



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

May 1, 2020

via ELECTRONIC SUBMISSION

Ms. Liesl Clark, Director
Michigan Department of Environment, Great Lakes, and Energy
Constitutional Hall
P.O. Box 30473
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Mr. Joe Haas, Unit Chief
Water Resources Division
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Re: Enbridge Energy Application for Construction of Tunnel for Crude Oil Pipeline, Soils and Bottomlands, Straits of Mackinac, Lake Michigan; and Authorization of 2018 DNR Easement, MSCA Assignment of Easement to Enbridge, 99-Year Lease of Soils and Bottomlands for Tunnel and New Pipeline; Tunnel and Related Agreements for Use and Occupancy of Soils and Bottomlands, Great Lakes Submerged Lands Act, MCL 324.32501 et seq. (“GLSLA”)
Application Number: HNY-NHX4-FSR2Q

Dear Director Clark and Mr. Haas:

The undersigned officers and attorneys for For Love of Water (“FLOW”), together with those for Straits of Mackinac Alliance (“SMA”)¹ hereby submit this letter/legal memorandum on the GLSLA and public trust law necessary to authorize the proposed Corridor and Tunnel, together with easement, assignment of easement, and long-term lease for occupancy, use, and control of

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. For nearly five years, FLOW has investigated, researched, and published a dozen reports addressing the risks, existing alternatives, worst-case scenarios and economic damages, and violations of law regarding Line 5 and the proposed tunnel and tunnel pipeline. www.flowforwater.org. The Straits of Mackinac Alliance (“SMA”) is a group of citizens living on waterways that would be impacted by a Line 5 oil spill. The Board and most of the members of the Alliance live in and around the Straits along Lakes Huron and Michigan and are working to protect their homes and waterways for future generations.

the public trust soils and bottomlands beneath the waters of the Great Lakes.² Based on our analyses, Enbridge (and the Michigan Straits Corridor Authority (“MSCA”) and Department of Natural Resources (“DNR”) to the extent necessary) must apply for and obtain authorizations required by Sections 32502 and 32503 et seq. of the GLSLA, MCL 324.32501 et seq., and the State’s sovereign title under the equal footing and public trust doctrines.

- 1. 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**

Enbridge’s proposed corridor tunnel and new tunnel pipeline are subject to the State’s sovereign trust title and the public trust doctrine and law that apply to the Great Lakes and the soils under them. Like all of the 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 mark.³ All of these waters and the soils beneath them are held in and protected by a public trust.⁴ 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:⁵

² On November 8, 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 of 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, the Great Lakes Submerged Lands Act, MCL 3234.32501 et seq. 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. On December 18, 2018, FLOW submitted a subsequent letter to the Governor and the same State officials, more fully addressing the violations of rule of law by the State and its officials of the GLSLA and public trust law.

<https://forloveofwater.org/wp-content/uploads/2020/04/FLOW-Public-Comment-12-18-18.pdf>

On March 5, 2020, FLOW submitted a letter setting forth a similar basis under the GLSLA and public trust law in Michigan to the MSCA as part of a meeting to consider Enbridge’s announced plans to apply for the required authorizations, approvals, and permits for a tunnel and tunnel pipeline. These letters are incorporated by reference.

³*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).

⁴ *Id.*; see also *Obrecht v National Gypsum*, 361 Mich 299 (1961).

⁵ *Id.* p. 416.

- (1) The proposed disposition, occupancy, or action predominantly serves or enhances a public trust interest or 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, 146 U.S. 387 (1892); *Obrecht v National Gypsum Co.*, 361 Mich 299 (1960). The public trust doctrine and its legal mandates are irrevocable.⁶

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

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 EGLE pursuant to the public trust standards in the GLSLA and the common law of the public trust doctrine. Because the GLSLA applies to any conveyances, leases or other agreements and occupancy of these public trust bottomlands, the DNR Easement, MSCA Assignment, and 99-year lease or for as long as Enbridge operates the tunnel and tunnel pipeline segment are subject to the GLSLA and common law public trust standards.

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.

Sec. 32502. The lands covered and affected by this part are all of *the unpatented lake bottomlands and unpatented made lands in the Great Lakes*, including the bays and harbors of the Great Lakes, *belonging to the state or held in trust by it*, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. *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, and to permit the filling in of patented submerged 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.* The word “land” or “lands” as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark ⁷

⁶ *Illinois Central R Rd v Illinois*; *Obrecht v National Gypsum Co.*, *supra*.

⁷ MCL 324.32502; see also 324.32503, 324.32504, 324.32505(4), 324.32512.

Sec. 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 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. Quitclaim deeds, leases, or agreements covering unpatented lands may be issued or entered into by the department with any person, and shall contain such terms, conditions, and requirements as the department determines to be just and equitable and in conformance with the public trust. The department shall reserve to the state all mineral rights, including, but not limited to, coal, oil, gas, sand, gravel, stone, and other materials or products located or found in those lands...*⁸

(2) The department shall not enter into a lease or deed that allows drilling operations *beneath unpatented lands for the exploration or production of oil or gas.*⁹

Based on the plain meaning and public trust law incorporated into the GLSLA and its rules, the Governor, state agencies, and Enbridge agreements, the DNR Easement, MSCA Assignment, and 99- year Lease from MSCA to Enbridge pertaining to any deed, grant, lease, other disposition, or agreement for use or occupancy of the soils or bottomlands beneath the Straits are subject to the GLSLA. Enbridge has not sought or obtained authorization for any of these conveyances or use documents under the GLSLA and/or based on the findings or determinations required for a valid conveyance or agreement required by the GLSLA or public trust law.

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.*

⁸ MCL 324.32503(1).

⁹ MCL 324.32503(2).

The attempt to escape the GLSLA and public trust law is an 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. The deeded or grant of easement, assignment, and lease are all subject to the GLSLA and public trust law. First, 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 solemn, perpetual trust is irrevocable, irrevocable, and cannot be violated by any attempt to escape it.

Moreover, the unpatented lands, bottomlands, and soils beneath the waters of the Great Lakes are clearly covered by the GLSLA. The title of the State cannot be surrendered or alienated. If a conveyance, interest, or use of these soils and bottomlands is proposed, it can only be done based on the findings and standards in the GLSLA. Clearly, the GLSA extends to all lands and title in these unpatented trust lands. The legislature has expressly shown the extent of the State's public trust title and inalienable interest by the terms of the GLSLA. The legislature recognized this legal fact by reserving all mineral rights and interests, including but not limited to oil and gas, gravel and stone, and by prohibiting oil and gas development in or beneath the Great Lakes and bottomlands. Oil and gas development include drilling, bore pipes, pipelines, and facilities far beneath the soils of the Great Lakes; e.g., Niagaran Reef development is often more than a mile beneath the lakebed.¹⁰ Enbridge and the MSCA cannot proceed until the required authorizations under public trust law and the GLSLA have been applied for and obtained (if in fact and law they can ever be obtained for such an exclusive and primarily private tunnel and pipeline.

Further, the DNR, MSCA, and Enbridge did not obtain authorization for these conveyances, lease, and agreements from the State Administrative Board, and failed to consider and determine the effect on and potential impairment to the substantial tribal property rights of the 1836 Treaty Tribes in, fishing, fishery habitat and other usufructuary activities protected by the Treaty of 1836.

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

Section 2129, NREPA, delegates authority to the DNR "to grant public utility easements" and provides:

for state and county roads and *for the purpose of constructing, erecting, laying, maintaining, and operating pipelines, electric lines, telecommunication systems, and facilities for the intake, transportation, and discharge of water*, including pipes, conduits, tubes, and structures usable in connection with the lines, telecommunication systems, and facilities, *over, through, under*, and upon any and all lands belonging to the state which are under the jurisdiction of the department

¹⁰ MCL 324.32503(1) and 3203(2).

and over, through, under, and upon any and all of the unpatented overflowed lands, made lands, and lake bottomlands belonging to or held in trust by this state.

First, the legislature delegated authority to the Conservation Commission (now DNR) to grant such public utility easements through and under the Straits of Mackinac. It is important to note that the authority of the DNR is subject to the public trust and state sovereign interest in unpatented bottomlands and waters of the Great Lakes. Because of this, public trust law applies. No easement can be granted without a finding and determination by the DNR that the standards under public trust law have been met.

Second, the 2018 DNR Easement to the MSCA was granted without the required findings and determinations under public trust law. Further, the legislature enacted the GLSLA in 1955 just two years after Section 2129 (then Act 10). As described above, the GLSLA applies to any deed, lease, or other agreement of occupancy or use over *all unpatented bottomlands held in trust by the state*. Because Section 2129 contains no finding requirement or standards required by the public trust doctrine, *Illinois Central* and *Obrecht, supra*, standards, the GLSLA supplies those standards and finding requirements. Therefore, an easement granted under Section 2129 must also be authorized under GLSLA. And, in any event, as noted above, the grant under Section 2129 must be based on specific review, consideration, and findings or determinations of fact that the standards under public trust law, and to date those requirements have not been met.

Third, the Easement was not properly authorized under Section 2129, because the Tunnel and Tunnel pipeline were not certified by the MPSC as a *public* utility at the time of the grant. Further, the Assignment by the MSCA to Enbridge was *not* a grant by the DNR, and likewise Enbridge was not certified as a public utility at the time of the assignment. Moreover, the Lease is not an easement, and neither Enbridge nor MSCA applied for and obtained the required authorization or findings under the GLSLA for the Assignment and Lease. And, in any event, the Assignment and Lease were signed without the required findings required under public trust law.

d. Enbridge Must Also Obtain Authorization and Approval of the Right to Continue the Existing Line 5 under the Third Agreement, and All of EGLE’S Approvals Must Be Based on the Requirements of the Michigan Environmental Protection Act (“MEPA”) and the Third Agreement.

The Third Agreement between Governor Snyder, state agencies and Enbridge in December, 2018, purports to assure Enbridge a right to continued use and operation of the existing Line 5 until the tunnel and new tunnel pipeline are complete and operating.¹¹ Enbridge has asserted this provision grants and establishes a separate basis to use and operate existing Line 5 until completion of the tunnel and tunnel pipeline.¹² This provision constitutes an agreement for occupancy or use of the unpatented bottomlands under Sections 32502 and 32503 of the GLSLA. Based on the plain language of the GLSLA and the requirements of the public trust doctrine, the right to continue the existing Line 5 in the Third Agreement is invalid or without legal effect unless and until it has been authorized under the GLSLA.

¹¹ Third Agreement, Sec. 4.1, 4.2.d,

¹² *Id.*

Further, 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 Michigan Environmental Protection Act of 1970 (“MEPA”) imposes procedural duties and legal mandates to consider the legal effects and feasible and prudent alternatives of proposed conduct like the Enbridge Tunnel and Tunnel pipeline in any permit, approval, licensing or other proceeding.¹³ 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.¹⁴ No approvals, grants, authorizations or permits can be issued to Enbridge without a comprehensive review of the review and consideration of the likely effects and feasible and prudent alternatives to the tunnel.¹⁵ Accordingly, the MEPA applies to the Enbridge’s required application for authorization for the easement, assignment, and long-term lease and the Enbridge application for its construction permit.

e. The Enbridge Application for the Permit to Construct and/or Install the Straits Tunnel Is Also Subject to Sections 32510, 32512, and Rule 1015 of the GLSLA.

Applicant Enbridge in its cover letter submitting its EGLE Application for a Construction Permit under the GLSLA, claims provisionally that the construction of the tunnel is not subject to the GLSLA. First, for the reasons stated above, the proposed tunnel together with the entire proposed project including the tunnel is subject to the authorization of the conveyance and lease interests under Sections 32502, 32503 et seq. of the GLSLA and Rule 1015.

Second, Enbridge argues in its cover letter that the massive tunnel project in the soils beneath the Straits of Mackinac is not subject to the GLSLA Section 32513, M CL 324.32513 because it involves the placement of “other materials,” which is defined by Rule 322.1001(k) to mean “any man-made structure” or “installed device or facility extending over or *placed on* bottomlands” including bulkheads, groins, riprap, jetties, breakwaters, piers and pipelines, pilings, sand traps, and facilities related to marinas. Under Section 32513, a permit is required for activities such as dredging, filling with soils, and “other materials.” The term “other materials” includes structures and improvements. So, Enbridge would have the Department interpret the massive tunnel project as an activity involving “other materials” like those listed in Rule 101(k). The tunnel project does not fall within the type of activities covered by Section 32513 and its definitions. Accordingly, the tunnel project is a construction activity not authorized by Section 13. If the activity is not authorized by Section 32513, then Enbridge must obtain authorization under another section of the GLSLA, namely, it must include its construction activities as part of the comprehensive review required by the GLSLA, public trust law, and the MEPA, *supra*, that are part of the authorizations for the conveyances, leases, and other occupancy or use under Sections 32502, 32503 et seq. If Enbridge argues, the construction activity is not subject to the GLSLA all it has a major problem: Under public trust law, in the absence of express authority in a statute that delegates authorization, approval or permit review and decisions to an agency, Enbridge is prohibited from undertaking the project. The state’s title and interest in the waters and soils beneath the Great Lakes can never be alienated except by express authorization and findings required by

¹³ *Vanderkloot and Ray v Masson County Drain Comm’r, supra*; MCL 324.1705(2).

¹⁴ *Ray v Mason Count Drain Comm’r*, 393 Mich 294 (1975).

¹⁵ *Vanderkloot and Ray v Masson County Drain Comm’r, supra*.

public trust law. *Obrecht v National Gypsum; Illinois Central Railroad, supra*. The GLSLA Sections 32502, 32503 supply this authority for the authorizations; Section 32513 does not.

Third, Sections 32510 and 32512 of the GLSLA prohibit any activity not authorized by the GLSLA and/or in accordance with public trust law mandatory standards and findings. Section prohibits an activity “in any manner alters or modifies any of the land or waters subject to this part.” The waters and the State’s public trust soils and bottomlands are subject to Part 325, or “this part.” Section 32512 prohibits any activity, such as altering or modifying the lands or waters subject to the GLSLA unless authorized by Section 13 or the legislature. But in this instance Act 359 of Public Acts of 2018 expressly states that Enbridge must obtain all approvals and permits regarding location or construction of the tunnel. The legislature did not itself grant a permit or approval under Act 359, nor could it.

So, if Section 13 does not authorize a construction permit for Enbridge’s tunnel construction, then there is no authority at all for construction of a tunnel and operation of a tunnel pipeline, and for the reasons stated above no authorization of the easement, assignment, or lease to do so., and, in any event, there can be no authority without express findings required by the GLSLA and public trust law. Accordingly, the only way to proceed is to review the construction of the tunnel is to consider construction in conjunction with a notification to Enbridge that it must apply for authorization under the GLSLA and public trust law for the conveyance of the easement, assignment of easement, the lease, and the purported assurance of the right to continued use and occupancy of the bottomlands for the existing Line 5 in the Third Agreement..

CONCLUSION AND REQUEST

Based on the above, FLOW requests you and EGLE to require the following:

- a. Suspend consideration of Enbridge’s application for a construction permit for the tunnel and tunnel pipeline unless and until Enbridge submits an application and obtains authorization for the DNR Easement, MSCA Assignment, and Lease under the GLSLA and Part 21, Section 2129, NREPA and public trust law;
- b. When Enbridge applies for authorization of these conveyances, lease, or other agreements, it can also submit its proposed construction as part and parcel of the scope of requirements for the EGLE to review the requests for authorizations in accordance with the GLSA and public trust standards.
- c. Require the application of the duty to consider potential effects and feasible and prudent alternatives pursuant to the MEPA and case law; and
- d. Notify Enbridge that the purported right under the Third Agreement to continue to use and operate existing Line 5 on or in the unpatented bottomlands of the Straits of Mackinac is not legal unless and until Enbridge submits an application and obtains authorization under the GLSLA and Part 21, Section 2129, NREPA and public trust law.

The undersigned organizations thank you for the opportunity to provide the above legal memorandum, and request that you rule and request Enbridge to comply with the above requested actions.

Should you have questions or want to discuss further, please advise.

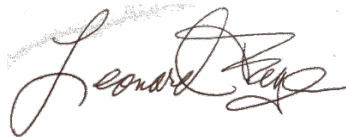
Sincerely yours,



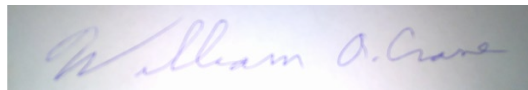
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Hon. William Crane (Retired Circuit Judge)
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cc: Hon. Governor Gretchen Whitmer
Hon. Attorney General Dana Nessel
MDNR Director Dan Eichinger
MDOT Director Paul C. Ajegba