<u>Public Comments Submitted by:</u>
The Hoosier Environmental Council, Save the Dunes Conservation Fund, Freshwater Future, the Great Lakes Environmental Law Center, Alliance for the Great Lakes, and Sierra Club Hoosier Chapter-Dunelands Group

December 18, 2012

Mr. Marty Maupin, Project Manager
Indiana Department of Environmental Management
100 North Senate Avenue
MC 65-42 IGCN 1255
Indianapolis, IN 46204-2251

RE: Public Comments on Application of Enbridge Energy, Limited Partnership for 401 Water Quality Certifications
IDEM Nos. 2012-322-45-MTM-A and 2012-321-64-MTM-A

Dear Mr. Maupin,

On behalf of the Hoosier Environmental Council, Save the Dunes Conservation Fund, Freshwater Future, the Great Lakes Environmental Law Center, Alliance for the Great Lakes, and Sierra Club Hoosier Chapter-Dunelands Group, we submit the following comments regarding the application of Enbridge Energy, Limited Partnership for two Water Quality Certifications, as referenced above, for placement of fill material into waters of the State of Indiana (hereinafter "the proposed pipeline project"). In the comments below, we outline our concerns regarding the proposed pipeline project including the adverse impacts it will have on 145 wetlands and 82 waterways/water bodies within the Lake Michigan watershed – many of which are avoidable and, if allowed, will violate the Clean Water Act.

The proposed pipeline project is particularly troublesome in light of Enbridge's dismal track record in constructing and maintaining its pipelines. Data from Enbridge's own reports reveal that 804 spills have occurred at Enbridge pipelines between 1999 and 2010. These spills have released approximately 168,645 barrels of crude oil into the environment.[1] In 2009, Enbridge agreed to pay $1.1 million to settle a lawsuit brought by the State of Wisconsin for committing 545 environmental violations associated with construction of its oil pipeline -- violations that caused numerous impacts to waterways

[1] These figures were compiled from Enbridge's Environmental, Health and Safety and Corporate Social Responsibility Reports at http://csr.enbridge.com.

and wetlands.[2] In January of 2010, an Enbridge pipeline in North Dakota spilled over 3,000 barrels of crude oil into the environment.[3] In late April of 2010, another Enbridge pipeline ruptured and leaked over 210 gallons of tar sands crude into Minnesota wetlands.[4] And, most notably, on July 25, 2010, Enbridge Line 6B ruptured near Marshall, Michigan causing one of the largest oil spills in Midwest history. According to the EPA, approximately one million gallons of diluted bitumen spilled into Talmadge Creek which flows into the Kalamazoo River. The massive spill damaged wetlands, farmlands, residential areas and businesses, raised health concerns and lead to evacuations and warnings about swimming, fishing and drinking water. By Aug. 5th, the spill had contaminated 30 miles of the Kalamazoo River.[5]

Recently, the Pipeline and Hazardous Materials Safety Administration (PHMSA) officials announced that Enbridge had violated two dozen regulations in connection with that spill (including the fact that the company knew about defects in the pipeline years before the spill occurred). PHMSA has proposed a $3.7 million civil penalty, the largest fine ever proposed by the agency.[6] Yet, this penalty is dwarfed by the costs of the tar sands spill, which has become the most costly inland pipeline accident in U.S. history, with damage and cleanup costs approaching one billion dollars.

Now, Enbridge is proposing to double or potentially quadruple the capacity of its tar sands pipeline here in Northwest Indiana through the construction of a larger diameter 50-mile pipeline. As stated above, the construction will negatively impact 145 wetlands and 82 waterways/water bodies within the Line 6B construction area. The repeated spills caused by Enbridge's consistent failure to adequately inspect and maintain its pipelines demonstrate the very real danger posed by Enbridge's proposed oil pipeline expansion project to our communities and the need for increased oversight. If a Michigan-scale spill happens at any one of the 30 major waterways crossed by Enbridge's proposed pipeline, the spill could reach Lake Michigan and cause catastrophic and irreparable harm to our economy, public health, and the environment.

It is for this reason, that we urge IDEM to utilize the full extent of its authority under Section 401 of the Clean Water Act (CWA) to carefully scrutinize Enbridge's application and ensure the proposed pipeline project comports with all CWA and applicable Indiana requirements as follows:

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[2] Milwaukee Journal Sentinel, *Pipeline Builder to Pay State $1.1 Million For Violations,* at http://www.jsonline.com/news/wisconsin/37009324.html.

[3] Marketwire, *Enbridge Energy Partners Lakehead Pipeline System Reports Crude Oil Spill in North Dakota,* Jan. 10, 2010, available at http://www.marketwire.com/press-release/Enbridge-Energy-Partners-Lakehead-Pipeline-System-Reports-Crude-Oil-Spill-North-Dakota-NYSE-EEP-1099523.htm.

[4] Elizabeth Dunbar, *Pipeline Leaks Oil in Wetlands on Leech Lake Reservation,* Minnesota Public Radio (Apr. 21, 2010) available at http://minnesota.publicradio.org/display/web/2010/04/21/oil-leak/

[5] U.S. EPA, *Response to Enbridge Spill in Michigan,* at http://www.epa.gov/enbridgespill.

[6] Chicago Tribune, *Enbridge Fined $3.7 Million for 2010 U.S. Oil Spill,* available at http://articles.chicagotribune.com/2012-07-02/news/sns-rt-enbridgespill-fine-update-2l2e8i2dth-20120702_1_pipeline-integrity-pipeline-s*afety-bill-materials-safety-administration.

I. The Proposed Pipeline Project Requires an Individual, Not Nationwide Permit under CWA Section 404

The U.S. Army Corps of Engineers (USACE) may issue nationwide permits (NWPs) for certain categories of discharges that will cause *only minimal adverse environmental effects* when performed separately *and will have only minimal adverse cumulative effects*.[7] A number of NWPs have been issued by the USACE[8] to allow minimally impactful activities to occur with little to no delay or paperwork.[9] Due to the streamlined process under the NWP program, verification of a NWP proposal is a far more simple and less rigorous process than is evaluating an individual 404 permit application. In essence, NWP verification requires only that the USACE confirm that a proposed activity qualifies for authorization under the relevant NWP and, in most cases, the proponent of the project simply notifies the USACE of its plans.[10]

Conversely, the individual permitting process under section 404 requires public notice and comment, compliance with factors identified in EPA's guidelines developed pursuant to CWA section 404(b)(1), the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Coastal Zone Management Act, historic preservation laws, and the USACE's public interest review.[11] We are aware that NWP 12 is being used to "piecemeal" another large interstate pipeline project like this one into several hundred 1/2-acre "projects" so as to avoid the individual permit process under section 404 and avoid an analysis of the overall project's impacts and alternatives.[12] However, we believe this unintended use of NWP 12, if allowed, to be an abuse of discretion considering the overarching goal of NWPs to streamline permitting only for projects that truly have *minimal adverse environmental effects* or *minimal adverse cumulative effects.* Allowing NWP 12 to be abused in this way will result in the new construction of major oil pipelines without ever requiring a comprehensive environmental review of their impacts.

Enbridge is now also attempting to side-step the rigorous individual permit review by seeking approval to proceed with pipeline construction under NWP 12. However, for reasons discussed below, the proposed pipeline project does not meet the conditions of NWP 12 and, although we recognize that USACE has ultimate discretion to determine whether the proposed pipeline project meets NWP 12 conditions,[13] that discretion can be influenced by IDEM. Specifically, under 33 CFR § 330.4, the USACE may consider IDEM's denial of 401 water quality certification in determining whether to exercise its "discretionary authority" to require Enbridge to obtain an individual permit. Moreover,

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[7] 13 USC § 1344(e)(emphasis added).
[8] 33 CFR § 330.5(a).
[9] 33 CFR § 330.1.
[10] 33 CFR §§ 325.1(c), 330.1(e).
[11] 33 CFR §§ 325.1 – 325.6
[12] *Sierra Club v. Bostick,* 2012 U.S. Dist. LEXIS 109015 (W.D. Okla. 2012).
[13] *See* 33 CFR § 330.1 (stating if the USACE "finds that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest, he shall modify the NWP authorization to reduce or eliminate those adverse effects, or he shall instruct the prospective permittee to apply for a regional general permit or an individual permit.")

Section 307(c)(1) of the Coastal Zone Management Act (CZMA) requires the Corps to provide a consistency determination and receive state agreement that a NWP "authorizes activities within a state with a Federally-approved Coastal Management Program" if those activities "will affect land or water uses or natural resources of the state's coastal zone.[14]" If the state disagrees with the USACE's consistency determination, authorization for activities that affect land or water uses or natural resources of the state's coastal zone are denied "without prejudice" until the applicant furnishes the USACE with an individual consistency certification pursuant to section 307(c)(3) of the CZMA and demonstrates that the state has concurred.[15] Finally, although USACE is not required to review a particular activity otherwise qualifying for an NWP under the individual permit scheme solely on the basis that the activity has not received CZMA consistency agreement from the state, USACE may consider that factor in determining whether to exercise its discretionary authority to require an individual permit application.[16]

As discussed fully below, the proposed pipeline project does not meet the threshold requirements and conditions to proceed under NWP 12, violates the Clean Water Act, and to our knowledge has not received a CZM consistency determination from IDEM or DNR. Accordingly, IDEM should deny water quality certification and urge USACE to review the proposed project under section 404's individual permitting scheme.

A. <u>The Proposed Pipeline Project Does Not Meet the Minimum Threshold Condition for NWP 12</u>

NWP 12 allows "activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities" to proceed without an individual 404 permit "<u>only if</u> the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.[17]" Based on even cursory review of Enbridge's application, it is clear that the proposed pipeline project requires an individual permit under section 404. Indeed, IDEM's Notice of Public Hearing published on November 20, 2012 states:

> Together the projects in total will traverse Lake, Porter, Laporte and St. Joseph counties and cross 145 wetlands for a total 23,726.9 linear feet. There will be temporary impacts to 76.3 acres of wetland of which 28.40 acres is forested wetland. Temporary impacts will be mitigated by planting and monitoring at the impacts sites. The projects will permanently convert 3.24 acres of forested wetlands to emergent wetlands. Permanent impacts will be mitigated by restoring 70 acres to 12.3 acres of forested wetlands; 1.5 acres of scrub-shrub wetlands; 17.7 acres of emergent/inundated wetlands and 34.7 acres of herbaceous dry to mesic prairie grassland.

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[14] 33 CFR § 330.4
[15] *Id.*
[16] *Id.*
[17] USACE, *2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions (with corrections)* at p. 7, available at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf.

Setting aside the fact that Enbridge has not demonstrated how its proposed "temporary impacts" from clearing 28 acres of trees from forested wetlands are not actually permanent impacts to those wetlands, IDEM's notice clearly states that the project "will permanently convert 3.24 acres of forested wetlands to emergent wetlands." As such, the project on its face exceeds the ½ acre threshold requirement for approval under NWP 12. Furthermore, even if the ½ acre limit is applied in a piecemeal fashion to each individual stream and wetland project to determine the applicability of NWP 12, many of the individual projects likely exceed the ½ acre threshold.[18]

Enbridge's attempt to get around the threshold requirement through compensatory mitigation of permanent impacts must fail according to the plain language of various terms and conditions applicable to all NWPs.[19] Specifically, *"[t]he acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services.[20]"* Also, NWP General Condition 23 strictly precludes the use of compensatory mitigation to increase the acreage losses allowed by the acreage limits of the NWPs.[21] "For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any project resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters.[22]" Because the Enbridge pipeline project does not meet even the basic threshold condition for permitting under NWP 12, IDEM should deny water quality certification.

B. <u>Enbridge has dismissed a practicable, alternative route that would avoid or minimize impacts to water resources not allowed under a NWP</u>

Under the CWA, discharges of pollutants, including dredged and fill material, are prohibited unless permitted pursuant to the Act.[23] At the heart of the CWA's section 404 permitting scheme is the requirement that impacts to wetlands are to be avoided; then minimized; and to the extent impacts are unavoidable, compensated.[24] For non-water dependent projects, CWA regulations do not allow for a permit to be issued if a practicable

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[18] *E.g.,* USFWS notes that "a 33-acre wetland supporting a diversity of habitat types will be bisected by the new Line 6B at MP 517.5. The crossing will be 1356.3 feet long, which will be almost double the second longest impact . . . in Porter County. This large wetland contains water that is several feet deep and has forested (living), forested (dead), scrub-shrub, emergent, aquatic bed and open water components, most of which are present within the proposed pipeline corridor."

[19] USACE, *2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions (with corrections)* at p. 44, available at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf..

[20] *Id.*

[21] *Id.* at 34-35.

[22] *Id.*

[23] 33 USC § 1311(a).

[24] *See* 33 USC § 1344(b)(1); 40 CFR § 230.10(a).

alternative to the discharge exists that would have less impact on aquatic water resources.[25] This is so because "unnecessary alteration or destruction of [wetlands] should be discouraged as contrary to the public interest.[26]" Mitigation, therefore, is a last resort to be used only to compensate for impacts that could not be avoided or minimized.

These principles apply regardless of whether a proposed activity is subject to permitting under a NWP or an individual permit. Indeed, NWP General Condition 23 concerning mitigation clearly requires that the proposed activity "must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable. . . . Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.[27]" Indeed, the very definition of "compensatory mitigation" for all NWPs recognizes that it is used only "for the purposes of offsetting *unavoidable adverse impacts* which remain after all appropriate and practicable avoidance and minimization has been achieved.[28]"

Here, Enbridge has dismissed a pipeline route alternative for Segment 2A in LaPorte and St. Joseph Counties that is both practicable and clearly less damaging to water resources than Enbridge's preferred route. Specifically, the preferred route follows the existing Line 6B right-of-way to the north of Hudson Lake that will cross 12 water bodies and 28 wetlands with permanent impacts to 5.89 acres of forested wetlands. On the other hand, Route Variation S-2A-04 follows the existing Vector/Wolverine right-of-way (also owned by Enbridge) to the south of Hudson Lake and crosses only 6 water bodies, 7 wetlands and permanently impacts a mere .02 acres of forested wetlands.

Enbridge's rationale for not choosing this clearly less impactful alternate route is that it will "require revised or new easement agreements with landowners" and "many new landowners will be impacted . . . [who] did not previously have a utility easement on their property.[29]" Yet this is simply not the case. As confirmed by IDEM, there are 69 landowners impacted by Enbridge's preferred route and only 52 on the rejected alternative route S-2A-04.[30] Moreover, Enbridge's inconvenience is simply not a factor that is considered in determining whether a particular route is in the public interest or practicable. In sum, we reiterate and concur with the analysis of the U.S. Fish & Wildlife Service with respect to Enbridge's failure to select a much less impactful alternative:

> Section 404(b)(1) Guidelines state that a proposed project must first avoid impacts to wetlands/waters, followed by minimization of impacts. Only after

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[25] 40 CFR § 230.10(a).
[26] 33 CFR § 320.4(b)(1); *see also Reichelt v. USACE,* 923 F.Supp 1090, 1094 (N.D. Ind. 1996).
[27] USACE, *2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions (with corrections)* at p. 34, available at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf.
[28] *Id.* at 43 (emphasis added).
[29] Enbridge, Individual Water Quality Certification Application – Supplemental Information, p. 12.
[30] *See* Email from Marty Maupin to Michael Hollcraft (Oct. 18, 2012).

> impacts have been avoided and minimized to the greatest extent practicable can mitigation for the remaining impacts be considered. In the case of this pipeline, there is a viable alternative to the extensive wetland impacts in the Hudson Lake and northern St. Joseph County area, which is to follow the Wolverine/Vector pipeline's right-of-way south of Hudson Lake [S-2A-04], where there are few wetland impacts. In addition, the Wolverine/Vector route has been vetted by a full EIS under FERC. By proposing to follow the existing Enbridge Line 6B through the significant wetlands associated with Hudson Lake and the mostly forested wetland in northwestern St. Joseph County, the applicant has not attempted to avoid or minimize wetland impacts. The Wolverine/Vector route is both possible and practicable and has already been surveyed by Enbridge as Alternative S-2A-04. It is our belief that avoidance of the wetland impacts in the Hudson Lake area is the only viable alternative.

In addition, alternative routes S-1A-01 and S-1A-04 are clearly shown by information provided by Enbridge in the table on Supplemental Information, page13, to result in reduced wetland impacts. Alternative route S-1A-13 has been further identified by the US Fish & Wildlife Service as environmentally-preferable routes, and we concur with this assessment. These alternative routes should be required. Enbridge's failure to avoid and minimize wetland impacts by choosing a route with significantly more impacts violates conditions required for permitting under a NWP and serves as an additional basis for IDEM to deny water quality certification for the proposed pipeline project.

C. <u>Enbridge's proposed crossing methods do not avoid and minimize impacts to water resources in violation of the CWA and NWP General Conditions</u>

Crossing methods proposed by Enbridge do not avoid or minimize impacts to water resources in violation of the CWA and several NWP General Conditions.[31] Rather than ensuring the least environmentally damaging, practicable alternatives are used, convenience seems to be the overriding concern. First, Enbridge makes no attempt to discuss what efforts will be made to ensure that the timing of wetland and stream crossings will result in the least amount of damage to those water resources. Given relatively predictable changes throughout the year in stream flow rates and periods of lower water levels, achieving the lowest level of environmental impact may depend greatly on *when* crossings occur. Thus, planning for crossings at times of low or no flow, or when wetlands are dry would greatly reduce impacts and should be required.

Second, for jurisdictional wetlands[32] and stream crossings, Enbridge indicates that it will use the "open cut" method -- the method with the most environmental impacts. An open cut allows substantial downstream sedimentation, since excavation, pipeline placement, and back fill all occur in flowing water. There are a total of 73 waterbodies and

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[31] *See* NWP General Conditions 8, 9 and 12.

[32] It is unclear whether isolated wetlands will be protected given that Enbridge is seeking to remove them from IDEM's permitting authority.

145 wetlands being crossed with no commitment by Enbridge to use less damaging alternatives to open-cut when needed -- only a description of "stream and river crossing methods [that] are typically used, subject to further restrictions by Enbridge and applicable permits and subject to modifications as approved by appropriate regulatory agencies and tribal resource specialists (as applicable) during construction.[33]" Enbridge's statement that "bridges will be designed and maintained to prevent soil from entering the water body,[34]" does not suffice. As described in Enbridge's Environmental Mitigation Plan (EMP), there are standard techniques used in the pipeline industry that are less impactful than the open-cut method including the dry dam-and-pump method, the dry flume method, as well as Horizontal Directional Drilling (HDD). Therefore, these methods are practicable and should be required, as preferred methods, especially in sensitive areas, to avoid and minimize impacts.

D. <u>The proposed pipeline project does not meet other NWP conditions</u>

As previously discussed, NWPs are valid only if the conditions applicable to the NWP are met. Failure to comply with a condition does not mean that the activity cannot be authorized but rather that the activity can only be authorized by an individual or regional permit.[35] Here, the proposed pipeline project does not meet the following conditions for permitting under NWP 12 and, therefore, should be reviewed under section 404's individual permit process:

<u>Endangered Species:</u> Pursuant to 33 CFR 330.4, "[n]o activity is authorized by any NWP if that activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Federal Endangered Species Act (ESA), or to destroy or adversely modify the critical habitat of such species." Moreover, General NWP Condition 18 precludes activity under any NWP which "may affect" a listed species or critical habitat, unless a Section 7 consultation addressing the effects of the proposed activity has been completed.[36] The U.S. Fish & Wildlife Service (FWS) has determined that the proposed pipeline project will likely have an "adverse affect" on the Federally endangered Indiana bat (*Myotis sodalis*).[37] However, to our knowledge, no formal consultation with FWS under Section 7 of the Endangered Species Act to determine how the proposed pipeline project will affect the Indiana bat or its critical habitat has been initiated.[38]

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[33] Enbridge, Environmental Mitigation Plan, p. 20.
[34] Enbridge, Individual Water Quality Certification – Supplemental Information, p. 15.
[35] *See Reichelt v. USACE,* 923 F.Supp at 1095.
[36] USACE, *2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions (with corrections)* p. 31, available at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf.
[37] US Fish & Wildlife Service, Comments to IDEM on Enbridge Project No. 2012-321-64-MTM-A (Sept. 6, 2012).
[38] *Id.* at 14 (stating, "[t]hese endangered species comments constitute informal consultation only. They do not fulfill the requirements of Section 7 of the Endangered Species Act of 1973, as amended).

Critical Resource Waters: NWP General Condition 22 prohibits discharges of dredged or fill material into waters of the U.S., under NWP 12, for "any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.[39]" Critical resource waters include, NOAA managed marine sanctuaries and marine monuments, National Estuarine Research Reserves and may also include "additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites.[40]" The proposed pipeline project will impact numerous wetlands and waterways that have been designated in Indiana as salmonid waters, outstanding state or national resource waters and/or exceptional use waters, including waters of the Indiana Dunes National Lakeshore.

Aquatic Species: NWP General Condition 2 precludes any activity that "may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species." As discussed above, other than generally describing various stream crossing methods it may use, Enbridge has not identified which method it will use on a site-specific basis, or that any of the "typical" methods proposed will ensure compliance with NWP General Condition 2. It appears that the rock flume bridge proposed in Appendix D of Enbridge's application supplemental information meets the low flow requirement cited above.

Spawning Areas: NWP General Condition 3 requires that any activity "in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized." Chinook salmon, coho salmon, and steelhead are among the many fish species that spawn in Trail Creek, Little Calumet River, Salt Creek, Reynolds Creek, and the St. Joseph River – waterways that the proposed pipeline project will cross and directly impact. Yet, Enbridge has not identified what, if any, measures it will implement to ensure compliance with NWP General Condition 3.

As noted above, Enbridge proposes the "open cut" method for water body and stream crossings. At least 31 tributaries of Lake Michigan are crossed by the proposed pipeline, and each of these crossings lies within or upstream of a waterbody in which spawning occurs. These facts demonstrate a significant probability for downstream smothering by increased turbidity should Enbridge complete the project as proposed, violating the requirements of NWP General Condition 3.

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[39] USACE, *2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions (with corrections),* p. 33, available at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf.
[40] *Id.*

Migratory Birds: NWP General Condition 4 provides that "activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable." The proposed pipeline project will impact waterways within the Reynolds Creek State Game Bird Area. However, Enbridge has not identified what, if any measures, it will implement to ensure compliance with NWP General Condition 4.

For all the foregoing reasons, Enbridge's proposed pipeline project does not meet the conditions for permitting under NWP 12. Accordingly, IDEM should deny water quality certification and urge USACE to subject Enbridge to a section 404 individual permit.

II. Even if the Proposed Pipeline Project is Subject to NWP 12, IDEM Can and Should Impose Additional Conditions and Monitoring Requirements to Ensure Enbridge's Compliance with NWP 12

If IDEM concludes that the proposed pipeline project is authorized by NWP 12, IDEM can and should impose additional conditions as part of its water quality certification to ensure Enbridge's compliance with the CWA, all NWP 12 conditions, Indiana-regional conditions for NWP 12,[41] Indiana's CZM program, and other state requirements.[42] IDEM has several avenues of authority to impose additional permit conditions to make sure our waterways and communities are protected not only from impacts from pipeline construction but also the very real and catastrophic threats of a pipeline rupture and oil spill.

In particular, we draw IDEM's attention to CWA section 401(d) which requires IDEM, as part of its certification, to impose all conditions, including limitations and monitoring requirements, as necessary to ensure that Enbridge complies with all effluent limitations, performance standards, prohibitions, effluent or pretreatment standards under CWA sections 301, 302, 303, 306 and 307, and all other appropriate requirements of State law.[43] Similarly, under 33 CFR § 330.4, "[i]f a state issues a conditioned individual 401 water quality certification for an individual activity, the DE will include those conditions as activity-specific conditions of the NWP." Similarly, NWP General Conditions 25-27 require the individual activity to comply with "any case specific conditions" added by the State in its section 401 Water Quality Certification, and "the State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management

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[41] *See Regional General Conditions for the State of Indiana,* available at http://www.in.gov/idem/4391.htm.

[42] *See 33 CFR § 330.6* (stating, "For activities where a state has denied 401 water quality certification and/or did not agree with the Corps consistency determination for an NWP the DE's response will state that the proposed activity meets the terms and conditions for authorization under the NWP with the exception of a state 401 water quality certification and/or CZM consistency concurrence. The response will also indicate the activity is denied without prejudice and cannot be authorized until the requirements of §§ 330.4(c)(3), 330.4(c)(6), 330.4(d)(3), and 330.4(d)(6) are satisfied. The response will also indicate that work may only proceed subject to the terms and conditions of the state 401 water quality certification and/or CZM concurrence.

[43] 33 U.S.C. § 1341(d).

requirements.[44]" Under this authority, IDEM can and should address the foregoing concerns and those detailed below by imposing additional permit conditions.

A. Protection of groundwater and surface water from an oil spill or leak

The devastating spill near Marshall, Michigan in 2010 affected wetlands, farmlands, residential areas, and businesses, raising health concerns and leading to evacuations and warnings about swimming, fishing and drinking water.[45] Unfortunately, impacts of Marshall spill continue to be felt. Many impacted residents are concerned about the health effects from direct or long-term exposure given that crude oil contains compounds such as benzene, toluene, and hydrogen sulfide. The evaporation or dissolution of these and other chemicals into the air and water can cause respiratory illnesses, nausea, and headaches. Indeed, nearly 50 residents near the spill site were urged to evacuate following the detection of elevated levels of benzene in the air.[46]

In Indiana, Enbridge's proposed oil pipeline will pass through areas where groundwater is close to the surface, where rural populations rely on groundwater for domestic and agricultural water supply, and through designated outstanding resource waters, salmonid waters, and exceptional use waters, and other sensitive areas that are part of the Lake Michigan ecosystem. Pipeline spills have and continue to occur throughout Enbridge's network of pipelines and a significant one like the Marshall spill will devastate our communities, the environment and Lake Michigan. Given Enbridge's dismal track record of repeated and catastrophic spills due to the company's neglect and failure to maintain its pipelines, IDEM should require Enbridge to:

1. install leak detection systems at each stream and significant wetland crossing that would allow the detection of a spill of volume no greater than 3 gallons;

2. follow Alternative Route S-2A-04; and

3. demonstrate the ability to respond to any pipeline spill or emergency in no more than 1 hour in a manner sufficient to contain a spill of material less dense, equally dense, or more dense than water.

B. Compliance with Construction Mitigation Requirements – the Need for Independent Environmental Monitors

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[44] USACE, *2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions (with corrections),* pp. 35-36, available at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf.
[45] *EPA's Response to the Enbridge Oil Spill,* EPA, http://www/epa/gov/enbridgespill/index.html.
[46] *Health Officials urge evacuations near Michigan oil spill,* CNN, (July 29, 2010) available at http://articles.cnn.com/2010-07-29/us/michigan.oil.spill.evacuation_1_oil-spill-oil-sheen-talmadge-creek?_s=PM:US

Enbridge has repeatedly failed to adhere to minimal federal safety standards[47] and demonstrated a tendency to violate regulatory requirements during construction of its pipelines. Indeed, during construction of its oil pipeline in Wisconsin, Enbridge committed 545 documented violations which caused numerous impacts to waterways and wetlands.[48] These violations would likely have gone undetected and unaddressed had it not been for the Independent Environmental Monitor (IEM) which the State of Wisconsin required as a condition of the state's water quality certification of Enbridge's pipeline construction project.[49]

For the proposed Indiana pipeline project, Enbridge must comply with 31 NWP conditions during construction including requirements for proper maintenance, reducing adverse effects from impoundments, protecting the pre-construction course, condition, capacity and location of open waters, managing water flows, minimizing soil disturbance in wetlands, controlling soil erosion and sediment, and other requirements designed to reduce the adverse impacts of the project.[50] Moreover, Enbridge must comply with requirements under Rule 5,[51] Indiana's Flood Control Act,[52] local ordinances,[53] and other conditions that may be required as part of Indiana's Lake Michigan Coastal Program.

Enbridge's "Environmental Mitigation Plan" (EMP) states that its Contractor will be responsible for implementing the requirements of the EMP and federal, state and local requirements. "If the Contractor has questions concerning . . . environmental requirements," the Contractor must first contact Enbridge before "appropriate construction oversight" will be provided "to confirm Company and Contractor Compliance."[54] At that point, Enbridge states that its "Environmental Inspectors (EIs)" will assist the Contractor in interpreting and implementing the requirements of the EMP. Unfortunately, the supposed "requirements" detailed in the EMP are nothing more than suggested "best management practices" to be used during construction that are "designed to address *typical* circumstances that may be encountered" during construction of the pipeline project.[55]

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[47] *PHMSA Announces Enforcement Action Against Enbridge for 2010 Michigan Oil Spill,* available at http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=0faf7fe7f1a38310VgnVCM1000001ecb7898RCRD&vgnextchannel=d248724dd7d6c010VgnVCM10000080e8a8c0RCRD&vgnextfmt=print

[48] Milwaukee Journal Sentinel, *Pipeline Builder to Pay State $1.1 Million For Violations,* at http://www.jsonline.com/news/wisconsin/37009324.html

[49] State of Wisconsin DNR, Dredging, Grading, Bridge/WQC Permit available at http://www.wisconsinwetlands.org/DNRpermit.pdf

[50] USACE, *2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions (with corrections)*, pp. 28-39, available at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf.

[51] 327 IAC 15-5, *et. seq.*

[52] Ind. Code §14-28-1, *et. seq.*

[53] For example, LaPorte County Joint Zoning Ordinance 2012.02, Article 22 which imposes a minimum 75 foot setback from the ordinary high water mark of streams, lakes, and ponds, and a 50 foot setback from the edge of wetlands.

[54] Enbridge, Environmental Mitigation Plan, p. 2.

[55] *Id.*

In other words, there are no actual "requirements" imposed by the EMP. The suggested, best practices may or may not be implemented at the whim of Enbridge or "as otherwise specified in project permits.[56]" This is unacceptable and the very reason construction best management practices must be clearly indentified and made mandatory as part of IDEM's water quality certification. Moreover, given Enbridge's track-record, it is not likely that the company will comply with its EMP and all federal, state and local requirements without independent oversight. Accordingly, IDEM should require Enbridge to pay for an Independent Environmental Monitor (IEM) to monitor, document, and report daily construction activities, manage environmental quality control and quality assurance issues, and have absolute, independent authority to order the correction of work activities in violation of permit conditions and compliance with all regulatory requirements. We urge IDEM to follow Wisconsin's lead in this regard and attach a copy of the Wisconsin issued permit for IDEM's reference.

C. Construction Best Practices

In other states, Enbridge has been required to implement specific construction best practices to ensure that water quality standards are maintained throughout construction[57]. These practices include flagging of wetland boundaries, erosion control measures, invasive species management planning, endangered resources management planning, and the use of construction mats in all wetlands. State regulators and impacted groups have reported that these conditions help to ensure minimal impacts to water resources. IDEM should require these best practices as a condition of any certification issued to Enbridge to ensure that state water quality standards are not violated[58].

D. Post-construction restoration, monitoring requirements and mechanisms to ensure that Enbridge will pay for full restoration

Enbridge's plan to "monitor and address all areas where stabilization techniques have been implemented in accordance with conditions identified in the applicable project permits and/or licenses,[59]" is not sufficient given that NWP 12 does not specify what stabilization techniques are to be utilized and when. Instead, as a condition of water quality certification, IDEM should require Enbridge to prepare a site-specific restoration and monitoring plan that includes at a minimum:

1. post-construction waterway and wetland monitoring until full restoration is achieved;

2. detailed parameters to be measured each year and a clear timeline for annual monitoring report submittals to IDEM;

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[56] This statement is used throughout the EMP in lieu of describing specific requirements.
[57] State of Wisconsin DNR, Dredging, Grading, Bridge/WQC Permit available at http://www.wisconsinwetlands.org/DNRpermit.pdf
[58] 327 IAC 2
[59] Enbridge, EMP, p. 40.

3. final invasive species management plan;

4. a financial assurance mechanism(s) in a form satisfactory to IDEM and in an amount sufficient to assure performance of restoration and monitoring requirements.

III. Conclusion

For the reasons outlined above, we believe that the proposed project does not meet the conditions for authorization under NWP 12 and, even if it does, IDEM must impose additional requirements to ensure compliance with NWP 12, the CWA and all other state requirements. We thank you for the opportunity to comment. Should you have any questions, please contact the undersigned.

Respectfully submitted,

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