

# Lac Vieux Desert Band Of Lake Superior Chippewa Tribal Government

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May 13, 2020

Executive Secretary  
Michigan Public Service Commission  
7109 W. Saginaw Hwy  
Lansing, MI 48917

**Re: Case No. U-20763, In Re Enbridge Energy  
Comments of the Lac Vieux Desert Band of Lake Superior Chippewa Indians in  
Opposition to a Request for Declaratory Rule by Enbridge Energy**

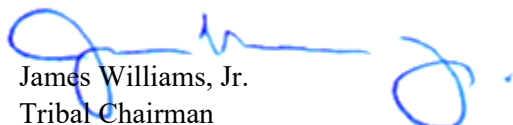
Dear Michigan Public Service Commission:

The Lac Vieux Desert Band of Lake Superior Chippewa Indians writes this letter to express their absolute opposition to the Request of Enbridge Energy to proceed with its relocation and reconstruction of its Line 5 pipeline, including an unproven tunnel, under the Straits of Mackinac. Enbridge's assertion that it may rely on a 1953 easement to now evade the MPSC's permitting process for an entire rebuilding of a submerged pipeline in one of the United State's most precious resources is ridiculous on its face. Our Tribe opposes a declaratory ruling by the MPSC and incorporates by reference the attached legal analysis of the Bay Mills Indian Community.

The Lac Vieux Desert Band consists of descendants of the Ojibwe who inhabited and maintained life from these lands for time immemorial. Our lives are tied to these lands and we have consistently been at the mercy of Enbridge and the State of Michigan as our lives are still tied to our historical waters. Our exercise of subsistence fishing rights are reserved in the Treaty of 1842 and we continue to rely on these rights for the culture, health, physical and spiritual well-being of our people. We saw the environmental dangers from the Line 5 pipeline when it spilled 220,000 gallons of oil and natural gas in our ceded territory, only miles from one of our most important fishing lakes. We know the assertions by Enbridge about the safety of their pipelines may not be true. Our fishing rights and those of our sister tribes are tied to Lake Superior and the potential fallout from an oil spill or other mishap with the proposed new line could be devastating to our lands and our way of life.

For these reasons as supported by the Bay Mills Indian Community's legal analysis you must deny Enbridge Energy's request for a declaratory ruling.

Respectfully,

  
James Williams, Jr.  
Tribal Chairman

Enclosure: Comments of the Bay Mills Indian Community Regarding the Request for a  
Declaratory Ruling by Enbridge Energy, Limited Partnership

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief

U-20763

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**COMMENTS OF BAY MILLS INDIAN COMMUNITY OPPOSING THE REQUEST FOR A  
DECLARATORY RULING BY ENBRIDGE ENERGY, LIMITED PARTNERSHIP**

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## **I. INTRODUCTION**

The Gnoozhkekaaning, “Place of the Pike,” or Bay Mills Indian Community (“Bay Mills”), through its undersigned counsel, respectfully submits these comments to the Michigan Public Service Commission (“the Commission”) opposing the request for a declaratory ruling by Enbridge Energy, Limited Partnership (“Enbridge”).

On April 17, 2020 Enbridge filed an application, pursuant to 1929 PA 16; MCL 483.1 *et seq.* (“Act 16”) and Michigan Administrative Code, R 792.10447 (“Rule 447”), requesting approval to replace and relocate the segment of Line 5 crossing the Straits of Mackinac into a tunnel to be constructed beneath the Straits of Mackinac (the “Line 5 Project” or the “Project”). In the alternative, Enbridge asks this Commission for a declaratory ruling that its application does not need to proceed through the approval process because, according to Enbridge, it already has the requisite authority for the Line 5 Project based on this Commission’s grant of authority for the construction of Line 5 in 1953. By its April 22, 2020 Order, the Commission requested comments on the request for a declaratory ruling.

The Commission’s mandate and commitment to regulate and protect the public requires that Enbridge’s request for a declaratory ruling be denied. The request must be denied for three reasons:

(1) The request lacks any legal basis and runs counter to the Commission’s regulations and rulings;

(2) The request requires the Commission to ignore the requirement that it consider the environmental impacts of the Line 5 Project; and



(3) The request would deprive Bay Mills and other impacted tribes the opportunity to participate in the proceedings, where they would raise substantial concerns about the Line 5 Project under the standards set forth in Public Act 16 and the Michigan Environmental Protection Act (“MEPA”).

## **II. BAY MILLS INDIAN COMMUNITY’S INTEREST**

Bay Mills has a long-standing and critical interest in the waters of the Great Lakes, the Straits of Mackinac and the surrounding region. Bay Mills is one of the signatories to the 1836 Treaty of Washington, which ceded territory to the United States for the creation of the State of Michigan. In exchange for the agreement to cede the territory to the United States, the Tribes reserved the right to hunt and fish throughout the territory--including in the Great Lakes and the Straits of Mackinac. The 1836 Treaty is a legally binding agreement between sovereign nations that acknowledges and establishes respective political and property relations as well as confirms each nation’s rights and privileges.<sup>1</sup> And, under Article Six of the United States Constitution, the Treaty of 1836 is to be considered the “supreme law of the land.” It remains as operative today as the day it was signed.

The right to fish has been fiercely protected by the Bay Mills Indian Community and other tribes, including through litigation that resulted in critical legal decisions upholding that right.<sup>2</sup> Bay Mills defends its legal right because the right to fish, and the need for a natural environment in which fish can thrive, is of the utmost importance to the tribe and its members.

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<sup>1</sup> See *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699, 203 L.Ed. 2d 846 (2019) (A treaty is “essentially a contract between two sovereign nations.”)

<sup>2</sup> See *People v. LeBlanc*, 399 Mich. 31, 248 N.W. 2d 199 (1976) and *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

Consistent with the tribes' legal right to fish, the State of Michigan and the signatory tribes to the 1836 Treaty entered into a consent judgment in 1985 regarding management of the Great Lakes fishery. That agreement affirmed that the State and the Tribal Nations must work together to protect the Tribal Nations' treaty fishing rights and manage the Great Lakes fishery in a manner that respected tribal and state interests. The Tribal Nations and the State have worked together to protect the Great Lakes ever since.

The Great Lakes and the Straits of Mackinac also have profound cultural significance to Bay Mills. According to the oral histories of the tribe, the creation of North America began with a flooded Earth. The animals that survived that Earth received instructions from the Creator to swim deep beneath the water and collect soil that would be used to recreate the world. All of the animals failed, but the body of the muskrat, the last animal that tried, resurfaced carrying a small handful of wet soil in its paws. According to the history, the Creator used the soil collected and rubbed it on the Great Turtle's back, forming the land that became known as Turtle Island, the center of creation for all of North America.

It is believed that the Great Turtle emerged from the flood in the Straits of Mackinac. Because the creation of North America took place in the Great Lakes, the Great Lakes are considered the heart of Turtle Island and as such, the heart of North America. The word "Mackinac" is, in fact, derived from the original name of the Great Turtle from the Ojibwe story of Creation.

Bay Mills has significant concerns about Enbridge's proposal to construct a tunnel under the lakebed of the Straits of Mackinac and has filed with the Commission a petition to intervene

in this matter as a party. Bay Mills believes that a full contested case process is essential to protect the rights of interested parties and long-term decisions arising from this application.

### **III. COMMENTS**

“The decision to issue a declaratory ruling is within the discretion of the Commission.”<sup>3</sup>

Under Rule 448, “[a]ny person may request a declaratory ruling as to the applicability to an actual state of facts administered by the commission or of a rule or order of the commission, pursuant to sections 33 and 63 of the act, MCL 24.201, MCL 24.328.” Here, a declaratory ruling is not appropriate because the facts are evolving and in dispute.<sup>4</sup> For this reason, and for the additional reasons discussed below, Bay Mills respectfully requests that the Commission exercise its discretion to deny Enbridge’s request for a declaratory ruling.

#### **A. The request for a declaratory ruling should be denied because a full permit approval process is required under the law.**

Act 16 invests this Commission with the authority to control, regulate and investigate the transportation of petroleum products.<sup>5</sup> In doing so, the Commission strives to “protect the public by ensuring safe, reliable and accessible energy.”<sup>6</sup> By mischaracterizing the scope of the project and omitting key facts about its agreements with the State of Michigan, Enbridge attempts to distract the Commission from one simple truth: the Commission’s legislative mandate, as reflected in the Commission’s rules and established criteria, requires that the Commission thoroughly vet Enbridge’s proposed construction of a new pipeline and tunnel.

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<sup>3</sup> See Rule 448 of the Michigan Public Service Commission’s Rules of Practice and Procedure, R 792.10448.

<sup>4</sup> In the matter of the petition by Consumer Energy Company for a request for a declaratory ruling related to PPA auction process, MPSC Case No. U-11811 (denying a request for a declaratory ruling because critical facts were unknown).

<sup>5</sup>MCL 483.3.

<sup>6</sup>MPSC Mission Statement at <https://www.michigan.gov/mpsc/0,9535,7-395-93218---,00.html>

**1. Enbridge's description of the project and the associated permit requirements is misleading.**

Enbridge's request for a declaratory ruling is based on a fundamental mischaracterization of the scale and scope of the Line 5 Project. In an effort to piggyback on an approval process that occurred 67 years ago, Enbridge characterizes the current Proposal as a "modest" relocation and a "maintenance-based" replacement that will be located "very close" to the dual pipelines that currently run through the Straits of Mackinac. (Enbridge's Application, p. 16-17.) By minimizing what is involved and what is at stake, Enbridge argues that the work involved in the Line 5 project is consistent with what was initially approved in 1953.

Nothing could be further from the truth. The Line 5 Project is massive in scale, involving the replacement of two 20" pipelines with one 30" pipeline and the relocation of this segment of the pipeline in a tunnel to be constructed underneath the lakebed of the Straits of Mackinac. Such a tunnel has never before been constructed and, therefore, there are serious questions about its viability and the massive impact it will have on the environment. It is absurd to suggest that a project of this type was somehow contemplated by, or included in, the grant of authority issued in 1953.

Enbridge's attempts to downplay the scope and significance of the Line 5 Project do not instill confidence in its plans to take the requisite care in this risky and complex plan. At the same time that the Line 5 Project siting approvals are pending before the Commission, several other approvals are pending before the Michigan Department of Environment, Great Lakes and Energy ("EGLE") and the United States Army Corps of Engineers. Notably, in the context of reviewing

Enbridge's joint permit application before EGLE and the Corps, EGLE sent a letter to Enbridge on May 4, 2020 pointing out a number of major gaps in Enbridge's joint permit application.<sup>7</sup>

Furthermore, Enbridge's attempt to exclude the tunnel from this permit analysis runs counter to the letter and spirit of the tunnel agreements it reached with the State of Michigan. The tunnel agreements do not supplant the need for permits, but, instead, recognize that Enbridge must seek all required governmental approvals and permits for the tunnel.<sup>8</sup> Further, Enbridge's own alternatives analysis report, in support of the tunnel agreement, lists the MPSC permit as a requirement for it to proceed with the tunnel project.<sup>9</sup> At that time, Enbridge did not inform the State that it would seek a declaratory ruling to bypass the Commission's regulatory authority.

## **2. No legal authority supports Enbridge's request.**

Enbridge offers no legal authority for its position. Instead, it baldly asserts that it should not have to comply with the Commission's rules because the rules makes no reference of applications for "segment-replacement projects." (Enbridge Application, p. 17.) Enbridge seems to suggest that, because it is not proposing to change the location of the beginning or end of the pipeline, it somehow has carte blanche to do whatever it wants in between.

Enbridge's position that it should get a "free pass" on the approval process for its proposed re-routing of a "segment" of Line 5 should be rejected because it is inconsistent with the broad regulatory authority granted to the Commission in Act 16 to "control, investigate and

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<sup>7</sup> EGLE May 4, 2020 Letter, Attachment A.

<sup>8</sup> See Tunnel Agreement between the Mackinac Straits Corridor Authority and Enbridge, attached to Enbridge's Application as Exhibit A-5.

<sup>9</sup> See Alternatives Report, attached to Enbridge's Application as Exhibit A-9, p. 3.

regulate” the business of transporting crude oil and petroleum products.<sup>10</sup> Furthermore, Enbridge’s request directly contradicts the requirements of Rule 447 of the Commission’s Rules of Practice and Procedure, which provides that a corporation must file an application and obtain Commission approval if it “wants to construct facilities to transport crude oil or petroleum products.”<sup>11</sup> The proposed pipeline *and* tunnel are clearly facilities that are used to transport petroleum products. Thus, the Line 5 Project falls squarely within the ambit of Rule 447.

Enbridge tries to circumvent this requirements of Rule 447 by characterizing the Line 5 Project as not new, but, instead, a modification to an existing pipeline. But, Rule 447 does not make the distinction that Enbridge draws. Rule 447 requires an application for all facilities and it certainly does not include an exemption for the construction of a massive tunnel underneath the lakebed that is designed to house a wholesale rerouting of an existing pipeline in a different location.

### **3. The changed siting of Line 5 requires a contested case process.**

Enbridge’s reliance on the 1953 easement is at odds with the MPSC’s criteria for evaluating proposed facilities and construction. The MPSC’s standards for granting an Act 16 certificate are well-established:

Generally, the Commission will grant an application pursuant to Act 16 when it finds that (1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and routed in a reasonable manner, and (3) the construction of the pipeline will meet or exceed safety and engineering standards.<sup>12</sup>

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<sup>10</sup> MCL 483.3.

<sup>11</sup> See Rule 447(1)(c) of the Commission’s Rules of Practice and Procedure.

<sup>12</sup> See Order of the MPSC, Case No. U-17020.

A contested case process will enable the Commission to evaluate all of these factors, including the dramatic change to the pipeline's location. When evaluating the reasonableness of a proposed design and route, the Commission has explained that it will examine the proposed route and consider its impact on humans and the environment.<sup>13</sup> And, this focus on the specific location of a proposed project and the impact it will have at that location, is long-standing. In the 1953 Order, the Commission approved the pipeline "over the route as hereinbefore described."<sup>14</sup> In fact, the specific location was so important that the Lakehead Pipe Line Company had to obtain a modification to the original 1953 easement when it realized that it had to change the "Easterly Center Line" identified in the original easement.<sup>15</sup>

Location matters in these proceedings. Nothing about the construction of a tunnel to house a new pipeline in a new location was contemplated in the 1953 easement. Indeed, the 1953 easement specifically requires the Commission's renewed approval for any relocation or replacement of the pipeline.<sup>16</sup> Thus, the Line 5 project was not previously approved by the Commission and Enbridge does not have authority to proceed with the current project based on the 1953 easement or its amendment.

**4. Pending litigation over the 1953 easement and the State's ongoing obligations under the public trust doctrine make a declaratory ruling inappropriate.**

Finally, Enbridge's reliance on the 1953 easement for a permit waiver in this matter should be rejected because the validity of the 1953 easement has been challenged in pending legal proceedings involving Line 5. On June 27, 2019, Michigan's Attorney General filed suit in the

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<sup>13</sup> See Act 16 Siting Process Overview, Michigan Public Service Commission, April 1, 2020, Attachment B, p. 2.

<sup>14</sup> See March 31, 1953 Order of the MPSC Approving Line 5, submitted with Enbridge's Application as Exhibit A-3.

<sup>15</sup> See 1953 Amendment to Straits of Mackinac Pipe Line Easement, attached to Enbridge's Petition as Exhibit A-2.

<sup>16</sup> 1953 Straits of Mackinac Pipe Line Easement, paragraph E, p.8, attached to Enbridge's Petition as Exhibit A-2.

Circuit Court of Ingham County alleging that the continued operation of Line 5 in the Straits of Mackinac violates the public trust and constitutes a public nuisance under Michigan common law and the Michigan Environmental Protection Act<sup>17</sup>. Notably, the Attorney General argues, *inter alia*, that the 1953 easement that allowed for the construction of the pipeline in the Straits was void from its inception because there were no contemporaneous factual findings that the easement would improve navigation or another public trust interest, or that the easement could be conveyed without impairment of the public trust. In the suit, the Attorney General requests an injunction to cease operation of Line 5 in the Straits and permanently decommission it. Because this matter is still pending, the most prudent course of action in this matter is to reject Enbridge's request to rely on a 67-year old easement whose validity has been called into question by the state's highest ranking legal officer.<sup>18</sup>

Furthermore, the public trust doctrine, which provides one of the legal bases for the Attorney General's conclusion that the 1953 easement is invalid, also supports the conclusion that Enbridge's request for declaratory relief should be denied. Under the public trust doctrine, the state, as sovereign, acts as trustee of public rights in the navigable waters, including the Great Lakes.<sup>19</sup> When the state conveys rights in the Great Lakes to a private party like Enbridge, that

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<sup>17</sup> Previously, In March 2019, the Attorney General issued an opinion stating that the law enacting the controversial tunnel plan was unconstitutional. Consistent with that opinion, Governor Gretchen Whitmer ordered all state agencies to halt all activities with respect to the tunnel. In response, Enbridge filed suit in Michigan's Court of Claims seeking to establish the validity and enforceability of the agreements it had reached with the State of Michigan. The Court of Claims ruled in favor of Enbridge, but the Attorney General appealed and the matter is now pending before the Michigan Court of Appeals.

<sup>18</sup> See *In the matter of Consumers Energy Company's request for a declaratory ruling concerning the provisions of gas transportation to the Midland Cogeneration Venture Limited Partnership*, MPSC Case No. U-17962 (denying request for declaratory ruling because of pending litigation) and *In the matter of the application of Consumer Power Company for a certificate under 1929 PA 69 authorizing it to make direct deliveries of gas to the City of Holland's Board of Public Works*, MPSC Case No. U-10833 (same).

<sup>19</sup> *Glass v. Goeckel*, 473 Mich. 667, 673-74, 703 N.W.2d 58 (2005), citing *Central R. Co. v. Illinois*, 146 U.S. 387, 435, 13 S.Ct. 110, 36 L.Ed. 1018 (1892) and *Nedtweg v. Wallace*, 237 Mich. 14, 16-23, 208 N.W. 51 (1926).



conveyance is subject to the State's obligation to protect and preserve the public's rights in the Great Lakes for fishing, hunting and boating.<sup>20</sup> The state never has the power to eliminate the public's rights.<sup>21</sup> Thus, the public trust doctrine imposes on the State a continuing obligation to preserve and protect the public's rights in the waters of the Great Lakes. That obligation can only be satisfied in this instance if the Line 5 Project is thoroughly vetted to determine its effect on the public's rights. For this reason, the request for declaratory relief must be denied.

**B. The request for a declaratory ruling should be denied because the Commission must consider the environmental impacts under the Michigan Environmental Protection Act.**

The Commission cannot grant Enbridge's request without circumventing the requirement that the Commission consider whether the proposed project complies with the Michigan Environmental Protection Act ("MEPA").<sup>22</sup> MEPA states, in part:

In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.<sup>23</sup>

Courts have recognized, and this Commission has acknowledged, that this language imposes on the MPSC a requirement to consider the impact proposed projects will have on the environment.<sup>24</sup>

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<sup>20</sup> See *Glass*, 473 Mich. at 678-81.

<sup>21</sup> *Id.* at 680-81

<sup>22</sup> See MCL 324.1701-.1706

<sup>23</sup> See MCL 324.1705.

<sup>24</sup> See, e.g., *Buggs v. Michigan Public Service Commission*, 2015 WL 159795 (Jan. 13, 2015) at \*6-7; see also Order of the MPSC, Case No. U-20634, Dec. 19, 2019, pp. 7-8; and, Act 16 Siting Process Overview, Michigan Public Service Commission, April 1, 2020, Attachment B, p. 2).

The need for a comprehensive environmental analysis under MEPA further demonstrates why Enbridge's reliance on the 1953 approval is misplaced. The Commission's decision in 1953 long predates the enactment of MEPA in 1970. The type of environmental impact analysis that is required today was not required then. Michigan law now requires that the Line 5 Project undergo environmental scrutiny and Enbridge's request must, therefore, be denied.

Considering that Enbridge claims that the Line 5 Project will promote environmental protection, an environmental analysis is particularly important in this matter. Enbridge asserts that relocating the tunnel will protect the aquatic environment and eliminate the risk of an anchor strike in the Straits of Mackinac that could result in a catastrophic oil spill.<sup>25</sup> Because it lies at the very heart of the justification for the project, Enbridge's claim that the Project will protect the aquatic environment warrants an in-depth, critical analysis under the requirements of MEPA. And, MEPA also requires that the Commission examine the impact the construction itself will have on the aquatic environment and the surrounding air, land, water and wildlife, as well as on Bay Mills' federally protected treaty fishing rights and resources. It is not hard to imagine that drilling a massive tunnel into the lakebed of the Straits of Mackinac will have significant consequences.

Bay Mills is also concerned about the condition of the inland portions of Line 5, especially at water crossings and where the Line comes in close proximity to the Great Lakes. Approving this application, without full environmental review or full knowledge of the condition of Line 5 within Michigan, blindly perpetuates the risks that Line 5 poses to hundreds of Michigan's aquatic

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<sup>25</sup> See Enbridge Application, p. 12; *see also* Pre-Filed Direct Testimony of Amber Pastoor, p.3 line 25 to p.4 line 2 ("The purpose of the Project is to alleviate an environmental concern to the Great Lakes....")

ecosystems. A contested case process is the appropriate mechanism to evaluate the environmental consequences of constructing a tunnel that would result in the continued reliance on the pipeline.

If given the opportunity to participate as an intervening party in the contested case process, Bay Mills intends to offer testimony and evidence about, *inter alia*, the unique ecosystem in and surrounding the Straits of Mackinac. Before approving this Line 5 Project, the Commission should evaluate the impacts of the project on threatened and endangered species, including the threatened Houghton's Goldenrod and Dwarf Lake Iris. The Commission must also consider the project's permanent wetland impacts. Notably, Enbridge's failure to address these concerns prompted the EGLE and the Army Corps of Engineers to deem Enbridge's joint permit application incomplete.<sup>26</sup>

Since 1953, we have become acutely aware of the disastrous impact that oil spills can have on our environment. And we have become aware of Enbridge's own troublesome record with respect to safety and transparency. In 2010, a failure in the Enbridge pipeline system resulted in the worst inland oil spills in our nation's history—releasing 800,000 gallons of oil into the Kalamazoo River System. Moreover, in 2017, Enbridge acknowledged that its maintenance activities damaged Line 5. Most recently, in September 2019, in the process of conducting geological work for the Line 5 tunnel, Enbridge got a drill rod stuck and did not report it to EGLE for two months. This record suggests that any proposal by Enbridge requires careful scrutiny with the benefit of a modern understanding of the dangers and risks posed by this type of construction project.

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<sup>26</sup> See Attachment A.

The current understanding of climate change and the need to reduce our reliance on fossil fuels are also important environmental concerns for the Commission to consider in evaluating the need for the Line 5 Project. Indeed, Governor Whitmer has issued an Executive Directive which commits the State of Michigan to lowering its greenhouse gas emissions by at least 26-28% below 2005 levels by 2025.<sup>27</sup> Because none of these modern considerations were part of the 1953 approval process, the Commission should deny Enbridge's request for declaratory relief.

An examination of all of these environmental considerations and consequences are part of the Commission's legislative mandate under MEPA and Bay Mills has valuable information relevant to that mandate. Enbridge's request for a declaratory ruling should, therefore, be denied to permit Bay Mills to present this information in a contested hearing.

**C. The request for a declaratory ruling should be denied because granting the ruling would deny Bay Mills and other tribes the opportunity for meaningful consultation and to present concerns to the Commission in a contested case hearing.**

Bay Mills has grave concerns about the Line 5 Proposal and has sought permission to participate in this matter as an intervening party. There is no doubt that Bay Mills—along with several other Tribal Nations—has a protected legal interest, under the 1836 Treaty of Washington, in the fishery resource in the upper Great Lakes, including in the waters of the Straits of Mackinac.<sup>28</sup> Bay Mills has worked cooperatively with the State of Michigan to manage the Great Lakes fishery for the past thirty years.

Bay Mills has diligently attempted to protect its legal interest in the public proceedings surrounding Line 5 and the proposal to construct a tunnel under the Straits of Mackinac. In

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<sup>27</sup> Executive Directive, 2019-12, [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90704-488740--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90704-488740--,00.html)

<sup>28</sup> See generally *United States v. State of Mich.*, 471 F. Supp. 192, 216 (W.D. Mich. 1979).

February 2018, Bay Mills wrote to then Governor Snyder to express its concerns about the agreement the State of Michigan was negotiating with Enbridge.<sup>29</sup> In that letter, Bay Mills expressed its frustration that the State was reaching agreements with Enbridge about the continued operation of Line 5 without any consultation with, or input from, Bay Mills and the other treaty Nations. In April, 2019, Bay Mills submitted comprehensive comments to the United States Army Corps of Engineers in response to Enbridge's permit application to install anchors to secure the portion of Line 5 that currently runs through the Straits of Mackinac. Then, in May 2019, Bay Mills wrote to Governor Whitmer to again express its concern about Line 5 and the proposed new tunnel.<sup>30</sup> In that letter, Bay Mills requested access to important information about Enbridge's operations and negotiations with the State that relate to the tribe's ability to protect its interest. In short, even though it has been excluded at many key decision points, Bay Mills has repeatedly asserted and defended its legal interest.

Now, Enbridge's request for a declaratory ruling once again threatens Bay Mills' ability to assert and protect its legal interest. By bypassing the contested case process, Enbridge would deprive Bay Mills of the opportunity to participate in these proceedings as a party. Such a result is contrary to basic notions of fairness and this Commission's recognition of the importance of tribal involvement and consultation in matters considered by the Commission.<sup>31</sup> Furthermore, granting the requested declaration would contravene Governor Whitmer's directive to state agencies to engage in meaningful consultation with the federally recognized Indian tribes before

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<sup>29</sup> See Letter to Governor Snyder, Feb. 7, 2018, Attachment C.

<sup>30</sup> See Letter to Governor Gretchen Whitmer, May 10, 2019, Attachment D.

<sup>31</sup> See Act 16 Siting Process Overview, MPSC, April 1, 2020 ("Tribal Consultation and Involvement") (describing the ability of tribes to participate in Act 16 siting proceedings by filing a petition to intervene). To the best of its knowledge, neither Bay Mills nor any other signatory to the 1836 Treaty of Washington was consulted about the decision to allow the pipeline to be constructed on the lakebed beneath the Straits of Mackinac.

taking an action that may affect the tribes.<sup>32</sup> It is beyond dispute that Bay Mills has a legal interest in the waters that are affected by Enbridge’s proposed activity. There is no reason why Enbridge should be permitted to use a 67-year old decision to deprive Bay Mills of the opportunity to be heard in this matter.

Indeed, other tribes and the public at large should be provided with the opportunity to participate in this matter. As the Commission noted at the initial hearing, this matter has generated considerable interest and attention from the public, despite the challenges to public participation presented by the COVID-19 pandemic. In consideration of the serious and substantial impact of COVID-19 on tribal communities, Bay Mills President Bryan Newland—who sits on the Michigan Advisory Council on Environmental Justice—sent a letter to Governor Whitmer requesting a pause on all tunnel permit processes.<sup>33</sup> In addition to the disruption of COVID-19, Enbridge’s continued operation of Line 5 and its proposal to construct a tunnel under the Straits of Mackinac have generated numerous legal proceedings in federal and state courts and administrative agencies.<sup>34</sup> Given the significant public interest in this matter, Bay Mills respectfully requests that the Commission deny Enbridge’s request for a declaratory ruling so that all interested parties can have the opportunity to present their arguments and evidence to the Commission.

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<sup>32</sup> See Executive Directive No. 2019-17 of Governor Gretchen Whitmer, Oct. 31, 2019, Attachment E.

<sup>33</sup> See Bay Mills Letter to Governor Whitmer, Apr. 3, 2020, Attachment F.

<sup>34</sup> See, e.g., *United States v. Enbridge Energy*, No. 1:16-cv-914 (W.D. Michigan); *Bad River Band v. Enbridge*, No. 3:19-cv-00602 (W.D. Wisconsin); *Nessel v. Enbridge*, No. 19-474-CE (Ingham County Cir. Ct. Michigan); *Enbridge v. State of Michigan*, No. 351366 (Michigan Court of Appeals); and, *In the Matter of Petitions of Straits of Mackinac Alliance, et al*, No. 18-010802, Michigan Office of Administrative Hearings and Rules.

## CONCLUSION

Regulating the transportation of petroleum products in a manner that protects the public requires a full, fair and deliberate consideration of the massive construction project proposed by Enbridge. The stakes are simply too great to allow Enbridge to bypass the critical application review process conducted by this Commission. The request for a declaratory ruling should, therefore, be denied.

Furthermore, Bay Mills agrees with the joint comments submitted to the Commission by the Michigan Environmental Council, Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council and National Wildlife Federation.

**Respectfully submitted,**

Counsel for Bay Mills Indian Community

---

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**OLSON, BZDOK & HOWARD, P.C.**  
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*\*Pro Hac Vice motions anticipated*





GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF  
ENVIRONMENT, GREAT LAKES, AND ENERGY  
GAYLORD DISTRICT OFFICE



LIESL EICHLER CLARK  
DIRECTOR

May 4, 2020

VIA E-MAIL

Mr. Paul Turner  
Enbridge Energy, Limited Partnership  
26 East Superior Street, Suite 309  
Duluth, Minnesota 55802

Dear Mr. Turner:

SUBJECT: Correction Request  
Submission No. HNY-NHX4-FSR2Q  
Counties: Emmet and Mackinac  
Site Name: Enbridge Energy-Line 5-Straits of Mackinac

The Department of Environment, Great Lakes, and Energy (EGLE), Water Resources Division (WRD), has received and reviewed your application for a utility tunnel beneath the Straits of Mackinac. Based on the review, the application has been determined to be incomplete as received and cannot be further processed until the information and edits requested below have been submitted.

EGLE requires a public notice document to explain the proposed regulated activities as concisely as possible and to be easily accessible to the public. The public notice material is intended to be published for the public to use in reviewing the proposal and offering substantive comments on the proposed project. The materials, as submitted when compiled, total over 350 pages in length and are 86 MB in size. This is a very large sized document. EGLE requests that Enbridge edit submitted materials for precision and relevance to actual proposed construction. Please eliminate items that do not apply to the proposed work, as well as, adding details where needed/requested. All Enbridge materials submitted to date will be retained in MiWaters and will continue to be accessible to the public. EGLE is not advising elimination of already submitted documents. EGLE is requesting refining of materials for appropriate public noticing.

EGLE understands that design-build process is being used by overlapping the design phase and construction phase of this project. This means that much of the exact dimensions and specifications of structures and tunnel location and design are to be determined as the project design is finalized. One example is the exact proposed tunnel inside diameter is not yet determined. Enbridge is proposing the tunnel will be approximately 18 to 21 feet in finished diameter, or other appropriate diameter determined through final design. Enbridge will be required to provide appropriate and relevant final design details to EGLE WRD as soon as designs are finalized and available.

Please consider the benefits of scheduling a conference call to discuss this correction request and EGLE comments and requested edits to Enbridge application materials. EGLE recommends that we discuss this application, its processing, and to go over the details of

Mr. Paul Turner

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May 4, 2020

implementing this application review including Enbridge future submittals of relevant design products and specifications.

Under Part 17, Michigan Environmental Protection Act, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), the department is required to assess whether there are any feasible or prudent alternatives to the tunnel project. The application should include a complete assessment of the alternatives.

On page 2 of the application attachment titled "Investing in Michigan's Future" two transportation options are mentioned but not analyzed. Please include a detailed analysis of those options and any others that are available to Enbridge.

EGLE anticipates requiring mitigation for permanent wetland impacts. Please provide a conceptual wetland mitigation plan. If permanent wetland impacts are proposed and no mitigation is offered, you must provide more than a request for wetland mitigation waiver. A commentary is required with an explanation detailing why compensatory wetland mitigation is not required.

The wetland restoration plan requires additional details. Please refer to R 281.925 (Rule 5) of Part 303, Wetlands Protection, of the NREPA for guidance.

Houghton's Goldenrod (*Solidago houghtonii*) and Dwarf Lake Iris (*Iris lacustris*), both plant species that have been separately listed by Michigan and the United States Fish and Wildlife Service as Threatened (legally protected), have been observed within the limits of disturbance on the north side of the Straits of Mackinac. Please upload a mitigation plan for the anticipated impacts to Houghton's Goldenrod and Dwarf Lake Iris.

Please provide spoil disposal information detailing, as best estimated, anticipated amounts including muck and rock that will be moved off-site and how and where this material will be both temporarily and permanently disposed of. Once designs are final please update this information.

There is known litigation involving the property with several ongoing legal challenges. On page 8 of the application there is a question asking about any known litigation involving the property. If not including known litigation information, Enbridge should explain why the still pending litigation on the validity of Act 359, the Tunnel Agreement, and the Assignment of Easement are not mentioned.

Please upload a copy of the referenced Michigan Department of Natural Resources Easement to Construct and Maintain Underground Utility Tunnel at the Straits of Mackinac.

Please upload a copy of the Straits Geotechnical Data Report (GDR). Enbridge indicated that additional laboratory testing was being completed and results of this analysis are proposed as an addendum to the GDR. As this project moves forward, please provide any additional GDR information as it is generated.

This is an effort to refine and reduce the total size and reduce number of pages to be included in the final public notice. Edits can simply be uploaded into the existing MiWaters application as an addition to already submitted materials.

Mr. Paul Turner

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May 4, 2020

Additional information and/or filing fees may be required upon further review of your application. Should we not receive the requested information from you within 30 days of this letter, we will consider your application as withdrawn and will close your application. Fees are not refundable on applications once a decision has been made or if an action has been taken, such as closing an application due to no or incomplete response to a correction request letter, posting a public notice, or conducting a site visit. A new application may be submitted, but fees are not transferable.

If you have any questions regarding this letter or your application, please contact me at 989-330-9252; or HaasJ1@michigan.gov. Most EGLE staff, including myself, are working remotely and we are attempting to complete as much as possible without going into the office. Please do not mail any work/application products to the Gaylord District Office. Please submit requested modifications as an amendment by uploading to the MiWaters site for this project and copy me at my email address. Please include Submission No. HNY-NHX4-FSR2Q in your response. The status of your application can be tracked online at <https://miwaters.deq.state.mi.us/miwaters/>.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joe Haas', with a long horizontal line extending to the right.

Joseph Haas, District Supervisor  
Gaylord District Office  
Water Resources Division

cc: Mr. Peter Holran, Enbridge  
Mr. Jeff Benefiel, Stantec Consulting Services, Inc.  
Ms. Katie Otanez, U.S. Army Corps of Engineers, Detroit



## Act 16 Siting Process Overview

Michigan Public Service Commission

April 1, 2020

### Overview

In Michigan, the authority for crude oil and petroleum product pipeline siting is granted to the Michigan Public Service Commission (“MPSC” or “Commission”) under [Public Act 16 of 1929](#) (Act 16). While Act 16 siting approval grants the right of eminent domain with respect to private property, condemnation proceedings are handled in local courts. In addition to the statute, Michigan Administrative Rule R 792.10447 contains minimum requirements for information that must be included in any application under Act 16.

The MPSC operates in a quasi-judicial manner with the Commission<sup>1</sup> making final decisions through a formal evidentiary hearing process and the MPSC Staff serving as independent experts to advise the Commission. Interested parties, represented by legal counsel, may also intervene in the case to present evidence and arguments for consideration by the Commission. The Commission bases its decision on the evidentiary record and also provides opportunities for members of the general public to make comments.

### MPSC process for reviewing an application under Act 16

An Act 16 contested case proceeding takes approximately one year. More complex pipeline projects may trigger a formal administrative hearing, beginning with a prehearing conference. This may include pipeline projects that require a new right of way, invoke major controversy and/or requests for intervention and hearing by interested parties, or involve highly developed or environmentally sensitive areas.

Upon scheduling a prehearing conference, the MPSC will require the applicant to deliver a notice of hearing to each landowner for whom it has not acquired the property rights for the proposed pipeline, and to all cities, villages, townships, and counties which may be traversed by the proposed pipeline and to **tribal governments** and state and federal agencies that may have a role in the process. In addition, the **notice of hearing** will be published in daily newspapers in the counties that the proposed pipeline would traverse.

Any interested parties may file petitions to intervene within the time frame designated in the notice of hearing. At the prehearing conference, the Administrative Law Judge (ALJ) sets a schedule for the case and rules on any petitions to intervene. The prehearing conference is open to the public and the ALJ may receive written comments or hear public comments at this time.

The case proceeds through the evidentiary process<sup>2</sup> which consists of filing and review of testimony and exhibits, audit and discovery, opportunity for cross-examination of witnesses, and filing of briefs and reply briefs. Once all the evidence is admitted into the record, the ALJ files a Proposal for Decision (PFD) to be considered by the Commission for a final decision. In limited cases, the Commission may choose to forego the PFD step and “read the record,” shortening the time in which the final decision is made. During the case, Commissioners are prohibited by law from communicating with any persons regarding the factual and legal issues during the pending proceeding. Unlike the three Commissioners, the MPSC’s Staff may engage in communications with the parties and the public and can serve as a liaison for parties and other governmental entities, including tribal governments. The Commission’s decision is subject to appeal.

<sup>1</sup> Three members appointed by the Governor with the advice and consent of the Michigan Senate.

<sup>2</sup> Pursuant to the [Rules for Practice and Procedure Before the Commission](#) and the [Administrative Procedures Act of 1969](#).

## MPSC considerations in granting an Act 16 certificate

In 2012, the Commission issued an order in Case No. U-17020, which stated:

“.... Generally, the Commission will grant an application pursuant to Act 16 when it finds that (1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and routed in a reasonable manner, and (3) the construction of the pipeline will meet or exceed current safety and engineering standards.”

These points are broad and require additional context as they apply to real situations.

(1) The applicant has demonstrated a **public need** for the proposed pipeline.

Liquid pipelines are generally proposed to either replace aging infrastructure, or to satisfy a market imbalance by constructing additional infrastructure. In some cases, both needs may be met by a single project. The “public need” of a project is generally described as the short and long-term local, statewide, regional, or national benefits to a project. These benefits are often difficult to quantify, and the protected nature of the industry can create challenges in acquiring information.

(2) The proposed pipeline is **designed and routed in a reasonable manner**.

The route proposed by the applicant is reviewed in detail by the MPSC Staff. Route considerations typically involve human impacts and environmental impacts. Human impacts often relate to the proximity of the pipeline to dwellings, the number of landowners impacted, the amount of new right-of-way needed, and the inconvenience to landowners caused during construction. Environmental impacts generally consist of short and long-term impacts of the construction and operation of the pipeline and may cover topics such as endangered species (see discussion below regarding review under the Michigan Environmental Protection Act).

(3) The construction of the pipeline will **meet or exceed current safety and engineering standards**.

While safety is critically important to all pipeline construction, the MPSC currently does not oversee the safety or ongoing operations of hazardous liquid pipelines. This oversight is managed by the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA), acting through the Office of Pipeline Safety. The Office of Pipeline Safety is responsible for the enforcement of 49 CFR Part 195, which includes requirements for design, construction, pressure testing, operation and maintenance, operator qualification, and corrosion control. In some cases, the MPSC may request for PHMSA to review the proposed specifications and can provide PHMSA’s determination as an exhibit to testimony in the case.

## Review under Michigan Environmental Protection Act

In addition to the factors considered by the MPSC in Act 16 proceedings referenced above, the MPSC must also consider the **impact of the proposed pipelines on the environment** under the Michigan Environmental Protection Act. Past case law explains that the MPSC must consider:

- i. Whether the proposed project would impair the environment;
- ii. Whether there was a feasible and prudent alternative to the impairment; and,
- iii. Whether the impairment was consistent with the promotion of the public health, safety, and welfare in light of the state’s paramount concern for the protection of its natural resources from pollution, impairment or destruction.

There is little case law under MEPA on the scope of review for environmental impacts. Most of the proceedings in which MEPA has been applied to date have been small, non-controversial projects with little or no environmental impact.

## Opportunities to participate in the case

The two main avenues for involvement in an Act 16 case are to **submit public comment**, or to **become a “party” in the case as an intervenor**.

At any point after an application is filed, the MPSC welcomes public comment in either written or verbal form. In some cases, although not required by rule or law, the Commission may schedule public meetings to promote public involvement and receive comment. Comments are posted to the docket or included in the hearing transcript.

The other option is to seek formal intervention as a party to the case. As discussed above, a party may petition to intervene during a time period prior to the prehearing conference, typically seven days. Historically, the petitioner for intervention must satisfy a “two-prong test” showing that (1) it has or will suffer an injury in fact; and (2) its affected interests fall within the zone of interest to be protected or regulated by statute or the constitutional guarantees in question. If the intervention is granted by the ALJ, the intervening party will have the opportunity to present evidence and arguments to be considered in the Commission’s decision making.

The application and all subsequent official filings will be posted to the MPSC’s E-Dockets system (<https://mi-psc.force.com/s/>). Interested persons may access all non-confidential filings on the E-Docket system and the case subscription feature allows anyone to sign up to receive email notification of new filings. In addition, the MPSC may issue press releases for key announcements, decisions, etc.

## Tribal Consultation and Involvement

After an application is filed, the MPSC Tribal Liaison and MPSC Staff will reach out to Tribes to consult on the application. A consultation may be in the form of an in-person or teleconference meeting with Staff that can better inform Staff of issues of which to be aware as Staff formulates its analyses and recommendations for the Commission’s consideration. Tribes may opt to also provide input through public comment or to petition to intervene in the case to become a party and present their own evidence and arguments with legal representation.



## Bay Mills Indian Community

12140 West Lakeshore Drive  
Brimley, Michigan 49715  
(906) 248-3241 Fax-(906) 248-3283



Dear Governor Snyder,

I am writing on behalf of the Bay Mills Indian Community ("Bay Mills") regarding the State of Michigan's recent agreement with Enbridge Energy, LLP ("Enbridge") regarding the operation of the Line 5 Pipeline beneath the Straits of Mackinac.

Bay Mills is concerned about the process used to reach this agreement, its potential to allow the Line 5 Pipeline to continue to operate beneath the Straits of Mackinac, and the risks it poses for our Tribe's right to fish in the Great Lakes under the 1836 Treaty of Washington.

### **Background**

Bay Mills is one of the signatories to the 1836 Treaty of Washington, which ceded territory to the United States for the creation of the State of Michigan. In exchange for the agreement to cede the territory to the United States, the Tribes reserved the right to hunt and fish throughout that territory – including in the Great Lakes (and the Straits of Mackinac).

In 1953, the State of Michigan granted an easement to the Lakehead Pipe Line Company to operate an oil and gas pipeline beneath the Straits of Mackinac. To the best of our knowledge, neither the Bay Mills Indian Community nor any other signatory to the 1836 Treaty of Washington was consulted about the decision to allow the pipeline to be constructed on the lakebed beneath the Straits. Enbridge has acquired ownership of that pipeline, which may include interest in the easement beneath the Straits.

In 1971, Michigan conservation officers cited Bay Mills tribal member Albert "Abe" LeBlanc for violating state fishing regulations. Several years later, in 1976, the Michigan Supreme Court held that Bay Mills, along with several other tribes, had retained the right to fish in the Great Lakes pursuant to the 1836 Treaty of Washington. The United States brought a lawsuit against the State of Michigan on behalf of the Tribes to enforce that treaty right; and, the United States District Court for the Western District of Michigan upheld the Tribes' treaty rights in a famous 1979 decision now known as the "Fox Decision."

In 1985, the State of Michigan and the signatory tribes to the 1836 Treaty entered into a consent judgment regarding management of the Great Lakes fishery. That agreement affirmed that the State and the Tribes must work together to protect the Tribes' treaty fishing rights and manage the Great Lakes fishery in a manner that respected tribal and state interests. The Tribes and the State have worked together to protect the Great Lakes ever since.



In 2000, the State and the Tribes negotiated a second iteration of the consent judgment, which was intended to last until August 2020. We have recently begun the work necessary to negotiate a new consent judgment in the ongoing litigation between the State and the Tribes under the Fox Decision.

In 2010, Enbridge's Line 6 pipeline ruptured in a tributary of the Kalamazoo River, causing more than 1.2 million gallons of oil to spill into Michigan's waterways. It was the largest on-shore oil spill in the history of the United States. Since that time, Enbridge has been subjected to closer scrutiny of its pipelines – including the Line 5 Pipeline beneath the Straits of Mackinac. That increased scrutiny has revealed a number of serious safety concerns with the Line 5 Pipeline, which include concerns about Enbridge's safety record and practice of failing to disclose important information.

### **Discussion**

There is no doubt that Bay Mills, along with several other tribes, has a protected legal interest in the fishery resource in the upper Great Lakes – including in the waters of the Straits of Mackinac under the 1836 Treaty of Washington. Bay Mills has worked cooperatively with the State to manage the Great Lakes fishery for the past thirty years. Bay Mills, the Chippewa Ottawa Resource Authority, and the other tribal parties to the 1836 Treaty have expressed grave concerns about the continued operation of the Line 5 Pipeline beneath the Straits of Mackinac; and, we have offered to work with the State to find ways to address those concerns.

With this long history of a cooperative relationship, we were disappointed to learn that the State had worked to come to terms with Enbridge that allow them to resolve this matter without further consultation with Bay Mills or any of the other tribes that have demonstrated an interest in this issue.

Neither Bay Mills nor any of the other 1836 Treaty Tribes were aware that the State was negotiating an agreement with Enbridge regarding the Line 5 Pipeline, despite the State's assurances that it would consult with the Tribes regarding the future of the Line 5 Pipeline. The State's new agreement with Enbridge goes so far as to assert that it is intended to protect tribal interests:

WHEREAS, the State and Enbridge recognize that the Straits Crossing and the St. Clair River Crossing are located in the Great Lakes and connecting waters that include and are in proximity to unique ecological and natural resources that are of vital significance to the State and its residents, ***to tribal governments and their members***, to public water supplies, and to the regional economy.... (emphasis added)

Despite the acknowledgment that Enbridge's Line 5 Pipeline affects "resources that are of vital significance...to tribal governments and their members," tribal governments were not made aware of the negotiations, or provided with an opportunity to help craft its terms.



Bay Mills, along with its fellow treaty tribes, continues to urge for the decommissioning of the Line 5 Pipeline beneath the Straits. Nevertheless, our position does not mean that we intend to cede our interest (and legal right) in ensuring that the operation of the Line 5 Pipeline does not destroy resources that are so fundamental to our culture and economy.

Bay Mills relies heavily upon commercial fishing and tourism to support our local economy. Our treaty fishery accounts for 100 direct and indirect jobs. Our tribally-licensed fishermen supply markets across northern Michigan; they also purchase fuel, goods, and services from small businesses across the region. Our continued livelihood depends upon successful cooperative management of the Great Lakes with the State of Michigan. The State's recent agreement with Enbridge does not embody cooperative management.

Moreover, our regional economy is heavily dependent upon tourism and outdoor recreation. A rupture of the Line 5 Pipeline, whether beneath the Straits or at other locations in our treaty-ceded territory, would be catastrophic – causing lasting damage to natural resources that drive our regional economy. In addition, a spill (and corresponding cleanup and repair work) could affect areas that have significant cultural and religious value.

### **Conclusion**

Bay Mills does not concede that the Governor had the legal authority to enter into this agreement with Enbridge. Nevertheless, we want to continue to work together to find a solution to our concerns. To that end, Bay Mills is urging the State to take the following steps to acknowledge and protect tribal treaty rights.

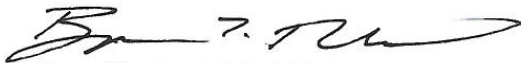
1. Meet directly with the 1836 Treaty Tribes to explain how the State's November 27, 2017 Agreement with Enbridge affects cooperative management of the Great Lakes fishery under the 1836 Treaty of Washington;
2. Modify the November 27, 2017 Agreement with Enbridge to ensure that the 1836 Treaty Tribes have the ability to receive and review safety information supplied by Enbridge, and to participate in the enforcement of the Agreement; and,
3. Modify the November 27, 2017 Agreement to acknowledge (a) the existing consent decree between the State of Michigan and the 1836 Treaty Tribes, and (b) the State's paramount obligation to abide by that decree, and the treaty rights recognized therein, in any State decisions and enforcement related to the Line 5 Pipeline.

If the State is unable or unwilling to modify its November 27, 2017 Agreement with Enbridge, I am requesting that the State enter into a separate agreement with the 1836 Treaty Tribes to ensure that the 1836 Treaty Tribes have the ability to receive and review safety information supplied by Enbridge relative to the Line 5 Pipeline's operation within the ceded territory. Bay Mills also wants to ensure that all State decisions related to the Line 5 Pipeline are formulated and implemented in a manner that protects our legal

interests, which include both treaty and cultural rights, and that for so long as it remains in place, the Pipeline is operated and maintained in such a way as to safeguard those rights to the maximum extent possible.

Bay Mills has enjoyed a positive relationship with the State over the years, even when seeking to resolve areas of disagreement. I sincerely hope that will be the case here. Thank you for your consideration, and I look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Bryan Newland", with a stylized flourish at the end.

Bryan Newland, Tribal Chairman  
Bay Mills Indian Community

Cc: Grand Traverse Band of Ottawa and Chippewa Indians  
Little River Band of Ottawa Indians  
Little Traverse Bay Bands of Odawa Indians  
Sault Ste. Marie Tribe of Chippewa Indians



## Bay Mills Indian Community

12140 West Lakeshore Drive  
Brimley, Michigan 49715  
(906) 248-3241 Fax-(906) 248-3283



May 10, 2019

Hon. Gretchen Whitmer, Governor  
State of Michigan  
George W. Romney Building  
111 South Capitol Avenue  
Lansing, Michigan 48909

**Re: Operation and Future of Enbridge's Line 5 Pipeline**

Dear Governor Whitmer:

I am writing on behalf of the Bay Mills Indian Community to transmit its response to your solicitation of tribal comments and views on the present and future operation of Enbridge's Line 5 within the State of Michigan.

I am grateful that your Administration has pledged to consult with Bay Mills, and other sovereign tribal nations, on a government-to-government basis on the development of the State of Michigan's approach to dealing with the Line 5 Pipeline. As a sovereign government with responsibility for managing and protecting the Great Lakes, the Tribe believes that a government-to-government approach is important to develop policies that account for our respective sovereign interests.

The Tribe's positions, comments, questions and recommendations are attached to this letter. In addition, you are invited to visit the Straits of Mackinac with representatives of Bay Mills and other Tribes to observe, first hand, its importance to our way of life.

Bay Mills has enjoyed a positive relationship with the State over the years, even when seeking to resolve areas of disagreement. I sincerely hope that will be the case here. I am grateful for your invitation to provide our views, and am hopeful that this process will be more respectful of our sovereign interests than previous actions related to Line 5. We look forward to your response.

Sincerely,

  
Bryan T. Newland  
President, Executive Council

BTN/kt

cc: CORA Member Tribes  
Katie Otanez, USACE Detroit Office  
Regional Administrator, Environmental Protection Agency  
Steven Willey, U.S. Department of Justice

cc: Tara Sweeney, Assistant Secretary of Interior--Indian Affairs  
Patrick Nelson, Cmdr. Sector Sault, U.S. Coast Guard

**I. Position of the Bay Mills Indian Community on Continued Operation of Line 5 in the State of Michigan**

Bay Mills Indian Community has serious concerns regarding the safety of continued operation of the Line 5 Pipeline in the Straits of Mackinac and on/near other bodies of water in our treaty-ceded territory. We believe that it is in the best interest of Bay Mills, the people of Michigan, and the United States, to decommission the Line 5 Pipeline and establish an alternative means for Enbridge to transport its oil from western Canada to Sarnia, Ontario.

## **II. Cultural Significance of Straits of Mackinac to the Great Lakes**

Every culture and religion in the world shares the story of the Great Flood. In Ojibwe oral traditions and cultures, the creation of North America also begins with a flooded Earth.

According to our oral histories, the animals that survived the flood received instructions from the Creator to swim deep beneath the water and collect soil that would be used to recreate the world. One by one the animals tried, but one by one they failed. The muskrat, as the last animal that tried, dove underneath the water and did not emerge. When the muskrat's body resurfaced, it carried a small handful of wet soil in its paws. The journey took the muskrat's life, but with its sacrifice the Creator used the soil collected and rubbed it on the Great Turtle's back. This land became known as Turtle Island, the center of creation for all of North America.

For the Ojibwe, the Great Turtle emerged from the flood in the Straits of Mackinac. Because the creation of North America took place in the Great Lakes, the Great Lakes are considered the heart of Turtle Island and as such - the heart of North America. The State of Michigan shares this history with the Ojibwe as well, and there are still signs of it in modern times. Mackinac City, Mackinac Island, Fort Michilimackinac, and the Straits of Mackinac were all named and established because of this shared history together.

In the Ojibwe language, "michi" is an old dialect for "gichi, which means "great." The Ojibwe word for water is "nibi," which is an inanimate word that shows no signs of life or movement. However, the word for the Great Lakes are "gichi gumee." Only things that are alive and have a spirit are assigned the word "gichi" or "michi." In addition, the Ojibwe word for turtle is "miikinaak." By combining these words together, you learn that Michlimackinac, and the word Mackinac are all derivations of the original name of the Great Turtle from the Ojibwe story of Creation.

In sharing these teachings, Bay Mills Indian Community emphasizes the cultural, traditional, spiritual, and historical significance of the Great Lakes to the Tribes and to the State of Michigan itself. Since time immemorial, the Great Lakes have been an integral part to Bay Mills' way of life, and they will continue to be an integral part of culture and traditions for many generations to come. By failing to consider the cultural significance of the Great Lakes to Bay Mills, and the dangers the Line 5 Pipeline poses to treaty-fishing rights, culture, and traditions of the Ojibwe - the State of Michigan risks killing the heart of North America, the heart of Turtle Island.



### **III. Historical Background**

#### **A. The Treaty of Washington (7 Stat. 491)**

Bay Mills is one of the signatories to the 1836 Treaty of Washington, which ceded territory to the United States for the creation of the State of Michigan. In exchange for the agreement to cede the territory to the United States, the Tribes reserved the right to hunt and fish throughout that territory – including in the Great Lakes (and the Straits of Mackinac).

In 1953, the State of Michigan granted an easement to the Lakehead Pipe Line Company to operate an oil and gas pipeline beneath the Straits of Mackinac. To the best of our knowledge, neither the Bay Mills Indian Community nor any other signatory to the 1836 Treaty of Washington was consulted about the decision to allow the pipeline to be constructed on the lakebed beneath the Straits. Enbridge has acquired ownership of that pipeline, which may include interest in the easement beneath the Straits.

In 1971, Michigan conservation officers cited Bay Mills tribal member Albert “Abe” LeBlanc for violating state fishing regulations. Several years later, in 1976, the Michigan Supreme Court held that Bay Mills, along with several other tribes, had retained the right to fish in the Great Lakes pursuant to the 1836 Treaty of Washington. The United States brought a lawsuit against the State of Michigan on behalf of the Tribes to enforce that treaty right; and, the United States District Court for the Western District of Michigan upheld the Tribes’ treaty rights in a famous 1979 decision now known as the “Fox Decision.”

In 1985, the State of Michigan and the signatory tribes to the 1836 Treaty entered into a consent judgment regarding management of the Great Lakes fishery. That agreement affirmed that the State and the Tribes must work together to protect the Tribes’ treaty fishing rights and manage the Great Lakes fishery in a manner that respected tribal and state interests. The Tribes and the State have worked together to protect the Great Lakes ever since.

In 2000, the State and the Tribes negotiated a second iteration of the consent judgment, which was intended to last until August 2020. We have recently begun the work necessary to negotiate a new consent judgment in the ongoing litigation between the State and the Tribes under the Fox Decision.

#### **B. Timeline of Events Related to Tribal Interest in Line 5 Pipeline Operations**

It is important to place our concerns in context of interactions that have taken place between tribes, federal agencies, state agencies, and Enbridge in recent years. Therefore, we have set forth a recitation of some of those key events:

**July 2010** – Enbridge’s Line 6B ruptures near Marshall, and spilled 800,000 gallons of oil into a tributary of the Kalamazoo River. The cost of the cleanup for this incident has exceeded \$1 Billion.

**July 2016** – The United States Department of Justice and Environmental Protection Agency files a lawsuit against Enbridge for environmental harm resulting from the Line 6B oil spill, and published notice of a draft Consent Decree with Enbridge. Without any prior notice to any of the tribes in Michigan, the draft Consent Decree included provisions relating to Enbridge's Line 5 crossing at the Straits of Mackinac (mandating that Enbridge take certain actions).

**August 3, 2016** – The State of Michigan issues a letter to Enbridge notifying them of violating the 1953 Easement due to unsupported spans of Line 5 exceeding 75 feet. Exactly two months later, DEQ issues permit to Enbridge for the installation of four screw anchors on the Line 5 Pipeline crossing in the Straits of Mackinac. Prior to this date, the State had never notified Bay Mills of Enbridge's anchor construction activities in the Straits of Mackinac.

**November 27, 2017** – Michigan Governor Rick Snyder signs an agreement between the State of Michigan and Enbridge setting forth some interim requirements for the operation of the Line 5 Pipeline in the Straits of Mackinac, and contemplating a replacement for the span beneath the Straits. While the agreement states that Enbridge's Line 5 Pipeline impacted tribal interests, neither the Governor nor any Michigan agency notified Bay Mills that it was negotiating an agreement with Enbridge.

**March 2018** – Bay Mills participates in a meeting with leadership from the MDNR and MDEQ in Lansing to discuss the State's ongoing efforts relating to the Line 5 Pipeline. The Director of the MDNR rejects a request from Bay Mills to amend the November 2017 agreement with Enbridge to make Tribes a party to that agreement; or, to enter into an agreement with Tribes to provide information relating to the safety of the Line 5 Pipeline. In rejecting our request, the Director of the MDNR told Bay Mills representatives to, "get your own agreement with Enbridge."

**April 1, 2018** – Enbridge's Line 5 pipeline is damaged by an anchor drag/strike from a commercial vessel in the Straits of Mackinac. That same incident caused damage to electrical cables along the bottom of the Straits owned by American Transmission Company, resulting in several hundred gallons of toxic chemicals spilling into the water. Due to adverse weather conditions, federal and state agencies were unable to assess the scope of the chemical spill for several days.

**April 2018** – Bay Mills, and other tribes, become aware that the U.S. Department of Justice is negotiating an amendment to its 2016 settlement agreement with Enbridge regarding the Line 5 Pipeline. Federal agencies did not provide Bay Mills, or other tribes, with notice of these negotiations until they were substantially completed.

**May 15, 2018** – Bay Mills hosts representatives from Enbridge and the 1836 Treaty Tribes for a discussion about a potential agreement relating to information-sharing



about the Line 5 Pipeline. Enbridge refuses to provide the Tribes with the same information it provides to the State of Michigan relating to the condition of the pipeline.

**June 28, 2018** – Bay Mills participates in a consultation with the U.S. Army Corps of Engineers regarding Enbridge's application for the installation of several dozen anchor supports along the Line 5 Pipeline. The U.S. Army Corps indicates that it will perform an Environmental Assessment of Enbridge's application, instead of granting the permit under a nationwide permit (pursuant to previous practice). This is the first time Enbridge's applications relating to the Line 5 Pipeline have been subjected to scrutiny under the National Environmental Policy Act.

**August 7, 2018** – Bay Mills participates in a consultation with the U.S. Department of Justice and Environmental Protection Agency in Traverse City, regarding proposed amendments to the 2016 consent decree. Attorneys with the U.S. Department of Justice informed tribal representatives that Enbridge was not in compliance with its easement with the State of Michigan. The DOJ and EPA filed the proposed amendments with the Court less than 24 hours after the meeting, and did not provide any substantive responses to tribal comments/concerns. Notably, the State of Michigan did not comment on the proposed amendments, despite ongoing negotiations with Enbridge.

**October 3, 2018** – Michigan Governor Rick Snyder enters into a second agreement with Enbridge regarding the continued operation of the Line 5 Pipeline in the Straits of Mackinac. Among other things, the new agreement requires Enbridge to take immediate steps to repair/improve the Line 5 Pipeline at two different water crossings in the Upper Peninsula. Tribes were not provided any opportunity to participate in the State's negotiations, or otherwise comment on the State's proposals. Tribes were not provided any prior notice that the two water crossings referenced in this agreement were matters of concern, despite prior requests to the State to receive information regarding the condition of Enbridge's Line 5 Pipeline.

**November 2018** – Michigan's Legislature introduces and immediately moves legislation authorizing the construction of a multi-utility tunnel beneath the Straits of Mackinac, and establishing an independent government body to regulate that tunnel. Michigan Governor Rick Snyder signs the legislation into law and immediately appoints members to the governmental body. Bay Mills, and other tribes, were not consulted during this process. In response to Bay Mills' request for government-to-government consultation, the Director of the MDNR responds that, "we don't need to consult with you because we already know your position."

**December 2018** – Outside Legal Counsel for Michigan's Governor engages in discussions with representatives for several tribes regarding an intergovernmental agreement that provides for joint tribal-state participation in monitoring and improving the condition of the Line 5 Pipeline at other water crossings in the State

of Michigan. The discussions expire at the conclusion of the Michigan Governor's term on December 31, 2018.

**March 28, 2019** – Michigan's Attorney General issues a formal opinion stating that the 2018 legislation authorizing a multi-utility tunnel beneath the Straits of Mackinac and establishing an independent governing body for its oversight is unconstitutional.

**April 30, 2019** – The Vice-President for American Transmission Company issues a letter to the Executive Director of the Chippewa Ottawa Resource Authority stating that a multi-utility tunnel beneath the Straits of Mackinac may not be feasible. The letter also states, "ATC does not believe that installing high voltage electric lines in close proximity to high pressure oil or gas lines is a good idea."

**May 3, 2019** – Representatives from several state agencies participate in a formal government-to-government consultation with tribal representatives in Mackinaw City regarding the State of Michigan's approach to Enbridge's Line 5 Pipeline.

As this timeline of events shows, Bay Mills (and other tribes) have been consistently and repeatedly excluded from any governmental process relating to Enbridge's Line 5 Pipeline, despite repeated requests to participate; and, despite our treaty-protected interest in the Straits of Mackinac.

In a number of instances, the State (and federal) government ignored tribal questions on matters that came to public light later – such as the condition of other water crossings for the Line 5 Pipeline, and the feasibility of a multi-utility tunnel beneath the Straits of Mackinac.

#### **IV. Questions and Concerns of the Bay Mills Indian Community Regarding Line 5**

The State of Michigan is considering taking actions to allow Enbridge to take further steps to stabilize the Line 5 dual pipelines in the Straits of Mackinac, to improve Line 5 water crossings of other water bodies in Michigan, and to construct a multi-utility tunnel beneath the Straits of Mackinac. All of these actions would occur within our treaty-ceded territory, where we manage natural resources in coordination with the State of Michigan and the United States under a series of judicially-binding consent decrees in the case of *United States v. Michigan*.

At present, we lack important information that would allow us to protect our interests, and provide the State with valuable insights that can inform its decision-making process. We have requested much of this information from the State in the past, without receiving substantive responses. We have set forth our outstanding questions below, along with additional questions for the State. The Tribe respectfully requests a formal and substantive response to these questions within 45 days:

**1. *Does Enbridge shut down (vacate and depressurize) the Line 5 Pipeline beneath the Straits of Mackinac during maintenance activities?***

Enbridge has clearly demonstrated that completing maintenance activities on the Straits segment of Line 5 can result in damage to the Line. For the protection of our Great Lakes resources, Bay Mills requests that the State make this a conditional requirement to any additional permits being administered for maintenance on the Line 5 Pipeline.

**2. *How did the State determine the 8-foot wave height threshold for “adverse weather conditions” in its November 27, 2017 agreement with Enbridge, Inc.?***

The November 27, 2017 agreement between the State of Michigan and Enbridge, Inc. establishes an 8-foot wave height threshold for the occurrence of “adverse weather conditions,” during which Enbridge, Inc. must shut down the Line 5 Pipeline beneath the Straits of Mackinac. Federal agencies, including the Coast Guard have indicated that they were not formally consulted by the State of Michigan in developing this standard, and have indicated to Tribes that they may not be able to respond to an oil spill when wave heights exceed four feet.

**3. *Does the State of Michigan have a plan in place for response to an oil spill in the Straits of Mackinac? Does the State of Michigan have any agreements in place with federal, tribal, or local governmental agencies to respond to an oil spill in the Straits of Mackinac?***

At present, Enbridge does not have a federally-approved spill response plan for the Line 5 Pipeline. In posing this question to State agencies in the past, officials have indicated that federal, state, and local agencies would respond to a spill pursuant to intergovernmental agreements. But, the State has not provided copies of any such agreements. To our knowledge, there are no intergovernmental agreements in place that address a response to an oil spill in the Straits of Mackinac.

**4. *Given recent events with American Transmission Company’s spill in the Straits, is the State confident that it (or any responding agency) can sufficiently protect our resources in the Straits by responding to a spill during ice cover?***

**5. *Does the State of Michigan know how many times the Line 5 Pipeline has been struck or damaged by a vessel anchor? If so, can the State of Michigan please provide Bay Mills with records of those incidents?***

In 2018, a vessel anchor struck and damaged the Line 5 Pipeline in the same incident in which a vessel anchor damaged American Transmission Company's electric transmission lines. Enbridge self-reported the anchor strike, but has not provided the public with any information on previous anchor strikes on the Line 5 Pipeline.

6. *Does the State of Michigan have a mechanism in place for Enbridge to report damage to the Line 5 Pipeline that occurs due to maintenance and/or construction activities? How many times has Enbridge's maintenance and/or construction activities caused damage to the Line 5 Pipeline in the Straits of Mackinac and at other water crossings?*
7. *In light of the American Transmission Company's April 30, 2018 letter to the Chippewa Ottawa Resource Authority, does the State of Michigan believe that it is safe to place high-voltage power lines in close proximity to high-pressure oil pipelines in an enclosed tunnel beneath the Straits of Mackinac? Does American Transmission Company's recent letter change or alter the State's views on whether such a tunnel is technically and economically feasible?*
8. *Has the State of Michigan identified any other Line 5 Pipeline water crossings that are of immediate concern, beyond those specified in the October 3, 2018 agreement between the State and Enbridge?*
9. *Does the installation of additional screw anchors on the Line 5 Pipeline in the Straits of Mackinac increase the risk of an anchor-strike or anchor-"hook"?*
10. *Does the State view the lack of a federally-approved response plan as required by the Oil Pollution Act of 1990, a violation of the 1953 Easement with the State of Michigan.*
11. *Given that the coal tar coating of Line 5 is known to be highly toxic, has any data been collected on the presence of contaminants in sediments surrounding Line 5?*

We asked this question in our July 31, 2017 letter to the State of Michigan regarding Enbridge's permit application for 22 anchor supports. The same question was asked of the United States Army Corps of Engineers in letters dated July 31, 2017 and December 19, 2017. To date we have not received a substantive response from any agency.

12. *If a spill in the Straits were to happen today, what current baseline data on the aquatic resources of the Straits does the State have that would inform the Natural Resources Damage Assessment process?*

#### **V. Bay Mills Indian Community Requests and Recommendations to the Governor**

In addition to the questions above, Bay Mills Indian Community requests that the State of Michigan take the following steps to protect our shared sovereign interests in the waters of the Great Lakes:

- 1. Immediately halt or suspend any consideration of further permits related to the Line 5 Pipeline until Enbridge has received federal approval for its spill response plan.**

Enbridge (belatedly) disclosed that its earlier construction activities have damaged the Line 5 Pipeline beneath the Straits. Construction of several dozen new anchor supports increases the potential for a pipeline rupture and oil spill. It would be reckless to allow Enbridge to conduct activities that place the Great Lakes at risk of an oil spill without having an approved spill-response plan in place.

- 2. Execute intergovernmental agreements with federal, tribal, and state agencies for pipeline monitoring and response to an oil spill in the Straits of Mackinac or other bodies of water within the State of Michigan.**
- 3. Resume negotiations with tribal governments regarding the integrity of the Line 5 Pipeline at other water crossings within the State of Michigan.**
- 4. Reach a determination that the installation of anchor supports along the Line 5 Pipeline in the Straits of Mackinac do not increase the risk of a structural failure in the pipeline or an anchor strike prior to issuing any permit for installation of such supports.**
- 5. Undertake a comprehensive risk analysis by independent experts of decommissioning the Straits segment of Line 5, and with the alternative scenarios limited to the continued operation of the existing infrastructure.**
- 6. Include Bay Mills (and other 1836 Treaty tribes) in any negotiations with Enbridge and/or government agencies regarding the potential for a tunnel beneath the Straits of Mackinac.**
- 7. Include Bay Mills (and other Treaty Tribes) in any discussions with Enbridge and/or government agencies regarding the condition of inland portions of Line 5, especially at water-crossings and sensitive habitats.**

The Bay Mills Indian Community is a sovereign Indian tribe with governmental interests. Enbridge is not; it is a private, for-profit company. The Bay Mills Indian Community has rights to the waters of the upper Great Lakes that are expressly reserved through a treaty with the United States. Enbridge does not. The Bay Mills

Indian Community is party to litigation with the State of Michigan and the United States concerning the protection and exercise of those rights. Enbridge is not.

Therefore, it is wholly inappropriate for the Bay Mills Indian Community to be excluded from any agreement concerning the impacts of the Line 5 Pipeline on our treaty-reserved rights.

### **Conclusion**

The Bay Mills Indian Community is appreciative of the opportunity to express its concerns and recommendations to the Governor in this extremely important matter.



STATE OF MICHIGAN  
OFFICE OF THE GOVERNOR  
LANSING

GRETCHEN WHITMER  
GOVERNOR

GARLIN GILCHRIST II  
LT. GOVERNOR

**EXECUTIVE DIRECTIVE**

**No. 2019-17**

To: State Department Directors and Autonomous Agency Heads  
From: Governor Gretchen Whitmer  
Date: October 31, 2019  
Re: State-Tribal Relations

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Michigan is home to twelve federally recognized Indian tribes. Each tribe is a sovereign government with an inherent right to self-governance and self-determination. Each has its own governing structure, culture, traditions, laws, regulations, and policies, which it uses to exercise jurisdiction over land and people. And each has a special trust relationship with the federal government. These principles are rooted in and affirmed by the Constitution, treaties, statutes, and court opinions of the United States, and they fundamentally define the unique legal relationship between these tribes and the State of Michigan.

The State of Michigan shares a responsibility with Michigan's federally recognized Indian tribes to provide for and protect the health, safety, and welfare of their common constituents. This responsibility is deeply important and calls for open communication and robust collaboration between the State and the tribes. Mutually beneficial cooperation and understanding, as well as the resolution of occasional disagreements, can best be achieved through regular consultation between the State and tribes on matters of shared concern.

On October 28, 2002, the State of Michigan entered into a Government to Government Accord (the "Accord") with several federally recognized Indian tribes located in Michigan. This Accord served as an acknowledgement by the State of each tribes' sovereignty and right to self-governance and self-determination, and as a commitment by the State to use a process of consultation with the tribes to minimize and avoid disputes.

This directive serves to reaffirm, implement, formalize, and extend the commitments made by the State of Michigan in the Accord. First, it ensures that all departments and agencies are aware of and adhere to certain fundamental principles regarding government-to-government relations with Michigan's federally recognized Indian tribes. Second, it describes a process of tribal consultation designed to ensure meaningful and mutually beneficial communication and collaboration between these tribes and the departments and agencies on all matters of shared concern. And third, it builds into the operations of the



State of Michigan the infrastructure necessary to ensure that the objectives of this directive and the Accord, and the strong tribal-state relationship envisioned by them, are realized as fully as possible.

Accordingly, acting under sections 1 and 8 of article 5 of the Michigan Constitution of 1963, I direct the following:

1. Each department and agency must recognize, and must ensure its policies and practices effectuate, the following fundamental principles concerning Indian tribes, bands, and communities that the Secretary of the United States Department of Interior has recognized as Indian tribes pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 USC 479a:
  - (a) Federally recognized Indian tribes are sovereign governmental entities.
  - (b) Federally recognized Indian tribes possess inherent authority to exercise jurisdiction over their respective lands and citizens.
  - (c) Federally recognized Indian tribes possess the right to self-governance and self-determination.
  - (d) The United States has a unique trust relationship with federally recognized Indian tribes as set forth in the United States Constitution, treaties, statutes, executive orders, court decisions, and the general course of dealings of the United States with the Indian nations.
  - (e) The State of Michigan has a unique government-to-government relationship with each of Michigan's federally recognized Indian tribes, and that relationship is shaped by accords, compacts, statutes, court opinions, and a multitude of intergovernmental interactions.
2. Each department and agency must adopt and implement a process for consulting on a government-to-government basis with Michigan's federally recognized Indian tribes. The department or agency must engage in this consultation process before taking an action or implementing a decision that may affect one or more of these tribes. This consultation process must adhere to the framework and requirements set forth below, which are designed to ensure that the process is consistent and predictable across departments and agencies but also flexible enough to meet the particular needs and circumstances of each consultation. Meaningful communication and collaboration on matters of shared concern must always be the core and driving objective of this consultation process.
  - (a) *Step One – Identification:* The first step in the consultation process is the identification by the department or agency of an activity (i.e., an action or decision) that may be appropriate for consultation. Identification includes a determination of the complexity of the activity, the identity of the tribe(s) potentially affected by the activity, the activity's potential implications for tribes, and any time or resource constraints relevant to the application of the consultation process to the activity.



Departments and agencies must use the following mechanisms to identify activities appropriate for consultation:

- (1) State-Initiated Identification: When undertaking an activity, state departments and agencies must evaluate whether the action or decision may affect tribal interests such that consultation would be appropriate.
- (2) Tribal-Government-Initiated Identification: A tribal government may initiate the consultation process by identifying for a department or agency an activity that may be appropriate for consultation. The department or agency must then evaluate whether the activity is appropriate for consultation, and it must afford substantial weight to the tribal government's request in performing that evaluation.
- (3) Other Resources: Departments and agencies must also utilize other relevant resources, such as tribal partnership groups in which the tribes may be participants, to assist them in identifying activities that may be appropriate for consultation.

Activities that may be appropriate for consultation include, but are not limited to, actions or decisions regarding: rules or regulations; policies, guidance documents, or directives; permits; civil enforcement and compliance monitoring; emergency preparedness and response; federal authorizations or delegations; and efforts to carry out state obligations under a state compact or agreement.

- (b) *Step Two – Notification:* As soon as a department or agency has identified an activity that may be appropriate for consultation, it must promptly notify the tribe(s) potentially affected by the activity. Notification must include sufficient information to permit the potentially affected tribe(s) to make an informed decision regarding whether to proceed with consultation, and must apprise the tribe(s) of how to provide input regarding the activity. Notification may occur by regular or electronic mail, telephone, or other agreed-upon means, depending on the nature of the activity and the number of tribes potentially affected. Departments and agencies must strive to honor tribal preferences regarding the specific method of notification, subject to applicable time and resource constraints.
- (c) *Step Three – Input:* The department or agency must then receive and consider input regarding the activity from any potentially affected tribe that may choose to offer it. Input may be provided to the department or agency in whatever format the tribe and the department or agency may mutually deem appropriate. The department or agency must coordinate with the tribe(s) throughout this step to ensure that the tribe(s) participating in the consultation: (1) receive all information necessary to provide the department or agency with meaningful input regarding the activity; (2) are afforded due opportunity to discuss that input with the department or agency; (3) are apprised of any significant changes to the activity, or any other issues that may arise as to it, over the course of the consultation process; and (4) are afforded due opportunity to provide to and discuss with the department or agency any additional input the tribe(s) may have regarding those changed circumstances.


- (d) *Step Four – Follow-up:* The department or agency must then provide feedback to the tribe(s) involved in the consultation to explain how their input was considered in the final decision or action. This feedback must be in the form of a written communication from a senior department or agency official involved in the consultation to the most senior tribal official involved in the consultation.
3. The governor's deputy legal counsel for tribal-state affairs, or such other individual as the governor may designate, must serve as the governor's advisor on tribal-state affairs and is responsible for monitoring the implementation of this directive and the Accord. These duties include assisting in the identification of department or agency activities appropriate for consultation, evaluating the adequacy of consultations undertaken by departments and agencies, and ensuring that department and agency consultation practices are consistent with this directive. The governor's advisor on tribal-state affairs will also serve as the governor's representative to the Tribal-State Forum formed under the Accord and, together with the tribal representatives to the Forum, must:
- (a) Monitor, confer, critically assess, make recommendations, and prepare an annual report regarding the implementation of this directive and the Accord;
  - (b) Organize an annual meeting or summit between the governor and the tribal leadership;
  - (c) Foster improved government-to-government communications between the executive office of the governor and tribal governments;
  - (d) Ensure that copies of tribal-state accords, each department's tribal consultation policy, and contact information for the tribal liaisons described in paragraph 4 below are regularly updated and available online; and
  - (e) Encourage the state legislature to adopt a tribal consultation policy and appoint a tribal liaison.
4. Within 30 days of the effective date of this directive, each department and agency must designate an individual serving in the department or agency as the department's or agency's tribal liaison. The responsibilities of this liaison must include:
- (a) Monitoring and ensuring the department's or agency's implementation of and compliance with this directive and the Accord.
  - (b) Coordinating the department's or agency's interactions with the governments of Michigan's federally recognized Indian tribes.
  - (c) Coordinating and implementing the department's or agency's tribal consultation process, including serving as a point-of-contact for department or agency staff, tribal governments, and other parties interested in the process. Within 90 days of the effective date of this directive, the liaison must submit a report to the governor's advisor on tribal-state affairs describing a plan for adopting a consultation policy by the department or agency pursuant to section (2). Within 180 days of the effective

date of this directive, the department must adopt a consultation policy consistent with section (2).

- (d) Communicating regularly with the governor's advisor on tribal-state affairs regarding the department's or agency's compliance with this directive and the Accord, and regarding the department's or agency's interactions with Michigan's federally recognized Indian tribes.
  - (e) Participating in the annual summit, the annual Tribal-State Forum, and monthly tribal-state conference calls as coordinated by the governor's advisor on tribal-state affairs.
  - (f) Producing an annual report regarding the department's or agency's implementation of this directive and the Accord. This report must include a description of the most significant interactions, including collaborations and conflicts, between the department or agency and Michigan's federally recognized Indian tribes over the past year. The tribal liaison must provide this report to the governor's advisor on tribal-state affairs and to the director or head of the department or agency no less than 21 days before the annual meeting or summit identified in section (3)(b).
- 5. Each department and agency must provide annual training on tribal-state relations for all department and agency employees who have direct interactions with tribes or who work on matters that have direct implications for tribes. This training must teach the fundamentals of tribal sovereignty, tribal treaty rights, and tribal governance, and must also provide an historical overview of Indian tribes in Michigan, with lessons on indigenous dispossession and Indian boarding schools. The governor's advisor on tribal-state affairs will provide the necessary training materials.
  - 6. This directive does not foreclose, discourage, or supplant existing effective relationships, cooperative efforts, and lines of communication between the departments and agencies and Michigan's federally recognized Indian tribes. Moreover, this directive is not enforceable by third parties, does not confer standing on any individual or entity, and does not supersede any legal obligations. Absence of agreement between the consulting department or agency and one or more tribes does not bar the department or agency from acting.
  - 7. As used in this directive, "implications for tribes" means an express reference to Indians, Indian tribes, bands or groups, or Indian organizations, or a direct effect on their collective or individual treaty rights, natural-resource or environmental interests, economic or commercial interests, civil or criminal jurisdiction, or other rights or benefits secured under Michigan or federal law by virtue of their status as Indians or tribal governments.

This directive is effective immediately.

Thank you for your cooperation in implementing this directive.

  
Gretchen Whitmer  
Governor

BAY MILLS INDIAN COMMUNITY  
"GNOOZHEKAANING" PLACE OF THE PIKE

BAY MILLS TRIBAL ADMINISTRATION  
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April 3, 2020

Hon. Gretchen Whitmer, Governor  
State of Michigan  
George W. Romney Building  
111 South Capitol Avenue  
Lansing, Michigan 48909

**Re: Emergency Time Extension for Review of Line 5 Tunnel Permit Application**

Dear Governor Whitmer:

Given these unprecedented times with the COVID-19 pandemic, Bay Mills Indian Community's first priority is protecting the health of our Community and the broader public. We have appreciated the State of Michigan's cooperation, and your leadership, in this effort.

Earlier this week, our Tribe was notified by representatives from the Michigan Public Service Commission (MPSC) and Michigan Department of Environment, Great Lakes, and Energy (EGLE) that Enbridge will file a number of permit applications next week to construct an oil pipeline tunnel beneath the Straits of Mackinac.

While we are operating under a State of Emergency and Stay-at-Home Executive Order, Bay Mills Indian Community is in absolutely no position to review and provide substantive comment on any permit applications submitted by Enbridge regarding the siting and construction of its long-discussed pipeline tunnel underlying the Straits of Mackinac.

The Line 5 Pipeline, and its impacts to our treaty-protected resources, have long been a top concern for the Tribe, and we have expressed our views on how to mitigate its adverse impacts to Michigan's regulatory agencies and elected officials for years. I am writing on behalf of Bay Mills Indian Community to request an emergency stay of the State's administrative review on any permit applications regarding Enbridge's Line 5 tunnel project in order to allow both State agencies and the Tribe to carefully, thoroughly, and appropriately review Enbridge's massive submission of data and technical reports. By filing its applications now, Enbridge is seeking to use a global pandemic to its advantage by avoiding rigorous review and meaningful public comment.

The reasons for the Tribe's request are outlined below.

## **Unprecedented Challenges Posed by a Global Pandemic**

The COVID-19 pandemic has eliminated the norms of everyday life and has eliminated our ability to effectively meet internally and communicate our concerns. We feel that the State should not move forward with a business-as-usual approach regarding this matter. We understand that the timeframes and deadlines for permit review are mandated by statute, but we formally request your intervention in this process. State workers at MPSC and EGLE are likewise working remotely, without easy access to work files and records. The timeframes provided under various permitting provisions of the Michigan Natural Resources and Environmental Protection Act [MCL 324.101, *et seq.*] are impossible to meet – unless no review of the application’s contents and appendices is made. The Tribe has even less access to the application documents, and even less time to meaningfully review, comment and advise as to their contents. The same constraints apply to the permit sought from MPSC under MCL 483.1, *et seq.*

## **Lack of Information to Provide Substantive Comment on the Entire Scope of Line 5 in Michigan**

Any work that permits a tunnel in the Strait of Mackinac will effectively give Enbridge the go-ahead to continue operating as usual, despite its history of safety violations and damage to Michigan’s public health and environment.

Bay Mills is missing a number of important pieces of information that are necessary for us to provide substantive comment regarding future Line 5 actions. To date, we have not been given access to or received information on any of the following:

- Biological data that was collected in 2019 at Line 5 water crossings within the State of Michigan;
- Data requested of Enbridge in the January 13, 2020 letter from the Michigan Department of Natural Resources;
- Condition of the inland portions of Line 5 throughout Michigan;
- Results of geotechnical borings; and,
- Rigor and history of Enbridge’s Line 5 maintenance program (maintenance records federally required in 49 CFR § 195.404(c)).

For all of the above reasons, the Tribe respectfully requests that the time periods for review and comment on the multiple permits and authorizations which Enbridge seeks from the State for its tunnel construction project be extended, and not begin to run for as long as the State remains in a State of Emergency due to the COVID-19 pandemic.

Thank you for considering our request and working with us to protect our shared resources.

Miigwetch (thank you),



Bryan Newland  
Bay Mills Indian Community  
President, Executive Council

Cc: Liesl Clark, Director Michigan Department of Environment, Great Lakes, and Energy  
Dan Eichinger, Director of the Michigan Department of Natural Resources  
Dana Nessel, Michigan Attorney General  
Sally Talberg, Chairperson of the Michigan Public Service Commission  
Wenona Singel, Office of the Governor

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief

U-20763

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**PROOF OF SERVICE**

On the date below, an electronic copy of **Comments of Bay Mills Indian Community Opposing the Request for a Declaratory Ruling by Enbridge Energy, Limited Partnership** were served on the following:

Name/Party	E-mail Address
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The statements above are true to the best of my knowledge, information and belief.

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