RECEIVED by MSC 1/23/2026 4:28:56 PM

STATE OF MICHIGAN
IN THE SUPREME COURT

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE & 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 (consolidated)

MPSC Case No. U-20763

FOR LOVE OF WATER,

Appellant,

v

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

Supreme Court No. 168346

Court of Appeals No. 369157

MPSC Case No. U-20763

Appellees,

and

ENBRIDGE ENERGY LIMITED
PARTNERSHIP,

Petitioner-Appellee.
_____/

AMICUS CURIAE BRIEF OF ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF THE STATE OF MICHIGAN IN PARTIAL SUPPORT OF APPELLANTS

Keith D. Underkoffler (P84854)
Assistant Attorney General
Attorney for Amicus Curiae
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
underkofflerk@michigan.gov

Dated: January 23, 2026

RECEIVED by MSC 1/23/2026 4:28:56 PM

RECEIVED by MSC 1/23/2026 4:28:56 PM

TABLE OF CONTENTS

Page

Index of Authorities ii

Statement of jurisdiction and questions presented vi

Statement of Interest of Amicus Curiae Attorney General Dana Nessel, on behalf of the people of the state i

Statement of Facts and Proceedings 1

Legal Standards 3

Argument 4

I. The Straits of Mackinac are among the State's most precious natural resources and are held in public trust for the use and benefit of the People. 4

II. Enbridge cannot be allowed to continue operating the Dual Pipelines in the Straits. 6

III. It is critically important that the Replacement Project be subject to a thorough environmental review based on a full and fair record. 9

IV. MEPA does not displace the common-law public trust doctrine. 13

Conclusion and Relief Requested 15

Word Count Statement 16

RECEIVED by MSC 1/23/2026 4:28:56 PM

INDEX OF AUTHORITIES

Cases

Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v Enbridge Energy Company, Inc,
unpublished opinion of the United States District Court for the Western District of Wisconsin, issued June 16, 2023 (Docket No. 19-cv-602-wmc);
2023 WL 4043961 12

Collins v Gerhardt,
237 Mich 38 (1926) 6

Enbridge Energy, LP v Whitmer,
__ F Supp 3d __, 2025 WL 3707609 (WD Mich, Dec 17, 2025) 8

Glass v Goeckel,
473 Mich 667 (2005) 5, 15

Highland Recreation Defense Foundation v Natural Resources Comm,
180 Mich App 324 (1989) 15

Hughes v Almena Twp,
284 Mich App 50 (2009) 13

Idaho v Coeur d'Alene Tribe of Idaho,
521 US 261 (1997) 4, 5

In re Certified Question (Wayne Co v Phillip Morris, Inc),
465 Mich 537 (2002) i

Janini v London Townhouses Condo Ass'n,
514 Mich 86 (2014) 14

Lessee of Pollard v Hagan,
3 How 212 (1845) 5

Martin v Lessee of Waddell,
16 Pet 367 (1842) 5

Mundy v McDonald,
216 Mich 444 (1921) i

Nedtweg v Wallace,
237 Mich 14 (1926) 5

RECEIVED by MSC 1/23/2026 4:28:56 PM

Obrecht v Nat'l Gypsum Co,
361 Mich 399 (1960) ..... i, 6

Oregon ex rel State Land Bd v Corvallis Sand & Gravel Co,
429 US 363 (1977) 5

State v Venice of Am Land Co,
160 Mich 680 (1910) 5

Utah Div of State Lands v United States,
482 US 193 (1987) 4

Wold Architects and Engineers v Strat,
474 Mich 223 (2006) 14

Statutes

MCL 14.102 i

MCL 14.28 i

MCL 14.29 i

MCL 24.272(3) 13

MCL 24.275 13

MCL 24.305 ..... 4, 13

MCL 24.306 4

MCL 324.1701(1) ..... i, 14

MCL 324.1705(1) ..... i, 14

MCL 324.1705(2) 10

Other Authorities

MI Propane Security Plan (Mar 11, 2021),
https://www.michigan.gov/-/media/Project/Websites/mpsc/consumer/propane/MI_Propane_Security_Plan_Overview.pdf?rev=90d4da17bbfb482a96fec64e2201b6c9 11

Michigan Statewide Energy Assessment: Final Report,
https://www.michigan.gov/-/media/Project/Websites/mpsc/regulatory/reports/2019-09-

11_SEA_Final_Report_with_Appendices.pdf?rev=77a6a88282384718aa09360f714f177f (Sept 11, 2019) 11

Press Release, *AG Nessel Calls on MPSC to Reject Enbridge's Attempt to Bypass Review Process for Building New Pipelines* (May 14, 2020), https://www.michigan.gov/ag/news/press-releases/2020/05/14/ag-nessel-calls-on-mpsc-to-reject-enbridges-attempt-to-bypass-review 1

Press Release, *AG Nessel Files in Wisconsin Federal Court Asking for Emergency Shutdown of Enbridge's Line 5 Pipeline* (May 17, 2023), https://www.michigan.gov/ag/news/press-releases/2023/05/17/ag-nessel-files-in-wisconsin-federal-court-asking-for-emergency-shutdown-of-enbridge-line-5-pipeline ii

Press Release, *AG Nessel Files Lawsuit on Behalf of Gov. Whitmer, DNR to Shut Down Enbridge's Line 5* (Nov 13, 2020), https://www.michigan.gov/ag/news/press-releases/2020/11/13/ag-nessel-files-lawsuit-on-behalf-of-gov-whitmer-dnr-to-shut-down-enbridges-line-5 8

Press Release, *Attorney General Nessel Comments on UP Energy Task Force Report on Propane, Urges Prompt Planning to Prepare for Shutdown of Enbridge Line 5* (Apr 7, 2020), https://www.michigan.gov/ag/news/press-releases/2020/04/07/attorney-general-nessel-comments-on-up-energy-task-force-report-on-propane 11

Press Release, Attorney General Nessel Lauds "Game-changing" Line 5 Report (Nov 17, 2023), https://www.michigan.gov/ag/news/press-releases/2023/11/17/attorney-general-nessel-lauds-game-changing-line-5-report 12

Press Release, *Attorney General Nessel Takes Legal Steps to Decommission Line 5* (June 27, 2019), https://www.michigan.gov/ag/news/press-releases/2019/06/27/attorney-general-nessel-takes-legal-steps-to-decommission-line-5 ..... ii, 7

Press Release, Governor Whitmer Takes Action to Protect the Great Lakes (Nov 30, 2021), https://www.michigan.gov/whitmer/news/press-releases/2021/11/30/governor-whitmer-takes-action-to-protect-the-great-lakes 8

Press Release, *Judge Orders Line 5 to Cease Operations* (June 25, 2020), https://www.michigan.gov/ag/news/press-releases/2020/06/25/judge-orders-line-5-to-cease-operations 6

RECEIVED by MSC 1/23/2026 4:28:56 PM

RECEIVED by MSC 1/23/2026 4:28:56 PM

Robert B. Richardson and Nathan Brugone, *Oil Spill Economics: Estimates of the Economic Damages of an Oil Spill in the Straits of Mackinac in Michigan* (May 2018), https://flowwateradvocates.org/wp-content/uploads/2018/05/FLOW_Report_Line-5_Final-release-1.pdf 7

UP Energy Task Force Committee Recommendations, Part 1—Propane Supply (Apr 17, 2020), https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Groups/UPETF/Report-UPETF-Part-1.pdf?rev=fcf2b8dfc8e64838b1195fd193405566 11

UP Energy Task Force Committee Recommendations, Part 2—Energy Supply (Mar 31, 2021), https://www.michigan.gov/-/media/Project/Websites/egle/Documents/Groups/UPETF/Report-UPETF-Part-2.pdf?rev=a3dd398abd834c16bcdc0ca3ec842555 11

Rules

MCR 7.312(H)(2)(a) ii

Regulations

Mich Admin Code, R 792.10447 10

RECEIVED by MSC 1/23/2026 4:28:56 PM

STATEMENT OF JURISDICTION AND QUESTIONS PRESENTED

The Attorney General concurs in the statements of jurisdiction and questions presented submitted by Appellants Bay Mills Indian Community, Little Traverse Bay Bands of Odawa Indians, Nottawaseppi Huron Band of the Potawatomi, Environmental Law and Policy Center, and Michigan Climate Action Network (collectively, Joint Appellants) and Appellant For Love of Water (FLOW).

RECEIVED by MSC 1/23/2026 4:28:56 PM

STATEMENT OF INTEREST OF AMICUS CURIAE ATTORNEY GENERAL DANA NESSEL, ON BEHALF OF THE PEOPLE OF THE STATE

Amicus Curiae Dana Nessel, as Attorney General for the State of Michigan, is charged with many duties, including representing the State of Michigan, the People of the State of Michigan, and state agencies in administrative and judicial proceedings. See, e.g., MCL 14.28, 14.29, 14.102; *Mundy v McDonald*, 216 Mich 444, 450–451 (1921); *In re Certified Question (Wayne Co v Phillip Morris, Inc)*, 465 Mich 537, 543–545 (2002). In addition, the Attorney General—along with other Executive and Legislative branch officials as well as this Court—is "one of the sworn guardians of Michigan's duty and responsibility as trustee" of the Great Lakes. See *Obrecht v Nat'l Gypsum Co*, 361 Mich 399, 412 (1960). Further, the Attorney General is regularly involved in proceedings under the Michigan Environmental Protection Act (MEPA). See MCL 324.1701(1) and 324.1705(1).

The controversy over the existing Line 5 pipelines in the Straits of Mackinac (Dual Pipelines), and the proposal to replace them with a new pipeline located in a tunnel (Replacement Project), have required the Attorney General to act in each of these capacities. For example, the Attorney General, on behalf of the People of the State of Michigan, has filed a lawsuit alleging that the 1953 easement purporting to authorize Enbridge to operate the Dual Pipelines in the Straits of Mackinac is invalid under the public trust doctrine and that the continued operation of the Dual Pipelines is a public nuisance and violates MEPA.[1] The Attorney General also

[1] See Press Release, *Attorney General Nessel Takes Legal Steps to Decommission Line 5* (June 27, 2019), https://www.michigan.gov/ag/news/press-

RECEIVED by MSC 1/23/2026 4:28:56 PM

represents the Governor and Department of Natural Resources (DNR) Director in legal proceedings regarding their revocation and termination of the 1953 easement. See *Enbridge v Whitmer et al*, WD Mich Case Nos 1:20-cv-1141 and 1:20-cv-1142; *Enbridge v Whitmer et al*, 6th Cir No 26-1021; *Enbridge v Whitmer et al*, US Sup Ct No 25-582. In addition, the Attorney General has filed amicus briefs in other lawsuits regarding Line 5.[2] Finally, Attorney General staff represents the Michigan Public Service Commission (MPSC or Commission) in this matter and the Attorney General separately participated in a limited capacity, on behalf of the People of the State, in the proceedings below. See Statement of Facts, pp 1–3.

Thus, the Attorney General has a unique perspective on this matter. The Attorney General does not take a position, as amicus, regarding the merits of the Replacement Project or many of the questions presented. The issues are complex, and the arguments on all sides are adequately presented by the parties. But the Attorney General submits this amicus brief, on behalf of the People of the State and pursuant to MCR 7.312(H)(2)(a), to provide additional context and information that may be beneficial to the Court. The Attorney General also urges the Court not to adopt one specific argument advanced by Enbridge, which could have ramifications in other proceedings and is not supported by applicable law.

---

releases/2019/06/27/attorney-general-nessel-takes-legal-steps-to-decommission-line-5.

[2] See, e.g., Press Release, *AG Nessel Files in Wisconsin Federal Court Asking for Emergency Shutdown of Enbridge's Line 5 Pipeline* (May 17, 2023), https://www.michigan.gov/ag/news/press-releases/2023/05/17/ag-nessel-files-in-wisconsin-federal-court-asking-for-emergency-shutdown-of-enbridge-line-5-pipeline.

RECEIVED by MSC 1/23/2026 4:28:56 PM

STATEMENT OF FACTS AND PROCEEDINGS

The facts and proceedings are set forth in the parties' briefs. The Attorney General will not repeat them here but takes this opportunity to provide an overview of the Department of Attorney General's limited participation, on behalf of the People of the State of Michigan, in the proceedings below.

Enbridge's application seeking authorization for the Replacement Project included an alternative request for a declaratory ruling that no new authorization was needed. (4/17/20 Application, MPSC Dkt 1, pp 15–17.) The Commission solicited public comments on that issue. (4/22/20 Order, MPSC Dkt 22, p 3.) The Attorney General was one of many concerned citizens who weighed in to oppose Enbridge's request, arguing that MEPA required the Commission to consider the environmental impacts of the Replacement Project and there is too much at stake for this significant project not to undergo a full and fair environmental review.[3] (5/13/20 AG Pub Cmt, MPSC Dkt 94.)

The Attorney General subsequently determined that the interests of the People of the State of Michigan required her to intervene on their behalf in the MPSC proceedings because the People of Michigan have an interest in the proper application of Michigan law, the Straits are "an area of unique ecological and economic significance," and "[a]ny action taken in this proceeding will affect the

[3] See Press Release, *AG Nessel Calls on MPSC to Reject Enbridge's Attempt to Bypass Review Process for Building New Pipelines* (May 14, 2020), https://www.michigan.gov/ag/news/press-releases/2020/05/14/ag-nessel-calls-on-mpsc-to-reject-enbridges-attempt-to-bypass-review.

RECEIVED by MSC 1/23/2026 4:28:56 PM

environment, natural resources and economy of the State as well as the general well-being of the citizens and residents of this State." (7/22/20 AG Notice of Intervention, MPSC Dkt 152, pp 2–3.) The Attorney General noted that the Commission was required under MEPA to consider environmental impacts and feasible and prudent alternatives to the project, and took the position that:

> the Commission should specifically evaluate whether the Line 5 Project, if implemented, is likely to pollute, impair and destroy natural resources and the public trust therein, by (a) perpetuating the operation of the existing Line 5 pipelines and attendant unreasonable risk of releases of petroleum products in the waters of the Straits for years until the Project is completed, and (b) promoting continued, unnecessary consumption of fossil fuels, delaying the transition to cleaner and more cost-effective sources of energy and impeding efforts to mitigate the effects of climate change. [*Id.* at 4.]

The Attorney General did not participate in the submission of evidence, examination of witnesses, or merits briefing on whether Enbridge's application met the requisite legal standards. Rather, the Attorney General's participation as intervenor was limited to advocating for a thorough environmental review of the proposed project based on a full and fair record.

Most relevant here, the Attorney General joined in the Joint Appellants' opposition to Enbridge's motion in limine, requesting that the motion be denied in its entirety. (9/23/20 AG Resp to Mot in Limine, MPSC Dkt 331.) After the administrative law judge (ALJ) granted in part Enbridge's motion in limine, the Attorney General supported FLOW's and the Joint Appellants' applications for leave to appeal. (11/6/20 AG Support for Applications for Leave to Appeal, MPSC Dkt 422.) And after the MPSC remanded the motion in limine for rehearing and reconsideration (12/9/20 Order, MPSC Dkt 480), the Attorney General continued to

RECEIVED by MSC 1/23/2026 4:28:56 PM

support the denial of Enbridge's motion in its entirety (1/15/21 AG Br in Supp of FLOW and Joint Appellants, MPSC Dkt 544; 1/29/21 AG Reply Br, MPSC Dkt 564).

The MPSC affirmed in part and reversed in part the ALJ's motion in limine ruling, excluding certain categories of evidence from being presented while allowing others. (4/21/21 Order, MPSC Dkt 713.) The MPSC subsequently approved Enbridge's application for the Replacement Project, subject to certain conditions. (12/1/23 Order, MPSC Dkt 1454.)

The Attorney General submitted an amicus brief in the Court of Appeals in partial support of the Joint Appellants. (9/19/24 AG Br, COA Nos 369156, 369159, 1369161, 369162.) The Attorney General expressed a concern that, despite the MPSC's admirable efforts in this matter, its ruling on Enbridge's motion in limine may have limited the evidence presented to and considered by the MPSC in its environmental review. (*Id.*) Accordingly, the Attorney General supported a remand to allow the MPSC to consider any additional evidence the Joint Appellants sought to offer and to modify its order as appropriate based on a full and fair record. (*Id.*)

The Court of Appeals affirmed the MPSC's decision to approve Enbridge's application on the existing record. (FLOW App'x Vol 1, pp 353–383.)

LEGAL STANDARDS

An administrative agency's final decision can be reversed, modified, or remanded if it is, among other things, in violation of the constitution or a statute; made upon unlawful procedure resulting in material prejudice to a party; not supported by competent, material and substantial evidence on the whole record; or

RECEIVED by MSC 1/23/2026 4:28:56 PM

arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion. MCL 24.306. Additionally, the Administrative Procedures Act (APA) provides a mechanism by which, if the Court finds that an inadequate record was created by the Commission and additional evidence would be material, the Court can order the Commission to take additional evidence, and the Commission may modify its findings, decision, or order based on the additional evidence. MCL 24.305.

ARGUMENT

I. The Straits of Mackinac are among the State's most precious natural resources and are held in public trust for the use and benefit of the People.

"The Straits of Mackinac and the Great Lakes are unique features on Earth." (FLOW App'x Vol 3, p 1061.) "The combined Michigan–Huron system forms the largest lake in the world by surface area and the fourth largest by volume, containing nearly 8% of the world's surface freshwater." (*Id.* at 1058.) The Straits of Mackinac, which connect lakes Michigan and Huron, "serve as a hub for recreation, tourism, commercial shipping, as well as commercial, sport and subsistence fishing." (*Id.*) "[S]everal tribes retain fishing rights in these 1836 treaty-ceded waters." (*Id.*)

The State of Michigan acquired title to the bottomlands of the Straits when it was admitted to the union in 1837. As the Supreme Court of the United States has explained, submerged bottomlands "have historically been considered 'sovereign lands.'" *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261, 283 (1997) (quoting *Utah Div of State Lands v United States*, 482 US 193, 195–98 (1987)). "[T]he people of

RECEIVED by MSC 1/23/2026 4:28:56 PM

each of the Thirteen Colonies at the time of independence 'became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for common use, subject only to the rights surrendered by the Constitution to the general government.'" *Id.* (quoting *Martin v Lessee of Waddell*, 16 Pet 367, 410 (1842)). States that entered the union after the original Thirteen Colonies "did so on an 'equal footing' with the original States and so have similar ownership over these 'sovereign lands.'" *Id.* (quoting *Lessee of Pollard v Hagan*, 3 How 212 (1845)). Accordingly, "a State's title to these sovereign lands arises from the equal footing doctrine and is 'conferred not by Congress but by the Constitution itself.'" *Id.* (quoting *Oregon ex rel State Land Bd v Corvallis Sand & Gravel Co*, 429 US 363, 374 (1977)).

The State's sovereign ownership of the submerged lands beneath the Straits has "a unique status in the law," as these lands are "infused with a public trust the State itself is bound to respect." *Id.* Michigan holds title "in its sovereign capacity" and "in trust for the use and benefit of its people." *State v Venice of Am Land Co*, 160 Mich 680, 702 (1910). As this Court has explained:

> [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. 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 v Goeckel*, 473 Mich 667, 678–79 (2005) (cleaned up).]

"The state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources." *Id.*; accord *Nedtweg v Wallace*, 237 Mich 14, 17 (1926) ("The State may not, by grant, surrender such public rights

RECEIVED by MSC 1/23/2026 4:28:56 PM

any more than it can abdicate the police power or other essential power of government."). Instead, these public rights are protected by a "high, solemn, and perpetual trust which it is the duty of the State to forever maintain." *Collins v Gerhardt*, 237 Mich 38, 49 (1926).

II. Enbridge cannot be allowed to continue operating the Dual Pipelines in the Straits.

Unfortunately, the State has not always fulfilled its public trust obligations when it comes to Line 5 in the Straits. The 1953 easement purporting to authorize Enbridge to operate the Dual Pipelines at their present location was granted without making either of the due findings that the State *must* make before such an easement may be validly conveyed: that the easement (1) would improve navigation or another public trust interest; or (2) at least not impair the public trust. See *Obrecht*, 361 Mich at 412–13. And that decision has resulted in an ongoing threat to the Great Lakes that cannot be squared with the State's obligations under the public trust doctrine, as underscored by the near-miss incidents in 2018 and 2020, the latter of which led the Ingham County Circuit Court to temporarily enjoin the operation of the Dual Pipelines.[4]

As the MPSC found, "[a] rupture of the dual pipelines would be catastrophic for the Great Lakes, costing an estimated $1.37 billion damages and resulting in long-lasting health, environmental, and cultural damages." (12/1/23 Order, MPSC

[4] See Press Release, *Judge Orders Line 5 to Cease Operations* (June 25, 2020), https://www.michigan.gov/ag/news/press-releases/2020/06/25/judge-orders-line-5-to-cease-operations.

RECEIVED by MSC 1/23/2026 4:28:56 PM

Dkt 1454, p 346.) Indeed, some studies suggest that the consequences could be even more severe, estimating total economic impacts of $5.6 billion. See Robert B. Richardson and Nathan Brugone, *Oil Spill Economics: Estimates of the Economic Damages of an Oil Spill in the Straits of Mackinac in Michigan* (May 2018), https://flowwateradvocates.org/wp-content/uploads/2018/05/FLOW_Report_Line-5_Final-release-1.pdf.

The Governor and Attorney General have sought to correct these errors of the past and end the ongoing threat posed by the Dual Pipelines. In June 2019, the Attorney General filed a lawsuit in Ingham County Circuit Court seeking to permanently enjoin the operation of the Dual Pipelines because the 1953 easement is invalid under the public trust doctrine and the continued operation of the Dual Pipelines is a public nuisance that violates the public trust and MEPA.[5] Due to procedural delays, the Attorney General's claims have yet to be decided. The court took the parties' cross-motions for summary disposition under advisement last January, and the action remains pending.

In November 2020, the Governor and DNR Director issued a Notice of Revocation and Termination of Easement, which revoked the 1953 easement under the public trust doctrine and terminated it due to Enbridge's repeated and incurable

[5] See Press Release, *Attorney General Nessel Takes Legal Steps to Decommission Line 5* (June 27, 2019), https://www.michigan.gov/ag/news/press-releases/2019/06/27/attorney-general-nessel-takes-legal-steps-to-decommission-line-5.

RECEIVED by MSC 1/23/2026 4:28:56 PM

breaches of the easement's terms and conditions.[6] On December 17, 2025, a federal district court enjoined the Governor and DNR Director from enforcing the Notice. *Enbridge Energy, LP v Whitmer*, __ F Supp 3d __, 2025 WL 3707609 (WD Mich, Dec 17, 2025). However, the district court recognized that its ruling "won't be the last word." (Tr, *Energy, LP v Whitmer*, WD Mich Case No 1:20-cv-1141, Dkt 160, p 64.) And indeed, the Governor and DNR Director have appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. (6th Cir No 26-1021.) Moreover, whether the district court even had jurisdiction to issue its ruling is subject to a petition for a writ of certiorari, which is currently pending before the Supreme Court of the United States. (US Sup Ct No 25-582.)

These ongoing legal proceedings contradict some of the Appellees' representations about the continued use of the Dual Pipelines. For instance, Enbridge cites the district court's ruling for the proposition that "[a]bsent the Replacement Project, the Line 5 Dual Pipelines . . . will continue to operate across the Straits lakebed indefinitely." (Enbridge Br at 1; see also *id.* at 33.) But even setting aside whether the current pipelines are capable of indefinite operation, Enbridge may be prevented from operating them for a number of reasons, including the federal district court's injunction being vacated on appeal or the Attorney

---

[6] See Press Release, *AG Nessel Files Lawsuit on Behalf of Gov. Whitmer, DNR to Shut Down Enbridge's Line 5* (Nov 13, 2020), https://www.michigan.gov/ag/news/press-releases/2020/11/13/ag-nessel-files-lawsuit-on-behalf-of-gov-whitmer-dnr-to-shut-down-enbridges-line-5; Press Release, Governor Whitmer Takes Action to Protect the Great Lakes (Nov 30, 2021), https://www.michigan.gov/whitmer/news/press-releases/2021/11/30/governor-whitmer-takes-action-to-protect-the-great-lakes.

RECEIVED by MSC 1/23/2026 4:28:56 PM

General prevailing in her pending lawsuit. The Attorney General remains convinced that Enbridge's operation of the Dual Pipelines is legally infirm and committed to ending Enbridge's ongoing violations of the public trust doctrine, Michigan public nuisance law, and MEPA.

The Michigan and National Propane Gas Associations (together, Propane Gas Associations) also state that, in light of the district court's ruling, concerns about the Replacement Project extending the length of time that crude oil is transmitted through the Straits are now moot. (Propane Gas Ass'n Br, pp 3, 40.) That is inaccurate. The Attorney General's pending lawsuit in the Ingham County Circuit Court has not been decided. And the federal district court's ruling in Enbridge's suit against the Governor and DNR Director is subject to a pending appeal and petition for writ of certiorari. As the district court itself recognized, its ruling is not the last word. Whether Enbridge will be allowed to continue operating the Dual Pipelines in perpetuity—which it should not do in any event, regardless of its profit motive—is very much in doubt.

III. It is critically important that the Replacement Project be subject to a thorough environmental review based on a full and fair record.

Given the pressing need to end the use of the Dual Pipelines, the assessment of alternative methods to meet Michigan's energy needs is a matter of considerable public importance. And it is critical to ensure that, this time around, the State's environmental obligations are fulfilled. To that end, the Attorney General intervened in the proceedings before the MPSC and consistently advocated that the

RECEIVED by MSC 1/23/2026 4:28:56 PM

intervenors be allowed to present all available evidence regarding the potential environmental impacts of the Replacement Project and any feasible and prudent alternatives to the Replacement Project so as to ensure that the MPSC's analysis was based on a full and fair record. See Statement of Facts, pp 1–3.

The Attorney General is concerned that the MPSC's ruling on Enbridge's motion in limine may have hampered its determination of two issues that were properly before it: (1) whether there is a public need for the Replacement Project pursuant to Mich Admin Code, R 792.10447 (commonly referred to as Rule 447); and (2) whether there is a feasible and prudent alternative to the Replacement Project pursuant to MEPA, MCL 324.1705(2).

In considering whether there is a public need for the replacement pipeline under Rule 447, the MPSC assessed whether there is a public need for not only the proposed replacement pipeline itself, but also for the petroleum products that Enbridge proposes to transport through the replacement pipeline. (12/1/23 Order, MPSC Dkt 1454, pp 302, 305.) But, because of its ruling on the motion in limine, the MPSC limited the evidence related to the need for Line 5's products.

Similarly, in considering whether there is a feasible and prudent alternative to the Replacement Project under MEPA, the MPSC relied primarily on a 2017 report prepared for the State of Michigan by Dynamic Risk Assessment Systems, Inc. (See *id.* at 300–305, 336–337.) However, the Dynamic Risk report was authored over eight years ago, and there has since been a great deal of additional research, showing that a combination of non-pipeline methods of hydrocarbon

RECEIVED by MSC 1/23/2026 4:28:56 PM

transport could satisfy Michigan's energy needs without having adverse impacts on consumers. Examples of more recent analyses include, but are not limited to:

- A 2019 Statewide Energy Assessment evaluating the resilience of Michigan's electric, natural gas, and propane delivery systems.[7]
- A 2020 report prepared by Michigan's Upper Peninsula Energy Task Force, which conducted a broad analysis of the energy needs of Michigan's Upper Peninsula and alternative solutions for meeting those needs in the event that Line 5 ceases operation.[8]
- The 2021 Michigan Propane Security Plan, which details measures Michigan has taken to ensure that it will have a secure energy supply if Line 5 shuts down.[9]

---

[7] Michigan Statewide Energy Assessment: Final Report, https://www.michigan.gov/-/media/Project/Websites/mpsc/regulatory/reports/2019-09-11_SEA_Final_Report_with_Appendices.pdf?rev=77a6a88282384718aa09360f714f177f (Sept 11, 2019).

[8] UP Energy Task Force Committee Recommendations, Part 1—Propane Supply (Apr 17, 2020), https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Groups/UPETF/Report-UPETF-Part-1.pdf?rev=fcf2b8dfc8e64838b1195fd193405566; UP Energy Task Force Committee Recommendations, Part 2—Energy Supply (Mar 31, 2021), https://www.michigan.gov/-/media/Project/Websites/egle/Documents/Groups/UPETF/Report-UPETF-Part-2.pdf?rev=a3dd398abd834c16bcdc0ca3ec842555; see also Press Release, *Attorney General Nessel Comments on UP Energy Task Force Report on Propane, Urges Prompt Planning to Prepare for Shutdown of Enbridge Line 5* (Apr 7, 2020), https://www.michigan.gov/ag/news/press-releases/2020/04/07/attorney-general-nessel-comments-on-up-energy-task-force-report-on-propane.

[9] MI Propane Security Plan (Mar 11, 2021), https://www.michigan.gov/-/media/Project/Websites/mpsc/consumer/propane/MI_Propane_Security_Plan_Overview.pdf?rev=90d4da17bbfb482a96fec64e2201b6c9.

RECEIVED by MSC 1/23/2026 4:28:56 PM

- Evidence presented at a 2022 trial, which a federal court relied upon in ordering Enbridge to reroute Line 5 or else permanently close it within three years. See *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v Enbridge Energy Company, Inc*, unpublished opinion of the United States District Court for the Western District of Wisconsin, issued June 16, 2023 (Docket No. 19-cv-602-wmc); 2023 WL 4043961 (appeal pending).
- A 2023 report prepared by industrial logistics and supply chain experts PLG Consulting, which concluded that "it is clear that there exists a range of commercially feasible and operationally viable solutions that can provide alternative crude and [natural gas liquid (NGL)] supply chains to affected markets in the event of a Line 5 shutdown" "without supply shortages or price spikes."[10]

The Attorney General is concerned that the MPSC's ruling as to the scope of its review may have discouraged or prevented the presentation of relevant evidence on these topics. The Attorney General also shares the Court of Appeals' concern that, in evaluating the alternatives to the Replacement Project, the MPSC appears to have made an apples-to-oranges assessment, comparing the environmental effects of non-pipeline alternatives "for the entire transport system" to the environmental effects from "just the tunnel project." (FLOW App'x Vol 1, p 376.)

[10] See Press Release, Attorney General Nessel Lauds "Game-changing" Line 5 Report (Nov 17, 2023), https://www.michigan.gov/ag/news/press-releases/2023/11/17/attorney-general-nessel-lauds-game-changing-line-5-report.

RECEIVED by MSC 1/23/2026 4:28:56 PM

The APA includes various mechanisms designed to ensure that the parties to an administrative hearing have an opportunity to present relevant evidence. See MCL 24.272(3); see also *Hughes v Almena Twp*, 284 Mich App 50, 69 (2009). In particular, administrative tribunals are empowered to admit evidence more liberally than a court of law, MCL 24.275, and to reopen proceedings to allow the presentation of additional evidence, MCL 24.305.

Considering the importance of the issues at stake, which could shape Michigan's energy infrastructure for generations to come, any decision on Enbridge's application requires a full and thorough environmental review, considering up-to-date evidence submitted by all parties regarding all issues in the contested case. To the extent this Court concludes that the MPSC's limitation on the scope of evidence prevented this from occurring, the Attorney General supports a remand for the consideration of additional evidence under the appropriate legal standard.

IV. MEPA does not displace the common-law public trust doctrine.

The appeal filed by FLOW raises complex questions about the relationship between MEPA and the common-law public trust doctrine. The Attorney General does not take a position on most of these issues, which are adequately briefed by the parties. However, the Attorney General does urge the Court not to adopt one argument advanced by Enbridge: that MEPA *displaces* the common-law public trust doctrine. (Enbridge Br, pp 43–47.) Enbridge contends that "MEPA and the common-law doctrine speak directly to the same issue . . . so these two obligations

RECEIVED by MSC 1/23/2026 4:28:56 PM

cannot coexist," and MEPA "displaces any obligations the common-law doctrine imposes." (*Id.* at 47.) Enbridge has made similar arguments in the Attorney General's lawsuit regarding the Dual Pipelines, which involves both MEPA and common-law public trust doctrine claims. See above, p 7, n5.

Enbridge's displacement argument does not withstand scrutiny. "Michigan courts have uniformly held that legislative amendment of the common law is not lightly presumed." *Wold Architects and Engineers v Strat*, 474 Mich 223, 233 (2006). Statutory and common-law obligations often coexist, and they are presumed to do so unless the Legislature clearly states an intention to abrogate the common law. See *id.* at 233–34; *Janini v London Townhouses Condo Ass'n*, 514 Mich 86, 95–96 (2014) (explaining that where a statutory scheme and common-law principles coexist, the Legislature should state any intent to abrogate the common law).

MEPA contains no such expression of legislative intent. The common law public trust doctrine is a limitation on the State's sovereign ownership of public trust resources, and whether the legislature even could abrogate the State's sovereign obligations is questionable. See above at 4–6. Regardless, the legislature did not purport to do so in MEPA. Far from expressing an intent to displace the common-law doctrine, MEPA incorporates it. MEPA simply creates a cause of action and specifies certain obligations that apply in administrative proceedings. MCL 324.1701(1) and 324.1705(1). While there may be cases in which MEPA overlaps with the common-law doctrine to such a degree that no separate analysis is required, see *Highland Recreation Defense Foundation v Natural Resources Comm*,

RECEIVED by MSC 1/23/2026 4:28:56 PM

180 Mich App 324, 331 (1989), it is not true that the statutory scheme and common law "cannot coexist" (contra Enbridge Br, p 47). They manifestly can. Indeed, as this Court has established, "the public trust doctrine is alive and well in Michigan." *Glass*, 473 Mich at 667.

It is a different question, of course, whether the common-law public trust doctrine imposes any additional obligations on the MPSC in the circumstances presented here. Again, the Attorney General takes no position on that issue. But because Enbridge's displacement argument is not supported by applicable law and could have ramifications in other actions that present both MEPA and common law issues in different circumstances, the Attorney General urges the Court not to adopt Enbridge's position.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, the Attorney General partially supports the appellants' requests to remand this matter to the MPSC for further proceedings.

Respectfully submitted,

/s/ *Keith D. Underkoffler*
Keith D. Underkoffler (P84854)
Assistant Attorney General
Attorney for Amicus Curiae
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
underkofflerk@michigan.gov

Dated: January 23, 2026

RECEIVED by MSC 1/23/2026 4:28:56 PM

WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.312(A) and 7.212(B) because, excluding the part of the document exempted, this **amicus curiae brief** contains no more than 16,000 words. This document contains **3,731** words.

Respectfully submitted,

/s/ *Keith D. Underkoffler*
Keith D. Underkoffler (P84854)
Assistant Attorney General
Attorney for Amicus Curiae
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
underkofflerk@michigan.gov

LF: Enbridge MPSC App re Line 5 MSC #168346/LF# 2020-0289230-C/Brief of Amicus Curiae 2026-01-23