



Michigan Department of Environment, Great Lakes, and Energy
PETITION FOR CONTESTED CASE HEARING

Permit or Application No: (On permit or application as assigned by EGLE)
WRP027179

The procedural authority for a contested case hearing is the Michigan Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 et seq. Information requested on this form may be provided in an alternative written format or additional pages may be attached.

<input checked="" type="checkbox"/> PETITIONER'S NAME	or	<input type="checkbox"/> AGENT'S NAME
Bay Mills Indian Community		
STREET ADDRESS 12140 W. Lakeshore Drive		
CITY Brimley	STATE MI	ZIP CODE 49715
TELEPHONE NO. (906) 248-8100		

MAILING ADDRESS (If different from street address)		
CITY	STATE	ZIP CODE
E-MAIL ADDRESS candyt@bmic.net		

Statement of Authority:	
I petition a contested case hearing be initiated under the authority of:	
<input checked="" type="checkbox"/> Part 303 and Part 325 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.101 et seq.	
<input type="checkbox"/> Part _____ of the Public Health Code, 1978 PA 368, as amended, MCL 333.1101 et seq.	
<input checked="" type="checkbox"/> Other statute: See Attached Addendum.	
<i>{Identify statute by popular name, the public act year and number, MCL, and if applicable, the part of the statute}</i>	
<input type="checkbox"/> Administrative Rule, R _____ ; Title:	
<input type="checkbox"/> Order No. _____ ; Title:	
Statement of matters asserted, including the site location and other pertinent facts: See Attached Addendum.	
Petitioner's relationship/interest to the activity or proposed project: See Attached Addendum.	
Relief sought by Petitioner: See Attached Addendum.	
SIGNATURE OF PETITIONER/AGENT <i>Kathryn L. Hursey</i>	DATE 04/26/2021

Submit this completed petition and attachments to:
 Michigan Office of Administrative Hearings and Rules
 Ottawa Building, Second Floor
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 Lansing, MI 48909-8195
 Telephone: 517-335-2484
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 E-mail: MOAHR-GA@Michigan.gov

NOTICE:
 A COPY OF EGLE'S FINAL ACTION ON AN APPLICATION OR PERMIT **MUST BE** ATTACHED TO THIS OR ANY ALTERNATIVE WRITTEN PETITION.

ADDENDUM TO PETITION FOR A CONTESTED CASE

The following is the Addendum to Petition for Contested Case by the Bay Mills Indian Community. This Addendum is attached to and supplements the Petition for Contested Case Hearing form as completed and executed by the undersigned counsel.

Petitioners:

BAY MILLS INDIAN COMMUNITY
12140 West Lakeshore Drive
Brimley, MI 49715

Permit / Application Numbers:

Application N^{os}. HNY-NHX4-FSR2Q
Permit N^o. WRP027179¹

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Statement of Authority:

This petition for a contested case hearing is initiated under the authority of the Administrative Procedures Act, 1969 PA 306, as amended, MCL §24.201 *et seq.* pursuant to the Natural Resources and Environmental Protection Act, 1994, PA 451, as amended, MCL §324.101 *et seq.* (“NREPA”) Parts 303 and 325 as well as the rules promulgated thereunder.

¹ A copy of the Permit is attached to this Addendum as Exhibit 1.

INTRODUCTION

The Bay Mills Indian Community (“Bay Mills”) petitions for a contested case hearing on Water Resources Permit WRP027179 (“Permit”), issued by the Michigan Department of Environment, Great Lakes, and Energy’s (“EGLE”), on February 25, 2021, in violation of MCL 324.30301, *et seq.*, and EGLE’s own policies on tribal consultation and public participation. In Water Resources Permit WRP027179, EGLE authorizes Enbridge Energy, Limited Partnership (“Enbridge”) to construct a tunnel underneath the lakebed of the Straits of Mackinac and to then install a pipeline within the tunnel to transport light crude oil and liquid natural gas (the “Tunnel Project,” or the “Project”). The existing dual pipelines that run along the lake bottom in the Straits would be decommissioned and a new pipeline would be routed through the tunnel. The Tunnel Project is a massive project that will cost more than \$500 million dollars and take several years to complete.

With this major Tunnel Project, Enbridge aims to continue transporting crude oil and natural gas through its Line 5 pipeline across the Great Lakes for up to 99 years.² Yet, this proposed tunnel and continued operation of the Line 5 pipeline may soon become unnecessary: Governor Whitmer and the Michigan Department of Natural Resources have issued a notice of revocation and termination for Enbridge’s 1953 easement for the operation of the dual pipelines in the Straits and have ordered a shutdown of the dual pipelines on May 13, 2021.³

Nothing like this tunnel has ever been constructed in the Great Lakes and this Project raises serious questions about the impact that the tunnel will have on the environment and

² See Tunnel Agreement between Mackinac Straits Corridor Authority and Enbridge Energy, Limited Partnership, p. 34, Section 5.3 (December 19, 2018), https://www.michigan.gov/documents/mdot/Tunnel_Agreement-MCSA_Enbridge_Energy_684294_7.pdf.

³ Notice of Revocation and Termination of Easement, November 13, 2020.

cultural and archaeological resources in the Straits area. The Project will involve boring a tunnel underneath the Straits of Mackinac in the Great Lakes, which hold twenty percent of the world's fresh surface water. The tunnel construction will require a massive disturbance of land and involve construction and the placement of structures on the bottomlands within the Straits, placing at risk the significant cultural and historic properties within the Straits of Mackinac area, including the bottomlands and the shore area.

The Tunnel Project threatens Bay Mills' way of life and its treaty-protected interests in the Great Lakes, the Straits of Mackinac, and the surrounding areas. As described in this Addendum to the Petition, the Straits area is a place of historic and ongoing cultural, spiritual and economic significance; it is where tribal members fish, gather plants for food and medicine, and pray. In an effort to protect these interests, Bay Mills has raised its concerns in the tunnel permitting processes⁴ by submitting detailed comments to EGLE,⁵ participating in consultation EGLE, and writing numerous letters to EGLE.

Because Bay Mills views the Straits area and the cultural and historic properties located therein as a single cohesive landscape, the destruction or contamination of one part of the landscape damages the entire landscape. Bay Mills aims to prevent the destruction or degradation of cultural resource sites in the Straits area.

Echoing Bay Mills' and other Tribal Nations' concerns about the risks the Project poses to this area of great cultural and historic significance, the State Historic Preservation Office

⁴ Bay Mills has also participated in the permitting processes for other state and federal permits required for the Project, including permits before the United States Army Corps of Engineers and the Michigan Public Service Commission.

⁵ See Bay Mills' and Little River Band's Comments on EGLE Application Nos. HNY-NHX4-FSR2Q and HNY-TBJC-PNK8V, with attachments (October 19, 2020) ("Bay Mills Comments"), Exhibit 2.

(“SHPO”)—an agency with responsibility to preserve sites under federal and state law—recommended additional studies be completed to assess the Project’s impact on historical and cultural resources *prior* to the issuance of the Permit. However, EGLE sidelined the SHPO’s and Bay Mills’ concerns and issued the Permit before the completion of these crucial studies.

Despite the unique, complex, and substantial nature of the proposed undertaking, EGLE failed to undertake critical steps required by law before issuing the Permit. This Addendum to the Petition details Bay Mills’ interests in this permitting process, provides important facts surrounding the Project and the permitting process, and explains EGLE’s failure to follow the law and its own policies. First, EGLE blatantly disregarded the calls by experts—including the SHPO, a sister government agency, and Bay Mills and other Tribal Nations—for further archaeological and cultural studies before making a decision on the permit application. Second, EGLE contravened its own policies by failing to conduct meaningful tribal consultation. Third, EGLE thwarted public participation by not allowing the public to review and comment on critical documents and plans prepared after the comment period ended. Accordingly, Bay Mills requests that the Permit be denied.

PETITIONER’S RELATIONSHIP/INTEREST TO THE ACTIVITY OR PROPOSED PROJECT

1. Petitioner, Bay Mills, a federally recognized Indian Tribe, requests a contested case proceeding to represent the interests of its members in protecting treaty rights, natural resources, and cultural and historic resources from risk and harm associated with the activities authorized by Water Resource Permit Number WRP027179, issued by EGLE on February 25, 2021.

2. Gnoozhekaaning, “Place of the Pike,” or the Bay Mills Indian Community is a federally recognized Indian Tribe with a government organized under the provisions of the Indian Reorganization Act of 1934, 25 USC §5101.

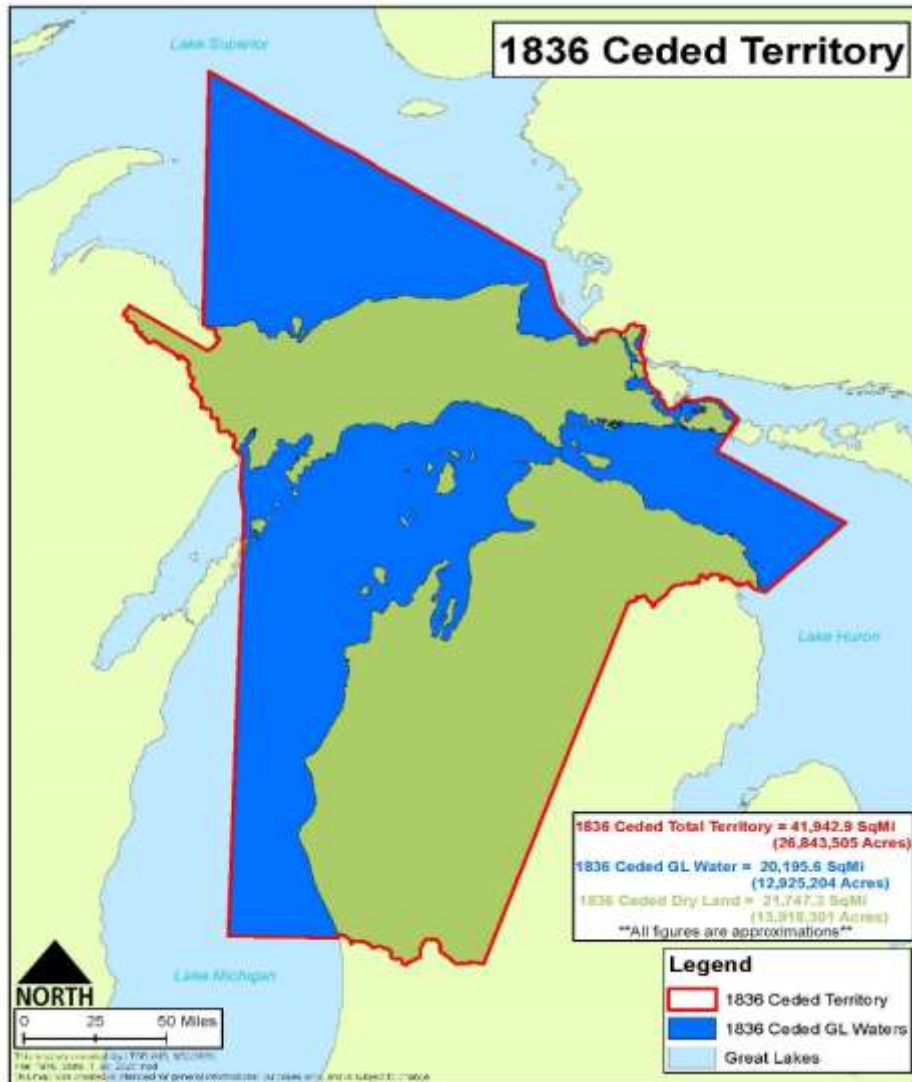
3. Bay Mills has 2,196 enrolled members and a service area that includes Chippewa, Mackinac, and Luce Counties. More than half of the enrolled members live on or near the Bay Mills Reservation.

4. Bay Mills is a modern-day successor in interest to Indians who were signatories to the March 28, 1836 Treaty of Washington, 7 Stat. 491.

5. In the Treaty of Washington, the Indian signatories ceded to the federal government 14 million acres of land and inland waters and 13 million surface acres of water in Lakes Michigan, Huron, and Superior; while reserving the right to hunt, fish, and other privileges of occupancy.⁶

⁶ Treaty of March 28, 1836, 7 Stat 491. Bay Mills, Grand Traverse Band of Ottawa and Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, Sault Ste. Marie Tribe of Chippewa Indians, and Little River Band of Ottawa Indians are successors to the signatories of the 1836 Treaty and are collectively known as “the 1836 Treaty Tribes.”

6. This area, pictured in the map below, is known as the “Ceded Territory.”



7. The Affidavit of Bay Mills Indian Community President Whitney Gravelle, attached as Exhibit 3 to this Petition, provides further information regarding Bay Mills; the role of its predecessors-in-interest in the Treaty of Washington; the rights of Bay Mills arising out of the Treaty of Washington; and the role of Bay Mills in the landmark case affirming those treaty rights known as *United States v. Michigan*, 471 F Supp 192 (W.D. Mich. 1979).

8. As an 1836 Treaty Tribe, Bay Mills retains usufructuary property rights to natural resources in the Ceded Territory, including in and around the Straits of Mackinac. The State of Michigan is obligated to honor these treaty-protected rights and is prohibited from diminishing them.

9. The Straits of Mackinac is a place of immense spiritual and cultural significance to Bay Mills. According to oral histories, the creation of North America began with a flooded Earth. 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. 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.⁷ It is believed that 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. According to the history, the Great Turtle emerged from the flood in the Straits of Mackinac. The word "Mackinac" is derived from the original name of the Great Turtle from the Ojibwe story of Creation.⁸

10. The area provides numerous spawning grounds for different fish species – including Lake Whitefish – which Bay Mills holds sacred. According to the Tribe's oral histories, during a time of famine and desolation, the eight traditional clans Bear, Turtle, Deer, Loon, Crane, Marten, Bird, and Whitefish came together to discuss how to save the Anishinaabe throughout the Great Lakes region. After much debate and discussion, the Whitefish clan chose to sacrifice itself to provide for the wellbeing of the people. The Whitefish clan submerged itself in the Great Lakes and became the Whitefish that Tribal citizens harvest and eat today.

⁷ Bay Mills Comments, p. 24, Exhibit 2.

⁸ *Id.*

11. Since time immemorial, the robust ecosystem of the Great Lakes watershed has allowed for trading and harvesting of many different traditional medicines and food sources.⁹ Tribal citizens gather maple sugar, berries, mushrooms, and wild rice (*manoomin*) within the Great Lakes watershed. These foods are staples to the traditional diets of Tribal citizens. Other culturally important plant species are found in the watershed including Northern white cedar (*giizhik*), a plant considered sacred to Bay Mills, and black ash (*aagimaak*). These plant species are important for producing medicine, canoes, clothing, baskets, and ricing sticks for harvesting wild rice (*manoomin*).¹⁰

12. Bay Mills Conservation Officers patrol the Ceded Territory – both by boat and by land.

13. Due to its significant interest in the Straits of Mackinac and surrounding areas, Bay Mills has actively engaged in tribal consultation opportunities throughout the Tunnel Project permit processes, including the Water Resource Permit.¹¹

14. The proposed permit activity threatens harm or will adversely affect or impair the Treaty protected resources, including aquatic resources of both Lakes Huron and Michigan at the

⁹ Affidavit of Whitney B. Gravelle, Exhibit 3.

¹⁰ *Id.*

¹¹ Tribal consultation occurs on a government-to-government basis with the core objective of meaningful communication and collaboration on matters of shared concern. Exec. Dir. No. 2019-17, Tribal Relations (October 31, 2019); *see also* 2002 Government-to-Government Accord Between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan, Lansing, Michigan, October 28, 2002, https://www.michigan.gov/documents/Accordfinal_53478_7.pdf. Bay Mills was clear to EGLE throughout the Permit process regarding its expectations surrounding tribal consultation. *See* Letter from President Bryan Newland to various agencies (August 18, 2020) “Bay Mills can ask questions and present concerns ...[and] agencies can provide responses.” Exhibit 4; Letter from President Bryan Newland to Ms. Teresa Seidel, Director Water Resources Division, EGLE (January 28, 2021), Exhibit 5.

Straits of Mackinac, and Bay Mills' members use and enjoyment of those resources, wildlife, plants, and natural resources.

15. The proposed project will adversely affect historical and cultural resources in and around the Straits of Mackinac.

16. Bay Mills submitted extensive comments to EGLE expressing its concerns and opposition to this Project.¹² Bay Mills also sent multiple letters documenting its concerns about the Project proceeding without further cultural and archaeological studies and an opportunity for the public to comment on materials obtained by EGLE after the comment period.¹³

OTHER PARTIES

17. EGLE is the administrative agency responsible for the administration of the protection of wetlands pursuant to Part 303 of the NREPA, MCL 324.30301 *et seq.*, and is the administrative agency responsible for the administration of the public trust bottomlands of the Great Lakes and any permitting in the state of Michigan pursuant to Part 325 of the NREPA, MCL §324.32501 *et seq.*

18. Enbridge applied for and was issued Water Resource Permit Number WRP027179. As a result, it is a potential party in this proceeding.

¹² See Bay Mills Comments, Exhibit 2.

¹³ See, e.g., Letter from President Bryan Newland, Bay Mills, et al, to Director Liesl Clark, EGLE (December 11, 2020), Exhibit 6; Letter from President Bryan Newland, Bay Mills, to Director Liesl Clark, EGLE (January 21, 2021), Exhibit 7.

**STATEMENT OF MATTERS ASSERTED, INCLUDING THE SITE LOCATION AND
OTHER PERTINENT FACTS**

19. The Straits of Mackinac and the surrounding area have profound cultural significance to Bay Mills.¹⁴

20. The Straits of Mackinac area is replete with sites that are listed, or eligible for listing, on the National Register of Historic Places, a recognition that they are important to our national patrimony.¹⁵

21. Enbridge, including its predecessor(s) in interest, and its various related corporate entities, is in the business of transporting fossil fuels and operating pipeline infrastructure.¹⁶

22. “Line 5” is the pipeline at issue in the Application. Line 5 is a 645-mile-long pipeline that runs from Superior, Wisconsin to Sarnia, Ontario.¹⁷

23. Line 5 is utilized primarily for the transport of light crude oil and natural gas liquids.¹⁸

24. At the Straits of Mackinac, Line 5 splits into two 20” pipelines that extend along the lakebed of Lake Michigan (the “dual pipelines”).

25. The dual pipelines were constructed in 1953; since that time, the dual pipelines have become aged, damaged, and the subject of multiple lawsuits.¹⁹

¹⁴ See Affidavit of Whitney B. Gravelle, Exhibit 3.

¹⁵ See e.g., John M. O’Shea and Guy A. Meadows, “Evidence for early hunters beneath the Great Lakes,” PNAS, vol. 106 no. 25 (June 23, 2009); see generally, Charles E. Cleland, Rites of Conquest: The History and Culture of Michigan’s Native Americans. (University of Michigan Press) (1992); John Halsey, ed., Retrieving Michigan’s Buried Past (Cranbrook Institute of Science) (1999).

¹⁶ See Enbridge, Inc. – About us, available at <https://www.enbridge.com/about-us>.

¹⁷ See Enbridge Liquid Pipeline Assets Map, available at <https://www.enbridge.com/Map.aspx#map:infrastructure,crudeInfrastructure>.

¹⁸ *Id.*

¹⁹ See, e.g., *Attorney General v Enbridge*, No. 19-474-CE (Ingham County Cir Ct, 2019); *Enbridge Energy, Limited Partnership v. Whitmer et al.*, Case No. 1:20-cv-01141 (W.D. Mich.,

26. In order to maintain its preferred routing of Line 5 through the Straits of Mackinac, and in response to safety concerns, Enbridge proposed building a tunnel under the lakebed and replacing the dual pipelines with one new 30” pipeline in the tunnel.²⁰

PROPOSED PROJECT AND APPLICATION PROCESS

Project Overview

27. On April 8, 2020, Enbridge submitted its Joint Permit Application,²¹ Submission No. HNY-NHX4-FSR2Q (“Joint Permit Application” or “Application”), for filling of wetlands, the placement of structures on the bottomlands of the Great Lakes, and construction activities within the 100-year floodplain of the Great Lakes to EGLE and the Army Corps.²² EGLE and the Army Corps conduct independent permit reviews, but their review processes are based on the same Joint Permit Application, amendments to the application, supporting materials, and overlapping analysis of statutory considerations. The Army Corps may not issue a permit unless and until EGLE issues the Permit.

Nov. 24, 2020); *State of Michigan, et al. v. Enbridge Energy, Limited Partnership*, Case No. 1:20-cv-01142 (W.D. Mich., Nov. 24, 2020).

²⁰ Aside from the permit at issue in this Petition for a Contested Case, the Project requires several distinct permit approvals, including but not limited to (1) a permit from the Army Corps of Engineers for dredging and filling wetlands under Section 404 of the Clean Water Act; (2) a National Pollution Discharge Elimination System permit under Part 31 of NREPA and Section 402 of the Clean Water Act; and (3) approval from the Michigan Public Service Commission under Act 16 for construction of the tunnel and re-routing of the dual pipelines.

²¹ The EGLE/Army Corps Joint Permit Application covers permit requirements derived from state and federal rules and regulations for construction activities where land meets the water. It prevents duplication of state and federal permitting and provides for simultaneous review for activities involving wetlands, floodplains, dams, inland lakes and streams, Great Lakes bottomlands, critical dunes, environmental areas, and high-risk erosion areas.

²² The EGLE application documents are publicly available in the “MiWaters” database at <https://miwaters.deq.state.mi.us/nsite/site/2746869251480183093/documents>.

28. The site of the proposed Project includes Emmet County, Wawatam Township, T39N-R04W-Section 10, Mackinac County, Moran Township, T40N-R04W-Section 23, and the Straits of Mackinac, which connects Lake Michigan and Lake Huron.²³

29. The Project will involve the filling and disturbance of wetlands and significant disturbance, including drilling, blasting, and excavation, of other land.²⁴

30. The proposed tunnel would be approximately 3.58 miles long and 18-21 feet in diameter, connecting Point LaBarbe in Michigan's Upper Peninsula to McGulpin Point in Michigan's Lower Peninsula.²⁵

31. The proposed tunnel would be constructed using a tunnel boring machine.²⁶

32. A launch portal would be constructed in the southern work area to provide for the tunnel boring machine's entry at McGulpin Point. This portal would be approximately 60 feet wide, up to 1,000 feet long, and 75 feet deep.²⁷

33. A circular shaft would be constructed on the northern side, Point LaBarbe, for the tunnel boring machine's exit. This shaft would be approximately 70 feet in diameter and approximately 150 feet deep.²⁸

34. As explained in Enbridge's Joint Permit Application materials, Enbridge plans to remove approximately 364,000 cubic yards of material from underneath the lakebed to construct the tunnel.²⁹

²³ Permit, p. 1.

²⁴ Joint Permit Application, p. 101.

²⁵ Joint Permit Application, p. 9.

²⁶ *Id.* at 99.

²⁷ *Id.* at 101.

²⁸ *Id.* at 101.

²⁹ Army Corps of Engineers, Public Notice Re Enbridge Energy, LP No. LRE-2010-00463-56-A19, p. 2 ("Corps Public Notice") (May 15, 2020), Exhibit 8.

35. The Project would also involve widening an existing road, Boulevard Drive, and the filling of a wetland to provide a construction and staging area on the northern work area.

36. Enbridge's Joint Permit Application includes decommissioning of the existing pipelines, stating that "[o]nce the new segment of the pipeline across the Straits is put into service, the existing dual pipelines will be decommissioned in accordance with federal, state, and local regulations..."³⁰

37. On April 14, 2020, the Army Corps sent a letter to Enbridge requiring substantial, additional information about the Project including details of the tunnel design, information related to wetland impacts, and decommissioning.³¹ The Army Corps indicated that Enbridge's permit application would not be deemed complete unless the information was submitted.

38. On May 4, 2020, in response to the Army Corps' information request, Enbridge provided two options for decommissioning the pipelines.³²

39. The first option was "Abandonment in Place of Dual Pipelines." Under this option, Enbridge would leave all 21,000 feet of each pipeline in place. This would entail purging and cleaning the pipelines and plugging/grouting the ends.³³

40. The second option was "Removal of Unburied/Exposed Sections of the Dual Pipelines." Under this option, Enbridge would remove those portions of the pipelines that are fully or partially exposed and not fully buried along the shoreline. This option would entail: (1) purging/cleaning the pipelines; (2) removing all screw anchor supports or cutting them near the

³⁰ See Joint Permit Application, p. 103.

³¹ Letter from Kerrie Kuhne, Chief, Permit Evaluation Western Branch, U.S. Army Corps of Engineers to Paul Turner, Environmental Specialist, Enbridge (April 14, 2020), Exhibit 9.

³² Letter from Paul Turner, Environmental Specialist, Enbridge, to Kerrie Kuhne, U.S. Army Corps of Engineers, p. 5 (May 4, 2020), Exhibit 10.

³³ *Id.*

mudline; (3) “jet sledding,” the partially covered portions of the pipelines and anchor supports to remove sediment to allow for cutting and removal; (4) cutting the pipelines into segments; (5) capping the ends of the remaining, buried portions of the pipelines; (6) winching the pipelines segments of pipe that are closer to the shoreline of the Straits and cutting them into lengths suitable for transportation; (7) cleaning and transporting the pipeline segments off-site; and (8) monitoring the remaining sections of the pipelines.³⁴

41. Enbridge noted that decommissioning by Removal of Unburied/Exposed Sections of the Dual Pipelines “would be expected to require approvals” from EGLE, other state agencies, and the Army Corps.³⁵

42. Also on May 4, 2020, EGLE sent Enbridge a Correction Request stating that the Application was “incomplete as received” and could not be further processed without the receipt of additional information.³⁶

43. On June 23, 2020, Enbridge submitted a revised Application.³⁷ While it is titled Submission No. HNY-NHX4-FSR2Q, version 4, the only previous version publicly available on EGLE’s website is version 1.

44. On July 21, 2020, Enbridge submitted version 5 of its Application.³⁸

EGLE’S Public Comment and Review Process

45. EGLE published the public notice for the Joint Permit Application on July 31, 2020. The public notice provided for the submission of written comments by October 19, 2020.³⁹

³⁴ *Id.*

³⁵ *Id.* at 6.

³⁶ EGLE, Correction Request to Enbridge regarding Submission no. HNY-NHX4-FSR2Q (May 4, 2020), Exhibit 11.

³⁷ Submission No. HNY-NHX4-FSR2Q, version 4.

³⁸ Submission No. HNY-NHX4-FSR2Q, version 5.

³⁹ EGLE Public Notice regarding Submission No. HNY-NHX4-FSR2Q (July 31, 2020).

46. As detailed below, EGLE continued to request and accept critical information from Enbridge after the close of the public comment period on October 19, 2020. The public comment period was not re-opened to allow for the review of materials that EGLE relied on as part of its decision making.

47. On October 20, 2020, EGLE sought information from McMillen Jacobs Associates, a private engineering firm, regarding the Project. McMillen Jacobs Associates provided multiple “whitepapers” addressing particular topics, upon which EGLE relied for its permit review. These documents were not disclosed much less made available to the public or the consulting Tribal Nations until the date the permit documents were published on January 29, 2021.⁴⁰

48. On November 17, 2020, EGLE requested critical information from Enbridge on a variety of topics including cultural, historic, and archaeological resources, wetland impacts, mitigation of wetland impacts, impacts to threatened and endangered species, and decommissioning of the existing pipelines.⁴¹

49. Regarding decommissioning, EGLE specifically requested “a conceptual plan and timeline for decommissioning and removal of the existing twin pipelines through the straits.”⁴²

50. On December 18, 2020, Enbridge responded to EGLE’s information request about decommissioning by referring EGLE to Enbridge’s May 4, 2020, response to the Army Corps. It did not provide any additional information about decommissioning.⁴³

⁴⁰ McMillen Jacobs Associates white papers are available at <https://www.michigan.gov/line5/0,9833,7-413-100616---,00.html>.

⁴¹ Email from Joseph Haas, District Supervisor, EGLE, to Paul Turner and Peter Holran, Enbridge (November 17, 2020), Exhibit 12.

⁴² *Id.*

⁴³ Letter from Paul Turner, Environmental Specialist, Enbridge, to Joseph Haas, District Supervisor, EGLE (December 18, 2020), Exhibit 13.

51. With regard to the Native American burial mound (20MK15) located on the north side of the Straits in close proximity to the proposed placement of the outfalls in the Project area, Enbridge’s December 18 response claimed—without support—that the SHPO records suggest that the burial mound has been destroyed.⁴⁴

Enbridge’s Limited Cultural Resource Studies

52. As part of its Joint Permit Application, Enbridge incorporated reports, including past cultural surveys, prepared for different purposes. For instance, Enbridge submitted a Cultural Resource Survey of the Straits created in a related permitting process designed to obtain permission to conduct geotechnical investigations—including borings—that informed the tunnel design. This limited Cultural Resource Survey relied on a “Desktop Assessment,” conducted for archaeological review by SEARCH, Inc., which assessed previously collected side-scan sonar imagery and identified 32 acoustic contacts (features) near the Project area.⁴⁵ The “Desktop Assessment” reached the unlikely conclusion that “[n]one of the 32 contacts are likely to represent a submerged cultural resource.”⁴⁶

53. On February 12, 2020, new information concerning the reliability of the SEARCH report was revealed. An expert archaeologist, Dr. John M. O’Shea, sent a letter to the Deputy State Historic Preservation Officer and shared information he received from a technician—a whistleblower—who had been involved with the inadequate Survey.⁴⁷

⁴⁴ *Id.*

⁴⁵ SEARCH, Maritime Archaeology Desktop Assessment in Support of the Enbridge Line 5 Geotechnical Surveys Project, Emmet and Mackinac Counties, Michigan, (Feb. 2019), at 30.

⁴⁶ *Id.* at 30-31.

⁴⁷ Letter from Professor John M. O’Shea, Curator of Great Lakes Archaeology, to Ms. MacFarlane-Faes, Deputy State Historic Preservation Officer (February 12, 2020), Exhibit 14.

54. Dr. O’Shea’s letter relayed information from the technician whistleblower:

No new survey was conducted, but instead the assessment was based on sonar imagery previously conducted for other purposes. The technician assigned to the job was told only to consider shipwrecks. This is despite the now well-established fact that there are significant prehistoric remains dating 10,000-8,000 BP on the lake bottom associated with the Lake Stanley/Chippewa lowstands and that the river that would have connected the Huron and Michigan basins at that point would be a prime location for prehistoric use. When the technician noticed linear stone alignments of the type documented in Lake Huron, he was told to ignore them. When he asked permission to consult with me about their potential cultural origin his request was again denied. He was subsequently removed from the project and was not allowed to see the final report.⁴⁸

55. As part of its Joint Permit Application, Enbridge also submitted a Phase I Cultural Resources Survey.⁴⁹ That preliminary report acknowledged “nine previously recorded terrestrial cultural resources” within a one-mile radius of the dual pipelines in the Straits of Mackinac, and it noted that there were three unverified sites that may cross into the project areas and are associated with tribal cultural traditions. The Phase I Report specifically mentions the possibility of a Native American burial ground (designated as site 20MK15) at Point La Barbe, within one mile of the North Straits Project area: “The SHPO record, which is based on historical documentation, indicates the site was the location of a precontact (likely Woodland period) Native American burial mound.”⁵⁰ The Phase I Report also makes clear that there are likely additional sites, necessitating further study.

56. More recently, Enbridge has taken on additional, non-expert cultural survey work without informing or engaging the permitting authorities. In a December 14, 2020 letter, a company named Dirt Divers notified Bay Mills that it was preparing a “Cultural Resource

⁴⁸ *Id.*

⁴⁹ Commonwealth Heritage Group, Phase I Cultural Resources Survey for the Enbridge Mackinac Straits Project, 20-22 (August 2019).

⁵⁰ *Id.*

Survey” as part of the Great Lakes Tunnel Project, and it would be “reaching out and speaking with your elders and community members about historic traditional use and existing use areas in and around the Straits.”⁵¹ None of the agencies involved in the review of the permit applications—EGLE, the SHPO, or the Army Corps—were notified by Enbridge of this effort. No approvals were sought for this survey.

57. On January 5, 2021, in response to Dirt Divers’ outreach, Bay Mills notified Dirt Divers that it was denying permission to speak with its Tribal Historic Preservation Officer or tribal citizens or community members.⁵² Bay Mills also asked Dirt Divers to provide more information about its work and how it fit into the regulatory process.

58. On January 29, 2021, Dirt Divers sent a second letter in which it acknowledged “our cultural resources survey is separate from what any regulatory body is requiring.”⁵³

59. On January 22, 2021, during a tribal consultation, Bay Mills notified EGLE of the Dirt Divers correspondence and then forwarded the letters to EGLE on the same day. On February 24, 2021, Bay Mills shared Dirt Divers’ second letter with EGLE.

The SHPO’s Concerns about Cultural and Archaeological Resources and Studies

60. The SHPO, at EGLE’s request, provided comments regarding the Project’s potential impacts on cultural resources. In its November 10, 2020 comments, the SHPO “identified concerns as well as gaps in existing data that support the need for additional cultural resources

⁵¹ Dirt Divers Letter (December 14, 2020), Exhibit 15.

⁵² Bay Mills Letter (January 5, 2021), Exhibit 16.

⁵³ Dirt Divers Letter (January 29, 2021), Exhibit 17.

surveys.”⁵⁴ The SHPO explicitly stated, “We recommend not moving forward with permit approvals until further research is completed to provide baseline cultural resources data.”⁵⁵

61. The SHPO recognized that the Straits of Mackinac area “is one of the most strategically located areas in the Great Lakes region and has been the center for cultural contact and interaction for thousands of years.”⁵⁶

62. The SHPO also stated that the Project area “is sensitive for the presence of terrestrial and bottomland archaeological sites (including historic aircraft and shipwrecks), submerged paleo landscapes, cemeteries and isolated human burials, significant architecture and objects, and historic districts.” Per the SHPO, “[n]umerous previously reported cultural resources eligible for or listed in the National Register of Historic Places (NRHP) and four National Historic Landmarks are immediately present in the Straits.”⁵⁷ The SHPO went further:

It is possible that the Straits is NRHP-eligible as a Traditional Cultural Property and/or Traditional Cultural Landscape encompassing tangible and intangible values such as cultural resources, culturally significant natural resources, and traditional place-based beliefs and practices.⁵⁸

63. The SHPO’s comment letter noted that while Enbridge has previously completed certain cultural resources studies in the area,⁵⁹ the SHPO deemed those studies inadequate: The “[s]urvey for significant cultural resources in the Straits is incomplete *and we expect numerous additional resources to be present that have yet to be reported, documented, and evaluated.*”⁶⁰

⁵⁴ See SHPO Comments regarding Enbridge Energy Line 5 Straits of Mackinac, p. 1 (November 10, 2020), Exhibit 18.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 2.

⁶⁰ *Id.* at 1 (emphasis added).

64. The SHPO called for additional assessments of archaeological impacts on the uplands as well as the bottomlands, specifically noting that these surveys “should consider direct and indirect impacts of all project activities, including those related to interim operation and proposed removal of the extant lines, proposed tunnel construction, and projected project maintenance activities in perpetuity.”⁶¹

65. The SHPO specified that Enbridge must obtain appropriate approvals and permits before conducting the additional cultural and archaeological studies.

Revocation and Termination of the 1953 Easement

66. On November 13, 2020, the Governor of Michigan and the Michigan Department of Natural Resources revoked and terminated the easement that allowed the existing dual pipelines to operate in the Straits, effective 180 days later – May 13, 2021.⁶²

67. The Governor’s Notice stated that “the Easement is being revoked for violation of the public trust doctrine, and is being terminated based on Enbridge’s longstanding, persistent, and incurable violations of the Easement’s conditions and standard of due care.”⁶³

68. On December 11, 2020, Bay Mills and many other interested parties sent a letter to EGLE urging it to pause the permitting process to consider the implications of the revocation and termination of the 1953 easement. The December letter also urged EGLE to not proceed with permitting before it could address the concerns raised by the SHPO and the flaws in the public participation process.⁶⁴ Bay Mills received no response.

⁶¹ *Id.* at 2.

⁶² Notice of Revocation and Termination of Easement, November 13, 2020, https://content.govdelivery.com/attachments/MIEOG/2020/11/13/file_attachments/1600920/Notice%20of%20%20Revocation%20and%20Termination%20of%20%20Easement%20%2811.13.20%29.pdf.

⁶³ *Id.* at 1.

⁶⁴ Bay Mills Letter to EGLE (December 11, 2020), Exhibit 6.

Permit Decision and Permit

69. On January 29, 2021, EGLE published a draft permit for countersignature and notified Enbridge that the Project as proposed would be permitted. This draft permit would become effective once it was signed by Enbridge, returned to EGLE, and then signed and issued by EGLE.⁶⁵

70. This draft permit was the first public document that contained the complete wetland mitigation plan for this Project. The plan, which is incorporated as a permit condition in the final Permit, includes the use of a conservation easement to protect existing wetlands and provides for wetland mitigation bank credits to be purchased at a future date.⁶⁶

71. On January 29, 2021, EGLE released its Project Review Report for the Project.⁶⁷

72. The Project Review Report contains a statement provided by the SHPO, acknowledging that the Straits of Mackinac bottomland and shore are notable for the presence of cultural and historic properties.⁶⁸ This language was later integrated into the final Permit.

73. In the Project Review Report, EGLE checked a box marked “yes,” finding that the Project will be in the public interest.⁶⁹

74. The attached “Explanation of Findings and Recommendation,” does not explain the public interest conclusion or how that finding can be reconciled with the acknowledgement that the Project area is of historic and cultural significance.⁷⁰

⁶⁵ Draft Permit No. WRP027179.

⁶⁶ Permit, p. 6-12.

⁶⁷ EGLE Project Review Report for Submission No. HNY-NHX4-FSR2Q (“Project Review Report”) (January 28, 2021), Exhibit 19.

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 4-6.

75. On January 29, 2021, EGLE also issued a Responsiveness Summary document in which it provided a summary of its responses to public comments regarding the Project.⁷¹

76. In its Responsiveness Summary, EGLE again notes the SHPO's concern regarding cultural and historical resources in the Project area. This time, EGLE states that the SHPO's statement will be a "proposed permit condition."⁷²

77. The Responsiveness Summary contains EGLE's determination "that the benefits provided by the project, including consideration of the unacceptable risk of the current dual pipelines, outweigh the potential harm from the permitted wetland and bottomlands impacts, and the project is in the public interest."⁷³

78. The Responsiveness Summary does not contain an assessment, analysis, or finding related to the Project's probable effects on cultural and historical resources.

79. In the Responsiveness Summary, EGLE stated that "the permitting process does not address the decommissioning of the existing Line 5 dual pipelines."⁷⁴

80. In the Responsiveness Summary, EGLE acknowledged that it had engaged McMillen Jacobs Associates, a private engineering firm, to provide a series of "white papers" addressing certain questions related to EGLE's review.⁷⁵

81. These white papers addressed specific questions that an EGLE representative posed to McMillen Jacobs. The topics of these whitepapers include: the sufficiency of Enbridge's

⁷¹ EGLE Responsiveness Summary for Submission No. HNY-NHX4-FSR2Q ("Responsiveness Summary") (January 28, 2021), Exhibit 20.

⁷² *Id.* at 3.

⁷³ *Id.* at 8.

⁷⁴ *Id.* at 1.

⁷⁵ *Id.* at 9.

geotechnical investigation; the risk of collapse and loss of TBM face control; risk mitigation; gas encounters; vibrations; and slurry containment systems.⁷⁶

82. On February 25, 2021, after Enbridge had signed the draft permit for countersignature, EGLE issued Permit No. WRP027179 to Enbridge Energy, Limited Partnership pursuant to Parts 303 and 325 of the NREPA.⁷⁷

83. The approved Permit Number WRP027179 authorizes Enbridge to:

- Place two water intake/water discharge structures on the bottomlands within the Straits of Mackinac off McGulpin Point.
- Construct one 30” RCP storm water outfall structure and place up to 450 square feet of angular rock on the bottomlands/shoreline at McGulpin Point.
- Place fill in 0.13 acre of wetlands at Point LaBarbe.
- Place two intake structures on the bottomlands within the Straits of Mackinac off Point LaBarbe.
- Construct two 30” RCP storm water outfall structures and place up to 900 square feet of angular rock on the bottomlands/shoreline at Point LaBarbe.⁷⁸

84. The Permit explicitly recognizes that the:

“Straits of Mackinac bottomland and shore are notable for the presence of historic properties, such as terrestrial and bottomland archaeological sites (including historic aircraft and shipwrecks), submerged paleo landscapes, cemeteries and isolated human burials, significant architecture and objects, historic districts, National Historic Landmarks, and traditional cultural properties and landscapes.”⁷⁹

85. However, EGLE did not assess the Project’s impacts on these historic and cultural resources. Instead, the Permit includes a mere acknowledgement that the Army Corps “has federal permitting authority over this project and is required to comply with Section 106 of the

⁷⁶ White papers available at: <https://www.michigan.gov/line5/0,9833,7-413-100616---,00.html>.

⁷⁷ Permit, at 1.

⁷⁸ Permit, at 1.

⁷⁹ Permit, at 5.

National Historic Preservation Act of 1966,” which “requires federal agencies to consider the effects of their undertakings on historic properties in consultation with the State Historic Preservation Officer, consulting Tribes, and other stakeholders.”⁸⁰

86. The Permit acknowledges the SHPO’s recommendation that additional surveys should be conducted, and states that the recommendation “will remain under consideration during the Section 106 consultation process.” The Section 106 of the National Historic Process is a separate process conducted by a federal agency.⁸¹

Tribal Consultation

87. On August 18, 2020, Bay Mills invited EGLE, along with the Army Corps, Michigan Public Service Commission, Michigan Department of Transportation’s Pipeline and Hazardous Materials Safety Administration, the United States Environmental Protection Agency Region 5, the United States Bureau of Indian Affairs, and the Office of Michigan Governor Gretchen Whitmer to a joint consultation regarding the Tunnel Project and each agency’s role in the Project.⁸² EGLE attended this consultation which was held on October 29, 2020.

88. On October 19, 2020, Bay Mills submitted detailed written comments to EGLE regarding the Project.⁸³ EGLE received thousands of comments.

89. Bay Mills also attended consultation meetings with certain EGLE staff members on August 13, 2020, August 17, 2020, and January 22, 2021.

⁸⁰ *Id.*

⁸¹ *Id.* at 6-7.

⁸² Letter from President Bryan Newland to various agencies (August 18, 2020), Exhibit 4.

⁸³ *See* Bay Mills’ and Little River Band’s Comments on EGLE Application Nos. HNY-NHX4-FSR2Q and HNY-TBJC-PNK8V, with attachments (October 19, 2020), Exhibit 2.

90. At each of the consultations and in various correspondence, Bay Mills expressed to EGLE its concerns that EGLE's tribal consultation process did not comply with its own policy as significant Permit information was frequently provided late or not at all.⁸⁴

91. Bay Mills relayed to EGLE at each of the tribal consultations and in various correspondence the significance of the Ceded Territory, which includes the Straits of Mackinac and the surrounding areas, and the Tribe's concerns about oil spills in the area.

92. Tribal consultation concluded with a meeting with interested tribes on January 22, 2021. On January 28, 2021, Bay Mills wrote a letter to EGLE expressing concerns over EGLE's failure to comply with the Department's Tribal Consultation Policy due to concerns stemming from the January 22, 2021 consultation, as well as earlier consultation meetings.⁸⁵ Bay Mills' January 28 letter detailed concerns about EGLE's failure to share critical documents such as the McMillen reports.

LEGAL BACKGROUND

Part 303 – Wetlands Protection

93. Depositing or placing of fill material into a wetland, dredging or removing soil or minerals from a wetland, constructing or operating or maintaining any use or development in a wetland, and draining of surface water from a wetland are prohibited unless authorized by a permit. MCL §324.30304(a)-(d).

⁸⁴ Letter from President Newland, Bay Mills to Ms. Seidel, Director Water Resources Division, EGLE (January 28, 2021), Exhibit 5.

⁸⁵ Letter from President Newland, Bay Mills to Ms. Seidel, Director Water Resources Division, EGLE (January 28, 2021), Exhibit 5.

94. A permit to deposit or place fill material in a wetland and construct, operate, or maintain any use or development in a wetland must be issued by EGLE in accordance with laws applicable to wetlands and to permits under the NREPA. MCL §324.30304.

95. EGLE may not issue a permit unless it determines that the issuance of the permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful. MCL §324.30311(1). In determining whether a project is in the public interest, EGLE must consider the following criteria:

- (a) The relative extent of the public and private need for the proposed activity.
- (b) The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.
- (c) The extent and permanence of the beneficial or detrimental effects that the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides.
- (d) The probable effects of each proposal in relation to the cumulative effects created by other existing and anticipated activities in the watershed.
- (e) The probable effects on recognized historic, cultural, scenic, ecological, or recreational values and on the public health or fish or wildlife.
- (f) The size of the wetland being considered.
- (g) The amount of remaining wetland in the general area.
- (h) Proximity to any waterway.
- (i) Economic value, both public and private, of the proposed land change to the general area.” MCL §324.30311(2)(a)-(i).

96. In determining whether a proposed wetland activity is in the public interest, “the decision shall reflect the national and state concern for the protection of natural resources from pollution, impairment, and destruction.” MCL §324.30311(2).

Part 325 – Great Lakes Submerged Lands Act

97. The Great Lakes are public trust resources.⁸⁶

98. Part 325 of the NREPA, the Great Lakes Submerged Lands Act (“GLSLA”), covers “all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes . . . belonging to the state or held in trust by it...” MCL §324.32502.

99. The proposed Project in this matter pertains to unpatented bottomlands of the Great Lakes, and therefore, its application must meet the requirements of the GLSLA.

100. The GLSLA prohibits dredging or placing spoil or other material on the bottomlands unless authorized by a permit. MCL §324.32512(1)(c).

101. EGLE’s regulations promulgated pursuant to the GLSLA define “other materials” as including “any man-made structure or installed device or facility extending over or placed on bottomlands...” Mich Admin Code R 322.1001(k).

102. In each application for a permit, deed, or agreement for a bottomland, EGLE must determine the “existing and potential adverse environmental effects.” Mich Admin Code R 322.1015.

Michigan Environmental Protection Act

103. Pursuant to the Michigan Environmental Protection Act, EGLE must determine whether a project will result in the pollution, impairment, or destruction of air, water, or other natural resources, or the public trust in these resources.⁸⁷ MCL §324.1705(1).

⁸⁶ MCL § 324.32501 *et seq.*

⁸⁷ *Highway Comm’n v Vanderkloot*, 394 Mich 159 (1974); *Ray v Mason County Drain Commissioner*, 393 Mich 294 (1975).

Tribal Consultation

104. The State of Michigan has recognized that a unique government-to-government relationship exists with Bay Mills, a federally recognized Indian tribe, including a requirement for open and robust collaboration, as well as mutually beneficial cooperation and understanding. Exec. Dir. No. 2019-17, Tribal Relations (October 31, 2019).⁸⁸

105. To comply with Exec. Dir. No. 2019-17, EGLE developed a tribal consultation policy with the ultimate stated goal of “strengthening the consultation, communication, coordination, and collaboration between tribal governments and partners.” EGLE Policy and Procedure No. 09-031, Consultation and Coordination with Indian Tribal Governments (July 24, 2020). The policy recognizes that in order to achieve this goal, “open communication and robust collaboration with tribal partners” is required. *Id.* at 1.

106. EGLE’s Tribal Consultation Policy describes four steps that establish the framework for the consultation process. These four steps must be followed prior to taking any action or implementing any decision that may affect a federally recognized tribe located in the State of Michigan. *Id.* at 2. At issue in this Petition are “Step Three – Input” and “Step Four – Follow-up.”

107. “Step Three – Input” establishes how an affected tribe provides input during the consultation process for an EGLE activity. This Step requires that EGLE coordinate with the tribe throughout the Step to ensure the tribe’s full participation. Key to this Step is: (1) that the tribe receive all information necessary to provide meaningful input; (2) that the tribe be informed

⁸⁸ See also 2002 Government-to-Government Accord Between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan, Lansing, Michigan, October 28, 2002, https://www.michigan.gov/documents/Accordfinal_53478_7.pdf; *Taxpayers of Michigan Against Casinos v. Michigan*, 471 Mich. 306; 685 N.W. 2d 221 (2004).

of any changes to the activity or other issues that may arise during the consultation; and (3) that the tribe be afforded an opportunity to provide any supplemental input regarding any changed circumstances. *Id.* at 4.

108. “Step Four – Follow-up” provides that, whenever feasible, EGLE will provide preliminary feedback to interested tribes before the final decision is made or the action is taken. This preliminary feedback regarding EGLE’s decision must be a written communication from the most senior EGLE official involved to the most senior tribal official. *Id.*

Public Participation

109. In December 2019, as part of EGLE’s resolution of civil rights investigations by the United States Environmental Protection Agency, EGLE committed to adopt and implement Policy and Procedure No. 09-007 to ensure adequate public participation in its decision-making processes, which includes permitting processes like the resource permit decisions.⁸⁹

110. EGLE Policy No. 09-007 provides, “[a] successful public involvement process ensures that those who are most likely affected by an EGLE decision are notified, understand the proposed decision and have an opportunity to provide meaningful input prior to EGLE action.”

111. EGLE Policy No. 09-007 states that decision-making processes “should foster fairness, understanding, and engagement,” including enabling the public to access “information relevant to the decision-making process.”

⁸⁹ Resolution Letter and Agreement, EPA Complaint No. 17RD-16-R5, p. 5, https://www.epa.gov/sites/production/files/2019-12/documents/resolution_letter_and_agreement_for_complaint_17rd-16-r5.pdf

APPLICATION REVIEW AND DEFICIENCIES

EGLE Abdicated its Statutory Obligation to Evaluate Cultural and Historical Resources

112. EGLE unlawfully abdicated its statutory obligation to evaluate the Project's effects on cultural and historical resources.

113. EGLE may not issue a wetlands permit unless it determines that the issuance of the permit is in the public interest.⁹⁰

114. In determining whether a project is in the public interest, Part 303 of the NREPA requires that EGLE consider a project's probable effects on cultural and historical resources.⁹¹

115. EGLE's conclusory statement that this Project will be in the public interest does not meet the standard set forth in Part 303 because EGLE failed to fully evaluate the probable effects on recognized historic, cultural, and scenic values and these effects weigh heavily against the Project being in the public interest. EGLE reached its conclusion without obtaining substantial missing information about this factor.

116. Despite being aware of Tribal Nations' and the SHPO's concerns about the Project's impacts on cultural, historical, and archaeological resources, and the SHPO's recommendation that EGLE "not mov[e] forward with permit approvals"⁹² until additional studies are conducted to evaluate the effects of the Project, EGLE proceeded to issue the Permits.

117. EGLE incorrectly accepted Enbridge's assessment⁹³ of the burial mound at Point La Barbe (20MK15) without considering the SHPO's documentation and without independently confirming this statement with the SHPO or Bay Mills. EGLE accepted Enbridge's assessment

⁹⁰ MCL §324.30311(1)

⁹¹ MCL § 324.30311(2)(e)

⁹² SHPO Comments, p. 3, Exhibit 18.

⁹³ See Enbridge's December 18, 2020 response to EGLE's November 17, 2020 Information Request concerning Submission No. HNY-NHX4-FSR2Q.

even though the credibility of Enbridge’s cultural surveys has been called into question by the issues raised related to SEARCH report and the unauthorized and unprofessional actions of its hired consultant Dirt Divers.

118. EGLE improperly approved the Project, which allows for construction activities and the placement of structures on the lakebed, without assessing potential impacts to underwater archaeological and cultural resources or requiring Enbridge to conduct further, approved studies prior to the Permit issuance.

119. The “special instruction” or “specification” included in the Permit regarding cultural and historical resources is nothing more than an acknowledgement that the Army Corps will also be looking at the effects that the Project will have on cultural and historic properties.⁹⁴ Critically, this “instruction” or “specification” overlooks the fact that EGLE has an independent obligation under state law to evaluate the probable effects of the Project.⁹⁵ It does not require any further action after completion of the forthcoming studies and, even if it did require further action, it would still be improper for EGLE to issue the Permit prior to assessing this statutorily required information.

120. EGLE must evaluate the probable effects of the Project on cultural and historical resources, and these studies must be completed prior to issuance of the Permit. EGLE cannot simply ignore its independent obligation to evaluate the Project on the grounds that a federal agency will also be evaluating the Project.

121. Because the results of the studies recommended by the SHPO may ultimately lead to the discovery of information requiring the denial of the Permit, EGLE cannot grant the

⁹⁴ See Permit, Special Instruction/Specification No. 21, Exhibit 1.

⁹⁵ MCL §324.30311(1); MCL § 324.30311(2)(e).

Permit and then take a “wait and see” approach regarding further studies. This is especially true here, as the SHPO explicitly characterized the discovery of significant cultural resources as a likelihood, stating “*we expect numerous additional resources to be present that have yet to be reported, documented, and evaluated.*”⁹⁶

122. Prior to the Permit issuance, Bay Mills sent a letter to EGLE and explicitly raised this concern: “If EGLE approves the permit now, but then the archaeological and cultural surveys demonstrate that the proposed project will likely negatively impact historic or cultural values, it could tip the balance of public interest factors in a way that was not considered in reaching the permit decision.”⁹⁷

EGLE Failed to Address Decommissioning of the Existing Pipelines

123. Enbridge included decommissioning of the dual pipelines in its Joint Permit Application but EGLE altogether failed to address this issue in the Permit.⁹⁸

124. Decommissioning of the pipelines is part of the proposed Project, and Enbridge has characterized it as “the only activity that is certain to occur once the Project has been constructed.”⁹⁹ As a result, under the GLSLA, MEPA, and Part 303 of NREPA, EGLE is obligated to assess the effects of the various options for decommissioning, including potential impacts to cultural and historical resources.

⁹⁶ SHPO Comments, p. 1, Exhibit 18.

⁹⁷ See Letter from Bryan Newland, President, Bay Mills to Liesl Clark, Director, EGLE (January 21, 2021), Exhibit 7.

⁹⁸ Joint Permit Application, p. 103.

⁹⁹ Enbridge Response to Army Corps of Engineers Information Request, p. 1 (March 25, 2021). In this response, Enbridge also announced its intent to decommission the pipelines by deactivating them in place. As noted in the response, this proposal has not been approved by the State of Michigan.

125. Despite submitting an information request to Enbridge regarding decommissioning as part of processing and reviewing the Permit Application,¹⁰⁰ EGLE's permit decision documents conclude, with no explanation, that decommissioning is not part of this permitting process.¹⁰¹

126. Enbridge's response to EGLE's November 17, 2020 Information Request, referred to an earlier submission to the Army Corps which indicated that decommissioning of the pipelines may involve disturbance to the bottomlands, require an NPDES permit for a discharge into the Straits of Mackinac, and cause other environmental impacts.¹⁰²

127. By segmenting the Project and excluding decommissioning from its permit review, EGLE failed to evaluate the full environmental impacts of the Project. As a result of this segmentation, EGLE also ignored the impacts that decommissioning may have on cultural and historical resources.

EGLE's Tribal Consultation Process Failed to Comply with Executive Directive No. 2019-17 and EGLE's Own Tribal Consultation Policy

128. EGLE failed to provide all information to Bay Mills in order to provide meaningful input by considering additional information following the final consultation meeting with tribes in violation of "Step Three" of EGLE's Tribal Consultation Policy.¹⁰³

129. EGLE failed to inform Bay Mills of other issues that arose during the course of the consultation, thus depriving Bay Mills of the opportunity to discuss any additional input that

¹⁰⁰ See Email from Joseph Haas to Paul Turner and Peter Horan (November 17, 2020), Exhibit 12.

¹⁰¹ Responsiveness Summary, p. 1, Exhibit 20.

¹⁰² See Letter from Paul Turner to Joe Haas (December 18, 2020), Exhibit 13. Referring to and incorporating Enbridge's Response to Army Corps Information Request (May 4, 2020), Exhibit 10.

¹⁰³ See Paragraphs 106-108.

it may have had regarding those changed circumstances in violation of “Step Three” of EGLE’s Tribal Consultation Policy.¹⁰⁴

130. Contrary to “Step Four” of EGLE’s Tribal Consultation Policy, EGLE failed to provide preliminary feedback to Bay Mills prior to the final decision being made on the permit. The final consultation meeting with Bay Mills and other affected tribes was held on January 22, 2021, where EGLE refused to provide preliminary feedback regarding the final decision. In violation of “Step Four” of EGLE’s Tribal Consultation Policy, EGLE did not communicate further with Bay Mills regarding the water resource permits until the permit documents were issued on January 29, 2021.

131. EGLE’s consistent failure to comply with its own tribal consultation policy are also in violation of Governor Whitmer’s Executive Directive No. 2019-17.¹⁰⁵

EGLE Thwarted Public Participation Throughout the Permitting Process

132. EGLE acted contrary to its own public participation policy, Policy No. 09-007, when it failed to provide the public with access to materials that were relevant to the decision-making process.

133. Bay Mills and other members of the public lacked access to “information relevant to the decision-making process” during the public comment period and before EGLE announced its permitting decision on January 29, 2021.

134. In response to public concern about the safety of Enbridge’s tunneling plan, EGLE engaged McMillen Jacobs Associates to answer a series of specific questions posed by EGLE.

¹⁰⁴ See Paragraphs 106-107.

¹⁰⁵ Exec. Directive No. 2019-17, Tribal Relations, (October 31, 2019) *available at* https://www.michigan.gov/whitmer/0,9309,7-387-90499_90704-520036--,00.html.

135. In its review of this Project, EGLE relied on the white papers that McMillen Jacobs Associates provided in response to its questions.¹⁰⁶

136. Contrary to Policy No. 09-007, Bay Mills and the general public lacked any opportunity to review the white papers and raise additional concerns or questions regarding McMillen Jacobs’ analysis or the specific questions posed by EGLE.

137. Contrary to Policy No. 09-007, Bay Mills and the general public lacked any opportunity to comment on the idea of using wetland banking and a conservation easement as mitigation to compensate for the impacts to wetlands. The January 29, 2021 Draft Permit for Enbridge’s countersignature included a wetland banking option that had not been presented for public comment.

138. After the close of the public comment period, EGLE requested critical information from Enbridge regarding cultural, historic, and archaeological resources, wetland impacts, mitigation of wetland impacts, impacts to threatened and endangered species, and decommissioning of the existing pipelines.¹⁰⁷ In response, Enbridge submitted voluminous documents to supplement its application.¹⁰⁸

139. Enbridge’s submissions throughout and after the public comment period involved substantial changes to its tunnel design and routing, and changes to its wetland mitigation plans.

140. Due to Enbridge’s submission of large amounts of material after the public comment period had ended, Bay Mills and the general public were denied the opportunity to meaningfully participate in the permitting process.

¹⁰⁶ Responsiveness Summary, at 9, Exhibit 20.

¹⁰⁷ Email from Joseph Haas, District Supervisor, EGLE, to Paul Turner and Peter Holran, Enbridge (November 17, 2020), Exhibit 12.

¹⁰⁸ Letter from Paul Turner, Environmental Specialist, Enbridge, to Joseph Haas, District Supervisor, EGLE (December 18, 2020), Exhibit 13.

141. Due to EGLE's failure to provide adequate opportunity for public comment on key materials that impacted its decision, Bay Mills and the general public were denied the opportunity to meaningfully participate in the permitting process.

CLAIMS ASSERTED

142. Bay Mills is aggrieved by EGLE's action to grant the Permit without fully analyzing the Project's effects on historical and cultural resources in and around the Straits of Mackinac. In doing so, EGLE acted in violation of the requirements of Part 303 of the NREPA and its applicable regulations.

143. Throughout the permitting process, EGLE acted in violation of EGLE Policy and Procedure 09-031, Consultation and Coordination with Indian Tribal Governments and in violation of the Governor Whitmer's Executive Directive 2019-17 regarding Tribal Relations.¹⁰⁹

144. EGLE processed the Application in a manner that improperly thwarted public participation in violation of EGLE Policy and Procedure 09-007.

RELIEF SOUGHT BY PETITIONERS

Based on the foregoing, Petitioners respectfully request that this Honorable Tribunal take the following actions:

1. Petitioner requests that the Office of Administrative Hearings place this petition on its docket of pending cases; acknowledge, in writing, the Office's receipt of this petition and state that the case is open relating to EGLE's issuance of Permit No.

WRP027179.

¹⁰⁹ Exec. Directive No. 2019-17.

2. Petitioner requests that the Office schedule a prehearing conference regarding this Petition.
3. Petitioner requests that the Office conduct a contested case, including a hearing allowing for the submission of evidence, pursuant to the applicable law and administrative rules relating to the allegations contained in this petition.
4. Petitioner requests that the Office prepare a proposal for decision finding that Permit No. WRP027179 should be denied. Petitioner requests that the final decision-maker issue an order denying Permit No. WRP027179.
5. In the alternative, Petitioner requests that Permit No. WRP027179 be revoked until (1) Enbridge provides complete and accurate application information, including, but not limited to, the completion of the cultural resource surveys and a full analysis of decommissioning alternatives; (2) EGLE undertakes the required statutory analysis of the Project including the decommissioning of the pipelines; (3) the updated, complete and final application is subject to a public hearing and public comment; and (4) EGLE convenes a robust and meaningful tribal consultation in compliance with its policy.

Respectfully submitted,

Date: April 26, 2021

/s/ Kathryn L. Tierney
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**Pro hac vice motions anticipated.*