



Protecting the Common Waters of the Great Lakes Basin
Through Public Trust Solutions

April 11, 2018

<p>Ms. Sally Talberg Chairwoman Michigan Public Service Commission P.O. Box 30221 Lansing, Michigan 48909 talbergs@michigan.gov</p>	<p>Ms. Heidi Grether Director Michigan Department of Environmental Quality P.O. Box 30473 Lansing, Michigan 48909 gretherh@michigan.gov</p>
<p>Mr. Tom Graf Great Lakes Submerged Land Act, SWAS Section Michigan Department of Environmental Quality P.O. Box 30458 Lansing, Michigan 48909 graft@michigan.gov</p>	<p>Mr. John Matousek Inland Lakes and Streams Act, SWAS Section Michigan Department of Environmental Quality P.O. Box 30458 Lansing, Michigan 48909 matousekj@michigan.gov</p>

Re: Comment and Request to Comply with Legal Requirement to Conduct and Consider a Comprehensive Analysis of New, Altered, or Substantial Improvements, Structures, or Other Activities for Enbridge Line 5 in the State of Michigan

Dear Chairwoman Talberg and MPSC Commissioners Cadwell, Rittenhouse, Saari, and Eubanks, Director Grether, Mr. Graf, and Mr. Matousek:

This letter comment is submitted to you by For Love of Water (“FLOW”), a non-profit water law and policy center for the Great Lakes. Our mission at FLOW is to safeguard the integrity of the waters and public trust in the waters of the Great Lakes, connecting waterways, and tributary streams, wetlands, and groundwater. This comment and accompanying request is submitted in the spirit of promoting protection of the public trust in the waters and bottomlands of the Great Lakes and Michigan’s water and natural resources, and in promoting good governance in accordance with the Michigan Constitution and laws.

It is the consensus view of federal and state agencies, experts, and interested parties, including Enbridge, that a failure of Line 5 along its length, but particularly under the Straits of Mackinac and the St. Clair River, would result in catastrophic economic and environmental harm. The comments that follow request a comprehensive evaluation of feasible and prudent alternatives to

Line 5 in its entirety, including, but not limited to Line 5 near, in, across or under the public trust bottomlands and/or waters of the Straits of Mackinac, and Line 5 near, in, across, or under the St. Clair River at Marysville, and across the other 245 public trust water crossings in the state. For the reasons described below, the Department of Environmental Quality (“DEQ”), Michigan Public Service Commission (“MPSC”), and State of Michigan have a legally and state constitutionally required duty to conduct such a comprehensive analysis of the feasible and prudent alternatives to Line 5 in its entirety, including both the Straits and St. Clair River.

1. FACTUAL CIRCUMSTANCES AND BACKGROUND¹

The following factual circumstances demonstrate the immediate need for the DEQ and MPSC to invoke the law and apply it to Enbridge and all of Line 5, including any applications in the past, now, or in the future for new or expanded, substantially altered pipelines in the waters and bottomlands of the Straits. The DEQ and MPSC are required by law to conduct a full and comprehensive environmental impact or assessment of likely or potential adverse effects, endangerment, and risk of the high degree of or catastrophic harm to the Straits and northern Lake Michigan and Lake Huron; in addition, the State of Michigan also has an obligation to the many property owners, businesses, towns, and members of the public who depend on the protection of these public trust waters, submerged lands, and aquatic resources.²

Enbridge Line 5 runs from Superior, Wisconsin across the Upper Peninsula, across the bottom of the Straits, down through lower Michigan to Marysville, Michigan, then across or under the St. Clair River to Sarnia, Canada. It was approved to accommodate Lakehead Pipe Line Company’s (now Enbridge) request to save the company money, because a line around the southern end of Lake Michigan and across southern Michigan to Sarnia was deemed too expensive.

¹For detailed documentation of these facts and circumstances, see the Enbridge disclosures and submissions, including the 2014 Kiefner Report. See also the submissions and attached reports or comments from FLOW, dated [August 24, 2016](#); [June 29, 2017](#); [August 4, 2017](#); [October 12, 2017](#); and [February 9, 2018](#).

²See Section 2, below.

The original Easement and design for Line 5 in the Straits that was authorized by the Department of Conservation in 1953 called for twin pipelines in the Straits segment, approximately one mile west of the Mackinac Bridge later built in 1957. The Easement provided that Enbridge covenanted to the State to “at all times exercise the due care of a reasonably prudent person” to prevent injury to private or public property, or the public health and safety, and to comply with all state and federal laws.³ Because of the extremely strong currents and natural forces in the Straits, the Easement provided that there could not be more than 75 feet of open exposed or scoured bottomlands beneath the pipelines.⁴

Most significantly, the placement and use of the pipelines in the Easement are subject to the public trust and the State’s inalienable sovereign title in the bottomlands and waters of the Straits and Lake Michigan and Lake Huron. Title to the bottomlands and waters of the Great Lakes vested absolutely in the State on admission to the Union.⁵ This duty of the State as trustee with absolute sovereign title in these waters and bottomlands is inalienable.⁶ Simply put, the public trust necessarily reserves the power and imposes the duty on the State to protect the public trust at all times, including the right to terminate or modify the Easement or enact additional legal requirements or conditions to protect the public trust and the State’s sovereign title and the public trust uses of these waters and bottomlands. The public trust is perpetual and irrevocable in nature.⁷

The original design and construction authorized by the State called for the placement of these twin pipelines along the bottom of the Straits. To comply with this original engineering design, the pipelines were dragged by special equipment across the bottomlands of the Straits. They were covered by wood slats over protective coating and secured along the bottom by natural materials.

State DEQ and MPSC documents show that Line 5 was originally designed to transport 180,000 barrels per day (“bbls/day”) with the option of a maximum of 300,000 bbls/day of crude oil and natural gas liquids from Canada through Michigan and back into Canada at Sarnia.⁸ In approximately 2013, Enbridge submitted a series of applications for apparent changes in pump stations, anti-friction injection equipment, and other facilities to expand its capacity to 540,000 bbls/day. The MPSC did not approve or consider the effects and alternatives to this overall expansion of its capacity by 80 percent. Rather, MPSC limited its review to just the equipment,

³ 1953 Easement, Section A.

⁴ *Id.*, pp. 3-4.

⁵ The “equal footing” doctrine vested title to all bottomlands and waters of navigable lakes and streams in each State on admission to the Union, Michigan in 1837. *Montana PPL v Montana*, 565 U.S. 576 (2012).

⁶ *Collins v Gerhardt*, 237 Mich 31 (1926); *Obrecht v National Gypsum Co.*, 361 Mich 399, 412 (1960); *Illinois Central R Rd v Illinois*, 146 U.S. 387, 412 (1892); *Nedtweg v Wallace*, 237 Mich 1 (1926); the law is more fully described in Section 2.

⁷ *Illinois Central*, 146 U.S. at 452-454.

⁸ MPSC Opinion and Order, p. 6, Mar. 31, 1953.

without considering the actual purpose, risks, and potential economic and environmental impacts to public trust resources, or the comprehensive examination of feasible and prudent alternatives to Line 5 as a whole as required by law.

After the Enbridge Kalamazoo River disaster in 2010, Enbridge applied to the MPSC on a segment-by-segment basis for a new replacement line that doubled the capacity of Line 6b (now referred to as Line 78) from 400,000 bbls/day to 800,000 bbls/day. Enbridge did not disclose that this was for the purpose of constructing an expansion of its crude oil transport system in and out of Michigan from 700,000 bbls/day to 1,340,000 bbls/day (including the 540,000 bbls/day increase in Line 5). The MPSC approved each segment and change without considering the overall purpose of the applications, the overall and cumulative impacts of this purpose, or the feasible and prudent or reasonable alternatives to doubling Line 6b to 800,000 bbls/day or of the condition of what was then a 60-year-old Line 5, its risks and impacts, or alternatives, including shifting the transport out of the Straits and Great Lakes to and within the capacity of Line 6b.

Similarly, when Enbridge submitted its serial applications for adding saddles and anchored supports to Line 5 in the Straits, the DEQ routinely went along with Enbridge's representation that these were just anchor supports to the line that were "repairs" or "preventive maintenance."

In the past two years, information and documents submitted by Enbridge have revealed several conditions that increase the risk of a breach in the integrity of Line 5. Collectively, these conditions, together with the failed overall design evidenced by the complete modification of the original design of Line 5 with the 150 supports and application for 48 more, demand immediate attention as an analysis of cumulative impacts and alternatives to the line as a whole that have not been undertaken:

- A loss of coating from the movement of the supports that are fastened to the pipelines;
- Abrasion to the pipelines;
- Evidence of deformities or bending in the pipelines;
- Three pipeline dents caused by an vessel anchor strike;⁹
- Documentation that corrosion has occurred on the pipelines in nine locations;
- Observation that there are 55 "circumferential" cracks in the pipelines;
- Loss of wall thickness in pipelines;
- Continuing scouring of bottomland support beneath the pipelines contrary to and in violation of the 1953 Easement and original "as built" design;
- As a result of the failure of the original design due to scouring and strong currents, the continual addition from 2001 to 2018 of 150 saddles and supports, which have completely or substantially altered the original design and suspend almost 2 miles of pipelines above bottomlands of the Straits.¹⁰

9 Emma Winowiecki, New Dents in Line 5 Pipeline Likely Came from Same Vessel That Hit Electric Cables," Michigan Radio. April 11, 2018

<http://michiganradio.org/post/new-dents-line-5-pipeline-likely-came-same-vessel-hit-electric-cables>

¹⁰ Enbridge recently applied to the MDEQ for 48 more supports for the pipeline, which would bring the total to a line supported by 198 new structures or nearly 3 miles of lines suspended between half a foot and four feet above the bottomlands.

These matters are disturbing and demand caution and decisive state-led action. Before 2001, currents and/or wave action scoured the bottomland under the pipelines. In 2001, Enbridge applied for an “emergency” permit to install 16 new anchor support structures to support the lines; this change from the original design of pipelines along the bottomlands was characterized by Enbridge and MDEQ as “repairs” or “preventive maintenance.” These “repairs” in fact called for saddles strapped to the lines, held in place by supports that were secured to the bottomland with screw anchors. More scouring occurred and more saddles and support “repairs” were installed in 2003, then 16 in 2004, 14 in 2005, and 12 more in 2006. By 2017, Enbridge has added 128 saddles and supports with anchors to the line, *suspending it in the water column and not along the bottom according to the original design and 1953 Easement*. The joint DEQ/U.S. Army Corps of Engineers permit for “repairs” issued on March 22, 2018 for another 22 saddles and anchor supports brings the total to 150 or 11,250 feet of suspended pipeline in the currents of the Straits. In addition, Enbridge has applied for another 48 saddles and supports for the line, bringing the total to 198 supports or 14,850 feet, almost 3 miles of suspended pipelines in the waters of the Straits. These modifications constitute a complete modification and redesign of Line 5 triggering consideration of all feasible and prudent alternatives and impacts to Line 5 or occupancy of the Great Lakes as required by the Great Lakes Submerged Lands Act (“GLSLA”), the Michigan Environmental Protection Act (“MEPA”), and Art. 4, Sec. 52 of the Michigan Constitution.¹¹

The State MPSC and DEQ have been aware of and yet have continued to approve this massive, substantial new or altered design for Line 5 in the Straits. The matter is serious because the severe currents have and will continue to scour beneath the pipelines, likely requiring even more saddles and supports. Nearly half of the length of the twin-pipelines as originally designed is now suspended in the water area above the bottomland.

During May and June 2017, Enbridge provided the Kiefner Report that documented the scouring and failure of the original design and construction and the change in design through saddles, supports and screw anchors. The report and photographs also documented the failure of supports that were bent or twisted because of strong currents or other forces. Further, it appeared that the currents had caused bending of the lines. In late 2017, Enbridge provided information to the DEQ, Attorney General Schuette, and Governor Snyder that the saddle supports along the now suspended line were moving and scraping off the coating, exposing bare pipe to corrosion, and a weakening of cathodic protection.

2. APPLICABLE LAW

The Michigan Constitution, Art. 4, Sec. 52, declares that the “air, water, and natural resources of the state are of paramount public concern.” It further mandates that the legislature “shall provide for the protection of the air, water, and natural resources from pollution, impairment, or destruction.”

¹¹ GLSLA, MCL 324.32501 et seq.; MEPA, MCL 324.1701 et seq. MEPA also applies to the MPSC’s jurisdiction of the location and siting of new or modification of existing crude oil pipelines. MC: 460.1 et seq.; MCL 460.6(1); MC: 483.3 (“Act 16”); R 460.17601 (“Rule 601”).

Article 4, Sec. 52 establishes that the public interest or concern in our air, water, and natural resources is superior (“paramount”) to other considerations that may be present when the State is faced with important decisions. Accordingly, the Michigan Supreme Court has ruled that Article 4, Section 52 is self-executing; that is, the Legislature has a mandatory duty to pass laws that protect air, water and natural resources from pollution, impairment, or destruction.¹²

In 1970, the Legislature passed and Governor William Milliken signed into law the Michigan Environmental Protection Act (“MEPA”).¹³ The Supreme Court has held that the MEPA constitutes one of the legislature’s responses to this constitutional commitment.¹⁴ Michigan re-codified its air, water, land and environmental laws through the adoption of the Natural Resources and Environmental Protection Act, Public Act 1994, No. 451 (“NREPA”).¹⁵ The MEPA imposes a substantive duty on the State and its agencies to protect or prevent likely environmental degradation of our air, water, natural resources or public trust in those resources, such as water, Great Lakes, and inland lakes and streams.¹⁶ The MEPA also imposes a legal duty to consider the likely effects and/or feasible and prudent alternatives to a project or proposed application before an agency of the State.¹⁷

In 1955, Michigan adopted the Great Lakes Submerged Lands Act (“GLSLA”).¹⁸ The GLSLA has been amended on several occasions since then, and was expressly reenacted and re-codified as part of NREPA and in response to the State’s constitutional commitment to protecting its paramount air, water, and natural resources from degradation or harm.¹⁹ The GLSLA reaffirms the public trust doctrine, its standards, and the State’s affirmative duty as trustee to protect these waters and submerged lands and paramount public trust protected uses (e.g. fishing, navigation, boating, swimming, sustenance) from impairment, subordination, and/or alienation.²⁰ The GLSLA imposes a duty on the State, currently the DEQ, to consider and determine through “due findings” to protect the public trust in evaluation of any application for a proposed conveyance, lease, occupancy, alteration, improvement, and/or structure, or permit for placement of fill in, on, across, under the waters and/or submerged lands below the ordinary highwater mark of the Great Lakes.²¹ No conveyance, lease, occupancy, approval, or permit is authorized unless within the

¹² *State Hwy Comm’n v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974).

¹³ MCL 324.1701 et seq.

¹⁴ *Id.*; *Ray v Mason Co Drain Comm’r*, 393 Mich 294; 224 NW2d 883 (1975).

¹⁵ MCL 324.101 et seq.

¹⁶ *Ray v Mason County Drain Comm’r*, 393 Mich 294.

¹⁷ *Vanderkloot*, 392 Mich at 159.

¹⁸ MCL 324.32501 et seq.

¹⁹ *Id.*, Part 325, NREPA.

²⁰ *Obrecht v National Gypsum Co.*, 361 Mich 399 (1961); *People v Broedell*, 365 Mich 201 (1961). *Glass v Goeckle*, 473 Mich 667 (2003).

²¹ GLSLA, Sections 32502, 32503, 32504, 32505(1), 32512(1), 32513(1), 32515.

scope of the GLSLA and the common law of public trust.²² Authorizations or approvals can be granted only where it is determined on due recorded findings that the private or public use will not substantially affect the public use of those lands and waters, or where navigation and the public trust in the state will not be impaired by agreement for use, sales, lease, or other disposition.²³ The GLSLA and its Rules prohibit issuance of any agreement, permit, or approval unless the DEQ has determined that there is “no feasible and prudent alternative” to the proposed conduct or actions.²⁴

Pursuant to Act 16 and other laws, the MPSC has jurisdiction and regulates the siting of crude oil or petroleum liquid pipelines within the State.²⁵ In order to site and construct a crude oil pipeline in Michigan, companies, like Enbridge, must obtain a certificate of convenience and necessity and approval for siting and constructing each pipeline and every change, alteration, structure or improvement made to a pipeline. In addition, by MPSC practice, decisions, and orders require an applicant to assure a project meets the needs of Michigan, and requires testimony from the applicant company that the project meets its future and current needs. Importantly, the MPSC requires applicants to consider whether there are reasonable alternatives to the proposed project.²⁶ Further, as noted above, the MEPA requires full consideration of effects, impacts, and alternatives to the overall and related parts of the project.

In addition, the Inland Lakes and Streams Act and Rules²⁷ impose a requirement for authorization and permits for any structure, dredging, drilling, placement, tunnel, or other occupancy, use, and activities in and on the waters and bottomlands of Michigan’s inland lakes and streams. Like the GLSLA as to the waters and bottomlands of the Great Lakes, the ILSA prohibits authorization, approval or a permit unless it is determined that there will be no impairment of or interference with the public trust or the water, natural resources, and health, safety and general welfare; further, the ILSA and its Rules prohibit such authorization, approval or permits if there exists a feasible and prudent alternative to the overall project and severally related parts.

²² *Obrecht*, 392 Mich 159; *Superior Public Rights v Dept. of Natural Resources*, 80 Mich App 72 (1977); the common law standards or limitations for the narrow authorization or approval of agreements, occupancy, use or permits are similar and contained in *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); Michigan has adopted and follows *Illinois Central R Rd.*, *Obrecht*, 392 Mich 159; *Superior Public Rights*, 80 Mich App 72.

²³ E.g. GLSLA, Section 32502; only after finding that the public trust in the waters will not be impaired or substantially affected, may the state enter into any [such agreements]. Section 32503(1); only “after finding that the public trust will not be impaired or substantially injured” may the state “permit, by lease or agreement, the filling in of patented and unpatented submerged lands and permit permanent improvements and structures.” Section 32505(2).

²⁴ GLSLA; Rule 1015, R. 322.1015.

²⁵ MCL 483.1 et seq.; MCL 460.6. (“MPSC Organic Act”).

²⁶ Pursuant to MPSC Act 16, there must be a demonstration that the route is reasonable compared to other routes or alternatives. E.g. *In re Energy Partnership*, MPSC, Decision and Order, U-16838.

²⁷ MCL 30302 et seq.; R 281.811 et seq. (“ILSA”).

The MEPA, Part 17, NREPA, independently imposes a duty on the MPSC to consider and determine the likely effects of a proposed project, change or improvement, and whether feasible and prudent alternatives exist.²⁸

Standards of environmental impact, risk, and alternatives principles require comprehensive and full review and consideration by the MPSC and DEQ, followed by necessary and appropriate legal determinations. There can be no segmentation of a project's overall purpose into smaller projects to evade review of impacts and alternatives to the whole project. This means the scope of review must be equal to or greater than the overall project purpose. In other words, standard impact and alternative laws, regulations, and/or principles prohibit segmentation or piecemeal approval that forecloses review, consideration and determination of the effects, impacts and alternatives to the project as a whole. To date, the MPSC, DEQ, and State officials have not complied with the legal duties required to protect our Great Lakes, water resources, drinking water, fisheries, public trust uses, water and public trust dependent businesses, public health and private property.

CONCLUSION AND REQUESTS

Line 5 in the Straits is an old, demonstrably impaired, and failing infrastructure. The saddles and supports that lift the line off the bottom constitute a radically different design that must be subject to a full legal review and scrutiny. The MPSC and DEQ have not yet required or considered a comprehensive and full assessment of environmental impacts required by the MEPA and MPSC 1929 Act. They have not yet required or considered and determined whether there exist feasible and prudent alternatives to Line 5, including adjusting the capacity of Line 6b. The law requires this through proceedings, hearings, and evidence. The public is entitled to notice, hearings, and public comments, and the right to continue to comment and submit evidence.

As you are well aware, the 2015 Michigan Petroleum Pipeline Task Force Report acknowledged the jurisdiction and legal powers of the MPSC and DEQ to demand an independent, full, and comprehensive study of health, environmental impacts, damage to public and private property, common waters, and communities, risks, and feasible and prudent alternatives.

The Governor created the Michigan Pipeline Safety Advisory Board ("MPSAB") to arrange and advise on such studies. While perhaps well-intended, the MPSAB was not given any powers under law, so it is powerless to act. However, you, as officials and leaders at the head of the MPSC and DEQ do have power to take charge under rule of law, and the GLSLA, MPSC Act, and MEPA require it. You have the factual basis and legal authority to take charge.

Accordingly, we request that you follow the strict contours of the law and your "solemn and perpetual duty"²⁹ under the public trust doctrine that protects the Great Lakes and connecting waterways. Moreover, we request that you order Enbridge to suspend its transport of oil in Line 5 and to submit an application for the new and modified design of 150 to 198 support structures or up to 14,850 feet of suspended lines in the Straits. Once the new application is submitted, we request that you provide notice for hearing, conduct hearings under the GLSLA, ILSA, MEPA, and MPSC

²⁸ *Vanderkloot*, 392 Mich 159; *Buggs v Michigan Public Service Comm'n*, 2015 WL 15975 (Mich App, Jan. 13, 2015).

²⁹ *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115, 237 Michigan 38 (1926).

1929 Act, and require Enbridge to show no potential risks or catastrophic harm, and, separately, make Enbridge submit a full and comprehensive study of potential impacts and a study showing that there exist no feasible and prudent alternatives to Line 5 in the Straits and crude oil pipelines in the Great Lakes. Because the proposed new tunnel for Line 5 under the St. Clair River and the options for replacing Line 5 in the Straits under the Governor's November 2017 agreement with Enbridge would constitute a substantial and significant change in the overall character, use, and life of Line 5, and constitute severally related parts of this overall project, Michigan law requires a consideration of the effects, impacts, risks, and comprehensive evaluation of the existence of a full range of feasible and prudent alternatives to Line 5 in its entirety. Any review and consideration short of this will violate the legal duties imposed on the State and its agencies to prevent and minimize endangerment, risk, pollution, impairment or destruction of the air, water, natural resources, or public trust, including the prohibition of the segmentation of an overall project and its severally related parts that would avoid full review of impacts and alternatives that are part of the GLSLA, ILSA, MEPA, and the MPSC processes and standards consistent with court cases and Art 4, Sec. 52, Michigan Constitution.

In short, we hereby request the following that you exercise your jurisdiction, authority, and properly apply Michigan's laws, regulations, body of court and agency decisions, including but not limited to the location and siting responsibility of the MPSC under its Organic Act, as amended, and Rules, the GLSLA and Rules, the ILSA and Rules, the MEPA and its common law of the environment, to your review, evaluations, studies, and decisions or determinations concerning the following:

- (a) the Enbridge proposed tunnel and related project for Line 5 adjacent to and under the St. Clair River;
- (b) the proposed tunnel, trench, or ditch for a replacement of the twin pipelines under the Straits of Mackinac with a new line,
- (c) the pending application for an additional 48 saddles, support legs, and anchors as part of the redesign and substantial modification to suspend a large portion of the existing twin pipelines in the water column above the bottomlands (the original pipelines were designed and built to lay on the bottomlands);
- (d) other crossings or intersections of Line 5 in or under or within ¼ mile of any lake, stream or wetland in Michigan; and
- (e) any other severally related facilities, equipment, and projects for continued use or modifications to Line 5 or its volume, capacity, or rate of flow.

Further, because these above-numerated projects are part of an overall modification that intend, propose, and/or involve the continued use of Line 5 in its entirety, you are requested to require Enbridge to apply for authorization for the substantially modified design, structures, and use of Line 5 under the GLSLA, the MPSC Organic Act, the ILSA, and the MEPA, and submit a comprehensive environmental, water, natural resources and public trust impact statement and relevant studies, and a comprehensive alternatives study of Line 5 in its entirety, including the tunnel or drilled new line under the St. Clair River, any replacement tunnel, trench, ditch or other measures near or under the Straits of Mackinac, and the past and pending application for another 48 saddle supports design and structures for the continued use of the existing Line 5 under the Straits of Mackinac; the alternatives study must demonstrate that there exist no feasible and prudent alternative to Enbridge Line 5 in and through Michigan.

On behalf of FLOW, our supporters, and the people of Michigan, we ask you to implement this request immediately.

Sincerely yours,



Stanley Pruss, Chairman



James Olson, President



Elizabeth Kirkwood, Executive Director

For Love of Water