



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

February 18, 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:

Initial Brief of Intervenor For Love of Water

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

INITIAL BRIEF OF

INTERVENOR FOR LOVE OF WATER (FLOW)

ON THE FAILURE OF ENBRIDGE TO SATISFY THE STRICT MANDATORY

REQUIREMENTS OF THE PUBLIC TRUST DOCTRINE AND MICHIGAN

ENVIRONMENTAL PROTECTION ACT

February 18, 2022

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I. INTRODUCTION

The Line 5 Tunnel and Tunnel Pipeline Project (“Tunnel Project”) would be the single largest intrusion on public trust waters, lands, and uses in Michigan’s history. As one of the “sworn guardians” of the State’s public trust resources and uses, the Michigan Public Service Commission (“MPSC” or “Commission”) has a solemn obligation to ensure that this unprecedented use is consistent with the state law.

The threshold question for the MPSC in fulfilling these trust duties here is whether Enbridge has obtained lawful authorization to use and occupy submerged lands in the Straits of Mackinac. Because Enbridge has not obtained such authorization under Michigan’s public trust doctrine or the Great Lakes Submerged Lands Act, the MPSC may not approve the Tunnel Project. The MPSC should accordingly suspend consideration of the Tunnel Project until Enbridge obtains valid authorization from other state agencies. At a minimum, the MPSC must condition its approval on Enbridge obtaining such authorization, though that approach would put the cart before the horse and establish backwards precedent for future projects.

In any event, the MPSC may not approve the Tunnel Project because of Enbridge’s failure to establish a basis for the Commission’s consideration or determination of the likely effects and feasible and prudent alternatives required by the Michigan Supreme Court and Section 1705(2) of the Michigan Environmental Protection Act.

A. The Public Trust Doctrine

One of the irrefutable historical and legal facts in this proceeding is that the State of Michigan obtained title to the bottomlands and waters of the Great Lakes in public trust on

admission to statehood.¹ The State has a “high, solemn, and perpetual” duty to protect these public trust resources and their associated uses under Michigan’s public trust doctrine.² This duty clearly extends to state agencies, including the MPSC:

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* (citations omitted) to the *universally accepted rules of such trusteeship* as announced by the Supreme Court in *Illinois Central Railroad Co. v. State of Illinois*³.

Both the United States Supreme Court and the Michigan Supreme Court have repeatedly held that the public trust doctrine strictly limits the circumstances under which a state may convey property interests in public trust resources. In *Illinois Central*⁴, the United States Supreme Court identified two narrow exceptions under which such a conveyance is permissible: 1) when the conveyance results in the improvement of the interest thus held; or 2) when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. In *Obrecht*⁵, the Michigan Supreme Court expressly adopted these exceptions, noting that the State must make a “due finding” that one of the exceptions applies in order to “legally warrant the intended use” of state bottomlands. As explained below, the MPSC’s sister agencies have provided no such public trust findings to authorize the Tunnel Project.

¹ *Shively v Bowlby*, 14 S Ct 548 (1894)

² *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926).

³ *Obrecht v National Gypsum Co*, 361 Mich 399, 105 NW2d 143 (1960).

⁴ *Illinois Central Railroad Co. v. State of Illinois*, 146 US 387, 13 S Ct. 110, 119, 36 L Ed 1018 (1892).

⁶ MCL 324.325-32508

B. The Great Lakes Submerged Lands Act (“GLSLA”)

The GLSLA⁶, requires that any conveyance, lease, agreement, occupancy, use or other action in the waters or on, in, through or under the bottomlands of the Great Lakes, be authorized by the Department of Environment, Great Lakes and Energy (“EGLE”) pursuant to the public trust standards in the GLSLA and the common law of the public trust doctrine. Sections 32502-32508 of the GLSLA specifically incorporate public trust principles including the requirement that any conveyance of an interest in Great Lakes waters and bottomlands is subject to a mandatory determination that the use of public trust lands and waters will not be substantially affected or that the public trust in the same will not be impaired. The GLSLA is to “be construed so as to preserve and protect the interests of the general public in the lands and waters.”⁷ It broadly applies to the “sale, lease, exchange, or other disposition of unpatented lands.”⁸ EGLE must ensure that “the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition.”⁹ All conveyances of state lands are authorized only “after finding that the public trust in the waters will not be impaired or substantially affected” and must be “in conformance with the public trust.”¹⁰

⁶ MCL 324.325-32508

⁷ Sec. 32502

⁸ *Id.*

⁹ *Id.*

¹⁰ Sec. 32503

C. The Michigan Environmental Protection Act (“MEPA”)

Another undisputed legal and historical fact in this case is that the Commission is bound by and must comply with the duties, findings, and standards of MEPA, Part 17, NREPA, MCL 324.1701 *et seq.* MEPA is the legislature’s response to the state constitutional mandate that the State’s “air, water, natural resources are of *paramount public concern*,” and that the legislature “*shall provide for the protection of the air, water, and natural resources of the State from pollution, impairment, or destruction.*”¹¹ The State’s executive branch and its administrative agencies are subject to the mandates of MEPA as well as the public trust doctrine.

MEPA prohibits the “likely pollution, impairment, or destruction of the air, water, natural resources or the public trust in those resources.”¹² In order to assure this protection, MEPA imposes a substantive duty on both government and the public sector to *prevent or minimize environmental degradation*.¹³ In addition, MEPA mandates: “In administrative, licensing, or other proceedings ... the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, *shall be determined.*”¹⁴ MEPA also provides that any conduct considered in such proceeding “*shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.*”¹⁵ Independent of Section 1705(2), the common law of environmental quality under MEPA imposes an enforceable duty on

¹¹ Const. 1963, Art. IV, § 52.

¹² MCL 324.1702, 1703(1), 1705(2).

¹³ MCL 324.1705(2); *State Highway Commission v. Vanderkloot*, 392 Mich. 159, 186 (1974).

¹⁴ MCL 324.1705 (2) (emphasis added).

¹⁵ *Id.*

the agency to fully consider all of the feasible and prudent alternatives to the conduct that is the subject matter of such agency proceeding.¹⁶

In *Vanderkloot*, the Michigan Supreme Court found that even though the statute at issue - the Highway Condemnation Act - had no provisions requiring environmental review, the failure of the State Highway Commission *in a necessity determination* to apply MEPA and examine the likely effects and feasible and prudent alternatives to a highway project involving environmental “pollution, impairment, [or] destruction” would constitute an abuse of discretion and result in an invalidation of the determination.

We further hold that the substantive environmental duties placed on the Commission by EPA are relevant to [the Highway Condemnation Act] MCLA 213.368; MSA 8.261(8) judicial review in that failure by the Commission to reasonably comply with those duties may be the basis for a finding of fraud or abuse of discretion.¹⁷

In accord is *Ray v Mason County Drain Commissioner*.¹⁸ There, the court held that MEPA “does more than give standing to the public and grant equitable powers to the circuit courts, it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities.... [MEPA] allows the courts to fashion standards in the context of actual problems as they arise in individual cases and to *take into consideration changes in technology* which the Legislature at the time of the Act's passage could not hope to foresee.”¹⁹

¹⁶ *State Highway Commission v Vanderkloot*, 392 Mich 159 (1974); *Buggs v Michigan Public Service Commission*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2015 (Docket No. COA No. 315058).

¹⁷ *Vanderkloot*, 392 Mich. at 190.

¹⁸ *Ray v Mason County Drain Commissioner*, 393 Mich. 294 (1975).

¹⁹ *Id.* at 307 (emphasis added).

In the MPSC’s Order for Remand on the scope of MEPA, the Commission ruled that MEPA applied to the hearing proceeding and its own decision in this matter. To reiterate, the duties, considerations, and findings required by MEPA and its case law are imposed on the MPSC independent of Act 16. In other words, the scope of the MPSC’s review is not limited by the stated purpose of the project in Enbridge’s Application or Act 16; MEPA is supplementary to other administrative and regulatory procedures provided by law.

II. STATEMENT OF FACTS AND PROCEEDINGS

A. The Conveyances

On December 17, 2018, the Department of Natural Resources (“DNR”) conveyed an *Easement to Construct and Maintain Underground Utility Tunnel* (“2018 Easement”) in the Straits of Mackinac to the Mackinac Straits Corridor Authority (“MSCA”) pursuant to Public Act 10, which authorizes the DNR to “grant easements, upon terms and conditions the department determines just and reasonable, for....operating pipelines...”²⁰ Two days later, the MSCA, acting under authority of 2018 Public Act 359 (“Act 359”) executed an *Assignment of Easement Rights for Utility Tunnel* (“2018 Assignment”) conveying state lands subjacent to the bottomlands to Enbridge. Act 359 expressly requires the parties to the 2018 agreements to obtain all permits and approvals:

[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.²¹

Neither Act 10 nor Act 359 contains express findings authorizing the state agencies to convey public trust lands without making a due finding that the conveyance is within one of the

²⁰ MCL 324.2129

²¹ MCL 254.324d(4)(g).

narrow exceptions under public trust law and the GLSLA. Moreover, neither of the state agencies made such findings. Indeed, paragraph (13) of the 2018 Easement conveyed by the DNR contains an explicit disclaimer that no such findings or authorizations were made in conjunction with the conveyance.²²

B. Related Facts

The following statement of facts sets forth the undisputed factual basis for the submission to the Commission of the legal arguments, conclusions, and relief set forth in this Brief. It is undisputed that Enbridge's proposed Tunnel Project, if approved and authorized, would occupy, possess, use, alter, excavate, fill, and drill on and into the submerged public trust lands and waters of the Straits of Mackinac in Lake Michigan ("Straits"). The tunnel itself will cross under the Straits 60 to 370.8 feet below the lakebed, and on or just below the lakebed in the 250-foot near shore zone, and in the shoreline zone below and above the ordinary or natural highwater mark.

Although narrow and self-serving, Enbridge has from the start described the Tunnel Project as a mere "replacement" of the existing dual 20-inch crude oil pipelines in the Straits. As described in her direct testimony, Amber Pastoor, Enbridge Project Manager for development, stated: "The Project will replace the current Dual Pipelines... (the 'replacement pipe segment') located within a concrete tunnel below the lakebed.... The Project does not involve the tunnel itself." The record contains no indication whatsoever that Enbridge's employees, staff, or consultants considered or

²² "It is expressly understood and agreed that nothing in this easement shall be construed as a statement, representation or finding by the Grantor relating to any risks that may be posed to the environment by activities conducted by the Grantee or that the right-of-way conveyed by this easement is fit for any particular use or purpose."

evaluated anything but relocating and replacing the existing 20-inch diameter dual pipelines with a 30-foot diameter pipeline in, on, or under the Straits.

Enbridge's project supervisor responsible for all approvals and permits for the Tunnel Project testified that Enbridge applied for the construction permits for the tunnel and project under the public trust sections of the GLSLA that cover the construction activity permit.

Q: And your application under the Submerged Lands Act did not request authorization of the easements or the assignment of easement or property interest in the bottomlands of the Straits to actually locate the construction?

A: It wasn't an application for the easement [].²³

Enbridge accordingly does not dispute that it did not apply for or obtain any authorization for the 2018 Easement or 2018 Assignment of Easement under the conveyance or occupancy and use sections of the GLSLA.²⁴

In addition, Enbridge relies on a series of agreements with Michigan's executive branch, culminating in the 2018 Third Agreement (Ex A-1, Tunnel Agreement), , the 2018 Easement (Ex A-5), and the 2018 Assignment (Ex A-6) for establishing the legal property and possessory interest as a prerequisite for the Application to the Commission for approval of the Tunnel Project. The agreements describe a private-public partnership for Enbridge's exclusive use, occupancy, and operation of the Tunnel Project. All of these agreements are subject to and require all necessary permits and approvals for the location, construction, and operation of the Tunnel Project.

Further, Ms. Pastoor testified that she had personal knowledge of all of the exhibits, including Ex A-6, the 2018 Easement and 2018 Assignment of Easement for the Tunnel Project.

²³ Cross Examination of Paul Turner, 7 TR 643.

²⁴ MCLA 324-32508.

After discussion with counsel, she reaffirmed her answer that she had no knowledge of Enbridge having or holding any document authorizing the 2018 Easement and 2018 Assignment of Easement; those two documents are all that exists in terms of authorizing the conveyances. Again, the record contains no evidence that the Enbridge obtained or the DNR made the necessary findings to validly convey the alleged property interests under Michigan's public trust law or GLSLA. The DNR did not determine that the easements would improve the public trust interests of the State, meaning the waters and bottomlands or public trust uses such as navigation, fishing, and swimming. Similarly, there are no findings whatsoever that the Tunnel and Tunnel Project will not interfere, subordinate, or impair these public trust interests and uses.

Finally, the record establishes without quarrel or opposition that Enbridge did not consider or evaluate the "no action" alternative for the Tunnel Project and Line 5 now and into the future, and that Enbridge did not consider any alternatives involving capacity in other pipelines within the Enbridge system.

Q (By Mr. Olson): So let's take it one at a time, Ms. Pastoor. To your personal knowledge and in your position as project manager, can we conclude from this that with respect to this project, the alternative analysis that you're presenting did not include analysis of other pipeline routes outside of the Straits of Mackinac, other locations or routes not involving the Straits of Mackinac?

A Our analysis was specifically focused on the four-mile segment replacement at the Straits of Mackinac, so as that was the task, we considered alternatives for replacing the dual pipelines within the Straits of Mackinac, so that's how we approached this.

Q All right. But you have not considered -- you did not consider alternative locations, other pipelines with capacity of Enbridge's system?

A Well, no, because the task was to consider how do we replace the dual pipelines...

Q All right. ... Did you consider no tunnel ...?

A ... the objective was how do we replace the dual pipelines, so that we... considered alternatives for replacing the dual pipelines.

Q So you didn't look at the no tunnel, ... you 23 didn't look at not doing a project at all? 24

A Well, no, because the ask was how do we replace the dual 25 pipelines²⁵

FLOW adopts and incorporates herein the Statement of Facts of Intervenors Environmental Law and Policy Center and Climate Organizations on the prima facie showing of likely pollution or impairment of the air, water, natural resources, and public trust in those natural resources. The Climate Organizations presented testimony from expert witness Peter Erickson, who used a well-known and peer-reviewed methodology to estimate greenhouse gas emissions from the Proposed Project as compared to the feasible and prudent no-pipeline alternative. Mr. Erickson concludes that the Proposed Project will result in emission of 27,000,000 metric tons of carbon dioxide equivalents (CO₂e). Expert Dr. Peter Howard explains how to understand those GHG estimates in the context of the social cost of GHGs, calculating that the social cost of the GHG emissions from the Proposed Project is at least \$41 billion. Dr. Jonathan Overpeck, Dean of the School for Environment and Sustainability at the University of Michigan, explains that GHG emissions exacerbate climate change, and that climate change is already impairing Michigan's air, water, and natural resources. Dr. Elizabeth Stanton testifies that consideration of a no-pipeline alternative should have been undertaken by Enbridge, and that in her opinion, shutting down the Dual Pipelines without constructing the Proposed Project is a reasonable and prudent alternative.

²⁵ Cross Examination of Amber Pastoor, 7 TR 585-586.

III. THE MPSC CANNOT APPROVE THE TUNNEL PROJECT UNLESS AND UNTIL THE DECEMBER 2018 EASEMENT AND 2018 ASSIGNMENT HAVE BEEN AUTHORIZED UNDER THE PUBLIC TRUST DOCTRINE AND GREAT LAKES SUBMERGED LANDS ACT.

Enbridge does not have a legally warranted property interest in the state bottomlands through which the proposed tunnel would be excavated. The December 2018 Easement (Ex A-6) and 2018 Assignment of Easement (Ex A-6) to Enbridge have not been authorized by the requisite findings under public trust law and/or the conveyance provisions of the GLSLA, MCL 324.32502-32508. As described in the Statement of Facts above, the hearing record established that Enbridge did not apply for or obtain the 2018 Easement or 2018 Assignment; that is, Enbridge was simply assigned the Easement pursuant to the 2018 agreements. There are no accompanying documents containing the requisite findings under public trust common law by DNR for the Tunnel Project under Act 10, MCL 324.2129. There is also no authorization from EGLE under the GLSLA conveyance sections. Nothing on the face of the 2018 Easement or the 2018 Assignment contains anything that reflects the existence of such findings. The 2018 Easement and 2018 Assignment are accordingly both invalid under public trust law and the GLSLA. The public trust submerged lands and waters can never be alienated as DNR and EGLE have done here.

A. The Common Law of Public Trust in the Soils Beneath the Great Lakes

Enbridge's proposed corridor tunnel and new tunnel pipeline are subject to the State's sovereign trust title and the public trust doctrine and law that apply to the Great Lakes and the soils under them. Like all of the states, 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 mark.²⁶ All of these waters and the soils beneath them are held in and protected by a public trust.²⁷ 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 navigation, fishing, boating, swimming, bathing, drinking water, and other recreation. As a general rule, there can be no disposition, transfer, conveyance, occupancy or use of any kind of these public trust waters and the soils beneath them, unless there is a statute or law that expressly authorizes the proposed disposition, occupancy, or action and the statute contains and requires a consideration that the following standards for the narrow exception to the rule have been duly satisfied:²⁸

- (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.

The public trust doctrine and its legal mandates are irrevocable.²⁹

B. Great Lakes Submerged Lands Act of 1955 (“GLSLA”): Limited conveyances, leases, agreements, or actions over, on, in, and through, soils and bottomlands of the Great Lakes.

Two years after the passage of Act 10, the legislature enacted the GLSLA. As amended, the GLSLA prohibits any conveyance, lease, agreement, occupancy, use or other action in the waters or on, in, through or under the bottomlands of the Great Lakes, unless authorized by the Michigan EGLE pursuant to the public trust standards in the GLSLA and the common law of the

²⁶*Shively v Bowlby*, 14 S Ct 548 (1894); *Illinois Central R Rd v Illinois*, 146 US 387 (1892); *State v Venice of America Land Company* 160 Mich 680 (1910); *Glass v Goeckel*, 473 Mich 667 (2005).

²⁷ *Id.*; see also *Obrecht v National Gypsum*, 361 Mich 399 (1961).

²⁸ *Id.* p. 416.

²⁹ *Illinois Central R Rd v Illinois*; *Obrecht v National Gypsum Co.*, *supra*.

public trust doctrine. Because the GLSLA applies to any conveyances, leases or other agreements and occupancy of these public trust bottomlands, the DNR Easement, MSCA Assignment, and 99-year lease or for as long as Enbridge operates the tunnel and tunnel pipeline segment are subject to the GLSLA and common law public trust standards.

As a threshold matter, the State and Enbridge must first obtain authorization under the GLSLA for the public-private partnership to establish a long-term agreement for the 99-year lease and occupancy agreement for a tunnel or pipeline in or through the soils and bottomlands of the Straits of Mackinac.

Sec. 32502. The lands covered and affected by this part are all of *the unpatented lake bottomlands and unpatented made lands in the Great Lakes*, including the bays and harbors of the Great Lakes, *belonging to the state or held in trust by it*, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. *This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition.* The word “land” or “lands” as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark ³⁰

Sec. 32503. (1) Except as otherwise provided in this section, the department, *after finding that the public trust in the waters will not be impaired or substantially affected, may enter into agreements pertaining to waters over and the filling in of submerged patented lands, or to lease or deed unpatented lands, after approval of the state administrative board. Quitclaim deeds, leases, or agreements covering unpatented lands may be issued or entered into by the department with any person, and shall contain such terms, conditions, and requirements as the department determines to be just and equitable and in conformance with the public trust. The department shall reserve to the state all mineral rights, including, but not limited*

³⁰ MCL 324.32502; see also 324.32503, 324.32504, 324.32505(4), 324.32512.

*to, coal, oil, gas, sand, gravel, stone, and other materials or products located or found in those lands...*³¹

(2) The department shall not enter into a lease or deed that allows drilling operations *beneath unpatented lands for the exploration or production of oil or gas.*³²

Based on the plain meaning and public trust law incorporated into the GLSLA and its rules, the Governor, state agencies, and Enbridge agreements, the DNR Easement and the MSCA Assignment are subject to the GLSLA. It is undisputed based on the testimony of Enbridge's Ms. Pastoor and Mr. Turner³³ that Enbridge has not sought or obtained authorization for any of these conveyances or use documents under the GLSLA and/or based on the findings or determinations required for a valid conveyance or agreement required by the GLSLA or public trust law.

State officials or Enbridge may represent that the 2018 Agreements, the Tunnel Agreement, the 2018 DNR Easement, the MSCA Assignment, and the Lease for tunnel and the use of tunnel for the new Line 5 Pipeline in the Straits are not subject to the public trust doctrine, the GLSLA, or Section 2129, MCL 324.2129. Negotiators and parties knowingly manipulated the legal description of the DNR Easement, the Assignment, and Lease for the Tunnel Corridor and New Line 5 Pipeline in the tunnel in a calculated attempt to bypass the State's sovereign title and public trust interest in the waters and soils beneath the Great Lakes. They inserted the following legal description:

... the Grantee, and to its successors and assigns, a 1,200 foot wide right of way and a full easement and right to place, construct, operate, maintain, inspect, protect, repair, use, and remove an underground tunnel (within which one or more pipelines, and or one or more other utility lines... may be located) through and across all underground lands and interests in the underground lands, *specifically lands located beneath the lakebed, to which the state has title* that may be necessary or convenient to the placement and construction of such underground tunnel within

³¹ MCL 324.32503(1).

³² MCL 324.32503(2).

³³ Pastoor Cross, 7 TR 579-587; Turner Cross, 7 TR 641-650.

the area of 600 feet on each side of the centerline... Their easement and right of way *do not include any lands or interests in land on or above the lakebed.*

The attempt to escape the GLSLA and public trust law is an attack on the State and its citizens' rights and sovereign public trust interests in the history of the State of Michigan. This attempt was and is flatly wrong, and must be rejected by the Commission as a "sworn guardian" of mandatory public trust responsibilities to prevent violations of the public trust. The deeded or grant of easement, assignment, and lease are all subject to the GLSLA and public trust law.

First, based on numerous United States Supreme Court decisions, including *Shively* and *Illinois Central*, *supra*, and Michigan Supreme Court decisions, including *Obrecht and Venice of America Land Company*, *supra*, the State took sovereign title to the waters and "all of the soils" beneath the Great Lakes in trust, public trust, on admission to Statehood. This solemn, perpetual trust is irrevocable, irrevocable, and cannot be violated by any attempt to escape it. Moreover, the unpatented lands, bottomlands, and soils beneath the waters of the Great Lakes are clearly covered by the GLSLA. The title of the State cannot be surrendered or alienated. If a conveyance, interest, or use of these soils and bottomlands is proposed, it can only be done based on the findings and standards in the GLSLA. Clearly, the GLSA extends to all lands and title in these unpatented trust lands. The legislature has expressly shown the extent of the State's public trust title and inalienable interest by the terms of the GLSLA. The legislature recognized this legal fact by reserving all mineral rights and interests, including but not limited to oil and gas, gravel and stone, and by prohibiting oil and gas development in or beneath the Great Lakes and bottomlands. Oil and gas development include drilling, bore pipes, pipelines, and facilities far beneath the soils of the Great Lakes; e.g., Niagaran Reef development is often more than a mile beneath the lakebed.³⁴ Enbridge

³⁴ MCL 324.32503(1) and 3203(2).

and the MSCA cannot proceed until the required authorizations under public trust law and the GLSLA have been applied for and obtained (if in fact and law they can ever be obtained for such an exclusive and primarily private tunnel and pipeline.

Further, the DNR, MSCA, and Enbridge did not obtain authorization for these conveyances, lease, and agreements from the State Administrative Board, and failed to consider and determine the effect on and potential impairment to the substantial tribal property rights of the 1836 Treaty Tribes in, fishing, fishery habitat and other usufructuary activities protected by the Treaty of 1836.

C. Act 10 of Public Act (“Act 10”) Easements for Public Utilities over, under or through State Lands and State-Owned Public Trust Bottomlands

Section 2129, NREPA, delegates authority to the DNR “to grant public utility easements” and provides:

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.

First, the legislature delegated authority to the Conservation Commission (now DNR) to grant such public utility easements through and under the Straits of Mackinac. It is important to note that the authority of the DNR is subject to the public trust and state sovereign interest in unpatented bottomlands and waters of the Great Lakes. Because of this, public trust law applies. No easement can be granted without a finding and determination by the DNR that the standards under public trust law have been met.

Second, the 2018 DNR Easement to the MSCA was granted without the required findings and determinations under public trust law. Further, the legislature enacted the GLSLA in 1955 just two years after Section 2129 (then Act 10). As described above, the GLSLA applies to any deed, lease, or other agreement of occupancy or use over *all unpatented bottomlands held in trust by the state*. Because Section 2129 contains no finding requirement or standards required by the public trust doctrine, *Illinois Central* and *Obrecht, supra*, standards, the GLSLA supplies those standards and finding requirements. Therefore, an easement granted under Section 2129 must also be authorized under GLSLA. And, in any event, as noted above, the grant under Section 2129 must be based on specific review, consideration, and findings or determinations of fact that the standards under public trust law, and to date those requirements have not been met.

Third, the Easement was not properly authorized under Section 2129, because the Tunnel and Tunnel pipeline were not certified by the MPSC as a *public* utility at the time of the grant. In addition, the Assignment by the MSCA to Enbridge was *not* a grant by the DNR, and likewise Enbridge was not certified as a public utility at the time of the assignment. Enbridge has not sought authorization of the Assignment under Act 10, nor the findings within the exceptions required for such occupancy and use of the Straits of Mackinac required by public trust law and the GLSLA.

Accordingly, as trustee and “sworn guardian” of the public trust in the Straits of Mackinac and Lake Michigan, the MPSC must deny or otherwise not authorize unless and until the required findings have been made and the public trust requirements upheld.

IV. BASED ON THE INFORMATION IN THE RECORD, THE COMMISSION MAY NOT APPROVE THE TUNNEL PROJECT WITHOUT VIOLATING THE MICHIGAN ENVIRONMENTAL PROTECTION ACT.

The Commission's authority to evaluate and investigate "public need" is plenary under MCL 483.3(1) In addition, MEPA" imposes independent duties to prevent or minimize likely degradation of the environment and to consider and/or prove there exist no feasible and prudent alternatives to a project or conduct. To assure this substantive duty and purpose of the MEPA is achieved, in light of art. 4, sec. 52 of the Michigan Constitution to protect water, natural resources, and the public trust in those resources as a paramount mandate, the legislature and courts have imposed two duties on state agencies, including the Commission.

One duty is imposed by common law of the environment through the decisions of the Michigan Supreme Court and Court of Appeals. The other duty is compelled by the plain language of Section 1705(2) of MEPA itself. These duties arise under MEPA and therefore are not limited by arguments put forward by Enbridge that its project to replace the existing dual pipelines in the Straits of Mackinac with a single pipeline in a tunnel delimits the authority of the Commission under Act 16 to consider and demonstrate that no other feasible and prudent alternatives exist to a Straits Crossing.

A. The Record Demonstrates that the Tunnel Project Is Likely to Pollute, Impair, and Destroy Public Trust Resources.

Section 1705(2) of the MEPA provides that:

In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such

an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

The plain meaning of Section 1705(2) applies to this MPSC proceeding. The MPSC has a duty to determine the likely effects of the Tunnel Project on the air, water, natural resources, or the public trust.

In fulfilling this duty, the MPSC is not limited by the narrow “replacement” or “relocate” purpose stated by Enbridge in its application under Act 16. Michigan courts have consistently recognized that MEPA imposes additional environmental review requirements that are supplemental to existing administrative and statutory requirements. MEPA expressly provides that “[t]his part is supplementary to existing administrative and regulatory procedures provided by law.”³⁵ Moreover, the scope of the determination of such effects is as broad as the conduct that is subject to the request for approval. MEPA by its terms is not limited by the scope of Enbridge’s Application. The MPSC is charged by the MEPA to determine these effects, and if there are such effects, the MPSC must deny Enbridge’s Application for the Tunnel Project.³⁶

The threshold for pollution or likely pollution under MEPA depends on the magnitude of the project and harm. The larger the project or the greater the magnitude of harm, the lower the threshold. MEPA imposes a substantive duty on the MPSC to “prevent or minimize environmental degradation.” Necessarily, the MPSC should determine that actual pollution or impairment of water quality, natural resources such as fish and fish habitat, and the public trust (e.g. fishing and swimming) that has already occurred or is likely to occur from the construction and operation of the Tunnel Project, and from the continued transport of 540,000 bbl/day of crude oil through Line

³⁵ MCL 324.1706.

³⁶ MCL 324.1705(2).

5 for up to 99 years. Based on the Statement of Facts of Intervenors Environmental Law and Policy Center and Climate Organizations, which were previously incorporated herein by reference, it is far more than likely that the Tunnel Project will pollute, destroy, and impair public trust resources and uses. This conclusion is bolstered by testimony presented by the Intervenor Tribes, which document significant, adverse impacts on fishing and fish habitat, as well as the discharge of millions of gallons a day of pollutants pursuant to the NPDES permit.³⁷

Enbridge's Application clearly constitutes "conduct" within the meaning of Section 1705(2) based on *Western Michigan Environmental Action Council v. Natural Resources*, a Pigeon River oil and gas development case. The Commission issued an order for the drilling of ten exploratory wells. The intervenor oil companies argued that the conduct was the permitting and actual drilling of the wells. The Court held:

We conclude that the issuance of the permits to drill ten exploratory wells was properly before the circuit court as conduct alleged to be likely to pollute, impair and destroy the air, water or other natural resources or the public trust therein. The effects of these permits were comprehensively treated at the trial level, both by the parties and by the circuit judge. Further, the consent order, which the trial court recognized was designed to be a "legally enforceable" document, stated that "[a]s many as ten test wells may be drilled for verification of seismic information. Specific drilling locations for these wells shall be determined by the oil companies and the director in consultation with the Public Service Commission. Therefore, plaintiffs' allegation that the consent order is likely to lead to pollution, impairment or destruction of the natural resources of the Pigeon River Country State Forest can fairly be said to include within it an allegation that the issuance of permits for drilling test wells will have such result, the issuance of these permits being an inevitable consequence of the adoption of the consent order."³⁸

Accordingly, given the actual or likely pollution and impairment of water and natural resources from the construction and operation of the Tunnel Project, and the significant effects on

³⁷ (Ex A-15, NPDES Permit No. MI0060278).

³⁸ *West Michigan Environmental Action Council v Natural Resources Commission*, 405 Mich. 741 (1979).

the Great Lakes attributable to an approval of the Tunnel Project, the MPSC must deny Enbridge's Application for the Tunnel Project.

B. Because the Record Demonstrates That the Tunnel Project Is Likely to Pollute, Impair, and Destroy Public Trust Resources, The Commission Must Deny or Cannot Otherwise Approve the Tunnel Project Due to Enbridge's Failure to Consider or Prove That There Is No Feasible and Prudent Alternative under MEPA or *Vanderkloot*.

In *Vanderkloot*, the Court voided a necessity approval for condemnation of a segment of an expressway project in Oakland County, because the then Michigan Highway Department (now MDOT) failed to consider the full range of feasible and prudent alternatives to the project. The Court articulated what is required by an agency when reviewing alternatives to fulfill the duty imposed by MEPA:

Relevant to such a review, for example, is the Commission's duty to consider *alternative routes* for environmental purposes. This duty is imposed by EPA (referring to MEPA). . . .

"Early consideration... should also better serve the affected community's ecological interests while sparing highway planners unexpected public opposition at a point in time when planning has reached a stage too far advanced for inexpensive and uncomplicated alteration. Note the following analysis on this point:

'... highway engineers . . . have generally considered it unprofessional to scratch around in parochial politics. Because engineers have tended to ignore the highway's impact on communities it penetrates, they have frequently been subjected to what Marvin Manheim of MIT calls 'the big surprise.' They study the highway location, run benefit-cost analyses, propose a route publicly [sic], and then are surprised by the overwhelming community opposition it creates.' Demaree, 'Cars and Cities on a Collision Course,' *Fortune* (February 1970), p. 188.

Adding to this 'big surprise' problem is a growing public awareness that *ecological considerations are just as important to the public interest as the benefits of improved public services resulting from new construction*. Recently in Michigan this same public awareness has focused on the environmental impact of public utilities construction... 'MONITORING MICHIGAN'S UTILITIES'... MICHIGAN'S need for adequate *supplies of*

*electricity and gas at reasonable prices and without despoiling the state are eventually going to make imperative the controls on utility plant siting and monitoring of management decisions recommended by Gov. Milliken....*³⁹

More recently, in *Buggs v Michigan Public Service Commission*⁴⁰, a case involving construction of a proposed natural gas pipeline, the court found that MEPA “established a substantive standard prohibiting the impairment of natural resources, which applies to an agency’s determinations.” Following *Vanderkloot*, the court held that the MPSC “had to consider whether the proposed project would impair the environment, whether there was a feasible and prudent alternative to the impairment, and whether the impairment was consistent with the promotion of the public health, safety, and welfare in light of the state’s paramount concern for the protection of its natural resources from pollution, impairment, or destruction.”⁴¹

The *Buggs* court stated that “although the Commission found in a cursory manner that the pipelines would serve the public convenience and necessity, it did not otherwise *expressly speak to necessity, practicability, feasibility, or prudence in its orders.*”⁴² Remanding the case back to the MPSC, the court stated that the Commission “failed to follow the *independent statutory requirement* imposed under MEPA. Because its orders approving the pipelines were unlawfully issued, we vacate those orders and remand for a new necessity determination in both dockets.” (emphasis added).⁴³

³⁹ *Vanderkloot*, 392 Mich. 176, n.7 & 186, n.10.5.

⁴⁰ *Buggs v. Michigan Public Service Commission*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2015 at 8 (Docket No. COA No. 315058).

⁴¹ *Id.*

⁴² *Id.* at 9.

⁴³ *Id.* at 11; *see also Mich. Oil v. Natural Resources Commission*, 406 Mich 1, 32-33, 55-56; 276 NW2d 141 (Mich 1979).

Buggs holds that the Commission must examine the “necessity, practicability, feasibility, and prudence” of projects.⁴⁴ Although the Commission in the past has not evaluated health and environmental externalities when considering projects and regulatory approvals, the legal requirement to do so has applied to the Commission since *Vanderkloot* and *Ray*.⁴⁵ Unfortunately, when Enbridge requested approval from the Commission in replacing all of ruptured Line 6b after the Kalamazoo disaster, the necessity, prudence, likely effects, and alternatives to the new Line 6b (now Line 78) were not considered. Had that occurred, the Commission may well have determined, based on Enbridge’s testimony that the new Line 78 would meet all of its future needs, that Line 5, including the existing dangerous dual pipelines in the Straits of Mackinac, were not necessary; this was because the new Line 78 (formerly 6B, the expansion of which was approved by the Commission) has a design capacity of 800,000 bbl./day, an excess of 400,000 bbl./day, a sufficient volume in light of today’s circumstances with declining crude oil demand and climate change impacts.⁴⁶

As for the scope of MPSC’s consideration of alternatives in this case, the failure of the duty to consider likely effects and alternatives analysis required by *Vanderkloot* would violate MEPA. This is particularly compelled by Enbridge’s narrow “replace” and “relocate” consideration of alternatives intended to avoid full review of alternatives required by *Vanderkloot*, MEPA, and other laws.

⁴⁴ *Buggs*, p.9.

⁴⁵ *Vanderkloot*, 392 Mich. at 185, *Ray*, 393 Mich. at 308.

⁴⁶ In re Enbridge Energy, Limited Partnership Application Case No. U-17020, Pre-Filed Direct Testimony of Mark Sitek And Exhibits, p 12, available at <https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t0000000wdShAAI>

In summary, the *Vanderkloot* and the MEPA require an evaluation of feasible and prudent alternatives, including a “no action” alternative. This, in turn, requires an analysis of “feasible and prudent alternatives” when considering pipeline projects that have, or are likely to have, detrimental effects on public health and the environment such as the massive Tunnel Project. Evaluating feasible and prudent alternatives is complementary to the determination of public need.

Enbridge intentionally described the Tunnel and pipeline as a mere “replacement” of an existing Line 5. As demonstrated in the Statement of Facts section of this Brief, Enbridge’s lead managers—Ms. Pastoor and Mr. Turner—responsible for the Tunnel Project and obtaining permits and approvals in compliance with all laws, including MEPA and *Vanderkloot*, testified that Enbridge did not consider any “no action” alternative involving the need for the project itself, or other alternatives elsewhere in the Enbridge pipeline system through existing capacity, unused capacity, for example the extra 400,000 bbl./day design capacity of Line 78. (The Commission can take judicial notice of its own decisions and orders). Typically, such an analysis would include the following:

- Whether the carrying capacity of the existing network of North American pipelines is sufficient to meet future needs?
- To what extent did the 2010 catastrophic failure of Line 6b and the more recent temporary partial closure of Line 5 result in constriction of supply, market disruption, or price increases to end users?
- Does Line 6b, now reconstructed as Line 78, have the capacity to meet market demand if Line 5 closes?
- Whether cessation of Line 5 would result in a new pipeline system equilibrium capable of meeting existing and future demand for oil and natural gas liquids?
- What is the potential for the tunnel project to become a stranded asset and liability to the State of Michigan in the event market trends play out as predicted?

Based on the above undisputed facts, MEPA, the *Ray*, and *Vanderkloot* decisions, the Commission should deny the Application for the Tunnel Project.

V. CONCLUSION AND REQUESTED ACTION BY THE COMMISSION

First, the MPSC should deny or otherwise not approve the Enbridge Application for the Tunnel Project unless and until: 1) it has obtained a legally warranted and authorized interest in or right to use the public trust bottomlands of the Straits of Mackinac as required by the common law public trust doctrine findings authorizing such interest and use within one of the narrow exceptions set forth by *Illinois Central Railroad* and *Obrecht*; and 2) Enbridge obtains the authorization for the 2018 Easement and 2018 Assignment of Easement, and related 99-year lease, pursuant to the conveyance Sections 32502 through 32508 of the GLSLA. MCL 324.32502-32508.

Second, the MPSC must determine the likely effects on the air, water, natural resources and public trust in those resources, including the effects on the Straits of Mackinac and waters of Lake Michigan, and Great Lakes, pursuant to the mandatory requirements of Section 1705(2) of MEPA, MCL 324.1705(2).

Third, since the record demonstrates a prima facie case of likely effects on the air, water, natural resources, or public trust in those resources, Section 1705(2) of MEPA, *Vanderkloot*, and *Ray* prohibit the approval of the Application for the Tunnel Project unless there exist no feasible and prudent alternatives to the Tunnel Project. Because Enbridge has not demonstrated on the hearing record that the “no action” alternative and other alternatives utilizing existing location, pipelines, and carrying capacity are not feasible and prudent alternatives, the Application for the Tunnel Project must also be denied. This includes the Commission’s direction that the project applicants must evaluate future market, financial and regulatory trends to demonstrate that projects are necessary and prudent in light of environmental, climactic and public health concerns, and the energy transition that is underway.

Respectfully submitted,

FOR LOVE OF WATER (FLOW)

Date: February 18, 2022

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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

PROOF OF SERVICE

On the date below, an electronic copy of the **INITIAL BRIEF OF INTERVENOR FOR LOVE OF WATER** 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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