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## Via Email

Governor Gretchen Whitmer  
George W. Romney Building  
P.O. Box 30013  
Lansing, MI 48909

Mr. Daniel Eichinger  
Director  
Michigan Department of Natural Resources  
Executive Division  
P.O. Box 30028  
Lansing, MI 48909

Dear Governor Whitmer and Director Eichinger:

### **Re: Enbridge Rejection of November 13, 2020, Notice of Revocation and Termination of 1953 Easement**

We have carefully reviewed the Notice of Revocation and Termination of 1953 Easement (“Notice”) that we received on November 13 from Mark Totten, Chief Legal Counsel to the Governor. Our review shows that the State lacks the authority to terminate or revoke the 1953 Easement. Enbridge’s court filings since November 13 make clear why “termination” or “revocation” of the Easement is contrary to federal law. Moreover, as discussed in detail below, the Notice fails to specify an existing violation of Easement terms that would justify termination.

For these reasons, we intend to operate the Dual Lines until the replacement pipeline under the Straits within the Great Lakes Tunnel is placed into service, as per our existing Agreement with the State of Michigan and consistent with PHMSA federal regulatory requirements. Enbridge already has requested that the United States District Court allow us to move to dismiss the civil suit the State filed in an attempt to enforce the November 13 Notice. In responding to the Notice’s claims here, Enbridge preserves all of its legal arguments, including that the federal Pipeline Safety Act preempts Michigan’s attempt to enforce its own safety standards on the Dual Lines or to take any action to close the Dual Lines. See 49 U.S.C. §60104(c).<sup>1</sup>

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<sup>1</sup> This letter generally is limited to addressing the Notice’s factual claims. Enbridge will address related legal claims in the various actions now pending in the United States District Court for the Western District of Michigan.

We address the Notice's specific claims below. To summarize, the Notice ignores scientific evidence, and is based on inaccurate and outdated information. As a result, the Notice repeatedly fails to acknowledge that our Dual Lines in the Straits are safe and in full compliance with the federal pipeline safety standards that govern them, have been found fit to operate by PHMSA, and that no basis for termination or revocation of the Easement exists. For example:

- Enbridge today is in full compliance with the span provisions of the Easement and with legal Agreements reached with the State in 2018 to maintain compliance with the span provisions going forward. The Notice does not claim otherwise.
- Enbridge today is in full compliance with the coating provisions of the Easement. Again, the Notice does not claim that the Dual Lines are not currently in compliance with both the 1953 Easement and 2017-18 Agreements regarding coating.
- The Notice's discussion of anchor strike prevention focuses on a report from 2017 while ignoring the extensive measures that Enbridge implemented over the last two and a half years to avoid even accidental anchor strikes. It appears that the Governor and Director may not even be aware of Enbridge's May 21, 2020, report to the State regarding those measures or of a subsequent safety analysis provided to the State on November 6, 2020.<sup>2</sup> It is otherwise hard to fathom the Notice's failure to discuss any of the extensive safety measures recently installed at the Straits to prevent anchor strikes.
- The Notice's claims that the Easement does not allow Enbridge to correct any breaches that do occur is wrong. The Easement specifically allows correction where required. See Easement § C.(1). The State's attempt to terminate the Easement fails to consider the fact that past issues have been corrected, and fails to demonstrate that any current breaches exist, much less that any alleged breaches are uncorrectable.

Based on this flawed approach, the Notice seeks to close Line without any plan for replacement and without acknowledging that the State's own experts determined that there were no feasible and readily available alternatives. In doing so, the Notice fails to acknowledge that Line 5 enables the safe transport of fuel essential to heat homes and provides energy to Michigan, neighboring U.S. states and Canada's two largest provinces. It also fails to account for the significant adverse social and economic impacts that will result from closure.

Specific factual misstatements in the claims contained in the Notice are discussed in more detail below.

## **I. Claims re Spans**

Section A.(10) of the 1953 Easement provides: "The maximum span or length of pipe unsupported shall not exceed seventy-five (75) feet." The Notice does not claim that Enbridge currently is in violation of this provision, and there currently are no spans on Line 5 that exceed the Easement's 75-foot limit. Instead, the Notice focuses on historical span exceedances that

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<sup>2</sup> Copies of both documents are attached.

were all remedied no later than 2014, some six years ago.<sup>3</sup> Because the Notice identifies no existing “specified breach” of Easement terms, as § C of the Easement requires, the Whitmer Administration has no lawful basis to terminate the Easement related to spans. Nor does the Notice identify any safety concerns with respect to existing spans or any compliance issues under PHMSA safety standards.

The State of Michigan is already aware of this fact. As recently as the execution of the Third Agreement in December 2018, the State acknowledged in § 5.3(a) that “there are no locations along the Dual Pipelines where the span or length of unsupported pipe exceeds the seventy-five (75) feet maximum specified in Paragraph A (10) of the 1953 Easement.” In § 5.3(d) of that same Agreement, the State “agree[d], based upon currently available information, that Enbridge’s compliance with the requirements [of the Third Agreement] satisfies the requirements of Paragraph A (10) of the 1953 Easement.” Enbridge has complied with this provision of the Agreement.

## **II. Claims re Coating**

The Easement contains two provisions related to the protection of the Dual Lines’ exterior from corrosion and potential impacts. First, § A.(8) of the Easement provides that “[c]athodic protection shall be installed to prevent deterioration of pipe.” Second, § A.(9) provides that the Dual Lines shall be coated with a primer coat plus inner and outer wraps composed of glass fiber fabric material and wood slats, prior to installation.” Both systems protect the Dual Lines. The Notice says nothing about the Lines’ cathodic-protection system. That system is fully operational and is an integral part of Enbridge’s system to protect the Dual Lines from corrosion.

As for coating, the Notice does not identify any current breach of the Easement’s coating provisions. Since September 2017, Enbridge has inspected and maintained the Dual Lines’ coating pursuant to Work Plans approved by the State. In 2018, the State agreed in § 5.2 of the Third Agreement to an Enbridge plan for regularly inspecting and repairing when necessary the Dual Lines’ coating. The State further agreed in § 5.2(d) that Enbridge’s compliance with § 5.2 and the Work Plan “satisfies the requirements of Paragraph A (9) of the 1953 Easement.” The Lines’ coating is in compliance with both the Agreement and with federal safety standards.

Enbridge has met its obligations under these Agreements, and the Notice does not allege otherwise. Inspections conducted in 2019 and 2020 confirm that the coating and cathodic protection systems are working as intended and effectively protect the Dual Lines. Recent ILI results provided to the State similarly show that there is no corrosion concern on the Dual Lines. Because Enbridge is in full compliance with the coating provisions of the Easement, no corrective action is required and there is no basis for termination.

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<sup>3</sup> Since 2014, only one span greater than 75 feet has appeared (in 2019) and it was promptly corrected through the installation of an additional pipeline support. The State was fully advised of Enbridge’s discovery of the span and prompt corrective action. To the extent that any new spans develop in the future, Enbridge and the State have already agreed in the Third Agreement on procedures for correcting a new span or spans as permitted by § C.(1) of the Easement.

### **III. Claims re Curvature**

Section A.(4) of the Easement provides that “[t]he minimum curvature of any section of pipe shall be no less than two thousand and fifty (2,050) feet radius.” The Notice states that ILI runs “identify 20 to 25 exceedances of the Easement’s minimum curvature requirement.” In making this claim, the Notice cites to “Geopig” in-line inspection reports recently provided by Enbridge from 2005, 2016, 2018 and 2019. Notice at p. 16 notes 35-36. Strikingly, the Notice omits Geopig ILI runs from 2013 that Enbridge provided to the State for review six years ago (in 2014). The State has never suggested that the 2013 runs, which contain the same results as the Geopig runs from years cited by the Notice, indicate any breach of curvature provisions.

Based on statements in the Notice, Enbridge believes that the State may have misinterpreted portions of the Geopig ILI reports. Regrettably, since January of 2019 the State has consistently refused opportunities to convene discussions on technical issues with Enbridge as provided for in the Second Agreement, and the State has never before raised this issue with Enbridge. In any event, the Easement requires the State to provide Enbridge adequate notice and a reasonable opportunity to correct any alleged breach before termination, which Enbridge is prepared to discuss as needed. Given the apparent confusion around the data in the Geopig ILI reports, Enbridge would be pleased to participate in discussions with the State’s technical experts and PHMSA as promptly as possible.

### **IV. Claims re the Exercise of Due Care in Operating the Dual Lines**

#### **A. Enbridge Exercises Due Care in Minimizing the Risk of a Release from an Anchor Strike**

Section A of the Easement provides that Enbridge 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.” The Notice claims that safety systems intended to mitigate the risk of a release from a vessel anchor strike have failed. See Notice at 17. In fact, there has not been a failure: in the last 67 years, there has never been any release to the Straits from the Dual Lines, whether due to an anchor strike or any other cause.

Indeed, the Notice pointedly ignores the many improvements Enbridge has implemented through the years, including additional measures in 2019 and 2020, which significantly reduce the risk of a vessel’s anchor striking the Dual Lines.

For example, Enbridge informed the State on May 21, 2020, and November 6, 2020, of measures implemented by the Enbridge Straits Maritime Operations Center (“ESMOC”) in Mackinaw City. The ESMOC operates 24-hours per day, 7 days per week to closely monitor, observe and communicate with vessels to identify any activity that may pose an anchor strike risk to the Dual Lines. Among other protective measures, the ESMOC specifically identifies vessels of a size that could cause damage to the Dual Lines; conducts observations of the anchor status of such vessels; transmits electronic messages to all such vessels to notify them that they are entering a no-anchoring zone regulated by the U.S. Coast Guard; and contacts vessels via radio to ask the vessel to confirm that its anchors are secured. In addition, Enbridge has positioned a patrol boat

over the Dual Lines (weather permitting) to observe all vessel activity occurring in proximity to the pipelines. Should any observation identify vessel activity that may pose a risk to the Dual Lines that cannot be resolved, the ESMOC has full authority to direct the Enbridge Operations Center to shut down the pipelines.

Similarly, the Notice fails to address a recent assessment by a third-party research agency (previously provided to State officials on November 6, 2020) that concluded that the measures that Enbridge has now put in place reduce by 99.5% (relative to the absence of any measures) the risk of a failure of the Dual Lines.<sup>4</sup>

The Notice makes certain claims regarding the damaged pipeline support known as EP-17-1 that was addressed in the summer of 2020. That incident did not impact the integrity of either pipeline. Corrective action in the form of strict new anchoring requirements for vessels working near the Dual Lines, described in the November 6 letter, has already been completed.<sup>5</sup> Both lines are now operating following a review by PHMSA and with the consent of the State, which months ago dropped its claim for injunctive relief to shut down the Dual Lines based on this incident. Accordingly, the Notice fails to identify with specificity any current problem that requires correction, and none of the Notice's statements regarding anchor strikes provides a basis for termination.

#### B. The Dual Lines Are Operated with Due Care

The Notice cites Dynamic Risk's 2017 study of the Dual Lines to make additional claims that Enbridge is not exercising due care in operating the Dual Lines. See Notice at 7 and 16-17. According to the Notice, Dynamic Risk identified "incorrect operations" as a risk to the Dual Lines. The Notice includes in this category "accidental overpressurization, exercising inadequate or improper corrosion control measures, and improperly maintaining, repairing, or calibrating piping."

But the Notice notably fails to specify any *actual* operating practice that reflects a failure to operate the Dual Lines with due care. The Dynamic Risk study addressed only *theoretical* types of "incorrect operations" – it did not say that any actual Enbridge practice failed to meet industry standards or otherwise failed to show due care. Quite the opposite, Dynamic Risk stated that the failure rate from incorrect operations on Enbridge company pipelines generally was *less* than the failure rate associated with all companies. In other words, the safety of Enbridge's operations *exceeds* the industry average. The Notice's assertion that Enbridge is not operating the Dual Lines with due care is unsubstantiated and is no basis for termination.

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<sup>4</sup> Copies of both the May 21 and November 6, 2020 submission are attached to this document, as discussed in note 2 above.

<sup>5</sup> A copy of these requirements has been supplied to the State.

## **V. Claims re Whether Alleged Breaches Can Be Corrected under the Easement**

The Notice includes a conclusory assertion that any breaches it alleges are not capable of being corrected. See Notice at 12. In doing so, the Notice ignores Section C.(1) of the Easement, which explicitly provides that Enbridge has a minimum of 90 days to commence efforts to correct any breach specified by the State. The State cannot disregard this express provision of the Easement and simply say that it does not apply. Enbridge has consistently demonstrated its willingness and ability to respond to alleged issues with its performance under the Easement. For example, the State since 2002 has approved the installation of over 200 screw anchor supports to correct or avoid the growth of spans in excess of Easement limits, thus allowing Enbridge to remain in compliance with the Easement. Absent a reasonable opportunity to cure in response to specific allegations of problems, there is no basis for termination.

## **VI. Claims Re Revocation of the Easement (as Opposed to Termination)**

The Notice also seeks to “revoke” the Easement, in addition to seeking to “terminate” it. See Notice at 2 to 11. The revocation claims are equally unjustified.

The Notice echoes the claims made in the Attorney General’s prior suit, *Nessel v Enbridge Energy, Limited Partnership, et al* (case no. 19-474-CE), regarding whether the 1953 Easement was void at its inception. Enbridge has already demonstrated that these claims are legally baseless. It does not repeat those arguments here. The Michigan Supreme Court considered and rejected challenges to the operation of Line 5 as long ago as 1954. See *Lakehead Pipe Line Company v Dehn*, 340 Mich 25.

The Notice’s argument regarding whether the continued use of the Dual Lines is consistent with the public trust doctrine similarly echoes arguments made by the Attorney General in her action filed in 2019. The public trust doctrine argument in the Notice has the same flaws, as explained in Enbridge’s motion for summary disposition and supporting papers in that action. Those arguments are not repeated here, but in short, the Governor and DNR Director have no more authority than the Attorney General to disregard the Legislature’s policy-making prerogative when it comes to the public trust and continued operation of the Dual Lines. Nor can the State displace PHMSA as the regulator of the safety of the Dual Lines as provided in the Pipeline Safety Act based on this claim.

## **VII. Discussions Going Forward**

Notwithstanding the shortcomings of the Notice as summarized above, Enbridge is prepared to work with the State and PHMSA to address any concerns about the safety of the Dual Pipelines raised in the November 13 Notice and to yet again provide assurances that the Straits remain safe. Although the State has not shown a willingness to confer with us on these matters since January 2019, we reiterate that we are prepared to build on voluntary agreements we have reached in the past on matters such as span length and coating and to do so in the cooperative environment envisioned in the 2018 Second Agreement. There, we and the State committed to periodic meetings on the Dual Pipelines that we have consistently sought.

We believe that it would be in the best interest of the State to find an agreement that would achieve the State's long-term goals rather than pursue litigation that ultimately is unlikely to succeed. To that end, we propose that the parties begin technical discussions promptly in order to better define the issues that the State believes require attention. As part of such discussions the State would need to be specific about its concerns and about where it believes problems exist in light of current facts and science, rather than the distant past. Further, given PHMSA's statutory role as our exclusive safety regulator under the Pipeline Safety Act and the direct applicability of that agency's safety standards to the matters raised by the Notice, we propose that PHMSA be invited to participate in these discussions. Any such discussions should include how the planned construction of a tunnel to house a replacement for the Dual Lines would fully address all concerns that the State may have regarding the issues raised in the November 13 Notice.

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For all of the reasons discussed, the November 13 Notice is not a valid exercise of the State's authority under the Easement. Accordingly, the Easement will not terminate or be deemed "revoked" at the end of the 180-day period, as the Notice seeks. Our dual pipelines in the Straits are safe, fit for service and in full compliance with the federal safety standards that govern them.

We trust you will respond positively to our offer to participate in good-faith discussions to resolve any differences. In the meantime, the Dual Pipelines will continue to operate safely until they are replaced on completion of the Tunnel Project, as per the 2018 Agreements. Enbridge will vigorously defend its rights under the Easement in pending court actions, and fully expects that its legal positions will prevail.

Respectfully submitted,



Vern Yu  
EVP & President, Liquids Pipelines

Attach.

cc (w/ attach): Mark Totten (Chief Legal Counsel, Office of the Governor)