Corps of Engineers Permit Program Relative to Enbridge’s Line 5 Tunnel Proposal

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Section 404 Clean Water Act

- Requires a permit for the placement of dredged or fill material into “waters of the United States”. Delegated to the State of Michigan.
- A permit from the Corps may also be needed. (Next slide.)
Section 10 of the Rivers and Harbors Act of 1899

1. Requires authorization from the Corps of Engineers, for the construction of any structure in or over any navigable water of the United States. Structures or work outside the limits defined for navigable waters of the United States require a Section 10 permit if the structure or work affects the course, condition, location, or capacity of the water body. The law applies to any dredging or disposal of dredged materials, excavation, filling, rechannelization, or any other modification of a navigable water of the United States, and applies to all structures. It further includes, without limitation...aerial or subaqueous power transmission lines...tunnel...and any other permanent, or semi-permanent obstacle or obstruction.

2. The Straits of Mackinac is a navigable water of the United States.
National Environmental Policy Act (NEPA)
- NEPA mandates preparation of an environmental assessment or environmental impact statement for any federal agency action, including activities carried out by, funded, or permitted by a federal agency.
- EIS is required for “major federal actions significantly affecting the quality of the human environment”.
- The purpose of an EIS is to help public officials make informed decisions based on the relevant environmental consequences and the alternatives available. The drafting of an EIS includes public party, outside party, and other federal agency input concerning its preparation. These groups subsequently comment on the draft EIS.
- An EIS is required to describe the environmental impacts of the proposed action, any adverse environmental impacts that cannot be avoided should the proposal be implemented, the reasonable alternatives to the proposed action, the relationship between local short-term uses of man's environment along with the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action.
- One purpose is to engage the public in the agency deliberative process.
- Awareness and scrutiny by the public, and sometimes legal challenges are necessary to ensure adequate opportunity for public participation.
Section 7 of Endangered Species Act

- Interagency Cooperation
- Requires federal agencies, in this case, the COE to consult with U.S. Fish & Wildlife Service for any action they determine “may affect” threatened or endangered species or their critical habitat
- If the action, e.g. issuing a permit for the tunnel, will result in harm or killing of a listed species, the agency must obtain a “take permit”.
- Listed species in the UP include: Canada Lynx, Gray Wolf, Northern Big-Eared Bat, Piping Plover. Other species, and not necessarily all may be affected.
Migratory Bird Treaty Act

- Requires a permit for harming or killing migratory birds with intent.
- Incidental harm or killing, such as from a large petroleum leak has previously been subject to fines and possible jail time.
- Petroleum kills of birds, e.g. the Gulf Oil Spill have been used to purchase and protect tracts of bird habitat as partial compensation.
- These provisions were permanently removed by the Trump Administration.
- Any documented loss of birds from a leak, including from the existing pipelines will carry no liability for Enbridge.
- Enbridge says they will cover “clean-up costs” in “unlikely event” of an oil leak. Does that include reparations for dead and injured birds? They now have no liability.
Bald and Golden Eagle Protection Act

- Any potential harm to eagles requires measures to avoid this. For unavoidable harm, a permit must be obtained.
- Harm includes killing, injuring, or reduction in reproductive capacity, such as abandonment of a nest.
Fish and Wildlife Coordination Act

- Requires consultation with the Fish and Wildlife Service and the fish and wildlife agencies of States (MDNR) where the waters of any stream or other body of water are proposed or authorized, permitted or licensed to be impounded, diverted . . . or otherwise controlled or modified by any agency under a Federal permit or license. Consultation is to be undertaken for the purpose of "preventing loss of and damage to wildlife resources".
- Corps must seek the views of FWS and MDNR.
Native American Graves Protection and Repatriation Act (NAGPRA)

- Requires return of grave and cultural items found on reservations, federal land, and project areas receiving federal funding or permits.
Some opinions

- Enbridge’s Line 5 Tunnel project reviews may or may not proceed, depending on outcome of Michigan AG’s lawsuit.
- The COE should require an individual permit based on their jurisdiction over navigable waters of the U.S.
- The COE should prepare an EIS, based on the potential for significant impacts to the human environment and public controversy, pursuant to NEPA.
- EIS process allows for full participation by the Tribes, State or States, relevant State and Federal agencies, NGOs, and the public
- COE and State review processes take time and should proceed, if at all, with due deliberation.
- Enbridge’s 2010 tar sands oil spill into Kalamazoo River.
- Keystone XL pipeline in North Dakota. Court revoked COE permit.
- Enbridge’s pronouncements of moving forward and completing construction by 2024 are premature and demonstrate a lack of respect toward the State, involved federal agencies and the public.