Exhibit 1

Comments 1-37

Attachment A Comments 38 – 84

Attachment B Comments 85 – end

Exhibit 1

Part 1 Comments 1 - 7

Comment 1

From: KnowWho Services
To: ENRD, PUBCOMMENT-EES (ENRD)
Subject: Public comment on United States v. Enbridge Energy (DJ. Ref. No. 90-5-1-1-10099)
Date: Wednesday, August 24, 2016 3:22:09 PM

Dear EPA and Department of Justice,

I'm writing to urge the EPA and DOJ to hold Enbridge accountable for the largest oil spill ever on U.S. soil, instead of giving it a slap on the wrist.

In 2010, the Canadian pipeline company Enbridge caused the worst onshore oil spill in U.S. history when it dumped more than a million gallons of heavy tar sands crude oil into Talmadge Creek and the Kalamazoo River in Michigan. A National Transportation Safety Board report on the incident described a pattern of neglect and insufficient training that increased the severity of the spill, which polluted more than 40 miles of the Kalamazoo River, took at least five years to clean up, and permanently displaced families from their homes.

The $62 million in civil penalties that the EPA and DOJ negotiated with Enbridge amounts to a slap on the wrist for a company like Enbridge, which reported $1.2 billion in earnings in just the first quarter of 2016.

Even more outrageous is the fact that the consent decree would actually reward Enbridge with a mandate to replace its aging Line 3 pipeline in Minnesota and Wisconsin. The Line 3 "replacement," however, is a project Enbridge has been pushing for years, and it really means building an entirely new, bigger pipeline designed to pump twice as much crude oil through the region. While this mandate would not supersede or preempt the ongoing regulatory process for Line 3, it is nonetheless inappropriate to include in the settlement process for a completely different pipeline in a different state. There are also many unaddressed concerns with the twin Line 5 pipelines as they pass under the Great Lakes and threaten drinking water for 40 million people which are not addressed in the settlement.

Given the magnitude of the oil disaster caused by Enbridge's negligence in Michigan, and its long history of safety violations, it's imperative that the EPA and DOJ impose fines strong enough to send a message to Enbridge and other pipeline companies that massive oil spills are not just a cost of doing business. The requirement to replace Line 3 should also be removed from the final consent decree.

Thank you for your consideration.

Sincerely,

Sally Henkes
[redacted] IA [redacted]

Comment 2

August 23, 2016

Assistant Attorney General, U. S.

DOJ-ENRD

PO Box 7611

Washington, D. C. 20044-7611

email: pubcomment-ees.enrd@usdoj.gov

RE: Consent Decree DOJ/Enbridge public comment

The recent Consent Decree put forth by the Department of Justice is certainly a gift, not a penalty, to Enbridge. By encouraging haste in completing a Line 3 replacement, the Consent Decree has given Enbridge the gift of a talking point in rushing through a pipeline that would be extremelly dangerous to Minnesotas water resources and thus risking the completion of a full and comprehensive Environmental Impact Statement which Minnesota Courts have ordered.

The Consent Decree places itself in the middle of a decision that belongs to Minnesota. It not only supports Enbridge's wish to move tar sands oil through Minnsota's watered environment, unbelievably, the Decree also allows for Enbridge the potential to again re-open the old line 3 pipeline. So, thus the Decree is gifting two pipelines to Enbridge rather than one.

In the first place, the public who care about our environment and resources and the health of citizens has to ask, why were not criminal charges levied against Enbridge? Certainly, allowing the Kalamazoo rupture to go on for 17 hours, before action, is gross negligence and a complete breakdown of safety measures on behalf of the company! The lesson from the Kalamazoo debacle should be caution in regard to pipeline construction and certainly not rewarding unconscionable behavior of big oil corporations. The sets a very dangerous precedent.

Enbridge continues to show disregard for safety and care of environmental assets, by it's request of the Line 3 replacement corridor through the most pristine and valuable water assests of the State of MN. Enbridge set up a LLC company to go through our resources. At a public meeting, I asked Enbridge officials where the pipe comes from. The company stated the company they contract with for pipe is EVRAZ, which is associated with Russian iron ore and Chinese steel production. This leaves me as a citizen to question the quality of the steel which would be used in the pipes going through our precious waters. Enbridge has ignored the dangers and effects of dilbit in a watered environment in their Line 3 proposals to the MN PUC.

Another example of the companies disregard for the security of our nation's waters is the fact that Enbridge continues to use the very old pipe under the Straits of Mackinac and have it braced up. In 2013 they increased the flow thus endangering our precious Great Lakes even more!

Citizens who care about our water and our health, cannot be fooled by this Consent Decree. Enbridge came to the table and got what they want rather than a penatly of any significance, because a great share of the dollars sited in the penalty actually get Enbridge what it wants. An analogy this makes me think of is of robbers breaking in and steeling ancient artifacts of intrinsic value from a museum and then blowing the place up with gas and nasty chemicals and then as a result public officals give them a pittance of a fine and provide them with keys or entrance codes to move on to another like museum.

This Consent Decree speaks loudly to the crises our nation finds ourself in. A crises where corporate greed and influence trumps citizens safety and health. A crises where our god given and life-giving precious water supplies take a back seat to a short term corporate profit for a company. Minnesota is of the last remaining clean water resource regions in the country, and the requested Line 3 would go directly through the the cleanest water resources in the state. If Enbridge achieves this oil corridor, which terminates in Superior, Wisonsin, one has to worry then that they will wish to ship dirty tar sands on Lake Superior which holds 20% of the world's fresh water supply. As a citizen, I ask how much has to be sacrificed for this companies maximized profit? Please read the National Academy of Sciences study on the effect of Tar Sands dilbit on a watered environment. They as yet do not know how to clean up such a spill.

This crises of care for corporate entities rather than citizens, our environmental resources and health of citizens puts our country and our democracy in an extremely dangerous place. Please take an opportunity to change this Consent Decree so that is is a document of integrity and careful planning for our resources.

Sincerely,

Deanna Johnson

[redacted]

[redacted] MN [redacted]

Comment 3

To: ENRD, PUBCOMMENT-EES (ENRD)[PENRD3@ENRD.USDOJ.GOV]
From: margaret seibel
Sent: Wed 8/17/2016 6:03:19 PM
Importance: Normal
Subject: Consent Decree concerning Michigan oil spill in Kalamazoo River, Case 1:16-cv-00914 ECF No. 3 filed 07/20/16 United States v. Enbridge Energy, Limited Partnership, et al., D.J. Ref. No. 90-5-1-1-10099.
Received: Wed 8/17/2016 6:07:46 PM

Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to United States v. Enbridge Energy, Limited Partnership, et al., D.J. Ref. No. 90-5-1-1-10099.

As a resident of Minnesota, I am concerned about the consent decree for the following reasons:

1)According to the decree, the old line 6b was 43 years old (page 5,pageid35) and the decree says it cannot be put back into service, "Enbridge is permanently enjoined from operating, or allowing anyone else to operate Original US Line 6B for the purpose of transporting oil, gas, diluent, or any hazardous substance.(page 25, pageid55) According to Enbridge, "Line 3 is an existing 1,097-mile crude oil pipeline, originally installed in the 1960s" (http://www.enbridge.com/projects-and-infrastructure/projects/line-3-replacement-program-us). I am concerned because the consent decree says line 3 can be put back into service when it is older than line 6b.

2)The decree says the Lakehead system is 1900 miles (page 1, pageid31) and that Enbridge has done 5700 excavations from 2010 to 9/2014. (page 6, pageid36) What was the result of these excavations? I am concerned that the decree says that line 3 can be put back into service without referring to this information.

3) On page 25(pageid55), I think that instead of saying Enbridge will build a pipeline, "Enbridge shall replace the segment of the Lakehead System Line 3 oil transmission pipeline that spans approximately 292 miles from Neche, North Dakota, to Superior, Wisconsin (“Original US Line 3”).", it should read Enbridge will take Line 3 out of service by a certain date. I don't understand why the consent decree demands a new pipeline.

4)From page 41(pageid71), "In cases where an excavated section of pipe contains a high volume of unreported features, Enbridge need not collect and record field measurements of all features observed in the field, provided that (1) Enbridge obtains and records field measurements of all features that were identified by the ILI, as well as the five worst features not identified by the ILI;". I am concerned that the number 5 seems arbitrary and a record of features that are not identified by ILI is an important record to maintain. How often are features not identified by ILI the limiting pressure feature? I don't understand this phrase, "Notwithstanding the foregoing, Enbridge shall not be required for purposes of this Paragraph to record any field measurement values that are below the ILI tool detection thresholds." It seems to say that despite what was just said Enbridge does not have to report field measurements that the ILI tool doesn't detect when the decree just said it has to record the 5 worst measurements that the ILI didn't identify. This seems contradictory.

5) On page 90 (pageid120)the consent decree says for the 5 minute alarm, the MBS Leak Detection System shall detect and alarm if within any rolling 5 minute period, it cannot account for 7-13% of the volume of oil injected or pumped into the MBS segment. 13% is nearly twice 7%. Why is this such a big range?

Margaret Seibel, resident of Minnesota

Comment 4

From: Bill Rastetter
To: ENRD, PUBCOMMENT-EES (ENRD)
Cc: Candy Tierney [redacted]; Aaron Schlehuber [redacted]; James A. Bransky [redacted]; OTJ; Karen Diver; Jane TenEyck
Subject: comment re: 81 Fed. Reg. 48462 notice of consent decree
Date: Tuesday, August 23, 2016 11:11:01 AM
Attachments: Aug. 23, 2016 comment.pdf
Aug. 23, 2016 comment.docx

To whom it may concern:

Pursuant to 81 Fed. Reg. 48462 (July 25, 2016) notice of proposed consent decree in *United States v. Enbridge Energy, Limited Partnership, et al.*, (W.D. Michigan Case No. 1:16-cv-00914-GJQ-ESC), please find attached Word and PDF versions of a document entitled "**Objection, Demand for Tribal Consultation, and Request for Extension of Comment Deadline Until 90 Days After Completion of the Tribal Consultation Process**". Please be aware that earlier today this comment also was filed electronically with the federal court together with the referenced exhibits; those exhibits are not being submitted with this comment, but will be transmitted upon request.

Bill Rastetter

William Rastetter
Tribal Attorney
Grand Traverse Band of Ottawa and Chippewa Indians

Of Counsel to Olson, Bzdok & Howard, P.C.
[redacted] MI [redacted]
E-mail: [redacted] Web site: http://www.envlaw.com/

Objection, Demand for Tribal Consultation, and Request for Extension of Comment Deadline Until 90 Days After Completion of the Tribal Consultation Process

Introduction

This pleading is filed by the undersigned counsel for one of the intervening -plaintiff Indian Tribes in the *United States v. Michigan* litigation (W.D. Mich. Case No. 2:73 -cv-00026). Usufructuary rights reserved by the Indian Tribes in the March 28, 1836 Treaty of Washington (7 Stat. 491) – including fishing rights within the Straits of M ackinac through which Line 5 of Enbridge's Lakehead pipeline system extends – are the subject matter of the *United States v. Michigan* litigation which has been pending in this Court since 1973. Separately the 1836 Treaty Tribes and others are submitting comments pursuant to the process prescribed in the notice published July 25, 2016 in the Federal Register (81 Fed. Reg. 48462). In part the purpose of this pleading is to notify this Honorable Court an d the parties that – to the extent that terms of the Enbridge Line 6 settlement address Line 5 matters – the 1836 Treaty Tribes have an interest in the subject matter of the above -captioned litigation including claims under the Clean Water Act ("CWA")[1] pertaining to Line 5 as it extends through the Straits of Mackinac as well as inland portions of the 1836 Treaty cession.

The proposed consent decree filed July 20, 2016 purportedly deals with Line 6; but there are provisions addressing Line 5. [2] The 1836 Treaty Tribes' i mmediate concern is whether th e Line 5 provisions might preclude the Tribes (and/or the United States as trustee for the Tribes) from litigating CWA and/or other potential claims against Enbridge with respect to the imminent

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[1] *See* PageID.2-3.

[2] *See* paragraphs 67 73 (pp 75 80), paragraphs 81 83 (pp 85 86), and paragraph 122 (p 125 26). PageID.105-110, 115-116, 155-156.

likelihood of a catastrophic failure of Line 5 within the Straits of Mackinac [3] adversely affecting the Tribes' treaty-reserved property rights to the fishery resources. Had the 1836 Treaty Tribes been informed that the DOJ and EPA were including Line 5 issues in the discussions with Enbridge concerning settlement of Line 6 claims – and had the Tribes been consulted as required by federal law and policy – then it would not be necessary to request an extension of the comment period.

Yet despite prior knowledge of the 1836 Treaty Tribes' concerns regarding Line 5, [4] DOJ and EPA negotiated and apparently resolved Line 5 issues within the Enbridge Line 6 settlement – a settlement that directly impacts the Tribes' legally-protected interest in the subject matter of any Line 5 litigation.[5] But the 1836 Treaty Tribes never had an opportunity to consider possible intervention in the above-captioned civil action because no notice existed until the complaint was filed on July 20, 2016, and because the DOJ and EPA breached their trust responsibility to

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[3] "There exists an imminent risk of catastrophic harm to one-third of North America's surface water that is Lakes Michigan and Huron (one lake)." **Exhibit 9**, July 27, 2016 statement of Stanley ("Skip") Pruss, former Chief Energy Officer for the State of Michigan, former director of the Michigan Department of Energy, Labor and Economic Growth, former deputy director of the Michigan Department of Environmental Quality, and former Assistant Attorney General. http://5lakesenergy.com/other-hidden-costs-of-line-5/
See also https://www.nwf.org/pdf/Great-Lakes/NWF_SunkenHazard.pdf
("Sunken Hazard: Aging oil pipelines beneath the Straits of Mackinac an ever-present threat to the Great Lakes").

[4] *See* section II.B., *infra* at pages 6-7; *see also* **Exhibits 4A**, **4B** & **4C**; **5**, **5A**, **5B** & **5C**; **6**; **7**; and **8**.

[5] *See* order entered August 5, 2016 in Eastern District of Michigan Case No 2 16 cv 11727 [Doc # 25] granting intervention as parties-plaintiff to two of the 1836 Treaty Tribes in the litigation captioned *National Wildlife Federation v. Administrator of the Pipeline and Hazardous Materials Safety Administration*; Line 5 is the subject matter of this case. **Exhibit 10** is the Rule 24 motion and brief [Doc # 21] filed July 15, 2016 establishing, in the words of FED.R.CIV.P 24(a), that the 1836 Treaty Tribes have "an interest relating to the property or transaction" of any litigation involving portions of Line 5 extending through the 1836 Treaty cession area including the Straits of Mackinac.

consult with the 1836 Treaty Tribes. Pursuant to the motion enacted July 28, 2016, by the Chippewa Ottawa Resource Authority, the 1836 Treaty Tribes object to the proposed consent decree to the extent that it addresses Line 5 matters, demand consultation as required by the federal trust responsibility, and request an extension of the comment deadline until 90 days after completion of the tribal consultation process.

I. 1836 Treaty Tribes' legally-protected interest in subject-matter of Line 5 litigation

The Chippewa Ottawa Resource Authority ("CORA") is comprised of five Indian Tribes signatory to the March 28, 1836 Treaty of Washington (7 Stat. 491): Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, and Little Traverse Bay Bands of Odawa Indians (collectively, "the 1836 Treaty Tribes"). [6] In the 1836 Treaty these Tribes reserved off-reservation fishing rights in the Great Lakes including the Straits of Mackinac that have been confirmed by the federal courts, *see United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd.* 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). [7] In the 1836 Treaty these Tribes also reserved usufructuary fishing, hunting, trapping and gathering rights in inland portions of the cession that were confirmed by the November 2, 2007 Consent Decree (Dkt. 1799 in W.D. Mich. Case No. 2:73-cv-00026).[8]

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[6] *See* **Exhibit 5** (Declaration of Jane TenEyck) and attached **Exhibits 5A**, **5B** & **5C**.

[7] A map of the portions of Lakes Michigan, Huron and Superior in which the 1836 Treaty Tribes possess treaty-reserved fishing rights is designated as **Exhibit 1**; *see also United States v. Michigan*, 471 F. Supp. 192, at 277 (W.D. Mich. 1979).

[8] A map of the 1836 Treaty cession in which the 1836 Treaty Tribes possess inland treaty reserved usufructuary rights is designated as **Exhibit 2** (Appendix A at page 69 of November 2, 2007 Consent Decree, 2:73-cv-00026 PageID.1654).

The 1836 Treaty Tribes ' treaty-reserved fishing rights in the Great Lakes' fishery resources (including Straits of Mackinac) "are property rights protected by the United States Constitution." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources* , 971 F. Supp. 282, 288 (W. D. Mich. 1995), *aff'd.* 141 F.3d 635 (6th Cir. 1998), *cert. denied* , 525 U.S.1040 (1998). These property rights in the treaty -reserved fishery resources in Lakes Michigan, Huron and Superior (and in particular the Straits of Mackinac) are likely to be adversely impacted by inevitable discharges of oil from Line 5, *see* **Exhibit 3** (Declaration of Mark Ebener); *see also* footnote 3, *supra* at page 2 . Similarly, the 1836 Treaty Tribes have property rights in treaty -reserved fauna and flora resources within inland portions of the 1836 Treaty cession area through which Line 5 extends including rivers and streams tributary to Lakes Michigan, Huron and Superior that also are likely to be adversely impacted by inevitable discharges of oil from Line 5.

II. Objection: Breach of Trust Responsibility

A. U.S. v. Michigan litigation

With respect to the federal government's trust responsibility in the context of these Tribes' 1836 Treaty-reserved rights, *see United States v. Michigan* , *supra*, 471 F. Supp. at 205, 218 and 228. *See also* the Department of the Interior's web site: "The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages."

http://www.bia.gov/FAQs/

B. DOJ and EPA awareness of 1836 Treaty Tribes' concerns re: Line 5

The federal government's trust responsibility obligation and concomitant duty to consult with Tribes is not dependent upon a request initiated by Tribe(s). This duty flows from "the solemn obligation of the federal government" to protect "[t]he treaty -guaranteed fishing rights preserved to the Indians in the 1836 Treaty." *United States v. Michigan* , 653 F.2d 277, 278 (6th Cir. 1981). Nonetheless, the breach of the trust responsibility in this particular situation is even more egregious because both the Department of Justice ("DOJ") and Environmental Protection Agency ("EPA") had been apprised specifically about the 1836 Treaty Tribes' concerns regarding Line 5.

1. DOJ ENRD

-- The DOJ Environmental & Natural Resources Division ("ENRD") represents the 1836 Treaty Tribes in the *United States v. Michigan* litigation (W.D. Mich. Case No. 2:73 -cv-00026); the docket of that case reflects that ENRD attorneys John Turner and Steven Miskinis currently are counsel of record for the 1836 Treaty Tribes.

-- Three other ENRD attorneys represent the defendant in the *National Wildlife Federation v. Administrator of the Pipeline and Hazardous Materials Safety Administration* litigation[9] (E.D. Mich. Case No. 2:16-cv-11727); and by virtue of May-July correspondence with undersigned counsel and the Rule 24 pleadings filed July 15, 2016 (**Exhibit 10**) in that litigation, ENRD counsel are aware of 1836 Treaty Tribes' legally -protected interest in subject -matter of any Line 5 litigation.

[9] *See* appearances filed as Docs.10, 12, and 24 in Eastern District of Michigan Case No. 2:16-cv-11727.

-- The complaint and proposed consent decree filed July 20, 2016 in the *United States v. Enbridge* (Line 6) litigatio n are signed by an Assistant Attorney General (ENRD) and two additional ENRD attorneys.

-- Both the United States Attorney for the Western District of Michigan and the Assistant United States Attorney who signed the complaint and proposed consent decree filed July 20, 2016 in the *United States v. Enbridge* (Line 6) litigation also currently represent the 1836 Treaty Tribes in the *United States v. Michigan* litigation (W.D. Mich. Case No. 2:73-cv-00026).

2. EPA

There have had numerous interactions with EPA staff in the 1836 Treaty Tribes ' efforts seeking enforcement of the National Environmental Policy Act ("NEPA") to Enbridge's Line 5 construction activities within the Straits of Mackinac. *See, e.g.*, **Exhibit 4A** (EPA's December 1, 2014 letter); **Exhibit 4B** (memo to EPA prompting December 1, 2014 letter); and **Exhibit 4C** (December 16, 2014 email to Army Corps of Engineers).

C. DOJ & EPA policy (Office of Tribal Justice July 7, 2016 consultation letter)

The validity of the 1836 Treaty Tribe s' objection is confirmed by **Exhibit 11**, the July 7, 2016 letter from the Office of Tribal Justice inviting Tribal Leaders to participate in consultation with DOJ and EPA regarding a proposed settlement of another litigation. If generic "tribal consultation" is appropriate in the VW settlement, then specific consultation certainly is required for the 1836 Treaty Tribes whose treaty -reserved rights are impacted by aspects of the proposed litigation settlement addressing Line 5 issues.

III. Demand for Tribal Consultation

Because the 1836 Treaty Tribes have a legally-protected interest in the subject-matter of any litigation involving portions of the Line 5 pipeline extending through the 1836 Treaty cession, and because the proposed consent decree addresses Line 5 matters, the 1836 Treaty Tribes demand that DOJ and EPA engage in tribal consultation before implementing the current version of the consent decree.

IV. Request for Extension of Deadline for Comments

Due process requires the deadline for comments to be extended for a reasonable time beyond completion of the tribal consultation process as is authorized by paragraph 207 (PageID.190) and 28 C.F.R. § 50.7.

V. Preliminary Concerns

Upon information and belief, other comments are being submitted regarding the proposed consent decree raising concerns about the Line 5 provisions. Among those concerns is Enbridge's contention that any construction activities on Line 5 contemplated in the proposed consent decree are not subject to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, by virtue of the nationwide permit ("NWP") authorized by the Army Corps of Engineers. This contention is not valid; *see, e.g.*, the complaint[10] filed July 27, 2016 in the District of Columbia District Court in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, Case No. 1:16-cv-01534; *see also* **Exhibit 4C**. Again, had there been prior consultation with the 1836 Treaty Tribes by the Department of Justice and Environmental Protection Agency, this concern could have been thoroughly discussed with representatives of

[10] http://earthjustice.org/sites/default/files/files/3154%201%20Complaint.pdf

these agencies acting as the Tribes' trustee. Moreover, the Department of Justice currently acts as counsel for the 1836 Treaty Tribes in the *United States v. Michigan* litigation; yet the same DOJ counsel have acted contrary to the 1836 Treaty Tribes' interests in negotiating and filing the Enbridge Line 6 complaint and proposed consent decree on July 20, 2016 without any tribal consultation. Presumably this was an oversight that still can be corrected – if implementation of the proposed consent decree is extended for a reasonable time beyond completion of the tribal consultation process as is authorized by paragraph 207 (PageID.190) and 28 C.F.R. § 50.7.

Respectfully submitted:

Grand Traverse Band of Ottawa
and Chippewa Indians

Dated: August 23, 2016

/s/ William Rastetter
William Rastetter
Tribal Attorney
420 E. Front Street
Traverse City, MI 49686
231-946-0044 (telephone)
231-946-4807 (fax)
bill@envlaw.com

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ENBRIDGE ENERGY, LIMITED PARTNERSHIP, *et al.*, Defendants.	)	Case No. 1:16-cv-00914-GJQ-ESC Hon. Gordon J. Quist

OBJECTION, DEMAND FOR TRIBAL CONSULTATION, AND REQUEST FOR EXTENSION OF COMMENT DEADLINE UNTIL 90 DAYS AFTER COMPLETION OF THE TRIBAL CONSULTATION PROCESS

Grand Traverse Band of Ottawa
and Chippewa Indians

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Objection, Demand for Tribal Consultation, and Request for Extension of Comment Deadline Until 90 Days After Completion of the Tribal Consultation Process

Introduction

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The proposed consent decree filed July 20, 2016 purportedly deals with Line 6; but there are provisions addressing Line 5.[2] The 1836 Treaty Tribes' immediate concern is whether the Line 5 provisions might preclude the Tribes (and/or the United States as trustee for the Tribes) from litigating CWA and/or other potential claims against Enbridge with respect to the imminent

[1] *See* PageID.2-3.

[2] *See* paragraphs 67-73 (pp. 75-80), paragraphs 81-83 (pp. 85-86), and paragraph 122 (p. 125-26). PageID.105-110, 115-116, 155-156.

likelihood of a catastrophic failure of Line 5 within the Straits of Mackinac[3] adversely affecting the Tribes' treaty-reserved property rights to the fishery resources. Had the 1836 Treaty Tribes been informed that the DOJ and EPA were including Line 5 issues in the discussions with Enbridge concerning settlement of Line 6 claims – and had the Tribes been consulted as required by federal law and policy – then it would not be necessary to request an extension of the comment period.

Yet despite prior knowledge of the 1836 Treaty Tribes' concerns regarding Line 5,[4] DOJ and EPA negotiated and apparently resolved Line 5 issues within the Enbridge Line 6 settlement – a settlement that directly impacts the Tribes' legally-protected interest in the subject matter of any Line 5 litigation.[5] But the 1836 Treaty Tribes never had an opportunity to consider possible intervention in the above-captioned civil action because no notice existed until the complaint was filed on July 20, 2016, and because the DOJ and EPA breached their trust responsibility to

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[3] "There exists an imminent risk of catastrophic harm to one-third of North America's surface water that is Lakes Michigan and Huron (one lake)." **Exhibit 9**, July 27, 2016 statement of Stanley ("Skip") Pruss, former Chief Energy Officer for the State of Michigan, former director of the Michigan Department of Energy, Labor and Economic Growth, former deputy director of the Michigan Department of Environmental Quality, and former Assistant Attorney General. http://5lakesenergy.com/other-hidden-costs-of-line-5/
See also https://www.nwf.org/pdf/Great-Lakes/NWF_SunkenHazard.pdf
("Sunken Hazard: Aging oil pipelines beneath the Straits of Mackinac an ever-present threat to the Great Lakes").

[4] *See* section II.B., *infra* at pages 6-7; *see also* **Exhibits 4A**, **4B** & **4C**; **5**, **5A**, **5B** & **5C**; **6**; **7**; and **8**.

[5] *See* order entered August 5, 2016 in Eastern District of Michigan Case No. 2:16-cv-11727 [Doc # 25] granting intervention as parties-plaintiff to two of the 1836 Treaty Tribes in the litigation captioned *National Wildlife Federation v. Administrator of the Pipeline and Hazardous Materials Safety Administration*; Line 5 is the subject matter of this case. **Exhibit 10** is the Rule 24 motion and brief [Doc # 21] filed July 15, 2016 establishing, in the words of FED.R.CIV.P 24(a), that the 1836 Treaty Tribes have "an interest relating to the property or transaction" of any litigation involving portions of Line 5 extending through the 1836 Treaty cession area including the Straits of Mackinac.

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I. 1836 Treaty Tribes' legally-protected interest in subject-matter of Line 5 litigation

The Chippewa Ottawa Resource Authority ("CORA") is comprised of five Indian Tribes signatory to the March 28, 1836 Treaty of Washington (7 Stat. 491): Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, and Little Traverse Bay Bands of Odawa Indians (collectively, "the 1836 Treaty Tribes").[6] In the 1836 Treaty these Tribes reserved off-reservation fishing rights in the Great Lakes including the Straits of Mackinac that have been confirmed by the federal courts, *see United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd.* 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).[7] In the 1836 Treaty these Tribes also reserved usufructuary fishing, hunting, trapping and gathering rights in inland portions of the cession that were confirmed by the November 2, 2007 Consent Decree (Dkt. 1799 in W.D. Mich. Case No. 2:73-cv-00026).[8]

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[6] *See* **Exhibit 5** (Declaration of Jane TenEyck) and attached **Exhibits 5A**, **5B** & **5C**.

[7] A map of the portions of Lakes Michigan, Huron and Superior in which the 1836 Treaty Tribes possess treaty-reserved fishing rights is designated as **Exhibit 1**; *see also United States v. Michigan*, 471 F. Supp. 192, at 277 (W.D. Mich. 1979).

[8] A map of the 1836 Treaty cession in which the 1836 Treaty Tribes possess inland treaty-reserved usufructuary rights is designated as **Exhibit 2** (Appendix A at page 69 of November 2, 2007 Consent Decree, 2:73-cv-00026 PageID.1654).

The 1836 Treaty Tribes' treaty-reserved fishing rights in the Great Lakes' fishery resources (including Straits of Mackinac) "are property rights protected by the United States Constitution." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 288 (W. D. Mich. 1995), *aff'd.* 141 F.3d 635 (6th Cir. 1998), *cert. denied*, 525 U.S.1040 (1998). These property rights in the treaty-reserved fishery resources in Lakes Michigan, Huron and Superior (and in particular the Straits of Mackinac) are likely to be adversely impacted by inevitable discharges of oil from Line 5, *see* **Exhibit 3** (Declaration of Mark Ebener); *see also* footnote 3, *supra* at page 2. Similarly, the 1836 Treaty Tribes have property rights in treaty-reserved fauna and flora resources within inland portions of the 1836 Treaty cession area through which Line 5 extends including rivers and streams tributary to Lakes Michigan, Huron and Superior that also are likely to be adversely impacted by inevitable discharges of oil from Line 5.

II. Objection: Breach of Trust Responsibility

A. U.S. v. Michigan litigation

With respect to the federal government's trust responsibility in the context of these Tribes' 1836 Treaty-reserved rights, *see United States v. Michigan*, *supra*, 471 F. Supp. at 205, 218 and 228. *See also* the Department of the Interior's web site: "The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages." http://www.bia.gov/FAQs/

B. DOJ and EPA awareness of 1836 Treaty Tribes' concerns re: Line 5

The federal government's trust responsibility obligation and concomitant duty to consult with Tribes is not dependent upon a request initiated by Tribe(s). This duty flows from "the solemn obligation of the federal government" to protect "[t]he treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty." *United States v. Michigan*, 653 F.2d 277, 278 (6th Cir. 1981). Nonetheless, the breach of the trust responsibility in this particular situation is even more egregious because both the Department of Justice ("DOJ") and Environmental Protection Agency ("EPA") had been apprised specifically about the 1836 Treaty Tribes' concerns regarding Line 5.

1. DOJ ENRD

-- The DOJ Environmental & Natural Resources Division ("ENRD") represents the 1836 Treaty Tribes in the *United States v. Michigan* litigation (W.D. Mich. Case No. 2:73-cv-00026); the docket of that case reflects that ENRD attorneys John Turner and Steven Miskinis currently are counsel of record for the 1836 Treaty Tribes.

-- Three other ENRD attorneys represent the defendant in the *National Wildlife Federation v. Administrator of the Pipeline and Hazardous Materials Safety Administration* litigation[9] (E.D. Mich. Case No. 2:16-cv-11727); and by virtue of May-July correspondence with undersigned counsel and the Rule 24 pleadings filed July 15, 2016 (**Exhibit 10**) in that litigation, ENRD counsel are aware of 1836 Treaty Tribes' legally-protected interest in subject-matter of any Line 5 litigation.

[9] *See* appearances filed as Docs.10, 12, and 24 in Eastern District of Michigan Case No. 2:16-cv-11727.

-- The complaint and proposed consent decree filed July 20, 2016 in the *United States v. Enbridge* (Line 6) litigation are signed by an Assistant Attorney General (ENRD) and two additional ENRD attorneys.

-- Both the United States Attorney for the Western District of Michigan and the Assistant United States Attorney who signed the complaint and proposed consent decree filed July 20, 2016 in the *United States v. Enbridge* (Line 6) litigation also currently represent the 1836 Treaty Tribes in the *United States v. Michigan* litigation (W.D. Mich. Case No. 2:73-cv-00026).

2. EPA

There have had numerous interactions with EPA staff in the 1836 Treaty Tribes' efforts seeking enforcement of the National Environmental Policy Act ("NEPA") to Enbridge's Line 5 construction activities within the Straits of Mackinac. *See, e.g.*, **Exhibit 4A** (EPA's December 1, 2014 letter); **Exhibit 4B** (memo to EPA prompting December 1, 2014 letter); and **Exhibit 4C** (December 16, 2014 email to Army Corps of Engineers).

C. DOJ & EPA policy (Office of Tribal Justice July 7, 2016 consultation letter)

The validity of the 1836 Treaty Tribes' objection is confirmed by **Exhibit 11**, the July 7, 2016 letter from the Office of Tribal Justice inviting Tribal Leaders to participate in consultation with DOJ and EPA regarding a proposed settlement of another litigation. If generic "tribal consultation" is appropriate in the VW settlement, then specific consultation certainly is required for the 1836 Treaty Tribes whose treaty-reserved rights are impacted by aspects of the proposed litigation settlement addressing Line 5 issues.

III. Demand for Tribal Consultation

Because the 1836 Treaty Tribes have a legally-protected interest in the subject-matter of any litigation involving portions of the Line 5 pipeline extending through the 1836 Treaty cession, and because the proposed consent decree addresses Line 5 matters, the 1836 Treaty Tribes demand that DOJ and EPA engage in tribal consultation before implementing the current version of the consent decree.

IV. Request for Extension of Deadline for Comments

Due process requires the deadline for comments to be extended for a reasonable time beyond completion of the tribal consultation process as is authorized by paragraph 207 (PageID.190) and 28 C.F.R. § 50.7.

V. Preliminary Concerns

Upon information and belief, other comments are being submitted regarding the proposed consent decree raising concerns about the Line 5 provisions. Among those concerns is Enbridge's contention that any construction activities on Line 5 contemplated in the proposed consent decree are not subject to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, by virtue of the nationwide permit ("NWP") authorized by the Army Corps of Engineers. This contention is not valid; *see, e.g.*, the complaint[10] filed July 27, 2016 in the District of Columbia District Court in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, Case No. 1:16-cv-01534; *see also* **Exhibit 4C.** Again, had there been prior consultation with the 1836 Treaty Tribes by the Department of Justice and Environmental Protection Agency, this concern could have been thoroughly discussed with representatives of

[10] http://earthjustice.org/sites/default/files/files/3154%201%20Complaint.pdf

these agencies acting as the Tribes' trustee. Moreover, the Department of Justice currently acts as counsel for the 1836 Treaty Tribes in the *United States v. Michigan* litigation; yet the same DOJ counsel have acted contrary to the 1836 Treaty Tribes' interests in negotiating and filing the Enbridge Line 6 complaint and proposed consent decree on July 20, 2016 without any tribal consultation. Presumably this was an oversight that still can be corrected – if implementation of the proposed consent decree is extended for a reasonable time beyond completion of the tribal consultation process as is authorized by paragraph 207 (PageID.190) and 28 C.F.R. § 50.7.

Respectfully submitted:

Grand Traverse Band of Ottawa
and Chippewa Indians

Dated: August 23, 2016

/s/ William Rastetter
William Rastetter
Tribal Attorney
420 E. Front Street
Traverse City, MI 49686
231-946-0044 (telephone)
231-946-4807 (fax)
bill@envlaw.com

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ENBRIDGE ENERGY, LIMITED PARTNERSHIP, et al. Defendant.	Case No. 1:16-cv-00914-GJQ-ESC Hon. Gordon J. Quist

INDEX OF EXHIBITS

1. Map (1836 Treaty-ceded waters of the Chippewa-Ottawa Treaty of 1836)

2. Map (1836 Treaty-ceded territory with coordinates)

3. Declaration of Mark Ebener

4.

   4A. EPA Letter to Grand Traverse Band dated December 1, 2014

   4B. Memo to EPA regarding NWP

   4C. Request for Tribal Consulation

5. Declaration of Jane TenEyck
   5A. CORA Resolution 01-23-14
   5B. July 1, 2014 letter to PHMSA
   5C.CORA Resolution 01-28-16 A

6. Sault Tribe Resolution No. 2015-45

7. Grand Traverse Band Resolution No. 15-33.2602

8. Little Traverse Bay Band of Ottawa Indians Resolution #030515-01

9. Statement of Stanley Pruss

10. Motion and Brief of Grand Traverse Band in Eastern District of MI Case No. 2:16-cv-11727

11. July 7, 2016 U.S. Department of Justice Consultation Invite

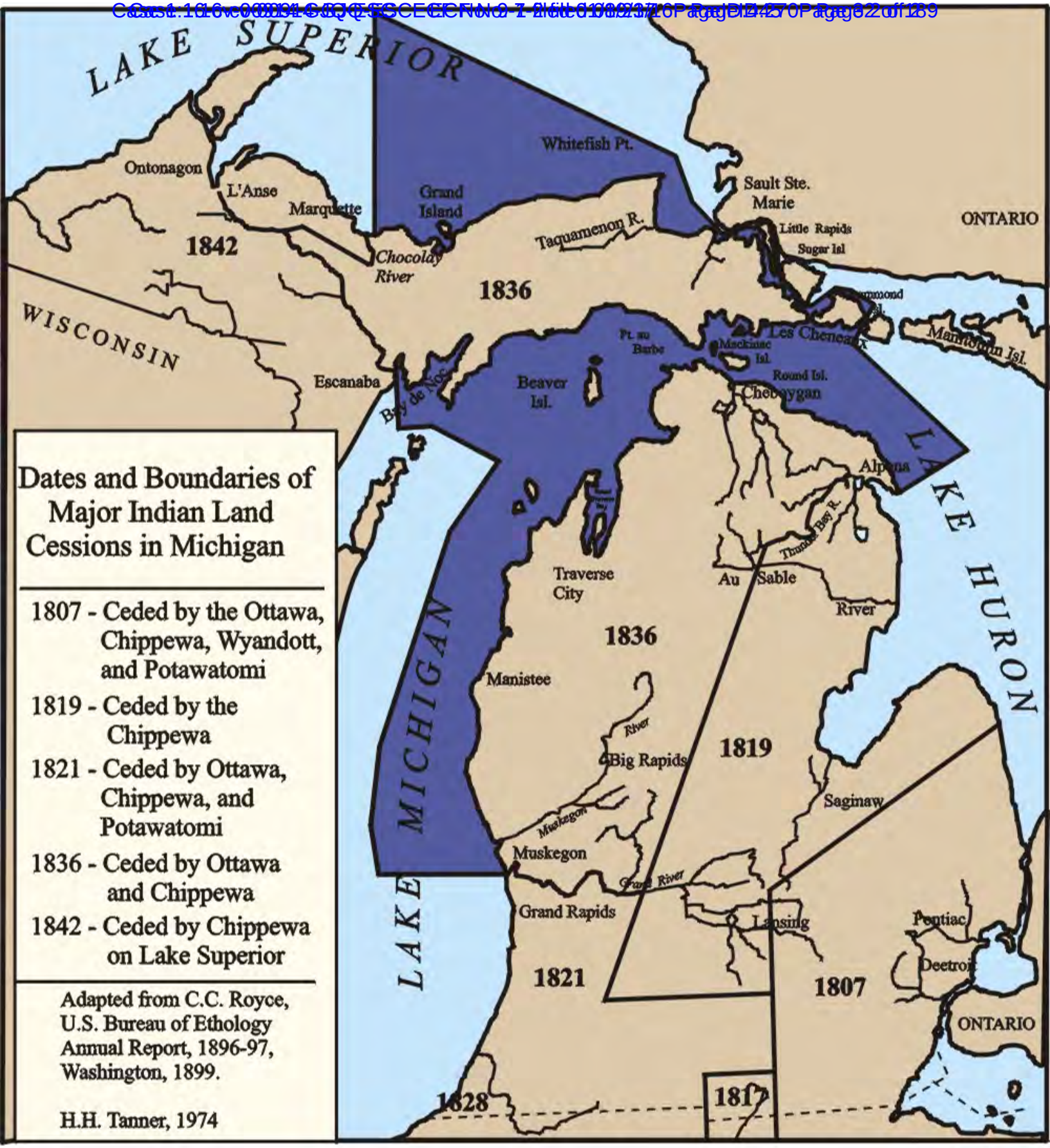
Grand Traverse Band of Ottawa
and Chippewa Indians

Dated: August 23, 2016

/s/ William Rastetter

William Rastetter
Tribal Attorney
420 E. Front Street
Traverse City, MI 49686
231-946-0044 (telephone)
231-946-4807 (fax)
bill@envlaw.com

Exhibit 1



Ceded waters of Chippewa-Ottawa Treaty of 1836

Exhibit 2


1836 Ceded Territory
(Does Not Show Disputed Area in Western Upper Peninsula)
Ontario
87° 53' 57.7" W
46° 35' 21.6" N
87° 18' 51.2" W
46° 21' 3.6" N
83° 19' 23.2" W
45° 8' 10.5" N
Chocolay River
Escanaba River
Lake Huron
Thunder Bay River
83° 25' 6" W
45° 4' 0.4" N
Lake Michigan
84° 14' 35" W
44° 57' 39.7" N
Grand River
Grand River
85° 14' 60" W
42° 55' 34.6" N
10 0 10 20 30 40 50 Miles
N
W
E
S
Map Legend
State Roads
Rivers
Michigan Counties
Disputed Area
Ceded Territory
Lakes
Map Data Sources: Great Lakes Indian Fish & Wildlife Commission,
State of Michigan & Inter-Tribal Council of Michigan
Map Prepared by: Inter-Tribal Council of Michigan
Map Projection: Michigan GeoReference
July 2007

Exhibit 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ADMINISTRATOR OF THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION, Defendant.	)	Case No. 2:16-cv-11727 Hon. Mark A. Goldsmith, District Judge Hon. R. Steven Whalen, Magistrate Judge

Declaration of Mark P. Ebener

Mark P. Ebener, being duly sworn, states that he is competent to testify to the matters stated and that the following statements are made on personal knowledge regarding facts that would be admissible in evidence:

1. Declarant states that he is employed as the Fishery Assessment Biologist for the Inter-Tribal Fisheries and Assessment Program ("ITFAP") of the Chippewa Ottawa Resource Authority ("CORA"); that he has a bachelor of science (1977) and masters degree (1980) in Fisheries Management from the University of Wisconsin-Stevens Point; and that he has been employed by Native American Inter-Tribal Natural Resource Agencies as a Great Lakes Fishery Biologist for 35 years. (The details are on the attached document which is incorporated by reference.)

2. Attached to this notarized document is a document also titled "Declaration of Mark P. Ebener". Declarant attests that all of the statements in the attached document are true, that they are based on his personal knowledge, and that he is competent to testify to those stated facts and conclusions.

3. Also attached to this notarized document is another document titled "Fish harvest reported by CORA commercial fishers, summarized by grid, 2005-2015." This was prepared by ITFAP based on records maintained by ITFAP and CORA; Declarant attests that the harvest information depicted is accurate based on records maintained by ITFAP and CORA.

Mark P. Ebener

STATE OF MICHIGAN

COUNTY OF Chippewa

Signed and sworn before me in Chippewa County on July 14, 2016 by Mark P. Ebener.

, Notary Public

Chippewa County, Michigan

Commission Expires: Sep. 26, 2021

Acting in Chippewa County, Michigan

MATTHEW KAGARISE
NOTARY PUBLIC, STATE OF MI
COUNTY OF CHIPPEWA
MY COMMISSION EXPIRES Sep 26, 2021
ACTING IN COUNTY OF Chippewa

Declaration of Mark P. Ebener

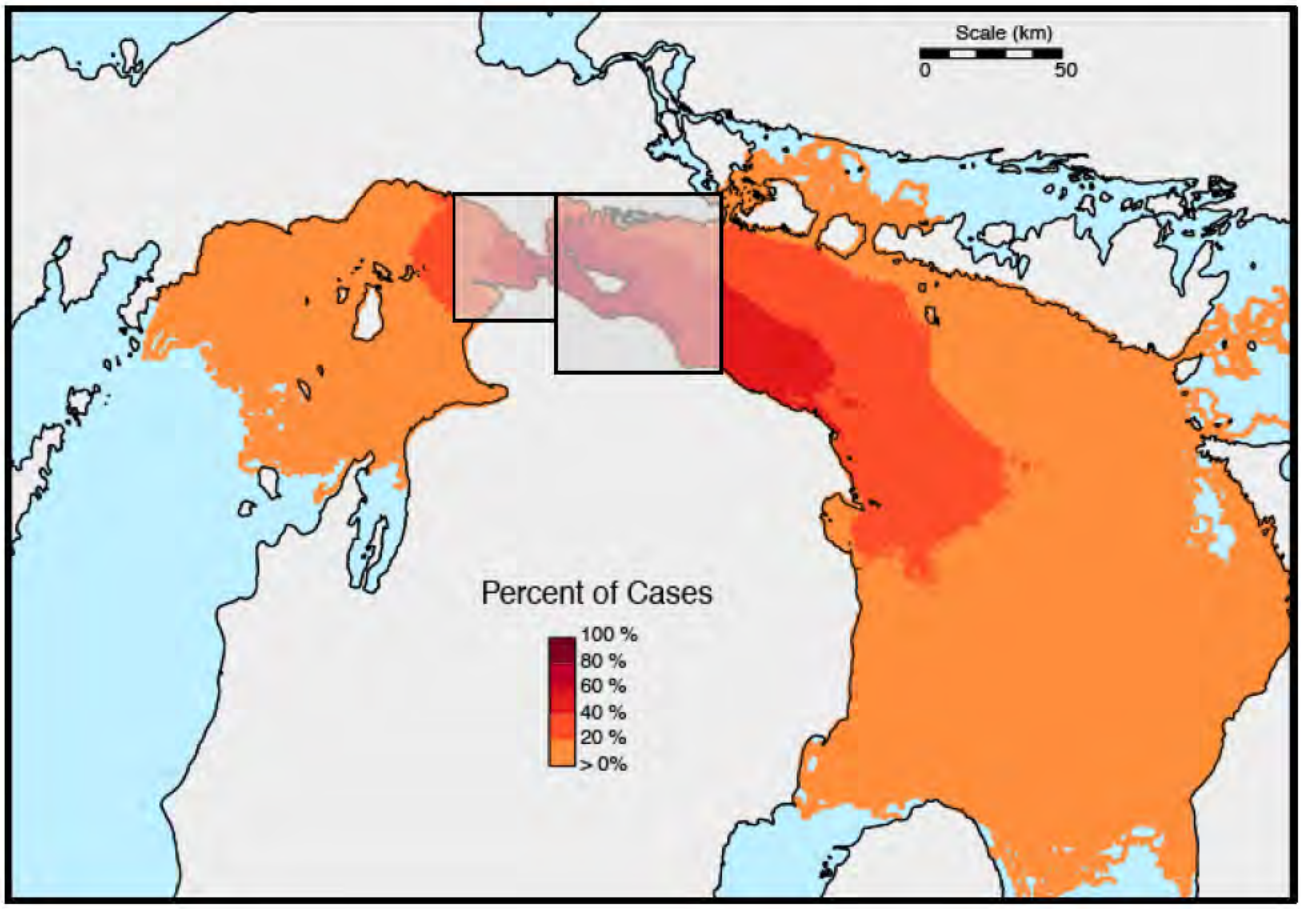
I am employed as the Fishery Assessment Biologist for the Inter-Tribal Fisheries and Assessment Program (ITFAP) of the Chippewa Ottawa Resource Authority, but since the Sault Ste. Marie Tribe of Chippewa Indians handles the financial contract for my organization, I am technically an employee of the Sault Ste. Marie Tribe of Chippewa Indians. I have a Bachelor of Science (1977) and Master's degree (1980) in Fisheries Management from the University of Wisconsin-Stevens Point. I was employed as Assessment Biologist for the Inter-Tribal Fisheries Program from 1981 to 1984, then from part of 1984 to 1990 I was employed as Great Lakes Biologist for the Great Lakes Indian Fish and Wildlife Commission in Odanah, Wisconsin. I returned to my current position as Assessment Biologist in November 1990. Thus, I have been employed by Native American Inter-Tribal Natural Resource Agencies as a Great Lakes Fishery Biologist for 35 years.

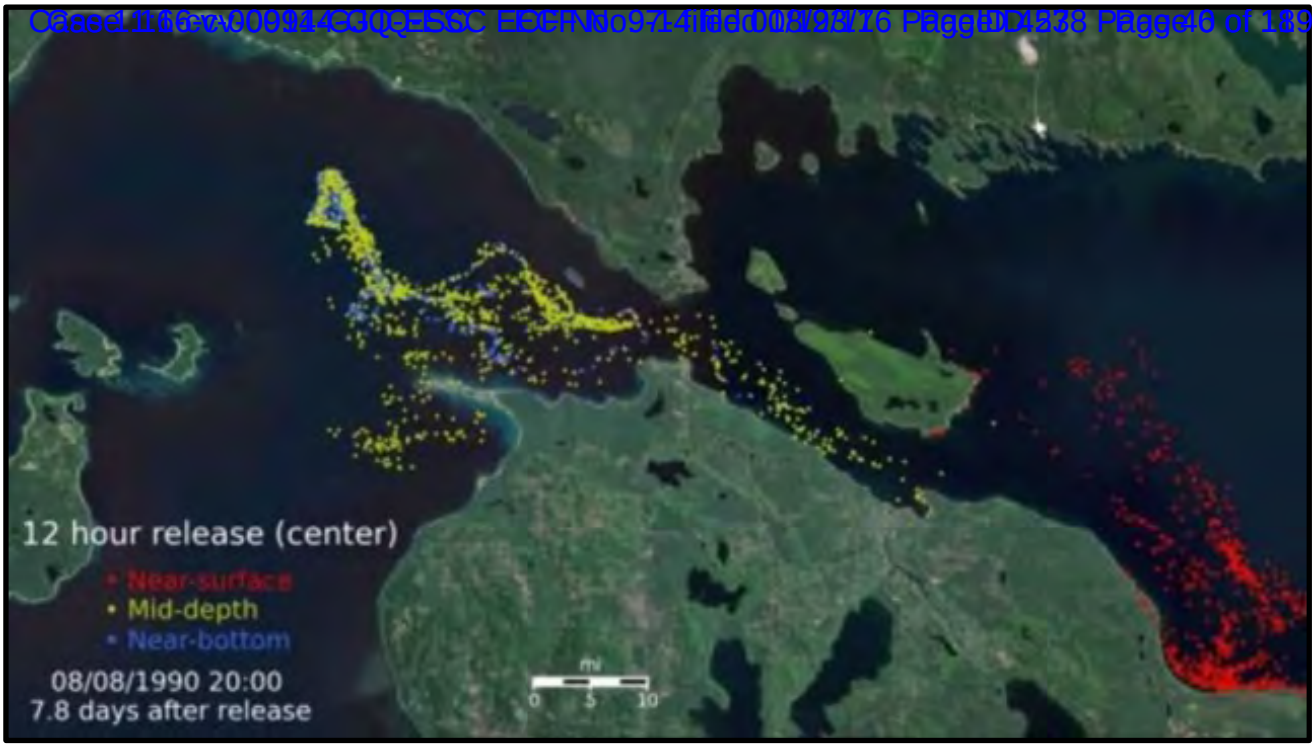
I have conducted numerous research and assessment projects on Great Lakes fishes during my 35 years as a professional fishery biologist both independently for the Chippewa Ottawa Resource Authority and cooperatively with researchers from other state, federal, university, and tribal organizations. The vast majority of my work has focused on lake whitefish and lake trout, but I have also studied Great Lakes walleye, cisco, yellow perch, and Chinook salmon. I have authored or co-authored over 25 scientific papers based on data our staff has collected, or as part of collaborative studies with other researchers.

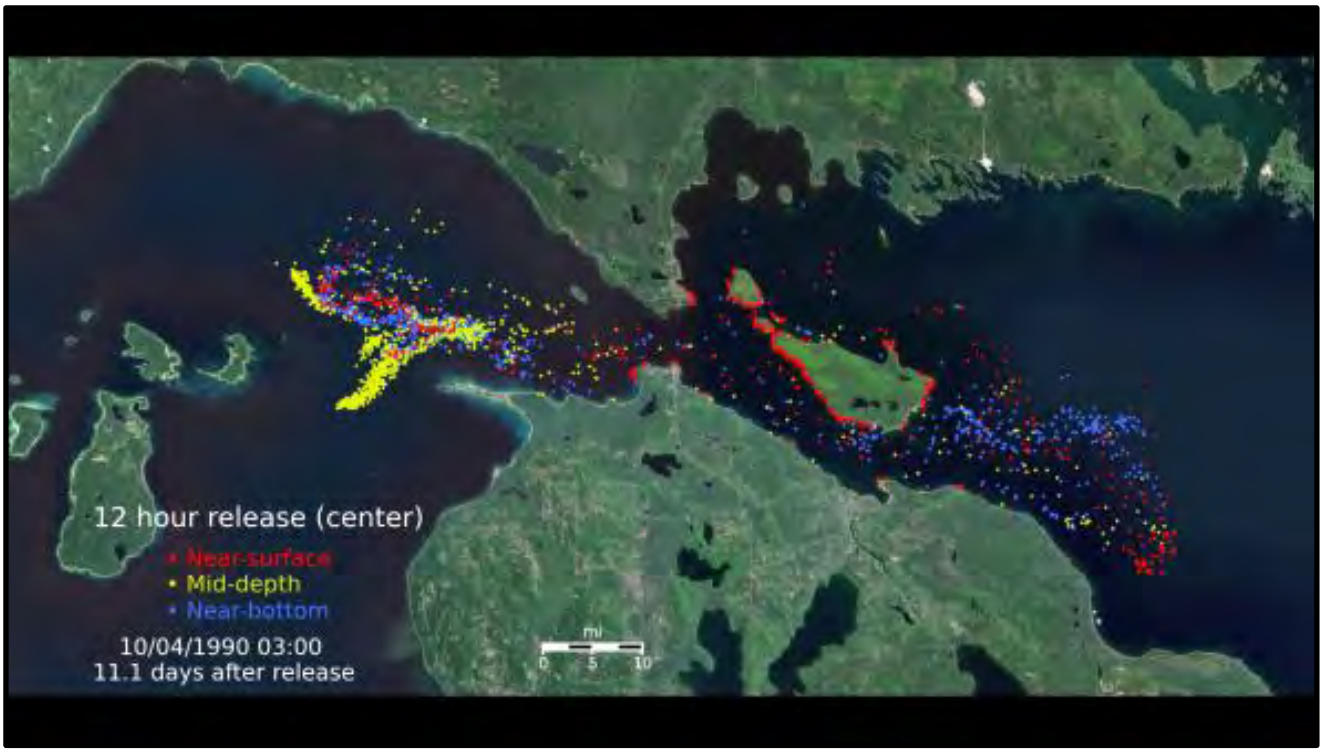
My primary responsibility at ITFAP is to coordinate collection of information to describe the status of fish species important to the CORA fishery. I also serve on the Modeling Subcommittee for the 1836 Ceded waters, whose primary responsibility is to estimate safe harvest limits of whitefish and lake trout in each of the management units in the ceded waters. I also serve on two international technical committees whose responsibilities are to coordinate research and assessment on fish populations and their habitat, and to advise state, federal, and tribal governments on management of fish and their habitat in Lakes Superior, Huron, and Michigan. I was chairman of the Lake Superior Technical Committee for 14 years and chairman of the Lake Huron Technical Committee for five years. I also served on the Lake Michigan Technical Committee.

This is my assessment of the potential effects of an oil spill from Line 5 on the fishery resources in the 1836 Treaty-ceded waters. Before I get into specifics, I will point out that the commercial fisheries and some fish populations in the Prince William Sound area of Alaska have not recovered from the oil spill of the Exxon Valdez in 1989. I did a simple Google search and found at least five articles of how all the oil from the Exxon Valdez has not been cleaned up in Prince William Sound as of 2014 and these articles document how some fisheries and the local economy have also not recovered from the spill. I suspect we would see the same effect here in the 1836 Treaty-ceded waters of Lakes Huron and Michigan as a consequence of a leak from Line 5. It would be naïve to believe otherwise.

My evaluation of the effects on fish populations and their habitat because of an oil spill from Line 5 is based on my experience as a fishery biologist working for Native American Tribes in the upper Great Lakes of North America; specifically lakes Superior, Huron, and Michigan. My evaluation is also based on some of the results from University of Michigan computer simulations that estimated the spatial and bathymetric extent of an oil spill from Line 5 into northern lakes Michigan and Huron. These simulations were based on a water flow model and current patterns in the Straits of Mackinac for a release of oil from Line 5 that lasted for 8 to 12 hours. Based on these simulations, I am defining the affected areas as all waters of northern Lake Michigan east of a line drawn south from Epoufette, Michigan to Ile aux Galet and all waters of northern Lake Huron west of a line drawn south from Detour, Michigan to Forty Mile Point. I am defining these areas as Northern Lake Michigan and Northern Lake Huron.





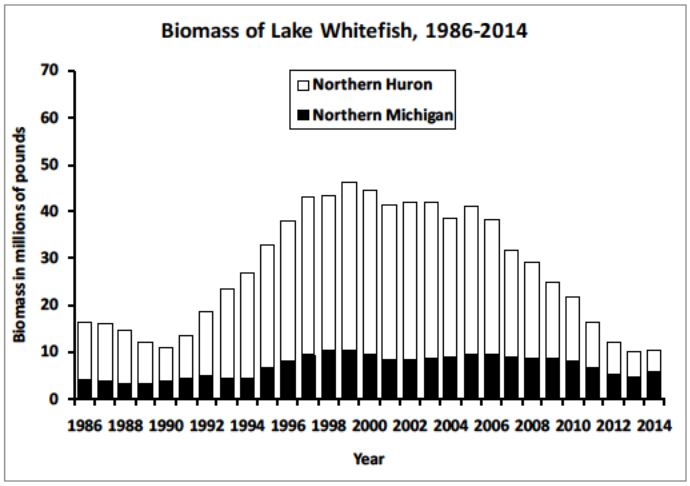


Lake whitefish (*Coregonus clupeaformis*) is the primary target of the CORA commercial fishery and the species made up 79% by weight of the total commercial harvest from the 1836 ceded waters during 2006-2015 based on CORA commercial fishery statistics summarized by our staff. Lake whitefish sustain themselves solely through natural reproduction, but spawning does not take place throughout Northern Lake Michigan and Northern Lake Huron. Rather lake whitefish spawning is concentrated in shallow rock and gravel areas adjacent to the shorelines. As such, lake whitefish spawning sites would be highly vulnerable to an oil spill. In the

Northern Lake Michigan area specific spawning locations include the areas around Green Island, Pt. aux Chenes, and Epoufette along the southern shore of the Upper Peninsula of Michigan and along the shoreline of the northern Lower Peninsula of Michigan from Cecil Bay and Big Stone Bay west to Waugoshance Point and then south through Sturgeon Bay. In Northern Lake Huron lake whitefish spawn along nearly the entire southern Upper Peninsula shoreline from Detour west to just north of St. Ignace wherever there are small rocky and gravel areas. Lake whitefish also spawn in large aggregations from Cheboygan, Michigan southeast along the northeastern portion of the Lower Peninsula of Michigan to 40 Mile Point; again wherever rocky and gravel areas are found along the shoreline.

Nearly the entire area of Northern Lake Michigan and Northern Lake Huron is lake whitefish habitat that is used by all life stages. Lake whitefish eggs are laid on shallow rocky/gravel areas in water less than 10 ft. deep typically from late October through early December where they incubate throughout the winter. Young lake whitefish hatch just after ice out from mid to late April through mid to late May. These young lake whitefish occupy very shallow sandy areas less than 5 ft. deep adjacent to the spawning shoals through roughly early July. Thereafter, the young lake whitefish move to deeper water. Juvenile and adult lake whitefish live throughout Northern Michigan and Northern Huron occupying waters of typically 30 to 200 ft. deep.

Northern Lake Michigan and Northern Lake Huron are very productive areas for lake whitefish with biomass levels typically exceeding 10 million pounds annually. Statistical-catch-at age estimates of the total biomass of lake whitefish age-4 and older in Northern Lake Michigan and Northern Lake Huron ranged from 10 to 47 million pounds annually and averaged 28 million pounds during 1986-2014. The annual CORA commercial harvest from Northern Lake Michigan and Northern Lake Huron ranged from 1 to 4 million pounds and averaged 3 million pounds during 1986-2014. Lake whitefish harvests from Northern Lake Michigan and Northern Lake Huron made up 37% to 76% of the total annual CORA commercial lake whitefish harvest from the 1836 ceded waters and averaged 58% during 1986-2014. Thus, Northern Lake Michigan and Northern Lake Huron are very important fishing grounds for the CORA fishery and the habitat in these areas produces more than ten millions of pounds of lake whitefish annually for harvest by the tribes.



I believe declines in biomass of lake whitefish due to an oil spill will have a huge negative effect on the CORA commercial fishery for over a decade. Egg incubation and larval abundance in nearshore habitat will be most affected by an oil spill and these habitats will be

rendered basically useless for many years. Juvenile and adult lake whitefish may be less directly affected by an oil spill than eggs and larvae, but their food resources will be affected, thus I suspect that growth of these fish will be negatively affected by the spill. Juvenile and adult lake whitefish consume a broad array of indigenous food items such as zooplankton, clams, snails, darters, larval and adult mayflies, caddis flies, and midges, Mysis, Diporeia, and ostracods. Juvenile and adult lake whitefish also consume invasive species such as dreissenid mussels, Bythotrephes, and small rainbow smelt and alewife. Most of the indigenous prey of lake whitefish live on the lake bottom (they are benthic) and as such will be negatively affected by an oil spill. Reductions in abundance of benthic prey will most certainly reduce food consumption by juvenile and adult lake whitefish and will reduce their growth rates and possibly their body condition. Large reductions in body condition were observed on lake whitefish from Northern Lake Michigan and Northern Lake Huron during the late 1990s and early 2000s after arrival of dreissenid mussels to the Great Lakes, and this reduction in body condition reduced marketability of lake whitefish by the CORA commercial fishery. I expect a repeat of this process if an oil spill occurs.

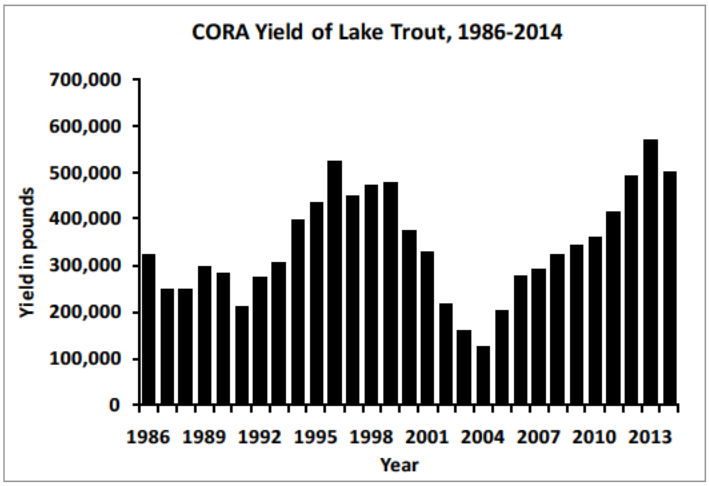
Lake trout (*Salvelinus namaycush*) is the second most commonly harvested fish species by the CORA fishery and the species made up 15% by weight of the total CORA harvest during 2006-2015 based on fishery statistics summarized by our staff. Lake trout populations are sustained through both natural reproduction and stocking of hatchery-reared fish. Lake trout are indigenous to the Great Lakes and historically they were the top fish predator in the Great Lakes prior to becoming extirpated in all but Lake Superior by 1960. Since then, federal, state, provincial, and tribal governments have being trying to promote rehabilitation and recovery of lake trout population throughout the Great Lakes by controlling fishery harvests, stocking hatchery-reared fish, and controlling populations of the invasive sea lamprey. Through 2015, lake trout populations have fully recovered in Lake Superior, they are becoming self-sustaining in the main basin of Lake Huron, and they are just now starting to sustain themselves in Lake Michigan. Northern Lake Michigan populations of lake trout are composed of 94% hatchery-reared fish, whereas Northern Lake Huron populations are composed of 35% naturally produced fish based on our monitoring of the populations in both lakes during 2010-2015. The 2000 Consent Decree negotiated between CORA member tribes and the State of Michigan and U.S. federal government was designed to promote recovery of lake trout populations in the 1836 ceded waters, so much of the current management focuses on protecting lake trout through refuges, harvest limits, reductions in gill net effort, lake trout stocking, and sea lamprey control. An oil spill from Line 5 would have direct effects on agreements contained in the Consent Decree and would create a huge setback in the process to rehabilitate lake trout populations.

Lake trout spawn primarily on offshore reefs in Northern Lake Michigan and Northern Lake Huron, but they also spawn to a lesser extent in shallow rocky areas along the shoreline of both areas. In Northern Lake Huron lake trout currently spawn in offshore areas such as the Martin, Pomery, and Tobin reef complex near Cedarville, Michigan, and Spectacle and Raynolds reefs which are located between Detour and St. Ignace anywhere from 5 to 10 miles from shore. Lake trout also spawn along the shoreline near Detour, Hammond Bay, and Bois Blanc

Island. Historically, lake trout spawned on Graham and Majors Shoals, which are both located directly in the Straits of Mackinac just east of the Mackinac Bridge, but I am unsure of the current status of lake trout spawning on either of those shoals. In Northern Lake Michigan lake trout spawn along the shoreline of the northwest portion of the Lower Peninsula from Cecil Bay to Waugoshance Point and south through Sturgeon Bay.

Nearly the entire area of Northern Lake Michigan and Northern Lake Huron is lake trout habitat that is used by all life stages. Lake trout eggs are laid on rocky substrates in water of 5 to 30 ft. deep typically from mid-October through mid-November where they incubate throughout the winter. Young lake trout hatch after ice out from mid to late April through mid to late May. These young lake trout occupy rocky areas on the spawning shoals, but as they age through their first summer they move off the rocky spawning shoals to deeper, more soft bottomed areas. Juvenile and adult lake trout live throughout Northern Lake Michigan and Northern Lake Huron occupying waters of typically 30 to 350 ft. deep.

As with lake whitefish, both Northern Lake Michigan and Northern Lake Huron are productive areas for lake trout. The CORA commercial harvest of lake trout from both areas combined ranged from 124,000 to 572,000 pounds annually and averaged 343,000 pounds each year during 1986-2014. The annual CORA commercial harvest of lake trout from Northern Lake Michigan and Northern Lake Huron represented 36% to 56% of the total CORA yield of lake trout from the 1836 ceded waters. Since the 2000 Consent Decree the CORA commercial yield of lake trout in Northern Lake Michigan and Northern Lake Huron has been limited to within certain bounds by total allowable catches that are established annually by the parties to the agreement. In Northern Lake Huron the annual CORA total allowable catch has ranged from 69,000 to 414,000 pounds during 2001 to 2015. In Northern Lake Michigan the total allowable catch has been much more constant at 453,000.



Lake trout that spawn along shorelines, particularly in Northern Lake Huron through Hammond Bay, will be severely affected by an oil spill model for Line 5 based on the simulations from the oil spill model. In particular, lake trout spawning in the Cheboygan to Hammond Bay area will most affected because these fish spawn near shore and the spill will cover rocky substrates where eggs are deposited nearshore. Offshore spawning populations of lake trout will be somewhat affected by the oil spill as simulations indicated that oil may be found near the lake bottom at the Raynolds and Spectacle Reef spawning sites.

An oil spill from Line 5 will also affect yellow perch, walleye, and round whitefish (i.e. menominee) populations in Northern Michigan and Northern Huron. These species in the aggregate made up less than 2% of the annual CORA commercial harvest during 1986-2014, but yellow perch and walleye, in particular, are high value species and as such are important to the fishery. The effect of an oil spill from Line 5 on yellow perch, walleye, and menominee will be concentrated in Northern Lake Huron from the Mackinac Bridge through the South Channel to Cheboygan and Hammond Bay. This area contains spawning grounds for all three species, particularly from Cheboygan through Hammond Bay. Yellow perch spawn directly in front of Cheboygan and throughout the South Channel as do menominee. Walleye spawn in the Cheboygan River and inhabit the South Channel through much of the year. Many of the walleye that inhabit the South Channel come from a population that spawns in the Saginaw River, but lives in the Straits of Mackinac for part of the year. Thus a spill from Line 5 will affect much more than fish populations in the Straits.

Fish harvest reported by CORA commercial fishers, summarized by grid, 2005-2015 average.

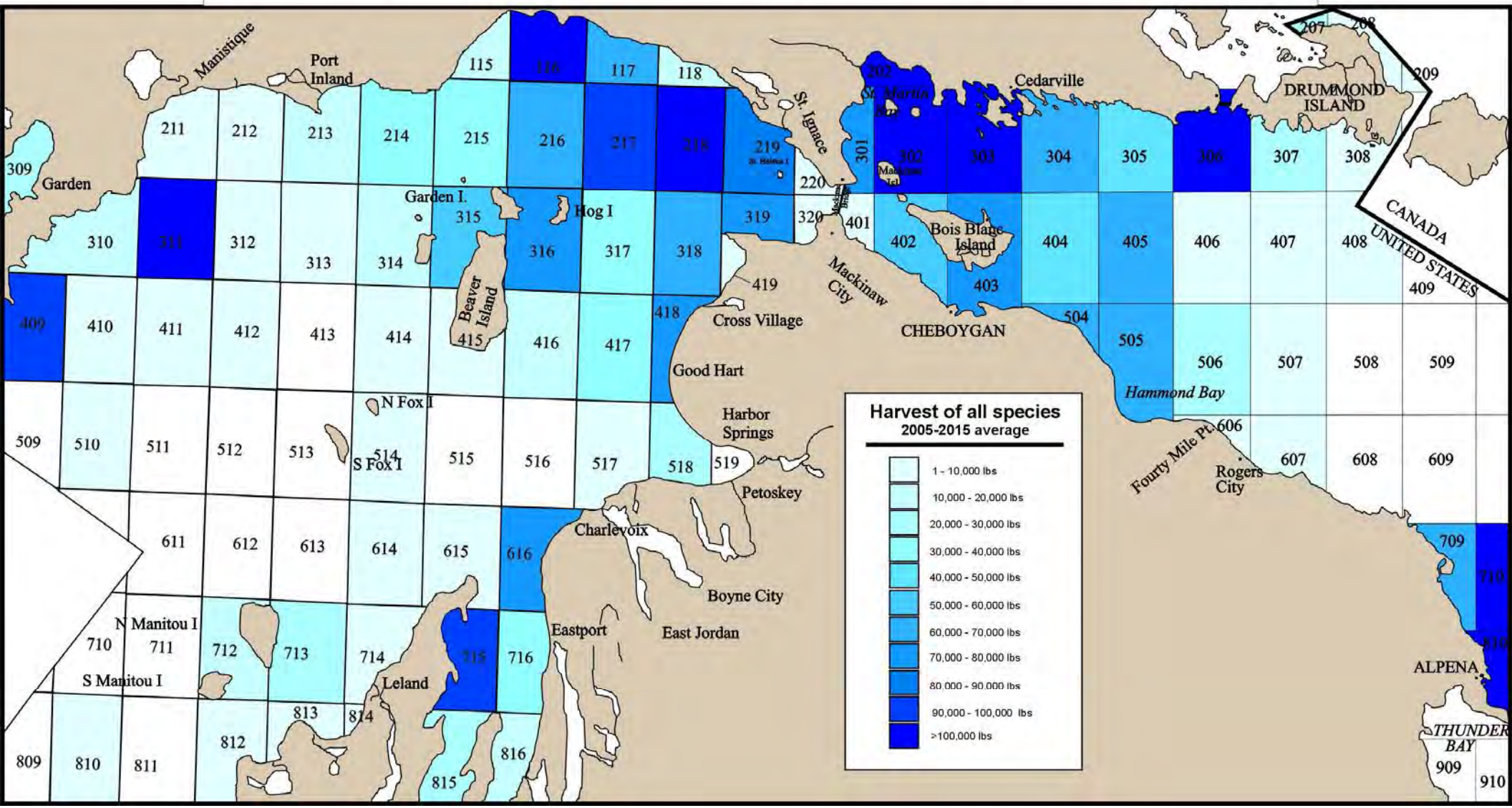


Exhibit 4A

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

DEC - 1 2014

REPLY TO THE ATTENTION OF

Desmond L. Berry
Natural Resources Department Manager
Grand Traverse Band of Ottawa and Chippewa Indians
2605 N.West Bayshore Drive
Peshawbestown, Michigan 49682

Dear Mr. Berry:

Thank you for your inquiry to Darrel Harmon about Enbridge's actions regarding pipeline 5 in the Mackinac Straights.

You ask whether the National Environmental Policy Act (NEPA) applies to these actions. The Corps of Engineers complies with NEPA when it develops its nationwide permits, and its authorization of a specific project does not trigger any further requirement for action under NEPA that EPA could review. The attached letter from the Corps sets out the scope of work authorized under its Nationwide Permit, and the general and special conditions that apply to this work. Because the Corps has jurisdiction in this matter, I encourage you to discuss your questions and concerns with them, including considerations the 1836 Treaty may raise in the context of this permit. In the absence of EPA statutory authority, the 1836 Treaty does not create an independent basis for EPA to intervene.

EPA does participate in area contingency planning under the National Response Plan, along with the Coast Guard. The Enbridge crude oil pipeline from Superior, Wisconsin to Sarnia, Ontario – including the 5-mile stretch under the Straits of Mackinac – is an important focus of this planning. The company and other parties (including the state, local governments, area tribes such as the Grand Traverse Band, and other local stakeholders) are invited to participate in the planning process. The company also conducts its own integrity management testing and must comply with the regulations of the Pipeline and Hazardous Materials Safety Administration.

I hope this information is responsive, and appreciate your commitment to protecting Lake Michigan.

Sincerely,

Alan Walts, Director
Office of Enforcement and Compliance Assurance

Enclosure

DEPARTMENT OF THE ARMY
DETROIT DISTRICT, CORPS OF ENGINEERS
SAULT STE. MARIE FIELD OFFICE
312 WEST PORTAGE AVENUE
SAULT STE. MARIE, MICHIGAN 49783-1838

REPLY TO
ATTENTION OF:

June 19, 2014

Engineering & Technical Services
Regulatory Office
File Number LRE-2010-00463-56-N14-2

Enbridge Pipelines
Attn: Andrew Prew
1320 Grand Avenue
Superior, Wisconsin 54880

Dear Mr. Prew:

Reference your application for a Department of the Army (DA) permit to perform maintenance work on an existing pipeline in Lake Michigan (Straits of Mackinac) near St. Ignace/Mackinaw City, Emmet and Mackinac County, Michigan. We have verified that the project is authorized by nationwide permit (NWP) as published in the Federal Register. As indicated on the enclosed plans, the following work is authorized under NWP3 and NWP6.

You may proceed with the work per the following project description, attached drawings, and attached general and special conditions:

> Drop a remote operated vehicle (ROV) and umbilical cable into the water from a a barge, in order to perform a visual inspection of two (2) 21,000 ft long 20 inch diameter pipelines. Install saddle mounts with helical anchoring systems in 34 locations as shown on the attached plans and install up to 8 additional supports as needed to maintain pipeline integrity.

Special Conditions:

1. The permittee shall contact the U.S. Coast Guard in writing, a minimum of 14 days prior to the start of work, and request that a notice to mariners be published. The permittee shall provide this office a concurrent copy of their request.

2. In the event of a release of petroleum products to regulated waterways, the permittee will follow the procedures outlined in the Enbridge Emergency Response Plan.

3. Additional notification of the Detroit District, Regulatory Office will be made as soon after the emergency response has been initiated as possible. Contact either Don Reinke, Chief, Compliance and Enforcement Branch at (313) 226-6812 or Edward Arthur, Project Manager at (906) 635-3461.

4. Upon completion of the authorized work the permittee will provide drawings

showing the location and the latitude and longitude of all installed saddle mount supports not shown on the attached plans to this office.

5. The structures and appurtenances authorized herein are located in the proximity of the authorized Federal channel limits. The permittee is responsible for the removal of any structures and appurtenances that interfere with Federal dredging or other maintenance activities on the channel.

Any construction activity other than that shown on the plans may not qualify for the authorization. If you contemplate any changes or additional activities from those depicted on the plans, please submit them to this office for authorization review prior to any construction. On completion of the work, you must fill in and return the enclosed **COMPLETION REPORT along with such information necessary to comply with special condition number 4.**

This verification is invalid until you obtain an appropriate state permit/certification or waiver thereof. You must not initiate activities authorized under the NWP until all required State authorizations have been received. We suggest that you contact the Michigan Department of Environmental Quality (MDEQ) in Lansing, Michigan, at 517-373-9244 for the status of your state permit, if you have not received it three weeks after you receive this letter. If local approvals are required, we recommend you contact the appropriate local government body directly.

This verification is valid until the NWP is modified, reissued, or revoked. All of the existing NWPs are scheduled to be modified, reissued, or revoked prior to March 18, 2017. It is incumbent upon you to remain informed of changes to the NWPs. We will issue a public notice when the NWPs are reissued. Furthermore, if you commence or are under contract to commence this activity before the date that the relevant nationwide permit is modified or revoked, you will have twelve (12) months from the date of the modification or revocation of the NWP to complete the activity under the present terms and conditions of this nationwide permit.

As per 33 CFR 325, Appendix A, representatives from this office are allowed to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of the Nationwide Permit.

Should you have any questions, please contact me at the above address, by E-Mail at Edward.J.Arthur@usace.army.mil, or by telephone at 906-635-3461. In all communications, please refer to File Number LRE-2010-00463-56-N14-2.

We are interested in your thoughts and opinions concerning your experience with the Detroit District, Corps of Engineers Regulatory Program. If you are interested in letting us know how we are doing, you can complete an electronic Customer Service Survey from our web site at:

http://per2.nwp.usace.army.mil/survey.html. Alternatively, you may contact us and request a paper copy of the survey that you may complete and return to us by mail or fax. Thank you for taking the time to complete the survey, we appreciate your feedback.

Sincerely,

Edward J. Arthur
Regulatory Project Manager
Sault Ste. Marie Field Office

Enclosures

Copy Furnished

City of St. Ignace (Les Therrian)
Emmet County
U.S. Coast Guard Sector Sault Ste. Marie
MDEQ, UP District Office (14-49-0017-P)
NOAA

A. Nationwide Permit General Conditions:

To qualify for NWP authorization, the permittee must comply with the following general conditions, as appropriate. These conditions are selected from those published in the Federal Register that are particularly relevant to the construction and/or operation of this particular authorized activity. The complete text is available at our website, under "Nationwide Permits": http://www.lre.usace.army.mil/who/regulatoryoffice/district information/ or you may contact the Detroit District. We have done our best to verify that your project complies with the others, where applicable.

1. Navigation. (b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

12. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow.

14. Proper Maintenance. Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety.

19. Migratory Birds and Bald and Golden Eagle Permits. The permittee is responsible for obtaining any "take" permits required under the U.S. Fish and Wildlife Service's regulations governing compliance with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. The permittee should contact the appropriate local office of the U.S. Fish and Wildlife Service to determine if such "take" permits are required for a particular activity.

20. Historic Properties. (e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h–2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, explaining the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. Discovery of Previously Unknown Remains and Artifacts. If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer of what you have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

29. Transfer of Nationwide Permit Verifications. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

> "When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below."

(Transferee) (Date)

30. Compliance Certification. Each permittee who receives an NWP verification from the Corps must submit a signed certification regarding the completed work and any required mitigation. The certification form, forwarded by the Corps with this NWP verification letter, includes:
(a) A statement that the authorized work was done in accordance with the NWP authorization, including any general or specific conditions;
(b) A statement that any required mitigation was completed in accordance with the permit conditions; and
(c) A place for the signature of the permittee certifying the completion of the work and mitigation.

B. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.
2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.
3. NWPs do not grant any property rights or exclusive privileges.
4. NWPs do not authorize any injury to the property or rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project

NATIONWIDE PERMIT COMPLETION REPORT

CELRE-RG-CE-S June 19, 2014

Chief, Compliance and Enforcement Branch
Regulatory Office
U.S. Army Corps of Engineers
477 Michigan Avenue
Room 603
Detroit, MI 48226-2550

Dear Sir:

You are hereby notified that work under Department of the Army Permit No. LRE-2010-00463-56-N14-2 to perform maintenance work on an existing pipeline in Lake Michigan (Straits of Mackinac), near St. Ignace/Mackinaw City, Emmet and Mackinac County, Michigan, issued to Enbridge Pipeline was completed in accordance with the permit on:

_____.
(Date work completed)

_____
(Permittee's Signature)

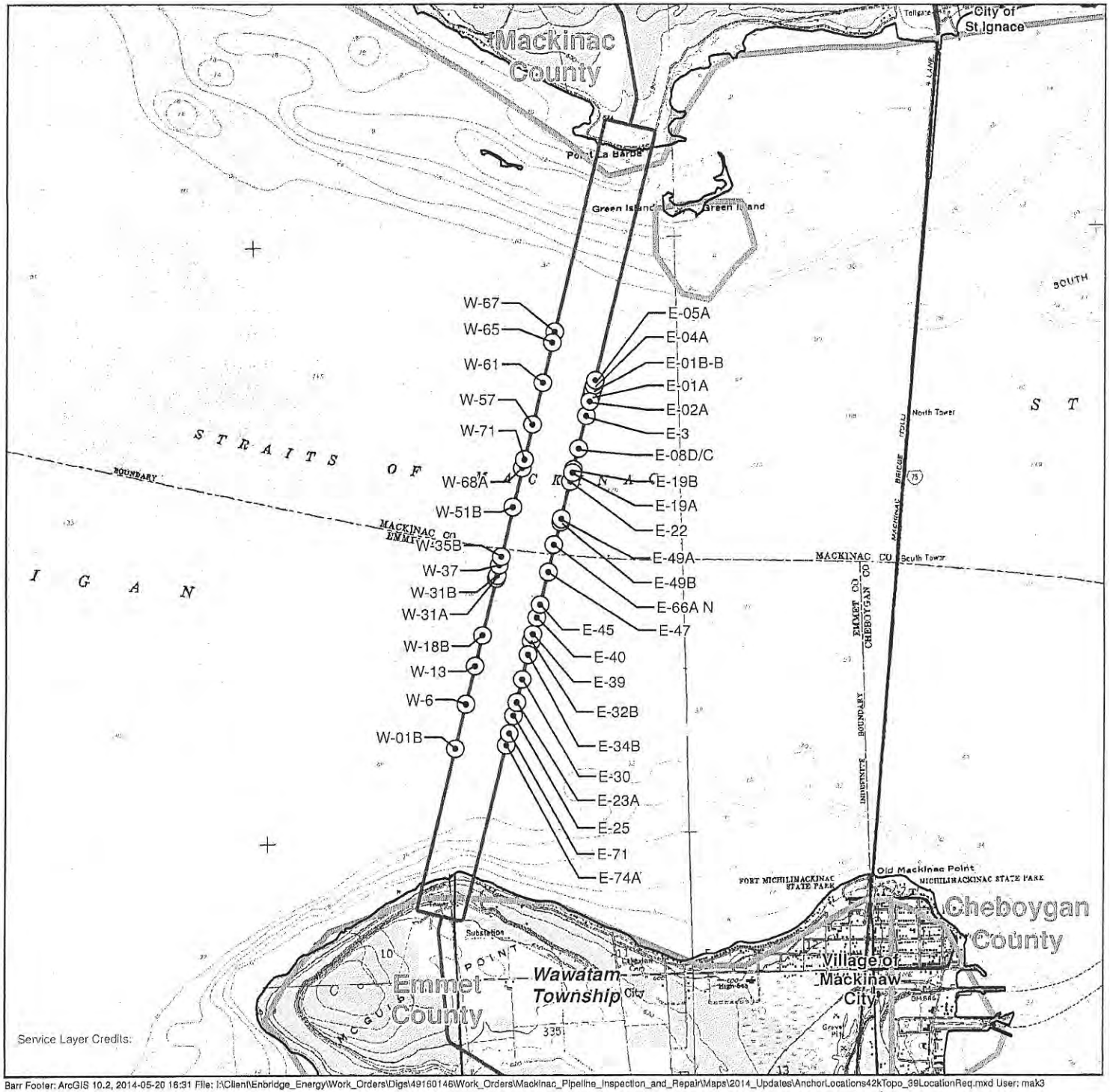
IMPORTANT

1. This COMPLETION REPORT MUST BE MAILED to the above addressee within 10 days after completion of work covered by the FEDERAL PERMIT to insure an accurate Government record of data affecting navigation.

2. Where dredging soundings are made of projects which include dredging, a copy of the soundings should accompany this report. If the soundings are measured from the water surface and have not been corrected to International Great Lakes Datum plane, the hour and date soundings was made should be noted on sounding reports.

3. Supply a map or table showing the latitude and longitude of any pipeline supports not shown on the permit drawings.

NOTE: Although permits authorizing structures carry an expiration date, REPAIRS that conform to the permit plans are also within the scope of the authorization. Therefore, it is recommended that expired permits NOT be destroyed, but retained as proof that the work to be repaired has received the Corps of Engineers' approval.



Anchor Locations

Line 5

0 3,500 7,000

Feet

1 Inch = 3,500 Feet

Imagery: Esri/Microsoft, May 2010

ANCHOR LOCATIONS

Line 5

Straits of Mackinac

ENBRIDGE

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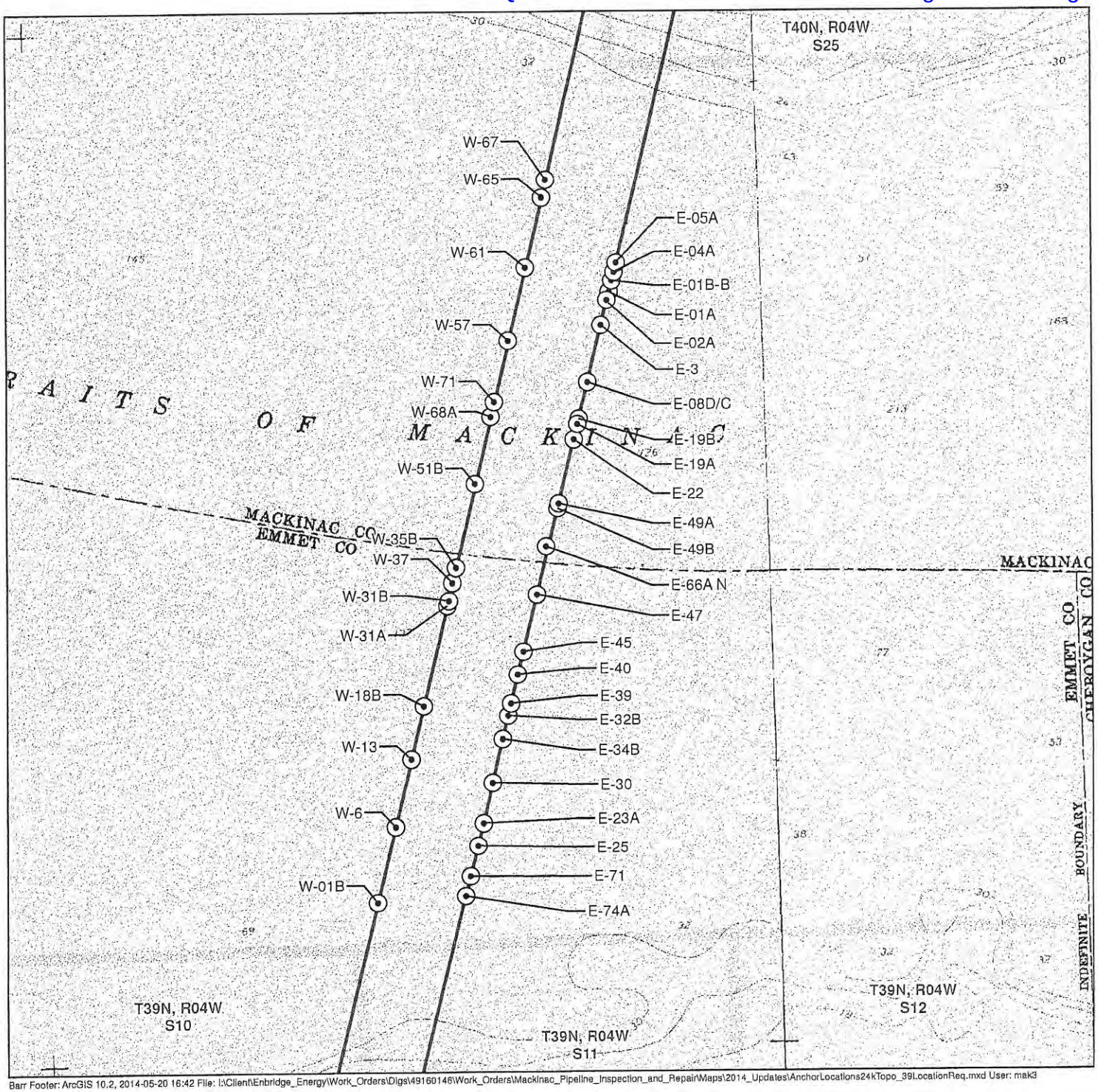

Anchor Locations

Line 5

0 2,000 4,000

Feet

1 Inch = 2,000 Feet

ANCHOR LOCATIONS
Line 5
Straits of Mackinac

ENBRIDGE

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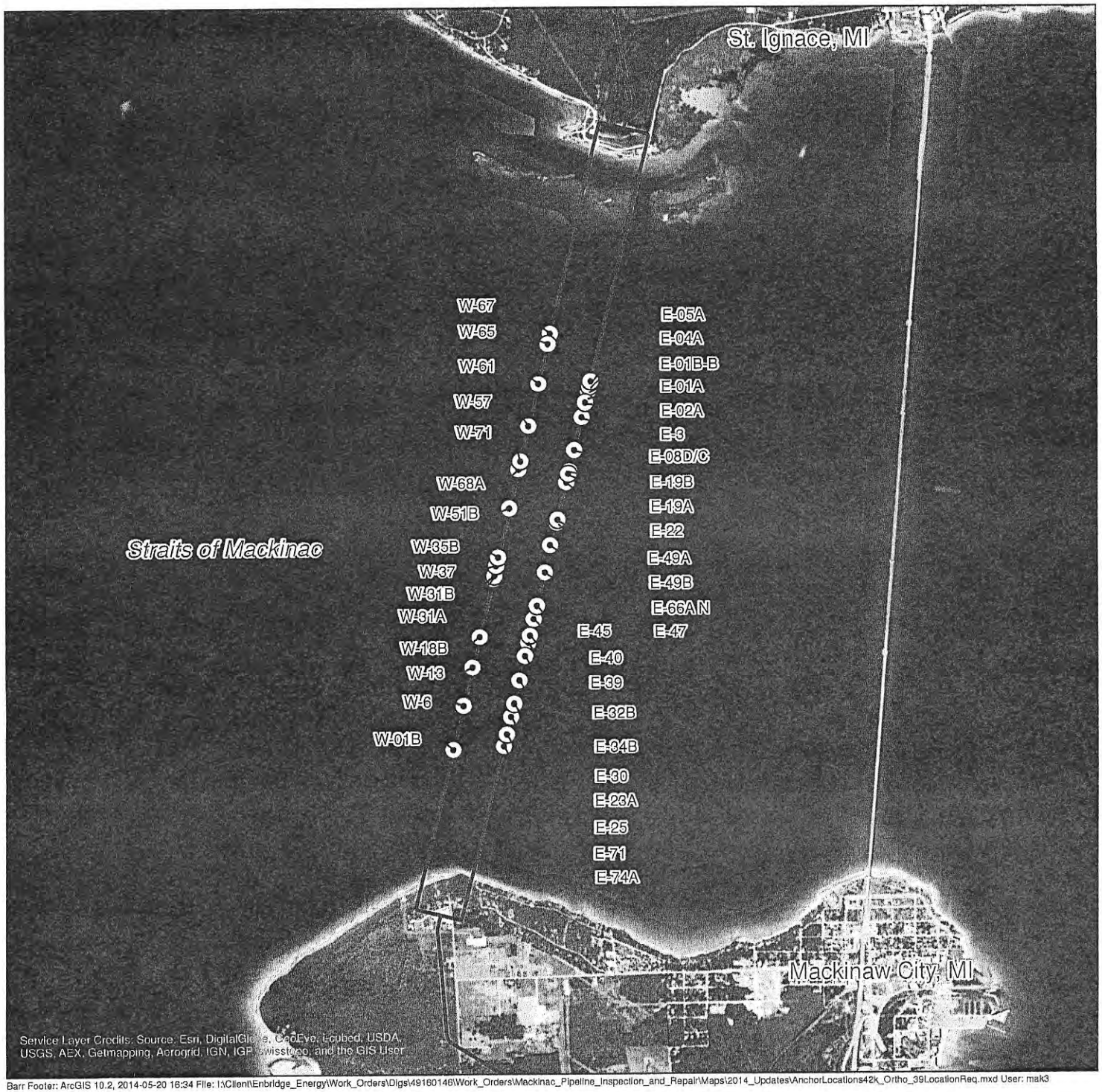

Anchor Locations

Line 5

0 3,500 7,000

Feet

1 Inch = 3,500 Feet

Imagery; Esri/Microsoft, May 2010

ANCHOR LOCATIONS
Line 5
Straits of Mackinac

ENBRIDGE

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MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER RESOURCES DIVISION
PERMIT

ISSUED TO:

Enbridge Energy
Thomas Prew
1320 Grand Avenue
Superior, WI 54880

Permit No.	14-49-0017-P
Issued	July 24, 2014
Extended	
Revised	
Expires	July 24, 2019

This permit is being issued by the Michigan Department of Environmental Quality (MDEQ) under the provisions of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), and specifically:

- ☐ Part 301, Inland Lakes and Streams
- ☒ Part 325, Great Lakes Submerged Lands
- ☐ Part 303, Wetlands Protection
- ☐ Part 31, Floodplain/Water Resources Protection
- ☐ Part 315, Dam Safety
- ☐ Part 323, Shorelands Protection and Management
- ☐ Part 353, Sand Dunes Protection and Management

Permission is hereby granted, based on permittee assurance of adherence to State of Michigan requirements and permit conditions, to:

Permitted Activity: **Hydraulically auger 42 sets of multi-helix anchors into Great Lakes bottomlands.**

Install anchors in 39 identified locations with up to 3 additional locations in the project area and attach saddle mounts to the existing Line 5 pipeline for the purpose of increased support and stability to existing pipeline infrastructure.

All activities to be conducted in accordance with the attached plans and conditions of this permit dated 07/24/2014.

A permit is also required from the US Army Corps of Engineers for this project.

Water Course Affected: Lake Huron/ Lake Michigan
Property Location: Mackinac and Emmet County, Moran and Wawatam Township – Straights of Mackinac
Town/Range 40N, 4W **Section** 25, and **Town/Range** 39N, 4W **Section** 11

Authority granted by this permit is subject to the following limitations:

A. Initiation of any work on the permitted project confirms the permittee's acceptance and agreement to comply with all terms and conditions of this permit.
B. The permittee, in exercising the authority granted by this permit, shall not cause unlawful pollution as defined by Part 31, Water Resources Protection, of the NREPA.
C. This permit shall be kept at the site of the work and available for inspection at all times during the duration of the project or until its date of expiration.
D. All work shall be completed in accordance with the approved plans and specifications submitted with the application and/or plans and specifications attached to this permit.
E. No attempt shall be made by the permittee to forbid the full and free use by the public of public waters at or adjacent to the structure or work approved.
F. It is made a requirement of this permit that the permittee give notice to public utilities in accordance with Act 53 of the Public Act of 1974 and comply with each of the requirements of that Act.
G. This permit does not convey property rights in either real estate or material, nor does it authorize any injury to private property or invasion of public or private rights, nor does it waive the necessity of seeking federal assent, all local permits, or complying with other state statutes.
H. This permit does not prejudice or limit the right of a riparian owner or other person to institute proceedings in any circuit court of this state when necessary to protect his rights.

I. Permittee shall notify the MDEQ within one week after the completion of the activity authorized by this permit, by completing and forwarding the attached preaddressed postcard to the office addressed thereon.
J. This permit shall not be assigned or transferred without the written approval of the MDEQ.
K. Failure to comply with conditions of this permit may subject the permittee to revocation of permit and criminal and/or civil action as cited by the specific state act, federal act, and/or rule under which this permit is granted.
L. All dredged or excavated materials shall be disposed of in an upland site (outside of floodplains, unless exempt under Part 31, and wetland).
M. In issuing this permit, the MDEQ has relied on the information and data that the permittee has provided in connection with the submitted application for permit. If, subsequent to the issuance of a permit, such information and data prove to be false, incomplete, or inaccurate, the MDEQ may modify, revoke, or suspend the permit, in whole or in part, in accordance with the new information.
N. The permittee shall indemnify and hold harmless the State of Michigan and its departments, agencies, officials, employees, agents, and representatives for any and all claims or causes of action arising from acts or omissions of the permittee, or employees, agents, or representative of the permittee, undertaken in connection with this permit. The permittee's obligation to indemnify the State of Michigan applies only if the State (1) provides the permittee or its designated representative written notice of the claim or cause of action within 30 days after it is received by the State and (2) consents to the permittee's participation in the proceeding on the claim or cause of action. It does not apply to contested case proceedings under the Administrative Procedures Act challenging the permit. This permit shall not be construed as an indemnity by the State of Michigan for the benefit of the permittee or any other person.
O. Noncompliance with these terms and conditions and/or the initiation of other regulated activities not specifically authorized shall be cause for the modification, suspension, or revocation of this permit, in whole or in part. Further, the MDEQ may initiate criminal and/or civil proceedings as may be deemed necessary to correct project deficiencies, protect natural resource values, and secure compliance with statutes.
P. If any change or deviation from the permitted activity becomes necessary, the permittee shall request, in writing, a revision of the permitted activity from the MDEQ. Such revision request shall include complete documentation supporting the modification and revised plans detailing the proposed modification. Proposed modifications must be approved, in writing, by the MDEQ prior to being implemented.
Q. This permit may be transferred to another person upon written approval of the MDEQ. The permittee must submit a written request to the MDEQ to transfer the permit to the new owner. The new owner must also submit a written request to the MDEQ to accept transfer. The new owner must agree, in writing, to accept all conditions of the permit. A single letter signed by both parties which includes all the above information may be provided to the MDEQ. The MDEQ will review the request and if approved, will provide written notification to the new owner.
R. Prior to initiating permitted construction, the permittee is required to provide a copy of the permit to the contractor(s) for review. The property owner, contractor(s), and any agent involved in exercising the permit are held responsible to ensure that the project is constructed in accordance with all drawings and specifications. The contractor is required to provide a copy of the permit to all subcontractors doing work authorized by the permit.
S. Construction must be undertaken and completed during the dry period of the wetland. If the area does not dry out, construction shall be done on equipment mats to prevent compaction of the soil.
T. Authority granted by this permit does not waive permit requirements under Part 91, Soil Erosion and Sedimentation Control, of the NREPA, or the need to acquire applicable permits from the County Enforcing Agent.
U. Authority granted by this permit does not waive permit requirements under the authority of Part 305, Natural Rivers, of the NREPA. A Natural Rivers Zoning Permit may be required for construction, land alteration, streambank stabilization, or vegetation removal along or near a natural river.
V. The permittee is cautioned that grade changes resulting in increased runoff onto adjacent property is subject to civil damage litigation.
W. Unless specifically stated in this permit, construction pads, haul roads, temporary structures, or other structural appurtenances to be placed in a wetland or on bottomland of the waterbody are not authorized and shall not be constructed unless authorized by a separate permit or permit revision granted in accordance with the applicable law.
X. For projects with potential impacts to fish spawning or migration, no work shall occur within fish spawning or migration timelines (i.e., windows) unless otherwise approved in writing by the MDNR, Fisheries Division.
Y. Work to be done under authority of this permit is further subject to the following special instructions and specifications:

Notification shall be made to the MDEQ's Water Resources Division, one working day prior to starting the project. Please notify Kristi Wilson at 1504 W Washington Street, Marquette, MI, 49855, or wilsonk17@michigan.gov, or 906-236-0380.

This permit does not authorize work completed without permit under Part 325, Great Lake Submerged Lands.

Prior to the start of work authorized by this permit, the permittee or authorized contractor shall provide the MDEQ with an emergency response plan for containing any unauthorized discharges to open water. This plan shall be submitted to the MDEQ at 1504 W Washington Street, Marquette, MI, 49855 or wilsonk17@michigan.gov a minimum of three business days before the start of construction. This plan shall provide the name, address, and telephone number of the person that the MDEQ can contact if necessary and who has the authority to stop work on the project.

Sam Jones Permit No. 99-99-0001-P

In the event there is a leak of any material during the drilling operation, the project shall be immediately stopped, evaluated, and appropriate measures shall be taken to alleviate the release and contain the leaking material. The permittee is responsible for all liability associated with the occurrence of any unintended release, and is also ultimately responsible for the isolation, containment, restoration and final site cleanup, and disposal of the inadvertent fluid losses. The permittee, agent or contractor shall immediately notify the MDEQ representative at 906-236-0380 or by email at wilsonk17@michigan.gov, of any leaking problems. The notification shall include the following:

- The time and magnitude of the release.
- A description of the steps that are being taken to eliminate and control the inadvertent release.
- A time for the next notification to the MDEQ with the time not to exceed eight (8) hours.
- The name and telephone number of the person reporting the unintended release of drilling mud or of the person overseeing the construction efforts to halt and control the inadvertent return of fluids.

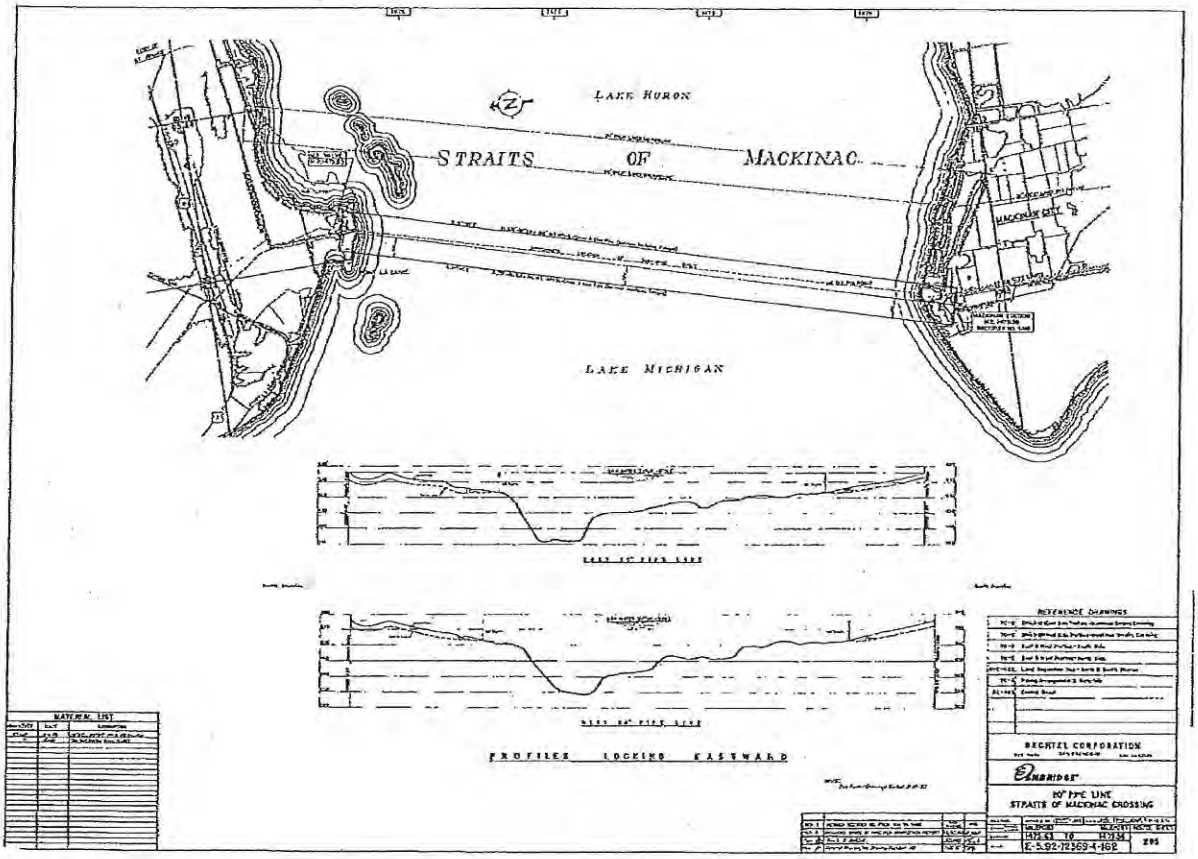
Upon the MDEQ's assessment of the situation, modifications to the permitted activity may be required.

This permit is being issued for the maximum time allowed and no extensions of this permit will be granted. Initiation of the construction work authorized by this permit indicates the permittee's acceptance of this condition. The permit, when signed by the MDEQ, will be for a five-year period beginning at the date of issuance. If the project is not completed by the expiration date, a new permit must be sought.

By: _____

Kristi Wilson
Water Resources Division
906-236-0380

cc: Mackinac County Clerk
Mackinac CEA
Emmet County Clerk
Emmet County CEA
USACE, SSM
Moran Township Clerk
Wawatam Township Clerk
Emmet County Conservation District
DEQ, GLSU



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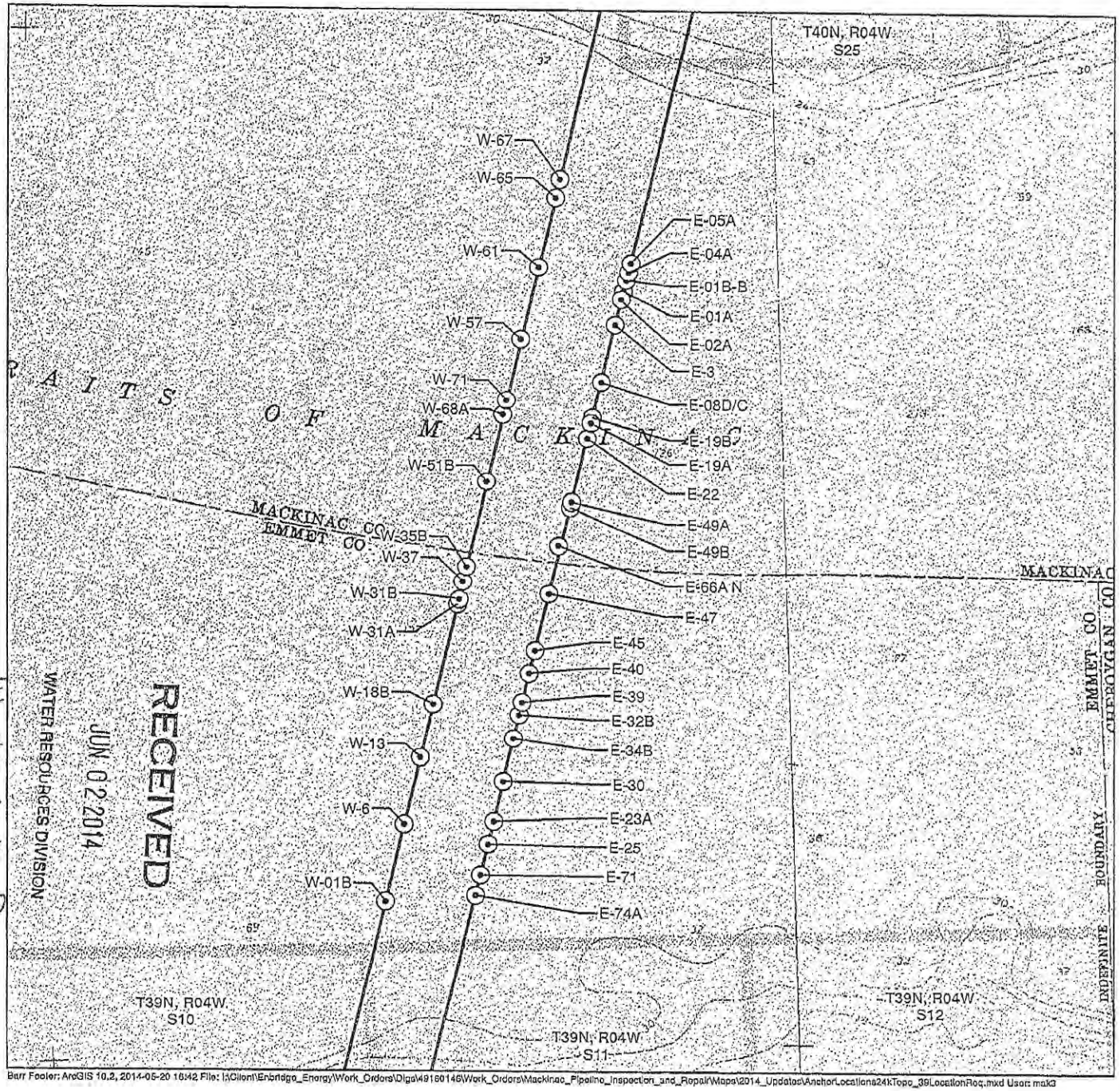


Anchor Locations

Line 5

N

0 2,000 4,000

Feet

1 Inch = 2,000 Feet

ANCHOR LOCATIONS

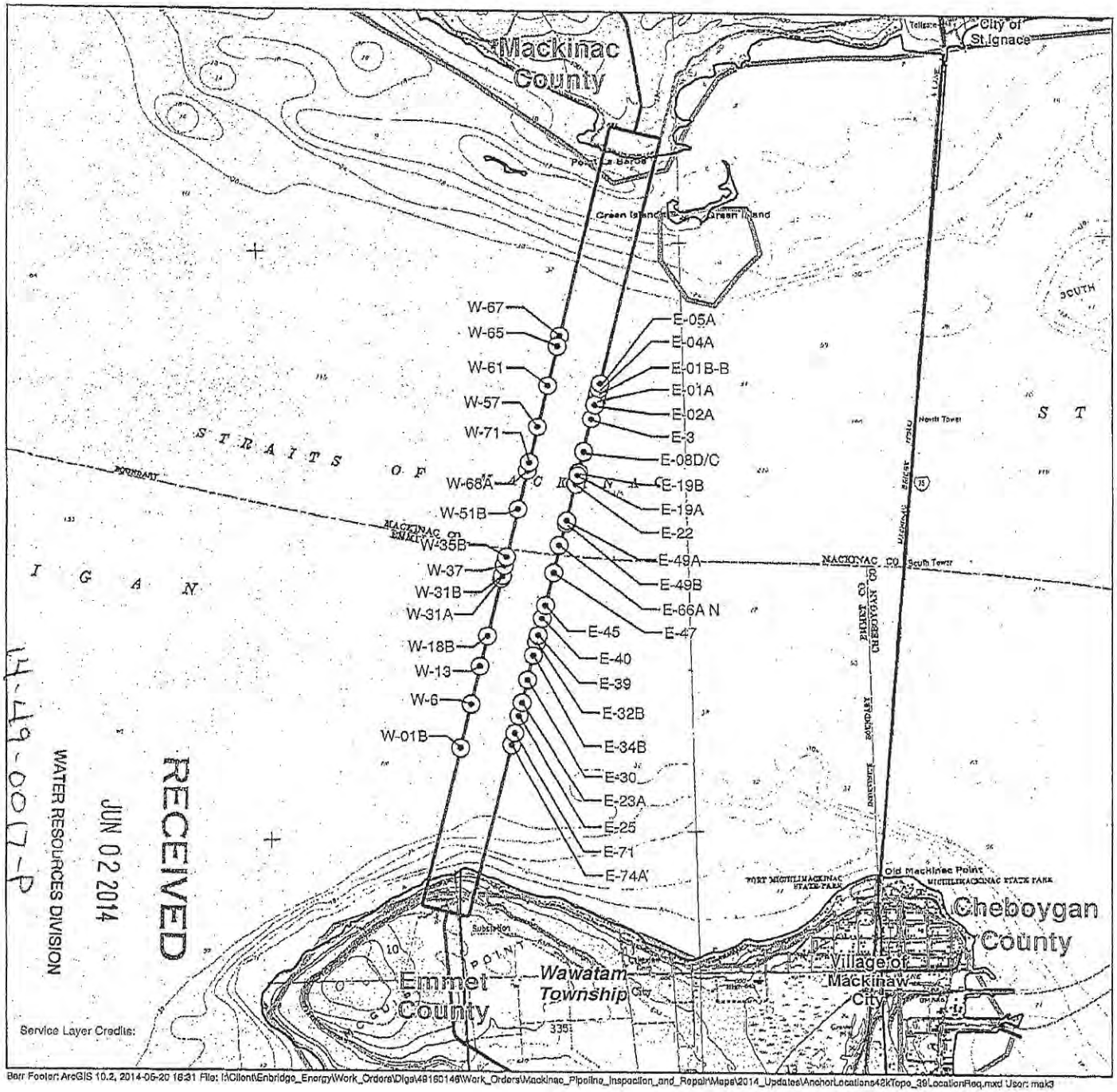
Line 5

Straits of Mackinac

ENBRIDGE

RECEIVED
JUN 02 2014
WATER RESOURCES DIVISION

14-49-0017-P



Anchor Locations

Line 5

0 3,500 7,000

Feet

1 Inch = 3,500 Feet

Imagery: Esri/Microsoft, May 2010

ANCHOR LOCATIONS

Line 5

Straits of Mackinac

ENBRIDGE

RECEIVED
JUN 02 2014
WATER RESOURCES DIVISION

14-49-0017-P

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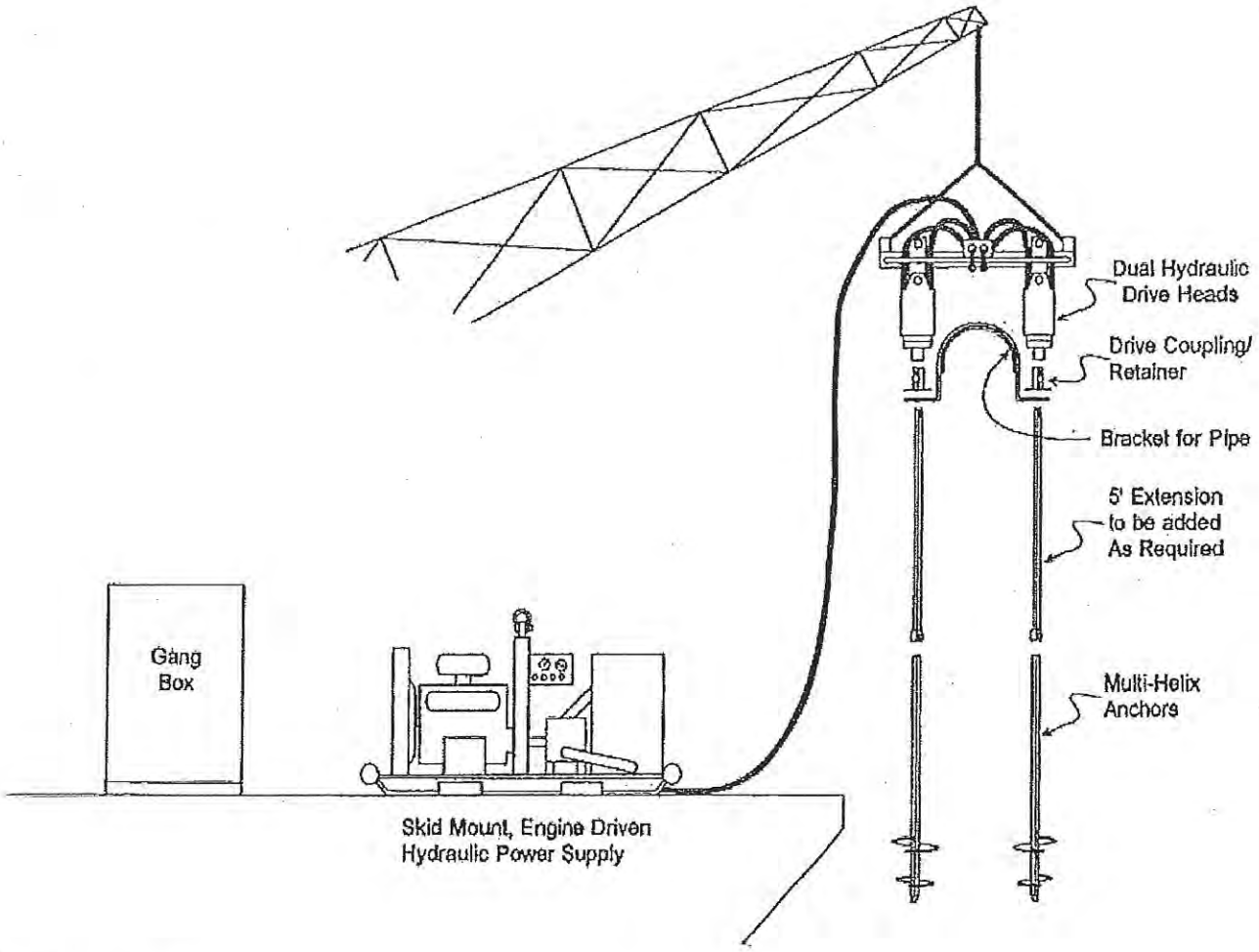
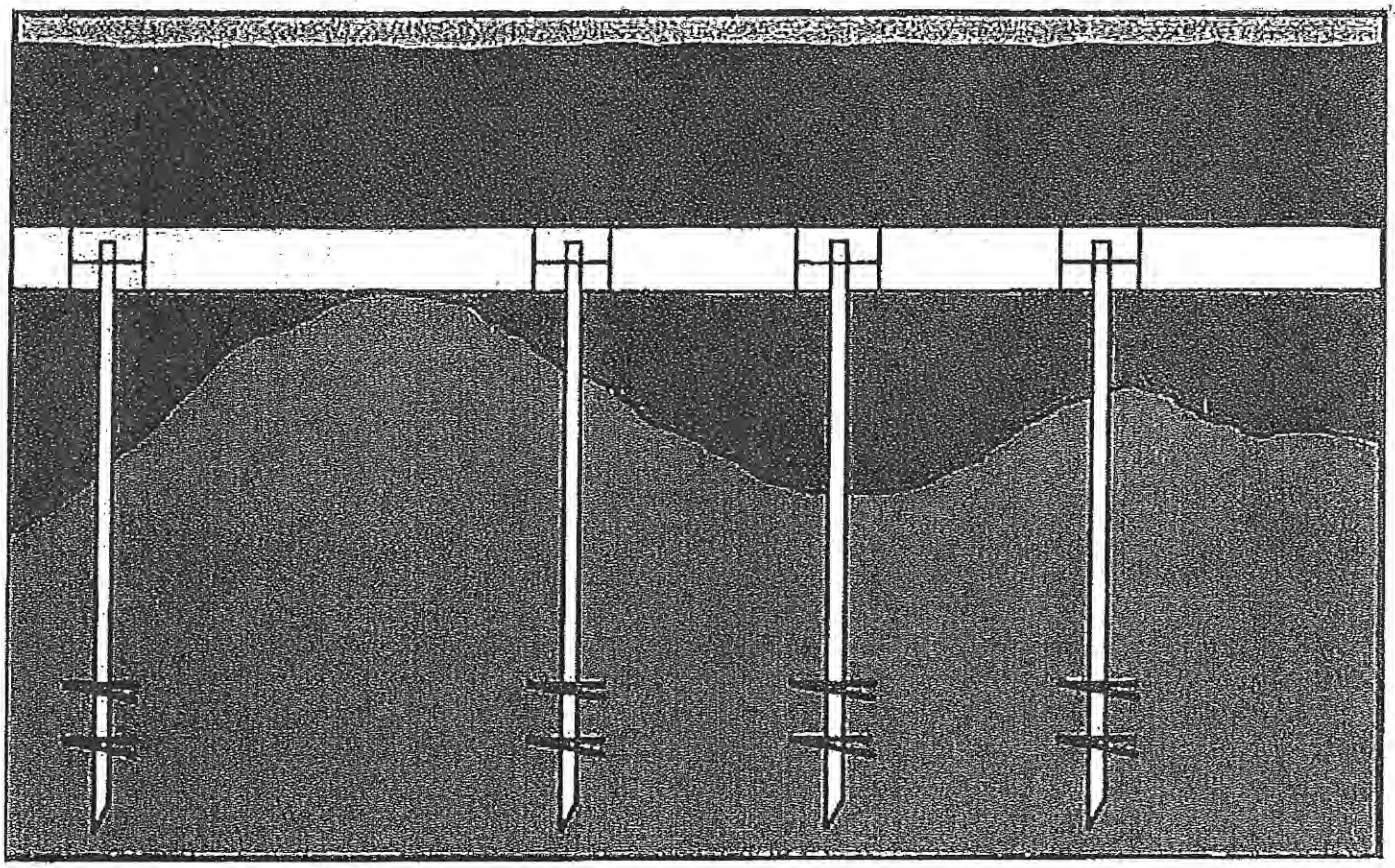


ENBRIDGE

14-49-0017-P



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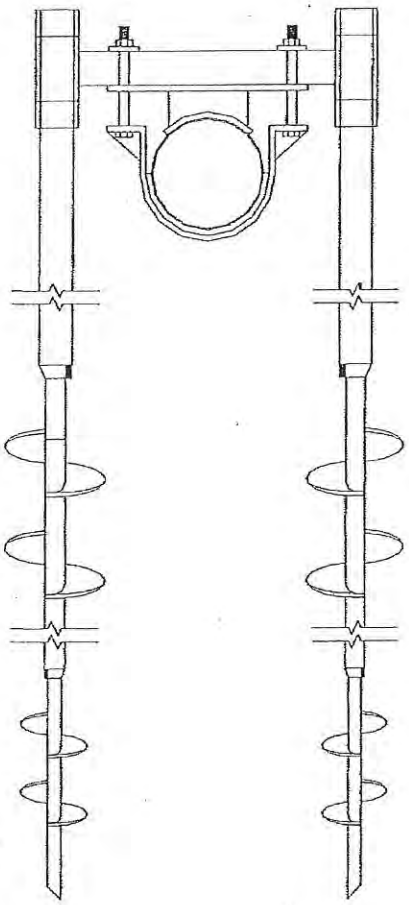
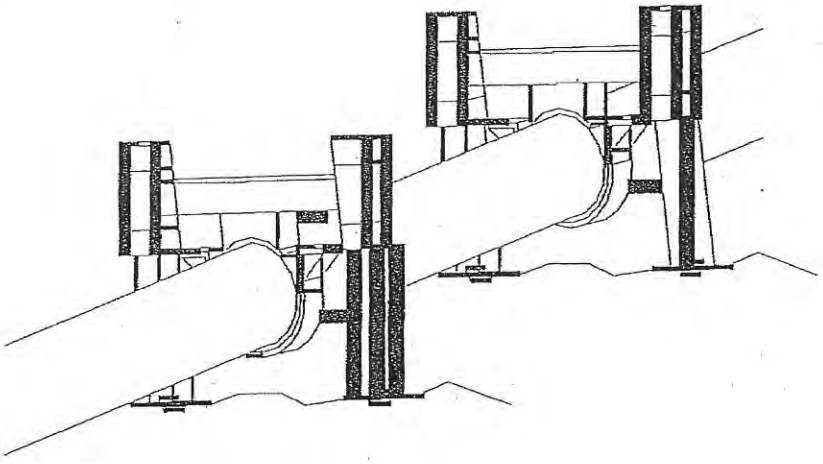
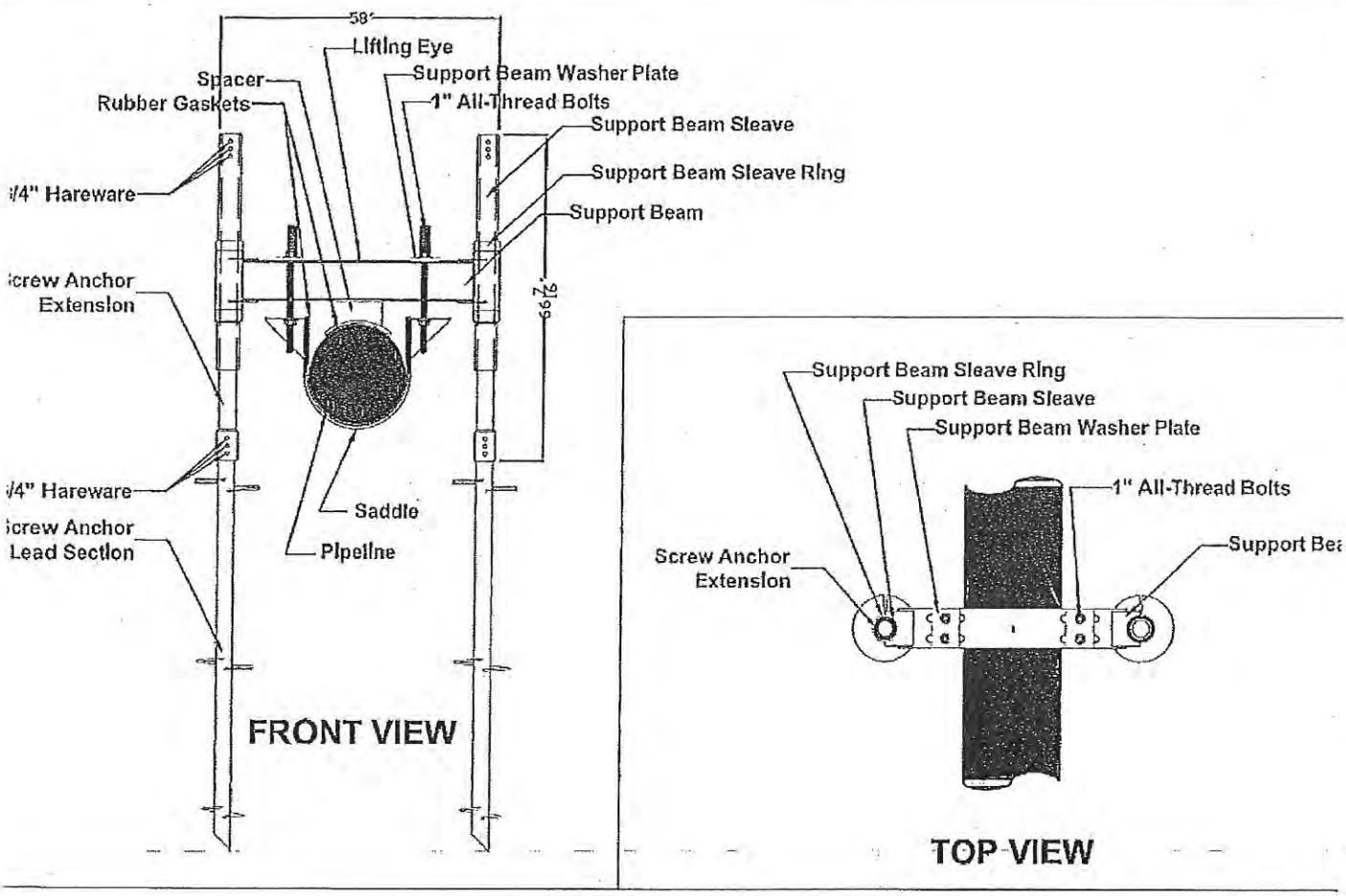
14-49-0017-P





ENBRIDGE

14-49-0017-P



ENBRIDGE

RECEIVED

APR 29 2014

MDEQ UP DISTRICT OFFICE

14-49-0017-P

Exhibit 4B

Is this project really eligible for Nationwide Permit (NWP) for maintenance?

It appears that the scope and purpose of the permitted activity is broader than the stated purpose of general maintenance for the two existing pipelines together known as Line 5. Our understanding is that the additional supports are being installed because Enbridge intends to increase the capacity of the existing 61-year-old pipeline. Although Enbridge refuses to disclose this information publicly, our understanding is that Enbridge intends to increase the volume and pressure of the product being transmitted. Further, our understanding is that the permitted construction work is being done because Enbridge intends to transmit a different "product" through the pipeline.[1] This combination – transmitting a potentially more corrosive product under greater pressure at higher volume – poses a greater risk than merely continuing the preexisting activity.

We have not reviewed records dating back to 2001, including a 2005 permit (that apparently was not acted upon) and renewed permit applications circa 2010-2011. But this year Enbridge first proposed 22 locations for pipeline support structures and then later requested approval for 34 to 42 locations. The July 24, 2014 MDEQ permit authorizes installation of anchors in 39 identified locations (with up to 3 additional locations) "to the existing Line 5 pipeline for the purpose of increased support and stability to existing pipeline infrastructure."

The "existing pipeline infrastructure" implicitly refers to how Line 5 has been utilized the past six decades. If all that is involved is general maintenance of that preexisting use, we can understand why this might be considered within the purview of a NWP for maintenance. But that does not appear to be the purpose for the permitted construction activities.

Our initial communications with EPA have focused on whether NEPA review is required for NWPs. But rather than focusing on the process for approval of NWPs, isn't the relevant issue whether Enbridge has mischaracterized the purpose of the permitted activities? Is this truly a "minimal impact project"?

It seems clear that Enbridge intends to change its overall use of Line 5. In doing so, this no longer should be considered a "minimal impact project" eligible for a NWP for which a NEPA assessment is not required. Instead, the National Wildlife Federation "Sunken Hazard" document provides substantial justification for the proposition that Enbridge intends to utilize Line 5 in a manner different from how it has been utilized in the past. Thus, our question: is this project really eligible for Nationwide Permit (NWP) for maintenance? And, if not, then shouldn't EPA have a role in protecting the 1836 Treaty-reserved tribal fishing rights (and public trust) in the Straits of Mackinac and surrounding waters of Lakes Huron and Michigan?

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[1] *See* section entitled "Raising the Stakes: Enbridge Plan to Expand Lakehead Pipeline System Would Increase Spill Risk" (pages 10-11) in the 2012 National Wildlife Federation "Sunken Hazard" document:
http://www.superiorwatersheds.org/images/nwf_sunkenhazard.pdf

Exhibit 4C

Request for Tribal consultation -- Enbridge Pipeline Line # 5

Bill Rastetter

Sent: Tuesday, December 16, 2014 3:23 PM
To: Arthur, Edward J LRE [Edward.J.Arthur@usace.army.mil]
Cc: Simon, Charles M LRE [Charles.M.Simon@usace.army.mil]; Sedlacek, Curtis H LRE [Curtis.H.Sedlacek@usace.army.mil]; Berry, Desmond (Desmond.Berry@gtbindians.com); Olsen, Erik [Erik.Olsen@gtbindians.com]
Attachments: EPA 12-1-14 letter to GTB,~1.pdf (8 MB) ; memo to EPA about NWP.PDF (171 KB) ; NWF Sunken Hazard.pdf (4 MB)

Messrs. Arthur, Simon, and Sedlacek-

On behalf of Desmond Berry, Natural Resources Department (NRD) Manager, Grand Traverse Band of Ottawa and Chippewa Indians (GTB), I'm contacting you to request consultation regarding Line 5. Specifically, the GTB-NRD requests a meeting with USACE. Per Mr. Arthur's request, this email provides some background information for you to consider prior to our meeting.

Attached are the following documents:
(1.) The EPA's December 1, 2014 letter (with attachments) to Desmond Berry, Natural Resources Department Manager, Grand Traverse Band of Ottawa and Chippewa Indians (GTB);
(2.) GTB-NRD's memo to the EPA that prompted the December 1 reply letter; and
(3.) the 2012 National Wildlife Federation "Sunken Hazard" document referenced in GTB-NRD's memo (see first paragraph and footnote 1 of the memo to EPA).

The Grand Traverse Band and the other 1836 Treaty Tribes possess usufruct fishing, hunting, trapping and gathering rights reserved in the Treaty of Washington executed March 28, 1836; the Tribes' off-reservation fishing rights in the Great Lakes were confirmed by federal court litigation, see United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), aff'd. 653 F. 2nd 277 (6th Cir. 1981), cert. denied, 454 U.S. 1124 (1981); and the Tribes' usufruct rights in inland areas of the treaty-ceded territory were confirmed by the November 2, 2007 Consent Decree (docket entry 1799 in File No. 2:73-CV-26, U.S. District Court for the Western District of Michigan). The Straits of Mackinac is central to the 1836 Treaty Tribes' Treaty-reserved Great Lakes' fishing rights.

The GTB-NRD's dialogue with the EPA (see attached documents) was prompted by concerns that a breach of Line 5 within the Straits of Mackinac would have disastrous environmental consequences. It must be understood that the Grand Traverse Band (and other Tribes with Great Lakes fishing rights reserved in the Treaty of 1836) have a unique property interest in the fisheries resources dependent upon water quality within the Straits. The Grand Traverse Band and other 1836 Treaty Tribes have a property right in the Great Lakes' fishery resources protected by the United States Constitution, see Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources, 971 F. Supp. 282, 288-91 (W.D. Mich. 1995), aff'd, 141 F.3d 635, 638-41 (6th Cir. 1998), cert. denied, 525 U.S. 1040 (1998). As stated in 1981 by the United States Court of Appeals:
"The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty, including the aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights. The protection of those rights is the solemn obligation of the federal government, ..."
United States v. Michigan, supra, 653 F. 2nd at 278-79.

Among the matters that the GTB Natural Resources Department would like to discuss with the USACE are the following questions:
1. Has Enbridge mischaracterized the purpose of the permitted activities?
2. Is the project really eligible for a Nationwide Permit for maintenance?
3. Should the current work of attaching 39-42 anchors be considered construction activities rather than maintenance?
4. Doesn't changing the overall use of Line 5 trigger a NEPA assessment?

5. Shouldn't the federal government (including the USACE and EPA) have a role in protecting the 1836 Treaty-reserved tribal fishing rights (and public trust) in the Straits of Mackinac and surrounding waters of Lakes Huron and Michigan?

Thank you for considering this request. We are looking forward to meeting with you at your convenience.

Bill

William Rastetter
Tribal Attorney
Grand Traverse Band of Ottawa and Chippewa Indians

Of Counsel to Olson, Bzdok & Howard, P.C.
420 East Front Street
Traverse City, MI 49686
231/946-0044 (ph); 231/946-4807 (fax); 231/883-1333 (cell)
E-mail: bill@envlaw.com Web site: http://www.envlaw.com/

-----Original Message-----
From: Arthur, Edward J LRE [mailto:Edward.J.Arthur@usace.army.mil]
Sent: Monday, December 08, 2014 8:55 AM
To: Bill Rastetter
Cc: Simon, Charles M LRE; Sedlacek, Curtis H LRE
Subject: Enbridge Pipeline Line # 5 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Hi Bill,

My contact info is given below and I have copied Mr. Charles Simon the Chief of the processing section that handles permits in the area in question. Please send me the background information that you mentioned and provide a copy to Mr. Simon. Once we have had a chance to review the information we can set up a time to discuss the tribes concerns regarding Line 5.

Edward J. Arthur
Regulatory Project Manager

U.S. Army Corps of Engineers, Detroit District Sault Ste. Marie Field Office
Regulatory Office
312 W. Portage Avenue
Sault Ste. Marie, MI 49783

Exhibit 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ADMINISTRATOR OF THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION, Defendant.	Case No. 2:16-cv-11727 Hon. Mark A. Goldsmith, District Judge Hon. R. Steven Whalen, Magistrate Judge

Declaration of Jane TenEyck

Jane TenEyck, being duly sworn, states that she is competent to testify to the matters stated and that the following statements are made on personal knowledge regarding facts that would be admissible in evidence:

1. Declarant is Executive Director of the Chippewa Ottawa Resource Authority ("CORA").

2. CORA is an inter-tribal organization of five Indian Tribes that possess off-reservation fishing rights in the Great Lakes (including the Straits of Mackinac) and fishing, hunting, trapping and gathering rights in inland portions of the territory ceded by these Tribes in the Treaty of Washington executed March 28, 1836, 7 Stat. 491 ("1836 Treaty"). The CORA Tribes' Great Lakes fishing rights were confirmed in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd.* 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

3. The CORA Tribes' usufructary rights in inland areas of the 1836 Treaty-ceded territory ("cession") were confirmed by a separate November 2, 2007 Consent Decree in the *United States v. Michigan* litigation (Dkt. 1799 in Case No. 2:73-CV-26, U.S. District Court for the Western District of Michigan).

4. As successor to a previous inter-tribal entity, CORA was created by the consent decree entered August 8, 2000 in the U.S. District Court for the Western District of Michigan (Dkt. 1458 in Case No. 2:73-CV-26) allocating the fishery resources within the Great Lakes' portions of the 1836 Treaty cession. Specifically, at page 5 of the 2000 Consent Decree the CORA Charter is referenced in the introduction (section I), CORA is defined in section II.E., and CORA's management obligations as an inter-tribal entity are referenced numerous times throughout the 2000 Consent Decree. Each of the CORA Tribes was required by the 2000 Consent Decree to adopt the CORA Charter; consequently the CORA Tribes jointly manage and regulate Great Lakes fishing activities, *see* section VI.A.2 of the 2000 Consent Decree.

5. Two of the five CORA Tribes are the Grand Traverse Band of Ottawa and Chippewa Indians and the Sault Ste. Marie Tribe of Chippewa Indians; the other three CORA Tribes are the Bay Mills Indian Community, the Little River Band of Ottawa Indians, and the Little Traverse Bay Bands of Odawa Indians.

6. The CORA Tribes are very concerned about the failure of the federal and state governments to enforce laws governing transportation of diluted bitumen and heavy petroleum and protecting the environment within the 1836 Treaty cession including the Straits of Mackinac. I attest that the following attached documents are official CORA actions involving Line 5:

Exhibit 9A – Resolution 01-23-14 (January 23, 2014);

Exhibit 9B – July 1, 2014 letter to the Pipeline and Hazardous Materials Safety Administration ("PHMSA") Administrator and Office of Pipeline Safety requesting PHMSA "to conduct a water crossing study to evaluate the risk of ruptures and leaks in all sections of pipeline that cross Michigan's rivers, streams, and lakes" including the Straits of Mackinac; and

Exhibit 9C – Resolution 01-28-16 A (January 28, 2016).

Jane TenEyck
Executive Director of the Chippewa
Ottawa Resource Authority ("CORA")

STATE OF MICHIGAN
COUNTY OF Chippewa

Signed and sworn before me in Chippewa County on July 13, 2016 by Jane Ten Eyck, the Executive Director of the Chippewa Ottawa Resource Authority.

ERICA C. GORDON
NOTARY PUBLIC, CHIPPEWA COUNTY, MI
My Commission Expires: October 27, 2019

Erica C. Gordon
,Notary Public
Chippewa County, Michigan
Commission Expires: 10/27/19
Acting in Chippewa County, Michigan

Exhibit 5A

Chippewa Ottawa Resource Authority
179 W. Three Mile Road
Sault Ste. Marie, MI 49783
Ph: 906-632-0043
Fax: 906-632-1141

RESOLUTION 01-23-14

OPPOSITION TO TRANSPORTATION OF DILUTED BITUMEN AND OTHER HEAVY PETROLEUM PRODUCTS IN THE GREAT LAKES

WHEREAS, The Chippewa Ottawa Resource Authority (CORA) exists for the purpose of managing the fishery resource under the Treaty of 1836, 7 Stat. 491, through regulation of treaty fishing activity by members of the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians and the Sault Ste. Marie Tribe of Chippewa Indians; and

WHEREAS, the right to fish under the 1836 Treaty is dependent upon the ability of the Great Lakes and inland ecosystems to support viable and stable fish stocks; and

WHEREAS, the physical properties of diluted bitumen derived from tar sands petroleum deposits such as those being mined in Alberta, Canada, and any heavy petroleum products (heavy petroleum) that sink in water are exceptionally difficult to remediate when spilled in fresh water; and

WHEREAS, a network of petroleum product and natural gas pipelines of various ages and dubious integrity exist in the Great Lakes including some that may be transporting diluted bitumen as evidenced by the spill that occurred from an Enbridge Inc. pipeline in the Kalamazoo River watershed in 2010; and

WHEREAS, the Enbridge Inc. Line 5 extends through the 1836 Treaty-ceded lands of Michigan and beneath the Straits of Mackinac in an especially sensitive and vulnerable area; and

WHEREAS, diluted bitumen may hasten corrosion of steel pipelines leading to spills;

WHEREAS, there are proposals to transfer diluted bitumen and/or crude oil from pipelines to vessels for transportation across the Great Lakes and connecting channels; and

WHEREAS, the use of rail cars and tanker trucks to transport crude oil to refineries in the Great Lakes region has increased greatly in recent years and accidents have led to the loss of lives and damage to the environment; and

WHEREAS, spills of diluted bitumen and/or other heavy petroleum products in the Great Lakes region threaten the health of people, the health of the ecosystem and the livelihood of tribal members engaged in commercial fishing activities; and

NOW, THEREFORE, BE IT RESOLVED, that the Great Lakes Resources Committee of CORA hereby states its unqualified opposition to the transport of diluted bitumen and heavy petroleum products by any means, but especially by pipeline across or through the Great Lakes, their connecting channels or watersheds.

AND, LET IT BE FURTHER RESOLVED, that CORA urges the governments of the United States, Canada and the Great Lakes states and provinces to prohibit transport of diluted bitumen and heavy petroleum products by any means, but especially by pipeline across or through the Great Lakes, their connecting channels or watersheds.

CERTIFICATION

I, the undersigned, as Chairman of the Great Lakes Resources Committee to the Chippewa Ottawa Resource Authority, certify that the foregoing resolution was adopted at a duly called, noticed and convened meeting on the 23rd day of January, 2014, with a quorum present and with a vote of 10 in favor, 0 opposed, 0 abstaining and 0 absent.

Jason Grondin, Chairman
Great Lakes Resources Committee of the
Chippewa Ottawa Resource Authority

Exhibit 5B

Chippewa Ottawa Resource Authority

179 W. Three Mile Road
Sault Ste. Marie, MI 49783
Ph: 906-632-0043
Fax: 906-632-1141

July 1, 2014

The Honorable Cynthia I. Quarterman
Administrator
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
East Building, 2nd Floor
1200 New Jersey Ave., SE
Washington, DC 20590

Director Linda Daugherty
PHMSA
Office of Pipeline Safety
Central Region Office
901 Locust Street, Suite 462
Kansas City, MO 64106

RE: Water Crossing Survey of Michigan Pipelines

Dear Administrator Quarterman and Director Daugherty:

On behalf of the Chippewa Ottawa Resource Authority (CORA) I am writing to request that the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) conduct a water crossing study to evaluate the risk of ruptures and leaks in all sections of pipeline that cross Michigan's rivers, streams, and lakes.

CORA represents five tribes in Michigan with regard to the tribes' commercial and subsistence fisheries in the 1836 treaty-ceded waters of Lakes Huron, Michigan and Superior. The tribes which are party to the 1836 Treaty are the Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians and Sault Ste. Marie Tribe of Chippewa Indians.

The treaties signed by the Chippewa and Ottawa peoples and the United States government inherently recognize the importance of the Great Lakes and watersheds to the cultural identity and economic well-being of our people. In 2007, the CORA tribes entered into an historic consent decree with the State of Michigan and the U.S. government that recognizes the right to hunt, and the other usual privileges of occupancy, secured by Article 13 of the 1836 Treaty of Washington, 7 Stat. 491, on lands and inland waters within the boundaries of the territory ceded in the 1836 Treaty. The CORA tribes work with the State of Michigan and U.S. agencies to protect and restore the ecosystem of these lands and waters.

Pipelines crossing Michigan's rivers, streams, and Great Lakes put these resources at risk – threatening our health and economic viability. These treasures demand increased attention from the Pipeline and Hazardous Material Safety Administration to accomplish its pipeline safety mission by ensuring the safety of pipeline crossings in Michigan waterways.

We request that PHMSA conduct a water crossing survey of Michigan pipelines to:

- Develop a comprehensive map of pipeline waterway crossings;
- Determine the status of all existing pipelines running underneath Michigan's water bodies;
- Evaluate the pipeline integrity and risk of ruptures and leaks at each pipeline crossing; and
- Outline what should be done to prevent future pipeline failures.

We request that PHMSA review all the documentation necessary to determine the status of all pipelines running under Michigan's rivers, streams, and lakes. PHMSA should analyze and critique the structural integrity of each pipeline and the standards required at the time of installation of each pipeline to assess the risk of ruptures and leaks. The review should include a variety of factors including each pipeline's age, thickness, and degree of corrosion; the condition and operation of all shut-off valves; the valve distances from the streams or rivers; what products the pipelines are carrying; the pipeline diameters and burial depth; and what pressures the pipeline products are under. It should also include identification of any critical information gaps that exist in the pipeline network within Michigan.

In addition, PHMSA should work directly with pipeline operators to complete the water crossing survey. PHMSA should request any and all information related to structural integrity and potential risks from pipeline operators whose infrastructure crosses a river, stream, or lake. PHMSA should also require that companies fill any critical information gaps found during the analysis. This may prompt operators to perform in-depth studies/analyses on all their major pipeline water crossings. All of this information can then be used to make recommendations to prevent any future failures that damage Michigan's pristine rivers, streams, and lakes.

The state has various programs related to the regulation of pipelines. However, the Michigan Public Service Commission (MPSC) is the only state agency with direct regulatory authority over safety of pipelines. The MPSC's authority is restricted to natural gas pipelines. All other safety-related authority, including jurisdiction of hazardous liquid pipelines, rests with PHMSA and preempts state regulation of safety factors. Therefore, it is incumbent upon PHMSA to fulfill its mandate and conduct a study to ensure the protection of Michigan's citizens and environment from the risks that are inherent in the transportation of hazardous materials by pipeline.

The waters of Michigan have already suffered as a result of a July 26, 2010 pipeline rupture that released an estimated 843,000 gallons of crude oil into Talmadge Creek and the Kalamazoo River, a Lake Michigan tributary. It is imperative that history not be repeated elsewhere in Michigan. It is critical to ensure the integrity of pipelines at major water crossings that affect rivers, streams, and lakes in Michigan. To do this, PHMSA must compile a comprehensive inventory of pipelines at water crossings and determine if they are currently safe.

If you have any questions regarding this request or would like to discuss this matter further, please do not hesitate to contact me or Mike Ripley at (906)632-0043 or via email jteneyck@chippewaottawa.org or mripley@sault.com .

Sincerely,

Jane A. TenEyck, Executive Director
Chippewa Ottawa Resource Authority

Cc: CORA Board
Jon Allan, Michigan Office of the Great Lakes
Senator Debbie Stabenow
Senator Carl Levin
Representative Dan Benishek
Representative Bill Huizenga
Representative Dave Camp
Representative Fred Upton

Exhibit 5C

Chippewa Ottawa Resource Authority

179 W. Three Mile Road
Sault Ste. Marie, MI 49783
Ph: 906-632-0043
Fax: 906-632-1141

RESOLUTION 01-28-16 A:
SUPPORT FOR REMOVAL OR DECOMMISSIONING OF ENBRIDGE LINE 5 IN MACKINAC STRAITS

WHEREAS, the Chippewa Ottawa Resource Authority (CORA) exists for the purpose of managing the fishery resource under the Treaty of 1836, 7 Stat. 491, through regulation of treaty fishing activity by members of the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians and the Sault Ste. Marie Tribe of Chippewa Indians; and

WHEREAS, the right to fish under the 1836 Treaty is dependent upon the ability of the Great Lakes and inland ecosystems to support viable and stable fish stocks; and

WHEREAS, Line 5 is a set of twin, 62-year-old pipelines owned by Enbridge that carry light crude oil and natural gas under the Straits of Mackinac; and

WHEREAS, the Enbridge Inc. Line 5 extends through the 1836 Treaty-ceded lands of Michigan and beneath the Straits of Mackinac in an especially sensitive and vulnerable area; and

WHEREAS, the currents in the Straits of Mackinac at peak volumetric transport can be more than 10 times greater than the flow of Niagra Falls and switch bi-directionally from east to west every few days, and according to a 2014 University of Michigan study are the "worst possible place" for an oil spill in the Great Lakes; and

WHEREAS, Enbridge has a shaky track record that includes 1,244 reportable spills, leaks and releases from 1996 to 2013; and

WHEREAS, Enbridge was in violation for their spacing requirements of its 1953 easement for Line 5 in 2014 and were responsible for a pinhole leak in a section of the pipeline north of the Straits in December 2014; and

WHEREAS, Enbridge was responsible for one of the worst and most expensive oil spills in U.S. History when Line 6b ruptured near Kalamazoo in 2010 allowing almost 1 million gallons of tar sands oil to leak for 17 hours before shutting down the line; and

WHEREAS, corrosion is the number one reason that pipelines fail; and

WHEREAS, Line 5 was built before the Great Lakes Submerged Lands Act was adopted so it didn't have to obtain a permit and ensure that the pipeline wouldn't pose a threat to the waters or the public's use of the waters; and

WHEREAS, Michigan's Attorney General Bill Schuette has stated (in regards to Line 5) that the "pipeline wouldn't be built today" and that "the pipeline's days are numbered"; and

WHEREAS, the Coast Guard Commandant testified before Congress in 2015 that the Coast Guard would be unable to respond effectively to an open water oil spill in the heart of the Great Lakes; and

NOW, THEREFORE, BE IT RESOLVED, that the Great Lakes Resources Committee of CORA hereby states its support for the removal or decommissioning of Enbridge's Line 5 beneath the Mackinac Straits.

AND, LET IT BE FURTHER RESOLVED, that CORA supports H.R. 182 and C.R. 15 introduced by State Representatives Sarah Roberts and Jeff Irwin calling on Governor Rick Snyder and Attorney General Bill Schuette to shut down Line 5; and

LET IT BE FURTHER RESOLVED, that CORA calls upon Governor Rick Snyder, Attorney General Bill Schuette, Michigan's State Representatives, State Senators and U.S. Senators to take swift action to shut down Line 5.

CERTIFICATION

I, the undersigned, as Chairman of the Great Lakes Resources Committee of the Chippewa Ottawa Resource Authority, certify that the foregoing resolution was adopted at a duly called, noticed and convened meeting on the 28th day of January, 2016, with a quorum present and with a vote of 10 in favor, 0 opposed, 0 abstaining and 0 absent.

Levi D. Carrick, Sr., Chairman
Great Lakes Resources Committee of the
Chippewa Ottawa Resource Authority

Exhibit 6

Sault Ste. Marie Tribe of Chippewa Indians

Min Waban Dan

Administrative Office

523 Ashmun Street

Sault Ste. Marie

Michigan

49783

Phone

906.635.6050

Fax

906.635.4969

Government Services

Membership Services

Economic Development Commission

RESOLUTION NO: 2015-45

RESOLUTION IN SUPPORT OF DECOMMISSIONING OF THE ENBRIDGE LINE 5 OIL PIPELINE AT THE STRAITS OF MACKINAC

WHEREAS, the Sault Ste. Marie Tribe of Chippewa Indians is a Federally recognized Indian Tribe organized under the Indian Reorganization Act of 1934, as amended; and

WHEREAS, Enbridge Pipelines, Inc. operates Line 5, a 645-mile, 30-inch-diameter pipeline built in 1953 that extends a distance of 4.6 miles beneath the Straits of Mackinac and transports a variety of petroleum products; and

WHEREAS, Line 5 runs across the northern portions of Wisconsin and Michigan, and as it reaches the Straits of Mackinac, the line splits into two, 20-inch-diameter, parallel pipelines buried onshore and tapering off deep underwater, crossing the Straits of Mackinac west of the Mackinac Bridge for a distance of 4.6 miles; and

WHEREAS, the waters that would be impacted by any spilled petroleum from Line 5 in the Straits of Mackinac would include the shoaling, spawning and nursery areas of Northern Lake Michigan and Northern Lake Huron that encompass the most productive fishing areas of the 1836 Treaty area; and

WHEREAS, it is estimated that more than half of all fishing efforts and harvest occur in the waters likely to be impacted; and

WHEREAS, a catastrophic oil spill in the Straits of Mackinac would devastate the tribal fishing industry; and

WHEREAS, the Sault Tribe is investing staff time and financial resources as well as a $610,000 grant from the Great Lakes Fishery Trust to redevelop a commercial and subsistence fishing access point at Epoufette Bay, Michigan, which is immediately west of the Straits of Mackinac and will serve fishers relying on the excellent fishing grounds in Lake Michigan waters which would be severely affected by any oil spill at the Straits; and

WHEREAS, Enbridge Line 5 was designed for a 50 year life, and is now twelve years beyond its design life, and numerous small ruptures have already occurred on land portions of this line; and

WHEREAS, this pipeline at any given time contains nearly one million gallons of crude oil beneath the waters of the Straits of Mackinac; and

WHEREAS, the State of Michigan, owing to public concerns arising from this pipeline and the Enbridge pipeline disaster at Talmadge Creek Michigan in 2010 leading to the contamination of 40 miles of the Kalamazoo river, has established the Michigan Petroleum Pipelines Task Force; and

WHEREAS, the Michigan Petroleum Pipelines Task Force is charged with examining issues and making recommendations to the Government of the State of Michigan regarding petroleum pipelines in Michigan, with particular emphasis on Enbridge Line 5 at the Straits; and

WHEREAS, it is our considered opinion that no corporation would be successful in any proposal to site and construct a new pipeline at this location under the 2015 regulatory regime, due to the catastrophic impacts of a failure, and further it is our belief that Enbridge, Inc. knows this and is aware that it would not be permitted to simply replace the aging pipeline with new technology at the Straits; and

WHEREAS, it is our belief based on Enbridge public statements, that given these constraints and the value of Line 5 to the Enbridge system, Enbridge intends to continue to operate this pipeline and has no intention of voluntarily taking it out of service; and

WHEREAS, in our judgment there are only two possible outcomes for the Enbridge Line 5 pipeline at the Straits of Mackinac, and one of these two things will eventually occur, and these are 1) the pipeline will rupture and cause catastrophic damage to the Great Lakes system, or 2) a regulatory agency will succeed in requiring decommissioning of the Straits segment before a catastrophe occurs.

THEREFORE, BE IT RESOLVED, that the Sault Ste. Marie Tribe of Chippewa Indians hereby entreats any regulatory authority be it Federal, State, or other, to take all action toward requiring decommissioning of the Enbridge Line 5 pipeline at the Straits of Mackinac.

BE IT FURTHER RESOLVED, that the Sault Ste. Marie Tribe of Chippewa Indians specifically requests the Michigan Petroleum Pipelines Task Force to include in its recommendations the decommissioning of the Enbridge Line 5 pipeline at the Straits of Mackinac.

BE IT FURTHER RESOLVED, that time is of the essence in this entreaty.

BE IT FURTHER RESOLVED that the Chairperson of the Tribe, or his designee, is authorized to execute or amend all documents relating to.

CERTIFICATION

We, the undersigned, as Chairperson and Secretary of the Sault Ste. Marie Tribe of Chippewa Indians, hereby certify that the Board of Directors is composed of 13 members, of whom 12 members constituting a quorum were present at a meeting thereof duly called, noticed, convened, and held on the 17 day of February 2015; that the foregoing resolution was duly adopted at said meeting by an affirmative vote of 11 members for, 0 members against, 0 members abstaining, and that said resolution has not been rescinded or amended in any way.

Aaron A. Payment, Chairperson
Sault Ste. Marie Tribe of
Chippewa Indians

Bridgett Sorenson, Secretary
Sault Ste. Marie Tribe of
Chippewa Indians

Exhibit 7

COPY

The Grand Traverse Band of Ottawa and Chippewa Indians

2605 N. West Bay Shore Drive • Peshawbestown, MI 49682 • (231) 534-7750

TRIBAL COUNCIL RESOLUTION

Resolution No. 15-33.2602

WHEREAS, the Grand Traverse Band of Ottawa and Chippewa Indians is a signatory to the Treaty of Washington executed March 28, 1836 (7 Stat. 491) and was restored to its former status as an Indian tribe having a government-to-government relationship with the United States by action of the Department of the Interior effective May 27, 1980, *see* 45 Fed. Reg. 18321-18322 (March 25, 1980); and

WHEREAS, the Grand Traverse Band is organized under a Tribal Constitution approved by the Secretary of the Interior on March 29, 1988; and

WHEREAS, the Grand Traverse Band has elected a governmental Tribal Council currently consisting of Alvin V. Pedwaydon, Chairman, JoAnne Cook, Vice-Chair; Thomas P. Shomin, Treasurer; David Arroyo, Secretary; Derek J. Bailey, Councilor; Frank Wilson, Councilor; and Mark L. Wilson, Councilor; and

WHEREAS, the Grand Traverse Band possesses usufruct fishing, hunting, trapping and gathering rights under the Treaty of Washington executed March 28, 1836; the Tribe's off-reservation fishing rights in the Great Lakes were confirmed by federal court litigation, *see United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd.* 653 F. 2nd 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981); and the Tribe's usufruct rights in inland areas of the treaty-ceded territory were confirmed by the November 2, 2007 Consent Decree (docket entry 1799 in File No. 2:73-CV-26, U.S. District Court for the Western District of Michigan); and

WHEREAS, the Grand Traverse Band retains property rights in the Great Lakes fishery resources: "Treaty reserved rights to access traditional fishing areas and catch fish are property rights protected by the United States Constitution," *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 971 F.Supp. 282, 288 (W.D.Mich. 1995), *aff'd.* 141 F.3d 635 (6th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998); and

WHEREAS, the Straits of Mackinac is central to these Treaty-reserved fishing rights, due to the abundance of fish stocks and related spawning grounds; and

WHEREAS, the State of Michigan owns the bottom lands under the Great Lakes bordering the State of Michigan, and the Enbridge oil pipelines (Line 5) currently are located on the bottom lands within the Straits of Mackinac under authority of the Great Lakes Submerged Lands Act and the terms of a 1953 easement; and

Tribal Council Resolution
Resolution No. 15-33.2602

WHEREAS, the Enbridge oil pipelines ("Line 5") extending through the Straits of Mackinac pose a great risk to the Grand Traverse Band's Treaty-reserved fishing rights, especially if Enbridge were to begin transmitting tar sands crude oil mixed with sand, clay and other corrosive material under greater pressure, thereby increasing the risk of ruptures in the old metal pipelines; and

WHEREAS, in honor of its traditional cultural heritage, the Grand Traverse Band places a high priority on the preservation and responsible use of its natural resources in the 1836 Treaty-ceded territory, including Treaty-reserved fishing rights dependent upon preservation of Great Lakes' water quality; and

WHEREAS, in 2014 the State of Michigan created the Michigan Petroleum Pipeline Task Force which met with Michigan's Indian Tribes on February 4, 2015, and inquired whether the Tribes opposed the Enbridge pipelines (Line 5) within the Straits of Mackinac; and

NOW THEREFORE BE IT RESOLVED, that the Grand Traverse Band of Ottawa and Chippewa Indians requests the State of Michigan to exercise authority under the Great Lakes Submerged Lands Act and the 1953 easement requiring Enbridge to demonstrate that its Line 5 pipelines within the Straits of Mackinac will not substantially affect the Grand Traverse Band's Treaty-reserved fishing rights forever into the future; and

BE IT FURTHER RESOLVED, that the Grand Traverse Band of Ottawa and Chippewa Indians resolves that the Enbridge Line 5 pipelines should be removed from the Straits of Mackinac.

APPROVED: JoAnne Cook
JoAnne Cook
Vice-Chairperson

ADOPTED: David Arroyo
David Arroyo
Secretary

CERTIFICATION

As Secretary of the Tribal Council of the Grand Traverse Band of Ottawa and Chippewa Indians, I hereby certify that the above resolution was approved and adopted at a regular session of the Tribal Council held in Peshawbestown, Michigan, on February 18, 2015, by a vote of 4 FOR, 0 AGAINST, 0 ABSTAINING, and 2 ABSENT.

David Arroyo
Secretary

Exhibit 8

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

7500 Odawa Circle
Harbor Springs, MI 49740

TRIBAL RESOLUTION # 030515-01

Decommission and Safe Removal of Pipeline Running under the Straits of Mackinac

WHEREAS the Waganakising Odawak, known as the Little Traverse Bay Bands of Odawa Indians, is a nation of citizens with inherent sovereignty and right to self-governance;

WHEREAS the Little Traverse Bay Bands of Odawa Indians (LTBB or Tribe) is a federally recognized Indian Tribe under Public Law 103-324, and is a party to numerous Treaties with the United States, the most recent being the Treaty of Washington of March 28, 1836 (7 Stat. 491) and the Treaty of Detroit of 1855 (11 Stat. 621);

WHEREAS Tribal citizens have harvested fish in the Great Lakes for subsistence and commercial purposes since time immemorial. The Tribe's right of subsistence and commercial fishing reserved in Article 13 of the 1836 Treaty is of central cultural, social and economic significance to LTBB and its citizens, and the Tribe strives to protect the quality of the environment for future generations. The Preamble to the Constitution says "We will work together in a constructive, cooperative spirit to preserve and protect our lands, resources and Treaty Rights";

WHEREAS LTBB is a party to the case of *United States v. Michigan*, 2:73-CIV-26 (WD MI) in which the Tribe's fishing rights in the 1836 Treaty ceded portions of the Great Lakes were upheld, and it is a signatory to the 2000 Consent Decree entered in that case. The Straits of Mackinac lie at the heart of the Great Lakes waters ceded in the 1836 Treaty;

WHEREAS a network of petroleum product and natural gas pipelines of various ages and dubious integrity exist in the Great Lakes, including some that may be transporting diluted bitumen, as evidenced by the spill that occurred from an Enbridge Inc. pipeline in the Kalamazoo River watershed in 2010;

WHEREAS the Enbridge Inc. Line 5 extends through the 1836 Treaty ceded lands and waters of Michigan and beneath the Straits of Mackinac in an especially sensitive and vulnerable area;

WHEREAS the physical properties of diluted bitumen derived from tar sands petroleum deposits and any heavy petroleum products that sink in water are exceptionally

difficult to remediate when spilled in fresh water, and a spill of any petroleum products, heavy or otherwise, transported through Line 5 through the Straits of Mackinac would cause vast irreparable damage to the Treaty fishery;

WHEREAS the 2010 Kalamazoo River spill starkly demonstrates the inherent danger of transporting petroleum products through pipelines under fresh water;

WHEREAS the fact that the Straits of Mackinac freeze over for about 4 months per year make adequate year round monitoring of Line 5, or clean-up of a winter spill, impossible;

THEREFORE BE IT RESOLVED that to honor the Tribe's duty to protect the natural environment and its Great Lakes Treaty fishing rights, the portion of Enbridge Inc.'s Line 5 running under the Straits of Mackinac must be decommissioned and safely removed as soon as possible.

CERTIFICATION

As the Tribal Council Treasurer and Tribal Council Secretary, we certify that this Tribal Resolution was duly adopted by the Tribal Council of the Little Traverse Bay Bands of Odawa Indians at a regular meeting of the Tribal Council held on March 5, 2015 at which a quorum was present, by a vote of _8_ in favor, _0_ opposed, _0_ abstentions, and _0_ absent as recorded by this roll call:

	In Favor	Opposed	Abstained	Absent
Bill A. Denemy	X			
John W. Keshick III	X			
Beatrice A. Law	X			
Michael J. Naganashe	X			
Aaron Otto	X			
Winnay Wemigwase	X			
Julia A. Shananaquet	X			
Marcella R. Reyes	X			

Date: 03.12.15 Marcella R. Reyes
Marcella R. Reyes, Treasurer

Date: 03-06-15 Julia Shananaquet
Julia A. Shananaquet, Secretary

Received by the Executive Office on 3/12/15 by

Pursuant to Article VII, Section D, Subsection 1 of the Little Traverse Bay Bands of Odawa Indians Constitution adopted on February 1, 2005 the Executive concurs in this action of the Tribal Council.

Date: 3-19-15 Regina Gasco Bentley
Regina Gasco Bentley, Tribal Chairperson

Exhibit 9

Statement of Stanley ("Skip") Pruss [http://5lakesenergy.com/]

From: Skip Pruss <pruss@5lakesenergy.com>
Sent: Wednesday, July 27, 2016 7:18 PM
Subject: Energy & Climate Notes 07/27/16

Other Hidden Costs of Line 5

"You wouldn't site, and you wouldn't build and construct pipelines underneath the straits today."
Attorney General Bill Schuette

[Begging the question: If a state-of-the-art, 21st Century pipeline presents an unacceptable risk, why is the continued use of an aging, mid-20th Century pipeline acceptable?]

Many compelling reasons exist to terminate the use of Line 5, the twin 20-inch pipelines carrying crude oil and natural gas liquids that cross the state-owned bottomlands under the Straits of Mackinac. Much research, analysis, and modelling has been done by scientists, engineers, lawyers and academics demonstrating that Line 5 poses an unreasonable risk. Yet Line 5 continues in use, operating under the inherent illogic that a 63 year-old undersea pipeline can function indefinitely without incident.

To the many arguments compelling closure, let me offer another – one that is decidedly minor when compared to the potential catastrophic impacts of a Line 5 failure – but an argument that might manage to nudge your outrage quotient up a notch:

You and I are subsidizing Enbridge to maintain and operate Line 5.

But before addressing the many ways public resources are being expended to benefit Enbridge, let's review some of the facts that should have already been determinative.

- There exists an imminent risk of catastrophic harm to one-third of North America's surface water that is Lakes Michigan and Huron (one lake). UM's Graham Sustainability Institute's analysis <http://graham.umich.edu/water/project/mackinac-oil-spill> indicates that that more than 700 miles of shoreline in Lakes Michigan and Huron and proximate islands are potentially vulnerable to an oil release in the Straits that would result in accumulation requiring cleanup, and that more than 15% of Lake Michigan's open water (3,528 square miles), and nearly 60% of Lake Huron's open water (13,611 square miles) could be affected by visible oil from a spill in the Straits.

- "Imminent risk" has two components – the likelihood of a failure and the potential magnitude of the harm. The UM study and the National Wildlife Federation report Sunken Hazard <http://www.nwf.org/~/media/PDFs/Regional/Great-Lakes/NWF_SunkenHazard.ashx> have amply demonstrated the magnitude of potential harm through dispersion modelling. The likelihood of failure cannot be regarded as zero as Enbridge's own inspections have revealed corrosion in nine locations, 55 "circumferential" cracks, and loss of wall thickness in the pipeline itself.

- The U.S. Coast Guard has acknowledged its limited capacity to launch an effective remedial response should a spill event occur in winter or with waves over 4-5 feet – a common occurrence in the

Straits.
<http://www.oilandwaterdontmix.org/citizens_call_to_shut_down_enbridge_line_5_by_december>

- Enbridge pipelines have had 804 document spills through 2010 with at least five additional spills since 2012. <https://line9communities.com/history-of-enbridge-spills/>

These facts illustrate a risk of substantial harm to Lakes Michigan and Huron – a globally unique freshwater resource – as well as to the coastal communities and the tens of millions of people connected to and served by these waters.

So let's start there – who bears the risk?

First, Enbridge has transferred the risk of harm to people of the Great Lakes Region. The risk of harm can be quantified, modelled and monetized. Under Enbridge's worst-case spill scenarios of 200,000 to 400,000 gallons, Enbridge's estimate of remedial costs approaches $1 billion. But the FLOW (For Love of Water) policy center analysis found Enbridge's estimate low, and has calculated a worst case spill scenario of 1.27 million gallons <http://flowforwater.org/wp-content/uploads/2016/05/FINAL-Line-5-Spill-Scenarios-05-02-16.pdf>. Yet under the 1953 easement <http://www.michigan.gov/documents/deq/Appendix_A.1_493978_7.pdf>, Enbridge is required to maintain a paltry $1 million in insurance and a surety bond of $100,000.

Second, additional work necessary cited by UM as a predicate to determining the full cost of the transferred risk would include an analysis of environmental impacts, cleanup costs, restoration and remediation measures, natural resource damages, and economic damage to public and private sector interests. Natural resource damages and natural resource restoration alone costs could be many times greater than the cost of responding to a spill. As it stands, there is no financial assurance mechanism that could begin to cover the costs of these potential impacts.

Third, the additional work necessary to ascertain the full nature and extent of damages that may occur with a Line 5 failure has been left to taxpayers. Already, significant resources have been expended in an effort to understand the risks presented by Line 5. In Michigan, these costs include the work of the Department of Attorney General and its lawyers, the staff of the Michigan Department of Environmental Quality, the Michigan Department of Natural Resources, the Michigan Public Service Commissions, and local governments who have mobilized in response to the Line 5 threat. It includes the staff and support for the Michigan Petroleum Pipeline Task Force. Also include all the staff time of the myriad state and federal agency personnel who have spent thousands of hours attending to the various aspects of Line 5 matters.

Fourth, taxpayers have paid for the spill response exercises undertaken by state and federal officials. We have paid for the multiple mobilizations of the United States Coast Guard, the Pipeline and Hazardous Materials Safety Administration, the Environmental Protection Agency, the Michigan State Police, and Mackinac County Emergency Management. NOAA's Great Lakes Environmental Research Laboratory (GLERL) and GLERL's Lake Michigan Field Station have also been involved in spill response exercises.

Fifth, aside from a $2,450 payment made to the Michigan Department of Conservation in 1953, the state is not receiving any compensation for the use of state bottomlands. Great Lakes bottomlands are "public trust" resources meaning that under our jurisprudence, the state holds the bottomlands in trust

for the benefit of the people of the State of Michigan. When state bottomlands are leased for uses like a marina or dockage, compensation is paid for that use. But more importantly, under the "Public Trust Doctrine," the state may not lease bottomlands unless it first makes a determination that future uses of state bottomlands will not be impaired or substantially affected.

Here's what the MDEQ website state s<http://www.michigan.gov/deq/0,1607,7-135-3313_3677_3702-10865--,00.html> about the Public Trust Doctrine:
"The bottomlands of the Great Lakes are held in trust by the State of Michigan for use and enjoyment by its citizens. The State, as the owner and trustee, has a perpetual responsibility to the public to manage these bottomlands and waters for the prevention of pollution, for the protection of the natural resources and to maintain the public's rights of hunting, fishing, navigation, commerce, etc. The State of Michigan's authority to protect the public's interest in the bottomlands and waters of the Great Lakes is based on both ownership and state regulation. The Public Trust Doctrine, as the basis for Part 325, provides state authority to not only manage but also to protect the public's fundamental rights to use these resources.
"Michigan courts have determined that private uses of the bottomlands and waters, including the riparian rights of waterfront property owners, are subject to the public trust. In other words, if a proposed private use would adversely impact the public trust, the State of Michigan's regulatory authority requires that the proposal be modified or denied altogether in order to minimize those impacts."

Another critical aspect of the Public Trust Doctrine is that the doctrine requires reexamination of past governmental decisions on public trust matters in light of new scientific knowledge and information. Attorney General Schuette has stated that based upon what we know today, a pipeline crossing the Straits is unacceptable. Under the Public Trust Doctrine, he should be compelled to act to terminate Line 5.

The Traverse City-based FLOW policy center <http://flowforwater.org/> has been an international champion of the Public Trust Doctrine and recently persuaded the international Joint Commission to recognize the doctrine as a managing framework for the Great Lakes. FLOW has also taken the lead in doing much of the legal and engineering assessments of Line 5 – earning widespread gratitude, respect and support.

Disclosure: I'm on FLOW's board.

Exhibit 10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

NATIONAL WILDLIFE FEDERATION,

Plaintiff,

v.

ADMINISTRATOR OF THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION,

Defendant.
_____/

Case No. 2:16-cv-11727

Hon. Mark A. Goldsmith, District Judge

Hon. R. Steven Whalen, Magistrate Judge

MOTION OF GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS AND SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TO INTERVENE AS PARTIES-PLAINTIFF

Pursuant to Fed. R. Civ. P. 24(a), the Grand Traverse Band of Ottawa and Chippewa Indians and the Sault Ste. Marie Tribe of Chippewa Indians state:

1. Regarding the requirement of E. D. Mich. LR 7.1(a), counsel for Plaintiff concurs with the relief requested in this motion, and counsel for Defendant does not oppose the relief requested in this motion; specifically, by email correspondence on July 15, 2016, opposing counsel of record stated: "The Administrator of the Pipeline and Hazardous Material Safety Administration takes no position on the Tribe's motion to intervene." The undersigned counsel certifies that on several occasions he communicated in writing and on two occasions he

personally spoke by telephone with opposing counsel for Defendant, explaining the nature of the relief to be sought by way of this motion and seeking concurrence in the relief.

2. The Grand Traverse Band of Ottawa and Chippewa Indians (“Grand Traverse Band”) and Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe") are signatories to the Treaty of Washington executed March 28, 1836, 7 Stat. 491 (“1836 Treaty”).

3. The Sault Tribe was restored to its former status as an 1836 Treaty signatory Indian tribe having a government-to-government relationship with the United States by memorandum of the Commissioner of Indian Affairs on September, 7, 1972; land was first taken into trust for the Sault Tribe by deed dated May 17, 1973 and approved by the Area Director for the Bureau of Indian Affairs on March 7, 1974; and the Commissioner of Indian Affairs formally declared trust land to be a reservation for the Sault Tribe on February 20, 1075, with notice published in the Federal Register on February 27, 1975 (40 Fed. Reg. 8367).

4. The Grand Traverse Band was restored to its former status as an 1836 Treaty signatory Indian tribe having a government-to-government relationship

with the United States by action of the Department of the Interior effective May 27, 1980, *see* 45 Fed. Reg. 18321-18322 (March 25, 1980).

5. In the 1836 Treaty the Sault Tribe and Grand Traverse Band reserved off-reservation fishing rights in the Great Lakes including the Straits of Mackinac that have been confirmed by the federal courts, *see United States v. Michigan*, 471 F. Supp. 192 (W. D. Mich. 1979), *aff'd.* 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). On August 8, 2000 the U.S. District Court for the Western District of Michigan entered a 20-year consent decree (Dkt. 1458 in Case No. 2:73-CV-26) allocating the fishery resources within the Great Lakes' portions of the treaty-ceded territory ("cession"). The 2000 Consent Decree is attached as **Exhibit 1**. A map of the portions of Lakes Michigan, Huron and Superior in which the Sault Tribe and the Grand Traverse Band possess treaty-reserved fishing rights is attached separately as **Exhibit 2**; *see also United States v. Michigan, id.*, 471 F. Supp. at 277.

6. In the 1836 Treaty the Sault Tribe and Grand Traverse Band also reserved usufructary fishing, hunting, trapping and gathering rights in inland portions of the cession. A map of the cession in which the Sault Tribe and Grand Traverse Band possess inland treaty-reserved usufructary rights is attached as

Exhibit 3 [Appendix A at page 69 of Dkt. 1799 in W.D. Mich. Case No. 2:73-CV-26, Dkt. 1799-2]).

7. The usufructary rights of the Sault Tribe and Grand Traverse Band in inland areas of the cession were confirmed by the November 2, 2007 Consent Decree (Dkt. 1799 in W. D. Mich. Case No. 2:73-CV-26). The 2007 Consent Decree is attached as **Exhibit 4** (note: Appendices B-M of the 2007 Consent Decree are omitted from this exhibit).

8. The Sault Tribe's and Grand Traverse Band's treaty-reserved fishing rights in the cession's Great Lakes' fishery resources (including Straits of Mackinac) "are property rights protected by the United States Constitution." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 288 (W. D. Mich. 1995), *aff'd.* 141 F.3d 635 (6th Cir. 1998), *cert. denied*, 525 U.S.1040 (1998).

9. The Sault Tribe's and Grand Traverse Band's property rights in the treaty-reserved fishery resources in Lakes Michigan, Huron and Superior (and in particular the Straits of Mackinac) are likely to be adversely impacted if the inadequate and illegal response plan challenged by the National Wildlife

Federation ("NWF") in this action fails to protect these resources from inevitable discharges of oil from Line 5, *see* **Exhibit 5** (Declaration of Mark Ebener).

10. Similarly, the Sault Tribe and Grand Traverse Band have property rights in treaty-reserved fauna and flora resources within inland portions of the 1836 Treaty cession through which Line 5 extends including rivers and streams tributary to Lakes Michigan, Huron and Superior that are likely to be adversely impacted if the inadequate and illegal response plan challenged by NWF in this action fails to protect these resources from inevitable discharges of oil from Line 5. The reliance of tribal members upon the treaty-reserved resources within inland portions of the 1836 Treaty cession is demonstrated in **Exhibit 11** entitled "Treaty Hunting, Fishing and Trapping Summary".

11. The Sault Tribe's and Grand Traverse Band's property rights in the treaty-reserved Great Lakes' fishery resources and in the inland fauna and flora resources through which Line 5 extends are sufficient to establish the Fed. R. Civ. P. 24(a)(2) requirement of "an interest relating to the property or transaction that is the subject of the action, …"

12. The Sault Tribe's and Grand Traverse Band's interest in the "transaction at issue" also is demonstrated by **Exhibits 6, 7, 8, 9A, 9B and 9C**.

13. The Sault Tribe and Grand Traverse Band are members of the Chippewa Ottawa Resource Authority (CORA); in that capacity movants have further expressed concerns regarding Line 5, *see* **Exhibit 9** (Declaration of Jane TenEyck) and attached documents designated as **Exhibits 9A, 9B, and 9C**.

14. The Grand Traverse Band also exchanged correspondence with PHMSA dated September 24, 2014 and November 20, 2014 that are designated as **Exhibits 10A and 10B**.

15. This Court's disposing of the action in the absence of the Sault Tribe and Grand Traverse Band would "as a practical matter impair or impede the movant's ability to protect its interest…" Fed. R. Civ. P. 24(a)(2).

16. The Fed. R. Civ. P. 24(a)(2) inquiry whether "existing parties adequately represent [movants'] interest" is answered in part by pointing out that the Pipeline and Hazardous Materials Safety Administration ("PHMSA") owes a trust responsibility toward movant Indian Tribes that has been ignored, *see* **Exhibits 9A** Resolution 10-23-14 of the Chippewa Ottawa Resource Authority and **Exhibit 9B** 7/1/14 letter requesting PHMSA to "conduct a water crossing study to evaluate the risk of ruptures and leaks…". Furthermore, the unique status/nature of Tribal property rights in treaty-reserved resources renders Plaintiff

NWF incapable of informing the Court about the importance to Tribal cultures of the treaty-reserved fishing, gathering and hunting rights and potential corresponding harms/damages unique to Indian Tribes.

17. The Fed. R. Civ. P. 24(a) inquiry whether the motion of the Sault Tribe and Grand Traverse Band is timely is answered:

(a.) by pointing out that the Defendant, PHMSA Administrator, has not yet filed a responsive pleading per the requirements of Fed. R. Civ. P. 12(a)(2); and

(b.) by noting that the movants' proposed complaint (**Exhibit 12**) does not assert additional claims beyond those already asserted in NWF's amended complaint [Doc # 11], nor do movants anticipate conducting discovery, filing motions, and/or presenting any evidence that would expand the scope of this litigation beyond plaintiff NWF's pleadings.

18. No other party has standing to address the unique status/nature of Tribal property rights in treaty-reserved resources; nor will any other party inform the Court about the importance to Tribal cultures of the treaty-reserved fishing, gathering and hunting rights; and potential corresponding harms/damages unique

to Indian Tribes won't be articulated/presented by other parties to the litigation that are likely to result if the inadequate and illegal response plan challenged by NWF in this action fails to protect these resources from inevitable discharges of oil from Line 5.

19. As required by Fed. R. Civ. P. 24(c), the Grand Traverse Band's proposed complaint is attached as **Exhibit 12**.

WHEREFORE, pursuant to Fed. R. Civ. P. 24(a), the Grand Traverse Band of Ottawa and Chippewa Indians and Sault Ste. Marie Tribe of Chippewa Indians move to intervene as parties-plaintiff in the above-captioned litigation.

Respectfully submitted,

Grand Traverse Band of Ottawa and Chippewa Indians

Dated: July 15, 2016

/s/ William Rastetter
William Rastetter
Of Counsel
Olson, Bzdok & Howard, P.C.
420 E. Front Street
Traverse City, MI 49686
231-946-0044 (telephone)
231-946-4807 (fax)
bill@envlaw.com

Sault Ste. Marie Tribe of Chippewa Indians

Dated: July 15, 2016

Aaron C. Schlehuber (admission pending)
Aaron C. Schlehuber
523 Ashmun Street
Sault Ste. Marie, MI 49783
906-635-6050
ASchlehuber@saulttribe.net

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

NATIONAL WILDLIFE FEDERATION,

Plaintiff,

v.

ADMINISTRATOR OF THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION,

Defendant.
_____/

Case No. 2:16-cv-11727

Hon. Mark A. Goldsmith, District Judge

Hon. R. Steven Whalen, Magistrate Judge

BRIEF OF GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS AND SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS IN SUPPORT OF MOTION TO INTERVENE AS PARTIES-PLAINTIFF

Historically fishing, gathering, and hunting played the central role in the spiritual and cultural framework of Native American life. As the Supreme Court noted more than a century ago, access to fish and wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). Not only are the Great Lakes fish culturally important to the Indian Tribes signatory to the Treaty of Washington executed March 28, 1836, 7 Stat. 491 ("1836 Treaty"), these communities depend upon fisheries resources for their livelihoods. Moreover, by virtue of the supremacy clause (Article VI, clause 2) of the Constitution,

Indian Tribes have a property right in treaty-reserved fishery resources. *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 288 (W. D. Mich. 1995), *aff'd.* 141 F.3d 635 (6th Cir. 1998), *cert. denied*, 525 U.S.1040 (1998); *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 853 F. Supp. 1118, 1125 (D.Minn.1994); and *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1516 (W.D.Wash.1988*).* The 1836 Treaty Tribes' right to the treaty-reserved Great Lakes' fishery resources and inland fauna and flora resources is paramount to the standing of other Michigan citizens, *see Bigelow v. Michigan Department of Natural Resources*, 727 F. Supp. 346, at 352 (W. D. Mich. 1989).

The crux of the claims asserted in this litigation is that approval of Enbridge's response plan regarding possible oil discharges from Line 5 does not comply with the mandate of Congress when the Clean Water Act ("CWA") was amended. [Doc # 11, paragraph 2] Violations of the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") also are asserted. [Doc # 11, paragraph 3] Enforcement of these federal laws is both critical in protecting the Indian Tribes' 1836 Treaty-reserved resources but also is a "solemn obligation" of federal agencies including the Pipeline and Hazardous Materials Safety Administration ("PHMSA"):

> The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty, including the aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights. The protection of those rights is the solemn obligation of the federal government …

United States v. Michigan, 653 F.2d 277, 278 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

To no avail proposed Intervening-Plaintiffs Grand Traverse Band of Ottawa and Chippewa Indians ("Grand Traverse Band") and Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe") have entreated PHMSA to protect their 1836 Treaty-reserved resources, *see* **Exhibits 6, 9A, 9B and 10A**. The Sault Tribe and Grand Traverse Band likewise have requested PHMSA to act in response to the State of Michigan's failure to enforce state law to protect their treaty rights, consistent with the trust "responsibility of the federal government to protect Indian treaty rights from encroachment by state and local governments [which] is an ancient and well-established responsibility[1] of the national

[1] With respect to the federal government's trust responsibility to the Sault Tribe and Grand Traverse Band in the context of these Tribes' 1836 Treaty-reserved rights, *see United States v. Michigan*, 471 F. Supp. 192, at 205, 218 and 228 (W. D. Mich. 1979), *aff'd.* 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). *See also* the Department of the Interior's web site: "The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages." http://www.bia.gov/FAQs/

government." *Id., United States v. Michigan*, 653 F.2d. at 278-79. *See* **Exhibits 6, 7, 8 and 9C**. The State's failure to exercise authority under the Great Lakes Submerged Lands Act (MCL 324.32501, *et seq.*) leaves PHMSA as the sole governmental agency with authority to protect the Indian Tribes' 1836 Treaty-reserved resources as well as the public trust for the citizens of Michigan.

A. Proposed Intervenors Are Entitled To Intervene As Of Right.

Intervention as of right is governed by Fed. R. Civ. P. 24(a):

> On timely motion, the court must permit anyone to intervene who: ... (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

A proposed intervenor must establish that: (1) the motion is timely, (2) the proposed intervenor has a substantial legal interest in the case's subject matter, (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention, and (4) existing parties may not adequately represent the proposed intervenor's interest. *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999). These elements are to be "construed broadly in favor of the applicants". *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1246 (6th Cir. 1997). Because counsel for Plaintiff and Defendant do not object[2] to the

[2] Regarding the requirement of E. D. Mich. LR 7.1(a), counsel for Plaintiff

proposed intervention, proposed Intervening-Plaintiffs Grand Traverse Band and Sault Tribewill summarize the Rule 24 factors pertaining to intervention of right.

(1) Timeliness of Motion

Defendant, PHMSA Administrator, has not yet filed a responsive pleading per the requirements of Fed. R. Civ. P. 12(a)(2). The Grand Traverse Band's and Sault Tribe's proposed complaint (**Exhibit 12**) asserts the same claims as those already asserted in the amended complaint of Plaintiff, National Wildlife Federation ("NWF") (Doc #11). Movants' motion to intervene is both timely and not detrimental to other parties. Movants are aware of and concur with the existing parties' stipulations regarding the Case Management Order (Doc # 19).

(2) Interest in the Property or Transaction

The second requirement for intervention as of right is that the intervenor must demonstrate "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). To demonstrate a sufficient

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concurs with the relief requested in this motion, and counsel for Defendant does not oppose the relief requested in this motion; specifically by email correspondence on July 15, 2016, opposing counsel of record stated: "The Administrator of the Pipeline and Hazardous Material Safety Administration takes no position on the Tribe's motion to intervene."

"interest" in the litigation, prospective intervenors must show a "direct and concrete interest that is accorded some degree of legal protection." *Diamond v. Charles*, 476 U.S. 54, 75 (1986); *Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1223 (6th Cir. 1975) (Rule 24 requires a "direct, substantial interest in [the] litigation"). The Sixth Circuit has liberally interpreted this interest requirement. *Grutter, supra,* 188 F.3d at 398 ("in this circuit we subscribe to a 'rather expansive notion of the interest sufficient to invoke intervention of right.'") (quoting Michigan State AFL-CIO, supra, 103 F.3d at 1245).

The Sault Tribe's and Grand Traverse Band's interest in the property or transaction which is the subject of this action is established in the following factual allegations of the motion and referenced documents filed with the Tribes' Rule 24 motion and this supporting brief:

> 2. The Grand Traverse Band of Ottawa and Chippewa Indians ("Grand Traverse Band") and Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe") are signatories to the Treaty of Washington executed March 28, 1836, 7 Stat. 491 ("1836 Treaty").
>
> 5. In the 1836 Treaty the Sault Tribe and Grand Traverse Band reserved off-reservation fishing rights in the Great Lakes including the Straits of Mackinac that have been confirmed by the federal courts, *see United States v. Michigan*, 471 F. Supp. 192 (W. D. Mich. 1979), *aff'd.* 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). On August 8, 2000 the U.S. District Court for the Western District of Michigan

entered a 20-year consent decree (Dkt. 1458 in Case No. 2:73-CV-26) allocating the fishery resources within the Great Lakes' portions of the treaty-ceded territory ("cession"). The 2000 Consent Decree is attached as **Exhibit 1**. A map of the portions of Lakes Michigan, Huron and Superior in which the Sault Tribe and the Grand Traverse Band possesses treaty-reserved fishing rights is attached separately as **Exhibit 2**; *see also United States v. Michigan*, *id.*, 471 F. Supp. at 277.

6. In the 1836 Treaty the Sault Tribe and Grand Traverse Band also reserved usufructary fishing, hunting, trapping and gathering rights in inland portions of the cession. A map of the cession in which the Sault Tribe and Grand Traverse Band possesses inland treaty-reserved usufructary rights is contained in **Exhibit 3**, Appendix A (at page 69 [W. D. Mich. Case No. 2:73-CV-26, Dkt 1799-2]).

7. The usufructary rights of the Sault Tribe and Grand Traverse Band in inland areas of the cession were confirmed by the November 2, 2007 Consent Decree (Doc. 1799 in W. D. Mich. Case No. 2:73-CV-26),. The 2007 Consent Decree is attached as **Exhibit 4** (note: Appendices B-M of the 2007 Consent Decree are omitted from this exhibit).

8. The Sault Tribe's and Grand Traverse Band's treaty-reserved fishing rights in the cession's Great Lakes' fishery resources (including Straits of Mackinac) "are property rights protected by the United States Constitution." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 288 (W. D. Mich. 1995), *aff'd.* 141 F.3d 635 (6th Cir. 1998), *cert. denied*, 525 U.S.1040 (1998).

9. The Sault Tribe's and Grand Traverse Band's property rights in the treaty-reserved fishery resources in Lakes Michigan, Huron and Superior (and in particular the Straits of Mackinac) are likely to be adversely impacted if the inadequate and illegal

> response plan challenged by the National Wildlife Federation ("NWF") in this action fails to protect these resources from inevitable discharges of oil from Line 5.
>
> 10. Similarly, the Sault Tribe and Grand Traverse Band have property rights in treaty-reserved fauna and flora resources within inland portions of the 1836 Treaty cession through which Line 5 extends including rivers and streams tributary to Lakes Michigan, Huron and Superior that are likely to be adversely impacted if the inadequate and illegal response plan challenged by NWF in this action fails to protect these resources from inevitable discharges of oil from Line 5.
>
> 11. The Sault Tribe's and Grand Traverse Band's property rights in the treaty-reserved Great Lakes' fishery resources and in the inland fauna and flora resources through which Line 5 extends are sufficient to establish the Fed. R. Civ. P. 24(a)(2) requirement of "an interest relating to the property or transaction that is the subject of the action, …"

(3) Effect of Disposition on Movant's Ability to Protect Interest

With respect to the third element of the Rule 24(a)(2) analysis, the Sixth Circuit has held that "a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied. *This burden is minimal." Grutter supra*, 188 F.3d at 399 (6th Cir. 1999) (emphasis added). The Proposed Intervenors easily satisfy this minimal burden.

At present, this litigation presents straight-forward legal issues that might be resolved expeditiously. But litigations sometimes take twists and turns requiring

development of facts beyond the existing record. If that were to happen here, disposition of the case without input from the Tribes would preclude their ability to protect property rights in the treaty-reserved Great Lakes' fishery resources and in the inland fauna and flora resources through which Line 5 extends

(4) Adequacy of Representation by Existing Parties

With regard to the final element, ordinarily a proposed intervenor need only show that representation of its interests "'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10 (1972). Sixth Circuit law is clear that an intervenor "is not required to show that the representation will in fact be inadequate." *Michigan State AFL-CIO, supra,*103 F.3d at 1347. "For example, it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id.,* citing *Forest Conservation Council v. United States Forest Serv.,* 66 F.3d 1489, 1498-99 (9th Cir. 1995).

PHMSA owes a trust responsibility toward movants that has been ignored. Despite the fact that protection of "(t)he treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty ... is the solemn obligation of the federal

government," *United States v. Michigan*, *supra*, 653 F.2d at 278, PHMSA has not responded to the CORA Tribes' request contained in **Exhibits 9A and 9B**, the Resolution01-23-14 of the Chippewa Ottawa Resource Authority ("CORA") and the letter dated July 2, 2014.

None of the other parties will address the unique status/nature of Tribal property rights in treaty-reserved resources. Nor will any other party inform the Court about the importance to Tribal cultures of the treaty-reserved fishing, hunting and gathering rights and the corresponding harms/damages unique to Indian Tribes that are likely to result if the inadequate and illegal response plan challenged by the NWF in this action fails to protect these resources from inevitable discharges of oil from Line 5.

B. Alternatively, Permissive Intervention Should be Granted.

Even if this Court were to conclude that movants have failed to establish all four elements required under Rule 24(a), nonetheless permissive intervention should be granted under Rule 24(b). As previously discussed, the instant motion is timely. And as required Fed R. Civ. P. 24(b)(1)(B), proposed intervenors Sault

Tribe and Grand Traverse Band share common questions of law and fact with Plaintiff NWF's assertions in this case.

Conclusion

For the reasons previously stated, this Honorable Court should grant leave to the Grand Traverse Band of Ottawa and Chippewa Indians and Sault Ste. Marie Tribe of Chippewa Indians to intervene as a parties-plaintiff in the above-captioned litigation.

Respectfully submitted:

Grand Traverse Band of Ottawa
and Chippewa Indians

Dated: July 15, 2016

/s/ William Rastetter
William Rastetter
Of Counsel
Olson, Bzdok & Howard, P.C.
420 E. Front Street
Traverse City, MI 49686
231-946-0044 (telephone)
231-946-4807 (fax)
bill@envlaw.com

Sault Ste. Marie Tribe of Chippewa Indians

Dated: July 15, 2016

Aaron C. Schlehuber (admission pending)
Aaron C. Schlehuber
523 Ashmun Street
Sault Ste. Marie, MI 49783
906-635-6050
ASchlehuber@saulttribe.net

LIST OF EXHIBITS

1. 2000 Consent Decree

2. Map (1836 Treaty-ceded waters of the Chippewa-Ottawa Treaty of 1836)

3. Map (1836 Treaty-ceded territory with coordinates)

4. 2007 Consent Decree

5. Declaration of Mark Ebener

6. Sault Tribe Resolution No. 2015-45

7. Sault Tribe Position Paper (Enbridge Line 5 Oil Pipeline at the Straits of Mackinac)

8. Grand Traverse Band Resolution No. 15-33.2602

9. Declaration of Jane TenEyck
   9A. CORA Resolution 01-23-14
   9B. July 1, 2014 letter to PHMSA
   9C.CORA Resolution 01-28-16 A

10. Grand Traverse Band correspondence with PHMSA
    10A. September 24, 2014 GTB letter to PHMSA
    10B. November 20, 2014 PHMSA response to GTB

11. Sault Tribe Treaty Hunting, Fishing and Trapping Summary

12. Proposed Complaint
    12A. March 23, 2016 Grand Traverse Band letter to PHMSA "Notice of Intent to Sue"

LOCAL RULE CERTIFICATION

I, William Rastetter, certify that this document complies with Local Rule 7.1(a): Regarding the requirement of E. D. Mich. LR 7.1(a), counsel for Plaintiff concurs with the relief requested in this motion, and counsel for Defendant does not oppose the relief requested in this motion; specifically, by email correspondence on July 15, 2016, opposing counsel of record stated: "The Administrator of the Pipeline and Hazardous Material Safety Administration takes no position on the Tribe's motion to intervene." The undersigned counsel certifies that on several occasions he communicated in writing and on two occasions he personally spoke by telephone with opposing counsel for Defendant, explaining the nature of the relief to be sought by way of this motion and seeking concurrence in the relief.

Grand Traverse Band of Ottawa
and Chippewa Indians

Dated: July 15, 2016

/s/ William Rastetter
William Rastetter
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LOCAL RULE CERTIFICATION

I, William Rastetter, certify that this document complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one- inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 14 point (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

Grand Traverse Band of Ottawa
and Chippewa Indians

Dated: July 15, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2016, I electronically filed the foregoing Rule 24 Motion to Intervene as Parties-Plaintiff, Brief in Support of Motion to Intervene as Parties-Plaintiff and Exhibits 1-12A with the Clerk of the Court using the electronic filing system, which will send notification of such filing to the registered CM/ECF users at the following e-mail addresses:

Neil Kagan

kagan@nwf.org

Cynthia Huber

cynthia.huber@usdoj.gov

Alan Greenberg

alan.greenberg@usdoj.gov

Grand Traverse Band of Ottawa
and Chippewa Indians

Dated: July 15, 2016

/s/ William Rastetter
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Exhibit 11

U.S. Department of Justice

Office of Tribal Justice

Room 2318, RFK Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

(202) 514-8812
FAX (202) 514-9078

July 7, 2016

Dear Tribal Leader:

The Department of Justice and the Environmental Protection Agency invite you to a consultation on the process for distribution of the Tribal Allocation Subaccount of the Environmental Mitigation Trust to be established under a partial settlement of *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation.* Under the partial settlement of EPA's Clean Air Act claims in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation*, Case No. 15-md-2672 CRB (JSC) (N.D. Cal.), the Settling Defendants are required to establish an Environmental Mitigation Trust (Trust) to fund specific actions to mitigate excess emissions of nitrogen oxides (NOx) from the cars subject to the lawsuit by reducing NOx emissions from other sources (Eligible Mitigation Actions).

The Trust will be administered by a Trustee, and the Eligible Mitigation Actions will be implemented by the Trust Beneficiaries. The Trust provides an allocation for federally-recognized tribes that become Trust Beneficiaries (Tribal Allocation Subaccount), as well as an allocation to cover the Trustee's administrative costs associated with the Tribal Allocation Subaccount. Further information regarding the general terms of the consent decree are available at https://www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement. Only the listed projects in Appendix D-2 of the consent decree are Eligible Mitigation Actions. Specific portions relevant to Tribes can be found at pages 13 through 16 of the consent decree and in Appendices C and D to the consent decree.

The Department of Justice and the Environmental Protection Agency invite you to consult on a method for allocating annual funding in the Tribal Allocation Subaccount for Eligible Mitigation Actions, for providing technical assistance to tribes, and for recommending candidates to serve as the Trustee. A framing paper detailing the issues will be distributed prior to the consultation.

The schedule for the telephonic consultations is as follows:

Monday, August 8, 2016: Consultation Session 3:00 – 4:00 p.m. Eastern
Link to register for the call and receive the call-in information: http://dpregister.com/10088759

Wednesday, August 10, 2016: Consultation Session 3:00 – 4:00 p.m. Eastern
Link to register for the call and receive the call-in information: http://dpregister.com/10088775

Monday, August 15, 2016: Consultation Session 3:00 – 4:00 p.m. Eastern
Link to register for the call and receive the call-in information: http://dpregister.com/10088779

Please note that you will be asked to provide your name and Tribal affiliation when you register. In addition, we will accept written comments until the close of business on Wednesday, August 27, 2016, the end of the 60 day consultation period established in the consent decree. Please submit any written comments via email to OTJ@usdoj.gov or (if necessary) via regular mail to:

Office of Tribal Justice
Department of Justice
950 Pennsylvania Avenue NW, Room 2318
Washington, DC 20530

If you have questions or have trouble using the links to register, please contact the Office of Tribal Justice at OTJ@usdoj.gov. We hope you will be able to participate in this important government-to-government consultation and look forward to working with you on this important issue.

Sincerely,

Tracy Toulou
Director
Office of Tribal Justice
U.S. Department of Justice

Comment 5

Center for Biological Diversity * For Love of Water * Natural Resources Defense Council * Sierra Club

August 24, 2016

Assistant Attorney General
Environment and Natural Resources Division
U.S. DOJ--ENRD
P.O. Box 7611
Washington, DC 20044-7611

Submitted via US mail and Email to pubcomment-ees.enrd@usdoj.gov

Re: *United States v. Enbridge Energy, Limited Partnership*, et al., D.J. Ref. No. 90-5-1-1-10099

Dear Assistant Attorney General,

The undersigned groups submit these comments regarding the proposed consent decree filed by the Department of Justice ("DOJ") in the case of *United States v. Enbridge Energy, Limited Partnership, et al.*, Civil Action No. 1:16-cv-914. On July 25, 2016, the Department announced a 30-day public comment period through August 24, 2016. 81 Fed. Reg. 48462. Commenters request that these comments be filed with the court and made part of the administrative record as required by 28 C.F.R. § 50.7.

The proposed consent decree at issue is intended to resolve claims over two crude oil spills from pipelines owned and operated by Enbridge Energy, L.P. ("Enbridge") in Marshall, Michigan, and Romeoville, Illinois, both of which occurred in 2010. As part of the proposed settlement, Enbridge would be required to pay approximately $61 million in civil penalties, spend $110 in pipeline maintenance and safety measures, and reimburse the government for $5.4 million in unreimbursed costs stemming from the Michigan incident.

The 2010 spill on Enbridge's Line 6B in Marshall, Michigan was among the worst onshore oil spills in US history, both in terms of the amount of oil spilled and cost of the response and clean-up efforts. A subsequent report by the National Transportation Safety Board ("NTSB") detailed a series of "pervasive organizational failures" at Enbridge that contributed to the severity of the incident, including failure to detect the spill for 17 hours and restarting the pipeline multiple times during that period.[1] Given these circumstances, commenters believe that a penalty of only $61 million, and/or any amount less than the maximum allowed under the Clean Water Act, will be insufficient to act as a deterrent to prevent similar oil spills disasters in the future.

In addition, commenters object to the provisions in the consent decree requiring Enbridge to replace its Line 3 pipeline in Minnesota and Wisconsin. Comments addressing these and other concerns are included in detail below.

I. Comments on Proposed Consent Decree Provisions Related to Replacement and Continued Use of Original US Line 3

Section VII.B of the Proposed Consent Decree contains a number of provisions related the replacement, decommissioning, and recommissioning of the Original US Line 3 pipeline. These provisions are illegal because they: (1) are not within the subject matter jurisdiction of this case; (2) infringe on state authority over crude oil pipeline replacement; (3) impact the Constitutional, statutory and regulatory rights of persons and entities that are not parties to this case; and (4) constitute a major federal action under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq* ("NEPA"), which action cannot be ordered absent completion of an

[1] Available at http://www.ntsb.gov/investigations/AccidentReports/Reports/PAR1201.pdf.

environmental impact statement ("EIS"). Therefore, these provisions must be removed from the Proposed Consent Decree, or at a minimum substantially modified.

A. The Proposed Consent Decree Mandates Replacement of Original US Line 3

Proposed Consent Decree paragraph 22 states:

> Enbridge shall replace the segment of the Lakehead System Line 3 oil transmission pipeline that spans approximately 292 miles from Neche, North Dakota, to Superior, Wisconsin ("Original US Line 3"). Enbridge shall complete the replacement of Original US Line 3 and take Original US Line 3 out of service, including depressurization of Original US Line 3, as expeditiously as practicable after receiving required regulatory approvals and permits for new Line 3. Enbridge shall seek all approvals necessary for the replacement of Original US Line 3, and provide approval authorities with complete and adequate information needed to support such approvals, as expeditiously as practicable, and Enbridge shall respond as expeditiously as practicable to any requests by approval authorities for supplemental information relating to the requested approvals.

These decree terms are unambiguous in that they directly order that Enbridge "shall" replace the Line 3 pipeline and "shall" take the Original US Line 3 out of service. Although subsequent language recognizes that other regulatory approvals are necessary, the Proposed Consent Decree is nonetheless absolute in its mandate to Enbridge that it must replace Original US Line 3. Section VII.B presumes that Enbridge will receive all required approvals from other government agencies, even though this cannot and should not be presumed, such that the Proposed Consent Decree orders Enbridge to take an action that is not within its sole authority to do, is not within the authority of the federal government to order, and that, in the absence of approvals by one or more other federal, state, or local regulatory agencies, may be illegal. If Enbridge fails to gain all necessary approvals to replace Original US Line 3, it could not fulfill the terms of the Proposed Consent Decree and therefore would be in violation of this proposed federal court order.

Although the USEPA and Enbridge may tacitly understand that a denial of a necessary governmental approval would in effect void the Proposed Consent Decree's replacement requirement, presumably because the USEPA would not enforce this requirement, such language is inappropriate for a federal court order because it is unclear, does not expressly and accurately describe future contingencies, and fails to recognize the practical limits of federal regulatory and judicial authority over the replacement of crude oil pipelines. It is inappropriate for a judge to order a defendant to do something that may or may not be legal.

B. Factual Background Related to Replacement of Line 3

The Original US Line 3 Pipeline extends 292 miles from Neche, North Dakota, traversing Minnesota to Superior, Wisconsin. It currently transports up to 390,000 barrels of crude oil per day. Enbridge has admitted that the Original US Line 3 contains a large number of pipe anomalies, meaning locations where the pipe wall may be weakened or damaged.

Enbridge has proposed to replace the Original Line 3 Pipeline by building an entirely new pipeline. From the Canadian border in North Dakota to Enbridge's Clearbrook Terminal near Clearbrook, Minnesota, Enbridge has proposed to build a replacement pipeline in a right-of-way adjacent to the Original US Line 3 right-of-way. From the Clearbrook Terminal to a location near the Superior Terminal, Enbridge has proposed to construct the replacement pipeline in an entirely new right of way through Minnesota's pristine lake country and the headwaters of the Mississippi River. This route has proven to be controversial.

Minn. Stat. § 216B.243 and its implementing regulations in Minn. R. Ch. 7953, require that Enbridge acquire a Certificate of Need from the Minnesota Public Utilities Commission ("MNPUC") for replacement of Original US Line 3. The purpose of the Certificate of Need process is to evaluate the commercial and public need to construct proposed new pipelines,

including proposed replacement pipelines. Typically, the MNPUC considers a wide variety of commercial and socioeconomic information before determining whether or not a new pipeline should be constructed. On April 24, 2015, Enbridge filed its Certificate of Need Application ("Need Application") with the MNPUC for its Line 3 Replacement Project. The Need Application contains detailed information related to Enbridge's claim for a commercial need to replace the Original US Line 3 pipeline, as well as information about the environmental and socioeconomic impacts of the Line 3 Replacement Project. Pursuant to its certificate of need laws, the State of Minnesota must consider non-route alternatives to the Line 3 Replacement Project, including but not limited to: (a) continued use and maintenance of the Original US Line 3 pipeline within Minnesota; (b) the use of non-pipeline transportation alternatives to replacing Line 3; and (c) decommissioning Line 3 without replacement. In its evaluation of these alternatives, the MNPUC will consider the commercial, socioeconomic, and environmental merits of each alternative to ensure that a decision on the future of Original US Line 3 is in the public interest.

In additional, Minn. Stat. Ch. 216G ("Chapter 216G") and its implementing regulations, Minn. R. Ch. 7852, require that Enbridge acquire a route permit from the MNPUC. On April 24, 2015, Enbridge filed its Route Permit Application ("Route Application") for the Line 3 Replacement Project with the MNPUC. The Route Permit Application shows that replacement of Original US Line 3 would require substantial construction activity and create significant environmental and socioeconomic impacts. Under Minn. R. 7852.1400, the MNPUC must consider alternative routes to that proposed by Enbridge and evaluate these routes in a comparative environmental analysis. The purpose of the Minnesota route permitting process is to identify the best route for a pipeline given a wide variety of public and private interests.

The MNPUC has also ordered that it will prepare a state EIS for the Line 3 Replacement Project pursuant to the Minnesota Environmental Policy Act, Minn. Stat. Ch. 116D ("MEPA"), and its implementing regulations at Minn. R. Ch. 4410. MEPA is modeled after NEPA and has similar requirements. This decision acknowledges that the Line 3 Replacement Project will have significant environmental impacts. Although the MNPUC has not yet completed its scoping process for its EIS, it is clear that construction and operation of the Line 3 Replacement Project would impact and put at risk a wide variety of terrestrial and aquatic resources, including but not limited to drinking water, wetlands, lakes, ponds, rivers, streams, wild rice, and wildlife. Many of these resources are also usufructory property owned by a number of Ojibwe bands pursuant to US treaties with these bands. In addition, the importation of additional crude oil from Canada would impact the US and global environment due to increased greenhouse gas emissions.

Both the Need and Route Applications are subject to the contested case hearing requirements of Minn. Stat. Ch. 14 and Minn. R. Ch. 1400 and Ch. 7829. Contested case hearings for pipelines are conducted by administrative law judges ("ALJ") and include a formal evidentiary hearing, discovery, public meetings and comment periods, briefing, and an ALJ recommended decision. Contested case hearings typically require at least one year to complete.

The White Earth Band of Ojibwe and the Mille Lacs Band of Ojibwe have both intervened in the MNPUC dockets to protect their interests. A number of entities including but not limited to the Sierra Club, Honor the Earth, Friends of the Headwaters, Minnesota Center for Environmental Advocacy, MN350, and Carlton County Land Stewards, have either formally intervened, intend to intervene, or intend to informally participate in the MN Route Permit and MN Certificate of Need dockets. In addition, a large number of individuals have provided public comments to the MNPUC stating that the Line 3 Replacement Project would adversely

impact their interests. The forgoing participation in the MNPUC dockets is evidence that replacement of the Original US Line 3 pipeline would impact the rights and privileges of a substantial number of entities and individuals.

The scoping comments filed in the Need and Route Applications together with the MNPUC's decision to prepare a state EIS provide ample evidence that construction and operation of the Line 3 Replacement Project would significantly impact the environment.

C. Standard of Review for Proposed Consent Decrees

In *US v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991), the Court stated:

> The district court, however, is not obliged to approve every proposed consent decree placed before it. Because the issuance of a consent decree places the power of the court behind the compromise struck by the parties, the district court must ensure that the agreement is not illegal, a product of collusion, or against the public interest. The court also has the duty to decide whether the decree is fair, adequate, and reasonable before it is approved.

(*Citing US v. City of Miami, Florida*, 664 F.2d 435,440-41 (5th Cir. 1981). Similarly, the Court in *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990), stated that:

> Because of the unique aspects of settlements, a district court should enter a proposed consent judgment if the court decides that it is fair, reasonable and equitable and does not violate the law or public policy. *See Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125-26 (D.C.Cir.1983), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984) . . . .

In its review of a controversial election dispute, the Seventh Circuit Court of Appeals stated:

> A judge has obligations to . . . members of the public whose interests may not be represented by the litigants. A district judge need not lend the aid of the federal court to whatever strikes two parties' fancy.

Kasper v. Board of Election Com'rs of the City of Chicago, 814 F.2d 332, 338 (7th Cir. 1987).

Thus, the district court here may not simply rubberstamp the Proposed Consent Decree.

The federal courts have recognized that consent decrees may be disapproved if they include terms that, *inter alia*: (1) are outside of the subject matter jurisdiction of the court, beyond statutorily defined agency jurisdiction, and not within the scope of the pleadings; (2) infringe on valid state laws; or (3) impermissibly impact the rights of persons and entities that are not parties to the proposed decree. Further, at least one court has recognized that remediation requirements in a consent decree may be subject to NEPA, such that they may not be undertaken without first complying with NEPA's environmental review requirements.

1. Consent Decree Terms Must Be Within the Subject Matter Jurisdiction of the Court, in Accordance with Statutes on Which the Complaint Is Based, and Within the Scope of the Pleadings

In *Local Number 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 525-26 (1986), the Supreme Court held that: (1) a consent decree "must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction," (2) the "consent decree must com[e] within the general scope of the case made by the pleadings," and (3) the decree "must further the objectives of the law upon which the complaint was based." The Court emphasized that, "[t]his is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based." Although the Court recognized that a consent decree may provide remedies beyond the authority granted to an agency by a specific statutory provision following trial, when read in light of the enumerated requirements above, it is clear that a district court cannot approve a consent decree that is not in accordance with or outside of the scope of the statute on which jurisdiction is based. These constraints prevent district court judges from approving proposed consent decree terms that overreach beyond federal judicial and agency authority and into matters that are not within the scope of the

pleadings. While a consent decree need not be limited to actions required by law, neither may it violate or exceed the scope of authority of the statute on which a complaint is based.

2. Consent Decree Terms May Not Violate Valid State Law

As a corollary to the principle that a federal consent decree must relate to federal subject matter and statutory authority, the federal courts have held that consent decrees must also not infringe on state authority. The Court in *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995) held that a consent decree should not include terms that "disregard valid state laws" and that parties "cannot consent to do something together that they lack the power to do individually," due to the action of state law. The court recognized that:

> "[s]ome rules of law are designed to limit the authority of public officeholders, to make them return to other branches of government . . . . They may chafe at these restraints and seek to evade them," *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986), but they may not do so by agreeing to do something state law forbids.

Id. In *PG Publ'g Company v. Aichele*, 705 F.3d 91, 97, 116-17 (3d Cir. 2013), *cert. denied*, 133 S. Ct. 2771 (2013), the Third Circuit Court of Appeals upheld the district court, which found that parties may not "use a consent decree to enforce 'terms which would exceed their authority and supplant state law.'" *PG Publ'g Co. v. Aichele*, 902 F.Supp.2d 724 (W.D.Pa. 2012), *quoting Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997).

Where federal power does not preempt state law but rather leaves regulation of a matter to state discretion, a federal consent decree must respect and not interfere with state authority. Judicial failure to recognize state authority could result in the inclusion of consent decree terms that go beyond the limits of federal authority and require a party to a proposed decree to violate valid state laws. This is of particular concern where a valid pending state regulatory process may

ultimately require such party to act in ways that conflict with a jurisdictionally overreaching federal consent decree.

3. Consent Decree Terms May Not Infringe on the Rights of Persons and Entities Not Parties to the Decree

The Court in *Perkins* also stated:

> Because a consent decree is not just an agreement between two parties, but is also a judicial act, district courts must ensure that the consent decrees they approve respect . . . the rights of third parties. *EEOC v. Hiram Walker Sons*, 768 F.2d 884, 889 (7th Cir. 1985), *cert. denied*, 478 U.S. 1004, 106 S.Ct. 3293, 92 L.Ed.2d 709 (1986); *South v. Rowe*, 7S9 F.2d 610, 613 n·3 (7th Cir. 1985).

Id. Because a judgment by consent has the same force and effect as judgment rendered on the merits following trial, such judgment cannot be issued in contravention of the rights of impacted third parties. *Id*. As stated forcefully by the Court in *US v. Miami*:

> And while it is well and very well to extoll the virtues of concluding . . . litigation by consent, . . . we think it quite another to approve ramming a settlement between two consenting parties down the throat of a third and protesting one, leaving it bound without trial to an agreement to which it did not subscribe. If this be permitted, gone is the protester's right to appear in court at a trial on the merits, present evidence, and contend that the decree proposed is generally infirm – as imposing unconstitutional or illegal exactions – so that it should not be entered at all or so as to bind any party or affected third party. Who can know what the protester might have been able to show at such a hearing, one to which first-reader principles of procedural due process entitle it? Surely, whether or not it had the power to persuade the trial court, it had the right to try.

664 F.2d at 451-52 (footnotes omitted). Particularly, where a consent decree necessarily implicates the rights of many persons, a district court judge must consider the rights of "members of the public whose interests may not be represented by the litigants" and "need not lend the aid of the federal court to whatever strikes two parties' fancy." *Kasper*, 814 F.2d at 338.

Imposing consent decree terms on a person not party to an action is fundamentally unfair and could violate both Constitutional and statutory rights to due process. Therefore, a court should not approve a consent decree with sweeping terms that impact the legal rights of a person or entity who is not a party to the decree. A proposed consent decree that impacts the rights of many non-parties in multiple ways would be particularly unfair and would create a risk of violation of a wide variety of property, due process, and other rights under law.

D. Consent Decrees that Mandate a Major Federal Action Significantly Impacting the Environment Are Subject to NEPA Requirements

Assuming that a consent decree is a proper exercise of federal power, then an action ordered by a consent decree may be a major federal action under NEPA, 42 U.S.C. § 4332(C). *See United States v. S. Florida Water Mgmt. Dist.*, 847 F. Supp. 1567 (S.D. Fla. 1992), a*ff'd in part, rev'd in part sub nom. United States v. S. Florida Water Mgmt. Dist.*, 28 F.3d 1563 (11th Cir. 1994). This case considered whether state government remedial actions ordered as part of a federal consent decree required compliance with NEPA. The district court ruled that they did, though it did not require completion of an EIS as a condition of its approval of the consent decree. 847 F. Supp. at 1580-82. The Eleventh Circuit overturned the district court, but it did not find that agency actions ordered by consent decrees are exempt from NEPA. *See* 28 F.3d at 1573. Instead, it found that federal agency negotiation of a settlement with state agencies did not convert the proposed state remedial measures into a major federal action. *Id*. at 1572. The court found that, "[t]he power to influence the outcome of a lawsuit by advocacy and negotiation is not synonymous with a federal agency's authority to exercise control over a nonfederal project which requires federal approval as a legal precondition to implementation." *Id.* It found that negotiation with a state government does not "federalize" the matter to the point that NEPA applied. *Id.* at 1573. But the court also noted that "[t]he United States does not contend that

NEPA obligations will never arise during the implementation of the remedial measures" and it agreed that NEPA might apply to particular measures, but that such application was premature. *Id.* at 1573. This being said, in this case the primary responsibility lay with the state government – the federal agency involved did not directly order any particular remedial action. *Id.* It follows that where a federal agency does directly assert "authority to exercise control over a nonfederal project" that significantly impacts the human environment, then NEPA would apply even if such authority is expressed in the form of a consent decree.

E. The Proposed Consent Decree Fails to Comply with Judicial Standards

The Proposed Consent Decree's requirement to replace Original US Line 3 is remarkably expansive, falling outside the scope of this matter, outside the scope of federal agency jurisdiction, and within an area of regulation exclusively subject to state authority. Moreover, the Proposed Consent Decree purports to require construction of a controversial pipeline project, thereby impacting the legal rights of tribes, landowners, environmental organizations, and other interested persons. It is simply inappropriate for a handful of staff at the USEPA and Department of Justice to determine through private negotiations with a pipeline company that a new publicly controversial pipeline is needed and must be built, in apparent ignorance of state authority and in apparent disregard for the rights of many persons and entities who are not parties to Civil Action No. 1:16-cv-914.

1. The Consent Decree Terms Requiring Replacement of Original US Line 3 Are Not Within the Subject Matter Jurisdiction of the Court, Are Not in Accordance with Statutes on Which the Complaint Is Based, and Are Not Within the Scope of the Pleadings

The complaint in Civil Action No. 1:16-cv-914 asserts claims against Enbridge under Sections 309 and 311 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1319 and 1321, and the Oil Pollution Act ("OPA"), 33 U.S.C. §§ 1321 and 2702, with respect to two oil spills that

occurred in 2010 as the result of unlawful discharges of oil from Lines 6a and 6b in the States of Illinois and Michigan, respectively. The court found subject matter jurisdiction under only these statutes. Proposed Consent Decree, Section II, paragraph 1. This case is based solely on compliance with the CWA and OPA, such that actions required by the Proposed Consent Decree must be within the subject matter encompassed by these statutes and not in excess of the statutory authority granted to the USEPA by these statutes. Further, the requirement to replace Original US Line 3 must be within the scope of the pleadings, which focused on these particular oil spills.

The CWA does not authorize the USEPA to order a pipeline operator to replace a pipeline. The general purpose of the CWA and the scope of its programs at generally described in 33 U.S.C. §§ 1251 and 1252. These sections do not include within even a very broad definition of their terms an authorization for the USEPA to order the replacement of hundreds of miles of interstate crude oil pipeline. The CWA is intended to control water pollution from discharging facilities; it does not give the USEPA the right to determine which facilities exist. Accordingly, none of the regulations promulgated pursuant to the CWA establish a regulatory process for the replacement of an entire interstate crude oil pipeline or any other type of polluting facility. The USEPA may order the replacement of particular pollution control equipment and the repair of equipment that is illegally discharging pollution into US waters, but it may not order the replacement of an entire facility.

The CWA is not a pipeline siting and routing act, nor does it contain provisions related to determining if replacement of a pipeline, as opposed to continued operation in compliance with the PSA, is in the public interest. The USEPA lacks the statutory authority, regulatory structure,

and agency expertise necessary to weigh the merits of such decision and to order the replacement of an entire interstate crude oil pipeline.

It could be argued that replacement of the Original US Line 3 pipeline might reduce the near-term risk of an oil spill into waters of the United States and thereby help reduce water pollution and accomplish the purposes of the CWA. This being said, many other actions not authorized by the CWA and well outside of the expertise of the USEPA, such as ordering decommissioning or relocation of oil wells, refineries, terminals, and other oil infrastructure, could also arguably reduce the risk of water pollution. However, the purpose of the CWA is to prevent and limit water pollution from any facilities that exist and not to determine which facilities are in the public interest and which are not and where such facilities should be located.

If the USEPA proposed a decommissioning of Line 3 without replacement, Enbridge would undoubtedly object on the ground that such action would be *ultra vires* under the CWA and OPA. The fact that Enbridge does not object to the terms of the Proposed Consent Decree that require replacement of the Original US Line 3 does not somehow extend USEPA authority under the CWA to generally order the replacement of an interstate crude oil pipeline.

Accomplishment of a broad purpose of a statute does not in itself provide sufficient foundation for a consent decree condition arising from such statute. Rather, the condition must fall within the scope of the implementing agency's duties under the statute. Here, the CWA does not authorize the USEPA to order replacement of hundreds of miles of existing crude oil pipeline with hundreds of miles of entirely new pipeline. Therefore, the USEPA cannot order Enbridge to replace the Original US Line 3 pipeline with a new pipeline.

This being said, the CWA is not entirely inapplicable to the construction of a replacement for the Original US Line 3 pipeline, because it would require a Section 401 individual water

quality certification, 33 U.S.C. § 1341, and a Section 404 fill individual permit, 33 U.S.C. § 1344. It is unclear how, respectively, the State of Minnesota and the Army Corps of Engineers, who administer these sections, would be impacted by the knowledge that the USEPA ordered replacement of the Original US Line 3 pursuant to authority under the CWA. Still, it appears that the Proposed Consent Decree would interfere with the objective decision making of these agencies under established CWA authority.

The OPA also does not authorize the USEPA to order the replacement of the Original US Line 3 pipeline. OPA § 1321 generally relates to oil spill response planning and implementation. It does not contain provisions that authorize the replacement of risky petroleum facilities. Although numerous provisions within the OPA state that the President may act to prevent "a substantial threat of a discharge," *e.g.*, 22 U.S.C. § 1321(c)(1)(A), this authority is intended to provide the President with authority to address specific "substantial threats" and does not encompass the authority to entirely replace an interstate crude oil pipeline. Upon discovery of a weakness in a pipeline that created a substantial threat of an oil spill, the President could act to remediate that particular threat. Such remediation might include temporarily stopping use of the pipeline and a repair related to that particular threat. However, such authority falls far short of a general authorization to replace an aging interstate crude oil pipeline with a new pipeline in a new location.

OPA §§ 2701-6004 generally relate to liability for oil spills, international oil spill response, matters related to oil tanker operations and design, and the federal oil spill response system. The requirements of these sections related to prevention of oil spills include specific standards for operation of oil tankers and research and do not relate to replacement of crude oil

pipelines. Nothing in these sections of the OPA authorizes the President or the USEPA to order the replacement of an interstate crude oil pipeline.

Accordingly, replacement of the Original US Line 3 pipeline does not fall within the subject matter of Civil Action No. 1:16-cv-914 as regards the CWA or the OPA, nor is the USEPA authorized by the CWA or the OPA to take such action, nor does the USEPA have expertise in determining whether to replace, repair, or decommission an entire interstate crude oil pipeline.

It should be noted that siting, routing, and permitting for interstate crude oil pipelines is solely within the province of state authority, because Congress has not authorized any federal agency to evaluate the overall public interest in crude oil pipelines and to generally approve construction or routing of crude oil pipelines.[2] This state regulation of interstate crude oil pipelines stands in marked contrast with federal authority over determination of need for and routing of interstate natural gas pipelines, which are regulated solely by the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq.*

The USEPA's scope of authority over interstate crude oil pipelines under the CWA and OPA must be evaluated in light of the states' unquestionable authority to permit and route these pipelines, as well as the fact that many states that have exercised this authority for many decades. For example, the states of North Dakota, Minnesota, Wisconsin, and Illinois all have longstanding laws under which they approve construction of interstate crude oil pipelines. In the absence of express Congressional authorization to preempt these state laws, the USEPA may not

[2] The President, pursuant to the foreign commerce power granted by the Constitution (not Congressional authorization), may determine if new pipeline importation facilities are in the national interest and the location of the border facilities. The President has exercised this power through Executive Order 13337, which requires that the Department of State ("DOS") issue a Presidential Permit following a National Interest Determination. As regards Line 3, the DOS has determined that its replacement does not require either an amendment to the existing permit for Original US Line 3 or a new permit. In any case, the President's authority does not extend to control over permitting within the states.

order replacement of an entire interstate crude oil pipeline because doing so would impinge on this state authority.

Finally, it is the Sierra Club's understanding that the pleadings in Civil Action No. 1:16-cv-914 relate primarily to the oil spills from Lines 6a and 6b and do not relate to whether or not the Original US Line 3 pipeline should be replaced. The replacement of the Original US Line 3 was not the focus of this civil action, such that the pleadings simply do not relate to the merits of such replacement. If the pleadings do not concern replacement of Original US Line 3, then resolution of this matter should not be included in the Proposed Consent Decree.

2. The Consent Decree Terms Requiring Replacement of Original US Line 3 Could Require that Enbridge Violate Valid Minnesota Law

The Proposed Consent Decree expressly orders Enbridge to replace Original US Line 3 with a new pipeline. The MNPUC[3] is currently considering, pursuant to valid state law, whether to replace Line 3, and if so where. It could require that Enbridge take other actions including: (a) repairing, maintaining, and continuing to use of this pipeline;[4] (b) meeting demand for crude oil transportation services via modifications of other existing pipelines or use of other transportations modes; or (c) decommissioning Line 3 entirely. Should the MNPUC determine that it is more economical to repair and maintain this pipeline or that other means are available to meet forecast increases in demand for crude oil transportation services, it would reject Enbridge's application to replace Line 3. If this happens, then Enbridge would need to choose

[3] The State of Wisconsin is also considering whether to permit construction of the Line 3 Replacement Project, as well as ancillary facilities at the Superior Terminal. The State of North Dakota has completed its review of this project and issued a permit for it.

[4] The Pipeline Safety Act's, 49 U.S.C. § 60601 *et seq.* ("PSA"), standards are intended to keep old pipelines such as Original US Line 3 safe through ongoing maintenance. Under the PSA Line 3 can be made just as safe as a new pipeline. Therefore, the issue of whether or not to replace or maintain this pipeline does not relate to safety, but rather to the cost of maintaining an old pipeline as opposed to the cost of building a new pipeline. Such determination is not within the expertise or authority of the USEPA, because it has no role in determining the commercial merits of maintaining as opposed to replacing a pipeline.

between being in violation of a federal consent decree or a MNPUC order validly issued pursuant to state law.

While such outcome is currently a contingency, it is inappropriate for a federal consent decree to create the possibility of a conflict with state law, particularly where such conflict is based on an overreaching by a federal agency into a subject matter (pipeline replacement) that is regulated exclusively by state law.

3. The Proposed Consent Decree Would Infringe on the Rights of Persons and Entities Not Parties to this Civil Action

The Proposed Consent Decree is a statement that the US government has decided and ordered that Enbridge "shall" replace Original US Line 3. Assuming Enbridge fulfills this obligation, construction of a new pipeline would impact the legal rights of many, many individuals and entities that are not parties to Civil Action No. 1:16-cv-914. Replacement of Original US Line 3 would impact many persons and entities including, but not limited to: tribal governments; state, county, and city governments; easement holders; adjacent landowners; construction contractors; local businesses; crude oil shippers and refineries; individuals and groups with environmental concerns; labor unions; and citizens who believe that their interests would be positively or negatively impacted by construction and operation of the pipeline. Proof of the existence of these interested parties is provided in part by the list of intervenors and public commenter in the MNPUC Line 3 and Sandpiper Pipeline need and route permit processes. Under Minnesota law, intervention in pipeline need and routing dockets is allowed only where a party has a substantial interest in the pipeline, and such interventions are approved by an Administrative Law Judge ("ALJ"). The intervention deadline in the MNPUC's Line 3 Replacement Project has not yet been set, such that the full list of intervening parties is not yet known. At present, the list of intervenors in one or both MNPUC dockets includes: the Laborers

District Council of Minnesota and North Dakota; the Sierra Club; Kennecott Exploration Company; the Minnesota Chamber of Commerce; the Mille Lacs Band of Ojibwe; the White Earth Band of Ojibwe; the Friends of the Headwaters; the Minnesota Center for Environmental Advocacy; and the United Association of Journeymen and Apprentice of the Plumbing and Pipe Fitting Industry of the United States and Canada.[5]

Substantial evidence of the legal interests of these third-parties can be found in many sources, including but not limited to:

- pleadings filed in the MNPUC need and route dockets for the Line 3 Replacement Project and the Sandpiper Project, a proposed pipeline that would share the same right of way through much of Minnesota;
- existing and future documents with federal and state agencies related to any of the other permits or authorizations required for the Line 3 replacement project, including but not limited to: (a) the US Army Corp of Engineers CWA Section 404 permit; (b) the MNPUC transmission line dockets related to powering new substations; and (c) the US Fish & Wildlife Service Section 7 Endangered Species Act Consultation;[6]
- US treaties with the Ojibwe Bands;
- communications between the tribes and various federal and state agencies on the Line 3 Replacement Project;
- easement agreements with landowners;
- environmental advocacy websites;

[5] The MNPUC's Line 3 Replacement Project need and route dockets, Docket Nos. MPUC PL-9/CN-14-916 and MPUC PL-9/PPL-15-137, respectively, may be accessed at: https://www.edockets.state mn.us/EFiling/edockets/searchDocuments.do?method=showeDocketsSearch&showEdocket=true&userType=public

[6] A complete list of all permits applicable to the Line 3 Replacement Project can be found in Enbridge's Need and Route Applications.

- public comment letters filed with the MNPUC;
- local government resolutions;
- trade union resolutions and statements; and
- statements of organizations and individuals in many press articles.

There can be no doubt that construction of hundreds of miles of new pipeline would substantially impact the legal rights of many more parties than just Enbridge and the US government.

Since Enbridge and the federal government are not the only entities that would be significantly impacted by a federal requirement replace the Original US Line 3 pipeline, including a requirement to do so in the Proposed Consent Decree is an impermissible infringement on substantive legal, private property, due process rights of third-persons who are not parties to Civil Action No. 1:16-cv-914. Therefore, this requirement should be removed from the Proposed Consent Decree. A matter of such broad and controversial public interest should not be resolved via court approval of privately negotiated terms between a regulated entity and the federal government.

In contrast, the Proposed Consent Decree's terms related to improving Enbridge's internal pipeline safety practices, upgrading specific pieces of its existing infrastructure, and requiring that Enbridge itself better prepare for oil spills, are in the interest of all parties, improve overall public welfare, and do not burden or adversely impact the commercial, financial, environmental, or socioeconomic condition of third parties. These Enbridge-focused terms impose burdens only on Enbridge and not on other parties. Therefore, inclusion of these terms in the Proposed Consent Decree is permissible.

F. The USEPA Cannot Require that Enbridge Replace Original Line 3 Without First Preparing an EIS

An agency that takes a "major Federal actions significantly affecting the quality of the human environment" must prepare an environmental impact statement before implementing such action. 42 USC § 4332(C). The Proposed Consent Decree's direct mandate that Enbridge replace Original US Line 3 is a major federal action by the USEPA that would significantly impact the human environment, such that the USEPA must prepare an EIS prior to including such requirement in the consent decree. This is not a situation where the USEPA has negotiated a settlement with state or local agencies to perform remediation actions under state authority that could significantly affect the human environment. Just the opposite. Here, the USEPA has ignored state authority and instead directly ordered a private party to take an action that would undoubtedly significantly impact the human environment.

The significant impacts of construction of hundreds of miles of 36-inch diameter crude oil pipeline are well known due in part to the similar impacts of the proposed Keystone XL and Alberta Clipper crude oil pipelines, for which a number of NEPA EISs were prepared. The types of impacts caused by construction and operation of major crude oil pipelines include, but are not limited to land, water, air, species, and climate impacts. Digging a trench almost seven feet deep through farmland, wetlands, streambeds, and forests creates significant impacts. Crude oil pipeline spills put the quality of aquifers, streams, rivers, and lakes at risk, along with the fish, wildlife, and plants they support. Construction also adversely impacts and puts at risk human land uses including residences, farms, businesses, roads, and utilities. Condemnation of private property for pipeline company private gains also adversely impacts landowners' private property, safety, and economic interests.

More specifically, many of the likely specific impacts that would result from replacing Original US Line 3 are generally known due to the prior environmental review by the MNPUC for the proposed Sandpiper Pipeline, which would be constructed immediately adjacent to a replacement for the Original US Line 3 pipeline. Although the Sandpiper Pipeline would be a smaller pipeline (30-inch) and transport crude oil from the Williston Basin, the environment that these pipelines would impact would be nearly identical and the types of impact they would cause would be very similar. Moreover, the fact that the MNPUC and Minnesota courts have determined that a state EIS is required for the Line 3 Replacement Project pursuant to MEPA, which is modeled on NEPA, indicates that replacement of Original US Line 3 would significantly affect the human environment. The White Earth Band of Ojibwe and the Mille Lac Band of Ojibwe have both documented claims of adverse impacts to federally protected treaty rights, including hunting, fishing, and gathering rights, which impacts would also significantly affect their environments. Friends of the Headwaters, a northern Minnesota citizen's group, has documented the adverse impacts and risks to water quality in Minnesota's pristine lake country and in the headwaters of the Mississippi that would result from replacement of the Original US Line 3 pipeline in Enbridge's proposed route, and included descriptions in their filings with the MNPUC, as well as online. In short, there can be no doubt that construction of a replacement for the Original US Line 3 pipeline would significantly impact the human environment.

The fact that other permits are required for construction of a replacement for Original US Line 3 does not relieve the USEPA of its duty under NEPA, any more than the existence of such permits relieved the Department of State ("DOS") from such duty to comply with NEPA in its reviews of other cross-border pipelines, including the Keystone XL Pipeline and the Alberta Clipper Pipeline. For these pipelines, the DOS was required to make a determination that the

pipelines were in the national interest. Here, the USEPA proposes to take a step beyond determining that a pipeline is in the national interest and therefore allowing it to be constructed, to instead requiring that a pipeline be constructed. Such requirement makes construction of the replacement pipeline a federal action, because the federal government would actually mandate that such action happen.

Since replacement of Original US Line 3 would be a major federal action that would substantially affect the human environment, NEPA requires that the USEPA may not agree to mandate such replacement prior to completing an EIS. Since it has not done so, a federal judge may not approve the Proposed Consent Decree and make its replacement mandate into federal law.

G. Conclusion

A federal court order that Enbridge replace Original US Line 3 with a new interstate crude oil pipeline as a means to remediate a spills from Line 6a and 6b, which were located in entirely different states, would be a remarkable overreaching of judicial consent decree authority. The subject matter of Civil Action No. 1:16-cv-914 did not include replacement of Original US Line 3. The USEPA has no statutory authority to order replacement of Original US Line 3. The pleadings in Civil Action No. 1:16-cv-914 did not directly relate to replacement of Original US Line 3. Ordering replacement of this pipeline would infringe on unquestionable state authority to regulate the replacement of interstate crude oil pipelines. The Proposed Consent Decree would unfairly and illegally impact a multitude of persons with many diverse legal interests in the replacement of this pipeline. And, assuming *arguendo*, that the requirement to replace Original US Line 3 is legal, the USEPA may not mandate the replacement of this major interstate

crude oil pipeline without first preparing an EIS, because such action would unarguably be a major federal action significantly affecting the human environment.

For the forgoing reasons, the language in the Proposed Consent Decree related to replacement of Original US Line 3 must be stricken. Instead, the Proposed Consent Decree must be limited to ensuring that Original US Line 3, as well as other Enbridge pipelines, be maintained and operated safely.

II. Additional comments

Commenters provide the following additional comments on the proposed consent decree:

A. The following comments relate to Enbridge's 645-mile pipeline, known as Line 5. This pipeline traverses across Michigan's Upper Peninsula from Superior, Wisconsin to St. Ignace, Michigan, across the public trust waters and bottomlands of Lake Michigan in the Straits of Mackinac, and down through the Lower Peninsula to Marysville, near Port Huron, Michigan, to Sarnia, Canada:

1. The foregoing Comments, Section I, C., 1.-3, are incorporated by reference and also apply to Enbridge's Line 5 pipeline.

2. Comment Section I. D. is incorporated by reference because the proposed anchor supports and some of the other measures related to Line 5 in the Consent Decree are not merely "preventive maintenance," but rather part of Enbridge's admitted massive expansion to transport crude oil through the Albert Clipper down through Michigan and the Great Lakes, including expanding Line 5's crude oil daily flow volumes by 80 percent, or from 300,000 bbls/day to 540,000 bbls/day. Moreover, the anchor supports are subject to the 1953 public trust easement with the State of Michigan, and occupancy agreements and permits under Michigan's Great Lakes Submerged Lands Act ("GLSLA"), MCL 324.32501 et seq., and its rules, R 322.1501.

The GLSLA mandates assessment and determinations of environmental impacts and alternatives to Line 5, including the new replacement Line 6B at issue in this case that doubled the pipeline's design capacity from 400,000 bbls/day to 800,000 bbls./day and made Line 5 inessential.

3. The foregoing Comment E.3. is incorporated by reference, as the proposed Line 5 measures should not and cannot infringe on the rights of persons who are not parties to the Consent Decree, including the rights of citizens and the State of Michigan in the public trust waters and bottomlands of Michigan, as well as the usufructuary rights reserved by the Indian Tribes in the March 28, 1836 Treaty of Washington (7 Stat. 491) – including fishing rights within the Straits of Mackinac through which Line 5 of Enbridge's Lakehead pipeline system extends.

B. The technical issues at issue lack sufficient information, time, and opportunity to make substantive comments on the 228-page Consent Decree that addresses not only Enbridge's 2010 oil spills on Line 6A and Line 6B but specific infrastructural upgrades to improve the overall safety and integrity of the Lakehead System. Essential information forming the basis of the decree should be made available in a record or document deposit form accessible to the organizations making comments and the general public. In accordance with 28 C.F.R § 50.7, public notice and comment on the Consent Decree should be "not *less than 30 Days*." In other words, the court can extend the public comment period for any reasonable time with conditions that may be required to provide meaningful comment. Moreover, there is no litigation emergency that warrants the shortest possible public comment period possible, particularly because the scope of this Consent Decree has far exceeded Enbridge's Line 6B disaster. Accordingly, sufficient information should be required and the time for public comment be extended to 90 days.

C. For purposes of the Independent Third Party Verification in Section VII. J of the Consent Decree, the Consent Decree should specify that Enbridge shall not influence or involve in any way the same consultants or any of their firms that have worked for Enbridge within the last five (5) years or are under contract or being considered by Enbridge now or in future. Moreover, the Independent Third Party Verification under the Consent Decree may not use any of the consultants or firms assisting the State of Michigan in its risk and alternative assessments.

D. Notwithstanding any of the concerns raised in Section I above, a provision should be added to one of paragraphs 191 to 207 that states, in effect: "The terms of this decree constitute a negotiated settlement between the parties, and shall not be used by Enbridge as a substitute for independent evidence regarding the risks, impacts, alternatives, or other standards of any other federal or state law, regulation, requirement or standard. The evidence in other federal or state agency or court proceedings shall be based on the record of those proceeding and not the provisions of this Consent Decree."

E. Paragraph 191 should be modified as indicated in bold/italics below:

In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, response or removal costs, expenses, damages, criminal liability, or other appropriate relief relating to the Lakehead System or Enbridge's violations alleged in the Complaint, including any proceeding related to any Corrective Action Order or Notices of Probable Violations issued by PHMSA, pertaining to the Line 6A Discharges or the Line 6B Discharges, Enbridge shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States ***or by any third-party claim*** in a subsequent proceeding...

F. Paragraph 192 should be clarified to more expressly state that:

This Consent Decree ***or any measures contained in the Consent Decree, including but not limited to those for Enbridge's Lines 5 and 3***, are not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Enbridge is responsible for and the Consent Decree may not be used for achieving and maintaining compliance with all applicable federal, State, and local laws, regulations, orders, and permits. Enbridge's compliance with this Consent Decree shall not constitute compliance with or shall not be used as a defense to any action commenced pursuant to any such laws, regulations, orders, or permits except to the extent provided in this Section XIV.

G. Paragraph 193 should be modified as shown in bold/italics below:

This Consent Decree does not limit or affect the rights of Enbridge or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Enbridge, ***[delete: "except as otherwise provided by law"]***, including but not limited to, claims of third parties for damages under the Oil Pollution Act, and claims under 33 U.S.C. § 1365(b)(1)(B) and 42 U.S.C. § 7604(b)(1)(B). This Consent Decree shall not be construed to ***either limit or*** create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

Because the scope of this proposed Consent Decree implicates Enbridge's other Lakehead System pipelines, including Line 3 and Line 5, it is critical that Enbridge is prohibited from using this decree as a shield to evade compliance with federal and state laws or regulations, as well as any current[7] or future litigation or potential causes of action involving these other pipelines. The gravity and complexity of this issue is underscored by the State of Michigan

[7] There are two NWF cases involving Line 5 pending in the E.D. of Michigan, both assigned to Judge Goldsmith – Case No. 2:15-cv-13535 (NWF v. Secretary, DOT), and Case No. 2:16-cv-11727 (NWF v. Administrator, PHMSA).

Attorney General's recent notice of violation letter issued on August 3, 2016 to Enbridge. This notice of violation specifically documented Enbridge's misrepresentations and violations for failure to comply with its Line 5 pipeline support requirements in the 1953 Easement Agreement with the State of Michigan, which in turn authorizes Line 5 to occupy public trust bottom lands in the Straits of Mackinac.

There are also substantial legal questions as to whether Enbridge is operating Line 5 in compliance with the permit requirements and standards of other state and federal laws, which if applied would point to the removal of crude oil transported in Line 5 and trigger a mandate that Enbridge undertake and implement available alternatives to Line 5 that do not put the Great Lakes at risk.

Finally, the Governor of the State of Michigan has created the Michigan Pipeline Safety Advisory Board to oversee a year-long independent study of risks and alternatives to Line 5 in the Straits of Mackinac. Enbridge should not be able to wield or introduce the Consent Decree as affecting these studies.

In short, this paragraph in the proposed Consent Decree must be strengthened through a more express and comprehensive provision that states: "The provisions or measures in this Consent Decree shall not affect or be used as a defense or bar to any other claims, demands, legal obligation, or requirement arising under any other federal or state law regulation, common law, or local ordinance. Moreover, this Consent Decree shall not constitute compliance or be used as evidence of compliance with any federal and state law or regulation."

H. The Proposed Consent Decree should prohibit Enbridge from seeking cost recovery through its FERC-approved tariffs for any civil penalties paid by Enbridge. Fees for use of the Mainline System are established in tariffs approved by the FERC. These tariffs are

based on Enbridge's costs of operation plus a rate of return on its investment. Should Enbridge be allowed to include the civil penalties within the costs that it reports to FERC in its Form 6 and Form 6Q quarterly reports, then it could recover the costs of these penalties from its customers, who would in turn pass them on to end use consumers. By passing on the costs of penalties to others, Enbridge's officers, directors, partners, and shareholders would not themselves ultimately bear the burden of these penalties. The USEPA should ensure that the culpable party, Enbridge, bears the costs of these penalties by prohibiting Enbridge from including them in the costs that it reports to FERC, thereby preventing Enbridge from recovering the penalty amounts via future tariff fees.

III. Conclusion

For the foregoing reasons, the Proposed Consent Decree must be modified prior to judicial review. A failure to ensure that the decree conforms with judicial standards will likely result in a rejection by the district court of the decree and further delay in imposing justified fines and improvements to Enbridge's internal safety-related efforts and commitments.

Respectfully submitted,

Doug Hayes
Staff Attorney
Sierra Club Environmental Law Program
[redacted]

Liz Kirkwood
Executive Director
FLOW (For Love Of Water)
[redacted]

Marc Fink
Center for Biological Diversity
[redacted]

Anthony Swift
Director- Canada Project
Natural Resources Defense Council
[redacted]

Comment 6

[redacted]
WHITE EARTH, MN [redacted]

1855 TREATY AUTHORITY

EAST LAKE ♦ LEECH LAKE ♦ MILLE LACS ♦ SANDY LAKE ♦ WHITE EARTH

August 24, 2016

SENT VIA EMAIL ONLY
pubcomment-ees.enrd@usdoj.gov

Assistant Attorney General
Environment and Natural Resources Division,
P.O. Box 7611
Washington, DC 20044-7611

RE: United States v. Enbridge Energy, Limited Partnership, et al.,
D.J. Ref. No. 90-5-1-1-10099.

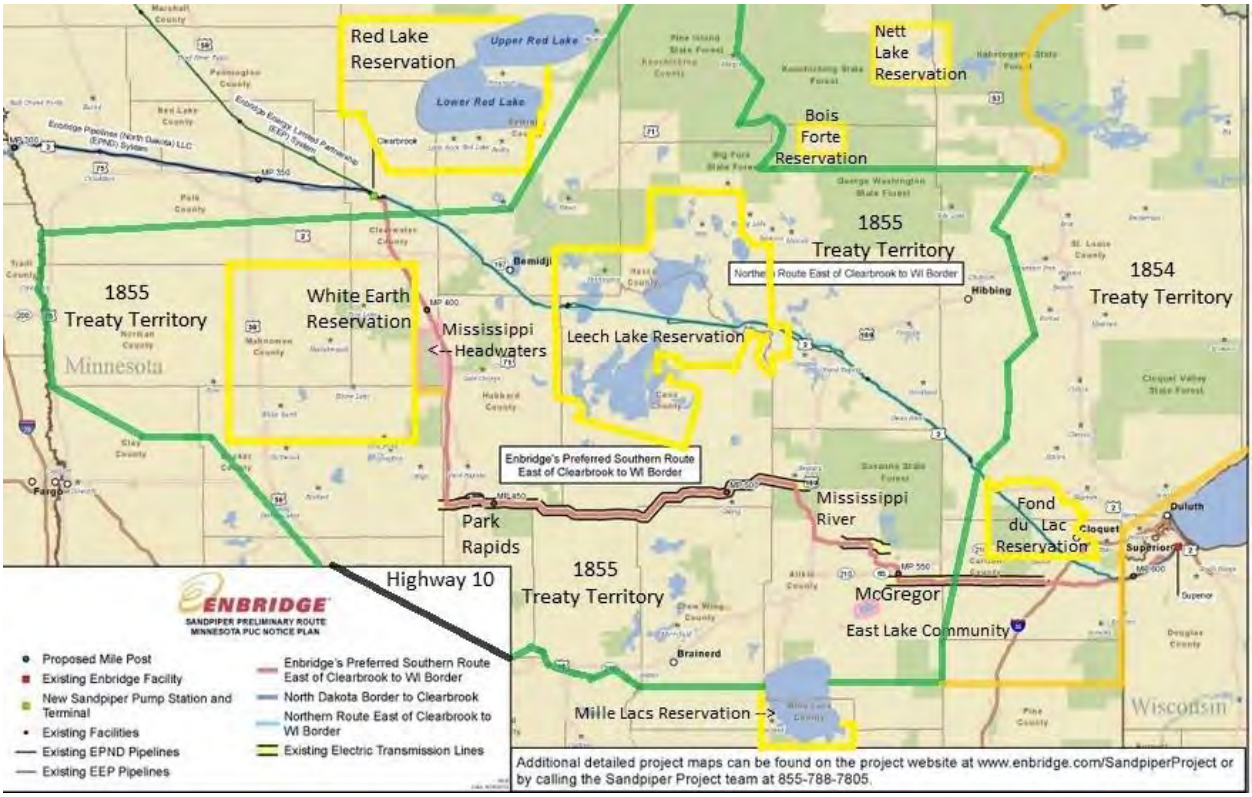
Dear Assistant Attorney General,

I am writing with many concerns about the proposed stipulated agreement in Michigan federal court, with Enbridge and the ongoing environmental risks, spills and damages to tribal interests and the adverse impacts of EPA mandating construction on these interests, which must necessarily require a full, project long EIS before broadly mandating replacement.

Here in Minnesota various Minnesota Chippewa Tribal reservations and environmental groups have intervened with the Minnesota Public Utilities Commission, with regard to Enbridge's Sandpiper pipeline and Line 3 Replacement. The notice of this potential agreement with the United States and Enbridge raises concerns about the 44 treaties the Chippewa have pre-existing with United States for ceded territories in Michigan, Wisconsin, Minnesota and North Dakota, and what concerns may have been considered outside of Michigan. It seems odd how the people of Minnesota are provided little notice and without opportunity to be heard, and instead only 30 days for comment, on an agreement we knew nothing about.

Enbridge has been well aware, for over a decade, about all the problems with Line 3, and could have replaced the pipeline a long time ago and returned from half volume flow, to full flow and fully use the desired new pipeline. This is not the path Enbridge has chosen. Enbridge relies on secrecy and deception, to avoid Indian country and responsibility for the environment. For the past three years Enbridge has been trying to convince all parties at the PUC they have no other route choice for fracked Bakken crude oil. All of a sudden, Dakota Access Pipeline is the new remedy, projected to be completed sooner. Enbridge continues to have system failures, environmental catastrophes and human fatalities while assuring everyone they are really different and much safer.

Here in Minnesota, at the PUC proceedings where Enbridge is seeking a new route in Minnesota for Line 3, all we can see is pipeline abandonment and certain environmental risks into the future for the natural resources the Chippewa have a right to rely upon, in a clean environment where the food and water can be used for human consumption and to earn a modest living, in perpetuity.



As you can see from the map of the 1855 ceded territory, the new proposed route for Sandpiper and Replacement Line 3 attempt to avoid crossing reservations, by crossing previously undisturbed wild rice waters, lakes and rivers to intentionally create a second, future environmental time bomb for the freshwater resources in Minnesota. This new, second Pipeline corridor route is completely unacceptable.

We understand Enbridge does have certain rights, and has an existing right-of-way with an obviously failing pipeline. We would expect a cleanup, before a new pipeline would be put in anywhere. Otherwise we are just waiting for more environmental problems for the rest of our lives and for all of those into the future.

It seems ridiculous to allow Enbridge to make an agreement in Michigan that impacts important federal treaty rights, constitutionally usufructuary property rights and other congressionally created wild rice refuges. As such, we believe the only authority that a Michigan court can exercise in such a broad multistate agreement, outside of the normal reach of the Michigan federal court or federal Appellate Courts, is to compel Enbridge to do all of the environmental protection and clean up, as well as Replacement of Line 3, where they have an existing right of way.

If DOJ and the Michigan federal court is willing to modify the consent agreement to require all of Line 3 Replacement in Minnesota to be in the original corridor along Highway 2, **or not all**, with all the new, ongoing conditions for monitoring, that would be a fair environmental remedy for the rest of us, not included in these Michigan legal proceedings.

The federal government has a trust responsibility, for all of the Indian tribes. There are many impacted tribal communities, reservations and broader territories. At this point, tribal consultation by the Michigan federal court looks much more like Enbridge's avoidance of Indian country consultation and our *federally protected, usufructuary property rights, which can only be modified, changed or abrogated by Congress*---***not the executive branch and not the judicial branch.***

I am attaching a 2003 Minnesota Pollution Control memo about the biggest north American oil spills, before Kalamazoo, in 1991 in Grand Rapids and 2002 in Cohasset, Minnesota, which resulted in a giant burn off and air pollution from particulate. I am also

attaching a Reply Brief in the Minnesota PUC for Sandpiper describe the lack of jurisdiction by Minnesota, and bureaucratic ignorance of wild rice refuges created by Congress for the exclusive use of the Chippewa. Both demonstrate that the Minnesota PUC and Enbridge both choose to politically and legally ignore the usufructuary property rights protected by the U.S Constitution. Line 3 is a giant problem with a bad oil history in Minnesota. Line 3 needs to be cleaned up first. Line 3 has 25 years of environmental problems in Minnesota that cannot be abandoned, indefinitely, and be considered any kind of environmental justice when the largest impacts will be in Indian Country on and off reservations. Again, the Chippewa from Michigan to North Dakota have federally protected usufructuary rights that can only be changed, modified or abrogated by Congress. Neither the executive branch nor judicial branch have this constitutional power. This is a separation of powers issue, with near zero due process for Chippewa rights in Minnesota.

Again, if DOJ and the Michigan federal court is willing to modify the consent agreement to require all of Line 3 Replacement in Minnesota to be in the original corridor along Highway 2, ***or not all***, with all the new, ongoing conditions for monitoring, that would be a fair environmental remedy for the rest of us, not included in these Michigan legal proceedings.

If you have any questions or need of assistance with this matter please call on me via email or cell phone. Mii gwitch.

Sincerely,

/s/ Frank Bibeau

Frank Bibeau
Executive Director
1855 Treaty Authority

Attachments

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street St. Paul, Minnesota 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350 St. Paul, Minnesota 55101-2147

In the Matter of the Applications of North Dakota Pipeline Company LLC for a Certificate of Need and Pipeline Routing Permit for the Sandpiper Pipeline Project	MPUC Docket No. PL-6668/CN-13-473 OAH Docket No. 8-2500-31260 MPUC Docket No. PL-6668/PPL-13-474 OAH Docket No. 8-2500-31259

REPLY OF HONOR THE EARTH, INTERVENOR TO:
APPLICANT'S CLAIM OF EXCLUSIVE STATE JURISDICTION
OVER FEDERALLY-GUARANTEED OJIBWE USUFRUCTUARY PROPERTY,
IN CONTRAVENTION OF *MN. V. MILLES LACS* 526 U.S.172 (1999).

To: Administrative Law Judge Eric L. Lipman, Minnesota Department of Commerce and Applicant Enbridge and Applicant Enbridge d/b/a/NDPC

Pursuant to verbal order of Administrative Law Judge Eric L. Lipman on March 17, 2014 and written order dated April 8, 2014, for jurisdictional briefing, *Honor the Earth* does now serve its Reply Memorandum of Law.

INTRODUCTION

Applicant relies nearly entirely on case law, and other precedent, that is both inapposite and precedes the 1999 Supreme Court opinion in *Minnesota v. Milles Lacs Band of Chippewa Indians*, which completely alters all *prior* treaty analysis[1] by requiring

[1] The supplemental review of "Indian Law" (Appendix B.) submitted by Applicants is educational but inapposite since neither "Indian Title;" "Indian Country;" nor, any federal or

examination of: (a) whether the treaty(ies) in question created and guaranteed usufructuary property interests ratified by Congress; and (b) whether Congress has taken any action since ratification of the specific treaty(ies) in question that abrogates some, or all, of the usufructuary property interests created and guaranteed by Congressional ratification of the treaty in question.

ARGUMENT

1. Applicant Misapprehends the Meaning of the *Milles Lacs* Opinion, Regarding Federal Treaty-Guaranteed Usufructuary Property

Prior to the *Milles Lacs* opinion, the Supreme Court had never applied usufructuary property analysis to the interpretation of a treaty with an indigenous nation, although Seventh Circuit did apply such an analysis in the Lac Courte Oreilles (LCO) cases interpreting the 1854 Treaty with the Ojibwe in the Minnesota Arrowhead Region and Wisconsin,[2] which the Supreme Court cited favorably in *Milles Lacs*. The parties agree that the Supreme Court has already held that the same 1855 Treaty at issue before the PUC did not abrogate prior usufructuary property interests of the Ojibwe Nation regarding the 1837 land cession Treaty in *Minnesota v. Milles Lacs*.[3]

Although Applicants and Intervenors *continue to* dispute whether the *Mille Lacs*

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state statutory analysis is relevant to the straightforward "usufructuary property interests" analysis adopted by the Supreme Court in the *Milles Lacs* opinion. This property, like all other forms, is protected by the Due Process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States. Only an analysis of the specific treaty(ies) at issue is relevant, under *Milles Lacs,* to determine whether a constitutionally protected property-interest is present in the treaty territory, or not.

[2] Lac Courte Oreilles v. Voigt, 700 F. 2d 341 (7th Cir. 1983)

[3] Applicant's Appendix B, p. 6

opinion upheld usufructuary property rights in the 1855 Treaty Territory directly,[4] *both* parties agree the 1855 Treaty did not abrogate pre-existing treaty-guaranteed usufructuary rights, (Applicants Response, Appendix B. p.6), *to wit*:

> The majority opinion in *Mille Lacs* held that the second provision was insufficient, in light of the legislative history and the history of the 1855 Treaty negotiations, to demonstrate that the Indians understood that they were giving up their 1837 hunting and fishing privileges by signing the 1855 Treaty. *See Mille Lacs*, 526 U.S. at 196-98 (stating that the treaty "would reserv[e] to them [i.e. Chippewa] those rights which are secured by former treaties") (citing *Cong. Globe*, 33 Cong., 1st Sess., 1404 (1854)).

However, Applicant ignores the *two* treaties with the Ojibwe that *preceded* the 1837 Treaty, which *also* guaranteed usufructuary property interests in the 1855 Treaty Territory, itself, the Treaty of 1825 and the Treaty of 1826.

Like the 1837 Treaty, both establish treaty-guaranteed usufructuary property interests in the Ojibwe prior to 1855 and on the same territory that *includes* the 1855 Treaty land cession (as well as territory beyond the 1855 cession). Thus, the continuing vitality of the usufructuary property interests guaranteed in the 1825 and 1826 Treaties is *res judicata*, with which counsel for Applicants must agree, given the language cited from the *Milles Lacs* opinion that:

> "[the 1855 Treaty] would reserv[e] to them [i.e. Chippewa] those rights which are secured by former treaties" (citing *Cong. Globe*, 33 Cong., 1st Sess., 1404 (1854)).

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[4] The Supreme Court held as early as 1968 that, even if Congress specifically abrogates a treaty that establishes(d) a Reservation such as the Menominee Reservation in Wisconsin (which became Menominee County, Wisconsin), usufructuary property interests survived the dissolution of the Reservation when not specifically abrogated in the dissolution measure debated and passed by Congress. See, *Menominee Band of Chippewa Indians v. U.S.*

The only questions remaining in any particular case are: (a) does the challenged activity take place within the boundaries of the Treaty Territory; and (b) does the challenged activity have a potential impact on the ability of the Ojibwe people to fully enjoy the federally-protected property belonging to all the Ojibwe Nation in that territory?

2. Minnesota Has Admitted Limited DNR Jurisdiction Over Treaty-Guaranteed Ojibwe Usufructuary Property in Minnesota's Arrowhead for Over 20-Years.

The method of analysis being advanced by Intervenor, *Honor the Earth*, was not only upheld in the *Milles Lacs* opinion, but has been in place in both Wisconsin and Minnesota since the settlement of the *LCO* litigation which upheld the usufructuary property of the Ojibwe in the 1854 Treaty Territory in the late 1980's. The Minnesota DNR has recognized for more than 20-years that it may only exercise such wildlife regulation jurisdiction in the *entire* 1854 Treaty Territory as may be agreed upon by the Ojibwe Bands within the Arrowhead Region of Minnesota. *Honor the Earth's* position is that the PUC, and other Minnesota state agencies, have no more power to act unilaterally *with respect to federally- guaranteed Ojibwe usufructuary property interests* in treaty territory than does the Minnesota DNR.

This is not a new concept, the Supreme Court has clarified in 1999 that, in some cases depending on the language of the original treaty and subsequent Congressional action, or lack thereof, "treaty rights" are *actually* federally-guaranteed usufructuary property. Once this fact is apparent, from the analysis of a particular treaty and its history, this property is entitled to the same protections as all other under the Constitution.

3. Applicants Inapposite Arguments

Applicant asserts four major points in opposition to the Motion to Dismiss for lack of subject matter jurisdiction of state Public Utilities Commission over territory, within the boundaries of specific treaties with the Ojibwe which U.S. treaty negotiators created and guaranteed usufructuary property rights to the Ojibwe with Congressional approval.

(1) The Minnesota Public Utilities Commission ("MPUC or Commission") lacks statutory authority and The Minnesota Public Utilities Commission ("MPUC or Commission") lacks statutory authority and jurisdiction to consider the claims raised in the Motion;
(2) Honor the Earth lacks standing to assert treaty rights purportedly belonging to the Ojibwe Bands;
(3) The Sandpiper Pipeline does not cross "Indian country," and the Ojibwe Bands do not have jurisdiction over nonmembers outside of Indian country; and
(4) Honor the Earth's claims that granting a route permit will result in "inevitable oil spills and environmental degradation across the ceded territories"2 is a contested issue of material fact and is not an appropriate basis for a motion to dismiss for lack of subject matter jurisdiction.

Intervenor Honor the Earth's Reply to 1-4.

Items (1) and (4). Applicants and Intervenors *agree* that the Public Utilities Commission lacks jurisdiction to decide claims under federal treaties (Applicant's points 1 and 4), as do Minnesota state courts. The point of difference is that Intervenors have pointed out to the Commission that the *complete* absence of subject matter jurisdiction means this is an issue that cannot be decided solely by the State of Minnesota in the first instance, since federally-guaranteed usufructuary property interests are at issue before the Commission. The distinction is made plain by the Supreme Court in *Menominee v. United States* in which the Supreme Court held that the State of Wisconsin lacked sole

jurisdiction over usufructuary property interests of the Menominee people in Menominee County, Wisconsin, an area within the Treaty territory and formerly the Menominee Reservation.

Intervenors have raised the Motion to Dismiss only in response to the PUC unlawfully claiming exclusive jurisdiction over federally-guaranteed usufructuary property interests within the territory of the 1855 Treaty. In the case of actions that impact federally-guaranteed property interests, the State of Minnesota does not have, *and cannot have*, exclusive jurisdiction to take or diminish federally-guaranteed property. The Motion to Dismiss puts the Minnesota PUC on notice of massive "taking of property" by the State of Minnesota without Due Process of any kind, at the federal level, in violation of the U.S. Constitution. Should this permitting process continue federal judicial injunctive remedies halting the Minnesota permitting process will be required.

Item (3). Applicant's "Indian Country" analysis is inapposite and completely overtaken by Constitutionally-based property-interest analysis required by the Supreme Court in the *Milles Lacs* opinion, and needs no further response. Regarding references to "Indian title" are also inapposite because all of northern Minnesota, roughly north of I-94, was subject to the Treaties of 1825 and 1826 in which Congress specifically guaranteed: (a) Ojibwe sovereignty; (b) Ojibwe jurisdiction (1826); and (c) usufructuary property interests consisting of the right to hunt, fish and gather in the entire area north of I-94.

The historical record reveals the 1825-26 Treaties supplanted *inchoate* "Indian title" with treaties between sovereigns in which the Congress guaranteed usufructuary property interests in all of northern Minnesota (including the 1837, 1847, 1854 and 1855,

etc. Treaty territories). Thus, arguments based on "Indian Country" or other non-treaty foundations are inapposite.

Item (2). "Intervenors" before the Commission have already demonstrated an interest which will be affected by granting the Application which requires no special standing in order to make the Commission aware of the federally-guaranteed usufructuary property interests at stake. The question as to whether *Honor the Earth* or any other party has standing to assert federal issues in proper federal venue that does have subject matter jurisdiction over the property interests in question is a separate matter for a separate federal proceeding.

However, Ojibwe usufructuary property interests have been exercised by individuals on behalf of others in a series of federal cases including: U.S. v Gotchnik, U.S. v Bressette, 2013 SquareHook walleye netting cases Duluth Federal District Court, Judge Tunheim[5] dismissed U.S. Lyons, U.S. v Brown, U.S. v Tibbetts for 1855 treaty rights. While these last cases are under appeal, the Department of Justice did dismiss other off-reservation Chippewa tribal member defendants who would have the same defenses and rights to assert individually under the 1855 Treaty. Or in the cases of Gotchnik and Bressette 1854 defenses and rights to assert individually.

4. Applicant uses limited vision for Chippewa property interests

Applicant pretends to know what all the Chippewa property interests are, and that everyone should just accept their dismissive words. Two additional federal sources sources of Chippewa property interests for this pipeline routing include Article 8 of the

[5] See FN 19 *Honor the Earth* Brief filed 4-7-2014

1855 Treaty with the Chippewa and the Wild Rice Refuge Acts of 1926 and 1935.

> The 1855 Treaty provided for 10 reservations as well as
>
> > All roads and highways, authorized by law, the lines of which shall be laid through any of the reservations provided for in this convention, *shall have the right of way through the same; the fair and just value of such right being paid to the Indians therefor; to be assessed and determined according to the laws in force for the appropriation of lands for such purposes.*

(Art. 8, Emphasis added). The proposed pipeline route map included in Applicant's Response Brief appears to be crossing the original reservations of Sandy Lake and Rice Lake. Here, Applicant ignores important right-of-way rights and other property interests of the Chippewa.

In 1939, Minnesota sued the federal government over eminent domain litigation to resolve the creation of the Wild Rice Indian Refuge[6] on White Earth, where the pipeline is routed right through the watershed in the original boundaries, just south of Clearbrook, (where a giant pipeline fire and explosion, property damage and loss of life incident occurred and still needs more clean-up). The Court determined that

> On the 23rd day of June, 1926, Congress enacted certain legislation whereby there was created a reserve to be known as the Wild Rice Lake Reserve, for the exclusive use and benefit of the Chippewa Indians of Minnesota. The Act reads (44 Stat. 763):
>
> > 'An Act Setting aside Rice Lake and contiguous lands in Minnesota for the exclusive use and benefit of the Chippewa Indians of Minnesota.

[6] See U.S. v 4,450.72 Acres of Land, Clearwater County, Minnesota et al, No. 932, (D. Minn March 7, 1939). "This is an action by the United States to acquire by condemnation 4,450.72 acres of land in Clearwater County, Minnesota, to be known as the Wild Rice Lake Indian Reserve under the Act of June 23, 1926 (44 Stat. 763), as amended by the Act of July 24, 1935 (Public Resolution No. 217, 75th Congress, 49 Stat. 496)."

> 'Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> 'That there be, and is hereby, created within the limits of the White Earth Indian Reservation in the State of Minnesota a reserve to be known as Wild Rice Lake Reserve, for the exclusive use and benefit of the Chippewa Indians of Minnesota,

This legislative intent of Congress and use of the Commerce Clause is superior to state interests. The Court went on to note that the Act provided in

> ''Sec. 3. The Secretary of the Interior is authorized, in his discretion, ***to establish not to exceed three additional wild-rice reserves in the State of Minnesota, which shall include wild-rice-bearing lakes situated convenient to Chippewa Indian communities or settlements, including all lands which, in the judgment of said Secretary, are necessary to the proper establishment and maintenance of said reserves and the control of the water levels of the lakes***: Provided, however, That there shall be and hereby is excluded from said reserves any and all areas, whether of land or water, necessary or useful for the development to the maximum of water power or the improvement of navigation in the Pigeon River, an international boundary stream, and tributary lakes and streams.[7]

This decision was upheld by the Eighth Circuit in 1942, in State of Minnesota v. U. S., 125 F.2d 636 (C.C.A.8 (Minn.) Feb 11, 1942) (NO. 12094).

One of these refuges are created at Tamarack *Refuge* on the south end of White Earth Reservation. Another is Rice Lake National Wildlife Refuge, 5 miles south of McGregor at East Lake (which is still identified on the Minnesota State map as an Indian Reservation, just like Sandy Lake reservation). The Rice Lake Ricing Committee at East Lake has been regulating exclusive Chippewa wild rice harvesting for decades. It is also

[7] Id. at 171

apparent from this section that other negative impacts are to be guarded[8] against, except for "necessary or useful for the development to the maximum of water power or the improvement of navigation in the Pigeon River."

Also in 1939, the Minnesota Legislature declared an exclusive grant to the Chippewa Indians of Minnesota, in Minn. Stat. 84.09 *Conservation of Wild Rice*[9] which recognized that in order

> to discharge in part a moral obligation to those [Chippewa} Indians of Minnesota *by strictly regulating the wild rice* harvesting upon all public waters of the state ***and by granting to those Indians the exclusive right to harvest the wild rice crop upon all public waters within the original boundaries of the White Earth***, . . . and Mille Lacs reservations.

(Emphasis added).

Obviously, this is an openly declared and notoriously published for decades GRANT of exclusive rights, to whatever degree the State may have had rights within reservation boundaries, and it quit claimed wild rice, to be protected for the Chippewa with *strict regulating* STATE-WIDE. The fact that the Minnesota Legislature has revised it statutes, does not withdraw these grants. Again, instead would require the consent of the Chippewa Indians of Minnesota to "quit claim" or otherwise transfer of this property interest.

It is readily apparent Applicant either doesn't know or doesn't care to look and consider where and what our Chippewa property interests include. Instead Applicant

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[8] Id. at 173-174, "Congress has determined that it is necessary to obtain this area in order to safeguard the rights of the wards of the Government." [and]"Its supremacy over the State in looking after the Indian tribes is conceded. In its activities and in furtherance of a Federal power, the United States is supreme and the State must give way."

[9] See copy attached as Exhibit C.

choses to broadly dismiss Chippewa interests in its Response Brief, and choses an incomplete process and fair and reasonable consideration by big oil, who doesn't care about our treaty rights, state grants and federally-protected, usufructuary property interests as the Chippewa Indians of Minnesota.

5. Rule 12 Motions against Applicant including frivolous and red herring decoys subject to *Stare Decisis* and *Res Judicata*

Applicant raises a variety decoy arguments, attempting to change the question in an attempt to confuse, while ignoring (knew or should have known) the more important legal concepts of *res judicata* and *stare decisis*[10], which apply to the Minnesota v Mille Lacs Supreme Court decision. In the present matter, Counsel Randy V. Thompson[11], who submitted the *NDPC LLC's Response to Honor the Earth's Dispositive Motion* dated April 21, 2014, also served as Counsel for Respondent Landowners John W. Thompson, et al, in the Eighth Circuit and United States Supreme Court in the Minnesota v. Mille Lacs[12] appeals. NDPC suggests arguments which cite and rely upon *Oregon Dep't of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985) and the *Red Lake*[13] *cases* from 1979 and 1980, and the *Nelson Act*, finally suggesting that 1951 was the deadline for asserting federally protected, usufructuary property interests reserved and protected in part as treaty

[10] Latin for "to stand by things decided." Stare decisis is essentially the doctrine of precedent. Courts cite to stare decisis when an issue has been previously brought to the court and a ruling already issued. See http://www.law.cornell.edu/wex/stare_decisis

[11] See *Reply Brief of John W. Thompson et al* on Writ of Cert to the Eighth Circuit Court of Appeals, 1998 WL 748397 (U.S.), See also Minnesota et al v. Mille Lacs Band et al, 526 U.S. 172, 174, 119 S.Ct. 1187, 1191 (1999).

[12] Id.

[13] Red Lakes Band of Chippewa Indians v. Minnesota, 614 F. 2d 1161 (8th Cir. 1980) (per curiam), cert denied, 449 U.S. 905 (1980).

rights with the United States. It is readily obvious that LCO, Menominee, FDL v Carlson, and Minnesota v Mille Lacs to name a few all prove 1951 was no such deadline.

The afore-mentioned issues were all resolved by the Eighth circuit Mille Lacs[14] decision 1997. The Mille Lacs Appellate Court clearly indicated that res judicata does not apply[15] [to the Chippewa]. Additionally, that Court held that although

> the Counties argue that the Wisconsin and Fond du Lac Bands do not hold usufructuary rights in the Minnesota portion of the 1837 ceded territory because, allegedly, none of these Bands used and occupied the area at the time of the Treaty. ***The district court rejected the argument.*** See Mille Lacs III, slip op. at 39; Fond du Lac, slip op. at 36-37. [. . .] *The 1837 Treaty does not tie usufructuary rights to historic use or occupancy*, and thus the Counties' urgings defy the plain language of the Treaty. ***We affirm the district court on this issue.***[16]

The Appellate Court also considered that "[t]he Landowners make myriad additional arguments . . . , including (but not limited to) the following: . . . *Nelson Act* . . . " [and] ***"We have given these arguments full consideration and have determined them to be without merit."***[17]

Here, Applicant has chosen to advance arguments that their Counsel should best know are frivolous, are in fact subject to *stare decisis* and are barred by *res judicata*. As such, these issues are ripe for a rule 12.03 Motion for Judgment on the Pleadings. It

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[14] See Mille Lacs Band of Chippewa Indians v. State of Minn., 124 F.3d 904, C.A.8 (Minn.), 1997.

[15] Id. at 932-933 See IX. Additional Defenses Claimed by the Counties, at 932-33 "The district court was correct in holding that res judicata does not apply. See Mille Lacs III, slip op. at 34-36." See Brief of Respondent Counties 1998 WL 464930

[16] Id. Emphasis added.

[17] Id. Emphasis added. At 933-34. Here Respondent Counties argued Oregon Dep't of Fish & Wildlife v. Klamath Tribe, 473 U.S. 753 (1985), Red Lakes Band of Chippewa Indians v. Minnesota, 614 F. 2d 1161 (8th Cir. 1980) (per curiam), cert denied, 449 U.S. 905 (1980) and Klamath Tribe v. Oregon Fish & Wildlife Dep't, 729 F.2d 609 (9th Cir.1984), See 1998 WL 464930 at 39. See also *Reply Brief of Landowners John Thompson et al*, 1998 WL 748397.

should also be pointed out that in addition to the Mille Lacs case law which instructs to first read the treaties to see what they say, in

> Mille Lacs Band v. Minnesota, Case No. 3-94-1226 (D. Minn. December 10, 1999) (unpublished decision): The district court (Judge Davis) granted the tribes' petitions for attorney's fees from the State. The court ordered the State to pay the tribes a combined total of over $3.95 million in attorneys' fees, litigation expenses and court costs.[18]

What may be the most telling and concerning statement about how Applicant views the rights of tribal members and/or Minnesota State citizens is at the bottom of page 7 of Applicants Response Brief asserting that

> [a]ccordingly, the MPUC does not have the authority to determine whether the Project requires the consent of any of the Ojibwe Bands, any more than the MPUC has the authority to decide whether the Project needs a particular permit from a federal agency under federal law.

CONCLUSION

Both Applicant Enbridge d/b/a NDPC and Intervenor *Honor the Earth* agree that the PUC process lacks the jurisdiction to consider our federally protected, usufructuary property interests. Applicant Enbridge d/b/a NDPC argues it is up to private, big oil industry to decide what federal, state and tribal laws to recognize and follow. Applicant

[18] See *Fulfilling Ojibwe Treaty Promises – An Overview and Compendium of Relevant Cases, Statutes and Agreements*, by Ann McCammon-Soltis and Kekek Jason Stark, Great Lakes Indian Fish & Wildlife Commission Division of Intergovernmental Affairs, Great Lakes Indian Fish & Wildlife Commission, 2009. See also http://www.glifwc.org/minwaajimo/Papers/Legal%20Paper%20-%20DIA.pdf

Enbridge has demonstrated a failure to recognize, assert and argue *stare decisis* of Minnesota v Mille Lacs as decided by the United States Supreme Court and instead forwards old, overruled, 15-year old arguments that are just another attempt to bite the apple barred by *res judicata*.

As such, the present Application for Routing Permit must be dismissed for lack of subject matter jurisdiction as the state lacks authority to unilaterally grant the permit without providing for due process protections for Chippewa usufructuary property interests.

Respectfully submitted April 28, 2014.

/s/ Frank Bibeau
Frank Bibeau
[redacted]

Peter Erlinder
International Humanitarian Law Institute
[redacted]

ATTORNEYS FOR HONOR THE EARTH

DEPARTMENT : POLLUTION CONTROL AGENCY

STATE OF MINNESOTA

Office Memorandum

DATE : July 10, 2003

TO : Cliff Zimmerman
National Transportation Safety Board

FROM : Stephen J. Lee, Supervisor
Emergency Response Team
Minnesota Pollution Control Agency

PHONE : 651/297/8610

SUBJECT : Accident # DCA02-MP002
Enbridge Pipe Line Company 34 Inch Crude Oil Line

A 34 inch diameter pipeline operated by Enbridge Pipe Line Company crosses northern Minnesota. Since the July 4, 2002, Cohasset rupture this pipeline has been under Federal order to operate at reduced pressure to reduce the risk of additional leaks or ruptures. Enbridge may ask the Federal Office of Pipeline Safety for permission to resume normal operating pressures in order to increase the volume of crude oil transported by the pipeline.

In my role as supervisor of the Emergency Response Team of the Minnesota Pollution Control Agency (MPCA), I have urged both the Federal and Minnesota Offices of Pipeline Safety to be extraordinarily cautious in considering increased pressures in this line, given the spill history of this pipeline and the very sensitive route of the line across Minnesota.

MPCA senior emergency response staff have been involved with spills from the 34 inch Enbridge line since the 1970's. The option that would be most protective of the public's safety and the environment would be replacement of all or major segments of this 34 inch line. Short of that, we are comfortable with continued operation of the 34 inch line at reduced pressure. We are not confident that internal inspections are sufficient to prevent additional spills. Hydrostatic pressure testing, coupled with follow-up internal inspections, might provide sufficient assurance to allow increased operating pressures.

Enbridge has pipelines as large as 48 inches in diameter running across northern Minnesota. The Enbridge pipelines carry mostly Canadian crude oil through some of the most sensitive environment in Minnesota. They also run through heavily populated neighborhoods, under and near the Mississippi River, and through a number of tribal lands.

One of the parallel Enbridge pipelines is a 34 inch pipeline carrying crude oil from Canada, through Clearbrook, Minnesota, to Superior Wisconsin. MPCA has records of nearly three dozen non-third-party spills, leaks, or ruptures of the Enbridge 34 inch line between 1972 and 2003. About 87% of the petroleum gallons spilled from all Minnesota pipelines in the period 1991 to 2002 was from the Enbridge 34 inch line. This is equal to about 48% of the reported gallons of petroleum spilled from all sources in Minnesota during that period. [i]

Included in the Enbridge 34 inch line spills are the 1.7 million gallon rupture in 1991 in Grand Rapids and the 250,000 gallon rupture on July 4, 2002 in Cohasset. The Grand Rapids spill was between a college and an apartment building. But for incredible luck an inferno could have resulted. 300,000 gallons of the Grand Rapids spill flowed to a river. Luck with the timing of the spill; river-ice conditions; and an aggressive and organized recovery by the company kept hundreds of thousands of gallons of crude oil from entering the Mississippi River. Oil in the Mississippi would likely have fouled St. Cloud, St. Paul, and Minneapolis drinking water intakes for months. Likewise, the Cohasset spill could have easily entered the Mississippi River if it had happened in a different segment of that 34 inch pipeline.

The Enbridge 34 inch line was built in the 1960's. From North Dakota to Clearbrook most of the steel pipe was manufactured by A.O. Smith Company. From Clearbrook to Superior most of the pipe was manufactured by U.S. Steel. Each pipe type has had differing patterns of manufacturing, installation, and/or maintenance issues. Each pipe type seems prone to differing patterns of leak and rupture failures.

Pipelines can be tested in several ways: Hydro testing in-line tool testing; or "the test of time, soil, and pressure." Enbridge's "pipeline integrity program" for testing, monitoring, and repairing pipelines is state-of-the-art. That is to be commended and expected from the largest pipeline company in the world. This program will reduce, but not eliminate, leaks and ruptures so long as the pipeline is operated.

After the 1991 Grand Rapids rupture the federal Office of Pipeline Safety required Enbridge to limit pumping pressures on the 34 inch line. Then Enbridge conducted in-line testing using an "elastic wave tool" to seek cracks, corrosion, or other faults in the line. A number of such faults were identified, many were excavated, and some were repaired. The federal OPS then allowed Enbridge to resume operation at full pressure in the 34 inch line.

On July 4, 2002, however, the 34 inch Enbridge line again ruptured, this time at Cohasset. Federal OPS has again placed a pressure limit on the 34 inch line

Recent examination of the in-line tool records from the after-Grand Rapids testing showed that a fault had been present at the Cohasset rupture site, but the fault was below the threshold criteria for further examination or repair.

Because of the Cohasset rupture, in-line testing of the 34 inch line was again done in 2003 using an in-line tool of increased capabilities. The A.O. Smith steel segment of the 34 inch line had dozens of features identified. The U.S. Steel segment had hundreds of features identified.

The 34 inch line between North Dakota and Superior passes under or near the Mississippi River, past a number of large and very important resource lakes, through bogs and wetlands, and through or near very many other sensitive features. There are frightening potential consequences of another 34 inch line failure if it occurs at or near the Mississippi River, within a tribal boundary, within a neighborhood or city, or under or near one of the major lakes.

SJL:tf

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[i] Spill statistic background information- Between January 1991 and December 2002 there were 23,301 spill or emergency incidents reported to MPCA. A majority of these incidents involved petroleum ranging from crude oil, to gasoline, to diesel fuel, to lubricating and waste oils. In the 1991 – 2002 period 4,593,053 gallons of petroleum were reported spilled in Minnesota

In contrast to long term storage tank or pipeline leaks, a sudden rupture of an underground pipeline or tank can be estimated with some accuracy. Between 1962 and 2003 there are 68 reports of large (>10,000 gallons) spills or ruptures from petroleum pipelines on MPCA records. The overall frequency and volume of pipeline ruptures has declined. About 22% (15) of these large pipeline ruptures involved the Enbridge 34 inch line. The 34 inch line is not 22% of Minnesota's linear pipeline distance or carrying capacity.

The largest pipelines can have the largest spills and ruptures. About 56 % of the reported volume of oil spilled in Minnesota in this period was from pipelines. The remainder of the oil spilled from trucks, trains, tanks, and other sources. Of the pipeline spills about 87 % was from the Enbridge 34 inch line.

[Great care needs to be taken in interpreting or extrapolating from historic spill reports. Most reports of aboveground spills, including pipeline ruptures, include an estimate of the spilled amount. However, reports that storage tanks or underground pipelines have leaked slowly usually do not include estimates of the lost product volume. Accurate estimation of an underground leak is very difficult, and is ultimately usually not very important in designing the needed cleanup. It is probable that atleast as much petroleum has been leaked underground in Minnesota during that period as was spilled aboveground. For example, over 3 million gallons of petroleum have been recovered from under the Flint Hills Refinery, presumed to have leaked from tanks and underground lines during the 1960's to 1990's. Likewise, the pipeline operators have found a large number of locations where unknown volumes of oil have leaked over unknown periods. Those underground leaks are not included in the spill volumes cited above.]

June 27, 2003

Mr. Cliff Zimmerman, IIC – Accident # DCA02-MP002
Office of Railroad, Pipeline and Hazardous Materials Investigations
National Transportation Board
Washington, DC 20594

Re: IIC Technical Report – Accident # DCA02-MP002

Dear Mr. Zimmerman:

The Minnesota Office of Pipeline Safety (MNOPS) has reviewed the draft IIC Technical Report concerning the July 4, 2002 rupture of Enbridge's 34 inch pipeline near Cohasset Minnesota (Accident # DCA02-MP002) submitted to us electronically on May 30, 2003. We appreciate the opportunity to offer our input relative to this failure, the failure history of this pipeline, and the actions taken both prior and subsequent to the most recent rupture.

It is of primary importance to MNOPS that we ensure all reasonable and responsible measures are taken to prevent another in service failure of this pipeline. The recent inspection and mitigation program conducted by Enbridge, utilizing the UltraScan CD tool, FAST ultrasonic testing and magnetic particle inspection for field assessment, and conservative repair criteria, has certainly helped in this regard. The prior use of Elastic Wave internal inspection technology clearly demonstrates Enbridge's commitment to use the best available technology to identify and assess pipeline defects, even though our involvement with the defect assessment process did not lead us to the same conclusions concerning the tool's capabilities.

The available results from the most recent program provide clear indications of improved capabilities related to identification of longitudinally oriented defects. They also provide indications of a deteriorating pipeline, given the number and severity of anomalies that were identified between Clearbrook, Minnesota and Superior, Wisconsin. In addition to the threats of manufacturing defects and fatigue cracking in longitudinal seams, Enbridge is now faced with the threat of failure due to Stress Corrosion Cracking (SCC). Even though Enbridge had previously implemented a program to look for SCC, none had been found in the U.S. until this most recent inspection program.

The results of the recent UltraScan CD inspection between Clearbrook and Superior are unquestionably impressive, particularly when compared to the results achieved using Elastic Wave technology. It is important, however, to look very closely at these results from different perspectives, in order to avoid gaining a false sense of security. For example, the shortest defect reported by the UltraScan CD inspection was 1.00 inches. In fact, there were 15 defects reported that were below the 2.362 inch contracted threshold for length. Conversely, there were 207 defects greater than 1.00 inches identified during field assessments, that were not reported by the tool. Of these, 182 were in excess of the 2.362 inch contracted threshold. This provides some indication of the difficulty associated with the tool vendor's interpretation of ultrasonic signals.

It would be advantageous to compare defect size from the Elastic Wave inspection(s) to the UltraScan CD inspection, in order to better understand defect growth rates. Unfortunately, the only results available from the Elastic Wave inspections are those in or very near the longitudinal seam, as the remainder of the pipe body information had to be discarded due to data storage and processing constraints. Even so, there are some defects for which this analysis could be performed. A defect at M.P. 961.8437 was identified that was 4.5 inches long, with a maximum depth of 75% through wall. This same defect should have been visible from the prior Elastic Wave inspection, and an analysis would seem prudent. Other examples of defects that could be evaluated are; a 3.9 inch long, 50% through wall defect at M.P. 933.4289, a 1.35 inch long, 82% through wall defect at M.P. 954.7452, a 4.00 inch long, 40% through wall defect also at M.P. 961.8437, a 2.50 inch long, 40% through wall defect at M.P. 965.9056, a 3.1 inch long, 50% through wall defect at M.P. 969.1296, a 13.70 inch long, 42% through wall defect at M.P. 1003.0578, a 4.50 inch long, 28% through wall defect at M.P. 1005.3448, a 2.5 inch long, 44% through wall defect at M.P. 1018.3529, a 2.7 inch long, 35% through wall defect at M.P. 1018.8062, a 21 inch long, 33% through wall defect at M.P. 1021.7944, (2) defects 2.5 inches long, 32% and 35% through wall at M.P. 1040.6927 (the latter unreported by the UltraScan CD tool), a 14.60 inch long, 30% through wall SCC field at M.P. 1086.7558, a 36.50 inch long, 28.60% through wall SCC field at M.P. 1091.6776, and (2) SCC fields – 59.00 and 10.90 inches long, both 27% through wall. We would expect an Elastic Wave inspection to have seen these defects, and due to their location in or adjacent to the longitudinal seam, the Elastic Wave information should be available. This defect growth analysis is extremely important for future integrity and operational safety considerations.

MNOPS is particularly concerned that longitudinally oriented defects are growing much faster than expected by Enbridge and their third party consultants. Despite Enbridge's extensive in-house expertise, and their utilization of the foremost outside experts in fracture mechanics, it remains quite possible they do not have an adequate understanding of the pipeline's response to longitudinal defects and pressure cycles. Enbridge has provided extensive information related to their past and present thinking with regard to defect growth analysis, and has made every attempt to be conservative in their assumptions. We question though, whether their analyses properly consider the diverse operating history of this pipeline. From most reports, this pipeline was run relatively hard up until the rupture in Grand Rapids, MN, on March 3, 1991. Subsequent to that failure, operation and testing of the pipeline was subject to an RSPA Consent Order, as detailed in your draft report.

The RSPA Consent Order was closed early in 1999. And the pipeline was allowed to be operated at the full operating pressure provided for by CFR Part 195 until the July 4, 2002 rupture near Cohasset. The pressure cycle analysis used by Enbridge applies data from a two month time period which exhibits the most severe pressure cycles, and uses the information to determine and evaluate constants applicable to the Paris Law equation for known defects that have been identified in the pipeline. One concern is that using conservative pressure cycle data could artificially drive down the values of the constants "C" and "n" in the Paris Law equation, which could then under-predict defect growth during actual pressure cycles. Another concern is that too much emphasis may be placed on the expert's conclusions for predicted time to failures, given the assumptions that have to be made, and the number of variables that can affect an individual defect's response to operating characteristics. With just general knowledge of past failures and all of the recently identified defects, MNOPS is quite concerned that the pipeline is not responding well to the increased pressures allowed by closure of the 1991 RSPA Consent Order.

The Draft Technical Report discusses a significant amount of history related to the 34 inch pipeline, but does not appear to fully take into account the substantial failure history of this pipeline, other than longitudinal seam failures. It is in the best interest of our public and the environment to fully consider all of the integrity concerns associated with operation of this pipeline, rather than just the seam failures. There is a documented history of maintenance weld failures which have occurred over the past few years, both on repair sleeves and stopple fittings, which point to inadequate workmanship and inspection of maintenance welding. While Enbridge has undertaken a substantial program to inspect and repair many of these welds, there are hundreds more that haven't been looked at.

In addition to maintenance weld failures, there have been several flange and fitting leaks, and recently a cracked girth weld from original construction that failed. These types of defects and failures cannot presently be addressed reliably through in-line inspection.

The Draft Technical Report also discusses the prevailing theory that the longitudinal defects in the U.S. Steel pipe are the result of transportation induced fatigue cracks due to railroad shipment. While familiar with the theory, MNOPS questions whether there shouldn't be discussion within the report of plausible alternatives to crack initiation that have been considered and eliminated. We are particularly concerned with the discussion of the potential number of pipe joints that could have sustained railroad fatigue cracking during transportation. Any estimate of the number of joints that could have been exposed to worst case conditions is purely speculative, and probably should be excluded from the Technical Report. If included, it should be specifically acknowledged as an attempt to guess what the extent of the problem could be, rather than stated as facts and conclusions.

The Draft Technical Report briefly discusses the pipe movement which occurred on February 5, 2002 during the Terrace Phase III construction project, and the analysis that was performed. However, the analysis did not consider the effect of having a deep crack in the longitudinal seam of the pipe, and it seems obvious that the pipe movement was a contributing factor to the ultimate failure, given what we now know about the defect that existed at that location. We believe more attention needs to be paid to the effect of pipe movement on this defect, particularly as it relates to Enbridge's defect growth analysis, and any future recommendations related to evaluation of the pipeline when movement has occurred.

Mr. Zimmerman, according to information available from the Minnesota Pollution Control Agency (MPCA), the Enbridge 34 inch pipeline accounts for 87% of reported petroleum gallons spilled from pipelines in Minnesota from 1991 – 2002, and almost 50% of petroleum gallons spilled from all sources during the same time period. While we certainly acknowledge Enbridge's efforts to establish the integrity of this pipeline through inspection and repair, we are not satisfied that their preferred approach is sufficiently reliable at this time to prevent another in-service failure. It is our recommendation that confirmatory hydrostatic testing be performed on selected segments of the pipeline in order to establish that the UltraScan CD inspection has not missed any critical defects. We further recommend a follow-up inspection using the best available crack detection technology within two years of the hydrostatic test. We also request additional evaluation of the defect growth analysis for this pipeline using some of the recently identified anomalies, in order to more accurately determine the pipeline's response to actual pressure cycles and increased operating pressures.

We believe it's possible for this pipeline to be operated safely until such time that replacement is a viable option. Given the age, failure history, and integrity concerns, we believe it's prudent to limit the operating pressure of this pipeline until an adequate understanding of defect growth is established, and the ability for defect detection can be established with the highest degree of confidence. Given this pipeline is an integral factor in our nation's energy supply we must ensure it is operated safely throughout the remainder of its useful life.

We appreciate the opportunity to provide our input into the report, and remain available to assist in any way possible. The review was prepared by Brian Pierzina, Senior Engineer and Ron Wiest, Chief Engineer. If you have technical questions please contact Brian at 218 -327-4218 or Ron at 651-296-5123. Brian is the assigned lead investigator for MNOPS for this case.

Sincerely,

_____ Ronald J. Wiest, Chief Engineer

_____ Charles R. Kenow, Administrator

CC: Ivan Huntoon, Director – Central Region Office of Pipeline Safety

Comment 7

RE : Comments of SACCPJE on consent decree in US v. Enbridge et al, (w.d. michigan)

These comments are being submitted by the Straits Area Concerned Citizens for Peace, Justice and the Environment (SACCPJE). We are an unincorporated organization of local citizens in the Cheboygan County area, that has been working to address concerns about Enbridge Line 5 and its potential devastating harm to the Great Lakes watershed. Last year, we proposed a resolution asking local communities to ask Governor Rick Snyder to reduce product and volume in Line 5 until an independent panel of pipeline experts can certify that Line 5 is safe. Together with other members of the Oil and Water Don't Mix Campaign, we have helped secure over 70 community resolutions supporting state action on Line 5. These resolutions come from counties, cities, townships and native american tribes.

We have testified at several meetings of the Michigan Pipeline Advisory Board.

We have two comments for the court's consideration.

First, the 30 day comment period is way too short.

The largest inland oil spill in modern history occurred in July, 2010 in the Kalamazoo watershed when Enbridge's Line 6(B) pumped oil for 17 hours into Talmadge Creek. Six years have passed. There is no litigation emergency which warrants the shortest possible public comment period possible - particularly when the legal matter has now been expanded to deal with far more than just Enbridge Line 6(B)

We request that the public comment period be extended to 90 days.

Second, paragraph 193 of the proposed Consent Decree needs to be clarified to make it clear that the consent decree cannot not be used as a shield by Enbridge in any future litigation involving Line 5.
The parties saw fit to encompass several other Enbridge pipelines in this decree. Our concern is that Enbridge might attempt to use this court order to avoid additional remedies in future litigation over Line 5 - which is virtually guaranteed. Enbridge should be required to pledge that it will not rely on, or seek to use the decree in any other litigation or potential cause of action involving Line 5.

We also note that there is currently a pending action involving Enbridge line 5 in the E.D. of Michigan (National Wildlife Federation v. U.S. Dept of Transportation, Judge Goldsmith, Case No. 2:16 CV 11727)

There are substantial questions whether Enbridge has complied with the 1953 Easement Agreement dealing with pipelines across the Straits of Mackinac. There are substantial