



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

May 24, 2018

Governor Rick Snyder State of Michigan P.O. Box 30013 Lansing, MI 48909	Attorney General Bill Schuette G. Mennen Williams Building, 7th Floor 525 West Ottawa Street P.O. Box 30212 Lansing, Michigan 48909
Director Heidi Grether Michigan Department of Environmental Quality P.O. Box 30458 Lansing, Michigan 48909-7958	Director Keith Creagh Michigan Department of Natural Resources Executive Division P.O. Box 30028 Lansing, Michigan 48909

VIA ELECTRONIC SUBMISSION

RE: STATE OF MICHIGAN’S LEGAL AUTHORITY TO AFFIRMATIVELY PROTECT THE PUBLIC TRUST WATERS OF THE GREAT LAKES AND THEIR TRIBUTARIES

Dear Governor Snyder, Director Grether, Director Creagh, and Attorney General Schuette:

In recent news releases and reports, your administration and state officials have questioned whether the State of Michigan has jurisdiction or control to do anything about the imminent threat to the citizens of Michigan from Enbridge’s dual Line 5 pipelines located on the bottomlands of the Straits of Mackinac in the heart of the Great Lakes.

These statements overlook and misrepresent law and legal circumstances. Moreover, they are a disservice to and breach of your duties as trustees under the public trust doctrine to the Straits and Great Lakes. The legal fact is the State of Michigan has substantial jurisdiction and control over Enbridge Line 5 based on (1) the 1953 Easement, (2) the exercise of the state’s property power, (3) the common law public trust doctrine, (4) the Great Lakes Submerged Lands Act,¹ and (4) the police power regarding conservation and protection of Michigan’ air, water, and natural resources or public trust in those resources.²

In the 1953 Easement authorizing the pipelines, Enbridge (then the Lakehead Pipe Line Company) and the State of Michigan acknowledged the state’s jurisdiction and property power and police power control over the Straits of Mackinac, because of the Great Lakes. It is undisputed that there can be no pipelines in the Straits or elsewhere in or under the Great Lakes or its connecting waters without a lease, occupancy agreement, or other written consent and a

¹ MCL 324.32501 et seq. (“GLSLA”).

² Mich Const., Art. 4, Sec. 52; MCL 324.1701 et seq. (Michigan Environmental Protection Act (“MEPA”).)

permit under the GLSLA from the State of Michigan. When Michigan joined the United States in 1837, Michigan took title absolutely in the bottomlands and waters of the Great Lakes below the ordinary high-water mark. *Illinois Central Railroad v Illinois*, 146 US 397 (1892); *Obrecht v National Gypsum Co*, 361 Mich 399 (1960); *Glass v Goeckel*, 703 NW 2d 58 (2005). This title is subject to a public trust, imposed on state as trustees to protect these waters, bottomlands, and protected uses from impairment or alienation. Moreover, in the words of the U.S. Supreme Court in *Illinois Central Railroad*, this public trust is “irrepealable.” This means that no one or no government can remove or nullify this trust in any manner.

Yet state officials have repeatedly stated or represented that the state has no jurisdiction on Line 5 in the Straits or have questioned jurisdiction, when in fact relevant state agencies and bodies in your administration and before have acknowledged the state does have jurisdiction. Even Enbridge has conceded the state’s jurisdiction and control of siting approvals by the Michigan Public Service Commission (“MPSC”) the easement, and the Michigan Department of Environmental Quality (“MDEQ”) under the GLSLA.³

Most recently, at the May 14 meeting of the Michigan Pipeline Safety Advisory Board, MDEQ Director Heidi Grether said to the media regarding the Line 5 pipelines in the Straits, “People keep saying shut them down, shut them down; part of the question is, under what authority?”⁴ Director Grether’s comments, unfortunately, echo the remarks she made to the media during her first month in office, on August 12, 2016, as reported by MLive: “In regards to shutting the line down, Grether said ‘there is a process that’s in place and we don’t really have the control over that.’ The federal agency with that power is the Pipeline Hazardous Materials Safety Administration (“PHMSA”). In regards to those calling for Line 5 to be shut down, Grether said ‘their opinion is that it is an environmental hazard and we should not put the Great Lakes at risk. That is their opinion, but there is a not a process for us to do that.’ She said those folks should be making a case with federal regulators.”⁵

Yet the MDEQ, since at least 2001, has asserted the state jurisdiction over the bottomlands and waters of the Great Lakes to require permits under the Great Lakes Submerged Lands Act, MCL 324.32501 et seq., for Enbridge’s substantial modification of the Straits pipeline design by repeated requests to install anchor supports and brackets to suspend the lines in the water above the bottomlands.

Governor Snyder in 2014 similarly stated the state could do nothing, because the federal government had exclusive jurisdiction over the *safety standards* for the pipelines. Later, after Governor Snyder appointed a task force to study the matter, the Task Force, headed by the MDEQ and Attorney General Schuette, concluded that the State of Michigan had jurisdiction under the 1953 Easement because of the State’s ownership of the bottomlands and waters, the Great Lakes Submerged Lands Act, and the Michigan Public Service Commission’s jurisdiction

³ Enbridge has applied for permits under the GLSLA for 198 anchor supports to implement a new or materially changed pipeline design for Line 5 in the Straits.

⁴ Beth LeBlanc, “Coast Guard: Good fortune that Straits spill was minor,” Detroit News, May 14, 2018, <https://www.detroitnews.com/story/news/politics/michigan/2018/05/14/coast-guard-good-fortune-straits-spill-only-minor/608335002/>

⁵ Garrett Ellison, “New DEQ director says calls to shut down Enbridge Line 5 are premature,” MLive, August 23, 2016, http://www.mlive.com/news/index.ssf/2016/08/shut_down_line_5_calls_are_pre.html

over location and changes or construction of crude oil pipeline. In point of legal fact, the siting and construction of crude oil pipelines, as distinct from *safety measures* and *natural gas* pipelines, are *not* regulated by the federal government.

Governor Snyder, in the fall of 2017, unilaterally entered into his own agreement with Enbridge that calls for a resolution of the pipeline threats in the Straits, and specifically requires Enbridge, who signed the agreement, to submit to the jurisdiction of the State of Michigan under the Great Lakes Submerged Lands Act, MPSC, and other laws and regulations. These laws require exercise of state jurisdiction, control and power to fully evaluate, suspend the flow of oil pending such evaluation, and require Enbridge to conduct studies and prove no other alternative to the Straits and Line 5 exists. So far, the state has not demanded these legal requirements.

Let us be clear: The Michigan attorney general have legal authority under the public trust doctrine to seek voidance of the easement for Line 5. There is precedent for such action. *In Frank J. Kelley, Attorney General for the State of Michigan, ex rel, Michigan Natural Resources Commission, Michigan Department of Natural Resources, and the Director of the Michigan Department of Natural Resources v. Consumers Power Company and The Detroit Edison, Supreme Ct. No. 98019*, the attorney general sought a declaratory judgment that a lease for state bottomlands authorized under the Great Lakes Submerged Lands Act should be determined void because activities conducted under the lease were inimical to the state's public trust resources.

In the case *Attorney General v. Con Power*, the Michigan Court of Appeals held that "because the fish resources destroyed by the plant are held in trust by the state for the people, the state is empowered to bring a civil action to protect those resources." 202 Mich App 74; 508 NW2nd 901 (1993).

In *Phillips Petroleum v. Mississippi*, the U.S. Supreme Court held that there are no constitutional limits limiting state recognition of preexisting public trust rights.

It is a basic tenet of public trust jurisprudence that when a state conveys tidelands and shorelands to a private company, it conveys only the *jus privatum*, and retains the *jus publicum*, or public authority interest, for itself.

Since 2014, FLOW, Oil and Water Don't Mix, Michigan tribes, and residents and threatened citizens and businesses in the Straits, including Mackinac Island, have documented in numerous research reports and communications to you that Michigan owns and has jurisdiction over the use, occupancy, construction and protection under the easement of the public waters, bottomlands, and public and treaty-protected interests in the Straits, Lake Michigan and Lake Huron.⁶

⁶ See, for example, FLOW & Oil & Water Don't Mix Partners, "Re: Lack of Transparency and Compliance Concerning Terms and Conditions of Enbridge's 1953 Line 5 Pipeline Easement & the State's Perpetual Public Trust Authority To Protect These Great Lakes Waters," July 1, 2014, <http://flowforwater.org/wp-content/uploads/2014/06/2014-07-01-FINAL-Line-5-Governor-Ltr-Sign-On.pdf>; FLOW, "Eliminating The Line 5 Oil Pipelines' Unacceptable Risk To The Great Lakes Through A Comprehensive Alternatives Analysis And Systems Approach," December 24, 2015, <http://flowforwater.org/wp-content/uploads/2015/12/FLOW-Composite-Report-12-14-15-FINAL-1.pdf>; FLOW & Oil & Water Don't Mix, "Recommendation to the State of Michigan to Terminate the 1953 Line 5 Easement with Enbridge," April 13, 2016, <http://flowforwater.org/wp->

The time for full application of Michigan’s interests, jurisdiction, and control is now.

More than 60 communities, 15 tribes and tribal groups, and hundreds of businesses have called for state leaders to shut down Line 5 before Enbridge’s next oil spill pollutes the Great Lakes. Many other pipelines with excess capacity deliver oil to Sarnia and other regional refineries, but these are the only Great Lakes we will ever have.

For these reasons, the undersigned demand that you immediately withdraw and/or correct your statements that Michigan does not have jurisdiction, control, or the power to enforce its easement, protect its public trust interests and title, or enforce its authority under the Great Lakes Submerged Lands Act and the MPSC siting laws and regulations. Moreover, for the reasons documented before all of you over the past four years, and part of your public record and the public record before the Michigan Pipeline Safety Advisory Board, you are again requested to take immediate action to address what is an obvious and grave threat to the waters, bottomlands, public trust, public property, private property, and public health of the citizens of Michigan.

Sincerely yours,



James Olson
President



Elizabeth R. Kirkwood
Executive Director

cc: U.S. Senator and Hon. Gary Peters
U.S. Senator and Hon. Debbie Stabenow

[content/uploads/2016/04/FINAL_OWMD-Sign-On-Letter-to-Gov-AG-DEQ-DNR.pdf](http://flowforwater.org/wp-content/uploads/2016/04/FINAL_OWMD-Sign-On-Letter-to-Gov-AG-DEQ-DNR.pdf); FLOW, “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. 2HBVGKO-35JE],” August 24, 2016, <http://flowforwater.org/wp-content/uploads/2016/08/FLOW-8-24-16-Final-Letter-to-DEQ-USCOE-Joint-App-Enbridge-for-Supports-GLSLA-CWA.pdf>; FLOW, “New Evidence Compels State Of Michigan To Enforce Easement Violations And Eliminate Crude Oil Transport In Line 5 In The Straits Of Mackinac,” March 9, 2017, <http://flowforwater.org/wp-content/uploads/2017/06/Final-Letter-re-corrosion-violations-3-9-17-SIZE-ADJUSTED.pdf>; FLOW, “Public Comments On The Joint Application Of Enbridge Energy To Occupy Great Lakes Bottomlands For Anchoring Support Structures And Improvements For Line 5 Pipelines In The Straits Of Mackinac And Lake Michigan [HNCAR90-WAHM0],” May 11, 2018, <http://flowforwater.org/wp-content/uploads/2018/05/FINAL-FLOW-public-comments-on-Anchor-Permit-05-11-18.pdf>.