STATE OF MICHIGAN
IN THE SUPREME COURT

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

FOR LOVE OF WATER,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.
_____/

Supreme Court No. 168346

Court of Appeals No. 369163

MPSC Case No. U-20763

APPELLANT FOR LOVE OF WATER'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

On April 2, 2025, Appellant For Love of Water ("FLOW") timely filed an application for leave to appeal the February 19, 2025 opinion of the Court of Appeals in consolidated appeals bearing case numbers 369156, 369157, 369159, 369161, 369162, 369163, 369165, and 369231. The Court of Appeals affirmed the December 1, 2023 final order of the Michigan Public Service Commission granting a permit under Public Act 16 of 1929, MCL 483.1–11 ("Act 16"), to Appellee Enbridge Energy Limited Partnership for the construction and operation of a petroleum pipeline within a four-mile tunnel under the Straits of Mackinac. This Court granted leave by order dated September 19, 2025. This Court has jurisdiction over this matter under MCL 600.215(3) and MCR 7.303(B)(1).

QUESTIONS PRESENTED

In its Order of September 19, 2025, this Court specified that the parties address the following 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.

   The Court of Appeals' answer: No
   Appellant FLOW's answer: Yes
   Appellees will answer: No

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

   The Court of Appeals' answer: No
   Appellant FLOW's answer: Yes

Appellees will 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 IV below.

INTRODUCTION

Enbridge seeks to bore a four-mile tunnel through the bottomlands of the Straits of Mackinac to house a replacement segment of its Line 5 pipeline, which will enable western Canadian oil to flow through the Great Lakes for the next ninety-nine years. In considering whether to approve this unprecedented project, the Michigan Public Service Commission (MPSC or "Commission")—like all State agencies, and indeed all branches of State government—must comply with the requirements of the public trust doctrine. It has failed to do so.

Under the doctrine, the state holds its navigable waters and other natural resources in trust subject to certain paramount public uses, and has a concomitant duty to protect the integrity of those resources to ensure that the public may continue to exercise its rights in meaningful fashion. With respect to Great Lakes bottomlands in particular, this Court accordingly has long held that without "assent" "from the legislature or its authorized agency … based on due finding as will legally warrant the intended use of such lands," *Obrecht v Nat'l Gypsum*, 361 Mich 399, 416 (Mich 1960), "no

part of the beds of the Great Lakes … can be alienated or otherwise devoted to private use," *id.* at 412.

Under both the common-law public trust doctrine and its implementation through the Michigan Environmental Protection Act (MEPA), MCL 324.1701–1706 , then, the MPSC may not approve a devotion to private use of any portion of the submerged lands of the Great Lakes unless due findings have been made that the project will not impair the public rights in those quintessential public trust resources. No such findings have ever been made for Enbridge's tunnel project: not in the statute requiring the State to enter into an agreement with Enbridge for the construction and operation of the tunnel, nor in the resulting agreements; and likewise not in the statute authorizing the State to convey a utilities easement to Enbridge, nor in the resulting easement through the Great Lakes bottomlands. The MPSC nevertheless approved the project based on its erroneous assertion that it had no obligation to evaluate whether the proper public trust determinations have been made. And rather than correct this fundamental legal error, the Court of Appeals compounded it by concluding that the MPSC has no duty—or even authority—to comply with the requirements of the public trust.

The MPSC's decision to approve the project is profoundly consequential. By permitting Enbridge to forever alter the bottomlands of the Great Lakes and thus to enable the flow of oil through the Straits for generations into the future, the

Commission blessed the private devotion of public trust resources without ensuring that the rigid scrutiny required of such decisions has taken place.

Under MEPA, the MPSC cannot authorize the location, construction, or operation of the Straits tunnel and pipeline unless and until the impacts to the public trust have been "determined." MCL 324.1705(2). The Legislature has specified that the Department of Environment, Great Lakes, and Energy (EGLE) must make such determinations pursuant to the Great Lakes Submerged Lands Act (GLSLA), MCL 324.32501–32516, and EGLE has promulgated rules for this purpose. Those rules provide the pollution control standard that protects the public trust in the very resources threatened by Enbridge's project.

Similarly, under the public trust doctrine at common law, Great Lakes waters and bottomlands cannot (as discussed above) be devoted to private use unless the Legislature or its authorized agency makes "due findings" regarding the impacts of that use on the public trust. The GLSLA reflects the Legislature's authorization of EGLE as the only entity that may properly make such findings, and EGLE's regulations again specify their necessary content.

Accordingly, this Court should reverse the Court of Appeals, remand this matter to the MPSC, and order the agency to deny Enbridge's application unless and until EGLE makes the requisite determinations under the GLSLA and its implementing regulations. Those determinations are nowhere more necessary than when it comes to

the waters and submerged lands of a location as central to this State's environment and history as the Straits of Mackinac.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. Enbridge Proposes To Build a Pipeline and Tunnel Under the Straits of Mackinac To Replace the Existing Line 5 Dual Pipelines.

As part of a pipeline system that transports western Canadian tar sands oil principally for refining and consumption in eastern Canada, Enbridge's Line 5 was originally constructed in 1953, after an easement was conveyed by the State of Michigan to Enbridge's predecessor for the pipeline to cross under the Straits of Mackinac. COA Op, p 7 (Appellant FLOW's Appendix ("App"), p 359). Line 5 runs from Superior, Wisconsin, to Sarnia, Ontario, traversing hundreds of interconnected waterbodies along the way. *Id.* It carries up to 540,000 barrels, or approximately twenty-three million gallons, of crude oil per day. *Id*. Where it crosses the Great Lakes in the Straits, Line 5 splits into two twenty-inch Dual Pipelines that either lie directly on the lakebed or are suspended off its bottom by intermittently placed support structures.

The Dual Pipelines suffered a series of anchor or cable strikes (and near misses) between 2018 and 2021.[1] Enbridge failed to detect and fully report such incidents.[2] State-ordered studies found that inadvertent anchor strikes are known in the industry to be a

[1] See Enbridge Report, Investigation of Disturbances to Line 5 in the Straits of Mackinac Discovered in May and June of 2020 6–8 (Updated August 21, 2020) (App, pp 1698–700).
[2] *Id.*

principal threat to offshore pipelines and are both "increas[ing] in frequency" and "not influenced by mitigation measures[.]" Dynamic Risk Assessment Systems, Inc., Alternatives Analysis for the Straits Pipeline PR11, 2-35 (October 2017) (App, pp 683, 764). Those studies further documented the potential for a catastrophic rupture of the Dual Pipelines from an anchor strike, predicting that a release of up to nearly 2,500,000 gallons of crude oil, Dr. Guy Meadows, et al., Independent Risk Analysis for the Straits Pipeline 53, Michigan Technological University (2018) (App, p 1085), would spread across as many as 700 square miles of surface water, *id*. at 71 (App, p 1103), and contaminate as much as 1,200 miles of shoreline, *id*. at 69 (App, p 1101), with major disruptions to navigation and fisheries, *id.* at 285–96 (App, pp 1317–28), and the food web of the Great Lakes, *id.* at 181 (App, p 1213). The strikes, Enbridge's deficient responses, and the risk analyses raised significant public concern about the threat the pipeline posed to the Straits and surrounding Great Lakes.

Governor Snyder's administration entered into a series of agreements with Enbridge providing in part for monitoring measures on Line 5 segments in Michigan and the exploration of alternatives to the Dual Pipelines, ultimately culminating in an agreement for Enbridge to design, construct, operate, and maintain a utility tunnel at the Straits to accommodate a replacement for the Dual Pipelines and other utilities. In none of those agreements—nor at any other step leading up to the Commission's approval of the tunnel project—was a public trust determination ever made.

The first two agreements made no reference to the public trust and did not purport to include or provide for public trust findings. Instead, they discussed the entirely distinct issue of public need. The First Agreement, signed on November 27, 2017, stated that "the continued operation of Line 5 through the State of Michigan serves important public needs by providing substantial volumes of propane to meet the needs of Michigan citizens, supporting businesses in Michigan, and transporting essential products, including Michigan-produced oil to refineries and manufacturers[.]" First Agreement, p 1 (App, p 1022). The Second Agreement, signed on October 3, 2018, similarly stated that "the continued operation of Line 5 through the State of Michigan serves important public needs[.]" Second Agreement, p 1 (App, p 1415).[3]

On November 6, 2018, Gretchen Whitmer was elected governor. On January 1, 2019, she and various newly elected legislators were sworn into office. During the lame duck interlude, the Legislature passed Public Act 359 ("Act 359"), MCL 254.311–332, on December 11, 2018, creating the Mackinac Corridor Straits Authority (MSCA) and requiring it to "enter into an agreement or a series of agreements for the construction, maintenance, operation, and decommissioning of a utility tunnel" if it finds that various conditions have been met, MCL 254.324d(4) & (a)–(k). Act 359 expressly requires the

[3] These public need assertions in the Agreements were made in only conclusory fashion, and the State has since revisited them. See EGLE, Upper Peninsula Energy Task Force Committee Recommendations Part I – Propane Supply 3 (Apr. 17, 2020) (App, p 1545) (formulating "alternative solutions for meeting the U.P.'s energy needs").

parties to such agreements to obtain all governmental permits and approvals. MCL 354.324d(4)(g) ("[T]he proposed tunnel agreement does not exempt any entity that constructs or uses the utility tunnel from the obligation to obtain any required governmental permits or approvals for the construction or use of the utility tunnel."). Like the First and Second Agreements, the Act neither includes nor provides for findings regarding the public trust. Instead, it proclaims only that "[t]he carrying out of the … authority's purposes, including a utility tunnel, are for the benefit of the people of this state and constitute a public purpose," MCL 254.324a(5).

On December 17, 2018, the Department of Natural Resources (DNR) conveyed to the MSCA an Easement to Construct and Maintain Underground Utility Tunnel at the Straits of Mackinac ("2018 Easement"). 2018 Easement (App, pp 1435–38). The 2018 Easement was issued "for statutory rights to use state lands, without consideration, granted to the Authority in [Public Act 359.]" *Id.* at 1 (App, p 1435). The DNR issued the 2018 Easement pursuant to the general authorization of MCL 324.2129, originally enacted as Public Act 10 of 1953 ("Act 10"), *id.*, which permits the agency to "grant easements, upon terms and conditions the department determines just and reasonable, for … operating pipelines," MCL 324.2129. Act 10 does not reference the public trust, nor does it include or provide for findings regarding the public trust by DNR or any other entity. Neither does the 2018 Easement, which, to the contrary, states:

> It is expressly understood and agreed that nothing in this easement shall be construed as a statement, representation or finding by the Grantor relating to any risks that may be posed to the environment by activities conducted by the Grantee or that the right-of-way conveyed by this easement is fit for any particular use or purpose. [2018 Easement ¶ 13, p 2 (App, p 1436).]

On December 19, 2018, the State of Michigan and Enbridge executed the Third Agreement, in which they agreed to

> fulfill … the parties' obligations … [to address] the operation, replacement, and decommissioning of the existing Dual Pipelines at the Straits, conditioned upon and in conjunction with, an Agreement between Enbridge and the Mackinac Straits Corridor Authority … to design, construct, operate, and maintain a utility tunnel at the Straits to accommodate a replacement for the Dual Pipelines and other utilities ("Tunnel Agreement"). [Third Agreement, p 1 (App, p 1439).]

That same day, the MSCA and Enbridge executed the Tunnel Agreement contemplated in Act 359, MCL 254.324d(4). Tunnel Agreement (App, pp 1454–1514). Pursuant to that agreement, ownership of the tunnel would transfer to the State once construction is complete, with the State leasing it back to Enbridge for ninety-nine years. *Id.* at pp 1, Recital C & p 5 § 1.1(uu) (App, pp 1454 & 1458). Also on that day, the MSCA, citing the authority of Act 359, executed an Assignment of Easement Rights for Utility Tunnel ("2018 Assignment"), which conveyed to Enbridge the interests that MSCA had received from DNR in the 2018 Easement. 2018 Assignment, p 1 (App, p 1515). Neither the Third Agreement nor the Tunnel Agreement nor the 2018 Assignment references the public trust or purports to make or provide for any public trust findings.

On April 17, 2020, Enbridge filed with the MPSC an Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac. Application (App, pp 1518–37). The Commission possessed jurisdiction over the application pursuant to its authority to regulate oil pipelines under Act 16 and rules governing the construction of pipeline facilities, Mich Admin Code, R 792.10447(1)(c); COA Op, p 6 (App, p 358). The Act vests in the Commission the power to grant rights to locate those pipelines "on, over, along, across, through, in or under any [location] within this state[.]" MCL 483.1(2); see also MCL 483.3(1) & (a)–(b) (vesting authority in the Commission).

In its application, Enbridge sought Commission approval to replace the twenty-inch-wide Dual Pipelines with a new thirty-inch-wide pipeline, which would be enclosed by a tunnel to be built through the bottomlands of the Straits. COA Op, pp 6–8 (App, pp 358–60); MPSC (Final) Order, pp 16–17 (App, pp 16–17). Enbridge proposed to connect the new pipeline to the segments of Line 5 on each side of the Straits, thereby enabling oil to flow across the Great Lakes for another ninety-nine years. COA Op, pp 7–8 (App, pp 359–60) (citing MPSC Order).

Never before has a crude oil pipeline been housed in a tunnel the length or depth of that contemplated by the Enbridge project. Such a project carries with it substantial risks to the waters and submerged lands of the Great Lakes. As reports commissioned

by the state itself attest,[4] the tunnel will be bored through "poor" and "very poor" quality bedrock that is highly fractured, "brecciated" (composed of broken fragments cemented together by fine particles), Geotechnical Rep, p 9 (App, p 1795), and very highly permeable, Risk Rep, p 3 (App, p 1780). Test borings in these low-quality formations have revealed numerous voids evidencing fractures and open seams in the rock. *Id.* at 9–10 (App, pp 1795–96).

Because of the porosity of the rock and the extreme pressures that will be encountered at the depth of the proposed tunnel (up to seventeen atmospheres, *id.* at 1

[4] See McMillen Jacobs Associates, Technical Memorandum, Collapse Potential for the Line 5 Replacement Tunnel (Jan. 13, 2021) ("Collapse Potential Report") (App, pp 1767–77); McMillen Jacobs Associates, Technical Memorandum, FINAL Risk Mitigation for the Line 5 Replacement Tunnel (Jan. 13, 2021) ("Risk Report") (App, pp 1778–86); McMillen Jacobs Associates, Technical Memorandum, DRAFT Geotechnical Exploration Level of Effort for the Line 5 Replacement Tunnel (Jan. 13, 2021) ("Geotechnical Report") (App, pp 1787–97); see also Test. of Brian J. O'Mara on Behalf of Bay Mills Indian Community (excerpt), *In re Enbridge Energy LP*, U-20763 at 4:21–22 (MPSC Feb. 3, 2023) (App, pp 1798–99) (relying on McMillen Jacobs Technical memoranda in developing expert testimony); Bay Mills Indian Community's Initial Brief on Remand, *In re Enbridge Energy LP*, U-20763 at 11 n49 (MPSC May 5, 2023) (App, pp 1813) (citing and linking to MJA Geotechnical Report). All three reports are published on the State of Michigan's website: https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Multi-Division/Line-5/MDOT/2021-01-13-Memo-Collapse-Potential.pdf?rev=365d55bcdae340df8649f105dc259c26; https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Multi-Division/Line-5/MDOT/2021-01-13-Memo-Risk-Mitigation.pdf?rev=532560ac752049b9a9817f42ca4a65b0; https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Multi-Division/Line-5/MDOT/2021-01-13-Memo-Geotechnical-Exploration-DRAFT.pdf?rev=8b564bb3c4614aaeaea4696b55c1a5ea.

(App, p 1778)), water inflows may "overwhelm operational conditions," Collapse Potential, p 3 (App, p 1769), and water treatment systems, Risk Rep, p 4 (App, p 1781), and result in the discharge of polluted water into the water column of the Straits, *id.*; see also Geotechnical Rep, p 10 (App, p 1796) (referencing findings of Collapse Potential Rep and Risk Rep). The poor rock conditions and high pressures may further cause blowouts of contaminated drilling material through the fractured rock of the bottomlands, Collapse Potential Rep, p 3 (App, p 1769), as well as blow-ins of the tunnel face with an "in-rush of loose or weak rock/soil," *id.* at 4 (App, p 1770), a "collapse" of the head of the tunnel, *id.* at 2 (App, p 1768), and the creation of new subterranean "voids … ahead or above the [tunnel boring machine]," *id.* at 4 (App, p 1770), and beneath the existing Dual Pipelines. These concerns are enhanced by Enbridge's failure to conduct sufficient geotechnical test borings, Geotechnical Rep, pp 3–7 (App, pp 1789–93), the most critical of which have not reached the depth of the route of the proposed tunnel, *id.* at 9 (App, p 1795).

II. FLOW Intervenes in Opposition to Enbridge's Proposed Project.

On May 1, 2020, FLOW filed a Petition for Permissive Intervention concerning Enbridge's application before the Commission. See FLOW Pet to Intervene (App, pp 1833–43). FLOW sought intervention to demonstrate that approval of the project would violate the State's public trust obligations under the common law, the Michigan Constitution, and various statutes, including MEPA. *Id.* at 1–4 (App, pp 1835–38).

On August 13, 2020, the Administrative Law Judge granted the petitions to intervene of FLOW and other parties and set a schedule for the contested case proceedings. See MPSC Intervention Order p 2 (App, p 1848–49).

III. The Commission Issues Its Order Approving Enbridge's Permit Application Without Considering the Public Trust Impacts.

On December 1, 2023, the Commission issued an order approving Enbridge's permit application. MPSC (Final) Order (App, pp 1–349).

Throughout the proceedings before the Commission, FLOW alerted the ALJ and the Commission that the findings required by the common-law public trust doctrine and MEPA have never been made in connection with the 2018 Easement or 2018 Assignment and that both are consequently void. MPSC (Final) Order pp 27–28; 33–34; 186–87; 307 (App, pp 27–28; 33–34; 186–87; 307). FLOW argued that because Enbridge therefore does not possess the property rights necessary to construct the project, the MPSC could not approve its application. *Id.* at 28 (App, p 28). The Commission dismissed these arguments, agreeing with Commission staff that the agency had no duty to ensure that public trust findings had been made: "In the Staff's opinion, FLOW fails to demonstrate that the Commission has a legal obligation to evaluate the validity of other State agencies' actions in this Act 16 proceeding. The Commission agrees." *Id.* at 310 (App, p 310) (quotation marks and citation omitted).

IV. The Court of Appeals Affirms the Commission's Refusal To Consider the Common-Law Public Trust.

On February 19, 2025, the Michigan Court of Appeals issued an order affirming the MPSC decision to grant Enbridge authorization to replace the segment of the Line 5 pipeline. COA Op, p 5–31 (App, pp 357–83). In front of that court, FLOW reiterated its arguments from the Commission proceedings that in the absence of a validly conveyed easement, the MPSC permit cannot be granted. FLOW Br on Appeal, pp 25–28 (App, pp 1882–85). The Court of Appeals recognized that "[u]nder 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." COA Op, p 22 (App, p 374) (emphasis and citation omitted). However, it held that "the [M]PSC is a creature of the Legislature and has no common-law powers; it possesses only that authority bestowed upon it by statute. All its power must derive from statutes. As such, the reliance by For Love of Water on the public trust doctrine is misplaced." *Id.* (quotation marks and citations omitted).

FLOW also argued that the Commission misconstrued the nature of its obligations under MEPA because it had adopted a legal standard for application of the Act requiring "that … an agency must determine whether the conduct under review will pollute, impair, or destroy natural resources" while omitting reference to "the public trust in those resources," such that the Commission's analysis pursuant to that flawed standard failed to substantively address public trust impacts, FLOW Reply Br,

p 3 (App, p 1900) (quoting MPSC (Final) Order, p 291). The Court of Appeals held in response, without elaboration, that "[t]he Commission considered this statutory reference to the "public trust in [the] resources" by way of its overall MEPA review. COA Op, p 26 (App, p 378) (brackets in original).

ARGUMENT

I. The Common-Law Public Trust Doctrine Safeguards the Public's Rights in Resources Including the Waters and Submerged Lands of the Great Lakes.

A proper understanding of the MPSC's obligations in this case under MEPA and the common law first requires an explanation of the public trust doctrine under Michigan law.

A. Standard of Review

The interpretation of a common-law doctrine is a question of law, which this Court reviews de novo. *Tkachik v Mandeville*, 487 Mich 38, 45 (2010). This Court examined the scope of the public trust doctrine under the de novo standard in *Glass v Goeckel*, 473 Mich 667, 676–77, 681 (2005).

B. The Common-Law Public Trust Duty To Protect the Waters and Submerged Lands of the Great Lakes for Public Use Is a Cardinal Obligation of State Government.

"[T]he public trust doctrine is alive and well in Michigan[.]" *Glass,* 473 Mich at 681. Pursuant to the doctrine, various natural resources constitute the public trust. These resources specifically include "the waters of the Great Lakes and their submerged lands[.]" *Id.* at 694. Under the doctrine, while the State took title to the submerged lands

within its boundaries upon statehood, it did so "in trust for the people," and "*[i]t holds the title in its sovereign capacity.*" *State v Venice of Am Land Co,* 160 Mich 680, 702 (1910) (emphasis added).

"The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure." *Glass*, 473 Mich at 679 (citing *Nedtweg v Wallace*, 237 Mich 14, 16 (1926)); *Venice of Am Land Co*, 160 Mich at 702; *State v Lake St Clair Fishing and Shooting Club*, 127 Mich 580, 586 (1901); *Lincoln v Davis*, 53 Mich 375, 388 (1884)). The State may not violate the trust by alienating submerged lands free of the trust's restrictions. Rather, the State's responsibility to protect these public rights is of "a high, solemn, and perpetual [character], which it is the duty of the state to forever maintain." *Collins v Gerhardt*, 237 Mich 38, 49 (1926).

This Court long ago recognized the venerable history of the public trust doctrine and its significance in Michigan law:

> The trust is a common-law one; it prevailed in England long before the American Revolution; it was in the Virginia cession of the territory northwest of the River Ohio; it continued during the period the United States held the Northwest Territory and passed as the same trust to the state of Michigan at her admission to the Union; it has not changed in character or purpose *and is an inalienable obligation of sovereignty*. [*Nedtweg*, 237 Mich at 17 (emphasis added).]

The Court continues to recognize the importance of the doctrine today, proclaiming in *Glass* that "[t]he state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources.… '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.'" 473 Mich at 679 (quoting *Nedtweg*, 237 Mich at 17).

C. The Public Trust Doctrine Requires that the State Ensure that the Public's Paramount Rights Will Not Be Impaired by Private Use of Public Trust Resources.

This Court has repeatedly explained that the Legislature must ensure that private use of public trust resources does not "impair[]" the public's paramount rights in those resources, because "all use authorized [by the Legislature] … will have to give way to the rights of the public," *Nedtweg*, 237 Mich at 22–23. In recognition of that duty, this Court has long held the State "to the universally accepted rules of such trusteeship as announced by the supreme court in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 [1892]," that

> no part of the beds of the Great Lakes, belonging to Michigan …, can be alienated or otherwise devoted to private use in the absence of a due finding of one of two exceptional reasons for such alienation or devotion to nonpublic use. One exception exists where the State has, in due recorded form, determined that a given parcel of such submerged land may and should be conveyed in the improvement of the interest thus held (referring to the public trust). The other is present where the State has, in similar form, determined that such disposition may be made without detriment to the public interest in the lands and waters remaining. [*Obrecht*, 361 Mich at 412–13 (quotation marks omitted).][5]

Even where authorized, any conveyance of property interests or devotion to nonpublic use must "leave[] intact public rights in the lake and its submerged land."

[5] As explained in greater detail below, *infra* pp 37–42, the Legislature has codified and fleshed out the requirements for this determination in the GLSLA.

Glass, 473 Mich at 679. Thus, regardless of whether property interests in bottomlands have been conveyed, the State must ensure the protection of the "inalienable" public rights to the Great Lakes, "which extends over both publicly and privately owned lands." *Id.* at 683.

D. The Public Trust Doctrine Includes the Duty To Protect the Integrity of the Natural Resources Held in Trust by the State in Order To Ensure that the Public's Paramount Rights of Use Remain Meaningful.

This Court has further recognized that the State may only "protect traditional public rights under our public trust doctrine … by simultaneously safeguarding activities inherent in the exercise of those rights," whether by protecting the right to walk the Great Lakes beaches to reach the water or to wade across the private bottomlands of a stream as an incident of the right to fish its waters. *Glass,* 473 Mich at 696 (citing *Att'y Gen, ex rel Dir of Conservation v Taggart*, 306 Mich 432, 435 (1943)). This Court reasoned in *Glass* that "[i]n order to engage in the[] activities specifically protected by the public trust doctrine, the public *must* have a right of passage over land below the ordinary high water mark" of the Great Lakes. *Id.* at 695 (emphasis added). "Consequently, the public has always held a right of passage in and along the lakes," as the protection of "traditional public rights under [the] public trust doctrine" requires "simultaneously safeguarding" the conditions necessary for the public to "exercise … those rights." *Id.* at 696.

That same reasoning makes clear that a duty to protect the integrity of public trust resources inheres in the public trust doctrine. The public's exercise of its protected rights to fishing, hunting, and navigation inexorably depends on the continued viability of the resources protected by the doctrine. The public cannot engage in the very activities for which the state holds these resources in trust if the resources are too damaged to support them—if, for example, an unprecedented pipeline rupture were to decimate fish and fowl in the Great Lakes and render swimming and boating dangerous. The integrity of the natural resources protected by the public trust doctrine is therefore "inherent in" the public's use rights protected by the doctrine, *id.*; the State is required to protect those resources—the Great Lakes included—from environmental degradation that would interfere with the exercise of those rights. Consequently, as with the rights of passage addressed by this Court in *Glass*, the public holds and "has always held," *id.*, a right to the environmental integrity of natural resources held in trust by the state.

Other jurisdictions have explicitly recognized an affirmative duty on the part of their governments to protect the environmental integrity of public trust resources. The Hawaii Supreme Court, for example, has explained that "the distinct public interest in resource protection" is "a logical extension" of the "public trust uses of waters in their natural state[.]" *In re Water Use Permit Applications*, 9 P3d 409, 448 (Haw 2000). Hawaii courts therefore "acknowledge resource protection, with its numerous derivative public

uses, benefits, and values, as an important underlying purpose of the reserved water resources trust" and recognize a corresponding "public interest in the purity and flow, continued existence, and preservation of the waters of the state[.]" *Id.* (quotation marks omitted). The state's water resource commission, as a designated "guardian of public rights under the trust," is therefore required to "take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process," *id.* at 455, and the Hawaii Supreme Court has vacated agency decisions that have failed to adequately evaluate potential harm to the state's waters, see, e.g., *id.* at 501.

The Wisconsin Supreme Court has similarly recognized that the state's "public trust duty requires the state not only to promote navigation but also to protect and preserve its waters for" traditional public trust uses such as "fishing, hunting, recreation, and scenic beauty." *Wisconsin's Env't Decade, Inc v Dep't of Nat Res*, 271 NW2d 69, 72 (Wis 1978) (quotation marks omitted). "Preventing pollution and protecting the quality of the waters of the state are," therefore, "part of the state's affirmative duty under the public trust doctrine." *Id.* at 76 (quotation marks omitted).

Likewise, the California Supreme Court has held that the state's public trust doctrine encompasses "preservation of [public trust] lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which

favorably affect the scenery and climate of the area." *Nat'l Audubon Soc'y v Superior Ct*, 658 P2d 709, 719 (1983). The state thus has an affirmative "duty … to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *Id.* at 724.

* * *

This Court has long recognized that "no part of the beds of the Great Lakes, belonging to Michigan …, can be alienated or otherwise devoted to private use" in contravention of the public trust doctrine. *Obrecht*, 361 Mich at 412 (emphasis added). Yet that is precisely what the MPSC has allowed for here. It has specified the design, size, location, route, and carrying capacity of Enbridge's Line 5 tunnel and has approved the boring of that tunnel through the submerged lands of the Great Lakes, all without any consideration of the public trust. The Court of Appeals erred badly when it held that in blessing the tunnel, the MPSC had no obligation under either MEPA or the common law to take the public trust into account. As explained in the sections that follow, the agency very much possessed that obligation under both.

II. In Enacting MCL 324.1705(2) of MEPA, the Legislature Required the MPSC To Comply with the Public Trust Requirements. [Answer to Question 1]

A. Standard of Review

This Court reviews issues of statutory interpretation, which are questions of law, de novo. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102 (2008). "[W]hether the Legislature has abrogated, amended, or preempted the common law … are also questions of law reviewed de novo." *Murphy v Inman*, 509 Mich 132, 143 (2022).

B. In Enacting Section 1705(2), the Legislature Bound Agencies To Protect the Air, Water, and Other Natural Resources *and* the Public Trust in These Resources.

1. The Statutory Text Plainly Requires Agency Protection of the Public Trust in Michigan's Natural Resources.

To determine the reach of a statute, this Court "focus[es] on the statute's text," *Jostock v Mayfield Twp*, 513 Mich 360, 372 (2024) (citation omitted), recognizing that "[p]lain and clear language is the best indicator of that intent, and such statutory language must be enforced as written," *Velez v Tuma*, 492 Mich 1, 16–17 (2012). "Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory." *Whitman v City of Burton*, 493 Mich 303, 311–12 (2013).

Section 1705(2) of the MEPA 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. [MCL 324.1705(2).]

This language commands attention to "pollution, impairment, or destruction" not only "of the air, water, or other natural resources" of this State but also of "the public trust in these resources." *Id.* "The language … is disjunctive[.]" *Stevens v Creek*, 121 Mich App 503, 507 (1982). It plainly extends to "existing or probable future pollution, impairment or destruction of natural resources *or* of the public trust in those resources." *Id.*[6]

Section 1705(2) extends the duty to attend to the public trust to the State's administrative agencies, as it requires without qualification that determination of the trust shall occur "[i]n administrative … proceedings." See *id.* at 185–86 (holding that the parallel Section 1703's "substantive environmental guideline is applicable to … administrative condemnation determinations"); see also *Buggs v Mich Pub Serv Comm'n*,

[6] Although *Stevens* did not construe "the air, water, or other natural resources, or the public trust in these resources," as that phrase appears in Section 1705, it interprets the identical phrase as it appears in what is now Section 1703 of the Act. See, e.g., *Stevens*, 121 Mich App at 507 ("Under section 3, the plaintiff, in order to obtain relief, must make a prima facie showing that the defendant's conduct 'has, or is likely to pollute, impair or destroy the air, water or other natural resources *or the public trust therein*.'" (citation omitted)). "[U]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute." *Robinson v City of Lansing*, 486 Mich 1, 17 (2010). Here, the legislature clearly intended the same meaning across Sections 1703 and 1705 given its use of identical language in both provisions. And absurdity would result otherwise: Section 1703 would allow a plaintiff to maintain a MEPA claim based on a prima facie showing of impairment of the public trust, but Section 1705 would nonetheless permit agencies to approve conduct without making this determination.

Docket Nos. 315058, 315064, 2015 WL 159795, at *7 (Mich Ct App Jan. 13, 2015) (reversing MPSC orders as "unlawful" where the Commission failed to follow other substantive requirements of Section 1705(2)).

The clear text of 1705(2) thus comprehends "the public trust" in natural resources, and it specifies that agencies including the MPSC are bound by that trust.

2. The Legislative History Corroborates the Plain Text.

Even were there ambiguity in the statutory text, the legislative history amply confirms that Michigan agencies must account for the public trust in their decisionmaking. As the bill that became MEPA made its way through the House and the Senate, attempts were made to limit the scope of its public trust language, and even to remove it altogether, but none of those attempts succeeded.

House Bill No. 3055 was introduced in the Michigan House of Representatives on April 1, 1969. Like the current statute, the original bill required agencies to protect the public trust in the State's natural resources. In the section corresponding to the current Section 1705(2), the bill stated that in administrative proceedings "the agency shall consider the alleged impairment, pollution or destruction *of the public trust or* air, water or other natural resources of the state[.]" House Bill No. 3055 § 5(2) (Apr. 1, 1969) (on file with Univ of Mich Bentley Hist Libr, Joseph L. Sax Papers, 1943–2013 ("Sax Papers"), Box 1, File 4) (App, p 571) (emphasis added). Similarly, in judicial review of such administrative proceedings, the courts were to "grant review of claims that the

conduct … under review has, or is reasonably likely to impair, pollute or destroy *the public trust or* the air, water or other natural resources of the state[.]" *Id.* § 5(3) (App, pp 571–72) (emphasis added).

By March 1970, the version of the bill reported out of the House Committee on Conservation and Recreation muddied the distinction between the natural resources and the public trust, providing that "the agency shall consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state[.]" Substitute House Bill No. 3055 § 5(2) (March 25, 1970) (Sax Papers, Box 1, Files 17, 18) (App, pp 577–78).

But four months later, the enacted version of the bill restored the two separate categories of protection. Signed by Governor Milliken on July 27, 1970, Enrolled House Bill No. 3055 provided that in administrative proceedings and judicial review of such proceedings, "any alleged pollution, impairment or destruction of the air, water or other natural resources *or the public trust therein* … shall be determined[.]" Enrolled House Bill No. 3055 § 5(2) (July 27, 1970) (Sax Papers, Box 1, File 4) (App, p 625) (emphasis added).[7] The change thus reaffirmed a distinction between the resources and the public trust in those resources and left no doubt that each shall be protected.

[7] In 1994, the phrase "public trust therein" was replaced by "public trust in these resources" when MEPA was recodified as Article I, Part 17 of the Natural Resources and Environmental Protection Act, MCL 324.101–324.90106. The change was not substantive, as the legislature stated its intent "that editorial changes in the language of

While the bill was under consideration in the Legislature, Professor Joseph Sax, author of the bill, confirmed that MEPA was intended to recognize protection both for natural resources and for the public trust in them:

> I have talked about the public trust, and/or air, water and other natural resources, rather than the public trust in the air, water and other natural resources. When the bill describes the scope of protection it uses the word and; when it describes the relief that may be granted it uses the word or, so that the court may act to protect the public trust or air, water and other natural resources. [Letter from Joseph L. Sax to Peter W. Steketee 1 (Apr. 2, 1970) (Sax Papers, Box 1, File 4) (App, p 594) (emphasis in original).]

Meanwhile, Governor Milliken's legal advisor, Joseph Thibodeau, advocated removing entirely the "public trust" language in House Bill 3055. In a letter to the co-chairs of the House committee considering the bill, he noted that several uses of the phrase "public trust" indicated

> something distinct and in addition to the "air, water or other natural resources of the state". I am at a loss to explain this discrepancy or its significance. I assume that it is a drafting oversight. But since I fail to see the legal significance to the term "public trust", for purposes of clarification, I would suggest that these references be deleted. [Letter from Joseph H. Thibodeau to Hon. Thomas J. Anderson and Hon. Warren N. Goemaere, Co-Chairs, Comm on Conservation and Recreation 8–9 (Mar. 18, 1970) (Sax Papers, Box 1, File 4) (App, pp 586–87).]

Professor Sax responded unequivocally that MEPA's reference to the public trust is not mere surplusage: "'public trust' should not be deleted from the bill." Prof. William J. Pierce, Prof. Joseph L. Sax, William A. Irwin, Responses to "Thoughts on

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statutes codified as parts within [NREPA] not be construed as changes to the meanings of those statutes," MCL 324.107.

H.B. 3055" 25, Univ of Mich L Sch 24 (Mar. 20, 1970) (Sax Papers, Box 1, File 3) (App, p 610). "It should be pointed out … that the public trust doctrine is useful in assuring that public uses of natural resources are protected from private encroachment, thus promoting a wider distribution of the beneficial use of these resources." *Id.* at 25 (App, p. 611).

In a later interview, Professor Sax recounted the debate on the issue:

> [T]here was [a] provision that [the Governor and I] talked about at great length: it had to do with public trust. I think I felt very strongly about that. They wanted to strike out the word 'public trust' and I had spent a great deal of time working out that very notion—which incidentally is a very well-developed concept in Michigan; it appears in statutes, etc. We talked about that at great length. [Interview by Paul Sabatier with Joseph Sax 5 (May/June 1972) (Sax Papers, Box 2, File 4) (App, p 632).]

Ultimately, the Legislature, in keeping with Professor Sax's views, retained the independent protection for the "the public trust." The legislative history of MEPA thus confirms what the text plainly provides for: State agencies—the MPSC included—cannot ignore or refuse to comply with the public trust in the State's natural resources.

III. Agencies, As Arms of the State, Have an Independent Common-Law Duty To Comply with the Public Trust Doctrine. [Answer to Question 2]

A. Standard of Review.

The interpretation and applicability of a common-law doctrine are questions of law, which this Court reviews de novo. *Tkachik*, 487 Mich at 45.

B. As Arms of the State, Executive Branch Agencies Including the MPSC Must Ensure that Their Actions Comply with the State's Public Trust Obligations.

The Court of Appeals rejected FLOW's argument that the MPSC had to account for the public trust in its decisionmaking, stating that "the PSC is a creature of the Legislature and has no common-law powers; it possesses only that authority bestowed upon it by Statute. All its powers must derive from statutes." COA Op, p 22 (App, p 374) (quotation marks and citation omitted). In framing the issue as a question of the MPSC's common-law "*powers*," the Court of Appeals entirely overlooked the agency's inalienable *duties* under the public trust doctrine. Its holding runs directly counter to two key tenets of this Court's public trust jurisprudence.

First, as discussed above, this Court has made it clear that "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." *Glass*, 473 Mich at 678 (emphasis added). Within nine years of the decision in *Illinois Central*, this Court had proclaimed that "[t]he state has no power to barter and sell the lands as the United States sells its public lands, but the state holds title in trust, in its sovereign capacity, for the people of the entire state[.]" *Lake St Clair Fishing & Shooting Club*, 127 Mich at 595. It has hewn ever since to this precept. Accordingly, the preservation and protection of the public's rights in the trust resources of this state, including the waters and submerged lands of the Great Lakes, is not discretionary.

Rather, as this Court has repeatedly held, "[t]he title of the State to submerged lands in the Great Lakes is impressed with a trust for the benefit of the public. The State has a duty to protect that trust and may not surrender the rights of the people thereto," *People v Broedell*, 365 Mich 201, 205 (1961) (citing *Venice of Am Land Co* and *Nedtweg*); see also OAG, No. 7,162, 2004 WL 2157847, at *2 (Sept. 23, 2004) (the State has "not only the authority, *but an affirmative obligation* to protect the public interest in navigable waters") (emphasis added).

Second, the duty to safeguard the public's rights in the trust resource extends to all three branches of the government. As this Court held in *Obrecht*, "[t]his Court, *equally with the legislative and executive departments*, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of the five Great Lakes." 361 Mich at 412 (emphasis added); see also *Glass*, 473 Mich at 700 ("[O]ur Court is one of the 'sworn guardians of Michigan's [public trust duty.]'" (quoting *Obrecht*, 361 Mich at 412)).

The Court of Appeals' holding runs directly counter to these teachings. Both the legislative and executive branches of government have a clear duty to safeguard the public's interests in the submerged lands and waterways of the Great Lakes (as well as in other trust resources). But the Court of Appeals' decision, if left to stand, would greatly eviscerate that obligation on the part of the two political branches.

This Court has made it plain that the Legislature cannot convey interests in submerged lands to private entities without fully safeguarding the public's rights in those resources. "The state is sovereign of the navigable waters within its boundaries, bound, however, in trust, to do nothing in hindrance of the public right of navigation, hunting, and fishing." *Nedtweg*, 237 Mich at 20. Accordingly, any conveyance of property interests must "leave[] intact public rights in the lake and its submerged land." *Glass*, 473 Mich at 679. "Under the public trust doctrine, the sovereign never had the power to eliminate those rights, so any subsequent conveyances … remain subject to those public rights." *Id.* at 681.

The Court of Appeals' holding would allow the Legislature to circumvent its public trust obligations. While the Legislature cannot directly convey interests in public trust resources free of public trust constraints, under the Court of Appeals' decision it could use governmental agencies to accomplish precisely that end—so long as the Legislature does not specify that the agencies must heed common-law public trust obligations, they would be free to convey property interests or permit activities in disregard of them. The Court of Appeals has treated the public trust doctrine as anything but "an inalienable obligation of sovereignty," *Nedtweg*, 237 Mich at 17, and has instead paved the way for wholesale end-runs around the government's sacred trust responsibilities to Michigan's citizenry. See *Brennan v Connolly*, 207 Mich 35 (1919) ("The Legislature cannot do by indirection that which it cannot do directly[.]").

Of course, none of that is what the Legislature has sought to do in this case or with respect to public trust obligations more generally. Instead, as discussed above, through MEPA the Legislature has made it crystal clear that all state agencies are bound to comply with public trust principles in making decisions that bear on public trust resources. The Court of Appeals erred doubly in ignoring both the clear legislative mandate and the common-law tenets on which it is based.

The Court of Appeals also entirely misapprehended the relationship of the executive branch to the public trust doctrine. As this Court made clear in *Obrecht*, the executive branch, no less than its legislative and judicial counterparts, is a "sworn guardian[]" of the public trust. 361 Mich at 412. Accordingly, legislative authorization is not needed for executive branch agencies such as the MPSC to consider the public's rights in public trust resources—the agencies have an independent obligation to take those rights into account in their decisionmaking. This obligation does not necessarily require every agency to separately conduct a complete analysis of the public trust implications of each agency action. Rather, as explained in further detail below, where the use or conveyance of Great Lakes bottomlands is concerned, the authority to conduct the public trust analysis has been vested by the Legislature in EGLE. See *infra* pp 42–48. Agencies including the MPSC have a corresponding obligation to ensure that Great Lakes bottomlands are not devoted to private use without due authorization from

EGLE. The Court of Appeals improperly absolved the MPSC of that obligation while abdicating its own responsibility to enforce it.

C. The Court of Appeals' Holding that the MPSC Has No Obligation or Authority To Apply the Public Trust Doctrine In Making Its Permitting Decisions Threatens Substantial, Adverse Consequences.

Act 16 and its implementing rules regulate the location, construction, and operation of oil and gas pipelines in the state. See MCL 483.1–11; Mich Admin Code R 792.10447. The Act vests in the MPSC the power to grant rights to locate those pipelines "on, over, along, across, through, in or under any [location] within this state[.]" MCL 483.1(2); see also MCL 483.3(1) & (a)–(b) (vesting authority in MPSC). Pursuant to this authority, the MPSC granted Enbridge the right to bore beneath the Straits of Mackinac an unprecedented four-mile, twenty-one-foot-diameter tunnel and to install within it a thirty-inch pipeline that will transport petroleum products for the next ninety-nine years. MPSC (Final) Order, pp 1, 18, 88 (App, pp 1, 18, 88); COA Op, p 8 (App, p 360). Where, as here, an applicant seeks authorization from the MPSC to utilize Great Lakes bottomlands for such purposes, the MPSC's decision plainly implicates the public trust. The Court of Appeals accordingly erred in holding that the MPSC had no obligation to take the public trust into account in rendering that decision. The contours of the MPSC's obligation, and the proper means of fulfilling it on remand, are discussed next.

IV. Under Both MEPA and the Common Law, the MPSC Cannot Approve the Tunnel Project Unless and Until the Department of Environment, Great Lakes, and Energy (EGLE) Makes the Required Public Trust Determinations. [Answer to Question 3]

A. Standard of Review

Where a lower tribunal applies an erroneous legal framework or a decision is based on erroneous legal reasoning, de novo review is appropriate. *Hoste v Shanty Creek Mgmt, Inc*, 459 Mich 561, 569 n 7 (1999).

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

1. MEPA Directs Courts To Determine Impairment to Public Trust Resources, Including By Evaluating and Adopting Pollution Control Standards.

Section 1705(2) of MEPA directs courts, in reviewing agency proceedings, to "determine[]" "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources," and to further determine whether the conduct before the agency "is likely to have such an effect[.]" MCL 324.1705(2).

Courts are charged with making an analogous determination in the context of MEPA's direct suit provisions, which create a cause of action "for the protection of" the state's "natural resources and the public trust in these resources," MCL 324.1701(1), and authorize courts to grant relief where a plaintiff makes a prima facie showing that "the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute,

impair, or destroy the air, water, or other natural resources or the public trust in these resources," MCL 324.1703(1).

In granting relief under these direct-suit provisions, a court can determine "pollution, impairment, or destruction" in multiple ways. MCL 324.1701(1). First, it can apply the MEPA criteria directly, determining whether a plaintiff has demonstrated "pollution, impairment, or destruction" based on the evidence presented in a particular lawsuit. See *Ray v Mason Cnty Drain Comm'r*, 393 Mich 294, 307 & n 10 (1975). Second, if there is an existing "standard for pollution or for an antipollution device or procedure" in other laws or regulations, the court may "[d]etermine the validity, applicability, and reasonableness of the standard" for evaluating the alleged impairment. MCL 324.1701(2). Finally, "[i]f a court finds a standard to be deficient," it may "direct the adoption of a standard approved and specified by the court." *Id.*

Hence, where a separate statute contains an adequate pollution control standard, a court may implement that standard to determine natural resource or public trust impairment in a direct-action MEPA lawsuit. In *Nemeth v Abonmarche Development, Inc*, 457 Mich 16 (1998), for example, this Court held that the Soil Erosion and Sedimentation Control Act, MCL 324.9101–9123a, and its implementing regulations are an appropriate pollution control standard under MEPA and that a violation of that Act therefore constituted a prima facie showing of natural resource impairment for the purposes of a MEPA action. *Id.* at 36, 44. The Court emphasized that it was "proper" under MEPA for

the judiciary "to independently determine whether … pollution control standards" created by the Legislature and agencies "are valid, applicable, and reasonable in accordance with the courts' development of the common law of environmental quality." *Id.* at 35.

The courts' role in evaluating and applying pollution control standards logically extends to judicial review of agency decisions under Section 1705. Both Section 1705 and MEPA's direct suit provisions require courts to determine the "pollution, impairment, or destruction" of natural resources or the public trust in those resources. Compare MCL 324.1705(2) (directing courts, in reviewing agency proceedings, to determine "the alleged *pollution, impairment, or destruction* of the air, water, or other natural resources, or the public trust in these resources") (emphasis added), with MCL 324.1703(1) (directing courts to grant relief where a plaintiff establishes that a defendant's conduct "has *polluted, impaired, or destroyed* or is likely to *pollute, impair, or destroy* the air, water, or other natural resources or the public trust in these resources") (emphasis added).

No reason exists why a court's determination of "pollution, impairment, or destruction" in reviewing agency decisions under Section 1705 would not follow the same approach as in the direct suit context. See, e.g., *Robinson*, 486 Mich at 17 (instructing that where the Legislature repeats the same phrase in multiple provisions of a statute, that phrase "should be interpreted in the same manner" throughout). Accordingly, in directing courts to determine impairment in the specific context of the

administrative decision on review, Section 1705 empowers courts to evaluate and implement "valid, applicable, and reasonable" pollution control standards from other statutes and regulations. *Nemeth*, 457 Mich at 35.

Reading MEPA to contemplate the same role for courts in determining impairment in the context of agency review and in direct suits "harmonize[s]" these sections of the statute and "carr[ies] out" the Legislature's objective of giving courts a central role in developing environmental protection law under the statute, *Macomb Cnty Prosecuting Att'y v Murphy*, 464 Mich 149, 160 (2001); see *Ray*, 393 Mich at 306 (explaining that, in enacting MEPA, the Legislature "set the parameters for the standard of environmental quality but … in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality").

Moreover, Section 1705 does not contemplate some other process diverging from that of Section 1701 by which a court must determine "pollution, impairment, or destruction" in reviewing agency decisions, nor does it in any way prevent courts from independently evaluating and applying pollution control standards from statutes and regulations consistent with Section 1701. See generally MCL 324.1705. And it would be strange for MEPA to empower courts to assess pollution control standards in adjudicating direct suits but not in reviewing agency decision-making, particularly where this Court has made clear that courts must exercise their own "totally

independent judgment" in reviewing an agency's MEPA analysis, *W Mich Env't Action Council, Inc v Nat Res Comm'n*, 405 Mich 741, 748, (1979); see also Joseph L. Sax & Roger L. Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1003, 1005 (1972) (explaining that MEPA was designed to "reduce[] the broad discretion" of regulatory agencies in enforcing environmental standards by "enlarg[ing] the role of courts," particularly in scrutinizing whether agency decisions "fail to protect natural resources from pollution, impairment, or destruction").[8]

2. The Rules Implementing the GLSLA Provide the Standard by Which Impairment to the Public Trust Waters and Bottomlands of the Great Lakes Must be Determined Pursuant to MEPA.

Here, the Commission failed to assess potential impairment to the public trust from Enbridge's unprecedented tunneling project because it misconstrued MEPA's protections to apply solely to natural resources rather than to the public trust in those resources as well. See, e.g., MPSC (Final) Order, p 291 (App, p 291) (adopting a legal standard that omits reference to the public trust and requires only "that … an agency must determine whether the conduct under review will pollute, impair, or destroy natural resources"); see also *id.* at 326–47 (App, pp 326–47) (failing to address public trust impacts in analysis).

Rather than identifying the appropriate standard by which to evaluate the potential public trust impairment at issue in the MPSC's proceedings, the Court of

[8] https://repository.law.umich.edu/cgi/viewcontent.cgi?article=4535&context=mlr.

Appeals instead sanctioned the agency's lack of analysis, holding that "[t]he Commission considered th[e] statutory reference to the 'public trust in [the] resources' by way of its overall MEPA review." COA Op, p 26 (App, p 378). While it is not at all clear what the Court of Appeals meant by this conclusory sentence, what is clear is that both it and the MPSC read "the public trust in th[e] resources" out of the statute. As a result, the Court of Appeals never identified, evaluated, or specified any pollution control standard applicable to the agency approval being sought, even though that approval sanctions the massive alteration of quintessential public trust resources.

And yet Michigan law contains in the Natural Resources and Environmental Protection Act, MCL 324.101–324.90106, and its implementing regulations a well-articulated, long-established, plainly applicable pollution control standard that protects the public trust in the very resources threatened by the tunnel and pipeline. Specifically, Part 325 of the Act, MCL 324.32501–324.32516, originally enacted as the GLSLA, and the associated regulations, Mich Admin Code, R 322.1001–1018, are the appropriate pollution control standard by which the proposed placement and routing of the pipeline through the bottomlands of the Straits of Mackinac must be assessed pursuant to MEPA.

The GLSLA provides for

> the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands … whenever it is determined by the department that the private or public

> use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation *or that the public trust in the state will not be impaired by those agreements for use*, sales, lease, or other disposition. [MCL 324.32502 (emphasis added).]

The GLSLA explicitly covers the resources at issue here: "the unpatented … bottomlands" and "waters of the Great Lakes within the boundaries of the state," *id.* The purpose of the Act is "to preserve and protect the interests of the general public in th[os]e lands and waters" and provide for the "disposition of unpatented lands and the private or public use of waters over patented and unpatented lands" only when it is "determined by [EGLE] that the private or public use of those lands and waters will not substantially affect [traditionally protected public trust uses] or that the public trust in the state will not be impaired[.]" *Id.*

Initially, the GLSLA's implementing rules did not reference pollution or the environment. See Mich Admin Code, R 299.351–63, Ann Admin Code Supp 1955 (App, pp 551–52); Mich Admin Code, R 281.901–15, Ann Admin Code Supp 1967 (App, pp 554–56); Mich Admin Code, R 281.901–15 (1979) (App, p 558–60). In 1982, the Department of Conservation completely rewrote them. Since that time, the rules have focused on the environmental protection of the public trust in the waters and bottomlands of the Great Lakes. See Mich Admin Code R 322.1001(m), Ann Admin Code Supp 1982 (App, p 562) (defining "public trust" to include the state's responsibility for "prevention of pollution"); *id.* 322.1011(1)(a) (App, p 565) (requiring

assurance against "significant environmental impact"); *id.* 322.1013(1) (App, p 565) (requiring minimal environmental impacts); *id.* (requiring use of "nonpolluting materials"); *id.* 322.1013(2)(c)(ii), (e) (App, p 566) (similar); *id.* 322.1013(f)(i) (App, p 566) (prohibiting dredging of pollutants); *id.* 322.1015 (App, p 566) (introducing environmental assessment requirement).

Indeed, EGLE's implementing rules specifically understand the public trust duty in terms of pollution control, defining "the public trust" to mean "the perpetual duty of the state to secure to its people the prevention of pollution … of its natural resources[.]" Mich Admin Code, R 322.1001(m). This definition explicitly honors the public's inherent right to the environmental integrity of public trust resources and recognizes the agency's corresponding duty to prevent the pollution of those resources. See *supra* pp 15–19.

Critically, EGLE's rules not only recognize this duty but also set forth the test by which unacceptable pollution to public trust resources shall be determined:

> In each application for a permit, lease, deed, or agreement for bottomland,[9] existing and potential adverse environmental effects shall be determined. Approval shall not be granted unless the department has determined both of the following:
>
> (a) That the adverse effects to the environment, public trust, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible.

[9] This includes "agreements to use or alter unpatented lands," Mich Admin Code, R 322.1002(1).

> (b) That there is no feasible and prudent alternative to the applicant's proposed activity which is consistent with the reasonable requirements of the public health, safety, and welfare. [Mich Admin Code, R 322.1015 ("Rule 1015").]

This rule represents an appropriate pollution control standard for the purposes of determining impairment to the public trust in the Great Lakes under MEPA. The standard requires EGLE to evaluate whether and to what extent the proposed conduct will cause pollution that will impair the public trust in Great Lakes waters and bottomlands. It leaves no room for agency discretion or for the agency to balance degradation of those public trust resources against unrelated concerns (such as alleged public need), as it prohibits with no exceptions all pollution that rises above a certain threshold. Cf. *Mich Citizens for Water Conservation v Nestle Waters N Am Inc*, 269 Mich App 25, 95 (2005) (holding that the Wetlands Protection Act "cannot be a pollution control standard because it specifically allows the DEQ to permit potentially harmful or polluting activities when it determines that the balance is in favor of the benefits over the harms"), *aff'd in part, rev'd in part on other grounds*, 479 Mich 280 (2007).

Further, by prohibiting all but "minimal" pollution of the public trust resources of the Great Lakes (and only then in the absence of alternatives), the GLSLA rule is intended "to protect our natural resources or to prevent pollution and environmental degradation," *Nemeth*, 457 Mich at 36, consistent with the state's duty under the public trust doctrine to "simultaneously safeguard[]" the resources necessary to support public trust uses, *Glass*, 473 Mich at 696; see *supra* pp 15–21. This purpose well reflects the

suitability of the rule as a pollution control standard. See *Nemeth*, 457 Mich at 28 (directing the adoption of the Soil Erosion and Sedimentation Control Act as pollution control standard where "a major purpose" of Act is "to prevent and control water pollution caused by sedimentation and erosion"); cf. *Mich Citizens for Water Conservation*, 269 Mich App at 94 (declining to adopt provisions of Inland Lakes and Streams Act as a pollution control standard where "the purpose of the statute is not to prevent pollution or environmental degradation, but to protect the rights of current water users from potential harm").

In sum, the GLSLA and its implementing regulations are the appropriate pollution control standard pursuant to which Enbridge's proposed tunneling and placement of its replacement pipeline segment in the bottomlands of the Straits of Mackinac should be assessed under MEPA Section 1705. Because no evidence is needed to resolve this issue, this Court may order the standard's adoption directly. *Dep't of Talent & Econ Dev/Unemployment Ins Agency v Great Oaks Country Club, Inc*, 507 Mich 212, 235 (2021) (reversing Court of Appeals and remanding to agency to apply rule identified by Supreme Court).

3. Where the Public Trust in Great Lakes Waters and Bottomlands Is Implicated, EGLE Must Make the Impairment Determination.

EGLE—*and EGLE alone*—must make the required determinations under the GLSLA pollution control standard. As this Court stated in *Obrecht*, the GLSLA "authoriz[es] the sale, lease, exchange or other disposition of such submerged lands

when and only when it is 'determined by the department of conservation'" that the public trust requirements of the GLSLA have been met. 361 Mich at 416 (quoting Section 2 of the GLSLA, as amended 1958) (emphasis added).

Following *Obrecht*, the Legislature amended the GLSLA and underscored the Department of Conservation's public trust responsibilities. It replaced references to "the general public interest," MCL 322.702 (as amended by 94 PA 1958) (App, p 543), with references to "the public trust," MCL 322.702 (as further amended by 293 PA 1965) (App, p 547), thereby requiring the Department to determine "that the private or public use of [Great Lakes] lands and waters will not substantially affect the public use thereof for hunting, fishing, swimming, pleasure boating or navigation *or that the public trust in the state will not be impaired*," *id.* (emphasis added). Similar changes were made throughout. Compare, e.g., MCL 322.703 (1958) (App, p 543), with MCL 322.703 (1965) (App, p 547) (replacing "*the public interest*" test with the required "finding that *the public trust* … will not be impaired or substantially affected"); MCL 322.705(b) (1958) (App, p 544), with MCL 322.705(b) (1965) (App, p 548) (authorizing agreements with municipalities only on terms "just and equitable in view of *the public trust* [rather than "the public interest"] involved"). The rules followed suit. Compare Mich Admin Code, R 299.353, Ann Admin Code Supp 1955 (App, p 551), with Mich Admin Code, R 281.913, Ann Admin Code Supp 1967 (App, p 555) (introducing express requirement that "the preservation of the public trust [rather than "the public interest"] [is] of

primary concern" in administration of the GLSLA). The Legislature has specified that EGLE is the successor to the Department of Conservation for the purposes of the GLSLA. See MCL 324.32502 (vesting responsibility for administration of the Act in "the department"); MCL 324.3201 (defining "department" to mean the Department of Environmental Quality); Executive Order 2019-06 (1)(a) (App, p 1921) (renaming the Department of Environmental Quality the Department of Environment, Great Lakes, and Energy). The GLSLA indeed criminalizes any action to "excavate[] or fill[] or in any manner alter[] or modif[y] any of the land or waters subject to" the Act absent EGLE approval. MCL 324.32510; see also MCL 324.32503 (authorizing EGLE to enter into agreements for the use or conveyance of bottomlands); MCL 324.32509 (authorizing EGLE to promulgate rules to implement the requirements of the GLSLA). Consistent with the statute, EGLE's rules accordingly provide that the agency "shall not" authorize the use or conveyance of bottomlands unless the department determines that the Rule 1015 standard is satisfied. See Mich Admin Code, R 322.1015.

Because Section 1705 of MEPA mandates that an agency shall not authorize conduct until the potential impairment to public trust resources is appropriately considered, and because EGLE is required by statute to make this determination when the public trust in the Great Lakes waters and bottomlands is concerned, the MPSC cannot render any decision on Enbridge's application unless and until EGLE determines under Rule 1015 that disposition of the Straits bottomlands for Enbridge's private use

will result in no more than minimal environmental effects and that no alternative exists to the disposition. Accordingly, this Court should remand this matter to the MPSC with clear instructions that it must deny Enbridge's application absent the requisite determinations being made by EGLE.

C. Under the Common Law, the MPSC Likewise Cannot Approve the Tunnel Project Until EGLE Makes the Required Public Trust Determinations.

Under the common law, as discussed above, Great Lakes bottomlands cannot be devoted to private use without "assent" "from the legislature or its authorized agency … based on due finding as will legally warrant the intended use of such lands." *Obrecht*, 361 Mich at 416. In *Obrecht,* the Court held that the construction of a permanent deep-water dock on Great Lake bottomlands was unlawful "[f]or want of [a] … determination" by the Department of Conservation that the project would not impair the public trust, as required by the GLSLA. *Id.* (citing the 1958 version of the statute); see also *People ex rel MacMullan v Babcock*, 38 Mich App 336, 351 (1972) (citing *Obrecht* for the proposition that, per the state's "public policy," "submerged lands in the Great Lakes … may be disposed of only when the Department of Conservation determines" the disposal will not impair the public trust). The *Obrecht* Court held that the Legislature or its authorized agency must at the very least determine either that the dedication of bottomlands to private use will result in "the improvement of … the public trust" or that the dedication "may be made without detriment to the public

interest in the lands and waters remaining." 361 Mich at 413 (quotation marks omitted). This baseline "due finding" requirement reflects "the universally accepted rules of … trusteeship," *id.* at 412, and represents "an inalienable obligation of sovereignty" on the part of the Legislature, *Nedtweg*, 237 Mich at 17.

In keeping with this obligation, the Legislature, as a sovereign and co-equal guardian of the public trust, has now set forth the more specific requirements for the use or conveyance of the bottomlands found in the GLSLA. *See Glass*, 473 Mich at 683 ("[T]he GLSLA establishes the scope of the regulatory authority that the Legislature exercises, pursuant to the public trust doctrine."). Subsequent to *Obrecht*, it specified that EGLE may convey or authorize the private use of Great Lakes bottomlands *only* if the agency determines that the conveyance or private use will not "substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired[.]" MCL 324.32502; see also MCL 324.32509 (authorizing EGLE to promulgate rules implementing the GLSLA requirements). EGLE in turn promulgated the 1982 regulations governing the use or conveyance of the bottomlands, Mich Admin Code, R 322.1015, which, as explained above, provide that the agency will not authorize any use or conveyance of bottomlands unless it determines (1) that adverse effects to the public trust "are minimal and will be mitigated to the extent possible"; and (2) "[t]hat there is no feasible and prudent alternative to the applicant's proposed activity which is

consistent with the reasonable requirements of the public health, safety, and welfare." *Id.*; see also *supra* pp 40–41.

The regulatory framework established by the GLSLA represents the Legislature's fulfillment of its "inalienable obligation" to the public trust, *Nedtweg*, 237 Mich at 17; see also *Obrecht*, 361 Mich at 412–13, 416. The statute supplements the baseline "due finding" requirements recognized by this Court under the common law by designating EGLE as the Legislature's "authorized agency" for the purposes of regulating the use or conveyance of bottomlands and empowering the agency to promulgate regulations that specify the precise determinations the agency must make before authorizing any use or conveyance. See *Obrecht*, 361 Mich at 416.

In other contexts, the Legislature has similarly established specific regulatory requirements to effectuate its broad obligations to the public. The comprehensive regulatory framework established by MEPA, for example, "marks the Legislature's response to [its] constitutional commitment to the 'conservation and development of the natural resources of the state[.]'" *Ray*, 393 Mich at 304 (quoting Const 1963, art 4, § 52). Similarly, the Legislature has enacted campaign finance rules to fulfill its "[c]harge[] to preserve the 'purity of elections' and to 'guard against abuses of the elective franchise[.]'" *Mich Educ Ass'n v Sec'y of State*, 489 Mich 194, 202 (2011) (quoting Const 1963, art 2 § 4). Analogous legislation exists at the federal level. See, e.g., *Tennessee v Lane*, 541 US 509, 520 (2004) (holding that Section 5 of the Fourteenth Amendment

authorizes Congress to "enact prophylactic legislation … to carry out the basic objectives of the Equal Protection Clause"). The GLSLA and implementing regulations likewise represent the Legislature's fulfillment of its inalienable public trust obligations as recognized by this Court. And pursuant to the specific requirements imposed by those sources of law, the MPSC cannot proceed to permit Enbridge's tunnel project unless and until EGLE makes the requisite public trust determinations under them.

CONCLUSION

Appellant FLOW respectfully requests that this Court reverse the Court of Appeals, remand this matter to the MPSC, and order the agency to deny Enbridge's application unless and until EGLE makes the requisite determinations under the GLSLA and its implementing regulations.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify Appellant For Love of Water's Brief on Appeal complies with the word count limit of MCR 7.212(B). This brief was written using Microsoft Word 365 and has a word count of 12,049 words.

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