

STATE OF MICHIGAN

IN THE COURT OF APPEALS

ENVIRONMENTAL LAW & POLICY CENTER
and MICHIGAN CLIMATE ACTION NETWORK,

Appellants,

Court of Appeals No. 369165

-vs-

MPSC Case No. U-20763

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

In the matter of the application of

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,
for authority to replace and relocate the segment of Line
5 crossing the Straits of Mackinac into a tunnel beneath
the Straits of Mackinac, if approval is required pursuant
to 1929 PA 16, MCL 483.1 *et seq.*, and Rule 447 of the
Commission's Rules of Practice and Procedure, R
792.10447, or the grant of other appropriate relief.

APPELLANTS' BRIEF ON APPEAL

* * * ORAL ARGUMENT REQUESTED * * *

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STATEMENT OF QUESTION PRESENTED

- I. DID THE MICHIGAN PUBLIC SERVICE COMMISSION, AFTER CORRECTLY CONCLUDING THAT THE MICHIGAN ENVIRONMENTAL PROTECTION ACT, MCL 324.1701, *et seq* REQUIRED CONSIDERATION OF THE CLIMATE CHANGE IMPACT OF ENBRIDGE’S PROPOSED PROJECT, COMMIT LEGAL ERROR IN FAILING TO FOLLOW MEPA’S STATUTORY REQUIREMENTS IN RENDERING ITS FINAL ORDER?

Appellants say “Yes.”

The Commission said “No.”

- II. DID THE MICHIGAN PUBLIC SERVICE COMMISSION ERR WHEN, IN RESPONSE TO A MOTION IN LIMINE FILED BY ENBRIDGE, IT PRECLUDED THE INTERVENORS FROM PRESENTING EVIDENCE CONCERNING THE PUBLIC NEED FOR THE CONTINUED OPERATION OF LINE 5, BUT THEN MADE CRITICAL FACTUAL FINDINGS IN ITS FINAL ORDER CONCERNING THE PUBLIC NEED FOR LINE 5'S CONTINUED OPERATION?

Appellants say “Yes.”

The Commission said “No.”

STATEMENT REGARDING APPELLATE JURISDICTION

This Court has jurisdiction to consider this appeal, which is taken from a Final Order entered in the Michigan Public Service Commission. The Final Order for purposes of MCR 7.202(6)(a) was the Commission's December 1, 2023 Order approving Enbridge Energy, Limited Partnership's application to replace and relocate a segment of its Line 5 oil pipeline crossing the Straits of Mackinac. On December 26, 2023, within 30 days of the entry of the Commission's Order, appellants filed a timely claim of appeal in this Court. The Court has jurisdiction to entertain this appeal pursuant to MCL 462.26(1) and MCR 7.203(A)(2).

INTRODUCTION

The Michigan Environmental Protection Act, MCL 324.1701, *et seq* (“MEPA”), prohibits projects causing pollution, impairment, or destruction of the air, water, or other natural resources unless there is no feasible and prudent alternative. This case involves Canada-based oil giant Enbridge Inc.’s misguided proposal to construct a tunnel creating a new segment of its “Line 5” oil pipeline that would cross beneath the lakebed of the Straits of Mackinac (the “Straits”). Michigan policymakers correctly concluded that the aged 70-year-old underwater section of the existing Line 5 pipeline beneath the Straits poses too great a risk of an environmentally and economically catastrophic oil spill. Attempting to end run that decision, Enbridge sought the approval of the Michigan Public Service Commission (the “Commission”) for the proposed project to replace Line 5’s existing Straits crossing with a massive tunnel constructed to house the pipeline.

Local Michigan businesses, Tribal Nations, and environmental groups opposed Enbridge’s application before the Commission. Among other important points, appellants Environmental Law & Policy Center (“ELPC”) and the Michigan Climate Action Network (“MiCAN”) presented evidence to the Commission that the proposed new Line 5 pipeline segment would result in a net increase of 27 million metric tons of CO₂ emissions annually, which translates to a social cost of at least \$41 billion, estimated using standard methodology.

MEPA requires that the Commission’s regulatory review of a proposed pipeline account for pollution not just from construction of a pipeline, but also from the crude oil and gas that will flow through it. The Commission recognized its statutory obligation under MEPA to account for “upstream” and “downstream” greenhouse gas (“GHG”) emissions attributable to the

production, transportation, and ultimate refining of oil and gas transported through Line 5. The Commission, however, unlawfully failed to fulfill its obligation to comply with MEPA's statutory requirements. The Commission approved Enbridge's application only after failing to adopt and apply *any* standard or methodology whatsoever for quantifying and valuing the climate change impacts of GHG emissions caused by the proposed project, in violation of Section 1, 3 and 5 of MEPA, and well-established Michigan caselaw applying MEPA. Instead, the Commission simply assumed away all climate change impacts from GHGs caused by the project. Because the Commission's December 1, 2023 Order approving Enbridge's application failed to follow the statutory requirements of MEPA, it is unlawful. For the reasons discussed in this brief, as well as the reasons discussed in the briefs of the other appellants, this Court should vacate the Commission's Order and remand this case for further proceedings consistent with the statutory requirements of MEPA.

STATEMENT OF FACTS

A. Enbridge Line 5 and the Straits Crossing

Enbridge Inc. ("Enbridge") and its many subsidiaries own and operate a network of crude oil pipelines in Canada and the United States. One of these pipelines, Enbridge's Line 5, runs 645 miles from Superior, Wisconsin, where it gathers crude oil and propane originating in North Dakota and Alberta, across Michigan's Upper and Lower Peninsulas, to oil refineries in Sarnia, Ontario. A four-mile segment of Line 5 runs underwater across the lakebed in the Straits of Mackinac. This crucial segment lies within an easement granted by the State of Michigan to Enbridge's predecessor in 1953. That same year, the Commission granted approval for the portion of the oil pipeline crossing the Straits. See *Lakehead Pipe Line Comp v Dehn*, 340 Mich

25, 29; 64 NW2d 903 (1954).

Since that time, multiple problems with the Line 5 oil pipeline have occurred at the Straits crossing. Those problems resulted in Michigan policymakers concluding that continued operation of Line 5 in the Straits poses too great a risk of a catastrophic oil spill, which would cause enormous environmental and economic damage. In 2016, the State of Michigan commissioned Dynamic Risk Assessment Systems (“Dynamic Risk”) to perform an analysis of alternatives to the pipeline crossing the especially vulnerable Straits, and to assess the risks of continued Line 5 pipeline operation. In its 2017 report, Dynamic Risk estimated the chance of a pipeline rupture in the Straits sometime during the next thirty-five years to be one in sixty, with the dominant threat coming from anchor strikes to which the underwater pipeline segment is particularly vulnerable. Dynamic Risk Assessment, Exhibit ELP-24, at 28. Subsequently, in 2018, a group of academics and researchers led by Michigan Technological University analyzed the environmental, ecological, and economic consequences of a “worst case” oil spill in the Straits. They concluded that a clean-up would cost between \$1.8 billion and \$5.6 billion.

In 2019, Michigan policymakers then took actions to cease operation of Line 5 across the Straits. Michigan Attorney General Dana Nessel filed suit against Enbridge in the Ingham County Circuit Court. *Nessel v Enbridge Energy, LP, et al.*, Ingham County Circuit Court No. 19-474-CE. The Attorney General is seeking to enjoin Enbridge’s continued operation of Line 5 based on violations of MEPA.¹ On November 13, 2020, Governor Gretchen Whitmer and the Michigan

¹ Progress in the Attorney General’s suit to enjoin the operation of Line 5 had been procedurally slowed by Enbridge’s December 2021 removal of the case to federal court. *Nessel v Enbridge Energy, LP, et al.*, United States District Court, Western District of Michigan, No. 21-cv-0157. The Attorney General sought a remand back to state court, arguing that removal was untimely. The district court denied remand, and the Attorney General appealed to the Sixth Circuit Court of Appeals. *Nessel v Enbridge Energy, LP, et al.*, Sixth Circuit No. 23-1671. Last

Department of Natural Resources (“MDNR”) revoked and terminated the 1953 easement on which the segment of Line 5 crossing the Straits is allowed. A copy of the Notice of Revocation is Exhibit A to this brief. In that Notice, the Governor and MDNR cited two independent grounds for termination: (1) the easement was void from its inception because it violated Michigan’s public trust doctrine, which provides that Michigan has a fiduciary duty to preserve and protect the State’s waters; and (2) Enbridge has persistently and incurably violated the easement’s terms and conditions. Notice of Revocation (Exhibit A), at 2-16. The Governor’s Notice ordered Enbridge to shut down operation of Line 5 in the Straits by May 2021.

B. Enbridge Attempts an End Run Around Michigan Policymakers’ Actions

Enbridge responded to Michigan policymakers’ decisions and actions with a strategy to end run the impending shutdown of Line 5 crossing the Straits. On April 17, 2020, Enbridge filed an Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac with the Michigan Public Service Commission. A copy of that Application is Exhibit B to this brief. Enbridge’s Application sought approval to build a new tunnel and oil pipeline segment crossing beneath the Straits and, upon completion of that project, to decommission the existing 70-year-old oil pipeline under the Straits.

The first sentence of Enbridge’s Application stated that it was brought pursuant to 1929 PA 16, MCL 483.1, *et seq.* (“Act 16”), the statutory regime providing the Commission with the authority to control, investigate and regulate crude oil pipelines. MCL 483.3. Alternatively, Enbridge argued for *ex parte* approval of its proposed pipeline project, suggesting that the Commission need not even conduct a contested case proceeding. Enbridge stressed the need for

week, on June 17, 2024, the Sixth Circuit issued its opinion holding that Enbridge’s removal was untimely and that the case must be remanded to the Ingham County Circuit Court.

the oil and gas transported through Line 5, including a separate section in its Application titled “Line 5 Provides Needed Energy Transportation.” Application (Exhibit B), at 5-6. Enbridge also made several arguments intended to reduce or eliminate the Commission’s regulatory oversight, including arguing that the Commission’s 1953 approval of Line 5 automatically covered any later replacement of the pipeline. *Id.* at 15-17.

Numerous interested parties opposed to Enbridge’s application filed requests to intervene in the proceedings before the Commission. The intervenors included local Michigan businesses, Tribal Nations, and environmental groups, including appellants ELPC and MiCAN.² ELPC and MiCAN filed a joint petition to intervene in the Commission proceedings on June 30, 2020. That Petition to Intervene is Exhibit C to this brief.

On June 30, 2020, the Commission issued an order addressing several arguments that Enbridge had raised in an effort to limit the scope of the proceedings before the Commission. That June 30, 2020 Order is Exhibit D to this brief. The Commission rejected Enbridge’s argument that the Commission’s 1953 approval of Line 5 authorized the new pipeline project and that it somehow avoided any need for further Commission approval. Order, June 30, 2020 (Exhibit D), at 51-58. The Commission also rejected Enbridge’s argument that a new Act 16 application was not required for the project. *Id.* at 58-66. Finally, the Commission rejected Enbridge’s argument for *ex parte* approval. *Id.* at 67-70. On this point, the Commission concluded: “Enbridge’s Line 5 project involves significant factual and policy questions and complex legal determinations that

² ELPC is a not-for-profit public interest organization with offices in Grand Rapids, that works to achieve cleaner air, advance renewable energy, and improve environmental quality. ELPC has members throughout the state of Michigan and its members have an interest in mitigating the impact of climate change. Petition (Exhibit C), ¶3. MiCAN is a diverse statewide network of individuals, organizations, and businesses which also seeks to develop strategies to address climate change in Michigan and in the Great Lakes. *Id.* ¶4.

can only be resolved with the benefit of discovery, comprehensive testimony and evidence, and a well-developed record in a contested case proceeding.” *Id.* at 69. As a result, the Commission ordered a contested case proceeding on Enbridge’s Application filed under Act 16. *Id.* at 72.

C. Enbridge Moves to Restrict the Scope of Case

Approximately three months after the Commission ordered a contested case proceeding, Enbridge filed a motion *in limine* seeking severely to restrict the issues and the evidence that the Commission could consider in the case. Specifically, Enbridge moved to exclude evidence related to: (1) the construction of the underwater tunnel; (2) the environmental impact of tunnel construction; (3) the public need for continued operation of Line 5; (4) the current operational safety of Line 5; (5) whether Line 5 has an adverse effect on climate change; and (6) the intervening parties’ “climate change agendas.”

On April 21, 2021, the Commission issued an Order addressing Enbridge’s motion *in limine*. A copy of that Order is Exhibit E to this brief. The Commission reaffirmed that Act 16 would govern its review of Enbridge’s Application based on a three-part test developed by prior Commission precedents:

In its implementation of these statutory requirements, the Commission has developed and repeatedly applied a three-part test in its consideration of applications submitted under Act 16. In order to grant an application under Act 16, the Commission must find that: (1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and routed in a reasonable manner, and (3) the construction of the pipeline will meet or exceed current safety and engineering standards. (Order April 21, 2021 (Exhibit E), at 55.)

The Commission further acknowledged that, in addition to applying this three-part test under Act 16, it had to apply the requirements of MEPA. *Id.* at 55-57.

The Commission’s Order also rejected certain arguments made by the intervenors that the

public need for Line 5 must be part of the Commission’s consideration under Act 16 because it had been determined in 1953. *Id.* at 59-63. The Commission specifically precluded the intervenors from developing and submitting evidence related to determining whether or not there remained a present-day public need for Line 5. *Id.*

D. The Commission Recognizes Its Obligation to Consider Climate Change Impacts

Turning to the question of the application of MEPA, the Commission first indicated in its April 21, 2021 decision that “MEPA review does not extend to the entirety of Line 5 . . .” *Id.* at 64. But the Commission recognized that it could not “separate the construction of the Replacement Project from the reason for doing so.” *Id.* As a result, the Commission found that its review must include consideration of the products that would be transported through Line 5:

While some would narrowly constrain the review of pollution to the construction of the tunnel and pipeline, such an interpretation is untenable. It seems clear the Legislature intended for Act 16 to cover not just the construction of pipelines for the sake of building pipelines, but also that their purpose and the products flowing through them were inherently part of the regulatory framework established in Act 16. *It defies both well accepted principles of statutory interpretation as well as common sense to apply MEPA to a pipeline but not to the products being transported through it. (Id. at 64 (emphasis added)).*

Consistent with this finding, the Commission rejected Enbridge’s motion *in limine* seeking to exclude evidence of the proposed project’s adverse impact on climate change. The Commission noted that greenhouse gases (“GHGs”) “are widely recognized as pollutants that trap heat in the atmosphere and contribute to climate change, thereby, polluting, impairing, and destroying natural resources.” *Id.* at 65. Thus, the Commission concluded:

On this basis, the Commission finds that the allegations of GHG pollution made by several intervenors to this case fit within the statutory language of Section 5 of MEPA, and therefore must be reviewed in this case . . . The Commission finds that GHGs are pollutants within the scope of the clear language of MEPA, and

thus the parties are free to introduce evidence addressing the issue of GHG emissions and any pollution, impairment, or destruction arising from the activity proposed in the application. (*Id.* at 66.)

The Commission also held that it had to consider the possibility that, due to the Governor’s November 2020 revocation of the 1953 easement (Exhibit A) and/or the Attorney General’s pending litigation seeking to enjoin the operation of Line 5, the existing pipeline crossing the Straits would cease to operate. That meant that the Commission had to consider “alternative pipeline and non-pipeline shipping arrangements and alternatives to the products being shipped . . .” *Id.* at 68.

E. Appellants Present Unrebutted Evidence on Climate Change Impacts

ELPC and MiCAN intervened before the Commission primarily to address the significant climate change impacts of Enbridge’s proposed pipeline project. They presented unrebutted evidence that the United States, and the State of Michigan specifically, face a profound climate crisis. Rising global atmospheric greenhouse gas concentrations from human activities, including fossil fuel extraction and combustion, substantially and detrimentally impact the Earth’s climate. Peter Erickson Direct Testimony is Exhibit F to this brief, at 7-11. Between 2011 and 2021, the global average concentration of atmospheric GHG “continued to increase in the atmosphere, reaching [an] average [] of 410 [parts per million].” International Panel on Climate Change (IPCC), Climate Change 2021: The Physical Science Basis, Exhibit G to this brief, at 7. Those rising GHG levels increase average global temperatures, and thereby increasing both the frequency and severity of natural disasters including storms, flooding, and wildfires. IPCC Climate Change 2021 (Exhibit G), at 11-12. They cause more frequent and intense heat waves, degrade air quality, increase drought, cause sea level rise, and harm wildlife and ecosystems. *Id.*

at 11-12, 15.

Climate change directly affects Michigan and the Great Lakes region through significant changes in temperature and precipitation. ELPC and MiCAN presented the expert testimony of Dr. Jonathon T. Overpeck, Dean of the School for Environment and Sustainability at the University of Michigan. Dr. Overpeck testified:

The Great Lakes, as well as smaller water bodies in the region, are all warming substantially, and the increase in average and extreme precipitation is also generating more runoff into the lakes. Collectively, human-driven climate changes are changing the lake environments in dramatic ways, altering the temperature, nutrient and oxygen gradients in the lakes. Moreover, the warming is reducing lake ice duration, coverage and thickness, which affects the lake's ecosystems and the region's climate. (Overpeck Direct Testimony, Exhibit to this brief, at 13.)

Dr. Overpeck also testified about the threat that climate change poses to human health:

Michigan and the Great Lakes region will likely see a large increase in extreme temperature-related premature deaths if greenhouse gas emissions are not halted quickly. Increased flooding, fueled by greenhouse gas emissions, will become even more lethal and increase health risks related to degraded water treatment, disease spread, and access to critical health services. Risks from disease are also made worse by climate change. (*Id.* at 27.)

Avoiding the worst impacts of climate change requires limiting global temperature increases to 1.5 degrees Celsius above pre-industrial levels. Erickson Direct Testimony (Exhibit F), at 9-11. To achieve that goal, “coal use must decline by an average of 6% annually (for a total of 82% between 2020 and 2050), gas use by an average of 2% annually (for a total of 43%), and oil use by an average of 3% annually (for a total of 65%).” *Id.* at 10.

Burning fossil fuels such as oil, gas, and coal primarily causes the increased atmospheric CO₂ concentrations. Overpeck Testimony (Exhibit H) at 6–7. Specifically, “[t]he CO₂ in the atmosphere carries the chemical fingerprint of fossil fuels in its carbon isotopes, and the increase reflects the known combustion of over 18 trillion barrels of oil, 390 billion tonnes of coal, and

155 trillion cubic meters of natural gas over the past century.” *Id.* Thus, “[u]se and production of all three major fossil fuels—coal, gas, and oil—must decline dramatically to meet” the goal of the limiting warming to 1.5°C. Erickson Testimony (Exhibit F) at 10. Given that fossil fuel use must decline to prevent catastrophic warming, any new investments in fossil fuel infrastructure undermine that goal.

F. Appellants’ Evidence Comports with Michigan’s Public Policy on Climate Change

Consistent with the unrebutted evidence presented by appellants, Michigan has a strong public policy to rapidly transition to using clean energy in order to address climate change. The need for immediate action to combat climate change in Michigan has been emphasized by Governor Gretchen Whitmer in Executive Order 2020-182 and Executive Directive 2020-10, issued on September 23, 2020. Exhibits I and J to this brief. Both the Executive Order and the Executive Directive begin with this preamble:

The science is clear, and message urgent: the earth’s climate is now changing faster than at any point in the history of modern civilization, and human activities are largely responsible for this change. Climate change already degrades Michigan’s environment, hurts our economy, and threatens the health and well-being of our residents, with communities of color and low-income Michiganders suffering most. Inaction over the last half-century has already wrought devastating consequences for future generations, and absent immediate action, these harmful effects will only intensify. But we can avoid some of the worst harms by quickly reducing greenhouse gas emissions and adapting nimbly to our changing environment. (Executive Order (Exhibit I), at 1; Executive Directive (Exhibit J), at 1.)

On November 28, 2023, Governor Whitmer signed into law multiple bills passed by the Legislature to implement Michigan’s clean energy transition, including establishing milestones to produce 50% of the State’s energy from renewable sources by 2030, 60% by 2035, and fully

transition to 100% clean energy by 2040.³ See MCL 460.1061.

G. Appellants’ Experts Quantify and Value the Climate Impacts of the Project

ELPC and MiCAN also submitted the expert testimony of Peter Erickson to the Commission explaining, quantifying, and valuing the climate change impacts of Enbridge’s proposed pipeline project. Mr. Erickson is a Senior Scientist and the Climate Policy Program Director at Stockholm Environment Institute, affiliated with Tufts University, who has worked in environmental research and consulting for over twenty years, including performing greenhouse gas accounting informing government decisionmakers at the local, state, national and global level. Erickson Direct Testimony (Exhibit F), at 1-2. Mr. Erickson’s expert testimony included the following:

- Enbridge’s proposed pipeline project to construct a new tunnel and Line 5 segment under the Straits is associated with emissions of approximately 87 million metric tons of carbon dioxide-equivalent (CO₂-eq) annually. Direct Testimony of Peter Erickson (Exhibit F), at 20, 26. The incremental GHG emissions associated with the project are estimated to be about 27,000,000 metric tons of CO₂-eq annually. *Id.*
- These emissions fall into categories of “upstream” and “downstream” stages of the life cycle of a barrel of oil. The term “upstream” refers to all stages that happen before final combustion, such as the operation of oil wells and refining the oil. The term “downstream” refers to the final combustion at the point of end use. *Id.* at 20-21.
- Production of light oil from western Canada and North Dakota releases about 55 kg of CO₂-eq per barrel, refining it adds about another 18 kg per barrel, and consumption releases an average of 432 more kg per barrel once it is combusted, for a total release of about 505 kg of CO₂-eq per barrel of oil. *Id.* at 21.
- Construction of the proposed new pipeline crossing the Straits will

³ See <https://www.michigan.gov/whitmer/news/press-releases/2023/11/28/governor-whitmer-signs-historic-clean-energy-climate-action-package> (describing these laws).

generate about 87,000 metric tons of CO₂-eq. Operation of the pipeline will result in about another 520 metric tons of CO₂-eq. *Id.* at 23.

- If the existing Straits crossing is decommissioned, and permission for the proposed new pipeline crossing is denied, then Line 5 will cease operating. Oil still will be transported by other methods, however, and ultimately will still be refined and consumed. *Id.* at 25
- Shipping oil by rail is about \$6 a barrel more expensive than by pipeline. If that were the alternative to Line 5, then that additional cost would eliminate the market and the profit incentive to produce about 290,000 barrels of oil per day, based on an oil price outlook of \$53 per barrel and using long-run elasticities of supply and demand. *Id.* at 28-41. Market adjustments due to the increased cost of transport would result in reductions in emissions of CO₂-eq by about 27 million metric tons per year. *Id.* at 28-41.⁴
- Using standard tools for quantifying and valuing the “social cost of carbon,” the monetary value of eliminating the additional emissions of CO₂-eq that would result from the proposed new pipeline crossing would total at least \$41 billion in 2020 dollars. Direct Testimony of Dr. Peter Howard, Exhibit K to this brief, at 1. Without the most conservative assumptions, that value would likely be orders of magnitude higher. *Id.*

In response to this testimony, Enbridge’s experts argued that demand for oil is price-inelastic in the short-run, meaning changes in transportation costs do not affect demand. Yet, Enbridge’s experts also acknowledged the opposite—that higher costs do affect prices and demand. Enbridge therefore instead challenged any calculation of upstream or downstream emissions as too uncertain.

ELPC’s and MiCAN’s experts replied that long-run elasticities of demand for oil are

⁴With market forces reducing demand for fossil fuels, renewable sources becoming more competitive, consumers choosing to reduce their carbon footprints, public policymakers implementing plans for clean energy transition, like Michigan’s, there are numerous reasons to expect the demand for oil to decline in the future, which in turn should open up other transport options such as available unused capacity in other existing pipelines. As a result, full replacement of the oil flowing through Line 5, and the need to transport that oil by rail, would be a worst-case scenario.

likely higher than the figures used in their original testimony, and reaffirmed the consensus behind the importance and feasibility of estimating “indirect”—upstream and downstream—GHG emissions. Testimony and briefing on climate change was completed in early 2022.

H. The Commission Issues Its Final Order

On December 1, 2023, the Commission issued a Final Order approving Enbridge’s application. The December 1, 2023 Order is Exhibit L to this brief. The Commission ultimately concluded that there would be “an increase in GHG emissions that would not exist but for the construction of the Replacement Project.” December 1, 2023 Order (Exhibit L), at 329-330. Based on that conclusion and the Commission’s earlier April 21, 2021 Order finding that “GHGs are widely recognized as pollutants that trap heat in the atmosphere and contribute to climate change, thereby polluting, impairing and destroying natural resources,” April 21, 2021 Order (Exhibit E) at 65, the Commission proceeded to consider whether there was a feasible and prudent alternative to Enbridge’s proposed project in light of MEPA’s statutory requirement that the Commission could not approve the project if an alternative exists. December 1, 2023 Order (Exhibit L), at 331.

The Commission did not, however, quantify the GHG emissions that would result from upstream or downstream phases, or calculate their monetary social cost to assess whether or not there is a feasible and prudent alternative. *Id.* at 326-348. Instead, the Commission concluded that, no matter what the level of GHG emissions the proposed project would produce, there were no feasible and prudent alternatives to the tunnel project that Enbridge proposed. *Id.* at 347.

In reaching this conclusion, the Commission relied almost entirely on the six-year-old

Dynamic Risk report from 2017, which had evaluated alternatives for carrying the same amount of oil currently being carried by Line 5. *Id.* at 326-348. That report assumed that, under any alternative, the same GHG emissions would be involved so that was not a consideration for evaluating alternatives. The Dynamic Risk report concluded that relying on the existing pipeline would present a significant environmental risk, as would rail, truck, and tanker transport, and, assuming there was no existing pipeline capacity that could be used, any newly constructed pipeline would generate new environmental harms as well. *Id.* at 338-341.

The Commission largely accepted the Dynamic Risk report's conclusions, but rejected the "no pipeline" alternative that ELPC, MiCAN, and other intervenors had proposed because: (1) that looked too much like the issue of whether there remains a "public need" for Line 5, which the Commission was not going to consider; and (2) a sudden shutdown of the existing pipeline with no alternative in place would force Enbridge's customers to turn to rail and truck. *Id.* at 344-346. The Commission did not, however, evaluate how the markets would actually react to a "no pipeline" alternative. *Id.* at 345-346.

ELPC and MiCAN filed a timely claim of appeal in this Court on December 26, 2023 seeking review of the Commission's December 1, 2023 Order. See MCL 462.26(1).

STANDARD OF REVIEW

The Michigan Constitution provides that “[a]ll final decisions, findings, rulings and orders of any . . . agency . . . which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law.” Const 1963, art 6, § 28. “The constitutional provision provides for review to determine: (1) that the decision is authorized by law, and (2) if a hearing is required, that the decision is supported by record evidence. However, the provision does not stand for the proposition that agencies can assume this Court’s constitutional role as the final arbiter of the meaning of a statute.” *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 99-100; 754 NW2d 259 (2008). The Michigan Supreme Court “has uniformly held that statutory interpretation is a question of law that th[e] Court reviews *de novo*. Thus, concepts such as ‘abuse of discretion’ or ‘clear error,’ which are similar to the standards of review applicable to other agency functions, simply do not apply to a court’s review of an agency’s construction of a statute.” *Id.* at 102. Although an agency’s interpretation is given “respectful consideration,” that “is not equivalent to any normative understanding of ‘deference’ as the latter term is commonly used in appellate decisions.” *Id.* at 103, 108.

The Supreme Court also has held that MEPA “is a source of supplementary substantive environmental law” that “prescribe[s] the substantive environmental rights, duties and functions of subject entities” and places “substantive environmental duties” on state agencies. *State Highway Comm’n v. Vanderkloot*, 392 Mich 159, 182-190; 220 NW2d 416 (1974); see *Ray v. Mason County Drain Commissioner*, 393 Mich 294, 303-306; 224 NW2d 883 (1975). In enacting MEPA, “the Legislature in its wisdom left to the courts the important task of giving

substance to the standard by developing a common law of environmental quality.” *Id.* at 306. “MEPA . . . provides for *de novo* review in Michigan courts, allowing those courts to determine any adverse environmental effect and to take appropriate measures” without being “bound by any state administrative finding, or any federal law.” *Nemeth v. Abonmarche Development, Inc.*, 457 Mich 16, 30; 576 NW2d 641 (1998), quoting *Her Majesty the Queen v. Detroit*, 874 F2d 332, 341 (6th Cir 1989). Appellate courts, therefore, review agencies’ MEPA determinations *de novo*. *Id.*; *West Michigan Environmental Action Council v. Natural Resources Comm.*, 405 Mich 741, 752-53; 275 NW2d 538 (1979) (“*WMEAC*”) (“the Michigan environmental protection act requires independent, *De novo* determinations by the courts”).

Distinct from MEPA determinations, a final order issued by the Commission “fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services” is subject to appeal under MCL 426.26(1), which requires an “appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable.” MCL 426.26(8). A final order of the Commission must be authorized by law and must be supported by “competent, material, and substantial evidence on the whole record.” Const 1963, art 6, § 28; *In re Consumers Energy Co.*, 279 Mich App 180, 188; 756 NW2d 253 (2008). “To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment.” *In re Consumers Energy Co to Increase Rates*, 338 Mich App 239, 242; 979 NW2d 702 (2021), citing *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

ARGUMENT

The Commission's Final Order failed to comply with Section 1, 3 and 5 of MEPA, and Michigan caselaw applying MEPA, because the Commission failed to adopt and apply *any* standard or methodology whatsoever for quantifying and valuing the climate change impacts of GHGs caused by the proposed project. Instead, it simply assumed those impacts away. As discussed below, the Commission's failure to follow MEPA's statutory requirements renders its Final Order unlawful.

I. MEPA ESTABLISHES SPECIFIC STATUTORY REQUIREMENTS THE COMMISSION WAS OBLIGATED TO FOLLOW.

Under MEPA, the Commission may not approve conduct that is likely to pollute, impair, or destroy air, water, or other natural resources. MEPA places the burden on Enbridge to prove by a preponderance of the evidence, as an affirmative defense, that there is no feasible and prudent alternative to the proposed pipeline project and that the project is consistent with the promotion of the public health, safety, and welfare in light of the State's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. MCL 324.1701-MCL 324.1706.

The Michigan Constitution, in Article 4, Section 52, directed the Legislature "to provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." Article 4, Section 52 provides that this mandate serves the "paramount concern in the interest of the health, safety and general welfare of the people" specifically with respect to "the conservation and development of the natural resources of the state." Employing the precise words of the Constitution, in 1970 the Legislature enacted MEPA in fulfillment of Article 4, Section 52's mandate. See *Ray*, 393 Mich at 304 n 4. It has since been reenacted, substantially unchanged, as part of the National Resources and Environmental Protection Act. MCL 324.1701 *et seq.*

State agencies have an obligation to apply the requirements of MEPA to their decisions, including in Commission pipeline siting cases. *Vanderkloot*, 392 Mich at 185; *Buggs v. Mich Pub Serv Comm*, unpublished *per curiam* opinion of the Court of Appeals, issued January 13, 2015 (Docket Nos. 315058 and 315064) pp. 6-8. In *Vanderkloot*, the Michigan Supreme Court held that MEPA, and specifically Section 3 of the statute, “establishes substantive standards . . . applicable to” state agencies’ “administrative [] determinations.” 392 Mich at 185-186. In *Ray*, the Supreme Court recognized the basic framework of MEPA. 393 Mich at 303-313; see also *Nemeth*, 457 Mich at 24-25 (“The basic import of *Ray* has not changed.”). In *Ray*, the Court explained that MEPA “does more than give standing to the public and grant equitable powers to the Circuit Courts, it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities.” 393 Mich at 306. MEPA does not impose standards as to what constitutes pollution, impairment, or destruction of a natural resource; rather, courts must “fashion standards in the context of actual problems as they arise in individual cases. . . .” *Id.* at 306-307.

MEPA, and Michigan Supreme Court precedents applying it, create a series of specific steps where the burden of proof shifts and the Commission must consider and make findings regarding:

- Whether and how the intervenors established a *prima facie* case that Enbridge’s proposed pipeline project “is likely to pollute, impair or destroy the air, water, or other natural resources.”
- Whether and how Enbridge rebutted the *prima facie* case with evidence to the contrary.
- Whether and how Enbridge established as an affirmative defense that “there is no feasible and prudent alternative . . . and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the State’s paramount concern for the protection of its natural resources from pollution, impairment or destruction.”

Id. at 308-309; see also *Buggs* at p.7 (consistent with the *Ray* framework, recognizing *Vanderkloot* holds that MEPA obligates the Commission to consider and make findings on these three questions).

Once the intervenors establish a *prima facie* case, “the burden of going forward with the evidence shifts to” *Enbridge. Ray*, 393 Mich at 311. *Enbridge* also has the burden of proving “the statutory affirmative defense of [MEPA Section 3(1)] . . . by a preponderance of the evidence.” *Wayne County Department of Health v. Olsonite Corporation*, 79 Mich App 668, 702; 263 N.W.2d 778 (1977); see *Friends of Crystal River v Kuras Properties*, 218 Mich App 457, 464-465; 554 NW2d 328 (1996), citing *Olsonite*, 79 Mich App at 700-706.

In addition, the following principles govern the proper application of MEPA:

- “Proper application of MEPA’s impairment standard requires a statewide perspective.” *Thomas Twp v Sexton Corp*, 173 Mich App 507, 517; 434 NW2d 644 (1988).
- “[T]he court should evaluate the environmental situation prior to the proposed action and compare it with the probable condition of the particular environment afterwards.” *Nemeth*, 457 Mich at 31, quoting *Portage v. Kalamazoo Co Road Commission*, 136 Mich App 276, 282; 355 NW2d 913 (1984).
- “[O]ne of the purposes of MEPA is to protect our natural resources *before* they become ‘scarce.’” *Nemeth*, 457 Mich at 34 (emphasis in original).

Summing up the importance of properly applying MEPA in this case, the Michigan Supreme Court stated in *WMEAC*, under analogous circumstances where the Court applied MEPA to reverse the issuance of permits to drill new oil wells: “If oil or gas development does not take place, the oil and gas will *not* be adversely impacted. On the other hand, if such development does take place, [the environment] is adversely affected. Thus, the choice is whether or not *any* adverse impact on natural resources will be allowed.” *WMEAC*, 405 Mich at 759-760 (emphasis added).

II. THE COMMISSION FAILED TO FOLLOW MEPA'S STATUTORY REQUIREMENTS.

The Commission's final order approving Enbridge's proposed pipeline project violated MEPA because, even though the Commission determined both "that GHGs are pollutants within the scope of the clear language of MEPA" and that "an increase in GHG emissions [] would not exist but for the construction of the Replacement Project." April 21, 2021 Order, Exhibit E, at 66; December 1, 2023 Order, Exhibit L, at 330), the Commission failed to adopt and apply *any* standard or methodology whatsoever for quantifying and valuing the climate change impacts of GHGs caused by the proposed project. Instead, it simply assumed those impacts away, thereby failing to comply with Sections 1, 3, and 5 of MEPA and the well-established caselaw interpreting and applying MEPA's statutory requirements. The Commission's failure to follow MEPA's statutory requirements renders its Final Order unlawful.

A. **Once the Commission Determined that Appellants Established a *Prima Facie* Case, the Burden of Proof Should Have Shifted to Enbridge.**

The Commission correctly determined that ELPC and MiCAN established a *prima facie* case under MEPA that Enbridge's proposed pipeline project is likely to pollute, impair, or destroy the air, water, or other natural resources. The Commission determined that the evidence showed there would be "an increase in GHG emissions that would not exist but for construction of the Replacement Project" and, in any event, "no party disputes that GHG emissions will be emitted during construction of the Replacement Project." December 1, 2023 Order, Exhibit L, at 330. The Commission then concluded: "Therefore, as stated in the April 21 order, the Commission finds that 'GHGs are widely recognized as pollutants that trap heat in the atmosphere and contribute to climate change, thereby polluting, impairing, and destroying natural resources.'"

Id. at 331. The Commission continued: “Once the Commission concludes that the proposed conduct, *i.e.*, the Replacement Project, is likely to pollute, impair, and destroy natural resources, the Commission may not approve the action if there is a feasible and prudent alternative.” *Id.*

Having reached that conclusion, under the well-established MEPA framework, the burden of proof should have shifted to Enbridge—as the party whose proposed action would pollute, impair, or destroy the air, water, or other natural resources—to establish by a preponderance of the evidence that there is no feasible and prudent alternative to the proposed pipeline project and that the project is consistent with the promotion of the public health, safety, and welfare in light of the State’s paramount concern for the protection of its natural resources from pollution, impairment, or destruction. MCL 324.1703; *Ray*, 393 Mich at 311; *Olsonite*, 79 Mich App at 702 *Kuras*, 218 Mich App at 464-465. At no point in the 22-page section of the Final Order where the Commission applied MEPA, however, did the Commission even *mention* the burden of proof, much less apply it to evaluate whether Enbridge had carried its burden by a preponderance of the evidence. Order 12/1/23 (Exhibit L), at 326-347. Instead, the Commission effectively left the burden on the intervenors, improperly reversing the burden-shifting process established by MEPA and Michigan caselaw.

B. The Commission Failed to Adopt and Apply *Any* Standard or Methodology for Quantifying and Valuing the Climate Impacts of the Proposed Project.

Having determined that ELPC and MiCAN established a *prima facie* case that the proposed pipeline project would cause GHG pollution under MEPA, the Commission was required to adopt and apply a standard and methodology for evaluating that pollution to determine whether Enbridge proved the affirmative defense that there is no feasible and prudent

alternative and that the project is consistent with the promotion of the public health, safety, and welfare. The Commission should have “fashioned [a] standard[] in the context of the actual problems . . . in [this] individual case[],” *Ray*, 393 Mich at 306, applying “a statewide perspective,” *Thomas*, 173 Mich App at 517, “evaluat[ing] the environmental situation prior to the proposed action and compar[ing] it with the probable condition of the particular environment afterwards,” *Nemeth*, 457 Mich at 31. The Commission failed to do so. It did not even require Enbridge to *present* a standard and methodology to assess climate change impacts caused by the GHG. And Enbridge chose not to offer any such standard or methodology whatsoever. Only ELPC and MiCAN presented the Commission with a standard and methodology for quantifying and valuing the climate change impacts of the GHGs from the proposed pipeline project. But, rather than adopt and apply the only standard and methodology presented to it, the Commission instead simply assumed away all climate change impacts, in violation of MEPA.

Once the Commission recognized that the scope of its MEPA obligations extend to the oil and gas flowing through the Line 5 Straits crossing at the Straits, and was not simply limited solely to the GHG emissions caused by the construction and operation of the proposed pipeline project, the question became *how* to determine whether and to what extent upstream and downstream GHG emissions would result from the project. The Commission had to compare those GHG emissions with other alternative scenarios, especially a no-pipeline emissions alternative under which the replacement project would not proceed and the existing 70-year-old underwater pipeline would cease operating. Instead, the Commission adopted an assumption that “at least *in the short term*,” a shutdown in the pipeline crossing “would not *immediately* alter demand for the products shipped on Line 5” and so “an equivalent volume of petroleum” would

be transported by rail and truck in place of the pipeline. December 1, 2023 Order (Exhibit L), at 345-346 (emphasis added). Adopting this unfounded assumption allowed the Commission to reason that downstream and upstream GHG emissions would be no different between a scenario with the proposed pipeline project, on one hand, and a no-pipeline scenario, on the other hand. *Id.* By conveniently assuming no change in upstream and downstream GHG emissions, the Commission improperly shed its obligation to adopt and apply a standard and methodology for quantifying and valuing the GHG emissions. *Id.*

ELPC and MiCAN presented the Commission with the expert testimony from Peter Erickson and Dr. Peter Howard providing a well-established, standard methodology for assessing, quantifying, and valuing the net GHG emissions impact and associated social costs of new fossil fuel infrastructure like Enbridge’s proposed pipeline project. This standard methodology includes both “direct” GHG emissions from construction and operation of the project and “indirect” upstream and downstream GHG emissions from extraction, refining, and consuming the oil and gas that would flow through the pipeline. Importantly, this methodology utilizes *long-run* elasticities of supply and demand, because a short-run perspective accounts for less than one year, whereas consumers make decisions to change their behavior over a longer time horizon. Direct Testimony of Peter Erickson, Exhibit F, at 28-41. As Mr. Erickson explained:

“Long-run” elasticities are intended to gauge effects over a period of time in which producers and consumers have time to make changes in their equipment or investment decisions, such as the decision of what kind of car to buy or whether or not to drill a new oil field. Over this time period—the next several years—the flexibility of decisions is greater than in the “short run,” and hence the effects of a change in price are greater.” (*Id.* at 38.)

Applying long-run elasticities comports with the 99-year time horizon for Enbridge’s proposed

pipeline project, as well as with the timeline for Michigan’s public policy for addressing climate change, which sets clean energy transition milestones over the next 16 years.

In violation of MEPA, the Commission considered only “immediate” circumstances “in the short term” and assumed a perpetual 540,000 barrel-a-day need to transport crude oil from North Dakota and western Canada to Sarnia refineries. The Commission then assumed that demand for crude oil will never diminish over the next several decades. It further assumed that, if alternative means for transporting Line 5 oil and gas were more expensive, that would have zero effect on price, supply, or demand, and therefore would have zero effect on upstream and downstream GHG emissions. By ignoring entirely all GHG impacts beyond just the “immediate” time period, the Commission’s abbreviated analysis not only defies common sense and basic economic principles, but also constitutes legal error by failing to “evaluate the environmental situation prior to the proposed action and compare it with the probable condition of the particular environment afterwards,” *Nemeth*, 457 Mich at 31, applying “a statewide perspective,” *Thomas*, 173 Mich App at 517.

By ignoring the testimony and standard methodology presented by ELPC’s and MiCAN’s expert witnesses, the Commission simply assumed “business as usual” will continue unchanged for all time—540,000 barrels per day on both the supply and demand side, and those barrels will inevitably and forever be produced at Canadian and North Dakota oil fields and transported across Michigan to Sarnia refineries. As discussed above, the Commission’s flawed “business as usual” assumption enabled it to assume away the net increases in upstream and downstream GHG emissions shown by appellants’ experts. The Commission instead simply assumed GHG emissions will remain the same forever, and thereby assumed away any and all climate change

impacts from Enbridge's proposed project.

C. The Federal Government and Federal Courts Have Adopted and Applied the Same Standard and Methodology that Appellants' Experts Presented and the Commission Ignored.

The federal government has conducted exactly such an economic analysis that appellants' experts presented here, and courts have rejected the government's failure to make use of that quantitative analysis in greenhouse gas emissions accounting. In a case involving the rescission of oil and gas leases, the United States District Court for the District of Columbia found it appropriate for the Bureau of Ocean Energy Management to translate an estimate of the reduction in barrels of oil at various price point into greenhouse gas emissions by "[u]sing standard energy contents (from the U.S. Department of Energy) and carbon contents (from the U.S. Environmental Protection Agency), and discounting the oil used in products and not combusted." *Friends of the Earth v. Haaland*, No. CV 21-2317 (RC), 2022 WL 254526, at *14 (D.D.C. Jan. 27, 2022). That is the analysis Mr. Erickson conducted here. The reduction in barrels of oil in *Haaland* was of the same magnitude as in this case. The one, four, and six-billion barrel scenarios in *Haaland* were over the life of the leases. Here, the 150,000 barrels per day in reduced oil consumption amounts to approximately 54 million barrels per year. In twenty years, this exceeds the one-billion-barrel "low" price scenario contemplated in *Haaland*, and in the 99-year life span of the proposed project well exceeds the mid and high price scenarios. *Id.* at *11.

In *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, the federal government attempted to argue, without supporting data, that a negligible impact and a purported lack of information on foreign energy consumption and emissions patterns justified not

calculating foreign greenhouse gas emissions. No. 3:20-CV-00290-SLG, 2021 WL 3667986, at *10-11 (D. Alaska Aug. 18, 2021). That is the position the Commission took here. The court rejected that explanation because the government did not provide or describe research it relied upon to reach those conclusions. The Commission similarly made key assumptions without proper support.

In *WildEarth Guardians v. Zinke*, 368 F Supp 3d 41 (DDC 2019), the United States District Court for the District of Columbia rejected a blanket assertion by the federal government in an oil and gas leasing case that is strikingly similar to the Commission’s reasoning in this case. The Bureau of Land Management argued, without any supporting data analysis, that emissions from federal oil and gas leasing represented only an incremental contribution to the total regional and global GHG emission level. *WildEarth Guardians*, 368 F Supp 3d at 76. The court recognized that quantification of greenhouse gas emissions based on global market models posed inherent uncertainties that should be discussed. *Id.* at 70. But those uncertainties did not entitle the government to “simply throw up its hands and ascribe any effort at quantification to a crystal ball inquiry.” *Id.* This is precisely what the Commission did here.

In addition, courts have consistently and soundly rejected agency decision-making that relies on a “perfect substitution” assumption, such as the Commission adopted in this case. *See e.g. WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F3d 1222, 1234-38 (D.C. Cir. 2017) (“Even if we could conclude that the agency had enough data before it to choose between the preferred and no action alternatives, we would still conclude this perfect substitution assumption arbitrary and capricious because the assumption itself is irrational (*i.e.*, contrary to basic supply and demand principles.)”); *High Country Conservation Advocs. v. U.S. Forest Serv.*,

52 F Supp 3d 1174, 1197-98 (D. Colo. 2014) (same). Contrary to this caselaw, while the Commission recognized the statutory requirement under MEPA to assess and evaluate the climate change impacts of the oil and gas products flowing through the proposed pipeline project, it made no attempt whatsoever either to quantify those impacts or to monetarily value their gross or net effects and social costs. The record evidence presented by ELPC's and MiCAN's experts showed generally accepted, standard methodologies for estimating greenhouse gas emissions,⁵ including per barrel of oil. Likewise, once GHG emissions have been quantified, "social cost of greenhouse gas" (SC-GHG) tools are available to put the cost to society into dollar figures to facilitate comparisons among alternatives.⁶ The current figures for each additional metric ton of CO₂ emissions range from a low of about \$130/T up to \$600/T, depending on the time horizon and discount rate assumptions.⁷ See Direct Testimony of Dr. Peter Howard, Exhibit K, at 4, 9, 10. Despite those available tools, and their explication in the expert testimony (*id.*), the Commission made no attempt either to quantify the additional GHG emissions that would result from the proposed project or to monetize their social costs.

That failure, of course, skews the analysis of the "feasible and prudent" affirmative defense under Sections 3 and 5 of MEPA, MCL 324.1705(2). If the net reduction in GHG emissions and

⁵See generally Council on Environmental Quality, *GHG Tools and Resources*, ceq.doe.gov/guidance/ghg-tools-and-resources.html (accessed June 2024).

⁶The Council on Environmental Quality's climate guidelines require all federal agencies to use social cost of greenhouse gases tools in almost all cases when they consider climate change impacts. CEQ, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196, 1202-03 (Jan. 9, 2023).

⁷Environmental Protection Agency, *Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances* (Dec. 2, 2023), epa.gov/environmental-economics/scghg.

their social costs resulting from denying Enbridge’s application are small, it is less likely that any feasible and prudent alternative will have enough environmental benefit to justify a denial of Enbridge’s proposed project. If, on the other hand, denying Enbridge’s application will reduce GHG emissions by 27 million metric tons per year, and save society at least \$41 billion, as ELPC’s and MiCAN’s experts testified, then it is far more likely that comparing the environmental effects of potential alternatives will compel the conclusion that the Enbridge’s application should be denied. The Commission failed to do this analysis, however, and so left itself in no position to make the comparisons that MEPA requires. This is an error of law requiring reversal.

D. The Commission Failed to Meaningfully Consider a No-Pipeline Alternative.

Throughout the section of its Final Order applying MEPA, the Commission gave only scant attention to a no-pipeline alternative scenario, focusing instead on comparisons between the proposed tunnel project and other “alternatives” involving the continued operation of the existing underwater pipeline crossing the Straits. See December 1, 2023 Order (Exhibit L), at 326-347. The Commission recognized, as it had to, that, under MEPA, it is required to consider what it described as the “no action” alternative, *i.e.*, what would happen if the Commission denied Enbridge’s application, but view “no action” as leaving in place the existing underwater pipeline crossing the lakebed in the Straits, still carrying 540,000 barrels per day. *Id.*

This was not a legally sound “no action” scenario.⁸ To be at all useful, an analysis of any

⁸The CEQ has long rejected the notion that reasonable alternatives outside of an agency’s jurisdiction are out-of-bounds. CEQ, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, Question 2b. CEQ has also made it clear that “[w]here a choice of ‘no action’ by [an] agency would result in predictable actions by others, this consequence of the ‘no action’ alternative should be included in the analysis.” *Id.*, Question 3.

alternative scenario requires consideration of what third parties, not under the Commission's control, will do in response. How will the markets respond? How will oil producers in North Dakota and western Canada respond? How will oil refiners in Sarnia respond? How will Enbridge's competitors respond? If Line 5 is out of service because the Straits crossing has been closed and no replacement has been permitted, what alternatives will shippers and refiners consider? Will they find alternative routes or modes of transportation? Will they reduce production due to higher costs?

But the Commission avoided all of these relevant questions by simply assuming that the Governor and the Attorney General will fail in their efforts to shut down the existing Straits crossing, that the courts will not intervene, and the consequence of denying Enbridge's application will be to leave the existing, 70-year-old pipeline operational forever. But it is hardly unreasonable to conclude that the current pipeline will be shut down under the Governor's revocation order or the Attorney General's lawsuit, or by some other action, *e.g.*, the federal court injunction now in place ordering Line 5 shut down in no more than three years, or when Enbridge can get a reroute around the Bad River reservation permitted and operational. See *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Reservation v Enbridge Energy Company, Inc.*, No. XXX, 2023 WL 4043961 (WD Wis June 16, 2023) (entering injunction requiring defendants "to adopt and implement" a "shutdown plan" and "to cease operation of Line 5 on any parcel within the Band's tribal territory on which defendants lack a valid right of way.").

A rational refiner facing a probable or even a possible shutdown of the Line 5 crossing, or any other segment of the Line 5 pipeline, will identify other potential sources of crude oil

feedstock, and also evaluate whether it makes sense to curtail how much oil it chooses to refine. Rather than simply rely on the alternatives from the seven-year-old Dynamic Risk report that did not proclaim to make the required MEPA analysis, and that ignored extra pipeline capacity that currently exists, the Commission should have considered what would most likely happen if the Line 5 crossing at the Straits were shut down without the tunnel project, and then decide if, from the perspective of Michigan's "paramount concern for the protection of its natural resources from pollution, impairment, or destruction," that alternative scenario would compare favorably. If it would, then Enbridge's application must be denied under Sections 3 and 5 of MEPA and the caselaw applying it. The Commission simply did not meaningfully evaluate that no-pipeline alternative scenario and this case should therefore be reversed and remanded back to the Commission to do that analysis if Enbridge still wants to proceed.

The Michigan Supreme Court's observation in *WMEAC* decades ago is even more apt today: oil is never adversely affected if its development does not take place, but when oil development *does* take place, like Enbridge's proposed pipeline project, Michigan's environment and natural resources are *always* adversely affected. *WMEAC*, 405 Mich at 759-760. MEPA exists for that very reason. This Court should enforce MEPA's requirements and reverse and remand the Commission's Final Order.

III. THE COMMISSION ERRED WHEN IT INITIALLY RULED THAT THE INTERVENORS WERE BARRED FROM SUBMITTING EVIDENCE RELATED TO THE PUBLIC NEED FOR THE CONTINUED OPERATION OF LINE 5 AND PROCEEDED TO MAKE FACTUAL FINDINGS OF THE PUBLIC NEED FOR THE OPERATION OF LINE 5.

In its April 21, 2021 order addressing Enbridge's motion to limit the scope of these proceedings, the Commission adopted one of the arguments that Enbridge had raised and

concluded that evidence on the public need for the continued operation of Line 5 could not be offered by the intervening parties. Order, April 21, 2021 (Exhibit E), at 59-63. But, after reaching this conclusion before testimony was presented, the Commission proceeded to find in its final ruling on December 1, 2023 that its determination to approve Enbridge's application was appropriate because "Enbridge has established both the public need for the products to be shipped through the Replacement Project and the need to relocate the Straits Line 5 segment inside the tunnel, and as such, has established the public need for the Replacement Project." Order, December 1, 2023 (Exhibit L), at 305.

The Commission seriously erred in precluding the intervening parties from presenting evidence on the subject of the public need for the continuation of Line 5 and, after doing so, making a specific finding with respect to that public need. The Commission's error in precluding evidence on an issue that it ultimately found to be relevant to its Act 16 inquiry has been fully addressed in the March 11, 2024 brief that was filed in this Court by the Tribal defendants. Rather than repeat those arguments here, ELPC and MiCAN would merely adopt all of these arguments as their own. For this reason as well, the Court should reverse the Commission's decision.

RELIEF REQUESTED

Based on the foregoing, appellants, Environmental Law & Policy Center and Michigan Climate Action Network, request that the Court reverse the Commission's December 1, 2023 Order and remand this case to the Commission for further proceedings.

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Dated: June 27, 2024.

CERTIFICATION PURSUANT TO MCR 7.212(B)(1)

Mark Granzotto, attorney for appellants, hereby certifies pursuant to MCR 7.212(B)(1) that this brief was typed using the Corel Word Perfect word processing program. That program has a function which can calculate the total number of words contained in a document. According to that program function, there are 9,730 countable words in this brief.

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