

News

Subscribe To News

Email Address *

SUBSCRIBE!

Search Posts



Categories

▸ Webinars & Podcasts

▸ Jaffe Updates

▸ News

▸ Electronic Payments Law



▸ Michigan Green Law



▸ Data Privacy Law



▸ Immigration Law



Download PDF

JUNE 22, 2020

Enbridge was having a good few weeks until last week



One fight that Attorney General Dana Nessel picked after taking

office was to challenge Enbridge Energy's plan to build a new tunnel under the Straits of Mackinac to install new oil and gas pipelines to replace the infamous and aging Line 5 which sits on the bottom of the straits connecting Lakes Michigan and Huron.

While not her fight, a challenge by the National Wildlife Federation to the US Department of Transportation did not go her way. On June 5th, [the 6th Circuit Court of Appeals issued a 2-1 ruling](#) overruling District Judge Mark Goldsmith and holding that Enbridge's plans adequately protected fish and wildlife under the Endangered Species Act. The Court also held that the agency was not obligated to prepare an environmental impact statement as required under the National Environmental Policy Act, because DOT lacked the discretion to deny the permit application that "checked" all the required "boxes."

Two weeks ago, the State lost a challenge filed by Enbridge seeking to validate the [law enacted in the last weeks of the Snyder administration](#) that set up and empowered a State Authority to negotiate a contract with Enbridge for the new tunnel. [The Michigan Court of Appeals ruled on June 11th](#), that the law did not violate the Michigan Constitution's "title-object" clause which requires that the title of a law give fair notice of what is in the law.

Barring a further appeal and surprise reversal, it appears that the AG's arguments will come down to a third case pending in Ingham Circuit Court. That case argues that both the 1953 law permitting the easement at the bottom of the Straits and the 2018 law are unconstitutional because the pipeline is a nuisance violating Michigan environmental law and the common law public trust doctrine which requires the State to hold navigable waterways and the lands under them in trust for public uses such as fishing, boating and recreation. Effectively, the State's argument is that the 67 year old law was *always* invalid. The Trial Judge held a hearing via Zoom on May 22, where lawyers for both sides argued that they should win without a trial. The State argued that it didn't matter what the Legislature did in 1953 or 2018 because the laws in question would not advance protected public rights, or at least, not significantly harm them. The State argued that the risk of a leak and the harm that would follow represented a substantial threat to those public rights and, so, should and could never have been approved.

Enbridge's lawyers argued that this was a "fundamental policy question" that the Legislature had already answered, first, in 1953, by authorizing the pipeline easement and then again by passing [the 2018 law](#) that authorized the State Authority and the contract with Enbridge. Enbridge also argued that the 1953 easement satisfied the public trust doctrine and, even if it didn't, the statute of limitations had run out. It's not clear when the Ingham Circuit Judge will rule on the case. Even before the events of last week, appeals were almost guaranteed no matter which way the judge ruled.

This past Friday, things appeared to turn south for Enbridge when it was reported that Enbridge had notified the State that there was significant damage to an anchor support on the east leg of the Line 5 pipeline near an area last month it was reported that some of the pipeline's coating was worn away. Governor Whitmer sent a Enbridge a [letter](#) asking for information and warning them to exercise caution. Things got more tense when it was reported that Enbridge had resumed using the west leg of Line 5 and the Governor asked Enbridge to shut it all down.

Today, Attorney General Dana Nessel filed two motions in the case pending in the Ingham Circuit Court. The first seeks a temporary restraining order to shut down Line 5 until the second motion, [for a preliminary injunction](#) can be heard. The State seeks to: (A) compel Enbridge to provide the State with all information it has regarding the newly discovered damage to the pipelines, (B) allow the State to review this information; and (C) to maintain the status quo by shutting down both of the Line 5 pipelines until the State's review is complete, the cause investigated, and mitigation measures are in place.

Given the risks and possibility of significant harm predicted by a prior University of Michigan study, it seems likely that the Ingham Circuit Judge will shut down Line 5 until he has a chance to sort things out.

SHARE THIS 