UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, et al.,

Plaintiffs,

v.

Court File No. 1:20-CV-1141
Hon. Janet T. Neff

GRETCHEN WHITMER, et al.,

Defendants.

AMICUS BRIEF OF FOR LOVE OF WATER IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF THE AMICUS AND INTRODUCTION

For Love of Water ("FLOW") is a non-profit organization located in Traverse City, Michigan. Our mission is "to ensure the waters of the Great Lakes Basin are healthy, public, and protected for all."[1] We have expertise in Michigan's public trust law and are submitting this amicus brief to help inform the Court's understanding of the State of Michigan's ("State") sovereign title, rights, and duties thereunder.

Enbridge's characterization of Michigan's public trust doctrine as an environmental safety law is generally misleading and certainly wrong in the context of this dispute. Although the doctrine does place a duty on the State to protect public trust resources, its primary function (and its function here) is to protect public trust *uses* such as navigation and fishing. To achieve this end, the Michigan Supreme Court has developed strict rules concerning the occupation and use of public trust lands. *First*, the State generally may not convey an interest in state bottomlands for any activity that is not a recognized public trust use (hereafter, "non-public trust use"), such as a petroleum pipeline. *Second*, if the State wishes to convey such an interest for a non-public trust use, the State must make due findings that one of two narrow exceptions described in more detail below applies. *Third*, a grantee of such a conveyance receives it on the condition that the State may revoke the conveyance at any time in order to protect public trust uses and resources from being subordinated to or impaired by the authorized non-pubic trust use.

Michigan's public trust doctrine also imposes exacting duties on the State after a valid conveyance is made. These include perpetual duties to maintain control over the occupation and use of submerged lands and waters to ensure public trust uses are not subordinated to or impaired by the authorized non-public trust use, and to reassess occupation and uses in response to new

[1] https://forloveofwater.org/about-us/mission-and-goals/ (accessed March 15, 2022).

information or changed conditions. Following the catastrophic oil release from Enbridge's Line 6B into the Kalamazoo River in 2010, these duties required the State to reassess Line 5's occupation of state bottomlands in the Straits of Mackinac. This inquiry resulted in four important findings: (1) the 1953 Easement purporting to authorize the occupation of Michigan's bottomlands by Line 5 was void from its inception; (2) Enbridge had flouted the terms and conditions of the Easement for decades; (3) Enbridge had materially altered the pipelines without seeking or receiving public trust authorization from the State; and (4) the pipelines are interfering with public trust uses such as navigation. Based on these collective findings, the State fulfilled its duty under the public trust doctrine to revoke and terminate the 1953 Easement.

Enbridge attempts to thwart this collision of the State's public trust duties and Enbridge's own transgressions by running for cover under the auspices of federal preemption. This tactic fails for two reasons. *First*, because Enbridge (and its predecessor, Lakehead) has never received valid public trust authorization to occupy submerged lands in the Straits of Mackinac, it has no interest that could conceivably be protected by the Pipeline Safety Act ("PSA") and Transit Pipeline Treaty. *Second*, even if the 1953 Easement were misconstrued to validly authorize Line 5's occupation of state bottomlands, the State is correct in rejecting Enbridge's contention that the federal laws at issue displace the State's sovereign authority over the occupation of its public trust lands and waters. Federal preemption of such a fundamental aspect of state sovereignty requires a clear manifestation of congressional intent that is altogether missing here.

MICHIGAN'S PUBLIC TRUST DOCTRINE

"Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders."[2] Therefore, "[i]t is state law that

[2] *PPL Montana, LLC v. Montana*, 565 U.S. 576, 604 (2012).

determines what rights and privileges in submerged lands may be granted by a state to private individuals."[3] Each state makes this determination "within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it consider[s] for the best interests of the public."[4] Federal courts recognize states' public trust authority over their submerged lands as an "essential element" of sovereignty.[5] Consequently, state bottomlands have "unique" status and are "infused with a public trust that the state itself is bound to respect."[6]

Michigan, as sovereign, holds the title and control of the bottomlands and waters of the Great Lakes within its territorial boundaries in a "high, solemn, and perpetual trust" for the benefit of its citizens.[7] The courts, "equally with the legislative and executive departments," are the "sworn guardians" of this trust obligation.[8] The trust *res* includes "uses inherently belonging to the people" such as navigation, fishing, hunting, swimming, and pleasure boating.[9] The *res* also includes natural resources such as the water itself.[10]

As public trustee, the State has a duty to protect the *res* from unauthorized interference and impairment by non-public trust uses.[11] This duty generally prohibits the State from conveying a

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[3] *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038 (9th Cir. 2012).
[4] *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).
[5] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997).
[6] *Id*. at 282.
[7] *Collins v. Gerhardt*, 211 N.W.2d 115, 118 (Mich. 1926); *Glass v. Goeckel*, 703 N.W.2d 58, 64 (Mich. 2005) ("[T]he [S]tate, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public.").
[8] *Obrecht v. Nat'l Gypsum Co.*, 105 N.W.2d 143, 149 (Mich. 1960).
[9] *Morgan v Kloss*, 221 N.W. 113, 114 (Mich. 1928); *see also Glass*, 703 N.W.2d at 65; *People v. Broedell*, 112 N.W.2d 517, 519 (Mich. 1961).
[10] *Glass*, 703 N.W.2d at 73; *Broedell*, 112 N.W.2d at 519; *People ex rel. MacMullan v. Babcock*, 196 N.W.2d 489, 497 (Mich. Ct. App. 1972).
[11] *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452-54 (1892); *Glass*, 703 N.W.2d at 73; *Obrecht*, 105 N.W.2d at 150; *Hilt v. Weber*, 233 N.W. 159, 168 (Mich. 1930); *Kloss*, 221 N.W. at 114.

proprietary or other property interest in public trust land and waters for a non-public trust use. The sole exception to this prohibition is where the State makes a "due finding" that there is an "exceptional reason" for the conveyance.[12] And only two findings qualify: the conveyance must either (1) improve public trust uses, or (2) not impair public trust resources or uses.[13]

Where a conveyance of an interest in public trust lands (the *jus privatum*) for a non-public trust use is supported by the requisite finding, the interest granted is necessarily and perpetually encumbered by paramount public trust rights (the *jus publicum*).[14] The State can never "relinquish [its] duty to preserve public rights in the Great Lakes and their natural resources."[15]

Because a conveyance of the *jus privatum* "leaves intact public rights in the [water] and its submerged land," the State's public trust duties survive the disposition of public trust lands.[16] The power to revoke a conveyance of submerged lands to protect the *jus publicum* is necessarily incident to these duties.[17] *Illinois Central* recognizes that states must have this revocation power because a "state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."[18] Thus, the State may exercise its revocation power to protect the public trust in response to changed conditions.[19]

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[12] *Obrecht*, 105 N.W.2d at 149; *Illinois Cent.*, 146 U.S. at 455-56.
[13] *Obrecht*, 105 N.W.2d at 149-51.
[14] *Glass*, 703 N.W.2d at 65 (noting that "although the state retains the authority to convey lakefront property to private parties, it necessarily conveys such property *subject to the public trust*"); *Nedtweg v. Wallace*, 208 N.W. 51, 52 (Mich. 1926) (same).
[15] *Glass*, 703 N.W.2d at 65.
[16] *Id.*
[17] *Illinois Cent.*, 146 U.S. at 453-55 (recognizing that grants of public trust lands for non-public trust purposes are "necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time"); *Obrecht*, 105 N.W.2d at 149 (noting that Michigan courts "[l]ong ago" adopted the "universally accepted rules" of public trusteeship announced in *Illinois Central*).
[18] *Illinois Cent.*, 146 U.S. at 453.
[19] *Id*. at 453-54 (upholding legislative repeal of a prior act authorizing the fee-simple disposition

ARGUMENT

The threshold question in this case is whether the 1953 Easement purporting to authorize Enbridge's predecessor to occupy state bottomlands in the Straits of Mackinac was validly issued under Michigan's public trust doctrine. Given that the Conservation Commission granted the easement in violation of Michigan's public trust law, the conveyance is void from its inception. Enbridge's preemption claims accordingly fail because the federal laws at issue do not purport to give pipelines that have *never* received valid state authorization to occupy state bottomlands the right to trespass.

I. The 1953 Easement is void from its inception because the Conservation Commission did not provide an exceptional reason for the conveyance as required by Michigan's public trust doctrine.

As noted above, the Michigan Supreme Court in *Obrecht* unequivocally stated that it had "[l]ong ago" committed itself to the "universally accepted rules of [public] trusteeship" articulated in *Illinois Central*.[20] Collectively, these earlier cases recognized a flat prohibition on the grant of state bottomlands unless the conveyance would either (1) improve public trust uses, or (2) not impair public trust resources or uses.[21] Thus, *Obrecht*'s description of the two "exceptional reasons" justifying a conveyance was far from a new pronouncement. The same holds true for *Obrecht*'s requirement that such reasons be memorialized in the form of a due finding. Findings

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of submerged lands based on the current legislature's right to exercise its public trust powers in a manner "more conformable to its wishes"); *Nat'l Audubon Soc'y v. Superior Ct.*, 33 Cal. 3d 419, 447, 658 P.2d 709 (1983) (holding that "the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs"); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094 (Idaho 1983) (recognizing the power of the state trustee to "determin[e] in the future that th[e] conveyance is no longer compatible with the public trust").

[20] 105 N.W.2d at 149 (citing prior cases from 1901, 1910, and 1926).

[21] *Illinois Cent.*, 146 U.S. at 453; *State v. Lake St. Clair Fishing & Shooting Club*, 87 N.W. 117, 123 (Mich. 1901); *State v. Venice of America Land Co.*, 125 N.W. 770, 778-79 (Mich. 1910); *Nedtweg v. Wallace*, 208 N.W. 51, 54-55, 58 (Mich. 1926).

have always been part and parcel of a trustee's res-management duties.[22]

There is no reasonable basis for Enbridge to assert that the 1953 Easement comported with the public trust principles restated by the Court in *Obrecht*. Act 10, which authorizes the Conservation Commission to lease public trust bottomlands throughout Michigan, is a statute of general applicability.[23] It does not contain any legislative findings to support site-specific conveyances, including the easement for the dual pipelines.[24] Similarly, the only language in the 1953 Easement conceivably touching on the public trust effects of the conveyance are cursory recitals that do not constitute a due finding under public trust law in Michigan. These recitals to the Easement provide:

> WHEREAS, the Conservation Commission is of the opinion that the proposed pipe line system will be of benefit to all of the people of the State of Michigan and in furtherance of the public welfare; and
>
> WHEREAS, the Conservation Commission duly considered the application of Grantee and at its meeting held on the 13th day of February, A.D. 1953, approved the conveyance of an easement.

The Conservation Commission's unsubstantiated opinion is not a reason, much less a due finding.[25] Moreover, the boilerplate recitals do not address or provide either of the two "exceptional reason[s]" for conveying a public trust interest.[26] They do not address whether the conveyance will impair public trust uses, and the alleged pipeline benefits they identify are not

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[22] *Kelsey v. Detroit Tr. Co.*, 251 N.W. 555, 556 (Mich. 1933) (recognizing the common law "duty to disclose to the beneficiaries and account for the estate"); *In re Childress Tr.*, 486 N.W.2d 141, 145-46 (Mich. Ct. App. 1992) (recognizing that a "beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust").

[23] Mich. Comp. Laws § 324.2129.

[24] *See Obrecht*, 105 N.W.2d at 149 (omitting Act 10 from its list of numerous other acts where "the legislature has directly and specially pursued its exceptional and conceded authority" to convey state bottomlands).

[25] *See Evening News Ass'n v. City of Troy*, 339 N.W.2d 421, 433 (Mich. 1983).

[26] *See Obrecht*, 105 N.W.2d at 149.

public trust benefits as they must be under *Obrecht* and *Illinois Central*. The latter case specifically states that a public trust interest cannot be conveyed unless the authorized, non-public trust use will directly improve a public trust use, such as navigation.[27] Improvement of the general welfare is therefore not a valid basis for granting the Easement under public trust law. This is especially true where, as here, there are no findings or even suggestions that the public welfare benefit cited by the Conservation Commission is also a public trust benefit. The 1953 Easement is therefore void for unlawfully impairing public trust rights.[28]

Enbridge dismisses the State's argument that the Easement is void from the inception for lack of compliance with Michigan's public trust doctrine in a single, conclusory sentence. Enbridge claims that the State is "wrong about the requirement and wrong that the State never satisfied it," but Enbridge offers no supporting analysis. Br. in Support of Plaintiffs' Mtn. for Summary Judgment ("Br. ISO MSJ") at 3. Instead, Enbridge glosses over the issue by maintaining that "neither claim ultimately matters because this is plainly a state-law safety standard."[29] Enbridge's off-handed and casual dismissal of Michigan's sovereign rights and duties under the public trust doctrine as mere safety standards evidences its fundamental misunderstanding of the critical role that the doctrine plays in protecting public trust uses pursuant to Michigan law.

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[27] 146 U.S. at 452 ("The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants.").

[28] *See Shooting Club*, 87 N.W. at 123 (noting that if public trust rights "were taken away or materially infringed upon by the act or action of the commissioners under the act, the action of the commissioners could not be sustained") (internal quotation marks omitted).

[29] *Id.*

II. The 1953 Easement is void now because the pipelines currently interfere with and subordinate navigation.

FLOW agrees that the Easement is revocable and terminable for the reasons provided in the State's Notice of Revocation and Termination of Easement ("Notice") and associated briefing. The purpose of our argument here is to underscore that the Easement must be revoked in response to unanticipated conditions that are currently interfering with and subordinating navigation.

First, vessels sailing through the Straits of Mackinac encounter a no-anchor zone that would not exist but for the pipelines. The U.S. Coast Guard established this no-anchor zone in response to the spate of recent anchor strikes on and near the pipelines described in the State's Notice.[30] Because a ship captain's highest duty is to protect the safety of the crew and vessel, and because casting an anchor to avoid harm is part and parcel of this duty, the pipelines necessarily interfere with navigation.

Second, the Mackinac Bridge, which did not exist in 1953, compounds navigational risks. Its towers create a 3,800-foot shipping lane constriction that was neither anticipated nor analyzed at the time of the conveyance. A vessel encountering power or steering loss when sailing west to east would be particularly inclined to cast an anchor to avoid a collision with the bridge, as the towers of the bridge present an imminent hazard affecting the safety of the crew and vessel as well as the integrity of the bridge. The U.S. Coast Guard's no-anchor zone, which again would not exist but for the pipelines, and related liability concerns interfere with this navigational imperative. Enbridge does not dispute this navigational interference. For instance, in a recent lawsuit seeking damages from a tug and barge company whose vessel struck the pipelines with one of its anchors, Enbridge stated:

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[30] *Coast Guard "No Anchor" Zone Rules*, 83 Fed. Reg.190, 49283, (October 1, 2018), *available at* https://www.scribd.com/document/390913807/Coast-Guard-no-anchor-zone-Rules (accessed March 15, 2022).

> a reasonable vessel operator would heed the public signs and publicly-available navigational charts urging extreme caution in anchoring in the Straits of Mackinac. Additionally, a reasonable vessel operator would be cognizant of the potential for severe harm to the Great Lakes should any of the pipelines and cables in the Straits of Mackinac be struck by an anchor, and the fact that Enbridge would incur response costs in the event of such an anchor strike.[31]

Third, the foregoing navigational risks are exacerbated because the pipelines are no longer resting on the lakebed as required by the Easement.[32] The Conservation Commission granted the 1953 Easement based on Lakehead's representation that the pipelines would lie on the bottomlands of the Straits buried in the soft clay bottom of the lakebed.[33] Where the topography on the bottomlands was irregular and created valleys or spans of pipe above bottomlands, Lakehead was obligated to fill the voids with riprap and other materials to make sure the dual pipelines rested on the bottomlands.[34]

The current pipelines do not comport with this expectation. Based on Enbridge's own data, approximately 11,049 feet or 2.1 miles of the pipelines were suspended in the water column as of 2018.[35] This equates to more than 47% of the total distance between the pipelines' southern and northern exposure points—that is, where the water depth exceeds 65' and the pipelines no longer

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[31] First Amended Verified Complaint at ¶ 31 (ECF No. 5 at 7-8, PageID.24-25), Enbridge Energy, *L.P. v. Van Enkevort Tug & Barge, Inc.*, 2:18-cv-00105-GJQ-MV (W.D. Mich. July 27, 2018).

[32] Notice at 13-14 (ECF No. 1-1 at 13-14, PageID.34-35).

[33] Columbia University, Dep't of Civil Engineering, *Report on the Structural Analysis of the Subaqueous Crossing of the Mackinac Straits,* p.2 ("Engineering and Construction Considerations" preface) 1953, *available at* https://www.michigan.gov/documents/deq/Appendix_A.2_493980_7.pdf (accessed March 15, 2022).

[34] *Id.* at 1 (noting that "[s]harp 'dips' and 'humps' were avoided wherever possible [in selecting the route for the pipelines], and [in] the relatively few places where those conditions occur, it will be possible to excavate or fill the area *to provide an even bed*") (emphasis added).

[35] Enbridge's 2018 Span Table (West Leg), *available at* https://michigan-dnr.canto.com/v/ENBDNRFILES/album/L85OB?display=list&viewIndex=0&gSortingForward&gOrderProp=name&from=list&column=document&id=s0ub8aeqcl7776o2ouagjfu70b; Enbridge's 2018 Span Table (East Leg), *available at* https://michigan-dnr.canto.com/v/ENBDNRFILES/album/L85OB?display=list&viewIndex=0&gSortingForward&gOrderProp=name&from=list&column=document&id=dc9ebo98ol7j769n8dcf3r6j5o

have to be completely buried in accordance with Paragraph A(1) of the Easement.[36] The elevation of these suspended spans varies from six inches to four feet off the bottom.[37] Many of these elevated spans are located directly in the shipping lane of the Straits of Mackinac.[38]

Enbridge's infidelity to the Easement's locational prescriptions is flatly prohibited under Michigan's public trust law. This is yet another rule emerging from *Obrecht*, where defendant National Gypsum Company constructed a 1,076-foot commercial dock in contravention of an 800-foot length limitation in the authorizing legislation.[39] The Michigan Supreme Court held that the 276-foot exceedance was in effect a trespass because the company's occupancy of public trust lands "may be exercised . . . only in accordance with the regulatory assent of the State.[40] The Court further held that nobody has the right to occupy "bottom lands of the Great Lakes . . . unless and until he has sought and received, from the legislature or its authorized agency, such assent based on due finding as will *legally warrant* the intended use of such lands."[41]

Enbridge has never submitted an application or received approval to occupy state bottomlands with a materially different project. Accordingly, it has no legal warrant to occupy the Straits of Mackinac with the current pipelines.[42] This lack of a warrant, combined with Line 5's subordination of and interference with navigation and other public trust uses, renders the Easement void and revocable.

While FLOW believes that the propriety of the State's revocation action is clear under

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[36] *Id.*
[37] *Id.* (column 3).
[38] Enbridge Pipelines LLC, *MDEQ/USACE Joint Permit Application: 2017 Line 5 Anchor Installation Project*, May 9, 2017, Att.A, Figs.2a&3a, *available at* https://www.envlaw.com/media/uploads/Documents/2018-05-18_petition_to_deq_w_attachments.pdf.
[39] *Obrecht*, 105 N.W.2d at 146.
[40] *Id.* at 150.
[41] *Id.* at 151 (emphasis added).
[42] *See* Great Lakes Submerged Lands Act, Mich. Comp. Laws §§ 324.32502-32508.

Michigan law, if this Court has any doubts in that regard the proper course would be to afford the Michigan Supreme Court the opportunity to resolve any public trust issues the Court believes are unsettled through the certification process.[43] The Michigan Supreme Court is a "sworn guardian" of Michigan's public trust and has the duty to resolve any such questions.[44]

III. The PSA does not preempt the State's duty and right to reassess and reject the existing location of the Line 5 pipelines.[45]

Enbridge essentially argues, under the guise of federal preemption, that the PSA forever binds the State to its 1953 siting decision while simultaneously giving Enbridge the right to repudiate the material terms and conditions of the 1953 Easement as unenforceable.[46] This repudiation-without-rescission theory is wholly unsupported by the congressional scheme at issue and offends the State's public trust rights, basic contract law, and the principles of fair dealing. Although Enbridge claims that "the statutory text and congressional intent are clear that states may determine where *new* pipelines can be built but cannot interfere with the operation of an *existing* pipeline based on purported safety concerns,"[47] it provides no statutory analysis or legislative history to support this conclusion. And none exists.

The PSA expressly provides that its broad grant of authority to the Secretary of Transportation and preemptive effect do not apply to decisions regarding the "location or routing of a pipeline facility."[48] The PSA defines the term "pipeline facility" to mean "a gas pipeline

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[43] *See* W.D. Mich. L. Civ. R. 83.1; *see also* Mich. Ct. R. 7.308(A)(2).
[44] *Obrecht,* 105 N.W.2d at 149.
[45] FLOW does not address Enbridge's argument for preemption under the foreign affairs doctrine because FLOW has nothing to add to the State's thorough rejection of that contention. In the interest of efficiency, FLOW also incorporates the State's description of the legal standard for express preemption in lieu of repeating it here.
[46] Br. ISO MSJ at 16-17.
[47] *Id.* at 17.
[48] *Compare* 49 U.S.C. § 60104(c) (providing that "a State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation") *with*

facility and a hazardous liquid pipeline facility."[49]

Congress's differential treatment of natural gas pipelines and hazardous liquid pipelines like Line 5 in the relevant statutes highlights the importance of the location-routing exemption for the latter pipelines. Natural gas pipeline facilities are subject to the jurisdiction of FERC under the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.*, 49 U.S.C. § 60101(a)(6)(B). Under the NGA, FERC authorizes the location of natural gas pipeline facilities by issuing a certificate of public convenience and necessity to the project applicant, who can then use the certificate to take lands of recalcitrant landowners through an eminent domain proceeding in federal district court.[50]

By contrast, the PSA neither references nor establishes any comparable process, authorizing federal entity, or eminent domain authority for the siting of hazardous liquid pipelines. The omission of any such cognate demonstrates that Congress intended to preserve state authority to dictate and enforce the terms related to the siting of such facilities.[51] This conclusion is reinforced by the PHMSA interpretations recognizing state authority over location and routing decisions cited in the State's Opposition.[52] It is also consistent with testimony in hearings before the Senate Committee on Commerce, Science, and Transportation:

> Q: "In light of the bill's preemption of states over interstate facilities, what effect would DOTs granting of preconstruction approval have on a State's authority over facility siting?"
>
> A: "Exercise of the preconstruction approval authority provided for by S. 411 would in no way diminish a State's existing authority over facility siting."[53]

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id. § 60104(e) ("This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.").

[49] *Id.* § 60101(a)(18).

[50] 15 U.S.C. § 717f.

[51] *See Savage Servs. Corp. v. United States*, 25 F.4th 925, 935 (11th Cir. 2022) ("Where Congress knows how to say something but chooses not to, its silence is controlling.") (internal quotation marks omitted).

[52] Br. in Opposition to Plaintiffs' Mtn. for Summary Judgment at 20 & n.5.

[53] Pipeline Safety Act, Comm. on Commerce, Science, and Transportation (February 8, April 25-26, 1979).

In short, the PSA's preemptive domain does not limit any aspect of state authority over the siting, routing, or location of hazardous liquid pipeline facilities.[54] If Congress had wanted to extinguish any state rights over locational decisions, it would have created a right of eminent domain as it did in the natural gas context. Inferring that the PSA silently abrogated the public trust rights of the several states would also impermissibly upset the "constitutional balance between the States and the Federal Government" where Congress has not made "its intention to do so unmistakably clear in the language of the statute."[55] Constitutional balancing considerations are especially important in the context of non-public trust uses of a state's public trust lands where any intrusion of the federal government into state decisions regarding conveyance, location, and uses is highly circumscribed.[56]

IV. The State's performance of its public trust duty to revoke and terminate the Easement may not be reduced to preemptible "safety standards."

Enbridge's PSA preemption argument fails for the additional reason that Michigan's public trust doctrine and the State's rights, authorities, and duties are far broader than the narrow scope of "safety standards" preemption on which Enbridge relies.[57] Enbridge's mischaracterization and reduction of the State's public trust revocation of the 1953 Easement as nothing more than the mere imposition of safety standards is flawed but understandable—it is the only means by which Enbridge can frame federal preemption. Of course the State's actions here are informed by a compelling desire to avoid another catastrophic oil spill from Enbridge's pipelines, but the Notice

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[54] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (noting that when a court is asked to interpret "a statutory provision that expressly pre-empts state law," it must "identify the domain expressly pre-empted") (internal quotation marks omitted).

[55] *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal alterations, quotation marks, and citation omitted).

[56] *See, e.g.*, *PPL Montana*, 565 U.S. 576; *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

[57] *See* Br. ISO MSJ at 14 (citing 49 U.S.C. § 60104(c)).

makes it perfectly clear that Line 5 is already interfering with public trust uses such as navigation.[58] This interference, along with Enbridge's chronic disregard for the terms of its privilege to occupy state bottomlands, is far more evidence than the State needs to exercise its revocation power under Michigan's public trust law. The State is not saddling Enbridge with a pipeline safety standard; it is fulfilling its paramount, sovereign duty to protect public trust uses from being subordinated by a non-public trust use.

CONCLUSION

Enbridge asks this Court to do something no other court has ever done: reduce a state's manifold rights, duties, and responsibilities under the public trust doctrine down to a square peg of "safety standards." Enbridge then invites the Court to pound that square peg of distortion into a round hole of federal preemption. The Court should reject both overtures.

Respectfully submitted,

OLSON, BZDOK & HOWARD, P.C.
Counsel for Amicus For Love of Water (FLOW)

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By: _____
Digitally signed by Scott W. Howard
Date: 2022.03.15 16:09:35 -04'00'

James M. Olson (P18485)
Scott W. Howard (P52028)
OLSON, BZDOK & HOWARD, P.C.
420 E. Front Street
Traverse City, MI 49686
(231) 946-0044
olson@envlaw.com
scott@envlaw.com

[58] Notice at 2-3, 5-7, 16-17.