STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL DISTRICT
INGHAM COUNTY

DANNA NESSEL, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON BEHALF OF THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiffs,

v.

Case No. 19-474-CE
Honorable James S. Jamo

ENBRIDGE ENERGY, LIMITED PARTNERSHIP; ENBRIDGE ENERGY COMPANY, INC.; AND ENBRIDGE ENERGY PARTNERS, L.P,

Defendants.

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AMICUS CURIAE BRIEF OF FOR LOVE OF WATER (FLOW) IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

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INTRODUCTION

When the Department of Conservation in 1953 granted an easement to Lakehead Pipeline Company, now held by the Enbridge Defendants, for two dual crude oil pipelines in the Straits of Mackinac, it did so subject to the State's paramount sovereign title, rights, limitations, and duties to protect the waters and bottomlands of the Great Lakes under the common law public trust doctrine. Based on the nature of this state sovereign interest, the public trust in these waters and bottomlands are inalienable; and, further, the state is under a "high solemn and perpetual duty" [1] to protect and prevent subordination of these waters and lands to primarily private purposes or interests, and protect public trust uses, such as navigation, fishing, swimming, or drinking water from interference or impairment. As a result, Lakehead acquired the easement to occupy and use the bottomlands and waters of the Straits subject to these paramount public rights limitations and duties that adhere in the sovereign title that are imposed by public trust law. In short, no one, including Enbridge, can hold an easement to occupy and use the public trust bottomlands and waters of the Great Lakes unless consistent with, authorized, and legally warranted pursuant to the mandatory requirements and limitations of the core principles of public trust law. The Courts equally with the legislative and executive branches of state government are the "sworn guardians" of this sovereign interest and title to assure that no such alienation or unlawful agreement to occupy and use these public trust lands and waters occurs.[2]

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[1] *Collins v Gerhardt*, 237 Mich 38, 49 (1926). (The public trust doctrine imposes on the State as trustee "a high solemn and perpetual trust which it is the duty of the State to forever maintain.")
[2] *Obrecht v. National Gypsum Co.*, 361 Mich. 399; 105 N.W.2d 143 (1960).

Under the public trust doctrine, the state can never alienate the state's sovereign title and public trust interest; and the state can never dispose or enter into easements or occupancy agreements for primarily private, non-public trust purposes, private use, and private control except where it is determined that it falls within two narrow circumstances: (1) improvement of the public trust interest or protected public uses; and (2) no substantial detriment or impairment of the public trust interest or public trust use or purpose. *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 455–60 (1892); *Obrecht v. National Gypsum Co.*, 361 Mich. 399; 105 N.W.2d 143, 149–150 (1960). The 1953 Easement is void under Count I.A. because without compliance with these standards the Easement was not legally granted.

As will be seen from the undisputed facts in this case, there was a total lack of compliance with the core requirements of the public trust law at the time the Easement was granted to Lakehead in 1953, and as a consequence the 1953 Easement is void. As a matter of law, this Court can and should grant Plaintiff's Partial Motion for Summary Disposition, declare the 1953 Easement void, and enter appropriate equitable relief, including an orderly and prompt shutdown of the dual pipelines in the Straits.

Further, and for similar reasons, the Enbridge Defendants' claimed right to use and operate the existing Line 5 dual pipelines in the Straits under the 2018 Third Agreement with the State of Michigan is void, because neither Enbridge Defendants nor the State applied for and obtained authorization as required by the public trust common law and the Great Lakes Submerged Lands Act. As with the 1953 Easement, it is undisputed that there were no due recorded factual findings by the MDEQ (now "EGLE") that the right to continued use of the existing dual pipelines fell within the narrow exceptions of public trust law or the Great Lakes Submerged Land Act ("GLSLA"), MCL 324.32501 et seq.

And further, whether void in 1953 or not, by its very nature the Easement is revocable because of the eroded and aged conditions, ill-design of the pipelines, a total change in design and elevation up to 3 miles of the lines above the lakebed, anchor strikes from passing ships, safety history, the inability to fully respond to a release or rupture in the Straits, and the catastrophic loss and damage to the waters, bottomlands, fishery and habitat, municipal drinking water, transportation, safety, and public and private property and uses.[3] The dire reality is that the condition and continued use and operation of the 1953 Easement and dual pipelines presents a grave and unacceptably high magnitude of harm to the public trust resources and uses of Michigan. Accordingly, the Court through the exercise of its judicial power can and should revoke the 1953 Easement to preserve and/or prevent such unacceptable catastrophic harm to the public trust in the Great Lakes.

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[3] These factual, scientific, and legal matters have been addressed by dozens of studies, reports, and comments filed with the State, including the Michigan Petroleum Pipeline Safety Task Force, and the Michigan Petroleum Pipeline Safety Advisory Board, reports and studies submitted by Enbridge Defendants, the State of Michigan and FLOW. Over the past 5 years FLOW has been submitted more than a dozen reports with the State, including the MDEQ (now EGLE), MDNR, Michigan Petroleum Pipeline Task Force, and the Michigan Petroleum Pipeline Advisory Board. FLOW has actively participated in numerous hearings and public meetings regarding Line 5 in the Straits of Mackinac. These reports can be found at www.flowforwater.org. For convenience, FLOW has submitted ten public comments challenging Enbridge's continued drumbeat request to install more and more anchors on the lakebed floors. Public Comments on the Joint Application of Enbridge Energy for Anchor Screws for Line 5 Pipelines in the Straits of Mackinac July 19, 2018. See Public Comments on Enbridge's Studies Required by the November 2017 Agreement July 15, 2018; Public Comments on the Joint Application of Enbridge Energy for 48 New Anchor Screws for Line 5 Pipelines in the Straits of Mackinac May 11, 2018; Letter to MPSC and DEQ on New or Altered Structures of Line 5 April 11, 2018; Supplemental Comments on 2017 Anchor Permit Application February 9, 2018; FLOW Supplemental Comments on Enbridge Anchor Permit Application October 12, 2017; Supplemental Comments on the Joint Application of Enbridge Energy to Occupy Great Lakes Bottomlands for Anchoring Supports August 4, 2017; Comments on the Joint Application of Enbridge Energy to Occupy Great Lakes Bottomlands for Anchoring Supports June 29, 2017(Appendices Table of Contents: Appendix A, Appendix B, Appendix C, Appendix D, Appendix E); Supplemental Comments on 2017 Anchor Permit Application February 9, 2018.

Finally, the Court should deny Defendant's Motion for Summary Disposition, and set the matter for trial under Count I, B., revocation of the 1953 Easement under public trust law, Count II public nuisance, and Count III, the "common law of environmental quality" *Ray v Mason County Drain Comm'r*, 393 Mich 294, 306-307; 224 N.W.2d. 883 (1975),[4] under the Michigan Environmental Protection ("MEPA"). Part 17, NREPA, MCL 324.1701 *et seq*. Contrary to the arguments of Defendant, the claims in this case do not violate the separation of powers; they are not barred by the statute of limitations and adverse possession or estoppel; and they are not preempted by the federal PHMSA pipeline safety construction and operation law. Moreover, the Complaint in this case alleges substantial and material facts and circumstances that demonstrate, or upon reasonable factual development would demonstrate, serious conditions, and risks, including a failing original design, anchor strikes, and a catastrophic magnitude of harm sufficient to state causes of action for revocation based on public trust law, public nuisance, and violation of the MEPA. A motion for failure to state a claim under MCR 2.116(C) (8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Defendants have not and cannot meet this test. As a result, the Defendant's Motion for Summary Disposition should be denied in its entirety.[5]

[4] The legislature "left to the courts" the decision based on the facts and circumstances of each case. 393 Mich at 306.

[5] *E.g.*, see, Complaint, paragraphs 17-22, 34, 35-43, 44-47, 49-53, 54-62.

STATEMENT OF SUPPLEMENTAL FACTS AND PROCEEDINGS [6]

The State's role in the existing 66-year-old Line 5 dual pipelines Straits segment has taken two forms: (1) The general legislation (1953 PA 10 ["Act 10"])[7] that delegated to the Department of Conservation authority to grant easements over, in, and under state lands for public utilities, including state-owned bottomlands, and the decision in 1953 to grant the Easement for occupancy and use of Great Lakes bottomlands and waters [8] to Lakehead Pipe Line Company (now Defendant Enbridge Energy); and (2) The December 2018 Third Agreement between the State and Enbridge to allow Enbridge to use and control the soils beneath the Great Lakes to construct a tunnel and locate and operate a new pipeline under the Straits.[9]

A. The 1953 Easement and 2018 Third Agreement (Right to Continue Using Line 5)

Act 10 of 1953 delegated only general authority to the executive branch, the Department of Conservation, to grant utility easements on, in, or under state lands, including bottomlands of the State. Act 10 contained no standards for the required determinations for a lawful grant to a private applicant to occupy and use state-owned bottomlands under the public trust doctrine. Act 10 left it up to the department to make findings to assure compliance with the public trust doctrine. However, the department did *not* make the required findings, not in the record of the Conservation

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[6] For purposes of the Motion for Summary Disposition under MCR 2.116(C)(8), Amicus FLOW adopts the allegations of the Complaint, and supplements the parties' statements of facts and proceedings.

[7] Recodified as Part 21, NREPA, MCL 324.2129.

[8] Predecessor Department to the successor Department of Natural Resources and Department of Environmental Quality, now the Department of Environment, Great Lakes, and Energy (hereafter "EGLE").

[9] 2018 PA 359. Enbridge claims that this Third Agreement grants it a right to continue to use and operate the existing Line 5 dual pipelines in the Straits segment until the proposed tunnel and new pipeline are in operation

Commission, and not in the 1953 Easement itself. All the Easement did was declare that the pipeline would run "upon certain lake bottom lands belonging to the State of Michigan," and that, "[T]he Conservation Commission is of the opinion that the proposed pipeline is system will be of benefit to all people of the State... for the purpose of transporting petroleum and other products."[10] The Commission expressly recognized that it is subject to the paramount interest in the public trust waters and bottomlands of the State,[11] and that "at all times" the grantee is to exercise the "due care of a reasonably ordinary person" to prevent harm to private and public property and safety, and to "comply with all state and federal law."[12] Yet, nowhere were there any findings that the grant was for the improvement of the public trust interest or uses or that there would be no impairment of public trust interests or uses, such as navigation, fishing, boating, sustenance or drinking water, and swimming.[13]

In 1955, the Michigan Legislature enacted the Great Lakes Submerged Lands Act ("GLSLA"), MCL 324.32501 *et seq.*, specifically 324.502 and 324.503, which codified the long-held common law requirements and standards for riparian owners with lake bottomlands previously filled or occupied by structure or improvement to apply for authorization to conform to the standards for private use or occupancy under public trust law.[14] Those persons were given three (3) years to apply for such authorization.[15] In 1958, the legislature amended GLSLA to allow applications for private use of "[A]ll unpatented lake bottom lands and made lands—including

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[10] Attached as **Ex 1** to Brief in Support of Plaintiff's Motion for Partial Summary Disposition,1953 Easement, p. 1.
[11] 1953 Easement, pp. 1 and para. J(1), p. 10,
[12] Id., para. A., pp. 3-4.
[13] See, the list of protected public trust uses in *Obrecht, supra*, at 416; see, also *Arnold v Mundy*, 6 N. J. 1, 12 (1821) ("sustenance); *Collins v Gerhardt*, 237 Mich 38 (1926); *Nedtweg v Wallace,* 231 Mich 14 (1926).
[14] 1955 PA 247, CL 1948, MCL 322.702.
[15] Id., Sec, 4(6): "Before an application can be acted upon it must be filed within 3 years."

those which have heretofore been artificially filled in."[16] After 1958, any landowner could apply for authorization to fill, occupy, or use bottomlands without limitation to time, so long as the private use or public fell within one of the exceptions under public trust law. There is no provision in the history of the GLSLA that prohibits its retroactive application. It is undisputed that Enbridge has never applied for or obtained authorization under the GLSLA for the 1953 Easement.[17]

Similarly, paragraph 4.1 of the 2018 Third Agreement between the State and Enbridge that allows the right to continue to operate the existing Line 5 pipelines is "subject to Enbridge's compliance with * * * (e) all other applicable laws." Paragraph 4.2(d)[18] of the Third Agreement states that "the State has acted *in accordance with and in furtherance of the public's interest* in protection of *waters, waterways, or bottomlands held in public trust by the State of Michigan.*"[19] It is undisputed that Defendant Enbridge has not applied for or obtained any authorization based on a findings by the State that a right to continue the use or operation of the existing Line 5 in the Straits is (1) an improvement of the public trust, or (2) will not impair the public trust or public trust uses under Section 32502 or 32503 of the GLSLA, MCL 324.32502, 32503, Act 10, MCL 324.2129, or public trust law.

In their response to Plaintiff's Motion for Summary Disposition, Enbridge Defendants claim that the recent decision by the Court of Claims in *Enbridge v Michigan* decided the public trust claim regarding its right to continue using Line 5 under the Third Agreement.[20] In fact, the Court ruled only on the constitutionality of 2018 PA 359 and related tunnel agreements under the

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[16] 1958 PA 94. MCL 322.702.
[17] For a discussion of the applicability and the retroactive nature of the GLSLA and public trust law, see Arguments II, D., and III, A. infra.
[18] Third Agreement, Dec. 19, 2018, p. 4, Art. 4, 4.1 and 4.2(d), attached Ex A to Defendants' Response to Plaintiff's Motion for Partial Summary Disposition.
[19] Id., p. 4.
[20] Opinion and Order (Hon. Michael Kelly, J.), Oct. 31, 2019, Ct. of Claims No. 19-000090-MZ

Title-Object clause of Mich. Const. 1963, art. 4, sec. 24, and explicitly stated that, "[D]efendants in this case have not [contended] that those agreements were not actually in accordance with the public trust, and the Court declines to decide an issue not before it."[21]

B. Proceedings and Supplemental Facts

Amicus FLOW and other organizations, experts, and citizens have submitted to officials of Michigan numerous reports with scientific and legal analyses regarding the condition, risks, estimated damages, and the extremely high magnitude of harm, and alternatives to Line 5 dual pipelines in the Straits.[22] These reports address public trust, Act 10, GLSLA, and MEPA. They also assess the dangerous condition of the failing original design that placed the dual pipelines in the Straits on the bottomland, evidenced by the fact that Enbridge has or will install over 200 saddle supports that elevate approximately three miles of line into the water column—a near total change from the original design that to date has not been reviewed or authorized by the State, anchor strikes that dented the pipelines, and the risk, probability and magnitude of harm,[23] and estimated damages. The Michigan Tech University risk and damage study puts damages at more than $1.2 billion, and Michigan State University study[24] estimating damages of a realistic worst-case scenario at more than $6 billion. The studies are part of the public record in this case and necessarily fall within the factual development of the four corners of the Plaintiff's Complaint. (Again, see Complaint, paragraphs 17-22, 34, 35-43, 44-47, 49-53, 54-62).[25] The 2016 University

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[21] Id., p. 22.

[22] See n. 3, supra. These reports and those by others have been submitted to and are part of the public record, including those submitted to the Michigan Petroleum Pipeline Task Force, and Michigan Pipeline Safety Advisory Board.

[23] Independent Risk Analysis for the Straits Pipelines (Sept. 15, 2018).

[24] Oil Spill Economics: Estimates of the Economic Damages of an Oil Spill in the Straits of Mackinac in Michigan (May 2, 2018); Oil Spill Economics: Addendum A: Multibillion dollar Economic Impact to Great Lakes Shipping, Steel Production, and Jobs (November 20, 2018),

[25] See n. 3 and 22, supra.

of Michigan study, for example, demonstrated that more than 700 miles of shoreline in Lakes Huron and Michigan are potentially vulnerable to an oil spill, threatening drinking supplies for hundreds of thousands of citizens.[26] As an expert concluded in a National Wildlife Federation Report, the Straits of Mackinac is the "worse place" for a crude oil pipeline in the Great Lakes.[27]

ARGUMENT

I. Upon Statehood, Michigan Acquired the Soils, Bottomlands, and Waters of the Great Lakes within Michigan's Borders as an Incident of Sovereignty and Holds Those Resources in a Public Trust for the Benefit of its Citizens.

State Sovereign Title Held in Public Trust

According to fundamental public trust law, upon winning the Revolutionary War, each of the original 13 states acquired title (previously held by the sovereign in England) to the soils and beds of its navigable water bodies to hold in trust for its citizens. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473–76 (1988); *Shively v. Bowlby*, 152 U.S. 1, 12–13, 57 (1894). To ensure that each new state subsequently carved out of the territories is admitted to the Union on an "equal footing" with the original states, the equal footing doctrine constitutionally mandates that each new state automatically receive at statehood the same right of title to the soils and beds beneath its navigable water bodies as that held by the original states. See *Shively*, 152 U.S. at 57-

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[26] *Statistical Analysis of Straits of Mackinac Line 5: Worst Case Spill Scenarios*, University Of Michigan, Ann Arbor by David J. Schwab, Ph.D. March 2016 , Tables 1-4, pages 7-10. Available at: http://graham.umich.edu/media/pubs/Mackinac-Line-5-Worst-Case-Spill-Scenarios.pdf

[27] https://news.umich.edu/straits-of-mackinac-worst-possible-place-for-a-great-lakes-oil-spill-u-m-researcher-concludes/

58; *Pollard's Lessee v. Hagan*, 44 U.S. 212, 230 (1845); *North Carolina v. Alcoa Power Generating, Inc.*, 853 F.3d 140, 147 (4th Cir. 2017), *cert. denied*, 138 S.Ct. 981 (Feb. 20, 2018). In short, the equal footing doctrine delivered the public trust doctrine to each new state joining the Union, including Michigan. The only right and power reserved by the federal government was the navigational servitude for the citizens of the United States and the exercise of a limited commerce power to promote and protect navigation. *Shively; Pollards Lessee, supra.*

Inalienable Right and Perpetual Duty to Preserve and Protect the Public Trust

Thus, upon statehood, Michigan acquired ownership of the soils, bottomlands, and waters of the Great Lakes within Michigan's borders as an incident of sovereignty, to hold in trust for the public. *State v. Venice of America Land Co.*, 160 Mich 680, 702; 125 N.W. 770 (1910); *State v. Lake St. Clair Fishing & Shooting Club,* 127 Mich 580, 595-596; 87 N.W. 117 (1901). The nature of the state title is sovereign, meaning not simply proprietary like public buildings, but that the state can never "abdicate its sovereign power in public trust bottomlands". *Illinois Central; supra*, at 545-460; *Arnold v Mundy*, 6 NJ 1, 12 (1821). The State, as sovereign, "has an *obligation* to protect and preserve the waters of the Great Lakes and *the lands beneath them* for the public" (emphasis ours), and to preserve these "as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure." *Glass v. Goeckel*, 473 Mich. 667; 703 N.W.2d 58, 64–65 (Mich. 2005). Critically, the State "cannot relinquish this obligation or duty to preserve public rights in the Great Lakes and their natural resources." *Id.* at 65; *Obrecht v National Gypsum Co*, 361 Mich. 399; 105 N.W.2d 143, 149–150 (1960) (citing and adopting the principles of *Illinois Central.*).[28] The public trust doctrine imposes a "high, solemn and perpetual trust which it is the

[28] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997) ("An attempted transfer was beyond the authority of the legislature since it amounted to abdication of its obligation to regulate,

duty of the State to forever maintain." *Collins v Gerhardt*, 237 Mich 38, 49 (1926). When a state abdicates this "high, solemn" duty, its action is void or revocable. *Illinois Central*, 146 US at 459-60 *Illinois Steel Co v Bilot*, 109 Wis. 418; 84 N.W. 855 (1901).

Irrepealable Public Trust

The Michigan Supreme Court in *Glass, at 64-65,* affirmed that when the State conveys an interest or occupancy of the soils and bottomlands beneath the Great Lakes, it "necessarily conveys such property subject to the public trust." *Id.* "There can be no irrepealable contract in a conveyance of property by a grantor in disregard of [the] public trust, under which [it] was bound to hold and manage it." *Illinois Central*, 146 U.S. at 459-460.[29] Under the public trust doctrine, "the sovereign never had the power to eliminate those rights [the public trust], so any subsequent conveyances... *remain subject to those public rights." Glass*, 703 N.W.2d. at 65-66 (emphasis added).

II. The Duty under the Public Trust Doctrine Requires the Courts to Assure that No Part of Michigan's Soils, Bottomlands, or Waters of the Great Lakes Can be Alienated or Otherwise Devoted or Occupied for Public or Private Use, Purpose, or Control Unless the Legislature Expressly Grants the Necessary Authority, and Determines that the Conveyance Will Improve the Public Trust Interest or Not Impair the Public Interests in the Lands and Waters Remaining.

A. The Michigan Legislature cannot authorize, and the executive branch cannot approve, any conveyance or agreement for public or private use or occupancy of Great Lakes soils, bottomlands, or waters without an express factual determination that one of two narrow exceptions applies.

A legislative grant of public trust bottomlands cannot authorize a grant for either a private or even public occupancy and use unless and until the legislative grant or authorization by the agency

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improve, and secure submerged lands for the benefit of every individual.") (citing *Illinois Central R Co v. Illinois*, 146 U.S. 387, 455–60 (1892)).

[29] See Argument II., C., *infra.*

is based on factual findings that legally assure and warrant the grant or agreement for occupancy falls within the narrow exceptions in *Illinois Central.*

> One exception exists where the State has, *in due recorded form*, determined that a given parcel of such submerged land may and should be conveyed in the improvement of the interest thus held (referring to the public trust). The other is present where the State has, in similar form, determined that such disposition may be made without detriment to the public interest in the lands and waters remaining.

Illinois Central, supra, at 146 US 454-460 (emphasis added); *Obrecht, supra*, at 361 Mich at 412-413. In *Obrecht v. National Gypsum Co.*, 361 Mich. 399; 105 N.W.2d 143, 149–150 (1960), Michigan adopted the two narrow exceptions in *Illinois Central* to the prohibition on alienation or disposition of public trust land or water for private use or occupancy:

> [N]o part of the beds of the Great Lakes, belonging to Michigan . . . can be alienated or otherwise devoted to private use *in the absence of due finding of one of two exceptional reasons* for such alienation or devotion to non-public use.

Obrecht, 105 N.W.2d at 149 (emphasis added; citations and quotation marks omitted) (citing and adopting *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 455–60 (1892). The Court in *Obrecht* elaborated further:

> No one... has the right to construct for private use a permanent deep-water dock or pier on the 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. Indeed, *and aside from the common law as expounded in Illinois Central*, the legislature bids us construe its design and purpose 'so as to *preserve and protect the interests of the general public' in such submerged lands* and as authorizing the sale, lease, exchange or other disposition of such submerged lands *when and only when it is 'determined* by the department of conservation that such lands have *no substantial public value* for hunting, fishing, swimming, pleasure boating or navigation *and* that the *general public interest will not be impaired* by such sales, lease or other disposition.'

Obrecht, supra, 399 Mich at 416 (emphasis added).[30]

Michigan has followed the principles in *Illinois Central* for more than 100 years. *State v. Venice of America Land Co*, 160 Mich at 702; *State v Lake St Clair Fishing & Shooting Club,* 127 Mich at 595-596; *Nedtweg v. Wallace, supra*; *Collins v. Gerhardt, supra*; *Obrecht, supra*; *People v Broedell,* 365 Mich 201, 204; 112 N.W.2d 517 (1961); *Glass, supra.* Thus, whether a directly by the legislature or by a delegation of executive power to an agency, a disposition, occupancy, or use of public trust bottomlands is void unless based on findings and determinations that "legally warrant" the conveyance or agreement complies with one of the two exceptions; in Michigan, these determinations are required by the common law and/or the GLSLA.[31]

B. Exception 1: Great Lakes soils, bottomlands, and waters cannot be devoted to public or private use or occupancy unless the disposition is primarily for the public purpose of improving the public trust resources and uses.

Under *Illinois Central* and *Obrecht* the first exception is satisfied only upon finding that the use or occupancy constitutes an "improvement of the interest thus held." *Illinois Central*, 146 U.S. at 454-460. The "interests thus held" refers to the public trust rights and interests or protected uses, such as fishing, navigation, swimming, and drinking water. Conveyances or agreements for use by the State for the enhancement or improvement of recognized public trust uses may include improvements in navigation (e.g., dredging of public harbors, building of public docks); in fishing

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[30]See also, *Muench v Pub. Service Comm'n*, 261 Wis. 492; 55 N.W.2d. 40, 45-48; *Robbins v Department of Public Works*, 355 Mass 328, 331; 244 N.E.2d. 577 (1969); *North Dakota Plainsmen Association v State Water Conservation Commission.* 247 N.W.2s. 457; 463 (N.D. 1976). ("Confined to traditional concepts, the Doctrine confirms the State's role as trustee of the public waters. It permits alienation and allocation of such precious state resources only after an analysis of present supply and future need.")

[31] Like Michigan, its Lake Michigan sister state of Wisconsin has adhered vigorously to the public trust principles of *Illinois Central.* E.g., see, *Illinois Steel Co. v Bilot*, 84 N.W. 855 (1901); *City of Milwaukee v State*, 193 Wis. 423; 241 N.W. 820, 821, 832 (1927).

and hunting opportunities (e.g., habitat protection and restoration); in walking opportunities (e.g., removal of structures blocking beach); and in water uses (maintaining safe drinking water). Surely, a general declaration that a grant or use is to "benefit the people" or "in furtherance of the public welfare" does not satisfy the findings required to legally warrant the grant falls within the strict, narrow exceptions. Without sufficient findings that legally warrant or clearly demonstrate a private or public use constitutes an "improvement" of the public trust interest, it violates the mandatory requirements of public trust law.

C. Exception 2: Great Lakes soils, bottomlands, and waters cannot be devoted to private use or public use or occupancy unless the disposition can be made without impairing the public interests and uses in the public trust lands and waters remaining.

The second exception to the general rule prohibiting disposition or occupancy of public trust land and water for private use or occupancy would apply if "such disposition may be made without detriment to the public interest in the lands and waters remaining." *Obrecht*, 105 N.W.2d at 149.

Although the term used by the *Obrecht* court in this second exception is "detriment," this exception is generally interpreted as an "impairment" (or non-impairment) standard. *See Illinois Central*, 146 U.S. at 453 ("The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in *promoting the interests of the public therein*, or *can be disposed of without any substantial impairment of the public interest* in the lands and waters remaining.") (Emphasis added); *Superior Public Rights, Inc. v. State Dep't. of Natural Resources*, 80 Mich App 722; 63 N.W.2d. 290, 296 (1977) ("The *Illinois Central* case expressly authorizes the state to permit the private use of public trust lands when 1) the private use will improve the public trust, or 2) the private use will not substantially impair the trust lands and waters that remain."). The Court in *Superior Public Rights* ruled that the GLSLA complied with the standards

required by *Illinois Central.* In doing so, the Court implicitly ruled that a legislative delegation of power to allow private or public use of Great Lakes waters and bottomlands must meet these common law public trust standards. If an agreement or easement to allow private use of Great Lakes bottomlands fails to satisfy these common law standards under *Illinois Central* and Michigan case law or is subject to and fails to satisfy the GLSLA, it is void.[32]

D. The State is entitled to revoke or retract a prior disposition of public trust land whenever the narrow exceptions no longer apply or where a substantial change in circumstances requires the State to prevent substantial impairment of the public trust interests and uses.

As discussed above, in cases where the original disposition failed to satisfy either requirement, the State has a right and duty to subsequently declare the original disposition void. However, whether or not a previous grant or allowance of occupancy and use is void, the State retains the sovereign and paramount right to revoke a grant or agreement for occupancy and use of bottomlands and waters of the Great Lakes under appropriate circumstances.[33] These principles are derived from *Illinois Central*, 146 U.S. at 455-460. In *Illinois Central*, an act of the Illinois Legislature passed in 1869 granted to the private railroad company a large swath of submerged land in Lake Michigan. *Illinois Central*, 146 U.S. at 448-449. The *Illinois Central* Court held that

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[32] See, *People v Babcock*, 196 N.W.2d. 489, 497 (Mich. Ct. App. 1972) ("When lands are owned by the State... in public trust, it is the state's duty to protect the trust and not surrender the rights thereto... [T]hey may be disposed of only when the Department... determines that such lands are of no substantial public value for hunting, swimming, pleasure boating, or navigation and that the general public interest will not be impaired. There has been no such finding here.").

[33] See, e.g., *National Audubon v Superior Court*, 33 Cal.3d.419; 658 P.2d. 709, 727-728 (1983) ("Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision... In exercising its sovereign power to allocate water resources..., the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.").

this conveyance, despite the general public and economic benefits, violated the public trust, and that the state could subsequently revoke the conveyance. *Id.,* at 455. Because of the similar nature of the sovereign power to protect the public trust, the Court discussed its prior decision in *Newton v. Commissioners*, 100 U. S. 548 (1880), in which the dispute was over whether an act passed by the Ohio Legislature in 1846 to establish a county seat in one town could be revoked by the 1874 legislature. The Court stated,

> [L]egislative acts concerning public interests are necessarily public laws; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment, neither more nor less... it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

The Court then applied the principle from *Newton,* and concluded,

> We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the act of April 16, 1869 ... was inoperative to control the sovereignty and dominion of the state over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873... *There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.*

Id. at 459–60 (emphasis added).

In *Newton,* there was no finding that the original legislation was unlawful, yet the state had the power to revoke it. In *Illinois Central,* itself, the Court found that the original grant to the railroad company violated the public trust. *Id.*[34] The common principle is that subsequent government bodies can revoke, independently of the reserved powers doctrine. Unquestionably, decisions of

[34] 146 U.S. at 453 ("A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.").

prior government bodies under public trust law can be revoked or retracted, if the original disposition was unlawful or if the decision no longer complies with the duty to protect the public trust because of new knowledge or an underlying change in circumstances that endanger or threaten the public trust.

Even if a public trust determination satisfies the *Obrecht* standard for an agreement to occupy public trust resources, the grant remains voidable or revocable by a subsequent administration that makes a contrary substantive determination. The original determination may have been based on a mistake or misunderstanding of law or fact, and was thus invalid at its inception, or circumstances may have significantly changed since an original valid determination such that the authorized disposition or occupancy now threatens to impair the public trust. In either case, a subsequent administration or legislature to replace the original defective determination with a new determination that is valid in law and fact. *See also National Audubon Society, supra.*

III. The 1953 Easement and the 2018 Third Agreement's Right to Continued Use of the Existing Line 5 in the Straits of Mackinac Are Invalid Because Neither is Authorized in Compliance with Findings or Determinations Required for the Narrow Exceptions for Disposition or Use under the Public Trust Doctrine and Great Lakes Submerged Lands Act.

A. The 1953 Easement is void because it has never been authorized and is otherwise in violation of the mandatory requirements and standards for one of the narrow exceptions for disposition or use of public trust bottomlands and waters of the Straits of Mackinac.

The existing 1953 Easement has never been authorized in compliance with the narrow exceptions of the common law public trust doctrine, and is therefore void. *Illinois Central*, 146 US 454-460; *Obrecht,* 361 Mich at 412-413.The State can never authorize a conveyance, lease, easement, or other disposition or agreement to occupy and use public trust soils and waters unless there is express statutory authority that requires findings and determinations that the standards for

the exceptions under *Illinois Central*, *Obrecht,* and GLSLA are met. Accordingly, if the statute does not contain these standards, the authorizing statute violates the public trust, and the dependent instruments also must fail. Absent the standards for the narrow exception for allowing easements in public trust bottomlands and waters, any grant or agreement for occupancy and use based on the general delegation of power in Act 10 is void, or at least voidable. *Newton*, *Illinois Central*, *Glass*, *supra.*

The general delegation of power under Act 10 to the Conservation Commission and the 1953 Easement is subject to the State's sovereign interests and duties imposed by the public trust doctrine on and in the waters and bottomlands of the Straits of Mackinac. Because 1953 PA 10 involved dispositions of public trust lands and soils beneath waters of the Great Lakes, it was required to contain the "due" determinations required by *Illinois Central* and adopted in *Obrecht.* The Easement is void because the department did not make the required common law determinations to legally warrant the easement within one of the narrow exceptions under the common law of *Illinois Central* and *Obrecht.*

Further, the 1953 Easement is void because it has never been authorized under the Great Lakes Submerged Lands Act. By its terms, the Easement must comply with "all laws of the State of Michigan and of the Federal Government..."[35] Section 32502 of the GLSLA, MCL 324.32502, provides:

> Section 32502. 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 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*

[35] 1953 Easement, paragraph A, page 3.

> *that the public trust in the state will not be impaired* by those *agreements for use, sale, lease or other disposition...*(emphasis added)[36]

First, the GLSLA provides for sale, lease, exchange, or "other disposition" and "the private or public use of lands" by "agreements for use, sales, lease or other disposition." Second, the GLSLA prohibits such disposition, occupancy or use agreements unless "it is determined" 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..." (emphasis added) Third, nothing in the GLSLA states that it is not retroactive, and nothing "grandfathers" previously allowed utility easements by the Department of Conservation under Act 10 or by the current EGLE under Section 2129, MCL 324.2129.

Under Michigan law regulatory statutes are 'presumed to operate prospectively unless the contrary intent is clearly manifested." *Frank W. Lynch & Co. v Flex Techs*, 463 Mich 577, 583 (2001). "This is especially true if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions." *Franks W. Lynch*, at 583. However, the principle would not apply to a legislative

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[36] Section 23503(1) of GLSLA, MCL 324.32503(1), contains substantially similar authorization and findings:

> 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... shall contain such terms, conditions, and requirements as the department determines to be just and equitable and in conformance with the public trust. (Emphasis added)

authorization for disposition or agreements to occupy or use the public trust bottomlands and waters of the State. There are no vested rights in public trust lands and waters – such an easement has always been subject to the sovereign public rights, interests, duty and requirements of the public trust doctrine. The initial purpose of the GLSLA was to confine authorization for occupancy and use of waters and bottomlands within the narrow exceptions of the public trust law.

Unlike the exercise of police power over private property, public trust law limits the disposition or use of sovereign title and public trust lands and waters. Thus, a grant of private use like the 1953 Easement is subject forever to the rights, powers, and duties of the public trust doctrine, *Illinois Central*, at 459-460; *Newton, supra* (quoted in *Illinois Central, Id.*); *Glass, supra*, at 64-66, including the right to alter or revoke uses of public trust lands and waters based on the perpetual paramount interests of the State: "Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time." *Ill. Central*, at 454. Moreover, contrary to Defendants' arguments, the history of the GLSLA actually demonstrates an exercise of sovereign power under the public trust doctrine to reach backward in time. The legislature enacted the GLSLA in 1955 to require riparian landowners to apply for previously occupied or filled bottomlands of the Great Lakes, to bring them into line with the public trust doctrine. Landowners were given three years in which they could apply or lose their right to occupancy. (1948 C.L. 322.702). This clearly evidences an intent that the statute was to be applied retroactively to existing bottomland uses.

Defendants also argue that Obrecht's reference to prior authorizations "not coming within the purview of previous legislation" excepts the 1953 Easement for private occupancy and use of public trust bottomlands.[37] This language, specifically, referred to the previous legislative grants

[37] Brief in Support of Defendants' Motion for Summary Disposition, pp. 15-16,

for swamp lands and the St. Clair Flats lands.[38] Swamp land grants provided for purchase of swamp lands for small sums to encourage drainage and occupancy.[39] The legislature did not refer to any "previous legislation," such as a delegation of general power to grant easements or use of state owned lands, including bottomlands, in Act 10 of 1953, but to unique situations involving the St. Clair Flats and swamp land grants because they were permanently dry or no longer part of navigable waters.[40]

Finally, Defendants argue that a determination that the condemnation of a private upland parcel in another segment of Line 5 (not the Straits segment) constituted a "public use" or "public purpose" is conclusive of the public use or public purpose[41] requirement under public trust law—"improvement of the interest [public trust] thus held." *Illinois Central; Obrecht.* A ruling that affirms the taking of private property by eminent domain for a "public purpose' or "public use" (such as the condemnation of upland property based on a certificate of public need)[42] is not the same as the "public purpose" requirement under public trust law. Rather, the "public purpose"

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[38] Turning to pages 453 through 460 of the report, and reading those pages in conjunction with our quoted act of 1955 as amended in 1958, it will be found authoritatively that no part of the beds of the Great Lakes, belonging to Michigan *and not coming within the purview of previous legislation such as the swamp land acts and the St. Clair Flats leasing acts* (see *State v. Lake St. Clair Fishing & Shooting Club* and *Nedtweg v. Wallace, supra*), can be alienated or otherwise devoted to private use in the absence of due finding of one of two exceptional reasons for such alienation or devotion to non-public use." *Obrecht*, 399 Mich at 412-413.

[39] See, e.g., RG-57-31, Official Archives of Michigan, at www.michigan.gov/archivesofmichigan.

[40] *Netdweg v Wallace*, 237 Mich 14 (1926). Approximately 7000 acres of swamp bordering or part of Lake St. Clair became permanently dry overtime. Approximately 2000 persons were interested in leasing these dried lands for hunting and fishing. The legislature passed the St. Clair Flats law to authorize leasing of these lands based on the undisputed fact that they had become dry and no longer part of the waters of the Lake. Like the swamp land grants, the facts and leasing program in *Nedtweg* is unique to the facts of dried lands no longer susceptible to navigation or public trust uses.

[41] Id., Brief of Defendants, pp. 16-17 (citing *Lakehead Pipeline Co. v Dehn*, 340 Mich 25 (1954).

[42] Mich Const. 1963, art. 10, sec. 2. (There is no taking of private property unless for a "public use").

requirement under public trust law references uses that themselves improve the public trust interest, such as a public harbor, marina, or bridge. In any event, the GLSLA explicitly applies to both "private and public use," MCL 324.32502, and makes both subject to its requirement that any use can be authorized only if it is determined that the authorized use will not substantially affect or impair public trust uses such as hunting, fishing, swimming, pleasure boating, or navigation.

Accordingly, because there are no recorded determinations or findings required for compliance with the standards to legally warrant the narrow exceptions for occupancy agreements or easements required by the common aw public trust doctrine and the GLSLA, the 1953 Easement is void and unenforceable.

B. The December 2018 Third Agreement's purported grant to Enbridge the right to continue use of existing Line 5 is void because it was never authorized under law and is otherwise in violation of the public trust and the Great Lakes Submerged Lands Act.

Defendant Enbridge in its Brief in Opposition to Partial Summary Disposition also argues that paragraphs 4.1 and 4.2(d) of the 2018 Third Agreement with the State grants it a valid and enforceable right to "continue to operate the Dual Pipelines... until the Tunnel is completed" and the Straits Line 5 Replacement segment is placed in service."[43] At the same time, the Third Agreement concedes that it must be authorized under the public trust doctrine: "In entering into this Third Agreement, and *thereby authorizing* the Dual Pipelines to continue to operate....., *the State has acted in accordance with and in furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust* by the State of Michigan."[44] Enbridge even admits that that any use of public trust bottomlands and waters that use of public trust bottomlands

[43] Defendants' Response to Plaintiff's Motion for Summary Disposition, pp. 10-11. Third Agreement, Sec. 4.2(d), and 4.1. https://mipetroleumtaskforce.com/document/3rd-agreement-between-state-micigan-and-enbridge -energy.

[44] . *Id.* (Emphasis added).

and waters today is subject to and must be authorized pursuant to the and within the narrow exceptions or standards of the GLSLA, Section 32502, 32503, MCL 324.32502, 32503.[45]

Clearly, the right to continue to use the bottomlands and waters of the Straits for the existing line failed to obtain authorization under Act 10, the common law public trust doctrine, or the GLSLA. Sec. 32502., or "will not be impaired." Sec. 32503(1). Accordingly, the provision in the Third Agreement for the continued use or operation of the Line 5 dual pipelines in the Straits is invalid and unenforceable.

IV. The Defendant's Motions for Summary Disposition to Dismiss the Complaint Pursuant to MCR 2.116(c) (4), (7), and (8) Based on Separation of Powers, Preemption, Statute of Limitations, and Failure to a Claim Should Be Denied.

A. The Plaintiff's Claims Do Not Offend the Exercise of Legislative Power.

As established above, the courts, along with the legislative and executive branches, are the "sworn guardians" to enforce the duty to protect the public trust and the core principles of the public trust law. See *Illinois Central*, *Obrecht*, and the GLSLA. By definition, the exercise of judicial power based on public trust law is not an interference with the legislative power.

Moreover, despite Defendants' characterization of the Count III MEPA claim as interfering with the exercise of legislative power, the MEPA constituted the Legislature's response to the state's "constitutional commitment" to the "protect the air, water, and natural resources of the state from pollution, impairment or destruction." *Ray v Mason County Drain Comm'r*, 393 Mich 294, 305-306 (1975). When the legislature enacted the MEPA, it the legislature "left to the courts" the development of the "common law of environmental quality." *Ray, supra, at* 309. The MEPA established a cause of action for plaintiffs who can show *prima facie* case that defendant's

[45] *Id.*, p. 5 ("[T]he "due finding" requirement summarized in *Obrecht* is the 1955 GLSLA.")

"conduct... has polluted... or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources." MCL 324.1703(1). While MEPA created a cause of action or citizen suit to protect "the public trust in those resources," MEPA, Sec. 1703, it did not expressly subsume or repeal the public trust cause of action at common law, nor could it; the state's sovereign public trust title and interest and the common law public trust principles are "irrepealable." *Illinois Central*, at 459-460. [46]

Like public trust law and MEPA, public nuisance is a common law cause of action to prevent "unreasonable interference with a right common to all members of the general public." *Sholberg v Truman*, 496 Mich 1, 6 (2014); Rest. Torts, 2d, Sec.821B, and "involves threatening or impending danger to the public. *Kilts v Board of Supers.*, 162 Mich 646, 651 (1910). In *Michigan v United States Army Corps of Engineers*, 667 F.3d. 765 (CA 7, 2011) (threat of Asian carp to Lake Michigan, fish, and public trust uses), the Court ruled that plaintiffs had alleged a valid claim of common law public nuisance based on threatened environmental harm to the Great Lakes—a "non-trivial" chance with "substantial likelihood of harm" where "if the invasion of Asian Carp comes to pass, there would be little doubt that the harm ... would be irreparable" and thus constitute a public nuisance. Id. at 79.

Clearly, the legislature and constitution[47] have left the common law and MEPA claims in this case to the judicial branch.

B. The Plaintiffs Claims to Protect and Enforce the Public Trust, MEPA, and Public Nuisance against a Private Defendants Are Not Preempted by the Interstate Commerce Clause or Barred by Statute of Limitations, Adverse Possession and Estoppel.

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[46] *E.g.*, *Trout Unlimited v City of White Cloud*, 196 Mich App 343 (1992) (Trout Unlimited had standing for cause of action under the public trust doctrine in addition to the MEPA). See also water and property law cases, e.g. *Collins v Gerhardt*, supra, 237 Mich 38 (1926).

[47] Mich Const., art. 6, sec. 13 "Sec. 13. The circuit court shall have original jurisdiction in all matters not prohibited by law..."

Defendants raise a number of arguments as defenses to dismiss Plaintiff's claims under MCR 116(C)(4), (7) and (8). Defendant's arguments do not apply and are groundless. As well established by the Plaintiff and the Amici Brief of the Attorney General's from California, Minnesota, and Wisconsin, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") is a safety code that does not expressly or impliedly preempt any of Plaintiff's claims. As established by the 2015 Michigan Petroleum Pipeline Task Force Report ("Task Force Report"), Michigan has jurisdiction over siting and locating crude oil pipelines under the Michigan Public Service Commission law. MCL 483.3 (Act 16).[48] The federal government has exercised power to site natural gas pipelines, but has never done so for the siting of crude oil pipelines, which has been left to the state. Further, Michigan has a near plenary power and jurisdiction over its sovereign interest in water resources, including its navigable public trust waters and soils beneath them, except for the reservation by the federal government to protect the interests of citizens for navigation. E.g. *Shively v Bowlby*, 152 U.S. at 31; *McMorran Milling Co v C.H. Little,* 201 Mich 301, 313-315 (1918). The federal navigational servitude is limited to regulating and promoting commerce *in navigation* over these navigable waters; the states have absolute title held in trust for its citizens. *Illinois Central*; *McMorran*, *supra*. Defendants' argument and references to preemption based on the exercise of police power regulation of commerce generally do not involve the narrower interest of regulating commerce for navigating the Great Lakes or Straits. Moreover,

[48] 1929 PA 16. Michigan Petroleum Pipeline Task Force Report (July 2015), pp. 27-29, 32-33. https://www.michigan.gov/documents/deq/M_Petroleum_Pipeline_Report_2015-10_reducedsize_494297_7.pdf. Under Act 16, MPSC has broad grant of authority over siting a crude oil pipeline. Michigan has not opted into the PHMSA shared state delegated authority program. State also has exclusive authority over granting easements or agreements to occupy public trust bottomlands of the Great Lakes. Act 10 of 1953, MCL 324.2129; GLSLA, supra, MCL 324.32501 et seq.

Defendant's occupation of the Straits of Mackinac and its high risk of a catastrophic oil spill threatens to interfere with the federal navigational servitude and significantly impede navigation and commerce in the Great Lakes.[49]

Further, Defendants' argument that the Plaintiff's Complaint is barred by the statute of limitations, adverse possession, or estoppel is also without merit. As established in Arguments I through III, the law is clear that the public trust waters and lands beneath the Great Lakes cannot be occupied or used by a private person unless expressly authorized in compliance with public trust law requirements. The 15-year statute of limitations cited by Defendants, MCL 600.5821(1) (1961), for example, is devoid of any mention state owned bottomlands beneath the Great Lakes, hence no express standards or authority can be inferred. Moreover, there are no standards that would prevent adverse possession, prescription, or estoppel against public trust bottomlands within the narrow exceptions of *Illinois Central* and *Obrecht, supra.* As a matter of law, the 15-year statute is not expressly applicable, and in any event could not alter the irrepealable absolute sovereign title of the state in public trust bottomlands. Statutes of repose, adverse possession, and equitable estoppel are not applicable to public trust lands and waters of the Great Lakes. *St. Clair Hunting & Shooting Club, supra; Venice of America Land Co., supra.*

C. The Defendants Motion for Failure to State Claims under MCR 2.116(C)(8) Should Be Denied Where Substantial and Genuine Issues of Fact Exist Surrounding the Likelihood, Risks and Conditions that Would Result in Catastrophic or High Magnitude of Harm, Which Facts Can Be Reasonably Developed from the Allegations of the Complaint.

Defendants argue that the Plaintiff's Complaint does not allege sufficient facts or potential factual development to maintain action for "likely" or "probable" harm under public trust law in

[49] Oil Spill Economics: Addendum A: Multibillion-dollar Economic Impact to Great Lakes Shipping, Steel Production, and Jobs (November 20, 2018),

Count I,B., MEPA, or conditions, resulting in probable interference with public rights under public nuisance.[50] As established in Argument II, D., above, the Count I,B. claim for threatened impairment or endangerment and revocation under the public trust doctrine is based on the inherent power of the sovereign in any easement or grant to revoke the right granted where wrongly granted or a subsequent change in conditions carries with it the risk and threat of substantial impairment or interference with the public trust or its protected public trust uses, such as fishing, drinking water, or navigation. The facts alleged by Plaintiff in this case clearly state an action for revocation based on the duty of the state to prevent impairment of the public trust or interference with its protected uses. Already, the existing pipeline interferes with and hinders navigation by ships through the Straits. The failing condition of the line coupled with high degree or magnitude of harm as alleged in the Complaint and demonstrated by multiple voluminous reports, including devastating loss of fish and fishing, and the shutdown of the City of Mackinac Island's ferry service and drinking water supplies are just a few of many irreparable harms to public and private property and natural resources.

The argument that the threshold of "likely" harm, interference, or injury under MEPA or public nuisance law has not been met is also misplaced. While "likely" means "probable," claims under MEPA and the common law of public nuisance do not turn solely on probability as Defendants argue. And even if "probability" was the single limiting factor, the consequences or magnitude of harm that is alleged or can be reasonably developed from the allegations in the Complaint cannot be ignored. Given the high magnitude and risk of irreparable harm Defendant's Line 5 pipelines pose to water, the public trust, public trust uses, environment, public health and safety, and public and private property, the 1 in 60 odds identified in the Dynamic Risk Report,

[50] Brief in Support of Defendants Motion for Summary Disposition, p. 36.

although flawed, give rise to a cause of action. Odds are not considered in a vacuum. Taken together, all of these facts after a full trial or hearing are very likely to result in a conclusion of fact that 1 in 60 odds violates the standards of all or any of the Count I, B., public trust, Count II public nuisance, and Count III MEPA claims in this case. Moreover, when considering the conditions of the 66-year old pipelines, safety violations, failing original design, storms, lack of response capability in winter months, and anchor s trikes, the consequences of the risks of a release of hazardous substances, the high degree of harm, and interference with public rights that if it occurred would result in grave, irreparable injury are sufficient to show a threshold violation of any of these claims. Risk, probability, and the degree of magnitude of harm are recognized by the Courts as dynamic and inextricably related. In a leading case on the subject, the D.C. Circuit reasoned:

> Danger [] is not set by a fixed probability of harm, but rather is composed of reciprocal elements of risk and harm, or probability and severity. That is to say, the public health [or, in the case of Line 5, public trust waters of the Straits of Mackinac] can be found endangered both by a lesser risk of a greater harm and by a greater risk of a lesser harm. *Danger depends upon the relation between the risk and harm presented by each case, and cannot legitimately be pegged to 'probable' harm, regardless of whether that harm be great or small.*

Ethyl v EPA, 541 Fed 2d 1, 18-20 (D.C. 1976) [citations omitted; emphasis added].

As noted in *Sholberg* and *Kilts*, *supra*, "public nuisance involves threatening impending danger to the public or public rights common to all, which would include public health, safety, and public trust rights and interest of citizens, as legal beneficiaries, of the public trust in the Great Lakes and navigable waters." And, as noted in *Ray v Mason County*, involving MEPA,

> "The Legislature... set the parameters for the standard of environmental quality but did not attempt to set forth an elaborate scheme of detailed provisions designed to cover every conceivable type of environmental pollution or impairment. ... The Act allows the courts to fashion standards in the context of actual problems as they arise in individual cases [.] *Id.* at 306.

Accordingly, the allegations in the Complaint regarding conditions, safety, probabilities, dangers, odds, and risks of grave harm fall within or support cognizable claims for revocation of the 1953 Easement and/or a public nuisance and violation of the MEPA.

CONCLUSION AND RELIEF

Based on the foregoing, Amicus Curiae FLOW submits that Plaintiff's Motion for Partial Summary Disposition under Count I,A., based on the sovereign state's interest and violation of the core requirements and standards under the common law of public trust and/or the GLSLA in allowing or authorizing the continued use of the Straits of Mackinac under the 1953 Easement and the 2018 Third Agreement should be granted; and an injunction issued prohibiting Defendants from using and operating Line 5 dual pipelines in the Straits unless Defendants have obtained authorization under the requirements for an easement or agreement for occupancy and use of the bottomlands and waters of the State pursuant to public trust law and Sections 32502 and 32503 et seq. of the GLSLA, MCL 324.32502, 32503 et seq..

In addition, based on the foregoing, Amicus FLOW submits that the Defendants' Motion for Summary Disposition under MCR 2.116(C)(4) and (7), and (8) should be denied.

Respectfully submitted,

Date: December 4, 2019

By: _____

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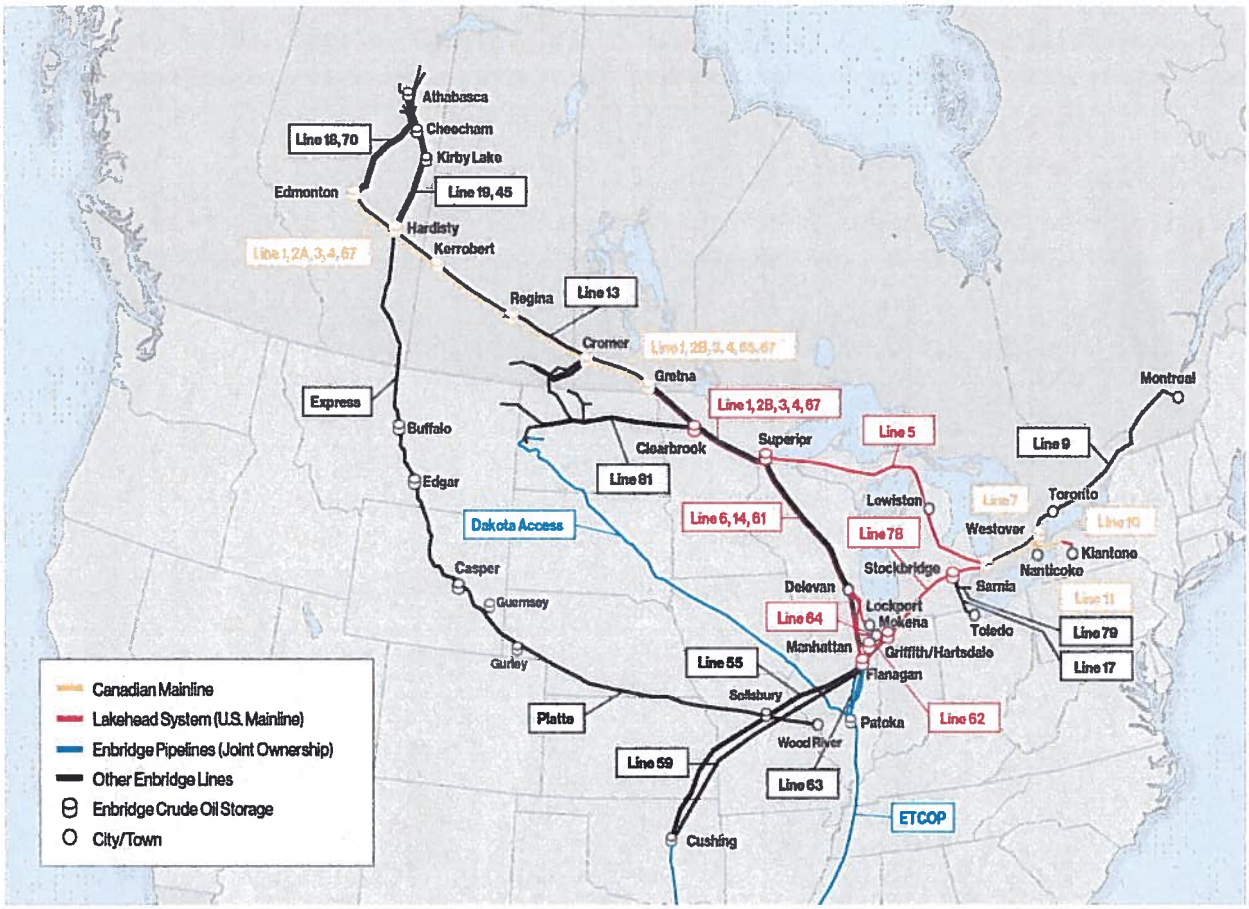
Exhibit 1



Amicus Curiae **Exhibit 1**

Enbridge Mainline Crude Oil Pipeline System Capacity, https://www.enbridge.com/reports/2019-liquids-pipelines-customer-handbook/mainline,