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Red Cliff Tribal Council

September 26, 2023

VIA ELECTRONIC MAIL
Christopher.mclean@usda.gov

Christopher A. McLean
Assistant Administrator
USDA Rural Development – Electric Program
Rural Utilities Service
STOP 1510, RM 4121-S
1400 Independence Avenue, SW
Washington D.C., 20250

RE: Red Cliff Band of Lake Superior Chippewa Comments on the USDA’s Rural Utility Service’s Revised Supplemental Environmental Assessment for the proposed Nemadji Trail Energy Center

Boozhoo Assistant Administrator McLean,

The Red Cliff Band of Lake Superior Chippewa (hereafter “Gaa-Miskwaabikaang”) respectfully submits the following comments on the US Department of Agriculture’s Rural Utility Service’s (hereafter “RUS”) Revised Supplemental Environmental Assessment (hereafter “RSEA”) for Dairyland Power Cooperative’s (hereafter “the Applicant”) proposed Nemadji Trail Energy Center (hereafter “NTEC”). These comments are the more in-depth comments that were referenced in our August 28, 2023 submittal. Gaa-Miskwaabikaang is a federally recognized tribal nation that retained the inherent right to hunt, fish, and gather “with the other usual privileges of occupancy” within ceded territories (hereafter Treaty Rights) under several treaties. These rights were affirmed in court under the 1837 Treaty of St. Peters, 1842 Treaty of LaPointe, and 1854 Treaty of LaPointe.1,2,3 Our authority as a sovereign nation includes exercising stewardship responsibilities of indinawemaaganag (our relatives), who are often called “natural resources”, across ceded territory upon which meaningful exercise of our treaty rights is based. These authorities provide us opportunities and the responsibility to submit comments to support, protect, and preserve treaty relatives for the next seven generations within ceded territories. The proposed NTEC project would be located on the banks of the Nemadji River near the shores of Anishinaabeg Gitchigami (Lake Superior) and would likely impact aki (land) and nibi (water) ceded by our people in the 1842 Treaty of LaPointe as well as the St. Francis Xavier Cemetery (hereafter “St. Francis Cemetery”), which is a known traditional cultural property. We encourage the RUS to truly engage the Tribes as sovereigns by consulting directly with interested Tribes under the National Environmental Protection Act (hereafter “NEPA”) and the National Historic Preservation Act (hereafter “NHPA”). It is our view that the RUS should either 1) select the no action alternative or 2) conduct an Environmental Impact Statement (hereafter “EIS”) and fully assess any impacts identified by concerned Tribes. We urge you to do so.

1 1837 Treaty of St. Peters, July 29, 1837
2 1842 Treaty of LaPointe, October 4, 1842
3 1854 Treaty of LaPointe, September 30, 1854

"The Hub of the Chippewa Nation"
Historic Preservation, Sacred Sites, and Tribal Engagement

RUS has failed to meaningfully engage Gaa-Miskwaabikaang during their review of the proposed project. RUS did not notify Gaa-Miskwaabikaang that the agency was conducting a NEPA review, and we were unaware of the 2020 Environmental Assessment until after RUS released a Finding of No Significant Impact determination (hereafter “FONSI”) in May 2021. As noted in our Treaty Natural Resources Division’s (hereafter “TNR”) letter to you dated August 28, 2023, no RUS staff acknowledged our email requesting a 30-day extension for our comments to be part of the RUS’s public record. To date, our Tribal Historic Preservation Office has not been contacted for any NHPA Section 106 review or Consultation by RUS for the proposed project. In our view this exhibits a disregard by RUS for Tribal interests and Treaty Rights. While the RSEA’s 6.5 Tribal Coordination references communications between NTEC applicants and certain Tribes including Gaa-Miskwaabikaang, this does not absolve the RUS of their federal obligation to engage with Gaa-Miskwaabikaang as a tribal government with Treaty Rights in the proposed project area. The RSEA’s 6.5 Tribal Coordination section also references a 2019 letter that was sent to Tribes regarding a State Historic Preservation Office determination on impacts to historic properties and states that we did not respond to the letter. Our failure to respond cannot be considered consultation or consent. RUS may not have needed to release a Supplemental Environmental Assessment or the RSEA had RUS appropriately and meaningfully engaged Tribes. The lack of meaningful consultation is evident since the RSEA makes no reference to the NHPA other than when explaining what Traditional Cultural Properties (hereafter “TCP”) are and makes incorrect assumptions on how Tribes would be impacted by the proposed project. The lack of meaningful Tribal engagement is apparent in the RSEA. In addition, Section 3.3.1.1 Tribal History and Traditional Cultural Properties chose the 1854 Treaty of LaPointe to focus on even though the proposed project is within lands ceded under the 1842 Treaty of LaPointe.

Gaa-Miskwaabikaang supports the Nagaajiwanaang, also known as the Fond du Lac Band of Lake Superior Chippewa, (hereafter “FDL”) assessment of how the proposed project may affect any of FDL’s sacred or cultural sites. The RSEA mentioned the desecration of FDL’s burial site at Wisconsin Point and that FDL ancestors were moved into a mass grave on banks of the Namadji River at the St. Francis Xavier Cemetery (hereafter “St. Francis Cemetery”). The RSEA failed to mention that this mass grave has been eroded by the river causing some of these ancestors to fall into the Namadji River. FDL’s Tribal Historic Preservation Office has identified St. Francis Cemetery and the Namadji River upstream of the cemetery to the mouth of the river as a cultural property. We support FDL’s Tribal Historic Preservation Officer’s determination that the proposed project would have “adverse effects” on the St. Francis Cemetery and Namadji River cultural property. Gaa-Miskwaabikaang urges the RUS to select the No Action Alternative to ensure this cultural property is protected.

The RSEA 3.3.2.1 Proposed Action Alternatives recognizes that “the Fond du Lac Band of Lake Superior Chippewa consider the St. Francis Xavier Cemetery a TCP because it contains these burials”. Despite RUS’s recognition that the St. Francis Cemetery should be protected as a TCP as determined by FDL, the Proposed Action Alternatives states that “[a]s noted in October 2020 EA, the St. Francis Xavier Cemetery would not be impacted by the Project”. RSEA Table 3-1 mistakenly makes a similar assertion. The National Park Service (hereafter “NPS”), as authorized by the NHPA, has recognized that people who hold a connection to a TCP are “the only people with the expertise to identify them, determine if and how they may be affected, and determine whether or not treatment is necessary.” The NPS also understands that adverse effects to most TCPs cannot be mitigated. As such, the RUS does not have the ability to determine if a TCP will or will not be impacted by a proposed project. Only the Tribe(s) that have recognized a site or landscape can appropriately assess if a site or landscape will be impacted by a proposed activity. RSEA Section 3.3.1.3 Regulatory Overview recognizes that the American Indian Religious Freedom Act protects rights including “access to sites with historical or religious value”, but the RSEA fails to consider how the presence and operation of a powerplant next to a sacred site may impact one’s ability to hold certain ceremonies. For instance, the RUS does not hold the appropriate cultural knowledge to determine how noise from the proposed project would

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affect cultural activities that may occur at the St. Francis Cemetery. The proposed project is expected to be so loud that it will exceed the EPA’s noise guideline levels according to RSEA Table 3-1. The RSEA also fails to consider how water discharges from the proposed project would impact the St. Francis Cemetery and Nemadji River cultural property. The RSEA Section 5.5 Infrastructure, Transportation, Public Health, and Waste Management identifies some indirect effects such as chemical spills response and the corresponding spill cleanup plans. The RSEA does not consider how any indirect effects, including the potential of a large-scale facility accident similar to the Husky Refinery’s 2018 explosion, could impact the St. Francis Cemetery and Nemadji River cultural property. An indirect effect, such as a facility accident similar to the Husky Refinery’s 2018 explosion, could lead to the use of flame retardants, which are composed of PFAs-containing chemicals to be used to extinguish a fire. The RSEA failed to assess how this could impact the environment, Treaty Rights, or Tribal cultural resources.

As such, Gaa-Miskwaabikaang recommends that the RUS accept all determinations FDL makes regarding impacts to the St. Francis Cemetery and Nemadji River cultural property and any necessary mitigation or project abatement and either 1) conduct an EIS or 2) select the No Action Alternative.

Impact on Treaty Rights and NEPA Review

The NEPA review process employed by RUS has been entirely inadequate and is completely unacceptable. First, the EA that was released in October of 2020 was written by the applicant and was simply adopted by RUS. The FONSI determination in May of 2021 was based on an EA that exhibited numerous problems and deficiencies identified by the U.S. EPA, Fond du Lac Resource Management Division, and TNR. In addition, the Supplemental Environmental Assessment released in June 2022 that the US Environmental Protection Agency and others also commented on was found to be inadequate leading to the RSEA that was released in July 2023. The RSEA fails to address many of the concerns that Gaa-Miskwaabikaang has raised. An EIS is the next step in the NEPA process to fully assess the impacts of the proposed project unless the RUS selects the No Action Alternative. The majority of topics and concerns raised in TNR’s October 27th, 2021, letter were referenced, but were not assessed in the Supplemental Environmental Assessment or the RSEA. For example, our October 2021 letter urged RUS to assess how NTEC will contribute to the Missing and Murdered Indigenous Women and Relatives epidemic (hereafter “MMIWR”), but the RUS documents have not assessed how NTEC would contribute to MMIWR as an indirect effect or a cumulative effect. RSEA (and the Supplemental Environmental Assessment) Section 3.3.1.2 Social Characteristics recognizes that MMIWR exists, that “[e]xtractive industries... have been investigated”, that “[m]an camps have been implicated in higher rates of violence against Indigenous women”, and that “Duluth’s harbor...has been identified as a site for trafficking of Native people”. Nowhere in RUS’s NEPA review has RUS assessed how NTEC will contribute to MMIWR.

RSEA Section 3.2.2.1.3.2 Upstream Impacts doesn’t consider MMIWR impacts at the point of natural gas extraction. This selective review of upstream impacts also ignores any water-related impacts from the upstream hydraulic fracturing (hereafter “fracking”) process to acquire natural gas for NTEC. Since 2016, the Environmental Protection Agency has recognized that oil and natural gas fracking impacts water including the use of chemical additives to water to facilitate the fracking process, how fracking can harm aquifers and disrupt groundwater-surface water interactions, and lead to drinking water contamination.⁶ More recently, in July 2021, the Physicians for Social Responsibility released a report that some major oil and gas companies used per- and polyfluoralkyl substances (commonly known as PFAS) in oil and natural gas fracking.⁷ The RSEA skirts around this topic by stating the proposed project “is not anticipated to require additional oil or gas development. The Proposed Action would use existing, developed sources for natural gas. As such, the Proposed Action would not contribute to a need for more man camps or other development boom circumstances linked to increase in criminal activity, including human trafficking” (RSEA 3.3.2.1 Proposed Action Alternatives). This statement attempts to create a false narrative claiming that the proposed project would not contribute or support any fracking activities or MMIWR. This is incorrect and fails to assess how NTEC would maintain a current demand for fracking and in turn contribute to

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MMIWR. These types of upstream impacts should have been assessed in the RSEA’s *Upstream Impacts* section. We are requesting that RUS analyze these upstream impacts in RUS’s EIS for the proposed project before making any decisions on the Applicant’s loan application other than selecting the No Action Alternative.

Despite this obvious impact, RSEA Section 3.3.2.1 *Proposed Alternatives* advances the fallacy that “[n]o direct impact to tribes are anticipated. The proposed project will impede Gaa-Miskwaabikaang, or other 1842 Treaty, citizens’ ability to exercise their Treaty Rights. No construction or facilities will be located on tribal lands, and no impacts to TCPs or Native American cultural sites are anticipated to be disturbed.” The RUS has not engaged Tribes adequately enough to be able to make such a determination. This determination is also inconsistent with other portions of the RSEA. The *Proposed Action Alternatives* section recognizes that access to public lands that Tribal citizens can use for Treaty Rights “may be limited or temporarily closed”. It is impossible to exercise Treaty Rights when an area is limited or temporarily closed. Additionally, this section fails to assess how construction, expected operations of NTEC and indirect effects such as facility accidents (whether that be chemical releases or explosions) may impact the presence or health and well-being of relatives that Gaa-Miskwaabikaang citizens may be seeking out for harvest. Further, the RSEA does not make any mention of Wisconsin’s Criminal Trespass to an Energy Provider Property law (hereafter “Felony Trespass law”) or consider how Tribal Citizens’ access to Treaty Rights will be impacted by it. The Felony Trespass law makes it a Class H felony to enter “an energy provider property without lawful authority and without the consent of the energy provider that owns, leases, or operates the property”. The Felony Trespass law includes transmission line corridors, which would mean that the proposed project would make portions of public lands inaccessible to Gaa-Miskwaabikaang, or other 1842 Treaty, citizens to exercise Treaty Rights. Based on the RSEA, the proposed project would prohibit the exercise of Treaty Rights in the following hunting areas due to the Felony Trespass law: Allouez Area Parcel 1 Hunting Area, Itasca Area Hunting Area, and Annex Hunting Area. As such, the proposed project will inhibit 1842 Treaty citizens' ability to lawfully exercise their Treaty Rights. Any contrary determination simply does not align with reality.

The RSEA fails to adequately assess potential impacts to threatened, endangered, and other rare species, (hereafter “vulnerable relatives”). The RUS’s review of how the proposed project would impact ma’iinganag (also known as gray wolves) has not been reconsidered since the October 2020 Environmental Assessment was released. According to the WDNR’s Gray Wolf Depredation Mapping Application, the four-mile buffer of a depredation incident is within one mile of the proposed project. Since the buffer zone extends within one mile of the proposed project there is a potential impact on ma’iinganag (a protected species) that any meaningful EA must consider. Additionally, none of RUS’s NEPA documents reference vulnerable relatives who are plants. The WDNR’s ePermitting website for WP-IP-NO-2023-16-X01-06T12-02-08, an Enbridge Energy project where their Line 6A crosses the Nemadji River, included a file titled *Redacted Technical Memo_No0099.pdf*. This file is a memo dated 12/15/2022 from an Enbridge consultant that “indicated the potential presence of REDACTED plants within the project area.”. This redacted memo indicates that there is a vulnerable relative (whose name was redacted for their own protection) who may be very close to the proposed NTEC project area. Additional surveys for this vulnerable plant relative should be conducted given the proximity of the WP-IP-NO-2023-16-X01-06T12-02-08 project to the proposed project. The RUS’s NEPA review should assess how this vulnerable plant relative may be impacted.

We are requesting that RUS conduct an EIS and meaningfully assess how Treaty Rights and Tribal cultural resources will be impacted before making any decisions on the Applicant’s loan application other than selecting the No Action Alternative.

**Climate Change Considerations**

The RSEA fails to adequately assess climate change related impacts and how the proposed project will contribute to climate change. EPA staff reviewed RUS’s RSEA and in a letter to Mr. Czerwien dated September 1, 2023 stated that EPA staff were “unable to replicate… RUS’s [SC-CO2] estimates in Table 3-9”. The RSEA also attempts to create a false narrative that if the RUS loan isn’t issued for NTEC then new coal powerplants will need to be built. This claim is not supported with facts and appears to be included to show that a No Action Alternative would lead to more greenhouse gas emissions than the proposed project. For example, RSEA 2.6 No Action Alternative states that the proposed project will not be built if the RUS does not approve the Applicant’s loan request, but the RSEA does

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8 *Criminal Trespass to an Energy Provider Property*. Wisconsin legislature: 943.143. (n.d.).
https://docs.legis.wisconsin.gov/statutes/statutes/943/ii/143
not provide evidence supporting that other forms of financing are unavailable. The RSEA argues that the proposed project will be the cornerstone of the Applicant’s “Sustainable Generation Plan”. This is comparable to stating that a proposed lithium mine sited to be built on a documented sacred site for individual Tribes that would lead to the contamination of millions of gallons of water is the cornerstone of clean energy plan because it will facilitate the production of solar panels and batteries. Projects that promote environmental harm and impact on Tribal cultural resources or TCPs should not be accepted as settler colonial extraction projects under the guise of sustainability initiatives.

The RSEA references state and federal initiatives to combat climate change, but the RSEA doesn’t assess how the proposed project would work towards or against the various initiatives. Additionally, the RSEA fails to consider how these state and federal initiatives will eventually lead to the proposed project being a stranded asset. This is another example of the RUS’s NEPA process’s failure to assess the impacts of the proposed project. RSEA Section 1.5.1.2 Federal Initiatives references various federal initiatives to combat climate change, including President Biden’s goal of 100 percent carbon pollution-free electricity by 2035.” The RSEA fails to justify why they would provide federal funds to build a fracked gas powerplant that will not be operational until 2027 at the earliest. The RSEA fails to justify how this investment in a carbon pollution-based electricity generating facility upholds President Biden’s goal of carbon pollution-free electricity. The RSEA’s Federal Initiatives section also references the 2022 Inflation Reduction Act but fails to assess how the proposed project will “help lower energy costs” or constitute as a federal “investment in clean energy”. The RSEA Federal Initiatives section also references the Bipartisan Infrastructure Law and recognizes the goals of that law — to provide funding for clean energy and to deliver clean energy to communities. Yet the RSEA fails to address how the proposed project meets any of these federal initiatives by investing in a fossil fuel facility that will not be operational until 2027 at the earliest. On the state level, the RSEA has similar deficiencies when it comes to assessing climate change-related initiatives. RSEA Section 1.5.1.3 Wisconsin Initiatives references Wisconsin initiatives to combat climate change, but again fails to address how the proposed project would support those initiatives. The RSEA references Governor Evers’s Executive Order 38 Relating to Clean Energy in Wisconsin but doesn’t assess how the proposed project would support the goal to ensure all “electricity consumed within the State of Wisconsin is 100 percent carbon-free by 2050”. Similarly, the RSEA references the 2020 Governor’s Task Force on Climate Change Report and acknowledges the report’s Tier 2 recommendation to “avoid all new fossil fuel infrastructure”. In fact, investing in additional fossil fuel infrastructure would appear to undermine Wisconsin initiatives to combat climate change.

The RUS’s NEPA documents have thus far failed to adequately assess local climate change considerations. There is widespread acceptance within the scientific community that climate change impacts are worsening globally and that regionally this is expected to lead to more frequent and severe storm events. None of these local climate change impacts are assessed in the RSEA or earlier NEPA documents. The RSEA only assessed if the proposed project would be outside of a 500-year floodplain. The proposed project should be assessed to see what would happen to the facility if it were impacted by a 1,000-year 24-hour storm event. 2010-2020 included three extreme storm events in northern Wisconsin, and another storm that is a 500-year 24-hour storm event or greater is a reasonably foreseeable future action. RSEA Section 4.3 Tribal Environmental Justice referenced the Fourth National Climate and included excerpts highlighting how indigenous peoples across Turtle Island, which many Indigenous communities refer to as the continent of North America or planet, are disproportionately impacted by climate change, but doesn’t look at specific impacts to 1842 Ceded Territory. The RUS’s NEPA documents fail to consider local climate change impacts despite the plethora of regional climate change plans including those produced by the Great Lakes Indian Fish and Wildlife Commission, 1854 Treaty Authority, plans produced by individual 1842 and 1854 Treaty Tribes, or local governments or interagency workgroups. This section, again, pushed the manipulative narrative that without the proposed project, climate change would worsen due to more coal-produced energy. The proposed action is not to decommission a coal powerplant and build a natural gas powerplant, nor is it to transition a coal powerplant into a natural gas powerplant.

Gaa-Miskwaabikaang believes that the USDA Rural Utility Service’s NEPA analysis is insufficient to issue a loan to the Applicant. Gaa-Miskwaabikaang urges the RUS to either 1) select the No Action Alternative or 2) engage concerned Tribes to ensure that Tribal cultural resources are not impacted and to develop a comprehensive Environmental Impact Statement that fully assesses the potential impacts of the proposed project.

We remain committed to protecting nibi (water), aki (land), and air of our current and ancestral homelands for our people and the generations to come. Preserving the environment means preserving our treaty rights and our
traditional life ways. Migwech (thank you) for the opportunity to submit comments. Questions and follow-up can be directed to Linda Nguyen, Red Cliff Environmental Director, at linda.nguyen@redcliff-nsn.gov or 715-779-3650.

Sincerely,

[Signature]

Richard Peterson, Vice Chairman
Red Cliff Band of Lake Superior Chippewa

Cc: Red Cliff Tribal Council
Andrew Edwards, Red Cliff Treaty Natural Resources Division Administrator
Linda Nguyen, Red Cliff Environmental Director
Marvin Defoe, Red Cliff Tribal Historic Preservation Office
Andrew Berke, USDA RUS Administrator
Joseph Ranson, USDA RUS Rural Development Environmental and Historic Preservation Division Director
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William Sande, Army Corps of Engineers – St. Paul District Project Manager

Attachments: Gaa-Miskwaabikaang’s TNR’s Comments to Christopher McLean – August 27th, 2023
Gaa-Miskwaabikaang’s TNR’s Comments to Christopher McLean – October 27th, 2021
Gaa-Miskwaabikaang’s Comments to Jeff Kitsembell – August 29th, 2019