STATE OF MICHIGAN

CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

DANA NESSEL, Attorney General of the State of Michigan, on behalf of the People of the State of Michigan

Plaintiff,

v.

ENBRIDGE ENERGY LIMITD PARTNERSHIPS; ENBRDIGE ENERGY COMPANY, INC.; and ENBRIDGE ENERGY PARTNERS, L.P.,

Defendants.

Honorable James S. Jamo

BRIEF OF AMICUS CURIAE

Case No. 19-474-CE

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SUMMARY OF ARGUMENT

1. Claim three of the attorney general's complaint arises under the Michigan Environmental Protection Act, which incorporates by reference the Michigan Common Law of the Public Trust.

2. The Public Trust Doctrine in Michigan, as it has developed since statehood, prevents a holder of an easement like that issued in this case from impairing public trust resources in connection with operation of its Line 5 pipeline.

3. The Common Law of the Public Trust continues to be available to the courts of this state.

4. The enactment of the MEPA is consistent with the legislature's delegated duties under the Michigan constitution.

5. The state has plenary authority to terminate or change the conditions in the Enbridge easement, and said easement does not confer any vested rights that immunize Enbridge from regulatory oversight of the courts pursuant the MEPA.

6. The harm to public trust resources alleged by the attorney general is 'likely' to occur within the meaning of the MEPA.

7. Michigan's authority over pipeline location and siting is not preempted by federal law.

STATEMENT OF FACTS

The Attorney General commenced this action on July 27, 2019 to abate the continuing threat of grave harm to critical public trust resources in the Great Lakes "posed by the Defendant's daily transportation of millions of gallons of oil in dual pipelines that lie exposed in open water on State-owned bottomlands of the Straits of Mackinac." AG Complaint at Paragraph 1 (hereafter "P."). The AG Complaint continues:

> 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, Defendant's

> continued operation of the Straits Pipeline presents an extraordinary unreasonable threat to public rights because of the very real risk of further anchor strikes, the inherent risk of pipeline operations, and the foreseeable catastrophic effects if an oil spill occurs at the Straits.

Id.

In the Complaint, the Attorney General recites the history of the pipeline, and describes the easement under which it operates, granted by the State Conservation Commission on April 23, 1953. Complaint at Ps.10-15.

The operator of the Line 5 Pipeline, Enbridge, currently transports an average of 540,000 barrels (equivalent to 22,680,000 gallons) of light crude oil, synthetic light crude oil, and or natural gas liquids per day through dual pipelines in the Straits of Mackinac. Complaint at P.18. Most of each pipeline was "placed on the lakebed, and remains exposed in open water, with no covering shielding it from anchor strikes or other physical hazards." *Id*. While some sections of the pipeline rest directly on the lakebed, at many other locations, the pipelines are suspended several feet above the lakebed. Complaint at P.19.

The Complaint recites that the Straits of Mackinac are at the heart of the Great Lakes, hydraulically linking Lakes Michigan and Lake Huron, and constitute a unique ecosystem of enormous public importance for recreation, tourism, commercial shipping, as well as commercial, sport, subsistence, and recreational fishing. Complaint at P.20.

The Complaint states that if an oil spill occurs, the environmental consequences would be significant and catastrophic:

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

Complaint at P.21.

The Complaint further states that:

> 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.

Complaint at P.34.

The Complaint cites to a Report, *Alternatives Analysis for the Straits Pipeline*, prepared by Dynamic Risk Assessments Systems for the State, which concludes:

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

Complaint at P.40.

Further, the Attorney General states in the Complaint:

> It would be extremely difficult to deliberately arrange a more ill-advised setting for exposed pipelines than at the Straits of Mackinac. 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…And in 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.

Complaint at Ps.42-43.

The Complaint describes anchor strikes that have actually occurred in the Straits (Ps.43-46). It concludes that "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." Complaint at P.47. The Complaint also describes leaks that have occurred at Enbridge's above ground pipelines. Complaint at Ps. 49-50. The Complaint concludes that leaks occurring as a result of incorrect operation are also a substantial risk:

> 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 improperly maintaining, repairing, or calibrating piping, fittings, or equipment.

Complaint at P.51.

The Complaint concludes, with respect to operational error, that "continued operation of the Straits Pipelines presents significant, inherent risks of release of hazardous substances into the environment." Complaint at P.53.

The Complaint also recites that "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." Complaint at P.57. "Due to crude oil toxicity, numerous species of fish are at risk as well. Viewed as a whole, the ecological impacts would be widespread and persistent." Complaint at P.58.

The Complaint points out that the Michigan Tech Report, *supra*, "estimated large damages to recreational fishing, recreational boating, commercial fishing, and commercial navigation…." Complaint at P. 60. The Complaint further alleges:

> [I]t 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.

Complaint at P.61.

Finally, the Attorney General alleges, in summary of the preceding allegations, that "an oil spill at the straits risks catastrophic environmental and economic consequences, including severe impairment of Public Trust rights." Complaint, Page 23.

ARGUMENT

I. CLAIM THREE OF THE ATTORNEY GENERAL'S COMPLAINT ARISES UNDER THE MICHIGAN ENVIRONMENTAL PROTECTION ACT, WHICH INCORPORATES BY REFERENCE THE MICHIGAN COMMON LAW OF THE PUBLIC TRUST

Section 1701(1) of the Michigan Environmental Protection Act ("MEPA") 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."

Mich. Comp. Laws Ann. § 324.1701(1).

This section essentially incorporates by reference the existing longstanding public trust common law, which has long been the law of this state and is an attribute of this state's sovereignty. *See infra, Section II.* Section 1701, by its express terms, provides for the protection of "the public trust in the natural resources of the state from pollution, impairment, or destruction." *Id*. The statute

serially lists resources that are protected ("the air, water, and other natural resources") and then expressly provides for "protection of the public trust in those listed resources" from "pollution, impairment, or destruction." *Id*. It does not express any limitation on the common law public trust doctrine that has been recognized in Michigan cases, discussed in Section II, *infra*. To the contrary, it expressly incorporates by reference the common law public trust doctrine. As will be argued *infra* in Section VI of this brief, the language relating to likelihood of impairment of natural resource values does not limit applicability of this section only to events "likely to happen." It is inclusive of low probability events that if they occur, would have catastrophic consequences. This also is consistent with the historic application of the public trust doctrine. In any event, whatever intent of this provision relating to probability, Section 1701 is clearly applicable to the threats of pollution to the Great Lakes posed by the Line 5 pipeline.

II. THE PUBLIC TRUST DOCTRINE IN MICHIGAN, AS IT HAS DEVELOPED SINCE STATEHOOD, PREVENTS A HOLDER OF AN EASEMENT LIKE THAT ISSUED IN THIS CASE FROM IMPAIRING PUBLIC TRUST RESOURCES IN CONNECTION WITH OPERATION OF ITS LINE 5 PIPELINE

The public trust doctrine of Michigan, as it had existed since statehood, is best articulated in two 1926-1927 cases. In *Collins v. Gebhardt*, 237 Michigan 38, 49 (1926), the Court held that the public's rights in the navigable waters of the State are protected by a "high, solemn, and perpetual trust which it is the duty of the State to forever maintain." The Court continued:

> [W]hen Michigan entered the Union of states, she became vested with the same qualified title that the United States had, that these soils and

> waters passed to the State in its sovereign capacity impressed with a perpetual trust to secure to the people their rights of navigation, fishing, and fowling.

237 Mich. at 46.

In *Nedtweg v. Wallace*, 237 Mich. 14, 16-17 (1927), the Court fully articulated the scope of the public trust doctrine, as it applied to the natural resources of the state:

> The State of Michigan, upon admission to the Union, became vested with title to be beds of all the navigable waters….It is necessary to go back to the common law to decide the claim [at issue] that the title of the State is impressed with a public trust under which rights of navigation, fishing, and fowling must be saved to the public… The Constitution of this State contains no limitation upon legislative power with reference to the beds of navigable waters.…The beds of navigable waters, like any other part of the public domain, may pass by grant ….to individuals, but the sovereign power retains, because inalienable, all rights of navigation therein or thereover…There has risen, out of centuries of effort…a rule beyond question, impressing rights of the public upon all navigable waters…The State may not, by grant, surrender such public rights any more than it can abdicate the police powers or other essential power of government.

237 Mich. at 16-17.

The *Nedtweg* Court cites to Act No., 326, Pub. Acts 1913 (1 Comp. Laws 1915, section 606, *et seq*.), which provided:

> All of the unpatented overflowed lands, made lands, and lake bottom lands belonging to the State of Michigan or held in trust by it, shall be held, leased, and controlled by the State board of control…

237 Mich. at 18.

With respect to this Act, the Court opined:

> Under the act such land may be leased for 99 years…..but may not be sold, and at all times is subjected to the rights of navigation, hunting, and fishing. We note the broad language employed in designating the lands to be leased and the contention of the Attorney General that: 'The legislature may not authorize a grant for private purposes of all the beds

of all the Great Lakes, lands held in trust by the State.'

Id.

With respect to the rights of riparian proprietors along the shores of Lake Michigan, the *Nedtweg* Court commented:

> The riparian proprietor has private rights to the thread of the river but such rights are subordinate, at all times, to the public rights of navigation and other rights inherent in the people. There is a trust reposed in the sovereignty of the State to safeguard and preserve public rights. The lessees, under this act, acquire proprietary rights, but at all times such rights are subordinate to the rights of the public to the same extent and on the same principle as are the rights of riparian proprietors.

237 Mich. at 20.

Finally, citing *Illinois Central R. Co. v Illinois*, 146 U.S. 387 (1892) as stating the "governing rule", the *Nedtweg* Court held:

> The rights of the public, of which the State, in its sovereign governmental capacity, acts as trustee, have been sedulously protected, not in prohibiting grants by the State of private rights to relicted lake beds, or the rule of riparian ownership, for such would restrict the proprietary sovereignty, but by denying the power, by grant or otherwise, to abdicate the trust by placing use and control in private lands to the curtailment or exclusion of public use.

237 Mich. at 21.

The *Nedtweg* Court concluded:

> Who is to determine whether the *ius privatum* can be let and used without *impairment of the ius publicum*?…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…or permit use thereof, under suitable regulations, to the greater benefit of the public. The legislative act retains in the State every feature of the trust reposed in its governmental capacity, and all use authorized thereunder will have to give way to the rights of the public.

237 Mich. at 22-23.

In *Illinois Central R. Co. v, Illinois,* 146 U.S. 387 (1892), the Court had before it a conveyance by the Illinois Legislature of the entire lakefront. The Supreme Court ruled:

> Any grant of this kind is expressly revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time.… [T]he power to resume the trust whenever the state judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands and the right to the erection of wharves, piers, and docks at its pleasure, or for its business in the harbor of Chicago would place every harbor in the country at the mercy of the majority of the legislature of the State in which the harbor is situated.

146 U.S. at 455.

In addition, Justice Field, in a concurring opinion, stated that one legislature could not give away or sell the discretion of future legislators with respect to public harbors held in trust:

> The Legislature could not give away or sell the discretion of its successors, in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required another day. Every Legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership of the ownership and control of the State in and over the submerged lands in lake Michigan, by the Act of April 16, 1869, was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the State over the lands or its ownership thereof…..There can be no irrepealable contract in a conveyance of property by a grantor in disregard of the public trust, under which he was bound to hold and manage it.

Illinois Central, 146 U.S. at 460.

The *Illinois Central* Court also stated:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under

> them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.

146 U.S. at 453.

In *Superior Public Rights, Inc. v. Department of Natural Resources*, 80 Mich. App. 72, 84 (1977), the Court quoted the language quoted above from *Illinois Central* and commented:

> The *Illinois Central R Co.* case expressly authorizes the state to permit the private use of public lands when l) the private use will improve the public trust or 2) the private use will not substantially impair the public trust lands and waters that remain.

The *Superior Public Rights* Court also goes on to discuss the Michigan Great Lakes Submerged Lands Act, Part 325, 1994 PA 451, as amended, which provides:

> This act shall be construed so as to preserve and protect the interests of the general public in the aforesaid lands and waters and to provide for the sale, lease, exchange, or other disposition of the lands of unpatented lands and the private or public use of waters over patented and unpatented lands and to permit the filling in of patented submerged lands whenever it is determined by the department by the Department of Conservation that the private or public use of such lands and waters will not substantially affect the public use thereof for hunting, fishing, swimming, pleasure boating or navigation or that the public trust in the state will not be impaired by such agreement for use, sale, lease, or other disposition……..The department of conservation, hereinafter referred to as the "department", after finding that the public trust in the waters will not be impaired or substantially affected, is hereby authorized to enter into agreements pertaining to waters over and the filling of submerged lands, or to lease or deed unpatented lands…..

M.C.L.A. 322.702-03; M.S.A. 13.700(2)-(3).

The *Superior Public Rights* court, immediately after quoting the portions above from the Submerged Lands Act, comments that the tests set forth in *Illinois*

Central and the Submerged Lands Act "are nearly identical." 80 Mich. App. at 85. In *Superior Public Rights*, the Court upheld decisions of the Department of Natural Resources approving easements related to use of public trust lands for railroad and coal unloading facilities. DNR was acting under the authority conferred to it under the Submerged Lands Act, and approved supplemental agreements and authorizations (easement) to expand the facilities in 1971 and 1973, relying principally on an EIS prepared by the Army Corps of Engineers in connection with permits it approved associated with the expansion of a generating facility, which would discharge cooling water into Lake Superior. 80 Mich. App. at 78. The Court of Appeal based its decision upholding the easements involved in this case based solely on the record before DNR which included an EIS prepared by the AC. Plaintiffs did not adduce any independent evidence that impairment of public trust resources would occur as a result of issuance and approval of the easements. Had Plaintiffs done so, coming forward with evidence that the public's trust rights would be impaired, the result would have been different, and a *prima facie* case under Section 1701 of the Michigan EPA would likely have been established.

III. THE COMMON LAW OF THE PUBLIC TRUST CONTINUES TO BE AVAILABLE TO THE COURTS OF THIS STATE

In Michigan the public trust, as a common law doctrine, has been espoused by the Michigan courts since statehood. *See* Section II, *supra*. The Enbridge Opposition Brief argues that the public trust common law doctrine has been superceded by the Michigan EPA, which, Enbridge argues, limits the application of MEPA only to events likely to occur, using a "probability" analysis. Enbridge

Opposition Brief at 22. Enbridge is completely wrong. The common law of the public trust has not been superceded or preempted. *See* Section I, *supra*. And, additionally, the law of the public trust as it applies to the natural resources of the state has not been in any manner limited or affected by the Michigan EPA.

The 1963 Constitution of Michigan provides: "All writs, actions, causes of action, prosecutions, and rights of individuals and bodies corporate…shall continue unaffected except as modified in accordance with this constitution or the laws enacted thereto." 1963 Constitution, section 2.

In *Ray v. Mason City Drain Commission*, 393 Mich. 294, 306 (1975), the Court recognized:

> [T]here still remained, after enactment of the MEPA, a common law of environmental quality which 'imposes a duty on public and private actors to prevent or minimize degradation of the environment….The Legislature, in establishing environmental rights set the parameters for the standards of environmental quality but did not attempt to set forth , an elaborate scheme of detailed provisions designed to cover every conceivable type of environmental pollution or impairment. Rather the Legislature' spoke as precisely on the subject matter permits and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality.

The *Ray* Court also held:

> Michigan's EPA marks the Legislature's response to our constitutional commitment to the "conservation and development of the natural resources of the State.

393 Mich. at 304.

In *Opal Lake Association v. Michayne Ltd. Partnership*, 47 Mich. App. 354, 364, n.3 (1973) the Court stated:

> The [MEPA] is also in part a recognition of the ancient powers of a court to hear nuisance cases, balance equities, and fashion

> appropriate remedies……For our purposes the Act is significant by way of analogy in that it represents a legislative acknowledgment of a court's power to recognize anticipated harm and fashion a remedy to prevent harm where its potential becomes discernible from evidence taken in an adversary proceeding.

IV. THE ENACTMENT OF THE MEPA IS CONSISTENT WITH THE LEGISLATURE'S DELEGATED DUTIES UNDER THE MICHIGAN CONSTITUTION

In *State Hwy. Commission v. Vanderklot*, 392 Mich. 159, 179-82 (1974), the Supreme Court determined that the legislature could fulfill its duties under the 1963 Michigan Constitution, Article 4, section 52 by enacting general legislation like MEPA. The 1963 Constitution provides:

> The conservation and development of the natural resources of the state are 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.

1963 Michigan Constitution, Article 4, section 52.

The *State Hwy. Commission* Court determined that MEPA is consistent with the Constitution's command to protect natural resources. The legislature has provided (by creating rights of action by the Attorney General) for the protection of air, and water, and other natural resources of the state from pollution, impairment or destruction. This was a totally appropriate delegation of authority by the Legislature to the courts to exercise long existing common law remediation of environmental harm to public resources. Enbridge's argument that Michigan's EPA, particularly Section 1701, exceeds the Legislature's authority and constitutes an invalid delegation of authority to the Michigan Courts is in a manner supported by relevant case authority.

V. THE STATE HAS PLENARY AUTHORITY TO TERMINATE OR CHANGE THE CONDITIONS IN THE ENBRIDGE EASEMENT, AND SAID EASEMENT DOES NOT CONFER ANY VESTED RIGHTS THAT IMMUNIZE ENBRIDGE FROM REGULATORY OVERSIGHT OF THE COURTS PURSUANT THE MEPA

In *Obrecht v. National Gypsum Co.* 361 Mich. 399 (1960), suit was brought by neighboring riparian owners who owned riparian state land adjacent to or near a US Gypsum project that would involve the mining of gypsum and its transport on the Great Lakes. They alleged, *inter alia*, that the whole operation proposed by National Gypsum (involving riparian leased land) would destroy or impair the value and enjoyment of their property and adversely affect the healthful and recreational advantages of the lake front for a considerable distance each way. The Court considered approval given by the U.S. Army Corps of Engineers to a massive and permanent loading dock, extending some 1076 feet easterly into the bay from the shore of the company's property, and the dredging of more than a mile of deep channel leading westward from the deeper waters of the bay to and on both sides of the dock. The Court characterized the question before it as the following:

> May a riparian proprietor of Great Lakes frontage, having obtained a due permit from the United States Corps of Engineers, of right and regardless of leave, construct a permanent dock or wharf extending with or without accessory dredging into the waters of the state a sufficient distance ….to reach lake steamer draft depths?

Obrecht, 361 Mich. at 406-07.

The Court held that enactment of the Great Lakes Submerged Lands Act, *supra*, resolved the question presented in the case. Under the Great Lakes Submerged Lands Act, authority was conferred on the State Department of

conservation to convey or lease, subject to limitations provided therein "the unpatented lake bottom lands and unpatented lands in the Great Lakes…..belonging to the State of Michigan or held in trust by it." *Id*. at 408. The Michigan Supreme Court first held that it had long been the "sworn guardian of Michigan's duty and responsibility as trustee of the above delineated beds of 5 Great Lakes." *Id*. at 412. It continued:

> Long ago we committed ourselves (See *State v. Lake St. Clair Fishing and Shooting Club*, 127 Mich. 580, 594-595; *State v. Venice of America Land Co.*, 160 Mich. 680, 702; *Nedtweg v. Wallace*, 237 Mich. 14, 21, 24, 34) to the universally accepted rules of such trusteeship as announced by the Supreme Court in *Illinois Central v. Illinois*, 146 US 387, 13 S. Ct. 110)…That exhaustively reasoned decision may be read with profit as Michigan approaches the impending construction and utilization, as instruments of marine commerce, of more deep water docks and piers along the lake bound shores. Turning to pages 453 through 480 of the report [*Illinois Central*] and reading those pages in conjunction with [The Submerged Lands Act] of 1955, as amended in 1958, it will be found authoritatively that no part of the beds of the Great Lakes, belonging to Michigan ……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 the public trust]. The other is present where the state has, in similar form, determined that such disposition may be made 'without detriment to the public interests in the lands and water remaining.".

Id. at 412-13.

The Court goes on to quote from *Illinois Central*:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely a under the use and control of private properties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters , or when parcels can be disposed of without impairment of the of the public

> trust in what remains, that it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state."

Id. at 415-16 (quoting *Illinois Central*, *supra.*).

It is clear from the Court's broad endorsement of *Illinois Central* in *Obrecht* that, whether pursuant to MEPA, or pursuant to the common law of the public trust that the State has applied since its Admission to the Union, that the State has plenary authority to revoke or revise an easement such as that issued to Enbridge. Although, as argued by Enbridge, that the proposed use in *Obrecht* had not been expressly authorized by an easement from the State, and is therefore distinguishable from this situation (where Enbridge is in possession of an easement), and because the gypsum transport project was characterized by the *Obrecht* Court as a private use by a for profit corporation involving docking facilities for the transport of gypsum (used principally in the construction of houses), rather than a use that advances public interests such as is declared under the easement issued to Enbridge, this is not a critical distinction that immunizes Enbridge from termination or modification of its easement. Although it is true that the easement contains a recitation that the pipeline is a public use and advances the public interest, that in no manner constrains the power of the Court, under the common law public law doctrine, which is incorporated by reference in MEPA, Section 1701, from terminating the easement or imposing additional new conditions on its exercise. Besides, it would be

appropriate to characterize the project in *Obrecht*, as one that was delivering a product (gypsum is used for wall board and is needed in the construction of houses)---like crude oil—that was also necessary to satisfy public purposes and advanced the public interest. *See San Francisco Baykeeper v. State Lands Commission*, 29 Cal. App.5th 562, 578 (Ct. App. 2018) (Mining sand in state navigable waters is a public use insofar as it is a use that facilitates public enjoyment of beaches and advances public recreational uses and provides material for construction and highways, but is still subject to regulation under the public trust doctrine.) Whether the use allowed under an easement is characterized as a private use or a public use that advances public interests is irrelevant for purposes of applying the public trust doctrine if the use results in impairment to natural resources within the meaning of Section 324.1701.

The *Obrecht* court continued:

> Indeed, and aside from the common law as expounded in *Illinois Central*. The legislature bids us to construe its design and purpose 'so as to preserve and protect the interests of the general public' in such submerged lands and as authorizing the sale, lease, exchange or other disposition of such submerged lands when and only when it is determined 'by the department of conservation that such lands have no substantial public value for hunting, farming, swimming, pleasure boating or navigation and that the general public interest will not be impaired by such sales , leases, or other disposition.'

Id. at 416 (citing the *Michigan Great Lakes Submerged Lands Act*, PA 1955, *supra*).

In *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), the Court considerably reduced water diversions the City of Los Angeles made from the eastern Sierras in order to protect public trust resources at Mono Lake, a terminal

lake that was fed by streams from which LADWP made upstream diversions. The rights to divert stemmed from decisions made by the State Water Board in 1941. The Court held:

> "Once the state has approved an appropriation the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs, The State accordingly has the power to reconsider allocation decisions even though those decisions were made after consideration of the effect on the public trust.

33 Cal.3d at 447.

The Court continued:

> In 1974 the Water Board confirmed that DWP had perfected its appropriative right by the actual taking and beneficial use of water and issued two permanent licenses...authorizing DWP to divert up to 167,000 acre feet annually…from Lee Vining, Walker, Parker, and Rush Creeks. The Water Board viewed this action as a ministerial action based on the 1940 decision [authorizing appropriation through a permit] and held no hearings on the matter.

33 Cal.3d at 428 n.8.

Similarly, here under the power of the Michigan Courts, pursuant to the common law public trust doctrine, or pursuant to MEPA Section 324.1701, the Court can prevent Enbridge from continuing to exercise rights it claims under the easement to continue operating the crude oil pipeline under the Straits of Mackinac. *See also*, *Light v. SWRCB*, 226 Cal. App. 4th 1463 (2018). (No party can acquire vested or grandfathered rights to appropriate water in a manner harmful to the public trust.).

It is unnecessary for this court to decide whether the common law public

trust cause of action still independently exists. It is clear that the MEPA, section 324.1701 is intended to ensure that public trust common law be an independent ground for finding an impairment to public trust resources. And as argued infra, it is equally clear that the operation of the pipeline constitutes an action that that could produce catastrophic public trust natural resource impairing consequences if a leak should happen, even though the probability of such an event happening is low. The allegations of the Attorney General clearly come within the parameters of the Michigan EPA. Section 324.1701. Enbridge has no immunity from regulatory oversight, pursuant to the Michigan EPA, Section 324.1701, and is barred from claiming that its proprietary rights under its easement allow it to proceed to operate its pipeline in a manner that may impair public trust resources in the event of a spill of crude oil from the pipeline.

VI. THE HARM TO PUBLIC TRUST RESOURCES ALLEGED BY THE ATTORNEY GENERAL IS 'LIKELY' TO OCCUR WITHIN THE MEANING OF THE MEPA

The Attorney General's claims should not be dismissed based on the notion that the risk of rupture of Line 5 is impermissibly speculative. Rather, the harm to public trust resources is "likely" to occur within the meaning of the Michigan Environmental Policy Act, taking into account the catastrophic effects on public trust resources of an oil spill into the Straits of Mackinac in the event a spill does occur.

Section 324.1701(1) of the Michigan Environmental Protection Act 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.

Defendant argues at length in its opposition papers that because the risk of an accident causing the pipeline to leak (such as an anchor strike) is statistically very low that the Section 324.1701 statutory standard of "likelihood" and "likely" cannot be met. Defendant's argument relies on its premise that "likely" in the statute references the probability of an event occurring. Under this statutory analysis a low risk (low probability) event that if it occurs would have catastrophic consequences, would not be covered under the Act. Such an outcome would not be consistent with the legislative history of the act. *See*, *Thomas J. Anderson, Gordon Rockwell*, The Michigan Environmental Protection Act of 1970, 1970 Mich. Public Act 127:

> In Michigan Professor Sax worked with the Michigan Legislature to draft the Michigan EPA. According to Sax the law had three purposes: 1) creating an enforceable legal right held by the public to a 'decent environment, 2) making that right enforceable by private citizens suing as members of the public and 3) setting the groundwork for a common law of environmental quality by leaving the terms "pollution", "environmental quality " and "public trust" undefined to allow courts to develop a common law approach to the problems and create flexible solutions.

In Klass, Alexandra, The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study, 45 Environmental Law 431 (2015), the legislative history of the Michigan Environmental Protection Act is discussed:

> Prior to 1970, US courts limited application of the [public trust] doctrine primarily to cases involving efforts to preserve public access to water resources for commerce, recreation, transportation, and

> fishing. In 1970, however, Joseph Sax argued in an influential law review article that the public trust doctrine cold be an alternative and complementary means of forcing state officials to protect natural resources even when strong environmental protection legislation did not require such action. [See Joseph Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Michigan Law Review 471, 475 (1970). The rise of environmental statutes, coupled with the increasing use of the public trust doctrine, led to another strand of legal developments that combined the legislative and common law advances. First several states amended their constitutions in the 1970's and included provisions declaring that citizens of the state have the right to clean air, pure water, and the preservation of natural resources; these provisions also declare that the government has an obligation to protect those resources for its citizens and for future generations. Second, Professor [Joseph] Sax worked with the Michigan legislature to create an environmental rights statute, the Michigan Environmental Protection Act, that grants to private citizens the right to sue the government and other private persons to ensure the protection of natural resources…

Id. at 433.

Section 324.1705(2) of MEPA provides:

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

Id. (emphasis added).

In this provision of MEPA, "likely" pertains explicitly to the "effects" of actions, not the probability of an event occurring. It is clear from this provision that the MEPA applies to events that though of low probability would have dire or catastrophic environmental consequences if they in fact occur.

It is also pertinent that the Act's definition of "spill" provides that a spill means:

> [A]ny leaking….discharging, escaping, or disposing of hazardous material in a quantity which is or may become injurious to the public health, safety, or welfare or to the environment…

Section 324.32911(4)(e); *see also Nemeth v. Abonmarche Dev. Inc.*, 457 Michigan 16, 30 (1998) (MEPA creates an environmental common law that allows for *de novo* review in Michigan courts, allowing those courts to determine any adverse environmental effect and to take appropriate measures); *Preserve the Dunes Inc. v. Dept of Environmental Quality*, 471 Mich. 508, 517(2004) ("Thus the only determinative statutory requirement in evaluating a prima facie MEPA violation is whether the defendants' conduct will, in fact, pollute, impair, or destroy a natural resource."); *Whitaker and Gooding Co. v. Scio Twp.*, 117 Mich. App. 18, 24 (1982) (A court is empowered to prevent any conduct that does rise to the level of an "environmental risk".); *see also Rush v. Sterner*, 143 Mich. App. 672, 679 (1985) ("The trial court must conduct a dual inquiry to determine if a *prima facie* showing of pollution, impairment, or destruction of a natural resource has been made, whether a natural resource is involved, and whether the impact of the activity on the environment rises to the level of impairment to justify the court's intervention…In answering the latter question, the trial court should evaluate the environmental situation before the proposed action and compare it with the probable condition of the environment after.")

In *Oscoda Chapter v. Dept of Natural Resources*, 403 Mich. 215 (1978), the Supreme Court opined that "a court is not empowered to prevent any conduct….which does not rise to the level of environmental risk proscribed by the [Michigan Environmental Protection Act.]" The concept of "environmental

risk" is not set out in the Michigan EPA and ordinarily involves "long term serious threats of uncertain likelihood to human health and life." *See Talcott Page, A Generic View of Toxic Chemical and Similar Risks*, 7 Ecology Law Quarterly 207, 218 (2007.).

In *City of Portage v. Kalamazoo City Road Commission*, 136 Mich. App. 276, 282 (1984), the Court discussed "environmental risk" as follows:

> In determining whether the impact of a proposed action on wildlife is so significant as to constitute an environmental risk or require judicial intervention, the Court should evaluate the environmental situation prior to the proposed action and compare it with the probable condition of the particular environment afterward.

In *West Michigan Environmental Action Council v. Natural Resource Commission*, 405 Mich. 741, 766 (1979), the Court used a "may cause" analysis: "In light of the limited number of elk and the unique nature and location of the herd, there is evidence that defendants conduct may impair or destroy a natural resource."

In *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983) the Sierra Club urged the court to consider the environmental effects of an oil leak from a supertanker carrying crude oil. The likelihood of this happening was considered remote but the consequences disastrous. In overturning the decision of the District Court, which had refused to perform a worst case analysis, as required by 40 C.F.R. §1502.22, the Court of Appeal commented:

> The CEQ's interpretation of its worst case regulation makes it quite clear that Sierra Club's catastrophic worst case is precisely what the CEQ intended…A total cargo loss by a supertanker is undoubtedly a significant adverse impact. No party can seriously question the importance of the analysis of such an oil spill to this permit decision. Indeed, the probabilities and consequences of oil spills are at the heart of the controversy.

695 F.2d at 972, 973.

The Court commented further that "the fact that the possibility of a total cargo loss by a supertanker is remote does not obviate the requirement of a worst case analysis in the FEIS." 695 F.2d at 974. The Court also found that:

> The Sierra Club presented evidence demonstrating that it is possible to create an informative and useful worst case scenario that reasonably limits speculating…Thus, for instance although the 24 hour dispersion model represents the state of the art in scientific methods, a worst case analysis could go beyond that state of the art based on known information about tides and currents in the Bay…There must, of course, be a base of information upon which to project past these limits, but the projections cannot be subjected to the same rigorous scrutiny other information in the EIS must endure…As the Sierra Club claims, this case presents precisely the type of situation for which the worst case regulation was designed. All parties agree that a total cargo loss could occur and could wreak catastrophic environmental damage in the Bay. While this damage is a "significant adverse effect", there is considerable uncertainty about its likelihood, scope, and consequences…However, there is a body of data with which a reasonable worst case analysis can be made that is not unreasonably speculative. Remoteness does not bar a worst case analysis so founded and should instead by weighed by the Corps when it applies the worst case analysis in its decision making process.

695 F.2d at 974-975.

VII. MICHIGAN'S AUTHORITY OVER PIPELINE LOCATION AND SITING IS NOT PREEMPTED BY FEDERAL LAW

Federal law does not grant any federal agency the authority to route or generally approve or permit construction of new interstate crude oil pipelines within the United States. Instead, federal authority over these pipelines is limited to regulation of particular matters, one of which is the regulation of pipeline safety

pursuant to the Pipeline Safety Act, 49 U.S.C. §60101 et. seq. ("PSA").[1] Defendant's arguments that federal preemption prevents the state's exercise of its authority pipeline siting or location are plainly erroneous.

As clarified by the Tenth Amendment to the Constitution, powers not specifically granted to the federal government are reserved to the states. Therefore, states may regulate interstate oil pipelines to the extent that federal law does not.

The Pipeline Safety Act regulates pipeline operators and owners with regard to the safety standards for the technical design, materials, construction and operation of crude oil pipelines. Enbridge' brief focuses on the preemption of state law relating to pipeline safety, and does not mention relevant law relating to authority remaining in the states to regulate pipeline siting and location. *See* Enbridge Opposition Brief at pp. 28 et seq.

Therefore, although the PSA expressly preempts any state law that attempts to alter or impact the application of pipeline safety standards, there is no such express preemption relating to pipeline location and siting. The PSA does not provide the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) from routing or locating a crude oil pipeline for any reason, including safety. 49 U.S.C § 60104(e) (clarifying that the law does not "authorize the [DOT] to prescribe the location or routing of a pipeline facility.")

[1] Before the enactment of the PSA in 1992, two separate statutes provided the framework for the regulation of pipeline safety. The Natural Gas Pipeline Safety Act of 1968 ("NGPSA") authorized the DOT to regulate pipeline transportation of natural gas and other gases as well as the transportation and storage of liquefied natural gas. Pub. L. No. 90-481, 82 Stat. 1003 (1968) (formerly 49 U.S.C. § 1671 et seq.). The Hazardous Liquid Pipeline Safety Act of 1979 ("HLPSA"), Pub. L. No. 96-129, 93 Stat. 1003 (1979) (formerly 49 U.S.C. §§ 2001-2014), was modeled largely on the NGPSA, and authorized the DOT to regulate pipeline transportation of hazardous liquids. The PSA combined and re-codified the two existing pipeline safety statutes at 49 U.S.C. § 60101 *et seq*.

Further, no other federal law generally authorizes a federal agency to determine the route or location of an interstate crude oil pipeline.[2] Therefore, the route and location of crude oil pipelines are left to the sole discretion of state agencies. Since no federal law broadly preempts state and local siting requirements for crude oil pipelines, pipeline companies must obtain approval of the pipeline route on a state-by-state basis. Since PHMSA cannot, by law, consider safety within a routing decision, federal law does not preempt a state from so doing. As no federal law regulates crude oil pipeline routing and location on state land, states are free to make routing decisions for any policy reasons they deem relevant. A state may route a crude oil pipeline to limit impacts to sensitive environments and public trust resources in order to limit or minimize impacts to sensitive areas that would be caused by a pipeline rupture. Likewise, in order to protect public trust resources, the State of Michigan has the authority, through its Legislature, to delegate authority to its Circuit Court (as it did in the Michigan EPA, Section 324.1701), to order the rerouting of a pipeline, or the transport of oil by other means, to protect public trust resources in the Straits of Mackinac.

The PHMSA regulates interstate crude oil pipeline safety pursuant to the

[2] In some instances not applicable here, federal laws do require federal agencies to evaluate and/or make decisions relating to the location of oil pipelines. For example, the U.S. Army Corps of Engineers often must grant permits for pipelines to be constructed though waters of the U.S. pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344. That decision requires the Corps to choose the least damaging practicable alternative. 40 C.F.R. § 230.10. Similarly, the U.S. Bureau of Land Management is tasked with granting pipeline rights-of-way across federal lands pursuant to the Mineral Leasing Act, 30 U.S.C. § 185. Before making permitting decisions such as these for oil pipelines, federal agencies must evaluate the potential impacts of, and alternative routes to, the project pursuant to the National Environmental Policy Act, 42 U.S.C. § 4342 *et seq.*

PSA. The PSA grants PHMSA exclusive authority over pipeline safety and expressly preempts state regulation of "safety standards for interstate pipelines." 49 U.S.C § 60104(c) (*emphasis added*). These standards regulate the activities of pipeline owners and operators with regard to the design, materials, construction, and operation of natural gas and hazardous liquids pipelines. Thus, although the PSA preempts state law related to these standards, it does not preempt state law related to siting and location and other policy objectives, such as protecting aesthetic values from the impacts of construction and normal operations, and regulation of appropriate land uses adjacent to existing interstate pipelines. State action may not impact federal administration of the PSA's pipeline safety standards, but this limited federal regulation does not prohibit all regulation of interstate crude oil pipelines. The PSA contains a number of provisions that protect specific state powers, including § 60104(e) (prohibiting PHMSA from prescribing the location or routing of an oil pipeline); § 60105 (permitting PHMSA to delegate certain federal regulatory authorities over pipeline safety to a state, provided the state adopts a comprehensive state safety program that implements federal standards); and § 60133(c) (specifically stating that the PSA's environmental review provisions do not preempt applicable federal, state, or local environmental laws).

Thus, the PSA does not preempt non-safety regulation such as those relating to siting, unless such regulation interferes with PSA standards related to the technical design, materials, construction, and operation of crude oil pipelines. That federal regulation of pipelines does not make them immune from state siting regulations is underscored by *Panhandle Eastern Pipe Line Co. v.*

Madison County Drainage Board, 898 F. Supp. 1302 (S.D. Ind. 1995). Even though the pipeline at issue was an interstate natural gas pipeline regulated by both the NGA and the PSA, a local drainage board was found to have the power to order the pipeline to be reconstructed to pass under a deepened drainage ditch. *Id.* at 1315. The court reasoned that the drainage board was not attempting to regulate pipeline safety because the board's action was strictly related to a drainage improvement project that happened to impact an existing gas pipeline and did not attempt to dictate any safety standards for how such improvement would be constructed. *Id.* at 1315 and n.7. Because the pipeline would still be able to follow the same route and comply with the same federal standards, while being lowered in a specific location to accommodate another public utility, the court held that the pipeline company could comply with both federal and state law without conflict. *Id.* at 1315; accord *Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49, 53 (S.D. R.I. 2000) ("local regulation with respect to matters or activities that are separate and distinct from subjects of federal regulation may be permissible if they do not impede or prevent the accomplishment of a legitimate federal objective"); *Columbia Gas Transmission Corp. v. Meadow Preserve York*, 2006 U.S. Dist. Lexis 30645, *13-15 (N.D. Ohio 2006) (requirement that township street over an easement be paved with concrete not preempted by PSA, because PSA is silent as to enforcement of rights-of-way and easements). Thus, a state agency may determine the location of the pipeline, but it may not regulate the design, materials, or construction required to relocate it.

The fact that federal law prohibits PHMSA from determining the location

or route of a crude oil pipeline, 49 U.S.C. § 60104(e), indicates that Congress intended that the states retain broad policy authority with regard to the factors considered in selecting a route. In summary, as a general rule, state regulation of interstate oil pipelines may not relate to enhancing pipeline safety through design, materials requirements, construction, operation, testing or monitoring of interstate crude oil pipelines, because these matters are regulated by the PSA. However, states may regulate pipeline construction to address other policy issues including but not limited to limiting the adverse economic impacts of construction, protection of sensitive cultural, agricultural, and ecological lands from the impacts of construction, and protecting citizens from adverse aesthetic impacts caused by regular pipeline operations, such as the noise of pump stations. In addition, states may regulate the routing and location of interstate crude oil pipelines and may also regulate oil spill response activities.

A routing law or ordinance would clearly not be preempted if it sought to minimize environmental or aesthetic impacts, for example by prohibiting construction in areas that impacted sensitive cultural or environmental values.

In *Texas Midstream Gas Servs. LLC v. City of Grant Prairie*, 608 F.3d 200, 211-12 (5th Cir. 2010) the Court held that a city's setback requirements that dictate the location of pipeline pump stations were not preempted by the Pipeline Safety Act, because the PSA expressly preempts pipeline safety standards only. The Court held that:

> Here, Congress has spoken clearly. The PSA preempts safety standards for natural gas pipeline facilities. Grand Prairie's setback requirement is not a safety requirement in letter, purpose, or effect. It may remain in force.

Id. at 212; *see also Washington Gas Light Co. v. Prince George's City Council*, 711 F.3d 412, 420 (4th Cir. 2013) (holding county zoning regulations dictating the location of pipelines were not preempted by the PSA).

CONCLUSION

For the foregoing reasons, this Honorable Court should deny Defendant's Motion For Summary Disposition of the Attorney General's Complaint.

Respectfully submitted,

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Dated: November 13, 2019

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

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.

Case No. 19-474-CE

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I declare under the penalties of perjury that this proof of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

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