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.

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APPELLANTS' REPLY BRIEF ON APPEAL

*** * * ORAL ARGUMENT REQUESTED * * ***

MARK GRANZOTTO, P.C.
MARK GRANZOTTO (P31492)
Attorney for Appellants
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page

Cases

Statutes

Court Rules

INTRODUCTION

In 1963, a decade *after* the "1953 approval" of Line 5 so heavily relied upon by Enbridge, the people of Michigan adopted Article 4, Section 52 of the Michigan Constitution, which declared "conservation … of the natural resources of the state … to be of paramount public concern in the interest of the health, safety and general welfare of the people." 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." Accordingly, in 1970, the Legislature enacted the Michigan Environmental Protection Act, MCL 324.1701, *et seq* ("MEPA"), which 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 a proposed project to build a new oil pipeline tunnel beneath the Straits of Mackinac—a project the Michigan Public Service Commission (the "Commission") found *will* cause greenhouse gas (GHG) pollution. Having reached that conclusion, the Commission should have denied Enbridge's permit application.

In their opening brief, ELPC and MiCAN showed that the Commission failed to comply with MEPA's statutory requirements in at least three respects. First, the Commission neglected to follow MEPA's burden-shifting framework, as outlined by the Michigan Supreme Court. Second, the Commission failed to apply any standard or methodology for quantifying the long-term GHG pollution from the oil that will flow through the pipeline tunnel. Third, the Commission did not meaningfully consider a no-pipeline alternative as part of its MEPA analysis. Each of these failures independently invalidates the Commission's Final Order. As discussed in this reply brief, the Appellees' response briefs have little, if anything, to say about these MEPA failures; what they do say, though, confirms the Commission did not fulfill its obligations. This Court should vacate the Final Order and remand for further proceedings.

I. Appellees Incorrectly Attempt to Minimize MEPA's Scope and Significance.

Both the Commission and Enbridge, in their respective response briefs, misstate the scope of MEPA's application to the proposed pipeline tunnel project, as well as the significance of MEPA's substantive standards, which carry out the constitutional mandate to uphold "conservation … of the natural resources of the state" as a "paramount public concern." Mich Const of 1963, Art 4, Sec 52. Enbridge goes so far as to mischaracterize MEPA as having only "minimal requirements" and "not requir[ing] an onerous environmental effects analysis." Enbridge Brief at 29. This flies in the face of the Michigan Supreme Court's holdings. As ELPC and MiCAN previously summarized, in *Vanderkloot* the Supreme Court held that MEPA "prescribe[s] the substantive environmental rights, duties and functions of subject entities" and "establishes substantive standards" that are "applicable to [state agencies'] administrative [ ] determinations." *State Highway Comm'n v. Vanderkloot*, 392 Mich 159, 184-86; 220 NW2d 416 (1974). In *Ray* the Supreme Court held that MEPA "imposes a duty on … organizations both in the public and private sectors to prevent or minimize degradation of the environment." *Ray v. Mason County Drain Comm'r*, 393 Mich 294, 303-06; 224 NW2d 883 (1975). The Commission concedes that *Vanderkloot* is binding, *see* Comm'n Brief at 35, and the Supreme Court has made clear "[t]he basic import of *Ray* has not changed," *Nemeth v. Abonmarche Dev, Inc*, 457 Mich 16, 25; 576 NW2d 641 (1998). *See* ELPC/MiCAN Brief at 15-19.

Enbridge misstates "the required scope of the Commission's MEPA analysis" here as "limited to Enbridge's proposal to replace the Dual Pipelines, *not* the ongoing operation of Line 5." Enbridge Brief at 27 (italics in original). The operation of Line 5, however, falls squarely within the scope of MEPA's analysis because the Commission ruled earlier in this case "that review of greenhouse gases (GHGs) related to the products shipped through the four-mile segment at issue … is proper for a complete and thorough MEPA

analysis." Comm'n Brief at 42. In other words, MEPA requires analysis of the GHG pollution from the oil that will flow through the pipeline tunnel. Contrary to the central theme of Enbridge's brief, the environmental effects at issue under MEPA are *not* limited simply to "a locational change to a discrete segment of Line 5" (constructing a tunnel), Enbridge Brief at 2-3, but instead encompass all of the "GHGs related to the products"—the oil—"shipped through" it. The Commission concedes precisely this point in its response brief: "this pipeline section would involve hydrocarbons that may result in GHG pollution that *must* be subject to MEPA review." Comm'n Brief at 22-23 (italics added).

Far from "attempting to relitigate" or "collaterally attack" the entirety of Line 5, as Appellees claim, ELPC and MiCAN seek only to hold the Commission accountable to MEPA's substantive standards and the Commission's own ruling that MEPA *requires* a thorough and complete analysis of the GHG pollution from the oil that will flow through the pipeline tunnel.

II. The Commission Did Not Follow MEPA's Burden-Shifting Framework.

ELPC and MiCAN laid out in their opening brief MEPA's statutory requirements and burden-shifting framework, and the Michigan Supreme Court's explication of those requirements in a series of decisions. ELPC/MiCAN Brief at 15-19. In short, MEPA establishes a burden-shifting framework, whereby once the challenger makes a *prima facie* showing that a proposed project is likely to pollute natural resources, the burden of proof by a preponderance of the evidence shifts to the project-proponent (1) to rebut that showing and (2) to prove both that (a) there is no feasible and prudent alternative and (b) the project is consistent with the State's paramount concern for protection of its natural resources. *Id.* The Commission, for its part, does not address, much less contest, these MEPA legal principles. Enbridge's only response is to try to distinguish the Supreme Court's *Ray* decision as applying to "courts, *not* administrative agencies." Enbridge Brief at 31 (italics in

original). But Enbridge is wrong.

Section 3 of MEPA sets forth the burden-shifting framework created by the statute, MCL 324.1703 (formerly MCL 691.1203), as the Supreme Court recognized in *Ray*, 393 Mich at 306-11. The Supreme Court in *Vanderkloot* specifically held that Section 3 governs state agencies:

> M.C.L.A. s 691.1203; M.S.A. s 14.528(203) [Section 3 of MEPA] also establishes substantive standards imposed upon those engaging in, or likely to engage in, pollution, impairment, or destruction of the air, water or other natural resources or the public trust therein. In relevant part, [Section 3] proscribes such pollution, impairment, or destruction *unless it is demonstrated* that there is no feasible and prudent alternative to (the polluting, impairing, or destroying entity's) conduct 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. *This substantive environmental guideline is applicable to the Commission*'s administrative condemnation determinations.

392 Mich at 185-86 (italics added; quotation marks omitted). The Supreme Court's explication of Section 3's burden-shifting framework in *Ray* applies to MEPA analysis regardless of the forum. Section 3 binds state agencies, as *Vanderkloot* held, just as it binds courts. Enbridge is simply wrong when it tries to argue otherwise.

The Commission did not follow the burden-shifting framework required by Section 3 of MEPA in its Final Order. As Enbridge concedes, "[t]he Commission … concluded that the Replacement Project would increase greenhouse gas emissions and thereby impair the environment." Enbridge Brief at 29-30 (citing pages 330-31 of the Final Order). The Commission, therefore, determined that ELPC and MiCAN established a *prima facie* case under MEPA. At that point, the burden of proof should have shifted to Enbridge not only to rebut the *prima facie* case but also to prove by a preponderance of the evidence that no feasible and prudent alternative exists and that the proposed project comports with the paramount concern for protection of natural resources. MCL 324.1703; *Vanderkloot*, 392 Mich at 185-86; *Ray*, 393 Mich at 306-11; *Wayne County Dep't*

of Health v. Olsonite Corp, 79 Mich App 668, 702; 263 NW2d 778 (1977). Nowhere in the Final Order's discussion of MEPA, however, did the Commission acknowledge the burden of proof, that the burden shifted to Enbridge, or the standard Enbridge must satisfy to carry its burden of proof. Instead, the Commission entirely disregarded MEPA's burden-shifting framework and left the burden of proof on the intervenors. This fundamental flaw, which neither the Commission nor Enbridge addresses in their response briefs, requires reversal and remand for further proceedings consistent with Section 3 of MEPA.

III. The Commission Did Not Analyze Long-Term GHG Pollution.

Beyond ignoring MEPA's burden-shifting framework, the Commission also failed to follow MEPA's statutory requirements by considering GHG pollution from oil that will flow through the pipeline tunnel *only* "in the short term" or "immediately," and by failing to analyze that GHG pollution *in the long run*. All parties agree that MEPA required the Commission to analyze the environmental effects of GHG pollution. The Commission and Enbridge now argue that the Commission *did* consider GHG pollution, but their only support for that argument is the following language from the Final Order:

> Indeed, if the current GHG emissions associated with the product transported by the dual pipelines are compared with the GHG emissions that would be produced following a shutdown of the dual pipelines, the Commission finds that a shutdown would actually result in a significant increase in GHG emissions, *at least in the short term*, as a shutdown of the dual pipelines would not *immediately* alter demand for the products shipped on Line 5, and consequently the modes of transportation for crude oil and NGLs would shift to rail and truck.

Comm'n Brief at 28; Enbridge Brief at 32, 38 (quoting Final Order at 345) (italics added). As this language makes explicit, the Commission limited its analysis of GHG pollution to "the immediate short term." Anticipating Appellees' argument, ELPC and MiCAN showed in their

opening brief that the distinction between "the immediate short term" and sound economic analysis of "the long run" matters. ELPC/MiCAN Brief at 11-13, 22-24.

Enbridge has not proposed the oil pipeline tunnel project for the "short term." As the Commission notes, Line 5 already "has been in existence and operation for approximately 70 years," Comm'n Brief at 46, and Enbridge hopes to more-than-double that lifespan by constructing a new tunnel intended "to have a service life of 99 years," Final Order at 100. In other words, the proposed project would enable Enbridge to move 540,000 barrels of oil per day (Enbridge Brief at 2) through the Straits of Mackinac, every day, for another century. That amounts to 20 billion barrels of oil.[1] The Commission recognized the oil shipped through the pipeline tunnel causes GHG pollution and MEPA requires analysis of the environmental effects of that pollution; yet the Commission considered those effects for only "the immediate short term."

The difference between the "long run" and the "short run" in economic analysis is significant. Price elasticity of demand for a product, such as oil, measures how much demand for the product changes when the price of the product changes—for example, how much demand for oil *de*creases when the price of oil *in*creases. The only evidence on long-run elasticities before the Commission, presented by ELPC and MiCAN's expert, Peter Erickson, showed that "'[l]ong-run' elasticities are intended to gauge effects over a period of time"—"the next several years"—during "which producers and consumers have time to make changes" in their investment and purchasing decisions in response to changes in price. ELPC/MiCAN Brief at 23. In contrast, considering just short-run elasticities means *not* accounting for such changes in

[1] 540,000 barrels per day x 365 days per year x 99 years = 19,512,900,000 barrels of oil.

behavior. *Id.* As the Commission acknowledged in the Final Order, the only other evidence, presented by Commission staff-member Mr. Morese, used only "short-term elasticities." Final Order at 140-41 (citing 9 Tr 1091-92). Mr. Erickson explained the fundamental flaw in this:

> Mr. Morese discussed the "short run" elasticities of demand … restricting his analysis to a very short timeframe. *A short-run elasticity is … a change over a year or less*. By contrast, for a project like the Proposed Project—designed to last 99 years—it would be more appropriate to use "long-run" elasticities…. Long run elasticities are generally higher in magnitude than short-run elasticities (i.e., a given change in price leads to a greater change in consumption over the long-term than in the short term), because, in the long term, people have more time to adjust their behavior and investments in response to price. Taking a long-term perspective is especially important for oil, since alternatives to oil in the transport sector, like electric vehicles, are emerging and becoming price-competitive, suggesting that the elasticity of demand may be greater in magnitude in the future….

9 Tr 1091-92, F#1037 (italics added).

Mr. Erickson showed that, over the long run (the next several years), substantially more GHG pollution will occur if the tunnel is constructed than if it is not approved and the Line 5 pipeline crossing at the Straits of Mackinac is decommissioned by Michigan policymakers. This results from the negative long-run elasticity of oil: decommissioning the Straits crossing will increase the price of oil, which in turn will decrease the demand for oil as consumers change purchasing decisions, and will decrease the supply of oil as producers change investment decisions, thereby decreasing both upstream and downstream GHG pollution. Using standard methodology, Mr. Erickson calculated the difference with the tunnel versus without it to be 27 million metric tons of GHG pollution per year, equating to $41 billion of social cost per year. ELPC/MiCAN Brief at 11-13, 22-24. This was the only evidence before the Commission analyzing GHG pollution in the long run.

The Commission failed to address the long run, instead explicitly limiting its

consideration to "the immediate short term." Final Order at 345. This means that for its MEPA analysis of the environmental effects of a project intended to ship oil through the Straits for the next 99 years, the Commission deemed it sufficient to consider a period of one year or less and to ignore the remaining 98 years. Moreover, the Commission did not just ignore the only evidence of long-run GHG pollution, it failed to apply *any* standard or methodology for quantifying such pollution from the oil that will flow through the pipeline tunnel. This constitutes legal error, disregarding MEPA's requirement "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. As ELPC and MiCAN showed in their opening brief, federal courts have consistently reversed agency decisions that, like the Commission's here, failed to apply a methodology for analyzing GHG pollution in the long run. ELPC/MiCAN Brief at 25-28 (citing cases).[2]

Finally, the Commission's first legal error—failing to apply MEPA's burden-shifting framework—compounds this second legal error because Enbridge, which should have had the burden of proof (as discussed above), did not offer *any* standard, methodology, or evidence related to long-term GHG pollution; only ELPC and MiCAN did. Thus, not only did the Commission fail to analyze long-term GHG pollution, but by failing to shift the burden of proof to Enbridge as MEPA requires, the Commission also improperly excused its complete lack of proof on this issue.

[2] Michigan courts have found "a review of federal authority is instructive" where state and federal statutes have "similar purposes," *Genesco, Inc v. Michigan Dep't of Envtl Quality*, 250 Mich App 45, 53; 645 NW2d 319 (2002), as do MEPA and the National Environmental Policy Act (NEPA), *Vanderkloot*, 392 Mich at 188 (discussing NEPA in conjunction with MEPA).

IV. The Commission Did Not Meaningfully Consider a No-Pipeline Alternative.

The Commission erred in a third respect by failing to meaningfully consider a no-pipeline alternative as part of its MEPA analysis. The Commission concedes in its response brief that "MEPA requires a holistic ('statewide') analysis of each alternative option in order to determine *if there is an alternative that* is more reasonable and prudent (i.e. *does less harm to the environment*) than the project being considered…." Comm'n Brief at 45-46 (italics added). According to Enbridge, "[t]he alternative with the least net effect would be the most environmentally protective." Enbridge Brief at 33. As shown above, MEPA required *Enbridge* to prove by a preponderance of the evidence both that there is no feasible and prudent alternative to the proposed oil pipeline tunnel project and that the project is consistent with the State's paramount concern for protection of its natural resources. *See* Part II above. An alternative is "feasible" even if "financially burdensome" to the point of impacting "the continued existence of" the project-proponent. *Olsonite*, 79 Mich App at 703-04. An alternative is "prudent" absent "truly unusual factors" or costs of "extraordinary magnitude." *Id.* at 705-06.[3]

In its Final Order, the Commission recognized that, compared to the proposed tunnel project, a no-pipeline alternative "might similarly reduce the environmental threats to the Great Lakes." Final Order at 343. The Commission had earlier found "that it cannot ignore the possibility that Enbridge will cease to operate the 4-mile dual pipeline segment of Line 5 in the Straits" because Michigan policymakers revoked the easement and took other actions to begin decommissioning the Straits crossing. Enbridge Brief at 34 (quoting the Commission's finding);

[3] Enbridge attempts to distinguish *Olsonite*, suggesting it "dealt with a different MEPA provision," but Enbridge is wrong. Enbridge Brief at footnote 6. *Olsonite* interpreted "feasible and prudent" in Section 3 of MEPA, which applies here. *See* Part II above.

ELPC/MiCAN Brief at 3-4 (describing policymakers' actions). A no-pipeline alternative plainly is "feasible" and "prudent" under *Olsonite*—Enbridge certainly did not prove otherwise. Furthermore, a no-pipeline alternative is far more consistent with the paramount concern for protection of natural resources. Avoiding 27 million metric tons of GHG pollution every year, for 99 years, using the Commission's words, clearly "does less harm to the environment."

The only argument Appellees can muster in response is to repackage their claim, already debunked in Part III above, that "a shutdown" of the Straits crossing "would not *immediately* alter demand for the [oil] shipped on Line 5," "*at least in the short term*." Comm'n Brief at 28; Enbridge Brief at 38-39. To reiterate, that argument relies entirely on improperly using only short-run elasticities, utterly ignoring the long run, and thereby unjustifiably assuming no decrease in the demand for oil and no corresponding decrease in GHG pollution. This logic defies common sense, basic economic principles, and MEPA's requirements.

The Commission was required to, but did not, meaningfully consider a no-pipeline alternative as part of its MEPA analysis. By failing to analyze the environmental effects of GHG pollution in the long run, the Commission also failed to compare the effects of constructing a new oil pipeline tunnel with the effects of decommissioning the Straits crossing. Under the proper comparison, the no-pipeline alternative "does less harm to the environment."

CONCLUSION

For the reasons discussed in this reply and in their opening brief, ELPC and MiCAN request that the Court reverse the Commission's December 1, 2023 Order and remand this case to the Commission for further proceedings.

MARK GRANZOTTO, P.C.

/s/ Mark Granzotto
MARK GRANZOTTO (P31492)
Attorney for Appellants
2684 Eleven Mile Road, Suite 100
Berkley, MI 48072
(248) 546-4649

Dated: October 3, 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 3,184 countable words in this brief.

/s/ Mark Granzotto
Counsel for Appellants