Exhibit 2

RESPONSE TO COMMENTS
REGARDING PUBLIC COMMENTS RECEIVED

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A. PUBLIC COMMENTS REGARDING PENALTY

Comments:

A number of commenters stated that the civil penalty of $61 million that Enbridge will pay with respect to the Marshall spill is, for a variety of reasons, too low. Some commenters focused on Enbridge's earnings and the size of the Lakehead System, arguing that the penalty to be paid under the settlement will not be an effective deterrent for so large an entity. Exh. 1, Comments 1 and 2; Exh. 1, Attach. B, Comment 85. Other commenters focused on Enbridge's conduct in causing the Marshall spills, as well as other spills in the United States and Canada, arguing that such spills warrant civil penalties equal to the maximum civil penalties permitted under Section 311 of the Clean Water Act. Exh. 1, Comment 8 at 3-4 and 14-20. Finally, other commenters focused on individual facts relating to the Marshall spill – such as the size of the release – to argue that such facts warrant a civil penalty greater than the $61 million. Exh. 1, Comments 1 and 2; Exh. 1, Attach. B, Comment 90.

Response:

After taking all of these comments into account, the United States continues to believe that the $61 million civil penalty agreed to for the Marshall Spill is an appropriate settlement result. The civil penalty in the proposed settlement is the largest civil penalty paid in any settlement resolving claims under Section 311 of the CWA, 33 U.S.C. § 1321, other than settlements relating to the Deepwater Horizon disaster. By comparison, the civil penalty paid by Colonial Pipelines in 2003 for several spills, including one in the Reedy River in South Carolina that rivaled the size of the Marshall spill, was approximately $44 million in today's dollars after adjustments for inflation. Not only is the civil penalty large in comparison to comparable prior

oil spill settlements, but it is a "per barrel" level that could only be reached in litigation if the Court were to find that the Marshall spill resulted from gross negligence or willful misconduct by Enbridge.

Enbridge estimated that the spill resulted in the release of 20,082 barrels, but evidence suggests that the spill could have been larger. As one commenter correctly noted, Enbridge prepared and submitted reports to EPA estimating that 1.15 million gallons of oil (equivalent to 27,380 barrels) were collected through its cleanup operations. Although this estimate was based upon conservative formulas that could have overstated the volume of recovered oil, the estimate does not take into account the volume of oil that volatized into the atmosphere during the first few days of the spill. Accordingly, it is conceivable that, if the parties were to pursue contested litigation, a court could find a maximum spill volume as high as 27,380 barrels of oil.

In any event, regardless of the estimated spill size, the $61 million civil penalty for the Marshall spill falls comfortably within the range of penalties reserved by Congress for spills caused by gross negligence or willful misconduct. The $61 million civil penalty is equal to Enbridge paying $3,037 for each barrel discharged, assuming a minimum spill volume of 20,082 barrels. Even assuming a maximum spill volume of 27,300 barrels, the penalty is equal to Enbridge paying $2,227 for each barrel discharge – far greater than the maximum penalty ($1,100 per barrel) that could be assessed for spills that do not involve gross negligence or willful misconduct. The United State believes that the agreed penalty is fair and appropriate in light of the circumstances of the case and sends a clear message to Enbridge and other regulated entities that discharges of oil to navigable waters will not be tolerated.

Commenters are also correct in noting that Enbridge has violated the CWA in the past. Many of the oil spills cited by the commenters, however, were not violations of Section 311 of CWA because they occurred in Canada or, while in the United States, did not reach navigable water or their adjoining shorelines. The vast majority of the spills identified by the commenters fall into either of these two categories. While such spills demonstrate the need for system-wide injunctive relief to protect waterways in the United States, and may have some relevance to the civil penalty analysis, they do not constitute "prior violations" of the CWA – one of the penalty factors identified in Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8).

Commenters have correctly identified two major spills that are relevant to the penalty assessment – one spill of 6,000 barrels near Cohasset, Minnesota in 2002 and another spill of approximately 4,500 barrels near Superior, Wisconsin in 2003. Both spills involved a pipeline that is part of Enbridge's Lakehead System, and both involved discharges to water that violated the CWA. A third major violation of the CWA – one that commenters did not identify – impacted a tributary of the Mississippi River near Grand Rapids, Minnesota in 1991 ("1991 Spill"). The 1991 Spill was significant because it involved circumstances and mistakes that were nearly identical to those that occurred during the Marshall spill. Specifically, during both spills, Enbridge personnel misinterpreted alarms in the control room as an indication of a column separation and, as a result, continued to pump oil after the pipeline ruptured. After the 1991 Spill, Enbridge adopted a procedure, known as the "Ten-Minute Rule," which was intended to prevent such mistakes in the future by requiring control personnel to shut down and sectionalize a pipeline within ten minutes of an alarm unless such personnel determined that alarm was caused by conditions other than a leak or rupture. During the Marshall spill, however, Enbridge

failed to comply with the Ten-Minute Rule and, as result, repeatedly pumped thousands of barrels of oil into the rupture pipeline.

The United States was aware of these prior spills by Enbridge and believes that they support the penalty amounts agreed upon in this case. The United States does not have unfettered discretion to assess a penalty based solely upon Enbridge's financial strength, as some commenters have suggested. Rather, the CWA limits the size of the penalty that can be assessed taking into account the violator's culpability in causing the spill and other pertinent factors. 33 U.S.C. §§ 1321(b)(7) and (b)(8). Whenever a spill is the result of the violator's gross negligence or willful misconduct, the violator is subject to a maximum penalty of up to $4,300 per barrel of oil discharged *Id.*, at § 1321(b)(7)(D); 40 C.F.R. § 19.4. Alternatively, in the absence of gross negligence or willful misconduct, the maximum statutory penalty is capped at $37,500 per day of violation or an amount up to $1,100 per barrel discharged. Here, as previously discussed, the "per barrel" penalty for the Marshal spill ranges between $2,227 and $3,037 depending upon the estimated size of the spill and, as a falls within the range of penalties applicable to spills caused by the violator's grow negligence of willful misconduct.

Some comments argue that the settlement should be rejected because it fails to provide for a civil penalty equal to the maximum penalty that can be assessed under the Clean Water Act. Such comments ignore the litigation risks the United States would face if it were to pursue contested litigation against Enbridge. As an initial matter, Enbridge has not admitted that the Marshall spill was the result of gross negligence and, in a contested action, would present an alternative theory of the events that led to the Marshall spill. Whether the court would reject or accept such a theory is not a question whose answer is free of doubt. Certainly, an adverse

determination on this issue would reduce Enbridge's civil penalty exposure below the penalty assessed under the proposed Consent Decree.

Further, in assessing a civil penalty under 311(b)(8) the Clean Water Act, 33 U.S.C. § 1321(b)(8), the court would consider a number of factors, including the degree of success experienced by Enbridge in its efforts to mitigate the effects of the spill. While Enbridge was tardy in recognizing and responding to the Marshall spill, it ultimately completed an effective cleanup in accordance with the enforcement orders issued by EPA. At the peak of its response action, Enbridge had more than 1,500 persons engaged in the collection, treatment, and disposal of oil and oil-contaminated waste. In addition, the company entered into a separate settlement agreement with state and federal Trustees to restore and replace natural resources that were lost or damaged by the spill. Given the success of Enbridge's cleanup efforts, a court might be reluctant to assess a civil penalty equal to the statutory maximum penalty.

Finally, commenters who criticize the size of the penalty fail to recognize that the penalty was negotiated as part of package that included relief that the United States might not have secured through contested litigation. The proposed settlement not only affords system-wide relief to minimize the risk of future spills in six states, but it also provides the United States with protection against counterclaims that could otherwise have been asserted by Enbridge. Under Sections 1004(a)(4) and (c)(1) of the Oil Pollution Act, 33 U.S.C. § 1004(a)(4) and (c)(1), Enbridge's liability for response costs is capped at $350 million for each incident, unless the incident was proximately caused by (1) gross negligence or willful misconduct or (2) the violation of an applicable Federal regulation relating to the safety, construction, or operation of the pipeline. According to Enbridge's public filings, the company spent $548 million on response personnel and equipment alone in responding to the Marshall spill. Hence, absent

settlement, the United States could face a significant claim for Enbridge for response costs incurred in excess of the $350 million statutory cap. Under the proposed settlement, Enbridge will waive any and all claims for the reimbursement of such costs from the United States. Decree at ¶ 194.

Comment:

One commenter contends that the total maximum statutory penalty for the Marshall and Romeoville spill would be more than $840 million based upon the number of defendants named in the complaint. The commenter maintains that the total civil penalty of $62 million civil penalty as agreed to in the Consent Decree is too low in comparison to such a maximum statutory penalty. Exh. 1, Comment 8 at 16-17.

Response:

The United States agrees that, when multiple distinct entities are shown to have contributed to a violation of the CWA, each may be subject to a separate civil penalty for the violation. How that black letter legal rule would apply to the closely-related Enbridge entities named as defendants in this case, however, is not so clear, and, for purpose of settlement, the United States has treated the Defendants as components of a single overall enterprise responsible for the violation. The mere fact each Defendant is separately incorporated does not make that approach inappropriate. If this case were litigated, to establish each Defendant's liability would require proof that that each such Defendant individually had ownership or operational control over relevant facilities sufficient to be adjudged an owner or operator under the Clean Water Act. The outcome of such litigation is by no means assured, and the facts and considerations presented in the public comments shed no light on those issues at all. Moreover, while treating the Defendants as a single entity might be viewed as disadvantageous in the context of

calculating the maximum civil penalty, it is highly advantageous to the government in the context of ensuring implementation of remedial measures – a vital objective of this settlement. Under the Consent Decree, all of the Enbridge Defendants are bound to implement extensive injunctive measures set forth in the Decree without regard to the arguments they may have been able to raise in litigation that any one of them, if considered separately, lacks the authority or capacity to perform particular aspects of those measures. On balance, the United States believes that treating the Enbridge Defendants as components of a single entity in this settlement is appropriate and in the public interest.

Comments:

A number of commenters wanted to know whether certain facts and circumstances were known to the United States when it reached agreement with Enbridge on the civil penalties to be paid under the Consent Decree. The commenters wanted to know, for instance, whether the United States was aware that the spills at Marshall and Romeoville were discovered by third parties and not Enbridge. Exh. 1, Comments 8 and 26. Likewise, they wanted to know whether the United States was aware that Enbridge's Line 14 ruptured near Grand Marsh, Wisconsin in 2012, and that Enbridge Lakehead System includes more than 3,000 miles of pipeline in the United States. Exh. 1, Comment 8 at 12. Further, commenters asked whether the United States has taken into account the views of the City of Romeoville regarding the cause of the Romeoville spill, as well as the views of the National Academy of Sciences ("NAS") regarding the fate and transport of diluted bitumen ("dilbit") once it is released into the environment by a spill. Exh. 1, Comment 8. Finally, commenters wanted to know whether the United States was aware of investments

made by Enbridge in the Elder Project and in various ad campaigns relating to the Marshal and Romeoville Spills. Exh. 1, Comment 8.

Response:

The United States was, at least, generally aware of all of the facts and circumstances identified by the commenters as related to the civil penalty and, for most such facts, had detailed information. To the extent that these facts and circumstances are relevant to the penalty analysis, the United States took them into account in formulating its settlement position, as discussed further below.

Third-Party Discovery of Spills: Commenters noted that Enbridge failed to realize that its pipeline had ruptured near Marshall, Michigan until a third-party spotted oil on the ground seventeen hours after the rupture and reported the spill to Enbridge. Likewise, commenters noted that the local fire department discovered and reported the spill near Romeoville, Illinois. In both instances, however, the commenters are not presenting any new facts that were unknown to the United States, but rather they are repeating facts that were previously documented by the National Transportation Safety Board ("NTSB") in its publicly-released reports regarding the Marshall and Romeoville spills. The United States agrees that such facts are pertinent to the penalty assessment as they relate to the effectiveness of Enbridge's spill response – one of the penalty factors under Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8). As previously discussed, the United States took into account Enbridge's spill response when the United States formulated its settlement position.

Line 14 Spill: Commenters noted that Enbridge Line 14, which is part of the Lakehead System, ruptured near Grand Marsh, Wisconsin in July 2012. However, this is not a new fact that was unknown to the United States during its negotiations with Enbridge. The Line 14 spill

prompted PHMSA to issue an order to Enbridge on August 2, 2012, requiring the company to prepare and submit a comprehensive plan to improve the safety of the Lakehead system. This plan, known as the Lakehead Plan, is referenced on page 5 of the Consent Decree. Although the rupture of Line 14 informed the United States' settlement position with regard to injunctive relief, it was not relevant to the issue of civil penalties because the rupture did not result in any discharge of oil to waters of the United States or adjoining shorelines and, therefore, did not constitute a past violation of the CWA.

Length of the Lakehead Systems: Commenters noted Enbridge owns and operated more than 3,000 miles of pipeline in the United States. However, this is not a new fact that was unknown to the United States during its negotiations with Enbridge. As explained more fully on the first page of the Consent Decree, Enbridge's Mainline System includes more than 3,000 miles of pipeline corridors in the United States and Canada. The Consent Decree further explains that the portion of the Mainline System in the United States includes a network of pipelines, known as the Lakehead System, that are grouped within right-of-ways that collectively span 1,900 miles. Such corridors and right-of-ways frequently contain more than one pipeline. Indeed, if all the pipelines in the Lakehead System were linked end-to-end, such pipelines would span, in fact, span over 4,000 miles – a fact that can be readily learned from Enbridge's own website. http://www.enbridge.com/about-us/our-work/transportation-and-transmission/liquids-pipelines. In any event, the size of Enbridge's pipeline system has little relevance to the penalties that should be assessed under the Consent Decree. Nothing in the CWA states that penalties should be adjusted based upon the size of the violator's operations.

View of the Village of Romeoville: Commenters argued that the United States must confer with the Village of Romeoville ("VOR") in order to assess an appropriate penalty relating

to the Romeoville spill. The United States disagrees. The central facts relating to the Romeoville spill were documented by the NTSB in its publicly-released report regarding the spill. Specifically, the NTSB found that the spill was caused by a 6-inch water pipe, which provides water to a private-business known as the Northfield Block Company. According to the NTSB, the water pipe was improperly installed in 1977 because (1) the water pipe was located 5 five inches beneath Line 6A and (2) the water pipe did not include any measures to guard against stray electrical currents generated by Enbridge's cathodic protection system. The NTSB concluded that, as a result of such stray currents, the water pipe corroded and ultimately failed. The NTSB found that the water jet escaping from the corroded water pipe caused a hole to form in Line 6A, resulting in the spill. The commenters do not present any new facts or information that show the NTSB's central findings were in error. The VOR argued in its comments that an Enbridge knew or should have known in 2009 that the water line was located in close proximity to Line 6A. However, we do not perceive how such an allegation detracts from the NTSB's central findings.

View of the NAS regarding the fate and transport of tar-sands oil in the environment: Commenters noted that the NAS published a study in 2016 concluding that spills involving oil derived from tar sands are more difficult to clean up than spills involving oil from other sources. However, this information is not a new fact that was unknown to the United States when it negotiated the Consent Decree. To the contrary, EPA was well aware of the unique problems relating to the cleanup of dilbit based upon its own experience in overseeing the cleanup of the Marshall spill – a cleanup operation that took over three years to complete. Further, the NAS study is known to the United States because, among other things, one of the experts on the NAS panel was Orville Harris – a former industry executive who served as the independent third party

monitor under a prior consent decree between the United State and BP P.L.C. arising from a spill on Alaska's north slope in 2006. Mr. Harris will also serve as the independent third-party monitor under the Consent Decree with Enbridge.

Enbridge's investment in the Elder Project and in various public relations efforts: Commenters noted that Enbridge has invested in the research of external leak detection technologies, including the ELDER project – an apparatus that Enbridge and industry partners built for the purpose of testing such technologies. Further, Commenters alleged that Enbridge launched a public-relations campaign to counter its image after the Marshall and Romeoville spills. In both instances, the commenters are not presenting any new facts that were unknown to the United States. The Consent Decree specifically references the ELDER project and requires Enbridge to conduct a study evaluating the feasibility of deploying external leak detection technology in the Straits of Mackinac. Enbridge's public filings also disclose the fact that Enbridge routinely makes investments to bolster its public image. For instance, the 2012 annual report of Enbridge, Inc. states that the "Company's reputation is one of its most valuable assets" and notes that "reputation risk" is managed by, among other things, making investments in corporate social responsibility projects. *2012 Annual Report*, pp. 12 and 84. The United States does not perceive how such investments indicate that the civil penalty to be paid by Enbridge is too low or otherwise inappropriate.

Comments:

Commenters questioned the scope and purpose of the civil penalties assessed under the Consent Decree. Some commenters contended that Enbridge should be required to pay

criminal penalties in addition to civil penalties. Exh. 1, Comments 2, 19, and 30 at *3[1]; Exh. 1, Attach. B, Comment 150. Others argued that the money paid by Enbridge as a civil penalty should be deposited in a trust fund for the benefit of individuals harmed by the spill. Finally, one commenter argued that various governmental agencies, in addition to Enbridge, should be required to pay a civil penalty as result of the spill.

Response:

None of the comments regarding the scope and purpose of the civil penalties bear upon the central issue of concern to the United States and the Court – namely, whether the proposed settlement is fair, reasonable, and in the public's interest. Instead, the comments raise matters that are outside of the scope of the Consent Decree.

Commenters argue that Enbridge should be required to pay criminal penalties in addition to civil penalties, but this argument misinterprets the purpose of the Consent Decree. The Consent Decree resolves the *civil* claims of the United States for penalties and injunctive relief for violations of the CWA alleged in the Complaint, as well as the *civil* claims of the United State in the Complaint for recovery of removal costs or damages under OPA. The United States has not asserted any criminal claims against Enbridge, and such claims are reserved under Paragraphs 188 and 191 of the Consent Decree.

Commenters also argue that the penalties paid by Enbridge should be deposited in a trust fund for the benefit of persons harmed by the Spill, but such criticisms ignore the requirements of the CWA. Under Section 311(s) of the CWA, 33 U.S.C. § 1321(s), the penalties paid by

[1] The use of the " *[page number]" as shown above identifies the page number of a particular public comment in the attached exhibits where either the original document has no page numbers, or where the page number of the electronic version differs from the number on the original document. This the number following the " *" identifies the page number in the electronic PDF document.

Enbridge must be deposited in the Oil Spill Liability Trust Fund – a fund established by Congress to pay for removal costs and other expenses arising from an oil spill. Hence, the United States and Enbridge did not have discretion to set up a site-specific fund that would solely benefit of persons harmed by the Marshall spill.

Finally, one commenter argued that various governmental entities, together with Enbridge, should be penalized for the Marshall spill. This comment, however, overlooks the purpose of the CWA. Congress enacted Section 311 of the CWA so as to ensure that those who own or operate vessels or facilities, or who are otherwise in charge of such vessels or facilities, are held accountable in the event that their vessel or facility discharges oil or other hazardous substances into a navigable waterway or its adjoining shorelines. Here, no governmental entity owned, operated, or was in charge of Line 6B – the pipeline that ruptured at Marshall. Rather, the pipeline was collectively owned and operated by the nine defendants named in the complaint. Accordingly, they, alone, are liable for civil penalties under the statute.

Comment:

One commenter remarked that the Consent Decree should prohibit Enbridge from passing the cost of the civil penalty through to its customers. Exh. 1, Attach. B, Comment 185.

Response:

The Consent Decree provides that the penalty cannot be deducted from any federal, state or local income taxes, but, consistent with the government's normal practice in environmental enforcement settlements, it does not address how Enbridge will account for the penalty internally. While this was not a subject of negotiations, as an informational matter we

understand that the Federal Energy Regulatory Commission ("FECR") typically does allow the pass-through of civil penalties assessed under the Consent Decree.

In *Electric Energy, Inc.*, 29 FERC 61,212 (1984), FERC considered whether a utility company could include rates in power contracts that, in part, provided for the pass through of fines and penalties incurred as a result of the utility having violated environmental and worker safety laws. EPA and OSHA had imposed fines and penalties due to environmental and safety violations associated with the utility's operation of a power plant, and the utility sought to increase its rates in order to recover those penalty amounts. FERC, however, concluded that it could not authorize a regulated company to charge "rates based upon illegal, duplicative or unnecessary labor costs," such as the utility's violation of EPA and OSHA laws. FERC explained that allowing recovery for such penalties and fines would "eliminate the incentive for the company to comply with the laws thereby frustrating the purpose of such laws." *Id*. Also, even if customers agreed to pay the rates, FERC stated that it "does not relieve this Commission of its responsibility to protect the public interest in approving only those rates which have been shown to be just and reasonable." *Id.* Accordingly, if Enbridge were to try to recover its civil penalty from its customers, it seems likely that FERC would similarly conclude that such a pass-through was improper.

In any event, separate and apart from FERC's disallowance of penalties as a reimbursable cost, Enbridge does not as practical matter adjust rates based upon its recently-incurred costs from operations, including penalties. Rather, Enbridge's rates are determined by a combination of inflation-based adjustments (which are formulaic and not based on costs such as a civil penalty) and facility surcharges (which flow through certain agreed-upon costs, of which a civil penalty is not one). Enbridge negotiates the facility surcharges with the Canadian Association of

Petroleum Producers ("CAPP"), which represents Enbridge's shippers, and then submits the agreed-upon surcharges to FERC for approval. Enbridge has informed the United States that it has no plans to ask its shippers, acting through CAPP, to agree to a surcharge to account for the cost of the civil penalties to be paid under the Consent Decree, but that, even if Enbridge were to make such a request there is no meaningful prospect that its shippers, acting through CAPP, would agree to such a surcharge. In light of these representations, together with the fact that FERC has previously disallowed penalties as a reimbursable cost, the United States perceives no need to include an express provision in the Consent Decree barring Enbridge from passing along the cost of its civil penalties to its customers.

B. RESPONSE TO COMMENTS CHALLENGING JURISDICTION AND AUTHORITY FOR LINE 3 REPLACEMENT AND APPLICATION OF INJUNCTIVE RELIEF TO PIPELINES OTHER THAN LINES 6A AND 6B.

Comments:

Some commenters, including one Tribal commenter, have generally questioned the inclusion in the proposed settlement of any terms or conditions relating to Enbridge's Line 5 and Enbridge's Line 3. Exh. 1, Comments 1, 4 at 1 (at *2), 9, 16, and 29; Exh. 1, Attach. A, Comments 39, 46, 59, 60, and 80. At least one comment objected to provisions of the proposed settlement providing for replacement of Enbridge's Line 3, arguing that such terms are outside the scope of this action and the Court's jurisdiction under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* Exh. 1, Comment 5. The commenters refer to *Local Number 93, Int'l Ass'n of Firefighterfighters, AFL-CIO v City of Cleveland,* 478 U.S. 501, 525-26 (1986) as support for these assertions.[2]

Response:

The proposed Consent Decree is well within this Court's jurisdiction under the CWA. In the *Local Number 93* case cited by commenters, the Supreme Court ruled that a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction and must come within the general scope of the case made by the pleadings. 478 U.S. at 525. In addition, the consent decree must not conflict with or violate the statute upon which the

[2] The petitioners in *Local Number 93* challenged a consent decree, arguing that the injunctive relief in the settlement was precluded by Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 USC 200e5(g). The Court rejected the petitioner's arguments and concluded that Section 706(g) did not apply to relief awarded in a consent decree.

complaint was based. *Id.* at 526. As discussed below, the proposed settlement in this case satisfies the requirements set forth in *Local Number 93*.

First, the proposed settlement in this case addresses claims for injunctive relief and civil penalties for unlawful and unpermitted discharges of oil from defendants' pipelines in violation of Sections 301 and 311 of the CWA, 33 U.S.C. §§ 1311 and 1321, as well as a claim for recovery of removal costs pursuant to Section 1002 of the Oil Pollution Act ("OPA"), 33 U.S.C. § 2702. *See*, Complaint, ECF #1. Such claims are clearly within the Court's subject matter jurisdiction under Section 309 of the Clean Water Act, 33 U.S.C. § 1319(b). Furthermore, although the complaint focuses on 2010 discharges from two Enbridge pipelines known as Line 6A and Line 6B, the complaint specifically alleges that Enbridge has experienced numerous other pipeline failures that resulted in the release of oil from various other Enbridge pipelines, including Lakehead pipelines known as Line 2[3], Line 3, Line 5, and Line 14. ECF #1, p. 6, ¶ 18. In such circumstances, the Court's jurisdiction under CWA §309(b) to restrain violations and require compliance with the CWA, is sufficiently broad to require measures to prevent discharges from other Enbridge Lakehead System pipelines. The injunctive provisions in the proposed Consent Decree are all designed to prevent future discharges from Enbridge's Lakehead System pipelines or to promote a prompt and effective response to any discharges that may occur in order to reduce the magnitude of environmental harm resulting from any discharges that may occur within the Lakehead System.

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[3] Enbridge sometimes distinguishes between general references to "Line 2," which includes segments in both Canada and the United States, and a narrower reference to "Line 2B" when referring to the portion of Line 2 in the United States. The proposed Consent Decree adopted the "Line 2B" designation, since the Consent Decree only addresses Enbridge obligations with respect to specified pipelines in the United States.

Furthermore, the proposed injunctive relief also does not conflict with or violate the CWA or OPA, which are the statutes upon which the complaint was based. To the contrary, the proposed injunctive relief, including the provisions related to Line 3, is well within the broad authority granted by Section 309(b) of the CWA, as well as the Court's equitable injunctive relief powers. Section 309(b) authorizes EPA to seek, and the court to award, all appropriate relief, including a permanent or temporary injunction, to restrain violations and require compliance with the Act. 33 U.S.C. § 1319(b); *see also*, *U.S. v ATP Oil & Gas Corp., et al.*, 955 F. Supp. 2d 616 (E.D. La 2013). The authority to pursue a permanent injunction includes shutting down an entire facility or pipeline.[4] The district court also has broad equitable powers, especially when public interests are involved. *ATP Oil & Gas* at 636, citing Porter v. Warner Holding Co. 328 U.S. 395 (1946). As explained in *ATP Oil & Gas*

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. [Where] the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.

Id., at 398.

Therefore, although the complaint alleges current CWA violations only on Line 6A and Line 6B, the complaint includes a specific allegation that mentions other Lakehead System pipelines, including Line 2, Line 3, Line 4, Line 5 and Line 14 have all previously experienced pipeline failures that resulted in the release of oil. ECF 1 (complaint) ¶ 18. Section 309(b) of the CWA and the Court's equitable authority are not limited to preventing future violations solely on

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[4] For example, the settlement reached in the *ATP* case prohibited the use of the facility where the violations occurred until certain actions were taken to ensure compliance. See, *U.S. v. ATP Oil & Gas, et al.*, Civil Action No. 2:13-cv-262, Partial Consent Decree (E.D. La. 2014).

Lines 6A and 6B. The kinds of problems that gave rise to the unlawful discharges from Lines 6A and 6B exist or have existed elsewhere on the Lakehead System and it is appropriate for resolution of this matter to include requirements to address risks of discharge violations from similar causes that may exist on other Enbridge pipelines. The injunctive relief described in the proposed Consent Decree focuses on preventing or minimizing future violations of the CWA by (i) requiring timely implementation of various measures that will help prevent future pipeline failures, (ii) ensuring timely and effective leak detection measures that will permit timely recognition of any future pipeline failures and help minimize future pipeline discharges that could impact waters of the United States, and (iii) promoting more effective emergency response capabilities in order to minimize the harm from any future discharges that should occur. The pipelines subject to these obligations are all within the Lakehead System and are operated from a single control room in Edmonton, Canada, monitored using the same computational leak detection model known as the "MBS system," governed by common pipeline integrity procedures and policies, and managed in accordance with a common integrity management strategy. It is, therefore, appropriate for this settlement to require implementation of the injunctive relief on all Lakehead System pipelines.

C. COMMENTS RELATING TO UNIQUE TRIBAL ISSUES

The United States received a number of comments on the proposed Consent Decree from or on behalf of federally-recognized Indian tribes or tribal authorities who contend that the proposed Consent Decree affects various rights under treaties with the United States. In general, these tribal commenters fall into two groups: representatives of several tribes based in Minnesota ("Minnesota Tribes") who assert rights under an 1855 Treaty with the Chippewa, 10 Stat. 1165, and prior treaties; and representatives of five tribes based in Michigan ("Michigan Tribes") who are parties to the 1836 Treaty of Washington, 7 Stat. 491.[5] *See, e.g.*, Exh. 1, Comments 4, 6, 16, 27, 34, 35, and 36; *see also* Exh. 1, Comment 5 (noting that certain of the 1855 Treaty tribes were intervenors in Minnesota Public Utilities Commission proceedings relating to a pending proposal for replacement of Enbridge's Line 3). The tribal comments include concerns similar to those raised by other commenters about the potential replacement of Enbridge's Line 3, part of which passes through Minnesota, as well as concerns about the impact of possible future spills from Enbridge's existing Line 5, particularly in environmentally sensitive areas such as the Straits of Mackinac, where Line 5 crosses from the Upper Peninsula to the Lower Peninsula of Michigan. Those shared concerns are addressed in Sections D (comments relating to Line 3) and E (comments relating to Line 5) of this Response to Comments. In addition, the tribal commenters raise issues unique to their status as federally-recognized Tribes that will be addressed in this Section of the Response to Comments.

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[5] The 1855 Treaty Authority organization represents several Minnesota Tribes, including the Leech Lake Band of Ojibwe, and the Mille Lacs Band of Ojibwe, which are federally-recognized tribes. The various comments submitted on behalf of Michigan Tribes appear to reflect the interests of 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 Travers Bay Band of Odawa Indiana.

Comments:

The unique issues raised by the Tribes are of two types. First, they contend that the proposed settlement does not adequately protect tribal rights to fish, hunt, gather and otherwise use natural resources that are vulnerable to injury from spills of the oil or petroleum products carried by Lines 3 and 5. *See, e.g.*, Exh. 1, Comment 6 at 4 (comments of the 1855 Treaty Authority); Exh. 1, Comments 4, 34, and 35 (comments on behalf of Michigan Tribes). Second, certain of the tribal comments assert that the United States has an obligation to engage those tribes in government-to-government consultation concerning the potential impacts of the proposed settlement on the Tribes' treaty rights but has failed to do so. *See* Exh. 1, Comment 4 at 6 (at *7) and 7 (at *8),[6] and *see* Exh. 1, Comment 6 at 3 (including general references to federal trust responsibility and consultation).

Response:

Potential Impacts on Fishing and Other Usufructuary Treaty Rights.

The Michigan Tribes' concerns about treaty rights focus primarily on the Straits of Mackinac – the relatively narrow, fast-flowing body of water that connects Lake Huron with Lake Michigan – and on the portion of Enbridge's Line 5 that crosses the Straits. As the United States has long recognized, the 1836 Treaty gives the Michigan Tribes legally-protected rights to fish in the Straits of Mackinac and in adjoining waters of Lake Michigan and Lake Huron. The Tribes correctly point out that a rupture of Line 5 as it crosses the Straits could (depending on the location of the rupture and amount of oil discharged) have severe impacts on fish and disrupt

[6] This comment, submitted on behalf of the Grand Traverse Band of Ottawa and Chippewa Indians, was filed directly with the Court. *See*, ECF #7. However, neither the Grand Traverse Band nor any of the other tribal commenters is a party to or has sought to intervene in this case.

fishing activities both in the Straits and in portions of Lake Michigan and Lake Huron. The proposed Consent Decree would reduce this risk by requiring Enbridge to make a number of improvements to its leak detection systems and control room operations (*see*, Consent Decree, Section VII.G.), as well as to its program of pipeline inspections and maintenance of Line 5 (*see*, Consent Decree Section VII.D and VII.F). In addition, the proposed Consent Decree includes requirements to implement specific additional protective measures with respect to the crossing of the Straits. *See*, Consent Decree, Section VII.E. As the Michigan Tribes point out, however, these improvements cannot absolutely eliminate any possibility of a future release of oil from Line 5 that might adversely affect fisheries or other resources used by the Michigan Tribes. At least one of the Michigan Tribes explicitly asserts that the United States' trust responsibility to protect the Tribes' fishing rights mandates federal action to remove Line 5 from the Straits of Mackinac. Exh. 1, Comment 35, at 2; *see also*, Exh. 1, Comment 4, at 4 (at *5).[7]

The United States shares the Tribes' concern about the potential for harm from a leak or rupture of Line 5, particularly at or near the Straits crossing. Based on that concern the United States negotiated aggressively for, and secured in the proposed settlement, substantial measures to reduce the risk of leaks or ruptures on Lakehead System pipelines, including Line 5. However, while the claims in this case afford a basis for seeking the kinds of improved inspection, operation, and maintenance practices required by the proposed Decree, the United

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[7] The 1855 Treaty Authority expressed concerns that the route proposed by Enbridge for replacement of Line 3 will have an adverse impact on tribal hunting, gathering and other usufructuary rights within the 1855 Treaty Territory. As discussed in Section D of this Response to Comments, the proposed Consent Decree does not adopt or endorse the Line 3 replacement route described in the Route Application currently pending before the MPUC; nor does the proposed Consent Decree require Enbridge to relocate Line 3 outside the existing Line 3 right of way – an alternative deemed preferable by the 1855 Treaty Authority.

States does not believe those claims would have supported a demand to cease operation of Line 5 altogether or to require Enbridge to eliminate the Straits crossing. Line 5 itself had not experienced a significant rupture during the time period at issue in this case, and to the best of our knowledge no rupture of the portion of the pipeline that crosses the Straits has ever occurred. Given the extensive compliance program incorporated into the proposed settlement, the United States does not believe that there is any basis to conclude that the proposed Consent Decree is inadequate to assure compliance with the CWA during the period when the Decree will be in effect. As noted below at p. 41 of this Response to Comments, the United States would not typically require shutdown of a facility, where adequate compliance alternatives exist, except where a facility owner elects to cease operation of a facility in lieu of implementing other compliance measures – something Enbridge has not done with respect to Line 5. Moreover, any effort to negotiate for removal of the Straits crossing would vastly expand the issues to be considered in shaping equitable relief, potentially requiring an examination of the effects of a loss of the oil supply carried by Line 5 and/or any analysis of the time, costs, benefits and adverse impacts of any project to reroute or replace Line 5, and/or the practicality of alternative ways to balance energy supply and demand in the affected parts of the Nation. Although the United States sought and obtained expansive relief in the proposed settlement, the government did not, and does not, view this case as an appropriate vehicle for considering the complex question of whether it would be preferable to eliminate the Straits crossing or to shutdown Line 5 altogether.

That said, contrary to the implication in some of the Michigan Tribes' comments, the proposed settlement in no way shields Enbridge from legal challenges, outside this action, to the continued existence of the Line 5 crossing. Nothing in the Consent Decree should be read as

endorsing that crossing of the Straits or as impairing any legal or political remedies the Tribes or others may have beyond the specific bounds of this case. The proposed Consent Decree only resolves specified liabilities of Enbridge with respect to the Line 6A Discharges and Line 6B Discharges that occurred in 2010. Consent Decree, ¶ 187. It does not protect Enbridge against any liability arising from discharges on Line 3 or Line 5, where tribal commenters exercise usufructuary rights. Rather, the proposed Consent Decree includes an express reservations of rights with respect to any and all claims for matters not specifically resolved, including claims for any discharges from Line 3 and Line 5. Consent Decree, ¶¶ 187 and 189.

All of the Lakehead System pipelines covered by the proposed Consent Decree, and the risks inherent in such pipeline operations, existed well before this case and the proposed settlement. As discussed, the proposed settlement includes numerous measures that serve to limit or reduce risks of pipeline failures that could result in oil discharges that might affect areas where tribal commenters exercise usufructuary rights. None of the tribal commenters presented any information suggesting that provisions of the proposed Consent Decree fail to limit and reduce risks of oil discharges from Enbridge's pipelines, compared to the situation that would exist if the settlement were not approved, nor did they suggest specific improvements to the risk reduction measures negotiated by the government. In fact, as noted above, the proposed Consent Decree includes extensive compliance measures designed to reduce risks of future releases of oil from Lakehead System pipelines.

For the reasons set forth above, there is no basis to conclude that the proposed Consent Decree impairs tribal treaty rights, and there is no basis to conclude the federal trust

responsibility to protect those rights requires either a complete shutdown of Line 5 or a shutdown of the portion of Line 5 that crosses the Straits.[8]

Alleged Breach of Duty of Government-to-Government Consultation

Comments:

Both in written comments and in oral communications to the government, representatives of the Michgan Tribes have stated that, because of the potential of this proposed settlement to affect treaty-protected rights, the Department of Justice and other federal agencies involved in this case had a trust obligation to engage in government-to-government consultation with the Tribes before proceeding with the settlement.

Response:

As discussed above, the United States does not believe that the proposed settlement in fact has any potential to affect treaty rights adversely. On the contrary, the United States believes that the proposed settlement will serve to reduce currently existing risks that could affect those rights. At the same time, the United States recognizes that full and frank communication between federal representatives and tribes about matters that have even a possibility of affecting tribal interests is an important objective. Accordingly, representatives of the Department of Justice and the United States Environmental Protection Agency met with representatives of the 1836 Treaty Tribes in Traverse City, Michigan on October 7, 2016, to provide an opportunity for discussion of tribal concerns relating to the proposed Consent Decree.

For reasons explained below, the October 7, 2016 meeting concerning the proposed settlement of the United States' CWA claims is outside the scope of the formal, government-to-

[8] As noted above in Section D of the Response to Comments, the proposed Consent Decree does not govern the selection of a route for any replacement of Line 3.

government consultation process contemplated under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments). Pursuant to that Executive Order, the Attorney General approved the Department of Justice Policy on Tribal Consultation. DOJ Policy Statement 0300.01 (August 29, 2013). The Policy Statement contemplates that there will be consultation with federally recognized Tribes before adopting "policies" with tribal implications. *Id.*, at p. 4. The Policy Statement goes on to clarify that "policies" refers to regulations, proposed legislation, and similar Federal standards, and expressly excludes matters in litigation, including individual settlements.

> The term "policies" includes: (1) regulations or regulatory policies; (2) proposed legislation; (3) decisions regarding whether to establish Federal standards; and (4) other policies for which the Department determines consultation is appropriate and practicable. The term "policies does not include matters that are the subject of investigation, anticipated or active litigation, or settlement negotiations.

Id. Thus, the role of consultation in the relationship between the federal government and Tribes during litigation, where Tribes are not parties, is different from the role of consultation in the relationship between the federal government and Tribes where policymaking, or in the case of administrative agencies such as EPA, administrative decisions are being made.

Comment:

One Tribal commenter argued that the government should have followed the example set by that the Department of Justice and the Environmental Protection Agency's consultation with tribes in connection with a settlement in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case No. 15-md-2672 CRB (JSC) (N.D. Cal.) ("*Volkswagen*"). Exh. 1, Comment 4 at 6 (at *7).

Response:

Although the Department of Justice and the U.S. Environmental Protection Agency engaged in consultation with tribes regarding one element of a proposed settlement in the *Volkswagen* case, the United States did not consult with tribes regarding the general terms of the proposed consent decree in that litigation. In *Volkswagen*, the proposed settlement included a requirement for the defendant to establish an Environmental Mitigation Trust that would be used to pay for specified mitigation actions that would offset excess nitrogen oxide ("NOx") emissions from defendants' cars by reducing NOx emissions from other sources. Eligible mitigation actions were to be administered by Trust Beneficiaries, and the settlement expressly contemplated that federally recognized tribes could become Trust Beneficiaries and would then be able to implement eligible mitigation projects from a Tribal Allocation Subaccount within the Trust. Thus, the *Volkswagen* settlement contemplated a direct tribal role in implementing one aspect of the settlement, and the agencies coordinated with tribes on specific implementation issues, such as the method of allocating annual funding to the Tribal Allocation subaccount. Unlike the situation in *Volkswagen*, the proposed settlement in this action does not include an implementation role for tribes. The fact that the agencies coordinated with tribes on a discrete issue in the *Volkswagen* consent decree does not create an obligation to do so for all settlements.

D. COMMENTS ON PROVISIONS OF THE PROPOSED CONSENT DECREE RELATING TO REPLACEMENT OF LINE 3

The United States received numerous comments regarding various terms of the proposed settlement that relate to a commitment by Enbridge to replace the U.S. portion of existing Lakehead System Line 3, which runs from the Canadian border near Neche, North Dakota, crosses part of North Dakota, Minnesota and Wisconsin, and ends at a terminal in Superior, Wisconsin. *See*, Consent Decree, ¶ 22. Although the United States does not believe any of the comments demonstrated facts or considerations showing that the proposed Consent Decree previously lodged with the Court was inappropriate, improper or inadequate, the United States and Enbridge agreed to revise two provisions of the proposed Consent Decree relating to replacement of Line 3, in light of concerns raised in certain public comments.

Revisions to Proposed Consent Decree:

First, as discussed below, to clarify that the proposed Consent Decree does not purport to preempt or otherwise interfere with the authority of regulatory bodies, such as the Minnesota Public Utilities Commission ("MPUC"), that have approval authority with respect to replacement of Line 3, the parties agreed to revise the language of paragraph 22.a of the proposed Consent Decree. The revised language eliminates a perceived ambiguity on the relationship between the Consent Decree and independent regulatory authorities by expressly providing that the obligation to replace Line 3 is subject to obtaining applicable regulatory approvals.

Secondly, the parties also agreed to revise Paragraph 22.e of the proposed Consent Decree so that it provides for permanent shutdown of existing Line 3, while eliminating a previously negotiated option that would have allowed Enbridge to restart old Line 3 after meeting specified conditions to insure integrity of the old line. Since the proposed Decree no longer provides an option for restarting old Line 3, the revised proposed decree also deletes the

provisions in Subparagraphs 22.f through 22.h of the Consent Decree originally lodged with the Court, as those subparagraphs by their terms would only have applied in the event of a restart of existing Line 3.[9] This proposed revision effectively addresses concerns raised by various commenters regarding a potential restart of existing Line 3 after completion of the replacement line. *See, e.g.*, Exh. 1, Comments 2 at 1, 3, 14 (favoring an approach that eliminates any possibility of restart), and 24 at 3.

Overview of Comments on Line 3

The public comments received by the United States on Line 3 provisions addressed a wide range of issues and provided varying perspectives on provisions of the Consent Decree. Some comments on the proposed Consent Decree questioned whether the settlement should address Line 3 at all, while other comments supported efforts to reduce risks associated with Line 3, but raised various concerns with specific provisions in the Consent Decree that address Line 3. For example, although some comments expressed support for replacement of Line 3, provided that the replacement line is confined to the same right of way corridor as existing Line 3, other comments opposed provisions of the proposed Decree relating to replacement of Line 3 on various grounds. Several comments incorrectly assumed that the proposed Consent Decree mandates implementation of the particular Line 3 replacement project described in Enbridge's Line 3 replacement project applications currently pending before the MPUC, or endorses details of Enbridge's currently pending proposals regarding the size and capacity of any replacement pipeline or the particular route proposed by Enbridge. Other commenters more broadly opposed

[9] The revised proposed Consent Decree also deletes now superfluous references to resumption of operation of Original U.S. Line 3 previously found in Paragraphs 84.a and 206 of the Consent Decree previously lodged with the Court.

pipeline replacement based on concerns about continuing development and use of fossil fuel resources generally and the impact of fossil fuel use on climate change.

As discussed below, the United States does not believe that the comments on Line 3 disclose facts or considerations demonstrating that the proposed settlement is inappropriate, improper or inadequate.

1. Comments Proposing To Eliminate All Provisions Relating To Line 3

Comments:

As a threshold matter, some commenters argue that since the unlawful discharges that gave rise to this action occurred on Lakehead System Lines 6A and 6B, it is inappropriate for injunctive requirements of the Consent Decree to extend beyond Lines 6A and 6B. *See, e.g.*, Exh. 1, Comments 1, 5 at 2, and 12-14; and Exh. 1, Attach. A, Comments 46 and 47.

Response:

As discussed in Section B of this Response to Comments (addressing comments on the general scope of the proposed settlement), the United States and the Court have authority to approve such relief and inclusion of such relief in the settlement was appropriate, proper and adequate.

2. Comments Suggesting Line 3 Replacement Provisions Impermissibly Interfere With Matters Committed to the MPUC

Comments:

Various commenters have observed that decisions regarding the need for and siting of oil transmission pipelines are subject to approval by state regulatory authorities, noting that the MPUC is currently presiding over proceedings relating to a proposal by Enbridge

for replacement of Line 3.[10] *See, e.g.*, Exh. 1, Comments 5 at 4-5 and 31 at 1 (at *2). One commenter opined that the proposed Consent Decree "places itself in the middle of a decision that belongs to Minnesota," *see* Exh. 1, Comment 2 at 1, and other commenters have questioned whether the Line 3 replacement provisions in the proposed Consent Decree inappropriately may preempt or otherwise interfere with the jurisdiction of the MPUC. *See, e.g.*, Exh. 1, Comments 5 at 2-3 and 23 at p.3 (incorrectly interpreting the proposed Consent Decree as requiring replacement of Line 3 regardless of the outcome of MPUC proceedings[11]); *see also*, Exh. 1, Comments 31 line 86 at 4 (at *5) and line 146 at 6 (at *7) (observing that there has not yet been a regulatory determination of the need for a replacement line); *and see* Exh. 1, Comments 31 line 125 at 5 (at *6) and line 231 at 9 (at *10); and Exh. 1, Attach. A, Comments 78 and 79. Other commenters expressed concern that a state Environmental Impact Statement ("EIS") should be completed before any replacement of Line 3. *See, e.g.*, Exh. 1, Comment 15, 24 at 3; and Exh. 1, Attach. A, Comments 44 and 45.

Response:

The United States agrees that state authorities have responsibility for making determinations concerning both the need for new oil transmission pipelines in Minnesota and the

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[10] *See, In the Matters of the Applications of Enbridge Energy, Limited Partnership for a Certificate of Need and Routing Permit for the Line 3 Replacement Project*, Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137

[11] Based on this same incorrect premise, one commenter characterizes the proposed Consent Decree as infringing on the rights of persons and entities who may participate in contested case proceedings before the MPUC to contest either the need for a replacement pipeline or the proposed route of the pipeline. Comment 5 at 18.

location of the authorized route for any new pipelines. Such state authority, as well as the authority of any federal agency involved with such determinations, is preserved by this Consent Decree.[12] The United States also recognizes that completion of an EIS is an element of the state's ongoing evaluation of Enbridge's currently pending proposal for replacement of Line 3. However, as discussed below, the United States does not agree that the proposed Consent Decree interferes in any way with the authority of the MPUC or any other federal, state or local regulatory authority to make determinations regarding replacement of Line 3; nor does the proposed Consent Decree impair the rights of any persons or entities to present to the MPUC, or any other applicable forum, any objections to Enbridge's Line 3 replacement proposal and to secure an adjudication of relevant issues by the MPUC or other regulatory entity.

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[12] At least one comment questioned the jurisdiction of MPUC over claims of Indian tribes that are based on usufructuary rights under federal treaties. Comment 6, attachment (Reply of Honor the Earth, Intervenor to: Applicant's Claim of Exclusive State Jurisdiction Over Federally-Guaranteed Ojibwe Usufructory Property, In Contravention of *MN. v. Mille Lacs* 526 U.S. 172 (1999)), at 5-6 (at *10-11). In that brief, Honor the Earth suggests that federal judicial injunctive remedies may be available to halt any Minnesota permitting process that impairs usufructuary rights under treaties. *Id.* For purposes of the pending motion to enter the proposed Consent Decree, it is unnecessary for United States District Court for the Western District of Michigan to address the scope of MPUC jurisdiction over issues relating to possible impacts of pipeline routing decisions on tribal usufructuary rights. The proposed Consent Decree does not make any determination or prejudgment regarding the nature of various permits and approvals that may be required under the proposed Consent Decree; nor does it make any assumptions regarding the identity of the authorities with jurisdiction to grant such approval. The proposed Consent Decree does not in any way limit the ability of Honor the Earth or any tribe to contest MPUC's jurisdiction over issues concerning tribal usufructuary rights – either before the MPUC or in a separate proceeding in federal court in Minnesota seeking to enjoin the MPUC proceeding. Rather, the Consent Decree appropriately leaves such matters subject to applicable law. The salient point, for purposes of evaluating the fairness, reasonableness and adequacy of the proposed settlement, is that it does not purport to circumvent any laws applicable to work required under the Consent Decree.

A few commenters observed that the opening sentence of Paragraph 22.a of the Consent Decree lodged with the Court broadly stated that Enbridge "shall replace" the U.S. portion of Line 3, and the commenters interpreted this language as mandating replacement of Line 3 in accordance with Enbridge's current proposed pipeline project even if the MPUC were to reject Enbridge's application for replacement of the line.[13] Such an interpretation is not consistent with the intent of the parties in negotiating the proposed settlement, and while the parties do not agree that these commenters' interpretation represents a sound reading of the proposed Consent Decree as a whole, as discussed above, the parties nevertheless agreed to revise Paragraph 22.a to avoid any perceived ambiguity based on the broad phrasing of the opening sentence of Paragraph 22.a in the Consent Decree originally lodged with the Court. As revised, Paragraph 22.a would read:

> 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"), *provided that Enbridge receives all necessary approvals to do so*. Enbridge shall seek all approvals necessary for the replacement of original 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. *If Enbridge receives approvals necessary for replacement of Original U.S. 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.

Emphasis added.[14]

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[13] *See, e.g.*, Comments 5 at 3, and 23 at 2-3.

[14] The proposed revision is intended to clarify the intent of the previously lodged settlement and does not represent a material modification of the proposed settlement. When the provisions of the Consent Decree originally lodged with the Court are read together, we do not believe that the Consent Decree could reasonably be construed as an order directing Enbridge to proceed with replacement of Line 3 in derogation of the authority of MPUC or any other applicable federal, state or local permitting or approval process. Far from authorizing Enbridge to bypass applicable regulatory requirements relating to pipeline replacement, the Decree lodged with the Court explicitly required Enbridge to "seek all approvals necessary for the replacement . . . ," and to provide complete, adequate and timely information to support such approvals. ECF

Without explicitly referring to MPUC authority, some commenters suggested that the Consent Decree should not provide for replacement of Line 3 where there has been no determination of need for a replacement pipeline. *See, e.g.*, Exh. 1, Comments 31 line 67 at 3 (at *4), line 86 at 4 (at *5), line 146 at 6 (at *7), and line 249 at 9 (at *10). The United States recognizes that a Certificate of Need is an element of the state regulatory process for approving a new pipeline, and that the MPUC has not yet made determinations necessary for issuance of a Certificate of Need. However, as noted above, any obligation to replace Line 3 under the proposed Consent Decree is contingent upon Enbridge securing all necessary federal, state and

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#3, ¶ 22.a. The Decree lodged with the Court also explicitly provided that Enbridge is required to complete the replacement only "after receiving the required regulatory approvals and permits for new Line 3." *Id.*

Paragraph 142 of the Consent Decree, as originally lodged with the Court (and currently), further underscores that the proposed Decree does not contemplate or authorize any bypassing of applicable permitting or approval requirements. That provision states:

> [w]here any compliance obligation under the Consent Decree requires a federal, state or local permit or approval, Enbridge is responsible for submitting timely and complete applications for such permits or approvals.

ECF #3, ¶ 142. In a similar vein, Paragraph 192 of the Consent Decree explicitly recognizes that the Consent Decree does not constitute a permit under any federal, state or local laws or regulations. ECF #3, ¶ 192. That paragraph goes on to provide – without any qualification or exemption for Line 3 replacement work – that Enbridge remains responsible for achieving and maintaining compliance with all applicable federal, state and local laws regulations, orders and permits. *Id.* At least one commenter proposed specific modifications to language in certain general provisions of the Consent Decree, including Paragraph 191 (addressing the potential *res judicata* and collateral estoppel effect of the settlement), Paragraph 192 (making clear that the proposed Consent Decree does not alter or effect permitting requirements) and Paragraph 193 (regarding the impact of the Consent Decree on rights of or against third parties). *See, e.g.* Exh. 1, comment 5 at 27. The United States does not agree that the proposed changes are material, necessary, or appropriate.

local approvals -- including a Certificate of Need by MPUC for pipelines in Minnesota. Thus, the proposed Consent Decree does not mandate building a pipeline in Minnesota that has not received a determination of need.

Comments:

Finally, a few commenters expressed concern that provisions of the Consent Decree calling for expeditious replacement of Line 3 encourages a truncated and cursory evaluation of issues in the pending proceedings before the MPUC. *See, e,g.*, Exh. 1, Comments 2 at 1, 13, 28 and 32 at 1-2.

Response:

The concern reflected in these comments is misplaced. Paragraph 22.a of the proposed Consent Decree, as revised, provides:

> *If Enbridge receives approvals* necessary for replacement of 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.

Proposed Consent Decree, at p. 25 (emphasis added). Thus, the proposed Decree contemplates that *Enbridge* will proceed as expeditiously as practicable to complete replacement of Line 3 after all necessary approvals have been obtained. The proposed Consent Decree also includes a provision that requires *Enbridge* to act expeditiously in *seeking* regulatory approvals, both in terms of applying for approvals and in terms of providing information necessary to support regulatory decisions – including any requests by regulatory authorities for supplemental information. *Id.*

All of the provisions in Paragraph 25 that require action "as expeditiously as practicable" are explicitly directed to *Enbridge* – not to the MPUC or any other regulatory authority. Such provisions are intended to assure that Enbridge takes steps to prevent unnecessary delays in any

applicable independent regulatory proceedings relating to Line 3 replacement as well as to assure that, if and when necessary regulatory approvals are granted, Enbridge promptly completes the Line 3 replacement, to assure that Enbridge does not contribute to unnecessary delays in realizing any long-term risk reduction benefits associated with replacement of Line 3. Nothing in the proposed Decree directs an expedited regulatory process by the MPUC, which is not a party to the proposed settlement.

Comments:

Although some commenters explicitly recognized that the Consent Decree requirements for expeditious action are directed to Enbridge and not the MPUC, they nevertheless expressed concern about the possibility that Enbridge would seek to expedite the MPUC proceedings relating to the Line 3 replacement based on a misreading of the Consent Decree language. *See, e.g.*, Exh. 1, Comments 13, 23 at 2 and 28. As a result, they urged the United States to revise the language of the Consent Decree to clarify that the Consent Decree does not require expedited decisionmaking by the MPUC. *Id.*, and Exh. 1, Comments 20 at 2 and 32 at 2.

Response:

The United States believes that the proposed Consent Decree as written does not in any way limit or affect the timetable for the MPUC to make decisions.[15] Although we recognize that

[15] A comment on the proposed Consent Decree submitted by MPUC suggests that the MPUC shares this understanding. *See*, Comment 35. In its comment, the MPUC noted that the proposed Consent Decree imposes certain additional requirements if existing Line 3 is not replaced by December 31, 2017. The MPUC's comment advised the United States that it could not estimate when MPUC proceedings relating to replacement of Line 3 will be completed, and made clear that the MPUC cannot say at this point whether Enbridge's pending Line 3 replacement proposal would be approved, modified or rejected. Thus, it seems clear that the MPUC does not regard the proposed Consent Decree as limiting or affecting its regulatory process or decisions.

provisions in the Consent Decree can be drafted in numerous ways that would be acceptable, we do not believe that there is anything inappropriate, improper or inadequate about the language of Paragraph 25.

3. Comments Substantively Opposing Replacement of Line 3

Apart from comments relating to the relationship between the proposed Consent Decree and State regulatory approval processes applicable to replacement of Line 3, a number of commenters have expressed opposition to replacement of Line 3 on various substantive grounds. These comments generally fall into a few distinct categories described below.

a. Comments Relating to Route of Replacement Line 3

Comments:

A number of commenters objected to various aspects of Enbridge's Line 3 replacement proposal that is currently pending before the MPUC. In particular, commenters opposed the route proposed by Enbridge for new Line 3, characterizing it as "controversial" because it would require a right of way passing through pristine areas of Minnesota lake country and the headwaters of the Mississippi River. Exh. 1, Comment 5 at 4; see also, e.g., Exh. 1, Comments 2, 6 at 2-3, 13, 14, 20 at 1-2, 25, and 28; Exh. 1, Attach. A, Comments 55, 56, 58, and 69. Several commenters expressed concerns about the potential impact of the Line 3 replacement project on headwaters of the Mississippi, its surrounding ecosystem, and Minnesota lake country. See, e.g., Exh. 1, Comment 37; Exh. 1, Attach. A, Comments 54, 55, 56, 58, 62, 63, 65, 68, 76, 77 and 82. Some commenters who oppose the Line 3 replacement route proposed by Enbridge do not object to replacement of Line 3, if a different route is selected, see, e.g., Exh. 1, Attach. A, Comments 55, 56 and 76; Exh. 1, Attach. B, Comment 725; or if the replacement line is confined to the existing line 3

right-of-way. See, e.g., Exh. 1, Comments 6 at 3-4, 14, 25; Exh. 1, Attach. A, Comments 57 and 74.[16]

Response:

Comments expressing views about the appropriateness or inappropriateness of particular routes for replacement of Line 3 raise issues that are outside the scope of this settlement and do not establish that the proposed Consent Decree is inappropriate, improper or inadequate. The proposed Consent Decree is silent on the route of any replacement Line 3 and does not endorse any particular route, including the route described in Enbridge's pending application before the MPUC. Thus, commenters who construe the Consent Decree as adopting the proposed route described in pending proceedings before the MPUC are incorrect.[17] Rather, the proposed Decree appropriately leaves such decisions to regulatory authorities with jurisdiction to address such

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[16] However, as discussed below at p. 43-44, other commenters oppose replacement of Line 3, regardless of the route for any proposed replacement pipeline.

[17] At least one commenter recognized that the proposed Consent Decree does not refer to Enbridge's specific proposal for replacement of Line 3, but expressed concerns that the proposed Consent Decree might be understood as an endorsement of the details of Enbridge's pending proposal, based on the fact that Enbridge's proposal and the Consent Decree both refer to "replacement" of Line 3. S*ee* Comment 23, at 2. As explained above, the United States does not agree that the Consent Decree may reasonably be construed as adopting or endorsing specific details of Enbridge's current Line 3 replacement project proposal.

The fact that the proposed Consent Decree does not specify requirements relating to the route, size, or construction details relating to the replacement of Line 3 replacement clearly shows that specific elements of Enbridge's current Line 3 replacement project are not mandated by the proposed Consent Decree. Rather, such matters will be evaluated on the merits by applicable regulatory authorities, independently of the Consent Decree, and the relevant regulatory bodies will make determinations they deem appropriate. The proposed Consent Decree has sufficient flexibility to require Enbridge to complete implementation of any Line 3 replacement project that relevant regulatory authorities may determine is appropriate – whether that involves the route currently proposed by Enbridge, replacement of Line 3 within the existing Line 3 right of way, or some other alternative. The United States does not believe that there is a need to revise existing language of Paragraph 22 of the proposed Consent Decree or that this provision as currently drafted is in any way inappropriate, improper or inadequate.

matters in regulatory proceedings that are separate from, and independent of, this Consent Decree.

The United States agrees with commenters who recognized that decisions concerning siting of liquid pipelines generally rest with independent regulatory authorities, including authorities not parties to the proposed settlement, and that such decisions should be based on the project's own merits. *See, e.g.*, Exh. 1, Comment 31 at 1 (at *2). The proposed Consent Decree does not interfere with MPUC's authority over pipeline siting decisions within Minnesota -- nor does it in any way limit commenters' ability to present any concerns regarding pipeline proposals, including siting concerns, to the MPUC. Should the MPUC decide to reject the Line 3 replacement route proposed by Enbridge and instead approve replacement of Line 3 within the existing Line 3 right-of-way or some other route, such an outcome would be fully consistent with the Consent Decree. However, while replacing Line 3 within the existing Line 3 corridor would satisfy the objectives and requirements of the proposed Consent Decree, limiting Line 3 replacement to that single alternative in the Consent Decree, as suggested by certain commenters, would prove to be problematic if applicable regulatory authorities ultimately were to approve a different route for replacement Line 3.

This Court's role in reviewing and approving the proposed Consent Decree neither requires nor extends to supervising independent regulatory proceedings or decisions governing pipeline replacement projects. There is no basis to conclude that the Consent Decree is inappropriate, improper or inadequate because it appropriately leaves siting decisions to applicable regulatory authorities in independent regulatory proceedings.

b. Comments That Oppose Replacing Line 3 With Larger Pipeline

Comments:

Some commenters expressed concerns that Enbridge proposes to replace the existing 34-inch diameter Line 3 with a larger, 36-inch diameter pipe that will have the capacity to transport a significantly greater volume of oil than current Line 3. *See, e.g.*, Exh. 1, Comments 1, 23 at 2, 31 at 1 (at *2), 31 line 304 at 11 (at *12), and 32 at 1. Some comments, including one Tribal comment, incorrectly construe the proposed Consent Decree as mandating this size and capacity for any Line 3 replacement. *See, e.g.*, Exh. 1, Comments 8 at 16 and 23; 31; and 49 line 231 at 9 (at *10); Exh. 1, Attach. B, Comment 198.

Response:

The proposed Consent Decree does not include provisions mandating any particular size, volume, flow rate or capacity for replacement Line 3, Proposed Consent Decree, pp. 25-28, because decisions regarding such matters are outside the scope of the proposed Consent Decree. As noted above, the MPUC requires a Certificate of Need for any Line 3 replacement project. If the MPUC were to determine that there is no demonstrated need for a pipeline of the size and capacity proposed by Enbridge, there is nothing in the proposed Consent Decree that would limit MPUC's ability to approve a smaller pipeline – or no line at all if it determines that there is no need for any pipeline replacement. Thus, the size and capacity of any replacement Line 3 will ultimately be subject to approval by MPUC and other federal state and local regulators rather than being mandated by the proposed Consent Decree. Since the proposed Consent Decree does not mandate any increase in capacity with respect to replacement Line 3, commenters' concerns

about the size and capacity of Enbridge's Line 3 replacement proposal do not show that the proposed Consent Decree is inappropriate, improper or inadequate.

c. Comments That Oppose Replacement Of Line 3 On Grounds That It Will Transport Tar Sands And/Or Contribute to Climate Change

Comments:

Several commenters have expressed concerns that Enbridge will use replacement Line 3 to transport tar sands oil, sometimes referred to as "dilbit" or "diluted bitumen." *See, e.g.*, Exh. 1, Comments 2, 13, 17, 25, 28, 31 at 1 (at *2), 31 line 153 at 6 (at *7), 32 at 2, and 37; Exh. 1, Attach. A, Comments 51, 53, 66, 69, and 71. Some commenters expressed concerns that tar sands oil are difficult to clean up if spilled, *see, e.g.*, Exh. 1, Comments 13, 17, and 25, and should be kept out of sensitive environments such as Minnesota's lake country. *See, e.g.* Exh. 1, Comment 32 at 2. Still other commenters expressed concern about the impact of tar sands extraction production and use of tar sands – and fossil fuels generally – on greenhouse gas emissions and climate change. *See, e.g.*, Exh. 1, Comments 13; 31 at 1 (at *2); 31 lines 25 at 2 (at *3), 86 at 4 (at *5), 139 at 5 (at *6), 153 at 6 (at *7), 197 at 7 (at *8), 217 at 8 (at *9), 219 at 8 (at *9), 230 at 8 (at *9), and 304 at 11 (at *12); Exh. 1, Attach. A, Comments 71, 82, and 83.[18] At least one commenter observed that dilbit may contribute to deterioration of pipe. See, Exh. 1, Comment 4, Exhibit 5A (Chippewa Ottawa Resource Authority Resolution 01-23-14).

[18] Additional commenters expressed a general opposition to any new pipelines, *see*, *e.g.*, Exh. 1, Comments 31 lines 81 at 4 (at *5), 112 at 5 (at *6), 121 at 5 (at *6), 197 at 7 (at *8), 202 at 7 (at *8), 219 at 8 (at *9); Exh. 1, Atttach. A, Comments 53, 61; or to exploitation of fossil fuels, *see*, *e.g.*, Exh. 1, Comments 31 at line 22 at 2 (at *3), 58 at 3 (at *4), 67 at 3 (at *4), 81 at 4 (at *5), 121 at 5 (at *6), 202 at 7 (at *8), 219 at 8 (at *9), 254 at 9 (at *10), 274 at 10 (at *11), 282 at 10 (at *11), and 302 at 11 (at *12), without explicitly referencing climate change or greenhouse gases.

Response:

As an initial matter, it is incorrect to suggest that the proposed Consent Decree promotes or requires the development of a 'tar sands pipeline.' In fact, the proposed Consent Decree does not address the nature of the product transported in any replacement Line 3, and it neither endorses nor prohibits transport of particular products that are otherwise lawful to transport. Enbridge currently transports dilbit product in various pipelines, including some Lakehead System pipelines, and the United States is aware of no legal impediment that would preclude Enbridge from transporting dilbit on existing Line 3. While the United States recognizes that tar sands present unique environmental risks and challenges, general concerns relating to the development, use and transport of tar sands oil are beyond the scope of this CWA action and this Consent Decree. The proposed Consent Decree appropriately focuses on reducing risks that could contribute to *any* discharges of oil in harmful quantities – including discharges of tar sands oil. United States believes that replacement of Line 3 will result in less risk than continued operation of existing Line 3 over an indefinite period.

The instant case is an action under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, arising from unlawful discharges of oil into the waters of the United States and adjoining shorelines following failures of pipelines owned and operated by Defendants. The injunctive relief described in the proposed Consent Decree focuses on preventing or minimizing future violations of the CWA by (i) requiring timely implementation of various measures that will help prevent future pipeline failures, (ii) ensuring timely and effective leak detection measures that will permit timely recognition of any future pipeline failures and help minimize future pipeline discharges that could impact waters of the United States, and (iii) promoting more effective emergency response capabilities in order to minimize the harm from any future discharges that should occur.

Whatever the merits of commenters' policy arguments in favor of decreased reliance on fossil fuels and transition to cleaner sources of energy in order to reduce greenhouse gas emissions and limit climate change, broad implementation of such policies is beyond the scope of this enforcement case.

It is not the objective of this civil action or the proposed Consent Decree to regulate otherwise lawful transport of dilbit via pipeline, where such transport does not result in discharges in violation of the CWA. Although the Section 311(b) of CWA 33 U.S.C. § 1321, prohibits discharges of oil in quantities that may be harmful, the CWA's prohibition on discharges of oil quantities that may be harmful applies equally to discharges of tar sands oil and discharges oil from any other source. By establishing requirements to prevent future pipeline ruptures or leaks that may result in unlawful discharges of oil – including tar sands oil -- to waters of the United States and adjoining shorelines, the proposed Consent Decree furthers the objectives of the CWA.[19] Commenters' general concerns about tar sands, fossil fuels and

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[19] The proposed Consent Decree focused on reducing the risk of pipeline failures that might result in unlawful discharges in violation of the CWA-including discharges of dilbit. A National Academy of Sciences study concluded that dilbit did not physically affect a pipeline that transports it any differently than other crude oil products. See "Effects of Diluted Bitumen on Crude Oil Transmission Pipelines", Transportation Research Board Special Report 311, National Research Council of the National Academy of Sciences, at p. 96. https://www.nap.edu/catalog/18381/trb-special-report-311-effects-of-diluted-bitumen-on-crude-oil-transmission-pipelines. Nonetheless, the proposed Consent Decree requires Enbridge to conduct periodic inspections of each of its Lakehead System pipelines using ILI tools that are designed to identify areas where the pipeline exhibits signs of metal loss, areas within the pipeline where cracks are present, and areas in the pipeline where there are dents or other geometric anomalies. *See,* Proposed Consent Decree, pp. 31-32, ¶¶ 27-28.a. Following each ILI to detect crack or corrosion features, Enbridge must calculate the Remaining Life of features that do not meet dig selection criteria established in the Consent Decree. Proposed Consent Decree, pp. 73, ¶ 60. For purposes of the Consent Decree, the Remaining Life of a feature refers to the period of time required for the feature to grow to the point where the predicted burst pressure of the feature is less than or equal to the established Maximum Operating Pressure applicable to the location where the feature is located, i*d.*, and the inputs for Remaining Life

climate change do not establish that the settlement is an improper, inappropriate or inadequate resolution of the CWA claims asserted in this case.

d. Comments That Favor Shutdown of Existing Line 3 Without Regard to Completion of a Replacement Line 3

Comments:

Some commenters propose that the Consent Decree should require shutdown of existing Line 3 independently of any provision for construction of a replacement pipeline. *See, e.g.*, Exh. 1, Comments 3, 8 at 23, 24 at 3, and 31 at 1 (at *2) and line 51 at 3 (*4); and Exh. 1, Attach. B, Comment 132.

Response:

While shutdown of existing Line 3 would resolve concerns regarding any threat of future unlawful discharges from that pipeline, the United States does not believe that such an approach is automatically necessary to address concerns relating to conditions that may present a threat of future discharges. As previously indicated, a basic objective of the injunctive requirements of the proposed Consent Decree is to protect waters of the United States by preventing pipeline leaks and ruptures that may result in discharges of oil in quantities that may be harmful in violation of the CWA. Although the United States regards replacement of existing Line 3 as an effective way of reducing or eliminating risks associated with certain aspects and features of that

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calculations include inputs that reflect feature growth rates. See Proposed Consent Decree, p. 74, ¶¶ 62-63 (crack features) and ¶ 64 (corrosion features). Under the proposed Consent Decree, the maximum interval between successive ILIs to identify crack features or corrosion features on any given pipeline may not exceed one-half of the shortest Remaining Life of any unrepaired crack or corrosion feature in that pipeline. Thus, to the extent that any products accelerate the growth of metal loss or corrosion features in the pipeline, that would result in increased ILI frequency on the pipeline, so that features that meet dig selection criteria continue to be identified and mitigated or repaired in timely fashion.

pipeline, the United States has not concluded that replacement of Line 3 at this time represents the *only* acceptable alternative for preventing future CWA violations. Thus, the proposed Consent Decree identified a number of requirements intended to prevent discharges in violation of the CWA. *See*, Proposed Consent Decree, ¶ 22.c and d.[20] Where viable compliance alternatives exist, the United States would not typically seek an order mandating shut down of a facility, except in cases where a facility owner or operator elects to commit to shutting down a facility rather than incurring costs of measures required to assure compliance with applicable requirements.

e. Comments Proposing That The Consent Decree Should Prohibit Enbridge From Re-Starting Original Line 3 After That Line Is Decommissioned

Comments:

Although the proposed Consent Decree includes a provision permanently enjoining Enbridge from operating or allowing anyone else to transport oil, gas, diluent or any hazardous substance in former Line 6B – another pipeline that Enbridge has already replaced (*see*, Proposed Consent Decree, ¶ 21), several commenters noted that the proposed Decree originally lodged with the Court did not establish an identical prohibition with respect to existing Line 3 following completion of any replacement line, as some commenters correctly observed. *See, e.g.*, Exh. 1, Comments 2 at 1, 3, 9, 14 and 24.

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[20] Additionally, the proposed Consent Decree originally lodged with the Court included additional measures that would have been required if Enbridge had opted to restart existing Line 3 following completion of a replacement Line 3. *See*, ECF # 3, ¶ 22.g. Although those measures are no longer part of the proposed settlement, since the proposed Decree no longer reserves any option for Enbridge to restart existing Line 3 after replacement of the line, such requirements are an example of measures that could support continued safe operation of Line 3 as an alternative to shutting down the line.

Rather, the proposed Decree originally lodged with the Court provided for Enbridge to take existing Line 3 out of service promptly after completing a replacement line, ECF #3, ¶ 22.a, and thereafter to complete decommissioning of the existing Line 3, ¶ 22.b. The proposed Decree originally lodged with the Court prohibited further operation of old Line 3 for purposes of transporting oil, gas, diluent or hazardous substances is prohibited unless Enbridge complied with specified requirements set forth in Paragraph 22.e – 22.i of the Decree. Although no one identified any deficiency with respect to the conditions described in Paragraph 22.e - i or explained why those conditions would not be adequate to ensure that any resumption of operations on old Line 3 would be safe, some commenters nevertheless favored a flat prohibition of any resumption of operations on old Line 3. *See, e.g.*, Exh. 1, Comments 14 (old Line 3 should be totally removed) and 24 at 3.[21]

Response:

Although the United States believes that the provisions in Paragraph 22.f to 22.i of the Consent Decree as lodged with the Court were sufficient to assure that any integrity threats on current Line 3 would be adequately addressed prior to any restart of that line, the parties nevertheless agreed to revise the provisions of Paragraph 22 to eliminate the option for a restart of existing Line 3 following replacement of the line, as discussed above in this Section. The revised Consent Decree thus resolves concerns of the parties who objected to any restart of old Line 3.

[21] One commenter urged that Enbridge should not be allowed to restart Line 3 without considering information from pipeline excavations conducted by the company between 2010 and 2014. Comment 3.

E. COMMENTS RELATING TO ENBRIDGE LINE 5

1. Comments That Favor Shutdown of Line 5

Comments:

Various commenters, including Indian tribes based in Michigan, either expressed concerns about the condition of Enbridge's existing Line 5, particularly the portion of Line 5 that crosses the Straits of Mackinac, or characterized Line 5 as a threat to water, including drinking water supplies for communities that obtain their water from Lake Huron, and to fisheries or to usufructuary rights reserved by several tribes under the 1836 Treaty of Washington, 7 Stat. 491. *See, e.g.*, Exh. 1, Comments 1, 4 at 1-2 (at *2-3) and Exhibit 3 thereto (Declaration of Mark Ebener) (at *25), 37, 29, 30 at *6, 34 at 3-4; Exh. 1, Attach. B, Comments 94, 100, 104, and 672. One commenter asserted that Line 5 presents an "imminent likelihood of a catastrophic failure," Exh. 1, Comment 4 at 1-2 (at *2-3) and Exhibit 9 thereto (at *87),[22] and at least one commenter expressed concern about "inevitable discharges of oil" from Line 5. Exh. 1, Comment 4 at 4 (at *5). Some commenters noted the presence of strong and shifting currents within the Straits, *see, e.g.*, Exh. 1, Comment 4, Exhibit 5C (at *74) (Chippewa Ottawa Resource Authority Resolution

[22] This comment rests on a statement that characterizes "imminent risk" as a function of the likelihood of failure and the potential magnitude of harm resulting from a failure. Exh. 1, Comment 4, Exhibit 9 at 1 (at *87). However, neither the comment nor the Exhibit providing any information or analysis regarding the likelihood or timing of any anticipated failure of Line 5. Instead, the Exhibit observes that the likelihood of failure is not "zero," based on the fact that there are some documented anomalies on Line 5. *Id.* Thus, the characterization of "imminent risk", which the commenter transformed into an allegation of "imminent likelihood of failure," is effectively driven entirely by consideration of an evaluation of harm associated with a worst case pipeline failure in the Straits.

No. 01-28-16 A, p.1), and others expressed concern that it would be difficult or impossible to clean up a pipeline failure in the Straits in wintertime, due to freezing conditions. *See, e.g.*, Exh. 1, Comment 4, Exhibit 8 at 2 (at *83-84) (Little Traverse Bay Band of Odawa Indians Resolution # 030515-01) and Exhibit 9 at 1-2 (at *86). Several commenters, including Michigan Tribes, explicitly favor shutting down Line 5, or at least the portion of Line 5 that crosses the Straits of Mackinac. *See, e.g.*, Exh. 1, Comments 16 at 1-2, 30 at *6, and 34 at 3-4; Exh. 1, Attach. B at Comments 92, 93, 94, 97, 107, 109, 129 and 137. *See also*, Exh. 1, Comment 19 (line should be phased out as a Supplemental Environmental Project).[23] Finally, at least one commenter asserted that there are "substantial questions" whether Enbridge is in compliance with terms of a 1953 easement that the State of Michigan granted to Enbridge's corporate predecessor, Lakehead Pipeline Company, Inc., as part of the authorization to construct Line 5 across Great Lakes bottomlands owned by the State, although the commenter recognized that the proposed Consent Decree may not be the place to resolve claims arising from alleged non-compliance with the State easement. Exh. 1, Comment 7 at 1-2. *See also*, Exh. 1, Comment 4, Exhibit 5C (Chippewa Ottawa Resource Authority Resolution 01-28-16 A) at 1 (at *74) (maintaining that Enbridge violated conditions of State easement relating to spacing of span support structures in the Straits), and Exh. 1, Comment 5 at 28 (questioning whether Line 5 is operating in compliance with applicable "permit requirements and standards" and whether failure to comply with such standards might provide a basis for shutdown of Line 5).

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[23] Some commenters went further, favoring shut down of Enbridge pipelines generally or broad prohibition against further Enbridge operations in the United States. *See, e.g.* Exh. 1, Atttach. B, Comments 129 and 384 (supports cancellation of all licenses and permits).

Response:

The United States does not agree that the Consent Decree needs to mandate a shutdown of Enbridge's existing Line 5 in order to be reasonable, appropriate and adequate. The purpose of the injunctive requirements in the proposed Consent Decree is to assure compliance with the CWA, which prohibits discharges of oil in quantities that may be harmful. The proposed Consent Decree appropriately focuses on implementation of measures intended to prevent unlawful discharges of oil from Lakehead System pipelines – including Line 5 – and to improve emergency preparedness and response in order to reduce the adverse impact of any discharges that may occur. To that end, the proposed Consent Decree requires Enbridge to conduct periodic in-line inspections ("ILIs") of Line 5 using ILI tools that are most appropriate for detecting and determining the critical dimensions of crack features, corrosion features and dents or other geometric anomalies that may be present on the Line. Consent Decree, ¶ 28. The proposed Consent Decree also establishes extensive dig selection criteria to assure the timely excavation and mitigation or repair of features on Line 5 that may present a threat of leak or rupture. Consent Decree, Table 1 – Table 5.

Among other things, the proposed Consent Decree requires Enbridge to determine the Predicted Burst Pressure of crack and corrosion features identified during inspections. Consent Decree, ¶¶ 42-44. The dig selection criteria in the proposed Consent Decree assure that any crack or corrosion feature that Enbridge is not required to repair will have a Predicted Burst Pressure that is well above the Established Maximum Operating Pressure applicable to the location where such feature is located. Consent Decree, Table 1, pp. 56-57, Table 2, p. 62, Table 3, p. 65, Table 5, p. 71.

In addition, the proposed Consent Decree requires Enbridge to determine the Remaining Life of crack and corrosion features taking into account the anticipated growth of features over time. Consent Decree, ¶ 60. The dig selection criteria in the proposed Consent Decree require Enbridge to excavate crack and corrosion features well before the end of the feature's Remaining Life.[24] Consent Decree, Table 1, at p. 57, Table 2, at p. 63, Table 3 at p. 66, Table 5 at p. 72.

Further, in the case of specified categories of features that may present greater threats or uncertainties with respect to pipeline integrity, the proposed Consent Decree requires prompt imposition of temporary pressure restrictions to maintain an appropriate margin of safety pending repair or mitigation of such features. See Consent Decree, Table 1, at p. 56ff, ¶¶ 52, 54, 57 and 58.

The comments favoring shutdown of Line 5 do not critique the inspection, dig selection criteria and pressure restriction provisions in the proposed Consent Decree or explain why such requirements are inadequate to provide for safe operation of Line 5. Rather, the comments appear to reflect a view that, due to the ecological sensitivity of the Straits of Mackinac, **no** pipeline should be allowed in that area. Such comments effectively urge revocation of a pipeline routing decision approved by State regulatory authorities more than 60 years ago. As discussed above in connection with the response to comments on Line 3, pipeline siting decisions are beyond the scope of this Consent Decree.

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[24] Conversely, the proposed Consent Decree provides that the interval between successive ILI inspections for crack and corrosion features on Line 5 may not exceed one-half of shortest Remaining Life of any unrepaired crack or corrosion feature in the Line. Consent Decree ¶¶ 65 and 66. Thus, the proposed Consent Decree assures the ILI are conducted at a frequency adequate to monitor changes in unrepaired features and trigger additional excavation and repair or mitigation of any features that have grown to the point that they meet the established dig selection criteria.

To the extent that commenters believe there are grounds for the State of Michigan to terminate the 1953 easement that provides for the Line 5 crossing of the Straits of Mackinac due to alleged violations of easement terms and conditions by Enbridge or otherwise, such arguments should be presented to and resolved by the State of Michigan. Although the proposed Consent Decree does not require shutdown of Line 5, for reasons discussed above in Section B of this Response to Comments at pp. 19-20, neither does the proposed Consent Decree mandate continued operation of Line 5 by Enbridge, and the proposed Decree certainly does not supersede Michigan's authority to enforce the terms of the 1953 easement, including any provisions relating to termination of the easement.

Finally, the proposed Consent Decree is not inappropriate, improper or inadequate because it does not include a Supplemental Environmental Project ("SEP") that provides for shutdown of Line 5, as proposed by one commenter. While a settlement may in appropriate circumstances provide for some mitigation of applicable civil penalties where defendants agree to perform a SEP that satisfies requirements in the 2015 Update to the 1988 EPA Supplemental Environmental Projects Policy ("SEP Policy"),[25] there is no legal requirement to include a SEP as part of a settlement. A proposed settlement cannot be deemed inappropriate, improper or inadequate based on the failure to include a discretionary SEP provision that provides for implementation of one or more projects that go beyond any legal requirement.

[25] *See*, https://www.epa.gov/enforcement/2015-update-1998-us-epa-supplemental-environmental-projects-policy. Under the SEP Policy, SEPs are limited to projects that are not otherwise required by law. *Id.*, at 1 and 6.

2. Comments Relating to Line 5 Span Management Requirements in Proposed Consent Decree

a. Comments Relating to the Frequency or Timing of Under Water Visual Inspections of the Segment of Line 5 that Crosses the Straits of Mackinac

Comment:

A few commenters, including one Tribal commenter, advocated establishing a shorter inspection interval for visual inspections of submerged portions of Line 5 within the Straits of Mackinac. *See, e.g.*, Exh. 1, Comments 24 at 4 and 34 at 4. Paragraphs 68.c and 68.f of the proposed Consent Decree require periodic visual underwater inspections of this part of Line 5 at an interval not to exceed 24 months, but commenters urged the settlement to require annual inspections instead.

Response:

Although the United States would not object to an increased frequency of underwater inspections if Enbridge were willing to do so, the United States believes that the inspection schedule agreed to by the parties in the proposed Consent Decree is adequate for purposes of this settlement. The purpose of the visual inspections of Line 5 within the Straits of Mackinac is to monitor compliance with provisions of a span management program that is intended to assure that the integrity of this portion of Line 5 is not impaired by conditions such as currents or ice movement that might (1) remove cover over shallow portions of the pipeline that might be vulnerable to physical damage such as anchor strikes, (2) undermine uncovered portions of the pipeline resting on the bed of the Straits, potentially increasing the length of unsupported spans of the pipe, and subjecting the pipeline to increased stresses that could contribute to cracking in the pipelines, particularly in or around girth welds, or (3) result in excessive lateral movement of

the pipeline that could also contribute to increased stress in the metal and increased risk of crack development.

The United States believes that the two-year inspection interval required under the Consent Decree is adequate to achieve the purposes of the Consent Decree. In the first place, although Line 5 has been in the Straits of Mackinac for more than 60 years, subject to prevailing currents and icing conditions, available ILI data has not documented the presence of any circumferential cracks in the portion of the pipeline that crosses the Straits – even though, as commenters have observed, *see, e.g.*, Exh. 1, Comment 24 at 4-5, past biennial inspections have on some occasions identified unsupported pipeline spans that exceeded a 75 feet specification established in a 1953 easement issued by the State of Michigan. Second, based on an analysis of ILI data collected over a 10 year period, Enbridge represented to the United States that the lateral movement of the pipeline in the Straits has been minimal, never exceeding 0.6 inch (six tenths of an inch) at any location. The United States believes that the biennial inspection period established in the Consent Decree is sufficient to allow Enbridge to install additional supports, if needed, before there is any likelihood of adverse impact on the pipeline.

Moreover, the United States believes that measures required under the proposed Consent Decree will reduce the likelihood that excessive unsupported pipeline spans will develop in the future. The provisions of the proposed Consent Decree relating to installation of anchor supports are somewhat broader than the requirements established in the 1953 easement, since the proposed Consent Decree contemplates installation of additional anchor supports at "uncovered" portions of the pipeline, rather than being limited to situations where the pipeline is "unsupported." The requirement to install anchor supports in areas where the pipeline is not "adequately covered or supported," Consent Decree, ¶ 68.d, involves a commitment by Enbridge

to install additional supports in locations that do not yet exceed specifications in the 1953 easement, but where available information indicates the potential for significant growth of unsupported spans on a relatively near term basis. By requiring Enbridge to proactively address such situations, the proposed Consent Decree should reduce instances in which biennial inspections find exceedances of span management requirements.

Comment:

One commenter suggested that Enbridge should be required to complete under water inspections of Line 5 within the Straits of Mackinac by July 1 of the year in which the inspection is performed, to allow sufficient time for Enbridge to complete any needed repairs during the same year the inspection is completed. Exh. 1, Comment 24, at 5. The same commenter advocated a 90 day period for Enbridge to complete any required repairs. *Id.* Alternately, the same commenter proposed that the Consent Decree establish a fixed deadline of December 31, 2017 for completing installation of required screw anchor supports. *Id.* at 4.

Response:

The United States believes that the schedule in the proposed Consent Decree for installation of screw anchor supports is appropriate. Although Paragraph 68.f of the proposed Consent Decree mandates that underwater inspections be completed by no later than July 31 of the year when the inspection is due, rather than the July 1 date advocated by the commenter, nothing in the proposed Consent Decree restricts Enbridge's ability to commence the required underwater inspections as early in the spring as conditions allow. Under Paragraph 68.d of the proposed Consent Decree, Enbridge is required to undertake repairs to address areas where the pipeline is not adequately covered or supported within 60 days after the inspection is completed,

i.e., by no later than October 1 of the year when the inspection is completed. Thus, the proposed Consent Decree contemplates that any necessary repairs will be completed during the same season in which the visual underwater inspection is performed, absent delays in securing any permits required for such work.[26]

Finally, although it might have been possible to negotiate a December 31, 2017 deadline for completing initial installation of certain screw anchor supports, as suggested by the commenter, the parties did not negotiate such an agreement, such an approach would have allowed both "unsupported" and "uncovered" spans of pipe in the Straits to remain unaddressed for 17 months after the initial underwater inspection performed in 2016, and the United States does not agree that such a delay would be appropriate.

3. Comments Relating to Requirements for Investigation of the Impact of Biota on Segment of Line 5 in Straits of Mackinac

Comment:

One commenter, while generally supporting the requirement in Paragraph 69 of the proposed Consent Decree to undertake an investigation to determine whether biota present on the portion of Line 5 in the Straits of Mackinac have an adverse impact on the integrity of the pipeline, went on to suggest clarification of and additions to the requirements set forth in this provision. Exh. 1, Comment 34 at 4-5. The commenter believes that the scope of the required biota investigation should include an examination of whether biota on the

[26] Under the proposed Consent Decree, delays in obtaining permits may, in appropriate circumstances, provide a basis for extending a schedule for completing required work under Section XII of the proposed Consent Decree ("Force Majeure"). *See* Consent Decree, ¶ 142.

pipeline introduce features that impair the integrity of the pipeline due to the weight of the biomass or the pressure caused by the current or ice movement around the biomass. *Id*. at 4.

Response:

This comment appears to reflect an incorrect understanding of the scope of the biomass study required under the proposed Consent Decree. Under the proposed Consent Decree, the scope of the required biota study includes all of the elements described in Paragraph 69.a – including the element described in the final sentence of Paragraph 69.a, which expressly confirms that the biota investigation will include an evaluation of the impact of biomass weight, and the impact of current and ice pressure on biomass present on the pipe.[27]

Comment:

The same commenter suggested that the Consent Decree should mandate immediate shutdown of the pipeline if it is found that biota "are affecting" the integrity of the pipeline. Exh. 1, Comment 34 at 4.

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[27] The same commenter proposed that the Consent Decree should also require an investigation of the effects of biota on the performance of an acoustic tool that Enbridge is required to run on a quarterly basis in the portion of Line 5 that crosses the Straits of Mackinac. Exh. 1, Comment 34 at 5. Although the parties conceivably could have negotiated to include such a requirement in the settlement, the United States does not believe that the absence of such a provision in any way renders the proposed Consent Decree inadequate, unreasonable or improper. There is no current regulatory requirement to evaluate the pipeline integrity using acoustic technology at all. In recognition of the environmental significance and sensitivity of the Straits of Mackinac, the United States negotiated to supplement the generally applicable spill prevention requirements of the proposed Consent Decree with a supplementary requirement for quarterly monitoring of the Line 5 crossing of the Straits of Mackinac using an acoustic leak detection tool. *See*, Consent Decree, ¶ 73. This technology has the potential to detect smaller leaks that might otherwise go undetected because they fall below leak detection thresholds of Enbridge's MBS leak detection system. The United States is not aware of any credible information that this technology is affected by presence of biota on the outside of the pipe.

Response:

The United States does not agree that any impact on pipeline integrity, however slight, provides a reasonable basis for requiring immediate shutdown of the pipeline. Rather, when a feature is discovered that may have some impact on the integrity of a pipeline, there may be a range of appropriate responses short of shutting down the pipeline, depending on the nature, severity, and location of the impact.[28] In the event that the biota investigation indicates that biota have impaired – or even threatened to impair – the pipeline, the proposed Consent Decree appropriately requires Enbridge to develop and submit a workplan to address the impairment, and that workplan will be subject to review and approval by EPA. Consent Decree, ¶ 69.c.[29] Nothing in the proposed Consent Decree rules out the possibility that shutdown of Line 5 might be an appropriate response to impairment of the pipeline resulting from the presence of biota, but the Consent Decree appropriately does not prejudge that issue.

Comment:

Finally, the same commenter expressed concern that it is unclear whether the Consent Decree could terminate before Enbridge implemented any plan to address

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[28] In this connection, it is worth noting that the most recent ILI investigations of Line 5 have not identified any metal loss, cracks or dents that meet criteria for repair or mitigation.

[29] Commenter believes that any plans to remove biota from the pipeline should be reviewed and approved by EPA and independent experts prior to implementation. To the extent that Enbridge submits a workplan under Paragraph 69.c that includes provisions for removing biota from the pipeline, any such plan will be subject to review and approval by EPA. In addition, the proposed Consent Decree also assures that the plan is subject to review and evaluation by an Independent Third Party established under the Consent Decree. *See*, Consent Decree, ¶¶ 132.b (Task 2) and 151. These requirements are consistent with the Commenter's suggestion that data, results and reports from investigations should be reviewed by independent experts. Exh. 1, Comment 34 at 5.

impairment of Line 5 in the Straits caused by the presence of biota on the pipelines. Exh. 1, Comment 34 at 5.

Response:

The United States believes that concern is misplaced. The proposed Consent Decree explicitly indicates that Enbridge must implement all requirements of the Consent Decree before it may seek termination of the Consent Decree. *See*, Consent Decree ¶¶ 203 and 203.d. To the extent that a workplan required under Paragraph 69 identifies requirements that will be implemented over a fixed time period, Enbridge must implement all such requirements before it could seek termination of the Consent Decree. To the extent that such a workplan proposes a corrective strategy that calls for measures to be implemented on a periodic basis for an indefinite period – *e.g.*, annual removal or reduction of biota present on the pipeline – Enbridge would have to implement the strategy in accordance with the approved frequency at least until such time as it has implemented all the "fixed" obligations under the Consent Decree (i.e., those that do not recur indefinitely) and is otherwise eligible to seek termination of the Consent Decree. Thus, the provisions of the proposed Consent Decree do not allow termination of the Consent Decree before Enbridge implements approved measures to address any impairments caused by the presence of biota on Line 5.

4. Other Comments Relating to the Line 5 Segment Crossing the Straits of Mackinac

Comment:

One commenter suggested that the Consent Decree should identify a minimum depth of required cover over portions of Line 5 that are in shallower portions of the Straits of Mackinac -- *i.e.*, at a depth of 65 feet or less. Exh. 1, Comment 24 at 4.

Response:

Paragraph 68.b of proposed Consent Decree requires that portions of Line 5 in such shallow parts of the Straits be continuously covered in a buried trench, and Paragraph 68.d requires Enbridge to undertake repairs in areas that are not adequately covered. Although the proposed Consent Decree does not specifically define the depth of adequate cover, the United States notes that the 1953 easement granted to Enbridge by the State of Michigan established explicit requirements regarding depth of cover over the pipeline in shallow portions of the Straits. In pertinent part, the easement provides:

> (1) All pipe line laid in water up to fifty (50) feet in depth shall be laid in a ditch with not less than fifteen (15) feet of cover. The cover shall taper off to zero (0) feet at an approximate depth of sixty-five feet. Should it be discovered that the bottom material is hard rock, the ditch may be of lesser depth, but still deep enough to protect the pipe lines against ice and anchor damage.

See, Straits of Mackinac Pipe Line Easement, Conservation Commission of the State of Michigan to Lakehead Pipe Line Company, Inc., at p. 4. The United States believes that such terms of the 1953 easement inform the meaning of "adequately covered" in the proposed Consent Decree. In any event, the 1953 easement establishes independent legal requirements with respect to pipeline cover depth, and the proposed Consent Decree is not inadequate because it does not re-state specifications already required under the 1953 easement.

Comment:

Finally, the same commenter also proposed including a provisions in the Consent Decree requiring Enbridge to employ a technology that uses an Automatic Identification System based vessel position data and analytical tool to help reduce risks of damage to the pipeline as a result of contact with vessel anchors. Exh. 1, Comment 24 at 4.

Response:

While the United States does not oppose use of such technology and would encourage Enbridge to consider application of such technology to the extent it would prevent pipeline damage that might result in discharges of oil in violation of the CWA, the United States does not have information to suggest that Enbridge's existing requirements for pipeline cover and existing navigational restrictions are inadequate to protect the pipeline against anchor strikes, and the United States does not believe that the failure to mandate use of such technology makes the proposed Consent Decree improper, inadequate or unreasonable.

F. RESPONSE TO COMMENTS REGARDING LINE 6A SPILL

Comment:

The Village of Romeoville commented that: the Enbridge spill in Romeoville, on Line 6A was not the result of a third party; that Enbridge should have known about the water service line installed near Line 6A; that Enbridge violated several PHMSA regulations in connection with maintaining Line 6A; and that those violations should have been specifically addressed in the consent decree. Exh. 1, Comment 22 at 2-4.

Response:

As discussed above in Section A of this Response to Comments, the NTSB found that the Romeoville spill was caused by a 6-inch water pipe which was improperly installed by a third party in 1977. However, the proposed Consent Decree does not assume or take the position that the 2010 Romeoville spill was solely the result of a third party actions. Section 311(b)(7) of the Clean Water Act, 33 U.S.C. §1321(b)(7), imposes strict liability on owners, operators and persons in charge of vessels, onshore facilities and offshore facilities that discharge oil or hazardous substances in quantities that may be harmful. Accordingly, the proposed Consent Decree assesses a $1million dollar penalty against Enbridge for the Romeoville spill, which the United States believes is appropriate under the facts of this case.

In the instant case, the United States has asserted claims on behalf of the United States Environmental Protection Agency under the Clean Water Act, as well as claims on behalf of the Coast Guard under the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*, for recovery of removal costs. The proposed Consent Decree seeks appropriate injunctive relief under the Clean Water Act to prevent future spills from Enbridge's Lakehead System pipelines into waters of the United States and to promote timely and effective emergency response to spills that may occur in the future. The proposed Consent Decree appropriately focuses on resolving the claims asserted in this

action. As documented elsewhere in the Response to Comments, PHMSA has separately addressed its concerns relating to compliance with PHMSA requirements through a separate administrative settlement and through issuance of an administrative order that required Enbridge to develop and implement a compliance program known as the "Lakehead Plan."

G. COMMENTS RELATING TO NATIONAL ENVIRONMENTAL POLICY ACT

Comments on Application of NEPA to Consent Decree

Comment:

Several public interest organizations submitted a comment (Exh. 1, Comment 5) suggesting that EPA must prepare an Environment Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) prior to including a requirement in the Consent Decree to replace the original Line 3. *Id.* At 2, 11-12 ans 21-23. Comment 5 incorrectly asserted that this provision is a "Major Federal Action" under NEPA that would significantly impact the human environment. Other commenters expressed concern about the potential environmental impact from the replacement project and stated that NEPA guidelines regarding the effect of climate change should be followed for major federal actions significantly affecting the environment. *See, e.g.*, Exh. 1, Comments 13 and 28.

Response:

NEPA does not require an EIS prior to entry of this Consent Decree for several reasons. First, federal judicial actions are excluded from the EIS requirement. 40 CFR 1508.18(a) (stating that "[Major Federal] Actions do not include bringing judicial or administrative civil or criminal enforcement actions"). Even without this exclusion for judicial actions, the requirement to replace Line 3 is not a "major federal action" for other reasons, including: 1) the Consent Decree does not specify the size, location, or other parameters of the replacement project; 2) State agencies retain their state law authority to make decisions concerning any replacement project; and 3) Enbridge must obtain any permits or other authorizations (including NEPA compliance) before implementing any replacement project proposal. To the extent an EIS is required, it would be performed during the approval or permitting process.

The commenters' reference to *U.S. v. S. Florida Water Mgmt. Dist.*, 28 F.3d 1563 (11th Cir. 1994) does not support their position. In that case, the district court concluded that an EIS was needed, but the Court of Appeals for the Eleventh Circuit reversed this decision. The appellate court concluded that negotiation of a settlement did not convert the proposed remedial measures into a major federal action and, though NEPA might apply to particular measures, such application was premature at the time of filing the settlement with the court. As the 11th Circuit explained in the referenced case

> NEPA does not require evaluation of hypothetical proposals, impacts and alternatives concerning a nonexistent federal proposal. This would seem to be an impossible task. If and when such activities are actually proposed, the responsible agency will have to comply with NEPA requirements, and the question of whether an EIS is required will then be addressed. Now, none of these types of federal action has yet been performed.

Id., at 1573.

The application of NEPA would be the same in this case. The proposed judicial settlement does not convert the injunctive measures into a major federal action and, though NEPA obligations might arise during implementation, conducting a NEPA analysis now would be premature and is not required.

Comments on Application of NEPA to Line 5 Span Management Requirements

Comments:

Two commenters raised concerns regarding whether NEPA will be followed during implementation of Consent Decree requirements for installation of anchors to support Line 5. Exh. 1, Comments 4 at 7 (at *8) and 5 at 11 and 24. The commenters also contend that the construction activities on Line 5 are not covered under the nationwide permit issued by the United States Army Corps of Engineers ("USACE"). Exh. 1, Comment 4 at 7 (at *8).

Response:

This concern is outside the scope of the settlement agreement and should not impede entry of the Consent Decree. As discussed in previous Sections of this Response to Comments, under the proposed Consent Decree, Enbridge is required to obtain all permits and approvals necessary for work required under the proposed settlement. In the case of any work that requires permits or approvals from USACE (or any other federal agency), issues concerning applicability of NEPA to the permitting or approval process, or the analysis of the potential environmental impacts of work required under the Consent Decree, including installation of pipeline anchor supports, will be addressed in the first instance by USACE (or other relevant federal agency, depending on the type of permit or approval required for particular work). Any such NEPA determinations may be subjected to judicial review in proceedings that are independent of this civil action. The proposed Consent Decree does not in any way purport to supersede applicable permitting or NEPA requirements; nor does the proposed Consent Decree prescribe how regulatory authorities such as USACE should interpret permitting requirements or apply NEPA requirements. Instead, the proposed settlement appropriately leaves such matters to be resolved in independent regulatory proceedings, in accordance with applicable permitting and NEPA requirements and subject to judicial review.

H. RESPONSE TO COMMENTS REGARDING INJUNCTIVE MEASURES FOR LEAK DETECTION, CONTROL ROOM OPERATIONS, AND DATA INTEGRATION

Comments:

Some commenters proposed changes to provisions in the Consent Decree relating to data integration. Such proposals included expanding the OneSource database to broaden the type and amount of data included within the database. Exh. 1, Comment 22 at 8. One commenter also proposed expanding access to the database to include state and federal agencies, as well as Enbridge's own ILI vendors. Exh. 1, Comment 24 at 6.

Response:

The OneSource database is a tool developed by Enbridge to improve its ability to identify interacting anomalies on the pipeline, such as a crack feature interacting with a corrosion feature, and to improve access to historic information relating to the construction and condition of the pipeline. None of the comments show that provisions in the Consent Decree regarding the OneSource database are inappropriate, improper, or inadequate.

The Marshall spill was the product of interacting corrosion and crack features. While Enbridge had separately discovered individual features several years prior to the spill, it failed to integrate the data in a manner that enabled personnel to understand the cumulative risk posed by the interaction of such features. Following the Marshall spill, Enbridge addressed this failure by developing and implementing the OneSource database. Among other things, the OneSource database integrates information about crack features, corrosion features, and geometric features that have been collected from multiple ILI tools. Specifically, under the proposed Decree, the database must include information about (1) the predicted length and location of each feature taking into account the uncertainty of the ILI tool, (2) the predicted depth of each feature taking

into account the uncertainty of the ILI tool, (3) each feature's type and classification, (4) the rupture pressure ratio and/or predicted burst pressure of the feature, and (5) any comments made by the ILI vendor regarding such feature. Decree at ¶ 75.c.

The proposed Consent Decree also sets forth various requirements for Enbridge to update, maintain, and utilize this database for the purpose of selecting anomalies that Enbridge must excavate and repair. For instance, the Consent Decree specifies that with respect to each type of ILI tool, the OneSource database shall include at least two successive ILI data sets – one data set from the most recently completed ILI tool run and the other data set from the second most-recently completed ILI tool run.

One commenter proposed that the database should be expanded to include *all* ILI data sets, not merely those data sets from the two most recent ILI tool runs. Exh. 1, Comment 24 at 6. The United States disagrees. The purpose of the database is to provide integrity management personnel with the latest up-to-date information about anomalies on the pipeline. Such a purpose is achieved by mandating that the database include the two most recent ILI data sets for each ILI tool, which will enable Enbridge personnel to evaluate the current length, depth, and location of each feature, as well as evaluate any changes to the feature that have occurred since the previous ILI run. As a result, the United States perceives little utility in mandating that the database also include all data sets that have been collected by Enbridge across the entire lifespan of the pipeline. Enbridge, of course, may choose to maintain older data sets in the database if it wants to do so, or it can choose to delete such data sets from the database, provided that it preserves the data in accordance with Section X of the Consent Decree.

Comment:

Another commenter proposed that the OneSource database should be expanded to include information about utility crossing and other types of integrity threats, not just information collected from ILI tools or in-ditch inspections. Exh. 1, Comment 22 at 2.

Response:

The United States does not believe it is necessary, as part of this settlement agreement, to require Enbridge to include this additional information in the OneSource database. Under federal regulations (49 C.F.R. § 195.404(a)(2)), Enbridge must maintain current maps and records that include, among other things, all buried utilities that cross its pipelines. Further, Enbridge must include in its written integrity management program an analysis that integrates all available information about the integrity of each pipeline and the consequences of a failure. 49 C.F.R. § 195.453(f)(3). However, there is no requirement in the regulations that Enbridge must integrate all available information about integrity threats within one database, and doing that may make the database seem unduly difficult to use and therefore undermine the purpose of data integration. The data integration requirements in the Consent Decree are intended to ensure that personnel who are responsible for reviewing and acting upon threats identified by ILI tools have at their fingertips all of the information that they need to accurately evaluate such threats. Without such a database, personnel might underestimate the risk posed by a crack feature because they cannot see how such a feature might interact with a nearby corrosion or geometric feature. However, the potential interaction between a crack feature and a utility crossing seems sufficiently remote so as to afford no real benefit from expanding the database to include data on utility crossings. Further, such an expansion could prove counterproductive. According to Enbridge, the massive amounts of data generated from ILI tools required the company to create a

proprietary platform just to accommodate such data, and it is not clear that Enbridge could expand this platform to include data on utility crossings without overburdening its existing system.

Comment:

Finally, one commenter proposed that access to the OneSource database should be expanded to include personnel from PHMSA, state agencies, and Enbridge's own contractors. Exh. 1, Comment 24 at 6.

Response:

The United States does not believe it is necessary to include such requirements in this settlement agreement. Responsibility for the operation and maintenance of Lakehead pipelines rests with Enbridge, not with federal and state regulators or Enbridge's contractors. The purpose of the Consent Decree's data management requirements help to ensure that Enbridge's integrity management personnel not only have access to the OneSource database, but also assuring that they review the database for the purpose of identifying any overlapping, or otherwise interacting, features that must be excavated and repaired in accordance with the Consent Decree.

The United States also notes that, in the event that PHMSA wants access to the OneSource in furtherance of its on-going monitoring of Enbridge's Lakehead Plan, PHMSA can gain such access through its own enforcement authority under 49 C.F.R. § 190.203, which authorizes PHMSA to inspect pipeline facilities and request information as necessary to ensure compliance with pipeline safety requirements. Consequently, there is no need for the Consent Decree to mandate access to the database for PHMSA.

Comment:

One commenter proposed changes to various reports that Enbridge must prepare and submit under the Consent Decree with respect to alternative leak detection

technologies (ALD). The commenter suggested that Enbridge should conduct a broad literature search and prepare an ALD report that covers any conventional and innovative technologies relating to leak detection. The commenter also suggested that the United States should require Enbridge to evaluate the feasibility of using various aerial-based technologies to detect a leak or rupture in the Straits of Mackinac. Finally, the commenter proposed that Enbridge should be required install and use any ALD technology deemed feasible and effective for identifying spills or leaks in the Straits of Mackinac. Exh. 1, Comment 24 at 6-7.

Response:

While the comments raise interesting ideas, the United States does not agree that they warrant changes to the Consent Decree. Under the Decree, Enbridge will be required to prepare and submit a report regarding the feasibility and performance of certain types of ALD technologies enumerated in the Consent Decree. In addition, Enbridge will be required to prepare and submit a report assessing the feasibility of installing an ALD system in the Straits of Mackinac. None of the commenter's proposals show that the provisions in the Consent Decree are inappropriate, improper, inadequate, or not in the public interest.

The commenter proposes that the ALD Report should not be limited to those technologies identified in the Consent Decree, but rather should include a discussion of all conventional and innovative technologies relating to leak detection. While such a report might be desirable in general, the United States perceives no need for a new report to support the present settlement. In December of 2012, PHMSA published a report that included the same

type of survey of technologies proposed by the commenter.[30] As a result, based on that relatively recent report, the Consent Decree requires Enbridge to assess new technologies that Enbridge, and other pipeline operators, might deploy to bolster and supplement their existing leak detection capabilities.

The commenter also proposes that Enbridge should consider aerial-based technologies when it assesses the feasibility of installing an ALD System in the Straits of Mackinac. However, the utility of aerial-based technologies in the Straits is questionable. Given the depth of the pipeline and the currents in the lake, it is likely that an aerial-based system would only be capable of detecting a slick generated by a large rupture, and such large ruptures should be detected by Enbridge's existing leak-detection system, as demonstrated by the fact that the Enbridge's system alarmed repeatedly when the rupture occurred near Marshall, Michigan.

Lastly, the commenter proposed that Enbridge should not merely assess the feasibility of installing ALD technology in the Straits, but rather it should be required to install such a system. The United States disagrees. Enbridge currently uses a computational pipeline modelling ("CPM") system for leak detection. Although Enbridge is under no regulatory requirement to supplement the CPM system with other ALD technologies, Enbridge is required under the Consent Decree to deploy in the Straits, on a quarterly basis, an acoustic ILI tool that is capable of detecting small leaks in a pipeline. Further, under Paragraph 102 of the Consent Decree, Enbridge shall continuously operate a new Rupture Detection alarm system, which shall be integrated with Enbridge's existing SCADA system and its CPM system. The United States

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[30] The study ("2012 PHMSA Leak-Detection Report") can be found at this address: www.phmsa.dot.gov/staticfiles/PHMSA/.../Files/.../Leak%20Detection%20Study.pdf.

believes that the proposed ALD feasibility study, which Enbridge is required to prepare under the Consent Decree, should help to inform and reassure the public as to whether Enbridge is undertaking all reasonable measures to detect leaks or rupture that could occur in the Straits of Mackinac. Until such study is completed, however, it is not known whether an ALD system would be reliable or whether it would produce some incremental benefit that would argue in favor of Enbridge adding the ALD system to supplement existing systems for detecting a leak or rupture within the Straits.

Comment:

One commenter proposed changes to provisions in the Consent Decree relating to the leak-detection capabilities in new pipelines. The commenter recommended that all replacement segments or new Lakehead pipelines should be designed and constructed to meet the most stringent standards for leak detection. The commenter further stated that there should not be varying standards for new U.S. Line 3 and all other pipelines. Finally, the commenter recommended that any new Lakehead pipeline should be constructed with remote-controlled valves and automatic valves for water crossings. Exh. 1, Comment 24 at 6-7.

Response:

The Consent Decree neither supports nor allows Enbridge not to comply with any existing regulatory requirements with respect to leak-detection capabilities for new pipelines or replacement segments that are part of the Lakehead System. Thus, under the settlement, Enbridge will remain obligated to comply with all applicable regulations and also with the further inspection and repair requirements imposed by the Consent Decree.

The commenter states that the leak-detection standards for Line 3 should not vary from those for other new pipelines. The commenter, however, appears to misread the Consent Decree. Line 3 is the only Lakehead pipeline that Enbridge currently plans to replace during the life of the Consent Decree. Enbridge has been able to estimate, with a reasonable degree of accuracy, the leak-sensitivity targets that Line 3 should be able to achieve when it is constructed. In contrast, for other replacement projects that might be undertaken in the future, Enbridge is less able to predict the leak-sensitivity performance of such pipelines. As a result, the leak-sensitivity "targets" for future pipelines are less tightly drawn in the Consent Decree than those for Line 3. However, all new pipelines constructed prior to the termination of the Consent Decree, including Line 3, will be subject to the same leak-sensitivity standards once such pipelines are built and operating. Specifically, Enbridge shall ensure that all such pipeline alarm systems meet or exceed the minimum alarm thresholds set forth in paragraph 91.a. In addition, with respect to the 24-hour alarm, Enbridge shall also comply with the alarm threshold that it shall establish in accordance with the optimization procedure set forth in Paragraph 103.

Finally, the commenter recommended that any new pipeline, including Line 3, shall be constructed with remote-controlled valves and automatic valves for all major water crossings. PHMSA regulations, however, already include detailed requirements for valve locations and the United States did not believe that this was a necessary requirement to include in this Consent Decree. Specifically, under 49 C.F.R. § 195.260, Enbridge and other operators are required to install a valve on each side of a water crossing that is more than 100 feet wide from high-water mark to high-water mark unless the administrator finds in a particular case that valves are not justified. Although the parties could have agreed to requirements that go beyond 49 C.F.R. §

195.260, the Consent Decree may not be deemed inappropriate, improper, or inadequate where it does not undermine existing regulatory standards in this area.

Comments:

Commenters criticized provisions in the Consent Decree relating to the time periods for investigating alarms. Exh. 1, Comment 3. The Commenters read the Consent Decree to authorize Enbridge to discharge oil for a ten minute period while Enbridge investigates an alarm or other information of a potential leak or rupture. Exh. 1, Comment 24 at 7.

Response:

The commenters are misinterpreting the requirements of the Consent Decree. Nothing in the Consent Decree authorizes any discharge of oil from Enbridge's pipelines at any time, and the proposed Consent Decree does not permit Enbridge to continue operating its pipeline in the event of a rupture or leak. To the contrary, Paragraph 113 specifies that, upon confirmation of a leak or rupture, Enbridge shall immediately proceed, without delay, to take necessary and appropriate actions to minimize and prevent the discharge of oil into, and upon, the waters of the United States or adjoining shorelines. In the event that Enbridge discharged oil in such quantities as may be harmful into waters of the United States or their adjoining shorelines, Enbridge would be liable for violating the CWA, even if it were otherwise in compliance with the requirements of the proposed Consent Decree. Decree at § 192.

The commenters' misreading of the Decree arises from a misperception that Enbridge's leak detection system will alarm only in the event of a leak or rupture. However, this is not the case. As noted by PHMSA in its 2012 report on leak-detection systems, virtually every physical effect that is used to detect leaks may be duplicated by another non-leak event. See *2012*

PHMSA Leak-Detection Report, p. 4-28. As a result, all leak detection systems, including Enbridge's, are capable of generating false alarms. Further, leak-detection systems that are highly sensitive to small amounts of lost oil are prone to generating more false alarms. *Id.* at p. 2-13. To determine whether an alarm indicates an actual leak or rupture, control room personnel must conduct an investigation of the circumstances and conditions that triggered the alarm.

Under the Consent Decree, Enbridge's control room personnel must complete such an investigation within ten minutes of an alarm – a requirement known as the "Ten-Minute Rule." Specifically, under Paragraph 105, all alarms generated by the CPM leak-detection system (known as the "MBS Leak Detection System") or by the new Rupture-Detection System shall be addressed by an Alarm Response Team, which consists of three members of the control room including the operator of the pipeline that generated the alarm. Under Paragraph 109, the operator of the pipeline shall immediately, and without further consultation or notification, shut down and sectionalize the pipeline in the event that the Alarm Response Team is unable to rule out the possibility of a leak or rupture within ten minutes of the start of the alarm. Thus, if an investigation is incomplete or inconclusive after ten minutes, Enbridge must shut down the line while it continues to evaluate the situation. Likewise, if any member of the Alarm Response Team determines during the ten minute period that an Alarm is a confirmed leak or rupture, the operator shall immediately, and without further consultation or notification, shut down and sectionalize the pipeline.

The same rules apply in the event that Enbridge receives information of a potential leak or rupture from a source other than an alarm, such as if a policeman or fire fighter calls to report a leak. It is conceivable that such information could be incorrect or could relate to an oil spill from a source other than Enbridge's pipeline. As a result, under paragraph 111 of the Consent

Decree, Enbridge must conduct an investigation of the report as expeditiously as possible, but in no event shall the investigation take more than 10 minutes from the moment that Enbridge received information concerning a potential leak or rupture and the approximate location of the potential leak or rupture. If Enbridge cannot complete its investigation within ten minutes, it must shut down its pipeline to avoid violating the requirements of the Consent Decree. Likewise, if the investigation uncovers evidence consistent with a leak or rupture by a Lakehead pipeline, the operator shall immediately, and without further consultation or notification, shut down and sectionalize the pipeline.

I. RESPONSE TO COMMENTS ON EMERGENCY PREPAREDNESS PROVISIONS

Comment:

One commenter raised concerns about Enbridge's spill plans and stated that the decree should require a third party to review Enbridge's "spill plans," including a review of the local responders training and equipment. Additionally, the commenter suggested that the plans and the review of such plans should be publically available. Exh. 1, Comment 30 (Honor the Earth).

Response:

EPA does not have statutory jurisdiction for reviewing transportation pipelines' integrated contingency plans (ICPs). PHMSA has regulatory jurisdiction for such reviews and approvals and is addressing them outside this CWA enforcement case. Accordingly, the proposed Consent Decree does not seek to review Enbridge's previously-approved ICP, and third party review is neither necessary nor appropriate under this settlement. The proposed Consent Decree does require Enbridge to conduct a review to assess of the achievability of response times identified in the ICPs for transport of personnel and equipment, and to summarize the results of the review in a final report. The final report must be provided to EPA, the Sub-Area committees (which includes local responders), USCG, PHMSA and Enbridge's contractors. This requirement is intended to foster better coordination between Enbridge and potential first responders. In addition to this review, the Consent Decree requires that Enbridge conduct on an annual basis at least six field exercises and ten table-top exercises for community, state and local first responders *See*, Consent Decree, Appendix C).

Comment:

The State of Michigan expressed support for the emergency preparedness requirements of the proposed Consent Decree, specifically the Agreed Exercises. Exh. 1, Comment 33.

Response:

The United States agrees with the State of Michigan when it states "[e]ngaging and testing a unified command structure, emergency response plans, mitigation equipment, and response personnel should improve system resiliency and will provide improved protection for our natural, economic, and human resources from the threats of an oil spill." The training exercises required by the proposed Consent Decree serve this objective.

Comment:

While generally supportive of the Agreed Exercises, the State of Michigan requested that two of the four large scale exercises be located in Michigan. Exh. 1, Comment 33.

Response:

The establishment of a comprehensive exercise program is greatly beneficial to assessing Enbridge's readiness to respond to a potential oil spill and enhancing Enbridge's ability to respond to any spills that may occur throughout the Lakehead System. Each exercise will be designed to test tactical deployment of personnel and equipment for containment and recovery, as well as techniques for responding to a large oil spill. Not only do all parties who participate in these exercises gain technical insights from the spill scenarios chosen by a consensus of the planning participants, each exercise provides a critical opportunity for public and private participants to build relationships through the planning and implementation of each exercise. The United States believes it is in the public interest to require the four large-scale exercises

(Agreed Exercises) to be held in four different states (Minnesota, Illinois, Wisconsin and Michigan) to gain the greatest benefit from the exercises. The United States also notes that in 2014, Enbridge conducted a large scale exercise on Line 5 in Indian River, Michigan, and in the summer of 2015, Enbridge, along with the U.S. Coast Guard, EPA and others, conducted a large scale exercise in Michigan's Straits of Mackinac. Thus, Enbridge will be conducting a total of three large scale exercises in the State of Michigan within six years.

Comment:

One commenter suggested that the Consent Decree should also require Enbridge to complete an unannounced training exercise because such exercises provide a better "opportunity to evaluate, on a no-notice basis, Enbridge's access to necessary resources and test the viability of their oil spill response plan(s)." Exh. 1, Comment 24 at 7 (Tip of the Mitt Watershed Council).

Response:

While an unannounced exercise certainly has benefits, the United States believes that the proposed Consent Decree is not inappropriate, improper or inadequate because it does not include such an exercise. The United States believes the training exercises required under the proposed Consent Decree foster closer working relationships between Enbridge and the various levels of government responders. The Agreed Exercises contemplated in the proposed Consent Decree require many more meetings (at least three) and opportunities for community input regarding their pipeline spill concerns than do unannounced exercises.

Comment:

One commenter also proposed that the After Action Reports from the Agreed Exercises should be publically available. Exh. 1, Comment 24 at 7.

Response:

The proposed Consent Decree requires Enbridge to provide its After Action reports to each of the participants involved in planning the exercises. These participants include: EPA, PHMSA, and the appropriate area-committee, Sub-Area committee, tribal representatives, state and local authorities. EPA plans to upload these after action reports to its public webpage for the Enbridge oil spills at issue in this case.

Comment:

One commenter also suggested that Enbridge include Local Emergency Planning Committees, state and local agency and government representatives, Tribal governments, and known stakeholders in the Field and Table-Top Exercises. Exh. 1, Comment 24 at 7.

Response:

The proposed Consent Decree requires Enbridge to conduct on an annual basis at least six field exercises and ten table-top exercises for community, state and local first responders (Consent Decree, App D). Additionally, the proposed Consent Decree also requires Enbridge to actively participate in the Area committees and sub-area committees responsible for planning and overseeing emergency preparedness throughout the Lakehead System. Active participation includes: participation in at least one additional field exercise organized by each specific committee (if invited) and participation in at least two other training events if invited by a committee.

Comment:

One commenter expressed concern that the Control Point Plans include access points for vessels as well as vessel availability including, but not limited to, Enbridge owned vessels, Oil Spill Response Organization (OSRO) resources, and Vessels of Opportunities. Exh. 1, Comment 24 at 7.

Response:

Appendix D of the revised proposed Consent Decree provides a template for Enbridge to use to provide all relevant information required by the Consent Decree, including a strategic plan that describes, *inter alia*, the type and quantity of equipment needed and the estimated travel time for equipment to arrive. (¶117b(iii)). Information like access points for vessels, to the extent relevant for that particular control point, would be included in this section of the template.

Comment:

The same commenter also stated that the Consent Decree should require Enbridge to provide electronic copies of the final report on review of response times for transport of personnel and equipment to control points and other locations to the respective jurisdictional local, state, and tribal governments. Exh. 1, Comment 24 at 7.

Response:

To the extent allowed by law, EPA intends to provide Enbridge's final report that reviews response times included in Enbridge's ICP for transportation of personnel and equipment to the public via EPA's webpage for the Enbridge oil spills at issue in this case. As always, Enbridge may make a claim of confidentiality in whole or in part of any submittal to the US. If Enbridge makes such a claim, it must submit a redacted report that EPA may release to the public. EPA

will follow its regulatory procedures at 40 C.F.R. Part 2 for determining whether a submittal is entitled to confidential treatment.

Comment:

The commenter also stated that the Consent Decree should provide a copy of the "Straits of Mackinac Tactical Response Plan" to the State of Michigan and jurisdictional local and tribal governments. Exh. 1, Comment 24 at 7.

Response:

The Consent Decree requires Enbridge to provide a redacted copy of the Straits of Mackinac Tactical Response Plan electronically to the Area and Sub-area Committees. These committees include state, local and tribal governments.

J. RESPONSE TO COMMENTS ON CONSENT DECREE PROVISIONS RELATING TO INDEPENDENT THIRD PARTY

Comments:

Some commenters, including one Tribal commenter, raised the issue of independence of any third party reviewer. The commenters suggested that Enbridge not be allowed to use any party that was a consultant for Enbridge in the recent past or would be in the future. *See* Exh. 1, Comments 5 at 26 and 30 at 8.

Response:

The proposed ConsentDecree requires Enbridge to retain an independent third party to review Enbridge's compliance with many injunctive relief requirements of the Decree. Proposed Decree ¶125. As the name suggests, the third party must act independently and objectively when reviewing Enbridge's compliance. To better ensure any third party's independence from Enbridge, the Decree requires: 1) the third party and its personnel have not conducted any services for Enbridge within the last three years; 2) the third party has not been involved in the development of Enbridge's control room, leak detection or pipeline integrity procedures that are the subject of this Decree; 3) the third party will not provide commercial, business or voluntary services to Enbridge (except serving as the third party reviewer) for the life of the Decree and for three years following termination of the Decree; 4) Enbridge shall not provide future employment to any third party personnel who participated in the review of Enbridge's compliance with the Decree for at least three years following the termination of the Decree. *See* Proposed Decree ¶127.

The US believes that these independence requirements, as well as others that require any sub-contractor used by the third party to have similar independence from Enbridge, ensure that

the third party's assessment of Enbridge's compliance with the terms of the Decree will be independent and objective.

Comment:

At least one commenter wanted the independent third party's findings and recommendations be publicly available. *See* Exh. 1, Comment 30 at 8.

Response:

The Consent Decree states that all reports, findings and recommendations from the independent third party will not be subject to any privilege or protection. Proposed Decree ¶ 134m. Thus, it is the United States' intent that these reports will be publicly available, although some of the data used to support its findings and recommendations may need to be protected to the extent required by law.

Comment:

The same commenter believed that the selection of the third party should be a "public process." Exh. 1, Comment 30 at 8.

Response:

The United States believes that the criteria for the selection of an independent third party are stringent and in the public interest. Specifically, the proposed Consent Decree establishes explicit qualifications that independent third party candidates must meet, including technical competence in matters relating to pipeline integrity and operations (Proposed Decree ¶ 127.a), as well as requirements for assuring independence from Enbridge (Proposed Decree, ¶¶ 127.b-e and 128). Moreover, the provisions of the Consent Decree governing the Independent Third Party qualifications and independence have already been subject to public comment, and the United

States has not received comments arguing that such provisions are inadequate or suggesting additional selection criteria that need to be taken into consideration.

The proposed Consent Decree's process for selecting an Independent Third Party requires Enbridge to propose more than one candidate to the United States, and to provide relevant supporting information about each proposed candidate so that the United States may evaluate whether the proposed candidates satisfy requirements specified in the proposed Consent Decree. The proposed Consent Decree allows Enbridge to make the final selection of the Independent Third Party in cases where the United States approves more than one proposed candidate as satisfying Decree's requirements.[31]

While the Consent Decree explicitly assures an opportunity for public participation on the terms of the proposed settlement consistent with 28 C.F.R. 50.7, the proposed Consent Decree does not contemplate or provide for separate public participation on Consent Decree implementation activities, except where implementation of CD requirements is subject to separate regulatory approvals that trigger their own public participation requirements. Selection of an Independent Third Party in accordance with proposed Decree's criteria is not fundamentally different than other Consent Decree implementation activities that do not trigger separate opportunities for public participation, and the United States does not believe that the proposed Consent Decree is improper, inappropriate or inadequate because it does not include a provide the selection process envisioned by the commenter.

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[31] As indicated in the memorandum in support of the United States' motion for entry of the proposed Consent Decree, at this point Enbridge has retained an Independent Third Party in accordance with the procedures outlined in the proposed Consent Decree.

Comment:

Other comments on the Independent Third Party asked for a broader scope to the third party review, including Enbridge's entire pipeline system. *See* Exh. 1, Comment 30 at 8.

Response:

The terms of the proposed Consent Decree require the independent third party to review Enbridge's compliance with the requirements of all injunctive measures in Section VII of the Consent Decree, except for the spill response and preparedness requirements, which EPA will conduct. Since the proposed Consent Decree covers all of Enbridge's Lakehead System pipelines, the scope of this review is quite broad. However, the United States does not believe that it would be appropriate in this case to broaden the Independent Third Party's review beyond the pipeline system that is subject to the requirements of the Consent Decree itself since the US would likely have no recourse under the decree to require Enbridge to implement Independent Third Party conclusions with respect to pipelines that are not covered by the proposed Consent Decree. By contrast, to the extent the Independent Third Party identifies any deficiencies in Enbridge's implementation of specific requirements of the Consent Decree, the United States would have the ability to seek additional action and/or stipulated penalties from Enbridge in appropriate cases.

K. RESPONSE TO COMMENTS ON OVERSIGHT ANDCITIZEN INVOLVEMENT

Comment:

Several commenters requested that Michigan citizens be compensated for damage to Kalamazoo River. Exh. 1, Attach. B, Comments 171, 200, 275, and 459.

Response:

Claims for damages to natural resources arising from the 2010 Line 6B discharges, including the Kalamazoo River were previously addressed and resolved in a separate settlement. *See, United States of America et al. v. Enbridge Energy, Limited Partnership, et al.*, 1:15-cv-00590-GJQ (W.D. Mich.), (Consent Decree approved by Court December 3, 2015). The present settlement addresses and resolves separate claims under Sections 301, 309 and 311 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1321, for injunctive relief and civil penalties arising from unlawful discharges of oil from two Enbridge pipelines, as well as resolving claims under the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*, for recovery of unreimbursed removal costs incurred by the United States as a result of the 2010 spill from Enbridge's Line 6B. The claims before the Court in the present case do not provide a basis for collection of additional damages relating to the 2010 Line 6B spill.

Comment:

One group of commenters urged that the settlement be revised to create and fund of two separate independent citizen advisory councils and two independent municipal-focused committees modeled after the environmental monitoring program conducted by the Prince William Sound Regional Citizens' Advisory Council ("RCAC") for the Alyeska tanker terminal. *See* Exh. 1, Comment 8 at 3-4, 20, and 21-23. The commenters contemplated that these groups would assume responsibility for vetting and hiring the

Independent Third Party required in Section VII.J of the proposed Consent Decree, and that these groups would provide citizen involvement in monitoring of compliance with the Consent Decree. *Id.* at 20, and 21-23. The commenters proposed that the Consent Decree require Enbridge to pay each group an inflation-adjusted amount of $10 million annually, for total annual expenditures of $40 million. *Id.* at 24.

Response:

The Consent Decree relating to the Exxon Valdez oil spill cited as an example was settled of natural resources damages claims that contemplated a long public process to develop an overarching restoration plan and select restoration projects. The erection of an advisory group to help implement the settlement in this case is neither required nor justified. The provisions suggested by commenters would require payment of at least an additional $160 million, assuming that Enbridge satisfies requirements for termination of the Consent Decree at the earliest time defendants may seek termination. Clearly, this amounts to a significantly increased financial commitment, and one that might not have been achievable in settlement at all – and certainly could have resulted in further delays in reaching a resolution of this matter. Although the proposed Consent Decree does not establish an Independent Environmental Monitoring Program modeled after the program conducted by the Prince William Sound RCAC, the proposed Consent Decree does provide for independent expert review of Enbridge's compliance efforts under the proposed Consent Decree. *See generally*, the Response to Comments regarding the Independent Third Party at Section J of the Response to Comments. The proposed Consent Decree is not inappropriate, improper or inadequate because it does not provide for the creation and funding of independent citizen groups, as proposed by commenters.