



December 15, 2018

To: Michigan Department of Natural Resources
Pipeline Safety Advisory Board

Subject: Proposed Tunnel Agreement Between MSCA and Enbridge Energy

Ladies and Gentlemen: Following are the comments of the Upper Peninsula Environmental Coalition on the Proposed Subject Agreement (Hereafter "Proposed Agreement" or "Agreement")

1. The Proposed Agreement and the manner in which it is being presented to the public is highly problematic and objectionable. The Proposed Agreement concerns a major construction project affecting the citizens of Michigan, the environment of the Straits of Mackinaw, and potentially the entire Great Lakes ecosystem and the citizens of several other states and Canadian provinces. Many of those effects would extend throughout the life of the proposed tunnel project, essentially in perpetuity. The public notice for the Proposed Agreement was posted at 3:03 pm on December 13, 2018, with the public period ending on December 18, 2018, for a period of just over five days, including a weekend. Such a limited public comment period for a proposal of this magnitude, presented in a legally dense document, with such significant potential impacts to the population of the State and beyond is an egregious abuse of power, and an obvious attempt to limit public review and input. The State should extend the public comment period for 60 days to allow adequate time for public review and comment. The manner in which this Proposed Agreement is being pushed through also ties the hands of the incoming Governor, and is an affront to Michigan voters and the democratic process.
2. Part C of the Recitals/Preamble section of the Proposed Agreement is written in such a manner as to presuppose rights, authorizations, ownership, and leases of the tunnel. These are actions, including State and Federal regulatory actions, that remain to be determined, and at least some of which must also undergo public and agency review and analysis.

Including them in this Agreement is prejudicial and premature, and should be struck or reworded to indicate that these things will be sought, rather than obtained or granted.

3. The U.S. Army Corps of Engineers has jurisdiction to require a permit for the proposed tunnel under the Straits, a federally designated navigable water, pursuant to Section 10 of the Rivers and Harbors Act of 1899. The Agreement should explicitly reference that authority, and the fact that a federal permit would need to be obtained for the construction and operation of the proposed tunnel. That federal permit review process would involve an opportunity for agency, private group, and public review and comment, as well as analysis under the National Environmental Policy Act, to potentially include preparation of an Environmental Impact Statement.
4. The definition of “Confidential Information” in subsection “g” is highly problematic. Under this definition Enbridge and/or the State of Michigan could designate anything as confidential, to include all geotechnical, engineering, biological, environmental, cultural, social, and other relevant data and analyses. Such data and analyses are essential to public and agency reviews and informed input to the project. This definition should be rewritten to include only “personally identifiable information” (PII), which is information that can be used on its own or with other information to identify, contact, or locate a single person, or to identify an individual.
5. Article 3 on Property Interests, section 3.1 (a) on Needed for Construction states “Authority has or will acquire from the Michigan Department of Natural Resources a Tunnel Easement that will provide the Authority with the lawful right to enter, occupy, and use, lands beneath the lakebed of the Straits of Mackinac necessary for the construction, use, operation, and maintenance of the Tunnel (“Subsurface Right of Way”), which will include the right to construct a liquid hydrocarbon pipeline within the Tunnel, and which will allow and authorize assignment to Enbridge in accordance with this Agreement.” Again this language presupposes that the Bridge Authority already has or will obtain such easement. Granting of an easement is an MDNR function for which a particular outcome is not, or should not be guaranteed. This section should be reworded to state that an easement will be applied for by Enbridge, and issued or denied by the State, as appropriate.
6. In Article 4 on Government Approvals/Permits, there are discrepancies in the language in the first unnumbered paragraph in Section 4.2 which states the State and Enbridge will jointly apply for permits, and further, that the State may sign onto approvals and permits, and the rest of this section that indicates all responsibilities for obtaining and complying with all Government approvals and permits. The language should be revised in this section and subsection 7.4 to reflect that Enbridge will be solely responsible for obtaining all Government approvals and permits, and will be responsible for following all terms and conditions of such approvals and permits.
7. Subsection 7.11(c) states “Based upon the Tunnel Completion Report and Certification described in 7.11(b), and other available information, concurrent with the execution and delivery of the Tunnel Lease, the Authority will (i) accept the Tunnel and take title thereto...”. Subsection 7.11(d) contains similar language. This would also presumably require the Authority to have any Government approvals and permits transferred to it as the

permittee. This would also make the Authority, and by extension, the State responsible for any accidents or mishaps and any corrective actions or penalties that may result. In the event of a major spill from the new Line 5 pipeline into the Great Lakes, Enbridge should be held responsible, not the Authority, who should be representing the interests of the citizens of the State.

8. Article 11 on Indemnification, subsection 11.1 states “Subject to Section 11.2 and Article 12, Enbridge will defend, indemnify, protect and hold harmless the Authority and the State of Michigan, and all of its officers, officials, agents, and employees, each in their capacities as such (Indemnitee) from and against (a) any Claim or Liability arising out of or in connection with the work done by Enbridge or its contractors under this Agreement, including without limitation, the design, construction, operation and maintenance of the Tunnel or the Line 5 Straits Replacement Segment, and (b) any Claim or Liability relating to the Tunnel arising out of or in connection with the condition of state-owned lands beneath the Straits of Mackinac. It is the specific intent of the Parties to this Agreement that the Indemnitee will, in all instances except for loss or damage resulting from the sole and exclusive negligence or wrongful acts or omissions of the Indemnitee, be indemnified against all liability, loss or damage for or on account of any injuries to or death of any third person or any damages to or destruction of real or personal property belonging to any third person arising out of or in any way connected with the performance of this Agreement, regardless of whether or not the liability, loss, or damages caused in part, or alleged to be caused in part by, the negligence or fault of the Indemnitee.” Notwithstanding this part, if the Authority, and by extension, the State is the lease holder and/or permittee or co-permittee of the Tunnel, an indemnity agreement cannot shield the State against an enforcement action of a federal permitting authority due to a catastrophic failure of Line 5, including a major spill of liquied hydrocarbon product into the Straits or other portions of the Great Lakes and its shorelines.

9. Section 12 on Coordinated Defense with Respect to Certain Claims. This section states that the State (the Authority) and Enbridge will jointly defend against claims not limited to, but especially those challenging the validity of any Governmental Approval or Permit granted to allow construction of the Tunnel based upon an application submitted under this Agreement, notwithstanding whether the Authority does not accept or become a party to the Permit; claims initiated by Enbridge or the Authority to challenge a Governmental Entity’s denial of a Governmental Approval or Permit applied for under this Agreement; claims challenging the Authority’s and/or Enbridge’s right to use any State lands required for the Tunnel. It stretches credulity to think that the State would join forces with a private entity like Enbridge in defending challenges to the validity of Government permits, even when the State is not a party to the permit or to challenge a legally-issued Government permit that is denied under any circumstances, but especially in light of Enbridge’s checkered safety and environmental compliance record.

10. Article 19 on Records and Information, subpart (d) states: “In the event that the Authority receives a request under FOIA for disclosure of records provided by Enbridge to the Authority which Enbridge has designated as Confidential Information, the Authority will

promptly notify Enbridge of the FOIA request and provide Enbridge an opportunity to timely identify in writing to the Authority any provision(s) of FOIA that Enbridge believes would exempt the requested records from disclosure. Any such notification by Enbridge will not bind the Authority or alter its obligation to fully comply with FOIA.” We view this provision as a breach of Michigan’s FOIA. The State has the sole responsibility to make any determinations of information that may or may not be provided pursuant to a request under FOIA. To allow a private entity such as Enbridge to make separate judgements on what information may be released is an abrogation of State authority, and is likely to be successfully challenged in court. This language should be struck from the Agreement.

11. Article 22 on Assignment, subpart 22.1 states “Enbridge may assign, charge, or transfer its rights or obligations under this Agreement provided that it obtains the written consent of the Authority.” If Enbridge is named as a permittee on any federal permit and potentially State permits, it cannot eliminate its obligations under such permits merely by written consent of the Authority.
12. Schedule 1—Third Party Utility Access. This Schedule sets forth the procedure by which Third-Party Utilities may gain access to construct, operate, and maintain linear utilities inside of the Tunnel. Certain Government permits, e.g. a permit issued by the Corps of Engineers, authorize specific uses of the activities and structures permitted. If a Corps permit were to be issued for construction of the Tunnel and replacement Line 5, but not for other utilities inside the Tunnel, an application would have to be submitted to allow for construction of that utility line as an amendment to the original permit. Issuance of either an original permit or an amendment are subject to the review and comment of reviewing agencies, private entities, and the public. These processes should be recognized in this Agreement so that all parties and the public understand that allowing additional utilities is not simply subject to agreement between the Authority and Enbridge.
13. In sum, the draft Agreement is highly flawed, ill-advised, and inadequately available to the public. At the very least, the public notice period for this Agreement should be extended to 60 days to allow the public adequate opportunity to review and comment. The manner in which this Agreement and accompanying documents is being rushed through at the end of the Snyder Administration gives the undeniable impression that there is not a sincere desire to provide the public with a reasonable opportunity to be informed of the State’s and Enbridge’s intentions with respect to the Tunnel, nor to allow for a deliberative process that considers the potential impacts to the incomparable natural resources of the Straits of Mackinac and the Great Lakes ecosystem. This is especially true in consideration of Enbridge’s dismal track record of major pipeline spills, including in Michigan. This Agreement and the entire subject of the construction of a Tunnel under the Straits of Mackinac should be left to the incoming Whitmer Administration, in accordance with the clear expression of the voters of Michigan.

Sincerely,
/signed/
Jeffrey K. Towner
Board Member,
Upper Peninsula Environmental Coalition