



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

August 12, 2020

Via E-filing

Ms. Lisa Felice
Michigan Public Service Commission
7109 W. Saginaw Hwy.
P. O. Box 30221
Lansing, MI 48909

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following is attached for paperless electronic filing:

For Love of Water (FLOW) Reply to Enbridge's Objections to Petition to Intervene
Proof of Service

Sincerely,

James Olson
jim@flowforwater.org

xc: Parties to Case No. U-20763

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief

Case No. U-20763

ALJ Dennis Mack

**FOR LOVE OF WATER (FLOW) REPLY TO APPLICANT
ENBRIDGE'S OBJECTIONS TO PETITION TO INTERVENE**

- I. FLOW CAN AND WILL PROVIDE A UNIQUE, LASER-FOCUSED PERSPECTIVE AND EXPERTISE AND INFORMATION CONCERNING (1) THE LOCATION, SITING, AND USE OF THE STATE'S TITLE AND REAL PROPERTY INTEREST IN THE BOTTOMLANDS OF THE STRAITS OF MACKINAC AND GREAT LAKES; (2) NECESSITY OF LOCATING AND USING THESE BOTTOMLANDS; (3) REASONABLE ALTERNATIVES, ADJUSTMENTS, AND MEASURES TO SITING ON THESE BOTTOMLANDS; AND (4) THE OVERARCHING PUBLIC INTEREST IN THESE PROCEEDINGS BECAUSE OF THESE BOTTOMLANDS.**

On May 1, 2020, For Love of Water ("FLOW") filed its Petitioner for Permissive Intervention pursuant to MPSC Rule 410, R 792.10410(b), because FLOW can and will "provide useful information to the Commission or a unique perspective on the issues in this case." Id.; *Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150; 90 S Ct 827; 250 L Ed 184 (1970); *In re Application of The Detroit Edison Co for Authority to Increase its Rates*, Case Nos. U-15768 and U15751, January 11, 2010, Order, p. 7 ("*In re Detroit Edison*").

Before the Commission can approve Enbridge’s Act 16 request, the Commission will consider whether “(1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and routed in a reasonable manner, including an analysis of reasonable alternatives; and the proposed tunnel pipeline is in the public interest under Act 16 and the applicable provisions of the Michigan Constitution of 1963, laws and statutes, and the common law that defines the parameters of the public interest, including the public trust in the soils, bottomlands, and waters of the Great Lakes, Michigan Const., art. 4, sec. 51 and 52, and the MEPA, MCL 324.1701 et seq.; *Highway Commission v Vanderkloot*, 392 Mich 159 (1974); *Buggs v Michigan Public Service Comm’n*, 2015 W.L. 159795 (2015) (Unpublished Opinion); Ct of App. Docket Nos. 315058, 315064); *In re Enbridge Energy Limited Partnership*, Case No. U-17020, January 31, 2013, Order, p. 5.

For over 6 years, FLOW has researched and submitted comments and reports on many issues concerning Enbridge Line 5, including necessity, siting, alternative siting, routing, adjustments, and other measures, and the consideration of the public interest standards required by Act 16 of the Commission’s Organic Act, 1929 PA 16, MCL 483.1 et seq., Rule 447 of the Commission’s Rules of Practice and Procedure, R 792.10447. Specifically, FLOW has substantial expertise in matters concerning the location or siting, use, occupancy, alternatives, and necessity, and in matters involving the title and the duty of the State to prevent unlawful or improper use, siting or location, occupancy by Enbridge of the bottomlands of the Straits of Mackinac—the precise public trust land, waters, and related public trust uses that form the very subject matter of this Application.¹

¹ These reports can be found as a matter of public record and at www.flowforwater.org.
<https://www.flowforwater.org>.

Since 2014, FLOW has demonstrated its special expertise, experience, knowledge, through the submission of such comments and reports and by its appearance of participation in hearings or meetings before the following state agencies and public bodies: Office of Attorney General (OAG), Executive Office of the State of Michigan (Governor's Office), Department of Environment, Great Lakes, and Energy (EGLE)(formerly Department of Environmental Quality), Department of Natural Resources (DNR), the Michigan Petroleum Pipeline Task Force and the Michigan Petroleum Pipeline Advisory Board, whose members included representatives from the Michigan Public Service Commission, and the Michigan Public Service Commission, the Michigan Public Service Commission, and the Mackinac Bridge Authority and Mackinac Straits Corridor Authority concerning the proposed tunnel and tunnel pipeline. These studies, reports, and presentations include but are not limited to the following:²

- FLOW Comment to Governor Rick Snyder on need for comprehensive review, July 1, 2014;
- FLOW Expert Report to the Michigan Petroleum Pipeline Task Force on Line 5, April 30, 2015;
- Comments on Michigan Petroleum Pipeline Task Force Report, July 2015;
- FLOW Expert Report on Oil Transport in the Great Lakes, with Supplemental Comments on the Michigan Petroleum Pipeline Task Force's July 2015 Report, September 30, 2015;
- FLOW Expert Report: Eliminating the Line 5 Oil Pipeline's Unacceptable Risk to the Great Lakes through a Comprehensive Alternatives Analysis and Systems Approach, December 14, 2015;
- Public Comment to Pipeline Advisory Board, June 12, 2017;
- FLOW Comments on the Dynamic Risk Draft Alternatives Analysis August 4, 2017: Appendix A, Rick Kane; Appendix B, Rick Kane; Appendix C, Gary Street; Appendix D, Dr. Ed Timm;

² For a complete list of FLOW comments and reports, see <https://forloveofwater.org/resource-library/>.

- FLOW Public Comments on Dynamic Risk Final Alternatives Analysis Report, December 22, 2017;
- Letter to MPSC and DEQ on New or Altered Structures of Line 5, April 11, 2018;
- Oil Spill Economics: Estimates of the Economic Damages of an Oil Spill in the Straits of Mackinac in Michigan, May 2, 2018
- Letter and Legal Memorandum on the Property Interest and Duty of the State under the Great Lakes Submerged Lands Act and Public Trust Doctrine May 13, 2019;
- Legal Memorandum for Formal Opinion of the Attorney General, on Tunnel Law, Act 359 of Public Acts of 2018, February 8, 2019;
- FLOW Letter to Mackinac Straits Corridor Authority, March 5, 2020;
- FLOW Comments on the Upper Peninsula Energy Task Force Draft Propane Report, April 6, 2020.
- FLOW Public Comment on Enbridge Request for Declaratory Relief on its Application for Approval under Public Act 16 of 1929, May 13, 2020, consisting of 27 pages.

As a result of these unique, focused efforts on the siting, location, use of the State's real property interests in the bottomlands of the Straits of Mackinac, and the alternatives, risks, necessities, pipeline logistics, adjustments, markets and economic issues related, FLOW's expertise, and focus is unique and provides a perspective that is critical in these proceedings.

No other party or putative party provides this laser-beamed expertise, knowledge, perspective, experience, and information that will be provided by FLOW to the Commission in this case.

II. THE OBJECTIONS TO INTERVENTION BY APPLICANT IMPROPERLY AND PREMATURELY ARGUE ULTIMATE QUESTIONS OF LAW AND FACT CONTRARY TO THE COMMISSION'S ORDER AND DECISION, JUNE 30, 2020, AND OTHERWISE TO BE DETERMINED BASED ON THE HEARING AND FURTHER PROCEEDINGS.

On June 30, the Commission issued an Order denying Enbridge's request for declaratory rulings or preemptory approval of its Application, because the "the Commission finds that Enbridge's Line 5 Project involves significant factual and policy questions and complex legal

determinations that can only be resolved... in a contested case proceeding.) (Order, p. 69). The Commission concluded that “due to the significant public interest and concern regarding the Line 5 Project’s potential environmental impact on the Great Lakes, the Commission finds that it is in the public interest to conduct a contested case hearing. Therefore, the Commission finds that Enbridge’s request for *ex parte* approval... should be denied.” (Id, pp. 69-70).

First, Applicant Enbridge throughout its Objections to Intervention reargues the arguments it made before the Commission, and which were rejected by the Commission in favor of a full, comprehensive record to assure that the central questions of necessity, alternatives, risks, impacts, and public interest, specifically the bottomlands and waters of the Great Lakes, are fully addressed in the contested case. Moreover, throughout its Objections, Applicant argues several mixed law and fact issues regarding the tunnel and tunnel pipeline, the scope of alternatives analysis, necessity, and the public interest in this case. All of these questions can only be resolved by way of motions, evidence, and argument in the contested case that will be heard and determined by the Commission, as directed by its Order, June 30, 2020.

Second, the Commission expressly incorporated FLOW’s May 13, 2020 Public Comments filed in this matter as part of its Order on June 30, 2020 (Id., pp. 17-23), underscoring the specific and unique expertise, information, and perspective that FLOW has already provided the Commission in these proceedings.

III. APPLICANT ENBRIDGE IS WRONG THAT THE MICHIGAN ENVIRONMENTAL PROTECTION ACT, Part 17, NREPA, MCL 324.1701 et seq., DOES NOT APPLY TO THESE PROCEEDINGS.

First, independent of Section 1705 of the MEPA, the MEPA imposes a duty on agency or governmental body of the State to comprehensively consider environmental effects and alternatives in any specific proceeding for permits, approvals, or other authorizations from the

State. *Highway Commission v Vanderkloot*, 392 Mich 159 (1974); *Buggs v Michigan Public Service Comm'n*, 2015 W.L. 159795 (2015) (Unpublished Opinion); Ct of App. Docket Nos. 315058, 315064); *In re Enbridge Energy Limited Partnership*, Case No. U-17020, January 31, 2013, Order, p. 5; Michigan Const., art. 4, sec. 52 (The MEPA is the legislature's response to the constitutional mandate to prevent or minimize environmental effects and consider alternatives to avoid or minimize the effects on the air, water, and natural resources or public trust in those resources, in light of the State's paramount public concern" for the environment. *Ray v Mason County Drain Comm'r*, 393 Mich 294, 304 (1975). *Vanderkloot* involved a determination of "necessity" related to the location of a proposed expressway. The Highway Commission's failure to conduct a thorough analysis similar to the level of an environmental impact statement constituted an abuse of discretion and voided the necessity determination. *Id.* It should be noted that this was an independent cause of action and basis for invalidating the government's approval or determination.

Second, Section 1705(1) provides for intervention by a party by the filing of a "pleading" in any proceeding for a permit, approval, licensing, or other authorization. The courts have indicated this MEPA provision should be liberally construed in favor of intervention. *West Michigan Environmental Action Council v Betz Foundry* (Ct. App. No. 14355, Decision, Aug. 3, 1972).

IV. CONCLUSION AND RELIEF

As permissive intervenor, FLOW does not plan on presenting direct or rebuttal testimony or exercising cross examination, as will the parties and intervenors of right. Rather, FLOW will concentrate its submissions, briefs, and arguments on the questions before the Commission under Act 16, the MEPA and applicable duties and standards involving impairment and alternatives, and

as described above, the overarching framework and public interest of the State's property interest in the bottomlands of the Straits and the Great Lakes that is unique to these proceedings; further, because of its extensive involvement and understanding of all aspects of the proposed Line 5. No other party adequately represents the long-standing work and interests of FLOW in the public trust and state bottomlands and the issues presented in these proceedings.

For the reasons stated above, FLOW respectfully requests that the Commission grant this petition for permissive intervene and treat it as a party to this proceeding for purposes of appearing and participating in hearings, motions, arguments, and the filing of legal briefs, reports in proper form under the Commission's rules of evidence. As for providing expert witnesses, direct testimony, or exercising cross examination, FLOW will cooperate with other intervenors granted intervention in this case.

Date: August 12, 2020

By: _____
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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the 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, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief

U-20763

ALJ Dennis Mack

PROOF OF SERVICE

On the date below, an electronic copy of **FLOW's Reply to Enbridge's Objections to Petition to Intervene** was served on the following:

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The statements above are true to the best of my knowledge, information and belief.

Counsel FLOW

Date: August 12, 2020

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