



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

November 1, 2018

Mackinac Bridge Authority Board Members

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c/o Mr. Bob Sweeney, Executive Secretary

Mackinac Bridge Authority
N 415 I-75
St. Ignace, Michigan 49781

VIA ELECTRONIC SUBMISSION

RE: STATE AND ENBRIDGE PROPOSAL TO IMPLICATE MACKINAC BRIDGE AUTHORITY IN THE CONSTRUCTION, OWNERSHIP, LEASING, AND LONG-TERM OPERATION OF A NEW CORRIDOR TUNNEL FOR ENBRIDGE’S NEW LINE 5 IN STRAITS OF MACKINAC

Dear Members of the Mackinac Bridge Authority:

For Love of Water (“FLOW”)¹ submits this letter to assist the Mackinac Bridge Authority (“MBA”) in deciding whether to reject the proposal in Paragraph G of the Second Agreement (“Agreement”) entered into on October 3, 2018, between Enbridge Energy Partners (“Enbridge”) and the Governor, the Michigan Department of Environmental Quality (“DEQ”), and the Michigan Department of Natural Resources (“DNR”). Based on our research and analysis, described more fully below, FLOW urges the MBA to reject the proposal or any similar arrangement by the State of Michigan and Enbridge set forth in Paragraph G.

The Agreement calls for (1) a new pipeline under the St. Clair River, (2) a few relatively minor measures along the length of the existing Line 5 pipeline in the Straits of Mackinac, and (3) a new proposed tunnel for a new pipeline through the soils and rock of the public trust bottomlands beneath the Straits of Mackinac. Paragraph G is the only provision in the Agreement that implicates the MBA. This is because

¹ FLOW is an independent law and policy center dedicated to the protection of water, health, and communities in the Great Lakes Basin, with offices in Traverse City, Michigan. For nearly five years, FLOW has investigated, researched, and published a dozen reports addressing the risks of the 65-year-old Line 5, existing alternatives to Line 5, worst-case scenarios and economic damage and loss, and violations of the state’s agreement with Enbridge and state laws, including the strict protections for the public trust waters and bottomlands of the Straits of Mackinac, Lake Huron, and Lake Michigan. All of these reports are available for viewing on FLOW’s website, www.flowforwater.org.

the Governor and Enbridge want MBA to provide all of the public land, ownership, lease, other agreements, and oversight of the tunnel and new pipeline for Enbridge that would be completed in seven to 10 years and would provide a lease for the next 99 years. Enbridge, however, has other options or alternatives that it can choose and submit for approval as required by law.

A review of the Agreement's Paragraph G raises a host of legal issues and questions:

G. Further Agreements for a Straits Tunnel. The State has *proposed* that, together with housing the Line 5 Straits Replacement Segment, the Straits Tunnel could accommodate multiple utilities... The State and Enbridge agree to *initiate discussions*, as soon as practicable, to *negotiate a public private partnership agreement with the Mackinac Bridge Authority ("Authority") with respect to the Straits Tunnel* for the purpose of locating the Line 5 Straits Replacement Segment and, to the extent practicable, Utilities in that Tunnel (hereinafter "Tunnel Project Agreement"). The Tunnel Project Agreement *shall* include provisions under which *the Authority will provide property necessary for the construction of the Straits Tunnel...* Such agreement *shall* also provide that *the Authority shall: (a) obtain or support Enbridge in obtaining the necessary permits, authorizations, or approvals for the construction and operation of the Tunnel and the Line 5 Straits Replacement Segment; and (b) upon completion of the construction of the Straits Tunnel, the Authority shall assume ownership of the Straits Tunnel.* Simultaneous with the execution of such agreement, *the Authority would execute a lease or other agreements to: (a) authorize Enbridge's use of the Straits Tunnel for the purpose of locating the Line 5 Straits Replacement Segment for as long as the Line 5 Straits Replacement Segment shall be in operation by Enbridge.* (emphasis added).

In short, Paragraph G provides only for "discussions" for a "proposal" for new corridor tunnel under the Straits. It is a nonbinding "concept,"² which the MBA does not have to negotiate or accept. While the Agreement provides that the MBA and Enbridge should negotiate a "public private partnership" agreement, it also seeks to force ("shall") the MBA to provide property, permits, authorizations, and own the facility, and lease to Enbridge. The MBA is an independent authority. The Governor and State of Michigan cannot bind the MBA to any agreement.

In law and practice since the day the Mackinac Bridge opened on November 1, 1957 exactly 61 years ago today, the MBA and the bridge have been jealously protected as a completely independent and stand-alone entity. Why? Because the bridge was a singular state and wholly *public* project for its citizens and the general motoring public to "ferry" them by highway over the navigable waters to connect the people of both peninsulas.³

Paragraph G would do just the opposite. It demands the MBA to agree to and participate in a "public-private partnership," which is vastly different from a state public project for a singular public purpose like transporting the citizens and general public. As noted below, the Governor and Enbridge Agreement cannot bind the MBA to anything.

² Ryan Duffy, Enbridge, <https://www.detroitnews.com/story/news/local/michigan/2018/10/03/line-five-tunnel-deal-enbridge-snyder/1509072002/>.

³ In this sense, the MBA's sole purpose has served to marshal the public trust bottomlands and waters, credit and bonding authority of the State to build a public bridge that links the two peninsulas in the same, but safer and more beneficial manner, than the ferry service that preceded the bridge and separated the peninsula's people. As such, the Mackinac Bridge, the MBA, and its financial revenues and assets are as much a part of the public trust and public trust purpose of public travel as the ferry services. Viewed in this way, the MBA and bridge are subject to more stringent limitations imposed by the public trust doctrine. See Section 4, below.

This letter examines the legal boundaries of the Mackinac Bridge Authority in the context of subsequent modern state laws and constitutional requirements, and raises numerous legal challenges to the Governor-Enbridge Second Agreement and its intent to build a tunnel under the Great Lakes using the MBA to broker a public-private agreement. The letter concludes that the MBA should postpone any hasty decisions that dilute its single-mission purpose to protect and maintain the Mackinac Bridge and that burdens this authority for the next century to take ownership responsibility for a risky private tunnel venture.

1. PARAGRAPH G, INCLUDING A “PUBLIC-PRIVATE PARTNERSHIP,” DOES NOT FIT AND IS NOT SUITABLE TO HELP A PRIVATE COMPANY ACHIEVE PRIMARILY PRIVATE ENDS.

A “public-private partnership” or PPP involves arrangements by the government to secure private equity funding or participation for *new government public projects* such as schools, highways, and hospitals, where government lack the financial capacity to do it alone.⁴ PPPs are *not* intended for private funding or participation to build or aide a private project or purpose. Typically, the state may invest in companies or companies may invest or participate with states (whether by acquiring assets, leasing assets, investing, owning, securities or rights or otherwise), or provide loans and guarantees and make other kinds of financial provisions to or in respect of them, including rights to step in and own in event of default. However, PPPs are *not* used by government to assist a private company to build a project that aides a private corporation business or long-term control of a facility or pipeline for its own corporate purposes—such as the state’s proposal in Paragraph G to oversee and own a tunnel that it will lease-back for an Enbridge privately owned pipeline that benefits private stockholders, or pays for private investors or creditors demanded rates of return. PPPs often include extra costs, because either interest or profits are guaranteed or assured to private corporations and their investors. Because of these financial expectations, PPPs are strictly regulated and limited for purely public projects and purposes. Public or state authority, finances, and property are not to be used for private projects such a privately leased tunnel and pipeline. If strictly controlled, PPPs can cause serious problems for government boards and citizens and often create unnecessary public risks and harm.⁵

Paragraph G would require the MBA to provide all of the land (including public trust bottomlands of Lake Michigan and apparently the exercise of condemnation powers), all of the permits and other approvals, the ownership of the tunnel, the leasing to Enbridge for 99 years to transport crude oil (primarily destined for Canada). Enbridge may also sublease space within the tunnel to other utilities, but only “if practicable.” While a lease could provide for indemnification of the MBA for any liabilities, damages, or losses, these are only contractual assurances and will not prevent the MBA from being held liable for any occurrences, including catastrophic damages and losses, as owner or entity that provides oversight of the project and its operation for essentially a private function. In short, Paragraph G’s public-private partnership or similar arrangement is not applicable or suitable for building primarily private projects funded by their shareholders like Enbridge’s and it’s the proposed tunnel and new pipeline.

Not surprisingly, the proposal is fraught with constitutional, legal, engineering, fiscal, water, environmental, and other significant problems and risks that are radically different than the singular,

⁴ See *Collins Dictionary of Law* © W.J. Stewart, 2006. E.g., the PPP arrangement are confined to assist governments, state or local, to build public facilities or highways. Public-Private Transportation Act, <https://vacode.org/2016/33.2/>; Pennsylvania Public-Private Transportation Law, Pa.C.S. Secs. 9101-9124. In these instances, there are strict registration, qualification, and authorization controls regulated by state agencies to assure the standards for public projects are met.

⁵ <https://www.foodandwaterwatch.org/insight/public-public-partnerships>. Since Michigan’s Constitution of 1850, state government has been prohibited from aiding the construction of public works for private persons or purposes. Mich. Const 1963, Art. 3, Sec. 6.

historic role of the Mackinac Bridge Authority.⁶ It is also inconsistent with the MBA's specific mission, authority, history, and respect for the MBA's strict independence and freedom from interference by governors, state agencies, and state officials. This is because the MBA has one function and one function only: to protect the financial, infrastructure integrity, and safety of the Mackinac Bridge and the general motoring public who use and enjoy it.

As discussed in Section 3, below, Enbridge has sound, safer, and less costly alternatives that this foreign corporation can and should use its *own* financial resources and borrowing power to apply for and obtain the necessary lands, authorizations, and permits to implement those alternatives.⁷ Even if Enbridge decides that it will construct a tunnel or new Line 5 under the Straits, similarly, it should and can utilize its own financial assets and financing to obtain the authorizations, land, agreements, and permits to do so. It is also too risky and short-sighted if not blind for the State of Michigan to force the MBA to help build, own, lease, and oversee or control a new tunnel for fossil-fuel pipeline(s) that most likely will be unnecessary stranded assets long before the expiration of Enbridge's proposed 99-year lease.⁸

In summary, PPPs are designed to provide for various means of building projects for a state or local government to serve the general public. They are not authorized and are ill-suited for states or local governments to exercise governmental powers to help build projects for the private sector and their investors.⁹

2. HISTORY OF THE MACKINAC BRIDGE AUTHORITY AND MACKINAC BRIDGE AUTHORITY ORGANIC ACT

Michigan's legislature enacted the Mackinac Bridge Authority in 1952 for the express and singular purpose of building, maintaining, and operating the Mackinac Bridge. The bridge was opened for traffic on November 1, 1957. To this public end, the Mackinac Bridge Authority has operated for 61 years as an independent authority free from outside influence and political pressure. Each of Michigan's governors since that time has appointed members to the MBA who have fiercely defended the independence of the MBA. From Governor Williams until now, our governors and legislators have fiercely defended the MBA's singular mission: to maintain and govern this iconic infrastructure that spans and unites our Michigan peninsulas.

A poignant example occurred in 2004 when then Michigan Department of Transportation ("MDOT") Director Gloria Jeff attempted to take over the MBA, including control of engineering, finances, and

⁶ 1950 PA 21; 1952 PA 214, ("Act"); 2005 PA 830, Sec. 357(2) and (3); Mich Const. 1963, Art 3, Sec. 6; Art. 4, Sec. 30.

⁷ See Ex. 1 (Figs. 6-11, Expanded pipelines for Tar Sands and Baaken Crude Oil)

⁸ The calculated joint effort of the State of Michigan and Enbridge to craft a new "fix" for Enbridge's Line 5 is both misguided and imprudent given that this tunnel corridor could be used to transport oil in Enbridge's pipeline for the next 99 years or more. Locking Michigan's Great Lakes, Mackinac Bridge, the MBA, and the State's financial and infrastructure resources into today's fossil fuel economy makes little sense in light of the recent October 2018 Special Report of the Intergovernmental Panel on Climate Change ("IPCC"). <http://www.ipcc.ch/report/sr15/> The special report warns that "rapid and far-reaching" transitions in land, energy, industry, buildings, transport and cities" are required in the next 15 years in order to assure that the increase in temperature of the earth stays within the 1.5° C (2.7° F) threshold between 2030 and 2050.

⁹ Most state constitutions, including Michigan, prohibit or strictly limit use of public or state powers, financing, credit, eminent domain, appropriation and property, or commingling of state with private works or projects. E.g. Mich Const. 1963, Art 4, Sec. 30; Art. 9, Sec. 18; Art. 6, Sec. 3. (This provision was first adopted in 1850, after the commingling of state financing and property for private internal works caused massive bank failures and a deep depression. The 1963 Constitution eliminated any exceptions, and made clear that the state "shall not be a party to" nor "financially interested" in internal improvements other than those of a public nature and by authorization of law.

employees of the Authority. The legislature defeated the Department's takeover attempt by enacting amendments to the MBA Act reaffirming the MBA's independent authority from state agencies and government officials.¹⁰ The House voted 38-0 and Senate 38-0 to supplement the independence of the MBA provided in Section 302(1) through (6) of the original MBA Act. The 2005 amendment expressly declared that "The authority shall exercise its prescribed statutory powers, duties, and functions independently of the department."¹¹ To this end, the amendment established the sole authority for the fiscal, engineering, and oversight of the integrity of the bridge and employees free of interference by state agencies and officials.¹² Given the MBA's strong historical independence, it is shocking that Governor Snyder and his state agencies are now attempting to do the very thing that both the MBA Act and the legislature unanimously prohibited in 2005. The attempted "fix" for Enbridge to build and then lease a tunnel for a new Line 5 proposed by Paragraph G directly interferes with the independent authority and single mission of the MBA to protect and maintain the bridge.

While the scope of the MBA's powers is broad, those powers are tailored to a singular objective: the building, management, and protection of the integrity of the Mackinac Bridge. These powers include: charging fares to reduce debt and pay for scheduled structural maintenance, issuing bonds, transfer of public lands, condemnation of private property, all for the construction, maintenance, and scheduled maintenance of the infrastructure of the bridge. The MBA's finances and authority are insulated from interference or raiding by other agencies or the legislature; similar to the public trust bottomlands in which the bridge is secured, the bridge itself and its revenues are impressed with a public trust for the dedicated purpose of integrity of the bridge. Because of this, the MBA and its property are exempt from taxes and obtaining any required approvals from any other state boards and agencies. These provisions are not intended for a public-private partnership or project that primarily assists a private purpose or mixed public-private project owned by the state but leased to a private entity for a private purpose. These provisions unlawfully compete with the authority and the single mission to protect revenues, finances, and integrity of the bridge.¹³

3. THERE ARE BETTER, SAFER, LESS COSTLY ALTERNATIVES THAN EXPLOITING THE MBA AND IMPOSING RISKS ON THE MACKINAC BRIDGE, THE STRAITS, AND ENVIRONMENT FOR A TUNNEL AND PRIVATE PIPELINE.

Parenthetically, some would argue that the proposed tunnel for Enbridge's pipeline is a solution to the dangers and risks of major catastrophe inherent in the failing design of the existing 65-year-old Line 5 pipeline. But this argument ignores several key facts: (1) Line 5 continues to operate as a high and unacceptable risk every day in our Great Lakes; (2) Line 5 can be decommissioned in far less time than the seven to 10 years to build a tunnel; (3) Line 5 is no longer essential, and (4) alternatives exist that do not require imposing on or implicating and burdening the MBA or integrity and safety of the Mackinac Bridge, and the citizens and tribes of Michigan. The MBA should be aware that this proposed tunnel and new pipeline has not been authorized or approved by the state as required by the laws of Michigan or federal government. In fact, once the rule of law is adhered to, it will be readily evident that the tunnel and new pipeline option is only one of other feasible and prudent alternatives. One alternative would

¹⁰ 2005 P.A. 830, amending Sec. 357 (MCL 16.457). It should also be noted that Section 269 of the MBA that purported to give some authority to the department was repealed. MCL 254.269 (repealed).

¹¹ *Id.*

¹² MCL 254.302(1), (2), (3), (4) (5), (6). MBA is an "independent authority." OAG 1969, No. 4468. The MBA is "entirely separate," OAG 1955-56 No. 2465, II, p. 61.

¹³ For example, Paragraph G of the Agreement would allow utilities to relocate in the tunnel if Enbridge decides it is practical. The MBA is authorized to rent space to allow utilities to run lines, such as fiber optic cables, under the bridge to raise additional revenues to maintain fair tolls and to secure the finances and maintain integrity of the bridge. MCL 254.317, and prohibited from establishing any other bridge or tunnel that would compete for revenues and tolls for the bridge.

allow Enbridge to adjust and use the excess design capacity in its 1,900-mile network of high-volume pipelines that run into and out of the Midwest,¹⁴ including Line 6B (now Line 78) located across the southern part of the Lower Peninsula to Sarnia and Detroit; Line 6B can be easily adjusted to handle up to 800,000 barrels per day (“bbl/day”)¹⁵ for far less money, without the MBA, Straits of Mackinac, and the current Line 5 that remains an unacceptable economic and ecological risk and that can be decommissioned over a relatively short period of time.

4. THE GOVERNOR’S TUNNEL AGREEMENT, INCLUDING PARAGRAPH G CONCERNING THE MBA, CANNOT BE IMPLEMENTED BECAUSE IT DOES NOT COMPLY WITH THE COMMON LAW PUBLIC TRUST DOCTRINE, THE 1955 GREAT LAKES SUBMERGED LANDS ACT, ART. 4, SEC. 52 OF THE 1963 MICHIGAN CONSTITUTION, AND THE MICHIGAN ENVIRONMENTAL PROTECTION ACT.

It is important for the MBA to understand that the State of Michigan, including the MBA and the authorizing statute, are subject to the public trust doctrine and law that applies to the Great Lakes and the soils under them. Like all of the other states, when Michigan joined the United States in 1837, the State of Michigan took title, absolutely, as sovereign for its citizens under the “equal footing” doctrine to all of the navigable waters in its territory, including the Great Lakes, and “all of the soils under them” below the natural ordinary high mark.¹⁶ All of these waters and the soils beneath them are held in and protected by a public trust.¹⁷ The public trust doctrine means that the state holds these waters and soils beneath them in trust for the public for the protection of preferred or dedicated public trust uses of navigation, fishing, boating, swimming, bathing, drinking water, and other recreation. As a general rule, there can be no disposition, transfer, conveyance, occupancy or use of any kind of these public trust waters and the soils beneath them, unless there is a statute or law that expressly authorizes the proposed disposition,

¹⁴ E.g., Enbridge anticipates construction for Phase II of the Line 61 Upgrade Project will be complete during the second quarter of this year. With completion of construction, Line 61 will have the infrastructure in place to transport up to 1.2 million barrels per day (“bbl/day”) of crude (the amount it was permitted, designed, built, and successfully tested to carry in 2009). The pipeline is currently carrying approximately 930,000 bbl/day. Ultimately, volumes transported on the pipeline fluctuate based on our customers’ needs. <http://www.enbridge.com/projects-and-infrastructure/public>.

¹⁵ The original capacity of Line 5 in the Straits was 180,000 bbl/day. That was later increased with State approval to 300,000 bbl/day. Recently, Enbridge manipulated pressure capacity of the line and increased the flow volume to 540,000 bbl/day. However, records over the years show that the volume is closer to 400,000 bbl/day. “A Scientific and Legal Policy Report on the Transport of Oil in the Great Lakes” <http://flowforwater.org/wp-content/uploads/2015/09/FINAL-FLOW-9-21-15-REPORT-ON-ACTION-PLAN-AND-COMMENTS.pdf>. While an alternative is not required to achieve the volume desired by Enbridge, these pipelines can be easily adjusted to accommodate most of the volume handled by Line 5. Studies show that similar adjustments can be made to assure continued, safe delivery of propane for areas served in the Upper Peninsula, and the transport of smaller volumes of crude oil from Michigan’s northern Lower Peninsula. “Eliminating the Line 5 Oil Pipelines’ Unacceptable Risk to the Great Lakes through a Comprehensive Alternatives Analysis and Systems Approach,” <http://flowforwater.org/wp-content/uploads/2015/12/FLOW-Composite-Report-12-14-15-FINAL-1.pdf>. In other words, Line 5 or a new massive tunnel to accommodate a new Line 5 is not necessary for the fundamental needs of Michigan residents, or for that matter Enbridge. When Enbridge doubled the design capacity of Line 6b across southern Michigan it testified before the Michigan Public Service Commission that the new line would meet all of its present and future needs. “FLOW Public Comments Objecting to Enbridge’s Application to DEQ & Corps for Anchoring Supports” <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>, In re Enbridge Energy, Limited Partnership Application Case No. U-17020, Pre-Filed Direct Testimony of Mark Sitek And Exhibits, p 25. https://www.michigan.gov/documents/mpsc/u-17020_01-31-13_569385_7.pdf.

¹⁶ *Shively v Bowlby*, 14 S. Ct. 548 (1894); *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); *State v Venice of America Land Company* 160 Mich 680 (1910); *Glass v Gackle*, 473 Mich 667 (2005).

¹⁷ *Id.*; see also *Obrecht v National Gypsum*, 361 Mich 299 (1961).

occupancy, or action and the statute contains and requires a consideration that the following standards for the narrow exception to the rule have been duly satisfied:¹⁸

- (1) The proposed disposition, occupancy, or action predominantly serves or enhances a public trust interest or interest (such as navigation, fishing, etc.), not a private one; and
- (2) The proposed disposition, occupancy, or action will not interfere with or impair the public trust waters, soils, habitat, wildlife like fish and waterfowl, or one or more of the public-trust uses.

Illinois Central Rd v Illinois (US S Ct, 1892); *Obrecht v National Gypsum Co.* (Mich S Ct, 1960).

Understanding the relationship between the MBA and the State of Michigan’s overarching public trust, constitutional and statutory legal requirements is critical because the MBA’s stand-alone powers and authority also do not satisfy our modern legal regime designed to protect the public interest and public trust resources. For example, the MBA Act exempts the actions of the authority to transfer public lands, bottomlands, and construct the bridge from “any approvals required from state boards or agencies.” This would not comply with these requirements today. Moreover, this exemption is closely tied to the bridge anchored in public trust soils for the purpose of carrying of the general public across the Straits of Mackinac. However, using the MBA Act to authorize the construction of a tunnel for a private pipeline would be inconsistent with the mandates, policies, and standards of the public trust doctrine, the GLSLA, Art 4, Sec. 52, the MEPA, and the banning of oil and gas drilling in the soils and bedrock under the Great Lakes.¹⁹

a. Act 10 of Public Act (“Act 10”) Easements for Public Utilities Over, Under or Through State Lands and State-owned Public Trust Bottomlands

The legislature enacted Act 10 in 1953 to authorize the state to grant easements over, though, under, and upon any and all lands belonging to the State, including “the unpatented lake bottomlands belonging to or held in trust,” such as the Straits of Mackinac. First, it should be noted that Act 10 only authorizes *easements, not leases* or conveyances, which when it comes to public trust bottomlands are extinguishable or revocable. Second, it is stressed that Act 10 does not contain the required public trust standards set forth at the end of Section 2, above. Third, the 1953 easement for the existing Line 5 in the Straits was granted without the required findings for the narrow exceptions set forth in Section 2 above. Fourth, the MBA ownership and lease to Enbridge under the proposed public-private partnership in Paragraph G of the Agreement is not authorized by the plain meaning of Act 10. Rather, if authorized at all, it would be subject to authorization for a conveyance or leasing of state public trust bottomlands under the provisions of the Great Lakes Submerged Lands Act, discussed immediately below.

b. Great Lakes Submerged Lands Act of 1955 (“GLSLA”): Limited Conveyances, Leases, Agreements, or Actions Over, on, in, Through, Soils and Bottomlands of the Great Lakes.

Two years after the passage of Act 10, the legislature enacted the GLSLA. As amended, the GLSLA prohibits any conveyance, lease, agreement, occupancy, use or other action in the waters or on, in, through or under the bottomlands of the Great Lakes, unless authorized by the Michigan DEQ pursuant to the public trust standards in the GLSLA and the common law of the public trust doctrine. Because Act 10 is limited to easements and the GLSLA applies to any conveyances, leases or other agreements and occupancy of these public trust bottomlands, Act 10 does not apply.

¹⁸ Id. p. 416.

¹⁹ GLSLA, MCL 324.32503(2).

As a threshold matter, the State and Enbridge must first obtain authorization under the GLSLA for the public-private partnership to establish a long-term agreement for the 99-year lease and occupancy agreement for a tunnel or pipeline in or through the soils and bottomlands of the Straits of Mackinac.

This part shall be construed to *preserve and protect the interests of the general public* in the lands and waters described in this section...to provide for the sale or lease or other disposition...or permit filling in [including dredging or removal of materials]...If it is determined by the department that the public or private use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, boating, or navigation or that the public trust in the state will not be impaired by those agreements use, sale, lease or other disposition.”²⁰

* * *

(4) Agreements for lands or water... described in section 32502 may be granted with local units of government for public purposes.²¹

Based on the GLSLA and its rules, the Governor, state agencies, and Enbridge have not sought or obtained authorization for the Second Agreement, any agreement with the MBA, or for any other action or use called for by the Second Agreement. While state officials or Enbridge may represent that no authorization or agreements require approval under the GLSLA consistent with the public trust doctrine standards, these representations are flatly wrong. The plain meaning of the GLSLA and the required authorizations to lease or dispose of or use public trust soils held in public trust cannot be avoided. In fact, it is a violation of the public trust doctrine and GLSLA to make such statements.

Moreover, because the legislature created the MBA to build the public Mackinac Bridge into the public trust bottomlands and soils of the Straits for the “interests of the general public” in these waters and soils as a substitute for ferry service, the Mackinac Bridge and the MBA are also subject to the public trust doctrine and GLSLA. No agreement or lease can be authorized for a tunnel leased for 99 years for Enbridge’s crude oil pipeline because (1) it is not for a recognized public trust purpose such as fishing, boating, navigation, and recreation, and (2) it will interfere with and impair navigation, fishing, and cause massive disruption to fish, habitat, and the Straits during construction. Using the MBA, as trustee and representative of the public to protect and preserve the bridge for the general public, for a primarily private purpose wholly unrelated to its statutory responsibility, the Second Agreement and subsequent agreements would violate the public trust doctrine and GLSLA. Moreover, under the GLSLA, the public trust soils and waters of the Great Lakes cannot be used for construction for a privately leased and operated tunnel and pipeline unless Enbridge proves under rule of law that there are no other feasible and prudent alternatives.²²

c. The Michigan Environmental Protection Act: Duty to Consider and Determine No Likely Effects or No Feasible and Prudent Alternatives.

Article 4, Sec. 52 of the Michigan 1963 Constitution mandates that the state legislature shall enact laws that protect the air, water, natural resources and public trust in those resources from pollution or impairment or risk of degradation or harm. The GLSLA represents a legislative enactment consistent with the protection of the public trust in the waters and natural resources of the State. So does the Michigan Environmental Protection Act of 1970 (“MEPA”).²³

²⁰ MCL 324.32502; see also 324.32503, 324.32504, 324.32505(4), 324.32512.

²¹ MCL 324.32505(4).

²² GLSLA Rule 1015. R 322.1015.

²³ MCL 324.1701 et seq.

Except for the public trust doctrine common law principles, which are irrevocable,²⁴ Article 4, Section 52 and the MEPA establish new duties and legal mandates than those that existed when the MBA was established in 1952. The Michigan Supreme Court ruled that the MEPA is the “legislative response to the constitutional commitment” mandated by Art 4, Sec. 52. The Courts have consistently ruled that the MEPA imposes a substantive duty on any public body or entity to prevent harm or degradation of water, natural resources, and public trust.²⁵ In addition, the MEPA requires agencies or any other public body (like the MBA) to consider and determine the potential and likely effects and feasible and prudent alternatives to the proposed action *before making any decision* to approve or authorize the action.²⁶

It is important to understand that the MBA and the state’s constitutional and legal duties to protect the paramount interests of the waters, natural resources, and public trust are critical to any decision by the MBA that would implicate it in the State and Enbridge Agreement to build a tunnel and new pipeline for Enbridge. To this end, the MBA must follow the duty to comply with public trust standards for the transfer of any public trust soils and bottomlands; the duty to comply with the GLSLA; the duty to comply with the MEPA and Art. 4, Sec. 52; and the duty to consider and determine no likely effects and to consider alternatives under the GLSLA and the MEPA.

The design of the public-private partnership between the MBA and Enbridge in Paragraph G cleverly exploits the MBA Act’s broad authority to assemble public lands and bottomlands,²⁷ exercise eminent domain,²⁸ and hide behind the exemption from any board or agency approvals.²⁹ The legal fact of the matter is that the MBA Act’s authority was expressly intended for the single mission and purpose in 1952 to build the Mackinac Bridge in and across the Straits of Mackinac. That mission has been accomplished. And since that time—over six decades ago—other laws have been understood to apply or new ones have been enacted. The underlying premise for using the MBA does not exist, because Paragraph G would use the Act for an entirely different and new objective, subject to new and continuing public trust, environmental, and other constitutional provisions, laws, and regulations. The most prudent decision or action the MBA can or should take is to reject the use of the MBA for these purposes, or at the very least work through the duties and exercise of due diligence imposed by the MBA Act, its heritage, and the laws of Michigan.

5. SUBSTANTIAL RISK OF POTENTIAL MASSIVE LIABILITY OF THE MBA AND STATE OF MICHIGAN

The MBA per MCL 254.302 is a public benefit corporation and an agency of the State of Michigan. It is an entity that can sue or be sued in its name for the purpose to provide and maintain a system of highways and bridges for the use and convenience of its inhabitants. Regardless of the potential for additional amending legislation allowing it to contract with a Canadian corporate entity for the purpose of building a non-transportation tunnel, MBA will own and ultimately be legally responsible for the executive oversight of the project during the proposed tunnel’s life time. Though it will be argued that through contract and lease, legal responsibility and responsibility for resultant damages will be delegated to the lessee, Enbridge coupled with appropriate indemnification and hold harmless provisions. Such representations are fantasy. In any situation of accident or negligent conduct, the MBA will be a named defendant and will be financially responsible for any damages not covered by Enbridge’s insurers.

²⁴ *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892).

²⁵ *Ray v Mason Count Drain Comm’r*, 393 Mich (1975).

²⁶ *Highway Comm’n v Vanderkloot*, 392 Mich 159 (1974).

²⁷ MCL 254.314.

²⁸ MCL 254.314.

²⁹ MCL 254.321.

Enbridge will respond that the entirety of its corporate assets will be subject to indemnification; however, this reality might only occur after years of litigation by the MBA and attempts by Enbridge to sequester assets to other non-reachable Enbridge entities. Thus, regardless of lease or contract, the MBA has a non-delegable fiduciary duty to the people of the State of Michigan to protect, oversee, and maintain any artificial structure, be it the bridge or a tunnel that rests on public trust protected bottomlands of the Great Lakes.

CONCLUSIONS AND RECOMMENDATIONS

First we must note the reality of the Governor's rush to judgment. It is obvious to the people of the State of Michigan that he has appointed some of you as new MBA members to do his and Enbridge's bidding. When you take or have taken your oath of office as a Michigan Bridge Authority member, your unwavering oath is controlled by your independent authority and obligations of the MBA Act. Your duty as trustees of the bridge and on behalf of the public trust in the Straits of Mackinac is owed to the people of Michigan and to them only. The Authority has a singular legislative purpose, to protect and maintain the Mackinac Bridge in perpetuity. You are now being asked by this lame duck governor and a Canadian corporation to violate your legislative mandate and violate the history and singular purpose of the MBA. But the legal reality is that you are not controlled by the Governor, MDOT, or any other official of Michigan. We would ask you to be true to your oath.

Accordingly, the MBA should reject any public private partnership or other agreement with Enbridge for the proposed tunnel or Line 5 or other privately-owned utilities. Moreover, if the MBA decides to entertain the proposal or an agreement, it should not consider or decide to negotiate unless and until it has conducted independent and comprehensive investigation (due diligence) and obtained independent studies and advice on all of the following:

1. Fiscal impacts on the current and future needs of the Mackinac Bridge and the MBA;³⁰
2. Completion of the geotechnical and other engineering studies, with accurate costs estimates, including worst-case scenario, economic damages, and exposure analyses and studies;
3. Impacts on existing infrastructure or scheduled decking and other routine and necessary maintenance of the Mackinac Bridge;
4. Constitutionality of a public-private partnership agreement, the commingling of the MBA revenues, obligations to repay existing or future bonds, and providing public lands, condemnation, or other property for the a primarily private purpose.³¹
5. Legality of whether the MBA can or should undertake the proposed project, provide lands, appropriations, and oversight, including the project as described in Paragraph G;
6. Potential and likely environmental impacts and risks to air, water, natural resources, public trust and health, and the potential impact;³²
7. Risks of losses or damages or liability of the MBA, the Bridge, the Straits of Mackinac from a worst-case scenario from the action or conduct of a public-private partnership or participation in the proposed conduct or project;³³

³⁰ The MBA still owes \$60 million on the debt assumed by the State of Michigan. Currently, the MBA must finance an estimated \$200 million in scheduled replacement of the decking structure under the spans of the travelled vehicular surface areas of the bridge.

³¹ E.g., Michigan Constitution of 1983, Art. 4, Sec. 30, Art 9, Sec. 18, Art. 3, Sec. 6.

³² E.g., Great Lakes Submerged Lands Act, Part 325r, NREPA, MCL 324.32501 et seq.; Mich Constitution, Art. 4, Sec. 52, Michigan Environmental Protection Act, Part 17, NREPA, MCL 324.1701 et seq.; *Highway Commission v Vanderkloot*, 392 Mich 159 (1974).

³³ For example, this would include far more insurance coverage and financial assurances than the current 1953 Easement or a tunnel and new Line segment described in Paragraph G of the Second Agreement. It would include the integrated or compounded potential liabilities of other utilities using the corridor for gas and electrical lines

8. Feasible and prudent alternatives that include existing crude oil pipelines, capacity, design, and adjustments, or the privately financed, application and compliance with law by Enbridge without unnecessarily implicating the MBA or Paragraph G to implement the proposed project.

Based on the above, FLOW submits that the MBA should reject negotiating or entering into any agreement with Enbridge for the proposal as described in Paragraph G. At the very least, this letter concludes that the MBA should postpone any decision to negotiate or enter into an agreement pursuant to Paragraph G of the Agreement or any similar or related action or conduct.

On behalf of FLOW, we thank you for the opportunity to provide these comments. Should you have questions or desire further information please advise.

Sincerely yours,



James M. Olson
President and Legal Advisor
FLOW



Elizabeth R. Kirkwood
Executive Director
FLOW

cc: Governor Snyder
Attorney General Schuette
MDEQ Director Grether
MDNR Director Creagh
Senator Peters
Senator Stabenow
Rep. Chatfield

based on a “worst-case” scenario study. It should analyze whether an indemnity to MBA and State of Michigan and taxpayers would be sufficient if coverage lapses, is exempt or inadequate coverage, or if the tunnel is closed, Enbridge goes bankrupt, or tries to assign the lease, defaults, or fails to make lease payments without ability to pay, or if the tunnel or pipeline line is abandoned, decommissioned, or no longer needed because of shifts from crude oil to renewable energy during the term of the lease.