



Bay Mills Indian Community

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WRITTEN COMMENTS OF THE BAY MILLS INDIAN COMMUNITY

Presented by President Bryan T. Newland

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Over the past few years, the Bay Mills Indian Community, a sovereign tribal nation with a government to government relationship with the United States (hereinafter “Bay Mills” or “the Tribe”) has implored federal and state officials to take action to protect the Straits of Mackinac and treaty-reserved fishery resources. Today, the Tribe again respectfully urges the Army Corps of Engineers to do the following:

1. Prepare an Environmental Impact Statement (EIS) prior to deciding whether to grant Enbridge Energy, LLP’s (“Enbridge”) requested permits to effectively rebuild its Line 5 Pipeline beneath the Straits of Mackinac.
2. Delay consideration of Enbridge’s permit application until it has an approved and effective Oil Spill Response Plan for Line 5 from the Pipeline and Hazardous Materials Safety Administration (PHMSA). *See National Wildlife Federation v. Secretary of Department of Transportation, (NWF 2) Case No. 17-10031 (E.D. Mich.) ___ F.3d ___, 2019 WL 1426310, March 29, 2019.* Alternatively, the Corps should deny Enbridge’s amended application on the basis that it does not possess an approved Oil Spill Response Plan for Line 5, considering that construction and maintenance activities increase the potential for a pipeline rupture and oil spill.

The Tribe’s grave concerns are not hypothetical. Enbridge is notorious for causing environmental catastrophe. Only a few years ago, Enbridge released more than 800,000 gallons of oil into the Kalamazoo River System. It constitutes the largest on-shore oil spill in United States history. On October 9, 2018, an Enbridge Pipeline exploded near the Lheidli T’enneh First Nation in British Columbia, forcing the evacuation of people from their homes on their tribal lands. In 2017, Enbridge admitted that its own maintenance and repair activities – like those contemplated in its application to the Corps – damaged the Line 5 Pipeline beneath the waters of the Straits of Mackinac.

Bad actors like Enbridge warrant more scrutiny, not less.

It must be acknowledged that Enbridge’s Line 5 is no ordinary pipeline and it threatens an extraordinary environment. This point was made by Judge Goldsmith in *NWF 2*:

Straits of Mackinac are a six-mile long section of water that joins lake Michigan and Lake Huron in a single hydraulic system...Although one has never occurred,

an oil spill in the Straits of Mackinac poses a significant threat to Lake Michigan and Lake Huron...More than 700 miles of shoreline in Lakes Michigan and Huron are potentially vulnerable to an oil spill in the Straits.

Judge Goldsmith ultimately concluded that another agency's summary approval of Enbridge's response plans violated NEPA, was arbitrary and capricious, and remanded the matter back to the agency. The Corps should heed this decision and prepare an EIS prior to deciding whether to issue the requested permits to Enbridge.

Enbridge's most recent application is its latest attempt to redesign and rebuild the Line 5 Pipeline beneath the Straits of Mackinac through repeated, smaller maintenance projects. The Corps must not reward Enbridge's past misdeeds by allowing the company to proceed with a course of action designed to minimize the pipeline's 'significant' threat to Lakes Michigan and Huron. Attempting to artificially limit the Corps review by submitting repeated, piecemeal requests for permits is a classic example of segmentation under NEPA. *Huntington v. March*, 850 F.2d 1134 (2d Cir. 1988); *Thomas v. Peterson*, 753 F.2d 745 (9th Cir. 1985). Instead, the Corps must review all of Enbridge's connected actions to rebuild this stretch of Line 5 through the Straits by performing an EIS.

As described in more detail below, Enbridge's requests put Bay Mills' treaty rights at risk. Enbridge's most recent request is its latest attempt to avoid meaningful NEPA review. Enbridge's pipeline rebuild poses risks to Lakes Michigan and Huron which are serious, real, and consequential. They must be evaluated through an EIS.

Bay Mills' Reserved Rights in the 1836 Treaty of Washington

Just as Canada and the United States maintain treaties regarding the Great Lakes, Bay Mills maintains a treaty with the United States regarding the Straits of Mackinac. Under the 1836 Treaty of Washington (7 Stat. 491), Bay Mills ceded territory to the United States that was used for the creation of the State of Michigan. In exchange for providing millions of acres of tribal land to the federal government, the Tribes reserved the right to hunt, fish and gather throughout the territory—including the Great Lakes and the Straits of Mackinac. It is pursuant to these reserved treaty rights that Bay Mills and other Tribes co-manage the fishery and wildlife resources with the State of Michigan and the United States.

In 1971, Michigan conservation officers cited Bay Mills member Albert "Big Abe" LeBlanc for fishing with agillnet in violation of Michigan law. Subsequently, in 1976 the Michigan Supreme Court agreed with Bay Mills and its members that the Tribes retained the right to fish in the Great Lakes waters ceded in the 1836 Treaty. In 1973, the United States brought suit against the State of Michigan on behalf of the Tribes to enforce that treaty right, and the District Court for the Western District of Michigan confirmed the continued existence of the Tribes' treaty rights in a famous 1979 decision, known as the "Fox Decision" and reported as *United States v. Michigan*, Case No. 2:73-cv-26. Accordingly, the 1836 Treaty of Washington confirms Bay Mills' and other signatory Tribes' protected legal interest in the fishery resources in Lakes Superior, Michigan and Huron—including the waters of the Straits of Mackinac.

For the past 35 years, Bay Mills and the other Tribal parties to the 1836 Treaty have worked with the State to manage the Great Lakes fishery. We have done so in a spirit of good stewardship and governmental cooperation, which is embodied in Consent Decrees entered in *United States v. Michigan* in 1985 and 2000. With this stewardship in mind, Bay Mills, the Chippewa Ottawa Resource Authority (an inter-tribal entity established to regulate Great Lakes fishing by members of the 1836 Treaty signatory Tribes), and the other signatory Tribes have expressed grave concern about the continued operation of the Line 5 Pipeline beneath the Straits of Mackinac.

An EIS Is Both Appropriate and Required

This is not the first time that Enbridge has attempted to pull a fast one on federal agencies, the Tribes and the public. Late last year, Enbridge attempted to use the State of Michigan to rewrite State law to exempt Enbridge from important legal obligations. After a careful and thorough analysis of that legislation, the Michigan Attorney General concluded that it was unconstitutional.

Also last year, Enbridge attempted to avoid compliance with federal laws and treaties through its interpretation of a consent decree with the Department of Justice. The Consent Decree was filed as a result of the largest oil spill in United States history from Enbridge's Line 6 Pipeline in Michigan. *United States v. Enbridge Energy, LLC, et al*, Case No. 1:16-cv-914 (W.D. Mich.)

Stunningly, it appears that Enbridge attempted to use the Consent Decree—imposed because of its violation of federal law—to insulate its rebuild of Line 5 in the Straits from federal law, including NEPA. After significant comments from Tribes and the public, it was made clear that the Consent Decree did not end Enbridge's or any federal agency's obligation to comply with federal law, including the permits it seeks from the Corps, NEPA, and the Tribes' treaty-reserved fishing rights. For example, correspondence from Environmental Protection Agency's Region 5 Director, dated July 30, 2018, and addressed to President Bryan Newland (copy attached), makes it clear that the Consent Decree doesn't relieve Enbridge of its obligation to comply with federal regulations and procedures:

Your letter expresses a concern that any proposed modification to the Consent Decree will “circumvent” permitting processes related to additional screw anchors in the Straits. The original, court approved Consent Decree does not authorize screw anchor construction activities. Similarly, *any court approved modification to the Consent Decree would not be expected to authorize construction activities. The screw anchor installation itself is subject to all applicable permitting processes, and does not circumvent or replace any applicable permitting processes. This includes the Army Corps of Engineers and State of Michigan permitting processes which you reference in your letter.* [emphasis added]

Now, since the pathway through the Michigan Legislature has been eliminated, and the Consent Decree's terms are not interpreted as exempting Enbridge's activities from otherwise applicable federal law, Enbridge is turning back to the Corps to see if they can be hoodwinked. It is clear to the Tribe, and to others who care deeply about the Great Lakes and the Straits of Mackinac, that

Enbridge is attempting to completely rebuild the Line 5 Pipeline in the Straits without meaningful review. It is doing this by submitting applications in a piecemeal approach that attempts to limit review to each segment contained in its proposal, rather than a review of the entirety of their rebuild. Enbridge's approach makes a mockery of the Corps' permitting responsibilities, its duty to comply with NEPA, and its trust and treaty responsibilities to the Tribes.

Bay Mills reiterates its commitment to work with the Corps and all interested parties to find ways to address its concerns. (Attached for review and reference is the Tribe's original list of concerns regarding this issue as they were expressed in response to the proposed entrance of the Consent Decree in *Enbridge Energy*). In addition to supplying comments such as those referenced, Bay Mills has reached out to Michigan's Governor, the Michigan Department of Environmental Quality, the U.S. Coast Guard, the Environmental Protection Agency, the Army Corps of Engineers, and PHMSA, as well as Enbridge directly, to understand and evaluate the risks that may be present by the continued operation of Line 5 in the extremely vulnerable area of the Straits of Mackinac.

To date, no entity has provided a substantive response to the Tribe's concerns.

To be clear, Bay Mills' primary concern—which should be shared by anyone cognizant of the risks involved with the aging Line 5 Pipeline—is that verifiable data and oversight of Enbridge's activities related to the Pipeline's operation and maintenance has not been forthcoming from Enbridge. As a result, the safety of continued operation of Line 5 cannot be effectively evaluated. An EIS will ensure that the Corps has the necessary data and input to meaningfully evaluate the potential impacts potentially resulting from Enbridge's rebuild in the Straits.

Enbridge itself has admitted that its own maintenance efforts on the existing Line 5 Pipeline resulted in additional structural damage to the pipeline in the Straits, when it added four (4) additional anchor braces to the pipeline to be in compliance with the State-issued bottomland easement.

Notably, this means that Enbridge was *out of compliance* with the terms of the easement for years before even attempting to install the omitted anchor braces. Officials from the United States Department of Justice and Environmental Protection Agency confirmed that Enbridge has been out of compliance with the terms of its easement during an August 7, 2018 meeting in Traverse City, Michigan with representatives from several tribes (including Bay Mills).

Making this situation even more alarming, Enbridge *failed to disclose the damage*, keeping Federal agencies, State agencies, Bay Mills, other 1836 Treaty signatory Tribes and the people of Michigan effectively in the dark as to the increased risk of harm to the pipeline's integrity in the Straits area.

This blatant obfuscation of damaging information by Enbridge establishes yet another basis for the Corps to conduct an EIS before deciding whether to issue permits necessary to install even more anchor braces to a structurally fragile pipeline in the Straits. Clearly, Enbridge is not a reliable source of necessary information.

In May 2018, Bay Mills hosted representatives from Enbridge to discuss its willingness to share information with the Tribe that would enable the Tribe (and public) to review the data regarding pipeline usage, repair and maintenance records, emergency response plans, incident reports, and similar technical information. In response, Enbridge engaged in a master class of delay and obfuscation – going so far as to invite tribal leadership on a fishing trip with executives from Enbridge. (Despite the invitation, Bay Mills officials do not consider a fishing trip with Enbridge executives as a viable alternative to the provision by Enbridge of accurate, verifiable data and information about the operations of a major oil pipeline in the 1836 cession area.)

Bay Mills proposed an information sharing agreement with Enbridge, but efforts to finalize it are so far unavailing, as Enbridge insists on restricting what information could be shared and in what format. Bay Mills finds this patronizing position unhelpful, especially when the health of Lakes Michigan and Huron is at issue and the holder of the necessary information has demonstrated on many occasions that it does not know, or will not disclose, the exact risk its pipeline business presents to the surrounding environment.

For the reasons stated above, Bay Mills urges the Corps to either deny Enbridge’s application on the grounds that the company doesn’t have a PHMSA-approved Oil Spill Response Plan, or to defer any action on the application until Enbridge obtains approval of a Response Plan. This precondition to authorizing installation of additional screw anchors to the Line 5 pipeline in the Straits is essential, considering that “maintenance activities are the most likely cause of a spill from a pipeline.

Bay Mills also requests that the Corps consider anew Enbridge’s application for a permit to install anchor braces, and to expressly consider the concerns Bay Mills expressed in its 2017 initial comments on Enbridge’s first permit application for installation of four anchor braces.

We reiterate those concerns here, because neither Enbridge nor the Corps has provided meaningful information in response.

1. *Examination of Cumulative Impact of Line 5 Construction Efforts in the Straits.* The Corps is obligated to examine the cumulative impact of Enbridge’s proposed activities on the Tribes’ cultural and treaty rights. Enbridge’s request to additional support anchors is not unique. Numerous permits have been approved since the early 2000’s, allowing Enbridge to install more than 100 screw anchors on the bottom of the Straits. With this history, it is apparent that the continued segmentation of construction activities, thus ensuring permanent placement and operation of this 65-year old pipeline (already exceeding its designed lifespan of 50 years), allows Enbridge to circumvent the NEPA process and avoid the preparation of an Environmental Impact Statement (EIS). Bay Mills appreciates the Corps’ request that Enbridge provide more information on expected future anchor support installation activities, and requests that any responses received be carefully reviewed in light of the attempted project segmentation Enbridge has utilized in this matter in the past.

2. *Public Hearings.* The Corps must conduct multiple public hearings on Enbridge's amended permit application, and require Enbridge to be present at all such hearings to respond to questions posed, and to provide additional substantive information upon the request of the Tribes and the public.

3. *Examination of Cumulative Impact on Tribes.* During a tribal consultation session on June 28, 2018, representatives of the Corps expressed agreement with the Tribe that the Federal Trust Responsibility to Indian Tribes obligated the Corps to examine the impact of Enbridge's proposed work (including the risks posed by such work) on Bay Mills Indian Community's treaty reserved fishing rights. At this time, Bay Mills and the other Tribes lack the information needed to assist the Corps in this effort, because EPA, DOJ, the State of Michigan, and Enbridge have not been forthcoming with that information. Bay Mills therefore requests that the Corps examine the cumulative impact of Enbridge's proposed screw anchor installation on the Tribe's reserved treaty fishing rights, as well as the Tribe's legally protected cultural interests in the area surrounding the Straits of Mackinac. This cumulative impact analysis should include, but not be limited to, the following:

A. Independent review of the structural integrity of the Line 5 Pipeline after the installation of all the screw anchors contemplated in Enbridge's various applications.

B. Risk of an anchor strike to the Line 5 pipeline in the Straits due to the installation of the screw anchors.

C. Level of risk of a spill from the pipeline in the Straits stemming from its continued, indefinite operation after screw anchor installation is completed.

D. Potential economic value of damages to Bay Mills and other Treaty Tribes, due to the risk of an oil spill from the Line 5 pipeline in the Straits.

E. Risk level be measured against decommission of the Straits segment of the Line 5 Pipeline, rather than using a "no action" alternative.

4. *Environmental Impact Statement.* The Corps must prepare a full Environmental Impact Statement (EIS) encompassing the totality of activities proposed by Enbridge, which includes an assessment of whether screw anchor supports will affect the structural integrity of the pipeline in the Straits.

5. *Assessment of Risks Due to Maintenance and Imposition of Conditions for Permit.* As the inherent risks to the Line 5 Pipeline due to Enbridge's maintenance activities are not sufficiently addressed in its amended permit application or in Enbridge's previous, similar permit applications for anchor support installation, the Corps must not only consider well documented instances' of damage occurring to the Straits pipeline segment during anchor installation, but also Enbridge's poor safety record. Certainly, the information Enbridge included in its amended permit application is grossly inadequate to

meet the Corps' obligation to assure adequate protection to the natural and human environments exists in the proposed activities Enbridge seeks to undertake.

The Corps should deny Enbridge's application pending a complete assessment of the risks posed by Enbridge's proposed activities in the form of an EIS. In the event that the Corps does issue a permit for screw anchor installation, Bay Mills requests that the Corps impose conditions on the permit that require the Line 5 pipeline in the Straits be shut down, vacated, and depressurized during any maintenance activities. Imposition of conditions for permit issuance is within the Corps' authority under the Clean Water Act.

6. *Burden of Proof*. The Corps should not place the onus on Bay Mills and the public to demonstrate that Enbridge's response capabilities to a spill, anchor strike, or pipeline structural failure are inadequate. Enbridge should bear the burden of demonstrating that it has the capability to adequately respond to any spill activities during and after construction and installation of the anchor screws, and that its emergency procedures for anchor strikes or structural failure are in place and effective,

7. *Full Extent of Environmental Impact Cannot Be Determined from the Scope of Work*. Enbridge's current permit application does not clearly describe the exact nature and type of work to carry out installation of the anchor supports, such as: number of inspection sites, number of sites requiring excavation of bottomland, amount of sediment distributed from water jetting tools, etc. It is therefore difficult if not impossible for the Corps to identify and address the exact environmental risks involved in Enbridge's project. It is obvious that the actual footprint of the project is greater than described in Enbridge's application, as it does not take into account the movement of construction equipment and materials, nor the disposal of bottomland sediment. The footprint of the disturbance to the bottomland could easily be substantial, especially since known spawning grounds for Lake Whitefish are in the immediate vicinity of the work Enbridge proposes. As has been stated many times, Lake Whitefish is the most important fish in the Tribal treaty commercial fishery; movement of sediment in the Straits could severely hinder successful spawning of this species for a number of years.

8. *Risk of Recontamination*. Enbridge's proposed activities will disturb and resuspend contaminated sediments that were buried and entrained over the last 100 years. The Tribe's commercial fishery has already suffered extensive economic damage in past decades due to the presence of contaminants such as mercury and PCBs in the fatty tissue of fish. One of the ways contaminant levels are reduced is the burial of contaminated sediments by clean sediments that fall to the bottom. In order to best evaluate the risk of releasing contaminated sediments during anchor brace installation, the Corps should require sediment core samples extending at least 36 inches below the lake bottom surface to be taken and tested, and the results reported to the Corps.

We must note here that Bay Mills has been requesting that the Corps provide a substantive response to our concerns on this point since at least 2017. In fact, we posed this question directly to the Corps in a letter to the District Commander on December 19, 2017, and have yet to receive a response.

9. *Decommissioning as Alternative.* It is imperative that the Corps consider as a reasonable and viable alternative to authorization of Enbridge's proposed activities the decommissioning of the Straits segment of Line 5,

Bay Mills thanks the Corps for the opportunity to provide input on this significant issue. The Tribe respectfully requests that Enbridge's application be denied for lack of a PHMSA-approved Oil Spill Response Plan. If the Corps does not deny the application, it should hold the application in abeyance until such time as Enbridge obtained an approved Oil Spill Response Plan. If and when Enbridge has an approved Plan, then the Corps should conduct an EIS to evaluate Enbridge's application, which includes Enbridge's past activities and its foreseeable future activities concerning Line 5.