



## Bay Mills Indian Community

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VIA EMAIL

September 13, 2018

Mr. Jeffrey H. Wood  
Acting Assistant Attorney General  
United States Department of Justice  
Environment and Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044-7611

Re: **BAY MILLS INDIAN COMMUNITY'S OBJECTIONS TO PROPOSED THIRD MODIFICATION OF CONSENT DECREE IN *UNITED STATES V. ENBRIDGE ENERGY, LIMITED PARTNERSHIP, ET AL.*, D.J. REF. NO. 90-5-1-1-10099.**

Dear Acting Assistant Attorney General Wood:

The Bay Mills Indian Community (Bay Mills), a federally recognized tribe, submits its objections to the proposed Third Modification of the Consent Decree in *United States v. Enbridge Energy, Limited Partnership, et al.*, D.J. Ref. No. 90-5-1-1-10099 (Proposed Third Modification). The Notice of the Proposed Third Modification and a request to submit comments was published in the Federal Register on August 14, 2018. 83 Fed. Reg. 40339. For the reasons set forth below, we respectfully request that DOJ and EPA withdraw the Proposed Third Modification. If the Proposed Third Modification is not withdrawn, the Bay Mills Indian Community respectfully requests a fairness hearing with the Court. *Local Number 93, Int'l Ass'n Firefighters, AFL-CIO C.L.C., v. City of Cleveland*, 478 U.S. 501, 529 (1986)(affirming right to present evidence and have objections heard at hearing on whether to approve consent decree); *Tennessee Ass'n of Health Maintenance Organizations v. Grier*, 262 F.3d 559 (6<sup>th</sup> Cir. 2001); *United States v. Akron*, 794 F.Supp.2d 782 (N.D. Ohio 2011) (declining to enter US proposed consent decree concerning CWA violations after conducting a fairness hearing).

### INTRODUCTION

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 1971, Michigan conservation officers cited Bay Mills tribal member Albert “Abe” LeBlanc for violating state fishing regulations. That citation resulted in the Michigan Supreme Court ruling that Bay Mills, along with several other tribes, retained the right to fish in the Great Lakes pursuant to the 1836 Treaty of Washington. In 1973, your predecessor stood with Bay Mills by filing 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.” Accordingly, 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.

As the original stewards of this area, we have always maintained grave concerns regarding the placement and operation of Line 5 in the Straits of Mackinac. The Line 5 Pipeline poses serious risks to the exercise of our reserved treaty fishing rights, our ability to preserve cultural resources near Lake Michigan and Lake Huron, our cultural and religious interest in the Great Lakes, our economy, and the health and welfare of our tribal members.

As our trustees, the Department of Justice (DOJ) and the Environmental Protection Agency (EPA) have a responsibility to ensure the continued protection of the treaty fishery. In this particular matter, our trustee has a duty to ensure that the Proposed Third Modification cannot be used by Enbridge to claim it is above the law. As written, the Proposed Third Modification at the very least creates tremendous confusion by ordering Enbridge to install anchor screws within 18 days after the close of this comment period. We respectfully submit that the Proposed Third Modification must be withdrawn and changed to make crystal clear that Enbridge must comply with all federal laws and regulations (including obtaining federal and state permits that it has applied for) prior to taking any action that could impact our treaty reserved waters. Withdrawal of the Third Proposed Modification to revise it and provide clarity on this point is required by law, serves the public interest, and demonstrates that this comment period is something more than an exercise of going through the motions. Indeed, without withdrawal and modification, the Proposed Third Modification is not fair, adequate and reasonable. We further submit that before any further modification is made to the existing consent decree, EPA and DOJ must share facts and analysis with Bay Mills and the public to support any further modification.

I note at the outset the complete lack of any meaningful consultation by DOJ and the Environmental Protection Agency (EPA) on the Proposed Third Modification. Earlier this year, EPA and DOJ indicated to the five tribes that retain treaty reserved fishing rights within parts of Lakes Superior, Michigan, and Huron of a potential modification to the Consent Decree. On at least two occasions, meetings with EPA and DOJ were rescheduled because the agencies were not yet prepared to share a draft of the proposed modification. When we finally met with DOJ and EPA on August 7, 2018 and received a copy of the Proposed Third Modification, we were shocked to learn that it would be filed with the Court within hours of our meeting, and that no changes would be considered or made prior to filing. This clearly is not meaningful tribal consultation. Had our trustees been willing to engage in something other than a “check-the-box” exercise, it’s possible that reasonable changes could have been incorporated into the Proposed Third Modification and our Tribe would not have had to expend limited resources preparing these comments or preparing for potential intervention in the litigation.

#### **A. The Proposed Third Modification Conflicts With and Violates Federal Law.**

The Bay Mills Indian Community objects to the Proposed Third Modification as conflicting with or violating federal law. It is well-settled that a court abuses its discretion in approving a consent decree that conflicts with statutory and regulatory requirements. *Local Number 93, Int’l Ass’n Firefighters, AFL-CIO C.L.C., v. City of Cleveland*, 478 U.S. 501, 526 (1986)(court may not approve consent decree that “conflicts with or violates” statutes and regulations); *Conservation Northwest v. Sherman*, 715 F.3d 1181 (9<sup>th</sup> Cir. 2013) (consent decree cannot circumvent compliance with NEPA and other statutory requirements). Here, the Proposed Third Modification requires Enbridge to install at least 70 screw

anchors by October 1, 2018 (18 days after the close of this comment period). Bay Mills is concerned that the modification will be used by Enbridge in an attempt to bypass the statutory and regulatory permit process. Federal and state law clearly require Enbridge to obtain permits from the Army Corps of Engineers (Corps) and the Michigan Department of Environmental Quality (MDEQ) prior to installation of the screw anchors. Prior to issuing any permit to Enbridge under section 10 of the Rivers and Harbors Act of 1899 or section 404 of the Clean Water Act, the Corps must comply with the National Environmental Policy Act (NEPA). The Proposed Third Modification must be withdrawn because a consent decree cannot change these statutory and regulatory requirements or require federal or state agencies to approve Enbridge's permit applications.

Our concern that Enbridge will attempt to use the Proposed Third Modification as a justification to ignore permitting requirements or to force issuance of permits notwithstanding non-compliance with substantive and procedural statutory requirements is real. We recently learned from MDEQ that Enbridge is already using the consent decree as justification for issuance of permits. In our August 7, 2018 meeting, DOJ and EPA pejoratively dismissed our concern by stating that nothing in the Proposed Third Modification requires the Corps or MDEQ to issue the necessary permits to Enbridge; and, that if the agencies decided not to issue the required permits that the Consent Decree is clear that this would be a *force majeure* event.

We respectfully maintain that the Proposed Third Modification is less than clear on this point. Indeed, DOJ and EPA's reasoning that the non-issuance of necessary permits by the October 1, 2018 deadline would be a *force majeure* event is flawed in that it is completely foreseeable that the Corps and MDEQ may not issue the necessary permits before a date less than three weeks from the close of this comment period. DOJ and EPA should withdraw the Proposed Third Modification, engage in meaningful consultation with Bay Mills to develop language that clearly states that the Consent Decree does not insulate Enbridge from complying with federal permitting requirements or the Proposed Third Modification should be rejected by the Court.

**B. The Proposed Third Modification Must be Withdrawn Because DOJ and EPA have Failed to Provide Any Facts to Demonstrate to the Public that the Proposed Modification is Fair, Adequate, and Reasonable.**

DOJ and EPA have submitted this Proposed Third Modification as a *fait accompli*. Other than the filing before the Court, neither agency has provided any independent facts to demonstrate that such modification is safe, necessary or warranted. *United States v. Lexington-Fayette Urban County Government*, 591 F.3d 484 (6<sup>th</sup> Cir. 2009) (consent decree may be approved only if it is "fair, adequate, and reasonable, as well as consistent with the public interest"). No evidence has been provided to Bay Mills, the public or to the Court to demonstrate that this Proposed Third Modification is fair. There are no facts in the record of this proceeding that demonstrates the number of anchor screws are adequate or inadequate. Neither DOJ nor EPA have shared any analysis prepared by their agencies that provides facts to support a finding that the Proposed Third Modification is fair.

Neither DOJ nor EPA have provided any facts or analysis to Bay Mills, the public or the Court to demonstrate that the Proposed Third Modification is adequate or reasonable. The Sixth Circuit has stated that "[o]ne of the most important considerations when evaluating whether a proposed consent decree is reasonable is 'the decree's likely effectiveness as a vehicle for cleansing' the environment." *Id.* at 489. No facts have been provided as part of this public comment period to support a conclusion that installation of at least 70 anchor screws as required by the Proposed Third



Modification will serve as a vehicle for cleansing the environment or that such installation is reasonable.

During our August 7, 2018 consultation, DOJ and EPA suggested that Bay Mills was opposing a modification intended to make the pipeline safer. We want to remain absolutely clear: It is and always has been Bay Mills Indian Community's view that Enbridge's continued operation of the Line 5 pipeline through the heart of the Great Lakes—the Straits of Mackinac—is a direct and unnecessary threat to our treaty-protected rights to hunt, fish, and gather.

Neither DOJ nor EPA provided any facts or evidence to show that this Modification will make the pipeline safer. Indeed, we have not been provided any analysis or facts prepared by DOJ and EPA to show that installation of the at least 70 anchor screws set forth in the Proposed Modification can be done safely and with no detrimental impact to the environment.

The activities proposed in the Modification may actually put the pipeline at a greater risk of anchor hooking and ultimate rupture by elevating the line off the lake floor. Furthermore, we are not aware of any facts or analysis showing the effectiveness of Enbridge's screw anchor design. It is well documented, however, that the process of installing these screw anchors has damaged the pipeline's protective coating. The Proposed Third Modification must be withdrawn by DOJ and EPA or rejected by the Court because there are no facts in the record to support this Proposed Third Modification. Indeed, DOJ and EPA have not shared any facts during the public comment period to support this Proposed Third Modification.

If the intent of the Proposed Third Modification is to make the pipeline safer, then the Modification should require the highest safeguards during installation, including shutting down the pipeline during construction activities. Certainly, the parties may agree to shut down the pipeline to ensure safe installation of the seventy anchor screws. The Proposed Third Modification should also include conditions on *operation* of the pipeline prospectively to ensure that leaks and blowouts do not occur. As expressed above, any such actions should be done in full compliance with federal and state law permitting requirements. The consent decree should not be used as a mechanism to by-pass federal permitting requirements.

Further, EPA and DOJ have not provided any facts to demonstrate that the Third Proposed Modification is in the public interest. “[T]he district court must consider whether the decree is ‘consistent with the public objectives sought to be attained by Congress.’” *United States v. Lexington-Fayette Urban County Government*, 591 F.3d 484, 490 (6th Cir. 2010). Here, there are no facts or analysis developed by EPA or DOJ to support a finding that the installation of at least 70 anchor screws within 18 days of the close of the comment period furthers the public objectives of Congress. Congress enacted laws such as the Rivers and Harbors Act, the Clean Water Act, and the National Environmental Policy Act to ensure thoughtful processes and decision-making on actions that have the potential to impact the natural environment, including our treaty reserved resources.

A consent decree that attempts to do an end-run around these laws and processes is not in the public interest. If DOJ and EPA believe that additional anchor screws are necessary to protect the environment, they should share their facts and analysis with Bay Mills and the public before proposing a modification to the consent decree. After sharing such information with the public, if such facts and analysis demonstrate that at least 70 additional anchor screws are reasonable and in the public interest, then a proposed modification should provide Enbridge a reasonable period of time to install

such anchor screws *if and after* they receive the necessary permits from federal and state agencies. The Proposed Third Modification should not be a mechanism to influence the independent permit review of the before mentioned agencies. This permit review process should adhere to the full requirements of the National Environmental Policy Act, especially given the concerns that Enbridge is attempting to segment its projects to avoid NEPA review.

### **C. The Proposed Third Modification Should Be Withdrawn As it Undermines the Regulatory Processes of Other Agencies.**

The Proposed Third Modification should be withdrawn because it directly and indirectly interferes with the regulatory responsibilities of other agencies. While we fully support EPA and DOJ's efforts to seek justice for Enbridge's egregious oil spills, this Proposed Third Modification twists the consent decree process into a tool for corporate gain. Our understanding is that it was Enbridge that requested this modification so that it could extend the life of a pipeline it has minimally maintained over the course of its operation. By attempting to rebuild the pipeline through a consent decree, the Proposed Third Modification not only attempts to circumvent existing laws, but it does so without the input and expertise of federal agencies such as the Army Corps of Engineers and the Pipeline and Hazardous Materials Safety Administration.

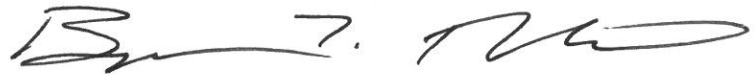
If a complete rebuild of the pipeline is necessary to protect the environment, Enbridge should be required, like every other company, to follow the existing laws and regulations to do so. If the existing pipeline is unsafe, Enbridge should be required to take the pipeline out of service until it is safe to operate. But DOJ, EPA and the court should not allow Enbridge to have it both ways under the guise of a consent decree – full operation while it continues to rebuild pursuant to a consent decree. The Line 5 Pipeline is either safe enough to operate, and Enbridge must follow the law and rules before installation of a complete rebuild; or, it is unsafe to operate and Enbridge must shut down the pipeline until it receives the necessary permits and approvals to rebuild. A rebuild by consent decree undermines regulatory agencies' statutory responsibilities.

### **CONCLUSION**

The Bay Mills Indian Community respectfully requests that DOJ and EPA withdraw the Proposed Third Modification. It was filed with the court within hours of our Tribe's initial consultation with EPA and DOJ. The utter lack of meaningful engagement underscores that this modification is being done for and at the behest of Enbridge – not for the public, the environment or for the best interests of our treaty tribes. The consent decree process is being distorted -- used by Enbridge in an attempt to circumvent existing federal and state laws. The Proposed Third Modification orders the installation of at least 70 anchor screws without any facts showing that this can be done safely or that it will make the pipeline safer. It further violates federal law by requiring installation by October 1, 2018 regardless of the issuance of federal and state permits. DOJ and EPA have provided no facts or analysis to support a finding that this Proposed Third Modification is fair, adequate, reasonable and in the public interest.

If DOJ and EPA decline to withdraw the Proposed Third Modification, we respectfully request consultation with DOJ and EPA prior to seeking final approval by the court. I cannot emphasize enough the importance of this issue to our Tribe. Since time immemorial, we have cared for this fishery and it is inextricably part of our Tribe's ceremonies, culture, and the health and welfare of our people. Our ancestors had the foresight to reserve our rights to hunt and fish through treaty with the United States. We will use every lawful avenue to protect our rights.

Respectfully,



Bryan Newland, President  
Bay Mills Indian Community

Cc: Andrew Wheeler, Acting Administrator for EPA  
Cathy Stepp, EPA Region V Administrator  
Tara Sweeney, Assistant Secretary of the Interior – Indian Affairs  
S. Craig Alexander, U.S. Department of Justice – Indian Resources Section  
Ryan Cobb, Chief of the Civil Division for the U.S. Attorney for the Western District of Michigan  
Heidi Grether, Director of the Michigan Department of Environmental Quality  
Keith Creagh, Director of the Michigan Department of Natural Resources  
United States Senator Debbie Stabenow  
United States Senator Gary Peters  
United States Representative Jack Bergman  
United States Senator John Hoeven, Chairman of the Committee on Indian Affairs  
United States Senator Tom Udall, Vice-Chairman of the Committee on Indian Affairs  
Jane TenEyck, Executive Director of the Chippewa Ottawa Resource Authority