IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *et al.*,	)	
Plaintiffs,	)	**Civil Action No. 1:16-cv-914**
v.	)	**Judge Gordon J. Quist**
ENBRIDGE ENERGY, LIMITED PARTNERSHIP, *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF THE UNOPPOSED MOTION OF THE UNITED STATES FOR ENTRY OF THE CONSENT DECREE

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I. INTRODUCTION

The United States, on behalf of the Environmental Protection Agency ("EPA") and the United States Coast Guard ("USCG"), submits this memorandum in support of its unopposed motion for entry of a proposed Consent Decree that was lodged with the Court in this action on July 20, 2016.[1] The proposed Consent Decree would resolve all claims asserted by the United States in this action under the Clean Water Act, as amended ("CWA"), 33 U.S.C. § 1251 *et seq.*, and the Oil Pollution Act, as amended ("OPA"), 33 U.S.C. § 2701 *et seq.* against Enbridge Energy Limited Partnership and seven affiliated Enbridge entities (collectively "Defendants" or "Enbridge") with respect to two oil spills that occurred within two months of each other in the summer of 2010 — one in Marshall, Michigan ("Marshall spill") and the other in Romeoville, Illinois ("Romeoville spill").[2]

The proposed settlement will require Enbridge to pay a total civil penalty of $62 million – $61 million for the Marshall spill and a civil penalty of $1 million for the Romeoville spill. If approved, this will be the largest civil penalty ever imposed under a CWA settlement outside of settlements relating to the Deepwater Horizon disaster. The proposed Consent Decree also includes a commitment by Enbridge to reimburse over $5.4 million in federal removal costs paid by the Oil Spill Liability Trust Fund ("Fund") through October 1, 2015 in connection with the

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[1] In accordance with Rule 7.1(d) of the Local Rules of Civil Procedure, the United States conferred with counsel for Enbridge, who authorized the United States to represent that Enbridge does not oppose the motion to enter the proposed Consent Decree as a final judgment.

[2] The proposed Consent Decree is the second and final settlement pertaining to the Marshall spill. The first settlement, which the Court approved on December 3, 2015, resolved natural resource damage claims under OPA, based on Enbridge's commitment to make payments and perform natural resource restoration projects with an estimated total value of approximately $62 million. *United States et al., v. Enbridge Energy Ltd P'ship et al.*, 1:15-cv-00590-GJQ, Consent Decree, (Doc. No. 9).

Marshall spill, as well as all additional removal costs consistent with the National Contingency Plan that are paid by the Fund subsequent to October 1, 2015. Finally, the proposed Consent Decree sets forth a comprehensive set of remedial measures designed to improve Enbridge's ability to prevent, detect, and respond to oil spills from pipelines throughout the entire portion of its Mainline System in the United States.

Enbridge owns and operates the single largest conduit of liquid petroleum into the United States, delivering on-average 1.7 million barrels of oil from Canada each day – a figure that accounts for 23% of the U.S. crude oil imports. The portion of this pipeline system within the United States is known as the Lakehead Pipeline System ("Lakehead System") and includes a network of fourteen pipelines that are grouped within right-of-ways that collectively span 1,900 miles from the international border in North Dakota to delivery points in the Midwest, New York, and Ontario. All pipelines that are part of Lakehead System, including the two pipelines that were the subject of the Marshall and Romeoville spills, are operated and controlled by Enbridge's control center in Edmonton, Canada. A primary objective of the Consent Decree is to ensure that, for at least the next four years, Enbridge implements judicially-enforceable requirements intended to bolster the safety of the Lakehead System pipelines – many of which have been in operation for more than 40 years.

Consistent with the terms of paragraph 207 of the proposed Consent Decree, the United States published notices of the proposed settlement in the Federal Register on July 25, 2016 and on September 9, 2016 and held two public comment periods totaling more than 70 days. In all, the United States received over 17,000 comments on the proposed Consent Decree. Those comments are attached at Exhibit 1. The United States has carefully considered all of the public comments and, with EPA's assistance, prepared responses that are attached to this memorandum

at Exhibit 2. After considering these comments, the United States continues to believe that the proposed Consent Decree is highly favorable and in the public interest.

Following the public comment period, the parties agreed to make four changes to proposed Consent Decree. Two changes pertain to Enbridge's proposed replacement of Line 3 – a 292-mile pipeline that spans between Neche, North Dakota and Superior, Wisconsin. The new language addresses an incorrect public perception reflected in some of the public comments that the proposed Consent Decree might supersede or otherwise interfere with the authority of independent regulatory bodies to review and approve the Line 3 replacement project. This was not the intent of the parties when they signed the original Consent Decree lodged with the Court and has been made clear in the revised Decree. The revised proposed Consent Decree also eliminates a provision opposed by several public commenters that would have allowed Enbridge, under specified conditions, to restart old Line 3 at some point following completion of the replacement Line. In addition to these changes, the parties have agreed to make two technical corrections to the Consent Decree. All of these changes, which are discussed more fully below, are included in the proposed revised Consent Decree, which is attached at Exhibit 3. For the convenience of the Court, excerpts of the proposed revised Consent Decree in redline-strikeout format, showing changes from the original Decree lodged with the Court, are attached at Exhibit 4.[3]

A court should enter a consent decree if it is fair, adequate, and consistent with the objectives of the law (here, CWA and OPA). *See* Part V, *infra*, for citations. The proposed Decree plainly meets this standard, because it includes a civil penalty that punishes Enbridge for

[3] In addition to the four agreed-upon changes to the proposed Consent Decree, the parties have identified and corrected a few typographical errors in the proposed Consent Decree originally lodged with Court.

the alleged violations of the CWA, sends a clear deterrent message to the entire industry, and fully compensates the Fund for removal costs incurred by the United States in overseeing the cleanup of the Marshall spill – all of which the settlement achieves while simultaneously putting in place a comprehensive program of measures to help protect communities, waterways, and adjoining shorelines in seven states from the potentially devastating effects of oil spills from Enbridge's Lakehead System.

Under Paragraph 207 of the proposed Consent Decree, Enbridge has consented to the entry of the proposed Consent Decree without further notice. Accordingly, the United States requests that this Court approve and execute the Consent Decree attached at Exhibit 3 and enter the proposed Decree as a final judgment.

II. SITE BACKGROUND

A. The Marshall and Romeoville Spills

This case arose when Defendants' Line 6B oil pipeline ruptured near Marshall, Michigan on July 25, 2010, during a scheduled shutdown of the pipeline. At the time of the spill, the 30-inch diameter pipeline had been in operation for more than forty years, transporting oil from Griffith, Indiana to Sarnia, Ontario. Although the rupture triggered numerous alarms in the control room in Edmonton, Canada, Enbridge failed to conduct a proper investigation of those alarms and did not realize that a spill had occurred until the following day — 17 hours after the rupture — when a Michigan utilities employee called to report oil in Talmadge Creek. In the interim, Enbridge had re-started Line 6B on two occasions, pumping a large volume of additional oil into the already-ruptured line.

Enbridge estimated that the spill resulted in the release of 20,082 barrels of oil. Due, in part, to Enbridge's delay in recognizing the spill, as well as its initial delay in marshaling

resources to contain the spill, oil spread down the Kalamazoo River for at least 38 miles before it was finally contained at Morrow Lake. The spill resulted in a 4-year cleanup effort that closed large sections of the Kalamazoo River for significant periods while Enbridge dredged the river bottom and performed other removal activities under administrative orders issued by EPA.

According to an investigation by the National Transportation Surface Board ("NTSB"), the rupture resulted from one of six cracks that had previously been detected by Enbridge using an in-line investigation ("ILI") tool in 2005.[4] At the time of this discovery, Enbridge possessed data from a prior ILI inspection showing that the crack was located within an area of corrosion that had significantly eroded the wall of the pipeline. *NTSB Marshall Report,* at pp. 37-38. Enbridge failed to integrate data from the two ILI tools, however, and this mistake, in combination with others, caused Enbridge to underestimate the depth and severity of the crack. *Id.,* at 89-90. The NTSB concluded that, if Enbridge had not made such mistakes, the crack might have been identified and addressed in time to prevent the rupture and resulting spill. *Id.,* at 87.

Two months after the Marshall spill, a second oil spill occurred near Romeoville, Illinois from Enbridge's Line 6A – a 34-inch diameter pipeline that had been in operation for more than 40 years, transporting oil from Superior, Wisconsin to Griffith, Indiana. Apart from its timing, however, the Romeoville spill bears little resemblance to the Marshall spill. According to an investigation by the NTSB, the proximate cause of the Romeoville spill was a water line that had

[4] *Accident Report: Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release – Marshall, Michigan July 25, 2010*, (Adopted July 10, 2012), NTSB Doc. No. PAR-12-01, (hereinafter "*NTSB Marshall Report"*), at §§ 2.4. The report is available on NTSB's website at: https://www.ntsb.gov/investigations/AccidentReports/Pages/PAR1201.aspx

been improperly installed by a third-party approximately 5 inches below Line 6A.[5] The close proximity to the Enbridge pipeline accelerated the corrosion of the waterline, which eventually generated a hole that ejected a jet of water at the bottom of Line 6A. The pressure of the water, mixed with sand and gravel, punched a 1.5-inch diameter hole in the wall of Line 6A.

The Romeoville spill released at least 6,427 barrels of oil. Much of the oil flowed into a drainage ditch, which flowed into an unnamed tributary of the Des Plains River and a two-acre retention pond located approximately one-half mile upstream from the Des Plaines River. Discharged oil impacted approximately 1,400 feet of the unnamed tributary and adjoining shorelines, as well as the retention pond and its shorelines. Discharged oil also impacted a portion of the Romeoville sanitary sewer system and public wastewater treatment plant. Enbridge reported that it spent $46 million in cleaning up the Romeoville spill, and it fully reimbursed the Fund for $660,000 in costs incurred by the United States in connection with the spill.

B. Cleanup and Earlier Enforcement Actions Relating to the Marshall Spill

Although its initial response to the Marshall spill was slow and uncoordinated, Enbridge ultimately devoted significant resources to the cleanup in compliance with an order issued by EPA on July 27, 2010. According to Enbridge, more than 1,500 Enbridge employees and contractors were engaged in the removal work in and along Talmadge Creek and the Kalamazoo River within one month of EPA's order. Despite this level of effort, the cleanup was significantly complicated by the fact that the spill involved "dilbit" – a mixture of diluent, which

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[5] *Pipeline Accident Brief* (Adopted Sept. 30, 2013), NTSB Doc. No. PAB-13-03, (hereinafter "*NTSB Romeoville Report*"), at p. 13. The report is available on NTSB's website at: https://www.ntsb.gov/investigations/AccidentReports/Pages/PAB1303.aspx

is similar to gasoline, and bitumen, which is a heavy, viscous, sediment-laden residue.[6] As the diluent evaporated into the atmosphere, the bitumen sank to the bottom of the Kalamazoo River. As a result, EPA issued supplemental orders in September 2010 and in March 2013, requiring Enbridge to undertake additional cleanup work, including dredging, to recover submerged oil and oil-contaminated sediments. Enbridge completed this work in the fall of 2014, and EPA then transitioned the lead for continuing removal actions to the State of Michigan.

In the spring of 2015, the United States, the State of Michigan, and two Indian tribes – the Nottawaseppi Huron Band of the Potawatomi and the Match-E-Be-Nash-She-Wish Band of the Pottawatomi Indians – entered into a consent decree with Enbridge under OPA for natural resource damages resulting from the Marshall spill. The consent decree, which the Court approved on December 3, 2015, required Enbridge to (1) complete primary restoration of 320 acres of wetlands impacted by the spill and subsequent cleanup operations, (2) perform compensatory restoration of at least another 300 acres of wetlands, (3) perform various restoration projects to address in-stream injuries, including the removal of the Ceresco Dam, (4) pay $2,265,048 to fund additional restoration projects and certain future costs, and (5) pay $1,559,952 in reimbursement of past assessment costs incurred by Federal and tribal trustees. Altogether, the estimated value of the settlement was approximately $62 million.

In addition, Enbridge took actions to repair and restart Line 6B in accordance with corrective action orders issued by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), which is the primary regulator of the pipeline transportation system in the United

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[6] In 2015, the National Academy of Sciences ("NAS") published a study of the Marshall spills and other spills that involved dilbit. A summary of the report, and a description of dilbit, is found on the website of the NAS. http://dels.nas.edu/Report/Spills-Diluted-Bitumen-from-Pipelines/21834

States. Ultimately, rather than repairing and replacing segments of the pipeline, Enbridge replaced the entirety of the pipeline with a new Line 6B. Enbridge also paid an administrative penalty of $3.7 million assessed by PHMSA for regulatory violations relating to the Marshall spill.[7]

While PHMSA did not assess any administrative penalties with respect to the Romeoville spill, it commenced an administrative action against Enbridge in July 2012 after a third Lakehead System pipeline, known as Line 14, ruptured near Grand Marsh, Wisconsin. Although the Grand Marsh spill was confined to a field (and, therefore, did give rise to claims under the CWA), it prompted PHMSA to order Enbridge to develop an integrity management plan for its Lakehead System. The approved plan, known as the "Lakehead Plan," required Enbridge to review and improve its performance with respect to a number of areas, many of which overlap with the proposed Consent Decree. By letter dated July 20, 2016 – the date that the United States lodged the Consent Decree with the Court – PHMSA terminated its August 2012 order, but advised that it would continue to monitor Enbridge's compliance with the Lakehead Plan.

In its negotiations with Enbridge, the United States sought to follow and build upon the Lakehead Plan by broadly addressing those problems identified in the *NTSB Marshall Report* relating to Enbridge's control center operations, its practices for inspecting and maintaining the integrity of its pipelines, and its preparations to detect and respond to pipeline ruptures. To accomplish this goal, the parties engaged in highly technical negotiations aided by experts retained by the government, as well as information and expertise presented by Enbridge, and

[7] A Final Order was issued by PHMSA on September 7, 2012. http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Press%20Releases/320125013_Final%20Order_09072012.pdf

sought to find the right balance between increasing the stringency and protectiveness of applicable requirements and preserving the flexibility needed for safe operation of these complex pipeline systems.

III. THE PROPOSED CONSENT DECREE

There are three major components of the attached settlement resolving the United States' claims in the complaint. First, within 30 days of the entry of the Consent Decree, Enbridge will pay $61 million, plus interest, as a civil penalty for discharges related to the Marshall spill and pay a civil penalty of $1 million, plus interest, for discharges related to the Romeoville spill. *Decree*, ¶ 11. Second, within the same time period, Enbridge will pay $5,438,222, plus interest, to reimburse the Fund for past removal costs relating to the Marshall spill, and it will subsequently reimburse the Fund for future removal costs relating to the Marshall spill within 30 days of receipt of any bill from the U.S. Coast Guard. *Id.*, p. 15-18. Lastly, Enbridge is required to complete numerous injunctive measures set forth in Section VII of the Consent Decree. As discussed further below, these measures include provisions to (1) reduce the potential for future pipeline failures that could result in unlawful discharges from Enbridge's Lakehead System pipelines, (2) improve leak detection capabilities and Enbridge's response to situations that could indicate potential pipeline failures, and (3) improve effective emergency response and preparedness to better address any future spills that might occur. Finally, the Consent Decree requires Enbridge to select, and pay for, an independent third party to assist in evaluating Enbridge's compliance with the requirements of the Consent Decree.

In general, the Consent Decree resolves the "civil claims of the United States [against Enbridge] for violations of the [CWA] alleged in the complaint, as well as the civil claims of the United States in the complaint for recovery of removal costs or damages" under OPA with

respect to the discharges from Lines 6A and 6B. *Id.*, ¶ 187. The Consent Decree reserves all other claims of the United States against Enbridge, including claims to recover amounts paid by the Fund after October 1, 2015 with respect to third-party damages. *Id.*, ¶¶ 188-190. For its part, Enbridge covenants not to sue or assert any claims related to the Line 6A or Line 6B discharges against the United States or assert any kind of claim against the Fund. *Id.*, ¶ 194. Further, Enbridge covenants not to assert the limitation on liability at 33 U.S.C. §2704(a)(4) as a defense to any claim or bill presented to Enbridge for payment of future removal costs or damages. *Id.*

Since the close of the public comment period, the parties have agreed to make four changes to the Consent Decree previously lodged with the Court. First, in light of certain public comments regarding Enbridge's plans to replace Line 3, the parties have agreed to clarify that the Consent Decree's requirement that Enbridge replace Line 3 is conditioned on Enbridge being able to obtain all permits or other authorizations needed for a replacement project, and that the Consent Decree does not require any permitting authority to expedite its review of Enbridge's proposal for replacement. Second, the parties have agreed that, in the event the replacement project is approved and completed, Enbridge is barred from re-using the decommissioned Line 3 for the transmission of oil or other hazardous substances. As re-written, the Consent Decree now states that Enbridge shall replace the portion of Line 3 within the United States ("US Original Line 3") "provided that Enbridge receives all necessary approvals to do so." *Id.*, ¶ 22.a (emphasis added). If such approvals are received, "Enbridge shall complete the replacement of the Original US Line 3 and take Original US Line 3 out of service . . . as expeditiously as practicable." *Id.* In place of provisions that allowed re-use of Original US Line 3 under specified conditions, the final Decree permanently enjoins Enbridge from operating, or allowing

anyone else to operate, any portion of Original US Line 3 for transport of oil, diluent, or any hazardous substance. *Id.*, ¶ 22.e.

In addition to the changes regarding Line 3, the parties have agreed, unprompted by public comments, to make two technical corrections to the Consent Decree. Specifically, as discussed on page 13 below, the parties have corrected and updated a list of maximum operating pressures ("MOPs") for Enbridge's Lakehead System pipelines. Finally, as discussed on page 16 below, the parties have corrected and updated procedures for determining the predicted burst pressure of corrosion defects that are detected by certain ILI tools.

A. Measures to Prevent Spills by Reducing the Potential for Pipeline Failures

A primary objective of our negotiation was to secure robust relief to address Enbridge's aging Lakehead System pipelines. To that end, the Consent Decree addresses four areas where we have sought to reduce the potential for future pipeline spills. First, Sections VII.A thru C of the Consent Decree contain provisions relating to the replacement, decommissioning, and investigation of three pipelines – Lines 6B, 3, and 10. Second, Section VII.D of the Consent Decree contains provisions relating to Enbridge's program to inspect, repair, and maintain its Lakehead pipelines using in-line inspections tools. Third, Section VII.E of the Consent Decree contains supplemental measures to bolster efforts to prevent a spill or leak from Line 5 where it crosses the Straits of Mackinac in Michigan. Finally, Section VII.F of the Consent Decree contains measures to improve the integration of data relating to anomalies that may threaten the integrity of the pipeline. Each of these four subject-matter areas is discussed, in turn, below.

1. Replacement, Decommissioning, and Evaluation of Lines 6B, 3 and 10

In 2014, Enbridge completed the construction of a new Line 6B to replace the 40-year old pipeline ("Original Line 6B") that caused the Marshall spill. However, that replacement project

did not include removing Original Line 6B pipe from the ground or repairing all of the features that might present integrity threats if the old line were to resume operation. Under Paragraph 21 of the Consent Decree, Enbridge is permanently enjoined from operating, or allowing anyone else to operate, the original Line 6B for the purpose of transporting oil, gas, diluent, or any hazardous substance.

The same prohibition applies to US Original Line 3 in the event that Enbridge replaces the pipeline. That pipeline is more than 50 years old and includes segments of pipe that are substantially similar to the pipe that failed and caused the Marshall spill. As previously noted, the Consent Decree mandates that Enbridge replace US Original Line 3 as expeditiously as practicable, provided that Enbridge receives all regulatory approvals and permits necessary to build the new pipeline. Unless and until the pipeline is replaced, Enbridge must implement enhanced measures to ensure the integrity of the pipeline, including an accelerated inspection schedule starting on December 31, 2017. Further, Enbridge must limit the operating pressure in Line 3 so the pressure in the pipeline does not exceed the maximum operating pressure ("MOP") referenced in the Consent Decree, unless and until Enbridge has conducted pressure testing in accordance with Section VII.C (Hydrostatic Pressure Testing) to validate a change in the MOP.

As previously noted, the attached updated Consent Decree contains a technical correction regarding the MOPs for the Lakehead pipelines. The version of the Consent Decree lodged with the Court listed MOPs in Appendix A, but we subsequently discovered that this list was incomplete and inaccurate. Specifically, Appendix A to the Consent Decree as originally lodged with the Court, (Doc. No. 3), divided each of the Lakehead System pipelines into segments that extended the entire distance between adjacent pump stations, and the Appendix included a single MOP for each such segment. In fact, however, at the time the parties entered into the settlement

and lodged the Consent Decree with the Court, Enbridge actually had established MOP values for much smaller segments of pipe, so that there are a large number of different MOP values to sections of pipe located between each set of adjacent pump stations, instead of the single value listed in original Appendix A. Given that a corrected Appendix A would be an extremely large and cumbersome document, the parties have decided that they will not file an updated Appendix A with the Court. Instead, the attached Consent Decree deletes the original Appendix, and it instead incorporates by reference MOPs values for each line, which will be posted on EPA's website simultaneously with this motion to enter the Consent Decree.

Finally, the Consent Decree requires Enbridge to conduct an evaluation regarding the potential replacement of Line 10 – a pipeline that crosses the Niagara River a few miles upstream of Niagara Falls. Line 10 is more than 40 years old, and Enbridge is currently replacing segments of the same pipeline in Canada. Under paragraph 23 of the Consent Decree, Enbridge must submit to EPA a report evaluating, among other things, the replacement of the entire portion of Line 10 between the Canadian border and the terminus of the pipeline near West Seneca, New York.

2. ILI-Based Integrity Management Program

Enbridge's primary strategy to prevent leaks and ruptures is to use in-line inspection ("ILI") tools to identify defects, such as cracks, corrosion or dents, in the pipelines that, if unaddressed, could contribute to a threat of pipeline ruptures or leaks that would allow the release of oil into the environment. Such tools are inserted into pipelines and carried through the pipe by flow of oil while sensors on the ILI tool collect information about the condition of the pipe. Based upon this information, Enbridge identifies the most critical defects in the pipeline and excavates relevant sections of the pipeline in order to repair or

mitigate such defects before they reach a severity that could result in a pipeline rupture or leak. The Consent Decree includes numerous provisions that attempt to assure that the ILI-based inspection and repair program is robust.

As an initial matter, the proposed Decree includes provisions to ensure Enbridge conducts periodic inspections using ILI tools that are most appropriate for detecting and accurately sizing each of the major types of anomalies (cracks, corrosion and dents). Different ILI tools are commonly used for different types of anomalies, so that a complete assessment of threats posed by cracks, corrosion and dents on any given line would typically require at least three separate tool runs. Although Enbridge has historically conducted a fairly intensive program of ILIs, the proposed Decree nevertheless includes provisions intended to assure that Enbridge assesses each type of anomaly present on its Lakehead lines with sufficient frequency so that serious anomalies will be detected and corrected well before the time they would be projected to grow to where they might cause a pipeline failure. Thus, the proposed Decree generally establishes a re-inspection interval that is the shorter of: (1) one-half of the time required for the worst unrepaired feature to grow to the point where it would be expected to result in a leak or rupture,[8] or (2) the 5-year period established in PHMSA regulations for assessing the integrity of pipelines in HCAs. *See* 49 C.F.R. § 195.452(j)(3). In the case of dents or other geometric anomalies that are not susceptible to reliable growth rate calculations, the proposed Decree requires ILI runs at least every 5 years.[9]

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[8] As discussed below, the proposed Decree mandates excavation and repair or mitigation of the worst identified features. Enbridge may elect to excavate and repair or mitigate additional features for various reasons, including, potentially, the ability to extend the time between successive ILI tool runs of a given type.

[9] Because of unique integrity concerns relating to Line 3, Enbridge is currently running ILIs for all types of anomalies on an annual basis, and the proposed Decree mandates continuing this more intensive inspection frequency unless the existing Line 3 is replaced by December 31, 2017.

Second, the proposed Decree establishes timelines for Enbridge to receive initial ILI reports from vendors following each ILI tool run, and it requires Enbridge to promptly evaluate ILI data and identify features that meet specified dig selection criteria. Under the proposed Decree, Enbridge must complete an initial review of each ILI vendor report and identify all data quality concerns within 30 days after receiving the report. In the case of features located in pipeline sections without identified data quality concerns, Enbridge must proceed immediately to determine whether the features meet one or more dig selection criteria, and to put features that meet such criteria promptly on the dig list, without waiting for resolution of identified data quality concerns applicable to other features or other sections of the pipeline. Where Enbridge does identify data quality concerns, it must resolve such concerns as expeditiously as practicable, so that all features requiring excavation are, as a general rule, added to the dig list within 180 days after the ILI tool is removed from a pipeline at the conclusion of a tool run.[10]

Third, the proposed Decree establishes default dig selection criteria and pressure restriction requirements, including timetables for excavation and repair or mitigation of specified types of features that are described in tables in the Consent Decree.[11] *See, e.g.* Table 1 at page 56 of the Consent Decree.

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[10] In limited circumstances, Enbridge's data quality investigations could include investigative dig programs that may not be completed before expiration of the 180 deadline for adding features to a dig list. *Decree*, ¶ 34(e). In such cases, features must be added to the dig list based on the ILI-reported values, but if the investigatory digs document a sound basis for revising the ILI reported value for particular features, Enbridge may revise the dig list with respect to any such features that have not already been excavated and repaired. *Id.*, ¶ 34(f).

[11] Although the default dig criteria should be applicable to most features and situations on Enbridge's Lakehead System lines, the proposed Consent Decree contains two provisions that allow Enbridge to avoid application of the default criteria under certain limited situations. First, Paragraph 49 of the proposed Decree allows Enbridge in specified circumstances to extend deadlines for excavation and repair of the subset of features that are subject to 180 excavation and

The attached Consent Decree contains a technical correction with respect to the procedures for determining whether a defect meets dig selection criteria. Under Paragraph 36, Enbridge shall use three methods to make such a determination. One such method is to estimate the lowest pressure at which the defect is predicted to rupture or leak. The procedures for calculating a defect's predicted burst pressure are set forth at Appendix B to the updated and revised Consent Decree at Exhibit 3.[12] In the original Consent Decree lodged with the Court, Enbridge was precluded from calculating the predicted burst pressure of a corrosion feature using one type of model (the RSTRENG model) whenever the feature was detected by one type of ILI tool, known as a magnetic flux leakage ("MFL") tool. However, based on additional information that Enbridge provided regarding the detection capabilities of certain "high resolution" MFL tools, the parties have agreed to revise the blanket restriction on using the RSTRENG model and to allow use of the RSTRENG model in calculating the predicted burst pressure of corrosion features that are detected using MFL tools that meet certain high-resolution requirements. Appendix B incorporates language to reflect this technical correction.

3. Supplemental Measures at the Straits of Mackinac

The Consent Decree sets forth several extra integrity measures that apply uniquely to the segment of Line 5 that crosses the Straits of Mackinac. When the pipeline was installed in the 1950s, safety features were included to minimize the risk of a release into the Great Lakes, such

repair or mitigation deadlines. Second, Paragraphs 46.c through 46.m authorize Enbridge, under certain limited conditions, to develop and implement an alternate plan and timetable for excavation and repair or mitigation of features requiring excavation.

[12] Given the deletion of Appendix A, all the other appendices have been moved forward one letter. Thus, Appendix B in the original Consent Decree lodged with the Court is now Appendix A in the updated Consent Decree at Exhibit 3.

as splitting Line 5 into two "dual" pipelines for its passage across the 4-mile width of the Straits.[13] Nevertheless, in the aftermath of the Marshall spill, these "dual" pipelines have received a great deal of public attention in recognition of the potentially catastrophic consequences of a significant spill in this ecologically sensitive part of the Great Lakes. In addition to the generally applicable provisions of the proposed Decree intended to prevent future pipeline spills, the proposed Consent Decree includes the following supplemental measures to provide further protection for the Straits:

- Span Management Program: The proposed Decree includes a span management program designed to insure that the shallow portions of the pipelines are buried in trenches in the bed of the Straits, while any deeper, uncovered portions of the pipelines are supported and anchored at distances not to exceed 75 feet.[14] Enbridge is required to conduct periodic visual inspections of the pipelines, complete prompt repairs of any deficiencies identified in the inspection, and to submit reports concerning the inspection and any repairs. *Id.*, ¶ 68.

- ILI Schedule: Although the Straits are subject to the same requirements discussed above with respect to the frequency of ILIs, the Consent Decree requires Enbridge to arrange its ILI schedule to assure that it completes ILIs for crack and corrosion features no later than July 30, 2017, regardless of when the previous crack and corrosion ILIs were completed.

- Axially-Aligned Crack Investigation: The proposed Decree requires Enbridge either to inspect the Dual Pipelines for axially-aligned cracks or to confirm the integrity of the Dual Pipelines with a hydrostatic test, which Enbridge must conduct in accordance with Section VII.C of the Consent Decree.

- Leak Detection using Acoustic Tool: The proposed Decree requires quarterly inspections of the Dual Pipelines using an acoustic leak detection tool, which is capable of detecting small “pin hole” leaks.

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[13] As an initial matter, the pipelines were constructed with a seamless pipe and, as such, are generally not susceptible to the defects that can develop in the long seams of other pipes. Further, the wall of the dual pipelines in the Straits is substantially thicker than the pipe used on the rest of Line 5 — or on other Enbridge lines for that matter. Finally, operating pressures in the dual pipelines that cross the Straits are very low. All of these conditions help to reduce the threat of a leak or rupture.

[14] These requirements are consistent with technical specifications in the easement that the State of Michigan originally granted to Enbridge when Line 5 was constructed.

- Contingent Movement Investigation: If Enbridge identifies cracks that meet one or more of the dig selection criteria, Enbridge shall install instrumentation to monitor potential movement of the pipelines unless Enbridge is able to affirmatively rule out pipeline movement as a cause of the cracks.

- Biota Investigation: The proposed Decree requires Enbridge to investigate whether the various biota that are growing on the pipelines could adversely impact their integrity by damaging coating material, creating an environment that contributes to metal loss, or affecting the pressures exerted on the pipeline by currents or ice movement.

4. Data Integration Database

The Consent Decree requires Enbridge to take steps to improve its ability to integrate data regarding defects detected by ILI tools. As discussed above in the Background section, one cause of the Marshall spill was Enbridge's failure to correlate data from two separate ILI tools – one tool that detected corrosion defects and another tool that detected crack defects. To address this problem, Enbridge has developed a data integration database, known as OneSource, that gives integrity personnel the capability to correlate data from different ILI tools runs. Under the Consent Decree, Enbridge is required to update the OneSource database with new ILI data as Enbridge completes ILIs required under the proposed Decree, as well as data generated from visual in-the-ditch inspections of pipelines during excavation and repair operations. Further, the proposed Consent Decree expressly requires Enbridge to consult the database for the purpose of determining whether intersecting or interacting defects meet any of the dig selection criteria set forth in the Consent Decree. *See*, Decree, Section VII.D.(V), Table 5.

B. Measures to Improve Leak Detection and Control Room Operations

Beyond improvements to integrity management, a second goal of our negotiations was to improve leak detection and control room operations. Enbridge uses a computational pipeline monitoring ("CPM") system for detecting leaks and ruptures. Such a system utilizes real-time

data to simulate and predict the volume of oil within discrete segments of each pipeline, known as MBS segments.[15] Where the CPM system notes a discrepancy between volume of oil entering and exiting particular segments of the pipeline that exceeds a specific threshold, and the discrepancy is not resolved within a given time period, the CPM system will generate an alarm in Enbridge's control room in Edmonton, alerting operators to a potential leak or rupture within the MBS segment. Unfortunately, at the time of the Marshall spill, control room personnel had little confidence in the accuracy and reliability of Enbridge's leak-detection system, as demonstrated by the fact that "none of the control team members involved in Line 6B operations recognized that the cause of the alarms was a rupture and that re-starting the line would only exacerbate, rather than correct, the underlying condition." *NTSB Marshall Report*, p. 95. Since the Marshall spill, Enbridge has made investments to improve the reliability and accuracy of its leak-detection system, and the company has extensively revised control room procedures to ensure that alarms are addressed in an appropriate and timely fashion. The proposed Consent Decree locks in these improvements.

For all Lakehead System pipelines, the Consent Decree requires Enbridge to operate its CPM System to maintain continuous and uninterrupted leak-detection capability for each MBS segment, except for certain circumstances enumerated in the Consent Decree. *Decree*, ¶¶ 92-98. The Consent Decree also sets forth certain minimum alarm thresholds that Enbridge must meet after the flow in the pipeline achieves a steady state. In the event that leak detection capability within an individual MBS segment is temporarily lost (*e.g.*, due to instrument failure), Enbridge must restore this capability as expeditiously as possible and, in the interim, maintain leak-detection capability by alternative means. *Id.*, ¶ 94. Further, if Enbridge fails to meet certain

[15] Enbridge calls its leak-detection system the "Material Balance System" or MBS.

deadlines for restoring leak-detection capability, it must submit a report explaining the rationale for its delay. *Id.*, ¶¶ 96-97.

The Consent Decree also requires Enbridge to develop and implement a new 24-hour Alarm, which is intended to detect smaller leaks than the system was capable of detecting at the time of the Marshall spill. Id., ¶ 103. The new alarm will alert control room personnel if the CPM system cannot detect, or otherwise account for, 3% of the oil pumped or injected into an MBS segment over any 24-hour period. In addition to the new alarm, Enbridge must conduct an optimization study of each Lakehead pipeline in an effort to improve upon this 3% target. Based upon the results of the study, Enbridge shall set an alarm threshold, subject to EPA disapproval, that optimizes the tradeoff between the competing goals of reducing false alarms and improving the sensitivity of the CPM system in detecting leaks or ruptures.

With respect to all new replacement pipelines, Enbridge must install certain instruments to bolster the sensitivity and reliability of the CPM system. Id., ¶ 85. Enbridge is also required to design and construct the pipelines to achieve specific leak-detection targets. For instance, with respect to the new 24-hour alarm, Enbridge shall design and construct all new lines to meet a leak-detection target of 2%, which is more stringent than the 3% standard required for existing lines. The Consent Decree creates a significant incentive for Enbridge to limit the size of MBS segments, which improves the sensitivity of the CPM System; if an MBS segment holds a volume of oil less than 45,000 cubic meters, Enbridge is not required to conduct testing to demonstrate compliance with the leak-detection targets in the decree.

In addition to these CPM requirements, the Consent Decree requires Enbridge to maintain continuous operation of a new rupture-detection system, which Enbridge developed after the Marshall spill. *Id.*, ¶ 102. The rupture-detection system will continuously monitor real-

time data for the purpose of detecting the telltale signs of a rupture, including abnormally low pressures, an abnormal pressure drop, or an abnormal increase in flow rate. Enbridge is required to conduct demonstration testing of the new system for at least two MBS segments.

In the event that the CPM System or the new rupture-detection generates an alarm, the Consent Decree sets forth the procedures to be followed by a 3-member Alarm Response Team for investigating such alarms. *Id*., ¶¶ 105-109. Each alarm shall remain active until the pipeline is either shutdown for the purpose of investigating the alarm or the Alarm Response Team (1) accounts for the imbalance indicated by the alarm, (2) confirms the cause of the alarm, and (3) rules out the possibility of a leak or rupture. The Alarm Response Team must immediately shut down the pipeline if an investigation of the alarm cannot be completed within ten minutes. Likewise, the team must shut down the pipeline if the alarm is determined to be a "Confirmed Leak or Rupture" as defined in Paragraph 109.d of the Consent Decree.

To ensure compliance with these procedures, Enbridge must compile a series of reports documenting actions taken by the Alarm Response Team and identifying violations of the procedures. *Id*., ¶ 110. Such reports, together with a summary of alarms ("SOA") for the reporting period, shall be submitted to EPA on semi-annual basis. Enbridge's Vice President for Pipeline Control is required to sign the SOA and certify to the accuracy and completeness of the information submitted to EPA.

C. Measures to Improve the Containment of Spills

A final objective of the Consent Decree was to strengthen Enbridge's ability to contain spills and prevent discharges to water in the event of a leak or rupture. Like all operators, Enbridge is required under PHMSA regulations to maintain a manual that sets procedures in the event of a spill or other emergencies. 49 C.F.R. § 195.402(e). With respect to the

Lakehead System, Enbridge has set forth its procedures in three integrated contingency plans ("ICPs") — each of which covers a multi-state area. The proposed Consent Decree seeks to strengthen Enbridge's proficiency in carrying out these emergency procedures.

First, Enbridge must conduct four large-scale exercises to test and practice Enbridge's response to a major inland oil spill. The exercises will occur on an annual basis at various locations set forth in the Consent Decree. For each exercise, Enbridge must hold planning sessions with government personnel and seek and obtain EPA's approval of the exercise plan, which shall require the establishment of a unified command structure and the deployment of personnel and equipment within a designated waterway. All Enbridge personnel who will participate in the incident command system ("ICS") must obtain appropriate ICS training.

Second, on an annual basis, Enbridge shall conduct at least six field exercises and ten "table-top" exercises with community, state, and local first responders. Each field exercise shall test and practice a specific oil-spill response tactic used in the initial hours of a spill of at least 1,000 gallons into water. Each "table-top" exercise, in contrast, will not occur in the field, but rather shall test and practice response procedures using a hypothetical spill scenario. In addition, on an annual basis, Enbridge shall conduct at least 15 community outreach sessions that discuss the locations of Enbridge pipelines and the hazards of different oils transported by the pipelines.

Third, Enbridge must implement measures to improve the ability of its personnel and contractors to coordinate with their governmental counterparts. Enbridge must participate in all area planning meetings to which it is invited by Federal officials. It must provide EPA with copies of hundreds of "control point" plans that set forth Enbridge's strategies for containing oil in designated waterways. Enbridge must also assess and report its ability to deploy personnel and equipment within the estimated time limits set forth in the ICPs.

Finally, the proposed Consent Decree requires Enbridge to install 18 additional remotely-controlled valves that may be closed in order to reduce the volume of oil that may be released in the event of potential pipeline leak or rupture situations in certain locations. EPA identified each of these locations based upon an analysis of remote areas where existing valves appeared inadequate to safeguard waterways and other environmentally-sensitive areas. The Consent Decree specifies that each valve shall close and seal within three minutes of the operator engaging the closure control on his or her control panel.

D. Provisions Relating to Independent Third-Party

The Consent Decree requires Enbridge to retain and pay for an Independent Third Party ("ITP") to conduct a comprehensive verification of Enbridge's compliance with the measures discussed above, except for measures to improve the containment of the spills. The Consent Decree sets forth safeguards to ensure the independence of the ITP, including a requirement that Enbridge's written agreement with the ITP shall explicitly state, among other things, that the ITP owes a duty to the United States to provide objective and fair assessment of Enbridge's compliance with the Consent Decree. In addition, such agreement shall mandate that the ITP shall perform a variety of tasks in support of EPA's oversight of the proposed Decree, such as reviewing and evaluating all proposed plans, reports, and other deliverables that Enbridge is required to submit under the proposed Decree. In the event that the Consent Decree is approved, the ITP shall complete its initial review of Enbridge's performance within 16 months of the entry of the Consent Decree. Thereafter, the ITP shall conduct periodic reviews, upon request by EPA, until the Consent Decree is terminated under Section XX (Termination).

IV. DESCRIPTION OF THE PUBLIC COMMENTS AND PROCESS

The Department of Justice regulations require the Department to publish notice of, and offer the public a period of at least 30 days to submit comments on, certain proposed consent decrees and to reserve the right to withdraw from any such proposed decree if the comments disclose facts or considerations which indicate that the proposed Decree is inappropriate, improper or inadequate. 28 C.F.R. § 50.7. The Department must also file the public comments with the court. *Id*. Here, the United States originally provided for a 30-day public comment period that ended on August 24, 2016, (81 Fed. Reg. 48462 (July 25, 2016)), but subsequently, in response to requests received during that period, extended the comment period until October 21, 2016. *See* 81 Fed. Reg. 48462 (Sept. 9, 2016). In addition, on October 7, 2016, the United States met with representatives of five Indian tribes based in Michigan to discuss objections to the Consent Decree raised in their filing with the Court (Doc. No. 7) and in a letter to the Department of Justice.[16] Although that meeting was not itself part of the public comment process, the extended comment period referred to above afforded the Michigan tribes an opportunity to supplement previous comments based on information exchanged at the October 7, 2016 meeting.

In all, the United States received communications from over 17,000 commenters, but the vast majority of these were comments submitted through internet-based portals that collect comments from separate commenters. One such portal was established by Friends of the Headwaters ("FOH") – a citizen's group opposed to the construction of Enbridge's replacement

[16] This meeting was held in Traverse City, Michigan and included representatives of Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, Sault Ste. Marie Tribe of Chippewa Indians, and Little River Band of Ottawa Indians.

of Line 3. The United States received a form letter as well as 347 separate individualized comments from FOH. The FOH form letter appears in Exhibit 1 as Comment 37; the individualized personal comments from the various FOH commenters have been collected in a spreadsheet that separately numbers each individualized comment. This spreadsheet is included in Exhibit 1 as Attachment A. In addition, the United States received 17,095 form letters submitted through a portal operated by KnowWho Services – an internet-based company that serves as a clearinghouse for a broad range of advocacy groups. A copy of the basic form letter submitted by KnowWho Services appears in Exhibit 1, as Comment 1. Of the form letters submitted through the KnowWho Services portal, 1,552 letters included some customized comments, which the United States extracted from the form letters and inserted into a spreadsheet that separately numbers each individualized comment. The spreadsheet containing individualized comments from KnowWho Services is attached at Exhibit 1, Attachment B. [17] Finally, the United States received another 35 public comments, either in emails or letters, prepared by submitters who did not rely upon either of the above-referenced internet-based portals. Some of these submitters were individuals, but the majority were non-profit environmental groups or Indian Tribes who wrote in-depth comments on a range of topics. All of these comments are included in Exhibit I.

The United States has provided its response to significant, substantive comments in Exhibit 2 ("Response to Comments").[18] For the Court's convenience, we have summarized and

[17] The United States does not plan to submit to the Court all of the form letters received from KnowWho Services. Unless the Court wishes to see the full text of each form letter, the United States perceives no value in clogging the ECF system with thousands of pages of duplicate text.

[18] Without suggesting that the proposed Consent Decree is inappropriate, improper or inadequate, various commenters offered suggestions for adding provisions to the Consent Decree that they believe would improve various aspects of the settlement. The United States did not

grouped the substantive comments under topic headings, such as "Comments Relating to Civil Penalty" or "Comments relating to Measures to Prevent Spills." As briefly discussed below (and in greater detail in the Response to Comments), none of the comments raise any facts or circumstances that would indicate the Consent Decree is improper, inadequate, or not in the public interest. Consequently, the United States does not withdraw its consent to the proposed settlement, as revised, and urges the Court to approve and enter the revised Consent Decree, a copy of which is attached to this Memorandum at Exhibit 3.

V. DISCUSSION

In reviewing a proposed consent decree, the reviewing court is to ascertain "whether the decree is 'fair, adequate, and reasonable, as well as consistent with the public interest.'" *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010), quoting *United States v. Cnty. of Muskegon*, 298 F.3d 569, 580-81 (6th Cir. 2002); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991). This limited standard of review reflects a public policy that strongly favors settlements of disputes without protracted litigation. *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976). Settlements conserve the resources of the courts, the litigants, and the taxpayers and "should . . . be upheld whenever equitable and policy considerations so permit." *Id.* at 1372. The presumption in favor of settlement is particularly strong where, as here, the Department of Justice played a significant role in negotiating the consent decree on behalf of federal agencies with substantial expertise in the environmental field. *Akzo Coatings*, 949 F.2d at 1436.

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specifically address each of these suggestions in the Response to Comments, and notes that, while it might have been possible to negotiate additional provisions consistent with such comments, the absence of such provisions does not render the Decree inappropriate, improper or inadequate.

Approval of a settlement is committed to the informed discretion of the trial court. *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351 (6th Cir. 1986); *Donovan v. Robbins*, 752 F.2d 1170, 1176-77 (7th Cir. 1985); *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984). Courts, however, usually exercise this discretion in a limited and deferential manner. For example, the Court does not have the power to modify a settlement; it may only accept or reject the terms to which the parties have agreed. *Jones & Laughlin Steel Corp.*, 804 F.2d at 351; *Akzo Coatings*, 949 F.2d at 1435; *Officers for Justice v. Civil Serv. Comm'n and Cnty. of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982). The focus of the court's evaluation is "not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute," *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1036 (D. Mass. 1989) (citations omitted), *aff'd*, 899 F.2d 79, 84 (1st Cir. 1990); see also, *Officers for Justice v. Civil Serv. Comm'n and Cnty of San Francisco*, 688 F.2d 615, 625 and 630; *Kelley v. Thomas Solvent Co.*, 717 F. Supp. 507, 515 (W.D. Mich. 1989).

Here, the Court should enter the proposed Consent Decree because it is fair, reasonable, and consistent with the objectives of the purposes of the CWA and OPA, which are the basis of the claims asserted in the complaint. The "presumption of validity" stands, and the proposed Decree should be entered as a final order of the Court.

A. The Consent Decree is Fair, Both Procedurally and Substantively

"Procedural fairness concerns the negotiations process, *i.e.*, whether it was open and at arms-length." *United States v. Fort James Operating*, 313 F. Supp. 2d 902, 907 (E.D. Wis. 2004) (citations omitted). The proposed consent decree was the product of extensive, good faith, arms-length negotiations among the parties with diverse interests. All parties to the settlement

were represented by experienced counsel who had the assistance of technical experts on key topics. No one submitted comments challenging the fairness of the negotiation process. The Court should conclude that the settlement process was procedurally fair, as it did when it approved the NRD settlement with Enbridge relating to the Marshall spill.

The proposed consent decree is also substantively fair. Substantive fairness, which "concerns concepts of corrective justice and accountability," typically comes into play in multiple-defendant environmental matters when non-settlors object that a settlement leaves them too large a share of liability. *Id.* Such an objection cannot arise here; the proposed Consent Decree resolves the liability of all of the defendants named in the complaint.

Some commenters contend that the settlement is not substantively fair because they maintain that their independent claims against Enbridge – claims not asserted by any party to this litigation – have been impaired by the injunctive measures required under the settlement. For instance, Indian tribes in Michigan allege that proposed Consent Decree authorizes construction activities in the Straits of Mackinac, and they maintain that such activities will impair their usufructuary rights reserved under various treaties with the United States. Similarly, various groups opposed to the replacement of Line 3 argue that the Consent Decree mandates the completion of that project and, as a result, impairs their legal efforts to stop the replacement of Line 3.

Such criticisms, however, misconstrue the Consent Decree. As discussed in greater details in the attached Response to Comments, the proposed Consent Decree does not authorize any construction activities in the Straits or with respect to Line 3. To the contrary, where "any compliance obligation under the Consent Decree requires Enbridge to obtain a federal, state, or local permit or approval," the proposed Consent Decree requires Enbridge to "submit timely and

complete applications and take all other actions necessary to obtain all such permits and approvals." *Id.* at ¶¶ 22.a and 142. Thus, before Enbridge can engage in construction activities in the Straits to install, for instance, additional pipeline anchors in accordance with Paragraph 68 of the Consent Decree, Enbridge must apply to State and Federal regulatory authorities for permission to complete such work. If the commenters wish to oppose such work, they are free to do so by filing comments or taking whatever legal action that they deem appropriate to oppose the issuance of permits and approvals for such work. Likewise, commenters are free to take legal action in an effort to prevent the Minnesota Public Utility Commission ("MPUC") from approving the replacement of Line 3. Accordingly, commenters' concerns that Consent Decree impairs their rights, or otherwise undermines their legal claims against Enbridge, are simply unfounded.

In its applications to the MPUC, Enbridge has proposed to change the route of Line 3, and it is this proposal that has precipitated much of the litigation relating to the replacement project. However, the Consent Decree does not adopt or endorse any of the elements of Enbridge's currently pending applications for approval to replace Line 3. Thus, contrary to the assumption of numerous commenters, the Decree contains no provisions regarding the route of the replacement line, no provisions regarding the size or capacity of the replacement line, and no provisions that would require the MPUC to accelerate or alter its procedures for reviewing Enbridge's proposal. The Consent Decree merely requires that, if relevant regulatory authorities grant approvals necessary for replacement of Line 3, then Enbridge must then complete the replacement project and take the old line out of service as expeditiously as practicable. Decree, at ¶ 22.a. Further, the Consent Decree sets forth certain leak-detection requirements for the replacement line. *Id.* at VII.G(III).

To provide further reassurance to the public, the parties have agreed to change provisions in the Consent Decree to clarify their intent with respect to the Line 3 replacement project. As discussed above, the revised proposed Consent Decree provides that Enbridge's obligation to replace Line 3 is conditioned on Enbridge being able to obtain all permits and other authorizations needed for the replacement project. "If Enbridge receives approval 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 . . . as expeditiously as practicable." *Id.*, ¶ 22.a.

This revision should fully resolve any public perception that the proposed Consent Decree might interfere with, or otherwise alter, the regulatory review of Enbridge's application for permission to replace Line 3.

B. The Consent Decree is Reasonable, Adequate and Consistent with the Purposes of the CWA and OPA

"One of the most important considerations when evaluating whether a proposed consent decree is reasonable is the decree's likely effectiveness as a vehicle for cleansing the environment." *Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d at 489 ("quotations omitted). Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," by, among other things, ensuring that "there should be no discharges of oil or hazardous substances into or upon the navigable water of the United States" and adjoining shorelines. 33 U.S.C. §§ 1251(a), 1321(b). Similarly, Congress enacted OPA "to encourage rapid private party responses" to oil spills by imposing "strict liability for pollution removal costs and damages on the responsible party for a vessel or a facility from which oil is discharged." *Metlife Capital Corp. v. M/V Emily S*, 132 F.3d 818, 820-22 (1st Cir. 1997). As discussed below, the proposed Consent Decree comports with these statutory policies by requiring Enbridge to (1) pay civil penalties that are among the largest ever assessed for

violations of Section 311 of the CWA, (2) implement robust measures to improve the prevention, detection, and containment of oil spills throughout seven states and (3) fully reimburse the Fund for all removal costs associated with the Marshall spill.

1. Settlement of Civil Penalties

The proposed Consent Decree requires Enbridge to pay $62 million in civil penalties – an amount that substantially exceeds the civil penalties assessed in other settlements outside of those relating to the Deepwater Horizon disaster.[19] If the United States were to pursue contested litigation, it might secure either a larger or smaller penalty against Enbridge taking into account the statutory penalty factors set forth under Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8). The proposed settlement of $62 million is a reasonable settlement that sufficiently punishes Enbridge for violations of the CWA and sends a clear deterrence message to the industry while, at the same time, it protects the public from the expenses and risks of contested litigation.

Several statutory factors weigh heavily in favor of a large and significant civil penalty against Enbridge with respect to the Marshall spill. First and foremost was the seriousness of the spill – one of the largest inland spills ever to impact the Midwest. The spill oiled over 30 miles of waterways and adjoining shorelines, released dangerous chemicals into the air, and precipitated a lengthy four-year cleanup – all of which threatened and injured local communities and the environment. Second, Enbridge was highly culpable in causing the spill. Enbridge not only made errors in the control room when personnel ignored alarms and restarted pumps,

[19] By comparison, the civil penalty paid by Colonial Pipelines in 2003 for several spills, including one spill in South Carolina that rivaled the size of the Marshall spill, was $34 million. *United States v. Colonial Pipeline Co.*, Civil Action No. 1:00-cv-3142 JTC (N.D. Ga.). Such a settlement is approximately $44 million in today's dollars after adjustments for inflation based upon the consumer price index.

injecting thousands of barrels of oil into a ruptured pipeline, but Enbridge also erred in its maintenance of Line 6B, allowing known cracks and corrosion to remain in the pipeline for over five years before they caused a rupture and applying incorrect information in evaluating the seriousness of the flaws that contributed to failure of Line 6B. Finally, Enbridge had experienced similar oil spills in the past. As discussed in the response to public comments, the NTSB found that the Marshall spill was highly reminiscent of another spill from a Lakehead pipeline in Grand Rapids, Minnesota in 1991. As a partially mitigating factor, Enbridge (after initial delays) ultimately performed an effective cleanup at considerable expense. While that could be viewed as no more than complying with defendant's legal obligation, it is nonetheless in the public interest and worthy of consideration.

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 shall be 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 $1,300 per barrel discharged.

Here, 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 $3,000 for each barrel discharged, assuming a minimum spill volume of 20,082 barrels. Even assuming a maximum spill volume of 27,300 barrels (as suggested by some commenters), the penalty is equal to Enbridge paying $2,234 for each barrel discharge – a penalty that is significantly greater than the

maximum penalty ($1,100 per barrel) that can be assessed for spills that do not involve gross negligence or willful misconduct. Conversely, the $1 million penalty for the Romeoville spill is equal to Enbridge paying a civil penalty of $155 per barrel, assuming a spill volume of 6,427 barrels. Such a penalty is consistent with the strict liability imposed by the CWA, holding Enbridge accountable for the spill even though the NTSB found that the proximate cause of the spill was a waterline owned by a third party. Accordingly, the United States believes that the penalties under the proposed Consent Decree are fair and appropriate in light of the circumstances of each spill and will send a clear message to Enbridge and other regulated entities that discharges of oil to navigable waters will not be tolerated.

Some commenters 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 facing the United States if it were to pursue contested litigation against Enbridge. For instance, Enbridge could argue that its 4-year effort to clean up the Marshall spill, together with settlements to restore and replace lost and damaged natural resources, warrants reductions in the civil penalties it should pay. Further, commenters who question the penalty ignore the fact that the penalty was negotiated as part of a package that not only included system-wide injunctive relief, but also reimbursement of removal costs. Given the overarching goal of the settlement is not merely to penalize violators, but to prevent future oil spills and replenish the Oil Spill Liability Fund, the Court should find that the penalty is reasonable, adequate, and in the public interest.

2. Settlement of Injunctive Claims

The Consent Decree contains robust measures to minimize the risk of future oil spills – not just in Michigan and Illinois, where the 2010 pipeline failures on Lines 6A and 6B occurred,

but in any of the seven states where Enbridge operates its Lakehead System pipelines. The errors made by Enbridge that caused the Marshall spill could potentially be repeated for any one of Enbridge's 14 Lakehead System pipelines, which collectively span 1,900 miles of right-of-ways across the upper Midwest. Enbridge operates all of the pipelines from its control center in Edmonton, Canada. Further, the majority of the pipelines are forty years or older and, hence, susceptible to the same kind of crack and corrosion defects that led to the Marshall spill. Accordingly, as PHMSA recognized in ordering Enbridge to prepare the Lakehead Plan in 2014, a comprehensive plan for the entire Lakehead System is necessary to safeguard the public and protect the environment from future spills.

As detailed in Section III above, the proposed Consent Decree sets forth injunctive measures in three broad categories. First, the proposed Consent Decree seeks to prevent future spills by, among other things, ensuring that Enbridge pursues a vigorous ILI-based program to inspect and repair its pipelines in a timely fashion, as well as undertake other supplemental measures to improve the safety and integrity of Line 5 in the Straits of Mackinac. Second, the decree seeks to ensure that control room personnel will take prompt action in response to a leak or rupture by mandating improvements to Enbridge's leak-detection system, as well as by setting forth procedures for control room personnel to follow in investigating future alarms. Lastly, the proposed consent decree seeks to ensure that Enbridge's field personnel and contractors will take quick and effective action to mitigate a spill by mandating a number of programs to improve training and bolster coordination with federal, state, and local responders. All of these programs shall remain in effect for at least 4 years from the date of entry of the Decree, and the program shall be overseen by EPA with the assistance of an independent third-party hired by Enbridge.

Despite the robustness of this injunctive program, certain commenters contend that the Consent Decree does not go far enough to prevent future spills in the Straits of Mackinac. Specifically, commenters argue that the settlement should require Enbridge to cease operation of Line 5 altogether or at least to eliminate the Line 5 crossing of the Straits of Mackinac. Such comments, however, ignore the litigation risks that the United States would face if it were to pursue such injunctive relief in contested litigation. Enbridge has not unlawfully discharged oil into the Straits, and therefore, it is questionable whether the Court, at this stage, would conclude that a complete shutdown of Line 5, or the removal of that line from the Straits, represents a necessary and appropriate means of assuring compliance with the CWA prohibition on discharges of oil to waters of the United States. Accordingly, the Court should find that the injunctive program established by the proposed Consent Decree is reasonable and consistent with the goals of the CWA.

3. Settlement of Claim for Removal Costs

The proposed settlement provides for full and complete payment of all unreimbursed removal costs incurred by the United States for the cleanup of the Marshall spill. Enbridge has already paid $57.8 million in removal costs that the U.S. Coast Guard previously billed with respect to the Marshall spill, and Enbridge has paid $659,027 in removal costs previously billed by the U.S. Coast Guard with regard to the Romeoville spill. Under the proposed Consent Decree, Enbridge will pay the only remaining unreimbursed removal costs – namely, $5,438,222 in removal costs relating to the Marshall spill, plus interest on this amount accruing from the date of lodging of the Consent Decree. In addition, Enbridge will also pay any future removal costs that U.S. Coast Guard may bill

with respect to the Marshall spill, provided that such costs are consistent with the national contingency plan, as codified in 40 C.F.R. Part 300.

The proposed Consent Decree provides substantial benefit to the public consistent with the Congressional purpose in enacting the OPA. The cost of cleaning up the spill is being fully borne by Enbridge – the responsible party – and not by taxpayers. Further, the payments made by Enbridge will be used to replenish the Oil Spill Liability Trust Fund, providing critical funding that can be used to address future spills. Lastly, Enbridge has agreed under the Consent Decree to waive any claim that it might assert against the Fund for removal costs that Enbridge may have incurred in excess of the liability cap at Section 1004(a)(4) of OPA, 33 U.S.C. § 2704(a)(4). In short, the settlement provides the United States with all the relief that it could have reasonably expected to secure if it had, in fact, pursued contested litigation and won on its claims under Section 2702 of OPA, 33 U.S.C. § 2702.

VI. CONCLUSION

For the reasons stated above, the proposed Consent Decree is fair, reasonable, adequate, and consistent with the goals of the CWA and OPA. The United States respectfully requests that the Court sign the proposed consent decree and enter the consent decree as a final judgment.

Respectfully submitted,

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