

DECEMBER, 2023 LEGAL REPORT ON LINE 5 DEVELOPMENTS

by Leonard Page

MPSC Decision:

On December 1 2023, the Michigan Public Service Commission issued its decision granting Enbridge the right to build a tunnel with a new 30-inch diameter pipeline in the Straits.

Full decision:

<https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/0688y00000At0GQAAZ>.

Decision summary:

<https://www.michigan.gov/mpsc/-/media/Project/Websites/mpsc/consumer/info/briefs/Line-5-Issue-Brief-12-1-23.pdf>

The permit is subject to 4 conditions:

1. Enbridge must receive all governmental approvals and no change to the route/location can be approved without further proceedings.
2. No third-party utilities may be located in the tunnel without an application for Public Service Commission review and approval.
3. Enbridge must provide the Mackinac Straits Corridor Authority with a risk assessment.
4. Enbridge must construct the pipeline in a manner that exceeds federal regulations to ensure the safety, integrity, and reliability of the replacement pipeline segment.

I have to admit that I thought the MPSC commission decision would be based on "Michigan's needs" for the Alberta oil product being delivered. Only 5% of the Alberta oil product stays in the state -- case closed. Instead, the MPSC chose to look at the state's need for avoiding the imminent disaster of a rupture to the twin pipelines now in the open waters of the Straits. But then decommissioning line 5 also takes care of that need. Michigan has no NEED to help move Alberta oil to Sarnia.

I assume there will be an appeal to a Michigan circuit court.

US Army Corp of Engineers Permit:

The Army Corp decision on its permitting will not emerge until 2026 while they do an environmental impact statement.

Bad River Band of Lake Superior Chippewa Indians Eviction Litigation:

Bad River Band decision of June 2023 on Enbridge's eviction will be decided by the 7th Circuit in Chicago next spring. Judge Conley's order for Line 5 removal from reservation by June 2026 is the key. Appellate courts are generally reluctant to second guess remedial aspects of a lower court's decision. Cautious optimism permitted.

Nessel litigation Seeking to Void the Original 1953 Easement:

Nessel's 2019 litigation challenged the original Line 5 easement of 1953 as void since it was signed without consideration of the Michigan public trust doctrine - is pending at 6th circuit - with a decision also expected in the spring. However, the appeal is limited to whether the original state court or the federal court in Grand Rapids has jurisdiction. Four years of fighting over jurisdiction!!! I am optimistic that the 6th circuit in Cincinnati will find that the case involving Michigan land, Michigan law, and a Michigan contract - belongs back in state court. But the removal to federal court issue could get SCOTUS review – adding another year - regardless of which side wins. If we keep it in state court, the already revoked easement (Whitmer in 2021) is likely to be found void as of its inception. But with appeals - any final order on the public trust doctrine

litigation may still be years away. Could the tunnel construction start before there is an eviction order for the twin pipelines from the 1953 easement?

OWDM:

OWDM is now working on getting the Biden administration to withdraw the presidential permits letting line 5 cross the border at Superior Wisconsin and Marysville, Michigan (Sarnia). A tough ask in an election year.

Rupture in the Twin Pipelines During This Decade:

And let's not forget a rupture in the twin pipelines over the remainder of this decade. Anchor screw supports now hold most of line 5 at a convenient anchor shank grabbing height of 2-4 feet above the lakebed. and the problem of over 70 years of high currents and corrosion remains a threat.