



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

May 13, 2020

***Via E-filing***

Ms. Lisa Felice  
Michigan Public Service Commission  
7109 W. Saginaw Hwy.  
P. O. Box 30221  
Lansing, MI 48909

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following is attached for paperless electronic filing:

- For Love of Water (FLOW) Public Comment on Enbridge Energy Limited Partnership Request for Declaratory Relief in its Application for Approval Under Public Act 16 of 1929; and
- Proof of Service

Sincerely,

James Olson  
[jim@flowforwater.org](mailto:jim@flowforwater.org)

xc: Parties to Case No. U-20763

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief

U-20763

**FOR LOVE OF WATER (FLOW) PUBLIC COMMENT ON ENBRIDGE ENERGY, LIMITED  
PARTNERSHIP REQUEST FOR DECLARATORY RELIEF ON ITS APPLICATION FOR APPROVAL  
UNDER PUBLIC ACT 16 OF 1929<sup>1</sup>**

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<sup>1</sup> This Public Comment and Response is submitted by James Olson, President and Legal Advisor, and Elizabeth Kirkwood, Executive Director, For Love of Water (FLOW). 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. Since late 2013, FLOW has investigated, researched, and submitted more than a dozen reports addressing the risks of the now 67-year-old Line 5, the proposed tunnel and tunnel pipeline in the subsurface deep beneath the Straits, analyses of alternatives to Line 5, worst-case scenarios, predicted economic damage and loss, and violations of the state's agreement with Enbridge, and the violation of state laws, including the strict protections for the public trust waters and bottomlands beneath the waters of the Straits of Mackinac, Lake Huron, and Lake Michigan. All of these reports and appendices are available for viewing on FLOW's website, [www.ForLoveOfWater.org](http://www.ForLoveOfWater.org).

## TABLE OF CONTENTS

<b>I. Introduction .....</b>	<b>1</b>
A. Interest of Commenter For Love of Water (FLOW) .....	4
B. Proceedings Related to Applicant’s Request for Declaratory Rulings .....	4
C. Background Facts of Commission’s 1953 Order Approving the Siting of the Line 5 Based on the Specific Design Capacity, Requirements, Location Coordinates, and Conditions in the 1953 Easement .....	6
D. Allegations and Facts Regarding Declaratory Ruling Allegations .....	10
<b>II. Legal Analysis .....</b>	<b>14</b>
A. Enbridge Energy, Limited Partnership is Not a Successor in Interest to the Original 1953 Easement and the MPSC Order; Therefore, Enbridge Must Obtain A Certificate of Necessity (“CON”). .....	15
B. Enbridge Cannot Shoehorn Its New Proposed Tunnel and Subterranean Pipeline Request into the 1953 MPSC Order and the Express Conditions Incorporating the Design, Capacity, Nature, and Location of the Lakehead Lakebed Dual 20-Inch Pipelines in the Straits of Mackinac.....	17
C. Enbridge Cannot Separate the Tunnel from the “Pipeline” within the Meaning of Act 16 and Rule 447 Because the Tunnel Involves New Tunnel and Pipeline Construction, Extensions, Facilities, Structures, Fixtures, and Equipment. ....	19
D. Enbridge Does Not Have the Legal Right or Property Interests in Accordance with Act 16 and Michigan Law that Applies to the State-Owned Bottomlands of the Great Lakes Held in Public Trust for the Citizens of Michigan. ....	20
1. State Land Public Utility Easements, Section 2129 Part 21, MCL 324.2129 (formerly Act 10 of 1953).....	22
2. The Great Lakes Submerged Lands Act.....	23
3. Conclusion and Requested Action .....	25

## I. INTRODUCTION

Enbridge requests “to the extent required by law” that the Michigan Public Service Commission (“Commission”) grant Enbridge the authority for its project known as (through an absurd and unduly narrow and self-serving description) the “Straits Line 5 Replacement Segment (the ‘Project’).” In the alternative, Enbridge requests the Commission to “confirm that it already has the requisite authority from the Commission” to construct the “Straits Line 5 Replacement Segment.” In other words, Enbridge asks the Commission to rule that a new massive, unprecedented proposed one-half billion dollar tunnel<sup>2</sup> *and* pipeline infrastructure along a new route some 60 to 250 feet below the Straits of Mackinac falls outside the Commission’s review, because a former Commission’s 1953 Order approved the siting of the existing Line 5 dual pipelines on the lakebed of the Straits of Mackinac—67 years ago.<sup>3</sup>

The Commission established a public comment period pursuant to Order U-20763-0022, expressly limited to the Applicant Enbridge’s request for declaratory rulings in Section IX of its Application. FLOW submits this Public Comment into the record pursuant to this Order. All other allegations and requests set forth in the Applicant’s Application are subject to further proceedings under Act 16 and its Rules.

Applicant Enbridge’s request must be denied.

Act 16 prohibits any person from obtaining the legal right to locate and construct a public utility pipeline and related infrastructure, including facilities, structures, fixtures and equipment

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<sup>2</sup> Enbridge estimates a conservative cost of \$500,000,000 to construct this unprecedented tunnel and pipeline infrastructure.

<sup>3</sup> In the matter of the application of Lakehead Pipeline Company, Inc., Case No. D-3903-53-1, Order, March 31, 1953 (hereafter “1953 Order”); Supplemental Order, Case No. D-3903-53-2, May 29, 1953 (hereafter “Supplemental 1953 Order”) (see Ex A-5 to Applicant Enbridge’s Application).

related to a proposed project like the tunnel and tunnel pipeline at the north and south shores and under the Straits of Mackinac. To locate and construct a pipeline infrastructure project under Act 16, the Commission must determine that a project is necessary for the State of Michigan, that there are no reasonable alternatives, and that the project is in the public interest.

In addition, the location, magnitude, and nature of the proposed tunnel and pipeline infrastructure for the Straits allow no resemblance to the specific location and design incorporated into the former Public Utility Commission's 1953 Order that approved the existing dual pipelines 67 years ago.

Further, the tunnel and tunnel pipeline are one and the same pipeline infrastructure project that requires the Commission's full review, consideration, and decisions as required by Act 16 and provided by its Rules.

Moreover, the Applicant does not have a lawful property interest in the public trust bottomlands of the Straits of Mackinac that connect Lake Huron and Lake Michigan, and unless this Commission grants full authority under Act 16, Enbridge has no legal right to locate or construct the entire infrastructure project.

Finally, the contours of necessity, the public interest, and the alternative considerations required by Act 16 are dramatically different from those considerations in 1953. In 1955, the Legislature passed the 1955 Great Lakes Submerged Lands Act ("GLSLA"), which prohibits any deed, easement, or lease of the bottomlands of the Great Lakes without authorization from the State very narrow circumstances that promote a public trust purpose, or do not interfere with or impair the public's paramount rights in navigation, fishing, bathing and sanitation, boating,

swimming, and recreation.<sup>4</sup> Then in 1963, people of Michigan adopted a new Constitution. Article 4, Section 52 of the 1963 Constitution declared that “the air, water, and natural resources” are a “paramount public concern,” and mandated that the Legislature “shall provide by law for the protection of the air, water, and natural resources from pollution, impairment, and destruction.” In 1970, the Michigan Environmental Protection Act (“MEPA”) was enacted in response to this constitutional mandate.<sup>5</sup> The MEPA imposes a duty on the state government to prevent environmental degradation and to fully consider the likely effects and the feasible and prudent alternatives of a proposed project.<sup>6</sup> The common law public trust doctrine that imposes a solemn and perpetual duty on the State as trustee to protect the waters and bottomlands of the Great Lakes.<sup>7</sup> In 2020, intensified by the COVID-19 global pandemic and the existential impacts of climate change, the contours of the public interest are more than ever and remain inextricably connected and shaped by decisions about water, energy, food, health, quality of life, and the economy.

Based on the following analysis and comments, FLOW requests that this Commission deny the Applicant’s Request for Declaratory Relief, and that this proceeding go forward with a full and comprehensive review and determinations of the necessity, alternatives, and overarching

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<sup>4</sup> Id.

<sup>5</sup> MCL 324.1701 et seq.

<sup>6</sup> *Ray v Mason County Drain Comm’r*, 393 Mich. 294(1975); *Vanderkloot v State Highway Dept.*, 392 Mich. 159 (1974).

<sup>7</sup> *Illinois Central R Rd v Illinois*, 146 U.S. 38 (1892); *Obrecht v National Gypsum Co.*, 361 Mich. 399 (1960); *Glass v Goeckel*, 473 Mich. 667 (2005); MCL 324.32501 et seq.

public interest under Act 16 and other laws and legal principles that define the outcome of Enbridge’s proposed tunnel and tunnel pipeline infrastructure project under the Great Lakes.

**A. Interest of Commenter For Love of Water (FLOW)**

For Love of Water (“FLOW”) is a Michigan-based Great Lakes law and policy center that provides independent research, analyses, studies, reports and comments to government boards and officials, leading decision-makers, and the public throughout the Great Lakes Basin. The central purpose of its work is to protect the integrity of the water, bottomlands, natural resources and ecosystem in the Great Lakes Basin. This includes the protection of the health and quality of life of the people and communities who depend on the integrity of these waters.<sup>8</sup>

**B. Proceedings Related to Applicant’s Request for Declaratory Ruling**

On April 17, 2020, Enbridge Energy, Limited Partnership (“Applicant Enbridge”<sup>9</sup>) filed an Application seeking Approval by the Michigan Public Service Commission (“Commission”) for the following pipeline infrastructure project:

- (1) [T]he “Project,” which will replace the current crossing—consisting of two, 20-inch diameter pipes [dual pipelines—with a single, 30-inch diameter pipe (the ‘replacement’ pipe segment) located within a concrete-lined tunnel below the lakebed of the Straits.

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<sup>8</sup> FLOW has filed a Petition for Permissive Intervention, May 1, 2020, U-20763-0022, that more fully describes its interests and special and unique expertise and perspective. The petition is incorporated by reference.

<sup>9</sup> Applicant Enbridge Energy Limited Partnership is hereinafter referred to as “Applicant” or “Applicant Enbridge.” The confusion surrounding these questions of fact surrounding the scores of Enbridge Energy companies and subsidiaries that may be involved with the ownership or operation of the existing Line 5 pipeline are better addressed through full factual development and discovery in a full proceeding on the merits of Applicant’s Application. Further, it is emphasized that the 1953 Easement incorporates the specific location and requirements and conditions of the existing 67-year-old pipeline, including the dual pipelines in the Straits of Mackinac. Table 1, *infra*, and accompanying text.

- (2) In addition to relocating the replacement pipe segment within the tunnel, the Application seeks approval to operate and maintain the replacement pipe segment as part of Line 5.
- (3) Enbridge also proposes to tie-in, operate, and maintain approximately 0.4 to 0.8 miles of pipe to connect the replacement pipe segment to Enbridge existing Line 5 on both sides of the Straits.
- (4) The Project will also include all the associated fixtures, structures, systems, coating, ... protective measures, equipment and appurtenances relating to the replacement segment and connection to the existing Line 5 pipeline.<sup>10</sup>

However, in an attempt to avoid the inseparable and direct physical and operational relationship between the location of the pipeline and the tunnel and full review of the true proposed project, the Applicant seeks to exclude the tunnel proposed to be sited 60 to 250 feet below the Straits.

The Project as described to the Commission does not include the tunnel itself, which is the subject of separate applications addressed to other state and federal agencies described below.<sup>11</sup>

To avoid the Commission's full review and decision based on proceedings, including participation by interested persons and organizations, Applicant Enbridge has made the following Request for Declaratory Relief:

- (1) Enbridge requests a declaratory ruling pursuant to Section 263 of the Administrative Procedures Act, MCL 24.263, and Rule 448, R 792.10448 or other finding, that Enbridge already has the requisite authority needed from the Commission for the Project based on the Commission's grant of authority for Line 5 in its 1953 Order, because the Project involves no more than continuing to operate Line 5 by replacing and relocating one four-mile segment across the Straits.

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<sup>10</sup> These four elements of the "Project" are described in paragraph 3, Enbridge Application for Commission Approval (hereafter "Application"), dated April 17, 2020; see also, Application, VI., paragraphs 17-22, pp. 8-10.

<sup>11</sup> *Id.*



(2) [T]he project does not involve a proposed new construction or extension of a pipeline that has not already been authorized by the 1953 Order pursuant to Rule 447, R 792.10447.<sup>12</sup>

**C. Background Facts of Commission’s 1953 Order Approving the Siting of the Line 5 Based on the Specific Design Capacity, Requirements, Location Coordinates, and Conditions in the 1953 Easement**

The Applicant obtained specific approval for the 1953 public utility easement granted by the Department of Conservation (now Michigan Department of Natural Resources “MDNR”) under 1953 Act 10 (now Section 2129, MCL 324.2129) and an corresponding order by the Michigan Public Service Commission (“MSPC”) to locate the pipelines across the open waters and public trust bottomlands of the Great Lakes at the Straits of Mackinac. The 1953 Easement expressly included the construction design, specifications, location descriptions, and conditions for the dual 20-inch diameter pipelines located on the lakebed of the Straits. Pages two and three of the 1953 Easement provided exact longitudinal and latitudinal locations for the easterly and the westerly located Line 5 pipeline infrastructure. The 1953 MPSC Order included similar express terms and conditions about the pipeline infrastructure and location: “the Lakehead Pipe Line Company, Inc. (Lakehead) . . . filed with this commission and application requesting approval of the location and construction of the 30” O. D. Welded steel pipe line including 20” O.D. welded steel pipe lines across the Straits of Mackinac. . .” Such exact locations matter in legal documents because the State of Michigan only granted Lakehead conditional use of its public trust lands and waters. In sum, the 1953 Easement and the corresponding 1953 MPSC Order authorize the dual pipeline infrastructure siting limited to the exact location on the lakebed floor.

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<sup>12</sup> Application, Section IX, paragraphs 38-45, pp. 15-17, Relief, subparagraph G, p. 19.

Nothing in the Commission's 1953 Order contained approval or even consideration for the location and construction of a deep subsurface tunnel and tunnel pipeline. The history of the authorization and building of the current Line 5 pipeline only reinforces this critical point: The Michigan Petroleum Pipeline Task Force July 2015 Report explains that as a threshold matter, Enbridge's successor, Lakehead Pipe Line Company, had to "convince[] the Michigan Legislature to enact a new law, 1953 PA 10, delegated authority to the Conservation Commission to grant public utility easements across state-owned public lands," including the unpatented state-owned "bottomlands, for the purpose of constructing, operating and maintaining pipelines and other public utilities." It was under that delegated authority, in April 1953, that the Conservation Commission granted a Straits of Mackinac Pipeline Easement to Lakehead, which "authorized the construction, operation and maintenance of the Straits Pipelines on state-owned bottomlands, ***subject to specified terms and conditions***" (emphasis added). None of the specifications and conditions mentioned a subterranean pipeline:

## Comparison of the 1953 MPSC Order and Easement and the 2020 Enbridge MPSC Application

Express Terms and Conditions of 1953 Easement & MPSC Order	1953 MPSC Order Incorporating 1953 Easement	2020 MPSC Application
Nature of Pipeline Infrastructure	two, 20-inch diameter pipes in specific location	single, 30-inch diameter pipe in a 21-foot diameter tunnel
Location of Pipeline Infrastructure	On lakebed floor of public trust bottomlands owned by the State of Michigan as trustee; pipelines are 1,200 foot apart from each other.	60 to 250 feet below the lakebed floor in public trust soils owned by the State of Michigan as trustee (NOTE: Map on page 7 of Application illustrates that this single pipeline is not in the exact same location as the 1953 Order)

Table 1. Description of 1953 Order and Easement for Line 5 and 2020 Proposed Tunnel and Tunnel Pipeline.

Enbridge readily admits that the proposed tunnel and pipeline fall outside the 1953 Easement: “[T]he replacement pipe segment will not be placed within the precise easement that existed in 1953.”<sup>13</sup> Moreover, the .4 to .8-mile tie-ins on the north and south sides of the Straits constitute new locations and extensions for construction of the new 30-inch pipeline extension to the existing 30-inch diameter pipeline.

The 2018 DNR Easement to the Mackinac Straits Corridor Authority (hereinafter “2018 DNR Easement” or “tunnel easement”) that was assigned to Applicant confirms Enbridge’s problem and reveals different longitudinal and latitudinal locations along with different

<sup>13</sup> Application, paragraph 45, p. 17.

horizontal locations since the new proposal oil pipeline is far beneath the lakebed floor, ranging between 60 and 250 feet. Enbridge then argues that “very close geographic proximity to the existing location of the Dual Pipelines” is good enough, and therefore, should be “tied to the existing and previously approved Line 5 at both sides of the Straits.”<sup>14</sup>

Securing the 1953 MPSC Order and 1953 Easement to locate Line 5 in the Straits of Mackinac was fundamental to Lakehead Pipe Line Company’s project because this route across the UP, the Straits, and down to Sarnia, Canada, was shorter and less expensive than locating a pipeline down and around Chicago, and across Indiana and southern Michigan to Sarnia.<sup>15</sup> The capacity of the proposed Line 5 in 1953 was originally 180,000 bbl./day with a maximum capacity of 300,000 bbl./day. The MPSC approved additional increases to 300,000 bbl./day. Today, Enbridge operates at 540,000 bbl./day (80 percent above the originally approved design capacity) by reducing adding anti-friction equipment and changing the number and locations of pump stations along Line 5.<sup>16</sup> Some of these stations and devices were approved by the Commission at the same time (8 to 10 years ago) Enbridge sought and the Commission approved the location of

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<sup>14</sup> *Id.*

<sup>15</sup> Ironically, in 1969, the Commission approved Enbridge’s Line 6b with a design capacity of 400,000 bbl./day across southern Michigan to Sarnia. Applicant alleges that the 1953 Order established a public interest in Line 5, and that this was affirmed by *Lakehead Pipeline Co. v Dehn*, 340 Mich, 37 (1954). The allegation is incorrect. *Dehn* involved the approval of the Commission for the exercise of eminent domain on an entirely different segment of Line 5, and has no bearing on the Commission’s 1953 Order, specifically, addressing the Straits and the necessity for approval to acquire the legal description of the 1953 public utility easement on the lakebed of state-owned public trust bottomlands.

<sup>16</sup> Appendix A, pp. 1-6, FLOW Report, Sept. 30, 2015. <https://flowforwater.org/wp-content/uploads/2015/09/FINAL-FLOW-9-21-15-REPORT-ON-ACTION-PLAN-AND-COMMENTS.pdf>.

the replacement for Line 6b (now Line 78) after the Kalamazoo River disaster, increasing the design capacity of Line 6b from 400,000 bbl./day to 800,000 bbl./day.<sup>17</sup>

#### **D. Allegations and Facts Regarding Declaratory Ruling Allegations**

Applicant alleges that the tunnel is subject to separate applications from other state and federal agencies other than the Commission. Applicant refers to the lawful authorization, approvals, and permits required for the 2018 tunnel easement granted by the MDNR to the Mackinac Straits Corridor Authority (“MSCA”), the Assignment by the MSCA to Applicant Enbridge, and the 99-year lease-back of the tunnel and site for the new—what Applicant describes as a “replacement”—a 30-inch subterranean pipeline in a tunnel up to 250 feet below the lakebed of the existing Line 5 dual pipelines in the Straits.<sup>18</sup>

Applicant relies on the Second Agreement, Third Agreement, Tunnel Agreement, and Act 359 of 2018 as the basis for the property interests, construction, and operation of the tunnel and tunnel pipeline,<sup>19</sup> including the tunnel easement, assignment, and 99-year lease.<sup>20</sup> Applicant further alleges that all of these property interests, location of the tunnel, construction and operation were expressly subject to state and federal law.

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<sup>17</sup>In re Enbridge Energy, MPSC Case No. U-17120, Pre-Filed Direct Testimony, Mark Sitek (V.P., Enbridge), Transcript, pp. 11-14.; FLOW Public Comments on Dynamic Risk Draft Alternatives Analysis Report (August 4, 2017), pages 6-7 <https://forloveofwater.org/wp-content/uploads/2016/04/Final-FLOW-comments-Alternatives-Analysis-8-4-17.pdf> While Enbridge testified that doubling the capacity of Line 6b would meet all of its future needs, the record does not disclose any effort by Enbridge that it had also nearly doubled its capacity by adding the anti-friction fluid devices to Line 5.

<sup>18</sup> E.g., Application, paragraphs 5., p. 3, 18., pp. 8-9.

<sup>19</sup> See Application, paragraphs 27-29, pp. 11-12.

<sup>20</sup> Application, paragraphs 5., p. 3, 33., p. 12-13.

The Second Agreement, requires Enbridge to obtain all authorizations, approvals, and permits for the *location, construction, and operation* of the tunnel and new tunnel pipeline segment:

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)<sup>21</sup>

Act 359 established the MSCA as a separate state entity to implement the corridor tunnel and new tunnel pipeline segment. Act 359 explicitly requires that the MSCA and/or Enbridge

to secure the approval of any department, agency, instrumentality, or officer of the United States government or this state required by law to approve the plans, specifications, and *location of the utility tunnel*..<sup>22</sup>

The tunnel agreement expressly stated that it

does not exempt any entity that *constructs or uses* the utility tunnel from the *obligation to obtain any* required governmental *permits or approvals* for the *construction or use* of the utility tunnel.<sup>23</sup>

In short, the Second Agreement and Act 359 unequivocally require MSCA and/or Enbridge to apply for and obtain all authorizations, approvals, and permits for the tunnel easement to MSCA, the assignment of the easement by MSCA to Enbridge, the 99-year-lease, and for the

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<sup>21</sup> Second Agreement, Oct. 4, 2018, Applicant Ex A-10.

<sup>22</sup> 2018 PA 359, Section 14a(1)(4).

<sup>23</sup> *Id.*, Section 14d(4)(g).

location, use, construction, and operation of the tunnel. To underscore these requirements, the tunnel agreement explicitly obligates the MSCA and/or Enbridge to obtain all required governmental permits, approvals, and authorizations required for the tunnel and pipeline under the Straits of Mackinac.<sup>24</sup>

The foregoing agreements demonstrate the inseparable and direct physical and operational relationship for the location, use, construction, and operation of the tunnel and tunnel pipeline. The Applicant Enbridge admits this throughout its Application that the description includes both. Applicant's allegations of the need for the tunnel and pipeline to be located in the tunnel, the alternative analysis of the tunnel pipeline in the tunnel, the impact and risk analysis related to both the tunnel and tunnel pipeline, the economic benefit of the construction of the tunnel and pipeline recognize the direct connection between the tunnel and tunnel pipeline.

In addition, the Applicant alleges that these agreements, together with the tunnel easement, assignment of tunnel easement, and 99-year-lease of the tunnel for the pipeline, establish that it has all of the necessary property interests to occupy and construct the subsurface public trust bottomlands and tunnel pipeline inside the tunnel.<sup>25</sup> Again, the Applicant and agreements tie the tunnel and tunnel pipeline into a single project, all of which require approval of a new structure and facility, a new or relocated pipeline in the tunnel, which trigger the express

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<sup>24</sup> Tunnel Agreement, **Applicant Ex A-5**, paragraph 7.9.

<sup>25</sup> Application, paragraph 33, fn. 6, *supra*.

approval of the Commission under Act 16 on the fundamental determinations of necessity and no alternatives, and a finding that this project is in the public interest.

The MDNR conveyed the 2018 tunnel easement<sup>26</sup> to the MSCA under Part 21, NREPA, Section 2129, MCL 324.2129, which delegates authority and legal obligation to review and determine whether it can and should grant *public utility easements* on an individual-by-individual request basis for “the purpose of constructing, laying, and operating pipelines, electric lines...., including pipes... and structures usable in connection with the lines” upon any lands belonging to the state... 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.*” The MSCA assigned the tunnel easement to Applicant Enbridge.<sup>27</sup> Enbridge will own the bottomlands and soils beneath the Straits to construct the tunnel. On completion of the project, Enbridge will transfer title back to MSCA, then obtain a 99-year lease-back to operate and maintain the tunnel pipeline.<sup>28</sup>

Ironically, unless Applicant Enbridge concedes that the tunnel is part of the “tunnel pipeline,” the tunnel is not authorized under Section 2129, MCL 324.2129. In other words, the only way the Applicant can argue that the tunnel easement qualifies as a “pipeline” is to argue before the Department of Environment, Great Lakes, and Energy (“EGLE”) that the tunnel and tunnel pipeline are one and the same.<sup>29</sup> In any event, even if a tunnel qualifies as part of the

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<sup>26</sup> Application, Tunnel Agreement, **Ex A-6**.

<sup>27</sup> Application, Assignment, **Ex A-6**.

<sup>28</sup> Application, paragraph 33, fn. 6, *supra*.

<sup>29</sup> To put this bluntly for purposes of its declaratory ruling request, Enbridge can’t have it both ways: On the one hand, Enbridge argues that the tunnel is not part of the “replacement” pipeline for the existing Line 5 pipeline



tunnel pipeline, the tunnel itself has not been approved as a “public utility” structure or facility, so does not fall within the plain language of Section 2129. And, further, the grantee of the tunnel easement is the MSCA, which most certainly is not and has not applied for designation as a “public utility.” Moreover, the MSCA, not the MDNR, assigned the tunnel easement for laying, location, construction and operation of the tunnel and pipeline to Applicant. At the time of the assignment of the 2018 tunnel easement, the Applicant had not obtained approval for the tunnel structure or facility and its pipeline under Act 16, so the Applicant and its project was not a legally authorized public utility.

Further, as a matter of fact, the MDNR tunnel easement to MSCA, the MSCA assignment of the tunnel easement to Applicant, and the authorization for the 99-year lease to Enbridge to occupy, use, control, and operate the tunnel and tunnel pipeline have not been authorized by the EGLE as required by the GLSLA or the findings required by the common law public trust doctrine applicable to the bottomlands, soils, and waters of the Great Lakes, including the Straits.<sup>30</sup> Both state departments, the EGLE under the GLSLA and MDNR under Section 2129, now must make findings that the exclusive long-term title and private control leased back to Applicant improve the public trust interest in the soils and waters of the Great Lakes, and does not impair or diminish the public control and use of the soils and bottomlands for a private purpose.

## II. LEGAL ANALYSIS

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because Enbridge will own and then lease-back exclusive possession and use of the tunnel for the pipeline for 99 years; on the other hand, it argues the tunnel qualifies for a public utility easement under Section 2129, MCL 324.2129.

<sup>30</sup> See Argument 4, *infra*, and the Memorandum of Law submitted to EGLE, which is attached to this Public Comment as **FLOW MPSC Public Comment Ex 1** and incorporated by reference.

**A. Enbridge Energy, Limited Partnership is Not a Successor in Interest to the Original 1953 Easement and the MPSC Order; Therefore, Enbridge Must Obtain A Certificate of Necessity (“CON”).**

It comes as no surprise that there is tremendous confusion as to the legal status of which Enbridge entity is the legal successor in interest and correct signatory to the multiple agreements at issue involving the 2018 tunnel agreement, easement, assignment, and lease agreement. It turns out there are multiple Enbridge entities who are parties and signatories to these agreements and since 2018, several of these entities have merged through acquisition by another wholly owned subsidiary of Enbridge. Enbridge Energy Partners, L.P.—the legal successor to Lakehead Pipe Line Company—and Enbridge Energy Management, L.L.C., two of the three signatories and named plaintiffs in pending Line 5 litigation, have become “indirect wholly owned subsidiaries of Enbridge” through acquisition by another wholly owned subsidiary of Enbridge, effective December 17, 2018.<sup>31</sup> Thus, a host of questions emerges including whether the current Enbridge subsidiary, Enbridge Energy, Limited Partnership, is the legal successor in interest to the original 1953 Easement Agreement between Lakehead Pipe Line Company and the State of Michigan and the 1953 MPSC Order, and can rely on these legal documents to avoid a certificate of necessity (“CON”) review by the MPSC.

The parent company, 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. Enbridge Inc. lists numerous

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<sup>31</sup> *Enbridge Inc. Completes Mergers with Enbridge Energy Partners, L.P. and Enbridge Energy Management, L.L.C.*  
<https://www.prnewswire.com/news-releases/enbridge-inc-completes-mergers-with-enbridge-energy-partners-lp-and-enbridge-energy-management-llc-300769267.html>

subsidiaries<sup>32</sup> who may or may not have legal interest as a successor in the 1953 Easement and MSPC Order, may or may not be insured under Enbridge’s general liability coverage, may or may not be named insured in policies related in a Line 5 pipeline oil spill failure.

A 2019 report commissioned by the State of Michigan’s Attorney General office concluded that Enbridge, Inc. is neither party to Line 5’s 1953 easement through the Straits nor part of two other recent agreements with the state. Instead, the agreements were made with subsidiaries of the company with insufficient funds to cover a potential \$1.8 to \$6.3 billion oil spill.

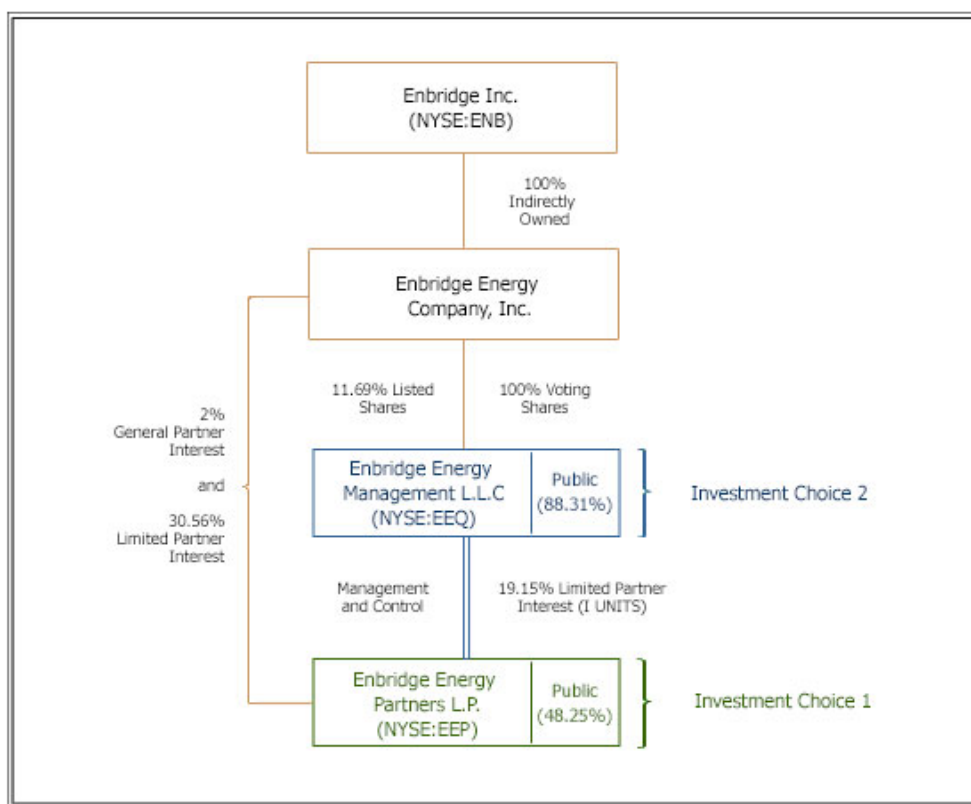


Table 2: <https://www.enbridgepartners.com/Investor-Relations/EEP/Common-Unit-Information/Ownership-Structure.aspx>.

<sup>32</sup>[https://www.google.com/search?q=enbridge+subsidiary+companies&rlz=1C1CHBD\\_enUS831US831&oq=enbridge+subsidiar&aqs=chrome.2.69i57j0l4.11979j0j7&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=enbridge+subsidiary+companies&rlz=1C1CHBD_enUS831US831&oq=enbridge+subsidiar&aqs=chrome.2.69i57j0l4.11979j0j7&sourceid=chrome&ie=UTF-8)

Accordingly, there are substantial questions of fact regarding the full ownership and control of the existing Line 5 easement in the Straits, the dual pipelines in the Straits, the tunnel easement, the assigned easement to the Applicant, the 99-year lease, and the other agreements relied on by Applicant Enbridge in its Application. Until the parties to these proceedings under Act 16 answer, obtain discovery, and resolve these questions, the Application and request for declaratory ruling must be denied.

**B. Enbridge Cannot Shoehorn Its New Proposed Tunnel and Subterranean Pipeline Request into the 1953 MPSC Order and the Express Conditions Incorporating the Design, Capacity, Nature, and Location of the Lakehead Lakebed Dual 20-Inch Pipelines in the Straits of Mackinac.**

Enbridge cannot rely on the 1953 Easement, because the proposed tunnel and tunnel pipeline are not a “replacement” pipeline as alleged by Applicant or found in the language of the 2018 tunnel and related agreements. The mere recital by an agreement or an allegation by a party that the proposed project is a mere “replacement” is not determinative of the jurisdiction of the Commission in this case. As the proverbial saying goes, “You can call it a duck, but if it doesn’t quack or waddle like a duck, it’s not a duck.” In substance, Applicant’s proposal is a “new” pipeline to be located in a new tunnel that constitutes a “structure or facility” related to the pipeline in an entirely new horizontal and deep subterranean, vertical location. Enbridge, however, attempts to minimize its extraordinary request before the Commission by arguing that this mere replacement 4-mile segment is part of the 645-mile pipeline. In its application to the commission, the company’s lawyers boldly argue the proposed pipeline “involves no more than maintaining and continuing to operate Line 5 by replacing and relocating one approximate four-mile segment of the over 600-mile line.” Nothing could be further from the truth.

As established in Section I., A. and illustrated in Table 1 above, the actual 1953 Easement reveals express terms and conditions related to the precise location, construction, and operation of twin pipelines 20 inches in diameter to rest on the lakebed floor of the Straits of Mackinac. Such exact locations matter in legal documents because the State of Michigan only granted Lakehead conditional use of its public trust lands and waters. In sum, the 1953 Easement and the corresponding 1953 MPSC Order authorize dual pipeline infrastructure siting limited to the exact location on the lakebed floor.

State authorization contained no consideration of a subsurface tunnel and pipeline. The history of the authorization and building of the current Line 5 pipeline described in Section 1.A. above only reinforces this critical point. In 1953, the Conservation Commission granted a Straits of Mackinac Pipeline Easement to Lakehead, which “authorized the construction, operation and maintenance of the Straits Pipelines on state-owned bottomlands, ***subject to specified terms and conditions***” (emphasis added). No tunnel or subterranean pipeline was ever mentioned or ever authorized. And, the former Public Utility Commission approved its 1953 Order to locate and construct the dual pipelines in the Straits based on these specific terms and conditions.

Enbridge admits that “the replacement pipe segment will not be placed within the precise easement that existed in 1953.” A review of the 2018 DNR easement to the MSCA that was then assigned to Enbridge under the Snyder Administration, confirms Enbridge’s problem and reveals different longitudinal and latitudinal locations along with different horizontal locations since the new proposal oil pipeline is far beneath the lakebed floor, ranging between 60 and 250 feet. Enbridge then argues that “very close geographic proximity to the existing location of the Dual

Pipelines” is good enough, and therefore, should be “tied to the existing and previously approved Line 5 at both sides of the Straits.”

Given that the 1953 Easement and 1953 MPSC Order did not authorize Enbridge’s new single subterranean pipeline and tunnel as a matter of fact, the Michigan Public Service Commission should deny Enbridge’s request for declaratory relief on this basis alone.

**C. Enbridge Cannot Separate the Tunnel from the “Pipeline” within the Meaning of Act 16 and Rule 447 Because the Tunnel Involves New Tunnel and Pipeline Construction, Extensions, Facilities, Structures, Fixtures, and Equipment.**

Applicant Enbridge argues that its massive half-billion dollar project is “no more than maintaining and continuing” under the prior approval in the Commission’s 1953 Order for the existing Line 5, and that the four-mile tunnel and tunnel pipeline and extensions is “no different than the replacement of small portions of facilities owned by electric and gas utilities subject to Rule 447.”

MPSC Rule 447 requires an application for approval by the Commission under Act 16 where an applicant “wants to construct facilities to transport crude oil or petroleum.”<sup>33</sup> Act 16, Section 1, states that a person who “does not have a legal right to locate... pipelines, fixtures, and equipment... in this state” cannot locate or construct such pipeline or structures without approval from the Commission.<sup>34</sup>

First, as established in Section A., 2. above, the Second Agreement, Tunnel Agreement, Act 359, MDNR easement, the assignment of the easement, and 99-year Lease back of the tunnel

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<sup>33</sup> MPSC Rule 447(1)(c).

<sup>34</sup> MCL 483.1. Act 16, Section 6 also states that there is no right to locate, maintain, or operate a “pipeline, fixture, or equipment appurtenant” without approval of the Commission. MCL 483.6.

for the 30-inch pipeline demonstrate that the tunnel and tunnel pipeline are inseparable and therefore a single project. Second, the Commission's authority under Act 16 over pipelines includes "structures" or "fixtures and equipment." Rule 447 requires approval to construct "facilities." The tunnel would constitute a structure or facility directly related to the pipeline and a fixture in the bottomlands of the State. Third, the project as a whole constitutes new construction. Fourth, in any event, the pipeline into the tunnel is a vertical extension 60 to 250 feet below the lakebed and outside the original 1953 easement and Commission's Order. Fifth, the project includes two new extensions totaling 1.2 miles of pipeline that would tie into the existing Line 5 on the north and south of the Straits.

Clearly, the proposed project in substance and description is subject to Act 16 and Rule 447, and therefore the Commission should deny the request for declaratory ruling.

**D. Enbridge Does Not Have the Legal Right or Property Interests to Locate and Construct the Tunnel Pipeline Infrastructure in Accordance with Act 16 and Michigan Law that Applies to the State-Owned Bottomlands of the Great Lakes Held in Public Trust for the Citizens of Michigan.**

Enbridge alleges in its Application that it has "acquired the necessary property rights to use lands on the north and south sides of the Straits" for necessary for installation, maintenance, and operation of the "replacement" tunnel pipeline and tunnel.<sup>35</sup> Applicant alleges that has the property rights in the soils and bottomlands beneath the Straits to build the tunnel and pipeline based on the 2018 assignment by the MSCA of the MDNR 2018 tunnel easement.<sup>36</sup> Applicant also

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<sup>35</sup> Application, paragraph 33, p. 13.

<sup>36</sup> Id.; Application Ex A-6.

alleges that it will own the tunnel and pipeline, but transfer the title back to MSCA with a right to lease-back the tunnel and pipeline route for 99 years.<sup>37</sup>

Section of Act 16(1), *supra*, unequivocally states that no person has a legal right to *locate or construct* a pipeline, structure, facility or fixture in the State without approval of the Commission. Without Commission approval of the location of the tunnel *and* tunnel pipeline, the Applicant Enbridge is not a public utility for purposes of the proposed project, cannot acquire any property interest for the tunnel and tunnel pipeline project, and has no legal right to locate or construct the tunnel and pipeline. It is axiomatic under Act 16 that for a utility to locate and start a crude oil or petroleum pipeline project, it must *first* obtain approval from the Commission. Once Enbridge has the legal right to locate or construct the project *as a public utility*, it can acquire private property or public property interests that are required for the project. Although Applicant did not have MPSC approval as a public utility to locate and construct the tunnel and pipeline project under Act 16, in the closing days of 2018 it sought to quickly acquire the property interests—the tunnel easement, assignment of easement, and 99-year lease—from the MDNR under Section 2129 in the state-owned bottomlands under the Straits. To obtain or acquire these property interests, Applicant Enbridge first should have, but did not, obtained the approval of the MPSC to qualify for the authorization to obtain these state-owned bottomland interests required by Section 2129 and the GLSLA.

Because the bottomlands under the Straits are owned and held by the State in public trust, Applicant was and is required to obtain authorization for a public utility easement from the MDNR under Section 2129, Part 21 of the NREPA, and then obtain authorization for the

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<sup>37</sup> Id.



conveyance to MSCA, assignment to Applicant, and the 99-year lease from the EGLE under the GLSLA, Part 325 of the NREPA. As will be seen, the Applicant has not obtained any of these approvals and authorizations as required by law.

**1. State Land Public Utility Easements, Section 2129 Part 21, MCL 324.2129 (formerly Act 10 of 1953)**

Section 2129 delegates authority to the MDNR to grant public utility easements “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.*” Without the approval from the Commission, Enbridge is not a public utility and cannot seek authorization for a public utility under Section 2129.

Further, because bottomlands of the Great Lakes, like the Straits, are held in public trust, any deed, easement or other conveyance to a public utility is invalid unless (a) the Applicant has been determined to be a public utility and (b) complies with the mandatory requirements of the common law of the public trust doctrine. To comply with public trust law, EGLE must factually determine that:

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*, 146 U.S. 387 (1892); *Obrecht v National Gypsum Co.*, 361 Mich 299 (1960). (It should be noted that the public trust doctrine and these legal mandates are irrevocable).

As described in the facts in Section A. 2. above, the MDNR tunnel easement granted a public utility easement to the MSCA under Section 2129. However, MSCA is not a public utility and did not seek approval from this Commission in 2018 to become a public utility corridor owner or operator. Moreover, the MDNR did not make either of the two express findings required by the public trust doctrine for any conveyance or easement in, under, through or on the state-owned public trust bottomlands of the Straits.

## **2. The Great Lakes Submerged Lands Act**

Two years after the passage of Act 10, the legislature enacted the Great Lakes Submerged Lands Act (“GLSLA”).<sup>38</sup> 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 EGLE pursuant to the public trust standards in the GLSLA and the common law of the public trust doctrine. Because the GLSLA applies to any conveyances, leases or other agreements and occupancy of these public trust bottomlands, the DNR Easement, MSCA Assignment, and 99-year lease or for as long as Enbridge operates the tunnel and tunnel pipeline segment are subject to the GLSLA and common law public trust standards.

Section 32502, Part 325, GLSLA<sup>39</sup> prohibits any deed, lease, or other agreement granting occupancy or use, or any structure, improvement or other activity involving the waters and

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<sup>38</sup> MCL 324.32501 et seq. As a matter of law, because the state-owned bottomlands are held in a perpetual public trust, the GLSLA applies to any transfer, deed, easement, or other conveyance after 1955.

<sup>39</sup> MCL 324.32502.

bottomlands of the Great Lakes unless expressly authorized by the Department of EGLE (formerly DEQ) after express findings on the record that (1) “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 (2) “the public trust in the state *will not be impaired* by those agreements for use, sales, lease, or other disposition.”

Section 32503 of the GLSLA provides that 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.*<sup>40</sup>

Section 32510 of the GLSLA prohibits any use, conduct, or construction activity that would result in “*any alteration*” of public trust bottomlands unless permitted by the EGLE under Part 325.<sup>41</sup>

GLSLA Rule 1015 prohibits EGLE from approving any permit without an impact statement or study that demonstrates (1) not more than a potential of minimum impairment or harm, and (2) that there exist no feasible and prudent alternatives to the proposed conduct or activity.<sup>42</sup>

The Applicant Enbridge has applied for a construction permit under the GLSLA with EGLE in April 2020.<sup>43</sup> However, as described above, Enbridge has not obtained the legal right to construct the tunnel and tunnel pipeline under Act 16. Therefore, its application is premature or

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<sup>40</sup> MCL 324.32503.

<sup>41</sup> MCL 324.32510.

<sup>42</sup> R 299.1015.

<sup>43</sup> See FLOW Public Comment, Ex 1, *supra*.

at least incomplete until it has the legal right to apply for the construction permit under the GLSLA.

In addition, Enbridge has not applied for or obtained authorization under Section 32502, *supra*, of the GLSLA from EGLE for the MDNR tunnel easement, the MSCA assignment of the tunnel easement, or the 99-year lease. Therefore, it does not have a legally authorized property interest in the public trust bottomlands of the Straits of Mackinac. Thus, as noted above, the Applicant does not have a legal interest to even locate the tunnel pipeline infrastructure in, under, or through the public trust bottomlands of the Great Lakes, because it has not obtained approval under Act 16. Accordingly, the Applicant, technically, is not entitled to acquire any interest in the state-owned public trust bottomlands of the Straits until it has a legal right to locate, that is, to acquire an easement, assignment, or lease of those bottomlands from the State.

Moreover, Enbridge is not entitled to obtain authority for an easement or enter into any agreement unless it has obtained the approval of state administrative board as required by Section 32503, *supra*, of the GLSLA.<sup>44</sup>

Accordingly, Applicant Enbridge does not have the legal right to locate and construct under Act 16, and Enbridge does not have a valid or authorized property interest to locate, use, construct, and operate under GLSLA.

### **3. Conclusion and Requested Action**

Enbridge's Request for Declaratory Relief should be denied based on the substantial nature and magnitude of Applicant's Enbridge's tunnel and pipeline infrastructure project, the prohibition to locate or construct the proposed project under Act 16 and Rule 447, the

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<sup>44</sup> MCL 32503(1).

substantial difference between the Commission's 1953 Order, the fact that the tunnel and tunnel pipeline are inseparable, and the fact that Applicant does not have a lawfully authorized property interest to even locate or construct the tunnel and pipeline under the Straits of Mackinac.. Accordingly, the momentous questions concerning necessity, alternatives, and the contours of the public interest at this time in history, informed by the Michigan Constitution, art 4, sec. 52, the public trust in the bottomlands and waters of the Great Lakes, the Michigan Environmental Protection Act, and the dramatic and overwhelming impacts of climate change, these proceedings must go forward and be addressed through the comprehensive review, analysis, and determinations by this Commission as provided by law.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "James M. Olson".

James M. Olson  
President and Legal Counsel  
For Love of Water (FLOW)

A handwritten signature in blue ink, appearing to read "Elizabeth Kirkwood".

Elizabeth Kirkwood  
Executive Director  
For Love of Water (FLOW)

Date: May 13, 2020



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

May 1, 2020

***via* ELECTRONIC SUBMISSION**

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*Re: Enbridge Energy Application for Construction of Tunnel for Crude Oil Pipeline, Soils and Bottomlands, Straits of Mackinac, Lake Michigan; and Authorization of 2018 DNR Easement, MSCA Assignment of Easement to Enbridge, 99-Year Lease of Soils and Bottomlands for Tunnel and New Pipeline; Tunnel and Related Agreements for Use and Occupancy of Soils and Bottomlands, Great Lakes Submerged Lands Act, MCL 324.32501 et seq. ("GLSLA")*  
Application Number: HNY-NHX4-FSR2Q

Dear Director Clark and Mr. Haas:

The undersigned officers and attorneys for For Love of Water ("FLOW"), together with those for Straits of Mackinac Alliance ("SMA")<sup>1</sup> hereby submit this letter/legal memorandum on the GLSLA and public trust law necessary to authorize the proposed Corridor and Tunnel, together with easement, assignment of easement, and long-term lease for occupancy, use, and control of

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<sup>1</sup> 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, existing alternatives, worst-case scenarios and economic damages, and violations of law regarding Line 5 and the proposed tunnel and tunnel pipeline. [www.flowforwater.org](http://www.flowforwater.org). The Straits of Mackinac Alliance ("SMA") is a group of citizens living on waterways that would be impacted by a Line 5 oil spill. The Board and most of the members of the Alliance live in and around the Straits along Lakes Huron and Michigan and are working to protect their homes and waterways for future generations.

the public trust soils and bottomlands beneath the waters of the Great Lakes.<sup>2</sup> Based on our analyses, Enbridge (and the Michigan Straits Corridor Authority (“MSCA”) and Department of Natural Resources (“DNR”) to the extent necessary) must apply for and obtain authorizations required by Sections 32502 and 32503 et seq. of the GLSLA, MCL 324.32501 et seq., and the State’s sovereign title under the equal footing and public trust doctrines.

- 1. The MSCA cannot approve and the MSCA and Enbridge cannot implement the 2018 Tunnel Agreement, the 2018 Easement, the 2018 Assignment of Easement, the Lease, or any other Use or Occupancy/Location Agreement for a corridor tunnel and tunnel pipeline unless and until these conveyances, leases, easements, and other occupancy and use agreements have been authorized by the common law public trust doctrine, Sections 32502, 32503 et seq. of the Great Lakes Submerged Lands Act, Part 325, NREPA, MCL 324.32501 et seq., and/or Section 2120, Part 21, NREPA, MCL 324.2129.**

- a. The Common Law of Public Trust in the Soils Beneath the Great Lakes**

Enbridge’s proposed corridor tunnel and new tunnel pipeline are subject to the State’s sovereign trust title and the public trust doctrine and law that apply to the Great Lakes and the soils under them. Like all of the 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.<sup>3</sup> All of these waters and the soils beneath them are held in and protected by a public trust.<sup>4</sup> 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, 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:<sup>5</sup>

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<sup>2</sup> On November 8, 2018, FLOW submitted a letter to the Mackinac Bridge Authority, former Governor Rick Snyder, former DEQ Director Heidi Grether, former DNR Director Keith Creagh, and former Attorney General Bill Schuette of the critically necessary legal requirements for proper authorization and approval of a tunnel corridor and tunnel pipeline in the soils and bottomland under the common law public trust, the Great Lakes Submerged Lands Act, MCL 3234.32501 et seq. that govern the use, occupancy, control, and operation of a private corridor tunnel, pipeline, and operation by a private corporation in the public trust waters and soils beneath the Great Lakes. On December 18, 2018, FLOW submitted a subsequent letter to the Governor and the same State officials, more fully addressing the violations of rule of law by the State and its officials of the GLSLA and public trust law.

<https://forloveofwater.org/wp-content/uploads/2020/04/FLOW-Public-Comment-12-18-18.pdf>

On March 5, 2020, FLOW submitted a letter setting forth a similar basis under the GLSLA and public trust law in Michigan to the MSCA as part of a meeting to consider Enbridge’s announced plans to apply for the required authorizations, approvals, and permits for a tunnel and tunnel pipeline. These letters are incorporated by reference.

<sup>3</sup>*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 Goeckel*, 473 Mich 667 (2005).

<sup>4</sup> Id.; see also *Obrecht v National Gypsum*, 361 Mich 299 (1961).

<sup>5</sup> Id. p. 416.

- (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*, 146 U.S. 387 (1892); *Obrecht v National Gypsum Co.*, 361 Mich 299 (1960). The public trust doctrine and its legal mandates are irrevocable.<sup>6</sup>

**b. Great Lakes Submerged Lands Act of 1955 (“GLSLA”): Limited conveyances, leases, agreements, or actions over, on, in, and 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 EGLE pursuant to the public trust standards in the GLSLA and the common law of the public trust doctrine. Because the GLSLA applies to any conveyances, leases or other agreements and occupancy of these public trust bottomlands, the DNR Easement, MSCA Assignment, and 99-year lease or for as long as Enbridge operates the tunnel and tunnel pipeline segment are subject to the GLSLA and common law public trust standards.

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.

Sec. 32502. The lands covered and affected by this part are all of *the unpatented lake bottomlands and unpatented made lands in the Great Lakes*, including the bays and harbors of the Great Lakes, *belonging to the state or held in trust by it*, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. *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, and to permit the filling in of patented submerged 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.* The word “land” or “lands” as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark <sup>7</sup>

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<sup>6</sup> *Illinois Central R Rd v Illinois*; *Obrecht v National Gypsum Co.*, *supra*.

<sup>7</sup> MCL 324.32502; see also 324.32503, 324.32504, 324.32505(4), 324.32512.



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. The department shall reserve to the state all mineral rights, including, but not limited to, coal, oil, gas, sand, gravel, stone, and other materials or products located or found in those lands...*<sup>8</sup>

(2) The department shall not enter into a lease or deed that allows drilling operations *beneath unpatented lands for the exploration or production of oil or gas.*<sup>9</sup>

Based on the plain meaning and public trust law incorporated into the GLSLA and its rules, the Governor, state agencies, and Enbridge agreements, the DNR Easement, MSCA Assignment, and 99- year Lease from MSCA to Enbridge pertaining to any deed, grant, lease, other disposition, or agreement for use or occupancy of the soils or bottomlands beneath the Straits are subject to the GLSLA. Enbridge has not sought or obtained authorization for any of these conveyances or use documents under the GLSLA and/or based on the findings or determinations required for a valid conveyance or agreement required by the GLSLA or public trust law.

State officials or Enbridge may represent that the 2018 Agreements, the Tunnel Agreement, the 2018 DNR Easement, the MSCA Assignment of the DNR Easement, and the Lease for tunnel and the use of tunnel for the new Line 5 Pipeline in the Straits are not subject to the public trust doctrine, the GLSLA, or Section 2129, MCL 324.2129. Negotiators and parties knowingly manipulated the legal description of the DNR Easement, the Assignment, and Lease for the Tunnel Corridor and New Line 5 Pipeline in the tunnel in a calculated attempt to bypass the State's sovereign title and public trust interest in the waters and soils beneath the Great Lakes. They inserted the following legal description:

... the Grantee, and to its successors and assigns, a 1,200 foot wide right of way and a full easement and right to place, construct, operate, maintain, inspect, protect, repair, use, and remove an underground tunnel (within which one or more pipelines, and or one or more other utility lines... may be located) through and across all underground lands and interests in the underground lands, *specifically lands located beneath the lakebed, to which the state has title* that may be necessary or convenient to the placement and construction of such underground tunnel within the area of 600 feet on each side of the centerline... Their easement and right of way *do not include any lands or interests in land on or above the lakebed.*

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<sup>8</sup> MCL 324.32503(1).

<sup>9</sup> MCL 324.32503(2).

The attempt to escape the GLSLA and public trust law is an attack on the State and its citizens' rights and sovereign public trust interests in the history of the State of Michigan. This attempt was and is flatly wrong, and must be rejected by MSCA, the Director of the EGLE, and Director of the DNR, who represent the citizen legal beneficiaries of the State of Michigan and have a solemn duty to protect the public trust and public trust uses in the soils and waters of the Great Lakes. The deeded or grant of easement, assignment, and lease are all subject to the GLSLA and public trust law. First, based on numerous United States Supreme Court decisions, including *Shively* and *Illinois Central*, *supra*, and Michigan Supreme Court decisions, including *Obrecht and Venice of America Land Company*, *supra*, the State took sovereign title to the waters and "all of the soils" beneath the Great Lakes in trust, public trust, on admission to Statehood. This solemn, perpetual trust is irrevocable, irrevocable, and cannot be violated by any attempt to escape it.

Moreover, the unpatented lands, bottomlands, and soils beneath the waters of the Great Lakes are clearly covered by the GLSLA. The title of the State cannot be surrendered or alienated. If a conveyance, interest, or use of these soils and bottomlands is proposed, it can only be done based on the findings and standards in the GLSLA. Clearly, the GLSA extends to all lands and title in these unpatented trust lands. The legislature has expressly shown the extent of the State's public trust title and inalienable interest by the terms of the GLSLA. The legislature recognized this legal fact by reserving all mineral rights and interests, including but not limited to oil and gas, gravel and stone, and by prohibiting oil and gas development in or beneath the Great Lakes and bottomlands. Oil and gas development include drilling, bore pipes, pipelines, and facilities far beneath the soils of the Great Lakes; e.g., Niagaran Reef development is often more than a mile beneath the lakebed.<sup>10</sup> Enbridge and the MSCA cannot proceed until the required authorizations under public trust law and the GLSLA have been applied for and obtained (if in fact and law they can ever be obtained for such an exclusive and primarily private tunnel and pipeline.

Further, the DNR, MSCA, and Enbridge did not obtain authorization for these conveyances, lease, and agreements from the State Administrative Board, and failed to consider and determine the effect on and potential impairment to the substantial tribal property rights of the 1836 Treaty Tribes in, fishing, fishery habitat and other usufructuary activities protected by the Treaty of 1836.

**c. Act 10 of Public Act ("Act 10") Easements for Public Utilities over, under or through State Lands and State-Owned Public Trust Bottomlands**

Section 2129, NREPA, delegates authority to the DNR "to grant public utility easements" and provides:

for state and county roads and *for the purpose of constructing, erecting, laying, maintaining, and operating pipelines, electric lines, telecommunication systems, and facilities for the intake, transportation, and discharge of water*, including pipes, conduits, tubes, and structures usable 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

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<sup>10</sup> MCL 324.32503(1) and 3203(2).

*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.*

First, the legislature delegated authority to the Conservation Commission (now DNR) to grant such public utility easements through and under the Straits of Mackinac. It is important to note that the authority of the DNR is subject to the public trust and state sovereign interest in unpatented bottomlands and waters of the Great Lakes. Because of this, public trust law applies. No easement can be granted without a finding and determination by the DNR that the standards under public trust law have been met.

Second, the 2018 DNR Easement to the MSCA was granted without the required findings and determinations under public trust law. Further, the legislature enacted the GLSLA in 1955 just two years after Section 2129 (then Act 10). As described above, the GLSLA applies to any deed, lease, or other agreement of occupancy or use over *all unpatented bottomlands held in trust by the state*. Because Section 2129 contains no finding requirement or standards required by the public trust doctrine, *Illinois Central* and *Obrecht, supra*, standards, the GLSLA supplies those standards and finding requirements. Therefore, an easement granted under Section 2129 must also be authorized under GLSLA. And, in any event, as noted above, the grant under Section 2129 must be based on specific review, consideration, and findings or determinations of fact that the standards under public trust law, and to date those requirements have not been met.

Third, the Easement was not properly authorized under Section 2129, because the Tunnel and Tunnel pipeline were not certified by the MPSC as a *public* utility at the time of the grant. Further, the Assignment by the MSCA to Enbridge was *not* a grant by the DNR, and likewise Enbridge was not certified as a public utility at the time of the assignment. Moreover, the Lease is not an easement, and neither Enbridge nor MSCA applied for and obtained the required authorization or findings under the GLSLA for the Assignment and Lease. And, in any event, the Assignment and Lease were signed without the required findings required under public trust law.

**d. Enbridge Must Also Obtain Authorization and Approval of the Right to Continue the Existing Line 5 under the Third Agreement, and All of EGLE’S Approvals Must Be Based on the Requirements of the Michigan Environmental Protection Act (“MEPA”) and the Third Agreement.**

The Third Agreement between Governor Snyder, state agencies and Enbridge in December, 2018, purports to assure Enbridge a right to continued use and operation of the existing Line 5 until the tunnel and new tunnel pipeline are complete and operating.<sup>11</sup> Enbridge has asserted this provision grants and establishes a separate basis to use and operate existing Line 5 until completion of the tunnel and tunnel pipeline.<sup>12</sup> This provision constitutes an agreement for occupancy or use of the unpatented bottomlands under Sections 32502 and 32503 of the GLSLA. Based on the plain language of the GLSLA and the requirements of the public trust doctrine, the right to continue the existing Line 5 in the Third Agreement is invalid or without legal effect unless and until it has been authorized under the GLSLA.

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<sup>11</sup> Third Agreement, Sec. 4.1, 4.2.d,

<sup>12</sup> *Id.*

Further, 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 Michigan Environmental Protection Act of 1970 (“MEPA”) imposes procedural duties and legal mandates to consider the legal effects and feasible and prudent alternatives of proposed conduct like the Enbridge Tunnel and Tunnel pipeline in any permit, approval, licensing or other proceeding.<sup>13</sup> 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.<sup>14</sup> No approvals, grants, authorizations or permits can be issued to Enbridge without a comprehensive review of the review and consideration of the likely effects and feasible and prudent alternatives to the tunnel.<sup>15</sup> Accordingly, the MEPA applies to the Enbridge’s required application for authorization for the easement, assignment, and long-term lease and the Enbridge application for its construction permit.

**e. The Enbridge Application for the Permit to Construct and/or Install the Straits Tunnel Is Also Subject to Sections 32510, 32512, and Rule 1015 of the GLSLA.**

Applicant Enbridge in its cover letter submitting its EGLE Application for a Construction Permit under the GLSLA, claims provisionally that the construction of the tunnel is not subject to the GLSLA. First, for the reasons stated above, the proposed tunnel together with the entire proposed project including the tunnel is subject to the authorization of the conveyance and lease interests under Sections 32502, 32503 et seq. of the GLSLA and Rule 1015.

Second, Enbridge argues in its cover letter that the massive tunnel project in the soils beneath the Straits of Mackinac is not subject to the GLSLA Section 32513, M CL 324.32513 because it involves the placement of “other materials,” which is defined by Rule 322.1001(k) to mean “any man-made structure” or “installed device or facility extending over or *placed on* bottomlands” including bulkheads, groins, riprap, jetties, breakwaters, piers and pipelines, pilings, sand traps, and facilities related to marinas. Under Section 32513, a permit is required for activities such as dredging, filling with soils, and “other materials.” The term “other materials” includes structures and improvements. So, Enbridge would have the Department interpret the massive tunnel project as an activity involving “other materials” like those listed in Rule 101(k). The tunnel project does not fall within the type of activities covered by Section 32513 and its definitions. Accordingly, the tunnel project is a construction activity not authorized by Section 13. If the activity is not authorized by Section 32513, then Enbridge must obtain authorization under another section of the GLSLA, namely, it must include its construction activities as part of the comprehensive review required by the GLSLA, public trust law, and the MEPA, *supra*, that are part of the authorizations for the conveyances, leases, and other occupancy or use under Sections 32502, 32503 et seq. If Enbridge argues, the construction activity is not subject to the GLSLA all it has a major problem: Under public trust law, in the absence of express authority in a statute that delegates authorization, approval or permit review and decisions to an agency, Enbridge is prohibited from undertaking the project. The state’s title and interest in the waters and soils beneath the Great Lakes can never be alienated except by express authorization and findings required by

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<sup>13</sup> *Vanderkloot and Ray v Masson County Drain Comm’r, supra*; MCL 324.1705(2).

<sup>14</sup> *Ray v Mason Count Drain Comm’r*, 393 Mich 294 (1975).

<sup>15</sup> *Vanderkloot and Ray v Masson County Drain Comm’r, supra*.

public trust law. *Obrecht v National Gypsum; Illinois Central Railroad, supra*. The GLSLA Sections 32502, 32503 supply this authority for the authorizations; Section 32513 does not.

Third, Sections 32510 and 32512 of the GLSLA prohibit any activity not authorized by the GLSLA and/or in accordance with public trust law mandatory standards and findings. Section prohibits an activity “in any manner alters or modifies any of the land or waters subject to this part.” The waters and the State’s public trust soils and bottomlands are subject to Part 325, or “this part.” Section 32512 prohibits any activity, such as altering or modifying the lands or waters subject to the GLSLA unless authorized by Section 13 or the legislature. But in this instance Act 359 of Public Acts of 2018 expressly states that Enbridge must obtain all approvals and permits regarding location or construction of the tunnel. The legislature did not itself grant a permit or approval under Act 359, nor could it.

So, if Section 13 does not authorize a construction permit for Enbridge’s tunnel construction, then there is no authority at all for construction of a tunnel and operation of a tunnel pipeline, and for the reasons stated above no authorization of the easement, assignment, or lease to do so., and, in any event, there can be no authority without express findings required by the GLSLA and public trust law. Accordingly, the only way to proceed is to review the construction of the tunnel is to consider construction in conjunction with a notification to Enbridge that it must apply for authorization under the GLSLA and public trust law for the conveyance of the easement, assignment of easement, the lease, and the purported assurance of the right to continued use and occupancy of the bottomlands for the existing Line 5 in the Third Agreement..

## CONCLUSION AND REQUEST

Based on the above, FLOW requests you and EGLE to require the following:

- a. Suspend consideration of Enbridge’s application for a construction permit for the tunnel and tunnel pipeline unless and until Enbridge submits an application and obtains authorization for the DNR Easement, MSCA Assignment, and Lease under the GLSLA and Part 21, Section 2129, NREPA and public trust law;
- b. When Enbridge applies for authorization of these conveyances, lease, or other agreements, it can also submit its proposed construction as part and parcel of the scope of requirements for the EGLE to review the requests for authorizations in accordance with the GLSA and public trust standards.
- c. Require the application of the duty to consider potential effects and feasible and prudent alternatives pursuant to the MEPA and case law; and
- d. Notify Enbridge that the purported right under the Third Agreement to continue to use and operate existing Line 5 on or in the unpatented bottomlands of the Straits of Mackinac is not legal unless and until Enbridge submits an application and obtains authorization under the GLSLA and Part 21, Section 2129, NREPA and public trust law.

The undersigned organizations thank you for the opportunity to provide the above legal memorandum, and request that you rule and request Enbridge to comply with the above requested actions.

Should you have questions or want to discuss further, please advise.

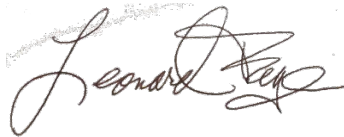
Sincerely yours,



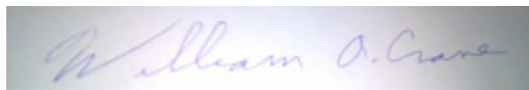
James M. Olson  
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For Love of Water (FLOW)



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Leonard Page  
Vice President  
Straits of Mackinac License



Hon. William Crane (Retired Circuit Judge)  
Secretary  
Straits of Mackinac Alliance

cc: Hon. Governor Gretchen Whitmer  
Hon. Attorney General Dana Nessel  
MDNR Director Dan Eichinger  
MDOT Director Paul C. Ajegba

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief

U-20763

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**PROOF OF SERVICE**

On the date below, an electronic copy of **Public Comment on Enbridge Energy Limited Partnership Request for Declaratory Relief on its Application for Approval under Public Act 16 of 1929** was served on the following:

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The statements above are true to the best of my knowledge, information and belief.

Counsel for FLOW

Date: May 13, 2020

By: \_\_\_\_\_  
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