



March 21, 2025

Via Electronic Mail

Lt. Col. Wallace W. Bandeff
Commander
U.S. Army Corps of Engineers, Detroit District
477 Michigan Avenue
Detroit, MI 48826-2550
Line_5_LRE@usace.army.mil

Re: Notice of Intent to Withdraw as Cooperating Agencies

Dear Lt. Col. Bandeff,

The undersigned Tribal Nations hereby provide the U.S. Army Corps of Engineers (the “Corps”) with notice of their intent to withdraw as Cooperating Agencies in the Corps’ Environmental Impact Statement (“EIS”) process under the National Environmental Policy Act (“NEPA”),¹ as it evaluates Enbridge Energy, Limited Partnership’s (“Enbridge”) application for a permit pursuant to Section 404 of the Clean Water Act (“CWA”)² and Section 10 of the River and Harbors Act (“RHA”).³ Enbridge seeks approval to construct a massive fossil fuel infrastructure project in the Straits of Mackinac, a place that is sacred to Tribal Nations and protected by treaty. The Corps has informed Cooperating Agencies, without their cooperation and over protestations from Tribal Nations, that the permit will likely be issued soon pursuant to the Executive Order, *Declaring a National Energy Emergency*.⁴ This is unacceptable.

The Tribal Nations established their cooperating agency status early in the EIS process by agreement with the Corps.⁵ Each Tribe negotiated its special expertise⁶ with the Corps in Memorandums of Understanding (“MOUs”), which include expertise in Indigenous knowledge, as well as expertise relating to environmental justice issues and project impacts on the Ceded

¹ 42 U.S.C. § 4321 *et seq.*

² 33 U.S.C. § 1344.

³ 33 U.S.C. § 403.

⁴ Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 29, 2025).

⁵ 42 U.S.C. § 4336a(3); 42 U.S.C.A. § 4336e(2).

⁶ 42 U.S.C. § 4336e(13) (“The term “special expertise” means statutory responsibility, agency mission, or related program experience.”).

Territory, the species, natural resources, treaty-protected resources, and cultural resources that are significant to Tribal Nations.⁷

The Tribes have participated in Cooperating Agency meetings and submitted extensive comments throughout the EIS process. The Corps, however, has disregarded its commitments to cooperating agencies and its obligations under NEPA by fully aligning itself with the applicant at every step.⁸ Indeed, at the Cooperating Agency meeting on March 20, 2025, it became evident that—in the near term—the Corps is likely to identify the applicant’s project as one subject to emergency treatment and issue the permit. Even at this critical juncture, the Corps claimed it was acting with transparency while at the same time providing few details about the Detroit District’s identification of projects identified under the Executive Order. While there are numerous reasons why the Executive Order is inapplicable to the Proposed Project, the Corps’ complete failure at consultation over potential emergent action is the final straw in the cooperating agency relationship.

As set forth more fully below, the Corps’ key decisions relating to its jurisdiction, scope of analysis, and project purpose were designed merely to advance the applicant’s goal to continue the flow of oil through the Straits; the Corps has closed off meaningful dialogue with the Cooperating Agencies, including the Tribes; the Corps has failed to integrate its federal commitments to uphold Tribal treaty rights; and the Corps appears ready to abdicate its federal treaty-trust responsibilities to Tribal Nations in favor of approving the project under the guise of an emergency. In short, the Corps has failed to adequately engage with the Tribal Nation Cooperating Agencies in the EIS process. The Corps’ agreement to establish a cooperating agency relationship with Tribal Nations appears to have been another “check-the-box” exercise on its way towards permitting Enbridge’s proposed project.

Tribal Nations are no longer willing to expend their time and resources as Cooperating Agencies just so their participation may be used by the Corps to lend credibility to a flawed EIS process and document.⁹ The Tribal Nations intend to withdraw as Cooperating Agencies in the NEPA process effective immediately.

⁷ Notably, the Corps sought to limit the Tribes’ expertise and refused to agree to their full participation on all subject matters. *See, e.g.*, Corps’ Second Draft MOU with Bay Mills (Mar. 31, 2022) (where the Corps asserted that the Bay Mills Indian Community should not be identified as having expertise in the effects on the Ceded Territory under the 1836 Treaty of Washington). Unlike a federal agency that might specialize in certain disciplines, Tribal Nations are sovereign governments with experience and expertise across all aspects of their peoples’ experience in a place. That the Corps insisted on a more myopic view of the Tribal Nations’ expertise at the start of the EIS process was a harbinger of the way it continued to quarter off the Tribal Nations’ comments and expertise throughout the Consulting Agency relationship.

⁸ *See* 33 C.F.R. Pt. 325, App. B (9)(b)(5) (“The Corps is neither an opponent nor a proponent of the applicant’s proposal...”).

⁹ *See* Preliminary Draft Chapter 1 at 12 (“Cooperating agencies contributed to the development of the Draft EIS by providing information, participating on technical teams, and reviewing draft documents.”).

The Corps' EIS Process Has Advanced the Applicant's Goals and Harmed Tribal Nations.

The Straits of Mackinac is spiritually, culturally, and economically vital to Tribal Nations.¹⁰ The Corps' EIS process disregards this deep place-based connection and instead seems designed to ensure that oil—and its associated threats—will continue to exist throughout the treaty ceded territory, including in the Great Lakes and the Straits. Each decision the Corps has made—its EIS-Section 106 sequencing, jurisdiction,¹¹ purpose statement, scope of analysis, and potential emergency action—limits not only its review of the environmental effects of the Proposed Project, but also the Project's disproportionate impacts on Tribal Nations. As a result, the Corps' EIS process summarily dismisses evidence and viewpoints provided by Tribal Nations as being “outside the scope,” and readily and uncritically accepts the representations provided by Enbridge.

The Corps' approach reflects systemic exclusion of the Tribal Nations' perspectives and expertise to the benefit of the applicant. This approach is contrary to the Corps' obligation to “use and consider the comments, recommendations, data, and/or analyses” provided by Tribal Nations in their Cooperating Agency roles, pursuant to the MOUs executed between the Corps and the Tribal Nations. The Corps' approach is further inconsistent with both NEPA regulations and guidance that require the Corps to conduct an independent evaluation of the proposed project.¹² The Corps' position is also contrary to its federal commitment to uphold Tribal treaty rights in permitting decisions, as discussed more fully herein.¹³ The result of the Corps disregarding its obligations and designing its EIS to advance the applicant's goals is that the only alternative that is logically possible to carry forward for analysis in the EIS is the preferred alternative proposed by the applicant. This effectively renders a decision on the proposed project before the EIS is even completed,¹⁴ and limits the value of Tribal involvement in the EIS process going forward.

The Tribal Nations have repeatedly raised concerns regarding the Corps' inappropriate and unlawful sequencing of its National Historic Preservation Act Section 106 review and EIS

¹⁰ See, e.g., Little Traverse Bay Bands of Odawa Indians' Comments on Draft Chapters 1 and 2 at 2 (May 20, 2024) (“The Straits of Mackinac have a rich history of settlement and cultural activity among the Anishinabek. Anishinaabe stories also point to the Straits as the place of origin for the creation of Mshiikenh Minis (Turtle Island) or in non-tribal culture, North America. The Straits bear a deep cultural and historical importance to the Anishinabek.”).

¹¹ The Corps adopted an extremely narrow interpretation of its jurisdiction under the CWA and the RHA, stating that it extended only to construction of the discrete project and the issuance of a permit for structures, work and discharges of fill into waters of the United States. See generally Comment Response Matrix (June 24, 2024). While laser-focused on its regulatory authority, the Corps' position ignores its statutory obligations under NEPA, its federal trust obligations to protect Tribal treaty rights, and the applicability of relevant Executive Orders, which are binding on the Corps, as set forth herein and in prior Tribal comments.

¹² 33 C.F.R. Pt. 325, App. B(9)(b)(5) (“The Corps is neither an opponent nor a proponent of the applicant's proposal...”).

¹³ Office of Sec'y of Defense, Trust Responsibility and Consultation Matrix at 1 (2004), <https://perma.cc/JPW9-HQXE> (“Where trust responsibility applies,” as in the Ceded Territory, “Indian interests cannot be subordinated to interests of the [Department of Defense] absent overriding legal authority to do so.”).

¹⁴ See GLIFWC Comments on Draft Chapters 1 and 2 (May 17, 2024) at 1.

process. The Corps' failure to move the Section 106 process forward in a timely manner has caused the EIS process to progress without the benefit of a partial—let alone complete—historic properties review. The EIS alternatives were developed and screened without the benefit of Section 106 identification, analysis, and resolution, and it is apparent to the Tribal Nations that alternatives and sub-alternatives analysis will be similarly uninformed. It is unclear how the Corps will complete its review under the Section 106 process if it moves forward with emergency action.

The Corps made the affirmative decision to stunt the EIS process and drastically minimized the Tribal Nations' interests by pausing Section 106 for over sixteen months. Such sequencing dismissed Tribal Nations' interests and expertise within the EIS process and further revealed a systemic disregard for the Tribal Nations, their treaty resources, and cultural lifeways, as further evidenced by the Corps' other EIS process decisions. As a direct result of this sequencing, numerous cultural properties and resources were damaged throughout this process.

The Corps has been dismissive of Tribal concerns about the purpose statement in the EIS and the resultant limitations.¹⁵ The Corps defines the purpose as providing transportation of fuels between the North Straits Facility and Mackinaw Station, unreasonably limiting the geographic location of the project or any alternative to the Straits, in disregard of the sacredness of this location to Tribal Nations. The Corps further specifies the type and amount of fossil fuels to be transported in its purpose statement, limiting the ways that purported energy needs can be met in the future and disregarding the climate change impacts that are already being experienced in the region, which disproportionately affect the Tribal Nations.¹⁶ The Corps' purpose statement ensured that only those alternatives that advanced the continued flow of oil through pipelines in the Straits will be analyzed in the EIS.¹⁷

The Corps similarly created no room for the recognition and protection of Tribal lifeways in the scope of its analysis.¹⁸ The scope excludes the risk of an oil spill from Line 5 into the Great Lakes, a concern that Tribal Nations and other Cooperating Agencies have expressed on numerous occasions—and a risk that the Acting Assistant Secretary of the Army (Civil Works) has ordered

¹⁵ MFR on Purpose and Need (June 28, 2023) (“[T]he purpose of the project is to provide safe transportation of light crude oil, light synthetic crude oil, light sweet crude oil, and natural gas liquids between Enbridge’s existing North Straits Facility and Mackinaw Station, and to approximately maintain the existing capacity of the Line 5 pipeline while minimizing environmental risks.”).

¹⁶ See Bay Mills’ Comments on Environmental Justice (Jan. 5, 2024) at 12-15; Bay Mills’ Scoping Comments (Oct. 14, 2022) at 35-42.

¹⁷ See Bay Mills’ Comments on the Corps’ Preliminary Draft Chapters and Appendix (May 17, 2024) at 15-18.

¹⁸ MFR on Scope of Analysis (June 28, 2023) at 10 (“[T]he Corps’ scope of analysis for our NEPA review and our public interest review includes the construction of the tunnel between the tunnel boring machine entry and exit portals; installation of structures within the tunnel; associated construction activities, equipment use, and materials staging within the limits of disturbance, including site restoration; transport and disposal of spoils material; select operation and maintenance activities related to the tunnel and structures within it; and decommissioning of the existing dual pipelines by abandoning them in place.”).

the Corps to consider.¹⁹ A spill of oil reaching the Great Lakes would have immediate, devastating, and long-lasting impacts on hundreds of islands and shorelines, all of which are key breeding areas and nesting grounds for various culturally significant species of birds, fish, and plants, including threatened and endangered ones.²⁰ A spill would harm treaty-protected resources and prevent Tribal members from exercising their treaty-reserved rights, destroying the Indigenous way of life. Yet under the Corps' constrained scope, the disproportionate exposure of Tribal members to contaminants from an oil spill will not be analyzed, nor will the disproportionate impacts to Tribal Nations due to climate change from the continued reliance on oil be assessed. There can be no meaningful Tribal participation or representation when Tribal perspectives are repeatedly dismissed as "outside the scope."

The Corps' Process Lacked Meaningful Dialogue with the Tribal Nations and other Cooperating Agencies.

The Corps has a duty to be transparent in its decision-making processes and to work toward "mutual consensus" when possible.²¹ The Cooperating Agency MOUs require that the parties "agree to cooperate in identifying and developing information . . . to complete a thorough" review.²² Yet the Corps has closed itself off to meaningful dialogue with Tribal Nation Consulting Agencies in the EIS process, shielding its decision-making process from dialogue, and frustrating the purpose of the Cooperating Agency relationship.²³ While the Corps often cites different modes

¹⁹ See, e.g., Bay Mills' Scoping Comments (Oct. 14, 2022) at 28-35; EPA Scoping Comments (Oct. 7, 2022) at 18-27 (providing detailed recommendations for the DEIS relating to, among many issues, climate change and oil spills, including impact assessment, prevention, preparedness, and response plans); see also SHPO Scoping Comments (Oct. 14, 2022) at 7-8 (setting forth its recommendations for the DEIS, including that the Corps "[i]dentify and analyze the short-, long-term, and cumulative effects of the proposed action and risks associated with the action to traditional use of the Straits as a cultural landscape and TCP, and the ability of Tribes to exercise treaty rights" and "[e]nsure that the scope is sufficient to capture direct, indirect, and cumulative impacts to cultural resources in the entire Straits watershed."); Jamie A. Pinkham, Acting Ass't Sec'y of the Army (Civil Works) to Commanding General, U.S. Army Corps of Eng'rs, *Policy Direction on the Enbridge Energy Line 5 Permit Application Environmental Impact Statement (EIS)* (Jan. 7, 2025).

²⁰ See Bay Mills' Scoping Comments at 30-31 (citing Esteban Chiriboga, *Cumulative Environmental Risk of Crude Oil and Natural Gas Pipelines in the 1836, 1837, 1842, and 1854 Ceded Territories*, Great Lakes Indian Fish & Wildlife Comm'n (April 2022)); see also Audubon, *Priority Region: St. Mary's River and the Straits of Mackinac*, <https://gl.audubon.org/coastal-wetlands/priority-region-st-marys-river-and-straits-mackinac>.

²¹ U.S. Army Corps of Engineers, Civ. Works, *Tribal Consultation Policy* at 3, 8 (Dec. 5, 2023), <https://perma.cc/6RC2-PFHW>.

²² MOU between the Corps and Bay Mills (Dec. 15, 2022) at 7 (IV)(C)(2).

²³ See MOU between the Corps and Bay Mills (Dec. 15, 2022) at 2 (identifying as a purpose of the MOU "[t]o establish a framework for cooperation and coordination between the Corps and BMIC to ensure the timely development and successful completion of the Enbridge Line 5 Tunnel EIS in an efficient and thorough manner."); see also CEQ, Memorandum for the Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan. 30, 2002) (recognizing that the benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include "fostering intra- and intergovernmental trust").

of regular communication that it claims it uses to engage with Tribal Nations (including monthly meetings, opportunities to provide written comments, issuance of Memorandums for the Record (“MFR”) on various topics, and the use of a Comment Matrix to respond to written comments), there remains a disconnect in the Corps’ communication.²⁴ No matter the form it takes, the Corps’ communications are far from meaningful or robust,²⁵ and there is no constructive dialogue in the EIS process to ensure a true understanding of all parties’ perspectives, questions, and statements.²⁶ Communication is a one way street, with no regard for the information, expertise, or facts provided by Cooperating Agency Tribal Nations.

When the Corps receives comments from the Tribal Nations, whether during a Monthly Cooperating Agency meeting or in written submissions, the information goes into a proverbial “black box.”²⁷ The Corps receives the information, but there is no transparency about how—or whether—the information is used before making key decisions. At the March 20, 2025 Cooperating Agency meeting, the Corps refused to commit to incorporating Cooperating Agency comments into the decision of whether to identify the Proposed Project as one subject to the Executive Order *Declaring a National Emergency*, refused to share what recommendation would be made regarding the project’s applicability under the Executive Order, and refused to share the policy directives regarding the project or the definition of emergency.

Further, the Corps’ use of a Comment Matrix is dismissive of Tribal concerns and is an ineffective way to communicate or reach consensus.²⁸ After Tribal Nations routinely provide extensive comments in response to the Corps’ requests and in accordance with very tight timelines, the Corps summarily dismisses Tribal expertise in a few sentences *for documents that have already been finalized*.²⁹ The Corps does not engage in conversations with Cooperating Agencies before

²⁴ See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians’ (MBPI) Comments on Draft Chapters 1 and 2 (May 17, 2024) at 1-2.

²⁵ See Tribal Consultation Policy, *supra* note 21, at 5; see also Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 Daily Comp. Pres. Doc. 91 (Jan. 26, 2021), <https://perma.cc/6XUZ-J965>.

²⁶ MBPI Comments on Draft Chapters 1 and 2 (May 17, 2024) at 1-2 (providing concrete suggestions of ways the Detroit District could more productively communicate its decisions beyond the use of comment matrices).

²⁷ See Cooperating Agency Meeting Record (Feb. 16, 2023) at 7 (“When Tribes enter into consultation, it usually becomes a one-way street. Tribal comments get thrown into what appears to be a black box. There is never a two-way dialogue about what concerns there may be. There is always follow up to Enbridge about information and when a decision is made, but there is hardly ever a dialogue between the Tribal nations and the federal agency.”).

²⁸ When Bay Mills expressed a concern that the Corps’ practice of responding to comments in a comment matrix was ineffective in that “the Corps summarily dismisses Bay Mills’ expertise in a few sentences,” the Corps responded *in a few sentences in a Comment Matrix*. Comment Response Matrix (June 24, 2024) at Line 44.

²⁹ For example, the Corps indicated in its Comment Matrix in response to comments on the Corps’ Draft List of Alternatives that it “has not included Tribal Treaty Rights as a screening criterion to determine whether an alternative will be carried forward for detailed analysis in the EIS.” Comment Response Matrix

decisions are made and does not adequately explain its reasoning afterwards.³⁰ The Corps' communication in the EIS process has been one-sided, resulting in a process that does not comply with NEPA, the terms of the MOU, or its trust responsibility.

The Corps' use of "Technical Forms"³¹ did not right the ship. Its reliance on technical forms suffered from the same lack of coordination and lack of meaningful and robust communication described with respect to the use of other modes of communication. Comments on the technical forms appeared to enter the same "black box" as all other comments. The Corps did not engage in discussion with the Cooperating Agencies about the technical forms—the Corps may have heard, but it did not communicate. In fact, at Cooperating Agency monthly meetings, the forms were mostly read aloud by Corps staff with little opportunity to discuss any other concerns.³²

The Corps' handling of Cooperating Agencies' comments to the Technical Forms highlights the illusory nature of the Corps' review and Cooperating Agency consultation. For example, Bay Mills' comments to the Biological Resources Technical Form pointed out that the form had entirely omitted data sources that would allow the Corps to understand the project's impacts to biological resources, as opposed to simply cataloging current resource baselines—a

(Apr. 17, 2024) at Line 17. It is clear from the phrase "has not included" that the Corps had already made its decision regarding screening criteria without any attempt to reach a consensus with Cooperating Agencies, including Tribal Nations, following release of the Draft List.

³⁰ The Corps' lack of transparency in its application of the CWA Guidelines exemplifies its failures in communication. Bay Mills and other Cooperating Agencies pressed the Corps to follow the CWA Guidelines and affirm that the basic purpose of the proposed project is not water-dependent, a critical step to take before screening alternatives, but the Corps did not engage in any dialogue about the issue and its approach lacked transparency. *See, e.g.*, Bay Mills' Comments on the Corps' Draft List of Alternatives (Dec. 12, 2023) at 12-13; Comment Response Matrix (Apr. 17, 2024) at Line 18 (indicating that the Corps "has determined the basic purpose of the project," but without sharing that basic purpose, and that it "will document its determination of water dependency in the Record of Decision."); *see also* Preliminary Draft Chapter 2 (silent on the basic purpose). Yet in response to comments on the draft chapters, the Corps indicated that it "agrees the proposed project is not water dependent." Comment Response Matrix (June 24, 2024) at Line 4. The Corps never engaged in a dialogue to address Tribal concerns about how its application of the basic purpose in regard to advancing alternatives for analysis in the EIS aligns with the CWA Guidelines.

³¹ Following the issuance of Draft Chapters 1 and 2, the Corps introduced the use of technical forms for only a fraction of the topics covered in the EIS. The technical forms list the expected data sources and outstanding data needs and describe the Corps' approach for documenting the affected environment and its analysis of potential beneficial and detrimental direct, indirect, and cumulative impacts based on the Corps' limited scope.

³² *See* SHPO Comments on Water Resources Technical Form (Aug. 22, 2024) ("We find that the Cooperating Agencies meeting held on August 15, 2024 to discuss this technical form did not allow sufficient time for cooperating agencies to comment or for meaningful discussion on the topic. We request that during future meetings which cover technical forms, time is not spent reading the form/document to the meeting participants. Rather, time should be reserved for discussion. For example, USACE could begin with a series of questions for the cooperating agencies and/or allow cooperating agencies to pose their own questions. In the future, please allow time for feedback from cooperating agencies and establish the meeting as a listening session, wherein cooperating agencies can provide comments and voice concerns.").

gaping hole in the research. The Corps responded not by going back to the drawing board to correct its omission or by restructuring its schedule to permit Cooperating Agencies to review a Technical Form without such egregious deficiencies, but by asking Cooperating Agencies to make suggestions for “specific sources” to add to the Corps’ empty set. Bay Mills informed the Corps that they were not provided with enough information to provide their expertise³³ on this missing section of Technical Form. The Tribal Nations are not aware that any relevant data sources were added to the draft Technical Form, and, if they were, no opportunity to review was extended to Cooperating Agencies. Such a process is not reflective of a lead agency interested or engaged in actual consultation and revision but instead reflects the Corps’ bare prioritization of its schedule ahead of its NEPA, treaty, and MOU obligations. The Corps’ approach fosters no meaningful dialogue and fails to advance informed decision-making.³⁴ Its process is decidedly not cooperative, nor does it evidence that the Corps is interested in utilizing the Tribal Nations’ expertise to “develop[e] information at the level of detail required to complete a thorough environmental and cultural resources review.”³⁵

The Corps’ Technical Forms have, like all communication with the Corps, isolated discussion of treaty rights and impacts to treaty-protected resources from discussion. Bay Mills cannot consider communication “meaningful” or “robust,” and certainly cannot trust the EIS process, if the Corps’ communication consistently silos or disregards all Tribal concerns regarding the impacts to treaty rights.

Finally, the Corps’ handling of Enbridge’s destruction of historic property only reinforced the lack of transparency and trust in the Corps’ EIS process. Bay Mills raised concerns at a meeting in April 2024 about a land swap that occurred between an Enbridge subsidiary and Emmet County.³⁶ The land swap resulted in Enbridge financing the construction of a parking lot over land that was subject to the Corps’ Section 106 review process.³⁷ In the months before the Corps made a decision as to whether Enbridge’s actions constituted anticipatory demolition under the National Historic Preservation Act and/or a choice-limiting option under NEPA regulations, the Corps led Tribal Nations to believe that it was investigating the matter and would discuss its findings with them.³⁸

As it turned out, the Corps neither investigated the matter nor discussed its findings with Tribal Nations. Once again, the Corps’ final decision on the matter did not reflect an exchange of

³³ Recall that per the Cooperating Agency MOU, Bay Mills is an expert on traditional ecological knowledge, effects on the Ceded Territory under the 1893 Treaty of Washington, and ecological technical knowledge. MOU between the Corps and Bay Mills (Dec. 15, 2022) at 5.

³⁴ See MOU between the Corps and Bay Mills (Dec. 15, 2022) at 6 (IV)(C)(2).

³⁵ See *id.* at 7 (IV)(C)(5).

³⁶ See generally Letter from Bay Mills to the Corps regarding construction activities and likely violations of NHPA and NEPA (July 8, 2024); Email from the Corps to Consulting Parties (May 13, 2024).

³⁷ *Id.*

³⁸ See, e.g., Monthly Section 106 Meeting Minutes dated June 26, 2024, July 24, 2024, and August 28, 2024; see also Email from the Corps (Oct. 22, 2024) (noting, less than a day before the scheduled meeting, that the Corps “look[s] forward to discussion” at the Section 106 meeting).

ideas with the Tribal Nations. Rather, the Corps deferred to the applicant when issuing its final decision—despite evidence that Enbridge was not forthcoming in its responses to the Corps and brought legal counsel to the monthly Section 106 meeting who instructed the Corps’ staff members not to answer any questions about the matter. Indeed, when the Advisory Council on Historic Preservation sought clarification regarding the Corps’ response to the matter, the Corps shut down the inquiry and declined to respond to the Advisory Council’s specific questions.³⁹ The Corps’ actions with respect to this issue only heightened the lack of trust the Tribal Nations have in the EIS process as it moves forward.⁴⁰

The Corps’ EIS Process Undermines Its Trust Responsibility to Protect Tribal Treaty Rights.

In the 1836 Treaty of Washington, 7 Stat. 491, the Ojibwe and Ottawa Tribes reserved the “usual privileges of occupancy,” the right to hunting, fishing, and gathering in the over 14 million acres of land and large portions of the surface of Lakes Superior, Michigan, and Huron, and all connecting waterways—including the Straits of Mackinac—that they ceded to the United States.⁴¹ These rights were not given or granted by the United States but are inherent rights reserved by the Tribal Nations for themselves.⁴² The exercise of these rights was, and continues to be, fundamental to Tribal Nations’ culture and way of life:

[T]his reservation of sovereign rights is part of the Ojibwe’s ongoing struggle to preserve a culture—a way of life and a set of deeply held values—that is best understood in terms of the tribes’ relationship to *Aki* (earth) and the circle of the seasons.⁴³

³⁹ Letter from Jaime Loichinger, ACHP, to Shane McCoy, USACE (Dec. 20, 2024); Letter from Shane McCoy to Jaime Loichinger (Mar. 3, 2025).

⁴⁰ For example, the Corps has indicated that Consulting Parties in the EIS process will be permitted to review certain draft chapters in advance of the administrative DEIS; however, based on the Corps’ disingenuous behavior regarding the land swap, Tribal Nations have no reason to trust that the Corps will follow through with the advance review.

⁴¹ Ann McCammon-Soltis & Kekek Jason Stark, *Fulfilling Ojibwe Treaty Promises—An Overview and Compendium of Relevant Statutes and Agreements*, Great Lakes Indian Fish & Wildlife Comm’n Div. of Intergovernmental Affairs, 2009 at 1 (citing Treaty of 1836, 7 Stat. 491, Article Thirteenth (“The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.”)).

⁴² *Id.*; see also Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights at 2 (2021), <https://perma.cc/Q4UW-6NSF> (“From 1778 to 1871, the United States’ relations with American Indian tribes were defined and conducted largely through treaty-making. Through these treaties, Indian tribes ceded land and other natural and cultural resources to the United States, while retaining all rights not expressly granted. The United States Supreme Court has affirmed this principle of reserved rights, explaining that treaties are ‘not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.’” (citing *United States v. Winans*, 198 U.S. 371, 381 (1905))).

⁴³ McCammon-Soltis & Stark, *supra* note 41, at 1-2.

In their role as Cooperating Agencies, the Tribal Nations detailed the direct, indirect, and cumulative impacts of permitting a massive new infrastructure project on their treaty rights and treaty-protected resources, and stated that the Proposed Project, or any alternative that continues oil through the Straits, will threaten their traditional lifeways.⁴⁴ The Tribal Nations have provided extensive authority requiring that the Corps, as a federal agency, abide by Executive Orders and federal policies to uphold the United States’ treaty trust responsibilities when making its permitting decision.⁴⁵ Indeed, the Corps’ own 2023 revised Tribal Consultation Policy emphasizes that the Corps “cannot authorize, approve, or carry out any activities which would result in a violation of a Tribal treaty right.”⁴⁶

To uphold its trust responsibility to protect Tribal treaty rights in the permitting process, the Corps must understand the Straits as a place of spirituality and a fossil fuel infrastructure project as a threat to the Tribes’ sovereign and treaty rights to exercise their traditional lifeways. Engaging in a traditional lifeway includes maintaining a relationship with the earth through the exercise of treaty rights and passing down teachings, stories, history, and culture between elder and child.⁴⁷ In order to continue, Tribal Nations need access to the plants, trees, animals, and fisheries that are integral to their exercise of treaty rights.⁴⁸ Clean water and a healthy ecosystem throughout the ceded territory, including in the Straits of Mackinac, are vitally important.⁴⁹ Thus, not only do the waters of the Straits give meaning to and support treaty rights, but they are central to the Tribal Nations’ cultural, traditional, and spiritual identity.

The Corps, however, has persisted in advancing the applicant’s view of the Proposed Project that continues the flow of oil through the Straits. The Corps has failed to grasp an understanding of the project through a Tribal lens and failed to uphold its trust responsibility throughout the EIS process. Instead, it has segregated the topic of “Tribal Resources and Ceded Territory Rights” into a sub-section of a later EIS chapter.⁵⁰ Further, as discussed above, the Corps

⁴⁴ See, e.g., Bay Mills’ Scoping Comments (Oct. 14, 2022) at 2-9, 34-35; Bay Mills’ Comments on the Corps’ Draft List of Alternatives (Dec. 12, 2023) at 7-9; see also Letter from Tribal Nations to Shane McCoy regarding Treaty Implications of the USACE’s Consideration of Enbridge’s Proposed Great Lakes Tunnel Project Permit Application (Aug. 2, 2024); Little Traverse Bay Bands of Odawa Indians’ Comments on Draft Chapters 1 and 2 (May 20, 2024).

⁴⁵ See, e.g., Bay Mills’ Scoping Comments (Oct. 14, 2022) at 4-7; Bay Mills’ Comments on the Corps’ Draft List of Alternatives (Dec. 12, 2023) at 4-7.

⁴⁶ Tribal Consultation Policy, *supra* note 21, at 4.

⁴⁷ See Pre-Filed Direct Testimony of Pres. Whitney Gravelle at 12, *In re Appl. for Auth. to Replace and Relocate Segment of Line 5 Crossing the Straits of Mackinac* (MPSC No. U-20763), <https://web.archive.org/web/20231128203933/https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/068t000000TUxgKAAT>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Preliminary Draft Chapter 1 at Table 1-1; Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights at 1 (2021), <https://perma.cc/Q4UW-6NSF> (affirming a commitment to protect tribal treaty rights, reserved rights, and


made key decisions in the EIS process that minimize the Tribal Nations' interests and expertise, as recognized in the Cooperating Agency MOUs. In this way, the Corps has put blinders on to the impacts of the Proposed Project on Tribal treaty rights and has forged ahead with an EIS process that will ultimately infringe on Tribal rights. Thus, despite its stated commitment to "work to meet trust obligations, protect trust resources, and obtain Tribal views of trust and treaty responsibilities,"⁵¹ the Corps' actions in the EIS process demonstrate the hollowness of its commitments.

Conclusion

In addition to their role as Cooperating Agencies, Tribal Nations also participate in the Corps' permitting process as sovereign Tribal Nations and consulting Tribal Nations in the NHPA Section 106 process. While the Corps' approach to those processes has been equally troublesome, this Notice of Withdrawal applies only to the Tribal Nations' role as Cooperating Agencies in the NEPA process. The Tribes will continue, for the time being, to engage with the Corps as sovereign Tribal Nations and consult in the Section 106 process.

Pursuant to the terms of their MOUs, the Tribal Nations expect the Corps will act in good faith to resolve the concerns raised in this correspondence and adjust its EIS process accordingly. At this point, however, and as detailed herein, the undersigned Tribal Nations have not seen any evidence of the Corps acting in good faith and intend to withdraw as Cooperating Agencies in the NEPA process effective immediately.

Chi miigwetch (thank you),



President Whitney Gravelle,
Bay Mills Indian Community

Ogema Larry Romanelli,
Little River Band of Ottawa Indians

Chairman Austin Lowes,
Sault Ste. Marie Tribe of Chippewa Indians

Chairwoman Sandra Witherspoon,
Grand Traverse Band of Ottawa and Chippewa
Indians

similar tribal rights to natural and cultural resources through "*early consideration*" of such rights in decision-making processes) (emphasis added).

⁵¹ See *U.S. Army Corps of Engineers Tribal Nations Program*, USACE, <https://perma.cc/CW5N-L8CW>.

Chairman Bob Peters,
Match-E-Be-Nash-She-Wish Band of Pottawatomi

Chairperson Dorie Rios,
Nottawaseppi Huron Band of the Potawatomi

cc: U.S. EPA Region 5
U.S. Coast Guard, Ninth District 9
Michigan State Historic Preservation Office
Via electronic mail