

December 15, 2014

# The State's Duty under Public Trust Law to Protect the Great Lakes from the Operation of the Line 5 Oil Pipelines in the Straits

Presentation to the Michigan Petroleum Pipeline Task Force by:

- Jim Lively, Michigan Land Use Institute
- Liz Kirkwood, FLOW (For Love of Water)
- James Clift, Michigan Environmental Council



# Enbridge 2010 Kalamazoo Spill



Oil & Water Don't Mix Campaign

[www.OilandWaterDontMix.org](http://www.OilandWaterDontMix.org)



# Oil & Water Don't Mix

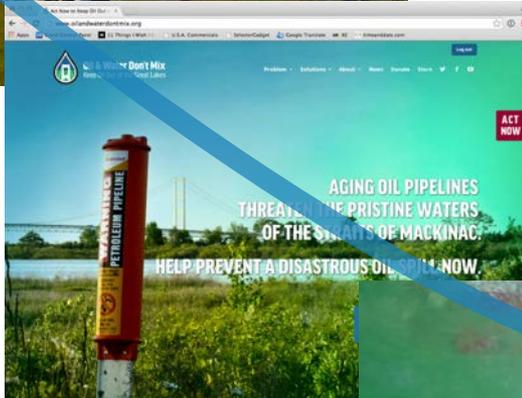
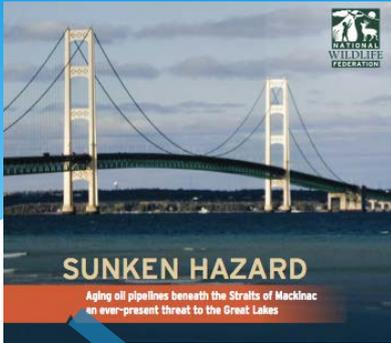
Keep Oil Out of the Great Lakes



Oil & Water Don't Mix Campaign

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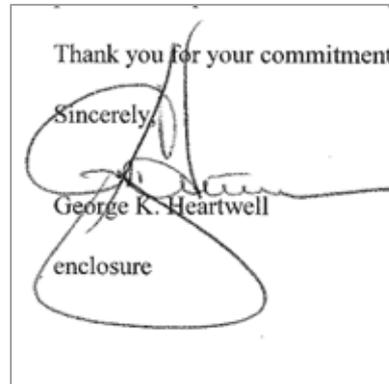
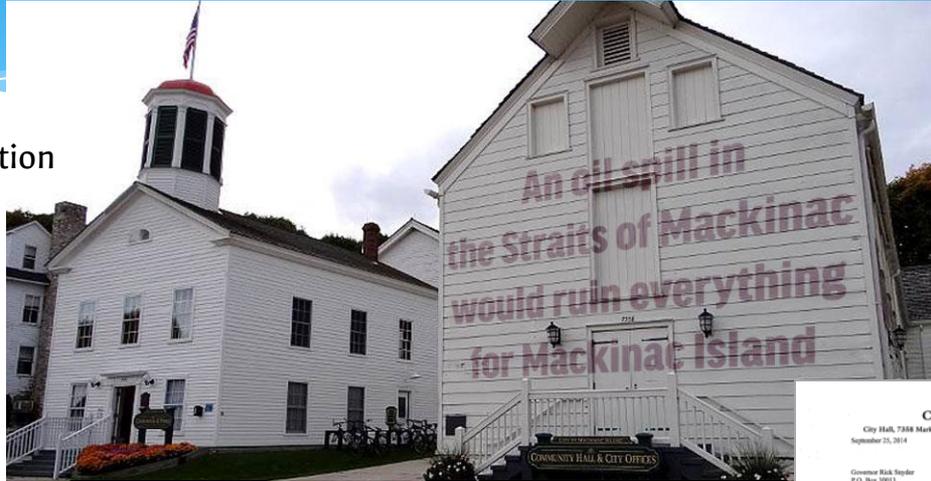
# How We Got Here



# Civic, Public & Business Support

## Public & Business Endorsements

Upper Peninsula Environmental Coalition  
 Student Environmental Alliance  
 Ryde Marine  
 Shepler's Mackinac Island Ferry  
 Breezeswept Docks  
 Mackinac Island Community Fdn.  
 Cheboygan Brewing Company  
 Surgeon for Tomorrow  
 ...and more



## Civic Endorsements

City of Mackinac Island  
 City of Grand Rapids  
 City of Traverse City  
 County of Cheboygan

2,560+ Public Sign-On  
 Letter Signatures to Date



Oil & Water Don't Mix Campaign

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[www.OilandWaterDontMix.org](http://www.OilandWaterDontMix.org)

# Our Partner Organizations



ENVIRONMENTAL LAW & POLICY CENTER  
Protecting the Midwest's  
Environment and Naural Heritage



michigan league of  
conservation voters  
EDUCATION FUND



food&waterwatch



CONCERNED  
CITIZENS OF  
CHEBOYGAN  
& EMMET  
COUNTY



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# Line 5 Oil Pipelines: The State of Michigan's Duty

## Line 5 in the Straits:

- \* Rests on **state-owned bottomlands**
- \* Required legislative authorization (Act 10)
- \* 1953 easement is held in **public trust** for the benefit of Michigan's current & future generations



Actual Line 5 Construction



# Michigan's Public Trust Responsibility

**Public Trust** means:

- \* State's **perpetual duty**
  - \* Ongoing determination Line 5's continued operation will **not substantially harm or impair**
  - \* Public trust protection of resources and uses:
    - \* navigation, fishing, commerce, hunting, drinking water, recreation, etc
- R 322.1001; R 322.1006(d)



# Public Trust Precedent in Great Lakes

*Chicago in 1860, Michigan Avenue from Illinois Central Tracks.*



Illinois Central Railroad Co. v. Illinois - 1892



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# Public Trust Incorporated in Enbridge's 1953 Easement

The state's easement with Enbridge says:

\* “Grantee...at all times shall exercise the due care of a **reasonably prudent person** for the safety and welfare of all persons and of all public and private property...”

- Enbridge easement pgs. 3-4



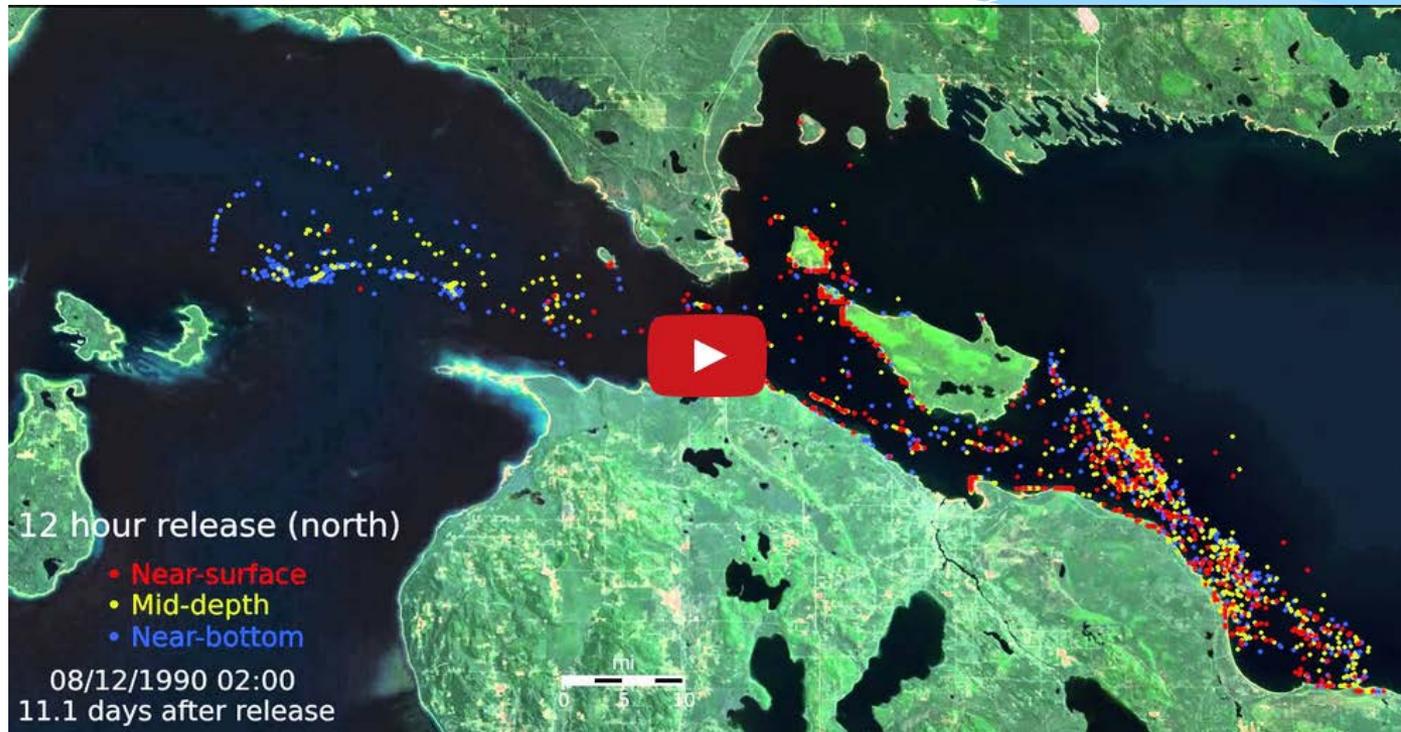
# Urgency for State to Act Now to Protect the Public Trust



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# Great Lakes Submerged Lands Act & the Public Trust

## About the GLSLA:

- \* Legislature incorporated state's **public trust** responsibilities into the **GLSLA** in 1955.
- \* Executive branch issued rules under GLSLA to dictate details of a **public trust determination**.
- \* Judicial branch reaffirms its role as the **third trustee** of the public trust. (Obrecht v. National Gypsum, 1960)



# Great Lakes Submerged Lands Act & the Public Trust

- \* Rules under GLSLA: “A **determination** by the department that the private or public use of such lands and waters **will neither substantially affect** the public use thereof **nor impair** the public trust or interest of the state.”  
(R 322.1006(d))



# Procedure for Public Trust Review: GLSLA

- \* Attorney General Frank Kelly's Opinion #5214 - Existing deed owners subject to GLSLA permitting.



# Procedure for Public Trust Review: GLSLA

- \* Enbridge and state recognize GLSLA as guiding statute as it applies to maintenance activities under the easement.



Enbridge Installs New Anchors – 8/22/2014



# Protections included in GLSLA

- \* **Open public process** with full disclosure with **notice** to impacted local units of government and riparian owners.
- \* Allows **participation by the tribes** to protect their public use rights.



# Protections included in GLSLA

- \* Opportunity to explore the cost and feasibility of a full **range of alternatives**, including decommissioning, re-routing, secondary containment, replacement etc.
- \* **Burden of proof** on Enbridge to demonstrate they are protecting public trust uses.
- \* **Duly recorded findings** necessary (*Obrecht v. National Gypsum Co., 1960*)



# Task Force Proceeding

- \* Applaud the administration for the work of the Task Force for bringing attention to the pipeline and the potential risk to the Great Lakes.
- \* Has served an important fact-finding function.
- \* However, we don't think it has the legal authority to make a final public trust determination the Enbridge's Line 5 will neither substantially harm nor impair the public waters and uses of the Straits.



# Our Recommendations to the Task Force

1. Enbridge be required to file a proceeding under GLSLA to show:
  - That its pipelines will neither substantially affect the public use nor impair the state's public trust interests and that they are taking all reasonable steps to protect public uses.
2. That the review should be ongoing and formally reviewed under the GLSLA on a time table determined by the state.



# Thank you

Presented by

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