STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

DANA NESSEL, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON BEHALF OF THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

ENBRIDGE ENERGY, LIMITED PARTNERSHIP; ENBRIDGE ENERGY COMPANY, INC.; and ENBRIDGE ENERGY PARTNERS, L.P.,

Defendants.

No. 19-474-CE

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PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

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INTRODUCTION

This case is about law, not policy. Contrary to Enbridge's assertions, the Attorney General brings this action on behalf of the people of Michigan to protect and enforce public rights, not to advance policy preferences. As alleged in the complaint, this action seeks to abate the continuing threat of grave harm to critical public rights in the Great Lakes posed by Enbridge's daily transport of millions of gallons of oil in dual pipelines that lie exposed in open water on State-owned bottomlands at the Straits of Mackinac.

The law at issue is deeply-rooted and clear: (1) the common law public trust doctrine that imposes a perpetual duty on the State to protect inalienable public rights in the Great Lakes; (2) the common law of public nuisance that prohibits unreasonable interference with rights common to the public; and (3) the Michigan Environmental Protection Act (MEPA) that provides another means to protect natural resources and the public trust in them from pollution, impairment or destruction.

Under Michigan's Constitution, environmental protection is not, as Enbridge claims, the exclusive province of the legislative branch. It is the constitutional role of the executive branch, including the attorney general, to enforce state law and of the judiciary to resolve disputes about compliance. The Constitution expressly preserves common law and neither MEPA nor any other statute has displaced or subsumed the public trust doctrine. And transfers of property rights in State-owned bottomlands—including the 1953 Easement granted under 1953 PA 10—were and remain subject to the public trust.

The welter of arguments advanced in Enbridge's motion cannot obscure the fact that the complaint is firmly grounded in state law and alleges legally cognizable claims for declaratory and injunctive relief within the jurisdiction of this Court.

COUNTER-STATEMENT OF FACTUAL BACKGROUND

The factual background of this case is sufficiently stated in the complaint and need not be repeated here.

Enbridge correctly notes that the complaint, at various points, refers to and quotes certain findings and analyses contained in a report prepared by an expert consulting firm, Dynamic Risk, Inc., *Alternatives Analysis for the Straits Pipelines* (October, 2017). (Complaint, ¶¶ 35—41; 51—52). But Enbridge erroneously and repeatedly claims (Br, p 5) that by including an *identifying* reference to the Report in a footnote, the complaint thereby "incorporates" the entire Report into the complaint itself. That is simply untrue; the footnote included a link to the Report to clearly identify the source and to enable the reader to verify the accuracy of the quoted excerpts. It neither expressly nor impliedly adopted the entire Report as allegations in the complaint. Thus, Enbridge's extensive quotation from other portions of the Report not specifically quoted in the complaint is improper and should be disregarded in evaluating under MCR 2.116(C)(8), whether the complaint itself states a claim upon which relief can be granted.

STANDARD OF REVIEW

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119 (1999), citing *Wade v Dep't of Corrections*, 439 Mich 158, 162—163 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* When deciding a motion brought under this section, a court considers only the pleadings. *Id.* at 120, citing MCR 2.116(G)(5).

SUMMARY OF ARGUMENT

Each of the myriad arguments Enbridge advances in support of its motion to dismiss the complaint for failure to state a claim is without merit. First, as noted above, the complaint in no way violates the constitutional separation of powers. Contrary to Enbridge's assertion, Michigan's Constitution does not assign the legislature exclusive responsibility for the protection of natural resources. The Constitution expressly preserves the common law, which includes both the public trust and public nuisance doctrines, neither of which has been subsumed by MEPA or any other statute. The complaint here seeks to enforce public rights protected under those laws, not make policy.

Second, Count I.A. states a cognizable claim that the 1953 Easement violated the public trust doctrine and was void from its inception in the absence of a due finding that the Easement would not impair the public trust. This is not, as Enbridge suggests, a mere "procedural hoop" based upon alleged "dicta" in *Obrecht v National Gypsum*, 361 Mich 399 (1960), that the complaint seeks to "retroactively" apply. The need for such a finding was a substantive holding of *Illinois Central Railroad Co v Illinois*, 146 US 387 (1892), and a series of Michigan cases following it, long before 1953 and that was reiterated in *Obrecht.* Neither 1953 PA 10, the statute that authorizes easements on State-owned lands, nor the 1953 Easement itself included a determination that the Easement would not impair the public trust. And contrary to Enbridge's assertions, it has not acquired a prescriptive easement since under well-established Michigan law, property interests in public trust bottomlands may not be acquired by prescription. Nor, under the circumstances of this case, is Count I.A. barred by equitable estoppel.

Third, Count I.B. states a cognizable claim that even assuming the 1953 Easement was initially valid, it is now clear that Enbridge's continued operation under its terms is inconsistent with the State's perpetual duty to protect the public trust. Enbridge's claim that MEPA has

displaced the common law public trust doctrine is utterly baseless. As the Supreme Court held in 2005, the public trust doctrine "is alive and well" in Michigan and co-exists with environmental statutes. Because the Easement remains subject to the public trust, revocation of the Easement on that basis is not limited by the Easement's termination provisions. Finally, the public trust doctrine claim in Count I.B. is not preempted either by the federal Pipeline Safety Act or Coast Guard regulation of vessel traffic in navigable waters. The basis of the complaint is the location and siting of the pipelines on State-owned public trust bottomlands (matters specifically excluded from federal regulatory authority) not the establishment of a pipeline safety standard governing pipeline design and operation. And the complaint here addresses activities on the bottomlands, not the movement of vessels on the surface above that is regulated by the Coast Guard.

Count II alleges a cognizable claim for declaratory and injunctive relief based upon common law public nuisance. Such a claim may seek to prevent future harm and does not, as Enbridge claims, require a showing that such harm is certain or very probable. Moreover, the gravity of the potential risk depends not only on the probability that an event will occur but also upon the magnitude of the harm resulting when it does occur.

Here, the complaint alleges specific facts relating to the demonstrated, very real risk of anchor strikes, the substantial inherent risks of the operation of the pipelines, and the foreseeable catastrophic effects of an oil spill at the Straits. These facts, read in the light most favorable to the Plaintiff, sufficiently allege a claim of public nuisance.

Enbridge's claim that the form of the injunctive relief requested in the complaint—"requiring Enbridge to cease operation of the Straits Pipelines as soon as possible after a reasonable notice period notice period to allow orderly adjustments by affected parties"—

somehow undermines the claim of public nuisance is nonsense. That qualification simply recognizes and is consistent with the legal principles that would necessarily apply in fashioning an injunction, including the impact upon the public interest and other persons.

Count III also states a legally cognizable claim for declaratory and injunctive relief under MEPA. Such a claim may be based upon anticipated future pollution, even where that pollution is not certain. Count III alleges that Enbridge's conduct presents "substantial risks of grave environmental harm." As in Count II, that is supported by specific factual allegations pertaining to anchor strikes, inherent risks, and the catastrophic consequences of an oil spill. Reading the complaint in the light most favorable to the Plaintiff, it substantively alleges that Enbridge's conduct is likely to pollute, impair or destroy natural resources or the public trust, in violation of MEPA.

Moreover, while the complaint in its present form alleges facts sufficient to state claims under both the common law of public nuisance and MEPA, should the Court conclude otherwise, it should refrain from granting Enbridge's motion under MCR 2.116(C)(8) pending the filing of an amended complaint by Plaintiff, since such a motion may be granted only where the Court determines that no factual development could possibly justify relief.

Finally, in response to the question regarding potential mootness that this Court asked the parties to address, the Court of Claims decision in *Enbridge Energy v State of Michigan* (No. 19-000090-MZ) does not render any part of this litigation moot. The issues determined there regarding the constitutionality of 2018 PA 359 were distinct from those in the present case and actual controversies still exist with regard the matters at issue here.

ARGUMENT

I. Plaintiff's complaint is fully consistent with the framework of Michigan's Constitution and the separation of powers.

Contrary to Enbridge's assertion, the complaint in no way "transgresses limits imposed by the Constitution and endorsed by the Supreme Court." (Enbridge Br, Arg I, p 11.) Enbridge's separation of powers argument mischaracterizes both the nature of the relief sought in the complaint and the relevant constitutional framework.

A. The complaint seeks to enforce existing law, not establish preferred environmental policy.

First, Enbridge erroneously suggests that this case presents a conflict over environmental *policy*, in which the Attorney General and/or this Court would simply substitute their policy judgments for those of the legislature (Enbridge Br, pp 1, 11—13). That is manifestly untrue.

In this action, the Attorney General, as a directly elected constitutional officer within the executive branch[1] and pursuant to her broad authority to represent the interests of the people of the State of Michigan in litigation,[2] seeks to enforce Michigan *law*. Specifically, the complaint is grounded in both well-established common law, including the public trust doctrine (Counts I.A. and I.B.) and the common law of public nuisance (Count II) and a Michigan statute, the Michigan Environmental Protection Act, MCL 324.1701 *et seq.* The complaint does not ask the Court to determine environmental policy, but rather to exercise the judicial branch's constitutional authority[3] to resolve a dispute about compliance with applicable law.

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[1] Const, art V, § 21.

[2] See *In re Certified Question from the US Dist Court for the E Dist of Michigan v Philip Morris,* 465 Mich 537, 543—547 (2002).

[3] See Const, art VI, § 1.

B. Enbridge's characterization of the relevant constitutional framework is inaccurate and incomplete.

Enbridge relies upon Article IV, § 52 of the Constitution, which provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety, and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

It is contained within Article IV, which addresses legislative functions and is one of a series of new provisions added to the Constitution in 1963 identifying matters of public importance on which the legislature was authorized to act.[4] As the 1962 Constitutional Convention Comment explained:

> This is a new section recognizing public concern for the conservation of natural resources and calling upon the legislature to take appropriate action to guard the people's interest in water, air and other resources.

But neither the text nor history of this section provides, as Enbridge suggests (Br, pp 11—13), that "environmental protection" is the exclusive province of the legislature under Michigan's Constitution.

None of the three cases cited by Enbridge (Br, p 12) establish that only the legislature has constitutional responsibility for protection of natural resources and the environment. The first case, *Kyser v Kasson Twp,* 486 Mich 514 (2010), overruled a prior decision holding that a local zoning ordinance restricting the extraction of natural resources would be unreasonable and violate constitutional due process protections unless "very serious consequences" would result from the activity. It did so for three independent reasons: (1) the prior judicially-created rule was not required under the Constitution; (2) the prior rule constituted judicial policy-making,

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[4] See also Article IV, § 50 (atomic and new forms of energy) and Article IV, § 51 (public health and general welfare).

violating the separation of powers; and (3) the prior rule had been superseded by subsequent legislation. *Id.* at 546. The Court's discussion of the second issue—cited by Enbridge—was thus unnecessary to the ultimate decision, and thus arguably dicta. But in any event, it has no bearing on the present case. In *Kyser,* the Court said that the prior judicially-created rule "established a statewide public policy that prefers natural resource extraction to alternative public policies" and observed that Article IV, § 52 directs the legislature, not the judiciary, to formulate such policy. *Id.* at 556. Here, as explained above, the complaint seeks to enforce existing law; it does not invite the Court to make public policy.

Enbridge's reliance upon *Oscoda Chapter PBB Action Comm v Dep't of Natural Res*, 403 Mich 215 (1978), is equally misplaced and misleading. The language quoted by Enbridge from Justice Levin's opinion[5] rejected the plaintiff's apparent argument that under the paramount policy of the State to preserve and protect the environment reflected in Article IV, § 52, MEPA should be construed to require the adoption of "the feasible and prudent alternative *least likely* [emphasis in the original] to impair or pollute." *Id.* at 231. In that context, the opinion noted that Article IV, § 54 "confers no authority on the courts" and that MEPA "does not confer plenary power on the courts to do whatever they may think preferable in environmental cases." Again, here the complaint seeks to enforce existing common and statutory law. It does not ask the Court to re-write MEPA based upon Article IV, § 52, let alone to "do whatever [it] may think is preferable" as a policy matter.

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[5] That opinion was joined by only two other justices and is thus not a binding precedent. *See, e.g. Pellegrino v Ampco Sys Parking,* 485 Mich 1134, 1141 (2010) (four justices needed for binding precedent).

The third case cited by Enbridge, *Nedtweg v Wallace,* 237 Mich 14 (1926), actually supports the Plaintiff's position in this case, not Enbridge's. Like a series of Michigan Supreme Court decisions that preceded it,[6] *Nedtweg* reiterated (*Id.* at 21) that Michigan had adopted and followed the common law public trust doctrine as articulated in *Illinois Cent R Co, supra.* Under that doctrine, which is the legal foundation of Counts I.A. and I.B. of the complaint, public rights in navigable waters and the lands beneath them are held in an irrevocable public trust. While reiterating that doctrine, *Nedtweg* held that as applied to relicted (i.e. non-navigable) lake bottomlands, a state statute authorizing leases of such bottomlands for private use, expressly subject to continued public rights, did not violate the public trust doctrine and was therefore not invalid. *Id.* at 19, 23—24. Here, by contrast, the waters of the Straits of Mackinac are navigable, and those waters and associated bottomlands remain subject to the public trust, as set forth in *Illinois Central* and the Michigan cases following it.

Moreover, while focusing exclusively on the adoption of legislation under Article IV, § 52, Enbridge's argument completely ignores another highly relevant part of Michigan's constitutional framework, the continuation of common law. Article III, § 7 provides:

> The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

Here, as noted above, Counts I.A. and I.B. of the complaint are based upon the common law public trust doctrine.[7]

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[6] See II.A.2 below.

[7] Count II is based on the common law of public nuisance, the continuing force of which Enbridge does not dispute. See Argument IV, below.

In *Glass v Goeckel*, 473 Mich 667 (2005), after carefully reviewing the origins and development of the public trust doctrine at common law, the Supreme Court held that "the public trust doctrine is alive and well in Michigan." *Id.* at 667—681.[8] And in marked contrast to Enbridge's theory that the legislature is the sole arbiter of public rights in the Great Lakes, the Court observed that the judiciary did not "have the luxury of forsaking public rights" because "our court is one of the 'sworn guardians of Michigan's duty and responsibility as trustee of the [Great Lakes].'" *Id.* at 700 (citing *Obrecht, supra*, 361 Mich at 412).

In sum, Enbridge's argument that the complaint and the relief it seeks violates the constitutional separation of powers is without legal merit. The complaint seeks to enforce existing law, not make policy. Michigan's Constitution does not, as Enbridge claims, vest the legislature with sole responsibility for protecting public rights in the Great Lakes. On the contrary the public trust doctrine remains enforceable in this action.[9]

II. The 1953 Easement was invalid from its inception because it violates the long-established public trust doctrine.

A. At the time the Easement was granted, the public trust doctrine strictly limited the circumstances under which a state may convey property interests in public trust resources to private parties.

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[8] As discussed in Argument III.A., below, Enbridge's separate claim that the public trust doctrine has somehow been "subsumed" by MEPA is without merit.

[9] Enbridge's claim that the Legislature alone has, through statute, established the legal framework for pipeline operations in the Great Lakes is incorrect. (Br, pp 12—13.) First, the application of 1953 PA 10, authorizing the granting of easements, remains subject to the limitations imposed by the public trust doctrine. *Cf. Nedtweg v Wallace, supra.* Second, 2018 PA 359, which provides for an agreement to construct a "utility tunnel" beneath the Straits intended to accommodate a new pipeline does not purport to and does not have the legal effect of authorizing the operation of the existing Dual Pipelines. Finally, as discussed in Argument III.A. below, MEPA has not subsumed or displaced the common law public trust doctrine.

1. In *Illinois Central*, the United States Supreme Court applied the public trust doctrine to the Great Lakes, long before the Easement was granted.

The seminal case applying the common law public trust doctrine to the Great Lakes, *Illinois Central Railroad Co, supra*, was decided decades before the Easement was issued in 1953. There, the United States Supreme Court held that the common law doctrine requiring the protection of public rights in navigable seas applied to the navigable waters of the Great Lakes:

> The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. 146 US at 436—437.

The Court explained that a state holds title to lands under the navigable waters in a public trust:

> It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. *Id.* at 452 [emphasis added.]

Illinois Central held that the public trust requires a state to maintain control of property subject to it, and strictly limits the circumstances under which property interests in it may be transferred:

> The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, *except as to such parcels as are used in promoting the interests of the public therein or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. Id.* at 453 [emphasis added.]

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> The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. *Id.* at 455—456 [emphasis added.]

In *Illinois Central,* the Court held that because neither of those exceptions applied, a state statute purporting to grant submerged lands along the Chicago lakefront to a private company was inconsistent with the public trust, and a subsequent state statute revoking that grant and restoring public rights was valid and enforceable. *Id.* at 460.

2. The Michigan Supreme Court repeatedly followed *Illinois Central* and its application of the public trust doctrine in the decades before the Easement was granted.

In *People v Silberwood,* 110 Mich 103 (1896), the Michigan Supreme Court extensively quoted *Illinois Central*, stating that "the reasoning of this case is without flaw, and the law enunciated therein ought to stand as the law of this state." *Id.* at 108. It held that public trust doctrine applies the Great Lakes and that a statute prohibiting the cutting of vegetation on Lake Erie was valid.

In *State v Lake St. Clair Fishing and Shooting Club*, 127 Mich 580 (1901), the Court again extensively quoted *Illinois Central* with approval. *Id.* at 594. A subsequent decision also addressing lands in Lake St. Clair, *State v Venice of America Land Co,* 160 Mich 680 (1910), while not directly citing *Illinois Central,* followed its holding that the State holds Great Lakes bottomlands in the public trust:

> That the State of Michigan holds these lands in trust for the use and benefit of its people—if we are correct in our conclusion—cannot be doubted. The State holds the title in trust for the people, for the purposes of navigation, fishing, etc. It holds the title in its sovereign capacity. *People v Silberwood,* 110 Mich 103; *State v Fishing & Shooting Club,* 127 Mich 580. *Id.* at 701—702.

And, as discussed above, in *Nedtweg v Wallace,* the Michigan Supreme Court again followed *Illinois Central* and its application of the public trust doctrine to the Great Lakes:

> The rights of the public, of which the State, in its sovereign governmental capacity, acts as trustee, have been sedulously protected; not in prohibiting grants by the State of private rights to relicted lake beds or the rule of riparian ownership, for such would restrict the proprietary sovereignty, but in *denying the power, by grant or otherwise, to abdicate the trust by placing use and control in private hands to the curtailment or exclusion of public use.* The governing rule is pointed out in *Illinois Cent R Co v Illinois,* 146 US 387. *Id.* at 21 [emphasis added.]

As *Nedtweg* made clear, the public trust is inalienable and precludes the State from transferring property interests so as to impair the exercise of public rights. In that case, the Court considered a public trust challenge to a state statute authorizing leases of State-owned bottomlands in the St. Clair Flats, but ultimately concluded it was constitutional as applied to relicted (non-navigable) bottomlands and because the statute expressly made the leases subject to public rights. *Id.* at 19, 23—24.

3. Against this background, it is clear that *Obrecht v National Gypsum* reiterated the public trust doctrine as it already existed in 1953.

Obrecht v National Gypsum, supra, 361 Mich at 412, itself explicitly recognized that the Michigan Supreme Court had "long ago" committed itself to the principles of the public trust doctrine articulated in *Illinois Central:*

> This Court, equally with the legislative and executive departments, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of 5 Great Lakes. Long ago we committed ourselves (see *State v Lake St Clair Fishing & Shooting Club,* 127 Mich 580, 594, 595; *State v Venice of America Land Co,* 160 Mich 680, 702; *Nedtweg v Wallace,* 237 Mich 14, 21, 24, 34) to the universally accepted rules of such trusteeship as announced by the supreme court in *Illinois Cent R Co v Illinois,* 146 US 387 (13 S Ct 110).

Obrecht involved consolidated cases challenging the construction of a loading dock by National Gypsum Company on State-owned Lake Huron bottomlands and the dredging of an

adjacent channel. *Id.* at 405—411. In one case, nearby property owners sought to enjoin the construction and dredging as a public and private nuisance at common law. Another case sought to enjoin a proposed sale of certain bottomlands for the project pursuant to a statute, 1957 PA 176, that directed the Department of Conservation to make such a conveyance. *Id.* at 406. During the course of the litigation, Natural Gypsum asserted that even in the absence of the conveyance, it had the right as a littoral or riparian property owner to "wharf out" to navigable waters.

Notably, the then Michigan Attorney General intervened in the second case challenging the proposed conveyance under the public trust doctrine:

> The attorney general intervened in this second suit. He contended and now contends that the department of conservation has no right to convey, according to the act of 1957, *for want of formal (legislative or departmental) determination that conveyance to private use of the submerged lands described in the act "would cause no injury to the public trust."* *Id.* at 411 [emphasis added.]

It is against this background, that the Court in *Obrecht* (in language quoted in paragraph 26 of the Plaintiff's complaint in this case) reiterated the limited circumstances under which public trust resources may be conveyed:

> Turning to [*Illinois Central,* 146 US at 453–460], and reading those pages in conjunction with [the Great Lakes Submerged Lands Act, 1955 PA 247 as amended by 1958 PA 94, now recodified at MCL 324.32501 *et seq.*] it will be found authoritatively that no part of the beds of the Great Lakes, belonging to Michigan and not coming within the purview of previous legislation such as the swamp land acts and the St. Clair Flats leasing acts (see *State v Lake St Clair Fishing & Shooting Club* and *Nedtweg v Wallace, supra*), can be alienated or otherwise devoted to private use *in the absence of due finding of 1 of 2 exceptional reasons for such alienation or devotion to nonpublic use.* One exception exists where the State has, in due recorded form, determined that a given parcel of such submerged land may and should be conveyed "in the improvement of the interest thus held" (referring to public trust). The other is present where the State has, in similar form, determined that such disposition may be made "without detriment to the public interests in the lands and waters remaining." *Id.* at 412—413 quoting *Illinois Central*, 146 US at 455—56 [emphasis added.]

B. Here, as alleged in the complaint, neither the 1953 Easement nor the statute upon which it was based, 1953 PA 10, reflect either of the exceptional circumstances required under the public trust doctrine as stated by *Illinois Central* and *Obrecht*.

Enbridge's motion for summary disposition nowhere actually disputes the absence of findings of those exceptional circumstances. Instead, Enbridge advances a variety of arguments that the language quoted from *Illinois Central* and *Obrecht* is inconsequential or inapposite. (Br, pp 14—18). Each of those arguments is without merit.

1. The language in *Illinois Central* and *Obrecht* is not mere dicta.

To begin, Enbridge's characterization of the quoted language regarding the public trust as mere dicta is incorrect. As noted above, one of the issues raised and necessarily decided in *Obrecht* was the conflict between National Gypsum's asserted riparian right to "wharf out" and public rights in the Great Lakes. In resolving that issue, the Court in *Obrecht* found it necessary to address and explain two reasons for reversing lower court orders in favor of National Gypsum.

First, the Court stated:

> We agree with the attorney general that the public title and right is supreme as against National Gypsum's asserted right of wharfage, and hold that the latter may be exercised by the company only in accordance with the regulatory assent of the State. No such assent has been given and, for that reason alone, the chancellor erred in decreeing that National Gypsum might proceed with what in law has become, since entry of such decrees, an entry upon and unlawful detention of State property. *Id.* at 413—414.

But the Court also held, in apparent response to the Attorney General's argument noted above, that under the common law public trust doctrine, the State may not assent to private use of the bottomlands without due finding that the intended use would not impair the public trust:

> No one (riparian proprietors included) has the right to construct for private use a permanent deep water dock or pier on the bottom lands of the Great Lakes—adjacent to Michigan—unless and until he has sought and received, from the legislature or its authorized

> agency, such *assent based on due finding as will legally warrant the intended use of such lands*. *Id.* at 415—416 [emphasis added.]

In sum, the language quoted from *Illinois Central* and *Obrecht* reflects the actual holdings in those cases, not mere dicta.

2. The complaint's reliance on *Illinois Central* and *Obrecht* is not legally flawed.

Enbridge advances three other arguments that Plaintiff's reliance upon the quoted language from *Illinois Central* and *Obrecht* is "legally flawed." (Br, pp 15—18.) Each of those arguments is also without merit. First, Enbridge notes that quoted language states in part:

> No part of the beds of the Great Lakes, belonging to Michigan and *not coming within the purview of previous legislation* such as the swamp land acts and the St. Clair Flats leasing acts (see *State v Lake St Clair Fishing & Shooting Club* and *Nedtweg v Wallace, supra*) can be alienated or otherwise devoted to private use in the absence of due finding of 1 of 2 exceptional reasons for such alienation or devotion to nonpublic use. *Obrecht* at 412—413 [emphasis added.]

Enbridge asserts that because *Obrecht* was decided in 1960, 1953 PA 10, which was the stated basis for the 1953 Easement, is encompassed by the phrase "previous legislation," rendering the language quoted in the complaint inapplicable to the 1953 Easement. (Br, p 16.)

This argument fails for at least two reasons. To begin, the exception in *Obrecht* refers to not just any "previous legislation," but rather to a particular type of legislation, "such as" the examples noted by the Court. Importantly, the most recent example cited in *Obrecht*, the St. Clair Flats leasing acts considered in *Nedtweg* were, as noted above, upheld as applied to relicted (non-navigable) bottomlands, because leases were expressly made subject to the exercise of public rights and therefore were determined not to violate the public trust. *Nedtweg,* 237 Mich at 19, 23—24. By contrast, 1953 PA 10 does not itself encompass such a determination of no adverse effect on the public trust. It merely authorizes, in general terms, the granting of easements across State-owned lands, including bottomlands. Like any other transfer of a State

property interest in Great Lakes bottomlands, an easement granted under 1953 PA 10, including the 1953 Easement, is "necessarily . . . *subject to the public trust*." *See Glass v Goeckel*, 473 Mich 679 [emphasis in original]. The enactment of 1953 PA 10 did not and could not dispense with the limitations upon conveyances imposed by the public trust doctrine articulated in *Illinois Central* and subsequent Michigan cases following it.

Second, Enbridge mistakenly suggests that the Plaintiff's complaint is somehow attempting to "apply retroactively" *Obrecht* and the Great Lakes Submerged Lands Act (GLSLA), 1955 PA 247. (Br, pp 9, 14, 16.) That is not so. While *Obrecht* was decided in 1960, its articulation of the public trust doctrine and the limits it imposes on conveyance of public rights in Great Lakes bottomlands was not new law. On the contrary, as outlined above, the public trust doctrine was long-established law under *Illinois Central* and a series of Michigan cases adopting and following it, that preceded the 1953 Easement and reiteration of that law in *Obrecht*. Moreover, Enbridge almost completely ignores, and even then mischaracterizes *Illinois Central.*

Contrary to Enbridge's assertion, the language of *Illinois Central* quoted in *Obrecht* did not "simply recognize the public interest exception to the public trust doctrine." (Br, p 16.) Instead, the language of *Illinois Central* quoted extensively in *Obrecht* thoroughly explained the application of the public trust doctrine to the navigable waters and bottomlands of the Great Lakes, and that under that doctrine, public rights in those waters and lands may not be transferred to private use unless one of two exceptional circumstances apply: (1) the use would enhance the public rights (e.g. navigation, fishing, etc.) in the lands transferred; or (2) there would be no impairment of the public rights in the lands and waters remaining. *Obrecht,* 361 Mich at 412—417.

Enbridge also argues that the complaint seeks to retroactively apply the GLSLA because the Court in *Obrecht* referred to "reading [*Illinois Central*] in conjunction with [the GLSLA adopted in 1955]." *Id.* at 412. Again, this is incorrect. Here, the complaint is based upon the public trust doctrine as applied in *Illinois Central* and subsequent Michigan cases following it. Moreover, the Court in *Obrecht* was applying established common law. It referred to the GLSLA as *an additional* reason for its decision, prefacing its discussion of the statute, by saying "Indeed, *and aside from the common law as expounded in Illinois Central . . .*" *Id.* at 416 [emphasis added.]

Finally, the GLSLA itself is, in substantial part, a reiteration of the pre-existing common law public trust doctrine as articulated in *Illinois Central* and subsequent Michigan cases.[10] As explained in *Glass v Goeckel,* 473 Mich at 683:

> [T]he act reiterates the state's authority as trustee of the inalienable *jus publicum,* which extends over both publicly and privately owned lands . . . [T]he GLSLA establishes the scope of the regulatory authority that the Legislature exercises pursuant to the public trust doctrine.

Third, Enbridge focuses on the phrase "private use" in the following language in *Obrecht* quoted in the complaint:

> [N]o part of the beds of the Great Lakes, belonging to Michigan and not coming within the purview of previous legislation . . . *can be alienated or otherwise devoted to private use in the absence of due finding of 1 of 2 exceptional reasons for such alienation or devotion to nonpublic use.*

Id. at 412-412 quoting *Illinois Central,* 146 US at 455—56 [emphasis added.]

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[10] *See, e.g.*, MCL 324.32502 (conveyance of property interests in submerged lands allowed "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"); §§ 324.32503, 324.32505 (same).

Enbridge then argues that these limitations on transfers of public trust property identified in *Illinois Central* and reiterated in *Obrecht* do not apply to the 1953 Easement on the theory that its use of the bottomlands for "common carrier" oil pipelines is "public" rather than "private." (Br, pp 16—18.) That argument fails for multiple reasons.

To begin, as explained above, the core purpose of the public trust doctrine is forever preserving and protecting from impairment public rights in navigable waters, including navigation, fishing and recreation. To that end, the public trust constrains the State from transferring interests in the public property—"alienat[ing] or otherwise devot[ing] to private use"—unless one of two conditions is determined to be met. One condition is that the intended use of the property will actually enhance public trust rights (e.g., a dock enhancing public rights of navigation and/or fishing). The other is that regardless of the intended use, it will not impair the public trust in the lands and waters not transferred.

Here, Enbridge has not claimed and clearly cannot establish that the construction and operation of its Dual Pipelines in the Straits somehow enhances the public rights protected by the public trust such as navigation, fishing, and recreation. Enbridge does not address how the other condition—no impairment of the public trust—was determined to be met.[11]

Instead, Enbridge mistakenly suggests that the 1953 Easement is not subject to the public trust doctrine because its operation of the Straits Pipelines is a "public use," citing *Lakehead Pipe Line Co*, 347 Mich 25 (1954). *Lakehead* is inapposite. It involved a dispute over condemnation of private property for the right-of-way for other portions of Line 5 pursuant to 1929 PA 16. The Court noted that the Michigan Public Service Commission had approved the

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[11] As discussed below, Enbridge merely points to general statements in the 1953 Easement referring to "benefit" to the public and "furtherance of the public welfare."

construction and operation of Line 5 under that statute. *Id.* at 29, 41. Ultimately, the Court found that operation of the pipeline would benefit commerce in Michigan and upheld the use of eminent domain "to acquire property for the public use claimed." *Id.* at 36. Although the description of Line 5's route in *Lakehead* made a passing reference to the Dual Pipelines (*Id.* at 27—29), the decision did not consider, and has no bearing upon the validity of the 1953 Easement, or the impact of the Straits Pipelines on the public trust.

3. Neither 1953 PA 10 nor the language of the 1953 Easement satisfy the requirements of the public trust doctrine.

Enbridge also argues that the 1953 Easement is necessarily valid because it was based upon legislative authorization in 1953 PA 10 (Br, pp 13—14) and because the Easement itself contained language referring to "benefit" to the public and "furtherance of the public welfare." (Br, p 18.) Both arguments are without merit.

As noted above, 1953 PA 10, in general terms, authorized the Conservation Commission to grant easements for certain structures, including pipelines, across state-owned lands:

> The conservation commission is hereby vested with the power and authority to grant easements, upon such terms and conditions as the said commission deems just and reasonable, for the purpose of erecting, laying, maintaining and operating pipe lines, electric, telephone and telegraph lines over, through, under and upon any and all lands belonging to the state of Michigan which are under the jurisdiction of the conservation commission or the department of conservation, and over, through, under and upon any and all of the unpatented overflowed lands, made lands and lake bottom lands belonging to or held in trust by the state of Michigan.

Notably, the statute does not determine, or purport to determine, that any easement on lake bottomlands granted under its terms—including the 1953 Easement—would necessarily be consistent with the preservation of the public trust. In that respect, the statute contrasts sharply with other legislation from the same era, in which the legislature made specific findings

regarding public rights before directly authorizing the department of conservation to transfer interests in Great Lakes bottomlands to private parties. For example, in 1959 PA 11, the legislature authorized and directed the Department of Conservation to convey an easement on Lake Michigan bottomlands to a utility company to construct and operate a breakwater and ship channel for an electric generating plant. The legislature made specific findings that the proposed use would not impair the public trust, addressing both of the exceptional circumstances described in *Illinois Central* and Michigan cases following it:

> The legislature, exercising the public and private rights of the state of Michigan and the police powers thereof, further *finds and declares that the proposed use to be made of the lands described . . . will not impair the public trust;* that the construction and operation of the breakwater, deep water ship and intake channel, harbor and water discharge channel at these locations are in the best interests of the people of this state; *that navigation will be improved thereby and the public rights of fishing and fowling in the areas described . . . will not be adversely affected;* and that the granting of an easement in, on, and over the lands for such purposes is for the public good and the general welfare of the people of the state. 1959 PA 11, § 3 [emphasis added.] [12]

Like the St. Clair Flats leasing statute addressed in *Nedtweg,* 1953 PA 10 must be construed and applied to protect inalienable public trust rights, the *jus publicum. Nedtweg,* 237 Mich at 17, 20. As previously noted, the Court there upheld that statute (1) as applied to relicted, non-navigable waters and (2) and because the leased lands remained subject to the rights of navigation, hunting and fishing. *Id.* at 18. To the extent that 1953 PA 10 is applied to

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[12] See also, e.g. 1954 PA 41 (authorizing conveyance of Lake Huron bottomlands to utility company based upon determinations that the lands were not suitable for fishing, fowling and navigation and would not impair the public interest in remaining lands not conveyed); 1959 PA 31 (authorizing conveyance of Lake Erie bottomlands to utility company, based upon determination that the lands were inappropriate for fishing, fowling or public navigation and have not been used by the public for those purposes for many years); 1959 PA 84 (authorizing conveyance of Lake Huron bottomlands to a county for public road bridge, subject to department of conservation review and modification of plans as necessary to protect the public interest in the public navigable waters.).

bottomlands of navigable water, like those encompassed in the 1953 Easement, such an easement can only be considered valid if, at a minimum, there is a determination that the proposed use will not impair the public trust.

As alleged in the complaint, neither the 1953 Easement nor any other contemporaneous document reflected such a determination. Enbridge emphasizes the following recital in the Easement: ". . . the Conservation Commission is of the opinion that the proposed pipe line system will be of benefit to all of the people of the State of Michigan and in furtherance of the public welfare . . ." (Ex 1, p 1.) But a general reference to "benefit to...the people" and "furtherance of the public welfare" is simply not equivalent to determining that the proposed use of the bottomlands would not adversely affect the public trust in the navigable waters of the Great Lakes and the bottomlands. Indeed, the language used by the legislature in 1959 PA 11 quoted above clearly illustrates that important distinction by *separately* determining that the proposed use of bottomlands in that easement (1) "will not impair the public trust" and (2) "is for the public good and the general welfare of the people of the state." Finally, notwithstanding Enbridge's repeated attempts to trivialize reference to the public trust as "magic words" (Br, pp 14, 18), *Illinois Central* and the Michigan cases following it make clear that determining the lack of adverse impact on the public trust is a substantive legal requirement, not an empty verbal formula. The failure to address it renders the 1953 Easement invalid.

C. The challenge to the 1953 Easement is not barred by either a statute of limitations or equitable estoppel.

Enbridge also argues at length that the complaint's challenge to the validity of the Easement "comes far too late" because if the Easement was void from its inception, "Enbridge

has long since acquired a prescriptive easement across the Straits." (Br, pp 19—21.) That argument fails as a matter of law.

First, it ignores longstanding authority from the Michigan Supreme Court holding that the State may not be divested of title to Great Lakes bottomlands by adverse possession because such lands are held in trust by the State for the public. *Venice of America Land Co*, *supra,* 160 Mich at 701—702 (1910), citing *Illinois Steel Co v Billot*, 109 Wis 418 (1901), *Olds v Comm'r of State Land Office*, 150 Mich 134 (1907), and *Ainsworth v Hunting & Fishing Club*, 159 Mich 61 (1909). In *Venice of America Land Co.*, the State successfully sought to enjoin a private company from selling lots located on Lake St. Clair bottomlands that were under water when Michigan became a state. The defendant argued, among other things, that the State's complaint was barred by the then existing statute of limitations, CL 1897 § 9724.[13] *Id.* at 683. In rejecting that claim, the Court held that notwithstanding the statute of limitations, the public trust in lake bottom lands could not be divested through prescription:

> An exhaustive discussion of the nature of the State's title to the land beneath the waters of the Great Lakes, and of the question whether any part of such territory can be acquired, as against the State, by adverse possession, will be found in the minority opinion of Justice HOOKER in [*State v Fishing & Shooting Club,* 127 Mich 580]. It there clearly appears from an abundance of authority that *title to submerged lands in the Great Lakes held by the State cannot be devested by adverse possession*; *it being held in trust for the public,* according to the original cession from Virginia and the ordinance of 1787. The late case of *Illinois Steel Co. v Bilot,* 109 Wis 418 (84 NW 855, 85 NW 402, 83 Am St Rep 905), supports this view. *Olds v Commissioner of State Land Office,* 150 Mich 134 (112 NW 952); *Ainsworth v Hunting & Fishing Club,* 159 Mich 61 (123 NW 802.)
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[13] The statute provided: "No suit for the recovery of any land shall be commenced by or on behalf of the people of this state, unless within 15 years after the right or title of the people of the state therein first accrued, or within 15 years after the said people or those from or through whom they claim, shall have been seized or possessed of the premises, or shall have received the rents and profits of the same, or some part thereof."

> The trust in the State is an express trust; and the rule is too well settled to need citation of authorities that, as against the State as the trustee of an express trust, the statute of limitations will not run. 1 Cyc p 1113, and cases cited. *Id.* at 702 [emphasis added.]

Although *Venice Land Co* involved a dispute regarding the alleged acquisition of full legal title through adverse possession, "[a]n easement by prescription requires elements similar to adverse possession, except exclusivity." *West Michigan Dock & Market Corp v Lakeland Investments,* 210 Mich App 505, 511 (1995), citing *St. Cecilia Society v Universal Car & Service Co.*, 213 Mich 569, 576 (1921). Accordingly, the analysis and holding in *Venice Land Co* applies with equal force here to preclude Enbridge's claim that it acquired a prescriptive easement to the public trust bottomlands on which the Straits Pipelines currently exist.

The principal case cited by Enbridge, *Caywood v Department of Natural Resources,* 71 Mich App 322 (1976), is inapposite. It involved a dispute over title to upland property (*Id.* at 324—325), not Great Lakes bottomlands held in the public trust. Thus, the Court of Appeals in that case did not have occasion to and did not consider *Venice Land Co* and the public trust doctrine upon which it was based.

The same is also true of *People v Clement,* 356 Mich 314 (1959), a decision upon which *Caywood*, in turn, relied (*Id.* at 329—331) in holding that based upon the statute of limitations[14], title by adverse possession can be asserted against the State. *Clement* involved a claim by the State for trespass and tree removal on State-owned forest lands. The State argued that a 3-year statute of limitations for such claims should not apply because the State held title to the lands at issue in a sovereign rather than a proprietary capacity, citing, by analogy, cases involving adverse possession of State-owned lands. *Id.* at 315—317. The Court found the cited decisions

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[14] Previous version of MCL 600.5801 prior to its amendment by 1988 PA 35. See *Caywood* at 328 n 3.

unpersuasive either because the discussion was characterized as dicta [*Fishing & Shooting Club, supra*] or because the prior decisions did not even mention the statute of limitations for actions for recovery of State land. *Id.* at 317—318.

But the Court in *Clement* did not mention or consider either the public trust doctrine or *Venice Land Co.* And, unlike the decisions criticized in *Clement, Venice Land Co* explicitly and necessarily considered the statute of limitations in holding that it could not be applied to acquire prescriptive rights in bottomlands held in the public trust. In sum, *Venice Land Co* remains a legally binding precedent that defeats Enbridge's claim to have obtained a prescriptive easement.

Enbridge's argument that the Attorney General is estopped from pursuing Count I.A. of the complaint (Br, pp 21—21) is likewise without merit. It bases that argument on the fact that the 1953 Easement includes the following notation signed by an assistant attorney general: "Examined and approved 4/23/53 as to legal form and effect." (Ex 1, Complaint).

On its face, that notation simply reflects the opinion of an individual assistant attorney general,[15] approving in general terms, the legal form and effect of the Easement. But it plainly does not explicitly address or purport to determine the central issue raised in Count I.A., *viz* whether the Easement was valid in the absence of a determination that the proposed use of the Great Lakes bottomlands would not impair the public trust. To the extent that is construed as implicitly addressing that issue, the individual attorney's opinion rendered in 1953 was legally incorrect for the reasons discussed at length above. Moreover, Enbridge does not cite any

[15] Presumably, the assistant attorney general who signed the document was assigned to represent and provide legal advice to the Conservation Commission and acting within the scope of his assigned responsibilities.

authority for the proposition that the legal opinion of an attorney general is forever legally binding upon her or his successors or that such successors may not reach a different conclusion.

Enbridge's reliance upon the equitable doctrine of estoppel in this context is misplaced for several reasons. First, while estoppel can be asserted against the State when justified by the facts, *see Oliphant v State,* 381 Mich 630, 636—638 (1969), it should not lightly be invoked against the State, especially when its use is contrary to public policy. *Attorney General v Ankerson,* 148 Mich App 524, 544 (1986), citing 28 Am Jur 2d, Estoppel and Waiver, §§ 122—124; 11 Michigan Law & Practice, Estoppel, § 12. Here, application of estoppel against the State would not thwart mere public policy, but also undermine the requirements of long-established law—the public trust doctrine—that protects inalienable public rights in the Great Lakes.

Second, the facts of this case simply do not meet the standards for application of estoppel against the State, i.e. "the requirements of equity, justice or good conscience." *Oliphant, supra,* at 638. Indeed, the circumstances in *Oliphant* are vastly different from those presented here. That case involved a dispute between the State and a group of plaintiff homeowners regarding the title to, and the value of, platted lots comprised of filled bottomlands of Lake St. Clair. The State had previously (1) joined as proprietor of the platted subdivision, (2) formally approved the plat, and (3) conveyed title to the platted lots to a person who later sold them to the plaintiffs. *Id.* at 636. Years later, the State asserted title to lots based upon their historic status as lake bottomlands subject to the public trust that had not been properly alienated pursuant to legislative authority and sought payment from the homeowners for the value of the lots. *Id.* at 637. After noting that they were not dealing with the rights of the original grantee, where "obviously different conclusions would be reached," the trial court and the Supreme Court held that the

State's position with respect the plaintiffs—"innocent third persons"—was completely unconscionable" (*Id.* at 636) and therefore subject to estoppel:

> The State proceeds upon the proposition that it owns a trust interest in the premises for the use and benefit of the public, said trust interest embracing such uses as hunting, fishing, fowling and navigation. It, *however, is not challenging the title of the landowners for the purpose of preserving these interests.* Obviously, these lands have long since, and by acquiescence of the State, lost their value for such trust purposes. The State purports rather to convey off those very rights for the purpose of enriching the central [general?] fund of the State. In the court's opinion, there is nothing here but the desire of the State to get into the real estate business, not to protect the trust interest of the public. In the court's opinion, the property owners are innocent parties who will suffer a great loss if the intervening State's position is allowed to stand. *Id.* at 637 [quoting trial court opinion with approval; [emphasis added.]

Here, the opposite is true. The complaint seeks relief against the original grantee of the 1953 Easement and its corporate successors, not "innocent third persons."

And in contrast to *Oliphant,* the complaint does not advance a pecuniary interest of the State. Instead, the complaint is based exclusively upon the protection of the public trust rights in the navigable waters of the Great Lakes and associated bottomlands from the threats presented by continued operation of the dual pipelines under an invalid easement.

Finally, Enbridge's contention that Count I.A. of the complaint is now subject to estoppel because of its past reliance upon the 1953 Easement (Br, pp 21—22) is not persuasive. Obviously, Enbridge's corporate predecessor relied upon the 1953 Easement, among other things, in constructing and operating the dual pipelines and the remainder of Line 5 and made "significant expenditures" (Br, p 21) for those purposes. But Enbridge has, over the last almost sixty-six years, undoubtedly derived enormous financial benefit from the operation of Line 5 in Michigan, far exceeding whatever expenditures it has made in reliance upon the Easement. If the Easement is determined invalid in this litigation and Enbridge thereafter ceases operation of the Straits Pipelines as sought in the complaint, Enbridge will nonetheless retain the vast

financial benefits already accumulated through its decades of operation of Line 5 under an invalid easement. Under these circumstances, the relief sought in Count I.A. of the complaint does not conflict with "the requirements of equity, justice, or good conscience" and is therefore not subject to estoppel.

For all these reasons, Enbridge's motion to dismiss Count I.A. of the complaint should be denied.

III. Count I.B. of the complaint states a valid claim for relief under the public trust doctrine that is within the subject matter jurisdiction of this Court.

Count I.B. of the complaint alleges that even apart from the invalidity of the 1953 Easement, Enbridge's continued operation of the dual pipelines in the open waters of the Straits violates the public trust doctrine. Enbridge's motion seeks dismissal of this count on three alternative grounds, arguing that the Plaintiff's claim for prospective relief under the public trust doctrine: (1) has been "subsumed" or displaced by the Michigan Environmental Protection Act; (2) is inconsistent with the terms of the 1953 Easement; and (3) is preempted by federal law. As discussed below, each of these arguments is without legal merit.

A. The common law public trust doctrine has not been subsumed or displaced by MEPA or any other statute.

In 2005, 35 years after MEPA's enactment, the Michigan Supreme Court declared the common law public trust doctrine "alive and well in Michigan." *Glass v Goeckel, supra,* 473 Mich at 681.

In spite of this clear declaration, and in spite of various reported cases in which Michigan courts have applied and relied upon the common law public trust doctrine post-MEPA, Enbridge

erroneously alleges that the Attorney General's claims based on the common law public trust doctrine fail because the doctrine has been subsumed by MEPA. (Br, pp 22—25.)

Enbridge's erroneous assertion rests primarily on one case in which the Michigan Court of Appeals noted that a plaintiff/appellant had alleged identical claims under MEPA and the common law public trust doctrine. (*Id.*, p 22, citing *Highland Recreation Defense Fund v Natural Resources Comm'n*, 180 Mich App 324, 331 (1989)). In that case, the Court of Appeals analyzed the plaintiff/appellant's MEPA claims and affirmed a circuit court's decision to dismiss them. *Highland Recreation Defense Fund*, 180 Mich App at 331. The Court of Appeals then held that because the plaintiff/appellant's claims under the public trust doctrine were identical to their MEPA claims, the Court's MEPA analysis applied to both sets of claims and did not need to be repeated. *Id.* The Court of Appeals did not in any way hold or even imply that the common law public trust doctrine had been subsumed, superseded, or displaced by MEPA.

Michigan law is clear that, "The common law, which has been adopted as part of our jurisprudence, remains in force or effect until repealed . . . . Whether a statutory scheme preempts, changes, or amends the common law is a question of legislative intent." *World Architects and Engineers v Strat*, 474 Mich 223, 233 (2006) (citing Const 1963, art. III, § 7; *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183 (1987)).

"In general, where 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." *Millross*, 429 Mich at 183. However, "Michigan courts have uniformly held that legislative amendment of the common law is not lightly presumed." *World Architects*, 474 Mich at 233 (citing *Marquis v Hartford Accident & Indemnity (after remand)*,

444 Mich 638, 652 (1994)). "Statutes in derogation of the common law must be strictly construed and will not be extended by implication to abrogate established rules of common law." *Nation v WDE. Electric Co*, 454 Mich 489, 494 (1997).

Enbridge has cited no authority that supports the suggestion that Michigan courts have found the common law public trust doctrine to be superseded by MEPA, because no such authority exists. In fact, Michigan courts have continued to apply and rely on the common law public trust doctrine since MEPA's enactment. *Glass*, 473 Mich 667 (holding that the common law public trust right to walk on the beaches of the Great Lakes lakeward of the ordinary high water mark could not be impaired); *Highland Recreational Defense Foundation*, 180 Mich App 324 (considering simultaneous claims based on MEPA and the common law public trust doctrine and holding them to be subject to the same analysis, but making no mention of MEPA superseding or abrogating the common law); *People ex rel Macmullan v Babcock*, 38 Mich App 336 (1972) (addressing a claim that the common law public trust doctrine would prevent a defendant from filling submerged lands fronting on Lake St. Clair); *Superior Public Rights v Dep't of Natural Resources*, 80 Mich App 72 (1977) (considering whether a permit issued under GLSLA violated the common law public trust doctrine).

The Michigan Supreme Court's opinion in *Glass* is particularly instructive. That case involved the plaintiff's assertion that the common law public trust doctrine provided the people of the State of Michigan the right to walk on the beaches of the Great Lakes below the ordinary high-water mark, and that this right could not be impaired via a trespass action filed by lakefront property owners. *Glass*, 473 Mich at 673. As noted previously, the Court specifically determined the common law public trust doctrine to be "alive and well in Michigan." *Id.* at 681. In reaching this conclusion, the Court held that the public trust doctrine is "a legal principle as

old as the common law itself," and that "defendants cannot prevent plaintiff from enjoying the rights preserved by the public trust doctrine." *Id.* at 673—674.

The Court went on to hold that, because no Michigan statute defines the scope of the public trust doctrine, courts seeking to define the scope of the doctrine "must turn again to our common law." *Id.* at 685.

If a MEPA lawsuit was the only mechanism by which a plaintiff could prevent the impairment of public trust rights in natural resources, then the plaintiff in *Glass* would have been compelled to file a MEPA lawsuit to prevent lakefront property owners from impairing her right to walk on the beach of Lake Huron. But that was not the case. Rather, the Supreme Court upheld a complaint based on the common law public trust doctrine as an appropriate mechanism to prevent impairment of the public trust in natural resources. Similarly, the Court of Appeals in *Highland Recreational Defense Foundation* could have held that the plaintiff/appellant's common law claims were superseded by MEPA, but it did not.

Moreover, while MEPA allows the Attorney General or any person to sue to obtain injunctive relief to prevent the impairment of natural resources or the public trust in such resources, MEPA does not define the scope of the public trust or prescribe an exclusive procedure for enforcing the rights protected by the public trust. Where the Supreme Court has specifically held that courts must look to the common law to define the scope of the public trust doctrine, MEPA cannot be said to "[prescribe] in detail a course of conduct to pursue and the parties and things affected, and [designate] *specific limitations and exceptions*," which is required to support a finding of statutory abrogation of the common law. *Millross*, 429 Mich at 183 (emphasis added.)

The cases cited by Enbridge from other jurisdictions involving the displacement of common law by statutory provisions do not support its position here with respect to MEPA and the common law public trust doctrine. In each of these cases, the Congress or legislature had adopted statutes providing for detailed and comprehensive regulation of the activities in question, thereby displacing common law on the subject. *City of Milwaukee v Illinois and Michigan,* 451 US 304 (1981) (the Clean Water Act's comprehensive regulatory and enforcement scheme displaced federal common law of public nuisance regarding interstate water pollution); *American Electric Power Co v Connecticut (AEP),* 564 US 410 (2011) (the Clean Air Act's comprehensive regulatory scheme displaces federal common law with respect to greenhouse gas emissions); *Alec v Jackson,* 863 F Supp 2d 11 (D DC, 2012) (same); *Sanders Reed v Martinez*, 350 P3d 1221, 1226—1228 (NM App, 2015) (State Air Quality Control Act established adequate process for regulation of air pollution, displacing state common law on the subject).

MEPA is a very different statute. It is expressly "supplementary to existing administrative procedures provided by law." MCL 324.1706. And, more important, MEPA supplements, but does not displace the common law.[16] While MEPA broadly provides an additional means by which "the attorney general or any person" may maintain an action to protect "natural resources and the public trust in those resources from pollution, impairment or destruction," MCL 324.1701, it does not specifically regulate or address activities on Great Lakes bottomlands subject to the public trust.

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[16] Notably, Enbridge does not suggest that MEPA displaces the common law of public nuisance, which like the common law public trust doctrine, protects public rights.

But there is another provision in NREPA that does "speak directly" to the public trust in Great Lakes bottomlands, Part 325 (GLSLA). As discussed above, the GLSLA substantially codified common law public trust principles as articulated in *Illinois Central* and Michigan cases following it. And, as explained in *Glass*, the GLSLA and the common law public trust doctrine co-exist, with the GLSLA defining the scope of the regulatory jurisdiction. Michigan courts have specifically held that the requirements of Part 325 and the common law public trust doctrine are virtually identical. *Superior Public Rights, Inc.*, 80 Mich App at 85—86. And yet, as noted previously, causes of action based on the common law public trust doctrine have been maintained and upheld by the courts, after the enactment of MEPA with no finding that the common law has been superseded or displaced.

In sum, Enbridge's claim that the common law public trust doctrine has been displaced by MEPA is incorrect as a matter of law. Therefore, Enbridge's motion for summary disposition on this issue must be denied.

B. The 1953 Easement was and remains subject to the public trust. Count I.B. of the complaint states a claim that the Easement is void because it is now apparent that the activity it authorizes is inconsistent with the State's perpetual duty to protect the public trust. That claim is not limited by or subject to separate provisions of the Easement outlining the process by which it may be terminated for a violation of its terms.

Enbridge's argument that Count I.B. is barred because it does not invoke the procedures for terminating the Easement when its terms are violated (Br, pp 26—28) completely misses the mark. That argument simply ignores and does not in any way rebut the legal basis of Count I.B.—the State's continuing and inalienable duty to protect the public trust in the navigable waters of the Great Lakes. (See Comp, ¶¶ 30—33.)

As alleged in the complaint, public rights in navigable waters "are protected by a *high, solemn* and *perpetual* trust, which it is the duty of the State to forever maintain." *Collins v Gerhardt,* 237 Mich 38, 48 (1926). The State did not surrender its trust authority—or the affirmative responsibilities that underpin it—when it granted the 1953 Easement to Enbridge's predecessor. "The state, as sovereign, cannot relinquish [its] duty to preserve public rights in the Great Lakes and their natural resources." *Glass*, 473 Mich at 679. To the contrary, a state's conveyance of property rights "to private parties leaves intact public rights in the lake and its submerged land . . . . Under the public trust doctrine, the sovereign never had the power to eliminate those rights, *so any subsequent conveyances . . . remain subject to those public rights.*" *Id.* at 679—681 [emphasis added.]

As explained above, it has long been the law in Michigan that all conveyances of bottomlands and other public trust resources are encumbered by the public trust. *See Nedtweg,* 237 Mich at 17 (the public trust "is an inalienable obligation of sovereignty" and "[t]he State may not, by grant, surrender such public rights any more than it can abdicate the police power or other essential power of government.").

Again, as alleged in the complaint, when the State conveys a property interest in Great Lakes bottomlands, "it necessarily conveys such property *subject to the public trust." Glass*, 473 Mich at 679. Accordingly, even assuming the 1953 Easement was initially valid, it necessarily remains subject to the public trust and the State's continuing duty to protect public trust resources of the Great Lakes. Moreover, by its terms, the Easement broadly reserved the State's rights: "All rights not specifically conveyed herein are reserved to the State of Michigan." (1953 Easement, p 11, ¶ M.) In sum, the 1953 Easement could not and did not surrender the State's perpetual right and responsibility to protect the public trust.

As the Supreme Court held in *Illinois Central,* a grant of property rights in public trust resources "is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time." 146 US at 455. There, the State of Illinois had granted Lake Michigan bottomlands to a private entity, but "subsequently determined, upon consideration of public policy" that it should rescind its prior grant and the Court upheld that action.

Count I.B. is expressly based upon these legal principles of the public trust doctrine. (Comp, ¶¶ 30—33). Paragraph 33 summarizes why the 1953 Easement violates the public trust and is therefore void:

> Here, it has now become apparent that continuation of the activity authorized by the 1953 Easement—transporting millions of gallons of petroleum products each day through twin 66-year-old pipelines that lie exposed, and literally in the Great Lakes at a uniquely vulnerable location in busy shipping lanes—cannot be reconciled with the State's duty to protect public trust uses of the Lakes, including fishing, navigation, and recreation from potential impairment or destruction. As outlined below, continued operation of the Straits Pipelines presents an extraordinary, unreasonable threat to public rights because of the very real risk of further anchor strikes to the pipelines, the inherent risks of pipeline operations, and the foreseeable, catastrophic effects if an oil spill occurs at the Straits.

The Easement cannot, as Enbridge suggests, effectively overrule or negate the common law public trust doctrine by limiting the circumstances under which it may be terminated.

Enbridge's motion neither addresses nor rebuts the legal principles underlying Count I.B. Applying those principles, Count I.B. states a legally cognizable claim that the 1953 Easement is substantively invalid, independent of any separate determination of whether the Easement should be terminated for a violation of its terms. (Easement, ¶ C).[17] Enbridge's argument on this issue fails.

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[17] The question of whether the Easement should be terminated based upon a violation of its terms is not raised in the complaint and is not currently before this Court.

C. Count I.B. is not preempted by federal law and states a claim within the subject matter jurisdiction of this Court.

Enbridge also argues that Count I.B.'s claim that the 1953 Easement is void because continued operation of the dual pipelines on State-owned bottomlands at the Straits of Mackinac violates the public trust doctrine "constitutes a form of regulation of the pipeline's safety" that is (1) expressly preempted by federal pipeline safety law and regulation and (2) impliedly preempted by federal pipeline safety law and regulation, as well as federal Coast Guard regulation and should therefore be dismissed for lack of subject matter jurisdiction under MCR 2.116(C)(4). (Br, pp 28—35.) Those arguments are without merit.

1. Count I.B. is not expressly preempted by federal pipeline safety law and regulation.

Enbridge bases its express preemption argument on the federal Pipeline Safety Act (PSA), 49 USC § 60101 *et seq.*, and its mistaken claim that the application of the public trust doctrine in Count I.B. is a state "safety standard for interstate pipeline facilities" preempted in 49 USC § 60104(c). (Br, pp 28—29.) But Enbridge's argument fundamentally mischaracterizes both the scope of express preemption under the PSA and the nature of claim asserted in Count I.B.

As Enbridge notes, the PSA authorizes a federal agency within the Department of Transportation, the Pipeline and Hazardous Materials Safety Administration (PHMSA), to regulate the design, installation, inspection, construction, operation, replacement and maintenance of interstate pipelines transporting petroleum products. See 49 USC § 60102(a)(2). And, one provision of the PSA, 49 USC § 60104(c), does expressly preempt state "safety standards" for such interstate pipelines: "A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation."

However, Enbridge completely ignores another provision of the PSA that explicitly provides that the federal regulatory scheme does not apply to, and that PHMSA has no authority with respect to the location and routing of interstate pipelines such as Line 5: "This chapter [49 USC § 6010101 *et seq.*] does not authorize the Secretary of transportation to prescribe the location or routing of a pipeline facility." 49 USC § 60104(e). Those issues are thus left to be determined under state and local laws.

Here, the focus of the complaint in general, and of Count I.B. in particular is not on "safety standards" but rather *the location* of the Straits Pipelines covered by the 1953 Easement on State-owned bottomlands at the Straits of Mackinac that are subject to the public trust doctrine. (See, e.g. Complaint, ¶ 1 ["pipelines that lie exposed in open water on State-owned bottomlands at the Straits of Mackinac. This location—where Lakes Michigan and Huron connect and multiple busy shipping lanes converge—combines great ecological sensitivity with exceptional vulnerability to anchor strikes like those that occurred in 2018, making it uniquely unsuitable for oil pipelines"]; Complaint, ¶¶ 20—21 [critical importance of the Straits of Mackinac to public rights and natural resources]; Complaint, ¶ 33 ["transporting millions of gallons of petroleum products each day through twin 66-year-old pipelines that lie exposed, and literally in the Great Lakes at a uniquely vulnerable location in busy shipping lanes—cannot be reconciled with the State's duty to protect public trust uses of the Lakes, including fishing, navigation, and recreation from potential impairment or destruction."]; Complaint, ¶¶ 42—43 [location of pipelines in shipping channels]; Complaint, ¶¶ 56—60 [characteristics of the Straits and the consequences of an oil spill there].) While the complaint also refers to inherent risks of oil pipeline operations (Complaint, ¶¶ 48—53), it does not seek to impose pipeline "safety standards" different from those applied by PHMSA, governing *how* the pipelines are designed,

operated, inspected and maintained. Instead, the gravamen of Count I.B. of the complaint is that *where* the pipelines are operating violates the public trust.

Federal courts have repeatedly held that 49 USC § 60104(c) preemption applies only to "safety standards" and does preclude state and local regulation pertaining to land use. In *Portland Pipe Line Corp v City of S Portland,* 288 F Supp 3d 322, 429-30 (D Me 2017), the court rejected an argument that a local ordinance prohibiting the loading of crude oil in a harbor because of environmental and safety concerns was a "safety standard" preempted by the PSA. In *Texas Midstream Gas Services, LLC v City of Grand Prairie,* 608 F 3d 200, 212 (CA 5, 2010), the court held that a setback standard for a pipeline compressor station was "not a safety standard in letter, purpose or effect" and could therefore remain in effect. In *Enbridge Energy v Town of Lima,* 2013 US Dist LEXIS 193476 (WD Wis Apr 4, 2013), the court held that a local government's requirements for using local roads were not safety regulations and thus were not expressly preempted by the PSA.

The cases cited by Enbridge do not support its argument that the application of the public trust doctrine in Count I.B. of the complaint is a "safety standard" preempted under the PSA. In *Olympic Pipe Line Co v City of Seattle,* 437 F 3d 872, 874—76 (CA 9, 2006), the court held that specific pipeline operation and testing requirements that the city sought to impose through a franchise agreement were "safety standards" subject to regulation by PHMSA and expressly preempted under the PSA. But unlike the present case, *Olympic Pipe Line Co* did not concern the location or routing of pipeline facilities. Similarly, *Texas Oil & Gas Assoc v City of Austin,* unpublished order of the U.S. District Court for the Western District of Texas No. 03-CV-570-SS (WD Tex Nov 7, 2003), did not involve the location or routing of a pipeline, but rather financial responsibility requirements. Finally, *Kinley Corp v Iowa Utilities Bd,* 999 F 2d 354,

359—60 (CA 8, 1993) held that "environmental and damages remedies provisions" of a state law were preempted by the PSA because they could not be severed from other provisions of the law that contained "safety standards." It did not find that those environmental damages and remedies provisions were themselves "safety standards." Because the claim advanced here under the public trust doctrine is more similar to "environmental damage remedy" than a safety regulation, *Kinley* does not support preemption in this case.

In sum, neither Count I.B. of the complaint or the public trust doctrine upon which it is based, as applied to the location of the pipelines on public trust bottomlands at the Straits are "safety standards" expressly preempted by the PSA.

2. Count I.B. is not impliedly preempted by the PSA or U.S. Coast Guard regulation.

"There is a strong presumption against preemption of state law and preemption will be found only where it is the clear and unequivocal intent of Congress." *Konynenbelt v Flagstar Bank, FSB,* 242 Mich App 21, 25—26 (2000), quoting *Martinez v Ford Motor Co,* 224 Mich App 247, 252 (1997). Implied preemption can exist when (1) the state law directly conflicts with the federal law or the accomplishment of Congress' objectives, or (2) through field preemption where the federal statute so thoroughly occupied the field as to leave no room for states to supplement it. *Id.*

Enbridge cannot show that either of those circumstances are present here. In this case, application of the state public trust doctrine to determine whether pipelines may continue to be located on state-owned bottomlands does not conflict with PHMSA's authority to regulate how those pipelines are designed, inspected, operated or maintained under the PSA *if* they are located in compliance with state law. And, as noted above, by explicitly depriving PHMSA of any

authority to determine the location or routing of pipelines in section 60104(e), Congress has plainly *not* evidenced an intent to occupy the field.

Finally, Enbridge's suggestion that the Coast Guard's authority to regulate navigation of vessels, including regulation of anchor deployment somehow impliedly preempts state authority to apply its own law—the common law public trust doctrine—to the use and occupation of state-owned bottomlands is utterly devoid of merit. (Br, p 34.) Enbridge does not allege—nor could it—that determining that pipelines are not lawfully present on the State lakebed directly conflicts with the Coast Guard's authority to regulate the activities of vessels on the lake surface above. Nor does Enbridge cite any federal statute manifesting congressional intent to enter, let alone occupy, the field of regulating activities on State-owned bottomlands.

In sum, each of Enbridge's preemption arguments is without merit and this Court should deny its motion to dismiss Count I.B. of the complaint.[18]

IV. Count II of the complaint states a legally cognizable claim for declaratory and injunctive relief based upon common law public nuisance.

Count II of the complaint seeks a declaratory judgment that Enbridge's continued transportation of oil through the Straits Pipelines constitutes a common law public nuisance, and ultimately, injunctive relief to abate that nuisance. (Comp, ¶¶ 1—2, 61—64).

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[18] Enbridge's suggestion that "the Attorney General's actions are also in conflict with Enbridge's effort to reduce the risk of anchor strikes altogether by relocating the Dual Pipelines into a tunnel beneath the lakebed of the Straits" (Br 35, fn 20) is seriously misleading. Nothing in the complaint here addresses the subject of the proposed tunnel. Presumably, Enbridge is referring to the Attorney General Opinion No. 7309 issued in response to a formal opinion request from Governor Whitmer. As discussed in section VI, below, that opinion was concerned exclusively with the constitutionality of the so-called "tunnel statute", 2018 PA 359.

A. The complaint alleges facts consistent with the elements of a claim of public nuisance.

As Enbridge notes (Br, p 36), "[a] public nuisance involves the unreasonable interference with a right common to all members of the general public." *Sholberg v Truman,* 496 Mich 1, 6 (2014) [citation and quotation marks omitted]. *See* Restatement Torts, 2d, § 821B. "The term 'unreasonable interference' includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190 (1995) [citation omitted]. A public nuisance involves "threatening or impending danger to the public." *Kilts v Board of Suprs*, 162 Mich 646, 651 (1910).

Here, the complaint plainly alleges facts consistent with the elements of claim of public nuisance, that are summarized in paragraph 1:

> The Attorney General brings this action to abate the continuing threat of grave harm to critical public rights in the Great Lakes and associated resources posed by the Defendants' daily transportation of millions of gallons of oil in dual pipelines that lie exposed in open water on State-owned bottomlands at the Straits of Mackinac. This location—where Lakes Michigan and Huron connect and multiple busy shipping lanes converge—combines great ecological sensitivity with exceptional vulnerability to anchor strikes like those that occurred in 2018, making it uniquely unsuitable for oil pipelines. *Defendants' continued operation of the Straits Pipelines presents an extraordinary, unreasonable threat to public rights because of the very real risk of further anchor strikes, the inherent risks of pipeline operations, and the foreseeable, catastrophic effects if an oil spill occurs at the Straits.* [emphasis added.]

The complaint alleges facts showing the critical public importance of public rights in the waters and associated ecological resources of the Straits of Mackinac that would be harmed by an oil spill from the Straits Pipelines. (Comp, ¶¶ 20—21.)

The complaint also alleges that the Straits Pipelines remain highly vulnerable to damage caused by inadvertent deployment and dragging of anchors from the many vessels moving in the

multiple shipping lanes that converge at the Straits." (Comp, ¶ 34.) That allegation is supported by both independent expert analysis (Comp, ¶¶ 35—43) and facts regarding actual anchor deployments in the Straits, including anchor strikes in 2018 that damaged, but fortunately in that instance did not rupture, the Straits Pipelines. (Comp, ¶¶ 44—47.)

The complaint further alleges that continued operation of the Straits Pipelines "carries substantial, inherent risks" illustrated by past releases from and failures of other pipelines, including the July 2010 release from Enbridge's own Line 6B pipeline near Marshall, Michigan (Comp, ¶¶ 48—50) and supported by expert analysis finding that Enbridge's operation of the Straits Pipelines remains subject to a continuing "principal threat" of "incorrect operations." (Comp, ¶¶ 51—53.)

The complaint also alleges, based in part upon independent expert analysis, that an oil spill from the Straits Pipelines risks catastrophic environmental and economic consequences, because the pollution would be widely distributed, have toxic effects on fish and other biota, causing widespread and persistent ecological impacts as well as damages to recreational fishing, recreational boating, commercial fishing, and commercial navigation, all of which are public rights. (Comp, ¶¶ 54—61, 66.) It further alleges that "[g]iven the magnitude of the threatened harm, continuation of oil transport through the Straits Pipelines is fundamentally unreasonable . . ." (Comp, ¶ 62.)

Concluding Count II, paragraph 67 alleges:

> By continuing to transport oil through the Straits Pipelines that lie exposed in the waters of the Great Lakes where multiple shipping lanes converge, despite the recently demonstrated risks of anchor strikes, the inherent risks of pipeline operations, and the foreseeable consequences of an oil spill at the Straits, Enbridge has created a continuing, unreasonable risk of catastrophic harm to public rights. As such, Enbridge is maintaining a public nuisance.

B. Enbridge's argument that Count II of the complaint is "impermissibly speculative" mischaracterizes both the relevant law and the complaint.

Notably, in seeking dismissal of Count II, Enbridge does not dispute that the allegations of the complaint include all the elements of a claim grounded on common law public nuisance. And, for purposes of its motion under MCR 2.116(C)(8), the facts alleged in the complaint must be accepted as true.

Instead, Enbridge asserts that the allegations of harm in the complaint are "entirely speculative," and that based on "blackletter Michigan law" regarding "anticipatory nuisance," Count II cannot state a claim of public nuisance unless it alleges that the harm arising from continued operation is "practically certain" or a "strongly probable result," (Br, pp 36, 38, 39, 40), [selectively quoting *Falkner v Brookfield,* 368 Mich 17, 23 (1962)].)

Once again, Enbridge mischaracterizes both the relevant law and the complaint. Enbridge principally relies on two cases, neither of which support its argument that Count II must be dismissed. In the first case, *Falkner,* neighboring property owners sought to enjoin, as a common law nuisance, the planned operation of an auto salvage business licensed by the State on the grounds that the land use was inconsistent with and would be harmful to residential use in the area. *Id.* at 18—22. The defendant argued that the complaint should be dismissed citing *Plassey v S. Lowenstein & Son,* 330 Mich 525 (1951), for the proposition that a court will not enjoin the establishment of a lawful business, and that only actual nuisances arising once the business commenced would be enjoined. *Id.* at 22. The trial court in *Falkner* dismissed the complaint apparently because it interpreted prior caselaw as warranting an injunction only if the surrounding area was strictly residential and in its view the area in question was not. *Id.* at 24—25. The Supreme Court reversed because the complaint did allege residential land use, and

it remanded for trial where the character of the neighborhood and the effects of the business operation could be determined. *Id.*

In sum, the actual holding in *Falkner* was narrow, and fact-based. It did not include the language that Enbridge selectively quotes (Br, pp 36—40) from the following general discussion, most, if not all of which, is dicta:

> From the cited authorities and others it appears that equity will not enjoin in injury which is merely anticipated nor interfere where an apprehended nuisance is doubtful, contingent, conjectural or problematical. A bare possibility of nuisance or a mere fear or apprehension that injury will result is not enough. On the other hand, an injunction may issue to prevent a threatened or anticipated nuisance which will necessarily result from the contemplated act, where the nuisance is a practically certain or strongly probable result or a natural or inevitable consequence. *Id.* at 23.

Moreover, contrary to Enbridge's suggestion, the Court did not even say that an injunction may issue "*only*" where the nuisance "is a practically certain or strongly possible result . . ." Read in context of the immediately preceding sentence, the last sentence of the quoted paragraph appears to merely illustrate a contrast between two extremes, not an inflexible rule.

The second case on which Enbridge principally relies, *Smith v Western Wayne Co Conservation Ass'n*, 380 Mich 526 (1968), is likewise neither controlling nor persuasive here. In that case, neighboring property owners sued to enjoin the operation of a shooting range as a nuisance, complaining primarily that noise from the range unreasonably interfered with plaintiffs' enjoyment of their property. *Id.* at 536—541. In addition, the plaintiffs alleged that the range was unsafe because of the possibility of stray bullets, and that even if it was safe, the plaintiffs' fears about its operation render it a nuisance. *Id.* Following an extensive trial, the trial court found that the plaintiffs had not proven an actual nuisance based upon noise or safety concerns and that no relief could be granted on the claim that there exists in plaintiffs' minds

even though there is not actual danger, noting that "[m]ere apprehension is insufficient to grant injunctive relief against a claimed nuisance." *Id.* at 541—543. The trial court did place some restrictions on the defendants' operation of the range and retained jurisdiction to address any actual nuisance in the future. The Supreme Court affirmed in all respects (*id.*) and adopted extensive portions of the trial court opinion. *Id.* at 529—544.

Smith has no bearing on the present case. Neither the trial court nor the Supreme Court cited or relied upon language from prior cases discussing injunctions of "anticipatory nuisances" like the dicta in *Falkner* quoted by Enbridge. As noted above, *Smith* determined that a nuisance had not been proven, based upon specific factual findings made after trial under circumstances far removed from the facts alleged in the complaint here.

Contrary to Enbridge's suggestion (Br, p 40), the complaint does not rely upon "[m]ere apprehension" like that referred to in *Smith.* Unlike the plaintiffs in *Smith,* the complaint does not in any way allege that a nuisance exists here because of "fears" in the plaintiff's mind irrespective of actual danger. *Id* at 541. Nor, as Enbridge suggests (Br, pp 37—38), does the complaint rest upon allegations that certain common and relatively inconsequential harms "conceivably could happen" like those described by the trial court in *Smith:*

> Plaintiffs urge, however, that if a gun is raised 3-1/2 degrees from level, a bullet will clear the backstop and could kill someone upon its descent; further, that a gun can accidentally be discharged over the side walls. These things conceivably could happen. The fact that baseballs may be hit out of parks, that golfers may hook or slice out of bounds, that motorists may collide with pedestrians or other motorists (an automobile is considered 'a dangerous instrumentality') does not render such uses nuisances, subject to being enjoined.

On the contrary, the complaint alleges that "continued operation of the Straits Pipelines presents an extraordinary threat to public rights because of the *very real risk* of further anchor strikes to the pipelines, the *inherent risk* of pipeline operations, and the *foreseeable, catastrophic effects* if an oil spill occurs in the Straits." (Comp, ¶ 33.)

A series of other cases cited by Enbridge (Br, p 37) do not establish that the complaint here fails, as matter of law, to state a legally cognizable claim for declaratory and injunctive relief based upon common law public nuisance. For example, *Brent v City of Detroit,* 27 Mich App 628 (1970), affirmed the dismissal of a complaint seeking to enjoin the construction of a public swimming pool on the ground would cause increased noise, traffic and parking problems and there were other more suitable locations. The Court observed: "Michigan law is replete with applications of the equity maxim that: 'Equity, as a rule, will not interfere in advance of the creation of a nuisance where the injury is doubtful or contingent, and anticipated merely from the use to which the property is to be put.' *Plassey v S. Lowenstein & Son,* 330 Mich 525, 529 (1951)." *Id.* at 632. But here the complaint is not seeking to enjoin, in advance, the construction of a swimming pool or slaughterhouse in a residential neighborhood. Instead, it alleges that continued operation of the already existing Straits Pipelines presents an actual and substantial risk of grave harm to critical public rights of state-wide importance and constitutes a public nuisance.

City of Jackson v Thompson-McCully Co, LLC, 239 Mich App 482 (2000), did not address the legal sufficiency of a complaint alleging a public nuisance. It held instead the evidence at trial did not establish that the operation of an asphalt plant would cause significant harm unreasonably interfering with the plaintiffs' use of their property. *Id.* at 490—491.

In *Marshall v Consumers Power Co,* 65 Mich App 237, 265—266 (1975), the Court affirmed the dismissal of a complaint alleging the proposed operation of a nuclear power plant constituted a public nuisance because the proposed activity was not a nuisance per se and given uncertainty about whether the plant would even be built, it did not sufficiently allege a nuisance in fact. That holding has no relation to the present case.

Gray v Grand Trunk Western R Co, 354 Mich 1 (1958), involved a request to enjoin the construction and operation of a railroad switching yard. The Court affirmed the denial of the injunction, finding that the operation of a railroad is not an "inherent nuisance" and would not violate local zoning. *Id* at 8—9. Again, nothing in that case is germane to the instant case.

Concerned Citizens of Chesaning v Vill of Chesaning, unpublished opinion of the Court of Appeals, issued June 10, 2004; 2004 WL 1292057, *4 (Docket No. 246564), disposed of the plaintiff's public nuisance claim in summary fashion, without a discussion or analysis of the allegations in the complaint, merely repeating the formula that the alleged harm "is purely speculative and highly doubtful." Here, contrary to Enbridge's assertions, the allegations in the complaint are neither "purely speculative" nor "highly doubtful."

As outlined above, the complaint alleges that the continued operation of the Straits Pipelines constitutes a public nuisance on three grounds. First, the complaint alleges specific facts showing that the continuing risk of anchor strikes threatens an oil spill at the Straits. (Comp, ¶¶ 34—47.) The clearest illustration that the risk is real and not "purely speculative" is the fact that each of the Straits Pipelines *was actually struck and damaged* by an inadvertently deployed anchor in 2018. (Comp, ¶¶ 44—45.) The complaint further alleges that the 2018 incident was not an isolated event and that *at least* one other anchor strike occurred in the Straits in 1979, damaging electrical cables that parallel the Straits Pipelines, just as in the 2018 incident. (Comp, ¶ 46.) Remarkably, Enbridge seeks to dismiss the significance of these plainly dangerous events by noting that neither is alleged to have resulted in a release of oil. (Br, p 38.) Apparently, under Enbridge's extraordinarily constricted view of the law, the public must wait until oil actually spills from the Pipelines before a claim of public nuisance could be asserted.

Such a view is completely at odds with the well-established principle that a claim of public nuisance may properly be advanced to *prevent* as well as abate harm to public rights. For example, in *Michigan v United States Army Corps of Engineers,* 667 F3d 765 (CA 7, 2011), state and tribal plaintiffs alleged that the defendants' operation of waterway facilities that threatened to allow the introduction of harmful invasive species into the Great Lakes constituted a common law public nuisance. The Court held that the plaintiffs had alleged a legally cognizable claim of public nuisance based upon threatened harm and stated:

> A court may grant equitable relief to abate a public nuisance that is occurring or to stop a threatened nuisance from arising . . . the threatened harm underlying the nuisance claim must be shown to be real and immediate . . . [t]he elements of a claim . . . are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant . . . [case citations and quotations omitted]. Additional statements about averting threatened nuisances appear in the *Restatement*, see Restatement (Second) Torts § 821B cmt. (i) ("[F]or damages to be awarded [in public nuisance cases] significant harm must have been actually incurred, while for an injunction harm need only be threatened and need not actually have been sustained at all."); *id.* § 821F cmt. (b) ("[E]ither a public or a private nuisance may be enjoined because harm is threatened that would be significant if it occurred."), and in other treatises, see, *e.g.*, 5 J. Pomeroy, A Treatise on Equity Jurisprudence and Equitable Remedies, § 1937 (§ 523), at 4398 (2d ed. 1919) (noting that while "a mere possibility of a future nuisance will not support an injunction," relief will be warranted when "the *risk* of its happening is greater than a reasonable man would incur"). *Id.* at 781.

Here, the facts alleged in the complaint—including actual anchor strikes—go far beyond the mere possibility of future harm, and read in the light most favorable to the Plaintiff, show a real and immediate threat of significant harm to public rights. And, as alleged in the complaint, the continuing risk is "extraordinary [and] unreasonable." (Comp, ¶ 33.)

Moreover, in addition to the history of actual anchor strikes in the Straits, the complaint alleges other specific facts based upon independent expert analysis by Dynamic Risk Assessment Systems, Inc., showing a real and significant risk of harm related to inadvertent anchor deployment. (Comp, ¶¶ 35—41.) Inadvertent anchor strikes are known to be the principal threat

to offshore pipelines and are both increasing in frequency and not influenced by mitigation measures. (Comp, ¶ 36.) The Straits Pipelines score high on all four of the vulnerability factors used to assess the risk, and over much of their length are suspended above the lakebed, making them especially vulnerable to be hooked and ruptured by a dragging anchor. (Comp, ¶¶ 39—41.)

The complaint also alleges that Dynamic Risk estimated the chance of rupture of the Straits Pipelines from an anchor strike in the next 35 years to be one in sixty. (Comp, ¶ 35.) Enbridge seeks to dismiss this estimate on the grounds that statistically, a risk over a single year would be lower, that the complaint does not allege that Enbridge plans to operate the existing Straits Pipelines for another 35 years, and that "the Tunnel statute clearly contemplates the eventual decommissioning of [the existing Pipelines]." (Br, pp 38—39.) But these arguments simply obfuscate the issue and do not change the fact the complaint alleges facts showing a real and significant risk of harm due an anchor strike. For purposes of the present motion, the issue is not the precise numerically expressed estimate of risk, or how long the Pipelines should be assumed to continue to operate.[19] Moreover, the gravity of the risk necessarily depends not only upon the probability that an event will occur, but also the magnitude of the harm resulting from the event when it does occur. *Cf. Michigan,* 667 F 3d. at 785 (courts consider magnitude of potential harm in evaluating whether plaintiffs have shown enough of risk of nuisance for preliminary injunctive relief). Here, the complaint alleges specific facts showing that magnitude of harm resulting from an oil spill at the Straits would be very high. (Comp, ¶¶ 54—62.)

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[19] While the so called "tunnel statute," 2018 PA 359, contemplated an agreement under which a tunnel would be constructed to accommodate a replacement for the current Pipelines, neither the statute nor the December 2018 Tunnel Agreement establish any firm deadline for completion of a tunnel and the "eventual" decommissioning of the current Pipelines.

Second, the complaint alleges facts showing that continued operation of the Straits Pipelines carries substantial, *inherent* risks of environmental harm. (Comp, ¶¶ 49—53.) These risks are illustrated by numerous reported hazardous material pipeline "incidents"[20] nationwide and in Michigan, including 126 involving Enbridge between 2006 and 2018, 72 of which occurred since 2010, the date of Enbridge's huge oil spill from the Line 6B pipeline near Marshall that ostensibly led Enbridge to extensively reform its safety practices. (Comp, ¶¶ 48—50.) Simply put, these facts show that releases or other failures commonly occur on hazardous liquid pipelines, including those operated by Enbridge. As another example of inherent risks, the complaint alleges that the report prepared by Dynamic Risk identified "incorrect operations" as a continuing threat of failure for the Straits Pipelines, notwithstanding Enbridge's review of its management systems following the 2010 Marshall spill. (Comp, ¶¶ 51—52.) Enbridge seeks to dismiss the significance of these allegations, quoting the estimated annual risk of release from incorrect operations included in the Dynamic Risk Report.[21] (Br, p 39.) But as noted above, the significance of the risk for purposes of the complaint depends upon the magnitude of resulting harm, not merely the probability of its occurrence. Furthermore, the allegations regarding *inherent* risk do fall within the dicta from *Falkner* repeatedly, but selectively quoted by Enbridge:

> On the other hand, an injunction may issue to prevent a threatened or anticipated nuisance which *will necessarily result* from the contemplated act, *where the*

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[20] The definition of "incident" used by PHMSA is quoted in the complaint, ¶ 48 n 17, and includes those involving fatalities, injuries requiring hospitalization, costs exceeding a certain threshold, and releases exceeding certain volume thresholds.

[21] While the complaint does quote portions of the Report, and provides a link to its content for identification purposes, it does not, as Enbridge claims, "specifically incorporate" or adopt the entire Report.

nuisance is a practically certain or strongly probable result *or a natural* or inevitable *consequence*. 368 Mich at 23 [emphasis added.]

Third, the complaint alleges that an oil spill at the Straits risks catastrophic environmental and economic consequences (Comp, ¶¶ 54—62.) The complaint alleges specific facts, drawn from the findings of the *Independent Risk Analysis for the Straits Pipelines* (Michigan Technological University, September 2018) that analyzed the consequences of a "worst case" spill of oil from the Straits Pipelines under varying conditions. (Comp, ¶¶ 54—55.) Because of the unusually strong, complex and variable currents at the Straits oil spilled there could be widely transported into either Lake Michigan or Lake Huron, potentially impacting up to hundreds of miles of Great Lakes shoreline. (Comp, ¶¶ 56—57.) Toxic compounds contained in crude oil would cause widespread and persistent ecological damage, affecting fish and other biota, and their habitat. (Comp, ¶ 58.) Extensive natural resource and other economic damages would result because of impacts to public rights of fishing, navigation and recreation. (Comp, ¶ 60.) Contrary to Enbridge's assertion, these allegations of significant harm are not, in the context of the complaint as a whole, simply "speculative and conjectural." As discussed above, the complaint alleges facts supporting a substantial risk of pipeline failure, particularly from an anchor strike, but also due to inherent operational risks of failure. In sum, Count II does not as Enbridge claims (Br, p 40), reflect "mere apprehension."

Enbridge's further argument that the form of the relief requested in the complaint somehow undermines the allegations of harm contained in Count II is without merit. As noted above, the complaint seeks, among other things, "[a] declaratory judgment that Enbridge's continued operation of the Straits Pipelines is a public nuisance subject to abatement" (Comp, ¶ 27) and "[a] permanent injunction requiring Enbridge to (1) cease operation of the Straits Pipelines *as soon as possible after a reasonable notice period to allow orderly adjustments by*

affected parties . . ." (Comp, ¶ 28) [emphasis added.] The primary request is to require Enbridge to cease operation of the Straits Pipelines "as soon as possible." The qualifying language regarding "a reasonable notice period to allow orderly adjustments by affected parties" does not in any way diminish the risk of continued operation alleged in Count II of the complaint. Instead, it reflects the fact the well-established legal principles governing the issuance of injunctions will necessarily require the parties and the Court to consider the impact of the injunction on other parties and upon the public interest in determining the specific terms of the equitable relief to be granted.[22] Ironically, when this litigation reaches the stage of determining any injunctive relief to be granted, there can be no doubt that Enbridge will itself strenuously argue that equity requires some reasonable notice before it ceases operations on Line 5.

Finally, while the complaint in its present form alleges facts sufficient to state a claim of public nuisance, should the Court conclude otherwise, it should refrain from granting Enbridge's motion under MCR 2.116(C)(8) pending the filing of an amended complaint by Plaintiff, since such a motion may be granted only where the Court determines that no factual development could possibly justify relief. *Maiden v Rozwood, supra.*

V. Count III of the complaint states a legally cognizable claim for declaratory and injunctive relief under MEPA.

In addition to the claims based upon the public trust doctrine (Counts I.A. and I.B.) and the common law of public nuisance (Count II), the complaint states another claim based upon the Michigan Environmental Protection Act (Count III, Comp, ¶¶ 68—70.). Part 17 (Michigan

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[22] *See, e.g. Janet Travis Inc v Preka Holdings LLC*, 306 Mich App 266, 274 (2014) (factors to be considered in granting an injunction include the interests of third persons and the public).

Environmental Protection Act) of the Natural Resources and Environmental Protection Act, 1994 PA 451, provides:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred *or is likely to occur* for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in those resources from pollution, impairment, or destruction. MCL 324.1701(1) [emphasis added.]

Consistent with that statute, paragraph 70 of the complaint alleges:

> As set forth above [¶ 68 incorporating ¶¶ 1—67], Enbridge's conduct—continuing to transport oil though the Straits Pipelines in the face of substantial risks of grave environmental harm—*is likely to cause pollution, impairment, or destruction of the water and other natural resources of the Great Lakes and the public trust in those resources.* [emphasis added.]

Enbridge nevertheless argues that Count III should be dismissed under MCR 2.116(C)(8) for failure to state a claim upon which relief can be granted. (Br, pp 40—43.) Once again, Enbridge's argument mischaracterizes both the relevant law and the complaint and should therefore be rejected.

To begin, in attempting to frame the elements of a claim under MEPA, Enbridge repeatedly and misleadingly quotes the following language taken out of context from a footnote[23] in *Preserve the Dunes Inc v Dep't of Environmental Quality,* 471 Mich 508, 518 n 5 (2004): "the determinative consideration is whether the defendant's conduct will, in fact, pollute, impair, or destroy a natural resource." (Br, pp 41—43.) To the extent that Enbridge suggests that the Court held that a complaint under MEPA must allege facts showing that pollution will necessarily or certainly occur, it is plainly mistaken. On the contrary, it is clear from the text of

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[23] The language quoted by Enbridge appears in a discussion of a subject not raised in this case—the relationship between an alleged violation of a "pollution control standard" and the defendant's opportunity to rebut a prima facie case of a MEPA violation. *Id.* It plainly was not intended to establish a test for evaluating the sufficiency of the allegations in a MEPA complaint.

the statute and a series of cases interpreting it, that a claim may be stated under MEPA not only for relief from pollution that has actually occurred, but also for anticipated future pollution, even where that pollution is not certain.

As noted above, the statute itself refers to conduct "likely to pollute . . . ." A prima facie case under MEPA is "not restricted to actual environmental degradation but also encompasses probable damage to the environment as well." *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 309 (1975). *See also, Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 109 (1979) ("the standard of [MEPA] is probable rather than guaranteed harm.").

Here, Count III alleges in ¶ 70 that Enbridge's continued operation of the Straits Pipelines presents "substantial risks of grave environmental harm." As with Plaintiff's claims under Counts I.A. and II. discussed above, that allegation is supported by further specific allegations of fact showing that the continuing risk of anchor strikes threatens an oil spill at the Straits (Comp, ¶¶ 34—47), the substantial, inherent risks of continued operation of the Pipelines (Comp, ¶¶ 48—53) and the catastrophic consequences of an oil spill at the Straits. (Comp, ¶¶ 54—62.) Reading the complaint in its entirety, and in the light most favorable to the Plaintiff, as required under MCR 2.116(C)(8), it substantively alleges that Enbridge's conduct is likely to pollute, impair or destroy natural resources or the public trust, in violation of MEPA.

Enbridge also again mischaracterizes the complaint. Contrary to Enbridge's assertions, the factual allegations of harm are not "wholly conjectural" or merely "hypothetical risks" (Br, p 42.) Enbridge completely ignores the very real history of anchor strikes alleged in the complaint as well as the detailed allegations of the Pipelines' specific vulnerability to anchor hooking and rupture, from which a likelihood of harm may be inferred. And it brushes aside the

specific allegations regarding the *inherent* risks from continued operations, from which a likelihood of harm may also be inferred.

Enbridge also mistakenly attributes to the State certain specific conclusions stated in the Dynamic Risk Report regarding its numeric estimates of overall failure probability and of failure due to "incorrect operations." (Br, p 42.) While the complaint does quote from other portions of the Report to illustrate the potential harm from continued operation of the Pipelines, it did not, as noted above, "incorporate" the entire Report into the complaint, nor allege the specific estimates quoted by Enbridge as facts in the complaint.[24]

Enbridge mistakenly relies upon *Portage v Kalamazoo Co Road Comm*, 136 Mich App 276, 281—282 (1984), and a series of cases citing it for the proposition that there is an established "threshold of harm" that must be shown under MEPA that the complaint here does not satisfy. *Portage* dealt with allegations that cutting 70 trees beside a road violated MEPA. In holding that it did not, the Court in *Portage* purported to identify "factors" not stated in the statute to be used to evaluate the significance of the alleged harm. *Id.* But the Supreme Court subsequently made clear that *Portage* factors "are not mandatory, exclusive, or dispositive." *Nemeth v Abonmarche Dev Inc*, 457 Mich 16, 37 (1998), and that each case must be decided upon its specific facts. In any event, nothing in *Portage* supports Enbridge's argument here.

Enbridge also erroneously claims that the language of the request for relief seeking an injunction terminating the operation of the Pipeline as soon as possible after a reasonable notice period to allow orderly adjustment by affected parties somehow is an acknowledgement that the

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[24] The fact that the State of Michigan commissioned the Dynamic Risk Report does not mean that its contents are statements or admissions by the State. Indeed, the Report specifically states the contrary: "The results of this Study do not necessarily reflect the positions of the State of Michigan." Report at FO-1.

harm alleged in the complaint is not likely to occur. (Br, p 43.) For the reasons discussed above in regard to the same argument concerning Count II, that is simply nonsense.

Finally, while the complaint in its present form alleges facts sufficient to state a claim under MEPA, should the Court conclude otherwise, it should refrain from granting Enbridge's motion under MCR 2.116(C)(8) pending the filing of an amended complaint by Plaintiff, since such a motion may be granted only where the Court determines that no factual development could possibly justify relief.

In sum, Enbridge's motion to dismiss Count III is without merit and should be denied.

VI. The Court of Claims ruling in *Enbridge Energy v State of Michigan* (No. 19-000090-MZ) does not render any part of this litigation moot.

This Court asked the parties to also address the following issue in their briefs responding to the respective motions for summary disposition:

> Given the timeline of this case and the current pending case before the Court of Claims related to the Enbridge Pipeline, *Enbridge Energy v State of Michigan,* No. 19-000090-MZ, might the Court of Claims ruling render all or part of this litigation moot? Explain why or why not.

The Court of Claims subsequently issued its final Opinion and Order in that case on October 31, 2019, a copy of which is attached as Exhibit 1. The Court of Claims granted the Plaintiffs' request for summary disposition in accordance with MCR 2.116(I)(2). The Defendants in the Court of Claims have filed a claim of appeal in the Court of Appeals, where it has been assigned Case No. 351366.

In answer to this Court's question, and for the reasons outlined below, Plaintiff submits that the Court of Claims October 31, 2019 does not render any part of this litigation moot.

A. The legal issue decided by the Court of Claims and the issues pending before this Court are separate. The Court of Claims ruling does not eliminate the actual controversies between the parties in this case.

1. The issues decided by the Court of Claims were whether (a) 2018 PA 359 is constitutional and (b) certain agreements and actions in December 2018 based upon that statute are invalid due any constitutional defect in that law.

As stated by the Court of Claims, 2018 PA 359 (Act 359) amended 1952 PA 214, the statute that authorized the construction and operation of the Mackinac Bridge, to provide for the acquisition, operation maintenance, improvement, repair and management of a new "utility tunnel" at the Straits of Mackinac, initially by the Mackinac Bridge Authority, MCL 254.324a(1), and then by a newly-created Mackinac Straits Corridor Authority once the members of its board were appointed by the governor. MCL 254.324b(2); MCL 254.324d(1). Among other things, Act 359 required the Straits Corridor Authority, not later than December 31, 2018 to enter into an agreement or series of agreements proposed by the governor for the construction, operation maintenance and decommissioning of a utility tunnel provided it met certain conditions. (Opinion and Order, pp 2—3.)

On December 19, 2018, the Straits Corridor Authority entered into the Tunnel Agreement[25] with Enbridge Energy Limited Partnership, that had been proposed by Governor Snyder. The Tunnel Agreement provided for Enbridge to design and construct a utility tunnel beneath the lakebed at the Straits, that would eventually accommodate a replacement of the existing Straits Pipelines. Pursuant to Act 359, the Corridor Authority also assigned to Enbridge

[25] Available at https://mipetroleumpipelines.com/document/tunnel-agreement-between-msca-and-enbridge-energy.

easement rights for a utility tunnel that had been granted to it by the Department of Natural Resources.[26]

While not mentioned in or provided for in Act 359, the State, through Governor Snyder and the then directors of the Departments of Natural Resources and Environmental Quality concurrently signed a "Third Agreement" with three Enbridge entities.[27] The Third Agreement provided that subject to certain conditions, Enbridge may continue to operate the existing Straits Pipelines until the utility tunnel is completed and a replacement segment of Line 5 is placed in service within the tunnel. The Third Agreement provided that it was "premised upon the existence, continued effectiveness of, and Enbridge's compliance with the Tunnel Agreement . . . " (Article 3.1.)

As noted by the Court of Claims (Opinion, p 4), on March 28, 2019, in response to a request for a formal opinion made by Governor Whitmer, the Attorney General issued Opinion No. 7309[28] which concluded that Act 359 violated the Title-Object Clause, Article IV, § 24 of the Michigan Constitution. The Opinion further concluded that if a court determined that Act 359 is unconstitutional, it would likely apply that decision retroactively, and conclude that the Mackinac Straits Corridor Authority, its Board, and any action taken by the Board are void from their inception. Governor Whitmer then issued Executive Directive 2019-13[29] prohibiting state departments from taking action authorized by, in furtherance of, or dependent upon Act 359.

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[26] Available at https://mipetroleumpipelines.com/document/assignment-easement-rights-msca-enbridge-energy.

[27] Available at https://mipetroleumpipelines.com/document/3rd-agreement-between-state-michigan-and-enbridge-energy.

[28] Available at https://www.ag.state.mi.us/opinion/datafiles/2010s/op10388.htm.

[29] Available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90704-493373--,00.html.

Enbridge then filed suit against the State in the Court of Claims seeking a declaratory judgment that Act 359 is constitutional, and that the December 2018 Tunnel Agreement, the Third Agreement, the MDNR Easement for the utility tunnel, and the Assignment of MDNR Easement rights are valid. The State Defendants moved for summary disposition under MCR 2.116(C)(8) arguing that Act 359 violated the Title-Object Clause and was void from its inception, and that the December 2018 actions directly based on it (the Tunnel Agreement, MDNR Easement, and Assignment of Easement Rights) were invalid, as was the Third Agreement which by its terms was dependent upon the effectiveness of the Tunnel Agreement.

Because Enbridge's complaint in the Court of Claims initially sought a broad declaration that the Third Agreement is valid (without reference to Act 359), the State Defendants' motion for summary disposition also advanced an additional argument addressing portions of the Third Agreement purporting to determine that in entering into the Third Agreement allowing the continued operation of the Straits Pipelines pending their replacement in the proposed tunnel "the State has acted in accordance with and in furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan." (Article 4.2(d)).[30]

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[30] The State Defendants' motion argued: "In addition, to the extent that the Third Agreement purports to determine that in agreeing to Enbridge's continued operation of its existing pipelines in the Straits of Mackinac until they are replaced in a tunnel, the State has acted in accordance with and furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan,' *such a determination cannot legally bind the successors to the State officials who signed the Third Agreement,* as it violates the reserved powers doctrine under which the State may not bargain away or relinquish its sovereign authority and perpetual duty to protect the public trust." (Motion, ¶ 9 [emphasis added].)

Enbridge's response to the State Defendant's motion requested judgment in its favor under MCR 2.116(I)(2) and requested the following relief, specifically limited to the subject of the constitutionality of Act 359:

> This Court should declare that (i) Act 359 does not violate Michigan's Title-Object Clause and, as a consequence, (ii) the Third Agreement, as well as the other December 2018 Agreements pertaining to the tunnel under the Straits (including specifically the Tunnel Agreement and the above-referenced MDNR Easement and Assignment of Easement Rights), are not invalid due to any constitutional defect in Act 359.

In their reply brief, State Defendants noted that in light of the specific relief requested by Enbridge, the Court of Claims need not decide the additional issue they had raised regarding the language in Article 4.2 of the Third Agreement.

As reflected in its Opinion, the Court of Claims held that Act 359 did not violate the Title-Object Clause, and accordingly granted Enbridge's request for entry of judgement under MCR 2.116(C)(8). While the Opinion noted and discussed the additional issue regarding Article 4.2 of the Third Agreement it expressly declined to decide it. (Opinion, p 22.) Thus, the only issues determined by the Court of Claims were the constitutionality of Act 359 itself and that the December 2018 agreements were not invalid due to any constitutional defect in that law.

2. This case involves entirely distinct issues that were neither considered by the Court of Claims nor affected by its decision.

The Court of Claims did not consider, and its ruling does not affect, any of the issues presented here: the validity of the 1953 Easement and whether the continued operation of the Straits Pipelines violates the public trust doctrine, the common law of public nuisance, or MEPA. There is a continuing actual controversy between the parties here with respect to each of those matters.

As noted above, the Third Agreement includes a purported determination by the State that entering the Agreement and allowing the continued operation of the Straits Pipelines pending the eventual completion of a utility tunnel was somehow in accordance with the protection of waters and bottomlands held in the public trust. While the Court of Claims held that the Third Agreement is not invalid due to any constitutional defect in Act 359, it did not otherwise determine the validity of the Third Agreement or whether the recital in Article 4.2(d) is legally binding upon the successors to the signatories of the Third Agreement. The Court of Claims decision leaves those matters subject to dispute either in this case or separate litigation.

Finally, the Court of Claims ruling is the subject of a pending appeal.

In sum, the Court of Claims decision does not render any aspect of this case moot.

CONCLUSION AND RELIEF REQUESTED

As explained in detail above, the Attorney General properly brings this action on behalf of the People of the State of Michigan to protect public rights in the Great Lakes that are gravely threatened by Enbridge's continued transport of oil though pipelines located on state bottomlands in the open waters of the Straits of Mackinac. Contrary to Enbridge's numerous arguments the complaint states legally cognizable claims based upon the public trust doctrine, the common law of public nuisance and MEPA. Accordingly, Plaintiff respectfully requests that this Court:

A. Deny Enbridge's motion for summary disposition in its entirety; and

B. Grant Plaintiff other relief as the Court finds appropriate and just.

Respectfully submitted,

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Dated: November 12, 2019

LF: Enbridge Straits (AG v)/AG #2019-0253664-B-L/Pl's Brief in Opp to Defs' Motion for SD 2019-11-12

Exhibit 1

STATE OF MICHIGAN

COURT OF CLAIMS

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, ENBRIDGE ENERGY, INC., and ENBRIDGE ENERGY PARTNERS, L.P.

Plaintiffs,

v

STATE OF MICHIGAN, GOVERNOR OF MICHIGAN, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN DEPARTMENT OF NATURAL RESOURCES, and MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY

Defendants.
_____/

OPINION AND ORDER

Case No. 19-000090-MZ

Hon. Michael J. Kelly

Pending before the Court is defendants' motion for summary disposition filed pursuant to MCR 2.116(C)(8). For the reasons that follow, the motion is DENIED. In addition, because it is apparent that plaintiffs, the non-moving parties, are entitled to judgment, summary disposition is GRANTED in favor of plaintiffs in accordance with MCR 2.116(I)(2). Given the thorough and adequate briefing submitted by the parties, this matter is being decided without oral argument. See LCR 2.119(A)(5).

I. BACKGROUND

This case involves 2018 PA 359, which concerns two liquid petroleum products pipelines (known as "Line 5" or the "Line 5 Dual Pipelines") that traverse the Straits of Mackinac. At the

point where Line 5 traverses the Straits, the pipeline consists of two, 20-inch diameter pipes that rest on or are anchored to the submerged land below the Straits. The pipeline has been in existence and has been used to transport petroleum products for over 60 years pursuant to a 1953 easement granted by the state. The preamble of the easement declares the former Michigan Conservation Commission opined that the purpose of the pipeline would "be of benefit to all of the people of the State of Michigan" and was in the furtherance of the public welfare. The easement has no fixed termination date.

In 2017 and 2018, this state entered into a series of agreements with plaintiffs regarding the continued use and operation of Line 5. As is pertinent to the instant case, the agreements contemplated what is referred to as a "tunnel" beneath the straits; the purpose of the tunnel was to house Line 5 and/or a new replacement line. In November and December of 2018, the Legislature began the process of enacting legislation to implement some of the provisions of the aforementioned agreements. On December 12, 2018, former Governor Richard Snyder signed 2018 PA 359, and the Act was given immediate effect.

The Act amended 1952 PA 214 by creating defendant Mackinac Straits Corridor Authority and by including several provisions pertaining to a new utility tunnel. In pertinent part, PA 359 authorized the Mackinac Bridge Authority to "acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel." MCL 254.324a(1). In addition, the Act created the Mackinac Straits Corridor Authority and its board of directors. See MCL 254.324b(1)-(2). The board of directors was to be appointed by the governor and board members were to exercise the duties of the Mackinac Straits Corridor Authority. MCL 254.324b(2).

With respect to the powers and responsibilities of the newly created Mackinac Straits Corridor Authority, MCL 254.324d(1) provided that "[a]ll liabilities, duties, responsibilities, authorities, and powers related to a utility tunnel as provided in section 14a[1] and any money in the straits protection fund shall transfer to the" Mackinac Straits Corridor Authority Board, upon the appointment of the Board's members. Furthermore, the Corridor Authority was required, "no later than December 31, 2018," to "enter into an agreement or a series of agreements for the construction, maintenance, operation, and decommissioning of a utility tunnel" upon certain conditions being satisfied. MCL 254.324d(4). Among the conditions that had to be satisfied in the agreement were, pertinent to this case: (1) that the Governor supply a proposed tunnel agreement to the Corridor Authority on or before December 21, 2018; (2) that the tunnel agreement allow for use of the utility tunnel by multiple utilities; (3) that the tunnel agreement require the gathering of certain geotechnical information before construction; (4) that the tunnel agreement afford the Corridor Authority a mechanism to ensure that the tunnel was built to appropriate specifications and that it was maintained properly; (5) that the tunnel agreement not require the Corridor Authority "to bring or defend a legal claim for which the attorney general is not required to provide counsel." MCL 254.324d(4)(a)-(d), (*l*). Finally, MCL 254.324d(5) provided that if this state's Attorney General "declines to represent the Mackinac bridge authority or the Mackinac Straits corridor authority in a matter related to the utility tunnel, the attorney general shall provide for the costs of representation by an attorney licensed to practice

[1] Section 14a(1) of the act refers to the authority of the Mackinac Bridge Authority to "acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel." Hence, the Mackinac Bridge Authority's duties, responsibilities, power and authority in regard to the acquisition, construction, operation, and maintenance of a utility tunnel were transferred to the Corridor Authority by way of § 14d(1).

in this state chosen by the Mackinac bridge authority or the Mackinac Straits corridor authority, as applicable."

After the enactment of PA 359, Governor Snyder appointed members of the newly formed Mackinac Straits Corridor Authority Board. On December 19, 2018, the board held its first meeting and approved a tunnel agreement that had been proposed by Governor Snyder. The Authority signed the agreement as well as an assignment of Michigan Department of Natural Resources easement rights to plaintiffs. In addition, the state signed what is referred to as the "Third Agreement" with plaintiffs. The Third Agreement stated that plaintiffs had the right to continue using Line 5 in its current state until the tunnel was completed and until a new segment of pipeline was placed within the tunnel.

From its inception, PA 359 was met with opposition with respect to its content and the manner in which it progressed through the Legislature. However, despite the wide political opposition to the Act, the legal challenge before this court is far narrower. Indeed, the defendants challenge one-and only one-aspect of the Act: its constitutionality under the title-object clause of Const 1963, art 4, section 24. The issues raised in the instant case have their roots in a formal Attorney General Opinion, OAG 2019, No. 7309 (March 28, 2019), concluding that PA 359 ran afoul of the title-object clause. Citing the Michigan Supreme Court's decision in *Rohan v Detroit Racing Ass'n*, 314 Mich 326; 22 NW2d 433 (1946), the OAG opinion concluded that PA 359 failed a "title-body" challenge under art 4, § 24. OAG 2019, No. 7309, pp. 9-12. In particular, the OAG opinion concluded that the title of PA 359 did not adequately reflect the content of the law with respect to §§ 14d(1), (4), and (5) of the act—these sections will be discussed in detail *infra*. *Id.* at 12-18. The opinion further concluded that two of the offending sections, §§ 14d(1) and (4) could not be severed from the act, such that the entire act

should be invalidated. *Id.* at 19-21. Finally, the opinion concluded that any action taken under an invalid statute, such as entering into the tunnel agreement, was void. *Id.* at 21-24.

After issuance of the OAG opinion, Governor Gretchen Whitmer issued an Executive Directive, 2019-13, prohibiting state departments from taking any action in furtherance of, or dependent upon, PA 359. In light of Executive Directive 2019-13 and the OAG opinion, plaintiffs have filed suit in this Court against the state, the Governor, and varies departments and agencies. Plaintiffs ask the Court to declare that PA 359 is valid, and to declare that the tunnel agreement and the third agreement were valid actions taken by the Mackinac Straits Corridor Authority. Count II of plaintiffs' complaint asks the Court to declare that the easement issued and assigned to plaintiffs is valid and enforceable.

II. SUMMARY DISPOSITION

This matter is before the Court on defendants' motion for summary disposition filed pursuant to MCR 2.116(C)(8). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and summary disposition is appropriate "if the opposing party has failed to state a claim on which relief can be granted." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010) (citations, quotation marks, and alteration omitted).

III. TITLE-OBJECT REVIEW

As evidenced by the voluminous amounts of amicus briefing courteously submitted by a variety of entities, the instant litigation has generated strong views on whether the policy goals of PA 359 are sound. Those concerns are not the focus of the instant action and are best left to the Legislature. Indeed, a statute "is not unconstitutional merely because it appears undesirable,

unfair, unjust, or inhumane nor because it appears that the statute is unwise or results in bad policy." *People v Bosca*, 310 Mich App 1, 71; 871 NW2d 307 (2015) (citation and quotation marks omitted). As such, the Court's focus with respect to PA 359 is simply this: whether the statute passes constitutional muster. In analyzing this issue, the Court's view is shaped by the principle that statutes are presumed to be constitutional, as well as by the notion that the Court has a "duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Oakland Co v State*, 325 Mich App 247, 260; 926 NW2d 11 (2018) (citation and quotation marks omitted). In that regard, the Court is to "exercise the power to declare a law unconstitutional with extreme caution," and it cannot exercise the power "where serious doubt exists with regard" to the conflict between the Constitution and the statute at issue. *Id.* (citation and quotation marks omitted). Instead, "[e]very reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Id.* (citation and quotation marks omitted).

A. CONST 1963, ART 4, § 24, GENERALLY

This case requires the Court to examine PA 359 in light of the title-object clause of this state's Constitution. Art 4, § 24 of the Constitution provides that:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

Resolution of the issues raised directs the Court's attention to the amended title of PA 359. This amended title "should be construed reasonably, not narrowly and with unnecessary technicality." *Gillette Commercial Operations North America & Subsidiaries v Dep't of*

Treasury, 312 Mich App 394, 439; 878 NW2d 891 (2015). Consistent with this manner of construction, it has long been observed by this state's appellate courts that the "purpose of the [Title-Object] clause is to prevent the Legislature from passing laws not fully understood, to ensure that both the legislators and the public have proper notice of legislative content, and to prevent deceit and subterfuge." *Roe v Hayman Co*, 323 Mich App 649, 656-657; 918 NW2d 211 (2018) (citation and quotation marks omitted). The "goal of the clause" it has often been said, is to provide notice of legislation, rather than to act as a restraint on the Legislature. *Pohutski v City of Allen Park*, 465 Mich 691; 641 NW2d 219 (2002). In this respect, the clause does not demand an exacting level of review, but instead requires a reasonable approach from the Court. *Id.*

The title-object clause lends itself to three types of constitutional challenges, only two of which are at issue in this case: (1) a title-body challenge; and (2) a multiple-object challenge. See *Roe*, 323 Mich App at 657 (describing title-object challenges, generally).[2] The first type of challenge was at issue in OAG, 2019, No. 7309 and is asserted in defendants' motion for summary disposition. Defendants' briefing also raises a multiple-object challenge. The Court will first address the title-body challenge.

B. TITLE-BODY CHALLENGE

The title-body component of art 4, § 24 demands that "the title of an act must express the general purpose or object of the act." *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 185; 658 NW2d 804 (2002). "The 'object' of a law is defined as its general

[2] The third type of a challenge, a "change of purpose challenge," is not at issue in this case and will not be discussed in this Court's opinion.

purpose or aim." *General Motors Corp v Dep't of Treasury*, 290 Mich App 355, 388; 803 NW2d 698 (2010) (citation and quotation marks omitted). In order to show a statute's invalidity under this type of challenge, "a party must demonstrate that the title of the act does not adequately express its contents . . . such that the body exceeds the scope of the title." *Roe*, 323 Mich App at 657 (citation and quotation marks omitted). Courts construe an act and its title reasonably under this type of challenge. See *Gillette*, 312 Mich App at 439 (citation and quotation marks omitted). Consistent with the manner in which courts must construe an act, it must be noted that, "[t]he title of an act is not required to serve as an index to all of the provisions of the act." *Bosca*, 310 Mich App at 83. Instead, "the test is whether the title gives the Legislature and the public fair notice of the challenged provision." *Id.* (citation and quotation marks omitted). "The fair-notice requirement is violated only where the subjects [of the title and body] are so diverse in nature that they have no necessary connection. . . ." *Id.* (citation and quotation marks omitted). Stated otherwise, an act will pass muster under title-body review if it "centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose. . . ." *Livonia v Dep't of Social Servs*, 423 Mich 466, 501; 378 NW2d 402 (1985) (citation and quotation marks omitted).

Returning to the case at bar, the title of PA 359 states as follows:

> *An act authorizing the Mackinac bridge authority to acquire a bridge and a utility tunnel connecting the Upper and Lower Peninsulas of Michigan*, including causeways, tunnels, roads and all useful related equipment and facilities, including park, parking, recreation, lighting, and terminal facilities; extending the corporate existence of the authority; *authorizing the authority to enjoy and carry out all powers incident to its corporate objects*; authorizing the appropriation and use of state funds for the preliminary purposes of the authority; providing for the payment of the cost of the bridge and authorizing the authority to issue revenue bonds payable solely from the revenues of the bridge; granting the right of

> condemnation to the authority; granting the use of state land and property to the authority; making provisions for the payment and security of bonds and granting certain rights and remedies to the holders of bonds; authorizing banks and trust companies to perform certain acts in connection with the payment and security of bonds; authorizing the imposition of tolls and charges; authorizing the authority to secure the consent of the United States government to the construction of the bridge and to secure approval of plans, specifications, and location of the bridge; authorizing employment of engineers regardless of whether those engineers have been previously employed to make preliminary inspections or reports with respect to the bridge; authorizing the state transportation department to operate and maintain the bridge or to contribute to the bridge and enter into leases and agreements in connection with the bridge; exempting bonds and the property of the authority from taxation; prohibiting competing traffic facilities; authorizing the operation of ferries by the authority; *authorizing the creation of the Mackinac Straits corridor authority; authorizing the operation of a utility tunnel by the authority or the Mackinac Straits corridor authority*; providing for the construction and use of certain buildings; and making an appropriation. [Emphasis added.]

Examination of this title reveals that the construction, maintenance, and operation of a utility tunnel are plainly contemplated within the scope of the Act's title and that the same are included within the Act's general purpose. As a result, and as explained in more detail *infra*, the Court agrees that the challenged provisions of the Act are all germane, auxiliary, or incidental to this general purpose and that they are adequately expressed in the Act's title. See *Livonia*, 423 Mich at 501. In arguing for a different result, defendants highlight § 14d(4) of the act, which requires the Mackinac Straits Corridor Authority to enter into an agreement with a private entity pertaining to a utility tunnel. Defendants argue that the specific tunnel agreement, with all of its precise parameters, should have been reflected in the amended title of PA 359. Defendants stress too narrow of an interpretation of art 4, § 24 and they purport to impose an exacting requirement on legislation that is not supported by caselaw. In the case at bar, the title of PA 359 stresses that the Corridor Authority is to acquire and operate a utility tunnel across the Straits of Mackinac. The precise parameters for how the same is to be accomplished need not be spelled out in painstaking detail in the Act's title. See *Bosca*, 310 Mich App at 83. Rather, it is sufficient in

this case that the provisions of PA 359 that are not directly mentioned in the Act's title—such as entering into a specific tunnel agreement—are "germane, auxiliary, or incidental" to the general purpose of the Act as expressed in the Act's title. See *Livonia*, 423 Mich at 501. Here, entering into an agreement called for by § 14d(4) is germane, auxiliary or incidental to the general purpose of acquiring and maintaining a tunnel or other means of infrastructure traversing the Straits of Mackinac. The agreement was the means by which the Corridor Authority carried out and implemented the principal object plainly expressed in PA 359's title. Furthermore, that the Corridor Authority utilized a private party in furtherance of this statutory goal does not amount to a constitutional violation, as defendants contend, because the act's title was not required to serve as an index for each and every way that the title's object would be implemented. See *Bosca*, 310 Mich App at 83. In short, § 14d(4) is not so diverse in nature from PA 359's title as to amount to a constitutional violation. See *id.* Defendants' arguments run contrary to art 4, § 24's goal of notice, and stray into the hindrance of litigation against which caselaw cautions. See, e.g., *Pohutski*, 465 Mich at 691.

Defendants' argument regarding § 14d(1) of PA 359 fare no better. In this respect, defendants note that the title of PA 359 declares that the Bridge Authority will take certain actions regarding the utility tunnel, and that § 14d(1) of the act transfers that same authority to the Mackinac Straits Corridor Authority. Defendants contend that this shifting of responsibilities is a title-body violation, because the entity mentioned in the title as having certain authority is not the same entity that is ultimately granted such authority in the body of the Act. The Court disagrees. As noted above, a title need not serve as an index of the act's provisions; instead, the court's concern under a title-body challenge is whether the provisions of the act are germane, auxiliary, or incidental to the act's general purpose. *Livonia*, 423 Mich at 501. In *Midland Twp*

v State Boundary Comm, 401 Mich 641, 654; 259 NW2d 326 (1977), the Supreme Court held that "[w]hether a provision is germane depends on its relationship to the object of the act, not who is charged with implementing the provision." In *Midland Twp*, the issue before the Court was whether an amendment to the Home Rule Cities Act concerning the annexation authority of cities could encompass annexation procedures to be performed by a different entity. *Id.* at 651-652. The Court held that where the act in question had a general purpose of providing for the functioning of city government, "it is not consequential for purposes of the Title-Object Clause whether a city, county or state official or agency is charged by the act with participation in implementation of a provision of the act as long as the provision to be implemented is germane to the functioning of city government." *Id.* at 654. Hence, it mattered not *who* performed the function described by the Act, as long as the function being performed was contemplated within the Act's title. *Id.* In reaching this conclusion, the Court explained that it remained "committed to a liberal interpretation of the constitutional provision concerning titles of legislative enactments," and that there was "no constitutional requirement that the Legislature do a tidy job in legislating." *Id.* at 652, 655 (citation and quotation marks omitted). Furthermore, the Court remarked that adopting a contrary interpretation of art 4, § 24 would run the risk of rendering a number of provisions of the act in question at issue, which was contrary to the intent of the Framers in adopting art 4, § 24. *Id.* at 655.

In light of *Midland Twp*, the Court disagrees that defendants' arguments regarding § 14d(1) demonstrate a title-body violation. As *Midland Twp*, 401 Mich at 654, informs, it is not consequential for purposes of title-object review who implements a provision of an act as long as that which is to be accomplished is germane to the object of the act as expressed in the title. In other words, the "who" is not as important as the "what." And here, the "what"—maintenance,

operation, and acquisition of a utility tunnel—is clearly expressed within PA 359's amended title.

Defendants next argue that § 14d(5) fails title-body review. This section of the law provides that if the Attorney General declines to represent the Mackinac Straits Corridor Authority in a matter related to the utility tunnel, the Attorney General is required to provide for the costs of legal representation chosen by the State, Bridge Authority, or Corridor Authority's choosing. Although the Court shares defendants' concern that this arrangement is unusual, this provision nevertheless passes constitutional muster under title-body review. To that end, litigation involving a utility tunnel is germane or incidental to the general object expressed in the title of PA 359, which is to authorize the acquisition, construction, and maintenance of such a tunnel. Indeed, in any large-scale construction project, let alone one as publicized and controversial as the utility tunnel at issue in this case, it is hardly unusual for litigation concerning the project to arise. In this sense, litigation, and representation during that litigation, is pertinent to the underlying construction project. Section 14d(5)'s provision is not so diverse in nature as to have no necessary connection to PA 359's title. See *Bosca*, 310 Mich App at 83.

Defendants' last title-body challenges concern §§ 14a(1) and 14a(4) of PA 359. These provisions pertain to the Mackinac Bridge Authority. According to defendant, these sections of the act grant the Bridge Authority certain authority with respect to securing approval for the location of a utility tunnel and with respect to entering into agreements with respect to the utility tunnel. The problem, according to defendants, is that the title of PA 359 announces that the Bridge Authority may undertake these efforts with respect to a *bridge*, but not a *tunnel*. The Court agrees that the title contains a level of imprecision; however, this is not to say that the general object of the Act as expressed in the title is so diverse as to have no necessary connection

to §§ 14a(1) and 14a(4). Once again, the general purpose of PA 359 contemplates the acquisition, operation, and maintenance of infrastructure, including a utility tunnel. In order to accomplish this general goal, Act 359 must necessarily authorize the doing of certain actions, and not every one of those actions must be expressly delineated in the act's title. In order for a utility tunnel to be acquired, operated, and maintained, it can be reasonably inferred that the same governmental authority will need to obtain certain permission(s), and that certain agreements and contracts must be entered into in furtherance of that general goal. The general object of the statute cannot simply come into existence on its own; rather, the implementation of this general goal, like the implementation of any general goal, will inherently involve the undertaking of a number of impliedly necessary, and germane, tasks. Each of these tasks need not be delineated in the act's title in order to satisfy art 4, § 24. See *Livonia*, 423 Mich at 501. Defendants' technical review is contrary to the reasonable approach this Court must take on title-object review. See *Gillette*, 312 Mich App at 439.

Before concluding on this issue, the Court notes that the cases cited by defendants in support of their position are distinguishable from the scenario presented in the case at bar. For instance, defendants place considerable reliance on the Supreme Court's decision in *Rohan v Detroit Racing Ass'n*, 314 Mich 326; 22 NW2d 433 (1946).[3] In that case, the statute at issue authorized the leasing of state-owned land for the conduct of horse racing. *Id.* at 356. Meanwhile, while the title of the act pertained to the regulation and licensing of racing meets; in addition, the title provided for the creation of a racing commissioner. *Id.* at 354. The Supreme

[3] Although *Rohan* was decided under the Constitution of 1908, the title-object clause was present in, and substantively similar to, the current version of the title-object clause. See Const 1963, art 4, § 24, Convention Comment.

Court held that the title of the act at issue did not give the Legislature fair notice that the act would contain a provision delegating to the department of agriculture the authority to lease state-owned land for horse racing meets. *Id.* at 356-357. The Court concluded that the provision of the act in question which authorized "the department of agriculture to lease State-owned land under its control is not germane, auxiliary or incidental to the general object and purpose of the act as expressed in its title, which was to regulate horse-racing meets and betting on horse races." *Id.* at 357.

The case at bar involves an act that is distinguishable from the statute at issue *Rohan*. As explained by the Supreme Court in *Rohan*, an act with a title pertaining to the regulation of horse racing and betting on horse races simply bore no relation to leasing state-owned land. Here, by contrast, the title of PA 359 is broad enough to encompass the challenged sections of PA 359, even if the same were not expressly listed in the Act's title. That is, the challenged sections of PA 359 pertaining to the utility tunnel and various methods of carrying out the act's objectives are all, at a minimum, germane, auxiliary, or incidental to the Act's general purpose of providing for the acquisition, maintenance, and operation of a utility tunnel and other infrastructure, as stated in the Act's title. The case is not one, such as *Rohan*, where the subject-matter contained in the body of the Act was completely divorced from, and bore no relation to, the object expressed in the Act's title. Nor can it be said that the acquisition of a utility tunnel—and various provisions implementing the tunnel—were hidden from the Legislature or the public. Defendants' arguments sound more in the nature of complaints that the exact details of the Act were not expressed in its title. Title-object review caselaw does not support the type of precision from an Act's title as demanded by defendants. See, e.g., *Bosca*, 310 Mich App at 83.

C. MULTIPLE-OBJECT CHALLENGE

The next issue presented in the parties' briefing is whether PA 359 fails multiple-object review under art 4, § 24. Courts entertaining a multiple-object challenge examine the body of the law, as well as its title, in determining whether the act embraces more than one object. *Gillette*, 312 Mich App at 440. The Court's review of this issue must be guided by the notion that the "object" of a law, for purposes of this type of challenge, is its general aim or purpose. *HJ Tucker & Assocs, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 557; 595 NW2d 176 (1999). In addition, "[t]he 'one object' provision must be construed reasonably, not in so narrow or technical a manner that the legislative intent is frustrated." *Pohutski*, 465 Mich at 691. Nor should a court:

> invalidate legislation simply because it contains more than one means of attaining its primary object. . . . An act may include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object, and it may authorize the doing of all things which are in furtherance of the general purpose of the Act without violating the Title–Object Clause. [*Roe*, 323 Mich App at 658 (citations and quotation marks omitted).]

Furthermore, in cases—such as the case at bar—where the Legislature amends an act to include a new item, courts must remain mindful that "the Legislature is free either to enact an entirely new act or to amend any act to which the subject of the new legislation is germane, auxiliary, or incidental." *Livonia*, 423 Mich at 500. The Legislature's choice of amending an act to include a new, but germane subject "will not be invalidated merely because an alternative location for the new legislation might appear to some to be more appropriate." *Id.*

Defendants argue that PA 359 fails title-body review because it refers to two different subjects: (1) a bridge spanning the Straits of Mackinac; and (2) an underground utility tunnel spanning the Straits of Mackinac. Defendants' position takes too narrow of an approach to title-

object review. Once again, the object of a law is its "general purpose or aim." *HJ Tucker & Assocs*, 234 Mich App at 557 (citation and quotation marks omitted). Here, defendants' argument largely avoids identifying a general purpose or aim of PA 359 and concludes that, because a bridge is different from a utility tunnel, PA 359 necessarily embraces multiple objects. Defendants also place significant focus on the notion that, for a period of over 60 years, PA 214 only pertained to a bridge. However, caselaw cautions art 4, § 24's single-object provision should not be read "in so narrow and technical a sense as unnecessarily to embarrass legislation." *In re Requests for Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 466; 208 NW2d 469 (1973). The focus is not on how long PA 214 only pertained to a bridge. See *Gillette*, 312 Mich App at 440 (focusing on the version of the statute at issue in the present case). See also *Livonia*, 423 Mich at 497-498. Indeed, the Legislature was free to amend the Act, with the only pertinent limitation being—for present purposes—that the subject of the amendment be germane, auxiliary, or incidental to the act's general purpose. *Id.* at 500. Here, if the Court were to adopt the position advanced by defendants in this case, it would run the risk of propagating an approach under which few laws could withstand scrutiny. As cautioned against in Justice Cavanagh's opinion in *People v Kevorkian*, 447 Mich 436, 455; 527 NW2d 714 (1994) (Opinion by CAVANAGH, J.), "[w]ith all but the simplest of statutes, it would be possible to select one section, describe the "object" of that section, and be able to reason . . . that the remaining sections have different objects." The Court should not, as defendants invite it to do, pick out individual components of PA 359. Rather, the focus is whether the current version of PA 359 embraces a single object. For the reasons expressed below, the Act passes that test.

Expanding on this last point, the Court agrees with plaintiffs that a utility tunnel spanning the Straits of Mackinac is germane, auxiliary, or incidental to PA 359's general purpose, such

that defendants' multiple-object arguments fail. Upon review of PA 359's title and body, the Court agrees with plaintiffs that the general purpose or aim of PA 359 relates to the provision of infrastructure connecting the state's Upper and Lower Peninsulas. See *HJ Tucker & Assocs*, 234 Mich App at 557 (explaining how a court is to ascertain the general purpose or object of an act). That PA 359 does not expressly refer to "infrastructure" does not, contrary to defendants' position, negate the notion that a fair reading of the act's provisions demonstrates a purpose of referring to infrastructure connecting the Straits of Mackinac. See *Builders Square v Dep't of Agriculture*, 176 Mich App 494, 499; 440 NW2d 639 (1989) (explaining that the act at issue, item pricing and deceptive advertising act, had as its overall purpose consumer protection, and that "it is inconsequential that the act fails to mention consumer protection" when a "fair reading of the title demonstrates its purpose."). Here, the title of PA 359 refers to connecting this state's peninsulas through a bridge, utility tunnel, and all necessary accompanying facilities. The body of the act repeatedly stresses infrastructure connecting this state's peninsulas as well, and makes repeated references to utility lines spanning the Straits. See, e.g., MCL 254.311(c); MCL 254.317; MCL 254.324(e). The construction of a utility tunnel, and all that is necessary to accompany the same, is within the scope of this general purpose. Two types of infrastructure spanning the same waterway cannot be said to be so diverse that they have no necessary connection to each other. See *Wayne Co Bd of Commr's*, 253 Mich App at 190 (citation and quotation marks omitted) (explaining that the "reason for limiting the objective of an act to a single purpose is to avoid bills addressing diverse subjects that have no necessary connection."). In addition, the transfer of responsibilities from one entity to another—such as from the Bridge Authority to the Corridor Authority—in furtherance of the general purpose of the act, does not amount to a multiple-object violation. PA 359 can, and does, authorize a variety of activities in

furtherance of the Act's general purpose without running afoul of the prohibition against multiple objects. See *id.* at 190-191.

The remainder of defendants' argument consists of picking individual aspects of PA 359 and contending that those bits and pieces of the statute do not fit the within the narrowly defined object which defendants advance as the principal object of PA 359. However, as noted above, defendants' view of the principal object of PA 359 is unnecessarily narrow. As explained in *Gillette*, 312 Mich App at 411, there is:

> no constitutional requirement that the legislature do a tidy job in legislating. It is perfectly free to enact bits and pieces of legislation in separate acts *or to tack them on to existing statutes even though some persons might think that the bits and pieces belong in a particular general statute covering the matter. The constitutional requirement is satisfied if the bits and pieces so enacted are embraced in the object expressed in the title of the amendatory act and the act being amended.* [Citation and quotation marks omitted; emphasis added.]

Here, regardless of whether the Court agrees with defendants about the lack of tidy draftsmanship, the argument advanced by defendants misses the mark. The Court's concern under a multiple-object challenge is not whether PA 359 could have been drafted in a different manner. As explained by Justice Cavanagh's opinion in *Kevorkian*, 447 Mich at 459 (Opinion by CAVANAGH, J.): "[t]here is virtually no statute that could not be subdivided and enacted as several bills. It is precisely that kind of 'multiplying' of legislation that we seek to avoid with the liberal construction given to art 4, § 24." As a result, defendants' attempt to elevate the definition of "bridge" in MCL 254.311(c) over the remaining provisions of PA 359, as well as over the Act's title, does not establish a multiple-object violation.

Finally, as it concerns both the title-body challenge and the multiple-object challenge, the Court finds the following discussion from *In re Requests for Advisory Opinion re*

Constitutionality of 1972 PA 294, 389 Mich at 464-465, to be pertinent in the instant matter. That is, although the above discussion is sufficient to resolve this issue, the Court finds additional support for its conclusion in the Supreme Court's advisory opinion. In *In re Requests for Advisory Opinion*, the Court examined changes to the Insurance Code. The Court focused on the idea that art 4, § 24 was intended to provide notice and to prevent the passage of statutes not fully understood. *Id.* at 464. And in that case, it was apparent, given the amount of public attention paid to the act in question, that notice was not an issue:

> The so-called 'log-rolling' argument may be valid in some instances, but does not apply in this case. The code was in being and had been since 1956. The amendment in question cannot be said to have allowed the passage of a law not fully understood (although the subject matter may be complex and difficult for a layman to understand), or that the amendment brought into the code subjects having no connection with the Insurance Code. *The legislature and the public were well aware of the intention and context of this legislation. One is safe in assuming that probably no piece of legislation since statehood has received more attention or been more noted than the present change in the automobile injury reparation provisions.* [*Id.* at 464-465 (emphasis added).]

While the Court is not bound by this discussion in the Supreme Court's advisory opinion, see *id.* at 460 n 1, the discussion can nevertheless be persuasive. And here, the Supreme Court's discussion is persuasive, given that there have been no serious assertions that anyone was misled as to the contents and object of PA 359. Rather, the contents of Act 359 were well known, as evidenced by the strong policy-based reactions the Act has drawn. But those policy questions are best left to the Legislature. The Court's concern is only with art 4, § 24, regardless of the merits or wisdom—or lack thereof—of PA 359. And on the issue of the Act's constitutionality, it is apparent that art 4, § 24 was intended to cure a particular type of ill; PA 359 does not, however, contain the required symptoms to be struck as unconstitutional under that provision. While there are reasons to debate the appropriateness of the utility tunnel called for in PA 359, issues surrounding notice and art 4, § 24 are not among them.

IV. PUBLIC TRUST DOCTRINE AND CONCERNS RAISED IN AMICUS BRIEFING

The final issue raised in the parties' briefing invokes the public trust doctrine. While the amicus briefing filed in this matter raises issues extending beyond the public-trust arguments articulated in the parties' briefing, the Court will confine its analysis to the arguments and issues asserted in defendants' motion for summary disposition.[4] See *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 173; 744 NW2d 184 (2007) ("Absent exceptional circumstances, amicus curiae cannot raise an issue that has not been raised by the parties") (citation and quotation marks omitted). See also 2 Am Jur Amicus, § 7 (explaining that courts should decline to grant relief on issues raised by amicus briefing but not by the litigants); *United Parcel Serv, Inc v Mitchell*, 451 US 56, 60 n 2; 101 S Ct 1559; 67 L Ed 2d 732 (1981).

The public trust doctrine has its origins in the common-law notion "that the sovereign must preserve and protect navigable waters for its people." *Glass v Goeckel*, 473 Mich 667, 677; 703 NW2d 58 (2005). "This rule—that the sovereign must sedulously guard the public's interest in the seas for navigation and fishing—passed from English courts to the American colonies, to the Northwest Territory, and, ultimately, to Michigan." *Id.* at 678. In *Glass*, the Supreme Court explained that, under this doctrine, the state "has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public." *Id.* The state cannot relinquish

[4] The Court notes that it is uncertain to what extent defendants are even continuing to advance their arguments premised on the public trust doctrine. Indeed, the arguments asserted in their summary disposition briefing are relatively vague with respect to the public trust. Moreover, their reply brief declined to advance the matter, stating on p 13 n 9 that because—in their estimation—the constitutional issues were dispositive, the "Court need not address this additional argument or [plaintiffs'] attempted response." Thus, it is not apparent defendants are still advancing an argument premised on the public trust doctrine. Nevertheless, the Court will evaluate the issue as it has been framed by defendants' brief filed in support of their motion for summary disposition.

this duty. *Id.* at 679. "Therefore, although the state retains the authority to convey lakefront property to private parties, it necessarily conveys such property *subject to the public trust.*" *Id.* See also *id.* at 694 ("As trustee, the state must preserve and protect specific public rights . . . and may permit only those private uses that do not interfere with these traditional notions of the public trust.").

With respect to the public trust doctrine, defendants note that ¶ 4.2 of the Third Agreement—which affirmed plaintiffs' right to continue using the existing pipeline until a replacement is built—declares that "the State has acted in accordance with and in furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan." This paragraph of the Third Agreement echoes the 1953 easement which, as noted above, gave plaintiffs the right to operate a pipeline underneath the Straits of Mackinac.

Defendants have not expressly argued that the Third Agreement—or any other agreement, for that matter—offends the public trust doctrine. In this sense, they have not advanced the argument that a conveyance to plaintiffs failed to preserve and protect public rights, nor have they advanced the notion that any conveyance interfered with the traditional notions protected by the public trust doctrine. See *Glass*, 473 Mich at 694. Instead, they argue at page 48 of their briefing that the Third Agreement's conclusion regarding the public trust "in no way precludes the State, through its present officials, from making a contrary determination." They do not, however, contend that a "contrary determination" could be or should be made. Because they have not articulated any arguments about a contrary determination—at least not in this case—it is not apparent a live controversy is before the Court on this matter. See *Oakland Co*, 325 Mich App at 265 n 2 (declining to address hypothetical claims). Defendants also argue

that the state cannot surrender its duties under the public trust doctrine. On the materials submitted and highlighted by defendants' briefing, however, the state has not surrendered any duties or obligations to plaintiffs.[5] Rather, the 1953 easement concluded that the granting of the easement was in accordance with the public trust, and the Third Agreement echoes this sentiment. Again, defendants' briefing in this case has not made any contention that those agreements were *not* actually in accordance with the public trust, and the Court declines to decide an issue that is not properly put before it.

V. CONCLUSION

IT IS HEREBY ORDERED that defendants' motion for summary disposition is DENIED.

IT IS HEREBY FURTHER ORDERED that summary disposition is GRANTED in favor of plaintiffs, as non-moving parties, pursuant to MCR 2.116(I)(2).

This order resolves the last pending claim and closes the case.

Dated: October 31, 2019

Michael J. Kelly, Judge
Court of Claims

[5] In fact, on pages 47-48 of their brief in support of summary disposition, defendants assert that "[t]he State of Michigan *did not* and could not surrender its trust authority—or the affirmative responsibilities that underpin it—when the Snyder administration signed the Third Agreement" (emphasis added).