



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

October 19, 2020

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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 Directors Clark and Eichinger:

The undersigned officers and attorneys for For Love of Water (FLOW)¹, together with those for Straits of Mackinac Alliance (SMA), and the Straits Area of Concerned Citizens for Peace, Justice, and the Environment (SACCPJE) hereby submit these comments in order to outline the legal requirements that the Michigan Department of Environment, Great Lakes, and Energy (EGLE) and the Michigan Department of Natural Resources (DNR) must follow in administering the Enbridge

¹ FLOW is an independent law and policy center dedicated to the protection of water, health, and communities in the Great Lakes Basin, with offices in Traverse City, Michigan. For nearly seven 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.ForLoveofWater.org.

above-referenced permit applications in accordance with the requirements of the Public Trust Doctrine (PTD), the Great Lakes Submerged Lands Act (GLSLA), the Wetlands Protection Act (WPA), and the Michigan Environmental Protection Act (MEPA).

Our comments address the following common law and statutory requirements:

- The PTD and the GLSLA require specific findings and determinations to be made before a property interest in state lands may be conveyed, alienated, or occupied by another public or private entity for use consistent with the public trust doctrine and the GLSLA. The 2018 Easement to Construct and Maintain Underground Utility Tunnel at the Straits of Mackinac granted to the Michigan Straits Corridor Authority (MSCA), the assignment of this easement to Enbridge Energy, Limited Partnership, and the 99-year Tunnel Lease agreement were executed without the requisite determinations and authorizations required by the PTD and the GLSLA.
- The issuance of a permit under the WPA requires EGLE to make a number of specific determinations including whether the project benefits outweigh reasonably foreseeable detriments, the extent to which there is a public and private need for the project, and whether there are feasible and prudent alternatives to the tunnel project. Unless Enbridge demonstrates that the benefits of the proposed project outweighs the foreseeable detriments and establishes a public and private need, the permit is prohibited by the WPA and its Rules.
- MEPA requires EGLE to consider and determine whether there is a feasible and prudent alternative to the direct and cumulative effects of the proposed project and the proposed project is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction.

Our analysis sets forth the Departments' legal responsibilities under the PTD and Parts 303 and 17 of the Natural Resources and Environmental Protection Act (NREPA).²

² 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. <https://forloveofwater.org/wp-content/uploads/2020/04/FLOW-MBA-Authority-Letter-11-01-18.pdf>

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. <https://forloveofwater.org/wp-content/uploads/2020/03/FLOW-Letter-to-MSCA-2020.03.05.pdf>

1. EGLE Cannot Properly Proceed on Administering the Enbridge Permit Applications Unless and Until the December 2018 Easement and Tunnel Lease Have Been Authorized under the PTD and GLSLA

a. The Soils Beneath the Great Lakes Are Impressed with the Public Trust

Enbridge’s proposed corridor tunnel and new tunnel pipeline are subject to the state’s sovereign trust title, the Public Trust Doctrine, and the GLSLA. 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.³ All of these waters and the soils beneath them are held in and protected by a public trust.⁴ 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 conveyance and one of the following conditions have been satisfied:⁵

- (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.⁶

b. Any Conveyance of a Property Interest or Agreement for Occupancy and Use of the Soils and Waters of the Great Lakes by the State Must Conform to the Requirements of the GLSLA

As amended, the GLSLA requires that any conveyance, lease, agreement, occupancy, use or other

On May 1, 2020, FLOW and the Straits of Mackinac Alliance (SMA) submitted a legal memorandum to EGLE alerting the department again about the lack of authorization under the GLSLA and the PTD as a prerequisite for Enbridge’s tunnel permit applications under the Great Lakes. <https://forloveofwater.org/wp-content/uploads/2020/06/FLOW-and-Straits-of-Mackinac-Alliances-formal-legal-comments-to-EGLE.pdf> These letters are all incorporated by reference.

³ *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).

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

⁵ *Id.*; p. 416.

⁶ *Illinois Central R Rd v Illinois*; *Obrecht v National Gypsum Co.*, *supra*.

action in the waters or on, in, through or under the bottomlands of the Great Lakes, be authorized by EGLE pursuant to the public trust standards in the GLSLA and the common law of the Public Trust Doctrine. The GLSLA also specifically incorporates public trust principles, including the requirement that any conveyance of an interest in Great Lakes waters and bottomlands is subject to a mandatory determination the use of public trust lands and waters will not be substantially affected or that the public trust in the same will not be impaired.

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.⁷

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...*⁸
(Emphasis Added)

In the above sections, the legislature makes clear that:

- 1) The GLSLA is to “be construed so as to preserve and protect the interests of the general

⁷ MCL 324.32502; see also 324.32503, 324.32504, 324.32505(4), 324.32512.

⁸ MCL324.32503(1)

- public in the lands and waters;”
- 2) The GLSLA applies to the “sale, lease, exchange, or other disposition of unpatented lands;”
 - 3) The state must ensure that “the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition;” and,
 - 4) All conveyances of state lands are authorized only “after finding that the public trust in the waters will not be impaired or substantially affected” and must be “in conformance with the public trust.”

Maintaining fidelity to the Public Trust Doctrine is a “*high, solemn and perpetual*...duty of the State to forever maintain.” *Collins v. Gerhardt*, 211 N.W. 115, 118 (Mich. 1926).⁹ In order to be a valid conveyance authorized under law, the DNR must make a determination that the easement and the lease will not be inimical to the public trust. The conveyance of the easement and lease constituted a *per se* violation of this public trust requirement. In the absence of a finding and determination that “the public trust in waters will not be impaired or substantially affected” the DNR conveyance of the easement and tunnel lease are invalid and void.¹⁰

To the extent that Enbridge may claim that the state’s public trust interest and fiduciary responsibilities do not extend to the subterranean lands that will be excavated to accommodate the tunnel, that argument must fail. Section 3 of the GLSLA also makes clear that the GLSLA applies to subterranean lands by specific reference to materials found under subterranean lands “*including, but not limited to, coal, oil, gas, sand, gravel, stone, and other materials or products located or found in those lands.*” The state’s title and public trust interest in the lands subjacent to the bottomlands cannot be seriously contested as the title to the soils in the bottomlands and waters of the Great Lakes vested absolutely and in public trust on the State’s admission to the Union in 1837.¹¹

2. EGLE Must Undertake an Analysis of the Lifetime Greenhouse Gas Emissions Attributable to the Proposed Tunnel

Like the DNR’s and EGLE’s mandatory duty to determine whether the public trust will not be impaired or substantially affected by the conveyance of the easement and lease, EGLE must, in administering Enbridge’s permit application under Parts 325 of NREPA, also determine whether the public trust in the waters will not be impaired or substantially affected by the construction of the tunnel.¹² As the tunnel

⁹ The Michigan Supreme Court has emphatically declared that “the public trust doctrine is alive and well in Michigan[.]” *Glass v. Goeckel*, 703 N.W.2d 58, 66 (Mich. 2005).

¹⁰ No part of the beds of the Great Lakes can be alienated or otherwise devoted to private use in the absence of due finding that the conveyance can be done without detriment to the public interest in the lands and waters remaining. *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 413; 105 N.W.2d 143 (1960).

¹¹ *Illinois Central R Rd, supra; Shively v Bowlby, supra*, n. 3.

¹² EGLE may also take the position that the permit application is not administratively complete because Enbridge has not shown that it has a legally cognizable interest in the bottomlands under the Straits of Mackinac. *See also FLOW’s and SMA’s May 1, 2020 joint letter.*

is proposed to extend the operable life of Line 5 for 99 years, EGLE must evaluate the environmental and health consequences of approving the tunnel.

When gasoline and diesel fuel are burned, they produce carbon dioxide, a greenhouse gas (GHG), carbon monoxide, nitrogen oxides, particulate matter, and unburned hydrocarbons.¹³ The overwhelming scientific consensus holds that these unavoidable byproducts of petroleum combustion have profound environmental, climactic, and public health consequences that are now quantifiable and monetizable. Line 5 transports approximately 8.4 billion gallons of crude oil and natural gas liquids per year (23 million gallons per day).¹⁴

According to the Michigan Department of Health and Human Services, GHG emissions have already resulted in the impairment of Michigan's natural resources – effects that will get worse unless CO₂ emissions are abated.¹⁵

Since 1951, Michigan has experienced measurable increases in temperature ranging from 0.6°F in the southeastern Lower Peninsula to 1.3°F in the northwestern Lower Peninsula.¹⁶ The Great Lakes, like the oceans, are absorbing heat, but at a faster rate, affecting limnologic health and altering ecosystems. Lake Superior's summer (July–September) surface water temperatures increased approximately 4.5°F (2.5°C) since 1980, warming twice as fast as air temperature. Great Lakes ice cover has decreased by 71% in the past 40 years.¹⁷

¹³ EIA, Gasoline and the Environment, rb.gy/ubclo6

¹⁴ Line 5 in Michigan, Michigan.gov

<https://www.michigan.gov/line5/0,9833,7-413-99504---,00.html#:~:text=Line%20%20transports%20up%20to,gas%20liquids%2C%20according%20to%20Enbridge>

¹⁵ Present and future climate impacts in Michigan according to MI Dept of Health and Human Services and National Climate Assessment:

- Increased severity and frequency of storm events
- Water-borne diseases from flooding, sewage overflows, septic failures, and development of harmful algal blooms.
- Increased heat wave intensity and frequency, increased humidity, degraded air quality, and reduced water quality will increase public health risks
- Increased heat stress causing ecosystem disturbance, crop failures and reduced yields
- More frequent flooding with associated soil erosion, declining water quality and beach health.
- More numerous late spring freezes detrimental to fruit crops
- Increased aquatic invasive species and harmful blooms of algae, and declining beach health.
- Negative impacts on transportation, agriculture, human health, and infrastructure

MDHHS, Michigan Climate and Health Profile, 2015. https://www.michigan.gov/documents/mdhhs/MI_Climate_and_Health_Profile_517517_7.pdf

¹⁶ International Association for Great Lakes Research, The Great Lakes at a Crossroads Preparing for a Changing Climate, http://iaglr.org/scipolicy/factsheets/iaglr_crossroads_climatechange.pdf

¹⁷ <http://absolutemichigan.com/michigan/great-lakes-ice-coverage-down-71-in-past-40-years/>

The Public Trust Doctrine and the GLSLA compel EGLE to determine the effects of the proposed tunnel on the Great Lakes and its tributary rivers and streams and whether the public trust in waters will not be impaired or substantially affected.

While EGLE may have not sought to quantify the carbon emissions of pipeline projects in the past, doing so now is a scientific, environmental, and economic imperative. “The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.”¹⁸ Because climate science concerning the adverse and injurious effects of GHG emissions has become clearly evident, the courts now require federal agencies that review major projects such as pipeline proposals to take a “hard look” at the environmental consequences of the proposed action, including carbon emissions, in applying the National Environmental Policy Act (NEPA).¹⁹

In *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), the D.C. Circuit held that “FERC must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.” The court found that NEPA requires FERC to balance “the public benefits against the adverse effects” of natural gas pipelines and evaluate the reasonably foreseeable downstream emissions and climate impacts resulting from its approval of expanded natural gas pipeline infrastructure.

In accord, in *Birckhead v. FERC*, No. 18-1218 (D.C. Cir. 2019), the court followed *Sierra Club v. FERC*, stating that FERC has the responsibility to attempt to obtain information necessary to evaluate the downstream environmental effects of a proposed interstate pipeline project.²⁰ Similarly, in *WildEarth Guardians v. Zinke*, 368 F. Supp 3d 41, (D.D.C. 2019), the court held that the Bureau of Land Management did not sufficiently consider climate change when leasing federal lands for oil and gas development.

The scientific and jurisprudential trends are clear – the courts are requiring regulatory agencies to exercise their fiduciary responsibilities and evaluate the long-term effects the proposed permitted activities on the natural resources for which they are required by law to protect.

¹⁸ *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972).

¹⁹ See FERC, *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042, 2018. (NEPA and its implementing regulations require that review of major projects such as pipeline proposals demand a “hard look” at the environmental consequences of the proposed action and identification of possible alternatives).

²⁰ FERC’s reviews should “ensure that pipeline infrastructure additions occur only if they: are required by the public interest after considering all relevant factors; produce greater benefits than costs (including through consideration of environmental externalities); do not impose undue burdens on landowners and communities; and enable the orderly development of infrastructure.” Testimony of Susan F. Tierney, before the U.S. House Subcommittee on Energy of the Committee on Energy and Commerce Subcommittee Hearing on “Modernizing the Natural Gas Act to Ensure It Works for Everyone” February 5, 2020. <https://docs.house.gov/meetings/IF/IF03/20200205/110468/HHRG-116-IF03-Wstate-TierneyS-20200205.pdf>

3. Part 303 of NREPA Requires EGLE to Measure the Benefits of the Proposed Tunnel Against Its Reasonably Foreseeable Detriments

The issuance of a permit under the Wetland Protection Act (WPA) requires EGLE to make a number of specific determinations including that the tunnel project is in the public interest, whether the project benefits outweigh reasonable foreseeable detriments, the extent to which there is a public and private need for the project, and whether there are feasible and prudent alternatives. Sec. 30311 of the WPA provides:

(1) A permit for an activity listed in section 30304 shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful.

(2) In determining whether the activity is in the public interest, the *benefit which reasonably may be expected to accrue from the proposal shall be balanced against the reasonably foreseeable detriments of the activity*. The decision shall reflect *the national and state concern for the protection of natural resources from pollution, impairment, and destruction*. The following general criteria shall be considered:

(a) The relative extent of the public and private need for the proposed activity.

(b) The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.²¹

The WPA's specific requirements to measure the benefits of the proposed project against its foreseeable detriments also compel EGLE to evaluate the long-term GHG emissions that the proposed project will produce. The WPA further instructs that this analysis must be conducted with reference to "*the national and state concern for the protection of natural resources from pollution, impairment, and destruction.*"

a. Determining the Public and Private Need for the Project

The proposed tunnel project is intended to extend the transmission of crude oil and natural gas liquids well into the 22nd Century. In that context, EGLE must evaluate the public and private need for the project for the next 100 years.

Long-term market trends and recent events strongly suggest the need for fossil fuel-related infrastructure is decreasing significantly. Petroleum industry economists are warning that peak oil demand is near or may have already arrived. BP's (British Petroleum) chief economist recently explained why BP will undertake a fundamental restructuring of its business model to invest in zero-carbon energy sources.

"The advent of electric vehicles and the growing pressures to decarbonise the transportation sector means that oil is facing significant competition for the first time within its core source of demand. This has led to considerable focus within the industry and amongst commentators on

²¹ MCL 324.30311

the prospects for peak oil demand – the recognition that the combined forces of improving efficiency and building pressure to reduce carbon emissions and improve urban air quality is likely to cause oil demand to stop increasing after over 150 years of almost uninterrupted growth.”²²

The energy sector has lost hundreds of billions in market value and future production will be reduced as the number of active oil rigs have plummeted.²³ The Wall Street Journal reported that the oil development industry lost \$280 billion between 2007 and 2018.²⁴ Since 2015, more than 200 North American oil and gas producers have filed for bankruptcy protection, leaving \$130 billion in debt. Oil and gas bankruptcies have accelerated in 2020, which now include oil giant Chesapeake Energy Corporation.²⁵

Other market indicators suggest that investment in new pipeline infrastructure is highly questionable in light of clear trends indicating a precipitous drop in oil consumption in future years.

- Analysis released August 9th by world’s 8th largest bank, BNP Paribas reports “that the economics of oil for gasoline and diesel vehicles versus wind-and solar-powered [electric vehicles] EVs are now in relentless and irreversible decline, with far-reaching implications for both policymakers and the oil majors.”²⁶
- Seventeen major tar sands projects have been cancelled in the last several years. Seven international oil companies – Exxon Mobil, Conoco Phillips, Statoil, Koch Industries, Marathon, Imperial Oil and Royal Dutch Shell – have divested their interests in Alberta tar sands and will not need Enbridge’s future pipeline services.²⁷ The conveyance of tar sand oils represents a large increment of Enbridge’s ongoing carrying capacity and a major revenue source.
- The International Energy Agency (IEA) projects *Global EV Outlook 2020* that adoption of EVs will result in reduced oil demand of 2.5 – 4.2 million barrels per day by 2030.²⁸
- The world’s major auto manufacturers are transitioning away from gas and diesel-powered vehicles. General Motors, Ford, Toyota, VW, Volvo, and others are making clear that

²² BP, Peak oil demand and long-run prices, <https://www.bp.com/en/global/corporate/energy-economics/spencer-dale-group-chief-economist/peak-oil-demand-and-long-run-oil-prices.html>

²³ Business Insider, *The battered \$700 billion US energy industry is now worth roughly half of Microsoft amid oil's record plunge*, April 21, 2020. <https://markets.businessinsider.com/commodities/news/us-energy-industry-worth-half-microsoft-oil-price-crash-record-2020-4-1029113811#>

²⁴ WSJ, *Wall Street Tells Frackers to Stop Counting Barrels, Start Making Profits*, December 13, 2017. <https://www.wsj.com/articles/wall-streets-fracking-frenzy-runs-dry-as-profits-fail-to-materialize-1512577420>

²⁵ World Oil, *Chesapeake joins more than 200 other bankrupt U.S. shale producers*, June 29, 2020. <https://www.worldoil.com/news/2020/6/29/chesapeake-joins-more-than-200-other-bankrupt-us-shale-producer>

²⁶ PNB Paribas, *Wells, Wires and Wheels*, August 2019. <https://docfinder.bnpparibas-am.com/api/files/1094E5B9-2FAA-47A3-805D-EF65EAD09A7F>

²⁷ Grist, *This could be the end of Canadian tar sands*, January 12, 2017. <https://grist.org/article/this-could-be-the-end-of-canadian-tar-sands/>

²⁸ IEA, *Global EV Outlook 2020*, <https://www.iea.org/reports/global-ev-outlook-2020>

petroleum-free electric drivetrains will dominate their future manufacturing investments and that future product offerings will not use transportation fuels.

- California has joined 18 countries and 25 cities and metropolitan areas that have announced their intention to ban future sales and, in some cases, the use of vehicles with internal combustion engines.²⁹

It should also be of concern to EGLE that members of the global insurance industry are announcing that they will no longer invest in or insure tar sands related projects and pipelines. Zurich Insurance Group, for example, announced an updated fossil fuel policy which commits to cutting both insurance and investment support for companies significantly involved in tar sands or oil shale.³⁰ Global leader AXA indicated that it is “phasing out of insurance coverage for new coal construction projects and oil sands businesses.”³¹

In addition, in response to reduced global oil demand, in part attributable to the SARS-CoV-2 crises, Enbridge has begun to use excess pipeline capacity to store excess crude oil.³² Available market-based data and information cast serious doubt that there is a future public or private need for the tunnel and strongly suggest that the need for petroleum products is already waning. EGLE should take into account the strong market trends favoring the transition to zero carbon energy generation resources and the abundant and growing evidence of the environmental, economic, and public health impacts associated with the development, transportation, and combustion of fossil fuels. Such data and information is necessary to fulfil EGLE’s responsibility to make an informed determination on whether a wetlands permit may issue.

b. Determining the Availability of Feasible and Prudent Alternative Locations and Methods to Accomplish the Expected Benefits from the Activity

Evaluating feasible and prudent alternatives is complementary to the determination of public need. Both ask the question, “Is there an alternative that results in more public benefit or less potential public harm?”

²⁹ Center for Climate Protection, *Survey of Global Activity to Phase Out Internal Combustion Engine Vehicles*, September 2018. <https://theclimatecenter.org/wp-content/uploads/2018/09/Survey-on-Global-Activities-to-Phase-Out-ICE-Vehicles-FINAL.pdf>

³⁰ Zurich Insurance Group Becomes First Primary Insurer to Commit to Not Underwriting Tar Sands Companies, June 25, 2019. <https://www.insureourfuture.us/updates/2019/6/25/zurich-insurance-group-becomes-first-primary-insurer-to-commit-to-not-underwriting-tar-sands-companies>

³¹ AXA accelerates its commitment to fight climate change, December 12, 2017. <https://www.axa.com/en/press/press-releases/axa-accelerates-its-commitment-to-fight-climate-change>

³² Enbridge makes deal to store oil in Mainline pipeline as oil glut grows, May 4, 2020. <https://www.cbc.ca/news/canada/calgary/enbridge-mainline-1.5555509>

As the WPA expressly requires a determination concerning the availability of feasible and prudent alternatives, EGLE must require the applicant to provide information demonstrating that there are no viable alternatives to constructing the tunnel. EGLE should require Enbridge to provide independent third-party review tasked with evaluating alternatives to the tunnel. Such independent third-party review should examine the following issues:

- Whether the carrying capacity of the existing network of North American pipelines is sufficient to meet future needs.
- To what extent did the 2010 catastrophic failure of Enbridge's Line 6B and the more recent temporary partial closure of Line 5 result in constriction of supply, market disruption, or price increases to end users?
- Does Line 6B, now reconstructed as Line 78 with double the pipeline's original capacity, have the excess capacity to meet market demand if Line 5 closes?
- Whether cessation of Line 5 would result in a new pipeline system equilibrium capable of meeting existing and future demand for oil and natural gas liquids.
- What is the potential for the tunnel project to become a stranded asset and liability to the State of Michigan in the event market trends play out as predicted?

In 2019, the Energy Information Agency released an inventory of new constructed or expansion of existing pipelines.³³ The inventory listed 230 new or expanded pipeline projects with 21 projects attributed to Enbridge. EGLE should also consider whether these new or expanded pipelines are capable of meeting future market demand.

4. MEPA Requires EGLE to Comprehensively and Independently Consider and Determine Whether the Tunnel Project is Consistent with Protection of Michigan's Natural Resources

EGLE is also required by law to follow the requirements of the Michigan Environmental Protection Act (MEPA), in all of its significant permitting decisions. Michigan courts have consistently recognized that MEPA imposes additional environmental review requirements that are supplemental to existing administrative and statutory requirements.³⁴ The MEPA "imposes a duty on individuals and organizations both in the public and private sectors to prevent and minimize degradation of the environment which is caused or likely to be caused by their activities." *Ray v Mason County Drain Comm'r*, 393 Mich 294, 306 (1975). Further, "It is most important to note that [M]EPA does not, as both parties imply, merely provide a separate procedural route for protection of environmental quality, it also is a source of supplementary substantive environmental law." *In State Highway Commission v Vanderkloot*, 392 Mich. 159 (1974).

First, Section 1705(2), MCL 324.1705(2) of the MEPA itself mandates that:

³³ The Energy Information Administration's new pipeline database lists 230 new pipeline projects and expansions that are underway. https://www.eia.gov/petroleum/xls/EIA_LiqPipProject.xlsx.

³⁴ Section 1706 of the MEPA, MCL 324.1706.

(2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare. (Emphasis added)

In the absence of a determination on whether the conduct will or is likely to pollute, impair, or destroy the air, water, natural resources, or the public trust in those resources, the Department is prohibited from approving any permit or authorization. Further, if it is determined there are such “likely” effects of pollution, impairment, or destruction, the approval or permit is prohibited. Clearly, the Department must consider the likely effects and alternatives of the proposed conduct; the scope of this consideration and determination must include the severally related and cumulative likely effects of direct and severally related conduct.

Second, independent or separate from Section 1705(2), interpreting MEPA, the Court in *Vanderkloot* found that the statute “is designed to accomplish two distinct results:”

- (a) to provide a *procedural* cause of action for protection of Michigan's natural resources; and
- (b) to prescribe the *substantive* environmental rights, duties, and functions of subject entities (court’s emphasis).

Under *Vanderkloot*, MEPA requires a state agency or commission to undertake a two-part inquiry:

- 1) determine whether the project proponent has demonstrated that “*there is no feasible and prudent alternative to [the polluting, impairing, or destroying entity's] conduct*”; and
- 2) whether “*such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction*” (court’s emphasis).

Failure to comply with the substantive duty imposed by (b) above results in an invalidation of the permit or approval. The *Vanderkloot* court found that even though the statute at issue - the Highway Condemnation Act - had no provisions requiring environmental review, the failure of the State Highway Commission to apply MEPA and examine feasible and prudent alternatives when a highway project involves environmental “pollution, impairment [or] destruction” would constitute an abuse of discretion.

“We additionally hold that the substantive environmental duties placed on the State Highway Commission by the Environmental Protection Act of 1970, MCLA 691.1201 *et seq.*; MSA 14.528(201) *et seq.*, are relevant to [the Highway Condemnation Act] judicial review in that failure by the Commission to reasonably comply with those duties may be the basis for a finding of fraud or abuse of discretion.”

In accord is *Ray v Mason County Drain Commissioner, supra*, 93 Mich at 306-307. There, the court held that MEPA “does more than give standing to the public and grant equitable powers to the circuit courts, it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities.... [MEPA] allows the courts to fashion standards in the context of actual problems as they arise in individual cases and to *take into consideration changes in technology* which the Legislature at the time of the Act's passage could not hope to foresee.” 393 Mich at 306-307³⁵ (emphasis added).

In *Her Majesty the Queen v Detroit*, 874 F.2d 332 (1989), a case challenging the siting of the Detroit municipal incinerator, the Sixth Circuit followed *Ray*, finding that, “In addition to creating procedural rights, MEPA imposes a substantial duty on all persons and entities, public and private, to prevent or minimize environmental degradation caused by their activities.” The court further found that “MEPA is supplementary to existing administrative and regulatory procedures provided by law. It specifically authorizes the court to determine the validity, applicability, and reasonableness of any standard for pollution or pollution control equipment set by state agency *and* to specify a *new* or *different* pollution control standard if the agency's standard falls short of the substantive requirements of MEPA” (court’s emphasis, internal citations omitted).

More recently, in *Buggs v. Michigan Public Service Commission*, COA No. 315058, (2015) (unpublished opinion), a case involving construction of a proposed natural gas pipeline, the court found that MEPA “established a substantive standard prohibiting the impairment of natural resources, which applies to an agency's determinations.” Following *Vanderkloot*, the court held that the MPSC

“had to consider whether the proposed project would impair the environment, whether there was a feasible and prudent alternative to the impairment, and whether the impairment was consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction.”³⁶

The *Buggs* court stated that “although the Commission found in a cursory manner that the pipelines would serve the public convenience and necessity, it did not otherwise *expressly speak to necessity, practicability, feasibility, or prudence in its orders.*” Remanding the case back to the MPSC, the court stated that the Commission “failed to follow the *independent statutory requirement* imposed under MEPA. Because its orders approving the pipelines were unlawfully issued, we vacate those orders and remand for a new necessity determination in both dockets.” (emphasis added). *See also, Mich Oil v. Natural Resources Commission*, 406 Mich. 1, 32-33 (Mich. 1979). (“The environmental protection act, by

³⁵ Speaking to whether MEPA is in *pari materia* with the Oil Conservation Act, the court stated: “Having concluded that 1939 PA 61 and 1921 PA 17 provide statutory authority for denial of the drilling permit in the instant case, it is unnecessary to decide whether the Michigan environmental protection act, MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.*, must be read *in pari materia* with the oil conservation act. Nevertheless, if an answer to this question were required, we would hold that the Michigan environmental protection act should be read *in pari materia* with all legislation relating to natural resources.”

³⁶ Referring to Mich Const. 1963, art. 4, sec. 52.

its terms, is substantively supplementary to existing laws and administrative and regulatory procedures provided by law.”); *West Michigan Environmental Action Council v. Natural Resources Commission*, 405 Mich 741 (1979), (under MEPA, courts have a responsibility to independently adjudicate and determine whether there is adequate protection from pollution, impairment and destruction).

Under *Vanderkloot*, *Ray*, and *Buggs*, the duty to consider and/or determine likely effects and alternatives of a project must be as broad and thorough as the subject matter requires. *Buggs* teaches that EGLE must determine the “necessity, practicability, feasibility, and prudence” of the tunnel project.

Under MEPA, EGLE’s analysis must determine if extending the service life of Line 5 by authorizing the tunnel project is “consistent with the promotion of the public health, safety and welfare in light of the state’s paramount concern for the protection of its natural resources from pollution, impairment or destruction.”³⁷ Enbridge’s proposed tunnel project is intended to extend the life of Line 5 for the next 99 years, delivering 57 million tons of atmospheric carbon to the Great Lakes Region annually. Authorizing the project is fundamentally at odds with Governor Whitmer’s recent Executive Order 2020-10 which states in its preamble:

“The science is clear, and message urgent: the earth’s climate is now changing faster than at any point in the history of modern civilization, and human activities are largely responsible for this change. Climate change already degrades Michigan’s environment, hurts our economy, and threatens the health and well-being of our residents, with communities of color and low-income Michiganders suffering most. Inaction over the last half-century has already wrought devastating consequences for future generations, and absent immediate action, these harmful effects will only intensify. But we can avoid some of the worst harms by quickly reducing greenhouse gas emissions and adapting nimbly to our changing environment.”

Executive Order 2020-10 sets a goal “to achieve economy-wide carbon neutrality no later than 2050.” EGLE has the opportunity to conduct its analyses in conformity with statutory and common law public trust requirements and be congruent with the carbon reduction goals of the administration.

Conclusion and Requested Action

1. The 2018 Easement to Construct and Maintain Underground Utility Tunnel at the Straits of Mackinac purports to grant a public utility easement for the location, occupancy, and use of the public trust bottomlands of the Straits of Mackinac for the Enbridge Line 5 tunnel project, consisting of the 2018 Easement to the Mackinac Straits Corridor Authority (MSCA), the assignment by MSCA of this easement to Enbridge Energy, Limited Partnership, and the 99-year lease to Enbridge for the right to exclusively possess, occupy, and use the utility tunnel for a new 30-inch diameter pipeline that will connect with the existing 645-mile, 67-year old Line 5 from Superior, Wisconsin, to Sarnia, Canada. In effect, these conveyances--the easements, the assignment, and 99-year lease encumber and transfer substantial public trust interests of the

³⁷ Section 1705(2), MEPA, *supra*; *Vanderkloot*; *Buggs*, *supra*; Mich Const. 1963, at. 4, sec. 52.

State's public trust bottomlands and waters; in fact, it could tie the State to the entire 67-year old line for another century.

The 2018 Easement, the Assignment, and the 99-year Tunnel Lease agreement were executed and conveyed without the requisite determinations and authorizations required by the Public Trust Doctrine and the GLSLA. The PTD and the GLSLA prohibit such authorization without an application for authorization of these conveyances or lease documents and the required findings and determinations that (a) under public trust law that the public trust interest and uses of the Great Lakes waters and bottomlands will be improved and/or not impaired, and (b) under the GLSLA will not be substantially affected or that the public trust in the same will not be impaired. Without such specific findings and determinations, the conveyance or transfer of these interests violate the PTD and GLSLA and are per se void; and the EGLE should determine that the Enbridge permit applications for a construction permit as "fill" or "other materials" under Section 32512(1)(c) of the GLSLA for the tunnel under the GLSLA, Part 325, NREPA, and Wetlands Protection Act, Part 303, NREPA, cannot be further processed, reviewed or decided by the Department.³⁸

Accordingly, the application for construction permit is premature and must be denied unless and until Enbridge submits an application for authorization of these conveyance and transfers of public trust bottomlands under Sections 32502 and 32503, including related sections, e.g. 32504, 32505, and Rule 1015. For these reasons and to avoid a violation of public law and the GLSLA, the Department should determine and notify the applicant Enbridge that it must submit an application for authorization of these conveyance and occupancy and use agreements under Sections 32502 and 32503 of the GLSLA, and related sections and GLSLA Rules. Once this additional necessary application is submitted, with required showings and assurance that it is administratively complete, the application can be processed, reviewed, and determined along with the current application to construct the tunnel project on these public trust bottomlands. At that point, both the current applications for construction and wetlands permits can proceed in accordance with the GLSLA, WPA, and their respective rules with the application for

³⁸ While the 2018 DNR Tunnel Easement to the MSCA on its face refers to authority for the easement under Part 2129, Section 2129, MCL 3242129, an easement for a public utility pipeline under Section 2129 does not satisfy the authorization and public trust determination standards required by Sections 32502 and 32503 of the GLSLA. More. The GLSLA exempts expressy prior conveyances of St. Clair Flat relicted lands in the early 900s, but does not except public utility line easements.. Moreover, there were no recorded findings or determinations made by the DNR before it entered into and granted the tunnel easement for public utility purposes, so the easement is void under public trust law adopted by the Michigan Supreme Court more than 100 years ago. *Illinois Central R Rd v Illinois*, *supra*; *State v St. Clair Fishing & Shooting Club*, 127Mich App at 595-596 (1901); *State v Venice of America Land Co.*, 160 Mich 680 (1910); see Plaintiff Attorney General's Brief in Support of Motion for Partial Summary Disposition on Public Trust Count I,A, dated September 16, 2019, pp. 8-10, *Attorney General Dana Nessel ex rel People of Michigan v Enbridge, Ingham County Cir. Ct.* Case No. 19-474-CE.

authorization of the easement, assignment, and 99-year lease of the state's public trust bottomlands.

2. The issuance of a permit under the Wetland Protection Act requires EGLE to make a number of specific determinations including the following:
 - a. Section 30311(2). Whether the project is "in the public interest" and the benefits outweigh reasonably foreseeable detriments, the extent to which there is a public and private need for the project, and whether there are feasible and prudent alternatives to the tunnel project. The proposed project would extend the life of Line 5 for 99 years and annually convey approximately 8.4 billion gallons of petroleum products that would yield millions of tons of greenhouse gas emissions. The overwhelming scientific consensus holds that the unavoidable byproducts of petroleum combustion have profound environmental, climactic, and public health consequences. Unless Enbridge demonstrates the public benefits of the proposed project outweighs the foreseeable detriments and shows a public and private need, the issuance of a permit is prohibited by the WPA and its administrative rules.
 - b. Section 30311(1). Whether the Tunnel Project and pipeline are necessary to realize the benefits from the activity. For the reasons noted above, particularly regarding the falling demand for crude oil and rapid shift throughout the country in both the public and private sectors toward renewable energy, a thorough analysis must determine whether the tunnel and Line 5 are needed at all. Further, whatever need there is for Enbridge and the public to realize the benefits of crude oil transport, with a few adjustments with far less impact, no use of public trust lands and waters, and at less cost, Enbridge can utilize the 400,000 bbls./day additional design capacity in the replacement of Line 6B or Line 78 across southern Michigan to Sarnia, Detroit, and Toledo.
 - c. Section 30311(4)(b). Whether there exist feasible and prudent alternatives to the proposed conduct and tunnel. As established and noted in the foregoing comments, and subparagraphs a. and b. above, there exist feasible and prudent alternatives for Enbridge because there is neither a necessity for continuing Line 5 or the Tunnel Project, nor is Enbridge without better alternatives, more feasible and prudent than the \$500,000 tunnel project. There is ample capacity in the overall crude oil and petroleum pipeline system. There exists 400,000 bbls.'day of excess capacity that would meet Michigan and Enbridge's and its customers' future needs.

For these reasons, the WPA Permit should be denied, because it is contrary to or without the showing and findings required by Section 30311(1), (2), and (4) of the WPA

3. MEPA and the WPA require EGLE to consider and determine whether there is a feasible and prudent alternative to the direct and severally related cumulative effects of the entire proposed

project and whether the proposed project is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. EGLE must require Enbridge to show that there are no feasible and prudent alternatives to the proposed project and that it is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction.

For these reasons, the Department is requested to apply the full scope of MEPA and its requirements to consider and/or consider and determine likely effects of the proposed conduct, and each and severally related part, including cumulative effects, and whether there exist feasible and prudent alternatives to the Tunnel Project and pipeline.

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.

Sincerely,

Liz Kirkwood
Executive Director
For Love of Water (FLOW)

Patty Peek
Chair
Straits of Mackinac Alliance (SMA)

Joanne Cromley
Chair
Straits Area of Concerned Citizens for Peace, Justice, and the Environment (SACCPJE)

cc: Hon. Governor Gretchen Whitmer
Hon. Attorney General Dana Nessel
MDOT Director Paul C. Ajegba
Hon. Senator Gary Peters
Hon. Senator Debbie Stabenow