

July 9, 2019

Dear Senators and Representatives:

The Whitmer Administration and Attorney General Nessel are marking a new era for Michigan and Great Lakes protection by bringing Enbridge, finally, under the rule of law and nullifying the improper actions and agreements of their predecessors. Attorney General Nessel's lawsuit against Enbridge seeks to abate the continuing threat of grave harm to critical public rights in the Great Lakes and resources -- and devastating harm to the state's economy and tourism industries -- posed by Enbridge's daily transport of 23 million gallons of oil in dual pipelines that lie exposed in the open waters on state-owned bottomlands in the Straits of Mackinac.

We are writing to express our deep concern that the Michigan Legislature is not fulfilling its constitutional duty to protect the paramount interests of the public as trustee of our Great Lakes and navigable waters. In addition, we are troubled by active legislative efforts to interfere with state-initiated Line 5 litigation, to downplay Line 5's unreasonable risk of catastrophic harm to public rights, and the proposed unconstitutional private tunnel law that cedes state-owned lands for a foreign corporation to operate its aging and dangerous fossil-fuel infrastructure for the next century. This letter sets forth years of independent legal and technical research and reports on Line 5 to counter the persistent, inaccurate, and misleading information about Enbridge's Line 5 aging petroleum operations.

1. Michigan's Constitution Mandates Legislature to Protect the Air, Water, and Other Natural Resources of the State from Pollution, Impairment and Destruction

Article IV, Section 52 of Michigan's 1963 constitution declares:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. [Emphasis added]

This section demands that the state's air, water, and natural resources are treated and protected as "paramount," which means "above all else." Moreover, this constitutional section defines the legislature's mandatory role in the state's natural resource protection.

In 1970, the legislature responded to the Constitutional mandate by passing the Michigan Environmental Protection Act. The MEPA, as it is known, Part 17 of NREPA, [MCL 324.1701-1706](#), charged the courts with hearing the coming controversies between citizens and polluters, or between citizens and state and local governments, when governments or polluters failed to act to protect the public's use and enjoyment of the air, water, natural resources, and the public trust in those resources. Affected citizens were granted the right to bring civil lawsuits in our circuit courts to protect our environment and the public trust from likely harm, and to force polluters and government to choose alternative courses of action that would not likely harm the environment.

Following the MEPA's passage, the legislature passed a number of landmark laws to protect our water and environment, including the Inland Lakes and Streams Act, the Wetlands Protection Act, the Solid Waste Management and Hazardous Waste Management Acts, the Natural Rivers Act, and the Wilderness and Natural Areas Act. In two test-cases in 1974 and 1975, the Michigan Supreme Court

ruled that Article IV, Section 52 is self-executing, which means that the section imposes a mandatory duty on the legislature and government to pass laws that protect the air, water, and environment and public health from harm.¹

The Attorney General's legal opinion reviewing the 2018 lame-duck legislation correctly found that Act 359 was unconstitutional and void from its inception. Not only did this rushed and sloppy legislation violate the "title-object clause" of Michigan's constitution, but Act 359 also violated the [Great Lakes Submerged Lands Act](#), which requires there be a "public purpose," no impairment or interference with fishing and other public trust uses and rights of citizens and communities, and a showing of no feasible and prudent alternative for transporting Canadian oil back to Canada. Act 359 was a blatant attempt to pass off Enbridge's proposed private oil tunnel as a public project using public lands and \$4.5 million in public funds from the 2018 budget. Recently, a major energy provider - American Transmission Company (ATC) - whose electric cables ruptured from an anchor strike in April 2018 that also hit and dented Line 5 - publicly rejected Enbridge's proposed Straits of Mackinac utility tunnel, stating: "ATC does not believe that installing high voltage electric lines in close proximity to high pressure oil or gas lines is a good idea."²

2. Enbridge's Lawsuit Against the State of Michigan is a Diversion that Ignores the Ongoing and Unacceptable Risk a Line 5 Oil Spill Poses to the Great Lakes

Enbridge's lawsuit against the State of Michigan challenging the constitutionality of Act 359 is another diversionary tactic designed to try and continue indefinitely operating an aged, dangerous line in the Straits of Mackinac for profit, not for the benefit of citizens of Michigan or the environment. This lawsuit is a diversion from the reality that the 540,000 barrels of oil are pulsing through a 66-year old pipeline, which is peppered with [design flaws, gouges, dents, and cracks](#), and unavoidably threatened with another anchor strike at any time. Independent expert reports and shipping experiences indicate that the Line 5 dual pipelines remain extremely vulnerable to anchor strikes from vessels because this oil pipeline infrastructure lies exposed on top of the lake bed in the middle of one of the busiest shipping lanes in the Great Lakes.

Line 5 categorically is a failing piece of oil infrastructure located in our Great Lakes and across 547 miles in Michigan where it endangers nearly [400 other water crossings](#). **It is the continued use and operation of the failing Line 5 oil pipeline that must stop.**

3. A Line 5 Oil Spill Would Devastate the Great Lakes, Michigan's Economy and Enbridge Lacks Adequate Insurance

¹ In the first case, *Highway Department v Vanderkloot*, 392 Mich 152 (1974), the Supreme Court halted an expressway in southeast Michigan because the highway department had failed to comply with its duty to consider the effects on the environment and the alternatives that may be available or feasible to accomplish the same purpose as the expressway. In the following year, the Court in *Ray v Mason County Drain Commissioner*, 393 Mich 294 (1975) stopped a county drain project because a drain commissioner failed to fulfill his duty to prevent water pollution in approving and implementing the project. The Court ruled that the MEPA and laws like it that protect the environment constitute a response to the constitutional mandate.

² <https://www.9and10news.com/2019/05/02/atc-proposed-straits-of-mackinac-utility-tunnel-not-a-good-idea/>

A spill from Line 5 at the Straits of Mackinac could deliver a blow estimated between \$1.87 billion to over [\\$6 billion](#) in impacts and natural resource damages to Michigan's economy and drinking water. Moreover, Enbridge lacks adequate insurance to cover the impacts of a catastrophic spill, and has not even named the State of Michigan as "an additional insured" and/or "named insured" on its insurance coverage for Line 5. In March, Enbridge's oil spill response plan was held to be [inadequate](#) by the [U.S. District Court for the Eastern District of Michigan](#).

Continuing to operate the decaying Line 5 risks jobs. Many jobs. Shutting down Line 5 will protect hundreds of thousands of jobs in Michigan's tourism economy. According to an [economic report in May 2018](#), direct spending by tourists supports approximately 221,420 jobs, and the total tourism economy in 2016, including direct, indirect and induced impacts, supported 337,490 jobs—approximately 6.1% of total employment in Michigan.

4. Smart Alternatives Exist to Line 5 that Do Not Require a Tunnel

Feasible and prudent alternatives exist that would provide safe, affordable energy options to Michigan residents and businesses without continuing this unnecessary risk to the Great Lakes - our economic engine.

Line 5 is not vital energy infrastructure for Michigan. More than 90 percent of the oil in Line 5 comes from and flows back to Canada. Despite Enbridge's misleading claims,, there are [alternatives to the existing Line 5](#) that do not require a tunnel; these include delivering [propane](#) for those pockets of customers in the Upper Peninsula and the use of excess capacity in other Enbridge pipelines that run across southern Michigan and northern Indiana to Canada and Detroit. Equally important, there is a lack of necessity for a 99-year tunnel and pipeline in light of plummeting demand for crude oil as the world economy rapidly shifts to renewable energy.

A number of modest adjustments would deliver propane via truck, train, or 4-inch-diameter pipeline to meet the needs of our rural residents. In fact, the existing pipeline network across southern Michigan and from Pennsylvania, Ohio, and the southern U.S. will meet the crude oil needs of Michigan and regional refineries. There are sensible, less costly alternatives within this existing pipeline network that render the need for Line 5 or a tunnel under the Straits imprudent and unnecessary. A number of independent studies, including [FLOW's](#), and the [London Economics International \(LEI\)](#) have come to this same conclusion: decommissioning Line 5 is not only economically feasible but is the best alternative because it would protect Michigan's waters and natural resources, and it would have a negligible impact on Michigan's economy.

The [real solution](#) to the Line 5 threat must protect the Great Lakes, which define Michigan, drive our economy, and provide drinking water to half the state's population. The state must shut down Line 5, while implementing a common-sense [backup plan for propane](#) transport in the Upper Peninsula using truck, train, or a small new pipe that doesn't cross the Straits of Mackinac.

5. Enbridge Has Lost Public Credibility in Michigan and Beyond

According to the federal Pipeline Hazardous Materials Safety Administration (PHMSA), Enbridge has reported 126 pipeline "incidents" between 2006 and 2018. Enbridge's dismal track record is underscored by its 2010 Line 6B [Kalamazoo River disaster](#) – known as the largest inland tar sands oil spill in U.S. history – and extends to Line 5, which has leaked in total [over a million gallons](#) of oil in Michigan

and Wisconsin from at least 33 known spills since 1968. The National Transportation Safety Board (NTSB) identified the Kalamazoo spill as “the single most expensive on-shore spill in US history.” In addition, the NTSB concluded that the Line 6B rupture and prolonged 17-hour release occurred due to corrosion fatigue cracks along with “pervasive organizational failures at Enbridge.”

6. The Jobs of the Future Are Tied to Rebuilding Our Existing and New Infrastructure in the 21st Century

[Infrastructure needs abound in Michigan](#) – ranging from our failing drinking water and wastewater infrastructure to the aging Soo Locks and a long-term clean energy plan for the U.P and the state as a whole. It’s time to decommission Line 5 and create jobs focused on those real needs, instead of protecting Enbridge’s private interest in our public waters.

7. Climate Impacts of Line 5 Must Be Prioritized

Finally, it would be irresponsible to consider the future of the Line 5 pipeline without considering its cumulative climate impacts for the next century. The Recent Intergovernmental Panel on Climate Change report concludes that we have about eleven years remaining to decarbonize our economies globally in order to avoid the worst potential effects of climate change. Taking five to ten of those years to build a new oil tunnel under public lands in the Straits of Mackinac in order to keep climate-killing fossil fuels flowing for the foreseeable future is the exact opposite of the sort of action we need to be taking to address climate. Climate impacts alone should provide state lawmakers with ample reason to oppose this potential project.

We strongly urge all members of the Democratic caucus to support the actions of Attorney General Nessel and Governor Whitmer to address the problems of Line 5, and further urge you to reject any legislative initiative that seeks to interfere with the work already being done by our executive branch to address this critical Great Lakes issue.

Please reach out to any of us at any time if you have further questions.

Thank you,

Jane TenEyck, Chippewa Ottawa Resource Authority

Mary Brady-Enerson, Clean Water Action

Liz Kirkwood, FLOW For Love of Water

Conan Smith, Michigan Environmental Council

Lisa Wozniak, Michigan League of Conservation Voters

Patty Peek, Mackinac Straits Alliance

June Thaden and Greg Reisig, Northern Michigan Environmental Action Council

Sean McBrearty, Oil and Water Don't Mix

Joanne Cromley, Straits Area Concerned Citizens for Peace, Justice, and the Environment

Anne Woiwode, Sierra Club Michigan Chapter

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