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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGIONAL ADMINISTRATOR
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUL 3 0 2018

Bryan Newland, Chairman
Bay Mills Indian Community
12140 West Lakeshore Drive
Brimley, Michigan 49715

Dear Chairman Newland:

Thank you for your June 15, 2018 letter regarding the modification of the May 23, 2017 Consent Decree between EPA and Enbridge, which is expected to be proposed shortly. You express concern regarding the management of this proposed modification by the U.S. Environmental Protection Agency ("EPA") and U.S. Department of Justice ("DOJ").

First, EPA would like to provide you with additional, recent information related to the proposed modification. As you note, EPA sent a letter to the five Chippewa Ottawa Resource Authority (CORA) tribes on May 3, 2018. In that letter, EPA informed the CORA tribes that it expected to propose a modification to the Consent Decree. Further, the May 3 letter noted that the proposed modification relates to Section VII.E. (paragraph 68) of the Consent Decree, which addresses screw anchors in the Straits of Mackinac. Representatives of DOJ and EPA offered to travel to Michigan to meet with all interested tribal representatives regarding this expected proposed modification to the Consent Decree prior to the time the proposed modification went out for public comment. After a meeting date of May 19 was set, it became apparent that DOJ and EPA would be unable to provide a copy of a draft proposed modification to the CORA tribes prior to the meeting and the meeting was postponed, as requested by the CORA tribes. On June 25, EPA notified the CORA tribes that DOJ and EPA had made more progress on the approval process for a proposed modification and anticipated being able to share a draft proposed modification in approximately one month. DOJ and EPA are now scheduled to meet with tribal representatives in Traverse City on August 7 at 10:00 a.m. DOJ and EPA anticipate that publication in the Federal Register regarding the proposed modification will occur after August 7.

Second, I wish to address your concerns regarding the proposed modification and the process EPA is employing to interact with the CORA tribes on the proposed modification. 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.¹ This includes the Army Corps of Engineers and State of Michigan permitting processes which you reference in your letter.²

Third, you express concern regarding information you have indicating that EPA and DOJ were negotiating a potential modification with Enbridge as early as April 24, 2018, without informing the CORA tribes. As you know, the CORA tribes are not parties to the Consent Decree. As a result, the negotiations regarding this potential modification took place between DOJ and Enbridge. No non-parties participated in the negotiations. You may also wish to review this information which EPA sent on May 7:

One important clarification we wish to make pertains to the discussion in your emails regarding formal consultation with the tribes. As this Consent Decree is a judicial enforcement matter, the DOJ Policy on Tribal Consultation (August 29, 2013) applies. Under that policy, DOJ "...seeks Tribal input regarding the development of new or amended policies, regulations, and legislative actions initiated by the Department." The DOJ policy does not, however, provide for consultation on matters that are "the subject of investigation, anticipated or active litigation, or settlement negotiations."

-May 7, 2018 email from Garypie (EPA) to CORA tribes. See also the January 2018 response to Consent Decree Comments at pp. 21-26, which discusses the issue of consultation.

<https://www.epa.gov/enbridge-spill-michigan/enbridge-consent-decree-public-comments-and-revisions>.

As explained in that same email, the DOJ Policy on Tribal Consultation is not applicable to negotiation of the proposed modification currently under consideration. Nevertheless, EPA and DOJ want to provide the CORA tribes with an opportunity to meet in person to provide information regarding the proposed modification, answer questions and to listen to concerns. Please note such a meeting and our communications on a proposed modification are separate from the public comment process that occurs when a consent decree is initially proposed or when modifications which constitute a material change to a consent decree are proposed. As such, any concerns you wish to be formally considered should separately be provided in writing during the public comment period. The public comment period will be announced in the Federal Register and DOJ and EPA expect to let you know via email when the announcement occurs.

¹ See the January 2018 response to Consent Decree comments at pp. 57, footnote 26 which notes that delays in permitting may provide a basis for extending a schedule for completing required work under the Consent Decree. <https://www.epa.gov/enbridge-spill-michigan/enbridge-consent-decree-public-comments-and-revisions>.

² See the May 24, 2017 letter from the Corps to the tribes regarding the Enbridge permit application for installation of 22 screw anchors and the March 20, 2018 letter from the Corps to the tribes regarding the Enbridge permit application for installation of 22 screw anchors.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Catherine Garypie, Regional Counsel, at (312) 886-5825.

Sincerely,



Cathy Stepp
Regional Administrator

- cc: Steven J. Willey, EES/ENRD/USDOJ
William Rastetter, Tribal Attorney, Grand Traverse Band of Ottawa and Chippewa Indians
Bryan Newland, Chairman, Bay Mills Indian Community
Aaron Payment, Tribal Chairperson, Sault Ste. Marie Tribe of Chippewa Indians
Thurlow McClellan, Chairman, Grand Traverse Band of Ottawa and Chippewa Indians
Larry Romanelli, Ogema, Little River Band of Ottawa Indians
Regina Gasco-Bentley, Chairperson, Little Traverse Band of Odawa Indians