



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

December 3, 2018

Mr. Scott Rasmusson
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Water Resources Division
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Ms. Heidi Grether, Director
Michigan Department of Environmental Quality
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Mr. Charles Simon, Chief, Regulatory Office, Corps Detroit District
U.S. Army Corps of Engineers
477 Michigan Avenue, Room 603
Detroit, MI 48226-2550

Ms. Kerrie Kuhne, Chief, Permits, Corps Detroit District
U.S. Army Corps of Engineers
477 Michigan Avenue, Room 603
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VIA ELECTRONIC SUBMISSION

RE: PUBLIC COMMENTS ON ENBRIDGE ENERGY'S JOINT APPLICATION TO DRILL 24 GEOTECHNICAL BORINGS IN THE GREAT LAKES BOTTOMLANDS FOR AN EXPLORATORY TUNNEL INTENDED FOR ENBRIDGE TO TRANSPORT CRUDE OIL IN NEW LINE 5 PIPELINES UNDER THE GREAT LAKES[NO. HNH-V8PE-85G36]

Applicable Laws Include: Great Lakes Submerged Lands Act, MCL 324.32501 et seq.; Wetlands Protection, Part 303 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA)' 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 Mr. Rasmusson, Director Grether, Mr. Simon, and Ms. Kuhne:

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. For the past five years, FLOW has dedicated significant legal, technical, scientific expertise evaluating Enbridge's Line 5 pipelines and educating state leaders about the legal requirements and their role as public trustees to protect the communities and citizens who are the legal beneficiaries of the irrevocable public trust doctrine in the Great Lakes. FLOW has submitted numerous independent reports and public comments regarding Line 5 and the applicability of the public trust doctrine and Great Lakes Submerged Lands Act, Part 325, NREPA, to the Straits of Mackinac and waters of Lake Huron and Lake Michigan.

Enbridge has submitted the above-referenced application for a permit to bore into the soils under the Straits just outside the boundaries of the 1953 Easement for the existing dual pipelines for Line 5. For the reasons stated below, we urge the Michigan Department of Environmental Quality ("MDEQ") and the U.S. Army Corps of Engineers (the "Corps") to deny Enbridge's Joint Application under the Great Lakes Submerged Lands Act ("GLSLA") and other governing environmental state, federal, and applicable treaties:

- (1) Enbridge's application for geotechnical borings is premature given that this corporation has not secured legal authorization of agreements, including the November 2017 and October 2018 proposed "tunnel agreements" between the State of Michigan and Enbridge, to occupy and build a tunnel in public trust soils under the GLSLA and other relevant state and federal statutes; the geotechnical borings are incidental to obtaining information for application to construct a tunnel; and may be ancillary to an application for a tunnel in the Straits, should Enbridge decide to apply for proper authorization and agreements for a tunnel under the GLSLA. Until Enbridge does so, this application is premature;¹
- (2) Enbridge has not submitted proper evidence of riparian title ownership to apply for the land necessary for the application for the authorization and agreements for a tunnel or the geotechnical borings in the soils subject to the GLSLA;²
- (3) Based on the public record, the Enbridge's Line 5 oil pipelines are and continue to be in violation of the 1953 Public Trust Easement requirements with the State of Michigan; and
- (4) Enbridge and the MDEQ face current litigation before the Administrative Law Tribunal over the MDEQ's permits for these anchor supports as "repairs," now totaling approximately 200, and shoring up nearly 3 miles of the 8.5 miles of the existing dual lines in the Straits; in point of legal fact, these screw anchor supports are not "repairs" or "maintenance." There is no such category in the GLSLA; the 200 screw anchors constitute a total change in design, not authorized by the existing 1953 Easement; and they have not be authorized by agreement for occupancy, use, or other conveyance under the GLSLA.

There is simply no urgency to secure a geotechnical boring permit when Enbridge will not even be able to conduct such offshore Great Lakes activity until at least June of 2019 during ice-free conditions. Moreover, the citizens of Michigan demand transparency and a full determination from the State of Michigan that public trust soils and bottomlands can be conveyed or occupied for Enbridge's private use to transport oil in a tunnel pursuant to the strict public trust standards under the GLSLA and common law.

¹ It is of course the position of FLOW and many other organizations that a tunnel cannot be authorized by any agreement unless and until an application for agreements to occupy and use the soils beneath the Straits of Mackinac under the GLSLA. In this regard, this has not been done to date, and if applied for, there must be factual determinations by the MDEQ that there (1) there is no likely impairment to the public trust; that it is a (2) proper public trust, not private or special purpose; and (3) that there are no non-Straits and Great Lakes locations, routes or capacity, reasonably adjusted, to accomplish Enbridge's overall private endeavor and purpose.

² Section 32514, GLSLA, MCL 324.32514.

Enbridge’s application to secure geotechnical boring permission is premature; instead, Enbridge must first secure legal authorization under the GLSLA to build a Great Lakes tunnel coupled with the ancillary geotechnical boring permits.

Enbridge’s geotechnical boring permit application assumes that the State of Michigan – trustee of the Great Lakes waters and bottomlands – has made a legal determination under the GLSLA that a conveyance or agreement to construct a tunnel in the public trust soils and waters of the Great Lakes for the benefit of a private corporation serves a “public purpose,” will not impair or interfere with fishing and other public trust uses and rights of citizens and communities, and is the most feasible and prudent alternative to transporting Canadian oil back to Canada. No such authorization under the GLSLA has yet been applied for or occurred. Rather, the Governor-Enbridge Second Agreement dated October 3, 2018, which included MDEQ and MDNR, unlawfully called for the transfer of state public trust bottomlands, in violation of and without authorization under the GLSLA.

Enbridge’s proposed geotechnical boring activities under Section 32515 and Rule 1015 are arguably premature, and should not be considered except as incidental to and on application for authorization for an agreement or transfer of land for location and occupancy for the tunnel in the soils beneath the lakebed of the Great Lakes. The permit for offshore and onshore geotechnical borings should naturally be filed with and accompany the necessary agreement or conveyance for location, occupancy, and use required by Sections 32502, 32503, MCL 324.32502, 324.32503. As currently conceived, Enbridge’s geotechnical boring permit application is a classic case of putting the horse before the cart.

Enbridge will argue that these geotechnical boring studies are necessary to determine the feasibility of a tunnel. The reality is that Enbridge is pushing for final decision-making on both the administrative and legislative fronts to seal this private deal before the next incoming Michigan Governor’s administration. The State of Michigan and Enbridge are on notice, as they have been for some time, that despite assurances from the Governor, the MDNR Director, the MDEQ Director or others verbally or by written “tunnel agreements,” that they must but have not complied with the GLSLA and other federal and state laws pertaining to the navigable public trust waters of Michigan. Other measures are likewise subject to notice and premature without compliance with the public trust doctrine and the GLSLA. No taxpayer dollars should be subsidizing this proposed private pipeline tunnel lease agreement between the State of Michigan and Enbridge for the next 99 years. And yet, a supplemental appropriations bill currently earmarks \$4.5 million in public funding to “support infrastructure and environmental threat mitigation projects at the Straits of Mackinac.” According to the bill, “[t]hese projects are to be completed by contracted entities, as well as state agencies through memorandum of understanding agreements. Project activities include radar current mapping, as well as planning, oversight, and legal services related to the proposed Mackinac Straits utility tunnel project.”

Enbridge is fully responsible for the costs of doing business, including infrastructure and safety upgrades, and its internal decisions on whether to file an application for the land and other agreements to locate, occupy, and use the bottomlands and soils beneath them under the public trust doctrine and GLSLA.

In sum, this joint application should be denied because the State of Michigan has not authorized a proposed tunnel under the GLSLA, and because this current geotechnical boring study regarding whether to undertake the tunnel project is incidental to, not primary to, the required application for authorization of conveyance or agreement for location, occupancy, and use.

Enbridge is not currently in compliance with the 1953 Public Trust Easement with the State of Michigan and fails to acknowledge current litigation involving its pending DEQ anchor permits for an additional 22, plus 48, plus 3 screw anchors.

Enbridge's permit application falsely states that it is in compliance with all environmental laws and denies any current litigation involving the state-owned bottomlands and waters of the Great Lakes. Under the Compliance section on page 2, Enbridge states it is currently in compliance with "any unresolved violations of environmental law or litigation involving the property." However, Enbridge is in violation of the 1953 easement with the State of Michigan as it relates to the maximum 75-foot span requirements, the pipeline coating requirements, the insurance requirements, the reasonably prudent person requirements, the emergency response requirements, etc. These ongoing violations are documented in FLOW's submissions to the MDEQ and the State of Michigan in 2014, 2015, 2016, 2017, and 2018.

To address this failing pipeline infrastructure, Enbridge developed a new engineering design in 2001 with screw anchors that brace the Line 5 pipelines to the lakebed floor. In 2017, Enbridge applied for an additional 22 screw anchors, which the MDEQ granted under permit number WRP008225 v.1. On or about May 21, 2018, the Straits of Mackinac Alliance and Grand Traverse Band of Ottawa & Chippewa Indians separately filed contested cases in the Michigan Administrative Hearing System on this March 2018 permit issued to Enbridge Pipelines (Lakehead) LLC. These two cases are consolidated and are pending in the Michigan Administrative Hearing System before Administrative Law Judge Daniel L. Pulter. (Docket No. 18-010802 – In the matter of the Petitions of the Straits of Mackinac Alliance & Grand Traverse Band of Ottawa & Chippewa Indians). Therefore and contrary to Enbridge's joint permit application, there are actually two pending legal cases involving the adjacent easement property where Enbridge seeks permission to drill 14-24 offshore bores.

In addition, Enbridge claims in its joint permit application that it plans to begin the offshore bore drilling in Winter 2019. In the written portion of its permit application, however, Enbridge contradicts itself and acknowledges that "[a]ll off-shore borings are proposed during ice-free conditions, typically May through October." Therefore, the earliest time Enbridge could commence this lakebed drilling work would be the Spring of 2019, not the Winter of 2019 as it inaccurately claims. Enbridge's application later states that it plans to complete "off-shore borings between June 1 and August 31, 2019 to help avoid potential adverse effects to migratory birds." (p.15) Moreover from a logistics standpoint, Enbridge proposes to use dynamically positioned drill ships ("DPDS") for the 14-24 off-shore bore drillings and currently there are no DPDS on the Great Lakes and "one would have to be sourced via the Atlantic Ocean and St. Lawrence Seaway."

Conclusion

Accordingly, we request the MDEQ and the Corps to deny this joint application until Enbridge has submitted a full and completed application required by the GLSLA and its applicable rules.

Thank you to you and your staff for your serious consideration of this letter and public comments. If you have any questions or would like to discuss the above, please contact us. We are willing to provide additional information by phone, email, or personal meeting.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "James M. Olson".

James M. Olson
President

A handwritten signature in blue ink, appearing to read "Elizabeth R. Kirkwood".

Elizabeth R. Kirkwood
Executive Director

cc: 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