Bay Mills Indian Community
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May 10, 2019

Hon. Gretchen Whitmer, Governor
State of Michigan
George W. Romney Building
111 South Capitol Avenue
Lansing, Michigan 48909

Re: **Operation and Future of Enbridge's Line 5 Pipeline**

Dear Governor Whitmer:

I am writing on behalf of the Bay Mills Indian Community to transmit its response to your solicitation of tribal comments and views on the present and future operation of Enbridge's Line 5 within the State of Michigan.

I am grateful that your Administration has pledged to consult with Bay Mills, and other sovereign tribal nations, on a government-to-government basis on the development of the State of Michigan's approach to dealing with the Line 5 Pipeline. As a sovereign government with responsibility for managing and protecting the Great Lakes, the Tribe believes that a government-to-government approach is important to develop policies that account for our respective sovereign interests.

The Tribe's positions, comments, questions and recommendations are attached to this letter. In addition, you are invited to visit the Straits of Mackinac with representatives of Bay Mills and other Tribes to observe, first hand, its importance to our way of life.

Bay Mills has enjoyed a positive relationship with the State over the years, even when seeking to resolve areas of disagreement. I sincerely hope that will be the case here. I am grateful for your invitation to provide our views, and am hopeful that this process will be more respectful of our sovereign interests than previous actions related to Line 5. We look forward to your response.

Sincerely,

Bryan T. Newland

Bryan T. Newland
President, Executive Council

BTN/kt

cc: CORA Member Tribes
Katie Otanez, USACE Detroit Office
Regional Administrator, Environmental Protection Agency
Steven Willey, U.S. Department of Justice

cc: Tara Sweeney, Assistant Secrtary of Interior--Indian Affairs
Patrick Nelson, Cmdr. Sector Sault, U.S. Coast Guard

I. Position of the Bay Mills Indian Community on Continued Operation of Line 5 in the State of Michigan

Bay Mills Indian Community has serious concerns regarding the safety of continued operation of the Line 5 Pipeline in the Straits of Mackinac and on/near other bodies of water in our treaty-ceded territory. We believe that it is in the best interest of Bay Mills, the people of Michigan, and the United States, to decommission the Line 5 Pipeline and establish an alternative means for Enbridge to transport its oil from western Canada to Sarnia, Ontario.

II. Cultural Significance of Straits of Mackinac to the Great Lakes

Every culture and religion in the world shares the story of the Great Flood. In Ojibwe oral traditions and cultures, the creation of North America also begins with a flooded Earth.

According to our oral histories, the animals that survived the flood received instructions from the Creator to swim deep beneath the water and collect soil that would be used to recreate the world. One by one the animals tried, but one by one they failed. The muskrat, as the last animal that tried, dove underneath the water and did not emerge. When the muskrat's body resurfaced, it carried a small handful of wet soil in its paws. The journey took the muskrat's life, but with its sacrifice the Creator used the soil collected and rubbed it on the Great Turtle's back. This land became known as Turtle Island, the center of creation for all of North America.

For the Ojibwe, the Great Turtle emerged from the flood in the Straits of Mackinac. Because the creation of North America took place in the Great Lakes, the Great Lakes are considered the heart of Turtle Island and as such - the heart of North America. The State of Michigan shares this history with the Ojibwe as well, and there are still signs of it in modern times. Mackinac City, Mackinac Island, Fort Michilimackinac, and the Straits of Mackinac were all named and established because of this shared history together.

In the Ojibwe language, "michi" is an old dialect for "gichi, which means "great." The Ojibwe word for water is "nibi," which is an inanimate word that shows no signs of life or movement. However, the word for the Great Lakes are "gichi gumee." Only things that are alive and have a spirit are assigned the word "gichi" or "michi." In addition, the Ojibwe word for turtle is "miikinaak." By combining these words together, you learn that Michlimackinac, and the word Mackinac are all derivations of the original name of the Great Turtle from the Ojibwe story of Creation.

In sharing these teachings, Bay Mills Indian Community emphasizes the cultural, traditional, spiritual, and historical significance of the Great Lakes to the Tribes and to the State of Michigan itself. Since time immemorial, the Great Lakes have been an integral part to Bay Mills' way of life, and they will continue to be an integral part of culture and traditions for many generations to come. By failing to consider the cultural significance of the Great Lakes to Bay Mills, and the dangers the Line 5 Pipeline poses to treaty-fishing rights, culture, and traditions of the Ojibwe - the State of Michigan risks killing the heart of North America, the heart of Turtle Island.

III. Historical Background

A. *The Treaty of Washington (7 Stat. 491)*

Bay Mills is one of the signatories to the 1836 Treaty of Washington, which ceded territory to the United States for the creation of the State of Michigan. In exchange for the agreement to cede the territory to the United States, the Tribes reserved the right to hunt and fish throughout that territory – including in the Great Lakes (and the Straits of Mackinac).

In 1953, the State of Michigan granted an easement to the Lakehead Pipe Line Company to operate an oil and gas pipeline beneath the Straits of Mackinac. To the best of our knowledge, neither the Bay Mills Indian Community nor any other signatory to the 1836 Treaty of Washington was consulted about the decision to allow the pipeline to be constructed on the lakebed beneath the Straits. Enbridge has acquired ownership of that pipeline, which may include interest in the easement beneath the Straits.

In 1971, Michigan conservation officers cited Bay Mills tribal member Albert "Abe" LeBlanc for violating state fishing regulations. Several years later, in 1976, the Michigan Supreme Court held that Bay Mills, along with several other tribes, had retained the right to fish in the Great Lakes pursuant to the 1836 Treaty of Washington. The United States brought a lawsuit against the State of Michigan on behalf of the Tribes to enforce that treaty right; and, the United States District Court for the Western District of Michigan upheld the Tribes' treaty rights in a famous 1979 decision now known as the "Fox Decision."

In 1985, the State of Michigan and the signatory tribes to the 1836 Treaty entered into a consent judgment regarding management of the Great Lakes fishery. That agreement affirmed that the State and the Tribes must work together to protect the Tribes' treaty fishing rights and manage the Great Lakes fishery in a manner that respected tribal and state interests. The Tribes and the State have worked together to protect the Great Lakes ever since.

In 2000, the State and the Tribes negotiated a second iteration of the consent judgment, which was intended to last until August 2020. We have recently begun the work necessary to negotiate a new consent judgment in the ongoing litigation between the State and the Tribes under the Fox Decision.

B. *Timeline of Events Related to Tribal Interest in Line 5 Pipeline Operations*

It is important to place our concerns in context of interactions that have taken place between tribes, federal agencies, state agencies, and Enbridge in recent years. Therefore, we have set forth a recitation of some of those key events:

> ***July 2010*** – Enbridge's Line 6B ruptures near Marshall, and spilled 800,000 gallons of oil into a tributary of the Kalamazoo River. The cost of the cleanup for this incident has exceeded $1 Billion.

July 2016 – The United States Department of Justice and Environmental Protection Agency files a lawsuit against Enbridge for environmental harm resulting from the Line 6B oil spill, and published notice of a draft Consent Decree with Enbridge. Without any prior notice to any of the tribes in Michigan, the draft Consent Decree included provisions relating to Enbridge's Line 5 crossing at the Straits of Mackinac (mandating that Enbridge take certain actions).

August 3, 2016 – The State of Michigan issues a letter to Enbridge notifying them of violating the 1953 Easement due to unsupported spans of Line 5 exceeding 75 feet. Exactly two months later, DEQ issues permit to Enbridge for the installation of four screw anchors on the Line 5 Pipeline crossing in the Straits of Mackinac. Prior to this date, the State had never notified Bay Mills of Enbridge's anchor construction activities in the Straits of Mackinac.

November 27, 2017 – Michigan Governor Rick Snyder signs an agreement between the State of Michigan and Enbridge setting forth some interim requirements for the operation of the Line 5 Pipeline in the Straits of Mackinac, and contemplating a replacement for the span beneath the Straits. While the agreement states that Enbridge's Line 5 Pipeline impacted tribal interests, neither the Governor nor any Michigan agency notified Bay Mills that it was negotiating an agreement with Enbridge.

March 2018 – Bay Mills participates in a meeting with leadership from the MDNR and MDEQ in Lansing to discuss the State's ongoing efforts relating to the Line 5 Pipeline. The Director of the MDNR rejects a request from Bay Mills to amend the November 2017 agreement with Enbridge to make Tribes a party to that agreement; or, to enter into an agreement with Tribes to provide information relating to the safety of the Line 5 Pipeline. In rejecting our request, the Director of the MDNR told Bay Mills representatives to, "get your own agreement with Enbridge."

April 1, 2018 – Enbridge's Line 5 pipeline is damaged by an anchor drag/strike from a commercial vessel in the Straits of Mackinac. That same incident caused damage to electrical cables along the bottom of the Straits owned by American Transmission Company, resulting in several hundred gallons of toxic chemicals spilling into the water. Due to adverse weather conditions, federal and state agencies were unable to assess the scope of the chemical spill for several days.

April 2018 – Bay Mills, and other tribes, become aware that the U.S. Department of Justice is negotiating an amendment to its 2016 settlement agreement with Enbridge regarding the Line 5 Pipeline. Federal agencies did not provide Bay Mills, or other tribes, with notice of these negotiations until they were substantially completed.

May 15, 2018 – Bay Mills hosts representatives from Enbridge and the 1836 Treaty Tribes for a discussion about a potential agreement relating to information-sharing

about the Line 5 Pipeline. Enbridge refuses to provide the Tribes with the same information it provides to the State of Michigan relating to the condition of the pipeline.

June 28, 2018 – Bay Mills participates in a consultation with the U.S. Army Corps of Engineers regarding Enbridge's application for the installation of several dozen anchor supports along the Line 5 Pipeline. The U.S. Army Corps indicates that it will perform an Environmental Assessment of Enbridge's application, instead of granting the permit under a nationwide permit (pursuant to previous practice). This is the first time Enbridge's applications relating to the Line 5 Pipeline have been subjected to scrutiny under the National Environmental Policy Act.

August 7, 2018 – Bay Mills participates in a consultation with the U.S. Department of Justice and Environmental Protection Agency in Traverse City, regarding proposed amendments to the 2016 consent decree. Attorneys with the U.S. Department of Justice informed tribal representatives that Enbridge was not in compliance with its easement with the State of Michigan. The DOJ and EPA filed the proposed amendments with the Court less than 24 hours after the meeting, and did not provide any substantive responses to tribal comments/concerns. Notably, the State of Michigan did not comment on the proposed amendments, despite ongoing negotiations with Enbridge.

October 3, 2018 – Michigan Governor Rick Snyder enters into a second agreement with Enbridge regarding the continued operation of the Line 5 Pipeline in the Straits of Mackinac. Among other things, the new agreement requires Enbridge to take immediate steps to repair/improve the Line 5 Pipeline at two different water crossings in the Upper Peninsula. Tribes were not provided any opportunity to participate in the State's negotiations, or otherwise comment on the State's proposals. Tribes were not provided any prior notice that the two water crossings referenced in this agreement were matters of concern, despite prior requests to the State to receive information regarding the condition of Enbridge's Line 5 Pipeline.

November 2018 – Michigan's Legislature introduces and immediately moves legislation authorizing the construction of a multi-utility tunnel beneath the Straits of Mackinac, and establishing an independent government body to regulate that tunnel. Michigan Governor Rick Snyder signs the legislation into law and immediately appoints members to the governmental body. Bay Mills, and other tribes, were not consulted during this process. In response to Bay Mills' request for government-to-government consultation, the Director of the MDNR responds that, "we don't need to consult with you because we already know your position."

December 2018 – Outside Legal Counsel for Michigan's Governor engages in discussions with representatives for several tribes regarding an intergovernmental agreement that provides for joint tribal-state participation in monitoring and improving the condition of the Line 5 Pipeline at other water crossings in the State

of Michigan. The discussions expire at the conclusion of the Michigan Governor's term on December 31, 2018.

March 28, 2019 – Michigan's Attorney General issues a formal opinion stating that the 2018 legislation authorizing a multi-utility tunnel beneath the Straits of Mackinac and establishing an independent governing body for its oversight is unconstitutional.

April 30, 2019 – The Vice-President for American Transmission Company issues a letter to the Executive Director of the Chippewa Ottawa Resource Authority stating that a multi-utility tunnel beneath the Straits of Mackinac may not be feasible. The letter also states, "ATC does not believe that installing high voltage electric lines in close proximity to high pressure oil or gas lines is a good idea."

May 3, 2019 – Representatives from several state agencies participate in a formal government-to-government consultation with tribal representatives in Mackinaw City regarding the State of Michigan's approach to Enbridge's Line 5 Pipeline.

As this timeline of events shows, Bay Mills (and other tribes) have been consistently and repeatedly excluded from any governmental process relating to Enbridge's Line 5 Pipeline, despite repeated requests to participate; and, despite our treaty-protected interest in the Straits of Mackinac.

In a number of instances, the State (and federal) government ignored tribal questions on matters that came to public light later – such as the condition of other water crossings for the Line 5 Pipeline, and the feasibility of a multi-utility tunnel beneath the Straits of Mackinac.

IV. Questions and Concerns of the Bay Mills Indian Community Regarding Line 5

The State of Michigan is considering taking actions to allow Enbridge to take further steps to stabilize the Line 5 dual pipelines in the Straits of Mackinac, to improve Line 5 water crossings of other water bodies in Michigan, and to construct a multi-utility tunnel beneath the Straits of Mackinac. All of these actions would occur within our treaty-ceded territory, where we manage natural resources in coordination with the State of Michigan and the United States under a series of judicially-binding consent decrees in the case of *United States v. Michigan*.

At present, we lack important information that would allow us to protect our interests, and provide the State with valuable insights that can inform its decision-making process. We have requested much of this information from the State in the past, without receiving substantive responses. We have set forth our outstanding questions below, along with additional questions for the State. The Tribe respectfully requests a formal and substantive response to these questions within 45 days:

1. ***Does Enbridge shut down (vacate and depressurize) the Line 5 Pipeline beneath the Straits of Mackinac during maintenance activities?***

Enbridge has clearly demonstrated that completing maintenance activities on the Straits segment of Line 5 can result in damage to the Line. For the protection of our Great Lakes resources, Bay Mills requests that the State make this a conditional requirement to any additional permits being administered for maintenance on the Line 5 Pipeline.

2. ***How did the State determine the 8-foot wave height threshold for "adverse weather conditions" in its November 27, 2017 agreement with Enbridge, Inc.?***

The November 27, 2017 agreement between the State of Michigan and Enbridge, Inc. establishes an 8-foot wave height threshold for the occurrence of "adverse weather conditions," during which Enbridge, Inc. must shut down the Line 5 Pipeline beneath the Straits of Mackinac. Federal agencies, including the Coast Guard have indicated that they were not formally consulted by the State of Michigan in developing this standard, and have indicated to Tribes that they may not be able to respond to an oil spill when wave heights exceed four feet.

3. ***Does the State of Michigan have a plan in place for response to an oil spill in the Straits of Mackinac? Does the State of Michigan have any agreements in place with federal, tribal, or local governmental agencies to respond to an oil spill in the Straits of Mackinac?***

At present, Enbridge does not have a federally-approved spill response plan for the Line 5 Pipeline. In posing this question to State agencies in the past, officials have indicated that federal, state, and local agencies would respond to a spill pursuant to intergovernmental agreements. But, the State has not provided copies of any such agreements. To our knowledge, there are no intergovernmental agreements in place that address a response to an oil spill in the Straits of Mackinac.

4. ***Given recent events with American Transmission Company's spill in the Straits, is the State confident that it (or any responding agency) can sufficiently protect our resources in the Straits by responding to a spill during ice cover?***

5. ***Does the State of Michigan know how many times the Line 5 Pipeline has been struck or damaged by a vessel anchor? If so, can the State of Michigan please provide Bay Mills with records of those incidents?***

In 2018, a vessel anchor struck and damaged the Line 5 Pipeline in the same incident in which a vessel anchor damaged American Transmission Company's electric transmission lines. Enbridge self-reported the anchor strike, but has not provided the public with any information on previous anchor strikes on the Line 5 Pipeline.

6. ***Does the State of Michigan have a mechanism in place for Enbridge to report damage to the Line 5 Pipeline that occurs due to maintenance and/or construction activities? How many times has Enbridge's maintenance and/or construction activities caused damage to the Line 5 Pipeline in the Straits of Mackinac and at other water crossings?***

7. ***In light of the American Transmission Company's April 30, 2018 letter to the Chippewa Ottawa Resource Authority, does the State of Michigan believe that it is safe to place high-voltage power lines in close proximity to high-pressure oil pipelines in an enclosed tunnel beneath the Straits of Mackinac? Does American Transmission Company's recent letter change or alter the State's views on whether such a tunnel is technically and economically feasible?***

8. ***Has the State of Michigan identified any other Line 5 Pipeline water crossings that are of immediate concern, beyond those specified in the October 3, 2018 agreement between the State and Enbridge?***

9. ***Does the installation of additional screw anchors on the Line 5 Pipeline in the Straits of Mackinac increase the risk of an anchor-strike or anchor-"hook"?***

10. ***Does the State view the lack of a federally-approved response plan as required by the Oil Pollution Act of 1990, a violation of the 1953 Easement with the State of Michigan.***

11. ***Given that the coal tar coating of Line 5 is known to be highly toxic, has any data been collected on the presence of contaminants in sediments surrounding Line 5?***

We asked this question in our July 31, 2017 letter to the State of Michigan regarding Enbridge's permit application for 22 anchor supports. The same question was asked of the United States Army Corps of Engineers in letters dated July 31, 2017 and December 19, 2017. To date we have not received a substantive response from any agency.

12. ***If a spill in the Straits were to happen today, what current baseline data on the aquatic resources of the Straits does the State have that would inform the Natural Resources Damage Assessment process?***

V. Bay Mills Indian Community Requests and Recommendations to the Governor

In addition to the questions above, Bay Mills Indian Community requests that the State of Michigan take the following steps to protect our shared sovereign interests in the waters of the Great Lakes:

1. **Immediately halt or suspend any consideration of further permits related to the Line 5 Pipeline until Enbridge has received federal approval for its spill response plan.**

   Enbridge (belatedly) disclosed that its earlier construction activities have damaged the Line 5 Pipeline beneath the Straits. Construction of several dozen new anchor supports increases the potential for a pipeline rupture and oil spill. It would be reckless to allow Enbridge to conduct activities that place the Great Lakes at risk of an oil spill without having an approved spill-response plan in place.

2. **Execute intergovernmental agreements with federal, tribal, and state agencies for pipeline monitoring and response to an oil spill in the Straits of Mackinac or other bodies of water within the State of Michigan.**

3. **Resume negotiations with tribal governments regarding the integrity of the Line 5 Pipeline at other water crossings within the State of Michigan.**

4. **Reach a determination that the installation of anchor supports along the Line 5 Pipeline in the Straits of Mackinac do not increase the risk of a structural failure in the pipeline or an anchor strike prior to issuing any permit for installation of such supports.**

5. **Undertake a comprehensive risk analysis by independent experts of decommissioning the Straits segment of Line 5, and with the alternative scenarios limited to the continued operation of the existing infrastructure.**

6. **Include Bay Mills (and other 1836 Treaty tribes) in any negotiations with Enbridge and/or government agencies regarding the potential for a tunnel beneath the Straits of Mackinac.**

7. **Include Bay Mills (and other Treaty Tribes) in any discussions with Enbridge and/or government agencies regarding the condition of inland portions of Line 5, especially at water-crossings and sensitive habitats.**

   The Bay Mills Indian Community is a sovereign Indian tribe with governmental interests. Enbridge is not; it is a private, for-profit company. The Bay Mills Indian Community has rights to the waters of the upper Great Lakes that are expressly reserved through a treaty with the United States. Enbridge does not. The Bay Mills

Indian Community is party to litigation with the State of Michigan and the United States concerning the protection and exercise of those rights. Enbridge is not.

Therefore, it is wholly inappropriate for the Bay Mills Indian Community to be excluded from any agreement concerning the impacts of the Line 5 Pipeline on our treaty-reserved rights.

Conclusion

The Bay Mills Indian Community is appreciative of the opportunity to express its concerns and recommendations to the Governor in this extremely important matter.