

January 6, 2017

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VIA ELECTRONIC SUBMISSION

Re: Reissuance of the Enbridge Energy, Limited Partnership Special Use Permit to continue using, occupying, and maintaining the Line 5 pipeline, pumping station, and right-of-way (ROW) across National Forest Lands on the Washburn Ranger District of the Chequamegon-Nicolet National Forest

Dear U.S. Forest Service:

We the undersigned write to comment on the U.S. Forest Service (USFS or Forest Service) special use authorization for the Enbridge Line 5 pipeline, pumping station, ROW, and associated improvements located on federal public land on the Washburn Ranger District of the Chequamegon-Nicolet National Forest. Built in 1953, Enbridge's petroleum pipeline currently is operating in the National Forest under a permit that expired in 2013. We urge you to extend the public comment period to uphold your federal trust responsibilities and consider off-reservation treaty rights of ten federally recognized tribes¹ as part of Enbridge's special use permit application.

FEDERAL TRUST RESPONSIBILITIES DEMAND THAT POTENTIAL IMPACTS TO OFF-RESERVATION TREATY RIGHTS AND NATURAL RESOURCES BE EXAMINED AS PART OF THIS SPECIAL USE PERMIT APPLICATION

The treaties signed by the Ojibwe (or Chippewa) with the United States government inherently recognize the importance of the Great Lakes and watersheds to the cultural identity and economic well-being of their people. In those treaties they ceded land in northern Michigan, Wisconsin and Minnesota, but retained the rights to hunt, fish and gather in the ceded territories. In 1983, the U.S. Circuit Court of Appeals in *Lac Courte Oreilles v. Voigt*, 700 F. 2d 341, 7th Cir. (1983), affirmed the existence of Ojibwe treaty rights to hunt, fish and gather on ceded off-reservation lands without regulation by the State of Wisconsin. "The Voigt ruling had broad implications for sovereignty and treaty rights in

¹ The ten tribes include (1) Misi-zaaga'iganiing (Mille Lacs), (2) Nagaajiwanaang (Fond du Lac), (3) Bikoganoogan St.Croix (Danbury), (4) Gaa-miskwaabikaang (Red Cliff), (5) Mashkiigong-ziiibiing (Bad River), (6) Waaswaaganing (Lac du Flambeau), (7) Gete-gitigaaning (Lac Vieux Desert), (8) Zaka'aaganing (Mole Lake/Sokaogon), (9) Gakiiwe 'onaning (Keweenaw Bay), (10) Odaawaa-zaaga'iganiing (Lac Courte Oreilles).

the upper Midwest, but more pointedly, it afforded the Ojibwe bands an opportunity to develop their own regulations for managing off reservation resources.”²

The 1999 memorandum of understanding (MOU)³ between USFS and Tribes of the Great Lakes Indian Fish and Wildlife Commission (GLIFWC)⁴ recognizes and implements treaty guaranteed hunting, fishing, and gathering rights under tribal regulations and establishes a consultation process for management decisions that affect treaty rights in four National Forests located within areas ceded by the Chippewa in the Treaties of 1836, 1837 and 1842. Accordingly, “[t]he MOU requires the Forest Service to consider the effects of its decisions on treaty resources and the tribes’ ability to exercise their gathering rights. In all decision and analysis documents, the Forest Service must show how tribal information and involvement was taken into account.”⁵

Because of this federal trust responsibility to the GLIFWC Tribes, the Forest Service must ensure that its agency actions do not conflict with tribal treaty rights. Accordingly, this issue of off-reservation treaty rights may trigger a NEPA review as suggested recently in a memo issued by the Department of the Army on the *Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota*. Assistant Secretary of the Army (Civil Works), Jo-Ellen Darcy, wrote:

NEPA requires that Federal agencies consider reasonable alternatives to recommended actions whenever those actions “involve[] unresolved conflicts concerning alternative uses of available resource.” See 42 U.S.C. §4322(2)(E). The Council on Environmental Quality’s (CEQ) has advised that in some circumstances, including some cases where environmental effects on Tribal resources are at stake agencies ‘should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the

² The Harvard Project on American Indian Economic Development, Treaty Rights/National Forest Memorandum of Understanding Tribes of the Great Lakes Indian Fish and Wildlife Commission, 2000

http://www.nnidatabase.org/db/attachments/text/honoring_nations/2000_HN_Bad_River_national_forest_mngt_MOU.pdf

³ The most recent MOU was amended March 2012.

https://www.fs.fed.us/spf/tribalrelations/documents/agreements/mou_amd2012wAppendixes.pdf

⁴ GLIFWC member tribes are: in Wisconsin -- the Bad River Band of the Lake Superior Tribe of Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin, Sokaogon Chippewa Community of the Mole Lake Band, and Red Cliff Band of Lake Superior Chippewa Indians; in Minnesota -- Fond du Lac Chippewa Tribe, and Mille Lacs Band of Chippewa Indians; and in Michigan -- Bay Mills Indian Community, Keweenaw Bay Indian Community, and Lac Vieux Desert Band of Lake Superior Chippewa Indians.

⁵ The Harvard Project on American Indian Economic Development, Treaty Rights/National Forest Memorandum of Understanding Tribes of the Great Lakes Indian Fish and Wildlife Commission, 2000

http://www.nnidatabase.org/db/attachments/text/honoring_nations/2000_HN_Bad_River_national_forest_mngt_MOU.pdf

affected community or population.” See CEQ, “Environmental Justice Under the National Environmental Policy Act” at p.10 (1997).⁶

Therefore, the Forest Service should not apply the categorical exclusion (CE)⁷ under the National Environmental Policy Act (NEPA) without considering the off-reservation treaty rights given the potentially significant environmental impacts of a pipeline rupture to these off-reservation tribal hunting, fishing, and gathering rights. These property rights in the resources dependent upon the habitat within the Chequamegon-Nicolet National Forest and related waters and wetlands may be impacted by transport of crude oil in Line 5.⁸ In the past, GLIFWC has clearly explained how Enbridge’s Line 5 and other activities in Ceded Territories can directly impact their ability to exercise their treaty rights. In a GLIFWC letter dated August 26, 2016 to the U.S. Army Corps of Engineers regarding Enbridge’s permit request for Line 5 anchor supports in the Straits of Mackinac, the Commission wrote:

Pipelines destroy and divide habitats, reduce access to harvest areas and, through the threat of oil spills, endanger the resources tribal members use to maintain their Anishinaabe lifeway. The complex network of pipelines that now exists in the ceded territory was constructed with little or no tribal consultation or prior informed consent. Ultimately, the oil that is transported by the Line 5 pipeline contributes to human induced climate change and the ongoing degradation of the Ceded Territories.

More recently, the Bad River Band’s formal resolution on January 4, 2017 to deny the renewal of Enbridge’s Line 5 easement through its reservation further underscores the level of concern and the heightened scrutiny demanded by GLIFWC tribes.

WITH A HISTORY OF PIPELINE FAILURES, ENBRIDGE’S LINE 5 POSES A HIGH RISK OF IMMINENT HARM, AND ALTERNATIVES TO LINE 5 EXIST

History of Pipeline Failures

Although only 11.5 miles of this 645-mile pipeline are being evaluated under this permit application, Enbridge’s Line 5 poses as one of the greatest threats to the Great Lakes and its tributaries with a well-known history of crude oil ruptures. With public records dating back only as far as 1988, Enbridge has 15 documented failures on Line 5, resulting in about 260,000 gallons of oil leaking from this aging pipeline.⁹

⁶ Department of the Army Memorandum *Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota* (Dec. 4, 2016) <https://www.army.mil/e2/c/downloads/459011.pdf>

⁷ <https://www.fs.fed.us/emc/nepa/restorationCE/>

⁸ The potential for a pipeline spill on federal forest lands is real. Enbridge’s Line 5 pipeline, in fact ruptured during the 1980s in the Hiawatha National Forest in Michigan’s Upper Peninsula and Enbridge did not remediate the contaminated soil and groundwater for over three decades. See Matheny, Keith, “30 years later, contamination remained at site of pipeline spill,” *Free Press*, May 10, 2016 <http://www.freep.com/story/news/local/michigan/2016/05/07/enbridge-line5-oil-spill-hiawatha-national-forest/83507228/>

⁹ http://www.oilandwaterdontmix.org/enbridge_safety_record

The most relevant Line 5 oil spill to this pipeline permit application to use federal forest lands occurred in the Hiawatha National Forest in the Upper Peninsula during the 1980s.¹⁰ Contaminated soil and groundwater persisted at the spill site in Hiawatha National Forest for more three decades. Enbridge did not remove the 825 tons of contaminated soil until 2011 and the USFS stated that they weren't aware of the spill until 2012 when they granted Enbridge a permit to monitor contaminated groundwater.

Across Enbridge's entire pipeline system between 1999 and 2014, there have been 1,068 spills that have dumped 7.4 million gallons of oil into the environment - an average of 71 spills and 500,000 gallons per year. That's more than one oil spill every week for the last 15 years. This includes, of course, Enbridge's 2010 Line 6B Kalamazoo heavy tar sands spill deemed the largest inland oil spill in U.S. history, with the National Transportation Safety Board comparing the company's spill response plan to the "Keystone Cops."

Evaluating Risk and Alternatives to Line 5 Pipeline

Since National Wildlife Federation's 2012 *Sunken Hazard* publication on Enbridge's Line 5 in the Straits of Mackinac, a number of organizations – including For Love or Water ("FLOW") and the Oil & Water Don't Mix ("OWDM) Campaign – have submitted legal and technical letters and reports to top Michigan officials, the Michigan Petroleum Pipeline Task Force ("Task Force"), and Michigan Pipeline Safety Advisory Board ("Advisory Board") on the high risks associated with Line 5, including the segment in the Straits of Mackinac.¹¹ These reports concluded the following:

- (1) the high risk of catastrophic harm from a crude oil release in the Straits and Lake Michigan and Lake Huron is unacceptable;¹²
- (2) there are a number of suitable alternatives and capacity (with reasonable adjustments) within the Great Lakes and Midwest existing crude oil pipeline system to meet existing and future demand and needs; and
- (3) interim measures should be immediately implemented to remove crude oil transport from Line 5 given the high risk, magnitude of harm, and suitable alternatives.

¹⁰ Matheny, Keith, "30 years later, contamination remained at site of pipeline spill," *Free Press*, May 10, 2016 <http://www.freep.com/story/news/local/michigan/2016/05/07/enbridge-line5-oil-spill-hiawatha-national-forest/83507228/>

¹¹ [FLOW Composite Report on Line 5 Risks and Recommendations, with Appendices, submitted to Michigan Petroleum Pipeline Task Force](#) (FLOW, Apr. 30, 2015); [A Scientific and Legal Policy Report on the Transport of Oil in the Great Lakes: \(1\) Recommended Actins on The Transport of Oil Through Line 5 under the Straits of Mackinac; \(2\) Supplemental Comments to the Michigan Petroleum Pipeline Task](#) (FLOW, Sept. 21, 2015); [A Report on the Legal and Pipeline Systems Framework for the Alternatives Analysis of the Pipeline Transport of Crude Oil in the Great Lakes Region, Including Line 5 under the Straits of Mackinac, submitted to Michigan Pipeline Advisory Board](#) (FLOW, Dec. 2015).

¹² According to the University of Michigan's 2014 and 2016 research, the Straits of Mackinac would be the "worst possible place for an oil spill in the Great Lakes."

These reports¹³ and comments¹⁴ demonstrate that Line 5 is only a part of Enbridge's large Lakehead Crude Oil Pipeline System in North America, which transports crude oil, including heavy and synthetic light crude oil, from Canada through and to the Midwest (including Michigan) and Canada.

Since 1953, Enbridge has expanded Line 5 to 80 percent of its original design capacity from 300,000 bbls/day to 540,000 bbls/day through 12 pump stations and anti-friction injection facilities.¹⁵ Line 5's expansion is part of Enbridge's large multi-billion project to more than double crude oil transport, including tar sands, from Canada and North Dakota to the U.S. East and Gulf Coasts for export.

Following the 2010 Kalamazoo River disaster, Enbridge shut down Line 6B and replaced it with a new Line 6B (recently renamed Line 78) that doubled its design capacity from approximately 400,000 bbl/day to 800,000 bbl/day. Enbridge has stated that the doubling of capacity Line 6B will meet the current and future needs of shippers or production facilities in the Midwest, Canada, and Michigan. In proceedings before the Michigan Public Service Commission, Enbridge stated that the doubling of design capacity for Line 6B is a preferable alternative to Line 5.

Four primary conclusions are clear: (1) Enbridge has followed a piecemeal, segmentation approach to this massive pipeline expansion to avoid alternative analyses; (2) federal and state agencies have not conducted thorough alternative analyses because segmentation has improperly narrowed the range of alternatives; (3) Line 5 is no longer essential in the context of the overall Enbridge expanded project and pipeline system in and through the Great Lakes basin; (4) Line 5 is not essential and should be decommissioned based on proper high magnitude of harm and risk principles because there exist alternatives within the larger overall project purpose and system.

These same reports further demonstrate that there are feasible and prudent alternatives to the transport of crude oil in Line 5. To date, the State of Michigan's Advisory Board is overseeing two separate and independent risk and alternative studies to be completed in the fall of 2017; however, there still are no interim measures in place to reduce Line 5's current risk to our lands and waters.

Finally, these reports¹⁶ have also identified Enbridge in violation of eight known provisions of its 1953 Easement with the State of Michigan to occupy the public trust bottomlands of

¹³ [A Report on the Legal and Pipeline Systems Framework for the Alternatives Analysis of the Pipeline Transport of Crude Oil in the Great Lakes Region, Including Line 5 under the Straits of Mackinac, submitted to Michigan Pipeline Advisory Board](#) (FLOW, Dec. 2015).

¹⁴ FLOW public comments to the MDEQ regarding Enbridge's anchor violations filed on [August 24, 2016](#) and [August 25, 2016](#).

¹⁵ [FLOW Public Comments Objecting to Enbridge's Application to DEQ & Corps for Anchoring Supports](#), August 24, 2016 at p. 5.

¹⁶ [FLOW & Oil & Water Don't Mix Sign-On Letter to the State re: Enbridge Easement Violations](#), April 13, 2016.

the Great Lakes. Michigan's Attorney General also recently confirmed that Enbridge has violated this easement with the State more than once.¹⁷

For over six decades, both state and federal agencies have allowed the strategic piecemeal expansion of Line 5 without examining the cumulative impacts and alternatives to this entire pipeline. It is imperative that state and federal agencies now assess these cumulative impacts and alternatives of this 64-year-old oil pipeline that traverses across other National Forest Lands, tribal lands, as well as dozens of critical waterways in Wisconsin and Michigan.

Please place these comments into the record of the agency on this matter.

We the undersigned organizations thank you for your serious consideration and protection of the off-reservation treaty rights, public trust, waters, environment, and public health associated with your obligations under all applicable laws.

Respectfully submitted,

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Phil Bellfy, PhD, Director, Article32.org

Mike Shriberg, Great Lakes Regional Executive Director, National Wildlife Federation (NWF)

Liz Kirkwood, Executive Director, For Love of Water (FLOW)

Chris Kolb, President, Michigan Environmental Council (MEC)

David Holtz, Executive Committee Chair, Sierra Club Michigan Chapter Chair

Bill Davis, Sierra Club John Muir Chapter Director

Jim Lively, Program Director, Groundwork Center for Resilient Communities

Mariah Urueta, Michigan Organizer, Food & Water Watch

Nic Clark, Director, Michigan Clean Water Action

Greg Reisig & Ann Rogers, Co-Chairs, Northern Michigan Environmental Action Council (NMEAC)

Peggy Case, Michigan Citizens for Water Conservation (MCWC)

Bill Latka and Kelly Lively, Coordinators, TC350.org

Eric Gietzen, Chairman, Surfrider Foundation Milwaukee

Roger and Susan Gauthier (Benton Township), David and Anabel Dwyer (Mackinaw Township), Vince Lumetta and Linda Rogers (Beaugrand Township), Straits Area

Concerned Citizens for Peace, Justice, and the Environment (SACCPJE)

Bob Dunn, Breezeswept

Murtaza Nek, Bike the Line

Chauncey Moran, Chairman, Yellow Dog Watershed Preserve, Great Lakes Waterkeepers

Marc Yaggi, Executive Director, Waterkeeper Alliance

Cheryl Nenn, Riverkeeper, Milwaukee Riverkeeper

Chauncey Moran, Yellow Dog Riverkeeper, Yellow Dog Watershed Preserve

Robert Burns, Detroit Riverkeeper, Friends of the Detroit River

¹⁷ Letter from Michigan Attorney General to Enbridge VP Brad Shamlu (August 3, 2016)

http://media.mlive.com/news_impact/other/Enbridge%20-%20joint%20ltr%20with%20Keith%20Creagh%20&%20Heidi%20Grether%208-3-16%20-2.pdf

Lee Willbanks, St. Lawrence Riverkeeper, Save the River
Joseph Campbell, Seneca Lake Guardian, A Waterkeeper Affiliate
Heather Smith, Grand Traverse Baykeeper, The Watershed Center Grand Traverse Bay
Jill Jedlicka, Executive Director & Riverkeeper, Buffalo Niagara Riverkeeper
Sandy Bihn, Executive Director and Waterkeeper, Lake Erie Waterkeeper
Doug Martz, Channelkeeper, St. Clair Channelkeeper