

**STATE OF MICHIGAN
IN THE OAKLAND COUNTY CIRCUIT COURT**

Protect Our Land And Rights Defense Fund,

Plaintiff

Case No. 12-_____-CH

v

Hon. _____

Enbridge Energy, Limited Partnership,

Defendant.

William D Tomblin (P40540)
P. O. Box 4782
East Lansing MI 48826
(517) 349-8000

H. Kirby Albright
Fraser Trebilcock Davis & Dunlap, PC
124 W. Allegan Street, Suite 1000
Lansing, MI 48933

Gary L. Field (P37270)
Gary A. Gensch (P66912)
Field Law Group, PLLC
3493 Woods Edge Drive, Suite 100
Okemos, MI 48864
(517) 913-5100

Attorney for Defendant

Attorneys for Plaintiff

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in this Complaint.

COMPLAINT

Parties, Jurisdiction and Venue

1. Plaintiff, **Protect Our Land And Rights Defense Fund a/k/a POLAR** is a non-profit Michigan corporation with the following stated purpose: “Through retaining outside counsel, and other means, seek to protect natural resources, seek to promote environmentally sound values, and seek to protect landowners’ private property rights from the excessive or improper use of eminent domain.” POLAR Articles of

Incorporation, Exhibit A. POLAR is composed of landowners in the Counties of Livingston, Oakland, Cass, Berrien, Ingham, St. Joseph, Jackson, St. Clair, and Kalamazoo, State of Michigan (collectively, “Members”).

2. POLAR has standing to bring a suit in the interest of its members because its members would have standing as individual plaintiffs. *County Road Association v Governor of Michigan*, 287 Mich App 95, 115; 782 NW2d 784 (2010). A “non-profit corporation has standing to advocate interests of its members where the members themselves have a sufficient stake or have sufficiently adverse real interests in the matter being litigated.” *Trout Unlimited v White Cloud*, 195 Mich App 343; 489 NW2d 188, 191 (1992).

3. POLAR’s members have a sufficient stake or have sufficiently adverse real interests in the matter being litigated, as exhibited by the affidavits attached as Composite Exhibit B.

4. Defendant Enbridge Energy, Limited Partnership (and its affiliates) (“Enbridge”) is, upon information and belief, a Delaware Company, having its principal place of business in Houston, Texas, and is authorized to do, and does, business in the State of Michigan and the County of Oakland.

5. The real property at issue is located within the Michigan Counties of Oakland, Livingston, Jackson, Calhoun, Ingham, and St. Clair, and as otherwise set forth in this Complaint.

6. The events giving rise to this action took and/or will take place in the Michigan Counties of Oakland, Livingston, Jackson, Calhoun, Ingham, and St. Clair, and as otherwise set forth in this Complaint.

7. Plaintiffs' claims are within the jurisdiction of this Honorable Court because the amount in controversy is in excess of \$25,000, exclusive of interest and costs, and because Plaintiff seeks equitable and other relief within the jurisdiction of this Court.

8. This Complaint is Specialized Business Docket Case Eligible.

COMMON ALLEGATIONS

The Pipeline

9. Enbridge currently owns and operates a crude oil and petroleum pipeline known as Line 6B that commences in Griffith, Indiana, terminates in Sarnia, Ontario, and runs through the State of Michigan, including through Oakland County, as well as the Counties of Berrien, Cass, St. Joseph, Kalamazoo, Calhoun, Jackson, Ingham, Livingston, Macomb, and St. Clair.

10. Upon information and belief, Enbridge has initiated a project to "replace" segments of the existing Line 6B ("Old 6B"), by building a new pipeline that it will call 6B ("New 6B"), and allegedly, terminating the use of Old 6B by filling it with nitrogen gas (the "Project").

11. Enbridge asserts that it has the authority to conduct certain work on New 6B as a result of easements it claims on various properties across the State ("Existing Easement Rights").

12. Upon information and belief, Enbridge also asserts that it needs certain additional lands and rights in order to complete the New 6B not covered by the Existing Easement Rights, and has negotiated with landowners, and/or sought to obtain the authority to acquire these property rights by condemnation ("New Property Acquisition").

MPSC and Other Governmental Approvals and Lack Thereof

13. As part of the Project and pursuant to 1929 PA 16 (“Act 16”), Enbridge is in the process of seeking required approval from the Michigan Public Service Commission (“MPSC”) for the authority to proceed with the Project.

14. Upon MPSC approval, with respect to the New Property Acquisitions, Enbridge will then have the authority to utilize the Uniform Condemnation Procedures Act to initiate condemnation proceedings against landowners with whom agreement has not been reached for the pipeline to run through their property, in order to perform those Additional Property Acquisitions that cannot be concluded by agreement with the relevant land owners.

15. Enbridge has sought, or is seeking, approval from the MPSC for the Project in three separate cases: MPSC Case No. U-17020 (“MPSC 17020”), MPSC Case No. U-16856 (“MPSC 16856”), and MPSC Case No. U-16838 (“MPSC 16838”) (sometimes, collectively, “MPSC Actions”). Attached as Exhibit C are maps showing the various segments of the Project.

16. MPSC 17020, which addresses the longest portion of Line 6B, is not scheduled to have a final order issued by the MPSC until sometime after January 9, 2013, and with rights of appeal thereafter. See, Exhibit D, MPSC Order Adjusting Schedule, p. 8.

17. In addition, while the MPSC issued a final order approving the pipeline segments addressed in MPSC 16838, such order is currently under appeal with the Michigan Court of Appeals in Docket No. 310967 (“16838 Appeal”). Exhibit E, Docket Sheet.

18. The pipeline segments addressed in MPSC 16838 run through Oakland and Livingston Counties.

19. Enbridge has admitted in discovery responses in MPSC 17020 that Enbridge has not obtained the necessary environmental permits in segments of the State of Michigan which would allow it to connect the entire length of 6B, identifying the following as permits not yet obtained:

State Permits:

- Michigan Department of Environmental Quality (MDEQ) – Inland Lakes and Streams Part 301/303
- MDEQ General Permit for Hydrostatic Test Water Discharge (surface waterbodies)
- MDEQ General Permit for Hydrostatic Test Water Discharge (discharges to the ground surface)
- MDEQ NPDES Storm Water Coverage

Local Permits:

- Berrien County Drain Commissioner – Soil Erosion and Sedimentation Control (SESC) Permit
- Cass County Water Resources Commissioner – SESC Permit
- St. Joseph County Conservation District – SESC Permit
- Kalamazoo County Department of Planning & Community Development – SESC Permit
- Calhoun County Road Commission – SESC Permit
- Jackson County Health Department – SESC Permit
- Ingham County Drain Commissioner – SESC Permit
- Oakland County Water Resources Commissioners Office – SESC Permit
- Macomb County Public Works Commissioners Office – SESC Permit
- St. Clair County Health Department – SESC Permit.

Exhibit F, Excerpt of discovery responses in MPSC 17020.

20. Enbridge has also not obtained consents from the counties, townships or municipalities traversed and in which work is to be conducted, as required by Art. 7, § 29 of the Michigan Constitution, which states:

“No person . . . operating a public utility shall have the right to the use the highways, streets, alleys or other public places of any county, township, city or village for . . . pipes . . . *without the consent* of the duly constituted authority of the county, township, city or village.”

Michigan Constitution, Art. 7, § 29.

21. Enbridge has also not obtained consents from the townships or municipalities traversed and in which work is to be conducted, as required by MCL 247.183(1), which states:

“Except as otherwise provided under subsection (2), telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including, longitudinally within limited access highway rights-or-way, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained.”

22. In a recent hearing before an Administrative Law Judge (“ALJ”) in MPSC 17020, the ALJ indicated that “consents will be necessary before construction [of New 6B] commences,” and that Enbridge “is going to have to obtain those [consents] from the municipalities.” Exhibit G, at 4:24-25; 5:12-13.

23. Enbridge has, upon information and belief, not obtained these approvals, has not complied with the conditions for approval unilaterally propounded (without application by Enbridge) by at least one township, the Township of Brandon, County of Oakland. Recognizing the requirement that Enbridge obtain township consent, on

August 20, 2012, Brandon Township passed Resolution #229-12 (the “Resolution”). The Resolution is attached as Exhibit H.

24. The Resolution states that Enbridge must comply with the following 8 requirements prior to commencing construction in Brandon Township:

1. An increased pipeline wall thickness of the oil pipeline equal to or greater than that used in the Northern Gateway Project.
2. An additional pipeline wall thickness for water crossings equal to or greater than that used in the Northern Gateway Project.
3. An increased number of remotely-operated isolation valves equal to or greater than that used in the Northern Gateway Project.
4. An increased frequency of in-line inspection survey across the entire Line 6B pipeline system by a minimum 50% over and above current standards which is equal to or greater than that used in the Northern Gateway Project.
5. The installation of dual leak detection systems equal to or greater than that used in the Northern Gateway Project.
6. On-site monitoring, heightened security, and rapid response to abnormal conditions at the Ortonville pump station equal to or greater than that used in the Northern Gateway Project.
7. A guarantee that once the original pipeline is deactivated it will not be used for any kind of petroleum, natural gas, propane or environmentally hazardous product in the future thereby doubling the amount of hazardous material running through Brandon Township.

8. Compensation to Brandon Township for the additional usage of Township roads.

25. Although Member Jeffrey Axt granted Enbridge an easement on a portion of his property in Brandon Township to lay the New 6B pipeline (the “Easement,” attached as Exhibit I), the Easement expressly requires Enbridge to “*comply with all applicable federal, state and local laws and regulations.*” See ¶ 8 of the Easement.

26. Enbridge has asserted that it intends to move forward with the New 6B Project, and that, in its estimation, it need not comply with these consent requirements. See, Exhibit J, correspondence of Michael S. Ashton, attorney for Enbridge, stating that “Enbridge does not need to seek consent from a township to locate facilities within a township because Enbridge will be locating its facilities within the right of way which Enbridge owns.” However, Enbridge is required to comply with this provision pursuant to the plain language in the Michigan Constitution and Michigan Compiled Laws.

27. Until Enbridge has obtained all MPSC approvals and all required township approvals, it will not be able to complete the New 6B Project, and it runs the risk of violating the Members’ property rights and disrupting all of the Members for no reason.

28. Additionally, Enbridge, through its counsel, has asserted at times that it is not subject to regulation by states and municipalities, as the regulation of its pipelines is subject to pre-emption by federal law (see Exhibit J); however, in reality, the law is that only such matters as maintenance, fuel transport and access are pre-empted by Federal law; access issues, if any, are governed exclusively by state law. *See Panhandle E. Pipe Line Co. v Musselman*, 257 Mich. App. 477, 482; 668 N.W.2d 418 (2003), stating that “federal law does not grant plaintiff any more rights over the property than does the grant

of the right-of-way itself.” Moreover, it is plain that since Enbridge has submitted to the jurisdiction of Michigan Courts (i.e., the Oakland Condemnations) and Tribunals (the MPSC actions) for its access, that it has acknowledged that access is governed by state law.

Risk of Breach of the Peace

29. Additionally, because the rights of Enbridge remain unsettled, and Enbridge is nonetheless improperly taking unilateral action to construct New 6B, without the agreement of Members and other landowners (“Other Disputing Owners”) whose properties remain the subject of dispute (“Other Disputed Lands”), it risks a breach of the peace.

30. Indeed, upon information and belief, according to the Livingston Daily.Com, Enbridge has hired armed guards to enforce its unilateral decisions in at least Livingston County. See, Exhibit K, attached, at URL,:

<http://www.livingstondaily.com/article/20120805/NEWS01/208050307/Comp>

31. Such actions, if allowed to expand to Oakland County and other counties, run the risk of provoking confrontations and breaching the peace of the County of Oakland and throughout the state.

COUNT I

Public Nuisance

32. All preceding paragraphs are realleged and incorporated, as if fully set forth here.

33. The conduct of these construction activities in derogation of law and without the requisite government approvals and the potential breach of the peace, coupled with the damages to real property of the community constitutes a nuisance.

34. A public nuisance is defined as an “unreasonable interference with a common right enjoyed by the general public.” *Capital Props. Group v 1247 Ctr. St.*, 283 Mich App 422, 427; 770 NW2d 105 (2009). “Unreasonable interference” is conduct that “(1) significantly interferes with the public’s health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasing, significant effect on these rights.” *Id.* at 430-31. In addition, the public is presumed harmed “by the violation of a statute enacted to preserve public health, safety, and welfare.” *State v McQueen*, 293 Mich App 644, 674; 811 NW2d 513 (2011).

35. In the instant case, Enbridge has not obtained the consent of all counties, townships and municipalities through which this pipeline is to be constructed. Indeed, with respect to Brandon Township, Oakland County, it has been expressly directed that it does not have consent until it proves compliance with certain factors. Exhibit H. Upon information and belief, it has not done so, and, according to its attorneys, will not do so. Exhibit J, Letter of Michael A. Ashton. See also the Affidavit of Kathy Thurman, Supervisor of Brandon Township, indicating that Enbridge has not communicated any specific response to the Brandon Township resolution, and has not obtained the consent of Brandon Township. Exhibit L. See also Affidavit of Gary L. Field, attached as Exhibit N.

36. As such, the action is proscribed by law.

37. The action is plainly of a continuing nature, as it involves a several month construction project and placement of a permanent New 6B into the ground.

38. The Enbridge activities interfere with public health, safety, peace, comfort and convenience; the Michigan Constitution and statutes specifically limit the rights of pipeline companies for that reason.

39. As to Member Jeffrey Axt, Enbridge beginning construction on his property before it obtains consent as required by the Michigan Constitution, Michigan Statute, and the Brandon Township ordinance, is also contrary to the express provisions of the Easement he granted Enbridge.

40. Additionally, the National Transportation Safety Board (the governing federal entity) ("NTSB") has already found that Enbridge failed to properly maintain and police line 6B, thusly creating harm and danger to the public and environment:

The NTSB found that the material failure of the pipeline was the result of multiple small corrosion-fatigue cracks that over time grew in size and linked together, creating a gaping breach in the pipe measuring over 80 inches long.

"This investigation identified a complete breakdown of safety at Enbridge. Their employees performed like Keystone Kops and failed to recognize their pipeline had ruptured and continued to pump crude into the environment," said NTSB Chairman Deborah A.P. Hersman. "Despite multiple alarms and a loss of pressure in the pipeline, for more than 17 hours and through three shifts they failed to follow their own shutdown procedures."

Clean up costs are estimated by Enbridge and the EPA at \$800 million and counting, making the Marshall rupture the single most expensive on-shore spill in US history. Over 840,000 gallons of

crude oil - enough to fill 120 tanker trucks - spilled **into hundreds of acres of Michigan wetlands, fouling a creek and a river. A Michigan Department of Community Health study concluded that over 300 individuals suffered adverse health effects related to benzene exposure, a toxic component of crude oil.**

Line 6B had been scheduled for a routine shutdown at the time of the rupture to accommodate changing delivery schedules. Following the shutdown, operators in the Enbridge control room in Edmonton, Alberta, received multiple alarms indicating a problem with low pressure in the pipeline, which were dismissed as being caused by factors other than a rupture. **"Inadequate training of control center personnel" was cited as contributing to the accident.**

The investigation found that Enbridge failed to accurately assess the structural integrity of the pipeline, including correctly analyzing cracks that required repair. The NTSB characterized Enbridge's control room operations, leak detection, and environmental response as deficient, and described the event as an "organizational accident."

Following the first alarm, Enbridge controllers restarted Line 6B twice, pumping an additional 683,000 gallons of crude oil, or 81 percent of the total amount spilled, through the ruptured pipeline. **The NTSB determined that if Enbridge's own procedures had been followed during the initial phases of the accident, the magnitude of the spill would have been significantly reduced. Further, the NTSB attributed systemic flaws in operational decision-making to a "culture of deviance," which concluded that personnel had developed an operating culture in which not adhering to approved procedures and protocols was normalized.**

NTSB Press Release, dated, July 10, 2010, attached as Exhibit M (also found at URL: <http://www.nts.gov/news/2012/120710.html>).

41. Likewise, the potential presence of armed guards in Livingston, Oakland and/or other Counties is a nuisance, in that it threatens to breach the peace of the county and state.

42. As such, the activity constitutes a public nuisance which must be abated by injunctive relief.

WHEREAS, Plaintiffs request that this Honorable Court:

- a. Enter such temporary, preliminary and/or interim orders as are necessary to protect the Members and their property interests and/or preserve the status quo, until ultimate decision of this Court;
- b. Order that Enbridge abate the nuisance, not only on the property in Oakland, Livingston, Jackson, Calhoun, Ingham, and St. Clair Counties, but across the entire state; and
- c. Grant such other and further relief as this Court deems just and equitable, including interest, costs and reasonable attorney fees.

COUNT II

Claims and Basis for Injunctive Relief

43. All preceding paragraphs are realleged and incorporated, as if fully set forth here.

44. Enbridge must also be enjoined from commencing construction on Members' property to lay the new pipeline until such time as Enbridge has obtained all necessary and non-appealable approvals for the Project, including MPSC and environmental approvals, and including county, township and municipality consents.

45. There is no adequate remedy at law for Members because absent an injunction, Enbridge will be permitted to dig up and destroy numerous areas of the Counties and unique real property belonging to Members to lay the New 6B, and because of the unique nature of real property, no adequate remedy at law exists to replace the damaged property.

46. The danger of harm to Members is imminent because, upon information and belief, Enbridge has begun construction of the New 6B in Oakland, Livingston, Jackson, Calhoun, Ingham, and St. Clair Counties.

47. The destruction of Members' property, and the laying of the New 6B through Members' property, results in a harm to unique real property of the Members that is irreparable and without adequate remedy at law.

48. The balance of the equities favors the Plaintiff, as it has established its Members' rights to the properties, that the acts of Enbridge are wrongful, and there is no harm to Enbridge because it can, if it desires, begin working on that property by obtaining the requisite approvals of governmental entities.

49. The public interest is served, for all the reasons set forth above, including the failure to obtain municipal consents, but also because there is no benefit to the public in constructing a partial, unusable pipeline. Moreover, it will preserve the peace of Oakland, Livingston, and other Counties if Enbridge is enjoined until the rights of the various parties are determined.

50. Plaintiff has, for the reasons set forth above, established a likelihood of success on the merits.

WHEREAS, Plaintiff respectfully request that this Honorable Court:

- a. Enjoin Enbridge from commencing or continuing construction on property within Oakland County, and all other Counties identified in the Complaint, to lay the new 6B pipeline until such time as Enbridge has obtained all necessary and non-appealable approvals for the Project, including MPSC and environmental approvals, and the appeal of any such approvals, and including county, township and municipality consents;
- b. Enter such temporary, preliminary and/or interim orders as are necessary to protect the Members and their property interests and/or preserve the status quo, until ultimate decision of this Court;
- c. Order that Enbridge abate the nuisance, not only on the property of the Members, but across the entire state; and
- d. Grant such other and further relief as this Court deems just and equitable, including interest, costs and reasonable attorney fees.

Respectfully submitted,

Dated: September 18, 2012

/s/ William D. Tomblin
William D Tomblin P40540
P. O. Box 4783
East Lansing MI 48826
(517) 349-8000

Gary L. Field (P37270)
Gary A. Gensch (P66912)
Field Law Group, PLLC
3493 Woods Edge Drive, Suite 100
Okemos, MI 48864
(517) 913-5100

Attorneys for Plaintiffs