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STATE OF MICHIGAN
IN THE SUPREME COURT

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

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

Supreme Court Nos. 168335, 168346

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

Lower Court:
MPSC Case No. U-20763

PETITIONER-APPELLEE ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S RESPONSE TO AMICI

February 13, 2026

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INTRODUCTION

Three amici[1] mimic Appellants' arguments and seek to overturn the PSC's decision authorizing Enbridge to move a discrete, four-mile-long segment of Line 5 into an underground tunnel. As the PSC found, this Replacement Project is a safety enhancement to further protect the Straits. Without it, the existing Line 5 Dual Pipelines will continue to operate indefinitely on the Straits lakebed pursuant to the PSC's 1953 order. Like Appellants, amici try to use this proceeding as a referendum on the entire Line 5. But Michigan established Line's 5's public need in 1953, and no aspect of this proceeding can result in a do-over.

Indeed, amici's unabashed goal is to shut down Line 5. But a federal court recently confirmed that federal law prohibits Michigan officials from doing that. *Enbridge Energy, LP v Whitmer*, Case No 1:20-cv-001141, Dkt 164 (WD Mich, Dec 17, 2025). As a result, the AG's lawsuit to shut down Line 5 is stayed. *Nessel v Enbridge Energy, LP*, unpublished order of the Ingham County Circuit Court, issued January 29, 2026 (Docket No. 19-474-CE) (staying proceedings until the conclusion of the appeal in *Enbridge Energy, LP v Whitmer*). Accordingly, amici's best result here is guaranteeing that Line 5 will continue to operate on the Straits' lakebed instead of in a protective underground tunnel. That's hardly environmental "protection."

Instead, the Court should reject amici's legal arguments. *First*, there is no de novo appellate-review standard in MEPA's text or this Court's precedent. *Second*, amici's attempts to broaden the scope of the PSC's MEPA analysis are contradicted by MEPA's text and would violate federal law. *Third*, the PSC has no authority to evaluate common-law theories nor wait for other agencies that might. This Court should affirm the Court of Appeals' unanimous decision upholding the PSC's authorization of the Replacement Project.

[1] Attorney General Dana Nessel; Great Lakes Environmental Law Center (GLELC); Great Lakes Business Network (GLBN).

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ARGUMENT

I. MEPA does not dictate new evidentiary hearings on appeal.

Amici suggest that MEPA requires appellate courts to review agency MEPA determinations de novo, but MEPA's text and this Court's precedent do not say that. MEPA must be read *in pari materia* with existing administrative procedure, so traditional standards for reviewing agency orders still apply.

MEPA's statutory scheme does not require de novo review of agency Section 1705 determinations. In direct lawsuits filed under Section 1701, trial judges retain original jurisdiction. MCL 324.1704(3). But reviewing courts under Section 1705 engage in "judicial review," MCL 324.1705(2), meaning appellate review of agency determinations under traditional standards governing review of agency orders. Any other interpretation leads to appellate judges sitting as factfinders, hearing testimony and deciding evidentiary issues. Nothing in MEPA's text supports that surprising result. Accord ITC.Amicus.Br.4 (MEPA "does not contemplate courts displacing agency expertise, retrying factual disputes, or substituting judicial preferences for agency determinations grounded in the evidentiary record").

GLELC argues that the phrase "any judicial review" in Section 1705 shows that MEPA's *substantive* safeguards apply in all forums of review. GLELC.Br.3-5. True. Even on review, a court must "determine," or come to a decision about, environmental effects. But substantive safeguards are different from standards of review. And when the Legislature wants to specify standards of review for agency orders, it writes express statutory language to that effect. E.g., *Palo Grp Foster Care, Inc v Dep't of Soc Servs*, 228 Mich App 140, 145; 577 NW2d 200 (1998) (Legislature provided for de novo review of agency orders by specifying a court "shall have jurisdiction to hear and determine the questions of fact *or* law involved in the appeal") (emphasis added). Section 1705 includes *no* language specifying a particular standard of review.

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Amici compare this case to *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich 741; 275 NW2d 538 (1979). But *WMEAC* is distinguishable because it was filed in trial court under Section 1701, which says the trial court "retains original jurisdiction of the matter." That's why this Court instructed the trial judge to exercise independent judgment rather than defer to a pre-existing agency decision. *Id.* at 753. Section 1705 does not similarly require courts to exercise original jurisdiction, so *WMEAC* is inapposite.

GLELC says *WMEAC* requires de novo review because the opinion cited Section 1705 in passing. GLELC.Br.5-6. But the opinion's analysis "addressed the relationship between *suits brought under [MEPA]* and administrative proceedings." *WMEAC*, 405 Mich at 752 (emphasis added). The Court's reasoning was driven not by Section 1705(2)'s "any judicial review" language but by Section 1701's requirements that trial courts exercise original jurisdiction and "adjudicate" and "determine" environmental effects. *Id.* at 753. Because Section 1705 lacks that language, the Court of Appeals correctly distinguished *WMEAC* and its progeny from this Section 1705 appeal.

GLELC also says the PSC's governing statutes, MCL 462.25 and 462.26, do not apply to MEPA determinations. GLELC.Br.6-9. This overlooks Section 1706, which directs that MEPA is *supplementary* to existing administrative procedure, MCL 324.1706—including MCL 462.25 and 462.26. This Court has interpreted Section 1706 to mean MEPA must be read "*in pari materia*" with other statutes. *Mich Oil Co v Natural Resources Comm*, 406 Mich 1, 32-33; 276 NW2d 141 (1979). MEPA's use of "supplementary" does not mean it supersedes other statutes but that it is incorporated *into* their procedures. E.g., *Lakeshore Grp v State*, 510 Mich 853, 854 n2; 977 NW2d 789 (2022) (Bernstein, J, concurring) ("supplementary" does not mean that MEPA creates processes separate and additional to those existing in statutes governing specific permitting processes); accord ITC.Br.3 (MEPA "fits within the existing administrative scheme.").

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Reading MEPA *in pari materia* with the PSC's governing statutes, the required MEPA determination is incorporated as just one element of an Act 16 review, and the challenge on appeal is a challenge to an element of an Act 16 decision. So the standards in MCL 462.25, 462.26, and the Administrative Procedure Act apply.

II. In an Act 16 proceeding, MEPA only authorizes the PSC to review the "conduct" at issue.

Amici also say that the PSC construed MEPA's scope too narrowly, excluding impacts from Line 5's overall operation. But Section 1705's text limits the PSC's MEPA analysis to likely effects of the "*conduct*" to be "authorized or approved" in the underlying proceeding. MCL 324.1705(2) (emphasis added). Any other interpretation "would vastly expand the scope of proceedings beyond the boundaries contained in the governing enabling acts." ABATE.Br.7. Here, the conduct at issue is the Replacement Project, the subject of Enbridge's application seeking authorization under Act 16. While amici try to introduce issues concerning the existing pipeline's operation at the Straits and beyond (e.g., AG.Br.6-9), the State has already authorized Line 5 in its entirety, and its continued operation is outside the scope of this limited proceeding.[2] Given the federal court's finding that the State's shutdown attempts are preempted, the Dual Pipelines and Line 5 will continue to operate indefinitely, or until the Replacement Project is placed into service in the tunnel. *Whitmer*, *supra*.

[2] GLELC suggests the PSC must conduct a MEPA review of the entire pipeline because Line 5 has never been subject to one. GLELC.Br.10-11. But nothing in MEPA or Michigan law requires the PSC to retroactively conduct a MEPA analysis for a pipeline approved in 1953. See *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012) ("Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application."). And GLELC has not even made the argument for retroactive application, so that issue is waived. The PSC is not required to expand its MEPA review beyond the scope of the conduct at issue simply because Line 5 happened to be authorized before MEPA became law, or every pre-1970 PSC approval would be subject to re-opening today.

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Despite the limited "conduct" at issue (the Replacement Project), the PSC's alternatives analysis obligingly considered several "no-pipeline" alternatives to replace the entire Line 5.[3] Enbridge.Br.33-36. Initially, the PSC limited its analysis to alternatives to the conduct at issue and compared the effects of those alternatives to the Replacement Project's effects. *Id.* But, at intervenors' insistence—and believing that the Dual Pipelines could be shut down, an outcome foreclosed by *Enbridge Energy, LP v Whitmer*—the PSC also compared the effects of the entirety of several no-pipeline alternatives to the Replacement Project's effects. *Id.* The AG attacks this analysis as "apples-to-oranges." AG.Br.12. But the PSC only engaged in this additional analysis because intervenors were allowed to introduce evidence of alternatives that went far beyond alternatives to the Replacement Project.[4]

The PSC also went above-and-beyond MEPA's requirements by considering GHG emissions when such emissions will occur even without the Replacement Project. Enbridge.Br.30, 39; ABATE.Br.8 n2. Where the "conduct" at issue has no impact on GHG emissions, such emissions are irrelevant to the PSC's analysis. Enbridge.Br.10.

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[3] The AG complains that the PSC's alternatives analysis relied primarily on the now eight-year-old Dynamic Risk alternatives report rather than more recent reports. AG.Br.10-12. These reports were not relevant to the PSC's analysis because they are not alternatives to the Replacement Project but are instead alternatives to the entire pipeline. In addition, the Dynamic Risk report was only three years old when the PSC began its review, and the PSC is not required to continually supplement the alternatives report simply because Appellants prolonged the permitting process several years. See *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty v Zinke*, 889 F3d 584, 605 (CA9, 2018) (data over four years old is not inherently suspect); *Badger Helicopters Inc v FAA*, 154 F4th 902, 914-15 (CA8, 2025) (reliance on 20-year-old data not problematic where there was no evidence that it had meaningfully changed). The possible alternatives to the Replacement Project have not changed, and the Dynamic Risk report remains relevant today.

[4] The AG also says the PSC's ruling on Enbridge's motion in limine may have inappropriately limited evidence relevant to public need. AG.Br.10. But no party sought leave to appeal the Court of Appeals' ruling on the PSC's public need determination, so the issue is not before the Court.

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GLELC says the PSC should have treated oil-spill risks the same as GHG emissions. GLELC.Br.11-12. Wrong. Hypothetical oil spills outside the Straits are unrelated to operation of the Replacement Segment, which will *eliminate* the existing, extremely remote risk of a release at the Straits. Operation of the Replacement Segment cannot be the cause of any risk elsewhere, because Line 5 will continue to operate without the Replacement Project. Regardless, the differing treatment was consistent: GHG emissions are caused by the transport of hydrocarbons through the Replacement Segment; speculative oil spills elsewhere on Line 5's route are not.

In any event, the PSC lacked authority to consider oil-spill risks because pipeline safety is within the exclusive jurisdiction of the federal Pipeline and Hazardous Materials Safety Administration. 49 USC § 60104(c). While the location or routing of an interstate liquid pipeline is a decision that the federal Pipeline Safety Act leaves to the states, state agencies may not regulate pipeline safety (including oil spills) when making siting or routing decisions. See *Couser v Shelby Co*, 139 F4th 664, 671-72 (CA8, 2025). Any attempt by the PSC to consider oil spill risks during its Act 16 proceeding would have violated this clear division of labor between federal and state agencies.

III. Amici's public-trust arguments contradict governing statutes.

Amici say (1) there is no legislative intent for MEPA to displace the common-law, public-trust doctrine, and (2) the PSC can only comply with its public-trust obligations by waiting for EGLE to make a public-trust determination. This is incorrect on both counts. As to the former, PSC lacks statutory authority to exercise common-law powers, so this argument is irrelevant. Anyway, MEPA's text displaces the common-law doctrine, and the only way PSC complies with its public-trust duties is to comply with MEPA. As to the latter, EGLE has no role in an Act 16 proceeding. This argument merely forestalls any PSC decision and ensures that Line 5 will continue to operate in the Straits indefinitely without the protective tunnel.

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1. First and foremost, the PSC has no public-trust obligation because it "has no common-law powers." *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988). As this Court has emphasized, the PSC is a statutory creation and only exercises the powers given to it in statutory enactments. Because no statute directs the PSC to consider the common-law, public-trust doctrine in an Act 16 proceeding, the PSC is prohibited from doing so. PSC.Br.37-39. So the Court need not resolve the displacement issue.

But Section 1705(2) *does* displace the common-law, public-trust doctrine where MEPA applies. The Legislature may supersede common-law doctrines by statute. *Kyser v Kasson Twp*, 486 Mich 514, 539-43; 786 NW2d 543 (2010). And in the environmental protection context, the Legislature did so by enacting MEPA, which places an express, affirmative duty on agencies to protect "the public trust in" the State's resources. MCL 324.1705(2). This statutory duty codifies the common-law doctrine, making any common-law, public-trust claims duplicative of the agency's Section 1705(2) obligations. See *Highland Recreation Defense Foundation v Natural Resources Comm*, 180 Mich App 324, 331; 446 NW2d 895 (1989). When MEPA applies, the common law yields to the statutory obligations. *Pulver v Dundee Cement Co*, 445 Mich 68, 75 n8; 515 NW2d 728 (1994) ("[I]f there is a conflict between the common law and a statutory provision, the common law must yield.").

The AG says there is no legislative intent that MEPA subsumes the common-law, public-trust doctrine. AG.Br.13-15. Not so. The common-law, public-trust doctrine is used to fill gaps where legislation is lacking. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471, 509 (1970). MEPA expressly provides for the protection of the public trust in the State's natural resources. When MEPA applies, no gap remains for the common-law doctrine to fill.

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To put it another way, by enacting MEPA, the Legislature expressed its intent to replace the gap that used to be filled by the common-law, public-trust doctrine. See *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987) ("[W]here comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter."). And the common-law, public-trust doctrine remains "alive and well" for any agency action excluded from MEPA review. Enbridge.Br.46.

Under the PSC's statutory, public-trust obligation, a proper public-trust analysis in an Act 16 proceeding consists of complying with MEPA. The PSC must still determine whether the conduct at issue "has or is likely" to result in "the alleged pollution, impairment, or destruction of … the public trust in" the State's natural resources. MCL 324.1705(2). Even if the PSC determines that the conduct at issue will impair the public trust, it may authorize the conduct if there is no "feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare." *Id.* Here, the PSC's analysis comported fully with this obligation, and the record is clear that while the Replacement Project will minimally impair State resources in constructing the Replacement Project, there are no feasible and prudent alternatives under MEPA. Enbridge.Br.49-51.

2. GLBN says the only way the PSC can fulfill its public trust duties under MEPA is to wait for EGLE to make a permitting decision. GLBN.Br.10-11. That's not what MEPA requires. MEPA obligates the PSC to affirmatively consider whether conduct would impair the public trust in the State's resources. MCL 324.1705(2). And the PSC did that here.

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The fact that EGLE might have more protective standards for projects involving Great Lakes bottomlands has no bearing on the PSC's Act 16 determinations. Had the Legislature wanted to require the PSC to wait for EGLE before making determinations involving State bottomlands, it would have said so. It did not. And the tunnel cannot proceed until Enbridge obtains EGLE's separate authorization – meaning that, if EGLE decides it cannot issue the permit, the PSC's authorization is meaningless, and the tunnel cannot go forward.

Finally, GLBN spills much ink arguing why EGLE should reject Enbridge's permit. GLBN.Br.11-18. These arguments are far outside the scope of this proceeding, since the only permitting process at issue is the PSC's Act 16 determination for the Replacement Project. GLBN's effort is illustrative of how all Appellants and their amici want to turn this proceeding into something it is not.

CONCLUSION AND REQUESTED RELIEF

Amici's arguments are largely copycats of Appellants' briefs. In sum, (1) MEPA does not require appellate courts to hold months-long evidentiary hearings, weigh witness credibility, and make findings of fact in a 1705 proceedings; (2) the PSC's MEPA review here appropriately focused on the Replacement Project—the "conduct" at issue—not the entirety of Line 5; and (3) the PSC's statutory authority does not extend to common-law theories.

Enbridge respectfully requests that the Court affirm the Court of Appeals' decision or deny the application for leave as improvidently granted. Either way, the Court should uphold the Court of Appeals' unanimous decision affirming the PSC's authorization rather than further delay the Replacement Project.

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Respectfully submitted, February 13, 2026,

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STATEMENT OF COUNTABLE WORDS

Pursuant to MCR 7.312(A), the undersigned certifies that the number of countable words in the foregoing brief is 2,863, according to the word count provided by the word processing software used to create the foregoing brief. The name and version of that software is Microsoft® Word for Microsoft 365 MSO, Version 2601 Build 16.0.19628.20204, 64-bit.

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