It's a tiered approach. The 13 antidegradation Tier 2, Exceptional Resource Waters; Tier 2.5, Outstanding Resource Waters; and 14 15 Tier 3, Outstanding Tribal Resource Waters. Any surface water that's not specifically classified 16 as ORW or OTRW are classified as Tier 2 ERW. 17 18 A little bit more focus on OTRW, 19 Outstanding Tribal Resource Waters, Tier 3. These 20 waters are viewed as pristine, highly valued 21 waters important to culture, recreation, and wild 22 rice. Exceptional -- it has an exceptional 23 ecological significance. In this policy, there are no new or increased discharges or alterations 24 25 of the background conditions allowed.

1	However, a short-term, temporary, no
2	more than six months, and no more than necessary
3	lowering in the water quality may be allowed.
4	The water resources program. We often
5	use a water quality designation map. This map
6	helps to view all of those tiers that we have,
7	Tier 2, Tier 2.5, and Tier 3, so that water
8	resource designations as set forth in the
9	antidegradation policy in the Bad River Band's
10	water quality standards.
11	So on this map you can see the Bad River
12	Reservation and then Madeline Island, a part of
13	the Apostle Islands, and on that inlet there
14	showing Madeline Island and part of the
15	reservation on there.
16	So as you see, these rivers flow through
17	the reservation and feed into the Kakagon and Bad
18	River Sloughs, the Bad River, Potato River.
19	OTRWs, Outstanding Tribal Resource
20	Waters, we also have the Potato River. Beartrap
21	Creek, the White River, and the Marengo River are
22	ORWs.
23	This map, giving a little more detail, a
24	little closer look at the complexity of the
25	Kakagon Sloughs and the Bad River Sloughs, also

1 showing that Beartrap Creek, Bad River, and White 2 River and feeding into that. 3 When you are looking at this map, the pink/purple color, this is the wild -- wild rice 4 5 wetlands, also wild rice lakes and Sloughs that are a large part of the northern section of the 6 7 reservation. Miigwech. 8 MS. MARTIN: Thank you, Chris. 9 The next presentation will be by 10 Esteban Chiriboga, who will spell his last name for you, from the Great Lakes Indian 11 Fish and Wildlife Commission. 12 13 MR. CHIRIBOGA: Good morning. My name is Esteban Chiriboga. it's C-H-I-R-I-B-O-G-A, and 14 I am an environmental specialist with the Great 15 Lakes Indian Fish and Wildlife Commission. 16 17 I'm going to talk a bit about my recent 18 mapping and connectivity analysis that my agency 19 has done in supporting the Bad River Band. 20 Quick background on me. I have a master 21 of science degree of physical geography from the 22 University of Wisconsin at Madison, and I've 23 worked at GLIFWC for over 26 years now in the environmental section. And one of my primary 24 25 tasks has been to characterize the effects that

1	large scale land use alterations have on national
2	resources that tribal members depend on, and I use
3	Geographic Information Systems and Mapping as a primary
4	tool for that.
5	Next slide, please.
6	So as I think most of you, if not all of
7	you, already know, GLIFWC is an intertribal
8	agency of 11 Ojibwe tribes in Michigan,
9	Wisconsin, and Minnesota.
10	Our primary charge is to exercise
11	delegated authority from those tribes to implement
12	various federal court orders regarding the
13	exercise of treaty reserve rights to hunt, fish,
14	and gather in ceded territories, which are the
15	areas that are shown on this map, as part of
16	ensuring the continued existence of the treaty
17	reservation rights, the health and sustainability
18	of ecosystem's needs to be protected and
19	maintained. Bad River is one of our member tribes
20	and it is located in the 1842 ceded territory.
21	So just very quickly, an outline on what
22	I'll be covering today. The purpose of our
23	mapping was really to illustrate the hydrologic
24	connection between the Bad River Reservation and
25	the entire watersheds of concern that were shown

1 on a previous map.

2	We also want to add some context to
3	characterize the adequacy of existing hydrological
4	data that is used to establish the risk that
5	exceeds water quality standards of the
6	reservation, and we want to maintain and support
7	watersheds that Bad River has identified as their
8	area of concern as the most appropriate analysis
9	area for the water quality standards compliance
10	and analysis.
11	And just as a note, the wetlands and
12	hydrography data on the maps are all public
13	well, all except for one slide, which I will point
14	out when I get there. But the vast majority is
15	public information that is either maintained by
16	state or federal agencies.
17	Next slide.
18	So establishing a hydrological
19	connection between Bad River Reservation and
20	bringing the water quality standards that Chris
21	referred to and the watershed areas of concern,
22	which are the tan-colored on the map, I think, is
23	relatively straightforward.
24	This map illustrates the hydrologic
25	networks on the watersheds which add up to about

1 4,247 river miles at minimum, and I'll talk about why that is in a little bit. 2 3 The entire networks flow into the reservation or to Lake Superior. And, also, Chris 4 5 alluded to the ecologic connections via currents that Lake Superior has with the reservation 6 7 boundaries. 8 So this figure is, in ways, similar to the one the Corps has included in the Minor 9 10 Discharges RGP documents and the Utility Map 2 11 that we are talking about today. 12 Next slide, please. The watersheds of concern includes 13 several rivers that are classified as Outstanding 14 15 and Exceptional Resource Waters by both state and Tribal governments. These waters are connected 16 17 across the reservation boundaries, so there is an 18 obvious regulatory connections that mirror the hydrologic connections in these watersheds of 19 20 concern. 21 However, the hydrologic complexity of 22 the watersheds of concern is much greater than 23 what the Corps depicts on its Map 2. 24 Wetlands are abundant throughout the 25 watersheds and one of the reasons for the presence

1 of Outstanding and Exceptional rivers. Wetlands 2 slow water flows and filter water removing 3 sediment and contaminants. Water filtration and flood control functions are lost when wetlands are 4 filled or degraded. 5 Wetlands are also important components 6 7 in hydrological connectivity in the area and should be 8 considered when characterizing the flow of water from anywhere in the watersheds of concern to the 9 10 reservation boundary and/or to Lake Superior. 11 It's really not clear to us, or to me, 12 at this point, why the Corps did not include 13 wetlands in its analysis of hydrologic characterization for these watersheds of concern 14 15 because other areas, as far as regulatory functions are concerned, are considered part of 16 17 the overall hydrologic network. 18 So in this watershed, according to the National Wetlands Inventory data, there are 44,068 19 20 individual wetlands that add up to over 256,000 21 acres, and, again, this is a minimum amount. This is a lowball estimate of the number of acres in 22 23 the watersheds, and I'll come back to that. 24 Next slide, please. 25 All right. So the inclusion of wetlands

1	in characterizing hydrologic connectivity is,
2	again, something that the Corps has recognized.
3	As you may recall, I know some of you recall,
4	I gave a similar presentation to this one a couple of
5	years ago when the Fond du Lac Band challenged a
6	Corps permit for the proposed NorthMet mine.
7	Now that challenge was based on the
8	concept that the contaminants from projects would
9	move through shallow groundwater and to wetlands
10	before reaching headwater streams.
11	The contaminants would persist as the
12	water moved from these headwater streams that you
13	see in this well, you can't see them very well,
14	but they are the boxes 1, 2, 3, 4, and 7, and
15	maybe 10 up on the top part of the map.
16	Contaminants would then move through these
17	headwater streams to the St. Louis River, all the
18	way interacting with wetlands along those stream
19	corridors and further south until they reach the
20	Fond du Lac Reservation boundary, which is the
21	salmon-colored block on the lower part of the
22	figure.
23	So what I think we are arguing here is
24	generally the same principle for the Bad River
25	watershed. The potential for activities that

1 could lead to violation of the Band's water quality 2 standards exists throughout the area of concern that 3 the Tribe has outlined, and I should point out that the St. Louis River watershed and the Bad River 4 5 watershed are both HUC 8 watersheds, so they are very commonly compared to one another in a number of 6 7 different areas, so I feel this comparison is valid. 8 Next slide, please. So another slide, and this is 9 10 something that I know that the Corps has seen 11 before. It shows some work that GLIFWC did using conductance data that was conducted in the 12 13 state of Minnesota. Specific conductance is a 14 very useful parameter because it measures, 15 basically, the number of ions in water and, in other words, it's a good general measure for the 16 17 amount of stuff that is in the water column, and 18 that includes metals, salts, other general things. So in this figure, the large blue/green 19 dots that are located near the taconite mines in 20 21 Minnesota represent water quality samples of 22 specific conductance. So the larger the dot, the 23 more specific contaminant is in the sample, and the dots get smaller with distance downstream as 24 25 the contaminants are diluted.

1	Next slide, please.
2	This concentration and distance
3	relationship for specific contaminants is
4	statistically significant. The dark blue dots on
5	this graph are the MPCA samples on the St. Louis
6	River, and the darker blue regression line on the
7	figure indicates that the mine water quality
8	signal persists persists downstream from the
9	mines for about 200 kilometers, or 124 river
10	miles.
11	The point I'd like to stress by showing
12	this data is that distance from the reservation
13	does not equate to water quality protection or
14	compliance with the Tribe's water quality
15	standards. Land alterations anywhere in the
16	watersheds of concern could lead to degradation in
17	water quality at the reservation boundary and/or
18	Lake Superior.
19	Next slide, please.
20	So I think, you know, when looking at
21	using watersheds, it's easy to establish a
22	hydrologic connection, but I'd also like to point
23	out that the available data that we have for
24	mapping, mapping of streams and wetlands,
25	underestimates the magnitude of the hydrologic

1 connections for both streams and for wetlands. So 2 in all of our agencies we use the available stream 3 datasets that are maintained by the national hydrology datasets, state's National Wetlands 4 5 Inventory, and, again, these datasets underestimate the hydrologic connection because 6 7 they under-represent the number of streams and 8 wetland acres that are actually present in the landscape. 9 10 This map here is a zoomed-in section of

11 the Bad River watershed. It's in, essentially, 12 the southeast corner of the Bad River Reservation 13 there in the salmon color again. This is the 14 Tyler Forks watershed.

In 2023, the National Wetlands Inventory was updated with higher resolution mapping that GLIFWC produced. So this subwatershed and only one other watershed, kind of to the southwest of it, are the sections of the whole Bad River watershed and the watersheds of concern that have this higher resolution wetland mapping.

We did an analysis that compared the
older National Wetland Inventory information,
which is still what is in use for the rest of the

Next slide, please.

22

1 watersheds of concern, with this newer, higher 2 resolution data, and we were surprised by the 3 results. There was an increase in wetland acres across the entire Tyler Fork watersheds. 4 5 The yellow grids, on the figure to the left, right now indicate increases between 6 7 two-and-a-half to 37 acres for each grid all 8 the way up to the darker blue boxes, still on the left side of the figure, indicating increases in 9 wetland acres of 148 to 222. There were no 10 11 sections of this subwatershed where increased 12 detailed mapping led to a reduction in wetlands. 13 The right-side figure -- or the right side map on the figure here indicates the 14 percentage of increase in wetland acres as found 15 by this additional mapping. 16 17 The minimum increase, or the yellow grids, showed a 30 percent increase in the wetland 18 acres all the way up to the dark blue ones where 19 20 orders of magnitude increase. 21 So we feel this strongly suggests 22 wetland acreage, and I think the potential wetland 23 impacts in land use alterations are underestimated throughout the entire watersheds of concern. 24 25 Next slide.

1 This is the data I mentioned before 2 where the streams are not -- where the data is not 3 maintained by states. This is GLIFWC data. So this is data that we collected on streams, and 4 5 this is a zoomed-in, very zoomed-in section in the Bad River watershed as the Penokee Hills area 6 south of here. 7 8 And this -- this has been presented, I believe, to the Corps in the past -- in past 9 10 years, so you've seen it. But the brighter color 11 streams here are streams that were not part of the 12 hydrography datasets maintained by the feds or 13 state. They were mapped by walking the stream channel with a GPS unit. 14 15 So, again, this is a small sample from a small area, but we feel confident in saying that 16 river mile estimates in the available GIS data 17 18 underestimate the actual total. 19 Next slide, please. 20 Okay. So going back to our watershed of 21 concern scale, we have a complex, high scale 22 aquatic habitat that you've heard a little bit about in a previous presentation and you'll hear 23 more about coming up. 24 We also have underestimates about the 25

extent and connectivity of aquatic habitats that underestimate potential water current impacts on the reservation from land use changes anywhere in the watersheds of concern.

5 And there are a lot of actions that are 6 happening in the watershed. This figure shows 7 only two of them, pipelines and transmission lines 8 are depicted.

9 And there is a figure in the gray box to 10 the right that shows the number of stream 11 crossings for oil pipelines, gas pipelines, and 12 the major powerline corridors, hundreds of them. 13 There are also some, in fact, on a number of NWI wetlands that are crossed by these features, 14 15 including the acreages of wetlands that are crossed by these features. 16

17 In this case, to make that calculation, 18 we assumed only a 60-foot right of way. Right of 19 ways for powerlines tend to be larger than that. 20 Just, again, goes with the underestimating impacts 21 theme.

To this we could add areas of agriculture, new housing construction, roads.
There is just a lot happening here both individually and cumulatively, and the Bad River

1 Band should be able to assess the stresses of 2 those projects both from an individual perspective 3 and a cumulative analysis. Next slide, please. 4 5 Okay. So this is the Map 2 from the Corps' Minor Discharges and Utility Regional 6 7 General Permit documents that are being discussed 8 today, and here respectfully I want to challenge the Corps' work because I don't feel that there is 9 10 scientific validity to what you are proposing in 11 this case. 12 So as I understand it, the Corps has 13 said to Bad River that preconstruction notices, and therefore the ability of the Bad River Band to 14 15 evaluate impacts of projects proposed under the RGPs, would only be required for projects that are 16 within a ten-mile radius of the reservation or 17 18 where there is a change in Strahler stream order, whichever is less, and the result of that proposal 19 20 is this black line here that the Corps has drawn. 21 And I've been trying for a while now to find some way of supporting this proposal and to 22 23 try to understand it, and I can't. First, the ten-mile radius is arbitrary. The Corps could 24 25 have chosen nine or 11 or 65.

Regardless, based on data that I 1 2 outlined earlier regarding how far contaminants 3 can move downstream of their source, ten miles is not at all protective of the water quality of the 4 5 Bad River Reservation. It does not guarantee compliance with Bad River standards at all. 6 7 Next slide, please. The Strahler stream order thing to me is 8 9 worse than arbitrary because, in my opinion, it 10 gives the illusion of some scientific approach, 11 but, in reality, it's just like you're picking a distance out of a hat. 12 13 As someone who makes a lot of maps, I do know what stream orders are for. Stream orders 14 15 are graphical organizational methods in vector geometry that are used to organize streams, and 16 17 these days they are particularly used in geographic information systems. 18 So this is a -- this figure is a 19 20 schematic showing the stream orders. The number 1 21 are the smaller stream orders. And so a GIS 22 program is told to recognize vectors, or river 23 reaches, and is told that the water flows from the ones to the twos, from the twos to the threes, 24 25 basically smaller numbers to higher numbers, and

1 that is how the program builds a network. It's 2 also used by cartographers to decide how thick and 3 how blue to make a stream line on a map. The first order streams are the smallest, thinnest 4 5 line. second order streams are seen to be bigger, so they have got a slightly thicker line until you 6 7 get to the Mississippi River, a 12th-order river, gets the thickest and bluest line of all. 8 9 Sometimes biogeographers will use stream 10 orders to make general assumptions about biological communities in streams where they have 11 12 no field data. And so they look at all the number 13 one streams and say, well, this number one stream has this bug community, we are going to assume the 14 15 other number one streams have a similar community of bugs. But that's really it for uses. 16 17 There are other stream order methods 18 that are topological. Some of them start counting with the lower number at the mouth and start 19 20 counting higher as you go up into the stream. If 21 the Corps had chosen one of these other methods, 22 the black line that you drew would have been guite 23 a bit different. 24 Most importantly, Strahler stream order

25 does not provide information on water quality,

1 temperature, sediment transport, sediment flow. 2 None of the parameters that are actually 3 used for figuring out if you have violated a water quality standard, whether they are narrative or 4 5 numeric, there is nothing about that in Strahler stream order. 6 7 Strahler stream order is not a regulatory tool. I'm happy to admit if I'm 8 missing something, but if the Corps is going to 9 10 use that, I would urge you to provide some 11 scientific justification for this method. 12 Next slide, please. 13 Fortunately, I think we have a very easy and perfect solution, which are watersheds. 14 Watersheds are simple, scientifically defensible 15 constructs that we have all used before to use for 16 17 preconstruction notices and for determining 18 compliance or risk to -- of violating Bad River's water quality standards at the reservation 19 20 boundary. 21 Watersheds are commonly used for 22 individual project proposals and for cumulative 23 analysis, and I hope that the information I have provided on the shortcomings on the existing 24 25 hydrographic data would -- would help you see that

1 the current information just isn't capturing the 2 full extent of the past and present changes to the 3 watershed and potential problems or violations of Bad River water quality standards, and it's not 4 5 likely to be able to capture the full picture of future project proposals, and so some additional 6 7 notification, additional analysis is needed for 8 Bad River to ensure the protection of their water resources. 9 That is all I have this morning. Thank 10 you for your attention. 11 12 MR. KONICKSON: Okay. We are going to 13 recess the hearing for ten minutes for a break starting at 9:47, and we'll resume at 9:57. I'll 14 give you 15 minutes, 9:47 to 10:02. We'll do the 15 10:02. 16 17 (Recess at 9:47-10:02 A.M.) 18 MR. KONICKSON: Resuming the hearing at 19 10:02. 20 MS. MARTIN: Thank you. The next 21 presentation for the Band will be by Matt 22 Schweisberg, who is a senior professional wetland 23 scientist, and he is going to spell his last name for the court reporter. 24 25 MR. SCHWEISBERG: Yes, I will.

1 Good morning. My name is Matt 2 Schweisberg, S-C-H-W-E-I-S-B, as in boy, E-R-G. I've never had to do that before. 3 So next slide. 4 All right. So just for those of you --5 I only know one person in person -- I've been with 6 7 wetlands and water and all of that for many, many years, decades. 8 9 Just a little bit more about me, my 10 background. I have worked all over the country, 11 many times in concert with the Army Corps, with 12 other federal agencies as well, and always had a 13 good time doing it. 14 And so -- next slide. 15 What we're talking about here is these numbers. However, as you heard Esteban describe, 16 17 this is probably a substantial underestimation of 18 what those resources are when you're out in the field and actually identifying them and mapping 19 20 them, when you're doing it in the field with a --21 with a GPS or whatever. But still, this is fairly 22 substantial, as it shows, but, again, it's a major 23 underestimation of what you have out there. 24 Next slide. 25 Just some of the wildlife and fish that

1 are represented by all these streams and rivers 2 and wetlands doesn't often get talked about. But 3 just so you can see what I'm saying here, this is just some of what you have out there. 4 5 I'm a wildlife biologist by education, so I tend to focus on the critters. Obviously, 6 there is quite a bit more than that, but it also 7 always fascinates me. 8 9 Next slide. And of particular significance is the 10 11 harvesting and cultivation of wild rice. When we 12 talk to tribes anywhere up here in the Midwest --13 when we worked -- when we did the Fond du Lac project a couple years ago, wild rice was a major 14 15 concern, as it is here. 16 Next slide. 17 So a couple years back, the EPA 18 partially funded and worked on something called the Connectivity Report about waters and wetlands, 19 20 and there were several major conclusions, I think, 21 that come into play on this particular project. 22 As it says here, the scientific 23 literature unequivocally demonstrates that streams individually, and I want to stress cumulatively, 24 25 exert a strong influence on the integrity of

1 downstream waters. And the literature, which is 2 fairly robust, shows that streams are biologically 3 connected, not just hydrologically but biologically connected to downstream waters by 4 5 dispersal and migration of aquatic and semiaquatic organisms, including fish, amphibians, plants, 6 7 microorganisms, and invertebrates that use both 8 upstream and downstream waters as habitats during one or more stages of their life cycle, and they 9 10 provide food for a wide variety of other -- other 11 wildlife.

12 So riparian and floodplain wetlands and 13 open waters improve water quality through the 14 assimilation, transportation, or sequestration of 15 pollutants -- excuse me -- including excess 16 nutrients and chemical contaminants such as 17 pesticides and metals that can degrade downstream 18 water integrity.

19 Importantly, all of these waters and 20 wetlands assimilate excess nutrients and chemical 21 contaminants such as pesticides and metals that 22 can degrade downstream waters including wetlands. 23 In addition to providing effective 24 buffers to downstream areas from point and 25 nonpoint source pollution, these systems form

1 integral components of river food webs, stream 2 food webs, and they provide nursery habitats for 3 breeding fish and amphibians, colonization opportunities for stream invertebrates, and 4 maturation habitats for stream insects. 5 So through all life stages, these streams and these 6 7 wetlands are vitally important. 8 And if you have ever seen or read through the Connectivity Report from 2015, there 9 is a wealth of evidence, a wealth of documentation 10 11 about all of these aspects of waters -- waters and 12 wetlands. 13 These RGPs that we're considering today really don't take into account most of this, and I 14 15 think that's a major -- a major problem with these 16 RGPs.

Next slide.

17

18 Some of the conclusions, the wetlands and open waters in nonfloodplain landscape 19 settings provide numerous functions that benefit 20 21 downstream water integrity. These functions 22 include, and you can read what it shows here, 23 various degrees of connectivity influence. The range of functions provided by streams and 24 25 wetlands are critical to the integrity and

sustainability of downstream waters. This connection, this ecological connection, can't be understated enough -- or can't be overstated enough.

5 The incremental effects of individual 6 streams and wetlands are cumulative across an 7 entire watershed, and you saw the mapping that 8 Esteban put up here. This water is huge and it's 9 all connected. And what happens in one aspect of 10 it either directly or indirectly affects other 11 parts of the watershed.

12 I have not seen much in the way of 13 indirect effects, any explanation of that, and, while I think of it, is there a statement or 14 15 findings that goes with these RGPs? I haven't seen that anywhere, and I sent the District an 16 17 email asking about that. I haven't seen a 18 response yet. But that's one key aspect I'd like to see is a statement of findings about how these 19 20 proposed RGPs comply with the regulations.

In addition, when you're considering the effects on an individual stream or wetland, all of the contributions and functions of that stream or wetland will be evaluated cumulatively, not just individually. Very often these things are looked at individually rather than cumulatively.
 Next slide.

Adverse impacts. Section 404(e) of the 3 Clean Water Act, which is where the authorization 4 5 of general permits comes from states, that for any category of activities, including involving 6 7 discharge of dredge or fill material, if the sect 8 determines that the activities in such category are similar in nature, will cause only minimal 9 10 adverse environmental effects when performed 11 separately and will have only minimal cumulative 12 adverse effects on the environment. Again, that's 13 something that should be explained in a statement of findings by the Army Corps, and I don't know 14 15 that that exists. If it does, I hope I can see it and read through it and understand it better, but 16 17 I haven't seen any documentation that explains all of those things, and that's something that EPA 18 should be seeking, should be asking about. 19

20

Next.

When looking at the possibilities here, the proposed RGPs could potentially kill or alter hundreds of acres, if not thousands of acres of wetlands and other waters over the life of the RGP. They are good for five years, these general

1	permits, so this could potentially be a big deal.
2	Despite the fact they are general
3	permits and not individual permits, when they are
4	issued, that statement of findings that I
5	mentioned and an environmental assessment that
6	goes with it, should explain how the permit can
7	comply or will comply with Section 404(b)(1)
8	guidelines, which are the environmental standards
9	that any permit has to comply with.
10	I haven't seen again, I haven't seen
11	that statement of findings or the environmental
12	assessment, and it appears that the Corps did not
13	completely evaluate direct and indirect adverse
14	impacts in compliance with NEPA and with both
15	Corps and EPA regulations with 404(b)(1)
16	guidelines. I would like to see it and be able to
17	read through it and understand it.
18	Pollutants of concern with a general
19	permit of this type could be almost anything.
20	So, next slide.
21	How how are we dealing with
22	compliance here? Cumulative adverse impacts under
23	Section 230.10(c) of the guidelines. As there are
24	direct surface water connections between the
25	streams and the wetlands within and adjacent to

1 the reservation here and with Lake Superior, it is 2 a given that the material/pollutants from 3 discharges that are covered under this proposed general permit would be transported to other 4 wetlands and likely to Lake Superior. 5 Again, I haven't seen any explanation of 6 7 this potential impact, and that should be analyzed 8 both individually and cumulatively. 9 Again, the question here is, has the 10 Corps identified and evaluated these potentially 11 significant adverse impacts? If so, where is that 12 evaluation? 13 Section 230.10(c) of the guidelines, which deals with adverse impacts, it says that, 14 15 Except as provided under Section 404 (b) (2) -- not an issue here -- no discharges of dredge or fill 16 17 material shall be permitted which will cause or 18 contribute -- let me stress the cause or contribute -- to significant degradation of the 19 20 waters of the U.S. 21 The guidelines require an analysis of 22 all the direct, secondary, which are also called 23 indirect, and cumulative adverse impacts to the affected aquatic resources. Again, I'm repeating 24 25 myself some, but that's because I want to stress

1 these effects as the Corps evaluated the indirect 2 impacts to the lake and, particularly, to the 3 wetlands and streams on the reservation, there has been no apparent evaluation of cumulative adverse 4 5 impacts, that I have seen anyway. Maybe it's somewhere, but I still haven't seen it. 6 7 Is that it? Oh, okay. Got ahead of myself. Anyway, so these all seem kind of 8 technical, and I'm focusing on the regulations 9 10 here, but they are important. Anything that the 11 Army Corps -- any permit that the Corps issues or that the State issues, if it's authorized to do 12 13 so, should comply with things I've mentioned here, and I haven't seen any of that explanation. 14 I haven't seen or heard from EPA that 15 they have evaluated these things, and I don't know 16 17 that any of this material exists, so I'm going to 18 leave it at that, and we can move on; so -- thank 19 you. 20 MS. MARTIN: Thank you, Matt. 21 If you could tee up the presentation 22 number two. Yep, that's it.

The next presentation is going to be -to have two presenters, the Director of Natural
Resources Department for the Band, Naomi Tillison,

1	and Jessica Strand, who is an Environmental
2	Specialist, and they will introduce themselves
3	when they start speaking, and they will spell
4	their last names for the court reporter.
5	MS. TILLISON: Good morning. I'm Naomi
6	Tillison, T-I-L-L-I-S-O-N. I am the Director of
7	Natural Resources Department with Bad River. So
8	I'll be giving this presentation with my colleague
9	Jessica, and we are going to expand upon the
10	concerns that we have on the Utility and Minor
11	Discharges RGPs and water quality concerns related to
12	the Bad River tribal waters.
13	So in this presentation we are going to
14	start off by talking about the responsibilities
15	that we have on the reservation, and then we will
16	get into the concerns about the two RGPs. As part of
17	the discussion about concerns,
18	We have prepared some case studies to
19	highlight the concerns for our water, and then
20	we are going to talk about tribal treaty rights
21	and build on what we already heard from Chairman
22	Blanchard. And then we are going to end the
23	presentation with providing some recommendations
24	to the Corps in regards to these two RGPs.
25	So let's start by talking about some of
our responsibilities on the reservation as a
 Natural Resources Department.
 So this slide is an abbreviated version

of the Natural Resources Department mission
statement. Our full mission statement is rather
lengthy and is available on our web page. This
version is just highlighting some components in that
mission statement.

9 So our Department is tasked with
10 protecting and conserving the natural resources
11 and maintaining ecosystem integrity.

We are tasked with infusing traditional tribal values into decision-making and to manage the natural resources in a way that conserves them for future generations while providing for the needs of the present. So it's a rather large mission statement that is set for our department.

18 The Bad River Band has an Integrated 19 Resources Management Plan, and we call it the IRMP 20 for short. The Integrated Resources Management 21 Plan focuses on protecting the water resources for 22 the reservation by a couple different ways. 23 First, by implementing resource management areas. And you can see a reservation-size map that shows 24 25 these different resource management areas, and

1 there is four in total, and I'm going to be 2 describing three of them. 3 So there is the Conservation Areas that are managed for their natural ecological and 4 5 cultural values and will be protected from timber harvest activities as well as future residential, 6 7 industrial, and recreational development. So 8 those are the areas that have the greatest amount of protection under the IRMP. 9 10 Then we have the Watershed Protection 11 Areas, which are managed to protect water quality 12 in streams, rivers, lakes, and wetlands. This 13 includes a buffer on slopes and open water areas. And then we have Restoration Areas, 14 15 which are managed to increase biodiversity and habitat, and extended buffers that were set in the 16 Watershed Protection Areas from 100 to 330 feet 17 18 out from WPAs. So this next map is just a zoomed-in 19 20 version looking at one specific area of the 21 reservation, so it's just to help illustrate how 22 these resource management areas apply on the 23 reservation. So, again, we are just looking at one area, and more like the 24 25 southeast corner of the reservation so that we can

1 better see how the Conservation, Watershed 2 Protection Areas, and Restoration areas map out 3 along the waterways, but these also apply to wetlands. 4 So the second way the IRMP focuses on 5 protecting water resources is setting 6 7 water-related goals. The water related goals in the --8 in the IRMP includes conserving wetlands and restoring degraded wetlands, protecting the 9 10 quality of pristine surface water, and improving 11 the quality of water impacted by point and nonpoint 12 source pollution and protecting and improving the 13 groundwater quality. So the Band's Integrated Resources is an umbrella plan that guides the 14 15 Natural Resources Department. 16 We also want to highlight some of the 17 natural resources-related codes. We are not going 18 to go through them all, but we did want to highlight a couple that were most relevant to this 19 20 hearing. So to start off, we do have a code 21 that's called a Bad River Reservation Wetland and 22 23 Watercourse Protection Ordinance. 24 This code is similar to Clean Water 25 Section 404 permitting, but it's more protective

1 than that section of the Clean Water Act. It 2 focuses -- its focus is to avoid, minimize, and 3 mitigate impacts to wetlands and watercourses to ensure healthy and functioning wetlands and 4 5 watercourses for the seventh generation. Ιt applies to all lands within the external 6 7 boundaries of the reservation. It allows for the 8 consideration of cultural welfare, tribal rights, groundwater protection, and other factors in 9 10 permitting decisions, and not only allows for this 11 but requires consideration of these factors. 12 Our responsibilities under this code is 13 to evaluate those factors when we are making a decision in relation to the Wetland and 14 Watercourse Protection Ordinance. It also 15 establishes enforcement procedures for unpermitted 16 17 impacts to wetlands and watercourses. 18 The next code we wanted to highlight today is our Water Quality Certification and Water 19 20 Quality Review Code for the Bad River Band. This 21 code establishes procedures and standards for the 22 review of applications for Tribal Water Quality 23 Certification under Clean Water Act 401(a)(1), tribal water reviews under Clean Water Act Section 24 25 401(a)(2), and tribal water quality reviews of

1 proposed federal and state permits that may affect the water of the Bad River Reservation. 2 This code 3 established procedures for the Tribe's review of federal and state general permits for the 4 5 consistency with the Tribe's water quality standards. This is a code and procedure that the 6 Natural Resources Department is responsible for 7 8 implementing to protect the reservation waters.

9 And just to give you the reference to 10 the picture of this, this is a picture of Trout 11 Creek at Highway 13. That was the highway that 12 was washed out at this location from the 2016 13 flood.

14 Another code we wanted to highlight 15 today is what's called the Bad River Band Sloughs Protection Ordinance. This applies to all areas 16 within the external boundaries of the reservation. 17 18 It prohibits motorboat boat use within sensitive 19 vegetative areas in riparian zones. There is also a slow/no-wake zone that's described in this 20 21 code and goes into effect at certain times of the 22 year, especially when wild rice is growing and 23 it's in the stages that it's more sensitive to uprooting, so in that early life of wild rice. 24 25 So this code also describes that

1 paddling through emergent vegetation is prohibited. Instead, a push pole needs to be 2 3 used. It also excludes the use of non-indigenous bait when fishing, and then there is a provision 4 5 when it comes to pesticide application and, specifically, the timing of those applications, if 6 7 they are even necessary and approved to begin with. There is provisions that talk about they 8 cannot be done within 14 days of the start of 9 10 manoomin harvest. And for folks that are familiar with the manoomin harvest, you can't predict the 11 12 exact date when the harvest is going to start. So 13 if, for example, the chemical application is approved , they need to plan way ahead of time to 14 15 make sure they adhere by that provision. And then we wanted to also briefly talk 16 about our experiences and engagement in Clean 17 18 Water Act-related activities, including outside 19 the reservation. 20 As you've already heard today, most of 21 the Bad River Reservation is in the downstream 22 third of a larger watershed, the Bad River 23 watershed, which is roughly a thousand square miles in size. Activities located can and do 24 25 use -- sorry, activities located upstream of the

reservation can and do impact the water quality of
 downstream tribal waters.

As you also have heard, the tribal waters are influenced by Chequamegon Bay and Lake Superior's seiche and can and do impact the quality of tribal waters such as coastal wetlands and Bad River Sloughs.

8 So we do engage in off-reservation projects due to our responsibilities to provide 9 protection for effects to tribal waters. 10 It has 11 been experienced, unfortunately, that the 12 Wisconsin DNR permitting decision does not 13 typically consider our downstream water quality standards or those water quality standards that 14 15 apply to connected waters.

16 And it's also been our experience, 17 unfortunately, that the Army Corps' permitting 18 decisions off the reservation also do not typically consider the Band's water quality 19 20 standards. Despite that, we continue to be 21 engaged in activities that happen outside the 22 reservation, again, because it is our 23 responsibility to do so in our attempt to protect these resources out to that seventh generation 24 25 while still providing for the needs of the

current. We do this by engaging in a few
 different ways.

3 We engage in field work involving 4 review of mapping of wetlands and water bodies. 5 As we already heard from Esteban's presentation, 6 there is a lot of inaccuracies in what is mapped 7 in our area, so we engage in that field work. We 8 engage in the field work to better understand current conditions and other resources that might 9 10 be impacted by a project. We also engage in that 11 field work to better understand the connections between the waterways and wetlands. We also 12 13 engage in an office review and evaluation, and we 14 do this both with data that's available to us but 15 also with engagement with regulatory agencies, and 16 we continue to engage in these activities because 17 we understand they can and do affect tribal 18 waters.

19 So on that note, we are going to dive in 20 a little bit further to our concerns with both of 21 these RGPs. We are going to start with Jessica 22 Strand who is going to talk about the Minor 23 Discharges RGP, and then I will come back to talk 24 to about the Utility RGP.

MS. STRAND: All right. Jessica Strand,

25

1 S-T-R-A-N-D,

I've worked with the -- for the Bad
River Band's Natural Resources
Department since May of 2011, so going on 13
years. I started as their wetland specialist and
now I am an environmental specialist here with the
Department.

8 So as Naomi stated, I will be talking about the Minor Discharges RGP and our concerns 9 10 related to that. So, one of our major concerns 11 with the Minor Discharges RGP is though we asked 12 the Army Corps to institute a preconstruction 13 notice and tribal coordination requirements, the Army Corps instead proposed conditions excluding 14 certain activities under the RGP in the tributary 15 excluded areas shown on this map, also referred to 16 17 as Map 2.

18 Our concern is that the proposed exclusion conditions to exclude certain activities 19 20 in watercourses in this downsized geographic area 21 of concern is not adequate to address our water 22 quality concerns, and this is due to the fact that 23 it only excludes a subset of activities in a subset of streams and rivers, so approximately 600 24 25 miles of the 1,462 miles of watercourses flowing

1 onto the reservation. It does not apply 2 exclusions to other waters the Tribe have 3 identified and comments as areas of interest. This includes waters connected to the Madeline 4 5 Island portion of the reservation, and those connected via Lake Superior to the Sloughs/wetland 6 7 complex through the lower reaches of Bad River and 8 other tribal waters. It also does not exclude those activities in wetlands in Army Corps' 9 10 identified area of concern, including those areas 11 to downstream tribal waters. Also, Army Corps' 12 identified area of interest doesn't geographically 13 line up with what it was purportedly based on, which was a ten-mile buffer of the reservation or 14 15 a change in Strahler stream order. That is shown in this map, with the Army Corps' area of interest 16 17 as the black line. Then the map has Strahler 18 stream order indicated by both the green points. And then the line following the hydrographic 19 20 breaks shown is the orange dotted line, and then 21 the blue ten-mile buffer of the reservation 22 boundary.

23 So as you can see -- well, there are 24 definitely differences where the black line does 25 not actually extend, so maybe the ten-mile buffer 1 area even when the Strahler stream order is past 2 that point or where it cuts in closer to the 3 reservation than even the Strahler stream order. So we have not only concerns about making the 4 5 geographic extent of our area of interest smaller, but also how that area of interest was determined. 6 7 This also relates back to some of the points that Esteban made in his presentation. 8

9 And then just to kind of quantify that 10 for you, if we compare the area that the Tribe has 11 expressed interest in for the Minor Discharges RGP 12 just within the Bad River watershed, so those 13 lands flowing directly on the mainland portion of 14 the reservation, we expressed interest in roughly 15 1,462 stream miles.

Within the Army Corps' area of interest, there is only 600 stream miles. So that leaves out 862 stream miles, approximately, from our area of interest, and these are the stream miles that flow directly through the reservation.

And then as I highlighted earlier, this area of interest does not include any wetlands within the Army Corps' exclusion. So, if you look at the wetlands within this area, there are 109,146 acres of wetlands, and that's just the Wisconsin Wetland Inventory of large wetlands.
This doesn't include small wetlands and it doesn't
get at those undermapping of wetlands that Esteban
talked about. So, as you can see, all of those
wetlands within the watershed have not been
considered in Army Corps' minimized area of
interest.

8 Our second main concern is the preconstruction notices are still not required 9 10 under the Minor Discharges RGP as mentioned a 11 couple slides ago. The Tribe requested PCN and tribal coordination added to the RGP to ensure 12 13 protection of our water quality. Not only does a lack of PCN mean that tribal coordination is 14 15 impossible, but it also weakens Army Corps' oversight on projects that would fall to the Minor 16 Discharges RGP. This includes no oversight on 17 18 proper delineation on watercourse and wetland 19 boundaries, the proper calculation of wetland 20 impacts to ensure thresholds are met under the 21 RGP, the proper application of avoidance and 22 minimization of impacts, identification of special water resources or T&E species, the identification 23 of whether an activity may cause more than minimal 24 25 adverse effects on tribal rights, which is left up

1 to the proponent to decide, where they do not have 2 the expertise to decide, and it also does not 3 ensure that standard conditions under the RGP are being met, including a subset of conditions like 4 5 the restoration of temporary impacts, the duration of those impacts, the implementation of best 6 7 management practices, and the assurance that 8 culverts and crossings of watercourses are properly designed and maintained. 9 10 And I'm sorry for the context. These 11 are just pictures showing how even small 12 disturbances can really be detrimental to certain 13 water quality if they are done incorrectly. So, we have concerns that overlap for both RGPs. 14 15 One of our main concerns highlighted in the previous presentation is that waters for the 16 17 RGPs are hydrologically connected to the 18 reservation and this does not seem to be 19 appropriately incorporated. 20 We also believe that tribal coordination 21 requirements under the RGPs fall short of the intentions of 33 U.S.C. Section 1341(a)(2), which 22 23 call for the permitting agency to make sure conditions of a permit such as may be necessary to 24 25 ensure discharge are compliant with downstream

1 water quality.

2	We are also concerned about RGPs
3	allowing for the possibility of more than minimal
4	adverse degradation and the effects on tribal
5	treaty rights.
6	We are also concerned that the Tribe's
7	water quality standards were not in the Corps'
8	RGPs or in the State of Wisconsin's Clean Water
9	Act 401 certification of the RGPs.
10	The Band is also concerned that water
11	quality impacts associated with single and
12	complete projects or related activity eligible for
13	coverage under the RGPs and the cumulative impacts
14	of all these regulated activities might degrade
15	water quality.
16	Some of these images on this slide
17	illustrate how even water discharges along the
18	Bayfield spigot or in Chequamegon Bay may impact
19	the Tribe's water quality.
20	As we can see, the top image, which is a
21	satellite image taken in the 2016 flooding, you
22	can see sediments are carried out into Lake
23	Superior from different tributaries, and then
24	those sediments are pushed out in the lake in
25	different ways depending on the current and other

1 conditions in the lake.

2 And those are our major concerns under 3 the Minor Discharges RGP. So, we came up with a subset with three case studies to better 4 5 illustrate those concerns, so I'm going to go through those three case studies. Each case study 6 7 has about three slides to kind of get at the 8 points we wish to make. 9 The first one will be the Swanson Ford 10 on Little Beartrap Creek. This is actually a 11 site, even though there was no PCN required, Army 12 Corps did receive notice of. The second one will be the Potato River 13 tributary forest trail bridge replacement. This 14 15 is a new bridge that happened in 2023 upstream of the reservation on the east side, and then a 16 17 residential build near the Marengo River, once 18 again, back along the west side of the reservation, which is a reasonable and foreseeable 19 new residential home site along the bank of that 20 21 river. 22 I want to talk about cumulative impacts 23 and individual impacts because there are the potential of many Minor Discharges RGPs being 24 25 applied to the same area, whether it's from

individual landowners in a small geographic area, and then individual impacts when we're talking about misplaced or incorrectly implemented projects.

5 So as I said, the first case study is the -- is the Swanson Ford on Little Beartrap 6 7 Creek. This is -- as you can see on the map, this 8 is not far from the reservation boundaries. The 9 reported impact of this site was 300.56 square 10 feet of permanent fill into the little Beartrap 11 Creek watercourse. The site itself is a little over six miles upstream of the reservation 12 13 boundaries and 3.37 stream miles from the confluence with Beartrap Creek. The site is also 14 15 only 14 stream miles to the Kakagon Sloughs, and, as Esteban illustrated in his presentation, you 16 17 can see water quality impacts in the St. Louis --18 St. Louis watershed for 124 miles downstream of 19 different mining interests.

The DNR designation for Little Beartrap Creek are for fish and aquatic life, and that is a coldwater habitat. Beartrap Creek, which flows as an Exceptional Resource Water, depicted on the stream legend, supports fishing and aquatic life and fish, recreational, wild rice, and cool water 1 fishery designated uses.

2 Beartrap Creek enters the Reservation 3 it is an Outstanding Resource Water. That designation changes when it enters the Kakagon and 4 5 water complex where it becomes a Tribal Outstanding Resource Water once it supports wild 6 7 rice, including wild rice water, cultural 8 wildlife, aquatic life and fish, recreational, and cool water fishery designated uses. 9 So this is an overview of where I said 10 11 the site is located in relation to the reservation 12 boundary, and then it also includes the Strahler 13 stream order in Army Corps' area of interest. This is just zoomed in a little bit more showing 14 15 in greater detail the map of the wetlands. As Esteban said, these can be greatly underestimated. 16 17 Once again, just a little bit closer, 18 and then here the digital elevation model for the site based on the 2014 radar flown over Ashland 19 20 County. 21 So the second slide shows aerial images of the site that we are discussing. So, as you can 22 23 see in 2011 the site, which was the top left image, there is a culvert at the location and the 24

25 trail crosses over the stream over the culverted

1 crossing. Same thing for April of 2015. In 2019, 2 you start to see some washout at the site. The 3 2020 aerial photos in the winter doesn't show us too much obvious. But then once we get to 4 5 September of 2022, which is after the PCN notice for the Minor Discharges, we do see the actual 6 7 ford. You can see there is water crossing over the 8 trail instead of the trail going over the water, and that is also shown in the 2023 July aerial image. 9 10 The aerial image is from 2020. It 11 wasn't on the previous one. It shows in more --12 in more detail the washout that happened that 13 probably prompted the need for the ford. 14 But then I'm going to zoom back in on 15 once the ford was completed and focus on the fact that the aerial image from 2022, which is this, 16 17 shows that there is still kind of bare soil, it's 18 not green anymore, it's brown, leading to the ford And then in 2023, we can see that on 19 in 2022. 20 each side of the ford -- so this really means that 21 the soil is not actually stabilized yet leading to 22 the ford even a year after -- or more after the 23 ford was constructed. 24 This is a concern because even DNR notes

24 THIS IS a CONCERN DECAUSE EVEN DAR HOLES 25 that Beartrap Creek releases the highest amount of

1 sediment among the streams entering the Kakagon 2 Slough's system. This is important because too 3 much sediment can impact wild rice growth. As Dr. James Meeker researched, you just 4 5 need just the correct amount of sediment. Too much or too little can be extremely detrimental to 6 7 wild rice. 8 So aside from sediment being one of us 9 water quality concerns, we want to highlight for a 10 site like this for this case study, we also would 11 be concerned that something like this, like a 12 ford, could cause chemical residue to enter the 13 watercourses if the different vehicles using the ford drive through the stream, also possible 14 15 interruption of aquatic organisms and other loss of habitat or aquatic organism passage if a ford or a 16 17 different crossing would be improperly 18 constructed or designed. And as I mentioned, there is the potential risk for degradation to the 19 20 manoomin treaty resource for the Tribe. 21 So that was it for that case study, so 22 we'll move on to the second case study, which is 23 on the west -- eastern side of the reservation in the Potato River watershed. 24 25 So this one was not on a list for

1 voluntary PCNs for the Army Corps. We did find a 2 previous permit from the Wisconsin DNR for this 3 site approximately from 2011, but we did not find one for the 2023 bridge that we found at the site, 4 5 the site that -- tributary to the Potato River. We are not sure of the impact of the project 6 7 because there was no reporting or permitting 8 related to it. It's approximately 3.3 stream miles 9 upstream of the reservation boundary, just a 10 little upstream of the confluence with the Potato 11 River, and about 14.7 stream miles to the Potato 12 confluence with the Bad River. The DNR designation 13 for the Potato River includes Outstanding it is a Class II trout stream. 14 Resource Water 15 It's documented as having rare macroinvertebrate species, and it has a designated 16 17 coldwater use, including Outstanding Tribal 18 Resource Water with cultural, wildlife, aquatic life and fish, recreational, cold- and cool- water 19 20 fishery designated uses. 21 And I want to go back to something that 22 Chris highlighted in his presentation, and that is 23 that the Outstanding Tribal Resource Waters under our degradation demonstration only allows for 24 25 minimal changes of water quality and only as much

as necessary for a set number of projects over a
 very small-time frame.

3 So this, once more, this next image on this slide is just kind of zooming into the site. 4 5 This site is unique because due to different proposed projects within the watershed, we do have 6 an actual wetland delineation of this site. 7 So 8 in addition to the national WWI data that was updated for this area, we also have that wetland 9 10 delineation and the delineation of the waterbody 11 from 2019.

Once again, here are some aerial images of the site over time. As you can see, in 1992 there is no visible bridge on this tributary, the same for 2011. But then in 2015 we do have the bridge, which is probably associated with that 2011 WDNR permit that I mentioned. 2020 we still see the 2011 bridge, same thing for 2022.

And then in the fall of 2023, we have discovered this new bridge, which is not -- we do not have an aerial image for this site in 2023, but we do actually have the photos that were taken at the site.

24 So as I highlighted, there was evidence 25 of a 2011 permit but no 2023 permit or any other

1 permits in a slightly earlier time frame for this 2 site. 3 The photos from 2023 show no best management practices or erosion sedimentation 4 5 control at this location, and -- although the 2019 delineation and the DEM show fill was likely 6 7 placed in the riparian wetlands in relation to the 8 2011 permit, we do not know how much additional impact or fill was placed from the 2023 9 10 replacement. 11 The Tribe has an interest in the Potato River watershed because it flows on them 12 13 reservation and also because there has been, through the Tribe's water quality monitoring on 14 15 and off reservation, a suggestion that certain water quality parameters are exceeded at certain times, 16 17 so we have put a lot of effort into recently getting grant funding through the Great Lakes 18 Restoration Initiative to dig into this more. 19 20 So we did complete a phase 1 monitoring 21 assessment of the Potato watershed. This included 22 monitoring 12 sites within the watershed both on 23 the main shed and Potato River tributaries. The Potato River has concentrations of total phosphorus, 24 25 total suspended

1 solids, and E. coli are elevated at Highway 169 2 relative to the crossing upstream to the Potato 3 River, at the 169 crossing just downstream of where this tributary enters the Potato River. So 4 5 it includes possible loading between 169 and the next upstream site at Sullivan Fire Lane. 6 7 The measured concentrations at this location is modest compared to those measured in 8 9 Vaughn Creek and Barr Creek, which are notably 10 higher than the upstream Potato River just to 11 north of Vaughn Creek and Barr Creek. Both flow 12 into the Potato River downstream of Highway 169. 13 So phase 1 monitoring 14 definitely suggests that there are 15 pollutants flowing into the Potato River upstream to the reservation boundaries and are being 16 carried downstream in the Potato River. 17 18 Our water quality concerns include erosion and sedimentation from disturbed banks as long as 19 soils aren't stabilized. 20 21 We are also concerned with cumulative 22 impacts because this is not the only site like 23 this within the walk -- within the watershed where there is potential of people constructing small 24 25 crossings along tributaries through recreational

1 lands.

25

And we are also concerned that there is a cumulative impact where you are combining impacts from sites like this with additional residential development along these larger streams.

7 If you were to take a look at the aerial 8 photos, you can see that the left bank, or the 9 north side of Potato River just adjacent to where 10 this tributary enters, has seen a lot of 11 residential development over the last decade.

12 So our third case study under the Minor 13 Discharges RGP is along the Marengo River on the 14 west side of the reservation as shown on this map.

So this is not a real site yet, but we 15 believe it's a reasonable and foreseeable site for 16 17 Minor Discharge. The location is shared here 18 in coordinates just like it is for the other two previous ones where we're talking about a 19 20 theoretical impact here of 300 square feet, which 21 is a lot, under the Minor Discharges RGP. It's 22 approximately 3.1 stream miles upstream of the 23 reservation and 14.8 river miles to the confluence 24 with the Bad River.

The WDNR designation for the Marengo

1 River is impaired for fecal coliform. It's an 2 Outstanding Resource Water. And depending on where you are, it's either a Class II or Class III 3 trout stream, and it does have that coldwater 4 5 designated use once more. Once it enters the Reservation boundaries it maintains its 6 7 Outstanding Resource Water designation and it has 8 cultural, wildlife, aquatic life and fish, recreational, cold water and cool water fishery 9 10 designated uses. 11 We chose this site for various reasons, 12 which I'll get into more on the next slide, but I

do want to highlight that this is kind of our reasonable and foreseeable project that we're going to talk about under the Minor Discharges where you probably have a house, a garage, and an individual septic system going in at this site.

18 I also want to note that this is a 2020 aerial, but the 2022 aerial actually shows a 19 20 gravel driveway being installed at this location. 21 And as you can see, those -- WWI doesn't map any 22 large wetlands at this site. There is a small 23 wetland point which indicates that there is a two-acre or less wetland at this location. 24 25 And then, once again, just to discuss

1 and highlight what Esteban said, this is probably 2 an underestimation of the wetlands actually at 3 this site. And then here is the digital elevation 4 5 photo from the 2014 radar showing how close the floodplain and the slopes are to the Marengo River 6 at this location. 7 8 So the aerial images really suggest more why we chose this as a reasonable and foreseeable 9 10 Minor Discharges site. 11 So in 1992 you can see that the site is 12 really just field, even to the east of the 13 location we chose. 14 Then in 2005, there is a new house, 15 basically, right next door to where we are talking 16 about and some land disturbance adjacent to our 17 This stays the same in the 2010 aerial site. 18 image with no obvious changes from 2015. But then no obvious changes -- sorry, that should have 19 said 2003. 20 21 Then in the 2015 aerial image, we see 22 that there is quite a bit of land disturbance just 23 to the west of that home site that's built there, and that disturbance extends down to the forested 24 25 portion of the bank and floodplain in the Marengo

River. And we also find in that other disturbance
 to the west in the forest there is now a
 structure.

And then in 2020, five years later, there is another new home site in what was originally field in 1992, and there is a slightly different structure in that same location on the west side.

9 And then in 2022, the aerial image does 10 show that a gravel driveway was added into the 11 site that we chose to highlight for this case 12 study.

13 So as you can see, from 2005 to 2020, we have two sites that are highlighted, but there is 14 15 also some more driveways that are extending to the north outside of these aerial images also at this 16 17 So, we chose this site because we think it's site. 18 reasonable and foreseeable that we think there might be real estate, residential developments, 19 20 and minor discharges at this location.

21 So there was no evidence of DNR permits 22 from the surface water DataViewer where they do 23 have those points for any of those sites that I 24 highlighted in the previous aerial images, even 25 though there has been multiple buildings

1 constructed, all of which would need personal on-site 2 wastewater treatment systems for the 3 structures because there is no municipal water and sewer to this area. As you 4 5 can see in the previous aerial images between 2020 and 2022, there is permanent driveway fill into 6 7 the site that we were discussing. So, we have to consider impacts from that driveway. 8 9 In addition to impacts from the home and 10 the actual septic construction, our water quality concerns for a project such as this would continue 11 12 to be erosion and sediment, 13 elevated bacteria levels from improperly designed or maintained septic systems, the loss of wetlands 14 15 and their functions, and the cumulative impacts. As you can see, this site continues to 16 17 have more and more homes built adjacent to each 18 other. This is interesting because the Marengo 19 20 River watershed does have a nine key elements 21 watershed action plan which recently underwent an 22 update in 2023 which lists primary pollutants of 23 concern such as bacteria, nutrients, and sediment. In the plan the high bacteria counts are 24 25 attributed to improperly applied and managed

livestock waste; poorly designed and functioning
 septic systems; surface drainage from agricultural
 aeration; untreated stormwater runoff; development
 or the conversion of land use; elevated water
 temperatures; inconsistent and inadequate zoning.
 drained wetlands; bluff and stream bank erosion.
 and stream channelization and incision.

8 What's interesting is that three of these possible activities attributing to high 9 10 bacteria counts are illustrated in the case study 11 that we chose, and if that case study was not just a residential home but a farm, we can add two more 12 13 to that list with the improperly applied or managed livestock waste with surface drainage from 14 15 agricultural areas.

16 And that really concludes the case 17 studies that I was going to discuss under the 18 Minor Discharges RGP.

As you can see, there are definitely water quality concerns that carry over from case study to case study, though we tried to choose three different types of projects, and these impacts are seen both on tributaries and the main watercourses and to wetlands upstream in the reservation boundaries.

1 So with that, Naomi is going to come 2 back and discuss possible -- discuss case studies 3 and water concerns under the Utility RGP. MS. TILLISON: Okay. To start off, a 4 5 little about the concerns specific to the Utility Some of this will be repetitive because, as 6 RGP. Jessica stated, there is some concerns that are 7 8 relative to both RGPs. 9 So our concerns include waters where the 10 RGPs apply that are hydrologically connected to 11 the Band's water. Jessica already talked about 12 the tribal coordination requirements falling short, so 13 that concern also applies to the Utility RGP. 14 The RGPs allowed for the possibility of 15 more than minimal adverse effects on tribal treaty The Band's water quality standards were 16 rights. 17 not considered in the Corps' RGPs or in the State of Wisconsin 401 certification. 18 The Band is concerned with water quality 19 20 impacts associated with a single and complete 21 project or regulated activity eligible for coverage under the RGPs, and we are also concerned 22 23 with the cumulative impacts with all the regulated activities under the RGPs. Jessica already 24 25 described the images that are on this figure to

illustrate the connections with Chequamegon Bay
 and Lake Superior.

3 So continuing with concerns for both RGPs, we feel that since our water quality 4 5 standards were not considered yet as part of these RGPs, or the State's 401 certification, and based 6 7 on our experience of reviewing similar regulated 8 activities within the reservation boundaries, and also our engagement in the activities upstream and 9 otherwise connected outside of the reservation 10 11 boundaries, that the incorporation of the Band's 12 water quality standards should occur through 13 project-specific and site-specific reviews as necessary to address our water quality concerns 14 15 and ensure that our water quality standards are going to be complied with. 16

17 So a little bit of repeat, but just so 18 everyone is aware, within the reservation boundaries the Band is a 401 certifying agency 19 under the Clean Water Act. And when we had made 20 21 decisions related to these RGPs within the 22 exterior boundaries, the Band denied, without prejudice, the 401 certifications for these two 23 RGPs, and really for the majority of the RGPs, thus 24 individual Clean Water Act 401 certification decisions 25

are necessary prior to being eligible for coverage 1 2 under these RGPs when they occur within the exterior boundaries of the reservation. 3 When we look outside the exterior 4 5 boundaries of the reservation, which is the focus of this hearing, Wisconsin DNR is the 401 6 7 certifying agency. And as we previously 8 mentioned, they issued a statewide conditional 401 certification without any coordination with the 9 Band and without consideration of the Band's water 10 11 quality standards approved under the Clean Water Act. 12 So going a little bit further into 13 concerns with the Utility RGP. As part of our conversations with the Corps over the last year or 14 15 so as we've worked through this process, the Corps has proposed a condition requiring preconstruction 16 notification for activities in watercourses in a 17 downsized geographic area of concern, which is 18 referred to as Map 2 and shown on the slide. 19 20 We do not feel like this proposed 21 condition is adequate. It does not exclude 22 activities but requires a PCN for a subset of 23 activities in a subset of streams and rivers, and, as Jessica described in detail, this is less than 24 25 half of the river mapped miles of watercourses

1 flowing into the reservation within the Bad River 2 watershed specifically, and that doesn't include 3 the area outside of the Bad River watershed. This condition does not apply to any other watercourses 4 in the Tribe's identified area of interest. 5 And then, as Jessica already described in detail and 6 7 also referenced in Esteban's presentation, we also don't fully understand the Army Corps' methodology 8 and how they implemented it to come up with the 9 10 boundaries shown on Map 2. 11 And then -- although in the current 12 Utility RGP, a PCN is required for activities in 13 state and tribal high-quality waters, a PCN is not required for regulated 14 15 activities connected to high quality waters, and that connection can either be an activity 16 17 occurring upstream of us or, as we have talked, it 18 could be otherwise hydrologically connected to 19 Chequamegon Bay and Lake Superior. So to continue with this same bullet 20 21 point, this proposed condition does not require 22 PCN for wetlands in the Army Corps identified areas of interest despite the connection to tribal 23 waters that those wetlands have. It does not include 24 25 activity in watercourses or wetlands connected to

1 tribal waters located in the reservation on 2 Madeline Island. Although I do want to note that 3 the Utility RGP does have a PCN requirement specific to Madeline Island. This proposed 4 5 condition does not exclude nor require a PCN in watercourses or wetlands connected via Lake 6 7 Superior to Kakagon and Bad River Sloughs wetland 8 complex, lower reach of Bad River, and other tribal waters connected hydrologically with 9 10 Chequamegon Bay and Lake Superior. 11 So under the current RGP, the Corps only initiates tribal coordination when a PCN is 12 13 required and the activity is within the 14 reservation boundaries. A PCN is not required for 15 regulated activity in waters connected to high quality tribal waters that we just walked through. 16 17 The Corps' proposed draft changes would 18 require PCN for less than 50 percent of waterways 19 mapped within the Bad River watershed, and, again, 20 that does not cover the other part of our area of 21 interest. And the Corps' proposal is also to have 22 a coordination process specifically with the Bad River Band for these PCNs, and we do appreciate 23 that proposal, but, again, we feel like it falls 24 25 short and does not adequately address our water

1 quality concerns.

2	A PCN coordination process could allow
3	for project-specific and site-specific reviews
4	that we talked about are necessary to incorporate
5	the Band's water quality concerns, and, as we
6	already went through, the Corps' proposal does not
7	include all waters connected to tribal high
8	quality waters.
9	So on this slide, I also highlighted some
10	of our water quality concerns in the blue text
11	box, and these are concerns related to us
12	antidegradation policy and our standards, but also
13	concerns related to activities such as adverse
14	effects to the cultural use and other existing
15	uses supported by tribal waters.
16	And also our concerns that regulated
17	activities can cause or contribute to an
18	exceedance of narrative or numeric criteria in the
19	Band's water quality standards.
20	I also want the Corps to know that this
21	has been our recent experience with this Utility
22	RGP specifically, that the Corps has not always
23	successfully implemented the tribal coordination
24	process that's in place. I believe the current
25	Utility RGP reads something like before

immediately -- or, sorry, immediately or promptly provide a copy of the complete PCN to the affected tribe when activities occur within the reservation boundaries.

5 We have had a recent experience were the Corps has received a PCN for regulated 6 7 activity that's requested being authorized 8 under the Utility RGP. They received a PCN towards the beginning of December of 2023, and 9 10 we have just received a copy of that toward the 11 beginning of February of 2024, and we don't think 12 two months is immediate or prompt. So, we have 13 concerns about the successful implementation of something like a tribal coordination piece. 14

15 Still focusing on PCN, another area of concern for Utility RGP. We appreciate that PCN 16 17 is required for areas with suspected sediment or 18 soil contamination. We think that makes sense, 19 and we have requested the Corps to modify that 20 language and that specific verbiage requiring that 21 PCN -- the Corps does specifically call out 22 Superfund sites because of the high probability of 23 suspected sediment or soil contamination. And we'd ask the Corps to have a similar approach, 24 25 and specifically requiring a preconstruction
notice for existing valve locations on oil pipelines, as the existing valve locations and oil pipelines do have a high probability of suspected sediment or oil contamination, and we believe those should be treated and specifically called out, similar to how Superfund sites were called out.

8 The photo on the left was a photo taken west of the reservation at an existing valve site 9 10 on an oil pipeline where significant oil 11 contamination was discovered during work to 12 improve the functions of this valve. The 13 quantities of contamination that was removed from the work site was far greater than what was noted 14 15 in the public realm.

16 I wasn't able to quickly track down the 17 exact quantity of the truckloads that brought out 18 contamination, but this slide is something that we will include in our written comments. 19 This is 20 one example that's close by in the Beartrap 21 drainage that we have experienced and is part of 22 why we have asked the Corps to expand that PCN 23 requirement to specifically list out the existing valves on oil pipelines. 24

25

So as part of our dialogue with the

1 Corps in working through all the water quality 2 concerns over the last year, the Corps has 3 proposed a reporting requirement that would require some information submitted and require a 4 5 coordination process with the Band for activities in the downsized geographic area of concern, and 6 7 then, in this case, we are showing a draft map, 8 one that the Corps provided us of that area of concern. 9 And, again, we appreciate this proposal, 10 but we don't think the proposal is adequate to 11 fully address our water quality concerns. 12 The requirement would only apply when 13 "overall project" would result in either cumulative loss of .2 acres or greater or 14 15 cumulative temporary impact of 0.5 acres or It falls short of -- this reporting 16 greater. 17 requirement falls short of a full PCN requirement, 18 and Jessica already described what that full PCN requirement is in her slides, but some of what I 19 20 wanted to highlight of how this falls short of a 21 full PCN requirement includes that if a project 22 proponent determines if triggered -- triggering reporting requirement threshold. So, it's sort of 23 a self-determination. The project proponent 24 25 required -- is required to submit only a portion

of the information required by a PCN. There are certain pieces of information of PCN that they wouldn't be required to submit.

There is no Corps oversight, as Jessica 4 5 described in detail, or not as much Corps oversight when a PCN is not required, so there is 6 7 no Corps determination if an activity will result in more than minimal individual or cumulative adverse 8 environmental impact or be contrary to the public 9 10 interest. And it seems to -- based on what 11 information is not required, it seems to imply that there is also no consideration of 12 13 compensatory mitigation, in any case, if something were to trigger this draft reporting requirement 14 15 number two.

16 So another point we want to make is that 17 the Utility RGP covers a wide range of activities 18 and associated environmental effects. I think 19 that has been a challenge as we have been working 20 through our water quality issues with the Corps 21 because the RGP isn't just covering the same type 22 of environmental effects.

23 So the Utility RGP covers a wide range 24 of eligible activity that are classified in five 25 broad categories. Even activities described in 1 one category can result in a wide range of 2 environmental effects, and, for example, if you 3 look a little bit closer at the utility survey activities, it includes things like core 4 5 sampling, exploratory type bore holes, exploratory trenching, soil surveys, sampling, sample plots or 6 transects for wetland delineations and historical 7 resources surveys. So even that list has a wide 8 range of environmental effects. 9

On this slide, the first two pictures to 10 11 the left, these are showing what a wetlands 12 delineation looks like. So, you can see what 13 transects look like for a wetland delineation followed by a small diameter probe that's used to 14 15 investigate soils. That has a much smaller environmental effect by conducting wetland 16 delineation work than some of these other 17 18 activities that can fall in this Utility survey 19 activity.

20 So we have concerns with some of those 21 activities specifically listed, like core 22 sampling, exploratory type bore holes, exploratory 23 trenching because they have greater potential for 24 adverse environmental effects than things such as 25 wetland delineations.

1 Unfortunately, we were not able to find 2 some good photos of these other survey activities. 3 The closest we got was the photo on the right which is just showing, you know, a larger diameter 4 5 disturbance as compared to wetland delineation, but we are going to look for photos because we 6 7 think visuals will help if we can show a photo of what exploratory drilling and trenches look like 8 and the environmental effects associated with 9 10 that.

11 But just to give a little more context 12 for exploratory trenching, the Corps designates 13 that as temporary excavation of the upper soil 14 profile to expose substrates for the purpose of 15 mapping or sampling the exposed material. So, as I read that definition, I think back to Esteban's 16 17 slide, too, shows specific sulfates in the 18 Fond du Lac Reservation and how those constituents 19 can impact downstream tribal waters.

20 So another area we wanted to talk about 21 is concerns for Utility RGP regarding directional 22 drilling or boring activities, as these activities 23 have a risk of inadvertent returns and because 24 these activities also have some environmental 25 concerns. Directional drilling, and which we also 1 are going to refer to horizontal directional 2 drilling, or HDD, and boring activities can cause 3 significant water quality concerns from a single project and contribute to adverse cumulative 4 5 And, again, project-specific, site-specific impacts. reviews are necessary for these types of regulated 6 7 activity to evaluate and address water quality 8 concerns.

9 Individual permit evaluations are 10 necessary for these types of proposed regulated 11 activities because of the adverse environmental 12 concerns that can occur.

And then -- and we are going to talk a little bit more about this when we get to the case study to talk more about what our concerns are here. We did want to call out that -- oh, one last thing before I leave that individual permit bullet point.

19 The Corps and the RGP acknowledges that 20 an individual permit will be necessary if it 21 meets -- or if the Corps determines that the 22 activity will result in more than minimal 23 individual and cumulative adverse effects on the 24 aquatic environment and other aspects of the 25 public interest, and this is part of why we are 1 making the case that the RGP is modified for directional 2 drilling and boring activities. We think those 3 warrant an individual permit process.

So another thing to note related to 4 5 directional drilling and boring activities is they do have the risk of resulting in inadvertent 6 7 returns or releases, and although the Utility RGP 8 states the remediation of directional drilling or boring activity must be done as soon as practical 9 10 to restore the affected waterbody, which we really appreciate that language, the project proponent of 11 12 a regulated activity using one of these methods is 13 not required to have a proactive remediation plan 14 for these types of discharges under the Utility 15 RGPs unless the Corps chooses to add that as a special condition, and, to us, that doesn't make 16 17 sense.

18 When there is a possibility of 19 inadvertent return, then the Corps should and must 20 require that the project proponent have a 21 remediation plan, proactively have it in place now 22 and not after a release has occurred as then 23 time is ticking for trying to clean up that release as soon as practical to restore the 24 25 affected waterbody.

Another concern of the Utility RGP that we wanted to highlight was the Utility RGP allows the Corps to issue a waiver listed for greater than 300 linear feet of tributary loss.

5 In the current version of the Utility 6 RGP, the Corps is required to do an agency 7 coordination process if an entity is requesting 8 this type of waiver, which includes appropriate 9 federal, state, or tribal offices, including 10 tribal natural resources or water quality 11 agencies.

12 So we have water quality concerns with adverse environmental effects from a single 13 project and cumulative impacts of all regulated 14 15 activities, and these concerns are amplified if a waiver is issued, especially because there is no 16 17 requirement for the Corps to explicitly coordinate 18 with the Bad River Band on a waiver decision when a waiver is being requested within the Band's 19 20 geographic area of interest.

The current wording implies they may reach out to us but does not actually say they would reach out to us if an activity -- if a waiver was being requested outside the reservation in these areas hydrologically connected to the 1 reservation.

2	Another area that we wanted to talk
3	about related to the Utility RGP is the duration
4	of temporary impacts. As you heard in Chris's
5	presentation, we do have an antidegradation policy
6	to protect our high quality water in those
7	different tiers. The antidegradation policy has
8	different requirements and criteria that have to
9	be met. Our Outstanding Tribal Resource Waters,
10	which are Tier 3 waters, has the most protective
11	antidegradation policy. And for OTRW, a
12	short-term, temporary, no more than six months and
13	no more than necessary lowering of water quality
14	is allowed in tribal OTRWs.
15	So the Utility RGP has a General
16	Condition 15 that describes the duration of
17	temporary impacts allowed, including that temporary
18	impacts must be avoided and limited to the
19	smallest area and the shortest duration required
20	to accomplish the project permit which, again,
21	appreciate that language.
22	The condition further goes on to say
23	temporary impacts may not remain in place longer
24	than 90 days between May 15 and November 15. And
25	before those 90 days have elapsed, all temporary

1 discharges must be removed in their entirety. 2 We don't understand why this RGP, unlike 3 the Minor Discharges RGP, does not require that restoration of temporary discharges also occurs 4 5 within that 90-day time frame, as that is language in the existing Minor Discharges RGP in a similar 6 7 condition on the duration of impact, and we think 8 it makes sense that that language carries over from the Minor Discharges to the Utility RGPs. 9 10 This is another area of the Utility RGP 11 that allows for the Corps to issue a waiver if an 12 applicant requests a waiver in the PCN. However, 13 we noticed that in the Utility RGP there is no requirement for the Corps to have agency 14 15 coordination when this type of waiver is being requested, unlike the waiver being requested 16 17 related to the linear feet of stream disturbance, 18 and we are not sure why that is because we think 19 anytime a waiver is requested under RGP, there 20 should be an agency coordination process, and we 21 do think that agency coordination process should 22 basically include the Bad River Band related to 23 activity in our areas of interest outside the 24 reservation boundaries. 25 The other thing I want to highlight on

1 this slide is, as I earlier talked about, the OTRW 2 provision related to short-term, temporary impact, 3 no more than six months and no more than necessary, and we went over the language in the 4 5 Corps' RGP that says temporary impact may not remain in place longer than 90 days. 6 I just want 7 to note that 90 days could be more than necessary 8 for impact-regulated activities depending on project-specific and site-specific details. 9 So another area of concern related to 10 11 the Utility RGP is that the Utility RGP excludes 12 regulated activities which would enclose any 13 portion of a non-wetland of the U.S. However,

14 there is an exception made for permanent or 15 temporary access roads and temporary crossings 16 required for Utility line construction, repair, 17 and maintenance.

And, again, we don't know why an exception is made for those access roads and temporary crossings. We would like to understand what is the basis and justification for this exception, including what was completed to evaluate the cumulative impacts to support this type of exception.

25

And then we wanted to highlight another

concern which is related to the thresholds
 described in the activity restriction section of
 the Utility RGP, which is the basis for if a
 regulated activity can be authorized under this
 RGP.

We have concerns because these 6 7 thresholds are only based on permanent loss of waters and do not consider the sum of all 8 temporary adversely-affected jurisdictional 9 10 waterbodies for a single and complete project. 11 And I'm not going to attempt to explain the 12 definition of a single project. I know Army Corps is familiar with that definition. 13

14 Well, that covers, at least, our Okay. 15 broad concerns related to the Utility RGP. Now we will dive into some case studies to help make our 16 17 case of why we have concerns when it comes to 18 these activities outside the reservation and how they can impact water quality and tribal waters. 19 20 I can tell that this slide did not quite download 21 properly. It's mostly here, but there is a little 22 bit missing language that I'll go over.

But we did pull together six project
case studies. We compiled some case studies of
regulated activities that could be authorized

under the Utility RGP and could result in water
quality concerns to tribal waters. These cases include
some examples outside of the Reservation. However,
there is limited details easily available to us,
so we also included some examples that have occurred
within the reservation boundaries and the
associated water quality concerns.

8 Knowing that these types of activities 9 could also occur outside the reservation and cause 10 water quality problems downstream or otherwise 11 hydrologically connected. It is our intention to 12 include additional details in case studies that 13 will be included in our written comments in March.

And I did want to pause before we go into case studies just to note that we do have concerns both with individual impact because misplaced, incorrectly implemented, or unnecessary projects could result in water quality impacts even with just a single project, and then know we have concerns related to cumulative impact.

And this is the part of the slide that didn't quite translate right. But before I talk about cumulative impact, I do want to refresh everyone's memory about what the Corps is supposed to consider when they are thinking about impacts. 1 They are both -- to consider both the direct 2 effects that are caused by regulated activity that 3 occur at the same time and place and the indirect 4 effects that are caused by regulated activity and 5 are later in time or farther removed in distance 6 but are still reasonably foreseeable.

7 So for the cumulative impacts what we can't see on the one slide is basically a summary of 8 what we saw in Esteban's presentation where we had 9 10 mapped existing powerlines and pipelines in our 11 area of interest and determined the number of 12 stream crossings and wetland crossings. And, 13 again, this is just what's mapped here. We went into the details of how that mapping is 14 15 inaccurate in our area, but we can see that in our area of interest there are over 870 streams and 16 2,390 wetland crossings that exist between 17 18 existing Utility lines and pipelines.

19 So then we wondered, what if each one of 20 the water crossings was impacted by the maximum 21 RGP thresholds? So, worst case scenario, if we 22 took that 870 streams, and we multiply it by the 23 300 linear feet of tributary loss that is 24 allowable, that RPG would result in 261,000 linear 25 feet of tributary loss. If you take the number of

1 wetland crossings that are up on that slide and 2 you multiply by a half an acre, which is allowable 3 wetlands loss under the Utility RGP, that would be a loss of 1,195 acres of wetlands. These numbers 4 5 don't consider temporary impacts or indirect impacts, these numbers don't consider what was not 6 7 mapped, and these numbers don't consider what also 8 could occur under the Utility RGP in terms of new streams or wetlands that are crossed by Utility 9 10 lines and pipelines. 11 So with that, we'll go into our six different case studies. So the first one we 12 13 wanted to highlight is a case study that is on -that occurred on Denomie Creek tributary and the 14 15 Denomie Creek tributary modification to an engineered riprap channel location provided on the 16 screen. The waterbodies are Denomie Creek 17 18 tributaries and connected wetlands. This is something that occurred within 19 20 the reservation boundaries, but, again, we had a 21 lot of information about it, and we know this type 22 of activity could be authorized in the Utility RGP

23 outside of the reservation boundaries.

24 So on the map, if we look at the yellow 25 star, that's the approximate location of the site

1 we are going to talk about in more detail. The 2 two house symbols are the locations of the nearby 3 tribal communities, one just east of this area and then one located downstream on Denomie Creek of 4 5 this project site. And on this next slide the yellow star, 6 7 that's the area we are going to zoom in and look a 8 little bit closer at. 9 So in terms of reported impact in the 10 original application materials that were submitted 11 to us in December of 2019, the reported impacts 12 were estimated at three acres of wetland impacts 13 due to access and staging along with acknowledgment of watercourse impacts. This is an 14 15 example of a project where the design and implementation failure resulted in us having to 16 17 issue two emergency approvals to prevent even more 18 adverse impacts from a complete project failure. 19 The final antidegradation decision 20 made by the Tribe after this project was 21 completed because, again, this was a design and 22 implementation failure which resulted in having to 23 amend our original approval and issue those 24 emergency approvals to prevent this situation from 25 becoming even worse. But the final

antidegradation decision in July of 2020 was the Band's partial approval and partial denial of the water quality impacts that had occurred at the time.

5 So the reported impacts after the 6 project construction had been completed is at 7 least three acres of wetland impacts due to access 8 in staging, and an estimated 1,025 square feet of 9 permanent fill of wetlands and watercourse on 10 the slope and other water quality impacts that 11 occurred that we'll see some visuals of as we go.

12 Oh. Oops. I forgot to cover the tribal 13 designations. Denomie Creek is an Exceptional 14 Resource Waters with cultural, wildlife, aquatic life and fish, recreational designated uses. 15 Wetlands were impacted, including the loss of 16 17 wetlands and these are also Exceptional Resource 18 Waters with wetland designated use. And I wanted 19 you to know that Denomie Creek does flow into wild 20 rice waters, including the Bad River Slough.

21 So this is a more detailed map of the 22 area and so if we look at this site, the project 23 site area, which is roughly between the two stars, 24 if those show up on the map. I know this is a 25 colorful map that shows the DEM of this area so we can see the waterways and connections between
 them.

3 We basically included some figures in the upper right of what this site looked like 4 5 prior to this modification to an engineered riprap channel. So the two photos that have a pink star 6 7 next to them and which roughly correspond to that 8 downslope location on that map, which I hope folks can see, these are photos taken in 2018. 9 I know 10 it's really challenging to see because this is an 11 area on a pipeline corridor that had not been 12 brushed, so it's hard to see the water resources, 13 especially if you don't make it to the site often. 14

The photos that are on the bottom next to the yellow star, these were taken in 2019, again, prior to the project of a modified engineered riprap channel occurring. But the location of the photos are a little bit upslope and are represented where the yellow star falls on the map.

21 We wanted to show this map just to get a 22 feel for the project site but also to point out 23 that tributaries were modified during the construction 24 of the pipeline and/or prior maintenance of the 25 pipeline.

1 You can see to the east of this site 2 there are two tributaries that instead of flowing 3 north they flow down slope because they were hydrologically altered by either the construction 4 5 and/or maintenance of the pipeline, which, as a result, there is more water that flows -- that 6 7 meets with this other tributary and flows down the slope before it meets another Denomie Creek 8 9 tributary at the base of the slope. 10 This is the same project site, but we 11 did want to just step -- we did want to provide 12 this as an example of water quality impacts due to 13 the inadequacy of accurate mapping of the waterbodies that Esteban talked about in his 14 15 presentation. 16 And what we're looking at on the slide is a wetland delineation of this location. And 17 although the wetland delineation to collect field data, 18 which was completed by the project proponent from 19 20 the contractor, this wetland delineation did 21 improve the mapping of waters at this project site. 22 However, it did not accurately map all wetlands and 23 waterway features. And coupled with the Corps' limited review of water resources on the site. I believe 24 25 the Corps has only been on the site once in the

1 fall time, unlike the Natural Resources Department 2 who has been to this site numerous times. 3 As a result of the inaccuracy of the wetland delineation and the Corps' review of it, 4 5 this contributed to more water quality impacts from the project activities. This should have 6 7 been activity that was authorized under the Utility RGPs 8 as acknowledged in the original application materials. However, there was no Corps oversight 9 10 on this project. 11 And one thing we wanted to show on this 12 map is you'll see on the figure there is this pink 13 dashed line of missing water features. So these are the features that Mashkiiziibii Natural Resources 14 added on based on our knowledge of this site and 15 the water resources here. 16 17 After we viewed photos in 2018 and 2019, 18 we believe the delineation missed wetlands 19 adjacent to the gully that had occurred, 20 specifically along the northeastern edge, and we 21 depict this in a green polygon shown there, so 22 that's the missing wetlands that were not mapped. 23 And then after reviewing evidence from -- sorry -- From 2014 through 2019 there is 24 25 plenty of water flowing down that intermittent

1 watercourse, which is the area that was eroded where 2 the pipeline was exposed, connecting the tributary and 3 wetlands with the tributary at the base of the slope. This missing waterway feature is shown in 4 5 sort of this pink polygon next to the green polygon that we added based on our knowledge of 6 7 the water resources. And the figures on this 8 slide, the top one's documenting some wetland plant species that are present on the slope. And 9 10 the bottom one is another picture showing a reach 11 of this intermittent tributary that flows down 12 this slope. 13 So here are some more photographs of this project that occurred within the reservation. 14 15 So the first photos on the slide to the left, these are prior to the start of regulated 16 activities. 17 18 The photo on the left is looking west 19 and downslope. 20 And then the photo next to it is looking 21 upslope. 22 And, again, these are photos that were taken after this area was brushed, which occurred 23 after we discovered a stretch of the pipeline 24 25 exposed.

1 So starting in early February of 2020, 2 that's when the ground-disturbing work started to 3 cover the pipe back up and engineering a channel of erosion matting constructed. 4 The 5 project was scheduled to wrap up on March 4th or shortly after. And then this photo -- the 6 7 remaining photo on the slide is from March 5th. 8 This is the day the project proponent told us that the project was failing and emergency surface 9 10 drain tile was needed to prevent water flow and prevent more, greater project failure and greater 11 12 water quality impact. 13 So here is a photo -- another photo from that same day, March 5th, that's showing, 14 15 basically, the temporary measure to redirect surface water through drain tile to mitigate 16 further erosion. 17 18 From there, from March 13 of 2020 to March 16 of 2020, the project proponent installed 19 20 subsurface drain tile. And the photo on 21 the right is showing one area that's at the head 22 of the slope 23 from March 14th, the sump at the head of 24 the slope created to divert water to two, six-inch 25 drain tile pipes.

1 So these photos are from March 17 and 2 March 27th, so basically after what I just described. And then the project proponent upsized 3 subsurface drain tile, changes shape of and 4 5 riprap to channel, so that is showing that work completing from March 17th through March 27th. 6 7 And then more photos. These ones are from the end of March. At the end of March, then there was 8 the installation of surface drain tile and sandbag water 9 10 bars to flow downslope. 11 So as I mentioned earlier, we wanted to share this example for many reasons, but including 12 13 because this is an example of a regulated activity where the design and implementation failure 14 occurred. That failure occurred because -- or at 15 least the project proponent did acknowledge there 16 17 was more sandy soil and water on this site than 18 originally thought, which did not surprise us, because we knew there was a lot of water on this 19 20 site, and that's something that we kept 21 communicating to both the project proponent and 22 the Corps. 23 And so some of our water quality concerns that I've shown include the excess 24 25 sedimentation and erosion, as a concern with the

project if it didn't have a failure but then also amplified due to the design and implementation failure which caused repetitive impacts with both wetlands within access routes and to the Denomie Creek tributary down gradient the slope of the construction activity.

And, again, you might remember me saying this project was scheduled to wrap up towards the beginning of March, but, as you saw, the activity -- construction continued through the end of March.

12 And then these are photos from August of 13 2020. And in August and September of 2020 we were 14 having compliance issues related to water quality 15 concerns, including some BMPs were not properly 16 maintained. There is excess sediment in the 17 stilling basin.

18 And then we did have concerns about sink 19 holes and subsidence along the south side of the 20 backfilled pipeline in the lower half of the 21 previously exposed interval. There was elevation 22 change of six inches or more that was evident in 23 this area, and it seemed to line up with where the turf reinforcement mat abuts the riprap. Concerns that 24 25 this abrupt change in elevation maybe due to

1 subsidence due to inadequate compaction, the 2 placement of frozen material in the backfill that 3 had subsequently thawed creating a void, or from subsurface materials being transported away by 4 5 water, which is often referred to as piping. These are some of our concerns related to water quality 6 7 concerns. 8 So looking at the same site, this is from October 2020, and this is showing the project 9 10 proponent's contractor planting on the southern 11 slope, which you can see from the photo on the 12 right there is a lot of exposure here. 13 And the photo on the left is showing, you know, the planting and other BMPs that were 14 15 installed in October of 2020. This planting is a condition in the Band's water-related approvals for 16 17 this project and is an example of a project-specific and site-specific condition 18 derived to address water quality concerns and to 19 20 minimize adverse environmental impacts. 21 So I believe this is the last slide about this case study. This is showing the same 22 23 site but a little bit later. This is from June of 2021 on the left and on the right is from October 24 25 2023, so just so you get a sense of what this

1 engineered riprap channel looks like now and the 2 loss of the Denomie Creek tributary and connected 3 wetlands. And, as I mentioned, construction duration lasted significantly longer than 4 5 originally planned due to the design and implementation failure and, still today, four 6 7 years after that construction phase, still more 8 inspections are being completed since this project has not met the stability thresholds of having 9 10 greater than 70 percent native vegetation, 11 although getting close to meeting those 12 thresholds. 13 So, again, related to our water quality concerns consisting of excess erosion and 14 sedimentation and how that affects turbidity, but 15 also the loss of a portion of the waterways and 16 17 the wetlands and functions that they provide --18 MR. KONICKSON: Ma'am? 19 (Brief discussion with 20 Ms. Tillison.) MR. KONICKSON: We are going to recess 21 22 the hearing for lunch and continue this -- we are 23 going to reconvene at 1:00 o'clock. 24 (Noon recess at 11:57 A.M. -25 1:05 P.M.)

1 MR. KONICKSON: Resuming the hearing at 2 1:05. MS. TILLISON: Thank you. We are going 3 to resume with going over the five-remaining case 4 5 studies as part of the Utility RGP presentation. So this next case study, again, is a 6 project within the reservation boundaries. 7 This 8 case study did not actually get implemented, but we wanted to talk about it because it's an example 9 10 of a project that could be authorized under the 11 Utility RGP that the Band denied the 401 12 certification for due to water quality concerns. 13 So the location of this case study is provided on the screen, and this is an HDD 14 15 proposal specific to the Bad River in this area that's highlighted. Affected by this proposal 16 17 would be Bad River, Sugarbush Creek, and connected 18 wetlands. And the proposal includes a little over 19 14 acres of wetland impacts associated with 20 access, staging areas, and HDD workspace. And 21 impacts associated with the 1.55-mile HDD that was 22 proposed, impacts under watercourses and wetlands, 23 including Bad River, Sugarbush, and floodplain wetlands and into the groundwater aquifer. 24 25 The tribal designations are Bad River,

1 including the Bad River's Outstanding Tribal 2 Resource Water, with cultural, wildlife, cool water 3 fishery, aquatic life and fish, recreational designated uses; Sugarbush Creek, an Exceptional 4 5 Resource Waters with aquatic life and fish and recreational designated uses. And then there is 6 7 also connected wetlands Exceptional Resource 8 Waters, the wetlands designated uses. Other designations that apply in this stretch of the Bad 9 River is Section 10 water. 10 11 So we had water quality concerns, which 12 is why the Band decided to deny the 401 13 certification of the Utility RGP for this 14 specific proposal, and this slide just shows some 15 images of -- some images and a map of this proposal 16 area. 17 So the map at the bottom of the screen 18 shows the proposed one -- an over 19 one-and-a-half-mile HDD that was proposed, and 20 that's highlighted in red. 21 And then you can also see the temporary 22 workspaces proposed for the staging access and 23 what's needed to implement this project. 24 And in the upper left -- this is a 25 photo -- we're looking east, so you are close to

the Government Road location, which would be on 1 2 the western end of the HDD, not quite at the road 3 but close to, and you are looking east across the Bad River and the floodplain, and Sugarbush Creek 4 5 is in the background. And at the sort of edge of what you can see, that's where it's coming out of 6 the floodplain. There is that steep slope nearby 7 Sugarbush Creek. 8

9 And then the top right photo, this is 10 actually taken east of the Bad River, and this is 11 taken at the top of the floodplain that I was just 12 referencing, and you are looking at Sugarbush 13 Creek. And then further in the background would 14 be where the Bad River is.

15 So when we were reviewing this proposal, there was multiple categories of potential 16 17 discharge, which included potential discharge of 18 drilling fluid during the HDD construction, 19 including during the storage and handling of the 20 drilling mud and slurry waste. There was also 21 potential for discharge of stormwater associated with HDD construction and into wetlands and other 22 23 waters within the worksite area, including access 24 routes. So this gets at the 25 erosion/sedimentation-type concerns.

1 There also is discharge of dredged or fill 2 material in wetlands due to the -- within the 3 access route and temporary workspaces and the discharge of dredge or fill material due to 4 excavation within wetlands that would be needed to 5 implement this project, and then the potential for 6 7 discharge of fuels, oils, or chemicals from the 8 equipment into waters within the worksite area, including the access routes. 9 10 We determined that this project did not 11 comply with water quality considerations, and, 12 thus, we denied the 401 Certification for this 13 proposal. And details of our decision are included in the December 22nd, 2020, letter from 14 15 the Band to the Corps. This is a letter that we attached to our will affect analysis and describes 16 in detail the water-related concern. 17 18 In summary of those water-related 19 concerns, this proposal was eligible under the 20 antidegradation policy because of OTWR, Bad River, 21 and the Exceptional Resource Waters, 22 including Sugarbush Creek and wetlands that would 23 be affected and, also, this project was ineligible 24 under the Band's wetland and 25 watercourse protection ordinance. These are the details that are referenced in that December 2020 decision
 document.

Another area that was highlighted in that decision document was that there was other feasible alternatives that exist with lower, or less adverse environmental impacts required in our water reviews.

8 We also looked at alternatives that 9 exist and the least environmental damaging 10 options. So, again, more details in that decision 11 letter that I think should be part of the record 12 already.

We then wanted to move on to just a general case study about HDD to talk a little bit more about what I had talked about earlier today. So we'll start with an overview of the HDD approaches for utility waterbody crossings.

18 And, basically, the next few slides for this case study will talk about general benefits 19 20 of HDD and open trench crossings, regulatory 21 oversight that applies to planning of HDD versus 22 the reality of what can happen, and the types of 23 potential impacts of water quality and then concerns with sensitive environments and 24 25 downstream subsistence populations.

1 So, in general, benefits of HDD. These 2 statements are not specific to any waterbody 3 crossing and do not consider the site assessment work that would need to occur before deciding it 4 5 was appropriate to design an HDD at a specific location. The general benefits of HDD 6 7 water crossings is HDD can reduce impact. When appropriate, HDD results in less adverse effects 8 9 in water quality and aquatic resources compared to 10 open trench methods. 11 HDD depth can reduce risk, meaning that 12 using this method you can install Utility lines 13 below waterbodies. In theory, that reduces the risk of exposure due to channel erosion, migration 14 15 and/or downcutting. 16 And then if an HDD project is properly 17 planned, that can add protection to the waters. 18 Potential for adverse effects to water quality 19 caused by HDD construction and inadvertent release 20 can be reduced by preventative and contingency 21 response measures. On this next slide, this is a document 22 23 from the Army Corps of Engineers that acknowledges that there is risk associated with HDD techniques 24 25 being used for waterbody crossings, and it does

read, "Drilling fluid released (or mud loss) has become a critical issue which engineers and contractors face during HDD because Frac-Out causes project delays and poses grave risks in environmental sensitive and urban areas."

6 So we do appreciate that the Corps does 7 acknowledge that HDD has potential grave risks in 8 environmental sensitive areas. When it comes to 9 oversight and regulation of HDD, it just has a 10 couple bullet points.

11 You know, there is often construction 12 stormwater permitting; however, stormwater 13 management plans specific to stormwater do not include -- or do not often include specific 14 concerns for HDD, including the inadvertent 15 releases, and this can be more specific to the 16 17 erosion/sedimentation controls specific to 18 construction.

19 County grading and erosion/sediment
20 control plans. They often also don't have things
21 specific to HDD because many don't have experience
22 with HDD oversight, and they focus in other areas
23 that the county may have experience in.
24 And then Army Corps' Clean Water Act

25 Section 404. Regulatory oversight is frequently

1 avoided due to lack of planned surface impacts to 2 non-Section 10 waters. 3 When Clean Water Act 404 authorization is required, it provides an opportunity for 4 5 federal, state, and tribal environmental managers to review expected water quality effects and 6 7 require reasonable best management practices to 8 avoid, minimize, and mitigate adverse effects from 9 HDD. So this slide just gives a couple of 10 11 visuals of what these construction sites that are 12 using HDD can look at -- look like. So the photo on the left is showing an 13 HDD bore pit disturbance. 14 15 And then the photo on the right is showing the right-of-way clearing that is required 16 17 when these types of projects are implemented. 18 These photos, which are from the Ohio EPA, these show water quality impacts resulting 19 20 from HDD projects, and, as I emphasized in a prior 21 slide, you know, often if it's a non-Section 10 water, you know, project proponents are saying 22 23 that these types of impacts don't exist or there is not a risk or these aren't considered as part 24 25 of the decision-making to decide to permit or not

permit a type of project. But these types of water quality impacts, these releases, these are things that do happen associated with HDD or boring projects. So I think both visuals show how much water concern there can be if there is an inadvertent release that occurs in waterbodies.

7 You might be wondering how frequently do 8 these types of releases happen, so we did a little 9 digging into that. So these types of inadvertent 10 releases frequently -- sorry, inadvertent release 11 on a project is dependent on a range of variables 12 within and outside the operator's direct control.

Frequencies of inadvertent releases on up to a half of HDD crossings have been reported, and in the river crossings of Enbridge Line 3 construction project in Minnesota, there was 28 IRs at 12 river crossings that were reported.

18 Individual releases exceeding a thousand 19 gallons or more are not uncommon from what we 20 could see in our review. The Enbridge Line 3 21 replacement had a single release of up to 9,000 22 gallons.

Reported instances of operators -- there
has been reported instances of operators
continuing with HDD after recognizing an

inadvertent release has occurred rather than
 abandoning and restarting.

3 And then to just get a little bit further in the nature of inadvertent releases, 4 5 drilling fluids frequently contain 1 to 5 percent bentonite clay. The small particle size of 6 7 bentonite can remain for prolonged periods and 8 delay settling, resulting in potential increases in suspended sediment and turbidity for long 9 distances downstream. Drilling fluid released 10 11 into wetlands can solidify and present a physical 12 removal challenge, and other additives are 13 frequently used with potential effects on aquatic 14 communities.

You might remember from Chris's presentation he went through some of the narrative and numeric criteria which, are in many cases, our water quality concerns with RGPS, and these are a reflection of some of the criteria that these would impact.

Pulling out the narrative criteria that talks about turbidity and TSS along -- hold on one sec. Okay. Along with the numeric criteria that's in our water quality standards, turbidity shall not increase more than 5 NTU over natural
1 background when natural background is 50 NTU or 2 less. When natural background is more than 50 3 NTU, turbidity shall not increase more than 10 percent above the background levels. So that's 4 5 language directly from the water guality standards approved under the Clean Water Act. 6 7 So on this slide we took some of that information we gathered that I just went over to 8 give a visual for conceptual impact to water 9 10 quality from an inadvertent releases. 11 This chart shows the increase in 12 turbidity that could be anticipated in a range of volumes for HDD. 13 14 The axis shows from zero to 10,000 gallons, well within the range of observed IRs, of 15 16 which we described in a prior slide. The vertical axis shows the estimated 17 18 increase in turbidity resulting in an inadvertent 19 release. The red horizontal line shows the Band's 20 21 water quality standards of no more than 5 NTU. 22 Fifty NTU or less assumes for this analysis, which 23 are based on ranges, that could reasonably be 24 expected. 25 So assumptions include the receiving

stream range is a range of 50 cfs; inadvertent release has 30,000 milligrams per liter; and the and the duration of inadvertent release is six hours.

5 You can see the relationship between --6 sorry, the relationship between suspended sediment 7 (or SCC), and the turbidity in NTU is variable 8 depending on the waterbody.

9 The upper and lower ranges that we show 10 on this graph are based on the relationships of a 11 U.S.-derived study of rivers in Minnesota and, 12 basically, to arrive at a relationship between SCC 13 or TSS, or turbidity, those need to be site-specific relationships. You can't take a 14 relationship derived, say, on the Bad River and 15 then apply it to all waterbodies. 16 That's 17 something that USGS and other entities are well 18 aware that those need to be site-specific 19 relationships.

20 So this graph shows that there is 21 likelihood that inadvertent release can result in 22 an exceedance of that turbidity numeric criteria 23 that we went over. Because you can see at 2,000 24 gallons you have an exceedance of that criteria, 25 and, as we know, inadvertent release volumes can be much greater than 2,000 gallons. So there is multiple inadvertent release scenarios that result in the Band's turbidity criteria could be exceeded.

5 This is an example scenario based on 6 frequently observed stream conditions in the 7 watershed and the range of observed IRs. Many 8 situations exist that results with a more extreme 9 effect on water quality than what is shown on this 10 graph. And that's the conclusion of that case 11 study.

12 So then going on to the next case study. 13 This one we wanted to look at a project that did 14 occur the Utility RGP and is in our area of 15 interest.

So this is a summary of North Fish Creek
Tributary Bank Stabilization and Watercourse
Modification Project.

19 The location is described on the slide.
20 The waterbody directly affected is an
21 unnamed tributary to North Fish Creek. The
22 reported impact is 1,530 square feet of permanent
23 fill into the watercourse.

24This site is off the reservation and is25approximately -- or not quite six-and-a-half river

1 miles to Lake Superior, it's a little over 2 18-and-a-half miles to the reservation boundary, 3 and not quite 23-and-a-half total miles to the sloughs. 4 5 The Wisconsin DNR designations that apply macroinvertebrate, cold water, cool-warm 6 7 headwater, fish and aquatic life designated uses. 8 Again, this is off the reservation, but we have already described the water quality 9 10 connections for tribal waters for projects that 11 are outside the watershed but might discharge 12 in Chequamegon Bay or Lake Superior because of the 13 known connections or hydrologic connections between that area and the Kakagon and Bad River 14 15 Sloughs complex. 16 This slide includes an aerial imagery, is 17 showing the project site, and then it includes a 18 couple photos, including, as you can see, that very turbid water which is downstream of the 19 20 project site. 21 And then the photo on the top right is 22 showing work happening at the project site. 23 So some of our water concerns with this is increased sediment, nutrients, and bacteria. 24 25 Long-term or indirect effects may have occurred.

And this is a project that the Corps did not coordinate with us so there wasn't, as far as we know, any tribal coordination that the Corps took on related to this project even though this did get authorized after we submitted our will affect letter.

7 So then going to the next case study. This one is focusing on Bayfield Electric's pole 8 replacement. This one is nothing that has 9 10 occurred. This is just an example -- a reasonable 11 and foreseeable example of something that could 12 occur off the reservation, and it is informed by our experiences on the reservation, so we just 13 have a reasonable and foreseeable location 14 15 described up there based on where Bayfield Electric's current Utility line is. 16 17 And so this is an example of looking at

18 waterbodies: Beartrap Creek, Little Beartrap 19 Creek, Wood Creek, and connecting wetlands.

20 Theoretical impact is roughly 92 cubic
21 yards from excavation.

The Wisconsin DNR designations that apply include Little Beartrap Creek, fish and aquatic life, coldwater habitat. Beartrap Creek is an Exceptional Resource Water/Outstanding Resource Water depending on the reach, also fish
 and aquatic life, and warm water sport fishery.
 Wood Creek is fish and aquatic life, cool-warm
 headwater.

5 Tribal designation in the tribal waters are downstream of our theoretical project site. 6 7 They include Beartrap Creek as an Outstanding Resource Water until it gets to the area where 8 rice grows, and then it is elevated to Outstanding 9 10 Resource Water and has cultural, wildlife, aquatic 11 life, fish and recreational, wild rice, and cool 12 water designation uses.

Wood Creek; Outstanding Resource Water, wild rice water, cultural, wildlife, aquatic life and fish, recreational, cool water fishery designation uses.

17 So we wanted to use this as an example 18 based -- based on our experience. Army Corps did 19 not always regulate these types of activities that 20 use -- like especially if these types of 21 activities happen on frozen ground conditions, and 22 often frozen ground conditions is used as a best 23 management practice to minimize impacts to the 24 wetlands and waterbodies.

However, as we have been experiencing,

25

1 frozen ground conditions or winters don't 2 always result in frozen ground conditions these 3 days as they have in the past.

4 Continued change in climate affecting 5 average air temperatures and invariable snowpack 6 has a direct influence on ground temperatures. 7 The determination of frozen ground conditions is 8 subjective and uses the contractor's judgment 9 without oversight.

10 So we want to point that out because 11 this pole replacement project is something that 12 could occur in nonfrozen ground conditions, and we 13 do think the nonfrozen ground conditions do result in larger water quality concerns and impact. Some 14 15 water quality concerns with this type of activity, which is pole replacement, includes turbidity 16 17 sedimentation, nutrients, and wetland losses.

18 So then we have some visuals with this 19 reasonable and foreseeable example of a case 20 study. Pole replacements, as other maintenance 21 work through wetlands, do not always go to plan or 22 result in minimal adverse impact to water 23 resources.

24 So these are just photos that show, in 25 this example, an excavator that slid off construction matting can cause impact on wetlands
 during construction. Erosion controls are being used
 as shown in these pictures.

We just want to emphasize that in our experience we know that there is an original plan and then there is the reality of what actually happens on the ground, and they don't always match up.

9 Okay. Our last case study that we have 10 for our testimony today is trying to get at a case 11 study to really stress cumulative impacts, so we 12 chose a case study of Xcel Energy having multiple 13 projects.

14 The Army Corps did provide us with some 15 historical information about projects that had been authorized under the Utility RGP. So as we 16 17 reviewed that information, we saw Xcel Energy had 18 a number of rows of activities in that Army Corps' spreadsheet they provided us. So they had 19 20 basically 32 rows or activities in that 21 spreadsheet, or single complete projects. 22 We had a little bit of a hard time 23 creating and, like, thoroughly evaluating this

25 when the entity had multiple single and complete

24

case study because of how locations are reported

1 projects. The location is reported like a 2 centroid, so it's really hard to pinpoint the 3 specific locations of activities. We still wanted to try to demonstrate 4 5 this as a case study, so the reported impacts for all 32 activities that required a PCN include .17 6 7 acres of permanent wetland impacts plus 83.21 8 acres of temporary impact. We wanted to note 9 related to the permanent impact listed that 10 mitigation was required by the Corps, which is 11 good. However, it consisted of purchasing credits in a watershed different than where the watershed 12 13 impacts were occurring. Still within the Lake Superior basin, but does not help replace those 14 lost wetland functions specific to the area where 15 they were lost. 16 17 So some specific details related to 18 what's called W3604. This involved 15 -- crossing of 15 watercourses including North Pikes Creek, 19 20 Racket Creek, and Sand River. It also consisted 21 of .81 miles of wetlands. And these are just the 22 Wisconsin Wetland Inventory maps of large 23 wetlands, which are the wetlands 2 acres in size or greater. But this does not include the 24

25 quantification of smaller wetlands that may have

1 existed and are impacted.

2	Again, this example is off reservation.
3	However, we wanted to show it because this is in
4	our area of interest, and we know that things that
5	are outside the Bad River watershed but still
6	connected to Chequamegon Bay and Lake Superior do
7	affect the water of tribal waters, such as Kakagon
8	Sloughs or part of the reservation on Madeline
9	Island or the Bad River herself. As in Jessica's
10	or maybe it was Chris's presentation, we talked
11	about how far up the Bad River that it's
12	influenced by the Lake Superior seiche.
13	So on this slide, there are the
14	different designations that applied to the
15	different waterbodies and I've already noted the
16	water quality connections to tribal waters.
17	So we are hoping to have a little bit
18	more details in our case study in our written
19	comments. So if there is any additional
20	information the Corps can provide us, please let
21	us know so we can continue to evaluate and help
22	further articulate the water quality concerns that
23	can result in our larger projects or combination
24	of larger projects.
25	And here's some visuals to go with that

1 case study. Pole replacements along existing 2 lines can result in earth disturbances, even with 3 timber matting used to cross wetlands and watercourses. Appropriate implementation of BMPs is important to 4 5 quickly stabilizes soils. The longer and more remote the route, the more potential for adverse impacts and 6 7 cumulative impact in the drainage basin and 8 downstream.

9 So that concludes our case study slides. 10 And then the next part of our testimony is talking 11 a little bit more about tribal and treaty rights.

12 In the RGPs, they typically include 13 language that regulated activities that may cause more than minimal adverse effects on tribal rights and 14 15 protected tribal resources are ineligible for coverage under RGPs, and we do appreciate that, 16 but we are not sure who is the one that makes that 17 18 determination because the Corps, nor the project proponent, they don't necessarily have the 19 expertise to determine on their own whether 20 21 regulated activities may cause more than minimum 22 effect on protected tribal resources and tribal 23 land. 24 So I wanted to share with you about what

24 SO I wanted to share with you about what 25 it is to be a resource department with the 1 treaties, what it is to serve a way of life that 2 is treaty-resources oriented, and I want to try to 3 highlight for you what we do in our resources department to care for the Band's way of life and 4 5 what permits -- what regulated activities under these two RGPs that we are talking about, what 6 7 they risk in terms of impact on tribal treaty rights. 8

9 So the Tribe is closely tied to the 10 natural environment by a system of beliefs and 11 practices that organize everyday life. This 12 relationship involves a notion of connected geographic 13 places that embodies people's migration to these rivers and identity, a connection of people to see, hear, 14 15 and feel changes and connected reaches of streams, rivers, and creeks. 16

Today with seeing, feeling, and hearing changes is represented in water quality standard criteria and demonstration tiers; the important meaning for people is the water quality necessary for gathering, fishing, trapping, hunting and a safe home.

23 So trying to expand upon what we heard 24 from Chairman Blanchard this morning, and this 25 slide does show the Chequamegon Bay area and,

1 specifically, the Bad River watershed and has some 2 photos of different locations in the watershed 3 ranging from White River to Tyler Forks River. Families and communities organize around 4 5 different activities according to the changing seasons as resources become available for harvest. 6 7 As one resource -- as one researcher has noted, 8 traditional food system uses provides opportunities for cultural expression and transmission of cultural 9 10 patterns from one generation to the next. 11 An important aspect of evaluating water 12 resources is the language. The Ojibwe language transmits 13 knowledge and teaching from one generation to the next. The Ojibwe language tends to wrap up many ideas into 14 15 word and involves a highly developed vocabulary for discussing activities, such as fishing methods as well 16 17 as more complex and abstract notions such as the 18 knowledge of manoomin harvesting. 19 So we just have a few slides. This 20 slide shows some photos of tribal members 21 harvesting fish, and I know this type of harvest 22 is on a lot of community members' mind right now 23 because there is a lot of harvest that happens in the spring. So folks are getting ready to harvest 24 25 in the spring, including netting and spearing at

Bad River Falls, and then there is also fish
harvested as part of the commercial lake fishery
and home-use lake fishery. And Chairman Blanchard
talked a little bit about fishing earlier this
morning.

We also wanted to show some photos of 6 7 tribal members harvesting manoomin. This is 8 something that most folks have heard about. Manoomin is wild rice. This is something that's 9 10 unique to this part of the world that, again, is 11 responsible for the identity of people and 12 especially in a culture to have survived through a 13 very challenging history. Wild rice helps -- wild rice is the cornerstone of the Band's migration 14 15 story to this specific area that we now call the 16 Bad River Reservation.

We also wanted to provide some photos regarding plants and medicines that are harvested by community members.

All parts of the forest have different uses to people at different times. I believe folks have started maple sugar processing this year with our warmer temperatures. Again, because this is something that has always taken care of us and that's why we do that. Sorry. This is something 1 that's always taken care of the Bad River
2 community. And the reason the community does this
3 is so community members have gifts, so they have
4 food, so they have that medicine that these plants
5 can provide.
6 And we heard Chairman Blanchard this

7 morning talked about gathering medicine and how he 8 has personally used it to heal himself and family.

9 So a wide variety of plant species on10 this slide, including cranberries.

11 And we wanted to conclude this section 12 with a slide showing tribal members harvesting 13 deer and other wildlife, whether they are trapping or using other methods to harvest animals who rely 14 15 on healthy waters, and just how everything is connected and goes back to just continuing to make 16 17 sure these high-quality resources are protected 18 and are still able to not only provide for their current generation but for that future generation, 19 20 looking out for their seventh generation.

So if you think back, I imagine it's very hard for people to -- you know, back in the day when tribes had to make a treaty with the United States, I imagine it was very hard for them to give up their territory, a time in history that 1 was probably very challenging to them, and yet 2 they managed to think ahead, seeing, hearing, and 3 feeling, and relying on those connected water 4 resources.

5 So now we are on the final section of 6 our testimony, and we wanted to conclude our 7 testimony with describing our recommendations to 8 the Corps specifically to the Minor Discharges RGP 9 and the Utility RGP.

10 Please know that we are here listening 11 to other's testimony, and we are interested if the 12 Corps has any additional information to provide us 13 such as that -- all right. Just give me one second -- such as the statement of findings or EA 14 15 that Matt referenced in his presentation because we are continuing to evaluate, and we will be 16 17 providing written comments as a follow-up to this 18 testimony.

Saying that, I'm going to pass it back to Jessica who is going to go over the recommendations related to the Minor Discharges RGP.

23 MS. STRAND: I only have a couple slides 24 to present regarding the recommendations that the 25 Tribe has on the Minor Discharges RGP. It

1 shouldn't be a surprise they were in our original 2 letters. 3 So our recommendation includes modification under 33 CFR 325.7(b), which allows 4 that a condition be added that the Bad River 5 Tribe's area of interest, which is shown on Map 1 6 7 here on this slide, require preconstruction notification for all activities allowed under the 8 RGP. 9 10 Add to that a condition that requires 11 Corps coordination with the Band for all regulated 12 activities proposed in that same area now that a PCN would be received. 13 14 And then add the coordination language that's found in most of the other RGPs that the 15 Corps and the Tribe were able to resolve issues. 16 17 I'm not going to read the whole thing, but, 18 basically, allows for the Corps to share the preconstruction notice with the Tribe and the 19 20 Tribe to get back to the Corps on whether we have 21 substantial concerns or comments, plus additional 22 time to develop those in more detail, and then 23 allows the Corps to consider those comments from the Tribe before making a decision on whether or 24 25 not the RGP applies.

1	So if those three preferred
2	recommendations are not something that the Corps
3	is willing to modify into the Minor Discharges RGP
4	then, which includes the PCN requirement, the
5	Tribe's area of interest, and the
6	condition-required coordination, then the Tribe
7	believes the Corps must revoke the entire Minor
8	Discharges RGP for the geographic area identified
9	by the Band.
10	And that brings us to the Utility RGP
11	recommendations.
12	MS. TILLISON: Okay. Recommendations to
13	the Corps for the Utility RGP include revoking the
14	Utility RGP for the following individual or
15	categories of activities, which includes
16	construction construct Utility lines, including
17	foundations for overhead Utility line towers,
18	poles, and anchors; maintain or repair Utility
19	lines, including foundations for overhead Utility
20	line towers, poles, and anchors using
21	directional drilling, including HDD or boring
22	methods; the use of directional drilling or HDD or
23	boring methods for installing or replacing Utility
24	lines, including associated access roads.
25	So the same category continued is asking

1 the Corps to revoke the Utility RGP for survey 2 activities, including core sampling, 3 exploratory type bore holes, exploratory trenching, and other activities not explicitly 4 5 listed in this category of the RGP; also, construct or expand substation facilities; 6 7 construction of permanent and temporary access 8 roads necessary for the construction of Utility lines and substations; and then the remediation of 9 10 inadvertent returns of drilling fluid category in 11 its entirety.

12 And I just want to stress that when it comes 13 to remediation of inadvertent returns, that these regulated activities should be considered when the Corps 14 15 completes an individual permit process of directional drilling or boring methods. This should include, 16 17 but is not limited to, the Corps requiring the 18 project proponent to be proactive in a remediation plan prior to permitting a decision being made 19 20 regarding these types of methods. This should also 21 include, but is not limited to, the Corps coordinating 22 with the Band for activities within the geographic 23 scope illustrated on Map 1 specific to the 24 individual permit process. 25 We are also recommending that the Corps

1 revoke the Utility RGP for the following 2 geographic areas: Section 10 waters and waters of 3 the U.S. located within the geographic area illustrated on the Corps' draft Map 1, unless the 4 5 Utility RGP is revised to both revoke the individual activities, categories of activities and 6 7 other geographic areas described above; and, 8 second, to incorporate the conditions described below for the remaining activities. 9 10 We recommend that the Corps, for the 11 remaining regulated activities and geographic 12 areas, modify the Utility RGP to add the 13 following: Revise thresholds described in the Activity Restrictions section to include temporary 14 15 wetland and waterbody impacts into the calculation. 16 17 For example, regulated activities cannot 18 have greater than a half-acre of temporary and permanent adverse effects to the waters of the 19 20 U.S. instead of how it's written currently, which 21 is only considering the permanent impacts to 22 waters of the U.S. 23 Another example is regulated activities may not have greater than 300 linear feet of 24 25 tributary impacts, including both permanent and

1	temporary adverse effects instead of how it's
2	currently written, which only focuses on the loss
3	of 300 linear feet of tributary.
4	And then continuing with this, add
5	proposed reporting requirement number two with the
6	Bad River Band coordination process for a subset
7	of the remaining activities within the Utility
8	Survey Activities that are located within the
9	geographic scope illustrated on the Corps' draft
10	Map 1; the subset of survey activities consisting
11	of surveys, sampling, and sample plots or
12	transects for wetlands delineations.
13	And then continuing, add a PCN
14	requirement with the Bad River coordination
15	process for historic resources surveys and the
16	remaining activities within the Utility Lines,
17	Substation Facilities and Access Road categories
18	that are located within the geographic scope
19	illustrated on the Corps' Map 1.
20	And then revise PCN requirement for
21	areas with suspected sediment or soil
22	contamination to include specific reference to
23	existing oil pipeline valve locations given the
24	high probability of contamination at existing
25	valve sites.

1 And then continuing on, to revise 2 general conditions on the Duration of Temporary 3 Impacts, which is general condition 15, to require that restoration of temporary discharges also 4 5 occur within the 90-day time frame that is referenced similar to the general condition on the 6 7 Duration of Temporary Impacts that already is 8 included in the Minor Discharges RGP. 9 Revise RGP to require agency 10 coordination if a project proponent requests a 11 waiver for the Duration of Temporary Impact, 12 similar to the requirement when a waiver is 13 requested to exceed the 300 linear feet tributary 14 loss threshold. 15 We are also recommending to revise the Agency Coordination section for waivers allowed 16 17 under the Utility RGP to explicitly require the 18 Corps to coordinate with the Bad River Band when a 19 waiver is required in the geographic area 20 illustrated on the Corps' Map 1. 21 If the Corps is not willing to modify 22 the Utility RGP by revoking the individual and 23 categories of activities identified, revoking geographic areas identified, and adding the --24 25 adding or revising the conditions identified for

1 the remaining regulated activities, then they must 2 revoke the entire Utility RGP for the entire 3 geographic area identified by the Band. I just want to say I know that was a 4 5 lengthy testimony but hopefully provided information that further explained what our water 6 7 concerns are and also provided recommendations on how the Corps can resolve those concerns. So I 8 9 just want to say thank you. 10 MS. GRASER: Okay. So I just wanted to 11 allow the remaining time we have associated with 12 today's hearing for any -- anyone who may have 13 registered. I didn't see anyone right at 1:00 o'clock, but if anyone has registered to 14 speak or if anyone just walked in and would like 15 to provide some verbal comments, we would welcome 16 17 that. 18 Similar to this morning's format, we would have any speaker offer their name and spell 19 20 it for our court reporter. 21 We will afford the opportunity for 22 interested parties to present their views, 23 opinions, and information on the proposed action. 24 We are limiting testimony for each 25 individual to ten minutes, and I can give anyone

1 who would like to speak a warning at about eight 2 minutes just to make sure they can plan their time 3 accordingly.

Again, I'll say all comments and information presented during the hearing today will be considered when evaluating whether to re-issue the Minor Discharges Regional General Permit and Utility Regional General Permit for the watersheds in the Bad River Reservation.

10 We ask that all speakers focus their 11 comments on whether the use of these two RGPs on 12 the Bad River Reservation would or would not apply 13 and whether new conditions could be added to the Regional General Permits to help issue compliance. 14 15 Comments expressing support for or opposition to the reissuance will not be 16 17 informative to our decision. Rather, we must base 18 our decision on substantive information related to the application of water impacts from discharges 19 20 regulated under the Clean Water Act.

Again, we are unable to provide responses to questions or comments today and anyone who would like to speak, we will ask them to provide their testimony independently without any cross-examination of others, and we ask that

1 those present allow each other the opportunity to 2 share their views without interruption. 3 At this time, I'll open the floor to see if there is anyone who would like to speak. 4 (No one indicated.) 5 MR. KONICKSON: So I just want to say 6 thank you to everybody who provided thoughtful 7 comments and well-prepared presentations. I want 8 9 to assure everyone we will consider everything we 10 heard and everything we get in writing between now 11 and March 12th when we make our decision to re-issue the permits or not re-issue the permits. 12 13 I appreciate the people in attendance today. 14 I won't repeat what Becky just said 15 because she just said it, but I will provide a reminder that comments can be emailed. Maybe you 16 17 can pull up that slide with the email address. I 18 won't read it. Comments can be provided by email 19 or mailed to your St. Paul District Office. 20 And just another reminder that when 21 submitting comments, everybody should be apprised 22 that commenting is public, so don't put any personal information in there that you don't want 23 24 to be made public. 25 One last call for anybody who would like

1	to speak.
2	Okay. We will officially adjourn the
3	hearing. Thank you.
4	(The public meeting was
5	adjourned at 2:01 P.M.)
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1 CERTIFICATION 2 STATE OF WISCONSIN ) ) SS. FOND DU LAC COUNTY 3 ) 4 I, AnnaMaria H. Casper, a Registered 5 Merit Reporter, do hereby certify that the 6 foregoing public meeting testimonies were 7 stenographically recorded by me at the time and 8 place herein set forth and thereafter transcribed; 9 The foregoing pages contain a full, 10 true, and accurate transcription of the 11 proceedings and testimony stenographically 12 recorded by me to the best of my skill and 13 ability; 14 I further certify that I am not a 15 relative or employee or attorney or agency of any 16 of the parties, or a relative or employee of such 17 attorney or agency, or financially interested 18 directly or indirectly in these proceedings. 19 Dated: This 5th day of March, 2024. 20 Ane Mart Causes ARIA H. CASPER, RMR 21 22 23 24 25