

case because the only issue in the application is not controversial: “if the Application is granted, Enbridge will (1) relocate Line 5 in a tunnel for which permits are being sought in separate proceedings at other agencies and (2) deactivate the Dual Pipelines.” *Id.*, p. 19. Enbridge concludes that if approval to build the tunnel or relocate the pipeline is not granted, it will continue to operate the Dual Pipelines.

On May 13, 2020, For the Love of Water (FLOW) timely filed comments asserting that Enbridge’s request for declaratory relief should be denied because Enbridge does not have the requisite authority to construct the Line 5 Project or the tunnel pursuant to the 1953 order, the 1953 easement, the 2018 tunnel easement, or its agreements with the State of Michigan. In addition, FLOW asserts that Enbridge must obtain Commission approval to construct the tunnel and the Line 5 Project pursuant to Act 16 and Rule 447.

FLOW states that Enbridge acknowledges that the replacement pipe segment for the Line 5 Project will not be placed within the precise location set forth in the 1953 easement. FLOW notes that the 1953 easement contains “exact longitudinal and latitudinal locations for the easterly and the westerly located Line 5 pipeline infrastructure. The 1953 MPSC Order included similar express terms and conditions about the pipeline infrastructure and location . . . .” FLOW’s initial comments, p. 6. FLOW argues that these specific locations are legally significant because, in the 1953 easement and the 1953 order, the State of Michigan granted Lakehead conditional use of its public trust lands and waters so long as the Dual Pipelines were constructed in an exact location on the lakebed floor. FLOW asserts that “[n]othing in the Commission’s 1953 Order contained approval or even consideration for the location and construction of a deep subsurface tunnel and tunnel pipeline.” *Id.*, p. 7. Therefore, FLOW argues that the 1953 order, together with the 1953 easement, does not provide Enbridge the requisite authority to construct the Line 5 Project.

FLOW also contends that “there is tremendous confusion as to the legal status of which Enbridge entity is the legal successor in interest and correct signatory to the multiple agreements at issue involving the 2018 tunnel agreement, easement, assignment, and lease agreement.” *Id.*, p. 15. FLOW states that there are multiple Enbridge entities who are parties and signatories to the agreements and, since 2018, several of these entities have merged through acquisition by another wholly owned subsidiary of Enbridge. FLOW asserts that interested parties should be provided an opportunity, through an Act 16 contested case, to obtain discovery and resolve these questions.

Next, FLOW argues that Enbridge’s agreements with the State of Michigan and the Tunnel Agreement, independent of other required permits and approvals, do not provide Enbridge the authority to construct the Line 5 Project. FLOW explains that on November 27, 2017, Enbridge and the State of Michigan entered into an agreement (First Agreement) which states, among other things, that “the State and Enbridge desire to establish additional measures and undertake further studies with respect to certain matters related to Enbridge’s stewardship of Line 5 within Michigan.” First Agreement, p. 2. Then, on October 4, 2018, FLOW states that Enbridge, the State of Michigan, MDNR, and the Michigan Department of Environmental Quality (MDEQ) (now known as EGLE) entered into an agreement (Second Agreement) wherein the Mackinac Bridge Authority (Authority) was directed to “(a) obtain or support Enbridge in obtaining the necessary permits, authorizations, or approvals necessary for the construction and operation of the Tunnel and the Line 5 Straits Replacement Segment; and (b) upon completion of the construction of the Straits Tunnel, the Authority shall assume ownership of the Straits Tunnel.” Second Agreement, p. 6. On December 19, 2018, FLOW notes that Enbridge and the MSCA entered into the Tunnel Agreement, wherein the parties agreed, among other things, that Enbridge and the MSCA will “jointly obtain all Governmental approvals and Permits required for the Tunnel.”

Tunnel Agreement, p. 1. On that same date, FLOW contends that Enbridge, the State of Michigan, MDNR, and MDEQ (now known as EGLE) entered into an agreement (Third Agreement), which states, among other things, that:

Enbridge may continue to operate the Dual Pipelines, which allow for the functional use of the current Line 5 in Michigan, until the Tunnel is completed, and the Straits Line 5 Replacement segment is placed in service within the Tunnel, subject to Enbridge's continued compliance with all of the following:

- (a) The Second Agreement;
- (b) The Tunnel Agreement;
- (c) This Third Agreement;
- (d) The 1953 Easement; and
- (e) All other applicable laws, including those listed in Section V of the Second Agreement.

Third Agreement, p. 4.

FLOW also notes that, on December 17, 2018, an easement was granted by MDNR under Section 2129 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.2129, for the construction of the tunnel (2018 tunnel easement). Section 21 of NREPA states in relevant part:

The department may grant easements, upon terms and conditions the department determines just and reasonable, 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 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.

FLOW asserts that MDNR conveyed the 2018 tunnel easement to the MSCA and the MSCA assigned the tunnel easement to Enbridge, who will temporarily own the bottomlands and soils beneath the Straits to construct the tunnel. FLOW states that, once the tunnel is complete,

Enbridge will transfer title to the MSCA in exchange for a 99-year lease to operate and maintain the tunnel pipeline.

According to FLOW, Enbridge claims that these three agreements with the State of Michigan, together with the 2018 tunnel easement, the MSCA's assignment of the 2018 tunnel easement to Enbridge, and the 99-year-lease of the tunnel, provide it the necessary property interests to occupy the subsurface public trust bottomlands and to construct the pipeline inside the tunnel. FLOW disagrees, arguing that "the Second Agreement and Act 359 unequivocally require MSCA and/or Enbridge to apply for and obtain all authorizations, approvals, and permits for the tunnel easement to MSCA, the assignment of the easement by MSCA to Enbridge, the 99-year-lease, and for the location, use, construction, and operation of the tunnel." FLOW's initial comments, pp. 11-12. Accordingly, FLOW asserts that Enbridge must obtain Act 16 approval to construct the tunnel and the Line 5 Project.

In response to Enbridge's claim that the tunnel is not part of the Line 5 Project and, therefore, not subject to the Commission's Act 16 jurisdiction, FLOW contends that Enbridge provides the conflicting argument that the tunnel is a pipeline that qualifies for a public utility easement, i.e., the 2018 tunnel easement, under Section 2129 of NREPA. FLOW states that, for the 2018 tunnel easement to be lawful pursuant to Section 2129 of NREPA, Enbridge must concede that the tunnel is an inseparable part of the Line 5 Project. In any event, FLOW asserts that, at the time the MSCA assigned the 2018 tunnel easement to Enbridge, Enbridge had not obtained Act 16 approval for the tunnel structure or the Line 5 Project. Therefore, FLOW argues that the tunnel and the Line 5 Project are not legally approved public utilities that qualify for an easement pursuant to the plain language of Section 2129 of NREPA.

Similarly, FLOW asserts that the language in: (1) the Second Agreement; (2) the Tunnel Agreement; (3) Act 359; (4) the 2018 tunnel easement; (5) the assignment of the easement; and (6) the 99-year lease of the tunnel, indicate that the tunnel and the Line 5 Project are inseparable and a single project that constitutes new construction under Rule 447. FLOW also notes that the 0.4- to 0.8-mile tie-ins on the north and south sides of the Straits are new locations and extensions to construct the new 30-inch-diameter pipeline that will be connected to the existing Line 5 pipeline. As a result, FLOW avers that the tunnel, the Line 5 Project, and the tie-ins are a single project of new construction that requires Act 16 approval pursuant to Rule 447.

FLOW also contends that, because Enbridge “did not have MPSC approval as a public utility to locate and construct the tunnel and pipeline project under Act 16, in the closing days of 2018 it sought to quickly acquire the property interests—the tunnel easement, assignment of easement, and 99-year lease—from the MDNR under Section 2129 in the state-owned bottomlands under the Straits.” *Id.*, p. 21. However, FLOW asserts that to qualify for and acquire these property interests, Enbridge first should have, but did not, obtain Act 16 approval for the tunnel and the Line 5 Project as public utilities, which is required by Section 2129 of NREPA and the Great Lakes Submerged Lands Act (GLSLA).

FLOW argues that the 2018 easement can only be assigned to Enbridge if it is determined that the easement complies with the mandatory requirements of the common law public trust doctrine.

According to FLOW:

To comply with public trust law, EGLE must factually determine that:

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).

*Id.*, p. 22. FLOW argues that, prior to conveying the 2018 tunnel easement to the MSCA, neither MDNR nor MDEQ (now known as EGLE) made the two findings required by the public trust doctrine.

Moreover, FLOW contends that EGLE must make a determination pursuant to the GLSLA that “the public trust in the waters will not be impaired or substantially affected,” and only then may EGLE lease unpatented lands with the approval of the state administrative board. *Id.*, p. 24, quoting MCL 324.32503. As stated above, FLOW alleges that neither MDNR nor EGLE have made findings pursuant to public trust law. FLOW notes that, in April 2020, Enbridge applied to EGLE for a construction permit for the tunnel pursuant to the GLSLA. FLOW argues that “Enbridge is not entitled to obtain authority for an easement or enter into any agreement unless it has obtained the approval of state administrative board as required by Section 32503, *supra*, of the GLSLA.” *Id.*, p. 25. In addition, FLOW states that Enbridge has not applied for, or obtained, authorization under Section 32502 of the GLSLA for the 2018 tunnel easement, the MSCA assignment of the tunnel easement, or the 99-year lease. As a result, FLOW asserts that Enbridge does not have a legally authorized property interest in the public trust bottomlands of the Straits.

In conclusion, FLOW states that there are important questions concerning the necessity of the Line 5 Project, alternatives to the project, and how the Line 5 Project affects the public interest. FLOW asserts that the Michigan Constitution, the public trust doctrine, MEPA, and impacts of climate change should shape the outcome of these questions. For these reasons and those discussed above, FLOW contends that Enbridge’s request for declaratory relief should be denied,

and “these proceedings must go forward and be addressed through the comprehensive review, analysis, and determinations by this Commission as provided by law.” *Id.*, p. 26.

On May 13, 2020, the Attorney General timely filed comments asserting that Enbridge’s request for declaratory relief should be denied. First, she disputes Enbridge’s claim that the Line 5 Project is simply maintenance and continued operation of the existing Line 5 pipeline pursuant to the 1953 order. Rather, the Attorney General states that the Line 5 Project is new construction that will be located within a new tunnel structure deep beneath the Straits. She argues that the new location “differs both horizontally from the existing dual pipelines on the lakebed . . . and vertically, i.e. up to 250 feet beneath the lakebed.” Attorney General’s initial comments, p. 5. In addition, the Attorney General asserts that it is unclear whether “Enbridge Energy Limited Partnership, one of several Enbridge entities variously involved in Line 5, is actually the legal successor to Lakehead and the authorization granted in the 1953 order.” *Id.*, p. 2, note 2. Therefore, she contends that Enbridge does not have the requisite authority pursuant to the 1953 order to construct the Line 5 Project.

Second, the Attorney General states that Act 16 and Rule 447 require Commission approval of the Line 5 Project. She asserts that, “[u]nder Act 16, no one subject to the Act, including Enbridge[,] has the right to ‘locate’ an oil pipeline within Michigan, except as authorized by and subject to the Act.” *Id.*, p. 2 (emphasis in original). The Attorney General states that, because Enbridge operates a pipeline under the requirements of Act 16 and is proposing to construct a new pipeline to transport petroleum products, pursuant to Rule 447, Enbridge is required to file an Act 16 application and obtain Commission approval of the Line 5 Project.

Third, the Attorney General contends that the Commission has previously required Enbridge to file an Act 16 application for the replacement and relocation of other pipeline segments. She