STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Kelly, Letica and Wallace

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE AND RELOCATE LINE 5.

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, BAY MILLS INDIAN COMMUNITY, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, and ENVIRONMENTAL LAW & POLICY CENTER, and MICHIGAN CLIMATE ACTION NETWORK,

Appellants,

v

MPSC, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.
_____/

Supreme Court No. 168335-9

Court of Appeals Nos. 369156, 369159, 369161, 369162, 369165

MPSC No. U-20763

BRIEF ON APPEAL OF APPELLEE MICHIGAN PUBLIC SERVICE COMMISSION

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid.

BRIEF ON APPEAL OF APPELLEE MICHIGAN PUBLIC SERVICE COMMISSION

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Bay Mills Indian Community, Little Traverse Bay Band of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatomi, Environmental Law and Policy Center, Michigan Climate Action Network, For Love of Water, (Appellants) sought leave to appeal the Court of Appeals' opinion in *In re Application of Enbridge Energy to Replace and Relocate Line 5,* ___ Mich App ___ (2025), 2025 WL 554844, which affirmed the Michigan Public Service Commission's (Commission or MPSC) order in the underlying case, *In the matter of the application of Enbridge Energy, Limited Partnership, for 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 Commission's Rules of Practice and Procedure, R 792.10447, or the grant of other appropriate relief,* MPSC Case No U-20763 December, 2023 Order. This Court granted Appellants' leave to appeal on September 19, 2025. This Court has jurisdiction pursuant to 7.303(B)(1); MCL 600.215(3).

STATEMENT OF QUESTIONS PRESENTED

In its Orders issued on September 19, 2025, this Court directed the parties to address the following five questions:

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

   Appellant FLOW's answer: Yes

   Appellee MPSC's answer: No.

   Court of Appeals' answer: No.

2. If not, does the common-law public trust doctrine nonetheless require such compliance, see *Glass v Goeckel*, 473 Mich 667, 694–696 (2005).

   Appellant FLOW's answer: Yes.

   Appellee MPSC's answer: No.

   Court of Appeals' answer: No.

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

   See Argument Section III. below.

4. Did the Court of Appeals err by applying a deferential standard of review rather than determining de novo whether the proposed conduct will pollute, impair, or destroy the air, water, or state's other natural resources or the public trust in these resources under MCL 324.1705(2) of the Michigan Environmental Protection Act (MEPA), MCL 324.1701 et seq., in accordance with *West Mich Environmental Action Council, Inc v Natural Resources Comm,* 405 Mich 741, 752–755 (1979)?

   Appellants Little Traverse Bay Bands of Odawa Indians, Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatami, and Environmental Law and Policy Center and Michigan Climate Action Network answer: Yes

   Appellee MPSC's answer: No

   Court of Appeals' answer: No

5. Did the Court of Appeals err by affirming the Michigan Public Service Commission's limitation on the scope of the evidence to be reviewed regarding its determination under MCL 324.1705(2) of MEPA and its decision to exclude evidence of the history and risk of oil spills along the entire length of Line 5 in those determinations?

   Appellants Little Traverse Bay Bands of Odawa Indians, Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatami, and Environmental Law and Policy Center and Michigan Climate Action Network answer: Yes

   Appellee MPSC's answer: No

   Court of Appeals' answer: No

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

Const 1963, Art 4, §52:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

MCL 324. 1705

(1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.

(2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct 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 324.1706

This part is supplementary to existing administrative and regulatory procedures provided by law

MCL 483.1

(1) As used in this act:

(a) "Carbon dioxide substance" means a gaseous or liquid substance, consisting primarily of carbon dioxide, that will be put in storage or that has been or will be used to produce hydrocarbons in a secondary or enhanced recovery operation.

(b) "Commission" means the Michigan public service commission.

(c) "Person" means an individual, partnership, corporation, association, governmental entity, or other legal entity.

(2) A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines, for hire, compensation or otherwise, or exercising or claiming the right to engage in the business of piping, transporting, or storing crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, or engaging in the business of buying, selling, or dealing in crude oil or petroleum or carbon dioxide substances within this state, does not have or possess the right to conduct or engage in the business or operations, in whole or in part, or have or possess the right to locate, maintain, or operate the necessary pipe lines, fixtures, and equipment belonging to, or used in connection with that business on, over, along, across, through, in or under any present or future highway, or part thereof, or elsewhere, within this state, or have or possess the right of eminent domain, or any other right, concerning the business or operations, in whole or in part, except as authorized by and subject to this act. (3) Subsection (2) does not apply to a right that exists on March 27, 1929 and is valid, vested, and incapable of revocation by any law of this state or of the United States.

MCL 483.2B

A pipeline company shall make a good-faith effort to minimize the physical impact and economic damage that result from the construction and repair of a pipeline.

INTRODUCTION

Appellants seek to vastly expand the scope of review under Act 16, MCL 483.1 *et seq*. and the Michigan Environmental Protection Act (MEPA) MCL 324.1701 *et seq*. Enbridge sought approval of a project to replace a 4-mile segment of Line 5 that runs under the Straights of Mackinac. Appellants want to essentially relitigate the public need for Enbridge's Line 5. The public need for Line 5 was established by the Commission and, affirmed by the Michigan Supreme Court 72 years ago. After conducting extensive administrative hearings, the Commission issued its final order approving the Replacement Project, with conditions, based on competent, material, substantial and relevant record evidence. The Appellants appealed that order to the Court of Appeals alleging that the Commission's interpretation of MEPA was too narrow and that it failed to consider the public trust doctrine. The Court of Appeals properly rejected Appellants' claims and affirmed the Commission's order.

The Appellants ask this Court to correct the alleged errors made by the Court of Appeals. This attempt fails. Appellants do not demonstrate any error. Simply being dissatisfied with the lower court's decision is not a valid ground for reversal.

The Court of Appeals properly affirmed the scope of the Commission's MEPA analysis: that it must be co-extensive with the scope of Act 16 that governed the Commission's analysis of Enbridge's Replacement Project application. By adhering to the requirements of MEPA, the Commission also satisfied the requirements of the public trust doctrine. MEPA protects those same interests and through its statutory scheme subsumes the protections provided by the common law doctrine.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The Commission submits this Counter-Statement of Facts and Proceedings because the Statement of Facts presented by the Appellants is incomplete and inaccurate.

A. Background and Procedural History

The underlying case in this appeal, *In the matter of the application of Enbridge Energy, Limited Partnership, for 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 Commission's Rules of Practice and Procedure, R 792.10447, or the grant of other appropriate relief,* MPSC Case No U-20763, in simplest terms, is about whether to replace a dual petrochemical pipeline, currently sitting on the bottom of the Straits of Mackinac, into a tunnel purpose-built to house it, and attendant questions about safety, feasibility, necessity, and the proper approvals necessary to engage in and complete the work. This case began with Enbridge's April 2020 application to the MPSC for authority to commence the "Line 5" project, or alternatively that Enbridge already possessed the authority to proceed with the project.

In defining the "Project," Enbridge stated that Line 5 is a 645-mile-long interstate pipeline with approximately 4 miles that crosses the Straits underwater, resting on the lakebed. (Application, ¶2. F#0001.) The Project involved relocating this portion of the pipeline that crosses the Straits underground, into a tunnel that

would be at various depths below the lakebed. *Id.* The stated purpose of the project was to "alleviate an environmental concern to the Great Lakes raised by the State of Michigan relating to the approximate four miles of Enbridge's Line 5 that currently crosses the Straits of Mackinac." (Application, ¶2. F#0001.) Enbridge explained that the project consists of replacing the dual pipelines with a single pipe, and sought approval from the Commission to operate, and also all the "associated fixtures, structures, systems, coating, cathodic protection, and other protective measures" and equipment and appurtenances necessary to connect the replacement pipe to existing segments on either side of the Straits of Mackinac. (Application, ¶3. F#0001.) The concrete-lined tunnel would be designed and operated pursuant to the "Tunnel Agreement" entered between the Mackinac Straits Corridor Authority and Enbridge pursuant to 2018 PA 359 and is not part of the Project. Explaining the benefit of the Project, the application stated that "the placement of the pipeline within the tunnel eliminates the possibility of release into the Great Lakes caused by a vessel anchor strike," and that "the pipeline being located underground, within a tunnel and located at a depth of approximately 60 feet to 250 feet beneath the lakebed, will further protect" the lakes against the possibility of a petrochemical release. (Application, ¶6. F#0001.)

In its application, Enbridge also referenced its "First Agreement" and "Second Agreement" with the State of Michigan. (Exhibits A-8, A-10; F#0003.) Enbridge described the First Agreement as providing that "the continued operation of Line 5" served important public needs in Michigan by providing propane to

Michigan residents and businesses and that the First Agreement was "entered into with the understanding that both parties, Enbridge and the State, contemplated additional measures and further studies related to Enbridge's stewardship of Line 5 within Michigan." (Application, ¶24. F#0001.) The replacement of the dual pipelines was a measure to address the issues referred to in the First Agreement. The Second Agreement between Enbridge and the State of Michigan, Michigan Department of Natural Resources (MDNR) and the Michigan Department of Environmental Quality (EGLE) stated that replacement of the dual pipelines could eliminate the risk of a release from Line 5 into the Straits, and that the parties would pursue further agreements for building a tunnel as a feasible alternative for replacing the dual pipelines that could eliminate the risk from a release or spill into the Straits of Mackinac. (Application, ¶24, 25, 26, 27. F#0001.) In short, the First Agreement resulted in contemplated action to replace the existing Line 5 segments on the lakebed, and the Second Agreement provided the "how"—into a purpose-built tunnel designed to house the replacement pipe. Enbridge also asserted that certain economic benefits might occur from the project, that the relocation of the pipeline into the tunnel protects the aquatic environment of the Straits, and that Enbridge acquired the necessary property rights to conduct the work in question. (Application, ¶31, 32, 33. F#0001.)

Enbridge also included a request for declaratory relief, stating that as an alternative to approving the Project, the original Commission's approval in 1953 which included "operation and maintenance" of the tunnel "embraces" the scope of

the underlying project—replacement of the four-mile segment. (Application, ¶38. F#0001.)[1] Enbridge asserted that replacement of the four-mile segment into the tunnel falls within the scope of the Commission's prior approval to maintain and operate Line 5, and no further grant of authority to proceed with the project is needed because such authority was granted via the Commission's 1953 Order. Specifically, Enbridge argued the 1953 order found that the construction, operation and maintenance of Line 5 was in the public interest, and that because the proposed Project—the replacement of Line 5 into a tunnel under the bottom of the Straits—maintains and continues the operation of Line 5, the Project "falls squarely within the scope of the Commission's prior approval to maintain and operate Line 5." (Application, ¶¶39, 40. F#0001.) Enbridge asserted the Replacement Project was "no different than the replacement of small portions of facilities owned and operated by electric and gas utilities subject to Rule 447 and the Commission has never taken the position that such maintenance-based replacements require Commission approval and should not do so now." (Application ¶41. F#0001.) Therefore,

[1] Pursuant to Enbridge's (formerly Lakehead Pipeline Company) 1953 application for approval to construct and operate the pipeline, the Commission found that, "after careful consideration of this matter the Commission finds that the petitioner should be authorized to construct, operate and maintain this line as a common carrier as represented by the applicant." *In the matter of the application of Lakehead Pipe Line Company, Inc. for approval of construction and operation of a common carrier oil pipeline,* MPSC Case No. D-3903-53.1, March 31, 1953 Order, p 9. On May 29, 1953, the Commission issued a supplemental order allowing for the alteration of the engineering design to permit a higher operating pressure. The Commission found that nothing in the petition proposed a change of route, that the issue is one that is entirely of engineering design, and as such no further hearings on the issue were necessary. These Orders are available on the docket in the case below as Exhibit A-3 (F#0003.)

according to Enbridge, seeking specific approval for this project was unnecessary, and it sought declaratory relief to that effect.

B. Enbridge's motion in limine and the Commission's order granting, in part, the motion.

Following the Commission's Order setting the case for a contested hearing, Enbridge filed a motion in limine requesting that the Administrative Law Judge exclude six issues from the proceeding and limiting the scope to three issues. The issues that Enbridge sought to exclude were: "(1) the construction of the utility tunnel, (2) the environmental impact of the tunnel construction, (3) the public need for and continued operation of Line 5, (4) the current operational safety of Line 5, (5) whether Line 5 has an adverse impact on climate change, and (6) the intervening parties' climate change agendas." Enbridge's Motion in Limine, pp 1–2. (F#0296.) Enbridge sought to limit the scope of the hearing to three issues: "(A) is there a public need to replace the existing Line 5 crossing of the Straits with a pipe segment relocated in a utility tunnel beneath the Straits, (B) is the replacement pipe segment designed and routed in a reasonable manner, and (C) will the construction of the replacement pipe segment meet or exceed current safety and engineering standards?" *Id.* To support the exclusion of the six issues, Enbridge argued that Act 359 exclusively vests the Mackinac Straits Corridor Authority, and not the Commission, with the authority to oversee the construction of the tunnel. *Id.* at 6. Furthermore, Enbridge argued that Act 16 merely vests the Commission with the authority to approve the relocation of the Straits crossing within the

tunnel. *Id.* at 7. Additionally, Enbridge argued that the tunnel is not a fixture or equipment appurtenant to the pipeline making the provision in Act 16, Subsection (2), MCL 483.1(2) (stating that a person transporting petroleum products through a pipeline does not possess the right to locate or operate fixtures or related equipment except as authorized by and subject to the Act) inapplicable. Enbridge also argued that another subsection of Act 16, MCL 483.2b, which provides that "A pipeline company shall make a good-faith effort to minimize the physical impact and economic damage that results from the construction and repair of a pipeline" pertains only to a pipeline and not the construction of a tunnel. *Id.* at 10. For these reasons the Commission's authority allegedly did not extend to the construction of the tunnel. Enbridge argued that the Michigan Environmental Protection Act (MEPA), is limited to the environmental impact of the specific conduct at issue in the application. *Id.* at 11. Enbridge also argued that the public need for Line 5 was outside the scope of the proceeding because the Commission, pursuant to the 1953 Orders, had "already granted approval to "construct, operate, and maintain" the pipeline as a "common carrier" and the Michigan Supreme Court had held that the pipeline was "for a public use benefitting the people of the State of Michigan." *Id.* at 13. Enbridge asserted that nothing in Act 16 provides a basis for interference with the current operation of Line 5. *Id.* at 14.

Next, Enbridge distinguished the purpose of its application—"the purpose of Enbridge's application is to provide greater environmental protection to the Great Lakes by relocating the Line 5 Straits crossing in a utility tunnel where the line

cannot be touched by anchor strikes"—from certain intervenors' assertions of harm because the Project might delay the transition to cleaner energy sources and impede the efforts to mitigate climate change. *Id.* at 15. Enbridge asserted that Act 16 did not provide the Commission with authority to "deny the approval of the location of a pipeline due to generalized concerns over climate change." *Id.* at 16. Lastly, Enbridge asserted that the Commission had established the scope of Act 16 proceedings as "(A) whether there is a public need for the Project — here, to relocate the Line 5 Straits crossing within a tunnel to protect the Great Lakes; (B) the reasonableness of the route for the replacement pipe segment; and (C) whether the construction of the replacement pipe segment will meet or exceed current safety and engineering standards, here, the standards imposed by PHMSA." *Id.* at 16–17 citing *In re Enbridge Energy Limited Partnership*, MPSC Case No. U-17020, 1/31, 2013, Order, p 5; *In re Wolverine Pipeline Co.*, MPSC Case No. U-13225, 7/23/2002 Order, pp 4–5.

Several intervening parties, including Bay Mills Indian Community, filed a joint response to Enbridge's motion in limine arguing that the Commission has authority over the tunnel pursuant to Act 16, that Enbridge was inappropriately attempting to limit the scope of the evidence needed to conduct a MEPA analysis, that risks associated with the continued operation of the entirety of Line 5 in Michigan are within the scope of the case, and that climate change is a relevant issue in the Commission's analysis of the project. (Joint Response to Enbridge's Motion in Limine, F#0326.)

The Michigan Public Service Commission Staff filed a separate response to Enbridge's Motion in Limine. (F#0328.) In its response, the MPSC Staff explained that the Commission reviews Act 16 Applications to determine whether (1) the applicant has demonstrated a public need for the proposed pipeline; (2) the proposed pipeline is designed and routed in a reasonable manner; and (3) the construction of the pipeline will meet or exceed current safety and engineering standards. (MPSC Staff's Response, p 4. F#0328.) In addition, the Commission must consider whether the project impairs the environment under the Michigan Environmental Protection Act. *Id.* Staff argued that the analysis of these questions should not preclude the Commission's review of the tunnel "which would not be constructed but for the purpose of housing and protecting the pipeline." *Id.* Staff also argued that the tunnel can be characterized as a fixture pursuant to Act 16, Section 1(2) and a facility involved in the transportation of petroleum under Mich Admin Code R 792.10447 (Rule 447), and that the Commission must comply with MEPA and perform an environmental review as part of its overall determination. *Id.* at 5. Staff agreed with Enbridge that issues related to the public need for the entire Line 5, broad environmental impacts including climate change, safety issues involving current operations of the pipeline, and alternatives to current Line 5 operations were not properly noticed, are not pertinent to the Commission's Act 16 review of the Application and are beyond the scope of the case. *Id.* at 6. Staff also acknowledged the significant public interest generated by the proposed project but that "this public interest is not a blanket authorization for parties to relitigate the

public need for Line 5 or bog down the proceeding with extraneous material." *Id.* Staff stated that the scope of the proceedings should be focused on "material relevant to the Commission's review under Act 16, MEPA, applicable administrative rules, and Commission and court precedent." *Id.*

The Commission issued its order addressing the ALJ's rulings on the motion in limine, affirming the ALJ's ruling that the issue of the public need for the continued operation of Line 5 was outside the scope of the case, but also asserting that testimony and evidence related to greenhouse gas emissions was appropriate to consider within the scope of the case. The Commission first reiterated the statutory parameters of an Act 16 review, the three-part test the Commission applies to evaluate Act 16 applications, and the obligation that state agencies must apply MEPA requirements to such decisions. (4/21/21 Order, p 55, F#0713.) The Commission found that:

> in order to grant an application under Act 16, the Commission must find that: (1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and routed in a reasonable manner, (3) the construction of the pipeline will meet or exceed current safety and engineering standards, and (4) the project complies with the requirements of MEPA. [*Id.* at 57.]

Next, the Commission agreed with the ALJ's explanation of the scope of this case, providing that it was dictated by the activity proposed in the application, and the Commission's jurisdiction over that proposal under Act 16, the administrative rules promulgated under its authority and MEPA. *Id.* at 60. The Commission agreed 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 that was

approved by the Commission in 1953 and affirmed in *Lakehead Pipe Line Company* is outside the scope of this case. *Id.*

Referring to its past orders in other pipeline cases, the Commission explained that its precedent in these cases strongly supports a focus on the need for the particular replacement segment at issue, not a re-evaluation of the entirety of the pipeline or interconnected portions to the portion at issue in the application. *Id.* at 62. For example, the Commission referenced a past Enbridge case under Act 16 dealing with five non-contiguous segments and found that:

> Finally, in the 2013 order, the Commission examined a proposal under Act 16, filed by Enbridge, to construct, operate, and maintain 110 miles of new 36-inch pipeline, and 50 miles of new 30-inch pipeline, which replaced certain 30-inch pipeline segments on Line 6B. The application sought approval to replace five separate, noncontiguous pipeline segments. 2013 order, p. 2, n. 2. Again, the Commission did not examine the remainder of Enbridge's pipeline system that interconnected with the five proposed segments, nor did it consider the potential lifespan of any part of Enbridge's system including Line 6B. [*Id.*]

The Commission highlighted that the Intervenors' argument to consider portions of the pipeline that were outside the proposed project was a novel, unusual position, stating, "when deciding an application to construct or relocate pipeline, the Commission has never examined any portion of existing pipeline that is interconnected with the segment that is proposed in the applicant's project but not within the proposed route; nor has it examined how the proposed pipeline segment could affect the lifespan of an existing interconnected pipeline system. *Id.* As the Commission explained, the proper scope is to "look[] at whether the applicant has explained the need for the construction or relocation of the segment or segments

being proposed and, where alleged, has considered the capacity and safety issues presented by the use of the existing pipeline segment that is proposed for improvement." *Id.* at 62–63. The Commission found that the first issue is whether there is a public need to carry out the Replacement Project, and does not concern the already approved, existing pipeline "that is merely interconnected with the segment that is the subject of the application." *Id.* at 63. Or, put simply, "[t]he public need for the existing portions of Line 5 has been determined. The public need for the Replacement Project has yet to be determined." *Id.*

Regarding the required MEPA analysis, the Commission found that consideration of greenhouse gases (GHG) as a pollutant was appropriate. *Id.* at 66. The Commission found that "GHGs are pollutants within the scope of the clear language of MEPA, and thus the parties are free to introduce evidence addressing the issue of GHG emissions and any pollution, impairment, or destruction arising from the activity proposed in the application. MCL 324.1705(2); MCL 24.272. While the project under consideration is limited to the 4-mile section of the pipeline described in the application, this pipeline section would involve hydrocarbons that may result in GHG pollution that must be subject to MEPA review." *Id.* at 66–67. The Commission reasoned that:

> At this early stage of the proceeding, the Commission is not persuaded that it should prohibit arguments and evidence addressing what the appropriate point of comparison is for any pollution, impairment, or destruction of Michigan's natural resources resulting from the proposed Replacement Project. Such questions on the feasibility and prudence of alternatives – both in terms of alternative pipeline and non-pipeline shipping arrangements and alternatives to the products

> being shipped – are inherently questions of fact well suited to the development of record evidence. [*Id.* at 68–69.]

Therefore, the Commission largely upheld the ALJ's rulings on Enbridge's motion in limine but provided for evidence related to GHGs resulting from construction and operation, and from the products transported through the pipeline portion at issue in the Project.

C. The Commission's December 1, 2023, Order

The Commission found that "[b]ased on a review of this record evidence, the Commission finds that as noted by Enbridge, the Staff, and the Associations, the First, Second, and Third Agreements and Act 359 demonstrate that there is a public purpose and public need to replace the dual pipelines with the Replacement Project." *In re Enbridge Line 5 Application,* MPSC Case No. U-20763, 12/1/2023 Order, p 300, F#1454. In assessing the public need for the Project and reviewing the dangers and triggering events that underlie the Application, the Commission referenced the Dynamic Risk report provided by Enbridge, stating:

> the Principal Threats that were found to contribute to the operating risk on the existing 20-[inch] Straits Crossing segments are, in order of decreasing contribution, anchor hooking, incorrect operations, vortex-induced vibration (VIV), and spanning stress. . . . As shown in Figure ES-4, the dominant threat, representing more than 75% of the annualized total (all-threat) failure probability, is that of anchor hooking caused by the inadvertent deployment of anchors from ships traveling through the Straits. [*Id.* at 293, quoting Exhibit ELP-24, p 28.]

The Commission also reviewed the Commission Staff's analysis, stating that:

> [t]he Staff recognized that, currently, an anchor strike to the dual pipelines poses a risk and requires the implementation of numerous measures to mitigate that risk. The Staff stated that it analyzed the

> comparative risk of operating the dual pipelines with the Replacement Project, evaluated the Act 16 criterion, and considered the environmental impact of the Replacement Project. The Staff concluded that the Replacement Project meets the public need, is in the public interest, and "is the best option out of the alternatives." [*Id.* at 166–167.]

Explaining the dangers of maintaining the status quo, the Commission pointed to Staff's argument that the status quo "leaves the dual pipelines in their current position, which is vulnerable to anchor strikes as was illustrated by the damage that occurred in April 2018 and June 2020."[2] *Id.* at 175. Furthermore, any rupture to the dual pipelines would result in a direct release of natural gas liquids (NGLs) and light crude oils in the waters of the Straits. *Id.* By constructing the tunnel housing the replacement pipeline, "[t]he Staff contends that such a review reveals a clear reduction to overall risk, particularly with respect to "anchor hooking, vortex-induced vibration from currents in the Straits, and spanning stress." (Citation omitted.) Additionally, the Staff asserts that if the Replacement Project is constructed, the exterior of the replacement pipe segment can be visually inspected more easily, and the tunnel will offer secondary containment." *Id.* at 281.

The Commission began its discussion of the public need for the Replacement Project by noting the Michigan Supreme Court's 1954 finding that the construction

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[2] The details of these events are provided in the record at volume 12 TR 1724–1725, F#1070. Regarding the 2018 incident Staff witness Travis Warner explained that "it was determined that the damage to ATC's and Enbridge's infrastructure in the Straits was caused by an anchor from a vessel that was inadvertently dropped and dragged through the Straits" and regarding the June 2020 incident witness Warner explained that "The Enbridge report entitled, "Investigation of Disturbances to Line 5 in the Straits of Mackinac Discovered in May and June of 2020" supports a conclusion that damage was caused by a cable suspended from a surface vessel."

and operation of Line 5, was "for a public use benefiting the people of the State of Michigan." *Lakehead*, p. 37. Further, as noted in the April 21 order, the Commission reaffirmed its finding that "the first issue is whether there is a public need to carry out the Replacement Project, a project to replace the dual pipelines with a new pipeline in a tunnel, and does not concern approved, existing pipeline that is merely interconnected with the segment that is the subject of the application. The public need for the existing portions of Line 5 has been determined. The public need for the Replacement Project has yet to be determined." *In re Enbridge Line 5 Application,* MPSC Case No. U-20763, 4/21/2023 Order, p 63, F#0713.

After evaluating alternative proposals for the products shipped through the pipeline and considering the risks and alternatives for protecting the environment in the vicinity of the Straits, the Commission concluded that Enbridge had established "both the public need for the products to be shipped through the Replacement Project and the need to relocate the Straits Line 5 segment inside the tunnel, and as such, has established the public need for the Replacement Project." *In re Enbridge Line 5 Application,* MPSC Case No. U-20763, 12/1/2023 Order, p 305, F#1454.

Having satisfied the first prong of its analysis of Act 16 applications—public need—the Commission turned its attention to the other two prongs of the requisite analysis: whether (2) the proposed pipeline is designed and routed in a reasonable manner; and whether (3) the construction of the pipeline will meet or exceed current

safety and engineering standards, and found that the proposed project satisfied both of these remaining prongs. *Id.* at 322, 325.

Regarding the MEPA review, the Commission analyzed various alternatives to the Project put forward by the parties. For example, regarding a "no-pipeline" alternative advanced by ELPC and MEC (ELPC initial brief, pp 50–51; MEC Reply brief, pp 39–40) the Commission found that simply shutting down the pipeline would likely result in an *increase* in GHGs because a shutdown would do nothing to alter the demand for those products that must still be met. The Commission explained:

> Indeed, if the current GHG emissions associated with the product transported by the dual pipelines are compared with the GHG emissions that would be produced following a shutdown of the dual pipelines, the Commission finds that a shutdown would actually result in a significant increase in GHG emissions, at least in the short term, as a shutdown of the dual pipelines would not immediately alter demand for the products shipped on Line 5, and consequently the modes of transportation for crude oil and NGLs would shift to rail and truck. [12/1/2023 Order, p 344.]

The Commission noted that the Staff found that shutting down the pipeline and transporting similar volumes to meet the existing demand would result in "approximately 160% more GHG emissions than the shipment of these products via pipeline." *Id.* at 346; MPSC Case No. U-20763, 12 TR 1792, F#1070. The Commission also found that a no-action alternative was untenable, because "anchor hooking" was determined to be the dominant primary threat . . . that could cause rupture . . . and that in the last five years the dual pipelines have experienced two incidents . . . that could have resulted in catastrophic release of Line 5 products into the Straits." *Id.*

Regarding alternate routes, the Commission found, referencing the Dynamic Risk's Alternatives Report, that the other proposed route "exhibits a greater failure frequency and safety risk when compared to the tunneling alternative." *Id.* at 338. Similarly, other proposals, such as suspending the pipeline from the Mackinac Bridge, a trenching alternative, and others were considered and ultimately found to be either unfeasible, imprudent, or exposed the Straits to significant other risks. *Id.* at 337–339. Concluding its analysis, the Commission noted a rupture of the currently operating dual pipelines would be "catastrophic" for the Great Lakes, result in well over a billion dollars in damages and result in "long-lasting health, environmental, and cultural damages." *Id.* at 347; MPSC Case No. U-20763, 12 TR 1717–17178, F#1070. Therefore, after a thorough MEPA analysis, the Commission found that there are no feasible and prudent alternatives to the Replacement Project. The Commission then approved Enbridge's application.

D. The Court of Appeals' February 19, 2025, Opinion

In 2025, the Court of Appeals affirmed the Commission's December 1, 2023, Order approving the Replacement Project. The Court rejected the Appellants' claim that the Commission erred by granting Enbridge's Motion in Limine, providing:

> We find no basis upon which to reverse the PSC's final order, in light of (1) prior statements made by the PSC (in its April 21, 2021 order), which reflected a finding that the public need for Line 5 had already been established; (2) the incorporation of this April order into the final order; (3) the deferential standard of review to be applied by this Court; and (4) the fact that the PSC did eventually allow evidence regarding the need for Line 5 to be introduced. [*In re Application of Enbridge Energy to Replace and Relocate Line 5*, ___ Mich App___(2025), 2025 WL 554844*18–19.]

Regarding the Commission's Act 16 analysis, the Court of Appeals explained that it ordinarily upholds the PSC's interpretations of its own orders so long as the interpretation is reasonable or has support on the record. *Ass'n Businesses Advocating Tariff Equity v Pub Serv Comm,* 219 Mich App 653, 662 (1996). *In re Enbridge,* Mich App at *12. Furthermore, "No party argues that the Commission's adopted three-part "test" of need, reasonableness of design and routing, and safety is unreasonable. As such, public need in general was at issue." *Id.* Regarding the establishment of that public need, the Court of Appeals explained, "It is difficult to conclude that the PSC abused its discretion, see *Nat'l Wildlife Federation*, 306 Mich App at 342, by concluding that the need for Line 5 as a whole was simply not a salient issue in the proceedings because the application was for the Replacement Project, not for the construction of Line 5 as a whole." *In re Enbridge,* Mich App at *12. Regarding the Commission's April Order granting Enbridge's Motion in Limine, the Court noted that "nothing in the Commission's 1953 order set a termination date for the operation of Line 5, and no party disputes Enbridge's legal authority to continue to operate the other 641 miles not at issue in this proceeding." *Id.* at *13. Consequently, the "already established public need for Line 5 was a piece of the puzzle demonstrating a need for the Replacement Project." *Id.* The Court affirmed the Commission's order, noting that:

> On balance, we conclude that affirmance is appropriate, not only because of the wording of the April order and the deferential standard of review but also because, as will be discussed more fully *infra*, the Commission, despite its ruling on the motion in limine, did in fact end up allowing intervenors the opportunity to present evidence of possible alternatives for Line 5. Moreover, in its analysis of the "public need"

> issue, the Commission considered the viability of those alternatives. See *In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), pp 293–296, 300–302. [*Id.* 2025 WL 554844, at *14.]

Regarding the Commission's MEPA analysis, the Court first differentiated between the appropriate standard of review for direct MEPA claims filed in circuit court as opposed to the Commission's application of MEPA requirements and the Court of Appeals' review of the Commission's order. The Court of Appeals explained that the de novo review in MEPA cases discussed in this Court's holding in *West Mich Environmental Action Council v Natural Resources Comm,* 405 Mich 741 (1979) pertained to MEPA actions filed in circuit court, as opposed to the present case which "is not a separate MEPA action but a MEPA analysis made in the context of a PSC permitting decision." *In re Application of Enbridge Energy to Replace and Relocate Line 5*, ___ Mich App___(2025), 2025 WL 554844, at *23. Additionally, the Court of Appeals explained that unlike the circuit courts at issue in those cases, it was not a finder of fact. *Id.* Additionally, in the case below, there was no suit under MEPA in circuit court, which appeared to be the triggering event for the court's de novo review. *Id.* Following this analysis of the requirements of MEPA in the Court of Appeals' review of Commission orders, the Court explained that the proper standard of review was lawfulness and reasonableness. *Id.*

Following the discussion of the proper standard of review, the Court of Appeals explained that, in accordance with the plain language of MEPA Section 1705(2), the Commission properly looked to the conduct at issue in Enbridge's Application—the Replacement Project. *Id.* at *15. And based on its review, the

Commission "explained why the alternatives [to the conduct] that were presented were not feasible and prudent in its view. *Id.* at *16. The Court concluded that the Intervenors were allowed to provide comprehensive evidence regarding alternatives, which the Commission did fully consider, and based on its analysis its decision was supported by record evidence. *Id.* at *17. Therefore, the Court of Appeals found that the Commission satisfied both its Act 16 and MEPA requirements and affirmed the Commission's order. *Id.*

STANDARD OF REVIEW

In Section 25 of the Railroad Act,[3] the Legislature identified how MPSC orders are to be reviewed by providing that all rates, classifications, regulations, practices, and services fixed by the Commission are deemed prima facie lawful and reasonable. MCL 462.25. Further, Section 26(8) of the Railroad Act places a heavy burden of proof on an appellant to show by clear and satisfactory evidence that the Commission's order is unlawful or unreasonable. MCL 462.26(8).

This Court has explained how difficult it is for an appellant to prove that an MPSC order is unlawful or unreasonable. In *In re MCI Telecommunications Complaint,* 460 Mich 396, 427 (1999) (quotation omitted), this Court said that to find a Commission order unlawful "there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of

[3] The Railroad Act is a source of authority under MCL 460.54 and MCL 460.4, which passed authority from the Michigan Railroad Commission to the Michigan Utilities Commission to the Michigan Public Service Commission.

discretion." Likewise, "[t]he hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the PSC may operate." *Id.*

While an appellant always has the burden of proving that a Commission order is unlawful or unreasonable, courts may apply different standards of review when evaluating the appellant's arguments depending on the nature of the agency decision involved. *In re Rovas Complaint*, 482 Mich 90, 108–109 (2008) ("[C]ourts should carefully separate the different agency functions under consideration and apply the proper standard of review for each."). For judicial or quasi-judicial decisions where a hearing is required, the agency's decision must be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Dowerk v Twp of Oxford*, 233 Mich App 62, 72 (1998). Even in these "substantial evidence" cases, however, Michigan courts have held that Section 26 of the Railroad Act does not grant courts all of the powers traditionally vested in a court of equity, nor the power to make de novo findings of fact. See *In re Rovas Complaint*, 482 Mich 90, 101 (2008). Rather, a court should not substitute its judgment in place of the Commission's factual findings or regulatory judgment. *Consumers Power Co v Public Service Comm*, 196 Mich App 687, 691 (1992).

Similarly, the MPSC's legislative or quasi-legislative judgments may not be overturned unless the Commission exceeded its statutory authority or abused its discretion. See *In re Rovas Complaint*, 482 Mich at 100–101; see also *Coffman v State Board of Examiners in Optometry*, 331 Mich 582, 589–590 (1951). An abuse of

discretion is one that is "outside th[e] range of principled outcomes," and does not occur unless "an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision." *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254 (2005).

ARGUMENT

I. MEPA fulfilled the Constitutional directive to protect Michigan's natural resources. In doing so, the Legislature included the protections afforded Michigan's waters and submerged lands in the public trust doctrine as part of its extensive protection of the State's other natural resources.

A. The enactment of MCL 324.1705(2) incorporated the public trust doctrine, rather than requiring a separate, standalone analysis, as part of its broader, comprehensive protection of natural resources.

The answer to this Court's question asking whether the enactment of MEPA meant that the Commission must also comply with the common-law public trust doctrine and perform a separate public trust analysis is no. The Legislature did not require redundancy. "Michigan's Environmental Protection Act marks the Legislature's response to our constitutional commitment to the 'conservation and development of the natural resources of the state….' " *Ray v Mason Country Drain Commissioner,* 393 Mich 294, 304 (1975). The Michigan Environmental Protection Act implements the command of the Michigan Constitution to the Legislature: "[t]he conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the

air, water and other natural resources of the state from pollution, impairment and destruction." Const 1963, art 4, § 52. The Constitutional directive's broad language works to bring almost all, if not the totality, of Michigan's natural resources into the ambit of the Legislature's statute responding to the directive. And the directive is "for the protection of the air, water, and other natural resources, of the state from pollution, impairment and destruction." MEPA's mirroring of this language demonstrates that MEPA directly implements this command.

MEPA is wide-ranging and intended to safeguard the broad swath of Michigan's natural resources, not just the interest traditionally contemplated in the public trust doctrine. The MEPA statute effectively subsumes the common law public trust doctrine. MEPA in effect is the statutory equivalent of, or the enactment via statute of, the common law public trust doctrine. Moreover, MEPA is more comprehensive, broad and encompasses not just the navigable waters of Michigan and related lake and stream beds, which is the primary focus of the public trust doctrine, but the air and land as well. To require the Commission to perform a common-law public trust analysis for which it possesses no statutory authority, after or concurrent with a MEPA analysis, would require the Commission to essentially conduct the same work twice, albeit in a more comprehensive and thorough manner via MEPA, and then again in accordance with the doctrine. Section 1705(2) of MEPA states that if "the alleged pollution, impairment, or destruction of the air, water or other natural resources, or the public trust in these resources" is determined to exist, then the proposed "conduct shall not be

authorized" if there is a feasible and prudent alternative. By definition, MEPA casts a wide net, broadly encompassing Michigan's natural resources in contrast to the common-law public trust doctrine which focuses primarily on the State's navigable waters and their associated submerged lands.

B. The common-law public trust doctrine is limited to protecting Michigan's citizen's traditional rights in the waters and bottomlands for hunting, fishing, boating for commerce or pleasure.

The common-law public trust doctrine provides that the waters of the Great Lakes, and the submerged land under those waters are held in trust by the State for the benefit of the people of Michigan. Michigan holds title to those waters and lands. As this Court explained in *Glass v Goeckel*, the public trust doctrine from the common law of the sea applies to the Great Lakes. *Glass v Goeckel,* 472 Mich 667, 678 (2005). Explaining what specifically needed to be protected through the application of this doctrine, this Court stated that the State serves as a trustee to protect the public rights in the waters as related to boating, fishing and hunting for commerce or pleasure:

> Accordingly, under longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public. The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure. [*Id.* at 679–670.]

This Court explained the State's trustee responsibility in an earlier case, *Nedtweg v Wallace*, 237 Mich 14 (1926). In *Nedtweg*, this Court defined the responsibilities and whether or not a trustee of such a public trust required a

complete prohibition of private use or development of the submerged lands. This Court first explained what the public trust is, stating:

> What is this trust so often mentioned in the books, frequently cited in legislation, and recognized by our Legislature, by reference, in acts relative to such beds?... Much is answered by recognition of the distinction between the proprietary title and obligations of sovereignty. The beds of navigable waters, like any other part of the public domain, may pass, by grant, or the common-law rule of riparian ownership, to individuals; but the sovereign power retains, because inalienable, all public rights of navigation therein or thereover. There has arisen, out of centuries of effort, limitation of crown prerogative, parliamentary action, numerous adjudications, common necessity, and public forethought, a rule beyond question, impressing rights of the public upon all navigable waters. [*Id.* at 16.]

In short, beds of waterways can pass into private use or ownership, but the right of navigation of the waterways always stays with the state for public use and benefit. Explaining that safeguarding the public trust did not entail a complete prohibition on private use, this Court stated that:

> But at common law the crown and Parliament recognized the distinction between the governmental power essential to be retained to carry out the trust and the mere proprietary interest possible of being parted with, without at all preventing governmental control. The state may not, by grant, surrender such public rights any more than it can abdicate the police power or other essential power of government. *But this does not mean that the state must, at all times, remain the proprietor of, as well as the sovereign over, the soil underlying navigable waters.* If this were the rule, then there could exist no riparian rights in this state in navigable rivers. The rule is that the state may grant the jus privatum but never alienate the jus publicum. *The state of Michigan has an undoubted right to make use of its proprietary ownership of the land in question, by lease to private persons* and need only hold sovereignty over its use to the end that the public shall enjoy the benefit of the trust. [*Id.* at 17 (emphasis added.)]

This Court succinctly captured this point in that same case, by explaining that the Northwest Ordinance of 1787, from which the public trust doctrine derives in part,

"accomplished no more than to preserve the rivers and lakes as common highways and in no sense prevents the state from granting the soil under navigable waters to private owners." *Id.* at 20. As shown in these cases, from several centuries ago up to the current era, the common-law public trust doctrine focused on the protection of the state's waters for the use of citizens to navigate, hunt, fish, or otherwise utilize the waters and associated lakebeds for recreation or commerce, but did not constitute a total or complete prohibition on economic use and activity of these lakebeds.

This Court provided the mechanics for allowing for economic activity while still maintaining the trust for the benefit of all of Michigan's citizens; it could convey portions of lakebeds to either improve that portion of the lakebed, or if the conveyance does not result in harm to the public trust in what's left. In *Obrecht v National Gypsum Co*, 361 Mich 399 (1960), this Court addressed a dispute between lakeside cottage owners and a gypsum mining company that built and operated a wharf near those owners to load mined gypsum onto steamers, finding that the State's title to and rights in the lakebed were supreme and the rights of a wharf operator to build a dock to load gypsum onto steamers could only be exercised with the regulatory assent of the State.

While this Court reiterated that all three branches of the state government are "sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of five Great Lakes," the Court also explained how portions of the lakebeds can be "alienated" and "devoted to private use" pursuant to either of two

exceptions. *Id.* at 412–413. The first exception is that the submerged land is conveyed in a manner that improves the interest held, meaning in a manner that improves the interest held in public trust. The second exception is where the State determines that the "disposition can be made "without detriment to the public trust in the lands and waters remaining.' " *Id.* This Court acknowledged that the State had previously accomplished exactly that in conveyances to Detroit Edison Company, Consumers Power Company, Abitibi Corporation, and to the Mackinac County board of road commissioners. *Id.* at 413.

The public trust doctrine therefore preserves the public's rights as they relate to navigation, travel, boating, fishing, and hunting for recreation or commerce. The State holds title to the waters and associated bottomlands, and that title must always be held for the benefit of the citizens of the State to exercise their traditional rights. However, under the public trust doctrine, conveyances of bottomlands can be made so long as the public trust in the remaining portion is maintained for the benefit of the citizens of Michigan.

As demonstrated in subsection A, MEPA's scope is broad, encompassing Michigan's natural resources, effectively subsuming the common-law public trust doctrine, which focuses primarily on the State's navigable waters and their associated submerged lands.

C. FLOW's argument that impairment of the State's natural resources and the public trust doctrine must be concurrently assessed fails to adhere to the plain language of Section 1705(2).

FLOW's attempt to fragment Section 1705(2) to assert that the natural resources consisting of "air, water, or other natural resources" must be evaluated on the one hand and the public trust on the other, as if these are two silos of concerns that should be simultaneously evaluated, should fail. (FLOW brief p 22–23.) Such an interpretation flies in the face of the plain language of the statute, because parsing out phrases while omitting the word "or" between the listed natural resources and the "public trust" fails to capture the actual plain meaning of the entire subsection and skews its meaning. As described above, the section lists natural resources and the public trust, and if any one of those are impaired, then the analysis shifts to feasible and prudent alternatives. Nothing in the plain language of that provision requires a separate, standalone public trust analysis.

In this case, the Commission's approval of a permit to repair and replace a small portion of the pipeline hardly constitutes a conveyance of what the State holds in trust, as described in *Obrecht*. But the Commission nevertheless undertook a proper and thorough analysis under MEPA, which by its very words incorporates the safeguarding of the public trust beyond simply waterways and lakebeds, and protects those resources themselves. MEPA, in fact, provides a more rigorous analysis than the public trust doctrine alone. As stated in Section 1705(2), "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct

shall not be authorized or approved that has or is likely to have such an effect…" Any harm to any of those natural resources, including the public trust, immediately puts a stop to the proposed conduct, and propels the analysis toward an examination of whether there are any feasible and prudent alternatives. The statute does not say harm to "air, water, or other natural resources" **and "**the public trust in these resources." In other words, the statute does not require a concurrent public trust analysis. Any harm to *any* one of those resources *or* the public trust is enough to stop the conduct in question and engage in an alternatives analysis. So, hypothetically, if a scenario arose where a resource was impaired but the public trust was not, MEPA would still spring into action halting the offending conduct until an alternatives analysis could be completed. This Court explained, in *People v Gardner*, 482 Mich 41 (2008), that "the touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written. Accordingly, when statutory language is unambiguous, judicial construction is not required or permitted." *Id.* at 50 (internal quotation marks and citation omitted.) The plain meanings of, and the difference between, "and" and "or" is apparent. "And" is utilized to form a conjunction requiring both (or all) conditions to be met, while "or" functions to indicate alternatives in which if any constituent alternative condition is met, the statement is executed.[4] In Section 1705(2), it is

[4] *And*, Merriam-Webster, https://www.merriam-webster.com/dictionary/and (last visited November 26, 2025); *Or,* Merriam-Webster, https://www.merriam-webster.com/dictionary/or (last visited November 26, 2025.)

impairment of "air," or "water," or "other natural resources," "*or* the public trust in these resources" that halts the conduct in question and initiates an alternatives analysis. The plain language of Section 1705(2) clearly shows that rather than requiring the Commission to adhere only to the public trust doctrine, it required the Commission to apply a more exacting standard, which by the statute's own words, subsumes the pre-existing common law public trust doctrine, and adds additional natural resources under the umbrella of the state's protection.

This Court has explained that "where [the] language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Morey,* 461 Mich 325, 330 (1999). Therefore, given the plain, unambiguous language of Section 1705(2), reliance on legislative history is impermissible.

Nonetheless, even looking at legislative history, FLOW's reliance on MEPA's legislative history does not support its preferred interpretation. (FLOW Brief, pp 24–27.) If anything, it simply highlights that the public trust was one of several factors, along with the state's natural resources themselves, for which the determination of an impairment could be made. See FLOW Brief, p 26, discussion of Professor Joseph Sax, author of the bill. Professor Sax, bill author states "the court may act to protect the public trust or air, water, and other resources." (FLOW brief, p 26, emphasis in original.) The language adopted by the Legislature states that it is the "air, water, or other natural resources, or the public trust" that could

be impacted which would trigger the protective mechanism of the provision. Nothing in the legislative history contravenes the import of the plain language of the statutory text.

However, both the public trust doctrine and MEPA direct the analysis to the same place—consideration of alternatives. As this Court articulated in *Obrecht,* an analysis of "detriment" to the resources affected is required prior to any disposition of lands protected by the public trust doctrine. *Obrecht,* 361 Mich at 412–413.

In this case, the Commission did consider the public trust. While perhaps not incanting the words "public," and "trust" as frequently or in the manner and place FLOW prefers, the Commission nevertheless considered exactly that. Among the 352 pages of its final order considering the expert testimony and evidence of scores of intervenors, the applicant and the Commission Staff, the Commission considered the following impacts:

> 1. Increased noise generated from construction operations that may impact nearby residences and fauna.
>
> 2. Increased dust/particulates generated during construction that may impact nearby residences and fauna and possibly impact surface water.
>
> 3. Increased light generated from construction operations that may impact nearby residences and fauna.
>
> 4. Increased light from construction and operation of the project that could have potential impacts to the Headlands International Dark Sky Park located south and west of the southern workspace.
>
> 5. Surface water impairments:
>
> a. Impacts such as dewatering operations during construction of the tunnel.
> b. Impacts associated with construction equipment traffic.

c. Impacts associated with using lake water for hydrostatic testing of the pipe.

6. Environmental impairments to local residences and fauna associated with construction.

7. Air quality impacts associated with use of additional internal combustion engines during construction and operation.

8. Groundwater impacts:
a. Impacts to groundwater during construction due to spills of hazardous materials from construction equipment.
b. Impacts to drinking water wells due to construction.
c. Impacts to shallow groundwater aquifers and groundwater quality during trenching, excavation, and backfilling maintenance activities.
d. Impacts to surface drainage and groundwater recharge patterns altered by clearing, grading, trenching, and soil stockpiling activities, potentially causing minor fluctuations in groundwater levels and/or increased turbidity, particularly in shallow surficial aquifers.
e. Reduced infiltration and increased surface runoff and ponding due to soil compaction caused by heavy construction vehicles.

9. Environmental impacts to surface soils, vegetation, and surface water due to storage and handling of fuels/hazardous liquids during construction and operation.

10. Impacts to local flora and fauna due to the introduction of aquatic invasive animals and plants during construction. [*In the Matter of the Application of Enbridge to Replace and Relocate Segment of Line 5*, MPSC Case No. U-20763, 12/1/2023 Order, pp 89–90.]

After reviewing the record, the Commission agreed that these constituted impairments under MEPA, stating, "the Commission agrees, and also finds that the 10 impairments identified by Ms. Mooney are environmental impairments pursuant to MEPA." *Id.* at 329. MCL 324.1705(2) incorporates the protections of the public trust doctrine eliminating redundancy. Therefore, a separate, standalone common-

law public trust analysis is not required, when the statute already provides for that same analysis in its provisions.

FLOW alleges a public trust doctrine violation based on this Court's holdings in *Glass*, *Nedtweg*, and *Obrecht*, but fails to demonstrate any practical impairment or effect on the rights protected by the public trust by this project. After the State enacted 2018 Public Act 359 creating the Mackinac Straits Corridor Authority, the Department of Natural Resources granted the easement for the tunnel route, and the Department of Environment Great Lakes and Energy found no likely impact on the lake bed,[5] Appellants assert concerns about impingements on the public trust but fail to explain how a tunnel ranging from 60 feet to 370 feet below the bedrock, housing a pipeline thereby reducing the chance of a catastrophic spill, impacts any of the public trust rights in any meaningful way. If anything, the rights in what remains, separate from the project, is more than maintained. *Obrecht*, at 412–413. It is protected.

[5] EGLE Responsiveness Summary, Exhibit A-18, F#1041, pp81: protect, and the state through the MDNR has previously decided that the current operation of the dual pipelines violates the public trust doctrine. EGLE agrees with and adopts the finding of the MDNR. The construction activities proposed under Part 303 and Part 325 of the NREPA for this application include wetland fill and placement of structures and fill on Great Lakes bottomland and construction of a tunnel beneath the lakebed in the Straits of Mackinac, specifically. Feasible and prudent alternatives have been thoroughly evaluated to ensure that impacts to wetlands and bottomlands have been minimized through the location and methods. The tunnel itself will be placed in the bedrock, with depth to the tunnel below grade ranging from 60-370 feet. *The proposed project does not authorize adverse impacts to the lakebed and is not anticipated to impact navigation, hunting, fishing, or water quality as protected under the Public Trust doctrine*. (emphasis added.)

FLOW argues that the public would be unable to engage in the very activities for which the state holds natural resources in trust if "an unprecedented pipeline rupture" were to occur but nowhere mentions the record in the case below where evidence demonstrated that the tunnel project would *reduce that possibility to near zero*. Instead, the status quo imperils those very same resources significantly more.

FLOW points to cases from other jurisdictions, such as Hawaii, arguing that its supreme court vacated agency decisions that "failed to adequately evaluate potential harm to the states waters" but that's exactly what the Commission did: evaluate harms to the State's waters and other resources. (See FLOW brief, pp 19–20.) And then citing *Obrecht*, FLOW asserts that no part of the lakebeds can be alienated in contravention of the public trust, all while overlooking that MEPA specifically addresses the public trust. The Commission's fealty to the requirements of MEPA incorporated the protection of the public trust in its analysis of impairments. While not intoning the specific words demanded by FLOW, the Commission, by fulfilling its MEPA obligations, met the long-standing requirements of the public trust doctrine. FLOW is wrong when it argues that the Commission approved the application "without any consideration of the public trust" FLOW brief, p 21. Moreover, the words of the statute address something essential that FLOW fails to address. Regardless of which specific element listed in the statute is impaired, whether it be air, or water or the public trust, the analysis mandatorily goes to an evaluation of feasible and prudent alternatives. The Commission has no

latitude to ignore the statutory script. Regardless of which listed element of the statute is affected, the Legislature demanded, by the plain words of the statute, that the conduct be halted if there was a feasible and prudent alternative to the conduct applied for. This point is addressed more fully in the following section.

II. The Commission, as a state agency operating within the bounds of its statutorily prescribed authority, cannot exercise any common law powers.

The Commission must operate within the parameters created by the Legislature and act in accordance with the applicable statutes in each case. The Commission may only exercise statutory authority bestowed by the Legislature. Those are its limits. It can do nothing beyond that. The statute lists factors that could be determined. Determining all of them: air *and* water *and* other natural resources, *and* the public trust in those resources is not mandatory. It does not command the Commission to determine whether there is an impairment of all of the listed factors. The impairment of at least one of these factors is sufficient to halt the conduct and trigger an alternatives analysis.

"The MPSC has no common-law powers; it has only the authority granted to it by the Legislature." *Ass'n of Bus Advocating Tariff Equity v Consumers Energy Co*, 505 Mich 97, 119; 949 NW2d 73 (2020). Although the MPSC may interpret the statutes it administers, "[w]hat authority a statute gives to an agency is a matter of statutory interpretation," *id*., and is thus a function exclusively retained by courts, *Rovas*, 482 Mich at 103 (an agency's interpretation is due "respectful consideration" but "is not binding on the courts"). To define the authority granted to the MPSC,

"the court's ultimate concern is a proper construction of the plain language of the statute." *Id.* at 108. Or, put differently, the statutes applicable to the Commission must be strictly construed, as a doubtful or implied power does not exist. *Union Carbide v MPSC*, 431 Mich 135, 146–147 (1988). Furthermore, the Commission possesses no common law powers: "[a]s a creature of the Legislature, the Commission possesses only that authority bestowed upon it by statute," and "the power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist." *Id.* at 151. Because the Commission's authority derives from statute and the Commission possesses no common-law powers to enforce the public trust doctrine, the doctrine does not apply to the Commission.

Yet, through the application of MEPA, compliance with the public trust doctrine is accomplished because MEPA incorporates the doctrine. Compliance with MEPA protects the same interests the common-law public trust doctrine operates to protect. By following MEPA, compliance with the public trust doctrine is accomplished because MEPA protects those same interests similar to the stream and lakebed conveyances to utilities and other corporations highlighted by this court in *Obrecht*. Following the principle in *Obrecht*, the public trust rights are properly safeguarded if they can still be exercised in what remains after the conveyance. Following MEPA checks the public trust box. But the Commission has no power to go outside of MEPA and conduct its own standalone public trust analysis separate from all the other factors for consideration in the MEPA

provision. As detailed in the section above, the Legislature's enactment of MEPA houses the public trust doctrine in a framework that protects Michigan's other natural resources not protected by the public trust doctrine alone. By doing this, the Legislature accounted for, and respected the fact that the Commission is "a creature of the Legislature" and possess no common law powers of its own. *Union Carbide* at 146. However, nothing about this leaves the citizens of Michigan at risk of harm to their natural resources. As mentioned, the statute subsumes the public trust doctrine, and safeguards Michigan's natural resources through the MEPA required analysis of feasible and prudent alternatives.

Far from eviscerating the State's obligation as trustee to protect the waterways and lakebeds of Michigan, the Commission's application of MEPA met that obligation.

III. Requiring the MPSC to separately apply the common-law public trust doctrine falls outside the Commission's statutory authority and would be unlawful.

This Court, in *Union Carbide,* admonished, "[t]he Michigan public utilities commission is an administrative body created by statute and *the warrant for the exercise of all its power and authority must be found in statutory enactments*." 431 Mich at 146 (emphasis added.) Therefore, the only form of public trust analysis that the Commission may undertake is the one provided for in MCL 324.1705(2), which requires the Commission to bar conduct if any natural resources or the public trust in the resources are impaired, unless a feasible and prudent alternative existed. That is what the Commission did.

The Commission examined the record, found that the project would cause environmental impairments, and investigated the alternatives for feasibility and prudence. The Commission followed MEPA's statutory directive exactly. The Court of Appeals was correct in asserting that the Commission is a "creature of the Legislature, possessing no common law powers; it "possess only that authority bestowed upon it by statue." *Union Carbide v Public Serv Comm,* 431 Mich 435, 146 (1988.)". *In re Enbridge,* Mich App at *14. Because the Commission is an administrative body created by statute, the warrant for the exercise of all its power and authority must be found in statutory enactments. (See for example MCL 460.6.) The Commission is not empowered to undertake common-law actions. To the extent the public trust doctrine applies in this case, given that the underlying action is an Act 16 case within the Commission's purview, the Commission can only consider the doctrine through MEPA's provisions. The Commission did this, and after a thorough analysis of the environmental impairments, and the proposed alternatives, issued its order.

FLOW's reliance on this Court's holdings reiterating the State's obligations to protect the public trust do not address the prohibition against an agency acting outside of its statutory authority. FLOW relies on broad pronouncements of the protection of public's rights to hunt, fish, boat, or otherwise enjoy waterways and bottomlands for recreation or commerce, but fails to explain why, how, and in what circumstance—the mechanics of how a state agency should ignore its responsibility to operate within its legislatively conferred statutory authority, and operate in a

no-mans-land for which there exists no authority. Or in other words, because the state has broad, general responsibilities to protect the rights in the public trust, FLOW appears to believe the Commission should simply engage in analyses for which it has no authority. As mentioned several times in this brief, this Court frowns on statutory authority-free regulatory action. See *Union Carbide*, 431 Mich at 146. FLOW suggests that the Commission do exactly that. Relying on this Court's assertion in *Obrecht* that all three branches of the state government are "sworn guardians" of the public trust, FLOW argues that "legislative authorization is not needed for executive branch agencies such as the MPSC to consider the public's rights in public trust resources…" (FLOW Brief, p 31.) However, recitations of broad duties on the part of the State do not create specific exemptions for any particular agency to depart from its statutory limitations. And all of this ignores the fact that by following MEPA the Commission protected the selfsame interests protected by the public trust doctrine. FLOW's argument amounts to petitioning this Court to require the Commission to engage in a redundant common-law analysis, for which it possesses no statutory authority. Such an argument should fail.

IV. The Court of Appeals applied the correct standard of review because the analysis conducted by the Commission was for feasible and prudent alternatives consistent with the reasonable requirements of public health, safety, and welfare.

This Court asks whether the Court of Appeals erred by applying a deferential standard of review rather than determining de novo whether the conduct in

Enbridge's application would impair the State's natural resources under Section 1705(2) of MEPA. But that question was already conclusively answered by the Commission in the record below. There was no dispute among adversarial parties in the case below that the conduct in question would cause negative environmental consequences as contemplated by MEPA. The Commission identified at least 10 distinct environmental impairments that would result from the project, stating "the Commission agrees, and also finds that the 10 impairments identified by Ms. Mooney are environmental impairments pursuant to MEPA." *In the Matter of the Application of Enbridge to Replace and Relocate Segment of Line 5*, MPSC Case No. U-20763, 12/1/2023 Order, p 329. The Court of Appeals recognized that the locus of the case was beyond the initial determination of impairment, and was based on the second clause of MEPA, stating:

> As noted, the PSC concluded that there would be some environmental impairment as a result of the Replacement Project... Accordingly, under MCL 324.1705(2), the PSC was tasked with determining if there was a feasible and prudent alternative. [Opinion, p 24.]

The finding of environmental harm constitutes the first hurdle in MEPA, or the triggering event for the initiation of an alternatives analysis. If there is no impairment of natural resources, then there is no alternatives analysis. The record showed, and the Commission agreed, that natural resource impairment was present. At all levels of litigation in this case, the fact of natural resource impairment was not in serious dispute. Therefore, the crux of this case was the Commission's consideration of proposed alternatives and the Appellants' dissatisfaction with that analysis. Simply being dissatisfied with the Commission's

analysis does not constitute a valid basis for reversing the Court of Appeals or the Commission. Both the plain language of MEPA and this Court's holding in *WMEAC*, demonstrate that the Court of Appeals applied the correct standard of review.

A. The plain language of MEPA supports the standard of review applied by the Court of Appeals.

This Court has explained that if a "statute's language is clear and unambiguous, then… the Legislature intended its plain meaning, and the statute is enforced as written." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63, (2002). The Appellants attempt to predicate their erroneous argument challenging the standard of review applied by the Court of Appeals on the plain text of MEPA's Section 1705(2), which provides:

> In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct 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.

First, nothing in the plain text of MEPA calls for de novo review. The Legislature has clearly stated, with unambiguous language, when it requires de novo review. For example, in the Friend of the Court Act, Act 294 of 1982, the Legislature states, "[t]he court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court." MCL 552.507(4), (emphasis added.) This is simply one of

numerous examples illustrating that when the Legislature intends de novo review, it says so. Nothing of the sort exists in the MEPA statute. To conjure the impression of a de novo review requirement in MEPA, the Appellants paint with too broad of a brush. While quoting this Court's holding in *South Dearborn Environmental Improvement Ass'n v Dep't of Environmental Quality*, 502 Mich 349, 360 (2018), that the Court "must give effect to every word, phrase, and clause" the Appellants fail to do exactly that in their proffered interpretation of Section 1705(2). Nowhere in Section 1705(2) does the Legislature state a requirement for de novo review. The Appellants discuss the meaning of the phrase "in any judicial review," and the word "determine" as they appear in Section 1705(2). (Appellant Tribes' Brief, p 16.) "Determine" as provided in the Appellant's brief, simply means "to find out" or "come to a decision about by investigation, reasoning, or calculation." *Id.*[6] On the other hand, "de novo" means "anew; afresh; or over again." *Black's Law Dictionary*, (12th ed 2024.) To "find out" does not mean "anew" or "a second time." Nevertheless, the Appellants wish to conflate these two meanings in their interpretation of Section 1705(2).

Additionally, while the Appellants' standalone interpretations of these phrases and word are not controversial, the Appellant's are wrong when they fail to apply specificity in what the words apply to in the provision. For example, the Appellants assert, "[r]ather the statute says that reviewing courts themselves shall

[6] Quoting Merriam-Webster, *Determine,* https://www.merriam-webster.com/dictionary/determine (last accessed December 17, 2025.)

"determine" the alleged pollution… and whether feasible and prudent alternatives exist." (Appellant's brief, p 17.) But that is not what is stated in the provision; it does not direct courts to determine, or "find out" the alternatives. The provision plainly says that the impairment must be determined, but it does not say that the court must determine the alternatives. The Commission is the entity best suited to examine which proffered alternative is the most feasible and prudent. The Appellants appear to erroneously believe that courts must "determine" every part of this two-part provision. As this Court has unambiguously explained, and the Appellants themselves reference, this Court "do[es] not read requirements into a statute where none appear in the plain language and the statute is unambiguous." *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125 (2017), quoting *People v Feeley*, 499 Mich 429, 439, (2016). Yet the Appellants appear to be reading a fictitious requirement into the statute that not only shall the courts determine, or find out, environmental impairment, but also the feasible and prudent alternatives. Instead, the provision demands the determination of environmental harm. That part is mandatory if there is a dispute.

But the second part is that the conduct will "not be authorized" under Section 1705(2) if proper alternatives exist. The provision does not mandate that Courts themselves determine what those proper alternatives are. When substantial evidence exists in the record, this Court explained that courts themselves do not make de novo findings of fact. See *In re Rovas, supra.* Aside from the serious logistical problems of courts of general jurisdiction inserting themselves as

factfinders in specialized technical matters for which administrative agencies were created in the first place, it is also simply not what the provision calls for. The plain language of the provision states that the environmental harm shall be determined in any judicial review, and the conduct disallowed if proper alternatives exist. In the case below, the Commission found harm. That is beyond dispute. So, by any measuring stick, the analysis, by statute, goes to evaluating alternatives to determine if a feasible and prudent one exists. The Appellants appear to disagree with the Commission on the types and magnitude of environmental impairments or destruction that might occur, but given the architecture of the statutory provision, it is a distinction without a difference, because the statute requires an evaluation of alternatives. To create a patina of error, the Appellants attempt to foist the "shall be determined" language onto every clause of the Section 1705(2) provision. While it states that the damage, harm, impairment "shall be determined," it absolutely does not say "feasible and prudent" alternatives "shall be determined." That simply is not in the language. What it does say is that the conduct shall not be authorized if there is a feasible and prudent alternative. The Appellants are trying to essentially shift the entire subsection under the "shall be determined" umbrella when the plain language of the provision unequivocally shows that that is not the case.

In the case below, the Commission determined there was impairment and evaluated, in detail, the alternatives presented on the record. The provision does not leave it to the Courts to complete the analysis from A-Z, in total, but instead

directs the courts to examine the first, triggering part of the clause, the part that sets into motion the alternatives analysis. Because if there is no impairment, there is no alternatives analysis. In this case, the Court of Appeals saw that the Appellants, the Commission, and even Enbridge agreed, or at least acknowledged that there would be an impairment to the environment from the Replacement Project.

Essentially, the Appellants want this Court to force a de novo review for something not in dispute. MEPA Section 1705(2) provides that, "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative…" MCL 324.1705(2). In this case there is no dispute that there is an impairment of natural resources. The Commission, and obviously the Appellants agree on that. The Commission found that the Replacement Project would result in impairment to the natural resources of Michigan, and therefore initiated an alternatives analysis, as required by Section 1705(2). *In re Enbridge*, MPSC Case No. U-20763, 12/1/2023 Order, p 329. Even Enbridge, whose application initiated this litigation acknowledged impairment of natural resources in its briefs before the Court of Appeals,[7] and its answer to the

[7] Enbridge's Appellee Brief before the Court of Appeals, acknowledging the finding of environmental effects, pp 29–30.

applications for leave to appeal by the Appellants.[8] The Court of Appeals recognized this fact in its opinion, stating:

> As noted, the PSC concluded that there would be some environmental impairment as a result of the Replacement Project... Accordingly, under MCL 324.1705(2), the PSC was tasked with determining if there was a feasible and prudent alternative. [Opinion, p 24.]

However, the Appellants insist the Court of Appeals erred by not determining on its own whether there might be an impairment of natural resources from the proposed project, essentially substituting itself as factfinder in place of the Commission. As mentioned above, the Commission, the Commission's Staff, and the Appellants all agree there is an impairment. Stripped to its essence, the Appellants argue that the Court of Appeals erred by not inserting itself as factfinder when the adversarial parties to this litigation agree on the central fact that, as contemplated by MEPA, the conduct in question will result in impairment of natural resources. At its core then, the Appellants are simply not happy with the outcome of the Commission's alternatives analysis, and any alleged errors are an expression of the litigation not turning out their way. Being dissatisfied with the Commission's order, in the absence of any error by the Commission or the Court of Appeals, does not constitute sufficient grounds for reversal.

[8] Enbridge's Answer to Applications for Leave to Appeal, pp 11, 30.

B. Appellants' reliance on *West Michigan Environmental Action Council v Natural Resources Comm* is misplaced.

As stated in the preceding section of this brief, there is no dispute that the conduct at issue in Enbridge's Application would result in some degree of impairment of natural resources as it pertains to MEPA. Multiple parties alleged negative environmental consequences in the case before the Commission and the Commission's Order listed at least ten areas of environmental impact. The Court of Appeals acknowledged that central fact, stating, "the PSC concluded that there would be some environmental impairment as a result of the Replacement Project." (Opinion, p 24.)

In contrast, in *WMEAC,* 405 Mich at 752, the issue turned on whether, or if, the conduct in that case would cause impairment or destruction of natural resources. In that case, the Department of Natural Resources found that the contemplated drilling would not result in pollution, impairment, or destruction of natural resources, whereas the plaintiffs alleged that such environmental impacts would occur, and that the trial court erred by deferring to the DNR's assessment. This is far removed from the facts of this case. In *WMEAC*, the question of whether there would be any environmental impact from the proposed conduct was not answered and was at issue. This difference is crucial because it highlights that the Court of Appeals in this case did apply the correct standard of review. When all adversarial parties agreed that the conduct in question results in the impairment contemplated in MEPA, there is nothing that "shall be determined" by a reviewing court pertaining to pollution, impairment, or destruction of the State's natural

resources. The conduct will cause environmental impacts contemplated by MEPA. The analysis mandatorily must proceed to an alternatives analysis. The Appellants, then, are asserting error and decrying a lack of redundancy by the Court of Appeals. But as discussed in the section above, "determine" does not inherently mean "conduct anew." The terms are not synonymous. Appellants' argument should be rejected.

MEPA Section 1705(2) provides for a two-part analysis. First, the alleged environmental harm "shall be determined." If it exists, then the second part or prong provides for an investigation of alternatives to the proposed conduct at issue for feasibility and prudence. In *WMEAC*, the question of whether the drilling permits in that case would harm the natural resources in that area was very much alive and in dispute. However, no such dispute exists in this case. The focus of the litigation below, as it pertained to MEPA, was on the second part of Section 1705(2): "conduct 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." The focus of this case was on the alternatives analysis, not the question of environmental impairment. That preliminary question had been answered. And, as discussed in the section above, MEPA does not include a mandatory, "shall be determined" requirement for the alternatives analysis. Instead, that is an area that is firmly within the Commission's authority and expertise. Agencies like the Commission were created to handle exactly those types of technical issues. If the Appellants' erroneous use of

WMEAC to support their interpretation of MEPA was adopted, then not only would courts be responsible for examining whether the record demonstrated environmental impairment, but then also saddled with the job of examining feasible and prudent alternatives. In this case, that would involve gaining expertise, in short order, in engineering, propane markets in northern Michigan, pipeline construction, tunnel boring, and wetland management, to name a few topics, and also possibly taking witness testimony on these issues, to arrive at the most feasible and prudent alternative. Appellants would have the courts supplant the Commission as the factfinder and be responsible for making these determinations. Luckily, the Legislature did not burden courts in this manner. Instead, the plain language of MEPA provides for a de novo review of an impairment determination by the courts but saves them the task of sifting through thousands of pages of technical, specialized testimony and evidence to make factual findings regarding feasible and prudent alternatives.

Additionally, the Appellants attempt to analogize *WMEAC* to the case below by pointing out that in *WMEAC* this Court considered MEPA impacts from the project outside of the physical boundaries of the conduct in the permit application, and therefore a similar analysis in this case should include environmental effects far beyond the conduct in Enbridge's application for the Replacement Project. (Appellant Tribe's brief, p 33.) The analogy fails because the facts are not remotely similar. In *WMEAC,* wildlife impacts from the road construction were within the scope of the conduct because they were part of the conduct: new roads were needed

to access the new wells. 405 Mich at 756. In contrast, Line 5 is in existence. Its existence is not part of the conduct under MEPA; it's part of the status quo. MEPA does not exist to retroactively litigate the existence of infrastructure that an intervening party wishes to terminate. Yet, by expanding the scope of MEPA and reversing the Court of Appeals opinion, it would function in exactly that way. While this Court in *Michigan State Hwy Comm v Vanderkloot*, 392 Mich 159, 183–185 (1974), stated that feasible and prudent alternatives to the proposed conduct must be evaluated, it did not state that existing infrastructure can, or should be relitigated and that MEPA could be wielded as a "terminate button" by intervenors to retroactively assess such infrastructure. The Appellants essentially proffer a novel use of MEPA—to look backwards and redress issues related to the existing infrastructure. The Commission has never taken such a retroactive review of pipeline cases before it.

Two prior Commission cases clearly illustrate the reasonable and measured approach the Commission employs in determining the scope for evaluating Act 16 applications. In *In re Wolverine*, MPSC Case No. U-13225, 7/23/2002 Order ("Wolverine"), the pipeline company sought to construct, operate, and maintain a "12-inch pipeline system, approximately 26 miles in length, for the transportation of liquid petroleum products." *Id*. at 1. The proposed pipeline consisted of three segments, the first commencing near the company's existing 8-inch pipeline. *Id*. The Commission conducted an extensive review of the safety and environmental risks associated with the proposed pipeline extension project, including how the 26-

mile pipeline could impact local waterways and wells, nearby commercial and residential areas. *Id.* at 35. Although the Commission conducted an extensive evaluation of the proposed 26-mile pipeline, at no point did the Commission examine: (1) any portion of Wolverine's existing pipeline system not clearly related to the proposed extension; and (2) whether the pipeline could or should extend the operational life of the existing pipeline system. The purpose of the *Wolverine* application was for the replacement segment to increase overall capacity. Any discussion in that case regarding the larger system was directly related to the activity in the application, unlike this case where the Appellants sought to introduce tangential, unrelated, upstream and downstream considerations into the case.

The Commission again judiciously employed a reasonable and prudent scope based on the activity proposed in a prior Enbridge Act 16 case dealing with a different line than the one in this case, Line 6b. In that case, Enbridge sought approval to construct an additional 110 miles of new 36-inch pipeline and 50 miles of new 30-inch pipeline to its existing Line 6b pipeline system. MPSC Case No. U-17020, 1/31/2013 Order, pp 1–2. Considering the sheer size of the request, the Commission nevertheless focused its attention on the "five separate, noncontiguous pipeline segments" proposed in the application. *Id.* at 2, n 2. The Commission did not revisit or reanalyze the public need for the entirety of Line 6b. Rather, the Commission evaluated the public need for the pipeline segments as an important update to the existing pipeline. U-17020, supra, p 22. In one instance, the

Commission even rejected an intervenor's attempt to introduce an official government report of a 2010 oil spill on Line 6B as a "red herring," not relevant, and that it did "not address [the] current application." *Id.* at 27.

In *WMEAC*, this Court determined that de novo review applied where the suit was brought in circuit court, referring to suits "brought under the environmental protection act." *Id.* at 752. Furthermore, the "efficacy of the EPA will turn on how well circuit court judges meeting their responsibility." This case was not brought under MEPA, but instead under Act 16 which set the parameters of the conduct at issue. It was not a MEPA suit filed in circuit court. And the central issues in the case were not a dispute over whether the conduct would cause environmental impacts under MEPA but instead focused on the alternatives analysis. *WMEAC* centered on the question of whether there would be negative environmental impacts from the conduct in the first place. It did not deal with an alternatives analysis; rather this Court reversed and remanded that case to the trial court for the entry of a permanent injunction. *Id.* at 760. This case is fundamentally outside the matters considered in *WMEAC*. *WMEAC* considered the impact of the conduct, this case focuses on alternatives analysis. Consequently, the requirements for de novo review explicated by this Court in *WMEAC* are easily distinguishable from this case.

V. The Court of Appeals correctly affirmed the Commission's determination of the scope of the case based on the conduct at issue in Enbridge's application.

The Court of Appeals correctly reasoned that the scope of this case was determined by the plain language of MEPA, which calls for an analysis centered on the conduct at issue. First, the Court of Appeals noted this case was initiated to approve the Replacement Project, not for the construction of the already-existing Line 5, stating: "Enbridge, in its application, was not seeking approval for the construction of Line 5. It was seeking approval for the Replacement Project." Opinion, p 19. The Court of Appeals further noted that "[t]he Commission, by looking to the desired "conduct," was following the plain language of MCL 324.1705(2)." *Id.* at 24. The Court properly found that the scope of the Commission's MEPA analysis focusing on the conduct in the application was correct.

A. The plain language of MEPA illustrates that the Commission correctly limited the scope of its MEPA analysis to the conduct at issue in Enbridge's application.

Section 1705(2) of MEPA states that: "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and *conduct* shall not be authorized or approved that has or is likely to have such an effect…" Additionally, subsection (1) provides for intervention in such cases where "*conduct*…has, or is likely to have, the effect of polluting, impairing, or destroying" the State's natural resources. MCL 324.1705(1) (emphasis added). Similarly, other sections of MEPA not at issue in this case, such

as 1703(1) and 1704(2) and (3), also focus on conduct. That is because conduct is the linchpin on which all other parts of MEPA are contingent. Without the proposed conduct in the case below, there would be no assessment of the related environmental impact. Without the conduct in the case below, there would be no alternatives analysis.

The Appellants focus on words and phrases in Section 1705(2) such as "effect," "alleged" and "likely to have such an effect" but appear to neglect the fact that there are no effects, "alleged" or "likely" without conduct. (See Appellant Tribes' brief, pp 30–31.) Conversely, if this Court were to adopt the Appellants' view that the phrase "has or is likely to have such an effect" encompasses such far upstream and downstream effects from the conduct so as to essentially encompass the entirely of Line 5, then that distends and distorts the common notion of conduct in the Replacement Project application to basically mean the building of the already-constructed Line 5. Such an approach would undermine the Legislature's intent illustrated by the plain language of Section 1705(2) that the determination of environmental impacts, and the alternatives analysis be fundamentally linked to the conduct at issue in the case.

B. MEPA Supplements Act 16 and Administrative Rule 447.

Furthermore, MEPA is, by its own words, supplementary to existing law. Section 1706 states: "this part is supplementary to existing administrative and regulatory procedures provided by law." MCL 324.1706. The existing applicable administrative laws in this case are Act 16, and Rule 447 of the Commission's Rules

of Practice and Procedure. MCL 483.1 *et seq*; Mich Admin Code R 792.10447. Act 16 governs pipelines. Rule 447 provides the requirements for an Act 16 application. Enbridge's application seeks approval to remediate a portion of pipeline. MEPA is intended to be supplementary to these laws, and administrative procedures. MCL 324.1706. The conduct in this case, the central essential component without which there would have been no litigation below and the dual pipeline status quo would continue *ad infinitum* is the Replacement Project. The Replacement Project is governed by Act 16 and thus MEPA, being supplementary to existing law, should be co-extensive with it. In, *Buggs v Pub Serv Comm'n*, unpublished opinion per curiam of the Court of Appeals issued January 13, 2015 (Docket nos. 315058 and 315064), the Court of Appeals, addressing the MEPA analysis imposed on state agencies by *Mich State Hwy Comm v Vanderkloot,* 392 Mich 159, 183–185 (1974), agreed that MEPA analyses must be centered on the conduct at issue, and that future, tangential or unrelated conduct are not pertinent to the conduct triggering the MEPA review. *Buggs* at 9, 10.[9] Put simply, if the conduct at issue is determined by Act 16, the statute under which the Commission may or may not approve the conduct, the scope of MEPA is co-extensive with that. It is not supposed to swallow Act 16 and radically reshape the parameters of that analysis. A Commission denial

[9] In accordance with MCR 7.215(C)(1), *Buggs v Pub Serv Comm'n* is not precedentially binding but can be helpful in the analysis in the present case because it also addressed a situation, similar to this case, where the appellants sought to include matters well outside the scope of the pertinent issues. The *Buggs* opinion is well-reasoned and can be persuasive in addressing the narrow MEPA analysis required in this case.

of Enbridge's application will not shut down Line 5. Yet that is exactly the goal the Appellants hope to achieve: to use MEPA as a vehicle to attack the existence of Line 5.

For example, the Appellants raise an alarm about continued operation of Line 5, referencing the potential extension of the operation of the Line for "99 years." (See Appellant Tribes' brief, pp 1, 4, 30, 34, 35, 40.) Continued operation of Line 5 is not at issue, as the Commission pointed out in its April 21, 2023 Order:

> Indeed, while intervenors argue that the issue of whether Line 5 will continue in operation indefinitely (as Enbridge has alleged) is a question of fact that should be tested, *what is ignored by these parties is that whether Enbridge holds the legal right to operate the other 641 miles of Line 5 is not a question of fact but rather of law. Nothing in the Commission's 1953 order set a termination date for the operation of Line 5, and no party disputes Enbridge's legal authority to continue to operate the other 641 miles not at issue in this proceeding.* Furthermore, a focus on the need for the Replacement Segment – as opposed to a reconsideration of the need for the entire pipeline – is strongly supported by the Commission's precedent in this area. In the 2001 order, for example, Wolverine sought approval of discrete 12- and 16-inch petroleum products pipeline systems (those which remained after Wolverine's motion to withdraw its application respecting a particular segment was granted). 2001 order, p 9. The Commission granted approval under Act 16 for Wolverine to construct, operate, and maintain the proposed segments. In granting this approval, the Commission did not examine the remainder of Wolverine's pipeline system that interconnected with the proposed segments, *nor did it consider the potential lifespan of any part of Wolverine's system*. [*In re Enbridge for Replacement Project*, MPSC Case No. U-20763, April 21,2023 Order, p 61 (emphasis added).]

In essence, Line 5 has been operating since 1953 and as the Commission concluded, the 1953 MPSC Order does not expire or require renewal. The impact of "continued operation" of Line 5 has no basis in Act 16, MEPA, or precedent. But more importantly, MEPA is supplementary to existing law; it is not intended to

swallow existing law. Where the Legislature states that MEPA is supplementary to existing law, the Appellants intend it to swallow existing law. There is no inconsistency in the Commissions' analysis. MEPA requires a holistic ("statewide") analysis of each alternative option to determine if there is an alternative that is more reasonable and prudent (i.e. does less harm to the environment) than the project being considered under Act 16. MCL 324.17205(2). Act 16 limits the Commission's analysis to the project contained in an application. It does not authorize a holistic ("statewide") analysis of Line 5's environmental impact in its entirety (including the impact of extraction, refinement and consumption of petroleum products). The issue before the Commission and Court of Appeals was the 4-mile-long Replacement Project, the relevance of oil spills was the catastrophic potential in the Straits of Mackinac of such an occurrence. The safety and operations of other portions of the line are not the subject matter of the Replacement Project. MEPA should not serve to widen the aperture of a case at the discretion of an intervening party. Instead, it should be linked to, and co-extensive with the administrative law to which it is intended to supplement.

CONCLUSION AND RELIEF REQUESTED

This Court asked the parties to address five questions addressing the applicability of the public trust doctrine, and if the Court of Appeals applied the proper standard of review. The Court of Appeals was correct in affirming the Commission's order. The Commission lacked the statutory authority to apply common-law public trust doctrine; moreover, the Commission's proper application of

MEPA subsumed the public trust doctrine and protected not only the interests contemplated by the doctrine but a broader swath of Michigan's natural resources. Furthermore, the Court of Appeals correctly concluded that the case before the Commission was not a suit under MEPA brought in circuit court, but an Act 16 case before the Commission, and as such, MEPA being supplementary to Act 16 must be co-extensive with it, and not override the proper parameters of the Act 16 analysis to permit the consideration of broadly unrelated issues. The Court of Appeals correctly determined that MEPA does not require a de novo review of Commission analysis of alternatives.

In short, the Court of Appeals opinion was reasonable, proper, and closely followed the plain language of MEPA. The Commission respectfully asks this Court to affirm the Court of Appeals' opinion.

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