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VIA ELECTRONIC SUBMISSION

Public Comments on the Joint Application of Enbridge Energy for proposed pipeline tunnel under the Straits of Mackinac between Mackinaw City and Saint Ignace, Michigan [EGLE File No. HNY-NHX4-FSR2Q] and [Corps File No. LRE-2010-00463-56-A19]

Dear U.S. Army Corps of Engineers Commander Sugrue, Chief Simon, Chief Kuhne, and Regulatory Project Manager Otanez:

On behalf of For Love of Water (“FLOW”), Sierra Club, Clean Water Action (“CWA”), Northern Michigan Environmental Action Council (“NMEAC”), Straits of Mackinac Alliance (“SMA”), Straits Areas of Concerned Citizens for Peace, Justice, and the Environment (“SACCPJE”), Groundwork Center for Resilient Communities, TC350.org, and the Chippewa Ottawa Resource Authority (“CORA”), Michigan League of Conservation Voters (“MLCV”), we submit the following comments on the application No. LRE-2010-00463-56-A19 for U.S. Army Corps of Engineers’ (the “Corps”) permit for the proposed Enbridge Line 5 tunnel and pipeline project (the “Project” or the “Application) under the Great Lakes.¹

¹ We respectfully request that the USACE District Office adopt and incorporate by reference the comments submitted by Earthjustice and Bay Mills Indian Community, Environmental Law and Policy Center, and all previous written comments submitted by FLOW into the record of these proceedings. FLOW has special expertise as a Great Lakes law and policy educational and advocacy organization, as do the other commenting organizations, including Sierra Club, Clean Water Action, MLCV, Groundwork Center, TC350, SMA, SACCPJE, NMEAC, CORA. FLOW has expertise on all aspects of Line 5 and the proposed tunnel and tunnel pipeline, having submitted more than a dozen reports, formal comments, and amicus briefs to federal and state agencies, and the courts; e.g.. See [FLOW](#)

I. Introduction

We, the undersigned groups, are writing to request that the Corps conduct an environmental impact statement (“EIS”) and public hearing pursuant to Section 102(c)(2) of the National Environmental Policy Act (“NEPA”), (42 U.S.C. § 4321-4347) and applicable rules in connection with Enbridge Energy’s application for a Department of the Army permit under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) and Section 404(b)(1) (33 U.S.C. § 1344) and 401 of the Clean Water Act (“CWA”) (33 U.S.C. § 1344 and 33 U.S.C. § 1341). For the reasons stated in detail below, (1) the Application under Section 10 of the Rivers and Harbors Act and 404(b)(1) of the CWA lacks the critical information required to grant a permit, and the permits should be denied; or (2) the purpose, scope, and nature of the federal action is major, complex, and highly controversial and will significantly affect the human and natural environment, and a full environmental impact statement must be required pursuant to the NEPA before any further action is taken on the Application.

II. The Proposed Project

The Project submitted by Enbridge in this matter is intentionally designed to avoid full review under the applicable law, including the EIS mandates of the NEPA and the demands for a thorough analysis and burden to demonstrate no practical alternatives to destruction or impacts to wetlands under Section 404 of the CWA. Enbridge characterizes its project as replacing an old dual pipelines system in the Straits of Mackinac to continue transporting crude oil and petroleum liquids between the Peninsulas of Michigan.

In fact, the Project involves a massive tunnel for its pipeline and, based on agreements with the State of Michigan, for the location and operation of a corridor tunnel for other utility pipelines. Moreover, the project would irreversibly commit natural and other resources of Michigan and the Great Lakes for another 99 years. Enbridge has purportedly, although legally questionable under Michigan public trust law, obtained an assignment of an easement in public trust bottomlands and a 99-year lease. This is not a mere replacement of two pipelines in the Straits with another pipeline in a tunnel bored deep under the States. It’s one of the most ambitious infrastructure projects in size, scope, and short and long-term commitment of resources in the State of Michigan and the Great Lakes region for the next century.

The Application involves substantial impacts and interference with tribal sovereign and fishing rights, navigation, shipping, tourism, regional economy, water quality and quantity issues, wetlands, tributary

[Comments on Enbridge's Violations of the 1953 Easement for the Line 5 Oil Pipelines in the Straits of Mackinac and Lake Michigan](#) November 12, 2019; [Public Comments on the Joint Application of Enbridge Energy for Anchor Screws for Line 5 Pipelines in the Straits of Mackinac](#) July 19, 2018; [Public Comments on Enbridge's Studies Required by the November 2017 Agreement](#) July 15, 2018; [Public Comments on the Joint Application of Enbridge Energy for 48 New Anchor Screws for Line 5 Pipelines in the Straits of Mackinac](#) May 11, 2018; [Letter to MPSC and DEQ on New or Altered Structures of Line 5](#) April 11, 2018; [Supplemental Comments on 2017 Anchor Permit Application](#) February 9, 2018; [FLOW Supplemental Comments on Enbridge Anchor Permit Application](#) October 12, 2017; [Supplemental Comments on the Joint Application of Enbridge Energy to Occupy Great Lakes Bottomlands for Anchoring Supports](#) August 4, 2017; [Comments on the Joint Application of Enbridge Energy to Occupy Great Lakes Bottomlands for Anchoring Supports \(with Appendices: Appendix A, Appendix B, Appendix C, Appendix D, Appendix E\)](#) June 29, 2017.

waters, and climate change. Enbridge's Application seeks to bore and construct a proposed massive, complex corridor tunnel and pipeline at an estimated cost of over one-half billion dollars from 60 to 250 feet deep in the bedrock and mixed soils under the waters of the Straits of Mackinac;² if allowed and constructed, it would operate the tunnel and pipeline for 99 years or more. The tunnel has a diameter of 18- to 21-foot-diameter and would be approximately 3.6 miles long, underneath the lakebed of the Straits of Mackinac at depths at least 10 feet below the top of rock or 60 feet below the mud line, whichever is shallower. Approximately 364,000 cubic yards of material would be removed from underneath the lakebed to construct the tunnel. The material would be disposed of in an upland location. Upon tunnel completion, the applicant proposes to install a new 30-inch diameter pipeline within the tunnel, for light crude oil and natural gas liquids, to replace the existing Line 5 dual pipelines crossing the Straits of Mackinac. The tunnel would be constructed using a tunnel boring machine ("TBM"). Precast concrete segmental lining would be installed as the tunnel is constructed, and the annular space outside the tunnel's concrete lining would be filled with low-permeability grout. In addition, at either end or the portals of the tunnel, the boring for the tunnel will require large volumes of water, either groundwater or surface water, in the millions of gallons per day that could result in the loss of adjacent drinking water wells and connected wetlands.

The proposed project and its several related components involve a long list of intertwined federal and state authorizations, approvals, easements, property interests, and permits. As noted at the outset, the instant Application before the Corps requires the following permits or approvals: (1) Section 10 of the Rivers and Harbors Act and Section 403 of the CWA regarding navigation and the removal and deposit of 364,000 cubic yards of spoils or other materials from the tunnel operation; (2) Section 404 of the CWA permit to dredge, fill, and deposit materials from a large area of coastal wetlands; (3) Section 402 of the CWA discharge permit for millions of gallons of water under the NPDES system; and (4) Section 401 of the CWA permit for state certification of water quality standards. On-shore construction of the tunnel and facilities involve removal of tens of millions of gallons of tributary groundwater directly connected to coastal wetlands and the Great Lakes. The mega tunnel project's use of heavy machinery, large volumes of effluent discharge and bentonite slurry, and blasting of bedrock, all threaten to destroy or displace fishing, cultural, and historic resources, such as traditional cemetery or burial sites of the Odawa and Ojibwe Tribes of Michigan.

The tunnel and pipeline are part of the larger North American crude oil pipeline system. Enbridge's 67-year-old Line 5 pipeline runs 645 miles from Superior Wisconsin, across Michigan's Upper Peninsula, across the Straits and down through the Lower Peninsula to Sarnia, Canada. Line 5 crosses 400 streams and runs along or near many lakes, state and federal lands, towns, tribal lands, ancient markers and historical resources. There have been 33 reported spills totalling over 1 million gallons of crude oil in

² Enbridge has provided conflicting information across its multiple pending permit applications regarding the depth of this proposed tunnel construction and pipeline replacement. In the related Michigan Public Service Commission ("MPSC") proceedings, Enbridge maintained that "The Project involves relocating underground the portion of Line 5 that crosses the Straits, within a tunnel to be located at a depth of approximately 60 feet to 250 feet beneath the lakebed of the Straits." In Re: Enbridge Energy, Limited Partnership - Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, April 17, 2020 <https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t000000BRSuOAAX>

recent years.³ Line 5 has been operated beyond its expected useful life span. Enbridge owns and operates other crude oil and natural gas liquid pipelines from Canada, down through Minnesota and Wisconsin, around Chicago, and across southern Michigan to Sarnia, with spur pipelines to Marathon and Toledo. Any decision on the tunnel and tunnel pipeline would commit resources and result in impacts throughout Michigan and the Great Lakes region for another 100 years. Thus, a decision on the tunnel and its pipeline is inseparable from the entire 645-mile line--which for many reasons is an aged, outdated crude oil pipeline no longer necessary in 2020.

The Application raises serious questions about the necessity of this project as there are alternatives and adjustments within the Enbridge and larger North American crude oil pipeline system that would avoid the substantial risks and irreparable losses or damage from the proposed project. And, most importantly, the proposed tunnel and pipeline involve technologies and risks that push the limits of experience and expertise for deep tunnels under the pressure and weight of bodies of water like the Great Lakes. As a result, the project will involve numerous, highly technical processes and methodologies to address substantial risks to human health, safety, life, and the environment. The technology, if feasible and prudent, and construction will require a massive amount of water and wastewater discharge during a long-period of construction, interference with or removal of groundwater at either end of the tunnel, and displace, dredge, and fill acres of highly-valued regulated coastal wetlands.

III. Denial of Permit under the Rivers and Harbor Act and Clean Water Act or Mandate to Prepare an EIS to “the fullest extent possible” under NEPA

The current Enbridge Application and supporting information and exhibits are incomplete and totally insufficient for the Corps to consider granting the requested permits and approvals. For this reason alone, the Application in its present form should be rejected and permits denied. In the alternative, the Corps must determine that the magnitude, scope, impacts, intensity, and highly controversial and complex scientific, technological, risky, sociological, environmental impact, and hydrogeological nature of the proposed project requires the preparation of an EIS to the “fullest extent possible” under NEPA and its regulations, including 40 C.F.R. 1508.27, with alternative analyses related to Section 404 of the CWA and the Rivers and Harbor Act: These impacts include coastal and other wetlands, public lands, Great Lakes, the public trust interests of citizens in the Great Lakes and Straits area, drinking water, transportation, land use, housing, commerce, including uncertainty of magnitude of harm, response actions, and irreparable loss of natural resources, historic and ancient cultural resources, endangered species, and interference with or violation of state and federal laws and regulations.

If this joint application for Enbridge’s proposed Great Lakes tunnel and pipeline is approved without a NEPA EIS, the Corps and the Michigan Department of Environment, Great Lakes, and Energy (“EGLE”) will have authorized Enbridge to build and operate a private oil infrastructure project on public trust bottomlands and waters without the state or federal agencies ever demanding a comprehensive review of risks, impacts, or alternatives under controlling and applicable laws. In addition, as a threshold matter, it

³ Garret Ellison, “Enbridge Line 5 has spilled at least 1.1M gallons in past 50 years,” MLive Jan. 19, 2019 https://www.mlive.com/news/2017/04/enbridge_line_5_spill_history.html

should be noted that the legal agreements and legislation that Enbridge relies on for this permit application violate public trust law because this proposed tunnel and new pipeline has not been authorized or approved by the state as required by the laws of Michigan⁴ or the federal government. In fact, once the rule of law is adhered to, it will be readily evident that the proposed tunnel and new pipeline option is not the practical alternative with the least impacts on the environment, does not comply with the paramount interests of public trust law, is not in the public interest required by the the Michigan Public Service Commission (“MPSC”), and is contrary to state environmental laws.⁵

The body of NEPA legal precedent triggers an EIS in this matter. The recent decisions by the federal D.C. District Court in *Standing Rock Sioux Tribe et al. v. U.S. Army Corps of Engineers*⁶ involving the Dakota Access Pipeline under Lake Oahe is applicable to the Corps’ current consideration of Enbridge Application for construction of a large, complex tunnel and pipeline in bedrock and unconsolidated materials and soils deep below the bottomlands of the Straits of Mackinac and the Great Lakes. The Great Lakes constitute 20 percent of the planet’s fresh surface water, provide drinking water and sustenance to 48 million people in the Great Lakes Basin, and provide the backbone for a \$6 trillion regional economy that would be one of the largest in the world if it stood alone as a country.⁷ In the Dakota Access case, the U.S. District Court for the District of Columbia found that the Corps had violated NEPA when it granted an easement to the defendant, Dakota Access LLC., to construct and operate a pipeline segment located underneath Lake Oahe, which separates North and South Dakota. The basis for the court’s decision was that the Corps had failed to produce an EIS despite clear conditions such as unrebutted expert critiques regarding leak-detection systems, operator safety records, adverse conditions, worst-case discharge (“WCD”), and the complex and significant unresolved controversy over critical and complex issues that required an EIS under NEPA.

Without an EIS, a joint approval of this proposed tunnel and pipeline project would violate the requirements of NEPA, the CWA, and the obligations between the Corps and the State of Michigan and its applicable laws, including but not limited to, the duty to examine and determine impairment or valid public trust purpose under public trust law,⁸ impacts to the environment under the Michigan

⁴ 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”); (5) the police power regarding conservation and protection of Michigan’s air, water, and natural resources or public trust in those resources; and (6) the Michigan Constitution Art IV, Sec. 52. 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. All of these waters and the soils beneath them are held in and protected by a public trust. 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.

⁵ See note 2, supra.

⁶ *Standing Rock Sioux Tribe et al. v. U.S. Army Corps of Engineers*,--F.Supp.--, 2020 WL 1441923(D.C.C., March 25, 2020); Memorandum Opinion, July 6, 2020.

⁷ Great Lakes Commission Website, About the Lakes. <https://www.glc.org/lakes/>

⁸ MCL 324.32501 et seq., particularly the requirement for authorization of the assignment of easement and 99-year lease for the tunnel at issue mandated by Sections 32502 and 32503, MCL 324.32502 and 324.32503, respectively..

Environmental Protection Act (“MEPA”),⁹ wastewater NPDES permit system laws, and the wetlands laws, and the necessity, public interest, and alternatives to a 100-year commitment to fossil fuels and continuing irreparable damage caused by greenhouse gases (“GHG”) emissions and climate change impacts.

IV. Request for Public Hearing

The Clean Water Act (“CWA”) imposed a critical role on the Corps to assure public participation in permitting decisions. Section 404 specifically states: “The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a). The applicable Corps regulations state: “[A]ny person may request, in writing, ... that a public hearing be held Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing.” 33 C.F.R. § 327.4(b). As such, commenters hereby request a public hearing on the Line 5 application pursuant to 33 C.F.R. § 327.4(b). The Corps would violate CWA’s clear mandate to involve the public and allow public hearings if it approves a massive crude oil tunnel and pipeline through the heart of the Great Lakes without holding a single public hearing during the federal approval process. Moreover, the Corps would undermine and violate its duties under the NEPA to consider and determine the effects and irreparable harm to the human environment, and the alternatives to the proposed project.

V. The Clean Water Act and the National Environmental Policy Act

A. The Clean Water Act

The Enbridge Application requires authorization under Section 10 of the Rivers and Harbors Act and Section 404 of the CWA. The purpose of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a)(1), and “to increase the quality and quantity of the Nation’s wetlands.” Id. § 2317(a). Section 404 of the CWA establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands, unless the activity is exempt from Section 404 regulation (e.g., established farming or ranching activities). In this case, the Corps issues nationwide permits (“NWP”) to authorize any category of activities involving discharges of dredged or fill material in waters of the U.S. that will result in “no more than minimal individual and cumulative adverse environmental effects.”¹⁰

Activities in waters of the United States regulated under this program include fill for development, water resource projects, transportation infrastructure development, and navigational projects. Sections 33 C.F.R. § 322.3; parts 323, 325 of the statute provides strict substantive limits on approving projects that degrade

⁹ Part 17, NREPA, MCL 324.1701 et seq. (“MEPA”).

¹⁰ 33 U.S.C. § 1344(e)(1) (2018); see legal update on NWP 12 that authorizes minimal impacts from “utility line activities” to jurisdictional waters.

<https://www.pipelaws.com/2020/05/court-limits-nationwide-permit-12-vacatur-to-new-oil-and-gas-pipeline-construction/>.

water quality or harm aquatic uses. The Corps cannot approve a discharge of dredged or fill material 404 permit unless: (1) a practicable alternative exists that is less damaging to the aquatic environment 40 C.F.R. § 230.10(a); (2) there is a demonstration that any discharge from the project “will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern,” Id. § 230.1(c), or if any discharge will result in significant adverse effects to water quality,” violating a water quality standard or toxic effluent standard. Id. § 230.10(c); (3) the Corps must determine that the project is in the “public interest” by weighing all “relevant” considerations and balancing all probable impacts of the proposed action against its alleged benefits. 33 C.F.R. § 320.4(a); or (4) the Corps must independently verify all the information in the application. See, e.g., *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004); see also 40 C.F.R. §1506.5(a). Taken together, these requirements create a “very strong” presumption “that the unnecessary alteration or destruction of (wetlands) should be discouraged as contrary to the public interest.” *Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir. 1982).

Under the Rivers and Harbors Act, the Corps cannot approve construction in or under the navigable waters of the United States, like the Great Lakes, unless Enbridge demonstrates there is no risk to the navigational interests of the federal government and the citizens of the United States. This involves consideration of construction and operation of the tunnel, the presence of a crude oil or other pipeline in the tunnel corridor. As noted above, the magnitude of the proposed tunnel and pipeline or pipelines will require extensive evaluation, studies, and considerations of highly technical matters, several of which are a controversial or unique nature not previously designed or fully understood. Approvals involving new technologies or existing technology in new or rare circumstances under the Rivers and Harbors Act require compliance with the NEPA EIS requirements under 42 USC§ 4332(2)(c). In this instance, the proposed project to construct and operate a massive tunnel for a private crude oil pipeline cannot be approved unless there is a full and comprehensive EIS, because (1) the proposed action is a major federal action; and (2) the proposed action significantly affects the quality of the human environment.

Enbridge’s application generic and conclusory statements also fail to provide the information the Corps must have to evaluate the Project under Section 404. Enbridge has not shown that there are no practical alternatives to the proposed Tunnel and pipeline, that overall, cumulatively, the Project will have the least impact on the aquatic ecosystem, that its planned methods of construction and operations will comply with the CWA, or that the Project is necessary and in the public interest. The items that Enbridge must provide include but are not limited to: a description of all reasonable alternatives, including systems alternatives, route alternatives, and alternative construction methods; a detailed analysis of the impacts to aquatic resources associated with all reasonable systems alternatives, route alternatives, and alternative construction methods; a detailed feasibility analysis for the Straits tunnel crossing, including a description of the conditions, hydrology, and geology, whether horizontal directional drilling (“HDD”) is feasible based on the geology; a wetland delineation reports for all wetlands proposed for impact; wetland mitigation plan in accordance with Mich. Admin. Code § 281.925(4); a detailed analysis of the Project’s impacts to water quality, including how the Project will comply with Michigan’s laws and regulations implementing the CWA; a detailed analysis of how the Project is in the public interest, as defined by 33 C.F.R. § 320.4(a). In addition, Enbridge must address the impacts to the Great Lakes, Lakes Huron and

Michigan, and public trust uses, fishing, navigation, infrastructure, wetlands, species, and public health, safety, and property attributable to climate change from transporting fossil fuels through Line 5 for the next 99 years. The necessity for fossil fuels in a shrinking market coupled with the impacts from climate change are directly related to the continued burning of crude oil and related fossil fuel products carried from Alberta to Canada and foreign ports.

B. The National Environmental Policy Act

As our “basic national charter” governing environmental protection, NEPA requires all federal agencies to prepare an EIS where (1) the proposed action is a “major Federal action;” and (2) the proposed action “significantly affects the quality of the human environment.”¹¹ A “major Federal action” includes those “with effects that may be major and which are potentially subject to Federal control and responsibility.”¹² In addition, private actions involving permitting for construction and management activities may constitute a “major Federal action” subject to EIS requirements.¹³

The EIS must describe: “(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action.”¹⁴

In performing an EA, the Corps must determine whether an EIS is required.¹⁵ To make this threshold determination of whether to conduct an EIS, the lead federal agency first prepares an EA that takes a “hard look” at the proposal, a full range of reasonable alternatives, and the potential environmental impacts of the proposed action.¹⁶ An EA must also inform the public and officials of consequences and alternatives before decisions are made. If the actions or related actions involve “any significant environmental impacts that might result from the action,” the EIS is required before any agency action on the permit application is taken.¹⁷ Where, as here, the environmental effects that may occur are severe or involve uncertainty or a lack of involving complex scientific and technical issues, the preparation of an EIS is required.¹⁸

Pursuant to NEPA’s “hard look” requirement, the agency must ensure that “the adverse environmental effects of the proposed action are adequately identified and evaluated.”¹⁹ In evaluating the significance of

¹¹ 42 U.S.C. § 4332 (2018).

¹² 40 C.F.R. § 1508.18 (2018).

¹³ *Id.*

¹⁴ 42 U.S.C. § 4332(2)(C) (2018); 40 C.F.R. § 1500.1.

¹⁵ 40 C.F.R. §§ 1501.4(b), 1508.9(a) (2018).

¹⁶ 40 C.F.R. § 1508.9 (2018); *Citizens to Preserve Overton Park*, 401 U.S. 402 (1971) *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983).

¹⁷ *Sierra Club v. Peterson*, 717 F.2d at 1414.

¹⁸ 42 U.S.C. § 4332 (2018).

¹⁹ *Standing Rock Sioux Tribe v. USACE*, 255 F. Supp. 3d 101 (2017); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Ocean Advocates v. USACE*, 402 F.3d 846 (9th Cir. 2005).

a proposed action impact, an agency is to consider, *inter alia*, the effect on “public health or safety”; “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources”; the extent to which the environmental effects “are likely to be highly controversial” or “are highly uncertain or involve unique or unknown risks”; “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts”; and the degree to which the action “may cause loss or destruction of significant . . . cultural[] or historical resources.”²⁰ The impact on the environment from incremental actions when added to other past, present, and reasonably foreseeable future actions must be considered.²¹

An EIS must be prepared if “substantial questions are raised as to whether a project may cause significant degradation.”²² “Significantly” has two components: “context” and “intensity.”²³ Context refers to the setting (e.g., the Great Lakes) in which the action takes place.²⁴ Intensity refers to “the severity of the impacts” and involves examining ten factors.²⁵

The presence of “one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.”²⁶ As noted, impacts refer to “potential” or “may,” and where the context and intensity exist, uncertainty demands preparation of an EIS. Finally, the Corps must give a “convincing statement of

²⁰ 40 C.F.R. § 1508.27 (2018).

²¹ *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142 (9th Cir. 1997); *see e.g.* 40 C.F.R. § 1502.16 (2018).

²² *Id.*; *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998).

²³ 40 C.F.R. § 1508.27 (2018).

²⁴ 40 C.F.R. § 1508.27(a) (2018).

²⁵ *See id.* § 1508.27(b). The ten factors include:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

²⁶ *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005).

reasons” to justify not preparing an EIS. For example, in a case involving an extension of harbor facilities for petroleum transport, the Corps was required to prepare an EIS, where the extension and the nature of potential consequences, as the proposed tunnel and pipeline under the Great Lakes in the instant matter, were not previously evaluated by an agency.²⁷

C. The Corps Must Prepare an EIS under NEPA Because Enbridge’s Proposed Tunnel Activity Constitutes a “Major Federal Action[] Significantly Affecting the Quality of the Human Environment.”

Enbridge’s Application for the proposed tunnel and pipeline pursuant to Section 404(b)(1) of the Clean Water Act and Section 10 of the Rivers and Harbors Act constitute a major federal action that requires compliance with NEPA.²⁸ Both the “context” and “intensity” of the possible effects from Enbridge’s proposed action are particularly relevant. The context here is extraordinary and involves the Great Lakes and its tributaries, which hold 20 percent of the world’s fresh surface water and support the communities, livelihoods, and quality of life of over 40 million people. Further, the Great Lakes are globally unique and subject to both a federal navigational servitude in one of the busiest shipping waterways in North America and the world, and are subject to protection under the common law public trust doctrine that protects paramount public uses for navigation, fishing, boating, drinking water, swimming, and other recreation.²⁹ In addition, the Great Lakes are deemed a “high consequence area” (“HCA”) under the 2016 PIPES Act³⁰ and the Straits of Mackinac are “the worst possible place” for an oil spill in the Great Lakes according to a 2014 University of Michigan study.³¹

Many of NEPA’s “intensity” factors are met here, indicating the need for a full EIS. For example, Line 5 proposed tunnel and pipeline could significantly affect drinking water, public health and safety; interfere with the protected treaty tribal fishing rights and historic and cultural resources, and parklands, prime farmlands, wetlands, or ecologically critical areas; would adversely affect protected species and habitat, endangered or specially protected species, and involve the direct, indirect, and cumulative effects to the human and natural environment, aquatic resources, and water dependent uses. Moreover, this Application would directly contribute and increase greenhouse gas emissions for the next century at a time when Great Lakes water levels are at an all time high, causing billions of dollars in damages to infrastructure,

²⁷ *Id.*, at 866-868.

²⁸ See, e.g., *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, Civil Action No. 16-1534 (JEB) (March 20, 2020); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, Civil Action No. 16-1534 (JEB) (July 7, 2020); *Stop The Pipeline v. White*, 233 F. Supp. 2d 957 (S.D. Ohio 2002) (the Corps prepared EIS for individual 404 permit for an 149-mile petroleum pipeline); *Hammond v. Kempthorne*, 448 F. Supp. 2d 114 (D.D.C. 2006) (BLM prepared EIS for the Williams oil pipeline project); *Spiller v. Walker*, No. A-98-CA-255-SS, 2002 WL 1609722 (W.D. Tex. July 19, 2002), *aff’d sub nom. Spiller v. White*, 352 F.3d 235 (5th Cir. 2003) (Corps’ permitting of an oil pipeline was a major federal action); *Wilderness Soc’y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) (DOI prepared EIS for trans-Alaska oil pipeline requiring rights-of-way and special land use permits over federal land).

²⁹ *Illinois Central R Rd v. Illinois*, 146 U.S. 287 (1892); *Obrecht v. National Gypsum Co.*, 361 Mich 399 (1961).

³⁰ 49 U.S.C. § 60109 (2018).

³¹ David J. Schwab, *Straits of Mackinac Contaminant Release Scenarios: Flow Visualization and Tracer Simulations*, University of Michigan Water Center, Spring 2014
<http://graham.umich.edu/media/files/mackinac-report.pdf>.

public and private property, public and private uses, businesses, navigation, and irreparable damage to the Great Lakes ecosystem.³²

The unprecedented nature of this Application cannot be overstated. This proposed tunnel corridor is one of a handful of large, lined tunnels that have been bored under waterways and mountain ranges like the Alps. Because these projects are highly complex, pushing technological and engineering boundaries; they involve layers of geotechnical and other studies and require the highest degree of scientific, technical and engineering analysis, modeling, design, techniques, and specifications. Enbridge's Application is devoid of crucial geotechnical studies and data to fully understand the risks that are associated with constructing a deep tunnel of this magnitude in this globally unique underwater location. The technical studies, expertise or experience may not even exist for constructing a tunnel through bedrock and soils at this depth and under extreme pressures under the waters of the Straits of Mackinac, Lake Huron, and Lake Michigan.

The Application itself, further underscores the uncertainty and risks associated with constructing and operating a tunnel and oil pipeline for 99 years. Exhibit 11A, for example, shows a valley or vortex at the bottom of the Straits of mixed or unconsolidated materials. This question alone lacks sufficient information, design, technical analysis, requiring a full EIS under NEPA.

Further, the construction of the tunnel will require large volumes of water and water discharge, management, monitoring, and controls; and construction at either portal to the tunnel will require the removal of or result in the loss of large volumes of groundwater daily, leading to drying up of water wells and wetlands. Enbridge provides little or no information that addresses these and other highly technical calculations, measurements, monitoring, controls and response to emergencies. Enbridge avoids even mentioning a "worst-case scenario" spill during or after construction of the tunnel for its crude oil tunnel pipeline, or other pipelines that may be located in the tunnel corridor. Evidence has been presented by environmental organizations, tribes, and state agencies in proceedings before EGLE and MPSC proceedings demonstrating, *inter alia*, the potential for the Project to cause significant GHG emissions, pollute Michigan's 400 waterways, and destroy historic and culturally significant resources of tribal nations. The evidence further shows a lack of demand for the Line 5 tunnel and pipeline project and the existence of less environmentally damaging alternatives.

In addition, the approval of the tunnel based on agreements with the State of Michigan includes a commitment to the continued use of the existing 67-year-old Line 5 pipeline from Superior, Wisconsin to Sarnia, Canada. Based on a December 2018 tunnel agreement between the Mackinac Straits Corridor Authority ("MSCA") and Enbridge, approval of the tunnel would also involve the potential use of the tunnel corridor by electrical, natural gas, or other utilities. However, despite Enbridge's efforts to advertise this project as a public utility corridor, no utility partner has yet to come to the table given the associated safety, economic, and technical risks.

³² The Impacts of Climate Change on the Great Lakes (Environmental Law and Policy Center, 2019) <http://elpc.org/issues/wild-natural-places/great-lakes/>.

The impacts of this Project are also highly controversial, uncertain, and involve unique and extraordinary risks as demonstrated by the number of intervening environmental organizations and tribes in the MPSC pipeline contested case proceeding that is essential to siting Enbridge's actual pipeline within the proposed Great Lakes tunnel. Significant evidence will be introduced in this MPSC contested case that demonstrates a lack of demand for the Line 5 pipeline replacement and the existence of less costly and environmentally damaging alternatives.

Given these circumstances, including the more detailed impacts outlined below, the Corps should prepare an EIS "to the fullest extent possible" as required by NEPA. The significance of the Line 5 in the Straits of Mackinac and implicit commitment to a 67-year-old crude oil pipeline across Michigan to Sarnia, Canada and the extreme size and scope of the proposed project is unprecedented. The proposed tunnel has ignited opposition against the tunnel by tens of thousands of Michigan citizens and tribes. The technical issues are unique, uncertain, and highly controversial. The Applicant's track record of 33 recorded spills along the length of the existing Line 5, failure to disclose critical information on the condition of the existing Line 5 in the Straits raise serious questions about the risk of Enbridge constructing one of the the largest deep waterway tunnels in the country's history. The likelihood or potential for serious and devastating impacts to the Great Lakes, citizens, communities, paramount tribal and public trust fishing rights, boating, recreation, drinking water, and public and private property call for a full EIS in compliance with NEPA.

In addition, the following section further details the Application's "severity of the impact," hereby triggering an EIS under the NEPA:

Inadequate Information about NPDES Impacts and Contamination of Great Lakes Drinking Water Supplies: Enbridge's interdependent NPDES permit request (version 3 as of June 3) to EGLE related to the tunnel and pipeline construction poses another related drinking water threat, withdrawing 4 million gallons a day ("MGD") and discharging up to 5 MGD into the Straits of Mackinac. As part of a recent tribal consultation, however, Enbridge provided new information that the NPDES permit would actually discharge 18 MGD (4 million gallons on the north side and 14 million gallons on the south side), which is nearly four times the original request. Thus, at this moment in time, there is inadequate information needed to analyze the potential impacts this proposed water discharge and slurry mixtures would have on community drinking water supplies. Specific Michigan communities whose Great Lakes water supply is at direct risk from a Line 5 oil spill include: Charlevoix, Mackinac Island, St. Ignace, Alpena, East Tawas, and Tawas City. Nearby communities whose water supply also could be threatened include: Bay City, Saginaw, Midland, and Traverse City. Depending on the size of a catastrophic oil spill in the Great Lakes, more than 400,000 residents and other customers with their water supply are at direct risk or potentially threatened.³³

Socioeconomic Impact of Proposed Tunnel and Pipeline: An independent analysis of the socioeconomic impacts of a proposed Line 5 tunnel through the Straits of Mackinac detailed significant negative potential socioeconomic impacts that must be taken into consideration under NEPA. A study

³³ http://flowforwater.org/wp-content/uploads/2017/01/FLOW_brochure_digital-2-2.pdf

conducted for the State of Michigan determined that impacts of a Line 5 tunnel project would focus on the Michigan counties of Emmet, Cheboygan and Mackinac which are “particularly sensitive to community resource impacts because their economies are dependent on seasonal tourism.”³⁴ These areas have a large rental housing market from seasonal tourism demand and seasonal workers that would be significantly impacted by a massive two-year tunnel construction project. As the report states “...the tourism sector (businesses, tourists, season workers), and community resources (policing, medical) could be stretched beyond their limits and negatively impacted.” Moreover, machinery and equipment operation would affect local road and highway infrastructure in a relatively densely populated area. Tunneling operations require the extraction and trucking of large amounts of rock and soil; dust and noise will impact community residents and visitors. The influx of temporary workers for the tunnel project will stress community resources and demand increases for police and for health and medical services. A large number of people would be exposed to construction dust, noise, and competition for medical and health services. Construction crews stationed in the Straits area will compete with seasonal workers and visitors to an area heavily dependent on the tourism economy, which generates 5,330 direct jobs in tourism with an annual payroll of \$153 million. In Mackinac County, 29 percent of the labor force is employed in tourism related services with Emmet and Cheboygan counties the tourism-related labor force consists of 15.3% and 17%, respectively, of total employment.

Tourism accounts for \$700 million in spending in the three counties that would be directly impacted by the proposed tunnel project and the cumulative negative impacts of noise, dust, traffic congestion, public safety and increased demand for health services and competition for housing. Moreover, more than 17 percent of Mackinac County’s residents are Native American as is 3.7 percent of Emmet County residents and 3 percent of Cheboygan County residents. Many of those residents are employed and depend on commercial and subsistence fishing in the Straits area. The tribal commercial harvest in 2016 was 2.8 million pounds and subsistence fish harvest was 141,262 pounds. The tunnel project will impact water quality and create other disturbances to adjacent water resources of local tribes, which are 1836 Treaty-ceded waters.

Inadequate Information about Worst-Case Scenarios, Leak Detection System, and Safety

Precautions to Mitigate Human and Mechanical Errors: Enbridge provides no information about worst-case scenarios or any leak detection system within the tunnel other than mentioning the following: “The tunnel will be constructed with a structural lining, providing secondary containment to prevent any leakage of fluids from Line 5 or utilities into the lakebed or the Straits.” This complete lack of information is frankly inexcusable since Enbridge is an owner of Dakota Access and this issue of leak detection systems and WCS has been at the heart of that EIS litigation involving the Corps. In addition, Enbridge’s application is notably silent about inevitable human and mechanical errors, accidents, and delays that will occur with the tunnel boring machine (“TBM”), slurry treatment plant, and ancillary plant and equipment at these deep geological depths. In fact, Enbridge recently had a mechanical error and violation incident during its geotechnical boring studies for this tunnel project and then waited two months before notifying EGLE that a 40-foot drilling rod broke off and could not be retrieved from the

³⁴ *Dynamic Risk Alternatives Analysis for the Straits Pipelines*, State of Michigan, Oct. 26, 2017.

lakebed floor.³⁵ In a comparable sized tunnel construction project known as the Lake Mead Intake Tunnel, a worker was killed and another was injured, triggering an OSHA investigation.³⁶

Tunnel drilling errors or operating vessels during construction also could threaten the existing Line 5 operations and result in an oil pipeline spill in the Great Lakes. According to a Michigan State University commissioned study, Michigan's economy could suffer an estimated \$6 billion blow from a Line 5 oil spill, damaging tourism, aquatic and terrestrial wildlife and natural resources, coastal property values, commercial fishing, and municipal water systems.³⁷ Given that the current Line 5 pipeline is elevated off the lakebed, the pipeline is now more susceptible to anchor strikes than it has ever been. The Application is silent on this very serious matter; instead it states that "Enbridge does not anticipate any impact to the lake bottom or the existing pipeline from settlement caused by tunnel construction." The Corps must demand further information given that this mega-instructure project is located directly under the existing operating oil pipelines and it involves explosives, blasting, drilling, and generation of surface and tunnel muck of soil and broken rock.

Inadequate Information and Serious Unresolved Issues About Proposed Tunnel Safety and Oil Spill Response Plan. The April 1, 2018 anchor strike to Line 5 cut and severed the American Transmission Company's (ATC) electrical transmission lines. The following year in April 2019, the company in a letter warned about safety issues involving the tunnel which would be transporting hazardous natural gas liquids that experts say could ignite under certain conditions causing a potentially disastrous tunnel explosion underneath the Straits. ATC, which carries electricity through cables to the U.P., took itself out of consideration for sharing the tunnel with Enbridge. During a presentation to the U.P. Energy Task Force on June 9, 2020, an ATC official described the potential safety issues of placing high electric voltage lines adjacent to high temperature oil and gas pipelines as "really, really scary."

Adverse Environmental Conditions for Construction: Enbridge's construction timetable of 27 months is unrealistic given the area's [extreme weather](#), water, and wind conditions all year round and potential ice cover on the Great Lakes for up to six months a year. According to Attorney General Dana Nessel in [an April 6th letter](#) to the U.P. Energy Task Force, "[w]hile Enbridge has proposed and is currently planning

³⁵ "We count on these types of industries to self-report — we don't have staff and equipment to go out and examine with an ROV (remote-operated vehicle) — we don't have an ROV," said Joseph Haas, EGLE's Water Resources Division district supervisor in Gaylord." Keith Matheny, "State 'disconcerted' by Enbridge's disclosures about broken rod left in Straits of Mackinac," Free Press, Jan. 23, 2020.

<https://www.freep.com/story/news/local/michigan/2020/01/22/broken-boring-pipe-straits-mackinac-bottom-longer-enbridge/4543466002/>

³⁶ Henry Breaun, "Worker killed, another injured at Lake Mead third intake construction site," Las Vegas Review Journal, June 11 2012

<https://www.reviewjournal.com/local/local-las-vegas/worker-killed-another-injured-at-lake-mead-third-intake-construction-site/>

³⁷ FLOW, Oil Spill Economics: Estimates of the Economic Damages of an Oil Spill in the Straits of Mackinac in Michigan, May 2018

http://flowforwater.org/wp-content/uploads/2018/05/FLOW_Report_Line-5_Final-release-1.pdf.

to construct a tunnel beneath the Straits to accommodate an eventual replacement for that segment of Line 5, the actual completion of that project is far from certain, and in any event, years away.”³⁸

Potential Adverse Impacts to Wetland Resources: Enbridge’s application concludes that wetlands mitigation requirements be waived and asserts that compensatory mitigation is not needed. Enbridge has not provided the Corps or the public with sufficient information to evaluate the Project under Section 404. Coastal wetlands play a dynamic and vital ecological role in the Great Lakes, particularly in times of high water. Since the early 1800s, however, 40 percent, or 4.273 million acres, of Michigan’s wetlands have been destroyed due to drainage, farming, housing, roads construction, and other development. The Great Lakes watershed has lost 62 percent of its original wetlands, and some parts of this region have lost [more than 90 percent of these habitats](#).³⁹ Wetlands protection is one of the highest priorities of the Great Lakes Restoration Initiative, which funds the [Great Lakes Coastal Monitoring Program](#) (“GLCMP”). According to Dr. Donald Uzarski, Director of CMU Institute for Great Lakes Research, Site 1598 Point St. Ignace Wetland is a lacustrine wetland that has been monitored chemically, physically, and biologically in 2011, 2016, 2017, 2018, 2019, and 2020. Significantly, this wetland scores among the best in Northern Lake Michigan (NLM) in terms of (1) water quality index, (2) vegetation index of biotic integrity (IBI), (3) largemouth bass young of the year (YOY) catch per unit effort (CPUE), (4) specific conductance representing the total amount of ions (and pollution) found in the water, and (5) nitrogen concentrations. Based on this extensive research and monitoring, Dr. Uzarski concludes that “Enbridge should avoid reconstructing the road that is established along the perimeter of this relatively pristine wetland. The road will harden the shoreline and add additional runoff to the wetland.”⁴⁰ In short, the Corps must order Enbridge to supplement the application with the information needed to evaluate the Project under Section 404 and provide another opportunity for public review and comment.

Potential Adverse Impacts to Endangered Species: Pursuant to the Endangered Species Act, a Section 7 consultation must be conducted as part of an EIS because as the permit notice states: “it is likely to adversely affect northern long-eared bat, Houghton’s goldenrod, and dwarf lake iris.”

Potential Adverse and Unprecedented Impacts on State and Taxpayer Liability: While Enbridge has agreed to pay for tunnel construction, the tunnel itself would be turned over to a state agency and would be owned by the state. That means Michigan’s taxpayers could be on the hook for any tunnel collapse or other significant liability problems, or in the event that Enbridge decides to abandon Line 5 as oil and other fossil fuel use decline over the next 99 years. In other words, appropriate indemnification and hold harmless provisions ultimately will not shield state agencies from any damages not covered by Enbridge’s insurers. To date, the State of Michigan has allocated \$4.5 million of taxpayers funds towards the planning, oversight, and legal services of the proposed Mackinac Straits tunnel project all thanks to Governor Snyder’s 11th hour supplemental appropriations budget in December 2018. This use of taxpayer monies to shoulder Enbridge’s costs violated Article 5.2 of the tunnel agreement, which states:

³⁸ Attorney General Nessel Letter to UP Energy Task Force dated April 6, 2020

https://www.michigan.gov/documents/ag/Letter_to_UP_Energy_Task_Force_686036_7.pdf

³⁹ FLOW, Wetlands Destruction, <https://forloveofwater.org/issues/wetlands-destruction/>

⁴⁰ Email correspondence between Dr. Uzarski and Jennifer McKay dated July 11, 2020.

“Nothing in this Agreement will be deemed to obligate the expenditure of State Funds.” The 2018 Snyder-Enbridge agreements then further appear to exempt Enbridge from any taxes under the Straits of Mackinac for the next 99 years.⁴¹

Proposed Action’s Connection to Continued Operations of Existing Line 5 Is Highly Controversial and Affects Public Health and Safety. As a threshold matter, Enbridge alleges in its Application that it can continue to use the existing Line 5 dual pipelines until the Tunnel is operating; Enbridge also states that it has this right, an easement, assignment of the easement, and a 99-year lease to the public trust bottomlands under the Straits.⁴² The allegations and statements are wrong and misleading. The tunnel agreement, the Third Agreement “continued use of existing Line 5” provision, easement, assignment of the easement, and lease are invalid and void, because they constitute agreements, conveyances, grants, or leases to occupy and use public trust bottomlands of Michigan without obtaining the mandatory authorizations of these agreements and interests from the State under the Great Lake Submerged Lands Act and public trust law.⁴³ They are also the subject of vigorous and controversial agency and court proceedings in Michigan.

First, the Third Agreement between Governor Snyder and Enbridge, signed after the Act 359 tunnel transaction, contains a “right of continued use or operation” provision, which is void because Enbridge has not obtained authorization under the Great Lakes Submerged Lands Act (“GLSLA”)⁴⁴ for a new agreement to occupy and use the bottomlands and waters of the Great Lakes until a tunnel is built, which could be as many as 7 to 10 years. Second, the State easement for the tunnel and tunnel pipeline to the MSCA and the assignment of the easement for the tunnel and pipeline to Enbridge are void, because they were not authorized under public trust law standards and the GLSLA.⁴⁵ Third, the 99-year lease signed by the MSCA and Enbridge is void because it did not obtain authorization for the lease of the public trust bottomlands of the Great Lakes required by the GLSLA.⁴⁶ Fourth, the validity and revocation of the 1953 Easement and right to operate the existing Line 5 in the Straits is at issue in *Michigan Attorney General Dana Nessel v. Enbridge Energy Ltd. Partnership et al.* in Ingham County Circuit Court of Michigan.⁴⁷

⁴¹ FLOW Public Comments on Public Act 359 and Line 5 Agreements, December 18, 2018

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

⁴² Enbridge Application to Corps for Tunnel and Tunnel Pipeline, p. 40.

⁴³ MCL 324.32502, MCL 324.32503; *Obrecht v National Gypsum*, 361 Mich 399 (1960). For a detailed and troubling history of the public trust violations associated with the legal agreements and Act 359 legislation that Enbridge brokered in 2018 at the very end of the Snyder Administration, see FLOW’s Public Comments on Public Act 359 and Line 5 Agreements December 18, 2018

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

⁴⁴ FN 43, *supra*; MCL 324.32502, MCL 324.32503.

⁴⁵ FLOW and the Straits of Mackinac Alliance have submitted an initial formal comment, requesting that the tunnel application before Michigan EGLE does not proceed unless and until Enbridge has obtained these authorizations required for the tunnel.

<https://forloveofwater.org/wp-content/uploads/2020/06/FLOW-and-Straits-of-Mackinac-Alliances-formal-legal-comments-to-EGLE.pdf>

⁴⁶ MCL 324.32502, MCL 324.32503.

⁴⁷ *Danna Nessel, Attorney General for the People of Michigan v. Enbridge Energy Ltd Partnership et al.*, Ingham County Cir. Ct. No. 19-474-CE (Hon. James Jamo, Cir. Judge).

Fifth, the 2018 tunnel agreement and Act 359 legislation to authorize such construction of a private tunnel violated the title object clause of the Michigan Constitution (Art. 4, Sec. 24).⁴⁸

Thus, without waving the lack of legal authority for and invalidity of Enbridge's claimed interest to occupy and use the public trust bottomlands of the Straits under state law, for purposes of the instant Application before the Corps, because Enbridge relies on the Third Agreement, tunnel and other agreements and conveyances that purport to continue to allow using the existing Line 5 until a tunnel is built in 7 to 10 years, the Corps consideration of the EIS cannot ignore the effects and impact of its decision leading to serious risks and danger of grave and devastating effects to the public health, safety, and public trust, and environment associated with the history, condition, and continued operation of the existing Line 5 in the Straits.

The body of legal, scientific, and technical evidence documenting Enbridge's risky operations of this pipeline and feasible and prudent alternatives is voluminous, highly relevant, and underscores the controversy of its continued operation. For example, Enbridge [has been in violation of its easement agreement](#) with the state for years but is now suing to force the state to accept additional agreements that would keep Line 5 operating.⁴⁹ In the last 18 month, Line 5 has been struck three times by vessel anchors and/or cable lines, damaging the pipeline coating and anchor supports.⁵⁰ Last month's discovery of damage to the pipeline's anchor support and coating following a remote operated vehicle inspection ("ROV") triggered the temporary court-ordered shut down of Line 5. Judge Jamo of Ingham County Circuit Court will hold the preliminary injunction and summary disposition hearing affecting the validity of the 1953 easement between the state and Enbridge on July 20, 2020.

Under NEPA, the Corps must evaluate oil spills as part of a Section 404 permit application.⁵¹ Relevant to this analysis is Line 5's troubling history of [spilling over 1.1 million gallons of oil](#) into Michigan's environment since 1953. In May 2018, Enbridge was forced to [pay a \\$1.8 million fine](#) as part of its Line 6B consent decree for failing to meet its pipeline safety inspection obligations (including 2 locations on

⁴⁸ The Court of Claims and Court of Appeals ruled there was no violation of the "title-object" clause, Const. 1963, art. 4, sec. 24, but the case is on appeal to the Michigan Supreme Court. *Enbridge v. Michigan*, Ct of App. No. 351566., Slip Opinion, June 12, 2020. However, on information and belief, the State has filed an application for leave to the Michigan Supreme Court.

⁴⁹ See FLOW's November 12, 2019 Letter to DNR documenting Enbridge's multiple and ongoing violations of the 1953 Easement with the State of Michigan. <https://forloveofwater.org/wp-content/uploads/2019/11/FLOW-Comments-on-Enbridges-Violations-of-the-1953-Easement-for-the-Line-5-Oil-Pipelines-in-the-Straits-of-Mackinac-and-Lake-Michigan-2019.11.12.pdf>

⁵⁰ On April 1, 2018, a tug boat anchor dented the dual oil pipelines in three locations and spilled over 600 gallons of dielectric fluid from a transmission cable into the waters of Lake Michigan. Emily Lawler, *Line 5 Damaged, Likely From Same Anchor Strike that Caused Spill*, MLive, April 11, 2018 https://www.mlive.com/news/index.ssf/2018/04/anchor_strike_responsible_for.html.

⁵¹ *Stop The Pipeline v. White*, 233 F. Supp. 2d 957 (S.D. Ohio 2002) (the Corps prepared EIS for individual 404 permit for a 149-mile petroleum pipeline).

land-based portions of Line 5).⁵² And last month, in June 2020, [EPA imposed a \\$6.7 million fine on Enbridge](#) for pipeline safety and compliance violations with its consent decree.

Enbridge's negligence also caused the largest oil pipeline rupture in Michigan history into the Kalamazoo River watershed near Marshall 10 years ago this month on July 25 but they were allowed to construct an even larger pipeline to replace the old Line 6B that ruptured and transport up to 800,000 bbl. This tar sands catastrophe dumped more than a million gallons along 40 miles of the Kalamazoo River, triggering a four-year cleanup that cost more than \$1.3 billion. Enbridge was fined \$61 million as part of an overall \$177-million settlement that required improvements to its Lakehead Pipeline System. This tar sands disaster serves as a poster child for the serious inadequacies of our pipeline regulatory regime and why the public should not rely on the companies responsible for oil spill disasters to prevent and respond to them in the first place.

In short, the tunnel and tunnel pipeline Application cannot be meaningfully considered without a full EIS that includes a thorough analysis of the high risks of devastating harm fostered by the continued operation of the existing Line 5 in the Straits.

Project Construction and Continued Line 5 Operations Both Pose Adverse Impacts to Sovereign Tribal and Fishing Rights:⁵³

Categorical exclusions from NEPA are allowed only if the proposed activity or operation does not “impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.”⁵⁴ In this case, however, an EIS must examine the potential adverse effects on the Application as well as the continued operation of Line 5 to off-reservation fishing rights of five Indian tribes who signed the March 28, 1836 Treaty of Washington (7 Stat. 491): they include Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, and Little Traverse Bay Bands of Odawa Indians, and are collectively represented by the Chippewa Ottawa Resource Authority (“CORA”).⁵⁵ In the 1836 Treaty these Tribes reserved off-reservation fishing rights in the Great Lakes including the Straits of Mackinac that have been confirmed by the federal courts, *see United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). The massive proposed tunnel and pipeline project in this ecologically rich region threatens to disrupt

⁵² In negotiating the Line 6B 2016 federal consent decree with DOJ and EPA, Enbridge represented that the installation of anchor screws on the lakebed was a safety measure, even though the corporation had full knowledge as early as 2014 that this new engineering design was defective, caused pipeline coating loss, elevated Line 5 off the lakebed floor, and ultimately increased the overall risk of an anchor strike and pipeline rupture. In addition, Enbridge applied for three joint Michigan Department of Environmental Quality and Army Corps anchor screw permits in 2016, 2017, and 2018 with full knowledge of its defective design. When Enbridge finally disclosed this information in November 2017, the corporation stated that of the 48 out of 128 anchor locations inspected by actual divers had gaps, including three the size of dinner plates that were bare metal and 42 that had calcareous deposits. Mark Tower, *Enbridge finds issues at 42 of 48 sites along underwater oil pipeline*, MLive, Nov. 15, 2017 http://www.mlive.com/news/grand/-rapids/index.ssf/2017/11/enbridge_finds_issues_with_42.html.

⁵³ Again, without waving the invalidity of Enbridge's legal authority and public trust interest to occupy and use the bottomlands of the Straits, the Corps cannot ignore the effects and risks of the continuing use of Line 5 as part of its review and EIS on the proposed tunnel.

⁵⁴ 40 C.F.R. § 1508.4 (2018).

⁵⁵ We refer to and incorporate by reference public comments by the tribes protected by the 1836 Treaty.

treaty fishing rights. The Straits of Mackinac are the spawning and fishing grounds for 60 percent of the commercial tribal whitefish catch.⁵⁶ According to Mark Ebener, a Fishery Assessment Biologist for the Inter-Tribal Fisheries and Assessment Program (ITFAP) of CORA, “Northern Lake Michigan and Northern Lake Huron are very important fishing grounds for the CORA fishery and the habitat in these areas produces more than ten millions of pounds of lake whitefish annually for harvest by the tribes.”⁵⁷

The Corps Must Evaluate Adverse Impacts to Cultural Resources As Part of Tribal Consultation.

In addition to the unacceptable risks to natural resources and Michigan’s economy, the State of Michigan’s 2017 Risk Analysis clearly documents that Line 5 poses an intolerable risk to the federally recognized tribes’ cultural and historic traditions, which rely on the landscape this pipeline traverses to maintain their subsistence lifestyle and cultural identity. In 1836, the tribes reserved the right to fish the Straits of Mackinac.⁵⁸ The exercise of those rights was essential to their very survival, as well as to the maintenance of a way of life and cultural practices dating back to time immemorial. This reserved right to fish is not a reserved right to the actual fish population within the waters of the Straits, but rather is a reserved right to have a connection with the fish, to pray for the fish, to dance with the fish, to harvest the fish, as well as preserve and pass down these culturally significant acts from one generation to the next. A worst-case scenario (“WCS”) Line 5 spill would undoubtedly affect tribal members’ ability to engage in the act of fishing and the sacred connection to the waters and fish that are essential to their way of life. In sum, the Corps must consult with the Tribes to identify and evaluate the culture resources impacts by the proposed project.

Locking Michigan Into A 99-Year Fossil Fuel Mega Infrastructure Project Has Significant

Cumulative Climate Change Impacts and Risks. 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. The current energy shift towards renewables 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 petroleum investments that drive Enbridge’s Canadian oil transport roadmap into North America and the Great Lakes.

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

⁵⁶ “Unlike the oceans, the Great Lakes are a relatively confined ecosystem, meaning that they are ill equipped to digest or flush away oil. Oil spills in freshwater ecosystems cause a myriad of short term and long-term effects. Beyond the immediate threat to fish and wildlife, oil spills can also affect the spawning success of trout because the eggs of trout and other salmon species are “highly sensitive to oil toxins,” according to the U.S. Fish and Wildlife Service. (6) Small amounts of oil can kill fish eggs and oil toxicant that lingers in sediment and aquatic vegetation long after a spill is “cleaned up” can harm aquatic ecosystems for decades after a spill occurs. (7)” Exhibit 7 in *National Wildlife Federation v. PHMSA*, filed July 15, 2016.

⁵⁷ Mark Ebener, Fishery Assessment Biologist, Inter-Tribal Fisheries and Assessment Program (ITFAP) of CORA Exhibit 5, July 15, 2016.

⁵⁸ *People v. LeBlanc*, 399 Mich. 31 (Mich. 1976); see also *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

regulators are imposing more rigorous disclosure requirements and improved assessment and management of investment portfolios to mitigate risk. 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. Accordingly, the Corps' environmental review of impacts cannot be limited to the impacts of the tunnel/pipeline segment in the Straits of Mackinac alone; rather the Corps' review gives rise to a federal obligation to analyze the GHG emissions and impacts of the pipeline as a whole.

The Application Threatens to Violate State, Federal and Local Laws. In this case, boring an unprecedented tunnel through the bedrock and soils of the Great Lakes threatens to violate a host of Federal, State, or local law or requirements imposed for the protection of the environment, including but not limited to, the Great Lakes Submerged Lands Act (“GLSLA”), the Michigan Environmental Protection Act (“MEPA”) public trust law, Michigan’s Constitution,⁵⁹ Michigan Water Quality Standards, the Endangered Species Act (“ESA”).⁶⁰ As a threshold matter, Enbridge lacks legal authorization to construct and operate this proposed tunnel and pipeline because the 2017 and 2018 agreements coupled with the Act 359 legislation to authorize such construction of a private tunnel through public trust bottomlands violate public trust law (GLSLA and MEPA) and the Michigan Constitution (Art. 4 Sec. 52). As public trustee, the State of Michigan has a separate and irrevocable duty to protect the paramount interests of the navigable waterways and bottomlands of the Great Lakes. This includes the proposed location of the tunnel and pipeline project under the Straits of Mackinac. In other words, the very tunnel agreements and legislation Enbridge relies on to make this joint application are defective.⁶¹ Thus, an EIS is required to evaluate these and other applicable federal and state laws.

VI. The Scope of the EIS and/or EA must Comprehensively Study and Evaluate the Significant Impacts to Environment and Health and Range of Reasonable Alternatives to the Proposed Tunnel and Pipeline Project under the Great Lakes.

The Corps Must Evaluate Alternatives. The EIS must also inform federal agency decision-makers and the public of the “reasonable alternatives” that would “avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1. This alternatives analysis is the “heart” of the EIS—the agency should “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options.” Id. § 1502.14. The EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives,” including the alternative of “no action.” Id. §§ 1502.14(a), (d). The alternatives analysis is particularly

⁵⁹ MI. CONST. ART. 4, §52 “The legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment and destruction.”

⁶⁰ See FLOW Public Comments on Public Act 359 and Line 5 Agreements (December 18, 2018) for a lengthy legal analysis of the invalid agreements and unconstitutional legislation authorizing Enbridge’s proposed tunnel and pipeline scheme. <https://forloveofwater.org/wp-content/uploads/2020/04/FLOW-Public-Comment-12-18-18.pdf>

⁶¹ For a detailed and troubling history of the public trust violations associated with the legal agreements and Act 359 legislation that Enbridge brokered in 2018 at the very end of the Snyder Administration, see FLOW’s Public Comments on Public Act 359 and Line 5 Agreements December 18, 2018 <https://forloveofwater.org/wp-content/uploads/2020/04/FLOW-Public-Comment-12-18-18.pdf>

important in the CWA Section 404 context because the Corps must ensure that there are no less environmentally damaging practicable alternatives that exist. *Id.* § 230.10(a).

Whether an EA or EIS, the discussion and analysis of alternatives to actions that may significantly affect the environment is “at the heart” of the Corps’ duties under NEPA.⁶² The discussion of the range of alternatives to a proposed action must be “reasonable;”⁶³ and it must not unduly narrow by limiting the project to the purpose stated in the application.⁶⁴ Typically, the EIS or assessment must evaluate a full range of reasonably possible alternatives to accomplish the basic purpose of the project under review⁶⁵ – that is, a detailed disclosure of alternative ways or methods that would avoid or reduce impact and accomplish the goal or purpose.⁶⁶ However, in doing so, the government body must conduct a thorough evaluation and provide detailed reasons for its conclusions.⁶⁷

The consideration of alternatives and their comparative impacts must be in response to the basic “underlying purpose”⁶⁸ of the action proposed, and not simply the stated action in the application.⁶⁹ An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.⁷⁰ Moreover, the approach to the alternative requirement cannot be drawn too narrowly where it would result in the impacts or significant risks that are to be disclosed or avoided.⁷¹ In sum, an agency is forbidden to limit the range of reasonably possible alternatives.

⁶² *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978); 40 C.F.R. § 1502.14 (2018).

⁶³ 42 U.S.C. § 4332(2)(c)(iii) (2018).

⁶⁴ *Sierra Club v. Coleman*, 421 F. Supp. 63 (D.D.C. 1976).

⁶⁵ E.g., Council of Environmental Quality rules on NEPA impact and alternative studies and statements. 40 C.F.R. § 1501 (2018).

⁶⁶ *Id.* NEPA EIS, Alternatives requirement; 42 U.S.C. § 4332(C)(3) (2018) (“The purpose of an EIS is a “full and fair discussion [to] inform decision makers of environmental impacts... and reasonable alternatives which would avoid or minimize adverse impacts.”); 40 C.F.R. § 1502.1; *Stewart Park & Reserve Coal Inc. v. Slater*, 352 F.3d 545, 557 (2d Cir. 2003).

⁶⁷ *Sierra Club v. Coleman*, (“The purpose of an EIS is a “full and fair discussion [to] inform decision makers of environmental impacts... and reasonable alternatives which would avoid or minimize adverse impacts.”); 40 C.F.R. § 1502.1; *Stewart Park & Reserve Coal. Inc. v. Slater*, 352 F.3d 545, 557 (2d Cir. 2003).

⁶⁸ 40 C.F.R. § 1502.13 (2018).

⁶⁹ *Id.*

⁷⁰ *City of New York v. Dept. of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983).

⁷¹ 40 C.F.R. § 1502.14 (“[A]gencies shall: (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits. (c) Include reasonable alternatives not within the jurisdiction of the lead agency.”) This is similar to Michigan wetlands law, which discourages alternative analysis that draws the purpose or conduct in question so narrowly as to preclude consideration of alternatives that would eliminate or significantly reduce the loss of wetlands or natural resources that are threatened. MCL 303011(b)(4); R281. EGLE WPA rules prohibit “unduly narrowing” the basic project purpose to avoid considering alternatives, as did the respondent in this case. Applicant cannot narrow the purpose and must prove it has considered and established least damaging or wetland loss alternatives are not feasible and prudent. R281.922a(4)).

Further, where there is a relationship between new risk and safety concerns, the alternative analysis to an existing action or proposed action must treat the proposed action as new, and not previously authorized. An alternative analysis and related potential environmental impacts cannot be limited to an already authorized project or conduct, where new and additional circumstances, changes, and safety concerns have occurred or become known after the authorized project.⁷²

Section V of these comments document the Project's significant impacts to the quality of the human environment. FLOW and other groups have on numerous occasions submitted technical reports and comments regarding the existence of feasible and prudent alternatives that would avoid the severe threat of catastrophic harm and effects to Lake Huron and Lake Michigan and shoreline communities, property owners, and the many protected public trust uses and tribal fishing in these waters.⁷³ This body of evidence points to the fact that there are reasonable, practical, safer, feasible and affordable alternatives to building and operating a private oil tunnel and pipeline under one of the most important ecological bodies of water on the planet. Practical solutions, for example, exist for continued service of propane to the U.S., and transport of smaller volumes of crude oil out of northern Michigan. Moreover, Enbridge has doubled the design capacity of Line 6B (renamed by Enbridge as Line 78) with a 36-inch diameter pipeline to Stockbridge; there the line forks, with a 30-inch line to Sarnia and another equally large line to Detroit and Toledo.

Enbridge's claim that the proposed tunnel for Line 5 pipeline is "the solution" to the dangers and risks of major catastrophe inherent in its failing design of the existing 67-year-old Line 5 pipeline ignores several key facts and alternatives:

Line 5 is Not Vital to Michigan's Energy Infrastructure. Over the last five years, a number of independent reports have made clear that Line 5 is no longer essential energy infrastructure for Michigan with viable alternatives to meet the U.P.'s propane needs⁷⁴ and lower northern Michigan's crude oil transport needs;⁷⁵ A 2015 expert report, for example, shows only 5-10 percent of the oil in Line 5 is used in Michigan and that decommissioning the 67-year-old oil pipelines to prevent a disastrous spill in the Mackinac Straits would not disrupt Michigan's or the Midwest's crude oil and propane supply. Contrary to Enbridge's claims, a [Canadian news outlet](#) recently revealed that 500,000 bbl of the 540,000 bbl shipped in Line 5 are refined in Sarnia, Canada. Marathon in Detroit and Toledo refineries have access to 50,000 bbls/day of light crude oil from fields in Ohio and Pennsylvania, and from other pipelines from the

⁷² *Northern Plains Resource Council Inc. v. Surface Transp. Bd.*, 668 F. 3d 1067, 1099 (9th Cir. 2011). (Holding a board's decision to limit impact analysis to authorized railroad location or route was arbitrary and capricious).

⁷³ See FLOW, *Eliminating the Line 5 Oil Pipelines' Unacceptable Risk to the Great Lakes through a Comprehensive Alternatives Analysis and Systems Approach*, Dec. 14, 2015,

<http://flowforwater.org/wp-content/uploads/2015/12/FLOW-Composite-Report-12-14-15-FINAL-1.pdf>.

⁷⁴ 2 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/wpcontent/uploads/2017/06/JR022-PROPANE-20170606.pdf>.

⁷⁵ 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

south.⁷⁶ In sum, as a practical matter, the transport of crude oil carried by Line 5 to Canada, Detroit, and Toledo can be handled, with some minor or reasonable adjustments, by Line 6B; however, climate change impacts and risks must be fully evaluated as part of this or any other alternatives analysis under NEPA.⁷⁷

Alternatives Exist to Supply Michigan’s Propane and Crude Oil Needs. The 2017 Dynamic Risk Draft Alternatives Analysis dispelled Enbridge’s claims about Michigan’s dependency on Line 5 in unambiguous terms: “The majority of Line 5 throughput is delivered to the Sarnia, Ontario terminal in Canada where it is then transported to refineries across eastern Canada and the U.S. . . . Of the NGLs transported on Line 5, less than 5% are delivered into Rapid River [in the Upper Peninsula]. Lewiston oil injections are also less than 5% of Line 5 current throughput and do not appear to be increasing.” Draft Report at 4-4 and 4-5. In other words, the Michigan portion of Line 5 is largely a thoroughfare for the transportation of product to the benefit of commercial, government, and consumer interests elsewhere, including, of course, to the benefit of Enbridge and its shareholders.

The following year in 2018, an independent expert report from London Economics International, LLC (LEI)⁷⁸ confirmed the state’s finding: 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. The lowest-cost alternative options to Enbridge Line 5 would be truck or rail from Superior, Wisconsin. The Attorney General’s [April 6, 2020 letter](#) to the U.P. Energy Task Force outlines propane alternatives and legislation to address the energy needs of residents in the Upper Peninsula.

The Proposed Tunnel Solution Is Enbridge’s Solution, Not A Fait Accompli: Enbridge has disingenuously stated that “The purpose of the proposed work is to transport light crude oil and liquid natural gas between the upper and lower peninsulas of Michigan.” Line 5 is part of Enbridge’s 1,900-mile Lakehead Pipeline System that transports tar sands from Alberta and refined tar sands through Minnesota, Wisconsin, Illinois, and Michigan. As stated above, the majority of oil comes from and goes back to Canada, using the Straits of Mackinac in the Great Lakes as a shortcut. Enbridge has cleverly shifted the alternative analysis to the proposed tunnel option through illegal and unconstitutional agreements with the last state administration in 2018 even though it is clear that Michigan’s energy needs are not tethered to Line 5’s continued operations. Less than 10 percent of the oil produce remains in Michigan. In short,

⁷⁶ *Id.*

⁷⁷ *Id.* “The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.” *Ctr. for Biological Diversity v. NHTSA.*, 508 F.3d 508, 550 (9th Cir. 2007)); *Mid States Coal. for Progress v. Surface Trans. Bd.*, 345 F.3d 520 (8th Cir. 2003); *Border Power Plant Working Grp. v. DOE*, 260 F. Supp 2d 997 (S.D. Cal. 2003). The courts also underscore the need to analyze climate change when the proposed action is regional or national in scope, which is clearly the case for the proposed project which extends from Canada through several U.S. states in the Great Lakes region.

⁷⁸ 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/wpcontent/uploads/2017/06/JR022-PROPANE-20170606.pdf>.

Enbridge has never demonstrated a public need to justify operating the proposed pipeline and tunnel for the next 99 years.

Enbridge’s Tunnel Solution is Predicated on the Continued Risky Operations of Line 5. Line 5 continues to operate as a high and unacceptable risk every day in our Great Lakes and 400 other water crossings in Michigan. As detailed above, Line 5 is 67-years-old and continues to rupture every year, including in 2018 with an additional 4 pipeline oil spills in Michigan alone (land-based portions of Line 5). Moreover, Line 5 can be decommissioned in far less time than the seven to 10 years to build a tunnel.

It is clear that a “hard look” is necessary for any meaningful decision by the Corps to authorize Enbridge’s proposed tunnel and pipeline construction under the Great Lakes. Enbridge’s application and explanation of the tunnel agreement background followed by the no action alternative is insufficient in terms of analyzing feasible and prudent alternatives to the proposed action under Section 404. Enbridge has not made any showing that other alternatives are not practicable. See 40 C.F.R. § 230.10. A reasonable analysis of alternatives must include the avoidance of severe, intense and unacceptable harm threatened by Line 5 in the Straits. Thorough analysis, with clearly stated and supported reasons, not assumptions, is required based on the current conditions, failures, and circumstances surrounding Line 5. The proposed action underlying the application is to secure unfettered operations of the entire 645-mile pipeline to transport primarily Canadian oil for the next 99 years. The substantial, unique, rare, sensitive and public trust and tribal fishing and other uses of these waters and bottomlands demand an EIS and full analysis of a reasonable range of alternatives.

It is clear that Enbridge’s proposed federal permit request to construct and operate a subterranean pipeline tunnel under the Great Lakes in the Straits of Mackinac constitutes a “major Federal action[] significantly affecting the quality of the human environment”⁷⁹ because such activity interferes with tribal fishing and treaty rights, and represents an unacceptable risk given the magnitude of harm to drinking water supplies, and unprecedented regional economic impact and natural resource damages. Moreover, feasible and prudent alternatives exist that do not inequitably burden the State of Michigan’s agencies, and the citizens and Tribes of Michigan. In fact, given that the Line 5 pipelines can be decommissioned with little disruption and cost to the State, its citizens, and the Tribes, the continuing risk of an oil spill through the continued operation of the Straits Pipelines is simply not justified by Michigan interests. Based on the law and compelling evidentiary case, we urge the Corps to apply a broad scope of review of the EA and EIS to the proposed tunnel and the public need for this proposed project.

VII. There Is No Showing that Line 5 Proposed Tunnel and Pipeline Is In the Public Interest.

Determining that the Project is in the public interest requires weighing its benefits against its costs.⁸⁰ Here, Enbridge has failed to provide the Corps with the information it needs to make that determination. Based on this record, the Corps cannot find that the Project is in the public interest, particularly given that the Project is not needed, is not responding to actual demand for oil, would have extremely significant

⁷⁹ 42 U.S.C. § 4332(2)(C) (2018); 40 C.F.R. §§ 1508.27(a)-(b) (2018).

⁸⁰ *Nat’l Parks Conservation Ass’n v. Semonite*, 311 F. Supp. 3d 350, 377 (D.D.C. 2018).

climate change impacts, puts Michigan’s 400 waterways at risk from construction and oil spills, and would negatively affect sovereign tribal treaty rights.

VIII. Conclusion and Request for Action

The commentators appreciate the opportunity to comment on the framework and actions to be taken by the Corps pursuant to NEPA, rules, and applicable law to the Enbridge application for permits under the CWA and Section 10 of the Rivers and Harbors Act. For the foregoing reasons, the materials Enbridge has submitted fall far short of meeting its burden under Section 404, and thus, the Corps should deny Enbridge’s application. If and when the Corps moves forward with Enbridge’s application, commenters respectfully request that the Corps (1) prepare an EIS as described throughout these comments, (2) hold a public hearing on Enbridge’s application, and (3) provide further opportunities for public comment.

Finally, the Corps should take such other action as is necessary to prevent any risk of release from Enbridge’s existing Line 5 operations in the Straits pending further review and before any final decision is made, including the temporary suspension of the transport of crude oil to prevent serious harm to the waters of the US, environment, fishing, navigation, drinking water and other uses, and the related ecosystem.

Thank you for your serious consideration of our comments.

Sincerely yours,

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