STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Kelly, Michael J., J., P.J., Letica, A., J., and Wallace, Randall J., J.

In the matter of the Application of **Enbridge Energy, Limited Partnership** for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if approval is Required Pursuant to 1929 PA 16, MCL 483.1, *et seq*., and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief.

Supreme Court Nos. 168335, 168346

Court of Appeals No. 369156, consolidated with Nos., 369159, 369161, 369162, 369163, and 369165, 369231

Lower Court:
MPSC Case No. U-20763

PETITIONER-APPELLEE ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

December 22, 2025

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COUNTER-STATEMENT OF JURISDICTION

Petitioner-Appellee Enbridge Energy, Limited Partnership ("Enbridge") concurs in the statements of the basis for this Court's jurisdiction of Appellants Bay Mills Indian Community, Little Traverse Bay Bands of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatomi, Environmental Law & Policy Center, Michigan Climate Action Network (together, "Joint Appellants"), and For Love of Water ("FLOW").

COUNTER-STATEMENT OF QUESTIONS PRESENTED

This case concerns a Michigan Public Service Commission ("PSC") Act 16 administrative decision that authorized Enbridge to replace a discrete, approximately four-mile-long segment of Line 5 from the bed of the Straits of Mackinac into an underground tunnel, a safety improvement known simply as "the Replacement Project." The Court of Appeals upheld that decision. This Court has granted leave to appeal on the following issues:

1. Whether the Court of Appeals correctly applied a deferential standard of review rather than determining de novo under MCL 324.1705(2) of the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 *et seq.*, whether the Replacement Project will likely pollute, impair, or destroy the air, water, or state's other natural resources or the public trust in these resources in accordance with *West Mich Environmental Action Council, Inc v Natural Resources Comm*, 405 Mich 741, 752-55 (1979).

The Court of Appeals answer: Unanimously yes.
Joint Appellants answer: No.
Enbridge answers: Yes.

2. Whether the Court of Appeals properly affirmed the PSC's limitation on the scope of the evidence to be reviewed regarding its determinations to the "conduct" at issue under MCL 324.1705(2) of MEPA and upheld the PSC's decisions to exclude evidence of the history and risk of oil spills along the entire length of Line 5 in those determinations.

The Court of Appeals answer: Unanimously yes.
Joint Appellants answer: No.
Enbridge answers: Yes.

3. Whether, in enacting MCL 324.1705(2) of the Michigan Environmental Protection Act, MCL 324.1701 *et seq.*, the Legislature required the PSC to comply with the common-law, public-trust doctrine.

The Court of Appeals did not address this issue.
Appellant FLOW answers: Yes.
Enbridge answers: No.

4. If not, whether the common-law, public-trust doctrine nonetheless requires such compliance, see *Glass v Goeckel*, 473 Mich 667, 694-96 (2005).

The Court of Appeals answer: Unanimously no.
Appellant FLOW answers: Yes.
Enbridge answers: No.

5. If the PSC is required to comply with the common-law, public-trust doctrine, what a proper public trust analysis would entail in PSC proceedings.

See Argument Section IV.C below.

INTRODUCTION

Enbridge's Line 5 is a 645-mile-long international pipeline that originates in Superior, Wisconsin, traverses Michigan's Upper and Lower Peninsulas, and terminates near Sarnia, Ontario. Line 5 meets the energy needs of Michigan and beyond, including most of upper Michigan's propane needs and much of Detroit Metro Airport's fuel needs. At the Mackinac Straits, Line 5 splits into two parallel, approximately four-mile segments, known as the Dual Pipelines, which cross the Straits lakebed.

Beginning in 2017, the State of Michigan and Enbridge began working together to replace the Dual Pipelines with an even safer and more environmentally protective means for crossing the Straits. By 2018, the State and Enbridge agreed to place a new pipeline segment within a State-owned utility tunnel to be constructed and paid for by Enbridge beneath the lakebed. 2018 P.A. 359.

Under Public Act 16 of 1929, Enbridge was required to obtain approval from the PSC to locate the replacement pipeline segment within the tunnel. Enbridge sought and PSC approved this Replacement Project under Act 16, finding that the Project serves the public interest by providing the best protection to the environmental resources at the Straits. Absent the Replacement Project, the Line 5 Dual Pipelines—as approved by the PSC in 1953—will continue to operate across the Straits lakebed indefinitely. This was recently confirmed by a recent final judgment in federal court holding that the Governor's efforts to revoke the 1953 Easement for the Dual Pipelines violates federal law. *Enbridge Energy, LP v Whitmer*, Case No 1:20-cv-01141, Dkt 164 (WD Mich, Dec 17, 2025). That federal court decision precludes the Governor from seeking to enforce the 2020 notice revoking and terminating the 1953 easement. *Id.* Yet, Appellants ask this Court to overturn the PSC's approval, preventing the Replacement Project from being implemented and maintaining the status quo. Appellants' real goal is to turn the PSC's limited Act 16 proceeding into a reevaluation of the entirety of Line 5. But they cannot do so through this proceeding.

The PSC's Act 16 order and MEPA determination was appropriately narrow, focused only on whether the PSC should authorize the safety improvement achieved by locating the approximate four-mile Replacement Project in a tunnel. Because of the obvious environmental benefits provided by the Replacement Project—it eliminates the potential for any Line 5 release into the Great Lakes—the PSC approved the Project.

The PSC's approval honored the State's multiple agreements and 2018 legislation, in furtherance of the public's trust in the Straits' resources. The PSC and Court of Appeals correctly rejected Appellants' attempt to broaden this limited approval process to challenge the continued operations of Line 5 in its entirety. This Court should do the same.

First, a de novo standard of review does not apply to judicial review of the PSC's MEPA Section 1705 effects analysis conducted in connection with an Act 16 administrative proceeding for the Replacement Project. Unlike a lawsuit filed under MEPA Section 1701—the sole subject of *West Michigan Environmental Action Council, Inc v Natural Resources Comm*, 405 Mich 741; 275 NW2d 538 (1979) ("*WMEAC*")—a reviewing court under Section 1705 does *not* have original jurisdiction over the matter and is *not* required to independently adjudicate the project's environmental effects. As a result, traditional deferential standards of review set forth in Const 1963, art 6, § 28 apply. Any conclusion otherwise would convert Michigan appellate judges into fact-finding trial judges. Where the Michigan Legislature has intended that outcome, it has done so expressly by statute, as it did in staffing the Court of Claims with Court of Appeals judges. Under the unambiguous language of MEPA Section 1705, the Court of Appeals has no such de novo fact-finding jurisdiction in reviewing the PSC's determination. Anyway, no different outcome would result from de novo review; the Replacement Project results in an obvious benefit to the environment by enhancing protection to the Great Lakes.

Second, the Court of Appeals correctly held that the scope of the PSC's MEPA analysis was limited to the Replacement Project. Because Enbridge's application to the PSC was limited solely to the Replacement Segment, MEPA requires (and allows for) only consideration of impacts associated with that "conduct." Joint Appellants seek to require the PSC to analyze the environmental impacts associated with the entirety of Line 5, which would unlawfully expand MEPA beyond the PSC's Act 16 proceeding in a way that the Act and appellate precedents have never contemplated. Oil-spill risk associated with the entirety of Line 5 is unrelated to the Replacement Segment and its benefits, and hence outside the PSC's jurisdiction here. Any theoretical impacts associated with Line 5's operation are not the result of the Replacement Segment because, per the PSC's 1953 order that authorized Line 5, those impacts will continue with or without the Replacement Project. All evidence relevant to the PSC's Act 16 jurisdiction over the Replacement Project was admitted and analyzed extensively as part of the PSC's Section 1705 determination.

Third, the Court of Appeals correctly concluded that the PSC has no common-law jurisdiction. In full accord with this Court's decisions—holding the PSC possesses only the authority bestowed on it by statute—the Court of Appeals held that Act 16 does not authorize the PSC to consider the common-law, public-trust doctrine. And because that doctrine has been subsumed by MEPA, the PSC satisfied any applicable public-trust obligation through its extensive Section 1705 determination that analyzed impacts to resources the State holds in public trust. The Court should reject Appellant FLOW's contrary arguments, including FLOW's assertion that only EGLE can fulfill the State's common-law, public-trust obligations. In addition, the State, including EGLE, fulfilled any common-law, public-trust-doctrine obligation when it entered into the 2018 "Third Agreement" with Enbridge, which expressly states the "Straits Line 5 Replacement Segment [to be] placed into service

within the Tunnel, the State has acted in accordance with and in furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan."

For these reasons, and those set forth in more detail below, this Court should affirm. While Appellants desire to turn this routine, limited, Act 16 approval of the Replacement Project into a referendum on Line 5 itself, this appeal is not an appropriate mechanism to do so. Affirmance is the only result that gives effect to the Michigan legislative- and executive-branch decisions that the Replacement Project will preserve and better protect the Great Lakes ecosystem.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. Enbridge applies to the PSC for approval of the Replacement Project pursuant to State legislation and agreements between Enbridge and the State.

More than 70 years ago, on March 31, 1953, the PSC granted Enbridge's predecessor authorization "to construct, operate and maintain [Line 5] as a common carrier" within Michigan. (Enbridge App'x 1, *In re Application of Lakehead Pipe Line Co, Inc*, opinion and order of the PSC entered March 31, 1953, Case No. D-3903-53.1 at p 9.) The 645-mile pipeline begins in Superior, Wisconsin, traverses Michigan's Upper and Lower Peninsulas, and terminates in Sarnia, Ontario. (Enbridge App'x 22, Dkt. 1455, *In re Application of Enbridge Energy, Limited P'ship to replace and relocate Line 5*, order of the PSC entered December 1, 2023, Case No. U-20763 at p 16 ("PSC Order"); ENBAPX001408.) At the Straits of Mackinac, Line 5 consists of two, 20-inch-diameter pipes—known as the Dual Pipelines—that cross the lakebed for approximately four miles. *Id*. Since entering operation in 1953, Line 5 has operated safely in the Straits and has served as a vital part of Michigan's energy infrastructure. (Enbridge App'x 26, Jan. 14, 2022 Vol 7 Tr 564:7; ENBAPX002223.)

Pursuant to State legislation (Public Act 359) and agreements, Enbridge and the State determined in 2018 that the safety of Line 5's crossing of the Straits can be enhanced by replacing the Dual Pipelines with a new, single-pipeline segment housed in a State-owned utility tunnel under the Straits. (See MCL 254.324b(1), Enbridge App'x 7, ENBAPX000546; Enbridge App'x 6, Oct. 3, 2018 Second Agreement at pp 3, 5-6, ENBAPX000522, 000524-000525; Enbridge App'x 22, PSC Order at 64, ENBAPX1456; Enbridge App'x 8, Dec. 19, 2018 Tunnel Agreement at 1, 4, ENBAPX000551, 000554; Enbridge App'x 9, Dec. 19, 2018 Third Agreement at 1, 3-4, ENBX000012, 000614-000615.) The Replacement Project is intended to achieve the State's goal of eliminating the potential for a release into the Great Lakes from Line 5 by housing the replacement segment in a tunnel that provides "secondary containment for any leak or pollution." MCL 254.324d(4)(d). (Enbridge App'x 7, ENBAPX000547.)

The tunnel is not limited to the Replacement Segment; it will be built to accommodate "utility infrastructure, including, but not limited to, pipelines, electric transmission lines, facilities for the transmission of data and telecommunications, all useful and related facilities, equipment, and structures." MCL 254.324(e). (Enbridge App'x 7, ENBAPX000545.) Because of the tunnel's multi-utility purpose, it will provide a long-term "route to allow utilities to be laid without future disturbance to the bottomlands of the Straits of Mackinac." MCL 254.324d(4)(b). (Enbridge App'x 7, ENBAPX000547.) But the tunnel will not be built without the Replacement Project. (Enbridge App'x 22, PSC Order at 21; ENBAPX001413 (quoting the ALJ's statement that "the relocation of the Straits Line 5 segment 'is the entire reason Enbridge is undertaking the [Replacement Project].'")))

The Replacement Project resulted from years of extensive study, beginning in 2014, when Governor Rick Snyder created the Michigan Petroleum Pipeline Task Force to review the Dual

Pipelines and other pipelines across the State. (Enbridge App'x 23, Jan. 13, 2022 Vol 9 Tr 944:8-9 (ELPC/MiCAN Witness E. Stanton), ENBAPX001762; Enbridge App'x 26, Vol 7 Tr 565 (Enbridge Witness A. Pastoor), ENBAPX0002224; Enbridge App'x 33, Jan. 24, 2022 Vol 12 Tr 1696-1697 (PSC Staff Witness T. Warner), ENBAPX002690-002691, 1762-1763 (PSC Staff Witness A. Morese), ENBAPX002756-002757.) The Task Force, composed of the heads of several State agencies, released a report in July 2015 recommending that an independent consultant be retained to prepare a comprehensive analysis of alternatives. (Enbridge App'x 33, Vol 12 Tr 1696-1697 (Warner) (ENBAPX002690-002691), 1714-1715 (Warner) (ENBAP002708-002709), 1764-1765 (Morese),[1] (ENBAPX002758-002759.)

Following the release of that report, the State created the Michigan Pipeline Safety Advisory Board ("PSAB") to further advise the Governor and make recommendations regarding pipeline safety. (Enbridge App'x 33, Vol 12 Tr 1696-1697 (Warner) (ENBAPX002690-00269). The PSAB was comprised of 16 members, including representatives of regulated stakeholders, government agencies, and non-governmental organizations.[2] Pursuant to the Task Force's recommendation, the State also commissioned Dynamic Risk Assessment Systems to prepare an independent analysis to assess alternatives to the Line 5 Dual Pipelines. (PSC Order at 68, ENBAPX001459; see also Enbridge App'x 33, Vol 12 Tr 1714-1715 (Warner), ENBAP002708-002709.)

On October 26, 2017, Dynamic Risk issued its Alternatives Analysis, which extensively analyzed several alternatives to the Dual Pipelines. (Enbridge App'x 3, Final Report: Alternatives

[1] The Task Force Report referenced by Mr. Morese is now housed at https://www.michigan.gov/psab, last accessed Dec. 16, 2025.
[2] See Executive Order 2015-12, also housed at https://www.michigan.gov/psab, last accessed Dec. 16, 2025.

Analysis for the Straits Pipelines, ENBAPX000032-000401). Dynamic Risk concluded that a tunnel would be a feasible alternative to the existing Dual Pipelines. (*Id.* at ES-10, ENBAPX000044; Enbridge App'x 22, PSC Order at 68, ENBAPX001460 (quoting PSC Witness Warner, Enbridge App'x 33, Vol 12 Tr 1717, ENBAPX002711.)

Following Dynamic Risk's analysis, the State and Enbridge entered the first of three agreements. The First Agreement, entered on November 27, 2017, recognized that Line 5's continued operation in Michigan serves important public needs. (Enbridge App'x 4, First Agreement, Exhibit A-8; ENBAPX000411.) However, to further protect the State's natural resources, Enbridge agreed to conduct an evaluation of alternatives to replace the Dual Pipelines. (*Id.*; ENBAPX000411.) Enbridge's analysis concluded that the Dual Pipelines' environmental risk is very low, but the risk of a release from a utility tunnel beneath the Straits would be "[n]egligible – considered virtually zero." (Enbridge App'x 5, June 15, 2018 Report to the State of Michigan: Alternatives for replacing Enbridge's dual Line 5 pipelines crossing the Straits of Mackinac, Exhibit A-9 at 14; ENBAPX000433.)

Accordingly, on October 3, 2018, Enbridge and the State entered into the Second Agreement in which the parties agreed to promptly enter into further agreements regarding the construction and operation of a tunnel. (Enbridge App'x 6, Second Agreement, Exhibit A-10 at 1; ENBAPX000520.) The Second Agreement again found that there is a public need for Line 5's continued operation and recognized the tunnel as a feasible alternative to the Dual Pipelines. (*Id.*, ENBAPX000520.)

On December 12, 2018, the Legislature passed Act 359, which authorized creation of a State-owned utility tunnel beneath the Straits to accommodate utility infrastructure, such as pipelines. (Enbridge App'x 7, Act 359 of 2018, preamble, ENBAPX000540; MCL 254.324(e),

ENBAPX000545.) Act 359 placed responsibility for the utility tunnel with the newly created Mackinac Straits Corridor Authority ("MSCA") and found that the MSCA's purpose is a public purpose essential for the benefit of the people of Michigan. (*Id*. at MCL 254.324b(1), ENBAPX000546; and MCL 254.234d(1); ENBAPX000547.)

One week later, on December 19, 2018, Enbridge entered into the Tunnel Agreement with the MSCA and the Third Agreement with the State. (Enbridge App'xes 8 and 9, ENBAPX000551 and ENBAPX000612.) The Tunnel Agreement required Enbridge, at its own expense, to construct the proposed utility tunnel. (Enbridge App'x 8, Tunnel Agreement, Exhibit A-5; ENBAPX000551.) As part of the agreement, the MSCA acquired an easement from the Michigan DNR to construct and operate the tunnel on state-owned bottomlands, and it assigned certain rights to Enbridge to enter and use the public property to construct the tunnel. (*Id.* at 1; ENBAPX000551.) The State's directive—through Legislation and agreements—is clear that the Replacement Project within the tunnel is necessary to enhance protection to the Straits resources. (Enbridge App'x 9, Third Agreement, Exhibit A-1 at 4, ENBPAX000615.)

B. The PSC Proceedings

To achieve the State's goals, on April 17, 2020, Enbridge applied to the PSC requesting Act 16 authorization to locate the Replacement Project in the tunnel. (Enbridge App'x 13, PSC Case No. U-20763, Dkt. 0001, Application, ENBAPX001022.) While Enbridge's application was limited to the Replacement Project, intervenors sought to expand its scope to extraneous issues concerning Line 5, so Enbridge filed a motion in limine seeking to exclude as legally irrelevant several issues raised by certain intervenors, (Enbridge App'x 14, Dkt. 0296 (Motion) at 1-2, ENBAPX001043-001044), including: (i) the public need for and continued operation of Line 5 as a whole; (ii) the existing operational safety of Line 5; and (iii) whether Line 5 has an adverse impact on climate change. (*Id*.)

On October 23, 2020, the ALJ ruled that existing and future operational aspects of the entire Line 5, including public need and safety issues, were outside the case's scope. (Enbridge App'x 15, Dkt. 0396 at 15-16 ("Motion Ruling"), ENBAPX001088-001089.) The ALJ also excluded evidence of greenhouse gas emissions and climate change as irrelevant under MEPA. (Motion Ruling at 17-19; ENBAPX001090-001092.)

The Michigan Environmental Council, Bay Mills Indian Community, and FLOW sought leave to appeal. (Enbridge App'xes 16, 17, and 18; Dkts. 0419, 0420, and 0421; ENBAPX001101-ENBAPX001280.) On December 9, 2020, the PSC remanded. (Enbridge App'x 19, Dkt. 0480, Dec. 9, 2020 order of the PSC order at 6; ENBAPX001286.) During the previous month, the Governor and the DNR issued a purported notice of revocation of the 1953 easement (Notice) (*Id*. at 4, ENBAPX001284), now permanently enjoined by the federal court in *Whitmer*, *supra*. The PSC directed rehearing on the question of whether and, if so, to what extent, the Notice changed the scope of review. (*Id*. at 6, ENBAPX001286).

The ALJ reached the same decision on remand. (Enbridge App'x 20, Dkt. 0602 ("Remand Ruling"), ENBAPX001291.) The ALJ ruled that "any evidence concerning the entirety of Line 5 is irrelevant." (Remand Ruling at 13, ENBAPX001303.) The ALJ also found the Notice did not broaden the proceeding's scope to include a reexamination "of the public need for Line 5 or any aspect of its operation and safety." (Remand Ruling at 17-19 ENBAPX001307-ENBAPX001309.) The ALJ further determined that the Notice did not expand the MEPA inquiry to include environmental effects from operation or safety of Line 5 in its entirety, or from the production, refinement, and consumption of the products Line 5 transports. (Remand Ruling at 21; ENBAPX001311.)

On April 21, 2021, after another appeal, the PSC agreed with the ALJ that "any issues concerning the current or future operational aspects of the entirety of Line 5, including the public need for the 645-mile pipeline . . . , [are] outside the scope of this case." (Enbridge App'x 21, Dkt. 0713 at 60 ("April 21 Order"), ENBAPX001377.) The PSC would only determine if there is a public need for the Replacement Project. (April 21 Order at 60-61, ENBAPX001377-ENBAPX001378.) As the PSC explained, the Replacement Project does not concern the "approved, existing pipeline that is merely interconnected with the segment that is the subject of the application," because "[t]he public need for the existing portions of Line 5 has [already] been determined." (April 21 Order at 63, ENBAPX001380.) The PSC denied the request to expand the Act 16 review beyond the safety upgrade presented in the application and did not require an Act 16 review and reexamination of the entire pipeline. (*Id.*)

Turning to MEPA, the PSC explained that its MEPA review does not extend to the entirety of Line 5 but is limited to reviewing the effects of the "conduct" at issue—the "replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel." (*Id.* at 64, ENBAPX001381.) At the same time, the PSC clarified that the Replacement Project's purpose —improving the safety of the Straits crossing— "is a question of fact that the parties may contest, and that is relevant to all three criteria that are considered in an Act 16 case." (April 21 Order at 63, ENBAPX001380.) The PSC also found that, because the "conduct at issue . . . is indistinguishable from the purpose behind it or its result, the [PSC]'s obligations under MEPA must also extend to the products being shipped through the Replacement Project." (April 21 Order at 64; ENBAPX001381.) The PSC recognized greenhouse gas emissions as pollutants and allowed evidence of their effects. (April 21 Order at 66, ENBAPX001383.)

There was a colossal record accumulated before the PSC during the nearly four years of the Act 16 proceeding. It includes over 1,400 docket filings; 2,800 pages of hearing transcripts and testimony, rebuttal testimony, sur-rebuttal testimony, sur-sur-rebuttal testimony, sur-sur-sur-rebuttal testimony, and cross-examination; over 11,000 pages of official exhibit filings; over 2,000 pages of briefing-related filings; and scores of public comments. (See generally, PSC e-docket, Case No. U-20763.)[3]

The PSC issued its final order authorizing Enbridge's Replacement Project, with conditions, on December 1, 2023. (Enbridge App'x 22, PSC Order at 347-348 ENBAPX001739-001740.) The PSC concluded that the Replacement Project satisfies all three Act 16 criteria. (*Id.* at 326, ENBAPX001718.) Regarding Act 16's public-need requirement, the PSC found that "the First, Second, and Third Agreements and Act 359 demonstrate that there is a public purpose and public need for the Replacement Project." (*Id.* at 300, ENBAPX001692.) As for the other two criteria, the PSC found that the Replacement Project is designed and routed in a reasonable manner and exceeds current safety and engineering standards. (PSC Order. at 322 (ENBAPX001714), 325 (ENBAPX001717).)

Because the PSC determined that the Replacement Project satisfies Act 16, it conducted a comprehensive MEPA review of the project in accordance with Section 1705. (*Id*. at 326, ENBAPX001718). Based on its review of the expansive record, the PSC concluded the Replacement Project's construction would result in several types of environmental impairments. (*Id.* at 328-31, ENBAPX001720-001722.) Specifically, the PSC found that the Replacement Project's potential impairments include: (1) increased noise, dust/particulates, and light impacting nearby residences, fauna, and possibly surface water; (2) increased light impacting the nearby

[3] https://mi-psc.my.site.com/s/global-search/20763, last accessed Dec. 16, 2025.

Headlands International Dark Sky Park; (3) surface water impairments associated with dewatering operations, construction equipment traffic, and hydrostatic testing; (4) environmental impairments to local residences and fauna; (5) air quality impacts from use of additional internal combustion engines; (6) environmental impacts to groundwater, drinking water wells, shallow aquifers, surface drainage and recharge patterns, and infiltration and runoff; (7) impacts to surface soils, vegetation, and surface water from storage and handling of fuels/hazardous liquids; and (8) impacts to local flora and fauna from introduction of invasive species. (*Id.* at 89-90 (ENBAPX001481-001482), 329 (ENBAPX001721.) Additionally, the PSC considered GHGs as a pollutant under MEPA and concluded that the Replacement Project would also have environmental impairments because of GHG emissions emitted during construction. (*Id.* at 330-31, ENBAPX001722-001723.)

The PSC then evaluated whether there is a feasible and prudent alternative to the Replacement Project that is consistent with the reasonable requirements of the public health, safety, and welfare. (PSC Order at 331-347, ENBAPX001723-001739.) The PSC's alternatives analysis was extensive – it considered at least 11 alternatives proposed by Enbridge, the PSC staff, the MSCA, and intervenors, including: (1) constructing a new pipeline that does not cross the Great Lakes; (2) use of existing pipeline infrastructure; (3) other methods of transportation, including rail, tanker trucks, oil tankers, and barges; (4) construction of a replacement pipeline segment via trenching; (5) sealed annulus tunnel; (6) continued operation of the Dual Pipelines; (7) suspension of a replacement pipe segment from the Mackinac Bridge; (8) construction of a new suspension bridge to house the replacement pipe segment; (9) construction of a replacement pipe segment via open cut; (10) construction of a replacement pipe segment via HDD; and (11) protection of the Dual Pipelines by installing rock armoring. (*Id.* at 331-337; ENBAPX001723-001729.) For each

of these alternatives, the PSC first assessed its feasibility, concluding that only eight alternatives are feasible and whether it was prudent. (*Id.* at 337-347, ENBAPX001729-001739.)

For each, the PSC compared its environmental impacts against those of the Replacement Project, primarily focusing on the risk of oil spills. (*Id*.) Based on its consideration of construction-related environmental impacts and spill risks associated with each alternative, the PSC found "there are no feasible and prudent alternatives to the Replacement Project pursuant to MEPA." *Id.* at 347.

C. The Court of Appeals' Decision

On appeal, Joint Appellants challenged the PSC's public-need finding under Act 16 and its MEPA analysis; Appellant FLOW also argued that the PSC's 2023 order failed to account for the common-law, public-trust doctrine. (Appellants' App'x A, *In re Enbridge Energy, Limited P'ship to Replace and Relocate Line 5*, __ Mich App __; __ NW2d __ at 6, 22 (Feb. 19, 2025) ("Op").) For its part, the PSC argued that its decision properly followed Act 16, its environmental analysis complied with MEPA, and that it lacked common law powers that would allow it to exceed Act 16. (Enbridge App'x 34, Aug. 29, 2024 Appellee PSC Br on Appeal at 35-37, ENBAPX002926-002928.) Enbridge agreed, arguing that the PSC properly found a public need for the Replacement Project, satisfied MEPA by performing a thorough, two-step environmental effects and alternatives analysis, and correctly determined that the common-law nature of the public-trust doctrine places it outside the PSC's statutory jurisdiction. (Enbridge App'x 35, Aug. 29, 2024 Petitioner-Appellee Enbridge Br on Appeal at 13-24, 25-39, ENBAPX002962-002973, ENBAPX002974-002988.)

The Court of Appeals consolidated the appeals and held oral argument. On February 19, 2025, the Court of Appeals issued a unanimous published, per curiam decision affirming the PSC's "comprehensive and detailed opinion," as consistent with the PSC's Act 16 and MEPA obligations. (Op at 31.)

With respect to the standard of review for an agency's Section 1705 MEPA determination made in connection with an Act 16 proceeding, the Court of Appeals determined that, "[t]o establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment." (Op at 18, 23 (citing *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999)). The Court of Appeals determined that a de novo standard of review does not apply to Appellants' MEPA challenges because those challenges arise under Section 1705 of MEPA. (Op at 23.) The court concluded that this Court's holding in *WMEAC* only requires de novo review for a lawsuit initiated under Section 1701 of MEPA, whereas here, Appellants' challenge was limited to a review of the PSC's effects analysis under Section 1705, made in connection with the PSC's Act 16 administrative proceeding. (*Id.*) A de novo standard is inapplicable under a Section 1705 appeal because the statute places no obligation on reviewing courts to take additional evidence or act as a fact finder. (*Id.*)

With respect to Joint Appellants' argument that the PSC's MEPA analysis should have extended to the entirety of Line 5 or was otherwise flawed, the Court of Appeals concluded "that the [PSC's] general MEPA decision was adequately supported by the law and evidence." (Op at 23.) To begin, the Court of Appeals held, based on rules of statutory construction articulated in *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007), that the "conduct" the PSC is to assess under Section 1705 was limited to the Replacement Project—the only activity for which Enbridge sought Act 16 authorization. (Op at 24.) The effects from the existing 645-mile pipeline—approved in 1953—were beyond the scope of "conduct." (*Id.*)

While the PSC *chose* to assess the entirety of non-pipeline alternatives to Line 5, the Court of Appeals concluded that the PSC could have limited its alternatives analysis to the four-mile Replacement Project. (Op at 25.) Even though the PSC assessed impacts associated with the entirety

of non-pipeline alternatives without assessing impacts for the entirety of Line 5, "PSC's MEPA decision is adequately supported by the record," (Op at 24), because Line 5 will continue to operate with or without approval of the Replacement Project. And the record supported PSC's reasonable determination that other, non-pipeline alternatives would result in greater adverse environmental effects than the Replacement Project. (*Id*. at 24-25.)

With respect to FLOW's argument, the Court of Appeals reasoned that because "the [PSC] is a 'creature of the Legislature' and has no common-law powers," Act 16 prohibits the PSC from considering the common-law, public-trust doctrine. (Op at 22 (citing *Union Carbide Corp v. Pub Serv Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988) (*Union Carbide*)). FLOW's reliance "on the public trust doctrine is misplaced." (*Id*.) In the alternative, the Court of Appeals held that the PSC satisfied any public-trust obligations derived from MCL 324.1705(2) because it "considered this statutory reference to the 'public trust in [the] resources' by way of its overall MEPA review." (Op at 26.)

COUNTER-STANDARD OF REVIEW

Whether the Court of Appeals applied the appropriate standard of review is a question of law that this Court reviews de novo. *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). This Court also "review[s] de novo questions of statutory interpretation." *Preserve the Dunes, Inc v Dep't of Env't Quality*, 471 Mich 508, 513; 684 NW2d 847 (2004).

ARGUMENT

I. Under MEPA, courts reviewing agency determinations under Section 1705 apply traditional deferential standards of review of agency orders.

The Court of Appeals correctly applied a deferential standard in its appellate review of the PSC's Section 1705 MEPA determinations conducted in connection with an Act 16 proceeding. MEPA's plain text requires courts reviewing agency determinations under Section 1705 to apply the traditional deferential standard applicable to review of agency orders under the Michigan Constitution. While Joint Appellants say that *WMEAC* requires all courts to engage in de novo review of MEPA issues, that decision is correctly limited to lawsuits filed under Section 1701, not review of agency actions under Section 1705.

A reviewing court under Section 1705 does not have original jurisdiction and is not required to independently adjudicate the project's environmental effects. So, a de novo standard does not make sense. Otherwise, appellate judges would have to hold evidentiary hearings and become fact finders. Nothing in MEPA indicates that the Legislature intended such an extraordinary change in routine review of agency decisions.

A. Section 1705 does not require de novo review of agency MEPA determinations.

This Court concluded in *WMEAC* that a de novo standard applies under a completely separate section of MEPA not at issue in this case, Section 1701. De novo review is required by a

circuit court reviewing a Section 1701 lawsuit because of the unique statutory scheme. Section 1705 has no such scheme for circuit courts or the Court of Appeals.

In interpreting a statute, this Court's primary goal is to give effect to the Legislature's intent, beginning with the statutory text. *AFSCME v City of Detroit*, 468 Mich 388, 399-400; 662 NW2d 695 (2003). Here, the Legislature created two different means under MEPA for accomplishing the state's environmental protection goals. *State Hwy Comm v Vanderkloot*, 392 Mich 159, 184; 220 NW 416 (1974). The first is through Section 1701, which provides citizens with a direct cause of action for protection of the state's natural resources. MCL 324.1701; *State Hwy Comm*, 392 Mich at 184. The second is Section 1705, which allows citizen intervention in agency proceedings and imposes obligations on administrative agencies to consider the environmental impacts of their actions. MCL 324.1705; *State Hwy Comm*, 392 Mich at 184. These two provisions envision different roles for the courts and administrative agencies.

Under Section 1701, the trial court serves as the fact finder. This provision allows a plaintiff to file an action for declaratory and equitable relief in a circuit court to challenge a private party's conduct that is allegedly causing pollution of the state's natural resources. MCL 324.1701(1). In these cases, trial judges must "take care to set out with specificity the factual findings upon which they base their ultimate conclusions." *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 25; 576 NW2d 641 (1998) (quoting *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975)); see also MCL 324.1703(1).

Section 1701 actions do not necessarily require agency involvement. While Section 1704 authorizes the trial judge to direct the parties to seek relief before the relevant administrative agency, or an existing administrative decision may exist, agency participation is not required. See MCL 324.1704(2). Rather, in every case filed under Section 1701, the *trial judge* retains *original*

jurisdiction and must take evidence and make specific fact findings. MCL 324.1704(3); accord *WMEAC* 405 Mich at 753 ("[T]he court in which suit is filed retains original jurisdiction of the matter, even if it chooses to remit parties to administrative proceedings."). So, a trial court must act like a trial court in every Section 1701 case, even if an administrative agency has already rendered a decision on the issues.

In stark contrast, under Section 1705, the administrative agency is the fact finder. Section 1705(2) obligates administrative agencies to determine whether the conduct at issue will have environmental impacts in agency permitting proceedings. MCL 324.1705(2). If the conduct at issue has or is likely to impact the environment, the agency may authorize the conduct only if it determines there is no feasible and prudent alternative. *Id.* Unlike a lawsuit under Section 1701, Section 1705(2) does not vest any court with original jurisdiction. Instead, the only role for the courts under Section 1705 is that of "judicial review." MCL 324.1705(2) ("In administrative, licensing, or other proceedings, and in any *judicial review* of such a proceeding …" (emphasis added)). "Judicial review" does not mean that the reviewing court must take evidence and make specific factual findings; it refers to the court's power to review decisions of an administrative body or a lower court on appeal. See *Judicial Review, Black's Law Dictionary* (6th ed 1990) (defining "judicial review" as the "[p]ower of courts to review decisions of another department or level of government"). Accordingly, under Section 1705(2), the task of a reviewing court – whether a circuit court, the Court of Appeals, or this Court – is limited to appellate review of the agency's determinations.[4]

[4] Joint Appellants wrongly claim that the Court of Appeals implied that circuit courts review Section 1705 decisions de novo while appellate courts apply deferential review standards. Joint Appellants Br at 16 n6. No. The Court of Appeals correctly identified the differences between a reviewing court's role in actions arising under Section 1705 and a circuit court's role in a lawsuit

Because Section 1705(2)'s plain language limits a court's involvement to appellate review, it follows that the traditional standards governing judicial review of agency orders apply to review of an agency's Section 1705 findings. That means "[r]eview of [the] agency's fact-finding is akin to an appellate court's review of a trial court's findings of fact in that an agency's findings of fact are entitled to deference by a reviewing court." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 101; 754 NW2d 259 (2008). Unlike under Section 1701, where the trial court is expected to exercise original jurisdiction in all cases, under Section 1705, "a reviewing court must ensure that the finding is supported by record evidence" but "*does not* conduct a new evidentiary hearing and reach its own factual conclusions, nor … subject the evidence to review de novo." *Id.* (emphasis added). In other words, Section 1705 requires only a "determination" by the appellate court and nowhere indicates that a de novo standard should apply.

When the Legislature wants to specify a de novo standard for specific types of claims, it has said so in the applicable statute. E.g., MCL 37.2606 ("An appeal before the circuit court shall be reviewed de novo."); MCL 28.425d(1) ("[An] appeal of [a] notice of statutory disqualification, failure to provide a receipt, or failure to issue a license shall be determined by a review of the record for error"). MEPA Section 1705 contains no similar language. Absent a statute mandating a specific standard of review, traditional standards of review for agency orders apply. Const 1963, art 6, § 28 (requiring reviewing courts to determine whether agency orders "are authorized by law" and "supported by competent, material and substantial evidence on the whole record").

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filed under Section 1701. Its holding made clear that *any* court reviewing an agency action under Section 1705 sits as an appellate court and should review the agency's MEPA analysis as it would any other agency order. That would include circuit courts as well as the Court of Appeals and this Court.

Likewise, when the Legislature wants appellate judges to act as factfinders, it has enacted legislation to that effect. See, e.g., MCL 600.6401, *et seq*. (requiring Court of Appeals judges to sit on the Court of Claims and exercise original jurisdiction over claims against the State or any of its departments or officers). MEPA does not contain language authorizing appellate judges to sit as factfinders making 1705 effects determinations.

Joint Appellants erroneously fixate on Section 1705's use of the word "determine." Joint Appellants' Brief ("JAB") at 15-17. They say the term "determine" does not allow for judicial deference to agency decisions and instead requires "any" reviewing court to assess a project's environmental effects anew. *Id.* But the word "determine" does not establish a de novo standard of review in appeals of Section 1705 findings. As Joint Appellants' own definition reflects, the term "determine" merely requires a reviewing court to "come to a decision" about the PSC's determination of environmental effects under Section 1705. *Id.* at 16. The word "determine" does not signify the appropriate standard of review, let alone impose fact-finding obligations on appellate courts that rewrite or abrogate the settled standards of review for agency orders. Section 1705's use of the word "determine" cannot be reasonably read to require de novo review of an agency's MEPA findings, particularly where a reviewing court does not exercise original jurisdiction under Section 1705 and lacks authority to hold evidentiary hearings and make its own factual findings.

Because MEPA's text is unambiguous, this Court should not look to legislative history. *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017) (quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999)). And Joint Appellants' reliance on post-passage press releases and law review articles is misplaced in any event. JAB at 21-23.

Post-passage statements—whether from legislators or the author of the statute's first draft—are the personal opinion of the article's author, not authoritative sources of legislative intent.[5] See *Cole v Ladbroke Racing Mich, Inc*, 241 Mich App 1, 12-13; 614 NW2d 169 (2000) ("'[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent … expressed before the Act's passage' because such statements 'represent only the personal views of these legislators'" (quoting *Mich United Conservation Clubs v Lujan*, 949 F2d 202, 209 (CA 6, 1991))). This Court should decline to substitute mere opinion for MEPA's plain text.[6]

Further, neither of the cited articles addresses the appropriate standard of review for appellate courts reviewing agency determinations under Section 1705. The excerpts of Professor Joseph Sax's 1972 article cited in Judge Welch's dissent in *Lakeshore Group v State*, 510 Mich 853, 857; 977 NW2d 789 (2022) (WELCH, J., dissenting), when viewed in context, only address direct actions filed under Section 1701. See Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1003, 1006 (1972) (explaining the purpose of the article is to monitor litigation filed under MEPA). And, while Professor Sax's 1974 article does state that Section 1705 is designed to give ultimate determinations to the circuit court, he does not identify any language in Section 1705 supporting his personal views. Sax & DiMento,

[5] Joint Appellants' reliance on the Michigan Environmental Law Deskbook prepared by the State Bar's Environmental Law Section is similarly misguided. JAB at 20 n7. Like post-passage statements of legislators, the Deskbook is the opinion of practitioners and cannot be used to alter the statute's plain text. Tellingly, the Deskbook cites no support for its assertion that appellate courts review agency MEPA determinations under Section 1705 de novo. See Haynes, ed, State Bar of Michigan, *Michigan Environmental Law Deskbook*, Michigan Environmental Protection Act, § 14.38 (2018), available at https://connect.michbar.org/envlaw/reports/deskbook, last accessed December 7, 2025.

[6] While this Court cited MEPA's chief legislative sponsor's statements in *WMEAC*, the quoted post-passage statement did not provide the basis for the Court's decision. *WMEAC*, 405 Mich at 754. The Court only cited that statement *after* reviewing the statutory text and determining it requires trial courts to make independent judgments in direct actions filed in circuit courts. *Id.* at 752-54.

Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act, 4 Ecology L Q 1, 20 (1974). The lack of textual support for Professor Sax's view is particularly problematic given that Section 1704 expressly gives original jurisdiction, and thus the ultimate determination, to the circuit court, while Section 1705 lacks similar language. See MCL 324.1704(2).

For these reasons, the traditional deferential standards under Const 1963, art 6, § 28 governing appellate review of agency Section 1705 determinations apply.

B. Court decisions requiring de novo review focus on lawsuits filed under MEPA Section 1701, not Section 1705.

This Court's decision in *WMEAC* is limited to a circuit court's review of claims filed under Section 1701 and is not applicable to courts engaged in judicial review under Section 1705.

Unlike this case, *WMEAC* made its way to this Court pursuant to the Section 1701 process: the case began when the plaintiffs filed a complaint in the circuit court. *WMEAC*, 405 Mich at 749-50. While an agency decision existed, the plaintiffs did not challenge that decision under Section 1705 (in fact, they were specifically barred from intervening in the agency proceeding) and instead chose to file a direct action in the trial court under Section 1701. *Id.* Because the case arose under Section 1701, MEPA directed the trial judge to exercise original jurisdiction over the matter—even when faced with an agency determination on the same issues—and to make specific factual findings. See MCL 324.1704. Despite Section 1704's clear directive, the trial judge deferred to the existing agency decision. *WMEAC*, 405 Mich at 752. This Court found that deference inappropriate. *Id.*

In *WMEAC*, the trial judge's deference was improper because it defies the plain language of Sections 1701 and 1704, which require the trial judge to render independent decisions. As this Court explained, under Section 1704, the trial court where a Section 1701 suit is filed "retains

original jurisdiction of the matter," even if an agency decision exists. *Id.* at 753 (emphasis added). In exercising that original jurisdiction, the trial judge is to *both* "adjudicate" and "determine" "whether 'adequate protection from pollution, impairment or destruction has been afforded.'" *Id.* The Court's decision was premised on the fact that MEPA obligates trial judges in suits filed under Section 1701 to act as trial courts and adjudicate claims brought in their courts, even when an agency has rendered a decision on the same issues. *Id.* at 753-54.

As explained, Section 1705 does not similarly require courts to exercise original jurisdiction after an agency has rendered a determination. Unlike Section 1704, Section 1705 does not place any obligation on reviewing courts to adjudicate environmental issues, take additional evidence, or act like a factfinder. That job is given to the agency, and the court's role is limited to "judicial review" of agency orders. MCL 324.1705(2). *WMEAC*'s reasoning—which is based on the statute's language requiring the trial court to act as the fact finder in cases filed directly in the circuit court—does not extend to a court's review of an agency determination.

The remainder of the discussion in *WMEAC* further illustrates that it does not extend beyond direct actions filed in circuit courts. The Court began its analysis by explaining that the statute "specifically addressed the relationship between *suits brought under the environmental protection act* and administrative proceedings." *WMEAC*, 405 Mich at 752 (emphasis added). While the Court quoted Section 1705(2), its analysis was focused on the relationship between MEPA direct actions and administrative proceedings. *Id.* at 752-53. The Court further explained that Section 1704 provides that the usual standards of review under the Administrative Procedure Act are inapplicable only "once an environmental protection act case has been *filed in a circuit court*." *Id.* at 754 (emphasis added). No similar language exists in Section 1705. *Compare* MCL 324.1704(4) *with* MCL 324.1705(2). Finally, the Court concluded its discussion by explaining that

it previously acknowledged the important role that a trial judge's fact findings play in giving vitality to MEPA. *Id.* As explained, in Section 1705, this fact-finding role is expressly delegated to the relevant administrative agency, not the courts.

Joint Appellants erroneously claim that the word "determine" was the "linchpin" of the *WMEAC* Court's holding. JAB at 19. The actual linchpin was the fact that the statute directs the trial court to exercise original jurisdiction, which involves making a decision *and also* taking evidence and making fact findings. *WMEAC*, 405 Mich at 753-54. While both Sections 1704 and 1705 might require courts to make a "determination," or "come to a decision," Section 1705 lacks the critical language requiring courts to exercise original jurisdiction and take evidence. MCL 324.1704, 1705. Joint Appellants' over-reliance on the term "determine" ignores these differences.

No other decision of this Court has addressed the appropriate standard of review for courts reviewing agency determinations under Section 1705. In *Ray*, *supra*, at 305, this Court held that administrative agencies alone, without opportunity for *citizen participation*, could not adequately protect the environment. 393 Mich at 305 ("The enactment of the EPA signals a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies *without the opportunity for participation by individuals or groups of citizens*" (emphasis added)). Except to authorize the development of common law in furtherance of MEPA, this Court did not opine on the standard of review MEPA requires, let alone the specific standard for judicial review of Section 1705 determinations. The *Ray* Court did not attempt to examine the role and obligations of agencies and courts in Section 1705 proceedings but rather set procedural standards for a circuit court's adjudication in Section 1701 disputes. *Id.* Given Joint Appellants' extensive involvement in this proceeding, and the fact that they have challenged the PSC's MEPA determinations, no aspect of this case conflicts with *Ray*.

Likewise, this Court's decision in *Nemeth*, *supra*, at 25, inapposite. 457 Mich at 25. Significantly, in *Nemeth*, no agency action was at issue, and the case arose under Section 1701. See generally *id.* While the Court referenced "de novo review," it did so in the context of analyzing the standards governing MEPA claims in Section 1701 actions, stating that "MEPA does not impose specific requirements or standards; instead, it provides for de novo review in Michigan courts, allowing those courts to determine any adverse environmental effect and to take appropriate measures." *Id.* at 30. The *Nemeth* Court did not purport to set the standard of review in Section 1705 proceedings and simply found that, in determining whether a MEPA plaintiff has alleged a prima facie case under Section 1703, "each alleged MEPA violation [in a Section 1701 case] must be evaluated by the trial court using the pollution control standard appropriate to the alleged violation." *Id.* at 32-35.

Finally, Joint Appellants misunderstand *Thomas Twp v John Sexton Corp of Mich*, 173 Mich App 507, 511; 434 NW2d 644 (1988), citing it for the proposition that appellate courts reviewing agency orders under Section 1705(2) must apply *WMEAC*'s de novo standard. JAB at 20. In *Thomas*, the Court of Appeals did not consider or analyze the difference between appellate review of a separate MEPA-action decision versus a MEPA analysis made in the context of an agency permitting decision. The Court of Appeals simply instructed the circuit court to review the MEPA issues de novo. *Thomas Twp*, 173 Mich App at 511. The Court of Appeals itself inexplicably reviewed the MEPA issues under the substantial evidence standard. *Id.* at 517. This unreasoned and inconsistent decision does not support Joint Appellants' claims that *WMEAC*'s reasoning extends to judicial review of an agency's Section 1705 determination.[7]

[7] Because the *Thomas Twp* decision was issued before November 1, 1990, it had no binding effect on the Court of Appeals here. MCR 7.215(J)(1).

WMEAC's holding that trial courts must exercise de novo review of MEPA claims is limited to Section 1701 actions filed in circuit courts, as that decision was premised on the trial court's original jurisdiction over the claims. Because Section 1705 does not give courts original jurisdiction over MEPA determinations but instead limits their role to judicial review, *WMEAC*'s reasoning does not extend to courts reviewing an agency determination under Section 1705. No decision of this Court requires otherwise.

C. MEPA is supplementary to existing administrative procedures and does not alter the governing standards in the PSC's enabling statutes or the APA.

De novo review in Section 1705 appeals also conflicts with statutes governing the PSC's proceedings and the APA. JAB at 23-25. MEPA Section 1706 states that the statute "is supplementary to existing administrative and regulatory procedures provided by law." MCL 324.1706. For this reason, this Court (and the PSC) has said that MEPA must be read "*in pari materia*" with other applicable statutes. *Mich Oil Co v Natural Resources Comm*, 406 Mich 1, 32-33; 276 NW2d 141 (1979); see also PSC Order at 37. When this Court reads statutes "*in pari materia*," it reads them "as together constituting one law," meaning that MEPA and the PSC's governing statutes are treated as one. *Mich Oil Co*, 406 Mich at 33. Under this view of MEPA—which Joint Appellants advocate (JAB at 23-24)—an agency's MEPA determinations under Section 1705 are just one element of the PSC's Act 16 analysis and do not constitute a separate determination that supersedes the judicial review procedures applicable to Act 16 decision. *State Hwy Comm*, 392 Mich at 184-89.

In *State Hwy Comm v Vanderkloot*, this Court considered whether MEPA's requirements altered the procedure for Highway Condemnation Act necessity hearings challenging the Highway Commission's condemnation decisions. 392 Mich at 189-90. Applying Section 1706, this Court said "no," MEPA did not change the conduct of necessity hearings and did "not supplant the

Highway Condemnation Act judicial review section." *Id.* at 189. So too here. The entirety of the PSC's Act 16 determination—including the MEPA element—is subject to MCL 462.26(8) and MCL 462.25; MEPA does not change the conduct of appeals under those provisions or supplant the established standards of review.

Similarly, Joint Appellants identify no basis for displacing traditional APA review standards. See JAB at 25. As they explain, the Legislature may alter the APA's default standards of review by statute. *Id.* (quoting *Palo Grp Foster Care, Inc v Mich Dep't of Soc Servs*, 228 Mich App 140, 145; 577 NW2d 140 (1998)); accord MCL 324.306 (providing that "a statute or the constitution [may] provide[] for a different standard of review"). And in MEPA Section 1704, the Legislature *did* expressly provide that the APA's usual standards do not apply—in a trial judge's review of MEPA claims under Section 1701. MCL 324.1704(4) (in Section 1701 direct actions, "notwithstanding the contrary provisions of [the APA] pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review"); accord *WMEAC*, 405 Mich at 754.

But Section 1705 does not contain any similar language purporting to supersede the APA's default standards of review. Absent such express statutory language, the APA standards of review apply in judicial review of an agency's Section 1705 determinations.

D. De novo review is inconsistent with traditional standards applicable to judicial review of agency orders and the regular role of appellate courts.

Joint Appellants argue that de novo review is consistent with the Court of Appeals' usual standards of review. JAB at 25-27. They rely exclusively on *WMEAC* (a civil appeal) and criminal cases.[8] *Id.* But, as discussed, a court's review under Section 1705 is judicial review of an agency

[8] Joint Appellants state that the *WMEAC* court applied a de novo standard of review to its record review, but the *WMEAC* court never stated the review standard *it* was applying. And as noted, the case did not involve judicial review of an agency order.

order. Therefore, the standards of review applicable in civil or criminal appeals are irrelevant. In judicial review of PSC orders, this Court consistently requires the reviewing court to be deferential to the PSC's determinations. *In re Rovas*, 482 Mich at 101. Accordingly, the expansive de novo approach required in *WMEAC* is inconsistent with the Court of Appeals' usual standards of review in PSC cases.

While Joint Appellants now say that de novo review would not require a new trial or fact finding, (JAB at 26-27), that's exactly what *WMEAC* requires. As explained, *WMEAC*'s analysis describes courts exercising original jurisdiction that must adjudicate a case and make "detailed findings of fact." *WMEAC*, 405 Mich at 753-54 (quoting *Ray*, 393 Mich at 307-08). Under this standard, the Court of Appeals, and then this Court, would be required to hold evidentiary hearings, take new evidence and re-weigh witness testimony in *every* challenge of an agency decision involving MEPA. *Id.* This Court has already declared that a court's role in reviewing PSC orders requires no such thing. *In re Rovas*, 482 Mich at 101. At most, as Joint Appellants concede, appellate courts would be obligated to review the PSC's interpretation and application *of MEPA* de novo. *Id.* at 117-18; *In re Application of Consumers Energy Co for Approval of a Gas Cost Recovery Plan*, 313 Mich App 175, 187; 881 NW2d 502 (2015). Even then, the PSC's determinations "are entitled to respectful consideration." *In re Rovas*, 482 Mich at 117-18.

The de novo standard applicable under *WMEAC* is incompatible with the function of appellate courts and the long-established principle that an appellate court "serves a different role from that of a circuit court and is not a finder of fact." Op. at 23. If this Court were to require courts to comply with *WMEAC* in Section 1705 proceedings, every court—including this one—would need to amend its rules and undertake facilities renovations to provide for a witness stand, electronic discovery and evidence presentation facilities and equipment, and audio-visual

equipment updates to allow counsel to be heard at counsel table for objections. In this Court, all seven Justices would have to hear testimony and reach decisions, presumably by a majority vote, on every evidentiary offering and objection, just like a trial judge. The same would be true in the Court of Appeals. And, because Joint Appellants advocate for the *WMEAC* standard to apply in *all* Section 1705 cases, the Court of Appeals and this Court would need to undergo this type of searching review in *every* challenge to an agency permitting decision that potentially impacts the environment. The Legislature's use of the words "in any judicial review" do not have such wide-ranging effects, especially in light of the original jurisdiction the Legislature affords circuit courts in Section 1701 cases.

E. Application of a de novo standard of review would limit, not broaden, consideration of environmental effects from the Replacement Project.

Joint Appellants argue that the Court of Appeals should have independently determined the MEPA environmental effects and alternatives under a de novo standard. See JAB at 27-29. Joint Appellants argue this would have resulted in the Court of Appeals not excluding GHG impacts that Joint Appellants assert result from approval of the Replacement Project because, without the Replacement Project, Line 5 will be shut down. *Id*. But the exact opposite is true.

Under Act 16, Enbridge applied only for PSC authorization to locate the Replacement Project within the tunnel. The PSC's Act 16 proceeding creates no potential for a Line 5 shutdown, as the decision in *Whitmer, supra*, confirms, so a hypothetical Line 5 shutdown is not an effect or alternative considered under MEPA. See Enbridge App'x 36, ENBAPX002999-003043.

Here, the Court of Appeals engaged in de novo review of the PSC's interpretation of MEPA's scope, independently reviewing the language of the statute and determining that the PSC's MEPA analysis need only extend to the environmental effects *of the conduct at issue in the Act 16 proceeding*, i.e., the Replacement Project. Op at 18, 23-24. As explained in Section II below,

the PSC's MEPA analysis *exceeded* the scope of MEPA by considering GHG effects of Line 5's continued operation. Because existing Line 5's operation will continue with or without the Replacement Project, its GHG effects are statutorily beyond the scope of the PSC proceeding. So, a de novo standard of review does not result in consideration of any facts not considered by the PSC.

II. The scope of an agency's MEPA analysis under Section 1705 is limited to the conduct at issue, and the PSC did not improperly exclude evidence or engage in a faulty alternatives analysis.

The PSC and Court of Appeals both correctly determined that the scope of an agency's MEPA analysis is limited to reviewing the effects of the "conduct" at issue. Section 1705's plain language limits the scope of an agency's MEPA analysis to the "conduct" sought to be authorized or approved in the underlying agency proceeding. Joint Appellants ignore the limited "conduct" at issue before the PSC, seeking to convert the PSC's narrow Act 16 proceeding into an examination of the environmental effects of the entire 645-mile Line 5 pipeline.

The only "conduct" at issue in the PSC's Act 16 proceeding was placement of a discrete four-mile replacement segment of Line 5 in an underground tunnel. No portion of the existing Line 5 outside the Straits was at issue before the PSC because the PSC authorized the existing routing through Michigan in 1953. Since Enbridge did not seek authorization from the PSC for any portion of the existing Line 5 outside the Straits, spill risk and GHGs from the entirety of Line 5 ongoing operation were unnecessary to the PSC's analysis because they are outside the statutory scope of the "conduct" at issue.

The Court of Appeals' decision should be affirmed even under a de novo standard. The Replacement Project's purpose is to enhance protection of the environment at the Straits. Without that enhancement, the existing Line 5 Dual Pipelines will continue to operate. Because locating the Line 5 replacement segment in an underground tunnel results in a clear environmental benefit – eliminating the potential for any release into the Great Lakes –the PSC satisfied MEPA.

A. MEPA's text limits the scope of the PSC's analysis to the "conduct" at issue in the Act 16 proceeding – the Replacement Project.

Section 1705(2)'s text governs the scope of an agency's MEPA analysis in permitting proceedings. When a "statute's language is clear and unambiguous, [courts must] assume that the Legislature intended its plain meaning, and … enforce the statute as written." *AFSCME*, 468 Mich at 399.

Here, Section 1705(2) unambiguously limits the scope of an agency's MEPA analysis to the "conduct" at issue in the PSC's underlying Act 16 proceeding. Specifically, Section 1705(2) states that "*conduct* shall not be *authorized* or *approved* that has or is likely to have [environmental effects] if there is a feasible and prudent alternative." MCL 324.1705(2) (emphasis added). MEPA's plain language instructs agencies to consider the environmental effects of the "conduct" that an applicant has asked the agency to authorize or approve, no more, no less.

The conduct at issue here is the Replacement Project alone. This proceeding began when Enbridge filed an application with the PSC seeking authorization to "operate and maintain the replacement pipe segment located within the tunnel as part of Line 5 under Act 16." PSC 1 Order at 18. Operation of the entirety of Line 5 is *not* the conduct for which Enbridge seeks the PSC's approval, as the PSC previously authorized the entirety of Line 5 in 1953. Enbridge App'x 1, *In re Application of Lakehead Pipe Line Co, Inc*, order of the Public Service Commission, entered March 31, 1953 (Case No D-3903-53.1). Because Enbridge did not apply to the PSC for an authorization for the existing Line 5, the PSC possessed no Act 16 authority, and hence no MEPA authority, to consider any Line 5 segment outside the Replacement Project. The PSC properly confined its MEPA analysis to the conduct for which Enbridge sought approval, not the conduct the PSC approved over 70 years ago.

Joint Appellants ignore the term "conduct" and focus on the subsequent phrase, "has or is likely to have such an effect." JAB at 31-33, 38-39. According to Joint Appellants, Section 1705(2) requires the PSC to evaluate any alleged effect that may reasonably result from Line 5, even if that activity is not presently before the agency. *Id.* But the phrase "has or is likely to have such an effect" is expressly tied to the "conduct" subject to agency review. See MCL 324.1705(2). While Joint Appellants focus on *which* effects the PSC must consider, before it makes that determination, the PSC must ask *what* "has or is likely to have" environmental effects. MEPA tells the PSC that the 'what' is the "conduct" sought to be "authorized or approved" in the underlying proceeding. *Id.* Joint Appellants' reading ignores this mandatory connection. *AFSCME*, 468 Mich at 399 ("In reviewing [a] statute's language, every word should be given meaning[.]" (quoting *Omelenchuk v City of Warren*, 466 Mich. 524, 528; 647 N.W.2d 493 (2002))).

Similarly, Joint Appellants say that Enbridge's application to the PSC cannot limit the scope of effects the PSC considers. JAB at 33. But Joint Appellants' argument fails because the PSC has no authority under MEPA to assess environmental effects beyond the conduct for which authorization is sought under Act 16. See Op at 19-20 (citing *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007)).

No court in this State has held otherwise. *WMEAC*'s effects analysis was limited to the environmental effects of the conduct at issue there. Contra JAB at 33. The first step this Court took was to determine "what conduct of defendants is alleged as being" likely to have environmental effects. *WMEAC*, 405 Mich at 751. The Court held that the conduct at issue was a consent order authorizing exploratory wells, along with permits issued for drilling the wells. *Id.* This conduct included the construction of several new roads necessary to access the exploratory wells because they would occur because of the agency's authorization of the project. *Id.* at 756-57.

By contrast, the entirety of Line 5, including the existing Line 5 Dual Pipelines' current configuration on the lakebed of the Straits, will continue to operate with or without the Replacement Project. *Whitmer*, Case No. 1:20-cv-01141, Dkt 164 (Michigan officials' attempt to shut down Line 5 is preempted under the federal Pipeline Safety Act and the foreign-affairs doctrine). See Enbridge App'x 36. Unlike the new roads in *WMEAC*, the continued operation of Line 5 is *not* a direct result or part of the Replacement Project; Line 5 is the status quo.

B. The PSC's alternatives analysis exceeded MEPA's requirements.

The PSC's MEPA analysis was *more expansive* than the "conduct" required to be assessed by MEPA. While Joint Appellants claim that the PSC's alternatives analysis was "lopsided" (JAB at 43-47), the PSC voluntarily exceeded the minimal requirements of MEPA to include impacts identified by intervenors that extended well beyond the the Replacement Project.

The PSC initially limited its MEPA analysis to the "conduct" at issue in the Act 16 proceeding – the "replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel." April 21 Order at 64. Based on this determination, the PSC evaluated the environmental impacts from the construction and operation of this four-mile replacement segment. Among other impacts, the PSC assessed the risk of a release from the replacement pipe segment, determining that the risk of harm to the Straits is essentially zero due to the Tunnel's secondary containment. PSC Order at 305.

Further, the PSC analyzed not only GHG emissions from construction, but also GHG emissions from the products transported through the replacement segment, reasoning that the "conduct" at issue in an Act 16 proceeding extends to the purpose of the pipeline, which is to transport products. April 21 Order at 64-67. That wasn't necessary because Line 5 would be operating regardless; its GHG emissions have already been approved. Ultimately, the PSC determined that the Replacement Project would have several environmental impairments,

including increased noise, dust/particulates, and light from construction; impacts to surface water, local residents, flora, fauna, air quality, groundwater, surface soils, and vegetation; and increased GHG emissions from construction. PSC Order at 89-90, 328-31.

Because the PSC determined that the Replacement Project would have environmental impacts, it then proceeded, in accordance with Section 1705, to analyze whether there are any "feasible and prudent alternative[s]" to the Replacement Project that are "consistent with the reasonable requirements of the public health, safety, and welfare." MCL 324.1705(2). Specifically, the PSC's alternatives analysis considered whether there are any feasible and prudent alternatives to the replacement pipe segment that would accomplish the Project's same goals—alleviating environmental concerns surrounding the Dual Pipelines while maintaining operation of Line 5.

The PSC considered several alternatives to the Replacement Project, including: (1) continued operation of the Dual Pipelines, (2) construction of a replacement pipeline segment via trenching, open cut, and HDD, (3) a sealed annulus tunnel, (4) suspension of a new pipeline segment from the Mackinac Bridge, and (5) construction of a new suspension bridge to carry a new pipeline segment across the Straits. After assessing feasibility, the PSC compared each alternative's environmental impacts to those of the Replacement Project. This analysis included comparing the risk of and impacts from a release for each alternative to the risk of a release from the Replacement Project. Unsurprisingly, none of the feasible alternatives proved to be as safe for the environment as the Replacement Project. PSC Order at 347.

After this analysis based on the "conduct" at issue was complete, Joint Appellants insisted on more. The Joint Appellants requested, and the PSC proceeded to evaluate, "no-pipeline" alternatives that could theoretically replace the full length of Line 5, such as transportation by other or new pipelines and transportation by rail or truck. While these no-pipeline alternatives were well

outside the range of reasonable alternatives because they are based on a hypothetical Line 5 shutdown not at issue in the Act 16 proceeding, the PSC evaluated them anyway. The PSC explained "that it cannot ignore the possibility that Enbridge will cease to operate the four-mile dual pipeline segment of Line 5 in the Straits" if the Governor and Attorney General succeed with their challenges to the Dual Pipelines. April 21 Order at 67-68. But the Governor has failed in her attempt to shut down the Dual Pipelines. *Whitmer, supra.* And that federal-court decision preempts Michigan officials from interfering with Enbridge's operation of the Dual Pipelines in the Straits. *Id.* Nonetheless, the PSC compared the environmental impacts from the full length of each no-pipeline alternative to the Replacement Project's impacts. The PSC found that the feasible no-pipeline alternatives would all be more harmful to the environment than the Replacement Project. PSC Order at 338-39.

As the Court of Appeals explained, because the Replacement Project is the only "conduct" at issue, MEPA only required the PSC to compare the Replacement Project's effects to the effects of alternatives to the existing Line 5 Dual Pipelines crossing of the Straits. Op. at 24. The PSC went above-and-beyond and considered *all* alternatives presented– a total of 11 – including those replacing the entirety of Line 5, only at the request of intervenors, which included Joint Appellants. MEPA did not require the PSC to assess the entirety of no-pipeline alternatives, but it did so voluntarily. Op at 24-25. Accordingly, the "lopsided" MEPA analysis that Joint Appellants allege occurred only because "Intervenors were *allowed* to present evidence of alternatives," and "[s]ome … presented evidence regarding alternative scenarios." Op at 26 (emphasis in original).

The PSC's MEPA analysis took an expansive approach because some alternatives advocated by Joint Appellants—including a hypothetical southern pipeline alternative and a rail alternative—contemplate a scenario in which Line 5 is shutdown and the alternatives would

replace the whole pipeline. To assess that hypothetical, the PSC measured the net effects of employing the entirety of a new pipeline and new railroad. Because these alternatives are redundant to Line 5, *all* their environmental effects are necessarily increased over Line 5 and were included in the net environmental effects resulting from the construction and operation of these alternatives. But the effects of the entirety of Line 5 need not be considered because they are outside the MEPA conduct at issue in the PSC's Act 16 proceeding. And the effects of the entirety of Line 5 remain the status quo; they will occur regardless the PSC's Replacement Project approval.

Even under de novo review, this Court should affirm. Properly limiting the alternatives analysis to Replacement Project alternatives, the Replacement Project is demonstrably the only feasible and prudent option. No other alternative will protect the Straits as well as the Replacement Project (due to the threat of release into Michigan waters resulting from the operation of each), and the extensive environmental impacts that would result from their construction. PSC Order at 347 ("[T]he Commission finds that after a review of the record evidence, there are no feasible and prudent alternatives to the Replacement Project pursuant to MEPA."). With the exception of the sealed annulus tunnel,[9] none of the other alternatives can virtually eliminate the risk of a release into the Straits because they lack secondary containment. Under any scenario, the PSC's authorization of the Replacement Project should be affirmed.

[9] The PSC explained that the sealed annulus tunnel has no environmental benefit over the proposed Replacement Project, and that the proposed project is preferred over the sealed annulus because the proposed tunnel allows Enbridge to better visually inspect the pipe. PSC Order at 340.

C. The PSC properly excluded evidence of the risk of oil spills from the other 641 miles of Line 5 because they are not likely effects of the discrete, four-mile Replacement Project.

The PSC correctly excluded evidence of the risk of oil spills outside the Straits, and the Court of Appeals properly affirmed, because that evidence is unrelated to the "conduct" at issue in the PSC's Act 16 proceeding. Contrary to Joint Appellants' arguments (see JAB at 33-43): (i) the risk of oil spills outside the Straits exceeds the scope of the conduct for which PSC approval was sought; (ii) because the PSC's proceeding was limited to the Replacement Project, its determinations regarding GHG evidence are irrelevant; (iii) the Replacement Project is consistent with the public health, safety, and welfare; and (iv) the PSC's determination did not prevent Tribal Appellants from introducing evidence regarding the Replacement Project's impact on cultural resources.

1. Line 5 will continue to operate even without the Replacement Project, so oil spill evidence for the entire pipeline is not an effect of the "conduct" at issue in the Act 16 proceeding.

Because Joint Appellants believe that the PSC's authorization of the Replacement Project will extend the operational life of the *entire* pipeline, they argue that MEPA requires the PSC to evaluate oil spill risks for the entire length of Line 5. JAB at 34-36. Pointing to the Attorney General's pending lawsuit to shut down Line 5 and Governor Whitmer's Notice, Joint Appellants contend that, but for the PSC's approval of the Replacement Project, Line 5 will inevitably be shut down. *Id.*

Not so. A Line 5 shutdown is entirely implausible as a result of the recent federal court decision finding that Michigan officials' efforts to shut down Line 5 are preempted by federal law. *Whitmer, supra.* The reality is that the Dual Pipelines will continue to operate, and nothing *in the PSC's Act 16 proceeding* creates any shutdown potential. So, it remains true that the only "conduct" at issue in the Act 16 proceeding is the Replacement Project. Because separate legal

actions do not change the limited "conduct" for which PSC authorization was sought, they do not change the scope of the PSC's MEPA analysis to encompass all of Line 5. See *Buggs v Pub Serv Comm*, unpublished per curiam opinion of the Court of Appeals issued Jan. 13, 2015 (Docket Nos. 315058, 315064), 2015 WL 158795, p *9 (Enbridge App'x 24; ENBAPX002080) ("*Buggs*") (concluding that the PSC's MEPA analysis is limited to considering the effects of the proposed pipeline, and the effects of future activities should be reserved for further proceedings).

WMEAC does not change this result. As explained, *WMEAC* only considered the environmental effects of activities that were part of the project at issue in the lawsuit. The challenged conduct was authorization of exploratory wells, which included the construction of several new roads that were part of and would not have been built absent the project. By contrast, hypothetical oil spills outside the Straits are not part of the Replacement Project and thus not part of the "conduct" at issue in the PSC proceeding.

Joint Appellants' reliance on a Minnesota case, *Smart Growth*, is inapposite for two reasons. First, the Minnesota Supreme Court did "not address whether Smart Growth did or did not establish a prima facie showing" under Minnesota environmental law. *State by Smart Growth Minneapolis v City of Minneapolis*, 954 NW2d 584, 596 (Minn, 2021). The court only held that Smart Growth's complaint was sufficient to survive a motion to dismiss. *Id.* Second, the only alleged effects at issue in *Smart Growth* were those caused by the conduct at issue—approval of a comprehensive city land-use plan. *Id.* at 595-96. While the defendant argued that, absent the approval of specific projects, the plan's effects were too speculative, the court determined that the complaint stated a claim because the allegations did not speculate about the types of actions allowed under the plan, and the environmental effects alleged were those caused by the types of actions permitted.

Here, by contrast, the conduct at issue (the PSC's Act 16 authorization for the Replacement Project) does not cause Line 5's continued operation, so the environmental effects of its operation are outside the scope of MEPA.

2. The PSC's treatment of GHG emissions is irrelevant to how the PSC treated oil spills.

As explained, the PSC did not need to consider GHG emissions for Line 5's continued operation, only for construction of the tunnel. So, the PSC did not err in considering the risk of oil spills only for tunnel construction.

The PSC's analysis of GHG emissions and oil spills was only consistent as the PSC performed it. The PSC (erroneously) said that GHG emissions are effects of the conduct at issue – transportation of hydrocarbons through the replacement segment. By contrast, hypothetical oil spills from the 641 miles of Line 5 outside the Straits are not caused by the Replacement Project. The Replacement Project's goal is to eliminate the risk of a release at the Straits. Thus, a potential release occurring on Line 5 outside of the Straits is not part of the "conduct" at issue.

More important, pipeline safety, including spill risk, is within the exclusive jurisdiction of the federal Pipeline and Hazardous Materials Safety Administration ("PHMSA"). PHMSA regulates all aspects of pipeline operations to set safety and security standards and reporting requirements for hazardous materials transportation. See 49 CFR Part 195, Subparts C-F. Thus, a review of the safety of the entire 645 miles of Line 5 cannot be considered by the PSC as a matter of law because the PSC has no authority over the safety of an operating interstate pipeline. See 49 USC § 60104(c) ("A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation"). The same is not true of GHG emissions, which are not regulated exclusively by any federal agency.

3. The PSC was not obligated under Section 1705(2) to determine whether the Replacement Project is consistent with the reasonable requirements of the public health, safety, and welfare.

Joint Appellants say the PSC was required to expressly determine whether the Replacement Project is consistent with the public health, safety, and welfare. JAB at 37-38. Not so. Section 1705(2) only requires the PSC to consider whether *alternatives* to the conduct at issue are consistent with the public health, safety, and welfare: "[C]onduct shall not be authorized or approved that has or is likely to have such an effect if there is a *feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare*." MCL 324.1705(2) (emphasis added). The PSC is only required to consider the reasonable requirements of the public health, safety, and welfare as a means of ruling out alternatives.

By contrast, Section 1703 expressly requires a court to consider whether a Section 1701 defendant's "conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for protection of its natural resources from pollution, impairment, or destruction." MCL 324.1703(1). Section 1705(2) does not contain similar language connecting the evaluation of consistency with the public health, safety, and welfare to the conduct at issue. Accordingly, unlike Section 1703, Section 1705 does not impose an affirmative obligation on the PSC to assess whether the conduct at issue is consistent with the public health, safety, and welfare. *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125; 894 NW2d 552 (2017) ("The omission of a provision in one part of a statute that is included in another part of the same statute should be construed as intentional.").[10]

[10] In its April 21 Order, the PSC relied on a decision of this Court and a decision of the Court of Appeals in stating that it must determine that the Replacement Project is consistent with the public health, safety, and welfare. April 21 Order at 68. Neither of those cases found that Section 1705(2) contains such a requirement. Relying on this Court's decision in *State Hwy Comm*, the Court of Appeals in *Buggs* remanded a PSC determination for the agency to make a determination that the

The PSC satisfied Joint Appellants' non-statutory standard in any event. After reviewing extensive evidence from all parties, the PSC found that the Replacement Project has substantial environmental *benefits*: it "essentially eliminates the risk of adverse impacts that may result from a potential release from Line 5 at the Straits and protects unique ecological and natural resources that are of vital significance to the State and its residents, to tribal governments and their members, to public water supplies, and to the regional economy." PSC Order at 305. Likewise, the PSC explained that "the Replacement Project is a significant improvement over the dual pipeline configuration currently installed in the Straits because it virtually eliminates the risk of anchor strikes confronting the dual pipelines and it will serve as a secondary containment vessel to prevent Line 5 product from reaching the Straits." *Id.* at 319. Further, the PSC said that the Replacement Project "could effectively prevent spills from reaching the Straits" and that the potential for a release from the Tunnel is "negligible – considered virtually zero." *Id.* at 340. In sum, the PSC correctly determined that the Replacement Project is consistent with the reasonable requirements of the public health, safety, and welfare.

4. The PSC's decision on the scope of its MEPA analysis did not prevent Tribal Appellants from presenting evidence about the Replacement Project's impact on cultural resources.

Tribal Appellants allege that the PSC's MEPA interpretation prevented them from introducing evidence about environmental impacts to their treaty-protected resources. JAB at 40-43. Not so. The PSC allowed Tribal Appellants to present evidence on environmental impacts from the Replacement Project in the Straits, as well as the cultural significance of the Straits and other

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conduct at issue was consistent with the public health, safety, and welfare. *Buggs*, 2015 WL 159795, at p *9 (Enbridge App'x 24; ENBAPX002080). However, the discussion in *State Hwy Comm* quotes Section 1703, which, then and now, expressly requires a court to consider whether a Section 1701 defendant's conduct is consistent with the public health, safety, and welfare. *State Hwy Comm*, 392 Mich at 185. The Court of Appeals in *Buggs* did not explain how *State Hwy Comm*'s discussion of Section 1703 is binding on an agency subject to Section 1705.

resources; it only excluded evidence that was unrelated to the "conduct" at issue in the Act 16 proceeding.

The evidence that Tribal Appellants allege should have been admitted does not relate to the Replacement Project's effects, so the PSC properly excluded it. For example, the PSC correctly struck John Rodwan's testimony about the effects of a spill from another Enbridge pipeline because that testimony did not discuss effects of the Replacement Project. And while Richard Kuprewicz was permitted to testify extensively about the safety of the replacement segment, any testimony about the safety of the remainder of Line 5 was not relevant.

Ultimately, however, the exclusion of irrelevant evidence made no difference. As the PSC concluded, the Replacement Project would have substantial benefits for Tribal Appellants because it will essentially eliminate the risk of a release in the Straits, further protecting Tribal Appellants' culturally significant resources. PSC Order at 305.

III. MEPA Section 1705(2) subsumes the common-law, public-trust doctrine, and any public-trust obligation the PSC had was satisfied through its MEPA analysis.

Section 1705(2) of MEPA places an affirmative duty on agencies to evaluate a project's impact on the public trust in the state's natural resources that is duplicative of the common-law, public-trust doctrine. By speaking directly to the same issue as the common-law, public-trust doctrine, MEPA subsumes it. As a result, the PSC satisfies the public trust through MEPA compliance, and it has no statutory authority to consider the common-law, public-trust doctrine. And h,ere, even on de novo review, the record shows that the Replacement Project will have the effect of protecting the public trust in the Straits, so this Court should affirm.

A. MEPA Section 1705(2) subsumes the common-law doctrine.

MEPA Section 1705(2) subsumes the common-law, public-trust doctrine and displaces any common-law obligation the PSC has to comply with that doctrine. The Court of Appeals has already implied that MEPA completely subsumes common-law, public-trust claims. *Highland Recreation Defense Foundation v Natural Resources Comm*, 180 Mich App 324, 331; 446 NW2d 895 (1989) ("We also agree that the claims raised by plaintiff under its public trust argument are duplicative of its claims under MEPA.").[11] This Court should so hold.

Before MEPA, the common-law, public-trust doctrine ensured that members of the public retained rights to the state's natural resources. The doctrine originates from an ancient notion developed in the days of the Roman Emperor Justinian that certain natural resources are held in common for the public. *Glass v Goeckel*, 473 Mich 667, 677; 703 NW2d 58 (2005); accord Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L Rev 631, 632 (1986). This notion subsequently developed into the English common law and eventually made its way into American law. *Glass*, 473 Mich at 677-78.

In *Illinois Central R Co v Illinois*, the U.S. Supreme Court first defined the parameters of the American public-trust doctrine, holding that the submerged lands in the Great Lakes are owned under a "title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction

[11] *Highland Recreation* arose under Section 1701, but that court's conclusion extends to Section 1705 proceedings, as both provisions contain similar language for the protection of "the public trust" in "air, water, and other natural resources." Compare MCL 324.1701(1) (authorizing lawsuits "for the protection of the air, water, and other natural resources *and the public trust in these resources* from pollution, impairment, or destruction" (emphasis added)), with MCL 324.1705(2) (requiring administrative agencies to determine "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, *or the public trust in these resources*" from the conduct at issue (emphasis added)).

or interference of private parties." 146 US 387, 452 (1892). This Court, too, has long recognized that the State serves "as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure." *Glass*, 473 Mich at 678-79.

Uses for the common-law doctrine have evolved over time. Historically, the public-trust doctrine served as a tool to regulate economic expansion and urban growth. Lazarus, *supra*, at 640-41. But in the 1970s, at a time when legislatures had done little in the way of resource conservation, the doctrine gained prominence as a legal basis for environmental protection. *Id.* at 641-43, 690. The doctrine's purpose became "to protect resources – [in Michigan,] the waters of the Great Lakes and their submerged lands – shared in common by the public." *Id.* at 694. Yet even then, Professor Sax – the doctrine's most prominent proponent – acknowledged that the doctrine "has no life of its own and no intrinsic content" and is not "a substantive set of standards." Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471, 509, 521 (1970). Instead, the doctrine's primary use in the environmental protection sphere was as "a technique by which courts may mend perceived imperfections in the legislative and administrative process." *Id.* at 509.

Over the last 55 years, state legislatures have taken up the mantle of environmental protection, eliminating the need for resource conservation via the public-trust doctrine. In Michigan, the Constitution expressly delegates implementation of the duty to protect the state's natural resources to the Legislature, not the judiciary. Const 1963, art 4, § 52; accord *Kyser v Kasson Twp*, 486 Mich 514, 536; 786 NW2d 543 (2010) ("Michigan's constitution directs the Legislature, not the judiciary, to provide for the protection and management of the state's natural resources."). The Legislature has complied with that duty by enacting MEPA, a first-of-its-kind statutory scheme that comprehensively addresses protection of the state's natural resources. See

MCL 324.1701, *et seq.*; *Ray*, 393 Mich at 304-05. Like the public-trust doctrine, "[t]he focus of MEPA is to protect [Michigan's] natural resources from harmful conduct." *Preserve the Dunes*, 471 Mich at 524.

Under Michigan law, the Legislature has the authority to supersede or change common-law doctrines by statute, and when it comes to the common-law, public-trust doctrine, MEPA does just that. *Kyser*, 486 Mich at 539-43. Through MEPA, the Legislature has placed a statutory obligation on the PSC in Act 16 proceedings to determine a proposed project's impact on the public trust in the state's natural resources. Section 1705(2) expressly provides that, in an "administrative, licensing, or other proceeding[]," the PSC must determine "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, *or the public trust in these resources*" from the conduct at issue in the proceeding. MCL 324.1705(2) (emphasis added). So MEPA places an affirmative duty on agencies subject to Section 1705(2) to maintain public-trust resources.

In placing this duty on agencies to maintain public-trust resources, the Legislature has effectively codified the common-law doctrine by incorporating it into MEPA. Both MEPA and the common-law, public-trust doctrine seek to protect the state's natural resources shared in common by the public. MCL 324.1705(2); *Glass*, 473 Mich at 694. Any common-law obligation to protect the state's trust resources is duplicative of the PSC's obligation to do the same under MEPA. See *Highland Recreation*, 180 Mich App at 331. The common-law doctrine yields to MEPA's statutory scheme. *Kyser*, 486 Mich at 536; *Pulver v Dundee Cement Co*, 445 Mich 68, 75 n8; 515 NW2d 728 (1994) ("[I]f there is a conflict between the common law and a statutory provision, the common law must yield"); see also Lazarus, *supra*, at 686-88 (explaining that modern environmental protection law undermines the rationale for application of the common-law, public-trust doctrine).

To be clear, MEPA does not render the common-law, public-trust doctrine a dead letter. Rather, MEPA only subsumes the common-law doctrine where MEPA applies. Where MEPA doesn't apply, the common-law doctrine remains "alive and well." *Glass*, 473 Mich at 681; see also Sax, *supra*, at 509 (describing the common-law doctrine as "a technique by which courts may mend perceived imperfections in the legislative and administrative process").

Glass v Goeckel is exemplary. In litigation between private parties unrelated to an agency, the issue was whether the public-trust doctrine encompasses the right of the public to walk along the shores of the Great Lakes, even if the water's edge is privately owned. 473 Mich at 672. MEPA was irrelevant, so it did not subsume the plaintiff's common-law claims. By contrast, in *Highland Recreation*, the plaintiff asserted both MEPA and common-law claims, and the Court of Appeals properly declined to discuss the common-law claims because they were duplicative of its MEPA claims. 180 Mich App at 330-31.

The concept of statutory environmental protection provisions subsuming the common-law, public-trust doctrine is not unique to Michigan.[12] Courts in other jurisdictions have also held that environmental laws displace a state's common-law, public-trust doctrine. E.g., *Mineral Co v Lyon Co*, 136 Nev 503, 511-15; 473 P3d 418 (2020) (state's comprehensive water statutes incorporated the common-law, public-trust doctrine, and the statute's obligation on the State Engineer to maintain trust resources subsumed the common-law obligations); *Sanders Reed v Martinez*, 350 P3d 1221, 1225-27 (NM App, 2015) ("New Mexico's constitutional and statutory provisions have incorporated and implemented the common law public trust doctrine with regard to the process a

[12] Professor Richard Lazarus predicted this result nearly 40 years ago: "… [M]uch of what the public trust doctrine offered in the past is now, at best, superfluous and, at worst, distracting and theoretically inconsistent with new notions of property and sovereignty developing in the current reworking of natural resources law." Lazarus, *supra*, at 658.

person must follow in asserting his or her rights to protect the atmosphere. In other words, one may raise arguments concerning the duty to protect the atmosphere, but such arguments must be raised within the existing constitutional and statutory framework and not alternatively through a separate common law cause of action."); *Alec L v Jackson*, 863 F Supp 2d 11, 12, 16-17 (D DC, 2012) ("[A] federal common law claim [under the public-trust doctrine] directed to the reduction or regulation of carbon dioxide emissions is displaced by the [Clean Air] Act."), *aff'd* 561 F App'x 7 (CA DC, 2014).

Analogous U.S. Supreme Court precedent likewise confirms that when, as here, a legislature enacts a statute that "speak[s] directly" to the question, common-law doctrines are displaced. *Am Elec Power Co, Inc v Connecticut*, 564 US 410, 424 (2011) (*AEP*). In *AEP*, the U.S. Supreme Court considered whether a public-nuisance claim against greenhouse-gas emitters could be maintained under federal common law after Congress enacted the Clean Air Act. 564 US at 415. It could not. "[T]he Clean Air Act and the [Environmental Protection Agency] actions it authorizes displace" any federal common law claims to seek abatement of greenhouse gas emissions. *Id.* at 424, 426.

So too here. MEPA and the common-law doctrine speak directly to the same issue—the protection of resources held in trust by the State for the public's benefit—so these two obligations cannot coexist. MEPA subsumes and displaces any obligations the common-law doctrine imposes on the PSC.

B. The PSC had no statutory authority to enforce the common-law, public-trust doctrine.

For over 70 years, this Court has held that the "MPSC has no common-law powers; it has only the authority granted to it by the Legislature." *In re Reliability Plans of Elec Utils for 2017-2021*, 505 Mich 97, 119; 949 NW2d 73 (2020); *G & A Truck Line, Inc v Pub Serv Comm*, 337 Mich 300, 305; 60 NW2d 285 (1953) (same). As the Court of Appeals succinctly put it, "the PSC is a 'creature of the Legislature' and has no common-law powers; it 'possesses only that authority bestowed upon it by statute.'" Op at 22 (quoting *Union Carbide*, 431 Mich at 146). Without common-law powers, the PSC lacks authority to enforce the common-law, public-trust doctrine. Full stop.

FLOW says the State has an obligation to protect the public trust in the Great Lakes, and this obligation extends to all three governmental branches. FLOW at 28-32. According to FLOW, the Court of Appeals' holding allows the State to circumvent its public-trust obligations in Act 16 proceedings. Not so. The Court of Appeals' holding only addressed the PSC's statutory authority. It said nothing about other agencies' obligations or give the State a pass on its public-trust obligation. This Court has never required every agency or government entity reviewing a permit application to evaluate the common-law, public-trust doctrine before approving a project; the obligation is on the State as a whole. See *Glass*, 473 Mich at 678-79. Moreover, because MEPA subsumes the common-law, public-trust doctrine, the PSC *had* an affirmative duty to ensure that the conduct at issue did not impair the public trust in the State's natural resources. See MCL 324.1705(2). No more was required.

This Court has long been reluctant to confer power to administrative agencies absent "clear and unmistakable" legislative support. *Mason Co Civic Research Council v Mason Co*, 343 Mich

313, 326-27; 72 NW2d 292 (1955). It should not start now. Until the Legislature grants the PSC common-law powers, the PSC has no authority to enforce the common-law, public-trust doctrine.

C. Because MEPA subsumes the common-law, public-trust doctrine, a proper public-trust analysis in Act 16 proceedings consists of compliance with Section 1705(2).

As MEPA subsumes the common-law, public-trust doctrine, all the PSC must do is determine whether the conduct at issue "has or is likely" to result in "the alleged pollution, impairment, or destruction of … the public trust in" the state's natural resources. MCL 324.1705(2). If the PSC determines that the conduct at issue will impair the public trust in any resource, it may still approve the conduct if there is no "feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare." *Id.*

Conduct impairs the public trust in the State's natural resources if it harms those resources shared in common by the public and interferes with the public's use of those resources for purposes protected by the doctrine (i.e., "fishing, hunting, and navigation for commerce or pleasure"). *Glass*, 473 Mich at 694-95. Because MEPA requires the PSC to evaluate a project's impacts on "air, water, or other natural resources," throughout the State, it necessarily encompasses resources traditionally protected by the public-trust doctrine, namely, the Great Lakes waters and bottomlands. MCL 324.1705(2); *Glass*, 473 Mich at 678, 694.

Even under a de novo review of the evidence, this Court should affirm, as the record shows that the Replacement Project complies with Section 1705(2) because it will not impair the public trust in Great Lakes waters and bottomlands. The Replacement Project has been specifically designed to *avoid* any impacts to the bottomlands, both in construction and operation. Appx 26 at 101-103. Construction activities will not have any direct impact on the bottomlands, and, during operation, the Tunnel (and pipeline segment) will be located entirely beneath the lakebed at depths of over 350 feet in the middle of the Straits. *Id.* The only disturbance to the lakebed during the

entire Replacement Project will be the temporary placement of two, small, water-intake structures near the shoreline on either side of the Straits. *Id.*

Further, while the PSC determined that there will be impairments to surface water and groundwater from the tunnel construction, (PSC Order at 329), record evidence shows that the Replacement Project will have minimal impacts to groundwater, surface water, or lake bodies. Appx 25 at 2102-2107. And the Replacement Project will essentially eliminate the risk of a release into the Straits by providing secondary containment and eliminating the risk of anchor strikes. PSC Order at 319.

The Replacement Project also will not interfere with the public's use of the Straits. The water-intake structures proposed to be located on the lakebed during construction are only temporary and will be located near the shoreline, away from the Straits' main channel. The Replacement Project will not have any impact on fishing in the Straits because the proposed Tunnel will be located beneath the lakebed. Appx 26 at 94. Aside from the water-intake structures, there will be no disturbance to the lakebed, and no permanent impacts to the lakebed or associated aquatic habitats are proposed. *Id.* And the Replacement Project will further protect aquatic habitats in the Straits by reducing the risk of release to "virtually zero." PSC Order at 303.

Finally, as explained in Section II, there are no feasible and prudent alternatives to the Replacement Project. Of all the alternatives to the Dual Pipelines that the PSC reviewed, the Replacement Project has the greatest benefit to the environment and the public. As the PSC explained, the Replacement Project will eliminate the risk of adverse impacts to the Straits caused by a release while protecting "unique ecological and natural resources that are of vital significance to the State and its residents, to tribal governments and their members, to public water supplies, and to the regional economy." PSC Order at 305.

Because no other alternative will serve to protect the Straits to the extent that the Replacement Project will, there is no feasible and prudent alternative. This Court should affirm.

D. The PSC is not obligated to wait until EGLE makes a public-trust determination before issuing authorization for the Replacement Project pursuant to Act 16.

Rather than identify what a proper public-trust analysis by the PSC entails, FLOW says that, under both MEPA and the common law, the PSC cannot approve the Replacement Project until EGLE – a separate agency – makes a public-trust determination. FLOW at 33-48. FLOW contends that courts and agencies must determine impairment to public-trust resources by evaluating and adopting existing pollution-control standards, and that EGLE's rules implementing the Great Lakes Submerged Lands Act ("GLSLA") are the appropriate standard here.[13] *Id.* at 33-42. According to FLOW, because EGLE is required under the GLSLA to make a public-trust determination when the Great Lakes bottomlands are at issue, the PSC cannot render a decision until EGLE complies with its obligations. *Id.* at 42-45. As for the common law, FLOW similarly says that, as the authorized agency to regulate conveyances of the bottomlands, only EGLE can make a public-trust determination for the Replacement Project. *Id.* at 45-48.

This argument lacks merit. Whatever obligations EGLE might have with respect to the public-trust in Great Lakes bottomlands, they are not at issue in the PSC's Act 16 proceeding. EGLE is a separate agency with separate governing statutes that oversees separate permits. Any public-trust obligation that EGLE has under GLSLA does not impact the PSC's separate Act 16 decision. If there were a statute requiring the PSC to wait to issue a permit until EGLE has made a public-trust determination, then the PSC would be required to 'press pause'; there is not, so the

[13] FLOW's argument suggests that it would agree that statutes can subsume the common-law, public-trust doctrine to the extent that it argues that the GLSLA governs public-trust determinations with respect to the conveyance of Great Lakes bottomlands.

PSC is free to authorize the Replacement Project before EGLE. And to be clear, despite the PSC's authorization of the Replacement Project, Enbridge cannot begin work until it receives *all* necessary authorizations, including EGLE's.

Incidentally, EGLE (through its predecessor, the Michigan Department of Environmental Quality) was a signatory to the Second and Third Agreements, which authorized further agreements concerning the Replacement Project and continued operation of the Dual Pipelines during construction, respectively. In the Second Agreement, the State—including EGLE—acknowledged that the Replacement Project is "intended to further protect ecological and natural resources held in public trust by the State of Michigan, and that the terms of this Second Agreement will both protect the ecological and natural resources held in public trust by the State." Appx 6 at 522. The Third Agreement further provides that the Replacement Project "adds protections to the health, safety, and welfare of Michiganders[,] increases protection for Michigan's environment and natural resources," and "is expected to eliminate the risk of a potential release from Line 5 at the Straits." Appx 9 at 615. The State—including EGLE—agreed that, in entering the agreement, "the State has acted in accordance with and in furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan." *Id.*

These findings, contained in two separate agreements to which EGLE was a party, are more than sufficient to satisfy any obligation EGLE might have to protect the public trust. And they go to show how extraneous FLOW's arguments are to this Act 16 proceeding.

CONCLUSION AND REQUESTED RELIEF

Enbridge respectfully requests that this Court affirm the Court of Appeals' decision or deny the application for leave as improvidently granted. Joint Appellants and FLOW are wrong on the law; nothing in MEPA suggests that this Court should start holding evidentiary hearings in agency appeals involving environmental issues, and nothing in Act 16 suggests that the PSC should be applying common-law doctrines. Joint Appellants and FLOW are also wrong on the facts; the PSC considered everything relevant to the "project" at issue, the Replacement Project, and the State and EGLE have already determined that the Project safeguards the public trust.

Accepting Joint Appellants' and FLOW's invitation to rewrite Michigan statutes and ignore the extensive record would be the worst possible outcome for the Great Lakes ecosystem. In Appellants' best-case scenario, the PSC's approval of the Replacement Project would be set aside, and the Dual Pipelines will continue to operate on the Straits lakebed unabated. *Whitmer, supra*. If Appellants want to shutdown Line 5 (and they clearly do), they must bring a different proceeding to do that. The Court should not indulge Appellants' fantasy that the safety upgrade resulting from the PSC's authorization of the Replacement Project is the vehicle to do so.

Respectfully submitted, December 22, 2025,

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STATEMENT OF COUNTABLE WORDS

Pursuant to MCR 7.312(A), the undersigned certifies that the number of countable words in the foregoing brief, as determined by MCR 7.312(B)(2), is 15,634, according to the word count provided by the word processing software used to create the foregoing brief. The name and version of that software is Microsoft® Word for Microsoft 365 MSO, Version 2511 Build 16.0.19426.20186, 64-bit.

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