



August 1, 2017

Hon. Rick Snyder, Governor
State of Michigan
Post Office Box 30013
Lansing, Michigan 48909

Hon. Bill Schuette, Attorney General
Michigan Department of Attorney General
Post Office Box 30212
Lansing, Michigan 48909

Hon. C. Heidi Grether, Director
Michigan Department
of Environmental Quality
Post Office Box 30473
Lansing, Michigan 48909

Hon. Keith Creagh, Director
Michigan Department of Natural Resources
Post Office Box 30028
Lansing, Michigan 48909

Hon. Valerie Brader, Executive Director
Michigan Agency for Energy
Post Office Box 30221
Lansing, Michigan 48909

RE: Tribal Comments on Dynamic Risk Draft Alternatives Analysis

Dear Governor Snyder, Attorney General Schuette, Director Grether, Director Creagh, and Executive Director Brader,

The Straits of Mackinac occupy a hallowed place in the history of the Indian and non-Indian peoples of Michigan. They are at once an iconic symbol of the State and a sacred wellspring of Anishinaabe life and culture. They have served as a focal point of our shared history for centuries.

In response to the State's invitation, Michigan's twelve federally-recognized Tribes submit these comments regarding the June 27, 2017, Draft Alternatives Analysis for the Straits Pipelines prepared by Dynamic Risk ("Draft Report"). We do so in the spirit of our cherished partnership with the State as co-stewards of the Straits, which while mighty are also vulnerable, and which serve so powerfully as an emblem of our entwined past, present, and future.¹

¹ Individual Tribes signatory to these comments may also submit additional comments on their own behalf.

Key Takeaways from the Draft Report

- In its February 22, 2016, Request for Information and Proposals (Independent Alternatives Analysis for the Straits Pipelines) (“RFP”), the State, quoting from the Michigan Petroleum Pipeline Task Force Report, declared:

Decisions about the future of the Straits Pipelines must be informed by an independent, comprehensive analysis of alternatives . . . [requiring] a study by relevant experts of the feasibility, costs, including the specific costs to Michigan, and public risks and benefits of alternatives to the existing Straits Pipelines.

RFP at 2 (emphasis in original) (quoting Task Force Report at 50). The RFP accordingly sought an alternatives analysis, the “overall objective of [which] is to provide the State of Michigan and other interested parties with an independent, comprehensive analysis of alternatives to the existing Straits Pipelines, and the extent to which each alternative promotes the public health, safety and welfare and protects the public trust resources of the Great Lakes.” RFP at 5.

- Dynamic Risk’s Draft Report evaluates a range of alternatives with respect to the Straits Pipelines, including maintenance of the status quo. While the Draft Report’s discussion of those alternatives is subject to significant criticism – some of which is outlined below – there are two critical points growing out of the Draft Report that bear emphasis at the outset and should not be obscured by its flaws.
- First, the odds of a rupture of the Straits Pipelines are undeniably high. The Draft Report discusses those odds in mathematical/engineering terms that are somewhat obscure. See Draft Report at 2-105 – 2-108. However, at the July 6, 2017, meeting in Holt, Michigan, the project’s Chief Engineer stated clearly that, based on the figures set forth in the Draft Report, the odds of a spill from the Straits Pipelines in the next 35 years are not one in a million, or one in a thousand, or even one in a hundred. They are *one in sixty*.² This projection stands as an unacceptable threat to an iconic resource, especially when considered in conjunction with the catastrophic consequences that would follow from such a spill. And there exists substantial reason to believe that the actual risk is considerably higher than Dynamic Risk has stated it.

² See Statements of James Mihell, P. Eng., at July 6, 2017, Information Meeting at Holt, Michigan, at 3:11:00–3:12:00. Available online at <https://mipetroleumpipelines.com/event/watch-video-july-6-public-information-session-holt>. Last visited July 29, 2017.

- Second, decommissioning the Pipelines would best serve Michigan interests. In addition to its discussion of the risks posed by the Pipelines, the Draft Report contains two critical additional facts leading to this vitally important conclusion:

Fact: Michigan consumers and businesses rely on only a modest amount of the crude oil and natural gas liquids transported by Line 5, the significant majority of which is transported through the State and ends up in Canada or beyond.

Fact: Feasible alternatives for supplying the amount of Line 5 product and capacity relied on in Michigan are readily available, such that the Straits Pipelines can be decommissioned with little disruption or increased cost to Michigan consumers and businesses.

Conclusion: Thus, exposing the Straits of Mackinac to the risk of a catastrophic oil spill through the continued operation of the Straits Pipelines is not justified by significant interests of the State, the Tribes, or their citizens. That risk is instead being borne by the people of Michigan for the benefit of out-of-state interests.

- The Draft Report establishes the first of these facts in unambiguous terms: “The majority of Line 5 throughput is delivered to the Sarnia, Ontario terminal in Canada where it is then transported to refineries across eastern Canada and the U.S. . . . Of the NGLs transported on Line 5, less than 5% are delivered into Rapid River [in the Upper Peninsula]. Lewiston oil injections are also less than 5% of Line 5 current throughput and do not appear to be increasing.” Draft Report at 4-4 and 4-5. In other words, the Michigan portion of Line 5 is largely a thoroughfare for the transportation of product to the benefit of commercial, government, and consumer interests elsewhere, including, of course, to the benefit of Enbridge.
- The Draft Report establishes the second of these facts in discussing Alternative 6. *See id.* at 4-6 – 4-24. That Alternative considers the options that will be available to Michigan consumers and businesses to meet their energy and energy transport needs if the Straits Pipelines are decommissioned. The analysis confirms that there are feasible options presently available (1) for delivering an adequate supply of propane to Upper Peninsula customers by truck, *see id.* at 4-6 – 4-13; (2) for transporting Michigan-derived crude oil from Lewiston to refineries by truck, *id.* at 4-14 – 4-16; and (3) for providing significant alternative sources of crude oil for the Detroit and Toledo refineries, *id.* at 4-16 – 4-21.
- The Draft Report concludes that utilizing such alternatives will increase fuel prices for Michigan consumers, but only by modest amounts that fall well within the ambit of typical

fluctuations in price. With respect to Upper Peninsula propane consumers, data in the Draft Report evidences that prices will increase by no more than 10 cents per gallon, whereas a “range of 10 cents/gal to 35 cents/gal . . . is similar to the year-to-year volatility experienced during normal seasonal fluctuations.” *Id.* at 4-13; *see also id.* at 4-6 (propane price variation between the winter of 2015-2016 and 2016-2017 was 10 to 25 cents per gallon).³

- With respect to gasoline and other distillates, the Draft Report concludes that “[i]n addition to crude oil supply from [elsewhere in] the Enbridge System, the Detroit and Toledo refineries would access additional supplies from the Mid-Valley Pipeline (total capacity of 240 kbb/d) as well as through truck and rail deliveries,” *id.* at 4-17, with a projected increase in consumer prices of no more than 2.13 cents per gallon, *id.* at 4-20 – 4-21, an amount well within the range of normal fluctuations in cost. *See id.* at 4-21 (Table 4-5).
- The Draft Report, then, contains ample support for the conclusion that the Straits Pipelines can be decommissioned with little disruption and cost to the State, its citizens, and the Tribes. The continuing risk of an oil spill through the continued operation of the Straits Pipelines is simply not justified by Michigan interests.
- This should be a marquee finding in the Draft Report. It is instead omitted entirely from the executive summary and thereafter buried within the Draft Report’s voluminous and detailed focus on the viability of the other alternatives. Even there its implications are never acknowledged, much less developed with the clarity that they obviously warrant. Alternative 6 comes across in the Draft Report as an afterthought when it should be the centerpiece. This is because, as explained next, much of the Draft Report rests on a faulty premise.

³ The Draft Report explores four alternative sources of propane for Upper Peninsula consumers. *See id.* at 4-6 – 4-13. Trucking from Superior, Wisconsin, is the least expensive of these, and according to the Draft Report would result in an additional cost of 10 cents per gallon. *Id.* at 4-12 – 4-13. While the other options explored would be more costly (up to an additional 35 cents per gallon), the Draft Report provides no indication that the Superior option is infeasible, and hence 10 cents per gallon is the realistic upper bound of impact. Indeed, the Tribes understand that the State may receive comments from other sources indicating that even this figure is too high. The Tribes, of course, have many members living in the Upper Peninsula. They have no interest in seeing the costs of alternative propane supplies understated. But neither do they have an interest in seeing them overstated in a manner that may distort a proper assessment of the pipeline alternatives.

Key Shortcomings in the Draft Report

A. The Faulty Premise

- The Draft Report focuses the bulk of its analysis on Alternatives 1-5. In doing so, it does not assess the extent to which each of those alternatives would serve *Michigan* interests (including the interests of the State, its citizens, and the Michigan Tribes), as provided for in the RFP, and as was the expectation for the Draft Report of the public generally and the Tribes specifically.
- Instead, the Draft Report imposes on each of those Alternatives the limitation that they must maintain undiminished Enbridge's existing Line 5 product flow between Superior, Wisconsin, and the refineries in Sarnia, Ontario. *See, e.g.*, Draft Report at TS-3 ("For this study, the alternatives described are designed to provide equivalent capacity and deliveries to that of the existing Line 5."); *id.* at 6-1 ("Alternative 1 considers the construction of one or more new pipelines . . . to transport the volume of petroleum products that are currently transported by Enbridge Line 5 from its terminal at Superior, Wisconsin to its terminus in Sarnia, Ontario" (emphasis added)); *id.* at 5-1 (same for Alternative 2 (use of existing pipeline infrastructure)); *id.* at 7-1 (same for Alternative 3 (use of alternative transportation methods)). By contrast, the Draft Report evaluates Alternative 6 with the requirement of replicating the amount of Line 5 flow in fact relied upon by Michigan citizens and businesses. *See id.* at 4-6 – 4-24. In the Final Report, that should be the measure by which all of the alternatives are framed and evaluated.
- The Draft Report nowhere provides an explanation as to why the commercial needs of Enbridge should serve as the measure for evaluating the viability of all but one of the proposed alternatives to the Straits Pipelines. The absence of any such explanation diminishes the potential of the Draft Report to be used as a tool for reaching consensus regarding the best interests of Michigan, its citizens, and the Tribes with respect to the future of the Straits Pipelines.
- The Draft Report's approach could lead a casual reader to conflate those critical public interests with Enbridge's private interest in maintaining Line 5's product flow undiminished. But the interests of Michigan and those of Enbridge are not co-extensive. As noted, Line 5 largely carries its products through Michigan to the benefit of commercial, government and consumer interests elsewhere. *See id.* at 4-4 and 4-5 (stating that "[t]he majority of Line 5 throughput is delivered to . . . refineries across eastern Canada and the U.S.," and "less than 5%" of Line 5 NGLs go to the Upper Peninsula, and "Lewiston oil injections are also less than 5% of Line 5 current throughput"). The Draft Report does not reconcile that fundamental fact with its insistence that viable alternatives to the Straits Pipelines must replicate 100% of Line 5's throughput unabated.

- The Draft Report’s unexplained solicitude for Enbridge’s commercial needs over Michigan-specific interests leads to a skewed focus on, and favoring of, alternatives that best serve Enbridge’s needs. Perhaps the starkest example comes with the Draft Report’s summary dismissal of Alternative 2, which was supposed to address the use of existing pipeline infrastructure. Instead, the Draft Report summarily dispenses with this option after concluding that the existing infrastructure cannot convey all 540,000 barrels of oil per day presently transported by Line 5. *See id.* at 5-1 – 5-4 (discussing same); *see also id.* at MS-2 (“[T]he option of using existing pipeline infrastructure was removed from further detailed analysis.”).
- The Report discards this alternative from further consideration despite acknowledging that there presently exists significant excess capacity on Enbridge’s existing Line 78, which extends from Griffith, Indiana (near Chicago), across southern Michigan, to Sarnia, *see id.* at 5-2, and despite further acknowledging that the Mid-Valley Pipeline could supply much of the remaining needs of the Detroit and Toledo refineries, *id.* at 4-7. An analysis focused on Michigan interests would have fleshed out these facts in detail. Instead, because of its focus on non-Michigan concerns, the Draft Report fails to complete the analysis.
- Fortunately, while some calculations remain to be done, much of the analysis is, as canvassed above, already contained in the discussion of Alternative 6 (decommissioning). *See id.* at 4-6 – 4-22. The Final Report should accordingly be able to address the ability of the existing pipeline infrastructure to satisfy Michigan needs without having to re-invent the wheel.

B. Failure to Properly Account for Costs to Michigan and the Tribes

- While focusing on the commercial needs of Enbridge, the Draft Report fails to properly consider the costs of the various alternatives to Michigan’s citizens generally and to the Tribes specifically. For example, the Draft Report acknowledges that it “does not provide a separate valuation estimate for subsistence, commercial or cultural values associated with the use of resources by tribes.” *Id.* at 1-9. As a result, while Tribal interests, including Tribal treaty rights, are mentioned at occasional junctures in the Draft Report, the costs associated with alternatives affecting tribal interests “are not necessarily fully accounted for,” as acknowledged (in what can only be characterized as a significant understatement) by the project’s economist at the July 6, 2017, Holt presentation.⁴
- These omissions are evident in the Draft Report’s conclusion that the total cost of an oil spill in the Straits of Mackinac – which, in addition to all the other costs for Michigan and its citizens, would almost certainly wipe out a significant swath of the Tribes’ treaty-guaranteed fishing, hunting and gathering activities for years – would be no more than 103-128 million

⁴ Statements of Jack Ruitenbeek, PhD, at July 6, 2017, Information Meeting at Holt, Michigan, at 3:46:00–3:47:30. Available online at <https://mipetroleumpipelines.com/event/watch-video-july-6-public-information-session-holt>. Last visited July 29, 2017.

dollars (with an environmental damages component of 62-76 million dollars). *See id.* at 2-104 – 2-105. These are stunningly low figures, and the Draft Report makes no attempt to reconcile them with the fact that the Marshall oil spill has, to date, resulted in 1.2 billion dollars in remediation and other costs due to its impact on the Kalamazoo River and surrounding communities.⁵

- The Tribes understand that the State will be receiving detailed comments from other sources about the Draft Report’s failure to model worst-case spill scenarios, despite the State’s explicit instruction that it do so, and regarding other flaws in the Draft Report’s modeling and costs analysis. The Tribes will not duplicate those arguments here but will simply underscore that the Draft Report’s analysis vastly understates the effects of a Straits spill on Tribal economies, cultures, and ways of life.
- The on- and off-reservation fishing, hunting, and gathering rights retained by a number of the undersigned Tribes in treaties with the United States were of vital importance to them as they ceded vast swaths of land to the government in the 19th century. The exercise of those rights was essential to their very survival, as well as to the maintenance of a way of life and cultural practices dating back to time immemorial. In *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), the court explained that in negotiating the 1836 Treaty of Washington, 7 Stat. 491, the Tribes reserved the right “to hunt, fish, gather fruits of the land and use all land and water resources of the ceded area . . . [i]ndefinitely,” *id.* at 236, and that this right “was extremely important to the Indians” because it meant that “they could continue living the way they had been living,” *id.* at 235. With respect to fishing rights in particular, “the vital right to fish in the Great Lakes was something that the Indians understood would not be taken from them[.]” *Id.* at 253. “[T]he Indians were too heavily dependent upon fish as a food source and for their livelihood to ever relinquish this right.” *Id.* at 259.
- The Tribes’ reliance on their ancient fisheries, including in particular their fisheries in the Straits of Mackinac, is well documented. In *United States v. Michigan*, the court found that “[t]hroughout the period from first contact to the 1830’s [when the Treaty of Washington was signed], missionaries, explorers, traders, and military and governmental officials wrote of the Indian gill net fishery in the Great Lakes and of its importance to the Indian inhabitants. For example, the Frenchman Joutel wrote [a] detailed description of Indian gill netting at the Straits of Mackinac in 1687.” *Id.* at 222. The court further found that “[s]ubsistence fishing continued to be tremendously important to the Indians of the treaty area in the 1830’s. The introduction of the market economy, the fur trade and the dependence of the Indians on trade goods did not alter the subsistence dependence of Indians on the fishery; to the contrary, as

⁵ See Garrett Ellison, MLive.com, *New price tag for Kalamazoo River oil spill cleanup: Enbridge says \$1.21 billion*, May 20, 2016. Available online at: http://www.mlive.com/news/grand-rapids/index.ssf/2014/11/2010_oil_spill_cost_enbridge_1.html. Last visited July 30, 2017.

Fitting reported in his 'Patterns of Acculturation at the Straits of Mackinac,' those factors actually [i]ncreased and amplified the importance of fishing." *Id.* at 224.

- As these passages suggest, firsthand accounts of the importance of the fisheries to the Tribes, including in the Straits of Mackinac in particular, abound. Those accounts make clear that it was the abundance of fish in the Straits that had led a number of the Michigan Tribes to reside there. The explorer Antoine de la Mothe Cadillac authored one of the most poignant of these in describing the Ottawa fisheries at Mackinac circa 1695:

The great abundance of fish and the convenience of the place for fishing have caused the Indians to make a fixed settlement in those parts. It is a daily manna, which never fails; there is no family which does not catch sufficient fish during the course of the year for its subsistence. Moreover, better fish can not be eaten and they are bathed and nourished in the purest water, the clearest and the most pellucid you could see anywhere.

W. Vernon Kinietz, *The Indians of the Western Great Lakes: 1615-1760* (1965), at 239-40.

- And it was this same abundance of fish that led the Tribes to insist, when they ceded their lands, that their treaty reservations be located near the Straits and adjacent waters. As the court explained in *United States v. Michigan*:

All Indians of the Upper Great Lakes, including the Ottawa and Chippewa, were fishing peoples. The settlement patterns of native peoples of the Upper Great Lakes, including the treaty Indians in the case at bar, were strongly influenced by available resources, especially fish. It is no mere coincidence that the [1836 reservations] are all located on the Great Lakes and all adjacent to important fishing grounds. It is also noteworthy that most major archaeological sites in the Upper Great Lakes are near or within [the 1836 reservations]. In order to reach a conclusion that the Indians were not dependent upon this valuable fishery resource, the court would have to ignore hundreds of years of recorded testimony and thousands of years of prehistoric information.

471 F. Supp. at 256.

- In the years since Cadillac wrote his account, and since the treaties were signed, much has changed. The waters, the fisheries, and the game have all suffered tremendously. But the Tribes have fought vigorously to retain their way of life and to restore those natural resources to some small measure of their former bounty. And the State, in recognition of the tremendous importance of those resources to all Michigan citizens, and to the very identity of the State, has worked in partnership with the Tribes towards that end.

- The continuing importance of the Straits to the Tribes cannot be gainsaid. The Tribes have continued to reside and to maintain significant commercial and subsistence fisheries there. As a tribal Great Lakes fishery biologist recently declared:

Northern Lake Michigan and Northern Lake Huron are very productive areas for lake whitefish [the most important commercial species] with biomass levels typically exceeding 10 million pounds annually. . . . Lake whitefish harvests from Northern Lake Michigan and Northern Lake Huron made up 37% to 76% of the total annual [Chippewa Ottawa Resource Authority] commercial lake whitefish harvest from the 1836 ceded waters and averaged 58% during 1986-2014.”⁶

- In addition, to compensate for shortfalls in the fisheries from historic levels, the Tribes have invested enormous amounts of time, effort, and resources to develop other aspects of their economies, including tourism-related activities, that are likewise predicated on the health of the Straits.
- The Draft Report mentions little of this, and the paltry figure it attaches to the physical and cultural carnage that would result from an oil spill in the Straits fails to adequately capture or respect the importance of the Straits to the history and very identity of the Tribes and the State. It may well be that the central role that healthy Straits have played and continue to play in the life of the Michigan Tribes and their non-Indian neighbors cannot be adequately quantified. If Dynamic Risk’s models do not allow for the monetization of that value it should forthrightly acknowledge that fact in its Final Report and eliminate any implication that it has fully captured the true cost of the harm that would result from a rupture of the Straits Pipelines.

C. Flawed Emphasis on Alternatives 5 (Status Quo) and 4 (Tunneling and Trenching)

- Ultimately, as a result of its unexplained focus on the commercial needs of Enbridge, the Report leaves the impression that the most prudent and reasonable alternative is to maintain Line 5 in place (Alternative 5), potentially with a revised Straits crossing via trench or tunnel (Alternative 4). But the Draft Report does not identify any interests of the State, its citizens, or the Tribes that would be advanced by these options.
- To the contrary, it is clear that Tribal interests, along with closely related interests of Michigan and its non-Indian citizens, have not been fully accounted for in the Draft Report’s favorable discussion of the possibility of trenching or tunneling the Straits Pipelines. The Draft Report acknowledges that both trenching and tunneling will have significant

⁶ See Attachment A (Declaration of Mark P. Ebener, Great Lakes fishery biologist for Chippewa Ottawa Resource Authority (“Ebener Decl.”) at 4. Filed in *National Wildlife Federation v. Administrator of PHMSA*, Case No. 2:16-cv-11727, United States District Court, E.D. Mich. (July 14, 2016)).

socioeconomic impacts in the Straits region. *See* Draft Report at 3-17 – 3-20 and Appendix Q. Trenching, which would not eliminate the risks of an oil spill posed by the Straits Pipelines,

will require disruption of water traffic through the Straits. The Straits is an important link between Lake Michigan and Lake Huron. Important to recreational boating and fishing, it is a fundamental part of the tourism attraction to the region. It is also part of the area's tribal treaty waters, and important for tribal commercial and subsistence fisheries. The impacts of any disruption to water traffic needs careful assessment with area tribes, the MDNR Fisheries Division, and others affected by lake traffic in the area.

Id. at 3-20. In addition, “[a]djacent shoreline areas will be temporarily transformed into worksites for materials delivery and machinery installation.” *Id.* at 3-17.

- Tunneling (projected to extend over at least a 27-month period) will involve, among other things, “considerable disturbance on the shoreline at both ends of the tunnel.” *Id.* “Tunneling operations in particular require the extraction and trucking of large amounts of rock and soil; dust and noise will impact community residents and visitors.” *Id.* at 3-20. And either of the proposed tunneling methods will quite predictably have significant disruptive effects on the bottomlands and on water quality. *See* Appendix E.3 for a description of the tunnel boring and drill and blast methods.
- Even on the face of the Draft Report, then, and without anything approaching a full exploration of the issues, it is clear that trenching or tunneling the Straits Pipelines will have significant, negative impacts on the Tribes’ treaty-protected activities. Any degradation in water quality will threaten the already fragile fisheries. Moreover, the significant shoreline disturbances mentioned in the Draft Report are of great concern given that “lake whitefish spawning is concentrated in shallow rock and gravel areas adjacent to the shorelines,” Ebener Decl. at 3, that “young lake whitefish occupy very shallow sandy areas less than 5 ft. deep adjacent to the spawning shoals,” *id.* at 4, and that lake trout also “spawn to a lesser extent in shallow rocky areas along the shoreline of both [lakes],” *id.* at 5.
- Tunneling or trenching could also result in major disturbances to the waterfowl, migratory birds, aquatic furbearers, and other resources to which Tribal treaty rights attach, and to both the water and shoreline sites (potentially including Tribal trust and reservation lands) that Tribal members use to gain access to their treaty resources. They would further render off-limits additional portions of the bottomlands on which the Tribes have set their nets since time immemorial.
- The Final Report should properly reflect the vast disruption that would be entailed by tunneling or trenching and should make clear that these options are unnecessary to satisfy

any significant interests of the State, the Tribes, or their citizens, but would instead be undertaken largely for the benefit of out-of-state interests.

D. Failure to Conduct an Apples-to-Apples Comparison of Risk

- The Draft Report’s comparison of the risks presented by the various Alternatives is summarized at Table ES-2, which is found at page 23 of the Technical Summary (TS-23). Even a cursory glance at the Table suggests that something is amiss. According to the Table, the total economic risk of a spill from the utilization of a state-of-the-art pipeline constructed along the existing southern route (Alternative 1), which largely avoids exposure to the Great Lakes, is 46.26 times higher than the total economic risk of maintaining the Straits Pipelines in place, while the monetized environmental risk is 33.77 times higher (the numbers are even starker for the tunneling or trenching options). This is impossible to fathom, given that the pipeline industry in general, and the Draft Report itself, consistently tout the reduction in risk resulting from continual technological improvements in pipeline design, construction and installation, *see, e.g.*, Draft Report at 3-1, 3-6, 3-25, 3-27, and 6-3 – 6-4, and given the extremely sensitive nature of the Straits crossing.
- The explanation lies in another fundamental flaw in the Draft Report – its failure to conduct an apples-to-apples comparison of risk. Table ES-2 summarizes the Draft Report’s assessment of the relative risks presented by the 4.5 mile Straits crossing against those presented by the *entire* 762 miles of a new southern pipeline (226 miles of which would fall in Michigan). *See* TS-23 (Table ES-2); *see also* 6-14 (“The failure likelihood component of the risk expression” for the southern route applies to “the segment of pipeline that would be used to bypass the Straits segment of Line 5.”). No valid reason is provided for such an unbalanced comparison, and none exists. If the Straits crossing remains in place, so too will the rest of Line 5, and an accurate assessment of relative risk would therefore compare the risks and consequences of a spill along Line 5 in its entirety with those related to the replacement route. Or, to focus more precisely on Michigan interests, an accurate assessment would compare the risks and consequences of a rupture along Line 5 that could affect Michigan lands and waters with those associated with the replacement route. The Final Report should correct what is otherwise a highly misleading comparison of risk.
- The Draft Report likewise overstates the consequences of a southern route spill compared to a spill at the Straits. The former are calculated using incident data from 2010-2016, which sweeps in the disastrous Enbridge spills at Marshall and near Romeoville, Illinois in 2010. *See* Draft Report at 6-14 – 6-16. By contrast, those spills are nowhere factored into the Draft Report’s assessment of the consequences of a Straits spill. The illogic of this is apparent. The results of failures of Enbridge’s older pipelines are used to skew the risk analysis in favor of maintaining another aged pipeline under the Straits as opposed to constructing a new, state-of-the-art pipeline in an existing right-of-way far removed from the Straits. Dynamic Risk should rethink its approach to its comparison of relative risks, which at present is not defensible.

The State's Obligation to Act

- The foregoing comments, and others submitted to the State, including by members of the State's own Pipeline Safety Advisory Board, reflect significant shortcomings in the Draft Report. Dynamic Risk can and should fix those flaws. But regardless of whether it does, the Draft Report contains ample evidence establishing the State's obligations to decommission the Straits Pipelines under two cardinal, and in this context closely related, legal doctrines.

The Public Trust Doctrine

- The Draft Report's focus on the commercial needs of Enbridge is not simply deficient as a matter of fact and policy, but also as a matter of law. For whatever may be Enbridge's private interests, or the interests of other jurisdictions, in maintaining the Straits Pipelines (whether in their present or in tunneled or trenched form), the interests of the people of Michigan and of the Tribes in protecting the Straits and its resources are paramount under the public trust doctrine.
- Pursuant to that doctrine, certain natural resources held in common by the public constitute "the public trust." These resources specifically include "the waters of the Great Lakes and their submerged lands[.]" *Glass v. Goeckel*, 473 Mich. 667, 694 (2005). The State, as trustee, has an affirmative obligation to protect such public resources against impairment. *See id.* That obligation is enshrined in the Michigan Constitution. *See* Mich. Const. art. IV, § 52. As the Michigan Attorney General, citing seminal authority from the United States Supreme Court, explained in 2004, under the public trust doctrine the State has "not only the authority *but an affirmative obligation* to protect the public interest in navigable waters." Mich. Op. Att'y Gen. 7162 (2004), 2004 Mich. AG LEXIS 18, at *5 (citing *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892)) (emphasis added).
- Because of the paramount nature of the public's rights in the Straits, the 1953 easement presents no obstacle to the State's full exercise of its public trust authority with respect to the Straits. Indeed, the State did not surrender even a fraction of that authority – or the affirmative duties that underpin it – when it granted the easement. "The state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources." *Glass*, 473 Mich. at 679. To the contrary, the easement was issued fully "subject to the public trust" at its inception. *Id.* In other words, 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). *See also, e.g., Nedtweg v. Wallace*, 237 Mich. 14, 17 (1927) (stating that public trust "is an inalienable obligation of sovereignty" and "[t]he State may not, by grant, surrender such public rights" in favor of private interests). These are not mere academic concepts. As the Michigan Supreme Court has recently explained, "the public trust doctrine is alive and well in Michigan[.]" *Glass*, 473 Mich. at 681.

- Accordingly, the State does *not* need to find a violation of the 1953 easement to revoke it and order the decommissioning of the Straits Pipelines. Because the easement was issued “subject to the public trust,” *id.* at 679, it issued subject to the understanding that the State could unilaterally revoke it based on subsequent understandings (as opposed to those prevailing in 1953) of the threat to the public trust posed by the Pipelines. As the United States Supreme Court, in a seminal public trust decision oft-cited by the Michigan Supreme Court, has explained, “[t]here can be no irrevocable contract in a conveyance of property by a [sovereign] in disregard of [the] public trust[.]” *Ill. Cent. R.R. Co.*, 146 U.S. at 460. Thus, any grant of property rights (*e.g.*, an easement) 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. . . . [T]he power to resume the trust whenever the State judges best is . . . incontrovertible.

Id. at 455. *See also id.* at 461-62 (recognizing power of the state under public trust doctrine “to resume control of the resources and property” based on subsequent “consideration of public policy” and stating that state’s power to do so “is unquestionable”).⁷

- Furthermore, the State not only has the authority under the public trust doctrine to revoke the easement, it has the *duty* to do so. Attorney General Bill Schuette has stated that “[c]ertainly the Straits Pipelines would not be built today[.]”⁸ That is unquestionably true. Laying private crude oil pipelines in the Straits of Mackinac (of all places) for the primary benefit of out-of-state commercial interests simply cannot, based on what is known today, be squared with Michigan’s paramount obligations to safeguard the public trust in the Straits and surrounding lands and waters. If the State would not permit the Straits Pipelines to be installed today because of their threat to the public trust, there exists no basis – and indeed *no authority* – to acquiesce in their continued operation. Again, the State’s public trust obligations are affirmative. As the Michigan Supreme Court has made clear, “the state . . . *may permit only* those private uses that do not interfere with . . . the public trust.” *Glass*, 473 Mich. at 694 (emphasis added). The trenching or tunneling of the Straits or the maintenance of the existing pipelines – in light of the known risks of catastrophic consequences identified in the Draft Report, and the known disruption that trenching or tunneling would cause – are private uses that would unquestionably interfere with public rights in that iconic resource. The Draft Report identifies no Michigan-based interests that would purport to justify such interference.

⁷ The State would not be subject to a claim for compensation under the Takings Clause if it revoked the Straits easement in absence of a violation. *See, e.g., Hilt v. Weber*, 252 Mich. 198, 225 (1930) (where private property rights are withdrawn by a state for public use, “compensation must be made, *unless the use has a real and substantial relation to a paramount trust purpose.*” (citing *Illinois Central*) (emphasis added)).

⁸ Public statement made on July 14, 2015. Available online at <http://www.michigan.gov/ag/0,4534,7-164-46849-359349--,00.html>. Last visited July 30, 2017.

Tribal Treaty Rights and the Supremacy Clause

- As discussed above, the Tribes have well-established treaty rights to fish, hunt, and gather in the lands and waters surrounding the Straits of Mackinac, and the vitality of those rights depends on the health and quality of those resources. The ever-present risk of a spill from the Straits Pipelines, and the destruction that would be caused by the tunneling or trenching alternatives, pose unacceptable threats to those rights.
- Similar to its obligations under the public trust doctrine to treat certain natural resources as “paramount” and to protect them against impairment, the State is firmly bound under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, to honor the Tribes’ treaty rights and to refrain from impairing, or from permitting the impairment of, the resources to which those rights attach. “[A] treaty made under the authority of the United States becomes the supreme law of the land . . . [and] maintains the same status as a federal statute[.]” *United States v. Michigan*, 471 F. Supp. at 217. *See also Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 n.12 (1968) (stating that treaties are “the supreme law of the land” and that rights “guaranteed to the tribe by the Federal Government [are not] subject” to abrogation by a state (internal quotation marks omitted)). That States may not act in derogation of rights guaranteed by Indian treaties is accordingly a “fundamental principle of federal constitutional law,” 471 F. Supp. at 265, and it is one that the State of Michigan has respected for decades.
- In the case of the Straits Pipelines, the State’s paramount public trust obligations and its constitutional duty to refrain from impairing the Tribes’ treaty rights are firmly aligned, and both point to decommissioning the Pipelines. Indeed, the State and the Tribes have cooperated extensively in recent years in efforts to protect and enhance the fish, game, and plant-based resources on which Tribal members and Michigan’s non-Indian citizens alike depend for subsistence, commercial, recreational, and cultural purposes. Their shared recognition of the incomparable value of such resources should underpin the decisions made by the State about the future of the Straits Pipelines.

* * *

The State of Michigan – with wisdom and courage commensurate with its paramount public trust and treaty obligations and its history of environmental leadership – should decommission the Straits Pipelines. When the State determines to do so, the Tribes and their members will stand shoulder-to-shoulder with the State and our non-Indian neighbors in defense of our shared legacy.

/s/ Levi Carrick, Sr.

Levi Carrick, Sr., President
Bay Mills Indian Community
12140 W. Lakeshore Drive
Brimley, MI 49715

/s/ Kenneth Meshigaud

Kenneth Meshigaud, Tribal Chairperson
Hannahville Indian Community
N14911 Hannahville B1 Road
Wilson, MI 49896

/s/ James Williams, Jr.

James Williams, Jr., Tribal Chairman
Lac Vieux Desert Band of Lake Superior
Chippewa Indians
East 23968 Pow Wow Trail
Watersmeet, MI 49969

/s/ Regina Gasco-Bentley

Regina Gasco-Bentley, Tribal Chair
Little Traverse Bay Bands of Odawa Indians
7500 Odawa Circle
Harbor Springs, MI 49740

/s/ Jamie Stuck

Jamie Stuck, Tribal Chairman
Nottawaseppi Huron Band of
Potawatomi Indians
1485 Mno-Bmadzewen Way
Fulton, MI 49052

/s/ Frank J. Cloutier

Frank J. Cloutier, Tribal Chief
Saginaw Chippewa Indian Tribe of Michigan
707 E. Broadway
Mt. Pleasant, MI 48858

/s/ Thurlow "Sam" McClellan

Thurlow "Sam" McClellan, Tribal Chairman
Grand Traverse Band of Ottawa and
Chippewa Indians
2605 N.W. Bayshore Drive
Suttons Bay, MI 49682

/s/ Warren C. Swartz, Jr.

Warren C. Swartz, Jr., President
Keweenaw Bay Indian Community
16429 Beartown Road
Baraga, MI 49908

/s/ Larry Romanelli

Larry Romanelli, Tribal Ogema
Little River Band of Ottawa Indians
2608 Government Center Drive
Manistee, MI 49660

/s/ Scott Sprague

Scott Sprague, Tribal Chairman
Match-e-be-nash-she-wish Band of
Pottawatomi Indians of Michigan
2782 Mission Drive
Shelbyville, MI 49344

/s/ John Warren

John Warren, Chairman
Pokagon Band of Potawatomi Indians
58620 Sink Road
Dowagiac, MI 49047

/s/ Aaron A. Payment

Aaron A. Payment, Tribal Chairperson
Sault Ste. Marie Tribe of Chippewa Indians
523 Ashmun Street
Sault Ste. Marie, MI 49783

cc: David Nyberg, Tribal Liaison, Governor's Marquette Office
Matthew Goddard, Energy Liaison, MDEQ
Teresa Seidel, MDEQ
S. Peter Manning, MDAG
Robert Reichel, MDAG
Trevor VanDyke, MDNR