



Protecting the Common Waters of the Great Lakes Basin
Through Public Trust Solutions

March 9, 2021

Via E-filing

Ms. Lisa Felice
Michigan Public Service Commission
7109 W. Saginaw Hwy.
P. O. Box 30221
Lansing, MI 48909

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following is attached for paperless electronic filing:

For Love of Water Application for Leave to Appeal Legal Ruling by Administrative
Law Judge on Remand Regarding Motion in Limine; and

Proof of Service.

Sincerely,

James Olson
jim@flowforwater.org

xc: Parties to Case No. U-20763

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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

U-20763

ALJ Dennis Mack

Commissioners:

Hon. Daniel C. Scripps, Chairman
Hon. Tremaine L. Phillips, Commissioner
Hon. Katherine L. Peretick

**FOR LOVE OF WATER
APPLICATION FOR LEAVE TO APPEAL LEGAL RULING
BY ADMINISTRATIVE LAW JUDGE ON REMAND
REGARDING MOTION IN LIMINE**

March 9, 2021

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APPLICATION FOR LEAVE

Pursuant to Rule 433,¹ Intervenor For Love of Water (“FLOW”) submits this Application for Leave to Appeal with Brief in Support the remand ruling, February 23, 2021, by Administrative Law Judge Dennis W. Mack (“ALJ”).

On December 9, 2020, in lieu of deciding the appeal of the ALJ’s ruling on Enbridge’s Motion in Limine, the Commission retained jurisdiction of the appeal, but remanded the matter to the ALJ for rehearing and reconsideration, because the State’s Revocation and Termination of the 1953 Easement for the Line 5 dual pipelines in the Straits of Mackinac constitute a significant change in factual development.²

Because the Commission retained jurisdiction of the appeal from the ruling on motion in limine, FLOW adopts, incorporates, and restates its previous Application for Leave and Brief in Support, dated November 6, 2020, and submits the instant Application for Leave and Brief in Support to reverse or otherwise modify the ALJ’s remand ruling, February 23, 2021, in accordance with the requisite authority of the Commission under Act 16, Rule 447, the orders of the Commission, the mandatory duties imposed by the common law of environmental quality of the Michigan Environmental Protection Act (“MEPA”)³, the Michigan Constitution, art. 4, sec.

¹ Mich. Admin. Code R 792.10433.

² Commission Order, Dec. 9, 2020, U-20763 (“Remand Order”).

³ MCL 324.1701 et seq. Where there exist alternatives to proposed conduct that is likely to impair or pollute the air, water, natural resources, or the public trust in those resources” the conduct or permit or approval of such conduct by an agency is prohibited. MCL 1703(1); 1705(2). In addition, the MEPA imposes a mandatory duty on agencies to independently and fully consider the effects and alternatives in governmental approval or licensing proceedings, even before a determination is made on any likely effects or alternatives. *Highway Comm’n v Vanderkloot*, 392 Mich 159 (1974).

52⁴, and the law of public trust that strictly governs the alienation and use of state-owned bottomlands and waters of the Great Lakes, including the Straits of Mackinac.⁵

The ALJ remand ruling and ruling on motion in limine are clearly erroneous and otherwise contrary to law. If not reversed, the ALJ's ruling that the EGLE permit for the Tunnel Project satisfies or resolves the lack of authorization of the 2018 DNR easement, its assignment, and 99-year Tunnel lease for Enbridge to occupancy and use the State's bottomlands and waters of the Straits of Mackinac will perpetuate the breach of the Commission's duty, as one of the "sworn guardians of the Great Lakes," to protect the public trust in the lands and waters of the Straits, Lake Michigan, and Lake Huron.⁶

If not reversed or properly modified, these rulings will cripple the Commission's exercise of its broad authority to fulfill its responsibilities to the public under Act 16 to regulate the "transport [of] crude oil or petroleum, or any of the products thereof..., by or through pipe line or lines, for hire, compensation or otherwise, or exercising or claiming the right to engage in the business of piping, transporting, or storing crude oil or petroleum, or any of the products thereof."⁷

If not reversed or modified, the ALJ's rulings will violate they duty to consider the likely effects on the air, water, and natural resources or public trust in those resources, and the existence

⁴ Mich Const. 1963, art. 4, sec. 52 declares the State's "air, water, natural resources are of paramount public concern" and imposes a duty on the legislature ("shall provide" laws like the MEPA that protect the air, water, and natural resources or public trust from pollution, impairment, or destruction").

⁵ *Obrecht v National Gypsum Co.*, 361 Mich 399(1960); *Illinois Central R Rd v Illinois*, 146 U.S. 387, 453-456 (1892).

⁶ *Obrecht v National Gypsum Co.*, 361 Mich 399, 412 (1960).

⁷ 1929 PA 16; MCL 283.1. The term "product" includes natural gas liquids or any liquified hydrocarbon whether crude oil or gas, such as propane or ethylene hat are carried by Line 5.

of feasible and prudent alternatives required by the MEPA⁸ and inherent in the authority under Act 16 over Enbridge's instant application regarding the "piping, transporting, or storing crude oil or petroleum" within in Michigan.⁹

First, the following remand rulings are clearly erroneous and contrary to law:

- (1) the finding that the conveyance or agreements for the 2018 DNR easement to the Mackinac Straits Corridor Authority ("MSCA"), the assignment to Enbridge, and the 99-year lease to extend indefinitely the 68-year-old dual pipelines in the Straits of Mackinac were authorized by a narrow EGLE activities permit to place the tunnel and new pipeline in the bottomlands of the Straits under public trust law.¹⁰
- (2) the near total exclusion of public need and other critical evidence in 2021, because of (a) the narrowly worded purpose of the Project as a mere "replacement," and (b) the exclusion of evidence on public need in 2021 based on the 1953 Order and *Lakehead Pipe Line Co v Dehn*, 340 Mich 25 (1954).
- (3) the decision that State's Revocation and Termination of the 1953 easement has no bearing on this matter, when in fact the fate of the existing dual pipelines and Tunnel Project are inseparable.

Second, even if the Notice of Revocation and Termination does not affect this case, the ALJ ruling on the Motion in Limine still before the Commission erroneously excluded evidence of public need and alternatives critical for the Commission to fulfill its role under Act 16, and fundamental to its role to prevent environmental degradation to the paramount concern for the State's air, water, natural resources, and public trust required by the MEPA and Mich. Const. art.

⁸ *Highway Comm'n v Vanderkloot*, 392 Mich 159 (1974).

⁹ Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 et seq., its common law of environmental quality, *Ray v Mason Country Drain Comm'r*, 393 Mich 294 (1975); *Highway Comm'n v Vanderkloot*, supra n. 7.; Mich Const. 1963, art. 4, sec. 52.

¹⁰ Remand Ruling, pp. 11-12; compare the "conveyance" or "agreements to use" bottomlands and waters of the Great Lakes required by the Great Lakes Submerged Lands Act, MCL 324.32502-32508 with the "permit to place" a structure in the bottomlands once the conveyance or use agreements are authorized. MCL 324.32512-32514. *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); *Obrecht v National Gypsum Co*, 361 Mich 399, 412-413 (1960).

4, sec. 52, including the serious ongoing impacts to the waters of Michigan, public and private property and infrastructure.¹¹

FLOW BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

I. HISTORY OF PROCEEDINGS

From the beginning, Enbridge’s self-serving allegations in its Application have sought to foreclose the Commission’s full review of the important questions of fact and law for the Tunnel Project: “The Project involves relocating underground the [dual pipelines] portion of Line 5 that crosses the Straits, within [a new 30-inch single pipeline] a tunnel to be located at a depth of 6- to 250 feet beneath the lakebed of the Straits.”¹² “The Project does not include the tunnel itself...”¹³

Further, Enbridge argues that “On March 31, 1953, this Commission granted approval ‘to construct, maintain, and operate Line 5 as a common carrier’ within Michigan.”¹⁴ It also argues (mistakenly) that in *Lakehead Pipe Line Co. v Dehn*, “the Michigan Supreme Court held that construction and operation of Line 5 was ‘for a public use benefiting the people of the State of Michigan,’”¹⁵ that it has the necessary easement, right-of-way, and lease-back interests in and

¹¹ MCL 324.1701 et seq., *Ray v Mason Country Drain Comm’r*, 393 Mich 294 (1975); *Highway Commission v Vanderkloot*, 392 Mich 159 (1974).; See FLOW’s Application for Leave and Brief in Support from ruling on Motion in Limine,

¹² *In re Enbridge Energy, Limited Partnership*, Case No. U-20763, Application, April 17, 2020, Introduction, p. 2. See also, Application, paragraph 17, p. 8.

¹³ *Id.*

¹⁴ *Id.*, p. 5; see, specifically, Subsection A, Application, p. 10; see also paragraphs 38 and 29, Application, p. 17.

¹⁵ *Id.* Enbridge refers to *Lakehead Pipe Line Co. v Dehn*, 340 Mich 25 (1954). The case involved an appeal by a landowner who contested that the scope of authority of the Commission to confer on Lakehead the right to condemn his land for an interstate pipeline, because the scope of authority under Act 16 was limited to intrastate pipelines. Contrary to Enbridge’s position before the Commission in 2021, its predecessor argued and the Court held that in the absence of express limitations on authority, Act 16 should be interpreted broadly to include interstate pipelines.

beneath the state-owned public trust bottomlands for the Tunnel Project: “Enbridge has been assigned The Tunnel Easement and the Easement Assignment (Exhibit A-6),” and that “Upon competition... the title to the tunnel will be transferred from Enbridge to MSCA in accord with the Tunnel Agreement, Enbridge and the MSCA will enter into a 99-year lease... which will authorize Enbridge to use the tunnel to operate and maintain the replacement pipe. Title to the replacement pipe segment will at all times remain with Enbridge.”¹⁶ As noted above, Enbridge does not have authorization of the conveyance of these sovereign property interests in the public trust bottomlands of the State.

Finally, in the alternative, Enbridge requested a declaratory ruling that, among other arguments, “approval of [the Project] is not necessary because the Commission’s 1953 approval... of Line 5 between Wisconsin and Canadian border embraces approval of the replacement of one four-mile segment of Line 5.”¹⁷ Specifically, Enbridge stated that it has the required authority to replace the dual lines with the single 30-inch diameter pipeline in the tunnel, because the Commission approved the entire Line 5 across the Upper Peninsula, the Straits, and down through the Lower Peninsula to Sarnia by its orders in 1953,¹⁸ citing *Lakehead Pipe Line Co v Dehn*,¹⁹ Enbridge argued that it is not required to obtain further authority to construct or replace the dual pipelines with the 30-inch tunnel pipeline because the Court ruled Line 5 in 1953

¹⁶ *Id.*, Application, pp. 13-14.

¹⁷ *Id.*, Request for Declaratory Relief, Application, paragraphs 38-40, p. 15-16.

¹⁸ *Id.*, p. 15 (March 31, 1953 Order, D-39303-53/1., p. 9).

¹⁹ 340 Mich 25, 37 (1954).

constituted a public use and need. (Enbridge makes this same claim in support of its motion in limine and in its position on remand; and the ALJ agreed with this in his ruling on remand.)²⁰

However, in fact, the Court in *Lakehead* ruled that the scope of authority under Act 16 extended to both intrastate and interstate pipelines, and, therefore, Enbridge could exercise the power of eminent domain and petition a circuit court to determine public necessity and use as part of a condemnation of an easement across defendant Dehn's property pursuant to Sections 2 through 6 of Act 16.²¹ *Lakehead* did *not* involve a ruling on appeal of the necessity or public interest determination for entirety of Line 5 under the 1953 Order; rather, the Court simply recited the fact of the 1953 Order in its opinion. Moreover, *Lakehead* had nothing to do with the necessity, public purpose, or validity of the 1953 utility pipeline easement obtained by the company under Act 10 of 1952 after the Commission's March 31, 1953 Order.²² The reference by the Court to the 1953 Order was pure *dicta*.²³

In its June 30, 2020 Order, the Commission denied Enbridge's request for approval of its application without a hearing (*ex parte*) and declaratory ruling, because this case involves "considerably more than a change in engineering design" or maintenance or a repair²⁴ of the

²⁰ Remand Ruling, pp. 15-16.

²¹ MCL 483.2 through MCL 483.6.

²² Part 21, NREPA, MCL 324.2129.

²³ This is significant for two reasons. First, this Commission in its June 30, 2020 order rejected the argument that Enbridge did not have to obtain authority under Act 16 for the Tunnel Project, including the new 30-inch pipeline in the tunnel and tunnel.²³ Second, Enbridge has made this same argument in its Motion in Limine, a question now before the Commission,²³ the Commission's staff agreed, and the ALJ in its decision ruled that no evidence of any kind can be introduced on public need or the public interest in the proceeding on the application for the Tunnel Project in 2021.²³ This is contrary to the Commission's direction in its June 30, 2020 Order and, for the further reasons set forth in Argument III, B., *infra*, and is otherwise contrary to law.

²⁴ Commission Order, June 30, 2020 ("June 30 Order"), "Dicta" means "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential," *McNalley v Bd of Canvassers*, 316 Mich 551, 558 (1947).

existing Line 5 pipeline approved by the 1953 Order. Moreover, without the 1953 easement for the dual pipelines, Lakehead did not have the authority to occupy, use, and construct the dual pipelines on the bottomlands belonging to the State.²⁵ The Tunnel Project proposes a tunnel and tunnel pipeline outside of the 1953 easement and “differs significantly from what was approved in the 1953 orders and the 1953 easement.”²⁶ Thus, while the Commission granted Enbridge’s request for declaratory ruling, it denied the requested relief because “Enbridge *does not have the requisite authority to construct the Line 5 Tunnel Project*” pursuant to the 1953 orders and the 1953 easement.²⁷ The Commission also denied Enbridge’s contention that it was entitled to an *ex parte* ruling that it was not required to obtain authorization under Act 16 and Rule 447.²⁸ Quoting, Section 1(2) of Act 16, the Commission ruled that Enbridge could not engage in the business or operations or “have or possess the right to locate, maintain, or operate the pipelines, fixtures and equipment... except as authorized by and subject to this act.”²⁹ The Commission also rejected Enbridge’s contention that the Tunnel was not new construction or not part of the relocation of the existing Line 5 dual pipelines into the tunnel,³⁰ and set the matter for a contested case hearing.³¹

²⁵ *Id.*, pp. 56-57.

²⁶ *Id.*, p. 58.

²⁷ *Id.* (emphasis ours).

²⁸ *Id.*, pp. 58-59, 68-69.

²⁹ *Id.*, p. 59.

³⁰ Enbridge Application, p. 2. Enbridge alleged that the Project does not include the tunnel itself, which is covered by applications to EGLE and the United States Corps of Engineers.

³¹ *Id.*, pp. 63, 69, 70, 72-73.

In ordering Enbridge to obtain the requisite authority under Act 16 and Rule 447, the Commission provided explicit guidance, finding that the Line 5 Project “involves significant factual and policy questions and complex legal determinations that can only be resolved with the benefit of discovery and comprehensive testimony.”³² “Given the significance of this proceeding and the novel legal questions that may arise, the Commission plans to read the record...”³³

On September 2, 2020, Enbridge filed a Motion in Limine to exclude significant evidence required for the Commission to fulfill its duties by the Commission under Act 16, the Michigan Environmental Protection Act (“MEPA”), and the Mich. Const. 1963, art. 4, sec. 52,³⁴ and the public trust law of Michigan. Enbridge also renewed the arguments based on its earlier request for an *ex parte* ruling, and, in the alternative, declaratory ruling that the need and public interest of the Project had already been approved by the 1953 Order and *Lakehead* case.³⁵ Even though the Commission had rejected this same argument in its June 30 Order. Enbridge’s motion in limine sought to exclude evidence on public need and reasonable alternatives under requirements of Act 16 based on the 1953 Order.

The Commission’s Staff and Intervenors filed briefs. The staff sided with Enbridge that the evidence on the public need was foreclosed by the 1953 Order, and also agreed that any evidence of impacts related to the entire Line 5 as a result of the State’s commitment to continuing the pipeline up to another 99 years and the effects of climate change from the crude oil transported

³² *Id.*, pp. 69-70.

³³ *Id.*, p. 70.

³⁴ MCL 324.1701 et seq.; *State Highway Commission v Vanderkloot*, 392 Mich 159 (1974); *Ray v Mason County Drain Commissioner*, 393 Mich 294, 370 (1975).

³⁵ Motion in Limine, pp. 14-15.

through the pipeline should be excluded. Intervenors through various response briefs demonstrated that the tunnel project, tunnel pipeline, and Line 5 were inseparable and necessarily extended the time for continued use of the existing 68-year-old Line 5, and, therefore, that the public need for the transport of crude oil through Line 5 was an essential and necessary element of obtaining requisite authority under Act 16, and that the impact and climate change evidence beyond the mere construction impacts of the tunnel could not be excluded.

On October 23, 2020, the ALJ granted in part, and denied in part, Enbridge's Motion in Limine to narrow the scope of evidence based on its characterization that the Tunnel Project is a mere "replacement." The ALJ denied Enbridge's motion to exclude even the impacts of the tunnel because the application concerned only the tunnel pipeline. However, the ALJ granted Enbridge's request to exclude (1) evidence on "public need" and reasonable or alternative routes under Act 16; (2) any impacts or alternatives under the MEPA beyond the actual physical construction of the tunnel; (3) any evidence on "the environmental effects from the extraction, refinement, or consumption of the oil that is transported" by Line 5 pipelines; and (4) any evidence... [on]... the environmental effect of greenhouse gas emissions and climate change.³⁶ All of the Intervening Parties filed timely applications for timely application for appeal from the ALJ's ruling on the motion in limine.

On November 13, 2020, Governor Whitmer and DNR Director Eichinger served the Notice of Revocation and Termination of the 1953 easement based on the inherent state sovereign title and public trust duties to eliminate and prevent the clear and serious danger of catastrophic

³⁶ ALJ Decision and Order, Oct. 23, 2020, pp. 19-20.

harm to hundreds of miles of Lake Huron as far south as Saginaw Bay and Lake Michigan as far south as Green Bay and the top of Grand Traverse Bay.³⁷

In lieu of deciding the appeal from the ALJ's ruling on the motion in limine, the Commission issued the December 9, 2020 Order, that reserved jurisdiction of the appeal and remanded the case to the ALJ to establish a schedule for the parties to brief the ALJ to rule on "the question of whether, and, if so, to what extent, the... action to revoke and terminate the 1953 easement changes the scope of review in this proceeding and how that change, if any, effects the issues presented in the motion in limine, including the issues of public need... and the required environment review of the Line 5 Project."³⁸

- (1) FLOW's argument that the claimed 2018 easement to MSCA, the assignment to Enbridge, and the 2018 Tunnel Agreement with 99-year lease-back of the tunnel for the pipeline to Enbridge have not been authorized by the Great Lakes Submerged Lands Act, MCL 324.32502-32508, is rejected, because "this case does not entail the 'approval' of the Utility Tunnel, See Initial Ruling, pg. 9, and "Enbridge has been issued a permit for the Utility Tunnel by the Department of Environment, Great Lakes, and Energy (EGLE) under the Great Lakes Submerged Lands [Act], MCL 324.32501 et seq... For purposes of this case, that permit resolves any issue with the public trust;"³⁹
- (2) The Revocation and Termination of the 1953 easement cannot be used to expand the scope of this case to include an examination or determination of the public need for Line 5, but only the public need to relocate and replace the dual pipelines from the bottomlands to the proposed Tunnel.⁴⁰
- (3) Evidence concerning the public need for Line 5 in 2021 is excluded because public need and use were decided by the Commission in its 1953 Order and the Court in Lakehead Pipe Line Co, supra;⁴¹
- (4) The Revocation and Termination of the 1953 Easement does not change the limitation on the scope of review under the MEPA to the impacts from the construction of the

³⁷ Notice of Revocation and Termination of the 1953 Easement, Nov 11, 2020 ("Revocation and Termination of 1953 Easement").

³⁸ Commission's Order, Dec. 9, 2020 Order ("December 9 Remand Order")

³⁹ *Id.*, pp. 11-12.

⁴⁰ Remand Ruling, p. 17-19, 21-22.

⁴¹ *Id.*, pp. 15-16, 21-22.

Tunnel, because the review under MEPA, Section 1705, MCL 324.1705, is limited to the proposed “conduct,” which is the Tunnel.⁴²

Intervenor FLOW files this Application for Leave and Brief in Support to appeal the remand ruling, February 23, 2021, and to continue the appeal from the ruling on motion in limine, October 23, 2020.

II. STANDARD OF REVIEW

Rule 433(2) establishes the standard of review for deciding an interlocutory appeal. The Commission will grant an application for leave to appeal and review the presiding officer’s ruling if any of the following provisions apply: (a) A decision on the ruling before submission of the full case to the commission for final decision will materially advance a timely resolution of the proceeding; (b) A decision on the ruling before submission of the full case to the commission for final decision will prevent substantial harm to the appellant or the public-at-large; and (c) A decision on the ruling before submission of the full case to the commission for final decision is consistent with other criteria that the commission may establish by order. If the Commission grants immediate review, it will reverse an administrative law judge’s ruling if the Commission finds that a different result is more appropriate.⁴³ Applications for leave to appeal should be granted because a decision on the ALJ’s ruling before the submission of the full case to the Commission will advance the timely resolution of this proceeding, and will prevent substantial harm to the appellants and other parties.⁴⁴

⁴² *Id.*, pp. 19-20, 21-22.

⁴³ Case No. U-18091, February 21, 2019, Order, p. 11.

⁴⁴ Consumers Energy’s 2018 Integrated Resource Planning, Case No. U-20165, October 5, 2018, Order, p. 17.

III. ARGUMENT ON REVERSAL OR MODIFICATION OF REMAND RULING

From December the 2018 Tunnel Agreement, DNR 2018 easement to the MSCA, the easement assignment to Enbridge, and the 99-year lease-back to give Enbridge the right to use, occupy, and operate the tunnel for its pipeline for up to 99 years, to the filing of the pending Application for authority for the Tunnel Project under Ac 16, and its motion in limine now back before the Commission after the remand hearing, Enbridge has engineered a calculated effort to block the application of the rule of law that governs the transport of crude oil and petroleum or hydrocarbons in Michigan, despite the requirements that Enbridge must obtain and comply with all authorizations, approvals, and permits required by law to locate, construct, and operate the Tunnel Project.

Act 359 that delegated to State agencies and the MSCA the authority to implement the Tunnel Project and related agreements expressly require Enbridge, MSCA, and the State to “secure approval of any department, agency, or instrumentality... of this state required by law to approve the... location of utility tunnel....”⁴⁵ The 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.”⁴⁶ The 2018 Tunnel Agreement and related agreements require Enbridge to obtain all required permits and approvals.⁴⁷

⁴⁵ 359 PA 2018, Sec. 14(a)(4).

⁴⁶ *Id.* Sec. 4d((4)(g), MCL 254.324d(4)(g).

⁴⁷ See Application, paragraphs 11-12, 27-29; Ex A-5, paragraphs 7-9.

Enbridge has sought to avoid or narrow review by the State, including the Commission, in the approvals or authorizations required for the Tunnel Project: the broad authority granted to the Commission under Act 16 over the “business of piping, transporting, or storing crude oil or petroleum, or any of the products thereof.”⁴⁸ In its Application for the permit to construct the tunnel under the “placement of structures on bottomlands” sections of the Great Lakes Submerged Lands Act (“GLSLA”), Enbridge contested EGLE’s jurisdiction over the construction permit under Section 32512 of the GLSLA. Enbridge has also argued that the Department of Environment, Great Lakes, and Energy (“EGLE”) must confine its evaluations of impacts and alternatives under the GLSLA and MEPA to the installation of the tunnel and replacement of the tunnel pipeline. Enbridge and EGLE stated that those impacts and alternatives would be addressed by the Commission under Act 16, and the EGLE permit did not consider impacts related to the combined project of the tunnel, the tunnel pipeline, and extended life of the entire Line 5 across Michigan, with its 400 stream crossings based on MSCA’s lease-back of the Tunnel for Line 5 for up to 99 years⁴⁹. Yet Enbridge has argued starting with its request for declaratory rulings in its Application through the present appeal that the Commission cannot consider any impacts or alternatives regarding the massive Tunnel Project beyond the mere replacement of the dual pipelines. Similarly, as noted above in the History of Proceedings, Enbridge has sought to prohibit review of the public need and critical public interest, alternatives, and effects of the Tunnel Project,

⁴⁸ MCL 483.1.

⁴⁹ Application, p. 18; “These agencies (EGLE and USACE) will undertake the appropriate environmental review laws as part of their permitting responsibilities... it would be wasteful to inject another environmental review of the tunnel into this proceeding.” Enbridge Motion in limine, pp. 3-4.

including the 99-year lease of the tunnel, at a time when the public need in 2021 is absolutely critical to evaluate Enbridge's application.

The Commission rejected these attempts by Enbridge to narrow the application of rule of law in its June 30 Order, and should do so again in rejecting Enbridge's thinly disguised effort through its motion in limine to severely constrict and prevent a comprehensive review of a fully developed record under Act 16, MEPA, and public trust law through its motion in limine and arguments on remand, which were adopted by the ALJ in its rulings.

A. ENBRIDGE DOES NOT HAVE THE REQUIRED AUTHORIZATION FOR THE 2018 DNR EASEMENT, EASEMENT ASSIGNMENT, AND THE 99-YEAR LEASE IN THE STATE-OWNED BOTTOMLANDS MANDATED BY THE GREAT LAKES SUBMERGED LANDS ACT, ("GLSLA"), MCL 325-2-32508, AND PUBLIC TRUST LAW.

FLOW argued on remand that the Application for the Tunnel Project does not have the required authorizations and right-of-way and lease interests to locate, construct, and operate the tunnel and tunnel pipeline. First, the ALJ's remand ruling stated that this argument "fails because "this case does not entail the "approval" of the Utility Tunnel. Initial Ruling on motion in limine, pg. 9."⁵⁰ This is conflicts directly with the Commission's June 30 Order that the approval of the Tunnel Project in this case includes the Tunnel, and should be reversed on this ground alone.

Second, the ALJ's remand ruling also stated that "Enbridge has been issued a permit for the Utility Tunnel [by EGLE] under Part 325, Great Lakes Submerged Lands Act..." and "that permit resolves any issue with the public trust."⁵¹ In fact, the EGLE permit submitted by Enbridge

⁵⁰ Remand Ruling, pp. 11-12.

⁵¹ *Id.*

and relied on by the ALJ did *not* grant authorization for the 2018 DNR Easement, the MSCA Easement Assignment, or the 99-year lease-back. The permit was issued under Section 32512(1)(c) of the GLSLA that is limited to dredge and fill, or to “place materials or structures” on Great Lakes bottomlands.⁵² But the review and decision to issue a permit for the activity to place the tunnel on or under the bottomlands is a completely different permit from the requirement for the deed, lease, or agreement for an easement, right-of-way, or agreement for the requisite interest in the state public trust bottomlands to apply for authorization under Act 16.

Enbridge’s proposed corridor tunnel and new tunnel pipeline are subject to the State’s sovereign trust title, the Public Trust Doctrine, the GLSLA, and MEPA. All of these waters and the soils beneath them are held in and protected by a public trust.⁵³ As a general rule, there can be no disposition, transfer, conveyance, occupancy or use of any kind of these public trust waters and the soils beneath them, unless there is a statute or law that expressly authorizes the proposed disposition, occupancy, or action and the statute incorporates and requires a consideration that the following standards for the narrow exception to the rule have been duly satisfied:⁵⁴

- (1) The proposed disposition, occupancy, or action predominantly serves or enhances a public trust interest or interest (such as navigation, fishing, etc.), not a private one; and
- (2) The proposed disposition, occupancy, or action will not interfere with or impair the public trust waters, soils, habitat, wildlife like fish and waterfowl, or one or more of the public-trust uses.

⁵² MCL 324.32512(1)(c). In its application for this placement-of-structures permit, Enbridge argued that it reserved the right to contest EGLE’s jurisdiction under Section 32512, presumably, because it thinks the word “on” does not cover the tunnel beneath the lakebed.

⁵³ *Id.*; see also *Obrecht v National Gypsum*, 361 Mich 299 (1961).

⁵⁴ *Id.*; p. 416.

The United States Supreme Court and the Michigan Supreme Court have repeatedly held that the public trust doctrine strictly limits the circumstances under which a state may convey property interests in public trust resources. In *Illinois Central Railroad Co v Illinois*, 146 US 387, 455-456 (1892), the United States Supreme Court identified only two exceptions under which such a conveyance is permissible: 1) when the conveyance results in the improvement of the interest thus held; or, 2) when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. Maintaining fidelity to the Public Trust Doctrine is a “*high, solemn and perpetual...duty of the State to forever maintain.*” *Collins v. Gerhardt*, 211 NW 115, 118 (Mich. 1926).⁵⁵ The public trust doctrine and its legal mandates are irrevocable.⁵⁶ In the absence of the determinations that “the public trust in waters will not be impaired or substantially affected” the 2018 easement, assignment of the easement, and tunnel lease are invalid and void as the conveyance of the easement and lease without such required findings constitute a per se violation of the PTD.⁵⁷

Separate from dredge and fill and permits to place materials on bottomlands under Section 32512, the GLSLA requires that any conveyance, lease, agreement, occupancy, use or other action in the waters or on, in, through or under the bottomlands of the Great Lakes, be authorized by EGLE pursuant to the public trust standards in those sections of the GLSLA and the common law

⁵⁵ The Michigan Supreme Court has emphatically declared that “the public trust doctrine is alive and well in Michigan[.]” See, *Glass v Goeckel*, 473 Mich 667, 678-679 (2005), where the Michigan Supreme Court held that the state, as sovereign, is obligated to protect and preserve the waters of, and lands beneath, the Great Lakes. “The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure.” *Id.* at 679 (emphasis added).

⁵⁶ *Illinois Central R Rd v Illinois; Obrecht v National Gypsum Co.*, *supra* n. 14.

⁵⁷ No part of the beds of the Great Lakes can be alienated or otherwise devoted to private use in the absence of due finding that the conveyance can be done without detriment to the public interest in the lands and waters remaining. *Obrecht v. National Gypsum Co.*, 361 Mich. 399. 413; 105 N.W.2d 143 (1960).

of the Public Trust Doctrine. Sections 32502-32508 of the GLSLA also specifically incorporates public trust principles. Sec. 32502 provides:

The lands covered and affected by this part are all of *the unpatented lake bottomlands and unpatented made lands in the Great Lakes*, including the bays and harbors of the Great Lakes, *belonging to the state or held in trust by it*, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. *This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged 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...*⁵⁸

Sec. 32503. (1) ... the department, *after finding that the public trust in the waters will not be impaired or substantially affected, may enter into agreements pertaining to waters over and the filling in of submerged patented lands, or to lease or deed unpatented lands, after approval of the state administrative board. Quitclaim deeds, leases, or agreements covering unpatented lands may be issued or entered into by the department... shall contain such terms, conditions, and requirements as the department determines to be... in conformance with the public trust.*⁵⁹ (Emphasis Added).

In the above sections, the legislature makes clear that:

- 1) GLSLA is to “be construed so as to preserve and protect the interests of the general public in the lands and waters;”
- 2) GLSLA applies to the “sale, lease, exchange, or other disposition of unpatented lands;”
- 3) The state must ensure that “the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition;” and,
- 4) All conveyances or agreements for use of state lands are authorized only “after finding that the public trust in the waters will not be impaired or substantially affected” and must be “in conformance with the public trust.”

⁵⁸ MCL 324.32502; see also 324.32503, 324.32504, 324.32505(4), 324.32512.

⁵⁹ MCL324.32503(1).

The 2018 DNR Easement recites that it was issued under Public Act 10, Public Acts 1952, MCL 324.2129, that specifically delegated authority to the DNR to convey public utility easements over public lands and the trust bottomlands of the State.⁶⁰ However, the DNR did not make either of the mandatory determinations that the DNR Easement would (1) improve, enhance, or (2) not adversely affect public rights and public trust in the waters and bottomlands of the Straits of Mackinac.⁶¹ Moreover, the DNR Easement itself requires the grantee to obtain all necessary authorizations required by state law, which would include the conveyance sections of the GLSLA. This explicit disavowal of such a finding makes clear that no such finding or determination was ever made.

Further, the subsequent assignment of the 2018 Easement must also fail because the Easement itself is invalid and void. Moreover, the 2018 Assignment also makes clear that it too was subject to the express condition that the assignment be compliant with “all *applicable laws and regulations and any permits or governmental approvals required under those laws and regulations.*”⁶² As noted above, the 99-year lease provision in the 2018 Tunnel Agreement and attached 99-year lease of the tunnel for the pipeline were also not authorized and not based on the

⁶⁰ Act 10 of Public Acts of 1952 is the law under which the 1953 easement to Lakehead was issued, but this law preceded the requirements for authorization for leases, deeds, and use agreements based on the mandatory the findings under public trust law embodied in Sections 32502 and 32503 of the GLSLA. See n. 54, below.

⁶¹ *Illinois Central R Rd v Illinois*, 146 US at 455-456; *Obrecht v National Gypsum Co.*, 361 Mich at 414-416 (1960), n. 1, *supra*; discussed in detail at n. 14-17, *infra*, and accompanying text.

⁶² Terms and Conditions: This Assignment is subject to the following terms and conditions:

1. Assignee's use of the Easement Premises is subject to and conditioned upon its compliance with the terms of (subject to any notice and cure periods provided therein):

(a) The Tunnel Agreement (unless and until terminated in accordance with Sections 17.3(a)(i),

(b), (c) or (d) thereof.

(b) The Easement.

(c) *All applicable laws and regulations and any permits or governmental approvals required under those laws and regulations.*

findings required by the public trust doctrine and the GLSLA. Nor do any of the “Agreements”⁶³ including the lease, executed by the outgoing administration or MSCA at the close of 2018 provide any findings or determinations that the conveyance of the 2018 Easement would improve, enhance, or not adversely affect public rights in the uses protected by the Public Trust Doctrine.⁶⁴

Finally, the EGLE permit for the Tunnel Project under Section 32512 of the GLSLA by its terms states that is the permit is subject to the conveyance and use agreement sections of the GLSLA: “G. This permit does not convey any property rights in real estate or materials...”; and “11: A conveyance of the occupied bottomlands is required pursuant to Part 325, NREPA (the GLSLA) to protect the general public’s rights in the bottomlands and water of the Great Lakes.”⁶⁵

Accordingly, the ALJ’s ruling on remand that Enbridge’s permit issued under Section 32512 of the GLSLA resolves the public trust requirements is clearly erroneous and must be reversed. The 2018 DNR Tunnel Project easement cannot even be considered by the DNR under Act 10 unless the Commission authorizes the project based on a finding of public need in 2021. Further, the Application for requisite authority for the Tunnel and Pipeline Project must be denied or held

⁶³ The “Agreements” ‘executed to advance the tunnel project in the closing day of 2018 are the Second Agreement https://www.michigan.gov/documents/line5/Enbridge_Second_Agreement_with_Governor_Snyder_October_2018_695450_7.pdf; Third Agreement, December 17-19, 2018) https://www.michigan.gov/documents/mdot/ThirdAgreementMichiganEnbridge_684307_7.pdf; Tunnel Agreement between the Mackinac Straits Corridor Authority and Enbridge Energy, December 19, 2018) https://www.michigan.gov/documents/mdot/Tunnel_Agreement-MCSA_Enbridge_Energy_684294_7.PDF; The first agreement executed was the Agreement Between the State of Michigan and Enbridge Energy, November 27, 2017) https://www.michigan.gov/documents/snyder/Enbridge_Agreement_11-27-17_606863_7.pdf

⁶⁴ Notably, Act 359 (the 2018 amendments to the Mackinac Bridge Authority Act) contains an explicit provision also making clear that Enbridge must obtain all the “required permits and approvals” and “location” for the proposed tunnel. 359 PA 2018. Section 14(4)(a).

⁶⁵ Attachment B, Conditions G and 11, EGLE Permit No. WRP022179v.1, *Supplemental Filing of Enbridge Energy of Michigan Department of Environment, Great Lakes, and Energy’s Permits*, Feb. 5, 2021.

in abeyance until Enbridge has obtained the legally authorized property interests and right-of-way, easement, and the 99-year lease-back under the conveyance Sections 32502 and 33508 as required by the GLSLA, Act 10 of 1952, MCL 324.2129, and the required public trust law findings.

B. THE FULL CONSIDERATION AND DETERMINATION OF PUBLIC NEED AND REASONABLE ALTERNATIVES UNDER ACT 16 ARE NOT FORECLOSED OR NARROWED BY 1953 ORDER AND LAKEHEAD CASE

Act 16 confers broad authority on the Commission to consider and determine whether the location, construction, and transport of crude oil and other hydrocarbons in pipelines are in the public interest, constitute a public need or necessity. To grant an application and authorize a pipeline project the Commission must find that the applicant has (1) demonstrated a public for the proposed pipeline, (2) the pipeline is designed and routed in a reasonable manner, and (3) the construction of the pipeline will meet or exceed engineering standards.⁶⁶

Rather than demonstrate public need and route alternatives, as described above, Enbridge has sought to block any consideration of public need and alternatives under Act 16 based on the 1953 Order, which authorizes the right of Enbridge to condemn private property for the easements necessary for Line 5. With respect to the state-owned bottomlands, the 1953 Order did not authorize the location and construction of the Line 5 dual pipelines in and across the public trust bottomlands of Michigan.

Subsequently, Enbridge applied for and obtained the 1953 utility easement for the existing dual pipelines in the Straits. The determination of public necessity for the purpose of condemnation of private property under Act 16 is not the same as the required authorization to certify a crude oil pipeline as a public utility to file an application for a public utility easement in, under, and across

⁶⁶ *In re Enbridge Limited Partnership*, Case No. U.17020, p. 5.

state-owned public bottomlands under Act 10 of 1952 (now MCL 324.2129). Both were required under Act 16 for the existing Line 5 pipeline. In short, the approximately 641 miles upland portion of Line 5 could not be located and constructed without the authorization under Act 10 and public trust law that governs the 4.5 miles across the Straits of Mackinac; and, conversely, the Straits of Mackinac 4.5 miles of Line 5 would not have been located and constructed without the public utility easement in state-owned bottomlands.

As established in Argument I, A., above, an easement for a utility pipeline cannot be obtained under Act 10 without the findings of (1) improvement of the public trust interest; and (2) no interference or impairment of the public trust. When the 1953 Easement was granted to Enbridge, these findings were not made, and, therefore, the easement is void or without legal effect.⁶⁷ In any event, any utility easement today must also be authorized under the conveyance Sections 32502 and 32503 of the GLSLA, Argument III, A., *supra*. Moreover, the 2018 DNR Easement, assignment of easement, and the Tunnel 99-year lease must also be authorized under Act 10 with the required findings under public trust law and under Sections 32502 and 32503 of the GLSLA. Also, as established, in Argument III., A, these 2018 conveyance and easement agreements have not been authorized under Act 10 and/or the GLSLA. Even if it is assumed for the sake of argument that the 1953 Order established a public need for the upland portion of the existing Line 5 68 years ago, there has been no determination of public need for purposes of authorizing the Tunnel and Pipeline Project under the Straits of Mackinac in 2021.

Accordingly, the 1953 Order does not and cannot constitute any determination of public need or necessity for purposes of any easement, assignment, or 99-year lease for the Tunnel

⁶⁷ State of Michigan Attorney General Dana Nessel's Brief in Support of Partial Summary Disposition on Public Trust Count I, A, Sept. 16, 2019, pp. 7-11, *Attorney General ex rel. People of the State of Michigan v Enbridge*, Ingham County Cir. Ct. No.19-474-CE.

Project, and, therefore, the ALJ ruling on remand and motion in limine should be reversed, and Enbridge must be required to demonstrate fully a public need under Act 16 for the proposed Tunnel and Pipeline Project through the contested case proceeding ordered by the Commission in its June 30, 2020 Order.

The ALJ remand ruling and ruling on motion in limine also foreclosed consideration of the public need for Line 5 based on *Lakehead Pipe Line Co v Dehn*. However, in *Lakehead*, the Supreme Court held that the exercise of eminent domain to acquire an easement across the Defendant's private property for an upland portion of Line 5 could be conferred under Act 16 for both intrastate and interstate pipeline within Michigan.⁶⁸ Further, the Court held that the lower circuit court properly determined that the condemnation was for a public purpose, citing as evidence the 1953 Order.⁶⁹ However, the Court did *not* review, decide, or affirm the public need question that formed the basis of the Order under Act 16. Therefore, *Lakehead* is not binding or conclusive on the question of fact regarding the basis of the Order

In any event, the 1953 Order most certainly cannot be relied on to narrow the demonstration of public need for certifying the Tunnel and Pipeline Project, together with Line 5 in its entirety that will have a legal right to continue up to 99 years. In this regard, it is noted that the DNR easement and assignment to Enbridge purportedly under Act 10 was granted before any Commission Order in this case without any determination of public need under Act 16. Accordingly, the DNR 2018 easement and assignment do not qualify for consideration under Act 10, and are presently not authorized by law based on public need under Act 16 and/or the GLSLA and Act 10.

⁶⁸ 340 Mich at 31-35.

⁶⁹ *Id.*, at p. 41.

C. THE DUTY OF THE COMMISSION TO COMPREHENSIVELY CONSIDER THE LIKELY EFFECTS AND FULL RANGE OF ALTERNATIVES IS NOT NARROWED BY THE AUTHORITY IN ACT 16 BECAUSE THE MEPA IS SUPPLEMENTAL AND IMPOSES A MANDATORY DUTY UNDER THE MICHIGAN CONSTITUTION OF 1963, ART. 4, SEC. 52, MEPA TO PROTECT THE AIR, WATER, NATURAL RESOURCES, OR PUBLIC TRUST IN THOSE RESEOURCES FROM POLLUTION OR IMPAIRMENT.

As noted in the History of Proceedings, Enbridge sought to limit any review of likely effects and alternatives in this matter under the MEPA based on the argument that the Commission has jurisdiction under Act 16 over just the replacement pipeline. Although the ALJ denied the attempt to separate the replacement of the dual pipelines with a new single 30-inch pipeline from the tunnel itself, the ALJ, specifically, granted Enbridge's motion to exclude evidence (1) on public need and reasonable or alternative routes under Act 16, (2) any impacts or alternatives under the duties imposed by the MEPA beyond the physical construction of the tunnel, and (3) any evidence on the environmental impacts from the 23,000,000 million gallons of oil transported through Line 5 on a daily basis.⁷⁰

On the remand, the ALJ ruled that the Revocation and Termination does not change the scope of review and the exclusion of evidence of likely impacts, effects, and alternatives beyond the replacement Tunnel Project, and confirmed his previous ruling that the Commission could not consider and determine likely effects and alternatives related to the commitment to the 99- year lease for the tunnel and the indefinite continued operation of the entire Line 5, and that it could not consider the effects from the consumption or transport of crude oil through the Tunnel Project pipeline or Line 5 as a whole.⁷¹

⁷⁰ Remand Ruling, p. 19

⁷¹ Remand Ruling, Feb. 23, 2021, pp. 19-22.

First, the 1953 Easement in the Straits was and is fundamental to all of Line 5. But for the 1953 Easement, Enbridge could never have built the entire 645-mile pipeline. Enbridge could not obtain authorization for and build Line 5 without a law expressly delegating authorization to grant a utility easement on the state-owned public trust bottomlands. The legislature passed Act 10 in 1952, which provided the legal path-way for Enbridge to apply for and obtain a public utility easement from the Department of Conservation in state-owned bottomlands based on public trust law. Enbridge then had to obtain separate authority under Act 16 to qualify as a utility easement under Act 10. The 1953 Order provides authority for condemnation of private easements; it necessarily had to authorize the dual pipelines in the Straits as a utility so Enbridge could apply for the easement. The 1953 Easement is fundamental to all of Line 5, and this fact is reflected in the 2018 Tunnel deal between the State and Enbridge, leading to the instant Application under Act 16. The 2018 Tunnel Agreement and related agreements underscore that the continuing existence of Line 5 and shutdown of the existing dual pipelines are inseparable. Moreover, as described in Argument III, B, above, the public need of the Tunnel Project must now be determined in this proceeding, before Enbridge can apply for a public utility easement for the tunnel and tunnel pipeline under Act 10. Accordingly, the Commission has broad authority under Act 16 to consider impacts and routes or reasonable alternatives far beyond the tunnel itself.

The ALJ ruling concluded that the scope of evidence to be considered under the MEPA is controlled by the scope of Act 16.⁷² The ALJ concluded that the Commission could not consider impacts under the MEPA beyond this limited authority under Act 16. But for the reasons described in preceding sections of this Brief, the authority of the Commission is broad, and cannot be limited

⁷² Remand Ruling, pp. 18-19.

by the previous 1953 Order, because, as described above, the public need must be considered as part of the DNR tunnel easement and assignment to Enbridge, and, therefore, is subject to MEPA; and because the Tunnel Project and Line 5 in its entirety are inseparable and the authorization of this project necessarily (“come hell or highwater, “as the adage goes) commits the State and the public to Line 5 for up to 99-years, the MEPA requires consideration of the impacts and alternatives for the entire project and Line 5.

Second, these effects and impacts must include the effects of climate change from the “transport” of crude oil through the tunnel pipeline and Line 5. Act 16 applies to pipeline infrastructure but it also expressly applies to the “*transport* of crude oil” and other hydrocarbon products. The ALJ rejected climate change because it was caused by the consumption of crude oil; yet the transport of oil necessarily cannot be separated from its consumption. Moreover, under MEPA the Commission has a duty to consider the likely effects of the authorization of the tunnel and the continuation of Line 5 far past the grave existential limits on life on the planet in the next 30 years. The Commission has a duty prevent likely impairment of the air, water, natural resources, and the public trust in those resources, including the devastating effects on the Great Lakes.⁷³

⁷³ *Vanderkloot, supra*, 392 Mich 159 (1974). Present and future climate impacts in Michigan according to MI Dept of Health and Human Services and National Climate Assessment:

- Increased severity and frequency of storm events,
- Water-borne diseases from flooding, sewage overflows, septic failures, and development of harmful algal blooms,
- Increased heat wave intensity and frequency, increased humidity, degraded air quality, and reduced water quality will increase public health risks,
- Increased heat stress causing ecosystem disturbance, crop failures and reduced yields,
- More frequent flooding with associated soil erosion, declining water quality and beach health,
- More numerous late spring freezes detrimental to fruit crops,
- Increased aquatic invasive species and harmful blooms of algae, and declining beach health,
- Negative impacts on transportation, agriculture, human health, and infrastructure.

Under Michigan public trust law, the courts have rejected the “trifling effects” doctrine when it in total consequence cumulative effects impairs the public trust.⁷⁴

Third, independent of Act 16, MEPA supplies the authority and imposes a duty on the Commission to comprehensively consider likely effects and alternatives to the matters in front of it. MEPA is supplemental to other statutes and proceedings for permits, authorizations, and approvals like Act 16. Section 1706 plainly states that it “is supplementary to existing regulatory and administrative procedures provided by law.”⁷⁵ Section 1705(2) requires that in any agency proceedings the likely environmental effects “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...”⁷⁶

Fourth, in addition to the requirements of Section 1705(2), any agency or political subdivision of the State has a mandatory duty to consider the likely effects and full range of alternatives regarding the subject matter before it. In *State Highway Commission v Vanderkloot*, 392 Mich 159 (1974), the Court stated that. “It is most important to note that [M]EPA does not, as both parties imply, merely provide a separate procedural route for protection of environmental quality, it also is a source of supplementary substantive environmental law.” The Court then applied the MEPA to the highway condemnation statute and determination of public necessity, and held that the MEPA is designed to accomplish two distinct results:

- (a) to provide a *procedural* cause of action for protection of Michigan's natural resources;
- and

⁷⁴ *People v Broedell*, 365 Mich 201, 204 (1961). (“Application of that doctrine, however, to the lots in question may involve making it equally so elsewhere. In total consequence, the State’s trust interests of the kind mentioned and public rights could be affected to an extent amounting to considerably more than a trifling matter. We do not deem the doctrine applicable here).

⁷⁵ MCL 324.1706.

⁷⁶ MCL 324.1705(2).

(b) to prescribe the *substantive* environmental rights, duties, and functions of subject entities (court's emphasis).

The common law of court decisions under the MEPA, imposes a substantive legal duty on this Commission in the exercised of its authority under Act 16 to conduct a two-part inquiry:

- 1) determine whether the project proponent has demonstrated that "*there is no feasible and prudent alternative to [the polluting, impairing, or destroying entity's] conduct*"; and
- 2) whether "*such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction*" (court's emphasis).

This duty and inquiry springs from the case law, and this duty to broadly consider impacts and especially the comprehensive look at all feasible and prudent alternatives, including routes and locations to accomplish the purposes of Line 5, apply to necessity determinations like the one before the Commission in the exercise of its authority under Act 16.

Fifth, the *Vanderkloot* court found that even though the statute in question, the Highway Condemnation Act, had no express provision requiring environmental review; even so, the failure of the State Highway Commission *in a necessity determination* to apply MEPA and examine the likely effects and feasible and prudent alternatives to a highway project involves environmental "pollution, impairment [or] destruction" would constitute an abuse of discretion and result in an invalidation of the determination.

"We additionally hold that the substantive environmental duties placed on the State Highway Commission by the Environmental Protection Act of 1970, MCLA 691.1201 *et seq.*; MSA 14.528(201) *et seq.*, are relevant to [the Highway Condemnation Act] judicial review in that failure by the Commission to reasonably comply with those duties may be the basis for a finding of fraud or abuse of discretion."⁷⁷

In accord is *Buggs v Michigan Public Service Commission*, COA No. 315058 (2015) (unpublished opinion) and *Ray v Mason County Drain Commissioner*, 393 Mich 294 (1975). The MEPA

⁷⁷ *Vanderkloot*, 392 Mich at 189-190.

imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation.... 393 Mich at 307 (emphasis added).⁷⁸

Sixth, the breadth or range of the duty to consider alternatives is demonstrated by the failure of the highway department in *Vanderkloot* to consider as part of its necessity determination a serious evaluation of alternatives. “Relevant to such a review, for example, is the Commission’s duty to consider alternative routes for environmental purposes. This duty is imposed by EPA (referring to MEPA).”⁷⁹

For these reasons, the ALJ decision to exclude evidence on the likely effects and impacts, direct, indirect, and cumulative related to the review under Act 16 and, independently, under *Vanderkloot*, must be reversed. The Commission can only fulfill its constitutional mandate under Article 4, Section 52 and its duty under the MEPA by requiring the development of a full evidentiary record on the public need for the Tunnel Project in 2021, not the need frozen in time by the 1953 Order. By developing this record fully on public need required by Act 16 and,

⁷⁸In accord, *Her Majesty the Queen v Detroit*, 874 F2d 332 (1989), a case challenging the siting of the Detroit municipal incinerator, the Sixth Circuit followed Ray, finding that, “In addition to creating procedural rights, MEPA imposes a substantial duty on all persons and entities, public and private, to prevent or minimize environmental degradation caused by their activities.”)

⁷⁹Footnote 7, 392 Mich at 194. “Early consideration of the environmental impact of proposed highway condemnation decisions should also better serve the affected community's ecological interests while sparing **highway** planners unexpected public opposition at a point in time when planning has reached a stage too far advanced for inexpensive and uncomplicated alteration. Note the following analysis on this point:

‘ . . . **highway** engineers . . . have generally considered it unprofessional to scratch around in parochial politics. Because engineers have tended to ignore the **highway’s** impact on communities it penetrates, they have frequently been subjected to what Marvin Manheim of MIT calls ‘the big surprise.’ They study the **highway** location, run benefit-cost analyses, propose a route publicly [sic], and then are surprised by the overwhelming community opposition it creates. ‘Fortune (February 1970), p. 188.

Adding to this ‘big surprise’ problem is a growing public awareness that ecological considerations are just as important to the public interest as the benefits of improved public services resulting from new construction. Recently in Michigan this same public awareness has focused on the environmental impact of public utilities construction... ‘MONITORING MICHIGAN'S UTILITIES’

‘MICHIGAN’S need for adequate supplies of electricity and gas at reasonable prices and without despoiling the state are eventually going to make imperative the controls on utility plant siting and monitoring of management decisions recommended by Gov. Milliken....’⁷⁹

independently, by the MEPA, the Commission will comply with its duty to fully consider the likely effects and range of alternatives related to the Tunnel Project, including the crude oil markets today and over the course of the Project, the effects and risks associated with operating Line 5, and the critical impacts to dams, shoreline infrastructure, lakes, and Great Lakes and public trust in these waters within the State of Michigan from climate change.⁸⁰

CONCLUSION

Based on the foregoing Arguments, FLOW submits that the Commission should enter an Order that reverses the ALJ Remand Ruling and/or the Ruling on Motion in Limine, and Orders the following:

- (1) The Commission cannot authorize the Tunnel Project based on the current Application unless and until Enbridge obtains authorization of the DNR 2018 easement, the MSCA assignment of the easement to Enbridge, and the provisions in the Tunnel Agreement for and including the 99-year lease-back by Enbridge of the Tunnel under the Great Lakes Submerged Lands Act, Sections 32502 and 32503, MCL 324.32502-32503, and public trust laws; and hold the contested case in abeyance until such authorization is satisfied; and/or
- (2) Remand the case to the ALJ for a full contested case that (1) fully dresses the public need in 2021 for the Tunnel Project and related right to continue Line 5 in as a whole; (2) fully addresses the alternatives to the Tunnel Project, including not doing the Tunnel Project, and/or the closure of Line 5; (3) fully addresses the likely direct, indirect, and cumulative effects on the environment and the Great Lakes, including the effects and impacts on the Great Lakes from climate change; and
- (3) Grant such other relief and guidance as appropriate for this case in accordance with the paramount public concern for the air, water, natural resources of the State under the Mich. Const. 1963, art. 4, sec. 52 and the MEPA, Vanderkloot, supra, 392 Mich 159 and Ray, supra, 393 Mich 294, and, as the sworn guardians of the Great Lakes, the affirmative duty to protect the public trust in Lake Huron, Lake Michigan, and the Straits of Mackinac under the public trust law of Michigan.

⁸⁰ An Assessment of the Impacts of Climate Change on the Great Lakes (Env. Law and Policy Center, 2018) <https://elpc.org/wp-content/uploads/2020/04/2019-ELPCPublication-Great-Lakes-Climate-Change-Report.pdf>.

FOR LOVE OF WATER (FLOW)

Date: March 9, 2021

By: _____

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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

U-20763

ALJ Dennis Mack

PROOF OF SERVICE

On the date below, an electronic copy of the *For Love of Water Application for Leave to Appeal Legal Ruling by Administrative Law Judge on Remand Regarding Motion in Limine* were served on the following:

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The statements above are true to the best of my knowledge, information and belief.

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