



November 4, 2021

The Honorable Joseph R. Biden  
President of the United States  
The White House  
1600 Pennsylvania Avenue  
Washington, D.C. 20500

Re: Administration Support for Michigan Tribal Nations and Governor Whitmer to  
Decommission the Enbridge Line 5 Pipeline

Dear President Biden,

As leaders of Michigan's twelve federally recognized Tribal Nations, which together make up the Three Fires Confederacy of the Ojibwe, Odawa, and Potawatomi, we write to urge you and your Administration to lend unequivocal support to our efforts (undertaken in conjunction with those of Governor Whitmer and Michigan Attorney General Nessel) to decommission the Enbridge Line 5 pipeline. On its path from Superior, Wisconsin, to Sarnia, Ontario, that pipeline threatens three Great Lakes and numerous precious rivers and streams. Most notably for our purposes, the pipeline (constructed in 1953 with an expected lifespan of 50 years) splits into dual lines and crosses under the Straits of Mackinac between Lakes Michigan and Huron, where it lays exposed on the bottomlands for over four miles. Twice in the last three years, ship anchors in that busy navigational thoroughfare have struck either the pipeline or its supporting structure, and only extreme good fortune has kept the pipeline from rupturing. The residents of Huntington Beach and other California communities were not nearly as lucky when an offshore pipeline ruptured there just weeks ago. While the Coast Guard investigation is ongoing, the cause was quite likely an anchor strike.<sup>1</sup> We write because we do not want Michigan and the Great Lakes to be next, and we need your help to ensure that they are not. We ask that your Administration (1) file a Statement of Interest in federal court supporting Governor Whitmer's legal action to decommission the pipeline; (2) seriously consider revocation of the Presidential Permit that allows the pipeline to operate; and (3) provide for our participation in any negotiations with Canada regarding the pipeline.

The fight to decommission Line 5 is critical to our communities. Five of our Tribal Nations reserved fishing, hunting, and gathering rights in the Straits of Mackinac in the 1836 Treaty of Washington. These were among the most precious of the rights our ancestors insisted upon when forced to make massive land cessions to the United States, as the ability to take fish, game, and plants was and remains central to our people's way of life and very survival. In addition, three of our Tribal Nations are located in southern Michigan, where another Enbridge

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<sup>1</sup> Richard Winton and Deborah Netburn, *Coast Guard designates cargo vessel as 'party in interest' in oil spill*, LOS ANGELES TIMES (Oct. 16, 2021), <https://tinyurl.com/26kff435>.

pipeline ruptured in Marshall, Michigan in 2010 (as a result of what the federal government has found to be “pervasive organizational failures” in Enbridge’s maintenance and operation of the pipeline).<sup>2</sup> That rupture befouled over 40 miles of the Kalamazoo River watershed, including tributaries of the Nottawaseppi Huron Band of the Potawatomi’s namesake, Pine Creek, with over 800,000 gallons of oil. In doing so, it annihilated sensitive ecosystems and sacred treaty-protected resources, including manoomin (wild rice), fish and waterfowl, and disrupted traditional indigenous lifeways in a manner that may never be fully remediated. It remains the costliest inland oil spill in American history.<sup>3</sup>

Even so, Enbridge’s devastation of the Kalamazoo River watershed pales in comparison to the catastrophic potential of a Line 5 rupture in the Straits. University of Michigan researchers have detailed the destruction that would follow from such an event. Given the strength and oscillation of the currents, over 700 miles of Lake Michigan and Huron shoreline would face serious contamination.<sup>4</sup> Treaty fisheries, already decimated by pollution, invasive species, climate change and habitat destruction, would be wiped out, and with them traditions that have endured for centuries. Animal and plant species would likewise suffer greatly. Scientists at the Michigan Technological University have characterized the Deepwater Horizon and Exxon Valdez disasters as “useful analogies for [the] ecological impacts” of a Line 5 rupture in the Straits.<sup>5</sup>

On November 13, 2020, Governor Whitmer ordered Enbridge to cease operating Line 5 at the Straits.<sup>6</sup> The Governor based her Order on Enbridge’s repeated violations of the conditions contained in the 1953 easement by which the State allowed the pipeline to cross under the Straits. She further based the Order on her duties under Michigan’s public trust doctrine to safeguard the Great Lakes. In doing so, she expressly recognized the Tribes’ historic rights in the Straits and surrounding waters, and the devastation to Tribal interests that would result from a Line 5 rupture. The Governor gave Enbridge six months to accomplish the shutdown, and Attorney General Nessel filed a companion lawsuit in state court to enforce the Order. The Bay Mills Indian Community likewise issued a Resolution banishing Line 5 from its Reservation and the lands and waters of its ceded territory (including the Straits of Mackinac), citing the 1.1 million gallons of oil that have already spilled from upland portions of the pipeline, the 6.5

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<sup>2</sup> *Pipeline Accident Report: Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release Marshall, Michigan July 25, 2010*, at xii, NATIONAL TRANSPORTATION SAFETY BOARD (Jul. 10, 2012), <https://www.nts.gov/investigations/AccidentReports/Reports/PAR1201.pdf>.

<sup>3</sup> *Enhance Pipeline Safety*, NATIONAL TRANSPORTATION SAFETY BOARD, [https://www.nts.gov/Advocacy/mwl/Pages/mwl5\\_2014.aspx](https://www.nts.gov/Advocacy/mwl/Pages/mwl5_2014.aspx) (last visited Oct. 21, 2021).

<sup>4</sup> David J. Schwab, *Statistical Analysis of Straits of Mackinac Line 5: Worst Case Spill Scenarios*, UNIVERSITY OF MICHIGAN (Mar. 2016), <http://graham.umich.edu/media/pubs/Mackinac-Line-5-Worst-Case-Spill-Scenarios.pdf>.

<sup>5</sup> *Independent Risk Analysis for the Straits Pipelines*, at 3, MICHIGAN TECHNOLOGICAL UNIVERSITY (Sep. 15, 2018), <https://mipetroleumpipelines.org/document/independent-risk-analysis-straits-pipelines-executive-summary>.

<sup>6</sup> Governor Gretchen Whitmer, *Notice of Revocation and Termination of Easement*, STATE OF MICHIGAN (Nov. 13, 2020), <https://tinyurl.com/5cdt5uy7%20> (“Order”).

million dollars in recent EPA fines that Enbridge has incurred for failure to maintain its pipelines properly, and the complete disregard it has shown for Tribal rights and cultural resources.<sup>7</sup>

Unfortunately, no meaningful action has ensued, and this is where the Governor, the Attorney General, and our Tribal Nations need your Administration's help. Enbridge chose to ignore the Governor's order. It stated that it would not cease Line 5 operations without a court order, but then took concerted steps to avoid any adjudication. It removed the State's enforcement suit from state to federal court, claiming that the Governor's actions violate a 1977 Pipeline Treaty between Canada and the United States, and that only a federal court can interpret the treaty. It further claimed that the Governor's action is preempted by the federal government's foreign affairs powers and by the Pipeline Safety Act. The Government of Canada filed an amicus brief giving full-throated support to Enbridge's position and suggesting the matter be held in abeyance, and the question whether to keep the case or to remand it to state court is still pending before the federal judge.

On October 4, 2021, the Government of Canada upped the ante. It filed a letter informing the federal court that it had that same day invoked its right to formal negotiations under the 1977 treaty. It asked the court to stay its hand entirely until those negotiations are complete. Enbridge has since filed a motion with the Court making this same request. If the court were to agree, adjudication of the validity of the Governor's action would be delayed indefinitely, with the grave threat posed by the aging pipeline continuing unabated in the meantime.

In contrast to Canada's vocal support of Enbridge, and despite what we understand to be the Governor's requests for help, your Administration has thus far been silent regarding Line 5. The juxtaposition could not be more stark and could well be apparent to the federal judge considering the matter. During your campaign, you promised that you would heed our concerns and act to protect our fundamental interests. We view Line 5 as an existential threat to our treaty-protected rights, resources, and fundamental way of life as Anishinaabe people of the Great Lakes, and we ask that your Administration take the following concrete steps to ensure that the pipeline is decommissioned.

**(1) File a Statement of Interest affirming the validity of the Governor's Order and urging speedy judicial resolution of challenges to it.** Pursuant to 28 U.S.C. § 517, the Department of Justice regularly files Statements of Interest in federal court expressing the government's views on issues of importance. It should do so here. Canada and Enbridge have represented that the 1977 treaty prohibits any American governmental entity from taking actions that would impede the flow of hydrocarbons through a cross-border pipeline. But Article IV of the Treaty expressly states that "[n]otwithstanding [that prohibition] ... [p]ipeline[s] shall be subject to regulations by the appropriate governmental authorities ... with respect to such matters

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<sup>7</sup> Bay Mills Executive Council, *Banishment of Enbridge Energy, Inc. Line 5 Dual Pipelines from the 1836 Treaty of Washington Ceded Territory, waters of the Great Lakes, and the Straits of Mackinac*, BAY MILLS INDIAN COMMUNITY (May 10, 2021), <https://tinyurl.com/46dzxmnv>.

as the following: a. [p]ipeline safety ... ; b. environmental protection[.]”<sup>8</sup> The State of Michigan clearly is an appropriate governmental authority empowered to safeguard the waters and bedlands of the Great Lakes within its borders, and Governor Whitmer’s Order is plainly directed to environmental protection. Accordingly, far from violating the treaty, the Order is explicitly sanctioned by it. The Justice Department’s voice carries great weight, and we think it incumbent upon your Administration to present a proper construction of the treaty in court. One can be sure that if the United States were misconstruing the treaty in a Canadian court, and threatening the interests of a Province and the integrity of the Great Lakes in the process, the Canadian government would stand up vigorously against those efforts. Your Administration should not remain silent here.

Canada and Enbridge are also misconstruing the foreign policy of the United States. Like the 1977 treaty, the 1991 Presidential Permit for Line 5 expressly subjects operation of the pipeline to orders issued by the State of Michigan:

“Article 4. Permittee shall comply with all applicable Federal and State laws and regulations regarding the construction, operation, and maintenance of the United States facilities....

“Article 6. This permit is subject to the limitations, terms, and conditions contained in any orders issued by any competent agency of the United States Government or of the State of Michigan with respect to the United States facilities.”<sup>9</sup>

The Justice Department recently filed an amicus brief in the United States Court of Appeals for the First Circuit in which it stated that similar language in a Presidential Permit made it clear that a local ordinance regulating pipeline operations in Maine did not run afoul of the federal government’s foreign affairs powers.<sup>10</sup> The same is true for Governor Whitmer’s Order, and we ask that your Administration speak up in defense of it.

The Justice Department should also make clear to the federal court that it need not sit on its hands while any treaty negotiations play out. Presumably negotiations will be more

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<sup>8</sup> *Agreement between the Government Of Canada and the Government of the United States Of America Concerning Transit Pipelines* (Jan. 28, 1977), <https://tinyurl.com/yvt89x38>.

<sup>9</sup> *Authorizing Lakehead Pipeline Company, Limited Partnership to Operate and Maintain a Pipeline at the International Boundary Line Between the United States and Canada* (Dec. 12, 1991), [tinyurl.com/y4hd7t23](https://tinyurl.com/y4hd7t23). We have been unable to confirm whether this specific permit pertains to Line 5 or to Enbridge’s Line 6b, both of which are 30-inch pipelines in St. Clair County, Michigan. But since Enbridge obtained new Presidential permits for pipelines in its Mainline system (of which Line 5 is a part) in the early 1990s due to a change in corporate ownership, *Authorizing Lakehead Pipeline Company, Limited Partnership to Operate and Maintain Four Pipelines* (Dec. 12, 1991), <https://tinyurl.com/wfemxnxj>; *Survey of Presidential Permits’ Scope Issued by EEB*, U.S. STATE DEPARTMENT, <https://tinyurl.com/f2bkk9sk>, and had other governmental permits re-issued for Line 5 based on that change, *Sierra Club v. United States Forest Serv.*, 828 F.3d 402, 404–05 (6th Cir. 2016); 2015 WL 5729091, at \*1 (E.D. Mich. Sept. 30, 2015), we believe that either this permit or a like one would have been issued for Line 5.

<sup>10</sup> Brief for the United States as Amicus Curiae in Support of Appellees, *Portland Pipeline Corp. v. City of South Portland*, 947 F.3d 11 (1st Cir. 2020) (No. 18-2118).

productive with a judicial determination as to the validity of the Governor's order in hand, but Canada and Enbridge are instead attempting to evade our normal judicial processes because of the infirmities in their position. A strong statement from the Justice Department that there is no reason for the federal court to abstain from determining the jurisdictional question in front of it, and for the appropriate court to then address the merits of the Governor's Order, would help immeasurably in countering their efforts.

**(2) Seriously consider revocation of the Presidential Permit.** We understand that revocation of the 1991 Presidential Permit would be a significant step, but strong consideration should be given to it here. As Governor Whitmer's Order details, Enbridge has for many years violated safety conditions in the 1953 easement, and has repeatedly concealed those violations from the State, all the while putting the Great Lakes in significant jeopardy. Enbridge is now flouting the Governor's shutdown Order and seeking to thwart judicial enforcement of it. This is the behavior of a rogue actor, and not just any rogue, but one operating a pipeline that pumps 24 million gallons a day of crude oil and natural gas liquids through the heart of the world's greatest repository of freshwater. The Permit provides that it is revocable at will, and as discussed above it is conditioned on Enbridge's compliance with the orders of the State of Michigan.<sup>11</sup> Enbridge is in flagrant violation of that condition, and while the company and Canada appear to believe otherwise, your Administration possesses the authority to vindicate the rights of Michigan, the Michigan Tribal Nations, and of all those who depend upon and treasure the Great Lakes in the face of such lawless action.

**(3) Provide our Tribal Nations with a seat at the negotiating table.** For the reasons discussed, negotiations with Canada under the 1977 treaty should follow an adjudication of the validity of the Governor's Order. When negotiations do take place, we request that we collectively be able to designate a single representative to participate as a member of the United States delegation pursuant to the Department of State's guidelines governing such participation, *see* 44 Fed. Reg. 17846 (Mar. 23, 1979). We possess rights and interests in the integrity of the Great Lakes that date back to time immemorial, and that are protected by solemn treaties with the United States long predating the agreement Canada rests on. We further possess an intimate familiarity with the fisheries and other resources threatened by Line 5's continued operation, and an intimate knowledge of the conditions at the Straits of Mackinac that render that continued operation a grave danger.

Our people – the Anishinaabe – have a teaching that the decisions we make today should result in a sustainable world seven generations into the future. That teaching reminds us to understand the decisions we make should not be limited to present concerns, but instead will have consequences long after we are gone. We ask you to honor and abide by this teaching and to uphold the United States' treaty obligations to our people by lending the invaluable support of your Administration to the fight to decommission Line 5.

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<sup>11</sup> Like the 1991 Presidential Permit, Enbridge's original 1953 permit for Line 5 provided that it "may be terminated at the will of the President of the United States." *Presidential Permit* (Apr. 28, 1953), <https://tinyurl.com/chtrax6m>.

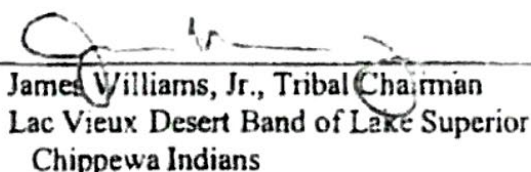




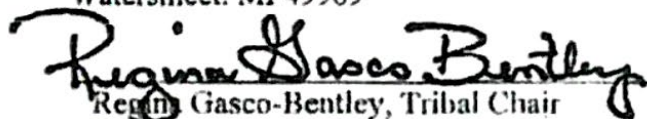
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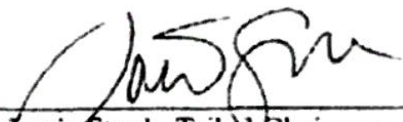
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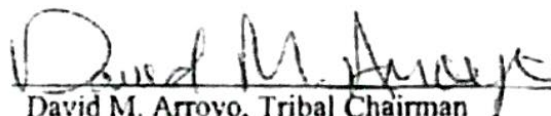
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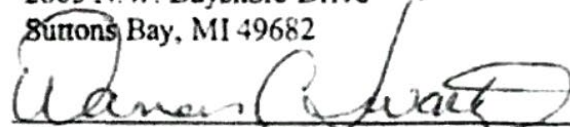
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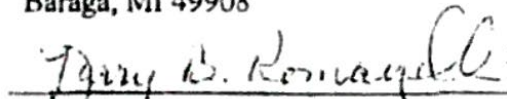
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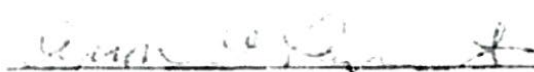
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