

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

V.

**ENBRIDGE ENERGY, LIMITED
PARTNERSHIP, *et al.*,**

Defendants.

Civil Action No. 1:16-cv-00914

**MEMORANDUM IN SUPPORT OF
MOTION FOR ENTRY OF
SEVENTH MODIFICATION OF CONSENT DECREE**

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Exhibit 1: Proposed 7th Modification

Exhibit 2: Public Comments on the Proposed Seventh Modification

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I. INTRODUCTION

The United States of America submits this memorandum in support of its motion for entry of the proposed Seventh Modification of Consent Decree (“Modification”), which was lodged with the Court on October 12, 2022. ECF No. 33 PageID.2243-2247. As outlined in detail below, the proposed Modification would make agreed adjustments to the 2017 Consent Decree entered in this case. In the wake of two pipeline ruptures that caused oil releases, the 2017 Consent Decree required the defendants (“Enbridge”) to implement an array of enhanced compliance requirements that were designed to identify and address features that could threaten the integrity of its Lakehead System pipeline network.

The United States conferred with counsel for defendants (referred to collectively as “Enbridge”) under Local Rule 7.1(d), and counsel represented that Enbridge supports the entry of the proposed Modification.¹

The proposed Modification sets forth revisions that were mutually agreed to by the parties and subject to public notice and comment procedures consistent with 28 C.F.R. § 50.7. As discussed in more detail below, the proposed Modification would revise terms concerning four main areas: (1) procedures for termination of Consent Decree obligations; (2) provisions designating certain pipeline segments on Line 61 and Line 62 as “Replacement Segments” and modifying certain instrumentation requirements applicable to the newly designated Replacement Segments; (3) provisions clarifying the timing of required In-Line Inspections (“ILIs”) on Line 62 following resumption of operations after an extended period when operation of that pipeline had been suspended; and (4) provisions clarifying that Enbridge will not have to conduct ILIs to

¹ A copy of the proposed Modification, with corrected signature block information for the United States Attorney, is attached as Exhibit 1.

assess axially aligned cracks on a short segment of Line 5 that crosses the Straits of Mackinac (referred to as the “Dual Pipelines” in the Consent Decree) for a period that extends at least until expiration of one-half of the remaining fatigue life of the worst feature that could have survived the 2017 hydrostatic pressure tests of the Dual Pipelines.

On October 18, 2022, the United States published notice of the proposed changes to the Consent Decree in the Federal Register. 87 Fed. Reg. 63,103 (Oct. 18, 2022). The United States received 15 public comments on the proposed Modification, all of which are attached to this Memorandum as Exhibit 2. After consideration of the public comments, the United States has concluded that the public comments do not present facts or considerations that justify withdrawing the United States’ consent to the Modification or warrant renegotiation of any terms of the Modification. A detailed response to significant points raised in the public comments is set forth in Exhibit 3 attached to this Memorandum.

Section II of this Memorandum provides background information on the current Consent Decree and the pending proposed Modification. Section III outlines the well-established standards of review that the Court should apply in judging the Modification, shows that the Modification satisfies those standards, and provides a brief overview of the United States’ responses to the points raised by the public comments. Because the proposed Modification is fair, adequate, reasonable, and consistent with the public interest, as discussed below, the United States respectfully requests that the Court approve, sign, and enter the proposed Modification.

II. BACKGROUND

A. The Consent Decree

Enbridge owns and operates numerous pipelines in the United States, including a network of oil transmission pipelines known as the Lakehead System. After oil spills from two different

Lakehead System pipelines in the summer of 2010, the United States and Enbridge negotiated a settlement resolving specified claims under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Oil Pollution Act, 33 U.S.C § 2701 *et seq.*, arising from the 2010 oil spills. The Court approved and entered the Consent Decree on May 23, 2017. ECF No. 14, PageID.1565-1788.²

In addition to assessing civil penalties for alleged violations of the Clean Water Act and recovery of removal costs incurred by the United States in response to one of the 2010 pipeline spills, the Consent Decree identified a comprehensive set of remedial measures that Enbridge agreed to implement to prevent or minimize future Lakehead System pipeline failures that could result in violations of the Clean Water Act. Among other things, the Consent Decree includes requirements concerning:

- Periodic inspections of pipelines using ILI tools to detect, characterize and size features such as cracks, corrosion, and dents or other geometric anomalies that could pose pipeline integrity threats that could result in unlawful discharges of oil;
- Timely evaluation of detected crack, corrosion, and geometric anomalies to identify features that require repair or mitigation under “dig selection criteria” established in the Consent Decree; and
- Leak detection systems used to monitor pipelines to identify potential leaks or ruptures, including enhanced leak detection measures applicable to “New Lakehead Pipelines” and “Replacement Segments.”

Subsection VII.J of the Consent Decree, also includes provisions requiring Enbridge to retain an Independent Third Party (“ITP”), which provides expert consultants that assist in monitoring Enbridge’s implementation of, and compliance with, the Consent Decree. *Id.*, at PageID.1693-1703.

² Certain deadlines and other provisions of the Consent Decree were subsequently modified by agreement of the parties, including three material modifications reviewed and approved by the Court. *See* ECF No. 15 PageID.1789-1796; ECF No.16 PageID.1797-1804; ECF No. 19 PageID.1846-1852; ECF No. 21 PageID.1934-1955; ECF No. 22 PageID.1956-1965; ECF No. 28 PageID.2102-2132; and ECF 32 PageID.2215-2242.

In addition, the Consent Decree includes numerous general provisions, including periodic reporting requirements and provisions establishing mechanisms for assessment of stipulated penalties, dispute resolution, and termination of the Consent Decree.

B. The Proposed Seventh Modification

The proposed Modification would make two types of changes to the Consent Decree. First, the Modification would establish a new process allowing for the sunset and termination of some of Enbridge's obligations under the Consent Decree, with the preservation and continuation of other obligations, based on the parties' nearly six years of experience under the Consent Decree. Second, the Modification would make a set of clarifying changes to document the parties' agreed mutual understandings and avoid potential disputes over how to apply certain provisions of the current Consent Decree.

1. Revisions Related to Termination

The proposed Modification would revise Section XX of the Consent Decree to establish a "Partial Termination" mechanism that would allow the parties to agree to terminate certain Consent Decree obligations while Enbridge continues to implement certain other requirements of the Consent Decree. ECF No. 33-1 at PageID.2265-2275. The proposed Modification identifies certain obligations that are not eligible for termination until the Final Termination stage, *id.*, PageID.2265-2266 (revised Paragraph 204.a), but the proposed Modification allows Enbridge to seek termination of other obligations when it believes criteria for termination are satisfied. The proposed Modification retains the same general structure and approach as the previously approved Consent Decree in terms of the type of documentation required to support requests for

termination.³ However, the proposed Modification provides additional details relating to the scope of the evaluation of termination requests by the ITP, and related requirements for submission of updated compliance information in specified circumstances. *Id.*, at PageID.2265-2266 (Partial Termination) and 2273-2274 (Final Termination).

As a related matter, the proposed Modification also includes provisions designed to minimize duplicative reporting by narrowing the scope of Semi-Annual Reports required following submission of a Request for Partial Termination. Generally, the proposed Modification provides that following submission of any Request for Partial Termination, subsequent Semi-Annual Reports would only be required to address obligations excluded from Partial Termination unless and until: (1) the Modification is disapproved by the Court, or (2) the United States rejects the request for Partial Termination, in whole or in part. *Id.*, at PageID.2263-2264. The Partial Termination Reports, and any Supplemental Partial Termination Reports, would satisfy reporting requirements with respect to obligations subject to a pending request for Partial Termination.

Finally, as a conforming change, the proposed Modification clarifies that employment restrictions applicable to the ITP would remain in effect until three years after Final Termination. *Id.* at PageID.2262-2263.

³ Thus, termination is conditioned upon a demonstrating that (1) Enbridge has fully implemented all obligations that are subjects of the termination request, and (2) that Enbridge has maintained substantial compliance with all obligations that are the subject of the termination request for a period of at least the last 12 consecutive months prior to submission of a request for termination. Another condition precludes termination sooner than four years after entry of the Consent Decree, but that condition was met as of May 23, 2021.

2. Leak Detection Requirements

In addition to leak detection system requirements applicable to Lakehead System pipelines generally, the Consent Decree established some additional instrumentation, leak detection system sensitivity requirements, and alarm optimization requirements for new pipelines and certain modified pipeline segments. The proposed Modification would revise Consent Decree leak detection requirements in three respects. First, the Modification revises definitions in Paragraph 84 to clarify that Line 93 is a “New Lakehead Pipeline,” and that specified segments on Lines 61 and Line 62 are “Replacement Segments” that are subject to certain additional leak detection system requirements Subsection VII.G.(III) of Consent Decree. Second, although the proposed Modification does not revise general leak detection sensitivity requirements applicable to New Lakehead Pipelines and Replacement Segments, the proposed Modification does provide, in the case of the newly designated Replacement Segments on Lines 61 and 62, that Enbridge need not retrofit those pipeline segments with additional temperature and pressure sensing instrumentation but must maintain existing instrumentation in those segments. Finally, the proposed Modification memorializes a March 31, 2023 deadline for completing optimization studies relating to Replacement Segments on Lines 61 and 62, rather than a deadline based on Initial Linefill of the Replacement Segment.

3. Timing of In-Line Inspections on Line 62

The proposed Modification establishes deadlines for completing ILIs to assess Crack features, Corrosion features, and Geometry features on Line 62 after Enbridge resumed operation of that pipeline following an extended period when that Line was idle. At this point, Enbridge has performed ILIs in accordance with the deadlines agreed to by the parties.

4. Assessment of Axially Aligned Cracks on the Dual Pipelines

The proposed Modification would revise Paragraph 71 of the Consent Decree to specify that Enbridge will not be required to conduct axial crack ILIs on the Dual Pipelines and associated piping until expiration of one-half of the estimated Remaining Life of the worst potential axial crack feature that could be present on the Dual Pipelines. Because Enbridge does not concede that the Consent Decree currently provides any basis for requiring axial crack ILIs on the Dual Pipelines, the Modification reserves Enbridge's right to contend that the Consent Decree does not require axial crack ILIs on the Dual Pipelines at all.

III. DISCUSSION

A. Standard of Review

In reviewing the proposed agreed Modification, the Court should apply the same standard that governed the Court's review and approval of the original Consent Decree: whether the proposed terms are "fair, adequate, and reasonable, as well as consistent with the public interest." *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010)(internal quotations omitted); *see also United States v. Upjohn Co.*, No. 1:92-CV-659, 2005 WL 8174372 (W.D. Mich. Apr. 15, 2005) (applying the same standard that was applicable to its review of the consent decree to an agreed amendment of the consent decree). This limited standard of review reflects a public policy that strongly favors settlements of disputes without protracted litigation. *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976). Settlements conserve the resources of the courts, the litigants, and the taxpayers and "should . . . be upheld whenever equitable and policy considerations so permit." *Id.* at 1372.

The presumption in favor of approving a settlement is particularly strong where, as here, the Department of Justice played a significant role in negotiating the Consent Decree on behalf

of federal agencies with substantial expertise in the environmental field. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991). “The controlling criterion is not what might have been agreed upon or what the court believes might have been the optimal settlement.” *Kelley v. Thomas Solvent Co.*, 717 F. Supp. 507, 515 (W.D. Mich. 1989); *see also Officers for Justice v. Civil Serv. Comm’n and Cty of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982). Instead, the Court should consider whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute,” *United States v. Cannons Eng’g Corp.*, 720 F. Supp. 1027, 1036 (D. Mass. 1989) (citations omitted), *aff’d*, 899 F.2d 79, 84 (1st Cir. 1990); *see also Officers for Justice*, 688 F.2d at 625 and 630; *Thomas Solvent Co.*, 717 F. Supp. at 515.

B. The Proposed Modification Meets Standards for Approval

The Court should enter the Modification because it is fair, reasonable, in the public interest, and consistent with the goals of the Clean Water Act and the Oil Pollution Act.

“Procedural fairness concerns the negotiation process, i.e., whether it was open and at arms-length.” *United States v. Fort James Operating Co.*, 313 F. Supp. 2d 902, 907 (E.D. Wis. 2004) (citations omitted). The proposed Modification is the product of extensive, good faith, arm’s length negotiations among the parties with diverse interests. All parties were represented by experienced counsel who had the assistance of technical experts. No one challenged the fairness of the negotiation process.⁴ The Court should conclude that the negotiation of the

⁴ One commenter maintains that the United States should have consulted with Tribes prior to entering into the proposed Modification. This comment reiterates a position previously raised by the commenter prior to entry of the Consent Decree in 2017 and prior to a previous modification of the Consent Decree. As discussed in the attached Response to Comments, applicable Tribal consultation policies provide for consultation with respect to adoption of “policies” but expressly exclude matters in litigation, including settlements. Exhibit 3, at p. 15. The comment does not establish that the Modification is procedurally unfair.

proposed Modification is procedurally fair, as the Court did when it approved the original Consent Decree and subsequent material modifications of Consent Decree provisions.

“Substantive fairness concerns concepts of corrective justice and accountability.” *Fort James Operating Co.*, 313 F. Supp. 2d at 908. “One of the most important considerations when evaluating whether a proposed consent decree is reasonable is the decree’s likely effectiveness as a vehicle for cleansing the environment.” *Lexington-Fayette Urban Cty. Gov’t*, 591 F.3d at 489 (quotations omitted).

The Consent Decree, with the revisions set forth in the proposed Modification, remains an effective vehicle for securing corrective justice and protecting waters of the United States from pipeline failures that could result in discharges of oil in violation of the Clean Water Act. Congress enacted the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” by, among other things, ensuring that “there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States” and adjoining shorelines. 33 U.S.C. §§ 1251(a), 1321(b). The Consent Decree, and the provisions in the proposed Modification establish an extensive series of requirements covering many different facets of Enbridge’s operation and management of its Lakehead System pipelines, including requirements that effectively reduce the potential for unlawful discharges of oil from the Lakehead System pipelines to navigable waters of the United States and adjoining shorelines. As discussed below, all of the elements of the proposed Modification are consistent with concepts of corrective justice and preventing or minimizing discharges of oil that could impair waters of the United States.

Proposed revisions to Paragraph 28.b of the Consent Decree reinforce the effectiveness of the Consent Decree’s ILI inspection provisions by clarifying application of ILI frequency

requirements in a scenario not clearly addressed by the existing Consent Decree. More specifically, the current Consent Decree provisions governing ILI frequency, ECF No. 14 at PageID.1641, do not specifically contemplate, or address how to account for, situations in which pipelines are removed from service for extended periods of time – as occurred on Line 62 between April of 2017 and December of 2021. The proposed Modification establishes appropriate deadlines for completing three different ILIs on Line 62 taking into consideration the severity of features known to be present on Line 62 prior to shutdown of the line in April 2017 as well as the potential for growth of such features during the period the pipeline was idle. No one submitted comments on this element of the proposed Modification, and the Court should conclude that this aspect of the Modification is substantively fair and adequate.

The proposed Modification also promotes corrective justice and protection of the environment by assuring that specified segments on Line 61 and all segments of Line 62 will meet certain enhanced leak detection system requirements that go beyond those applicable to Lakehead System pipelines generally. Although Enbridge does not concede that any Lakehead System pipeline segments qualify as “Replacement Segments” under the original consent Decree, ECF No. 33-1 at PageID.2253, 2255, Enbridge agrees in the proposed Modification to designate specified segments on Lines 61 and 62 as “Replacement Segments” and to meet enhanced leak detection sensitivity requirements applicable to “Replacement Segments” on those pipeline segments. Although Enbridge did not agree to retrofit newly designated Replacement Segments on Line 61 with temperature and pressure sensing instrumentation at all locations specified in the original Consent Decree, the ITP confirmed that the existing instrumentation on these pipeline segments is sufficient to enable Enbridge to achieve the enhanced leak detection system sensitivities applicable to Replacement Segments. ECF No. 33-1 at PageID.2255. Thus,

the proposed Modification achieves the central goal of providing enhanced leak detection sensitivity on Replacement Segments.

The United States did not receive any public comments relating to provisions of the Modification relating to the newly designated Replacement Segments on Lines 61 and 62. The only public comment relating to proposed revisions to Paragraphs 84 and 87 of the Consent Decree expressed a concern based on a mistaken belief that the Modification somehow eliminates a requirement for Enbridge to comply with “New Lakehead Pipeline” instrumentation requirements on Line 93, the pipeline that replaced Original U.S. Line 3. In fact, the proposed Modification does not revise previously approved instrumentation requirements applicable to New Lakehead Pipelines.

The proposed revisions to the Termination provisions of the Consent Decree do not undermine the effectiveness of the Consent Decree as an instrument of corrective justice and accountability. The United States and the ITP have closely monitored Enbridge’s implementation of Consent Decree requirements over a period of almost six years. Given the broad scope of the Consent Decree, which covers 14 separate pipelines and includes an extensive array of requirements relating to pipeline inspections and repairs, leak detection systems, certain aspects of control room operations, emergency preparedness exercises and planning, and other matters, it is reasonable to allow a mechanism that would allow for termination of some Consent Decree obligations while other provisions of the Consent Decree remain in effect. That approach would allow the parties to focus oversight resources on a more limited set of obligations reserved for Final Termination.

None of the public comments on the proposed Modification objected to creating a Partial Termination mechanism or criticized revised elements of the Termination process. The

only comment that the United States received with respect to the Termination provision urged changing certain termination criteria that are unchanged from the existing Consent Decree. Thus, the commenter proposed that Partial Termination or Final Termination be conditioned on a demonstration that Enbridge has maintained substantial compliance with relevant Consent Decree provisions for a period of 36 continuous months prior to the termination request, instead of the 12-continuous-month substantial compliance period established in both the proposed Modification, ECF No. 33-1, at PageID.2265 (Partial Termination) and 2271 (Final Termination), and the previously approved Consent Decree. ECF No. 14 at PageID.1724.

The termination criteria in the original Consent Decree were the subject of extensive negotiations and compromise. In agreeing to establish a Partial Termination mechanism, the parties did not seek to reopen that settled issue, which was previously approved by the Court. While the commenter would prefer a longer substantial compliance period, the comment does not present facts or considerations showing that there is anything inappropriate, unreasonable or inadequate with the previously approved 12-month period.

Finally, the proposed revisions to Paragraph 71.c, which addresses the timing of any axial crack ILIs on the Dual Pipelines segment of Line 5, are reasonable and do not undermine the protectiveness of the Consent Decree as suggested by certain public commenters. This element of the proposed Modification appropriately takes into consideration: (1) limitations on current axial crack ILI tool depth sizing capabilities on thick-walled pipe of the kind used to construct the Dual Pipelines; (2) the fact that any detected Crack features falling within the tool's depth sizing capabilities would not meet any Consent Decree criteria for identifying features that require repair or mitigation; (3) the fact that a 2017 hydrostatic pressure test conducted on the Dual Pipelines in lieu of an axial crack ILI demonstrated the integrity of the Dual Pipelines, and

an engineering analysis of that hydrotest established that any potential axial cracks present on the Dual Pipelines would have a conservatively estimated Remaining Life of at least several decades; (4) a subsequent inspection of portions of the Dual Pipelines affected by a 2018 anchor strike incident, which did not identify any axial crack features – new or otherwise – in the anchor strike impact areas; and (5) the fact that there is a genuine issue regarding whether the current Consent Decree requires ILI assessments of axial cracks on the Dual Pipelines at all. These points are amplified in the detailed response to public comments attached as Exhibit 3.

III. CONCLUSION

For the reasons stated above, the proposed Modification is fair, reasonable, adequate, and consistent with the goals of the Clean Water Act and the Oil Pollution Act. The United States respectfully requests that the Court approve, sign and enter the proposed Modification.

Respectfully submitted,

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