



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

March 5, 2020

The Mackinac Straits Corridor Authority and Board Members

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VIA ELECTRONIC SUBMISSION

RE: THE MACKINAC STRAITS CORRIDOR AUTHORITY REQUIREMENTS FOR AUTHORIZATION AND APPROVAL OF THE 2018 DNR GREAT LAKES BOTTOMLANDS EASEMENT TO THE MSCA, THE ASSIGNMENT OF 2018 DNR EASEMENT TO ENBRIDGE, THE LEASE OF PUBLIC TRUST SOILS BENEATH THE WATERS OF THE GREAT LAKES FOR THE USE AND OCCUPANCY BY ENBRIDGE OF THE CORRIDOR TUNNEL AND NEW ENBRIDGE LINE 5 PIPELINE IN THE STRAITS OF MACKINAC

Dear Members of the Mackinac Straits Corridor Authority:

For Love of Water (“FLOW”)¹ submits this letter to assist the Mackinac Straits Corridor Authority (“MSCA”) in complying with the legal requirements necessary to authorize and approve the proposed Corridor and Tunnel, together with easement, assignment of easement, and long-term lease and occupancy of the public trust bottomlands of the Great Lakes for the location and private use and purpose of the corridor to locate, construct, and operate a proposed new Line 5 30-inch pipeline in the soils,

¹ FLOW is an independent law and policy center dedicated to the protection of water, health, and communities in the Great Lakes Basin, with offices in Traverse City, Michigan. Since 2013, FLOW has investigated, researched, and published a dozen reports addressing the risks of the 67-year-old Line 5, existing alternatives to Line 5, worst-case scenarios, and economic damage and loss, and violations of the state’s agreement with Enbridge and state laws, including the strict protections for the public trust waters and bottomlands of the Straits of Mackinac, Lake Huron, and Lake Michigan. All of these reports are available for viewing on FLOW’s website, www.forloveofwater.org.

bottomlands beneath the waters of the Straits of Mackinac.² Based on our research and analysis, FLOW urges the MSCA to halt and otherwise postpone any further implementation of the Tunnel Corridor and Tunnel Pipeline Line 5 project unless and until the authorizations and approvals required by public trust law, both common law and statute, have been applied for and obtained.

1. The Second Agreement, October 2018

The Second Agreement between the State and Enbridge called on the parties to negotiate, among other things, an agreement for a corridor tunnel and new Line 5 pipeline in and through the soils and bottomlands beneath the waters of the Straits of Mackinac. Paragraph G contemplated that the Mackinac Bridge Authority (“MBA”) and/or MSCA would assist in providing all of the public land, ownership, lease, other agreements, and oversight of the tunnel and new pipeline for Enbridge, to be completed in 7 to 10 years. The Second Agreement also contemplated that the MSCA would provide a lease for 50 years for Enbridge to occupy and use the tunnel for its new proposed 30-inch diameter Tunnel Line 5 Pipeline. Specifically, the Second Agreement intended that the MSCA and/or Enbridge would be required to obtain all authorizations, approvals, and permits for the location, construction, and operation of the tunnel, and the new Tunnel Line 5 Pipeline:

G. Further Agreements for a Straits Tunnel. The State has *proposed* that, together with housing the Line 5 Straits Replacement Segment, the Straits Tunnel could accommodate multiple utilities... The State and Enbridge agree to *initiate discussions*, as soon as practicable, *to negotiate a public private partnership agreement with the Mackinac Bridge Authority (“Authority”) with respect to the Straits Tunnel* for the purpose of locating the Line 5 Straits Replacement Segment and, to the extent practicable, Utilities in that Tunnel (hereinafter “Tunnel Project Agreement”). The Tunnel Project Agreement *shall* include provisions under which *the Authority will provide property necessary for the construction of the Straits Tunnel*... Such agreement *shall* also provide that *the Authority shall: (a) obtain or support Enbridge in obtaining the necessary permits, authorizations, or approvals for the construction and operation of the Tunnel and the Line 5 Straits Replacement Segment; and (b) upon completion of the construction of the Straits Tunnel, the Authority shall assume ownership of the Straits Tunnel.* Simultaneous with the execution of such agreement, *the*

² On November 1, 2018, FLOW [submitted a letter](#) to the Mackinac Bridge Authority, former Governor Rick Snyder, former DEQ Director Heidi Grether, former DNR Director Keith Creagh, and former Attorney General Bill Schuette. This letter explains the critically necessary legal requirements for proper authorization and approval of a tunnel corridor and tunnel pipeline in the soils and bottomland under the common law public trust doctrine and statutes of Michigan that govern the use, occupancy, control, and operation of a private corridor tunnel, pipeline, and operation by a private corporation in the public trust waters and soils beneath the Great Lakes. FLOW’s November 1, 2018 letter is incorporated by reference. It should be noted that officials, staff, and agents of Enbridge, Enbridge Energy, and affiliates were present at the meeting of the MBA when the FLOW letter was presented. Enbridge and state officials were put on notice of the legal requirements under public trust law and statutes of Michigan at the November 8, 2018 meeting, and that Enbridge proceeded at its own risks.

Paragraph G of the Second Agreement authorizes the negotiation of a public private partnership agreement (‘PPP’) between the Mackinac Bridge Authority and Enbridge with respect to the proposed Straits Tunnel. As explained in the November 1, 2018 letter, typically, the state may invest in companies or companies may invest or participate with states (whether by acquiring assets, leasing assets, investing, owning, securities or rights or otherwise), or provide loans and guarantees and make other kinds of financial provisions to or in respect of private companies, including rights to step in and own company assets in event of default. However, such PPPs are *not* to be used by government to assist a private company to build a project that aides a private corporation or business or which provides long-term control of a facility or pipeline for its own corporate purposes—such as the state’s proposal in Paragraph G.

Authority would execute a lease or other agreements to: (a) authorize Enbridge's use of the Straits Tunnel for the purpose of locating the Line 5 Straits Replacement Segment for as long as the Line 5 Straits Replacement Segment shall be in operation by Enbridge. (emphasis added)

2. Act 359, Public Acts of 2018

Act 359 establishes the Mackinac Straits Corridor Authority, as a separate state entity, for purposes of entering into agreements; assisting in providing public lands, including bottomlands; easements, assignments, leases, and other interests to locate, occupy, use, construct, and operate a corridor tunnel and Enbridge's proposed new Line 5 Pipeline in and through the soils and substrate beneath the waters of the Straits of Mackinac, Lake Michigan. Act 359 explicitly contemplates and requires that the MSCA and/or Enbridge obtain all necessary permits and approvals to accomplish these purposes.³

Section 14a. (4) The Mackinac bridge authority may perform *all acts necessary to secure the consent of any department, agency, instrumentality, or officer of the United States government or this state* to the construction and operation of a utility tunnel and the charging of fees for its use, *and to secure the approval of any department, agency, instrumentality, or officer of the United States government or this state required by law to approve* the plans, specifications, and *location* of the utility tunnel or the fees to be charged for the use of the utility tunnel.

Sec. 14d.(4)(g) That the proposed tunnel agreement *does not exempt any entity that constructs or uses the utility tunnel from the obligation to obtain any required governmental permits or approvals* for the construction or use of the utility tunnel. (emphasis added)

3. The 2018 Tunnel Agreement

Pursuant to Act 359, the MSCA entered into and authorized a Tunnel Agreement with Enbridge to obtain public lands, bottomlands, easements, assignments, leases, and other occupancy and use agreements required to locate, use, construct, and operate a tunnel and for Enbridge to locate, use, construct, and operate the proposed new pipeline through the soils beneath the waters of the Straits of Mackinac. The Tunnel Agreement explicitly requires the MSCA and Enbridge, or Enbridge by itself, to obtain all required governmental permits, approvals, and authorizations required for the tunnel and the Enbridge-proposed pipeline under the Straits of Mackinac.

Paragraph 7.9 Permits and Compliance with Applicable Law (a) Enbridge and its contractors and subcontractors shall construct the *Tunnel in compliance with the requirements of applicable law and of any required Government Approvals and Permits.* (emphasis added)

4. The MSCA cannot approve and the MSCA and Enbridge cannot implement the 2018 Tunnel Agreement, the 2018 Easement, the 2018 Assignment of Easement, the Lease, or any other Use or Occupancy/Location Agreement for a corridor tunnel and tunnel pipeline unless and until these conveyances, leases, easements, and other occupancy and use agreements have been authorized by the common law public trust doctrine, Sections 32502, 32503 et seq. of the Great Lakes Submerged Lands Act, Part 325, NREPA, MCL 324.32501 et seq., and/or Section 2120, Part 21, NREPA, MCL 324.2129.

a. The Common Law of Public Trust in the Soils Beneath the Great Lakes

³ Act 359, Public Acts of 2018, Sec. 14a(1)-(3).

It is important for the MSCA to understand that the State of Michigan, including the MBA and the authorizing statute, are subject to the public trust doctrine and law that applies to the Great Lakes and the soils under them. Like all of the other states, when Michigan joined the United States in 1837, the State of Michigan took title, absolutely, as sovereign for its citizens under the “equal footing” doctrine to all of the navigable waters in its territory, including the Great Lakes, and “*all of the soils under them*” below the natural ordinary high water mark.⁴ All of these waters and the soils beneath them are held in and protected by a public trust.⁵ The public trust doctrine means that the state holds these waters and soils beneath them in trust for the public for the protection of preferred or dedicated public trust uses of navigation, fishing, boating, swimming, bathing, drinking water, and other recreation. As a general rule, there can be no disposition, transfer, conveyance, occupancy, or use of any kind of these public trust waters and the soils beneath them, unless there is a statute or law that expressly authorizes the proposed disposition, occupancy, or action and the statute contains and requires a consideration that the following standards for the narrow exception to the rule have been duly satisfied:⁶

- (1) The proposed disposition, occupancy, or action predominantly serves or enhances a public trust interest or interests (such as navigation, fishing, etc.), not a private one; and
- (2) The proposed disposition, occupancy, or action will not interfere with or impair the public trust waters, soils, habitat, wildlife like fish and waterfowl, or one or more of the public-trust uses.

Illinois Central R Rd v Illinois, 146 U.S. 387 (1892); *Obrecht v National Gypsum Co.*, 361 Mich 299 (1960). The public trust doctrine and its legal mandates are irrevocable.⁷

b. Great Lakes Submerged Lands Act of 1955 (“GLSLA”): Limited conveyances, leases, agreements, or actions over, on, in, or through the soils and bottomlands of the Great Lakes.

Two years after the passage of Act 10, Public Acts of 1953, which provided for easements for public utilities, the legislature enacted the GLSLA. As amended, the GLSLA prohibits any conveyance, lease, agreement, occupancy, use, or other action in the waters or on, in, through, or under the bottomlands of the Great Lakes, unless authorized by the Michigan DEQ pursuant to the public trust standards in the GLSLA and the common law of the public trust doctrine. Because Act 10 is limited to easements and the GLSLA applies to any conveyances, leases, or other agreements and occupancy of these public trust bottomlands, Act 10 does not apply.

As a threshold matter, the State and Enbridge must first obtain authorization under the GLSLA for the public-private partnership to establish a long-term agreement for the 99-year lease and occupancy agreement for a tunnel or pipeline in or through the soils and bottomlands of the Straits of Mackinac.

This part shall be construed to *preserve and protect the interests of the general public* in the lands and waters described in this section...to provide for the sale or lease or other disposition...or permit filling in [including dredging or removal of materials]...If it is determined by the department that the public or private use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, boating, or navigation or

⁴*Shively v Bowlby*, 14 S. Ct. 548 (1894); *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); *State v Venice of America Land Company* 160 Mich 680 (1910); *Glass v Gackle*, 473 Mich 667 (2005).

⁵ *Id.*; see also *Obrecht v National Gypsum*, 361 Mich 299 (1961).

⁶ *Id.* p. 416.

⁷ *Illinois Central R Rd v Illinois*; *Obrecht v National Gypsum Co.*, *supra*.

that the public trust in the state will not be impaired by those agreements use, sale, lease or other disposition.”⁸

* * *

(4) Agreements for lands or water... described in section 32502 may be granted with local units of government for public purposes.⁹

The Governor, state agencies, and Enbridge have not sought or obtained authorization based on the GLSLA and its rules for the Second Agreement, any agreement with the MBA, or for any other action or use called for by the Second Agreement. State officials or Enbridge may represent that the 2018 Agreements, the Tunnel Agreement, the 2018 DNR Easement, the MSCA Assignment of the DNR Easement, and the Lease for tunnel and the use of tunnel for the new Line 5 Pipeline in the Straits are not subject to the public trust doctrine, the GLSLA, or Section 2129, MCL 324.2129. Negotiators and parties knowingly manipulated the legal description of the DNR Easement, the Assignment, and Lease for the Tunnel Corridor and New Line 5 Pipeline in the tunnel in a calculated attempt to bypass the State’s sovereign title and public trust interest in the waters and soils beneath the Great Lakes. They inserted the following legal description:

... the Grantee, and to its successors and assigns, a 1,200 foot wide right of way and a full easement and right to place, construct, operate, maintain, inspect, protect, repair, use, and remove an underground tunnel (within which one or more pipelines, and or one or more other utility lines... may be located) through and across all underground lands and interests in the underground lands, *specifically lands located beneath the lakebed, to which the state has title* that may be necessary or convenient to the placement and construction of such underground tunnel within the area of 600 feet on each side of the centerline... Their easement and right of way *do not include any lands or interests in land on or above the lakebed.*

The negotiators and parties representations and attempt to bypass the GLSLA, public trust law, and the public trust law standards that must be read into Section 2129 constitutes one of most egregious, if not the most egregious, attack on the State and its citizens’ rights and sovereign public trust interests in the history of the State of Michigan. This attempt was and is flatly wrong, and must be rejected by MSCA, the Director of the EGLE, and Director of the DNR, who represent the citizen legal beneficiaries of the State of Michigan and have a solemn duty to protect the public trust and public trust uses in the soils and waters of the Great Lakes. Based on numerous United States Supreme Court decisions, including *Shively* and *Illinois Central*, *supra*, and Michigan Supreme Court decisions, including *Obrecht and Venice of America Land Company*, *supra*, the State took sovereign title to the waters and “all of the soils” beneath the Great Lakes in trust, public trust, on admission to Statehood. This trust is irrevocable, irrevocable, and cannot be violated by bureaucratic, legislative, or legal invention.

Enbridge cannot proceed and the MSCA and State cannot proceed until the required authorizations under public trust law have been applied for and obtained, if in fact and law they can be obtained at all under the standards of public trust law and the GLSLA. The plain meaning of the GLSLA and the required authorizations to lease or dispose of or use public trust soils held in public trust cannot be avoided. In fact, it is a violation of the public trust doctrine and GLSLA to make such statements.¹⁰ Enbridge, and the

⁸ MCL 324.32502; see also 324.32503, 324.32504, 324.32505(4), 324.32512.

⁹ MCL 324.32505(4).

¹⁰ The State’s, Enbridge’s, and MSCA’s actions to date violate and are entirely inconsistent with the GLSLA and public trust jurisdiction over and legal duty to protect the waters of the Great Lakes and soils beneath them. E.g., the GLSLA expressly bans oil and gas drilling and use of the soils for bores and pipelines in the soils miles beneath the surface of the bottomlands of the Great Lakes. GLSLA, MCL 324.32503(2).

DNR and the EGLE are put on notice that they proceed in violation of the public trust and the GLSLA at their own risk and expense. No agreement or lease can be authorized for a tunnel leased for 99 years for Enbridge's crude oil pipeline because (1) it is not for a recognized public trust purpose such as fishing, boating, navigation, and recreation, and (2) it will interfere with and violate the public trust rights and uses of citizens, and the fishing rights and interests of the tribes rights protected by the Treaty of 1836. Moreover, under the GLSLA, the public trust soils and waters of the Great Lakes cannot be used for construction for a privately leased and operated tunnel and pipeline unless Enbridge proves under rule of law that there are no other feasible and prudent alternatives.¹¹

c. Act 10, Public Acts of 1953 (“Act 10”) Easements for Public Utilities over, under, or through State Lands and State-Owned Public Trust Bottomlands

In addition to the GLSLA, Section 2129 of the NREPA, which codifies Act 10, Public Acts of 1953, requires express authorization by the DNR pursuant to the delegated authority of the legislature, for any easements “over, through, under, and upon any and all lands belonging to the State,” including “the unpatented lake bottomlands belonging to or held in trust,” such as the Straits of Mackinac. First, it should be noted that Act 10 delegates to the DNR authority to grant *easements*, but it does *not* authorize leases, occupancy agreements, or any other form of conveyance or interest in the soils and water of the Great Lakes. As noted above, the public trust in these soils and water is irrevocable or irrepealable. Therefore, any decision by the DNR to grant an easement under Section 2129 must be based on a review, consideration, and findings to assure such easement is not void under the standards imposed by the common law public trust doctrine. Further, any form of conveyance or agreement for use or occupancy is subject to the GLSLA and must be authorized by the EGLE.

Leases can only be authorized by the EGLE, and then only to the extent authorized based on the findings required by the GLSLA, *supra*.

Second, it is stressed that Section 2129 does not contain the required public trust standards set forth at the end of Section 2, in the GLSLA, and does not contain the standards for the legally required authorization of any easement, use, conveyance or transfer of public trust soils as required by *Illinois Central R Rd v Illinois* and *Obrecht v National Gypsum Co.*, *supra*.

Third, the 1953 easement for the existing Line 5 in the Straits was granted without the required findings for the narrow exceptions set forth in Section 2 of the GLSLA, above. Fourth, the MSCA ownership and lease to Enbridge under the proposed public-private partnership in Paragraph G of the Second Agreement has not been authorized under the GLSLA, and has not been authorized by any other statute of the State.

Finally, it should be noted that Act 359 cannot grant use, easements, leases, assignments, or occupancy of soils under the public trust doctrine, unless there is an express statute that delegates to an agency to make the findings required by *Illinois Central* and *Obrecht*. Of course, this is exactly why the GLSLA was enacted in 1955; it supplies the standards lacking in the former Act 10, Section 2129, or any other law purporting to authorize the location, easement, use, occupancy, leasing, or other conveyance document of the public trust soils beneath the waters of the Great Lakes and Michigan's navigable waters.

d. The Michigan Environmental Protection Act: duty to consider and determine no likely effects or no feasible and prudent alternatives.

Article 4, Sec. 52 of the Michigan 1963 Constitution mandates that the state legislature shall enact laws that protect the air, water, natural resources, and public trust in those resources from pollution or impairment or risk of degradation or harm. The GLSLA represents a legislative enactment consistent with

¹¹ GLSLA Rule 1015. R 322.1015.

the protection of the public trust in the waters and natural resources of the State. The Michigan Environmental Protection Act of 1970 (“MEPA”) is the legislature’s constitutional commitment to Article 4, Sec. 52.¹²

The MEPA establish substantive and procedural duties and legal mandates than those that existed when the MBA was established in 1952. The Michigan Supreme Court ruled that the MEPA is the “legislative response to the constitutional commitment” mandated by Art 4, Sec. 52. The Courts have consistently ruled that the MEPA imposes a substantive duty on any public body or entity to prevent harm or degradation of water, natural resources, and public trust.¹³ In addition, the MEPA requires agencies or any other public body (like the MBA) to consider and determine the potential and likely effects and feasible and prudent alternatives to the proposed action *before making any decision* to approve or authorize the action.¹⁴

It is important to understand that the MSCA and the state’s constitutional and legal duties to protect the paramount interests of the waters, natural resources, and public trust are critical to any decision by the MBA that would implicate it in the State and Enbridge Agreement to build a tunnel and new pipeline for Enbridge. To this end, the MSCA must follow the duty to comply with public trust standards for the transfer of any public trust soils and bottomlands; the duty to comply with the GLSLA; the duty to comply with the MEPA and Art. 4, Sec. 52; and the duty to consider and determine no likely effects and to consider alternatives under the GLSLA and the MEPA.

CONCLUSIONS

The negotiators and parties representations and attempted manipulation of these documents to bypass the GLSLA, public trust law, and Section 2129 and its necessarily implied requirements under public trust law constitutes one of most egregious, if not the most egregious, attack on the State and its citizens’ rights and sovereign public trust interests in the history of Michigan. This attempt was and is flatly wrong, and must be rejected by the MSCA and the state officials at the head of the DNR and the EGLE. Enbridge cannot proceed, and the MSCA cannot proceed until the required authorizations under public trust law have been applied for and obtained, if in fact and law they can be obtained at all under the standards of public trust law and the GLSLA. The plain meaning of the GLSLA and the required authorizations to lease or dispose of or use public trust soils held in public trust cannot be avoided. In fact, it is a violation of the public trust doctrine and the GLSLA to make such statements.¹⁵

Enbridge, and the DNR and the EGLE are put on notice that they proceed in violation of the public trust and the GLSLA at their own risk and expense. No agreement or lease can be authorized for a tunnel leased for 99 years for Enbridge’s crude oil pipeline because (1) it is not for a recognized public trust purpose such as fishing, boating, navigation, and recreation, and (2) it will interfere with and violate the public trust rights and uses of citizens, and the fishing rights and interests of the tribes rights protected by the Treaty of 1836. Moreover, under the GLSLA, the public trust soils and waters of the Great Lakes

¹² MCL 324.1701 et seq.

¹³ *Ray v Mason Count Drain Comm’r*, 393 Mich (1975).

¹⁴ *Highway Comm’n v Vanderkloot*, 392 Mich 159 (1974).

¹⁵ The State’s, Enbridge’s, and MSCA’s actions to date violate and are entirely inconsistent with the GLSLA and public trust jurisdiction over and legal duty to protect the waters of the Great Lakes and soils beneath them. E.g., the GLSLA expressly bans oil and gas drilling and use of the soils for bores and pipelines in the soils miles beneath the surface of the bottomlands of the Great Lakes. GLSLA, MCL 324.32503(2).

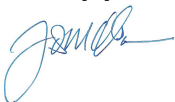
cannot be used for construction for a privately leased and operated tunnel and pipeline unless Enbridge proves under rule of law that there are no other feasible and prudent alternatives.¹⁶

The MSCA must comply with and obtain all permits, approvals, and authorizations, and direct Enbridge to apply for and obtain all permits, approvals, and authorizations required for the 2018 Tunnel Agreement, the 2018 DNR Easement and 2018 MSCA Assignment of DNR Easement, the Lease, and the provisions for continued use of existing Line 5 pending authorizations, if any, location, use, and construction and operation, if at all, of the proposed Corridor Tunnel and Enbridge Tunnel new Line 5 pipeline in the Straits of Mackinac. Unless and until the MSCA and/or Enbridge have obtained the required authorizations for the DNR Easement, the Assignment of the DNR Easement, the 50-year Lease, and other obligations to locate and use the soils and bottomlands of the State as required by the public trust doctrine, the GLSLA and/or Section 2129, NREPA, MSCA and Enbridge may not proceed with the location, use, occupancy, construction, and operation of any tunnel corridor or tunnel pipeline. Should MSCA and/or Enbridge proceed along a path toward the proposed tunnel corridor and tunnel pipeline, each and both do so at their own risk. Further, because the MSCA is housed in the Michigan Department of Transportation (“MDOT”), and is otherwise a unit or a governmental of the State of Michigan, the State, EGLE, DNR, Michigan Public Service Commission, and MDOT, and Enbridge, should not proceed, and if they do proceed, they each severally and jointly do so at their own risk, cost, and expenses. Under the common law of the public trust doctrine in Michigan, there is no adverse use, possession, equitable estoppel, or other similar legal doctrine contrary or that constitutes a defense to the public trust in the waters and bottomlands and soils beneath and the waters of the Great Lakes and connecting waters.

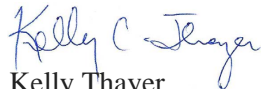
The MSCA is also subject to Art 4, Sec. 52 and the Michigan Environmental Protection Act, *supra*. It and/or Enbridge cannot proceed with the Tunnel and Tunnel Pipeline, or the Tunnel Agreement, without a comprehensive consideration and determination of likely effects and feasible and prudent alternatives under the MEPA, Part 17, NREPA, *Vanderkloot*, and *Ray v Masson County Drain Comm’r, supra*.

On behalf of FLOW, we thank you for the opportunity to provide this analysis and these comments. Should you have questions or want to discuss further, please advise.

Sincerely yours,



James M. Olson
President and Legal Advisor
FLOW



Kelly Thayer
Deputy Director
FLOW

Cc: Hon. Governor Gretchen Whitmer
Hon. Attorney General Dana Nessel
EGLE Director Liesl Clark
MDNR Director Dan Eichinger
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¹⁶ GLSLA Rule 1015. R 322.1015.