



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

July 15, 2018

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VIA ELECTRONIC SUBMISSION

RE: FLOW (FOR LOVE OF WATER) PUBLIC COMMENTS AND REPORT ON ENBRIDGE’S STUDIES AS REQUIRED PURSUANT TO THE NOVEMBER 2017 GOVERNOR – ENBRIDGE AGREEMENT ON THE LINE 5 PIPELINES IN THE STRAITS OF MACKINAC AND LAKE MICHIGAN

Dear Governor Snyder, Attorney General Schuette, Michigan Department of Environmental Quality (“MDEQ”) Director Grether, Michigan Public Service Commission (“MPSC”) Director Talberg, Michigan Department of Natural Resources (“MDNR”) Director Creagh:

For Love of Water (“FLOW”) submits the following formal public comments for the public record regarding the proposed decisions and actions the State of Michigan should take under the Michigan Constitution and laws of Michigan and the Agreement entered into between Governor Snyder and Enbridge on November 27, 2017 (“Agreement” or “November 2017 Agreement”).

Published on the Michigan Pipeline Safety Advisory Board’s (“PSAB”) website, the State of Michigan’s formal notice requested public comments on Enbridge’s technical studies for the express purpose of guiding the future of Line 5, including the full replacement of this pipeline under or in the Straits of Mackinac, under the St Clair River, and across Michigan. The state’s notice appears to favor a commitment to the continued operation of Enbridge’s 65-year-old Line 5 throughout Michigan for decades to come. In the spirit of this public notice and request for thoughtful comments, FLOW submits the following analysis, comments, and conclusions regarding the path the State of Michigan and its

agencies should take. Specifically, FLOW’s analysis and comments address: (1) the November 2017 Agreement’s flaws and non-compliance with the laws and Constitution of Michigan; (2) the Enbridge Straits Alternatives report; (3) the Water Crossings of Line 5 report; and (4) the supplemental reports concerning Anchor Strike Mitigation, Coating Technologies, and Underwater Leak Detection. In order to provide a meaningful review of Enbridge’s supplemental reports, however, the comment period from June 29, 2018 until July 15 is deficient and should be extended to a minimum of 30 days. Most importantly, however, a review of Enbridge’s supplemental reports is secondary to the primary issues, problems, and actions that should be addressed before any decision or further implementation for any replacement lines or other actions called for by the November 2017 Agreement.

I. SUMMARY OF COMMENTS AND RECOMMENDED ACTIONS

FLOW submits the following conclusions and recommendations based on our careful review and analysis of the Agreement and the above-described reports and studies:

1. The Agreement is invalid because the Governor and MDEQ did not “take care that the laws are faithfully executed” before signing the Agreement as required by Michigan Constitution, Art. 5, Sec. 8, and the Great Lakes Submerged Lands Act (“GLSLA”).¹ The Governor took the law into his own hands by ignoring the GLSLA and other laws before signing the Agreement. Specifically, the Agreement constitutes an “agreement” for the “use of bottomlands” of the Great Lakes, (i.e. the “replacement” of existing dual pipelines in the Straits with a new, single line alternative tunnel, open cut, or horizontally drilled location and construction), contrary to and without the authorization for such an agreement required by Sections 32502, 32503, and other sections of the GLSLA and its rules.²
2. The Agreement unlawfully narrows the scope of alternatives to Line 5 occupying the bottomlands of the Great Lakes contrary to the governing laws of the GLSLA, the Michigan Environmental Protection Act (“MEPA”),³ and MPUC laws. Under these laws, Enbridge is required to demonstrate that there is no substantial impairment to the waters and no feasible and prudent alternative to the twin pipelines and Line 5, including alternative design capacity, routes, and other measures throughout its system. Instead, the Governor short-circuited the mandates under public trust, environmental, and public utility law to fully and comprehensively determine potential risks, impacts, and whether alternatives exist, such as the doubled-capacity in Enbridge’s new Line 6B (now called 78) across southern Michigan, along with other reasonably minor adjustments compared to the replacement and long-term operation of Line 5.
3. The Agreement allows Enbridge to apply for and obtain all the approvals and permits necessary to construct and build a replacement “tunnel” or horizontally drilled line under the St. Clair River. Such permit approvals are also subject to the public trust of the state and citizens under the Inland Lakes and Streams Act (“ILSA”). Once more, the Governor and state officials have prematurely decided and usurped the rule of law required to make a decision about Line 5 under the St. Clair River.

¹ MICH. COMP. LAWS §32501 et seq.

² MICH. COMP. LAWS §§32502, 32503; GLSLA Rule 1015.

³ GLSLA Rule 1015; see also MICHIGAN ENVIRONMENTAL PROTECTION ACT, MICH COMP. LAWS §324.1701 et seq.; *Michigan State Highway Commission v. Vanderkloot*, 392 Mich 159, 185-187 (1974); *Gensco v. MDEQ*, 250 Mich App 45 (Mich. Ct. App. 2002); *Buggs v. Michigan Public Service Comm’n*, 2015 WL 15995 (Mich. Ct. App. Nos. 31508, 315064, Jan. 13, 2015).

4. The Agreement fails to follow the rule of law by not requiring Enbridge to conduct its own environmental impact and alternative studies “replacement” of Enbridge’s Line 5 in the Straits, Line 5 in or under the St. Clair River, and the implicit long-term operation of Line 5 across Michigan. By its terms, the Agreement narrowed the range of alternative actions by the State of Michigan and Enbridge to the overall replacement and long-term commitment to Enbridge and Line 5.
5. On its face, the Agreement combined Line 5, the Straits, and St. Clair River replacements without an independent evaluation of potential and cumulative impacts and alternatives to Line 5 in its entirety. Instead, the law requires projects affecting public trust bottomlands to evaluate risks, impacts, and alternatives.⁴ As a result, the Agreement violated the rule against segmentation of projects affecting public trust bottomlands, waters, fisheries, navigation, boating, and other public trust uses, and private riparian properties, drinking water systems, and public health risks to the State of Michigan.
6. The Agreement does not acknowledge the current failing Line 5 pipeline infrastructure in the Straits of Mackinac and Enbridge’s unlawful efforts to characterize its screw anchors as repair and maintenance in order to avoid a comprehensive state and federal review of the entire underwater Line 5 structure. For over 15 years, Enbridge has created a new and altered design for Line 5 in the Straits that includes the continuing installation of 198+ anchor saddles and supports to elevate the lines in the water column off the lakebed, which in turn increase the chances for a successful anchor strike and pipeline rupture.
7. The Agreement imposes substantial taxpayer expenses on assisting and supporting permission for Enbridge to proceed with a tunnel or similar replacement of a crude oil pipeline under or in the bottomlands of the Great Lakes.
8. The Enbridge reports, Michigan Technological University (“MTU”) reports, and other reports confirm that the nature and extent, risks, and instability of soils, geology, and soils under the Straits of Mackinac are unknown or uncertain. As a result, no final decision should be made on the feasibility of constructing a tunnel or other alternative until the completion of an independent and comprehensive geotechnical study.

Based on the foregoing analyses and conclusions, FLOW advises and urges the Governor, Attorney General, DEQ, DNR, and MPSC to refrain from making any decisions regarding any alternative replacement or other matter called for in the Agreement until current proceedings or actions related to Line 5 are lawfully approved or otherwise are in compliance with the Michigan Constitution and laws of Michigan.

II. THE GOVERNOR’S NOVEMBER 2017 AGREEMENT WITH ENBRIDGE

The Governor’s 2017 Agreement with Enbridge has directly impacted the citizens of Michigan and tribes without their public participation or consultation. By sidelining a three-year public process, this Agreement has effectively approved Enbridge’s continued and uninterrupted flow of 23 million gallons of oil each day

⁴ *Id.*, fn 3, *supra*; see also FLOW report to Michigan Pipeline Advisory Board, Director, MDEQ, Attorney General Schuette, Dec.14, 2015, Part I, A Proper Legal Framework and Principles for Comprehensive Alternatives Analysis, pp. 7-13(<http://flowforwater.org/wp-content/uploads/2015/12/FLOW-Composite-Report-12-14-15-FINAL-1.pdf>).

through the Great Lakes and Michigan's waterways. In addition, the Governor's 2017 agreement has resulted in the following:

- An assurance to Enbridge to replace Line 5 under the St. Clair River with a tunneled line using a horizontal directional drilling method;
- An assurance to Enbridge to replace Line 5 in the Straits of Mackinac with a new line in a trench or tunnel;
- A waiver of the requirement for Enbridge to prove that using Line 6B across southern Michigan was not a feasible and prudent alternative to Line 5;
- A complicit agreement that all of Line 5 could then be replaced to guarantee that Enbridge could continue transporting crude oil or heavy tar sands in the future;
- An agreement that Enbridge could continue to use the failing Line 5 design and structures without the legal authorization under the GLSLA and MEPA and the Constitution;
- A tacit agreement that Enbridge can use the failing Line 5 design and support structures during the five or more years it would take to plan, construct, and entirely replace Line 5 with the tunnels in the Straits and St. Clair River;
- A private agreement that ignores over three years of independent studies that show most of Line 5's oil is transported to Sarnia, Canada, not Michigan.
- A denial of the Pipeline Safety Advisory Board's opportunity to complete the two independent risk and alternatives studies and to make corresponding recommendations related to the future of Line 5 in Straits;
- A denial for affected citizens, communities, local units of government, and tribes to have an opportunity to participate, comment, and obtain protection of property, water, and public uses threatened by Line 5; and
- A denial of due process of the law for affected citizens, local units of government, and tribes.

The Agreement has left the public voiceless and has unfairly allowed Enbridge to influence how the state will proceed on deciding the crucial fate of the entire Line 5, including its Straits of Mackinac and St. Clair River crossings. An investigative news report from Bridge Magazine⁵ broke last week to raise fundamental questions about the uncomfortably cozy on-going negotiations and revolving-door relations between the State of Michigan and Enbridge in crafting and announcing this Agreement. FOIA documents revealed that the State of Michigan's departments, Michigan Agency for Energy ("MAE") and MDEQ sharing talking points with Enbridge lobbyists prior to the release of the November 27 Agreement, and that MAE's Executive Director now works in the private sector as an expert consultant representing Enbridge as one of her first clients.

In addition, the timing of the announcement of this privately negotiated deal between Enbridge and the State of Michigan was particularly jarring. In late October 2017, Enbridge disclosed that it knew as early as 2014 about areas of coating damage on the underwater oil pipes related to its anchor screw installations but did not acknowledge the damage to state or federal officials.⁶ This is very significant because Enbridge knowingly misled both state and federal agencies in authorizing multiple past anchor permits and entering into federal consent decrees when the company knew about bare steel spots adjacent to anchor locations as early as 2014. Rather than enforcing this and other related easement violations, the State of Michigan

⁵ Jim Malewitz, "Email Cast Doubt About Michigan's Ties to Enbridge in Line 5 Debate," Bridge Magazine, July 11, 2018 <https://www.bridgemi.com/michigan-environment-watch/emails-cast-doubt-about-michigans-ties-enbridge-line-5-debate>

⁶ Officials: Enbridge Knew About Line 5 Coating Gaps Tuesday, Paint Square News, October 31, 2017 <https://www.paintsquare.com/news/?fuseaction=view&id=17583>

entered into a highly favorable agreement with Enbridge that empowered the corporation to develop its own reports advocating for a tunnel replacement in the Straits and St. Clair River crossings.

It's been eight years since Enbridge's Line 6B disaster along the Kalamazoo River and the people of Michigan are still without a thorough and independent alternatives analysis and risk assessment of Enbridge's Line 5. A [new poll](#)⁷ conducted by the National Wildlife Federation ("NWF") shows that the majority of Michiganders across every region and political party want Line 5 shut down, and 84 percent are concerned about a Line 5 oil spill in the Great Lakes. Instead, the citizens of Michigan are watching their taxpayer dollars being spent to verify Enbridge's self-serving reports.⁸

Most significantly, this Agreement further delays much needed and immediate state action to address the ongoing risk of a catastrophic pipeline oil spill in the Great Lakes. This risk is not unfounded given the decaying conditions of the 65-year-old pipeline⁹ and the recent April anchor strike that dented Line 5 in three locations and spilled approximately 600 gallons of dielectric fluid into Lake Michigan.¹⁰ In addition, Enbridge's proposed tunnel imposes a five to ten year delay depending on likely legal and technical challenges, and thus is not a realistic solution to Line 5's looming threat that could cause over \$6.3 billion in economic impact to the State of Michigan and its citizens. The Agreement perpetuates the status quo and rewards Enbridge by externalizing the company's risks on the citizens of Michigan, the tribes, and the Great Lakes. In sum, this Agreement circumvents the rule of law and abrogates the state's primary public trust duties as trustee of the Great Lakes waters and bottomlands.

A. The Governor's Agreement with Enbridge Violates the Duty to Take Care to Faithfully Follow the Law Mandated by Art. 5, Sec. 8 of the Michigan Constitution.

Article 5, Section 8 of the Michigan Constitution clearly provides:

Each principal department shall be under the supervision of the governor unless otherwise provided by this constitution. The governor *shall take care that the laws be faithfully executed.*

The governing law to use of public trust bottomlands and waters is the GLSLA and its sections 32502 and 32503.¹¹ This is the law that governs the State of Michigan's decision on whether or not Enbridge's Line 5

⁷ National Wildlife Federation. "New Poll: Michigan Voters Overwhelmingly Support Shutting Down Line 5," (May 2018) <https://nwf.org/Home/Latest-News/Press-Releases/2018/05-24-18-Michigan-Voters-Line-5>

⁸ Jim Malewitz, "Cost to Michigan of Trusting Enbridge on Line 5: \$255 per hour," Bridge Magazine, <https://www.bridgemi.com/michigan-environment-watch/cost-michigan-trusting-enbridge-line-5-255-hour> (last visited July 13, 2018).

⁹ Jim Malewitz, "'History of Failure' Highlights Risks Outside Straits of Mackinac," Bridge Magazine, July 11, 2018 <https://www.bridgemi.com/michigan-environment-watch/history-failure-highlights-line-5-risks-outside-straits-mackinac>

¹⁰ Emily Lawler, *Line 5 Damaged, Likely from Same Anchor Strike that Caused Spill*. See https://www.mlive.com/news/index.ssf/2018/04/anchor_strike_responsible_for.html (last visited July 13, 2018).

¹¹ MICH. COMP. LAWS §§324.32502, 32503 et seq. Section 32502... This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands... whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. Section 32503. (1) Except as otherwise provided in this section, the department, after finding that the public trust in the waters will not be impaired or substantially affected, may enter into agreements

can continue to occupy the state’s public trust waters. This statutory public trust law mandates that the MDEQ must authorize any agreement for occupancy or use of navigable waters and bottomlands pursuant to the legal and regulatory public trust standards of no impairment.¹² Constitutionally, all departments and officials of every agency, including the Attorney General, are subject to the same mandates and limitations of the Michigan Constitution and laws of the legislature. In this case, the Governor, the executive agencies and departments, including MDEQ, MDNR, MPSC, MAE, and the Attorney General, must follow and execute the statutory public trust law of the GLSLA and other applicable state laws.

The Agreement improperly calls for a “replacement” pipeline in the Straits of Mackinac and therefore narrows the scope of alternatives for Line 5 in the Straits. By narrowing the scope of alternatives, the Governor’s Agreement fails to take care that the laws of the GLSLA are faithfully executed. This is because the GLSLA, MEPA, and requirements of the MPSC collectively mandate submission by Enbridge and determinations by the executive branch through the MDEQ and MPSC that potential adverse impacts are minimized and that a showing demonstrates no feasible and prudent alternative. These findings must be made prior to any one alternative being selected. Therefore, the Governor’s Agreement with Enbridge violated Art. 5, Sec. 8 by waiving and narrowing the agreement’s only alternative for Enbridge to examine: a “replacement” pipeline in the Straits and under the St. Clair River. In other words, this Agreement has not been authorized consistent with the public trust standards for use and occupancy of the Great Lakes bottomlands or waters. Moreover, the effect of the Governor’s Agreement is to allow Enbridge to continue indefinitely with a new or replaced Line 5 in its entirety without submission, authorizations, permits or approvals required by law.

B. Independent of the Constitutional Violations of Law, the Agreement between the Governor and Enbridge Failed to Comply with Other Laws and Legal Requirements.

1. Contrary to Rule 1015 of the GLSLA, MEPA, Inland Lakes and Streams Act (“ILSA”), MPSC law, the Agreement improperly narrowed the range of Line 5’s potential impacts and alternatives to a “replacement” pipeline in both the Straits of Mackinac and the St. Clair River.

The GLSLA applies to occupancy, use, improvements, and other activities on, in or under Great Lakes bottomlands and waters.¹³ In addition to all other requirements, no approval or permit can be granted by MDEQ “unless the department determines both of the following: (a) that the adverse effects to the environment, public trust, and riparian interests... are minimal...; and (b) That there is no feasible and prudent alternative to the applicant’s proposed activity which is consistent with the reasonable requirements of the health, safety, and welfare.”¹⁴

The MDEQ must make these findings *prior* to selecting any one alternative. The Agreement, however, has bypassed the department’s legal required independent fact finding of no adverse impacts and no feasible and prudent alternative, and has instead unilaterally selected the “replacement” tunnel alternative as the preferred alternative. In short, the Agreement has circumvented the GLSLA and Rule 1015.

2. Similarly, the Agreement provides for Enbridge to locate, construct and operate a “replacement” Line 5 pipeline under the St. Clair River without complying with the state’s

pertaining to waters over and the filling in of submerged patented lands, or to lease or deed unpatented lands, after approval of the state administrative board.

¹² *Id.*

¹³ *Id.*

¹⁴ GLSLA Rule 1015.

sovereign public trust ownership and interest in the bottomlands of the river and/or the waters over the bottomlands of the river.

The St. Clair River is a part of a connecting international waterway between Lake Huron and Lake St. Clair, the Detroit River, and Lake Erie. Michigan received sovereign title and control of all navigable waters at the time of statehood in 1837 under the “equal footing doctrine.”¹⁵ Subsequently, the Michigan Supreme Court ruled under the common law, that the title and ownership of the bottomlands and the waters of the Great Lakes was held by Michigan in public trust.¹⁶ As to inland lakes and streams, the Court ruled that the private title to bottomlands under navigable inland lakes and inland rivers was in the adjacent riparian owner to the center of the lake or stream.¹⁷ However, the Court also ruled that the riparian private title was subject to the state’s residual public trust interest that cannot be alienated, subordinated without the state’s express authorization by statute or by a department’s determination as delegated by law. The private riparian interest or *jus privatum* is always subject to *jus publicum*, which is the paramount rights in navigable waters and the lands under them in order to protect navigation and the public trust.¹⁸

Where there is no such express legislative or department authorization, the use, improvement or alternation of riparian bottomlands is unlawful. For example, the Inland Lakes and Streams Act (“ILSA”) delegates authority to the MDEQ to issue permits for use, occupancy, alternation, improvement or similar activity on bottomlands of lakes or stream. A permit cannot be approved unless there is no impairment of the public trust, riparian interests, or the environment, and, further, unless it is demonstrated that there is no feasible and prudent alternative to the proposed conduct or activity.¹⁹

The Agreement calling for a replacement Line 5 single pipeline under the St. Clair River has not been permitted by the MDEQ under the ILSA. Therefore, the Agreement does not comply with the ILSA and its rules. Like Rule 1015, the ILSA rules require a showing that there is no feasible and prudent alternative.²⁰ In this instance, the alternative would include using other capacity and/or routes within Enbridge’s pipeline system or connecting systems, such as Line 6B/78 across southern Michigan.²¹

Enbridge or MDEQ may try to argue that the “tunnel” under the St. Clair River is private riparian land and therefore the ILSA and the GLSLA do not apply, citing *McMorran Milling v. C.H. Little Co.* However, for the reasons stated above, any private riparian title or *jus privatum* is technically bare title for the exercise of riparian interest, and is always subject to the paramount state’s sovereign and public trust interest in the waters and bottomlands, the *jus publicum*.²²

¹⁵ *Shively v. Bowlby*, 14 S. Ct. 548 (1894) (title to bottomlands “vested absolutely” in states in trust for citizens on admission to the U.S.); *State v. Venice of America Land Co.*, 160 Mich. 680 (1910); *Glass v. Goeckle*, 473 Mich. 667 (Mich. 2005).

¹⁶ *Id.*, *State v Venice of American Land Co* and *Glass*.

¹⁷ *McMorran Milling Co. v C.H. Little Co.*, 201 Mich. 301 (1918).

¹⁸ *Id.*, *McMorran*, at p. 309-310. (“Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.”).

¹⁹ *Illinois Central R. Rd. v. Illinois*, 146 U.S. 287 (1892); *Obrecht v. National Gypsum Co.*, 361 Mich. 399 (Mich. 1960).

²⁰ MICH. COMP. LAWS §324.30106.

²¹ See FLOW’s Public Comments on Dynamic Rick *Final* Alternatives Analysis Report, dated December 22, 2017 (<http://flowforwater.org/wp-content/uploads/2018/01/FLOW-Comments-on-Final-Alternatives-Analysis-2017.12.21.pdf>).

²² See fns 10 and 11, *supra*.

By its terms, the GLSLA does not address or grant authority to MDEQ to approve or grant any authorization or permit under the St. Clair River. If Enbridge or MDEQ are correct in asserting that the ILSA does not apply, then in effect, they must concede that there is no legislative grant or authority to alienate or authorize use, occupancy, or construction activity as to the state's sovereign, paramount public trust interest in the bottomlands of the St. Clair River. Even though these bottomlands are privately titled, as noted above, the private title remains subject to the state's residual public trust interest. If the public trust in riparian bottomlands under inland rivers or lakes cannot be alienated (which it cannot),²³ then there must be a legislative grant authorizing MDEQ to allow the use or activity. Short of such express authorization consistent with the public trust, there is no authority, and a replacement pipeline and private occupancy would be unlawful.

3. The Agreement unlawfully short-circuited the duty to consider and determine likely or potential adverse impacts and the existence of feasible and prudent alternatives to the entire Line 5 contrary to the principle of non-segmentation.

As noted above, the Agreement calls for a replacement of the existing Line 5 dual lines in the Straits, the Line 5 pipeline under the St. Clair River, and a review and consideration of 400 river or water crossings that have been identified for Line 5 in Michigan from Superior, Wisconsin to Sarnia, Canada. The Agreement addresses a single or related part of a single project, namely the replacement and indefinite location, siting, use, and operation of Line 5 in Michigan. While the Agreement requires the replacement tunnels or similar alternatives to obtain necessary permits and approvals under federal, state, and local law or regulations, the Agreement did not consider and/or determine the impacts or effects and alternatives to this overall project, which presumes the rebuilding of the entire 645-miles of Line 5 in Michigan and Wisconsin.

As previously addressed in a separate letter to the state dated April 11, 2018, FLOW set forth the legal prohibition of dividing a larger project into smaller segments to avoid or narrow consideration of impacts, likely effects, or alternatives to proposed conduct.²⁴ The Governor entered into the 2017 Agreement without consideration of the impacts, likely effects, and alternatives to Line 5 as a whole. Accordingly, the Agreement is contrary to law, and any decisions must be delayed until the state has required Enbridge and the MDEQ, MDNR, and/or MPSC under proper legal proceeding and the rule of law to do so.

C. Procedural and Substantive Comments on Enbridge's 5 Reports Required under the Governor's 2017 Agreement with Enbridge

1. Procedural Comments

After nearly nine months of analysis, in July 2015, the Michigan Petroleum Pipeline Task Force released its final report, recommending an independent review and analysis of Line 5's risk and alternatives. Immediately following, the Michigan Attorney General Bill Schuette acknowledged that Line 5 presents an unacceptable risk stating that "you wouldn't site, and you wouldn't build and construct pipelines

²³ See *Shively v. Bowlby*, 14 S. Ct. 548 (1894).

²⁴ See fn 4, *supra*, and FLOW's Non-segmentation letter to MPSC and DEQ, dated April 11, 2018 (<http://flowforwater.org/wp-content/uploads/2018/04/Final-FLOW-letter-to-MPSC-and-DEQ.pdf>).

underneath the Straits today”²⁵ and that the days of Line 5 were numbered.²⁶ Shortly after, the State of Michigan negotiated with Enbridge to fund an independent risk report and independent alternatives report to the tune of \$3.5 million. Pursuant to the Governor’s Executive Order, the PSAB was charged to implement the recommendations of the Task Force and to oversee the two Line 5 independent reports on risk and alternatives. Almost two years after the Task Force report was released in June 2017, the risk report was jettisoned because of conflict of interest problems with the independent contractor. The alternative report was released on November 20, 2017 for public comment and proved to be deficient as it failed to examine the alternative of transporting crude oil in existing pipelines around the Great Lakes. Exactly one week later on November 27, 2017, the Governor and Enbridge released this side agreement, which favored one alternative: a pipeline tunnel replacement under the Great Lakes and the St. Clair River.

The Governor’s 2017 Agreement with Enbridge does not call for an assessment of decommissioning Line 5, but rather stipulates that Enbridge shall proceed with detailed design and installation of the most appropriate option within 180 days of receiving all authorizations and approvals necessary for the construction of that option. Therefore, Governor Snyder’s agreement evades the fundamental question of whether Michigan needs Line 5 to supply the energy needs of the Upper Peninsula and if there are other reasonable and prudent alternatives that do not involve a pipeline across or under the Great Lakes and over 400 other water crossings.

Enbridge’s reports outline the procedures taken by the company to prepare the reports. However, the outlines that are provided in Enbridge’s reports are not fully transparent and leave many procedural details unclear to the public and state decision makers. For example, the Water Crossings report states that Enbridge worked with “the State Technical Team” to identify and evaluate water crossing by Line 5. However, under further inspection, the only definition provided for “the State Technical Team” is “state representatives.” This ambiguous definition does not give the people of Michigan the opportunity to understand who in the state government is working with Enbridge on this issue, and what credentials these individuals possess.

In addition, the reports released on June 29 were not comprehensive, and in fact, contradicted the earlier Straits Alternative report Enbridge provided to the state on June 18. These reports attempt to offer piecemeal fixes to a complex system problem that demands a holistic solution to eliminate the imminent risks to the Great Lakes and connecting tributaries.

Furthermore, the July 15 deadline for comments concerning Enbridge’s reports published on June 29 is an inadequate amount of time for technical and legal professionals to provide thoughtful comments on the reports and fate of Line 5. The public must have a sufficient amount of time to properly form and share their opinion on the future of Line 5.

2. Substantive Comments

Lack of Adequate Geotechnical Information and Evaluation: Both Enbridge’s alternatives report and Michigan Technological University’s Horizon Engineering Report recommends that a geotechnical study be performed before any “replacement” alternative is selected. This recommendation is in response to the

²⁵ Rick Pluta, “Task force says Enbridge’s Line 5 should keep operating,” Interlochen Public Radio, July 15, 2015 <http://interlochenpublicradio.org/post/task-force-says-enbridges-line-5-should-keep-operating>

²⁶ Jim Malawitz, “Michigan Truth Squad: Bill Schuette talks tough on Line 5 pipeline,” Bridge Magazine, June 15, 2018 <https://www.bridgemi.com/michigan-truth-squad/michigan-truth-squad-bill-schuette-talks-tough-line-5-pipeline>

uncertainties surrounding the Mackinac Straits geology. Any decision regarding the replacement of Line 5 in the Mackinac Straits must be postponed or denied until a comprehensive geotechnical study of the Mackinac Straits is concluded.

Water Crossings Report: Enbridge's Water Crossing Report reveals that Line 5 crosses nearly 400 Michigan waterways, which is roughly double the number that state decision makers originally thought. This finding highlights the immense risk Line 5 possesses not only in the Straits of Mackinac, but across the State of Michigan. All the water crossings identified in the report are connected to the Great Lakes hydrological system and all pose a risk to the health of the Great Lakes and the Michigan people. According to the National Wildlife Foundation's FOIA review, since 1968, Enbridge's Line 5 has ruptured at least 29 times on land, spilling over 1.1 million gallons of oil into Michigan's environment.²⁷ Enbridge's Water Crossing Report fails to address any of these Line 5 spills or the company's Line 6B spill in the Kalamazoo River that caused between 840,000 and 1.1 million gallons of tar sands oil to enter the river.²⁸

Enbridge's Water Crossing Report also discloses that the company's current process for establishing baseline environmental sensitivity maps are based on information supplied at the federal level. The maps do not utilize Michigan-specific species and habitat data to supplement current data sources. This finding emphasizes the lack of coordination between the State and Enbridge over Line 5's 65-year history in the State of Michigan.

The report prioritized 74 different water crossing with 17 of those crossing occurring between Rock River and the Straits of Mackinac. These water crossing are prioritized because of their unique characteristics that make the overall consequences and costs of a potential release significantly higher for the localized area and the State of Michigan as a whole.

Enbridge's Water Crossing Report also identified 16 rare wetland communities that they believe are of the highest priorities to protect and restore in any recovery effort. However, 12 of the 16 rare wetland communities identified in the report were last surveyed before 1993. Having current surveys of these prioritized areas is key to any efficient and effective recovery efforts Enbridge might have in the future.

In addition, on page 8 of the Water Crossing Report, Enbridge only presents its economic numbers on how Line 5 benefits the State of Michigan. The report never acknowledges that these numbers are highly contested and that there are viable and economically feasible alternatives to supply the Upper Peninsula with propane and to transport crude oil from lower Northern Michigan to southern refineries. At a minimum, this report should include other reports like FLOW's 2015 Report²⁹ and Groundwork's 2018 Report³⁰ that demonstrate that Line 5 is not essential to Michigan's energy economy but rather threatens the Great Lakes water-dependent economy. Specifically, FLOW's 2015 report and subsequent technical reports found that 90-95% of Line 5's only returns to Canada, that only [18% of the propane in the Upper Peninsula](#) comes from Line 5, and that propane can be transported in a new four-inch pipeline or other modes of transport from Superior to Rapid River.

²⁷ National Wildlife Federation, *Why the Line 5 Oil Pipeline Threatens the Great Lakes*, Nov. 7, 2017, <http://blog.nwf.org/2017/11/why-the-line-5-oil-pipeline-threatens-the-great-lakes/> (last visited July 13, 2018).

²⁸ *Id.*

²⁹ FLOW, *Eliminating the Line 5 Oil Pipelines' Unacceptable Risk to the Great Lakes Through a Comprehensive Alternatives Analysis and Systems Approach*, Dec. 14, 2015 <http://flowforwater.org/wp-content/uploads/2015/12/FLOW-Composite-Report-12-14-15-FINAL-1.pdf>

³⁰ Groundwork Center for Resilient Communities, *Canadian Profits, Michigan Risk: Line 5 threatens Michigan economy and environment, brings little in return*, May 2018 https://www.bridgemi.com/sites/default/files/gw-line_5_report.pdf

Underwater Leak Detection Report: Enbridge's Underwater Leak Detection Report concluded that all the alternatives discussed in the report could not provide continuous real-time monitoring that was practical, cost-effective, or operationally proven. Furthermore, Enbridge was not aware that any of the technologies proposed in the report had previously been applied for continuous operational underwater pipeline leak detection.

The proposed alternatives in the Underwater Leak Detection Report ranged in costs from \$4 to \$40 million. However, the report used a net present cost assuming a 20-year operating and maintenance period. This means that Enbridge intends to operate the Line 5 pipeline at the same or an increased capacity for at least the next twenty years through Michigan's waterways.

Both optical camera options outlined in the Underwater Leak Detection Report would require 1,800 cameras on the dual pipelines. Furthermore, all alternatives provided in the report require external inspection of the pipeline, which contradicts the most effective proposed alternative under Enbridge's Anchor Strike Mitigation Report.

Coating Technologies Report: Enbridge's Coating Technologies Report concluded that the only technology that can be readily deployed on the dual pipelines is cathodic protection close interval survey (CP CIS), which Enbridge plans to execute in the summer of 2018. This survey requires an electrical connection from the pipeline structure to a voltmeter, which then takes measurements along the pipeline. However, the CP CIS technology does not satisfy the small-defect detection element outlined in the report. Therefore, small leaks could still go undetected even with the implementation of the CP CIS technology. The Coating Technologies Report does not address the fact that Enbridge's screw-anchor engineering efforts that have caused the Line 5 to lose coating in over 80 locations. Enbridge's report fails to explain how Enbridge will attempt to remedy this major design flaw in the installation of 22 anchors this summer, and then a possible 48 more.

The Coating Technologies report set out four essential elements, with more specific objectives under each element. The four elements in the report are: (1) small-defect detection, (2) large-defect detection, (3) submarine/offshore readiness, and (4) applicability to the dual pipelines. None of the alternatives provided in the study satisfy all the objectives under the four elements.

Anchor Strike Mitigation Report: Enbridge's Anchor Strike Mitigation Report demonstrated that the probability of a failure of an anchor strike to the existing dual pipeline in the Straits of Mackinac are two to three times higher than the values provided in the November 2017 Dynamic Risk alternative analysis report.

Enbridge's report concludes that the most effective mitigation option is to cover the dual pipeline with a protective barrier consisting of approximately 360,000 cubic yards of gravel and rock. This protective barrier would not allow for visual inspection of the pipeline and would significantly impede any external maintenance that must be completed on Line 5 within the Straits of Mackinac. Furthermore, this protective barrier option also poses significant environmental risks including: disturbance to fish habitat, disturbance to lake vegetation, impacts to water clarity, as well as potential of exposure to toxins during construction.

Finally, Enbridge's Anchor Strike Mitigation Report does not address the recent anchor strike that caused an estimated 600 gallons of dielectric fluid to enter the waters of Lake Michigan and dented Line 5 underwater pipelines in three different locations. This is a significant reminder of the unacceptable risks Line 5 pose to the region's economic lifeblood, the Great Lakes, as well as the urgent need for the State of

Michigan to develop a phased and sensible decommissioning plan that ensures safe, reliable energy sources for citizens and businesses in Michigan.

III. CONCLUSION AND RECOMMENDED COURSE OF CONDUCT AND ACTIONS

The Agreement improperly narrowed the impact and alternative studies to one exclusive alternative: the replacement and continuation of Line 5 in the Straits and the public trust waters and bottomlands of the State and its citizens. Based on the foregoing analysis and comments, FLOW recommends that the officials, departments, and State of Michigan take the following steps and actions:

1. Postpone or end implementation of the November 2017 Agreement unless and until Enbridge submits an application under the GLSLA and obtains approval of an agreement to use the bottomlands of the Great Lakes in the Straits of Mackinac consistent with the public trust in the waters and bottomland of the Great Lakes and the mandate to follow the rule of law under Art.5, Sec. 8 of the Michigan Constitution;
2. Postpone or end implementation of the Agreement until the Governor and state officials and departments have required, considered, and determined that there is no feasible and prudent alternative to the replacement of Line 5 in the Straits, St. Clair River, and to the proposed upgrade of Line 5 for continued use and operation in Michigan, as required by the GLSLA, Rule 1015 of the GLSLA, the MPSC public utility law for siting and necessity and convenience, and the MEPA;
3. Postpone any decision or implementation of the Agreement unless there has been a comprehensive study and determination of the likely and potential adverse impacts or effects to the water, air environment, and public health and property for the Straits crossing, the St. Clair River crossing, and the entire 645-mile Line 5, including the 400 water crossings;
4. Postpone all state decisions concerning a tunnel option or other alternative in the Straits unless 1 and 2 above have been satisfied, and a full geo-technological study of the extent of unconsolidated sediments, rocks and glacial materials, bedrock, limestone and other formations have been determined.
5. Postpone any decision regarding the supplemental studies on leak detections, coating, and strike mitigation until the state and MDEQ have provided adequate time for review and comment as intended by the public notice issued on June 29 (the time was simply too short to comply with the intent and purpose of the notice).

Should you have any questions or desire further information, we are willing to meet with you and technical experts to discuss the above. Thank you.

Sincerely yours,



James Olson
President



Elizabeth R. Kirkwood
Executive Director

cc: U.S. Senator Peters
U.S. Senator Stabenow
Representative Bergman
Representative Kildee