No. 24-783

IN THE

Supreme Court of the United States

ENBRIDGE ENERGY, LP, *et al.*,

Petitioners,

v.

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

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 13, 2025
CERTIORARI GRANTED JUNE 30, 2025

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APPENDIX A — NOTICE OF REMOVAL OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED DECEMBER 15, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:21-cv-01057-RJJ-RSK

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

Plaintiffs,

v.

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

Defendants.

NOTICE OF REMOVAL

PLEASE TAKE NOTICE THAT Defendants Enbridge Energy, Limited Partnership; Enbridge Energy Company, Inc.; and Enbridge Energy Partners, L.P. (collectively, "Enbridge") hereby remove this action from the Circuit Court for the 30th Judicial Circuit, Ingham County, Case No. 19-474, to the United States District

Court for the Western District of Michigan pursuant to 28 U.S.C. §§ 1331, 1441(a), 1442, and 1367.

In this action, the Attorney General of Michigan seeks to permanently enjoin Enbridge from continuing to operate its international Line 5 pipeline in the Straits of Mackinac. In finding that removal of a similar suit against Enbridge was proper, this Court recently held that "this Court is an appropriate forum for deciding these disputed and substantial federal issues." *Michigan v. Enbridge*, No. 1:20-cv-01142, ECF No. 42 at 15, PageID.1035 (W.D. Mich. Nov. 16, 2021). This removal is timely because "the initial pleading lack[ed] solid and unambiguous information that the case [wa]s removable" and this Notice is being filed "within 30 days after receipt" of this Court's order in *Michigan v. Enbridge*, which "contains solid and unambiguous information that th[is] case *is* removable." *Berera v. Mesa Medical Group, PLLC*, 779 F.3d 352, 364 (6th Cir. 2015) (emphasis added). Removal ensures that both cases between Enbridge and Michigan officials concerning the officials' attempt to shut down the Straits Pipelines are considered in federal court. Indeed, if the Court grants the summary judgment motion that it has authorized Enbridge to file in January, that ruling will impact resolution of this action as well.

I. The Attorney General's Complaint

1. In her Complaint, the Attorney General seeks declaratory relief and an injunction requiring Enbridge to cease operation of the Straits Pipelines. A copy of the Attorney General's Complaint is attached hereto as Exhibit A.

2. The Complaint includes a "factual background" section. It explains that Line 5 was built as a means of transporting petroleum and other products to Sarnia, Ontario without interruption. Compl. ¶ 10. In 1953, the State of Michigan granted Enbridge's predecessor an Easement "to construct, lay, maintain, use, and operate" two 20-inch pipelines on the bottomlands of the Straits as part of Line 5. *Id*. at ¶¶ 12-14. Line 5 has operated continuously since construction was completed in 1954. *Id*. at ¶ 15.

3. The Complaint includes three counts. Count I asserts that the Easement violates the public trust and is void. *Id.* at ¶¶ 22-63. Counts II and III assert, respectively that Line 5 is a public nuisance and that it violates the Michigan Environmental Protection Act. *Id.* at ¶¶ 64-70.

4. Enbridge was served with a copy of the Complaint on or about June 27, 2019. Enbridge has not filed an answer, and no discovery has taken place in the state court action. Both parties instead moved for summary disposition. Those motions have not yet been decided. In January 2021, both parties and the state court agreed that the Attorney General's action should be held in abeyance pending the outcome of the related proceedings before this Court. The action remains in abeyance. Prior to the filing of this Notice, the next planned action in the case was a status conference requested by the Attorney General and scheduled for January 7, 2022.

II. Related proceedings before this Court

5. This Court is familiar with the parties' dispute from two related cases: *Enbridge v. Whitmer*, No. 1:20-cv-01141 (which remains pending before the Court), and *Michigan v. Enbridge*, No. 1:20-cv-01142 (which Michigan recently voluntarily dismissed).

6. The related proceedings arose out of a November 13, 2020 notice of revocation and termination issued by Michigan Governor Gretchen Whitmer and the Director of Department of Natural Resources. The Governor and Director notified Enbridge that the 1953 easement was revoked for violation of the public trust doctrine. They also notified Enbridge that the easement was being terminated based on Enbridge's alleged violation of the 1953 easement's terms and conditions. The notice directed Enbridge to cease operating the Straits Pipelines by May 12, 2021. The Attorney General's office represented the State, the Governor, and the Director in the related litigation.

7. Enbridge filed *Enbridge v. Whitmer* in this Court on November 24, 2020. In that action under *Ex parte Young*, Enbridge seeks declaratory and injunctive relief barring the defendants—Michigan's Governor and the Director of its Department of Natural Resources—from violating federal law by seeking to shut down the Straits Pipelines. Count I of Enbridge's Complaint claims that the defendants' attempt to shut down Enbridge's pipeline violates the Supremacy Clause of the U.S. Constitution in light of the express preemption provision of the federal

Pipeline Safety Act. *See* No. 1:20-cv-01141, ECF No. 1 at 10-13, PageID. 10- 13. Count III claims that the defendants' attempt to shut down the pipeline violates the Foreign Affairs Doctrine, which is rooted in the Constitution's assignment of authority over foreign affairs to the Federal Government. *See id.* at 16-18, PageID.16-18. Enbridge seeks declaratory relief and "[a]n injunction prohibiting Defendants from taking any steps to impede or prevent the interstate and international operation of Line 5." *Id.* at 18-19, PageID.18-19. *Enbridge v. Whitmer* remains pending before this Court, which has authorized Enbridge's filing of a motion for summary judgment, due on January 18, 2022. *See* No. 1:20-cv-1141, ECF No. 42 (briefing order).

8. Also on November 24, 2020, Enbridge removed *Michigan v. Enbridge* to this Court. In that lawsuit, the State of Michigan sought an injunction forcing Enbridge to "cease operation of" and "permanently decommission the Straits Pipelines"—the very outcome that Enbridge sued to prevent in *Enbridge v. Whitmer*. No. 1:20-cv-01142, ECF No. 1-1 at 23, PageID.37. Enbridge's grounds for removal included the *Grable* doctrine (because the lawsuit "necessarily raised" federal issues of Pipeline Safety Act preemption and the Foreign Affairs Doctrine), federal common law (because of the suit's implications for international relations), and the federal officer removal statute (because Enbridge acts under federal officers in operating its pipeline). *See* No. 1:20-cv-01142, ECF Nos. 1, 12.

9. Represented by the Attorney General's office, the State moved to remand *Michigan v. Enbridge* to state court. *See* No. 1:20-cv-01142, ECF No. 42. The State argued that rejection of removal under *Grable* was "straightforward, as none of the State's causes of action rely on federal law in any way." *Id.* at 7, PageID.486. Rather, the State asserted, the claims were "all matters of pure state law that fall squarely within the jurisdiction of Michigan courts," and "[t]he issues raised by Enbridge as grounds for federal jurisdiction—alleged statutory preemption, interstate and foreign commerce, and foreign affairs and treaties—are simply its defenses, not elements of the State's claims." *Id.* Indeed, the State vigorously disputed three of the four factors required for removal under *Grable*, contending that the federal issues Enbridge had identified were not "necessarily raised," that those issues were not even "substantial," and that allowing this suit to proceed in federal court would upset the balance between federal and state courts. *See id.* at 7-16, PageID.486-495. The State also urged that there was no legal basis for removal under federal common law or the federal officer removal statute. *See id.* at 16-27, PageID.495-506.

10. This Court rejected the State's arguments and held that *Michigan v. Enbridge* was "properly in federal court" under *Grable*. No. 1:20-cv-1142, ECF No. 80 at 1, PageID.1021. This Court held that "[t]he State Parties' claims 'arise under' federal law because the scope of the property rights the State Parties assert necessarily turns on the interpretation of federal law that burdens those rights, and this Court is an appropriate forum for

deciding these disputed and substantial federal issues." *Id.* at 15, PageID.1035.

11. The Governor, however, has made clear that she "disagree[s]" with this Court's ruling that it had jurisdiction. No. 1:20-cv-1141, ECF No. 39-1 at 1, PageID.254. Two weeks after issuance of the Court's November 16 order, the Governor admittedly directed the State to "shift[] its legal strategy" to "give Michigan courts the final say . . . by voluntarily dismissing" its complaint. *Id.* The Governor believed that this maneuver, which deprived this Court of jurisdiction, would "clear[] the way for the lawsuit filed by Attorney General Dana Nessel to go forward in Michigan state court," giving "state courts, . . . the final say" on the federal issues implicated by the parties' dispute. *Id.* She further noted that "[o]ur goal here remains the same." *Id.* Attorney General Nessel announced on the same day that she "fully support[s] the Governor in her decision to dismiss the federal court case and instead focus on our ongoing litigation in state court," which she declared the "most viable path to permanently decommission Line 5." Department of Attorney General, "AG Nessel Provides Statement on Voluntary Dismissal of Enbridge Lawsuit in Federal Court" (Nov. 30, 2021), https://www.michigan.gov/ag/0,4534,7-359-92297_99936-573159 –,00.html.

12. Consistent with this Court's ruling in *Michigan v. Enbridge* that "this Court is an appropriate forum for deciding these disputed and substantial federal issues," Enbridge hereby removes *Nessel v. Enbridge* to this Court so that it can be resolved along with the still-pending *Enbridge v. Whitmer* lawsuit.

III. Removal is timely under the third paragraph of 28 U.S.C. § 1446(b)

13. Generally, a defendant must remove within 30 days of receiving the state-court complaint. 28 U.S.C. § 1446(b)(1). The Sixth Circuit has held, however, that "[t]he 30-day period in § 1446(b)(1) starts to run only if the initial pleading contains 'solid and unambiguous information that the case is removable.'" *Berera v. Mesa Medical Group, PLLC*, 779 F.3d 352, 364 (6th Cir. 2015) (citation omitted). If the case is not unambiguously removable when it is filed, then "the defendant must file the notice of removal 'within 30 days after receipt . . . of a copy of an amended pleading, motion, *order* or other paper' that contains solid and unambiguous information that the case is removable." *Id.* (quoting 28 U.S.C. § 1446(b)(3)) (emphasis added).

14. *Nessel v. Enbridge* was not unambiguously removable when it was filed. The Complaint purports to assert claims under state law only, and the parties are not diverse. Like the parallel complaint in *Michigan v. Enbridge*, the Complaint here arises under federal law under the *Grable* doctrine because substantial federal issues are necessarily raised by the purportedly state-law claims. When the case was filed, however, its removability under *Grable* was far from unambiguous. Indeed, as set forth above, the State (represented by the Attorney General) vigorously argued that the broadly similar complaint in *Michigan v. Enbridge* was not removable and that it satisfied just one of the *Grable* doctrine's four requirements.

15. But in its recent order denying the State's motion to remand in *Michigan v. Enbridge*, this Court made it unambiguously clear that *Nessel v. Enbridge* is likewise removable under *Grable* and is "properly in federal court." No. 1:20-cv-1142, ECF No. 80 at 1, PageID.1021.

16. Appellate case law confirms that this Court's order in *Michigan v. Enbridge* constitutes an "order" within the meaning of 28 U.S.C. § 1446(b)(3). An order in a separate federal proceeding is an "order" under § 1446(b)(3) "where the same party was a defendant in both cases, involving similar factual situations, and the order expressly authorized removal." *Green v. R.J. Reynolds*, 274 F.3d 263, 267-68 (5th Cir. 2001); *see also Doe v. American Red Cross*, 14 F.3d 196, 201-02 (3d Cir. 1993). This case falls squarely within this rule: This Court's removal order in *Michigan v. Enbridge* involved the same Enbridge defendants, the facts and legal theories are similar, and the order expressly authorized removal.

17. Under § 1446(b)(3) and the Sixth Circuit's *Berera* decision, therefore, Enbridge has the right to remove *Nessel v. Enbridge* within 30 days of receipt of the Court's order in *Michigan v. Enbridge*. This Court issued that order on November 16, 2021. This Notice of Removal is being filed within 30 days of that order and is therefore timely.

IV. Grounds for removal in this action

18. Following this Court's order in *Michigan v. Enbridge*, this Court plainly has jurisdiction over this case

under 28 U.S.C. § 1331. Enbridge submits that removal is proper on three independent and alternative grounds: the *Grable* doctrine, federal common law, and the federal officer removal statute. Each ground is briefly explained below.

19. **The *Grable* doctrine.** This Court held that the similar complaint in *Michigan v. Enbridge* was properly removed under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). *See* 1:20-cv-01142, ECF No. 80. That ruling establishes that this case is likewise removable under *Grable*.

20. As this Court explained, *Grable* holds that "federal-question jurisdiction over state-law claims will lie where the 'state law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.'" *Id.* at 6, PageID.1026 (quoting *Grable*, 545 U.S. at 314). Applying the *Grable* framework, this Court held that it had jurisdiction.

21. *First*, the State's suit necessarily raised federal issues because "the Federal Submerged Lands Act necessarily governs the scope of the State's property interest" by reserving to the Federal Government "paramount" authority over the bottomlands, which the Federal Government has exercised by burdening the State's property rights through the Pipeline Safety Act and the Transit Pipelines Treaty with Canada. *See id.* at 10, PageID.1030.

22. *Second*, these federal issues are plainly disputed and "raise vitally important questions that implicate the federal regulatory scheme for pipeline safety and international affairs." *Id.* at 12, PageID.1032.

23. *Third*, "exercising jurisdiction over the state law claims" would not "open the federal courthouse doors too wide" because so few state-law claims necessarily raise issues under the Act or the Treaty. *Id.* at 14, PageID.1034. The Court concluded: "The State Parties' claims 'arise under' federal law because the scope of the property rights the State Parties assert necessarily turns on the interpretation of federal law that burdens those rights, and this Court is an appropriate forum for deciding these disputed and substantial federal issues." *Id.* at 15, PageID.1035.

24. The Court's application of *Grable* to *Michigan v. Enbridge*—which the State voluntarily dismissed in an admitted effort to avoid this Court's jurisdiction (*see* ECF No. 39 at 2, PageID.248; ECF No. 39-1 at 2-3, PageID.254-55)—makes clear that *Nessel v. Enbridge* likewise "arises under" federal law and belongs in federal court.

25. **Federal common law.** This Court also has jurisdiction under 28 U.S.C. § 1331 because the claims here implicate uniquely federal interests and thus must be brought, if at all, under federal common law. *See*, *e.g.*, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972); *Sam L. Majors*

Jewelers v. ABX, Inc., 117 F.3d 922, 926 (5th Cir. 1997); *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002). While the Complaint purports to state claims under Michigan law, courts have long recognized that claims may arise under federal law regardless of whether the plaintiff purports to plead federal claims. *See United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) (holding that certain claims asserted under state law must be governed by federal common law because they involved "matters essentially of federal character"). "[I]f federal common law exists, it is because state law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981); *see also* Brief for the United States as Amicus Curiae at 26-28, in *BP P.L.C. v. Mayor & City of Baltimore*, No. 19-1189 (U.S. Nov. 23, 2020) (explaining that removal was proper under federal common law in climate change lawsuit that was nominally couched in terms of state-law claims).

26. Enbridge invokes "federal common law based on foreign relations" as an independent basis for removal to federal court. The Fifth, Eleventh, and Second Circuits have recognized that removal is proper when the plaintiff's claims "directly and significantly affect American foreign relations." *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 542-53 & n.8 (5th Cir. 1997); *see also Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1377 (11th Cir. 1998); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352 (2d Cir. 1986). That describes this case perfectly. As the Court observed in holding that *Michigan v. Enbridge* was properly removed to federal court, Canada has "formally invoked the international dispute resolution provision

of Article IX of the 1977 [Transit] Treaty to determine whether the implementation of the Governor of Michigan's shutdown order would violate the binding commitments the United States made to Canada under international law in the 1977 Treaty." 1:20-cv-01142, ECF No. 80 at 4, PageID.1024 (quotation marks omitted). This Court explained that, "with Canada's invocation of the dispute resolution provision in the 1977 Treaty, the federal issues in this case are under consideration at the highest levels of this county's government," such that the dispute over the Straits Pipelines "raise[s] vitally important questions that implicate . . . international affairs." *Id.* at 12, PageID.1032. *Nessel v. Enbridge* likewise raises issues pertaining to the continued operation of Line 5 that lay at the heart of the Treaty dispute resolution proceeding now underway. This case belongs in federal court no less than did *Michigan v. Enbridge*.

27. Federal common law supplies the rule of decision for the State's claims, even if the complaint on its face only invokes state law. "[O]ur federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *see also City of New York v. Chevron Corp.*, 993 F.3d 81, 89-91 (2d Cir. 2021); *Ungaro-Benages v. Dresdner Bank AG*, 376 F.3d 1227, 1232-33 (11th Cir. 2004). Thus, federal courts have relied on U.S. foreign policy implications to find removal is proper, even though the underlying

facts and implications were not alleged in the complaint. *See*, *e.g.*, *Torres*, 113 F.3d at 542-43 ((relying on foreign government's protests, not alleged in the complaint, to find removal was proper); *Marcos*, 806 F.2d at 353-54 (relying upon an executive order issued by the Philippine government after the filing of the complaint); *Pacheco*, 139 F.3d at 1378.

28. Federal common law also governs for an independent reason: The Complaint is premised on concerns about environmental harm to the Great Lakes from international and interstate commerce. It therefore necessarily implicates uniquely federal interests and must be governed by federal common law.[1] The Supreme Court has long recognized that "[e]nvironmental protection is undoubtedly an area within national legislative power" for which "federal courts may . . . fashion federal common law." *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 419, 421 (2011) (cleaned up); *see also*, *e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91, 99 (1972). For this reason, too, this case belongs in federal court.

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1. In fact, the United States and Canada have long dealt with environmental issues in the Great Lakes through international agreements. The agreements include the 1972 Agreement on Great Lakes Water Quality, Apr. 15, 1972, U.S.-Can., 23 U.S.T. 301, CTS 1972/12. Canada and the United States have also entered into the Agreement Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, Can.-U.S., T.I.A.S. No. 11,099, CTS 1986/39, and the Canada-United States Joint Inland Pollution Contingency Plan, July 25, 1994, U.S.-Can., to address releases and other environmental emergencies along the Canada-United States border.

29. **The federal officer removal statute.** Federal law expressly authorizes the removal of any state-court action against "any officer (or any person acting under that officer) of the United States or of any agency thereof . . . relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). "The federal officer removal statute allows a defendant to remove a case from state to federal court if the defendant establishes (1) it is a federal officer or a 'person acting under that officer'; (2) a 'colorable federal defense'; and (3) that the suit is 'for a[n] act under color of office,' which requires a causal nexus 'between the charged conduct and asserted official authority.'" *Ripley v. Foster Wheeler LLC*, 841 F.3d 207, 209-10 (4th Cir. 2016) (citations omitted); *see also*, *e.g.*, *Bennett v. MIS Corp.*, 607 F.3d 1076, 1085 (6th Cir. 2010). All three elements are satisfied here.

30. *First*, Enbridge "acted under" a federal officer because "the government [PHMSA] exert[ed] some 'subjection, guidance, or control'" over Enbridge's operation and safety management of the Straits Pipelines through its extensive regulation and because Enbridge thereby "engage[d] in an effort 'to assist, or to help carry out, the duties or tasks of the federal superior.'" *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 255 (4th Cir. 2017) (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151-52 (2007)); *see also Watson*, 551 U.S. at 150 (the words "acting under" are "broad" and must be "liberally construed" to effectuate § 1442(a)'s policy objectives—principally, "to protect the Federal Government from [state] interference with its 'operations'"); *Caver v. Central Alabama Electric Cooperative*, 845 F.3d 1135,

1143-44 (11th Cir. 2017); *California v. H&H Ship Service Co.*, 68 F.3d 481, 1995 WL 619293, at *1-2 (9th Cir. 1995) (unpublished); *City of St. Louis v. Velsicol Chemical Corp.*, 708 F. Supp. 2d 632, 660 (E.D. Mich. 2010). Indeed, the federal government recognizes that Enbridge's pipelines constitute critical infrastructure whose operation is vital to the energy supply. *See Wazelle v. Tyson Foods, Inc.*, 2021 WL 2637335, at *3-5 (N.D. Tex. 2021) (holding that Tyson Foods properly removed under the federal officer removal statute "because Tyson Foods was designated as 'critical infrastructure' by the federal government").

31. *Second*, there is a causal nexus between Enbridge's management of the Straits Pipelines pursuant to PHMSA's directives and Plaintiffs' claims concerning the safety of the Pipelines. Historically, the hurdle set by the causal nexus requirement was "quite low." *Goncalves ex rel. Goncalves v. Rady Children's Hospital*, 865 F.3d 1237, 1344-45 (9th Cir. 2017). In 2011, Congress lowered the bar even further. *See Caver*, 845 F.3d at 1144; *Latiolas v. Huntington Ingalls, Inc.*, 951 F.3d 286, 291-92 (11th Cir. 2020). The current version of the statute merely requires that the conduct at issue "relate to" acts under color of federal office. 28 U.S.C. § 1442(a)(1). This test simply requires a "connection or association" between the acts in the lawsuit and the federal office; the defendant is *not* "required to allege that the complained-of conduct *itself* was at the behest of a federal agency." *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Association of Philadelphia*, 790 F.3d 457, 470-71 (3d Cir. 2015). This suit readily clears that low hurdle, because the allegations here depend on the activities of

Enbridge over the past decades in its management of the Straits Pipelines—many of which activities were undertaken in furtherance of PHMSA requirements and, as warranted, direct oversight. Similarly, in *Sawyer*, the Fourth Circuit held that removal was proper where a military contractor, sued for failing to warn of asbestos in military equipment, showed extensive federal control over its activities. This included "highly detailed ship specifications and military specifications provided by the Navy," whereby the Navy exercised "intense direction and control . . . over all written documentation to be delivered with" the equipment, deviations from which "were not acceptable." 860 F.3d at 253.

32. *Third*, Enbridge intends to raise numerous meritorious federal defenses, including preemption, interstate and foreign commerce, and the foreign affairs doctrine. These and other federal defenses are more than colorable. *See Willingham v. Morgan*, 395 U.S. 402, 407 (1969) (a defendant invoking § 1442(a)(1) "need not win his case before he can have it removed").

33. Removal is thus proper under the federal officer removal statute.

V. This Court has jurisdiction and removal is proper

34. Enbridge is required to show that this Court has 28 U.S.C. §1331 jurisdiction over at least one claim in the Complaint. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 563 (2005). It has met this burden here. This Court has supplemental jurisdiction under 28 U.S.C.

§ 1367(a) over any claims for which it does not have original federal question jurisdiction because those claims form part of the same case or controversy as the claims over which the Court has original jurisdiction. Removal of this action is accordingly proper under 28 U.S.C. §§ 1441(a), 1442, and 1367.

35. All Defendants in this action are Enbridge entities. All consent to removal.

36. The Eleventh Amendment does not bar removal to federal court. *See Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1239 (10th Cir. 2004) ("[T]he Eleventh Amendment's abrogation of federal judicial power 'over any suit . . . commenced or prosecuted against one of the United States' does not apply to suits commenced or prosecuted by a State."); *California ex rel. Lockyer v. Dynegy*, 375 F.3d 831, 847-48 (9th Cir. 2004) (same); *In re Katrina Canal Litigation Breaches*, 524 F.3d 700, 710- 11 (5th Cir. 2008).

37. Upon filing this Notice of Removal, Defendants will furnish written notice to Plaintiffs' counsel, and will file and serve a copy of this Notice with the Clerk of the Circuit Court for 30th Judicial Circuit, Ingham County pursuant to 28 U.S.C. § 1446(d).

Accordingly, Defendants hereby remove to this Court the above action pending against them in the Circuit Court for 30th Judicial Circuit, Ingham County.

Appendix A

Dated: December 15, 2021

Respectfully submitted,

/s/ *Peter H. Ellsworth*
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Appendix A

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APPENDIX B — COMPLAINT OF THE STATE OF MICHIGAN, CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT, INGHAM COUNTY, FILED JUNE 27, 2019

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

No. 19-474-CE
HON. JUDGE JAMES S. JAMO

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

Plaintiff,

v.

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

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Dana Nessel, Attorney General of the State of Michigan, on behalf of the People of the State of Michigan, by and through the undersigned Assistant Attorneys General, alleges as follows:

Appendix B

NATURE OF THE CASE

1. The Attorney General brings this action to abate the continuing threat of grave harm to critical public rights in the Great Lakes and associated resources posed by the Defendants' daily transportation of millions of gallons of oil in dual pipelines that lie exposed in open water on State-owned bottomlands at the Straits of Mackinac. This location—where Lakes Michigan and Huron connect and multiple busy shipping lanes converge—combines great ecological sensitivity with exceptional vulnerability to anchor strikes like those that occurred in 2018, making it uniquely unsuitable for oil pipelines. Defendants' continued operation of the Straits Pipelines presents an extraordinary, unreasonable threat to public rights because of the very real risk of further anchor strikes, the inherent risks of pipeline operations, and the foreseeable, catastrophic effects if an oil spill occurs at the Straits.

2. The Attorney General seeks declaratory judgments that: (a) the 1953 Easement granted by the State, which authorized the construction and operation of the Straits Pipelines, violates the public trust doctrine and is therefore void; (b) Defendants' continued operation of the Straits Pipelines unreasonably interferes with rights common to the public and is therefore subject to abatement as a common law public nuisance; and (c) Defendants' continued operation of the Straits Pipelines is likely to cause pollution, impairment, and destruction of water and other natural resources and the public trust therein in violation of Part 17 (Michigan Environmental Protection Act) of the Natural Resources and Environmental

Protection Act, MCL 324.1701 *et seq.* The complaint seeks injunctive relief requiring the Defendants to (a) cease operation of the Straits Pipelines as soon as possible after a reasonable notice period to allow orderly adjustments by affected parties; and (b) permanently decommission the Straits Pipelines in accordance with applicable law and plans approved by the State of Michigan.

PARTIES

3. Dana Nessel is the duly elected Attorney General of the State of Michigan pursuant to Article V, Section 21 of the Michigan Constitution and is the chief legal officer of the State of Michigan. She has the statutory and common law authority to bring this action on behalf of the people of the State of Michigan.

4. Enbridge Energy, Limited Partnership is a Delaware limited partnership conducting business in Michigan.

5. Enbridge Energy Company, Inc. is a Delaware corporation conducting business in Michigan.

6. Enbridge Energy Partners, L.P. is a Delaware limited partnership conducting business in the State of Michigan.

7. Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc., and Enbridge Energy Partners, L.P., (collectively "Enbridge") control and operate the Enbridge Line 5 pipeline that extends from Superior,

Wisconsin, across the Upper Peninsula of Michigan, crosses the Straits of Mackinac through the Straits Pipelines portion of Line 5, and continues through the Lower Peninsula to Marysville, Michigan and then crosses beneath the St. Clair River to Sarnia, Ontario, Canada.

JURISDCITION AND VENUE

8. This Court has subject matter jurisdiction of this civil matter under MCL 600.605.

9. Venue for this civil action brought by the Attorney General is proper in this Court under MCL 14.102 and MCL 600.1631.

FACTUAL BACKGROUND

The Development of Line 5 and the Straits Pipelines

10. As explained in the Michigan Petroleum Pipeline Task Force Report (2015), "what is now known as Enbridge's Line 5, including the Straits Pipelines, was conceived and built as a means of transporting crude oil produced in Alberta to refineries located in Sarnia, Ontario without interruption. In the late 1940s, Imperial Oil Company, Limited began producing significant quantities of crude oil from Leduc oil fields in Alberta. It formed a subsidiary, Interprovincial Pipe Line Company (IPL) (a corporate predecessor of Enbridge), which developed a series of pipelines to transport oil from Alberta to various refineries. By 1950, a pipeline had been completed eastward as far as Superior, Wisconsin, on the

shore of Lake Superior. Over the next few years, Imperial Oil transported approximately 50 million barrels of oil on a fleet of Great Lakes tankers from Superior, Wisconsin to refineries near Sarnia, Ontario."

11. Because of increasing oil production and because tankers could not operate during winter months on the Great Lakes, IPL decided, in late 1952, to extend its pipeline system from Superior to Sarnia. IPL, its wholly owned American subsidiary Lakehead Pipeline Company, its primary contractor Bechtel Corporation, and various other contractors completed the entire process of designing the 645-mile-long Line 5 pipeline, obtaining rights of way, securing required approvals, contracting, and constructing it in approximately one year, between November 1952 and January 1954. This process included:

- Lobbying the Michigan Legislature to enact 1953 PA 10 [later amended and recodified as MCL 324.2129] so that the State, through the Conservation Commission, had the legal authority to grant pipeline easements on state land and lake bottomlands.

- Obtaining pipeline easements, including the Easement for the Straits of Mackinac Pipelines, from the Conservation Commission.

- Obtaining approval of the construction, operation, and maintenance of the pipeline in Michigan from Michigan Public Service Commission under 1929 PA 16.

12. On April 23, 1953, the Conservation Commission of the State of Michigan granted an easement entitled "Straits of Mackinac Pipe Line Easement Conservation Commission of the State of Michigan to Lakehead Pipeline Company, Inc." (1953 Easement), a copy of which is attached as Exhibit 1.

13. The Easement recited that it was issued by the Conservation Commission under the authority of 1953 PA 10 and in consideration of a one-time payment of $2,450.00 by the Grantee to the Grantor.

14. Subject to its terms and conditions, the Easement granted the Grantee and its successors and assigns the right "to construct, lay, maintain, use and operate" two 20 inch diameter pipelines for the purpose of transporting petroleum and other products, "over, through, under, and upon" specifically described bottomlands owned by the State of Michigan in the Straits of Mackinac.

15. Since completing Line 5 in 1954, the Grantee and its successors have continued to operate it, and over time significantly increased the quantity of products transported through it.

16. The Grantee's present successor, Enbridge, currently transports an average of 540,000 barrels or 22,680,000 gallons of light crude oil, synthetic light crude oil, and/or natural gas liquids per day on Line 5, including the Straits Pipelines.

17. The Straits Pipelines are each approximately four miles long, run parallel to each other, approximately 1,200 feet apart, and are located approximately three miles west of the Mackinac Bridge, in waters ranging in depth to more than 250 feet.

18. While the near-shore sections of each Pipeline (those located where the water is less than 65 feet deep) were laid in trenches and covered with soil, most of each pipeline was placed on or above the lakebed, and remains exposed in open water, with no covering shielding it from anchor strikes or other physical hazards.

19. The lakebed beneath the pipelines varies considerably in depth and is subject to erosion by very strong currents in and beneath the Straits. Consequently, while some sections of the pipelines rest directly on the lakebed, at many other locations, the pipelines are suspended several feet above the lakebed. This includes locations where, since 2002, Enbridge has installed more than 150 anchor support structures in an effort to limit unsupported lengths or spans of pipeline to less than the 75-foot maximum prescribed in the Easement.

The Critical Public Importance of the Straits of Mackinac

20. The Straits of Mackinac are at the heart of the Great Lakes, a unique ecosystem of enormous public importance. As noted in *Independent Risk Analysis for the Straits Pipelines* (Michigan Technological University (September 2018)), a report commissioned by the State

and carried out by a multi-disciplinary team of experts (Michigan Tech Report):

> The Straits of Mackinac hydraulically link Lakes Michigan and Huron . . . and are wide and deep enough . . . to permit the same average water level in both water bodies, technically making them two lobes of a single large lake. The combined Michigan—Huron system forms the largest lake in the world by surface area and the fourth largest by volume, containing nearly 8% of the world's surface freshwater. The Straits of Mackinac serve as a hub for recreation, tourism, commercial shipping, as well as commercial, sport and subsistence [tribal] fishing. . . .[1]

21. An oil spill at the Straits threatens a wide range of highly valuable resources:

> The waters and shoreline areas of Lake Michigan and Lake Huron including areas surrounding and adjacent to the Straits of Mackinac contain abundant natural resources, including fish, wildlife, beaches, coastal sand dunes, coastal wetlands, marshes, limestone cobble shorelines, and aquatic and terrestrial plants, many of which are of considerable

1. *Independent Risk Analysis*, p 26; https://mipetroleumpipelines.com/sites/mipetroleumpipelines.com/files/document/pdf/Straits_Independent_Risk_Analysis_Final.pdf.

> ecological and economic value. These areas include stretches of diverse and undisturbed Great Lakes shorelines that provide habitat for many plant and animal species.[2]

COUNT I

The 1953 Easement violates the Public Trust and is Void

22. Paragraphs 1 through 21 above are re-alleged and incorporated by reference.

The Public Trust Doctrine

23. As the Michigan Supreme Court held in *Glass v Goeckel*, 473 Mich 667, 678-679 (2005):

> [U]nder longstanding principles of Michigan's common law, 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. The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure. (Citations and footnote omitted.)

24. These public rights are protected by a "*high, solemn* and *perpetual* trust which it is the duty of the State to forever maintain." *Collins v Gerhardt*, 237 Mich 38, 49 (1926).

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2. *Id.*, p 168.

25. Both the United States Supreme Court and the Michigan Supreme Court have held that the public trust doctrine strictly limits the circumstances under which a state may convey property interests in public trust resources. In *Illinois Central Railroad Co v Illinois*, 146 US 387, 455-456 (1892), the court identified only two exceptions under which such a conveyance is permissible:

> The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

There, the court held that because neither of those conditions were satisfied by a state statute purporting to grant submerged lands along the Chicago lakefront to a private company, a subsequent state statute revoking that grant and restoring public rights was valid and enforceable. *Id.* at 460.

26. In *Obrecht v National Gypsum Co*, 361 Mich 399, 412-413 (1960), the Michigan Supreme Court declared that "[l]ong ago we committed ourselves . . . to the universally accepted rules of such trusteeship as announced by the [S]upreme [C]ourt in *Illinois Central,"* including *Illinois Central's* delineation of the limited conditions under which public trust resources may be conveyed:

> [N]o part of the beds of the Great Lakes, belonging to Michigan and not coming within

> the purview of previous legislation . . . can be alienated or otherwise devoted to private use *in the absence of due finding of 1 of 2 exceptional reasons for such alienation or devotion to nonpublic use.* 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 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 interests in the lands and waters remaining."

Obrecht, 361 Mich at 412-413, quoting *Illinois Central*, 146 US at 455-56 [emphasis added]. The Michigan Legislature has incorporated that common-law standard and "due finding" requirement into Part 325 (Great Lakes Submerged Lands) of the Natural Resources and Environmental Protection Act, MCL 324.32501 *et seq.*[3]

3. *See*, *e.g.*, Mich. Comp. Laws § 324.32502 (conveyance of property interests in submerged lands allowed "whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition"); §§ 324.32503, 324.32505 (same).

Appendix B

A. The 1953 Easement Violated the Public Trust, and it was Void from its Inception.

27. The 1953 Easement violated the public trust doctrine because the State never made a finding that the easement: (1) would improve navigation or another public trust interest; or (2) could be conveyed without impairment of the public trust. There is no contemporaneous document in which the State duly determined that the proposed Easement met either of the two exceptions to the common law public trust doctrine's prohibition of conveyances of public rights in Great Lakes bottomlands. The Easement itself contains no such findings. It merely recited:

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

28. There is no indication the Conservation Commission determined that the conveyance of the Easement and the operation of oil pipelines in the Great Lakes would somehow improve public rights in navigation, fishing, or other uses protected by the public trust. Nor is there evidence that the Commission duly determined that

the operation could not adversely affect those rights. And the contemporaneous approval of the construction of what is now Enbridge's Line 5 in Michigan by the Michigan Public Service Commission made no such determinations and suggested that the Line 5 pipeline, which was built to transport crude oil from Alberta to Ontario, would enhance joint defenses in times of national emergency and promote improved trade relations.[4]

29. In the absence of either of the due findings required under the public trust doctrine, the 1953 Easement was and remains void.

B. The State's Continuing Obligation to Protect Public Trust Resources Now Requires Revocation of the 1953 Easement Because it is Today Clear that Enbridge's Continued Transportation of Petroleum Products through the Straits Pipelines Violates the Public Trust.

30. As noted above, public rights in navigable waters "are protected by a *high, solemn* and *perpetual* trust, which it is the duty of the State to forever maintain." *Collins v Gerhardt*, 237 Mich at 48. The State did not surrender its trust authority—or the affirmative responsibilities that underpin it—when it granted the 1953 Easement to Enbridge's predecessor. "The state, as sovereign, cannot relinquish [its] duty to preserve public rights in the Great

4. Mich Pub Serv Comm'n Op and Order for the 1953 Line 5 pipeline (Mar. 31, 1953); https://www.michigan.gov/documents/deq/Appendix_A.3_493982_7.pdf.

Lakes and their natural resources." *Glass*, 473 Mich at 679. To the contrary, a state's conveyance of property rights "to private parties leaves intact public rights in the lake and its submerged land. . . . Under the public trust doctrine, the sovereign never had the power to eliminate those rights, *so any subsequent conveyances . . . remain subject to those public rights.*" *Id.* at 679-681 [emphasis added]. That all conveyances of bottomlands and other public trust resources are encumbered by the trust has long been the law in Michigan. *See Nedtweg*, 237 Mich at 17 (the public trust "is an inalienable obligation of sovereignty" and "[t]he State may not, by grant, surrender such public rights any more than it can abdicate the police power or other essential power of government.").

31. When the State conveys a property interest in Great Lakes bottomlands, "it necessarily conveys such property *subject to the public trust.*" *Glass* at 679. Accordingly, even assuming the 1953 Easement was initially valid, it necessarily remains subject to the public trust and the State's continuing duty to protect public trust resources of the Great Lakes. And, by its terms, the Easement broadly reserved the State's rights: "All rights not specifically conveyed herein are reserved to the State of Michigan." 1953 Easement, p 11, paragraph M.

32. As the Supreme Court held in *Illinois Central*, a grant of property rights in public trust resources "is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time." 146 US at 455. There, the State of Illinois "subsequently determined, upon consideration of public

policy" that it should rescind its prior grant of lake bottomlands to a private entity and the court upheld that action.

33. Here, it has now become apparent that continuation of the activity authorized by the 1953 Easement—transporting millions of gallons of petroleum products each day through twin 66-year old pipelines that lie exposed, and literally in the Great Lakes at a uniquely vulnerable location in busy shipping lanes—cannot be reconciled with the State's duty to protect public trust uses of the Lakes, including fishing, navigation, and recreation from potential impairment or destruction. As outlined below, continued operation of the Straits Pipelines presents an extraordinary, unreasonable threat to public rights because of the very real risk of further anchor strikes to the pipelines, the inherent risks of pipeline operations, and the foreseeable, catastrophic effects if an oil spill occurs at the Straits.

1. The Continuing Risk of Anchor Strikes Threatens an Oil Spill at the Straits.

34. Independent expert analysis and real-world experience demonstrate that the Straits Pipelines remain highly vulnerable to damage caused by inadvertent deployment and dragging of anchors from the many vessels moving in the multiple shipping lanes that converge at the Straits. So long as oil flows through the Pipelines, the associated threat of a catastrophic spill will continue.

Appendix B

a. The Dynamic Risk Report.

35. In 2016, the State commissioned an expert consulting firm, Dynamic Risk Assessment Systems, Inc., to perform an analysis of alternatives to the Straits Pipelines that included, among other things, risks associated with continued operation of the existing pipelines. Dynamic Risk completed a Draft Report in the summer of 2017 and issued its Final Report in October 2017 (Report).[5] In publicly presenting its analysis, Dynamic Risk estimated the chance of rupture of the Straits Pipelines in the next thirty-five years to be not one in a million, nor one in a thousand, nor even one in a hundred, but a remarkable *one in sixty.*[6] And of the various threats the Report canvassed, it determined that "the dominant threat, representing more than 75% of the annualized total (all-threat) failure probability, is that . . . caused by the inadvertent deployment of anchors from ships traveling through the Straits."[7]

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5. Report, *Alternatives Analysis for the Straits Pipelines;* https://mipetroleumpipelines.com/document/alternatives-analysis-straits-pineline-final-report.

6. *See* Statements of James Mihell, P.Eng., at July 6, 2017, Information Meeting at Holt, Michigan, at 3:11:00-3:12:00; https://mipetroleumnipelines.com/event/watch-video-july-6-public-information-session-holt.

7. Report, *Alternatives Analysis for the Straits Pipelines*, at ES-25; https://mipetroleumpipelines.com/document/alternatives-analysis-straits-pipeline-final-report.

36. According to the Report, inadvertent anchor strikes are known in the industry to be the principal threat to offshore pipelines. They are both "increas[ing] in frequency" and "not influenced by mitigation measures":

> In offshore pipelines . . . inadvertent anchor deployment and dragging . . . represents the most significant threat due to shipping activity; all others being of insignificant magnitude by comparison. The threat associated with inadvertent anchor deployment and dragging involves the potential for a pipeline to be hooked by anchors that are unintentionally dropped while ships are underway, and subsequently dragged, and this threat has seen a heightened focus on the part of pipeline owners and operators, due to an increase in frequency. . . . *Because this scenario involves inadvertent deployment, it is not influenced by mitigation measures, such as warnings and signage that are taken to discourage ships from intentionally deploying anchors within the Straits of Mackinac.*[8]

37. The Report goes on to explain how, "[i]n bad weather when there is movement in both the ship and the anchor, snatches may cause the chain stopper to break or jump," rendering anchor mechanisms susceptible to inadvertent anchor deployment *even when operating as designed.*[9]

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8. *Id.* at 2-35 (emphasis added).

9. *Id. at* 2-35-36.

Bad weather conditions commonly occur in the Straits of Mackinac.

38. Moreover, "[a]fter having unintentionally dropped the anchor, the inadvertent anchor drop may or may not be discovered within a short period of time," a possibility that, as noted below, is borne out all too well by the recent anchor strikes in the Straits.[10]

39. According to the Report, the risk of a pipeline-anchor incident depends largely on four "vulnerability factors":

(1) size of the pipeline;

(2) water depth (relative to anchor chain length);

(3) pipeline protection (depth of burial, use of armoring material); and

(4) number and size distribution of ship crossings per unit of time.

40. The Straits Pipelines score high on all four of these factors:

> [I]t must be noted that with respect to the above vulnerability factors, the Straits Crossing segments cross a busy shipping lane. . . . They

10. *Id.*

> are also situated in water that is shallow, relative to the anchor chain lengths of most cargo vessels. Furthermore, a 20-in. diameter pipeline is small enough to fit between the shank and flukes of a stockless anchor for a large cargo vessel, and thus, is physically capable of being hooked.[11]

41. The Report further notes that because the Straits pipelines are, for significant portions of their length, suspended above the lake bottom, they are "therefore more vulnerable" to anchor hooking.

42. It would be extremely difficult to deliberately arrange a more ill-advised setting for exposed pipelines than at the Straits of Mackinac. The Straits are not simply a "busy shipping lane," as described in the Report. They are the point of convergence for *multiple* lanes of high-volume domestic and international shipping traffic, concentrating that traffic into a dense procession and funneling it daily across a narrow saddle of lake bottom between two of the largest, deepest, and most heavily trafficked lakes in the world.[12]

43. And on that lake bottom, below the heavily concentrated procession of ships, lie two 20-inch pipelines, at many junctures suspended off the lakebed in relatively shallow water, approximately 1,200 feet apart,

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11. *Id.*

12. *See* image at http://www.shiptraffic.net/2001/04/mackinac-strait-ship-traffic.html.

perpendicular to the ship traffic, ideally sized and situated to catch within the shank and flukes of a typical shipping anchor that is inadvertently deployed.

b. Anchor Strikes Have Actually Occurred in the Straits.

44. The risk of anchor strikes at the Straits is very real. In April 2018, a commercial tug and barge vessel inadvertently dropped and dragged its anchor across the lakebed at the Straits (and apparently for several hundred more miles, unknowingly, until it reached Chicago).[13] The anchor severed or dragged several active and abandoned electrical transmission cables that lie at the bottom of the Straits in close proximity to the Line 5 Pipelines.

45. Moreover, both Straits Pipelines were also struck and dented in three places by the anchor, as it

13. *See*, *e.g.*, Mark Tower, *Broken cables capped as Straits of Mackinac spill response continues*, mlive, Apr. 30, 2018; http://www.mlive.com/news/grand-rapids/index.ssf/2018/04/broken_cables_capped_as_strait.html; Elizabeth Brackett, *Straits of Mackinac Spill Raises New Fears of Great Lakes Disaster*, wttw News (May 1, 2018); https://chicagotonight.wttw.com/2018/05/01/straits-mackinac-spill-raises-new-fears-great-lakes-disaster; National Transportation Safety Board Marine Accident Brief 19/12 *Anchor Contact of Articulated Tug and Barge Clyde S VanEnkevort/Erie Trader with Underwater Cables and Pipelines* https://www.ntsb.gov/investigations/AccidentReports/Pages/MAB1912.aspx.

dragged across the lakebed[14] though neither ruptured.[15] Fortunately, these strikes to the Pipelines happened to occur at locations where they currently rest on the lakebed rather than other areas where they are suspended above it and particularly vulnerable to the risk of "hooking" identified in the Dynamic Risk Report.

46. The 2018 anchor strikes were not an isolated event. At least one other anchor strike in the Straits apparently occurred in April 1979. Correspondence dated June 14, 1979 from Consumers Energy Company to the Michigan Department of Natural Resources proposing to repair damaged electrical cables located on an easement granted by the Department referred to an outage that occurred on April 12, 1979 and stated: "Based on our inspection it is assumed that a ship dragging anchor accidentally hooked the cables, resulting in breaking two of the cables and damaging the third and fourth."

47. In sum, the Report and the actual anchor strikes show that the Straits Pipelines and shipping patterns together create an extreme vulnerability for a catastrophic oil spill. While the US Coast Guard has promulgated a regulation establishing a Regulated Navigation Area in

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14. See, e.g., https://www.bridgemi.com/michigan-environment-watch/watch-video-anchor-damage-line-5-straits-mackinac.

15. *See, e.g.*, Keith Matheny, *Line 5 oil pipeline in the Straits of Mackinac dented by ship*, Detroit Free Press, Apr. 11, 2018; https://www.freep.com/story/news/local/michigan/2018/04/11/enbridge-line-oil-pipeline-straits-mackinac/507506002/.

the Straits of Mackinac that generally prohibits anchoring and loitering or vessels there,[16] such measures regulating intentional anchoring cannot, as noted above, mitigate the principal threat identified in the Report—accidental anchor deployment. And while the State of Michigan is currently considering a regulation intended to reduce that risk by requiring vessels transiting the Straits to verify the security of their anchors, such a regulation, even if adopted as an interim measure, cannot ensure compliance or eliminate the continuing risk.

2. Continued Operation of the Straits Pipelines Carries Substantial, Inherent Risk.

48. Even apart from their unique susceptibility to damage from anchor strikes, the Straits Pipelines, like all hazardous materials pipelines, present inherent risks of environmental harm. Regardless of a pipeline operator's safety culture and the sophistication of its integrity management system, it has become clear that accidents, manufacturing defects, human error, and failures of material are an enduring, *inherent* feature of hazardous materials pipeline operation. According to United States Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) data, since 2014, there have been nearly 12,000 reported "incidents"[17]

16. See 33 CFR 165.994, 83 Federal Register 49283 (October 1, 2018).

17. An "incident" is defined by PHMSA as a pipeline occurrence resulting in any of the following: a fatality or injury

(an average of 666 per year) on pipelines across the United States.[18] In that time, Michigan has seen an average of approximately 20 incidents per year.[19]

49. Between 2006 and 2018, Enbridge reported 126 pipeline "incidents."[20] Most notably, in July 2010, Enbridge's Line 6B ruptured and for hours continued to pump crude oil into Talmadge Creek, a tributary of the Kalamazoo River, near Marshall, Michigan. The resulting damage to the lands, waters, wildlife, and other resources of that watershed were extensive, requiring years of clean-up efforts. The National Transportation Safety Board (NTSB) has identified the Marshall spill as

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requiring in-patient hospitalization; $50,000 (1984 dollars) or more in total costs; highly volatile liquid releases of 5 barrels or more or other liquid releases of 50 barrels or more; liquid releases resulting in an unintentional fire or explosion. *See* PHMSA, *Pipeline Incident Flagged Files*; www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-incident-flagged-files.

18. *See* PHMSA Pipeline Incidents (1999-2018).

19. *See* PHMSA Pipeline Incidents: Michigan (1999-2018).

20. *See* PHMSA, *Pipeline Incident Flagged Files*; www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-incident-flagged-files. Another recent compilation of federal data indicates that "the U.S. portion of the pipeline network owned by Enbridge and its joint ventures and subsidiaries suffered 307 hazardous liquids incidents from 2002 to August 2018—around one spill every 20 days on average." Greenpeace Reports, *Dangerous Pipelines: Enbridge's History of Spills Threatens Minnesota Waters*, at 6 (Nov. 2018); https://www.greenpeace.org/usa/wp-content/uploads/2018/11/Greenpeace-Report-Dangerous-Pipelines.pdf.

"the single most expensive on-shore spill in US history."[21] In examining the causes of the Line 6B spill, the NTSB determined that Enbridge "staff failed to recognize that the pipeline had ruptured until notified by an outside caller more than 17 hours later." It concluded "that the Line 6B segment ruptured under normal operating pressure due to corrosion fatigue cracks" and that "[t]he rupture and prolonged release were made possible by pervasive organizational failures at Enbridge[.]"[22]

50. While the design of the Straits Pipelines differs from that of Line 6B, and Enbridge has attested to improvements in its safety culture and pipeline integrity protocols since the Marshall spill, significant issues persist. Enbridge has reported 72 pipeline incidents since 2010.[23] And, for example, in recent months, explosions have at least twice occurred on Enbridge natural gas pipelines. In October 2018, an Enbridge natural gas pipeline exploded near Prince George, British Columbia, in close

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21. *See* NTSB News Release, *Pipeline Rupture and Oil Spill Accident Caused by Organizational Failures and Weak Regulations* (July 10, 2012); https://www.ntsb.gov/news/press-releases/Pages/PR20120710.aspx.

22. NTSB, *Accident Report: Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release, Marshall Michigan, July 25, 2010* (NTSB Line 6B Report), at xiii, 84, 121; https://www.ntsb.gov/investigations/AccidentReports/Reports/PAR1201.pdf.

23. PHMSA, Operator Information, Enbridge Energy; https://primis.phmsa.dot.gov/comm/reports/operator/OperatorIM_opid_11169.html? nocache=1967#_OuterPanel_tab_2.

proximity to a First Nation village.[24] In January 2019, another Enbridge pipeline in Ohio failed with the resulting "fireball" visible from 15 miles away.[25] Apparently, in each instance Enbridge's pipeline inspection technology and improved safety culture did not predict, much less prevent these failures.

51. As a part of its analysis of various potential threats to the integrity of the Straits Pipelines, Dynamic Risk sought to identify what it classified as the "Principal Threats," i.e., "Threats for which an evaluation of susceptibility attributes indicates a *significant vulnerability*, and that have the potential to provide the most significant contributions to overall failure probability."[26] The threats considered included "incorrect operations," which were described as follows:

> The threats to transmission pipeline integrity from incorrect operations include, but are not necessarily limited to accidental over-pressurization, exercising inadequate or improper corrosion control measures, and

24. Global News, *Enbridge natural gas pipeline explodes near Prince George*, Oct. 10, 2018; https://globalnews.ca/video/4531983/enbridge-natural-gas-pipeline-explodes-near-prince-george.

25. CBC News, *Enbridge pipeline explosion sends fireball into Ohio sky*, Jan. 22, 2019; https://www.cbc.ca/news/canada/calgary/enbridge-ohio-pipeline-explosion-1.4987897.

26. Dynamic Risk Report, p 98 (emphasis added).

> improperly maintaining, repairing, or calibrating piping, fittings, or equipment.[27]

52. Dynamic Risk concluded that notwithstanding the various operational and procedural changes that Enbridge adopted after the Line 6B failure, "incorrect operations" remain a Principal Threat for the Straits Pipelines:

> . . . [S]ince the Marshall incident in 2010, Enbridge has undertaken a review and upgrade of the management systems by which it controls its pipeline operations. Despite this, numerous pipeline investigation analyses have shown that regardless of the direct cause, some element of incorrect operations, such as procedural, process, implementation or training factors invariably plays a role in the root causes of pipeline failure. Furthermore, it is often impossible to foresee in advance what sequence of events and breakdown in management systems and operating practices might lead to failure. For this reason, failures that are related to incorrect operations cannot be discounted, and are considered a Principal Threat.[28]

53. In sum, continued operation of the Straits Pipelines presents significant, inherent risks of releases of hazardous substances into the environment.

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27. *Id.*, p 124.

28. *Id.*, p 134.

3. An Oil Spill at the Straits Risks Catastrophic Environmental and Economic Consequences, including Severe Impairment of Public Trust Rights.

54. As noted above, *Independent Risk Analysis for the Straits Pipelines* (Michigan Technological University (September 2018)), is a report commissioned by the State and carried out by a multi-disciplinary team of experts (Michigan Tech Report).

55. The Report analyzed the consequences of a "worst case" spill of oil from the Straits Pipelines under various seasonal and other conditions, taking into account the wide range of resources and activities that would likely be affected by such a spill.

56. Among other things, water currents in the Straits are unusually strong, complex, and variable:

> Water currents in the Straits of Mackinac can reach up to 1 [meter per second] and can also reverse direction every 2-3 days flowing either easterly into Lake Huron or westerly towards Lake Michigan. . . . Flow volumes through the Straits can reach 80,000 [cubic meters per second] and thus play essential roles in navigation and shipping in this region, the transport of nutrients, sediments and contaminants between Lakes Michigan and

Huron, and also the ecology and biodiversity of this region.[29]

57. Consequently, oil spilled into the Straits could be transported into either Lake, and depending upon the season and weather conditions, impact up to hundreds of miles of Great Lakes shoreline.[30]

58. Crude oil contains toxic compounds that would cause both short- and long-term harm to biota, habitat, and ecological food webs.[31] Numerous species of fish, especially in their early life stages, as well as their spawning habitats and their supporting food chains are also at risk from an oil spill.[32] Viewed as a whole, the ecological impacts would be both widespread and persistent.[33]

59. And "[b]ecause of the unique and complex environment of the Great Lakes and Straits area . . . ," it is uncertain how effectively and at what cost the affected resources could be restored.[34]

60. The Michigan Tech Report also estimated several forms of natural resources and other economic

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29. Michigan Tech Report, p 56.

30. *Id.*, pp 68-69.

31. *Id.*, pp 166-168, 176, 181-185.

32. *Id.*, pp 192-199.

33. *Id.*, pp 213-214.

34. *Id.*, pp 261-264.

damages that would likely result from a worst-case oil spill from the Straits Pipelines.[35] Among other findings, the Report estimated large damages to recreational fishing, recreational boating, commercial fishing, and commercial navigation,[36] all activities within the core rights subject to the public trust.

61. Finally, the Report estimated that the total of all cleanup costs and economic damages that it was able to measure would be $1.878 billion, but that figure was necessarily incomplete.[37] A different report conducted by researchers at Michigan State University, using different assumptions and methods, estimated the damages from a spill from the Straits Pipelines at $5.6 billion.[38]

62. In any event, regardless of the precise details of these estimates, it is now apparent that the continued operation of the Straits Pipelines presents a substantial, inherent risk of an oil spill and that such a spill would have grave ecological and economic consequences, impairing public rights in the Great Lakes and its resources. Given the magnitude of the threatened harm, continuation of oil

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35. *Id.*, pp 271-273.

36. *Id.*, pp 285-294.

37. *Id.*, p ES-31.

38. Nathan Brugnone and Robert B. Richardson, Mich. State Univ. Dep't of Cmty. Sustainability, *Oil Spill Economics: Estimates of the Damages of an Oil Spill in the Straits of Mackinac in Michigan.* https://flowforwater.org/wp-content/uploads/2018/05/FLOW_Report_Line-5_Final-release-1.pdf.

transport through the Straits Pipelines is fundamentally unreasonable and inconsistent with the State's perpetual duty to protect the inalienable public trust.

63. An actual controversy exists between the Parties as to whether (a) the 1953 Easement was void from its inception in the absence of the due findings required under the public trust doctrine; and (b) Enbridge's continued operation of the Straits Pipelines violates the public trust and is therefore unlawful.

COUNT II

Public Nuisance

64. Paragraphs 1 through 63 above are re-alleged and incorporated by reference.

65. At common law, including the common law of Michigan, a condition, action, or failure to act that unreasonably interferes with a right common to the general public is a public nuisance. A condition, action, or failure to act is unreasonable when it is of a continuing nature and the actor knows it has a significant effect upon the public right.[39] The attorney general may bring an action for injunctive relief to prevent or abate such a public nuisance.

66. The waters and aquatic resources of Lakes Huron and Michigan within Michigan's boundaries are

39. Restatement (Second) of Torts § 821B (1979).

held in trust for the benefit of the people of the State of Michigan. The public rights in those waters and resources include, but are not limited to, fishing, boating, commercial navigation, and recreation.

67. By continuing to transport oil through the Straits Pipelines that lie exposed in the waters of the Great Lakes where multiple shipping lanes converge, despite the recently demonstrated risks of anchor strikes, the inherent risks of pipeline operations, and the foreseeable consequences of an oil spill at the Straits, Enbridge has created a continuing, unreasonable risk of catastrophic harm to public rights. As such, Enbridge is maintaining a public nuisance.

COUNT III

Michigan Environmental Protection Act

68. Paragraphs 1 through 67 above are re-alleged and incorporated by reference.

69. Part 17 (Michigan Environmental Protection Act) of the Natural Resources and Environmental Protection Act, 1994 PA 451, provides:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources

> and the public trust in those resources from pollution, impairment, or destruction. MCL 324.1701(1).

70. As set forth above, Enbridge's conduct—continuing to transport oil though the Straits Pipelines in the face of substantial risks of grave environmental harm—is likely to cause pollution, impairment, or destruction of the water and other natural resources of the Great Lakes and the public trust in those resources.

RELIEF REQUESTED

For the reasons stated in this complaint, the Plaintiff requests that this Court grant the following relief:

A. A declaratory judgment that in the absence of the due findings required under the public trust doctrine, the 1953 Easement was void from its inception, and that Enbridge has no further right to maintain and operate the Straits Pipelines under its terms;

B. A declaratory judgment that under the present circumstances, the 1953 Easement violates the public trust and should be revoked, and that Enbridge has no further right to maintain and operate the Straits Pipelines under its terms;

C. A declaratory judgment that Enbridge's continued operation of the Straits Pipelines is a public nuisance subject to abatement;

D. A declaratory judgment that Enbridge's continued operation of the Straits Pipelines is likely to cause pollution, impairment, or destruction of water and other natural resources and the public trust therein and thereby violates the Michigan Environmental Protection Act;

E. A permanent injunction requiring Enbridge to (1) cease operation of the Straits Pipelines as soon as possible after a reasonable notice period to allow orderly adjustments by affected parties; and (2) permanently decommission the Straits Pipelines in accordance with applicable law and plans approved by the State of Michigan; and

F. Any other relief that the Court finds just and reasonable.

Respectfully submitted,

Dana Nessel
Attorney General

/s/ Daniel P. Bock
S. Peter Manning (P45719)
Division Chief
Robert P. Reichel (P31878)
First Assistant
Daniel P. Bock (P71246)
Charles A. Cavanagh (P79171)
Assistant Attorneys General

Appendix B

Environment, Natural Resources,
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
Attorneys for Plaintiff
BockD@michigan.gov
CavanaghC2@michigan.gov

Dated: June 27, 2019

APPENDIX C — EXCERPT OF STATE DOCKET SHEET

INGHAM COUNTY 30TH CIRCUIT
313 W. Kalamazoo St.

LANSING, MICHIGAN 48933

Case Number	Status	Judge
19-000474-CE-C30	OPEN	JAMO, JAMES S

In The Matter Of	Action
ATTY GEN MI VS DEFENDANT: ENBRIDGE ENERGY COMPANY, INC et al	COMPLAINT W/ SUMMONS

Party	Type	Attorneys
ATTY GEN MI 525 W OTTAWA ST FL 6 PO BOX 30755 LANSING, MI 48933	PLNTF	MANNING, S. PETER ASSISTANT ATTORNEY GENERAL P. O. BOX 30755 LANSING, MI 48909
ENBRIDGE ENERGY COMPANY, INC	DFNDT	ELLSWORTH, PETER H. 215 S WASHINGTON SQ #200 LANSING, MI 43933

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ENBRIDGE ENERGY PARTNERS, L. P	DFNDT	ELLSWORTH, PETER H. 215 S WASHINGTON SQ #200 LANSING, MI 48933
ENBRIDGE ENERGY, LIMITED PARTNERSHIP	DFNDT	ELLSWORTH, PETER H. 215 S WASHINGTON SQ #200 LANSING, MI 48933
AMICUS SIERRA CLUB	INPTY	

Opened	Judgment Date	Case Type
06/27/2019		CE – ENVIRONMENT

Comments:

Appendix C

No.	Date of Filing	Operator	Pleadings and Actions Journal Book-Page-Nbr Ref Nbr	Original Amt Due/Amt Dis-missed	Balance Due
1	12/16/21	JLILES	EVENT CANCELLED The following event: STATUS CONFERENCE scheduled for 01/07/2022 at 2:00 pm has been resulted as follows: Result: CANCELLED Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result Staff: Staff: COURT REPORTER: WERNER, KELLI Certification Number: 6610	0.00	0.00
2	12/15/21	DMIRACLE	NOTICE OF FILING OF NOTICE OF REMOVAL-W/PS	0.00	0.00

3	11/30/21	JLILES	HEARING SET: Event: STATUS CONFERENCE Date: 01/07/2022 Time: 2:00 pm Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result: CANCELLED	0.00	0.00
4	08/18/21	KAMILTON 1	NOTICE (JOINT STATUS REPORT)	0.00	0.00
5	08/18/21	KAMILTON 1	NOTICE (JOINT STATUS REPORT)	0.00	0.00
6	07/28/21	KAMILTON 1	ORDER THAT JOINT STIPULATED WRITTEN STATUS UPDATE BE PROVIDED TO THIS COURT BEFORE 8-18-21	0.00	0.00
7	02/26/21	WRIGHTT	JOINT INTERIM STATUS REPORT	0.00	0.00

8	01/20/21	KAMILTON	ORDER	0.00	0.00
		1	THAT PROCEEDINGS IN THIS CASE SHALL BE HELD IN ABEYANCE UNTIL FURTHER ORDER OF THIS COURT		
9	01/15/21	JLILES	HELD BUT	0.00	0.00
			NOT ON THE RECORD The following event: STATUS CONFERENCE scheduled for 01/15/2021 at 9:00 am has been resulted as follows: Result: HELD BUT NOT ON RECORD Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result Staff: Staff: COURT REPORTER: WERNER, KELLI Certification Number: 6610		
10	12/28/20	JLILES	HEARING SET: Event: STATUS CONFERENCE Date: 01/15/2021 Time: 9:00 am Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL	0.00	0.00

			Result: HELD BUT NOT ON RECORD		
11	09/24/20	KAMILTON 1	STIPULATION AND ORDER OF THE PARTIES AND PROPOSED ORDER TO AMEND THE THIRD TEMPORARY RESTRAINING ORDER AND FULLY RESOLVE THE PENDING MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTIONS	0.00	0.00
12	09/23/20	KAMILTON 1	PROOF OF SERVICE ON 092420 A COPY OF STIP & ORDER BY EMAIL UPON ATTY GENERAL	0.00	0.00

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13	09/18/20	KAMILTON 1	PROOF OF SERVICE ON 091820 A COPY OF (9-18-20 JOINT STATUS REPORT) BY MAIL UPON PARTIES OF RECORD	0.00	0.00
14	09/18/20	KAMILTON 1	PROOF OF SERVICE ON 091820 A COPY OF (SEPTEM-BER 18, 2020 JOINT STATUS REPORT)	0.00	0.00
15	09/11/20	KAMILTON 1	PROOF OF SERVICE ON 091120 A COPY OF STATUS REPORT BY MAIL UPON PARTIES OF RECORD (STATUS REPORT)	0.00	0.00

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16	09/09/20	KAMILTON 1	STIPULATION TO MODIFY SECOND AMENDED TEMPORARY RESTRAINING ORDER TO ALLOW FOR RESTART OF EAST LINE IN ACCORDANCE WITH PHMSA SEPTEMBER 4, 2020 LETTER	0.00	0.00
17	08/25/20	KAMILTON 1	NOTICE OF COMPLE-TION OF IN LINE INSECTION ON THE EAST PIPELINE	0.00	0.00
18	08/24/20	KAMILTON 1	ORDER SECOND AMENDED TEMPORARY RESTRAIN-ING ORDER	0.00	0.00

19	08/03/20	KSMITH	HELD BUT NOT ON THE RECORD The following event: STATUS CONFERENCE scheduled for 08/03/2020 at 1:30 pm has been resulted as follows: Result: HELD BUT NOT ON RECORD Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result Staff: Staff: COURT REPORTER: DEXTER, MELINDA Certification Number: 4629	0.00	0.00

20	07/31/20	KSMITH	HEARING SET: Event: STATUS CONFERENCE Date: 08/03/2020 Time: 1:30 pm Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result: HELD BUT NOT ON RECORD	0.00	0.00
21	07/27/20	TSMITH	DEF 7-27-20 STATUS REPORT	0.00	0.00
22	07/20/20	KSMITH	HELD BUT NOT ON THE RECORD The following event: STATUS CONFERENCE scheduled for 07/20/2020 at 3:30 pm has been resulted as follows: Result: HELD BUT NOT ON RECORD Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result Staff: Staff: COURT REPORTER: DEXTER, MELINDA Certification Number: 4629	0.00	0.00

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23	07/20/20	KAMILTON 1	NOTICE OF DF'S JULY 17, 2020 STATUS REPORT W/PS	0.00	0.00
24	07/20/20	KSMITH	HEARING SET: The following event: STATUS CONFERENCE scheduled for 07/20/2020 at 11:00 am has been rescheduled as follows: Event: STATUS CONFERENCE Date: 07/20/2020 Time: 3:30 pm Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result: HELD BUT NOT ON RECORD	0.00	0.00
25	07/20/20	KSMITH	HEARING ADJOURNED The following event: STATUS CONFERENCE scheduled for 07/20/2020 at 11:00 am has been resulted as follows:	0.00	0.00

			Result: C30 ADJOURNED Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result Staff: Staff: COURT REPORTER: DEXTER, MELINDA Certification Number: 4629		
26	07/13/20	KSMITH	HEARING SET: Event: STATUS CONFERENCE Date: 07/20/2020 Time: 11:00 am Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result: C30 ADJOURNED	0.00	0.00
27	07/09/20	KAMILTON 1	DFS NOTICE REGARDING IN LINE INSPECTION RESULTS FOR WEST PIPELINE FEATURE OF INTEREST – W/PS	0.00	0.00
28	07/09/20	JWHORTON	MOTION FEE Receipt: 467238 Date: 07/09/2020	20.00	0.00

29	07/08/20	RBUCK	TRAN-SCRIPT OF PROCEEDINGS – JUNE 30, 2020 HEARING ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION	0.00	0.00
30	07/07/20	KAMILTON 1	JOINT STATUS REPORT AND STIPULATION REGARDING LIST OF DOCUMENTS TO BE PRODUCED AS PROVIDED IN AMENDED TEMPORARY RESTRAINING ORDER DATED JULY 1, 2020	0.00	0.00
31	07/07/20	KAMILTON 1	PL'S SUPPLEMENTAL BRIEF IN OPPOSI-TION TO DFS MOTION FOR SUMMARY DISPOSITION W/PS	0.00	0.00
32	07/01/20	KAMILTON 1	AMENDED TEMPO-RARY RESTRAIN-ING ORDER	0.00	0.00

33	07/01/20	WRIGHTT	AMENDED TEMPO-RARY RESTRAIN-ING ORDER	0.00	0.00
34	07/01/20	WRIGHTT	NOTICE OF DEF'S SUPPLEMENTAL SUBMISSION OF ADDITIONAL MATERIALS REFERENCED DURING JUNE 30, 2020 PRELIMINARY INJUNCTION HEARING	0.00	0.00
35	06/30/20	KSMITH	HEARING HELD ON THE RECORD The following event: MOTION FOR IN JUNCTION/TRO scheduled for 06/30/2020 at 1:30 pm has been resulted as follows:	0.00	0.00

			Result: HEARING HELD ON THE RECORD Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result Staff: Staff: COURT REPORTER: DEXTER, MELINDA Certification Number: 4629		
36	06/30/20	KAMILTON	MOTION OF	0.00	0.00
		1	CITY OF MACKINAC ISLAND, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS AND STRAITS OF MACKINAC ALLIANCE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PL'S MOTION FOR PRELIMINARY INJUNCTION W/PS		
37	06/30/20	WRIGHTT	REQUEST	0.00	0.00
			FOR FILM AND ELECTRONIC MEDIA COVERAGE OF COURT PROCEEDINGS		

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38	06/30/20	DLOPEZ	MOTION FEE Receipt: 467021 Date: 07/01/2020	20.00	0.00
39	06/30/20	KAMILTON 1	REQUEST FOR FILM AND ELECTRONIC MEDIA COVERAGE OF COURT PROCEEDINGS TO RECORD HRG ON 063020 @ 1:30 PM	0.00	0.00
40	06/30/20	KAMILTON 1	ORDER ON MOTION TO FILE AMICUS BRIEFS, GRANTS OF AMERICAN PETROLEUM AND AMERICAN FUEL AND PETROCHEMICAL THE CITY OF MACKINAC ISLAND, GRAND TRAVERS BAND OF OTTAWA AND CHIPPEWA INDIANS AND	0.00	0.00

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			STRAITS OF MACKINAW AND ATTYS GENERAL OHIO, INDIANA AND LOUISIANA		
41	06/30/20	KAMILTON 1	STATE-MENT PURSUANT REGARDING MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF CITY OF MACKINAC ISLAND, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS AND STRAITS OF MACKINAC ALLIANCE IN SUPPORT OF PL'S MOTION FOR PRELMINARY INJUNCTION W/PS	0.00	0.00

42	06/30/20	KAMILTON 1	PROOF OF SERVICE ON 062920 A COPY OF SUPPLEMENTAL SUBMISSION VIA EMAIL UPON COUNSEL OF RECORD	0.00	0.00
43	06/30/20	KAMILTON 1	MOTION OF THE CITY OF MACKINAC ISLAND, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS AND STRAITS OF MACKINAC ALLIANCE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLS MOTION FOR PRELIMINARY INJUNCTION – BRIEF IN SUPPORT W/POS	0.00	0.00

44	06/30/20	KAMILTON	DFS	0.00	0.00
		1	SUPPLEMENTAL SUBMISSION OF ADDITIONAL INTERESTED PARTY LETTERS IN SUPPORT OF DFS RESPONSE TO PL'S MOTION FOR PRELIMINARY INJUNCTION		
45	06/30/20	KAMILTON	NOTICE	0.00	0.00
		1	(LETTER FROM ACTOHIO/ EXECUTIVE DIRECTOR MATTHEW SOLLOSI		
46	06/29/20	KAMILTON	ORDER	0.00	0.00
		1	GRANTING PL'S MOTION FOR LEAVE TO FILE REPLY BRIEF IN EXCESS OF FIVE PAGES		

47	06/29/20	KAMILTON	OHIO	0.00	0.00
		1	ATTORNEY GENERALK DAVE YOST'S MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF INSTANTER ON BEHALF OF THE STATE OF OHIO THE STATE INDIANA, AND THE STATE OF LOUISIANA REGARDING ECONOMIC HARM RESULTING FROM A LINE 5 SHUTDOWN – BRIEF IN SUPPORT W/PS		
48	06/29/20	KAMILTON	ORDER	0.00	0.00
		1	THAT THE COURT GRANTS DFS MOTION FOR LEAVE TO FILE BRIEF IN EXCESS OF 20 PAGES AND ACCEPTS DF BRIEF IN RESPONSE		

49	06/29/20	KAMILTON 1	DFS' SUPPLEMENTAL PROCEEDINGS SUBMISSION OF CORRESPON-DENCE FROM PHMSA IN SUPPORT OF DFS RESPONSE TO PL'S MOTION FOR PRELIMINARY INJUNCTION	0.00	0.00
50	06/29/20	KAMILTON 1	PL'S REPLY IN SUPPORT OF MOTION FOR PRE-LMINARY INJUNCTION	0.00	0.00
51	06/29/20	KAMILTON 1	INDEX EXHIBITS	0.00	0.00
52	06/29/20	KAMILTON 1	PL'S MOTION FOR LEAVE TO FILE REPLY BRIEF IN EXCESS OF FIVE PAGES W/PS	0.00	0.00

53	06/29/20	KAMILTON 1	DFS SUPPLEMENTAL SUBMISSION OF INTERESTED PARTY LETTERS IN SUPPORT OF DFS RESPONSE TO PL'S MOTION FOR PRELIMINARY INJUNCTION	0.00	0.00
54	06/29/20	JWHORTON	MOTION FEE Receipt: 467009 Date: 06/30/2020	20.00	0.00
55	06/29/20	KAMILTON 1	DECLARA- TION OF MARK MAXWELL IN SUPPORT OF ENBRIDGE ENERGY, LP'S OPPOSITION TO THE PRELIMI-NARY INJUNCTION	0.00	0.00
56	06/29/20	KAMILTON 1	AFFIDAVIT OF MIKE MOELLER IN SUPPORT OF ENBRIDGE ENERGY, LP'S OPPOSITION TO PL'S MOTION FOR PRELIMINARY INJUNCTION	0.00	0.00

57	06/29/20	KAMILTON	EMAIL	0.00	0.00
		1	NOTICE FROM PHILLIP DEROSIER REGARDING AFFIDAVI'T OF MIKE MOELLER INADVERTENLY OMITTED PAGE 15		
58	06/29/20	KAMILTON	MOTION OF	0.00	0.00
		1	AMERICA PETROLEUM INSTITUTE ASSOCIATION OF OIL PIPE LINES AND AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DFS OPPOSITION TO PL'S MOTION FOR PRELIMINARY INJUNCTION		
59	06/29/20	TPERKINS	MOTION FEE	20.00	0.00
			Receipt: 467009 Date: 06/30/2020		

60	06/29/20	KAMILTON 1	PROOF OF SERVICE ON 062620 A COPY OF AFFIDAVIT IN SUPPORT OF DF RESPONSE IN OPPOSITION TO PL'S MOTION FOR PRELIMINARY INJUNCTION UPON COUNSEL OF RECORD VIA EMAIL	0.00	0.00
61	06/29/20	KAMILTON 1	INDEX OF AFFIDAVITS	0.00	0.00
62	06/29/20	KAMILTON 1	DFS RESPONSE IN OPPOSITION TO PL'S MOTION FOR PRELIMI-NARY INJUNCTION		
63	06/29/20	KAMILTON 1	PROOF OF SERVICE ON 062620 A COPY OF DF RESPONSE IN OPPOSITION TO PL MOTION FOR PRELMINARY INJUNCTION VIA EMAIL UPON PARTIES OF RECORD	0.00	0.00

64	06/29/20	KAMILTON 1	PROOF OF SERVICE ON 062620 A COPY OF AFFIDAVITS IN SUPPORT OF DFS RESPONSE IN OPPOSITION TO PL MOTION FOR PRELIMINARY INJUNCTION VIA EMAIL UPON PARTIES OF RECORD	0.00	0.00
65	06/29/20	KAMILTON 1	DFS MOTION FOR LEAVE TO FILE BRIEF EXCESS OF TWENTY PAGES – NOTICE OF HEARING	0.00	0.00
66	06/29/20	TPERKINS	MOTION FEE Receipt: 466929 Date: 06/29/2020	20.00	0.00

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67	06/25/20	JLILES	HEARING SET: Event: MOTION FOR IN JUNCTION/TRO Date: 06/30/2020 Time: 1:30 pm Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result: HEARING HELD ON THE RECORD	0.00	0.00
68	06/25/20	KAMILTON 1	TEMPO-RARY RESTRAIN-ING ORDER	0.00	0.00
69	06/24/20	KAMILTON 1	DFS RESPONSE IN OPPOSITION TO PL'SM MOTION FOR TEMPORARY RESTRAINING ORDER PENDING HEARING ON MOTION FOR PRELIMINARY INJUNCTION – EXHIBITS W/PS	0.00	0.00

70	06/23/20	KAMILTON 1	PROOF OF SERVICE ON 062220 A COPY OF PL'S EX PARTE MOTION FOR RESTRAINING ORDER BY MAIL UPON COUNSEL OF RECORD	0.00	0.00
71	06/23/20	KAMILTON 1	PL'S EXPARTE MOTION FOR TEMPORARY RESTRAINING ORDER PENDING HEARING ON MOTION FOR PRELIMINARY INJUNCTION – BRIEF IN SUPPORT – NOTICE OF HEARING W/PS	0.00	0.00
72	06/23/20	JWHORTON	MOTION FEE Receipt: 466922 Date: 06/29/2020	20.00	0.00

73	06/22/20	KAMILTON	SUPPLE-MENTAL BRIEF IN SUPPORT OF DFS MOTION FOR SUMMARY DISPOSI-TION W/PS	0.00	0.00
74	06/02/20	RBUCK	TRAN-SCRIPT OF PROCEED-INGS	0.00	0.00
75	06/01/20	LCIAVA	STIPULA-TION AND ORDER FOR SUBMISSION OF SUPPLEMENTAL BRIEFS FOLLOWING THE MAY 22, 2020 HEARING ON THE PARTIES' MOTION FOR SUMMARY DISPOSITION – IT IS ORDERED DEF SHALL SUBMIT SUPPLEMENTAL BRIEF ADDRESSING ISSUES IDENTIFIED	0.00	0.00

			BY THE COURT BY 6/19/20, LIMITED TO 20 PAGES (EXCLUSIVE OF COVER PAGE, TABLES, INDEXES AND EXHIBITS) . THE PLAINTIFF SHALL RESPOND TO THE ISSUES ADDRESSED IN DEF'S SUPPLEMENTAL BRIEF BY 7/3/20, LIMITED TO 20 PAGES (EXCLUSIVE OF COVER PAGE, TABLES, INDEXES AND EXHIBITS)		
76	05/29/20	LCIAVA	PROOF OF SERVICE – ON 5/29/20 THE STIPULATION AND ORDER FOR SUBMISSION OF SUPPLEMENTAL BRIEFTS FOLLOWING THE 5/22/20 HEARING ON THE PARTIES'	0.00	0.00

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			MOTIONS FOR SUMMARY DISPOSITION WAS SERVED UPON DANIEL P. BOCK VIA EMAIL		
77	05/22/20	JLILES	HEARING	0.00	0.00
			HELD ON THE RECORD The following event: MOTION FOR SUMMARY DISPOSITION scheduled for 05/22/202 at 9:00 am has been resulted as follows:		
			Result: HEARING HELD ON THE RECORD Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result Staff: Staff: COURT REPORTER: DEXTER, MELINDA Certification Number: 4629		

78	05/22/20	JLILES	HEARING HELD ON THE RECORD The following event: MOTION FOR SUMMARY DISPOSITION scheduled for 05/22/2020 at 9:00 am has been resulted as follows: Result: HEARING HELD ON THE RECORD Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result Staff: Staff: COURT REPORTER: DEXTER, MELINDA Certification Number: 4629	0.00	0.00
79	02/20/20	LCIAVA	ORDER – THE COURT NOW FINDS THAT THE FOLLOWING PROSPECTIVE AMICI HAVE COMPLIED WITH THE	0.00	0.00

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			REQUIRED DISCLOSURES AND NOW ACCEPTS THEIR SUBMITTED BRIEFS FOR CONSIDERATION: THE SIERRA CLUB, THE GREAT LAKES BUSINESS NETWORK, FOR LOVE OF WATER (FLOW) AND THE CHITY OF MACKINAC ISLAND – W/ PS		
80	02/11/20	LCIAVA	NOTICE OF HEARING W/ PS	0.00	0.00
81	02/11/20	LCIAVA	BRIEF OF AMICUS CURIAE	0.00	0.00
82	02/07/20	LCIAVA	NOTICE OF HEARING W/ PS (5/22/20 @ 9AM)	0.00	0.00

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83	02/07/20	KSMITH	HEARING SET: Event: MOTION FOR SUMMARY DISPOSITION Date: 05/22/2020 Time: 9:00 am Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result: HEARING HELD ON THE RECORD	0.00	0.00
84	02/07/20	KSMITH	HEARING SET: Event: MOTION FOR SUMMARY DISPOSITION Date: 05/22/2020 Time: 9:00 am Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result: HEARING HELD ON THE RECORD	0.00	0.00

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85	02/05/20	LCIAVA	AMENDED MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF GREAT LAKES BUSINESS NETWORK – WITH BRIEF OF AMICUS CURIAE GREAT LAKES BUSINESS NETWORK – W/ PROOF OF SERVICE	0.00	0.00
86	02/03/20	LCIAVA	STATE-MENT PURUSANT TO MCR 7.212(H)(3) AND 7.312(H)(4) REGARDING MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF CITY OF MACKINAC ISLAND IN SUPPORT OF PLAINTIFF AND IN OPPOSITION TO DEFENDANTS W/ PS	0.00	0.00
87	02/03/20	LCIAVA	STATE-MENT PURSUANT TO MCR 7.212(H)(3) AND 7.312(H)(4) REGARDING MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF FOR LOVE OF WATER (FLOW) IN SUPPORT OF	0.00	0.00

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			PLAINTIFF AND IN OPPOSITION TO DEFENDANTS W/ PS		
88	01/31/20	JLILES	HEARING	0.00	0.00
			HELD ON THE RECORD The following event: STATUS CONFERENCE scheduled for 01/31/2020 at 9:00 am has been resulted as follows: Result: HEARING HELD ON THE RECORD Judge: JAMO, JAMES S Location: COURTROOM 7 – VETERANS MEMORIAL Result Staff: Staff: COURT REPORTER: DEXTER, MELINDA Certification Number: 4629		
89	01/27/20	LCIAVA	ORDER – THE AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES AND AMERICAN FUEL AND PETROMECHANICAL MANUFACTURERS'	0.00	0.00

			MOTION TO FILE AN AMICUS BRIEF IS THEREFORE GRANTED AND THEIR BRIEF IS ACCEPTED, AND THEY DO NOT NEED TO DO ANYTHING IN RESPONSE TO THIS ORDER. W/ PS		
90	01/02/20	KAMILTON	MOTION	0.00	0.00
		1	OF AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINE AND AMERICAN FUEL AND PETROCHEMICAL MANUFACTURERS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DFS MOTION FOR SUMMARY DISPOSITION – BRIEF IN SUPPORT		
91	01/02/20	TPERKINS	MOTION FEE	20.00	0.00
			Receipt: 460469 Date: 01/02/2020		

92	12/30/19	WRIGHTT	MOTION OF THE CITY OF MACKINAC ISLAND FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PL – AMICUS CURIAE BRIEF OF CITY OF MACKINAC ISLAND IN SUPPORT OF PL AND IN OPPOSITION TO DEF – W/ PS	0.00	0.00
93	12/30/19	TPERKINS	MOTION FEE Receipt: 460348 Date: 12/30/2019	20.00	0.00
94	12/12/19	KAMILTON 1	ORDER AND NOTICE OF STATUS CONFERENCE ON 1-31-20 @ 9 AM	0.00	0.00
95	12/11/19	KAMILTON 1	ORDER THAT BRIEF TO BE FILED ON 1-3-20	0.00	0.00

96	12/11/19	JLILES	HEARING SET: Event: STATUS CONFERENCE Date: 01/31/2020 Time: 9:00 am Judge: JAMO, JAMES S VETERANS MEMORIAL Location: COURTROOM 7 – Result: HEARING HELD ON THE RECORD	0.00	0.00
97	12/10/19	KAMILTON 1	PL'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DISPOSITION W/PS	0.00	0.00
98	12/10/19	KAMILTON 1	REPLY BRIEF IN SUPPORT OF DFS MOTION FOR SUMMARY DISPOSITION	0.00	0.00

99	12/10/19	KAMILTON 1	MOTION LEAVE TO FILE AMICUS CURIAE BRIEF OF GREAT LAKE BUSINESS NETWORK – BRIEF IN SUPPORT W/PS	0.00	0.00
100	12/10/19	LCIAVA	MOTION FEE Receipt: 459646 Date: 12/10/2019	20.00	0.00
101	12/06/19	BUCK	AMICUS CURIAE BRIEF OF FOR LOVE OF WATER (FLOW) IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY DISPOSITION AND OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY DISPOSITION	0.00	0.00

102	12/06/19	BUCK	PROOF OF SERVICE MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF FOR LOVE OF WATER (FLOW) IN SUPPORT OF PLAINTIFF AND IN OPPOSITION TO DEFENDANTS AND BRIEF IN SUPPORT	0.00	0.00
103	12/06/19	BUCK	MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF FOR LOVE OF WATER (FLOW) IN SUPPORT OF PLAINTIFF AND IN OPPOSITION TO DEFENDANTS	0.00	0.00
104	12/06/19	TPERKINS	MOTION FEE Receipt: 459475 Date: 12/06/2019	20.00	0.00

105	11/27/19	BUCK	ORDER FOR ADMISSION OF OUT OF STATE ATTY FOR AMICUS SIERRA CLUB WITH PS	0.00	0.00
106	11/26/19	KAMILTON 1	MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ATTORNEYS GENERAL OF MINNESOTA CALIFORNIA AND WISCONSIN IN SUPPORT OF PL – BRIEF IN SUPPORT – AFFIDAVIT OF SERVICE	0.00	0.00
107	11/25/19	KAMILTON 1	AMENDED MOTION FOR PRO HAC VICE ADMISSION OF LAURENS H SILVER	0.00	0.00

108	11/25/19	LCIAVA	MOTION FEE Receipt: 458945 Date: 11/26/2019	20.00	0.00
109	11/18/19	KAMILTON 1	NOTIFICA-TION PURSUANT TO MCR 8.126(A)(1)(b) C/O LAURENS SILVER	0.00	0.00
110	11/18/19	KAMILTON 1	ORDER REVERSING ADMISSION OF OUT OF STATE ATTY LAURENS SILVER	0.00	0.00
111	11/18/19	KAMILTON 1	NOTIFICA-TION PURSUANT TO MCR 8.126(A)(1)(b) FROM STATE BAR REGARDING ELIGIBILITY	0.00	0.00
112	11/15/19	KAMILTON 1	ORDER FOR ADMISSION OF OUT OF STATE ATTORNEY LAURENS SILVER	0.00	0.00

113	11/15/19	KAMILTON	ORDER FOR	0.00	0.00
		1	ADMISSION OF OUT OF STATE ATTORNEY OF LEIGH CURRIE W/PS		
114	11/14/19	KAMILTON	MOTION	0.00	0.00
		1	FOR PRO HAC VICE ADMISSION OF LAURENS H SILVER		
115	11/14/19	KAMILTON	PL'S SIERRA	0.00	0.00
		1	CLUB MOTION FOR PARTIAL SUMMARY DISPOSITION – BRIEF IN SUPPORT W/PS		
116	11/14/19	KAMILTON	NOTICE OF	0.00	0.00
		1	APPEARANCE OF NICHOLAS LEONARD AND LAURENS H SILVER ON BEHALF OF AMICUS CURAE SIERRA CLUBX		

117	11/14/19	DLOPEZ	MOTION FEE Receipt: 458368 Date: 11/15/2019	20.00	0.00
118	11/12/19	KAMILTON 1	PL'S BRIEF IN OPPOSITION TO DFS MOTION FOR SUMMARY DISPOSITION	0.00	0.00
119	11/12/19	KAMILTON 1	ATTY GENERAL'S MOTION FOR TEMPORARY ADMISSION OF OUT OF STATE ATTORNEY LEIGH K CURRIE – AFFIDAVIT OF LEIGH CURRIE IN SUPPOT OF ADMISSION PRO HAC VICE W/PS	0.00	0.00
120	11/12/19	KAMILTON 1	DFS' RESPONSE TO PL'S MOTION FOR PARTIAL SUMMARY DISPOSITION	0.00	0.00

121	11/12/19	KAMILTON 1	PROOF OF SERVICE ON 111219 A COPY OF DFS RESPONSE TO PL'S MOTION FOR PARTIAL SUMM DISP BY MAIL UPON PARTIES OF RECORD	0.00	0.00
122	11/12/19	TPERKINS	MOTION FEE Rcceipt: 458214 Date: 11/12/2019	20.00	0.00
123	10/24/19	KAMILTON 1	STIPULA-TION AND ORDER AMENDING BRIEFING SCHEDULE FOR CROSS MOTIONS FOR SUMMARY DISPOSITION	0.00	0.00
124	09/16/19	KAMILTON 1	DFS' MOTION FOR SUMMARY DISPOSITION – BRIEF IN SUPPORT – W/PS	0.00	0.00

125	09/16/19	KAMILTON 1	PL'S MOTION FOR PARTIAL SUMMARY DISPOSITION – BRIEF IN SUPPORT – W/PS	0.00	0.00
126	09/16/19	DLOPEZ	MOTION FEE Receipt: 454961 Date: 09/16/2019	20.00	0.00
127	09/16/19	DLOPEZ	MOTION FEE Receipt: 454951 Date: 09/16/2019	20.00	0.00
128	08/02/19	KAMILTON 1	PROOF OF SERVICE ON 080119 A COPY OF ORDER GRANTING UNOPPOSED MOTIONS FOR TEMPORARY ADMISSION OF OUT OF STATE BY MAIL UPON PARTIES OF RECOD	0.00	0.00

129	07/30/19	KAMILTON 1	ORDER GRANTING UNOPPOSED MOTION FOR TEMPORARY ADMISSION OF OUT OF STATE ATTORNEY JOSHUA RUNYAN; ATTORNEY ALICE LOUGHRAN; ATTORNEY WILLIAM HASSLER; DAVID COBURN WPS	0.00	0.00
130	07/29/19	KAMILTON 1	UN-OPPOSED MOTION FOR TEMPORARY ADMISSION OF OUT OF STATE ATTORNEY JOSHUA RUNYAN; ATTORNEY ALICE LOUGHRAN; ATTORNEY WILLIAM HASSLER; DAVID COBURN WPS	0.00	0.00

131	07/29/19	DLOPEZ	MOTION FEE Receipt: 452251 Date: 07/29/2019	20.00	0.00
132	07/24/19	KAMILTON 1	PROOF OF SERVICE ON 072419 A COPY OF ORDER EXTENDING TIME BY MAIL UPON PARTIES OF RECORD	0.00	0.00
133	07/23/19	KAMILTON 1	STIPULA-TION AND ORDER EXTENDING TIME FOR DEFS TO RESPOND TO COMPLAINT AND TO SET BRIEFING SCHEDULE AND PAGE LIMITS FOR INITIAL CROSS MOTION FOR SUMM DISP	0.00	0.00
134	07/22/19	KAMILTON 1	APPEAR-ANCE ON BEHALF OF DFS Attorney: ELLSWORTH, PETER H. (23657) W/PS	0.00	0.00

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135	07/12/19	KAMILTON 1	PROOF OF SERVICE ON070119 A COPY OF SUMMONS & COMPLAINT SERVED UPON THE CORPORATION COMPANY	0.00	0.00
136	06/27/19	BKIESEL	COMPLAINT FILED Receipt: 450757 Date: 06/27/2019	150.00	0.00
137	06/27/19	BKIESEL	SUMMONS ISSUED	0.00	0.00
			Totals By: COURT COSTS	470.00	0.00
			INFORMATION	0.00	0.00

*** End of Report ***

APPENDIX D — MOTION OF ENBRIDGE, CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT, INGHAM COUNTY, FILED SEPTEMBER 16, 2019

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

Case No.: 19-474-CE
Hon. James S. Jamo

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

Plaintiff,

v.

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

Defendants.

Filed September 16, 2019

DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Defendants Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc., and Enbridge Energy Partners, L.P. (collectively, "Enbridge") move for summary disposition of the Attorney General's Complaint.

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As further discussed in Enbridge's supporting brief, Count I.A. should be dismissed under MCR 2.116(C)(7) and/or (8) because the Attorney General cannot show that the 1953 Easement within which Enbridge's Line 5 dual pipelines operate was invalid from its inception and, in any event, her challenge to the Easement's issuance comes far too late. Count I.B. should be dismissed under MCR 2.116(C)(4) and/or (8) because the Attorney General's public trust claim has been subsumed by the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq.*, improperly seeks termination on grounds not provided in the Easement itself and is preempted by federal law. Count II (public nuisance) should be dismissed under MCR 2.116(C)(8) because the alleged risk of harm inherent in Line 5's continued operation is impermissibly speculative. Finally, Count II (request for relief under MEPA) should be dismissed under MCR 2.116(C)(8) because the Attorney General's Complaint does not adequately allege that harm to the environment has "occurred or is likely to occur."

Accordingly, Enbridge respectfully requests that the Court grant its motion for summary disposition and dismiss the Attorney General's Complaint in its entirety.

Respectfully submitted,

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Appendix D

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Attorneys for Defendants

Dated: September 16, 2019

Appendix D

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

Case No.: 19-474-CE
Hon. James S. Jamo

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

Plaintiff,

v.

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

Defendants.

[Tables Intentionally Omitted]

Glossary

Short Form	**Description**
Conservation Commission	Michigan Conservation Commission, predecessor to the Michigan Department of Natural Resources

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DEQ	Michigan Department of Environmental Quality, now called the Michigan Department of Environment, Great Lakes, and Energy
Dual Pipelines	Four miles of Line 5 where it crosses the Straits of Mackinac and splits into two, parallel lines
Dynamic Risk	Dynamic Risk Assessment Systems, Inc., an expert consulting firm commissioned by the State in 2016 to study alternatives to the existing Dual Pipelines
GLSLA	Great Lakes Submerged Lands Act of 1955, CLS 1956, § 322.701 *et seq.*
Easement or 1953 Easement	Easement granted by the Michigan Conservation Commission on April 23, 1953 to Lakehead Pipe Line Company, Inc.
Enbridge	All three defendants in this action
Lakehead	Lakehead Pipe Line Company. Inc., the former name of Enbridge Energy Company, Inc.
Line 5	645-mile pipeline that transports petroleum products between Superior, Wisconsin and Sarnia, Ontario, Canada

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MDNR	Michigan Department of Natural Resources, successor to the Michigan Conservation Commission
MEPA	Michigan Environmental Protection Act, MCL 324.1701 *et seq.*
PAWSA	Process initiated by the U.S. Coast Guard on June 10, 2019 to study additional measures that could reduce the risk of an anchor strike
PHMSA	Pipeline and Hazardous Materials Safety Administration, a federal agency within the U.S. Department of Transportation charged with responsibility for the promulgation and enforcement of federal pipeline safety standards
PIPES Act	Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016, Pub. L. 114-183, 130 Stat. 527 (2016)
PSA	Pipeline Safety Act, 49 USC 60101 *et seq.*
Task Force	Michigan Petroleum Pipeline Task Force, a multi-agency group formed in 2014 to address petroleum pipelines in Michigan
Tunnel	Tunnel in the bedrock underneath the Straits that would house a replacement for Line 5 and possibly other third-party utilities

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$1x10^{-4}$	$1x10^{-4}$ = 0.01% or 1/10,000
$3.5x10^{-4}$	$3.5x10^{-4}$ = 0.035% or 3.5/10,000
$4.5x10^{4}$	$4.5x10^{-4}$ = 0.045% or 4.5/10,000
1 in 60 over 35 years	Equivalent to an annual rate of (1/60)/35 = $4.76x10^{-4}$ = 0.0476%

Introduction

This case concerns an interstate pipeline built over six decades ago. This pipeline (Line 5) transports crude oil used for refining into vehicle, aviation, and other fuel products and natural gas liquids used to make propane. It extends more than 600 miles from Superior, Wisconsin to Sarnia, Ontario. At issue here is a segment of the pipeline that crosses the bottomlands of the Straits of Mackinac ("Straits") within an easement issued by the State of Michigan. The Easement was granted in 1953 in furtherance of a statute enacted by the Michigan Legislature. In the more than six decades since the pipeline was installed, there have been no releases of Line 5 product in the Straits and no efforts by any prior State administration to force closure of this Line 5 segment.

Sixty-six years after the Easement was granted, the Attorney General now, for the first time, seeks to end-run its terms. She starts by claiming that the Easement was void from its inception. This clearly was not the view of the Attorney General in 1953 or in any of the many years since then. In fact, the Office of the Attorney General approved the Easement in 1953 as to legal form

and effect. The Attorney General then claims that, even if the Easement was valid when issued, it should now be declared invalid under common-law doctrines and the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 *et seq.*

The Attorney General's Complaint is a direct attack on the separation of powers and on the ability of the Michigan Legislature to determine environmental policy—authority that has been placed squarely within the legislative sphere by Article 4, Section 52 of the Michigan Constitution. This attack manifests itself in three particular ways. *First,* the Complaint, by its very design, is an attempt to circumvent the limitations on the Easement's termination. The 1953 Easement was based upon a legislative grant of authority, and it set forth specific grounds on which the Easement may be terminated—none of which are invoked in the Attorney General's Complaint. *Second,* the Complaint invokes the common law public trust doctrine, but this claim is subsumed by MEPA. Under MEPA, the Attorney General could pursue essentially the same relief she now seeks if she could meet the statutory criteria; she has not, however, met that criteria here. The public trust doctrine cannot be used to undermine the specific framework that the Legislature has established in this area. *Third,* the displacement of the Attorney General's public trust claim is underscored by other legislative actions. In December 2018, the Legislature enacted new legislation authorizing the construction of a Tunnel under the Straits that would ultimately house a replacement pipeline and, according to the State-commissioned Dynamic Risk report cited in

the Attorney General's Complaint, would render the risk of a spill into the Straits "un-quantifiably low." While the Attorney General may desire a different approach, the Legislature has already balanced the relevant public interests with respect to Line 5.

Because the common law has been subsumed by legislative enactments and because, for reasons described below, the Attorney General has failed to state a cause of action for public nuisance or under MEPA, the Complaint should be dismissed in its entirety.

Factual and Procedural Background

A. Line 5 and the Dual Pipelines Across the Straits of Mackinac

Line 5 transports petroleum products between Superior, Wisconsin and Sarnia, Ontario, Canada. The 645-mile line extends across the Upper Peninsula of Michigan, crosses the Straits and then travels in a southeast direction toward Sarnia. This case focuses on the approximately four miles of Line 5 that crosses the Straits. At the point where it crosses the Straits, Line 5 splits into two parallel lines (the "Dual Pipelines"). The Complaint does not allege that the Dual Pipelines have ever released oil into the Straits.

B. Conveyance of the 1953 Easement

Prior to the construction of Line 5, oil moving from Superior to Sarnia was transported on the Great Lakes

by tanker. According to the Complaint, approximately 50 million barrels of oil moved by tanker over the Great Lakes in the years after 1950. (Complaint, ¶ 10.)

Lakehead Pipe Line Company, Inc.—which subsequently changed its name to Enbridge Energy Company, Inc.—submitted on January 24, 1953, its application for a permit to lay the Dual Pipelines in the Straits. The Michigan Conservation Commission ("Conservation Commission") initially considered the application on February 13, 1953.[1] The Michigan Public Service Commission on March 19, 1953. granted Enbridge the right to issue securities to finance the Pipelines, further evidencing the State's thorough process to authorize the Pipelines.[2]

Following the Conservation Commission's initial consideration of the application, the Michigan Legislature on March 28, 1953, enacted 1953 PA 10, which provided:

> The conservation commission is hereby vested with the power and authority to grant easements, upon such terms and conditions as the said commission deems just and reasonable, for the purpose of erecting, laying, maintaining and operating pipe lines . . . over, through, under and upon any and all lands belonging

1. See Easement, Third Whereas Clause (Exh. 1 to Complaint).

2. See *Lakehead Pipe Line Co v Dehn,* 340 Mich 25, 37; 64 NW2d 903 (1954).

> to the state of Michigan which are under the jurisdiction of the conservation commission or the department of conservation, and over, through, under and upon any and all of the unpatented overflowed lands, made lands and lake bottom lands belonging to or held in trust by the state of Michigan.

The Conservation Commission then considered the application a second time and granted the Easement on April 23, 1953. The Easement granted Enbridge the right to "construct, lay and maintain" the Dual Pipelines "over, through, under and upon certain lake bottom lands" in the Straits. (Complaint, Ex. 1 at 1). Attached to the Easement is a sworn statement by an Assistant Attorney General for the State stating that the Easement had been "[e]xamined and approved 4/23/53 as to legal form and effect." (*Id.* at 13).

The Commission specifically found in granting the Easement that the proposed line would benefit the people of Michigan:

> WHEREAS, the Conservation Commission is of the opinion that *the proposed pipe line system will be of benefit to all of the people of State of Michigan and in furtherance of the public welfare.*

Easement, Second Whereas Clause (Complaint, Ex. 1 at 1) (emphasis added).

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During 1953 and 1954, landowners in Bay County, Michigan, challenged the right of Lakehead (now Enbridge Energy Company, Inc.) to condemn land for construction of Line 5. One of the grounds cited by the landowners was that the company was seeking to take property by condemnation for a "private purpose." *Lakehead Pipe Line Co v Dehn,* 340 Mich 25, 30; 64 NW2d 903 (1954). The trial court rejected this claim, and the Supreme Court affirmed, holding that construction and operation of Line 5 was "for a public use benefiting the people of the State of Michigan." *Id.* at 37.

C. Construction and Current Operation of Line 5

Construction of Line 5, including the Dual Pipelines, was completed in 1954. Line 5 has continued to operate since that date (Complaint, ¶ 15) and there have been no releases of Line 5 product in the Straits. Eight different governors of both parties have led the State's executive department and seven different attorneys general have been elected but no prior State administration made efforts to force closure of the Dual Pipelines segment of Line 5.

D. Recent State Commissioned Reports on Line 5 Discussed in the Complaint

The Complaint relies on and cites to the following studies relating to the Straits. Additional studies exist that are not mentioned in the Complaint, and that thus do not serve as a basis for the current motion.

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1. 2015 Michigan Petroleum Pipeline Task Force Report

In 2014, the then-Attorney General and then-Director of the Department of Environmental Quality ("DEQ") formed a multi-agency Petroleum Pipeline Task Force ("Task Force") to address petroleum pipelines in Michigan (including Line 5). The Task Force published its report in 2015. (Complaint, ¶ 10.)

2. 2017 Dynamic Risk Alternatives Analysis

One of the recommendations of the 2015 Task Force Report was that the State obtain an independent analysis of alternatives to the existing Dual Pipelines. See 2015 Task Force Report at 56. In 2016, the State commissioned an expert consulting firm, Dynamic Risk Assessment Systems, Inc. ("Dynamic Risk"), to perform the recommended alternatives analysis. (Complaint, ¶ 35.) Dynamic Risk published its final Report in October 2017. (*Id.*) The Complaint incorporates the Dynamic Risk Report by a link in note 5 (¶ 35) and relies on it in numerous places.[3]

Dynamic Risk concluded that the annual probability of failure for the existing Dual Pipelines for *all risks combined* was approximately $4.5x10^{-4}$ (or 0.045%) per year.[4] To reach this conclusion, Dynamic Risk considered separately different causes of potential releases, including

3. See Complaint, ¶¶ 35-41, 45, 47, 51-52.

4. See Dynamic Risk at ES-25 and 2-71 to 2-73.

"anchor hooking" and incorrect operations (abbreviated as "Inc Ops" in the chart below), as well as the risk posed by "all threats" combined. The results of that analysis are shown in the chart below, which appears at page ES-25 of the Dynamic Risk Report:[5]

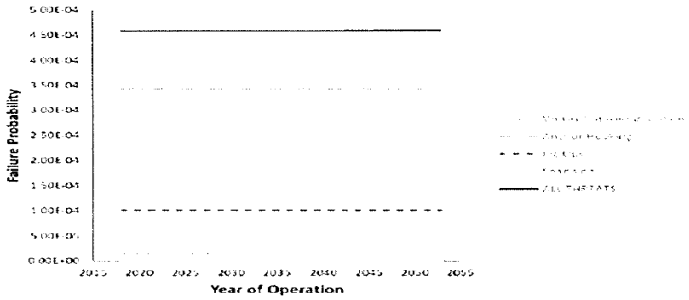

Figure ES-4: Annual Failure Probability Over Time – Existing Straits Crossing Segments

The Complaint alleges (at ¶ 35) that Dynamic Risk—in a town hall meeting held three months before the final report was issued—orally stated that the chance of "rupture" "in the next thirty-five years" was "one in sixty."[6] (See Complaint, ¶ 35 n.6.) The Complaint does not,

5. The Dynamic Risk Report included a much more detailed discussion of each of these risks, as well as other, lesser risks. See, e.g., Dynamic Risk at 2-41 to 2-73 and Figure 2-12.

6. A "one in sixty" chance of a strike over 35 years is equivalent to an annual risk of 0.0476% per year. This annual risk is calculated by dividing 1/60 by 35 years.

This equivalent allegation is relatively close to the approximate value published by Dynamic Risk of 0.045% (shown in the chart above). To the extent that the two estimates differ slightly, the

however, allege that the Dual Pipelines are expected to operate for thirty-five more years.

The Complaint (at ¶ 52) alleges that Dynamic Risk concluded that "incorrect operations" were a "Principal Threat" to the Dual Pipelines. The actual quantitative risk that Dynamic Risk calculated for this risk, however, is 0.01% per year (as shown in the chart above). Similarly, the Dynamic Risk Report, which is incorporated in the Complaint (¶ 35), calculates the annual probability of failure due to a vessel anchor accidentally striking the lines. According to Dynamic Risk, the annual probability of failure from this type of risk was $3.5x10^{-4}$ (or 0.035%) per year (as shown in the chart above).

E. Related Matters: Enactment of 2018 PA 359

The Dynamic Risk Report looked in detail at possible replacement of the existing Dual Pipelines with a segment that would be located in a Tunnel built in bedrock under the Straits. Dynamic Risk determined that a replacement Tunnel was feasible, and the risk of a potential release from a tunnel crossing to be "un-quantifiably low." See Dynamic Risk Report, § 3.2.2 (addressing "Alternative 4b") and § 3.6 at 3-60.

In December 2018, the Michigan Legislature enacted legislation (2018 PA 359) allowing the construction of

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facts alleged in the Complaint are assumed to be true for purposes of this Motion—i.e., that the risk of release is a "one in sixty" chance over the next 35 years, or an annualized risk of 0.0476% per year.

the Tunnel that would house a replacement for Line 5 and possibly other third-party utilities. The Legislature did not order a shutdown of Line 5. In substance and practical effect, the Attorney General is asking in this case for the Court to override the Legislature's solution to environmental concerns about Line 5.

On March 28, 2019, the new Attorney General issued an opinion asserting that 2018 PA 359 failed to comply with the Title-Object Clause of the Michigan Constitution and was therefore invalid. See Attorney General Opinion No. 7309. On the same day the new Governor directed state agencies to take no further action to implement the various 2018 agreements to construct a tunnel. See Executive Directive No. 2019-13.

On June 6, 2019, Enbridge filed suit against the State in the Court of Claims. *Enbridge Energy, Limited Partnership, et al. v State of Michigan,* et al, No. 19-000090-MZ. Enbridge's suit seeks a declaration that 2018 PA 359 complies with the Michigan Constitution and that related contractual agreements entered with the State pursuant to 2018 PA 359 are enforceable, including an agreement allowing Enbridge to continue operating the Dual Pipelines until the replacement Tunnel is complete. On June 27, 2019, the State moved for summary disposition of the case. On August 1, 2019, Enbridge opposed and cross-moved for summary disposition. The State has replied to Enbridge's motion and the case is now awaiting decision by the Court of Claims.

Appendix D

Standard of Review

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999). "A movant is entitled to summary disposition under MCR. 2.116(C)(8) if '[t]he opposing party has failed to state a claim on which relief can be granted.'" *Henry v Dow Chem Co,* 473 Mich 63, 71; 701 NW2d 684 (2005), quoting MCR 2.116(C)(8).

Summary disposition may be granted under MCR 2.116(C)(7) when an action is barred by a statute of limitations. *Vance v Henry Ford Health Sys,* 272 Mich App 426, 429; 726 NW2d 78 (2006). See also *Dep't of Environmental Quality v Gomez,* 318 Mich App 1; 896 NW2d 39 (2016) (analyzing latches argument under MCR 2.116(C)(7)); *Knight v Northpointe Bank,* 300 Mich App 109; 832 NW2d 439 (2013) (same). "A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may file supportive material such as affidavits, depositions, admissions, or other documentary evidence." *Vance,* 272 Mich App at 429.

Summary disposition of a claim under MCR 2.116(C)(4) is appropriate when federal preemption deprives the court of subject-matter jurisdiction to hear the claim. See *Packowski v United Food & Commercial Workers Local 951,* 289 Mich App 132, 138; 796 NW2d 94 (2010) (addressing federal preemption under subrule (C)(4)). "For jurisdictional questions under MCR 2.116(C)(4), th[e] Court 'determine[s] whether the affidavits, together with the pleadings, depositions, admissions, and documentary

evidence, demonstrate . . . [a lack of] subject matter jurisdiction.'" *Id.* at 138-139 (citation and some internal quotations omitted).

Summary of Argument

This Court should grant summary disposition in favor of Enbridge. As an initial matter, the Attorney General's entire complaint—which seeks to force Enbridge to remove the Dual Pipelines for supposedly threatening the Straits—is inconsistent with the separation of powers imposed by the Michigan Constitution. Under the Constitution, the duty to safeguard Michigan's natural resources is expressly assigned to the Legislature. Where, as here, the Legislature has made a considered judgment about how best to fulfill its duties, the Attorney General has no authority to second-guess that judgment—or to ask the courts to do so. The Attorney General's claims must be evaluated with the constitutionally mandated separation of powers in mind.

Count I.A claims that the 1953 Easement has been invalid all along, based on the supposed failure of the Legislature and the Conservation Commission to jump through a procedural hoop created (on the Attorney General's reading) by dicta in a Supreme Court ruling issued seven years after the Easement was granted, *Obrecht v National Gypsum Co,* 361 Mich 399; 105 NW2d 143 (1960). This claim fails for many reasons. For one, there is no ground to apply the *Obrecht* dicta retroactively—to the contrary, *Obrecht* relied on a 1955 statute that is not retroactive, and the very language of the

opinion that the Attorney General cites makes clear that it has no application to grants addressed by preexisting legislation. By its own terms, that language is also limited to cases where submerged lands are given over to private use, yet contemporaneous case law involving Line 5 makes clear that the construction of a pipeline is a quintessentially public use, regardless of whether the pipeline is constructed by a private company. Even if the *Obrecht* dicta did apply to preexisting easements, the Conservation Commission's express findings would he more than sufficient to satisfy the procedural requirement that the Attorney General draws from *Obrecht.* The Attorney General's invocation of *Obrecht* also comes far too late and is barred by the statute of limitations. If the express grant of an easement across the Straits was invalid in 1953, then Enbridge has long since acquired an easement by prescription. Finally, the Attorney General is estopped from denying the Easement's validity so late in the day.

Count I.B asserts that the Dual Pipelines pose a risk of an oil spill in the Straits in violation of the common law public trust doctrine. But such attempts to regulate the complex modern economy by means of an amorphous, non-legislative public trust doctrine have been displaced by MEPA. Count I.B also fails because it is inconsistent with the 1953 Easement, which itself provides the exclusive conditions and procedures under which it can be terminated (and leave no role for the Attorney General). Finally, the Attorney General's attempt to regulate pipeline safety through judicial application of the public trust doctrine is preempted by the federal Pipeline Safety Act ("PSA"), which assigns responsibility not to the 50 state attorneys general but rather to a single

expert federal agency, and more broadly by the Federal Government's pervasive occupation of the entire field of pipeline safety.

Count II asserts that the Dual Pipelines constitute a public nuisance. Yet Michigan law recognizes claims for anticipatory public nuisance only where the feared harm is either certain to come to pass or at least very probable. Here, the Attorney General alleges no facts that could suggest that the risk of an oil spill from the Dual Pipelines is anything but exceptionally low. This unduly speculative claim must therefore be dismissed. The Attorney General's own Complaint undermines any suggestion that harm arising from Line 5's operation is certain or probable. To protect the public interest served by Line 5, the Attorney General seeks to defer immediate action to allow users of the line a "reasonable notice period" to adjust to the proposed closure. (Complaint, ¶ 28).

Finally, Count III alleges violation of MEPA. This claim has basically the same fatal flaw as the public nuisance claim: MEPA authorizes an action by the Attorney General only when harm to the environment has "occurred or is likely to occur," (MCL 324.1701(1)), yet the Complaint fails to plead facts that any alleged harm is "likely." To the contrary, the Attorney General relies heavily on a report that puts the annual failure probability for the Dual Pipelines at less than 0.05%. Such a speculative risk falls far short of the statutory threshold. Moreover, the Attorney General's own proposed deferral of any closure of Line 5 for a "reasonable notice period" entirely undermines her MEPA claim.

Appendix D

Argument

I. The Attorney General's Complaint transgresses limits imposed by the Constitution and endorsed by the Supreme Court.

The Court's analysis of the Complaint should begin with the proper constitutional framework. The Michigan Constitution recognizes a duty to conserve the State's natural resources, and it delegates that specific duty to the Legislature:

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

Const 1963, art 4, § 52. The Constitution also provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2.

Addressing the separation of powers, the Supreme Court has explained that environmental protection is a *legislative* function. For example, in *Kyser v Kasson Township,* 486 Mich 514; 786 NW2d 543 (2010), the Court held that "Michigan's constitution directs *the Legislature, not the judiciary,* to provide for the protection and

management of the state's natural resources." *id.* at 536 (emphasis added). The Court made this statement in concluding that a judicially-created rule governing extraction of natural resources violated the separation of powers because Section 52 of Article 4 gives the authority to protect natural resources to the Legislature, not the courts. The *Kyser* Court also pointed out that trying to apply a judicially-created rule would require courts "to engage in an expansive and detailed analysis of land-use considerations as to which they have no particular expertise," and that such regulatory matters are thus appropriately left to the Legislature. *Id.* at 537. See also *Oscoda Chapter of PBB Action Comm, Inc v DNR,* 403 Mich 215, 231; 268 NW2d 240 (1978) (observing that "Const 1963, art 4, § 52, confers no authority on the courts"). Indeed, the Supreme Court recognized even before the 1963 Constitution that regulation of the public's interest in the lake bottomlands falls within the Legislature's purview. See *Nedtweg v Wallace,* 237 Mich 14, 22-23; 208 NW 51 (1926) ("The Legislature is vested with power to determine whether the public interests will be best served by leaving lake bottom, unsuited to purposes of navigation, in a wild state and wholly unproductive of any public revenue or of benefit, except to hunters, or permit use thereof, under suitable regulations, to the greater benefit of the public.").

Here, the Michigan Legislature has struck a balance of the relevant public interests in three different ways. The Legislature established the *initial* framework for pipeline operations by vesting the Conservation Commission with authority to "grant pipeline easements on state land and

lake bottomlands." (Complaint, ¶ 11; 1953 PA 10). The Legislature also established a *future* framework for continued operations by authorizing the construction and operation of the Tunnel in which a replacement for the existing Dual Pipelines could be located. (2018 PA 359). The Legislature did so without taking any action to discontinue operations of the Dual Pipelines in the meantime. Finally, the Legislature has enacted a statutory framework for courts to enjoin public or private entities from taking action that will likely impair natural resources or the public trust therein—the relief that the Attorney General seeks in this case—provided that certain substantive standards are satisfied. See MCL 324.1701(1). As discussed below, however, the Attorney General has failed to allege a prima facie case under MEPA.

Because the Michigan Constitution delegates the protection of natural resources to the *Legislature,* each count in the Complaint should be analyzed in light of the policy judgments made by the Legislature and the procedures authorized for challenging likely risks to the environment.

II. Count I.A should he dismissed because the Attorney General cannot show that the Easement was invalid from its inception.

A. The 1953 Easement was issued under a valid grant of legislative authority.

In Count I.A, the Attorney General claims that the 1953 Easement was void "from its inception." (Count I.A.)

Specifically, Count I.A complains that "the State never made a finding that the easement: (1) would improve navigation or another public trust interest; or (2) could be conveyed without impairment of the public trust." (Complaint, ¶ 27). To be clear, the Attorney General's argument is that the 1953 Easement is invalid regardless of whether it *in fact* improved a public trust interest, simply because "[t]here is no contemporaneous document" in which the State used the particular verbal formula that she says is necessary to make any such Easement valid. (Complaint, ¶ 27). This argument fails as a matter of law. Accordingly, the Court should dismiss Count I.A under MCR 2.116(C)(8).

As the Attorney General admits, the 1953 Easement was issued pursuant to a legislative grant of authority. (Complaint, ¶ 11). In 1953, the Legislature authorized the Conservation Commission "to grant easements for the erecting, laying, maintaining and operating of pipe lines . . . over, through, under and upon any and all of the unpatented overflowed lands, made lands and lake bottom lands belonging to or held in trust by the state of Michigan." 1953 PA 10 (emphasis added). Consistent with that legislative authorization, the Conservation Commission then proceeded to grant an easement for the construction and operation of the pipeline across the Straits. (See 1953 Easement (Complaint, Ex. 1); Complaint, ¶ 11). In April 1953, the Attorney General approved the easement as to legal form and effect. (Complaint, Ex. 1 at 13).

Because the Legislature enacted the statutory framework for granting pipeline easements and the 1953

Easement was granted pursuant to that framework, there is no basis for declaring the Easement void from its inception.

B. The Attorney General's reliance on *Obrecht* to retroactively change the legal framework is misplaced.

The Attorney General nevertheless complains now that the Conservation Commission failed to intone certain magic words in the 1953 Easement. (Complaint, ¶ 28). She does not contend that any Michigan statute or court decision on the books as of 1953 required such language. The Attorney General instead draws this theory from language in *Obrecht*—a case decided *seven years after* the 1953 Easement was granted and six years after Line 5 began operating.

Obrecht's holding does not help the Attorney General. *Obrecht* involved a landowner who claimed the right to build without first obtaining the State's consent. Specifically, in *Obrecht,* a riparian landowner sought (i) to construct a large loading dock that extended over 800 feet into Lake Huron, in an area predominantly devoted to recreational uses, and (ii) to dredge more than a mile of deep channel. See *Obrecht,* 361 Mich at 404-405. The landowner did not rely on an easement but claimed that it could construct docks and dredge channels of unlimited length without the State's consent under a riparian landowner's common law right to wharf out to navigable waters. See *id.* at n.2. The Supreme Court rejected this argument, explaining that "the public title and right

is supreme as against [landowner's] asserted right of wharfage" and that "the latter may be exercised by the [landowner] only in accordance with the regulatory assent of the State." *Id.* at 413. Because the State had not given assent, and "*for that reason alone,*" the landowner's actions were unlawful. See *id.* at 414 (emphasis added).

Obrecht's holding is clearly inapposite here. Enbridge does not claim any right to go beyond what the State has expressly authorized. Enbridge built and operated the pipeline pursuant to an Easement issued by the Conservation Commission under authority from the Legislature. Because *Obrecht*'s holding does not help her case, the Attorney General instead relies upon the following dicta in the Court's opinion:

> Turning to pages 453 through 460 of [*Illinois Central Railroad Co v State of Illinois,* 146 US 387 (1892),] and reading those pages in conjunction with [the 1955 GLSLA], 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*** . . . 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 nonpublic use. 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 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 interests in the lands and waters remaining." [*Obrecht,* 361 Mich at 412-13 (emphases added; quotations in original), cited in Complaint, ¶ 28].

The Attorney General's reliance on this quoted language is *legally* flawed for three separate reasons. *First,* the *Obrecht* passage that the Attorney General relies upon states that "no part of the beds of the Great Lakes, belonging to Michigan and *not coming within the purview of previous legislation* . . . can be alienated or otherwise devoted to private use in the absence of" the findings described by *Obrecht.* Of course, the Easement was granted in 1953 pursuant to 1953 PA 10. *Obrecht* was not decided until 1960, so the 1953 easement plainly "com[es] within the purview of previous legislation." That makes the language in *Obrecht* relied upon in the Complaint inapplicable by its very terms.

Second, the language would not apply retroactively to Enbridge's easement. The quoted passage from *Obrecht* derives from two sources: an excerpt from the U.S. Supreme Court's opinion in *Illinois Central* read "in conjunction with" the 1955 GLSLA. *Obrecht,* 361 Mich at 412-413. The cited pages from *Illinois Central* simply recognize the public interest exception to the public trust doctrine: state control cannot be relinquished except as "parcels . . . used in promoting the interests of the public therein." *Illinois Central,* 146 US at 453. The GLSLA requires that, where it applies, the state agency make

determinations about the public trust before conveying or leasing bottomlands. See, e.g., MCL 324.32503(1). The GLSLA, however, was not in effect in 1953 when the Easement was issued and thus is not applicable here.[7]

Third, the *Obrecht* passage speaks only about submerged lands "devoted to *private* use." *Obrecht,* 361 Mich at 412 (emphasis added). The use for which the Easement was granted—running a common carrier pipeline across the Straits—is a classic example of a *public* use. In 1954—the same year that Line 5 went into operation, and not long before *Obrecht*—the Supreme Court expressly held that Enbridge's use of land for Line 5 constituted a public use. See *Lakehead Pipe Line Co,* 340 Mich at 27. There, landowners challenged a proceeding initiated by Lakehead (now Enbridge Energy Company, Inc.) to condemn their land interests "for the construction of a pipe line for the transportation as a common carrier of petroleum products"—i.e., Line 5. *Id.* The landowners argued that Lakehead "was seeking to take property by condemnation for a private purpose"—the transportation of a private corporation's oil—in violation of "the general rule" that "private property may not be taken under the power of eminent domain for other than a public use." *Id.* at 30, 39. The Supreme Court rejected this argument, explaining that the right-of-way was a public necessity: "It is our conclusion that [Lakehead] was entitled to proceed under the act in question to acquire property necessary

7. Moreover, none of the criteria recognized by the Supreme Court as weighing in favor of retroactivity applies. See *LaFontaine Saline, Inc v Chrysler Group, LLC,* 496 Mich 26, 38-39; 852 NW2d 78 (2014).

for the public use claimed." *Id.* at 36 (emphasis added). See also *id.* at 38 ("Unquestionably the construction of the bridge [held to be a public use in an earlier decision] benefited the people of Michigan. A like result may be anticipated in the case at bar from the construction, maintenance and operation of the pipe line in question."). The Court explained that the existence of a private commercial interest in the pipeline did not undermine its holding that the easement was for a public use: "Doubtless the Imperial Oil Company [which indirectly owned a stake in Lakehead at the time] will be benefited by the fact that the pipe line system provides a method for transporting its oil to the refineries. It cannot be said, however, that, because of such situation, [Lakehead] is seeking to exercise the power of eminent domain for a private purpose. The private benefit, if such there is, is merely incidental to the main purpose." *Id.* at 40.[8]

Because the submerged lands subject to the 1953 Easement were not "alienated or otherwise devoted to private use," *Obrecht,* 361 Mich at 412, the passage that the Attorney General points to is inapplicable by its own terms. Enabling a common carrier to build transportation infrastructure is a textbook example of a "public use." In short, the Attorney General's reliance on *Obrecht* to invalidate the Easement is legally flawed.

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8. In describing Line 5, the Lakehead Court expressly noted that it "extend[ed] across the upper peninsula to the Straits of Mackinac" and that "[t]he use of two 20-inch pipes across the Straits of Mackinac [had been] approved." *Lakehead Pipe Line Co,* 340 Mich at 27-29. The Court plainly was referring to the Line 5 Dual Pipelines.

C. The 1953 Easement states that the pipeline system advances the public interest.

Even if *Obrecht* set forth a test applicable to all easements on the books, it is absurd to criticize the 1953 Easement simply for failing to use the exact words used seven years later in *Obrecht.* The far more important point is that the Conservation Commission relied on ample evidence of benefits to the public, as well as express Legislative authorization, when it granted the 1953 easement. This is reflected in the terms of the Easement, which is attached as an exhibit to the Complaint.

In the Easement, the Conservation Commission expressly found that "the proposed pipe line system will be of benefit to all of the people of the State of Michigan and [operate] in furtherance of the public welfare." (Complaint, Ex. 1 at 1.) The Complaint itself concedes that "the contemporaneous approval of the construction of what is now Enbridge's Line 5 in Michigan by the Michigan Public Service Commission . . . suggested that the Line 5 pipeline . . . would enhance joint defenses in times of national emergency and promote improved trade relations." (Complaint, ¶ 28.) Thus, even if *Obrecht* imposed a retroactive magic words requirement, as the Complaint asserts, the Legislature's authorization of the Easement and Commission's findings in the Easement itself satisfied it. As noted, the Attorney General approved the Easement as to legal form and effect in 1953. (Complaint, Ex. 1 at 13.)

In short, the Attorney General's allegation that the Easement was invalid from its inception is legally flawed. For this reason alone, the Court should dismiss Count I.A.

D. The Attorney General's argument comes far too late.

In addition, the Attorney General's challenge comes far too late. If she were right that the 1953 grant was invalid from its inception, then Enbridge has long since acquired a prescriptive easement across the Straits. "An easement by prescription results from use of another's property that is open, notorious, adverse. and continuous" for the applicable statutory period. *Mulcahy v Verhines,* 276 Mich App 693, 699; 742 NW2d 393 (2007), quoting *Plymouth Canton Community Crier, Inc v Prose,* 242 Mich App 676, 679; 619 NW2d 725 (2002). The applicable statutory period here is 15 years, as explained below.

Open and notorious. "To make good claim of title by adverse possession, the true owner must have actual knowledge of the hostile claim *or* the possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally." *Thomas v Rex A Wilcox Trust,* 185 Mich App 733, 737; 463 NW2d 190 (1990), quoting *Burns v Foster,* 348 Mich 8, 15; 81 NW2d 386 (1957) (emphasis added). See also *Martin v Arndt,* 356 Mich 128, 135; 95 NW2d 858 (1959) (same). As the disjunctive "or" indicates, where the owner has actual knowledge of the claimant's use, the requirement is satisfied even if the use is underground or underwater: "A use that is actually known to the owner of the servient estate satisfies the requirement even though it is not open." Restatement (Third) of Property (Servitudes) § 2.17 comment h. Thus, "if the installation of underground utilities is open and

their location remains notorious, either because actually known to the owner or widely known in the community, the prescriptive period will continue to run even though evidence of the use is subsequently buried." *Id.*

Here, the State has known full well, going back all the way to 1953, that Enbridge has been using the Straits bottomlands to operate Line 5. Thus, even though Line 5 crosses the Straits deep underwater, Enbridge met the requirement of open and notorious use because the State had actual knowledge of its use.

Adverse. "Adverse or hostile use is use that is inconsistent with the right of the owner, without permission asked or given, that would entitle the owner to a cause of action against the intruder for trespassing. The use of another's property qualities as adverse if made under a claim of right when no right exists." *Mulcahy,* 276 Mich App at 702 (citation omitted). The adverse-use requirement is met where the claimant claims a right under an express easement that it mistakenly believes to be valid: "[i]f a claimant has obtained a conveyance of an easement which is ineffective, his use of the subservient estate, made on the assumption that the conveyance was legally effective, is adverse and not made in subornation to the owner of the burdened estate." *Cook v Grand River Hydroelectric Power Co,* 131 Mich App 821, 826; 346 NW2d 881 (1984). In short, "use under an invalid easement may establish an easement by prescription." *Plymouth Canton,* 242 Mich App at 684. See also *Mulcahy,* 276 Mich App at 702.

Appendix D

Enbridge ran the Line 5 Dual Pipelines across the Straits under a claim of right: the 1953 Easement, which says that Enbridge has the right to do so. The Attorney General's position now is that no right actually existed, because the grant was "void from its inception." If that is true, then Enbridge's use was adverse.

Continuous for the statutory period. "[A]ssuming all other elements have been established, one gains title by adverse possession when the period of limitation expires." See *Gorte v Dep't of Transp.,* 202 Mich App 161, 168; 507 NW2d 797 (1993) ("the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession"). The Legislature "specifically enacted a statute of limitations which require[d] the state to commence an action to recover [] lands within 15 years after the right or title of the people of the state first accrued." *Caywood v Dep't of Natural Resources,* 71 Mich App 322, 331; 248 NW2d 253 (1976).[9] See 1948 CL 609.11 (setting a 15-year limitations period until 1963); MCL 600.5821(1) (1961) (setting a 15-year limitations period between 1963 and 1988).

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9. In 1988, Michigan "reinstated the common-law rule that one cannot acquire title to state-owned property through adverse possession." *Gorte,* 202 Mich App at 166. See MCL 600.5821(1) (1988). The 1988 amendment, however, did not apply retroactively to interfere with rights gained by adverse possession prior to the amended statute's effective date. *Gorte,* 202 Mich App at 167-168. See *id.* at 167 ("where a period of limitation has expired, the rights afforded by that statute are vested and the action in question is barred"). Thus, the 1988 amendment did not affect Enbridge's prescriptive easement across the Straits, which vested when the 15 year limitations period expired in 1969.

Enbridge has continuously used the Easement from 1954 until the present day. Indeed, the Attorney General acknowledges that "[s]ince completing Line 5 in 1954, the Grantee [of the Easement] and its successors have continued to operate it, and over time significantly increased the quantity of products transported through it." (Complaint, ¶ 15). It follows that, if the 1953 Easement was "void from its inception" as the Attorney General claims, in 1969 (15 years after the Dual Pipelines went into operation) Enbridge acquired a prescriptive easement.

Even if one assumes that Enbridge did not acquire a prescriptive easement, the Attorney General is estopped from pursuing Count I.A of the Complaint. In Michigan, "the State as well as individuals may be estopped by its acts, conduct, silence, and acquiescence." *Oliphant v Frazhe,* 381 Mich 630, 638; 167 NW2d 280 (1969). Here, the Office of the Attorney General approved the easement in 1953 as to legal form and effect. (Complaint, Ex. 1 at 13). Enbridge relied upon the State's representations in the easement, making significant expenditures on the construction and operation of this pipeline, both across the Straits and throughout the entire Upper and Lower Peninsulas. Enbridge would be prejudiced if the State were allowed, sixty-six years later, to deny the existence of the Easement's terms. The Court should dismiss Count I.A in the Complaint.

III. Count I.B should be dismissed because the Attorney General's public trust claim fails as a matter of law.

In Count I.B, the Attorney General claims that "Enbridge's continued transportation of petroleum

products through the straits pipelines violates the public trust" because (in her view) there is a "very real risk of further anchor strikes to the pipelines, the inherent risks of pipeline operations, and the foreseeable, catastrophic effects if an oil spill occurs at the Straits." (Complaint, ¶¶ 30, 33). Count I.B should be dismissed for alternative reasons: (1) it is subsumed by the MEPA, (2) it is inconsistent with the terms of the 1953 Easement, and (3) it is preempted by federal law.

A. The Attorney General's public trust claim has been subsumed by her MEPA claim in the context of this case.

The Court should dismiss Count I.B under MCR 2.116(C)(8) because it is subsumed by the Attorney General's MEPA claim. The Michigan Court of Appeals previously has implied that public trust claims are completely subsumed by MEPA. See *Highland Recreation Def Found v Natural Res Comm'n,* 180 Mich App 324, 331; 446 NW2d 895 (1989) ("We also agree that the claims raised by plaintiff under its public trust argument are duplicative of its claims under MEPA.").

The public trust doctrine is a common law doctrine. *PPL Montana, LLC v Montana,* 565 US 576, 603 (2012). The doctrine is "a matter of state law," and "the States retain residual power to determine the scope of the public trust[.]" *Id.* at 603-604. Under Michigan law, the Legislature has the authority to supersede or change common law by statute. See, e.g., *Kyser,* 486 Mich at 539-543. See also *Stout v Keyes,* 2 Doug 184, 189; 1845 WL

3119 (1845) ("[L]aws in force [when the state constitution was passed] are retained until they should expire by their own limitations, or be altered or repealed by the legislature."). The Michigan Constitution delegates implementation of the duty to protect the state's natural resources to the Legislature. Const 1963, art 4, § 52. "Michigan Constitution's directs the Legislature, not the judiciary, to provide for the protection and management of the state's natural resources." *Kyser,* 486 Mich at 536. The Legislature has enacted a statutory framework to address how protections to the state's resources are to be implemented and thus common law must yield to the statute. See *Kyser,* 486 Mich at 536; *PBB,* 403 Mich at 231. See also *Pulver v Dundee Cement Co,* 445 Mich 68, 75 n 8; 515 NW2d 28 (1994) ("[I]f there is a conflict between the common law and a statutory provision, the common law must yield."); *City of Milwaukee v Illinois and Michigan,* 451 US 304, 315 (1981) ("Our commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem.") (citation and internal quotations omitted); *Arizona v California,* 373 US 546, 565 (1963) ("[W]here Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress.").

The Michigan Legislature, through its enactment of MEPA, has expressly defined when a facility may present an unreasonable risk of release to public trust resources so as to warrant cessation of its operations. Specifically,

Section 324.1701(1) of MEPA expressly provides that the "attorney general . . . may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur . . . against any person for the protection of the air, water, and other natural resources and ***the public trust in these resources*** from pollution, impairment, or destruction." (emphasis added).

MEPA was enacted pursuant to the Legislature's authority under the Michigan Constitution, which squarely places protection of the State's "air, water and other natural resources" within the legislative sphere. See Const 1963, art 4, § 52. Accordingly, the Legislature, pursuant to its authority to regulate public trust resources, has established under MEPA a legal mechanism to address the precise situation alleged by the Attorney General—where a pipeline operator allegedly "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). MEPA specifically creates a remedy by which "the Attorney General or any person" can maintain an action for protection of the public trust. In light of this legislative determination, the Attorney General must follow the remedial framework established in MEPA.

Courts in other jurisdictions have found that statutory provisions displaced the common law public trust doctrine. See *Sanders Reed v Martinez,* 350 P3d 1221, 1225-27 (NM App, 2015) ("[W]here the State has a duty to protect the atmosphere under Article XX, Section 21 of the New Mexico Constitution, the courts cannot independently regulate greenhouse gas emissions in the atmosphere as Plaintiffs have proposed, based solely upon a common

law duty established under the public trust doctrine as a separate cause of action."); *Alec v Jackson,* 863 F Supp 2d 11, 12, 16-17 (D DC, 2012) ("Thus, a federal common law claim [under the public trust doctrine] directed to the reduction or regulation of carbon dioxide emissions is displaced by the [Clean Air] Act"), aff'd 561 Fed Appx 7 (CA DC, 2014).

Analogous U.S. Supreme Court precedent confirms that when the legislature enacts a statute that "speak[s] directly" to the question, the common law is displaced. *American Electric Power Co v Connecticut (MEP),* 564 US 410, 424 (2011), quoting *Mobil Oil Corp v Higginbotham,* 436 US 618, 625 (1978). In *AEP,* the U.S. Supreme Court considered whether a public nuisance claim against greenhouse gas emitters could be maintained under federal common law after enactment of the federal Clean Air Act. 564 US at 415. The Court held unambiguously that "the Clean Air Act and the [Environmental Protection Agency] actions it authorizes displace" any such common-law claim. *Id.* at 424. The Court's holding in *AEP* was not limited to nuisance claims: the Court held broadly that the legislative regime "displace[s] *any* federal common law right to seek abatement of" the greenhouse gas emissions. 564 US at 424, 426 (emphasis added).

The same reasoning applies here. Through MEPA, the Legislature, exercising the authority granted to it by the Constitution under Article 4, § 52, has established a legislative framework that speaks directly to the alleged problem identified in the Complaint. It is that framework that controls here and to which the Attorney General

must turn for relief. The common law public trust doctrine cannot be used to create "an *ad hoc* environmental policy." *Kimberly Hills,* 114 Mich App 495, 503; 329 NW2d 668 (1982). As the Supreme Court cautioned in *PBB,* courts do not have "plenary power . . . to do whatever they may think preferable in environmental cases." *PBB,* 403 Mich at 231. See also *Milwaukee,* 451 US at 320 (holding that because "the problem of effluent limitations" had been "thoroughly addressed" by the legislature, there was "no basis for a federal court to impose more stringent limitations"). Accordingly, the Attorney General should fail in her attempt to convince this Court to do something that it should not—allow Count I.B to proceed where it has clearly been subsumed by the Legislature's enactment of MEPA.[10]

B. The Attorney General's Claim I.B should be dismissed because it seeks termination on grounds not provided in the Easement.

The Attorney General's Count I.B fails for the additional reason that the 1953 Easement can only be terminated as provided under the termination provision in the Easement. The Attorney General does not purport to comply with the substantive and procedural requirements of that provision. Accordingly, Court I.B should be dismissed under MCR 2.116(C)(8) for this reason as well.

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10. While MEPA offers a framework that could allow the Attorney General to challenge the continued operation of the Dual Pipelines, the very high bar set by MEPA for such a challenge has not been met here, as discussed in Section V below.

Appendix D

In furtherance of its authority to regulate the protection of the public trust resources, the Michigan Legislature expressly vested the Conservation Commission with power and authority to grant easements over the bottom lands "upon such terms and conditions" as the Commission deems just and reasonable to protect the public trust authority. 1953 PA 10. See *Nedtweg,* 237 Mich at 22-23 (confirming the Legislature's authority to determine whether use of the bottomlands is in the public interest). On the basis of 1953 PA 10, the Conservation Commission issued the 1953 Easement after concluding that the "proposed pipe line system will be of benefit to all of the people of the State of Michigan and in furtherance of the public welfare." Easement, Second Whereas Clause (Complaint, Ex. 1 at 1).

As relevant here, the Easement also specifies the limited circumstances under which it may be terminated. Specifically, under Paragraph C of the Easement, the Easement "may be terminated by Grantor:

> (1) If, after being notified in writing by Grantor or 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;"

> (2) If Grantee fails to start construction of the pipe lines authorized herein within two years from date of execution of this instrument; or
>
> (3) If Grantee fails for any consecutive three-year period to make substantial use of said pipe lines commercially and also fails to maintain said pipe lines during said period in such condition as to be available to commercial use within thirty (30) days.

Easement at 7-8 (Complaint, Ex. 1 at 7-8). The Grantor of the Easement is expressly defined by the introductory paragraph of the Easement to mean the Conservation Commission, which was conferred by 1953 PA 10 with authority to issue the Easement to Enbridge. The Conservation Commission's successor is the Michigan Department of Natural Resources ("MDNR"), not the Attorney General.

Michigan courts recognize that an easement (or other property conveyances) must be administered based on the conveying instrument's own terms. See *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 42; 700 NW2d 364 (2005) (explaining that "[t]he task of determining the parties' intent and interpreting the limiting language is strictly confined to the 'four corners of the instrument' granting the easement."). Here, the above-quoted terms of the Easement relative to termination are not ambiguous or otherwise open to dispute. The Easement may be terminated, as per the termination provisions clearly set

forth in Paragraph C, only when the Grantor (now MDNR) asserts a "breach of the terms and conditions of this easement." The terms and conditions to which Paragraph C refers are those specified in the Easement.[11] At no point does the 1953 Easement invest the Attorney General with the right to seek Easement termination, refer to the public trust as a termination ground, or provide for termination based on any of the amorphous safety concerns being asserted by the Attorney General in her Complaint. Nor has the Michigan Legislature provided any other method by which the 1953 Easement can be terminated, i.e., 1953 PA 10 does not speak to termination and no other Michigan statute provides for the termination of the 1953 Easement.

Because the public trust claim is inconsistent with the Easement's own terms, Count I.B should be dismissed.

C. Federal law preempts the Attorney General's claims based on pipeline safety

Count I.B is also preempted by federal law. Specifically, the Attorney General's effort to terminate the Easement

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11. See Easement at Paragraph A (concerning specifications), Paragraph B (concerning notice requirements), Paragraph D (concerning construction timing), Paragraph E (concerning requirements for seeking approval for relocation, replacement, major repair, or abandonment), Paragraph F (maximum operating pressure), Paragraph G (concerning requirements to address a release), Paragraph H (abandonment requirements), Paragraph I (inspection and record retention requirements), Paragraph J (financial assurance requirements), and Paragraph K (notification of assignment).

based on speculative concerns over a hypothetical release from Line 5 constitutes a form of regulation of the pipeline's safety. As such, it is expressly preempted by federal pipeline safety law and regulation. It is also impliedly preempted by federal, pipeline safety law and regulation, as well as federal Coast Guard regulation. Dismissal is warranted under MCR 2.116(C)(4).[12]

Express Preemption. Pursuant to its Commerce Clause powers, Congress enacted the federal Pipeline Safety Act (PSA), 49 USC 60101 *et seq.,* in 1979. The purpose of the PSA is to "provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation." 49 USC 60102(a)(1).

The PSA establishes a two-fold scheme for regulating interstate pipeline safety. First, Congress vested the Pipeline and Hazardous Materials Safety Administration (PHMSA)—a federal agency within the US Department of Transportation—with exclusive jurisdiction to regulate the transportation of petroleum products on interstate pipelines (such as Line 5, which not only traverses two states, but also an international boundary). PHMSA's regulatory authority reaches to, among other matters, a pipeline's design, installation, inspection, construction,

12. When reviewing a motion under MCR 2.116(C)(4), the Court may consider affidavits, pleadings, dispositions, admissions, and documentary evidence filed with the Court, to the extent that their content or substance would be admissible as evidence to establish or deny the grounds stated in the motion. MCR 2.116(C)(4).

operation, replacement, and maintenance. 49 USC 60102(a)(2); 49 CFR Part 195. Second, to ensure that states do not regulate in areas covered by PHMSA, Congress included a broad express preemption provision in the Pipeline Safety Act: "A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 USC 60104(c). The need for federal preemption stems from the fact that interstate pipelines move through and serve multiple states.

Under this scheme, Congress intended that a single regulator—PHMSA—should regulate pipeline safety standards. Since the PSA's enactment in 1979, Line 5 and other interstate pipelines have operated under uniform and preemptive safety regulation by the U.S. DOT's PHMSA for several decades. No function of PHMSA is more important than ensuring the safety of the Nation's pipeline system. 49 USC 108. Congress has mandated that when carrying out its duties, PHMSA "shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in pipeline transportation and hazardous materials transportation." 49 USC 108(b). Having one very empowered, knowledgeable, on-the-job regulator constitutes a sensible arrangement for the complex pipeline industry. Under this regime, interstate pipelines obey a single set of safety regulations; heed to a single set of admonishments; and consult a single set of safety authorities.

Interstate pipelines are simply not positioned to meet the shifting and individualized demands of fifty states, each with multiple regulatory agencies that might potentially seek to extend their jurisdiction over pipeline safety. This case illustrates the problems. Line 5 is part of a major interstate pipeline that crosses and serves several states. Other states depend upon Line 5 for their petroleum needs. The Attorney General now seeks to impose Michigan's regulatory authority over the safety of Line 5 in the Straits and to shut down the transportation of petroleum in interstate commerce through the Straits. Of course, Michigan's authority in this regard would be no greater or less than that of other states, so to permit the Michigan Attorney General to regulate these interstate operations is to permit the same regulation fifty times over. If permitted, this patchwork of state regulation over safety standards for interstate pipelines would wreak havoc on the industry.

Courts have therefore concluded that the PSA preempts all efforts by states or local governments to impose, whether facially or otherwise, operational and environmental-related requirements that pertain to the interstate pipelines and appurtenant facilities. See *Olympic Pipe Line Co v City of Seattle,* 437 F3d 872, 880 (CA 9, 2006) (concluding that safety-related requirements, including the hydrostatic testing imposed by the city clearly fell within the realm of safety standards that are preempted by the PSA because, for example, PHMSA's safety regulations set forth specific regulatory requirements for the circumstances and frequency under which a pipeline operator must hydrotest an interstate

crude oil line); *Texas Oil & Gas Assoc v City of Austin, TX,* unpublished order of the U.S. District Court for the Western District of Texas, No. 03-CV-570-SS (WD Tex, Nov 7, 2003) (holding that a financial responsibility requirement on a pipeline designed to ensure coverage of clean-up expenses was preempted because the requirement was related to "safety" concerns, and the requirement was "exactly the type of piecemeal regulation" the federal law seeks to avoid with "a consistent, across-the board regulatory scheme'); *Kinley Corp v Iowa Utilities Bd.,* 999 F2d 354, 359 (CA 8, 1993) (concluding that a state's pipeline safety regime, as well as related provisions of state law designed to address environmental concerns, were expressly preempted under the PSA).[13]

Here, the Attorney General's Count I.B is expressly preempted because it is very obviously intended to address safety-related concerns arising from the operation of Line 5. (See Complaint, ¶ 33 (complaining about "the inherent risks of pipeline operations")). Namely, the Attorney General asserts that the public trust doctrine requires cessation of Line 5 operations based on a standard that provides that the risk of anchor strike and "accidents, manufacturing defects, human error, and failures of material" present unacceptable "inherent risks of environmental harm." (Complaint, ¶ 48; see also ¶¶ 50-51 (seeking to guard against "incorrect operation[]" of the lines)). The Attorney General also asserts that such inherent risk exists regardless of a "pipeline operator's

13. Unpublished opinions cited in this motion are attached as Exhibit 1.

safety culture and the sophistication of its integrity management system." *Id.*

PHMSA, however, directly regulates pipeline manufacturing requirements and failures of material, as well as those pipeline operations designed to ensure that operators are aware of pipeline discharge risks and to reduce environmental risks posed by discharges when they do occur.[14] PHMSA's extensive pipeline safety regulations are also designed to reduce the risk of possible releases that might harm the environment.[15]

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14. PHMSA's prescriptive regulations implementing the PSA, for example, dictate the design and specifications for all segments of a pipeline (49 CFR 195.200, *et seq.*), including requirements for material strength (e.g., 49 CFR 195.106) and coverage of underwater buried pipelines (49 CFR 195.248), a matter also addressed in the 1953 Easement, which imposes additional minimum cover requirements. PHMSA regulations further establish the frequency within which operators must conduct internal and external investigations to identify potential integrity threats associated with pipe materials, including the timelines under which even potential threats must be inspected and repaired (49 CFR 195.452). PHMSA regulations also address the pressures at which such pipelines may be operated (49 CFR 195.406) so as to ensure that maximum pressures are not exceeded, which could weaken the pipeline.

15. For example, those regulations establish the procedures under which an operator is to control and monitor a pipeline (including factoring in requirements to mitigate for human error) (49 CFR 195.446); the placement of valves that may be remotely shut quickly to minimize the impacts of a potential release (49 CFR 195.116); and requirements for alarms to notify a pipeline operator's control room in the event of a potential release and the steps that the pipeline operator is to take to shut down the pipeline promptly where a potential risk is identified (49 CFR 195.446(e)).

Because the PSA expressly preempts state regulation of interstate pipeline safety, 49 USC 60104(c), the Attorney General's reliance on the state public trust doctrine as a tool to regulate pipeline safety must give way. See US Const, Art VI, cl 2 (providing that the laws of the United States are "supreme law of the land" and "the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

Implied Preemption. Not only is the Attorney General's public trust claim expressly preempted by the PSA, but it is impliedly preempted by the Federal Government's broad authority over pipeline transportation, including PHMSA's right to order that unsafe pipeline operations cease, as definitively reflected in federal legislation, as well as the U.S. Coast Guard regulations concerning navigable waters. Implied preemption exists when either: (1) state law regulates conduct in a field Congress intended the Federal Government to occupy exclusively; or (2) when state law actually conflicts with federal law, See *English v General Elec Co,* 496 US 72, 79 (1990). Congress's preemptive intent is also implied when a state or local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v Davidowitz,* 312 US 52, 67 (1941).

Consistent with the broad national interest in energy, the Federal Government has occupied the entire field of pipeline safety regulation, with the overarching goal of preventing releases of petroleum products from

pipelines into surrounding waters and resources. As explained above, PHMSA regulates all aspects of pipeline operations to ensure that releases from pipelines that might harm the environment do not occur. See 49 CFR Part 195, Subparts C-F. These technical requirements are specifically designed to ensure that pipelines are capable of safely transporting products at appropriate volumes (i.e., pressure) without risking the possibility of a release into surrounding environmental resources, like the Straits, and to require the cessation of operations when the risk of a release and danger to the environment is deemed unacceptably high.

Moreover, 49 USC 60122 authorizes PHMSA to order any pipeline that it determines poses a risk of a release to cease operations. Under the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016 ("PIPES Act"), PHMSA is authorized to issue an emergency order to require an operator to cease any "unsafe condition or practice" that presents an "imminent hazard." Pub L 114-183, 130 Stat 527 (2016); 49 USC 60117(o). In accordance with the PIPES Act, PHMSA has authority to order the cessation of any pipeline operations, including any activity (such as risk of anchor strike or other factors) should such activities be determined to present an unsafe condition or practice constituting an imminent hazard to health, property or the environment.

Apart from PHMSA's extensive pipeline safety role, the U.S. Coast Guard has taken, and continues to take, an active role in the safety of the Dual Pipelines relative to the risk of an anchor strike. Pursuant to its broad

regulatory authority over vessels traversing navigable waters (see, e.g., 33 USC 1221 *et seq.*), the Coast Guard has established a restricted zone that embraces the Straits in which vessels are prohibited anchoring or loitering without advance Coast Guard permission. 83 Fed Reg 49283 (Oct 31, 2018). The Coast Guard is also currently studying, through a well-established process known as a Ports and Waterways Safety Assessment ("PAWSA"), additional measures that it might implement at the Straits that could reduce risks associated with vessels traversing the Straits, including the already low risk of an anchor strike.[16] The PAWSA is a focused risk analysis that is used to identify major waterway safety hazards, estimate risk levels, and evaluate mitigation measures to reduce that risk.[17] The PAWSA process includes participation by relevant agencies and other parties with expertise on waterway safety in the Straits, including pipeline interests represented by PHMSA and Enbridge. The Coast Guard has ample regulatory authority to enforce any such program.[18]

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16. See https://content.govdelivery.com/accounts/USDHSCG/bulletins/2470399.

17. See, e.g., https://www.dco.uscg.mil/PAWSA/ (the Coast Guard "is responsible for developing and implementing policies and procedures that facilitate commerce, improve safety and efficiency, and inspire dialogue within the port complex that will make waterways as safe, efficient, and commercially viable as possible. To accomplish this objective, the Coast Guard utilizes the [PAWSA] process").

18. See e.g., 46 USC 70034 (authorizing the Secretary of Homeland Security, under which the Coast Guard operates,

By contrast, the Attorney General's independent effort to regulate, through forced closure of the Dual Pipelines, according to her own notion of safety and environmental protection, and without seeking the assistance of expert federal agencies, is inconsistent with extensive federal regulation and objectives. Her effort to shut down the Dual Pipelines impinges directly on ongoing federal regulation. Forcing closure of an international pipeline for safety reasons where PHMSA has not exercised its broad authority to do so is as clear a conflict between federal and state regulation as one might imagine. See *Kinley,* 999 F2d at 358 ("Congress has expressly stated its intent to preempt the states from regulating in the area of safety in connection with interstate hazardous liquid pipelines. For this reason, the state cannot regulate in this area . . . .").[19] Her efforts also overlook the Coast Guard's

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to prescribe regulations for ports and waterways safety and consult with all interested persons, including interested Federal departments and agencies); 46 USC 3703 (authorizing the Secretary to prescribe regulations for the operation of vessels "that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment."). See also 33 CFR Part 164 (establishing navigational safety requirements for vessels operating in the navigable. waters of the United States); 33 CFR Part 165, Subpart B (implementing the Coast Guard's authority to establish and regulate requirements for regulated navigation areas, including: specifying times of entry, movement, or departure through such an area; establishing vessel size, speed, and operating conditions; and restricting vessel operations for safety purposes).

19. The conflict between the Attorney General's position on the risks of Line 5 and that of PHMSA is amply demonstrated by the following 2018 testimony of the PHMSA Administrator:

ongoing vessel anchor safety efforts. Accordingly, Count I.B is preempted by federal law.[20]

IV. The Attorney General's public nuisance claim (Count II) should be dismissed because the alleged risk of harm inherent in Line 5's continued operation is impermissibly speculative.

Next, the Court should dismiss the Attorney General's public nuisance claim (Count II) under MCR 2.116(C)(8)

> While Enbridge's previous spills have led to widespread concern over the safety of Line 5, I want to take a moment to emphasize that Line 5 was designed and constructed to significantly higher safety standards than the lines that had failed. Typically, our regulations allow a pipeline to be operated at a pressure that produces a hoop stress of 72 percent of the specified minimum yield strength of the steel pipe. In the case of the Line 5 crossings at the Straits of Mackinac, the twin pipelines were designed and have been operated at a maximum pressure that produces a hoop stress of only 25 percent of the specified minimum yield strength of the steel pipe. This is primarily due to the thickness of the wall of the pipeline, which is more than three times the thickness of the failed Line 6B. Because of these differences, PHMSA believes Line 5 has a much lower risk of failure.

Available at https://www.transportation.gov/content/pipeline-safety-great-lakes-incident-prevention-and-response-efforts-straits-mackinac

20. Of course, the Attorney General's actions are also in conflict with Enbridge's effort to reduce the risk of anchor strikes altogether by relocating the Dual Pipelines into a Tunnel beneath the lakebed of the Straits.

(failure to state a claim) because any alleged harm arising from Enbridge's operation of Line 5 is, on the face of the Attorney General's complaint, speculative.

"A public nuisance involves the unreasonable interference with a right common to all members of the general public." *Sholberg v Truman,* 496 Mich 1, 6; 852 NW2d 89 (2014) (citation and quotation marks omitted). The term "unreasonable interference" refers to "(1) conduct that significantly interferes with public health, safety, peace, comfort, or convenience; (2) conduct that is prescribed by law; [or] (3) conduct of a continuing nature that produces a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect on public rights." *Wagner v Regency Inn Corp,* 186 Mich App 158, 163; 463 NW2d 450 (1990) (citation omitted).

The Attorney General alleges that Line 5 is a public nuisance because it presents a "continuing, unreasonable risk of catastrophic harm to public rights" (Complaint, ¶ 70), and thus seeks to enjoin its continued operation. The Attorney General's allegation of potential harm, however, is entirely speculative and insufficient to state an actionable public nuisance claim.

As a matter of blackletter Michigan law, "equity will not enjoin an injury which is merely anticipated nor interfere where an apprehended nuisance is doubtful, contingent, conjectural or problematical." *Falkner v Brookfield,* 368 Mich 17, 23; 117 NW2d 125 (1962). Thus, "[a] bare possibility of nuisance or a mere fear or apprehension that injury will result is not enough."

Id. Instead, an injunction may issue only "to prevent a threatened or anticipated nuisance which will necessarily result from the contemplated act, where the nuisance is a practically certain or strongly probable result or a natural or inevitable consequence." *Id.* See also *Smith v Western Wayne Co Conservation Ass'n*, 380 Mich 526, 543; 158 NW2d 463 (1968) ("Mere apprehension is insufficient to grant injunctive relief against a claimed nuisance.").

This principle has guided decisions of the Supreme Court and the Court of Appeals; indeed, "Michigan law is replete with applications of [t]his equity maxim," such that "[c]ourts are reluctant to enjoin anticipatory nuisances absent a showing of actual nuisance or the strong probability of such result." *Brent v City of Detroit,* 27 Mich App 628, 632; 183 NW2d 908 (1970) (citations and quotation marks omitted). See also *City of Jackson v Thompson-McCully Co. LLC,* 239 Mich App 482, 490; 608 NW2d 531 (2000) (citation omitted) ("Equity will not interfere where injury from an anticipated nuisance is doubtful or contingent"); *Marshall v Consumers Power Co,* 65 Mich App 237, 265; 237 NW2d 266 (1975) (plaintiff failed to state a claim for nuisance where he "did not state facts sufficient to show that the building of defendant's plant would necessarily or inevitably create" a nuisance); *Gray v Grand Trunk Western R Co,* 354 Mich 1, 11; 91 NW2d 828 (1958) (affirming denial of injunctive relief under nuisance theory where the plaintiff's claim of potential harm arising from construction of a railroad freight switching yard was "in the nature of conjecture rather than factual."); *Concerned Citizens of Chesaning v Vill of Chesaning,* unpublished opinion of the Court

of Appeals, issued June 10, 2004; 2004 WL 1292057, *4 (Docket No. 246564) ("We reject plaintiff's nuisance argument because the harm contemplated by plaintiff is purely speculative and highly doubtful.").

In *Smith,* the Supreme Court explained the intuitive logic of this rule in determining that a gun-shooting range did not constitute a public nuisance. The Court observed—in terms that apply equally here--that a lawful activity cannot he enjoined as a nuisance merely because certain harms "conceivably could happen":

> Plaintiffs urge . . . that if a gun is raised 3½ degrees from level, a bullet will clear the backstop and could kill someone upon its descent; further, that a gun can accidentally be discharged over the side walls. These things conceivably could happen. The fact that baseballs may be hit out of parks, that golfers may hook or slice out of bounds, that motorists may collide with pedestrians or other motorists . . . does not render such uses nuisances, subject to being enjoined.

Smith, 380 Mich at 543.

The same analysis applies to the Attorney General's claim that Line 5—which has been operating safely for more than 65 years—presents a "continuing, unreasonable risk of catastrophic harm to public rights." (Complaint. ¶ 70). Such a claim is inherently speculative and uncertain. In seeking to allege harm, the Attorney General

posits "the very real risk of further anchor strikes," the "inherent risks of pipeline operations," and the "foreseeable, catastrophic effects if an oil spill occurs at the Straits." (*Id.*, ¶ 1). None of these allegations, however, portends harm that is a "practically certain or strongly probable result or a natural or inevitable consequence" of the continued operation of Line 5. *Falkner,* 368 Mich at 23.

With respect to anchor strikes, the Attorney General repeatedly asserts them as a "risk" that is "real," and an area of "vulnerability." (See, e.g., Complaint, ¶¶ 36, 39, 44, 47). In support of that claim, the Attorney General points to two prior anchor strikes—only one of which involved Line 5 and neither of which are alleged to have resulted in a release (and which are the only recorded instances of such anchor strikes in the Straits' history)—as well as an alleged "estimat[e]" by Dynamic Risk that there is a "one in sixty" "chance of rupture of the Straits Pipelines" at some point ***over the next 35 years*** (not in any given year), with anchor strikes being the "dominant threat." But even assuming the truth of those allegations, they simply prove the point that the Attorney General has alleged nothing more than a speculative and hypothetical "fear or apprehension that injury will result," which is patently insufficient to state a claim for public nuisance. *Falkner,* 368 Mich at 23. Simple math demonstrates that a one in sixty chance over 35 years is equivalent to an annual risk of approximately 4.76×10^{-4} (or 0.0476%).[21] Nowhere does the

21. The Dynamic Risk Report itself shows that the estimated annual probability of a release for all risks combined was

Complaint allege that the Dual Pipelines are expected to remain in operation until 2054 (or 35 years from the filing of the Complaint). On the contrary, the Tunnel statute clearly contemplates the eventual decommissioning of Line 5 following completion of the replacement Tunnel.

The same goes for the Attorney General's allegations concerning the purported "inherent risk" of pipeline operations. (See Complaint, ¶¶ 48-53). The Attorney General cites general statistics about the alleged frequency of pipeline "incidents" across the United States over the past several years (*id.*, ¶ 48), along with "126 pipeline 'incidents,'" allegedly involving Enbridge pipelines between 2006 and 2018. (*Id.*, ¶ 49). Nowhere, however, does the Complaint allege how any of these "incidents" have any bearing on whether harm to the environment from the operation of Line 5 is "practically certain." The Attorney General also references Dynamic Risk's assessment of "incorrect operations" as being a "Principal Threat" to Line 5. (*Id.*, ¶¶ 51-52). The Dynamic Risk Report, however—which the Complaint specifically incorporates—estimated the annual risk of a release from the "Principal Threat" of incorrect operations in fact to be only **0.01%**. See Dynamic Risk Report at 2-71. Even leaving that aside, none of the Attorney General's allegations even remotely support a claim that harm arising from continued operation of Line 5 is "practically certain" or a "strongly probable result." *Falkner,* 368 Mich at 23.

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approximately $4.5x10^{-4}$ (or 0.045%). See chart on page 6 above and Dynamic Risk at ES-25, 2-72 to 2-73.

The Attorney General further alleges that a "'worst case' spill of oil" would cause "ecological impacts" that would be "both widespread and persistent." (Complaint, ¶ 58). These allegations, however, assume a catastrophic rupture of Line 5 that, as discussed, is facially speculative and conjectural. Because "[m]ere apprehension" is legally insufficient to support a public nuisance claim, Count II of the Attorney General's complaint should be dismissed. *Smith,* 380 Mich at 543.

Finally, the Attorney General's own Complaint undermines any suggestion that harm arising from Line 5's operation is "practically certain" or a "strongly probable result." While claiming with one hand that the Dual Pipelines present a risk warranting the extraordinary measure of forced closure after over 65 years of continuous successful operation, with the other hand the Attorney General does not seek immediate closure of the Dual Pipelines. Instead, she seeks a permanent injunction requiring Enbridge to cease operation only "as soon as possible after a reasonable notice period to allow orderly adjustments by affected parties . . . ." (Complaint, ¶ 28.) The Attorney General's proposed reasonable notice period for continued operation for some indefinite period entirely undermines her claim that this Court should take the extraordinary step of forcing closure of the Dual Pipelines based on a speculative public nuisance theory.

V. The Attorney General's request for relief under the Michigan Environmental Protection Act (Count III) should be dismissed because her complaint does not adequately allege that harm to the environment has "occurred or is likely to occur."

As a final matter, the Court should also dismiss, again under MCR 2.116(C)(8), Count III of the Attorney General's complaint, which requests declaratory and injunctive relief under MEPA, MCL 324.1701 *et seq.* Like her public nuisance claim, the Attorney General's request for relief under MEPA is based on a purely conjectural level of risk at odds with the much lower risk level carefully identified in the Dynamic Risk report prepared at the request of the State.

MEPA authorizes the Attorney General to seek declaratory and equitable relief when conduct amounting to "pollution, impairment, or destruction" of "the air, water, and other natural resources and the public trust in those resources" has "*occurred or is likely to occur.*" MCL 324.1701(1) (emphasis added). The Supreme Court has held that the "determinative consideration" under this provision is whether the defendant's conduct "will, in fact, pollute, impair, or destroy a natural resource." *Preserve The Dunes, Inc v Dep't of Environmental Quality,* 471 Mich 508, 518 n 5; 684 NW2d 847 (2004). Indeed, the term "likely" is commonly defined as "expected to happen; probable."[22] See also *Ray v Mason Co Drain Comm'r,*

22. See Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/likely. "[A] dictionary definition is appropriately used to construe undefined statutory language

393 Mich 294, 309; 224 NW2d 883 (1975) (observing that MEPA requires a showing either of "actual environmental degradation" or "probable damage to the environment"). A failure to allege facts in support of this statutory requirement is fatal to a MEPA claim.[23]

For example, in *Bormuth v West Bay Exploration Co,* unpublished opinion of the Court of Appeals, issued October 21, 2014; 2014 WL 5364101 (Docket No. 316298), the Court of Appeals held that the plaintiff's claim that the "defendant's proposed waste disposal well [would] contaminate drinking water" in violation of MEPA was "entirely speculative" because there was no evidence that "that [the] defendant's drilling operation [would] *likely* pollute, impair, or destroy a natural resource." *Id.* (emphasis added).

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according to common and approved usage." *In re Casey Estate,* 306 Mich App 252, 260; 856 NW2d 556 (2014), citing *Hottmann v Hottmann,* 226 Mich App 171, 178; 572 NW2d 259 (1997).

23. It goes without saying that it is not sufficient to parrot the language of the statute. Instead, the Attorney General must allege *facts* giving rise to a cognizable claim. See, e.g., *Churella v Pioneer State Mut Ins Co,* 258 Mich App 260, 272; 671 NW2d 125 (2003) ("[B]ecause plaintiffs did not explain how the directors' failure to consider a distribution constituted fraud or bad faith dealings . . . we conclude that plaintiffs have not sufficiently pleaded facts that would overcome the business judgment rule."); *ETT Ambulance Service Corp v Rockford Ambulance, Inc,* 204 Mich App 392, 395, 399; 516 NW2d 498 (1994) ("[T]he mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. . . . Plaintiff's claim, that defendant is attempting to form a monopoly for the purpose of limiting competition and controlling prices, is unsupported by allegations of fact and will not suffice to state a cause of action.").

Similarly here, the Attorney General's claim that continued operation of Line 5 "is likely to cause pollution, impairment, or destruction of the water and other natural resources of the Great Lakes and the public trust in those resources" is wholly conjectural. (Complaint, ¶ 70). The "facts" alleged in the Complaint in support of her request for relief under the MEPA center on the alleged existence of "substantial *risks* of grave environmental harm" (*id.* (emphasis added)), not that Enbridge's continued operation of Line 5 "will, *in fact,* pollute, impair, or destroy a natural resource," as required by *Preserve the Dunes,* 471 Mich at 517 n 5 (emphasis added).[24] The Dynamic Risk Report, which the State commissioned and is cited repeatedly by the Complaint, concluded that the annual failure probability for the Dual Pipelines for *all risks combined* was approximately $4.5x10^{-4}$ (or 0.045%). See Dynamic Risk at 2-72 to 2-73.

"In determining when an environmental risk rises to a level requiring MEPA protection," "[n]ot all threats to the environment justify judicial intervention." *Highland Recreation*, 180 Mich App at 330, citing *Portage v Kalamazoo Co Road Comm,* 136 Mich App 276, 281-282; 355 NW2d 913 (1984). As indicated above, the Attorney General has pleaded only that a risk of release resulting from the Dual Pipelines as a result of "incorrect operation" is estimated to be a chance of only 0.01%. This speculative and insignificant risk does not rise "to the level of impairment which would justify the court's intervention" under the MEPA. *Id.,* citing *Kent Co Road Comm v*

24. For her MEPA count, the Attorney General refers back to the factual allegations supporting her public nuisance claim.

Hunting, 170 Mich App 222, 233; 428 NW2d 353 (1988); *Portage,* 136 Mich App at 280-281. The Attorney General has therefore only identified hypothetical risks that could result from a lawful activity (i.e., Enbridge's operation of a liquids pipeline) and has failed to plead "the determinative consideration" for seeking relief under MEPA. *Id.*

Further, for the same reasons set forth in Section IV above concerning the nuisance claim, the Attorney General's MEPA claims is self-contradictory. A complaint under MCL 324.1701 cannot stand where, as here, the Attorney General acknowledges, through her proposal for an undefined notice period to allow orderly adjustments to the closure of the Dual Pipelines, that the feared harm has neither occurred nor is likely to occur. As a result, Count III of the Attorney General's complaint should be dismissed.

Conclusion and Relief Requested

Enbridge respectfully requests that the Court grant its motion for summary disposition. Under the Michigan Constitution and controlling Supreme Court authority (before and after 1963), protection of the environment is a legislative function. Yet, the Attorney General's complaint seeks to unwind every legislative judgment made concerning Line 5 since 1953. MEPA represents the only legislative authority that the Attorney General has been granted in this area and, for the reasons discussed, her complaint fails to meet MEPA's express requirements for the granting of equitable relief. Nor has the Attorney General alleged a cognizable public

nuisance claim. As a result, her Complaint should be dismissed in its entirety.

Respectfully submitted,

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Attorneys for Defendants

Dated: September 16, 2019

APPENDIX E — EMAIL FROM INGHAM COUNTY CIRCUIT COURT, DATED MAY 1, 2020

From: Kacie Smith

To: Phillip J. DeRosier

Cc: Reichel, Robert (AG); Gibson, Judith (AG); Bock, Daniel (AG); Manning, Peter (AG); Cavanagh, Charles (AG); David Coburn (dcoburn@steptoe.com); whassler@steptoe.com; aloughra@steptoe.com; Runyan, Joshua; Peter H. Ellsworth; Jeffery V. Stuckey; Ryan M. Shannon

Subject: Nessel v Enbridge Energy et al 19-474-CE

Date: Friday, May 1, 2020 3:20:19 PM

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Counsel,

The Court has reviewed the motions for summary disposition along with responses and replies from each side, as well as the amicus briefs in this case. For the purposes of oral argument, the Court asks that you be prepared to address the following issues in particular, in addition to the rest of your argument:

- Defendants raise arguments under prescriptive easement and equitable estoppel. Please be prepared to discuss these issues. In particular,

Plaintiff raises the significant financial benefit Defendants have enjoyed over the last several decades by use of the existing pipelines—what is the legal significance and related authority of that benefit?

- Defendants raise arguments that the existing pipelines are a classic example of a public use. Please be prepared to discuss what constitutes a public use, and other examples of private companies utilizing public lands for similar public uses, with authorities.

- Defendants raise arguments regarding federal law pre-emptions. What are other examples where federal law has been applied, pre-emptively, to activities on state-owned bottomlands in the Great Lakes, or on state-owned lands generally, and how are those examples analogous or not to the case at hand?

Of course, the Court expects oral argument to include additional questions as they arise, and will likely involve more in-depth questions regarding the interplay between the several statutes, agreements, and common law concepts involved in this case. If needed, the Court may allow additional briefing following oral argument if some particularly unexpected question arises then.

Let me know if you have any questions for us, and have a good weekend. Thanks!

Kacie Smith
Law Clerk to the Hon. James S. Jamo
Ingham County 30th Circuit Court
(517) 483-6483

APPENDIX F — HEARING TRANSCRIPT ON CROSS-MOTIONS FOR PARTIAL SUMMARY DISPOSITION HELD ON MAY 22, 2020

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

Case No. 19-474-CE

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

Plaintiff,

v

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

Defendants.

Filed June 2, 2020

CROSS-MOTIONS FOR PARTIAL SUMMARY DISPOSITION

BEFORE THE
HON. JAMES S. JAMO, CIRCUIT JUDGE

Appendix F

Held remotely through Zoom, Friday, May 22, 2020

[TABLES INTENTIONALLY OMITTED]

* * *

[4]Ingham County, Michigan

Friday, May 22, 2020—At 9:03 a.m.

THE COURT: Good morning. This is the matter of Dana Nessel, Attorney General of the State of Michigan, on behalf of the People of the State of Michigan, as the Plaintiff, versus Enbridge Energy, Limited Partnership; Enbridge Energy Company, Inc.; and Enbridge Energy Partners, L.P. It is Case 19-474-CE.

We are conducting this hearing by way of video conference. It is through the Zoom application and is being live streamed on YouTube. All parties have agreed to this process.

What I'm going to have you do to start with, if you would, Counsel, is I'll have you place your appearances on the record. And we'll try to do it—I'll do it in the order that I have it on my screen, which I'm not sure will be the same order you have it on your screen. So we'll find that out.

First of all, before we proceed with the appearances, there is no recording. There can be no recording of these proceedings without Court authorization. I have not received any request for recording, media or otherwise.

Starting with you, Mr. Cavanagh, if you could place your appearance on the record, sir.

[5]MR. CAVANAGH: Thank you. Good morning,

Your Honor. Charlie Cavanagh on behalf of the Plaintiff.

THE COURT: Mr. Reichel.

MR. REICHEL: Morning, Your Honor. Robert Reichel on behalf of Plaintiff, Dana Nessel.

THE COURT: Mr. Bock.

MR. BOCK: Good morning, Your Honor. Daniel Bock on behalf of the Plaintiff.

THE COURT: And, Mr. Hassler.

MR. HASSLER: Good morning, Your Honor. William Hassler on behalf of Enbridge, *pro hac vice.*

THE COURT: Mr. Coburn.

MR. COBURN: Good morning, Your Honor. David Coburn with Steptoe & Johnson in Washington appearing *pro hac* for the Enbridge Defendants.

THE COURT: Mr. Ellsworth.

MR. ELLSWORTH: Morning, Your Honor. Peter Ellsworth on behalf of the Defendant, Enbridge.

THE COURT: First of all, I want to make sure that all of you can hear me okay. I could hear you all as you indicated your appearances, but are there any issues that you're having from a technology point of view at this point?

THE ATTORNEYS: (No response.)

THE COURT: None. No one is responding. So [6]none.

MR. ELLSWORTH: Not from here.

THE COURT: Okay. So far so good. If something comes up, we'll try to resolve that as we go along. Ms. Smith can help with that.

This is the time scheduled for oral argument on cross-motions for partial summary disposition. And this matter—these motions have been thoroughly briefed by way of agreed upon process. Prior to this hearing, there was a stipulation and order that was entered by agreement of the parties as to the briefing schedule, the length of briefs, and so we have the initial briefs, we have response briefs, and we have reply briefs.

I think everything that everyone wanted to submit has been submitted. We did send out an inquiry prior to the hearing as to whether anyone intended to use any additional exhibits besides those that were attached to the briefs. Apparently, there are none in terms of demonstrative exhibits or other materials. If I'm wrong about that, somebody can tell me as we go along, but that is my understanding at this point in time.

It's also my understanding that the parties have agreed, in essence, to divide up the arguments in a way that they are sectioned by claim, essentially, and that the intention is for both sides to be able to argue [7]one entire claim, the issues as to one claim all of the way through, and then move to the next section of the argument. And so we'll proceed in that fashion unless there has been a change that I have not been apprised of.

It is also my understanding that by agreement, this being the Plaintiff's—initially the Plaintiff's Complaint and Plaintiff's motion for partial summary disposition, that the Attorney General's Office is going to argue the first part of the motion first before the—before the Defense comments on it, and I think Mr. Reichel is going to take the lead on that.

I don't know the batting order, so to speak, after that. So we'll just have to, as we go along, figure that—figure that out and make sure that everybody is having an opportunity to present their arguments.

I don't know if on each side there is just one attorney who is going to argue or different attorneys are taking different parts of the argument. It doesn't matter to me. So however you wish to do it.

Also, I have not—I know there is some, perhaps, concern or angst, whatever you want to call it, on the part of counsel as to time limitations. That's because we all, as attorneys, face in different courts different limitations and particularly at the appellate [8]court level. And I know you

folks have been through some other arguments, and so I'll tell you right now, based on what I was told or what was told to my law clerk, Ms. Smith, about your intentions, they sound perfectly reasonable, and I don't intend to place any limitations on those, and I intend to allow you to create a full record of your oral argument.

Mr. Reichel, am I correct that you are going to start the argument?

MR. REICHEL: That is correct, Your Honor. And just to clarify that in each stage of the argument this morning, I will make the argument on behalf of the Plaintiffs. We are not going to divide our argument with my co-counsel.

THE COURT: Okay. Very good.

Unless anyone has anything else preliminarily—

Is there anyone who has anything preliminarily?

THE ATTORNEYS: (No verbal response.)

THE COURT: They are shaking their heads no. If nobody is asking for anything else preliminarily, then we will begin with your presentation, Mr. Reichel, sir.

MR. REICHEL: Thank you, again, Your Honor.

Let me introduce this by saying that almost [9]67 years ago, Enbridge's predecessor, Lakehead Pipeline Company, planted what is effectively an environmental

time bomb in the heart of the Great Lakes at the Straits of Mackinac. We don't know when that bomb may go off, but we do know that it's still ticking and that every day approximately 20 million gallons of crude oil is pumped through these pipelines that are literally in the Great Lakes presenting, as we allege in our Complaint, a grave and continuing threat of harm to public rights and resources.

Count I.A. of the Complaint, which I'm going to address now, which is the subject of our motion for partial summary disposition, focuses on how we got there; that is, the 1953 Easement granted by the Michigan Conservation Commission to Lakehead Pipeline Company giving them the right, the exclusive right, to occupy and use certain defined Great Lakes bottomlands for these twin oil pipelines.

Count I.A. of our Complaint alleges that the 1953 Easement is void because it violates the public trust doctrine. As we extensively argued in our brief—I'll just highlight it here—the public trust doctrine was recognized by both the U.S. Supreme Court and the Michigan Supreme Court in decades before 1953 when the easement was granted.

[10]Under long-standing principles of common law, the State has a perpetual and inalienable duty to protect and preserve the Great Lakes and the lands beneath them for the benefit of the public. And as the Supreme Court explained in *Glass v Goeckel*, the State serves as a trustee of those public rights in the lakes. Lakes, the rights such

as fishing, hunting, boating for recreation and commerce, swimming, etcetera.

And significantly, for the purposes of our motion, both the U.S. Supreme Court and the Michigan Supreme Court have held that the public trust doctrine strictly limits the circumstances under which the State, the trustee, may convey property interests in public trust lands. Under the case law, which we've detailed in our brief, those transfers of property rights in trust lands are strictly limited to only two exceptional circumstances:

First: If the transfer would enhance or improve the public trust rights, that is permissible.

So, for example, if the State transferred bottomlands for the purpose of constructing a pier or a dock that could be used by the public for fishing or boating, that would be an enhancement of the public rights protected by the public trust doctrine.

The only other circumstance under which such a [11]transfer is permissible under the public trust doctrine is if the transfer will not impair the public trust rights in the remaining lands and waters surrounding them. And Michigan law is also clear that before the State make such a transfer, it must actually and duly determine that one or both of those exceptions is met.

Again, we've detailed this in our brief, but, very briefly, the key cases on this subject reflecting the common law is the *Obrecht v National Gypsum Case.*

And, again, while that case was decided by the Michigan Supreme Court after the 1953 Easement was granted, it is clear, as we've outlined in our brief, that *Obrecht* was applying and reiterating long-standing common law, recognized—the principles of the public trust doctrine recognized not only by the United States Supreme Court in the *Illinois Central* case but in the series of subsequent Michigan Supreme Court cases following and adopting the reasoning of *Illinois Central.*

A further indication that there needs to be a finding that one of these circumstances applies is contained in the Great Lakes Submerged Land Act, which is now Part 325 of the Natural Resources and Environmental Protection Act.

To be clear, our argument is not based upon directly applying the Great Lakes Submerged Lands [12]Act. Rather, the point we make is that if you look at the Great Lakes Submerged Land Act and the antecedent case law, it is clear that what that statute was doing in part was essentially codifying the requirements of the public trust doctrine that one of these exceptional circumstances had to be identified and determined before transfer is made.

And under the case law, if a transfer is made without such a finding, it violates the State's perpetual duty to protect the public trust and is, therefore, invalid, and that is exactly what happened with the 1953 Easement. Neither the 1953 Easement itself, nor the statute that authorized it, Public Act 10 of 1953, or any other contemporaneous document shows that the Conservation Commission or

other state officials determined that either of the two exceptional circumstances were present.

First, it did not and, frankly, couldn't conceivably show that constructing oil pipelines in the Great Lakes would enhance the rights protected by the public trust; fishing, hunting, navigation, etcetera. If anything, they represent an existential threat. The activity represents an existential threat to the exercise of those rights. Nor, critically—and this is the central point—was there any contemporaneous finding [13]that the oil pipelines would not impair the public trust rights.

Now, the easement, as Enbridge points out, does contain some general language reflecting in the preamble to the easement the opinion of the Conservation Commission that the pipeline system would be "of benefit" and "in furtherance of the public welfare." But simply put, that is not equivalent to saying and determining, as the public trust doctrine requires, that there will not be an adverse impact or impairment of the public trust rights.

And the same is true—the legislate—there is a distinction, an important distinction between the proposition that something may have some benefit to the public and the separate inquiry required by the public trust doctrine that there will be no impairment of the public trust. It's the latter that is the critical determination.

As we pointed out in our brief, in the same era, in the 1950s, the Legislature itself in enacting other statutes which authorized the granting of easements in the Great

Lakes, for example, 1959 Public Act 11, which we quote in our brief, which involved—which authorized the State to grant an easement to utility companies to construct a breakwater, water intakes, and [14]pier for an electrical power plant.

The Legislature found in the statute itself that there would be no impairment of the public trust, and it also found or addressed a separate question that in addition it was the Legislature's view that there would be benefit to the public.

So this illustrates the proposition that there is an important, indeed critical, distinction between the idea that something may have some public benefit on the one hand and the requirement under the public trust doctrine that there is no impairment of public trust rights.

Enbridge Energy mistakenly claims that the requirements of the public trust doctrine articulated in *Illinois Central* and *Obrecht*, those limitations on the ability or transfers of public trust lands, don't apply here because the 1953 Easement authorized what they characterize as "a public use" of state bottomlands. And I would like to address that very specifically.

The—that—Enbridge principally relies on the case of *Lakehead Pipeline Company v Dehn*, which, as the Court will note from the briefs, involved litigation that arose in 1953 with respect to a decision by the Michigan Public Service Commission to authorize the construction and siting of Line 5 in Michigan, and, more [15]specifically,

it involved the interpretation of a separate state statute, 1929 Public Act 16, which gives the public service—er, gave and still gives the Public Service Commission the authority to regulate the siting of pipelines, and more specifically provides that if the Public Service Commission determines that the pipeline siting should be approved, that, under the statute, confers the right of eminent domain on the proponent or the applicant for the approval, and that's what happened in *Dehn*.

Parties whose property abutted the proposed pipeline route in the lower peninsula argued that the statute—a couple of things—that the statute didn't apply to pipelines that transported—er, let me restate that. They argued that it only applied to pipelines that transferred products solely within the state rather than pipelines, such as Lakehead, which had an interstate transport component. Again, that's not germane here.

The other argument that the court considered was that the pipeline company, Lakehead, was going to profit from the transportation, or its corporate parent would profit from the transportation of oil, and that that was not a public purpose. But, again, the issue in the *Dehn* or *Lakehead Pipeline* case was the interpretation and application of Act 16 of 1929.

[16]It did not—and while the court concluded that within the context of the Act 16 the use of the pipeline as a common carrier would be a "public use," it did not have occasion to consider, nor did it consider the issue we have here, which is, is the transfer of property rights in

Great Lakes bottomlands to a private entity, Lakehead or its successors, is that a public use consistent with the public trust.

So in answer to the Court's inquiry, the issue here is not—under Count I.A. is not whether the 1953 Easement involved a public use as described in the *Dehn* case, but, rather, whether the transfer to an indisputably private entity, Enbridge, for its exclusive use of these public trust bottomlands for an oil pipeline is or is not a private or a public use. It is not a public use in this context. That is not the inquiry here.

Enbridge makes a couple of other arguments as to why they think that Count I.A., our challenge to the validity of the 1953 Easement, it cannot succeed.

First, they argued, or at least initially argued, that the challenge brought by the Attorney General to the validity of the easement "comes far too late," and it is barred by a statute of limitations under which Enbridge—assuming the easement was invalid from [17]its inception, under which Enbridge would have acquired a "prescriptive easement;" something analogous to fee title through adverse possession. But, as we pointed out in our brief, there is clear Michigan case law, notably the *Venice of America Land Company* case, which establishes that, excuse me, adverse possession or in this case prescriptive easement, the State cannot be divested of its property interest in Great Lakes bottomlands through that process.

In its reply to our argument on that point, Enbridge offered no substantive legal response other than to say, "Well, the easement isn't invalid, so it doesn't matter."

The other argument that Enbridge raises in objecting to our challenge to the 1953 Easement is based upon the principle of equitable estoppel. Enbridge points out that the 1953 Easement, when it was issued, contained a notation at the bottom by an assistant attorney general saying "Examined and approved 4/23/53 as to legal form and effect."

And Enbridge argues that that notation, which is essentially on its face advice to the client, that assistant attorney general with the Conservation Commission, somehow is a legally binding determination that the easement is valid and, particularly, that it [18]somehow represents a determination that the easement was consistent with the limitations under the public trust doctrine.

But this simple notation or review as to the form and effect doesn't, in any way, purport to address the issue that is a core dispute here; that is, is that easement consistent with the requirements of the public trust and limitations that that public trust doctrine imposes upon transfers of State interest.

Further, even if the—the view of that assistant attorney general was somehow interpreted as addressing that issue, we submit, respectfully, that it is incorrect for the reasons we've outlined and detail in our brief. And, further—

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THE COURT: Mr. Reichel, can I interrupt you a minute? On this point, is there any case law that addresses change in position whether it be by way of formal AG opinion or endorsement of a position, a legal position, that changes over time, because, as we all know that the Attorney General, the person who occupies that office, changes over time, and so you may get differing opinions over time.

And clearly here there has been—and I guess part of what you're getting at in terms of the Defendants' argument, you may have long periods of time [19]where one or more persons in the position of the Attorney—State Attorney General endorses or at least allows a particular legal position to stand, and then you get somebody who comes along and takes a different position.

Is there any—anything in the law, either case law or otherwise, that addresses specifically that issue? And I'm not challenging your—I understand your argument that this is not a legal opinion. This doesn't create law by making a note on the particular—the note that's on this easement.

I'm not asking you to further elaborate on that because I understand that part of your argument. But I am curious as to whether this concept of estoppel, in essence, has previously been addressed by the courts, or I don't know where else it would be. I guess it would have to be some sort of a court determination.

Is that out there somewhere? I didn't see any citation to that by anyone in the—in the briefs unless I'm not recalling it.

MR. REICHEL: Well, to answer your question, Your Honor, I'm not aware of any published appellate decision that specifically addresses the issue that you're framing; whether an attorney general is bound by legal opinions or determinations of her or his predecessor. I can tell you—I'm not sure how helpful [20]it is here—that although it—in those cases where an attorney general has issued a formal legal opinion, which obviously this was not, there have been occasions where a subsequent attorney general has reached a different conclusion on a legal issue sometimes based upon a change in intervening law or that the attorney general would—the second attorney general would opine that in a new opinion that the prior analysis is superceded.

Certainly, Enbridge has not identified any authority for the proposition that as a legal matter, the person holding the office of attorney general is inexorably bound by the prior decisions or opinions, assuming there were, by his or her predecessor. So I can't point you to authority on that point.

THE COURT: All right. Thank you.

MR. REICHEL: But the—I think the most important thing in this context is looking at the case law involving the application of the equitable—principle of equitable estoppel.

Appendix F

Again, as you know and the parties have argued this, equitable estoppel can be a defense to certain claims where the party opposing the action that's being proposed argues or can show that it, the opposing party, has relied to its detriment on either representations made or conceivably some failure to or some omission on [21]the part of a—the opposing party to correct a misstatement to bar the claim, the new claim, but it is an equitable principle. Equitable estoppel is a venerable doctrine.

The case law clearly shows, both in Michigan and in other states, that it is not likely applied to the State, but there are rare circumstances, such as those discussed in the *Oliphant v State* case that both of the parties briefed, where equitable estoppel has been applied.

And the case law on that indicates that to successfully assert equitable estoppel, there has to be a showing that the estoppel is required by the—in other words, it's based on the requirements of equity, justice, and good conscience. In other words, the position being advocated, the person who is asserting equitable estoppel has to show that the opposing party's position under the circumstances is inequitable, unjust, and un—or unconscionable.

And if you look at—and we've discussed it at length in our brief, if you look at the case, the *Oliphant* case, which is one of the rare cases where equitable estoppel has been applied against the State, the circumstances there are vastly different than what is presented here. Again, we've laid it out in our brief. [22]I won't go into great detail.

But in that case, we are dealing with a situation where the State had actually—this had to do with some lands, bottomlands in Lake St. Clair. The State had actually, in prior years, approved a plat to create lots on these lands and then approved a conveyance of those lands to a private party, who in turn later conveyed title to these plated lots to third parties.

And years later, the State took the position that it wanted these other parties to pay the State for the value of the lots, not the party to whom the transfer was made but successor parties.

And critically in the context of this case, it's very clear if you read the court's opinion in *Oliphant*, that the Supreme Court was calling out the State's position in that case as not involving the protection of public trust rights, which in that case were no longer relevant because these lands were no longer submerged, but essentially asserting a proprietary or a pecuniary interest. In other words, the State was trying to put money the state treasury, not vindicate the protection and preservation of public trust rights, which was no longer possible.

The other case cited by Enbridge in their reply brief, I believe, *Hickey v Illinois Central Railroad* [23]*Company*, 35 Ill.2d 427, is likewise vastly different than the circumstances presented here.

In that case, it was undisputed that for over 50 years, the State repeatedly and formally disclaimed title to certain property owned by a railroad at issue, the Illinois

Central Railroad. And the Illinois Central Railroad had, in turn, conveyed leased lands that were subject to the dispute to third parties, all of whom had relied upon a set of real estate transactions.

And the court held that under those circumstances where the State had affirmatively and repeatedly disclaimed title to the property, it would be unjust, and it would be—the State would be estopped, and in that case the State of Illinois, from challenging the title to these properties.

And the court notably based its decision in part on how the destabilizing effect, the contrary decision would have on property interest, you know. In other words, it would have a cascading effect of undermining and casting in doubt the validity and effectiveness of a whole host of subsequent property transactions involving third parties.

So, again, here, Enbridge basis its argument—estoppel argument not upon repeated, let alone formal representations by the State that the easement was valid [24]or consistent with the public trust, but, rather, a single note made by an assistant attorney general at the time, which didn't address the issue, and a single, essentially, piece of property, the described easement premises covered by the Great Lakes bottomlands, which, and the record is undisputed, Lakehead Pipeline Company and its successors today hold title. There has been no attempt to further convey or transfer interest in those properties through third parties who would be prejudiced.

Let me in this context address one of the questions that the Court asked us to address in your inquiries to us, and that is the relevance of the financial benefit received by Enbridge over the duration of the easement since 1953.

Backing up. As a general principle, the law is clear that when a court considers an issue involving either rescission of a contract or in this case invalidation of an easement, the court must balance the equities between the parties. So, for example, the *Bazzi v Sentinel Insurance Company* case, 502 Mich 390 at 410, a 2018 case, recognized that general principle.

To be clear, that case did not involve this, but it stands for the proposition that in evaluating whether to apply equitable estoppel, it necessarily involved some consideration with competing equities.

[25]And as we noted before, when a Defendant asserts equitable estoppel as a defense, one element of the successful assertion of equitable estoppel is that the other party has relied to its detriment upon the action of the opposing party. So the issue—and it's prejudiced thereby. And, again, that's a general legal principle, for example, that was referred to in *Engel v State Mutual Rodded Fire Insurance Company*, 281 Mich 520, 527, a 1937 case.

Again, to be clear, it's just—that case does not directly apply here, but it stands for the proposition that an element of equitable estoppel is reliance and prejudice.

Here, Enbridge argued, when saying that the State is somehow equitably estopped, that it relied upon the

easement in making substantial expenditures for the pipeline. Well, its obviously true that Lakehead Pipeline Company spent money in 1953 and thereafter to construct and operate the pipelines.

The—in looking at the equitable situation here, our point is that the—that reliance, the investment in constructing the pipeline, while it did occur, one must consider the competing—the other side of the equation, which is that it is abundantly clear that the operation of the pipeline over the past 67 years [26]almost has yielded very substantial revenues to Lakehead and its successors. They wouldn't be doing this if they weren't making a lot of money.

And whatever—I don't know the exact figure what it cost to build a pipeline in 1953, but I think it's self-evident that the—it would be dwarfed by the revenues that Line 5, which is essentially a cash cow for Enbridge, has yielded over the years.

So it's in that context that we submit that their—in balancing the equities and—and that Enbridge, can it show that it would be unduly prejudiced by a determination that the easement is invalid? We submit the answer is no.

We are not—this motion does not seek to undue what has happened over the last 67 years, but, rather, seeks a determination that because the easement is invalid, it ultimately needs to cease the operation. We're not trying to claw back from Enbridge the significant financial benefit that it undoubtedly obtained by relying on what we

allege is an invalid easement, but, rather, simply saying that because it is invalid prospectively, they should no longer be able to continue with the operation that the easement authorized.

So in summary, Judge, we strongly submit for the argument and for the reasons that I've just [27]highlighted here and we've explained in greater detail in our brief, that the 1953 Easement was and is void. It didn't comply with the clear legal established requirements of the public trust doctrine and that its defenses of prescriptive easements or statute of limitations and defenses of equitable estoppel are not meritorious. They do not bar our claim.

So that is why we respectfully ask this Court to grant our motion for summary disposition as to Count I.A., determine that the 1953 Easement was void from its inception, and that once such a determination is made, as we've indicated in our papers, that we will present a separate inquiry as to what the form and timing of appropriate injunctive relief is. But we are simply asking the Court in our motion to determine that Enbridge does not have a valid or cognizable defense to our argument that Count—in Count I.A., excuse me, that the 1953 Easement violates the public trust doctrine.

I'd be happy to respond to any other questions the Court may have about that aspect of our motion.

THE COURT: All right. Thank you, very much, Mr. Reichel.

I will turn to the Defense at this point for purposes of their argument as to Count I.A., and we'll need to determine which counsel intends to argue. Who [28]would like to chime in on this and let me know that?

MR. ELLSWORTH: Your Honor, this is Peter Ellsworth. We would like to divide our argument between Mr. Coburn and I; Mr. Coburn addressing the federal preemption issue, and I will address the other issues that are raised in these motions.

THE COURT: Okay. So that is to say,

Mr. Ellsworth, you will then begin with addressing the Count I.A. issue?

MR. ELLSWORTH: I will.

THE COURT: Okay. Go right ahead, sir.

MR. ELLSWORTH: Thank you. I'm going to start by saying that I've been practicing law now for almost—almost 50 years, and this is the first time that I've ever addressed a court on television or had an argument that was essentially a televised argument. So it's a very unique experience certainly for me, maybe others, in this very trying time we are in. Maybe others have had this experience, but this is the first time for me, and so I'll do my best.

THE COURT: And probably 50 years ago, Mr. Ellsworth, if somebody told you we would be doing this, you would tell them they were crazy.

MR. ELLSWORTH: I would. That's right. It's a much different world.

[29]I'd like to begin by—by, Your Honor, giving you kind of an overview of our—the way we see this case generally, not just in terms of Count I.A., although I will get to Count I.A. quickly here, but we have overriding issues we think that permeate the entire case.

The Attorney General says that she is simply asking this Court to enforce existing law. That is not at all what she's doing in this case. What she does in this case is to raise a fundamental policy question, that question being what do we do about Line 5?

That question has already been answered by the Michigan Legislature. The Legislature has twice passed laws dealing directly with the Line 5 issue. And when I say Line 5, I mean Line 5 as it exists in the—in the Straits of Mackinac, the dual pipeline, although certainly this case has an effect on the entire pipeline because if the—if the Straits portion of it were to be closed down, then, of course, you can't use the rest of the pipeline. It's like breaking a link in the chain. It's all dependent on one another. But if I say Line 5, I mean, in this context, Line 5 as it exists in the Straits of Mackinac.

The Legislature has passed laws twice that deal directly with Line 5. The first law is 1953 Public Act 10, which was mentioned by Mr. Reichel. That was the [30]statute that originally authorized the issuance of an easement. And that statute expressly recognized and authorized an easement in Great Lakes trust waters.

We don't dispute the fact that this is—that we are dealing with trust property here. It is special. It's entitled to special protection. The State can't alienate it. It can't transfer fee title. It hasn't done that here, and we don't dispute the fact that we are dealing with trust property here.

But in 1953, the Legislature specifically authorized a pipeline to be—pipeline easement to be granted. And then much more recently, about a year and a half ago, the Legislature in 2018, Public Act 359, adopted what we call the tunnel statute. The tunnel statute is especially relevant in this context because it is the Legislature's response to the concerns that had been raised over the last few years about Line 5.

And when the Legislature—excuse me, when the Legislature considered what policy should be—we should have as a state with respect to Line 5 in 2018, it had before it all—all of the same information, questions, studies that the Attorney General is pointing to in this case.

At that point, the public debate over Line 5 had been going on for several years at that point. The [31]dynamic risk report, which was the report of the consulting firm that the State hired to take a look at potential risks and discuss alternatives to Line 5, that report had been out and available for a little over a year at the time that the Legislature began looking at this issue again.

And even the anchor strike, which the Attorney General has talked about quite a bit in her Complaint and in her briefs, that anchor strike had occurred in April of

2018, about six or seven months before the Legislature began looking at this—this issue.

So in December of 2018, the Legislature passed the tunnel statute, and in so doing, it—it did not order a curtailment of Line 5's operation. It didn't say it should be shut down.

There was a floor amendment offered in the House of Representatives to decommission Line 5 by a date certain. That amendment was defeated in the State House of Representatives. And then the Legislature as a whole went on to pass the tunnel statute. And it was not—it was not a close margin. It was a bipartisan vote. I think that when I counted up the number of votes, total votes that were cast for this statute was something like 99 in favor, and I think it was 45 or 50, something like that, against it. It's got to add up to not more than [32]148, and I guess there were a couple of people who were not there at that point, but it was a very—I don't want to say it was an overwhelming vote, but it was a very strong margin in the Legislature, and it was a bipartisan vote.

The tunnel statute and the 1953 statute are the statutes that answer that question that I think is being posed in this case: What should the State's policy be with respect to Line 5? And the Legislature's answer in 2018 was "Let's put it in a tunnel." And, in the meantime, the Legislature did not move to take any steps to curtail its operation.

Enbridge subsequently agreed with that policy decision. It agreed that it would pay for a tunnel that would

eventually house Line 5, and that process now is ongoing. It's in the permit stage, and work is being—is being done.

Shortly after Act 359 was passed, several agreements were entered into by the State, the DNR, the Governor; other agencies of the state. The one we talked about and briefing on both sides is, in particular, the third agreement, which expressly recognized, reaffirmed, whatever you want to—however you want to describe it, Enbridge's right to keep operating the tunnel—er, the statute—I'm sorry, the pipeline as the tunnel was [33]being constructed.

THE COURT: I have a question for you, Mr. Ellsworth, and I didn't think to ask Mr. Reichel, so I'll give him a chance after you finish to address this as well when he does his rebuttal presentation on this section of the arguments, but the third agreement, I'm a little unclear, not as to what your argument is as to the components of that and how that supports the Legislature's action in adopting or passing the tunnel statute, but where I'm a little unclear is the fact that the Court of Claims in its opinion as to the tunnel statute—

If I understand this correctly and if I read the opinion and also what you each have written in your briefs, the Court of Claims did not address in any respect the third agreement. And my—what I'm asking for clarification on, is somebody asking me in this case, either side, to in any way address the third agreement?

It seems to be completely linked to the tunnel statute even though it wasn't specifically—I think was not

specifically addressed or part of a decision by the Court of Claims.

Do I have that right, Mr. Ellsworth?

MR. ELLSWORTH: I agree with everything you just said. I think that the importance of Act 359 and [34]then the—and then the third agreement is that it illustrates what the State's current policy with respect to Line 5 is. And I think that is the overriding issue in the case, but we are not suggesting that—that Enbridge's right to operate the tunnel is dependent on the third agreement. Enbridge's right to operate the tunnel comes from the easement and the fact that it's fully in effect.

But this overriding policy issue, I think, is very, very important because the way that I view this case, I think the Attorney General is essentially asking the Court to override the Legislature's policy decision. And appellate case law in Michigan is very clear that the obligation to establish environmental policy is not something that is vested in the courts. That's a legislative function. And the Legislature here has exercised the power most recently in the tunnel statute.

I agree also that Judge Kelly in the Court of Claims case, he discussed Line—I'm sorry, the third agreement. He recognized it was there, but he didn't—he didn't rule on it in terms of all issues that might be raised with respect to third agree—to the third agreement. He did say that the—I think this was implicit in the opinion that it—it was not invalid by reason of Act 359 being defective

constitutionally [35]because it didn't have a valid title to it. That's implicit. And, of course, that issue is now up in the Court of Appeals and will be argued in, I think, less than two weeks from now. That's on the Court of Appeals agenda on the second of June, if I'm not mistaken.

What—what the Attorney General essentially is asking this Court to do is to override the determinations that have been made by the Legislature as recently as about a year and a half ago. I'll return to that probably a couple more times in the argument, but let me turn now specifically to Count I.A. of the Attorney General's Complaint.

As Mr. Reichel said, the Attorney General is saying that the easement was void from the very beginning. The 1953 statute authorized the Conservation Commission to grant the easement. It did so in 1953, the same year. And at the same time that it did it, it made a finding, which I will—I will quote because it's very short. The Conservation Commission said of the pipeline:

> It will be a benefit to all of the people of the state of Michigan and in furtherance of the public welfare.

An assistant attorney general approved the easement as to legal form and effect. And then the [36]Public Service Commission held proceedings in addition to that to basically authorize the construction of the—of the pipeline.

Now, the Attorney General, as Mr. Reichel argued, says that the easement was defective from the beginning

because it didn't contain and expressly recite one of two findings that they say was required by the Supreme Court in the *Obrecht* decision.

They say that the Conservation Commission or the Legislature had to make a finding either that the conveyance improves the trust interest or that there would be, secondly—or that there would be no detriment to lands and waters remaining after the conveyance was made.

This objection that the Attorney General has is—is a highly technical objection. The objection is specifically "You didn't—you didn't make the right super finding. You didn't annunciate it, and you didn't record it, and, therefore, the easement is no good."

The question is not whether one of those circumstances existed or not. It's whether the magic words were used in making this finding. And we know that to be true because we know that at least one of the circumstances, maybe both of them actually did exist in 1953, and we can tell that from the Attorney General's [37]own Complaint.

In paragraph 10 in her Complaint, she says that before the pipeline was constructed back in the early 1950's, 50 million barrels of crude oil were transported by tanker ships in the Great Lakes, and those ships went from Wisconsin through Lake—Lake Michigan through the Straits of Mackinac, down Lake Huron, down to the refineries in Creighton and Port Huron areas.

So we had oil being shipped in large quantities by tanker ships. We all know what can happen to a tanker ship. A tanker ship can run aground, hit a shoal, as the Exxon Valdez did in Alaska. A tanker ship can sink, as the Edmond Fitzgerald did in Lake Superior, and lots of other things can happen to a tanker ship. But oil being transported on a tanker ship is not as safe as oil being transported in a pipeline. And I think there is a real debate about that.

So by authorizing the construction of Line 5 in the Straits, the Conservation Commission was authorizing something that would improve the public's interest in a resource, not detract from it. It made it safer to transport oil than it had been before.

So, in fact, the circumstance that the—that the *Illinois Central* elements and the *Obrecht* elements talked about were there. The Attorney General is [38]complaining because she thinks that the Conservation Commission didn't recite them in proper form. But the finding that the Commission did make, we think, was certainly sufficient to—to meet the *Obrecht* requirement because the finding that—that the, you know, public welfare would be furthered could not have been made by the Commission if—if this project would have been a detriment to the trust property.

And of all agencies of state government, the State Conservation Commission was the most likely to be looking seriously at that issue. And it looked at it and said "This—this project is going to be in furtherance of

the public welfare," which it certainly in our view met whatever *Obrecht* standard might have been there.

But the basic problem with the position that the Attorney General is taking in this case is that *Obrecht* was not there in 1953 when this—when Public Act 10 was passed and when the easement was granted. *Obrecht* is a 1960 opinion of the Supreme Court. It was based in part on the Great Lakes Submerged Lands Act, but that didn't come along until 1955. So it was two years after this easement was conveyed.

And then on the face of the *Obrecht* decision itself, it was clear that the Supreme Court was saying that the findings requirements were not to be applied [39] retroactively. The Supreme Court said that—it said it expressly that the finding requirements were not to be applied to what it called previous legislation. And then the court gave examples of previous public acts that had made various conveyances in public trust waters.

At least—there was a whole list, and it was not meant, I think, to be an exclusive list because the Supreme Court started by saying "This—this—the finding requirement doesn't apply to previous legislation, such as—" these were examples. But two of the examples on the list, and I'll say at least two of the examples, involved public acts that made no findings whatsoever, let alone the kind of finding that was made by the Conservation Commission here. We attached two of those public acts to the reply brief that we filed on, I think it was, December 10th, 2018. So those are there.

There is—there is in short nothing wrong with the form of the—of the easement conveyance. It's perfectly proper. And it's by no means a grounds to throw it out.

Your Honor, we've made other arguments with respect to Count I.A. We think, however, that—that the one that I've just reiterated is dispositive of all of the assertions that have been made by the Attorney General in Count I.A., but I'd like to briefly address [40]one other argument since the Court has asked directly about it.

Obrecht also said that the finding requirements were applicable only in situations where a private company was receiving a conveyance for a private use. In the *Obrecht* case, it was a private company that wanted to build a dock out into Lake Huron. It was a use that the Supreme Court said was a private use, not a public use, and it made that distinction.

In this case, we have a public use, not a private use. We have the *Lakehead* case that Mr. Reichel has talked about, but there are lots of other reasons why this is a public use. Oil pipelines in Michigan are common carriers. They are public utilities. And under Michigan law, public utilities, the property used by public utilities, is used for a public purpose, and there are a number of cases and statutes that say this.

Mr. Reichel mentioned the fact that—I think he said the oil pipeline companies have the power to condemn private property. Most public utilities by statute have the right to condemn private property, which is not what

we are talking about here. This is not a condemnation. It wasn't private property. I mean, this is public property that we are talking about.

But the point I want to make is it would be [41] unconstitutional under the Michigan Constitution for the State to give an oil pipeline company or any other public utility the right to condemn by eminent domain private property because the Michigan Constitution says that only—only property—and, I'm sorry, I didn't—I misstated that. You can condemn private property but only if it is for a public use.

So when—when—when the Michigan Legislature gave the oil pipeline companies the ability to condemn private property, it did so only if the use was a public use because, otherwise, it would have been unconstitutional. And most all of the property that public utilities, electric companies, railroads, other kinds of public utilities use is used for a public use.

We have—as I said, we've pulled together some authority on this subject; cases and statutes. And if it would be helpful to the Court, we are prepared to summarize that briefly in writing and submit it to the Court after the argument is over, which might be helpful. It's actually fairly extensive. It's not huge, but it's more than what I want to get into here, although I think there is one—one good case recently, and that is the *County of Wayne v Hathcock* case, which we can give you the cite for. That's a decision by—that was written by Justice Young—Chief Justice Young. And the reason [42]that I

think it is helpful is because he reiterates in that decision the distinction between public use and private use and the fact that public utilities have the right to—the property that they use is property that's used for a public rather than private uses.

Just briefly, one other thing: Mr. Reichel has talked a little bit about prescriptive easement and estoppel. I don't want to—I don't want to really get into those doctrines at this point because we are really relying on what the Supreme Court said in *Obrecht* about the finding requirement not being something to be applied retroactively, but we are not saying here that either of the prescriptive right doctrine or the estoppel doctrine gives Enbridge fee title to the bottomlands. That wouldn't be possible. I mean, the State's got to—the State has got to retain fee title to trust property.

All we are saying is that those two doctrines should prevent the State 65 years after the fact from saying that the—that the easement was defective from a technical standpoint. That's all we are saying about these two doctrines.

Although, I will just comment on the argument that the Attorney General is making about how much money Enbridge maybe has made off of this pipeline over the years. I think that the Attorney General has this upside [43]down. What—what she is effectively saying is the longer it goes, the more money the company makes on the—in this case the pipeline. The more money the company makes, then the more difficult it is to get the easement or to apply collateral estoppel. That's backwards.

The longer it goes ought to work the other way. The longer it takes for the State to come in and say "What we told you before is not correct, and we are taking that back," that should get more difficult to do the more time that goes along, not less difficult. So I think the Attorney General has that sort of upside down.

I'll be glad to answer any questions you might have at this point, Your Honor.

THE COURT: Thank you, Mr. Ellsworth.

I'm going to have Mr. Reichel respond, to the extent he wishes to respond, and specifically to address the arguments that the Conservation Commission did—the issue as to the technical argument that the Conservation Commission, perhaps, did not specifically recite the benefit in proper form, but the benefit did exist at the time in order for—for—at least for purposes of analysis of whether the requirements of a public trust doctrine were met.

And then also the *Obrecht*—the quote from the *Obrecht* case that it did not apply. That the [44]requirements—the finding requirements do not apply to previous legislation.

I assume you probably were going to touch on that anyway, Mr. Reichel, but I'll point that out, and you can tell me anything else you wish.

MR. REICHEL: Thank you, Judge.

Addressing the points Mr. Ellsworth made, at least the salient—the ones he highlighted and the order that he

made them, this canard from Enbridge that this litigation involves an attempt by the Attorney General to impose her own policy preferences on this issue or determine a public—an issue of public policy is flat out wrong.

We've explained in our brief why that is the case. The basis of our Complaint is rooted in the law, in this case, under Count I.A., the public trust doctrine.

With respect to the suggestion that the argument here involves a formalistic or technical finding, that is not the case. We are not—our argument is not, as Enbridge claims, that the Commission was required to recite "magic words." Far from it.

The public trust doctrine protects and preserves and requires the State to protect and preserve in perpetuity certain public rights and, to that end, [45]places limitation on property transfers on public trust bottomlands.

And although counsel is right that this did not—what was at issue, there was an easement, not full fee title, the principle is the same. It is the easement committed to Enbridge's exclusive use for a defined purpose, a defined set of Great Lakes bottomlands.

The suggestion that somehow the Public Act 10 of 1953 made a determination that this particular easement, the 1953 Easement, was consistent with the public trust is wrong.

If you read that statute, it broadly authorizes the Department of Conservation to grant easements for

certain kinds of structures or utilities in a variety of state-owned lands, including, in some cases, Great Lakes bottomlands. But it did not determine or purport to determine that this particular conveyance was consistent with protection of the public trust.

The suggestion that the Conservation Commission somehow implicitly found that the construction of the pipeline would benefit the trust resources because the project was intended to replace Enbridge's, or, actually, it was Lakehead's, past practice of transporting oil from Superior, Wisconsin, to Sarnia by tanker is beyond a stretch.

[46]The—yes, of course, there were and are risks associated with the operation of tankers, but the—the impetus, and if you look at the historical record as alleged in the Complaint, the impetus for Lakehead or its parent company to construct this pipeline was not to reduce risk of spills from oil tankers. It was to enable them to push more oil faster and year-round from Alberta, Canada, to Sarnia, Ontario.

And this whole project, the 1953 project, was nothing more than an effort by Enbridge to find the shortest and cheapest and most continuous way of moving Canadian oil from Alberta to Sarnia, Ontario. It was not expressly about, nor did the, excuse me, Conservation Commission base its approval on the proposition that "Well, this is going to be a lot better than sending oil by a tanker."

So I don't think there is—certainly our Complaint doesn't establish that, nor, for purposes of this motion,

which, again, is based upon the pleadings that—Enbridge's argument that the Commission, that is Conservation Commission, somehow implicitly found that the public trust would be benefitted by using a pipeline rather than oil tankers is just not sustained.

And the—the reason—and, again, I want to emphasize this very clearly. The issue is not the [47]recitation of any particular words, although that is required, we believe, by the case law. That is not a particular formula but an expressed determination that the public trust would not be impaired, but it's not just a formula.

Reading our Complaint as a whole, it certainly alleges in Count II.B. and elsewhere that the continued operation of the pipeline, Line 5, at the Straits presents a grave risk of harm to public trust rights, including, in the event of a spill whether caused by an anchor strike or some other circumstance, to public rights to fish, boat, etcetera; all core public trust rights.

So I take strong exception to Enbridge's continuing suggestion that the point of the Complaint is sort of a gotcha technical argument that depends upon the—that argues that there had to be some "magic words" recited.

Bear with me, Your Honor. I'm just looking at my notes as to what he covered.

THE COURT: No problem.

MR. REICHEL: With respect to *Obrecht*, the contention that *Obrecht*—the discussion in *Obrecht* both

sides quoted it at length in their brief, references to "except as provided by prior statutes such as," and then [48]it listed some certain cases.

We've explained in our brief, and we stand on that, that what the court was doing there was saying that cases where there was not an implication or adverse affect on the public trust rights, for example, in one case because the lands in question were now dry, there was no water over them, and, therefore, there could be no impairment of potential—the exercise of public trust rights.

And, moreover, that—this, I believe, was the *Nedtweg* case, again, we both cited in our briefs. That the statute in question that authorized the transfer of interests also was done in a way that made these transfers subject, hypothetically, to the continued exercise of public trust rights, if that were possible.

So, again, I don't want to get into the weeds, but suffice it to say for the reasons we've explained in our brief, Enbridge is wrong, we submit, in claiming that the Act 10 of 1953, this generic statute that authorized the granting of easements, somehow was a prior statute encompassed in the language in *Obrecht* in that decision.

And, finally, with respect to the issue of public versus private use, again I touched on this before in explaining why we think that the *Lakehead v Dehn* decision has no bearing in this case is actually [49]underscored in part by part of Mr. Ellsworth's argument. The issue in that case was the application of a statute that would have the effect

of granting a private entity the right to exercise eminent domain to take private property.

This case, what we are arguing here, has nothing—our case has nothing to do with condemnation. The issue here is not whether Enbridge could have condemned the Great Lakes bottomlands. Obviously, they could not and did not.

So the standards that courts apply, whether it be, for example, the *Hathcock* case about the constitutional permissibility of the exercise of eminent domain power only for "public uses" has no bearing on the question presented here.

I'd be happy to respond further to any of the points raised by Mr. Ellsworth, if the Court desires.

THE COURT: Mr. Reichel, could you address whether the invalidation of the easement, if that were the ruling here, whether the invalidation of the easement would invalidate, then, the tunnel statute? In other words, we—we did talk about this a little bit in a conference we had previously, but do you see impact between these two cases?

If I were to rule that the easement is invalid, [50] what does that do, if anything, with regard to the tunnel statute and the related third agreement? And I guess as a—as a subpart of that question, or does it matter? Is that something I should completely ignore and not be concerned about any impact by invalidation of the easement?

MR. REICHEL: Thank you for the opportunity to address that. The short answer about the relationship between the tunnel statute and this case we've already addressed in response to an inquiry from the Court last fall when that issue was live. And the short answer is that the two cases present—and I think actually Mr. Ellsworth conceded this is the case—two distinct issues.

The tunnel statute, the Act 359 of 2018, as is clear from the briefs as Mr. Ellsworth indicated, set up this new entity, Mackinac Straits Corridor Authority, and then directed that new entity to enter into a particular kind of agreement with a private party, actually Enbridge, although it didn't mention Enbridge by name, to build a tunnel. That's what it was about.

And in connection with that, the Act 359, contrary to the suggestion, says nothing whatsoever about the continued operation of existing pipelines. The tunnel statute was addressed to the creation of a new [51]entity and a process by which a tunnel could be built, which would ultimately, assuming it's built, house a replacement for the dual pipelines at the Straits, but the tunnel statute did not by its terms or impliedly say that Enbridge is authorized to continue to use the existing pipeline. It simply was not addressed.

That's why, getting back to my initial point, there is a clear legal distinction between the question of whether Enbridge may continue to operate the existing pipelines, which necessarily depends upon the validity and continued

validity of this 1953 Easement, is distinct from whether and under what conditions a tunnel will be built, etcetera.

Now, let me touch briefly on the third agreement. Again, this has been discussed.

THE COURT: Right. Because although the statute didn't address continued operation of Line 5, the current Line 5, the third agreement references, in terms of the construction, the length of construction of the tunnel under the tunnel statute. Is that right?

MR. REICHEL: That is correct. The third agreement—two points—was not authorized or required by the tunnel statute. It was an agreement entered into by the former Snyder administration and Enbridge, which said that—a couple of things:

[52]The third agreement is mutually dependent upon the tunnel agreement. In other words, if the—if the tunnel agreement is not there, then this third agreement saying "You can continue to operate the existing pipelines" is not there either. So there is, by their terms, a connection between the two.

But the Court of Claims ruling did not, as was indicated, address the validity or challenges to the validity of the third agreement except to the extent that it involved—

What the Court of Claims said, and we laid this out in our briefs, is that—what it was asked to decide was

whether Act 359 was unconstitutional and whether certain agreements entered into in December of 2018 are invalid because of constitutional defects in Act 359. That's what it said.

With respect to the third agreement, again as has been noted, the Court of Claims made its ruling. The State has appealed that ruling upholding the validity of the Act 359. The appeal is still pending, and for that reason, among other reasons, if the Court of Appeals reverses the decision of the Court of Claims, that would, we believe, necessarily lead to the invalidation not only of the tunnel agreement but, by its terms, the third agreement. So the bottom line is, there is continuing [53]uncertainly about the outcome of the litigation of the Court of Appeals. That issue is not resolved.

But more fundamentally, Judge, to address your question head on, if you were to grant our motion for partial summary disposition under Count I.A., that would affect the operation of the existing pipeline.

If—that ruling would not on its—by its terms prohibit the construction of a tunnel. I mean, that's an entirely separate issue. So I don't know if that answers your question, but that—

THE COURT: It does. It does. Thank you.

MR. REICHEL: You're welcome.

THE COURT: I'm going to go back to Mr. Ellsworth on the point that he raised as to submitting supplemental

authority and specifically the reference to the *City of Wayne v Hathcock* case and the other cases that you indicated. I will allow that, and I will allow the State to—to respond, and we will separately—I don't think we need to take this hearing time to address the logistics of that and the timing of that, but just so we don't all lose sight of it or forget about it, I just wanted to comment about that now.

Mr. Ellsworth, is there anything that you want to make on the points that we were just addressing with regard to Mr. Reichel's rebuttal? And then after you do [54]that, I think my intention will be to—I think we are going to shift to the next area of argument after that. So it probably would be a good time to take a break and for everybody to prepare to shift for that part of the argument.

But, Mr. Ellsworth, anything else, sir?

MR. ELLSWORTH: Just two real quick points, Your Honor. First of all, you asked Mr. Reichel if you ruled for the State in this case, does that invalidate the tunnel statute? The answer is no, but a lot of things happen at that point because the tunnel would have to shut down, and there are all sorts of ramifications to that.

But the point, I think, that's important is that the Legislature did not—did not take any steps towards doing that. And, in fact, when—in the House of Representatives, I mentioned before, there was an amendment, a floor amendment, proposed to set a date certain by—by when the Line 5 would have to shut down. That amendment

was voted down. That's a pretty good indication of what the Legislature intended at that point. The Legislature has not taken any steps to do what the Attorney General wants the Court to do in this case.

Secondly, the distinctions that Mr. Reichel is [55]trying to make in terms of the kinds of previous legislation that *Obrecht* was talking about that were not—were not covered by—retroactively, at least, they're not in the opinion. You know, he's finding things that are not there. The court simply said—I'm looking at the opinion now:

> No part of the beds of the Great Lakes belonging to Michigan and not coming within the purview of previous legislation, such as . . .

There were no qualifiers on that as to, you know, the kind of—the kind of trust lands you were talking about. It was—it was whether the—you know, the public acts that authorize them were previous legislation. That's all the court was saying. So that's really all I have, unless you have anything further for me.

THE COURT: I don't.

Mr. Reichel, does that raise any other point for you before we shift?

MR. REICHEL: No, Your Honor. I think, as I said, we believe—we'll rest on our brief on that particular point.

THE COURT: Okay. Why don't we take a short break, and we are going to go—where do you intend to [56]go next, Mr. Reichel, in terms of argument? Are we going to the second portion of—it would be Count I.B.

Is that your intention or—

MR. REICHEL: Well, to be clear, Your Honor, and the parties conferred about this beforehand. We agreed that it made sense to bifurcate, as we started to do here, the Count I.A., which was the subject of the Plaintiff's motion for partial summary disposition on the one hand, and then the Defendants' motion for summary disposition with respect to the remaining counts in the Complaint—

THE COURT: Okay.

MR. REICHEL: —that is, I.B., II—

THE COURT: Because it is a broader argument that overlaps, to some extent, some of the issues.

MR. REICHEL: Correct. So what we anticipated is that when the Court turns to the remaining counts, Enbridge, as the moving party, would have the opportunity to first address that subject, of course, to our right to respond.

THE COURT: Okay.

MR. REICHEL: But that is what the parties, I think, agreed to among themselves as an efficient way

to approach this. If I am misstating that, I will stand corrected by counsel for Enbridge.

[57]MR. ELLSWORTH: No. We agree with that. And I would plan on addressing the Count I.B., Count II, and Count III with the exception of preemption and—

THE COURT: Mr. Coburn will do that.

MR. ELLSWORTH: Okay.

THE COURT: Yeah. Okay. That's fine. Let's take, Ms. Dexter, 15 or—

THE COURT REPORTER: 10 is fine.

THE COURT: Okay. We'll come back between 10 and 15. You can get ready for the next section then in the way that you have outlined it, and then we'll go right into those other counts.

THE BAILIFF: Judge, I want to clarify before we stop what's going to happen with the live stream. I'm going to end the live stream so we can take a break for everyone here, and then we will restart the live stream.

That means that folks who are watching the live stream right now will have to refresh their page and reenter a new live stream once we come back, probably around 10:45.

THE COURT: Okay.

THE BAILIFF: Okay.

THE COURT: Sounds good. Thank you.

(At 10:32 a.m., recessed; reconvened at 10:52 a.m.)

[58]THE COURT: All right. So as we indicated before the break, we are going to now turn to Mr. Ellsworth to address the remaining arguments, including the rest of the counts and the portions of the Defense motion for summary disposition motion.

Mr.—

Except for I understand Mr. Coburn at some point will jump in as to the preemption issue.

Mr. Ellsworth, when you're ready, sir, you can proceed.

MR. ELLSWORTH: Thank you, Your Honor. And our plan would be to have Mr. Coburn follow me. I'll try to compete—complete the comments that I have and then turn it over to Mr. Coburn so we are not going back and forth.

I will first address Count I.B. in the Attorney General's Complaint. And I will probably, in so doing, kind of slide into Count III, which is the MEPA count, because I think that the two are connected.

Appendix F

The Attorney General says, first of all, that the public trust doctrine, common law public trust doctrine, should be used here to—as a basis to close the pipeline.

I think we have to start with the Michigan Constitution and specifically Article IV § 52. Now, [59]Article IV § 52 is the part of the Michigan Constitution that states that it is the responsibility of the Legislature to protect air, water, and other natural resources.

The Supreme Court has said in several decisions, and the Court of Appeals has as well, and we've cited some of those decisions in our briefs, that environmental policy making is up to the Legislature, not up to the courts. The courts have a role. The role of the courts is to enforce the policy that is set by the Legislature, but it's not to make policy. That's a legislative function. With respect to the implementation of Article IV § 52, it's obviously not a self-executing provision.

As it is relevant here, the Legislature has adopted two statutes. The first one I've already mentioned; that's the 1953 Act that authorized the easement in the first place. I'm sorry, the '53 Act does not implement the constitutional provision because that came before the constitutional provision, but the tunnel statute, which we've already talked about, that is done in implementation of Article IV § 52.

And then the general statute in Michigan, which was enacted to implement Article IV § 52, is the Michigan Environmental Protection Act, MEPA. MEPA was enacted

in [60]1970 originally, and it was enacted specifically to implement Article IV § 52. And that original enactment did two things, which is still relevant today:

Number one, it gave standing to the Attorney General, and to anybody else for that matter, to bring lawsuits for declaratory judgments and/or injunctions, to protect the environment.

And then, secondly, MEPA set the standard, the test that a plaintiff has to meet in order to establish a prima facie case. In other words, to get in the door on a case where the requested relief is an injunction or declaratory ruling.

And the standard that MEPA sets, the get-in-the-door standard, if I can describe it that way, is that a plaintiff has to show either that there has been pollution, impairment, or destruction which has occurred, or—and this is the part that is important here—or is likely to occur. That's the threshold test that the Plaintiff needs to meet here in order to get in the door to keep this claim alive.

Now, the Attorney General in Count I.B. seems to be arguing that there is some other standard out there someplace that may be available under common law public trust principles. I—I can't tell exactly what that standard would be, but she is quite clearly arguing that [61]there is some other body of law out there in addition to what MEPA provides.

She cites the *Glass v Goeckel* case, but *Glass* was not a pollution case. It was not an environmental case. *Glass*

was a case involving the right of a member of the public to walk on beaches of the Great Lakes. In approaching that statute—er, that case, the Supreme Court looked first to see whether there was a statute that would be controlling. It determined that MEPA was not applicable because *Glass* did not involve pollution or impairment.

Then it considered whether the Submerged Lands Act might be applicable, and the answer from the Supreme Court again was no. And that's why the Supreme Court then proceeded to consider common law public trust principles. It's because there wasn't a statute there that provided any direction to the court in terms of what to do. And the Attorney General hasn't cited any other case where common law trust principles were used as to make a determination in any case where MEPA was applicable. Probably the best clue that MEPA provides the sole standard is MEPA itself. MEPA says that:

> Actions for an injunction to protect the air—

And I'm quoting here.

> [62]—the air, water, or our natural resources or the public trust in these resources.

That's what MEPA applies to, and that's exactly what we have here. And that's a pretty good clue that MEPA is the controlling standard here or supplies the controlling standard.

The Supreme Court has also said that where MEPA is applicable, courts do not have plenary authority to do whatever they think is best. That's the *PBB* case. And the Court of Appeals has interpreted that to mean that ad hoc decision making outside the framework of MEPA is—is not permitted.

So now let's go to—actually, to Count III in the Complaint. This is the MEPA—this is the MEPA count where the standard is likely to impair the environment. Case law says that "likely to impair" is synonymous with probability of impairment. To me, probability suggests something that's over 50 percent; more than likely than not to happen.

So we go back to the Complaint to see what the Attorney General has alleged in this case because this is a (C)(8) motion, obviously. The Attorney General, first of all, alleges that impairment is likely, but that's a conclusionary allegation. That's not sufficient. That's [63]just a repeat of what the statutory test is. You have got to have facts or evidence or a fact-based allegation.

So we go back to the Attorney General's complaint to see what she has alleged. And the basic allegation is in paragraph 35 in her complaint. And this, again, I will—I will read from the Complaint where she says, quote:

> Dynamic Risk estimated the chance of rupture of the Straits pipelines in the next 35 years to be not one in a million nor one in a thousand nor even one in a hundred but a remarkable one in sixty.

Now, a one in sixty chance of a rupture from any cause over a 35-year period, but this pipeline is not going to be in the water for 35 years. The tunnel should be quite completed under a few years. Enbridge has agreed in the subsequent agreements that came after the tunnel statute was adopted, Enbridge has agreed that it will decommission Line 5 and enclose it in that tunnel, and that will be considerably less than 35 years.

So we have to—we have to look at this one in sixty chance on an annualized basis. And when you do that and you do the math, the chance of a rupture from [64] any cause at all comes down to one chance in 2,000 on an annualized basis.

That's not likely. That's not probable. That doesn't meet the threshold standard that MEPA sets to get in the door. She cannot establish a prima facie case with that allegation.

Let me go back now to the nuisance claim, which is Count II in the Complaint. The AG is arguing what Michigan courts have called an anticipatory nuisance; it hasn't happened yet, but the Attorney General says it may come into being.

Anticipatory nuisances under Michigan law are actionable, but the Supreme Court has set a very, very high standard that a plaintiff has to meet. No injunction can be based on the mere possibility that a nuisance will arise. The Supreme—and that's part of the test from the Supreme Court. And the Supreme Court continues

saying "An injunction may issue only when the nuisance is practically certain or strongly probable."

A one in 2,000 chance of a spill, of a release doesn't meet that test. It is not practically certain or strongly possible, not when it's only one chance in 2,000 on an annual basis.

So the nuisance claim doesn't survive the test that's applicable either. So the nuisance claim, [65]Count II, in addition to Count I.B. and Count III should be dismissed by the Court.

Let me go back and finish where I began because I said that I would return to this because I really think it's the overriding issue in the case. The State's policy was set by the Legislature and the tunnel statute in 2018. That policy determination, we think, is binding on this Court.

The Attorney General is asking you to shut down the pipeline, which is something that the Legislature has not done, and that is a policy decision. That's not enforcement of existing law. And under the case law, the Court doesn't have any authority to overturn something that the Legislature has done.

This is not a question of whether this pipeline is going to remain in Lake Michigan in perpetuity. It won't. The Legislature said "Enclose it in a tunnel," and Enbridge said it would agree, and it has already set out to do exactly that. It is in the permitting stage.

This case, I want to—I want to turn this over to Mr. Coburn. This case as presented by the Attorney General is essentially—what she's concerned about is—is safety, whether the pipeline is safe from a release of oil in the Great Lakes.

Safety is a federal issue, and Mr.—and I'm [66]not competent to address that, but Mr. Coburn has worked in this area for many, many years. So I would like to turn this over to him to address the federal preemption issue.

THE COURT: All right. Very good.

Mr. Coburn, sir.

MR. COBURN: Thank you, Your Honor. Before I turn to preemption, I want to say a word about the third agreement in response to the question you raised earlier, Your Honor. I would first note that you have before you today two authors who were involved in drafting the third agreement: Myself and Mr. Reichel, who worked on the third agreement with us.

The—there are two important points relative to the third agreement as to which I would suggest that at a minimum you should take judicial notice:

First, the third agreement provides that the dual pipelines may continue to operate pending their replacement in the tunnel. That's a critical fact that the State can—cannot ignore, and obviously it is diametrically opposed to the position that the Attorney General was taking in this case.

Second—and here I would make note of the fact that the Court of Claims noted that the third agreement provides in Section 4.2(d) that:

> [67]In entering this third agreement, and thereby, again, authorizing the dual pipelines to continue to operate until such time that the Straits Line 5 replacement segment is placed into service within the tunnel—

This is the critical language.

> —the State has acted in accordance with and in furtherance of the public's interest in the protection of waters, waterways, and bottomlands held in public trust by the State of Michigan.

So the third agreement, again, responds directly to the Attorney General's position in this lawsuit and sets out the State's—a very clear expression of the State's view that continued operation of the pipelines is consistent with the protection of the public trust lands that Mr. Reichel and others have built their case around.

That said, on the third agreement I'll turn to preemption. And in the course of addressing preemption, I'll also address the question you raised, Your Honor, [68]before the hearing about the relationship between preemption and lands that are held in public trust, bottomlands, because we have found some, I think, important law on that issue that weighs in our favor.

So to begin, the federal law footprint in the area of interstate pipeline regulation is very large, and it is broadly preclusive of state regulation of pipeline safety. To perhaps state the obvious: Interstate pipelines are instrumentalities of interstate commerce.

There is a national interest in these pipelines because the nation's energy supply depends heavily on them and because they cross multiple jurisdictions. As one federal court in Minnesota has noted in barring a county from prohibiting an interstate pipeline from operating on county property without compliance with the county's own safety standards—and here—this is what the court said:

> Hazardous liquid pipelines run through 21 states, and presumably through small and large plots of land belonging to vast numbers of persons. Were each of these landowners entitled to demand compliance with their own safety standards, the clear [69]congressional goal of a national standard for hazardous liquid pipeline safety would be thwarted.

That's a quote from a federal court case *Williams v City of Mounds.* We can supply the citation, but it's a 1987 federal court case from the district of Minnesota.

So this—this federal safety regulation, which is critical to the functioning of the national pipeline system, is primarily administered by the Pipeline and Hazardous Materials Safety Administration, commonly known as PHMSA, which is an arm of the US Department of Transportation.

Appendix F

PHMSA operates under the terms of the Federal Pipeline Safety Act. A key goal of federal safety regulation under that Act is the prevention of leaks and ruptures, including into waterways. Thus, PHMSA imposes all manner of requirements of interstate pipelines, including the operation of Line 5, ranging from required leak detection systems, to pipeline design, to testing and maintenance of pipelines.

PHMSA also has broad power granted to it by congress in a 2017 amendment to the Pipeline Safety Act to address unsafe conditions. PHMSA has the right to [70] force a pipeline to modify its operations or to close where PHMSA determines that there is an imminent hazard to the public from the pipelines operation. And as recently as October 2019, PHMSA adopted a regulation implementing that statutory authority that it has.

So PHMSA can exercise rights to close a pipeline that it determines presents an eminent hazard. Needless to say, it has not done that with the dual pipelines. And, moreover, the statute and the regulations authorize PHMSA to seek out the views of states so states are not cut out of the process. PHMSA can solicit their views with respect to how it should deal with a dangerous pipeline.

Further, PHMSA requires that integrity assessments of dual pipelines be completed no less frequently—and this applies specifically with respect to the dual pipelines—no less frequently than annually. Given that requirement and Enbridge's own intensive integrity requirements, it's fair to say that the dual pipelines are among the most heavily

monitored pipelines in the nation. They're carefully monitored by Enbridge and by the regulator, and they've been audited by the regulator to ensure that they are safe.

Importantly here, the Pipeline Safety Act—and here well get to preemption—includes an express [71] preemption provision. That preemption is necessary to avoid exposing pipelines to the possibility that some state or locality may seek to regulate or even force the closure of a pipeline on the basis of its perception. Its perception of safety concerns.

So the Pipeline Safety Act says in very clear and broad language—and if you don't mind, Your Honor, it's only one sentence. I'll read it:

> A state authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.

That's at 49 USC 60104(c). This is a very expansive preclusion of state regulation in the area.

Nonetheless, through each count of her lawsuit, the Attorney General is seeking to force the closure of the segment of Line 5 under the Straits, the dual pipelines, on safety grounds, albeit her claims are cloaked in different terms. But, nonetheless, each count is in direct conflict with federal preemption law because her actions are based in each case—in each count on safety concerns.

That is clear from the face of the Complaint. For example, paragraph 48 says that:

> [72]Regardless of a pipeline operator's safety, culture, and integrity management system, the risk of accidents, failures of humans or materials are 'an enduring inherent feature of hazardous materials pipeline operation.'

If that isn't safety, if that isn't a safety concern, I don't know what is. What she's saying is that oil pipelines are, in fact, an inherent safety risk, which is underscored in several places in her Complaint: In paragraphs 48 through 53 on her public trust count; in paragraph 67 on her nuisance count; in paragraph 70 on her MEPA count.

The safety standards she seeks to impose is one that quite simply would prevent oil pipeline operations in a setting where, in her estimation, in the Attorney General's estimation, the pipeline is too dangerous. In fact, she uses the words again "inherently dangerous."

That kind of state-created safety standards opens the door wide to interference with the national pipeline system, contrary to what the Pipeline Safety Act, the federal law, is trying to allow.

Today the Attorney General is arguing that the [73] pipeline is an unacceptable safety risk to the Straits, but tomorrow she, or some other attorney general in another state, might look at any precedent that is set here and attack another pipeline segment for being too close to a

state forest, too close to a population center, too close to a river, claiming that the State's interest and the protection of those resources outweighs the—the safety concern or the federal concern. That's just not what the law allows.

The fatal flaw is that the Attorney General is expressly preempted by the Pipeline Safety Act from enforcing her view of what is safe and not safe or from seeking to close a pipeline due to her perception of its dangers, a perception that is not shared by the regulator.

Rather than complain to PHMSA, she has brought this lawsuit, tried to force, again, the pipeline to close based on her perception of safety. She's trying to take matters into her own hands, but neither she, nor any other state attorney general, can do this.

Federal preemption law is clear that we need to avoid a patchwork of different state, state safety standards resulting in attempts to close this or that section of a pipeline.

Now, the Attorney General has responded, and [74]I'm sure we will hear from Mr. Reichel today, that she's not, in fact—in fact, seeking to enforce safety. He will say, I assume, that this case has nothing to do with safety, but, rather, is focused on the siting of a pipeline, a matter of which we acknowledge PHMSA exercises no control for oil pipelines. But with all due respect, that argument lacks all credibility.

Appendix F

The Complaint itself is fully at odds with the notion that this case is anything but a siting case. Siting—er, anything but a safety case, I'm sorry. Siting is relevant when a pipeline is first being planned or when a pipeline is being moved.

At that point, siting is a relevant issue. But, here, that was resolved in 1953. The State granted an easement, as we just argued about, in 1953 to site the pipeline exactly where it is, on the Straits bottomlands. That was done pursuant to legislative enactment.

The State of Michigan, specifically in Act 10, allowed a pipeline to be sited on the bottomlands of the Straits. The Public Service Commission authorized the pipeline to run through the Straits. Thus, we are not here arguing about siting; that was resolved. We are arguing about safety. Again, preempted.

In fact, I would contrast this case to the case that is pending as we speak at the Michigan Public [75]Service Commission where Enbridge has sought permission from the PSC to move, relocate the dual—what are now the dual pipelines under the Straits into the tunnel.

Enbridge takes the position that it already has authority to do that, but alternatively if it doesn't have that authority, it asks for that authority. That is a siting case, and it's in the right forum; the Michigan Public Service Commission. This, this case, the case before Your Honor is not a siting case; it's a safety case.

Now, as you know, Your Honor, from the allegations, there was an anchor strike in April 2018. In response to that, Enbridge has taken a series of measures, which the State is well aware, to reduce the risk of any future strikes. But the Governor, Governor Whitmer, also took what we consider to be a very responsible measure directing her Department of Natural Resources in May of 2019, to require that vessels traversing the Straits and passing over the pipelines check their anchors.

That's in addition to prior state action designating that area as a no-anchor zone, which the coast guard has also done. These actions don't regulate or infringe on PHMSA's exclusive jurisdiction to address pipeline safety. By contrast, the Attorney General's [76]actions here are in direct conflict, as I've said, with the Pipeline Safety Act.

The case law, and I will not take up the Court's time this morning going in detail about the cases. But suffice it to say that the case law that's discussed in our briefs is fully on our side of this issue. Three cases: *Olympic Pipe Line v Seattle, Texas Oil and Gas Association v Austin*, and the *Kinley* case; three federal court cases establish that where a locality seeks to enforce its own safety regulations on an interstate pipeline, it cannot do that.

By contrast, the cases that the State cites—*Portland Pipe Line, Texas Midstream*, and *Enbridge v Town of Lima*—in each one of those cases, the court found that what the locality or the state sought to enforce was not a safety standard. In one or two cases there may have been some overlapping interest in safety, but the court—

the court ultimately found that the prohibitions and the activities sought to be enforced in those cases were not safety centered in contrast to this case.

It's also worth noting that Michigan courts have recognized federal preemption. The *Marshall v Consumers Power* case cited at page 37 of our opening brief provides that state law can't be applied to regulate radioactive hazards, certainly an inherently [77]dangerous matter, because of federal preemptive law.

The same is true here. And, again, the Attorney General has remedies. Her remedy is to go to PHMSA and persuade PHMSA that the dual pipelines represent the kind of risk that she says they represent.

Finally, Your Honor, I want to address the question that you raised prior to the hearing about whether we can find examples of where federal preemption has been applied either to state-owned bottomlands or other state-owned lands.

Now, one case that addresses that is one that is already cited in our brief; that's the *Olympic Pipe Line* case where the City of Seattle owned the property on which the pipeline that it sought to regulate through its own safety standards was located. And the court said, "No. Even though you own the land, even though you have a proprietary interest, you, the City of Seattle, cannot exercise safety jurisdiction. That is the purview of PHMSA."

Also, the *Williams Pipe Line v City of Mounds* case that I mentioned earlier, same result, same essential facts, and we'll get you a discussion of that case, if we may, Your Honor.

But in addition to those cases, we've located what I believe is some very significant additional [78]precedent that goes directly to your question of the applicability of preemption with respect to land that is held in public trust.

First off, we have found a federal statute, 43 U.S.C. 1314; it's part of the federal Submerged Lands Act from 1953, which predates Michigan's own Submerged Lands Act. That federal Act was enacted in order to make it clear in the face of an earlier Supreme Court decision that the states own the bottomlands, such as the lands under the Straits of Mackinac. There was an issue about that back in the late '40s and '50s.

Here, Congress made it clear in this federal law that, in fact, the states own those lands, but—and this is an important but—in enacting that statute, the federal government retained authority to regulate interstate commerce with respect to those bottomlands. In other words, it didn't give up its authority completely.

Section—43 U.S.C. § 1314—§ 1314 specifically allows the United States to retain powers over commerce, which is paramount to—that's the statutory language—paramount to the state's ownership interest in the bottomlands.

Now, several cases have interpreted that statute, applied the statute. And one of them, *Weaver's* [79]*Cove*

v Rhode Island Coastal Resources Management, 583 F. Supp. 2d 259, a 2008 case from the District of Rhode Island, says that the federal government's preemptive powers in the context of that case, which was dredging in connection with the construction of a liquefied natural gas terminal, the case holds that the federal government's powers over that dredging are—supercede the state's interest in those bottomlands, notwithstanding that those bottomlands are held in public trust. The court held, in other words, that the public trust doctrine is not a shield against—those are the exact words of the case—is no shield against the preemptive effect of applicable federal law.

The same holds true here. The Pipeline Safety Act applies to these bottomlands, notwithstanding that they are held in public trust.

What we'd like to do, Your Honor, if we may, is submit to you in writing a discussion of these supplemental authorities—there are others—perhaps in conjunction with the discussion of supplemental authorities that you had earlier with Mr. Ellsworth, and we can do that at a time to be determined by the Court.

With that, Your Honor, I'll conclude my remarks subject to any questions you have.

THE COURT: Thank you, Mr. Coburn.

[80]Mr. Reichel. Hold on, Mr. Reichel. We have to unmute you. There you go. Go right ahead, sir.

MR. REICHEL: Thank you, Judge. I'd like to address the comments of opposing counsel in the order in which they were made beginning with Mr. Ellsworth's remarks.

With respect to Count I.B., although Enbridge's reply brief seems to claim they're not arguing this, if you look at their original motion and supporting brief, their argument that I.B., which, again, invokes the public trust doctrine based upon the current conditions as we now know them, is somewhat "subsumed" or preempted—excuse me, displaced by subsequent statutes.

And, again, I am not going to repeat Mr. Ellsworth's argument. He correctly notes that Article IV § 52 of the Constitution stated the general proposition that there is a strong state interest in protection of natural resources from pollution, impairment, and destruction and directed or authorized the Legislature to adopt appropriate legislation. But as he rightly acknowledges, that is not self-executing.

The Constitution also provides in Article III § 7, which is nowhere acknowledged by Enbridge, that the common law as it existed at the adoption of the constitution is preserved.

[81]Neither Article IV § 52 nor MEPA, for that matter, swept away preexisting and still existing common law. And that includes both the public trust doctrine that underpins Counts I.A. and B in our Complaint, as well as the common law doctrine of public nuisance that is the focus of our Count II.

So to suggest that, as Enbridge is apparently arguing, that there is no basis under which the Attorney General in this action could seek to enforce public rights protected by the public trust doctrine and has to proceed solely under MEPA is without legal foundation.

Again, we've briefed this issue. In their original argument, they base this in part upon a citation to a Court of Appeals decision that noted but did not held that in that particular case—this was the *Highland Recreation Defense Fund* case cited in our brief—in both briefs—at page 30 in ours that there was some overlap between—er, plaintiff's arguments in that case between the arguments based on MEPA and public trust, and so it didn't need to separately repeat its analysis of those.

It certainly didn't hold or even imply that by adopting MEPA, the Legislature has "subsumed" the public trust doctrine or displaced it, nor, as Enbridge suggests in its brief, is MEPA in any way similar to some other [82] complex, comprehensive federal regulatory statute, such as the Clean Water Act, the Clean Air Act that have been held by federal courts in certain cases to have displaced previous common law. MEPA is not that.

MEPA is, on its face, supplementary to existing law. It doesn't abrogate or displace either the public trust doctrine or—under common law or the public nuisance doctrine.

The—and, again, Mr. Ellsworth reverts to this argument that Enbridge makes repeatedly that wants

to cast this case as a dispute over policy and the baseless assertion what the Attorney General is asking this Court to do is to substitute its own judgment about the wisdom of certain policy decisions made by Legislature. That is manifest not true.

What we are arguing in each of our counts of our Complaint, Counts I.A., B, and II, our claims are based on existing common law that is preserved under the constitution, and Count III under a statute, MEPA, that is supplementary to the common law, not displacing it.

THE COURT: And so, Mr. Reichel, just to put it out there and on the record particularly in finding cases like of this public interest, you don't disagree with Enbridge's, specifically with Mr. Ellsworth's comments that the Court cannot—cannot change the State's policy [83]decisions. In other words, that's not my—that's not my authority or the area of my control. You're not—what you just said is you're not asking me to do that.

I understand Mr. Ellsworth has the position—has asserted the position that that is exactly what the AG is requesting. But your position is, you're not asking—the AG is not asking that, and you agree with Mr. Ellsworth that I could not do that even if I wanted to impose some sort—my own personal policy position on this.

MR. REICHEL: That's absolutely correct, Your Honor. As we've said both in our written and oral argument, it is not—this case is not about policy preferences by the Attorney General or this Court.

Appendix F

Our Complaint alleges claims for relief under existing common law and statutory law. The question in those cases is, at this juncture where we are dealing with Defendants' motion for summary disposition which argues that our Complaint fails to state a claim upon which relief can be granted, is a legal one whether the allegations in the Complaint, accepting all well pleaded allegations as true and interpreting the facts alleged in the light most favorable to the Plaintiff, whether this Court can and should determine that the Complaint is so legally defective that there is no circumstance under [84]which the relief that we are seeking could be granted.

Again, we don't believe that standard is met even remotely. But the critical point, to respond to your question, is the arguments that the Attorney General is making and the relief that we are seeking is firmly grounded in common law and statutory law. And it's not about what the Attorney General thinks is better policy or what you think is better policy. We are not asking you to weigh in there.

We have filed a Complaint, which we believe states legally cognizable claims. In the case of Count I.A., a claim to which there is no valid defense, and this Court can and should rule that with respect to Count I.A., we, that is the Attorney General, is entitled to judgment based upon the pleadings alone.

But with respect to the Enbridge's motion, that they have not established grounds for this Court to determine that we have failed to state a claim upon which relief could be granted under (C)(8).

Does that address your question, Your Honor?

THE COURT: It does.

MR. REICHEL: Let me go back and review my notes of what Mr. Ellsworth had to say. Okay. Let me turn to some of the argument presented by Mr. Coburn.

THE COURT: Before you do that, Mr. Reichel, [85]one of the things that Mr. Ellsworth touched upon and, perhaps, if you could comment from the Plaintiff's perspective, that is this concept Mr. Ellsworth, I think, stated as an anticipatory nuisance. He addressed that issue with regard to Count II.

MR. REICHEL: Yes. We did address that in our brief. And to recap what we said there, we don't believe that Enbridge's characterization either of the governing case law or the facts alleged in our Complaint viewed in the light most favorable to the Plaintiff falls short of the standards for pleading a claim for nuisance.

And, for that matter, and I apologize for overlooking this, the similar arguments that Mr. Ellsworth makes with respect to Count III, the MEPA claim, in terms of the statutory requirement or the element of a MEPA claim, being that we allege facts that show that the Defendants' conduct is likely to cause pollution, impairment, or destruction.

He went into some detail in that consistent with their brief, you know, slicing and dicing some numbers from this

Dynamic Risk Report, which, to be clear, and we tried to make this clear in our pleadings, in making factual allegations in this case to support elements of our claims under common law nuisance and MEPA, we cited, among other things, certain fact—as [86]facts supporting that claim some of the information contained in that report, other facts that we alleged with respect to, for example, the inherent risks of pipeline operation.

The question before Your Honor is, again, under (C)(8) is whether looking at the facts that we allege, and I'm not going to walk through every one. We did in our papers go through count by count. We believe that if you look at the allegations, view them in the light as a whole and in the light most favorable to the Plaintiff, they do allege facts that would meet the elements of each of those claims, that is, common law public nuisance and MEPA, the Complaint as written.

But, if for some reason this Court were to conclude otherwise that there is some deficiency in the factual allegations in terms of meeting the standard, we would respectfully request that the Court afford us an opportunity to amend the Complaint, if the Court, indeed, concludes, and I'm not suggesting that you should, that the allegations are legally insufficient.

Let me turn now to—unless you had something else you wanted me to specifically to address, Judge?

THE COURT: I do not.

MR. REICHEL: Thank you. Let me turn to Mr. Coburn's portion of the argument. Just as an aside,

[87]Mr. Coburn noted, made some commentary about the third agreement. And just so this is not confusing to anyone, Mr. Coburn accurately stated that on a previous assignment as an assistant attorney general, who, under the prior administration, not the current administration, was detailed to provide legal support to Governor Snyder's administration, I did, in fact, participate in the development of various agreements, including the third agreement. But that's neither here nor there.

I mean, what the third agreement says and does and what its legal effect are is to be determined by its terms and the applicable law. But—so that was really in a prior assignment that has no present relationship to my current assignment where I am counsel—one of the attorneys representing Attorney General Nessel in this case.

Mr. Coburn noted that in paragraph 4.2(d) of the third agreement, there was recital that—in which the Snyder administration agreed—I think it was "acting in accordance and in furtherance of protection of the public trust," or words to that effect.

THE COURT: Public interest and—

MR. REICHEL: Public interest.

THE COURT: Both—both are in that sentence; public interest and public trust.

[88]MR. REICHEL: That's correct. Thank you, Your Honor. I didn't have it in front of me. But let me speak to that.

First of all, to the extent that Enbridge is arguing that that was a determination that satisfies the requirements of the public trust doctrine that we've discussed here earlier, I respectfully disagree, number one.

Number two, even if it were such a determination, keeping in mind that the public trust doctrine is—proposes a perpetual, solemn, and inalienable duty upon state officials, the State, as trustees to protect and preserve the public trust, this self-serving recitation in the third agreement does not necessarily, indeed legally, could not necessarily bind forever the successor officials to those who signed the agreement. And that is because under the reserved powers doctrine, the State cannot contract or bargain away its fiduciary responsibility as a government to cede those powers.

So I can address that further, if you'd like, but I wanted to be clear that with respect to the third agreement, it does not bar the claims that we've asserted. To the extent that it is—purports to recite that the continued operation of line—the existing [89]Line 5 pipelines is somehow consistent with the public trust, I don't think it actually says that. But even if it did, that would not be binding upon the current governor, the current director of the DNR, or the current director of the successor to the DEQ, that is, the Department of Environment, Great Lakes, and Energy.

Let me now turn to the preemption argument that Mr. Coburn presented at length. The parties don't disagree, and as you can see in the brief, as to what the text of

the Federal Pipeline Safety Act says. There is, as Mr. Coburn knows, a provision that specifically preempts state governments from adopting their own safety standards with respect to interstate pipelines. But it also—the same statute also makes clear that in 49 U.S.C. 60104(e), which is cited in our brief, that PHMSA has no authority over the selection—er, excuse me, location or routing of pipelines.

And cutting to the crux of the argument, the Complaint we brought here is not seeking to impose some different operational safety standard that diverges from PHMSA. You can look at the Complaint in vein for some allegation that Enbridge should be required to have some different interval for inspecting the pipeline. Some different interval—requirement about operation—operational pressure. Some different requirement for [90]inspections, etcetera, etcetera. Things that would be, indeed, safety standards that under the Federal Pipeline Safety Act are left to PHMSA's jurisdiction.

The crux of the Complaint—and we've laid this out in our brief in detail, and I think the supporting amici also emphasized this point. The crux of our Complaint is where this pipeline is located. That is why this case is profiled. This pipeline is, it's not disputed, located on bottomlands of the Great Lakes, held in trust by the State. The State has a continuing duty under the public trust doctrine to ensure that public trust resources are not impaired or harmed by activities on public trust lands, including the area covered by the easement. That is at the core of our allegations in Count I.B. of the Complaint.

So we are not saying that the Court should impose some different safety standard within PHMSA's purview. The gravamen of the Complaint is putting this kind of pipeline and continuing to operate it at this location, this uniquely vulnerable and important part of the Great Lakes system is inconsistent with the State's duty to protect the public trust.

So, put simply, it's not about how the pipeline is designed or even the details of its operation. It's about where it is and continuing to operate it at all. [91]That is not an attempt by the State to impose—er, the Attorney General to impose "her own perception of safety," let alone some different "safety standard," than that provided by PHMSA.

Bear with me, Your Honor, while I review my notes here for a moment.

THE COURT: No problem, Mr. Reichel.

MR. REICHEL: Mr. Coburn is correct in noting that there is, as there—now today, as there was in 1953, a separate statutory process involving the Michigan Public Service Commission under this 1929 Public Act 16, which was necessary to approve the siting of the existing pipeline, and there is now in light of Enbridge's proposal to relocate that pipeline to a different position inside this proposed tunnel that Enbridge is seeking commission approval.

But that is a separate process from what happened in 1953, which is the grant by the State through the

Conservation Commission of a right of a property interest to Enbridge to operate the pipeline—to place and operate the pipelines on state public trust bottomlands. That remains subject to the requirements of the public trust. I won't repeat our arguments, which you've heard and you've read as to why it wasn't done. That inquiry wasn't done properly or really at all in [92]1953.

And, secondly, as we allege in Count I.B., the present circumstances demonstrate that perpetuating the operation of a pipeline on these state-owned bottomlands at this highly vulnerable and ecologically significant location is not reconcilable with the State's duty to protect the State's public trust.

With respect to the cases we—the cases previously cited by Enbridge, including the *Olympic Pipeline* case, that have been discussed by each of the parties in their brief, I'm not going to repeat our argument there.

With respect to Mr. Coburn's argument with regard to the federal Submerged Lands Act, 43 U.S.C. 1314, and what its ostensible relevance is here, as well as this *Weaver Co. v Rhode Island*, obviously the Court, if it chooses, and it may—we have no objection to opposing counsel sharing whatever supplemental authority they think is germane to the issue before this. But, as before, we would respectfully request the opportunity to respond to—if that is done, to respond to whatever supplemental authority is offered to the Court by Enbridge.

Again, Your Honor, I also want to make one other observation. Mr. Coburn offered various commentary

[93]about anchor strikes, what actions have been taken by the current administration to mitigate potential risk of anchor strikes. The issue before the Court on Defendants' motion for summary disposition under (C)(8) is not about you determining now as a factual matter based upon certain representations by counsel outside wholly of the pleadings—and, in fact, there has been no answer here yet. There is just a motion under (C)(8)—about what exactly the facts are with respect to actions that have been taken or may be taken to mitigate the risk of an anchor strike.

The issue before you, Your Honor, as I said earlier and you well understand, in a motion based on Court Rule 2.116(C)(8) is the legal sufficiency of the legal allegations of the Complaint.

And, again, we submit, for the reasons outlined in our brief, that the facts alleged in the Complaint are sufficient to state claims under each of the counts that we've advanced:

I.B., II—I.B., being the public trust; Count II, being public nuisance; and Count III, being MEPA. We think they are sufficient—the allegations as pled are sufficient to meet that standard; that it does state a claim upon which relief could be granted.

But, again, we don't concede this, but if the [94] Court were inclined to believe that there was some legal deficiency in the allegations, we would respectfully request the opportunity for leave to amend our Complaint to address any such perceived deficiency.

THE COURT: Mr. Reichel, then, with regard to the facts that have been pled, are you taking me off the hook from a deep dive into the statistical analysis of the odds of a strike?

MR. REICHEL: Well, that's not my intention, Your Honor. Let me—I appreciate the Court's question.

THE COURT: I was hoping you would say yes so I don't have to do it.

MR. REICHEL: Yes. I think that—the short answer is yes. I don't think you have to do it. I think, again, Your Honor, stating what you're well familiar with is your task, in light of Enbridge's motion, is to look at the allegations in the Complaint, view them in their entirety, read them in the light most favorable to the Plaintiff, and determine whether those facts as alleged are sufficient to state a claim.

And, further, that in order for you to grant Enbridge's motion, you would also have to find that there was no factual development that could support the claim, and I respectfully submit that's not the case.

So I—in all seriousness, Judge, I don't [95]think the case or the validity—the validity of our claim as a legal matter depends on either the math that opposing counsel offered about taking—a statement about or an estimate of the probability of loss over a 35-year period, converting that to some annualized period, that—I don't think that the court rule requires you to engage in that.

But, rather, look at the allegations as a whole, determine whether they are sufficient to state a legally cognizable claim; that is, have we pled facts that support the elements of each of the claims under Counts I.B., II, and III?

For the reasons we've outlined in our brief, we respectfully submit that we have. So for that reason, Judge, we request that the Court deny Enbridge's motion for summary disposition in its entirety, not only as to Count I.A., which we argued previously, but the remaining three counts. If the Court has other questions, I'd be happy to respond.

THE COURT: Mr. Reichel, I'd like to go back for a moment to this idea of this distinction under the federal regulation of interstate pipelines, the distinction between regulating safety and the federal government controlling safety aspects, including things such as you touched upon, the periodic inspection of the [96]pipelines, and the specific distinction in the statute indicating that it does not cover location or does not regulate location.

What I'm interested in you—you talked a little bit about this, and I'm going to ask Mr. Coburn to talk about it some more as well. Are you saying that—this is not going to be the most artfully constructed question, frankly, Mr. Reichel. So if you have a question about what I'm trying to get at, just let me know.

But, in essence, what I'd like to know is how do you separate location from safety? Whether you're analyzing

this under the federal regulatory scheme or you're analyzing it under the public trust doctrine, the common law public trust doctrine, how do you separate location from safety?

And the reason I ask that is, isn't—this is really sort of a basic stating of this, but isn't the reason the location is an issue is because of safety?

MR. REICHEL: The reason—in some sense, yes, but it is not—we're not seeking in this action to impose some different safety standard. The crux of our argument is that the State has a duty under the public trust doctrine to protect—a perpetual duty to protect bottomlands and the public trust resources of the Great [97]Lakes from impairment.

And our contention is that by placing these pipelines in the open waters of the Great Lakes, literally in the Great Lakes at the Straits, which are susceptible as shown by past actions and as facts alleged in our Complaint, which are susceptible to damage and rupture with consequences that would be catastrophic from an environmental and economic standpoint, we are saying that it's not so much about the particular design of the pipeline, it is about—

THE COURT: I was going to ask you, is it your position that the federal regulatory scheme that Mr. Coburn argues preempts State control of this really goes to more, I guess, as a broad category—I'll start with the broadest category, and that would be engineering issues, like how strong the welds need to be, how many welds

need to be on it, the inspection cycle, the coating; those kind of things; those types of safety things, as opposed to the broader issue of whether the location, as you argue, is some sort of a threat or danger to the public trust; in other words, the State not trying to impose engineering standards or parameters?

MR. REICHEL: That's exactly correct, Your Honor. That is the argument we are making. That's why, as I said, our Complaint doesn't seek to have this [98]Court or Enbridge to change the design, to install some additional safety features, or do more frequent inspections.

The crux of our argument is that continuing to allow an oil pipeline at this location is fundamentally inconsistent with the State's duty to protect the public trust and the associated resources because of where it is.

THE COURT: All right. Thank you, Mr. Reichel. Mr. Coburn.

MR. COBURN: Thank you, Your Honor. Several points:

On that last question, Your Honor, it—the case law has made clear and the statute makes clear that PHMSA's role is not limited to, as you put it, just engineering considerations.

Rather, as I said in my opening, PHMSA has broad authority to address any pipeline safety risk resulting from a safety condition of any kind. PHMSA can close a

pipeline. PHMSA can impose restrictions on a pipeline. PHMSA can consult with states about such things, and states can consult with PHMSA. That hasn't happened here.

So PHMSA's authority is very broad, and the preemption applies not just to when a state tries to [99] adopt some technical safety standard that might be at odds with a PHMSA standard. It's where a state or a locality attempts to try to adopt any kind of safety standard.

Here, the State is trying to adopt the most extreme, if you will, type of safety standard, basically saying that the pipeline is, per se, fundamentally unsafe. An inherent danger. That's what their Complaint says. I'm not making those words up. That's what their Complaint says.

So that kind—so it's—so if Mr. Reichel is saying, "Well, we can't adopt the standard about specific welds or some particular technical issue, but we can just close the pipeline," that, I suggest to you, Your Honor, cannot be the law. That the preemption would mean nothing if states could go that far.

And so I would submit to you this is the most extreme kind of safety standard that—that cannot coexist with the presumption that is embedded in federal law.

Several other points: On the question of—

THE COURT: But why—

MR. COBURN: Sorry.

THE COURT: Mr. Coburn, I'm sorry.

MR. COBURN: Yes.

[100]THE COURT: So why do they carve out location then?

MR. COBURN: Right. Right. And, by the way, they didn't for gas pipelines. They did for oil pipelines. It's a somewhat different regulatory statute.

Because there is no federal agency with the expertise to address location. That is a matter that Congress left to the states to decide. In Michigan, it's done through the PSC, not through the Attorney General, but through the PSC through a well established process. When you want to site a new pipeline, you have to go to the PSC.

But whereas location involves questions of, you know, obviously where you are putting it relative to certain resources in the state, they're leaving it up to the State to make that decision. The State made that decision here. It made it legislatively through Act 10. It made it by granting the easement. It made its intentions clear in 2018, again, to allow the pipeline to be where it is. Safety is something all together different.

What—basically what the State is saying is that the problem with this particular pipeline in the Straits is not that it's in the Straits. The problem is that it's in the

Straits, and it poses a safety problem. [101]Therefore, they're really arguing about safety. They are not arguing about location. So that really is the crux of our position.

Let me see if there are other points. With respect to the third agreement, it is not our position, to be clear, that the third agreement precludes you from ruling in this case. But, at the same time, the third agreement is the clearest expression and the most recent expression of the State's view that the pipeline should be allowed to continue to operate.

And while I appreciate what Mr. Reichel says about not being able to bind successors, and that's an issue of Michigan law on which I will defer to others, I would suggest to you that the third agreement is only a year and a half old. And I don't think the State can basically run away from it at this point, which is why I'm suggesting that at a minimum it would be appropriate for you to take judicial notice, take into account what they said as recently as December of 2018, which is that the dual pipelines can continue to operate.

I think the fact that the Attorney General is arguing just the opposite now is the clearest example of why this is—this is a policy choice that's—that she is making, which we suggest is inappropriate for her to make in light of the preemption and federal law.

[102]In terms of amendment, Mr. Reichel, I think, twice now said he wants the opportunity—the Attorney General wants the opportunity to amend her Complaint. I would suggest to you that in light of the preemption, unless

they're going to make an entirely different claim that has nothing to do with the safety of the dual pipelines, an amendment would be futile and would not be appropriate.

They would have to allege some completely different set of facts; basically, a completely different case. There is no way to fix what they've done in this Complaint because, again, it is totally safety centered, notwithstanding what you've heard today.

I think those are the key points that I'd like to—that I'd like to make, Your Honor, unless Mr. Ellsworth has any additional points.

THE COURT: Before I go to Mr. Ellsworth—

MR. COBURN: Sorry, yes, of course.

THE COURT: —I'll indicate, Mr. Coburn, that in response to your request to submit supplemental authority, because some of it went to—to—as I understand what you said today, some of it was later found, in other words after your briefs were submitted, and some of it goes directly to your portion of the argument. I will allow that.

[103]Mr. Reichel had indicated as well that he didn't have any objection as long as the State is able to respond, and, again, that would be allowed as well. We just will need to work out the logistics of that, that we can do apart from this hearing, but just so that point is not lost.

MR. COBURN: Thank you, Your Honor.

THE COURT: You're welcome.

Mr. Ellsworth, anything to add, sir?

MR. ELLSWORTH: No, not much. The—your question about statistical analysis, I—this—the—the—one chance in 2,000 or one chance in 60 over a 35-year period, that's—that's their number. That's not coming from us.

I don't think you have to do anything more. We don't have to do anything more. That's their factual allegation, and we don't think it's sufficient for either MEPA or nuisance.

The only other thing that I will say, just so we are clear, I hope we have not created the impression on anybody that we're saying that the public trust doctrine is totally irrelevant in this case. It's not.

What we are saying is that at this stage in this case, that it's clear from the case law that where MEPA applies, and it applies here because it specifically [104]says that it applies when a plaintiff is trying to get an injunction, which is what the Attorney General is trying to do here, when MEPA is applicable, then you don't—you don't go to some other body of law. You look at MEPA, and what MEPA does at this stage in this case is to say that you've got to show a likelihood that there will be environmental damage before you can go further.

Now, if you can show that, then a defendant has a chance under the case law to come back and show that

there is no feasible and prudent alternative or that the conduct is consistent with the promotion of public health safety and welfare. In light of the State's concern about environmental issues, I don't know, there may be some room for public trust notions to come in at that stage, but we are not there. We're at the point where the Attorney General has to show enough to get in the door, and they haven't met that burden under the MEPA standard.

THE COURT: All right. Any—any of the other points you wanted to comment on, Mr. Ellsworth?

MR. ELLSWORTH: No, Your Honor.

THE COURT: Mr. Reichel, anything else you want to add, sir?

MR. REICHEL: I appreciate the opportunity, Judge, but I think that the points most recently raised [105]by counsel are adequately addressed both in our briefing and my prior remarks. So I don't feel it necessary to respond further to Mr. Ellsworth or Mr. Coburn's last commentary.

THE COURT: All right. Very good.

And, Mr. Coburn, anything else from your perspective, sir?

MR. COBURN: No. I appreciate the opportunity, Your Honor, but I think we've said what we need to. So thank you.

THE COURT: What we will do at this point is, then we will conclude the hearing. And then as I referred to earlier for purposes of coordinating supplemental filing, we will have—I'll have my law clerk reach out to you, and we'll coordinate something along the lines that are consistent with the timing that you all might need to address these issues and to respond to any new case law that is asserted. So we'll work that out. I believe—

Ms. Smith, is there anything else I'm overlooking before we close out the hearing?

THE LAW CLERK: (Shaking head no.)

THE COURT: Okay. So that will conclude the hearing. I do want to thank all of you. The issues in this case were extremely well briefed and well argued [106]here today. So I do appreciate it because as I know you all understand, the better the issues are framed in the briefing and the argument, the better chance of getting an opinion that will at least be framed in a way that if one side or the other wants to test it further on appeal, that will be properly framed or better chance of getting something, a basis for which the parties to move forward from this point. So I do appreciate all of the hard work that was put in and the good advocacy by both sides in this case.

MR. COBURN: Thank you, Your Honor.

MR. REICHEL: Thank you, Your Honor.

THE COURT: You're welcome. With that, that will conclude the hearing. Ms. Smith will take us off of live

streaming, and then we'll soon reach out and figure out a way to coordinate further discussion about the logistics of additional submissions. Thank you, all.

(At 12:13 p.m., the matter was concluded.)

APPENDIX G — SUPPLEMENTAL BRIEF OF ENBRIDGE, CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT, INGHAM COUNTY, FILED JUNE 19, 2020

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

Case No.: 19-474-CE
Hon. James S. Jamo

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

Plaintiff,

v.

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

Defendants.

Filed June 19, 2020

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

[CAPTION CONTINUED ON NEXT PAGE]

Appendix G

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[TABLES INTENTIONALLY OMITTED]

ARGUMENT

Enbridge submits this brief in response to the issues on which the Court agreed, during the May 22, 2020 hearing on the parties' motions for summary disposition, to accept supplemental briefing. In this brief, Enbridge will address: (1) the fact that the operation of the Line 5 Dual Pipelines across the bottomlands of the Straits is a public use not covered by *Obrecht v National Gypsum Co,* 361 Mich 399; 105 NW2d 143 (1960), and (2) the State's attempt to force closure of the Dual Pipelines constitutes a preempted effort to regulate safety notwithstanding the public trust interest in the bottomlands.

I. The Operation of the Line 5 Dual Pipelines Across the Submerged Bottomlands of the Straits Is a Public (Not Private) Use

Prior to the May 22 argument, the Court asked that the parties be ready to address the following question, and invited supplemental briefing on it:

> Defendants raise arguments that the existing pipelines are a classic example of a public use. Please be prepared to discuss what constitutes a public use, and other examples of private companies utilizing public lands for similar public uses, with authorities.

The question tracks the language found in *Obrecht*, which states that "no part of the beds of the Great Lakes" may 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*, 361 Mich at 412-413 (emphasis added). Both parties addressed the private versus public use issue raised in *Obrecht* in their opening briefs.[1] Enbridge argued that the above-quoted *Obrecht* language is inapplicable to the Conservation Commission's issuance of the 1953 Easement to Enbridge because the Line 5 Dual Pipelines constitute a public use. In support, Enbridge relied on *Lakehead Pipe Line Co v Dehn,* 340 Mich 25; 64 NW2d 903 (1954), in which the Michigan Supreme Court held that the shipment of oil using Line 5 in fact is a "public use":

> It is our conclusion that plaintiff [Lakehead, Enbridge's predecessor] was entitled to proceed under the act in question to acquire property necessary for the *public use claimed*. [*Id.* at 36 (emphasis supplied) (discussed at length in Enbridge's Br in Support of Def's Mot for Summ Disposition at 16-18).]

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1. See, e.g., Br in Support of Def's Mot for Summ Disposition at 16-18 (Sep 16, 2019); Br in Support of Pl's Mot for Partial Summ Disposition at 8-9 (Sep 16, 2019).

At the oral argument, Enbridge counsel advised the Court that there are other precedents that support both: (1) the conclusion that Line 5 (and common carriers generally) constitute a "public use" under Michigan law, and (2) that private companies may use public lands for public uses. With respect to pipelines specifically, the key statute is the Crude Oil and Petroleum Act of 1929, PA 1929, No. 16, codified at MCL 483.1 *et seq.* ("Act 16"). Under Act 16, interstate pipeline companies like Enbridge are classified under Michigan regulatory law as both a "common carrier"[2] and a "common purchaser."[3] These legal classifications require that a pipeline company such as Enbridge hold its service out equally to all that desire to use it, including shippers and refiners located in Michigan. Any private entity that operates a pipeline in accordance with these obligations may condemn private property and "use highways in this state to acquire necessary rights-of-way" because the Legislature has deemed pipelines operated in this manner to serve a public use. MCL 483.2.[4] See also MCL 247.183 (authorizing public

2. As a common carrier, a pipeline company cannot discriminate against persons receiving deliveries of petroleum the company carries in its lines. MCL 483.5.

3. As a common purchaser, a pipeline company cannot discriminate against petroleum producers who want to upload product for transport to market. MCL 483.4.

4. As used in Act 16, the term "highway" has an expansive common law meaning. "The term 'highway' is the generic name for all kinds of public ways, including county and township roads, streets and alleys, turnpikes and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers."

utilities and other infrastructure, such as pipelines, to use public roads and other public places for constructing pipelines and other infrastructure for public uses).

In determining that Line 5, in particular, serves a public use, the Supreme Court in *Lakehead* assessed the ability of Enbridge's predecessor, as a private company, to lawfully condemn property under Act 16. Because eminent domain may only be exercised to obtain private land when that land will be put to a public use, see Const 1963, art 10, § 2, a private entity that operates a pipeline—such as Enbridge—is necessarily engaged in a public use. Accordingly, the Supreme Court recognized that "[b]y the statute of 1929 [i.e., Act 16,] the legislature of Michigan did not undertake to authorize condemnation proceedings *other than for a public use benefiting the people of the State of Michigan*," and that Line 5 would provide such a public benefit. *Lakehead*, 340 Mich at 37-38 (emphasis added). The Supreme Court also recognized that although the owner of Line 5 "may receive some benefit from the earnings of the carrier," that fact "does not vitiate the action of the State in delegating to such carrier the power to condemn property for its necessary *public uses*, nor may it be given the effect in any such instance of barring the exercise of such power." *Id.* at 40 (emphasis added). Thus, when a privately-owned pipeline company is subject to and authorized to exercise eminent domain under Act

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Burdick v Harbor Springs Lumber Co, 167 Mich 673, 679; 133 NW 822 (1911). Cf. *Glass v Goeckel*, 473 Mich 667, 696; 703 NW2d 58 (2005), (recognizing upon review of historical materials that even the waters held in trust such as the Great Lakes must be protected for use in furtherance of commerce as "common highways.")

16, like Enbridge's predecessor was with respect to Line 5, that pipeline is unequivocally deemed by the Legislature to serve a public use. Accord *Dome Pipeline Corp v Pub Serv Comm'n*, 176 Mich App 227, 237; 439 NW2d 700 (1989) (pipeline company was properly considered a public utility "transporting gas for public use" in part because it was authorized to exercise eminent domain).[5] So not only are common carrier pipelines considered a public use as a general matter, the Michigan Supreme Court has already determined that Line 5 itself is a public use.

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5. Cases that have applied *Lakehead* for purposes of assessing public use are illustrative in delineating public versus private uses. For example, in *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), the Supreme Court concluded that the procurement of land for a business and technology park was for a private, not public, use, and thus Const 1963, art 10, § 2, prohibits the taking of private property for a non-public use. The Court recognized that a private entity engages in a *public* use when that "private entity remains accountable to the public in its use of that property." *Id.* at 474. The Court specifically identified Line 5 as an example, noting that, in *Lakehead*, the "state retained sufficient control of a petroleum pipeline constructed by the plaintiff on condemned property." *Id.* at 474. Accord *Indiana & Michigan Elec Co v Miller*, 19 Mich App 16, 27-28; 172 NW2d 223 (1969) (citing *Lakehead* to hold that an electric company's high voltage transmission line served a public use allowing the company to exercise eminent domain regardless of the fact that out-of-state individuals would benefit). Compare with *Nat'l Steel Corp v Pub Serv Comm'n*, 204 Mich App 630, 633-635; 516 NW2d 139 (1994) (a private pipeline did not involve a public use because the pipeline ran directly across the Detroit River from Canada to National Steel Corporation's plant involved no transmission of gas to others).

Michigan law also recognizes that various other types of privately-owned companies may use public property because of the public use served by their operation. E.g., MCL 484.3308 (providing private cable companies the right to use municipal rights of way, including access to buildings owned by governmental entities and municipal utility pole attachments); MCL 484.3115 (providing private telecommunications providers access to municipal rights of way). Michigan courts have confirmed that such privately-owned companies serve a public use, authorizing them to use public property and/or condemn property through eminent domain. See, e.g., *In re McLeodUSA Telecommunications Servs, Inc*, 277 Mich App 602, 619; 751 NW2d 508 (2008) (recognizing telecommunication provider as a public utility authorized to use public rights-of- way); *Bruce Twp v Gout*, 207 Mich App 554, 559; 526 NW2d 40 (1994) (owner of natural gas well and gas processing plant was a public utility because it "was in the business of producing, transporting, processing, and selling natural gas; all of the natural gas it produced was sold to a public utility … for distribution to the public; and it did not use any of the natural gas for its own purposes, or sell it to anyone else.").

In sum, it is well-established under Michigan law that privately-owned companies may use public lands and condemn private property when that property is to put to a public use, including use for a common carrier pipeline such as Line 5. Accordingly, to the extent that *Obrecht* requires specific enumerated findings when the State

authorizes the *private* use of bottomlands (and even if the state were not estopped from seeking to invalidate the 1953 Easement),[6] that requirement is unequivocally inapplicable to the Line 5 Dual Pipelines' crossing of the submerged bottomlands of the Straits given that the Pipelines indisputably constitute a *public* use.

II. The Attorney General's Claims Are Safety Based and Preempted by Federal Law; the State's Public Trust Obligations Do Not Change the Scope of Federal Preemption

The Attorney General seeks to force the closure of an operating interstate pipeline on safety grounds. Her claims cannot stand in the face of exclusive federal regulation of pipeline safety by PHMSA under the federal Pipeline Safety Act ("PSA"), 49 USC 60101 *et seq.*, and the express preemption of state law in the PSA at 49 USC 60104(c).

In this section, Enbridge provides additional authority on the scope of federal preemption in response to questions raised by the Court both prior to and during the May 22, 2020 oral argument. Enbridge will first further

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6. In this regard, Enbridge wishes to bring to the Court's attention the case of *Thompson v Enz*, 385 Mich 103; 188 NW2d 579 (1971), which underscores, in response to points raised by the Attorney General during the oral argument (see May 22, 2020 Hrg Transcript at 20-24) that the State can be estopped from preventing private activity as a result of its undue delay even where no third party rights or proprietary interests of the state are implicated.

address the Court's inquiry during the oral argument as to the distinction between a state's ability to regulate the *location* of interstate pipelines and a state's inability (by virtue of preemption) to regulate the *safety* of such pipelines, demonstrating that the claims at issue here are in fact preempted safety claims.[7] Enbridge will then explain, in response to a question posed by the Court prior to the oral argument, that the State's public trust obligations are preempted by, and subservient to, the federal government's regulation of Enbridge's operation of the Line 5 Dual Pipelines in interstate commerce on the Straits' submerged bottomlands.

A. The Pipeline Safety Act Draws a Very Clear Distinction Between PHMSA-Regulated Safety and State-Regulated Location/Routing of Interstate Pipelines; This Case is all about Safety

The PSA is the federal statutory vehicle by which the U.S. Congress, exercising its broad authority to regulate commerce under the Commerce Clause of the U.S. Constitution, chose to pervasively regulate the safe operation of interstate pipelines "transporting hazardous liquid" in interstate or foreign commerce. 49 USC 60102(a)(2). "Transporting hazardous liquid" means any "movement" of product (49 USC 60101(a)(22)) resulting from pipeline "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance." 49 USC 60102(a)(2) (directing the Secretary of Transportation to prescribe minimum safety standards for pipeline

7. See May 20, 2020 Hrg Transcript at 96, lines 4-19.

transportation). The PSA is thus not focused only on discrete engineering requirements for pipelines; rather, it covers every facet of Line 5's transport of petroleum products from origination points to destination points, including across the bottomlands of the Straits.

Federal pipeline safety regulation, as opposed to state or local control, is intended to provide uniformity so that interstate pipeline companies are subject to the same safety rules and the same regulator regardless of where they operate. If any state could shut down a pipeline based on its own speculative safety concerns, the very purpose of the PSA – to provide a uniform framework by which to regulate the safety of pipelines operating in interstate commerce – would be undermined. See *Williams v City of Mounds*, 651 F Supp 551, 569 (D Minn, 1987) (concluding that if landowners of land crossed by an interstate pipeline were "entitled to demand compliance with their own safety standards, the clear Congressional goal of a national standard for hazardous liquid pipeline safety [under the PSA] would be thwarted"). The need for uniform federal safety regulation of transportation activities conducted across state lines is well-recognized, including by the Michigan Supreme Court. See e.g., *Grand Trunk Western R Co v City of Fenton*, 439 Mich 240, 247; 482 NW2d 706 (1992) (noting that in adopting federal safety regulatory law for railroads, Congress sought to avoid a patchwork of differing state laws that could undermine safety).

The PSA draws a very clear distinction between PHMSA's broad and preemptive mandate to regulate the safety of interstate petroleum pipelines versus the "location or routing" of such pipelines, a matter as

to which PHMSA regulation is expressly excluded. Compare 49 USC 60104(c) ("A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.") with 49 USC 60104(e) (PSA does not authorize [PHMSA] to prescribe the location or routing of a pipeline facility"). The PSA makes this distinction because petroleum pipeline location/routing (absent Congressional enactment otherwise) is predominately a local concern that does not require national standards or uniformity.

Michigan exercises its location/routing authority reserved by the PSA through the MPSC under Public Act 16. In applying siting considerations prescribed by Act 16, the MPSC authorized Line 5 to be located "across the Straits of Mackinac." See PSC Order No. D-3903-53.1 (attached as Exhibit 1 hereto, which approved the pipeline's routing through Michigan).[8] To facilitate the MPSC's authorized routing, the Line 5 Dual Pipelines' placement on the bottomlands of the Straits was (as Enbridge's prior briefs explained) allowed by the legislatively-authorized 1953 Easement issued by the Conservation Commission. See 1953 PA 10.[9]

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8. The Attorney General is well aware of the MPSC's role in regulating the initial siting and relocation of pipelines; she is currently participating in an MPSC proceeding on the question of relocating Line 5 at the Straits into the tunnel that Enbridge plans to construct with State approval. MPSC Docket No. U-20763, *In Re Enbridge Energy, Limited Partnership.*

9. As Enbridge explained in its opening brief at page 14, the Attorney General approved the form of the easement used by the Conservation Commission.

The Attorney General's Count IB has nothing to do with the location/routing decisions made by the MPSC or Commission, but rather is focused solely on the safety of Line 5 operations across the Straits. See Complaint, at ¶ 33 (the "*continued operation* of the Straits Pipeline presents an *extraordinary, unreasonable threat to public rights* because of the *very real risk of further anchor strikes to the pipelines, the inherent risks of pipeline operations*") (emphasis added).[10] These explicit allegations about "the inherent risks of pipeline operations" are the very definition of a case designed to target safety matters that PHMSA alone may regulate. Thus, because the Attorney General seeks to regulate the Line 5 Dual Pipelines by forcing their closure on safety grounds, her Complaint falls squarely within the PSA's express preemption of state regulation of safety and cannot stand on that basis.[11]

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10. Numerous other allegations in the Attorney General's Complaint make clear that this is a case about the safety of the Line 5 Dual Pipelines. See, e.g., Complaint, at ¶ 48 ("[T]he Straits Pipelines, like all hazardous materials pipelines, present inherent risk of environmental harm. Regardless of a pipeline operator's safety culture and the sophistication of its integrity management system, it has become clear that accidents, manufacturing defects, human error, and failures of materials are an enduring, inherent feature of hazardous materials pipeline operation"); ¶ 51 (risk may result "from incorrect operations" including "accidental over-pressurization, exercising inadequate or improper corrosion control measures, and improperly maintaining, repairing, or calibrating piping, fittings, or equipment"); ¶ 53 ("In sum, continued operation of the Straits Pipelines presents significant, inherent risks of releases of hazardous substances into the environment").

11. Enbridge also stands on its implied preemption argument, set forth at pages 32-35 of its opening brief.

B. The State's Public Trust Obligations Are Limited and Preempted by the Federal Government's Regulation of Pipeline Safety

Before the May 22 oral argument in this case, the Court asked the parties to address the following question:

> Defendants raise arguments regarding federal law pre-emptions. What are other examples where federal law has been applied, pre-emptively, to activities on state- owned bottomlands in the Great Lakes, or on state-owned lands generally, and how are those examples analogous or not to the case at hand?

At the oral argument, Enbridge counsel advised the Court that there are in fact precedents that respond to the above question and that these weigh in favor of a finding of federal preemption with respect to the State's administration of the public trust on state-owned bottomlands. The Court welcomed supplemental briefing on those precedents.[12] We will next describe the relevant law and precedents that demonstrate this point.

The Federal Submerged Lands Act ("FSLA"), 43 USC 1301 *et seq.*, was enacted in 1953 to "resolve the long-standing controversy between the States of the Union and the departments of the Federal Government

12. See May 22, 2020 Hrg Transcript at pages 78, lines 3-25; 79, lines 1-22; 102, lines 19-25.

over the ownership and control of submerged lands." 83d Congress, 1st Session House Report No 215, at 12 (Mar 27, 1953).[13] As recognized by *Obrecht*, "[f]ollowing enactment of the [Federal] Submerged Lands Act of 1953 (67 Stat. 29, 43 U.S.C.A. §§ 1301-1315), . . . the United States relinquished to the coastal States its remaining rights, if any, in all lands lying beneath navigable waters within state boundaries." *Obrecht*, 361 Mich at 407-408. The transferred "rights" to which *Obrecht* refers are those specified in the FSLA at 43 USC 1311(a), through which the federal government transferred to the state "title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters and [] the right and power to manage, administer, lease, develop, and use the said lands and natural resources."

Michigan's ownership of the Straits bottomlands is thus confirmed by the FLSA; importantly, however,

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13. See https://coast.noaa.gov/data/Documents/OceanLawSearch/House%20Report%20No.%2083-215.pdf (accessed June 15, 2020). The legislation was enacted in direct response to a series of lawsuits between states and the United States concerning each government's ability to control and direct activities on submerged bottomlands. See *United States v California*, 332 US 19 (1947) (confirming that the United States has paramount sovereign rights in submerged lands seaward of the low-water line); *United States v Texas*, 339 US 707 (1950) (confirming the United States' dominion over submerged areas in coastal waters, including oil thereunder); *United States v Louisiana*, 339 US 699 (1950) (same).

the state's ownership and application of the public trust doctrine to such bottomlands is also limited by federal law in a manner directly relevant to this case. Specifically, the FSLA *expressly retains* on behalf of the Federal Government "all its . . . *rights in and powers of regulation and control of said lands* and navigable waters for the constitutional purposes of *commerce*, navigation, national defense, and international affairs . . ." 43 USC 1314(a) (emphasis added). Section 1314(a) further states that the Federal Government's retained powers with respect to regulating commerce associated with bottomlands are "*paramount to*, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title." *Id.* (emphasis added). Section 1314(a) of the FSLA, "which encompasses and pervades the entire [FSLA], makes it clear that Congress intended to and did retain all its constitutional powers over commerce and did not relinquish certain portions of the power by specifically reserving others." *Zabel v Tabb*, 430 F2d 199, 206 (CA 5, 1970). The FSLA thus "left congressional power over commerce . . . of the United States precisely where it found them" – i.e., under the paramount authority of the Federal Government. *United States v Rands*, 389 US 121, 127 (1967).

Accordingly, the FSLA has been relied on by courts to confirm that the Federal Government's regulation

of natural gas pipelines and other facilities preempts a state's authority to administer public trust uses of submerged lands. In *Weaver's Cove Energy v R I Coastal Resources Mgt Div*, 583 F Supp 2d 259 (D RI, 2008), a developer sued a Rhode Island agency for refusing to make a final decision on the developer's application to authorize dredging of submerged bottomlands off the Rhode Island coast for a liquid natural gas ("LNG") facility and two gas pipelines that would supply that LNG facility. The developer was required to obtain approval from the Rhode Island agency under a state law that incorporated the public trust doctrine before construction activities could commence. The developer contended that the Natural Gas Act ("NGA"), as administered by the Federal Energy Regulatory Commission ("FERC") with respect to the siting of natural gas facilities, preempted the Rhode Island agency from requiring the developer to obtain dredging (and public trust) approval from the state. The Rhode Island agency argued in response that the dredging authorization is mandatory, irrespective of the NGA, because "Rhode Island owns the submerged lands" and the developer must therefore "apply under purely state law . . . separate and apart from any Federal determination requirements." *Id.* at 280.

The court ruled against the state, reasoning that, although Rhode Island owned and held in public trust the submerged lands on which the facilities would be constructed, Rhode Island's interest was subject to, and preempted by, federal law embodied in the NGA at 49 USC 717b(e)(1), which provides FERC authority over the siting

and construction of the facilities at issue. As relevant here, the court then proceeded to find that "*the Public Trust Doctrine . . . is no shield against the [] preemptive effect*" of the federal laws governing natural gas facilities. *Weaver's Cove*, 583 F Supp 2d at 282 (emphasis added). In so holding, the court expressly acknowledged that "State ownership of submerged lands is subject to the paramount right and power of the United States to regulate and control those lands" as embodied in the FSLA. The court further recognized that "[w]hen the federal government exercises its paramount power in this respect, there is no 'taking' of land from the state, since the property was *burdened from the beginning by this reservation of rights*." *Id*. at 283. (emphasis added), citing *Rands*, 389 US at 123-124. See also *Weaver's Cove Energy v R I Coastal Resources Mgt Div*, 589 F3d 458 (CA 1, 2009) (affirming that the Rhode Island agency's use of state law predicated on the public trust to block the natural gas project was preempted by the NGA).

While the preemption found in the *Weaver's Cove* case arose from FERC's siting authority under the NGA (and there is no parallel federal siting authority for pipelines transporting petroleum liquids), the court's application of the FSLA to override Rhode Island's public trust interests in that State's squarely applies to the present case. The terms of the FSLA and that statute's application in *Weaver's Cove* leave no doubt that federal government's exclusive and preemptive safety authority under the PSA to regulate the Dual Pipelines applies notwithstanding the State's public trust obligations in

the bottomlands on which the Pipelines rest. The fact that there is federal siting authority for gas pipelines but not petroleum pipelines is, in this context, a distinction without a difference – the court decisions in *Weavers Cove* did not turn on the specifics of how the preemption arises but rather on the proposition that the federal government's right to regulate commerce is "paramount" to the State's public trust interests. Accordingly, the PSA preempts the Attorney General's efforts to regulate the safety of Line 5 based on public trust concerns to no less extent than the NGA preempted Rhode Island's efforts to prohibit federally approved gas pipelines on the basis of the public trust.

The U.S. Court of Appeals for the Second Circuit has also assessed the relationship between the public trust doctrine and federally-regulated facilities that cross submerged bottomlands. See *Islander East Pipeline, Co v Connecticut Dep't of Environmental Protection*, 482 F3d 79 (CA 2, 2006). In *Islander East*, a company seeking to construct an interstate gas pipeline challenged a Connecticut agency's denial of the company's application for a water quality certificate to authorize discharges into waters of Long Island Sound. In response, the Connecticut agency argued that the federal court could not review the case because doing so "infringes upon Connecticut's jurisdiction over its own public trust lands, i.e., the land underlying the Long Island Sound." *Id.* at 92. The court held that there was no infringement because the exercise of the public trust doctrine "is not a sovereign state right"; rather, Connecticut could exercise "only such authority

as has been delegated by Congress." *Id*. at 93. While Connecticut had the ability to administer uses of the public trust and retained jurisdiction to regulate discharges of waters into Long Island Sound, the public trust rights of the state were superseded by the federal government's exercise of power under the Commerce Clause of the U.S. Constitution that ensured the federal government's "dominion, to the exclusion of the States, over navigable waters of the United States." *Id*. at 92, citing *City of Tacoma v Taxpayers of Tacoma*, 357 US 320, 334 (1958). *Island East* thus further illustrates that state rights to administer uses of bottomlands in accordance with the public trust are subservient to, and limited by, applicable federal regulatory law.[14]

Based on the above precedents, the state's public trust responsibilities relative to the Strait's bottomlands are superseded by PHMSA's role as the exclusive regulator of the safety of pipeline operations occurring on those bottomlands. PHMSA, as the expert agency on pipeline safety, has authority to investigate and take action to correct a safety issue resulting from Line 5 operations that PHMSA believes pose a risk of a release into the Straits and surrounding environment. See, e.g., 49 CFR

14. Connecticut framed the issue in Tenth Amendment terms, arguing that federal court review of its regulation of state public trust lands intruded onto its sovereign rights. However, the court rejected that argument, holding that "Congress has the authority to regulate discharges into navigable waters under the Commerce Clause, and the State, in this case, exercises only such authority as has been delegated by Congress." *Islander East*, 482 F3d at 93.

190.203 (providing a mechanism by which PHMSA will initiate an investigation in response to any "complaint received from a member of the public."). If as a result of an investigation PHMSA concludes that the continued operation of the Line 5 Dual Pipelines presents a safety risk, PHMSA may issue an emergency order requiring their closure (see 49 CFR 190.236), or PHMSA may issue a safety order after advance notice and opportunity for a hearing (see 49 CFR 190.239). By seeking the same relief in this Court under the guise of the public trust doctrine, the Attorney General seeks relief that, by virtue of federal law, is not available to her in this forum.

Conclusion

For all the reasons stated here, in Enbridge's prior briefing, and at the oral argument, this Court should deny the Attorney General's motion for partial summary disposition, grant summary disposition in favor of Enbridge, and dismiss this case.

Respectfully submitted,

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