PETITION FOR CONTESTED CASE HEARING

Permit or Application No: (On permit or application
Michigan Department of Environmental Quality as assigned by MDEQ)

The procedural authority for a contested case hearing is the
Information requested on this form may be provided in an alternative written format or additional pages may be attached.

**PETITIONER'S NAME or AGENT'S NAME**

Straits of Mackinac Alliance
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City State Zip Code
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Statement of Authority:
I petition a contested case hearing be initiated under the authority of:

- [X] Part 325 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.101 et seq.
- [X] Other statute:
  See attached Addendum.

(Identify statute by popular name, the public act year and number, MCL, and if applicable, the part of the statute)

- [ ] Administrative Rule, R ; Title:
- [ ] Order No. ; Title:

Statement of matters asserted, including the site location and other pertinent facts:

See Attached Addendum

Petitioner's relationship/interest to the activity or proposed project:

See Attached Addendum

Relief sought by Petitioner:

See Attached Addendum

Signature of Petitioner/Agent

Date
May 18, 2018

Submit this completed petition and attachments to:
Michigan Administrative Hearing System
Ottawa Building, Second Floor
611 West Ottawa Street
P.O. Box 30695
Lansing, MI 48909-8195
Telephone: 517-335-2484

**NOTICE:**
A COPY OF MDEQ'S FINAL ACTION ON AN APPLICATION OR PERMIT MUST BE ATTACHED TO THIS OR ANY ALTERNATIVE WRITTEN PETITION.
The following is the Addendum to Petition for Contested Case by the STRAITS OF MACKINAC ALLIANCE (SMA). (This Statement is attached to and supplements the Petition for Contested Case Hearing form as completed and executed by the undersigned counsel.)

Petitioner:

STRAITS OF MACKINAC ALLIANCE
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Statement of Authority:

This petition for a contested case hearing is initiated under the authority of the Administrative Procedures Act, 1969 PA 306 (MCL §24.201 et seq.), and the rules promulgated thereunder (Michigan Administrative Code, R. 324.1 et seq.) pursuant to the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL §324.101 et seq., including (but not limited to) the Great Lakes Submerged Lands Act (GLSLA), Part 325, MCL §324.32501, et seq., and the rules promulgated thereunder (Michigan Admin. Code, R. 322.1001 et seq., including, but not limited to, R. 322.1015), and the common law public trust doctrine (Obrecht v National Gypsum Co, 361 Mich 399; 105 NW2d 143 (1960); Illinois Central R Rd v Illinois, 146 US 387 (1892)), the principles of which are incorporated into the Great Lakes Submerged Lands Act and its associated rules.

1 See Application for 2017 Line 5 Anchor Installation Project (Mackinac and Emmett Counties, Michigan) from Enbridge Pipelines (Lakehead), LLC to Michigan Dept. of Environmental Quality (May 9, 2017), Application No. 2RD-DFDK-Y35G, available at https://miwaters.deq.state.mi.us/miwaters/#/external/publicnotice/info/2861858022734864912/details (hereinafter, the “Application”). The Application was granted on March 22, 2018, and a copy of this final agency action is attached to this Petition and Addendum as Attachment 1.
PETITIONER'S RELATIONSHIP/INTEREST TO THE ACTIVITY OR PROPOSED PROJECT

1. Petitioner, the Straits of Mackinac Alliance (SMA) is a not-for-profit corporation in the State of Michigan with its resident office located in the County of Cheboygan, State of Michigan at 7749 Cordwood Shores Drive, Cheboygan. The SMA is a coalition of individuals and organizations working cooperatively to protect, preserve, enhance, and restore the natural resources of the Straits of Mackinac and adjacent waters of the upper Great Lakes, conducting activities intended to protect the natural environmental and ecological conditions of the region, bolster sustainable commercial uses of and recreational opportunities with said resources, enhance human resiliency to a changing climate, and maintain and improve the quality of life in the Straits of Mackinac and surrounding areas and communities.

2. Petitioner consists of Michigan residents, taxpayers, and property owners who own riparian property on Lake Huron, all of whom have assembled together for common purposes, including (inter alia):
   a. Protecting the water quality of Lake Michigan & Lake Huron;
   b. Preserving the natural character of and enhancing and restoring the wildlife habitat, coastal wetlands, and other ecological functions and natural resources of the Straits of Mackinac, as well as connecting and adjacent waters of the upper Great Lakes;
   c. Supporting sustainable commercial uses of and recreational opportunities within the Straits of Mackinac and the adjacent waters of the upper Great Lakes; and
   d. Maintaining the quality of life of communities in the vicinity of the Straits of Mackinac and surrounding areas.

3. Some of Petitioner's members also use and enjoy the waters of Lakes Huron and Lake Michigan at the Straits of Mackinac for recreational purposes, including swimming, boating, fishing, and observation of wildlife, plants, and other aquatic resources.

4. The Applicant's proposed permit activity threatens harm or will adversely affect or impair the use and enjoyment by the Petitioner's members of their riparian properties, the local aquatic resources of both Lakes Huron and Michigan at the Straits of Mackinac, and Petitioner's members' use and enjoyment of those aquatic resources, wildlife, plants, and related natural resources.

2 See, for example, the attached affidavits of certain SMA members (Attachments 2 - 5), which are incorporated by reference as if fully set forth herein.

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5. The interests of Petitioner's members are represented by the Petitioner, and Petitioner is authorized to pursue this action and all related to it, on behalf of and for its members and their interests. As such, the Straits of Mackinac Alliance has representational standing in this matter as a petitioner.3

6. Furthermore, the proposed activity and the continued operation of the pipelines at issue in this matter pose significant threats to all of the riparian property owners along the Straits of Mackinac that are members of the SMA, in a manner that is separate and apart from that of the general public. As such, there is no question that the SMA is aggrieved by the action (or failure to act in accordance with the requirements of the GLSLA) of the DEQ in this matter as required by Rule 322.1017(2) of the Michigan Administrative Code.

Other Parties

7. The Michigan Department of Environmental Quality (DEQ and/or Respondent) is the administrative agency responsible for the administration of the public trust bottomlands of the Great Lakes and any permitting thereupon in the state of Michigan under MCL 324.32501 et seq, the Great Lakes Submerged Lands Act (Part 325).

8. Upon information and belief, the Applicant, Enbridge Pipelines (Lakehead), LLC is a Delaware corporation that owns – either directly or through a related corporate entity or subsidiary – property along West Boulevard Drive, St. Ignace, Michigan (Property ID No. 008-720-056-00), and which maintains a registered office at 40600 Ann Arbor Road E., Suite 201, in Plymouth, Michigan 48170 (Applicant).

9. The Petition for Contested Case and this Addendum thereto relate to the Applicant's May 9, 2017 Application for a permit to "install[] 22 helical anchor support structures at 22 locations [along the "Line 5" pipeline] within the Straits of Mackinac,"4 which was assigned by Respondent DEQ as Application/File No. 2RD-DFDK-Y35G and which was issued by the Respondent on March 22, 2018 as Permit No. WRP008225 v.1.

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3 See Lansing Sch Educ Ass'n v Lansing Bd of Educ, 487 Mich 349, 373, n 21; 792 NW2d 686 (2010) ("It is not disputed that, under Michigan law, an organization has standing to advocate for the interests of its members if the members themselves have a sufficient interest. See, e.g., Trout Unlimited, Muskegon-White River Chapter v White Cloud, 195 Mich App 343, 348; 489 NW2d 188 (1992)."").

4 See supra, note 1 (May 9, 2017 Application No. 2RD-DFDK-Y35G).
STATEMENT OF MATTERS ASSERTED, INCLUDING THE SITE LOCATION AND OTHER PERTINENT FACTS

10. The Great Lakes are a globally unique resource, containing 20% of the Earth’s fresh water – this includes roughly 84% of the fresh surface water for all of North America, with greater than 30 million citizens of Canada & the United States living along the lakes’ coastlines.\(^5\)

11. Lake Michigan is the second largest Great Lake by volume, providing drinking water for both the Milwaukee and Chicago metropolitan areas, which together comprise roughly 8 million American citizens. Lake Huron is the third largest Great Lake by volume, although it is actually hydrologically connected with Lake Michigan at the Straits of Mackinac, making the two lakes collectively one of the largest bodies of fresh water in the world.\(^6\)

12. Lakes Michigan and Huron at the Straits of Mackinac and surrounding areas have a rich mosaic of high-quality natural habitats and varied shoreline features (such as alvars, sand dunes, coastal marshes and fens, and bedrock shores) that support a diversity of fish, birds, and other wildlife, as well as plant communities.\(^7\) This region provides suitable habitat for a variety of federal and state endangered, threatened, and special concern species, including some established in field surveys conducted by the Michigan Natural Features Inventory (MNFI) program.\(^8\)

13. The bottomlands of Lakes Michigan and Huron at the Straits of Mackinac have also been established as the Straits of Mackinac Great Lakes State Bottomland Preserve, indicating that the DEQ shall protect these bottomlands as an area of historic and recreational value.\(^9\)

14. The Straits of Mackinac and the associated shoreline habitats and ecosystems provide critical ecosystem services, including water catchment and purification, maintenance and protection of wildlife, recreation, research, and more. The Great Lakes and their coastal ecosystems are easily disrupted, yet essential to the integrity of the critical ecosystem services, due to the water quality and the diverse array of plant and animal species found in the area.

15. The Applicant, its predecessor(s) in interest, and its various related corporate entities is in the business of transporting fossil fuels and operating pipeline infrastructure.\(^10\)

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\(^6\) Id.; see also The Great Lakes, U.S. Environmental Protection Agency, available at https://www.epa.gov/greatlakes.


\(^8\) See Michigan Natural Features Inventory, available at https://mnfi.anr.msu.edu/ (including the endangered Great Lakes population of the Piping Plover, the Dwarf Lake Iris, and the Lapland Buttercup, among others).


16. The “Line 5” pipeline is the pipeline at issue in the Application. Line 5 is a 645-mile long pipeline and is part of the Applicant’s “Lakehead” pipeline system.¹¹

17. Line 5 is utilized primarily for the transport of oil, natural gas liquids, propane, and other products from Alberta, Canada to Superior, Wisconsin, through Michigan’s upper peninsula, under the Straits of Mackinac, and then overland in Michigan to Sarnia, Canada.¹²

18. Given the placement of the Straits of Mackinac in relation to the rest of each of these lakes, it is estimated that at least 3,528 square miles of Lake Michigan’s open water, and 13,611 square miles of Lake Huron’s open water could be at risk in the event of an oil spill in the Straits.¹³

The 1953 Agreement

19. In the early 1950’s, the Applicant (or its predecessor in interest) sought to build additional pipeline capacity in the Lakehead system, either by way of a pipeline route around Lake Michigan and through Chicago or via a pipeline through the Straits of Mackinac.¹⁴

20. In 1953, the Applicant’s predecessor in interest, Lakehead Pipe Line Company, Inc., entered into an agreement with the State of Michigan entitled “Strait of Mackinac Pipe Line Easement” (hereinafter, the “1953 Agreement”).¹⁵

21. In 1969, the Applicant (or its predecessor in interest), went ahead and built the other pipeline route anyway, routing it around Lake Michigan through Chicago in what became known as Line “6B.” Therefore, while Line 5 may be convenient for the Applicant, it is by no means necessary to the continued operation of the Lakehead pipeline system the Applicant maintains. As shown below, the risks to the Great Lakes, the communities, businesses, and industries who depend on them, and the public trust in the Great Lakes are much too great to further allow what is ultimately a mere convenience for the Applicant.

22. The 1953 Agreement purports to give the Applicant “an easement to construct, lay, maintain, use and operate two (2) pipe lines, one to be located within each of the two parcels of [Great Lakes] bottom lands … together with anchors and other necessary appurtenances and fixtures…” See Attachment 6, page 2

23. The 1953 Agreement imposes certain conditions upon the Applicant, including (inter alia) the following:


¹³ Graham Sustainability Institute (University of Michigan), Worst Case Oil Spill Straits of Mackinac (2016), available at http://graham.umich.edu/water/project/mackinac-oil-spill (hereinafter referred to as the “Michigan Spill Analysis”).


¹⁵ See Attachment 6.
a. "Grantee ... at all times shall exercise the due care of a reasonably prudent person for the safety and welfare of all persons and of all public and private property" (See Att. 6, pp. 3-4);

b. Grantee "shall comply with all laws of the State of Michigan and of the Federal Government" (See Attachment 6, p. 3); and

c. Grantee "shall comply with the following minimum specifications, conditions, and requirements, unless compliance therewith is waived or the specifications modified in writing by the Grantor," including (inter alia):

\[(10) \text{The maximum span or length of pipe unsupported shall not exceed seventy-five (75) feet.}\] (See Attachment 6, pp. 4-5).

24. The 1953 Agreement further provides that “C. The easement herein conveyed may be terminated by Grantor: (1) If, after being notified in writing by Grantor of any specified breach of the terms and conditions of this easement, Grantee shall fail to correct said breach within ninety (90) days, or, having commenced remedial action within such ninety (90) day period, such later time as it is reasonably possible for the Grantee to correct said breach by appropriate action and the exercise of due diligence in the correction thereof...” (See Attachment 6, p. 7).

25. As early as 1963, a mere ten years after its construction, Line 5 was found to be out of compliance with the 1953 Agreement, with unsupported spans in excess of 75 feet.\(^{16}\)

26. In 2001, as Line 5 was nearing 50 years of continuous underwater operation in the Straits, the Applicant filed sought permission to install grout bags on Straits bottomlands as an “emergency preventative maintenance repair.”\(^{17}\) The permit was sought only two days before Enbridge planned to commence work. The “emergency” nature of the 2001 application raised concerns that the Applicant had been operating the pipeline in violation of the 1953 Easement.

27. Since 2001, the Applicant has identified more unsupported spans of pipeline necessitating the installation of more than 100 additional support structures on the Straits bottomlands.


\(^{17}\) September 14, 2001, Letter from Adam I. Erickson (Enbridge) to John Arevalo (DEQ), and 2001 Joint Permit Application (DEQ File No. 01-24-0046P), collectively attached as Attachment 7.
28. In October 2016, a report commissioned by the Applicant and prepared by Kiefner & Associates revealed that an internal 2003 survey identified 16 unsupported spans greater than 140 feet, the longest being 224 feet on the east line and 286 feet on the west line.18

29. Despite sporadic attempts to add structural supports, the Applicant was and/or continues to apparently be in violation of the 1953 Agreement on an ongoing basis due to the numerous spans of unsupported pipeline exceeding 75 feet.

30. There appear to be no records demonstrating that the Applicant notified the State of Michigan of its violation of the terms of the 1953 Agreement, thereby preventing the state from exercising its right(s) under Paragraph “C.” to terminate the 1953 Agreement.

Lax State Oversight

31. Until the emergency permit application submitted by the Applicant in 2001, seemingly little interaction occurred between the Applicant and the Department.

32. Around 2009-2010, the Department (then operating as “DNRE”) apparently began taking a harder look at the Applicant’s regular requests for permits to conduct maintenance and repairs and considered whether Line 5 is subject to the requirements and procedures of the GLSLA.

33. In September 2010, the Applicant withdrew a pending application to install supports, ostensibly due to this increased scrutiny and consideration of GLSLA and/or the recent Line 6B rupture.

34. Documents obtained through FOIA reveal the Department’s internal debate as to whether the Applicant should be allowed to discharge dewatering wastewater during a maintenance project, and whether and how that activity might be regulated.19

35. Documents obtained through FOIA demonstrate that the Applicant has failed to meet, and the Department has failed to apply, requirements of the GLSLA to the Applicant’s Agreement and its many applications to install additional supports under Line 5. In particular, the Department and the Applicant have seemingly ignored the fact that the Applicant has no ownership in the lands upon which Line 5 rests and no dominant land estate to which the bottomlands “easement” appertains.20


20 See Appendix B, pp. B-9 – B-11; B-17-B-20; B-24-B-25; B-27-B-28; B-43-B-45; B-58-B-60 (prior permit applications omitting information about the property owner) and Appx B, pp. B-54-B-57 (emails between Enbridge and DEQ officials concerning Enbridge’s lack of ownership interest and need to obtain consent); But see Appx B, pp. B-33-B-34 (DEQ Project Review Report noting that a Part 325 conveyance would be required for the proposed project, but erroneously concluding that it was “likely obtained when pipelines installed.”).
36. In at least one instance, a Department official simply improvised a substitution for the ownership/consent requirement, stating that “because you [Enbridge] have crossing easements which presumably have language about maintaining the properties, you could provide me with those specific pages of the easement documents in lieu of getting letters of authorization . . .”21

37. Since the 2001 emergency permit applications, the Applicant has continued to submit, and the Department has continued to approve, “maintenance” permits designed to ensure the “integrity” of Line 5. The Department has allowed this piecemeal approach, which has enabled the Applicant to avoid comprehensive review of risks and alternatives.

Line 6B Spill

38. As the Department is aware, in July of 2010, another part of the Applicant’s “Lakehead” pipeline system - Line 6B – suffered a catastrophic rupture near Talmadge Creek (a tributary to the Kalamazoo River). The Applicant failed to notice or shut off the flow of product through Line 6B after the rupture for at least 17 hours, and the resultant six-foot gash in the pipeline ultimately released more than 843,000 gallons of Alberta tar sands oil/heavy crude into the creek and riverine ecosystems.22

39. The consequences of the Kalamazoo spill were severe. Approximately 39 miles of the Kalamazoo River and the nearby Morrow Lake, Mill Pond, and Ceresco Dam were contaminated; clean-up and remedial efforts lasted more than four years and required the use of booms to collect oil along the surface of the water and dredging to collect the heavy crude off the riverbed; nearby residents were evacuated, and several hundred suffered adverse health effects from exposure to benzene; a several-mile span of river was closed to public use for nearly two years.23 The United States Environmental Protection Agency estimated that 760,000 gallons of oil were captured through clean-up efforts.24

40. The National Transportation Safety Board (NTSB) concluded that the Applicant knew for five years prior to the spill that the section of Line 6B that eventually ruptured had suffered from cracks, and that the Applicant’s officials had ignored many opportunities to lessen the risk of a spill. In its words, the disaster was the result of a “complete breakdown of safety at Enbridge.” NTSB Chairwoman Deborah Hersman commented that the Applicant’s employees had acted like a troop of “Keystone Kops” as they worked to address the spill.25

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21 See Appendix B, supra, p. B-54.
24 April 2011 EPA Fact Sheet, Cleanup Continues; Focus on Submerged Oil (available at: https://www.epa.gov/sites/production/files/2016-06/documents/enbridge_fs_201104.pdf).
25 Press release, National Transportation Safety Board, Pipeline Rupture and Oil Spill Accident Caused by Organizational Failures and Weak Regulations (July 10, 2010) (attached as Attachment 8). The entire NTSB report is available at: https://www.ntsb.gov/investigations/Accident_Reports/Reports/PAR1201.pdf.
41. The Applicant spent more than $1.2 billion in clean-up costs\(^{26}\); its insurance coverage was only $650 million.\(^{27}\)

**Applicant’s “Major Expansion” of Lakehead System**

42. Incredibly, as the Applicant was still cleaning up and remediating the Kalamazoo River disaster, it announced “Major Expansions of its Lakehead System,”\(^{28}\) which would involve numerous small-scale projects “requir[ing] only the addition of pumping horsepower,” as well as a 50,000 barrel per day “expansion” of Line 5, all to “drive distributable cash flow growth” and to help the Applicant “achieve the higher end of our distribution growth target.” In short, the company announced plans to maximize flow rates and product distribution throughout the Lakehead system by undertaking numerous small scale projects that would ultimately have the effect of, in some cases, more than doubling the capacity of portions of the system.\(^{29}\)

43. This announcement coincided with additional permit requests to the Michigan Public Service Commission (MPSC) for activities that were later undertaken by the Applicant along Line 5, including the addition of numerous pump stations and anti-friction injection facilities, which allow the Applicant to increase the flow and volume of petroleum products through Line 5 and the Straits.\(^{30}\)

44. It is unknown whether the Applicant intended to utilize Line 5 to transport tar sands (aka. “heavy crude” oil) at that time, but the Applicant and the State of Michigan ultimately reached a separate agreement in September of 2015 that such products would not presently be transported via Line 5 under the Straits of Mackinac.\(^{31}\)

45. The Applicant’s “improvements” to protect the “integrity” of Line 5, together with the replacement of Line 6B (now Line 78) and other parts of the Lakehead system represent a massive expansion of the Applicant’s ability and capacity to move petroleum products through this state, the majority of which are destined for Sarnia, Ontario, and points beyond – not Michigan residents and consumers.


\(^{29}\) For example, 75 miles of Line 6B were replaced, along with further work transforming former Line “6B” into what is now Line “78,” all of which “increase[d] capacity from 240,000 bpd to 500,000 bpd.” Id.

\(^{30}\) See Attachment 9.

\(^{31}\) See Agreement Between the State of Michigan and Enbridge Energy, Limited Partnership Regarding the Transportation of Heavy Crude Oil Through the Straits of Mackinac Pipelines (Sept. 3, 2015), available at https://www.michigan.gov/documents/snyder/Final_Agreement_Line_5_Heavy_Crude_Transport_FINAL_completement_090315_499169_7.pdf. The Applicant was provided two escape clauses, however, including one that is solely in the Applicant’s discretion; in the event the Applicant elects “to change the current engineering configuration or operating parameters of the Straits Pipelines in order to transport heavy crude oil” it may provide written notice to the State, which must respond within 180 days.
Unacceptable Risks to Great Lakes

46. The Line 6B spill was a wake-up call to Michiganders about the risks that the pipelines traversing the state pose to the waters of the state, in particular, the potential threat to the Straits of Mackinac from Line 5.

47. The Line 6B disaster was the worst inland oil spill in US history, and one of the worst pipeline spills to have ever occurred in the United States. It is crucial to note in this context that many of the same risk factors that led to the Line 6B rupture are present with Line 5, with the added caveat that those risks are greatly exacerbated by, among other things, Line 5’s underwater location in the Straits of Mackinac, at the heart of the Great Lakes.32

48. Since its construction in 1953, the Applicant has increased the flow through Line 5 from its design capacity of 300,000 barrels per day to 540,000 barrels per day – an increase of 80%.33 This increase has occurred (a) without any environmental assessment as to the potential impacts of such expansion and continued activities, (b) outside of the requirements of the public trust doctrine (c) outside of the requirements of the Great Lakes Submerged Lands Act (GLSLA), and (d) without any affirmative findings or demonstration by the State or the Applicant concluding that any risks or potential adverse effects to the environment, public trust, and riparian interests from these expansion activities would be minimal and that no feasible and prudent alternative to the operation of Line 5 in this manner exists.

49. In response to questions posed by state officials, the Applicant reported in 2014 that it had no plans for pipeline replacement of Line 5 in the Straits because, according to its Procedure

32 Other risk factors related to Line 5 are (without limitation) the Applicant’s inability to effectively inspect the outside of the pipeline along the entirety of its underwater length, due to the presence of invasive mussels and its underwater location, as well as the excessive age of the pipeline itself. Further risk factors were expected to be the subject of a report that was to be completed by/on behalf of the State of Michigan in the summer of 2017, but the study leading to that expected report was recently terminated by the State (See Press Release, Michigan Department of Environmental Quality, State Terminates Independent Contractor Analyzing Line 5 Risks (June 21, 2017), available at http://www.michigan.gov/deq/0,4561,7-135-424437--00.html) and no further information as to whether or when those risks will ever be evaluated has been forthcoming since that termination.

33 MPSC documents reveal that Line 5 was designed with a capacity of 120,000 barrels per day, with the potential to increase to 300,000 barrels per day with the addition of four pump stations. The expansion to 540,000 barrels per day represented a $100 million investment by Enbridge. See MPSC Opinion and Order, p. 6, March 31, 1953; Appendix 2A to FLOW’s September 21, 2015 Comment (available at: http://flowforwater.org/wp-content/uploads/2015/09/Final-Appendices-9-21-15.pdf) This piecemeal, bit-by-bit approach by the Applicant means that the State of Michigan never undertakes a comprehensive review of the full range of alternatives to the operation of Line 5 as a whole, including the portions that are located under the surface of the Straits of Mackinac. The Applicant’s decision to seek and add pump stations and anti-friction injection systems up and down Line 5 have been characterized as “maintenance and integrity” measures. However, these changes have fundamentally modified the nature of Line 5, where the Applicant has essentially built its own version of the controversial Keystone XL pipeline through the heart of the Great Lakes and has done so without prompting the State of Michigan to exercise its public trust duties in an official capacity, thereby evading a consideration of the risks and alternatives to Line 5’s continued operation. As has been stated at earlier Pipeline Safety Advisory Board meetings, were the Applicant to have disclosed its true intentions to massively increase Line 5’s capacity, the public, the federal government, and/or the State of Michigan could have more fully evaluated the risk of harm to the natural resources of the state and could have taken action long before it got to the point where the Applicant has had to now apply for 22 anchor supports under the present circumstances.
for Pipeline Replacement Assessments, replacement is unnecessary to “maintain the pipeline safety, integrity, and overall reliability.” Yet the same Assessment tool caused the Applicant to replace the much younger Line 6B, belying the company’s objective to expand its system and increase its capacity to transport heavier Bakken and Alberta tar sands products. The prioritization of Line 6B over Line 5 — an older and partially underwater pipeline — also demonstrates the Applicant’s disregard for the condition and safety of Line 5 and the preservation of the Straits.

50. Chief among the concerns about Line 5 are the many documented instances of unsupported spans of pipeline exceeding 75 feet (in violation of the 1953 Agreement), sometimes by tens or even 100 feet or more.

51. Long spans of unsupported pipeline are susceptible to movement and shifting from the Straits’ strong currents, which in turn creates concerns that abrasion will occur, compromising the pipeline coating. Damage to the outer coating increases the risk of bare pipe being exposed, which is vulnerable to corrosion due to its underwater location.

52. Not only do the unsupported spans along Line 5 violate the terms of the 1953 Agreement, but some unsupported spans may not comply with the required safety factor for oil pipelines under ASME B31.8.

53. Further, the design and materials used for Line 5 have proven less robust than projected and, in some cases, have become obsolete.

54. Other concerns about the condition of the pipeline exist, such as delamination of the pipe coatings or missing coatings, noticeable cracks and dents in the pipe, missing slats protecting the lines, and documented instances of bends or curvature in the line. The presence of colonies of invasive mussels along vast portions of the line makes the pipeline difficult to inspect, and those mussels add weight, increase the gravitational and drag loading, and create an environment of corrosive acidity.

55. Similar to the Applicant’s five year delay in notifying the NTSB prior to the Line 6B spill that the Applicant knew of cracks in the section of Line 6B that eventually ruptured, the Applicant knew in 2014 yet failed to disclose to the State and federal officials for 3 years (until November 2017) the fact that the Applicant was aware that its newly implemented anchor design (with saddle supports, as suggested for implementation in this instance) was actually causing damage to the Line 5 pipeline coating and to the overall integrity of the pipelines themselves.

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35 See Kiefner Report, supra, note 18.
37 Id. at 11-14.
fact, the Applicant negotiated a 2016 Consent Decree (with respect to the Line 6B spill) and secured two joint DEQ and US Army Corps of Engineers anchor permits while it had knowledge of these problems with the anchor design but without disclosing that critical information to the state or federal government.  

56. Moreover, the Applicant’s underwater ROV inspections are scheduled only every two years, leaving open the possibility that small areas of damage could go unnoticed for dangerously long periods. Both the 2014 and 2016 ROV inspections revealed easement span violations.

57. Further, the Applicant’s simulated spill scenarios are understated and lead to inadequate response planning.

58. Under the terms of the 1953 Agreement, the Applicant is required to maintain insurance or a bond in the amount of only $1 million – nowhere near enough to cover the costs of cleanup. In the wake of the Line 6B spill, the Applicant reportedly increased its coverage to $700 million, a number that still pales in comparison to the $1.2 billion the company expended cleaning up the Kalamazoo River.

59. In 2016, researchers at the University of Michigan completed a simulation of 840 different spill scenarios under different spill volumes covering a wide range of weather and water current conditions, factoring in differences between different types of petroleum products that are transported through Line 5. Hydrodynamics expert David Schwab concluded that up to 152 miles of Lakes Michigan and Huron coastline could be affected by a single spill in the Straits, and that more than 700 miles of shoreline should be considered vulnerable to a spill. More than 17,000 square miles of open water surface area were demonstrated to be vulnerable.

60. A Line 5 spill threatens the pristine waters of the Straits of Mackinac, would irreparably tarnish the shorelines of Lakes Michigan and Huron, and would harm or kill innumerable waterfowl, fish, marine mammals, and aquatic plants.

61. A recent Michigan State University study predicts that the economy of the state of Michigan would lose $6.3 billion if there were a significant Line 5 oil pipeline rupture in the Straits of Mackinac, including catastrophic economic impacts on tourism ($4.8 billion in economic

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42 See Michigan Spill Analysis, supra, note 13, and associated materials.

43 Id.
impacts), property values ($485 million), municipal water systems ($233 million), and commercial fishing ($61 million), among others.44

62. A Line 5 spill would also contaminate the drinking water of communities along Michigan’s upper and lower peninsulas.

63. Oil spills also expose humans and wildlife to toxic chemicals such as benzene and create potentially noxious fumes from VOCs (volatile organic compounds).

64. A Line 5 spill would devastate Michigan’s tourist economy, which depends heavily on outdoor recreation, sightseeing and a “Pure Michigan” reputation.

65. As recounted above, a Line 5 spill would also irreparably harm the property rights of SMA’s members, catastrophically diminish their property values, potentially cause adverse health effects, and impose untold costs and mental distress upon SMA’s membership.

66. If the Applicant is permitted to install the 22 anchor supports as requested in its application,45 it will surely argue that the State has impliedly authorized the continued operation of Line 5 indefinitely, despite the fact that such operation represents conduct that has or is likely to have the effect of polluting, impairing, or destroying the aquatic and other natural resources of the State, as well as the public trust in those resources.

Line 5 Alternatives

67. In response to calls to shut down or decrease the volume of petroleum products transported through the Straits, the Applicant has often countered that Michigan refineries rely on Line 5 to supply crude oil, and that Line 5 is also necessary to supply Upper Peninsula residents with natural gas liquids for propane. The Applicant also claims Line 5 is integral to supplying two refineries in Toledo, Ohio.

68. However, Michigan’s demand for light crude oil transported through Line 5 is overstated by the Applicant. Marathon’s Detroit refinery processes primarily heavy crude, and in-state demand for light or medium crude makes up only approximately 5.6% of product transported through Line 5 daily.46

45 See MCL §324.32503(1) and §324.325.05(2). The Applicant’s proposed activity (“installation of a helical anchoring system with saddle mounts around the pipeline in each of the [22] proposed locations,” which will be “augured directly into the lakebed using 10-inch-diameter screws (total of 44 screws)”) is arguably in the nature of the installation of a “filling” of “other materials” such as “pilings,” as those terms are defined in R. 322.1001(j) and (k). See also MCL §324.32512(1). However, the SMA does not concede, and reserve the right to object to, this characterization/definition as established and apparently utilized by the Department.
69. The BP-Husky refinery in Toledo currently receives light crude via Line 5, in addition to the Mid-Valley and Capline pipelines. However, BP-Husky is reportedly converting to all heavy crude refining around 2020 and will no longer demand product from Line 5.47

70. The PBF Energy refinery in Toledo likely utilizes the Mid-Valley and Capline pipelines to supply light crude, not Line 5.48

71. Natural Gas Liquids (NGLs) destined for the Upper Peninsula are already removed from Line 5 and purified at Superior, WI and then piped to the existing distribution station in Rapid River. This transport does not require the use of the lines through the Straits.49

72. The vast majority of petroleum products transported through Line 5 are destined for refineries in Sarnia, Ontario and are then shipped on to other parts of Canada or the east coast for export.50

73. As demonstrated herein, Line 5 has little to do with supplying Michigan’s energy needs.

PROPOSED PROJECT AND APPLICATION

74. The Application was filed and received by the DEQ on May 9, 2017 and was assigned DEQ File No. 2RD-DFDK-Y35G. A Public Notice was issued by the DEQ on June 9, 2017.


76. Numerous public comments were submitted to and received by the DEQ in conjunction with its consideration of this Application.

77. The original permit application’s description of “All Proposed Activity” states that the Applicant “plans to conduct maintenance on its existing 20-inch-diameter Line 5 pipelines by installing helical anchor support structures at 22 locations” on the Lake Michigan bottomlands in the Straits of Mackinac “between Point La Barbe in the Upper Peninsula and McGulpin Point in the Lower Peninsula under authority of Part 325, Great Lakes Submerged Lands, of the Natural Resources and Environment Protection Act, 1994 PA 451, as amended”51 (being MCL §324.32501, et seq.).

78. According the Supplemental Information attached to the Application by the Applicant, the 22 anchor support structures would provide support to the pipeline “with saddle

47 Id. at 19.
48 Id.
51 See supra, note 1, p. 1 (May 9, 2017 Application No. 2RD-DFDK-Y35G); July 12, 2017 Notice of Public Hearing.
mounts” that “will be augured directly into the lake bed using 10-inch diameter screws (total of 44 screws).” 52 The Applicant further characterizes this “maintenance” activity as causing a “total lake bottom impact [of] approximately 9 cubic yards, with the proposed locations indicated in several tight groupings as shown in Figures 1a, 1b, 2a, 2b, 3a, and 3b on “Attachment A” to the Supplemental Information.

79. The Applicant’s Supplemental Information goes on to characterize the project as “pipeline maintenance” that simply allows the Applicant to “maintain[] the previously authorized pipelines.”53

80. Despite the Applicant’s characterization, it is important to point out that there are no relevant sections of the GLSLA that provide exceptions to any of the requirements set forth in the statute or its associated rules for activities that an applicant may characterize as “maintenance.” See MCL §324.32501, et seq.

81. Petitioner contends that the Applicant’s sought-after activity constitutes a substantial modification of the design of the pipeline into something more closely approximating a suspension bridge along the lake bottom. The 1953 Agreement between the State and Enbridge’s predecessor-in-interest specifically provides for the twin pipelines to be laid along the lake bottom, with the pipelines engineered in accordance with that location and the lower amount of current stress that would accompany that location. With these new activities, the Applicant’s aging and damaged pipelines would be elevated amidst the water-column, subjected to vastly stronger currents, and at greater risk of anchor strikes similar to that which damaged the pipelines on April 1, 2018.54

82. As more fully set forth below, there has never been any review of such a radically altered design or the risks that are or could be associated with it, meaning that the State and the Applicant have failed to fulfill the requirements of state law.

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52 See Attachment 1, p. 16.
53 Id. at 17. The word “maintenance” is used 4 times in the statute, including with respect to lighthouses (MCL §324.32504a), marina dredging (MCL §324.32513(2)(c)(v)), and artificial waterways (MCL §324.32515).
THE GREAT LAKES SUBMERGED LANDS ACT

83. The State of Michigan passed the Great Lakes Submerged Lands Act ("GLSLA") in 1955.55

84. The Great Lakes are public trust resources.56

85. As set forth in Section 32502, the GLSLA covers "all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes ... belonging to the state or held in trust by it...." MCL §324.32502.

86. The Applicant’s request in this matter pertains to unpatented bottomlands of the Great Lakes, and therefore, its application must meet the requirements of the GLSLA, both under the express statutory terms thereof, but also as a legislative expression of the State’s public trust duties, which predate the 1953 Agreement and date back at least to the admission of Michigan into the United States in 1837.57

87. Under Section 32502, the Michigan legislature provided that the GLSLSA “shall be construed so as to preserve and protect the interests of the general public in the lands and waters” described in Section 32502, while allowing 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” so long as the Department reaches a determination 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.” MCL §324.32502.

88. Section 32503 requires that the State/Department undertake an effort to reach an affirmative determination / finding(s) “that the public trust in the waters will not be impaired or substantially affected,” and only after doing so may it “lease ... unpatented lands, after approval of the state administrative board.” MCL §324.32503(1).

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55 MCL §324.32501 et seq.
56 Id. See also, e.g., Illinois Central Rail Co v State of Illinois, 146 US 387 (1892); Mich. Const. art. IV, §52.; and infra, note 57. For example, the U.S. Supreme Court states in Illinois Central Rail Co (146 US at 437) that “the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.”.
57 Illinois Central Rail Co v State of Illinois, 146 US 387 (1892); Obrecht v Nat'l Gypsum Co, 361 Mich 399, 412; 105 NW2d 143 (1960) (“This Court, equally with the legislative and executive departments, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of five Great Lakes.”); Collins v Gerhardt, 237 Mich 38, 60; 211 NW 115 (1926); and Glass v Goeckel, 473 Mich 667, 677-681 (discussing the history of the public trust doctrine and reaching the conclusion that “the public trust doctrine is alive and well in Michigan...".). See also R. 322.1001(1)(m) (“Public trust” means the perpetual duty of the state to secure to its people the prevention of pollution, impairment or destruction of its natural resources, and rights of navigation, fishing, hunting, and use of its lands and waters for other public purposes.”); Mich. Const. art. IV, §52.
89. Clear requirements for environmental assessments that are to be conducted in conjunction with the GLSLA are also set forth in Rule 15 of the rules promulgated pursuant thereto (R. 322.1015):

In each application for a permit, lease, deed, or agreement for a bottomland, existing and potential adverse environmental effects shall be determined. Approval shall not be granted unless the department has determined both of the following:

a. That the adverse effects to the environment, public trust, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible.

b. That there is no feasible and prudent alternative to the applicant’s proposed activity which is consistent with the reasonable requirements of the public health, safety, and welfare.  

90. Section 32504 requires the application to include a “surveyed description of the lands or water area applied for, together with a surveyed description of the riparian or littoral property lying adjacent and contiguous to the lands or water area, certified to by a registered land surveyor. MCL §324.32504(1).

91. Section 32504 further requires that the “applicant shall be a riparian or littoral owner or owners of property touching or situated opposite the unpatented land or water area over patented lands applied for or an occupant of that land.” MCL §324.32504(1).

92. Section 32504(1) further requires that “the application shall include the names and mailing addresses of all persons in possession or occupancy or having an interest in the adjacent or contiguous riparian or littoral property” or those having such interests in the lands or waters applied for (MCL §324.32504(1)(clause 5); again, no such information is contained in the instant Application.

93. Section 32504(1) further requires that “the application shall be accompanied by the written consent of all persons having an interest in the lands or water areas applied for in the application (MCL §324.32504(1)(clause 6); again, no such information is contained in the instant Application.

94. Section 32504(2) states that “[b]efore an application is acted upon by the department, the applicant shall secure approval of or permission for his or her proposed use of such lands or water area from any federal agency as provided by law, the department with the advice of the Michigan waterways commission, and the legislative body of the local unit or units of government within which such land or water area is or will be included, or to which it is contiguous or adjacent.” MCL §324.32504(2).

95. Under the public trust doctrine, the State of Michigan has an affirmative, perpetual, and inalienable duty to protect the Great Lakes and their bottom lands from pollution, impairment,
or destruction, and to protect the public’s rights of navigation, fishing, commerce, swimming, recreational, ecological and aquatic resources, and other public purposes.59

96. The public has utilized Lakes Michigan and Huron, along with the other Great Lakes, since the inception of Michigan’s statehood, and at all times since its admission to the Union in 1837, the public’s rights and the state’s public trust duty have applied.60

97. Since the State of Michigan cannot surrender, abdicate, or otherwise alienate its duty to preserve public rights in the Great Lakes under the public trust doctrine,61 any agreement entered into after statehood—including the 1953 Agreement between the State and the Applicant—remains subject to the duties, obligations, and responsibilities of the State of Michigan as trustee of that public trust.

98. As recognized in Michigan common law, “no part of the beds of the Great Lakes … can be alienated or otherwise devoted to private use in the absence of a due finding of one of two exceptional reasons…. 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.’”62

99. In order for the Department to approve the Applicant’s permit application, it must reach a determination on these narrow exceptions. Buggs v MPSC, Unpublished Opinion, January 13, 2015, Docket No. 315058 (Attachment 10). Namely, the state must:

   a. Affirmatively determine that approval of this permit application to allow the Applicant to continue operating this 65-year-old underwater pipeline is primarily related to the actual “improvement” and promotion of the public trust, and will result in the protection of the Great Lakes and public trust interests therein;

   b. The Department must determine that allowing the continued use and operation of Line 5 beyond the end of its expected useful life63 by granting a permit for the applied-for anchor supports will not result in an unacceptable risk of pollution, impairment, destruction, or harm to the public trust waters, the Great Lakes bottomlands, or other public trust uses.

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59 See supra, note 57 (including discussion of Illinois Central Rail Co v State of Illinois, 146 US 387 (1892)).
62 Obrecht, 361 Mich at 412-13 (emphasis added).
63 Previously described as a “50-year” useful life, the State of Michigan has asked for (and to date, upon information and belief, has not received) updated information from the Applicant as to the “estimated useful life” that is left in Line 5. See Letter from Attorney General B. Schuette (April 29, 2014), available at https://www.michigan.gov/documents/dqy/Appendix_B.1_493986_7.pdf. SMA contends that the pipeline is beyond its useful life at present.
100. Neither the State nor the Applicant can satisfy either of these exceptions, and therefore, the Application cannot be approved until after the fulfillment of the requirements specified herein has been demonstrated.

APPLICATION REVIEW & DEFICIENCIES

101. Based on the requirements of Section 32502 as described above, the DEQ must have, among other things, analyzed and reached a determination on the following points; namely:

a. That the public use of the waters of the Straits of Mackinac will not be substantially affected by the continued use of Line 5 by the Applicant as potentially enabled by way of the approval of the instant permit application; and

b. That the public trust in the aquatic and natural resources will not be impaired by the continued use of Line 5 by the Applicant as potentially enabled by way of the approval of the instant permit application.

102. Furthermore, based on the requirements of Rule 15 as recounted above, the DEQ must have analyzed and reached an affirmative determination as to the existing adverse environmental effects of the operation of Line 5, as well as the potential adverse environmental effects of the continued operation of Line 5 in the event this new design for the pipeline is implemented and installed on the lakebed.

103. It appears, however, that rather than reach such an affirmative determination, the State circumvented the requirements of the statute and the rule by conducting an unreasonably narrow assessment of the risk(s) inherent in the continued operation of Line 5, improperly limiting its review only to the impact related to the forty-four (44) bore-holes for the 10-in-diameter screws that will be directly augured into the lake bed.64

104. As described above with respect to Rule 15 (R. 322.1015), the DEQ is required to determine the “existing and potential adverse environmental effects” related to this Application. However, although the DEQ is now aware that the Applicant’s previous installations of this exact anchor support design caused damage to the pipeline coating and to the overall integrity of the pipelines, the DEQ has unfortunately failed to analyze the potential adverse environmental effects related to these proposed 22 anchor supports.65 Instead, the DEQ has enabled the Applicant to operate and utilize Line 5 in the Straits of Mackinac in a manner that is far in excess of the scope of operation authorized by the 1953 Agreement.

105. Despite the clear language of Section 32503, there is nothing in the record of this matter demonstrating that an affirmative determination that the public trust in the waters will not be impaired or substantially affected has been made, nor that “the state administrative board” has granted any approval. Furthermore, there is nothing in the record pertaining to this Application

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64 See Application, supra, n. 1.
65 See supra, ¶ 55.
which would bring the 1953 Agreement under the definition of a patent that was or has been conveyed, despite the fact that the Applicant is proposing to occupy additional bottomlands of the Great Lakes with its 22 anchor supports.

106. The Applicant has failed to include such surveyed descriptions as required by Section 32504.

107. The Applicant’s permit application (See note 1, supra) contains zero information relating to the ownership of riparian or other property necessary to fulfill the requirements of Section 32504(1)(clause 4).

108. No information fulfilling the requirements of Section 32504(1)(that “the application shall be accompanied by the written consent of all persons having an interest in the lands or water areas applied for in the application (MCL §324.32504(1)(clause 6)) is contained in the instant Application.

109. No approval from any of the applicable governmental entities required to be obtained in Section 32504(2) is evidenced in the Application or the Permit, and upon information and belief, all such approval has not been obtained by the Applicant to date.

110. The Applicant’s Application and accompanying materials do not include information that would fulfill the requirements of Rule 15, and the Department has not made any of the requisite findings or reached a determination(s) as to both of the required issues set forth in Rule 15.

111. The Applicant has improperly submitted an Application that so narrowly defines the purpose of the project as to limit a complete analysis of whether the continued use of Line 5 after its requested anchor supports are installed will not result in an unacceptable risk of pollution, impairment, destruction, or harm to the public trust waters, the Great Lakes bottomlands, or other public trust resources.

112. Moreover, the Applicant has failed to show, and the State has failed to require a showing of whether there are feasible and prudent alternatives to the continued operation of Line 5 as facilitated by this project as proposed that will not result in an unacceptable disruption to the public trust waters, the Great Lakes bottomlands, or other public trust resources, or are otherwise contrary to law.

113. As a result of the preceding paragraphs, it is clear that, at a minimum, the DEQ has improperly approved this Application without completing the necessary reviews and reaching all required affirmative determinations. Therefore, the Permit as granted must be withdrawn unless and until the Applicant and DEQ can correct all of the deficiencies identified herein.

114. If, in the determination of the DEQ and/or the State of Michigan, the risk of the continued operation of the Line 5 pipelines without the requested 22 anchor supports is too great (which Petitioner would contend that it very well could be), then the state should impose an operational delay of product through Line 5, at least until such time as the Applicant complies with
all applicable legal requirements, or should impose an alternate, temporary method by which damaged sections of pipeline would be addressed.

115. The Department and the Applicant must proceed at all times with the understanding that the GLSLA represents an exercise of Michigan’s inalienable property and police powers over public trust waters and bottomlands, which has existed at least as long as Michigan has been a state.66 Therefore, despite having been enacted two years following the execution of the original 1953 Agreement between the State of Michigan and the Applicant, the GLSLA is not subject to the presumption against retroactivity found in various common law rulings related to contracts or general legislation.67

116. Petitioner contends that the Application and Permit record does not meet Part 325 standards because it is not in the public interest; there are feasible and prudent alternatives; it would result in an unacceptable disruption to ecological resources; and the Application, Permit, and record accumulated by the DEQ in this review process is not consistent with law.

117. In sum, the Applicant and State have failed to meet the requirements of the GLSLA as set forth above, namely:

a. Failure to demonstrate the public use of the waters of the Straits of Mackinac will not be substantially affected by the continued use of Line 5 (MCL §324.32502(1));

b. Failure to demonstrate that the public trust in the aquatic and natural resources of the Great Lakes will not be impaired by the continued use of Line 5 (MCL §324.32502(1) and §324.32503(1));

c. Failure to provide any risk assessment or analysis of the potential risks inherent in such operation (MCL §324.32502(1));

d. Failure to provide information sufficient with which to properly classify its request for permit under MCL §324.32503;

e. Applicant has failed, under MCL §324.32504(1)-(2), to provide any of the following:

i. Surveyed description of the lands or water area applied for;

ii. Surveyed description of the riparian or littoral property lying adjacent and contiguous to the lands or water area, certified to by a registered land surveyor;

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iii. Information related to the Applicant’s status as riparian or littoral owner or occupant of property touching or situated opposite the unpatented land or water area over patented lands applied for;

iv. Names and mailing addresses of all persons in possession or occupancy or having an interest in the adjacent or contiguous riparian or littoral property or those having such interests in the lands or waters applied for;

v. Written consent of all persons having an interest in the lands or water areas applied for in the Application; and

vi. Approval or permission for the Applicant’s proposed use of such lands or water area from any (A) federal agency as provided by law; (B) the DEQ, with the advice of the Michigan Waterways Commission; and (C) the legislative body of all local units of government within which such land or water area is or will be included, or to which it is contiguous or adjacent.

118. Furthermore, as it has operated its pipeline under the authorization granted in the 1953 Agreement, the Applicant has failed to meet the requirements of that Agreement in several respects.

   a. First, as noted in the Kiefner report cited above, numerous sections of the Line 5 pipeline have been without the necessary supports in compliance with condition A.(10), requiring such supports no more than every 75 feet. Presumably the Applicant will characterize this permit Application as an attempt to fulfill that requirement, but the schematics accompanying the permit application appear to indicate an alternate reason for the installation of these anchors (perhaps to structurally support known weaknesses or abnormalities detected in the lines, rather than to “minimize the potential of having any spans exceed 75 feet” as suggested in the Application), as they are grouped closely together in certain sections of the pipeline(s).  

   b. Second, the Applicant has known that its operation of the Line 5 pipeline has been out of compliance with condition A.(10) since at least 2001-03. Despite the Applicant’s knowledge of that fact, it failed to shut-down (even on a temporary basis) the operation of Line 5 until it could come into compliance with its legal obligations under the 1953 Agreement. Therefore, the Applicant has also failed to meet the requirement of the 1953 Agreement that it "at all times shall exercise the due care of a reasonably prudent person for the safety and welfare of all persons and of all public and private

68 See Application, supra, note 1, Figure 2a (proposed anchors W-11a, W-11b, W-11c, W-11d, and W-11e appear to be directly adjacent to one another, with similar clusters for W-43A, W-42A, and W-42B, and W-49, W-48A, and W-48B).

69 See Kiefner Report, supra, note 18.
property...” A reasonably prudent person would have (and still should) shut down the pipeline’s operation, at least until the proper procedures for review of its safety and possible continued operation have been completed by the State of Michigan in compliance with its legal duties as trustee of the public trust inherent in the Great Lakes. At the conclusion of the time period declared for a fossil fuel pipeline’s “end of life,” especially for one in such a highly critical geographic and ecological location, a reasonably prudent person would similarly make and then publicize plans for the end of the operation of that pipeline, and its eventual decommissioning.70

119. The Applicant has failed to show that there are no feasible and prudent alternatives to the use and occupancy of the Great Lakes bottomlands beneath the Straits of Mackinac as part of the Lakehead pipeline system.

120. Upon information and belief, the Applicant could easily accommodate the product volume in other portions of the Lakehead pipeline system it currently operates, thereby reducing the pollution, impairment, and destruction risks to (a) waters, coastal wetlands, coastal forests, riparian properties, and other aquatic and natural resources in the Straits of Mackinac, (b) interference with SMA members’ use of the those resources and riparian property rights in the Straits of Mackinac, and (c) the public’s use of those resources and the public trust therein.

Claims Asserted

121. Petitioner is aggrieved by the decision of the DEQ to allow the Applicant to improperly and unlawfully:

a. Mischaracterized its proposed alteration of the pipeline design as “maintenance” activity;

b. Narrowed the scope of the potential adverse impacts of the project so as to prevent a meaningful review of all existing and potential adverse environmental effects impacts caused by the proposed project under Part 325, and

c. Narrowed the scope of review of feasible and prudent alternatives to the Applicant’s proposed activities in a manner which precludes consideration of existing feasible and prudent alternatives that are compliant with the reasonable requirements of the public health, safety, and welfare.

122. The DEQ has processed the Application without objecting to the improperly narrow scope of the proposed project’s impacts on regulated Great Lakes bottomlands.

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70 A reasonably prudent person would not continue to push the boundaries of allowable pressure for such a pipeline, seek to increase the flow and volume through that pipeline at increased risk to the public (and in the immediate aftermath of that person’s direct responsibility for the worst inland oil spill in US history), and work behind closed doors to continue operating that pipeline at the heart of the Great Lakes and in the face of mounting public pressure in order to “drive distributable cash flow” to its Canadian executives and shareholders.
123. The Application and the scope of the state’s review was improperly narrowed to “maintenance” purposes, which is incorrect as a matter of law and does not take into account the full extent of the activities required by the purpose of the permit.

124. The DEQ failed to require an occupancy agreement as required by MCL §324.32502 and §324.32503.

125. The DEQ failed to require the Applicant show the consent of adjacent landowners.

126. The Permit does not contain a finding or any evidence of an assessment that there is no likely impairment, degradation, or harm to the Straits of Mackinac from the transmission of fossil fuel products in the volumes the Applicant is utilizing after consideration of the public trust duties of the state and its requirements under the GLSLA.

127. The DEQ failed to fully analyze the potential for impairment or substantial injury to the public trust as a result of the Applicant’s proposed activity and the continued operation of the Line 5 pipeline the proposed activity will facilitate.

128. The Applicant’s project, as proposed, will or is likely to pollute, impair or destroy the natural resources of the State of Michigan.

RELIEF SOUGHT BY PETITIONER

Based on the foregoing, Petitioner respectfully requests that this Honorable Tribunal take the following actions:

1. Reverse the DEQ’s decision to grant the Applicant’s in accordance with the Great Lakes Submerged Lands Act, its associated regulations, and relevant state law;

2. Require the Applicant to submit all required GLSLA analyses and materials as set forth in the Permit Application Deficiencies section above;

3. Require the DEQ to undertake an affirmative review and analysis of:

   a. The risks involved in the continued operation of the Line 5 pipeline(s) as presently constituted; and

   b. Feasible and prudent alternatives to the Applicant’s continued operation of Line 5.

71 Including, but not limited to, long-standing jurisprudence such as Obrecht v Nat’l Gypsum Co, 361 Mich 399, 413; 105 NW2d 143 (1960) and Michigan State Hwy Comm’n v Vanderkloot, 392 Mich 159, 187; 220 NW2d 416 (1974)
4. Order a temporary shut-down, or — at a minimum — a restriction of the product that the Applicant can transport through Line 5 at this location for such time as the DEQ requires in order to conduct and complete the reviews/analyses required by law and requested above.

5. Grant or order such other relief as is authorized by law, including costs and attorney fees.

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Dated: May 18, 2018.

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