

Public Policy Position

**Amicus Brief in "In re APPLICATION OF ENBRIDGE ENERGY TO
REPLACE AND RELOCATE LINE 5", Docket No. 168335-9**

The Real Property Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,786 members. The Real Property Law Section is not the State Bar of Michigan and the position expressed herein is that of the Real Property Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Real Property Law Section has a public policy decision-making body with 18 members. On January 21, 2026, the Section adopted its position after a discussion and vote at a scheduled meeting. 10 members voted in favor of the Section's position, 0 members voted against this position, 5 members abstained, 3 members did not vote.

Explanation:

The Michigan Supreme Court invited the Real Property Law Section to file an amicus brief in "In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE AND RELOCATE LINE 5", Docket No. 168335-9. The Real Property Law Section voted to file an amicus brief for the purpose of discussing the application of the public trust doctrine.

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M E M O R A N D U M

To: RPLS Council

From: Chair Jason C. Long

Date: January 21, 2026

Re: Supreme Court invitation to file an amicus curiae in Enbridge Line 5 Cases

The Michigan Supreme Court invited the RPLS to file an amicus brief in two consolidated cases, both of which involve the proposed gas and oil transmission line that would be built under the lake bottom across the Straits of Mackinac, known as Enbridge Line 5. The court requested that briefing to the court address five primary issues, including (1) whether the Legislature required the Michigan Public Service Commission (the “MPSC”) to comply with the common-law public trust doctrine when it enacted the Michigan Environmental Protection Act, MCL 324.1701 *et seq.* (the “MEPA”); (2) if not, whether the common-law public trust doctrine nonetheless requires such compliance, *see Glass v Goeckel*, 473 Mich 667, 694-696 (2005); (3) if the MPSC is required to comply with the common-law public trust doctrine, what a proper public trust analysis would entail in MPSC proceedings; (4) whether the court of appeals erred by applying a deferential standard of review rather than determining *de novo* whether the proposed pipeline will pollute, impair, or destroy the air, water, or state’s other natural resources or the public trust in these resources under the MEPA; and (5) whether the court of appeals erred by affirming the MPSC’s limitation on the scope of the evidence to be reviewed regarding the MPSC’s determinations under the MEPA and the MPSC’s decision to exclude evidence of the history and risk of oil spills along the entire length of Line 5 in those determinations.

The RPLS Council discussed the Court’s invitations at the October and November meetings. Several members abstained because of conflicts in the Line 5 litigation. Remaining members observed that several of the issues are outside the general matters that the RPLS would typically address and seem more appropriate for comment by the Environmental Law Section or perhaps the Administrative Law Section. The public trust issue, however, was of interest and something that the RPLS might appropriately comment on.

At the November meeting, the discussion concluded with a direction that Nick Scavone and I would discuss the public trust issue with Kevin Smith. Kevin is a retired assistant attorney general who is knowledgeable about the public trust issue and has represented both the State and environmental organizations on that issue. Our discussion led to the concept that the RPLS could file a brief that basically

advises that the Legislature cannot avoid the “common law” public trust doctrine by delegating matters to statutory agencies, but that the Legislature’s inability to avoid the public trust doctrine does not necessarily compel any particular agency to analyze it or drive any particular outcome. Each case would stand or fall on its own merit after analysis by the appropriate agency, though some agency would need to conduct the analysis.

Our high-level bullet points for a brief were as follows:

- The public trust doctrine is applicable to Michigan through the Northwest Ordinance that granted land (including submerged land) to Michigan when Michigan became a State
- Per US Supreme Court precedent, the public trust therefore applies to actions of the Michigan Legislature
- The Legislature cannot avoid the application of the “common law” public trust to its actions by creating a subordinate agency with only statutory powers to make decisions affected by the public trust
- In terms of the MPSC, it cannot avoid the public trust doctrine just because it is a statutory agency
- Whether it must be the MPSC that applies the public trust analysis depends on the Legislature – because the public trust doctrine applies to the Legislature, the Legislature cannot adopt laws that avoid the public trust doctrine and analysis. The analysis must happen, though it may be the MPSC or some other agency, including perhaps EGLE or another agency with greater expertise, that conducts the analysis
- We would take no position on the analysis except to identify some of the factors from the cases that must be taken into account in any public trust analysis

Order

Michigan Supreme Court
Lansing, Michigan

September 19, 2025

Megan K. Cavanagh,
Chief Justice

168335-9

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas
Noah P. Hood,
Justices

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

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

v

SC: 168335-9
COA: 369156, 369159, 369161,
369162, 369165
PSC: 00-020763

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.

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On order of the Court, the application for leave to appeal the February 19, 2025 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall address whether the Court of Appeals erred by: (1) applying a deferential standard of review rather than determining *de novo* whether the proposed conduct will pollute, impair, or destroy the air, water, or state's other natural resources or the public trust in these resources under MCL 324.1705(2) of the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq.*, in accordance with *West Mich Environmental Action Council, Inc v Natural Resources Comm*, 405 Mich 741, 752-755 (1979); and (2) affirming

the Michigan Public Service Commission's limitation on the scope of the evidence to be reviewed regarding its determinations under MCL 324.1705(2) of MEPA and its decision to exclude evidence of the history and risk of oil spills along the entire length of Line 5 in those determinations. The total time allowed for oral argument shall be 40 minutes: 20 minutes for the appellants, to be divided at their discretion, and 20 minutes for the appellees, to be divided at their discretion. MCR 7.314(B)(1).

The State Bar of Michigan Environmental Law Section and Real Property Law Section are invited to file briefs *amicus curiae*. Other persons or groups interested in the determination of the issues presented in this case who are not exempt from the motion requirement under MCR 7.312(H) may move the Court for permission to file briefs *amicus curiae*.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *In re Application of Enbridge Energy: For Love of Water v MPSC* (Docket No. 168346).



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I, Elizabeth Kingston-Miller, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2025


Elizabeth Kingston-Miller
Clerk