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Michael Nystrom, Chairman  
Mackinac Straits Corridor Authority

Anthony England, Board Member  
Mackinac Straits Corridor Authority

Paul Novak, Board Member  
Mackinac Straits Corridor Authority

Re: Response to Oil & Water Don't Mix Request for Investigation

Dear Messrs. Nystrom, England and Novak:

I have reviewed the September 20, 2021 letter from Sean McBrearty, Coordinator for Oil & Water Don't Mix to Authority Board members England and Novak. Mr. McBrearty requests that Members England and Novak initiate an investigation into communications and actions undertaken by Chairman Michael Nystrom since the Authority's initial meeting in December 2018.

For reasons discussed more fully below, I do not believe that the concerns raised in Mr. McBrearty's letter warrant any further investigation into the inferences Mr. McBrearty makes against Chairman Nystrom. Oil & Water Don't Mix requests that Authority members investigate Chairman Nystrom's communications and actions relating to three areas:

- (1) Under whose authority did Chairman Nystrom seek to turn over to Enbridge the opportunity to fund the Mackinac Straits Corridor Authority;
- (2) Whether Chairman Nystrom has a conflict of interest because of his affiliation with the Michigan Infrastructure and Transportation Association (MITA); and
- (3) Whether Chairman Nystrom was consulted on MDOT's denial of a FOIA request for Enbridge's draft RFP and whether he was in a position to influence and eventually approve any draft from Enbridge.

#### 1. Possibility of Enbridge Funding MSCA Consultants

In order to fully understand this issue, some background information is necessary. At its first meeting on December 18, 2018, Authority members Nystrom, England, and Richardson unanimously voted to enter into the Tunnel Agreement presented by the governor, having found that the Agreement met all of the specified criteria in MCL 254.324d(4)(a)-(k). The Tunnel Agreement set forth certain deadlines for Enbridge to make submissions that the Authority was to consider and approve during 2019.

On March 28, 2019, Attorney General Dana Nessel issued OAG No. 7309, concluding that 2018 PA 359 was unconstitutional because it violated the Title-Object Clause of the Michigan Constitution. That same day, Governor Whitmer issued Executive Directive 2019-13 instructing state department directors and autonomous agency heads to "not take any action authorized by, in furtherance of, or dependent on Act 359."

Thereafter, Enbridge filed suit against the State of Michigan, seeking a declaration that 2018 PA 359 is constitutionally valid. On October 31, 2019, the Michigan Court of Claims issued an Opinion and Order agreeing with Enbridge that Act 359 was constitutional. Although the State of Michigan appealed that decision, the Court of Claims denied a stay of its decision.

On December 20, 2019, Governor Whitmer's Chief Legal Counsel issued a memo to the MDOT Director, EGLE Director, DNR Director, and MPSC Commissioner indicating that until a court decides otherwise, the State is bound by the Court of Claims decision. The Governor concluded that Executive Directive 2019-13 is no longer in effect and advised that the Michigan Department of Transportation should notify members of the Mackinac Straits Corridor Authority Board that the Authority should resume its responsibilities under Act 359 and the December 19, 2018 Tunnel Agreement.

On March 6, 2020 after a 9-month shutdown, the Authority met for the first time since its initial meeting on December 19, 2018. Following the March 6, 2020 meeting, the global COVID-19 pandemic began impacting state government operations. The State Budget Office cautioned all State Departments to review their budgets while it looked more closely at total state spending in light of COVID-related revenue impacts and overall state spending. MDOT's Director suspended all funding for the Authority's activities while the State Budget Office reviewed the State's budget.

MCL 254.324e prohibits the Authority from paying or obligating any money or assets related to the utility tunnel except money that is deposited in the Straits Protection Fund or any escrow, or reserve fund created under the Tunnel Agreement. MDOT is the administrator of the Straits Protection Fund. MCL 254.324c(4). And any administrative functions of the Authority shall be performed under the direction and supervision of MDOT. MCL 254.324(b).

When Chairman Nystrom learned in April 2020 that MDOT had suspended all expenditures under the Straits Protection Fund — after ED 2019-13 had suspended the Authority's powers and duties to act for 9 months in 2019 — he requested a virtual public meeting with the Authority Board to discuss whether and how Enbridge might be able to pay for the Authority's consultants under the provisions of the Tunnel Agreement.

There was nothing untoward about Chairman Nystrom's approach. Section 5.3 of the Tunnel Agreement requires Enbridge to provide funds necessary to retain an Independent Quality Assurance Contractor to monitor the construction of the Tunnel and provide information to the Authority. Chairman Nystrom intended to explore alternative funding similar to this provision for the Authority's consultants at a meeting open to the public. Moreover, this entire issue became moot when in May 2020, MDOT reinstated the Authority's funding under the Straits Protection Fund.

## 2. Whether Chairman Nystrom has a conflict of interest because of his affiliation with MITA.

Chairman Nystrom has been involved in the highway construction industry since early in his professional career. He has been the Executive Vice President of MITA since 2010.. According to MITA's website: <https://thinkmita.org>, MITA is:

A statewide construction trade association that consists of over 500 Michigan companies representing construction disciplines such as road and bridge, sewer and

water, utility railroad, excavation and specialty construction through the state of Michigan.

Governor Snyder no doubt appointed Mr. Nystrom to the Authority Board because of his experience and knowledge about the construction industry.

Oil & Water Don't Mix alleges that Chairman Nystrom may have a conflict of interest because one of the MITA board of directors, John DiPonio, was the founder of Jay Dee Contractors. That is one of the firms that Enbridge hired as part of its Project Team during the design phase of the Tunnel Project. Since Chairman Nystrom is one of the Authority members who reviews and approves Enbridge's construction plans, Oil & Water Don't Mix suggests that Chairman Nystrom may have a conflict of interest.

2018 PA 359 specifies that "[t]he members of the corridor authority board and any agent of the Mackinac Straits corridor authority are subject to 1968 PA 317, MCL 15.321 to 15.330 and 1968 PA 318, MCL 15.301 to 15.310." MCL 254.324b(7).

1968 PA 317 is entitled "Contracts of Public Servants with Public Entities". Under this Act, a public servant shall not be a party, directly or indirectly, to any contract between himself and the public entity at which he or she is an officer or employee. MCL 15.322(1). Nor shall a public servant directly or indirectly solicit any contract between the public entity of which he is an officer and (1) himself or (2) any firm or other unincorporated association in which he is a partner, member, or employee. MCL 15.322(2).

Similarly, 1968 PA 318 entitled "Conflict of Interest," prohibits a state officer from being "interested directly or indirectly in any contract with the State ... which shall cause a substantial conflict of interest." MCL 15.302. To be prohibited under this Act, the state officer's personal interest must be of such substance as to induce action on his part to promote the contract for his or her own personal benefit. MCL 15.304(2). The statute expressly declares that there is no substantial conflict of interest involving a contract between the state and "a firm, partnership, or other unincorporated association in which a ... state officer is a partner, member, or employee." MCL 15.304(3)(b)(ii).

Oil & Water Don't Mix infers that Chairman Nystrom may have a conflict of interest because Enbridge awarded a Construction Manager/General Contractor (CMGC) contract for, preconstruction services to a company founded by a person that sits on the MITA executive board. From a legal perspective, Chairman Nystrom is not a party to Enbridge's contract with Jay Dee for design services. As a matter of law, since the contract is not between Jay Dee and the state or other public entity, neither 1968 PA 317 nor 1968 PA 318 are applicable. But even if the Jay Dee contract was between Jay Dee and the Authority, that alone would not constitute a "substantial conflict of interest" where Chairman Nystrom sits on the MITA board with the founder of Jay Dee because MCL 15.304(3)(b)(ii) expressly provides there is "no substantial conflict of interest" in this situation.

Oil & Water Don't Mix takes issue with Chairman Nystrom's position on the Authority Board reviewing and approving Enbridge's construction design and implementation plans. This concern is wholly unwarranted and demonstrates a complete misunderstanding of the processes in place for the Authority's review and approval of Enbridge's construction design and implementation plans.

First, Enbridge is solely responsible for all costs of designing, constructing, operating, maintaining and decommissioning the Tunnel, including Preliminary Engineering Activities, procurement, and payments to contractors performing its work. Tunnel Agreement, Sec. 5.1. Enbridge would be taking a huge financial risk if it contracted with Jay Dee solely because of Chairman Nystrom's supposed influence. In fact, Jay Dee is a highly reputable company specializing in heavy underground construction.

Section 7.2 of the Tunnel Agreement required the Authority and Enbridge to identify members of a team to jointly develop the Project Specifications related to the design and construction of the Tunnel. For the Authority, the Project Team consists of Dr. Michael Mooney, who has been extensively involved in at least 20 tunnel projects worldwide, Daniel Cooper, a pipeline construction expert, Ryan Mitchell, Innovative Contracting Unit Manager from MDOT, and Matthew Chynoweth, Chief Bridge Engineer from MDOT.

Enbridge's design team consists of inhouse professionals Amber Pa stoor and Aaron Dennis, as well as the Enbridge Owner's Engineer WSP, Designer Arup, and CMGC joint venture Obayashi and Jay Dee. In developing the Joint Project Specifications with Enbridge's design team, the MSCA team submitted nearly 400 comments, each of which was satisfactorily resolved. Mooney Report, February 3, 2021 MSCA meeting.

Given the Authority Board's reliance on its consultants and Project Team, it is difficult to imagine how Chairman Nystrom could possibly have a conflict of interest in reviewing Enbridge's design and implementation plans, simply because the founder of a company with whom Enbridge has contracted, is on the MITA executive board. Moreover, Chairman Nystrom has only one vote on the three-person Authority Board.

### 3. FOIA Request for Enbridge Draft. RFP

Oil & Water Don't Mix raises concerns that Chairman "Nystrom's infrastructure association represents more than 500 construction contractors and as one of the three authority members Nystrom is in a position to influence and eventually approve any draft RFP from Enbridge." Again, its concern fails to consider the role of the Authority in this process and the circumstances surrounding this issue.

Under Section 7.5(c) of the Tunnel Agreement, the Authority is required to "concur" that "any RFP for design and/or construction of the tunnel, complies with Section 7.5(b)(i, ii, iii, iv, v, vi, vii).

- (i) Qualifications of proposed contractors, which shall include a requirement that the contractor and any proposed subcontractors do not appear on a list, provided by the State of Michigan, of contractors with violations of environmental and safety laws, regulations, rules and permits;
- (ii) Jointly developed Project Specifications;
- (iii) A statement that the Authority and the State are not subject to any financial risks or liabilities.
- (iv) Commercial structure;
- (v) Key progress reports and deliverables required from the contractor throughout the duration of the work; and

- ( ) Change management procedures for proposed modifications of or alternatives to any of the conditions post contract award.
- (i) A requirement that proposed contractors provide a plan of how they intend to engage Michigan's labor pool in the project, including their means and methods for recruitment, training, and utilization.

Only after the Authority concurs that the RFP complies with those criteria, is Enbridge able to release such RFP. The Authority will consider Enbridge's draft RFP at its October 13 public meeting and determine whether it complies with the seven criteria listed in Section 7.5(b) of the Tunnel Agreement.

In an effort to ensure that the draft RFP not only met the 7.5(b) criteria, but was also consistent with 2018 PA 359 and other provisions of the Tunnel Agreement, Enbridge provided limited access to its draft RFP through a Steptoe website. On behalf of the Authority, only Ryan Mitchell, Dr. Michael Mooney and I had access to, the Steptoe site. None of us could download, print, or make changes to the draft RFP. Enbridge insisted that the draft RFP could not be released because it contained confidential business and proprietary information. It was also concerned about releasing the information to prospective bidders before the Authority concurred that the draft RFP met the 7.5(b) criteria.

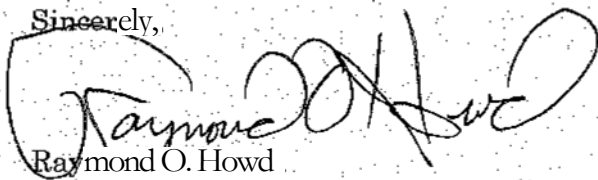
Over a 4-month period, representatives from Enbridge and Mr. Mitchell, Dr. Mooney, and I met to discuss changes to ensure that the draft RFP met the legal requirements of 2018 AP 359, that it complied with Tunnel Agreement requirements, that the technical requirements reflected best practices, and that the Authority would have access to quality assurance documents for adequate oversight of the Project.

When Oil & Water Don't Mix questioned why the draft RFP was not produced in response to its FOIA request last June, the document simply was not in the Authority's possession, nor did the Authority have any means to produce that document Section 2 of the Freedom of Information Act defines a public record as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function from the time it is created." MCL 15.232(i). MDOT, who performs administrative functions for the Authority, simply had no way of acquiring possession of, the draft RFP and therefore, could not produce it in response to the FOIA.

None of the Authority members had access to the RFP drafts through Steptoe. Chairman Nystrom was informed about the FOIA issue only after MDOT had provided the responsive documents and Oil & Water Don't Mix inquired about the draft RFP. His response and that of Member Novak at the September 20, 2021 public meeting was that they do not approve such document review and that a similar occurrence will not happen in the future.

I would be glad to answer any further questions or concerns the Authority members might have.

Sincerely,



Raymond O. Howd

Special Assistant Attorney General