STATE OF MICHIGAN
IN THE SUPREME COURT

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE & RELOCATE LINE 5

FOR LOVE OF WATER,

Appellant,

v

ENBRIDGE ENERGY LIMITED PARTNERSHIP, MICHIGAN PUBLIC SERVICE COMMISSION, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees.
_____/

Supreme Court No. 168346

Court of Appeals No. 369163

MPSC Case No. U-20763

APPELLANT FOR LOVE OF WATER'S REPLY BRIEF

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INTRODUCTION

The Michigan Public Service Commission (MPSC or "Commission") has authorized Enbridge's Tunnel Project without considering its effects on the public trust, expressly disclaiming the responsibility to take the trust into account in greenlighting proposals that come before it.

The Commission has done so in the context of an undertaking of unparalleled magnitude and complexity—one that, if allowed to proceed, will forever alter the geology of the Straits of Mackinac. Over the course of at least six years of proposed construction, more than half a million cubic yards of earth and bedrock will be bored and blasted to lay the path for a four-mile-long tunnel. That tunnel will house a pipeline pumping 540,000 barrels per day of crude oil and natural gas liquids through the Straits, which not only occupy a central place in Michigan history but literally conjoin two of the greatest lakes on Earth. At each end of the tunnel, construction will transform the banks into industrial sites, with attendant air, light, and sound pollution (and noise exceeding human health standards), impairing the waters and aquatic resources and threatening the public's ability to access and use the waters for fishing, hunting, and boating as humans have done since time immemorial.

In authorizing the project, the Commission disregarded the long-established legal framework for making decisions affecting the rights of the public in Michigan's cherished public trust resources. As this Court announced over sixty years ago, in

furtherance of a common law doctrine tracing back to Roman law, Great Lakes bottomlands cannot be devoted to private use unless the Department of Environment, Great Lakes, and Energy (EGLE) determines that the devotion will not impair the public trust under the standards established by the Great Lakes Submerged Lands Act (GLSLA). The statutory requirements mirror this common-law command: under the Michigan Environmental Protection Act (MEPA), agencies that would authorize bottomlands disposition must first determine the prospective "pollution, impairment, or destruction" of the public trust that would flow from a proposed activity, with the courts duty bound to guide those determinations by ensuring that the pollution control standard appropriate to the resources at risk is applied in any given case. Where, as here, the project involves Great Lakes bottomlands, the GLSLA and its regulations supply that standard. And under that standard, bottomlands cannot be devoted to private or public use unless EGLE first determines that the adverse effects to the environment and the public trust will be "minimal" and "mitigated to the extent possible" *and* that no feasible and prudent alternative to the proposed conduct exists.

Appellees never directly take issue with these principles. Instead, they attempt to sidestep them through a series of arguments that would all but erase the public trust from Michigan law. Conflating the inability of administrative agencies to make law with their inescapable duty to follow it, they argue that the Commission is powerless to comply with the requirements of the public trust doctrine unless expressly required to

do so by statute. Yet when confronted with such a statutory command in MEPA, Appellees contend that the statute "subsumes" the State's common-law duties in a manner that wholly excuses consideration of the public trust.

Appellees further argue that a public trust determination has already been made in any number of places, including in a prior EGLE permit and in various easements and agreements pertaining to the tunnel and the existing pipelines. But at Enbridge's insistence, the earlier permit did not extend to the tunnel or the pipeline proposed to be housed in it, and neither that permit nor any of the other documents pointed to contain anything remotely resembling the public trust findings required under the GLSLA standard.

Enbridge promises this Court that affirming the Commission's authorization of the Tunnel Project will not give the State "a pass" on its public trust obligations—that somehow the obligation will yet be fulfilled. But Appellees' arguments belie that claim. If accepted, they would guarantee that at no stage will any public trust determination be made by any arm of the State, let alone by the agency entrusted with rendering one. FLOW asks this Court not to sanction an outcome so at odds with the will of the Legislature and the dictates of the common law.

ARGUMENT

I. Under MEPA, the Commission Cannot Approve the Tunnel Project Unless and Until EGLE Makes the Required Public Trust Determinations.

A. MEPA Requires Analysis of Harm to Natural Resources *and* the Public Trust in Those Resources.

1. The Public Trust Reaches Beyond Environmental Protection.

MEPA requires that *any* alleged impairment of "the air, water, or other natural resources, or the public trust in these resources, shall be determined" in administrative proceedings and on judicial review. MCL 324.1705(2). The statute does not define the "public trust," leaving intact its well-settled meaning at common law. See *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 336–37 (2018); FLOW Opening Br 15–21.

As Enbridge acknowledges, "the public trust" plainly encompasses the State's obligation to safeguard natural resources from environmental degradation. Enbridge Br 44; see FLOW Opening Br 18–21. But it extends further, encompassing the State's solemn responsibility to protect the public's rights to use those resources, including Great Lakes "waters and [the] lands beneath them," for "fishing, hunting, and boating for commerce or pleasure." *Glass v Goeckel*, 473 Mich 667, 679, 681 (2005); see also *Collins v Gerhardt*, 237 Mich 38, 48–49 (1926). Even in the limited circumstances in which the State may convey or devote these trust resources to private use, it remains duty-bound to assiduously maintain the "public rights in the lake[s] and [their] submerged land." *Glass*, 473 Mich at 679; FLOW Opening Br 17–18.

2. MEPA Provides Expansive Protection to the Public Trust.

Section 1705(2) of MEPA requires agencies and courts to determine harm both to natural resources and to "the public trust" in those resources. The provision plainly commands agencies to "determine[]" "alleged … pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources." Section 1705(2)'s use of the disjunctive assures that potential harm to *any* listed item triggers protection under the statute. But an agency or court must still ensure that a complete review of a proposed project is conducted and that *all* alleged impairments to natural resources *and* the public trust in these resources are determined.

The Commission reads "or" differently, as providing it with license to avoid comprehensive review of a project's effects once any impairment has been identified. MPSC Br 28–31. This betrays a striking inconsistency in the Commission's position. After telling this Court that "MEPA protects those same interests [as the public trust doctrine] and through its statutory scheme subsumes the protections provided by the common law doctrine," MPSC Br 1 (an argument whose infirmities are addressed below, see *infra* Section II.B.), the Commission then reads the statute as allowing it to forego consideration of the public trust altogether.

According to the Commission, this reading of the statute is required because "[t]he plain meanings of, and the difference between, 'and' and 'or' is apparent." MPSC Br 29. But this Court does not share the Commission's understanding of a sharp

distinction between "and" and "or" that would allow for public trust protections to be written entirely out of MEPA (and neither does Enbridge, see Enbridge Br 45). To the contrary, this Court has long recognized that "one [can be] read in place of the other in deference to the meaning of the context." *Aikens v State Dep't of Conservation*, 387 Mich 495, 500 (1972) (quoting *Heckathorn v Heckathorn*, 284 Mich 677, 681 (1938)); see also *Pulsifer v United States*, 601 US 124, 151 (2024) ("[C]onjunctions are versatile words, which can work differently depending on context."). This dovetails with this Court's more general admonition that it "do[es] not read statutory language in isolation and must construe its meaning in light of the context of its use." *South Dearborn Environmental Improvement Ass'n v Dep't of Environmental Quality*, 502 Mich 349, 367–68 (2018).

The Commission's interpretation of "or" runs afoul of context because, as noted, it would allow for the public trust to be ignored entirely in Section 1705(2) determinations. The Commission contends that its interpretation nevertheless offers the greatest environmental protection because "harm to *any* one [cited] resource[] *or* the public trust is enough to stop the conduct in question and engage in an alternatives analysis." MPSC Br 29. However (and even leaving aside the grave issues with the Commission's prioritization of alternatives analysis over thorough impairment determination and resource protection, see *infra* pp. 6–7), alternatives analyses can prove grossly underprotective without a comprehensive understanding of the

impairments that might result from proposed conduct. For instance, under the Commission's theory, if an agency determines that a proposed pipeline project could adversely affect elk populations as a result of disruptive construction activities, the agency would be allowed to stop short of determining the pipeline's risk of rupture beneath an adjacent waterbody. The agency's alternatives analysis could instead focus narrowly on the best way to mitigate construction disruption affecting the elk while ignoring the need to determine and guard against the risk of an oil release into the waterbody and the consequences of any such spill on public trust uses of the waters.

Any argument that the Legislature intended such an outcome is wholly undermined by MEPA's legislative history. See *Aikens*, 387 Mich at 500–01 (determining the meaning of "and" in the Commercial Fishing Law of 1929, MCL 308.1–308.21, based on the Legislature's intent to "protect and preserve" fish populations). This history confirms that MEPA should be understood to require agencies and courts to independently evaluate and protect the public trust. FLOW Opening Br 24–27. Professor Sax, author of the bill that became MEPA, opposed attempts to strike the bill's references to the public trust, explaining that the language is important "in assuring that public uses of natural resources are protected from private encroachment, thus promoting a wider distribution of the beneficial use of these resources." Prof. William J. Pierce, Prof. Joseph L. Sax, William A. Irwin, Responses to "Thoughts on H.B. 3055" 25, Univ of Mich L Sch 25 (Mar. 20, 1970) (Sax Papers, Box 1, File 3) (Appellant FLOW's

Reply Appendix ("Reply App"), p 611). His position prevailed, and the Legislature retained independent protection for "the public trust" in the statute as enacted. FLOW asks this Court to vindicate that legislative determination here.

B. Under MEPA, the Commission Cannot Approve the Tunnel Project Unless and Until EGLE Determines Potential Public Trust Impairments Under the Great Lakes Submerged Lands Act.

1. MEPA Leaves to the Courts the Task of Identifying the Pollution Control Standards Applicable to the Resources at Issue in Any Given Case.

As discussed in FLOW's opening brief, FLOW Opening Br 33–34, and as Appellees nowhere contest, MEPA charges courts with the responsibility for deciding how best to "determine" pollution, impairment, or destruction for any given category of resources. MCL 324.1705(2); see also *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 306–07 (1975). In making this choice, a court may consider whether there is an existing "standard for pollution" in other laws or regulations, and the court may "[d]etermine the validity, applicability, and reasonableness of the standard" for determining the alleged impairment at issue. MCL 324.1701(2)(a). Where a separate statute or regulation contains an adequate "pollution control standard" for the resources involved, a court may adopt that standard to determine the existence of natural resource and public trust impairments. See, e.g., *Nemeth v Abonmarche Dev*, 457 Mich 16, 29 (1998).

2. The GLSLA and Its Implementing Regulations Provide the Appropriate Standard for Determining Impacts to the Public Trust Waters and Bottomlands of the Great Lakes.

Here, the GLSLA, MCL 324.32501–32516, and its implementing regulations supply the appropriate pollution control standard for making the determinations required by MEPA. FLOW Opening Br 37–42. The GLSLA prohibits "the sale, lease, exchange, or other disposition of" Great Lakes bottomlands unless it is determined "that the public trust in the state will not be impaired[.]" MCL 324.32502. The statute's implementing regulations provide additional specificity, prohibiting the approval of any "permit, lease, deed, or agreement" for bottomlands unless EGLE makes two independent determinations: (1) that "adverse effects to the environment, public trust, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible" *and* (2) that there exists "no feasible and prudent alternative to the applicant's proposed activity which is consistent with the reasonable requirements of the public health, safety, and welfare," Mich Admin Code, R 322.1015 ("Rule 1015").

Appellees again take issue with none of this. But neither do they acknowledge that because the GLSLA expressly governs the resources at issue here—"the unpatented lake bottomlands" and "waters of the Great Lakes," MCL 324.32502—EGLE must make the requisite impairment determination utilizing the standard supplied by the statute and its implementing regulations.

The reason for their non-acknowledgement is apparent. Appellees construe Section 1705(2) such that even where impairment to resources or the public trust in them is likely, that impairment may be excused if an agency determines that no feasible and prudent alternative exists to the proposed conduct. The second-step alternatives inquiry emerges as Appellees' Holy Grail. No matter the extent of the threat to natural resources or the public trust in them, "the analysis mandatorily goes to an evaluation of feasible and prudent alternatives." MPSC Br 34; see also Enbridge Br 49 ("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[.]" (citation and quotation marks omitted)); Propane Assn's Br 36.

That is the course the Commission pursued here. It found that Enbridge's Tunnel Project "is likely to pollute, impair, and destroy natural resources," MPSC Order 331 (Appellant FLOW's Opening Brief Appendix ("App"), p 331), and specified ten such categories of impairment, including to surface water, groundwater, air quality, flora, and fauna. *Id.* at 89–90, 329 (App, pp 89–90, 329); MPSC Br 31–32. But the Commission nevertheless approved the project because it concluded there were "no feasible and prudent alternatives to the Replacement Project pursuant to MEPA." MPSC Order 347 (App, p 347).

That approach is clearly proscribed under the GLSLA and its implementing regulations. If EGLE determines that adverse effects to the public trust are more than

minimal or will not be sufficiently mitigated, Enbridge's proposed project cannot be permitted, full stop. The GLSLA and Rule 1015 prohibit agencies from authorizing a private devotion of Great Lakes bottomlands unless EGLE determines "*both* … [t]hat the adverse effects to the environment, public trust, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible" *and* "[t]hat there is no feasible and prudent alternative" to the proposed activity. Rule 1015 (emphasis added).

The two-part test of Rule 1015 squarely aligns with this Court's public trust jurisprudence. As this Court has long held, the State may not "devote[]" bottomlands to private use unless it determines that "such disposition may be made '*without detriment* to the public interest in the lands and waters remaining.'" *Obrecht v Nat'l Gypsum Co*, 361 Mich 399, 412–13 (1960) (quoting *Ill Central R Co v Illinois*, 146 US 387, 455–56 (1892)) (emphasis added). Consistent with this baseline requirement, the proper application of MEPA prohibits EGLE from authorizing a private devotion of bottomlands that could impair the public trust.

Where, as here, the proposed conduct at issue contemplates the devotion of Great Lakes bottomlands to private use, the correct standard has been specified by the Legislature and the environmental protection agency charged with protecting the Great Lakes: the GLSLA and EGLE's Rule 1015 provide a well-articulated, long-established, plainly applicable pollution control standard that protects the public trust in the resources implicated by the tunnel and pipeline.

In attempting to avoid the application of that GLSLA standard, Enbridge can only argue that the MPSC "is free to authorize the Replacement Project" before EGLE makes the necessary impairment determination because there exists no statute requiring the MPSC to "press pause." Enbridge Br 51–52. But MEPA does just that: by providing that impairment to the public trust "shall be determined" before an agency authorizes or approves conduct, MCL 324.1705(2), it commands the Commission to withhold authorization until the proper evaluation is conducted, and here it is EGLE that must undertake that analysis.

II. Under the Common Law, the Commission Likewise Cannot Approve the Tunnel Project Unless and Until EGLE Makes the Required Public Trust Determinations.

A. Agencies Have an Independent Common-Law Obligation To Comply with the Public Trust Doctrine.

Appellees contend that the MPSC has "no statutory authority to enforce the common-law, public trust doctrine," Enbridge Br 48–49; see also MPSC Br 37–39; Propane Ass'ns Br 42–43, echoing their shared refrain from their oppositions to leave to appeal. It is undisputed that agencies have no power to *make* common law. See FLOW Opening Br 28. But the relevant focus here has to do not with agency power but rather with agency duty, and specifically with the responsibility of agencies to *obey* the affirmative and inalienable obligations imposed on all arms of the State by the public trust doctrine. See *id.* at 28–32.

This Court held in *Obrecht* that all three branches of government are "sworn guardians of Michigan's duty and responsibility as trustee of the … beds of [the] five Great Lakes." 361 Mich at 412; FLOW Opening Br 28–32. But under Appellees' argument, adopted by the court below, the Legislature can circumvent its public trust obligations by disposing of public trust resources through state agencies. That is, unless the Legislature explicitly requires an agency to adhere to Michigan's public trust obligations, the agency can convey or permit private use of the State's public trust resources in violation of the public's rights. FLOW Opening Br 30. This argument is untenable on its face and conflicts with the foundational principles of Michigan's public trust doctrine.

B. MEPA Supplements—Rather than Abrogates—the Common-Law Public Trust Doctrine.

Appellees incorrectly assert that MEPA abrogates the common law. See Enbridge Br 43–47; MPSC Br 23–24. Although they frame their argument as legislative "subsumption" of the common law, no such doctrine exists in Michigan. Enbridge relies on *Kyser v Kasson Twp*, 486 Mich 514 (2010), for the proposition that "[u]nder Michigan law, the Legislature has the authority to supersede or change common-law doctrines by statute[.]" Enbridge Br 45. But *Kyser* analyzed legislative "preempt[ion]" of the common law. 486 Mich at 539. And this Court has since clarified that "a state statute does not 'preempt' the common law"; rather "[t]he correct principle to apply in this context is

abrogation." *Davis v BetMGM, LLC*, No. 166281, 2025 WL 2054575, at *8 (Mich July 22, 2025). Appellees' arguments are hence arguments for abrogation.

But the Legislature cannot abrogate the State's inalienable public trust responsibilities. "The state, as sovereign, *cannot* relinquish [its] duty to preserve public rights in the Great Lakes and their natural resources." *Glass*, 473 Mich at 679 (emphasis added); see also *Nedtweg v Wallace*, 237 Mich 14, 17 (1926) (substantially same). The Legislature accordingly must act within the parameters established by the public trust. See *Ill Central*, 146 US at 453–54; *id.* at 460 ("Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it."). MEPA is thus properly understood to supplement the baseline public trust requirements established under the common law. Cf. *In re Water Use Permit Applications ("Waiāhole")*, 94 Haw 97, 133 (2000) (holding that the state's water code "does not supplant the protections of the public trust doctrine" and that "[e]ven with the enactment and any future development of the Code, the doctrine continues to inform the Code's interpretation, define its permissible outer limits, and justify its existence" (quotation marks omitted)).

Even were abrogation possible, the prerequisites for deeming it accomplished are nowhere close to satisfied here. This Court does "not lightly presume that the Legislature has abrogated the common law" and hence requires the Legislature to "speak in no uncertain terms" if it seeks to do so. *Velez v Tuma*, 492 Mich 1, 11–12 (2012)

(citation omitted). MEPA does not contain any statement abrogating the State's common-law public trust obligations. See generally MCL 324.1701–1706. To the contrary, the statute was enacted to strengthen, rather than overrule, common-law protections for natural resources and the public trust in those resources.

As this Court has recognized, MEPA "marks the Legislature's response to [its] constitutional commitment to the 'conservation and development of the natural resources of the state[.]'" *Ray*, 393 Mich at 304 (quoting Const 1963, art 4, § 52). Professor Sax testified to the Legislature that MEPA would achieve this goal by "open[ing] the door" to the continued development of "a common law for the environment." An Environmental Common Law for Michigan: Testimony of Joseph L. Sax on HB 3055 Before the H Comm on Conservation and Recreation, at 2 (Jan 21, 1970) (Sax Papers, Box 1, File 3) (Reply App, p 1939); see also *Ray*, 393 Mich at 306–07 (explaining that the Legislature enacted MEPA to promote "[t]he judicial development of a common law of environmental quality"). In short, MEPA was designed to promote the development of common-law protections for natural resources and the public trust rather than to eliminate them.

None of the cases cited by Appellees suggest otherwise. Contrary to Enbridge's argument, in *Highland Recreation Defense Foundation v Natural Resource Commission*, the Court of Appeals never "implied that MEPA completely subsumes common-law, public-trust claims," Enbridge Br 43. Rather, the court determined that the plaintiff's

public trust arguments were "duplicative of its claims under MEPA" based on the plaintiff's allegations and the facts of the case. 180 Mich App 324, 331 (1989).

Cases from other jurisdictions likewise do not support Appellees' argument. Citing *Mineral Co v Lyon Co*, 136 Nev 503 (2020), Enbridge suggests that the Supreme Court of Nevada held that a statutory "obligation on the State Engineer to maintain trust resources subsumed the common-law [public trust] obligations." Enbridge Br 46. To the contrary, the *Lyon* court held that the statutes at issue were "*consistent with* the public trust doctrine," and it enforced them accordingly. 136 Nev at 506, 514, 517 (emphasis added). So, too, here. MEPA's protections—when properly applied through use of the GLSLA's pollution control standard—are consistent with Michigan's common-law public trust doctrine and should be enforced accordingly.

Finally, Enbridge's cases discussing standards for the displacement of *federal* common law, Enbridge Br 47, are inapposite. Those standards reflect the disfavored status of federal common law. *City of Milwaukee v Illinois & Michigan*, 451 US 304, 312, 314 (1981) (stating that "[f]ederal courts, unlike state courts, are not general common-law courts," so "when Congress addresses a question previously governed by a decision [that] rested on federal common law[,] the need for such an unusual exercise of lawmaking by federal courts disappears"). Federal displacement principles are thus irrelevant to the purported abrogation of Michigan's public trust doctrine, a

quintessential common-law doctrine that has been recognized and furthered by Michigan courts since the earliest days of statehood. See *Glass*, 473 Mich at 678.

C. The Common Law Requires the Commission To Withhold Approval for the Tunnel Project Until EGLE Makes the Required Public Trust Determinations.

As explained by this Court in *Obrecht*, under the common law, Great Lakes bottomlands cannot be devoted to private use without "assent" "from the legislature or its authorized agency … based on due finding" that the devotion will not impair the public trust "as will legally warrant the intended use of such lands." 361 Mich at 412–13, 416. The Legislature, as a co-equal guardian of the public trust, has further specified the requirements for the private use or conveyance of the bottomlands in the GLSLA: any devotion of public trust resources to private use must be authorized by EGLE under the standards imposed by the GLSLA and its implementing regulations. This Court underscored this requirement in *Obrecht*, which held that the construction of a permanent deep-water dock on Great Lake bottomlands was unlawful "[f]or want of [a] … determination" by the Department of Conservation (now EGLE) that the project would not impair the public trust as required by the GLSLA, *id.* at 416 (citing the 1958 version of the statute). FLOW Opening Br 45–48.

The Commission would read this holding out of *Obrecht*, arguing that *Obrecht* requires merely that the public's right "can still be exercised in what remains [of the resource] after the conveyance." MSPC Br at 36; see also *id.* at 26–27, 33. The argument

ignores entirely this Court's clear instruction that any devotion of Great Lakes bottomlands requires EGLE's authorization under the GLSLA, *Obrecht*, 361 Mich at 416. It likewise ignores that the Legislature, through the GLSLA, has supplemented the common law by specifying additional requirements and standards for that authorization where the paramount public trust resources of the Great Lakes are affected.

The specific statutory conveyances referenced in *Obrecht* and cited by the Commission do not salvage its argument. See MPSC Br 27 (citing *Obrecht*, 361 Mich at 413). The *Obrecht* Court did not hold that those statutes satisfied the requirements of the public trust doctrine, noting them only as instances in which the legislature "pursued" its authority under the doctrine, 361 Mich at 413. Those conveyances, moreover, occurred prior to the Court's announcement in *Obrecht* that public trust bottomlands determinations must be made by the Department of Conservation pursuant to its powers and responsibilities under the GLSLA. See *id.* at 416. They also occurred prior to amendments to the GLSLA further evidencing the Legislature's intent, following *Obrecht*, that the Act should constitute the sole mechanism through which Great Lakes bottomlands public trust determinations are made. See FLOW Opening Br 43–44.

Similarly unavailing is the Commission's claim that its authorization "hardly constitutes a conveyance of what the State holds in trust, as described in *Obrecht*." MPSC Br 28; see also Propane Ass'ns Br 43–44. This is a stunning contention. *Obrecht*, as

explained above, held that *any* "devotion" of bottomlands to private use can only be approved based on "due finding[s]" consistent with the requirements of the GLSLA. 361 Mich at 412–13. And at issue here is not just any devotion. The Commission has purported to authorize a private company to alter the geology of a four-mile-long, twenty-one-foot-wide stretch of Mackinac Straits bottomlands to construct a permanent tunnel through which the company will operate a pipeline transporting 540,000 barrels per day of crude oil and natural gas liquids for the next ninety-nine years. The permanent impact to the bottomlands would be massive. By Enbridge's own calculation, the project will require the removal of over half a million bank cubic yards of earth and bedrock, see Enbridge, Comments on Draft Environmental Impact Statement (DEIS), cmt. 82 (June 30, 2025) (Reply App, p 1964), necessitating up to 282 trucks *per day* for transport of the removed bedrock for the entire projected six-year construction period, U.S. Army Corps of Eng'rs, DEIS Executive Summary 21 (May 2025) (Reply App, p 1989).[1] This unprecedented devotion of the State's public trust

[1] Appellant asks the Court to take judicial notice of these publicly available official records, and similar records cited in notes 3 and 5, *infra*, pursuant to MRE 201. The fact and contents of the records can be accurately and readily determined from official government websites, whose accuracy cannot reasonably be questioned. Enbridge's DEIS Comments can be found on the U.S. Army Corps of Engineers' website, entry dated June 30, 2025 7:22 pm, at https://www.line5tunneleis.com/posted-scoping-comments-copy/?search_fields%5B3%5D&view_id=931&pagenum=7. The DEIS Executive Summary can be found on the same website, at https://www.line5tunneleis.com/draft-eis/.

resources to private use is hardly a de minimis "permit to repair and replace a small portion of the pipeline," as the Commission boldly suggests. MPSC Br 28.

The impacts will be dramatic. The industrial activities associated with at least six years of projected construction (including blasting and the operation of the tunnel boring machine) will create vibration and air, noise, and light pollution threatening "direct, detrimental impacts to wildlife" and aquatic species, DEIS Executive Summary 17 (Reply App, p 1985), and exceeding noise impact thresholds for human exposure on both shores of the Straits, *id.* at 24 (Reply App, p 1992). It is fanciful to suggest that such activity will not directly impact public trust uses including fishing and boating in the Straits.

* * *

Pursuant to both MEPA and the common-law public trust doctrine, then, EGLE must determine public trust impairment under the GLSLA and its regulations, and the Commission has a corresponding common-law obligation to withhold authorization until EGLE makes this determination.[2]

[2] Because the same Rule 1015 analysis satisfies the State's statutory and common law obligations, there is no need for EGLE to "conduct the same work twice," as the MPSC argues, MPSC Br 23.

III. EGLE Has Not Yet Made the Requisite Public Trust Determinations in the Permitting Context.

A. EGLE Has Never Made the Required Determinations in Prior Regulatory Proceedings.

The Commission asserts that EGLE made the necessary public trust findings in issuing Enbridge a permit under the GLSLA and the Wetlands Protection Act, MCL 324.30301–30329, in 2021. See MPSC Br 33 & n 5. But EGLE's prior permit, which is set to expire on February 25, 2026, nowhere makes any public trust findings with respect to the tunnel project. The permit in fact comprehended neither the tunnel nor the pipeline within it. See EGLE Water Resources Division Permit No. WRP027179 v.1.1 (Feb. 25, 2021) (Enbridge App, ENBAPX000987–1012). Instead, it authorized only the construction of structures on the lakebed—specifically, stormwater outfalls on the lakeshore, and construction water intakes with a combined temporary footprint of no more than 800 square feet. See *id.* at ENBAPX000987 (scope of authorized activity).

That is because Enbridge never applied for a GLSLA permit for anything that would occur beneath the surface of the lakebed. See, e.g., ENB Joint Permit Application (Apr. 6, 2020) (Enbridge App, ENBAPX000646–47) (omitting tunnel from calculation of Great Lakes impacts and representing that project would involve no excavation in Great Lakes resources). Even for the handful of incidental surface structures, Enbridge applied for GLSLA approval in protest, "requesting [the] permit from EGLE out of an abundance of caution, [although] it respectfully does not believe that Part 325 is

applicable to the construction of the Great Lakes Tunnel Project … [which] will be constructed well beneath the lakebed of the Straits[.]"). Letter from Paul Turner, Enbridge, to Teresa Seidel, EGLE, "Enbridge Joint Permit Application" (Apr. 7, 2020) (Reply App, p 2001).[3]

EGLE did not require Enbridge to apply for a permit for the tunnel or pipeline, nor did it analyze the public trust impacts of their construction and operation, because in 2021 it apparently acceded to Enbridge's mistaken notion that jurisdiction under the GLSLA to protect the public trust does not extend beneath the surface of the lakebed (as discussed below, this is not indicative of EGLE's present position). EGLE thus concluded in its prior permit analysis that the public trust would not be impaired because "the tunnel itself will be placed in the bedrock" with no "adverse impacts to the lakebed." MPSC Br 33 (quoting EGLE Responsiveness Summary (Enbridge App, ENBAPX001018)).

Enbridge and the Commission maintain the same cramped understanding of the reach of the GLSLA and the public trust doctrine before this Court. See, e.g., ENB Br 49 ("Construction activities will not have any direct impact on the bottomlands …. [T]he

[3] This letter is available on EGLE's MiEnviro Portal, https://mienviro.michigan.gov/nsite/DEFAULT/map/results/detail/10080544/2789, by searching in the "Name" column for "GLTP_Part 325 Letter to EGLE." Notably—and contrary to Appellees' arguments that EGLE has already made the required public trust determinations—Enbridge's letter quotes the GLSLA but omits the statute's reference to "the public trust." See *id.*

Tunnel (and pipeline segment) will be located entirely beneath the lakebed[.]"); MPSC Br 33 ("Appellants … fail to explain how a tunnel … impacts any of the public trust rights[.]").

But the GLSLA and the public trust do not stop at the lakebed's surface. At English common law, the sovereign's title extended to "all the lands below high water mark, within the jurisdiction of the Crown[.]" *Glass*, 473 Mich at 677 (quoting *Shively v Bowlby*, 152 US 1, 11 (1894)). It was nowise limited to the surface of the submerged lands. Nor was the public trust. *Id.* at 680 ("[I]t has been treated as settled that the title in the soil of the sea, … whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing." (quoting *Shivley*, 152 US at 11)).

Any doubts as to the reach of the title and public trust of the states over the surface and subsurface of the submerged lands was eliminated by the federal Submerged Lands Act of 1953 (SLA), 43 USC 1301–1315, which was enacted in direct response to a United States Supreme Court decision that stripped the states of their traditional property rights in coastal submerged lands and subsurface resources in favor of exclusive federal ownership. *See United States v California*, 332 US 19 (1947). Through the SLA, Congress confirmed in the states their "title to and ownership of the lands beneath navigable waters within the[ir] boundaries …, and the natural resources within such lands," 43 USC 1311(a), including the lands under the Great Lakes, 43 USC 1301(a) & (b). And the Act further confirmed the power and authority of the states "to

manage, administer, lease, develop, and use [those] lands and natural resources[,]" 43 USC 1311(a), by relinquishing to the states "all right, title, and interest of the United States, if any it has, in and to all said lands … and natural resources," 43 USC 1311(b).

The GLSLA was enacted two years later, specifically to empower the State to exercise the incidents of ownership and protection over the lands reaffirmed to it by the SLA. See *Obrecht*, 361 Mich at 407; see also *People v Massey*, 137 Mich App 480, 485 (1984) ("In Michigan, the title to such lands is held in trust for the public pursuant to the Great Lakes Submerged Lands Act[.]"). By its own terms, the GLSLA governs the conveyance and use of "all of the unpatented lake bottomlands … in the Great Lakes[] … belonging to the state or held in trust by it," "lying below and lakeward of the [statutorily specified] natural ordinary high-water mark," MCL 324.32502.

Although the Act does not explicitly define "bottomlands,"[4] it makes plain that the term extends not just to the lakebeds but to the entirety of the surface and subsurface estates in the lands beneath the waters of the Great Lakes. For example, the GLSLA requires that prior to any conveyance of lands covered by the Act, the department "shall reserve to the state all mineral rights, including, but not limited to, coal, oil, gas, sand, gravel, stone, and other materials or products located or found in those lands." MCL 324.32503(1). As coal, oil, and gas are not found in the lakebeds but

[4] Nor are dictionary definitions instructive, as they generally focus on use of the term in the riverine context. See, e.g., *Black's Law Dictionary* (12th ed) (defining "bottomland" as extending generally to "[l]ow-lying land, often located in a river's floodplain").

in the subsurface estate below them, this language would serve no purpose if the bottomlands covered by the statute did not include that estate. See, e.g., *People v Miller*, 498 Mich 13, 25 (2015) ("[W]e must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." (quotation marks omitted)). Similarly, until 2002 the GLSLA authorized and regulated the issuance of subsurface oil and gas leases where those products would be extracted by diagonal drilling from onshore locations, see, e.g., MCL 324.32503(3) as amended by 1995 PA 59; see also MCL 324.502(4) as enacted in 1994 PA 451. That such drilling was regulated by the Act again confirms the clear legislative intent that the term "bottomlands" includes lands beneath the surface of the lakebed.

Consistent with the statutory text, implementing regulations have for over forty years defined the "bottomlands" to mean, without qualification, all "lands in the Great Lakes … lying below and lakeward of the ordinary high water mark." Mich Admin Code, R 322.1001(e); see also Ann Admin Code Supp 1982 (App, p 562) (introducing definition). "In its legal significance, 'land' is not restricted to the earth's surface, but extends below and above the surface." *Black's Law Dictionary* (12th ed) (defining "Land") (quoting 9 Butt, Land Law (2d ed)). It is defined as a "three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it." *Id.* The rules nowhere suggest that the term should be interpreted in anything other than this ordinary fashion.

B. EGLE Is Currently Reviewing Enbridge's Project Under the GLSLA.

Even if EGLE had made any public trust findings related to the tunnel in its prior permitting proceedings, those findings would be of no moment, as the permit is set to expire in February 2026. See EGLE Water Resources Division Permit No. WRP027179 v.1.1 (Feb. 25, 2021) (Enbridge App, ENBAPX000987).

EGLE is currently reviewing a new, modified permit application from Enbridge, see Letter from Jonathan Walt, EGLE, to Gina Lee, Enbridge, "Response to Comments" (Dec. 22, 2025) (Reply App, pp 2002–2005),[5] and by all indications the Department is conducting a searching analysis of public trust considerations in connection with that review. EGLE's communications to Enbridge seek additional information on the environmental impacts of and alternatives to the tunnel project because, according to the Department, Enbridge has thus far failed to demonstrate that the project will not create untenable risks or violate GLSLA standards:

> Enbridge has not fully demonstrated that the proposed tunnel cannot be constructed using alternate methods, or in alternate locations, that would avoid and minimize impacts[; or] … that the proposed tunnel construction will not create unreasonable risks to the environment during construction and/or during the life of the tunnel[; or] … that the proposed tunnel construction avoids and minimizes impacts to the maximum extent practicable. [*Id.*]

[5] This letter is available on EGLE's MiEnviro Portal, https://mienviro.michigan.gov/nsite/DEFAULT/map/results/detail/10080544/2789, by searching in the "Name" column for "2025-12-22 Response to Comments HQ3-8BYB-N9DT1."

A regulatory process is underway, then, in which the agency authorized under law to make the required public trust evaluations is engaged in active inquiry. But it defies reality to suggest that the agency has already rendered the necessary determinations.

IV. No State Entity Has Made the Requisite Public Trust Determinations in Any Other Form, and Under Appellees' Reasoning None Ever Will.

Enbridge argues that "the [M]PSC is not obligated to wait until EGLE makes a public-trust determination before issuing authorization" for the Tunnel Project. Enbridge Br 51. "And to be clear," Enbridge reassures, EGLE's public trust duties will eventually be fulfilled, since "Enbridge cannot begin work until it receives *all* necessary authorizations, including EGLE's." *Id.* at 52. But Enbridge simultaneously claims that EGLE has *already* fulfilled its public trust obligations in the State's prior agreements with Enbridge:

> 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 … protect the ecological and natural resources held in public trust by the State." … The State—including EGLE—agreed that, in entering the [Third] 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.*]

Enbridge contends that "[t]hese findings … are more than sufficient to satisfy any obligation EGLE might have to protect the public trust." *Id.* (Notably, the MPSC does not make this argument.) To the contrary, neither the State's Second nor Third

Agreement with Enbridge contains the public trust determinations EGLE is legally required to make.

First, neither agreement "determined" that the tunnel project's "adverse effects to the environment, public trust, and riparian interests of adjacent owners are minimal," as required by Rule 1015(a). Nor do the agreements "determine[]" that such effects would further "be mitigated to the extent possible," as also required by the Rule. In fact, neither agreement so much as mentions any such "adverse effects." And yet the Commission itself found that "10 [identified] impairments [from the tunnel project] … are environmental impairments pursuant to MEPA," MPSC Order 329 (App, p 329).

Second, neither agreement "determined … [t]hat there is no feasible and prudent alternative … which is consistent with the reasonable requirements of the public health, safety, and welfare," as also required by Rule 1015(b). Generic assertions that the Tunnel Project protects resources fall far short of a demonstration that EGLE scrutinized alternatives and determined that none are "feasible and prudent."

Enbridge has repeatedly told this Court that the Court of Appeals' holding does not "give the State a pass on its public-trust obligation." Enbridge Br 48; Enbridge Answer to Appls for Leave To Appeal 34. But the consequence of Enbridge's reasoning is that the public trust determination will never be made by any State entity, let alone the one agency—EGLE—that is required to make it under both MEPA and the common law.

For their part, the Michigan Propane Gas Association and National Propane Gas Association contend that "consideration of the public trust" is "implicit in the Commission's MEPA determination[.]" Propane Ass'ns Br 42. But Rule 1015 requires explicit determinations. Worse for their position is its inherent contradiction: the Associations, Enbridge, and the MPSC all contend (wrongly) that the Commission lacks authority to enforce the common-law public trust doctrine, *id.* at 44; Enbridge Br 48; MPSC Br 37—a proposition that, if true, wholly precludes the argument that the Commission made the requisite determinations pursuant to the doctrine.

The Associations further claim that "any consideration [of the public trust] has already been made in the context of the 1953 and 2018 Easements." Propane Ass'ns Br 44. But the 2018 easement—just like the Second and Third agreements—contains no determination that the adverse effects of the Tunnel Project are "minimal" or "will be mitigated to the extent possible" or that there is "no feasible and prudent alternative," Rule 1015. Indeed, the 2018 Easement expressly disavows the work the Associations would have it do, stating that "nothing in this easement shall be construed as a statement, representation or finding by the [State] relating to any risks that may be posed to the environment by activities conducted by the [Mackinac Straits Corridor Authority]." 2018 Easement ¶ 13 (App, p 1436).

Meanwhile, the 1953 easement conveyed different lands for the purposes of a different project—the existing dual pipelines. *Compare* 1953 Easement 2 (Reply App, p

2007) (conveying two 100-foot-wide easements for two twenty-inch pipelines), *with* 2018 Easement 1 (App, p 1435) (conveying "1,200 foot wide … easement and right to place … an underground tunnel"). That the Associations invoke that easement as satisfying the State's public trust obligations with respect to the current tunnel proposal reflects well just how little regard the Appellees have for the seriousness of those obligations.

CONCLUSION

For the foregoing reasons, this Court should remand this matter to the MPSC with instructions to deny Enbridge's application absent the requisite public trust determination by EGLE under the GLSLA and its implementing regulations.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify Appellant For Love of Water's Reply Brief complies with the word count set forth in the Unopposed Motion To File Consolidated Reply. This brief was written using Microsoft Word 365 and has a word count of 7,298 words.

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