



**Bay Mills Indian Community**  
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June 15, 2018

Cathy Stepp, Administrator  
U.S. Environmental Protection Agency – Region V  
Ralph Metcalf Federal Building  
77 West Jackson Blvd.  
Chicago, IL 60604

Dear Ms. Stepp,

I am writing on behalf of the Bay Mills Indian Community (“Bay Mills”) to express our concern and frustration regarding the Environmental Protection Agency’s (“EPA’s”) and the Department of Justice’s (“DOJ’s”) lack of process and transparency regarding its efforts to modify the Consent Decree in *United States v. Enbridge* (the “Consent Decree”).

From our perspective, it appears that the proposed modification of the Consent Decree is intended to avoid tribal consultation, and circumvent the statutory permitting process for the Line 5 Pipeline.

**BACKGROUND**

On March 20, 2018, I received a letter from the United States Army Corps of Engineers (the “Army Corps”) informing Bay Mills that Enbridge was seeking a permit to install 48 new anchor supports on the Line 5 Pipeline in the Straits of Mackinac. In response to that notice, Bay Mills and several other tribes requested that the Army Corps engage in formal consultation on Enbridge’s request.

Several weeks later, on May 1<sup>st</sup>, I received a copy of an April 24, 2018 email from an Enbridge attorney to the United States Army Corps of Engineers indicating that Enbridge and the EPA were working to modify the Consent Decree in *United States v. Enbridge*. This was the first time I was made aware that Enbridge and the EPA were in active discussions regarding modifications to the Consent Decree. The email communication stated:

The federal consent decree is currently being revised to better define the requirements for spans relative to “uncovered” pipe. *The proposed modification of the consent decree would require 48 new anchors.* (emphasis added).

Two days later, on May 3<sup>rd</sup>, I received a letter from EPA Regional Counsel T. Leverett Nelson “regarding a potential modification to the Consent Decree....” The letter offered a chance to meet with EPA and DOJ representatives during the week of May 14<sup>th</sup> – mere days after EPA had informed us of the potential modification. The letter suggested that such a short timeframe was necessary because “EPA and DOJ expect to release a proposed modification to the Consent Decree for public comment in May of 2018.”

Bay Mills requested the text of the proposed modifications by email on May 16<sup>th</sup>, and on several occasions since then. We still have not received a copy of the proposed modifications to the Consent Decree.

In an email issued yesterday, the EPA informed us that it will not be able to provide us with a copy of the proposed modifications to the Consent Decree prior to our scheduled consultation meeting in Traverse City, Michigan on Tuesday, June 19<sup>th</sup> – only four days from now.<sup>1</sup>

## **DISCUSSION**

Bay Mills requests that we postpone our scheduled June 19<sup>th</sup> consultation until after we have been provided with a copy of the proposed modifications to the Consent Decree. We do not believe that a meeting would be productive at this point, as you have not shared any language regarding the changes being contemplated. We are simply unable to provide substantive comments on EPA’s and DOJ’s intentions at this time. We further request that EPA and DOJ consult with us on the proposed modifications prior to seeking public comment on any modification to the Consent Decree.

I also want to express my serious concerns regarding the process by which EPA and DOJ are considering amendments to the Consent Decree.

Enbridge has requested a permit from the U.S. Army Corps of Engineers to install 48 new anchors on the Line 5 Pipeline beneath the Straits of Mackinac. But, on April 24<sup>th</sup>, Enbridge informed the Army Corps that it was working with EPA and DOJ to modify the Consent Decree to require the installation of 48 new anchor supports – the same number set forth in its permit application to the Army Corps.

The Army Corps has indicated that it intends to engage in formal consultation with the tribes affected by Enbridge’s application to install 48 new anchor supports; moreover, it has also indicated that it will engage in a formal review process under the National Environmental Protection Act (“NEPA”). This formal process is vitally important, as it ensures that federal agencies will consider alternatives to a reconfiguration of the Line 5 Pipeline that will allow it to remain in place indefinitely. Bay Mills, along with every other tribe in Michigan, has stated that the indefinite operation of the Line 5 Pipeline in the Straits of Mackinac poses an unacceptable risk to our treaty rights, cultural rights, natural resources, and human health.

EPA’s work with Enbridge to modify the Consent Decree to allow 48 new anchor supports (per Enbridge’s statement to the Army Corps) will presumably circumvent that process entirely. If this is the intent or goal of the amendments, it is contrary to the law and to the United States’ representations to the Court in this matter. It is well-settled that a consent decree cannot be approved if it conflicts with or violates an applicable statute. Thus, the Court may not approve a consent decree that shields a party from complying with statutory or regulatory requirements of the Clean Water Act and NEPA.

Further, EPA and DOJ have expressly assured both the Court and the public that the Consent Decree did not authorize any construction activities, and that Enbridge would need to apply for and obtain permits from federal regulatory agencies through the normal process of obtaining such permits.<sup>2</sup> If EPA and DOJ propose

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<sup>1</sup> In several emails, EPA officials have made it clear that neither the EPA nor DOJ believe that the Federal Government has an obligation to consult with the tribes affected by Enbridge’s Line 5 Pipeline regarding the Consent Decree. In other words, EPA and DOJ have asserted that any meeting between affected tribes and federal agencies is a mere courtesy.

<sup>2</sup> See United States Memorandum in Support of the Unopposed Motion of the United States for Entry of the Consent Decree at 28-30; United States Response to Comments Regarding Public Comments Received at 21 -25.

to modify the Consent Decree to shield Enbridge, Bay Mills, other Tribes that maintain treaty reserved rights, and members of the public will be directly impacted in concrete ways. For example, Tribes and interested parties would not be allowed to present alternatives to the Army Corps for consideration under NEPA of whether to permit installation of these anchor supports. There will be no public hearings at which interested parties can present alternatives. Finally, neither Bay Mills nor affected parties will be allowed to appeal a judicial decree requiring Enbridge to install 48 new anchor supports.

This process smacks of bad faith, and is leading toward a severe breach of the EPA's and DOJ's trust obligation to the Bay Mills Indian Community.

After all, Bay Mills is a party to the 1836 Treaty of Washington, which ceded the waters of the Straits of Mackinac to the United States. In exchange for that valuable land cession, our tribe reserved the right to fish in the waters of the Straits of Mackinac. DOJ defended that right in the landmark case of *United States v. Michigan*. Bay Mills is presently working with DOJ to negotiate a consent decree in the *United States v. Michigan* case to protect our treaty rights in the ceded waters – including the waters of the Straits of Mackinac.

EPA and DOJ are well-aware of our reserved treaty rights, and of our concerns relating to the Consent Decree in *United States v. Enbridge*. Bay Mills, and several other tribes, objected to the original Consent Decree when it was first entered in 2016.<sup>3</sup> In response to our objections, the United States acknowledged our direct interest, stating:

As the United States has long recognized, the 1836 Treaty gives the Michigan Tribes legally-protected rights to fish in the Straits of Mackinac and in adjoining waters of Lake Michigan and Lake Huron. The Tribes correctly point out that a rupture of Line 5 as it crosses the Straits could (depending on the location of the rupture and amount of oil discharged) have severe impacts on fish and disrupt fishing activities both in the Straits and in portions of Lake Michigan and Lake Huron.

United States Response to Comments Regarding Public Comments Received at 21 -22.

That awareness makes it all the more frustrating that Bay Mills learned of the proposed modification of the Consent Decree through a casual email provided by Enbridge to the Army Corps, instead of learning it from EPA or DOJ. I am fearful that this process is intended to prevent Bay Mills and other interested parties from offering substantive input on the future of Enbridge's Line 5 Pipeline, and from having the ability to appeal a negative decision.

## CONCLUSION

The Line 5 Pipeline poses grave risks to the Bay Mills Indian Community and the people of northern Michigan. EPA and DOJ owe a trust responsibility to Bay Mills to protect the rights we reserved under the 1836 Treaty of Washington, and to protect our health, safety, and welfare. If the proposed amendments attempt to fast-track the regular permitting process or circumvent NEPA review as it relates to the issuance of any required permits, Bay Mills stands prepared to take appropriate legal action. Hopefully, such legal

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<sup>3</sup> It is worth noting that the *United States v. Enbridge* litigation had nothing to do with Enbridge's Line 5 Pipeline, which crosses the treaty-ceded territory of the Bay Mills Indian Community. That litigation was filed in response to Enbridge's oil spill on a separate pipeline. The Bay Mills Indian Community was not on notice that its rights were at stake until after the Consent Decree was published in the Federal Register in 2016. Neither the EPA nor DOJ consulted with the Bay Mills Indian Community and other tribes before negotiating the Consent Decree.

action can be avoided through meaningful consultation. We are entitled to more than a courtesy “check the box” meeting from our federal trustee, where we do not have the opportunity to provide substantive feedback on EPA’s and DOJ’s plans.

I am requesting that we delay any meeting until after we have been provided with a copy of the proposed modifications to the Consent Decree in *United States v. Enbridge*. Further, I am requesting that this meeting occur prior to the EPA’s and DOJ’s publication of the proposed modifications in the Federal Register. Thank you

Sincerely,



Bryan Newland, Chairman  
Bay Mills Indian Community

Cc: Senator Debbie Stabenow  
Senator Gary Peters  
Congressman Jack Bergman  
Michigan Governor Rick Snyder  
Acting Assistant Secretary of the Interior – Indian Affairs John Tahsuda  
Steven Willey, United States Department of Justice  
Member Tribes of the Chippewa Ottawa Resource Authority