



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

August 24, 2016

Ms. Heidi Grether  
Director  
Michigan Department of Environmental Quality  
P.O. Box 30458  
Lansing, Michigan 48909-7958

Ms. Kim Fish  
Acting Chief  
Water Resources Division  
Michigan Department of Environmental Quality  
P.O. Box 30458  
Lansing, Michigan 48909-7958

Mr. James Milne, Env. Manager  
Mr. Thomas Graf, Env. Specialist  
Great Lakes Submerged Lands Unit  
Michigan Department of Environmental Quality  
P.O. Box 30458  
Lansing, Michigan 48909-7958

Mr. Scott Rasmusson  
Great Lakes Shorelands Unit  
Gaylord District Office  
Michigan Department of Environmental Quality  
2100 West M-32  
Gaylord, Michigan 49735

VIA ELECTRONIC SUBMISSION

**RE: PUBLIC COMMENTS ON THE JOINT APPLICATION OF ENBRIDGE ENERGY TO OCCUPY GREAT LAKES BOTTOMLANDS FOR ANCHORING SUPPORTS TO TRANSPORT CRUDE OIL IN LINE 5 PIPELINES IN THE STRAITS OF MACKINAC AND LAKE MICHIGAN [No. 2HB-VGKO-35JE]**

**Applicable Laws Include: Great Lakes Submerged Lands Act, MCL 324.32501 et seq., Common Law Public Trust, the Michigan Environmental Protection Act, MCL 324.1701 et seq.; Joint Application with US Army Corps of Engineers, Rivers and Harbors Act, Sec. 10, 33 U.S.C. § 403; Clean Water Act, 33 U.S.C. § 404.**

Dear Michigan Department of Environmental Quality Director Grether, Officials, and Staff:

For Love of Water (“FLOW”) is a Michigan nonprofit corporation dedicated to researching, evaluating, and providing sound law and policy to protect the waters of Michigan and the Great Lakes, their bottomlands, aquatic resources, and the public trust in these lands, waters, and their protected public trust uses. With respect to crude oil pipeline transport in the Great Lakes, FLOW has submitted several reports to the Governor, Attorney General, Michigan Department of Environmental Quality (“MDEQ”), Michigan Department of Natural Resources (“MDNR”), the Michigan Petroleum Pipeline Task Force (“Task Force”) and Michigan Pipeline Safety Advisory Board (“Advisory Board”) on the high risks associated with Line 5, including the segment in the Straits of Mackinac.<sup>1</sup> These reports concluded the following:

- (1) the high risk of catastrophic harm from a crude oil release in the Straits and Lake Michigan and Lake Huron is unacceptable;
- (2) there are a number of suitable alternatives and capacity (with reasonable adjustments) within the Great Lakes and Midwest existing crude oil pipeline system to meet existing and future demand and needs; and
- (3) interim measures should be immediately implemented to remove crude oil transport from Line 5 given the high risk, magnitude of harm, and suitable alternatives.

This letter is submitted as a primary comment on the above-referenced application to address the scope, purpose, laws, rules, and standards that govern the application. It also provides a brief background to place the application in proper context for your consideration and determination required by such laws, rules, and standards. FLOW appreciates the opportunity to submit these initial comments, and reserves the right to submit additional or supplemental comments before August 28, 2016 or in any extended or new public comment time period.

## **I. LEGAL FRAMEWORK AND BACKGROUND ON PUBLIC TRUST LAWS AND 1953 EASEMENT WITH STATE**

Upon joining the Union in 1837, Michigan took title to navigable waters and the lands beneath them in public trust for the benefit of all citizens, as legal beneficiaries of this trust.<sup>2</sup> The public trust includes fish, aquatic resources, and habitat within the boundaries of

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<sup>1</sup> Appendix A: [FLOW Composite Report on Line 5 Risks and Recommendations, with Appendices, submitted to Michigan Petroleum Pipeline Task Force](#) (FLOW, Apr. 30, 2015); [A Scientific and Legal Policy Report on the Transport of Oil in the Great Lakes: \(1\) Recommended Acts on The Transport of Oil Through Line 5 under the Straits of Mackinac; \(2\) Supplemental Comments to the Michigan Petroleum Pipeline Task](#) (FLOW, Sept. 21, 2015); [A Report on the Legal and Pipeline Systems Framework for the Alternatives Analysis of the Pipeline Transport of Crude Oil in the Great Lakes Region, Including Line 5 under the Straits of Mackinac, submitted to Michigan Pipeline Advisory Board](#) (FLOW, Dec. 20015).

<sup>2</sup> *Illinois Central R.R. v Illinois*, 146 US 387, 436-37, 453-59 (1892); *Obrecht v National Gypsum Co.*, 361 Mich 399, 412, 414-16 (1960).

the Great Lakes and tributary navigable waters. The public trust protects preferred public trust uses of these waters and lands, including navigation, boating, fishing, swimming, fowling, drinking water, and sustenance dependent on the integrity of these public trust lands and waters. The public trust imposes an affirmative “solemn” and “perpetual” duty on the state, as trustee, to protect and prevent impairment of these public trust uses, lands, and waters.<sup>3</sup> These public trust waters and bottomlands can never be alienated, public control cannot be surrendered, and these waters and their public trust uses must be protected from risk of impairment.<sup>4</sup>

There are only two very narrow exceptions<sup>5</sup> within which the state may authorize a use or occupancy by conveyances, leases, or agreements for public or private use. The state must determine in due recorded form that (1) the purpose is primarily related to the protection and promotion of these public trust interests and uses; and (2) the proposed use or conduct will not likely result in an unacceptable risk of impairment or harm to these public trust waters, bottomlands of public trust uses, now or for future generations.<sup>6</sup> If these standards are not considered, determined, and established, the use can never be authorized. Because the public trust is perpetual in nature, any private use of public trust waters and lands is subject to changes in knowledge, understanding, and new circumstances.<sup>7</sup> In other words, the public trust is an inherent limitation on any use of public trust resources, and a state trustee is never foreclosed from terminating or modifying a use to protect or prevent harm to the public trust resources or their preferred or protected uses.

In 1952, Enbridge Energy, then Lakehead Pipe Line Company (“Lakehead”), wanted to construct a pipeline from Alberta to Sarnia, Ontario. To do so, it considered two routes: (1) south around the bottom of Lake Michigan and across the Lower Peninsula, and (2) through the Upper Peninsula, across the Straits and down through the Lower Peninsula to Port Huron and under the St. Clair River to Sarnia. Lakehead chose the shorter and less expensive 645-mile route traversing the Upper Peninsula, the heart of the Great Lakes, and the Lower Peninsula.<sup>8</sup>

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<sup>3</sup> *Collins v Gerhardt*, 237 Mich 38, 211 NW 115, 118 (1926).

<sup>4</sup> *Obrecht* 361 Mich at 412; *Illinois Central R.R.*, 146 US at 436-37.

<sup>5</sup> *Obrecht*, 361 Mich at 412; Great Lakes Submerged Lands Act, §§ 32502, 32503.

<sup>6</sup> *Obrecht* 361 Mich at 412; *Illinois Central R.R.* 146 US at 436-37.

<sup>7</sup> *State v St. Clair Fishing Club*, 127 Mich 580 (1901); *State v Venice of America Land Co.*, 125 NW 770 (1910); *Illinois Central R.R.* 146 US at 436-37; *Obrecht* 361 Mich at 412.

<sup>8</sup> Ironically, in 1969, Lakehead obtained state approval to construct another pipeline system around the southern end of Lake Michigan and across the Lower Peninsula known as Line 6B. In 2010, this pipeline ruptured nearly a million gallons of heavy tar sands into the Kalamazoo River, causing the largest and most expensive inland oil spill disaster in U.S. history. Enbridge then took this opportunity to replace Line 6B and doubled its capacity without attracting the same level of scrutiny Keystone XL faced. Charged with the siting and construction of pipelines like the new Line 6B, the Michigan Public Service Commission (“MPSC”) quickly determined it was deemed to be in the “public interest” without conducting a comprehensive impact and alternative study to evaluate the entire Lakehead system and the potentially inessential nature of Line 5. MPSC Approves Enbridge Energy Limited Partnership Request to Construct Part of Line 6B Pipeline Along Alternative Route in Marysville September 24, 2013.

[http://www.michigan.gov/mpsc/0,4639,7-159-16400\\_17280-313062--,00.html](http://www.michigan.gov/mpsc/0,4639,7-159-16400_17280-313062--,00.html)

In order to build “Line 5,” the Attorney General of Michigan advised Lakehead that legislative authority was necessary to obtain an easement from the state to occupy the Straits public trust bottomlands and waters. In less than two months, the legislature passed Public Act 10 of 1953 (“Act 10”), which authorized state agencies to grant public utilities easements to run lines over public lands or in public trust bottomlands and waters of the Great Lakes. Any such easement, if approved, would remain subject to the state’s and citizens’ public trust in the public trust lands and waters of the Great Lakes. Lakehead also obtained approvals from the Michigan Public Service Commission (“MPSC”) to acquire rights of way for the entire 645-mile pipeline across the Upper Peninsula, under the Straits, and to Sarnia.<sup>9</sup>

On April 23, 1953, the Michigan Department of Conservation granted Lakehead an easement to transport 120,000 barrels/day (“bbls/day”) of petroleum products in the Straits segment of Line 5 subject to express covenants, conditions, and the public trust.<sup>10</sup> Specifically, the easement recognizes Enbridge’s use and operations are subject to Act 10’s reservation that the state’s bottomlands are “held in trust” and cannot be subordinated in favor of a private concern. The easement also requires that Enbridge exercise the due care of a reasonably prudent person to protect public (public trust lands and waters, public infrastructure) and private property (riparian or other related interests), and uphold a continuing obligation to comply with all federal and state laws.<sup>11</sup> Express conditions include a 75-foot maximum unsupported span requirement and other structural measures to stabilize the two 20-inch pipelines in the Straits segment.

In 1955, the legislature passed the Great Lakes Submerged Lands Act (“GLSLA”) to authorize leases or deeds on proper findings for bottomlands previously filled and occupied.<sup>12</sup> The purpose of the GLSLA at the time was to bring these previously filled and occupied bottomlands under control and protection of the state. Subsequently, the GLSLA was amended to allow leases, conveyance or occupancy agreements, and permits for filling, dredging, and other lawful structures; key to all applications was the fundamental requirement that the proposed public or private use would not impair or substantially injure the public trust in the Great Lakes.<sup>13</sup>

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<sup>9</sup> Michigan Public Service Commission, Opinion and Order, In the matter of the Application of Lakehead Pipe Line Company for approval of construction and operation of a common carrier oil pipeline (Case D-3903-53.1, March 31, 1953) [http://www.michigan.gov/documents/deq/Appendix\\_A.3\\_493982\\_7.pdf](http://www.michigan.gov/documents/deq/Appendix_A.3_493982_7.pdf); Act 16, Public Acts 1929, and other siting and police power laws and regulations.

<sup>10</sup> Straits of Mackinac Pipe Line Easement Conservation Commission of the State of Michigan to Lakehead Pipe Line Company, April 23, 1953 (hereinafter 1953 Easement Agreement). [http://www.michigan.gov/documents/deq/Appendix\\_A.1\\_493978\\_7.pdf](http://www.michigan.gov/documents/deq/Appendix_A.1_493978_7.pdf); Today, the public trust lands and waters are controlled or regulated by the Department of Natural Resources and Department of Environmental Quality.

<sup>11</sup> 1953 Easement, Section A.

<sup>12</sup> Now Part 325, NREPA, MCL 324.32501 *et seq.*

<sup>13</sup> *Id.*, see generally Bertram C. Frey and Andrew Mutz, *The Public Trust in the Surface Waters and Submerged Lands in the Great Lakes*, 4 U. Mich J. L. Reform 907-993 (2007).

In 1963, the people of Michigan adopted a new constitution. Article 4, Section 52 mandatorily requires the legislature to pass laws that protect the state's paramount concern for the air, water, natural resources, or public trust interest in those resources from pollution or impairment.

In 1970, the legislature passed the Michigan Environmental Protection Act ("MEPA"),<sup>14</sup> which prohibits likely pollution, impairment, or destruction of the air, water, natural resources or the public trust, except where it is considered and determined by a state or local governmental body or court that there exists no feasible and prudent alternative.<sup>15</sup> The MEPA imposes a duty on governmental and private entities to prevent and minimize environmental degradation or impairment of air, water, or natural resources or public trust.<sup>16</sup> In addition, under a separate legal duty, the MEPA applies to state and local governments, and requires them in any permit, licensing or other similar proceeding, such as the GLSLA or siting of pipelines by the MPSC, to consider and determine likely effects and whether there exist alternatives that better comply with the duty to prevent or minimize harm or impairment to air, water, natural resources and the public trust.<sup>17</sup>

### **III. ENBRIDGE'S PURPOSE AND STRATEGIC EXPANSION OF LINE 5 AND ENTIRE LAKEHEAD SYSTEM**

MPSC documents reveal that Line 5 was originally designed for 120,000 bbls/day with the option to increase to 300,000 bbls/day through the addition of 4 pump stations.<sup>18</sup> In 2013, Enbridge invested \$100 million to increase capacity and flow volumes to 540,000 bbls/day through 12 pump stations and anti-friction injection facilities—an expansion of 80 percent the original design capacity.<sup>19</sup> Despite a manifold increase from original volume or capacity and expanded use of Line 5, Enbridge applications to the MPSC have characterized the additional approval of pump stations and other equipment as mere maintenance.”

Similarly, in the past several years, Enbridge has implemented its plan to greatly expand its crude oil transport system to 800,000 bbls/day from Alberta and North Dakota through its Lakehead System<sup>20</sup> in the Great Lakes and Midwest region of the U.S. Numerous press

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<sup>14</sup> Part 17, NREPA, MCL 324.1701 *et seq.*

<sup>15</sup> *Id.*, MCL 324.1703(1); MCL 324.1705; *Ray v Mason Co Drain Comm'r*, 393 Mich 294; 224 NW2d 883 (1975); *State Hwy Comm'n v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974).

<sup>16</sup> *Id. Ray*, 393 Mich at 294.

<sup>17</sup> MCL 324.1705; *Vanderkloot*, 392 Mich at 159; *Buggs v. Michigan Public Service Comm'n*, 2015 WL 15975 (Mich Ct. App, Jan. 13, 2015)(*unpublished*) (Court ruled that the MPSC failed to sufficiently consider environmental impacts and feasible and prudent alternatives to a proposed pipeline as required by the Michigan Environmental Protection Act, MCL 324.1701 *et seq.*)

<sup>18</sup> See MPSC Opinion and Order, p. 6, March 31, 1953.

<sup>19</sup> Appendix 2A, pp. 1-6, FLOW Report, Sept. 17, 2015.

<sup>20</sup> “Enbridge’s Lakehead Pipeline System (“Lakehead System”) includes a network of pipelines that are grouped within right-of-ways that collectively span 1,900 miles from the international border near Neche, North Dakota to delivery points in the Midwest, New York, and Ontario. The products transported by these pipelines allegedly include natural gas liquids and a variety of light and heavy crude oils.” The Lakehead System is the part of Enbridge’s larger Mainline System with more than 3,000 miles of pipeline corridors in the United States and Canada and is the single largest conduit

releases, news reports, articles, and Enbridge applications to MPSC, and other agencies, and MPSC records, findings, and decisions show a massive expansion through a multi-billion dollar investment to increase capacity through changes to its pipeline infrastructure.<sup>21</sup> For example, after the Line 6B disaster in 2010, Enbridge filed a number of applications to the MPSC to add a new replacement Line 6B parallel to the failed line based on a stated purpose of “preventive maintenance.” In fact, the new Line 6B has doubled the capacity for transport of light and heavy crude up to 800,000 bbls/day,<sup>22</sup> making Line 5 inessential.<sup>23</sup> To date, the MPSC has never considered or determined the environmental impacts and feasible and prudent alternative pipeline system and adjustments of this massive expansion in either Line 5 or Line 6B.

In effect, as opposition to the north-south route of Keystone XL in the West mounted, Enbridge expanded its own pipeline system and Michigan and the Great Lakes region have ended up with its own “Great Lakes XL” crude oil pipeline,<sup>24</sup> without full disclosure and consideration of purpose, impacts, and alternatives as required by law and regulation.

#### **IV. ENBRIDGE’S CHRONIC VIOLATIONS OF THE EASEMENT’S MAXIMUM UNSUPPORTED SPAN PROVISION AND CURRENT 2016 APPLICATION SEEKING ADDITIONAL SUPPORTS IN THE STRAITS<sup>25</sup>**

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of liquid petroleum into the United States, delivering on-average 1.7 million barrels of oil into the U.S. each day – a figure that accounts for 23% of the U.S. crude oil imports. *See* USEPA v Enbridge Energy LP, Civil Action No. 1:16-cv-914, Proposed Consent Decree, (July 20, 2016), pp 191-193, 207. <https://www.epa.gov/sites/production/files/2016-07/documents/enbridge-cd.pdf>

<sup>21</sup> *See the following documents, which are hereby incorporated by reference:* Enbridge Energy Partners Announces Major Expansions of Its Lakehead System (May 15, 2012) <http://www.marketwired.com/press-release/enbridge-energy-partners-announces-major-expansions-of-its-lakehead-system-nyse-eeep-1658358.htm>; Application for Enbridge Energy 2012 for Amendment to the August 3, 2009 Presidential Permit for Line 67 to Increase Operational Capacity of Pipeline Facilities <http://www.state.gov/e/enr/applicant/applicants/202433.htm>; 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 10 Michigan Counties (Jan. 31, 2013) [http://www.michigan.gov/mpsc/0,4639,7-159-16400\\_17280-294097--,00.html](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](http://www.michigan.gov/mpsc/0,4639,7-159-16400_17280-313062--,00.html)

<sup>22</sup> FLOW Sept. Report, text, I.i.(i), Appendix 2A, 1-6; Appendix 2B, 2-3,

<sup>23</sup> In re Enbridge Energy, Limited Partnership Application Case No. U-17020, Pre-Filed Direct Testimony of Mark Sitek And Exhibits, p 25.

<https://efile.mpsc.state.mi.us/efile/docs/17020/0010.pdf>.

<sup>24</sup> *See* Sierra Club. *Enbridge Over Troubled Water: The Enbridge GXL System’s Threat to the Great Lakes*. February 2016.

<https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/Enbridge%20Over%20Troubled%20Water%20Report.pdf>

<sup>25</sup> A more detailed technical and engineering analysis on this issue will be provided in subsequent or additional comments.

Section A (10) of the easement provides that: “The maximum span or length of pipe unsupported shall not exceed 75 feet.” This specific engineering requirement was critical to ensuring that these heavy steel twin 20-inch underwater pipelines would be adequately supported both to withstand the currents of the Straits and to prevent collapse from gravitational force.

Dating back to at least 1963, however, sections of Line 5 under the Straits have not had the required support structures demanded by the express terms of the easement, according to Enbridge’s 2014 submission to the State of Michigan.<sup>26</sup>

Table 2 ROV Inspection and Span Support Installation History of Line 5 Straits of Mackinac

<b>Year of ROV Inspection</b>	<b>Follow up Actions (Anchor Support Installation)</b>	<b>Type of Support Installed</b>
1963	None	
1972	None	
1975	3	Grout Bags
1979	None	
1982	None	
1987	7	Grout Bags
1989	None	
1990	None	
1992	6	Grout Bags
1997	None	
2001	8	Grout Bags and mechanical support
2003	16	Mechanical Screw Anchors
2004	16	Mechanical Screw Anchors
2005	14	Mechanical Screw Anchors
2006	12	Mechanical Screw Anchors
2007	None	
2010	7	Mechanical Screw Anchors
2012	17	Mechanical Screw Anchors

<sup>26</sup> Enclosure to June 27, 2014 Letter To Hon. Schuette & Hon. Wyant Responses to Questions and Requests for Information Regarding the Straits Pipelines, Table 2 ROV inspection and span support installation history of Line 5 Straits of Mackinac p. 9  
[http://mediad.publicbroadcasting.net/p/michigan/files/201410/Attachment\\_to\\_Response\\_Letter\\_State\\_of\\_Michigan\\_Final.pdf](http://mediad.publicbroadcasting.net/p/michigan/files/201410/Attachment_to_Response_Letter_State_of_Michigan_Final.pdf)

While the full history of Line 5's support structures is not entirely known, it is clear from publically available information that Enbridge has struggled to address this chronic engineering issue for decades due to the powerful and unpredictable nature of the currents in the Straits of Mackinac. As a result, Enbridge has been out of compliance with the easement's 75-foot maximum unsupported span requirement repeatedly<sup>27</sup> and placed the public trust waters and bottomlands at high risk, yet has only recently admitted to violating this easement provision in 2014 and again in 2016 following their bi-annual underwater inspections.

Since 2001, as Enbridge's Table 2 reveals, the company has attempted to correct these violations by adding mechanical screw anchors to the bottomlands of the lake bed. In 2001 Enbridge, in what it characterized as an "emergency," applied for a joint MDEQ and Corps permit under the GLSLA and Rivers and Harbors Act ("RHA")/Clean Water Act ("CWA") "to provide support underneath our pipelines in sections where the pipeline shows spans unsupported over too great a distance."<sup>28</sup> Ever since then Enbridge has repeatedly continued to apply for "maintenance" permits under the GLSLA to install more screw anchor structures on the bottomlands of the Straits,<sup>29</sup> but has not completed the process as evidenced by the pending permit application before the MDEQ and the Corps.

Enbridge's most significant attempts to stabilize this underwater pipeline infrastructure took place in 2014 when the state and public became aware of Enbridge's Line 5 crude oil pipeline located in the Straits and Great Lakes. Governor Snyder formed the Michigan Petroleum Pipeline Task Force in 2014. Although the Task Force did not issue its report until the summer of 2015, the MDEQ issued Enbridge a GLSLA permit in July 2014 for an additional 40 screw anchor supports for the pipelines in the Straits; the stated purpose for these added improvements occupying public trust bottomlands was again "maintenance." By claiming this narrowly defined purpose, Enbridge avoided comprehensive review of impacts and alternatives associated with its concurrent 80 percent increase of crude oil transport in Line 5 and 10 percent increase in pressure. Although the MDEQ could have approved temporary or conditional emergency permits and demanded a comprehensive review of potential or likely impacts and alternatives to the expansion of Line 5,<sup>30</sup> the department did not do so.

Following the completion of these additional 40 anchors in 2014, Enbridge represented to the State of Michigan that its "predictive maintenance model . . . has confirmed that pipeline spans will not exceed 75 feet."<sup>31</sup>

On July 20, 2016, the U.S. Environmental Protection Agency ("USEPA") and the Department of Justice ("DOJ") filed a proposed Consent Decree to settle Enbridge's case

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<sup>27</sup> See Appendix B.

<sup>28</sup> Oil & Water Don't Mix Campaign letter to Governor Snyder, Attorney General Bill Schuette et al. (July 1, 2014) <http://flowforwater.org/wp-content/uploads/2014/06/2014-07-01-FINAL-Line-5-Governor-Ltr-Sign-On.pdf> (pp. 3-4, Exhibit 4).

<sup>29</sup> *Id.* p. 4, Exhibit 5.

<sup>30</sup> MCL 324.32514(2).

<sup>31</sup> Letter from Enbridge to State of Michigan dated November 19, 2014. [http://www.michigan.gov/documents/deq/Appendix\\_B.4\\_493991\\_7.pdf](http://www.michigan.gov/documents/deq/Appendix_B.4_493991_7.pdf)



for civil penalties and other relief for CWA violations arising out of the rupture of its Line 6B in 2010. As part of the decree, measures were added to Enbridge's entire Lakehead System, including 19 more anchor supports in the Straits for Line 5. However, the Consent Decree has been noticed for public comment as required by law and has not been approved by the federal district court; moreover, until approved, USEPA can withdraw from any or all of the decree.<sup>32</sup> Significantly, the decree states that it does not affect the requirement for Enbridge to comply with all state and other federal laws and regulations.<sup>33</sup>

On July 26, 2016, Enbridge filed a joint permit application to the MDEQ and the Corps to install up to 19 additional screw anchor supports; the application stated: "Four of the nineteen anchor locations are required per the...Easement, the remaining fifteen anchor locations are being installed for *preventative maintenance*."<sup>34</sup> Enbridge concludes that the impact of each anchor support will be "minimal" or none,<sup>35</sup> and that doing nothing "presents a future risk to the pipeline and is not a viable option."<sup>36</sup> For the reasons described below, this is not factually or legally accurate.

On August 3, 2016, Michigan's Attorney General, MDEQ Director, and MDNR Director then sent a demand letter to Enbridge to cure violation of the 1953 Easement for failure to provide, at a minimum, supports every 75-feet along the pipelines. In addition, the state demanded that Enbridge explain within 14 days how and why the predictive maintenance model had failed. It is unlikely that Enbridge can actually provide a reliable model that can predict "washouts" along the pipeline. As recently as 2010, Enbridge admitted to MDEQ: "we do not have the future structure locations determined at this point," "nor the scope of the projects to come..."<sup>37</sup>

A review of Enbridge's permitting history demonstrates that the company was fully aware of its planned major expansion of crude oil pipeline transport in Michigan, and that Enbridge has circumvented full review under the GLSLA and public trust by characterizing these new support structures and its expanded use of Line 5 as mere "maintenance." In reviewing Enbridge's permit applications (past and present) for these new structures and expanded use, the MDEQ must require Enbridge to complete a GLSLA application for Line 5, with public notice, hearings, full and careful review, and due findings and determinations regarding impacts and alternatives in compliance with the statute and public trust law. Moreover, the applicant has not submitted the required approvals or consent from both local units of governments and adjacent landowners as required by MCL 325.32504(2). If Enbridge does not satisfy these requirements, the application is not

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<sup>32</sup> USEPA v Enbridge Energy LP, Civil Action No. 1:16-cv-914, Proposed Consent Decree, (July 20, 2016), pp 191-193, 207.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; Attorney General et al. letter, Aug 3, 2016.

<sup>35</sup> Sec. 4, Project Description, Enbridge Application, p. 1.

<sup>36</sup> *Id.*

<sup>37</sup> See Oil & Water Don't Mix Campaign letter to Governor Snyder, Attorney General Bill Schuette et al. (July 1, 2014) <http://flowforwater.org/wp-content/uploads/2014/06/2014-07-01-FINAL-Line-5-Governor-Ltr-Sign-On.pdf> fn 6 (Email from Enbridge Jacob Jorgenson to Scott Rasmussen (DEQ) and Gina Nathan (ACE), Nov. 18, 2010).

administratively complete for proper review and decision, and accordingly, MDEQ cannot authorize or approve the application.

## V. PROPER LEGAL SCOPE AND PURPOSE DEMAND FULL REVIEW OF IMPACTS AND ALTERNATIVES FOR ENBRIDGE APPLICATION

Enbridge's application and supporting documents avoid the proper scope and review required by law. A hard look at the true purpose of Enbridge's actions and intent to massively expand capacity throughout its existing Great Lakes pipeline system is warranted.

Beyond the 1953 Easement and the self-serving "maintenance" strategy of Enbridge, there is an overarching legal duty of the MDEQ and state officials to protect the Great Lakes, including the public trust and environment. This duty arises out of the GLSLA, the MEPA, and common law of public trust, and requires a comprehensive review of the overall purpose and expansion of Enbridge in Michigan, and specifically the Straits and waters and bottomlands of the Great Lakes. As noted above, the public trust and duties under the MEPA are continuing and perpetual. The 1953 Easement is by its terms subject to public trust and state laws like the GLSLA and the MEPA, as well as federal laws and regulations, like the CWA, RHA, and the National Environmental Policy Act ("NEPA") (with the environmental impact and alternative process).<sup>38</sup> In each GLSLA application for a permit, lease, deed, or agreement, the MDEQ shall not grant approval unless it has "determined *both* of the following:

- (a) That the adverse effects to the environment, public trust, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible;
- (b) That there *is no feasible and prudent alternative* to the applicant's proposed activity consistent with the reasonable requirements of the public health, safety and welfare."<sup>39</sup>

In other words, the standards for purpose, public necessity, and public trust in the GLSLA and under public trust law demand a comprehensive review of environmental impact, public trust resources impact, and use impact, and alternatives or options assessments and determinations.<sup>40</sup> Thus, the state cannot allow the status quo in the use of Line 5 on public trust bottomlands or overlying waters *unless* Enbridge can demonstrate – as required by the easement, the GLSLA, public trust state laws, and federal laws – that these 4.09 mile submerged pipelines will not likely harm public trust waters, the ecosystem, fishing, commerce, navigation, recreation, drinking water and other uses that depend on these waters.

In addition, MEPA requires a consideration of such effects and whether there exist "feasible and prudent alternatives."<sup>41</sup> Moreover, MEPA requires compliance by an agency

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<sup>38</sup> 42 U.S.C. 4332(2)(C).

<sup>39</sup> R 322.1015 (emphasis added).

<sup>40</sup> *Obrecht*, 361 Mich at 412

<sup>41</sup> MEPA, Section 1705; *Vanderkloot*, 392 Mich at 159; *Buggs* 2015 WL at 15975; *Genesco v MDEQ*, 250 Mich App 45 (2002).

with the affirmative duty to prevent and minimize impairment or pollution,<sup>42</sup> and an independent duty to consider likely environmental impacts and alternatives to the fundamental purpose for which the project is being implemented.

The Task Force report recommends two separate, independent, and “comprehensive” analyses on Line 5’s risks and alternatives.<sup>43</sup> The law of impact and alternative statements and assessments demands comprehensive and full studies, including a proper scope and purpose that addresses all potential impacts and all alternatives such as other pipeline routes and adjustments within the overall pipeline system in question.<sup>44</sup>

The Advisory Board is providing oversight of these studies, which are being done by contract with the state through the Attorney General’s Office (risk study) and the MDEQ (alternatives study). This current state-led process slated for completion in late 2017/early 2018 is neither under rule of law nor complies with the GLSLA, public trust, MEPA, or NEPA impact and alternative assessment requirements. These studies, therefore, should be coordinated with the MDEQ’s permit application assessments as required under rule of law.

By the express terms of the easement and privilege to use public trust bottomlands and waters of Michigan, Enbridge’s easement interest is subordinate<sup>45</sup> to and must comply with the legal agreement along with all federal and state laws. In addition, Enbridge is subject to state laws authorizing the company to locate and operate crude oil pipelines in Michigan. Accordingly, it is up to the state to fully apply the laws within the scope and purpose that addresses the full risks and alternatives concerning transport of crude oil in Michigan.

The time has come for the MDEQ and State of Michigan to consider and determine the purpose and scope of impact and alternative review, assessments and decisions. Under the GLSLA, MEPA, CWA, RHA, the MDEQ, MDNR, and state, and the Corps are required to and should do so. Anything short of this reasonable prudent approach breaches the public trust, the GLSLA, MEPA, CWA, and NEPA.

## VI. CONCLUSION

Based on the above, we object to Enbridge’s current application. It does not state the basic or fundamental purpose or activity regarding the expansion of Line 5, does not contain an adequate study and assessment of potential adverse effects of Line 5 and the Straits section, does not address alternative pipeline routes, adjustments to capacity or the system, and violates the express requirements of the GLSLA, MEPA, public trust, and CWA and RHA.

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<sup>42</sup> *Id.*; *Ray*, 393 Mich at 294.

<sup>43</sup> Task Force Report, p 47.

<sup>44</sup> See FLOW Alternatives Legal Framework report to Michigan Pipeline Advisory Board, Dec. 2016, at pp. 10-12, supra fn 1; see also NEPA, 40 CFR 1502.1, calling for “full” discussion of alternatives; 40 CFR 1502.14 for “rigorous” exploration of alternatives.

<sup>45</sup> *State v St. Clair Fishing Club*, 127 Mich 580 (1901); *State v Venice of America Land Co.*, 125 NW 770 (1910); *Illinois Central R.R.* 146 US at 436-37; *Obrecht* 361 Mich at 412.

The MDEQ, state, and the Corps are requested to exercise their legal authority to review the overall Enbridge project purpose, not the “toe of the tiger.” Such review demands both the state and federal agencies to conduct a full and comprehensive environmental impact statement and alternatives assessment under Michigan and federal law as described above.

In addition, the MDEQ and the Corps are requested to set the application for public hearing as provided in Section 32514 of the GLSLA and R 322.1017 (Rule 17), along with proper notice and additional time for public comment.

Finally, this case presents a high risk of substantial likely impairment and safety concerns about the integrity of Enbridge’s twin underwater pipelines, as well as the mandatory state legal duties to protect health, safety, and welfare; these dual goals are not inconsistent and therefore warrant interim or temporary conditional measures to be ordered, including shutting down temporarily the transport of oil in Line 5. In fact, it would be prudent to do so given the established high and unacceptable risk of harm to the Great Lakes and economy endangered by Line 5, and available alternatives, including the doubled capacity to 800,000 bbls/day in the new Line 6B. In the alternative, the statute authorizes the agency to issue conditional emergency permits to protect the public health, safety, welfare and the environment. Accordingly, the MDEQ could conditionally approve – without prejudice to the State’s comprehensive review and final decision – the four anchor supports in violation by the easement as identified by the Attorney General et al. in the August 3, 2016 letter.<sup>46</sup> Such conditional permit can state that it does not affect or foreclose any decision on the record of the application within the authority granted by statute, regulation, or common law.

Once again, we appreciate the effort moving forward to comply with these laws and the public trust duties and principles that apply. Should you want to discuss further or have any questions, we are willing to meet with you at your earliest convenience.

Thank you.

Sincerely yours,



James M. Olson  
President



Elizabeth R. Kirkwood  
Executive Director

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<sup>46</sup> The GLSLA expressly authorizes “conditional permits” or actions in “emergency” “to protect public property or public health, safety or welfare.” MCL 324.32514(2). There is ample authority for MDEQ to take any action on a temporary emergency basis to protect health and safety to suspend transport of crude oil in light of the risks and dangers and lack of full understanding of the currents and other physical circumstances giving rise to such pipeline risk of failure.

CC: Charles Simon, Chief, Regulatory Office, Corps Detroit District  
Kerrie Kuhn, Chief, Permits, Corps Detroit District  
Michigan Governor Rick Snyder  
Michigan Attorney General Bill Schuette  
MDNR Director Keith Creagh  
U.S. Senator and Hon. Gary Peters  
U.S. Senator and Hon. Debbie Stabenow