



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

December 18, 2018

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VIA ELECTRONIC SUBMISSION: DNR-StraitsTunnelComment@michigan.gov

RE: PUBLIC COMMENTS ON PUBLIC ACT 359, THE THIRD AGREEMENT BETWEEN THE STATE OF MICHIGAN AND ENBRIDGE, THE PROPOSED TUNNEL AGREEMENT BETWEEN THE MACKINAC STRAITS CORRIDOR AUTHORITY AND ENBRIDGE, AND THE PROPOSED EASEMENT BETWEEN DNR AND MSCA, AND THE EASEMENT ASSIGNMENT TO ENBRIDGE.

Dear Governor Snyder, Attorney General Schuette, DNR Director Creagh, DEQ Director Grether, and Mackinac Straits Corridor Authority Board:

For Love of Water (“FLOW”) is a Michigan nonprofit corporation dedicated to researching, evaluating, and providing sound law and policy to protect the waters of Michigan and the Great Lakes, their bottomlands, aquatic resources, and the public trust in these lands, waters, and their protected public trust uses.

Michigan has an unparalleled endowment of freshwater. For decades, we practiced unparalleled stewardship of these waters. Our State Constitution of 1963 was foresighted in its declaration that conservation is a paramount public priority and in its mandate to the Legislature to enact laws to protect

laws to protect our natural resources. Our public officials generally acted in a way consistent with that mandate.

What we are writing about today is an appalling departure from that tradition and mandate. The action you are contemplating abandons all but the pretense of deliberative decision making and is unconstitutional in its substance, philosophy, and effect.

For the past five years, FLOW has dedicated significant legal, technical, and scientific expertise to evaluating Enbridge's Line 5 pipelines and educating state leaders about the legal requirements and their role as public trustees to protect the communities and citizens who are the legal beneficiaries of the irrevocable public trust doctrine in the Great Lakes. FLOW has submitted numerous independent reports and public comments regarding Line 5 and the applicability of the public trust doctrine and Great Lakes Submerged Lands Act, Part 325 of the Natural Resources and Environmental Protection Act ("NREPA"), to the Straits of Mackinac and waters of Lake Huron and Lake Michigan. The legal fact is the State of Michigan has primary jurisdiction and control over Enbridge Line 5 in the Straits of Mackinac based on (1) the 1953 Easement, (2) the exercise of the state's property power, (3) the common law public trust doctrine, (4) the Great Lakes Submerged Lands Act ("GLSLA"), (5) Michigan Environmental Protection Act ("MEPA"); and (5) the police power regarding conservation and protection of Michigan's air, water, and natural resources or public trust in those resources.

The agreements and proposed actions you are considering today are an abandonment of the requirements and duties imposed upon you by these authorities. Your agenda bears every sign of a predetermined decision. We urge you and the newly created Corridor Authority Board to cease this sham process and effort immediately.

I. DEFECTIVE PROCEDURAL PROCESS DESIGNED TO LOCK IN A 99-YEAR PRIVATE PIPELINE TUNNEL AGREEMENT

As a threshold matter, Enbridge and the State of Michigan are fast-tracking their master plan to seal a 99-year pipeline tunnel agreement under the Great Lakes. Why? It is apparently because the voters demanded change following eight years of weak state leadership on protecting Michigan's water resources and elected an incoming Governor and incoming Attorney General who campaigned to decommission Enbridge's risky, dented, cracked, and encrusted, 65-year-old pipeline operating in the heart of our lakes.

This three business-day public comment period on the proposed Third Agreement between the Governor and Enbridge, the tunnel agreement between the MSCA and Enbridge, and the DNR easement with MSCA and assignment to Enbridge violates the spirit of meaningful public insight and engagement on a deal with a foreign corporation that has extraordinary fiscal and legal implications over the next century and still ignores the ongoing risk of Enbridge's current Line 5 operations.

Moreover, it turns out that the State of Michigan in its joint agency press release dated Dec 13, 2018, at 4:35 p.m. announcing the three new agreements failed to include the actual easement between the DNR and the MSCA. The proposed easement link only previewed an "Assignment of Easement Rights for Utility Tunnel" among MSCA, DNR, and Enbridge, with no details on the legal basis to authorize this

public land transfer to a private foreign corporation. As a result, the public was only given one business day to review and analyze the DNR's signed-and-executed easement giving away public trust bottomlands for a private foreign oil corporation to operate and build pipeline tunnel for the next century. Just like the original 1953 Easement, this 2018 easement is flawed and provides no timetable certain for the DNR to revisit and renew or cancel the easement. Instead it authorizes a minimum of a 99-year lease agreement as contemplated in the proposed tunnel agreement, plus another 10 years if the easement is not yet being used for its intended purpose as a tunnel. This is an inexcusable, unconditional giveaway of a public trust resource for private benefit.

II. PUBLIC ACT 359'S CREATION OF A NEW TUNNEL AUTHORITY RAISES CONSTITUTIONAL AND OTHER SIGNIFICANT LEGAL QUESTIONS.

Signed into law less than one week ago at record lame-duck speed, Public Act 359 paved the way and established the legal avenue for the State of Michigan to enter into these three agreements with Enbridge. Specifically, P.A. 359 amends the 1952 Mackinac Bridge Authority enabling act and creates a new authority, the Mackinac Straits Corridor Authority ("MSCA"). The law then directs the MSCA to enter into an agreement or a series of agreements for the construction, maintenance, operation, and decommissioning of a utility tunnel." Enbridge Energy Corporation – the company that owns and operates Line 5 – remains unnamed in the legislation but indirectly referenced as part of the Governor's proposed tunnel agreement. Without having even seen the terms and conditions of the series of agreements that would implicate the State in a 99-year tunnel lease with Enbridge, the Senate passed Senate Bill 1197 on December 5, the House passed the bill with two amendments on December 11, 2018, and the Governor signed it into law the following day.

P.A. 359 raises significant constitutional and other legal issues about the overarching intent of amending a 66-year-old statute to circumvent modern environmental laws governing our public trust waters and bottomlands. As an initial matter, the law authorizes the Mackinac Bridge Authority to acquire a bridge *and a utility tunnel* and then later creates a separate authority to oversee the tunnel. This raises fundamental questions about whether this single purpose law runs afoul of Article IV, Section 24, of the Michigan Constitution, which reads, "No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title."

III. P.A. 359 AND THE THREE AGREEMENTS CANNOT BE IMPLEMENTED BECAUSE THEY DO NOT COMPLY WITH THE COMMON LAW PUBLIC TRUST DOCTRINE, THE 1955 GREAT LAKES SUBMERGED LANDS ACT, ART. 4, SEC. 52 OF THE 1963 MICHIGAN CONSTITUTION, AND THE MICHIGAN ENVIRONMENTAL PROTECTION ACT.

The State of Michigan, including the DEQ, DNR, and the MBA, and the authorizing statute and MSCA, 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 upon entry, 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.¹ All of these waters and the soils beneath them are held in and protected by a public trust.² 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 drinking water, bathing, navigation, fishing, boating, swimming, 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:³

- (1) The proposed disposition, occupancy, or action predominantly serves or enhances a public trust interest (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 Rd v Illinois (US S Ct, 1892); *Obrecht v National Gypsum Co.* (Mich S Ct, 1960).

Understanding the relationship among state agencies, the MBA, the MSCA, and the State of Michigan's overarching public trust, constitutional, and statutory legal requirements is critical because the MBA's and the MSCA's stand-alone powers and authority also do not satisfy our modern legal regime designed to protect the public interest and public trust resources. For example, the MBA Act exempts the actions of the authority to transfer public lands, bottomlands, and construct the bridge from "any approvals required from state boards or agencies." This would not comply with these requirements today. Moreover, this exemption is closely tied to the bridge anchored in public trust soils for the purpose of carrying the general public across the Straits of Mackinac. However, using the MBA Act to authorize the construction of a tunnel for a private pipeline would be inconsistent with the mandates, policies, and standards of the public trust doctrine, the GLSLA, the Constitution's Art IV, Sec. 52, the MEPA, and the banning of oil and gas drilling in the soils and bedrock under the Great Lakes.⁴

a. ACT 10: EASEMENTS FOR PUBLIC UTILITIES OVER, UNDER OR THROUGH STATE LANDS AND STATE-OWNED PUBLIC TRUST BOTTOMLANDS

The legislature enacted Act 10 in 1953 to authorize the state to grant easements over, though, 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 authorizes only easements, not leases or conveyances, which when it comes to public trust bottomlands are extinguishable or revocable. Second, it is stressed that Act 10 does not contain the required public trust standards set forth at the end of Section II, above. Third, the 1953 easement for the existing Line 5 in the Straits was granted without the required findings for the narrow exceptions set forth above. Fourth, the MBA

¹ *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 Goeckel*, 473 Mich 667 (2005).

² *Id.*; see also *Obrecht v National Gypsum*, 361 Mich 299 (1961).

³ *Id.* p. 416.

⁴ GLSLA, MCL 324.32503(2).

ownership and lease to Enbridge under the proposed public-private partnership in Paragraph G of the Agreement is not authorized by the plain meaning of Act 10. Rather, if authorized at all, it would be subject to authorization for a conveyance or leasing of state public trust bottomlands under the provisions of the Great Lakes Submerged Lands Act, discussed immediately below.

b. GREAT LAKES SUBMERGED LANDS ACT OF 1955 (“GLSLA”): LIMITED CONVEYANCES, LEASES, AGREEMENTS, OR ACTIONS OVER, ON, IN, THROUGH, SOILS AND BOTTOMLANDS OF THE GREAT LAKES; DNR’S EASEMENT TO MSCA AND ASSIGNMENT TO ENBRIDGE IS SUBJECT TO THE GLSLA.

Two years after the passage of Act 10, 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 DNR easement to the MSCA for a tunnel cannot be signed or granted without authorization under GLSLA; 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 that the public trust in the state will not be impaired by those agreements use, sale, lease or other disposition.”⁵

* * *

(4) Agreements for lands or water...described in section 32502 may be granted with local units of government for public purposes.⁶

Based on the GLSLA and its rules, the Governor, state agencies, and Enbridge have not sought or obtained authorization for the Second and Third Agreements, the proposed tunnel agreement, and the DNR easement with the MSCA. While state officials or Enbridge may represent that no authorization or agreements require approval under the GLSLA consistent with the public trust doctrine standards, these representations are flatly wrong. The plain meaning of the GLSLA and the required authorizations to lease or dispose of or use 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.

⁵ MCL 324.32502; see also 324.32503, 324.32504, 324.32505(4), 324.32512.

⁶ MCL 324.32505(4).

Moreover, because the legislature created the MBA to build the public Mackinac Bridge into the public trust bottomlands and soils of the Straits for the “interests of the general public” in these waters and soils as a substitute for ferry service, the Mackinac Bridge, the MBA, and the MSCA are also subject to the public trust doctrine and GLSLA. 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 impair navigation and fishing, and cause massive disruption to fish, habitat, and the Straits during construction. By using the MBA and the MSCA, as trustee and representative of the public to protect and preserve the bridge for the general public, for a primarily private purpose wholly unrelated to the State of Michigan’s statutory responsibility, the Second and Third Agreements, tunnel agreement and DNR Easement violate the public trust doctrine and GLSLA. 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.⁷

c. THE MICHIGAN ENVIRONMENTAL PROTECTION ACT: DUTY TO CONSIDER AND DETERMINE NO LIKELY EFFECTS OR NO FEASIBLE AND PRUDENT ALTERNATIVES.

Article IV, Sec. 52 of the Michigan Constitution of 1963 mandates that the state legislature shall enact laws that protect the air, water, and natural resources, and public trust in those resources, from pollution, impairment, or destruction, or risk of degradation or harm. The GLSLA represents a legislative enactment consistent with the protection of the public trust in the waters and natural resources of the State. So does the Michigan Environmental Protection Act of 1970 (“MEPA”).⁸

Except for the public trust doctrine common law principles, which are irrevocable,⁹ Article IV, Section 52 of the state Constitution of 1963 and the MEPA establish new duties and legal mandates beyond 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. 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.¹⁰

It is important to understand that the MBA 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 MBA 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.

⁷ GLSLA Rule 1015. R 322.1015.

⁸ MCL 324.1701 et seq.

⁹ *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892).

¹⁰ *Highway Comm’n v Vanderkloot*, 392 Mich 159 (1974).

The design of the public-private partnership between the MBA and Enbridge in Paragraph G cleverly exploits the MBA Act's broad authority to assemble public lands and bottomlands,¹¹ exercise eminent domain,¹² and hide behind the exemption from any board or agency approvals.¹³ The legal fact of the matter is that the MBA Act's authority was expressly intended for the single mission and purpose in 1952 to build the Mackinac Bridge in and across the Straits of Mackinac. That mission has been accomplished. And since that time—over six decades ago—other laws have been understood to apply or new ones have been enacted. The underlying premise for using the MBA does not exist, because Paragraph G would use the Act for an entirely different and new objective, subject to new and continuing public trust, environmental, and other constitutional provisions, laws, and regulations. The most prudent decision or action the MBA can or should take is to reject the use of the MBA for these purposes, or at the very least work through the duties and exercise of due diligence imposed by the MBA Act, its heritage, and the laws of Michigan.

In sum, despite the statutory and agreement assertions that this private tunnel serves a public purpose, it is abundantly clear in P.A. 359 and all subsequent agreements that this is an unconstitutional entanglement of government for Enbridge's private purpose and substantial monetary gain. The law even anticipates future litigation in any "matter related to the utility tunnel" and requires the attorney general to provide for the costs of representing the MSCA and Enbridge. As such, P.A. 359 and any subsequent easements assigned to Enbridge for use and occupancy of soils and waters of the Great Lakes violate the public trust doctrine and the Great Lakes Submerged Lands Act, as they fail to satisfy the public purpose standard.

The State of Michigan and the MSCA should postpone any hasty decisions that dilute the Mackinac Bridge Authority's single-purpose mission to protect and maintain the bridge and that burdens the MSCA for the next century to take ownership responsibility for a risky private tunnel venture. Instead, they should direct Enbridge to submit a full and proper application under the GLSLA and other laws, with notice, hearings, and determinations under rule of law.

IV. THE NEW LAW AND THREE SUBSEQUENT AGREEMENTS BURDEN TAXPAYERS AND IMPOSE SUBSTANTIAL AND UNPRECEDENTED FINANCIAL AND LEGAL LIABILITY

A conventional "public-private partnership" or PPP involves government arrangements to secure private equity funding or participation for new government public projects, such as schools, highways, and hospitals, where government lacks the financial capacity to do it alone.¹⁴ PPPs are not intended for private funding or participation to build or aide a private project or purpose. As discussed below, this so-called "public-private partnership" between the State of Michigan and Enbridge burdens the taxpayers with unprecedented fiscal and legal liability, multimillion-dollar upfront planning oversight costs, and even a coordinated defense fund to protect the MSCA and Enbridge from future state legal challenges to this tunnel agreement.

¹¹ MCL 254.314.

¹² Id.

¹³ MCL 254.321.

¹⁴ See <https://www.foodandwaterwatch.org/insight/public-public-partnerships>. Since Michigan's Constitution of 1850, state government has been prohibited from aiding the construction of public works for private persons or purposes. Mich. Const 1963, Art. 3, Sec. 6.

Potential financial and legal liability remains a daunting issue because the MBA and the MSCA per MCL 254.302 are public benefit corporations and agencies of the State of Michigan. Entities can sue or be sued in their name for the purpose to provide and maintain a system of highways, bridges, and utility tunnels for the use and convenience of its inhabitants. Regardless of the amending legislation and agreements allowing the MSCA to contract with a Canadian corporate entity for the purpose of building a non-transportation tunnel, the MBA and/or MSCA will own and ultimately be legally responsible for the executive oversight of the project during the proposed tunnel's 99-year lease and overall lifetime. Moreover, appropriate indemnification and hold harmless provisions ultimately will not shield the MBA and/or the MSCA from all liability. In any situation of accident or negligent conduct, the MBA and/or MSCA will be a named defendant and will be financially responsible for any damages not covered by Enbridge's insurers.

Enbridge will respond that the entirety of its corporate assets will be subject to indemnification; however, this reality might occur only after years of litigation by the MBA and/or MSCA and attempts by Enbridge to sequester assets to other non-reachable Enbridge entities. Thus, regardless of lease or contract, the MBA and the MSCA have a non-delegable fiduciary duty to the people of the State of Michigan to protect, oversee, and maintain any artificial structure, be it the bridge or a tunnel that rests on public trust protected bottomlands of the Great Lakes.

While Article 5.2 of the proposed tunnel agreement between the MSCA and Enbridge claims that "Nothing in this Agreement will be deemed to obligate the expenditure of State Funds," the facts show otherwise. To sweeten the deal and complement the enabling legislation, P.A. 359, Gov. Snyder has made a \$4.5 million supplemental appropriations request for planning, oversight, and legal services related to the proposed Mackinac Straits tunnel project. This use of taxpayer monies to shoulder Enbridge's costs is simply unacceptable. The agreements then further appear to exempt Enbridge from any taxes under the Straits of Mackinac for the next 99 years.

The jewel in the crown, however, is the coordinated joint legal defense that is authorized in both the enabling act and the subsequent agreements. In the anticipated event that the incoming attorney general declines to represent the MBA or the MSCA in a matter related to the utility tunnel, P.A. 359, Section 14.d(5) enumerates seven causes of action that trigger the obligation of the attorney general to provide for the costs of representation by an attorney licensed to practice in this state chosen by the Mackinac Bridge Authority or the Mackinac Straits Corridor Authority. The mutually dependent tunnel agreement mimics this statutory language and also requires the Straits Corridor Authority to agree to a "coordinated defense" with Enbridge should anyone take legal action that challenges the validity of the tunnel agreement, a government approval, a permit, or the state's use of land for the project. The point of this legislative overreach is to intentionally and unlawfully tie the hands of Michigan's incoming elected Attorney General, thereby thwarting the will of the people, and violating the separation of powers between our democratic branches of government.

V. THE NEW LAW AND THE THREE AGREEMENTS “CURE” THE ONGOING 1953 EASEMENT VIOLATIONS

Just over a year ago, on November 13, 2017, the Governor himself said, “I am no longer satisfied with the operational activities and public information tactics that have become status quo for Enbridge,”¹⁵ after the company disclosed that it had misled state and federal regulators for at least three years and knew that its screw anchor design had actually caused pipeline coating gaps due to the powerful lake currents. Less than two weeks later, the Governor and Enbridge entered into the first of three agreements that set the wheels in motion to narrow and select the preferred tunnel alternative outside the rule of law, to devise an elaborate plan that would legally shield Enbridge from complying with modern environmental and Great Lakes statutes, and to cement Enbridge’s virtually unfettered risky pipeline operations in the Great Lakes for the next decade or more.

Over the past five years, FLOW has documented at least eight direct violations of the express terms of the 1953 Easement that authorizes Line 5 to occupy the lakebed of the Straits.¹⁶ They include: (1) Standard of Care as a Reasonably Prudent Person (See Section A of the Easement); (2) Indemnity Provision (Section J); (3) Pipeline Wall Thickness Provision (Section A (11)); (4) Pipeline Exterior Slats and Coating Requirements (Section A (9)); (5) Pipeline Minimum Curvature Requirement (Section A (4)); (6) Maximum Unsupported Span Provision (Section A (10)); (7) Federal Violation of Emergency Oil Spill Response Plan (Section A); and (8) State Violation under the Michigan Environmental Protection Act (Section A). Despite Enbridge’s history of repeated violations, coupled with other compelling reports on risk and alternatives, the State of Michigan never enforced the express terms of the 1953 Easement with Enbridge or even imposed rational precautionary measures on this hazardous oil pipeline. Instead, the state ordered multi-year studies under the supervision of an executive-ordered Task Force and Advisory Board with no conclusion. The Third Agreement between the State of Michigan and Enbridge is a total abdication of the state’s perpetual public trust duty to the citizens of Michigan in favor of a private Canadian multinational corporation whose uninterrupted oil transport and profit threatens 95 percent of America’s fresh surface water supply.

This Third Agreement expressly attempts to cure Enbridge’s ongoing violations related to its failing submerged pipeline infrastructure occupying our public waters and bottomlands of the Great Lakes. Incredibly, Article 4.2(e) states: “Based on currently available information, the state is not aware of any violation of the 1953 easement that would not be addressed and cured by compliance.” The assertion raises a host of questions. What currently available information is the state relying upon? How can the

¹⁵ Trevor Bach, “A submerged oil pipeline triggers a frigid protest,” The Washington Post, December 14, 2018 https://www.washingtonpost.com/national/health-science/a-submerged-oil-pipeline-triggers-a-winter-of-frigid-protest/2018/12/14/8b65fa12-fd56-11e8-862a-b6a6f3ce8199_story.html?utm_term=.3959edd3af3c; The Governor’s full press statement on November 13, 2017 stated: “Enbridge’s announcement today about Line 5 is deeply concerning. While it does not indicate any imminent danger for the Great Lakes, this causes significant concern for the long term. I am no longer satisfied with the operational activities and public information tactics that have become status quo for Enbridge. It is vitally important that Enbridge immediately become much more transparent about the condition of Line 5 and their activities to ensure protection of the Great Lakes.” https://www.michigan.gov/snyder/0,4668,7-277-57577_57657-452199--,00.html

¹⁶ FLOW letter to State of Michigan re: New Evidence Compels State of Michigan to Enforce Easement Violations and Eliminate Crude Oil Transport in Line 5 in the Straits of Mackinac, (March 9, 2017) <http://flowforwater.org/wp-content/uploads/2017/06/Final-Letter-re-corrosion-violations-3-9-17-SIZE-ADJUSTED.pdf>

state reach this conclusion when every past ROV inspection - in 2014 and 2016 - has revealed more previously unknown anchor spacing violations? Since most future inspection requirements are not triggered until 2024, obtaining evidence of noncompliance with the 1953 Easement clearly is not a priority. In addition, the Third Agreement “cures” other outstanding easement violations by including Article 5.2 (pipeline coating), Article 5.3 (maximum span on unsupported pipe, and Article 5, which amends the Second Agreement and caps Enbridge’s financial liability at \$1.87 billion despite other independent economic impact and damage analysis that estimate damage at \$6.3 billion,¹⁷ and a potential domino effect of damage disrupting Great Lakes commercial shipping and steel production, slashing jobs, and shrinking the nation’s Gross Domestic Product by \$45 billion after just 15 days.¹⁸

Despite the coordinated efforts to cure Enbridge’s ongoing easement violations, these mutually dependent agreements cannot remedy the pending contested cases challenging Enbridge’s joint anchor permit applications with the DEQ and the US Army Corps of Engineers. Without the agreement of the interested parties (Straits of Mackinac Alliance and the Grand Traverse Band of Ottawa and Chippewa Indians) who have filed the contested cases, the agreements are void, and cannot unilaterally alter those cases.

Why would the State of Michigan as public trustee ignore ongoing violations of anchor spacing, pipeline coating, insurance, and more and enter into a 99-year agreement with the same company caught lying to state and federal regulators about the true condition of its failing pipeline underwater infrastructure? The answer is perplexing; however, the effect of Public Act 359 and proposed implementing legal agreements is clear. Collectively, they guarantee and extend another 10 years of Enbridge operating the 65-year-old oil pipelines in the open waters of the Straits of Mackinac, thereby threatening the Great Lakes with a catastrophic oil spill. The irony is that this “state-sponsored” solution is actually increasing the likelihood of a Line 5 pipeline rupture in the Great Lakes and exponential costs that will potentially leave taxpayers on the hook for billions of dollars in oil spill damages and the costs of defending Enbridge’s private legal interests.

VI. THE NEW LAW AND THE THREE AGREEMENTS DEFIANTLY IGNORE THE IMMINENT RISK LINE 5 CURRENTLY POSES TO GREAT LAKES FOR ANOTHER DECADE OR MORE

Energy publications uniformly hail these agreements as the icing on Enbridge’s cake: “Michigan's Gov. Snyder signed legislation yesterday clearing the way for Enbridge (ENB, EEP) to proceed with building a tunnel for the 65-year-old Line 5 oil pipeline under the Straits of Mackinac connecting Lake Michigan and Lake Huron.”¹⁹ But other national media outlets like the *Washington Post* picked up the story and offered a more sobering analysis before the State of Michigan and its tribes and its people.

¹⁷ Richardson, Robby. MSU. “Oil Spill Economics: Estimates of the Economic Damages of an Oil Spill in the Straits of Mackinac in Michigan,” May 2, 2018 http://flowforwater.org/wp-content/uploads/2018/05/FLOW_Report_Line-5_Final-release-2.pdf

¹⁸ Richardson, Robby and Brugnone, Nate. Oil Spill Economics: Estimates of the Economic Damages of an Oil Spill in the Straits of Mackinac in Michigan – Addendum A: Multibillion-dollar Economic Impact to Great Lakes Shipping, Steel Production, and Jobs. November 20, 2018. http://flowforwater.org/wp-content/uploads/2018/12/ADDENDUM_MSU-for-FLOW_Line-5-Economic-Impact-Study_FINAL-11-20-2018.pdf

¹⁹ Carl Surran, “Michigan Reaches Deal for Enbridge Line 5 Tunnel Under Straits of Mackinac,” Seeking Alpha, December 14, 2018. <https://seekingalpha.com/news/3417174-michigan-reaches-deal-enbridge-line-5-tunnel-straits->

“The stakes could hardly be higher. The larger Great Lakes system supplies drinking water for some 40 million people, sustains thousands of plant and animal species and supports vital industries such as fishing, logging and tourism. (The Straits of Mackinac, where an expanse of dazzling blue freshwater ripples below one of the world’s great suspension bridges, offers one of Michigan’s most famous images.) ...

A spill at the Straits, perhaps the only place in the world where an oil pipeline travels through several miles of freshwater, could be unprecedented. Computer models predict a major rupture would release tens of thousands of barrels of oil, potentially contaminating more than 1,000 square miles of water and hundreds of miles of shoreline. The area has strong and frequently shifting currents. In winter, the lakes often freeze, which would dramatically complicate any cleanup effort.

“Every spill is devastating,” said Guy Meadows, director of the Great Lakes Research Center at Michigan Technological University, who led a state-commissioned [risk analysis](#) released in September. “There is no single worst-case scenario.”

Michigan remains scarred from one Enbridge disaster. In 2010, a different pipeline burst in the southern part of the state, ultimately releasing more than 1 million gallons of tar-like diluted bitumen into the Kalamazoo River watershed — one of the largest inland oil spills in U.S. history. More than two dozen spills have also occurred since Line 5 opened.

More recent revelations about its condition through the Straits, from the disintegration of protective coating to insufficient anchor supports, have inflamed the years-long debate. In April, a tugboat’s anchor collided with the pipe, denting it in three places. State officials have repeatedly faulted Enbridge for failing to communicate about problems.²⁰

VII. THERE ARE BETTER, SAFER, LESS COSTLY ALTERNATIVES THAN EXPLOITING THE MBA AND/OR THE MSCA AND IMPOSING RISKS ON THE MACKINAC BRIDGE, THE STRAITS, AND ENVIRONMENT FOR A TUNNEL AND PRIVATE PIPELINE.

While proponents of this deal argue that the proposed tunnel for Enbridge’s pipeline is a solution to the dangers and risks of major catastrophe inherent in the failing design of the existing 65-year-old Line 5 pipeline, this argument ignores several key facts:

- (1) Line 5 continues to operate as a high and unacceptable risk every day in our Great Lakes and 400 other water crossings in Michigan
- (2) Line 5 is 65-years-old and continues to rupture every year, including in 2018 with an additional 4 pipeline oil spills in Michigan alone;²¹

[mackinac](#) See also, Kallanish Energy, “Michigan approves legislation for Enbridge pipeline tunnel” December 14, 2018. <http://www.kallanishenergy.com/2018/12/14/michigan-approves-legislation-for-enbridge-pipeline-tunnel/>

²⁰ Trevor Bach, “A submerged oil pipeline triggers a frigid protest,” The Washington Post, December 14, 2018 https://www.washingtonpost.com/national/health-science/a-submerged-oil-pipeline-triggers-a-winter-of-frigid-protest/2018/12/14/8b65fa12-fd56-11e8-862a-b6a6f3ce8199_story.html?noredirect=on&utm_term=.4cdd8b88fe41

²¹ According to the National Wildlife Federation’s ongoing FOIA research, Enbridge’s Line 5 has ruptured 33 times since 1968, spilling over a million gallons of crude oil into Michigan’s air, water, and land.

- (3) Line 5 can be decommissioned in far less time than the seven to 10 years to build a tunnel;
- (4) Line 5 is no longer essential energy infrastructure for Michigan with viable alternatives to meet the U.P.'s propane needs²² and lower northern Michigan's crude oil transport needs,²³ and
- (5) Alternatives exist that do not require imposing on or implicating and burdening the MBA and/or the MSCA or integrity and safety of the Mackinac Bridge, and the citizens and tribes of Michigan.

With respect to Michigan's propane needs, a recent independent expert report from London Economics International, LLC (LEI)²⁴ demonstrates that if the Line 5 pipeline in the Straits of Mackinac is decommissioned, truck and rail can replace the supply of propane to the Upper Peninsula with an estimated consumer cost increase of approximately 5 cents per gallon, which would be lost in the normal fluctuation of propane prices. This small price increase would be lost in the noise of typical propane price volatility. The lowest-cost alternative options to Enbridge Line 5 would be truck or rail from Superior, Wisconsin.

Finally, the MBA and/or MSCA should be aware that this proposed tunnel and new pipeline has not been authorized or approved by the state as required by the laws of Michigan or federal government. In fact, once the rule of law is adhered to, it will be readily evident that the tunnel and new pipeline option is only one of other feasible and prudent alternatives. One alternative would allow Enbridge to adjust and use the excess design capacity in its 1,900-mile network of high-volume pipelines that run into and out of the Midwest,²⁵ including Line 6B (now Line 78) located across the southern part of the Lower Peninsula to Sarnia and Detroit; Line 6B can be easily adjusted to handle up to 800,000 barrels per day ("bbl/day")²⁶

<https://www.arcgis.com/apps/View/index.html?appid=f817f5abad9a4cb09e942c1941fd0060>; According to Enbridge spokesman Ryan Duffy, "Right now, [Line 5 is] our most inspected piece of pipeline in our current system," Beth LeBlance, "Line 5 tunnel deal may preempt promised Nessel suit," Detroit Free Press. Dec. 14, 2018 <https://www.detroitnews.com/story/news/local/michigan/2018/12/14/proposed-line-5-tunnel-deal-appears-preempt-promised-nessel-lawsuit/2313156002/>

²² London Economics International. *Assessment of Alternative Methods of Supplying Propane to Michigan in the Absence of Line 5*. (July 27, 2018). http://blog.nwf.org/wp-content/blogs.dir/11/files/2018/07/LEI-Enbridge-Line-5-Michigan-Propane_7_27_2018.pdf; See also FLOW's propane study (Summer 2017) <http://flowforwater.org/wp-content/uploads/2017/06/JR022-PROPANE-20170606.pdf>.

²³ London Economics International. *Michigan Crude Oil Production Alternatives to Enbridge Line 5 for Transportation* (Aug. 23, 2018) http://blog.nwf.org/wp-content/blogs.dir/11/files/2018/09/LEI-Enbridge-Line-5-Michigan-Oil-Production-8_23_2018.pdf

²⁴ London Economics International. *Assessment of Alternative Methods of Supplying Propane to Michigan in the Absence of Line 5*. (July 27, 2018). http://blog.nwf.org/wp-content/blogs.dir/11/files/2018/07/LEI-Enbridge-Line-5-Michigan-Propane_7_27_2018.pdf

²⁵ E.g., Enbridge anticipates construction for Phase II of the Line 61 Upgrade Project will be complete during the second quarter of this year. With completion of construction, Line 61 will have the infrastructure in place to transport up to 1.2 million barrels per day ("bbl/day") of crude (the amount it was permitted, designed, built, and successfully tested to carry in 2009). The pipeline is currently carrying approximately 930,000 bbl/day. Ultimately, volumes transported on the pipeline fluctuate based on our customers' needs. <http://www.enbridge.com/projects-and-infrastructure/public>.

²⁶ The original capacity of Line 5 in the Straits was 180,000 bbl/day. That was later increased with State approval to 300,000 bbl/day. Recently, Enbridge manipulated pressure capacity of the line and increased the flow volume to 540,000 bbl/day. However, records over the years show that the volume is closer to 400,000 bbl/day. "A Scientific and Legal Policy Report on the Transport of Oil in the Great Lakes" <http://flowforwater.org/wp-content/uploads/2015/09/FINAL-FLOW-9-21-15-REPORT-ON-ACTION-PLAN-AND-COMMENTS.pdf>. While an alternative is not required to achieve the volume desired by Enbridge, these pipelines can be easily adjusted to accommodate most of the volume handled by Line 5. Studies show that similar adjustments can be made to assure continued, safe delivery of propane for areas served in the Upper Peninsula, and the transport of smaller volumes of crude oil from Michigan's northern Lower Peninsula. "Eliminating the Line 5 Oil Pipelines' Unacceptable Risk to

for far less money, without the MBA, the MSCA, the Straits of Mackinac, and the current Line 5 that remains an unacceptable economic and ecological risk and that can be decommissioned over a relatively short period of time.

VIII. THE FUTURE OF LINE 5 IS UNCERTAIN WITH RAPIDLY CHANGING ENERGY MARKETS AND CLIMATE CHANGE RISKS.

The enabling Act and the subsequent agreements make faulty assumptions that favor and bend towards Enbridge's private corporate shareholder interests. The proposed tunnel agreement, for example, purports to create "a mechanism to ensure that a utility tunnel is built with sufficient technical specifications and is maintained properly *to ensure a long asset life* and secondary containment for any leak or pollution from utilities using the tunnel." 14(D)(4)(D) (emphasis added). The audacious underlying assertion here is that our society will continue to rely on a fossil fuel-based economy over the next 99 years (the length of the proposed tunnel lease agreement between Enbridge and the State of Michigan).

Given accelerating trends in fossil fuel divestment, finance and asset management, and the electrification of transportation, the State of Michigan's investment in fossil fuel infrastructure on this scale is a risky proposition and completely at odds with the urgent and universally recognized need to reduce GHG emissions. Accordingly, there is no realistic "mechanism" that Enbridge and the State of Michigan can craft to "ensure a long asset life" for Enbridge's Line 5 pipeline tunnel.

The fundamental current energy shift underscores the high risk associated with investing in multi-billion fossil fuel infrastructure assets like a new Line 5 pipeline tunnel under our Great Lakes. In fact, even the world's leading oil producers are abandoning the tar sands investments that drive Enbridge's Canadian oil transport roadmap into North America and the Great Lakes.

Finance/Asset management – Asset managers are under increasing pressure to divest fossil fuel holdings. As of 2018, nearly 1000 institutions have pledged to [divest \\$6.24 trillion](#) in fossil fuel assets. Examples include the Norwegian Sovereign Wealth Fund (\$910 billion), the Rockefeller Family Fund and the California Public Employees Retirement System fund (\$292 billion). Over [120 universities and colleges](#) have committed to fully or partially divest their holdings in fossil fuel companies.

Investment trends – Global investment in renewable energy [exceeded \\$333 billion in 2017](#) while investment in fossil fuels and nuclear energy totaled \$144 billion. At the same time,

- A recent *Wall Street Journal* analysis indicates shale oil and gas sector has [lost \\$280 billion](#) since 2007.
- Seven international oil companies – Exxon Mobil, Conoco Phillips, Statoil, Koch Industries, Marathon, Imperial Oil and Royal Dutch Shell – will not need Enbridge's future pipeline services as they have announced that they are [writing off tar sand assets](#) in Alberta.

the Great Lakes through a Comprehensive Alternatives Analysis and Systems Approach," <http://flowforwater.org/wp-content/uploads/2015/12/FLOW-Composite-Report-12-14-15-FINAL-1.pdf>. In other words, Line 5 or a new massive tunnel to accommodate a new Line 5 is not necessary for the fundamental needs of Michigan residents, or for that matter Enbridge. When Enbridge doubled the design capacity of Line 6b across southern Michigan it testified before the Michigan Public Service Commission that the new line would meet all of its present and future needs. "FLOW Public Comments Objecting to Enbridge's Application to DEQ & Corps for Anchoring Supports" <http://flowforwater.org/wp-content/uploads/2016/08/FLOW-8-24-16-Final-Letter-to-DEQ-USCOE-Joint-App-Enbridge-for-Supports-GLSLA-CWA.pdf>. In re Enbridge Energy, Limited Partnership Application Case No. U-17020, Pre-Filed Direct Testimony of Mark Sitek And Exhibits, p 25. https://www.michigan.gov/documents/mpsc/u-17020_01-31-13_569385_7.pdf.

- [New Zealand](#) and Ireland have recently announced their intentions to decarbonize their economies.
- Xcel Energy, electricity provider to eight states, announced that it will [end the use of fossil fuels](#) and decarbonize its entire electric generation capacity.

Electrification of transportation– Recent petroleum sector forecasts by firms specializing in energy trends like Bloomberg, Navigant, and Goldman Sachs, predict that the transition to electric vehicles will accelerate quickly with a corresponding, precipitous [drop in the demand](#) for transportation fuels.

- The world’s major auto manufacturers are validating these predictions. General Motors, VW, Volvo, and others are making clear that petroleum-free [electric drivetrains will dominate](#) their future manufacturing investments and that future product offerings will not use transportation fuels. VW alone, intends to [invest \\$84 billion](#) in transitioning to electric vehicles.
- Oil demand is dropping [faster than anticipated](#) due to the electrification of transportation.
- England, France, Israel, Norway, Netherlands, Slovenia, India, Egypt, and China have announced their intentions to ban future sales and, in some cases, the use of vehicles with internal combustion engines. Ireland has gone even further, announcing that it will [divest its sovereign interest](#) in all oil, gas and coal.

Climate change has also increased actuarial uncertainties. The increasing frequency and severity of storm events necessitates recalibration of analytical models predicting impacts and losses. Insurance industry regulators are imposing more rigorous disclosure requirements and improved assessment and management of investment portfolios to mitigate risk. Moody’s Investors Service [announced recently](#) that it would give more weight to climate change risks in evaluating the creditworthiness of state and local governments.

In sum, the facts simply don’t add up to justify the State of Michigan investing with Enbridge to construct a pipeline tunnel for the next 99 years, while allowing the current pipeline to operate in the open waters for the next 10 years. At this time in history, governments, businesses, and citizens together must pivot and focus on solving complex systemic anthropogenic climate change impacts, rather than further contributing to it. Michigan leaders must put the interests of the Great Lakes and its people and of the tribes first by planning for our energy transition and inevitable future.

IX. CONCLUSION

As public trustee, the State of Michigan has primary jurisdiction or control to address the imminent threat to the citizens of Michigan from Enbridge’s dual Line 5 oil pipelines located on the bottomlands of the Straits of Mackinac in the heart of the Great Lakes. Instead, the State of Michigan has done the unconscionable by allowing Enbridge’s high hazard oil pipeline to operate in the Great Lakes and across 400 other vulnerable Michigan water crossings for the next decade.

Enbridge has sound, safer, and less costly alternatives that this foreign corporation can and should use its *own* financial resources and borrowing power to apply for and obtain the necessary lands, authorizations, and permits to implement those alternatives. Even if Enbridge decides that it will seek to construct a tunnel or new Line 5 under the Straits, similarly, it should and can utilize its own financial assets and financing to obtain the authorizations, land, agreements, and permits to do so. It is also too risky and

shortsighted, if not blind, for the State of Michigan to force the MBA and/or the MSCA to help build, own, lease, and oversee or control a new tunnel for fossil-fuel pipeline(s) that most likely will be unnecessary stranded assets long before the expiration of Enbridge's proposed 99-year lease.²⁷

Not 20 years ago, responding to the clearly expressed will of the people of Michigan, the legislature banned the drilling of oil and gas in the Great Lakes, recognizing the inherent risk of such activity. Now, in a last-ditch effort, with less than two weeks before Governor Snyder leaves office, the State of Michigan is seeking the blessing of its citizens to gamble the state's most precious natural resource -- the Great Lakes -- all for the benefit of a private foreign oil corporation. The current state administration and the next administration should respect the people's desire for strong water and environmental standards for the Great Lakes and an end to corporate favoritism.

This is a critical moment in the history of the State of Michigan and the Great Lakes. We urge you to pause, engage the public and these critical concerns meaningfully, and reflect on what is at stake for this and future generations. There need not be a rush to judgment when 20 percent of the available surface freshwater of the world is at stake.

Sincerely yours,



James M. Olson
President and Legal Advisor
FLOW



Elizabeth R. Kirkwood
Executive Director

cc: Governor-elect Gretchen Whitmer
Attorney General-elect Dana Nessel
U.S. Senator Debbie Stabenow
U.S. Senator Gary Peters

²⁷ The calculated joint effort of the State of Michigan and Enbridge to craft a new "fix" for Enbridge's Line 5 is both misguided and imprudent given that this tunnel corridor could be used to transport oil in Enbridge's pipeline for the next 99 years or more. Locking Michigan's Great Lakes, Mackinac Bridge, the MBA, and the State's financial and infrastructure resources into today's fossil fuel economy makes little sense in light of the recent October 2018 Special Report of the Intergovernmental Panel on Climate Change ("IPCC"). <http://www.ipcc.ch/report/sr15/> The special report warns that "rapid and far-reaching" transitions in land, energy, industry, buildings, transport and cities" are required in the next 15 years in order to assure that the increase in temperature of the earth stays within the 1.5° C (2.7° F) threshold between 2030 and 2050.