



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

March 11, 2022

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:

Reply Brief of Intervenor For Love Of Water (FLOW) on the Failure of Enbridge to Obtain the Legally Warranted Interest in the State-Owned Bottomlands Required by Michigan's Public Trust Law and to Comply with the Duties Imposed by the Michigan Environmental Protection Act; and

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 of Enbridge Energy, Limited Partnership 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

**REPLY BRIEF OF INTERVENOR FOR LOVE OF WATER (FLOW)
ON THE FAILURE OF ENBRIDGE TO OBTAIN THE LEGALLY WARRANTED
INTEREST IN THE STATE-OWNED BOTTOMLANDS REQUIRED BY MICHIGAN'S
PUBLIC TRUST LAW AND TO COMPLY WITH THE DUTIES IMPOSED BY THE
MICHIGAN ENVIRONMENTAL PROTECTION ACT**

March 11, 2022

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I. INTRODUCTION

As one of the “sworn guardians” of the State’s public trust resources and uses,¹ the Michigan Public Service Commission (“Commission” or “MPSC”) has a solemn affirmative duty to ensure that the Enbridge Tunnel Project and its massive alteration, occupancy, and use of public trust bottomlands has been lawfully authorized based on the findings required by Michigan public trust law. Further, as an agency of the State, the Commission has a constitutionally-based duty to determine the likely environmental effects of the conduct that arises out of Enbridge’s application for the Tunnel Project under the Michigan Environmental Protection Act (“MEPA”); and if there are any such likely effects, the Commission is prohibited from approving the Tunnel Project unless and until there exist no feasible and prudent alternatives the Tunnel Project. In addition, the Commission has an independent affirmative duty to prevent likely environmental degradation of the water, natural resources, and public trust in those resources based on the caselaw under MEPA; and to assure this duty is satisfied the Commission must comprehensively consider the likely effects and range of feasible and prudent alternatives to the Tunnel Project. Failure to satisfy any one of these duties prevents the Commission from approving of the Tunnel Project. Based on the hearing record and the Initial Briefs of Enbridge, MPSC Staff, the Mackinac Straits Corridor

¹ *Obrecht v National Gypsum Co*, 361 Mich 299, 105 NW2d 143, (1960): “This Court, equally with the legislative and executive departments, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of five Great Lakes. Long ago we committed ourselves (see *State v. Lake St. Clair Fishing & Shooting Club*, 127 Mich. 580, 594, 595, 87 NW 117; *State v. Venice of America Land Co.*, 160 Mich. 680, 702, 125 NW 770; *Nedtweg v. Wallace*, 237 Mich. 14, 21, 24, 34; 208 NW 51, 211 N.W. 647) to the universally accepted rules of such trusteeship as announced by the Supreme Court in *Illinois Central Railroad Co. v. State of Illinois*, 146 US 387, 13 S Ct 110, 119, 36 L.Ed. 1018.” *Obrecht*, at 412, 105 NW2d at 149 (1960).

Authority (“MSCA”), and other Intervenors, these duties have not been satisfied. For these reasons, the Enbridge application must be denied.

II. ARGUMENT

A. Neither Enbridge nor MSCA have obtained authorization for the location, occupancy, and use of state-owned public trust bottomlands and waters based on the findings required by public trust law and Sections 32502-32508 of the Great Lakes Submerged Lands Act (“GLSLA”).

In its Application for the Tunnel Project, Enbridge represented that it has the required property interest in the state-owned bottomlands of the Straits of Mackinac for the Tunnel Project. (6, 12-14, 16-17) Enbridge contends that this interest was created by Public Acts 2018, No. 359 (“Act 359”) and the 2018 Easement to the MSCA and Assignment of Easement from the MSCA to Enbridge. (collectively, “2018 Easement and Assignment”) (Ex A-6). As previously established, Enbridge has never applied for nor obtained an easement granting it the right to occupy and use the public trust bottomlands and waters of the Great Lakes for the Tunnel Project as required by public trust law and the Great Lakes Submerged Lands Act (“GLSLA”). MCL 324.32502-32508.²

In its Initial Brief Enbridge does not dispute the fact that it has not obtained the required authorization for the occupancy and use of public trust bottomlands under the GLSLA and public trust law. Instead, Enbridge continues to rely solely on Act 359 and the 2018 Easement and Assignment. (Enbridge Initial Brief, pp. 6-7) Act 359 authorizes the MSCA to acquire property, construct, and operate the tunnel and lease it to Enbridge for 99 years. Like Enbridge, Act 359 relies on the 2018 agreements, including the tunnel easement and its assignment by MSCA to Enbridge. (*Id.*) But Act 359 did not give the Michigan Department of Natural Resources (“DNR”)

² Cross Examination of Paul Turner, 7 TR 6443-6446; FLOW Initial Brief, pp. 8, 16, 17.

or MSCA unbridled discretion to convey an interest for state-owned bottomlands and waters.

Rather, Act 359 requires approval for the location of the tunnel required by law:

(4) The Mackinac bridge authority may perform all acts necessary to secure the consent of any department, agency, instrumentality, or officer of the United States government or this state to the construction and operation of a utility tunnel and the charging of fees for its use, and *to secure the approval of any department, agency, instrumentality, or officer of the United States government or this state required by law to approve the plans, specifications, and location of the utility tunnel or the fees to be charged for the use of the utility tunnel.*³

[T]he proposed tunnel agreement does not exempt any entity that constructs or uses the utility tunnel from the obligation to obtain any required governmental permits or approvals for the construction or use of the utility tunnel.⁴

Act 10, Act 359 and the 2018 Easement and Assignment do not express and are not based on recorded findings that there is an “exceptional reason” for the conveyance and occupancy as required by public trust law and Section 32502-32508 of the GLSLA. *See Obrecht*, 361 Mich. at 412-13 (reaffirming that a conveyance of public trust lands must either (1) improve public trust uses, or (2) not impair public trust resources or uses). FLOW Initial Brief, p. 6, 12-14, 16-17. Without these findings, Enbridge has no “legal warrant” to occupy and use state bottomlands in the Straits of Mackinac. *Id.* at 416 (recognizing that nobody has the right to occupy “bottom lands of the Great Lakes . . . unless and until he has sought and received, from the legislature or its authorized agency, such assent based on due finding as will *legally warrant* the intended use of such lands.”) (emphases added).

Enbridge also relies on the court decision that Act 359 is constitutional and that it “confirmed the validity and enforceability of the 2018 agreements” entered into pursuant to Act 359 under the “title-object” clause of the Michigan Constitution, Mich Const. 1963, art. 4, sec. 24.

³ P.A. 2018, No. 359, MCL 254.324a(4).

⁴ *Id.*, MCL 254.324d(g).

(Enbridge Initial Brief, p. n. 4) This is argument is misleading. The Court of Appeals did not rule on the 2018 agreements, including the 2018 Easement and Assignment; all it did was to rule on the constitutionality of Act 359 under the “title-object” clause.⁵

Enbridge argues that the EGLE authorization of the NPDES permit, wetlands permit, and construction activities permit in the bottomlands of the Straits of Mackinac found that there would be no significant adverse impacts or impairment from the construction activities. (Enbridge Initial Brief, pp. 8-10). However, the application to EGLE and approval was confined to the “construction activities” related to the tunnel under Section 32512, MCL 324.32512, of the GLSLA, and not the authorization of an easement for occupancy, and use of the trust bottomlands mandated by Section 32502-32508 of the GLSLA. EGLE did not make findings on the Tunnel Project’s occupancy, use, and operation over the projected lifetime of the project and its use.

The MSCA did not address the lack of authorization for the 2018 Easement and Assignment for the occupancy and use of the submerged lands beneath the Straits of Mackinac under Sections 32508-32508 of the GLSLA. Like Enbridge, it confined its proofs, through Dr. Mooney and Mr. Cooper to the technical, engineering, and operational aspects of the Tunnel and pipeline. (MSCA Initial Brief, pp. 1, 6-7) Further, like Enbridge, MSCA’s testimony on likely effects to the environment was confined to the construction of the “replacement” conduct of the Tunnel Project. (“the construction and operation of the tunnel and the relocated pipeline will satisfy the requirements of the Michigan Environmental Protection Act.” Like Enbridge, MSCA offered no proofs on specific impacts from the alternation and construction on public trust uses and resources.

⁵ *Enbridge v Michigan*, 332 Mich App 540 (2020).

Similar to Enbridge and MSCA, MPSC staff relied on the mere existence of the 2018 agreements and 2018 Easement and Assignment to address the route and occupancy and use for the Tunnel. (Initial Brief, pp. 49). Moreover, the staff limited its routing and location analysis to the segment crossing the Straits as “reasonable” within the scope of Act 16 (*Id.*, pp. 48, 50), but did not address the full range of likely effects and alternatives required by the MEPA. Further, like Enbridge and the MSCA, MPSC staff limited its proofs and arguments to construction and operational activities, e.g. “dredge or place spoils or other material on bottomland[s]” permitted by the EGLE under Section 32512(1) of the GLSLA. However, like Enbridge and the MSCA, Staff did not offer any evidence that Enbridge and the MSCA had applied for and obtained the required “legal warrant” to occupancy and use the bottomlands of the Straits under public trust law and Sections 32502-32508 of the GLSLA.

Enbridge, MSCA, and the MPSC staff conflate the EGLE construction permits, including the construction permit for “dredge or place spoils or other material” under Section 32512 of the GLSLA, with the conveyance deed, occupancy and use findings and authorization required by Sections 32502-32508. A construction activity permit to “place... other materials” on or in the bottomlands of the Straits does not does not satisfy the solemn obligation to obtain the authorization for the 2018 Easement and Assignment under public trust law and the GLSLA. The sovereign must preserve and protect navigable waters for its people.”⁶ “

⁶ *Glass v Goeckel*, 473 Mich 667, 677; 703 NW2d 58 (2005) (This rule—that the sovereign must sedulously guard the public’s interest in the seas for navigation and fishing—passed from English courts to the American colonies, to the Northwest Territory, and, ultimately, to Michigan.” *Id.* at 678. The Commission as an agency of the executive branch is one of the “sworn guardians” of this trust and “has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public”. *Id.*

Based on the Commission’s solemn duty as a “sworn guardian” of the public trust, it can not excuse its sister agencies’ failure to ensure that Enbridge has a legal warrant to occupy and use submerged lands and waters in the Straits of Mackinac under public trust law. Rather, it should deny or suspend consideration of Enbridge’s application until Enbridge and the MSCA apply for and obtain proper authorization under Sections 32502-32508 of the GLSLA and the public trust doctrine.

B. Enbridge has not shown and the record does not support compliance with the consideration and/or determination of likely effects and feasible and prudent alternatives requirements of MEPA and *Vanderkloot*, 393 Mich 159 (1974).

To summarize MEPA and its body of caselaw, the Michigan Constitution imposes a self-executing duty on the legislature to enact laws that protect the paramount public interest in “air, water, other natural resources of the State” from pollution, impairment, or destruction. Mich Const. 1963, art. 4, sec. 52. In response to this mandate, the legislature enacted MEPA in to prevent and minimize environmental degradation of “air, water, and other natural resources and the public trust in those resources” from pollution, impairment, or destruction.⁷ To assure compliance with this duty, MEPA imposes a duty on both the courts and state agencies to consider, evaluate, and determine whether conduct before the Court or the administrative proceeding is likely to result in pollution, impairment, or destruction.⁸

This Commission ruled in its April 21, 2021 order that MEPA applies to this matter⁹ To satisfy MEPA, the Commission ruled that it must do two things:

⁷ *State Highway Comm’n v Vanderkloot*, 392 Mich 159, 179-80, 184 (1974); *Ray v Mason County*, 393 Mich 294 (1975).

⁸ MCL 324.1705, 1705(), and 1705(2).

⁹ MPSC Order, April 21, 2021, p. 55-56. (“[S]tate agencies have an obligation to apply the requirements of MEPA to its decisions, including to Commission pipeline siting cases.”).

(1) Satisfy Section 1705(2): The Commission must determine the likely effects attributable to the proceeding and conduct under question;¹⁰ this includes a determination of whether there are likely effects to the paramount interests of the state in its water, natural resources, and public trust in those resources are attributable to greenhouse gases and climate change.¹¹ If it determines there are likely effects, it must determine whether there are feasible and prudent alternatives to the Tunnel Project; and if there is a feasible and prudent alternative, the Commission must not authorize or approve the Tunnel Project.¹² To show an alternative is not feasible under MEPA, the evidence must demonstrate economic infeasibility, that is, costs of an “extraordinary magnitude,” and to show an alternative is not prudent, the evidence must show there are “truly unusual factors.”¹³

(2) Satisfy duties under *Vanderkloot*: Independent from Section 1705(2), the Supreme Court has ruled that, when reviewing a project application, a state agency must consider the potential adverse environmental impacts or effects and a broad range of feasible and prudent alternatives and their effects.¹⁴ In the context of the Tunnel Project, the Commission has ruled that this duty require consideration of alternative pipelines and non-pipeline shipping arrangements and alternatives to the products being shipped.¹⁵ These alternatives necessarily require a consideration of the demand and market of the product.

¹⁰ MPSC Order, April 21, 2021, pp.55, 65-66

¹¹ MPSC Order, April 21, 2021, p.69.

¹² Section 1705(2) (“conduct shall not be authorized or approved that has or is likely to have such an effect if there a feasible and prudent alternative”).

¹³ *Wayne County Health Dept. v Olsonite Corp.*, 79 Mich App 668, 705-06 (1977).

¹⁴ *State Highway Comm’n v Vanderkloot*, 392 Mich at 185-186, 190-191; see also, *Buggs*, p. 9, MPSC Order, April 21, 2021, p. 56, 68.

¹⁵ MPSC Order, April 21, 2021, p. 68.

As described above, Enbridge confined its proofs on likely effects of the Tunnel Project to an alleged inappropriately narrow interpretation of “replacement” of the existing pipeline. As a result, Enbridge limited its proofs to the likely effects from construction of the project, risks of a release of crude oil and/or natural gas liquids, and risk of explosion. However, the magnitude of the size of the Tunnel Project and the massive alternation of the bottomlands, near-shore and on-shore water and natural resources and construction activities, discharge of millions of gallons of waste water with toxic chemicals, the disruption of near shore lakebeds critical for fishing, the interference with navigation, boating, and other activities protected by the public trust in the waters and bottomlands of the Straits, protected by the MEPA, clearly establish threshold likely impacts and effects to trigger the determination under Section 1705(2) that there is or is not a feasible and prudent alternative. *In Ray v Mason County*, the Michigan Supreme Court emphasized that the threshold of likely effects was dependent on or varies with the magnitude of the project or likely harm, or both.¹⁶ It is not whether the effects are substantial, but what they are and whether they are likely to pollute or impair. “Pollute” means “degradation.”¹⁷ “Impair” means to “diminish.” “lessen,” “weaken,” or “make worse.”¹⁸ The Commission’s determinations must be based on specific findings so it is clear how it arrives at a specific finding of fact.¹⁹ Here, the record supports likely effects on water, natural resources, or public trust in those resources well beyond the threshold to trigger the Commission’s determination of feasible and prudent alternatives. To

¹⁶ 393 Mich at 309 (“Obviously, the evidence necessary to constitute prima facie showing will vary with the nature of the alleged environmental degradation involved.”).

¹⁷ *Id.*

¹⁸ <https://www.merriam-webster.com/dictionary/impair>

¹⁹ *Id.*, at 307.

place a higher threshold would thwart *Vanderkloot, Buggs*, and the duty imposed by the MEPA that include a comprehensive consideration of both effects and feasible and prudent alternatives.²⁰

The impacts to the Great Lakes, water resources, fish and other natural resources of Michigan, and to shorelines, dunes, harbor, shipping, and navigational facilities, algal blooms, property damage are hardly disputable.²¹ Enbridge contends that the EGLE's Water Resource Permit ensures that the project will not have any adverse environmental impacts. But the EGLE permit simply states that "the proposed project does not authorize adverse impacts."²² That it does "not authorize" is not a finding that there are not likely effects. The EGLE permit again states that "the construction activities... do not authorize impairment, and are not anticipated to adversely affect fish, wildlife, or habitat..."²³ On its face, this does not establish no likely physical effects on water, natural resources, or their public trust uses. "Not anticipated" is not proof of no actual or likely effects. "Not authorize" is not a finding of no effects. Enbridge relies on EGLE's permit, which is not its own evidence, and clearly cannot be substituted as the specific determinations and findings of fact that this Commission must make to satisfy Section 1705(2) and MEPA. Enbridge glibly states, "... the construction of the tunnel" ... "are unnecessary for the Commission's MEPA review."²⁴ Finally, both Enbridge and Staff substitute potential mitigation measures that may in the future mitigate the effects that will or are likely to occur in place of addressing the effects that will undoubtedly occur.²⁵ To compound the admittedly lack of information to make a finding that

²⁰ MPSC Order, *supra*, n. 11.

²¹ ELP Initial Brief, pp. 12-17, 38-41.

²² Enbridge Initial Brief, p. 32.

²³ *Id.*

²⁴ *Id.*, p. 33.

²⁵ *Id.*; Staff Initial Brief, pp. 75-81 (these include impacts from construction noise, dust particulates, impacts to the Headlands International Dark Sky Park, groundwater impacts from construction, impacts of hazardous materials on soils and the surface waters of the Straits of Mackinac).

there are no likely effects, Enbridge relies on the future decision of the U.S. Army Corps of Engineers. (“USACE”).²⁶ Enbridge’s applications for permits for its construction activities from EGLE are part of a joint application to the USACE. On June 24, 2021, the USCAE issued a directive that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act.²⁷ For the USACE to direct and full EIS, it had to make the finding that the Tunnel Project is a “major federal action” “significantly affecting the quality of the human environment” that includes consideration of a full range of alternatives.²⁸ Enbridge relies prematurely on its conjecture that the final EIS will be favorable.²⁹ Until the process is complete, Enbridge’s anticipation is pure speculation and the adverse impacts and range of alternatives will not be fully identified and considered.

Moreover, the environmental impacts of the proposed conduct are far greater than those in its construction phase alone. The record demonstrates that climate change and greenhouse gases and the existing and continuing impacts and effects to Great Lakes shipping, navigation facilities, fish habitat, water quality, drinking water, human health, algal blooms, and low or highwater levels and attendant massive shoreline impacts throughout Michigan. Further, Enbridge’s only response to GHG emissions is that “the project capacity will not be increased due to the project.” But this is a superficial argument. First, it does not address one of if not the most critical existential and damaging threat to Michigan’s water, natural resources, human health, communities, and public

²⁶ E.g. Enbridge Initial Brief, p. 9;

²⁷ <https://www.lre.usace.army.mil/Missions/Regulatory-Program-and-Permits/Enbridge-Line-5-Tunnel/> (accessed March 11, 2022)

²⁸ 42 U.S.C. 4332(2)(c).

²⁹E.g. Enbridge Ex A-18, p. 8, Turner Rebuttal Testimony, Dec. 14, 2021. (“EGLE reviews applications under state law, in this case under Part 303 and Part 325 of the NREPA. The review process does not include an Environmental Impact Statement, which refers to a document and process specific to federal review under the National Environmental Policy Act.”).

health in the State's history. Second, it completely ignores the fact that because of the effects, there is a question of whether or not the Tunnel Project is a feasible and prudent alternative. Enbridge cannot avoid the finding of likely effects based on the record by trying to avoid the "no tunnel" or "no project" or "conduct" alternative.

The MEPA and case law, including *Vanderkloot*, demand consideration and/or determinations of a broad range of alternatives, including not building the tunnel. While need for the project may not be addressed within the meaning of "public need" under Act 16, this does not mean, and in fact has nothing to do with, the fact that the need for crude oil over the life of the Tunnel Project's use and operation does not exist or will be reduced considerably. Moreover, the Commission can take judicial notice of its order approving the expansion of design capacity of Line 6b from 400,000 bbl./day to 800,000 bbl./day that would meet Enbridge's needs for Michigan!³⁰ This demonstrates that there is more than enough shipping capacity in another pipeline to fall within the feasible and prudent alternative analysis under MEPA and/or *Vanderkloot*.

Enbridge may argue that this does not reduce GHG from the project, but would shift the transport of the current volume carried by Line 5 and the Tunnel Project to Line 6b (now Line 78).

³⁰ *In re Enbridge Energy, Limited Partnership* Application Case No. U-17020, Pre-Filed Direct Testimony of Mark Sitek And Exhibits, pp. 6- 7, 12, 20-21, 25 <https://efile.mpsc.state.mi.us/efile/docs/17020/0010.pdf>; MPSC Approves Enbridge Energy Crude Oil and Petroleum Pipeline Running Through 10Michigan Counties (Jan. 31, 2013) http://www.michigan.gov/mpsc/0,4639,7-159-16400_17280-294097--,00.html; MPSC Approves Enbridge Energy Limited Partnership Request to Construct Part of Line 6B Pipeline Along Alternative Route in Marysville (Sept. 24, 2013) http://www.michigan.gov/mpsc/0,4639,7-159-16400_17280-313062--,00.html See Appendix A, Appendix B

The argument is flawed. First, even Line 6b could handle all or close to all of the volume of Line 5 today, the Commission in its April 21, 2021 order directed the parties and intervenors to address other pipelines and/or other rail or shipping arrangements. Second, the additional 400,000 bbl./day is less than 540,000 bbl./day and would lessen although not avoid the likely effects attributed to the reduced amount. Third, consideration of market demand and need over the life of the Tunnel Project shows that in a reasonable time the Tunnel will not be necessary, so the combination of dropping demand, extra capacity in Line 6b (78), and other shipping and pipelines provides a feasible and prudent alternative that must be considered.

In summary, there are undisputed actual and likely effects associated with the construction and associated activities of the project that meet the threshold of likely effects under Section 1705(2) of MEPA. There are substantial climate change impacts and continuing and likely future effects on the air, water, natural resources or public trust in those resources of the State. Because of these likely effects, the project cannot be approved if there are feasible and prudent alternatives. There is a sound range of feasible and prudent alternatives or combination of alternatives exist. In any event, the Applicant Enbridge has chosen not to demonstrate on the record that feasible and prudent alternatives to the Tunnel Project do not exist. There is no basis for a finding that there are no feasible and prudent alternatives.

In addition, independent of Section 1705(2), under Vanderkloot, the Commission is required to consider a comprehensive range of feasible and prudent alternatives, including the “no tunnel” alternative, before it can approve the project and conduct that is the subject matter of the Enbridge Application. Until the record establishes an adequate consideration of these alternatives, as required by the Commission’s April 21, 2021 order, the Commission cannot approve the

Application. Enbridge has chosen not to address this range of alternatives. Similarly, staff has chosen to narrow its consideration of these alternatives.

III. CONCLUSION AND REQUESTED ACTION

Applicant Enbridge has not established that its claimed property interest in the State's public trust lands and waters based on the 2018 Easement and Assignment for occupancy and use of the bottomlands and waters of Lake Michigan, Straits of Mackinac, has been authorized based on the required findings that such occupancy and use falls within the exceptions to the prohibition against disposition and alienation of the public trust bottomlands and waters under Michigan public trust common law and/or Sections 32502-32508 of the GLSLA and Obrecht.

On the record before the Commission, Section 1705(2) cannot be satisfied. There are likely effects from the construction of the Tunnel Project, its operation and use, including GHG emissions within the meaning of Section 1705(2) of the MEPA; based on the record, including the extensive evidence from ELPC's experts, there exist feasible and prudent alternatives within the meaning of MEPA and its case law to the Tunnel Project, so that on the record before the Commission the Application should not be approved.

Further, the Commission cannot satisfy its affirmative duty to consider effects and feasible and alternatives under *State Highway Comm'n v Vanderkloot* and *Buggs v Mich Public Service Comm'n*. Enbridge, staff, and intervenors supporting Enbridge failed to establish for the Commission's consideration a comprehensive range of feasible and prudent alternatives required by *Vanderkloot*. The USACE has not completed the Draft Environmental Impact Statement on adverse impacts and alternatives. The Enbridge and staff excluded any analyses unrelated to "replacement," including the range of alternatives identified by the Commission in its April 21, 2021 Order. Absent a comprehensive complete impact and alternatives analyses, including other

pipelines, other shipping arrangements, reduced demand or need, or a combination of these factors, and the “no tunnel” or “no action” alternative, the Commission cannot approve the Application.

Based on the above, together with the record and briefs filed in this matter, Intervenor FLOW submits that the Commission should deny the Application before; alternatively, the Commission should not approve the project until the public trust duty, the MEPA determinations under section 11705(2), and the duty to consider imposed by MEPA caselaw have been satisfied.

Respectfully submitted,

FOR LOVE OF WATER (FLOW)

Date: February 18, 2022

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BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of Enbridge Energy, Limited Partnership 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

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ALJ Dennis Mack

PROOF OF SERVICE

On the date below, an electronic copy of the **Reply Brief of Intervenor For Love Of Water (FLOW) on the Failure of Enbridge to Obtain the Legally Warranted Interest in the State-Owned Bottomlands Required by Michigan's Public Trust Law and to Comply with the Duties Imposed by the Michigan Environmental Protection Act** was served on the following:

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

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Date: March 11, 2022

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