



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

September 28, 2018

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**RE: APPROVALS REQUIRED FOR PROPOSED ENBRIDGE LINE 5 TUNNELS IN THE BOTTOMLANDS AND WATERS OF THE ST. CLAIR RIVER AND STRAITS OF MACKINAC, LAKE MICHIGAN**

Dear Director Grether, Director Creagh, Lt. Col. District Commander Sugrue, Chief Simon, Chief Kuhne, and Regulatory Project Manager Otanez:

As Director of the Michigan Department of Environmental Quality (“MDEQ”), Director of Michigan Department of Natural Resources (“MDNR”), Lt. Col. District Commander, and chiefs officers in charge of the U.S. Army Corps of Engineers (“USACE” or “Corps”), Detroit District, you are charged with supervising and making all final decisions on behalf of your respective agencies. The USACE is subject to the dredge and fill and river and harbor navigational protection provisions of the Clean Water Act.<sup>1</sup> The State of Michigan departments are subject to the Michigan Constitution, Art. 4, Sec. 52; its common law proprietary interest and trust in the sovereign navigable waters and bottomlands of the state; and the laws, regulations, duties and standards of the public trust doctrine. These laws and regulations include the

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<sup>1</sup> 33 USC §1344.

Great Lakes Submerged Lands Act (“GLSLA”)<sup>2</sup>, the Inland Lakes and Streams Act (“ILSA”)<sup>3</sup>, the DNR Organic Act of 1917 (“DNR Organic Act”),<sup>4</sup> and the Public Utility Right of Way Act (“Act 10”).<sup>5</sup>

For Love of Water (“FLOW”) submits this letter to address the State of Michigan’s jurisdiction, sovereign control, interests, and duties imposed by the common law and statutes and regulations of Michigan regarding the [November 27, 2017 agreement](#) (“Agreement”) between Governor Snyder (“Governor”) and Enbridge Energy Partners (“Enbridge”) calling for major replacements and upgrades to Line 5 in Michigan and a long-term commitment by the state for the continued transport of crude oil through Line 5, including in, under, or through the public trust waters and bottomlands of the state. The Agreement specifically calls for the replacement of the existing Line 5, constructed in 1953, with a new horizontal directional drilled (“HDD”) 30-inch pipeline under the St. Clair River and under or in the Straits of Mackinac. FLOW will also send a copy of this letter to Governor Snyder and Attorney General Schuette so that they are fully apprised of the important legal issues addressed before implementing the Agreement for replacing major segments of Line 5.

Among other actions,<sup>6</sup> the November 2017 Agreement expressly calls for all of the following directly related actions for continuing Line 5 operations in the Great Lakes and Michigan:

- (1) A “replacement” of Line 5 with a new 30-inch horizontally drilled pipeline in the bottomlands of the St. Clair River;
- (2) A report assessing the replacement of the existing dual Line 5 in the Straits of Mackinac with a ditch, HDD, or tunnel under the Straits; and
- (3) Inspection and improvements, including 400 sensitive water crossings, along the entire 547-miles of Line 5 in Michigan (*note: Line 5 is 645-miles in its entirety*).

Based on the analysis below, we submit that the Governor and officials of the State of Michigan cannot and should not implement the November 2017 Agreement or allow any conduct called for by the Agreement unless and until all of the following legal requirements are met:

- (1) The proposed 30-inch HDD pipeline bored and pulled through the bottomlands and under the waters of the St. Clair River requires express authorization by the State of Michigan pursuant to an enactment of the legislature and based on determinations that such authorization is in compliance with the standards of the public trust doctrine and the state’s sovereign residual trust interest in the bottomlands of the St. Clair River.
- (2) The removal of rock, soils, and other material from the bottomlands of the St. Clair River as a result of the HDD requires a permit under the Inland Lakes and Streams Act.
- (3) The “replacement” of the existing dual 20-inch diameter pipelines of Line 5 in or thorough the public trust bottomlands of the Straits of Mackinac with a ditch, HDD, or tunnel require authorization and approval under the Great Lakes Submerged Lands Act.

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<sup>2</sup>Part 325, NREPA, MCL 324.32501 et seq.

<sup>3</sup> Part 301, NREPA, MCL 324.30101 et seq.

<sup>4</sup> Part 5, NREPA, MCL 324.501 et seq.

<sup>5</sup> Part 21, NREPA, MCL 324.2129.

<sup>6</sup> See Exhibit 1. The Agreement also calls for additional measures to the entire length of Line 5, including water crossings other than the Straits, subject to Part 301, NREPA (lakes and streams), Part 303, NREPA (wetlands), and other laws, including Part 5, NREPA, and the provisions of the Michigan Public Service Commission.

- (4) The “replacement” of the pipeline crossings in the St. Clair River and the Straits of Mackinac, together with the inspections and corrections at water crossings and other segments of Line 5 across the state, constitute related actions of a single pipeline project prescribed in the November 2017 Agreement; the State of Michigan and the Corps cannot authorize or permit any one or all of these directly related actions and overall project without legal compliance and approval under rule of law. Such compliance requires (i) a full and comprehensive consideration and determination that there is not likely pollution, impairment, or destruction of the waters and natural resources or public trust in those resources, and (ii) a consideration and determination that there is no feasible and prudent alternative to the project and directly related conduct described in the Agreement and any proceeding described in items (1), (2), and (3) above.

It is well documented by venerable United States Supreme Court and Michigan Supreme Court decisions that Michigan holds sovereign title and interests in the bottomlands and waters of navigable lakes and streams within its jurisdiction based on the “equal footing” doctrine.<sup>7</sup> It is also well documented by the U.S. and state Supreme Courts that the waters and bottomlands of navigable streams and related natural resources are subject to the paramount inalienable principles of the public trust doctrine.<sup>8</sup> It is undisputed fact that the Governor and/or Enbridge did not and have not yet applied for authorization from the State to enter into the Agreement for the location, structures, improvements, and construction for the proposed replacement tunnel in or under the St. Clair River or the replacement Line 5 (tunnel, drilled, or ditch) in or under the Straits.

For the reasons described below, you as the MDEQ Director, the MDNR Director, as well as Governor Snyder and Attorney General Schuette, are bound by and must follow the Constitution and fully implement the laws with all due and good care.<sup>9</sup> Similarly, the Corps must uphold and follow all applicable binding federal law.

#### **STATE’S SOVEREIGN INALIENABLE RESIDUAL TRUST INTEREST AND TITLE IN BOTTOMLANDS AND NAVIGABLE WATERS OF ST. CLAIR RIVER**

The bottomlands and waters of navigable lakes and streams, including Lake Huron, Lake Michigan, and the St. Clair River were titled in the State of Michigan as sovereign on admission to the Union in 1837.<sup>10</sup> The sovereign title of the state to bottomlands and waters of navigable lakes and streams is held in trust for the benefit of citizens. Under the equal footing doctrine, the state retains a residual sovereign title or interest in inland lakes and streams and the Great Lakes. In addition, under the public trust doctrine, the state retains a residual interest and must comply with the perpetual duty to protect the public trust interest of the state and citizens.<sup>11</sup> Citizens are the legal beneficiaries of the public trust, and enjoy paramount

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<sup>7</sup> *Shively v. Bowlby*, 14 S. Ct. 548 (1894) (the title vested in the states “absolutely” on admission to the Union); *Montana PPL v. Montana*, 565 U.S. 576 (2012); *State v. Venice of America Land Co.*, 160 Mich. 680 (1910): “The condition of this territory when the state was admitted into the Union is the condition which must control. That the state of Michigan holds these lands in trust for the use and benefit of its people—if we are correct in our conclusion—cannot be doubted. The state holds the title in trust for the people, for the purposes of navigation, fishing, etc. It holds the title in its sovereign capacity.” *Id.*, at 702; see also *Glass v. Goeckel*, 473 Mich. 667, 703 NW 2d 58, 76 (2005) (“Nor do we have the luxury of forsaking public rights; our Court is one of the ‘sworn guardians of Michigan’s duty and responsibility as trustee of the [Great Lakes].’ See Obrecht, *supra* at 412, 105 N.W.2d 143.”)

<sup>8</sup> *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Obrecht v. National Gypsum Co.*, 361 Mich. 399 (Mich. 1960).

<sup>9</sup> Mich. Const. 1963, Art. 5, Sec.8 (“The governor shall take care that the laws be faithfully executed.”).

<sup>10</sup> MCL 342.32501 et seq.

<sup>11</sup> *State v. Venice of America Land Co.*, 160 Mich. 680 (1910).

rights to public trust uses, such as navigation, fishing, boating, swimming, and other water-dependent recreation.<sup>12</sup> The residual state interest and trust imposed by the equal footing doctrine and public trust doctrine are inalienable. Even though a qualified or technical private riparian ownership extends to bottomlands of inland lakes and streams, the state residual interest and duties under the equal footing and public trust doctrine is paramount; private riparian titles are subject to the paramount overriding interest of the state.

#### **STATE’S INALIENABLE INTEREST IN THE BOTTOMLANDS OF THE ST. CLAIR RIVER**

The Great Lakes bottomlands and waters remain titled in the state and are subject to the public trust doctrine. However, for inland lakes and streams, a “bare” or “technical” title is held by adjacent riparian landowners<sup>13</sup> (those whose land touches a lake or stream) and extends to the “center” of the lake or stream between riparian boundary lines drawn from the original shoreline. This private riparian title is considered “bare” and “technical” because the private technical title is *qualified* by and subject to the state’s residual sovereign interest under both the equal footing doctrine and the public trust doctrine.<sup>14</sup> While the state can recognize that a riparian owner holds technical or qualified title to bottomlands of an inland lake or stream, the state cannot divest its inalienable sovereign interest because the private title is subject to the overriding and paramount rights and uses under public trust and equal footing interests in these lands and waters.

#### **THE STATE CAN NEVER CONVEY OR ALIENATE ITS RESIDUAL INTEREST UNDER THE EQUAL FOOTINGS DOCTRINE OR THE PUBLIC TRUST DOCTRINE**

The state can never alienate its residual trust interest in state sovereign bottomlands and waters under the equal footing doctrine and/or the public trust doctrine.

It is true that originally the title to the submerged lands of the navigable waters of the country was in the United States, but such title also was burdened with a trust for the public trust use and benefit of the people for commerce and navigation. Upon the admission of a state to the Union, a state took such title burdened with such trust. While a state might, by legislative enactment or judicial decision, as has been done in this state, retain such title to the bed of the Great Lakes and surrender such a fee ownership title to the riparian owner upon streams, the riparian title in the bottomlands is only a “bare” title because the private title is always subject to and burdened with the sovereign and public trust.<sup>15</sup>

It is well settled property law that a conveyance of land adjoining a navigable river carries title to the center of the stream; but, though the court declared the title to be in the riparian owner, *it could not divest the state of its trustee capacity*, and did not undertake to do so. The title allowed to be taken by the riparian owners was subordinate to the public rights, including the public right of fishing. It was so held in *McMorran Milling Co. v Little Co.*<sup>16</sup>

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<sup>12</sup> *Id.*, at 709; *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Obrecht v. National Gypsum Co.*, 361 Mich. 399 (Mich. 1960); *Collins v. Gerhardt*, 237 Mich. 38 (1926).

<sup>13</sup> *McMorran Milling Co. v. C. H. Little Co.*, 201 Mich. 301, 309-310 (1918); *Scranton v. Wheeler*, 179 U.S. 141 (1900), 113 Mich. 565 (1897); *Moore v. Sanborne*, 2 Mich. 520 (1853).

<sup>14</sup> *Id.*; *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Obrecht v. National Gypsum Co.*, 361 Mich. 399 (Mich. 1960); *Collins v. Gerhardt*, 237 Mich. 38 (1926) (“... these waters and the soil under them passed to the state in its sovereign capacity, impressed with a perpetual trust to secure to the people their rights of navigation, fishing, and fowling.” *Id.*, at 46); *Nedtweg v. Wallace*, 237 Mich. 1 (1926).

<sup>15</sup> *McMorran Milling Co. v. C. H. Little Co.*, 201 Mich. 301, 313-314 (1918); *State v. Venice of America Land Co.*, 160 Mich. 680 (1910); *Illinois Steel Co. v. Bilot*, 84 N.W. 855 (Wisc. 1901).

<sup>16</sup> *Collins v. Gerhardt*, 237 Mich. at 48.

The state “cannot divest the state of its trustee capacity.”<sup>17</sup> Given the paramount legal residual sovereign state interest or title in these bottomlands, the State of Michigan cannot enter into an agreement, like the November 2017 Governor-Enbridge Agreement, without express authority consistent with determinations to assure the title or interest of the state has not been alienated or subordinated.

**STATE STATUTES OR LAWS AUTHORIZING AGREEMENTS OR CONVEYANCES TO LOCATE, OCCUPY, AND USE SOVEREIGN TRUST BOTTOMLANDS OF NAVIGABLE WATERS OF THE STATE MUST BE BASED ON DUE FINDINGS THAT A PROPOSED OCCUPANCY OR USE COMPLIES WITH PUBLIC TRUST STANDARDS**

The State of Michigan, through its officials, cannot enter into agreements for location, use, or occupancy of these state sovereign bottomlands and waters unless expressly authorized by, and in compliance with, the express laws of the state and not in violation of the equal footing and public trust paramount interests.<sup>18</sup> These residual sovereign and public trust interests in bottomlands and waters cannot be conveyed or encumbered in any way without the express authorization by the state through a law passed by the legislature. In the absence of such express authority, a use or occupancy, such as a replacement ditch or tunnel under the Straits or a bored tunnel under the St. Clair River, cannot be entered into, conveyed, or permitted.

If the legislature has provided such express authorization, it can be granted, agreed to, or permitted *only if* the following findings or determinations are made within the narrow exception to the public trust doctrine:

- (a) The proposed use, occupancy, structure, or activity will not substantially interfere with public trust uses or impair the public trust uses, waters and bottomlands on which public trust uses depend; and
- (b) The proposed use, occupancy, structure, or activity is primarily for a public purpose in the interest of the public trust interest or uses by citizens.<sup>19</sup>

Accordingly, if a proposed use, occupancy, structure, or activity in, under, or on the bottomlands of the Great Lakes or inland lakes or streams (state’s residual sovereign interest under equal footing doctrine) is (1) expressly authorized by statute and (2) in compliance with determinations of standards and other provisions of the statutes, and satisfy (a) and (b), above, only then would it comply with the equal footing and public trust doctrines.

Codifying the standards of the equal footing and public trust doctrines, the Great Lakes Submerged Lands Act provides a narrow exception for proposed use, occupancy, structure or activity of public trust bottomlands.<sup>20</sup>

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<sup>17</sup> *McMorran Milling Co. v. C. H. Little Co.*, 201 Mich. 301 (1918).

<sup>18</sup> The legal principles under *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892), at 453-453, adopted in *Obrecht v. National Gypsum Co.*, 361 Mich. 399 (Mich. 1960), at 416, provide for a narrow exception to a rule of no authorization, permitting, or approval of any agreements, leases, licenses, or other conveyance: “No one (riparian proprietors included) has the right to construct for private use a permanent deep-water dock or pier on the bottom lands of the Great Lakes-adjacent to Michigan-unless and until he has sought and received, from the legislature or its authorized agency, such assent based on due finding as will legally warrant the intended use of such lands. Indeed, and aside from the common law as expounded in *Illinois Central*...”

<sup>19</sup> *Id. Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) at 453-454; *Obrecht v. National Gypsum Co.*, 361 Mich. 399 at p. 416 (1960) ; *Superior Public Rights v. Dept. Nat. Resources*: “The tests set forth in *Illinois Central R. Co.*, and the Great Lakes Submerged Lands Act, *supra*, are nearly identical, and go about protecting public trusts in a similar manner. Accordingly, we find no inconsistency between the tests.” 80 Mich App. 72, 85-86 (1977); *State v. Venice of America Land Co.*, 160 Mich. 680 (1910).

Sec. 32502. ... 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... 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.<sup>21</sup>

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*.

These determinations and standards in a statute expressly authorizing an agreement, easement or occupancy in bottomlands of the Great Lakes cannot be inconsistent or weaker than the public trust standards of express authority, primary public purpose, non-impairment, or substantial interference in *Illinois Central Rail Road, Obrecht*, and other public trust precedents of U.S. Supreme Court and Michigan.<sup>22</sup> The Michigan Attorney General's 1977 opinion regarding whether riparians along Lake St. Clair must obtain a GLSLA bottomlands permit further underscores that a sovereign interest or title to these lands is vested in the state impressed with a trust for the benefit of the people.<sup>23</sup> Even though riparians hold a "bare legal title" to the surface of these bottomlands for lawful riparian uses, the state acts in a "proprietary capacity" when it reviews applications by riparians to use, occupy, or engage in activities in the bottomlands of navigable lakes and streams.

Another example is found in the express authorization and standards for permits in public trust bottomlands and navigable waters under the Inland Lakes and Streams Act:<sup>24</sup>

Sec. 30106. The department shall issue a permit if it *finds that the structure or project will not adversely affect the public trust or riparian rights*. In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. The department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state.<sup>25</sup>

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<sup>20</sup> MCL 324.32501 et seq. ("GLSLA").

<sup>21</sup> See also GLSLA Sections 32503, 32504, 32505, et seq.

<sup>22</sup> FNs 4, 12, *supra*; see also *Superior Public Rights v. Dept. Nat. Resources*: "The tests set forth in *Illinois Central R. Co.*, and the Great Lakes Submerged Lands Act, *supra*, are nearly identical, and go about protecting public trusts in a similar manner. Accordingly, we find no inconsistency between the tests." 80 Mich. App. 72, 85-86 (1977).

<sup>23</sup> Op. Att'y Gen. 5214 (1977) <http://www.ag.state.mi.us/opinion/datafiles/1970s/op05214.htm>. "[T]he State acted in its *proprietary capacity* without surrendering or subordinating the public's trust interest..., nor did it surrender its police power to regulate the use of the land." *Id.*

<sup>24</sup> MCL 324.30101, et seq. ("ILSA").

<sup>25</sup> MCL 324.30106. Note "bottomland" means the land area of an inland lake or stream that lies below the ordinary high-water mark and that may or may not be covered by water. MCL 324.30101(a).

ILSA Rules 1(1) and (2) define “public trust” and “riparian rights:”<sup>26</sup>

(1)(f) “Public trust” means all of the following:

- (i) The paramount right of the public to navigate and fish in all inland lakes and streams that are navigable.
- (ii) The perpetual duty of the state to preserve and protect the public's right to navigate and fish in all inland lakes and streams that are navigable.
- (iii) The paramount concern of the public and the protection of the air, water, and other natural resources of this state against pollution, impairment, and destruction;
- (iv) The duty of the state to protect the air, water, and other natural resources of this state against pollution, impairment, or destruction.

(2) "Riparian rights," as defined in the act, means all the rights accruing to the owners of riparian property, including the following rights, *subject to the public trust*:

- (a) Access to the navigable waters.
- (b) Dockage to boatable waters, known as wharfage.
- (c) Use of water for general purposes, such as bathing and domestic use.
- (d) Title to natural accretions.

(3) Terms defined in the act have the same meanings when used in these rules.

In other words, the jurisdiction and application of the Act must be interpreted consistent with these rules and the common law public trust doctrine.<sup>27</sup> Like the GLSLA, activities that require permits under the ILSA include: (a) Dredge or fill bottomland; (b) Construct, enlarge, extend, remove, or place a structure on bottomland.<sup>28</sup> “Bottomland dredging” means dredging of channels and canals and the *removal of any rock, stone, soil, or other material from bottomlands*.<sup>29</sup>

ILSA Rule 4 imposes the following mandatory requirements for a permit:

Rule 4. In each application for a permit, all existing and potential adverse environmental effects shall be determined and the department shall not issue a permit unless the department determines both of the following:

- (a) That the adverse impacts to the public trust, riparian rights, and the environment will be minimal.
- (b) That a feasible and prudent alternative is not available.<sup>30</sup>

Like the GLSLA, the ILSA determinations and standards cannot be inconsistent or weaker than the public trust standards of express authority, primary public purpose, non-impairment, or substantial interference under the common law public trust doctrine.<sup>31</sup>

Finally, Public Act 10 of 1953 (“Act 10”) expressly authorized public utilities to obtain rights of way or easements over public lands, including the public trust bottomlands of the State:

Sec. 2129. The department may grant easements, upon terms and conditions the department determines just and reasonable, for ... the purpose of constructing, erecting, laying,

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<sup>26</sup> MAC R 281.811(f)(1), (2), and (3) (emphasis added).

<sup>27</sup> MAC R 281.811(3).

<sup>28</sup> MCL 324.30102(a) and (b).

<sup>29</sup> MAC 281.811(c).

<sup>30</sup> MAC 281.814.

<sup>31</sup> *Obrecht and Superior Public Rights, supra; Collins v. Gerhardt*, 237 Mich. 38 (1926).

maintaining... 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.*<sup>32</sup>

## **APPLICATION OF THE STATE SOVEREIGN INTEREST AND TRUST UNDER THE EQUAL FOOTING DOCTRINE, THE PUBLIC TRUST DOCTRINE, AND STATE LAWS AND REGULATIONS**

### **1. The Horizontally Bored Tunnel in and through the Trust Bottomlands of the St. Clair River Has Not Been Authorized Under Act 10 of 1953**

In its application for a HDD tunnel in and through the sovereign and trust bottomlands of the state, Enbridge states that its application is part of the November 2017 Agreement that constitutes a “commitment to replace the segment of Line 5 that crosses the St. Clair River.”<sup>33</sup> Enbridge also states that the “agreement requires that Enbridge submit applications for all necessary state and local authorizations by February 28, 2018, and all federal/joint state applications by July 25, 2018.”<sup>34</sup>

In addition, Enbridge states that it is “planning to ‘replace’ the segment of Line 5 that *crosses* the St. Clair River...using a horizontal directional drill.”<sup>35</sup> The ‘replacement’ pipeline will be 30-inches in diameter within the *existing right-of-way easement*, and approximately 3,000 feet in total, which consists of 1,500 feet in Michigan and 1,500 feet in Ontario.” Enbridge describes that the proposed new horizontally drilled pipeline will require drilling through the bottomlands 50 feet beneath the riverbed, removal of materials from the bottomland as the drilling occurs, and the pulling of a constructed line through the bore hole in and through the bottomlands. The quotes around “replacement” emphasize the fact that the proposed pipeline is *not* a “replacement” in the sense that it is not in the same location as the existing line across the bottomlands of the river, but in a location deeper in the bottomlands held in trust by the state.

It should be noted that Enbridge did not attach the right-of-way easement to the application. A Freedom of Information Act request by FLOW (on record with the MDEQ and USACE) for historical permits, easements, or other agreements from the state did not produce a public record of any such right-of-way easement or agreement. The nature of the easement is not disclosed; and in any event, the new horizontally bored tunnel is totally different than the pipeline along the bottom of the river in 1953. Moreover, this new proposed tunnel as described will run “in” and “through” the bottomlands of the state, and is subject to authorization and easement subject to the trust of the state in the bottomlands of the river.

A review of Enbridge’s and the MDEQ’s list of authorizations and permits required for the St. Clair Tunnel omits the GLSLA, the ILSA, and Act 10 of 1953 for public utility occupancy and use of, or removal of materials for, the proposed bored tunnel in the sovereign and public trust bottomlands of the St. Clair River. Presumably, this is based on an interpretation or assumption that neither the GLSLA nor the ILSA apply to the proposed bored or drilled tunnel under the St. Clair River. In addition, the lack of permit or other required authorizations for occupancy, construction, or use of the state’s trust bottomlands may assume that there is an existing right-of-way easement and that the easement contains language authorizing a new tunnel and pipeline bored in or through these trust bottomlands. FLOW submits that this interpretation or assumption is legally flawed.

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<sup>32</sup> MCL 324.2129.

<sup>33</sup> Enbridge Joint Application to USACE and MDEQ, July 20, 2018, para. 4, p. 3.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, pp. 1-2.

First, even if Enbridge and the MDEQ and the MDNR are correct in their interpretation or assumption that the GLSLA and the ILSA do not apply, the proposed location, construction, occupancy, and use of the drilled tunnel pipeline “under or through” the trust bottomlands of the St. Clair River requires a right-of-way easement under Act 10. Enbridge’s answer to the question of whether there was an existing easement, lease, or other agreement was “No.”<sup>36</sup>

Second, even if there is a right-of-way easement under Act 10 for the existing line, it does not constitute authorization for the new, deeper tunnel and pipeline “through” the bottomlands.

Third, there is no easement attached to the joint USACE/state application or made available to FLOW or the public, so the application is administratively incomplete.

Fourth, on information and belief, an easement does not authorize a horizontally drilled 50-foot deep tunnel and pipeline in or “through” the trust bottomlands of the state as required by Act 10.

Fifth, if there is a right-of-way easement from 1953 authorized under Act 10, this Act does not contain the required determination of the standards required by the public trust doctrine under *Illinois Central Rail Road*, *Obrecht*, and *Superior Public Rights* binding case precedents,<sup>37</sup> and is therefore inconsistent with the requirements of the public trust doctrine.

Sixth, in any event, there is no written determination or findings that (a) the proposed removal of bottomlands, construction, occupancy, or use will not substantially interfere with public trust uses or impair the public trust uses, waters, and bottomlands of the river; or that (b) the proposed use, occupancy, structure, or activity is primarily for a public purpose in the paramount trust interest or public trust uses of citizens.<sup>38</sup> As a result, any such easement would be void under the public trust doctrine.

Seventh, if Enbridge, the MDEQ and/or the MDNR takes the position that Act 10 does not apply to the state’s sovereign trust interest in the bottomlands under the navigable waters of the river, then it must necessarily be concluded that there is no express statutory authority in Michigan for the authorization or granting of a right-of-way in or through the state sovereign trust interest in the bottomlands; and because there is no express statutory authority under the Act, there is no statutory authority for the transfer or conveyance of a right-of-way by the state in its proprietary capacity over these state trust bottomlands under a navigable river.

Eighth, it must be kept in mind that the *McMorran Milling* case was a dispute between two contracting parties over payments due on a lease to remove sand and gravel, and that the subject matter (removal of sand and gravel from bottomlands) of the contract was subject to a federal navigational servitude, and thus prohibited.<sup>39</sup> On appeal, the Court excused further payment under the lease because the activity interfered with the navigational easement or servitude reserved by the federal government and imposed on the river at the time of statehood. The plaintiff argued that it had an absolute riparian right to sand and gravel because the river was an inland river, not part of the Great Lakes. But Michigan was *not* a party to the case, and is not bound by it. Moreover, the Court emphatically recognized that the riparian owners’

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<sup>36</sup> Enbridge Federal/state joint Application to USACE and MDEQ, July 20, 2018, para. 6, p. 3.

<sup>37</sup> FNs 19, 22, *supra*.

<sup>38</sup> *Id. Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) at 453-454; *Obrecht v. National Gypsum Co.*, 361 Mich. 399 at p. 416 (1960) ; *Superior Public Rights v. Dept. Nat. Resources*: “The tests set forth in *Illinois Central R. Co.*, and the Great Lakes Submerged Lands Act, *supra*, are nearly identical, and go about protecting public trusts in a similar manner. Accordingly, we find no inconsistency between the tests.” 80 Mich App. 72, 85-86 (1977); *State v. Venice of America Land Co.*, 160 Mich. 680 (1910).

<sup>39</sup> *McMorran Milling Co. v. C. H. Little Co.*, 201 Mich. 301 (1918).

title extending to the bottomlands at the center of the river was a “bare” or “technical” and “qualified” title. Therefore, the bottomlands underneath the St. Clair River are subject to an inalienable and paramount residual trust and proprietary interest of state under the equal footing and public trust doctrines.<sup>40</sup> The *jus privatum* is always subject to the *jus publicum* or residual or inalienable interest under the equal footing and public trust doctrines.

The interest of the state was not affected by *McMorran Milling* and other cases following it. Hence, authorization is required under Act 10 subject to findings that the public trust standards will not be violated. Alternatively, Enbridge is not authorized to drill a tunnel in and through the state trust bottomlands unless and until the state has enacted a law authorizing the same and Enbridge applies for and obtains an agreement authorizing the tunnel consistent with the required findings under the public trust doctrine.

## **2. The Enbridge Application Requires a Permit under the ILSA to Dredge Rock, Soils, and Materials from the Public Trust Bottomlands of the River**

The permit and public trust standards under the ILSA apply to Enbridge’s application to dredge and remove rock, soil, or other material from the bottomlands of the river.<sup>41</sup> The ILSA requires a permit for dredging materials. The rules define dredging as the “removal of any rock, stone, soil or other material from bottomlands.”<sup>42</sup> The boring, drilling, approaches, and other construction will require the removal of rock, stone, soil, or other material, as well as the handling and placement of this material as fill. Enbridge, as riparian, or with shared use with other riparians, may have certain riparian rights to the waters and bottomlands, but its riparian interest is a bare or technical one that is subject to the state’s sovereign residual interest and the public trust interest, rights, and uses.

ILSA Rule 1(2) expressly states that riparian rights in inland lakes and streams are “subject to the public trust.”<sup>43</sup> Dredging or filling of inland lakes and streams is prohibited unless authorized by a permit under the ILSA.<sup>44</sup> Accordingly, Enbridge and the Governor cannot implement the November 2017 Agreement unless and until an application has been applied for and obtained pursuant to the ILSA and its rules.

Finally, the state or Enbridge may claim that the “replacement” of Line 5 with a new bored tunnel in or under the bottomlands of the St. Clair River is a “repair” or “maintenance.” It is anything but a repair or maintenance. The rules noted above are explicit: a permit must be obtained. In any event, the repair or maintenance is not “in kind” or related to the structure “in place” and without “material modification.”<sup>45</sup> It is a new tunnel, with long-term consequences, if read in conjunction with the November 2017 Agreement as a whole. It does not fall with a general permit category under the ILSA;<sup>46</sup> and it does not fall within a “minor permit” category.<sup>47</sup>

Enbridge did not apply for a state permit required by the ILSA by February 28, 2018, as required by the Agreement; and if this requirement is considered part of the joint USACE/state application, the application does not specify that an application is filed under the ILSA. Thus, Enbridge did not submit any joint ILSA application by July 20, 2018 as required by the Agreement.

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<sup>40</sup> *Id.*, at 309-310.

<sup>41</sup> R 281.811(3).

<sup>42</sup> See FNs 28 and 29, *supra*.

<sup>43</sup> R 281.811(2).

<sup>44</sup> MCL 324.30102.

<sup>45</sup> MCL 324.30103.

<sup>46</sup> WRD, General Permit Guidelines, WRD, Aug. 121, 2016.

<sup>47</sup> WRD, Minor Categories, Aug. 11, 2016.

Enbridge or the state may also take the position that the ILSA does not apply to a tunnel under the bottomlands of the river. However, that interpretation would lead to the conclusion that there is no authority authorizing the bored tunnel proposal and that it is therefore prohibited unless there is a new statute enacted by the legislature that authorizes a tunnel consistent with the state's proprietary trust interest in the bottomlands of the navigable St. Clair River, as described above.

**THE “REPLACEMENT” OF LINE 5 WITH A NEW TUNNEL OR DITCH PIPELINE UNDER THE STRAITS OF MACKINAC CANNOT BE APPROVED OR AGREED TO BY GOVERNOR SNYDER OR THE STATE UNLESS IT IS FIRST APPROVED UNDER THE GREAT LAKES SUBMERGED LANDS ACT**

Specifically, the November 2017 Agreement calls for a new replacement line to occupy and use the public trust bottomlands of Lake Michigan. Under Sections 32502 and 32503, and other provisions, the agreement for a new replacement on or under the bottomlands is subject to the GLSLA and its Rules. The Agreement and/or implementation of the Agreement through one of the three options for replacement on the bottomlands of the Straits must be authorized by the MDEQ and the MDNR, as well as the State Administrative Board. Until that is done, the Governor and/or Enbridge cannot sign any further agreements regarding which alternative replacement option is selected. Rather, Enbridge must apply and secure a full review of the option or options, including risks, worst case scenarios, potential impacts, and prove that there is no feasible and prudent alternative. This is required by the GLSLA and the rule of law. As noted previously, it is also mandated by Mich. Const. Art. 5, Sec. 8.

**CONCLUSION AND REQUESTED DETERMINATIONS, RULINGS, AND/OR DIRECTIVES**

Based on the foregoing, you are requested to:

1. Decide, rule, and determine that there is no statutory authorization consistent with the standards and determinations imposed by state sovereignty residual interests under the equal footing and public trust doctrines for the proposed Enbridge drilled or bored tunnel under the St. Clair River; and, accordingly, Enbridge is directed not to proceed until a statute validly authorizing the alienation, occupancy, dredging, or removal of materials, consistent with state sovereignty and the public trust doctrine, is enacted, and Enbridge has applied for and obtained a lawful approval;
2. Decide, rule, and determine that Enbridge's riparian interest is subject to the equal footing and public trust doctrines, the St. Clair River is an inland river, and the proposed drilled or bored tunnel constitutes “dredging” and/or “filling” from handling and placement or disposal of materials that are removed, and that, therefore, Enbridge is prohibited from proceeding with the proposed tunnel unless and until it has applied for and obtained a permit pursuant to the ILSA and its Rules;
3. Decide, rule, and determine that the St. Clair River is not an “inland” river, because it is part of a continuous international boundary along the Great Lakes and a strait or connecting waterway, the bottomlands of which are owned by the State of Michigan, directing Enbridge that its proposed drilled or bored tunnel is prohibited until the GLSLA is amended<sup>48</sup> to authorize the proposal consistent with the equal footing and public trust doctrines;

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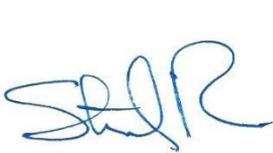
<sup>48</sup> It is not clear whether the 1955 GLSLA that applies to navigable Great Lakes, bays, harbors, and Lake St. Clair, was intended to include connecting waters or straits or a watercourse between two international land masses. MCL 324.2502.

4. Direct or otherwise inform and advise Enbridge, Governor Snyder, and state officials that no action should be implemented under the November 27, 2017 Agreement unless and until the Agreement, the proposed tunnel under the St. Clair River, and the proposed options in, across, or under the Straits of Mackinac, have been authorized or otherwise approved by law consistent with the equal footing and public trust doctrines, the ILSA, the GLSLA, and the Michigan Environmental Protection Act (“MEPA”).<sup>49</sup>
5. Advise Enbridge that no action can be taken or implemented under the November 2017 Agreement, including the selection or agreement to one of the options for locating and occupying the bottomlands of Lake Michigan with a new replacement line, unless and until the Agreement has been authorized by law, including the GLSLA and its Rules for any of the options proposed for the Straits.
6. Advise Enbridge that no action can be taken to implement the November 2017 Agreement unless and until a full and comprehensive environmental impact statement and study of feasible and prudent alternatives to the whole or entire project of the directly related tunnel pipeline under the St. Clair River, the tunnel or ditch under the Straits of Mackinac, and related measures for the entire length of Line 5, including water crossing, are completed and permits or other authorizations granted under rule of law, including the ILSA, the GLSLA, Act 10, the MEPA,<sup>50</sup> and the common law public trust doctrine.

On behalf of the affected communities, residents, landowners, and citizens who live, earn a living, and recreate on the St. Clair River, Lake Huron, the Straits of Mackinac, and Lake Michigan, you are requested to give this matter your utmost attention and fulfill your obligation pursuant to the Constitution, Art. 4, Sec. 52, Art. 6, Sec. 5, and the laws of Michigan, to assert jurisdiction over and protect the residual and public trust interests of the State of Michigan in its navigable waters and bottomlands below the ordinary high-water mark.

Thank you for the opportunity to submit this letter and the requests described above.

Sincerely yours,



Stanley Pruss, Chairman



James Olson, President



Elizabeth Kirkwood, Executive Director

For Love of Water

cc: Hon. Governor Richard Snyder  
 Hon. Attorney General William Schuette  
 Hon. Senator Gary Peters  
 Hon. Senator Debbie Stabenow

<sup>49</sup> Part 17, NREPA, MCL 324.1701 et seq; *State Highway Comm’n. v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974).

<sup>50</sup> MCL 324.1701 et seq.; *Vanderkloot*, 392 Mich at 159.