



Ensuring the Waters of the Great Lakes Basin Are
Healthy, Public, and Protected for All

July 7, 2022

**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

Commissioners:

Hon. Daniel C. Scripps, Chairman
Hon. Tremaine L. Phillips, Commissioner
Hon. Katherine L. Peretick, Commissioner

**Statement of James M. Olson, Founder and Senior Legal Advisor, Intervenor For Love of
Water (FLOW), MPSC Public Meeting, July 7, 2022**

Dear Chairman Scripps and Commissioners Phillips and Peretick:

Thank you for the opportunity to submit this comment and statement today regarding Agenda Item IV.B.1, submitted as part of the record in the above-captioned matter. As Intervenor, FLOW incorporates all of its previous submissions, comments, and briefs filed in this matter. For purposes of today's meeting, and to amplify for the Commission the context and critical determinations you will make in this matter, please accept the following additional statement/comments.

1. As repeatedly pointed out in our comments and legal briefs, FLOW has made it clear to the Commission and Enbridge that the use of the waters and bottomlands of the Great Lakes, including the Straits of Mackinac, requires authorization of an occupancy and use agreement and lease under the Great Lakes Submerged Lands Act, MCL 324.32502-32508,

and public trust law. *Obrecht v National Gypsum Co*, 361 Mich 299 (1960). The Great Lakes and Straits are held in public trust. No one can use them unless authorized by the GLSLA and public trust law. This has not occurred. The Commission cannot authorize Enbridge to locate or use the bottomlands for the tunnel and tunnel pipeline without Enbridge's submission of such authorization under the GLSLA. Until it does so, the Commission's approval and order have no legal effect. Accordingly, if the Commission approves the order, it must state that the approval and order are conditioned on Enbridge obtaining authorization under the GLSLA and public trust law.

2. The recent United States Supreme Court decision in *West Virginia v Environmental Protection Agency*, ___ U.S. ___, 2022 W. L. 2347278 (June 30, 2022), in effect, places a large share of responsibility on the States and its agencies, like this Commission, to address the catastrophic climate change crisis and the existing and continuing likely impacts to air, water, natural resources, and the public trust and interest in those resources. In its decision last week, the majority of the Court ruled that EPA did not have the authority to reduce fossil fuel emissions at existing electrical steam generating plants. The effect of this decisions stifles the federal government's authority to limit fossil fuel greenhouse gases, particularly by requiring implementation of renewable or clean energy alternatives.

Fortunately, this Commission recognized its responsibility to address climate change and other effects on the Great Lakes, environment, public health, and infrastructure in requiring consideration and determinations of these effects under Act 16 and the Michigan Environmental Protection Act, Part 17, NREPA, MCL 324.1701 et seq., and Michigan Const. 1963, Art. 4, Sec. 52. (MPSC Order, April 21, 2021, e.g., pp. 63-68). Given this recognition and the weight of this Commission decision on the Enbridge tunnel application now before it, this Commission should give this matter an even more heightened degree of consideration and determinations under MEPA, including the likely effects of the project and on the air, water, natural resources, and public trust in the Straits of Mackinac, Lake Michigan and Lake Huron, and from the undisputed serious and continuing effects of greenhouse gases from the production and consumption of oil and climate change.

3. Since the last hearing in this matter, the U.N. International Panel on Climate Change released its synthesis report, February 28, 2022, demonstrating key findings, all of which also apply to the Great Lakes region: (1) Climate change impacts are more widespread and severe than expected; (2) Impacts in the near-term are worse, that is, "all hands on deck" are necessary; (3) Impacts and risks will escalate rapidly with higher temperatures (documented again this summer), causing irreversible impacts; every tenth of a degree increase will seriously escalate harm to people, species, and ecosystems, including Lake Michigan and the Great Lakes; Michigan has and will continue to experience more severe and frequent weather events and extreme impacts like flooding in Detroit and other communities last summer, the Midland Dam blowout, and recent flooding in Big Rapids; (4) the capacity to adapt physically, socially, and economically is decreasing with every

incremental rise in greenhouse gases and temperature; (5) the world, including the U.S. and Great Lakes states, needs urgent action. As noted by the World Watch Institute:

The science is unequivocal: Climate change endangers the well-being of people and the planet. Delayed action risks triggering impacts of climate change so catastrophic our world will become unrecognizable.

The next few years offer a narrow window to realize a sustainable, livable future for all. Changing course will require immediate, ambitious and concerted efforts to slash emissions, build resilience, conserve ecosystems, and dramatically increase finance for adaptation and addressing loss and damage. ([6 Big Findings from the IPCC 2022 Report on Climate Impacts, Adaptation and Vulnerability | World Resources Institute \(wri.org\)](#))

4. The Michigan Environmental Protection Act, Section 5(2), MCL 324.1705(2) and *Highway Comm'n v Vanderkloot*, 392 Mich 159 (1974), and the undisputed public trust in our Great Lakes demand that this Commission, as one of the sworn guardians of the Great Lakes for the citizens of Michigan, *Obrecht, supra*, demands consideration of alternatives to reduce greenhouse gases and prevent or minimize further degradation of the Great Lakes, our water and natural resources, public health, and infrastructure from continued devastating and irreparable damage. The effects attributable to this proposed project, no matter how small, are cumulatively part of these effects and impairment. Accordingly, the Commission cannot and should not approve the proposed order for the tunnel project, because if there are such effects, the order is prohibited by MEPA if there exist feasible and prudent alternatives. This includes other alternative pipelines or a “no tunnel or tunnel pipeline” alternative. Because these effects clearly exist, the order must be denied. In any event, the record below undisputedly established that Enbridge and the Commission staff did NOT consider off-site or alternative pipeline capacity and route or the no-action alternative. Because of this, there is no record on which the order can be approved as required by the MEPA, Sec. 5(2); *Vanderkloot, supra*; Mich Const. 1963, art. 4, sec. 52.

Please include the above in the record of these proceedings. Thank you.

Respectfully Submitted,



James M. Olson
Founder and Senior Legal Advisor
Intervenor For Love of Water (FLOW)

cc: Hon. Michigan Governor Gretchen Whitmer
Hon. Michigan Attorney General Dana Nessel
Hon. Liesl Clark, Director, Michigan Dept. Environment, Great Lakes, and Energy