



**FLOW REPORT ON THE INADEQUACY OF  
ENBRIDGE FINANCIAL ASSURANCES TO THE STATE OF MICHIGAN  
January 29, 2019**

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The Snyder Administration’s hurried effort to sign an agreement with Enbridge (including the following Enbridge entities – Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc., and Enbridge Energy Partnership, L.P.) to replace Line 5, the dual 20-inch pipelines transporting crude oil and natural gas liquids through the Straits of Mackinac, has left the State of Michigan with potential catastrophic and unfunded financial liabilities.

The recent agreements between Governor Snyder and Enbridge as well as the “lame duck” legislation (2018 PA 359) enacted by the Michigan Legislature in late December, allow the continued operation of the existing 66-year-old Line 5 pipeline for a period of 7 – 10 years, the estimated construction time required to design and build a tunnel and new pipeline system across the Straits of Mackinac.

To mitigate the threat of a release from a pipeline failure during that critical period, Governor Snyder, MDNR Director Keith Creagh and MDEQ Director Heidi Grether signed a “Second Agreement”<sup>1</sup> specifying, among other things, Enbridge’s obligation to provide financial assurance mechanisms that would ensure that Enbridge has the ability to pay for any environmental and economic damages that could result from a spill from Line 5.

A preliminary review of Enbridge’s financial assurances leaves many questions regarding the adequacy of Enbridge’s commitment under the “Second Agreement.” The questions include:

- Whether the Enbridge subsidiaries that are signatories to the “Second Agreement” are, in fact, insured;
- The lack of specification relating to the amount of each of the multiple financial assurances set forth in the agreement;
- The inadequacy of the limits of general liability policy Enbridge carries for Line 5;
- The terms, conditions and exclusions contained within the general liability insurance policy;
- The adequacy and reliability over time of other financial assurances mechanisms that Enbridge is allowing to substitute for insurance coverage; and,
- The overall financial picture today of a pipeline company with unfunded end of useful life decommissioning expenses for aged pipe lines like Line 5.

### **State Failed to Conduct a Risk Management Review**

In its rush to execute an agreement with Enbridge, the state failed to conduct a study that would evaluate the financial capacity of Enbridge to address a worst-case scenario for damages and claims that may result from an existing Line 5 failure. The purpose of a detailed quantitative and qualitative assessment of Enbridge’s capacity to perform in the event of a pipeline failure is make sure that Enbridge has the ready financial capacity to:

- Immediately address and remediate environmental and natural resources damages over the next seven to ten years;
- Pay for economic damages that citizens, businesses, and affected coastal communities may incur as a result of an oil pipeline spill; and
- Ensure that the State of Michigan is protected from future liabilities and expenses that third parties may bring against the state.

An appropriate examination of measures necessary to manage the risks and exposure state and local governments may face from pipeline failures is not a novel enterprise. Rather, it is an essential precaution necessary to evaluate the risks posed by pipeline failures.

In reviewing Enbridge pipeline projects within their state boundaries, Minnesota and Wisconsin retained experts and undertook comprehensive reviews of the adequacy of Enbridge’s financial assurances to cover damages and claims arising from a pipeline failure. In both states, Enbridge’s financial assurances were found to be deficient.

### **Minnesota Department of Commerce**

After the Minnesota Public Service Commission (“MPSC”) issued a “Certificate of Need” in June 2018 for the replacement of the Enbridge Line 3 project that traverses Northern Minnesota, the Minnesota Department of Commerce (“MDOC”) engaged several experts in environmental risk management and insurance including American Risk Management Resource Network, LLC.<sup>ii</sup>

Following a comprehensive review of Enbridge’s insurance coverage for the Line 3 project, Kathleen Finnegan, general counsel to the Minnesota Department of Commerce, stated that the MDOC “found no meaningful coverage for damages caused by oil spills.”<sup>iii</sup> Thereafter, the Minnesota Department of Commerce filed objections regarding the “*Specific Deficiencies of Enbridge Inc’s. Currently Effective General Liability Insurance Policies,*” concluding that

*[C]onsistent with its filings on July 30 and August 10, 2018, the Department continues to conclude that Enbridge Inc.’s current GL insurance coverage applicable to the Enbridge U.S. Mainline System and, potentially, a new Line 3, include significant exclusions for insurance coverage related to damages caused by a crude oil spill. Enbridge’s current policies with the exclusions and other limiting language will not comply with the terms and conditions in the Department’s insurance recommendations. Therefore, the Department continues to recommend that the Commission not approve the Company’s compliance filings related to the insurance condition.<sup>iv</sup>*

### **Dane County, Wisconsin**

Similarly, in response to a proposed new Enbridge pumping station in Wisconsin, Dane County Zoning and Land Use Committee retained American Risk Management Resources Network LLC to evaluate Enbridge’s proposed financial assurances to determine whether the County would be adequately protected.

In its report, *An Insurance and Risk Management Report on the Proposed Enbridge Pumping Station,*<sup>v</sup> the firm found that Enbridge’s General Liability insurance coverage did not “include specific insurance coverages for clean-up costs, restoration costs and natural resources damages normally associated with an oil spill.”

The report found that Enbridge did not carry Environmental Impairment Liability (“EIL”) insurance on Line 61. In contrast to the General Liability insurance policies which only apply to liability arising from property damage, EIL insurance policies contain specific insurance coverage for clean-up costs, restoration costs, and natural resources damages associated with an oil spill.

*An EIL policy designed specifically to cover claims arising from pollutants provides broader coverage for environmental losses than a GL policy does. A good quality EIL insurance specifically insures Cleanup Costs, Emergency Response Costs, Restoration Costs and Natural Resources Damages within the insuring obligations of the policy. GL policies do not reference these important elements of coverage which will always come into play as a source of damages in a pipeline spill.*

## **Inadequacies of Enbridge’s Financial Assurances to the State of Michigan**

Again, there is no evidence that the State of Michigan conducted a risk management and insurance review of any kind, nor does it appear that the State sought any assistance from qualified experts to determine whether the financial assurances Enbridge has proffered would, in fact, protect the State of Michigan and its natural resources as well as coastal communities, citizens, property owners, and businesses.

### **1. Limits of Liability**

The “Second Agreement” has one paragraph<sup>vi</sup> that addresses Enbridge’s obligations and responsibilities in the event of a pipeline failure, stating that Enbridge “will maintain in force financial assurance mechanisms that meet or exceed the \$1,878,000,000 estimate of Enbridge’s potential total quantifiable response liability for a worst-case discharge.” Rather than articulating the terms, conditions, and limitations of the financial assurance mechanisms with specificity, much of this paragraph merely stipulates Enbridge’s objections to the State commissioned report, *Independent Risk Analysis for the Straits Pipelines*<sup>vii</sup> and the methodologies used in determining the amount of response liability at \$1.878 billion dollars.<sup>viii</sup>

This estimate was determined by an analysis conducted by Michigan Technological University of a worst-case spill of 58,000 barrels of crude oil. The estimate does not include costs of irreversible damage to resources for other potential areas of damages, including impacts to human health, value-added commercial fish products, subsistence fisheries, and compensatory habitat costs.<sup>ix</sup> Nor does this estimate take into account continuing economic impacts to coastal communities and businesses in years subsequent to a pipeline failure.

A prior analysis, *Oil Spill Economics: Estimates of the Economic Damages of an Oil Spill in the Straits of Mackinac in Michigan*,<sup>x</sup> conducted by Dr. Robert Richardson, Department of Community Sustainability, Michigan State University, estimated the worst-case damages resulting from a spill of 59,500 barrels of crude oil at \$6.3 billion. This study estimates \$697.5 million in costs for natural resource damages and restoration and more than \$5.6 billion in total economic impacts to tourism, commercial fishing, municipal water systems, and diminution of coastal property values.<sup>xi</sup>

The three-fold difference in total liability results from the same estimates of crude oil loss in a worst-case event (<60,000 bbl.), but different assessments and categories of quantifiable loss. Importantly, both estimates are characterized as conservative by their own terms. The fact that the State of Michigan is putatively requiring an amount of financial assurance at the lower damage estimate of the two studies could result in a potential multi-billion dollar shortfall in the event of a pipeline failure.

But the potential inadequacy of the gross amount of financial assurance proffered by Enbridge is only one of many deficiencies in the Snyder Administration’s multiple agreements with Enbridge.

### **2. Enbridge’s Patchwork of Financial Assurance Mechanisms**

As previously indicated, there is no evidence that the State of Michigan undertook any risk analysis or comprehensive review of the adequacy of Enbridge’s proffered financial assurances in the event of a pipeline failure. The “Second Agreement” lacks basic details regarding the scope and limitations of Enbridge’s obligations with respect to financial assurances.

Under the “Second Agreement,” Enbridge is providing a variety of different financial assurance mechanisms that can be used in combination to meet the total coverage requirement of \$1.878 billion. These include:

- Cash
- Credit Facilities
- Other Resources Available (which may include accounts receivable)
- General Liability Insurance
- Surety Bonds
- Parent Affiliate Guarantees
- Other Financial Resources

Apparently, the Governor and the Directors of MDEQ and MDNR signed the Second Agreement on October 3, 2018 even though *the dollar amounts of these financial assurance were left blank*. Neither the copies of the agreement signed by State or Enbridge’s corporate officers set forth the amounts of financial assurance provided to the State but instead leave question marks (“?”) where the amounts should be stated.<sup>xii</sup>

**Appendix 3**  
**Enbridge Financial Assurance Verification Form for Calendar Year [Insert]**

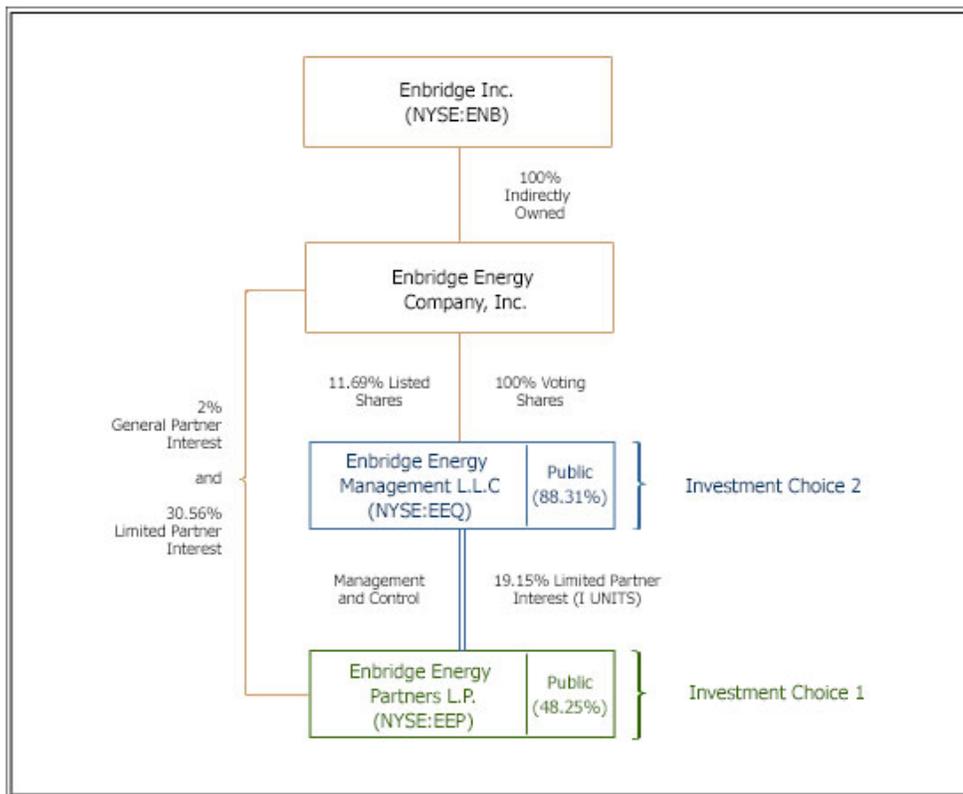
	<b>Enbridge Inc. (EI)</b>	<b>Enbridge Energy Partners, L.P. (EEP)</b>	<b>Total</b>	<b>Timing of Access (business days - estimate)</b>
Cash	\$ (as per EI’s consolidated Q_20__ balance sheet- cash & cash equivalents)		\$	1 day
Credit Facility (available liquidity as at [date]) Note 1	\$	\$	\$	1-3 days
Other Resources Available in 30-60 Days (explain)	\$ (as per EI’s consolidated Q_20__ balance sheet – accounts receivable and other)		\$	30-60 days
<b>Total Short-Term</b>	\$	\$	\$	
Insurance	General Liability Insurance, includes Time Element Reporting Pollution (sudden and accidental) coverage currently US\$[Insert] Note 2			Note 3
Surety Bonds				
Parent/Affiliate Guarantees (from Parent Co. to Authorization Holder)				
Other Financial Resources (explain)				
<b>Total Other</b>				

Paragraph I.J. of the “Second Agreement” also allows Enbridge to unilaterally change the mix of financial assurance mechanisms, providing that “Enbridge will file with the State updated financial assurance information in a format similar to that provided in Appendix 3.” Importantly, the Second Agreement explicitly states that “[T]he insurance amount is reviewed and renewed on an annual basis and is subject to *insurance market conditions and experience that may impact the breadth and limit of coverage available*.”<sup>xiii</sup>

3. Enbridge Inc., the Parent Company, is not a Signatory to the Second Agreement

Enbridge Inc. is an energy infrastructure company based in Calgary, Alberta operating in five sectors - Liquids Pipelines, Gas Transmission and Midstream, Gas Distribution, Green Power and Transmission, and Energy Services.<sup>xiv</sup> Enbridge Inc. lists 51 subsidiaries<sup>xv</sup> who may or may not be insured under Enbridge’s general liability coverage. The signatories to the second agreement are Enbridge Energy,

Limited Partnership, Enbridge Energy Company, Inc., formerly known as Lakehead Pipe Line Company, Inc., and Enbridge Energy Partners, L.P. It is unknown whether any of these subsidiaries are named insureds. Absent a careful review of Enbridge Inc. as well as its subsidiaries who are the actual signatories to the Second Agreement, the State of Michigan cannot ascertain the extent and limits of insurance coverage available in the event of a Line 5 failure.



#### 4. Enbridge’s General Liability Insurance Provides Limited Coverage

General Liability insurance policies insure “Property Damages” and do not typically include specific coverages for remediation and restoration costs or natural resources damages that would be a consequence with an oil spill. Additional insurance coverage under “Environmental Impairment Liability” (“EIL”) insurance is required to cover the full array of damages that would be associated with a Line 5 failure. As stated by American Risk Management Resources Network, “[T]he sole purpose of EIL insurance is to fill insurance coverage gaps created by the ever-present pollution exclusions in property and liability insurance policies.”<sup>xvi</sup>

In Wisconsin, Dane County’s insurance expert determined that Enbridge did not purchase EIL insurance on Line 61 and that Enbridge’s existing General Liability insurance would not provide specific coverages necessary to fully protect the citizens of the county in the event of a spill.

Enbridge’s Financial Assurance Verification Form indicates that its General Liability insurance includes “Time Element Reporting Pollution (sudden and accidental)” coverage. The scope of the TERP coverage needs to be carefully determined. Such policy provisions apply to damages from releases that begin and end in a limited time period specified in the policy and which also must be reported to an insurer within a

defined time period.<sup>xvii</sup> The coverage would typically not apply to gradual leaks over time and also may not cover remediation and restoration costs or businesses losses to third-parties.

#### 5. The State of Michigan Is Not Named as an “Additional Insured”

The State of Michigan should be designated as a “Named Insured” or as an “Additional Insured” on Enbridge’s General Liability and EIL insurance policies. The former would allow the State of Michigan to submit claims directly for any damages that may occur from a Line 5 failure. The latter would protect the State of Michigan by requiring the insurer to defend the State of Michigan from claims brought by third parties. Protection from third-party claims is essential given the fact that the State of Michigan may be named as a defendant because of its extraordinary and rushed effort to enter into agreements with Enbridge that authorized the continued operation of Line 5 in the open waters of the Great Lakes.

Importantly, without being designated as an additional named insured, the State of Michigan would have no direct right of recovery against an insurer but instead would only have a derivative right to a recovery through Enbridge or one of its subsidiaries, assuming the subsidiary was an insured party.

#### 6. Enbridge’s Insurance Coverage will Likely be Insufficient in the Event of a Prior Claim(s)

Enbridge’s general liability coverage ostensibly covers its entire network of energy infrastructure and may (or may not) also cover insured occurrences for some or all of its subsidiaries. In the event of a failure in another state (or another pipeline within Michigan), Enbridge’s policy limits may be insufficient to cover Michigan-based claims. Accordingly, the State of Michigan should ensure that Enbridge’s insurance coverage limits are available in Michigan at all times and are unaffected by potential claims in other states.

### **Other Market Risk Factors Must be Evaluated**

The financial assurances that Enbridge has provided the State of Michigan are vulnerable to future market forces and trends. As the world’s energy sectors transition from fossil fuels, Enbridge’s business model will be impacted, and the viability of its financial assurance mechanisms may also be impaired. Reliance on “credit facilities” surety bonds, and “parent affiliate guarantees” may leave the State increasingly vulnerable changing market conditions for the Enbridge business model.

These new market trends are disruptive and accelerating.

- Recent petroleum sector forecasts by firms specializing in energy trends like Bloomberg, Navigant, and Goldman Sachs, predict that the transition to electric vehicles will accelerate quickly with a corresponding, precipitous drop in demand for transportation fuels. Reduction in oil demand from EV penetration has already been noted by the International Energy Agency.<sup>xviii</sup>
- The world’s major auto manufacturers are validating these predictions. General Motors, VW, Volvo, and others are making clear that petroleum-free electric drivetrains will dominate their future manufacturing investments and that future product offerings will not use transportation fuels.<sup>xix</sup>
- At the same time, sovereign nations are intent on extinguishing demand for petroleum. Nine countries and numerous cities around the world have announced their intentions to ban future sales and, in some cases, the use of vehicles with internal combustion engines.<sup>xx</sup> Ireland has gone further, announcing that it will divest its sovereign interest in all oil, gas and coal.<sup>xxi</sup>

- Seven international oil companies – Exxon Mobil, Conoco Phillips, Statoil, Koch Industries, Marathon, Imperial Oil and Royal Dutch Shell – will not need Enbridge’s future pipeline services as they have announced that they are writing off tar sand assets in Alberta.<sup>xxii</sup>

Fundamental changes to a fossil fuel based business model are exemplified by looking at the saga of Peabody Coal Company. Peabody Coal went from an award-winning company to a bankrupt company within a five-year period of time due changes in the demand for coal as a source of fuel. It is possible that similar changes in demand for oil derived from tar sands could face a similar future. These contingencies which could dramatically affect the ability of Enbridge entities to pay for a release of oil into the Great Lakes were apparently not considered before the Second Agreement was entered into. They need to be considered as part of a risk management plan for the State.

### **Meaningful Amounts of Environmental Impairment Liability Insurance Should Be Required**

Expert reviews by both Minnesota and Wisconsin found that the General Liability insurance coverage carried by Enbridge including the “Time Element Reporting Pollution (sudden and accidental)” coverage was deficient and provided inadequate financial protection to their respective states. The expert reviews stress the importance of requiring the purchase of Environmental Impairment Liability (“EIL”) insurance to prove the operation of the subject pipeline was an insurable risk as determined by insurance underwriters. EIL insurance also provides more reliable insurance coverage for pollution related losses that is solely depended on exclusions to pollution exclusions to determine if a claim is covered or not, as is the case with all General Liability type insurance policies today. Both Dane County and Minnesota review panels recommended the purchase of EIL insurance as a condition of building a new pipeline through their lands. There is no similar requirement in Michigan on the proposed Line 5 and there should be.

Upon consultation with a national expert in environmental insurance availability, in his opinion the operating Line 5 is likely uninsurable in the environmental insurance market place today at any price due to the location and age of the line and it’s known degradation over time. The likely unavailability of EIL insurance would reflect a determination that the risks posed by the continued operation of Line 5 are too great.

For these reasons, it is imperative that the State of Michigan retain qualified experts to determine the adequacy of Enbridge’s financial assurances and to make appropriate recommendations regarding the magnitude of the financial risks posed by Line 5.

<sup>i</sup> Paragraph I. J., page 8. <https://mipetroleumpipelines.com/document/second-agreement-between-state-michigan-and-enbridge-energy-line-5-michigan>

<sup>ii</sup> MDOC news release, September 11, 2018. <https://content.govdelivery.com/accounts/MNCOMM/bulletins/1b655ef>

<sup>iii</sup> <https://www.jsonline.com/story/news/politics/2018/09/04/minnesota-officials-enbridge-lacks-insurance-pipeline-spills/1192193002/> (Accessed January 13, 2019).

<sup>iv</sup> MDOC, *Supplemental Filing by the Minnesota Department of Commerce Regarding Specific Deficiencies of Enbridge Inc’s. Currently Effective General Liability Insurance Policies*, August 31, 2018.

[http://www.thewheelerreport.com/wheeler\\_docs/files/0831350puc.pdf](http://www.thewheelerreport.com/wheeler_docs/files/0831350puc.pdf)

<sup>v</sup> American Risk Management Resources Network LLC., *An Insurance and Risk Management Report on the Proposed Enbridge Pumping Station*, April 8, 2015. [http://350madison.org/files/2015/10/2015\\_4\\_-insurance-consultant-report\\_d-dybdahl.pdf](http://350madison.org/files/2015/10/2015_4_-insurance-consultant-report_d-dybdahl.pdf)

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- <sup>vi</sup> Paragraph I. J., page 8. <https://mipetroleumpipelines.com/document/second-agreement-between-state-michigan-and-enbridge-energy-line-5-michigan>
- <sup>vii</sup> G. Meadows, et al., *Independent Risk Analysis for Straits Pipelines*, Executive summary, Michigan Technological University, September 15, 2018. <https://mipetroleumpipelines.com/document/independent-risk-analysis-straits-pipelines-final-report>
- <sup>viii</sup> “Enbridge strongly disagrees with the methods and conclusions of the Independent Risk Analysis report, and nothing in this Second Agreement shall be construed to constitute Enbridge’s acceptance of those methods and conclusions.”
- <sup>ix</sup> G. Meadows, et al., *Independent Risk Analysis for Straits Pipelines*, Executive summary, Michigan Technological University, September 15, 2018, pages 31-32. <https://mipetroleumpipelines.com/document/independent-risk-analysis-straits-pipelines-final-report>
- <sup>x</sup> R. Richardson, et al., *Oil Spill Economics: Estimates of the Economic Damages of an Oil Spill in the Straits of Mackinac in Michigan*, prepared for For Love of Water (FLOW), May 2018. [https://flowforwater.org/wp-content/uploads/2018/05/FLOW\\_Report\\_Line-5\\_Final-release-1.pdf](https://flowforwater.org/wp-content/uploads/2018/05/FLOW_Report_Line-5_Final-release-1.pdf)
- <sup>xi</sup> Ibid.
- <sup>xii</sup> Available at <https://mipetroleumpipelines.com/document/second-agreement-between-state-michigan-and-enbridge-energy-line-5-michigan> (Accessed January 12, 2019).
- <sup>xiii</sup> Ibid.
- <sup>xiv</sup> <https://finance.yahoo.com/quote/ENB/profile?p=ENB>
- <sup>xv</sup> [https://www.google.com/search?q=enbridge+subsidiary+companies&rlz=1C1CHBD\\_enUS831US831&oq=enbridge+subsidiary&aqs=chrome.2.69i57j0l4.11979j0j7&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=enbridge+subsidiary+companies&rlz=1C1CHBD_enUS831US831&oq=enbridge+subsidiary&aqs=chrome.2.69i57j0l4.11979j0j7&sourceid=chrome&ie=UTF-8)
- <sup>xvi</sup> American Risk Management Resources Network LLC., *An Insurance and Risk Management Report on the Proposed Enbridge Pumping Station*, April 8, 2015, Page 15. [http://350madison.org/files/2015/10/2015\\_4\\_-\\_insurance-consultant-report\\_d-dybdahl.pdf](http://350madison.org/files/2015/10/2015_4_-_insurance-consultant-report_d-dybdahl.pdf)
- <sup>xvii</sup> See IRMI, *The Sudden and Accidental Coverage Myth*, June 2018. <https://www.irmi.com/articles/expert-commentary/the-sudden-and-accidental-pollution-coverage-myth> (accessed January 12, 2019).
- <sup>xviii</sup> *Global Oil Demand Under Growing Threat From Electric Cars, Cleaner Fuels*, <https://www.reuters.com/article/us-oil-ia-demand/global-oil-demand-under-growing-threat-from-electric-cars-cleaner-fuel-idUSKCN1NI005> (Accessed January 26, 2019).
- <sup>xix</sup> *GM’s Path to an ALL Electric, Zero Emission Future* <https://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2018/mar/0307-barra-speech.html> (Accessed January 26, 2019).
- <sup>xx</sup> <https://qz.com/1341155/nine-countries-say-they-will-ban-internal-combustion-engines-none-have-a-law-to-do-so/>
- <sup>xxi</sup> <https://www.reuters.com/article/us-ireland-fossilfuels-divestment/irish-parliament-passes-bill-to-force-sovereign-fund-to-divest-from-fossil-fuels-idUSKBN1K22AA>
- <sup>xxii</sup> <https://environmentaldefence.ca/2017/03/14/seven-oil-multinationals-pulling-canadas-tar-sands/>