

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN

BAD RIVER BAND OF THE LAKE  
SUPERIOR TRIBE OF CHIPPEWA INDIANS  
OF THE BAD RIVER RESERVATION,

Plaintiff,

v.

ENBRIDGE ENERGY COMPANY, INC., and  
ENBRIDGE ENERGY, L.P.,

Defendants.

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ENBRIDGE ENERGY COMPANY, INC., and  
ENBRIDGE ENERGY, L.P.,

Counter-Plaintiffs,

v.

BAD RIVER BAND OF THE LAKE  
SUPERIOR TRIBE OF CHIPPEWA INDIANS  
OF THE BAD RIVER RESERVATION and  
NAOMI TILLISON, in her official capacity,

Counter-Defendants.

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No. 3:19-cv-00602-wmc

HON. WILLIAM M. CONLEY

MAG. STEPHEN L. CROCKER

**AMICUS BRIEF OF THE STATE OF MICHIGAN AND DANA NESSEL,  
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## **STATEMENT OF INTEREST OF AMICI CURIAE**

Amici the State of Michigan and Dana Nessel, Attorney General of the State of Michigan, have a duty to protect and preserve the waters of the Great Lakes. This duty, known as the public trust doctrine, is enshrined in Michigan law. It provides that Michigan's navigable waters belong to the public and are held in trust for their benefit by the state government. *Glass v. Goeckel*, 703 N.W.2d 58, 64–65 (Mich. 2005). In furtherance of this duty, Amici support the Plaintiff, the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation (the Band), in its emergency motion for injunctive relief.

### **INTRODUCTION**

The alarming erosion at the Bad River meander poses an imminent threat of irreparable harm to Lake Superior which far outweighs the risk of impacts associated with a shutdown of the Line 5 pipeline. Without judicial intervention, it is likely that this irreparable harm will be inflicted not only on the Band, but also on Michigan, its residents, and its natural resources. For this reason, Amici respectfully request that the Court grant the Band's motion and order Defendants Enbridge Energy Company, Inc. and Enbridge Energy, L.P. (collectively Enbridge) to purge and shut down the Line 5 pipeline.

### **STATEMENT OF FACTS**

In the interest of candor to the Court, Amici are currently involved in litigation with Enbridge related to the operation of Line 5 in the Straits of

Mackinac, where Line 5 crosses the bottomlands of Lake Michigan and Lake Huron between Michigan's Upper and Lower Peninsulas.

Attorney General Dana Nessel, on behalf of the People of the State of Michigan, filed a lawsuit in Michigan state court in 2019 seeking to enjoin operation of Line 5 in the Straits of Mackinac. That case was filed in state court and litigated for over a year before it was removed by Enbridge to federal court. In June of 2020, the state court entered a temporary restraining order shutting down Line 5 in the Straits for several weeks after an anchor or similar object struck the pipeline. That matter is still pending, *Nessel v. Enbridge Energy, L.P. et al.*, Western District of Michigan case number 21-cv-01057, and is presently before the U.S. Court of Appeals for the Sixth Circuit in the parallel matters of *In re: Dana Nessel*, case number 23-1148 and *Nessel v. Enbridge Energy, L.P. et al.*, case number 23-0102.

The State of Michigan, along with Michigan's Governor and the Director of the Michigan Department of Natural Resources (DNR), is currently a defendant in the matter of *Enbridge Energy, L.P. et al. v. Whitmer, et al.*, U.S. District Court for the Western District of Michigan case number 1:20-cv-01141. Those state parties were also previously plaintiffs in the matter of *State of Michigan, et al. v. Enbridge Energy, L.P. et al.*, Western District of Michigan case number 1:20-cv-01142 (voluntarily dismissed on November 30, 2021). In that case, the state plaintiffs sought, among other things, a court order enjoining the operation of Line 5 in the Straits of Mackinac. The State of Michigan, along with other state entities, was

also previously a defendant in the matter of *Enbridge Energy, L.P. et al. v. State of Michigan, et al.*, 957 N.W.2d 53 (Mich. App. 2020).

These matters are not relevant to this case or to this amicus brief. They are referenced here only to apprise the Court of previous and ongoing disputes between the Amici and Enbridge related to the operation of Line 5 in Michigan. This brief will address the imminent threat posed by Line 5 at the Bad River meander, the grave threat of catastrophic harm that this poses to Lake Superior, Michigan's efforts to assess the risk to the Great Lakes posed by Line 5, the potential impacts to Michigan in the event that the pipeline is shut down, and the steps Michigan and relevant market participants have taken to ensure that Michigan is prepared for a shutdown.

### **Brief Overview of Line 5**

As the Court is already well aware, Line 5 is an approximately 70 year old, 645 mile pipeline that runs from Superior, Wisconsin to Sarnia, Ontario. A stretch of the pipeline, approximately four miles in length, runs through the waters of the Great Lakes on the bottomlands of the Straits of Mackinac, between Michigan's Upper and Lower Peninsulas. Line 5 transports crude oil as well as natural gas liquids such as propane.

Since completing Line 5 in 1954, Enbridge's predecessors, and now Enbridge itself, have continued to operate it, and over time significantly increased the quantity of products transported through it. Enbridge currently transports an

average of 540,000 barrels (22,680,000 gallons) of light crude oil, synthetic light crude oil and/or natural gas liquids per day in Line 5.

### **The 2010 release from Enbridge's Line 6B**

As set forth in the Band's Statement of Proposed Findings of Fact in Support of its Emergency Motion for Injunctive Relief, in 2010 there was a release of approximately 20,080 barrels (873,600 gallons) of crude oil from Enbridge's Line 6B to the waters of the Kalamazoo River and Talmadge Creek in Michigan. Plaintiff's Proposed Findings of Fact, Dkt. 630, p. 9. It took Enbridge over 17 hours to shut down the pipeline,<sup>1</sup> resulting in one of the largest inland oil spills in U.S. history. The ensuing shutdown of Line 6B lasted "several months," but "did not have sizable price impacts for refined product in the Detroit/Toledo area . . . ." Plaintiff's Proposed Findings of Fact, Dkt. 630, p. 10 of 17, ¶¶ 54–56.

After the Line 6B release, State of Michigan officials undertook significant analysis of the likelihood of a release from Line 5, particularly where it lies on bottomlands over 200 feet below the surface of Lakes Michigan and Huron in the Straits of Mackinac, as well as the potential economic impacts of such a release. The obvious concern is that a release at that location would be particularly difficult to detect and remediate, and would cause catastrophic environmental, economic,

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<sup>1</sup> See, e.g., CBC News, *Enbridge staff ignored warnings in Kalamazoo River spill* (Jun. 22, 2012), available at: <https://www.cbc.ca/news/canada/edmonton/enbridge-staff-ignored-warnings-in-kalamazoo-river-spill-1.1129398>.



and cultural harm to Michigan’s residents and to the Great Lakes and all who depend on them.

### **Michigan’s actions with regard to Line 5**

The State of Michigan undertook a series of actions to understand and address the risks posed by a potential release from Line 5 to the waters of the Great Lakes, and to assess the impacts that a shutdown of Line 5 would cause. These actions include, but are not limited to:

- Creating the Michigan Petroleum Pipeline Task Force in 2014, whose work culminated in the publication of the Michigan Petroleum Pipeline Task Force Report in July of 2015. This report recommended actions to, among other things, protect Michigan and its residents from the risks posed by Line 5. A copy is available at: [Michigan Petroleum Pipeline Task Force Report | MI Petroleum Pipelines](#).
- Creating Michigan’s Pipeline Safety Advisory Board in November of 2015: [Creation of Pipeline Safety Advisory Board | MI Petroleum Pipelines](#).
- Commissioning a report titled “Alternatives Analysis for the Straits Pipelines” by Dynamic Risk Assessment Systems, which was published in October of 2017 and included, among other things, an analysis of the risks posed by Line 5’s operation in the Straits of Mackinac, and of alternatives that could be employed to meet Michigan’s energy needs in the event of a shutdown. A copy is available at: [Alternatives Analysis for the Straits Pipeline | MI Petroleum Pipelines](#).
- Establishing regulations to restrict vessel operation and anchor use in the Straits of Mackinac effective May 23, 2018, [DNR Establishes Restricted Anchor and Vessel Equipment Zone in the Straits | MI Petroleum Pipelines](#).
- Obtaining a second alternatives report from Enbridge itself for the State of Michigan titled “Alternatives for replacing Enbridge’s dual Line 5 pipelines crossing the Straits of Mackinac” in June of 2018, a copy of which is available at: [Alternatives for replacing Enbridge’s dual Line 5 pipelines crossing the Straits of Mackinac | MI Petroleum Pipelines](#).

- Obtaining a report from Enbridge for the State of Michigan titled “Mitigating potential vessel anchor strike to Line 5 at the Straits of Mackinac” published in June of 2018, a copy of which is available at: [Mitigating potential vessel anchor strike to Line 5 at the Straits of Mackinac | MI Petroleum Pipelines](#).
- Obtaining another report from Enbridge regarding the integrity of the coating of the Line 5 pipelines titled “Evaluation of technologies to assess the condition of pipe coating on Line 5” which was published in June of 2018, a copy of which is available at: [Evaluation of technologies to assess the condition of pipe coating on Line 5 | MI Petroleum Pipelines](#).
- Obtaining yet another Enbridge report, which addressed how to detect leaks from the underwater portion of Line 5 titled “Evaluation of identified underwater technologies to enhance leak detection of the dual Line 5 pipelines” published in June of 2018, a copy of which is available at: [Evaluation of identified underwater technologies to enhance leak detection of the dual Line 5 pipelines | MI Petroleum Pipelines](#).
- Obtaining a final Enbridge report titled “Enhancing safety and reducing potential impacts at Line 5 water crossings” published in June of 2018, a copy of which is available at: [Enhancing safety and reducing potential impacts at Line 5 water crossings | MI Petroleum Pipelines](#).
- Commissioning an independent risk analysis report titled “Independent Risk Analysis for the Straits Pipelines” which was prepared by a team of experts at Michigan Technological University and published in September of 2018, to assess the potential risks posed by Line 5’s operation in the Straits of Mackinac. A copy is available at: [Independent Risk Analysis for the Straits Pipelines—Final Report | MI Petroleum Pipelines](#).
- Undertaking a Statewide Energy Assessment in 2019 to evaluate and make recommendations to strengthen the resilience of Michigan’s electric, natural gas, and propane delivery systems. A copy is available at: [https://www.michigan.gov/-/media/Project/Websites/mpsc/regulatory/reports/2019-09-11\\_SEA\\_Final\\_Report\\_with\\_Appendices.pdf?rev=77a6a88282384718aa09360f714f177f](https://www.michigan.gov/-/media/Project/Websites/mpsc/regulatory/reports/2019-09-11_SEA_Final_Report_with_Appendices.pdf?rev=77a6a88282384718aa09360f714f177f).
- Creating, via Executive Order 2019-14, the Upper Peninsula Energy Task Force which conducted a broad analysis of the energy needs of Michigan’s Upper Peninsula, including its reliance on propane for heat and alternative solutions for meeting those needs in the event that Line 5 ceases operation. A copy of the Task Force’s propane supply recommendations is available at:

[Upper Peninsula Energy Task Force Committee. Recommendations Part 1 Propane Supply with Appendices \(michigan.gov\).](#)

- Establishing an interdepartmental Workgroup on Propane Energy Security focused on facilitating market changes to provide alternative sources of propane in anticipation of a Line 5 shutdown, and announcing in 2021 the MI Propane Security Plan, which detailed measures the State had taken and was continuing to take to ensure Michigan will have a secure energy supply when Line 5 shuts down. A copy of the Plan is available at: [https://www.michigan.gov/-/media/Project/Websites/mpsc/consumer/propane/MI\\_Propane\\_Security\\_Plan\\_Overview.pdf?rev=90d4da17bbfb482a96fec64e2201b6c9](https://www.michigan.gov/-/media/Project/Websites/mpsc/consumer/propane/MI_Propane_Security_Plan_Overview.pdf?rev=90d4da17bbfb482a96fec64e2201b6c9).

In sum, the State of Michigan has devoted substantial resources to studying and addressing the risks to Michigan's waters posed by Line 5, as well as strategies for addressing those risks, detecting and mitigating the harm of a potential release, determining whether those risks are outweighed by the potential economic impact of a shutdown of Line 5, and analyzing and preparing for the potential economic impact of such a shutdown.

Based on these efforts, Amici and numerous state officials have taken action to shut down the operation of Line 5 in the Straits of Mackinac. As noted above, the Attorney General, on behalf of the People of the State of Michigan, filed suit against Enbridge in 2019, seeking, among other things, a court order enjoining the operation of Line 5 in the Straits of Mackinac. *See Nessel v. Enbridge Energy, L.P. et al.*, Western District of Michigan case number 21-cv-01057.<sup>2</sup> The State of Michigan, through the Governor and the DNR Director, subsequently issued a

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<sup>2</sup> This matter was originally filed in a Michigan state court in 2019 before being removed to the Western District of Michigan federal court.

Notice of Revocation and Termination to Enbridge terminating and revoking the easement agreement that purported to allow Line 5 to operate in the Straits of Mackinac,<sup>3</sup> and then filed suit to enforce that Notice of Revocation and Termination. *See State of Michigan, et al. v. Enbridge Energy, L.P. et al.*, Western District of Michigan case number 1:20-cv-01142.

These actions were taken after careful consideration of the severe risks posed by Line 5's operation in the Straits of Mackinac and the potential economic and energy-related consequences of a shutdown—matters which the State of Michigan continues to actively assess and address.

### **Recent erosion at the Bad River meander and potential harm to Lake Superior**

As it relates to the recent erosion at the Bad River meander, Amici defer to the Band's Proposed Findings of Fact. Dkt. 630. Of particular concern to Amici is the evidence put forth by the Band regarding the likelihood and severity of a release of oil from Line 5 to Lake Superior.

While it requires no introduction, Lake Superior is the world's largest freshwater lake, containing more water than the other Great Lakes combined, and is also by many measures the healthiest of the Great Lakes. It is a precious cultural and natural resource that boasts extraordinary biodiversity, contributes to the drinking water that the Great Lakes provide to roughly 40 million people, and

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<sup>3</sup> A copy of the Notice of Revocation and Termination is available at: [Notice of Revocation and Termination of Easement \(11.13.20\).pdf \(govdelivery.com\)](#) .

supports industries such as fishing, tourism, and shipping. It shares hundreds of miles of shoreline with Michigan’s Upper Peninsula, and the Bad River feeds into it close to the Michigan border.<sup>4</sup>

As the Band sets forth, evidence indicates that “[a] full bore rupture of Line 5 at the Bad River meander would result in 21,974 barrels (922,908 gallons) of oil entering the Bad River, which is located 16 miles upstream of Lake Superior.” *Id.* at p. 8. Expert witnesses for both the Band and Enbridge have acknowledged that such a spill would result in harm to Lake Superior. *Id.* at p. 9 of 17, ¶ 48–49. And the Court itself has noted that a major oil spill here would lead to “tremendous dispersion in Lake Superior.” Plaintiff’s Memorandum of Law, Dkt. 629, p. 17 (citing PFF ¶ 50).

## ARGUMENT

### **I. The alarming erosion at the Bad River meander poses an imminent threat of irreparable harm to Lake Superior and necessitates injunctive relief.**

Amici have a legal duty to protect the waters of the Great Lakes for the People of the State of Michigan. The Michigan Supreme Court has underscored the importance of this sovereign duty:

[U]nder longstanding principles of Michigan’s common law, the state, as sovereign, has an obligation to protect and preserve the waters of

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<sup>4</sup> See generally, e.g., <https://www.michigan.gov/egle/about/organization/water-resources/great-lakes-coordination/lake-superior>; <https://www.michiganseagrant.org/topics/great-lakes-fast-facts/lake-superior/>; [https://www.canr.msu.edu/news/lakes appreciation month the great lakes facts and features](https://www.canr.msu.edu/news/lakes_appreciation_month_the_great_lakes_facts_and_features).

the Great Lakes and the lands beneath them for the public. The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure.

The state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources.

*Glass*, 703 N.W.2d at 64–65 (cleaned up).

These public rights are protected by a “high, solemn, and perpetual trust which it is the duty of the State to forever maintain.” *Collins v. Gerhardt*, 211 N.W. 115, 118 (Mich. 1926).

It is this solemn duty that compels Amici to weigh in here. The alarming erosion at the Bad River meander creates an imminent threat of a rupture of Line 5, which would cause irreparable harm not only to the Band, but also to the People and natural resources of the State of Michigan.

Injunctive relief is necessary because there is an imminent likelihood of irreparable harm, there is no adequate remedy at law, the balance of hardships favors an injunction, and the public interest will not be disserved if an injunction is granted. *LAJIM, LLC v. General Electric Co.*, 917 F.3d 933, 944 (7th Cir. 2019) (citing *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)).

The purpose of this amicus brief is not to belabor the analysis of the four-factor test for injunctive relief, as that has been ably addressed in the Band’s Memorandum of Law. Dkt. 629, pp 10–22 of 24. Rather, Amici ask the Court to consider the People of the State of Michigan and others who will be irreparably harmed by a release of Enbridge’s oil into Lake Superior.

Additionally, in its Memorandum of Law, the Band addresses the balance of equities, particularly the Court's concern that the Band has not permitted Enbridge to install erosion protection measures at the Bad River meander. Dkt. 629, pp. 12–15 of 24. As a preliminary matter, Amici agree with the Band that the Court should not balance the equities here, because the Band is a sovereign and the case involves a risk of substantial environmental harm. *Id.*, pp 10–11 (citing *LAJIM, LLC*, 917 F.3d at 942 and *U.S. EPA v. Entl. Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990)). And Amici agree that the Band should not be penalized for not allowing Enbridge to increase the scope of its trespass in order to reduce the likelihood of that trespass becoming an environmental catastrophe. But, if the Court does balance the equities, Amici respectfully request that the Court consider the imminent irreparable harm to Michigan and others who have no control over whether erosion-prevention measures could be installed at the Bad River meander. Michigan's citizens, to whom Amici owe a high and solemn duty to protect and preserve the waters of Lake Superior, face an imminent threat of irreparable harm, and Amici respectfully request that the Court grant the Band's request for injunctive relief to abate that threat by shutting down Line 5.

**II. The potential impacts of a court-ordered shutdown of Line 5 do not outweigh the risk of irreparable harm posed by Line 5's continued operation on the Bad River Reservation.**

The State of Michigan has undertaken significant analysis of the risks of a release of oil from Line 5 to the waters of the Great Lakes, and of the potential impacts of a shutdown of Line 5. As reflected by the actions Amici and numerous

state officials have taken against Line 5’s continued operation in the Straits of Mackinac, Amici agree with the Band that the potential harm of a shutdown has been exaggerated by Enbridge and does not outweigh the imminent threat of irreparable harm posed by Line 5. In fact, the State’s Notice of Revocation and Termination directed Enbridge to cease operation of Line 5 in the Straits of Mackinac by May of 2021. And the Attorney General’s lawsuit first sought an injunction to that effect in 2019.

Amici agree with the Band’s analysis that markets will adjust to a shutdown. Plaintiff’s Proposed Findings of Fact, Dkt. 630, pp 9–14 of 17. As set forth in the Band’s Proposed Findings of Fact, the 2010 shutdown of Line 6B in Michigan lasted for “several months” and “did not have sizable price impacts for refined product in the Detroit/Toledo area . . . .” Dkt. 630, p. 10 of 17, ¶¶ 54–56. And, as the Band further sets forth, there is time for propane markets to adjust before the winter heating season. *Id.*, pp. 12–14 of 17.

Based on the State of Michigan’s above-described research and analysis, as well as the State’s own expertise and experience with its energy needs, systems, and resilience (including prior shutdowns of Line 5 and Line 6B), Amici anticipate that the relevant markets can and will reasonably adapt to a court-ordered shutdown of Line 5. Indeed, the markets have already begun to do so in light of Amici’s efforts to shut down Line 5’s current operation in the Straits of Mackinac.<sup>5</sup>

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<sup>5</sup> See, e.g., MLive, *Some Michigan propane suppliers switching to rail cars in anticipation of Line 5 closure* (Mar. 12, 2021), available at:



The State of Michigan has taken extensive steps in recent years to ensure that Michigan is well positioned to maintain energy security in the event of a shutdown. This includes successful and ongoing efforts, illustrated by the MI Propane Security Plan, to strengthen Michigan's propane resilience and optionality through measures such as diversifying its wholesale propane supply, expanding propane-related transportation solutions, and creating new tools to help Michigan families and businesses lower their energy intensity and transition to more affordable options.<sup>6</sup>

Simply put, if erosion at the Bad River meander causes Line 5 to rupture, the resulting contamination will be catastrophic. Amici believe that this imminent

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<https://www.mlive.com/public-interest/2021/03/some-michigan-propane-suppliers-switching-to-rail-cars-in-anticipation-of-line-5-closure.html>.

<sup>6</sup> The MI Propane Security Plan, linked above, provides a summary of some such steps. For a sampling of specific examples, *see, e.g.*, LPGas Magazine, *NGL Supply Wholesale flows propane at new Michigan terminal* (May 4, 2022), available at: <https://www.lpgasmagazine.com/ngl-supply-wholesale-flows-propane-at-new-michigan-terminal/>; The Sault News, *New rail system in Kincheloe to increase propane delivery in EUP* (Mar. 15, 2021), available at: <https://www.sooeveningnews.com/story/news/2021/03/15/new-rail-system-kincheloe-increase-propane-delivery/4698833001/>; LPGas Magazine, *Crestwood acquires storage, terminal assets from Plains* (May 12, 2020), available at: <https://www.lpgasmagazine.com/crestwood-acquires-storage-terminal-assets-from-plains/>; NGL Supply Co. Ltd., *NGL Supply Buys Plains' Kincheloe, Michigan Propane Rail Terminal* (Nov. 3, 2019), available at: <https://nglsupply.com/ngl-supply-buys-plains-kincheloe-mich-propane-rail-terminal/>; Michigan Public Service Commission, *MPSC approves settlement agreement allowing \$155M rate increase for Consumers Energy electric customers* (Jan. 19, 2023) (detailing terms of settlement, including initiation of a pilot program for electrifying residential use of propane and other unregulated fuels), available at: <https://www.michigan.gov/mpsc/commission/news-releases/2023/01/19/mpsc-approves-settlement-agreement-allowing-rate-increase-for-consumers-energy-electric-customers>.

threat of irreparable harm far outweighs the risk of impacts associated with a shutdown of Line 5. For these reasons, the Band's request to enjoin that threat should be granted.

### **CONCLUSION AND RELIEF REQUESTED**

Amici, the State of Michigan and Dana Nessel, Attorney General of the State of Michigan, share deep concern about the imminent threat of irreparable harm to Lake Superior. Amici respectfully request that the Court grant the Band's motion and order a purge and shutdown of Line 5.

Respectfully submitted,

*/s/ Daniel P. Bock*

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