December 22, 2017

RE: Tribal Comments on Dynamic Risk Final Alternatives Analysis

Dear Governor Snyder, Attorney General Schuette, Director Grether, Director Creagh, and Executive Director Brader,

On August 1, 2017, Michigan’s twelve federally-recognized Tribes submitted to the State their initial joint comments (“Tribal Comments”) on Dynamic Risk’s June 27, 2017 Alternatives Analysis for the Straits Pipelines (“Draft Report”). Those Tribal Comments, which are attached, set forth in detail a number of concerns with the draft that are of great importance to us, and that we hoped would be addressed by Dynamic Risk in its revised report. Dynamic Risk issued its Final Alternatives Analysis for the Straits Pipelines (“Final Report”) on October 26, 2017. To our disappointment, the Final Report addresses none of our concerns and is, in all material respects, a reproduction of the deeply flawed Draft Report.

We stand by and reiterate our initial Tribal Comments. We provide these additional Comments to the State in the same spirit that informed our original submission: as co-sovereigns who share a solemn responsibility for the irreplaceable and imperiled Straits of Mackinac.
The Final Report Continues to Obscure the Risk of Rupture of the Straits

- After the Draft Report was released, Dynamic Risk engineers publicly conceded that the odds of a catastrophic rupture of the Straits Pipelines in the next thirty-five years are an alarming one in sixty. See Tribal Comments at 2 and n.2. The Draft Report obscured this conclusion by burying it in highly specialized engineering and mathematical discussions that are largely inaccessible to the general public. Id. The Final Report does not remedy this shortcoming but instead essentially reproduces the Draft Report’s findings in this regard. See Final Report 2-120 – 2-123. Dynamic Risk’s failure to relate the risk of rupture in reasonably accessible terms represents a failure of its charge.

The Final Report Continues to Obscure the Fact that Operation of the Straits Pipelines Cannot be Justified by Michigan-Based Needs

- In our initial comments, we noted that the Draft Report contained facts establishing that the Michigan portion of Line 5 is largely a thoroughfare for the transportation of product to the benefit of out-of-state commercial, governmental, and consumer interests. See Tribal Comments at 3. The Final Report reiterates these facts, concluding that “[t]he majority of Line 5 throughput” passes through Michigan and “is delivered to the Sarnia, Ontario terminal in Canada[.]” Final Report at 4-4.

- The Draft Report also contained facts establishing that, in light of Michigan’s very limited reliance on Line 5, cost-effective and feasible alternatives exist to meet the energy and energy infrastructure needs of Michigan should Line 5 be decommissioned. See Tribal Comments at 3-4. The Final Report reiterates those factual findings as well, concluding that in the absence of Line 5, Upper Peninsula propane and Lower Peninsula oil transport needs could be met by truck transport; and that alternative sources of oil exist for Michigan refineries. These alternatives would not increase cost burdens on Michigan consumers or businesses beyond existing seasonal cost fluctuations. See Final Report at 4-6 – 4-25.

- As with the “one in sixty” odds of a spill, these facts are likewise indispensable to any informed public debate or policy deliberations regarding Line 5. Yet the Final Report, like the Draft Report, presents these facts in a scattered fashion, with no attempt to elucidate the obvious conclusion that the risk of a Straits oil spill is not remotely justified by needs within the State of Michigan. It is a risk instead borne by the people of Michigan largely for the economic benefit of Enbridge and other businesses and consumers in Canada and elsewhere.

The Final Report Continues to Prioritize the Commercial Needs of Enbridge

- In our initial comments, we observed that the Draft Report rested on a flawed premise: it required, as a threshold criterion for the viability of the various alternatives to the Straits Pipelines, that each alternative must replicate the full flow-through capacity of Line 5. See Tribal Comments at 5-6. The Draft Report nowhere explained why the alternatives should be
defined and evaluated according to the commercial needs of Enbridge as opposed to the needs of the people, businesses, and governments within the State of Michigan.

- The Final Report continues this deeply flawed approach. *See* Final Report at ES-4 (“For this study, the alternatives described are designed to provide the equivalent capacity and deliveries to that of the existing Line 5”). And in doing so, it replicates the Draft Report’s deeply flawed conclusions. For example, the Final Report, like the Draft Report, acknowledges that excess pipeline capacity exists on Enbridge Line 78, *see id.* at 5-2, and that the Mid-Valley Pipeline could supply much of the remaining needs of the Detroit and Toledo refineries, *see id.* at 4-18. Yet instead of evaluating, under Alternative 2 (use of existing pipeline infrastructure), whether this combination would meet Michigan’s comparatively modest needs, the Final Report summarily rejects Alternative 2 out of hand because that existing infrastructure cannot accommodate *all* of Line 5’s current throughput. *See id.* at 5-1 – 5-5.

- While we specifically requested in our Comments that Dynamic Risk explain the rationale for this requirement in the Final Report, it made no attempt to do so. Instead, it simply states that evaluating the alternatives based on “only those volumes on which Michigan depends . . . was beyond the scope of work.” *Id.* at PR-14. Unless the State expressly forbade Dynamic Risk from analyzing Line 5 in terms of Michigan needs, this explanation seems flimsy at best.

**The Final Report Fails to Account for Tribal Interests**

- The authors of the Draft Report conceded that it did not seriously account for tribal interests. *See* Tribal Comments at 6 and n.4. And in the subsequent Tribal Comments and face-to-face consultation with the State, we set forth in detail a number of vital Tribal interests, including treaty rights attaching to lands and waters at and around the Straits guaranteed by the United States and affirmed by the federal courts. We likewise identified numerous ways that pending decisions regarding the Straits Pipelines will bear directly on those interests. *See id.* at 6-9.

- To our considerable surprise and dismay, the Final Report addresses none of this beyond scattered and perfunctory acknowledgements that Line 5 may implicate tribal rights. That is, it replicates the Draft Report’s essential disregard of tribal interests. The Final Report is at one point transparent about this disregard. *See PR-1 (“This report does not address feedback arising from the Tribal Consultations”).* Yet elsewhere it flatly contradicts that statement. *See id.* at 1-4 (“This Final Report reflects input received during . . . Tribal consultations”). The State has since informed us via email on November 20, 2017, that “the final analysis was informed by the . . . consultation meeting and subsequent information exchange.”

- The State does not indicate where in the Final Report evidence for that statement can be found, and we have reviewed the Final Report in vain for such evidence. If the Final Report
indeed reflects a consideration of tribal interests, we are left to conclude that the drafters of the Final Report deemed those interests unworthy of other than perfunctory mention, much less of serious evaluation. By contrast, the interests of Enbridge pervade the entire report, and those of non-Indian businesses and consumers in Michigan are at least addressed explicitly.

• With regard to the State’s assertion that the Final Report was “informed by” the Tribes’ views, we trust that when the State weighs in on the Final Report, it will state its position clearly as to whether the Final Report did an adequate job accounting for those views.

The Final Report Continues to Underestimate the Costs of a Spill

• In the initial Tribal Comments, we noted (as did many other commentators) that the Draft Report’s estimate of just over $100 million for the total costs of an oil spill at the Straits was grossly low, especially in light of the $1.2 billion in costs caused by the Enbridge Line 6B spill near Marshall, Michigan in 2010. See Tribal Comments at 6-7. The Final Report replicates the Draft Report’s estimate and simply adds, in response to the comments, that “there are too many differences in spill characteristics to draw effective comparisons” between the Line 6B spill and a spill at the Straits of Mackinac. Final Report at PR-15. But it is precisely “differences in spill characteristics” that presumably account for Dynamic Risk’s estimate that a spill into the vast and turbulent Straits of Mackinac would somehow result in one tenth the costs of a spill into an inland creek. The simple request was for the Final Report to provide some explanation as to how those differences led to such vastly divergent figures. It failed to do so, a lapse underscored by the Final Report’s concession that “[a] Straits spill would . . . entail a wider zone of exposure and broader scales of consequences.” PR-16.

• We trust that when the State renders its views on the Final Report it will – consistent with its solemn public trust obligations regarding the Straits – respond to Dynamic Risk’s failure to provide a proper rationale for its absurdly low costs estimates with the condemnation that such failure warrants.

The Final Report Continues Its Unexplained Focus on the Tunneling Alternative

• In our Tribal Comments, we asserted that the Draft Report (1) placed undue emphasis on the tunneling alternative; (2) failed to properly account for the vast disruption to tribal and State interests that tunneling would cause; and (3) failed to explain how Michigan interests justified this option, as opposed to the commercial needs of Enbridge. See Tribal Comments at 9-11. Enbridge has, in fact, agreed that “the [Draft] Report’s analysis of the trenching and tunneling alternatives[] appears to significantly understate the technical difficulties and likely
costs of such a project."¹ It is little wonder that public perception of the Draft Report views it as favoring the tunneling alternative.²

- The Final Report essentially replicates the Draft Report’s treatment of the tunneling option and remedies none of these issues. It acknowledges that “there have been suggestions that there is too much focus [in the Draft Report] on the use of tunneling technology as a replacement of the Straits pipelines.” Final Report at PR-16. It defends this focus on the basis that the State’s “Statement of Work” was part of Dynamic Risk’s contract with the State and that Dynamic Risk accordingly had “a contractual obligation to fully-develop a tunnel option.” Id. By this logic, Dynamic Risk also had a contractual obligation to fully develop the potential of utilizing existing pipeline capacity (Alternative 2), but the Final Report, like the Draft Report, summarily dismisses this alternative.

- By Dynamic Risk’s own logic, it likewise had a contractual obligation to fully develop Alternative 3 (alternative transportation methods and decommissioning of Line 5). Yet the Final Report views that obligation as having “no provision for mixed alternatives (multi-modal transport or permutations or combinations of lower capacity alternatives).” ES-2. Such common-sense possibilities therefore “were not considered.” Id. at 1-7. In fact, the Statement of Work’s description of Alternative 3 does not remotely suggest that such an analysis was beyond Dynamic Risk’s scope of work.³ To the extent there was any doubt, the Michigan Agency for Energy and the Michigan Public Service Commission highlighted this flaw in their joint comments on the Draft Report.⁴

- Finally, and most fundamentally, by Dynamic Risk’s own logic it likewise had a contractual obligation to fully develop Alternative 6 (full abandonment), but that analysis receives nowhere near the prominence and coherent presentation that the Final Report lavishes on the tunneling option. And this is despite the fact that the Report contains facts clearly


³ See August 24, 2016 Contract between Dynamic Risk and State of Michigan at Exhibit A (Statement of Work) at 2-3. Available at: https://mipetroleumpipelines.com/file/347/download?token=XNqW1QKn

establishing that the energy needs of Michigan can be fully and cost-effectively met without Line 5, while reducing the risk of a Straits oil spill to zero.

The Final Report Continues to Omit an Apples-to-Apples Comparison of Risk

• The Tribes and many other commenters noted that the Draft Report’s comparison of the risk of a spill along the 4.5 mile stretch of the Straits Pipelines with the risk along the entire 762-mile length of the southern route alternative was a self-evidently invalid basis for comparison. See Tribal Comments at 11. The Michigan Agency for Energy and the Michigan Public Service Commission agreed that “[t]hese are not valid comparisons” and that “the failure probability and risks associated with the remainder of Line 5 from Superior to Sarnia should be considered in any comparison.”

• The Final Report acknowledges that “[m]any comments were directed at the basis of comparison of the risk assessment, stating that confining the focus to the existing Straits Crossing segments was an unfair basis of comparison, and that a better basis of comparison would be the entirety of Line 5.” Final Report PR-13. Nevertheless, the Final Report continues to rely on that basis for comparison, id. at 6-14, despite its overwhelming potential to mislead the public. Indeed, the Final Report concedes the invalidity of that basis for comparison but again invokes its contractual obligations:

[T]he [Statement of Work] states “The risk analysis will focus on the Straits Pipelines only (i.e., the risk analysis will not address the full-length of Line 5).” All other factors being equal, risk for linear infrastructure such as pipelines is proportional to the length of that infrastructure. Therefore, had the Statement of Work not explicitly excluded the full-length of Line 5 from the risk analysis, it is self-evident that the risk associated with the full length of that pipeline would have been greater than that associated with the Straits Crossing segment of Line 5.

Id. at PR-14.

• Even if Dynamic Risk were correct that, for purpose of comparing alternatives, it was contractually limited to a risk analysis of the 4.5-mile length of the Straits Pipelines, then the obvious means of ensuring a fair comparison to the southern route would have been to choose a 4.5-mile segment of that southern route for comparison. Nothing about the Statement of Work required comparison of the entire 762-miles of the proposed southern route.

6 See August 24, 2016 Contract between Dynamic Risk and State of Michigan at Exhibit A (Statement of Work) at 31. Available at: https://mipetroleumpipelines.com/file/347/download?token=XNqW1QKn
• It is deeply troubling that when so many commenters pointed out a basic flaw in the Draft Report’s comparative analysis, Dynamic Risk has stubbornly stood by that analysis based on an argument about its contractual obligations that likewise suffers from a basic flaw.

Conclusion

In its final form, Dynamic Risk’s Report continues to contain facts establishing that the risk of a Line 5 rupture at the Straits of Mackinac is high, and that cost-effective and far safer alternatives exist to meet Michigan’s energy needs should the Straits Pipelines be decommissioned. However, we are beyond disheartened to see that, as with its draft report, Dynamic Risk does not state these facts with clarity, continues to omit them from any summary of the Report’s findings, and obscures them in thickets of technical analysis.

We are likewise beyond disheartened to see that the numerous material omissions, flawed premises, misplaced emphases, and demonstrable errors of reasoning identified by many commenters in the Draft Report remain fully intact in the Final Report. Dynamic Risk has responded to the constructive and well-supported criticism of its draft largely by ignoring it. And where it could simply not do so with a straight face, it has taken spurious refuge in its contractual obligations as purportedly justifying the bias and elemental errors in its conclusions.

In our Tribal Comments, we highlighted the State’s obligations (and its unquestionable power) to decommission the Straits Pipelines based on the Tribes’ treaty rights and on the State’s solemn responsibility to faithfully preserve the paramount public trust in the Straits of Mackinac. The Final Report, for all its flaws, does nothing to undermine the nature of those obligations. Yet relying on such a deeply flawed document to justify the further desecration of the already beleaguered Straits by pounding a tunnel though their very foundation would make a mockery of the public trust. And to what end? Why would Michigan go to such lengths and bear such risks to safeguard the commercial interests of a single corporation? That is a question the Report does not acknowledge, much less address, but it is one to which history will demand an answer should the State proceed down that path.

Michigan’s federally-recognized Tribes will engage in further consultation with the State over the future of the Straits Pipelines. We trust and hope that such consultation will be meaningful, and that the State and the Tribes will work together towards a common goal of decommissioning the Straits Pipelines. The Tribes will do everything within their power to secure that goal. The Straits, the Tribes, and the citizens of this State deserve nothing less.
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