October 14, 2022

Line 5 Tunnel EIS
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Submitted electronically at https://www.Line5TunnelEIS.com

Dear Detroit District:

Thank you for the opportunity to submit written comments on the proper scope of the environmental impact statement (EIS) for the Line 5 Tunnel Project. This is in response to the Notice of Intent (NOI) the U.S. Army Corps of Engineers ("USACE" or "Corps") published in the *Federal Register* on August 15, 2022, 87 Fed. Reg. 50074-50076 (Aug. 15, 2022).

This comment is submitted on behalf of two 501(c)(3) nongovernmental organizations: (1) the Michigan Climate Action Network (MiCAN), which is dedicated to confronting the climate crisis in Michigan and to advancing equitable climate solutions with the urgency science demands for the environment and all that live in it; (2) the Environmental Law & Policy Center (ELPC), which advocates, innovates, and litigates to protect the Midwest's environment from the Great Lakes to the Great Plains.

Our principal recommendations are as follows:

First, USACE must modify the purpose and need statement to avoid unlawfully precluding the consideration of reasonable alternatives to Enbridge's proposed project. The purpose and need statement proposed in the NOI would eliminate any alternative that does not connect Enbridge's existing North Straits Facility and its Mackinaw City pump station. The purpose and need statement also improperly includes "maintaining existing petroleum capacity," when even Enbridge acknowledges that, over the next 20 years, the need for petroleum transportation capacity will be considerably reduced, quite possibly to near zero if climate goals are to be reached.

The primary purpose and need of any crude oil pipeline is to meet the energy needs of the consumers ultimately served, at minimum risk to the environment (and, in this case, tribal resources). Line 5 cannot continue to operate without the Line 5 Tunnel project, and therefore the purpose and need for the project should largely mirror the purpose and need of Line 5 generally. The secondary purpose of Line 5 is to meet the feedstock needs of the petroleum refineries currently taking crude oil from Line 5, in a way that avoids or minimizes environmental and other risks." An EIS for the Line 5 project therefore must be defined in a way that permits full consideration and alternatives to meet those broader needs.[1]

[1] In its October 7, 2022 comment letter, EPA Region 5 suggests a general reference to connecting the Upper and Lower Peninsulas of Michigan in the purpose and need statement. That, however, completely misses the point of

With a more general conception of the purpose and need, then step one should be to assess whether and to what extent the need actually exists, not just currently but over a reasonably foreseeable time frame, e.g. 20 years. The ultimate purpose and need statement must reflect that need analysis.

Second, the alternatives the EIS must consider should assume that the current Line 5 pipelines across the Straits of Mackinac are shut down. That is what the governor of Michigan has ordered, and Enbridge's current refusal to abide by the governor's order does not entitle Enbridge to assert that the "no action" alternative is to leave the current Line 5 pipelines in place and operating.

Third, the alternatives should include possible use of existing underutilized pipelines that do not cross the Straits, the option of bringing crude oil from the Gulf of Mexico through existing pipelines or tankers, and the potential for expanded transport of oil by rail or truck, or various combinations of the above. Again, the consideration of any of those alternatives, and any others USACE considers, should assume a substantial decline in demand for refined petroleum products over the next 20 to 40 years as Canada and the U.S. adopt and respond to policies that discourage the continued use and extraction of fossil fuels.[2] Hence our belief that the Corps should conduct its alternatives analysis with a number of different scenarios reflecting public policy and demand for petroleum and propane products.

Fourth, each alternative should be evaluated, not only for potential impacts on aquatic resources, but also for social, economic, and cultural impacts.[3] In particular, USACE must

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the project, which is to meet energy needs and reduce environmental risk. Alternatives that do not involve connecting the Upper and Lower Peninsulas of Michigan, if reasonable, should be fully considered. *See generally* EPA Comments Concerning Line 5 Scoping, Alan Walts, Director, Tribal and Multimedia Programs Office, to Katie Otanez, U.S. Army Corps of Engineers, (Oct. 7, 2022), https://acrobat.adobe.com/link/review?uri=urn:aaid:scds:US:74d472ce-f09e-481e-9f18-ad1fb303c249.

[2] Government of Canada, *2030 Emissions Reduction Plan* (Mar. 29, 2022), https://www.canada.ca/en/environment-climate-change/news/2022/03/2030-emissions-reduction-plan--canadas-next-steps-for-clean-air-and-a-strong-economy.html ("Canada's average temperatures are rising at twice the global average. . . polluting less and taking steps to remove excess carbon from the air will be one of the most important undertakings in Canada's history. . . Canada increased its ambition on climate change under the Paris Agreement. The 2030 Emissions Reduction Plan describes the many actions . . . that will ensure that we reduce emissions across the entire economy to reach our emissions reduction target of 40 to 45 percent below 2005 levels by 2030 and put us on a path to achieve net-zero emissions by 2050."); Martina Igini, *All You Need to Know About The US Inflation Reduction Act*, Earth.org (Aug. 17 2022), https://earth.org/inflation-reduction-act/ ("[The Inflation Reduction Act] will help the US reduce its greenhouse gas emissions by around 40% below 2005 levels by the end of the decade – a significant improvement over the current projections of 27%. This will undoubtedly put the country within the hailing range of its pledge to cut emissions by at least 50% by 2030 and reach carbon neutrality by 2050."); Melissa Denchak, *Paris Climate Agreement: Everything You Need to Know*, NRDC (Feb. 19, 2021), https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know#sec-important ("On his first day in office, President Biden sent a letter to the United Nations, formally signaling that the United States would rejoin the Paris Agreement. . . The United States—the world's largest historical emitter and the second-biggest current emitter after China—had committed to cutting overall greenhouse gas emissions by 26 to 28 percent below 2005 levels by 2025.").

[3] EPA Comments Concerning Line 5 Scoping, *supra* note 1 at 15. ("Based on available project information, EPA is concerned that environmental effects would likely be significant, and that impacts experienced by minority populations, low-income populations, or Tribes could appreciably exceed those on the general population or other appropriate comparison groups."); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th

assess both the direct climate impacts from construction, but also the indirect climate impacts—the gross and net greenhouse gas emissions from upstream extraction, midstream transport and refining, and downstream consumption of the refined petroleum products from the crude oil. The climate impacts of those GHG emissions should be described qualitatively, and also should be monetized using the social cost of carbon metrics currently used by the U.S. federal government.[4] The potential impact of changing conditions caused by climate change, e.g. increased and exaggerated weather events, should also be factored in to any evaluation of the environmental risks of alternatives.[5]

The "404(b)(1) Guidelines" adopted by EPA and USACE prohibit USACE from permitting anything but the least environmentally damaging practicable alternative (LEDPA). To comply with that requirement, and to comply with this Administration's climate goals and directives, USACE needs to conduct a rigorous examination of a broad range of alternatives to Enbridge's proposed tunnel project. An EIS that only compares Enbridge's tunnel proposal (or with minor tweaks) to leaving the existing Line 5 pipelines in place and operating at current capacity would not comply with the National Environmental Policy Act (NEPA), and would not assure that USACE has met the substantive requirements of its own rules.

Purpose and Need

The Council on Environmental Quality (CEQ) regulations governing environmental review under the National Environmental Policy Act (CEPA) have long required each environmental impact statement (EIS) to briefly state the underlying purpose and need to which the agency is responding in proposing the alternatives, including the proposed action.[6] In 2020, the previous Administration proposed and adopted new language requiring that, when an agency like USACE is considering permit applications from private parties like Enbridge, the agency must base the purpose and need on the goals of the *applicant,* not the needs and goals of the public or the agency's own goals.[7]

Cir. 2003) ("The purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low income populations."); *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87 (4th Cir. 2020) (holding that environmental justice is not merely a box to be checked.).

[4] Renee Cho, *Social Cost of Carbon: What Is It, and Why Do We Need to Calculate It*? Columbia Climate School (Apr. 21, 2022), https://news.climate.columbia.edu/2021/04/01/social-cost-of-carbon/ ("If you want to know the damages caused by a ton of carbon, and make sure that any rule or project that we do ends up being beneficial for society, you need the social cost of carbon in order to do that.").

[5] Amir Bakian, *Climate Change and Future Reality*, La Weekly (Oct. 4, 2022), https://www.laweekly.com/climate-change-and-future-reality/ ("There is no denying or hiding behind the fact that climate change is real and poses an existential threat to human civilization. . . The impact of the devastation caused by climate change-related calamities will only multiply with each passing day. . . We are at a point where the UN Secretary-General warned that the world risks crossing the point of no return on climate change, with disastrous consequences for people across the planet and the natural systems that sustain them.").

[6] 40 C.F.R. § 1502.13 (2022). *See Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 668 (7th Cir. 1997) ("Logic and law dictate that every time an agency prepares an environmental impact statement, it must answer three questions in order. First, what is the purpose of the proposed project? Second, given that purpose, what are the reasonable alternatives to the project? And third, to what extent should the agency explore each particular reasonable alternative?").

[7] Four different federal courts stayed the implementation of the 2020 amendments.

This year, however, the current Administration repealed that 2020 amendment, and deleted the reference to the goals of the applicant.[8] In so doing, CEQ repeatedly cautioned against agencies adopting unreasonably narrow purpose and need statements to limit the range of alternatives to be considered to only those that advance the applicant's goals. As CEQ stated, "[i]t is contrary to NEPA for agencies to 'contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence).'"[9] And tailoring the purpose and need to an applicant's goals "could prevent an agency from considering alternatives that do not meet an applicant's stated goals, but better meet the policies and requirements set forth in NEPA and the agency's statutory authority and goals."[10]

The narrow purpose and need statement USACE and, presumably Enbridge, have proposed for this EIS clearly is intended to foreclose alternatives other than what Enbridge wants to do. Look at the language:

> The purpose of the project is to provide transportation of light crude oil, light synthetic crude oil, light sweet crude oil, and natural gas liquids between Enbridge's existing North Straits Facility and Mackinaw Station, and to approximately maintain the existing capacity of the Line 5 pipeline while minimizing environmental risks.[11]

The only possible alternatives that could conceivably meet that narrow purpose would be Enbridge's existing Line 5 pipelines, or a new pipeline "as near as practicable" to Enbridge's existing Line 5 pipelines and facilities on the north and south sides of the Straits. That will serve Enbridge's purposes, but may well not serve USACE's core purpose of preserving and protecting aquatic resources and assuring that projects it permits serve the "public interest."

The better, and, in our view, only lawful way to define the purpose and need is to start by defining the purpose and need of the existing Line 5 pipeline. Line 5's downstream customers are ultimately consumers with energy needs currently being met by refined petroleum products. Line 5's midstream customers are petroleum refineries, primarily in Ontario and Quebec, who want light crude oil to refine into gasoline, jet fuel, diesel fuel, asphalt, petrochemical feedstock, and other petroleum products that meet their end customer's energy needs. The purpose and need of Line 5 and the Line 5 Tunnel project is to serve those customers at minimum environmental risk. Crossing the Straits of Mackinac is a means, not an end.

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[8] CEQ restored the previous version of 40 C.F.R. § 1502.13, and also deleted the parallel reference to the goals of the applicant in the definition of "reasonable alternatives" in 40 C.F.R. § 1508.1(z). National Environmental Policy Act Implementing Regulation Revisions, 87 Fed. Reg. 23453 (2022) (to be codified at 40 C.F.R. pt.1502) ("The revision clarifies that agencies have discretion to consider a variety of factors when assessing an application for an authorization, removing the requirement that an agency base the purpose and need on the goals of an applicant and the agency's statutory authority.").

[9] National Environmental Policy Act Implementing Regulation Revisions, 87 Fed. Reg. at 23453 (quoting *Simmons v. U.S. Army Corps of Eng'rs,*120 F.3d 664, 666 (7th Cir. 1997)). *See Simmons*, 120 F.3d at 670 ("If NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives.").

[10] National Environmental Policy Act Implementing Regulation Revisions, 87 Fed. Reg. at 23459.

[11] Enbridge Line 5 Fact Sheet, U.S. Army Corps of Engineers (Aug. 31, 2022), https://www.line5tunneleis.com/wp-content/uploads/2022/08/Line-5-Scoping-Handout_3_Fact-Sheet_export.pdf

USACE has, of course, often taken the position that it has only a "small handle" on crude oil pipelines, that it only has jurisdiction over the construction of waterbody and wetland crossings, and that it can discharge its Clean Water Act (CWA) obligations with national or regional general permits or sometimes individual permits that impose standard construction conditions at those crossings.[12] In many of those cases, USACE's position is that no EIS is required under NEPA for crude oil pipeline projects, that their national and regional permits have already determined that crude oil pipelines have no significant environmental impact.

This is, however, not a "small federal handle" case. USACE has already determined that an EIS will be required, and that the project will have a significant environmental impact. The foreseeable consequences of a permit denial will not be tantamount to a minor re-route to protect a wetland. A permit denial will likely shut down Line 5, or keep it shut down, if Enbridge ultimately follows Governor Whitmer's order, or is compelled to do so by a judicial decision. USACE's decision will be far more consequential than in the "normal" pipeline case. The continued operation of Line 5 is not only "related" to the Line 5 Project; it is dependent on it.[13] In addition, USACE also has to confront the issues raised by the Bad River trespass under federal common law,[14] and a host of treaty and other tribal issues each involving the federal government's fiduciary responsibility to federally recognized tribes. Line 5's future is in the Corps' hands, and the EIS must reflect the significant role the federal government is playing. Adopting a project proponent's narrow purpose and need to avoid considering those factors would not only be unlawful, but would not serve USACE's central purposes.

Once an appropriate purpose and need is established, the next step will be to assess whether the need exists, or whether or to what extent the need will continue to exist. Simply assuming that the need for the current capacity of Line 5 will continue at the same level indefinitely might be in Enbridge's interest, but it does not reflect any kind of plausible reality. USACE will need to answer several key questions:

- Will current downstream consumers of refined petroleum products from the refineries served by Line 5 (or Michigan propane consumers) be able to meet their energy needs through means other than refined petroleum products (or propane)?

- How are those needs likely to change over time, as the U.S. and Canada transition away from fossil fuels?

- How competitive are the midstream refineries served by Line 5? If their costs increase, are they likely to survive? Or to scale back production? Are there other suppliers of

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[12] *E.g. Red Lake Band of Chippewa Indians v. U.S. Army Corps of Eng'rs,* 2022 WL 5434208 (D.D.C. Oct. 7, 2022) (Enbridge Line 3 expansion).

[13] CEQ rules require that "related" actions be considered together, and cautions against segmenting projects into smaller parts to try to confine the scope of an EIS. 40 C.F.R. §§ 1508.4, 1508.25 (Jul. 2020).

[14] The U.S. District Court for the Western District of Wisconsin has found, on cross motions for summary judgment, that Line 5's crossing of the Bad River reservation is a trespass that must be stopped. *Bad River Band of Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co.,* 2022 WL 4285707 (W.D. Wis. Sept. 16, 2022). Trial on the remedy phase is scheduled to begin on October 24, 2022.

> refined petroleum products elsewhere that will have lower costs and likely take market share during this interim period?

There are few industries where there are more market prognostications, globally, nationally, and regionally. Of course, the future is always uncertain, but USACE cannot evade its responsibility to make reasonable forecasts and estimates, using all the materials available. It cannot claim the absence of a crystal ball to justify assumptions about need that are very unlikely to be valid for long.

The smaller the actual need, of course, the less likely will there be any justification for granting Enbridge's permit request. The EIS is the appropriate place to make that assessment.

Alternatives

The CEQ rules require that the alternatives section in an EIS "present the environmental impacts of the proposed action and the alternatives in comparative form," and requires the inclusion of "the no action alternative."[15] The "no action alternative" means to maintain the status quo, and in this case, the status quo is to have the existing Line 5 shut down per the governor's November 13, 2020 order.[16] The November 13 order revoked the 1953 easement which authorized the existing line 5 pipelines in the Straits of Mackinac for violation of the public trust doctrine and for Enbridge's "longstanding, persistent, and incurable violations of the Easement's conditions and standard of due care." Enbridge cannot lawfully operate Line 5 without a valid Michigan easement for the Straits crossing.

Enbridge has defied that order. But the "status quo" cannot mean the continuation of Enbridge's unlawful behavior.

The no action alternative also requires an agency like USACE to consider what steps parties will take if the status quo is maintained. As CEQ's Forty Questions Guidance explains:

> Where a choice of "no action" by the agency would result in predictable actions by others, this consequence of the "no action" alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026 (March 23, 1981, amended 1986).

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[15] 40 C.F.R. § 1502.14(c) (2022). *See also Simmons*, 120 F.3d at 666, 670 ("Officials must think through the consequences of—and alternatives to—their contemplated acts; and citizens get a chance to hear and consider the rationales the officials offer…It thus blends a faith in technocratic expertise with a trust in democracy.").

[16] State of Michigan Notice of Revocation and Termination of Easement https://content.govdelivery.com/attachments/MIEOG/2020/11/13/file_attachments/1600920/Notice%20of%20%20Revocation%20and%20Termination%20of%20%20Easement%20%2811.13.20%29.pdf.

If Line 5 is shut down, and no permit is granted for a replacement, all of the parties will take predictable actions. The refineries will find alternative feedstock sources. Michigan propane consumers will find alternative supplies, or alternative heating sources. There has already been extensive analysis of those possible alternatives.

Examples on the oil side of the equation include:

- *Line 78:* Enbridge's own Line 78—Line 78A from Flanagan, Illinois through Griffith/Hartsdale, Indiana to Sarnia, Ontario, and Line 78B from Stockbridge, Michigan to Sarnia, Ontario—has an existing capacity of 570,000 and 500,000 bpd respectively. Both segments of the pipeline have unused capacity, but pump upgrades could increase capacity for the pipelines to 800,000 and 525,000 bpd. These are part of Enbridge's Mainline system, and connect to Line 5's current terminus in Superior, Wisconsin, or to points closer to where the oil is extracted in North Dakota, Montana, or Canada. That would be more than half the oil currently flowing through Line 5.[17]

- *Portland Pipeline:* The existing Portland, Maine to Montreal, Quebec pipeline has a capacity of 223,000 bpd, which could supply 100% of the refining capacity of the Suncor refinery in Montreal, and make nearly another 85,000 bpd available to other refineries.[18] That pipeline is not currently under Enbridge's control, but, of course, as CEQ's *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (March 23, 1981, amended 1986) makes clear, all "reasonable" alternatives must be considered, even if they are outside the capability of the applicant or outside the jurisdiction of the agency.[19]

- *Tankers:* Long-range (LR) marine tankers carry between 310,000 and 550,000 barrels of oil, and Very Large Crude Carriers (VLCC) can carry up to 1,000,000 barrels. The Valero refinery in Levis, Quebec currently receives all of its oil by marine tanker coming down the St. Lawrence Seaway.[20]

- *Rail:* Oil from Montana, North Dakota, and Western Canada can be transported by rail, and there is already 110,000 bpd of offloading capacity from existing rail lines. Rail

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[17] *See generally* Michelle Woodhouse, Keith Brooks, *Closing Enbridge's Line 5 Pipeline: What are the options and alternatives available?* Environmental Defense Canada at 8 (2022), https://environmentaldefence.ca/2022/02/16/line-5-closure/#:~:text=Other%20key%20findings%20of%20the%20report%20include%3A%201,existing%20rail%20capacity%20and%2For%20tankers.%20...%20More%20items.

[18] *See* Martin Meyers, *Potential Enbridge Line 5 Closure: Alternatives for Crude Oil Supply to Ontario and Quebec Refineries and Associated Impacts on Ontario and Quebec Refined Product Markets*, Meyers Consulting at 18 (Jan. 2022), Potential-Enbridge-Line-5-Closure-Meyers-Energy-Consulting-LLC-FINAL.pdf (environmentaldefence.ca).

[19] There has been local opposition to any expansion of oil going through this pipeline. But it is not possible at this stage to eliminate this from consideration on those grounds.

[20] Erickson Direct, 9 TR 1039:28-36 https://acrobat.adobe.com/link/track?uri=urn:aaid:scds:US:6c6d7f26-8639-44ed-8903-13e32e479581; s*ee also* Woodhouse *supra* note 17 at 11.

transportation may be more expensive than pipeline transportation, but expanding rail delivery is certainly feasible.[21]

EPA's October 7 comment likewise calls for USACE to "[a]ssess alternatives that: (1) examine the use of existing capacity in existing pipelines and, if necessary, other transportation solutions—such as rail and truck transport of natural gas liquids—in lieu of building new pipeline infrastructure; (2) propose a connection of Enbridge's Superior, WI and Sarnia, Ontario terminals without crossing the Great Lakes; and (3) examine a tunnel alternative that fully eliminates the risk of oil intrusion into the Straits in the event of an explosion or other pipeline damages."[22] The refineries currently served by Line 5 of course all have considered and likely costed out any number of alternatives, or combination of alternatives, if Line 5 is shut down. If USACE's analysis concludes that these alternatives will be more expensive and will make Line 5's current refinery customers less competitive, that may in turn reduce the refineries' demand for crude oil, and thereby reduce any need for Line 5 or the Straits crossing. Likely market responses should be part of the analysis of each alternative considered in the EIS.

On the propane side, assuming no change in demand in the Upper Peninsula, it would take approximately 15 trucks per day, or 35 railcars a week, to replace all of the propane that currently runs through Line 5. In addition, Governor Whitmer's Upper Peninsula Energy Task Force Committee recommended policies both to improve the propane supply infrastructure (including possible state contracting for propane supplies) and to encourage alternative heat sources for current propane customers, such as modern electric heat pumps and air source heat pumps. If propane becomes more expensive—one estimate is that the price would increase 10 to 25 cents per gallon—then demand will likely go down as the market signals prompt consumers to shift to alternatives. As with refined petroleum products generally, propane must be phased out no later than 2050, and possibly much earlier, if Michigan is to meet its GHG emission reduction and carbon neutrality goals.[23]

To make a fair environmental assessment of any of these alternatives, or combination thereof, USACE will need to estimate costs, economic feasibility, and market impacts. For example, if using an alternative will likely increase the costs of oil transportation for the refiners, USACE cannot just assume that current Line 5 refinery customers will continue to purchase 540,000 barrels per day. USACE should make its best efforts to predict those impacts, or a range of potential impacts, to make its assessment of environmental risks more useful. Back in 2017, Michigan commissioned its own study of Line 5 Straits crossing alternatives, which included some of the kind of economic analysis that will be required.[24]

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[21] Woodouse, s*upra* note 17 at 11, 13 ("Gasoline prices are in a constant state of market fluctuation so a 1.8 cent increase would essentially go unfelt by consumers.").
[22] Walts, *supra* note 1 at 8.
[23] Groundworks, *Canadian Profits, Michigan Risk* (May 2018), https://www.groundworkcenter.org/wp-content/uploads/originals/fu14crfqjw0j90lh9jra.pdf ; Stanton Direct, 9 TR 947:4-18 https://acrobat.adobe.com/link/track?uri=urn:aaid:scds:US:c9df1a5b-1f04-44f9-b07d-8f9218fcbc87.
[24] Dynamic Risk, *Alternatives Analysis for the Straits Pipeline* (Oct. 26, 2017), https://mipetroleumpipelines.org/document/alternatives-analysis-straits-pipeline-final-report.

MiCAN and ELPC do not endorse any of these alternatives, but we include the previous public reports to illustrate the kinds of alternatives USACE needs to identify and consider in its EIS.

Direct, Indirect, and Cumulative Effects and Climate

Once USACE has identified a reasonable range of alternatives, USACE is obligated to consider (1) direct effects, which are "caused by the action and occur at the same time and place"; (2) indirect effects, which are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable"; and (3) cumulative effects, which result from "the incremental impact of the action when added to other past, present, and foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions."[25] That analysis should include an assessment of potential ways to avoid, minimize, or mitigate adverse effects

EPA's comment letter lists several categories of direct, indirect, and cumulative effects of the proposed Line 5 Tunnel Project and reasonable alternatives that USACE needs to consider in developing this EIS:

- Tribal resources, including but not limited to hunting, fishing, and gathering rights reserved in treaties, natural resource use and access (including the Lake Michigan and Lake Huron fisheries), tribal cultural resources (TCRs), and safety and security of indigenous women;

- Environmental justice and children's health, i.e. potentially disproportionate impacts on low-income and minority communities, and sensitive receptors like children and people with asthma;

- Aquatic resources, including water quality and drinking water impacts;

- Climate change, including "potential upstream and downstream GHG emissions, i.e. reasonably foreseeable emissions from the production, processing, transportation, and combustion of natural gas and oil," coupled with social cost of GHG analysis;

- Air quality, both from construction and long-term operational emissions;

- Noise and vibration;

- Impacts to flora, fauna, endangered species, and habitat, working with both the U.S. Fish & Wildlife Service (USFWS) and the Michigan department of natural resources; and

- Spills: impact assessment, prevention, preparedness, & response.[26]

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[25] 40 C.F.R. §§ 1508.7, 1508.8, 1508.25.

[26] CEQ's Environmental Justice Guidance Under the National Environmental Policy Act. See Section III, Part C-4, https://www.epa.gov/environmentaljustice/ceq-environmental-justice-guidance-under-national-environmental-policy-act ("When the agency has identified a disproportionately high and adverse human health or environmental

MiCAN and ELPC certainly agree that all of those factors must be assessed in the EIS, and we urge USACE to adopt EPA's recommendations.

MiCAN and ELPC do, however, offer some additional comments on the climate issue. Too often in the past, federal agencies considering permits for fossil fuel infrastructure have tried to avoid the issue by claiming that climate impacts are unforeseeable or trivial in the context of global emissions and climate change, by assuming "perfect substitution," i.e. that if permits are denied, the resources will simply come from somewhere else and therefore the net effect is zero, or that GHG analysis should be limited to construction and facility operation emissions, and not include the GHG impacts of the coal, oil, gas, or other fossil fuels involved. Those attempts to avoid the climate question no longer comply with NEPA or governing federal policy.

Those arguments have, for the most part, been rejected or discarded. In 2016, the Council on Environmental Quality (CEQ) issued Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews ("the 2016 CEQ Guidance").[27] According to a memorandum authored by the Council on Environmental Quality, the 2016 CEQ Guidance rejected the argument that comparisons to overall global GHG emissions rendered any individual project's climate impact trivial or insignificant:

> [A] statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether or to what extent to consider climate change impacts under NEPA. . . . When considering GHG emissions and their significance, agencies should use appropriate tools and methodologies for quantifying GHG emissions and comparing GHG quantities across alternative scenarios. Agencies should not limit themselves to calculating a proposed action's emissions as a percentage of sector, nationwide, or global emissions in deciding whether or to what extent to consider climate change impacts under NEPA.[28]

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effect on low-income populations, minority populations, or Indian tribes from either the proposed action or alternatives, the distribution as well as the magnitude of the disproportionate impacts in these communities should be a factor in determining the environmentally preferable alternative. In weighing this factor, the agency should consider the views it has received from the affected communities, and the magnitude of environmental impacts associated with alternatives that have a less disproportionate and adverse effect on low-income populations, minority populations, or Indian tribes.").

[27] The Trump Administration attempted to revoke large parts of the 2016 Guidance, but the Biden Administration reversed that. 86 Fed. Reg. 10252 (Feb. 19, 2021); s*ee also* Executive Order 13990—*Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,* 86 Fed. Reg. 7037 (Jan. 20, 2021). The current Administration has stated that the 2016 Guidance applies, unless and until new guidance is forthcoming. CEQ is working on new guidance, and that is likely to come out while the environmental review process for the Line 5 Tunnel project is taking place.

[28] Memorandum from Christina Goldfuss, Chair, Council on Environmental Quality, to the Heads of Federal Departments and Agencies, Council on Environmental Quality at 11 (Aug. 1, 2016), Final guidance for Federal

Likewise, the courts have now consistently rejected agency reliance on the "perfect substitution" assumption to avoid considering climate impacts.[29] Those courts have recognized that federal approvals have market impacts on supply, demand, and price that can affect the quantity produced, transported, and consumed, and therefore cannot be presumed to have zero net effect.

Indeed, in fossil fuel infrastructure projects, both the agencies and courts are finding that compliance with NEPA requires specific estimation of upstream and downstream emissions. The 2016 CEQ Guidance expressly acknowledged that for resource projects, there are various phases, including "extraction, transport, refining, processing, [and] using the resource," and it is the agency's responsibility to assess the "reasonably foreseeable effects" of those various phases as "indirect" effects of the proposed project.[30] Over the past several years, the federal courts have more and more been willing to vacate EIS's for fossil fuel projects if upstream and downstream GHG estimates are not included.[31] Even the Federal Energy Regulatory Commission (FERC), which has jurisdiction over natural gas pipelines and other infrastructure, after years of resistance, has begun requiring that EISs for pipeline projects include upstream and downstream GHG emissions, unless those emissions are genuinely not "reasonably foreseeable." On February 18, 2022, FERC issued an interim policy statement entitled *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, and stated its policy as follows:

> [T]he Commission will quantify a project's GHG emissions that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action, including those effects that occur at the same time and place as the proposed action and effects that are later in time or farther removed in distance from the proposed action. This will include GHG emissions resulting from construction and operation of the project as well as in most cases, GHG emissions resulting from the downstream combustion of transported gas.[32]

The statement later clarifies that "upstream emissions" can also be "reasonably foreseeable" and therefore must be included in NEPA reviews as well.[33]

Consistent with that Guidance, the new FERC policy, and the more recent court decisions, EPA insists in this case that:

Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews (doe.gov).

[29] *WildEarth Guardians v. BLM*, 870 F.3d 1222 (10th Cir. 2017); *High Country Conservation Advocates v. USFS*, 52 F.Supp. 1174 (D. Colo. 2014).

[30] Goldfuss, *supra* note 28 at 14.

[31] *See generally Food & Water Watch v. FERC,* 28 F.4th 277, 288 (D.C. Cir. 2022)(downstream GHG emissions; natural gas pipeline project); *Sierra Club v. FERC (Sabal Trail),* 867 F.3d 1357 (D.C. Cir. 2017). The D.C. Circuit came out the other way in *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019), but still admonished the agency for not doing enough to estimate downstream emissions.

[32] *87* Fed. Reg. 14104, 14126 (Mar. 11, 2022).

[33] *Id.*

> Upstream GHG emissions from oil and natural gas production and downstream emissions from combustion are reasonably foreseeable and causally linked to crude oil and natural gas liquids (NGL) transportation infrastructure. It is important for the [Corps' draft environmental impact statement] to fully quantify and adequately disclose the impacts of the GHG emissions from the proposed action and discuss the implications of long-term carbon lock-in in light of science-based policies established to avoid the worsening impacts. Estimating upstream and downstream emissions would provide useful information to the public and decisionmakers as to the scale of the project's indirect impacts and the long-term public interests at stake. Omitting such emissions would result in an underestimation of the proposal's indirect impacts.[34]

EPA's emphasis on "long-term carbon lock-in" is particularly important. USACE needs to assess gross emissions to understand the broad impacts of the project. As USACE estimates net impacts, however, it must consider the estimated life spans of alternatives and the likely response of refinery customers to price and availability market signals. Shifting all or part of line 5's current capacity to brand-new or newer pipelines might "lock in" fossil fuel production and consumption that might otherwise be reduced substantially. USACE cannot comply with NEPA, nor can it ultimately make an informed decision whether the Line 5 Tunnel project serves the "public interest," unless it completes that analysis.

Last year, Peter Erickson, an expert retained by MiCAN and ELPC for the Michigan Public Service Commission proceedings, estimated that construction of the proposed Line 5 Tunnel project would be associated with about 87,000 metric tons carbon dioxide equivalent and operation of the pipeline would result in about 520 metric tons of GHG emissions annually.[35] The extraction, transport, refining, and consumption of the 450,000 bpd of crude oil and 90,000 bpd of natural gas liquids Enbridge projects will run through the proposed Line 5 Tunnel will be associated with about 87 million tons of carbon dioxide equivalent annually.[36] Compared to a "no action" alternative shutting down the existing line 5 pipeline, and not building the Tunnel, his estimate is that the *increase* in CO2-e if the Tunnel is built will be approximately 27 million metric tons annually, because of the likely price, supply and demand impact of a possible $6 per barrel increase in transport costs.[37] Multiplying those various figures by any reasonable social cost of carbon shows just how dramatic the impact will be, in a way that can both inform the Corps' decision making and let the public know what is at stake.

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[34] EPA Comments Concerning Line 5 Scoping *supra* note 1 at 19.
[35] MiCAN and ELPC have provided hyperlinks, rather than copies, of the Michigan Public Service Commission testimony, but certainly intend to include that testimony in this record. Erickson Direct, 9 TR 1039:11 https://acrobat.adobe.com/link/track?uri=urn:aaid:scds:US:6c6d7f26-8639-44ed-8903-13e32e479581.
[36] *Id.* at 22-23.
[37] Mr. Erickson's testimony describes his methodology and assumptions in detail. *Id.* at 24-43.

Conclusion

A draft EIS with Enbridge's narrowly drawn purpose and need, and only a comparison between the impacts of the current Line 5 pipelines in the Straits and the proposed Line 5 Tunnel project, with an assumption that current levels of crude oil and natural gas liquid through Line 5 continue indefinitely, would not meet the Corps' obligations under NEPA or its own rules, and would not give either the Corps or the public the information and analysis they need to make truly informed decisions. The draft EIS should identify and analyze several alternatives if Line 5 is shut down. Once those alternatives are identified, the Corps must analyze all of the factors identified by the EPA, and, in particular, the indirect effects stemming from upstream and downstream GHG emissions and their social costs.

MiCAN and ELPC look forward to reviewing and commenting on a properly scoped DEIS.

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