



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

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**Public Comment to  
Michigan Pipeline Safety Advisory Board  
from FLOW's Executive Director, Elizabeth R. Kirkwood  
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Sometimes events flow together in a great confluence, the way the waters of Lakes Michigan and Huron do. We are at that moment today with respect to the public ownership of the lakes and the troubling safety issues associated with Enbridge's Line 5 pipeline in the Straits of Mackinac. Will the State of Michigan rise to the majesty of the Lakes? That's what the people of the state want you to do – put the Great Lakes first. Be Great Stewards.

The confluence, of course, is the imminent release of the two studies this board has commissioned; the application submitted by Enbridge under the Submerged Lands Act to install anchor supports; and the recently-publicized Kiefner report demonstrating that Enbridge has been in chronic noncompliance with the terms of its easement to use publicly owned lakebed for the Straits of Mackinac crossing.

The framework for viewing these developments is the public trust doctrine. Under the doctrine, the State of Michigan holds title to navigable waters in trust for the use and benefit of the public and future generations. This means that where private interests such as easements conflict with public interests in those waters, the public interests trump the private ones *as a matter of law*. Under the seminal case, *Illinois Central Railroad*, a state cannot abdicate its trust responsibilities over property in which the public has an interest any more than it can abdicate its police power.

In addition, the state must not only take action to prevent endangerment of the trust but it must also take affirmative steps to protect the trust, particularly when new evidence suggests a substantial likelihood of pollution, impairment or destruction. That is exactly the case here today. And it is where the State's opportunity comes to be a great steward.

Based on the confluence of studies and disclosures, we now know these things.

1. Enbridge's latest evidence – the Kiefner report and 2016 Underwater Span Spreadsheet – confirms its chronic pattern of repeated span easement violations for decades, and raises fundamental questions about the structural integrity of Line 5. Most alarming was news of 16 sections of the submerged pipelines that were unsupported for distances of more than 140 feet (140 feet is significant because that is the maximum distance allowed by the pipeline's design specifications before it is expected to deform). Incredibly, this included a gap of 286 feet—nearly four times the 75 feet required in Enbridge's binding agreement with the State of Michigan. While Enbridge has installed approximately 128 anchors since 2002, Enbridge estimates in its April letter that only 14 % of the whole crossing length is supported by anchors. With no reliable model to predict lakebed washouts due to the highly dynamic nature of the currents, Enbridge cannot prudently operate this pipeline.

Is this Great Stewardship? Clearly it is not.

2. Following Enbridge's March presentation on the 19 missing pipeline coating areas, Enbridge then identified an additional 43 potential areas along the submerged pipes where the anti-corrosion coating is missing. Enbridge, however, has no plans to repair the pipeline's underwater coating. Why is evidence very significant? Because delamination and missing coatings were contributing factors in the notorious Enbridge pipeline failures of Line 6A and 6B, according to the NTSB's Pipeline Accident Reports.

Is this Great Stewardship? Clearly it is not.

3. By discounting and withholding critical information essential to evaluating the risks of continued operation, Enbridge violates the Easement's requirement to take all "reasonable and prudent" measures to protect public and private property, and human health and safety. In sum, this 64-year-old underwater oil pipeline has a compromised coating, is likely to have fatigued metal from insufficient supports and powerful underwater currents, and cannot be inspected externally by remote operator vehicle (ROV) due to thick, encrusted invasive and acidic mussel growth and portions lying on the bottom.

Is this Great Stewardship? Clearly it is not.

It is now up to the State to demonstrate Great Stewardship, separate and independent of the Advisory Board reports. It can do so by exercising its legal fiduciary obligations. In doing so, it must at long last recognize that Enbridge is a corporate scofflaw. We hear reassuring words from the company, but we see

alarming acts. The public trust doctrine is built on acts. After 64 years there is no reason to think Enbridge's acts will change and comply with what the law requires.

Attorney General Bill Schuette has the power to protect our Great Lakes by shutting this dangerous pipeline down. This board can inform his decision by rendering clear and compelling advice that Enbridge has failed to meet its legal obligations.

This meeting marks an historic confluence of responsibility and opportunity.

Responsibility – to exercise public trust obligations on behalf of the people.

Opportunity – to demonstrate Great Stewardship, and send the message now and for all time that the state will guard the Great Lakes with unwavering commitment.

Thank you.

Liz Kirkwood, Executive Director