

Letter warns Line 5 owner that they are trespassing in the Straits

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MACKINAW CITY — Gov. Gretchen Whitmer this week delivered a warning to Enbridge: as far as her office is concerned, the company is now trespassing in the Straits of Mackinac.

That message, addressed to Enbridge executive Vern Yu on Tuesday, was a shot across the bow as the oil provider charged ahead with plans to continue operating its Line 5 pipeline, despite the administration's Wednesday deadline.

Whitmer and Dan Eichinger, Michigan Department of Natural Resources director, set that timeframe in November after claiming the company had broken its agreement with the state, thus voiding the easement which allowed Line 5 to run along the bottom of the straits.

"Enbridge's continued occupation and use of state-owned bottomlands in the absence of a valid and effective easement constitutes an intentional trespass," states the letter, signed by Whitmer.

Enbridge is fighting the state's actions in court, and company representatives claim no agreements have been broken. Early in the week, the company had confirmed in multiple public statements that it would not comply with the demand to shut down unless ordered to do so by the court or its federal regulator, the Pipeline and Hazardous Materials Safety Administration.

"Line 5 is operating safely, reliably and is in compliance with the law," said Ryan Duffy, Enbridge spokesman. "The State of Michigan has never presented any concrete evidence to suggest otherwise. The U.S. agency in charge of pipeline safety, the Pipeline and Hazardous Materials Safety Administration (PHMSA), has confirmed on multiple occasions that the pipelines are fit for service."

Prior to Tuesday afternoon, Whitmer's office revealed little information publicly about what the governor planned to do in response to Enbridge's refusal, or what enforcement measures were at their disposal.

Tuesday's trespassing notice will likely do little to directly force Enbridge's hand. What it does do, according to some legal experts, is set the stage for the possibility of even more conclusive

Enbridge

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penalties as these court battles continue to play out.

"The letter really changes the equation for Enbridge," said Oday Salim, an environmental law professor at the University of Michigan. "It's putting Enbridge on notice that, starting today, it's operating illegally, that it's trespassing on state property, and that its profits that it derives from Line 5 are at risk."

Whitmer had already laid out some of those expectations in the November report she and the state Department of Natural Resources put out, along with the mandate to cease Line 5 operations within 180 days.

But Salim said the trespassing notice gives the state's legal representatives a clear document to cite in court showing that Enbridge knowingly operated on state property without permission, and profited from those actions. If the court rules in the state's favor, it would more than likely mean Enbridge would have to give up those profits.

In her letter, Whitmer said that the state "is confident it will ultimately prevail" meaning "Enbridge will face the prospect of having to disgorge to the state all profits it derives from its wrongful use of the easement lands," from Wednesday onward.

Environmental groups supported the steps Whitmer took Tuesday.

"Citizens and businesses throughout Michigan are expected to follow the laws and regulations set forth to protect our water and natural resources," said Jeniffer McKay policy director for Tip of the Mitt Watershed Council in Petoskey. "Enbridge cannot and should not be exempt from adherence to state rules and regulations. For a company that claims to be a good corporate citizen, Enbridge is certainly not behaving in an appropriate manner."

Sean Hammond, deputy policy director for the Michigan Environmental Council, said he was encouraged by the governor's stance.

"There's clearly going to be a continued court case, as all know, but there's going to be consequences to that court case for playing it out in the way they're choosing to," he said.

Others, including some Northern Michigan state legislators, said they opposed the steps the administration had taken.

"Line 5 safely provides oil and natural gas to Northern Michigan and supports jobs throughout the state," said Rep. Ken Borton, R-Gaylord in a prepared statement. "Gov. Whitmer's decision to close

the pipeline will hurt Michigan's energy supply and economic outlook, and I will continue to stand up for the people in our state who count on Line 5."

Before Whitmer's letter became public, a spokeswoman for Michigan Attorney General Dana Nessel said Tuesday the courts remained the primary channel through which the state would seek to enforce its easement revocation.

"We need a court order that requires Enbridge to shut down in compliance with the notice," said spokeswoman Lynsey Mukomel in a written statement. "We will continue to work to get that as soon as possible. We are reviewing other remedies that may be available to the state if Enbridge continues to operate the pipelines after the deadline."

But the state can't ask for a court order yet.

The case, which is now in U.S. District Court, is currently held up until the judge rules on the state's request to move it back to a state court, where it began. The case was originally bumped up to federal court based on a request by Enbridge — which Mukomel deemed a "procedural maneuver to delay" matters.

Only after that decision takes place can the state possibly make a move toward stopping the flow of Line 5 — at least temporarily.

"Wherever it ends up, whether it's state or federal court, then I think the State of Michigan will have the opportunity to file an injunction," Salim said. "To say 'Look, the lawsuit is ongoing. We may not reach a resolution for many, many, many months. In the mean time, the flow of oil should stop.'"

He said he believed the case — being a matter state contract on state lands — ought to be decided in a state court. There is no precedent for such matters to begin at the federal level, he said.

Meanwhile, opponents of Line 5 contest Enbridge's claims that there has been no evidence of easement violations — those were all spelled out in Whitmer's November report. They also say the company has had more than long enough to prepare for the eventuality of a shutdown.

"The UP Energy Task Force was created in June 2019 to formulate alternative solutions for meeting the UP's energy needs," McKay said. "The Revocation and Termination Order was issued 180 days ago, which provided notice for not only Enbridge, but all companies to make modifications in preparation of a Line 5 shutdown. Furthermore, Enbridge has had years to think about the long-term decommissioning of Line 5."