STATE OF MICHIGAN
IN THE SUPREME COURT

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE & RELOCATE LINE 5

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

Appellants,

v.

MICHIGAN PUBLIC SERVICE COMISSION, et al.

Appellees.

Supreme Court No. _____

Court of Appeals Nos. 369156, 369159, 369161, 369162, 369165 (consolidated)

MPSC Case No. U-20763

JOINT APPLICATION FOR LEAVE TO APPEAL BY BAY MILLS INDIAN COMMUNITY, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, ENVIRONMENTAL LAW AND POLICY CENTER, AND MICHIGAN CLIMATE ACTION NETWORK

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STATEMENT IDENTIFYING ORDER APPEALED

This is an application for leave to appeal a published opinion of the Court of Appeals dated February 19, 2025.[1] The Court of Appeals affirmed the Michigan Public Service Commission's December 1, 2023 Final Order in Case No. U-20763, which granted the application of Enbridge Energy, Limited Partnership ("Enbridge") pursuant to 1929 PA 16, MCL 483.1 *et seq*. ("Act 16") and Rule 447 of the Commission's Rules of Practice and Procedure.[2]

[1] *In re Application of Enbridge Energy to Replace and Relocate Line 5*, ___ Mich App ___; ___ NW3d ___ (2025) (Docket Nos. 369156, 369159, 369161, 369162, 369163, 369165, 369231) (hereinafter "COA Opinion"). The opinion of the Court of Appeals is Attachment 1.

[2] The Commission's December 1, 2023 Final Order is Attachment 2.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals misconstrue and misapply the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 *et seq*. by failing to conduct a de novo review of an agency's MEPA analysis determinations?

The Court of Appeals answered: No.

The Applicants answer: Yes.

2. Did the Court of Appeals and Michigan Public Service Commission misconstrue and misapply MEPA's requirement that administrative agencies assess whether proposed conduct "has or is likely to have such an effect" of causing the pollution, impairment or destruction of natural resources, or the public trust in those resources, which thereby led them to improperly exclude the Intervenors' testimony on the effects of the Line 5 tunnel project and to conduct a faulty comparison of feasible and prudent alternatives to the tunnel project?

The Commission answered: No.

The Court of Appeals answered: No.

The Applicants answer: Yes.

INTRODUCTION

This case is of fundamental importance to the people of Michigan, the state's natural resources, and the bedrock protections laid out in the Michigan Constitution and the Michigan Environmental Protection Act. It involves the protection of the state's natural resources from Enbridge Energy's plan to construct a massive tunnel beneath the Straits of Mackinac to house and extend the life of its 70-year-old Line 5 pipeline, enabling the daily transport of more than half a million barrels of oil across the Great Lakes—the largest freshwater system on Earth—for the next century. The unprecedented project has significant environmental consequences, including heightened risks of oil spills and increases in greenhouse gas pollution, affecting areas of special importance to Michigan's Tribal Nations and the natural resources of all Michiganders. As a result, this is a case of significant public interest and importance that has engaged the Governor, Attorney General, state administrative agencies, Tribal Nations, environmental and conservation organizations, and businesses taking different positions.

Despite the magnitude of this project affecting an environmentally sensitive and culturally significant area, the Michigan Public Service Commission (the "Commission") disregarded clear constitutional mandates and statutory provisions—and this Court's precedents—that require state agencies to prioritize the protection of Michigan's air, water, and other natural resources when deciding whether to issue permits. In affirming the Commission's decision to issue a permit to Enbridge, the Court of Appeals made two legal errors of major significance to this State's jurisprudence that require correction by this Court:

First, the Court of Appeals applied the wrong standard of review under the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 *et seq*. The Court erroneously deferred to the Commission's decision rather than making its own independent, de novo determinations as mandated by MEPA's plain language and this Court's precedents. See MCL 324.1705(2); *West Mich Environmental Action Council, Inc v Natural Resources Comm*, 405 Mich 741, 752; 275 NW2d 538 (1979), cert den 444 US 941 (1979) ("*WMEAC*"); *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 30-31; 576 NW2d 641 (1998). The Court of Appeals' decision explicitly narrows this Court's holding in *WMEAC*, incorrectly asserting that it applies to only circuit courts rather than all courts. Moreover, the decision conflicts with other decisions of the Courts of Appeals.

Second, the Court of Appeals either misunderstood or disregarded MEPA's twin commands that administrative agencies and reviewing courts "shall determine the alleged

pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources" from a proposed project, and forbids the approval of a project "that has or is likely to have such an effect if there is a feasible and prudent alternative." MCL 324.1705(2). MEPA requires agencies and courts to review the *full* range of likely effects from the issuance of a permit and determine whether feasible and prudent alternatives would prevent or minimize those effects. *Ray v Mason County Drain Comm'r,* 393 Mich 294, 30; 224 NW2d 883 (1975); *State Hwy Comm v Vanderkloot*, 392 Mich 159, 183; 220 NW2d 416 (1974). By affirming the Commission's in limine ruling excluding evidence of oil spill risk from Line 5 and, in turn, limiting the alternatives analysis, the Court of Appeals violated these statutory requirements.

The Court of Appeals' failure to properly enforce and apply MEPA's environmental review and determination framework contravenes the statute's plain language, the Legislature's intent, and the "common law of environmental quality" developed by this Court over the course of decades. *Ray,* 393 Mich at 888. Review by this Court is critical to preserving clarity in the law and to ensuring that state agencies and courts engage in the rigorous review required by the Act.

These failures jeopardize the sanctity of the Great Lakes and the Tribal economic and cultural interests and treaty-protected rights, which are inherent rights, including "the usual privileges of occupancy"—such as the rights to fish, hunt, and gather, in perpetuity. They also threaten to harm everyone who depends on the Great Lakes for drinking water, recreation, or economic benefit because all likely effects of the proposed project, including oil spills, have not been considered. The Environmental Law and Policy Center and the Michigan Climate Action Network, along with Tribal Nations, have been grappling with the way climate change has already begun to impact the Great Lakes basin, and this massive tunnel project will only exacerbate these harms by causing an annual net increase of 27 million metric tons of carbon dioxide emissions.

Accordingly, the Applicants respectfully request that this Court accept this application for leave to appeal the Court of Appeals' decision, reverse that decision, and vacate the Commission's Final Order. Applicants also support the application for leave to appeal submitted by For the Love of Water.

GROUNDS FOR GRANTING THIS APPLICATION FOR LEAVE TO APPEAL

Ample grounds exist for this Court to grant this application for leave to appeal pursuant to MCR 7.305(B)(2), (3), and (5). These are summarized below and discussed in the Argument.

MCR 7.305(B)(2): This case against a state agency, the Michigan Public Service Commission, involves matters of significant public interest, including the preservation of the Great Lakes, and Michiganders' constitutional right to environmental protection, the safeguarding of treaty-protected rights and Tribal interests, and the mitigation of climate change. Additionally, this case involves a proposed tunnel and pipeline under the Straits of Mackinac to transport 540,000 barrels of oil each day through the Great Lakes for the next 99 years, which has been the subject of extensive public interest and engagement.

MCR 7.305(B)(3): This case involves legal principles of great significance to the State's jurisprudence. These include the principles embedded in Article IV, Section 52 of the Michigan Constitution, MEPA, and this Court's jurisprudence applying those laws, all of which reflect the paramount public interest that the people of Michigan and their Legislature place on environmental protection and preservation of the State's natural resources. The Commission's and the Court of Appeals' incorrect interpretation of MEPA, and the Court of Appeals' failure to review the Commission's MEPA determinations de novo, undermine the Constitutional and legislative framework, and existing jurisprudence, designed to protect the Great Lakes and Michigan's other natural resources from pollution, impairment, and destruction.

MCR 7.305(B)(5): The Court of Appeals' decision applies an incorrect, unduly deferential standard of review, and conflicts with decisions of this Court and other decisions of the Courts of Appeals holding that MEPA requires de novo review. As discussed in detail below, the Court of Appeals' decision explicitly purports to narrow the holding of this Court's decision in *WMEAC*, 405 Mich at 752-55.

Further, the Court of Appeals' decision also conflicts with other decisions of the Courts of Appeals applying de novo review to MEPA claims. See, e.g., *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 487-90; 608 NW2d 531 (2000); *Friends of Crystal River v Kuras Props,* 218 Mich App 457, 470-72; 554 NW2d 328 (1996); *Thomas Twp v John Sexton Corp of Mich*, 173 Mich App 507, 510-11, 515-17; 434 NW2d 644 (1988); *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541, 546; 432 NW2d 315 (1988); *Mich Waste*

Sys v Dep't of Natural Resources, 147 Mich App 729, 735; 383 NW2d 112 (1985). By accepting review of this case, this Court can bring clarity to these conflicting decisions.

Moreover, additional decisions of the Courts of Appeals have indicated that a "clearly erroneous" standard of review applies to a trial court's factual findings, even in MEPA cases. See *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 264 Mich App 257, 259; 690 NW2d 487 (2004); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 8-9; 596 NW2d 620 (1999); *Trout Unlimited, Muskegon-White River Chapter v White Cloud*, 209 Mich App 452, 456; 532 NW2d 192 (1995); *City of Portage v Kalamazoo Co Rd Comm*, 136 Mich App 276, 279; 355 NW2d 913 (1984). Those decisions apply a standard of review that is different from the standard applied by the Court of Appeals' decision in this case. This Court can clarify the proper standard of review applicable to courts' determinations required by MEPA, including when those determinations involve factual findings. Similarly, the Court can correct the Commission's improper interpretation of MEPA's operative language.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. Enbridge Proposed to Build a Pipeline and Tunnel Under the Straits of Mackinac.

The Line 5 pipeline ("Line 5") was originally constructed in 1953, prior to Michigan's 1963 Constitution, and the enactment of MEPA and virtually all state and federal environmental laws, and without consultation with the Tribal Nations whose treaty-protected territory the pipeline traverses and threatens. Line 5 runs from Superior, Wisconsin to Sarnia, Ontario, crossing hundreds of interconnected waters along its path. COA Opinion, p 7 (citing December 1, 2023 Final Order). It can carry 540,000 barrels of oil per day. *Id*. Where it crosses the Great Lakes in the Straits of Mackinac, Line 5 splits into the Dual Pipelines that are located on the lakebed or, in many places, suspended in the water (the "Dual Pipelines"). Since their construction, the Dual Pipelines have been struck by anchors of passing vessels and have not been maintained or inspected in a sufficient manner. See Notice of Revocation & Termination of Easement, Exhibit ELP-18, pp 5-7, 15 (Doc No. U-20763-1046) (TI Appendix[3] N at 717-19, 727).

[3] "TI Appendix" refers to Tribal Intervenors-Appellants' Appendix in Court of Appeals Docket No. 369159 (April 11, 2024).

On April 17, 2020, Enbridge filed with the Commission an Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac. The Commission's jurisdiction over the permit application is based on its authority to regulate oil pipelines under Act 16, MCL 483, 483.1(2), and the Commission's Rule 447 governing construction of pipeline facilities, Mich Admin Code, R 792.10447(1)(c). COA Opinion, p 6. In its permit application, Enbridge sought approval to completely replace the existing Dual Pipelines, consisting of two 20-inch-wide pipelines, with a new 30-inch-wide pipeline to be housed within a tunnel to be constructed underneath the lakebed crossing the Straits (the "Project"). *Id*. at 6-7. Enbridge proposed that the new pipeline would then be connected to other segments of Line 5 on each side of the Straits of Mackinac, to continue the flow of oil through Line 5 for another century. COA Opinion, p 8 (citing December 1, 2023 Final Order).

B. The Intervenors Opposed Enbridge's Proposed Project

Following the submission of Enbridge's permit application, Bay Mills Indian Community ("Bay Mills"), the Grand Traverse Band of Ottawa and Chippewa Indians ("GTB"), the Little Traverse Bay Bands of Odawa Indians ("LTBB") the Nottawaseppi Huron Band of the Potawatomi ("NHBP") filed Petitions to Intervene, with supporting affidavits, in opposition to the proposed project. See Petitions to Intervene (Doc Nos. U-20763-0059, -0110, -0165, -0167). The Straits is a place of great spiritual, cultural, and economic significance for Tribal Nations. See Revised Direct Testimony of Pres. Whitney Gravelle, 10 Tr 1417 (Doc No. U-20763-1049) (TI Appendix H at 650). The Tribal Intervenors expressed strong interest in protecting their traditional lifeways (including their treaty-protected right to hunt, fish, and gather) from harm caused by Enbridge's proposed Project.[4] As described in Bay Mills' Petition:

> The operation of current Line 5, and the prospect of the siting and construction of a tunnel in the Straits of Mackinac for the transport of petroleum products, is the most obvious and most preventable risk to the fishery resources throughout northern Lakes Michigan and Huron. [Affidavit of Pres. Bryan Newland, Bay Mills' Petition to Intervene, p 4 para 11 (Doc No. U-20763-0059) (TI Appendix O at 750).]

[4] Critical fishery resources—including whitefish—have already suffered harm and been made vulnerable due to climate change impacts. See Revised Direct Testimony of Pres. Whitney Gravelle, 10 Tr 1428-30 (Doc No. U-20763-1049) (TI Appendix H at 661-63).

Three of the four Tribal Intervenors—Bay Mills, GTB and LTBB—have interests in the Great Lakes and Straits of Mackinac that are protected by a treaty with the United States. Threatened with removal from their homeland, the Ottawa (alternatively "Odawa") and Chippewa concluded the 1836 Treaty in which they transferred to the United States almost half of the land and water that would become the State of Michigan: about 14 million acres of land and inland waters and 13 million surface acres in Lakes Michigan, Huron, and Superior. Treaty of 1836, 7 Stat 491; see also Bay Mills Petition to Intervene, pp 1-2 (Doc No. U-20763-0059).[5] In ceding the lands and waters, the Tribal Nations reserved the rights to hunt, fish, and gather throughout the ceded territory. 7 Stat 491. These rights have been confirmed by state and federal courts. See *People v LeBlanc*, 399 Mich 31; 248 NW2d 199 (1976); *United States v Michigan*, 471 F Supp 192, 278-81 (WD Mich, 1979), aff'd 653 F2d 277 (CA 6, 1981), cert den 454 US 1124 (1981); *Grand Traverse Band of Chippewa & Ottawa Indians v Dir, Mich Dep't of Natural Resources*, 971 F Supp 282, 288-89 (WD Mich, 1995), aff'd 141 F3d 635 (CA 6, 1998).

On August 13, 2020, the ALJ granted the petitions to intervene of the Tribal Intervenors, Environmental Law & Policy Center ("ELPC"), Michigan Climate Action Network ("MiCAN"), and other parties, and set a schedule for the contested case proceedings. See Scheduling Memo (Doc No. U-20763-0222). Pursuant to MEPA, MCL 324.1705(1), the intervenors asserted that the Commission's consideration of Enbridge's permit application involved "conduct that has, or is likely to have, the effect of polluting, impairing or destroying the air, water, or other natural resources or the public trust in these resources."

C. The Commission's In Limine Order Constrained the Scope of Its MEPA Analysis.

At the beginning of the contested case, before the parties had the opportunity to conduct discovery and develop evidence, Enbridge filed a motion in limine (the "Motion In Limine") to exclude six categories of evidence and issues that it argued were legally irrelevant. COA Opinion, p 10. The six categories were: (1) the construction of the tunnel, (2) the environmental impact of the tunnel construction, (3) the public need for and continued operation of Line 5, (4)

[5] Bay Mills, GTB, and LTBB (as well as Sault Ste. Marie Tribe of Chippewa Indians and Little River Band of Ottawa Indiana) are successors to the signatories of the 1836 Treaty and are collectively known as "the 1836 Treaty Tribes." Although not one of the 1836 Treaty Tribes, NHBP and its members consistently maintain their culture and way of life through many of the same natural resources. NHBP Petition to Intervene, p 1 (Doc No. U-20763-0167).

the current operational safety of Line 5, (5) climate change, and (6) the Intervenors' "climate agendas." *Id.*

Enbridge argued that evidence about the public need for, current operational safety, and continued operation of Line 5 was outside the scope of the case. *Id*. The Intervenors countered that this evidence was relevant under MEPA because pollution risk from extending the operation of Line 5 for additional decades would be a likely effect of the Project. Joint Response to Motion In Limine by Michigan Environmental Council ("MEC"), GTB, Bay Mills, et al., pp 26-28 (Doc No. U-20763-0326).

On October 23, 2020, the ALJ issued a ruling on the Motion In Limine. (Doc No. U-20763-0396) (TI Appendix B). The ALJ denied the motion as it pertained to issues of tunnel construction and its environmental impact but granted the motion in all other respects. The ALJ explained that the parties did have the right to submit evidence about the public need for the proposed tunnel project, but that "any evidence concerning the current and future operational aspects of the entirety of Line 5, including the public need and safety issues, is outside the scope of the case." *Id*. at 16 (TI Appendix B at 369).

On November 6, 2020, the parties who had opposed the Motion In Limine filed applications for leave to appeal pursuant to Rule 433 of the Commission's Administrative Hearing Rules. (Doc Nos. U-20763-0419, -0420, -0421, -0423). The Attorney General filed a brief indicating her support for, and joinder in, the four applications for leave to appeal. (Doc No. U-20763-0422).

On November 13, 2020, while the applications for leave to appeal were pending, the State of Michigan notified Enbridge that it was in violation of its 1953 Easement for the Dual Pipelines, and that the Easement itself was void since its inception. COA Opinion, pp 10-11; Notice of Revocation & Termination of Easement (Doc No. U-20763-1046) (TI Appendix N). The Governor and the Michigan Department of Natural Resources found that Enbridge "breached or violated the standard of due care and its obligations to comply with the conditions of the Easement" by: (1) ignoring the requirement that each pipeline be physically supported at least every 75 feet "virtually the entire time the Easement has been in place"; (2) failing to "inspect, timely repair, and disclose exceedances of pipe spans to the State of Michigan"; (3) failing to timely investigate the condition of the pipeline coating/wrap despite its poor condition; and (4) ignoring exceedances of pipeline curvature standards. COA Opinion, pp 12-16; Notice,

pp 12-16 (TI Appendix N at 724-28). The Notice of Revocation and Termination further noted that Enbridge "produced few contemporaneous records and little evidence that it conducted a pipeline inspection and maintenance program from 1953 to the late 1990s or early 2000s—i.e., during most of the Easement's existence." *Id*. at 2 n 1 (TI Appendix N at 714).

On December 9, 2020, the Commission remanded Enbridge's Motion In Limine to the ALJ in light of the Notice of Revocation and Termination. (Doc No. U-20763-0480). After additional briefing from the parties, the ALJ issued a second decision on Enbridge's Motion In Limine on February 23, 2021. (Doc No. U-20763-0602) (TI Appendix C). This second ruling was substantially the same as the first. On March 9, 2021, the parties opposing the Motion In Limine again filed petitions for leave to appeal. (Doc Nos. U-20763-0620, -0622, -0624, -0625).

On April 21, 2021, the Commission issued its ruling on Enbridge's Motion In Limine. (Doc No. U-20763-0713) (TI Appendix D) (Attachment 3). The Commission reversed the ALJ's ruling with respect to greenhouse gas emissions. COA Opinion, p 14. It found that "the allegations of GHG [greenhouse gas] 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." Order on Motion In Limine, p 66 (TI Appendix D at 471). In reaching this conclusion, the Commission stated: "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 (TI Appendix D at 469) (emphasis added). The Commission further explained: "While the project under consideration is limited to the 4-mile section of the pipeline described in the application, this pipeline section would involve hydrocarbons that may result in GHG pollution that must be subject to MEPA review." *Id*. at 66-67 (TI Appendix D at 471-72).

However, despite these statements, the Commission upheld the exclusion of evidence related to the history of oil spills from Line 5 and the risks of future spills resulting from the Project, stating: "Issues raised by Bay Mills and other intervenors on potential pollution, impairment, and destruction of Michigan's natural resources resulting from existing sections of Line 5 are . . . outside the scope of the Commission's MEPA review . . . ." *Id*. at 64 (TI Appendix D at 469). The Intervenors had argued that such evidence was crucial in evaluating the likely environmental effects of the Project because "Line 5 crosses over 290 rivers and streams—many of which the Tribes have treaty rights to, which are interconnected and, which flow to the Great

Lakes." Joint Response to Motion In Limine by MEC, GTB, Bay Mills, et al., p 29 (Doc No. U-20763-0326).

D. The Evidence Was Substantially Limited by the Commission's In Limine Order.

Following the Commission's April 2021 Order on Enbridge's Motion In Limine, the parties submitted evidence, subject to the constraints set by the Order, including testimony that described the negative impacts that the construction, operation, and maintenance of the Project would have on the Tribal Nations and their treaty-protected resources. See, e.g., Gravelle Direct, 10 Tr 1415-21 (TI Appendix H at 648-54); Hemenway Direct, 9 Tr 1192-93 (TI Appendix I at 669-70); Wiatrolik Direct, 9 Tr 1181-86 (TI Appendix J at 673-78); LeBlanc Direct, 10 Tr 1514 (TI Appendix K at 682). However, the ALJ struck entire passages of that evidence, stating that it was "outside the scope" of the Commission's Order. See January 13, 2022 Order (Doc No. U-20763-1009).

The stricken evidence included testimony from Jacques LeBlanc, a Tribal fisherman, pertaining to the impact on fisheries—which are vital to the cultural and economic stability of Tribal Nations—from the pollution and impairment caused by the "continued operation of Line 5 and reliance on fossil fuels." *Id*. at 6. The ALJ characterized Mr. LeBlanc's testimony, as "a generalized concern over the effects of climate change," and granted Enbridge's motion to strike. *Id*. at 6-7. Also stricken was testimony offered by John Rodwan, NHBP's Environmental Department Director, which included the only evidence offered in this matter regarding the demonstrated effects on wild rice and other Tribal resources that Tribal Nations suffered following a catastrophic oil spill from an Enbridge pipeline. *Id.* at 15-16. Bay Mills President Whitney Gravelle's testimony was also stricken, even though it articulated critical information about Tribal concerns, including the alternatives analysis in the Dynamic Risk Report—a report that analyzed alternatives to Line 5 crossing underneath the Straits and the very report that the Commission later determined was "particularly informative in determining public need for the Replacement Project." *Id*. at 7-8; December 1, 2023 Final Order, p 300 (Doc No. U-20763-1454) (TI Appendix A at 301) (Attachment 2).

On July 7, 2022, the Commission issued an order reopening the contested case to receive additional evidence but did not admit the previously excluded evidence. Order, p 47 (Doc No. U-20763-1257). The parties submitted pre-filed direct and rebuttal testimony, and in April 2023 the

ALJ presided over a five-day hearing. Following the hearing, the parties submitted written briefs to the Commission and the record was again closed for review.

E. The Commission Approved Enbridge's Permit Application.

On December 1, 2023, the Commission issued an order approving Enbridge's permit application. (Doc No. U-20763-1454) (TI Appendix A). In this Final Order, the Commission again acknowledged its obligation to review Enbridge's permit application in light of the requirements imposed by MEPA: "In addition, pursuant to MCL 324.1705, the Commission must perform a MEPA review in pipeline siting cases." *Id.* at 37. Despite this acknowledgement, the Commission's Final Order referenced and incorporated its interpretation of MEPA from its April 21, 2021 In Limine Order, which barred the Intervenors from submitting evidence about pollution, impairment, and destruction of natural resources from an increased risk of oil spills. *Id*. at 39. The Commission also rejected the Tribal Intervenors' Joint Petition for Rehearing on the decision to exclude evidence regarding oil spill risks. *Id.* at 43-52.

Ultimately, and even with its self-imposed limited scope of analysis, the Commission concluded that the proposed project would likely "pollute, impair and destroy natural resources," but it then determined that "there are no feasible and prudent alternatives to the Replacement Project pursuant to MEPA." *Id*. at 331, 347 (TI Appendix A at 332, 348). To reach this conclusion, the Commission assessed oil spill risk for the *full length* of various alternative transportation routes, against the oil spill risk for only the *short length* of Line 5 that would run through the tunnel (roughly four miles rather than the hundreds of miles of Line 5 that the oil would traverse if the tunnel is constructed).

F. The Court of Appeals Deferred to the Commission's MEPA Determinations.

Bay Mills, GTB, LTBB, and NHBP, ELPC, MiCAN, Michigan Environmental Council ("MEC"), Tip of the Mitt Watershed Council, National Wildlife Federation, and For Love of Water filed timely appeals of the Commission's December 1, 2023 Final Order with the Michigan Court of Appeals. These Appellants argued that the Commission erred by failing to satisfy its MEPA responsibilities by granting Enbridge's motion to exclude evidence about risks of, and likely pollution from, oil spills along the length of Line 5, and then conducting an alternatives analysis that considered the impairments from the entire length of the alternatives but not those associated with Line 5. They also argued that while the Commission correctly

determined that greenhouse gases should be considered in the MEPA analysis, it then failed to follow MEPA in rendering its Final Order. The Court of Appeals consolidated the appeals and held oral argument on January 14, 2025. On February 19, 2025, the Court of Appeals, in a published opinion, affirmed the Commission's Final Order approving Enbridge's permit application. COA Opinion, p 31.

When discussing the appropriate standard of review for evaluating the MEPA claims, the Court of Appeals distinguished this Court's seminal decision in *WMEAC*, 405 Mich 741, by characterizing it as made "in the context of 'an environmental protection act case . . . filed in a circuit court.'" COA Opinion, p 23; see also 405 Mich at 749. The Court of Appeals reasoned that it, "of course, serves a different role from that of a circuit court and is not a finder of fact . . . ." COA Opinion, p 23.

Regarding the exclusion of evidence about oil spill risks and the resulting pollution, impairment, and destruction of natural resources under MEPA, the Court of Appeals focused on the word "conduct" when it stated that several appellants "contend that the Commission erred by failing to consider the risks of oil spills from Line 5 as a whole when making its environmental findings. But the proceedings at issue involved an application for the Replacement Project, and the 'conduct' sought to be 'authorized or approved' was the Replacement Project." *Id*. at 24. The Court did not address arguments raised by Appellants regarding the meaning and import of the phrase "has or is likely to have such an effect," and what that requires of the Commission in its MEPA analysis. The Court affirmed the Commission's decision and adopted its interpretation of the scope of effects that must be considered under MEPA. *Id*. It held that the Commission correctly looked only to the "desired 'conduct'" proposed by the applicant pursuant to the plain language of MCL 324.1705(2). *Id*.

The Court of Appeals went on to reject the argument that the Commission's failure to consider oil spills—likely to result from the Project—led to a flawed alternatives analysis. Notably, the Court of Appeals stated, "We acknowledge that it is concerning that the PSC, when discussing rail transport, looked to the effect of rail being used for the entire transport system . . . the Commission mentioned, for example, how many rivers and wetlands a rail system would cross but then did not mention the same statistics for Line 5 as a whole." *Id*. at 24; see, e.g., December 1, 2023 Final Order, pp 339, 341.

The Court of Appeals also rejected the arguments about the Commission's improper consideration of greenhouse gases. The Court once again deferred to the Commission, (1) stating that the Commission supported its conclusions with reference to certain testimony; and (2) acknowledging the Commission's lack of explanation for why it did not emphasize certain effects over others but concluding that sufficient support existed. COA Opinion, p 28.

The Court of Appeals also stated that the Commission considered the evidence submitted in the case, but did not reference the evidence that was excluded and not considered.

STANDARD OF REVIEW

This Application presents two legal issues that are subject to de novo review by this Court. The first issue is whether the Court of Appeals applied the appropriate standard of review under MEPA. "As a general proposition, this Court reviews de novo questions of law." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 97; 754 NW2d 259 (2008). A lower court's choice of the appropriate standard of review, including whether a statute requires one in particular, is a question of law, which is reviewed de novo on appeal. See *Palo Grp Foster Care, Inc v Mich Dep't of Social Servs*, 228 Mich App 140, 145; 577 NW2d 200 (1998). The second issue addresses the Commission's interpretation of MEPA—where it misinterpreted and then incorrectly applied Section 1705(2) by reviewing the Project and its alternatives on vastly different terms—and the Court of Appeals' affirmance of that statutory interpretation. Questions of statutory interpretation are reviewed de novo. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011).

HISTORY AND SCOPE OF MEPA

The case rests on Michigan's bedrock constitutional and statutory environmental protection framework. Michigan's Constitution expressly prioritizes environmental protection and obligates the Legislature to advance that goal:

> 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. [Const 1963, art IV, § 52.]

This Court has held that this constitutional declaration imposes a "mandatory legislative duty to act to protect Michigan's natural resources." *Vanderkloot*, 392 Mich at 178-79. "[F]ollowing its constitutional mandate, the Legislature led the national conservation and

environmental protection movement by enacting the Michigan Environmental Protection Act" in 1970. *Lakeshore Group v Michigan*, 510 Mich 853, 856; 977 NW2d 789 (2022) (WELCH, J., dissenting).

Section 1705(2) of MEPA sets forth the requirements for agencies and reviewing courts in connection with administrative proceedings:

> In administrative, licensing, or other proceedings, *and in any judicial review of such a proceeding*, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, *shall be determined*, and conduct *shall not be authorized or approved* that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare. [MCL 324.1705(2) (emphasis added)].

MEPA provides that administrative agencies and reviewing courts must determine "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources," and forbids the approval of a project "that has or is likely to have such an effect if there is a feasible and prudent alternative." *Id.* Soon after MEPA's enactment, this Court recognized that it "represents a comprehensive effort on the part of the legislature to preserve, protect and enhance the natural resources so vital to the well being of this State." *Vanderkloot*, 392 Mich at 183. This Court further described the significance and purpose of MEPA as implementing "a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies," in recognition that "[n]ot every public agency proved to be diligent and dedicated defenders of the environment." *Ray v Mason Co Drain Comm'r*, 393 Mich at 305; 224 NW2d 883 (1975). In sum, through the enactment of MEPA pursuant to its constitutional mandate, the Legislature "impose[d] 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." *Id.* at 306.

ARGUMENT

This case presents the Supreme Court with an opportunity to clarify its MEPA precedent. See *Lakeshore Group*, 510 Mich at 862 (WELCH, J., dissenting from order denying application for leave to appeal, joined by MCCORMACK, C.J., and CAVANAGH, J.) ("The Court has missed an opportunity to clarify its precedent and the applicability of MEPA to final administrative decisions authorizing conduct that will or is likely to harm our state's natural resources or the

public trust in those resources."). The Court of Appeals' decision in this case introduces the risk of uncertainty and inconsistency in lower courts' interpretation and application of MEPA. The Court of Appeals erred in two important ways. First, it applied a deferential standard of review rather than independently determining environmental impacts de novo, as MEPA and this Court's precedents require. Second, the Court of Appeals affirmed the Commission's narrow interpretation of MEPA's scope to exclude evidence of oil spill risk and thereby improperly restricted the requisite alternatives analysis. If left uncorrected, these legal errors will muddy the waters of the State's MEPA jurisprudence. This Court's review is necessary to clarify how lower courts must discharge their responsibility to fulfill MEPA's mandate. See *id.* (WELCH, J., dissenting) (recognizing a need for courts "to analyze the intricacies of how MEPA interacts with an agency's duties under specific permitting statutes"); *id.* at 853 (BERNSTEIN, J., concurring) ("Like Justice Welch, I am troubled by some of the uncertainty and inconsistency in the interpretation of MEPA."). Accordingly, we respectfully request that this Court grant this application in order to correct an appellate decision in conflict with this Court's precedents, to reinforce the Legislature's intent and goals in enacting MEPA, and to uphold the Michigan Constitution's "paramount public concern" for protecting the air, water, and natural resources that are so vital to Tribal Nations and all Michiganders.

I. THIS CASE WARRANTS REVIEW TO CORRECT THE COURT OF APPEALS' APPLICATION OF THE WRONG STANDARD OF REVIEW UNDER MEPA.

Both the Applicants, as Intervenors below, *and Enbridge* urged the Court of Appeals that it must review the Commission's MEPA determinations de novo under this Court's decision in *WMEAC*, 405 Mich at 752-55. See Excerpt from Enbridge's Brief (Attachment 4). The Court of Appeals, however, expressly declined to follow *WMEAC*, instead adopting a deferential standard of review. That decision contravenes the plain language of MEPA, which mandates that "in any judicial review" of an administrative proceeding, the environmental impacts of the proposed conduct "shall be determined." MCL 324.1705(2). This Court, in *WMEAC*, held that "[c]ourts can discharge their responsibility to make such determinations" under MEPA "only if they make independent, de novo judgments." 405 Mich at 753. The Court of Appeals' attempt to distinguish *WMEAC* makes new law and does not withstand scrutiny. This Court can correct the Court of Appeals' legal error and provide clear direction on the standard of review applicable to MEPA

claims to ensure that lower courts properly and consistently discharge their responsibility under MEPA.

A. MEPA Requires Independent De Novo Determinations by Courts.

This case involves the obligations that MEPA imposes upon administrative agencies and the courts reviewing administrative proceedings. MEPA requires that courts make independent de novo determinations of a proposed project's actual and likely environmental impacts.

1. *MEPA's Plain Language Reflects the Legislature's Intent that Courts Make Independent De Novo Determinations of Environmental Impacts.*

The plain language of Section 1705(2) of MEPA, quoted in full above, sets forth the requirements for agencies and reviewing courts in connection with administrative proceedings: It directs that both in the underlying administrative proceedings and in judicial review of those proceedings, the environmental impacts of proposed conduct "shall be determined," and then directs that the conduct "shall not be authorized or approved" if it has or likely will have negative impacts and a "feasible and prudent alternative" exists. MCL 324.1705(2).

This Court "interpret[s] statutes to discern and give effect to the Legislature's intent" by "focus[ing] on the statute's text" where "undefined terms are presumed to have their ordinary meaning" and the statute is "considered as a whole, reading individual words and phrases in the context of the entire legislative scheme. Unambiguous statutes are enforced as written." *Daher v Prime Healthcare Servs-Garden City, LLC*, ___ Mich ___; ___ NW2d ___ (2024) (Docket No. 165377), 2024 WL 3587935, at *4 (quoting *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs*, 500 Mich 362, 373; 902 NW2d 293 (2017)) (Attachment 5). The ordinary meaning of to "determine" is "to fix conclusively or authoritatively" or "to find out or come to a decision about by investigation, reasoning, or calculation." See Merriam-Webster, *Determine* <https://www.merriam-webster.com/dictionary/determine> (accessed April 1, 2025).[6] Moreover,

[6] See *People v. Wood*, 506 Mich 114, 122; 954 NW2d 494 (2020) (recognizing that the Supreme Court consults dictionary definitions to determine the plain and ordinary meaning of words). The Minnesota Supreme Court has ascertained the plain meaning of "determine" by consulting dictionary definitions, which it summarized as follows:

> One definition ascribed to the word "determine" is "to find out or come to a decision about by investigation, reasoning, or calculation." Merriam–Webster's Collegiate Dictionary 340 (11th ed. 2014). Another source defines "determine" as "to settle or

"[t]he Legislature's use of the word 'shall' . . . indicates a mandatory and imperative directive." *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014); see also *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002) ("The phrases 'shall' and 'shall not' are unambiguous and denote a mandatory, rather than discretionary action."). The statutory text of Section 1705(2) thus plainly and unambiguously places a mandatory obligation on a reviewing court, as well as on the administrative agency, to determine—i.e., to conclusively decide based on investigation, reasoning, and calculation—any "pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources." MCL 324.1705(2).

This does not allow for judicial deference to the agency. While an agency must make its own determination during the administrative proceeding, the statutory text separately imposes upon a court "in any judicial review of such a proceeding" an independent and distinct obligation to itself determine the environmental impacts. Section 1705(2) does not direct or allow a court to defer to an agency's determination of those impacts; instead, it directs the court to make its own independent determination. Moreover, "[w]hen interpreting a statute," as this Court recently explained, the Court's "purpose is to ascertain and effectuate the legislative intent at the time it passed the act." *Daher*, 2024 WL 3587935, at *4. The Legislature enacted MEPA to make "a dramatic change" in how "the important task of environmental law enforcement" functions in the State by shifting this responsibility away from the administrative agencies to the courts. *Ray*, 393 Mich at 305. MEPA reflects the legislative intent to remove deference to agency environmental determinations and, instead, require independent de novo environmental determinations by courts.

> decide (a dispute, question, etc.) by an authoritative or conclusive decision." The Random Dictionary of the English Language 542 (2d ed. 1987). Lastly, Black's Law Dictionary defines "determine" as "[t]he act of finding the precise level, amount, or cause of something." Determine, Black's Law Dictionary (11th ed. 2019). To summarize, these unambiguous and synonymous definitions of "determine" mean the process of making a decision. [*Hibbing Taconite Co, J.V. v. Comm'r of Revenue*, 958 NW2d 325, 329 (Minn, 2021).]

2. *This Court's Precedents Hold that MEPA Requires Independent, De Novo Determinations of Environmental Impacts by Courts.*

Consistent with MEPA's plain language and the statutory purpose, this Court has recognized that "the Michigan environmental protection act requires independent, de novo determinations by the courts." *WMEAC*, 405 Mich at 752. "The environmental protection act would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands." *Id.* at 754. Accordingly, MEPA "provides for de novo review in Michigan courts, allowing those courts to determine any adverse environmental effect and to take appropriate measures." *Nemeth*, 457 Mich at 30. "'Michigan courts are not bound by any state administrative finding.'" *Id.* at 31 (quoting *Her Majesty the Queen v Detroit*, 874 F2d 332, 341 (CA 6, 1989)); see also *Her Majesty the Queen*, 874 F2d at 338 (finding MEPA requires courts to exercise "independent judgment" and "[t]his de novo review feature of MEPA is based on the fact that, as recognized by Michigan's Supreme Court, 'not every public agency proved to be diligent and dedicated defenders of the environment'" (citing *WMEAC*, 405 Mich at 753-54; quoting *Ray*, 393 Mich at 305)); *Nemeth*, 457 Mich at 30-31 (citing with approval the discussion of MEPA in *Her Majesty the Queen*, 874 F2d at 337, 341).

In *WMEAC*, this Court held that the trial court erred under MEPA by deferring to the Michigan Department of Natural Resources' ("DNR") conclusion that no pollution, impairment, or destruction of the environment would result from drilling oil and gas wells in a state forest. 405 Mich at 751-54. The DNR initiated an administrative proceeding to grant drilling leases and permits to oil companies. Environmental groups intervened, invoking MEPA, and separately filed suit to enjoin DNR from issuing the permits. *Id.* at 748-50. After both the trial court and the Court of Appeals denied injunctive relief, this Court granted the environmental groups' application for leave to appeal. *Id.* at 750.

The environmental groups in that case argued that the trial court erred by deferring to the DNR's conclusion that no environmental harm would result from the contemplated drilling, rather than independently determining whether such harm would occur. *Id.* at 752. This Court addressed that argument by considering each section of MEPA, including the language presently

contained in Section 1705(2),[7] and recognized that in the statute, "the Legislature specifically addressed the relationship between suits brought under the environmental protection act and administrative proceedings." *Id.* at 752-53. The Court emphasized that under MEPA, Michigan courts have "a responsibility to 'adjudicate' and 'determine' whether 'adequate protection from pollution, impairment or destruction has been afforded.'" *Id.* at 753. The Court then stated that Michigan "[c]ourts can discharge their responsibility to make such determinations only if they make independent, de novo judgments." *Id.* The Court observed that, "[s]hortly after the environmental protection act was passed, its chief legislative sponsor stated that 'under the new statute, courts may inquire directly into the merits of environmental controversies, rather than concern themselves merely with reforming procedures or with invalidating arbitrary or capricious conduct.'" *Id.* at 754 (quoting State Representative Thomas Anderson).

Based on this analysis, the Court in *WMEAC* "conclude[d] that the trial judge erred in failing to exercise his own totally independent judgment." *Id.* But rather than remand the case to the lower courts, *this Court itself proceeded to perform the independent, de novo review of the record that MEPA requires*, ultimately finding that the environmental organizations demonstrated a likelihood of impairment or destruction of natural resources as a result of the proposed drilling. *Id.* at 754-760. The Court therefore "conclude[d] that a judgment in favor of [the environmental organizations] is required on the record presented." *Id.* at 754.

This Court's decision in *WMEAC* remains good law and is the seminal analysis of what MEPA requires of Michigan courts in cases involving environmental impacts, including when reviewing MEPA claims challenging agency decisions. See *Lakeshore Group*, 510 Mich at 858-62 (WELCH, J., dissenting from order denying application for leave to appeal, joined by MCCORMACK, C.J., and CAVANAGH, J.) (discussing *WMEAC*); *Nemeth*, 457 Mich at 32-35 (discussing *WMEAC*). Panels of the Michigan Court of Appeals have repeatedly recognized *WMEAC* as the controlling precedent regarding the standard of review for claims brought under MEPA. See *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 487-90; 608 NW2d 531 (2000) ("In a MEPA case, it is error requiring reversal for the trial court to defer to an administrative agency's conclusion that no pollution, impairment, or destruction of a natural resource will occur." (citing *Nemeth*, 457 Mich at 34; *WMEAC*, 405 Mich at 752-54)); *Friends of*

[7] At that time, this section of MEPA, MCL 324.1705, was located at MCL 691.1205.

Crystal River v Kuras Props, 218 Mich App 457, 470-72; 554 NW2d 328 (1996) (rejecting the trial court's use of the "substantial evidence test" and holding that trial court was required to review the case de novo (citing *WMEAC*, 405 Mich at 752-53)); *Thomas Twp v John Sexton Corp of Mich*, 173 Mich App 507, 510-11, 515-17; 434 NW2d 644 (1988) (where the trial court "declined to engage in a de novo review of the [agency's] decision under MEPA," holding that "[t]o the extent this case involves MEPA issues, we will use a de novo standard of review" (citing *WMEAC*, 405 Mich at 752-54)); see also *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541, 546; 432 NW2d 315 (1988) ("However, the Supreme Court has clarified that 'the Michigan environmental protection act requires independent, de novo determinations by the courts.'" (quoting *WMEAC*, 405 Mich at 752)); *Mich Waste Sys v Dep't of Natural Resources*, 147 Mich App 729, 735; 383 NW2d 112 (1985) ("Under the Michigan Environmental Protection Act (MEPA), . . . review by the circuit court is de novo." (citing *WMEAC*)).

B. The Court of Appeals Misinterpreted *WMEAC* and Contravened the Legislature's Intent Reflected in MEPA's Plain Language.

Even though the Court of Appeals recognized that this Court's *WMEAC* decision requires de novo review in MEPA cases (COA Opinion p 23), it purported to distinguish *WMEAC* as "an environmental protection act case . . . filed in a circuit court" requiring simply "that a circuit court must look at the evidence de novo in a MEPA case." *Id.* The Court of Appeals reasoned that, whereas a circuit court must independently review an agency's MEPA determinations de novo, the Court of Appeals need not apply that standard of review when *it* considers an agency's MEPA determinations. *Id.* This distinction does not withstand scrutiny and puts the Court of Appeals in conflict with decisions of this Court and of other Court of Appeals' panels. This Court's intervention is required to restore jurisprudential uniformity to this critical issue for lower courts' interpretation and application of MEPA in this case and other cases.

First, this Court itself demonstrated in *WMEAC* that the "responsibility to make [MEPA] determinations" by "mak[ing] independent, de novo judgments" *extends to all "courts,"* not just to circuit courts. 405 Mich at 753. After concluding that a court's "fail[ure] to exercise [its] own totally independent judgment" under MEPA constituted reversible legal error, this Court itself then proceeded to make the required independent, de novo judgment "on the record presented," ultimately finding "a likelihood of impairment or destruction of natural resources … as a result

of the proposed drilling." *Id.* at 753-755. It is not surprising, then, that in citing and discussing *WMEAC* in other opinions since having decided it more than forty years ago, this Court has never limited *WMEAC's* holding solely to circuit courts. This Court's own resolution of *WMEAC* evidences conclusively that the obligation to make independent, de novo determinations under MEPA applies equally to appellate and trial courts.

Second, the Court of Appeals' errant interpretation of *WMEAC* puts it in conflict not only with that decision but with prior decisions of the Courts of Appeals. The Applicants have not located any other decision of the Courts of Appeals concluding that *WMEAC* applies only to judicial review by circuit courts. Indeed, the Court of Appeals previously rejected that very distinction in *Thomas Township*, where the reviewing court had "declined to engage in a de novo review of the [agency's] decision under MEPA, reasoning that de novo review would only have been appropriate if petitioner had filed an original action in circuit court." 173 Mich App at 511. Relying on *WMEAC*, the Court of Appeals rejected the trial court's reasoning as legally incorrect and "use[d] a de novo standard of review" for the MEPA issues. *Id.* (citing *WMEAC*, 405 Mich at 741, 752-54).

Third, there is no legal or logical basis for the Court of Appeals' distinction. Section 26 of the Railroad Commission Act provides that judicial review of orders of the Public Service Commission occurs in the first instance in the Court of Appeals. MCL 462.26(1). Other statutory schemes like the Administrative Procedures Act provide for initial judicial review of agency decisions at the circuit court level. See, e.g., MCL 24.303(1). There is no rational reason why the mandatory determinations of environmental impacts required under MEPA should be made differently depending on which court has been assigned the responsibility for reviewing an agency decision in the first instance. Put differently, it makes no sense that a Court of Appeals would defer to an agency's MEPA determinations, but a circuit court would make its own, independent, de novo determinations without deferring to an agency.

The Court of Appeals' observation that, in contrast with a circuit court, it "is not a finder of fact" (COA Opinion, p 23), makes the attempted distinction no more sensible, because *WMEAC* shows that independent, de novo determinations under MEPA are not the sole province of an agency or a trial court, but also must be made by appellate courts "on the record presented." *WMEAC*, 405 Mich at 754-55; see also *Friends of Crystal River*, 218 Mich App at 472 ("analyzing the MEPA claim" requires "a thorough review de novo of the entire record"

(citing *WMEAC*, 405 Mich at 741, 752-53)). This Court has recognized the difference between, on the one hand, "review de novo" based on "an examination of the entire record below and weighing of all the evidence presented there as if there had been no prior determination," and on the other hand, "trial de novo" involving an entirely new evidentiary proceeding before a fact-finder with new and original evidence. *Walker v Wolverine Fabricating & Mfg Co, Inc*, 425 Mich 586, 600, 616-618; 391 NW2d 296 (1986). In *WMEAC*, this Court performed the required independent review de novo, but it did not conduct a trial de novo or engage in new fact-finding. This refutes the Court of Appeals' reasoning that it "is not a finder of fact."

Finally, the Court of Appeals also attempts to distinguish a court's role under Section 1705(2) of MEPA, as in this case, from "factual circumstances" where "a circuit court us[es] an administrative tribunal to conduct certain proceedings" under Section 1704 of MEPA. COA Opinion, p 23 (citing MCL 324.1704). This is a distinction without a difference. In fact, in *both* sections of the statute, the Legislature used the same language requiring that courts "determine" environmental impacts. Just like Section 1705(2), Section 1704 also requires that "the court *shall adjudicate* the impact . . . on the air, water, or other natural resources," and "the court retains jurisdiction . . . *to determine* whether adequate protection from pollution impairment, or destruction is afforded." MCL 324.1704(2), (3) (emphasis added). "[U]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute." *Robinson v City of Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010) (citing *Paige v Sterling Hts*, 476 Mich 495, 520; 720 NW2d 219 (2006)). Rather than supporting the Court of Appeals' reasoning, comparison of these two sections of MEPA undermines it. Both Section 1704 and Section 1705(2) reflect the Legislature's intent that courts make independent, de novo determinations of environmental impacts under MEPA.

C. Clarification of the Standard of Review Is Needed to Ensure Lower Courts Properly and Consistently Discharge Their Responsibility Under MEPA.

This Court has the opportunity to clarify its precedent on the proper standard of review under MEPA. The Court of Appeals' decision in this case, applying the wrong standard of review, conflicts with decisions of this Court and other Courts of Appeals and introduces risk of uncertainty and inconsistency in other lower courts' MEPA decisions. Absent correction by this Court, lower courts will lack the necessary guidance on when and how, consistent with this Court's *WMEAC* decision, they must "discharge their responsibility" under MEPA to

"'determine' whether 'adequate protection from pollution, impairment or destruction has been afforded" by "mak[ing] independent, de novo judgments." 405 Mich at 753. This Court's review and clarification are needed for several reasons.

First, only this Court can resolve the conflict between the Court of Appeals' decision and this Court's decision in *WMEAC*. The Court of Appeals' attempt to distinguish *WMEAC* does not withstand scrutiny, as discussed above, but so long as its published opinion stands uncorrected, lower courts will lack direction on reconciling the Court of Appeals' reasoning and this Court's precedent. Moreover, this Court's review can also bring clarity to inconsistencies between the Court of Appeals' decision in this case and other decisions where the Courts of Appeals reviewed MEPA claims de novo, and still other decisions where the Court of Appeals applied a clearly erroneous standard of review to trial courts' factual findings under MEPA. See cases cited above at pages 5-6. This Court can, and should, eliminate uncertainty and inconsistency in lower courts' interpretation and application of MEPA by reviewing, and reversing, the Court of Appeals' erroneous decision in this case.

Second, a material injustice will occur, and a fundamental failure of the state's jurisprudence effectuating MEPA will persist, if this Court does not accept this appeal and correct the Court of Appeals' use of the wrong standard of review. Even though this case involves the permit decision for an unprecedented Project with enormous environmental consequences, ***no court has*** independently determined the Project's environmental impacts de novo under MEPA, and ***no court will*** do so unless this Court requires such review. This results from the combination of two strands of the State's MEPA jurisprudence developing in the Courts of Appeals: (1) the Court of Appeals' decision in *Lakeshore Group v Michigan*,[8] and (2) the decision at issue here. As Justices of this Court have pointed out, "[t]he Court of Appeals' decision in [*Lakeshore Group*] demonstrates that" the Supreme Court's decision in "*Preserve the Dunes*[9] has been read to foreclose *all* direct MEPA challenges against government agencies that are based on the issuance of a permit or license authorizing third-party conduct that will or is

[8] See *Lakeshore Group v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued December 18, 2018 (Docket No. 341310), 2018 WL 6624870 (cited for reference and not for a proposition of law; a copy of the opinion is Attachment 6).

[9] *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004).

likely to harm the state's natural resources." *Lakeshore Group,* 510 Mich at 860 (WELCH, J., dissenting) (emphasis in original). This is "a matter of practical and jurisprudential importance." *Id.* It means that the Court of Appeals "applie[s] *Preserve the Dunes* as a blanket rule that denies the ability of persons to sue a state agency when the person claims that the issuance of a permit or license violates MEPA." *Id.* at 859. The only option to challenge a permitting decision is "to utilize the administrative appeal process." *Id.*

As a result of this "blanket rule," here, the Applicants could not have obtained judicial review of the Commission's issuance of a permit in the circuit court by filing a direct MEPA lawsuit. The Court of Appeals has foreclosed that option. The only option available to the Applicants was the administrative appeal process. Yet, despite the Applicants' engagement in that process, the Court of Appeals has now decided that it defers to the Commission's MEPA determinations; the Court does not make its own independent, de novo determinations. In short, the Applicants cannot obtain independent, de novo judicial review from the Court of Appeals, or from any other court. Thus, ***no court*** will fulfill MEPA's requirements here. Unless this Court corrects it, this material injustice not only affects the Applicants here but also threatens to prejudice other persons desiring to challenge agency permit decisions and to undermining MEPA's salutary goals.

Finally, without this Court's review and direction, the Court of Appeals' decision risks opening the door to other lower courts erroneously applying agency enabling statutes, as the Court of Appeals did here, to effectively override the requirements of MEPA by replacing independent, de novo judicial review with deference to the agency. In this case, the Court of Appeals adopted a deferential standard of review applicable to Public Service Commission orders fixing rates, fares, charges, classifications, regulations, practices, or services. COA Opinion, p 18 (citing MCL 462.25 and MCL 462.26). The Court of Appeals ruled that "[i]n all appeals" of those types of orders "the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." *Id.* (citing MCL 462.26(8)). It further ruled that "practices and services prescribed by the [Commission] are presumed, prima facie, to be lawful and reasonable." *Id.* (citing MCL 462.25). The Court explained that, in its view, the Commission is given "a broad range or zone of reasonableness within which [it] may operate" and "the hurdle of unreasonableness is high." *Id.* (internal quotations omitted). The Court of Appeals concluded that

it "gives due deference to the PSC's administrative expertise and is not to substitute its judgment for that of the PSC." *Id.* (internal quotations omitted).

These strong statements of deference to the Commission, which the Court grounded in the Commission's enabling statute, are contrary to MEPA's plain language, the Legislature's intent in enacting the statute, and the "common law of environmental quality" developed by the courts applying MEPA's mandate. The Court of Appeals' decision sets a precedent that other lower courts could follow to interpret other agency enabling statutes to allow courts to defer to agencies' MEPA determinations. Moreover, the Court of Appeals' deference to the Commission here cannot be grounded in any specific agency expertise related to MEPA, the purpose of which is "the protection of the air, water, and other natural resources ... from pollution, impairment, or destruction." MCL 324.1701(1). The Legislature's intent in enacting MEPA was to *remove* deference to agency environmental determinations and, instead, to require independent, de novo environmental determinations by courts. The Court of Appeals' decision defeats that legislative purpose. This Court can correct that error and prevent other lower courts from repeating it.

D. The Court of Appeals' Error Was Not Harmless.

The Court of Appeals' erroneous application of a deferential standard of review was not a harmless error. Rather, while MEPA and this Court's precedents required the Court of Appeals to make independent, de novo determinations, the Court of Appeals explicitly acknowledged that the standard of review it chose prevented the Court of Appeals from "substitut[ing] its judgment for that of the PSC." COA Opinion, p 18. The Court of Appeals' position runs counter to what MEPA requires. This Court explained in *WMEAC* that, while a court might be "reluctan[t] to substitute [its] judgment for that of an agency . . . the Michigan environmental protection act requires independent, *de novo* determinations by the courts." 405 Mich at 752. As a result of applying the wrong, deferential standard of review, the Court of Appeals did not review with any rigor, much less grapple with, the limited subset of evidence that the Commission had allowed the Applicants, as Intervenors below, to present regarding the Project's actual and likely pollution, impairment, and destruction of the environment.

For example, although the record contained evidence showing the likely effects of greenhouse gas pollution that would result from the Project, the Court of Appeals did not evaluate the merits of that evidence because it determined that, under its deferential standard of review, the Court need only ensure that the Commission "cited to transcript pages" that

"supported its conclusions." COA Opinion, p 28. The Court of Appeals stated that "[t]he bottom line is that the Commission considered the evidence presented in the contested case, which is what it was tasked with doing." *Id.* at 29. In other words, the Court of Appeals did not review the substance of the evidence cited by the Commission, or the rest of the record; instead, the Court merely satisfied itself that the Commission had "considered" certain evidence.[10] If the Court of Appeals had reviewed the evidence of greenhouse gas pollution de novo, it would have recognized that neither Enbridge nor the Commission presented an analysis of the likely effects of greenhouse gas pollution that would result from constructing the tunnel beneath the Straits of Mackinac and thereby extending the life of the pipeline crossing the Straits to enable the transport of oil through it for another 99 years (versus the existing pipeline crossing along the lakebed either being decommissioned or reaching the end of its useful life). Only the Applicants, as Intervenors below, presented such an analysis, and it showed that the tunnel will increase carbon emissions by tens of millions of tons each year. COA Opinion, pp 27-28. Although the Court of Appeals pointed to the Commission's assertion that its staff member's testimony "disputed" the Intervenors' expert evidence, the "cited evidence" actually confirms that staff simply adopted a "baseline assumption" that, with or without the tunnel, there would be no change in the demand for oil, no change in the volume of oil transported, and therefore no

[10] The Court of Appeals' review—far from de novo—does not come close to a clearly erroneous standard of review either. Nor did the Court of Appeals purport to apply that standard, for the words "clearly erroneous" do not appear in its opinion. As this Court has held, applying a clearly erroneous standard requires the reviewing court to conduct "a review of the entire record of th[e] case," utilizing a "judicial sieve" that in a non-jury case "is of finer mesh" than on review of a jury's verdict. *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976). After conducting this review, a court may conclude that a finding is clearly erroneous only if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* The Court of Appeals did not even attempt to apply that standard in this case. Yet, as noted above, some other panels of the Court of Appeals considering MEPA claims have applied a clearly erroneous standard of review to factual findings made by a trial court, though not to findings made by an administrative agency. See *Preserve the Dunes*, 264 Mich App at 259; *Cipri*, 235 Mich App at 8-9; *Trout Unlimited*, 209 Mich App at 456; *City of Portage*, 136 Mich App at 279. These decisions are inconsistent with the Court of Appeals' decision in this case, and also with this Court's decision in *WMEAC*, further demonstrating the need for the Supreme Court to clarify the proper standard of review under MEPA.

change in greenhouse gas pollution from that oil. COA Opinion, p 28 (citing December 1, 2023 Final Order, p 345 (citing 12 Tr 1771-77, 1791-92)).[11]

All of the greenhouse gas pollution that the Intervenors' experts showed through analysis and calculation, the Commission's staff just assumed away. The Court of Appeals' deferential standard of review caused it to overlook this fundamental flaw.

II. THIS CASE WARRANTS REVIEW TO CORRECT THE COMMISSION'S AND THE COURT OF APPEALS' IMPROPERLY NARROW INTERPRETATION OF MEPA.

MEPA mandates that administrative agencies and courts effectuate its critical purpose and support the constitutional underpinnings of the statute to avoid destruction of the State's irreplaceable natural resources. MEPA prescribes an evaluation of *all* likely effects of the conduct at issue in an administrative proceeding through the statutory language "has or is likely to have such an effect." See MCL 324.1705(2). An administrative agency and a reviewing court must analyze those effects to make the requisite determination of whether a project will result in the pollution, impairment, or destruction of natural resources. In this case, the stakes could not be higher. Line 5 has spilled many times since its construction, and it threatens waterways throughout the state, yet intervening parties were not even allowed to submit evidence about the extent and ramifications of this threat. The Project involves boring a massive and unprecedented tunnel under the Straits which will extend the life of Line 5 for 99 years. This is exactly the kind of undertaking that will affect Michigan's Great Lakes, their tributaries, inland streams, shorelines, fisheries, and numerous other resources, and that requires a thorough MEPA review.

Instead, the Commission failed to follow MEPA in three ways. First, it improperly limited the meaning of the phrase "has or is likely to have such an effect" and barred the Applicants, as Intervenors below, from submitting critical evidence about impairments that flow from the Project, including those the impacts of an oil spill. Second, even though the pipeline

[11] The Commission staff member's testimony confirming staff's "baseline assumption" is contained in Attachment 7. Direct Testimony of Alex Morese, 12 Tr 1770-71, 1774 (Doc No. U-20763-1070) ("Staff provided [its outside consultants] with baseline assumptions for their evaluation of GHG emissions," including the assumption that a "Line 5 shutdown would not alter the demand at market end points for the product transported on Line 5," and "[v]olumes shipped would remain consistent with historical averages," and "[t]herefore, emissions associated with extraction and end use are assumed to remain relatively unchanged for this analysis").

will operate far longer if the tunnel is approved and the perpetuation of known oil spill risks is a direct effect of the proposed Project, the Commission excluded this entire category of pollution and impairments from the record. Third, the Commission's flawed interpretation of MEPA contaminated its alternatives analysis by omitting information about the oil spill risks from the Project but while including information about oil spill risks from the alternatives.

The Court of Appeals erroneously affirmed the Commission's decision and narrowed MEPA in a way that threatens to undermine or confuse legal principles of great significance to the state's jurisprudence and MEPA's goal of protecting the state's resources and the environment. MCR 7.305(B)(3). Moreover, despite acknowledging that the Commission's irrational alternatives analysis was concerning, the Court of Appeals upheld it anyway—in part because it was applying the wrong standard of review. These improper decisions that erode Michigan's bedrock environmental protection statute must be reviewed and overturned.

A. MEPA Requires an Agency to Evaluate the Full Scope of Pollution and Environmental Impairments of the Conduct at Issue in a Permit Proceeding.

MEPA requires a thorough assessment of the likely effects of a project at issue in an administrative permit proceeding to determine whether, and to what extent, it will pollute, impair, or destroy water and other natural resources in Michigan. MCL 324.1705(2). In *Vanderkloot*, this Court recognized that MEPA "is a source of supplementary substantive environmental law" and not just a procedural statute. 392 Mich at 184. MEPA "imposes a duty" on the Commission to prevent or minimize degradation of the environment. See *Ray*, 393 Mich at 306.

The statutory language "likely to have such an effect" requires an agency to undertake a comprehensive consideration of the potential effects of the conduct under review. MCL 324.1705(2). Although the word "effect" is not defined, it must be given its common and ordinary meaning. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 159; 615 NW2d 702 (2000), citing *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). "Effect" means "something produced by an agent or cause; a result, outcome, or consequence." *Black's Law Dictionary* (11th ed 2019). Nothing in Section 1705(2) of MEPA limits or circumscribes the scope of what should be considered as likely effects.

MEPA further requires agencies to consider the existence of feasible and prudent alternatives when it determines that the project will impair natural resources. MCL 324.1705(2);

see also *Vanderkloot*, 392 Mich at 183-85. A proper evaluation of the potential effects of the proposed project is integral to the MEPA alternatives analysis because it is critical to compare the likely effects of the conduct under review to the likely effects of the alternatives.

B. The Commission and Court of Appeals' Failure to Consider Oil Spills Along Line 5 that Will Result from the Project Warrants This Court's Review to Correct Their Erroneous Interpretation and Further Develop the Law Related to the Scope of MEPA's Requirement to Consider Likely Effects of the Project.

The Court of Appeals improperly affirmed the Commission's decision related to whether oil spills outside of the Straits should be considered in a MEPA analysis. The Commission improperly interpreted MEPA in its April 2021 In Limine Order granting Enbridge's motion to exclude evidence of the history and risks of oil spills from Line 5. April 21, 2021 In Limine Order, pp 63-64. The Applicants, as Intervenors below, explained that evidence about the risk of oil spills from Line 5 in Michigan was relevant pursuant to the MEPA analysis because the risk of oil polluting the State from the continued operation of Line 5 is a likely effect of the Project.[12] Indeed, Line 5 has had numerous leaks and spills, posing a grave threat to waterways along its route.[13] Future leaks and spills are likely.[14]

The Commission, however, ruled that "the application of MEPA is limited to the conduct at issue . . ." and it considered only potential environmental impacts from the tunnel's construction (such as noise, dust, and particulate emissions)[15] and greenhouse gas emissions but

[12] See, e.g., Joint Response to Motion In Limine by MEC, GTB, Bay Mills, et al., pp 26-28 (Doc No. U-20763-0326).

[13] In Wisconsin, as a result of the oil spill threat Line 5 poses to the Bad River and the Bad River Band reservation, Enbridge is proposing a reroute of its pipeline. See Wisconsin Dep't of Natural Resources, *Enbridge Pipeline Projects in Wisconsin* <https://dnr.wisconsin.gov/topic/EIA/Enbridge.html> (accessed April 1, 2025).

[14] See Joint Petition for Rehearing by Tribal Intervenors, p 5 (Doc No. U-20763-0767), citing National Wildlife Federation's Petition to Intervene, Affidavit of Bruce Wallace, p 4 (Doc No. U-20763-0126) and Garrett Ellison, *Enbridge Line 5 has spilled at least 1.1M gallons in past 50 years*, MLive (April 26, 2017), <https://www.mlive.com/news/2017/04/enbridge_line_5_spill_history.html> (accessed April 1, 2025).

[15] Importantly, the Commission excused itself from considering other environmental impacts on the grounds that other agencies would consider them in their permitting processes. December 1, 2023 Final Order, at 328. MEPA does not allow agencies to abdicate their obligations to consider

did not consider the likely effect of oil spills from the continued operation of Line 5 in Michigan. See December 1, 2023 Final Order, pp 328-29. This reasoning and interpretation is unsupported by the law.

The Court of Appeals affirmed the Commission's holding with little analysis and, tellingly, no interpretation of what the phrase "has or is likely to have such an effect" means in MEPA. See COA Opinion, p 24. The Court merely noted that "the proceedings at issue involved an application for the Replacement Project, and the 'conduct' sought to be 'authorized or approved' was the Replacement Project." *Id*. at 24 (quoting Section 1705(2)). Thus, the Court reasoned, "[t]he Commission, by looking to the desired 'conduct,' was following the plain language of [the statute]." *Id*. In reaching its conclusion, the Court cited *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007), for the proposition that, when interpreting a statute, courts cannot read something into a statute that does not appear in the text and they can only go beyond the words of statute to ascertain the Legislature's intent when the statute is ambiguous. *Id*. But no appellants asked the Court of Appeals to go beyond the text of Section 1705(2). Instead, they asked the Court of Appeals to give force to the phrase "has or is likely to have such an effect," which appears in the plain text of the statute. The Court of Appeals failed to do so. Its brief analysis did not analyze, or even restate, the arguments made by various appellants that pursuant to MEPA, the "conduct" that is under review can have or is likely to have an "effect" that extends beyond the immediate footprint of that conduct.

Under the plain language of MEPA, the risk of oil spilling from Line 5 in Michigan is an effect of the Project that must be considered because oil is a pollutant that can negatively impact air, water, and other resources. Indeed, the threat that oil spills pose to fishery resources is one of several concerns that motivated the Tribal Intervenors to intervene in this permit proceeding. See, e.g., LTBB Petition to Intervene, pp 3-5 (Doc No. U-20763-0165); GTB Petition to Intervene, pp 3-5 (Doc No. U-20763-0110). Citing researchers from Michigan Technological University, the Notice of Revocation and Termination of Easement recognizes, "[c]rude oil

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environmental impacts. Indeed, the permit conditions upon which the Commission relied are now subject to change because Enbridge was required to reapply for its permits and only submitted its new application on March 3, 2025. Mich Dep't of Environment, Great Lakes, and Energy, *MiEnviro Portal* <https://mienviro.michigan.gov/nsite/map/results/detail/2746869251480183093/documents> (accessed April 1, 2025).

contains toxic compounds that would cause both short- and long-term harm to biota, habitat, and ecological food webs." Notice of Revocation & Termination of Easement, Exhibit ELP-18, p 8 (Doc No. U-20763-1046) (TI Appendix N at 720), citing Mich Tech Univ, *Independent Risk Analysis for the Straits Pipelines* (September 15, 2018), pp 166-69, 176, 181-85 <https://www.michigan.gov/psab/-/media/Project/Websites/psab/archive/media/Straits_Independent_Risk_Analysis_Final.pdf> ("Michigan Tech Report"). The Michigan Tech Report recognizes that an oil spill threatens natural resources, "including fish, wildlife, beaches, coastal sand dunes, coastal wetlands, marshes, limestone cobble shorelines, and aquatic and terrestrial plants, many of which are of considerable ecological and economic value." *Id.* at 165.

Tribal Intervenors have staff scientists who were prepared to testify about the critical resources threatened by an oil spill from Line 5. Tribal Intervenors' Petition for Leave to Appeal, pp 13-14, 27 (Doc No. U-20763-0622). The Tribal Intervenors should have been permitted to develop these points and present evidence on them in the contested case. Evidence about the oil spill risks presented by Line 5 is central to the required analysis of likely environmental effects under Section 1705(2) of MEPA.

The Commission's failure to consider significant, likely impairments, including oil spills, prevented it from understanding fully the Project's effects and contaminated its alternatives analysis and fulfilling its MEPA obligations.

C. This Court Can Clarify the Scope of MEPA by Recognizing that the Pipeline Segment's Precarious Future Demands that Pollution and Impairment from Future Operation of the Pipeline Be Considered as an Effect of the Project Under MEPA.

The Commission's issuance of a permit to Enbridge's Application will secure and extend the operation of Line 5 in Michigan for decades and the likely effects of its continued operation include oil spills. It is unreasonable to conclude that Enbridge will be able or permitted to operate the 71-year-old Dual Pipelines in the Straits of Mackinac indefinitely. Indeed, the existing lakebed segment to be replaced is subject to ongoing litigation, where the Attorney General is seeking to have it shut down on public trust and MEPA grounds. *Nessel v Enbridge Energy, Ltd*, No. 19-474-CE (Ingham Co Cir Ct, 2019). In addition, Governor Whitmer revoked and terminated the easement that authorized Enbridge to operate the Dual Pipelines across the Straits. Notice of Revocation & Termination of Easement, Exhibit ELP-18 (Doc No. U-20763-1046). These circumstances not only show the likelihood that the proposed Project would extend

the operational life of Line 5 in Michigan but also necessitate consideration of the effects of allowing the Project to proceed.[16]

MEPA mandates that "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, *shall be determined*." MCL 324.1705(2) (emphasis added). This Court has interpreted this statutory mandate broadly. See *Nemeth*, 457 Mich 16, at 25 (explaining that the showing of harm "is not restricted to actual environmental degradation but also encompasses probable damage to the environment as well") (quoting *Ray*, 393 Mich at 309). In *WMEAC*, this Court considered the impact of new road construction on the wildlife population in the Pigeon River Country State Forest as part of its MEPA review of a permit for exploratory oil wells, even though issuance of the permit for the wells was the conduct at issue before the circuit court, because without the permit the roads would not be built. *WMEAC*, 405 Mich at 741, 756-57.

Contrary to this Court's precedent, neither the Commission nor the Court of Appeals properly considered how a shutdown of the Dual Pipelines would alter the effects of the proposed conduct under MEPA. See COA Opinion, p 24. Because the Project is likely to have the effect of extending Line 5's operation for decades, the Commission erred by excluding key evidence about impairments and pollution posed by the Project. For example, if the Applicants, as Intervenors below, had been allowed to conduct discovery and introduce evidence showing that Enbridge will operate Line 5 in its current condition only for three to five more years if it does not undertake the Project but will operate Line 5 for another 80 years if the Project is completed, then an additional 75+ years of operation is an effect of the conduct in this proceeding.[17] The Commission's interpretation of MEPA to preclude this analysis of likely effects was legally incorrect, as was the Court of Appeals' decision upholding it. This legal error prevented the Applicants from developing and presenting evidence regarding the risk of oil spills to the Great Lakes, inland waters, and other natural resources from the extended operation of Line 5 in Michigan.

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[16] Notably, the Project will take at least five years to construct and will not immediately resolve the risks of the Dual Pipelines.

[17] Evaluation of the effects of a project under MEPA requires an agency or court to "evaluate the environmental situation before the proposed action and compare it with the probable condition of the environment after." *Kent Co Rd Comm v Hunting*, 170 Mich App 222, 233; 428 NW2d 353 (1988).

The narrow interpretation and approach adopted by the Commission and the Court of Appeals conflicts with this Court's analysis in *WMEAC* and requires correction. Beyond this case, the scope of effects to be considered in a MEPA analysis is an issue of major significance for Michigan jurisprudence, and the exclusion of oil spills here not only violates MEPA's requirements, it also puts Michigan out of step with other jurisdictions.[18] MEPA's requirements should be given force here and oil spills from the continued operation of Line 5 in Michigan should be deemed an effect of the project that must be considered under MEPA.

D. This Court Can Provide Clarity to Agencies and Reviewing Courts by Correcting the Commission's Improper Interpretation of MEPA and Exclusion of Oil Spill Evidence that Led to a Flawed and Unlawful Alternatives Analysis.

The Commission's exclusion of evidence about risks of oil spills from Line 5, in turn, led to an alternatives analysis that contravened MEPA. When an agency or a reviewing court determines that a project will impair natural resources, that project "shall not be authorized or approved . . . if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare." MCL 324.1705(2); see also *Vanderkloot*, 392 Mich at 185-87. An informed comparison of the environmental impacts of a proposed project with the environmental impacts of alternatives is necessary to "prevent or minimize

[18] Courts in other jurisdictions interpreting parallel environmental review statutes have required agencies to consider the likelihood and effects of an oil spill when conducting an environmental review for projects that involve the transport of oil. For example, in Minnesota, a court of appeals deemed the risk of an oil spill reaching Lake Superior from Enbridge's planned Line 3 to be an essential part of its environmental analysis. *In re Enbridge Energy, LP*, 930 NW2d 12, 17 (Minn App, 2019); see also Tribal Intervenors' Petition for Leave to Appeal, p 31 n 88 (Doc No. U-20763-0622), citing the Line 3 case. Recently, in *Standing Rock Sioux Tribe v US Army Corps of Engineers*, the court ruled that even if the risk of a pipeline leak may be low, its potential consequences must be considered as part of the environmental review of the pipeline's placement. 985 F3d 1032, 1049-50 (CA DC, 2021). In *Sierra Club v Sigler*, the court struck down a federal environmental impact statement for a dredging project that would allow increased oil tanker access in a port because its oil-spill analysis did not analyze the "worst case" scenario of an oil tanker spill. 695 F2d 957, 968-75 (CA 5, 1983). Similarly, *Ocean Advocates v US Army Corps of Engineers* held that the Corps was required to analyze risks of oil tanker spills before issuing a Section 404 permit for a dock extension, because "a 'reasonably close causal relationship' exists between the Corps' issuance of the permit, the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills." 402 F3d 846, 868 (CA 9, 2004), quoting *Dep't of Transp v Pub Citizen*, 541 US 752, 767 (2004).

degradation of the environment which is caused or is likely to be caused" by the project. *Ray*, 393 Mich 294, 306. Put simply, the agency must make an "apples to apples" comparison between the effects of a proposed project on Michigan's environment and natural resources and the effects of alternatives. Otherwise, the agency cannot make a rational and informed decision as to whether any such alternatives are feasible, prudent, and consistent with reasonable requirements of public health, safety, and welfare.

The Commission's alternatives analysis in this case was fundamentally flawed. It assessed environmental risk and potential impairment due to an oil spill from alternate methods of transport—including an alternate pipeline route and rail transportation—along the entire length of their route. See December 1, 2023 Final Order, pp 338-39 (Doc No. U-20763-1454) (TI Appendix A at 339-40). This included an assessment of how many rivers, streams, drainage canals, wetlands, and drinking water sources the alternate pipeline route would threaten with impairment and pollution along its entire length. *Id.* But the Commission did *not* consider, and the Applicants were *not* allowed to present, comparable evidence about environmental risk and potential impairment due to an oil spill from the 645 miles of Line 5 enabled by the Project. Instead, the Commission compared the oil spill risk for just the four-mile pipeline segment to be housed in the proposed tunnel with the risk for a 762-mile-long potential alternative route. *Id.* at 331-32, 338 (TI Appendix A at 332-33, 339), citing Exhibit ELP-24. This is not apples-to-apples, it is an utterly incongruent comparison, which led to an improper finding under MEPA.

The Court of Appeals' attempts to gloss over this flaw in the Commission's MEPA analysis are unpersuasive. The Court of Appeals concluded that "the Commission acted appropriately because it *could* have limited its 'comparisons' analysis to just alternatives for the Straits segment of pipeline . . . but instead decided to look to *all* presented alternatives, and ultimately it reached a decision that was supported by the evidence in the record." COA Opinion, p 25. At the same time, however, the Court of Appeals also "acknowledge[d] that it is concerning that the PSC, when discussing rail transport, looked to the effect of rail being used for the entire transport system and at first compared it to just the tunnel project; the Commission mentioned, for example, how many rivers and wetlands a rail system would cross but then did not mention the same statistics for Line 5 as a whole." COA Opinion, p 24.

As discussed above, however, the Court of Appeals unlawfully applied a deferential standard of review, when it should have reviewed the Commission's MEPA findings de novo

(see Part I above).[19] The Court of Appeals relied on the deferential standard of review to excuse the Commission's order as "adequately supported by the record" despite the irrationality at the core of this analysis. Moreover, even if a deferential standard of review were appropriate (which it is not), the Commission's lopsided alternatives analysis looked at one side of an important issue while refusing to consider the inverse. See, e.g., *Mich Consol Gas Co v Mich Pub Serv Comm*, 389 Mich 624, 640; 209 NW2d 210 (1973) ("In this case, the company showed that the commission, by refusing to consider increases in costs in the future while taking into account future reductions, acted arbitrarily and unreasonably."). The Commission's legal error in excluding evidence about a critical category of effects of the Project resulted in an alternatives analysis with an improperly narrow view of the pollution and impairment at issue. The Commission's comparison of this improperly narrow assessment of impairments and pollution from the Project with a broader view of impairments and pollution presented by project alternatives was a violation of MEPA.

Proper consideration of alternatives to conduct that pollutes, impairs, or destroys natural resources is a critical component of an agency's duty under MEPA. The Court of Appeals' unwarranted deference to the Commmission's flawed analysis—despite the acknowledgement that its lopsided comparison was concerning—is illustrative of why it is critical for this Court to step in and ensure that reviewing courts are applying the proper standard of review.

E. This Court's Review Can Further Develop the Common Law of Environmental Quality as to the Scope of Effects that Must Be Considered Under MEPA.

This Court has an important opportunity to uphold the words and purpose of the Michigan Constitution and MEPA that recognize the "paramount public concern" for the state's natural resources and the requirement that agencies and courts review the *full* range of likely effects from the issuance of a permit and determine whether feasible and prudent alternatives would prevent or minimize those effects. *Ray,* 393 Mich 294, 30; *Vanderkloot*, 392 Mich at 183. This case holds significant public interest for two reasons. MCR 7.305(B)(2).

[19] Moreover, the Court of Appeals did not determine, in "judicial review" of the Commission's decision and on the record before it, whether there are "feasible and prudent alternatives" as mandated by MCL 324.1705(2).

First, it threatens to undermine MEPA and the Michigan Constitution's environmental protection framework. In this case, the Commission and the Court of Appeals imposed improper constraints on MEPA by misinterpreting the words "has or likely has the effect." The exclusion of oil spills from the analysis of effects of the Project also led to an invalid alternatives analysis, which omitted effects, particularly oil spills, of the Project outside the Straits, but considered the effects of the alternatives outside the Straits. These decisions invite Michigan agencies to shirk their responsibilities under MEPA with the comfort of the flawed precedent of the Court of Appeals' decision. Thus, these errors are significant because they have the potential to shape MEPA jurisprudence, which has developed over many decades, and its goal of protecting the state's resources and the environment. MCR 7.305(B)(3). It is critical that the Court review these improper decisions that diminish Michigan's bedrock environmental protection statute.

Second, it threatens to harm an iconic place in Michigan and in the nation. This case involves a massive tunnel that will sit under the Great Lakes in the Straits of Mackinac—a place that is the center of the Anishinaabe creation story, a place of ongoing cultural and economic significance to Tribal Nations, a source of drinking water for more than 40 million people and a place for recreation and tourism. Ensuring the proper application of MEPA could not be more important than in a case involving the protection of the Great Lakes.

This Court also has the opportunity to correct a clearly erroneous decision of the Court of Appeals and ensure that other courts and agencies know how to determine the effects of a proposed project and conduct a proper alternatives analysis. MCR 7.305(B)(5).

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Applicants respectfully request that this Court grant this application for leave to appeal, reverse the decision of the Michigan Court of Appeals, vacate the Commission's December 1, 2023 Final Order approving Enbridge's permit application, and remand this matter to the Commission with instructions to allow the intervening parties to conduct discovery and submit evidence about the oil spill risks along the length of Line 5 in Michigan as a consequence of the Project.

Dated: April 2, 2025

Respectfully submitted,

By: Digitally signed by Christopher M. Bzdok Date: 2025.04.02 16:22:11 -04'00'

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of MCR 7.305(A)(1) and 7.212(B) because, excluding the parts of the document exempted, it contains 14,697 words.

Dated: April 2, 2025

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Attachment 1

STATE OF MICHIGAN

COURT OF APPEALS

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

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Appellant,

v

MPSC, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

FOR PUBLICATION
February 19, 2025
1:46 PM

No. 369156
Public Service Commission
LC No. 00-020763

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

MICHIGAN ENVIRONMENTAL COUNCIL, TIP OF THE MITT WATERSHED COUNCIL, and NATIONAL WILDLIFE FEDERATION,

Appellants,

v

No. 369157
Public Service Commission
LC No. 00-020763

MPSC, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

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

BAY MILLS INDIAN COMMUNITY,

Appellant,

v

No. 369159
Public Service Commission
LC No. 00-020763

MPSC, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

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

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,

Appellant,

v

MPSC, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

No. 369161
Public Service Commission
LC No. 00-020763

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

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI,

Appellant,

v

MPSC, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

No. 369162
Public Service Commission
LC No. 00-020763

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

FOR LOVE OF WATER,

Appellant,

v

MPSC, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

No. 369163
Public Service Commission
LC No. 00-020763

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

ENVIRONMENTAL LAW & POLICY CENTER and MICHIGAN CLIMATE ACTION NETWORK,

Appellants,

v

MPSC, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

No. 369165
Public Service Commission
LC No. 00-020763

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

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

MATTHEW S. BORKE,

Appellant,

v

No. 369231
Public Service Commission
LC No. 00-020763

MPSC, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

Before: M. J. KELLY, P.J., and LETICA and WALLACE, JJ.

PER CURIAM.

These consolidated appeals stem from a December 1, 2023 order of the Michigan Public Service Commission ("PSC" or "Commission") in which the PSC conditionally approved the application of Enbridge Energy Limited Partnership to relocate a portion of its "Line 5" fuel pipeline into a tunnel beneath the Straits of Mackinac. In Docket Nos. 369156, 369159, 369161, and 369162, intervenors Little Traverse Bay Bands of Odawa Indians, Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, and Nottawaseppi Huron Band of the Potawatomi ("the Tribes") appeal the order as of right. In Docket No. 369157, intervenors Michigan Environmental Council, Tip of the Mitt Watershed Council, and National Wildlife Federation appeal the order as of right; in Docket No. 369163, intervenor For Love of

Water appeals the order as of right; and in Docket No. 369165, intervenors Environmental Law & Policy Center and Michigan Climate Action Network appeal the order as of right.[1] We affirm.

Enbridge, as well as the PSC and intervenors Mackinac Straits Corridor Authority ("MSCA"), Michigan Propane Gas Association, National Propane Gas Association, and Michigan Laborers' District Council argue in support of upholding the December 1, 2023 order. Amici curiae Michigan Chamber of Commerce and Small Business Association of Michigan filed briefs in support of upholding the order. Amici curiae Great Lakes Business Network and Michigan Attorney General ("AG")[2] filed briefs in support of a reversal or remand.

The intervenor-appellants contend that the PSC, when considering Enbridge's application, erred by only looking to the public need for the new portion of pipeline, to be located in a tunnel underneath the lakebed ("the Replacement Project"), as opposed to reconsidering the need for Line 5 as a whole. They also contend that the PSC used improper comparisons for its analysis under the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701, *et seq*., and inadequately analyzed the impact of greenhouse-gas emissions ("GHGs") as they relate to supply of and demand for petroleum products. For the reasons set forth in this opinion, we find no basis to reverse or remand.

I. GENERAL FACTS

A. BACKGROUND INFORMATION, INCLUDING APPLICABLE LAWS AND AGREEMENTS

1929 PA 16 ("Act 16"), codified at MCL 483.1 *et seq*., vests the PSC with the power to regulate the transportation of "crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines. . . ." See MCL 483.3. Mich Admin Code, R 792.10447(1)(c) states, in applicable part, that a "corporation, association, or person conducting oil pipeline operations within the meaning of 1929 PA 16, MCL 483.1 to 483.11, that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier" must file an application with the PSC for the authority to do so.

The present case began on April 17, 2020, when Enbridge filed an application asking the PSC to authorize Enbridge to proceed with a "Straits Line 5 Replacement Segment." See *In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), p 1. "[T]he project involves replacing the segment of the Line 5 pipeline (Line 5) that crosses the Straits of Mackinac (Straits) in Michigan with a single, 30-inch

[1] In Docket No. 369231, Matthew S. Borke attempts to file an appeal as of right from the order. As will be discussed *infra*, he has no basis for doing so.

[2] We note, however, that the AG's office supports upholding the order in its capacity as counsel for the PSC and the MSCA.

diameter pipe and relocating the segment to a 'concrete-lined tunnel below the lakebed of the Straits' (Replacement Project)." *Id*. at 1-2.

The PSC's order engendering these appeals includes the following useful summary of some of the pertinent underlying facts:

> In its application, Enbridge explained that Line 5 was constructed by Lakehead Pipe Line Company (Lakehead) in 1953 and that it is a 645-mile interstate pipeline that traverses Michigan's Upper and Lower Peninsulas, originating in Superior, Wisconsin, and terminating near Sarnia, Ontario, Canada. Enbridge stated that Line 5 was built to transport light crude oils and natural gas liquids (NGLs). While the vast majority of product shipped through Line 5 travels through Michigan to Canada, Enbridge asserted that Line 5 delivers NGLs to a propane production facility in Rapid River, Michigan, and delivers light crude oil to facilities that interconnect with other pipelines in Lewiston and Marysville, Michigan. Line 5 has an annual average capacity of 540,000 barrels per day (bpd), and Enbridge stated that the Replacement Project will not impact its annual average capacity or the nature of the service provided by Line 5.
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> Enbridge explained that where Line 5 crosses the Straits, it currently consists of two, 20-inch-diameter pipes, four miles in length, referred to as the dual pipelines. Enbridge stated that pursuant to the Replacement Project, the four-mile segment of the dual pipelines will be replaced with a single, 30-inch-diameter pipe that will be located within a concrete-lined tunnel beneath the lakebed of the Straits (the tunnel). Enbridge asserted that the Replacement Project will provide greater protection from any release of liquid petroleum to the aquatic environment because compared to the dual pipelines that are currently situated on the top of the lakebed and vulnerable to a vessel anchor strike, the Replacement Project will relocate the Straits Line 5 segment to a concrete-lined tunnel deep beneath the lakebed. Enbridge noted that the construction of the tunnel is the subject of separate applications before other state and federal agencies, including EGLE [the Michigan Department of Environment, Great Lakes, and Energy] and the United States (U.S.) Army Corps of Engineers (USACE).
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> Enbridge stated that beginning in 2017, it entered into a series of agreements with the State of Michigan relating to the relocation of the Straits Line 5 segment to the tunnel. Enbridge noted that the Michigan Legislature enacted Act 359 [2018 PA 359] in December 2018, which created MSCA and delegated to MSCA the authority to enter into agreements pertaining to the construction, operation, and maintenance of the tunnel to house the replacement pipe segment. Thus, Enbridge asserted that its request for Commission approval of the Replacement Project does not include "authorization to design, construct, or operate the tunnel" because "[t]he tunnel will be designed, constructed, and maintained pursuant to the 'Tunnel Agreement' entered between the MSCA and Enbridge pursuant to Act 359."
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> Enbridge explained that, pursuant to the Tunnel Agreement, the tunnel will be constructed in the subsurface lands beneath the lakebed of the Straits within the

> easement issued by the Michigan Department of Natural Resources (DNR) to MSCA in 2018 (2018 easement) and pursuant to the assignment of certain rights under that easement by MSCA to Enbridge. Enbridge stated that the tunnel will be constructed in accordance with all required governmental permits and approvals. Enbridge averred that it will enter into a 99-year lease with MSCA for the use of the tunnel to operate and maintain the Straits Line 5 replacement pipe segment.
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> In its application, Enbridge seeks Commission approval to operate and maintain the replacement pipe segment located within the tunnel as part of Line 5 under Act 16. Enbridge stated that once the new four-mile pipe segment is placed into service within the tunnel, service on the dual pipelines will be discontinued. [*In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), pp 16-18 (record citations and footnotes omitted).]

The PSC ultimately approved Enbridge's application in a 349-page opinion and order. The approval was conditioned on, among other things, Enbridge's "obtaining the required governmental permits and approvals" and providing "the Mackinac Straits Corridor Authority with a detailed risk management plan." *Id*. at 347.

Line 5 as a whole has been considered by the Michigan Supreme Court. The PSC granted Enbridge's predecessor the authority for Line 5 as a whole on March 31, 1953. *In re Application of Lakehead Pipe Line Co, Inc*, order of the Public Service Commission, entered March 31, 1953 (Case No. D-3903-53.1). The 1953 order rejected as "without merit" the contention that the pipeline was "not in the public interest." *Id*. at 8. Subsequently, in *Lakehead Pipe Line Co v Dehn*, 340 Mich 25; 64 NW2d 903 (1954), the Michigan Supreme Court considered a challenge to condemnation proceedings undertaken in furtherance of the construction of the pipeline. The Court upheld the condemnation proceedings and stated that the statute relied upon by the pipeline company allowed for condemnation only for "a public use benefiting the people of the State of Michigan." *Id*. at 30, 37, 42.

In November 2017, an agreement ("the First Agreement") was signed between Enbridge and the State of Michigan. The First Agreement stated that "the continued operation of Line 5 through the State of Michigan serves important public needs by providing substantial volumes of propane to meet the needs of Michigan citizens, supporting businesses in Michigan, and transporting essential products, including Michigan-produced oil to refineries and manufacturers." It stated that the agreement was "intended to further protect ecological and natural resources held in public trust by the State of Michigan" and would "serve Enbridge's interest by providing clarity as to State's expectations concerning the safety and integrity of Line 5." Among other things, the First Agreement required Enbridge to assess the possibility of a replacement for the dual pipelines.

In October 2018, Enbridge and the State of Michigan entered into another agreement ("the Second Agreement"). The Second Agreement stated that, according to alternatives considered by Enbridge,

> construction of a tunnel beneath the lakebed of the Straits connecting the upper and lower peninsulas of Michigan, and the placement in the tunnel of a new oil pipeline, is a feasible alternative for replacing the Dual Pipelines, and that alternative would essentially eliminate the risk of adverse impacts that may result from a potential oil spill in the Straits. . . .

The Second Agreement stated that the State and Enbridge would pursue agreements for the construction of a tunnel "in which a replacement for the Dual Pipelines could be located," and it further stated, "Enbridge agrees that following completion of the Straits Tunnel and after the Line 5 Straits Replacement Segment is constructed and placed into service by Enbridge within the Straits Tunnel, Enbridge will permanently deactivate the Dual Pipelines."

In accordance with the agreements, the Legislature enacted 2018 PA 359 ("Act 359"), effective December 12, 2018, which authorized the creation of the MSCA and spoke to the creation of a utility tunnel under the Straits. Act 359 defines "utility tunnel" as

> a tunnel joining and connecting the Upper and Lower Peninsulas of this state at the Straits of Mackinac for the purpose of accommodating utility infrastructure, including, but not limited to, pipelines, electric transmission lines, facilities for the transmission of data and telecommunications, all useful and related facilities, equipment, and structures, and all necessary tangible or intangible real and personal property, licenses, franchises, easements, and rights-of-way. [MCL 254.324(e).]

The Act further states:

> The Mackinac Straits corridor authority is created within the state transportation department. The Mackinac Straits corridor authority is a state institution within the meaning of section 9 of article II of the state constitution of 1963, and an instrumentality of this state exercising public and essential governmental functions. The creation of the Mackinac Straits corridor authority and the carrying out of the Mackinac Straits corridor authority's authorized purposes are public and essential governmental purposes for the benefit of the people of this state and for the improvement of the health, safety, welfare, comfort, and security of the people of this state, and these purposes are public purposes. The Mackinac Straits corridor authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this act. [MCL 254.324b(1).]

Act 359 indicates that the MSCA is empowered to enter into agreements for a utility tunnel. MCL 254.324d.

Soon after the enactment of Act 359, on December 19, 2018, Enbridge and the State entered into yet another agreement ("the Third Agreement"). The Third Agreement stated that Enbridge would construct and maintain "the Straits Line 5 Replacement Segment" within the tunnel at its own expense. The Third Agreement also stated that, provided that Enbridge complied with the three agreements, the original easement granted in 1953, and all other applicable laws, "the State agrees that . . . [t]he replacement of the Dual Pipelines with the Straits Line 5 Replacement

Segment in the Tunnel is expected to eliminate the risk of a potential release from Line 5 at the Straits." The director of the Department of Natural Resources and the director of the Department of Environmental Quality were signatories to the Second and Third Agreements. Also on December 19, 2018, Enbridge and the MSCA entered into a "Tunnel Agreement." The Tunnel Agreement stated that Enbridge would construct the tunnel and that the MSCA would "issue a lease to Enbridge authorizing it to operate and maintain the 'Straits Line 5 Replacement Segment' within the Tunnel."

B. ENBRIDGE'S MOTION IN LIMINE

After Enbridge sought approval for the pipeline project by way of the current PSC proceedings, it filed a motion in limine, arguing that the administrative law judge ("ALJ") considering the motion should direct

> that the following issues be excluded from this proceeding: (1) the construction of the tunnel, (2) the environmental impact of the tunnel construction, (3) the public need for and continued operation of Line 5, (4) the current operational safety of Line 5, (5) climate change, and (6) the intervenors' climate agendas; and [also] direct that the proceeding be limited to whether: (A) there is a public need for the Project, (B) the replacement pipe segment is designed and routed in a reasonable [sic], and (C) the construction of the replacement pipe segment will meet or exceed current safety and engineering standards.

The ALJ initially ruled that the motion in limine was:

> 1. Denied as it pertains to the Utility Tunnel.
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> 2. Granted regarding the operational aspects, including the public need and safety, of the entirety of Line 5.
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> 3. Granted as it pertains to the review of the project under MEPA does not entail [sic] the environmental effects of greenhouse gas emissions and climate change.

The ALJ ruled that "under Act 16 the proper inquiry for a proposal involving a segment of an existing pipeline [encompasses only] that segment, as opposed to the entire pipeline system," and concluded that "evidence concerning the entirety of Line 5 is irrelevant." After various intervenors appealed the ruling of the ALJ, the PSC remanded the matter to the ALJ because Governor Gretchen Whitmer had, on November 13, 2020, stated that the previously granted 1953 easement to operate the dual pipelines in the bottomlands of the Straits was revoked and ordered that the

dual pipelines cease to operate."[3] The Commission indicated that this action might impact the ALJ's ruling on the motion in limine.

On remand, the ALJ stated that even *if* the notice of revocation of the 1953 *easement* were to be given immediate effect, this would not serve to revoke "the right to operate Line 5 under the 1953 Order." The ALJ stated:

> [T]o accept the Notice [of revocation] as requiring a reexamination of the public need of Line 5 under Act 16, along with its operational and safety aspects, would result in a diminishment of [an] existing license under §92(1) of the APA [Administrative Procedures Act, MCL 24.201 *et seq*.] without providing the procedural due process protections afforded a licensee. Accordingly, the Notice cannot be used to expand the scope of this case to include an examination or determination of the public need for Line 5, or any aspect of its operation and safety. Rather, the Notice can only be considered in the context of the Act 16 criteria as applied to the proposal to relocate the dual pipelines from the bottomlands [i.e., the surface of the lakebed] to the proposed Utility Tunnel.

The ALJ stated that the notice of revocation did not change the 1953 authority under which Enbridge operates Line 5 as a whole and that "the operation and safety of that system is outside the conduct subject to review under MEPA" because the conduct at issue was the Replacement Project.

[3] The attempt to revoke the easement for the dual pipelines has a complicated history. The governor filed an action in the Ingham County Circuit Court to enforce her attempted revocation of the easement, Enbridge removed the lawsuit to federal court and sought a declaration that the revocation was unlawful, and the governor sought to remand the case back to the state court. See *Nessel on behalf of People of Michigan v Enbridge Energy Ltd Partnership*, 104 F4th 958, 962 (CA 6, 2024), cert pending (discussing the history). The United States District Court for the Western District of Michigan determined that the dispute regarding revocation of the 1953 easement involved substantial federal interests, such as an application of the federal Pipeline Safety Act, see, e.g., 49 USC 60104, and that federal court was the appropriate forum. *Michigan v Enbridge Energy Ltd Partnership*, 571 F Supp 3d 851, 859, 862 (WD Mich, 2021). "Soon thereafter [i.e., after the federal district court's ruling], the Governor voluntarily dismissed her case." See *Nessel on behalf of People of Michigan*, 104 F4th at 963. However, the AG filed another lawsuit in state court, seeking to "enjoin Enbridge's continued operation of Line 5 based on alleged violations of three state laws: the public-trust doctrine, common-law public nuisance, and the Michigan Environmental Protection Act." See *id*. at 961. Enbridge then sought to remove the case to federal court, but the federal court deemed the removal attempt untimely. *Id*. at 963, 968, 971-972. Accordingly, the lawsuit remains pending in the Ingham Circuit Court.

The ALJ ruled:

> Based on the foregoing, in 1953 the Commission issued an Act 16 license that authorized the construction, operation, and maintenance of Line 5. That license remains in effect and can only be subject to the actions listed in §92(1) of the APA after the notice and hearing provisions of the APA are satisfied. Accordingly, neither the filing of the Application at issue in this case, nor the State's Notice that the easement under which the dual pipelines were sited and operate is revoked and terminated as of May 13, 2021, allows for a reexamination of the public need for Line 5, or its operational and safety aspects, under Act 16. Rather, the Notice is relevant under the proper Act 16 review of the project: whether a public need exists to replace the existing dual pipelines on Great Lakes bottomlands in the Straits of Mackinac with a single pipeline in a proposed Utility Tunnel.
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> The Commission's jurisdiction under Act 16 is over the proposal to relocate the existing pipelines into the Utility Tunnel, and a component of that jurisdiction is examining the environmental impacts of that conduct, consistent with the judicial and Commission construction of that term, under MEPA. The issuance of the Notice does not expand the MEPA inquiry to include the environmental effects of the operation and safety of Line 5, or those arising from the production, refinement, and consumption of the oil transported on Line 5.

Various intervenors appealed the ALJ's revisited ruling. Of note, however, is that the MSCA supported the ALJ's ruling. The PSC, in its subsequent order, stated:

> [I]n 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, (3) the construction of the pipeline will meet or exceed current safety and engineering standards, and (4) the project complies with the requirements of MEPA. [*In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered April 21, 2021 (Case No. U-20763), p 57.]

The Commission noted that the "impetus" for Enbridge's application was Act 359. *Id.*[4]

In affirming the ALJ's ruling excluding evidence about the need for the entirety of Line 5, the Commission stated:

> In the 1953 order, the Commission approved the construction, maintenance, and operation of Line 5, finding that Line 5 was fit for the purpose of carrying and transporting crude oil and petroleum as a common carrier in interstate and foreign commerce. In the 1953 order the Commission stated "[i]t appears to this Commission that in times of national emergency delivery of crude oil for joint

[4] This Court has considered and rejected a challenge to Act 359. See *Enbridge Energy, LP v State*, 332 Mich App 540; 957 NW2d 53 (2020).

> defense purposes would be greatly enhanced by operation of the proposed pipe line." 1953 order, p. 4. Denmark Township moved for denial of the application on grounds that the pipeline was not in the public interest. The Commission found the motion to be without merit, and it was denied. *Id*., p. 8. The Commission found that the proposed Line 5 met the requirements of Act 16, and Lakehead (Enbridge's predecessor) received permission to construct and operate the pipeline. Subsequently, in *Lakehead*, 340 Mich at 37, the Michigan Supreme Court held that construction and operation of Line 5 was "for a public use benefiting the people of the State of Michigan." Neither Act 16, nor Rule 447, nor Commission precedent require the Commission to make findings with respect to the length of time that an approved pipeline may operate, and such findings are not made in this order. Indeed, while intervenors argue that the issue of whether Line 5 will continue in operation indefinitely (as Enbridge has alleged) is a question of fact that should be tested, what is ignored by these parties is that whether Enbridge holds the legal right to operate the other 641 miles of Line 5 is not a question of fact but rather of law. *Nothing in the Commission's 1953 order set a termination date for the operation of Line 5*, and no party disputes Enbridge's legal authority to continue to operate the other 641 miles not at issue in this proceeding. [*In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered April 21, 2021 (Case No. U-20763), pp 60-61 (emphasis added; footnote omitted).]

The PSC also noted that its prior precedent did not support reexamining the entire length of a pipeline when a company proposed to replace only a segment. *Id*. at 61-62. It stated:

> [W]hen deciding an application to construct or relocate pipeline, the Commission has never examined any portion of existing pipeline that is interconnected with the segment that is proposed in the applicant's project but not within the proposed route; nor has it examined how the proposed pipeline segment could affect the lifespan of an existing interconnected pipeline system. [*Id*. at 62.]

The Commission stated that the pertinent issues were whether there was a public need for the tunnel and underground pipeline, whether this "Replacement Project" was designed and routed reasonably, and whether it met or exceeded safety and engineering standards. *Id*. at 63. It said that "[t]he public need for the existing portions of Line 5 has been determined." *Id*.

The Commission then considered MEPA. MCL 324.1705(2), a provision of MEPA, states:

> In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

The PSC said that, similarly to the analysis regarding public need, MEPA analysis "does not extend to the entirety of Line 5, including the 641 miles of Line 5 outside of the proposed Replacement Project, but only to" the proposed embedded pipeline to be located in the tunnel. *In re Enbridge*

Energy, Ltd Partnership, order of the Public Service Commission, entered April 21, 2021 (Case No. U-20763), p 64. It said that "some would narrowly constrain the review of pollution to the construction of the tunnel and pipeline," but concluded that this constraint was improper and that the MEPA analysis must encompass "the product being shipped through the Replacement Project." *Id*. It said that the pipeline segment under consideration "would involve hydrocarbons that may result in GHG pollution that must be subject to MEPA review." *Id*. at 67. The Commission said that, in light of the governor's attempt to revoke the easement for the dual pipelines, it was "unwilling to exclude evidence under MEPA that compares the pollution, impairment, or destruction attributable to an operating 4-mile pipeline segment in the Straits with non-operational 4-mile dual pipeline segments." *Id*. It said that, at this early stage in the case, it wanted to hear evidence about eventualities should the dual pipelines be shut down. *Id*. The PSC recognized that, "while Enbridge would retain the right to operate the other 641 miles of Line 5, it may not be able to ship product through the Straits by pipeline once the Notice is in force without the authorization that is sought in this case," *id*. at 68, and it added that "questions on the feasibility and prudence of alternatives—both in terms of alternative pipeline and non-pipeline shipping arrangements and alternatives to the products being shipped—are inherently questions of fact well suited to the development of record evidence," *id*. at 69. It emphasized that how to make proper comparisons of alternatives for the Replacement Project was a point yet to be determined. *Id*.

C. PSC'S FINAL ORDER AND EVALUATION OF ALTERNATIVES

The contested case then proceeded, with the submission of testimony and evidence. In its final order, the PSC concluded that there was a need for the Replacement Project, stating, "[T]he Commission finds that . . . the First, Second, and Third Agreements and Act 359 demonstrate that there is a public purpose and public need to replace the dual pipelines with the Replacement Project." *In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), p 300. It noted that there was a "public need for the products shipped through the Straits Line 5 segment." *Id*. at 302. The PSC determined:

> [T]he Commission finds that the Replacement Project essentially eliminates the risk of adverse impacts that may result from a potential release from Line 5 at the Straits and protects unique ecological and natural resources that are of vital significance to the State and its residents, to tribal governments and their members, to public water supplies, and to the regional economy . . . .
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> In conclusion, the Commission finds that 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. [*Id*. at 305.]

With regard to its MEPA analysis, the Commission first stated that certain environmental concerns would be addressed by way of permitting decisions by other agencies:

> As an initial matter, the Commission agrees with the Staff[5] that several potential environmental impairments resulting from the construction of the Replacement Project fall in the regulatory purview of other state and federal agencies and will be addressed by separate permitting decisions. For example, [certain] witnesses . . . asserted that the discharge of wastewater in the Great Lakes during construction of the tunnel and regular operations of the Replacement Project is likely to affect the Great Lakes' ecosystem. The Staff noted that the NREPA [Natural Resources Environmental Protection Act] Part 31 permit "establishes parameters for authorized discharge, including quantity and composition." . . . The Commission agrees with the Staff that Enbridge's compliance with these permit requirements should minimize potential environmental impacts from construction and operation of the Replacement Project. [*Id*. at 328.]

The Commission went on to state, however, that the Replacement Project would have some environmental impacts not addressed by other permitting decisions and not adequately addressed by Enbridge's plans. Those impacts were "increased noise, dust/particulates, and light from construction, and impacts to surface water, local residents, flora, fauna, air quality, groundwater, surface soils, and vegetations." *Id*. at 329. The Commission agreed with the recommendation of a PSC Staff witness that "these environmental impacts should be specifically addressed in Enbridge's final mitigation plans to minimize the environmental impairments." *Id*. It characterized the impairments as "environmental impairments pursuant to MEPA." *Id*. The PSC also recognized that construction of the Replacement Project would involve GHGs and that Line 5 as a whole involves GHGs. *Id*. at 330.

The PSC stated:

> 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*. at 331.]

The PSC considered six (at least theoretically possible) alternatives presented in a report by "Dynamic Risk," two alternatives presented by the MSCA, and six alternatives presented by PSC Staff. The Dynamic Risk alternatives were (1) a new pipeline that does not cross the Great Lakes; (2) use of existing pipeline infrastructure that does not cross the Great Lakes; (3) decommissioning Line 5 and using rail, trucks, or barges to transport Line 5 products from Wisconsin to Canada without the products crossing the Straits; (4) using a pipeline in a trench or "sealed annulus tunnel"[6] to cross the Straits; (5) continued operation of the dual pipelines; and (6) using alternative

[5] In PSC contested cases, "PSC Staff" provides testimony and evidence to help develop the issues.

[6] This tunnel would be somewhat different in character from the tunnel in the Replacement Project, but the PSC stated that the tunnels were largely equivalent in terms of environmental risk, with the Enbridge design having an advantage in terms of workers' future ability to inspect possible pipeline issues as they might arise. See *id*. at 340.

transportation such as rail or trucks to transport Line 5 product through the Straits if the dual pipelines were shut down.[7] *Id*. at 331-335. The MSCA alternatives were (1) suspending a replacement pipe segment from the Mackinac Bridge and (2) suspending a replacement pipe from a new suspension bridge. *Id*. at 335-336. The PSC Staff alternatives were (1) taking no action and allowing the dual pipelines to continue to be used, (2) using an "Open-Cut Alternative" for a pipeline,[8] (3) using a "horizontal directionally drilled" (HDD) method to install a pipeline across or under the Straits, (4) protecting the dual pipelines with rock armoring, (5) using alternative transportation for Line 5 products "in a hypothetical post-Line 5 shutdown scenario"; and (6) using alternative products from those transported by Line 5. *Id*. at 336.

The PSC concluded that Dynamic Risk option 1 would involve putting a pipeline across numerous streams and "231 miles of wetlands" and other sensitive areas and would present a greater safety risk than tunneling. *Id*. at 338. The PSC also concluded that rail transportation as discussed in option 3 was feasible;[9] however, it carried a greater likelihood of environmental harm because, in part, rail transportation presented a higher safety risk than the Replacement Project and "[r]ail transportation of Line 5 product will cross 11 rivers, 11 streams, 6 drainage canals, 6-7 miles of wetlands, 14 protected areas, and 72 miles of highly populated areas in Michigan." *Id*. at 338-339. It noted that the trench analyzed in option 4 would be less safe than the Replacement Project and that the "sealed annulus tunnel" analyzed in option 4 would be largely equivalent in safety to the Replacement Project but that the Enbridge design had an advantage in terms of workers' future ability to inspect possible pipeline issues as they might arise. *Id*. at 339-340. As for option 5, the Commission stated that the dual pipelines posed a much greater risk than the Replacement Project. *Id*. at 340. For option 6, the PSC stated that although rail transport would be feasible, it presented a greater risk than tunneling. *Id*. at 339, 341. It also stated that option 2 was not feasible and was equivalent to abandonment of any pipeline, leaving rail as the possibility to transport Line 5 product. *Id*. at 338, 341.

Regarding the MSCA alternatives, the PSC stated:

> The Commission also reviewed the two alternatives presented by MSCA. The Commission agrees with MSCA that it is not feasible to suspend a replacement pipe segment from the Mackinac Bridge. . . . In addition, the Commission agrees with MSCA that while construction of a suspension bridge to house a replacement pipe segment is feasible, it has "significant disadvantages compared to a tunnel" and is therefore imprudent. [*Id*. at 341.]

[7] The Dynamic Risk report, for alternative 6, took into account whether Line 5 as a whole would be abandoned "if the fragmented segments [i.e., the segments fragmented by the decommissioning of the Straits segment] could not be effectively used."

[8] This involves trenching or partial trenching to lay a pipeline.

[9] Nevertheless, the PSC agreed with Dynamic Risk that, "tanker truck, oil tanker, and barge transportation are not feasible." *Id*. at 338.

As for the Staff options, the PSC stated that the open-cut alternative (option 2) presented more of a risk of release than the Replacement Project and that the HDD method (option 3) was not feasible in light of current technical capabilities. *Id*. at 342. As for option 4 (rock armoring), the PSC stated that it would present more safety concerns than the Replacement Project. *Id*. at 342-343. Regarding option 1 (continued operation of the dual pipelines), the PSC noted that this was not a safe alternative. *Id*. at 346-347. As for option 5, the PSC stated that rail and truck transportation would result in greater GHGs than using a pipeline. *Id*. at 346. It made an apparent reference to option 6 by stating that "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." *Id*. at 345 (emphasis added).

The PSC concluded: "[T]he Commission finds that after a review of the record evidence, there are no feasible and prudent alternatives to the Replacement Project pursuant to MEPA." *Id*. at 347. The Commission ordered:

> A. Enbridge Energy, Limited Partnership's application is approved as set forth in the order.
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> B. The route and location of Enbridge Energy, Limited Partnership's Straits Line 5 Replacement Segment is approved conditioned upon the company obtaining the required governmental permits and approvals. Significant changes to the design of the tunnel that are completed subsequent to this approval, including the addition of third-party utilities, shall be considered by the Commission to be inconsistent with the approval of this application and would require further application to, and approval by, the Commission.
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> C. Prior to construction of the tunnel, Enbridge Energy, Limited Partnership shall provide the Mackinac Straits Corridor Authority with a detailed risk management plan. The plan shall include a description of the planned geotechnical test bores and frequency of probe-hole testing ahead of the tunnel boring machine and should include reporting of both test-bore data and probe-hole data in real time so that the State of Michigan can assess risks and construction plan modifications based on the data. The plan should also include inspections for concrete cast sections prior to moving them into the tunnel and after being put into place, placement of gaskets, regular analyses of bentonite mix properties, and changes in slurry pressure. Deviations from and modifications to the plan during the construction process should be reported by Enbridge Energy, Limited Partnership and available for public review.
>
> D. Enbridge Energy, Limited Partnership shall implement procedures for low-hydrogen welding for all mainline girth welds, shall ensure that the procedures require both preheat and inter-pass temperature requirements, and shall ensure that the mainline girth welds are nondestructively tested using automatic phased array ultrasonic testing methods as proposed by the Commission Staff.
>
> The Commission reserves jurisdiction and may issue further orders as necessary. [*Id*. at 347-348.]

II. ANALYSIS

A. PSC'S RULING ON THE MOTION IN LIMINE

Intervenors the Tribes, Michigan Environmental Council, Tip Of The Mitt Watershed Council, National Wildlife Federation, For Love Of Water, Environmental Law & Policy Center, and Michigan Climate Action Network argue that the PSC erred because it did not allow intervenors to introduce evidence regarding the public need for the continued operation of Line 5, yet, in its final order, it referred to this alleged public need. Intervenors contend that the PSC acted inconsistently and take issue with other aspects of the PSC's ruling regarding the motion in limine.

1. STANDARDS OF REVIEW

MCL 462.26(8) states, "In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." Pursuant to MCL 462.25, practices and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. See also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). 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 MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). Also, the "hurdle of unreasonableness" is high. *Id*. "Within the confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the PSC may operate." *Id*.

A final order of the PSC must be authorized by law and 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, 188-189; 756 NW2d 253 (2008).

A reviewing court "gives due deference to the PSC's administrative expertise and is not to substitute its judgment for that of the PSC." *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). Issues of statutory interpretation are reviewed de novo. *In re Complaint of Rovas*, 482 Mich 90, 102; 754 NW2d 259 (2008). A reviewing court should give an administrative agency's interpretation of statutes it is obliged to execute respectful consideration, but not deference. *Id*. at 108.

Whether the PSC exceeded the scope of its authority is a question of law subject to review de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

In *Nat'l Wildlife Federation v Dep't of Environmental Quality (No. 1)*, 306 Mich App 336, 342; 856 NW2d 252 (2014), the Court stated that an administrative tribunal's "evidentiary decisions are reviewed for an abuse of discretion."

2. DISCUSSION

We find no basis upon which to reverse the PSC's final order, in light of (1) prior statements made by the PSC (in its April 21, 2021 order), which reflected a finding that the public need for

Line 5 had already been established; (2) the incorporation of this April order into the final order; (3) the deferential standard of review to be applied by this Court; and (4) the fact that the PSC did eventually allow evidence regarding the need for Line 5 to be introduced.[10]

The Michigan Legislature vested the PSC with the power to regulate the transportation of "crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines. . . ." See MCL 483.3. Mich Admin Code, R 792.10447(1)(c), states, in applicable part, that a "corporation, association, or person conducting oil pipeline operations within the meaning of 1929 PA 16 . . . that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier" "shall file an application with the commission for the necessary authority to do" so. The applicant must set forth "[a] full description of the proposed new construction or extension, including the manner in which it will be constructed." Mich Admin Code, R 792.10447(2)(e).

In a 2002 case, the PSC explained that it evaluates public need when considering proposed pipelines:

> Pursuant to 1929 PA 16, MCL 483.1 et seq., (Act 16) the Commission is granted the authority to control and regulate oil and petroleum pipelines. Act 16 provides the Commission with broad jurisdiction to approve the construction, maintenance, operation, and routing of pipelines delivering liquid petroleum products for public use. *Generally, the Commission will grant an application pursuant to Act 16 when it finds that the applicant has demonstrated a public need for the proposed pipeline* and that the proposed pipeline is designed and routed in a reasonable manner, which meets or exceeds current safety and engineering standards. [*In re Wolverine Pipe Line Co*, order of the Public Service Commission, entered July 23, 2002 (Case No. U-13225), pp 4-5 (emphasis added).]

As stated in *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 219 Mich App 653, 662; 557 NW2d 918 (1996), "[T]his Court ordinarily will uphold the PSC's interpretation of its own orders as long as the interpretation is reasonable or supported by the record." See also *In re MCI Telecommunications Corp Complaint*, 240 Mich App 292, 303; 612 NW2d 826 (2000). No party argues that the Commission's adopted three-part "test" of need, reasonableness of design and routing, and safety is unreasonable. As such, public need in general was at issue.

However, Rule 447(1)(c) refers to the construction of facilities, and Rule 447(2)(e) refers to a description of the "*new construction or extension*." (Emphasis added.) Enbridge, in its application, was not seeking approval for the construction of Line 5. It was seeking approval for the Replacement Project.

[10] The PSC allowed such evidence as part of its MEPA analysis but ended up also considering it for the "public need" issue.

As stated in *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007), "The rules of statutory construction apply to both statutes and administrative rules." The panel in that case went on to state:

> When interpreting a statute, our primary goal is to ascertain and give effect to the intent of the Legislature. We must first look to the specific language of the statute or rule, and if the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted. We may not read into a statute or rule that which is not within the manifest intention of the Legislature as gathered from the statute or rule itself. *Only where the language under review is ambiguous may a court properly go beyond the words of the* statute or *administrative rule to ascertain the drafter's intent*. [*Id*. at 202 (quotation marks and citations omitted; emphasis added).]

It is difficult to conclude that the PSC abused its discretion, see *Nat'l Wildlife Federation*, 306 Mich App at 342, by concluding that the need for Line 5 as a whole was simply not a salient issue in the proceedings because the application was for the Replacement Project, not for the construction of Line 5 as a whole. Significantly, the Commission recognized the concern that "a pipeline operator who knows that hundreds of miles of approved, existing, and reliable pipeline will be put at risk through the filing of an application to improve a few miles of that pipeline may be unlikely to decide to make those improvements." *In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered April 21, 2021 (Case No. U-20763), pp 69-70.

Certain intervenors argue that the PSC's ruling on the motion in limine violated the APA and the Michigan Rules of Evidence. MCL 24.272(3), a provision of the APA, states that "[t]he parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact." In *Smith v Lansing Sch Dist*, 428 Mich 248, 257; 406 NW2d 825 (1987), the Court said that this statute "require[s] affording the opportunity to present evidence on issues of fact only when such issues exist." MRE 401, at the time of the decision on the motion in limine, stated, " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[11] Again, there was no abuse of discretion by virtue of the PSC's evidentiary ruling, given that the application at issue was for the Replacement Project. *Nat'l Wildlife Federation*, 306 Mich App at 342.

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[11] MRE 401 now states:

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

Intervenors contend that the PSC acted inconsistently and violated its own rules by essentially concluding in its final order that there was a public need for Line 5 as a whole. The PSC stated the following:

> In the present case, the public need is not based on the need for additional capacity, but on the ongoing reliance on the current capacity of the dual pipelines, even as other sourcing options emerge. Furthermore, the Commission finds that there is substantial evidence on the record in the present case to show that if the dual pipelines are damaged, deemed inoperable due to safety concerns, or [shut down], *Line 5 in Michigan may be abandoned in full* or in part, which will require higher-risk and costlier alternative fuel supply sources and transportation to Michigan customers than what is proposed in the Replacement Project. . . . *Thus, the Commission finds that there is a public need for the products shipped through the Straits Line 5 segment.* The evidence in this case, in addition to the official findings of public need and public benefit identified in Act 359 and the First, Second, and Third Agreements, clearly supports a finding of public need for the Replacement Project. [*In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), p 302 (emphasis added).]

At first blush, it does seem that the Commission violated its own ruling by incorporating references to the need for Line 5 as a whole into its decision. However, in its April 2021 ruling on the motion in limine, the Commission stated:

> In the instant case, the Commission finds that the first issue is whether there is a public need to carry out the Replacement Project, a project to replace the dual pipelines with a new pipeline in a tunnel, and does not concern approved, existing pipeline that is merely interconnected with the segment that is the subject of the application. *The public need for the existing portions of Line 5 has been determined.* The public need for the Replacement Project has yet to be determined. [*In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered April 21, 2021 (Case No. U-20763), p 63.]

In the April 2021 order, the Commission referred to the 1953 order and Supreme Court *Lakehead* decision and stated that "[n]othing in the Commission's 1953 order set a termination date for the operation of Line 5, and no party disputes Enbridge's legal authority to continue to operate the other 641 miles not at issue in this proceeding." *Id*. at 60-61. The PSC's comments in the December order must be viewed in the context of this April order, which the PSC, in fact, incorporated into the December order. *In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), p 292. In large part, what the PSC was stating in the December order was that the *already-established* public need for Line 5 was a piece of the puzzle demonstrating a need for the Replacement Project.

In addition, the Commission stated that there was a need for the Replacement Project because the dual pipelines posed an oil-spill risk, whereas the proposed tunnel alternative posed virtually no risk of an oil spill. *Id*. at 303-305. It cited the testimony of Travis Warner, a member

of the PSC Staff, who noted that the Replacement Project would "substantially reduce" "if not eliminate" the risk of an oil spill in the Straits and who added:

> At this time, there is no certainty as to how long the existing Dual Pipelines would continue to operate if the Replacement Project is not completed. This uncertainty creates the potential for perpetual and unnecessary risk for an undetermined length of time into the future. Based on the information currently known, Staff determined that support of the Replacement Project is prudent, in the public interest, and will reduce the risk of contamination of the Great Lakes.

The Commission's analysis reflected a heavy focus on the need for the Replacement Project as an alternative to the dual pipelines and accorded with the language of Rule 447(1)(c). In other words, that Enbridge has the authority to operate Line 5 has already been established, and the public will be served by the Replacement Project because of the risk posed by the continued use of the dual pipelines.[12]

On balance, we conclude that affirmance is appropriate, not only because of the wording of the April order and the deferential standard of review but also because, as will be discussed more fully *infra*, the Commission, despite its ruling on the motion in limine, did in fact end up allowing intervenors the opportunity to present evidence of possible alternatives for Line 5. Moreover, in its analysis of the "public need" issue, the Commission considered the viability of those alternatives. See *In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), pp 293-296, 300-302.

We note, lastly, that For Love of Water argues about the public trust. It refers to the fact that, "[u]nder common law, the state owns and holds the waters and bottomlands of the Straits and Great Lakes in public trust." As stated in *Glass v Goeckel*, 473 Mich 667, 678; 703 NW2d 58 (2005), with regard to the public trust doctrine, "[U]nder longstanding principles of *Michigan's common law*, the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public." (Emphasis added.) However, the PSC is a "creature of the Legislature" and has no common-law powers; it "possesses only that authority bestowed upon it by statute." *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988). All its power must derive from statutes. *Id*. As such, the reliance by For Love of Water on the public trust doctrine is misplaced.

[12] As set forth in the statement of facts, although the AG has initiated a lawsuit to shut down Line 5, that ligation is unresolved.

B. PSC'S MEPA ANALYSIS IN GENERAL

Intervenors the Tribes, Michigan Environmental Council, Tip Of The Mitt Watershed Council, National Wildlife Federation, And For Love Of Water argue that the PSC made various errors in connection with its general[13] MEPA analysis.

1. STANDARDS OF REVIEW

We note that in *West Mich Environmental Action Council, Inc v Natural Resources Comm*, 405 Mich 741, 754; 275 NW2d 538 (1979), the Court referred to de novo review in MEPA cases. This was stated in the context of "an environmental protection act case . . . filed in a circuit court." *Id*.; see also *id*. at 749. In other words, the Court stated that a circuit court must look at the evidence de novo in a MEPA case. *Id*. at 754. At issue here is not a separate MEPA action but a MEPA analysis made in the context of a PSC permitting decision. In *Friends of Crystal River v Kuras Props*, 218 Mich App 457, 470, 472; 554 NW2d 328 (1996), de novo review was applied by a circuit court in the context of a wetlands permitting decision, and this Court approved of the process. The Court of Appeals, of course, serves a different role from that of a circuit court and is not a finder of fact, and in *Friends of Crystal River*, *id*. at 470, this Court spoke about the circuit court's "finding" regarding the impairment of a natural resource. Also, in *West Mich Environmental Action Council*, 405 Mich at 754, the Court spoke about a circuit court making "findings of fact" under MEPA. (Quotation marks and citation omitted.) The factual circumstances in that case involved a process contemplated by statute, i.e., a circuit court using an administrative tribunal to conduct certain proceedings. See *id*. at 752-754, former MCL 691.1204, and current MCL 324.1704. The *West Mich Environmental Action Council* Court stated that "the Legislature specifically addressed the relationship between suits brought under the environmental protection act and administrative proceedings" and concluded that de novo review by the circuit court was required because of the statutory scheme. *Id*. at 752, 754.

In this case, there was no "suit" under MEPA. We note, too, that in *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 8-9; 596 NW2d 620 (1999), the Court spoke about according deference to a *trial court's findings* in a MEPA case. Given all the circumstances, including that judicial review of PSC decisions is set forth by way of statute, we conclude that the standards of review as set forth in Part II.A.1. of this opinion are applicable.

2. DISCUSSION

We conclude that the Commission's general MEPA decision was adequately supported by the law and evidence.

MCL 324.1705(2), a provision of MEPA, states:

[13] As discussed *infra*, certain intervenors take issue specifically with how the PSC addressed GHGs during its MEPA analysis. These arguments are addressed in Part II.C. of this opinion.

> In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

The Tribes, Michigan Environmental Council, Tip of the Mitt Watershed Council, and National Wildlife Federation contend that the Commission erred by failing to consider the risks of oil spills from Line 5 as a whole when making its environmental findings. But the proceedings at issue involved an application for the Replacement Project, and the "conduct" sought to be "authorized or approved" was the Replacement Project. Again, as stated in *United Parcel Serv*, 277 Mich App at 202:

> [This Court] may not read into a statute or rule that which is not within the manifest intention of the Legislature as gathered from the statute or rule itself. Only where the language under review is ambiguous may a court properly go beyond the words of the statute or administrative rule to ascertain the drafter's intent.

The Commission, by looking to the desired "conduct," was following the plain language of MCL 324.1705(2).

Various intervenors take issue with the comparisons the PSC used as possible feasible and prudent alternatives. For example, the Tribes contend that the Commission acted arbitrarily by failing to examine the risk of oils spills from Line 5 as a whole but then, when considering possible alternatives such as rail, taking into account the entire length of needed rail.

As noted, the PSC concluded that there *would* be some environmental impairment as a result of the Replacement Project. See, e.g., *In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), p 329. Accordingly, under MCL 324.1705(2), the PSC was tasked with determining if there was a feasible and prudent alternative. This could theoretically encompass (1) the status quo, with the dual pipelines in place; (2) replacement of or alternatives for only the Straits segment of Line 5; or (3) alternative transportation methods for the entire line. As set forth in the statement of facts in this opinion, the PSC looked at all of these options. While it could have limited its "alternatives" analysis merely to alternative methods of getting product *through the Straits*, it decided to examine *all* the presented alternatives to the Replacement Project. We acknowledge that it is concerning that the PSC, when discussing rail transport, looked to the effect of rail being used for the entire transport system and at first compared it to just the tunnel project; the Commission mentioned, for example, how many rivers and wetlands a rail system would cross but then did not mention the same statistics for Line 5 as a whole. See, e.g., *id*. at pp 339, 341. However, and importantly, the Commission also relied heavily on the presented evidence that using rail as transport would produce significantly more GHGs, for the same amount of product, than using Line 5 as a whole for transport. *Id*. at 345-346. Accordingly, we conclude that the PSC's MEPA decision is adequately supported by the record.

The Tribes, Michigan Environmental Council, Tip of the Mitt Watershed Council, and National Wildlife Federation contend that the PSC acted inconsistently because it did not consider the risk of oil spills for the entire line yet considered evidence about GHGs regarding the entire line. For Love of Water makes a related argument. The Commission's decision was evidently tied to the fact that the purpose of the Replacement Project was to transport hydrocarbons. It concluded that "its obligations under MEPA extend[] to the products being shipped through the Replacement Project" and, therefore, it considered the impact of GHGs in relation to various alternatives. See *id*. at 51. We conclude that the Commission acted appropriately because it *could* have limited its "comparisons" analysis to just alternatives for the Straits segment of pipeline (such as those presented by the MSCA) but instead decided to look to *all* presented alternatives, and ultimately it reached a decision that was supported by the evidence in the record.

For Love of Water, Environmental Law & Policy Center, and Michigan Climate Action Network contend that the PSC did not apply a proper burden of proof because, once the Commission concluded that there would be some environmental impairment as a result of the Replacement Project, it was Enbridge's burden to demonstrate that there was no feasible and prudent alternative, and Enbridge did not present evidence of the lack of such alternatives. MCL 324.1703(1) states:

> When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that his or her 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. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts apply to actions brought under this part.

The statute speaks to the defendant's opportunity to show the lack of a feasible and prudent alternative, but it does not state that *only* the defendant or petitioner can present evidence about alternatives. The PSC Staff and the MSCA presented possible alternatives, and the PSC also considered the alternatives set forth in the Dynamic Risk report, which, notably, was a report introduced by Environmental Law & Policy Center. In *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 312-313; 224 NW2d 883 (1975), the Michigan Supreme Court stated:

> If the defendant rather than, or in addition to attempting, to rebut plaintiff's case seeks to establish an affirmative defense, then *the judge must set out those facts which led him to conclude 1) that feasible and prudent alternatives do or do not exist and what the claimed alternatives were* and 2) that the defendant's conduct is or is not consistent with the promotion of public health, safety and welfare. [Quotation marks omitted; emphasis added.]

In this case, the PSC explained why the alternatives that were presented were not feasible and prudent in its view. Also, it is important to note that the Straits-specific alternatives presented by the MSCA were *on behalf of Enbridge*. Indeed, the MSCA intervened on Enbridge's behalf and stated that "MSCA . . . will suffer an injury in fact if Enbridge's permit application is denied." A remand is unwarranted because numerous alternatives were in fact presented and considered, even if they did not originate from Enbridge itself.

For Love of Water contends, in a reply brief, that the PSC, in its MEPA analysis, did not consider the public trust. MCL 324.1705(2) refers to "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources[.]" The Commission considered this statutory reference to the "public trust in [the] resources" by way of its overall MEPA review.

The AG contends that the PSC's MEPA analysis was flawed because the Commission limited its consideration of alternatives, such as rail transport. This is not accurate, however. The Commission, in its April 2021 order, ruled that it would consider evidence concerning alternative transportation methods. *In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered April 21, 2021 (Case No. U-20763), pp 64, 68-69. It stated:

> At this early stage of the proceeding, the Commission is not persuaded that it should prohibit arguments and evidence addressing what the appropriate point of comparison is for any pollution, impairment, or destruction of Michigan's natural resources resulting from the proposed Replacement Project. Such questions on the feasibility and prudence of alternatives—*both in terms of alternative pipeline and non-pipeline shipping arrangements* and alternatives to the products being shipped—are inherently questions of fact well suited to the development of record evidence. However, *while allowing evidence to be considered on this point*, the Commission notes that this is only the beginning of the inquiry, and the Commission must ultimately determine, consistent with its responsibilities under MEPA, whether there is any pollution, impairment, or destruction as a result of the Replacement Project—including in comparison to the possible closure of the dual pipeline segments currently in the Straits if the Notice is enforced; whether any pollution, impairment, or destruction is consistent with the protection of Michigan's natural resources; and whether there are feasible and prudent alternatives to any pollution, impairment, or destruction that is found as a result of the Replacement Project. [*Id*. (emphasis added).]

Intervenors were *allowed* to present evidence of alternatives. Some intervenors presented evidence regarding alternative scenarios. See *In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), pp 118-126. And, as discussed, the PSC considered alternatives such as rail transport before concluding that there was not a feasible and prudent alternative to the Replacement Project.

Moreover, the Commission stated that some environmental concerns will be addressed by way of permitting decisions by other agencies:

> As an initial matter, the Commission agrees with the Staff that several potential environmental impairments resulting from the construction of the Replacement Project fall in the regulatory purview of other state and federal agencies and will be addressed by separate permitting decisions. For example, [certain] witnesses . . . asserted that the discharge of wastewater in the Great Lakes during construction of the tunnel and regular operations of the Replacement Project is likely to affect the Great Lakes' ecosystem. The Staff noted that the NREPA Part 31 permit "establishes parameters for authorized discharge, including quantity and composition." . . . The Commission agrees with the Staff that Enbridge's compliance with these permit requirements should minimize potential environmental impacts from construction and operation of the Replacement Project. [*Id*. at 328.]

Certain intervenors contend that the PSC could not "defer" to another agency as it did in this passage. But the PSC's decision was supported by evidence in the record, such as permit language, indicating that Enbridge would need to comply with particular discharge requirements.

On balance, we find no basis on which to reverse or remand.

C. PSC'S MEPA ANALYSIS AS SPECIFICALLY APPLIED TO GREENHOUSE-GAS EMISSIONS

Intervenors Environmental Law & Policy Center and Michigan Climate Action Network argue that Commission made various errors with regard to how it analyzed the impact of GHGs in the context of its MEPA decision.

1. STANDARDS OF REVIEW

The standards of review are discussed in Part II.B.1.

2. DISCUSSION

We conclude that the Environmental Law & Policy Center and the Michigan Climate Action Network have not established entitlement to appellate relief in connection with their arguments about how the PSC evaluated the impact of GHGs.

The Environmental Law & Policy Center and the Michigan Climate Action Network argue that the PSC, in evaluating GHGs in connection with MEPA, failed to properly take into account the expert testimony they presented concerning the following:

> [a] standard methodology [that] includes both "direct" GHG emissions from construction and operation of the project [i.e., GHGs from building the tunnel and new pipeline segment] and "indirect" upstream and downstream GHG emissions from extraction, refining, and consuming the oil and gas that would flow through the pipeline.

Their expert witness Peter Erickson testified:

> [W]hen compared to a scenario in which the existing Line 5 pipeline no longer operates, construction and operation of the Proposed Project would lead to an increase of about 27 million metric tons CO2e annually in global greenhouse gas emissions from the production and combustion of oil.

Erickson explained further:

> In the case of the Proposed Project, the availability of oil pipelines, including Line 5, affects global GHG emissions because pipelines help increase the supply of oil. Evaluation of these dynamics is a typical methodology for analyzing incremental GHG emissions of an energy infrastructure project.

Erickson said that he calculated the 27-million-ton increase by looking at increased costs for oil as a result of rail transport, comparing these to the lower costs for oil if Line 5 were used, and considering " '[l]ong-run elasticities.' " He elaborated:

> "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. The long-run elasticities of supply (0.6) and demand (-0.3) that I use here are the same as in my most recent peer-reviewed research.

The Environmental Law & Policy Center and the Michigan Climate Action Network argue that the PSC, in evaluating GHGs, ignored the pricing pressure on supply and demand, simply *assumed* no diminishment in demand, and, therefore, failed to take into account that facilitating the continuation of Line 5 would result in an increase in GHGs.

Alexander Morese, a member of the PSC Staff, stated that the increase in prices resulting from alternative transportation methods "would not be enough to curb current usage" of petroleum products. Morese disputed Erickson's conclusion that a shutdown of Line 5 would result in "reduced demand, and thus reduced GHG emissions." He stated that long-term effects would be unlikely. The PSC, in making its GHGs analysis, cited to transcript pages that included Morese's testimony. *In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), p 345. Also, it noted, correctly, that "Erickson did not dispute that moving oil by rail will increase GHG emissions" (i.e., by virtue of the transport itself). *Id*. at 346.

The argument by the Environmental Law & Policy Center and the Michigan Climate Action Network is not persuasive because the PSC supported its conclusions regarding GHGs by direct reference to the testimony in evidence. The Environmental Law & Policy Center and the Michigan Climate Action Network contend that the Commission should have placed more emphasis on long-term effects as testified to by Erickson. The PSC did make reference to "short term" and "immediate" effects, see *id*. at 345, without explaining why it should not be focusing on all eventualities. But again, despite the wording the PSC employed, its ultimate conclusions regarding GHGs has support in the cited evidence. In addition, it is important to remember, as the

PSC itself strongly emphasized immediately after discussing GHGs, see *id*. at 346, that the dual pipelines pose a clear environmental threat. Any MEPA analysis needed to take into account that the attempt to shut the dual pipelines down has not yet been successful, and the granting of the permit by the PSC will resolve the problem posed by the dual pipelines.

The Environmental Law & Policy Center and the Michigan Climate Action Network further argue that the PSC violated *Ray*, 393 Mich at 306-307, because it did not "adopt and apply a standard and methodology" for evaluating GHGs. But the Environmental Law & Policy Center and the Michigan Climate Action Network do not indicate under what authority the PSC would be acting in adopting such standards. As already noted, the Commission is a "creature of the Legislature" and has no common-law powers; it "possesses only that authority bestowed upon it by statute." *Union Carbide Corp*, 431 Mich at 146. In the *Ray* case, the Court was speaking about the Legislature, by way of MEPA, leaving it to courts to "develop[] a common law of environmental quality." *Ray*, 393 Mich at 306-307. The bottom line is that the Commission considered the evidence presented in the contested case, which is what it was tasked with doing.

The Environmental Law & Policy Center and the Michigan Climate Action Network also suggest that the PSC violated *Thomas Twp v John Sexton Corp of Mich*, 173 Mich App 507; 434 NW2d 644 (1988), in which this Court stated that MEPA's impairment standard requires a "statewide perspective." In *Thomas Twp*, *id*. at 509-511, this Court reviewed the granting of a permit to drain an artificial lake. This Court stated:

> The [lower] court concluded that draining the lake would violate MEPA, reasoning that although the lake would be considered an abandoned clay pit filled with water if it were located elsewhere, in Saginaw County it was a rare resource.
>
> * * *
>
> This case does not concern the destruction of animal or plant life, nor the loss of a valuable natural resource. The lake is an abandoned clay pit filled with water which is hazardous to people and property. The lake's only significant value is its potential to be a recreational facility. The record indicates that this potential would not be realized even if the lake were not drained. . . .
>
> From a statewide perspective, draining the lake will not constitute the impairment or destruction of a natural resource under MEPA. [*Id*. at 516-517.]

The Commission in the present case considered general environmental impacts and did not run afoul of *Thomas Twp*.

The Environmental Law & Policy Center and the Michigan Climate Action Network also contend that the PSC, in evaluating GHGs, ran afoul of *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 31; 576 NW2d 641 (1998), wherein the Court noted that a MEPA review generally requires an evaluation of the environmental situation before the proposed action as compared to the probable environmental situation afterwards. But the Commission did, in fact, evaluate the environmental situation before the proposed action.

Accordingly, we conclude that the GHG-specific arguments raised by the Environmental Law & Policy Center and the Michigan Climate Action Network do not warrant a reversal or remand.

III. BORKE'S ATTEMPT TO APPEAL

Matthew S. Borke filed an appeal as of right in this case. All appellants in these consolidated appeals were formally recognized as intervenors in the proceedings below, *except* Borke. Borke, in his jurisdictional checklist, cites MCR 7.203(A)(2) and MCL 462.26. MCR 7.203(A)(2) states that this Court

> has jurisdiction of an appeal of right filed by an aggrieved party from the following:
>
> * * *
>
> (2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule.

MCL 462.26 provides that "*any* common carrier or *other party in interest*, being dissatisfied with any order of the commission . . . fixing any regulations, practices, or services, may within 30 days from the issuance and notice of that order file an appeal as of right in the court of appeals." (Emphasis added.) Borke merely offered *public comments* in the proceedings below; his contributions consisted of two short e-mails complaining generally about Enbridge's honesty and motives and alleging misconduct, sometimes in connection with a project unrelated to the instant case. No supported legal arguments were advanced. "[A]ny . . . *party* in interest," see MCL 462.26 (emphasis added), cannot include each and every person who happened to offer comments, but nothing more, in a contested case. Borke contends in a reply brief that the PSC can permit intervention if someone will bring a unique perspective to a case, but, crucially, he never states that *he* was granted intervention. He also cites MCL 460.6g(4), which is inapposite because it deals with appeals from certain types of rate-setting. And he cites Mich Admin Code, R 792.10413, which speaks of "participation without intervention" in certain proceedings and specifically states that a person participating in this manner "shall not be regarded as a party to the proceeding." See Mich Admin Code, R 792.10413(2). *Hundreds and hundreds* of people, perhaps thousands, offered comments in this case, and this is common for a high-profile case. It is not tenable that each is entitled to an appeal as of right.[14] We decline to consider Borke's arguments.

[14] We note that MCR 7.203(F)(1) states, "Except when a motion to dismiss has been filed, the chief judge or another designated judge may, acting alone, dismiss an appeal or original proceeding for lack of jurisdiction." In addition, the Court of Appeals may "enter any judgment or order or grant further or different relief as the case may require[.]" MCR 7.216(A)(7).

IV. CONCLUSION

The PSC issued a comprehensive and detailed opinion. We find no basis for ordering a reversal or remand. The Commission acted reasonably when one considers its actions and rulings as a whole.

Affirmed.

/s/ Michael J. Kelly
/s/ Anica Letica
/s/ Randy J. Wallace

Attachment 2

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

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.	)	Case No. U-20763

At the December 1, 2023 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Katherine L. Peretick, Commissioner
Hon. Alessandra R. Carreon, Commissioner

ORDER

I. HISTORY OF PROCEEDINGS

On April 17, 2020, Enbridge Energy, Limited Partnership (Enbridge) filed an application (application) and supporting exhibits in this docket pursuant to Public Act 16 of 1929, MCL 483.1 *et seq*. (Act 16) and the Commission's Rules of Practice and Procedure, Mich Admin Code, R 792.10447 (Rule 447) requesting that the Commission grant Enbridge the authority for its project known as the Straits Line 5 Replacement Segment. According to Enbridge, the project involves replacing the segment of the Line 5 pipeline (Line 5) that crosses the Straits of Mackinac (Straits) in Michigan with a single, 30-inch diameter pipe and relocating the segment to a

"concrete-lined tunnel below the lakebed of the Straits" (Replacement Project). Application, p. 2. Enbridge sought *ex parte* approval of the application. In the alternative, Enbridge requested a declaratory ruling confirming that it already has the requisite authority to construct the Replacement Project pursuant to the March 31, 1953 order in Case No. D-3903-53.1 (1953 order).

On April 22, 2020, the Commission issued an order in this case seeking comments on the threshold issue presented in Enbridge's declaratory ruling request. The Commission also decided to hold Enbridge's application in abeyance while it considered the request for a declaratory ruling.

On June 12, 2020, Enbridge filed in this docket supplemental authority for its request for a declaratory ruling, citing a recent decision of the Michigan Court of Appeals that affirmed the constitutionality of Public Act 359 of 2018, MCL 254.324 *et seq*. (Act 359). On June 25, 2020, Bay Mills Indian Community (Bay Mills) filed supplemental authority in this docket, citing recent motions and briefs filed by the Michigan Department of Attorney General (Attorney General) in *Nessel v Enbridge Energy, Ltd Partnership*, Docket No. 19-474-CE, Ingham County Circuit Court, Michigan.

On June 30, 2020, the Commission issued an order in this case denying both *ex parte* approval of Enbridge's application and its requested declaratory relief (June 30 order). The Commission set this matter for a contested proceeding, invited the continued submission of comments, and decided to read the record. June 30 order, p. 70.

On July 29, 2020, Enbridge filed in this docket a petition for rehearing of the June 30 order (July 29 petition for rehearing) pursuant to Mich Admin Code, R 792.10437 (Rule 437).

On August 11, 2020, Enbridge filed in this docket limited objections to the notice of intervention filed by the Attorney General and the petitions to intervene filed by Bay Mills, Grand Traverse Band of Ottawa and Chippewa Indians (GTBOC), Little Traverse Bay Bands of Odawa

Indians (LTBB), Nottawaseppi Huron Band of the Potawatomi (NHBP), the Michigan Environmental Council (MEC), Tip of the Mitt Watershed Council (TMWC), National Wildlife Federation (NWF), For Love of Water (FLOW), Environmental Law & Policy Center (ELPC), and Michigan Climate Action Network (MiCAN). On August 12, 2020, NHBP and FLOW each filed in this docket a reply to Enbridge's limited objections to the petitions to intervene. Also on August 12, 2020, a prehearing conference was held before Administrative Law Judge Dennis W. Mack (ALJ Mack), at which intervention was granted to the Attorney General; FLOW; MEC, GTBOC, TMWC, and NWF (together, the MEC Coalition); Bay Mills; ELPC and MiCAN (together, ELPC/MiCAN); LTBB; NHBP; Michigan Laborers' District Council (MLDC); Michigan Propane Gas Association (MPGA) and the National Propane Gas Association (together, the Associations); and the Mackinac Straits Corridor Authority (MSCA).[1] The Commission Staff (Staff) also participated. On August 13, 2020, ALJ Mack adopted a schedule for the case.

On August 19, 2020, the MEC Coalition, the Staff, Bay Mills, and ELPC/MiCAN each filed a response to Enbridge's July 29 petition for rehearing in this case.

On August 24, 2020, the Commission held a public hearing on the application, where the Commissioners listened to oral comments from members of the public. Written comments have been filed in this docket throughout the pendency of the case.

On September 2, 2020, Enbridge filed a motion in limine in this docket (September 2 motion in limine). On September 23, 2020, responses to the September 2 motion in limine were filed in this docket by the Staff; ELPC/MiCAN; FLOW; the Attorney General; the Associations; and

[1] ALJ Mack and the parties have used various shortened names in the documents filed in this docket. To reduce confusion, when reproducing a quote in this order, the shortened names or acronyms designated herein are used (in brackets).

MEC, Bay Mills, GTBOC, TMWC, and NWF. On September 30, 2020, ALJ Mack held a hearing on the motion.

On October 23, 2020, ALJ Mack issued a ruling in this docket granting Enbridge's September 2 motion in limine in part and denying it in part (ALJ Mack's initial ruling). On November 6, 2020, Bay Mills, the MEC Coalition, ELPC/MiCAN, FLOW, and the Attorney General[2] each filed in this docket an application for leave to appeal ALJ Mack's initial ruling under Mich Admin Code, R 792.10433 (Rule 433). On November 20, 2020, Enbridge, the Associations, the Staff, and MSCA each filed in this docket a response to the November 6, 2020 applications for leave to appeal.

On November 24, 2020, the MEC Coalition filed in this docket a motion for entry of a protective order to "govern the release, use, and disclosure of confidential, proprietary, or sensitive information, including information designated as Critical Energy Infrastructure Information." MEC Coalition's November 24, 2020 motion for protective order, filing #U-20763-0451, p. 1. On November 25, 2020, Enbridge filed in this docket a motion to compel answers to requests for admission from the Attorney General.

On December 4, 2020, the Staff filed in this docket a response supporting the MEC Coalition's motion for entry of a protective order. On that same date, Enbridge filed in this docket an answer to the MEC Coalition's motion for entry of a protective order, a brief in support, and a proposal for its own protective order. In addition, on December 4, 2020, MSCA filed in this docket a statement partially concurring with Enbridge's answer to the MEC Coalition's motion for protective order. Also on December 4, 2020, the Attorney General filed in this docket a response

[2] The Attorney General did not file her own application but filed a notice that she joins in the other four filed applications.

to Enbridge's November 25, 2020 motion to compel. On December 7, 2020, the MEC Coalition and Bay Mills jointly filed in this docket objections to the protective order requested by Enbridge in its December 4, 2020 answer.

On December 8, 2020, ALJ Mack held a hearing on the MEC Coalition's and Enbridge's motions for entry of a protective order and Enbridge's motion to compel. At the close of the hearing, ALJ Mack took the motions for entry of a protective order under advisement and denied Enbridge's motion to compel.

On December 9, 2020, the Commission issued an order in this case (December 9 order) remanding Enbridge's September 2 motion in limine to ALJ Mack in light of Governor Gretchen Whitmer's November 13, 2020 issuance of a notice of revocation of Enbridge's existing Line 5 easement in the Straits (Notice), which was issued during the briefing on the applications for leave to appeal ALJ Mack's initial ruling.

On December 10, 2020, ALJ Mack issued a ruling granting the MEC Coalition's motion for entry of a protective order in this case and denying Enbridge's proposed modifications. ALJ Mack set a revised schedule for the case on December 21, 2020.

On December 23, 2020, Enbridge filed a motion in this docket requesting approval to file supplemental direct testimony and exhibits (December 23 motion), and on that same date, filed the proposed supplemental direct testimony and exhibits. On January 8, 2021, the Staff filed a response in this docket in support of Enbridge's December 23 motion. On January 11, 2021, ALJ Mack granted Enbridge's December 23 motion, and the supplemental direct testimony and exhibits appear in the docket as filing #U-20763-0509.

Initial briefs on the remanded September 2 motion in limine were filed in this docket on January 15, 2021, and reply briefs were filed on January 29, 2021.[3] ALJ Mack held a hearing on the remanded motion on February 5, 2021. On February 5 and 8, 2021, Enbridge filed in this docket a supplemental filing of Enbridge's Michigan Department of Environment, Great Lakes, and Energy (EGLE) permits and responsiveness summaries, respectively.

On February 23, 2021, ALJ Mack issued a ruling in this docket granting the remanded September 2 motion in limine in part and denying it in part, consistent with his initial ruling (ALJ Mack's ruling on remand). On March 9, 2021, ELPC/MiCAN; FLOW; the MEC Coalition;[4] and Bay Mills, GTBOC, LTBB, and NHBP[5] each filed in this docket an application for leave to appeal ALJ Mack's ruling on remand pursuant to Rule 433. On March 23, 2021, MLDC, Enbridge, the Associations, the Staff, and MSCA each filed in this docket a response to the applications for leave to appeal ALJ Mack's ruling on remand.

On April 21, 2021, the Commission issued an order in this case (April 21 order) addressing both sets of appeals. The Commission granted the applications for leave to appeal and granted the requested relief in part and denied it in part.

On May 5, 2021, ALJ Mack set a revised schedule for the case.

On May 21, 2021, the Tribal Intervenors filed in this docket a joint petition for rehearing of the April 21 order pursuant to Rule 437 (May 21 petition for rehearing). On June 11, 2021, Enbridge and the Associations each filed in this docket a response to the Tribal Intervenors'

[3] At the time of the briefing on remand of the September 2 motion in limine, the alignment of certain parties changed. At the time of the filing of the second round of applications for leave to appeal, the alignment of certain parties changed again, as described below.

[4] At this stage of the proceeding, the MEC Coalition is comprised of MEC, TMWC, and NWF.

[5] Collectively, Tribal Intervenors for purposes of this application.

May 21 petition for rehearing. On that same date, the Staff filed a letter in this docket stating that it would not be filing a response to the Tribal Intervenors' May 21 petition for rehearing but "reserve[s] the right to address any issue and argument raised in the petition if they arise again throughout the course of this proceeding, related proceeding, or in any subsequent appeals." Staff's letter in response to the Tribal Intervenors' petition for rehearing, p. 1.

On September 14, 2021, direct testimony and exhibits were filed in this docket by LTBB, the Staff, MSCA, NHBP, Bay Mills, and ELPC/MiCAN. On September 15, 2021, ELPC/MiCAN filed in this docket additional direct testimony and exhibits, and MSCA filed the corrected testimony of Dr. Michael A. Mooney.

On December 14, 2021, rebuttal testimony and exhibits were filed in this docket by Enbridge, the Staff, the Associations, Bay Mills, and ELPC/MiCAN.

On December 21, 2021, Enbridge filed in this docket motions to strike portions of the direct testimony of Dr. Charles E. Cleland, Peter A. Erickson, and Jacques LeBlanc, Jr.; portions of the direct testimony and exhibits of Frank Ettawageshik, Whitney B. Gravelle, Dr. Peter Howard, and John Rodwan; and portions of the direct and rebuttal testimony of Dr. Elizabeth A. Stanton. On that same date, Enbridge filed in this docket a motion to strike portions of the rebuttal testimony of Richard Kuprewicz. On January 11, 2022, NHBP, the Staff, Bay Mills, the Associations, and ELPC/MiCAN each filed in this docket a response to Enbridge's motions to strike. On that same date, Enbridge filed in this docket revised Exhibits A-4 and A-21.1.

On January 13, 2022, ALJ Mack issued a ruling on the motions to strike in this case (ALJ Mack's January 13 ruling), finding that: (1) Enbridge's motion to strike portions of Dr. Cleland's direct testimony and Exhibit BMC-35 is granted; (2) Enbridge's motion to strike portions of Mr. Kuprewicz's rebuttal testimony is denied, but Enbridge's requested alternative relief to file

surrebuttal is granted; (3) Enbridge's motion to strike portions of Mr. LeBlanc's direct testimony is granted; (4) Enbridge's motion to strike portions of Ms. Gravelle's testimony and Exhibits BMC-1 through BMC-5 is granted; (5) Enbridge's motion to strike portions of Mr. Ettawageshik's direct testimony and Exhibits BMC-17 through BMC-30 is granted; (6) Enbridge's motion to strike Dr. Howard's direct testimony, in its entirety, and Exhibits ELP-8 through ELP-10 is denied; (7) Enbridge's motion to strike portions of Mr. Erickson's direct testimony is granted; (8) Enbridge's motion to strike portions of Dr. Stanton's direct and rebuttal testimony is denied; and (9) Enbridge's motion to strike portions of Mr. Rodwan's direct testimony and Exhibit NHBP-3 is granted. *See*, ALJ Mack's January 13 ruling, pp. 16-18. On January 14, 2022, Enbridge filed in this docket the surrebuttal testimony of Aaron Dennis, and NHBP filed the revised testimony of Mr. Rodwan. On January 17, 2022, Enbridge filed in this docket Exhibits A-13.1 and A-14.1, which are updates to Exhibits A-13 and A-14. On January 18, 2022, ELPC/MiCAN filed the revised direct testimony of Mr. Erickson in this docket.

On January 19, 2022, Bay Mills filed in this docket the revised direct testimony of Dr. Cleland, Ms. Gravelle, Mr. Ettawageshik, and Mr. LeBlanc. On that same date, Bay Mills filed a motion in this case to file the sur-surrebuttal testimony of Mr. Kuprewicz (Bay Mills' January 19 motion) or, "in the alternative to take official notice under Rule 428, [Mich Admin Code,] R. 792.10428, of a Joint Industry Report titled *Enhanced Girth Weld Performance for Newly Constructed Grade X70 Pipeline* [Joint Industry Report]—the exact grade of pipeline to be used in the Tunnel Project—and which was reviewed, approved, and signed by an Enbridge representative during the pendency of this contested case." Bay Mills' January 19 motion, p. 2. Also on January 19, 2022, Bay Mills filed Exhibit BMC-42C under seal. On January 20, 2022, ALJ Mack granted Bay Mills' motion to bind in the rebuttal and sur-surrebuttal testimony of

Mr. Kuprewicz, and ALJ Mack admitted Exhibits BMC-37 and BMC-43. On that same date, Bay Mills filed in this docket the sur-surrebuttal testimony of Mr. Kuprewicz and filed the revised direct testimony of Dr. Cleland under seal. On January 24, 2022, MSCA filed in this docket a motion to file the sur-sur-surrebuttal testimony of Daniel M. Cooper. On that same date, ALJ Mack granted MSCA's motion to bind in the sur-sur-surrebuttal testimony of Mr. Cooper.

Direct and cross-examination was conducted on January 14, 18-21, and 24, 2022.

On February 18, 2022, Bay Mills, GTBOC, LTBB, and NHBP;[6] ELPC/MiCAN; Enbridge; FLOW; MLDC; MSCA; and the Staff each filed an initial brief in this docket. On that same date, in its initial brief, Bay Mills filed an application for leave to appeal ALJ Mack's January 13 ruling. On February 22, 2022, the Associations filed an initial brief in this docket. On March 11, 2022, the Tribal Nations, ELPC/MiCAN, Enbridge, FLOW, the MEC Coalition, the Staff, and the Associations each filed a reply brief in this docket.

On March 14, 2022, ALJ Mack filed a notice in this docket that the record in this case closed on January 24, 2022, and that the case was to be transmitted to the Commission for its consideration.

On April 6, 2022, the Staff filed a Fee Exhibit in this docket pursuant to the requirements of MCL 460.119 and the December 19, 2019 order in Case No. U-20634. *See*, Case No. U-20763, filing #U-20763-1142. On May 16, 2022, the Commission's Executive Secretary filed a memorandum in the docket acknowledging that Enbridge fulfilled its payment obligations. *See*, Case No. U-20763, filing #U-20763-1190.

[6] For this stage of the proceeding, Bay Mills was joined by the GTBOC, LTBB, and the NHBP, and they refer to themselves as the Tribal Nations in their initial brief.

On July 7, 2022, the Commission issued an order in this case (July 7 order) reopening the record to receive additional testimony, exhibits, and rebuttal. In the July 7 order, the Commission found that additional evidence is necessary for the Commission to complete its Act 16 analysis of whether the Replacement Project is designed and routed in a reasonable manner and whether it meets or exceeds current safety and engineering standards. However, the Commission stated that briefing by the parties on the reopened record would not be permitted. On July 22, 2022, ALJ Mack set a revised schedule for the case.

On August 5, 2022, Enbridge, the Associations, and MLDC filed a joint petition for rehearing of the July 7 order (August 5 joint petition for rehearing) requesting that the Commission permit the parties to "advocat[e] their positions in briefing related to the reopened evidentiary record." August 5 joint petition for rehearing, p. 3. On August 22, 2022, MSCA and Bay Mills each filed a response to the August 5 joint petition for rehearing stating that they do not object to the relief sought in the petition. On September 8, 2022, the Commission issued an order in this docket (September 8 order) finding that the request by Enbridge, the Associations, and MLDC to file additional briefing is reasonable and should be granted. Thus, the Commission stated that "initial briefs of no more than 30 pages addressing the evidence presented in the supplemental record developed April 4-7, 2023, may be filed no later than May 5, 2023, and reply briefs of no more than 25 pages addressing the evidence presented in the supplemental record developed April 4-7, 2023, may be filed no later than May 19, 2023."[7] September 8 order, p. 5.

On September 14, 2022, this case was reassigned to Administrative Law Judge Christopher S. Saunders (ALJ Saunders).

[7] The hearing schedule was revised at a motion hearing on January 12, 2023, and the cross-examination scheduled for April 4-7, 2023, was rescheduled for April 11-14, 2023.

On October 21, 2022, Enbridge filed in this docket the direct testimony on reopening of Ashley Rentz and John Godfrey and Exhibits A-28 and A-29. On December 12, 2022, Bay Mills filed a motion in this docket to strike Appendix B to Exhibit A-29 (December 12 motion to strike). On December 20 and 21, 2022, ELPC/MiCAN and the Attorney General each filed a response in this docket, respectively, supporting Bay Mills' December 12 motion to strike. On December 21, 2022, the Staff filed in this docket a response in partial support of Bay Mills' December 12 motion to strike, and Enbridge filed in this docket a response opposing Bay Mills' December 12 motion to strike. On December 28, 2022, the Associations filed a response in this docket to Bay Mills' December 12 motion to strike, supporting Enbridge's response to the motion.

On January 11, 2023, ALJ Saunders held a hearing on Bay Mills' December 12 motion to strike. On January 12, 2023, ALJ Saunders issued a ruling in this docket on Bay Mills' December 12 motion to strike (ALJ Saunders' January 12 ruling), agreeing with Bay Mills, the Staff, the Attorney General, and ELPC/MiCAN that "Appendix B has not been offered in an admissible form and should be stricken." ALJ Saunders' January 12 ruling, p. 4. However, because the information in Appendix B was specifically requested by the Commission in the July 7 order, ALJ Saunders stated that Enbridge should be provided the opportunity to resubmit the information in an admissible form. ALJ Saunders directed Enbridge to "cure the evidentiary defects in the submission of Appendix B" and to submit the necessary testimony by January 17, 2023. ALJ Saunders' January 12 ruling, p. 5. ALJ Saunders thereafter set a revised schedule for the case.

On January 17, 2023, Enbridge filed in this docket the direct testimony on reopening of Ray Philipenko, the supplemental direct testimony on reopening of Mr. Dennis, the direct testimony on reopening of Steven Bott, and Exhibits A-30 through A-32. On January 18, 2023, Enbridge filed

in this docket the corrected direct testimony on reopening of Mr. Bott and Exhibit A-32. On that same date, Enbridge filed in this docket the amended corrected direct testimony on reopening of Mr. Bott, with Schedule 1 and Exhibit A-29.

On February 3, 2023, the Staff filed in this docket the direct testimony on reopening of Travis Warner and Exhibits S-31 through S-36. On that same date, Bay Mills filed in this docket the direct testimony on reopening of Mr. Kuprewicz, Brian O'Mara, and Ms. Gravelle, and Exhibits BMC-50 through BMC-63. Also, on February 3, 2023, MSCA filed in this docket a statement noting that it would not be filing additional testimony but reserved the right to file any rebuttal testimony as necessary and appropriate.

On February 23, 2023, Bay Mills filed in this docket a motion for leave to file the supplemental direct testimony on reopening of Mr. Kuprewicz based on newly publicized information (February 23 motion). On March 1, 2023, Enbridge filed in this docket a response and limited non-objection to Bay Mills' February 23 motion (March 1 response). Enbridge stated that it does not object to Bay Mills filing the supplemental direct testimony on reopening of Mr. Kuprewicz but "reserves all of its other rights including, but not limited to, filing a motion to strike the supplemental direct testimony . . . ." Enbridge's March 1 response, p. 3. On March 2, 2023, the Staff filed a letter in this docket stating that it would not be filing a response to Bay Mills' February 23 motion. On March 7, 2023, ALJ Saunders granted Bay Mills' February 23 motion. On that same date, Bay Mills filed in this docket the supplemental direct testimony on reopening of Mr. Kuprewicz and Exhibit BMC-64.

On March 10, 2023, Enbridge, the Staff, Bay Mills, and MSCA each filed in this docket rebuttal testimony on reopening and exhibits.

On March 29, 2023, Enbridge filed in this docket a motion to strike the rebuttal testimony on reopening and exhibits of Ms. Gravelle, asserting that it is not proper rebuttal, is outside the scope of the proceeding, is hearsay, and seeks to introduce information that was struck by ALJ Mack. On that same date, Bay Mills filed a motion in this docket to strike portions of Mr. Cooper's rebuttal testimony on reopening, asserting that it is not proper rebuttal, is irrelevant, and is outside the scope of the directives contained in the July 7 order. Also on March 29, 2023, Bay Mills filed a motion in this docket to strike portions of Paul Eberth's rebuttal testimony on reopening and Exhibit A-33 in its entirety. Further, on that same date, Bay Mills filed a motion in this docket to strike the direct testimony on reopening of Mr. Philipenko and Exhibit A-30, the supplemental direct testimony on reopening of Mr. Dennis and Exhibit A-31, and the amended corrected direct testimony on reopening of Mr. Bott and Exhibit A-32. In addition, on March 29, 2023, Bay Mills filed a motion in this docket to strike: (1) the direct testimony on reopening of Mr. Godfrey and Exhibit A-29; (2) the direct testimony on reopening of Gabriele Ferrara, Ph.D., and Exhibit A-35; (3) the March 10, 2023 rebuttal testimony on reopening of Mr. Dennis; and (4) the March 10, 2023 rebuttal testimony on reopening of Mr. Bott and Exhibit A-34. On April 7, 2023, Enbridge, the Staff, and MSCA filed in this docket responses opposing Bay Mills' March 29, 2023 motions to strike. On that same date, the Associations filed in this docket a brief in support of Enbridge's response opposing Bay Mills' March 29, 2023 motions to strike, and MLDC filed in this docket a concurrence with Enbridge's motion to strike and Enbridge's response opposing Bay Mills' March 29, 2023 motions to strike.

At a hearing conducted on April 11, 2023, Bay Mills orally made a motion and filed a motion in this docket requesting leave to file the surrebuttal testimony on reopening of Mr. O'Mara in response to Dr. Ferrara's direct testimony on reopening and exhibit. On that same date, ALJ

Saunders: (1) granted Enbridge's motion to strike the rebuttal testimony on reopening and exhibits of Ms. Gravelle; (2) granted Bay Mills' motion to strike portions of Mr. Cooper's rebuttal testimony on reopening; (3) denied Bay Mills' motion to strike the direct testimony on reopening of Dr. Ferrara and Exhibit A-35; (4) granted in part and denied in part Bay Mills' motion to strike the rebuttal testimony on reopening of Mr. Bott and Exhibit A-34; (5) granted Bay Mills' motion to strike portions of Mr. Eberth's rebuttal testimony on reopening and Exhibit A-33 in its entirety; (6) denied Bay Mills' motion to strike the direct testimony on reopening of Mr. Philipenko and Exhibit A-30, the supplemental direct testimony on reopening of Mr. Dennis and Exhibit A-31, and the amended corrected direct testimony on reopening of Mr. Bott and Exhibit A-32; and (7) denied Bay Mills' motion to strike the direct testimony on reopening of Mr. Godfrey and Exhibit A-29. 15 Tr 2056-2061.

At a hearing conducted on April 12, 2023, ALJ Saunders granted Bay Mills' motion to file the surrebuttal testimony on reopening of Mr. O'Mara. On that same date, Bay Mills filed in this docket the surrebuttal testimony on reopening of Mr. O'Mara. In addition, at the hearing conducted on April 12, 2023, Bay Mills orally renewed its motion to strike the amended corrected direct testimony on reopening of Mr. Bott and Exhibit A-32 (April 12 motion to strike). 16 Tr 2370. At the April 12, 2023 hearing, ALJ Saunders denied Bay Mills' April 12 motion to strike. 16 Tr 2374-2375.

On April 14, 2023, Bay Mills filed in this docket Exhibit BMC-70. On April 17, 2023, Enbridge, the Staff, and Bay Mills each filed in this docket official hearing exhibits.

On April 25, 2023, Bay Mills filed an application in this docket for leave to appeal ALJ Saunders' April 11 and 12, 2023 rulings admitting evidence on the record (April 25 application for leave to appeal). In the April 25 application for leave to appeal, Bay Mills objects to ALJ

Saunders' ruling that denied Bay Mills' motion to strike the direct testimony of Mr. Godfrey and Exhibit A-29 and ALJ Saunders' ruling that denied Bay Mills' motion to strike the amended corrected direct testimony on reopening of Mr. Bott and Exhibit A-32.

On April 27, 2023, Bay Mills filed in this docket corrected Exhibits BMC-50 through BMC-57. On April 28, 2023, Enbridge filed in this docket the corrected rebuttal testimony on reopening of Dr. Stanley Vitton.

On May 5, 2023, Enbridge, the Staff, Bay Mills, MLDC, and the Associations each filed in this docket an initial brief on reopening. On May 9, 2023, Enbridge filed in this docket a response to Bay Mills' April 25 application for leave to appeal and an accompanying initial brief. On May 19, 2023, Enbridge, the Staff, Bay Mills, the Associations, and MLDC each filed in this docket a reply brief on reopening.

On May 22, 2023, ALJ Saunders filed a notice in this docket that the reopened record closed on April 14, 2023, and that the case was to be transmitted to the Commission for its consideration.

On June 14, 2023, the Staff filed a Reopened Record Fee Exhibit in this docket pursuant to the requirements of MCL 460.119 and the December 19, 2019 order in Case No. U-20634. *See*, Case No. U-20763, filing #U-20763-1450. On July 19, 2023, the Commission's Executive Secretary filed a memorandum in the docket acknowledging that Enbridge fulfilled its payment obligations. *See*, Case No. U-20763, filing #U-20763-1451.

II. BACKGROUND

In its application, Enbridge explained that Line 5 was constructed by Lakehead Pipe Line Company (Lakehead)[8] in 1953 and that it is a 645-mile interstate pipeline that traverses Michigan's Upper and Lower Peninsulas, originating in Superior, Wisconsin, and terminating near Sarnia, Ontario, Canada. Application, p. 5. Enbridge stated that Line 5 was built to transport light crude oils and natural gas liquids (NGLs). While the vast majority of product shipped through Line 5 travels through Michigan to Canada, Enbridge asserted that Line 5 delivers NGLs to a propane production facility in Rapid River, Michigan, and delivers light crude oil to facilities that interconnect with other pipelines in Lewiston and Marysville, Michigan. Application, pp. 5-6. Line 5 has an annual average capacity of 540,000 barrels per day (bpd), and Enbridge stated that the Replacement Project will not impact its annual average capacity or the nature of the service provided by Line 5. Application, pp. 5, 8, 13.[9]

Enbridge explained that where Line 5 crosses the Straits, it currently consists of two, 20-inch-diameter pipes, four miles in length, referred to as the dual pipelines. Enbridge stated that pursuant to the Replacement Project, the four-mile segment of the dual pipelines will be replaced

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[8] Enbridge states that, in 1991, Lakehead transferred Line 5 to Lakehead Pipe Line Company, Limited Partnership, which changed its name to Enbridge Energy, Limited Partnership, in 2002. Enbridge's reply comments, p. 4. *See also*, November 8, 1991 order in Case No. U-9980.

[9] Enbridge witness Marlon Samuel states that, for the past 10 years, Line 5 has operated at about 90% of its annual average capacity of up to 540,000 bpd. 7 Tr 757. Ninety percent of average capacity is about 486,000 bpd, or 20,400,000 gallons per day, of crude oil and NGLs transported though Line 5. The Upper Peninsula (U.P.) Energy Task Force estimates that the Rapid River facility produces approximately 30,660,000 gallons per year of propane. *Upper Peninsula Energy Task Force Committee Recommendations, Part I, Propane Supply*, EGLE, April 17, 2020, p. 48. *See*, https://www.michigan.gov/documents/egle/Upper_Peninsula_Energy_Task_Force_Committee_Recommendations_Part_1_Propane_Supply_with_Appendices_687642_7.pdf (accessed December 1, 2023) (U.P. Energy Task Force Report).

with a single, 30-inch-diameter pipe that will be located within a concrete-lined tunnel beneath the lakebed of the Straits (the tunnel). Application, pp. 2, 8. Enbridge asserted that the Replacement Project will provide greater protection from any release of liquid petroleum to the aquatic environment because compared to the dual pipelines that are currently situated on the top of the lakebed and vulnerable to a vessel anchor strike, the Replacement Project will relocate the Straits Line 5 segment to a concrete-lined tunnel deep beneath the lakebed. Enbridge noted that the construction of the tunnel is the subject of separate applications before other state and federal agencies, including EGLE and the United States (U.S.) Army Corps of Engineers (USACE).

Enbridge stated that beginning in 2017, it entered into a series of agreements[10] with the State of Michigan relating to the relocation of the Straits Line 5 segment to the tunnel. Enbridge noted that the Michigan Legislature enacted Act 359 in December 2018, which created MSCA and delegated to MSCA the authority to enter into agreements pertaining to the construction, operation, and maintenance of the tunnel to house the replacement pipe segment.[11] Thus, Enbridge asserted that its request for Commission approval of the Replacement Project does not

[10] *See*, Agreement Between the State of Michigan and Enbridge Energy, Limited Partnership and Enbridge Energy Company, Inc. (First Agreement) (Exhibit A-8); Second Agreement Between the State of Michigan, Michigan Department of Environmental Quality, and Michigan Department of Natural Resources and Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc. and Enbridge Energy Partners, L.P. (Second Agreement) (Exhibit A-10); Third Agreement Between the State of Michigan, Michigan Department of Environmental Quality, and Michigan Department of Natural Resources and Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc. and Enbridge Energy Partners, L.P. (Third Agreement) (Exhibit A-1); and Tunnel Agreement (Tunnel Agreement) (Exhibit A-5). Required terms of the Tunnel Agreement are contained in MCL 254.324d(4). In this order, the First, Second, Third, and Tunnel Agreements are referred to collectively as the Agreements.

[11] On October 31, 2019, the Michigan Court of Claims held that Act 359 is constitutional and confirmed the validity and enforceability of the Agreements. *Enbridge Energy, LP v Michigan*, Case No. 19-000090-MZ (Oct. 31, 2019). The Michigan Court of Appeals affirmed the Michigan Court of Claims' order in *Enbridge Energy, LP v Michigan*, 332 Mich App 540; 957 NW2d 53 (2020). That order was not appealed.

include "authorization to design, construct, or operate the tunnel" because "[t]he tunnel will be designed, constructed, and maintained pursuant to the 'Tunnel Agreement' entered between the MSCA and Enbridge pursuant to Act 359." Application, p. 3.

Enbridge explained that, pursuant to the Tunnel Agreement, the tunnel will be constructed in the subsurface lands beneath the lakebed of the Straits within the easement issued by the Michigan Department of Natural Resources (DNR) to MSCA in 2018 (2018 easement) and pursuant to the assignment of certain rights under that easement by MSCA to Enbridge. Enbridge stated that the tunnel will be constructed in accordance with all required governmental permits and approvals. Enbridge averred that it will enter into a 99-year lease with MSCA for the use of the tunnel to operate and maintain the Straits Line 5 replacement pipe segment. Application, pp. 13-14.

In its application, Enbridge seeks Commission approval to operate and maintain the replacement pipe segment located within the tunnel as part of Line 5 under Act 16. Enbridge stated that once the new four-mile pipe segment is placed into service within the tunnel, service on the dual pipelines will be discontinued. Application, p. 3.

III. PETITIONS, EASEMENT REVOCATION, PERMITS, AND APPLICATIONS FOR LEAVE TO APPEAL

A. Enbridge Energy, Limited Partnership's Petition for Rehearing

On July 29, 2020, Enbridge filed a petition for rehearing of the June 30 order in this case. In the July 29 petition for rehearing, Enbridge argued that its petition should be granted because "the Commission's June 30, 2020 Order is based on an erroneous conclusion of law: that Enbridge is ***not*** a utility. This erroneous conclusion resulted in a misinterpretation and misapplication of Rule 447 (R 792.10447), and a faulty determination that Enbridge was required to file an application seeking approval for the [Replacement] Project." July 29 petition for rehearing,

pp. 1-2 (emphasis in original) (footnote omitted). Enbridge reiterated the arguments set forth in its initial comments filed in response to the April 22 order, specifically asserting that Enbridge *is* a utility pursuant to Act 16, that Rule 447 only applies to new construction of a utility pipeline and not to construction that relocates a portion of an existing pipeline, and that, pursuant to the 1953 order, the company already has the requisite authority to construct the Replacement Project. As a result, Enbridge contended that it was not required to file a new application with the Commission for approval of the Replacement Project. Finally, in the petition, Enbridge requested that the Commission rule on the petition for rehearing "at the time of the final order in the contested case hearing on its application, and only in the event that the Commission denies the application." Enbridge's July 29 petition for rehearing, p. 2, n. 2.

On August 19, 2020, the Staff, the MEC Coalition, Bay Mills, and ELPC/MiCAN each filed a response to Enbridge's July 29 petition for rehearing (August 19 responses). In the August 19 responses, the parties argued that Enbridge's July 29 petition for rehearing does not meet the Commission's rehearing standards because Enbridge merely reiterates the arguments set forth in previous filings, which have been addressed and rejected by the Commission. Additionally, in Bay Mills' August 19 response to Enbridge's July 29 petition for rehearing, Bay Mills asserted that if the Commission grants Enbridge's requested relief, it will "violate the State's obligation to confer with Bay Mills and to consider the impact of the Tunnel Project on Bay Mills' treaty rights." Bay Mills' August 19 response, p. 3. Furthermore, in ELPC/MiCAN's August 19 response to Bay Mills' July 29 petition for rehearing, ELPC/MiCAN requested that Enbridge's "proposal that the Commission rule on this petition for rehearing at the time of the final order in

the contested case hearing, and only in the event that the Commission denies the application, should be denied." ELPC/MiCAN's August 19 response, p. 1.[12]

For the reasons set forth in section VII of this order, the Commission finds that Enbridge's July 29 petition for rehearing is moot.

B. Enbridge Energy, Limited Partnership's Motion in Limine

In its September 2 motion in limine, Enbridge requested that ALJ Mack limit the scope of this Act 16 proceeding by excluding evidence that Enbridge characterizes as irrelevant: "(1) the construction of the utility tunnel, (2) the environmental impact of the tunnel construction, (3) the public need for and continued operation of Line 5, (4) the current operational safety of Line 5, (5) whether Line 5 has an adverse impact on climate change, and (6) the intervening parties' climate change agendas." September 2 motion in limine, pp. 1-2. In addition, Enbridge contended that the scope of the proceeding should be restricted to the following issues: "(A) is there a public need to replace the existing Line 5 crossing of the Straits with a pipe segment relocated in a utility tunnel beneath the Straits, (B) is the replacement pipe segment designed and routed in a reasonable manner, and (C) will the construction of the replacement pipe segment meet or exceed current safety and engineering standards?" *Id.*, p. 2.

In his initial ruling, ALJ Mack noted that Enbridge argues that the tunnel "is a standalone structure that is being constructed under Act 359 to accommodate a host of utility infrastructure, one of which is its relocated pipeline." ALJ Mack's initial ruling, p. 8. In addition, ALJ Mack stated that according to Enbridge, the tunnel should not be included in the Commission's Act 16 review because "it cannot be deemed a fixture under [MCL 483.1(2)], a facility under Rule 447, or

[12] Because ELPC/MiCAN's August 19 response is not paginated, the Commission clarifies that page 1 starts in natural order with the first page of the response.

a consideration in quantifying the physical and economic impact from the construction [of the] pipeline under [MCL 483.2b]." ALJ Mack's initial ruling, p. 8. ALJ Mack disagreed with Enbridge. Although other utility infrastructure may be relocated to the newly constructed tunnel, ALJ Mack noted that this other utility infrastructure is not the reason Enbridge is proposing to construct the tunnel; rather, the relocation of the Straits Line 5 segment "is the entire reason Enbridge is undertaking the project. The argument that the Utility Tunnel and relocated pipeline are unrelated disregard the fact that those components are, for the reasons discussed, inextricably connected." *Id*., p. 8.

ALJ Mack also found that, pursuant to Act 16, the Commission must:

> ensure that pipelines are designed, routed, constructed, and operated in a safe and economical manner. . . . The only way to make that determination is for the Commission to have a record that contains all relevant information concerning the proposal to relocate the existing pipelines into the Utility Tunnel. That necessarily requires the development of a record on the design, construction, and operational aspects of both the pipeline and Utility Tunnel. Counsel for [MSCA] indicated during Oral Argument [that] the plans for the Utility Tunnel will be completed while this case is pending and will be offered as evidence in this case. 2 TR 205-207. To exclude that evidence under Enbridge's Motion would effectively preclude the Commission from performing its statutorily mandated review of a project under Act 16.

ALJ Mack's initial ruling, p. 9 (footnote omitted). Moreover, ALJ Mack found that, as set forth in Act 16, the tunnel is a fixture and, pursuant to Rule 447, the tunnel is a facility. Therefore, he asserted that the tunnel's "design, construction and operation are relevant in considering Enbridge's Application to relocate the existing [dual] pipelines." ALJ Mack's initial ruling, p. 10.

Next, ALJ Mack noted that according to Enbridge, "any issue pertaining to the operation of Line 5 in its entirety, including the public need for that pipeline and its continued operation, are outside the scope of this case." *Id*., pp. 10-11. He found Enbridge's argument persuasive and granted the company's September 2 motion in limine regarding the current operational aspects of

Line 5. ALJ Mack stated that Enbridge's proposed relocation of the Straits Line 5 segment, as set forth in the application, does not warrant "a review of the operation of Line 5 in its entirety." ALJ Mack's initial ruling, p. 15 (footnote omitted).

Finally, ALJ Mack noted that Enbridge claims that the Michigan Environmental Protection Act, MCL 324.1701 *et seq*. (MEPA), does not apply to the tunnel, and that MEPA does not allow the Commission to consider climate change when reviewing the application for replacement of the Straits Line 5 segment. ALJ Mack disagreed, stating that:

> given the conclusion the Utility Tunnel is a "fixture" under [MCL 483.1(2)], a "facility" under Rule 447, and a necessary component of the determination under [MCL 483.2b] on whether a good-faith effort is made to minimize the physical impact and economic damage from the construction of the pipeline, [Enbridge's] contention cannot be sustained. Because the Utility Tunnel must be considered in determining whether the project can be approved under Act 16, it is necessarily part of the "conduct" in a licensing proceeding subject to review under MEPA.

ALJ Mack's initial ruling, p. 17. However, ALJ Mack noted that EGLE and USACE will review the construction of the tunnel, and he stated that the Commission may "rely on the expertise of those agencies as part of its MEPA review, and [it] avoids the potential for conflicting results between the agency decisions." *Id*.

ALJ Mack noted that Bay Mills, ELPC/MiCAN, FLOW, and the MEC Coalition argue that consumer consumption of the fuels shipped on Line 5 results in greenhouse gas (GHG) emissions and harmful effects to the environment and that these GHG emissions may be reviewed by the Commission under MEPA. He stated that:

> MEPA requires an examination of the "conduct" to determine its effect on the natural resources. The conduct in this case is the activity proposed in the Application and subject to the Commission's jurisdiction under [the] Act: the replacement of the existing pipelines on the bottomlands with a pipeline in a Utility Tunnel. In effect, the Parties opposing the exclusion of evidence concerning greenhouse gases and climate change are advancing a quite broad interpretation of the "conduct" that is subject to review under MEPA. Specifically, consideration of the environmental effect of the oil transported on the pipeline after it is refined and

> placed in the market for consumption would also extend the conduct to the extraction and refinement processes. While the Parties opposing the Motion provide a great deal of argument on the deleterious effect on the environment from greenhouse gases and climate change, they do not provide any substantive legal basis to support such a broad construction of the term "conduct" in MEPA.

ALJ Mack's initial ruling, p. 18. ALJ Mack concluded that, "consistent with Act 16 and as it pertains to MEPA, the conduct at issue in this case does not include the environmental effects from the extraction, refinement, or consumption of the oil transported on Line 5. Therefore, any evidence in that regard, including the environmental effect of greenhouse gas emissions and climate change, is irrelevant." ALJ Mack's initial ruling, p. 19. Thus, ALJ Mack granted Enbridge's September 2 motion in limine on this issue.

On November 6, 2020, Bay Mills, ELPC/MiCAN, and FLOW each filed an application for leave to appeal ALJ Mack's initial ruling (November 6 applications for leave to appeal). On that same date, the Attorney General filed a letter of support for and joinder in the November 6 applications for leave to appeal. Enbridge, the Associations, MSCA, and the Staff each filed a response to the applications for leave to appeal on November 20, 2020. On April 21, 2021, the Commission issued an order in this case addressing the November 6 applications for leave to appeal, which is discussed *infra*.

C. State of Michigan's Notice of Revocation and Termination of Easement

Seven days after Bay Mills, ELPC/MiCAN, and FLOW filed the November 6 applications for leave to appeal, Governor Whitmer and the DNR revoked and terminated the easement for the dual pipelines that was granted on April 23, 1953, by the State of Michigan to Enbridge's predecessor, Lakehead. The November 13, 2020 Notice of Revocation and Termination of Easement (Notice) states that:

> the State of Michigan hereby provides formal notice to Enbridge . . . that the State is revoking and terminating the 1953 Easement . . . . The revocation and

> termination each take legal effect 180 days after the date of this Notice to provide notice to affected parties and to allow for an orderly transition to ensure Michigan's energy needs are met. Enbridge must cease operation of the Straits Pipelines 180 days after the date of this Notice.

Notice, p. 1.[13, 14]

D. Remand and Rehearing of Enbridge Energy, Limited Partnership's Motion in Limine

Following the issuance of the November 13, 2020 Notice, the Commission issued the December 9 order. In the order, the Commission noted that at the outset of these proceedings, it recommended that:

> the administrative law judge (ALJ) set a schedule that would conclude the evidentiary portion of the proceeding and briefing approximately 10 months from the date of the prehearing conference. In providing this guidance, the Commission

[13] *See*, https://content.govdelivery.com/attachments/MIEOG/2020/11/13/file_attachments/1600920/Notice%20of%20%20Revocation%20and%20Termination%20of%20%20Easement%20%2811.13.20%29.pdf (accessed December 1, 2023).

[14] On November 13, 2020, the Attorney General filed an action in the Ingham County Circuit Court on behalf of the State of Michigan, Governor Whitmer, and the DNR, seeking declaratory and injunctive relief to acknowledge and enforce the revocation (Case No. 20-646-CE). On November 24, 2020, Enbridge filed an action against the State of Michigan in the U.S. District Court for the Western District of Michigan (U.S. District Court) in Case No. 1:20-CV-1141 for declaratory and injunctive relief seeking a determination that the revocation is not lawful. Subsequently, the Attorney General filed a motion in Case No. 1:20-CV-1141 to remand the case to state court pursuant to 28 USC 1447(c). On November 16, 2021, the U.S. District Court issued an opinion and order in Case No. 1:20-CV-1142 (November 16 opinion and order), finding that the proceeding is properly in federal court: "The State Parties' claims 'arise under' federal law because the scope of the property rights the State Parties assert necessarily turns on the interpretation of federal law that burdens those rights, and this Court is an appropriate forum for deciding these disputed and substantial federal issues." *Mich v Enbridge Energy*, 571 F Supp 3d 851, 862 (WD Mich, 2021) (quoting 28 USC 1331).

On November 30, 2021, the Attorney General filed a notice requesting that the case pending before the U.S. District Court be voluntarily dismissed. However, in a press release dated March 3, 2023, the Attorney General noted that although she voluntarily dismissed the case in U.S. District Court, she is continuing to pursue litigation against Enbridge in state court. *See*, https://www.michigan.gov/ag/news/press-releases/2023/03/03/attorney-general-nessel-asks-court-of-appeals-to-move-enbridge-case-back-to-michigan (accessed December 1, 2023).

> recognizes that significant developments may arise that could affect the schedule and scope of the proceeding and, therefore, looks to the ALJ to work with the parties to make appropriate adjustments to this general timeframe without seeking approval from the Commission.

December 9 order, p. 5 (quoting June 30 order, p. 70). In the December 9 order, the Commission found that the Notice, which revoked and terminated the 1953 easement, is a "significant development" and remanded Enbridge's September 2 motion in limine to ALJ Mack for rehearing. *Id*. The Commission stated that the rehearing would:

> give the parties the opportunity to brief the question of whether, and, if so, to what extent Governor Whitmer's action to revoke and terminate the 1953 easement changes the scope of review in this proceeding and how that change, if any, effects the issues presented in the motion in limine, including the issues of public need for the Line 5 Project and the required environmental review of the Line 5 Project.

December 9 order, p. 6.

Accordingly, on December 21, 2020, ALJ Mack provided an amended case schedule to allow briefing on remand and, if applicable, appeals of ALJ Mack's ruling on Enbridge's remanded September 2 motion in limine. On January 15, 2021, Enbridge, Bay Mills and the MEC Coalition, FLOW, the Associations, MSCA, and the Staff each filed an initial brief on remand in this docket. On that same date, ELPC/MiCAN filed in this docket a supplemental response to Enbridge's September 2 motion in limine. In addition, on that same date, the Attorney General filed in this docket a letter supporting the relief requested in the initial briefs on remand filed by ELPC/MiCAN and Bay Mills and the MEC Coalition. *See*, Attorney General's support for relief requested in initial briefs on remand filed by Tribal and environmental intervenors, p. 1.

In their initial briefs on remand, Enbridge, the Staff, and the Associations each asserted that the Notice does not affect the disposition of the September 2 motion in limine and does not alter the scope of review in this case. *See*, Enbridge's initial brief on remand regarding the September 2 motion in limine, p. 1; Staff's initial brief on remand of ALJ Mack's ruling on Enbridge's

September 2 motion in limine, p. 2; Associations' initial brief on remand regarding Enbridge's September 2 motion in limine, p. 2. In its initial brief on remand, MSCA stated that it supports the conclusions set forth in Enbridge's and the Staff's initial briefs on remand. MSCA's initial brief in support of ALJ Mack's ruling on Enbridge's September 2 motion in limine, p. 1.

In their initial brief on remand, Bay Mills and the MEC Coalition contended that the purpose of the Replacement Project is to extend the lifespan of Line 5 and to provide Enbridge with additional years of revenue from the shipment of product on Line 5. According to Bay Mills and the MEC Coalition, as a result of the revocation and termination of the 1953 easement and the possible shutdown of the dual pipelines, Enbridge must construct a tunnel in the Straits in order to continue the operation of Line 5 as a whole. Thus, Bay Mills and the MEC Coalition argued that the construction of the tunnel, the Replacement Project, and the continued operation of Line 5 are inextricably linked and the Commission must consider "whether there is a public need to secure and extend the operating life of Line 5 in this manner." Bay Mills' and the MEC Coalition's initial brief on remand regarding Enbridge's September 2 motion in limine, p. 9.

In addition, Bay Mills and the MEC Coalition noted that, according to Enbridge, the Replacement Project will significantly reduce the risk of an oil spill from the Straits Line 5 segment into the Great Lakes and better protect the environment. However, Bay Mills and the MEC Coalition asserted that the Notice, if enforced, will eliminate the risk of an oil spill from the dual pipelines and, thus, "the objective Enbridge claimed the [Replacement] Project would attain may be attained by other means. Moreover, it is possible that the evidence could show that the [Replacement] Project would reinstate the risk of an oil spill to the Great Lakes, and inland waters, when compared to the status quo under revocation and termination." *Id*., p. 21. Finally, Bay Mills and the MEC Coalition averred that, "[i]n light of the revocation and termination, it is even more

apparent that greenhouse gas emissions related to the transportation of hydrocarbons through Line 5 after Project completion should be considered emissions that may not occur in the absence of this Project." Bay Mills and the MEC Coalition's initial brief on remand regarding Enbridge's September 2 motion in limine, p. 29.

In its supplemental response to Enbridge's September 2 motion in limine, ELPC/MiCAN argued that because the Notice revokes the 1953 easement and directs the shut-down of the dual pipelines, the Replacement Project has become new construction of a pipeline in a new easement for the purpose of restarting a decommissioned pipeline. As a result, ELPC/MiCAN asserted that MEPA requires a comparison of the direct and indirect GHG emissions from a decommissioned pipeline with the direct and indirect GHG emissions from a restarted pipeline. Additionally, ELPC/MiCAN contended that the "MEPA analysis of Enbridge's request to restart a decommissioned Line 5 cannot be undertaken without considering all GHG emissions that will result from construction of the Proposed Project." ELPC/MiCAN's supplemental response to Enbridge's September 2 motion in limine, pp. 14-15 (footnote omitted). Finally, ELPC/MiCAN argued that a wholesale exclusion of evidence regarding GHG emissions is contrary to Michigan law.

In its initial brief on remand, FLOW asserted that the remand should focus on four issues. First, because the Commission is an agency of the State of Michigan, FLOW argued that the Commission "must ensure that its decisions conform to requirements of public trust law. This is particularly important in the present matter, because of the scope of the Commission's obligation to determine whether the tunnel and tunnel pipeline is based on the public interest, necessary [sic], and siting or locating the project in or under public trust bottomlands of the Great Lakes." FLOW's initial brief on remand regarding Enbridge's September 2 motion in limine, p. 2. Second,

FLOW stated that "an agency of the State cannot fulfill its sworn duty under the public trust doctrine without considering the evidence regarding all aspects of the public trust and paramount public uses connected with all of Line 5." *Id*., p. 3. Third, FLOW contended that Enbridge no longer has the right to operate the dual pipelines pursuant to the Notice, and Enbridge's claimed interests in public trust bottomlands through the 2018 easement "have not been authorized under and [as] required by the Great Lakes Submerged Lands Act ('GLSLA'), and are, therefore, void and/or have no legal effect; as a result, Enbridge cannot proceed under Act 16 unless and until it has obtained authorization for these claimed rights . . . ." FLOW's initial brief on remand regarding Enbridge's September 2 motion in limine, p. 4 (footnote omitted). Lastly, FLOW argued that ALJ Mack's initial ruling improperly narrowed the scope of the review required under Act 16 and MEPA.

On January 29, 2021, Enbridge, the Attorney General, Bay Mills and the MEC Coalition, ELPC/MiCAN, MLDC, the Associations, and the Staff each filed a reply brief on remand. MLDC asserted that it concurs with the Staff's initial brief on remand. *See*, MLDC's reply brief on remand in support of Enbridge's motion in limine, p. 2. In their reply brief on remand, the Associations asserted that the "Intervenors' arguments should be rejected and the Ruling affirmed. The Notice does not affect the issues presented in Enbridge's motion in limine, and no substantive changes to the Ruling establishing the scope of review in this proceeding are necessary." Associations' response brief on remand regarding Enbridge's September 2 motion in limine, p. 3.

In its reply brief on remand, Enbridge disagreed with Bay Mills and the MEC Coalition, asserting that the Notice does not alter Enbridge's activity as set forth in the application, it does not impact the Commission's Act 16 jurisdiction, and it does not change the Commission's MEPA review. In addition, Enbridge stated that Bay Mills and the MEC Coalition, ELPC/MiCAN, and

FLOW "fail to present any argument that justifies expanding the scope of this proceeding on the basis of the Notice." Enbridge's reply brief on remand regarding the September 2 motion in limine, p. 1. Enbridge asserted that the Notice does not revoke the Commission's 1953 order that provides Enbridge the authority to construct, operate, and maintain Line 5.

In its reply brief on remand, the Staff disagreed with Bay Mills and the MEC Coalition, ELPC/MiCAN, and FLOW, stating that:

> [t]hey explicitly or implicitly assume that the Notice will lead to the revocation and termination of Enbridge's 1953 Easement to operate the existing dual pipelines on the Straits' lakebed. Staff does not dispute the validity of the Notice, but given the uncertainty surrounding ongoing litigation, Staff does not assume that Line 5 will be shut down. And even if Line 5 is temporarily decommissioned until the pipeline can be relocated in the proposed tunnel—assuming Enbridge acquires all necessary regulatory approvals—the parties have not pointed to any caselaw or Commission precedent that a temporary decommissioning would automatically terminate the prior Act 16 authorization for Line 5 or require it to be reevaluated.

Staff's reply brief on remand of ALJ Mack's ruling on Enbridge's September 2 motion in limine, p. 2. In addition, the Staff averred that the public trust doctrine and MEPA do not change the scope of the case.

Bay Mills and the MEC Coalition contended that Enbridge, the Associations, and the Staff "erroneously downplay the import of that revocation and termination." Bay Mills' and the MEC Coalition's reply brief on remand, p. 1. Additionally, Bay Mills and the MEC Coalition asserted that the Staff's arguments in its initial brief on remand are inconsistent with the Michigan Rules of Evidence (MRE), Commission precedent, and MEPA. Finally, Bay Mills and the MEC Coalition argued that Enbridge, the Associations, and the Staff recommend a limited review of the operational risks of Line 5, which improperly omits an analysis of GHG emissions that is required by MEPA.

In her reply brief on remand, the Attorney General disagreed with Enbridge's characterization of the revocation and termination of the 1953 easement, asserting that the Notice changed the status quo on the issues of public need for the Replacement Project and the Commission's MEPA review. She stated that "[t]he fact remains that the Notice was issued by the grantor of the 1953 Easement—the State of Michigan—and that in the absence of a valid and effective easement, the continued presence and operation of the Enbridge pipelines on state-owned bottomlands is unlawful." Attorney General's response brief on remand involving Enbridge's September 2 motion in limine, p. 3. According to the Attorney General, Enbridge presumptively cannot continue operation of the dual pipelines and, therefore, the scope of the case should be broadened to reevaluate the issue of the public need for Line 5 and to include a review of the environmental effects of the Replacement Project.

ELPC/MiCAN asserted that "[t]he cases and Michigan Rules of Evidence [the] Staff references in support of its conclusion that the Notice does not impact the scope of this case are not relevant here." ELPC/MiCAN's reply to initial briefs on remand, p. 1.

On February 23, 2021, ALJ Mack issued a ruling on the remanded September 2 motion in limine (February 23 ruling). He noted that the initial ruling:

> held that under Act 16 the proper inquiry for a proposal involving a segment of an existing pipeline is on that segment, as opposed to the entire pipeline system. Case No. U-20763, October 23, 2020, Ruling, pg. 15. Therefore, any evidence concerning the entirety of Line 5 is irrelevant. Id., pgs. 15-16. The holding [in the initial ruling] remains before the Commission under the pending Appeals, but under the Order of Remand is to be reconsidered in light of the subsequent issuance of the Notice.

February 23 ruling, p. 13.

ALJ Mack stated that Bay Mills and the MEC Coalition, ELPC/MiCAN, the Attorney General, and FLOW argued that the Notice terminated Enbridge's authority to operate Line 5 in

the Straits and, consequently, the Commission should reexamine the public need for the entire pipeline. However, he noted that "the 1953 Order issued under Act 16 establish[ed] that Line 5 serves a public need and is in the public interest." February 23 ruling, p. 16. In addition, because the 1953 order does not have an expiration date or require renewal, ALJ Mack found that Enbridge's authority to operate the other 641 miles of Line 5 remains in effect. Furthermore, ALJ Mack noted that the Commission has not executed proceedings pursuant to MCL 24.205(a) and MCL 24.292(1) to suspend, revoke, or cancel Enbridge's Act 16 license to operate Line 5 that was issued in the 1953 order. Thus, ALJ Mack determined that the Notice did not extinguish Enbridge's authority to operate the other 641 miles of Line 5 and it does not require a reexamination of the public need for the entire system.

Regarding the Commission's MEPA review of the application, ALJ Mack stated that the initial ruling:

> held [that] the conduct subject to review under MEPA is the proposal to relocate the dual pipelines into a Utility Tunnel. Concomitantly, the Initial Ruling granted the Motion as it pertained to the environmental effects of both the Line 5 system, and the extraction, refinement and ultimate consumption of the oil shipped on that system as being beyond the scope of the Commission's MEPA review.

February 23 ruling, p. 19. He noted that Bay Mills and the MEC Coalition, ELPC/MiCAN, the Attorney General, and FLOW assert that the Notice broadens the MEPA review, thus allowing the Commission to consider the environmental effects of the oil transported on the system through the entirety of Line 5. ALJ Mack disagreed, stating that "[t]he Notice does not change the activity proposed in the Application, i.e., the conduct as that term is used in MEPA, the Commission's jurisdiction over that proposal, or the legal authority underlying the Initial Ruling's conclusion concerning the MEPA review." February 23 ruling, p. 20 (footnote omitted).

Accordingly, ALJ Mack concluded that "the Notice is relevant under the proper Act 16 review of the project: whether a public need exists to replace the existing dual pipelines on Great Lakes bottomlands in the Straits of Mackinac with a single pipeline in a proposed Utility Tunnel." February 23 ruling, p. 21. Additionally, he found that the Notice does not broaden the scope of the Commission's MEPA review to consider the "environmental effects from the production, refinement, and consumption of oil transported on Line 5." *Id*.

E. Permits Relating to the Construction of the Utility Tunnel

On January 29, 2021, EGLE granted Enbridge a set of permits relating to the construction of the utility tunnel, which were filed in this docket on February 5, 2021, as filing #U-20763-0574. Specifically, EGLE approved Enbridge's applications for a National Pollutant Discharge Elimination System (NPDES) wastewater permit, a Natural Resources and Environmental Protection Act (NREPA) Part 303 wetlands protection permit, and a NREPA Part 325 Great Lakes submerged lands permit. On February 8, 2021, Enbridge filed in this docket a supplemental filing containing the responsiveness summaries for the NPDES permit and the NREPA Parts 303 and 325 permits.

F. Applications for Leave to Appeal Administrative Law Judge Dennis W. Mack's Ruling Regarding the Remanded September 2, 2020 Motion in Limine and the April 21, 2021 Order

On March 9, 2021, Bay Mills, the MEC Coalition, ELPC/MiCAN, and FLOW each filed an application for leave to appeal ALJ Mack's February 23 ruling. In its application for leave to appeal, Bay Mills asserted that:

> [t]he Remand Ruling failed to address the bases upon which the Tribal Intervenors opposed Enbridge's Motion in Limine and excludes from the contested case evidence concerning significant and relevant issues of deep importance to the Tribal Intervenors. If the Remand Ruling stands, the Tribal Intervenors will be deprived of the opportunity to present evidence of how the Project threatens their Treaty-protected rights.

Bay Mills' application for leave to appeal the February 23 ruling, p. 12. Specifically, Bay Mills argued that the February 23 ruling improperly excluded the following evidence that is relevant to the Commission's review of Enbridge's application: (1) the public need for Line 5, (2) the environmental effects of continuing to operate Line 5, and (3) the GHG emissions related to Line 5 and the Replacement Project. *Id*., p. 14. Bay Mills contended that by excluding this relevant evidence, ALJ Mack has impermissibly narrowed the scope of the case, which is an error of law. In its application for leave to appeal, the MEC Coalition presented substantially similar arguments. *See*, MEC Coalition's application for leave to appeal the February 23 ruling, pp. 4-6.

ELPC/MiCAN argued that "the primary function of the [initial and February 23] Rulings is to limit discovery, and as a result limit the information presented to the Commission for consideration." ELPC/MiCAN's application for leave to appeal the October 23 and February 23 rulings, p. 2.[15] ELPC/MiCAN asserted that ALJ Mack's initial and February 23 rulings are contrary to public interest and will have a negative impact on the environment. Accordingly, ELPC/MiCAN requested that the Commission reverse the initial and February 23 rulings, permit the admission of evidence pertaining to GHG emissions and the climate impacts from the Replacement Project, and perform the required MEPA review.

FLOW contended that the Commission should deny "Enbridge's thinly disguised effort through its motion in limine to severely constrict and prevent a comprehensive review of a fully developed record under Act 16, MEPA, and public trust law through its motion in limine and arguments on remand, which were adopted by the ALJ in its rulings." FLOW's application for

[15] Because ELPC/MiCAN's application for leave to appeal is not paginated, the Commission clarifies that page 1 starts in natural order with the first page of the application.

leave to appeal the February 23 ruling, p. 13.[16] In addition, FLOW reiterated that, pursuant to the GLSLA, Section 2129 of NREPA, and public trust law, Enbridge has not received the required authorization from EGLE for the 2018 easement, the 2018 easement assignment, or the 99-year lease for the Replacement Project. Furthermore, FLOW disputed Enbridge's claim that the 1953 order constitutes a "determination of public need or necessity for purposes of any easement, assignment, or 99-year lease for the Tunnel Project," and contended that the 1953 order cannot limit the Commission's consideration of the public need for Line 5 under Act 16. *Id*., p. 21. Finally, FLOW argued that, pursuant to MEPA, the Commission must consider evidence relating to the impact of the tunnel and the continued operation of Line 5 on climate and the environment. In conclusion, FLOW requested that ALJ Mack's initial and February 23 rulings be reversed and remanded for a fully contested case regarding the public need for Line 5, an analysis of the alternatives to the Replacement Project, and a review of the environmental impacts of the Replacement Project.

In response, Enbridge disagreed with Bay Mills, the MEC Coalition, ELPC/MiCAN, and FLOW that ALJ Mack's initial and February 23 rulings impermissibly narrow the scope of the case. Enbridge asserted that the actual issues to be "presented in this Act 16 proceeding are straightforward," and "issues such as: the need for Line 5, the operation and safety of Line 5 in its entirety, the impact of greenhouse gases associated with products shipped on Line 5, the Marshall incident along Line 6B, [the] need for fossil fuels given the rise of electric vehicles, the public trust doctrine, and their overall general opposition to the fossil fuel industry" are "clearly outside the scope of an Act 16 proceeding." Enbridge's response to the applications for leave to appeal

[16] Because FLOW's application for leave to appeal is not paginated, the Commission clarifies that page 1 starts in natural order with the first page of the application.

the February 23 ruling, p. 10. Enbridge requested that the Commission deny the applications for leave to appeal the February 23 ruling or, in the alternative, deny the relief requested in the applications.

The Staff responded that:

> the ALJ properly considered all material relevant to the Commission's review under MCL 483.1, *et seq*[.] ("Act 16"), the Michigan Environmental Protection Act ("MEPA"), applicable administrative rules, and Commission and court precedent to reach his decision. Staff acknowledges the significant public interest generated by the proposed project; however, public interest alone cannot provide blanket authorization to expand the statutory scope of this proceeding or allow consideration of extraneous and irrelevant material.

Staff's response brief in opposition to joint appellant's applications for leave to appeal the February 23 ruling, p. 2. In addition, the Staff disputed the claim by Bay Mills, the MEC Coalition, ELPC/MiCAN, and FLOW that the 1953 order failed to consider the public need for Line 5 and disagreed that the public need should be reexamined in this case. Furthermore, the Staff "agree[d] with the ALJ that the appropriate MEPA analysis for this case is limited by the activity proposed in the application and the Commission's Act 16 jurisdiction" and that the scope of the Commission's MEPA review may not be broadened to include Line 5 in its entirety. *Id*., p. 23. Accordingly, the Staff requested that, in the event the Commission grants the applications for leave to appeal the February 23 ruling, the Commission affirm ALJ Mack's initial and February 23 rulings.

MSCA contended that the Commission should deny the applications for leave to appeal the February 23 ruling "because Judge Mack properly concluded that the Governor and the [DNR]'s November 13, 2020 Notice of Revocation and Termination of Easement (the "Notice") does not allow for a reexamination of Line 5's need or its operational and safety aspects because this

Commission already considered those issues when it approved Line 5's construction in the 1953 Order." MSCA's response to the applications for leave to appeal the February 23 ruling, pp. 1-2.

Similarly, the Associations asserted that:

> The ALJ correctly found that in determining whether there is a public need for the Line 5 Project, the question is whether there is a public need for the four-mile replacement pipeline, and the Notice provides no basis for expanding that review. And in reviewing the Line 5 Project under MEPA, the Remand Ruling correctly found that the focus is on the conduct under agency review, and the Notice does not change the activity proposed in Enbridge's application.

Associations' response to the applications for leave to appeal the February 23 ruling, pp. 6-7.

Additionally, MLDC asserted that the Notice does not affect Enbridge's application to relocate the dual pipelines into a tunnel beneath the Straits or alter the Commission's jurisdiction over Enbridge's proposed activities under Act 16. *See*, MLDC's response to the applications for leave to appeal the February 23 ruling, pp. 3-4. MSCA, the Associations, and MLDC requested that if the Commission grants Bay Mills', the MEC Coalition's, ELPC/MiCAN's, or FLOW's application for leave to appeal the February 23 ruling, the requested relief should be denied.

In the April 21 order, the Commission noted that "FLOW, the MEC Coalition, Bay Mills, and ELPC/MiCAN argue that the Commission should grant the applications [for leave to appeal] because a decision on the initial ruling and ruling on remand before submission of the full case to the Commission will materially advance a timely resolution of the proceeding and will prevent substantial harm to each appellant and to the public." April 21 order, pp. 53-54. The Commission agreed and granted the applications for leave to appeal. *Id*., pp. 54, 72.

To determine whether ALJ Mack's initial and February 23 rulings impermissibly narrowed the scope of this case as alleged in the applications for leave to appeal, the Commission first examined the statutory requirements for reviewing the Act 16 application filed in this case. Pursuant to the requirements in Section 3(1) of Act 16, MCL 483.3(1), the Commission has developed and applied

a three-part test to determine whether to grant an Act 16 application: "(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." April 21 order, p. 55; *see also*, March 7, 2001 order in Case No. U-12334, pp. 13-17; July 23, 2002 order in Case No. U-13225 (July 23 order), pp. 4-5; January 31, 2013 order in Case No. U-17020, p. 5. In addition, pursuant to MCL 324.1705, the Commission must perform a MEPA review in pipeline siting cases. *See*, *State Hwy Comm v Vanderkloot*, 392 Mich 159, 189-190; 220 NW2d 416 (1974); *Buggs v Mich Pub Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2015 (Docket Nos. 315058 and 315064) (*Buggs I*), p. 9. However, the Commission stated that "courts have repeatedly found that these MEPA obligations are supplementary to other statutes and regulations and should be read *in pari materia* with other laws. *See*, *Mich Oil Co v Natural Resources Comm*, 406 Mich 1, 32-33; 276 NW2d 411 (1979)." April 21 order, p. 56.

The Commission also noted that Section 14b of Act 359, MCL 254.324b, created MSCA and that Section 14d(1) of Act 359, MCL 254.324d(1), transferred from the Mackinac Bridge Authority to MSCA "[a]ll liabilities, duties, responsibilities, authorities, and powers related to a utility tunnel as provided in section 14a and any money in the straits protection fund shall transfer to the corridor authority board upon the appointment of the members of the corridor authority board under section 14b(2)." April 21 order, p. 58 (quoting MCL 254.324d(1)). Next, the Commission noted that Section 14d(4)(a)-(b) of Act 359, MCL 254.324d(4)(a)-(b), directed MSCA to "enter into an agreement or a series of agreements for the construction, maintenance, operation, and decommissioning of a utility tunnel" no later than December 31, 2018, so long as: (1) MSCA finds that the governor has provided a proposed tunnel agreement by that date and

(2) the agreement "allows for the use of the utility tunnel by multiple utilities, provides an option to better connect the Upper and Lower Peninsulas of this state, and provides a route to allow utilities to be laid without future disturbance to the bottomlands of the Straits of Mackinac." April 21 order, p. 59 (quoting MCL 254.324d(4)). The Commission asserted that "[t]he Agreements referenced in MCL 254.324d(4) have been duly entered into and affirmed by the courts. . . . Under Act 359, the 2018 tunnel easement has been assigned to Enbridge by MSCA. Exhibit A-6; Application, p. 13." April 21 order, p. 59. Accordingly, in the April 21 order, the Commission found that:

> [i]n its application, consistent with the Agreements executed with the State of Michigan and the easement it has been assigned by MSCA, Enbridge proposes to construct a replacement segment of Line 5 that crosses the Straits, to be housed in the utility tunnel. In its June 30 order, the Commission previously described the Replacement Project as the "replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel." June 30 order, p. 68. As such, the Commission must consider how both the three-part test under Act 16 and the requirements of MEPA apply to the Replacement Project. However, as described more fully below, the application of these provisions do not extend to the remainder of the line approved in the 1953 order.

April 21 order, p. 59.

After reviewing the statutory requirements, the Commission responded to FLOW's, the MEC Coalition's, and Bay Mills' argument that ALJ Mack's initial and February 23 rulings improperly exclude relevant evidence about the public need for Line 5. The Commission agreed with ALJ Mack that:

> the scope of this case is dictated by two factors: (1) the activity proposed in the application, namely replacement of the existing 4-miles of dual pipelines located on the bottomlands with a pipeline located in a tunnel, as contemplated in Act 359 and various agreements with the State; and (2) the Commission's jurisdiction over that proposal under Act 16, the administrative rules promulgated under its authority, and MEPA (initial ruling, p. 14), and that "the standards of Act 16 are well established and must be applied in this case." [Initial ruling], p. 15.

April 21 order, p. 60.

Next, the Commission explained that the 1953 order approved the construction, maintenance, and operation of Line 5 in its entirety. In the April 21 order, the Commission noted that, in 1953, it was determined that:

> Line 5 was fit for the purpose of carrying and transporting crude oil and petroleum as a common carrier in interstate and foreign commerce. In the 1953 order the Commission stated "[i]t appears to this Commission that in times of national emergency delivery of crude oil for joint defense purposes would be greatly enhanced by operation of the proposed pipe line." 1953 order, p. 4. Denmark Township moved for denial of the application on grounds that the pipeline was not in the public interest. The Commission found the motion to be without merit, and it was denied. [1953 order], p. 8.

April 21 order, p. 60. Additionally, the Commission stated that, in 1954, the Michigan Supreme Court found that the construction and operation of Line 5 was "for a public use benefiting the people of the State of Michigan." April 21 order, p. 61 (quoting *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 37; 64 NW2d 903 (1954) (*Lakehead*)).

In the April 21 order, the Commission asserted that the 1953 order did not set an expiration date for Enbridge's authority to operate the Line 5 system, and no party is disputing Enbridge's authority to operate the other 641 miles of Line 5 not included in the application. Furthermore, the Commission stated, "[n]either Act 16, nor Rule 447, nor Commission precedent require the Commission to make findings with respect to the length of time that an approved pipeline may operate, and such findings are not made in this order." April 21 order, p. 61. Rather, the Commission averred, the proper scope of the proceeding is for the Commission to examine whether there is a public need for the Replacement Project as set forth in the application.

Additionally, the Commission agreed with ALJ Mack that "the Tribal treaty-reserved rights asserted by Bay Mills do not serve to expand the scope of the Commission's Act 16 jurisdiction. The treaty-reserved rights do not confer on the Commission the ability to review the authority to own and operate the segments of an approved pipeline system that are not the subject of the Act 16

application before the agency." April 21 order, p. 63. Therefore, the Commission denied Bay Mills', the MEC Coalition's, ELPC/MiCAN's, and FLOW's request to reverse ALJ Mack's initial and February 23 rulings on this issue and it affirmed ALJ Mack's conclusion that the legal scope of this case may not include a reexamination of the public need for the entirety of Line 5 and the environmental risks associated with the operation of the entire Line 5 system. April 21 order, p. 63.

Turning to the issue of the Commission's MEPA review in this case, the Commission noted that Section 5(1) of MEPA states that the Commission may permit the attorney general or other person to intervene in a proceeding to challenge "conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources." MCL 324.1705(1). Additionally, the Commission noted that Section 5(2) of MEPA states that, in the proceeding, the Commission shall determine "the alleged pollution, impairment, or destruction of the air, water, or other natural resources" and "conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare." April 21 order, p. 65; MCL 324.1705(2). Accordingly, the Commission found that "[s]everal parties have intervened in this proceeding and have made assertions about the conduct at issue and its likelihood to have the effect of polluting, impairing, or destroying natural resources in their petitions to intervene, the briefs on this motion, and the offers of proof. The Commission must evaluate these assertions as provided under Section 5(2)." April 21 order, p. 65. However, the Commission found that its MEPA review only applies to the Replacement Project and cannot be broadened to include the entirety of the Line 5 system.

The Commission asserted that GHG emissions are "widely recognized as pollutants," that they "fit within the statutory language of Section 5 of MEPA, and therefore must be reviewed in this case." *Id*., p. 66. The Commission stated that:

> [i]t 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. As the Commission finds that conduct at issue in constructing the Replacement Project is indistinguishable from the purpose behind it or its result, the Commission's obligations under MEPA must also extend to the products being shipped through the Replacement Project.

April 21 order, p. 64. Therefore, the Commission found that the parties may provide evidence of GHG emissions and any pollution, impairment, or destruction resulting from the Replacement Project as set forth in Enbridge's application.

In addition, the Commission noted that there is a possibility that the Notice would be enforced and Enbridge would cease operation of the dual pipelines. The Commission stated that:

> should the Commission at this point in the proceeding exclude evidence simply on the basis of the uncertainty surrounding the validity of the Notice, it would lose the ability to consider evidence related to the loss of the use of the 4-mile dual pipeline segment in the Straits should the State ultimately prevail. As such, the Commission is unwilling to exclude evidence under MEPA that compares the pollution, impairment, or destruction attributable to an operating 4-mile pipeline segment in the Straits with non-operational 4-mile dual pipeline segments.

Id., p. 67.

The Commission also noted that MEPA requires a determination of "feasible and prudent alternatives" to the Replacement Project and "a determination of whether 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 324.1705; *State Hwy Comm*, 392 Mich at 159; *Buggs I*, p. 9." April 21 order, p. 68. The Commission found that this proceeding is in the early stage and, therefore, it would be inappropriate to disallow arguments and evidence regarding:

> whether there is any pollution, impairment, or destruction as a result of the Replacement Project – including in comparison to the possible closure of the dual pipeline segments currently in the Straits if the Notice is enforced; whether any pollution, impairment, or destruction is consistent with the protection of Michigan's natural resources; and whether there are feasible and prudent alternatives to any pollution, impairment, or destruction that is found as a result of the Replacement Project. Given the many considerations involved in the production, transportation, and ultimate refining and consumption of the products being transported, evidence addressing how to account for GHG pollutant impacts attributable to the proposed Replacement Project, where the proper boundaries of GHG pollutants should be drawn, and the correct alternative(s) for comparison would be helpful to the Commission in making this determination.

April 21 order, p. 69. Therefore, the Commission partially granted the relief requested by Bay Mills, the MEC Coalition, ELPC/MiCAN, and FLOW in their applications for leave to appeal ALJ Mack's initial and February 23 rulings on this issue. April 29 order, p. 69.

Next, the Commission agreed with ALJ Mack that the litigation involving the Notice will not affect the approvals granted in the 1953 order. The Commission stated that it "is expressly not seeking to re-examine or reconsider the approvals granted in that case, nor is it taking steps toward the possible 'suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license' under MCL 24.292(1), MCL 24.205(a), and *Rogers* [*Rogers v Mich State Bd of Cosmetology*, 68 Mich App 751; 244 NW2d 20 (1976)]." April 21 order, p. 71.

Finally, the Commission noted that several parties requested permission to offer proofs of "the economics of fossil fuel pipelines, the risk of stranded costs, and the safety issues arising from leaks on any part of the pipeline system." *Id*. The Commission found that those are not issues that may be considered in this case. *Id*.

G. Bay Mills Indian Community's, Grand Traverse Band of Ottawa and Chippewa Indians', Little Traverse Bay Bands of Odawa Indians', and Nottawaseppi Huron Band of the Potawatomi's Joint Petition for Rehearing of the April 21, 2021 Order

On May 21, 2021, Bay Mills, GTBOC, LTBB, and NHBP[17] filed a joint petition for rehearing of the April 21 order in this docket (May 21 joint petition for rehearing). On June 11, 2021, Enbridge and the Associations each filed in this docket a response to the May 21 joint petition for rehearing. On that same date, the Staff filed a letter in this docket stating that it was not filing a response to the May 21 joint petition for rehearing.

In the May 21 joint petition for rehearing, the Tribal Intervenors stated that, in the April 21 order, the Commission correctly decided to include in its MEPA review consideration of any pollution, impairment, or destruction arising from the products being transported through the Replacement Project, including GHG pollution. However, the Tribal Intervenors disputed the Commission's finding that "'[i]ssues raised by Bay Mills and other intervenors on potential pollution, impairment, and destruction of Michigan's natural resources resulting from existing sections of Line 5 are . . . outside the scope of the Commission's MEPA review as it relates to the Replacement Project.'" Tribal Intervenors' May 21 joint petition for rehearing, pp. 1-2 (quoting April 21 order, p. 64) (footnote omitted). The Tribal Intervenors argued that the Commission "improperly excluded from its [MEPA] review the effects of the products shipped through the [Replacement] Project in the form of an oil spill or leak from the existing sections of pipeline." Tribal Intervenors' May 21 joint petition for rehearing, p. 1. The Tribal Intervenors asserted that the Commission's decision is an error of law, leads to unintended consequences, and should be reversed on rehearing pursuant to Rule 437.

[17] Collectively, Tribal Intervenors for purposes of this petition for rehearing.

Specifically, the Tribal Intervenors explained that, historically, there have been leaks and spills associated with Line 5 and that there are likely to be additional leaks and spills in the future. The Tribal Intervenors argued that it is illogical to allow the parties to introduce "evidence of the environmental impacts of the oil products shipped by the pipeline *after* they are combusted for purposes of transportation, electricity, and other industrial processes, releasing GHGs—but not allow evidence of the environmental impacts of the oil products themselves in the likely scenario that the pipeline spills or leaks." Tribal Intervenors' May 21 joint petition for rehearing, p. 2 (emphasis in original). In addition, the Tribal Intervenors contended that because the Replacement Project will permit Enbridge to continue to operate the Line 5 system in its entirety, any spill or leak of oil products from Line 5 "are the result of the Project, regardless of whether the spill or leak occurs from the portion of the pipeline that runs through the Straits." *Id*., p. 6. Therefore, the Tribal Intervenors asserted that MEPA requires the Commission to determine whether pollution, impairment, or destruction will result from oil being transported on the Line 5 system, including the Replacement Project.

The Tribal Intervenors asserted that the Notice itself recognizes that "[c]rude oil contains toxic compounds that would cause both short- and long-term harm to biota, habitat, and ecological food webs." *Id*., p. 5 (quoting the Notice, p. 8). The Tribal Intervenors also cited a recent report that recognizes that oil spills on Line 5 threaten natural resources.[18] Furthermore, the Tribal Intervenors argued that courts routinely require agencies to consider the likelihood of oil spills in making environmental determinations, and the Tribal Intervenors pointed out that the language of

[18] *See*, May 21 joint petition for rehearing, p. 5 (citing Michigan Technological University, *Independent Risk Analysis for the Straits Pipelines*, September 15, 2018, pp. 165-185).

Section 5(2) of MEPA provides that the alleged pollution "*shall be determined*." Tribal Intervenors' May 21 joint petition for rehearing, p. 6 (emphasis in original) (footnote omitted).

Accordingly, the Tribal Intervenors asserted that the April 21 order has the unintended consequence of treating the pollution from GHG emissions and oil spills differently. They also argued that the April 21 order stifles the Tribal Intervenors' ability to address the effect of the Replacement Project on natural resources. Finally, the Tribal Intervenors contended that the April 21 order has the unintended consequence of prematurely limiting the scope of this case and preventing the development of a full record. They requested that the Commission apply the same reasoning used to allow the admission of evidence of GHG emissions related the Replacement Project and allow the admission of evidence regarding the effects of an oil spill or leak.

In their response, the Associations asserted that the Tribal Intervenors' May 21 joint petition for rehearing is a rehash of arguments made in response to the September 2 motion in limine and should be denied on that basis. The Associations stated that the Commission already considered and rejected the Tribal Intervenors' arguments regarding oil spills and leaks and they noted that the Commission stated that "the safety issues arising from leaks on any part of the pipeline system" are "not issues in this case." Associations' answer to the Tribal Intervenors' May 21 joint petition for rehearing, p. 3 (quoting April 21 order, p. 71). The Associations contended that the allegation that a leak is likely to occur is speculative and hypothetical. They argued that GHG emissions are different from leaks, because the combustion of the oil products as an end use is the purpose of the pipeline, whereas spills or leaks are not the purpose of the pipeline and are not part of the conduct at issue in the Replacement Project. The Associations contended that nothing in MEPA requires the Commission to "consider the effect of speculative, unintended events that are

unrelated to the project being approved." Associations' answer to the Tribal Intervenors' May 21 petition for rehearing, p. 7.

Enbridge also argued that the Tribal Intervenors' arguments have been considered and rejected by the Commission. Enbridge asserted that there are differences between the consideration of GHG emissions and the consideration of pipeline safety issues. Enbridge noted that the Commission found that the purpose of Act 16 is directly tied to the transportation of hydrocarbons, whereas "the safety of the sections of the pipeline not at issue in the Application is not similarly indistinguishable from the construction of the pipeline segment at issue and the flow of product through the pipeline." Enbridge's answer to the Tribal Intervenors' May 21 joint petition for rehearing, p. 3. Further, Enbridge argued, pipeline safety is within the exclusive jurisdiction of the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) and, therefore, a review of the safety of the other 641 miles of Line 5 is outside the Commission's purview. Enbridge asserted that the federal Pipeline Safety Act (PSA), specifically 49 USC 60104(c), provides PHMSA with exclusive jurisdiction to regulate the safety of already-constructed interstate pipelines, which preempts state jurisdiction. *See also*, 49 USC 60102(a)(2). Enbridge averred that if the Tribal Intervenors have complaints regarding the safety of the Line 5 system, they may take those complaints to PHMSA. Enbridge's answer to the Tribal Intervenors' May 21 joint petition for rehearing, p. 8, n. 20. Enbridge contended that parties may introduce evidence regarding the safety of the siting of the Replacement Project but argued that the April 21 order correctly recognizes the distinction between the Commission's siting authority and PHMSA's authority over the safety of operating pipelines. *See*, 49 USC 60104(c).

Enbridge further argued that the Commission's decision regarding the review of GHG emissions under MEPA did not serve to expand the Commission's jurisdiction over speculative

events that may occur on the entirety of the Line 5 system. Enbridge stated that the Commission's conclusion in the April 21 order "is wholly distinguishable from the claim that the Commission must also analyze the safety and integrity of the other 641-miles of Line 5" pursuant to MEPA. Enbridge's answer to the Tribal Intervenors' May 21 joint petition for rehearing, p. 10. In addition, Enbridge stated that the Tribal Intervenors:

> failed to show "conduct that has, or is likely to have, the effect of polluting . . . natural resources" which is a prerequisite under MEPA. All they have done is make bald and speculative assertions relating to releases from other portions of Line 5 not before the Commission in this Application. They have not shown that any such releases are likely.

Id., p. 9, n. 22 (quoting MCL 324.1705(1)). Enbridge noted that, according to the Commission, the purpose of the four-mile Replacement Project is to transport hydrocarbons and, therefore, the resultant GHG emissions are subject to review under MEPA. Enbridge argued that the same reasoning does not apply to oil leaks and spills, which are not the purpose of the Replacement Project.

Finally, Enbridge disagreed with the Tribal Intervenors' claim that the April 21 order results in the unintended consequence of prematurely limiting the scope of the case. *See*, Mich Admin Code, R 792.10421(1)(d). Enbridge stated that "[t]he Commission's procedural rules encourage and allow for an early determination of the scope of issues in a proceeding." Enbridge's answer to the Tribal Intervenors' May 21 joint petition for rehearing, p. 11. In any event, Enbridge contended, the Tribal Intervenors were among the parties requesting an early determination of the issues. Furthermore, Enbridge noted that the April 21 order was issued a year after the application was filed, belying any argument that it was issued too early.

The Commission notes that, pursuant to Rule 437, a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or

unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

The Commission finds that the Tribal Intervenors' petition for rehearing repeats arguments that were made during briefing on the motion in limine and that were considered and rejected by the Commission. In the April 21 order, the Commission stated that:

> Bay Mills asserts that the Commission must also examine the safety of Line 5, under obligations imposed by Tribal treaty rights, MEPA, and Act 16. Bay Mills points out that the Notice acknowledges the Tribal Nations' interests in the habitat of the Straits. Bay Mills states that "Treaty resources would be impacted by the approval of a Project that would allow Line 5 to operate well into the future." [Bay Mills' March 9, 2021 application for leave to appeal the ruling on remand], p. 24. Bay Mills argues that, under *State Hwy Comm* [*State Hwy Comm v Vanderkloot*, 392 Mich 159, 185; 220 NW2d 416 (1974)], the Commission must conduct an independent analysis of the evidence presented in this case, as well as consider the evidence embodied in other agencies' determinations. Bay Mills also contends that the Commission must consider alternatives, including:
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> > Evidence regarding the risk of oil leaks and spills to the Great Lakes and inland waters and resources from Line 5 if the Project is constructed. The Commission should also consider the risks from either an alternative method of delivering the commodities carried by Line 5 or the existing pipeline operating for a shorter duration than if the Project is allowed and constructed (as it almost certainly will be, in light of the Revocation and Termination).

> *Id*., p. 28. Bay Mills again argues that, under the APA [Administrative Procedures Act, MCL 24.201 *et seq.*], the parties must be allowed to rebut Enbridge's assertion that the Replacement Project will reduce the risk of an oil spill into the Great Lakes. Bay Mills wishes to present evidence regarding hydrologically connected waterways and potential environmental damage. Like the MEC Coalition, Bay Mills describes the Replacement Project as reinstating a nonoperational pipeline. Bay Mills again avers that nothing in federal law limits the Commission's authority to review Line 5's safety, stating "[b]ecause the Commission's obligations under Tribal Treaties, MEPA, Act 16, and the APA are not safety standards covered by Section 60104(c) of the PSA, none of those authorities are preempted by the PSA." *Id.*, p. 33.

April 21 order, pp. 41-42 (footnote omitted).

Addressing these arguments, the Commission found:

> Similar to the analysis in applying the three-factor test on project need, whether the proposed project's design and route is reasonable, and whether it meets or exceeds current safety and engineering standards, the application of MEPA is limited to the conduct at issue in this case. As such, the Commission's MEPA review does not extend to the entirety of Line 5, including the 641 miles of Line 5 outside of the proposed Replacement Project, but only to the "replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel." June 30 order, p. 68. Issues raised by Bay Mills and other intervenors on potential pollution, impairment, and destruction of Michigan's natural resources resulting from existing sections of Line 5 are therefore outside the scope of the Commission's MEPA review as it relates to the Replacement Project.

April 21 order, pp. 63-64. In the Commission's analysis applying the three-factor test, the Commission stated:

> In its application, consistent with the Agreements executed with the State of Michigan and the easement it has been assigned by MSCA, Enbridge proposes to construct a replacement segment of Line 5 that crosses the Straits, to be housed in the utility tunnel. In its June 30 order, the Commission previously described the Replacement Project as the "replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel." June 30 order, p. 68. As such, the Commission must consider how both the three-part test under Act 16 and the requirements of MEPA apply to the Replacement Project. However, as described more fully below, the application of these provisions do not extend to the remainder of the line approved in the 1953 order.

April 21 order, p. 59. The Commission thereafter described prior Commission cases in which it declined to re-examine the remainder of a pipeline system that interconnected with the segments proposed for work or repair targeted in a pipeline operator's application. The Commission found:

> As Commission precedent under Act 16 shows, when deciding an application to construct or relocate pipeline, the Commission has never examined any portion of existing pipeline that is interconnected with the segment that is proposed in the applicant's project but not within the proposed route; nor has it examined how the proposed pipeline segment could affect the lifespan of an existing interconnected pipeline system. The Commission has similarly never considered the projected length of usage of a pipeline system in its review of the public need for the replacement or relocation of a segment of the system. For this reason, the Commission is unpersuaded by the MEC Coalition's argument that the first issue in this case is "whether there is a public need to replace the dual pipelines with a new pipeline in a tunnel so as to perpetuate Line 5 for decades to come." The MEC Coalition's application for leave to appeal the initial ruling, p. 10.
>
> In determining public need, the Commission has instead looked at whether the applicant has explained the need for the construction or relocation of the segment or segments being proposed, and, where alleged, has considered the capacity and safety issues presented by the use of the existing pipeline segment that is proposed for improvement.
>
> In the instant case, the Commission finds that the first issue is whether there is a public need to carry out the Replacement Project, a project to replace the dual pipelines with a new pipeline in a tunnel, and does not concern approved, existing pipeline that is merely interconnected with the segment that is the subject of the application. The public need for the existing portions of Line 5 has been determined. The public need for the Replacement Project has yet to be determined.
>
> The alleged purpose of the Replacement Project is to improve the safety of the 4-mile segment that crosses the Straits. This is a question of fact that the parties may contest, and that is relevant to all three criteria that are considered in an Act 16 case: whether there is a public need for the Replacement Project, whether the Replacement Project is designed and routed reasonably, and whether the Replacement Project meets or exceeds current safety and engineering standards.
>
> Finally, the Commission also agrees with the ALJ that the Tribal treaty-reserved rights asserted by Bay Mills do not serve to expand the scope of the Commission's Act 16 jurisdiction. The treaty-reserved rights do not confer on the Commission the ability to review the authority to own and operate the segments of an approved pipeline system that are not the subject of the Act 16 application before the agency.

April 21 order, pp. 62-63. Finally, regarding the Commission's review of the other 641 miles of Line 5 (and related arguments), the Commission stated:

> Notably, the Commission finds that the outcome of the litigation surrounding the Notice has no impact on the approvals granted in the 1953 order. The Commission agrees with the ALJ that the 1953 order remains in effect, and the Commission is expressly not seeking to re-examine or reconsider the approvals granted in that case, nor is it taking steps toward the possible "suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license" under MCL 24.292(1), MCL 24.205(a), and *Rogers*. Rather, as noted by the Staff, the Notice involves not Enbridge's rights under the 1953 order, but the ongoing property interest to continue to operate in its current location under the easement granted by the predecessor to the DNR. Staff's response to the applications for leave to appeal the ruling on remand, p. 19. As such, the notice and other procedural protections provided by the APA and *Rogers* are not at issue in this case.
>
> Finally, the other offers of proof described in the applications for leave to appeal focus on the economics of fossil fuel pipelines, the risk of stranded costs, and the safety issues arising from leaks on any part of the pipeline system. These are not issues in this case.

April 21 order, p. 71.

As these excerpts show, the Tribal Intervenors' arguments were comprehensively examined and rejected. The Commission finds that the Tribal Intervenors' May 21 petition for rehearing fails to demonstrate an error of law in the April 21 order or unintended consequences flowing from the Commission's decision. In the April 21 order, the Commission found that its obligations under MEPA extended to the products being shipped through the Replacement Project. The Commission disagrees with the Tribal Intervenors' assertion that the logical extension of this finding is to expand the Commission's obligations under MEPA to usurp the clear federal jurisdiction over the safety of existing interstate pipelines laid out in the PSA. Although the April 21 order stated that nothing in the PSA precluded the Commission's required environmental review under MEPA, the Commission did not conversely find that MEPA preempted federal authority over the safety of existing pipelines because such a finding would be an error of law. *See*, 49 USC 60104(c). The

safety review of the entirety of Line 5 sought by the Tribal Intervenors is precluded by both federal law and by the fact that those sections of the pipeline outside of the Replacement Project are not at issue in this case. *See*, April 21 order, pp. 63-64. The April 21 order intentionally drew a clear distinction between the MEPA issues associated with the Replacement Project and the safety issues associated with Line 5 and, accordingly, rejected Bay Mills' arguments.

The Commission finds that Bay Mills' joint petition for rehearing does not meet the standards of Rule 437 and should be denied.

H. Bay Mills Indian Community's, Grand Traverse Band of Ottawa and Chippewa Indians', Little Traverse Bay Bands of Odawa Indians', and Nottawaseppi Huron Band of the Potawatomi's February 18, 2022 Application for Leave to Appeal

As part of their initial brief in this case, Bay Mills, GTBOC, LTBB, and NHBP[19] filed an application for leave to appeal ALJ Mack's January 13, 2022 ruling in which he granted several of Enbridge's motions to strike (January 13 ruling).[20] The Tribal Nations contended that ALJ Mack erred in granting the motions to strike with respect to five of the Tribal Nations' witnesses: Ms. Gravelle, Mr. LeBlanc, Mr. Ettawageshik, Mr. Rodwan, and Dr. Cleland.

In their application for leave to appeal the January 13 ruling, the Tribal Nations began by noting that the Commission has indicated the need for "comprehensive testimony and evidence, and a well-developed record" in this case. Tribal Nations' initial brief, p. 47 (quoting the June 30 order, p. 69). The Tribal Nations urged the Commission to apply a broad evidentiary standard and asserted that, due to the January 13 ruling, "the perspectives of the Tribal Nations have been

[19] Collectively, Tribal Nations for purposes of this application for leave to appeal.

[20] The Tribal Nations may appeal directly to the Commission without seeking leave to appeal because this order is the final disposition of the proceeding. Mich Admin Code, R 792.10433(5).

stricken in this matter." Tribal Nations' initial brief, p. 48. The Tribal Nations stated that the testimony and exhibits that were mistakenly stricken are:

- Direct Testimony of Whitney Gravelle – President of the Bay Mills Indian Community:
  - Page 6, lines 3 through 20
  - Page 12, line 13 through page 13, line 5
  - Sponsored Exhibits BMC-1 through BMC-5

- Direct Testimony of Jacques LeBlanc – Vice President of Bay Mills Indian Community and Tribal Fisherman:
  - Page 8, line 5 through page 9, line 19

- Direct Testimony of Frank Ettawageshik – Former Chairman of Little Traverse Bay Bands of Odawa Indians and climate change expert:
  - Page 7, line 3 through page 8, line 10
  - Page 8, line 11 through page 10, line 14
  - Page 10, line 15 through page 12, line 12
  - Page 14, line 2 through page 15, line 8
  - Page 15, line 10 through page 16, line 9
  - Sponsored Exhibits BMC-17 through BMC-30

- Direct Testimony of John Rodwan – Environmental Department Director of the Nottawaseppi Huron Band of the Potawatomi:
  - Page 12, line 11 through page 13, line 4
  - Page 14, lines 12 – 13
  - Page 16 lines 9 – 18
  - Page 16, line 19 through page 17, line 2
  - Sponsored Exhibit NBHP-3

- Direct Testimony of Dr. Charles Cleland – Ethnohistorian with decades of experience studying the culture and history of tribal communities in the upper Midwest:
  - Page 7, lines 16 – 20
  - Page 14, lines 11 – 15
  - Page 15, lines 3 – 7
  - Page 17, line 15 through page 20, line 10
  - Page 23, line 16 through page 24, line 2
  - Page 24, line 19 through page 25, line 20
  - Page 28, lines 5 – 8
  - Page 32, line 15 through page34, line 22
  - Page 35, line 8 through page 36, line 10
  - Page 37, line 11 through page 39, line 9
  - Sponsored Exhibit BMC-35

Id., pp. 48-49. The Tribal Nations contended that the testimony and exhibits listed above relate directly to Enbridge's Act 16 application and the Commission's MEPA analysis.

The Tribal Nations argued that Ms. Gravelle's testimony addresses the route of the tunnel, the risk of an oil spill, and the issue of climate change. The Tribal Nations stated that the stricken exhibits, which include two tribal resolutions, two letters to the Governor, and two official comment letters, cast doubt on the safety and reasonableness of the route. The Tribal Nations asserted that ALJ Mack erred in finding that the testimony and exhibits address "concerns over the safety and operational aspects of the entirety of Line 5." *Id.*, p. 50 (quoting the January 13 ruling, p. 7). In the Tribal Nations' opinion, the testimony repeatedly refers to the dual pipelines and the Straits, and the exhibits are explicitly about the plan to replace the dual pipelines.

The Tribal Nations averred that ALJ Mack mistakenly stated that the Staff supported Enbridge's motion. The Tribal Nations claimed that, during oral argument, the Staff revised its position and opposed striking any of Ms. Gravelle's direct testimony that addressed the risk of an oil spill in the Straits. Tribal Nations' initial brief, p. 51 (citing 6 Tr 437). The Tribal Nations contended that the "double standard is apparent. Numerous other witnesses were permitted to discuss the risk of an oil spill in the Straits, but the President of an intervening Tribal Nation was not. This is inconsistent with the dictates of the APA." Tribal Nations' initial brief, pp. 51-52 (footnote omitted) (citing MCL 24.272(3)-(4)).

The Tribal Nations also contended that the testimony of Mr. LeBlanc was mistakenly stricken. The Tribal Nations stated that Enbridge provided testimony addressing potential impairment to fisheries and, thus, the Tribal Nations should be allowed to do the same. According to the Tribal Nations, Mr. LeBlanc has been a commercial fisherman in the Straits since the age of 12, and they observe that he should be allowed to testify as to the probable effect on fishing families if the

ecosystem is damaged by the Replacement Project. Tribal Nations' initial brief, p. 53. The Tribal Nations asserted that Mr. LeBlanc's testimony is foundational to his conclusion that the route is not appropriate.

The Tribal Nations asserted that the testimony and exhibits of Mr. Ettawageshik are central to the issue of climate change. The Tribal Nations stated that Mr. Ettawageshik addressed "the nature of climate change, the severity of the problem, what has been done to address the problem, and what must be done going forward to combat the global, existential threat." Tribal Nations' initial brief, p. 54 (footnote omitted). The Tribal Nations argued that ALJ Mack erred in finding that the April 21 order limited the Commission's examination of GHG emissions to the emissions associated with the four-mile pipeline section that is the subject of the Replacement Project. *See,* January 13 ruling, p. 8. The Tribal Nations posited that to perform the MEPA analysis, the Commission needs to understand climate change, its global nature, and its impact on the Tribal Nations. For example, the Tribal Nations contended, one of the stricken exhibits illustrates how climate change has influenced negotiations with the State of Michigan over treaty-protected rights.

Next, the Tribal Nations asserted that the testimony and exhibit of Mr. Rodwan were stricken in error. In the Tribal Nations' opinion, Mr. Rodwan's testimony regarding the Line 6B oil spill will assist the Commission in performing its Act 16 analysis by providing information on "how much weight and credibility should be given to Enbridge's statements about the safety of the Proposed Project." Tribal Nations' initial brief, p. 56. The Tribal Nations averred that the Line 6B oil spill polluted many tribal natural resources, and the Tribal Nations stated that its proffered evidence addresses the issue of inadequate pipeline safety standards.

Finally, the Tribal Nations contended that the testimony and exhibit of Dr. Cleland were stricken in error. According to the Tribal Nations, Dr. Cleland's testimony is relevant to the

Commission's Act 16 analysis because it addresses the terrestrial archeological sites in and around the Replacement Project area in the Straits, the unreasonableness of the proposed route, and the importance of considering alternatives. The Tribal Nations observed that ALJ Mack failed to provide an explanation as to why he found the expert analysis of the 141 terrestrial archeological sites to be outside the scope of this case. The Tribal Nations stated that "[t]he ALJ simply stated that the testimony in question goes beyond the scope of the hearing 'by addressing operational and safety aspects of Line 5 and the dual pipelines.'" *Id.*, p. 58 (quoting the January 13 ruling, p. 3). The Tribal Nations asserted that this testimony is well within the qualifications of Dr. Cleland and provides context for the Commission's analysis under both Act 16 and MEPA. In addition, the Tribal Nations asserted that Dr. Cleland's testimony addresses the need for further study.

In Appendix A to Enbridge's reply brief in this case, the company responded to the Tribal Nations' application for leave to appeal the January 13 ruling. Enbridge agreed with ALJ Mack's finding that Ms. Gravelle's evidence "addressing concerns over the safety and operational aspects of the entirety of Line 5" is inconsistent with the scope of the case as defined in the April 21 order. Enbridge's reply brief, Appendix A, p. 2 (quoting the January 13 ruling, pp. 7-8). Thus, Enbridge contended that it was appropriate to exclude the referenced testimony and exhibits of Ms. Gravelle.

Similarly, Enbridge argued that Mr. LeBlanc's testimony, which addressed the consequences of allowing Line 5 to continue to operate in the territory ceded by the Tribal Nations and the effects of climate change on tribal territories, is irrelevant and exceeds the scope of this case as defined in the April 21 order. Enbridge's reply brief, Appendix A, p. 3 (citing the January 13 ruling, pp. 6-7). Enbridge also noted that Mr. Ettawageshik's evidence addressed the history of climate change advocacy carried out by several tribes, and the company asserted that ALJ Mack

correctly found it to be focused on "climate change on a global level," which is outside the scope of this case as set forth in the April 21 order. Enbridge's reply brief, Appendix A, p. 4 (quoting the January 13 ruling, p. 8). In addition, Enbridge argued that Mr. Rodwan's evidence addressed harms associated with the continued operation of Line 5 and harms arising from the general use of fossil fuels, as well as the effects of a release from Line 6B in the Kalamazoo River in 2010. Enbridge asserted that ALJ Mack correctly found this material to be irrelevant to the company's Act 16 application in this case and the Commission's MEPA analysis of the Replacement Project and inconsistent with the Commission's findings in the April 21 order.

Finally, Enbridge argued that Dr. Cleland's evidence was correctly stricken by ALJ Mack because it addressed the harms to cultural and historical sites from the continued operation of Line 5 as a whole and because Dr. Cleland purports to opine on the damage associated with the physical act of tunneling. Enbridge noted that Dr. Cleland is an ethnohistorian and has no training in tunnel construction or engineering. Enbridge contended that ALJ Mack correctly found that the testimony addresses "operational and safety aspects of Line 5" and that Dr. Cleland "lacks any basis to opine on the actual or potential impact to the physical world from the proposed project." Enbridge's reply brief, Appendix A, p. 7 (quoting the January 13 ruling, pp. 3-4). Enbridge further argued that ALJ Mack appropriately found that Exhibit BMC-35 was inadmissible as hearsay within hearsay, noting that ALJ Mack found that "[a] document that a witness relies on that is authored by someone who lacks personal knowledge of the facts it contains and does not identify who made the statements or their basis, is inherently unreliable." Enbridge's reply brief, Appendix A, p. 8 (quoting the January 13 ruling, p. 4).

On pages 50-58 of its reply brief in this case, the Staff responded to the Tribal Nations' application for leave to appeal the January 13 ruling. The Staff contended that ALJ Mack properly

determined that, in general, the stricken evidence falls outside the scope of this proceeding as defined in the April 21 order. In addition, the Staff asserted that the Tribal Nations rehashed evidentiary arguments that have been considered and rejected by ALJ Mack and the Commission. The Staff averred that it is within the Commission's discretion to exclude material that is irrelevant, immaterial, or unduly repetitious. Staff's reply brief, p. 52 (citing MCL 24.275 and Mich Admin Code, R 792.10427(1) (Rule 427(1)). Quoting the April 21 order, the Staff argued that:

> the Commission has already concluded that tribal input, although welcomed, does not expand its Act 16 jurisdiction over the application. (4/21/2021 Order, p 63.) ("Tribal treaty-reserved rights . . . do not confer on the Commission the ability to review the authority to own and operate the segments of an approved pipeline system that are not the subject of the Act 16 application before the agency.")

Staff's reply brief, p. 53 (quoting the April 21 order, p. 63).

With respect to Dr. Cleland, the Staff agreed with ALJ Mack that the witness lacks the expertise necessary to opine on the physical risks posed by the tunnel and agreed that Exhibit BMC-35 is hearsay within hearsay. The Staff noted that, in general, it agrees with ALJ Mack's January 13 ruling striking portions of Ms. Gravelle's and Mr. LeBlanc's testimony and exhibits:

> The Tribes are correct that Staff noted on the record that "it is not seeking to strike testimony about the risk of an oil spill from the tunnel" or exclude testimony that may relate to a spill in the Straits. Because Staff supported portions of Enbridge's motions, Staff felt it was important to distinguish its position from comments Enbridge made on the record that testimony alleging that the proposed "project would . . . damage the Straits of Mackinac" should be stricken. (6 TR 429.) Staff also revised its written response to the motion to strike portions of President Gravelle's testimony to reflect this distinction. (6 TR 437.) Specific impacts of the project on the Straits, whether harmful or remedial, should be considered. With that said, Staff believes the issue of an oil spill in the Straits and an oil spill elsewhere on Line 5 due to the "continued operation of Line 5" is so interwoven in the stricken portions of testimony of President Gravelle and Jacques LeBlanc, Jr., that the [January 13 ruling] is correct in its determination and should be affirmed.

Staff's reply brief, pp. 54-55 (quoting Tribal Nations' initial brief, p. 51, n. 260). Finally, the Staff maintained that Mr. Rodwan's evidence was correctly struck because it pertains to the 2010 oil spill on the Kalamazoo River from Line 6B, which is outside the scope of this case as defined by the April 21 order.

In the March 17, 2022 order in Case No. U-21090 (March 17 order), the Commission stated that "it will reverse an ALJ's ruling if the Commission finds that a different result is more appropriate." March 17 order, p. 14 (citing, June 5, 1996 order in Case No. U-11057, p. 2; May 19, 2020 order in Case No. U-20697, p. 9); *see also*, November 10, 2011 order in Case No. U-16230, pp. 7-8; October 5, 2018 order in Case No. U-20165, p. 17. The Commission has reviewed the Tribal Nations' application for leave to appeal and finds that ALJ Mack's January 13 ruling should be affirmed.

Regarding the testimony and exhibits of Ms. Gravelle, the Commission agrees with ALJ Mack that "[t]he challenged testimony and exhibits can only be characterized as addressing concerns over the safety and operational aspects of the entirety of Line 5." January 13 ruling, p. 7. The Commission finds that ALJ Mack appropriately preserved Ms. Gravelle's testimony concerning the proposed route of the Replacement Project and the potential impacts to cultural resources and struck testimony and exhibits that substantially addressed the potential harms associated with the continued operation of Line 5 as a whole, which the Commission determined is outside the scope of this case.

The stricken portions of Mr. LeBlanc's testimony state that Line 5 could damage rivers and lakes in the ceded territory and that reliance of fossil fuels is harmful to the environment. The Commission agrees with ALJ Mack that these portions of Mr. LeBlanc's testimony address issues

outside the scope of this case and, therefore, the Commission finds that this testimony was properly stricken.

ALJ Mack found that portions of Mr. Ettawageshik's testimony and Exhibits BMC-17 through BMC-30 should be stricken because they fail to address the "discreet issue" of whether the hydrocarbons that are shipped through the Straits Line 5 segment may result in GHG emissions that pollute, impair, or destroy Michigan's natural resources or the public trust in those resources. January 13 ruling, p. 8. The Commission agrees. After a review of those portions of Mr. Ettawageshik's testimony and Exhibits BMC-17 through BMC-30, the Commission finds that the stricken testimony and exhibits substantially address global climate change and tribal advocacy on this issue, which are unquestionably important to the Tribes, but are outside the scope of this case. Therefore, the Commission finds that these portions of Mr. Ettawageshik's testimony and Exhibits BMC-17 through BMC-30 were properly stricken.

Regarding the stricken portions of Mr. Rodwan's testimony and Exhibit NHBP-3, the Commission agrees with ALJ Mack's finding that the testimony and exhibit focus on issues outside the scope of this case. Specifically, the stricken testimony and exhibit substantively include information and documents pertaining to the Line 6B release into the Kalamazoo River, the decommissioning of Line 5 as a whole, the harmful effects of fossil fuels in general, and the notation of cultural resources and sites outside of Michigan. Although these issues are of undeniable importance to NHBP, they are not relevant to the issue presented in Enbridge's application: replacement of the Straits Line 5 segment and relocation of the segment to a tunnel beneath the Straits' lakebed. Thus, the Commission finds that these portions of Mr. Rodwan's testimony and Exhibit NHBP-3 were properly stricken.

In the Tribal Nations' application for leave to appeal, they argue that portions of Dr. Cleland's testimony and Exhibit BMC-35 were improperly stricken because ALJ Mack failed to explain why the testimony and exhibit were not relevant to the Commission's Act 16 determination and its MEPA analysis. ALJ Mack determined that because Dr. Cleland is an ethnohistorian, he "lacks any basis to opine on the actual or potential impact to the physical world from the proposed project," including "the potential for a catastrophic event emanating from the tunnel." January 3 ruling, p. 4. The Commission has reviewed the stricken testimony and agrees with ALJ Mack that the stricken portions address issues that are beyond the scope of this case and Dr. Cleland's professed expertise. *See*, 10 Tr 1526-1530. In addition, the Commission agrees with ALJ Mack that Exhibit BMC-35 contains "hearsay within hearsay because not only does Dr. Cleland lack personal knowledge of the claims in it, the author of the document, Dr. O'Shea, claims no such knowledge." January 3 ruling, p. 4. Therefore, the Commission finds that these portions of Dr. Cleland's testimony and Exhibit BMC-35 were properly stricken.

IV. POSITIONS OF THE PARTIES

A. Direct Testimony

1. Enbridge Energy, Limited Partnership

Amber Pastoor testified that she is Enbridge's Project Manager for the Replacement Project and she sponsored Exhibits A-1 through A-11. As an initial matter, she explained that Enbridge is an interstate common carrier pipeline company that operates in accordance with conditions of service and rates set in tariffs filed with the Federal Energy Regulatory Commission (FERC) and that the company "provides transportation service to qualified shippers of liquid petroleum" as nominated on a month-to-month basis. 7 Tr 558. She stated that Enbridge owns and operates the Lakehead System, which is the U.S. portion of an operationally integrated pipeline system located

within Canada and the United States, and which operates in seven Great Lakes states and spans approximately 1,900 miles from the international border near Neche, North Dakota, to the international border near Marysville, Michigan. Ms. Pastoor asserted that "Line 5 is a pipeline integrated within the Lakehead System." 7 Tr 558.

Ms. Pastoor testified that the purpose of the Replacement Project is to address an environmental concern raised by the State of Michigan's Pipeline Safety Advisory Board regarding the Straits segment of Line 5 known as the dual pipelines. She contended that relocating the Straits segment of Line 5 within a tunnel beneath the lakebed will eliminate the risk of a release of Line 5 products due to an accident such as an anchor strike. She asserted that the tunnel will be located 60 to 250 feet beneath the lakebed[21] and that approximately 0.4 to 0.8 miles of pipe will be used to connect the replacement pipe segment to the existing Line 5 on both sides of the Straits. Ms. Pastoor stated that "[t]he [Replacement] Project will also include all the associated fixtures, structures, systems, coating, cathodic protection and other protective measures, equipment and appurtenances relating to the replacement pipe segment and to the existing Line 5 pipeline on both sides of the Straits." 7 Tr 556-557.

Ms. Pastoor testified that the Replacement "Project does not include the tunnel itself;" rather, she contended, the tunnel will be constructed and maintained in accordance with the Tunnel Agreement (Exhibit A-5) entered into between MSCA and Enbridge pursuant to Act 359.

[21] In Exhibit A-13.1, an update to Exhibit A-13 that contains the Tunnel Design and Construction Report for the Straits line 5 Replacement Segment (Tunnel Design and Construction Report), Enbridge noted that, on page 5 of the Tunnel Design and Construction Report, "there is reference to the tunnel 'being at a depth of approximately 60 feet to 250 feet beneath the lakebed.' Based on new data the tunnel will be at a depth of approximately 60 to 370 feet beneath the lakebed, except that from the TBM [tunnel boring machine] launch site on the south side the tunnel will be 30 feet below the lakebed and will taper to the depth of 60 feet or more below the lakebed for 250 feet from the shoreline."

7 Tr 557. She explained that Enbridge must also obtain environmental permits from USACE and EGLE and that the tunnel will be constructed within the area described in the 2018 "Easement to Construct and Maintain Underground Utility Tunnel at the Straits of Mackinac" granted by the DNR and MSCA. *See*, Exhibits A-6 and A-11. Ms. Pastoor asserted that Enbridge plans to deactivate the dual pipelines once the replacement pipe goes into service within the tunnel in accordance with the Third Agreement (Exhibit A-1) and the 1953 easement (Exhibit A-2).

Ms. Pastoor described the work area for the Replacement Project as including 16 acres on the north side of the Straits and 25 acres on the south side and being located on property owned by Enbridge or property for which Enbridge has acquired the right of access. She explained that the replacement pipe segment contained in the tunnel "will be designed, installed, operated, and maintained in accord with federal pipeline safety regulations, specifically the Pipeline and Hazardous Materials Safety Administration ('PHMSA') pipeline safety regulations Parts 194 and 195 (49 Code of Federal Regulations 'CFR' Parts 194 and 195)." 7 Tr 561-562. In addition, she stated that the replacement pipe segment will tie into the existing Mackinaw Station on the south side of the Straits and the existing North Straits facility located on the north side of the Straits within the limits of disturbance created by the tunnel construction. Ms. Pastoor averred that the tie-in on the north side of the Straits is within the North Straits facility or on Enbridge-owned land in Moran Township, Mackinac County, Michigan; and the tie-in on the south side of the Straits is within the Mackinaw Station in Wawatam Township, Emmet County, Michigan. She contended that Enbridge will make modifications at its existing facilities to accommodate the change from the two 20-inch diameter dual pipelines to the single 30-inch diameter pipeline. Ms. Pastoor asserted that the Replacement Project will not change the annual average capacity of Line 5, which is currently 540,000 bpd. *See*, 7 Tr 564.

Ms. Pastoor explained that approximately two million labor staff-hours and 200 workers will be required to construct the tunnel and the Replacement Project. She stated that the "contractor has also committed to utilizing Indigenous Peoples for at least 10 percent of the total operating engineering and labor staff-hours worked." 7 Tr 564-565. Ms. Pastoor also noted that Enbridge has acquired all necessary land rights to construct the project.

Finally, Ms. Pastoor described the alternatives analysis required by the First Agreement that was undertaken by Enbridge and submitted to the State of Michigan on June 15, 2018 (Exhibit A-9). She stated that:

> Enbridge's alternatives analysis concluded that construction of a tunnel beneath the lakebed of the Straits connecting the Upper and Lower Peninsulas of Michigan, and the installation of a replacement pipe segment within the tunnel, was a feasible alternative to the Dual Pipelines, and that this alternative would essentially eliminate the risk of a potential release [of Line 5 products] in the Straits.

7 Tr 566; *see also*, 7 Tr 567-569. She noted that on October 4, 2018, Enbridge entered into the Second Agreement (Exhibit A-10), which recognized that "'the evaluations carried out pursuant to the First Agreement have identified near-term measures to enhance the safety of Line 5, and a longer-term measure – the replacement of the Dual Pipelines – that can essentially eliminate the risk of adverse impacts that may result from a potential release from Line 5 at the Straits.'" 7 Tr 566 (quoting Exhibit A-10, p. 3). Ms. Pastoor asserted that in December 2018, Enbridge entered into the Tunnel Agreement (Exhibit A-5) and the Third Agreement (Exhibit A-1), both of which state that the Replacement Project and the tunnel should eliminate the risk of a release of Line 5 products into the Straits.

Paul Turner stated that he is an Environmental Specialist for Enbridge and acts as the project lead for environmental permitting for the Replacement Project. He sponsored Exhibits A-9, A-11, and A-12. Mr. Turner testified that he participated in the preparation of the Environmental Impact

Report (EIR) for the Replacement Project and its appendices, which include the Environmental Protection Plan (EPP) and the Unanticipated Discovery Plan (UDP). He explained that the team that prepared the EIR included wetland and wildlife scientists, archeologists, and environmental specialists, who consulted publicly available data sources. Describing the results of the EIR, he stated that:

> The construction of the tunnel is not part of the [Replacement] Project that is the subject of this Application, but rather is the subject of the Joint Permit Application filed with EGLE and USACE, Exhibit A-11. The tunnel is also the subject of the Tunnel Agreement entered into between the Mackinac Straits Corridor Authority and Enbridge pursuant to 2018 PA 359. Given that the construction of the tunnel is not part of the [Replacement] Project, the impacts of the [Replacement] Project are minimal to the environment. The construction footprint for this [Replacement] Project – which includes storing the replacement pipe, welding the pipe, locating the replacement pipe segment into the tunnel, tying in the replacement pipe segment into Line 5 and installing all associated fixtures, structures, systems, coating, cathodic protection and other protective measures, equipment and appurtenances relating to the new 30-inch diameter pipeline to the already existing Enbridge facilities – is small. The pipeline construction will be contained within areas previously disturbed during the construction of the tunnel. Enbridge believes the construction and operation of the [Replacement] Project will result in minor short-term impacts on the human and natural environments. There would only be negligible temporary, and no permanent, impacts associated with the construction of the replacement pipe segment.

7 Tr 602-603. In addition, he stated that the Replacement Project will be constructed in accordance with the environmental permits obtained from EGLE and USACE. 7 Tr 604.

Next, Mr. Turner testified that Enbridge explored alternatives to the Replacement Project:

> Specifically, the alternatives assessment considered, in addition to the tunnel alternative, installing a replacement pipe segment across the Straits by placing a pipe inside a larger, secondary containment pipe, which would be buried in a trench near the shore and laid on the lakebed covered with rock and a replacement pipeline installed through a horizontal directional drilling ("HDD") method.

7 Tr 603. He explained that the trench alternative was rejected due to its potential environmental impacts during construction, and the HDD alternative was rejected because it was not technically

feasible. Mr. Turner asserted that the alternatives evaluation report concluded that the tunnel was the best alternative among those assessed.

Marlon Samuel testified that he is Vice President of Customer Service for Enbridge and that he is "familiar with the past, current, and forecasted usage of Line 5." 7 Tr 754. Explaining the current use of Line 5, Mr. Samuel stated as follows:

> Line 5 transports light crude, light synthetic, light sweet crude oil, and natural gas liquids ("NGLs") volumes providing transportation service from Superior, Wisconsin to Sarnia, Ontario. Line 5 delivers NGLs to a facility at Rapid River in Michigan. At the Rapid River facility, much of the NGLs deliveries are converted to propane which is then distributed to heat homes and power industry in the Upper Peninsula. The non-propane NGL component are then re-injected back into Line 5, delivering to a Sarnia, Ontario facility for further processing. In the Lower Peninsula, Line 5 accepts Michigan light crude oil production at Lewiston, where Line 5 interconnects with another pipeline system. Also, in the Lower Peninsula, Line 5 delivers crude to the Marysville Crude Terminal that connects with a third-party pipeline, that then transports crude from the Marysville Crude Terminal to refineries in Detroit and Toledo. These refineries produce petroleum products, including gasoline and aviation fuels used by consumers in Michigan and surrounding regions. Line 5 light crude is also delivered to the Sarnia area, including local Sarnia refineries. A portion of the volume is delivered to Enbridge's Sarnia operational terminal where the crude is then injected on pipelines that are ultimately being delivered to refineries in New York and elsewhere. Line 5 also delivers NGLs to a facility in Sarnia, where it is converted to propane for both local consumption and to be imported back to Michigan to meet Michigan's needs. Line 5 is not transporting heavy crude oil and the terms of the September 3, 2015 Agreement between Enbridge and Michigan restricts Line 5's transportation of heavy crude oil.

7 Tr 755-756. Mr. Samuel testified that, for the past 10 years, Line 5 has operated at about 90% of its annual average capacity of up to 540,000 bpd, and this use is expected to continue into the future "because there is lack of sufficient capacity on other pipelines to serve these markets and transport these volumes and types of light crude oil, light synthetic crude and NGLs." 7 Tr 757. He stated that the nature of the service currently furnished by Line 5 will remain unchanged after the Replacement Project is complete.

Aaron Dennis testified that he is an Engineer Specialist for Enbridge and that he acts as the lead engineer on the Replacement Project. He stated that the purpose of his supplemental direct testimony is to provide the two supplemental exhibits that were requested by the Staff. He sponsored Exhibit A-13, which is the Tunnel Design and Construction Report "that explains how the Great Lakes Tunnel will perform as a location to construct, operate, and maintain the replacement pipe segment, and how the tunnel will act as a secondary containment facility." 8 Tr 788. Mr. Dennis also sponsored Exhibit A-14, which consists of discovery responses provided by Enbridge to the Staff explaining "various aspects of the [Replacement] Project, such as the tie-in of the replacement pipe segment, pipe specifications, pipe support within the tunnel, and pipe bends." 8 Tr 788.

2. The Commission Staff

Travis Warner testified that he is a Public Utilities Engineer Specialist in the Energy Security Section of the Commission's Energy Operations Division. 12 Tr 1696. He sponsored Exhibits S-1 through S-8. Mr. Warner stated that the purpose of his testimony is to provide information on behalf of the Staff regarding the dual pipelines and Enbridge's application for approval of the Replacement Project. In addition, Mr. Warner noted that as a part of the Staff's review and analysis of Enbridge's application, the Staff has been communicating and meeting with Michigan's 12 federally recognized Indian Tribes since April 2020. He testified that two Tribes submitted comments and that, specifically, "the Gun Lake Tribe requests that several topics be included in Staff's review and analysis of Tribal Treaty Rights" as they relate to the application. 12 Tr 1713. Mr. Warner stated that although some of the Tribes' comments were submitted too late in the process to be incorporated into the Staff's testimony, these comments are being submitted to the record as Exhibits S-4 and S-5.

Mr. Warner testified that since 2014, he has been "provid[ing] engineering support as part of an interagency technical team comprised of staff from the [DNR], [EGLE], and the Office of the Attorney General (AG) (the Technical Team)." 12 Tr 1698. He noted that in 2016, the Technical Team selected Dynamic Risk Assessment Systems, Inc. (Dynamic Risk) to compose a report for the State of Michigan that would examine alternatives to the siting of Line 5 and would include safety, environmental, and economic considerations (Alternatives Report). In addition, Mr. Warner stated that "in 2017, the Technical Team began working with Michigan [Technological] University (MTU) on a separate report that analyzed the environmental and economic consequences of a 'worst case' spill from the Dual Pipelines into the Straits of Mackinac (Risk Analysis)." 12 Tr 1715.

Mr. Warner contended that there were several key conclusions in the Alternatives Report and Risk Analysis. He stated that in the Alternatives Report, "'anchor hooking' was determined to be the dominant primary threat to the Dual Pipelines that could cause a rupture. Dynamic Risk estimated that this threat represented more than 75% of the annualized total threat probability . . . ." 12 Tr 1716 (quoting Exhibit ELP-24, p. 28). He noted that, according to Dynamic Risk, internal and external corrosion, selective seam corrosion, stress corrosion cracking, construction defects, and manufacturing defects are secondary threats. Mr. Warner testified that a second "significant finding of the Alternatives [Report] is that replacement of the Dual Pipelines within a tunnel beneath the Straits would likely be a feasible alternative to Line 5's current configuration." 12 Tr 1717. He stated that in Dynamic Risk's opinion, the risk of a release of Line 5 products into the waters of the Great Lakes is negligible if the proposed Replacement Project is constructed.

Next, Mr. Warner explained that the Risk Analysis considered the amount of natural resources damages, the governmental costs incurred, and other public and private economic damages that would result from a worst-case-scenario release of Line 5 products into the Great Lakes. However, Mr. Warner noted that the Risk Analysis "did not consider any potential alternatives for replacing the Dual Pipelines, including within a tunnel, or the associated risk of environmental contamination with replacement alternatives." 12 Tr 1717-1718. He stated that "[t]he final report was completed in 2018 and determined that a worst-case scenario with the highest economic impact would be one in which oil spreads westward from the Straits along the shore of Lake Michigan and reaches Wisconsin. This scenario would cause anticipated damages of around $1.37 billion in total." 12 Tr 1718. Mr. Warner testified that according to the Risk Analysis, the study was based on an accumulation of worst-case assumptions and does not include any notion of probability.

Mr. Warner stated that "[i]n 2017 and 2018, the Technical Team provided support in the State's development of the three agreements between Enbridge and the State of Michigan relating to Line 5 . . . ." 12 Tr 1715. He noted that pursuant to the stipulations set forth in the First Agreement executed in 2017, the State of Michigan and Enbridge agreed to "complete a report that assesses options to mitigate the risk of a vessel's anchor puncturing, dragging, or otherwise damaging the Dual Pipelines." Exhibit A-8, p. 4. Accordingly, Mr. Warner stated that the Technical Team employed an engineering company to assist in conducting the required study. 12 Tr 1720. He testified that the report concluded that a protective cover of gravel and rock of 72 feet in diameter and 6 feet in depth over the dual pipelines would be the most effective barrier to protect against an anchor strike. Mr. Warner stated that "this type of covering would cost approximately $150 million to install along the entire length that the Dual Pipelines are exposed

on the lakebed" and that it would result in a 99% reduction in the risk of an anchor strike. 12 Tr 1721. However, he noted that the "the protective barrier would eliminate the ability to visually inspect the outside of the pipeline using a remote operated vehicle (ROV) or with divers as is done currently." 12 Tr 1721. Mr. Warner testified that if the protective barrier is installed, Enbridge would have to inspect the integrity of the dual pipelines using in-line inspection (ILI) tools. In addition, he asserted that the "installation of the barrier would likely cause environmental impairments and would require at least 11 state and federal environmental permits and approvals." 12 Tr 1721. Mr. Warner noted that the State of Michigan chose not to support this alternative.

Mr. Warner also noted that pursuant to the stipulations set forth in the First Agreement, the State of Michigan and Enbridge agreed to conduct an evaluation of alternatives for replacing the dual pipelines. He explained that the State of Michigan retained Dr. Mooney, Grewcock Chair Professor of Underground Construction and Tunneling, Colorado School of Mines, and Mr. Cooper, Senior Principal Engineer with HT Engineering, Inc., to provide the Technical Team with subject matter expertise regarding possible replacement alternatives. Mr. Warner stated that with Dr. Mooney's and Mr. Cooper's input, the Technical Team completed a report entitled "Alternatives for replacing Enbridge's dual Line 5 pipelines crossing the Straits of Mackinac" (Alternatives Analysis), which was attached to Enbridge's application as Exhibit A-9. Mr. Warner noted that the Alternatives Analysis "assessed the feasibility of three alternatives for replacing the segment of Line 5 that crosses the Straits:"

> (1) placing a new pipeline or pipelines in a tunnel under the Straits (Tunnel Alternative); (2) installing a new pipeline or pipelines under and across the Straits by the use of a horizontal directionally drilled method (HDD Alternative); and (3) installing a new pipeline or pipelines across the Straits with an open-cut method that includes secondary containment (Open-Cut Alternative).

12 Tr 1722.

According to Mr. Warner, the Alternatives Analysis found that the Tunnel Alternative would be feasible to construct and operate and that a concrete tunnel could serve as an effective secondary containment vessel in the event of a release of Line 5 products from the replacement pipe segment. In addition, he noted that the Alternatives Analysis stated that the Open-Cut Alternative would be safe and feasible, with a 30-inch diameter pipe to carry the hydrocarbon products and a 36-inch diameter outer pipe to contain a release of Line 5 products from the replacement pipe segment. However, Mr. Warner stated that "[t]he study concluded that the HDD Alternative would be technically infeasible based on current technology, primarily due to the diameter of pipe and the length of the drill required." 12 Tr 1723.

Mr. Warner testified that the Staff considered the following alternatives to the Line 5 Replacement Project:

1. No Action Alternative
2. Replacement of the Dual Pipelines using the Open Cut Alternative
3. Replacement of the Dual Pipelines using the HDD method
4. Protection of the Dual Pipelines by installing rock armoring
5. Alternative transportation methods to Line 5 and associated GHG emissions
6. Product switching and alternative fuel sources in the absence of Line 5 throughput.

12 Tr 1726-1727.

Regarding Alternative 1, Mr. Warner explained that "[t]he No Action Alternative assumes that the Replacement Project is not completed as proposed and the Dual Pipelines would not be replaced and decommissioned in the foreseeable future." 12 Tr 1728. He stated that if the dual pipelines continue to operate in an exposed position on the lakebed of the Straits, Enbridge must continue to monitor, maintain, and repair the pipelines. According to Mr. Warner, "to mitigate the risk of anchor strikes, Enbridge is [currently] monitoring vessel traffic by patrolling the Straits. In addition, Enbridge continues to visually inspect the exterior of the pipelines for damage or

unsupported spans. If these events occur, Enbridge would need to complete repairs using divers and vessels anchored in the Straits." 12 Tr 1729. Furthermore, he noted that pursuant to the First and Second Agreements, Enbridge must temporarily discontinue operation of the dual pipelines during "Sustained Adverse Weather Conditions" and notify the State of Michigan. 12 Tr 1729 (citing Exhibit A-8, p. 4, and Exhibit A-10, pp. 4-5).

Mr. Warner asserted that the Staff is not arguing that the continued operation of the dual pipelines presents an acceptable or unacceptable risk to the state of Michigan. Rather, he stated that "the Replacement Project proposed is superior to the no action alternative because it not only reduces the risk of a spill into the Straits, but also eliminates the need to continue most of the measures described above once the Dual Pipelines are decommissioned as planned." 12 Tr 1730.

Regarding Alternative 2, the Open-Cut Alternative, Mr. Warner testified that this alternative is inferior to the Replacement Project because the "the environmental impacts from this alternative would be substantially greater than those resulting from the Tunnel Alternative." 12 Tr 1730. In addition, Mr. Warner noted that another drawback of the Open-Cut Alternative is that without the construction of a utility tunnel, there is no opportunity for third-party infrastructure to be installed.

Mr. Warner testified that Alternative 3, the HDD alternative, is not feasible because of current HDD limitations, as discussed in the Alternatives Analysis. 12 Tr 1730. Regarding Alternative 4, he stated that the Staff considered two options for installing rock armoring for the dual pipelines. However, Mr. Warner contended that "neither rock armoring variation would be a prudent alternative to the Replacement Project" because: (1) rock armoring would not contain a release of Line 5 products from the dual pipelines into the Straits, (2) the rock armoring could damage the pipe exterior, (3) the installation of the rock armoring will disturb the lakebed and require special

permits, and (4) the rock armoring will prevent exterior visual inspection of the dual pipelines. 12 Tr 1731.

Mr. Warner noted that Alternatives 5 and 6 are feasible only if Enbridge ceases operation of the dual pipelines prior to the completion of the Replacement Project. He stated that, "[i]f the Dual Pipelines are allowed to continue operating, a denial of this application by the [Commission] would presumably have no effect on the existing operations of Line 5 and the original approval of Line 5 under Act 16. Therefore, consideration of alternatives to Line 5 or the products transported is neither relevant nor appropriate." 12 Tr 1727. However, Mr. Warner contended that the GHG emissions that relate to the Replacement Project are relevant to the proceeding whether or not the dual pipelines cease operations. He stated that, "[i]f a court determines the Revocation Notice to be valid and forces the Dual Pipelines to cease operation, the GHG emissions associated with Alternatives 5 and 6 may become relevant to the Commission's MEPA obligation as well." 12 Tr 1727.

Mr. Warner noted that in the April 21 order, the Commission stated that it "is interested in evidence that discusses the range of alternatives and environmental impacts that would be relevant in the event that that [sic] Dual Pipelines are shut down prior to completion of the proposed tunnel and Replacement Project." 12 Tr 1708 (citing April 21 order, p. 68). He testified that if the dual pipelines cease operation, an alternative mode of transportation would be needed for Line 5 products. Therefore, he stated that the Staff "reviewed and considered GHG emissions associated with" transporting "the full volume of Line 5, 540,000 [barrels]/day . . . ." 12 Tr 1732.

Mr. Warner also noted that the Staff considered alternative locations for the Replacement Project. However, he stated that "the alignment of the proposed tunnel was already determined through geotechnical analysis and design considerations between the MSCA and Enbridge. Also,

EGLE permits have already been granted based on existing plans for the tunnel alignment." 12 Tr 1732. Moreover, Mr. Warner contended that Enbridge already acquired the property rights to complete the tie-in segments and the installation of the Replacement Project. Therefore, he asserted that the Staff did not identify any feasible routing alternatives.

In conclusion, Mr. Warner stated that:

> the replacement of the Dual Pipelines with a new pipeline in a tunnel below the lakebed serves a public need, is in the public interest, and is the best option out of the alternatives described above. . . . There are no alternatives that would be feasible and prudent when compared to the proposed Replacement Project. While the likelihood of a release from the Dual Pipelines is low, the consequences of such a release could be catastrophic for the Great Lakes, the surrounding region, and Michigan's residents and economy. Replacement of the Dual Pipelines with a pipeline encased in a tunnel would substantially reduce the risk of oil reaching the Straits of Mackinac in the event of a rupture at the Straits crossing. Replacement would reduce the likelihood of damage to Line 5 which could cause a rupture; and mitigate, if not eliminate, the volume of oil that could reach the waters of the Great Lakes in the event a rupture does occur.

12 Tr 1736-1737.

David Chislea testified that he is the Manager of Gas Operations in the Commission's Energy Operations Division.[22] 12 Tr 1746. He sponsored Exhibits S-9 through S-11. Mr. Chislea stated that the purpose of his testimony "is to provide background and expertise relating to the [Commission]'s role in pipeline safety oversight." 12 Tr 1750.

In his testimony, Mr. Chislea explained that PHMSA has the authority to inspect hazardous liquid pipelines in Michigan and enforce pipeline safety regulations for hazardous liquids. He asserted that when a hazardous liquids pipeline is being constructed in Michigan, the Staff "consults with PHMSA to ensure that they reviewed the design, will be inspecting the

[22] On August 15, 2022, the Commission's Gas Operations section was reorganized and renamed the Gas Safety & Operations Division, and Mr. Chislea became the director of the division.

construction, and will inspect ongoing operation and maintenance of the pipeline." 12 Tr 1752. He stated that:

> On March 5, 2021, I sent a request letter to PHMSA outlining Staff's questions to PHMSA regarding the progress of their safety review of Enbridge's filing for the [Replacement] Project. These questions are the questions posed to PHMSA: 1) Based on your review of Enbridge's Act 16 application and supporting testimony and exhibits, will the proposed 30" replacement pipeline comply with design, construction and testing requirements of 49 CFR Part 195 [Part 195]? 2) In light of the proposed 30" pipeline's location in a tunnel across the Straits of Mackinac, do you see any obstacles to compliance with the operation, maintenance, integrity management, corrosion control and emergency response requirements of 49 CFR Parts 194 and 195?

12 Tr 1753; Exhibit S-9. Mr. Chislea noted that on March 26, 2021, PHMSA responded that its review is ongoing and that it did not have a final evaluation or compliance determination at that time. 12 Tr 1753; Exhibit S-10. He stated that on April 16, 2021, the Staff sent another letter to PHMSA inquiring about the date on which PHMSA expected to complete its final evaluation. 12 Tr 1753; Exhibit S-11.

Mr. Chislea noted that on August 26, and September 2, 7-9, 2021, the Staff met with PHMSA to discuss "the design, materials, construction, operations and maintenance, and emergency response of the replacement pipeline." 12 Tr 1754. He asserted that during these meetings, the Staff and PHMSA discussed Enbridge's ability to comply with the safety regulations in 49 CFR 194 and 195 and that "PHMSA did not express any design, construction, or operation issues that would preclude Enbridge from compliance with the pipeline safety regulations." 12 Tr 1754.

According to Mr. Chislea, the Staff plans to continue working with PHMSA on the Replacement Project. He stated that:

> Per 49 U.S.C. 60106 certified state programs are allowed to participate in the inspection of interstate operators. The Staff will continue to coordinate with PHMSA as they perform their safety reviews of the design and construction of the pipeline. PHMSA will be the agency performing inspections on the construction of the [Replacement] Project, though Staff anticipates ongoing communication and participation in these inspections and reviews.

12 Tr 1754.

Alex Morese testified that he is the State Administrative Manager of the Energy Security Section in the Commission's Energy Operations Division. 12 Tr 1762. He sponsored Exhibits S-12 through S-15. Mr. Morese stated that the purpose of his "testimony is to submit information on behalf of Staff relating to greenhouse gas (GHG) emissions associated with Enbridge's Line 5 Straits Replacement Project and alternatives under review." 12 Tr 1766. In addition, Mr. Morese noted that he is a member of the Technical Team and that "[s]ome of the specific topics relevant to [his] participation [in the Technical Team] included alternatives analysis of Line 5, propane and petroleum market analysis, risk analysis of the Straits water crossing, severe weather warnings, and identification of higher risk Line 5 water crossings in Michigan." 12 Tr 1765.

Mr. Morese testified that in the April 21 order, the Commission stated that the scope of this case should include an analysis of alternatives in the event that the Notice is enforced and Enbridge ceases operation of the dual pipelines. He explained that this case "could result in not only the replacement of a segment of pipeline into a tunnel but also a restart of a pipeline system idled by the loss of easement rights. The Commission stated that restarting the pipeline after a closure of the Straits segment should result in a broader Michigan Environmental Protection Act (MEPA) review that includes GHG emissions." 12 Tr 1767. Mr. Morese stated that Weston Solutions, Inc. (Weston) assisted the Staff in determining the environmental impacts of the Replacement Project and the tunnel, including an evaluation of GHG emissions. He testified that

in September 2021, Weston completed a report entitled "Green House Gas Emissions Evaluation," which is set forth in Exhibit S-24.

Mr. Morese explained that with the assistance of Weston, the Staff evaluated GHG emissions in two scenarios: (1) tunnel construction with subsequent pipeline operation within the tunnel and (2) rail and truck transportation of Line 5 products in the event the dual pipelines are no longer operational. However, he clarified that the Staff's analysis does not include "the ecological impacts of burning fossil fuels or the resulting impacts of global climate change . . . because the transportation alternatives in this case will likely result in no significant change to consumption of the primary end products (gasoline, diesel, jet fuel, propane, etc.) thus resulting in no material decrease in GHG emissions from the products being consumed." 12 Tr 1769-1770.

For the Staff's analysis of GHG emissions, Mr. Morese testified that the Staff focused on a 5- to 30-year timeframe because "[i]t is very difficult to speculate what the future holds in regard to technological developments/improvements, availability of energy infrastructure, or petroleum prices within regional markets or on an international scale." 12 Tr 1770. He noted that the Staff provided baseline assumptions to Weston so that it could evaluate the GHG emissions related to alternatives to shipping petroleum products on Line 5. More specifically, Mr. Morese stated that the baseline assumptions are:

> 1) A Line 5 shutdown would not alter the demand at market end points for the product transported on Line 5.
>
> a. Volumes shipped would remain consistent with historical averages and be required in those markets where refining and storage infrastructure resides.
>
> b. GHG emissions will only be calculated between primary beginning and end points of the supply chain.
>
> 2) Natural Gas Liquids (NGLs) would not flow on Enbridge Line 1 from western Canada to Superior, Wisconsin (Superior) following a Line 5 shutdown.

a. NGL or purity propane would be shipped via rail from western Canada to Sarnia, Ontario (Sarnia) and Rapid River, Michigan (Rapid River).

3) Crude oil would still flow on Enbridge Line 1 from western Canada to Superior.

a. Crude oil would be transported via rail from Superior to Marysville, Michigan (Marysville).

4) The primary mode of transportation for crude oil and NGL would be rail.

a. Trucking the volumes transported on Line 5 would not be feasible, except for the Michigan-produced crude oil volumes currently injected into Line 5 at Lewiston, Michigan (Lewiston).

b. Trucking may be used to supplement propane transportation.

12 Tr 1771.

Regarding Assumption 1, Mr. Morese contended that if Line 5 is shut down, he does not expect that fossil fuel extraction, the consumption of fossil fuels, or related GHG emissions will decrease. He stated that "[i]t is reasonable to assume that halting a primary petroleum transportation route/method to the region will not result in a demand reduction for products currently carried by Line 5. Existing and operational liquid pipelines serve solely as a transportation mode and not a determinate of demand." 12 Tr 1772. Mr. Morese asserted that the only method for reducing GHG emissions is to reduce demand for, or consumption of, petroleum products by end users.

Mr. Morese noted that for "the transportation and supply chain beginning and end points . . . for the GHG emissions evaluation," the Staff tried "to select the most feasible routes to transport these products based on current market locations, availability of supply, refining and distribution infrastructure, configuration of the Lakehead system, and previous studies by [Dynamic Risk] and Public Sector Consultants." 12 Tr 1772-1773 (footnotes omitted). In addition, he explained that the Staff selected these routes because the results of the comparison between the pipeline and other

transportation modes are more consistent. However, Mr. Morese stated that "the analysis has also determined a per barrel-mile emission value for each transportation mode (i.e., pipeline, truck, rail) which provides flexibility in analyzing potential routes." 12 Tr 1773.

Regarding Assumptions 2 and 3, Mr. Morese noted that according to Enbridge, if the Line 5 throughput is shut down, NGLs will no longer be transported on Line 1 because NGLs cannot be stored or transported "on any south routes of the Lakehead system." 12 Tr 1773 (footnote omitted). In addition, he stated that "[b]ased on public statements by Plains Midstream (Exhibit S-12), '. . . shutting down Line 5 would result in the inevitable shutdown of Plains facilities at Sarnia, Rapid River, and Superior,' [and] the economic viability of the Superior fractionator is in question should NGL shipments no longer pass through to Rapid River and Sarnia." 12 Tr 1773. Mr. Morese testified that Enbridge may be able to ship NGLs on other pipelines of the Mainline System (Lines 6, 14, and 61) downstream of the Superior Terminal; however, "it would reduce the available capacity to ship crude oil on those lines and would likely require pump station and other upgrades." 12 Tr 1775.

Regarding Assumption 4, Mr. Morese noted that:

> According to research by Dynamic Risk and Public Sector Consultants, the most likely alternate [sic] mode(s) of transportation [of Line 5 products] are by rail for the largest volumes and distances, and truck for shorter volumes and distances. Dynamic Risk considered rail "the most practical and cost-effective" of alternative transportation methods and deemed a truck-only alternative "nonviable."

12 Tr 1774 (quoting Exhibit ELP-24, pp. 349-350) (footnotes omitted). He explained that if the crude oil was to be transported by truck only, it would require 1,800 tanker trucks each day and transload facilities that are able to load 75 tanker trucks per hour, 24 hours per day.

Mr. Morese stated that the pipeline map depicted in Exhibit S-13 "demonstrates that without Line 5 takeaway capacity, there would not be enough available capacity to transport Line 5

volumes on the other pipelines of the Lakehead System and apportionment would be needed." 12 Tr 1776 (footnote omitted). Moreover, Mr. Morese contended that in the Risk Analysis, MTU noted that crude oil refineries are configured to receive a specific mix of light-, medium-, and heavy-weight oils. He asserted that if the mix of oils shipped to refining facilities is altered, production must be reduced until substantial re-engineering of the refining facilities occurs.

Furthermore, Mr. Morese contended that if Line 5 is shut down and alternative modes of transportation are utilized, the price of end products such as gasoline, diesel, jet fuel, and propane will increase. He stated that:

> According to Enbridge's FERC filed tariff for the Lakehead System, the cost to transport light crude oil and NGLs between Superior, WI and the international boundary near Marysville, MI (Line 5) is $1.63 and $1.46 per barrel, respectively. Conversely, the cost to ship an equivalent barrel of petroleum product by rail is estimated to range from $6.49 per barrel ($0.155/gallon) to $7.64 per barrel ($0.182/gallon), on average.

12 Tr 1777-1778 (footnotes omitted).

Mr. Morese also noted that the Alternatives Analysis and London Economics International's (LEI's) "Assessment of Alternative Methods of Supplying Propane to Michigan in the Absence of Line 5" quantified the cost increases for gasoline and propane. He testified that, in the Alternatives Analysis:

> Dynamic Risk estimated the gasoline price impact to Michigan consumers to be an increase of $0.038/gallon in the scenario where an alternative transport mode (rail) is used to transport the volume of crude oil shipped on Line 5. Further, [Dynamic Risk] estimate[d] the impact to propane consumers to be $0.026/gallon and between $0.10 – $0.35/gallon (dependent upon scenario) for lower and upper peninsula consumers, respectively. LEI did not publish estimates for cost impacts to gasoline but estimated that the propane price impact would be $0.11/gallon (of which $0.05/gallon would be borne by Michigan U.P. consumers) based on the lowest cost alternative. LEI further contends that the price impact to Lower Peninsula propane consumers may be negligible.

12 Tr 1778. Mr. Morese contended that these price increases are not likely to curtail current utilization of end-use products, explaining that "[c]onsumption of gasoline, diesel, jet fuel, and propane are relatively price inelastic. This means that it takes rather dramatic price movements for consumers to alter their purchasing habits." 12 Tr 1779. Therefore, Mr. Morese concluded that the GHG emissions associated with extraction and end use should remain static if the throughput on Line 5 is eliminated.

Next, Mr. Morese explained that the primary end products that are shipped on Line 5 are: (1) propane for "home heating and cooking" and for "transportation and crop drying;" (2) butane, which is primarily used as "a motor gasoline blending component, but also as a commercial and industrial fuel source;" and (3) crude oil that is primarily used "as the feedstock for refinery operations which produce a wide range of petroleum end products such as gasoline, diesel, jet fuel, and propane." 12 Tr 1780. He noted that according to U.S. Census Bureau data, "approximately 326,681 Michigan households use bottled, tanked, or LP [liquified propane] gas (propane) as their primary heating source." 12 Tr 1780 (footnote omitted). Mr. Morese stated that Line 5 provides 42.9% of the propane supply for Michigan's Lower Peninsula and 87.6% of the propane supply for Michigan's U.P. He asserted that if the propane from Enbridge's Superior fractionator is included in the calculation, the U.P. estimate increases to 93.8%.

Mr. Morese testified that in the short- or medium-term, it is not feasible for the majority of customers who purchase Line 5 propane to switch to natural gas for home heating and other fuel needs. He asserted that:

> Propane is commonly used in rural areas of the state where natural gas infrastructure is not present, nor economical, to build out given the population density. Where natural gas main line extensions are considered/implemented, costs are shared amongst residents along the specified route and commonly reach thousands of dollars per customer. Additionally, any upgrade required for propane appliances (i.e., furnace, stove/oven, dryer, water heater) would likely be cost

> prohibitive for most consumers. The EIA [United States Energy Information Administration], in their 2021 Annual Energy Outlook (AEO) Assumptions, list the installed cost for a natural gas furnace to range between $2,050 and $3,040. Costs associated with other appliances (~$3,110) are detailed in the table below. Whether a propane appliance requires replacement vs. installation of a fuel conversion kit is highly dependent on the age of the appliance.

12 Tr 1781-1782 (footnotes omitted). Additionally, Mr. Morese opined that if propane or natural gas customers were to switch to electric heat, "such as an air-source heat pump," there will likely be reductions in GHG emissions. 12 Tr 1782. However, he contended that switching to electricity for home heating and other energy needs is not an economical alternative for a majority of propane customers. Mr. Morese stated that "according to the American Council for an Energy-Efficient Economy (ACEEE) for northern midwestern climates such as Michigan, there is no payback over the lifecycle of the appliance" for switching to an electric air-source heat pump. 12 Tr 1782.

Mr. Morese testified that the consumption of liquified petroleum gases, jet fuel, and distillate fuel oil is projected to increase between 2020 and 2050. However, he noted that the consumption of motor gasoline is to remain static for the next 30 years, explaining that according to the U.S. Department of Energy and the "Electric Vehicle Cost-Benefit Analysis" conducted by M.J. Bradley & Associates LLC, electric vehicle adoption is expected to increase between 2020 and 2050. 12 Tr 1783-1788. Nevertheless, Mr. Morese stated that based on the AEO, "[i]t is evident that the EIA expect[s] conventional fueled vehicles to still have a considerable market share in the long-term." 12 Tr 1784.

If throughput on Line 5 is unavailable, Mr. Morese stated that alternative modes of transportation such as rail and truck will be necessary to transport petroleum. To determine the GHG emissions related to these alternative modes of transportation, he explained that:

> Using the baseline parameters established by the [Staff] (detailed in [12 Tr 1771-1772]), Weston sought to determine variables (i.e., shipping distance, approximate weight of products, size and number of vehicles required, equipment used, etc.)

> required for use in the GHG Emissions from Transport or Mobil Sources tool by the Greenhouse Gas Protocol [GHG Protocol] and the World Resources Institute. These inputs were then used to calculate approximate GHG emissions associated with transporting petroleum via rail and truck.

12 Tr 1789 (footnote omitted). He also stated that Weston calculated the GHG emissions associated with the construction of the tunnel for the Replacement Project by analyzing the equipment used for excavation, transportation, boring, and overall tunnel construction. Further, Mr. Morese asserted that using the data provided by Enbridge, Weston calculated the GHG emissions related to transporting petroleum on Line 5. He contended that "[t]his allows for a direct comparison of emissions associated with transportation of products between beginning and end points while providing flexibility to adjust those pathways while maintaining a basis for comparison." 12 Tr 1789.

Next, Mr. Morese stated that Weston used the GHG Protocol model "to estimate the emissions associated with transporting crude oil, NGL, and propane between critical refining and distribution hubs via different modes of transport. Staff calculated two additional routes to provide more flexibility to the NGL/propane analysis." 12 Tr 1790. He noted that to assist in the Staff's evaluation, Weston calculated the GHG emissions per-barrel-mile value for each proposed route or mode of transport. Mr. Morese asserted that pursuant to Weston's analysis, transporting petroleum products via rail, rather than by truck, produces significantly less GHG emissions. 12 Tr 1790.

In conclusion, Mr. Morese stated that Weston's analysis demonstrates that the GHG emissions associated with transporting petroleum products via rail or truck are substantially more than the GHG emissions related to shipping the same amount of petroleum products on Line 5. He contended that the Staff would "like to emphasize the following observations and conclusions:"

> 1) The appropriate framework for evaluating GHG emissions for the alternatives before the Commission should be bounded by transportation methodology only. If Line 5 throughput is unavailable, the extraction, refining, and consumption of

petroleum is unlikely to change significantly, therefore resulting in similar GHG emissions for these activities.

2) While the potential for Michigan residents and businesses to shift to natural gas or electricity for space heating and other appliances is technically possible, this transition will come at a significant financial cost without appropriate incentives and/or policy changes. Based on prior research by Public Sector Consultants, approximately 45% of Michigan's propane volume is derived from Line 5. Considering an approximate cost of $8,000 per household, it would cost over [$]1.1 billion dollars to shift 45% of Michigan's 327,000 propane households to an alternative. This transition would likely take a considerable amount of time to accomplish due to supply chain considerations, technical workforce availability, and financial requirements, making this infeasible over the short term.

3) The ongoing transition to light duty [electric vehicles] will likely reduce Michigan's demand for motor fuels (gasoline and diesel) in decades to come but is currently not a viable alternative to the products shipped on Line 5. Infrastructure improvements such as increased charging stations, home electrical system upgrades (meter, charger, panel), and grid improvements are needed to realize this potential. Current and projected sales of traditional internal combustion engines along with the resiliency of these vehicles within the automotive fleet reinforce the continued need for access to fossil fuels in the short to medium term.

4) Utilizing truck and rail as alternative modes of transport if throughput on Line 5 ceases will lead to an increase in GHG emissions. Based on the table above [set forth in testimony], GHG emissions associated with moving an equivalent volume of petroleum through a combination of rail and truck will result in approximately 160 percent more GHG emissions than the shipment of these products via pipeline.

5) Staff concludes that when considering the alternatives, pipeline transportation of the petroleum products in consideration will result in the least GHG emissions and is therefore the most feasible and prudent alternative as required for consideration under MEPA.

12 Tr 1791-1792.

Daniel N. Adams stated that he is a Tunnel Engineer and Chief Executive Officer of McMillen Jacobs Associates. 12 Tr 1811. He sponsored Exhibits S-16 and S-17. Mr. Adams testified on behalf of the Staff, stating that the purpose of his "testimony is to address concerns on risks of leakage from the tunnel in the event that the pipe within the tunnel leaks." 12 Tr 1814. He

explained that Exhibit S-16 is a "whitepaper" that was prepared under his direction and review that:

> documents our assessment of several items that limit the potential for escape of petroleum fluids from the tunnel in the event of a pipe rupture within the tunnel. These items, in order of their effectiveness preventing materials from escaping the tunnel, are external hydrostatic pressures, gasketed segmental lining, annular grout, rock cover, and soil cover. The external hydrostatic pressure and gasketed segmental lining provide the most effective means of secondary containment, and result in a very low probability of fluids escaping from the tunnel.

12 Tr 1814.

Mr. Adams testified that Exhibit S-17 is a geotechnical data report provided by Enbridge that explains the drilling investigation, describes the expected geologic conditions, and includes a graphic model that details the bedrock formations along the proposed tunnel route. He stated that "[t]his document was used to determine ground conditions at tunnel level and above the tunnel, for purposes of determining secondary containment provided by the ground." 12 Tr 1815. In addition, Mr. Adams asserted that he reviewed Enbridge's "Report to the State of Michigan Alternatives for Replacing Enbridge's Dual Line 5 Pipelines Crossing the Straits of Mackinac" (Exhibit A-9), which describes the feasibility of constructing the tunnel and the proposed construction methods. He testified that "[t]his report discussed the use of precast concrete tunnel linings (PCTL) with gaskets as both a short and long term lining system. This system has a proven record for providing a stable and mostly watertight tunnel system." 12 Tr 1816.

Mr. Adams noted that, according to Enbridge, the cavity for the tunnel will be excavated using a slurry TBM. He stated that the TBM "will be launched from the south side of the straits from a portal excavation, and will excavate north across the Straits. The TBM will install a gasketed segmental [PCTL] within the TBM, and push off of the assembled lining to advance the TBM and tunnel excavation." 12 Tr 1817. Mr. Adams explained that the small ring-shaped void between

the PCTL and bedrock will be filled with backfill cement grout as the TBM advances, which will lock the PCTL in place. 12 Tr 1817. He contended that:

> The TBM will excavate with full face pressure, matching the external hydrostatic pressures and anticipated ground loads, throughout the drive. For planned or unplanned maintenance stops, either work will be performed under hyperbaric pressures within the front of the machine to balance external pressures; or a "safe haven" will be created to limit risks of instability and/or excessive inflows in non-pressurized conditions. The TBM will be retrieved from a shaft on the north side of the Straits.

12 Tr 1817. Mr. Adams stated that after reviewing Enbridge's proposed construction method for the Replacement Project, he finds that there is a low risk that Line 5 products will escape the secondary containment tunnel in the event of a rupture of the replacement pipe segment.

Mr. Adams noted that he did not attend the Commission's July 27, 2021 technical consultation between the Staff and Michigan's federally recognized Tribes, but stated that he was briefed on the proceedings by his project manager. He stated that "[i]ssues that were raised during the meeting were directly answered" and that none of the issues required additional reviews. 12 Tr 1818.

In conclusion, Mr. Adams contended that there are no feasible and prudent alternatives to Enbridge's proposed Replacement Project relating to secondary containment. He testified that "[t]he construction techniques proposed represent the state of the art in the industry for secondary containment, and have been developed to deal with anticipated ground conditions, with mitigation measures for unanticipated conditions." 12 Tr 1818.

Chris Douglas stated that he is a Project Manager/Environmental Consultant at Weston. 12 Tr 1822. He sponsored Exhibit S-18. Mr. Douglas testified that he is:

> providing expert witness testimony on behalf of Staff based on reviews or document preparation completed by [him] or under [his] supervision. The subject matter of these reviews includes environmental reviews of specific project related documents for compliance with MEPA, high level review of EGLE permits, Tribal Treaty Rights and Resources, and preparation of a Greenhouse Gas (GHG) Emissions Evaluation. As project manager for Weston's work with Staff, [he is]

> also providing an overview of topics covered by other Weston experts and their testimony.

12 Tr 1828. He explained that Exhibit S-18 is a summary of Weston's review of EGLE's permits, which includes the NREPA Parts 303 and 325 permits and the NPDES Part 31 permit for the Replacement Project. Mr. Douglas asserted that although he reviewed Enbridge's application, Mr. Turner's testimony, and the EIR set forth in Exhibit A-12, his testimony focuses primarily on the NREPA and NPDES permits.

Mr. Douglas testified that "Weston provided a high-level review of the permits. Two Weston staff subject matter experts (one in wetlands and one in NPDES/surface water discharge) conducted the reviews under [his] supervision." 12 Tr 1832. In addition, Mr. Douglas noted that he personally reviewed the permits to ensure that Weston had a comprehensive understanding of the Replacement Project. He stated that Weston presumes that the permits were appropriately reviewed and approved by EGLE and that the permits comply with state and federal regulations. Mr. Douglas asserted that "[t]he purpose of Weston's high-level review of the permits was to identify any environmental issues that may not have been addressed in the permitting process without duplicating efforts by other agencies (i.e., EGLE Water Division, etc.)." 12 Tr 1832-1833.

According to Mr. Douglas, Weston found that the EGLE permits addressed impacts to wetlands, surface water, endangered species, submerged lands, and local culture and archeology. In addition, he contended that the EGLE permits specify discharge requirements, biological assessments, and wetland mitigation. However, Mr. Douglas stated that Weston identified several potential environmental impairments that may result from the Replacement Project: (1) "increased noise, light, and particulates, surface water impacts, groundwater impacts, impacts to flora and fauna;" (2) "noise impacts to aquatic life, light impacts due to construction, potential release of hazardous materials, disturbances to shipping and vehicular traffic;" and (3) possible impairments

to cultural and archeological resources. 12 Tr 1833-1834. Nonetheless, he asserted that Weston did not identify any issues or environmental concerns relating to the permits so long as Enbridge complies with the monitoring, reporting, and screening requirements set forth in the permits; follows all special instructions; and executes all required mitigation measures. Mr. Douglas noted that Weston's conclusions regarding the permits are set forth in Exhibit S-18.

In conclusion, Mr. Douglas asserted that there are no feasible and prudent alternatives to the location, the land requirements, or the construction techniques for the Replacement Project.

Kathleen Mooney stated that she is an Environmental Consultant at Weston. 12 Tr 1839. She sponsored Exhibits S-19 through S-21. Testifying on behalf of the Staff, Ms. Mooney explained that:

> Weston was tasked with review of Enbridge's EIR which is a 102-page document that describes the potential environmental impacts and the measures that Enbridge proposes to use to mitigate those impacts during construction of the replacement pipeline. Construction of the tunnel and decommissioning of the dual pipelines were outside of the scope of the EIR. As previously noted, Weston's original SOW [scope of work] only included the replacement pipeline installation and not the tunnel construction. However, review of potential impacts of the tunnel construction was later added to Weston's SOW. Weston reviewed the EIR to determine if any potential environmental impacts were not addressed in the document.

12 Tr 1845-1846.

Ms. Mooney testified that she reviewed the location and land requirements for the Replacement Project and the pipeline tie-in segments. She stated that "[t]he proposed Tunnel Alternative would require 10-15 acres of workspace on the north shore, and 2-8 acres on the south shore. Disturbed onshore areas would be reclaimed after construction with [a] permanent operational footprint remaining of up to one acre at entry and exit locations where aboveground portal structures would be built." 12 Tr 1847-1848. Ms. Mooney explained that to construct the 21-foot diameter tunnel, Enbridge would bore up to 371 feet below the lakebed of the Straits and

line the tunnel with concrete. She noted that there will be tunnel access portals on the north and south shores of the Straits.

However, Ms. Mooney contended that her review revealed several environmental issues and missing details in the EIR. She stated that "[a]fter completion of the review, [she] assisted Chris Douglas of Weston in preparing discovery questions, which were submitted by [the Commission] Staff to Enbridge (Responses attached as Exhibits S-19 and S-21). These questions requested additional information from Enbridge about control of potential environmental impairments." 12 Tr 1846. She asserted that Weston reviewed Enbridge's discovery responses and determined that some questions were inadequately answered and recommended that the Staff follow-up with additional discovery requests. Ms. Mooney contended that after a review of the discovery responses to the follow-up request, Weston found that Enbridge failed to fully answer the questions and, therefore, Weston was unable to "completely evaluate the potential environmental impairments associated with the project. Weston has identified the following potential environmental impairments as a result of the project if adequate preventative measures are not planned, executed, monitored, and documented prior to, and during, the project:"

1. Increased noise generated from construction operations that may impact nearby residences and fauna.

2. Increased dust/particulates generated during construction that may impact nearby residences and fauna and possibly impact surface water.

3. Increased light generated from construction operations that may impact nearby residences and fauna.

4. Increased light from construction and operation of the project that could have potential impacts to the Headlands International Dark Sky Park located south and west of the southern workspace.

5. Surface water impairments:

    a. Impacts such as dewatering operations during construction of the tunnel.

b. Impacts associated with construction equipment traffic.
c. Impacts associated with using lake water for hydrostatic testing of the pipe.

6. Environmental impairments to local residences and fauna associated with construction.

7. Air quality impacts associated with use of additional internal combustion engines during construction and operation.

8. Groundwater impacts:

   a. Impacts to groundwater during construction due to spills of hazardous materials from construction equipment.
   b. Impacts to drinking water wells due to construction.
   c. Impacts to shallow groundwater aquifers and groundwater quality during trenching, excavation, and backfilling maintenance activities.
   d. Impacts to surface drainage and groundwater recharge patterns altered by clearing, grading, trenching, and soil stockpiling activities, potentially causing minor fluctuations in groundwater levels and/or increased turbidity, particularly in shallow surficial aquifers.
   e. Reduced infiltration and increased surface runoff and ponding due to soil compaction caused by heavy construction vehicles.

9. Environmental impacts to surface soils, vegetation, and surface water due to storage and handling of fuels/hazardous liquids during construction and operation.

10. Impacts to local flora and fauna due to the introduction of aquatic invasive animals and plants during construction.

12 Tr 1848-1849. She recommended that "Enbridge develop, document, and implement specific plans and procedures to mitigate impairments and prevent significant environmental impacts for the potential impacts noted above. Weston recommends that the plans and procedures for the project should be specific and address each of the potential impacts." 12 Tr 1851-1852. However, Ms. Mooney concluded that she did not identify any feasible and prudent alternatives to the location, land requirements, and construction techniques for the Replacement Project.

Philip Martin Ponebshek stated that he is a Project Manager at Weston. 12 Tr 1855. He sponsored Exhibits S-22 through S-24. Mr. Ponebshek testified on behalf of the Staff, stating that

the purpose of his testimony is to review "Exhibit A-9, 'Alternatives for Replacing Enbridge's Dual Line 5 Pipelines Crossing the Straits of Mackinac, dated June 15, 2018'" and related discovery responses from Enbridge. 12 Tr 1862. He explained that his review of Exhibit A-9 was to determine whether the Alternatives Analysis presented accurate and appropriate information about the feasible alternatives to the dual pipelines and whether the Replacement Project is the best choice among the alternatives.

Mr. Ponebshek stated that there are three construction methodologies for replacing the dual pipelines presented in the Alternatives Analysis: (1) the Replacement Project, (2) the open cut with secondary containment alternative, and (3) HDD. 12 Tr 1864. He noted that for the Replacement Project:

> the TBM would drill through the solid rock and unconsolidated materials beneath the Straits using a pressurized slurry to maintain the integrity of the tunnel at the TBM cutterhead as well as facilitate excavation. A slurry and rock mixture produced by the excavation would be routed via dedicated pipe back through the tunnel to the on-shore facilities, where the slurry would be treated to remove spoils prior to reuse. As construction proceeds, precast concrete tunnel lining would be brought into the tunnel behind the TBM and installed and sealed with rubber gaskets to maintain tunnel integrity. Immediately ahead of the TBM, test probes would be used to assess the nature and integrity of the geologic formations, and as needed grouting would be injected into less consolidated materials to present a more consistent matrix for the cutterhead to encounter, reducing the probability for formation collapse and tunnel flooding. As the tunnel lining is completed, pipeline segments will be tied-in via welding at the south end of the tunnel, and advanced through the tunnel on permanent rollers.

12 Tr 1865.

For the open cut with secondary containment alternative, Mr. Ponebshek stated that there are two options. He explained that the first option is to cut a trench from the shoreline through the lakebed to a point where the water depth is 30 feet. Mr. Ponebshek asserted that at the 30-foot water depth, the pipeline will be laid on the surface of the lakebed and covered with an engineered gravel and cobble layer that is six- to eight-feet deep. 12 Tr 1866. He contended that "the cover

would minimize risk of impact from anchor drops and other factors. To further minimize the risk of loss of product to the environment, this alternative would rely on a pipe in pipe design, whereby a 30 inch diameter product pipe would be strung within a 36 inch secondary containment pipe." 12 Tr 1865. Mr. Ponebshek explained that the second option is to cut a trench through the lakebed for the entire pipeline. He stated that, "[w]hile feasible, Option 2 was discarded from detailed analysis for a number of reasons including complexity of trenching at a 250 foot depth below water level, environmental impacts related to turbidity and dredge material handling, impacts to ship traffic in the Straits, and high likelihood of hard soils on the lakebed." 12 Tr 1865-1866.

Mr. Ponebshek testified that the third alternative, directional drilling of the entire pipeline length under the lakebed of the Straits, is not feasible. He noted that "[t]he depth of the Straits would not allow for staging to conduct the drilling in segments, while the overall length of the crossing exceeds current directional drilling technology capabilities." 12 Tr 1866.

Mr. Ponebshek asserted that in reviewing the Replacement Project and the open cut with secondary containment alternative, he determined that the potential impacts to the environment for both alternatives were similar. He explained that there will be "significant underwater noise levels" as a result of trenching, dredging, filling, leveling, and laying pipeline, which will "directly disturb fish and benthic organisms, and would impact diel vertical migrations of organisms such as zooplankton." 12 Tr 1867. He recommended the use of silt curtains to mitigate the effects of turbidity in the water, and that Enbridge should avoid trenching and dredging during Lake Trout and Lake Whitefish spawning seasons. In addition, Mr. Ponebshek noted that the construction process may disrupt navigation in the Straits during construction and, in the long term, pipeline inspection may interfere with shipping lanes. He stated that the Replacement Project and the open cut with secondary containment alternative may disturb shoreline and shallow water habitat and

may "release into the water . . . hazardous materials/hazardous waste currently present in lakebed soils during construction." 12 Tr 1867. Furthermore, he testified that the Replacement Project or open cut with secondary containment alternative may disrupt local traffic because of the onshore land requirements for "stringing of pipeline segments," and cause visual environmental impairment "from lighted platforms and vessels used for offshore construction." 12 Tr 1867-1868.

Mr. Ponebshek asserted that, as set forth in Exhibit A-9, there are several measures to mitigate the environmental impairments associated with the open cut with secondary containment alternative. However, he stated that:

> many of the potential impacts and mitigation measures were not completely reviewed in this document because they would require additional studies which have not yet been performed (e.g. – an assessment of potential noise impacts on aquatic organisms would require detailed background noise modeling, as well as a comprehensive cataloguing of the species which may be affected by construction noise as well as the levels of underwater noise which may disturb their functions). If the Open Cut with Secondary Containment Alternative were to become the preferred Alternative, it is anticipated that additional studies would identify and quantify more potential impacts which would require a refinement of currently proposed mitigation measures as well as likely additional measures.

12 Tr 1868.

In addition, Mr. Ponebshek asserted that he has not identified any feasible and prudent alternatives for the location, land requirements, and construction techniques for the Replacement Project and the open cut with secondary containment alternative. He stated that "[t]his determination is made in the absence of a number of additional studies not conducted which would still be necessary to fully catalogue the environmental impacts of the Open Cut with Secondary Containment alternative. It is very likely that those additional studies would further expand the difference in expected environmental impacts between the two feasible alternatives." 12 Tr 1870-1871. Therefore, Mr. Ponebshek contended that the Replacement Project is "the more prudent of the two feasible alternatives." 12 Tr 1871.

Next, Mr. Ponebshek testified that Weston reviewed the GHG emissions associated with the Replacement Project and Line 5. Mr. Ponebshek stated that he analyzed "the following scenarios associated with alternative modes of transportation:"

1. Existing Enbridge Line 5 Pipeline.
2. Construction of Tunnel and Enbridge Line 5 Replacement Pipeline.
3. Operation of Enbridge Line 5 Replacement Pipeline within Tunnel.
4. Shut down of Enbridge Line 5 Pipeline and alternate [sic] modes of transporting liquid products comparing:
   a. Rail.
   b. On-Road Tanker Trucks – Lewiston, Michigan to Marysville, Michigan component, only.

12 Tr 1871. He noted that for the Replacement Project, Weston calculated the emissions from the use of diesel- and gasoline-powered construction equipment to clear the land and construct the tunnel, the emissions from the continued operation of the dual pipelines during construction, and the emissions from the use of Line 5 after construction of the Replacement Project.

Mr. Ponebshek testified that "[t]he greenhouse gas impacts from various transportation alternatives were estimated by evaluating the shortest distance road or rail routes available, and in combination with the weight of the product to be transported via each alternative entered into the Greenhouse Gas Protocol 'GHG Emissions from Transport or Mobil Sources' Calculation Tool (GHG Calculation Tool)." 12 Tr 1872. He explained that the GHG Calculation Tool is a standard model used widely by industry experts to calculate GHG emissions from various industrial and transportation activities. Mr. Ponebshek noted that Weston authored a report that explains the assumptions, methodology, data, and calculations used to analyze the GHG emissions, which is set forth in Exhibit S-24. 12 Tr 1872. He stated that according to the report in Exhibit S-24, the existing Line 5 pipeline emits approximately 209,854 metric tonnes of carbon dioxide (CO_2) equivalent (tCO_2e) per year. *See*, Exhibit S-24, p. 3. Mr. Ponebshek asserted that the report also states that during construction of the Replacement Project, approximately 6,036 tCO_2e per year

will be emitted as a result of construction activities each year. *Id*. He noted that after the Replacement Project is complete, the report asserts that the GHG emissions will be the same as the existing Line 5 GHG emissions: 209,854 tCO_2e per year. However, he averred that if Line 5 is shut down and rail transportation of the products is required, the report states that GHGs will be emitted as follows: (1) crude oil, 501,255 tCO_2e per year; (2) NGLs on Line 1, 193,060 tCO_2e per year; (3) NGLs from the pipeline origin to Sarnia, Ontario, 36,246 tCO_2e per year; (4) NGLs from Conway, North Dakota to Sarnia, Ontario, 80,734 tCO_2e per year; and (5) purity propane, 4,446 tCO_2e per year. Mr. Ponebshek stated that if Line 5 is shut down and tanker truck transportation of crude oil from Lewiston, Michigan to Marysville, Michigan is required, the report asserts that 44,283 tCO_2e will be emitted each year.

In conclusion, Mr. Ponebshek testified that a more detailed risk management plan should be provided to the State of Michigan prior to construction of the Replacement Project. He explained that:

> [t]his plan would include a description of the planned geotechnical test bores and frequency of probe-hole testing ahead of the TBM and should include reporting of both test-bore data and probe-hole data in real time so that the State can assess risks and construction plan modifications based on the data. The plan should also include inspections for concrete cast sections prior to moving them into the tunnel and after being put into place, placement of gaskets, regular analyses of bentonite mix properties, changes in slurry pressure. Deviations from and modifications to the plan during the construction process should be reported and available for public review.

12 Tr 1872-1873.

Wilson Yee stated that he is an environmental scientist and Project Manager for Weston. 12 Tr 1649. He sponsored Exhibit S-25. Mr. Yee testified on behalf of the Staff, stating that he:

> was asked to participate in a tribal consultation meeting on behalf of [the Commission] Staff and review seven documents either in full or selected pages identified by [the Commission] Staff that were relevant to the scope of Weston's review, which included cultural, spiritual, and economic resources, as well as treaty

> rights. The purpose of [his] involvement in the tribal consultation and [his] document review is to identify tribal treaty rights concerns and assist the [Commission] with ensuring consistency with Michigan's tribal consultation directive.

12 Tr 1653.

Mr. Yee explained that Exhibit S-25 is a summary of comments and recommendations that were collected by the Staff during the tribal consultation, "including potentially new information regarding cultural resources, treaty rights and traditional cultural interests, and environmental concerns." 12 Tr 1653. Mr. Yee asserted that the Commission should consider these recommendations "to ensure consistency with ongoing tribal treaty rights, environmental impact, and/or cultural resource impact analyses being conducted by USACE and other federal, tribal, and state parties." 12 Tr 1653. He stated that his review focuses on whether the comments relating to tribal interests have been addressed or will be addressed by other state and federal agencies. Further, Mr. Yee testified that his review analyzed whether there was additional information needed for the Commission to make its final determinations.

Mr. Yee noted that he reviewed the NPDES permit; the January 29, 2021 Draft Permit for Countersignature; and the "federal requirements for compliance with [Part 404 of the Clean Water Act (CWA), 33 USC 1344, and Part 402 of the CWA, 33 USC 1342], Section 106 of the National Historic Preservation Act [54 USC 306101], Section 7 of Endangered Species Act [16 USC 1536], and treaty rights in general." 12 Tr 1654. According to Mr. Yee, he was unable to fully evaluate the impact of the Replacement Project to wetlands because Enbridge provided an incomplete wetland survey. Furthermore, he asserted that the Replacement Project may impact rare or unique coastal habitats, shoreline alvar, Great Lakes cobble beach, lake bottomlands, and cultural and historical resources. In conclusion, Mr. Yee testified that Exhibit S-25 "contains a list of all

recommendations for addressing comments as part of the [Commission]'s tribal consultation process." 12 Tr 1655.

3. Little Traverse Bay Bands of Odawa Indians

Kevin Donner testified that he is the Great Lakes Fisheries Program Manager for LTBB. 9 Tr 1172. He sponsored Exhibits LTBB-KD-1 through LTBB-KD-3. Mr. Donner stated that he works with the Chippewa Ottawa Resource Authority (CORA) Biological Service Division, which includes members of LTBB, Little River Band of Ottawa Indians, GTBOC, Bay Mills, and the Sault Ste. Marie Tribe of Chippewa Indians.

In his testimony, Mr. Donner described the types of fish that tribally licensed commercial fishers harvest in the Straits and the types of fish that tribally licensed subsistence fishers harvest in the Straits, as well as the plant and animal species that these fish rely on for food. 9 Tr 1173-1174. He asserted that the commercial and subsistence records set forth in Exhibit LTBB-KD-2 were compiled by biologists from all of the CORA member tribes. According to Mr. Donner, Exhibit LTBB-KB-2 reflects the monetary value of the fishery by grid and Exhibit LTBB-KD-3 depicts the fish spawning grounds in the Straits. 9 Tr 1174.

Mr. Donner opined that "[d]estruction or impairment of spawning grounds will negatively impact recruitment/reproduction rates," which will lead to reductions in species population in the long term. 9 Tr 1177. Referring to the Line 5 Project, Mr. Donner testified that:

> The proposed activities include discharge of wastewater directly into Lake Michigan both during construction and during regular operations thereafter. The chemical composition of this wastewater has not been disclosed, so [it] could contain chemical compounds that have direct and indirect effects on fish health, the edibility of fish, and the ability of tribal fishers to market Great Lakes fish and therefore effectively conduct the Treaty fishery. . . . The proposed activities also indicate that operational byproducts may be part of the wastewater though the specific nature of those byproducts has not been disclosed. Without information on the byproduct we are unable to fully account for potential contaminant related effects of the project. However we can conclude that these activities elevate the

> risk of introducing non-natural and man-made contaminants to the water which, in turn, may be directly accumulated by fish and indirectly accumulated through bioaccumulation in the food web.

9 Tr 1177-1178. In conclusion, Mr. Donner requested a "comprehensive accurate accounting of the chemical composition and volumes" of wastewater discharge associated with the replacement of the dual pipelines to fully understand and account for the potential environmental impacts. 9 Tr 1178.

Melissa Wiatrolik stated that she is the Tribal Historic Preservation Officer/Tribal Officer for Native American Graves Protection and Repatriation Act, and Tribal representative to the Michigan Anishinaabek Cultural Preservation and Repatriation Alliance (also known as the THPO/NAGPRA/MACPRA officer) for LTBB. 9 Tr 1181. She testified that the Straits are integral to Odawa history and culture and "[contain] some of the important places where Manidok (spiritual beings) reside who have helped us as a people, but also personally and individually." 9 Tr 1183. Ms. Wiatrolik asserted that the proposed construction activities will "disrupt the ancient relationship that the Odawa have with a Manido known as Mishibizhii," who is known to the Odawa as a malevolent or guardian spirit in the Great Lakes region and who is "principal Manido over all the other underwater and underground animals, fish, Manidok and other creatures." 9 Tr 1185. In addition, Ms. Wiatrolik stated that the fish, plants, and animals that inhabit the Straits have an important relationship with the tribes as food, medicine, and economic commodities.

Ms. Wiatrolik next testified that she has examined the map for the tunnel and Replacement Project and she asserted that the project would disturb Odawa cultural sites. She noted that the tunnel begins on the north side of the Straits near the site of a former Odawa settlement where there are known burials. Ms. Wiatrolik also stated that "many people of the sturgeon clan were

buried in Lake Michigan" and opined that there could be potential disturbances to historic period burials, which could result in the souls of the dead negatively affecting their living relatives. 9 Tr 1185. She explained that:

> Mishibizhii is accustomed to receiving tobacco from the Anishinaabek accompanied with a request usually for safe passage through the waters of the Great Lakes and many other personal needs. The construction activity could confuse him, especially the use of explosives and any machinery activity that makes loud noises or vibrations that resemble the sounds of the Thunder Manidok. Mishibizhii has a long history of a turbulent relationship with the Thunder Manidok and he may not approach the area of those sounds so that the tobacco with its request would not be received by Mishibizhii who would become angered and use his power to cause bad things to happen to the people.

9 Tr 1186.

Eric Hemenway testified that he is the Director of LTBB Repatriation, Archives, and Records. 9 Tr 1188. He stated that the LTBB have historic villages located in St. Ignace, Ainse, Mackinac Island, Mackinaw City, Bois Blanc Island, and Round Island. He provided testimony regarding his knowledge of Odawa burial rituals and locations and the importance of the protection of burial sites in the Straits. Mr. Hemenway noted that he has examined a map of the proposed tunnel and Replacement Project and asserted that the proposed construction activity will disturb Odawa burials, which would be a violation of traditions and religious beliefs. He opined that such violations "create low self esteem, anger and withdrawal within Tribal community members." 9 Tr 1193.

4. Mackinac Straits Corridor Authority

Dr. Mooney testified that he is a Consulting Engineer for MSCA. 9 Tr 1201. He sponsored Exhibits MM1 through MM7. Dr. Mooney stated that he originally served as a tunnel engineering expert for the Michigan Agency for Energy (MAE) during the development of the Tunnel Agreement and later began acting as a consultant to MSCA. He explained that MSCA "is

responsible for overseeing construction and operation of [the] tunnel in bedrock beneath the waters of the Straits of Mackinac. MSCA will own the tunnel after its construction and provide independent oversight throughout its life." 9 Tr 1201. He further stated that MSCA exercises its duties through the MSCA Board, which consists of three members appointed by the governor with the advice and consent of the Senate.

Dr. Mooney opined that the placement of Line 5 inside the tunnel will reduce the risk of petroleum products leaking into the Great Lakes to "practically zero." 9 Tr 1204. He contended that this is a notable reduction in environmental risk compared to the current dual pipelines. Dr. Mooney explained that the tunnel will be designed and constructed according to the criteria established in the Tunnel Agreement and the standards set forth in the design-services request for proposals. He asserted that the tunnel is to have a service life of 99 years and will "be constructed of a suitable structural lining providing secondary containment to prevent any leakage of liquids from the Line 5 Replacement Segment into the lakebed or Straits." 9 Tr 1205. Dr. Mooney noted that once the tunnel is completed, third-party utilities may apply for "access to construct, operate, and maintain utilities inside of the tunnel" under conditions set forth in the Tunnel Agreement. 9 Tr 1214.

Dr. Mooney indicated that he was a member of the joint specifications team (JST), which included Michigan Department of Transportation engineers and consultants and Enbridge's consultants. He testified that the JST developed the Project Specifications that include nine construction specifications for the permanent tunnel structure: "(1) Structural concrete materials; (2) cast-in-place concrete; (3) precast structural concrete; (4) precast concrete tunnel lining; (5) sealing leaks; (6) excavation by tunnel boring machine; (7) backfill grout; (8) bored piles; and (9) diaphragm walls." 9 Tr 1207; *see*, Exhibit MM7. Dr. Mooney explained that pursuant to the

Project Specifications, the tunnel will be constructed using a slurry pressure balance TBM. He stated that the cuttings will be hauled away and the slurry will be recycled and reused. He added that the:

> [PCTL] is installed inside and at the back or tail of the shield. The tunnel process will involve the following repeating sequence: (a) excavate ahead 5.5 ft [feet] using slurry pressure balance with the SPBM [slurry pressure balance machine] pushing off the leading edge of the most recently installed PCTL ring; (b) while excavation is paused and while slurry pressure balance is used, assemble a PCTL ring, approx. 5.5 ft in width, using six PCTL segments. For a tunnel length of approximately 20,000 ft (4 miles), some 3500+ cycles of excavate-ring build will be performed to construct the tunnel.

9 Tr 1210.

Dr. Mooney testified that the designer of the tunnel is Arup, a global engineering firm with extensive experience designing tunnels. He stated that Arup "engaged a number of their top tunnel design engineers, geologists, and hydrogeologists and structural engineers from Asia, Europe, and the Americas to design the project. They also engaged a number of third-party experts to participate." 9 Tr 1211. In Dr. Mooney's opinion, the quality of their work is excellent. Additionally, he explained that he had extensive access to observe and monitor the design process, which he describes as rigorously conducted. Dr. Mooney contended that "some of the particularly challenging aspects" of the design process include the high groundwater pressure, face stability with reduced pressure, and ground characterization. 9 Tr 1212.

Dr. Mooney opined that the tunnel will meet or exceed industry standards. He stated that MSCA will engage a consulting firm to perform independent quality assurance (IQA) throughout construction, which will be paid for by Enbridge per the Tunnel Agreement. Dr. Mooney explained that the IQA contractor is independent of Enbridge's own quality assurance practices and that the IQA contractor "will monitor the construction quality, ensuring that the [tunnel] is constructed in accordance with the jointly developed project specifications and in accordance with

state of industry practice." 9 Tr 1213. He stated that MSCA's acceptance of ownership of the tunnel following construction will be dependent on the IQA contractor's documentation.

Dr. Mooney also testified that Enbridge will develop a Tunnel Operations and Maintenance (O&M) Plan that must be approved by MSCA. He stated that the risks "to the tunnel during the 99-year design service life" include degradation of the concrete and water infiltration through joints or cracks over time. 9 Tr 1216. However, Dr. Mooney contended that the tunnel has been designed with these risks in mind.

In conclusion, Dr. Mooney opined that the tunnel is designed and routed in a reasonable manner. Regarding pollution or impairment of the water in the Straits, he stated that there is no direct construction in the lake and that the high levels of groundwater pressure will be counterbalanced and stabilized, preventing appreciable groundwater inflow into the tunnel and ground destabilization. Dr. Mooney asserted that Enbridge has met every requirement set forth in the Tunnel Agreement, that the tunnel will be safe and constructed to industry standards, and that the new pipeline will be able to be safely laid within the tunnel. 9 Tr 1215-1216.

Mr. Cooper stated that the purpose of his "testimony is to provide pipeline engineering expertise on behalf of [MSCA] regarding Enbridge's application pursuant to Public Act 16 of 1929 to replace and relocate the segment of Line 5 crossing the Straits of Mackinac into a tunnel beneath the Straits." 9 Tr 1235. He noted that he worked part-time for MAE in 2017-2019 and participated in Enbridge's evaluation of replacement alternatives and risks. Mr. Cooper stated that he agrees with the outcome of Enbridge's alternatives study, which demonstrates that the tunnel is the best option. He opined that the Replacement Project is important to the state of Michigan because: (1) it will allow Line 5 to continue operating and fulfilling the public need identified in the 1953 order; (2) it will eliminate the risk associated with a large vessel anchor strike; and (3) it

will provide a safe and accessible transportation corridor for other energy and communications utilities, linking the Upper and Lower Peninsulas. 9 Tr 1237.

Mr. Cooper described two other alternatives not considered in the 2017 Alternatives Analysis or the 2018 alternatives study, namely, suspending a replacement pipeline from the Mackinac Bridge or constructing a new suspension bridge. He explained that these options are not, however, practical or economical. 9 Tr 1238-1239. In addition, Mr. Cooper considered retention of the dual pipelines to be impractical due to the already-demonstrated risk of anchor strikes. Moreover, he stated that, "[t]o abandon the existing 20-inch lines without replacing them would not meet the public need for operation of Line 5 as established by [the 1953 order] . . . ." 9 Tr 1240.

Mr. Cooper contended that Enbridge's application and evidence demonstrate that the Replacement Project will meet PHMSA requirements, federal regulations, and industry standards. He stated that the Tunnel Design and Construction Report (Exhibit A-13) indicates Enbridge's commitment to comply with these requirements, and he noted that the pipeline and tunnel interior will be available for inspection after construction is complete. In addition, Mr. Cooper opined that the plans for the tunnel are technically sound and in compliance with 49 CFR 195.110(a), which requires that the tunnel have the ability "to expand and contract with temperature and pressure changes." 9 Tr 1242. However, he stated that he is curious whether Enbridge has considered the weight of ILI tools traveling through the pipeline.

Mr. Cooper stated that, "[b]ased on [his] knowledge and experience, this work can be completed safely and successfully by properly trained and experienced personnel using appropriate care and diligence." 9 Tr 1244. He further opined that the Replacement Project will provide better access for direct inspection and maintenance of the pipeline. In addition, Mr. Cooper contended that divers, ROVs, and equipment for direct inspection and repair activities

will no longer be needed. Moreover, he asserted that "[t]here will be no further need for screw anchor supports to limit unsupported span lengths, and no risk of damage to the pipeline by marine vessel anchors or cables." 9 Tr 1245.

Mr. Cooper noted that Enbridge plans to add a second layer of leak detection to the existing computational pipeline monitoring system. He explained that:

> [t]he computational system compares actual operating data with computed values of pipeline pressure, temperature, flow rate, and product characteristics, and alerts operators of discrepancies that could indicate a pipeline leak. The added layer will consist of hydrocarbon vapor and liquid detectors directly monitoring the tunnel space and alerting operators of a leak. This direct monitoring of the tunnel will allow detection of a small leak that may fall below the detection limit of the computational pipeline monitoring system.

9 Tr 1246. As to how Enbridge's plans for the Replacement Project could be strengthened, Mr. Cooper suggested possible heat treatment of tunnel pipeline riser girth welds. He also expressed concern that the presence of other utilities could impact the pipeline's integrity or produce safety hazards, such as electric transmission cable that may "accelerate corrosion of the pipeline" or "create electric shock hazards for personnel working on the line." 9 Tr 1247. He contended that Enbridge could remedy these concerns by thoroughly examining these risks in the planning stages, implementing proper safety measures, and continuing to monitor the effectiveness of these safety measures.

In conclusion, Mr. Cooper predicted that the replacement pipeline and tunnel will perform safely over the life of the project and beyond. He encouraged Enbridge and the State of Michigan to consider the possible value of the dual pipelines for other service such as a conduit for power or communications lines.

5. Nottawaseppi Huron Band of the Potawatomi

John Rodwan, Environmental Director of NHBP, testified that he is responsible for "administering Tribal and Federal environmental natural resource programs and grants," and he "direct[s] community-based programs related to [the] environment . . . ." 10 Tr 1272. Mr. Rodwan stated that he serves on the steering committee for the Michigan Wild Rice Initiative and that he has worked to reestablish wild rice as a Tribal and ecologic resource. He explained that wild rice is central to many Native cultures, including the NHBP community, as a source of nutrition, culture, and spirituality. In addition, Mr. Rodwan asserted that wild rice is an important component of aquatic ecosystems because "it contributes to primary production, nutrient cycling, and habitat structure. Its shoots, foliage and grain are important food resources for a range of wildlife, notably waterfowl." 9 Tr 1277. Mr. Rodwan contended that more frequent and intense climate related stressors, including heightened storms and droughts, resulted in a failure of over 90% of the wild rice crop in Michigan in 2021. 9 Tr 1279.

Mr. Rodwan expressed concern that the Replacement Project will further impact climate change. He stated that:

> [v]iewing the proposed tunnel in a holistic manner from a Tribal perspective we see both direct and indirect impending impacts. Direct impacts are related to construction, operation and maintenance. Enormous amounts of resources, including fresh water and energy, will be used as part of the drilling operation. These operations will contribute greenhouse gases to the atmosphere. Also, untreated drilling fluids will pose an imminent threat of release to the Straits, thereby posing a direct threat to the aquatic community including high value natural resources such as fisheries and Wild Rice. As a unique Traditional Cultural Property the Straits are formerly and currently of extreme significance to Tribal communities within the Great Lakes Watershed.

10 Tr 1287.

6. Bay Mills Indian Community

Ms. Gravelle testified that she is the elected President of the Bay Mills Indian Community, which is a federally recognized Tribe and sovereign nation located in the eastern part of the U.P. 10 Tr 1415. She stated that she is also a former Chief Judge of the Bay Mills Tribal Court. In addition, Ms. Gravelle asserted that, as a woman of Anishinaabe culture, she is a waterkeeper who is "responsible for maintaining and protecting water for [her] people, praying to the water, and caring for the water during ceremonies." 10 Tr 1415. She sponsored Exhibits BMC-1 through BMC-7.[23] 10 Tr 1417.

Ms. Gravelle stated that the tunnel project runs through lands and waters that are central to Bay Mills' existence and that both the dual pipelines and the Replacement Project "have the potential to significantly affect, and indeed pose serious threats to, the exercise of our reserved treaty rights, our ability to preserve cultural resources, our cultural and religious interests in the Great Lakes, our economy, and the health and welfare of our tribal citizens." 10 Tr 1419. She explained that "the Straits of Mackinac and the Great Lakes are central to Bay Mills' cultural, traditional, and spiritual identity" because they are part of the Tribe's creation story, cultural teachings, and oral history. 10 Tr 1421. In addition, Ms. Gravelle stated that the Straits make up part of Bay Mills' fishery and that over half of Bay Mills' citizen households rely on fishing for some or all of their income.

Ms. Gravelle described the 1836 Treaty of Washington (1836 Treaty) and the ceded territories, noting that Bay Mills is the successor to a signatory of that treaty, the Ojibwe people. She noted that Bay Mills has had to protect its treaty rights through litigation, which has resulted in significant precedent upholding the Tribe's treaty rights, particularly as they relate to fishing.

[23] Exhibits BMC-1 through BMC-5 were struck following the January 13 ruling, pp. 7-8.

Ms. Gravelle stated that she "share[s] the legal history of the Treaty fishing controversies not only to emphasize the existence of Tribal rights regarding the fishery, but also to serve as evidence that the right to fish, and the need for a natural environment in which fish can thrive, is of the utmost importance to the Tribe and its members . . . ." 10 Tr 1425.

Ms. Gravelle expressed concern that climate change is negatively impacting land, resources, and members of indigenous communities in the U.S. She averred that "[c]limate change is already greatly harming the Great Lakes, and the fisheries, habitats, and ecosystems and[,] accordingly, having a negative impact on tribal sovereignty, economies, and cultures . . . ." 10 Tr 1428. Ms. Gravelle asserted that, specifically, Tribal cultural resources such as lake whitefish, walleye, wild rice, loons, and maple syrup produced by the sugar maple are threatened by climate change.

Ms. Gravelle indicated that Bay Mills is pursuing nomination of the Straits as a Traditional Cultural Property for inclusion on the National Register of Historic Places (NRHP) because the Straits contain bottomland and terrestrial archaeological sites that are significant to the Tribe, such as submerged paleo-landscapes, cemeteries, and burials sites. She stated that "damage, destruction, or contamination of one part of the landscape damages the entire landscape." 10 Tr 1427.

In sum, Ms. Gravelle contended that she is "deeply concerned about the proposed route for the Line 5 Tunnel Project," and "[d]ue to Bay Mills Indian Community's significant and critical connection to the Straits of Mackinac, the Great Lakes, and the inland lands and waters that are part of the ceded territory, we have been deeply involved in the various permit processes for the Line 5 Tunnel Project." 10 Tr 1419, 1427.

Mr. LeBlanc testified that he is a citizen of the Bay Mills Indian Community and serves on the Bay Mills Conservation Committee. Mr. LeBlanc stated that he is a fisher in the waters of the

ceded territory and that he has been a commercial fisherman since he was 12 years old, primarily fishing for whitefish. He asserted that:

> [f]ishing is an engrained tradition within the Bay Mills Indian Community and is considered a traditional and cultural practice by many throughout [his] Tribe. [His] fishing outfit does more than just support [his] family. Through [his] own commercial operation, [he has] employed several dozen tribal citizens throughout the years who also exercise their treaty right as a means to support their family financially. In addition to supporting [his] family and [his] community, a large part of why [he] fish[es] is because of the efforts of [his] grandfather and father, and the way that we were brought up.

10 Tr 1517. Mr. LeBlanc testified that his ancestors have fished for hundreds of years, and his grandfather was instrumental in litigation that preserved this traditional lifeway.

Dr. Karen M. Alofs, Assistant Professor in the School for Environment and Sustainability at the University of Michigan, testified as an expert witness on behalf of Bay Mills. She stated that her "research focuses on the impacts of environmental change on freshwater biodiversity, primarily in fish communities." 10 Tr 1447. She sponsored Exhibits BMC-8 and BMC-9.

Dr. Alofs testified that walleye fish are "a coolwater adapted species" that "live in freshwater streams and lakes primarily across central North America." 10 Tr 1449. She stated that walleye are "culturally and economically important" because they "support important recreational, commercial, and subsistence fisheries" in the Great Lakes region. 10 Tr 1449. She noted that recreational fishing is estimated to contribute about $2.3 billion in economic activity in Michigan.

Dr. Alofs asserted that "[s]cientists have expected that, in North America, climate change might favor warm water adapted species (including bass species) and hinder cool- and cold-water adapted species (including walleye and trout, salmon and whitefish) . . . ." 10 Tr 1451. She explained that successful walleye reproduction is strongly connected to cooler water temperatures and, as the climate and water warm, populations will become less sustainable. Dr Alofs contended

that declines in walleye will have negative impacts on lake ecosystems and on recreational, commercial, and subsistence fisheries.

Dr. Alofs noted that walleye are found in all five Great Lakes and avers that, "[w]hile walleye in inland lakes appear to be more threatened by climate change than in the Great Lakes themselves, [she is] concerned that the indirect impacts of climate change on walleye in the Great Lakes are not well understood or difficult to measure or predict." 10 Tr 1459. She asserted that to manage a sustainable fishery, reliable and accurate predictions of fish populations are necessary so that catch limits and spatial distribution of fishing may be set. Accordingly, Dr. Alofs recommended that "the management of Great Lakes resources . . . move from reactive actions (e.g. following population crashes or ecological impairments) to proactive actions with a focus on protection." 10 Tr 1459.

Dr. Inés Ibáñez, Professor in the School for Environment and Sustainability at the University of Michigan, testified as an expert witness on behalf of Bay Mills. She explained that she is a forest ecologist with a focus on the forest ecosystems of the Great Lakes region, which includes the study of the effects of climate change on the sugar maple that grows abundantly in the U.P. 10 Tr 1466-1467. Dr. Ibáñez sponsored Exhibits BMC-10 and BMC-11.

Dr. Ibáñez opined that climate change will negatively impact the sugar maple, which requires cold winters and springs for proper dormancy and germination. She stated that "[l]ack of snow cover protection over the winter, a consequence of warmer temperatures, negatively affects the roots. Roots freeze without the protecting snow layer. Increasing growing season temperatures are associated with an increased risk of desiccation in seedlings and of growth reduction in adults due to lack of sufficient moisture." 10 Tr 1472. Dr. Ibáñez asserted that she believes that sugar

maple habitat will decline by the end of the century as a result of climate change, including in the U.P.

Dr. Daniel Larkin testified that he is an Associate Professor and extension specialist in the Department of Fisheries, Wildlife and Conservation Biology at the University of Minnesota-Twin Cities and is testifying as an expert witness on behalf of Bay Mills. Dr. Larkin stated that he is a plant ecologist with a focus on wetlands, lakes, woodlands, and prairies of the Upper Midwest and aquatic plant species. 10 Tr 1480. He added that he studies the impact of climate change on freshwater ecosystems and on wild rice in particular. He sponsored Exhibits BMC-12 and BMC-13.

Dr. Larkin stated that wild rice is most abundant in Minnesota, Wisconsin, and Michigan, in descending order, and is an irreplaceable cultural and commercial resource for Native peoples as well as a critical component of aquatic ecosystems. He described the typical habitat, lifecycle, and reproduction of wild rice in the upper Great Lakes region and explained how wild rice is harvested. However, Dr. Larkin stated that:

> there are several stressors or disturbances to wild rice that can kill or displace the species. These include disturbances associated with climate change and corresponding temperature and precipitation changes, as well as lakeshore development (shoreline hardening, damage from motorboats, physical or chemical aquatic plant control), elevated sulfides from iron ore mining which are deadly to wild rice, hydrologic disturbances that change water levels (e.g., dams, flooding, watershed development), and attack by other organisms . . . .

10 Tr 1484. He noted that there has been a "sustained downward [trend] in the geographic distribution and local abundance of wild rice" that has "been observed over decades" and that Michigan has suffered the greatest loss. 10 Tr 1487-1488.

In Dr. Larkin's opinion, climate change is impacting wild rice, both directly through temperature changes and indirectly through growing threats from pathogens and pests. He averred that:

> [i]t is highly likely that climate change has already negatively impacted wild rice. How much climate change has affected wild rice to date has not been quantified. While wild rice has clearly declined, it is difficult to separate the impacts of climate change from other stressors that wild rice has been subjected to (e.g., wetland loss, watershed development, agricultural intensification).

10 Tr 1493. He asserted that "[i]f the severe effects of future climate change that have been predicted are not prevented," climate change will have catastrophic effects on wild rice populations in the coming years. 10 Tr 1494.

Dr. Alec R. Lindsay, a Professor of Biology at Northern Michigan University, offered expert testimony on behalf of Bay Mills. He stated that the primary focus of his research is the genetics and behavior of Holarctic birds, which includes the common loon. 10 Tr 1499. He sponsored Exhibits BMC-14 and BMC-15.

Dr. Lindsay stated that common loons are found in the Great Lakes region and breed in Michigan. He described the migration process and typical habitat of common loons. Dr. Lindsay stated that climate change has already affected common loons, noting that:

> [o]ne study of a population of breeding loons . . . found that in the last 38 years loon productivity declined in Ontario, and attributed that decline to "climate change-induced stress, acting through multiple interacting pathways." As to changes in loon migration, data collected over the last 30 years at Whitefish Point Bird Observatory ("WPBO") on Lake Superior demonstrate that:
> • loons are migrating north earlier in the spring (Figure 1)
> • numbers of migrating loons are declining in the spring (Figure 2)
> • loons are migrating south later in the fall (Figure 3).

10 Tr 1504. Dr. Lindsay continued, stating that:

> [He is] concerned about the impact of climate change on loons. [His] primary concerns are the loss of breeding habitats in Michigan associated with the overall loss of breeding range of loons, and the direct loss of individuals due to more

frequent and intense botulism type E outbreaks than have been experienced in the past.

10 Tr 1507. Dr. Lindsay explained that the botulism toxin grows more easily under the conditions in lakes created by climate change. He opined that climate change will reduce the number of, and possibly eliminate, common loons in Michigan.

Frank Ettawageshik, Executive Director of the United Tribes of Michigan, testified on behalf of both LTBB and Bay Mills. He stated that he is a citizen of LTBB, is a former Tribal Chairman, and sits on the LTBB appellate court. Mr. Ettawageshik was appointed to the Michigan Climate Action Council in 2008 by Governor Jennifer M. Granholm. *See*, Exhibit BMC-16, p. 6. He sponsored Exhibits BMC-16 through BMC-30.[24]

Mr. Ettawageshik stated that the purpose of his testimony is to express "why Tribes are deeply concerned about climate and why it is important to take immediate steps to address climate change for the wellbeing of the State's ecosystem, and all the species that depend on it." 10 Tr 1571. He explained that the Tribal way of life is closely tied to the Earth and climate change directly impacts the food the Tribe eats and the way in which the Tribe works. 10 Tr 1579-1581.

Dr. Cleland testified that he is a Distinguished Professor Emeritus at Michigan State University and an independent consultant. He stated that he is testifying as an expert witness on behalf of Bay Mills and that his "expertise is in the field of ethnohistory . . . ." 10 Tr 1527. He sponsored Exhibits BMC-31 through BMC-36.[25]

Dr. Cleland described the impact of the 1836 Treaty in which several native Tribes ceded 13 million acres of land, including what is now Michigan, along with the waters of Lakes Huron,

[24] Exhibits BMC-17 through BMC-30 were struck following the January 13 ruling, p. 8.
[25] Exhibit BMC-35 was struck following the January 13 ruling, p. 4.

Michigan, and Superior to the U.S., while retaining the right to hunt, fish, and gather over the land and waters that had been ceded (later enforced through litigation). He indicated that for the Ojibwe (Chippewa) and Odawa (Ottawa) people, the Straits represent the center of the creation of the Earth and are of deep religious and cultural significance. 10 Tr 1542.

Next, Dr. Cleland described the importance of historic preservation. He asserted that the historical record of preliterate, prehistoric societies is contained only in the archeological context, and thus damage to prehistoric sites (often the result of earth moving construction) constitutes the destruction of the only existing evidence of this type of cultural history. Dr. Cleland stated that the Straits have been occupied in the past by several native societies, including the Ojibwa and the Odawa. He averred that there are numerous archeological sites and that "they collectively contain a record of thousands of years of tribal history." 10 Tr 1535. Dr. Cleland described several prehistoric terrestrial sites that are in or near the Straits that he considers to be endangered.[26] 10 Tr 1545-1548. He also noted an endangered underwater archeological prehistoric site. 10 Tr 1549; *see*, Exhibit BMC-36.

In addition, Dr. Cleland stated that 84 shipwrecks have occurred in the Straits, of which 41 have been discovered. He opined that there has been "no adequate professional study of the effects of tunnel construction or petroleum fouling on the shipwreck sites" and recommends that a study be conducted. 10 Tr 1551-1552. Furthermore, Dr. Cleland explained that the Straits are within a bottomland preserve and contain endangered historic archeological sites that are important to the tourism industry, including Fort Michilimackinac, the Mill Creek Site, the Marquette Mission Site, and an indigenous cemetery. He opined that the most at-risk sites are

[26] To protect the identity of their location, unexcavated sites are named only in the confidential version of Dr. Cleland's testimony.

those terrestrial sites that are on the sandy shores of Lakes Michigan and Huron and their associated islands.

Dr. Cleland averred that:

> [a]rchaeological sites are by their nature vulnerable resources since they are usually buried and therefore not visible on the surface of the ground. Given their condition, many sites have been and are being unintentionally destroyed by the modern construction of roads, homes, and businesses. This renders those sites which remain intact all the more valuable as non-renewable cultural resources.

10 Tr 1560. He stated that there are no remediation measures that address the loss of archeological sites of cultural and historical value. Therefore, Dr. Cleland asserted that "it is necessary to know the location and characteristics of the site, the extent and nature of the potential damage, and finally the practicality of the corrective measures themselves." 10 Tr 1562.

7. Environmental Law & Policy Center and Michigan Climate Action Network

Mr. Erickson stated that he is a Senior Scientist and the Climate Policy Program Director at Stockholm Environment Institute-U.S. He testified as an expert witness on behalf of ELPC/MiCAN, and he noted that his expertise is on "greenhouse gas (GHG) emissions accounting and the role of policy mechanisms in reducing GHG emissions." 9 Tr 1038. Mr. Erickson stated that the purpose of his testimony is to estimate, quantify, and explain the level of GHG emissions associated with the Replacement Project, including emissions associated with construction and operation of the tunnel and the new pipeline as well as GHG emissions associated with the use of the oil and NGLs that will be transported through the replacement pipe segment. He sponsored Exhibits ELP-1 through ELP-7.

Mr. Erickson provided an overview of climate change and explained why there is a need for rapid and steep cuts in GHG emissions. He stated that in the "Midwest of the United States, climate change will lead to increased temperatures and precipitation that will reduce agricultural

productivity, erode soils, and lead to pest outbreaks, while also leading to poor air quality, substantial loss of life, and worsening economic conditions for people." 9 Tr 1045 (footnote omitted). He added that the Intergovernmental Panel on Climate Change (IPCC) has produced a report identifying the emission levels necessary to comply with the Paris Agreement of 2015 and the timeframe in which these levels must be achieved. Mr. Erickson noted that according to the report, net global CO_2 emissions must reach zero by about 2050 in order to meet the temperature limit, which means that the use of coal, gas, and oil must decline dramatically.

To estimate the GHG emissions associated with the Replacement Project, Mr. Erickson stated that he used standard GHG emissions accounting practices, consistent with the Greenhouse Gas Protocol initiative, and he reported his results in the standard units of millions of metric tons of CO_2e. 9 Tr 1042, n. 10. He averred that this method is routinely used in GHG emissions assessments. Mr. Erickson summarized his findings as follows:

- First, [he] estimate[s] that the Proposed Project is associated with about 87 million metric tons carbon-dioxide equivalent (CO_2e) annually.
- Second, [he] conclude[s] that, when compared to a scenario in which the existing Line 5 pipeline no longer operates, construction and operation of the Proposed Project would lead to an increase of about 27 million metric tons CO_2e annually in global greenhouse gas emissions from the production and combustion of oil.

9 Tr 1043.

Mr. Erickson explained that the Replacement Project will result in GHG emissions in two ways: (1) GHGs will be released by the equipment that is used to construct and operate the tunnel and pipeline, and (2) GHGs will be released when the petroleum products that are transported through the replacement pipe segment are produced and combusted. He estimated that the GHG emissions associated with construction of the tunnel and replacement pipe segment are 87,000 metric tons of CO_2e in total and that the GHG emissions associated with its operation are

520 metric tons annually. 9 Tr 1051, 1056. Mr. Erickson stated that he made these calculations using standard GHG emissions accounting practices, information provided by Enbridge, and other published information regarding energy usage for proposed activities, such as the production and use of concrete and steel.

In addition, Mr. Erickson estimated that the GHG emissions associated with the end use of the oil and NGL products transported through the replacement pipe segment will be 87,000,000 metric tons CO_2e annually. 9 Tr 1057. He stated:

> The Proposed Project is expected to handle 540,000 barrels per day (b/d) of liquid, comprising about 450,000 b/d of crude oil, and 90,000 b/d of natural gas liquids, chiefly propane and butane, again all for many years into the future. GHG emissions are released at each stage of producing, processing, and combusting petroleum, and so [he] estimate[s] the total emissions by splitting the "life cycle" of a barrel of crude oil or NGL into stages, which are typically referred to in this type of analysis as the "upstream" and "downstream" stages.

9 Tr 1057 (footnotes omitted). He explained that upstream refers to extraction and processing and downstream refers to end use, and he described the research that he relied upon in making his estimates. Mr. Erickson asserted that his estimate includes the assumption that 8% of the petroleum products handled by the replacement pipe segment will ultimately not be combusted. He noted that he amortized the emissions over the planned 99-year life of the replacement pipe segment. 9 Tr 1060.

Next, Mr. Erickson explained that a no-action scenario is one in which the dual pipelines are shut down and the Replacement Project does not go forward. He opined that it is important to consider the no-action scenario because it would achieve Enbridge's stated purpose of removing the environmental threat to the Straits. *See*, 9 Tr 1061. Mr. Erickson stated that he also estimated the incremental GHG emissions associated with the Replacement Project in comparison to the no-action scenario. According to Mr. Erickson, the incremental emissions are about 27,000,000

metric tons CO_2e annually, and he explained that this is "lower than my estimate of all emissions associated with the Project of 87,000,000 metric tons CO_2e annually because, in my estimation, some of those emissions would occur even if the Proposed Project does not proceed." 9 Tr 1063.

Mr. Erickson stated that "[t]o quantify the incremental GHG emissions of an energy project or action, one must first describe how that project or action will change the energy market." 9 Tr 1063. He asserted that pipelines increase the supply of oil by transporting oil to market when other options do not exist or are more expensive. Mr. Erickson contended that "[e]stimating the effect of the Proposed Project on oil supply requires clearly articulating what would happen in a 'no-action' scenario, so that the effect of the Proposed Project can be compared to that, and the incremental effect of the Proposed Project can be quantified." 9 Tr 1064. According to Mr. Erickson, because the State of Michigan is revoking and terminating the 1953 easement, the no-action scenario would be one in which the Line 5 pipeline is no longer operating and the Replacement Project is not constructed.

Regarding the no-action scenario, Mr. Erickson stated that:

> [i]n such a case, where the Line 5 pipeline through the Straits of Mackinac is not replaced, more of the oil from Montana, North Dakota, and Western Canada would likely be transported by rail, which is generally more expensive than pipelines for transporting petroleum. The key difference of the scenario with the Proposed Project and the scenario without the Project is therefore the cost of transporting oil out of these regions of North America. [He] will refer to these regions as the greater Williston Basin, which includes both the Bakken and Duvernay formations.

9 Tr 1065. Relying on studies, he calculated that the added cost associated with increased movement of light crude oil by rail rather than pipeline is $6 per barrel, which he described as a midrange estimate. He noted that GHG emissions will be slightly higher as well and he added this difference to his accounting.

Mr. Erickson noted that the Canadian Energy Regulator (CER) has forecasted a $53 per barrel crude oil price by 2030 (though the EIA forecasts $73 per barrel). In light of this trend and the $6 per barrel add-on, he stated that about 290,000 bpd are at risk of being stranded. Additionally, Mr. Erickson asserted that if there is not sufficient rail capacity to move oil, as much as 450,000 bpd could be undeveloped. 9 Tr 1071. However, Mr. Erickson stated that his estimates could turn out to be lower. Mr. Erickson noted that his estimates do not reflect the additional costs accruing to Michigan oil producers, specifically, if they no longer had access to Line 5.

In sum, he stated that the no-action scenario "would lead to less, and more costly, oil supplied from the greater Williston Basin over the long term" and that "building the Proposed Project would lead to a net, incremental increase in annual global oil consumption of about 150,000 bpd, equivalent to 27,000,000 metric tons CO_2e per year from burning and producing that oil." 9 Tr 1072, 1074. Again, Mr. Erickson explained that elasticities of supply and demand dictate that his GHG emissions estimates may turn out to be higher or lower but that they represent a reasonable approximation of the incremental effect of the Replacement Project.

Dr. Howard, Economics Director of the Institute for Policy Integrity, New York University School of Law, testified as an expert witness on behalf of ELPC/MiCAN. He sponsored Exhibits ELP-8 through ELP-10.

To begin, Dr. Howard noted that one of the alternatives to the Replacement Project is the no-action alternative, which involves shutting down the dual pipelines and not replacing them or building the tunnel. He stated that if the no-action alternative is selected, it would decrease the supply of oil and NGLs and, consequently, the price for oil and NGLs will increase. Dr. Howard opined that in response to the increasing price, demand for oil and NGLs will decrease. He stated that:

> [d]ecreased demand for oil and natural gas liquids will decrease the combustion of oil and natural gas liquids, which will decrease emissions of greenhouse gases and other harmful pollutants. The reductions in lifecycle emissions from the oil and gas products that the Proposed Project would otherwise transport, as well as avoided emissions from the construction and operation of any action alternative, can be monetized as the incremental benefits of selecting the no-action alternative (or, equivalently, as the incremental costs of selecting the Proposed Project).

9 Tr 1109-1110.

Dr. Howard stated that he relies on Mr. Erickson's calculations of the total GHG emissions from construction and operation of the Replacement Project, as well as the lifecycle emissions from the transported oil and gas that will run through the pipeline in the tunnel "to monetize the Proposed Project's climate costs." 9 Tr 1110. He averred that monetization can help decisionmakers to understand the true nature of the pollution and impairment that are associated with the Replacement Project. In addition, Dr. Howard stated that "[m]onetization can help decisionmakers and the public weigh climate costs against other costs and benefits of various alternatives, and so determine the relative prudence of the no action alternative as compared to the Proposed Project." 9 Tr 1113.

Dr. Howard asserted that the federal Interagency Working Group (IWG) routinely uses the Social Cost of Greenhouse Gases (SCGG) method to monetize climate damages from GHGs, and he recommended that Michigan do likewise. He explained that "[e]conomists monetize climate damages by linking together global climate models with global economic models, producing what are called integrated assessment models," and that the SCGG model "is widely considered to be the best available calculation of the social cost of climate change." 9 Tr 1116-1117 (footnote omitted). He added that using the SCGG, IWG calculates climate damage from GHGs using estimates based a "defensible set of input assumptions that are grounded in the existing scientific and economic literature." 9 Tr 1117 (footnote omitted). Dr. Howard noted that IWG updated its

estimates in the SCGG in February 2021 to reflect the latest scientific and economic data, and he expected they will be updated again in January 2022. However, he asserted that for current GHG estimates, the IWG provides a "'central estimate' of social costs per metric ton of emissions per year based on a 3% discount rate and [by] taking the average from a probability distribution . . . ." 9 Tr 1118. Dr. Howard stated that he is concerned that the current discount rate of 3% set forth in the SCGG is too high compared to "recently updated market data on U.S. Treasury rates, consumer saving rates, and economic forecasts—as well as updated economic literature on uncertainty, correlations between climate damages and economic growth, preferences for inter-generational equity, expert elicitations, and other technical concepts . . . ." 9 Tr 1119-1120 (footnote omitted).

Dr. Howard asserted that discount rates are important because they are "used to take all the marginal climate damages that an additional ton of emissions emitted in the near future will inflict over the next 300 years, and translate those future damages back into present-day values." 9 Tr 1119. He supplied data for both a 2.5% and 2% discount rate, in addition to the current 3% discount rate, as well as showing IWG's High Impact Estimate (95th percentile at a 3% discount rate). 9 Tr 1121. By the year 2070, his calculations show a social cost of $108 per metric ton of CO_2 at 3%, $144 per metric ton at 2.5%, and $328 per metric ton under the High Impact scenario. 9 Tr 1122. Dr. Howard urged the State of Michigan to consider this information and to weigh the no-action alternative against the impacts of the Replacement Project. He noted that climate change does not respect political borders and requested that the State of Michigan consider the externalities of GHG emissions that fall outside its borders.

Turning to the climate damages estimate for the Replacement Project, Dr. Howard stated that he relied on Mr. Erickson's estimates of the metric tons of CO_2e emissions that are associated with

construction and operation of the Replacement Project, as well as the lifecycle emissions of transported oil and NGLs relative to emissions in the no-action scenario. Dr. Howard explained that based on Enbridge's estimates, he assumes construction would begin in 2027 and end in 2028. He noted that Mr. Erickson's calculation of 87,000 metric tons of CO_2e emissions from construction was split between 2027 and 2028. Dr. Howard asserted that:

> [w]e then multiplied these annual construction emissions by the corresponding year's estimates of the social cost of carbon dioxide, considering the four sets of values defined above (3%, 2.5%, 2%, and high-impact). We then discounted these future damage estimates back to their present-day value in the current year of 2021 using the discount rate that corresponds to the underlying rate used to calculate the relevant social cost of carbon values (i.e., a 2.5% discount rate is used when applying the social cost of carbon values calculated at a 2.5% rate).

9 Tr 1128-1129.

For his calculation, Dr. Howard assumed annual emissions of 520 metric tons of CO_2e, with operations of the Replacement Project beginning in 2029 and continuing through the 99-year service life to 2127. However, he noted that the IWG/U.S. Environmental Protection Agency (EPA) social cost of CO_2 estimates do not extend beyond 2070; therefore, he used "linear extrapolation" to project the IWG/EPA's estimates beyond 2070. 9 Tr 1129; Exhibits ELP-9 and ELP-10. Dr. Howard opined that "[f]rom 2027 to 2070, the climate costs of the Proposed Project's emissions from the construction and operation of the pipeline equals $5.0 million dollars when applying the social cost of carbon values calculated at the 3% discount rate. 84% of these effects stem from the pipeline's construction." 9 Tr 1130.

Turning to the products to be delivered through the replacement pipe segment, Dr. Howard again relied on Mr. Erickson's estimates and assumed a net increase of 27 million metric tons of CO_2e annually from the products transported by the new pipeline as compared to emissions under the no-action alternative. 9 Tr 1131. He estimated the social cost of CO_2 in 2020 dollars to be

$41 billion using the 3% discount rate for 2027-2070, $65 billion using a 2.5% discount rate, and $124 billion using the High Impact estimate. According to Dr. Howard, his climate cost projection is likely a conservative estimate for three reasons: (1) certain highly significant forms of climate damage have not yet been quantified, (2) he applied a conservative discount rate of 3% that is likely outdated, and (3) the $41 billion reflects the net present value of the Replacement Project's climate impact only though 2070 and not beyond because the federal government's estimates of the social cost of carbon currently end in 2070. 9 Tr 1133.

Dr. Jonathon T. Overpeck stated that he is an interdisciplinary climate scientist and the Samuel A. Graham Dean of the School for Environment and Sustainability at the University of Michigan. 9 Tr 1137. He testified as an expert witness on behalf of ELPC/MiCAN and sponsored Exhibits ELP-11 through ELP-16. Dr. Overpeck stated that he has 40 years of experience studying climate change, that he served as the "Working Group 1 Coordinating Lead Author for the Nobel Prize-winning IPCC 4th Assessment (2007)," and that he served on Michigan's Council on Climate Solutions. 9 Tr 1139.

Dr. Overpeck stated that climate change is tied to human activity, and that 97%-100% of scientists believe that the burning of fossil fuels is warming the planet. He warned that not only are changes to the climate currently occurring but they are accelerating. In addition, Dr. Overpeck asserted that climate change is affecting Michigan and the Great Lakes region, which is demonstrated by the significant temperature and precipitation related changes, increased flooding, and recent record high water levels in the Great Lakes. Furthermore, he explained that:

> [t]he 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.

9 Tr 1149. Dr. Overpeck described possible climate futures and tipping points, including algal blooms in the Great Lakes resulting from more intense rainfall, and he expressed concern regarding the future quality of drinking water. He also described the various tipping points for the Earth's oceans.

Dr. Overpeck opined that continued reliance on fossil fuels will make these impacts more significant. He stated that "fossil-fuel-rich greenhouse gas emissions have the potential to warm Michigan and the Great Lakes region by an additional 5° [Celsius] or more by the end of the century," which will result in warmer surface air, warmer winters, more extreme-heat days, more annual precipitation, and worse droughts and storms. 9 Tr 1159. Dr. Overpeck concluded that there will be profound disruption of natural resources in the region, including greater tree mortality and increased lethal anoxic conditions in the lakes. Additionally, he stated that "[t]ourism, recreation, water supplies, healthy natural resources and more are all at increasing risk in Michigan and the Great Lakes region as long as we permit greenhouse gas emission[s] to continue." 9 Tr 1163.

Regarding human health, Dr. Overpeck stated:

> 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.

9 Tr 1163 (citing Exhibit ELP-15). He contended that climate change adaptation strategies are not likely to be cost-effective or sufficient.

Dr. Stanton stated that she is the Director and Senior Economist at the Applied Economics Clinic. She testified as an expert witness on behalf of ELPC/MiCAN and Bay Mills, and she sponsored Exhibits ELP-17 through ELP-25, and ELP-29. Dr. Stanton stated that the purpose of her "testimony is to determine whether 'no-action' was considered by Enbridge as an alternative that would meet the Company's stated purpose for the Proposed Project and whether such an alternative is feasible." 9 Tr 942.

Dr. Stanton noted that Enbridge considered three alternatives to operating the dual pipelines: (1) the Replacement Project, (2) the Open-Cut Alternative, and (3) the HDD method. She asserted that Enbridge did not analyze a no-action alternative and that, consequently, the company "overlooked an essential alternative that would meet its stated purpose of alleviating environmental risks to the Great Lakes." 9 Tr 946. Dr. Stanton stated that, in her opinion, it is "best practice" to consider a no-action alternative because it provides the Commission with all available alternatives for alleviating potential environmental harm to the Great Lakes. 9 Tr 946. In addition, she contended that because the State of Michigan has ordered a shutdown of the dual pipelines, a no-action alternative should be part of a full and proper alternatives analysis.

Dr. Stanton stated that if Line 5 were shut down and the products shipped on the pipeline were no longer available, Michigan consumers would still be able to heat their homes. She asserted that current propane consumers would either purchase fuels that were transported by rail and truck or switch to non-hydrocarbon fuels, such as modern heat pumps. Dr. Stanton averred that her findings are consistent with the short- and long-term recommendations of the U.P. Energy Task Force:

> The UP Energy Task Force report suggests the following alternatives to propane supplies via Line 5: the increased use of rail infrastructure and the creation of new track capacity; improvement of transloading in the Upper Peninsula; new wholesale and retail storage capacity, maximizing propane injected into storage reserves;

> developing a "Strategic Propane Reserve;" requiring contracts with the state government to have an attestation that companies will meet their supply obligations if Line 5 is shut down; pre-buying of propane to lock-in supply; and removal of barriers to propane deliverability (land acquisition, brownfield redevelopment assistance and permitting). The UP Energy Task Force's analysis of propane supply alternatives also considered trucking.

9 Tr 950-951 (citing Exhibits ELP-22 and ELP-23). In addition, she contended that "[m]odern electric heat pumps are a practical and economic alternative to propane space heating; electric hot water heaters (including heat pump hot water heaters) . . . can replace propane water heaters, stoves and dryers," and she claimed that air source heat pumps are four times more efficient than propane heaters. 9 Tr 952. Furthermore, Dr. Stanton testified that propane heaters emit twice the amount of GHGs than "air source heat pumps do for the same amount of heat." 9 Tr 953. She noted that heat pumps are available in Michigan, however there may be significant upfront costs for the conversion. Dr. Stanton asserted that the upfront costs could be addressed through a state-mandated zero-interest loan, and she noted that utilities offer a small rebate for installation.

Dr. Stanton disagreed with Enbridge's claim that if the Straits Line 5 segment is closed and not replaced, there will be a negative impact on Michigan oil producers, refineries, and jet fuel consumers. She stated that Line 5 provides only 10% of the jet fuel used at Detroit Metropolitan Wayne County Airport, rather than the 50% asserted by Enbridge. Dr. Stanton also suggested that Enbridge has exaggerated the alleged impact on refineries; rather, she argued that the closure of Line 5 would have "a positive or neutral effect on the Michigan economy." 9 Tr 957. She explained that businesses that have focused their investments in fossil fuels will see losses; however, "businesses with investments in electric supply, electric equipment manufacture and installation, and other 'green' goods and services should benefits [sic] from a Line 5 closure." 9 Tr 958. In addition, Dr. Stanton asserted that the question of whether a particular alternative

may benefit some businesses more than others should make no difference in the determination of whether the alternative is reasonable and prudent.

Finally, Dr. Stanton contended that a proper alternatives analysis must look at whether the demand for fossil fuels will be the same in 10, 25, and 100 years. She noted that Executive Directive (ED) 2020-10, Executive Order 2020-182, and the MI Healthy Climate Plan require statewide reduction of GHG emissions by 2025 and a "transition towards economywide carbon neutrality" by 2050. 9 Tr 960 (quoting Exhibit ELP-25). Accordingly, Dr. Stanton opined that it is not reasonable to assume that fossil fuel demand will not change, stating that "[w]ithin the next two to three decades, operating fossil fuel-fired equipment will not be permitted" in Michigan and fossil-fueled equipment and infrastructure will become stranded assets. 9 Tr 960; *see also*, 9 Tr 961-962. She argued that the no-action alternative represents the exercise of sound judgment because it achieves Enbridge's express purpose of eliminating the environmental risk to the Straits and advances climate change goals that have recently been established by state government.

B. Rebuttal Testimony

1. Enbridge Energy, Limited Partnership

Mr. Turner provided rebuttal testimony responding "to various environmental issues relating to the construction of the tunnel raised by Staff and intervenors." 7 Tr 609. To begin, Mr. Turner explained how Enbridge addressed potential environmental impairments. He testified that Enbridge developed an EPP, which is submitted as Exhibit A-11, pages 228-359. Mr. Turner stated that "[t]he baseline EPP is intended to meet or exceed federal, state, and local environmental protection and erosion control requirements, specifications, and practices" and that over time "a baseline EPP may be revised to include specifics for a particular project." 7 Tr 609. He noted that

an updated EPP was provided to the Staff through discovery and is included as Exhibit S-19, pages 3-59. Additionally, Mr. Turner asserted that:

> the United States Army Corps of Engineers (USACE) will prepare an Environmental Impact Statement (EIS) to ensure compliance with the National Environmental Policy Act (NEPA) and the EIS will evaluate potential impacts to, and mitigation measures for, environmental and cultural resources. Eventually, a detailed project-specific EPP will be developed after federal, state, and local authorizations have been obtained and prior to construction, in order to incorporate any permit conditions not specifically addressed in the earlier versions of the EPP. To ensure that Enbridge and its contractors comply with all applicable local, state, and federal regulatory requirements and permit conditions, Enbridge will develop a project-specific Environmental Training and Compliance Manual. This manual will be used to train construction personnel and establish guidelines for project-specific environmental protection measures that will meet or exceed applicable permit conditions and Enbridge standards.

7 Tr 610.

In response to Ms. Mooney's recommendation that Enbridge develop plans to address the increased noise generated from construction, Mr. Turner noted that the residences located within the workspaces and adjacent to the south side workspace will not be inhabited during construction because they have been purchased by Enbridge. In addition, he averred that Enbridge will implement the following measures to mitigate the sound impacts to nearby residences:

- Equipment will have muffled exhausts;
- Construction vehicles will minimize idle time to the extent practicable;
- Contractors will utilize sound control devices no less effective than those provided by the manufacturer and maintain equipment in accordance with manufacturer's recommendations;
- Equipment with the highest noise impact will be operated only when necessary;
- Equipment shields will be utilized at the contractor's discretion; and
- If blasting is required, blasting mats may be used as applicable.

7 Tr 612. Mr. Turner opined that because of the increased construction noise, wildlife may temporarily relocate but would likely return after construction. In any event, he asserted that "[g]iven the limited [construction] area and abundant adjacent habitat, the short-term disturbance of local fauna due to construction noise will not have population-level effects." 7 Tr 612.

In response to Ms. Mooney's recommendation that Enbridge develop plans to address increased dust and particulates from the construction project, Mr. Turner testified that Enbridge's typical dust control measures are outlined in the company's EPP. He contended that dust control plans are also included "in the stormwater pollution prevention plans and county erosion and sediment control permits that will be developed/obtained prior to construction." 7 Tr 612. Moreover, Mr. Turner stated that if additional mitigation is required at the time of construction, "the contractors may develop and implement additional measures based on industry-standard practices for dust control at construction sites." 7 Tr 612.

Next, Mr. Turner explained how Enbridge will control dust emissions, asserting that these measures "will meet or exceed the dust control best management practices (BMPs) outlined in the Michigan Department of Environment, Great Lakes, and Energy (EGLE) Nonpoint Source Best Management Practices Manual (2017)." 7 Tr 612-613. He stated that the dust control measures include:

- Watering access roads, storage piles and disturbed surfaces;
- Using temporary covers for stockpiles and other areas where vehicle traffic does not occur (e.g., mulch, vegetation, erosion control blanket, tarps, etc.);
- Placement of construction stone on unpaved areas, as practicable;
- Imposing speed restrictions for vehicles driving on unpaved areas; and
- Installing gravel tracking pads at entrances to the workspaces to help remove dirt from tires and tracks.

7 Tr 613. Mr. Turner asserted that additional mitigation measures will be utilized if blasting is required such as "fog cannons to spray atomized water across the excavation area" or pre-soaking the excavation area with water and using blast mats, if necessary. 7 Tr 613.

Regarding Ms. Mooney's claim that increased light from construction will impact nearby residences, fauna, and the Headlands International Dark Sky Park, Mr. Turner testified that "[l]ight generated during construction activities will be limited to discrete times when 24-hour

construction activities are required." 7 Tr 613. In addition, he stated that, during periods of nighttime construction, lighting will only be used to ensure that work areas are sufficiently illuminated so construction workers can avoid hazardous conditions and injuries. To reduce the impact of work-site lighting on residences and fauna, Mr. Turner asserted that Enbridge will implement the following measures:

- lighting will be downward-facing and include hooded lights to prevent skyglow;
- lighting will be of minimum necessary brightness while still allowing for required worker safety and security; and
- lighting will only be operated in areas of active construction.

7 Tr 613. Mr. Turner added that "[p]roject-specific plans will be developed after applicable federal, state, and local authorizations have been obtained and prior to construction, in order to incorporate any permit conditions not specifically addressed in the current version of the EPP and incorporated as necessary in the project-specific Environmental Training and Compliance Manual." 7 Tr 614.

Mr. Turner opined that the addition of permanent low-level lighting needed for operation of the tunnel after construction and the installation of security lighting at the ventilation building will not be a significant increase of light. Further, he stated that to minimize and mitigate impacts upon the Headlands International Dark Sky Park, Enbridge will develop a permanent operational lighting plan prior to construction, which may include motion-detected lighting, lighting at the minimum necessary brightness for operational safety and security, and downward-facing and hooded lighting to prevent skyglow. 7 Tr 614. Mr. Turner noted that Enbridge believes that permanent perimeter lighting is unnecessary.

Mr. Turner stated that Enbridge has developed plans to address Ms. Mooney's concerns about surface water impairments. First, he testified that "[i]f water is generated from trench dewatering, then it would be discharged within the construction workspaces using practices outlined in

Section 16 of the EPP Staff Exhibit S-19." 7 Tr 615. Mr. Turner explained that water generated from tunnel dewatering will be tested, monitored, and discharged pursuant to the authorizations in the NPDES permit. Second, he stated that "[s]ediment tracking from construction traffic will be controlled using erosion and sediment controls, as outlined in Enbridge's EPP." 7 Tr 615. Specifically, Mr. Turner explained that Enbridge will implement measures that include limiting vehicle access to the workspace, minimizing vehicle tracking of soil, street sweeping of sediment on public roads, employing temporary erosion and sediment control measures, and providing cat tracking. 7 Tr 615-616. He noted that additional soil and erosion management measures may be implemented as required by permits. Third, Mr. Turner testified that the water withdrawal from Lake Michigan for Enbridge's hydrostatic testing "will have a de minimis impact on the overall volume of the Great Lakes" and that the "[w]ithdrawn water will be fully treated before being discharged via the outfalls." 7 Tr 616.

In response to Ms. Mooney's recommendation that Enbridge mitigate air quality impacts, Mr. Turner asserted that the equipment used to construct the Replacement Project must comply with EPA's "mobile source regulations for on-road and non-road engines in 40 CFR Parts 85 to 90 and Parts 1033 to 1054." 7 Tr 617. In addition, he testified that "Enbridge and its contractors will maintain all fossil-fueled construction equipment in accordance with manufacturer's recommendations to minimize construction-related emissions. On-site vehicle idle time while in the construction area will be minimized for all equipment, to the extent practicable. Air emissions from the construction will be localized, intermittent, and short-term." 7 Tr 617-618.

Next, Mr. Turner addressed five concerns regarding potential ground water impacts. As a preliminary matter, he noted that the tunnel and Replacement Project will be constructed according to the criteria set forth in the EPP, county soil and erosion control permits, EGLE's Nonpoint

Source Best Management Practices Manual, and all applicable local, state, and federal permit and regulatory requirements. Turning to his first point, Mr. Turner contended that "[i]mpacts to surface drainage and groundwater recharge patterns due to construction activities including clearing, grading, trenching, and soil stockpiling activities will be minor, temporary, and will not significantly affect groundwater resources." 7 Tr 618. Second, he stated that there may be an increase in surface runoff and a reduction in infiltration of rainfall but asserted that these impacts are "temporary and will not significantly affect groundwater resources." 7 Tr 618. Third, Mr. Turner asserted that Enbridge has developed a spill plan that includes measures to prevent or minimize the impact of a hazardous material spill during construction. Fourth, he explained that nine drinking water wells within the workspace will be plugged and abandoned, and the remaining wells in the workspace will be properly protected. Mr. Turner averred that "[i]n the event construction adversely affects the well, it will be restored to its former quality, to the extent practicable, or replaced." 7 Tr 621. Fifth, he concluded that the trenching, excavation, and backfill activities will be "will be minor, temporary, and will not significantly affect groundwater resources." 7 Tr 621.

Mr. Turner testified that during construction of the Replacement Project, impacts to soils, vegetation, and surface water will be minimized by implementing the criteria set forth in the EPP. He stated that these measures include:

- Locating equipment parking areas, equipment refueling areas, concrete coating activities, and hazardous material storage at least 100 feet from surface waters, unless unfeasible;
- Installing and maintaining temporary erosion and sediment control BMPs throughout construction and until final restoration is achieved; and
- Implementing the Spill Plan to help prevent spills from occurring and mitigating a spill or leak if it occurs during construction.

7 Tr 622. He then explained the specific measures that are included in Enbridge's Spill Plan. 7 Tr 622. In addition, Mr. Turner testified that Enbridge will comply with condition 14 of the EGLE Water Resources Division Permit that requires the company "to minimize the risk of spreading terrestrial and aquatic invasive species" during construction. 7 Tr 623.

Next, Mr. Turner responded to the concerns regarding cultural resources expressed by the Tribes and noted in Exhibit S-25. He stated that USACE is preparing an EIS and will evaluate potential impacts to cultural and historical resources as part of that effort, which is done in consultation with Michigan's First Nations Peoples. Mr. Turner added that the evaluation will look at "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use to historic properties (including properties of cultural or religious significance to Indian tribes) if such properties exist." 7 Tr 624. Mr. Turner asserted that the EGLE permit also addresses Tribal concerns in Special Condition 21, which reads as follows:

> The Straits of Mackinac bottomland and shore are notable for the presence of historic properties, such as terrestrial and bottomland archaeological sites (including historic aircraft and shipwrecks), submerged paleo landscapes, cemeteries and isolated human burials, significant architecture and objects, historic districts, National Historic Landmarks, and traditional cultural properties and landscapes. The USACE has federal permitting authority over this project and is required to comply with Section 106 of the National Historic Preservation Act of 1966, as amended (Section 106). Section 106 requires federal agencies to consider the effects of their undertakings on historic properties in consultation with the State Historic Preservation Officer, consulting Tribes, and other stakeholders. Any adverse effects on historic properties must be avoided, minimized, or mitigated. The SHPO [State Historic Preservation Office] recommended [an] additional survey to identify historic properties in the project area (November 10, 2020). This recommendation will remain under consideration during the Section 106 consultation process. Note that historic properties on state-owned land and the state-owned bottomland are the property of the State of Michigan. Archaeological surveys that may be proposed on state-owned land and the state-owned bottomland will require a Department of Natural Resources Permit for Archaeological Exploration on State-Owned Land.

7 Tr 625 (quoting Exhibit A-17).

Mr. Turner stated that to address these concerns, Enbridge has performed a desktop and Phase I cultural resources investigation in coordination with USACE. He testified that:

> geophysical surveys of the workspaces on the north and south sides, where practical, were conducted in the summer of 2021. Additionally, Enbridge conducted additional marine archaeological surveys within the area of potential effect in the summer and fall of 2021. Tribal officials were present for portions of the geophysical and marine surveys. Enbridge will also be paying for an ethnographic study to be performed by a third party under the direction of the USACE as part of the cultural resource evaluations that will be conducted as part of the EIS and Section 106 processes.

7 Tr 626. Mr. Turner noted that Enbridge's survey methods were approved by USACE and SHPO. He explained that the data from these surveys is currently being processed and will be provided to USACE, which will make determinations regarding the potential effect of the project on cultural and historical resources and will publish the results in the EIS. Mr. Turner added that Enbridge has conducted additional cultural resource and wetland surveys in the area of Outfall 002, and he noted that the data results are being processed and submitted to EGLE and USACE.

Furthermore, Mr. Turner testified that wetland and waterbody field surveys were completed for the Replacement Project and submitted to EGLE and USACE. He noted that no costal alvar is present in the workspace. Mr. Turner stated that "[i]mpacts to limestone cobble shore will be limited to a small footprint required for the construction of Outfall 1 on the south side and Outfall 3 on the north side. Exhibit A-18 is the EGLE Responsiveness Summary for the Water Resources Permit, and it discusses the Permit conditions and efforts to minimize impacts to coastal wetlands." 7 Tr 628. He also noted that Exhibit A-15 is the EGLE Water Resources Permit, which includes authorization of the Replacement Project under Part 325 of the GLSLA.

Mr. Turner stated that the Replacement Project will have no direct impact on commercial fishing, fish populations, or spawning areas in the Great Lakes, including whitefish and walleye,

and there will be no permanent impacts to the lakebed or aquatic habitats. He noted that all water discharged to the Straits via the permitted outfalls will be tested in accordance with the EGLE NPDES permit. *See,* Exhibits A-15, A-16. In addition, he testified that construction of the Replacement Project will have no effect on wild rice and no direct impact on common loon populations. Mr. Turner contended that although construction "will include removal of individual sugar maple trees," the Replacement Project "will not impact overall populations of sugar maple or maple syrup production." 7 Tr 629.

Mr. Turner also responded to Dr. Cleland's testimony regarding cultural resources. He referenced the desktop and Phase I cultural investigations, stating that:

> [c]ultural resource consultants searched the files of the MI SHPO [Michigan SHPO] and the Office of the State Archaeologist (OSA) in order to identify cultural resource locations and investigations that have been previously recorded within a one-mile study area for the project. In 2019 and 2020, cultural resource consultants conducted Phase I cultural resources surveys in the north side and south side study areas in accordance with MI SHPO standards. . . . MI SHPO records show a total of 11 previously identified archaeological sites within one mile of the workspaces: these are one (1) unverified site on the north side, and five (5) unverified and five (5) verified sites on the south side of the Straits of Mackinac. Based on MI SHPO records, no previously recorded archaeological sites have been verified within the workspace; however, it may be possible that portions of three of the unverified sites cross into the workspace: sites 20EM11, 20EM12, and 20MK15.

7 Tr 632-633. Mr. Turner stated that with respect to the one historic structure and six archeological sites identified, none are recommended for inclusion in the NRHP by the cultural resource consultant. He noted that the information will be provided to USACE and USACE will complete the process in consultation with the Tribes and SHPO.

Finally, Mr. Turner stated that Enbridge will implement a UDP, which will be submitted to USACE for approval prior to construction. Exhibit A-12, pp. 98-102. Moreover, he asserted that the tunnel is being designed to avoid any impacts to the bottomlands of the Straits. Specifically, Mr. Turner stated that "[d]irect impacts to bottomlands will not occur as a result of tunnel

construction" with the exception of a small area around the temporary water intake structures. 7 Tr 636. He also cited a study that was conducted to evaluate the potential impacts of construction vibrations to very sensitive structures. Mr. Turner testified that:

> [a]nticipated vibration levels could be close to 0.1 inches per second near the shoreline where the tunnel is less than 75 feet deep. The study noted that while impacts to sensitive sites on the lakebed are not likely to occur due to vibrations from the TBM, location specific analyses could be conducted to verify potential impacts if sensitive sites are present in near-shore areas where the tunnel is less than 75 feet deep.

7 Tr 636. He added that Enbridge conducted additional marine archeological surveys in the fall of 2021, which were developed by a third party, approved by USACE and SHPO, and witnessed by Tribal officials.

2. The Commission Staff

Mr. Chislea responded to MSCA's testimony presented by Mr. Cooper regarding the construction of the replacement pipe segment in the tunnel. He recommended that "[f]or all mainline girth welds, Enbridge should be required to develop low-hydrogen welding procedures and qualify them per the requirements found in 49 CFR 195.214." 12 Tr 1757. Mr. Chislea also recommended that the welding procedures include pre-heat requirements and inter-pass temperature requirements and that the non-destructive testing of the mainline girth welds include automatic phased array ultrasonic testing methods. He stated that if these recommendations are implemented, "post-heat treatment is not necessary." 12 Tr 1758. Finally, Mr. Chislea sponsored Exhibit S-26, PHMSA's response letter regarding their design review of the Replacement Project that was described in his direct testimony, stating that he sought "to admit the letter into evidence once we received it, which [he is] now doing as part of [his] rebuttal testimony." 12 Tr 1758.

Responding to Dr. Stanton's no-action alternative, wherein the Notice is enforced and the dual pipelines are shut down, Mr. Warner contended that the "scenario as described by Dr. Stanton is

not an appropriate alternative for consideration" in this case. 12 Tr 1739. He explained that: (1) Dr. Stanton failed to support her claim that the Notice is likely to be enforced and a shutdown of the dual pipelines is likely to occur; (2) in the event the Commission denies Enbridge's application for the Replacement Project, Enbridge still has continuing authority to operate the dual pipelines; (3) Enbridge has not indicated that it will be voluntarily shutting down Line 5; and (4) the purpose of the Replacement Project is not only to mitigate the risk of an oil spill but also to continue service on Line 5. *See*, 12 Tr 1740-1742. In addition, Mr. Warner stated that Dr. Stanton failed to demonstrate that it is likely that service on the dual pipelines will be discontinued because, as a result of the Notice, the Canadian government "formally invoked the dispute settlement provision of the 1977 Agreement between the Government of Canada and the Government of the United States of America Concerning Transit Pipelines. This escalation to international dispute resolution adds further uncertainty to the enforceability of the easement revocation which was initiated over a year ago." 12 Tr 1741 (footnote omitted).

According to Mr. Warner, the more appropriate no-action alternative for Commission consideration "is the scenario in which the proposed Replacement Project is not completed." 12 Tr 1742. He stated that if the Replacement Project is not constructed, the status quo would be maintained and there would be no effect on the current or future operation of Line 5. However, Mr. Warner contended that "[i]f the Dual Pipelines and Line 5 are shut down prior to the completion of [Commission] Case No. U-20763, the Commission should consider that new scenario (Line 5 shutdown scenario) to be the status quo. In the Line 5 shutdown scenario, Staff anticipated that Line 5 products would be transported by other methods, such as rail or trucking," as described in Mr. Morese's direct testimony. 12 Tr 1742.

Mr. Morese responded to the direct testimony of Mr. Erickson and Dr. Stanton, and he sponsored Exhibit S-28. He disagreed with these witnesses, stating that "[t]he appropriate 'no-action' before Staff and the Commission is the denial or withdrawal of Enbridge's application, which would result in the status quo[:] operational Dual Pipelines resting on the bottomlands of the Great Lakes." 12 Tr 1795. Mr. Morese argued that the status quo is less desirable than the Replacement Project because the location of the dual pipelines in the Straits poses a health, safety, and environmental risk. 12 Tr 1795.

Mr. Morese also disagreed with some of Dr. Stanton's assertions regarding the ability of electric heat pumps to act as a practical and economic alternative to propane in Michigan. He noted that according to research, the lifecycle costs for electric heat pumps can be high compared to natural gas furnaces. Mr. Morese explained that "positive lifecycle costs for heat pumps can be expected for residents of states in the South and Northwest where the temperatures are warmer, but not for states in the Midwest such as Michigan, Illinois, or Wisconsin." 12 Tr 1796. He further noted that many homes will need an approximate $2,000 upgrade to 200-amp electrical service and opined that parts of the distribution system may also require upgrades or improvements to handle the additional load caused by electric heat pumps. Finally, Mr. Morese asserted that with a typical conversion cost (propane to electric heat pump) of more than $9,000, there are problems with affordability. Therefore, to reduce GHG emissions from residential consumers/homes as recommended by Dr. Stanton, Mr. Morese testified that it will require a holistic approach supported by local, state, and national policy, with the involvement of building codes, incentives, tax credits, rebates, and low-interest loans.

Mr. Morese also objected to Dr. Stanton's reliance on a study conducted in Massachusetts that found that propane is far more expensive than other forms of heating. He asserted that those study

conclusions are "not applicable to Michigan because the price structures for heating alternatives are different in the Northeast U.S. compared to those seen in the Midwest, particularly in Michigan." 12 Tr 1799. Moreover, Mr. Morese disputed Dr. Stanton's claim that GHG emissions limits or other zero emission energy requirements will prohibit the future use of fossil-fuel equipment and, as a result, propane heating equipment will become a stranded asset. He posited that the definition of carbon neutrality does not generally include the notion that all fossil fuel burning activities will be prohibited.

In response to Mr. Erickson's claim that a shutdown of Line 5 will result in increased petroleum prices, reduced demand, and reduced GHG emissions, Mr. Morese contended that Mr. Erickson's analysis has flawed assumptions. Mr. Morese explained that:

> [w]hile stating that the U.S. Dept. of Energy's EIA predicted almost $73/bbl [barrel] crude oil for 2030 . . . , Mr. Erickson's analysis chose to utilize the much more conservative $53/bbl predicted by the Canadian Energy Regulator . . . . This singular decision underpins Mr. Erickson's argument that future oil projects would go undeveloped in the greater Williston Basin and has ramifications throughout his testimony. It is historically very difficult to predict the future price of volatile commodities such as crude oil. As of November 15, 2021, Brent crude oil is over $80 a barrel.

12 Tr 1801-1802. Although Mr. Morese conceded that the additional cost of transporting crude oil by rail would be approximately $6/bbl, he disagreed with Mr. Erickson that the $6/bbl increase will result in 290,000 barrels of crude oil being stranded in the Williston Basin in Canada. He also noted that Canada's regional throughput is increasing, and he disputed the price elasticity value chosen by Mr. Erickson. Furthermore, Mr. Morese objected to Mr. Erickson's calculation that a shutdown of Line 5 would result in a long-term increase in the global price of crude oil by about $0.29/bbl. He stated that the "Staff is not confident the estimated increase of $0.29/bbl is significant enough to actually alter demand and impact behavioral change on the part of the consumer." 12 Tr 1804-1805.

Finally, Mr. Morese disagreed with Mr. Erickson that a shutdown of Line 5 would result in increased petroleum prices and reduced worldwide petroleum demand. He stated that:

> Line 5's volume of 450,000 crude barrels accounts for approximately 0.45 percent of daily world crude consumption based on 100,000,000 barrels. Planned and unplanned production or supply outages are frequent occurrences. These outages can and do have impacts on crude oil prices, but these impacts are difficult to predict and are often short term in nature when relatively small volumes are involved. As seen from the chart below, monthly unplanned disruptions averaged 2.58 million barrels a day over the last ten years, ranging from under 100,000 barrels to over 4,000,000 barrels. When compared to the monthly West Texas Intermediate (WTI) price of crude oil, it is difficult to precisely pinpoint the relationship Mr. Erickson relies on.

12 Tr 1805. Mr. Morese also noted that the Organization of Petroleum Exporting Countries have significant excess production capacity available to address market shortfalls, and he posited that the world crude oil market would adjust to limit any long-term price impact. 12 Tr 1806. Finally, he stated that the consumption of liquid fuels has trended upward for 20 straight years with little indication that this trend is influenced by insignificant price changes.

Mr. Ponebshek responded to Mr. Erickson's testimony and sponsored Exhibit S-27. He noted that Mr. Erickson's estimate of GHG emissions associated with the construction of the replacement pipe segment is significantly higher than the estimate calculated by Weston. Mr. Ponebshek explained that Weston's GHG emissions estimate included Scope 1 emissions, which are fuel combustion, company vehicle, and fugitive emissions. He noted that Mr. Erickson's GHG emissions estimate also included Scope 1 emissions but that Mr. Erickson added Scope 2 emissions (purchased electricity, heat, and steam) and Scope 3 emissions (purchased goods and services, business travel, employee commuting, waste disposal, use of sold products, transportation and distribution, investments, leased assets, and franchises). Mr. Ponebshek asserted that Weston's estimate of Scope 1 emissions is comparable to Mr. Erickson's estimate. However, Mr. Ponebshek disagreed with the source data used by

Mr. Erickson for the Scope 2 emissions, and he believed that Scope 3 emissions are "outside a proper range for this study." 12 Tr 1879.

3. Environmental Law & Policy Center and Michigan Climate Action Network

Mr. Erickson responded to Mr. Morese's and Mr. Ponebshek's testimony regarding GHG emissions analysis assumptions, and he sponsored Exhibits ELP-26 through ELP-28. In his rebuttal testimony, Mr. Erickson stated that he reached three main conclusions:

- First, Mr. Morese and Mr. Ponebshek erroneously assume that the Line 5 tunnel project, relative to a scenario in which this Proposed Project is not built, will have no effect on consumption of the oil anticipated to be handled by the project, nor any effect on emissions from producing or burning that oil. This is contrary to portions of their own testimony that support a conclusion that, if Line 5 is not re-started, oil prices would increase and global oil consumption decrease.

- Second, and perhaps as a consequence of the error above, Mr. Morese and Mr. Ponebshek fail to estimate or disclose the largest sources of greenhouse gas emissions associated with the proposed Line 5 tunnel project: the emissions associated with extracting and burning the oil and other liquids anticipated to be handled by the project.

- Third, Mr. Ponebshek fails to estimate the largest sources of emissions associated with tunnel construction: those from electricity to power the tunnel boring machine and the concrete used to construct the tunnel.

9 Tr 1087; *see also*, 9 Tr 1088-1102.

Mr. Erickson noted that according to Mr. Morese, the oil market is "relatively price inelastic" in the short term and, therefore, an increase in price would not result in a meaningful decrease in demand. 9 Tr 1090 (citing 12 Tr 1779). However, Mr. Erickson stated that, "by assuming that there would be zero change in global oil usage, [Mr. Morese] is treating demand as *perfectly* inelastic (elasticity of zero) – not *relatively* inelastic—which, as [Mr. Erickson] described above, is contrary to the evidence [Mr. Morese] cites." 9 Tr 1091 (emphasis in original). He also asserted that Mr. Morese only analyzed oil consumption in Michigan and that Mr. Morese failed to

consider the effect of a price increase globally. Furthermore, Mr. Erickson disagreed with Mr. Morese's use of short-term elasticities, arguing that Mr. Morese should have used long-term elasticities because it is more appropriate "for a project like the Proposed Project – designed to last 99 years . . . ." 9 Tr 1092.

Mr. Erickson contended that Mr. Morese inappropriately concluded "that oil consumption will not be affected if the existing Line 5 shuts down and the tunnel is not approved." 9 Tr 1902. Mr. Erickson asserted that the Bureau of Ocean Energy Management (BOEM) of the U.S. Department of Interior made a similar error during its analysis of global oil consumption for the Liberty Project in Alaska, which resulted in the 9th Circuit Court of Appeals finding that BOEM's analysis was arbitrary and capricious.

Next, Mr. Erickson claimed that:

> [b]ecause Mr. Ponebshek did not estimate GHG emissions associated with increased oil consumption, decision-makers do not have a complete and transparent basis for making decisions about the environmental impacts that will be caused by the proposed project compared to if the proposed tunnel project was not built. Moreover, by not accounting for the Proposed Project's increase in greenhouse gas emissions, Mr. Morese inappropriately suggests that the ecological impacts of GHG emissions need not be considered . . . .

9 Tr 1095. He argued that Mr. Morese and Mr. Ponebshek improperly narrowed the focus of their analysis to the primary beginning and end points of the supply chain and the direct emissions from the Replacement Project. Mr. Erickson asserted that a proper GHG emissions analysis should include the direct and indirect GHG emissions from the Replacement Project and that "uncertainty is no excuse for excluding these very large sources of emissions, because methods to calculate them are readily available, and associated uncertainties can be described." 9 Tr 1099 (footnote omitted).

Mr. Erickson also argued that making electricity, cement, and steel to construct the tunnel results in CO_2 emissions. He asserted that there are readily available methods to estimate these emissions and that Mr. Ponebshek's analysis should have included these estimates. 9 Tr 1100-1102.

Dr. Stanton responded to Mr. Morese's testimony, and she sponsored Exhibit ELP-29. She agreed with Mr. Morese that it is not feasible for most Michigan propane customers to switch to natural gas for home heating and other fuel needs but disagreed that it is infeasible for the majority of Michigan's propane customers to switch to electricity for home heating needs. Dr. Stanton explained that if Line 5 is shut down and the price of propane increases, "[m]any households will electrify, and electrification will be economical for many households. However, households would not be forced to electrify in the short term. Accordingly, some households may, in the short term, respond to an increase in propane prices by reducing somewhat the amount of propane they consume and paying more for the propane they continue to purchase." 9 Tr 967. She stated that if customers continue to use propane but at a lower volume, it will cost each household an additional $55 to $209 per year.

In addition, Dr. Stanton contended that MTU researchers found that after transitioning from propane to heat pumps for residential buildings, there were lower lifetime costs and lower GHG emissions, as shown in Exhibit ELP-29. Furthermore, she noted that an additional benefit of switching from propane to electric heat pumps is that "[e]very kWh [kilowatt-hour] of renewable energy added to Michigan's grid will reduce electric emission rates, increase savings from a propane-to-electric heat pump transition, and decrease its dollar per ton cost." 9 Tr 970. Dr. Stanton acknowledged that there may be up-front costs to transition to heat pumps that may be cost prohibitive for low-income families. However, she stated that "zero- and low-interest loan

programs, geared to meet the needs of households at all income levels," should be "an essential part of an equitable decarbonization effort." 9 Tr 971.

Next, Dr. Stanton asserted that "Mr. Morese has not provided any support or rationale for his conclusion that a transition from gasoline to electric vehicles is 'not a viable alternative' or that there is a 'continued need for access to fossil fuels in the short to medium term.'" 9 Tr 972 (quoting 12 Tr 1734, 1792). She also disagreed with Mr. Morese's claim that if the price of petroleum products increases, demand will not decrease—i.e., the demand for products shipped through Line 5 is perfectly inelastic. Dr. Stanton stated that:

> [d]emand for fossil fuels is more elastic over longer time frames (and less elastic over shorter time frames). Reacting to a fuel price increase over weeks, months or even a few years, consumers may be unable to change their consumer behavior quickly. Given more time, however, consumers react to a fuel price increase by changing behavior and/or purchasing equipment that runs on a different power source.

9 Tr 974. She encouraged the Commission to consider long-term demand elasticity when analyzing the no-action alternative in which Line 5 no longer operates.

4. Bay Mills Indian Community

Ms. Gravelle responded to Mr. Warner's and Mr. Yee's direct testimony, and she sponsored Exhibits BMC-38 through BMC-40. She testified that in the government-to-government consultation process, Mr. Warner mischaracterized how the Tribes' concerns with the Replacement Project would be addressed. She stated that:

> [p]ursuant to Executive Directive No. 2019-17, . . . each executive agency must consult *on a government-to-government basis* with the tribes before taking an action or implementing a decision that may affect one or more of the tribes. Contrary to Mr. Warner's assertion, the obligations of Executive Directive No. 2019-17 were not satisfied when the Staff chose to send a memorandum—on the day before testimony was due to be filed in the contested case—that attempted to summarize discussions that took place between the Staff and the tribes. Bay Mills' concerns about the tunnel project are not accurately or comprehensively described in the Staff's memo. The memo also does not accurately or

> comprehensively describe how any of Bay Mills' concerns were addressed in the [Commission]'s final decision on the proposed tunnel as required by the Executive Directive, as no final decision has been made.

10 Tr 1436 (emphasis in original). Ms. Gravelle opined that because Bay Mills and the Staff are both parties to this litigation and have taken adverse positions, the free exchange of ideas that is necessary for an effective consultation has not been able to occur and communication has been hampered. In addition, Ms. Gravelle contended that, according to the Staff, the consultation process is complete because the Staff has submitted testimony summarizing "what it believes to be the tribes' concerns. But, consistent with ED No. 2019-17, government-to-government consultation should continue until there is a final decision or action. The submission of testimony in the contested case is not a final decision or action in this matter." 10 Tr 1437.

Moreover, Ms. Gravelle objected to the Staff's reliance on Mr. Yee's testimony as evidence that the Staff's consultation obligation has been satisfied. She stated that "Mr. Yee participated in one meeting between the [Commission] Staff and the tribes but never asked a single question about the tribes' concerns. He offered no opinion about any issues raised." 10 Tr 1438. Ms. Gravelle opined that Mr. Yee has no understanding of Bay Mills' position regarding the Replacement Project and, as a result, could not assist the Staff in its consultation obligation.

Ms. Gravelle also disagreed with Mr. Warner's view "that the USACE will complete a comprehensive and rigorous study in preparation of the Environmental Impact Statement . . . ." 10 Tr 1439. She stated that USACE "announced its intention not to follow the proper regulatory process under Section 106 . . . ." 10 Tr 1439; *see also*, 54 USC 306108; 36 CFR 60.4; Exhibits BMC-38, BMC-39. Even if USACE uses the appropriate process and complies with Section 106, Ms. Gravelle asserted that Section 106 only requires that federal agencies consider the effects of the Replacement Project on historic properties, not cultural resources. Thus, she

contended that the Staff should not rely on USACE to conduct a proper review of cultural resources in its EIS. Finally, Ms. Gravelle asserted that the Commission should coordinate with the SHPO to determine whether the Replacement Project will impact cultural resources.

Mr. Kuprewicz responded to the Staff's and MSCA's testimony and sponsored Exhibit BMC-37. He asserted that the Staff underestimates the potential for a release of Line 5 products into the Straits from the tunnel. Mr. Kuprewicz explained that although the risk of release is low, it is not negligible and could occur "by way of a catastrophic explosion" caused by a spark from electrical equipment or human error. 10 Tr 1326. He opined that the ventilation system is not infallible, cannot eliminate all fuel vapor from the tunnel, and will not prevent "an explosion from occurring following the accumulation, or pocketing, of vapor in the tunnel." 10 Tr 1328. To help prevent an electrical ignition of fuel vapor, Mr. Kuprewicz suggested that all electrical equipment comply with Class 1, Division 1 specifications, rather than Class 1, Division 2 specifications.

Mr. Kuprewicz noted that the Replacement Project presents the opportunity to increase the volume and, therefore, the capacity of Line 5 because the new 30-inch diameter replacement pipe segment will have a maximum operating pressure of 1440 pounds per square inch gauge (psig). Accordingly, he disputed the Staff's claim that the tunnel would take 50 hours to fill with petroleum product. Rather, Mr. Kuprewicz asserted that because the replacement pipe segment will have a greater operating capacity, the tunnel will fill more quickly, which increases the environmental risk in the event of a release into the Straits. *See,* 10 Tr 1331; Exhibit S-16, Table 2.

In addition, Mr. Kuprewicz contended that "the Staff is not taking into account that this Tunnel Project is relying too heavily on Computation Pipeline Monitoring ('CPM')-based release

detection approaches . . . ." 10 Tr 1332. He stated that "[b]ased on my knowledge and expertise with pipeline safety measures, CPM-based released detection approaches defined in federal pipeline safety regulation are not reliable enough nor rapid enough for timely indication of leak detection of the pipeline segment in the unique siting/placement within a tunnel." 10 Tr 1332. Mr. Kuprewicz argued that a second leak detection system with mandatory shutdown procedures should take priority over the CPM-based approach.

Next, Mr. Kuprewicz asserted that the Replacement Project should not be approved because the Staff failed to "acknowledge that human error creates a risk that crude oil and/or propane will be released in the tunnel, that there will be a delay in recognizing a release, and that the released crude oil or propane will ignite." 10 Tr 1335. He contended that the Staff is overly reliant on the protection afforded by compliance with PHMSA regulations and CPM, stating that these standards and technology will not prevent a release of Line 5 products into the Straits.

5. Michigan Propane Gas Association

Michael D. Sloan, Managing Director of the natural gas and liquids advisory services practice at ICF, provided rebuttal testimony on behalf of the Associations. Mr. Sloan testified that Dr. Stanton's recommended conversion to electric heat pumps fails "to provide any assessment of the timeline of a conversion away from propane, hence does not provide any insight into whether or not her proposed solution to the Line 5 shutdown would address the impacts on Michigan propane customers in the near to medium term (one to ten years)." 8 Tr 905. He noted that Dr. Stanton seems to rely on the recommendations from the U.P. Energy Task Force to address the near-term impacts of a potential Line 5 shut down. However, Mr. Sloan contended that:

> the Upper Peninsula Task Force proposals are unlikely to reduce the price impacts of the termination, and . . . will have only a limited impact on the ability of the system to respond to extreme weather conditions or other supply shortages. They do not and cannot replace the supply flexibility provided by the regional propane production facilitated by Line 5. In addition, they are focused on propane markets in the Upper Peninsula and will have limited impact on Michigan propane consumers outside of the Upper Peninsula. While the Upper Peninsula represents the highest concentration of propane consumers per capita, the impacts on consumers in the rest of Michigan are also important to consider.

8 Tr 907.

Mr. Sloan stated that in the near term, to replace products transported by Line 5 following a shutdown, there would be an increased reliance on rail and truck transport, although "neither would be capable of offsetting the loss of Line 5 given the lack of existing infrastructure at locations dependent on propane deliveries manufactured from Line 5 volumes." 8 Tr 906. In addition, he asserted that rail and truck transport each have economic and environmental impacts that must be considered such as road safety issues, environmental accidents, and increased direct GHG emissions.

Mr. Sloan disagreed with Dr. Stanton's claim that "propane customers do not need a healthy propane distribution industry" in order to address heating and other energy uses. 8 Tr 908. He asserted that Dr. Stanton misjudges the complexity of the propane distribution and storage system when she states that homes and businesses can self-deliver propane in bottles or small tanks. Mr. Sloan explained that Dr. Stanton "fails to recognize that propane used for most home heating is delivered via pressurized tanker trucks (bobtails) and stored in permanently mounted residential storage tanks that are permanently connected to the permanently mounted residential propane appliances." 8 Tr 908-909. Furthermore, he stated that self-delivery "is generally limited to the 20 pound cylinders that are typically used by outdoor grills and portable outdoor space heaters and

firepits. A very small share of the propane market uses portable cylinders larger than 20 pounds." 8 Tr 909.

Mr. Sloan also testified that the examples of heat pumps cited by Dr. Stanton are not relevant to Michigan or the U.P. He disputed Dr. Stanton's reliance on heat pump studies from Massachusetts and San Francisco and on national averages, stating that these studies "do not reflect the actual conditions that heat pumps would face in the Upper Peninsula or the rest of Michigan" because: (1) temperatures in Michigan and the U.P. are much colder than the temperatures cited in the studies, (2) air conditioning requirements in the U.P. and propane prices in Michigan are lower than in the areas reflected in the studies, and (3) electricity prices in the U.P. are "significantly higher than national average electricity prices." 8 Tr 910-911. He further explained that Michigan has more annual heating degree days compared to California and Massachusetts and "the difference in temperature affects the performance and the cost of the heat pumps." 8 Tr 911. Mr. Sloan contended that for Michigan's colder climate, "the heat pump needs to be a larger size, or have a larger backup heat source in order to meet peak space heating requirements," which makes the units more expensive. 8 Tr 911-912. Furthermore, he testified that because Michigan has less cooling degree days compared to the national average, the economic impact of the heat pump's air conditioning capability is reduced.

Regarding propane prices, Mr. Sloan noted that "[r]esidential propane prices are generally more than 50% higher in Massachusetts than in Michigan," which indicates that heat pump economics for Massachusetts are not relevant for Michigan. 8 Tr 912 (footnote omitted). Concomitantly, he stated that Michigan's electric prices are approximately "23 percent higher than the national average," and the U.P.'s electric rates are "nearly 39 percent higher than the national

average. Hence the use of national average data to estimate heat pump economics is not useful for either Michigan or the Michigan Upper Peninsula." 8 Tr 913-914 (footnotes omitted).

Mr. Sloan averred that Dr. Stanton's indication that heat pumps are available in Michigan is not helpful and may be misleading. He explained that although heat pumps are widely available across the nation, only 10 percent of households in Michigan use electric space heating, which may include electric resistance space heating in addition to, or in lieu of, heat pumps. Mr. Sloan stated that the new generation cold climate heat pumps referred to by Dr. Stanton "still face significant challenges and are not yet widely available." 8 Tr 914.

Mr. Sloan further opined that "[c]onversions of propane heating customers to heat pumps will not significantly reduce the propane supply issues associated with a potential Line 5 shutdown in the near to mid-term (one to ten years)" because, absent a mandate by the government with financial incentives, there is unlikely to be a transition to heat pumps. 8 Tr 915. He noted that when reviewing historical data, the transition will take time and, even with market intervention, the transition will be too gradual to affect the near to mid-term. Mr. Sloan estimated that "[e]ven if the State of Michigan halted all sales of propane appliances, it would take up to 20 years or more before the likely appliance replacement rate would offset the loss of propane supply associated with a shutdown of Line 5." 8 Tr 916. He indicated that he has not observed evidence showing that heat pumps can take a market share from propane. Mr. Sloan opined that in the event of a Line 5 shut down in the near- to mid-term, it is more likely that customers would shift from propane to wood rather than to heat pumps. However, he stated that in the longer term, a slow transition to heat pumps is likely, given that the technology is improving.

Mr. Sloan also stated that, in addition to some U.P. customers converting to heat pumps, he "would also expect a significant number to convert (or convert back) to wood and to electric

resistance heat" if propane is not available or sales of propane appliances are prohibited. 8 Tr 918. He reiterated that there are a number of lower-than-average cooling degree days in the U.P. and, therefore, the value of a heat pump is significantly reduced in this region. Mr. Sloan asserted that "customers that are forced to move away from propane are likely to look for other lower cost space heating sources, including wood burning stoves, instead of installing a heat pump." 8 Tr 918. He also indicated that heat pumps may be more attractive in the remainder of Michigan given the lower heating load and higher cooling load, when compared to the U.P.

Mr. Sloan indicated that there is a lack of industry standards for utilizing heat pumps as heating systems and that contractors have struggled to properly size systems based upon heating loads. He opined that it will take significant incentives for customers and increased education efforts to accelerate the conversion from propane to electric heat pumps.

In response to Dr. Stanton's testimony that, compared to air source heat pumps, propane heaters are less efficient and emit more GHGs, Mr. Sloan averred that Dr. Stanton's estimated emissions benefits are not realistic in the short term. Based on ICF data, he stated that when assuming:

> a new propane furnace has an efficiency of 82 percent, the heat pump would require an annual COP [coefficient of performance] of about 3.4 in order to support Dr. Stanton's conclusions. While there will be some heat pumps capable of reaching this COP in practice, many will not, particularly when operating in a colder environment including both Michigan and the Michigan Upper Peninsula.

8 Tr 920. He noted that Dr. Stanton's evidence "references a Minnesota heat pump study with a COP of 2.3, which would lead to a moderately lower carbon emissions for the heat pump relative to a propane furnace when combined with the current carbon intensity of electricity." 8 Tr 920 (footnote omitted). However, Mr. Sloan noted that this is a laboratory calculation and, in reality, many customers would continue to utilize their propane furnace to supplement a heat pump during

the coldest parts of the year. Specifically, he stated that "[t]he electric utilities in Massachusetts that participate in the Mass Save program are currently recommending that customers not remove their existing fossil [fuel] heating systems, but rather keep them in operation for backup use." 8 Tr 921 (footnote omitted).

In addition, Mr. Sloan testified that Dr. Stanton did not consider the impact that a transition to heat pumps would have on the electric grid, noting that "[t]he increase in power requirements is potentially significant, particularly if the transition occurs in an accelerated fashion." 8 Tr 921 (footnote omitted). He averred that an increase in demand would require significant investments in the electrical grid, and he expected an increase in electricity prices even though the U.P. already has some of the highest electricity prices in the nation.

Finally, Mr. Sloan objected to Dr. Stanton's testimony regarding stranded assets. He alleged that Dr. Stanton "has not conducted any analysis of the costs of potential stranded assets, and has ignored the costs of the assets that would of necessity become stranded in the event that service on Line 5 is terminated and Michigan shifts to a net zero energy economy." 8 Tr 922. Mr. Sloan further disputed Dr. Stanton's suggestion that propane use will need to be eliminated by 2050 to achieve the goal of net zero emissions. He indicated that, currently, "there is very little clarity on how Michigan consumers will meet net zero requirements, and it is clear that Michigan is considering alternative approaches, including approaches that would rely on carbon-based fuels." 8 Tr 923. Mr. Sloan opined that renewable propane may be available before 2050, which would be consistent with environmental policies. He also noted that other low carbon technologies will develop in the next 30 years that "would allow existing propane households to be adapted to use hydrogen or other net zero emissions delivered fuels in the future, without requiring conversion to electric heat pumps." 8 Tr 923.

Ms. Pastoor responded to Dr. Stanton's proffered no-action alternative. She asserted that no action means maintaining the status quo, which would result in continued operation of the dual pipelines. She stated that the purpose of the Replacement Project has always been to ensure the continued operation of Line 5 and that the need for Line 5 is evidenced by the 1953 order and the Second and Third Agreements. Ms. Pastoor posited that the litigation over the 1953 easement has not changed this purpose and she noted that the State of Michigan voluntarily dismissed its suit in federal court on November 30, 2021.[27]

Ms. Pastoor also responded to Mr. Ponebshek's recommendation for a risk management plan. Noting that the construction of the tunnel is governed by the Tunnel Agreement, she stated that:

> [i]t is anticipated that probe-hole testing ahead of the TBM will be addressed in the Construction Execution Plan. As far as access to real time data gathered during construction, the Tunnel Agreement requires an Independent Quality Assurance Contractor who is unaffiliated with Enbridge to report to the [MSCA]. The Independent Quality Assurance Contractor will have access to construction documents, monthly progress reports, and the construction sites. Exhibit A-5, p. 13 ¶7.8. Risk management is important to both Enbridge and the [MSCA] and it is and will be continuously addressed within the framework created by Act 359 and the Tunnel Agreement.

7 Tr 578.

Mr. Dennis responded to Mr. Cooper's testimony regarding the heat treatment of girth welds, stating that:

> [f]or each project, Enbridge establishes a Welding Procedure Specification (WPS) that will require that the girth welds meet or exceed the strength, ductility, and hardness of the pipe used in the project. (See, Exhibit A-7, page 3 for the description of the pipe to be used this project.) This standard is established by Enbridge's own requirements, API [American Petroleum Institute] 1104 – "Welding of Pipelines and Related Facilities," and applicable provisions of ASME/ANSI B31.

[27] The State of Michigan filed a notice with the U.S. District Court in Grand Rapids, Michigan on November 30, 2021, stating that it was withdrawing its lawsuit against Enbridge from federal court so that the State could focus its efforts on a separate lawsuit that was filed in state court.

8 Tr 794.

Responding to Dr. Cleland, Mr. Dennis posited that the Replacement Project will not result in any release from the dual pipelines because the portal and shaft locations are safely offset from the dual pipelines. He explained that vibrations will be monitored and that the TBM supports the rock face during advancement through the tunnel. 8 Tr 795-796. Mr. Dennis averred that the expected vibrations at shallow depths will be well below industry limits. He also disagreed with Mr. Rodwan's assertions regarding untreated drilling fluid. Mr. Dennis opined that Mr. Rodwan is confusing inadvertent returns from HDD with the tunneling process proposed here, which does not rely on HDD. 8 Tr 797.

Mr. Eberth stated that he is the Director of Tribal Engagement, Public Affairs, Communication, and Sustainability for Enbridge. He provided rebuttal testimony on Enbridge's relations with First Nations People. Mr. Eberth stated that Enbridge seeks to reduce its operational impact on First Nations People while seeking to partner with them. He cited a 2017 shareholder resolution to implement an Indigenous Peoples Policy and to "integrate Indigenous rights sensitivities into our investment processes through early identification across our different types of investments." 7 Tr 770; Exhibit A-19. Mr. Eberth stated that Enbridge seeks to achieve Indigenous awareness training for all employees and contractors by the end of 2022. He asserted that in 2018, Enbridge attended a meeting with all of the 1836 Treaty Tribes and in 2019, Enbridge offered to meet with the Tribes. Mr. Eberth stated that the Tribes have participated in the regulatory process by filing comments with both EGLE and the Commission. He added that 13 Tribes have been invited to observe activities that are part of the USACE review process. *See*, 7 Tr 773; Exhibit A-23.

Jeffry Bennett testified that he is a Senior Air Quality Engineer for Enbridge. He responded to Mr. Erickson's testimony regarding the GHG emissions associated with transportation by rail, stating that:

> [a]ssuming rail transportation is available, my calculations show the GHG emissions from shipping crude oil by Line 5 by rail depending on the route would result in 0.9 to 1.9 million metric tons CO_2e per year. This represents a 4-to-9-fold increase in GHG emissions for rail transport compared to relocating Line 5's Straits crossing within a tunnel. Overall, my analysis shows that from a GHG emission standpoint only, the best alternative would be the no action alternative where the Dual Pipelines continued to be operated. The next best alternative would be to relocate Line 5's Straits crossing within a tunnel. The worst approach by far among these three alternatives would be the use of rail transport.

7 Tr 763. Mr. Bennett conceded that neither he nor Mr. Erickson determined whether rail transport is actually feasible. However, he stated that by his calculations, both northern and southern rail routes will result in significantly more GHG emissions than the Replacement Project. *See*, 7 Tr 763, p. 765; Exhibit A-26. Mr. Bennett disagreed with the notion of using the lifecycle GHG emissions for consideration in the analysis of whether rail transportation is an appropriate alternative, positing that the responsibility for GHG emissions should be placed on the causer of the emissions, such as the producer or end user.

Neil K. Earnest testified that he is a Professional Engineer and President of Muse, Stancil & Co. He responded to Mr. Erickson's testimony regarding GHG emissions associated with the use of rail transport. Mr. Earnest argued that Mr. Erickson's methodology is flawed and that Mr. Erickson made substantive mathematical errors in his calculations. He also questioned Mr. Erickson's assumption that Line 5 will close if the Replacement Project is not completed. *See*, 7 Tr 656-659.

Mr. Earnest asserted that Mr. Erickson failed to consider and analyze the pipeline takeaway capacity from North Dakota or any other region of the U.S. He also noted that the CER draft

report disagrees with Mr. Erickson's conclusions on takeaway capacity from Western Canada. In addition, Mr. Earnest opined that Mr. Erickson has no basis for his claims on higher Canadian crude oil supply costs or constraints caused by the failure to complete the Trans Mountain Expansion Project in Canada. *See*, 7 Tr 662-663.

Mr. Earnest argued that Mr. Erickson fails to demonstrate that a closure of Line 5 will force Bakken oil producers to shift from pipeline transportation to rail transportation; he noted that Line 5 is not a major route for oil producers. He further explained that Western Canadian oil producers "have pipeline transportation alternatives, and Mr. Erickson offers no evidence that the U.S. Bakken crude oil **producers** have pipeline transportation constraints. However, the U.S. and Canadian **refiners** that currently receive crude oil via Line 5 may have to use rail, to the extent that it is even possible, to transport crude oil to their refineries." 7 Tr 665 (emphasis in original). Mr. Earnest contended that the rail cost would be borne by the refiners and their customers, not the crude oil producers.

Mr. Earnest stated that Mr. Erickson's analysis regarding GHG emissions associated with rail transportation is unsupported and contains errors. Regarding the additional cost per barrel, Mr. Earnest argued that Mr. Erickson failed to include the one million barrels per day of light crude produced in Western Canada, and that, when the correct denominator is applied to the formula, the actual increased cost is $0.78 per barrel, not $6 per barrel. 7 Tr 667.

Next, Mr. Earnest averred that Mr. Erickson's calculation of the impact on crude oil production volume of the higher U.S. and Canadian crude oil supply cost is also in error. He stated that volume would be decreased (as a result of constraints caused by the loss of Line 5) by 80 b/d, not 286,000 b/d; he contended that this is a negligible change. Mr. Earnest stated that by correcting this error, Mr. Erickson's estimate of the impact to the global supply costs is

unsupported. He opined that in addition to the calculation error, Mr. Erickson's methodology has an arbitrary element that renders his conclusions invalid. 7 Tr 671.

Finally, Mr. Earnest asserted that Mr. Erickson's calculation of the increase in the global marginal crude oil supply price is in error because "the elasticity of supply (E_s) value and the data set used to calculate the elasticity of supply value are inappropriate." 7 Tr 672. He objected to the $53/bbl value selected by Mr. Erickson based on the CER draft report and noted that Mr. Erickson was aware that the EIA forecasted $73/bbl for 2030, which is the same time period. Mr. Earnest opined that the EIA forecast is more appropriate.

C. Surrebuttal Testimony

Mr. Dennis provided surrebuttal testimony in response to Mr. Kuprewicz's claims regarding the risk of explosion in the tunnel. In Mr. Dennis's opinion:

> There is no credible scenario that would result in an explosion within the tunnel. To have an explosion three events must occur: (1) there must be a release; (2) the release must be sufficient to create an explosive atmosphere; and (3) there must be an ignition source. While it is theoretically possible for these events to occur, the tunnel and replacement pipe segment have been designed and will be constructed, operated, inspected, and maintained to prevent the occurrence of these events, thereby effectively eliminating the possibility of any explosion.

8 Tr 799.

Elaborating on his claim that there is virtually no risk of explosion in the tunnel, Mr. Dennis averred that the risk of release of products from the replacement segment is less than 0.000001, or one in one million. 8 Tr 800. He explained that the risk of release is less than one in one million because the design and construction of the replacement pipe segment will exceed federal standards. In addition, he asserted that the pipeline will be subjected to multiple periodic inspections to allow for early identification and repair of pipe degradation. Moreover, Mr. Dennis stated that the location of the replacement pipe segment within a tunnel eliminates the risk of

excavation or third-party damage to the pipeline. Therefore, in his opinion, there is effectively no risk of release from the replacement pipe segment. Mr. Dennis contended that in the unlikely scenario that there is a release of products from the replacement pipe segment in the tunnel, the leak detection systems will detect the release and initiate shutdown procedures. *See*, 8 Tr 802-803.

Next, Mr. Dennis stated that all of the equipment in the tunnel will be Class 1, Division 2, which "are designed to not arc or spark and will not serve as an ignition source. Thus, even in the extremely unlikely scenario of a release[,] which then went undetected long enough to create an explosive atmosphere, there is still not an ignition source within the tunnel." 8 Tr 803. He also asserted that there will be procedures to prevent personnel from introducing an ignition source in the tunnel.

Finally, Mr. Dennis disputed Mr. Kuprewicz's claim that the replacement pipe segment will allow Enbridge to increase the shipping capacity of Line 5. Mr. Dennis stated that "the design decision to have the replacement pipe segment be 0.625 inches thick and be able to withstand 1440 psig is based on safety[;] it has nothing to do with increasing the overall capacity of Line 5. As a practical matter, one does not increase the capacity of an entire 645-mile pipeline by replacing 4-miles of it with thicker or larger diameter pipe." 8 Tr 804-805.

D. Sur-surrebuttal Testimony

Mr. Kuprewicz disputed Mr. Dennis's claim that the replacement segment will be "manufactured specifically for this project in a manner that exceeds API 5L Pipeline Specification Level," and, therefore, the risk of release from the pipeline is less than 0.000001. 10 Tr 1340 (quoting 8 Tr 800). Mr. Kuprewicz asserted that a pipeline that meets or exceeds this standard is still vulnerable to failure at its girth welds and associated heat affected zones. In support, he cited the Joint Industry Report, set forth in Exhibit BMC-43, and he noted that the report "identifies

some failures of X70 girth welds and their associated heat affected zones and found that the X70 pipeline has demonstrable issues of failure. The admission of this Joint Industry Report provides a credible warning about the specific grade of pipe to be used in the Tunnel Project that the Commission should consider." 10 Tr 1340.

E. Sur-sur-surrebuttal Testimony

In response to Mr. Kuprewicz's claim that there are failure issues associated with X70 pipe, Mr. Cooper asserted that he has no concerns about the specific grade of pipe proposed for the Replacement Project. He explained that:

> [t]he Joint Industry Report raises a concern that when longitudinal strain is placed on a pipeline where the girth welds, including adjacent heat-affected zones in the pipes, under-match the original longitudinal tensile properties of the pipes (i.e., the girth weld is weaker than the pipe), the strain will be focused in the girth weld and result in high local strain and an increased risk of failure at the under-matched girth weld. From a design perspective, longitudinal strains on the replacement pipe segment are expected to be small (well within elastic limits) relative to the strain capacity of a pipeline with overmatched girth welds.
>
> There are two main reasons why the issues raised in [the] Joint Industry Report should not be a concern for the replacement pipe segment within the tunnel. First, the replacement pipe segment in the tunnel will not experience the same longitudinal strain as a pipeline buried in the ground. A buried pipeline is subject to strain created by ground movement and the interaction of thermal or pressure-related expansion and contraction of the pipe with frictional forces between the pipe and surrounding soil. No such environment exists for the replacement pipe segment within the tunnel. The replacement pipe segment in the tunnel is not buried and is not subject to ground movement or frictional forces and the temperature in the tunnel will be relatively stable. When the replacement pipe segment does expand or contract due to temperature or pressure changes, it will be on supports with rollers which will allow the replacement pipe segment to expand or contract freely toward or from the expansion loops located outside the tunnel. This is an entirely different environment and does not impose the type of longitudinal stress and strain experienced by buried pipe.
>
> Second, as set forth in the Joint Industry Report (BMC-43), Enbridge states that it has already implemented the Joint Industry Report's recommendations intended to eliminate under-matched girth welds and minimize weld heat-affected zone softening. (Appendix B.)

> Since the replacement pipe segment will not be subject to the longitudinal strain of a buried pipeline and Enbridge states it has adopted the recommendations in the Joint Industry Report (BMC-43) with respect to under-matched girth welds and heat-affected zones, the Commission should not be concerned by the proposed use of Grade X70 pipe in the Tunnel Project.

12 Tr 1886-1887.

F. Initial Briefs

1. Enbridge Energy, Limited Partnership

Enbridge asserted that it has satisfied the Act 16 criteria required for Commission approval of the Replacement Project, namely: (1) there is a public need for the Replacement Project, (2) the replacement pipe segment is designed and routed in a reasonable manner, and (3) the construction of the replacement pipe segment will meet or exceed safety and engineering standards. Enbridge's initial brief, p. 1. Enbridge stated that it has also satisfied its MEPA obligations because the Replacement Project is not likely to pollute, impair, or destroy natural resources in Michigan. The company contended that even if the Replacement Project was likely to cause pollution, there are no feasible and prudent alternatives to eliminate the perceived environmental threat caused by the continued operation of the dual pipelines. *See*, MCL 324.1705.

Enbridge stated that in the April 21 order, p. 63, the Commission found that the three Act 16 criterion must be applied to the Replacement Project and not to Line 5 in its entirety. For the first prong of the Act 16 determination—demonstrated public need—Enbridge argued that by enacting Act 359 and executing the First, Second, and Third Agreements, the Michigan Legislature and the State of Michigan, respectively, determined that relocating the Line 5 Straits crossing into a State-owned utility tunnel would serve a public need. Specifically, Enbridge noted that according to the First Agreement, "the continued operation of Line 5 through the State of Michigan serves important public needs by providing substantial volumes of propane to meet the needs of Michigan

citizens, supporting businesses in Michigan, and transporting essential products, including Michigan-produced oil to refineries and manufacturers." Enbridge's initial brief, pp. 2-3 (quoting Exhibit A-8, p. 1); *see also*, Enbridge's initial brief, pp. 11-13. In addition, Enbridge contended that:

> [t]he NGL and crude volumes transported by Line 5 to [fuel] markets cannot be transported by other pipelines given the lack of available capacity on other pipelines. The [fuel] markets currently served by Line 5 will continue to require the volumes and types of light crude oil, light synthetic crude and NGLs transported by Line 5 long after the location of the replacement pipe segment within the utility tunnel.

Id., p. 4 (citing 7 Tr 757) (internal citations omitted). Enbridge asserted that according to the Second Agreement, the Replacement Project will meet the public need for NGLs and light crude oils in Michigan and "**can essentially eliminate the risk of adverse impacts that may result from a potential release from Line 5 at the Straits**." Enbridge's initial brief, p. 5 (citing Second Agreement, p. 4) (emphasis in original). Accordingly, Enbridge averred that the Michigan Legislature and the State of Michigan have determined that there is a public need for the Replacement Project.

Regarding the second prong of the Act 16 analysis, Enbridge contended that the replacement pipe segment is designed and routed in a reasonable manner. Beginning with design, Enbridge averred that the replacement pipe segment will meet or exceed all applicable PHMSA standards. Enbridge explained that the segment will be manufactured specifically for this project and will exceed API 5L Specification Level 2. Enbridge's initial brief, p. 17 (citing Exhibit A-14, pp. 133-178). In addition, Enbridge noted that the pipe wall thickness will be greater than what is required by applicable federal regulations. Enbridge also stated that the pipe segment is designed for a maximum operating pressure (MOP) of 1440 psig, whereas normal operating pressure is 480 psig. Enbridge's initial brief, p. 18 (citing 8 Tr 801). Enbridge posited that the increased MOP,

combined with installation of the automatic shutoff valves at both ends of the segment, "effectively eliminates the risk of a breach of the replacement pipe segment due to operations." Enbridge's initial brief, p. 18. Moreover, Enbridge noted that all pipeline appurtenances are located outside the tunnel and the segment will be subject to visual inspection within the tunnel. Enbridge asserted that because of these enhanced design factors, the risk of a release from the replacement pipe segment is one in a million (0.000001). Enbridge's initial brief, p. 19 (citing 8 Tr 802, 877, and 880-881). Enbridge contended that the Staff, MSCA, and PHMSA had no concerns with the safety of the replacement pipe segment. Enbridge's initial brief, p. 20 (citing 9 Tr 1240-1242, 12 Tr 1752-1755, and Exhibit S-26, p. 1).

Enbridge disputed Mr. Kuprewicz's claim that the grade X70 pipe, proposed for use in the Replacement Project, has had issues of failure. Enbridge's initial brief, p. 20 (citing 10 Tr 1340 and Exhibit BMC-43). Enbridge noted that Mr. Cooper, testifying on behalf of MSCA, points out that the replacement pipe segment will not be buried in the ground and thus will not experience the same longitudinal strains identified by Mr. Kuprewicz. Enbridge's initial brief, p. 21 (citing 12 Tr 1886-1887). Additionally, Enbridge stated that it has already adopted the recommendations in the Joint Industry Report, set forth in Exhibit BMC-43, that are intended to address this pressure-related concern.

Next, Enbridge asserted that the replacement pipe segment is routed in a reasonable manner, noting that the route was chosen by the DNR and is the shortest distance between the U.P. and the Lower Peninsula of Michigan. Enbridge contended that by placing the replacement pipe segment in a tunnel, the possibility of an anchor strike is eliminated and, in the unlikely case of a release, the tunnel will act as a secondary containment feature. Enbridge reiterated that the likelihood of a release was described in the Alternatives Analysis as "negligible, and un-quantifiably low."

Enbridge's initial brief, p. 22 (quoting Exhibit ELP-24, pp. 3-60). The company noted that this low risk of release is supported by the testimony of Dr. Mooney and Mr. Adams. Enbridge's initial brief, p. 22 (citing 9 Tr 1204 and 12 Tr 1811-1816).

Enbridge objected to Mr. Kuprewicz's testimony that there is a possibility of an explosion in the tunnel. The company argued that Mr. Kuprewicz "offers no quantification or likelihood of the risk of an explosion that might result in any hypothetical release impacting the Great Lakes." Enbridge's initial brief, p. 24. In addition, Enbridge asserted that Mr. Kuprewicz failed to indicate how the risk of a release from the tunnel compares to the risk of a release from the dual pipelines. In any event, Enbridge asserted that there is no credible scenario that would lead to an explosion in the tunnel and reiterated the explanation provided by Mr. Dennis. *See*, Enbridge's initial brief, p. 24 (quoting 8 Tr 799) (internal citations omitted). Enbridge also argued that the design, construction, inspection, and maintenance of the replacement pipe segment, along with the leak detection system, make an explosion extremely unlikely. Furthermore, the company explained that there are various procedures for manual and automatic shutdown of the pipeline based on the leak detection system, and Enbridge contended that there will be no ignition sources in the tunnel.

Enbridge disputed Mr. Kuprewicz's testimony that Class 1, Division 1 equipment and instrumentation should be required in the tunnel. Enbridge stated that, "[i]n making these assertions, Mr. Kuprewicz did not consult with the fire protection code, the state or national electric code, or an electric engineer. While Mr. Kuprewicz claims to be an expert with respect to pipeline safety, he admits he has never been involved in the design or construction of a utility tunnel." Enbridge's initial brief, p. 25, n. 19 (internal citations omitted). The company explained that there is nothing in the tunnel that would provide an ignition source. In addition, Enbridge contended that inspection and maintenance personnel will not create an ignition source in the

tunnel because personnel will be barred from entering the tunnel unless they undergo a permitting process that includes, at a minimum, issuance of a safe work permit, a plan for appropriate personal protective equipment and air monitoring, and the presence of a rescue team on standby, as well as several other safety measures.

For the third prong of the Act 16 analysis, Enbridge asserted that the replacement pipe segment will meet or exceed safety and engineering standards. The company noted that Mr. Cooper found Enbridge's installation plans to be technically sound and in compliance with applicable federal regulations. In addition, Enbridge stated that according to Dr. Mooney, if the tunnel is built to the Project Specifications, it will be safely constructed and meet industry standards. Furthermore, the company noted that Mr. Adams concluded that the tunnel design is state of the art for secondary containment. Enbridge's initial brief, pp. 28-29.

Enbridge argued that the parties who are opposing the Replacement Project have a different policy objective, namely, the shutdown of Line 5, which is beyond the scope of this proceeding and is contrary to the goal of providing greater protection for the Great Lakes. Enbridge contended that "[t]he Michigan Legislature through its enactment of Act 359 conclusively determined the need for the state-owned utility tunnel beneath the Straits . . . ." Enbridge's initial brief, p. 14. The company asserted that this proceeding cannot be used to second guess the determination of the Michigan Legislature and is limited to the question of whether the replacement pipe segment should be sited within the proposed tunnel.

Next, Enbridge averred that it performed the required MEPA analysis for the Replacement Project. The company contended that Exhibit A-12, which contains the EIR, and Exhibit A-12.1, which provides updates to the EIR, demonstrate that locating the replacement pipe segment within the proposed utility tunnel is not likely to have the effect of polluting, impairing, or destroying the

air, water, or other natural resources, or the public trust in these resources. Enbridge explained that there will be no permanent impact to groundwater, surface water, or lakes. Enbridge's initial brief, p. 31 (citing Exhibit A-12, pp. 11-12, 15). The company added that there are no expected impacts to geology, soils, terrestrial resources, or drinking water resources. Moreover, the company argued that the emissions associated with the Replacement Project are not likely to pollute, impair, or destroy natural resources "because Line 5's capacity will not be increased due to the project." Enbridge's initial brief, p. 33. As a result, the company asserted that the first step in the MEPA analysis is satisfied, and no further MEPA inquiry is required. Enbridge also argued that the result is the same even if the Commission considers construction of both the replacement pipe segment and the utility tunnel (rather than the replacement pipe segment alone). Enbridge's initial brief, p. 32 (citing Exhibit A-18, pp. 2, 6).

Enbridge stated that it expects that the Replacement Project will minorly impact wetlands; however, pursuant to the standard set forth in MEPA, the impact will not pollute, impair, or destroy the natural resource because the impact will be mitigated. The company explained that:

> [w]hile the Water Resource Permit allows Enbridge to place clean fill in up to 0.13 acre of wetlands, the planned mitigation will require Enbridge to: (a) place 1.3 (which is ten times the wetland impact) acres of Great Lakes coastal wetlands into a conservation easement, and (b) either construct a new 0.26 (which is two times the wetland impact) acres of coastal forested wetland or purchase 0.26 (which is two times the wetland impact) wetland mitigation bank credits. (Exhibit A-17, pp. 7-8.) Even if one considers the impacts caused by the construction of the tunnel, which are unnecessary for the Commission's MEPA review, the standard imposed by MEPA is satisfied.

Enbridge's initial brief, pp. 32-33 (citing to *Friends of Crystal River v Kuras Properties*, 218 Mich App 457, 470-471; 554 NW2d 328 (1996) (finding no impairment to natural resources where wetlands are replaced by "almost twice as many acres of mitigation wetlands")).

Enbridge stated that if the Commission continues to step two of the MEPA analysis, there are no feasible and prudent alternatives to the Replacement Project consistent with the public health, safety, and welfare. The company argued that in the April 21 order, "the Commission determined that the public need for Line 5 has been established and that need is not subject to dispute in this proceeding." Enbridge's initial brief, p. 33 (citing April 21 order, p. 63). In addition, the company reiterated that through the enactment of Act 359 and the execution of various agreements, the Replacement Project was selected as the most feasible and prudent option. Enbridge asserted that, "[i]f the Commission denies Enbridge's Application, then the Dual Pipelines will continue to operate in their current location, because there is a need for Line 5 and there is no other feasible or prudent alternative to its current Straits crossing." Enbridge's initial brief, p. 34.

In response to Dr. Stanton's claim that a voluntary shutdown of Line 5 is a feasible and prudent alternative to the Replacement Project, Enbridge contended that this option is not before the Commission in the company's application. In any event, Enbridge noted that "Line 5 provides critical energy transportation services for the State and the surrounding region." Enbridge's initial brief, p. 34 (citing 7 Tr 755-756). Enbridge maintained that the shutdown of Line 5 would not be consistent with the public health, safety, and welfare.

Enbridge noted that in the April 21 order, "the Commission stated it wished to consider the GHG impacts resulting from the potential resumption of service through the replacement pipe segment compared to other alternatives in case there was a shutdown of the Dual Pipelines." Enbridge's initial brief, p. 35 (citing April 21 order, p. 67). The company contended that any temporary shutdown of Line 5 is unlikely. Enbridge pointed out that the legal landscape of this case has changed significantly since the issuance of the April 21 order, namely, the State of Michigan's civil action to enforce the Notice has been dismissed and a federal court has

determined that the issues should be litigated in federal court, and the Government of Canada has invoked formal treaty dispute resolution provisions. Therefore, Enbridge requested that the Commission "take the changed circumstances into account in weighing the GHG impact evidence and acknowledge that a closure of Line 5 will not occur." Enbridge's initial brief, p. 36.

In any case, according to Enbridge, other fuel transportation methods produce more GHGs than Line 5. The company noted that Mr. Bennett testified that shipping the same amount of crude oil by rail would result in a four-to-nine-fold increase in GHG emissions compared to shipment on Line 5. *Id*. (citing 7 Tr 763-764). Enbridge also asserted that there is no other pipeline transportation available to ship the volume of product currently shipped on Line 5. Enbridge's initial brief, p. 36 (citing 7 Tr 757; 12 Tr 1775, 1790, 1801).

Enbridge disagreed that a closure of Line 5 will ultimately reduce demand for the fuel products transported on the pipeline; rather, the company asserted that demand will remain static and prices will increase modestly. Enbridge's initial brief, pp. 38-39 (citing 7 Tr 660, 666-667; 12 Tr 1779). Enbridge explained that even if Line 5 were closed and there was reduced production in Western Canada or the Bakken region, those fuel products could be easily replaced by other global producers such as Russia and Saudi Arabia.

2. The Commission Staff

In its initial brief, the Staff stated that "[t]he possibility that the Dual Pipelines could continue to operate if Enbridge's application is denied requires a candid assessment of the risk of an oil spill from the Dual Pipelines and a plan for an alternative that minimizes the risk of a spill as much as possible. This is the approach that Staff took when evaluating Enbridge's application." Staff's initial brief, p. 2. The Staff recognized that, currently, an anchor strike to the dual pipelines poses a risk and requires the implementation of numerous measures to mitigate that risk.

The Staff stated that it analyzed the comparative risk of operating the dual pipelines with the Replacement Project, evaluated the Act 16 criterion, and considered the environmental impact of the Replacement Project. The Staff concluded that the Replacement Project meets the public need, is in the public interest, and "is the best option out of the alternatives." Staff's initial brief, p. 4 (quoting 12 Tr 1736). Accordingly, the Staff recommended that the Commission approve Enbridge's Act 16 application subject to several conditions.

To begin, the Staff stated that pursuant to ED 2019-17, State of Michigan agencies must "implement a process for engaging in consultation with Michigan's 12 federally recognized Tribes," and ED 2019-17 "requires that the consultation process be used before a department or agency makes any decision that may affect one or more of the Tribes." Staff's initial brief, p. 36. The Staff noted that direct communication between the Tribes and the Commissioners is impermissible under MCL 24.282 in this contested case. Thus, to implement the consultation process, the Commission promulgated the Guide for Involvement by Tribal Governments in Infrastructure Siting Cases at the Michigan Public Service Commission (Involvement Guide), which appears in the record as Exhibit S-30, pp. 5-10. The Staff contended that consistent with the Involvement Guide, it made extensive efforts to seek input from the Tribes and logged numerous meetings and communications as set forth in Exhibits S-2 and S-3. The Staff stated that the purpose of the consultation process in the Involvement Guide was to "facilitate meaningful and mutually beneficial exchanges to inform Staff's direct testimony." Staff's initial brief, p. 38. The Staff observed that the Involvement Guide describes three potential methods for involvement in cases: formal intervention, consultation with the Staff, and public comment. *Id.*, p. 40 (citing Exhibit S-30, pp. 8-10). The Staff noted that the Tribes chose differing routes for involvement, which lead to all three methods being used.

The Staff disagreed with Bay Mills' assertion that in written feedback, the Staff failed to explain how the Tribes' input was considered. The Staff noted that it issued a request for information and a memo describing how the Staff considered the concerns raised by the Tribes. *See*, Exhibits BMC-46 and S-25. The Staff contended that both intervening and non-intervening Tribes were given many opportunities to provide input and explain their concerns. The Staff noted that ED 2019-17 allows for disagreement between tribes and agencies and does not bar the agency from acting despite disagreement. Staff's initial brief, p. 43 (citing ED 2019-17, ¶ 6).

The Staff also disagreed with Bay Mills' assertion that Mr. Yee's testimony and memo are unrepresentative of the Tribes' views and concerns. The Staff stated that:

> [b]eing a party in the case, Bay Mills had the opportunity to present its own concerns about the project without having to rely on an expert retained by Staff. Correspondingly, Staff did not set out to present all of Bay Mills' concerns to the Commission with the assumption that Bay Mills was much better suited to make these arguments on its own. . . . Mr. Yee's recommendations were not averse to the Tribal Government's concerns or even oppositional. Mr. Yee recommended that the Commission "[c]onsider coordination with SHPO on recommended cultural resources" and that it "also monitor the conclusions of a Section 106 review process . . . for these upland areas and reassess as needed." (Exhibit S-25, pp 2–4.)

Staff's initial brief, pp. 43-44. The Staff contended that, although the goals of each party in the consultation and litigation process are not always in harmony, in this case, the objectives of ED 2019-17 were satisfied, if not surpassed. However, if Bay Mills feels that the final requirement of ED 2019-17 (written follow-up) was not satisfied, the Staff asserted that the Commission's final order "may ultimately do more to satisfy this requirement." Staff's initial brief, p. 47.

For the first prong of the Act 16 analysis, the Staff averred that there is a clear public need to replace the dual pipelines. In the Staff's opinion, the Replacement Project will significantly reduce the risk of a release of NGLs and light crude oil into the Straits from Line 5. The Staff

stated that it "is not taking a position as to whether continued operation of the Dual Pipelines presents an acceptable or unacceptable level of risk to the State. Rather, Staff is comparing the risk of continued operation of the Dual Pipelines to that of the replacement project proposed." Staff's initial brief, p. 112. The Staff observed that there is no certainty regarding how long the dual pipelines will operate, and this uncertainty leads to "perpetual and unnecessary risk for an undetermined length of time into the future." *Id.*

Regarding the second prong of the Act 16 analysis, the Staff stated that "[t]he route and location of the replacement pipeline is heavily constrained by the existing onshore Line 5 segments, the tunnel easement, geotechnical considerations, and the planned tunnel alignment." *Id.*, p. 49. Because of these factors, the Staff contended that the proposed location for the Replacement Project is established and not subject to serious debate. In the Staff's opinion:

> the only routing determinations to be made in this case concern the "tie-in" segments that connect the replacement pipeline to the existing Line 5 segments on the north and south shores of the Straits. With this in mind, the goal should be to use existing facilities, previously disturbed land, and rights of way to the extent practicable to develop a reasonable route for these segments.

Staff's initial brief, p. 50. The Staff asserted that Enbridge has shown that its proposed tie-in segments are reasonable and meet the required criteria, referencing Exhibit A-12.1 and 7 Tr 556-563.

Next, the Staff noted that the pipeline construction work-space is contained within areas that are already disturbed by tunnel construction and, therefore, Enbridge needs no additional land rights. The Staff stated that:

> Bay Mills appears to believe that any route crossing through or under the Straits of Mackinac would be unreasonable. Thus, Staff views Bay Mills' objection to the route as opposition to the tunnel and replacement project as a whole rather than an objection to the specific route proposed. Bay Mills did not provide any route variations or mitigative measures for the Commission to consider.

Staff's initial brief, pp. 51-52. The Staff asserted that the proposed crossing location is appropriate and recommended that the Commission approve the route. *Id.*, p. 52 (citing 12 Tr 1869).

The Staff also addressed the design component and safety standard under the third prong of the Act 16 analysis. The Staff asserted that the Replacement Project is designed to meet or exceed relevant safety standards, and going forward, Enbridge should incorporate the Staff's recommendations for additional safety measures. The Staff explained that its safety recommendations were made in consultation with PHMSA, which retains jurisdiction over the safety and inspection of interstate pipeline facilities. Staff's initial brief, p. 54 (citing 12 Tr 1751-1754).

The Staff objected to Bay Mills' claim that the Staff simply sanctioned the Replacement Project because PHMSA stated that there are "no noncompliance issues identified with the proposed design, construction and testing of the replacement segment." Staff's initial brief, p. 55 (citing Exhibit S-26, p. 1). The Staff responded that it:

> has independently recommended that the Commission require the Company to exceed minimum pipeline safety requirements. The design is not likely to be finalized for the Commission's review and approval, and Staff's recommendations enhance the safety of the project with the understanding that ongoing and future work will ensure that the final designs will meet and exceed the requirements of the regulations.

Staff's initial brief, p. 55.

Additionally, the Staff recommended improvements to Enbridge's proposed welding procedures. The Staff stated that:

> for all mainline girth welds, the Company "should be required to develop low-hydrogen welding procedures and qualify them per the requirements found in 49 CFR 195.214." (12 TR 1757.) Witness Chislea further recommended that "the procedures should include pre-heat requirements prior to starting welding and inter-pass temperature requirements" and that "the non-destructive testing of the mainline girth welds should include automatic phased array ultrasonic testing

> methods." (12 TR 1758.) If the above recommendations are met, then no further post heat-treatment should be required. (*Id*.)

Staff's initial brief, pp. 56-57; *see also*, 9 Tr 1247. The Staff contended that if these recommendations are adopted, they will address Bay Mills' concerns regarding girth welds and welding procedures. The Staff acknowledged that these specifications exceed the minimum requirements under federal regulations and argued that they will ensure quality welds in both the deposited material and in the heat-affected zones.

In response to Bay Mills' concern regarding X70 girth weld failures, the Staff asserted that its recommendations will remedy this potential risk and that no further measures are required. The Staff stated that it:

> still firmly recommends that the Company address Staff's pre-filed recommendation that low-hydrogen welding procedures are in place for all mainline girth welds; that welding procedures require both preheat and inter-pass temperature requirements; and that the mainline girth welds are nondestructively tested using automatic phased array ultrasonic testing methods.

Staff's initial brief, p. 59. The Staff stated that it expects to continue to coordinate with PHMSA and will make further recommendations where needed.

The Staff argued that the design of the Replacement Project will reduce the risk of a spill of hazardous liquids into the Straits because the tunnel will provide effective secondary containment. The Staff explained that:

> Staff witness Mr. Adams testified that several factors would limit a potential release from the tunnel; in "order of their performance of what prevents materials from escaping the tunnel, [these factors] are external hydrostatic pressures, gasketed segmental lining, annular grout, rock cover, and soil cover." (12 TR 1816.) Thus, the likelihood of a release must overcome the external hydrostatic pressures and gasketed segmental lining as the best preventive factors in the tunnel design. Mr. Adams reports that this "combination of factors . . . results in a very low probability of a spill escaping from the tunnel." (12 TR 1817.) As such, Staff does not have a further recommendation to the tunnel design to improve tunnel integrity or the secondary containment characteristics.

Staff's initial brief, pp. 61-62.

The Staff stated that although Bay Mills claims that there is a risk of explosion in the tunnel, Bay Mills does not quantify the risk of an explosion that could damage the tunnel. In any event, the Staff contended that the risk of explosion has been mitigated to an acceptably low level and that the Replacement Project presents a lower likelihood of a release reaching the Straits compared to the dual pipelines. And contrary to Bay Mills' argument that the Replacement Project will allow Enbridge to increase the volume on Line 5, the Staff argued that MSCA provided evidence that "the project will have 'very little influence on the overall transportation capacity of Line 5.'" *Id.*, p. 63 (quoting 9 Tr 1245). In addition, the Staff asserted that the Replacement Project will not increase the capacity of Line 5 "in any substantive way that would cause safety concerns or change Staff's evaluation of the risk of release or the risk of a serious explosion." Staff's initial brief, p. 63.

The Staff also agreed with Enbridge that the design of the replacement pipe segment, the pipeline material, and the tunnel reduce the likelihood of an explosion, as do the leak detection systems, which consist of both the CPM and the external leak detection system (which relies on gas monitors and liquid hydrocarbon detection). The Staff noted that 27 detectors will be located throughout the tunnel and a ventilation system will be installed. The Staff asserted that the leak detectors will be appropriately placed at low points in the tunnel to detect heavier-than-air vapors. The Staff concluded that:

> [b]ased on all the above, it is extraordinarily unlikely that there will be an explosion in the tunnel resulting in product leaking into the Straits. Further, at this time, there are no additional mitigative measures for pipe material, gas and leak detection, or electrical equipment requirements that would further substantively reduce this likelihood. Staff fully intends to continue evaluating the risk of such a scenario in future discussions with Enbridge, the [MSCA], and PHMSA as it relates to the

> construction and design of the project, and Staff will make further recommendations in those discussions as needed.

Staff's initial brief, p. 69.

Turning to the 10 potential environmental impairments identified by Staff witness Mooney in her testimony at 12 Tr 1849-1850, the Staff asserted that these potential impairments may be mitigated or minimized. As an initial matter, the Staff reiterated that its MEPA review is intended to complement, not replace, the environmental reviews performed by other agencies. In addition, the Staff noted that some potential environmental impairments and several concerns identified by intervening parties will be addressed through the permitting process performed by other agencies. *See*, Staff's initial brief, pp. 71-74. The Staff asserted that although there may be potential environmental impairments, no feasible and prudent alternatives to the Replacement Project have been identified that would more effectively promote the public health, safety, and welfare. *See*, Exhibits A-8 and A-9.

Regarding environmental impairments that may not be addressed by other agencies' permitting processes, the Staff stated that these "[o]ther potential impairments should be addressed when the Company finalizes its mitigation plans, which should be specific enough to minimize the environmental impacts." Staff's initial brief, p. 75. Specifically, the Staff recommended that Enbridge include additional details in its final environmental mitigation plan showing an evaluation of the impact of construction noise, increased dust, and increased light. Regarding impacts to surface water associated with construction equipment traffic and the five potential impacts to groundwater from construction identified by Ms. Mooney, the Staff pointed to Enbridge's evidence describing mitigation measures and the minor nature of the potential impacts. The Staff also noted Enbridge's spill mitigation plan for addressing the impact of hazardous materials on surface soils, vegetation, and surface water. *Id.*, pp. 78-82. The Staff stated that

"with the understanding that the Company will finalize its impairment mitigation plans to satisfy all local, state, and federal permitting requirements and to address the potential environmental impairments from construction discussed above," the Staff recommended approval of the Replacement Project. *Id.*, pp. 85-86.

In the Staff's opinion, the GHG emissions associated with construction of the tunnel are typical for a project of this size and scope. The Staff asserted that using the Greenhouse Gas Protocol standards, it is appropriate to consider Scope 1 and Scope 2 emissions from construction. *Id.*, p. 82 (citing 9 Tr 1042 and 12 Tr 1872, 1877). The Staff explained that "[g]enerally, Scope 1 activities for this project included construction of the tunnel, fuel used by trucks and vehicles, and land clearing activities, while Scope 2 activities included electricity used by the tunnel boring machine and other electric tools and equipment. (12 TR 1877.)" Staff's initial brief, p. 83. The Staff contended that Mr. Erickson's Scope 2 emissions estimates should be given little weight, if any, because he used emission factors for non-baseload electricity, which is contrary to the guidance provided by the EPA, and he included emissions associated with purchased concrete and steel. The Staff asserted that the Commission should rely on the estimates produced by Mr. Ponebshek.

Although construction of the Replacement Project is expected to result in temporary additional GHG emissions, the Staff contended that pursuant to MEPA, there are no alternatives that outweigh the benefits of the Replacement Project. The Staff explained that:

> the only feasible alternative discussed by other parties in this case (the Open Cut with Secondary Containment approach) would likely cause more harm to the environment. (12 TR 1870.) All construction projects come with some associated impairments, including GHG emissions, and this project is no different. But the emissions from Enbridge's proposed utility tunnel, while real, will cause far less environmental harm than the harm the project is intended to mitigate (i.e., a potential spill from the Dual Pipelines). In other words, the project's risk-reducing benefits outweigh the impairments from construction.

Staff's initial brief, p. 86. Additionally, the Staff argued that the Replacement Project would reduce or eliminate some of the GHG emissions associated with the current operation of the dual pipelines, such as patrolling the Straits to monitor vessel traffic and periodic underwater visual inspection of the dual pipelines' exterior and spans. The Staff stated that, "[a]lthough the GHG emissions associated with these activities were not calculated, it's reasonable to conclude that GHG emissions would be reduced if these activities ceased. This reduction would help offset the increased GHG emissions caused by construction and operation of the tunnel." *Id.*

Next, the Staff objected to the no-action alternative described by Dr. Stanton, noting that she assumes that the dual pipelines will be shut down, which has not occurred. The Staff argued that the dual pipelines are not likely to be shut down, even if the Replacement Project is not approved, because the State of Michigan's lawsuit to enforce the Notice was voluntarily dismissed, Enbridge's federal lawsuit is still pending in federal court, and Canada has invoked the dispute resolution process under the 1977 Transit Treaty between the U.S. and Canada. *See*, Staff's initial brief, p. 89.

The Staff also argued that a true no-action scenario—continued operation of the dual pipelines—is not a prudent alternative to the Replacement Project. The Staff asserted that the status quo leaves the dual pipelines in their current position, which is vulnerable to anchor strikes, as was illustrated by the damage that occurred in April 2018 and June 2020. Staff's initial brief, p. 91 (citing 12 Tr 1724-1725). The Staff noted that any rupture to the dual pipelines results in a direct release of NGLs and light crude oils into the waters of the Straits.

The Staff disagreed with Mr. Erickson's assertion that a one cent per gallon increase to the price of gasoline would result in less petroleum being consumed worldwide and less overall GHG emissions. *See*, Staff's initial brief, p. 99 (citing 12 Tr 1801, 1805; 7 Tr 661, 667, 672).

Accordingly, the Staff asserted that Mr. Erickson failed to convincingly demonstrate that the shutdown of Line 5 would result in "product switching or a meaningful reduction in GHG emissions due to the cost and impracticability of such changes." Staff's initial brief, p. 102. Moreover, the Staff contended that alternative transportation methods, such as rail and truck, will produce more GHG emissions than the use of Line 5 for the same volume of product. *Id.*, pp. 103-104 (citing 12 Tr 1790-1791).

The Staff further argued that at this time, transitioning Michigan customers away from propane for home heating is not a feasible plan. *See*, Staff's initial brief, p. 105 (citing 12 Tr 1781-1782). In addition, the Staff asserted that electrification and heat pumps currently are not economically feasible alternatives to propane for most Michigan customers who depend on propane for home heating. *See*, Staff's initial brief, pp. 106-108 (citing 7 Tr 971; 12 Tr 1782-1783, 1791). Furthermore, the Staff observed that gas-powered vehicles and the need for motor fuels "will continue to play a large role in the transportation landscape for some time." Staff's initial brief, p. 109.

Regarding the issue of the Replacement Project's impact on cultural resources, the Staff noted that SHPO has acknowledged that the Straits are an area of cultural and historical importance. *Id.*, pp. 113-115 (citing 12 Tr 1668-1669); *see also*, Exhibit S-25. The Staff urged the Commission to continue to monitor developments of the SHPO process and the USACE Clean Water Act Section 404 Nationwide Permit program process, and to consider any potential impacts to cultural and archeological resources within the context of these reviews. *See*, Staff's initial brief, pp. 116-117.

Finally, the Staff objected to Bay Mills' claims that the Replacement Project will accelerate climate change, harm Tribal resources, and damage the local environment because, in the Staff's

opinion, Bay Mills provided generalized concerns and failed to quantify the alleged harm. *Id.*, pp. 122-125. The Staff stated that "the concerns regarding the tribal resources discussed above, though culturally and environmentally significant, should not serve as a basis for denial of the application." Staff's initial brief, pp. 123-124.

In conclusion, the Staff recommended that the Commission approve Enbridge's application subject to the Staff's conditions set forth above. Staff's initial brief, pp. 125-126.

3. The Michigan Propane Gas Association and the National Propane Gas Association

Similar to Enbridge, the Associations argued that, pursuant to the Commission's determination in the April 21 order, the question of public need under the first prong of the Act 16 analysis applies solely to the Replacement Project and not to Line 5 as a whole. *See,* Associations' initial brief, p. 9; *see also*, April 21 order, p. 63. And, like Enbridge, the Associations asserted that the Michigan Legislature and the State of Michigan conclusively determined that there is a public need for the Replacement Project by passing Act 359 and executing the First, Second, and Third Agreements, respectively. Associations' initial brief, p. 10 (citing 7 Tr 565; Exhibit A-8, p. 1; Exhibit A-1, p. 4; and Exhibit A-10, p. 1). In addition, the Associations averred that the DNR recognized the public need for the Replacement Project by granting a new easement for the tunnel to MSCA. Furthermore, the Associations noted that in the NREPA Parts 303 and 325 permits, "EGLE 'considered the concerns raised by comments that this project is in the public interest, and . . . EGLE has determined that . . . the project is in the public interest.'" Associations' initial brief, p. 10 (quoting Exhibit A-18, p. 8). The Associations also noted that the Staff concluded that the Replacement Project "serves a public need, is in the public interest, and is the best option out of the alternatives considered." Associations' initial brief, p. 12 (citing 12 Tr 1736).

Additionally, the Associations contended that the Replacement Project serves a public need because it will alleviate an environmental concern relating to the dual pipelines and will provide greater protection to the Great Lakes and the public. The Associations noted that according to witness testimony and the Alternatives Analysis, if the Replacement Project is constructed, the risk of release from the tunnel would be "negligible, and un-quantifiably low." Associations' initial brief, p. 11 (quoting Exhibit ELP-24, pp. 3-60); *see also*, 9 Tr 1204; Exhibit A-9, Appendix 7, p. 88.

For the second prong of the Act 16 analysis, the Associations asserted that the replacement pipe segment is designed and routed in a reasonable manner and will meet or exceed PHMSA regulations and standards. *See*, Associations' initial brief, p. 13; *see also*, 8 Tr 800; Exhibit A-13, p. 12; Exhibit A-14, pp. 133-178; Exhibit S-26, p. 1. The Associations also posited that the route is reasonable because it is the shortest distance between the two peninsulas. Associations' initial brief, p. 13 (citing 7 Tr 584; 8 Tr 788; and Exhibits A-6 and A-13).

Regarding the third prong of the Act 16 analysis, the Associations averred that the Replacement Project meets or exceeds applicable safety and engineering standards as demonstrated by the testimony of MSCA witness Mr. Cooper. Associations' initial brief, pp. 13-14.

Regarding the required MEPA analysis, the Associations asserted that the Commission's MEPA review applies solely to the replacement pipe segment and not to the construction of the tunnel. The Associations argued that the record demonstrates that the replacement pipe segment will not pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources. Associations' initial brief, p. 15. In addition, the Associations noted that the EIR concluded that there are no anticipated impacts on geology, soils, terrestrial resources, air

emissions, groundwater, or drinking water. *Id*. (citing Exhibit A-12, pp. 11-15, 18). Thus, in the Associations' opinion, the MEPA analysis should end here.

However, if the Commission were to consider the impacts of the tunnel construction, the Associations contended that there will be no pollution, impairment, or destruction of natural resources. *See*, Associations' initial brief, pp. 16-17. The Associations further asserted that because the Replacement Project will not increase the capacity of Line 5 or alter the nature of its transportation services, GHG emissions will not pollute, impair, or destroy natural resources. Associations' initial brief, p. 18 (citing 7 Tr 564, 757). Moreover, the Associations argued that:

> it would be inappropriate to compare the GHG emissions from the proposed [Replacement] Project to a scenario where the dual pipelines are non-operational. The State of Michigan has abandoned its effort to enforce the Notice and the Commission has already ruled that Enbridge has the authority under the 1953 Order to continue to operate Line 5. (7 Tr. 576; Order, at 60.) While the Commission in April of 2021 was "unwilling to exclude evidence under MEPA that compares the pollution, impairment, or destruction attributable to an operating 4-mile pipeline segment in the Straits with nonoperational 4-mile dual pipeline segments," that decision was premised on "uncertainty" created by the Notice and the possibility that the State would "succeed[ ] in its action to enforce the Notice." (Order, at 67.) But much has taken place since the Commission's decision, and the facts simply do not support a comparison of the proposed Project to a non-operational Line 5.

Associations' initial brief, p. 18.

The Associations asserted that there is no feasible and prudent alternative to the Replacement Project that is consistent with the public health, safety, and welfare. Specifically, the Associations argued that the no-action alternative, which involves Commission rejection of the Replacement Project, is not feasible or prudent. The Associations explained that the litigation regarding the Notice has been dismissed and "Enbridge has the right to continue to operate the [dual pipelines] under the authority granted by the Commission in 1953." Associations' initial brief, p. 20. Therefore, the Associations contended that if the Replacement Project is not approved, the dual

pipelines will continue to operate and the Great Lakes will not benefit from the tunnel project as a means of secondary containment in the event of a release from the Straits Line 5 segment.

The Associations also rejected Dr. Stanton's conclusion that the state's energy needs can be met through electrification. The Associations asserted that Line 5 provides a critical supply of affordable propane for Michigan residents that cannot be met with existing rail infrastructure or truck transport. Associations' initial brief, p. 22. In addition, the Associations averred that electric heat pumps are not a feasible alternative for heating needs because installation costs are high, Michigan has more than twice the heating load than the national average, and the price of electricity in Michigan "is more expensive, with electricity prices in the Upper Peninsula among the highest in the lower-48 states." *Id*., p. 23.

4. Michigan Laborers' District Council

MLDC requested that the Commission approve Enbridge's application for the Replacement Project. To begin, MLDC explained that it represents seven local labor unions and that Line 5 provides direct and indirect employment to MLDC members. MLDC asserted that the Replacement Project is expected to generate almost two million labor hours for approximately 200 Michigan workers over a multi-year period in the U.P. and the northern Lower Peninsula, along with hundreds of maintenance jobs after completion. MLDC's initial brief, p. 3. MLDC averred that the Replacement Project will also provide the union with the ability to recruit new talent because of these long-term jobs. In addition, MLDC stated that the Replacement Project "will positively impact Michigan and regional and local governments, that will benefit from enhanced taxes, broadened employment, pension benefits and healthcare earned by private-sector labor, and an expanded trained and experienced workforce that will be available for future government road and infrastructure construction and maintenance." *Id*., p. 4. Moreover, MLDC

argued that Line 5 benefits Michigan businesses and residents because a substantial amount of Line 5 product is sent back to Michigan to meet business and residential energy needs. *Id.*, p. 5. Finally, MLDC contended that the Replacement Project should be approved because it will eliminate the risk of an anchor strike to the dual pipelines and will improve environmental safety.

5. Bay Mills Indian Community

Bay Mills[28] asserted that there are three reasons for the Commission to deny Enbridge's application: (1) the route is unreasonable, (2) Enbridge has failed to demonstrate that the design of the pipeline is reasonable, and (3) the Replacement Project fails the MEPA analysis.

Beginning with the route, Bay Mills argued that the Straits area is a traditional cultural landscape and specific historical sites will be negatively impacted by the Replacement Project. Bay Mills averred that no party disputed that the Straits are of deep spiritual and cultural significance as the center of the Tribal Nations' creation story and a place of treaty-protected fishing rights. In addition, Bay Mills stated that SHPO has recognized that the Straits area "is sensitive for the presence of terrestrial and bottomland archeological sites . . . ." Bay Mills' initial brief, p. 15 (quoting Exhibit BMC-40, p. 1). Bay Mills contended that the Replacement Project will degrade the integrity and the values associated with this cultural landscape and for this reason alone the Commission should find the route to be unreasonable.

Bay Mills asserted that the Straits area contains 141 recorded archeological sites, including culturally significant village and burial sites, and that SHPO has stated that there are likely to be more. Bay Mills' initial brief, p. 16 (citing Confidential Exhibit BMC-34, and Exhibit BMC-40, p. 1). Bay Mills stated that:

> [c]onstruction activities and disturbances on and near Point La Barbe, including construction of proposed outfalls, operation of the tunnel boring machine, and

[28] In its initial brief, Bay Mills is joined by the GTBOC, LTBB, and NHBP.

> excavation of a large retrieval shaft for the tunnel boring machine, will disturb and degrade the cultural values associated with particular sites. One such site is a prehistoric burial mound, recorded in the SHPO files as 20MK15, that is mapped near the [Replacement] Project area and within the limits of disturbance.

Bay Mills' initial brief, p. 17 (citing Confidential Exhibit BMC-42, pp. 10 and 21, and Confidential Exhibit BMC-34, p. 5). Bay Mills contended that similar disturbances will occur on McGulpin Point, arguing that the vibrations from the massive TBM may cause damage to cultural and archeological sites around the work area. Bay Mills asserted that Enbridge has failed to properly mitigate this risk because there is no plan for the company to adhere to a vibratory limit that would protect these sensitive structures. Finally, Bay Mills averred that the route is unreasonable because Enbridge has not completed the necessary investigation of the cultural and historical resources that may be affected by the Replacement Project. Bay Mills maintained that these investigations are ongoing and incomplete. Bay Mills' initial brief, p. 19 (citing 7 Tr 625; Exhibit BMC-40, p. 1; and Exhibit BMC-41).

Next, Bay Mills argued that the design of the pipeline and tunnel is unreasonable because it is hazardous and untested. Bay Mills stated that:

> Enbridge plans to run a pipeline of liquid propane and crude oil, two highly volatile and flammable substances, through an enclosed underground tunnel. It is undisputed that this type of project has never been implemented anywhere else in the world. And for good reason. What is unique—and potentially catastrophic—about the Proposed Project is that it includes a tunnel where the three necessary elements for an explosion have the potential to be present at the same time: (1) a failure of the pipeline resulting in a hydrocarbon release, (2) that forms a heavier than air vapor cloud, and (3) that is ignited by a source of electricity.

Bay Mills' initial brief, p. 20 (citing 10 Tr 1327-1329, 8 Tr 803-807). Bay Mills asserted that a failure of the X70 pipe selected by Enbridge could lead to an explosion that damages the tunnel which, in turn, could lead to a release of Line 5 products into the Straits.

Bay Mills contended that the X70 pipe that is proposed for use in the Replacement Project has a demonstrated risk of failure at girth welds or heat affected zones. Bay Mills' initial brief, p. 20 (citing 10 Tr 1339-1340 and Exhibit BMC-43, pp. 11-14). Bay Mills asserted that the X70 pipe carries this risk of failure even where all applicable safety standards have been met. *See*, Bay Mills' initial brief, pp. 23-24 (citing 10 Tr 1336). In addition, Bay Mills stated that the fact that the pipeline will not be buried is irrelevant, explaining that "[t]he proposed design anchors the pipeline in the middle of the tunnel and uses rollers to allow for movement on either side. The movement will create additional stress on the girth welds and heat affected zones. And, as the [Joint Industry Report] recognizes, stress on the girth welds and heat affected zones leads to failure." Bay Mills' initial brief, p. 25.

Bay Mills argued that Enbridge's calculation of 0.000001 chance of an explosion in the tunnel and release of Line 5 products into the Straits is not credible or verified. Bay Mills stated that the "[assignment of] a probability to a risk through a Quantitative Risk Analysis ('QRA') is not utilized in the United States on pipeline projects, nor is it even defined in federal regulations." Bay Mills' initial brief, p. 25 (citing 10 Tr 1404-1405). Bay Mills contended that Enbridge provided no evidence to support its calculation and that Enbridge's witness, Mr. Dennis, "could not testify who calculated the number, when it was calculated, or crucially, what data points or equations were used to determine the probability." Bay Mills' initial brief, p. 25 (citing 8 Tr 812-818). Bay Mills asserted that the record is devoid of evidence to assist the Commission in confirming or refuting the credibility of the calculation.

Furthermore, Bay Mills posited that the design of the Replacement Project is unreasonable because it "lacks independency, meaning that each aspect of the design is linked to a common failure—a hydrocarbon release that produces a heavier than air vapor cloud. Multiple design

features within the Tunnel Project are all vulnerable to this same failure and therefore the design fails to provide independent, multi-level protection." Bay Mills' initial brief, p. 26. Bay Mills asserted that all of Enbridge's alert systems, including the CPM, gas detection equipment, automatic shutoff valves, and Class 1, Division 2 electrical equipment, are subject to this same vulnerability, due to faulty design. Bay Mills argued that both the Staff and the company rely too heavily on the CPM system, which Bay Mills contended is not foolproof or sufficiently rapid to identify the heavier-than-air vapor cloud. Additionally, in Bay Mills' opinion, the "design proposal . . . rests on the ventilation system working properly and there is no guarantee in Enbridge's proposal that the ventilation system will succeed in sweeping the low-lying vapor clouds upwards within the tunnel" so that the vapor is clear of potential sources of electricity and protected from flammability. *Id*., p. 27 (footnote omitted).

Turning to the MEPA analysis, Bay Mills contended that there is no dispute that the Replacement Project will result in GHG emissions and argued that these emissions will "harm the Tribal economies, cultural practices, and traditional knowledge that depend on those treaty-protected natural resources." Bay Mills' initial brief, p. 29. Bay Mills noted that construction of the Replacement Project will produce a significant amount of GHG emissions, and operation of the replacement pipe segment results in hundreds of metric tons of emissions annually. In addition, Bay Mills asserted that GHG emissions will be released through the production, processing, and combustion of the products that are transported by the replacement pipeline, which will result in 87,000,000 metric tons of CO_2e annually. *See*, *id*., p. 30 (citing 9 Tr 1057).

Bay Mills argued that the Staff's GHG emissions calculation is flawed because the Staff failed to include several sources of emissions during construction. Moreover, Bay Mills asserted that both the Staff's and Enbridge's GHG emissions calculations fail to account for the emissions

associated with the products that will be shipped through the new pipeline. Bay Mills stated that these emissions will contribute to climate change and will harm Michiganders and the Tribal Nations. *See*, Bay Mills' initial brief, pp. 32-38.

Next, pursuant to the MEPA analysis, Bay Mills argued that there is a feasible and prudent alternative to the Replacement Project: the potential shut down of the dual pipelines or the no pipeline alternative. Bay Mills stated that:

> [a]t the outset of this proceeding, Enbridge defined the purpose of the project as alleviating environmental risk to the Great Lakes. The Commission recognized this as the purpose, stating that the "purpose of the Replacement Project is to improve the safety of the 4-mile segment that crosses the Straits." Ceasing operation of the dual pipelines and not building the tunnel would achieve that purpose. Indeed, in June 2020, ceasing operations of the dual pipelines is exactly how Enbridge temporarily alleviated environmental risk to the Straits. The most obvious way to prevent an oil spill to the Straits is to stop transporting oil through the Straits. That means of achieving the purpose must be considered by the Commission.

Bay Mills' initial brief, pp. 40-41 (footnotes omitted). In addition, Bay Mills noted that other alternatives would be Enbridge's voluntary compliance with the Notice or forced shutdown of the dual pipelines through litigation.

Bay Mills further opined that the 1953 order does not constrain the Commission's MEPA analysis. Specifically, Bay Mills explained that MEPA does not require the permitting agency to consider only the alternatives that the permitting agency has the authority to implement. Rather, Bay Mills asserted that "[a]n agency can and should consider multiple possible alternatives" and that the agency's MEPA analysis should consider whether each of those alternatives is feasible and prudent. Bay Mills' initial brief, p. 42.

According to Bay Mills, the no pipeline alternative is feasible because "current consumers of propane [will] purchase fuels transported by other means or [will] switch energy sources, such as through electrification." Bay Mills' initial brief, p. 45 (citing 9 Tr 948-953, 1017-1018). Bay

Mills contended that the no pipeline alternative will eliminate the environmental risk to the Straits, will further the State's climate goals and policies, and will honor and respect the Tribal Nations' cultures and economies. *See*, Bay Mills' initial brief, p. 46 (citing 9 Tr 1043, 1063).

In conclusion, Bay Mills requested that the Commission deny Enbridge's Act 16 application, or, in the alternative, grant Bay Mills' petition for rehearing so that a full and complete record may be developed.

6. For Love of Water

FLOW asserted that the State of Michigan has a duty to protect public trust resources such as the Straits. In addition, FLOW contended that the law strictly limits the circumstances under which a state may convey a property interest in a public trust natural resource to a private entity, the narrow exceptions being: (1) when the conveyance results in the improvement of the interest thus held or (2) when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. FLOW's initial brief, p. 2 (citing *Obrecht v Nat'l Gypsum Co*, 361 Mich, 399; 105 NW2d 143 (1960)). FLOW asserted that the Commission's "sister agencies" have failed to make the necessary findings to support the conveyance of the 2018 easement to MSCA and Enbridge. FLOW's initial brief, p. 2.

FLOW stated that the GLSLA "requires that any conveyance, lease, agreement, occupancy, use or other action in the waters or on, in, through or under the bottomlands of the Great Lakes, be authorized by [EGLE] pursuant to the public trust standards in the GLSLA and the common law of the public trust doctrine." FLOW's initial brief, p. 3 (citing MCL 324.32502-324.32508). FLOW contended that before the State of Michigan may convey an interest in Great Lakes waters and bottomlands to a private entity, the State of Michigan must determine that the public trust will not be impaired or substantially affected. FLOW further argued that pursuant to MEPA, the

Commission must prevent or minimize environmental degradation, which is a duty independent of the Commission's Act 16 determination. FLOW's initial brief, p. 4 (citing MCL 324.1705 and *State Hwy Comm v Vanderkloot*, 392 Mich 159, 186; 220 NW2d 416 (1974) (*Vanderkloot*)).

In addition, FLOW stated that Act 359 requires that all parties to the Replacement Project obtain all requisite permits and approvals under MCL 254.324d(4)(g). FLOW contended that "Enbridge . . . did not apply for or obtain any authorization for the 2018 Easement or 2018 Assignment of Easement under the conveyance or occupancy and use sections of the GLSLA." FLOW's initial brief, pp. 8, 13-15. FLOW also argued that the DNR failed to make the necessary findings to convey the property interests to MSCA and Enbridge pursuant to public trust law or the GLSLA. Furthermore, FLOW maintained that the Agreements do not provide the requisite findings. Thus, FLOW contended that the 2018 easement conveyance is unlawful and the Commission cannot grant the Act 16 application because the Replacement Project would, if approved, unlawfully occupy submerged public trust lands and waters of the Straits. Similarly, FLOW asserted that Enbridge failed to obtain proper authorization from the State Administrative Board or from the relevant Tribes "and failed to consider and determine the effect on[,] and potential impairment to the substantial tribal property rights of the 1836 Treaty Tribes in, fishing, fishery habitat and other usufructuary activities protected by the Treaty of 1836." FLOW's initial brief, p. 16.

FLOW stated that Enbridge did not consider or evaluate a no-action alternative and did not consider the capacity available on other pipelines on Enbridge's pipeline system. FLOW's initial brief, p. 10 (citing 7 Tr 585-586). FLOW argued that ELPC/MiCAN made a prima facie showing that the Replacement Project will result in pollution or impairment of the air, water, natural resources, and public trust in those resources. *See*, FLOW's initial brief, p. 10.

Regarding the MEPA analysis, FLOW asserted that Enbridge's Act 16 application must be denied because the Replacement Project will likely result in pollution, impairment, or destruction of public trust resources. In addition, FLOW averred that as part of its MEPA analysis, the Commission must consider a no-action alternative and must evaluate whether Line 6B has "the capacity to meet market demand if Line 5 closes" and whether the Replacement Project may potentially become a stranded asset. *Id.*, p. 24.

7. Environmental Law and Policy Center and Michigan Climate Action Network

ELPC/MiCAN asserted that the Replacement Project will result in pollution, impairment, and destruction of natural resources, and as a result, Enbridge's Act 16 application must be denied pursuant to the requirements of MEPA. They argued that the no pipeline alternative[29] is reasonable and prudent and should not have been dismissed by Enbridge. ELPC/MiCAN's initial brief, p. 9.

ELPC/MiCAN contended that Mr. Erickson's testimony demonstrates that there are two reasons why the Replacement Project will result in increased GHG emissions, which are a pollutant under MEPA. *See*, ELPC/MiCAN's initial brief, pp. 9-13. First, ELPC/MiCAN noted that according to Mr. Erickson, the equipment used to build and operate the tunnel will produce GHG emissions, and he used standard GHG emissions accounting practices to determine the resulting amount. ELPC/MiCAN stated that "[n]o party disputes the propriety of [the GHG emissions accounting] methodology, though Staff inappropriately narrows the scope of the methodology when it is undertaken by Staff experts" (referring to Weston). *Id.*, p. 12.

[29] ELPC/MiCAN explained that they prefer the term "no pipeline alternative" over "no action alternative," in order to distinguish it from the no-action alternative described by the Staff in which the dual pipelines continue to operate. ELPC/MiCAN's initial brief, pp. 49-50, note 9. The Commission also notes that, when addressing this issue of terminology, "alternative" and "scenario" are used interchangeably in this order.

ELPC/MiCAN asserted that Mr. Erickson calculated about 87,000 metric tons of CO_2e (in total) related to the construction of the Replacement Project and 520 metric tons CO_2e annually for operation of the Straits Line 5 segment. ELPC/MiCAN averred that Enbridge provided no rebuttal on this issue. *Id.*, pp. 13-14 (citing 9 Tr 1048-1052 and 7 Tr 707). ELPC/MiCAN noted that the Staff's estimates were lower, but they asserted that the Staff mistakenly restricted the types of indirect emissions included in the analysis.

Second, ELPC/MiCAN asserted that GHG emissions result from the product that flows through the Straits Line 5 segment. *See*, ELPC/MiCAN's initial brief, pp. 14-15. ELPC/MiCAN noted that, according to Enbridge, the same amount of product will be transported through the Replacement Project as is currently transported through the dual pipelines "for an indeterminate number of years." *Id*., p. 17. ELPC/MiCAN stated that "GHG emissions are released at each stage of producing, processing, and combusting petroleum." *Id*. Therefore, ELPC/MiCAN contended that the product's lifecycle emissions upstream stage ("all stages that happen before, or upstream, of final combustion") and downstream stage ("combustion at the point of end use") should be included in the MEPA analysis. *Id*.

According to ELPC/MiCAN, Mr. Erickson found that if the Replacement Project was not constructed, it would not mean that these emissions would be avoided. Rather, ELPC/MiCAN noted that Mr. Erickson estimated that in a no pipeline scenario, the GHG emissions would be 27,000,000 metric tons of CO_2e annually, compared to 87,000,000 CO_2e metric tons annually from the Replacement Project. ELPC/MiCAN's initial brief, p. 19 (citing 9 Tr 1061). Therefore, because the no pipeline alternative would result in substantially less GHG emissions than the Replacement Project, ELPC/MiCAN asserted that it is the most feasible and prudent alternative, as demonstrated by the testimony on the record. *See*, ELPC/MiCAN's initial brief, pp. 19-38 (citing

7 Tr 661-675, 697, 709, 711, 713, 718-721, 725-726, 733-734; 9 Tr 972-974, 1047-1048, 1061-1079, 1087-1092; 12 Tr 1777, 1801-1802).

ELPC/MiCAN argued that these increased GHG emissions will pollute, impair, and destroy Michigan air, water, and other natural resources and contribute to climate change. ELPC/MiCAN asserted that Michigan is already experiencing the effects of climate change through increased temperatures, precipitation, and drought. ELPC/MiCAN contended that the increased GHG emissions from the Replacement Project will further exacerbate climate change in Michigan and impact the state's natural resources. ELPC/MiCAN's initial brief, pp. 43-44 (citing 9 Tr 1148-1164).

ELPC/MiCAN stated that Dr. Howard quantified the social cost of GHG emissions, also known as the social cost of carbon, to monetize the incremental costs associated with both the construction/operation of the Replacement Project as well as the lifecycle GHG emissions associated with the products that will be transported through the Replacement Project. ELPC/MiCAN's initial brief, p. 45 (citing 9 Tr 1105-1116). ELPC/MiCAN noted that according to Dr. Howard, a conservative estimate of the cost associated with the increased GHG emissions is $41 billion. ELPC/MiCAN explained that:

> [t]his means at least $41 billion of damage to Michigan, the United States, and globally, manifesting as energy system disruptions, air quality impacts, extreme temperatures, water quality and water scarcity impacts, agricultural productivity losses, property damage, biodiversity losses, and costs to other climate-vulnerable market sectors and natural resources important to Michiganders.

ELPC/MiCAN's initial brief, p. 46.

ELPC/MiCAN argued that the no pipeline scenario is a feasible and prudent alternative that is consistent with Enbridge's stated environmental safety goal, as well as with the State's duty to protect natural resources and its policy goal of reducing GHG emissions. ELPC/MiCAN

contended that Enbridge erred in limiting its alternatives analysis to only those options identified in the First Agreement, arguing that a party may not simply use an agreement to avoid the required review under MEPA. They argued that an Act 16 applicant may not simply choose to exclude a feasible alternative, and they objected to Enbridge's decision to define "the alternatives analysis to exclude any alternative that does not include the flow of oil across the Straits of Mackinac." ELPC/MiCAN's initial brief, p. 48. ELPC/MiCAN asserted that the Staff is mistaken in describing the no-action alternative as one where the dual pipelines continue to operate "until Enbridge determines to voluntarily cease operations or a legal or regulatory action forces Enbridge to cease operations." *Id.*, p. 49 (quoting 12 Tr 1728). ELPC/MiCAN observed that the Staff is asking the Commission to simply assume that the Notice is invalid.

ELPC/MiCAN argued that the no pipeline scenario is a feasible and prudent alternative. ELPC/MiCAN posited that in the absence of the Line 5 Straits segment, propane will be transported to Michigan by alternative methods or customers will switch to other alternatives, such as electric heat pumps. ELPC/MiCAN contended that in the no pipeline scenario, "losses to Michigan refineries would be limited to 15 percent of supply and . . . the related increase in gasoline prices would be lower than 1 cent per gallon." ELPC/MiCAN's initial brief, p. 53 (citing Exhibit ELP-24; 9 Tr 959). In addition, ELPC/MiCAN asserted that Michigan households could continue to use the same amount of propane at an additional cost of $55.00 to $209.00 per year. *See*, ELPC/MiCAN's initial brief, p. 53 (citing 9 Tr 959, 968, and Exhibit ELP-24, p. ES-2). ELPC/MiCAN contended that the U.P. Energy Task Force identified several alternative methods of shipping propane to the U.P., and Public Sector Consultants observed that rail transport is a feasible option for the supply of propane.

Finally, ELPC/MiCAN asserted that the no pipeline alternative is consistent with the State's climate policies while accomplishing the purpose of the Replacement Project, and they state that "Michigan propane users may face some increases in costs of propane, but most would eventually transition to cost-effective electric heat pumps that are more in line with state and national climate goals." ELPC/MiCAN's initial brief, pp. 58-59.

G. Reply Briefs

1. Enbridge Energy, Limited Partnership

As an initial matter, Enbridge contended that FLOW, ELPC/MiCAN, and Bay Mills do not dispute that the public interest will be better served by the Replacement Project as compared to the continued operation of the dual pipelines.

Turning to Bay Mills' claim that "the Straits is an inappropriate location for the tunnel and pipeline," Enbridge argued that Bay Mills disregards the fact that the dual pipelines are already located in the Straits and will continue to operate with or without the Replacement Project. Enbridge's reply brief, p. 2. Rather, Enbridge asserted that the material issue in this proceeding is determining the appropriate route for the Replacement Project so that the dual pipelines may be replaced and the Great Lakes better protected. Additionally, Enbridge objected to Bay Mills' contention that the design of the Replacement Project is unsafe. Enbridge stated that "[t]he fatal flaw with this argument is that every qualified expert who has examined the risk associated with locating the Line 5 Straits crossing within a tunnel has determined that its relocation within a tunnel is safer than the existing Line 5 Straits crossing and by any measure extremely safe." *Id.*, p. 3 (citing Exhibit ELP-24, pp. 3-60; 12 Tr 1737; 9 Tr 1204; and Exhibit A-9, Appendix 7).

Enbridge also disputed Bay Mills' claim that pursuant to the Commission's MEPA analysis, the company's application should be denied because the Replacement Project will result in

increased GHG emissions and irreparable damage to tribal, cultural, and natural resources. Enbridge reiterated that the dual pipelines will continue to operate whether or not the Replacement Project is approved, thus resulting in the same, or a similar, amount of GHG emissions. In addition, Enbridge noted that there are no meaningful alternative fuel sources and that demand for Line 5 products is not expected to change. Finally, Enbridge stated that there is no dispute that truck and rail transportation result in more GHG emissions, rather than less, as compared to pipeline transportation.

Next, Enbridge addressed Bay Mills' claim that vibrations from tunnel construction will negatively impact cultural and natural resources. Enbridge noted that EGLE "determined that the construction activities associated with the tunnel project 'do not authorize impairment of, and are not anticipated to adversely affect fish, wildlife, or habitat, nor the ability to hunt, fish, or gather in the Straits.'" Enbridge's reply brief, p. 8 (quoting Exhibit A-8, p. 2). In addition, Enbridge stated that SHPO identified a total of 11 archaeological sites within one mile of the project work area and:

> [w]ith respect to those identified sites, the survey revealed only one historic structure (a residence and modern outbuilding) actually within the south workspace, and two archaeological sites located within the north workspace. Based on the established review criteria, the one historic structure and the two archaeological sites were recommended as **not** eligible for listing in the National Register of Historic Places.

Enbridge's reply brief, p. 9 (emphasis in original) (citing 7 Tr 633) (internal citations omitted). Furthermore, Enbridge asserted that any potential impact on Tribal and natural resources will be appropriately addressed through USACE's Section 106 process. Concomitantly, Enbridge noted that it is performing additional surveys addressing a potential burial ground near Outfall 002 in response to a request by USACE. Enbridge's reply brief, p. 10, n. 11 (citing 7 Tr 627).

Enbridge disputed Bay Mills' claim that the design of the Replacement Project is unique and untested. Enbridge cited Exhibit BMC-41, p. 21, which contains a list of hydrocarbon pipelines that are located and operating safely within tunnels. Enbridge reiterated the arguments set forth in its initial brief regarding the design of the tunnel, the grade of pipe, and the low risk of a release of Line 5 products from the tunnel. *See*, Enbridge's reply brief, pp. 11-19.

Enbridge asserted that Bay Mills provided only one alternative to the Replacement Project—the shut-down of Line 5—which is not feasible or prudent. Enbridge contended that the no pipeline alternative was not presented in the company's application and is not an alternative pending before the Commission. Enbridge stated that in any case, a shutdown of Line 5 is not consistent with the requirements of public health, safety, and welfare pursuant to the standard set forth in MEPA. *See*, Enbridge's reply brief, pp. 19-21.

In reply to ELPC/MiCAN and FLOW, Enbridge contended that the no pipeline scenario is not feasible or prudent to alleviate or eliminate potential environmental impairment. Enbridge reiterated that the additional GHGs emitted during construction of the tunnel are minor compared to the GHGs emitted in the no pipeline scenario, which would require transporting the fuel products by rail. *See*, Enbridge's reply brief, pp. 23-24 (citing 7 Tr 665). Additionally, Enbridge asserted that contrary to the arguments made by ELPC/MiCAN, a shutdown of Line 5 would not strand oil in Western Canada and the Bakken regions, would not significantly increase the cost of fuels, would not reduce the demand for the fuels, and would not reduce GHG emissions. *See*, Enbridge's reply brief, pp. 24-32. Therefore, Enbridge concluded that "[t]he 'no pipeline alternative' creates far more environmental harm than the approval of Enbridge's Application." *Id*., p. 34.

Enbridge disputed FLOW's claim that the company's application must be denied "until the tunnel easement and assignment (Exhibit A-6) have been authorized pursuant to the common law public trust doctrine, the Great Lakes Submerged Lands Act and Act 10." Enbridge's reply brief, p. 34 (footnote omitted). Enbridge contended that the Commission has no jurisdiction to resolve these disputes and FLOW provides no statutory or other legal support that would empower the Commission to do so. Rather, Enbridge argued, the Commission has the obligation to comply with the public policy set forth in Act 359 to approve the construction of a pipeline in a utility tunnel beneath the Straits.

Responding to the Staff's initial brief, Enbridge "commends the Staff for its thorough and accurate assessment of the issues and arguments," however the company "believes that the Staff has overreached in imposing conditions beyond this Commission's jurisdiction." *Id*., p. 39. Enbridge explained that:

> [t]hese conditions are that Enbridge "commit to finalize its impairment mitigation plans to satisfy all local, state, and federal permitting requirements and to address potential environmental impairments from construction identified in Staff's testimony." Staff also stated that the "Commission should condition any approval such that it would be considered null and void if the [USACE] rejects Enbridge's application, or the [USACE's] review results in significant changes to the design of the proposed utility tunnel and replacement pipeline that are inconsistent with any proposal approved in this case."

Enbridge's reply brief, pp. 39-40 (quoting Staff's initial brief, pp. 117, 125) (internal citations omitted) (footnote omitted).

Regarding the Staff's first condition, which involves 10 potential environmental impacts identified by Ms. Mooney, Enbridge stated that it has addressed each issue. *See*, Enbridge's reply brief, p. 40 (citing 12 Tr 1849-1850; 7 Tr 610-624). In addition, Enbridge asserted that it will develop an EPP that will be continuously updated and will meet or exceed all federal, state, and local environmental protection and erosion control requirements. Enbridge noted that the baseline

EPP is set forth in Exhibit A-11, pp. 228-359, and an updated EPP is set forth in Exhibit S-19, pp. 13-59. Enbridge's reply brief, p. 41, n. 43. Enbridge contended that, in any case, the Commission has no jurisdiction over tunnel construction, permitting, or environmental conditions; rather, the Commission only has jurisdiction over the replacement pipe segment. *See*, *id.*, pp. 41-42.

Next, Enbridge responded to the Staff's second condition that Commission approval of the company's Act 16 application should be null and void if USACE rejects Enbridge's Sections 7 and 106 applications or if USACE recommends significant changes to the design of the proposed tunnel and replacement pipeline that are inconsistent with Enbridge's Act 16 application. Enbridge stated that:

> were the issues that are properly before this Commission to be impacted by the USACE permitting process in a way such that it would affect the decision to be issued by the Commission, the Commission of course, on its own could reopen this proceeding as necessary to adjust its decision as may be warranted. Thus, no condition relating to the USACE process as Staff has proposed is warranted.

Enbridge's reply brief, p. 42. Enbridge concluded by requesting that the Commission issue an order approving the company's application without condition so as to fulfill the purpose of Act 359.

2. The Commission Staff

In response to the arguments set forth in the intervenors' initial briefs, the Staff stated that:

> [a]t present, the Dual Pipelines operate with no buffer between the pipeline and the waters of the Straits. No one wants this to continue, but it may continue if Enbridge is not allowed to proceed with its proposed project. [ELPC/MiCAN] and the Tribes discount this possibility and instead argue that a no-pipeline alternative should be considered as the best way to fulfill Enbridge's stated purpose of alleviating the risk of a spill. The purpose of Enbridge's proposed replacement and relocation project, however, is not only to alleviate risk; it is also to maintain operation of the four-mile segment of Line 5 crossing the Straits. A no-pipeline alternative obviously does not fulfill this purpose. And because it does not fulfill one of the two primary purposes of the proposed project, it is not a viable alternative to the pipeline.

Staff's reply brief, pp. 1-2 (internal citations omitted) (footnote omitted). In addition, the Staff asserted that the April 21 order defined the scope of this proceeding and made clear that the no pipeline alternative is outside the scope of this case. *See*, Staff's reply brief, pp. 5-10.

The Staff noted that FLOW, ELPC/MiCAN, and Bay Mills argue that the no pipeline scenario is a feasible and prudent alternative. The Staff stated that "although this supposed alternative is not a direct challenge to the need for Line 5 as a whole, it implies that Line 5 is no longer needed. In other words, by suggesting that the Commission consider a scenario in which there is no Line 5, they question the need for Line 5 in violation of the Commission's scope order." Staff's reply brief, p. 11. In addition, the Staff asserted that the feasible and prudent alternatives considered by the Commission in its MEPA analysis must align with the purpose of the proposed project. The Staff noted that one purpose of Enbridge's Act 16 application is replacement of the dual pipelines, and "[t]he inherent purpose of the 'replacement,' to substitute the function of the Dual Pipelines, must be acknowledged in addition to the purpose of reducing the risk of an oil spill into the Great Lakes." Staff's reply brief, p. 14. Accordingly, the Staff asserted that a no pipeline alternative does not effectuate one of the purposes of the Replacement Project and, therefore, cannot be considered a "true alternative." *Id*.

Furthermore, the Staff noted that "no party in this proceeding has identified a past petroleum pipeline case under Act 16 of 1929, or even a natural gas pipeline case under [Public Act 9 of 1929], in which the Commission considered shutting down an existing pipeline as an alternative to a proposed replacement." Staff's reply brief, p. 16. In any case, the Staff argued that no party has provided convincing evidence that the no pipeline scenario is a feasible and prudent alternative. *See*, *id*., pp. 18-22.

Next, the Staff objected to FLOW's claim that pursuant to the public trust doctrine and the GLSLA, the Commission may not approve Enbridge's Act 16 application. The Staff argued that "[t]he true threshold matter in this case is not the validity of Enbridge's property rights [subject to the public trust doctrine and GLSLA], as FLOW suggests, but whether the Act 16 criteria have been met and whether the project satisfies MEPA's requirements." Staff's reply brief, p. 23. The Staff averred that:

> [t]hough the status of property rights and easements is undoubtably relevant to Act 16 proceedings, the Commission's four [Act 16] criteria do not require an applicant to obtain all property rights for a proposed project before approval. This has never been a prerequisite to Act 16 approval in the almost 100 years that Act 16 has been in effect. Rather, through an Act 16 application, qualifying entities have been able to request authority to obtain property rights through eminent domain. MCL 483.1; MCL 483.2. It follows that property rights may be obtained after Act 16 approval is granted. And the Commission has indeed granted approval in Act 16 proceedings where additional easement rights would be required.

Staff's reply brief, p. 24. Furthermore, the Staff contended that contrary to FLOW's claim, the Commission is not legally required, or even authorized, in its Act 16 review to find that the 2018 easement and assignment of easement by independent State of Michigan agencies were invalid. *See*, Staff's reply brief, pp. 25-27.

In response to Bay Mills' concerns about the route of the Replacement Project and its impact to cultural and natural resources, the Staff asserted that these concerns will be addressed by SHPO, EGLE, and USACE. *See*, Staff's reply brief, pp. 29-33. And, regarding Bay Mills' claim that the vibrations from the TBM will damage cultural and archaeological areas, the Staff stated that:

> [t]he Tribes have not provided any testimony that the potential archeological sites would be impacted by vibration, let alone the small levels anticipated by McMillan Jacobs. Nonetheless, the Company explained in testimony that it is still analyzing data on this issue that will be provided to [USACE] in consultation with SHPO and the Tribes . . . .

Staff's reply brief, p. 34. In addition, the Staff asserted that it is "confident that the potential issues identified by the Tribes will be granted due attention given the rigor of the EIS process and the stakeholders involved. Consistent with this view, the Commission should make any approval contingent on approval from other state and federal permitting agencies, including [USACE]." *Id*., p. 35.

The Staff disputed Bay Mills' claim that the Replacement Project has not been designed in a reasonable or safe manner. The Staff argued that while the configuration of the Replacement Project has not been previously used for this type of fuel mix, each separate feature of the Replacement Project has been used and has proven to be safe and reliable. *See*, Staff's reply brief, pp. 36-40. In addition, the Staff disagreed with Bay Mills that in the unlikely event of an explosion in the tunnel, the concrete lining in the tunnel would shatter and allow fuel products to escape into the Straits. The Staff asserted that "the tunnel lining material 'has been designed to be resilient against a hydrocarbon fire and any anticipated fire exposure condition,'" and in the unlikely event of a breach of the tunnel, outside hydrostatic pressure would prevent fuel products from reaching the Straits. Staff's reply brief, p. 41 (quoting Exhibit A-13, p. 12).

In response to Enbridge's claim that the Staff has no concerns with the safety of the Replacement Project, the Staff stated that it:

> would like to clarify this point, recognizing that the Company cited Staff witness David Chislea's testimony, where Mr. Chislea said, "At this time, based on the preliminary design and construction plans," Staff does not have any concerns. Although this is still true, Staff will remain in ongoing communications with PHMSA during its inspections and review. Staff maintains that the Company can mitigate pipeline safety concerns and to do so, firmly recommends that the Company implement all of Staff's recommendations.

Staff's reply brief, pp. 43-44 (internal citation omitted).

The Staff noted that ELPC/MiCAN claim that the upstream and downstream GHG emissions will be significantly reduced if Line 5 is shut down. However, the Staff stated that "[t]he scenario envisioned by [ELPC/MiCAN] collapses if any of the [scenario] premises are wrong or any of the [scenario] predictions fail to reach fruition." Staff's reply brief, p. 47. Specifically, the Staff contended that ELPC/MiCAN's Line 5 shut down scenario will likely result in a 0.3% increase in petroleum prices, which, in the Staff's opinion, is not substantial (i.e., a penny increase in price). The Staff asserted that this modest increase will not deter consumption of petroleum products and, as a result, will not reduce GHG emissions. Therefore, the Staff states that the no pipeline scenario is not a prudent alternative that should be considered in the Commission's MEPA analysis.

3. For Love of Water

In its reply brief, FLOW reiterated that Enbridge has not obtained the necessary property rights to occupy the bottomlands of the Straits and construct the Replacement Project. *See*, FLOW's reply brief, pp. 2-7.[30] Additionally, FLOW restated that pursuant to the MEPA analysis, the evidence on the record demonstrates that the Replacement Project is likely to impair or destroy Michigan's natural resources or the public trust in those resources. *See*, FLOW's reply brief, pp. 7-14. Moreover, FLOW contended that "the environmental impacts of the proposed conduct are far greater than those in its construction phase alone." *Id*., p. 10. FLOW asserted that there are a variety of reasonable feasible and prudent alternatives to the Replacement Project that would better protect the air, water, natural resources or public trust in those resources. As a result, FLOW requested that the Commission deny Enbridge's application for the Replacement Project.

[30] Because FLOW's reply brief is not paginated, the Commission clarifies that page 1 starts in natural order with the first page of the brief.

4. The Michigan Propane Gas Association and the National Propane Gas Association

The Associations replied that on the record, the only feasible and prudent alternative proposed by the intervenors is to simply not construct the Replacement Project. However, the Associations argued that shutting down Line 5 "is not feasible, prudent, or consistent with the reasonable requirements of the public health, safety, and welfare." Associations' reply brief, p. 3. The Associations explained that the fuels transported on Line 5 supply a critical energy need in Michigan and the region.

Next, the Associations disputed the intervenors' claim that construction of the Replacement Project will have a lasting negative impact on fish populations in Lake Michigan or that it will produce an excessive amount of GHG emissions that will pollute, impair, or destroy natural resources. The Associations argued that "the alternative of transporting the Line 5 products by truck or rail would produce more GHG emissions, not less." Associations' reply brief, p. 5. Furthermore, the Associations objected to the intervenors' request that the Commission consider the lifecycle GHG emissions associated with the products transported on Line 5 that are "produced and processed and combusted by end users." *Id*. They contended that the Commission should reject this request because if the Replacement Project is not approved, Line 5 will continue to operate in its current location; it will transport the same fuels for production, processing, and combustion, and it will result in the same amount of GHG emissions. In addition, the Associations argued that pursuant to its MEPA review, the Commission need not examine alternatives to the Replacement Project because the evidence shows that the Replacement Project will not pollute, impair, or destroy natural resources.

The Associations asserted that the intervenors "misconstrue what the purpose [of the Replacement Project] is, characterizing it as only alleviating an environmental risk to the Great

Lakes . . . ." Associations' reply brief, p. 7. Rather, the Associations stated that "[t]he purpose of the [Replacement] Project is and always has been to allow Line 5 to continue operating, only with a safer crossing under the Straits." *Id*. (citing 7 Tr 756 and 12 Tr 1740-1742). The Associations contended that the Commission should reject the no pipeline alternative because it does not achieve this purpose.

In the event the Commission considers the no pipeline alternative, the Associations requested that the Commission approve the Replacement Project because there are no feasible and prudent alternatives that are consistent with the public health, safety, and welfare. The Associations averred that Line 5 "serves a public need" because "it provides transportation for critical energy services in Michigan and the region, including propane to heat homes in the Upper and Lower Peninsulas of Michigan." Associations' reply brief, p. 8. According to the Associations, if the Commission declines to approve the Replacement Project, "substantial investment in new infrastructure" for fuel transportation would be required and new and expensive home heating pumps will be needed. *Id*., p. 9. The Associations asserted that the intervenors fail to explain how these projects would be financed and economically constructed.

Finally, the Associations disputed the intervenors' contention that "the no-pipeline alternative is prudent because it advances the State's goals in the Governor's MI Healthy Climate Plan." Associations' reply brief, p. 11. The Associations argued that the Legislature has determined the public need for the Replacement Project in Act 359, and the Governor's MI Healthy Climate Plan cannot supplant that legislation.

5. Environmental Law and Policy Center and the Michigan Climate Action Network

ELPC/MiCAN asserted that Enbridge, the Staff, and the Associations failed to rebut ELPC/MiCAN's prima facie MEPA case that "[t]he Proposed Project will exacerbate climate

change through the direct and indirect emission of greenhouse gases" and that the only feasible and prudent alternative is the no pipeline scenario. ELPC/MiCAN's reply brief, p. 1. They also argued that the conclusions offered by MLDC regarding employment and commerce are unsupported and irrelevant. ELPC/MiCAN's reply brief, p. 1, n. 1.

ELPC/MiCAN noted that "Enbridge, [the] Staff, and the Propane Associations recite the development and content of various agreements between the State of Michigan and Enbridge in an effort to establish the necessity and propriety of the Proposed Project." ELPC/MiCAN's reply brief, p. 2. ELPC/MiCAN argued that the provisions of the Agreements are not relevant to the Commission's MEPA review because MEPA is supplementary to other administrative and regulatory procedures that are required by law. *See*, ELPC/MiCAN's reply brief, p. 2 (citing *Her Majesty the Queen v Detroit*, 874 F2d 332, 337 (CA6 1989)). In addition, ELPC/MiCAN asserted that the Agreements are negotiated outcomes and "do not represent the State's chosen outcome from a thorough alternatives analysis." ELPC/MiCAN's reply brief, p. 2. They contended that agreements between private companies and State agencies "cannot take the place of the Commission's independent MEPA review." *Id.,* p. 4, n. 2.

Next, ELPC/MiCAN asserted that Enbridge failed to evaluate all feasible and prudent alternatives in its MEPA analysis in this case. ELPC/MiCAN argued that Enbridge should have considered the scenario in which the dual pipelines are shut down and the company does not construct the Replacement Project. ELPC/MiCAN stated that:

> [c]onsideration of this alternative would require analysis by Enbridge of how oil would get to market. . . . Mr. Earnest testified that he has access to and has used in the past a Market Optimization Model that assesses crude oil market implications of changes in logistical infrastructure, such as Line 5, that enables crude oil to reach the global market. (Earnest Cross, 7 TR 731–32). Enbridge did not ask Mr. Earnest to employ that model here.

ELPC/MiCAN's reply brief, p. 6.

Additionally, ELPC/MiCAN objected to the Staff's contention that if the Notice is not enforced and the Replacement Project is not approved and constructed, then the dual pipelines will continue to operate in their current location. ELPC/MiCAN argued that the Commission must assume that the Notice is valid and enforceable and that there is a scenario in which the dual pipelines could be shut down. In such a scenario, ELPC/MiCAN averred that in the MEPA analysis, the Commission must "compare the current environmental situation with the probable condition of the environment after the construction of the Proposed Project." ELPC/MiCAN's reply brief, p. 6.

ELPC/MiCAN also objected to the Staff's and Enbridge's characterization of the purpose of the Replacement Project, claiming that it is inconsistent and inaccurate. ELPC/MiCAN asserted that the "Staff seeks to define Enbridge's purpose [of the Replacement Project] to include the need for a pipeline through the Straits, even though Enbridge has explicitly argued that the need for Line 5 is outside the scope of this case." *Id*., p. 8. Furthermore, ELPC/MiCAN noted that Enbridge has stated that the purpose of the Replacement Project "is to alleviate an environmental concern to the Great Lakes." *Id*. However, ELPC/MiCAN argued that Enbridge has failed to consider that a no pipeline alternative would effectively achieve the purpose of protecting the Great Lakes from a release of fuel products from Line 5.

ELPC/MiCAN asserted that according to the Staff, the Commission "does not have explicit statutory authority to shut down the Dual Pipelines," and, therefore, should not consider a no pipeline scenario in its MEPA analysis. ELPC/MiCAN's reply brief, p. 10. ELPC/MiCAN, however, disagreed and contended that MEPA directs the agency to evaluate the actual or probable environmental impairment from the applicant's proposed conduct and any feasible and prudent alternatives, such as the no pipeline scenario. In ELPC/MiCAN's opinion, the analysis of feasible

and prudent alternatives, including the no pipeline scenario, is not contingent on whether the Commission has the authority to shut down the dual pipelines.

In addition, ELPC/MiCAN argued that the Staff failed to properly evaluate the GHG emissions associated with the Replacement Project as required by MEPA. In ELPC/MiCAN's opinion, "MEPA does not ask whether pollution is 'typical' for the activity at issue. The statute asks whether the conduct at issue pollutes, impairs, or destroys the air[,] water or other natural resources, or the public trust in those resources." ELPC/MiCAN's reply brief, p. 10 (quoting Staff's initial brief, p. 82). ELPC/MiCAN asserted that the Staff did not rebut ELPC/MiCAN's prima facie case that the Replacement Project results in GHG emissions that contribute to climate change and negatively impact fish, loons, sugar maples, and wild rice in Michigan.

ELPC/MiCAN also claimed that the Staff improperly excluded Scope 3 emissions (those from indirect sources not owned or controlled by the company) from its construction-related GHG emissions estimate. ELPC/MiCAN noted that the Staff argued "that Scope 3 emissions should not be included because they are optional under the Greenhouse Gas Protocol for corporate accounting and reporting." ELPC/MiCAN's reply brief, p. 14. However, ELPC/MiCAN asserted that:

> [u]nder MEPA, the question is whether GHG emissions are the result of the conduct at issue. The protocol recognizes that "Scope 3 emissions are a consequence of the activities of the company, but occur from sources not owned or controlled by the company." This language supports including Scope 3 emissions in a MEPA analysis, even though the protocol's Scope 1/2/3 construct intended for business use is not a useful guide for evaluating environmental harm from greenhouse gases under MEPA.

ELPC/MiCAN's reply brief, pp. 14-15 (footnote omitted). Additionally, ELPC/MiCAN contended that in the April 21 order, the Commission found that its MEPA analysis should be applied to the products shipped through the Replacement Project. Moreover, ELPC/MiCAN noted that federal courts have determined that indirect emissions may be included in a MEPA analysis.

ELPC/MiCAN disputed the Staff's claim that if the dual pipelines are shut down, Enbridge will continue to ship the same amount of fuel products, albeit by rail and truck, and that these types of transportation will produce more GHG emissions than the Replacement Project. ELPC/MiCAN asserted that "because rail is more expensive, and less oil is therefore transported, the net effect is a reduction in GHG emissions." ELPC/MiCAN's reply brief, p. 16. Moreover, ELPC/MiCAN objected to the Staff's and Enbridge's contention that if the Straits Line 5 segment is shut down, global oil markets will meet the demand for fuel products, and GHG emissions will remain static. ELPC/MiCAN urged the Commission to "require an actual analysis of market impacts and resulting [GHG] emissions." *Id.*, p. 22. ELPC/MiCAN cited several federal cases in support of their request, and they argued that these analyses can provide valuable information for decisionmakers.

In response to Enbridge's claim that the Commission's MEPA analysis should not include construction of the proposed utility tunnel, ELPC/MiCAN asserted that "the tunnel is a pipeline fixture pursuant to Act 16, and the construction of the tunnel must be considered in the MEPA analysis." ELPC/MiCAN's reply brief, p. 17. Additionally, ELPC/MiCAN contended that Enbridge: (1) failed to address Mr. Erickson's and Mr. Ponebshek's testimony that construction of the Replacement Project will produce GHGs, (2) did not deny that GHGs cause climate change, and (3) did not rebut ELPC/MiCAN's prima facie case regarding the negative impact of the GHGs produced by the Replacement Project.

ELPC/MiCAN stated that the Associations "repeat Enbridge and Staff's arguments that the Proposed Project does not pollute, impair, or destroy natural resources. [ELPC/MiCAN] addressed the flaws in those arguments in their opening brief and in reply to Enbridge and Staff's opening briefs." ELPC/MiCAN's reply brief, p. 22.

In conclusion, ELPC/MiCAN asserted that "[s]hutting down the Dual Pipelines and not building the tunnel is a feasible alternative Enbridge should have analyzed. On the record evidence before it, this Commission must conclude that the [Replacement] Project violates MEPA and deny Enbridge's Act 16 application." ELPC/MiCAN's reply brief, p. 25.

6. Michigan Environmental Council, National Wildlife Federation, and Tip of the Mitt Watershed Council

According to the MEC Coalition, "Enbridge declares that the public need [for the Replacement Project] has been conclusively determined based on the language of the Agreements." MEC Coalition's reply brief, p. 6 (footnote omitted). The MEC Coalition disagreed, explaining that "the Agreements were predicated on and bolstered by analyses and reports narrowly tailored to conclude that continued reliance on light crude oils and natural gas liquids (NGLs), as well as the current route, were most appropriate." *Id*. In addition, the MEC Coalition stated that the Agreements do not consider environmental harm that could occur outside the Straits or Great Lakes. Moreover, the MEC Coalition argued that "the conclusions about public need in these Agreements were drawn before any thorough planning and investigation into this project were completed." *Id*., pp. 6-7.

The MEC Coalition also noted that the Alternatives Analysis was completed five years ago and the report failed "to look at energy alternatives[;] instead the focus was on alternative *methods* of moving the same commodities in the same quantities." MEC Coalition's reply brief, p. 7 (emphasis in original) (citing Exhibit ELP-24). The MEC Coalition contended that another alternatives analysis was conducted after the execution of the First Agreement and it also failed to consider alternative pipeline routes or energy alternatives. The MEC Coalition asserted that the Agreements and the Alternatives Analysis are outdated and conclusory and, therefore, cannot be

relied upon. The MEC Coalition requested that the Commission conduct an independent Act 16 analysis of public need.

The MEC Coalition disputed Enbridge's claim "that the State Legislature has preemptively determined the need for this project by passing Public Act 359." MEC Coalition's reply brief, p. 9. The MEC Coalition asserted that Act 359 did not preapprove the Replacement Project. Rather, the MEC Coalition noted that, according to Section 14d(g) of Act 359, the constructing entity, Enbridge, must obtain all required governmental approvals for the Replacement Project, which includes the Commission's approval of the company's Act 16 application. Further, the MEC Coalition asserted that the 1953 order does not preclude the Commission from considering the public need for the Replacement Project. The MEC Coalition stated that "[e]ven though the 1953 Order recognized at that time a benefit to the proposed Lakehead project, that does not permanently bind this Commission to that conclusion in an application for a new project." MEC Coalition's reply brief, p. 11.

In addition, the MEC Coalition asserted that the Replacement Project will have an adverse impact on archaeological and cultural resources. The MEC Coalition noted that SHPO has recognized that the Straits are an important cultural area for the Tribes and recommended "not moving forward with permit approvals until further research is completed to provide baseline cultural resources data." *Id.*, p. 49 (quoting Exhibit BMC-40, p. 3). Therefore, the MEC Coalition posited that the Commission lacks sufficient information to determine that the route is reasonable.

Turning to the MEPA analysis, the MEC Coalition contended that the "Staff acknowledge and identify the [environmental] risks but disagree with ELPC and the Tribes regarding their significance; Enbridge simply asserts these risks do not exist." MEC Coalition's reply brief, pp. 16-17. The MEC Coalition asserted that the environmental risks associated with the

construction and operation of the Replacement Project have not been adequately analyzed or addressed and, as a result, the Commission lacks sufficient information to make an informed decision regarding the MEPA analysis for Enbridge's Act 16 application. Additionally, the MEC Coalition argued that the tunnel design results in a risk for catastrophic explosion and a release of Line 5 products into the Straits. The MEC Coalition contended that the Staff and Enbridge have failed to provide a scientific demonstration that there is no risk of explosion and that the tunnel will prevent a release of Line 5 products. The MEC Coalition stated that the Staff's assurance that it will continue to evaluate the environmental risks in future discussions with Enbridge, MSCA, and PHMSA is insufficient.

Next, the MEC Coalition pointed to the Staff's list of 10 potential environmental concerns with the Replacement Project "that could 'pollute, impair, or destroy natural resources,' as testified to by Staff Witness Ms. Kathleen Mooney." MEC Coalition's reply brief, p. 20 (quoting 12 Tr 1848-1850). The MEC Coalition stated that the:

> Staff accordingly admit that "the status of the Company's plans and current stage of the project prevents a final comprehensive evaluation of the overall effectiveness of the mitigation plans." This lack of information is an unmovable obstacle blocking the Commission's required MEPA review; as a result, the Commission should not approve Enbridge's application.

MEC Coalition's reply brief, p. 21 (quoting Staff's initial brief, p. 75).

Furthermore, the MEC Coalition argued that the Staff relies too heavily on Enbridge to address potential environmental impairments that are not addressed by the permitting process. Specifically, the MEC Coalition contended that the Staff requested that the Commission approve Enbridge's Act 16 application with conditions, "including 'a requirement that the Company commit to finalize its impairment mitigation plans to satisfy all local, state, and federal permitting requirements and to address potential environmental impairments from construction identified in

Staff's testimony.'" MEC Coalition's reply brief, p. 22 (quoting Staff's initial brief, pp. 125-126). The MEC Coalition asserted that the Staff's request for these conditions is "especially telling: they are required because none of these risks has yet been incorporated into Enbridge's existing mitigation plans." MEC Coalition's reply brief, pp. 22-23 (footnote omitted).

The MEC Coalition also disputed Enbridge's and the Staff's evaluation of GHG emissions. According to the MEC Coalition, "Enbridge argues that the amount of GHG emissions will be the same as they currently are upon completion of the replacement project because 'the service furnished on Line 5 will remain unchanged,' and therefore 'the project is not likely to have the effect of polluting, impairing, or destroying natural resources.'" MEC Coalition's reply brief, p. 32 (quoting Enbridge's initial brief, p. 33). Regarding the Staff's evaluation, the MEC Coalition asserted that the Staff downplays the GHG emissions associated with the Replacement Project, stating that, according to the Staff, the emissions are "typical for a project of this scope." *Id.* (quoting Staff's initial brief, p. 82). The MEC Coalition reiterated that the construction and operation of the Replacement Project, along with consumption of the products transported by the Straits Line 5 segment, will result in GHG emissions, which exacerbate climate change and impair, pollute, and destroy Michigan's natural resources.

Regarding feasible and prudent alternatives to the Replacement Project, the MEC Coalition asserted that pursuant to MEPA case law, alternatives need not be limited to those put forward by the applicant. *Id.*, pp. 37-38 (citing *Wayne Co Dep't of Health, Air Pollution Control Div v Olsonite Corp*, 79 Mich App 668, 703; 263 NW2d 778 (1977); *In Re: Wetlands Act Appeal of Kuras Properties, Inc*, order of the Michigan Natural Resources Commission, entered November 14, 1990 (File No. 88-6-5W), p. 5). The MEC Coalition stated that "if the Commission is to adequately consider alternatives under MEPA consistent with its April 2021 Order, it must

consider an alternative in which hydrocarbons are *not* shipped through the tunnel." MEC Coalition's reply brief, p. 40 (emphasis in original). The MEC Coalition asserted that the State of Michigan's "dismissal of the federal lawsuit to enforce the Notice of Revocation and Termination, Enbridge's pending federal lawsuit against the state, and Canada's invocation of the dispute resolution provisions of Article IX of the 1977 Transit Treaty to dismiss the no-pipeline alternative does not prove that a no-pipeline alternative is infeasible." MEC Coalition's reply brief, pp. 40-41. Rather, the MEC Coalition explained that it is possible that the State of Michigan could pursue an effort to shut down the Straits Line 5 segment, Enbridge may not prevail in its federal lawsuit, and binding arbitration between the U.S. and Canada could result in a shutdown of Line 5.

The MEC Coalition noted that Enbridge and the Staff argue that there are no feasible and prudent alternatives to the Replacement Project because Michigan citizens and businesses are dependent upon the products shipped on Line 5. The MEC Coalition disagreed, asserting that the intervenors have "presented evidence that customers can procure the products that Line 5 transports via other modes of transport or through electrification." MEC Coalition's reply brief, pp. 42-43. The MEC Coalition asserted that Enbridge failed to persuasively rebut this evidence. *See*, *id*., pp. 43-44.

The MEC Coalition also objected to the Staff's claims that the Replacement Project will not affect Tribal treaty rights and that the Staff "made extensive efforts to seek input from the Tribes" in this case. MEC Coalition's reply brief, p. 51. The MEC Coalition asserted that the source of the Tribal treaty rights are the 1836 Treaty of Washington and the 1855 Treaty of Detroit. The MEC Coalition averred that these treaties preserve the Tribes' right to hunt and fish in the territory ceded to the U.S. and that these rights are antecedent to any State or private property rights established after the creation of the treaties. The MEC Coalition contended that in the 1953 order,

the Commission determined the public need for Line 5 without meaningfully consulting with the Tribes. In addition, the MEC Coalition stated that in the 1953 order, "the Commission failed to consider the impacts of approving Line 5 on paramount, pre-existing treaty rights in areas of the ceded territory," and it "does not preclude the Commission in a new case from considering the impacts of extending Line 5's operation in the ceded territory by relocating the Straits segment in a tunnel." MEC Coalition's reply brief, p. 48. The MEC Coalition encouraged the Commission to consider modifying its 1953 order to reflect a consideration of treaty rights and to employ "meaningful and mutually beneficial communication and collaboration" with the Tribes in the Commission's evaluation of Enbridge's Act 16 application. MEC Coalition's reply brief, p. 54 (quoting ED 2019-17); *see also*, MEC Coalition's reply brief, pp. 51-55.

In conclusion, the MEC Coalition contended that "[i]t is imperative that the Commission review the whole record independently while deciding whether to grant the application." MEC Coalition's reply brief, p. 10. In addition, the MEC Coalition noted that pursuant to the APA, the Commission must make specific factual findings to support its final decision. The MEC Coalition asserted that based on the evidence currently on the record, the Commission lacks competent, material, and substantial evidence to approve the Replacement Project under Act 16 and MEPA.

7. Bay Mills Indian Community, The Little Traverse Bay Bands of Odawa Indians, The Grand Traverse Band of Ottawa and Chippewa Indians, and the Nottawaseppi Huron Band of the Potawatomi

Similar to the MEC Coalition, Bay Mills argued that "Act 359 and the Tunnel Agreements do not determine the outcome of any Act 16 criteria, the [MEPA review], or the Commission's review." Bay Mills' reply brief, p. 3. Bay Mills stated that according to Act 359 and the Agreements, any project to replace the dual pipelines will require consent and approval from federal and state agencies, which includes the Commission. In addition, Bay Mills asserted that

the language in Act 359 and the Agreements are not determinative of public need under Act 16; the Commission must perform an independent review and determine whether there is a public need for the Replacement Project.

Bay Mills noted that "[i]n their initial briefs, Enbridge and the Propane Associations suggest that the past actions the State [of Michigan] has taken with respect to the tunnel are to eliminate the risk of an oil spill from Line 5 to the Straits." Bay Mills' reply brief, p. 9. Bay Mills contended that:

> [a]ssuming there is an environmental risk to the Straits from the dual pipelines and that risk needs to be addressed, it does not necessarily follow that this particular Project is needed. Act 16 and MEPA criteria require the Commission to determine that the public needs the pipeline and that there is no feasible and prudent alternative that causes less environmental harm than the Project. As described in Tribal Intervenors' initial brief . . . this Project will not meet a public need of alleviating an environmental threat to the Straits because it still presents at least five unacceptable environmental risks . . . .

Bay Mills' reply brief, p. 10 (footnote omitted). Bay Mills reiterated that the five environmental risks are: (1) the route of the Replacement Project threatens cultural resources; (2) the design of the Replacement Project presents a risk of catastrophic explosion; (3) the Replacement Project contributes to climate change and impairs, pollutes, or destroys Michigan's natural resources; (4) construction of the Replacement Project will impair and pollute the waters of the Great Lakes and may destroy wildlife; and (5) the Replacement Project results in other environmental risks. However, Bay Mills noted that the Commission determined that the other environmental risks could not be included on the record.

In response to Enbridge's claim that the Replacement Project is necessary so that needed fuel transportation may continue on Line 5, Bay Mills argued that Enbridge presented arguments in its initial brief that are outside the scope of the case. Bay Mills noted that "Enbridge specifically sought to exclude evidence about whether there is a public need for the fuels transported by Line 5

from this case," and that motion was granted by the ALJ and affirmed by the Commission in the April 21 order, pp. 62-63. Thus, Bay Mills asserted, the Commission must disregard any evidence or argument presented by Enbridge in its initial brief that the Replacement Project is necessary to transport fuels to meet energy needs in Michigan.

Turning to the route of the Replacement Project, Bay Mills reiterated that it has provided extensive evidence that the location of "the [Replacement] Project poses an unacceptable risk to specific cultural and historical sites within that cultural landscape." Bay Mills' reply brief, p. 14. Bay Mills restated that the entire Straits area is a place of immense cultural significance and that damage to any part of this landscape is damage to the whole. *See*, Bay Mills' reply brief, pp. 14-15, 18-24.

Bay Mills also requested that the Commission reject Mr. Yee's recommendation that the Commission "continue to monitor developments of SHPO and the NWP [Nationwide Permit] 12 review process in terms of Section 106 compliance." Bay Mills' reply brief, p. 24 (quoting Staff's initial brief, p. 115). Bay Mills argued that Mr. Yee is "unqualified to opine on matters pertaining to cultural or historic resources," he lacks an understanding of the state and federal permit processes, and he reviewed a very limited body of information prior to making a recommendation. Bay Mills' reply brief, p. 25. Because of these shortcomings in Mr. Yee's qualifications and testimony, Bay Mills objected to Mr. Yee's recommendation that the Commission simply monitor the federal permitting process; instead, Bay Mills requested that the Commission accept the Tribes' concerns at face value as part of the Commission's Act 16 review.

Regarding the design of the tunnel, Bay Mills asserted that the "Staff and Enbridge inappropriately minimized the inherent risks associated with the Tunnel Project." Bay Mills' reply brief, p. 28. Bay Mills reiterated the arguments set forth in its initial brief addressing the risk of an

explosion and argued that "the Commission should conclude that any level of risk associated with such a high magnitude event is unreasonable, unsafe, and should not be routed through the Straits of Mackinac." Bay Mills' reply brief, p. 29; *see also*, *id*., pp. 29-33.

Bay Mills also restated its concerns regarding the use of X70 pipe in the Replacement Project and the risk of failure at girth welds. Bay Mills asserted that:

> Staff attempts to solve this problem by recommending that "low-hydrogen welding procedures [be put] in place for all mainline girth welds; that welding procedures require both preheat and inter-pass temperature requirements; and that the mainline girth welds [be] nondestructively tested using automatic phased array ultrasonic testing methods." Staff justifies this recommendation because it will require Enbridge to exceed the minimum regulations that are enforceable by PHMSA. This recommendation, however, falls short of negating any risk surrounding girth weld failure in X70 pipelines. Staff is vague in its reference to ultrasonic testing methods as to whether it will record photographs or data that will be maintained for the life of the pipeline and that can be audited. Staff is also vague as to whether it is recommending that only the "main line girth welds" be inspected or all girth welds.

Bay Mills' reply brief, p. 35 (quoting Staff's initial brief, pp. 59-60). Bay Mills contended that these measures may reduce the likelihood of a pipeline failure but will not negate the risk and, therefore, the use of X70 pipe contributes to the risk for catastrophic explosion in the tunnel.

Bay Mills reiterated that there will be ignition sources in the tunnel, and Enbridge and the Staff are overly reliant on faulty ventilation and warning systems to detect and prevent an explosion. *See*, Bay Mills' reply brief, pp. 37-41. Bay Mills restated that Class 1 Division 1 electrical specifications are necessary to prevent electrical ignition of a vapor cloud in the tunnel. Additionally, Bay Mills contended that the new pipeline will be capable of transporting a larger volume of fuel products. Bay Mills asserted that as a result, "[t]he effect of an explosion could be greater if the capacity of the replacement pipeline is increased." *Id*., p. 42. Finally, on the issue of design, Bay Mills argued that the Commission cannot adequately review the risks presented because the design of the Replacement Project is not yet final and, thus, important safety issues are

still unclear. Consequently, Bay Mills contended that Enbridge's Act 16 application is incomplete and should not be approved.

Regarding the MEPA analysis, Bay Mills asserted that the construction and operation of the Replacement Project will impair, pollute, or destroy Michigan's natural resources that are also protected by treaty rights. *See*, Bay Mills' reply brief, pp. 52-59. Bay Mills contended that "Enbridge and Staff err in calculating—and failing to calculate—emissions from the construction and operation of the [Replacement] Project, as well as from the burning of the fuels transported by the [Replacement] Project." Bay Mills' reply brief, p. 47. Bay Mills argued that these GHG emissions contribute to climate change and that the emissions pollute, impair, and destroy Michigan's natural resources that are of critical importance to Tribal Nations, including fish, wild rice, loons, and sugar maples. Bay Mills requested that the Commission conduct an independent investigation of all the potential environmental impacts of the Replacement Project.

Next, Bay Mills reiterated that the no pipeline scenario is the most feasible and prudent alternative to the Replacement Project because it causes the least amount of impairment to, and destruction of, natural resources. Bay Mills asserted that the Commission is not limited to the alternatives offered by Enbridge or to alternatives that the Commission has the specific authority to implement; "[r]ather, the inquiry is about whether a reasonable and prudent alternative exists that will avoid or lessen the environmental harm threatened by the proposal." Bay Mills' reply brief, p. 60. Bay Mills averred that the State of Michigan continues its effort to shut down the dual pipelines, which "underscore[s] the importance of considering the no pipeline alternative." *Id.*, p. 64.

According to Bay Mills, the Staff claims that if Enbridge's Act 16 application is denied and the Replacement Project is not constructed, the dual pipelines will continue to operate in the Straits. Bay Mills stated that:

> it is true that it is not certain that the dual pipelines will cease operating if the [Replacement] Project is denied. Enbridge may remain steadfast in its stubborn refusal to comply with Governor Whitmer's Revocation and Termination and perpetuate the risk it has created in the Straits. But that uncertainty does not change the fact that Enbridge could choose to cease operations and not build a tunnel. Enbridge's refusal to comply does not define the contours of the legal analysis.

Bay Mills' reply brief, p. 67.

Finally, Bay Mills argued that the Staff's description of the tribal consultation process is inaccurate and that the process itself did little to further the objectives of ED 2019-17. Bay Mills stated that "nothing in the Staff's testimony or in its briefing demonstrates how Staff put to use the extensive expert knowledge shared with Staff by the Michigan Tribes." Bay Mills' reply brief, p. 68. Bay Mills asserted that the consultation process should have been a dialogue between governments for the exchange of ideas and to find common ground, but the "Staff's testimony reveals almost no points of agreement or deference to sovereign nations." *Id.*, pp. 68-69. However, Bay Mills acknowledged that because this is a contested case and the parties are participating as litigants, the parties' ability to engage in meaningful dialogue has been hampered.

Bay Mills objected to the Staff's reliance on Mr. Yee to ensure that the Commission has complied with ED 2019-17. Bay Mills reiterated that Mr. Yee lacks experience with Tribal matters and the consultation process; he failed to properly review the documents, treaties, and comments relating to the consultation process; and he was not actively engaged in the consultation process. *See*, Bay Mills' reply brief, pp. 71-72. As a result, Bay Mills asserted that the views of the Tribal nations have not been fully heard or understood, and the Commission lacks a complete record on which to decide Enbridge's Act 16 application. In conclusion, Bay Mills requested that

the Commission grant Bay Mills' petition for rehearing and asked that the Commission reverse its ruling on the motions to strike. *See*, Bay Mills' reply brief, p. 73.

V. REOPENING OF THE RECORD TO RECEIVE ADDITIONAL EVIDENCE

In the July 7 order, the Commission noted that "when an application is filed pursuant to Act 16, the Commission must determine whether: (1) the applicant has demonstrated a public need for the proposed pipeline system, (2) the project is designed and routed in a reasonable manner, and (3) the project meets or exceeds current safety and engineering standards." July 7 order, pp. 7-8 (citing the March 7, 2001 order in Case No. U-12334, pp. 14-17). For the second prong of the Act 16 analysis, the Commission found that:

> given that at least a portion of Enbridge's justification for the proposed tunnel and pipeline project is to alleviate environmental concerns connected with the dual pipelines, the Commission must have sufficient evidence on the record regarding the current condition, maintenance, and safety of the dual pipelines and the future maintenance and safety of the dual pipelines in order to effectively determine whether the tunnel and pipeline segment proposed for the Replacement Project are designed and routed in a reasonable manner, and whether the proposed Replacement Project fulfills the alleged purpose of reducing the environmental risk to the Great Lakes posed by the dual pipelines. Although there is information on the record regarding the current condition, maintenance, and safety of the dual pipelines and the future maintenance and safety of the dual pipelines, additional evidence must be filed in the record for the Commission to complete prong (2) of its Act 16 analysis.

July 7 order, pp. 8-9.

The Commission noted that in the First Agreement, Enbridge was to provide the State of Michigan with a copy of a report that was required by paragraphs 81-83 of the federal consent decree. The Commission stated that "the federal consent decree cited in the First Agreement, the subsequent modifications to the federal consent decree noted in Exhibit S-8, and the Consent Decree Report cited in Exhibit A-8 have not been provided on the record in this case." July 7 order, p. 25. In addition, the Commission found that the following items required by the First

Agreement were not provided on the record: (1) additional technologies to detect leaks or coating damage to the dual pipelines that were not discussed in the Consent Decree Report and (2) options to mitigate the risk of damage from an anchor strike to the dual pipelines.

Pursuant to the terms of the Second Agreement, the Commission stated that "Enbridge has implemented near-term measures to enhance the safety of Line 5 and plans to continue these measures; however very few details describing these measures have been provided on the record in this case." July 7 order, p. 25. Additionally, the Commission found that according to the Second Agreement, "the State of Michigan planned to install radar technology to . . . determine whether SAWC [Sustained Adverse Weather Conditions] exist [in the Straits]. The Commission finds that there is no information on the record confirming whether the radar technology was installed, if it is in use, and whether information has been gleaned from the radar technology and shared with Enbridge." *Id*. Furthermore, the Commission noted that in the Second Agreement, Enbridge agreed to conduct a close interval survey (CIS) of the dual pipelines in 2018 and every two years thereafter. And in the Second Agreement, the Commission stated that Enbridge agreed to provide up to $200,000 for the installation of video cameras to assist the U.S. Coast Guard in monitoring vessel activity in the Straits. The Commission found that the record contains no information about whether the CISs have been performed or if the video cameras were installed at the Straits.

Next, the Commission noted that Appendix 1 to the Third Agreement was not attached to the agreement in Exhibit A-1. The Commission stated that Appendix 1 "contains specific details regarding the company's enhanced inspection regime for the dual pipelines . . . ." July 7 order, p. 26. In addition, the Commission found that "Enbridge's visual inspection of the coatings on the dual pipelines, the company's work plan, and the number and location of repaired areas of bare metal have not been provided on the record in this case. Furthermore, the results of Enbridge's

biennial inspections to verify that no unsupported spans exceed the specified maximum have not been provided on the record in this case." *Id*. The Commission also determined that the results of Enbridge's biota investigations on the dual pipelines were not provided on the record.

The Commission found that the information and documents discussed above are crucial to developing a full record for the second prong of the Act 16 analysis. Therefore, pursuant to Mich Admin Code, R 792.10436 (Rule 436) of the Commission's Rules of Practice and Procedure, the Commission determined that the record in this case should be "reopened for Enbridge to file the aforementioned information and documents, and any other relevant evidence regarding the current condition, safety, and maintenance and the future safety and maintenance of the dual pipelines because this evidence 'is necessary for the development of a full and complete record.'" July 7 order, p. 27 (quoting Rule 436(1)).

For the third prong of the Act 16 analysis, the Commission must determine whether the Replacement Project meets or exceeds current safety and engineering standards. The Commission noted that according to Enbridge, "the likelihood of a release of Line 5 products into the tunnel is 0.000001. However, the Commission finds that Enbridge did not provide record evidence of the data and methodology used to calculate the Replacement Project's alleged one in one million risk of release, and therefore the parties and the Commission are unable to review the calculation." July 7 order, p. 45. In addition, the Commission found that it is necessary for Enbridge to provide, on the record, "information regarding the feasibility of exceeding the minimum OSHA [U.S. Occupational Safety and Health Administration] standards and designing the electric equipment in the tunnel to Class 1, Division 1 or other methods of reducing the risk of ignition" in the tunnel. *Id*. The Commission also determined that the record lacks data and information about the concrete lining of the tunnel and its ability to withstand the effect of a high-pressure air impact from an

explosion. Furthermore, the Commission noted that "there is no information on the record regarding the procedure for full replacement of a PCTL segment (or segments) in the event of severe cracking or acute damage from a high-intensity fire or explosion and how this replacement procedure might affect the Line 5 pipe segment within the tunnel." *Id*., p. 46. Finally, the Commission directed Enbridge to file a cohesive explanation of its planned CPM, leak detection, and shut-down systems for the Replacement Project.

In conclusion, the Commission stated that "[t]he record shall be reopened to receive testimony, exhibits, and rebuttal, but no briefing will be permitted." *Id*., p. 47.

On August 5, 2022, Enbridge, the Associations, and MLDC (joint petitioners) filed in this docket a joint petition for rehearing of the July 7 order (August 5 joint petition for rehearing). The joint petitioners noted that in the July 7 order, the Commission reopened the record in this case to receive additional evidence, but the Commission stated that the parties would not be permitted to file further briefs. The joint petitioners asserted that, pursuant to Rule 437, the July 7 order results in unintended consequences.

The joint petitioners argued that "the plain language of Rule 434(2) of the Commission's Rules of Practice and Procedure [Mich Admin Code, R 792.10434(2)] vests the parties to a contested case the right (at their discretion) to file briefs and reply briefs and that rule does not contain language which might provide the Commission with latitude to deny the parties that right." August 5 joint petition for rehearing, p. 3. In addition, the joint petitioners asserted that the Commission's decision to deny the parties an opportunity for briefing is a change to Rule 434 that was not adopted through the formal rulemaking process as set forth in the APA. Moreover, the joint petitioners stated that, "on appeal, parties to this proceeding may argue that their free speech, due process, or other substantive rights have been violated by not being allowed to brief the

Supplemental Record, presenting a reviewing court with one or more bases to reverse the Commission's final order as violating the APA or the protections afforded to parties by other laws. See MCL 24.306." August 5 joint petition for rehearing, pp. 3-4. As a result, the joint petitioners requested that the Commission grant rehearing of the July 7 order and allow the parties to provide limited briefing on the evidence submitted to the reopened record.

On August 22, 2022, MSCA and Bay Mills filed in this docket responses stating that they have no objection to the relief sought in the August 5 joint petition for rehearing.

In the September 8 order, the Commission stated that it:

> does not find any error or unintended consequences associated with the decisions in the July 7 order. Noting that Rule 434(2) contains the caveat "unless otherwise provided," the Commission disagrees with the joint petitioners' interpretation of the rule. However, the Commission observes that the joint petitioners' request is reasonable, and finds that, pursuant to the agency's authority as presiding officer, the relief requested should be approved.

September 8 order, p. 5. Thus, the Commission granted the joint petitioners' request and permitted the parties to file, by May 5, 2023, initial briefs of no more than 30 pages that specifically address the evidence submitted to the reopened record. In addition, the Commission stated that the parties may file, by May 19, 2023, reply briefs of no more than 25 pages that specifically address the evidence submitted to the reopened record.

On April 25, 2023, Bay Mills filed an application for leave to appeal ALJ Saunders' April 11 and 12, 2023 rulings admitting evidence into the reopened record and a brief in support (April 25 application for leave to appeal and Bay Mills' brief in support of the April 25 application for leave to appeal, respectively). Bay Mills argued that MRE 702 and 703 require that expert opinions be supported by sufficient facts and data on the record and, in previous cases, the Commission has granted motions to strike expert testimony and exhibits that do not comply with MRE 703.

In Bay Mills' opinion, Mr. Bott's testimony on behalf of Enbridge and Exhibit A-32 do not "[provide] the data and methodology used to calculate the [one in one million] risk of release and, crucially, the parties and the Commission are still unable to review the calculations and conclusions asserted in the exhibit." Bay Mills' brief in support of the April 25 application for leave to appeal, p. 12. Bay Mills noted that Mr. Bott based his analysis on four prior Enbridge release incidents, but the three databases that he consulted are owned by Enbridge and are non-public. In addition, Bay Mills argued that the record does not include the following information:

- Facts and analysis to support Mr. Bott's inclusion of the June 22, 2013 release, the March 11, 2016 release, the February 27, 2017 release, and the January 9, 2018 release identified in Table 1 including, but not limited to, the specific location, any other relevant causes beyond the stated "primary cause," and the analyses performed to determine whether the release is applicable to the tunnel conditions;

- Facts and analyses to support the exclusion of any other Enbridge release during the stated timeframe; and

- The actual location of the stated 10,000 km [kilometers] of transmission pipeline relied on in the calculation, including the geographic location (i.e., Canada and/or the United States) and the environmental location (i.e., buried pipe, above-ground, in water).

Id., p. 11. Bay Mills asserted that reopening the case has changed nothing because "Enbridge still has not provided the data and methodology used to calculate the risk of release." *Id*., p. 12. Therefore, Bay Mills contended that Mr. Bott's testimony and exhibit that address this issue should be stricken.

Next, Bay Mills asserted that according to Enbridge, Mr. Godfrey's testimony and his probability of failure (POF) report in Exhibit A-29 purport to include an analysis regarding the POF of the tunnel project. However, Bay Mills stated that "[n]one of the calculations that support Mr. Godfrey's opinions on the probability of a Line 5 failure are supported by facts and data in the record." Bay Mills' brief in support of the April 25 application for leave to appeal, p. 13.

Specifically, Bay Mills noted that Mr. Godfrey claimed to calculate the POF for five scenarios. However, for Scenarios 1 and 2, Bay Mills asserted that Mr. Godfrey notes one actual failure that he deemed relevant in the BOEM data but "the underlying report and charted information lack any underlying facts or data about the '1 failure' used to calculate a failure frequency." *Id.* Bay Mills also contended that according to Mr. Godfrey, he consulted three European data sources for Scenarios 1 and 2, but he does not reveal the data that he reviewed from each source. Bay Mills made the same complaint with respect to the PHMSA data that Mr. Godfrey reviewed for Scenarios 3-5, as well as the ignition model that he applied. *Id*., p. 14.

Similarly, Bay Mills stated that the failure modes and effects diagnostic analysis (FMEDA) results in Appendix A of the probability of failure (POF) report, *Enbridge Line 5 Great Lakes Tunnel Project: Probability of Failure Analysis* (POF Report), "are incomplete and lacks [sic] any description or indication of the 'standards and integrity management program' that was considered in reaching the stated conclusion." Bay Mills' brief in support of April 25 application for leave to appeal, p. 14 (quoting Exhibit A-29, p. 3). In addition, Bay Mills argued that the failure history supplied to Mr. Godfrey by Mr. Bott for use at the FMEDA workshop should be disregarded because it was not entered into the record and its existence was only revealed during the evidentiary hearing. *Id*., p. 15. Thus, Bay Mills disagreed with ALJ Saunders' finding that Enbridge satisfied the requirements of the MRE and argued that Mr. Godfrey's testimony and exhibit on this issue should be stricken.

On May 9, 2023, Enbridge filed a response to Bay Mills' April 25 application for leave to appeal (May 9 response) and a brief accompanying its response. Enbridge stated that Bay Mills' April 25 application for leave to appeal should be denied because pursuant to Rule 433(2), "[g]ranting the Application cannot possibly 'advance a timely resolution of the proceeding,' given

that the proceeding is already in its final stage. Nor it [sic] is granting the Application necessary to 'prevent substantial harm to the appellant or the public-at-large' because all issues raised by Bay Mills in its Application can be (and should have been) raised in Bay Mills' initial brief." Enbridge's May 9 response, p. 2 (quoting Rule 433(2)) (footnote omitted).

In Enbridge's opinion, ALJ Saunders correctly determined that Mr. Godfrey's and Mr. Bott's testimony and exhibits satisfy the requirements of MRE 703 and the Commission's evidentiary standards. Enbridge asserted that the record demonstrates that "Mr. Godfrey is a leading expert in integrity management, regulatory compliance, standards development, pipeline operations, and design and construction." Enbridge's brief in response to the April 25 application for leave to appeal, p. 9 (footnote omitted). In addition, Enbridge contended that there are sufficient facts and data on the record to support Mr. Godfrey's opinion. *See*, *id*., pp. 10-15 (citing Exhibit A-29, pp. 4-12; Exhibit A-32; Exhibit BMC-69, p. 4; 17 Amended Tr 2449-2450). Furthermore, Enbridge argued that Bay Mills' objection to Mr. Godfrey's opinions based on MRE 702 was not raised in Bay Mills' motions to strike and is, therefore, improperly preserved and considered waived. Enbridge stated that "[e]ven if [the objection is] not waived, Bay Mills has not demonstrated that MRE 702 is a basis for objection." Enbridge's brief in response to the April 25 application for leave to appeal, p. 17.

Regarding Mr. Bott's testimony and Exhibit A-32, Enbridge asserted that ALJ Saunders properly admitted the testimony and exhibit into the record because the facts and data relied upon by Mr. Bott were provided in the record. *See*, Enbridge's brief in response to the April 25 application for leave to appeal, pp. 18-20. In addition, Enbridge contended that according to Mr. Bott, the data he supplied in support of his opinion and calculation is information "kept in Enbridge's business records in the ordinary course of its business." *Id*., p. 18.

Finally, Enbridge argued that "[e]ven if it were determined that MRE 703 were not completely satisfied, Mr. Godfrey's and Mr. Bott's testimony and exhibits are still admissible. Commission Rule 427(1) and MCL 24.275 affirmatively provide that 'an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.'" Enbridge's brief in response to the April 25 application for leave to appeal, pp. 20-21 (quoting MCL 24.275). In any event, Enbridge asserted that Mr. Godfrey's and Mr. Bott's testimony and exhibits comply with MRE 703 and requested that the Commission deny Bay Mills' April 25 application for leave to appeal.

The Commission finds that granting Bay Mills' April 25 application for leave to appeal will resolve purported issues regarding the sufficiency of evidence submitted into the record. Thus, the Commission finds that Bay Mills' April 25 application for leave to appeal should be granted. If the Commission grants review, "it will reverse an ALJ's ruling if the Commission finds that a different result is more appropriate." March 17, 2022 order in Case No. U-21090, p. 14 (citing, June 5, 1996 order in Case No. U-11057, p. 2; May 19, 2020 order in Case No. U-20697, p. 9); *see also*, November 10, 2011 order in Case No. U-16230, pp. 7-8; October 5, 2018 order in Case No. U-20165, p. 17.

Regarding Bay Mills' motion to strike Mr. Godfrey's testimony and Exhibit A-29, ALJ Saunders stated that:

> [he] think[s] that both the parties have presented compelling arguments in this matter and, frankly, [he does] agree with Bay Mills' position that there are some issues in relation to some of the data and the facts that are relied upon in terms of not being abundantly clear, however, [he] think[s] that Mr. Godfrey has identified a good portion, albeit voluminous, of what it was that [Mr. Godfrey] relied upon, and [he] think[s] that that is just enough to get over the threshold of MRE 703, however, again, this is up to the Commission to decide the weight to give to this testimony in this matter . . . .

15 Tr 2060-2061. The Commission has reviewed the testimony, Exhibit A-29, the motion, and the response in this matter and agrees with ALJ Saunders. The Commission finds that Mr. Godfrey has expertise in the areas of pipeline manufacturing, operations, integrity management, consulting, and asset integrity services. 17 Amended Tr 2434. Mr. Godfrey testified regarding the basis of his POF opinions and calculations contained in the POF Report. 17 Amended Tr 2436. In addition, Mr. Godfrey stated that the data he relied upon for the POF Report is collected by PHMSA pursuant to 49 CFR 195.50-54, which requires the reporting of hazardous liquid pipeline accidents. 17 Amended Tr 2449-2450. Furthermore, the Commission finds that the data contained in Exhibit A-29 is adequate for the Commission to determine that Enbridge has sufficiently demonstrated the methodology of its calculations and opinions. Therefore, the Commission finds that ALJ Saunders' April 11 ruling denying Bay Mills' motion to strike should be affirmed.

In his April 11, 2023 ruling denying Bay Mills' motion to strike Mr. Bott's testimony and Exhibit A-32, ALJ Saunders granted Bay Mills' motion in part and denied it in part. Bay Mills argued that the databases on which Mr. Bott relies for his one in one million calculation are not publicly accessible and, therefore, Enbridge has not provided the data and methodology to support the calculation. Enbridge responded, asserting that Mr. Bott relied on data that is kept in the ordinary course of business and that "it is evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." Enbridge's brief in response to the April 25 application for leave to appeal, p. 20. In addition, Enbridge asserted that if the entirety of the business record were to be admitted into evidence, it "would result in mountains of data being introduced in the record that was neither relevant nor relied upon." *Id*. Furthermore, Enbridge contended that although the company provided the data, analysis, and explanation of the one in

one million calculation, Bay Mills was entitled to make additional discovery requests regarding the data but chose not to.

The Commission finds that Mr. Bott's testimony and Exhibit A-32 directly respond to the Commission's request for additional information in the July 7 order regarding the one in one million calculation. Mr. Bott testified that he has "knowledge of and access to certain information and data requested by the Commission's [sic] in its July 7, 2022 Order regarding the Line 5 replacement segment to be located in the Great Lakes Tunnel Project (Project)." 16 Tr 2316. Accordingly, the Commission finds that Mr. Bott relied on data kept in the ordinary course of business pursuant to Rule 427(1) and MRE 803. In addition, the Commission finds that the data and analysis in Exhibit A-32 is adequate for the Commission to determine that Enbridge demonstrated the methodology of the one in one million calculation and the POF as requested in the July 7 order. Therefore, the Commission finds that ALJ Saunders' denial of Bay Mills' motion to strike Mr. Bott's testimony and Exhibit A-32 should be affirmed.

VI. POSITIONS OF THE PARTIES ON REOPENING OF THE RECORD

A. Direct Testimony on Reopening of the Record

1. Enbridge Energy, Limited Partnership

Ashley Rentz testified that she is a paralegal for Enbridge. She sponsored Exhibit A-28. Ms. Rentz stated that the documents contained in Exhibit A-28 are prepared and maintained in the normal course of business by Enbridge and are responsive to portions of the July 7 order. 15 Tr 2069.

Mr. Godfrey stated that he is a Senior Principal Consultant with the Integrity Solutions and Compliance Department within the Energy Services Group of DNV GL USA, Inc. (DNV). Mr. Godfrey sponsored Exhibit A-29, which includes the POF Report. Mr. Godfrey noted that the

POF Report was authored by himself and other DNV employees. 17 Amended Tr 2435. Mr. Godfrey stated that in performing his analysis, he relied upon the materials in Appendix B attached to his testimony (materials supplied by Enbridge) and exhibits sponsored by Mr. Dennis.

Mr. Godfrey testified that his analysis is based on the FMEDA, which is "a risk assessment methodology that considers the different ways in which a failure can occur and then reviews the means for detecting and preventing failures. When applied to [the] Line 5 Replacement Segment, the specific question addressed was what failure mechanisms could exist that could result in a pipeline failure?" 17 Amended Tr 2436. He explained that the FMEDA was presented as a virtual workshop in November 2021 and five potential failure scenarios were analyzed. He opined that the POF of the replacement pipe segment is extremely low, equating to "less than one failure in over 663,000 years" and that the probability of ignition in the event of a release of Line 5 products is "extremely remote . . . equivalent to approximately 6 in a billion chances per year or one ignition event every 169 million years." 17 Amended Tr 2437-2438. He stated that these low probabilities reflect the safety factors that the company has incorporated into the design. He further averred that these probabilities are conservative and that the actual failure rate should be an order of magnitude less. He added that the use of Class 1, Division 2 equipment is conservative because under the National Electrical Code (NEC), the tunnel "could be considered an unclassified location . . . ." 17 Amended Tr 2439.

Consistent with the ruling on the motion to strike materials in Appendix B, Enbridge filed the following additional testimony on reopening.

Ray Philipenko testified that he is the Director of TIS Pipeline Control Systems and Leak Detection for Enbridge. He sponsored Exhibit A-30, which he states "is identical to the information and data previously submitted as Response Nos. 1, 6, and 7 in Appendix B to

Exhibit A-29, the *Enbridge Line 5 Great Lakes Tunnel Project: Probability of Failure Analysis* sponsored by Witness John Godfrey filed on October 21, 2022." 16 Tr 2255-2256.

Mr. Dennis sponsored Exhibit A-31, which he states is "identical to the information and data previously submitted as Response Nos. 2, 3, 4, 5, 9, and 10 in Appendix B to Exhibit A-29, the *Enbridge Line 5 Great Lakes Tunnel Project: Probability of Failure Analysis* sponsored by Witness John Godfrey filed on October 21, 2022." 15 Tr 2087.

Steven Bott testified that he is the Manager of LP Pipeline Integrity Business Planning for Enbridge. He sponsored Exhibit A-32, which he states is "identical to the information and data previously submitted as Response No. 8 in Appendix B to Exhibit A-29, the *Enbridge Line 5 Great Lakes Tunnel Project: Probability of Failure Analysis* sponsored by Witness John Godfrey filed on October 21, 2022." 16 Tr 2316.

2. The Commission Staff

Mr. Warner testified regarding the Staff's review of the filings made by Enbridge in response to the July 7 order, and he sponsored Exhibits S-31 through S-36. He stated that the Staff analyzed the sufficiency of the information. 18 Tr 2790.

Mr. Warner asserted that Enbridge responded to all the evidentiary requests made by the Commission in the July 7 order. However, he stated that the Staff also sought additional clarifying information through two successive rounds of discovery served on Enbridge after the company's filing. The responses supplied by Enbridge are provided by Mr. Warner as Exhibits S-31, S-32, and S-33. He stated that the discovery responses provide additional information on: (1) the POF of the pipeline and the probability of ignition within the proposed tunnel, (2) the leak detection system, (3) the ventilation system, and (4) shutdown procedures. 18 Tr 2792. He noted that the Staff met with PHMSA personnel three times in late 2022 to discuss the discovery responses, as

well as with USACE and MSCA. He added that the Staff also re-initiated discussions with the Tribes and referred to Exhibit S-34, which contains a log of those discussions. He concluded that:

> the information provided has reinforced Staff's position that the Replacement Project is a significant improvement over the existing Dual Pipelines. Staff posits that the new information provides further confidence that the project is designed and routed in a reasonable manner in accordance with prong (2), and meets or exceeds current safety and engineering standards in accordance with prong (3) of the Commission's analysis under Act 16.

18 Tr 2793-2794.

3. Bay Mills Indian Community

Mr. Kuprewicz sponsored Exhibits BMC-50 through BMC-60. Mr. Kuprewicz testified that he is responding to the testimony regarding risk. He stated that:

> Mr. Dennis, Mr. Bott, and Mr. Godfrey all assign a numeric probability to various events that could cause a pipeline failure, fire, and explosion. This approach to risk assessment, particularly during the permit approval stage, finds no support in federal pipeline regulations. . . . This assignment of probability estimates to known, identified risks during a permitting process is dangerous because it invites complacency. An operator who adopts this approach to the construction and operation of a pipeline will inevitably drive the line toward failure.

17 Amended Tr 2622. He opined that assigning numeric probability values to risks creates a false sense that the project is safe. He stated that federal integrity management regulations appear in 49 CFR 195.452 and he described the history of the development of those regulations. Mr. Kuprewicz asserted that the regulations adopt a performance-based approach, which requires pipeline operators to use risk assessment to address potential threats and provides guidance for operators to develop their own integrity management programs.

While acknowledging that federal regulations allow pipeline operators to use quantitative risk assessment, Mr. Kuprewicz stated that the type of quantitative risk assessment used in this case (which makes risks appear to be nonexistent) leads to pipeline failure and fails to evaluate threats "on an iterative basis based on sound engineering principles." 17 Amended Tr 2626. He added

that compliance with PHMSA regulations does not ensure that failure will not occur. Moreover, Mr. Kuprewicz described the POF Report as "flawed, misguided, and dangerous," and he contended that the methodology employed in the report relies on cherry-picking the data. 17 Amended Tr 2627. He also opined that quantitative risk analysis "creates what [he] refer[s] to as a 'kill threshold,' or a prescriptive limit on the amount of death or destruction caused by an event. There is no such limit or threshold established in U.S. federal pipeline safety regulations." 17 Amended Tr 2628. Mr. Kuprewicz noted that Mr. Godfrey relied on data found in the PHMSA database, and he asserted that much of the incident data is provided to PHMSA by pipeline operators and is not verified or regulated.

Turning to a discussion of girth welds and heat-affected zones, Mr. Kuprewicz testified that prudent pipeline operators will exceed the regulations and will radiographically inspect all girth welds before the pipeline is installed. He asserted that for the X70 pipe grade, the heat-affected zone can also be affected, resulting in cracking. Mr. Kuprewicz specifically noted that this pipeline will be installed on rollers to allow it to move and opined that this will place abnormal loading on the girth welds and heat-affected zones. Thus, he contended that the risk of failure should not be dismissed by a probability analysis but, rather, should be addressed according to how conditions will change over the life of the pipe. As in earlier testimony, Mr. Kuprewicz noted that the Joint Industry Report addresses this issue and argued that Enbridge has not taken the issue seriously. *See*, 17 Amended Tr 2632-2634; Exhibits BMC-54, BMC-55, and BMC-56.

Mr. Kuprewicz also asserted that the POF Report ignores the issue of human error, particularly with regard to the CPM system. He stated that the 10-Minute Rule adopted by Enbridge (automatic shutdown 10 minutes after an alarm) will not prevent catastrophe because during previous pipeline ruptures, Enbridge has failed to shut down the pipeline within the

10-minute window. 17 Amended Tr 2637-2638. Mr. Kuprewicz listed several other aspects of Enbridge's design that are vulnerable to human error including data collection from the ILI tools and subsequent analysis, response to the telephone in the above-ground control room, reliance on CPM and historical data, system monitoring, responses to audio and visual alarms, and manual control of the fan plant in the event of fire. 17 Amended Tr 2639-2641. He further stated that it is "a dangerous view to think that any measure would prevent an explosion." 17 Amended Tr 2642. Mr. Kuprewicz asserted that Exhibit BMC-60 illustrates how a false sense of safety is created, and concluded that:

> [s]ound engineering and risk assessment principles require that you separate marketing of a product—here, the proposed tunnel—from the engineering risks associated with the project. Combining the two, as Enbridge has done, leads to what [he has] labeled over the decades as "Space Shuttle Syndrome," which as [he] previously testified, refers to what occurs when people ignore or underestimate risk to drive to [sic] a preordained decision to the point where they dismiss or ignore very real risk in favor of going forward with a project.

17 Amended Tr 2643.

Brian J. O'Mara stated that he is the founder and Principal of Agate Harbor Advisors LLC. He testified regarding the ability of the tunnel's concrete structure to withstand a fire and, in the event of the failure of the structure, the likelihood that Line 5 product would overcome the hydrostatic pressure on the pipeline and migrate to the Great Lakes. He sponsored Exhibits BMC-61 through BMC-63. 18 Tr 2668-2669.

Mr. O'Mara stated that, in general:

> an explosion will occur if flammable gas or vapors are present in the air of the tunnel at a concentration that is between the Lower Explosive Limit (LEL) and the Upper Explosive Limit (LEL)[sic], and those gasses or vapors are ignited. There are two sources of flammable gasses or vapors that will be present in the tunnel project: the product transported through Line 5, and groundwater with dissolved methane that may infiltrate the tunnel.

18 Tr 2670. He stated that the concrete lining of the tunnel would be severely damaged by a fire or an explosion, particularly in a fuel-rich environment that could result in a fire exceeding 1200°C. Such a fire, he explained, may cause spalling, which occurs when pieces of concrete separate, exposing the steel inside, which is then vulnerable to buckling and failure. 18 Tr 2671-2672.

Mr. O'Mara asserted that:

> Enbridge has no active fire suppression system for the Line 5 tunnel and relies only on passive fire-resistant concrete and stopping ventilation. The state of the practice for fire suppression in tunnels includes the use of Fixed Fire Fighting Systems (FFFS) and advanced ventilation systems that can quickly extinguish or limit fires and facilitate the removal of smoke so fire fighters can rescue trapped workers and extinguish fires. FFFS have been retrofitted in tunnels like the Chunnel [Channel Tunnel] and FFFS have proved effective in putting out fires in underwater tunnels in Tokyo, Sydney and Melbourne.
>
> Enbridge states that, in the event of a fire, it will secure the air lock and switch-off the ventilation system to starve the fire of oxygen. This plan ignores the fact that a fire in a tunnel usually reaches its peak temperature within 5 minutes. Crucially, sealing the two ends of the tunnel can lead to internal temperatures greater than if the tunnel portals were not sealed. Enbridge's plan would likely exacerbate the already heat-intense fire.
>
> Even if the tunnel was effectively sealed off, there would be more than 6,500,000 cubic feet of air in the tunnel, which could provide enough oxygen for a fire to burn for well over two hours. Enbridge stated it could lose up to 2 percent of the product shipped (approximately 460,000 gallons) before they detected the release using their pressure and flow monitoring approach. The amount of time before detection could result in a very large pool of product with a limited surface area that could burn for hours or days before it was "starved of oxygen".

18 Tr 2674-2675 (quoting Exhibit A-13, p. 17).

Mr. O'Mara opined that based on his professional experience, Class 1, Division 2 electrical equipment is not sufficient for the Replacement Project. He stated that "Class [1] Division 1 electrical equipment is both feasible and prudent based on the unique tunnel design and associated risks if there is a product release from the pipeline." 18 Tr 2675.

Referring to the existence of methane in the groundwater, Mr. O'Mara explained that methane could thus be introduced into the tunnel during the excavation by the TBM and "indefinitely by the never-ending seepage of groundwater into the tunnel through groundwater infiltration through the joints of the precast concrete tunnel segmented lining . . . ." 18 Tr 2675. He stated that the methane could then encounter a spark from any of several potential sources, including maintenance work, static electricity, freezing conditions, or a lightning strike. Mr. O'Mara described a methane explosion as similar to a shotgun blast, which can result in a loss of life. He noted that Enbridge's Geotechnical Data Report (Exhibit MM-4) "indicates that methane was found in 19% of the groundwater samples tested . . . ." 18 Tr 2677; *see also*, 18 Tr 2688.

Next, Mr. O'Mara addressed the hydrostatic pressure issue. Noting that Mr. Kuprewicz did not opine on hydraulic questions, Mr. O'Mara stated that he has "experience with tunneling in the Great Lakes with geology similar to the proposed Line 5 tunnel." 18 Tr 2679. He explained that:

> [h]ydrostatic pressure is the downward force exerted by gravity from the water, sediment and rock present above the proposed tunnel. The pressure is different at varying points in the proposed tunnel elevation. For example, the hydrostatic pressure is going to be the highest at the lowest depth of the tunnel compared with the pressure that would be present at either end of the tunnel. McMillan Jacobs Associates has estimated in its Technical Memorandum dated May 24, 2021 that the hydrostatic pressure at the deepest part of the tunnel to be 17 bar, which is roughly equivalent to 250 psi [pounds per square inch]. To overcome the hydrostatic pressure at the deepest part of the tunnel, the product would need to be released at a pressure that exceeds 250 psi.

18 Tr 2679-2680. He opined that if a fire caused a breach of the secondary containment system, Line 5 product would migrate into the Straits because the product will be discharged at the operating pressure of the pipeline, which is 1440 psi at the deepest part of the tunnel.

Mr. O'Mara further stated that if the pipeline is severed, product would flow at about 16,000 gallons per minute from the north side, and the flow would continue until it reached the hydrostatic pressure of 250 psi. He added that the pipeline product "would easily jet away the

highly fractured and brecciated rock and sediments overlying the tunnel. Product would move relatively rapidly outward and upward from the pipeline release point as long as the pipeline was flowing, or the product pressure exceeded the hydrostatic pressure." 18 Tr 2681. He noted that the pipeline product is lighter than water and would "continue to rise until it breaks through the lakebed sediment and enters the water column" where it would "eventually reach the shores of the Straits and be carried far into both Lake Huron and Lake Michigan." 18 Tr 2682. He added that:

> [i]n addition to the migration of the mobile product, there would be an immobile fraction that would remain stuck in the rock and sediments and slowly dissolve into the groundwater, and ultimately the water column, for decades or possibly centuries. Dissolved hydrocarbons are neutrally buoyant and travel with ground water or surface water flow and can travel hundreds of miles when driven by currents and wave action. These immobile product residuals would remain a long-term source of pollution in the Straits.

18 Tr 2682.

Ms. Gravelle responded to the testimony of Mr. Godfrey regarding risk. She stated that a single explosive event would be catastrophic for the citizens of Bay Mills and other tribal nations in the region. She described the Anishinaabe water keepers' profound connection to the water and stated that however small the chance of a release, any release is catastrophic, which is an issue that is ignored by the POF Report. Ms. Gravelle opined that a release from Line 5 "can only mean loss. A loss of oneself, a loss of one's past and future, a loss of one's culture, and a loss of one's Tribe." 17 Amended Tr 2611. Thus, she posited that it is essential to protect the Straits from even a single release no matter how unlikely. She stated that Mr. Godfrey's evidence does not address the perspective of the people who will be directly affected by a spill, however unlikely it is, and That the brunt of such accidents is often borne by indigenous people.

B. Rebuttal Testimony on Reopening of the Record

1. Enbridge Energy, Limited Partnership

Enbridge initially provided testimony from seven witnesses in the rebuttal phase of the reopened case. Two of the witnesses (Dr. Ferrara and Dr. Vitton) are new to the case. One of the witness's testimony (Mr. Eberth) was withdrawn by Enbridge. 17 Amended Tr 2564.

Mr. Bott responded to Mr. Kuprewicz's claim that Enbridge's quantitative risk analysis improperly minimizes the risk of the Replacement Project. He asserted that Enbridge employs a pipeline integrity management program (IMP) and explained that it "uses a 'defense in depth' approach to maintain integrity of the pipeline system. This approach leverages prevention, monitoring, and damage mitigation." 16 Tr 2322. Mr. Bott stated that probability analysis is an assessment tool that allows the operator to determine whether additional prevention measures are required in the design and operation of the proposed pipeline, and it should be conducted prior to construction. He further averred that probability analysis remains an important component of pipeline operation as well.

Mr. Bott asserted that Enbridge's IMP is designed to meet or exceed PHMSA requirements and to be in alignment with API 1160, API 1176, and API 1183. He stated that "[p]robability analysis is used to ensure that the deterministic requirements in 49 CFR 195.452(h) and Enbridge's liquid pipeline IMP procedures provide an adequate level of reliability" and that "probability and/or risk analysis may identify additional integrity actions that are required to maintain the risk to as low as reasonably practicable (ALARP) where deterministic requirements did not achieve the desired level of reliability or where additional preventative measures could further reduce risk." 16 Tr 2323-2324. He added that ILI is another tool for evaluating pipeline integrity that provides detailed information on interacting conditions. Moreover, Mr. Bott testified

that the issue of human error is addressed by Enbridge in three ways: (1) the company maintains a competency management program for pipeline integrity staff as required under Part 195 of the CFR and monitors vendor qualifications, (2) peer review and subject matter expert review is employed in plan development and analysis, and (3) the performance of the IMP is monitored.

In his rebuttal testimony, Mr. Philipenko objected to Mr. Kuprewicz's claim that Enbridge's leak detection system is ineffective. He described Enbridge's approach to leak detection, which involves multiple layers for overlapping and comprehensive protection in different operating scenarios. He explained that:

> [t]he CPM systems provide alarms to the Pipeline Controller and the Leak Detection Analyst in the event of a potential leak. The Leak Detection Analyst is located in the control room and provides operational support and root cause analysis for the leak detection alarms generated by the CPM systems. The Leak Detection Department is made up of approximately 40 employees located in Edmonton, Alberta.

16 Tr 2259. Mr. Philipenko contended that the method employed by Enbridge meets or exceeds all applicable engineering standards and regulatory requirements.

Mr. Philipenko asserted that Enbridge's leak detection strategy does not rely on any single technology or human factor and that operational testing of the CPM is part of the company's continuous improvement to ensure optimal performance. Specifically, he explained that Enbridge conducts regular fluid withdrawal tests (removing fluid from a live pipeline system) in order to verify that the CPM alarms are operating as expected and to test the human response as well. 16 Tr 2260-2261. Mr. Philipenko added that pipeline controllers and leak detection analysts undergo rigorous training and are guided by procedures that ensure consistency.

Next, Mr. Philipenko noted that "there are already automatic shut-off valves on each side of the Straits," which close automatically within three minutes of a threshold pressure loss. 16 Tr 2262. He stated that, following the 2010 incident in Marshall, Michigan, Enbridge has

"made significant improvements to the operations of the control center and leak detection system capabilities . . . ." 16 Tr 2262. Mr. Philipenko provided a description of the improvements:

> Leak Detection Improvements:
>
> • Additional instrumentation to enhance sensitivity & reliability
> • Single area of leak detection organizational accountability
> • Improvements to existing CPMs with additional statistical alarm analysis
> • Implementation of new CPMs and decision support tools
> • Industry leading testing strategy, tools and research
> • Training enhancements including competency program implementation for leak detection analysts
>
> Control Center Improvements:
>
> • Implementation of a Control Room Management Plan
> • Construction of a world-class control room facility
> • Management system implementation for effective monitoring and continuous improvement
> • Enhanced training program including team training and pipeline simulations
> • World class control center interdependent safety culture
> • Procedure rationalization, quality management system and procedures management tool
> • Implementation of new decision support tools, Leak Detection Alarm Manager (LDAM), Column Separation Management and Controller Portal

16 Tr 2263-2264.

Mr. Philipenko also disputed Mr. Kuprewicz's claim that historically, Enbridge has not complied with the 10-Minute Rule for shut down. He stated that Mr. Kuprewicz's concerns fail to recognize that the shut-off valves at either end of the Straits are "fully-automated, pressure-sensitive shutoff valves [that] are not subject to human error because they operate without need for human intervention." 16 Tr 2264. Mr. Philipenko added that:

> [t]he addition of the LDAM system after [the Marshall incident] includes a requirement for the Alarm Response Team (ART) to independently assess each CPM alarm. The ART consists of the Controller, the Senior Technical Advisor (STA) and the Leak Detection Analyst (LDA). Each member of the ART must complete an independent investigation of the pipeline for leak triggers within 10 minutes. To continue operating the pipeline all three members must independently select an invalid assessment. If within 10 minutes no assessment is

> completed, or any one of the 3 ART members identify leak triggers, then the LDAM system will request an emergency shutdown of the pipeline system. Additionally, the LDAM system contains an auto shutdown capability, where if an alarm has not been invalidated after 10 minutes, an automated shut down occurs at the 11-minute mark. Given the automated capabilities of the control systems design and LDAM, concerns related to the 10 Minute Rule have been alleviated.

16 Tr 2264-2265. Additionally, he noted that the 10 Minute Rule is "a component of the federal court-approved Consent Decree issued related to the Marshall incident between Enbridge, the United States Department of Justice, and the United States Environmental Protection Agency." 16 Tr 2265.

Mr. Godfrey responded to Mr. Kuprewicz's and Mr. O'Mara's testimony regarding the issues of probability analysis and human error. First, he noted that Mr. Kuprewicz and Mr. O'Mara fail to understand that the FMEDA provides the information requested by the Commission in the July 7 order. Mr. Godfrey asserted that the DNV POF Report (Exhibit A-29) provides the POF analysis that allows the Commission to compare the safety of the dual pipelines with the safety of the Replacement Project. Second, he stated that locating the replacement pipe segment within a tunnel eliminates or greatly reduces the risks that the dual pipelines present because the new pipeline: (1) will no longer be subject to anchor strikes and bending stress, (2) can be directly examined, (3) will have enhanced leak protection, and (4) will be encased in the secondary containment of the tunnel. 17 Amended Tr 2446. Third, Mr. Godfrey contended that the DNV POF Report that was based on the FMEDA is consistent with recent PHMSA recommendations, which favor probabilistic risk assessment.

Mr. Godfrey disputed Mr. Kuprewicz's claim that the assignment of numerical probability values creates a false sense of safety. He argued that the POF analysis accurately reflects the risk of a release and the risk of an ignition of product within the tunnel under multiple potential threats and failure scenarios. In addition, Mr. Godfrey noted that "the POF for each selected FMEDA

scenario was estimated by using publicly available pipeline data." 17 Amended Tr 2448. He contended that rather than being ignored (as Mr. Kuprewicz alleged), known risks are being considered along with appropriate preventive and mitigative measures. 17 Amended Tr 2449. Regarding Mr. Kuprewicz's claim that PHMSA's data for hazardous liquid pipeline accidents is unreliable, Mr. Godfrey asserted that pipeline operators are required to submit DOT Form 7000-1 following an accident and that accident reporting requirements are codified at 49 CFR 195.50-195.54. He testified that PHMSA collects this data in order to assess industry performance and that by comparison, the National Transportation Safety Board does little investigation of such events.

Turning to the issue of girth welds and the potential for catastrophic failure, Mr. Godfrey stated that Mr. Kuprewicz fails to acknowledge several important facts, beginning with the Joint Industry Report (Exhibit BMC-43) which Mr. Kuprewicz relied upon in his testimony. Mr. Godfrey asserted that the Joint Industry Report notes that Enbridge has already implemented the recommendations set forth in Exhibit BMC-43 and has designed the Replacement Project to reduce the risk of girth weld failure. Next, he contended that Mr. Kuprewicz is mistaken in asserting that the placement of the pipeline on rollers will increase stress on the pipe; rather, it will achieve the opposite, and Mr. Godfrey cited Mr. Cooper's testimony at 9 Tr 1241-1243 in support. He opined that this "is a significant improvement over the existing dual pipelines or a conventional buried pipeline which are subject to loading due to earth movement, hydrologic forces, and thermal effects." 17 Amended Tr 2452. He also stated that Mr. Kuprewicz's testimony significantly misrepresents the weld dimensions (by a factor of more than 10) and thus overstates the risk associated with the girth welds. Mr. Godfrey averred that Mr. Kuprewicz's references to

Exhibits BMC-54 and BMC-55, two PHMSA advisory bulletins, are inapt because these bulletins address a different issue.

Regarding the Keystone pipeline failure and Exhibit BMC-64 introduced by Mr. Kuprewicz, Mr. Godfrey testified that his conclusions about girth weld POF have not changed. He contended that the Replacement Project is significantly different from the Keystone pipeline, as illustrated by the fact that the replacement pipe segment "will have no pipe to fitting transition welds which is a potential source of weld flaws due to the weld geometry." 17 Amended Tr 2454. And, because the replacement pipe segment will not be buried in the ground, Mr. Godfrey asserted that "bending stress loads will be distributed across the tunnel pipe support and roller system by design." 17 Amended Tr 2454. Mr. Godfrey also objected to Mr. Kuprewicz's reference to the May 4, 2020 rupture on Enbridge's Line 10. He stated that Line 10 was constructed in 1952, "which was prior to PHMSA regulation and modern welding standards." 17 Amended Tr 2455. In addition, Mr. Godfrey noted that, in the case of Line 10, the failure involved a tie-in weld, however there are no tie-in welds in the Replacement Project. Therefore, due to the lack of similarity, he stated that the Line 10 failure was not considered in the FMEDA process. In any event, Mr. Godfrey contended, modern welding standards and Enbridge's commitment to examine all the welds will protect against the same type of failure.

Next, Mr. Godfrey responded to criticism that Enbridge is overly reliant on ILI tools to monitor safety conditions, reiterating that the threat of girth weld failure is being addressed through the design and construction of the Replacement Project. Regarding Mr. Kuprewicz's claim that the communications system is subject to human error, Mr. Godfrey asserted that it is "unclear what human error Mr. Kuprewicz envisions or how it would be mitigated further." 17 Amended Tr 2456. Turning to the alleged weaknesses of the CPM system, Mr. Godfrey

rejected Mr. Kuprewicz's concern related to the elevation of the tunnel. He explained that there is no basis to think that a pressure loss would not quickly result in the identification of a pipeline rupture because "the lower the elevation of a rupture, the greater the pressure drop and initial flow rate out of the pipe." 17 Amended Tr 2457.

In response to Mr. O'Mara's concern regarding the operating and hydrostatic pressure on the replacement pipe segment, Mr. Godfrey noted that Mr. O'Mara assumes the pipeline will operate at its MOP of 1440 psig when, in fact, the normal operating pressure will be 480 psig. 17 Amended Tr 2458 (citing 8 Tr 801). He also stated that Mr. O'Mara misunderstands how the pipeline will operate hydraulically, adding that "the tunnel will act as an elongated storage tank. Product leaving the pipeline will quickly equalize with ambient tunnel pressure until the tunnel is completely filled." 17 Amended Tr 2459. Mr. Godfrey asserted that, in any event, the automatic shutoff valves would close within three minutes.

Dr. Ferrara testified that he is a Principal Consultant with DNV Services UK Limited Energy Systems (also referred to as DNV). He sponsored Exhibit A-35. Dr. Ferrara stated:

> DNV conducted a numerical computational fluid dynamics (CFD) 3D modeling study to assess the severity (in terms of blast overpressures) of a hypothetical explosion occurring as a result of a release of natural gas liquids (NGLs) from the new Line 5 Replacement Segment within the Great Lakes Tunnel Project (GLTP). As a result of this study, [he] along with other DNV employees prepared a report titled *Enbridge Line 5 Great Lakes Tunnel Project: Tunnel Explosion Computational Fluid Dynamic Study* (Explosion Study), which is Exhibit A-35. The Explosion Study addresses concerns regarding an explosion within the tunnel that were raised by other witnesses. . . . Based on the modeling of four scenarios discussed in the Explosion Study, [they] concluded that the overpressure generated in the tunnel created by an explosion from an ignition of NGLs product in a conservative, worst case explosion scenario is 0.386 barg [bar gauge]. [They] understand from Enbridge that the tunnel's design will allow the tunnel to withstand overpressure [of] 3 barg where its overburden is least and overpressure of 29 barg where its overburden is greatest.

17 Amended Tr 2405-2406.

Mr. Dennis responded to Mr. O'Mara and Mr. Kuprewicz on the issues of fire suppression and risk management. He explained that Enbridge does not expect methane to be present in the tunnel at levels of concern during construction or operation of the tunnel. However, Mr. Dennis stated that:

> we still take seriously the risks that methane might create. To address the risk of methane during construction, as required by [OSHA], the [TBM] will be equipped with monitors to detect methane. In the unlikely event that the TBM were to encounter methane at levels that would present a risk, the TBM operators would be able to initiate appropriate safeguards to safely tunnel in that methane environment. The use of a TBM that is equipped to detect methane helps to ensure the safe mining of the tunnel. A TBM equipped to detect methane will also confirm the existence or lack of existence of methane along the entire path of the tunnel. If methane is identified at significant levels during tunneling, then we will take appropriate design and operational steps to address the existence of methane to operate the tunnel safely.

15 Tr 2090. In addition, Mr. Dennis contended that there will be vapor monitors in the tunnel after construction and during operation that will detect the presence of methane and if the gas is detected, the company will take steps to address the issue.

Mr. Dennis objected to Mr. O'Mara's request that Enbridge install an FFFS in the proposed utility tunnel similar to those installed in transportation tunnels. He stated that transportation tunnels have a much higher risk of accidental fire than the proposed utility tunnel and are better suited for an FFFS. In addition, Mr. Dennis asserted that an FFFS is not advisable in this situation:

> From an engineering and safety perspective, we have concluded that installing a [FFFS] is counterproductive for this tunnel. First, the risk of a fire is extremely remote, and the tunnel is a confined space which will not typically be occupied by humans. Second, by installing a [FFFS] within the tunnel, we would be increasing the number of hours personnel would need to be in the confined space of the tunnel to maintain the [FFFS]. These increased hours for maintenance on the [FFFS] creates more potential harm to human health and life than the benefits that such a system would provide. Therefore, given the tunnel is treated as a confined space, the risk of fire is extremely remote, and the additional risks in terms of human

> health and life to maintain a [FFFS], the installation of such a system is inappropriate.

15 Tr 2091-2092.

Mr. Dennis further concluded that Dr. Ferrara's explosion study, set forth in Exhibit A-35, is accurate. He noted Dr. Ferrara's conclusions regarding the tunnel lining's ability to withstand overpressure (3 barg at each end of the tunnel and 29 barg at its lowest point) and the fact that the largest overpressure that can be expected from an explosion is just under 0.4 barg. As a result, Mr. Dennis asserted that the tunnel lining will maintain its integrity in the event of an explosion. 15 Tr 2092-2093. Finally, he stated that Dr. Vitton's testimony shows that, even in the event of a failure of a portion of the lining, Line 5 product would not be released into the strata around the damaged lining.

Turning to the topic of risk assessment, Mr. Dennis noted that Enbridge based its design decision for managing risk on ISO 31000, which is a "widely adopted industry standard relating to risk management . . . codified by the International Organization for Standardization (ISO)." 15 Tr 2094. He stated that even where risks are low or are already mitigated, the company has not become complacent. Mr. Dennis cited methane as an example, as well as the steps taken to reduce the chance of a release of Line 5 product, stating that even though these risks are virtually nonexistent, the company has taken significant risk avoidance measures.

Finally, Mr. Dennis disputed Mr. Kuprewicz's claim that the strobe light alarm, which warns of a gas leak in the tunnel, and the communications system are subject to human error. He stated that along with the strobe light alarm, there are other modes of protection available such as a horn and personal gas monitors. Regarding the communications system, Mr. Dennis explained that:

> Enbridge will install two redundant communication systems within the tunnel. One is a radio system provided via a distributed antenna system, and the other is a fixed system provided via a mine telephone system. This duplicative communication

> system is sound risk management in the case that one system fails. This approach is well supported by industry practice and compliance with federal regulations concerning construction of underground tunnels.

15 Tr 2097. Furthermore, Mr. Dennis noted that "[a]ny entry team going into the tunnel will have a dedicated team outside the tunnel monitoring and ensuring their safety who will be located in the control room." 15 Tr 2097.

Stanley J. Vitton, Ph.D., testified that he is a Senior Geotechnical Engineer at Barr Engineering Company. In response to Mr. O'Mara's concern about a methane explosion during construction and operation of the Replacement Project, Dr. Vitton asserted that methane is not a risk for the Replacement Project. He stated that there are no sources of methane within the area of the tunnel "that have the ability to produce methane levels remotely capable of reaching explosible methane levels. Mr. O'Mara has drawn faulty conclusions from the Geotechnical Data Report (GDR) conducted by Enbridge." 17 Amended Tr 2465.

Dr. Vitton explained that, according to the GDR, very low levels of methane were detected in four samples (from the 18 boreholes) that range from 5.3 micrograms/liter (μ/L) to 11 μ/L. He stated that these "four samples are common for areas in or near shore water where the methane comes mainly from decomposed vegetation and atmospheric deposition." 17 Amended Tr 2465. Dr. Vitton added that the GDR samples taken from the main waterway showed no methane and there are no gas deposits underlying the Straits.

Dr. Vitton noted that the National Institute for Occupational Safety and Health publishes its Informational Circular 9486, *Handbook for Methane Control in Mining* (Kissell, 2006), that states that the "No Immediate Action" level for methane is <10 milligrams/Liter. 17 Amended Tr 2467, Table 9. According to Dr. Vitton, the highest level of methane reported in the GDR is 0.1% of the "No Immediate Action" level and, therefore, no mitigation measures are necessary. He also noted

that the findings in the GDR are consistent with the known geology of the Straits. 17 Amended Tr 2468-2470. Furthermore, he asserted that Mr. O'Mara provided no evidence or analysis to support his concerns regarding methane.

Next, Dr. Vitton discussed the examples of methane explosions in tunnels in the Great Lakes Basin cited by Mr. O'Mara, stating that they involved tunneling in areas that were well known to have a high methane concentration—one in a collector sewer tunnel constructed in swamp soils and the other in a tunnel constructed through the Antrim Shale. 17 Amended Tr 2471-2473. He argued that these tunneling projects are an apples-to-oranges comparison to the Replacement Project.

Finally, Dr. Vitton testified that he disagrees with Mr. O'Mara's assessment of the potential escape of Line 5 product into the Great Lakes in the event of a tunnel collapse. He concluded that:

> [a]ssuming a hypothetical breach of the tunnel lining caused by either an explosion or fire, any NGLs or petroleum products would likely be consumed by the fire or explosion. Further, the surrounding hydrostatic water pressure in the strata is higher than the atmospheric pressure in the tunnel, thus, groundwater would be forced into the tunnel, not allowing the product to move out of the tunnel and into the strata. The only way for the product to migrate into the strata is for the atmospheric pressure in the tunnel to somehow be at a pressure higher than the hydrostatic water pressure for a sustained period of time. There is no conceivable scenario for this to occur. For example, the force [of] an explosion would last only milliseconds and not be a cause of product to migrate through the strata. Even assuming that the tunnel lining were breached and then the tunnel allowed to fill with product, the water hydrostatic pressure would still be higher than the pressure from the product since the density of the NGLs and petroleum products is lighter than water. Again, water would move into the tunnel and up to the level of the water in the Straits, not out into the rock formation.

17 Amended Tr 2475. He contended that the path of least resistance would be the tunnel shafts, leading to the portals at the two ends. Dr. Vitton stated that "if such a breach were to occur, Enbridge would be in a position [to] remediate the release by vacuuming the product from the tunnel at either portal." 17 Amended Tr 2476.

2. The Commission Staff

In his rebuttal testimony on reopening, Mr. Adams responded to Mr. O'Mara and sponsored Exhibit S-37.[31] He argued that the examples provided by Mr. O'Mara of fires in large tunnel projects are not relevant to the Replacement Project. Mr. Adams explained that all the projects cited by Mr. O'Mara were built before 2000, all are tunnels used for the transportation of cars and trains, and all are regularly occupied by humans.

Mr. Adams stated that "the tunneling industry has made significant advances in both analysis and practical design considerations for large fire events for tunnel lining design." 17 Amended Tr 2570. He asserted that the Replacement Project design meets the current standard of practice and has been designed for the Rijkwaterstaat (RWS) fire event. Mr. Adams explained that this standard involves the use of polypropylene fibers in the concrete mix used for the tunnel lining, which reduces the impact from explosive spalling of the concrete in the event of a fire, and that this design will be incorporated by Enbridge in the Replacement Project.

Turning to Mr. O'Mara's discussion of the risks of long-term seepage of methane, Mr. Adams stated as follows:

> Per joint specifications developed by Enbridge and the [MSCA]'s specifications technical team, specifically Section 317117, Paragraph 3.14, the tunnel lining has an allowable inflow leakage of 7000 gallons per day total over the full length of the tunnel, or 0.7 gallons per minute per 1000 feet of tunnel over shorter stretches of the tunnel. [(]Exhibit MM-7, Page 237 of 238.) From the [GDR] for this project (Exhibit MM-4, Page 45 of 2625), methane detected in groundwater samples were a maximum of 11 micrograms of methane per liter of water, with average values of approximately 7 micrograms per liter.
>
> Exhibit S-37 provides estimates of the duration it would take to reach LEL in the tunnel for parameters cited above. These estimates have been made for both allowable flow rates cited above, and used the following conservative assumptions: No tunnel ventilation occurs, allowing methane concentrations to accumulate

[31] Mr. Adams is now the Chief Executive Officer of Delve Underground, formerly known as McMillen Jacobs Associates.

> without air exchange; all inflows into the tunnel contain methane at the maximum concentration detected along the tunnel alignment; all methane in the groundwater is released into the tunnel atmosphere; and methane is assumed to concentrate in a smaller portion of the tunnel, approximately 5% of the overall tunnel length. Our duration estimates suggest it would take approximately 800 and 2,400 years for the allowed tunnel inflow rates as well as higher inflow rates for short periods and lengths of the tunnel, to reach this level of methane concentration within the air in the tunnel. These calculations are provided in Exhibit S-37. In conclusion, durations are well beyond the design life of the tunnel even for conservative assumptions throughout.

17 Amended Tr 2572-2573.

Mr. Chislea responded to Mr. Kuprewicz on the issues of probability analysis and pipeline management. He disagreed with Mr. Kuprewicz that federal regulations provide no support for the use of numeric probabilities in performing risk assessment. Noting the requirements of Part 195 of the CFR, specifically 49 CFR 195.452 and Appendix C of Part 195 (which provides instructions on how to identify risk factors), Mr. Chislea concluded that "federal regulations on pipeline integrity management require pipeline risk assessment, which can include calculating numeric probabilities, to establish baseline and continual assessment schedules." 18 Tr 2810.

In response to Mr. Kuprewicz's description of the federal integrity management regulations concerning hazardous liquids pipelines, Mr. Chislea noted that 49 CFR 195.452 and 195.454 govern pipeline integrity management for hazardous liquid and carbon dioxide pipelines and that PHMSA has the responsibility for inspection and enforcement of hazardous liquid pipeline safety in Michigan. He explained that with a typical Act 16 application, the Staff consults with PHMSA to ensure that that agency is carrying out the required reviews and inspections, and the Staff may also make recommendations to the Commission depending on the information obtained in consultation with PHMSA.

Turning to the issue of the girth welds, Mr. Chislea reiterated his recommendation that Enbridge be required to develop low-hydrogen welding procedures and qualify them per 49 CFR 194.214, which exceeds the procedures required by API Standard 1104. 18 Tr 2812.

3. Mackinac Straits Corridor Authority

Mr. Cooper responded to Mr. Kuprewicz and Mr. O'Mara on the issue of probability assessment. He disputed Mr. Kuprewicz's claim that Enbridge's risk assessment is not supported by federal regulations. Rather, Mr. Cooper asserted that the pipeline integrity management regulations located in 49 CFR 195.452 and 195.454 require risk-based decision-making. Mr. Cooper further stated that risk assessment helps a pipeline operator decide when to take measures that exceed federal standards, such as when there are threats to the pipeline that are greater than those anticipated by federal regulations. He asserted that this is illustrated by Enbridge's decision to place the pipeline in a tunnel, which is not required by federal safety regulations but has been shown through risk assessment to provide greater safety than the existing dual pipelines which lay on the lakebed.

Mr. Cooper also disputed the notion that risk assessment results in complacency; rather, he asserted that risk assessment is a form of diligence. He stated that Enbridge has followed industry standards for estimating risk as "described by American Petroleum Institute Recommended Practice 1160 *Managing System Integrity for Hazardous Liquid Pipelines* and American Society of Mechanical Engineers Standard B31.8S *Managing System Integrity of Gas Pipelines*." 17 Amended Tr 2591.

In addition, Mr. Cooper objected to Mr. Kuprewicz's claim that Mr. Godfrey's numeric probability values are misleading. He testified that Mr. Godfrey's POF analysis follows industry standards for such assessments and that the need for "risk-based decision making is well

established in federal pipeline safety regulations." 17 Amended Tr 2593. Mr. Cooper noted that Mr. Godfrey reviewed PHMSA data for quality and even excluded data where there were better sources in order to provide an apples-to-apples comparison.

Next, he asserted that the issues identified in the Joint Industry Report (Exhibit BMC-43) regarding girth welds in grade X70 pipe are not applicable to the Replacement Project. Mr. Cooper reiterated that the replacement pipe segment will not be buried in the ground but will instead be located in the tunnel on supports with rollers and, as such, will not experience the stresses related to ground movement or the pressures related to thermal changes that are experienced by buried pipelines. He further noted that Enbridge has already implemented the measures recommended in the Joint Industry Report for this issue.

In response to Mr. Kuprewicz's claim that Enbridge underestimates the probability of explosion and release of Line 5 product into the Straits, Mr. Cooper stated that Mr. Kuprewicz failed to explain any observed situations where an explosion occurred, "how they compare with the proposed pipeline and tunnel, what safety measures were in place, and what events and causes led to product release and ignition." 17 Amended Tr 2597. Additionally, Mr. Cooper asserted that Mr. Kuprewicz misinterpreted Exhibit BMC-60, which contains Mr. Cooper's handwritten notes. Mr. Cooper testified that the notes were intended to provide Enbridge with examples of recommended "risk units to be used for reporting probability of failure analysis results," not targets that the State would find acceptable. 17 Amended Tr 2599.

Regarding Mr. O'Mara's assertions relating to the potential for product leaks, Mr. Cooper noted that the tunnel pipeline will not operate at 1440 psig but rather at a maximum steady-state pressure of 463 psig and a transient surge pressure of 750 psig. He stated that the lower pressure

reduces the potential for the destruction of rock and sediment, thus reducing the chance that product could reach the Straits. 17 Amended Tr 2599-2600.

C. Surrebuttal Testimony on Reopening of the Record

On behalf of Bay Mills, Mr. O'Mara responded to Dr. Ferrara and addressed the explosion study contained in Exhibit A-35. He sponsored Exhibit BMC-64. Mr. O'Mara contended that the explosion study was not based on a worst-case explosion scenario, which in his opinion, undercuts the conclusions of the study. He also objected to the explosion study, testifying that it: (1) only looks at vapor cloud releases from NGLs and not releases from crude oil; (2) does not evaluate an explosion following a full bore rupture; (3) assumes that the tunnel is level and only 1000 feet long rather than V-shaped and four miles long; (4) assumes a release from a single hole with a 0.315 inch diameter when it should look at releases from larger breaches including a full bore rupture; (5) assumes a vapor cloud height, width, and length that do not represent the worst-case scenario; (6) fails to include methane vapors; and (7) assumes a tunnel temperature of 42°F when it could actually be much colder or warmer. 18 Tr 2703-2704.

D. Initial Briefs on Reopening of the Record

1. Enbridge Energy, Limited Partnership

Enbridge asserts that the evidence in the reopened record demonstrates that replacing the dual pipelines with the Replacement Project will make the Straits safer. The company argues that in comparison to the dual pipelines, the Replacement Project reduces the probability of a release and decreases the overall environmental risk.

Enbridge begins with a description of the legal framework of the case, stating that under Act 359, MSCA is the ultimate owner of the tunnel and has authority over construction, operation, and maintenance of the tunnel. The company notes that the statute requires MSCA to ensure that

the tunnel will act as "secondary containment" and mandates that the purposes of MSCA are "public purposes." Enbridge's initial brief on reopening, p. 2 (quoting MCL 254.324d(4)(d) and MCL 254.324b(1), respectively). The company contends that PHMSA is vested with exclusive jurisdiction over "the safe operation of Line 5" under the PSA, "which expressly preempts a state's authority over the safe interstate pipeline operation." Enbridge's initial brief on reopening, p. 2 (citing 49 USC 60101 and 60104(c)).

Enbridge then describes the July 7 order and notes that in addition to supplementary information on the Replacement Project, the Commission requested information relating to the current and future operation of the dual pipelines. The company states that the Staff concluded that Enbridge addressed each of the Commission's information requests. Enbridge's initial brief on reopening, p. 4 (citing 18 Tr 2791).

Turning to the Commission's Act 16 analysis and the evidence on the reopened record, Enbridge argues that the second prong of the Act 16 analysis is satisfied because locating the replacement pipe segment within the tunnel is a better design and route than the dual pipelines. The company states that "[t]he additional evidence requested by the Commission regarding the current and future operations of the dual pipelines is set forth in Exhibit A-28, and that evidence demonstrates that the dual pipelines are being operated safely. Nonetheless, the testimony submitted on reopening demonstrates that locating Line 5 within the tunnel provides even greater protection." Enbridge's initial brief on reopening, p. 4. Enbridge contends that Mr. Godfrey's evidence demonstrates that the tunnel will reduce or eliminate the risks associated with the dual pipelines because the tunnel: (1) provides protection from anchor strikes and bending stress, (2) allows for direct examination of the pipeline, (3) provides better leak detection, and (4) acts as

secondary containment. Enbridge posits that the tunnel provides "a far superior design and route than the current dual pipelines." Enbridge's initial brief on reopening, p. 5.

Additionally, Enbridge notes, Mr. Godfrey's review of PHMSA data shows that the risk of a release of Line 5 product from the Replacement Project is less than once every 663,000 years, and his analysis of the risk of ignition in the tunnel is once every 169 million years. Enbridge's initial brief on reopening, p. 5 (citing 17 Amended Tr 2437, 2439). The company further posits that the evidence of Dr. Ferrara, Dr. Vitton, and Mr. Dennis demonstrate that the tunnel's design will allow it to withstand a worst-case explosion, and that even in the event of such an explosion, hydrostatic pressure would prevent any released product from migrating into the Straits. Instead, Enbridge asserts, released product would migrate to the end portals where it would be fully recovered. However, the company asserts, secondary containment will "be maintained in any explosion scenario." Enbridge's initial brief on reopening, p. 5. Enbridge states that even Mr. O'Mara agreed that a properly designed, constructed, and operated tunnel would be safer than the existing dual pipelines. *Id*., p. 6 (citing 18 Tr 2719). Therefore, Enbridge concludes that the second prong of the Commission's Act 16 analysis is satisfied.

For the third prong of the Act 16 analysis, Enbridge contends that the Replacement Project meets or exceeds current safety and engineering standards. The company asserts that it responded to the 10 categories of information sought by the Commission in the July 7 order and offered additional expert testimony, all of which rebuts the contentions of Bay Mills.

Enbridge claims that, on rebuttal, Mr. Godfrey and Mr. Cooper debunked Mr. Kuprewicz's assertion that probabilistic risk assessment should not be used at this stage. The company argues that PHMSA encourages quantitative risk analysis specifically for hazardous liquids pipelines. Enbridge states that:

> Mr. Kuprewicz relies on anecdotal evidence based on personal experience. By contrast, Enbridge's approach critically reviews relevant data, rigorously scrutinizes, analyzes, and computes it to inform reliable, fact-based opinions as to risk. At no point does Mr. Kuprewicz demonstrate that locating Line 5 within the tunnel is less safe than the existing dual pipelines.

Enbridge's initial brief on reopening, pp. 9-10.

Enbridge asserts that even in the extremely unlikely event of a release and an ignition (once in 169 million years), the tunnel will withstand the explosion and there will be no localized collapse. In support, the company cites Dr. Ferrara's evidence showing that even a worst-case explosion would not cause the tunnel to fail because the greatest blast overpressure that would be created in the tunnel is 0.4 barg, which is well within the range of 3 barg (at the area with the lowest overburden pressure) to 29 barg (at the area with the highest overburden pressure). Enbridge's initial brief on reopening, p. 11 (citing 15 Tr 2092-2093, 17 Amended Tr 2405-2406) (Enbridge rounds up from 0.386 barg). Enbridge argues that:

> [i]n sur-rebuttal, Mr. O'Mara criticized the inputs to the model used by Dr. Ferrara. Based on his own testimony, however, Mr. O'Mara has no expertise in modeling explosions and his lack of qualifications stand in stark contrast to the qualifications of Dr. Ferrara. Mr. O'Mara readily admits that he did no actual engineering or mathematical analysis, himself, on the effects of an explosion in the tunnel, and he did not even attempt to run a model using different inputs. In fact, Mr. O'Mara has never used a computational fluid dynamics model to calculate the overpressure generated by an explosion for this or any other tunnel. Dr. Ferrara presented the only analysis of overpressure generated by a worst-case explosion, demonstrating that the tunnel will remain intact in the extremely unlikely event of an explosion.

Enbridge's initial brief on reopening, pp. 11-12 (citing 17 Amended Tr 2408-2429; 18 Tr 2683-2687, 2695, 2737-2738).

Turning to the issue of methane, Enbridge argues that Mr. O'Mara made no attempt to analyze whether the methane values found in the GDR samples could result in an explosive atmosphere in the tunnel. By contrast, the company avers, Dr. Vitton analyzed the sample values and stated unequivocally that there are no methane sources in the area of the tunnel that "have the ability to

produce methane levels remotely capable of reaching explosible methane levels." Enbridge's initial brief on reopening, p. 13 (quoting 17 Amended Tr 2465). Enbridge asserts that the methane values in the GDR samples fall well below levels of concern according to the Methane Control Handbook. According to the company, Mr. O'Mara admitted that he relies on this handbook; however, Enbridge states that he failed to consider the handbook in his evidence because it would have undercut his assertions of risk.

Enbridge further argues that Mr. Adams' Exhibit S-37 concludes that it would take between 875 and 2,452 years for methane to accumulate in the proposed utility tunnel sufficient to reach the LEL. The company adds that Mr. O'Mara's two examples of methane explosions in tunnels in the Great Lakes Basin are inapposite in this case. Enbridge's initial brief on reopening, pp. 14-15. Enbridge asserts that, despite the fact that methane is highly unlikely to be a concern during construction or operation of the Replacement Project, the company has addressed any potential risk by equipping the TBM with methane detectors and equipping the tunnel with gas detectors.

Next, Enbridge contends that even if the tunnel liner failed, secondary containment would be maintained. The company argues that, again, Mr. O'Mara provides anecdotal evidence based on false assumptions. Specifically, Enbridge states that "Mr. O'Mara fails to explain how the pressure of the product exiting the pipe after a fire or explosion would be maintained at the same pressure within the pipe and not fall to the ambient atmospheric pressure of the tunnel after exiting the pipeline" or why the product would continue to be released at pressure after the automatic shutoff valves closed after three minutes. Enbridge's initial brief on reopening, p. 17. The company highlights Mr. Vitton's testimony indicating that it is implausible that the atmospheric pressure within the tunnel could be higher than the hydrostatic water pressure for a sustained period. Accordingly, Enbridge states, "there is no circumstance under which product released

from the Line 5 replacement segment could escape the tunnel." Enbridge's initial brief on reopening, p. 17 (citing 17 Amended Tr 2475). The company contends that any released product would float on the water inside the tunnel and be recovered at the portals.

Enbridge maintains that the CPM and other proposed leak detection systems for the Replacement Project will meet or exceed safety and engineering standards. As a preliminary matter, Enbridge notes that pursuant to its leak detection testing program, the company conducts fluid withdrawal tests on its various pipeline systems and that the performance of the system, in all such tests, including the human element, have always met or exceeded expectations. In addition to the CPM and the leak detection systems, Enbridge states that the Replacement Project will contain hydrocarbon vapor detectors, which will alarm if vapors reach 20% of the amount needed to create an explosive atmosphere. The company adds that:

> [i]f these detectors issue an alarm and the Control Center is unable to rule out the possibility of a release within ten minutes, then the pipeline will be shut-down. In addition to the hydrocarbon monitors, there are already automatic shut-off valves on each side of the Straits. These shut-off valves will close automatically within three minutes should a threshold pressure loss occur. The closure would be independent of and could not be overridden by any Control Center action.

Enbridge's initial brief on reopening, p. 19 (citing Exhibit A-32, p. 2; 16 Tr 2262; and Exhibit A-10, p. 20). Enbridge asserts that, as a direct result of the 2010 Marshall incident, the company implemented the LDAM to strengthen compliance with the 10-Minute Rule. The company explains that unless all three members of the ART find the alarm to be invalid, the pipeline will shut down automatically at the 11th minute.

Enbridge contends that the design of the Replacement Project ensures that the risk of a release of Line 5 product from the replacement pipe segment is less than one in one million. However, the company describes that figure as a reliability target for the IMP and states that the actual probability of a release is reflected in Mr. Godfrey's finding of once in 663,000 years. Enbridge

notes that, in calculating the one in one million reliability target, Mr. Bott testified that he considered the performance of the company's mainline transmission pipelines installed after 2000 and the IMP, as well as the fact that the replacement pipe segment will not be buried, can be visually inspected, and will operate at a much lower percentage capacity than its design allows. Enbridge's initial brief on reopening, p. 21 (citing 16 Tr 2355-2356 and Exhibit A-32). The company argues that of the pipelines installed by Enbridge between 2000 and 2022 (10,000 km), it has experienced only four releases. Enbridge explains that two were caused by ground movement and two were caused by third-party damage and, therefore, none of the causes would be applicable to the Replacement Project. The company notes that the one in one million figure represents the upper bound POF.

Next, Enbridge addresses the issue of the electrical equipment that will be located within the tunnel and contends that the reopened record shows that Class 1, Division 2 is conservative and appropriate. The company notes that Mr. Godfrey's estimate of the risk of ignition of once in 169 million years is based on the use of Class 1, Division 2 equipment. Enbridge highlights Mr. Godfrey's testimony that he was "unable to locate any data sets that would show [that] the use of Class 1, Division 1 equipment would make the risk of an ignition even more remote." Enbridge's initial brief on reopening, pp. 23-24 (quoting 17 Amended Tr 2439).

The company contends that:

> [d]esigning the electrical equipment to meet the more stringent standards for Class 1, Division 1: (1) is inconsistent with the [NEC], (2) may not be feasible, and, (3) more importantly, would create other safety concerns that are inconsistent with the design philosophy of the tunnel and adversely impact human safety.

Enbridge's initial brief on reopening, p. 24 (citing Exhibit A-31, p. 7). First, Enbridge explains that NEC 500.5(B)(1) requires Class 1, Division 1 equipment only where vapors can exist under normal operating conditions. The company avers that vapors will not exist in the tunnel under

normal operating conditions of the replacement pipe segment. Second, according to the company, it is not clear whether the Tunnel Service Vehicle (TSV) could even be designed to meet the Class 1, Division 1 standard. Enbridge assumes that the equipment would need to be larger and bulkier, and thus the tunnel itself may need to be redesigned. Third, the company states that it has designed the tunnel to limit to the extent possible the need for humans to be in the tunnel. Enbridge argues that a Class 1, Division 1 requirement would undercut that goal by requiring inspection and maintenance personnel to be in the tunnel for longer periods of time and, thus, imposing unnecessary safety risks.

Regarding the ventilation system, Enbridge states that it is designed to exceed OSHA requirements and will be activated only when personnel are in the tunnel. The company notes that the ventilation system will not be automatically activated in response to a release of Line 5 products because the tunnel is designed to act as secondary containment. Enbridge's initial brief on reopening, pp. 25-26.

Finally, with respect to the third prong of the Act 16 analysis, Enbridge addresses the issue of fire and reiterates that, according to Mr. Godfrey, the likelihood of a release with an ignition is once in 169 million years. The company argues that its evidence demonstrates that the risk of fire is extremely remote, that the tunnel meets the state of the practice for fire design, and that, even in the event of a fire, there is a repair process for the PCTL segments. Noting its goal of limiting the need for personnel in the tunnel, Enbridge maintains that the installation of FFFS would be counterproductive by increasing the number of required hours spent by workers in a confined space, particularly in light of the "incredibly remote risk of a fire." Enbridge's initial brief on reopening, p. 29. In conclusion, the company contends that it has satisfied the requirements for the third prong of the Act 16 analysis.

2. The Commission Staff

In its initial brief on reopening, the Staff notes that Enbridge's Exhibit A-28 contains materials responsive to the Commission's request in the July 7 order for additional evidence regarding the current condition, and future maintenance, of the dual pipelines. The Staff states that, after reviewing Exhibit A-28, the Staff sponsored Exhibit S-33, which is "a report entitled 'Evaluation of Identified Underwater Technologies to Enhance Leak Detection of the Dual Line 5 Pipelines'– which is also responsive to the Commission's request for additional evidence on leak detection and other relevant evidence regarding the current dual pipelines." Staff's initial brief on reopening, p. 2 (footnote omitted).

For the third prong of the Act 16 analysis, the Staff notes that in the July 7 order, the Commission requested additional information on 10 topics, including "the likelihood of release from the pipeline, the tunnel design's ability to meet or exceed safety standards, and the pipeline design's ability to meet or exceed safety standards." Staff's initial brief on reopening, p. 3. The Staff states that the reopened record contains two sources of evidence regarding the likelihood of a release, one being Exhibit A-32, which the Staff describes as providing "the achievable integrity performance for the project" (one in one million), and the second being Exhibit A-29, which includes Mr. Godfrey's POF analysis (once in 663,000 years). Staff's initial brief on reopening, p. 4. The Staff asserts that Exhibit A-32 includes a description of the four releases that have occurred on Enbridge's pipelines installed after 2000, and the Staff notes the company's conclusion that the causes are inapplicable to the Replacement Project.

Regarding Mr. Godfrey's POF analysis in Exhibit A-29, the Staff states that he relied on publicly available pipeline data from PHMSA and BOEM and looked at five POF scenarios. The Staff notes that it "sent a discovery request to Enbridge seeking, in part, a justification that

Enbridge's mitigation measures would result in a reduction in the probability by an order of magnitude less, as claimed in the POF Analysis." Staff's initial brief on reopening, p. 6. The Staff states that:

> Enbridge's response acknowledged that quantitative risk assessments do "not fully account for continuous improvement of pipeline designs, materials, and operating practices" but that "it is appropriate to apply factors that align the results of the data analysis with the expected performance characteristics of the new pipeline." (Exhibit S-31, pp 3-4.) Enbridge further explained that "[t]he order of magnitude reduction factor was chosen by DNV subject matter experts based on the unique design attributes of the Line 5 Replacement Segment." (Id. at 4.) Staff considers this to be a reasonable assumption for a risk assessment at this time, pending assumptions derived from future integrity assessments during operation and maintenance.

Staff's initial brief on reopening, p. 6. The Staff notes that the reopened record does not indicate a standard that sets a specific acceptable probability of release.

In response to Bay Mill's concerns regarding the girth welds, the Staff cites the testimony of Mr. Cooper in which he states that the girth weld issues identified in the Joint Industry Report are not applicable to the Replacement Project because the pipeline will not be buried and Enbridge has already carried out the recommendations in that report with respect to eliminating under-matched girth welds and minimizing weld softening in the heat affected zones. In addition, the Staff highlights Mr. Chislea's recommendations for low-hydrogen welding and testing procedures and notes that his recommendations exceed the standards that are incorporated into 49 CFR 195.214 (by reference). Staff's initial brief on reopening, pp. 8-9 (citing 17 Amended Tr 2595-2596, 18 Tr 2812).

According to the Staff, Enbridge filed additional information on the ventilation system in response to the July 7 order. The Staff describes the OSHA requirements for the ventilation system and contends that the company's proposed system is designed to exceed those safety requirements. Staff's initial brief on reopening, p. 11.

The Staff notes that Mr. O'Mara provided a general opinion that an explosion could damage the tunnel lining, and Enbridge responded with Dr. Ferrara's Exhibit A-35, which models four scenarios to determine a worst-case scenario. The Staff states that Dr. Ferrara concluded that a worst-case scenario would generate an overpressure of 0.386 barg, whereas the tunnel can tolerate an overpressure of 3 to 29 barg (moving from lowest overburden to highest overburden). Staff's initial brief on reopening, p. 12 (citing Exhibit A-35, p. 12; 17 Amended Tr 2406). The Staff asserts that it does not concur with Mr. O'Mara's criticisms of Exhibit A-35 and disagrees with Mr. O'Mara that a full bore rupture is the worst-case scenario. The Staff states that, for example, "there is already evidence on the record regarding the existing dual pipelines that indicates the outcomes from a 3-inch hole release could be more severe than those from a full-bore rupture. (*See* [Exhibit] ELP-24, p 253.)" Staff's initial brief on reopening, pp. 12-13.

Regarding the question of whether Line 5 product could reach the Straits in the event of an explosion, the Staff points out that Mr. O'Mara assumed an operating pressure of 1440 psi whereas normal operating pressure will be about 480 psi. Additionally, the Staff states that:

> the pressure inside the tunnel and against the surrounding geology could not match the pressure within the pipeline and overcome the hydrostatic pressure unless the pipeline continued to operate even after the tunnel filled with product. (Exhibit S-16, pp 2, 5-6.) The record indicates this would require at least two full days of continued pipeline operation for this to become possible. (17 TR 2459; Exhibit S-16, pp 5-6.)

Staff's initial brief on reopening, p. 13. The Staff argues that Exhibit A-35 is significant because it demonstrates that the anticipated pressure from an explosion is about seven times less than what the tunnel is designed to withstand at its highest levels and about seventy times less than what the tunnel is designed to withstand at its lowest level. The Staff contends that any released product would remain within the tunnel and could be recovered at the portals. The Staff avers that the

current tunnel design mitigates the risks associated with explosion and is consistent with safety and engineering standards. *Id*., p. 14.

The Staff asserts that the reopened record shows that the concrete lining of the tunnel can withstand a high-intensity fire and can resist spalling. Noting Mr. O'Mara's opinion that a fire is more likely to cause failure than an explosion, the Staff finds that this was rebutted by Mr. Adam's testimony regarding recent improvements to tunnel design and tunnel lining (such as the RWS fire event standard) and Mr. Dennis' testimony explaining why installation of an FFFS is not appropriate for the Replacement Project. Staff's initial brief on reopening, p. 15 (citing 17 Amended Tr 2570-2583, 18 Tr 2091-2092).

Turning to the issue of the electrical equipment located in the tunnel and the risk of fire, the Staff supports a recommendation by the Commission that Enbridge exceed the minimum OSHA standards for certain components. The Staff notes that a Class 1, Division 1 location is one in which flammable gases or vapors may exist under normal operating conditions, and a Class 1, Division 2 location is one in which hazardous gases, vapors, or liquids are normally confined within closed systems. Staff's initial brief on reopening, pp. 16-17 (citing Exhibit A-31 and 29 CFR 1926.449). The Staff asserts that, in response to discovery, Enbridge stated in Exhibit S-31 that it had not yet acquired the equipment that will be located in the tunnel and so the company cannot determine whether the more stringent standard would require bulkier equipment. The Staff states that it recognizes that the Replacement Project "appears to meet the definition of a Class 1, Division 2 location in which flammable liquids and gasses are handled, but will normally be confined within the pipeline, unless there is an 'accidental rupture' or other abnormal operation of equipment. (Exhibit A-31, p 6.)." Staff's initial brief on reopening, p. 17. However, the Staff states that:

> the reopened record also indicates there may be opportunities to design to the more stringent Class 1, Division 1 standard when finalizing the design. (Exhibit S-31, p 13; 16 TR 2187.) If the application is approved and the Commission deems it appropriate, Staff supports a Commission recommendation that certain equipment be designed to the more stringent Class 1, Division 1 standard to the extent such equipment is feasible, beneficial, safe, and permitted by the agreements and other permitting authorities governing the project.

Staff's initial brief on reopening, pp. 17-18 (footnote omitted). However, the Staff also acknowledges that technical feasibility should not be the only consideration in this decision.

The Staff asserts that the reopened record shows that the Replacement Project is designed to minimize the chance of fire or explosion. Pointing to the POF Report in Exhibit A-29, the Staff states that this analysis assumes that "an undetected leak achieved the required vapor concentration at the same time and location as an equipment failure that could result in ignition," and the report found the POF to be less than one failure in over 663,000 years and the probability of ignition to be one ignition event every 169 million years. Staff's initial brief on reopening, p. 18 (citing Exhibit A-29, pp. 16-17).

The Staff notes that Mr. Kuprewicz alleged that Mr. Godfrey cherry-picked the PHMSA data for the DNV POF Analysis and virtually ignored the engineering risks of the proposed tunnel project. The Staff highlights Mr. Cooper's disagreement and states that, "[w]hile the DNV POF Analysis does not appear to be directly responsive to one of the ten specific requests for additional prong (3) evidence, Staff recognizes the relevance to the July 7 Order and notes that findings showing an explosion is a relatively low-probability event does not, on its own, equate to ignoring a risk." Staff's initial brief on reopening, p. 19.

On the issue of methane in the groundwater and the possibility of seepage into the tunnel, the Staff notes Mr. Adams' rebuttal and states that his:

> sponsored analysis assumed the highest recorded maximum measured methane concentration and also incorporated several conservative assumptions throughout

> the analysis. (Exhibit S-37.) The conservative assumptions used in preparing Exhibit S-37 include assuming that: (1) no tunnel ventilation occurs, (2) all inflows contain the maximum methane concentration detected along the tunnel alignment; (3) all dissolved methane is released into the tunnel atmosphere; and (4) methane would accumulate in only 5% of the overall tunnel length. (17 TR 2572–73; Exhibit S-37, p 1.) The calculated durations needed to reach LEL in Exhibit S-37 were based on these conservative assumptions and, as witness Adams concludes, "are well beyond the design life of the tunnel." (17 TR 2573.)

Staff's initial brief on reopening, p. 21. The Staff also cites the testimony of Mr. Dennis and Dr. Vitton on this topic.

The Staff notes that Enbridge provided a response to the Commission's request for more information on the procedure for repairing or replacing PCTL segments. Staff's initial brief on reopening, pp. 23-24; *see also*, Exhibit A-31, pp. 8-9.

Next, the Staff states that the reopened record contains additional information regarding the leak detection system and the CPM. The Staff notes that Enbridge's response to the Commission's request:

> provides detail regarding the models, locations, and quantity of gas and liquid hydrocarbon detectors within the tunnel. (Exhibit A-31, pp 1-2.) Three hydrogen sulfide detectors and three gas hydrocarbon detectors will be located at nineteen separate locations in the tunnel. Each detector will operate independently, and the system will function on a voting basis to avoid false alarms. (*Id*. at p 2.) Three liquid hydrocarbon detectors will be placed at four locations. In the event that a leak alarm is generated, Enbridge's Control Center would initiate an investigation and shut down the pipeline if unable to rule out the possibility of a release within ten minutes. (*Id*.) Enbridge further described the rationale for the selected locations for the gas detectors and provided a schematic showing the locations in a discovery response to Staff. (Exhibit S-32, pp 3-4.)

Staff's initial brief on reopening, p. 25.

The Staff asserts that in response to the Commission's request for additional information, Enbridge reported that the gas detectors will be set to detect a threshold level of 20% of the LEL. *Id*. The Staff explains that, in discovery, it sought additional information about the detectors' ability to detect gas. The Staff states that Enbridge provided Exhibit A-32, which notes that

although the detectors will be "calibrated for propane, other gases will be subject to detection. Enbridge explains that the 20% threshold is an industry standard and provides a sufficient safety factor to account for minor variances in product types or inaccuracy of the detectors." Staff's initial brief on reopening, p. 26.

Regarding Enbridge's shutdown procedures in the event of a release, the Staff notes that Enbridge described the automatic shutoff valves that are pressure-sensitive and operate without human interaction, the activation of the ventilation system to assist in the evacuation of personnel, subsequent deactivation of the ventilation system, and the ultimate closure of the tunnel. The Staff observes that, in general, the conditions for shutdown of the tunnel pipeline are the same as the procedures in place for shutdown of the dual pipelines. *Id*., p. 28.

In conclusion, the Staff recommends approval of Enbridge's application with certain conditions. The Staff contends that the record as a whole supports a finding that the Replacement Project fulfills the purpose of reducing the environmental risk to the Great Lakes posed by the dual pipelines, and the additional information on the reopened record addresses prongs (2) and (3) of the Commission's Act 16 analysis. In addition to the conditions and recommendations made in its initial brief on the original record, the Staff "recommends Enbridge be required to implement certain welding and testing procedures and, to the extent the Commission deems it appropriate, Staff supports a Commission recommendation that certain equipment within the tunnel be designed to the more stringent Class 1, Division 1 under the circumstances described above." Staff's initial brief on reopening, pp. 28-29.

3. Bay Mills Indian Community

Bay Mills continues to oppose Enbridge's application and characterizes the company's response to the Commission's request for additional information on reopening of the record as "a

series of flawed and biased analyses manufactured to suggest that the risks identified by renowned experts are unlikely to occur." Bay Mills' initial brief on reopening, p. 1.

Bay Mills begins with the third prong of the Act 16 analysis and argues that the Replacement Project presents significant safety concerns. Regarding the X70 pipe proposed for use in the Replacement Project, Bay Mills contends that "Enbridge and Mr. Godfrey have been dismissive of the threat posed by catastrophic failure at the girth welds or [heat affected zones] of this pipe. Mr. Godfrey's analysis fails to account for the unique design and the abnormal loading and stress that pose a serious risk to the pipeline's integrity." Bay Mills' initial brief on reopening, p. 5. Specifically, Bay Mills argues that the installation of the replacement pipe segment on rollers will place abnormal loading on the pipe at these two areas, which can lead to a rupture. In addition, Bay Mills avers that PHMSA has issued an advisory explaining that the strength value of X70 pipe may be 15% lower than that specified by the manufacturer. *Id*., p. 4 (citing 17 Amended Tr 2630-2633). Bay Mills cites the rupture of the Keystone pipeline on December 7, 2022, as an example of a girth weld failure on X70 pipe caused by bending stress and a weld flaw that resulted in a crack (which propagated over time). Bay Mills emphasizes that this failure occurred despite the fact that the pipeline underwent all required inspection and testing. *See*, Exhibit BMC-64.

Bay Mills maintains that Enbridge has failed to adequately address concerns about the electrical equipment that will be located inside the tunnel, which may provide a source of ignition. Bay Mills notes that in the July 7 order, p. 45, the Commission requested information on the feasibility of exceeding the OSHA standard of Class 1, Division 2 equipment. Bay Mills contends that Mr. Godfrey did not determine the extent to which his reported POF could be lowered through the use of Class 1, Division 1 equipment. In addition, Bay Mills asserts that Mr. Godfrey provided no support for his conclusion that Class 1, Division 2 equipment is acceptable and that he provided

no feasibility analysis of exceeding the Class 1, Division 2 standard. Moreover, Bay Mills argues that contrary to Enbridge's claim, Exhibit A-31 does not actually offer a feasibility assessment for using the more stringent Class 1, Division 1 standard. Bay Mills' initial brief on reopening, p. 6. Bay Mills states that Enbridge had almost a year to determine whether it was feasible to move to Class 1, Division 1, and the company does not explain why it still does not know whether the TSV could be designed to meet that standard. *Id*., p. 7, n. 21. Bay Mills notes that the space-proofing exercise was never undertaken and observes that Enbridge made no serious effort to respond to the Commission's request for information.

Next, Bay Mills contends that Enbridge is overly reliant on the CPM system and notes that Enbridge's shutdown procedures are triggered by pressure loss rather than hydrocarbon accumulation in the tunnel. Bay Mills asserts that by the time the pressure in the replacement pipe segment has dropped to 45 psi and the alarms have sounded, explosive conditions may already exist. Bay Mills' initial brief on reopening, p. 8.

Turning to the issue of methane accumulation, Bay Mills argues that compared to Mr. O'Mara, Dr. Vitton does not have the same practical tunneling experience, and Mr. O'Mara "is the only witness in these proceedings who has experience with and direct training following an explosive event caused by methane accumulation." Bay Mills' initial brief on reopening, p. 9 (footnote omitted). Bay Mills asserts that Mr. O'Mara has provided well-founded concerns about methane accumulation during construction and operation of the Replacement Project, and Enbridge has improperly dismissed these concerns.

Bay Mills states that Enbridge's GDR "does not support Dr. Vitton's sweeping conclusion that 'there are *no methane sources* within the area of the tunnel that could lead to methane levels remotely capable of reaching explosible methane levels.' Rather, the GDR falls well short of

industry standards, relies on an insufficient number of samples, and the laboratory results are, at best, inconclusive." Bay Mills' initial brief on reopening, p. 11 (quoting 17 Amended Tr 2465) (emphasis added to initial brief on reopening). Additionally, Bay Mills argues that Enbridge obtained too few borings, the borings were too shallow, and they did not reach the tunnel depth; thus, the GDR does not represent actual geological conditions in the area of the Replacement Project. Bay Mills also contends that 23 of the 24 GDR samples had quality control issues rendering the results useless. Bay Mills' initial brief on reopening, p. 12 (citing Exhibit MM-4, 17 Amended Tr 2534-2536, 18 Tr 2757).

Bay Mills posits that Exhibit BMC-70, a U.S. Geological Society (USGS) survey from 2020, shows that "there *is* a significant oil and gas reserve directly situated under the Straits" and that Dr. Vitton looked only at surface water samples from outside the area proposed for the tunnel. Bay Mills' initial brief on reopening, p. 13 (emphasis in original). Bay Mills asserts that groundwater may contain dissolved methane and that "[t]he threat of methane may arise during construction activities if dissolved methane is encountered during excavation. After the tunnel is complete, methane may accumulate via constant groundwater infiltration through the joints of the precast tunnel segmented lining, as well as through leaks in the portal and exit shafts." *Id*., p. 9 (footnotes omitted). Bay Mills contends that ignition of this methane could occur via an equipment malfunction, maintenance work, or static electricity.

On the issue of fire in the proposed utility tunnel, Bay Mills argues that in Enbridge's response to the July 7 order, the company failed to provide evidence demonstrating that the concrete can withstand a high-pressure explosion. Bay Mills maintains that as a result of an explosion, the concrete will experience spalling due to fire in the tunnel and eventually the underlying steel structure will buckle. Noting Mr. Adams' testimony that the tunnel lining will be tested using the

RWS fire curve, Bay Mills contends that this curve only tests for fires with a maximum temperature of 1200°C for 180 minutes, and a tunnel fire could last longer or achieve a higher temperature. Bay Mills' initial brief on reopening, p. 15.

In the event of an explosion or fire in the proposed utility tunnel that results in a localized collapse of the tunnel lining, Bay Mills asserts that Line 5 product, pumped at its normal operating pressure, would escape the tunnel and migrate into the surrounding sediment and eventually into the waters of the Straits. Bay Mills' initial brief on reopening, p. 16 (citing 18 Tr 2679). Bay Mills argues that Dr. Ferrara's testimony and Explosion Study should be given little weight because he relied on findings derived from Mr. Godfrey's POF Report, which has been shown to be unreliable. Additionally, Bay Mills states that in his Explosion Study, Dr. Ferrara failed to evaluate a worst-case scenario such as a full bore rupture. Moreover, Bay Mills asserts that the Explosion Study is not credible because it assumed that the tunnel is level and only 1,000 feet long, and the study only examined a pinhole sized failure. Finally, Bay Mills notes that the Explosion Study ignores the potential for methane to enter the tunnel via groundwater seepage.

Turning to the second prong of the Commission's Act 16 analysis, Bay Mills argues that the reopened record fails to show that the Replacement Project will reduce or eliminate the environmental risks posed by the dual pipelines and that the tunnel simply replaces one set of risks for another. As an initial matter, Bay Mills avers that the probability analyses offered by Messrs. Godfrey and Bott should be disregarded "because the facts and data upon which they rely are not in evidence and the analyses do not consider worst case scenarios." Bay Mills' initial brief on reopening, p. 18. Accordingly, Bay Mills notes that it sought to strike the testimony of Messrs. Godfrey and Bott and Exhibits A-29 and A-32, which was denied by ALJ Saunders on April 11 and 12, 2023. Bay Mills states that it incorporates herein all the arguments made in its

April 25 application for leave to appeal. Bay Mills' initial brief on reopening, p. 19.[32]

In addition, Bay Mills contends that Mr. Godfrey and his employer DNV lack credibility, noting that Mr. Philipenko testified that DNV's software is used to provide support to the CPM. Bay Mills' initial brief on reopening, p. 22 (citing 16 Tr 2282-2285). Bay Mills posits that Mr. Godfrey's conclusions cannot be considered objective in light of the fact that he is an employee of the company that licenses the software which forms the basis for the CPM. Bay Mills further notes that Mr. Warner testified that in 2016 the State of Michigan terminated a contract with DNV for cause due to a conflict of interest. Bay Mills' initial brief on reopening, p. 23 (citing 18 Tr 2804-2805). Bay Mills states that Mr. Godfrey's testimony and POF Report should be disregarded.

Next, Bay Mills asserts that Enbridge failed to appropriately quantify the risks of the Replacement Project. Bay Mills faults Mr. Godfrey's POF Report for failure to consider all types of scenarios including installation damage, vandalism, lightning strikes, and seismic activity. Bay Mills reiterates that none of the probability analyses considered a worst-case scenario, such as a full bore rupture inside the tunnel, and Bay Mills notes that a 0.315-inch hole in the pipeline is not a worst-case scenario. Bay Mills' initial brief on reopening, p. 26. Bay Mills contends that Enbridge should have looked at a scenario involving a large amount of oil NGLs, or flammable gases, accumulating within the tunnel.

[32] The Commission notes that the arguments presented on this issue in Bay Mills' initial brief on reopening are almost identical to the arguments supporting the tribe's April 25 application for leave to appeal and will not be repeated here. The April 25 application for leave to appeal is addressed by the Commission *supra*.

Bay Mills also argues that the use of quantitative risk analysis is inappropriate and dangerous at the permitting stage of this type of project because it can downplay identified risks. Bay Mills asserts that "Enbridge gives no attention to the potentially catastrophic consequences of a pipeline failure within the tunnel. Instead, its analyses only offer mathematical conclusions, without supporting facts and data, suggesting that the likelihood of certain failure events is quite small." *Id*., p. 27. Bay Mills contends that low risk is not the same as no risk.

4. The Michigan Propane Gas Association and the National Propane Gas Association

The Associations support Enbridge's application and argue that the additional evidence in the reopened record shows that the application meets all of the Act 16 criteria. The Associations state that Line 5 delivers a significant portion of the propane that is essential for the state of Michigan, and they argue that none of the proposals for addressing a propane supply shortage following a shutdown of the pipeline are viable. Citing the POF Report and the fact that the tunnel will act as secondary containment, the Associations argue that the reopened record shows that the Replacement Project is safer than the dual pipelines and will provide greater protection to the Great Lakes. Associations' initial brief on reopening, p. 5. The Associations point to the testimony of Mr. Godfrey, Dr. Ferrara, and Dr. Vitton on the reopened record as showing that the Replacement Project is safe from both a release of product and an ignition of a release and is far superior to the dual pipelines.

5. Michigan Laborers' District Council

MLDC supports Enbridge's application for the Replacement Project, stating that "Line 5 currently provides direct and indirect employment to MLDC members in Michigan and throughout the region." MLDC's initial brief on reopening, p. 3. MLDC notes that construction of the Replacement Project is expected to employ about two hundred Michigan workers over a

multi-year period in an area of the state where jobs are needed. MLDC states that, once constructed, the tunnel and replacement pipe segment will provide hundreds of permanent maintenance jobs, and the Replacement Project will allow Michigan businesses to provide goods and services. In addition, MLDC contends that the Replacement Project will have a positive impact on local governments. *Id*., p. 5. MLDC also notes that "Line 5 has current vulnerability, including being susceptible to potential damage from anchors dropped by ships using the Straits. The [Replacement] Project, MLDC understands, will reduce this vulnerability to near zero." *Id*., p. 6. In conclusion, MLDC asserts that Enbridge's application has met all legal requirements and should be approved.

E. Reply Briefs on Reopening of the Record

1. Enbridge Energy, Limited Partnership

In its reply brief on reopening, Enbridge asserts that Bay Mills "focuses on highly-remote risks" and ignores the substantial environmental benefits offered by the Replacement Project in comparison to the dual pipelines. Enbridge's reply brief on reopening, p. 2. Enbridge contends that the Replacement Project eliminates the risk of anchor strikes and pipeline stress caused by currents and offers the benefits of direct inspection of the pipeline, enhanced leak detection, and secondary containment.

Enbridge maintains that "[t]he extensive record in this case makes clear that Enbridge has adopted sound design, safety, and engineering principles to avoid and mitigate a fire and explosion. As a result, the likelihood of both a release and an ignition of that release is extraordinarily remote: one occurrence every 169 million years." *Id*., p. 3. Enbridge posits that Mr. Adams refuted Mr. O'Mara's anecdotal theory of fire risk, and the company states that it is simply speculative to assume that a fire in the tunnel will burn longer and hotter than an RWS fire

event. *Id*., p. 4. Finally, on this point, Enbridge argues that Dr. Ferrara showed that the worst-case explosion within the tunnel would create an overpressure well below what the tunnel is designed to withstand and notes that Bay Mills' offered no overpressure calculations of its own.

Next, Enbridge highlights the benefit of secondary containment offered by the tunnel. Enbridge explains that the tunnel resembles an elongated storage tank and notes that it would take two days to fill; during that time, the pressure of the escaped product will equalize with the ambient pressure in the tunnel thus preventing a release into the lakebed. Enbridge states that "there is 'no conceivable scenario' where oil will penetrate the rocks and reach the Great Lakes" because groundwater will be forced into the tunnel at a pressure greater than the atmospheric pressure of the tunnel. *Id*., p. 7 (quoting 17 Amended Tr 2475). Enbridge posits that any release will float on the water within the tunnel until it is recovered at the end portals. Accordingly, Enbridge asserts that the tunnel achieves the goal contained in the Third Agreement—namely, it will eliminate the risk of a release of Line 5 product into the Straits presented by the dual pipelines.

Regarding the issue of methane accumulation during construction and operation of the Replacement Project, Enbridge contends that it is a nonissue and that Bay Mills' arguments are overstated. Enbridge notes that it has taken safety measures (despite the fact that there are no known sources of methane in the Straits) which include monitoring for methane during construction and operation of the tunnel, and the company has prepared mitigation and remedial actions, if needed. Enbridge's reply brief on reopening, p. 8. In addition, Enbridge maintains that the GDR samples demonstrate that methane is not a concern and that the only detected methane resulted from naturally occurring decay in organic material near the shore.

In response to Bay Mills' claim that the GDR samples are unreliable, Enbridge notes that "Dr. Mooney already testified that the GDR was completed 'in accordance with the state of practice in tunnel design'" and that "Bay Mills never challenged Dr. Mooney's conclusions in the earlier phase of this proceeding, and only does so belatedly, and now only after it realized that the GDR samples unequivocally show that methane is not a concern." *Id*., pp. 8-9 (quoting Exhibit MM-5, p. 6) (footnote omitted). Furthermore, Enbridge notes that, contrary to Bay Mills' claim, the USGS survey in Exhibit BMC-70 does not demonstrate that methane is a concern in the Straits area. Enbridge states that:

> no witness testified that this document establishes the existence of gas and oil reserves in the Straits. In fact, the only witness to mention Exhibit BMC-70 was Dr. Vitton during his cross-examination, testifying that "there's nothing in this paper to suggest there is or are deposits there, this is strictly trying to identify an area that could be [utilized for] future exploration[.]"

Enbridge's reply brief on reopening, p. 10 (quoting 17 Amended Tr 2562). Enbridge also adds that the two tunnel explosions in the Great Lakes Basin caused by methane cited by Bay Mills are not analogous to the geologic conditions existing at the Replacement Project.

Turning to Bay Mills' request for Class 1, Division 1 equipment in the tunnel, Enbridge avers that Bay Mills' proposal should be rejected as simply an attempt to focus the Commission on a non-issue. First, the company notes that Mr. Godfrey has shown that the risk of ignition is once in every 169 million years and his conclusion assumes the use of Class 1, Division 2 electrical equipment. Second, Enbridge states that Mr. Godfrey testified that even the use of Class 1, Division 2 equipment is a conservative design decision because the NEC "**suggests that the tunnel could be considered an unclassified location (i.e., one that does not require either Class 1, Division 1 or Class 1, Division 2 equipment)**." Enbridge's reply brief on reopening, p. 12 (emphasis added to reply brief on reopening) (quoting 17 Amended Tr 2439). Third,

Enbridge notes that there is nothing in the record that demonstrates that the use of the higher standard will reduce the risk of ignition.

Enbridge also reiterates that installing Class 1, Division 1 equipment would increase the risk to human life because it would require personnel to spend longer periods of time in the tunnel for inspection and maintenance duties. In any event, Enbridge argues that certain non-permanent equipment, such as welding equipment, will never be able to meet this standard. Thus, the company concludes, no space-proofing exercise was required because Class 1, Division 1 equipment is not feasible, "and even if it were feasible, moving to the Class 1, Division 1 standard only adds risk to human health and safety with no demonstrable benefits." Enbridge's reply brief on reopening, p. 12.

Enbridge contends that Bay Mills failed to show that locating the replacement pipe segment on rollers in a tunnel is an unsafe design. The company notes that in the July 7 order, the Commission did not request any additional information on girth welds, heat affected zones, or pipelines placed on rollers. In addition, Enbridge points out that in the reopened record, Mr. Cooper repeated his sur-sur-surrebuttal testimony addressing the fact that the pipeline will not be buried, and Mr. Godfrey explained that the rollers decrease stress on the pipeline by distributing loads away from the welds. Enbridge argues that the only similarity between the Keystone failure and the Replacement Project is that the same type of pipe is used; however, there are important differences noted by Mr. Godfrey in his rebuttal testimony admitted on the reopened record. Enbridge's reply brief on reopening, p. 15 (citing 17 Amended Tr 2454-2455). Enbridge contends that the replacement pipe segment will meet all PHMSA requirements under 49 CFR Part 195. Enbridge's reply brief on reopening, p. 15.

Turning to the issue of leak detection, Enbridge asserts that it is only prudent (rather than imprudent) to rely on the PHMSA-required CPM and control room procedures. Enbridge argues that Bay Mills should address its safety-related concerns to PHMSA because that federal agency has exclusive jurisdiction over "leak detection and control room safety standards for interstate liquids pipelines. *See* 49 U.S.C. § 60104(c)." Enbridge's reply brief on reopening, p. 16. Nevertheless, Enbridge asserts, Mr. Philipenko rebutted all of Bay Mills' contentions. Specifically, Enbridge states that Mr. Philipenko demonstrated that the CPM is safe and reliable, reiterating that the CPM has successfully performed 97 fluid withdrawal tests at 22 different locations. *Id*. (citing 16 Tr 2258-2262). In addition, Enbridge avers that it has implemented the LDAM, which addresses Bay Mills' concerns about shutdown capability. The company explains that the LDAM requires that three members of the ART independently assess each CPM alarm and within 10 minutes, "if any one of the members identify a leak trigger, then the pipeline will be shut down. If all three have not independently selected the alarm as invalid within that time, then the pipeline is automatically shut down." Enbridge's reply brief on reopening, p. 17 (citing 16 Tr 2264-2265). Enbridge asserts that it has improved its compliance with the 10-Minute Rule and has addressed all of the recommendations made by the NTSB in the wake of the Line 6B release.

Next, Enbridge asserts that Mr. Godfrey's and Mr. Bott's risk assessments meet industry standards and use appropriate data and methodology. Enbridge notes that, "[w]hile Bay Mills argues that the use of risk assessment in the permitting phase of [the] project is inappropriate," the company disagrees, reasoning that risk assessment allows appropriate risk reduction measures to become part of the design, and, in this case, allows for comparisons between the Replacement Project and the dual pipelines. Enbridge's reply brief on reopening, p. 20. Enbridge posits that

Exhibit ELP-24 (the Dynamic Risk Report) already provides the Commission with an assessment of the risk of release from the dual pipelines and argues that Exhibits A-29 and A-32 provide similar assessments for the Replacement Project. Enbridge's reply brief on reopening, pp. 20-21.

Enbridge contends that Mr. Bott's calculation of a one in one million POF is properly supported by data in Exhibit A-32, which is based on his analysis of actual failures experienced by Enbridge. The company restates that it installed over 10,000 km of pipeline between 2000 and 2022 and experienced only four releases and that the causes of those releases (ground movement or third-party damage) do not apply to the Replacement Project. Enbridge's reply brief on reopening, p. 22. Enbridge then modelled hypothetical typical flaws and arrived at the one in one million figure; however, the company states that the actual POF during real operation will be even lower. Enbridge's reply brief on reopening, pp. 22-23 (citing Exhibit A-32, p. 2). Enbridge contends that this data, too, is admissible because it is evidence of the type that is commonly relied upon by reasonably prudent persons in the conduct of their affairs. *Id*., p. 23; *see*, Mich Admin Code, R 792.10427(1). The company concludes that "[t]he reopened record makes abundantly clear that the safety of the Great Lakes will be enhanced by locating the Line 5 replacement segment within the tunnel. The highly remote risks alleged by Bay Mills (which, notably, are inherent in any major project) have been fully studied, mitigated, and are in all instances outweighed by the secondary containment provided by the tunnel." Enbridge's reply brief on reopening, p. 23.

2. The Commission Staff

In its reply brief on reopening, the Staff argues that Bay Mills' comparisons to other pipeline failures are not appropriate because those failures occurred under conditions fundamentally different from the conditions that apply to the Replacement Project. The Staff notes that the

PHMSA Advisory Bulletin relied upon by Bay Mills states that these failure issues "were present on pipelines being constructed in hilly terrain and high stress concentration locations such as at crossings, streams, and sloping hillsides with unstable soils." Staff's reply brief on reopening, p. 2 (quoting Exhibit BMC-55, pp. 1-2). The Staff argues that Mr. Cooper's testimony shows that the Replacement Project involves an entirely different environment that does not impose the kind of strains typical for buried pipes. The Staff contends that the Keystone failure is also inapplicable for the same reasons.

The Staff recommends exceeding the minimum OSHA standards for certain electric equipment to allow for Class 1, Division 1 equipment and states that the "Staff is not recommending the Commission impose such a requirement on all equipment in the tunnel. Instead, Staff's position recognizes there may be opportunities to exceed this standard for certain equipment as the design is finalized." Staff's reply brief on reopening, p. 4. Referring to the fact that Enbridge has not yet purchased the equipment, the Staff reiterates that there may be opportunities to exceed the applicable Class 1, Division 2 standard for some equipment and recommends its use where "feasible, beneficial, safe, and permitted by the applicable agreements and permitting authorities." *Id*., p. 5.

The Staff refutes Bay Mills' assertion that Enbridge is overly reliant on the CPM system. The Staff notes that the CPM system is actually three systems, which are complemented by a leak detection system that includes several different elements, each employing a different technology. The Staff notes that the control center can be alerted to a potential release by any one of these systems and elements. The Staff further notes that the pipeline already has an automatic shutdown system, which will activate in the event of a threshold pressure loss without human intervention.

The Staff posits that there is no evidence on the record showing that an additional shutoff system is required for safety purposes. *Id*., p. 6.

The Staff contends that methane is not a likely source of fire or explosion in the tunnel. The Staff argues that Exhibit S-37 shows that at the low methane concentrations detected in the four GDR samples, it would take 800 to 2,400 years for those concentrations to accumulate at the LEL inside the tunnel. Turning to the issue of whether the GDR samples met relevant quality standards, the Staff states:

> [w]hile [Bay Mills] notes that the GDR indicates that certain samples failed to meet certain parameters for analysis, there is no evidence showing failure to meet these parameters impacted the concentrations of methane detected in the samples, let alone to a level significant enough to reduce the time requirement (800 or 2400 years) to a time frame that would be of reasonable concern.

Id., p. 7. In addition, the Staff notes that the gas detectors in the tunnel will detect methane. *Id*. (citing 15 Tr 2090).

The Staff states that the USGS report contained in Exhibit BMC-70 relies on a model that includes assumptions about oil and gas within the Collingwood Formation and is based on a number of wells that were drilled to a depth at least 1,300 feet below the deepest spot for the tunnel (which is at a depth of 600 to 700 feet). The Staff asserts that the USGS report provides no factual evidence that there is methane at the depth of the Replacement Project and, therefore, it does not invalidate Dr. Vitton's conclusions. Staff's reply brief on reopening, p. 8.

The Staff further states that Mr. Adams refuted Bay Mills' argument regarding the risk of tunnel failure in the event of fire. The Staff contends that Mr. Adams' "assessment of the state of designing for potential fires in tunnels" is more current and more accurate, and he explained "that the inclusion of polypropylene fibers into the concrete mix typically has resulted in very little to no spalling observed." Staff's reply brief on reopening, p. 9. The Staff asserts that Mr. Adams

testified that the tunnel has been designed for the RWS fire event "in which the concrete is subjected to a temperature of 1200 degrees Celsius for 180 minutes . . . ." *Id.* The Staff notes that there is no record evidence showing that a fire of longer than 180 minutes would be significantly more damaging. Moreover, the Staff states that the RWS fire event "has been determined by experts in the industry as the appropriate standard-of-practice in designing for potential fires in tunnels, thus, the current design for the proposed tunnel meets applicable engineering and safety standards." *Id.*, p. 10.

The Staff also argues that it is not plausible that, in the event of a tunnel failure, product will reach the Straits. According to the Staff, Bay Mills' "claim that product would be forced out of the tunnel and migrate upward is based on several faulty assumptions as detailed in Staff's initial brief." Staff's reply brief on reopening, p. 10. The Staff reiterates that Bay Mills' arguments were mistaken with respect to the operating pressure and the hydraulic elements affecting a product release.

The Staff maintains that the record demonstrates that the Replacement Project would substantially reduce the environmental risks posed by the dual pipelines. The Staff notes that in Bay Mills' initial brief, it acknowledges that the Commission must conduct a qualitative review of the Replacement Project. The Staff contends that such a review reveals a clear reduction to overall risk, particularly with respect to "anchor hooking, vortex-induced vibration from currents in the Straits, and spanning stress." *Id.*, p. 11 (citing Exhibit ELP-24, p. 28). Additionally, the Staff asserts that if the Replacement Project is constructed, the exterior of the replacement pipe segment can be visually inspected more easily, and the tunnel will offer secondary containment.

The Staff disputes Bay Mills' claim that there is a reasonable risk that Line 5 product will be released from the Replacement Project into the Straits. For this to occur, the Staff asserts that an implausible chain of events is required:

> Initially, a release must occur. Then, product must evade gas detectors (or gas detectors must malfunction) and accumulate in a portion of the tunnel at the LEL. (18 TR 2670.) At which point in time and location, an abnormal spark must occur to ignite the product. (*Id.* at 2676.) The ignition must then cause a fire to burn long and hot enough to damage the tunnel lining (despite concrete designed to withstand fire) to a point that would allow product to escape. (*Id*. at 2671, 17 TR 2570-71.) Then, the pipeline must continue to operate for two full days in order to fill the tunnel and reach a pressure that may overcome the surrounding hydrostatic pressure. (17 TR 2459, Exhibit S-16, pp 5-6.) Finally, the product must migrate through the geology upward, continuously overcoming downward water pressure, for a volume of product to eventually reach the waters of the Straits. (17 TR 2475.)

Staff's reply brief on reopening, p. 12. The Staff also posits that "it is incomprehensible to conclude that such a chain of a events following a rupture from the proposed replacement segment is equally likely to reach the Straits as a rupture from the dual pipelines." *Id*., pp. 12-13.

The Staff notes that according to Bay Mills, Mr. Godfrey "is 'tipping the scales' and that due to his employment with DNV, his analysis could not be objective." *Id*., p. 13 (quoting Bay Mills' initial brief on reopening, p. 22). The Staff disagrees, asserting that Mr. Godfrey's employment status is not relevant nor is the fact that the State of Michigan terminated a contract with DNV seven years ago due to the actions of a different employee regarding a different issue. Staff's reply brief on reopening, p. 13.

Finally, the Staff states that it is not replying to the Associations or to MLDC.

3. Bay Mills Indian Community

Bay Mills asserts that Enbridge has failed to demonstrate that the Replacement Project meets or exceeds current safety and engineering requirements and thus the third prong of the Act 16 criterion is not satisfied. Bay Mills restates that:

> Enbridge's central argument on remand—that a catastrophic failure in the tunnel is an extremely unlikely event—relies on a quantitative risk assessment that minimizes identified engineering risks by assigning a misleading numeric probability value to suggest that the proposed project is "safe." As Mr. Kuprewicz testified, this assignment of probability estimates to known, identified risks during a permitting process is dangerous because it invites complacency.

Bay Mills' reply brief on reopening, p. 2 (quoting 17 Amended Tr 2622). Bay Mills also reiterates that the risk assessments, such as in Exhibits A-29 and A-32, cannot be checked for accuracy because the underlying data has not been made available and cannot be replicated. Bay Mills adds that Enbridge failed to recognize the interactive nature of risks and that a POF analysis for the tunnel should include "the sum total of all events, not just a reliance on one numerical value attached to one event." Bay Mills' reply brief on reopening, p. 3 (footnote omitted).

In addition, Bay Mills asserts that Mr. Godfrey's quantitative risk analysis does not address Mr. Kuprewicz's concern regarding the design of the Replacement Project. Bay Mills argues that the installation of the replacement pipe segment on rollers will result in abnormal loading on the girth welds, a concern that is heightened by the use of grade X70 pipe. Moreover, Bay Mills notes that Enbridge's engineer of record, Arup, provided no testimony on the potential axial shear stress that the pipeline segment will experience. Bay Mills' reply brief on reopening, p. 4.

Bay Mills states that Enbridge also failed to support the decision to adjust Mr. Godfrey's calculated POF down by an order of magnitude. Bay Mills notes that Mr. Godfrey claims that the adjustment is appropriate because "Enbridge has an Integrity Management program that prevents failures from occurring and detects them should they occur. In essence, Godfrey suggests that Enbridge should be given a probability 'credit' because, in his view, Enbridge is unlikely to experience 'operator error.'" *Id.*, p. 5 (footnote omitted). However, Bay Mills argues that Mr. Godfrey's conclusion is not credible because the PHMSA database (on which Mr. Godfrey

relies for his adjustment) notes that Enbridge had 20 incidents of operator error between 2002 and 2022.

Next, Bay Mills restates that Enbridge's explosion analysis failed to consider the worst-case scenario. Bay Mills explains that Dr. Ferrara's Explosion Study (Exhibit A-35) "only suggest[s] that a tunnel—about seven-times smaller than the one proposed—can withstand the overpressure generated by an explosion following a pinhole release; it proves nothing more." Bay Mills' reply brief on reopening, p. 7 (citing Exhibit A-35, p. 11). Bay Mills reiterates that a worst-case scenario would involve a full bore rupture of the pipeline, and instead, Dr. Ferrara "chose to run a model based on a tunnel that was level and only 1000 meters long; a release from a single hole that was 0.315 inches in diameter; a vapor cloud width, length, and height that did not fill the tunnel; and a constant atmospheric temperature, all of which were provided by Enbridge." Bay Mills' reply brief on reopening, pp. 7-8 (citing Exhibit A-35, pp. 8, 11). Accordingly, Bay Mills asserts that Dr. Ferrara's evidence should be given little weight. Bay Mills also contends that following the Marshall incident, the NTSB concluded that Enbridge had failed to plan for a worst-case discharge. Bay Mills argues that the Replacement Project is facing the same fate.

Bay Mills objects to Dr. Vitton's opinion that there is no methane in the area of the Replacement Project, asserting that his opinion is contradicted by the evidence on the record. Bay Mills refers to the USGS survey (Exhibit BMC-70) and states that shale oil has been identified in the geologic area (the Collingwood Formation) which lies directly under the Straits. Citing Exhibit BMC-70, Bay Mills states as follows:

> Dr. Vitton responded that "there's nothing in this paper to suggest there is or are deposits there." Vitton Cross-Examination, 17 Tr. 2562. That is not accurate. For clarification, the Fact Sheet refers to "undiscovered, technically recoverable" oil and gas resources. Exh. BMC 70 at 1. The USGS assesses "undiscovered, technically recoverable resources" as those which are estimated to exist based on geological knowledge and theory. *See* https://www.usgs.gov/faqs/what-difference-

between-assessed-oil-and-gas-resources-and-reserves#:%7E:text=The%20USGS%20assesses%20%E2%80%9Cundiscovered%2C%20technically,on%20geologic%20knowledge%20and%20theory[.]

Bay Mills' reply brief on reopening, p. 9, n. 40. Bay Mills asserts that Enbridge failed to investigate the rock at the deepest part of the Straits or the deepest elevation of the tunnel. Moreover, Bay Mills states that with four of the GDR samples showing methane, "the evidence suggests that methane could pose a risk to the construction and operation of the replacement pipeline." *Id*., p. 10. Bay Mills also notes that Dr. Vitton contributed to a report submitted to the State of Michigan by Enbridge in 2018 (Exhibit A-9) which found that explosive gases, including methane and hydrogen sulfide, form a potential hazard in the Straits.

In addition, Bay Mills disputes Enbridge's claim that "there is 'no conceivable scenario' in which Line 5 product could escape the confines of the tunnel and migrate into the Straits . . . ." Bay Mills' reply brief on reopening, p. 11 (quoting 17 Amended Tr 2475). Bay Mills again asserts that Enbridge failed to consider a worst-case scenario, stating that the "hydrostatic pressure outside the tunnel will naturally push fractured rock, sediment, and water against the intact tunnel, or into a compromised tunnel, because the pressure inside the tunnel is essentially zero . . . ." Bay Mills' reply brief on reopening, p. 11. In the event there is an explosion in the tunnel, Bay Mills states that it "could ignite a product fire resulting in a fuel-rich flame from a large pool of hydrocarbons that burns for hours, *not 180 minutes*, and triggers additional explosions and fires throughout the length of the 4-mile-long pipeline filled with hazardous liquids." *Id*., p. 12 (emphasis in original) (footnote omitted). Bay Mills asserts that this type of scenario could result in a "'pancake failure,' or a failure where the weight of the rock, sediment and water above the tunnel will cause the weakened portions of the tunnel segmented liner to fail and collapse inward." *Id*. (footnote omitted). Bay Mills contends that in this scenario, the tunnel interior will commingle with rock,

sediment, and water, and the secondary containment feature will be lost while the product in the pipeline escapes. Bay Mills states that the product's operating pressure of 463 psi will significantly exceed the hydrostatic pressure, including the pressure at the deepest part of the tunnel. *Id*., p. 13, n. 56.

Bay Mills avers that although Enbridge touts its leak detections systems and automatic shutdown procedures as effective and almost instantaneous, the company has experienced numerous releases due to operator error in the past 20 years. Accordingly, Bay Mills asserts that there is no reason to believe that Enbridge's LDAM system will effectively detect and prevent a catastrophe with the Replacement Project. Bay Mills contends that a full bore rupture will fill the tunnel "with tons of product in a matter of minutes" and an explosive environment will have already been created even if the leak is detected. *Id*., p. 14. Turning to Enbridge's assertion of a one in one million risk of release, Bay Mills argues that Enbridge initially pulled the number out of thin air (though presented it as evidence) and then later described it as a reliability target for the IMP rather than as a probability of release. *Id*., p. 15.

Bay Mills notes that the Commission requested information in the July 7 order on the feasibility of exceeding OSHA standards and using Class 1, Division 1 electrical equipment. However, Bay Mills contends that Enbridge failed to provide that information and simply indicated that it is unclear whether it is feasible. Bay Mills notes that "[t]he only reason the feasibility of using a more stringent electrical classification for the proposed tunnel remains *unclear* is because Enbridge, as the applicant, failed to supply the information that the Commission ordered it to produce." *Id*., pp. 16-17 (emphasis in original). Bay Mills argues that Class 1, Division 1 equipment will reduce the risk of an ignition in a location where hazardous

gases or vapors may exist and that a requirement to use this type of equipment is entirely appropriate.

Bay Mills further contends that Enbridge has made clear that the purpose of the ventilation system is not to prevent a catastrophic accumulation of hydrocarbon vapor in the tunnel. Rather, Bay Mills states that according to Enbridge, the ventilation system is designed strictly to provide "'breathable air' when maintenance personnel are in the tunnel." *Id*., p. 18 (quoting Exhibit A-31, p. 4). In any event, Bay Mills contends that Enbridge has not shown that the ventilation system is adequate, stating that:

> Enbridge calculated the critical velocity needed to be achieved to provide personnel with an exit path clear of smoke in the event of a fire. However, the "design fire size" used in the calculation was "10 MW." That measurement is "representative of a large vehicle fire." The size of a large vehicle fire cannot be said to be comparable to the size or intensity of a fire resulting from a breach of Line 5, and even less so to a full-bore rupture of the line—a 4-mile-long segment transporting 540,000 barrels per day—releasing roughly 16,000 gallons per minute. Enbridge has suggested only that its proposed ventilation system will allow workers a path out of the tunnel in the event of a car fire; it has proved nothing more.

Id., pp. 18-19 (citing Exhibit A-31, p. 4, and 7 Tr 564).

Furthermore, Bay Mills maintains that Enbridge has failed to show that its fire response system meets or exceeds current safety and engineering standards. Bay Mills notes that the company has proposed a passive fire suppression system that simply seals off the ends of the tunnel to starve a fire of oxygen. Bay Mills argues that Enbridge needs an active fire suppression system such as the FFFS and an advanced ventilation system that will remove smoke. Bay Mills observes that Enbridge based its decision on the need to reduce the presence of workers in the tunnel, and yet the evidence shows that workers will routinely be entering the tunnel. Bay Mills' reply brief on reopening, p. 19 (citing 16 Tr 2194).

Regarding the second prong of the Act 16 analysis, Bay Mills asserts that Enbridge has not shown that the Replacement Project eliminates the risks associated with the dual pipelines, asserting that "the tunnel substitutes one set of risks for another." Bay Mills' reply brief on reopening, p. 20. Bay Mills states that the dual pipelines are not safe and have been shut down by court order. While acknowledging that anchor strikes and bending stresses may be alleviated by the tunnel, Bay Mills argues that the design of the Replacement Project presents its own unique and specific risks including the possibility of explosion arising from a heavier-than-air vapor release that settles in the lowest spot in the tunnel and is ignited. Bay Mills notes that the siting of a hazardous liquid pipeline within a tunnel has never been attempted before and contends that it has "the potential to create a catastrophe in the Great Lakes." *Id*., p. 22.

Finally, Bay Mills states that it is not responding to the initial briefs filed by MLDC and the Associations because they do not comply with Mich Admin Code, R 792.10434 in that they include factual assertions without citations to the record. *Id*., pp. 23-24.

4. Michigan Propane Gas Association and National Propane Gas Association

In their reply brief, the Associations support Enbridge's application and state that they disagree with Bay Mills' arguments regarding the evidence presented by Mr. Godfrey and Mr. Bott. The Associations' reply brief on reopening, pp. 1-2.

5. Michigan Laborer's District Council

In its reply brief, MLDC supports Enbridge's application and states its disagreement with Bay Mills' arguments regarding the evidence presented by Mr. Godfrey and Mr. Bott. MLDC's reply brief on reopening, pp. 1-2.

VII. LEGAL FRAMEWORK

Enbridge's application requests that the Commission grant the company authority to construct and operate the Replacement Project pursuant to Act 16 and Rule 447. As set forth in the title, the purpose of Act 16 "is to regulate the business of carrying or transporting, buying, selling, or dealing in crude oil or petroleum or its products" and "to provide for the control and regulation of all corporations, associations, and persons engaged in such business, by the Michigan public service commission . . . ." In addition, Section 1(2) of Act 16, MCL 483.1(2), states in relevant part:

> A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof . . . by or through pipe line or lines . . . or exercising or claiming the right to engage in the business of piping, transporting, or storing crude oil or petroleum, or any of the products thereof . . . does not have or possess the right to conduct or engage in the business or operations, in whole or in part, or have or possess the right to locate, maintain, or operate the necessary pipe lines, fixtures, and equipment belonging to, or used in connection with that business . . . except as authorized by and subject to this act.

Moreover, the Commission has broad jurisdiction over the construction and operation of pipeline facilities and has the "authority to review and approve proposed pipelines, and to place conditions on their operations." March 7, 2001 order in Case No. U-12334 (March 7 order), p. 13, citing *Lakehead*; *see also*, January 31, 2013 order in Case No. U-17020, p. 5. The Commission has previously found that "[i]nherent in that jurisdiction is the power to make a qualitative evaluation regarding whether a proposed system would be safe and in the public interest." March 7 order, p. 14.

Pursuant to Section 8 of Act 16, MCL 483.8, the Commission has authority to make rules, regulations, and orders to give effect to and enforce the provisions of Act 16. Accordingly, the Commission promulgated Rule 447, which states in relevant part:

> (1) An entity listed in this subrule shall file an application with the commission for the necessary authority to do the following:
>
> (c) A corporation, association, or person conducting oil pipeline operations within the meaning of 1929 PA 16, MCL 483.1 to 483.9, that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier for which approval is required by statute.

Rule 447 (1)(c). In the June 30 order, the Commission found that Enbridge was required by Act 16 and Rule 447 to file an application for authority to construct and operate the Replacement Project. June 30 order, pp. 61, 66-67.

The July 23 order sets forth the criteria by which the Commission reviews an Act 16 application: "Generally, the Commission will grant an application pursuant to Act 16 when it finds that the applicant has demonstrated a public need for the proposed pipeline and that the proposed pipeline is designed and routed in a reasonable manner, which meets or exceeds current safety and engineering standards." July 23 order, pp. 4-5.

In addition to this three-part test, courts have found that state agencies have an obligation to apply the requirements of MEPA to its decisions, including to Commission pipeline siting cases. *State Hwy Comm v Vanderkloot*, 392 Mich 159, 189-190; 220 NW2d 416 (1974) (*State Hwy Comm*); *Buggs I*, p. 9. Section 5 of MEPA, MCL 324.1705, provides, in pertinent part:

> (1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.
>
> (2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

Accordingly, Section 5(2) of MEPA, MCL 324.1705(2), requires that in an administrative permitting proceeding, an agency must determine whether the conduct under review will pollute, impair, or destroy natural resources, and, if likely so, the proposed conduct shall not be approved if a feasible and prudent alternative exists that is consistent with the reasonable requirements of the public health, safety, and welfare. The substantive duty that is placed on administrative agencies and courts by Section 5(2) of MEPA is separate from the procedural rights afforded under Section 5(1) of MEPA. *State Hwy Comm*, 392 Mich at 185-186, 190-191; *Buggs I*, p. 9.

VIII. DISCUSSION

As an initial matter, the Commission notes that ED 2019-17 directs State agencies to "provide feedback to the tribe(s) involved in the consultation [process] to explain how their input was considered in the final decision or action." ED 2019-17, ¶ 2(d). The Commission has reviewed Exhibits S-25, S-34, S-35, S-36 and the comments filed on the record and finds that the concerns expressed during the Tribal consultation process and in comments were formally presented on the record for the Commission's consideration. Pursuant to its obligations under ED 2019-17, the Commission has fully considered the concerns presented by the Tribes in the Commission's Act 16 and MEPA analyses below.

To determine whether Enbridge's application for authority to construct and operate the Replacement Project should be approved, the Commission begins with the Act 16 analysis.

A. Is There a Public Need to Replace the Line 5 Segment that Crosses the Straits of Mackinac and Relocate the Segment to a Concrete-lined Tunnel Below the Lakebed of the Straits?

Enbridge asserted that the execution of the First, Second, and Third Agreements and the enactment of Act 359 demonstrate that there is a public need for the Replacement Project. *See*, Enbridge's initial brief, pp. 11-13. The Associations agreed. Associations' initial brief, pp. 9-12.

The Staff also contended that the execution of the Second and Third Agreements and the enactment of Act 359 "determined it to be in the public's interest" to replace the dual pipelines with a new segment located in a tunnel beneath the lakebed of the Straits. Staff's initial brief, p. 110. The MEC Coalition and Bay Mills argued that Enbridge failed to demonstrate a public need for the Replacement Project and that the Commission should deny Enbridge's application. *See*, MEC Coalition's reply brief, pp. 6-10; Bay Mills' reply brief, pp. 6-13.

The Commission begins its discussion of the public need for the Replacement Project by noting the Michigan Supreme Court's 1954 finding that the construction and operation of Line 5, as a whole, was "for a public use benefiting the people of the State of Michigan." *Lakehead*, p. 37. Further, as noted in the April 21 order, the Commission reaffirms its finding that "the first issue is whether there is a public need to carry out the Replacement Project, a project to replace the dual pipelines with a new pipeline in a tunnel, and does not concern approved, existing pipeline that is merely interconnected with the segment that is the subject of the application. The public need for the existing portions of Line 5 has been determined. The public need for the Replacement Project has yet to be determined." April 21 order, p. 63.

To determine whether there is a public need for the Replacement Project, the Commission begins by examining the record evidence explaining the rationale for the proposal to replace the dual pipelines with the Replacement Project.

The Commission notes that on February 22, 2016, the State of Michigan issued a Request for Information and Proposals:

> to provide the State of Michigan and other interested parties with an independent, comprehensive analysis of alternatives to the existing Straits Pipelines, and the extent to which each alternative promotes the public health, safety and welfare and protects the public trust resources of the Great Lakes. The work [should] not include a recommendation by the contractor of a preferred alternative. Rather, the work [should include] the development of information that can be used by the State

> [of Michigan] and other interested parties in making decisions about the future of the Straits Pipelines.

Exhibit ELP-24, p. 4. In response to the State of Michigan's request, on October 26, 2017, Dynamic Risk completed the Alternatives Report that analyzed alternatives to the dual pipelines. Dynamic Risk noted that "[t]he scope of work addressed within the analysis includes an independent review of the risks associated with Enbridge Pipelines' existing [dual pipelines] . . . ." *Id*.

The Commission reviewed the Alternatives Report and notes that according to Dynamic Risk:

> the Principal Threats that were found to contribute to the operating risk on the existing 20-[inch] Straits Crossing segments are, in order of decreasing contribution, anchor hooking, incorrect operations, vortex-induced vibration (VIV), and spanning stress. . . . As shown in Figure ES-4, the dominant threat, representing more than 75% of the annualized total (all-threat) failure probability, is that of anchor hooking caused by the inadvertent deployment of anchors from ships traveling through the Straits.

Exhibit ELP-24, p. 28; *see*, 12 Tr 1716. Dynamic Risk also provided a technical evaluation of six alternatives to the dual pipelines that included, for each alternative, a design-based cost estimate, an economic feasibility analysis, the socioeconomic impact, the market impact, and a spill risk analysis.

Alternative 1 in the Alternatives Report involved constructing a new pipeline that does not cross the open waters of the Great Lakes. Dynamic Risk explained that it explored two routes for the pipeline: (1) a northern route through Canada, around the Great Lakes, and south to Sarnia, Ontario, Canada, and (2) a southern route that follows existing Enbridge assets south to Chicago, Illinois, east to Marysville, Michigan, and east to Sarnia, Ontario, Canada. Dynamic Risk stated that the "northern new-build option was filtered out at a very advanced stage of analysis, after full design and costing were conducted and economic feasibility indicators were developed." Exhibit ELP-24, p. 46. Dynamic Risk asserted that the southern route for a pipeline includes 75 major

crossings (rail, highway, and watercourses), 17 of which would be in Michigan, it would cost $225 million/year upon start-up, and it would cost $165 million/year to operate. *See*, Exhibit ELP-24, pp. 25, 316, 359.

In its analysis for Alternative 2, Dynamic Risk considered whether existing Canadian and American pipeline infrastructure that does not cross the open waters of the Great Lakes could be used to carry the volume of petroleum products currently being shipped on Line 5 from Superior, Wisconsin, to Sarnia, Ontario, Canada. Dynamic Risk concluded that:

> the relatively short length and limited excess capacity in the available sections (Stockbridge-Sarnia and North Bay-Barrie), combined with the limited information on availability of the TransCanada line, mean that Alternative 2 would nonetheless still require that significant new infrastructure be built to complement this excess capacity. From that perspective, Alternative 2 is not significantly different enough from Alternative 1. Therefore, a separate cost analysis was not completed for Alternative 2.
>
> Also, as there is no meaningful partial capacity within existing infrastructure, any attempt to rely on Alternative 2 is essentially equivalent to the full abandonment option (Alternative 6b).

Exhibit ELP-24, p. 307.

For Alternative 3, Dynamic Risk analyzed alternative methods of transportation such as rail, tanker trucks, and oil tankers and barges in the event that Line 5 is decommissioned in Michigan and Line 5 product will need transportation from Superior, Wisconsin, to Sarnia, Ontario, Canada. Dynamic Risk asserted that:

> [t]o handle the Line 5 volumes would require 2,150 trucks per day on average, or an average of 90 trucks leaving the terminal every hour, 24 [hours] per day. . . . This rate of added vehicles will put significant strain on the existing infrastructure including wear and tear on public roadways. The probability of accidents associated with such heavy vehicle traffic makes it likely that spills will happen.

ELP-24, p. 348. For oil tankers and barges, Dynamic Risk stated that:

> [t]anker transportation of crude oil and NGLs from Superior to Sarnia would have to pass through the locks on the St. Marys River at Sault Ste. Marie. The Soo

> Locks are aging and in need of substantial investment to bring them back to reliable operation for this additional traffic. Should a problem arise or a restriction be placed on these locks[,] the feasibility of this option is severely limited.
>
> Additionally, the Soo Locks between Lake Superior and Lake Huron are closed for repairs from January 15th to March 25th, or two and a half months, each year. To accommodate this situation, volumes would need to be transported by another means or storage capacity would be required in the Superior and Sarnia areas to handle the large buffer volume required.

Id., p. 349. Regarding the rail option, Dynamic Risk noted that:

> [a]ccommodating Line 5's capacity of 450,000 bbl/d of crude oil, and 90,000 bbl/d of NGL would require approximately 800 rail cars per day on average. Considering unit trains comprised of 100 cars, this option would require 8 unit trains per day. Weather and other potential interruptions that may impact a large number of trains would need to be considered. A buffer storage volume of product would need to be available and the fleet of railcars would need to be large enough to catch up within a set period of time.

Id., pp. 349-350. For rail transportation of Line 5 petroleum products, Dynamic Risk calculated a construction cost of $907 million and an operating cost of $1,220 million/year. *See*, *id*., p. 25. Although Dynamic Risk stated that the increased rail transportation may negatively impact urban and farm areas and may pose an environmental threat to over 1,000 other aquatic environments in Michigan in the event of a rail accident and spill, Dynamic Risk found it to be the most practical and cost-effective option of the Alternative 3 transportation options. *See*, *id*., pp. 349-350.

In Alternative 4, Dynamic Risk analyzed a tunneling option. Dynamic Risk estimated that the total cost of the tunneling project would be approximately $153 million, but that the $95 million/year operational costs of the existing Line 5 system would remain the same and there would be negligible impacts to the market. *See*, *id*., pp. 230-232. Dynamic Risk contended that the tunneling option would require the procurement of shoreline locations, but stated that there are potentially available undeveloped sites along the shoreline. In addition, Dynamic Risk asserted that "[g]ood rock conditions and minimal water inflow are anticipated at the Straits and no adverse

geotechnical conditions are known to exist which would negate tunneling as an option." *Id*., p. 229. Dynamic Risk noted that there may be some socioeconomic factors to consider during construction of the tunnel, including air pollution, noise impacts, and limited housing for workers. In its risk assessment of Alternative 4 and the likelihood of Line 5 products entering the Great Lakes, Dynamic Risk stated that "the risks associated with the potential for a release of Line 5 products to enter the waters of the Great Lakes from a Straits tunnel crossing of a design, as proposed, is considered to be negligible, and un-quantifiably low." *Id*., p. 275.

For Alternative 5, Dynamic Risk conducted "a comprehensive engineering study of the current condition and operation of the existing pipeline segments based on an evaluation of design, materials properties, installation procedures, operating conditions, as well as a review of Enbridge's assessment data and integrity standards." Exhibit ELP-24, p. 88. Dynamic Risk asserted that continued operation of the dual pipelines presented no *new* operating costs, socioeconomic impacts, or environmental concerns. However, after conducting a threat assessment of the dual pipelines, Dynamic Risk noted that:

> [w]hile there have been no incidents involving anchor strike (drag/drop) in the operating history of the Straits pipelines (68), it must be noted that with respect to the above vulnerability factors, the Straits Crossing segments cross a busy shipping lane (see Figure 2-5), where they lie exposed on top of lakebed with no protective cover. They also are situated in water that is shallow, relative to the anchor chain lengths of most cargo vessels. Furthermore, a 20-[inch] diameter pipeline is small enough to fit between the shank and flukes of a stockless anchor for a large cargo vessel, and thus, is physically capable of being hooked.

Exhibit ELP-24, p. 123.

In Alternative 6, Dynamic Risk considered a scenario in which service on the dual pipelines was eliminated. Dynamic Risk analyzed the resulting market impacts and assessed alternatives for the delivery of propane to Michigan retailers and customers. *See*, *id*., pp. 276-278.

The Commission notes that on November 27, 2017, following publication of the Alternatives Report, the State of Michigan and Enbridge executed the First Agreement, which stated that "the continued operation of Line 5 through the State of Michigan serves important public needs by providing substantial volumes of propane to meet the needs of Michigan citizens, supporting businesses in Michigan, and transporting essential products, including Michigan-produced oil to refineries and manufacturers . . . ." Exhibit A-8, p. 1; *see*, 7 Tr 565-566. The First Agreement also stated that "the State [of Michigan] and Enbridge desire to establish additional measures and undertake further studies with respect to certain matters related to Enbridge's stewardship of Line 5 within Michigan and the transparency of its operation." Exhibit A-8, p. 2. Accordingly, the First Agreement required Enbridge to perform an additional Alternatives Analysis for three options that were selected for replacing the Straits Line 5 segment: (1) installation in a tunnel below the lakebed of the Straits, (2) installation using an open-cut method that includes secondary containment, and (3) installation using HDD. The First Agreement noted that the Alternatives Analysis should compare the feasibility of construction, the associated costs, engineering considerations, the potential environmental impacts and mitigation measures, and the risk of failure for the three alternatives. After analyzing the three alternatives, Enbridge concluded that the tunnel option was feasible, had the least impactful environmental construction process, and that there was "no credible scenario that would result in a release of product into the Straits." Exhibit A-9, p. 67; *see*, 7 Tr 566-568.

In addition, the Commission notes that according to MSCA's witness, Mr. Cooper, there are two other possibilities for replacing the Straits Line 5 segment that were not considered in the Alternatives Report or Enbridge's Alternatives Analysis: suspending a replacement pipeline from the Mackinac Bridge or constructing a new suspension bridge to house the replacement pipe

segment. He concluded that it would not be practical to suspend the Straits Line 5 replacement pipe segment from the Mackinac Bridge because:

> [t]he pipeline would add load to the Mackinac Bridge for which it was not designed and would tend to shorten the 64-year-old bridge's useful life. Maintenance of the pipeline would be challenging if it were suspended below the bridge deck, especially in the winter months. A suspended pipeline could include secondary containment, but a concurrent failure of pipe and casing would release product into the waters of the Straits.

9 Tr 1238. Regarding a new suspension bridge, Mr. Cooper asserted that this option would be difficult and expensive to maintain, at risk for aircraft and wind impacts, and cause visual impacts to the scenic beauty of the Straits. Similar to the option of suspending a pipeline from the Mackinac Bridge, he noted that a new suspension bridge with a pipeline and secondary containment feature would suffer from the same threat of concurrent failure of the pipe and casing, thus releasing product into the Straits.

A Second Agreement between the State of Michigan and Enbridge was executed on October 3, 2018. The Commission finds that the Second Agreement includes the same sentence regarding public need for the continued operation of Line 5 that is contained on page 1 of the First Agreement. Exhibit A-10, p. 1. However, the Commission finds that the Second Agreement identified a second element of public need: protection of public resources. Specifically, the Second Agreement stated that:

> the State and Enbridge recognize that the Straits Crossing and the St. Clair River Crossing (collectively "Crossings") are located in the Great Lakes and connecting waters that include and are in proximity to unique ecological and natural resources that are of vital significance to the State and its residents, to tribal governments and their members, to public water supplies, and to the regional economy, and the Crossings are also present in important infrastructure corridors . . . .

Exhibit A-10, p. 2. The Second Agreement noted that:

> Enbridge prepared and submitted to the State [of Michigan] the report entitled *Alternatives for replacing Enbridge's dual Line 5 pipelines crossing the Straits of*

> *Mackinac* (June 15, 2018) ("Alternatives Analysis"). That Alternatives Analysis concluded that construction of a tunnel beneath the lakebed of the Straits connecting the upper and lower peninsulas of Michigan, and the placement in the tunnel of a new oil pipeline, is a feasible alternative for replacing the Dual Pipelines, *and that alternative would essentially eliminate the risk of adverse impacts that may result from a potential oil spill in the Straits* . . . .

Id., p. 5 (emphasis added); *see*, 7 Tr 566-567.

On December 18, 2018, the Third Agreement between the State of Michigan and Enbridge was executed to fulfill the parties' obligations as set forth in the Second Agreement. The Third Agreement stated that "[t]he replacement of the Dual Pipelines with the Straits Line 5 Replacement Segment in [a] Tunnel is expected to eliminate the risk of a potential release from Line 5 at the Straits." Exhibit A-1, p. 4; *see*, 7 Tr 567.

Further, the Commission notes that concurrent with the Third Agreement, the Michigan Legislature enacted Act 359. Section 14a(1) of Act 359, MCL 254.324a(1), states in relevant part that "[t]he Mackinac bridge authority may acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel" connecting the Upper and Lower Peninsulas. Notably, Act 359 also states that "[t]he carrying out of the Mackinac bridge authority's purposes, including a utility tunnel, are for the benefit of the people of this state and constitute a public purpose." MCL 254.324a(5).

In accordance with the obligations set forth in the Second Agreement and Act 359, the State of Michigan and Enbridge executed the Tunnel Agreement on December 18, 2018. *See*, MCL 254.324d(4); 7 Tr 567. The Tunnel Agreement states in relevant part: "The Tunnel, subject to the design and engineering work including the Geotechnical Investigations required under this Agreement, is to . . . be constructed of a suitable structural lining, providing secondary containment to prevent any leakage of liquids from the Line 5 Replacement Segment into the lakebed or Straits." Exhibit A-5, p. 10; *see*, 7 Tr 567.

Additionally, in 2018, the DNR granted MSCA a new easement in the Straits for the Replacement Project, which was then assigned to Enbridge. *See*, Exhibit A-6.

Based on a review of this record evidence, the Commission finds that as noted by Enbridge, the Staff, and the Associations, the First, Second, and Third Agreements and Act 359 demonstrate that there is a public purpose and public need to replace the dual pipelines with the Replacement Project. The Commission also notes that the Associations point to the DNR's granting of a new easement for the tunnel to MSCA as recognizing the need for the Replacement Project, as well as EGLE's granting of the NREPA Parts 303 and 325 permits, where "EGLE 'considered the concerns raised by comments that this project is in the public interest, and . . . determined that . . . the project is in the public interest.'" Associations' initial brief, p. 10 (quoting Exhibit A-18, p. 8). However, the Commission finds Dynamic Risk's Alternatives Report and testimony presented by the Staff and the Associations to be particularly informative in determining public need for the Replacement Project.

For Alternative 6 in the Alternatives Report, Dynamic Risk assessed "the potential market and economic impacts of eliminating all transportation of petroleum products and [NGLs] through the segment of Enbridge's Line 5 which crosses the Straits of Mackinac. The crossing would then be abandoned and potentially all of Line 5 would be abandoned if the fragmented segments could not be effectively used." Exhibit ELP-24, p. 276. According to Dynamic Risk, if Line 5 was abandoned in full or in part, Enbridge would need to secure alternative supply sources to continue current refinery and petro-chemical operations, it may require plant or infrastructure modifications and capital additions, and it would require replacement access to alternative markets to secure sufficient supply, which is likely to increase transportation costs and tariffs. *See*, *id*., p. 278.

Dynamic Risk also noted that:

> [i]n 2015, Michigan consumed 460 million gallons of propane, with propane being distributed from several [in-state] storage and distribution terminals. Of this, approximately 430 million gallons were consumed in the Lower Peninsula. The Michigan Lower Peninsula is itself an important United States hub for natural gas and propane storage, which permits secure supplies of storage to be available to consumers in the Lower Peninsula. Line 5 does not deliver any NGLs directly to the Lower Peninsula, but deliveries to Sarnia approach 90 kbbl[kilobarrels]/[day]. Flows of propane from Sarnia to Michigan are estimated to be 25 kbbl/[day]; this is equivalent to about 380 million gallons annually and represents a significant proportion of total demand within Michigan.

Id., p. 280 (footnote omitted).

Further, Dynamic Risk noted that:

> [t]he assessment carried out for Alternative 6b focused on the impacts to energy facilities within the [s]tate of Michigan that rely on Line 5 for the receipt or delivery of commodities to their respective facilities. The alternative transportation chosen and estimated costs are presented in Table 4-5. In addition, the Sarnia fractionator was identified as an important potential source of propane into the Michigan storage and distribution hub.
>
> * * *
>
> Additionally, the incremental feedstock costs for the refineries may translate into higher refined product costs for gasoline and distillates of 2.13¢/[gallon] throughout the [s]tate of Michigan. Assuming the incremental cost is passed through to Michigan consumers, who consume 5,700 million [gallons]/[year], this cost equates to $121 million/[year].

Exhibit ELP-24, p. 300.

Moreover, Mr. Sloan, who testified on behalf of the Associations, stated that if Line 5 in Michigan was abandoned in full or in part, there have been no proposals to:

> address the increases in propane prices that are widely expected to occur in the absence of Line 5. In the near term, the replacement option for Line 5 is increased reliance on rail and truck transport. However, neither would be capable of offsetting the loss of Line 5 given the lack of existing infrastructure at locations dependent on propane deliveries manufactured from Line 5 volumes.

8 Tr 906. Mr. Sloan also asserted that alternatives to propane heating in Michigan, such as heat pumps, are (at this time) prohibitively expensive for propane customers. *See*, 8 Tr 909-919.

Similarly, Staff witness Mr. Morese contended that 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. *See*, 12 Tr 1771-1777, 1791-1792, 1801-1807; *see also*, 9 Tr 948, 974, 1092.

The Commission recognizes that there have been a number of steps taken in recent years by market participants to develop alternative sourcing options for propane and petroleum products. However, a determination of public need is not limited to whether other sourcing options may exist. For example, in the decision approving Enbridge's application to replace sections of its Line 6B in 2013, the Commission found that, "[o]n the issue of public need . . . Enbridge's shipper and refinery customers both have a present need for additional pipeline capacity." January 31, 2013 order in Case No. U-17020, p. 22. In the present case, the public need is not based on the need for additional capacity, but on the ongoing reliance on the current capacity of the dual pipelines, even as other sourcing options emerge. Furthermore, the Commission finds that there is substantial evidence on the record in the present case to show that if the dual pipelines are damaged, deemed inoperable due to safety concerns, or shutdown, Line 5 in Michigan may be abandoned in full or in part, which will require higher-risk and costlier alternative fuel supply sources and transportation to Michigan customers than what is proposed in the Replacement Project. *See*, ELP-24, pp. 278, 300; 8 Tr 906, 908-919; 12 Tr 1777-1778. Thus, the Commission finds that there is a public need for the products shipped through the Straits Line 5 segment. The evidence in this case, in addition to the official findings of public need and public benefit identified in Act 359 and the First, Second, and Third Agreements, clearly supports a finding of public need for the Replacement Project.

In addition, the Commission notes that the stated purpose behind the Replacement Project is to alleviate the risk of a spill and that this rationale further supports the public need to replace the dual pipelines with the Replacement Project. The Alternatives Report identified several threats to the integrity of the dual pipelines in their current configuration, the dominant threat being anchor hooking with the potential for a spill into the Great Lakes. *See*, Exhibit ELP-24, pp. 28, 123. The Commission also finds that alternative modes of transporting Line 5 products, such as truck, rail, oil tankers and barges, will likely increase environmental impairment and may increase the threat of spills that could significantly damage the Great Lakes, the state's terrestrial environment, and more than 1,000 other aquatic environments in Michigan. *See*, Exhibit ELP-24, pp. 348-350, 362-367.

The Commission also reviewed Enbridge's Alternatives Analysis, which evaluated construction feasibility, costs and engineering, environmental impacts, and approvals and authorizations necessary for three alternatives to the dual pipelines: (1) relocating the Straits Line 5 segment to a tunnel beneath the lakebed of the Straits, (2) relocating the Straits Line 5 segment using HDD, and (3) relocating the Straits Line 5 segment using an open-cut method that includes secondary containment. *See*, Exhibit A-9, p. 5; 12 Tr 1722. According to the Alternatives Analysis, Alternative 2 is not feasible to construct and was withdrawn from consideration. *See*, Exhibit A-9, p. 53. When Enbridge compared Alternatives 1 and 3, the company noted that for Alternative 1, the "[r]isk of product release into the Straits" is "negligible—considered virtually zero." *See*, Exhibit A-9, pp. 9, 14, 64, 66, 68; *see also*, 8 Tr 800, 822, 825; 12 Tr 1717, 1723. For Alternative 3, Enbridge noted that the "[r]isk of product release into the Straits" is "an extremely low value." *See*, Exhibit A-9, pp. 9, 32, 68.

Furthermore, the Alternatives Analysis conducted a preliminary evaluation of the potential environmental impacts for constructing Alternative 1, relocating the Straits Line 5 segment to a tunnel, and constructing Alternative 3, relocating the Straits Line 5 segment using an open cut method with secondary containment. *See*, Exhibit A-9, pp. 14, 32, 60-62. The Alternatives Analysis concluded that Alternative 1 was the "[l]east impactful construction process—[it] would have no impact to shores [sic] lines or [the] lakebed; marine work [would] only [be] required during the geotechnical program," whereas Alternative 3 would result in "[c]onstruction impacts to the shore lines and [the] lakebed; marine work [would be required] for two consecutive summer seasons, plus one summer season for geotechnical investigation/surveys." Exhibit A-9, p. 67. Thus, it was determined that Alternative 1 would cause the least environmental damage. *See*, 12 Tr 1868-1869. The Commission agrees.

The Commission notes that when asked if there are alternative methods for protecting the dual pipelines, Staff witness Mr. Warner testified that a study was conducted to determine whether a physical barrier of engineered gravel/rock cover could be installed to protect the dual pipelines. Mr. Warner stated that:

> the protective cover would need to be approximately 72 feet wide and a minimum of eight feet high from the lakebed to reach a minimum height of six feet from the top of the existing Dual Pipelines. The report also explains that this type of covering would cost approximately $150 million to install along the entire length that the Dual Pipelines are exposed on the lakebed. As an alternative, this covering could be installed only in areas where the Dual Pipelines are within the shipping channel with a buffer on each side, totaling approximately 2,000 feet of covering for each of the Dual Pipelines. A consultant hired for the study anticipated that a physical barrier of this design would result in a 99-percent reduction in the probability of an intentional or unintentional anchor strike causing a release of the Dual Pipelines.
>
> * * *
>
> One significant consideration was that the protective barrier would eliminate the ability to visually inspect the outside of the pipeline using a remote operated

> vehicle (ROV) or with divers as is done currently. The report explains that Enbridge would continue to assess the integrity of the Dual Pipelines using in-line inspection tools. . . . Additionally, installation of the barrier would likely cause environmental impairments and would require at least 11 state and federal environmental permits and approvals.

12 Tr 1721-1722 (footnote omitted). Mr. Warner noted that the State of Michigan declined to support this alternative.

Mr. Warner contended that if the Commission does not approve the Replacement Project, "the Dual Pipelines would continue operating on the lakebed of the Straits unless and until Enbridge determines to voluntarily cease operations or a legal or regulatory action forces Enbridge to cease operations. Further, the safety benefits and protections of the proposed replacement within a tunnel would not be realized." 12 Tr 1728. Mr. Warner "conclude[d] that the replacement of the Dual Pipelines with a new pipeline in a tunnel below the lakebed serves a public need, is in the public interest, and is the best option out of the alternatives described above. . . . There are no alternatives that would be feasible and prudent when compared to the proposed Replacement Project." 12 Tr 1736.

Accordingly, the Commission finds that the Replacement Project "essentially eliminates the risk of adverse impacts that may result from a potential release from Line 5 at the Straits" and protects "unique ecological and natural resources that are of vital significance to the State and its residents, to tribal governments and their members, to public water supplies, and to the regional economy." Exhibit A-10, pp. 2-3.

In conclusion, the Commission finds that 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.

B. Are the Replacement of the Line 5 Segment that Crosses the Straits of Mackinac and the Relocation of the Segment to a Concrete-lined Tunnel Below the Lakebed of the Straits Designed and Routed in a Reasonable Manner?

Enbridge asserted that the Replacement Project is designed and routed in a reasonable manner because the pipeline is being routed through a tunnel deep beneath the lakebed of the Straits, thus eliminating the risk of anchor strikes and providing secondary containment in the unlikely event of a release. In addition, Enbridge stated that the tunnel easement is located within the shortest distance between the Upper and Lower Peninsulas. Enbridge's initial brief, pp. 22-28. The Associations agreed. Associations' initial brief, p. 13. Although the Replacement Project "is heavily constrained by the existing onshore Line 5 segments, the tunnel easement, geotechnical considerations, and the planned tunnel alignment," the Staff contended that the route and location of the Replacement Project are reasonable. Staff's initial brief, pp. 49-52. FLOW, Bay Mills, and the MEC Coalition argued that Enbridge failed to demonstrate that the Replacement Project is designed and routed in a reasonable manner and asserted that the Commission should deny Enbridge's application. Bay Mills' initial brief, pp. 13-28; FLOW's initial brief, pp. 11-17; MEC Coalition's reply brief, pp. 49-51; Bay Mills' reply brief, pp. 14-43.

The Commission notes that the Tunnel Agreement provided a general description of the tunnel's design, location, and construction process:

> Project Description - The Tunnel, subject to the design and engineering work including the Geotechnical Investigations required under this Agreement, is to: (i) be approximately four (4) miles in length, extending from an opening point as near as practical to Enbridge's existing station located on the north shoreline of the Straits to an opening point as near as practical to Enbridge's existing Mackinaw station located on the south shoreline of the Straits; (ii) except for the opening points on either side of the Straits, be constructed entirely underground, below the lakebed of the Straits; (iii) be approximately ten (10) feet in finished diameter or other diameter that is deemed by Enbridge to not be greater than that necessary to efficiently construct the Tunnel and to construct, operate and maintain a 30-inch Line 5 Replacement Segment, in which Third-Party Utilities, including but not limited to electric and broadband cables, may also be housed, provided that:

> (a) such Third-Party Utilities do not increase the diameter of the Tunnel beyond that necessary to construct, operate, maintain and use a 30-inch Straits Line 5 Replacement Segment; and (b) the presence of such Third-Party Utilities is not incompatible with the operation, maintenance or use of the Line 5 Replacement Segment; (iv) be designed and constructed in accordance with prevailing, state of the practice tunnel standards and specifications for a design life of no less than ninety-nine (99) years; and (v) be constructed of a suitable structural lining, providing secondary containment to prevent any leakage of liquids from the Line 5 Replacement Segment into the lakebed or Straits.

Exhibit A-5, p. 10, ¶ 6.1. In addition, the Tunnel Agreement stated that MSCA:

> has or will acquire from [DNR] a Tunnel Easement that will provide [MSCA] with the lawful right to enter, occupy, and use, lands beneath the lakebed of the Straits of Mackinac necessary for the construction, use, operation, and maintenance of the Tunnel . . . which will include the right to construct a liquid hydrocarbon pipeline within the Tunnel, and which will allow and authorize assignment to Enbridge in accordance with this Agreement.

Exhibit A-5, p. 6. On December 17, 2018, DNR conveyed an easement to MSCA to construct a tunnel under the lakebed of the Straits, which included the option to assign the easement rights. *See*, Exhibit A-6, pp. 1-2. On December 19, 2018, MSCA assigned the easement to Enbridge. *Id*., pp. 5-6. In addition to constructing the tunnel beneath the lakebed of the Straits, Enbridge will "tie-in, operate, and maintain approximately 0.4 to 0.8 miles of pipe to connect the replacement pipe segment to Enbridge's existing Line 5 on both sides of the Straits," which will be located in workspace on land Enbridge owns or has the right to access. 7 Tr 556; *see also*, 7 Tr 561.

Intervenors Bay Mills and FLOW objected to the route and location of the Replacement Project. Bay Mills argued that the location of the Replacement Project will harm important cultural landscapes, historical sites, and threatened and endangered species in the Straits. *See*, Bay Mills' initial brief, pp. 13-19. FLOW asserted that the Commission may not approve the Replacement Project unless and until the 2018 easement and the 2018 assignment of easement are authorized under public trust law and the GLSLA. *See*, FLOW's initial brief, pp. 11-17.

In response to Bay Mills' claim that the proposed location of the Replacement Project may disturb sensitive cultural, historical, and natural sites, the Staff asserted that DNR, EGLE, SHPO, and the USACE possess the legal authority to review the Replacement Project and its impact upon these sites, and the Staff argued that these reviews should not be duplicated by the Commission. *See*, Staff's reply brief, pp. 21-35. In addition, the Staff contended that it complied with ED 2019-17 and the Commission's "Guide for Involvement by Tribal Governments in Infrastructure Siting Cases at the Michigan Public Service Commission" in good faith, and the Staff averred that it engaged in meaningful and mutually beneficial communication and collaboration with Michigan's 12 federally recognized Tribes. *See*, Staff's initial brief, pp. 36-48; *see also*, 12 Tr 1653-1655; Exhibits S-2, S-3, S-25, S-30, S-34. Although Bay Mills expressed some disagreement with the Staff's characterization of the consultation process, Bay Mills acknowledged that:

> the status of the . . . Staff and Bay Mills as litigants in a formal administrative proceeding hampered the free-flowing exchange of ideas that is necessary for effective consultation. Simply put, in its conversations with the . . . Staff, Bay Mills could not describe in detail the tribe's concerns about the proposed tunnel project because Bay Mills was working with its attorneys to prepare testimony and exhibits about those concerns.

10 Tr 1436-1437; *see*, 10 Tr 1438. Ultimately, the Staff recommended that the Commission approve Enbridge's Act 16 application contingent upon approval from other state and federal permitting agencies.

The Commission finds the Staff's position on this issue persuasive, concluding that there are several cultural, historical, and environmental characteristics of the Replacement Project that are within the regulatory authority of separate state and federal agencies. As noted by ALJ Mack in his initial ruling, "some degree of deference must be afforded those determinations." ALJ Mack's initial ruling, p. 17. EGLE is the state agency charged with the duty to issue NREPA Parts 31,

303, and 325 permits; SHPO is the state agency that assists USACE with the Section 106 review; and USACE is the federal agency authorized to prepare an EIS, conduct a Section 106 review, and issue a Section 10 permit pursuant to the Rivers and Harbors Act of 1899, 33 USC 403, and Section 404 of the Clean Water Act, 33 USC 1344. *See*, 12 Tr 1702.

However, the Commission notes that several Staff witnesses examined the permits and agency reviews and made recommendations. Staff witnesses Mr. Douglas and Ms. Mooney reviewed the environmental permits and proposed several improvements to Enbridge's EIR, which Enbridge addressed. *See*, 7 Tr 610-624; 12 Tr 1835-1836, 1849-1850; Exhibits A-9, A-12, S-18, S-19. In addition, in the NREPA Parts 303 and 325 permits, EGLE stated that "SHPO recommended [an] additional survey to identify historic properties in the project area (November 10, 2020). This recommendation will remain under consideration during the Section 106 consultation process." Exhibit A-17, p. 7. Furthermore, Staff witness Mr. Warner noted that according to USACE's website:

> [Enbridge's] application will be reviewed under Section 106 of the National Historic Preservation Act and that the USACE will consult with [SHPO] and federally recognized tribes. Relating to threatened and endangered species, the website further explains that USACE will review the potential impacts of the tunnel project on federally listed threatened and endangered species pursuant to Section 7 of the Endangered Species Act. Once the USACE determines that the biological assessment is adequate for consultation, the [USACE] will initiate formal consultation with the U.S. Fish and Wildlife Service.

12 Tr 1711. Accordingly, the Commission agrees with the Staff and finds that the route and location of the Replacement Project should be approved conditioned upon Enbridge obtaining the required governmental permits and approvals. The Commission acknowledges that the USACE review is ongoing and finds that significant changes to the design of the tunnel directed by USACE shall be inconsistent with the approval granted in this case and may require further review and approval by the Commission.

Next, the Commission notes that in response to FLOW, the Staff stated that "the Commission's four [Act 16] criteria do not require an applicant to obtain all property rights for a proposed project before approval." Staff's reply brief, p. 24. According to the Staff, an Act 16 applicant may acquire the rights to property through eminent domain and that these rights may be obtained after the Commission grants approval of the Act 16 application. The Staff stated that, in fact, "the Commission has indeed granted approval in Act 16 proceedings where additional easement rights would be required." *Id*. The Commission agrees. *See*, MCL 483.1-483.2; *see also*, January 31, 2013 order in Case No. U-17020, pp. 9-12, 24-30.

Responding to FLOW's argument that the Replacement Project has not been authorized by public trust law, the Staff noted that FLOW "appears to indicate that the determination under the public trust doctrine should be made by the DNR—the agency that granted the easement." Staff's reply brief, p. 26. In the Staff's opinion, FLOW fails to demonstrate that the Commission has a legal obligation to "evaluate the validity of other State agencies' actions in this Act 16 proceeding." *Id*. The Commission agrees.

Turning to the issue of whether the design and route of the Straits Line 5 replacement segment in an underground tunnel is reasonable, Enbridge claimed that relocation of the pipe segment to a tunnel eliminates the possibility of anchor strikes, virtually removes the likelihood of bending stress, provides the ability for direct examination of the pipe segment exterior, allows for enhanced leak monitoring, and provides secondary containment in the unlikely event of a release. *See*, 17 Amended Tr 2446; Exhibit S-32, pp. 3-4.

The Commission notes that MSCA's witness Dr. Mooney testified that Arup, "a global engineering firm," was employed to design the tunnel. 9 Tr 1210. He asserted that Arup's design team has an impressive depth of knowledge and design skills and "extensive experience in North

America and internationally" designing tunnels like the Replacement Project. 9 Tr 1210. In Dr. Mooney's opinion, Arup engaged "key experts from around the world" to ensure that the tunnel is designed to withstand "high groundwater pressure, face stability with reduced pressure, ground characterization, etc." and that the tunnel design meets or exceeds industry standards. 9 Tr 1212. Dr. Mooney also noted that the tunnel is routed within the 2018 easement and in a vertical alignment to stay within the bedrock beneath the Straits. 9 Tr 1218; *see*, Exhibit A-13.1. Furthermore, Dr. Mooney argued that "[p]lacing Line 5 inside the tunnel reduces the risk of leaking product reaching the Great Lakes to practically zero. . . . This is a notable reduction in environmental risk from the current dual pipeline configuration on the lakebed." 9 Tr 1204; *see*, 8 Tr 788; 17 Amended Tr 2445; Exhibit A-13.

Dr. Mooney noted that according to paragraph 5.3 of the Tunnel Agreement, MSCA must employ an "Independent Quality Assurance Contractor with appropriate technical expertise to monitor the construction of the Tunnel and provide information to [MSCA]." Exhibit A-5, pp. 9, 13; *see*, 9 Tr 1213. Dr. Mooney also stated that the Tunnel Agreement directs Enbridge to develop and provide MSCA with a Tunnel O&M Plan that will ensure a 99-year design life for the tunnel and "continued physical integrity for secondary containment purposes." Exhibit A-5, p. 14; *see*, 9 Tr 1205, 1216.

The Commission notes that Staff witness Mr. Adams reviewed the feasibility of constructing the tunnel, the anticipated methods, and the use of PCTL. In his opinion, the tunnel design proposed by Enbridge "has a proven record for providing a stable and mostly watertight tunnel system" and will "result in a very low probability of fluids escaping from the tunnel." 12 Tr 1816; *see*, 12 Tr 1817-1818; Exhibit S-16, p. 2; Exhibit A-9, pp. 14-31.

However, Staff witness Mr. Ponebshek provided several recommendations for tunnel construction. Mr. Ponebshek stated that he:

> would recommend a more detailed risk management plan be delivered to the State [of Michigan] ahead of construction. This plan would include a description of the planned geotechnical test bores and frequency of probe-hole testing ahead of the TBM and should include reporting of both test-bore data and probe-hole data in real time so that the State [of Michigan] can assess risks and construction plan modifications based on the data. The plan should also include inspections for concrete cast sections prior to moving them into the tunnel and after being put into place, placement of gaskets, regular analyses of bentonite mix properties, [and] changes in slurry pressure. Deviations from and modifications to the plan during the construction process should be reported and available for public review.

12 Tr 1872-1873. Enbridge did not explicitly respond to Mr. Ponebshek's recommendations.

The Commission notes that Bay Mills argued that Enbridge's proposal to locate a liquid petroleum pipeline within a tunnel is a "first-of-its-kind" design and that "[t]he evidence in the record demonstrates that Enbridge's untested proposal is neither reasonably routed nor designed." Bay Mills' initial brief, pp. 1, 13. Bay Mills' witness Mr. Kuprewicz testified that "[f]rom an engineering standpoint, there is a potential for a release into the Straits from the tunnel by way of a catastrophic explosion. While a risk of release in this manner may be considered low, it is not negligible . . . ." 10 Tr 1326. Bay Mills asserted that an explosion could result from vapors accumulating in the tunnel from a leak in the pipeline, a failure in the ventilation system, and a spark from electrical equipment or human error. *See*, 10 Tr 1327-1328; 18 Tr 2670-2671. According to Mr. Kuprewicz, this type of catastrophic explosion has "the potential of shattering concrete, especially segment concrete linings. In short, an explosion would cause a high-pressure event that would put the concrete structures at risk. This in turn runs the risk of releasing material into the Straits." 10 Tr 1330.

Bay Mills' witness Mr. O'Mara also testified that dissolved methane could enter the tunnel during excavation or through continual seepage of groundwater and create an ignition source. *See*,

18 Tr 2675-2676. Bay Mills contended that Enbridge has failed to properly calculate the probability of an explosion and tunnel failure and that the company has not adequately designed the tunnel and its systems to avoid the risk. *See*, 10 Tr 1328, 1332-1333, 1367-1368; 17 Amended Tr 2622-2629; 18 Tr 2670-2675, 2679-2682. To help prevent this scenario, Bay Mills recommended that: (1) all electrical equipment in the tunnel comply with Class 1 Division 1 specifications; (2) Enbridge perform proper girth welding techniques and inspections; (3) the gas detection systems be designed with independency and redundancy, and that the detectors be placed in proper locations in the tunnel; and (4) the secondary leak detection system "incorporate mandatory (even automatic) pipeline shutdown/isolation and tunnel ventilation procedures," and that "the system be designed to not generate false signals/alarms." 10 Tr 1333; *see*, 10 Tr 1328-1329, 1368, 1370-1374.

Enbridge disagreed with Bay Mills that the Replacement Project is unique and untested, noting that although there are no other pipelines in North America that transport NGLs through an underground tunnel, there are several tunnels worldwide that transport hydrocarbons. *See*, Exhibit BMC-41, p. 21.[33] The Alternatives Analysis also provides several examples of hydrocarbon pipelines within tunnel structures. *See*, Exhibit A-9, pp. 11, 13-15.

Next, Enbridge asserted that because the risk of release from the Straits Line 5 replacement segment in the tunnel is less than 0.000001, there is virtually no risk of explosion in the tunnel. *See*, 8 Tr 800-803; 16 Tr 2322; 17 Amended Tr 2437-2438, 2448-2450; 18 Tr 2589-2590, 2593, 2810-2811; *see also*, Exhibits S-31 and S-32. In addition, Enbridge stated that it does not expect to encounter methane at a level to cause concern. 17 Amended Tr 2465-2470. However, Enbridge

[33] Because Exhibit BMC-41 is not paginated, the Commission clarifies that page 1 starts in natural order with the first page of the documents in the exhibit.

contended that to address the potential risk of encountering methane during construction, the TBM will be equipped with monitors to detect methane. Enbridge stated that if methane is detected at significant levels during construction, the company will adjust its design and operations of the project. After completion of the Replacement Project, Enbridge averred that the gas monitors installed in the tunnel are capable of detecting methane. 15 Tr 2090.

Enbridge averred that in the unlikely event of an explosion and high-intensity fire in the tunnel, the concrete lining of the tunnel will maintain its integrity. 15 Tr 2092-2093. However, if a portion of the lining were to fail, Enbridge contended that Line 5 products would not migrate into the strata around the damaged lining. *See*, 15 Tr 2093; 17 Amended Tr 2458, 2475; Exhibit A-35.

Enbridge's witness Mr. Dennis asserted that there is no need for an FFFS in the tunnel because "[t]he risk of a fire in the tunnel housing the Replacement Project is extremely low and when compared to the added risk to human safety of sending personnel into the tunnel to maintain such a system, the balance of risks weighs in favor of not installing such a system." 15 Tr 2095. In any event, Mr. Dennis claimed that there will be no ignition sources in the tunnel and that "[t]here are numerous methods to detect and shutdown the replacement pipe segment in the extremely unlikely event of a release." 8 Tr 802; *see*, 8 Tr 803-804, 867-868.

Enbridge argued that it provided an overview of its pipeline integrity, gas monitoring and leak detection systems, and human error in detecting a failure, and the company responded to Bay Mills' concerns regarding the leak and gas detection systems for the Replacement Project. 15 Tr 2096-2097; 16 Tr 2256-2265, 2323-2324; 17 Amended Tr 2446-2448, 2456-2458. Additionally, Exhibits A-13, A-29, S-31, and S-32 describe Enbridge's plans for leak and gas detection, ventilation, sump pumps, the TSV, and emergency procedures. *See*, Exhibit A-13, pp. 15-17;

Exhibit S-31, p. 9; Exhibit S-32, pp. 3-4, 7. Furthermore, Enbridge added a second layer of leak detection to the existing CPM system. 9 Tr 1246-1247. Finally, Enbridge asserted that the use of Class 1 Division 2 equipment in the tunnel "is a conservative design decision and errs on the side of safety." Enbridge's initial brief on reopening, p. 23. Enbridge argued that the use of Class 1 Division 1 equipment is inconsistent with the National Electric Code, may not be feasible, and may create other safety concerns. *See*, *id*., p. 24; *see also*, Exhibit A-31, p. 7.

The Staff noted that it reviewed Enbridge's "methodology and assumptions used by [DNV] to estimate the [POF] of the pipeline and the Probability of Ignition within the proposed tunnel" and found that it "did not raise any additional concerns . . . ." 18 Tr 2792; *see*, 18 Tr 2794. In the Staff's opinion, Enbridge's design and operation of the leak and gas detection systems and the Staff's recommended girth weld procedures address Mr. Kuprewicz's concerns. *See*, Staff's initial brief, pp. 68-69; *see also*, 18 Tr 2792. Regarding Mr. Kuprewicz's concerns with the tunnel's ventilation system and human presence in the tunnel, the Staff noted that the ventilation system exceeds OSHA requirements and that Enbridge has implemented procedures to avoid human contact with harmful vapors and to prevent an ignition source. *See*, Staff's initial brief, pp. 66-67; *see also*, Exhibit A-31, p. 4; 18 Tr 2792. However, the Staff stated that if the Commission approves the Replacement Project, the Commission should recommend "that certain equipment be designed to the more stringent Class 1, Division 1 standard to the extent such equipment is feasible, beneficial, safe, and permitted by the agreements and other permitting authorities governing the project." Staff's initial brief on reopening, pp. 17-18 (footnote omitted); *see*, Exhibit S-31, p. 13.

Next, the Commission notes that the Second Agreement, Act 359, and the Tunnel Agreement require that the design of the tunnel allow for the accommodation of third-party utilities, so long as

they are not incompatible with the operation of the Line 5 Replacement Project. *See*, Exhibit A-10, p. 6; MCL 254.324d(4); Exhibit A-5, p. 7, ¶ 3.3 and pp. 48-51; *see also*, Exhibit A-11, p. 14.

The Tunnel Agreement stated, in relevant part, that the tunnel:

> be approximately ten (10) feet in finished diameter or other diameter that is deemed by Enbridge to not be greater than that necessary to efficiently construct the Tunnel and to construct, operate and maintain a 30-inch Line 5 Replacement Segment, in which Third-Party Utilities, including but not limited to electric and broadband cables, may also be housed, provided that: (a) such Third-Party Utilities do not increase the diameter of the Tunnel beyond that necessary to construct, operate, maintain and use a 30-inch Straits Line 5 Replacement Segment; and (b) the presence of such Third-Party Utilities is not incompatible with the operation, maintenance or use of the Line 5 Replacement Segment . . . .

Exhibit A-5, p. 10, ¶ 6.1. In addition, the Alternatives Analysis stated that:

> [w]hile increasing the TBM size to accommodate future third-party utilities is not specifically considered in this report, Hatch [Ltd] confirmed that increasing the tunnel size would not impact the feasibility of tunneling under the Straits. Tunnels are scalable in size and can be designed to accommodate a variety of services. **For a Straits tunnel, it would be critical to understand before design and engineering begins whether the tunnel could have a purpose beyond the pipeline, such as for third-party services/assets, and specifically risks associated with co-locating different types of infrastructure.** A scope change of this magnitude just before construction would limit or potentially eliminate the options for accommodating additional services.

Exhibit A-9, p. 26 (emphasis added).

Accordingly, Enbridge's Tunnel Design and Construction Report provided a design for the tunnel to accommodate the 30-inch liquid petroleum pipeline and future third-party utilities. *See*, Exhibit A-13, pp. 20-22, 26. The Tunnel Design and Construction Report stated that:

> Provisions have been made to accommodate the future installation for third-party electric and telecommunication utilities:
>
> - Electrical Power Circuits: the tunnel and portal Facilities will accommodate up to two (2) 230[kilovolt] circuits comprising of 3No 1000 kilocircular mils phase conductors, a ground and a communications cable.
> - Telecommunications: space in tunnel for a thirty-six-inch (36-inch) cable tray.

> Third-party utilities shall seek access to utilize the tunnel in accordance with the procedures established in the Tunnel Agreement executed by [MSCA] and Enbridge. Third-party utilities shall be responsible for the means and methods of construction including but not limited to provisions to prevent any damage to the pipeline/facilities or other existing third-party utilities including cable installation, operational fault conditions and any electric magnetic field mitigation required to prevent induced currents.

Exhibit A-13, pp. 8-9. Specifically, Dr. Mooney testified that the tunnel "will also serve as a conduit for third party utilities to cross the Straits, including possibly broadband telecommunications, high voltage electrical and other utilities that may become apparent and of need during the service life of the tunnel." 9 Tr 1204; *see*, 9 Tr 1203, 1214-1216; Exhibit MM3, pp. 22, 162.

Dr. Mooney also sponsored Exhibit MM3, which is Enbridge's draft request for proposals (RFP) for a design services contractor and a construction manager-general contractor. Section 2.5.2.1 of the draft RFP states that "[t]unnel systems shall be controlled to maintain acceptable operating temperature and humidity conditions for the pipeline and third-party utilities, and to maintain combustible gases at or below acceptable levels." Exhibit MM3, p. 165.

When asked if he had concerns about locating third-party utilities in the proposed tunnel, MSCA's witness Mr. Cooper stated that he is "concerned that future utilities could impact the pipeline's integrity or create safety hazards for maintenance personnel. For example, an electric transmission cable installed within the tunnel could create induced electric current in the pipeline. This could potentially accelerate corrosion of the pipeline and create electric shock hazards for personnel working on the line." 9 Tr 1247. He asserted that this risk could be mitigated by a thorough consideration of the hazards presented by third-party utilities in the planning and design stage, by implementing measures to protect against these hazards, and by continually monitoring the threats and protection measures. 9 Tr 1248.

MSCA stated that it "is aware that third-party utility Peninsula Fiber Network LLC has expressed interest in operating in the tunnel" but, "[o]ther than Peninsula Fiber Network, MSCA is not aware of any other Prospective Third-Party Utilities that have provided in writing a formal request with scope of use information." Exhibit BMC-44, p. 4. Bay Mills noted that according to a letter sent by American Transmission Company (ATC) to the Chippewa Ottawa Resource Authority, ATC would not locate electric cables in the tunnel because it is too dangerous. Exhibit BMC-46, p. 92.[34] However, the ATC letter referenced by Bay Mills in Exhibit BMC-46 was not provided on the record for the Commission's review.

In a discovery response, Enbridge stated that:

> [t]he tunnel is also designed to accommodate third-party utilities and third-party access would be subject to separate agreements with [MSCA]. (See, e.g., Exhibit A-5 pp. 53-56.) It is uncertain whether a third-party utility's equipment could meet the overly stringent standard of Class 1, Division 1, or whether meeting this standard would be feasible. Finally, it is uncertain whether [MSCA] could or would impose the overly stringent standard of Class 1, Division 1 on a third-party utility seeking access to the tunnel.

Exhibit A-31, p. 7.

Although Enbridge contended that the tunnel is designed to accommodate third-party utilities and third-party access, the POF Report does not take into account the presence of third-party installations. *See*, 9 Tr 1214; Exhibit A-13, pp. 8-9, 20-22, 26. The POF Report stated that in reference to the inputs used to conduct the probability of ignition, "[t]hese inputs are as per the current design and do not contemplate any future installations by third party utilities within the tunnel as those would need to be separately addressed." Exhibit A-29, p. 16.

[34] Exhibit BMC-46 contains a collection of separate documents that is not paginated as a single exhibit. Therefore, the Commission clarifies that page 1 starts in natural order with the first page of the documents following the cover page labeled "Exhibit BMC-46."

In its initial brief, Enbridge noted that "MCL 254.314d(4)(g) requires utilities using the tunnel to obtain any required governmental approvals for use. Given Act 16 provides the Commission siting authority over petroleum pipelines, Enbridge filed this Application to use the utility tunnel. On the other hand, telecommunication providers would not need such approval to use the utility tunnel for their facilities." Enbridge's initial brief, p. 15, n. 11.

After a review of the record evidence on this issue, the Commission finds that the route, location, and design of the Straits Line 5 replacement segment in a tunnel beneath the lakebed of the Straits is reasonable and should be approved, subject to conditions. As discussed above, provided that Enbridge receives the required governmental permits and approvals and there are no significant changes to the route and location of the Straits Line 5 replacement segment within the tunnel following Commission approval of this application, the Commission finds that the route and location of the Replacement Project are reasonable.

Regarding the design and physical integrity of the tunnel as a fixture, secondary containment feature, and route for the Straits Line 5 replacement segment, the Commission finds that Enbridge has demonstrated by a preponderance of the evidence that the tunnel has been designed by an experienced and knowledgeable engineering firm and that the tunnel will be constructed using state-of-the-art materials and practices that will meet or exceed industry standards. In addition, the Commission finds, by a preponderance of evidence on the record, that the Replacement Project is a significant improvement over the dual pipeline configuration currently installed in the Straits because it virtually eliminates the risk of anchor strikes confronting the dual pipelines and it will serve as a secondary containment vessel to prevent Line 5 product from reaching the Straits. Although the intervenors presented concerns about the integrity of the tunnel lining, explosion risk, methane infiltration, fire, leak and gas detection systems, ventilation, and human error, the

Commission finds that, subject to the conditions below, there is a preponderance of explanatory and convincing evidence on the record to rebut these concerns. However, the Commission recommends that Enbridge adopt Mr. Ponebshek's proposal, which is set forth at 12 Tr 1872-1873, to provide a detailed risk management plan to the State of Michigan, ahead of construction, regarding geotechnical test bores and related data and real-time reporting, concrete cast section inspections, placement of gaskets, analyses of bentonite mix, and any changes in slurry pressure.

In addition, the Commission agrees with the Staff that after a review of the evidence presented on the reopened record, there may be opportunities to design certain equipment in the tunnel to a Class 1 Division 1 standard. Therefore, the Commission recommends that to the extent feasible, beneficial, safe, and permitted by agreements and other permitting authorities, all equipment be designed to the more stringent Class 1 Division 1 standard. The Commission finds that this recommendation provides additional safety and risk mitigation in the event of an "accidental rupture or breakdown of [closed] containers or systems, or in case of abnormal operation of equipment" associated with the Straits Line 5 replacement segment. Exhibit A-31, p. 6.

Although the Commission finds that the route, location, and design of the Straits Line 5 replacement segment in a tunnel beneath the lakebed of the Straits is reasonable, the Commission finds that Enbridge failed to demonstrate by a preponderance of the evidence that co-locating third-party utilities in the tunnel with the Straits Line 5 replacement segment is reasonable or safe. The question here is not whether telecommunications providers require Commission approval to locate their facilities within the tunnel. They do not, and pursuant to Act 359 and the Tunnel Agreement, the decision of whether to allow third-party utilities access to the tunnel rests with MSCA. However, as Enbridge notes, "Act 16 provides the Commission siting authority over petroleum pipelines," and as such "Enbridge filed this Application to use the utility tunnel."

Enbridge's initial brief, p. 15. In its Act 16 review determining whether the project is designed and routed in a reasonable manner, the Commission must consider the risks to the pipeline, including any risks that could be introduced within the tunnel by third parties. As noted by the Alternatives Analysis, it is "critical to understand before design and engineering begins whether the tunnel could have a purpose beyond the pipeline, such as for third-party services/assets, and specifically risks associated with co-locating different types of infrastructure." Exhibit A-9, p. 26.

The Commission notes that the Second Agreement, Act 359, and the Tunnel Agreement specifically state that the tunnel could accommodate electric transmission lines and data and telecommunications facilities. There is testimony and record evidence demonstrating that co-locating electric cables with the Straits Line 5 replacement segment within the tunnel is dangerous and could "accelerate corrosion of the pipeline and create electric shock hazards for personnel working on the line." 9 Tr 1247; *see*, Exhibit BMC-46, p. 92.

MSCA provided record evidence that a telecommunications company is interested in operating in the tunnel. The Commission finds that there is no evidence on the record detailing the "means and methods of construction" of the telecommunications facilities in the tunnel, explaining how the telecommunications company would "prevent damage to the pipeline/facilities" during construction, or providing the "operational fault conditions and any electric magnetic field mitigation required to prevent induced currents." Exhibit A-13, p. 9. The Commission also finds that there is no evidence on the record detailing the probability of failure of the Replacement Project in the presence of third-party utilities. *See*, Exhibit A-29, p. 16. Finally, Enbridge acknowledged that it is unknown whether a third-party utility's equipment could meet the Class 1 Division 1 standard to ensure greater safety and risk management. *See*, Exhibit A-31, p. 7. Therefore, based on the evidence provided on the record, the Commission cannot find that the

inclusion of third-party utilities that could increase the risks posed to the Replacement Project is compatible with the Commission's obligations under Act 16 to ensure the project is designed and routed in a reasonable manner. The Commission further finds that nothing in Act 359, nor anything in the First, Second, or Third Agreements, nor the Tunnel Agreement, obviates, restricts, or lessons the Commission's obligations under Act 16.

Accordingly, the Commission finds that the route, location, and design of the Straits Line 5 replacement segment in a tunnel beneath the lakebed of the Straits is reasonable and prudent subject to the condition that no third-party utilities are co-located in the tunnel with the Straits Line 5 replacement segment without further application to, and approval by, the Commission.

C. Does the Replacement Line 5 Segment that Crosses the Straits of Mackinac Meet or Exceed Current Safety and Engineering Standards?

The Commission notes that according to Enbridge, the Replacement Project will meet or exceed applicable federal pipeline safety regulations administered by PHMSA. Enbridge's initial brief, pp. 17-19. The Associations agreed. Associations' initial brief, pp. 12-13. The Staff recommended that Enbridge perform specific procedures during pipeline construction that exceed the minimum pipeline safety requirements. Staff's initial brief, pp. 55-59. Bay Mills argued that the specific grade of pipe proposed by Enbridge for use in the project has a demonstrated history of failure and, consequently, the company's application should not be approved. Bay Mills' initial brief, pp. 22-25.

Regarding the design of the Straits Line 5 replacement segment, Enbridge asserted that it "will be manufactured specifically for this Project, in a manner that exceeds API 5L Pipeline Specification Level 2 . . . ." 8 Tr 800; *see*, Exhibit A-14, p. 5. In addition, Enbridge stated that the pipe segment is designed using a greater maximum operating pressure and wall thickness than is required by federal regulations. 8 Tr 800. Enbridge's witness Mr. Dennis testified that "the entire

circumference on 100% of the welds will be inspected (as opposed to the 10% made by each welder as required by the applicable regulations) and the replacement pipe segment will also be hydrotested to 150 percent of the MOP, which is 2160 psig." 8 Tr 801. Furthermore, with the automatic shutoff valves on both sides of the Straits and the pipeline appurtenances located outside of the tunnel, Enbridge claimed that the risk of release from the pipe segment is virtually eliminated. 8 Tr 801.

Bay Mills argued that the specific grade of pipe that Enbridge proposes for use in the Straits Line 5 replacement segment, API 5L X70 pipe, has a demonstrated risk of failure at girth welds. Bay Mills referenced the JIR, which cited several recent pipeline failures in API 5L X70 pipe. *See*, 10 Tr 1340; Exhibit BMC-43. Bay Mills' witness Mr. Kuprewicz testified on the reopened record that "[t]he risk of failure at the girth welds or heat affected zones in the X-70 pipeline should be addressed through sound Integrity Management analysis and procedures that go well beyond the API [Standard] 1104 for girth welding and heat treatment of pipe." 17 Tr 2631.

MSCA's witness Mr. Cooper testified that the issues raised in the JIR are not applicable to the Straits Line 5 replacement segment. He stated that the Straits Line 5 replacement segment in the tunnel will not experience "the type of longitudinal stress and strain experienced by buried pipe" and, therefore, the girth welds will not be affected by this type of strain. 12 Tr 1886. In addition, Mr. Cooper noted that "as set forth in the [JIR] (BMC-43), Enbridge states that it has already implemented the [JIR]'s recommendations intended to eliminate under-matched girth welds and minimize weld heat-affected zone softening. (Appendix B.)" 12 Tr 1887; *see*, 17 Amended Tr 2450-2456. Finally, Mr. Cooper stated that in designing the Straits Line 5 replacement segment, Enbridge properly considered and accounted for thermal expansion and contraction and stresses during hydrostatic testing. 9 Tr 1242-1243. Mr. Cooper concluded that the Straits Line 5

replacement segment complies with PHMSA requirements, federal regulations, and industry standards.

The Staff noted that it met with PHMSA five times in 2021 to discuss PHMSA's review of Enbridge's compliance with safety regulations and to review "the design, materials, construction, operations and maintenance, and emergency response of the replacement pipeline." 12 Tr 1754. The Staff also met with PHMSA three times in 2022, which "consisted of open discussions relating to Enbridge's testimony and relevant discovery responses." 18 Tr 2792-2793. The Staff contended that PHMSA did not have any concerns with the design, construction, or operation of the Straits Line 5 replacement segment. 12 Tr 1754. The Staff asserted that it will continue to communicate and coordinate with PHMSA regarding the safety reviews of the design and construction of the Straits Line 5 replacement segment. 12 Tr 1754.

However, after "consider[ing] PHMSA's process, discussions with PHMSA personnel, conversations with [Mr.] Cooper, and [the] Staff's own expertise," the Staff "recommend[ed] parameters that should be included in the Company's welding procedures." Staff's initial brief, pp. 55-56. Specifically, Staff witness Mr. Chislea recommended that Enbridge "develop low-hydrogen welding procedures and qualify them per the requirements found in 49 CFR 195.214." 12 Tr 1757. In addition, Mr. Chislea testified that "the procedures should include pre-heat requirements prior to starting welding and inter-pass temperature requirements" and "the non-destructive testing of the mainline girth welds should include automatic phased array ultrasonic testing methods." 12 Tr 1758. He stated that if Enbridge implements these recommendations, post-heat treatment is not necessary. According to the Staff, Mr. Chislea's recommendations will address Bay Mills' and Mr. Kuprewicz's concerns regarding the API 5L X70 pipe and will exceed the minimum federal regulations. 18 Tr 2812.

The Commission finds that the Straits Line 5 replacement segment meets or exceeds current safety and engineering standards and should be approved, subject to conditions. Enbridge provided a preponderance of evidence that the manufacture of the Straits Line 5 replacement segment exceeds API 5L Pipeline Specification Level 2 and that the company has exceeded industry standards for tolerances for pipe roundness, wall thickness, toughness, and chemical composition. *See*, 8 Tr 800-801. In addition, the Commission finds that the inspection procedures required by Enbridge at the manufacturing and installation levels exceed required minimum safety standards. *See*, 8 Tr 800-801. As discussed above, the Staff and MSCA reviewed Enbridge's design for the Straits Line 5 replacement segment and stated that it complies with 49 CFR Part 195 as administered by PHMSA. *See*, 9 Tr 1240; 12 Tr 1752. And, as noted by the Staff, PHMSA has not identified any compliance issues with the federal pipeline safety requirements for the design, construction, and testing of the Straits Line 5 replacement segment. *See*, Exhibit S-26, p. 1.

The Commission finds that the Staff's recommendation to exceed the minimum federal regulations is reasonable and prudent to ensure the safety, integrity, and reliability of the Straits Line 5 replacement segment. Thus, Enbridge shall implement procedures for low-hydrogen welding for all mainline girth welds and shall ensure that the procedures require both preheat and inter-pass temperature requirements. In addition, Enbridge shall ensure that the mainline girth welds are nondestructively tested using automatic phased array ultrasonic testing methods. *See*, 12 Tr 1757-1758.

The Commission also finds that there is a preponderance of the evidence on the record that Bay Mills' concerns regarding the use of API 5L X70 pipe in the Straits Line 5 replacement segment have been addressed. *See*, 12 Tr 1886-1887; 17 Tr 2450-2451; Exhibit BMC-43. Moreover, the Commission has adopted the Staff's recommended procedures that exceed federal

regulations and that address Bay Mills' and Mr. Kuprewicz's concerns. 12 Tr 1757-1758; 18 Tr 2812. Subject to these conditions, the Commission finds that the Replacement Project meets or exceeds current safety and engineering standards.

Finally, the Commission notes Bay Mills' concerns that Enbridge failed to recognize the interactive nature of risks involved in the Replacement Project. Bay Mills' reply brief on reopening, p. 3 (footnote omitted). Through the conditions added to address issues relating both to the siting of the Replacement Project and the safety and engineering standards that the Replacement Project will need to meet, the Commission finds that it has addressed the stated concerns over the interactive nature of risks in a way that is consistent with the Commission's statutory responsibilities and the well-established framework for adjudicating the Act 16 criteria.

Once the Commission determines that the application has satisfied the three Act 16 criteria, the Commission must conduct a MEPA review of the proposed project.

D. Michigan Environmental Protection Act Review

According to Enbridge, locating the Straits Line 5 replacement segment in a tunnel is not likely to have the effect of polluting, impairing, or destroying the air, water, or other natural resources, or the public trust in these resources pursuant to MEPA. Enbridge's initial brief, pp. 30-33; *see*, 7 Tr 602-604; Exhibits A-11, A-12, A-12.1. Specifically, Enbridge contended that the Replacement Project is not likely to impact ground water, surface water, or lake bodies; air emissions "will be localized, intermittent, and short-term;" and there are no anticipated impacts to geology, soils, terrestrial resources, or drinking water. Exhibit A-12, pp. 11-12, 15, 18. Thus, Enbridge argued that the Commission's MEPA analysis should conclude here. However, Enbridge stated that if the Commission determines that the Replacement Project is likely to have the effect of polluting, impairing, or destroying natural resources or the public trust in these

resources, there are no feasible and prudent alternatives to the Replacement Project. Enbridge's initial brief, pp. 33-35. The Associations agreed. Association's initial brief, pp. 14-27.

ELPC/MiCAN argued that the Replacement Project "will pollute, impair, and destroy Michigan's air, water, and other natural resources." ELPC/MiCAN's initial brief, p. 8. In particular, ELPC/MiCAN focused on the GHG emissions associated with construction and operation of the Replacement Project. Citing Mr. Erickson's testimony, methodology, and data, ELPC/MiCAN stated that GHG emissions will be produced during construction of the Replacement Project through "the use of a [TBM], operation of other construction equipment, and the making and installation of key construction materials, including steel and concrete," and operation of the tunnel systems. *Id*., p. 12; *see*, 9 Tr 1048-1057. ELPC/MiCAN also asserted that the products that are transported by the Replacement Project will emit GHG emissions when produced, processed, and combusted. ELPC/MiCAN's initial brief, pp. 17-19; *see*, 9 Tr 1057-1060. ELPC/MiCAN contended that the construction and operation of the Replacement Project will result in 87,000 metric tons of CO_2e per year and that these GHG emissions are likely to pollute, impair, or destroy Michigan's air, water, or other natural resources. ELPC/MiCAN's initial brief, pp. 12-13, 38-47; *see*, 9 Tr 1141-1168. In ELPC/MiCAN's opinion, there are feasible and prudent alternatives to the environmental impairments, which include denial of Enbridge's application for the Replacement Project and shutting down the dual pipelines. ELPC/MiCAN's initial brief, pp. 49-57; *see*, 9 Tr 946-949.

Similarly, Bay Mills, FLOW, and the MEC Coalition argued that the Replacement Project will impair the air, water, and other natural resources in the state of Michigan and that a shutdown of the dual pipelines and decommissioning of Line 5 are feasible and prudent alternatives. *See*, Bay Mills' initial brief, pp. 29-47; FLOW's initial brief, pp. 18-24; MEC Coalition's reply brief,

pp. 14-44. In addition to environmental and health impairment from GHG emissions, Bay Mills asserted that the Replacement Project would impair other natural resources such as fisheries, wild rice, loons, and sugar maple. *See*, 10 Tr 1278-1279, 1449-1458, 1472, 1504.

The Staff identified several potential environmental impairments resulting from the Replacement Project but asserted that there are no feasible or prudent alternatives. Staff's initial brief, pp. 70-87; *see*, 12 Tr 1828-1834; Exhibit S-18.

As an initial matter, the Commission agrees with the Staff that several potential environmental impairments resulting from the construction of the Replacement Project fall in the regulatory purview of other state and federal agencies and will be addressed by separate permitting decisions. For example, witnesses for LTBB and NHBP asserted that the discharge of wastewater in the Great Lakes during construction of the tunnel and regular operations of the Replacement Project is likely to affect the Great Lakes' ecosystem. *See*, 9 Tr 1176-1179; 10 Tr 1287. The Staff noted that the NREPA Part 31 permit "establishes parameters for authorized discharge, including quantity and composition." Staff's initial brief, p. 72; *see*, Exhibit A-15, pp. 3-9. The Commission agrees with the Staff that Enbridge's compliance with these permit requirements should minimize potential environmental impacts from construction and operation of the Replacement Project.

However, the Commission examined the testimony and exhibits of Staff witness Mr. Douglas, who reviewed the NPDES, Wetlands, and GLSLA permits issued by EGLE, and of Staff witness Ms. Mooney, who reviewed Enbridge's EIR. The Commission notes that Ms. Mooney identified several potential environmental impacts from construction of the Replacement Project and she determined that "specific details about preventing the impairments were not provided in [Enbridge's] EIR or the response to discovery requests." 12 Tr 1848; *see*, Exhibits S-19, S-20,

S-21. These impairments included increased noise, dust/particulates, and light from construction, and impacts to surface water, local residents, flora, fauna, air quality, groundwater, surface soils, and vegetation. 12 Tr 1850. Ms. Mooney determined that these environmental impacts should be specifically addressed in Enbridge's final mitigation plans to minimize the environmental impairments. 12 Tr 1850-1851. The Commission agrees, and also finds that the 10 impairments identified by Ms. Mooney are environmental impairments pursuant to MEPA.

The Commission also reviewed the record evidence regarding potential GHG emissions associated with the Replacement Project. The Commission notes that Staff witness Mr. Ponebshek explained that according to the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard, there are three types of GHG emissions: Scope 1, Scope 2, and Scope 3. 12 Tr 1877-1878. Mr. Ponebshek stated that Scope 1 emissions for the Replacement Project, which include emissions from construction equipment and land clearing, are expected to be 6,036 metric tons of CO_2e per year. He noted that ELPC/MiCAN's witness Mr. Erickson calculated Scope 1 emissions to be 5,635 metric tons of CO_2e per year, a difference of about 10%. 12 Tr 1878; Exhibit S-24, p. 6. In Mr. Ponebshek's opinion, "[a] difference of less than 10 percent (%) is not considered significant in this context." 12 Tr 1878. Regarding Mr. Erickson's calculations for Scope 2, which include emissions from the TBM and other electric equipment, Mr. Ponebshek stated that Mr. Erickson incorrectly used data for purchased electricity that is not recommended by the EPA. Mr. Ponebshek contended that "Mr. Erickson's GHG emissions from purchased electricity would be the same as calculated by Weston (37,320 metric tons of CO2e per year) had Mr. Erickson used the recommended EPA default emission inventory total output [emission factors]." 12 Tr 1879; *see*, Exhibit S-27. Additionally, Mr. Ponebshek asserted that Mr. Erickson's Scope 3 emissions should be excluded from consideration because of the uncertainty involved with the data.

ELPC/MiCAN disagreed with Mr. Ponebshek that Mr. Erickson's Scope 2 emissions calculation included improper data and stated that the EPA "clearly indicates that the non-baseload emission factor is the appropriate factor to use for estimating changes in GHG emissions." ELPC/MiCAN's initial brief, p. 16. In response to Mr. Ponebshek's claim that Mr. Erickson's Scope 3 emissions calculation should be excluded, ELPC/MiCAN stated that the methods used by Mr. Erickson are "readily available" and that he "cites reputable academic and government sources for reputable information on indirect GHG emissions." *Id*., p. 15 (citing 9 Tr 1099).

Regarding the GHG emissions resulting from the liquid petroleum transported by the Replacement Project, Mr. Erickson stated that his "central estimate of 27,000,000 metric tons CO_2e is a reasonable approximation of the incremental effect of the Proposed Project on global GHG emissions based on available information regarding supply and demand elasticities." 9 Tr 1078; *see*, 9 Tr 1063, 1077-1079, 1096-1099. Staff witnesses asserted that Exhibit S-24 contains a GHG analysis and calculations completed by Weston, which states that the current Line 5 pipeline emits 209,854 metric tons of CO_2e annually. Exhibit S-24, pp. 3, 6; *see*, 12 Tr 1768, 1831, 1862, 1872, 1875. Enbridge and the Staff noted that whether the Replacement Project is approved and completed does not affect service on Line 5; the Straits Line 5 segment will continue to transport 540,000 bpd and, thus, the GHG emissions will remain static (209,854 metric tons CO_2e annually). 7 Tr 564, 757; Exhibit S-24, pp. 3, 4, 6.

Although Mr. Ponebshek and Mr. Erickson disagree as to which GHG emissions should be included in the Scope 2 emissions calculation, their Scope 1 emissions are substantially similar, and both Scope 1 and Scope 2 calculations represent an increase in GHG emissions that would not exist but for construction of the Replacement Project. Moreover, no party disputes that GHG emissions will be emitted during construction of the Replacement Project. *See*, Enbridge's reply

brief, p. 23; Staff's initial brief, pp. 82-85; Bay Mills' initial brief, pp. 29-31; ELPC/MiCAN's initial brief, pp. 11-19; FLOW's initial brief, pp. 19-20; MEC Coalition's reply brief, pp. 32-33. 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." April 21 order, p. 65; *see*, 9 Tr 1044-1050; 12 Tr 1849-1850; Exhibits ELP-2, ELP-3.

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. Enbridge, the Staff, and the intervenors analyzed several potential alternatives to the Replacement Project.

Enbridge asserted that:

> [p]ursuant to the First Agreement, Enbridge performed [the Alternatives Analysis] for replacing the Dual Pipelines. The two feasible alternatives were and [sic] open-cut with secondary containment or a relocation within a tunnel. The open-cut with secondary containment option caused additional environmental impacts that would not be caused by the tunnel option. Through the passage of Act 359 and the various agreements entered between Enbridge and the state, the tunnel option was selected.

Enbridge's initial brief, pp. 33-34 (internal citations omitted).

As noted in the Act 16 analysis above, ELPC/MiCAN presented Exhibit ELP-24 that contained a report by Dynamic Risk, who evaluated six alternatives to the dual pipelines. The report included preliminary environmental analyses for several of the alternatives.

Alternative 1 involved constructing a new pipeline that does not cross the open waters of the Great Lakes. Dynamic Risk explained that it explored two routes for the pipeline: (1) a northern route through Canada, around the Great Lakes, and south to Sarnia, Ontario, Canada, and (2) a southern route that follows existing Enbridge assets south to Chicago, Illinois, east to Marysville,

Michigan, and east to Sarnia, Ontario, Canada. Dynamic Risk stated that, "[d]ue to the substantial cost advantage of the southern route in both capital and operating costs, the northern route was screened out . . . and the southern route was selected for continued analysis of market impacts, socioeconomic impacts[,] and risks." Exhibit ELP-24, p. 316.

According to Dynamic Risk, the southern pipeline route in Alternative 1 would cross 8 rivers, 24 streams, 5 drainage canals, and 231 miles of wetlands in Michigan. *See*, *id*., p. 328. In addition, Dynamic Risk stated that the southern pipeline option would "transect or come within 95 yards of Protected Areas 13 times in Michigan" and would traverse 52.9 miles of highly populated areas in Michigan. *Id*., p. 332. Dynamic Risk also contended that the southern pipeline route would affect 11 well-head protection areas for a total of 70.69 miles and "two 'Community Drinking Water Wells' areas would be exposed to a potential pipeline oil spill." *Id*. (internal citations omitted).

For Alternative 2, Dynamic Risk considered whether existing Canadian and American pipeline infrastructure that does not cross the open waters of the Great Lakes could be used to carry the volume of petroleum products currently being shipped on Line 5 from Superior, Wisconsin, to Sarnia, Ontario, Canada. Dynamic Risk concluded that because "there is no meaningful partial capacity within existing infrastructure, any attempt to rely on Alternative 2 is essentially equivalent to the full abandonment option" set forth in Alternative 6. *Id*., p. 307. Thus, Dynamic Risk did not conduct an environmental analysis for this option.

In its analysis of Alternative 3, Dynamic Risk analyzed other methods of transportation such as rail, tanker trucks, oil tankers and barges, in the event that Line 5 is decommissioned in Michigan and Line 5 product will need transportation from Superior, Wisconsin, to Sarnia, Ontario, Canada. Dynamic Risk noted that for tanker trucks, "[t]he risk factors associated with

this option, and the large capital cost, make it nonviable, and therefore no further analysis was conducted for truck transportation." *Id*., p. 349. Similarly, for oil tankers and barges, Dynamic Risk concluded that transportation of Line 5 products is not feasible and, therefore, it was not considered further. *Id*.

Dynamic Risk explained that for rail transportation of Line 5 product in Michigan, 11 rivers, 11 streams, 6 drainage canals, and 6-7 miles of wetlands would be crossed. *See*, *id*., p. 369. After a review of EGLE informational materials, Dynamic Risk found that many Michigan wetlands would be affected by Alternative 3, including rare wetlands and endangered species. In addition, Dynamic Risk stated that a spill of Line 5 product "directly on, or via dispersion into, palustrine and other aquatic environment would cause significant environmental damage that would be particularly difficult to contain and cleanup. The consequence to remaining wetland habitat and the rare or conservationally-important species that they support would most certainly be significant." Exhibit ELP-24, p. 371. Dynamic Risk also contended that Alternative 3 rail transportation would contact or transect 14 protected areas and 72 miles of highly populated areas in Michigan. *Id*., p. 374. Furthermore, Dynamic Risk asserted that a spill of Line 5 product from a rail accident would affect 44 well-head protected areas and five community drinking water well resource areas. *Id*.

Dynamic Risk analyzed a trench or tunneling option in Alternative 4. Regarding the oil spill impacts associated with a trenching alternative, Dynamic Risk stated that "once an event occurs the actual scale and significance of impacts to the various baseline habitats and biodiversity are not readily discernable with those associated with a Line 5 full rupture or leak" of the existing dual pipelines. *Id*., p. 261. Thus, Dynamic Risk provided a brief analysis of the differences in potential

ecological impacts between a release of product from a trenched pipeline and the existing dual pipelines, asserting that:

> [t]he only evident difference that can be determined at this level of analysis is that [for a trenching alternative] there will be reductions in oil volumes that reach certain sensitive habitat in the event of an oil spill. This could, in principle, lead to lower levels of acute oil smothering impacts to diving and wading birds and shoreline mammals. The potential for longer-term exposure from weathered oils (e.g., less entrained oils) to certain habitats such as fish habitat may also be reduced.

Exhibit ELP-24, p. 262.

For the tunneling option in Alternative 4, Dynamic Risk analyzed a sealed annulus tunnel wherein the opening between the pipe and tunnel wall is filled with an impermeable cement bentonite grout material. Dynamic Risk stated that for this tunnel design, "there are no foreseeable mechanisms whereby the pressure membrane of the welded steel pipe might be breached, leading to migration of pipeline contents through the grout annulus, the concrete liner, the surrounding bedrock, and the overburden, leading to contamination of the waters of the Great Lakes." *Id*., p. 274. Regarding the potential for a release from the sealed annulus tunnel, Dynamic Risk stated that the risk is negligible and unquantifiably low. *Id*., p. 275.

For Alternative 5, Dynamic Risk studied the current condition and operation of the dual pipelines and analyzed the environmental risks that would result from a release of Line 5 product. According to Dynamic Risk, the consequences of a light oil spill into the Straits include:

- portions of the light oil will dissolve resulting in decreasing toxin concentrations towards the outer potions [sic] of the modeled spill plume or slick
- in relation to the above, there is a higher probability of potentially direct toxic lethal effects to susceptible species (e.g., sessile or species unable to move away from certain habitat)
- as the plume or slick disperses further and comes into contact with the shore (typically with heavier hydrocarbon chains due [to] evaporation of lighter

fractions), direct contact with littoral zone or shoreline vegetation / wetlands and species will occur

- In relation to the above, lake waters, shorelines and littoral wetlands would experience:
    - Oil smothering impacts (e.g., coating fur or feathers) to sessile species or juveniles unable to escape the spreading oil leading to stresses at potentially lethal or sub-lethal levels.
    - Oil trapped in shoreline vegetation or coating vegetation (including floating vegetation) which could in turn be remobilized under certain metrological and hydraulic conditions.
    - Oil smothering of certain critical habitat (e.g., foraging or spawning grounds) making them inaccessible to various species, thereby causing stresses at potentially lethal or sub-lethal levels.
- mobile oils in lake water that undergo longer-term emulsification, submergence / sedimentation and photo-oxidation, could cause consequentially longer-term ecological exposure of sensitive receptors to lighter oil droplets in the water column, contaminated benthic sediments and tar balls.

Exhibit ELP-24, p. 179. Dynamic Risk also analyzed the impacts of a Line 5 product spill to birds, fish, herpetofauna, mammals, other flora and fauna, and habitat. *See*, *id*., pp. 179-189. Dynamic Risk concluded that the impact analysis "points to the many core and interconnected components of Lake Michigan and Lake Huron ecological environment that could be impacted" and "it is therefore prudent to assign a major negative impact level of significance." *Id*., p. 192.

Alternative 6 explored eliminating transportation service on the dual pipelines and alternatives for delivering Line 5 product to Michigan. Dynamic Risk contended that if Line 5 were partially or fully abandoned with no additional construction of infrastructure, Enbridge would have to rely on rail and truck to deliver Line 5 product to Michigan. *Id*., pp. 278-279. Dynamic Risk did not conduct an environmental analysis for this option.

MSCA also discussed two alternatives to the Replacement Project: suspending a replacement pipe segment from the Mackinac Bridge, or constructing a new suspension bridge in the Straits to

house the replacement pipe segment. *See*, 9 Tr 1238. However, the alternative of suspending a replacement pipe segment from the Mackinac Bridge was discarded by MSCA because a suspended "pipeline would add load to the Mackinac Bridge for which it was not designed and would tend to shorten the 64-year-old bridge's useful life." 9 Tr 1238. Regarding the construction of a new suspension bridge to house the replacement pipe segment, MSCA determined this option was imprudent because the structure would require regular and expensive maintenance, would be exposed to aircraft and high-wind impacts, and a failure of both the pipeline and the casing would result in a catastrophic release of product into the Straits.

The Staff stated that it considered six alternatives to the Replacement Project: (1) no action, (2) replacement of the dual pipelines using the Open-Cut Alternative, (3) replacement of the dual pipelines using HDD, (4) protection of the dual pipelines by installing rock armoring, (5) alternative transportation methods for Line 5 product, and (6) product switching and alternative fuel sources. 12 Tr 1726-1727. For Staff's Alternative 1, the Staff assumed that the Replacement Project is not constructed and, as a result, the dual pipelines continue to operate in their current location. The Staff stated that, "while the *likelihood* of a release from the Dual Pipelines is relatively low, the *consequences* of an unmitigated rupture directly into the Straits could be high. Therefore, the overall risk of the Dual Pipelines continuing to operate is not insignificant." 12 Tr 1729 (emphasis in original). As a result, the Staff concluded that although it is feasible, Staff's Alternative 1 is an inferior and imprudent option compared to the Replacement Project.

Regarding Staff's Alternative 2, the Staff rejected this option because it would cause substantially greater environmental impacts than the Replacement Project. *See*, 12 Tr 1865-1870. The Staff noted that Alternative 3, HDD, was found to be infeasible. For Staff's Alternative 4, the Staff contended that installation of rock armoring would not contain a release of Line 5 product, it

could damage the pipe exterior, it would disturb the lakebed and require additional state/federal permits, and it would prevent exterior inspection of the pipeline; therefore, the Staff found Alternative 4 to be a less prudent option. The Staff explained that Alternatives 5 and 6 are only relevant if the dual pipelines are shutdown. However, the Staff stated that for Alternative 5, it would result in "significantly more GHG emissions than an equivalent volume by pipeline," and Alternative 6 is imprudent and infeasible in the short term because it would "take a considerable amount of time to accomplish" and "come at a significant financial cost . . . ." 12 Tr 1791-1792.

Therefore, after considering the Replacement Project, the environmental impairments identified by Ms. Mooney, the GHG emissions, and the alternatives, the Staff concluded that there are no feasible and prudent alternatives to Replacement Project or the proposed construction techniques. *See*, Staff's initial brief, pp. 85-86.

ELPC/MiCAN asserted that the purpose of the Replacement Project is to alleviate the environmental risk posed by the dual pipelines to the Great Lakes. Accordingly, ELPC/MiCAN argued that "[c]ontinuing to operate the existing pipelines would not achieve Enbridge's stated purpose, and therefore cannot be considered as a component of an alternative here." ELPC/MiCAN's initial brief, p. 49. Rather, ELPC/MiCAN stated that the Commission must consider as a feasible and prudent alternative that the dual pipelines may cease to operate. *See*, *id*., pp. 52-57. Bay Mills, FLOW, and the MEC Coalition agreed. *See*, Bay Mills' initial brief, pp. 39-47; FLOW's initial brief, pp. 21-24; MEC Coalition's reply brief, pp. 39-44.

The Commission reviewed the record evidence regarding alternatives to the Replacement Project pursuant to the analysis required by MEPA and applicable case law. MCL 324.1705(2); *State Hwy Comm v Vanderkloot*, 392 Mich 159, 184-190; 220 NW2d 416 (1974); *Ray v Mason County Drain Comm*, 393 Mich 294, 890-891; 224 NW2d 833 (1975); *Friends of Crystal River*

v Kuras Prop(s), 218 Mich App 457, 466-467;554 NW2d 328 (1996) (*Kuras*); *Buggs I*, p. 8; *Buggs v Mich. Pub Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2017 (Docket Nos. 329781 and 329909).

The Commission analyzed the six alternatives studied by Dynamic Risk set forth in Exhibit ELP-24. For Alternative 1, the southern pipeline route, the Commission finds that although the alternative pipeline route is feasible, it is not prudent. As noted by Dynamic Risk, the alternative southern pipeline route would cross 8 rivers, 24 streams, 5 drainage canals, 231 miles of wetlands, 13 protected areas, and 52.9 miles of highly populated areas, and could expose 11 well-head protection areas and two community drinking water well areas to a potential oil spill. *See*, Exhibit ELP-24, pp. 328, 332. Moreover, as set forth in Dynamic Risk's Alternatives Report, the southern pipeline route exhibits a greater failure frequency and safety risk when compared to the tunneling alternative. *See*, *id*., p. 30.

Regarding Alternative 2, the Commission notes that Dynamic Risk did not explicitly conduct an environmental review for this option but stated that it was "essentially equivalent to the full abandonment option" in Alternative 6. Therefore, the Commission will conduct its MEPA review of this option in conjunction with Alternative 6.

For Alternative 3, other methods of transportation, the Commission finds that as noted by Dynamic Risk, tanker truck, oil tanker, and barge transportation are not feasible. However, for rail transportation of Line 5 product, the Commission finds that although this alternative is feasible, it is not prudent as it carries a greater likelihood of environmental harm. Rail transportation of Line 5 product will cross 11 rivers, 11 streams, 6 drainage canals, 6-7 miles of wetlands, 14 protected areas, and 72 miles of highly populated areas in Michigan. *See*, Exhibit ELP-24, pp. 369, 374. In addition, a rail transportation alternative will produce significantly more GHGs than the

Replacement Project. Furthermore, the Commission finds that the Dynamic Risk report demonstrated that a spill of Line 5 product from a rail accident would have a significantly negative effect on Michigan wetlands and endangered species. The Commission also finds that as set forth in Dynamic Risk's Alternatives Report, rail transportation exhibits a greater failure frequency and safety risk when compared to the tunneling alternative. *See*, *id*., p. 30.

The trenched pipeline option in Alternative 4 is similar to the Open Cut Alternative analyzed by the Staff and discussed further below. The Commission finds that compared to a release of Line 5 product from the existing dual pipelines, the trenched pipeline option would reduce the volume of oil that could reach and impact the environment. However, as noted by Dynamic Risk, a release from a trenched pipeline would still impact diving and wading birds, shoreline mammals, and fish habitat. *See*, Exhibit ELP-24, p. 262. In addition, the estimated annual probability of rupture of a trenched pipeline and the estimated annual probability of leakage are both greater than the probability of release of Line 5 product from the proposed pipeline into the tunnel of the Replacement Project, and greater than the probability of release of Line 5 product from the tunnel into the Great Lakes, which is "negligible—considered virtually zero." Exhibit A-9, p. 9; *see also*, Exhibit ELP-24, p. 251; 8 Tr 800-803; 16 Tr 2322, 2355-2360; 17 Amended Tr 2437-2438, 2448-2450, 2475, 2589-2590, 2593; 18 Tr 2810-2811; Exhibit A-9, pp. 14, 64, 66, 68; Exhibits S-31 and S-32. Therefore, the Commission finds that the trenched pipeline option is imprudent as it too carries a greater risk of environmental harm than the proposed tunnel.

For the tunneling option in Alternative 4, the Commission notes that according to Dynamic Risk, "tunnels have advantages over other types of installation, in part, because they provide a self-contained environment that can be isolated from the natural environment by sealed concrete walls that are in turn, surrounded by bedrock." *Id*., p. 273. The Commission finds that the sealed

annulus tunnel option presented in Alternative 4 is feasible because, like the Replacement Project, it could effectively prevent spills from reaching the Great Lakes. However, the Commission finds that Dynamic Risk's assessment of the potential for a release from the sealed annulus tunnel as being negligible and unquantifiably low is essentially the same as the estimated "negligible—considered virtually zero" probability of release of Line 5 product from the tunnel. Exhibit A-9, p. 9. As such, the Commission finds there is no additional environmental benefit to the sealed annulus tunnel considered by Dynamic Risk in Alternative 4 over the open annulus tunnel proposed by Enbridge. Because the open annulus design appears to have been chosen over the closed annulus design on the basis of pipeline integrity management and inspection, *see, e.g.*, Exhibit BMC-60, p. 12, the Commission further finds that these rationales add additional support to the proposed Replacement Project being preferred over the sealed annulus in Alternative 4 from a MEPA perspective, as the ability to visually inspect the pipeline in the tunnel—an option not available for "an inline tunnel in grout"—allows for a higher likelihood of identifying and remediating any pipeline integrity threats before they can cause environmental harm. *Id.*; *see*, Exhibit A-9, p. 73.

The Commission finds that Alternative 5 is feasible but not prudent. In the discussion below, the Commission analyzes this option as the "no action" alternative. The Commission notes that according to Dynamic Risk, the annual probability of failure of the dual pipelines due to anchor strike, VIV, and spanning and the annual probability of leak from the dual pipelines are both significantly higher than the estimated probability of release of Line 5 product from the proposed pipeline into the tunnel of the Replacement Project and the probability of release of Line 5 product from the tunnel into the Great Lakes. *See*, Exhibit A-9, p. 9; *see also*, Exhibit ELP-24, p. 208.

For the same reasons provided in the discussion of Alternative 3 above, the Commission finds that Alternative 6 is feasible but not prudent. If Enbridge must rely on rail to deliver Line 5 product to Michigan, the annual probability of failure and the environmental consequences of an oil spill in this scenario would be substantially similar to those set forth in Alternative 3. *See*, Exhibit ELP-24, p. 30. In addition, as discussed above, the GHG emissions associated with rail transportation of Line 5 product in Michigan are greater than that produced by the Replacement Project.

The Commission also reviewed the two alternatives presented by MSCA. The Commission agrees with MSCA that it is not feasible to suspend a replacement pipe segment from the Mackinac Bridge. *See*, 9 Tr 1238. In addition, the Commission agrees with MSCA that while construction of a suspension bridge to house a replacement pipe segment is feasible, it has "significant disadvantages compared to a tunnel" and is therefore imprudent. 9 Tr 1238.

Regarding the Open-Cut Alternative analyzed by the Staff, the Commission finds the Staff's position on this issue persuasive. As noted in Exhibit A-9, compared to the Replacement Project, the Open-Cut Alternative would cause more impacts and impairments to the Great Lakes' shorelines, waters, and lakebed, and marine construction work would be required for two consecutive summer seasons, plus an additional summer season for geotechnical investigation and surveys as compared to the single summer season required for marine/geotechnical work for the Replacement Project. *See*, Exhibit A-9, pp. 9, 67; 12 Tr 1865-1866. In addition, Mr. Ponebshek stated that although the Alternatives Analysis concluded that the Open-Cut Alternative was feasible, it "was discarded from detailed analysis for a number of reasons including complexity of trenching at a 250 foot depth below water level, environmental impacts related to turbidity and

dredge material handling, impacts to ship traffic in the Straits, and high likelihood of hard soils on the lakebed." 12 Tr 1865-1866.

In addition, the Commission notes that the purpose of the Replacement Project is to "alleviate an environmental concern to the Great Lakes" posed by the dual pipelines. Application, p. 1. The Alternatives Analysis stated that "[t]he secondary containment design of the [Open-Cut Alternative] reduces the probability of a release into the Straits to an extremely low value." Exhibit A-9, p. 9. However, the Alternatives Analysis determined that the "[r]isk of product release into the Straits" from the Replacement Project is "[n]egligible—considered virtually zero." *Id*. Accordingly, the Commission finds that although the Open-Cut Alternative may be feasible, it is not prudent because the risk of release and the environmental impairments are greater than those associated with the Replacement Project.

Next, the Commission finds persuasive the Staff's position that the HDD method is not feasible. 12 Tr 1730, 1864. As set forth in Exhibit A-9, there are not available technical capabilities to do a single shore-to-shore installation and it would not be feasible to place marine platforms in the middle of the Straits' shipping channel to complete an installation from other points in the Straits. *See*, Exhibit A-9, pp. 6, 8, 50-53.

Regarding the installation of rock armoring on the dual pipelines, the Commission finds the Staff's testimony on this issue persuasive. Mr. Warner stated that although this alternative is feasible, the "potential negative consequences" of rock armoring the dual pipelines are that it "eliminate[s] the ability to visually inspect the outside of the pipeline using a remote operated vehicle (ROV) or with divers as is done currently," and "it would likely cause environmental impairments and would require at least 11 state and federal environmental permits and approvals." 12 Tr 1722. Thus, the Commission finds that installation of the rock armoring would reduce

Enbridge's ability to conduct safety inspections and perform maintenance on the exterior of the dual pipelines, which is currently done to ensure the integrity of the pipeline segment and prevent a release of Line 5 product into the Straits. In addition, as noted by the Staff, this alternative does not provide secondary containment and it would involve more disturbance of the lakebed compared to the Replacement Project. 12 Tr 1731. Therefore, the Commission finds that rock armoring of the dual pipelines is not a prudent alternative.

Finally, the Commission notes that several parties presented a "no-action" or "no-pipeline" alternative. Enbridge and the Staff argued that if the Commission denies Enbridge's application for the Replacement Project, the dual pipelines will continue to operate in their current position and the purpose of the Replacement Project will not be effectuated, i.e., alleviating the environmental threat to the Great Lakes posed by the dual pipelines. *See*, Staff's initial brief, pp. 87-90. Enbridge and Staff have labeled this the "no-action" alternative. However, ELPC/MiCAN, FLOW, Bay Mills, and the MEC Coalition argued that Enbridge and the Commission "must consider alternatives that serve [the] same purpose" of alleviating the environmental threat of the dual pipelines to the Great Lakes such as a "no-pipeline" alternative, which involves shutting down the dual pipelines and not constructing the Replacement Project. ELPC/MiCAN's initial brief, p. 49.

Although the "no-pipeline" alternative presented by ELPC/MiCAN, Bay Mills, FLOW, and the MEC Coalition might similarly reduce the environmental threats to the Great Lakes, MEPA requires that the alternative must also be feasible and prudent. MCL 324.1705(2). In defining what constitutes a feasible and prudent alternative, the Michigan Court of Appeals stated that its duty was:

> to identify and effectuate the intent of the Legislature, and, if necessary, interpret language that does not on its face reveal legislative intent. *Piper v. Pettibone*

> *Corp*., 450 Mich. 565, 571, 542 N.W.2d 269 (1995). A fundamental rule of statutory construction is that the Legislature is presumed to have intended the plain meaning of words used in a statute. *Attorney General v. Sanilac Co. Drain Comm'r*, 173 Mich.App. 526, 531, 434 N.W.2d 181 (1988). Because the words "feasible" and "prudent" are not defined by the statute, an acceptable method of determining intent is to refer to a dictionary for the common usage of the words. *Nelson v. Grays*, 209 Mich.App. 661, 664, 531 N.W.2d 826 (1995) [(*Nelson*)]. A "feasible" alternative is one that is "capable of being put into effect or accomplished; practicable" or "capable of being successfully utilized; suitable." *Funk & Wagnalls Standard Dictionary* (1980). "Prudent" is defined as "exercising sound judgment." *Id*.

Kuras, 218 Mich at 466. Similarly, without a definition of "feasible and prudent" in MEPA, the Commission finds that it is acceptable to refer to a dictionary for the common use of the words "feasible and prudent" and accordingly adopts the definitions set forth in *Kuras*. *See*, *Nelson*, Mich App at 664.

ELPC/MiCAN asserted that the "no-pipeline" alternative is feasible and prudent because Governor Whitmer issued the Notice revoking the 1953 easement for the dual pipelines and the Attorney General is pursing legal action to shut down the dual pipelines, both of which could prove to be successful in the future. ELPC/MiCAN's initial brief, pp. 50-51. The MEC Coalition stated that the 1953 order "does not foreclose a future without Line 5" because the order "does not prohibit the Commission from considering an alternative without it." MEC Coalition's reply brief, pp. 39-40. In addition, the MEC Coalition contended that "the state's dismissal of the federal lawsuit to enforce the [Notice], Enbridge's pending federal lawsuit against the state, and Canada's invocation of the dispute resolution provisions of Article IX of the 1977 Transit Treaty to dismiss the no-pipeline alternative" do not make a shutdown infeasible. *Id*., pp. 40-41. Finally, Bay Mills argued that the "no-pipeline" alternative is feasible because Enbridge could voluntarily cease

operation of the dual pipelines. Bay Mills' initial brief, pp. 40-41. *See*, FLOW's initial brief, p. 24; FLOW's reply brief, p. 13.[35]

Putting aside the issue that a halting of operations of the current dual pipelines has not yet occurred and it is uncertain whether the additional actions necessary for such a halting of operations will occur, the Commission notes that many of the arguments raised in support of this "no-pipeline" alternative speak more to the need for the pipeline than to the Commission's required findings under MEPA. Given the record evidence in this case, the Commission is unconvinced that a "no-pipeline" alternative would actually result in reduced GHG emissions when compared with the Replacement Project.

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. 12 Tr 1771-1777, 1791-1792, 1801-1807; *see*, 9 Tr 948, 974, 1092. Enbridge's witness Mr. Bennet testified that:

> [his] calculations for the operation of existing Line 5 conclude that just slightly over 200,000 metric tons CO_2e per year are emitted and that the increase for tunnel operations will amount to approximately 440 metric tons CO_2e per year. Assuming rail transportation is available, [his] calculations show the GHG emissions from shipping crude oil by Line 5 by rail depending on the route would result in 0.9 to 1.9 million metric tons CO_2e per year. This represents a 4-to-9-fold increase in GHG emissions for rail transport compared to relocating Line 5's Straits crossing within a tunnel.

[35] Because FLOW's reply brief is not paginated, the Commission clarifies that page 1 starts in natural order with the first page of the reply brief.

7 Tr 763. The Staff agreed, asserting that transporting "an equivalent volume of petroleum through a combination of rail and truck will result in approximately 160 percent more GHG emissions than the shipment of these products via pipeline." 12 Tr 1792. ELPC/MiCAN's witness Mr. Erickson did not dispute that moving oil by rail will increase GHG emissions. 9 Tr 1067.

Furthermore, and most importantly, should the dual pipelines remain in operation, the Commission finds that the "no-action" alternative is not "consistent with the reasonable requirements of the public health, safety, and welfare." MCL 324.1705(2). As set forth in the record evidence, in 2016, Dynamic Risk was selected to examine the alternatives to the current configuration of the dual pipelines in the Straits. Staff Witness Mr. Warner testified that according to Dynamic Risk's Alternatives Report, "'anchor hooking' was determined to be the dominant primary threat to the Dual Pipelines that could cause a rupture. Dynamic Risk estimated that this threat represented more than 75% of the annualized total threat probability . . . ." 12 Tr 1716 (quoting Exhibit ELP-24, p. 28). Mr. Warner also stated that "to mitigate the risk of anchor strikes, Enbridge is [currently] monitoring vessel traffic by patrolling the Straits. In addition, Enbridge continues to visually inspect the exterior of the pipelines for damage or unsupported spans. If these events occur, Enbridge would need to complete repairs using divers and vessels anchored in the Straits." 12 Tr 1729. However, even with these mitigation measures in place, the Commission finds that in the last five years, the dual pipelines have experienced two incidents, including one anchor strike incident, that could have resulted in a catastrophic release of Line 5 products into the Straits. *See*, 10 Tr 1333-1334; 12 Tr 1724-1725; Exhibit S-6, p. 1. In addition, in their current configuration, the dual pipelines are subject to VIV and spanning stress, which

may contribute to the risk of failure and a release of Line 5 product. *See*, Exhibit ELP-24, pp. 17, 28, 141.

A rupture of the dual pipelines would be catastrophic for the Great Lakes, costing an estimated $1.37 billion damages and resulting in long-lasting health, environmental, and cultural damages. *See*, 12 Tr 1717-1718. Thus, the Commission finds that the "no-action" alternative to the Replacement Project would not be "consistent with the reasonable requirements of the public health, safety, and welfare." MCL 324.1705(2).

In conclusion, the Commission finds that after a review of the record evidence, there are no feasible and prudent alternatives to the Replacement Project pursuant to MEPA.

THEREFORE, IT IS ORDERED that:

A. Enbridge Energy, Limited Partnership's application is approved as set forth in the order.

B. The route and location of Enbridge Energy, Limited Partnership's Straits Line 5 Replacement Segment is approved conditioned upon the company obtaining the required governmental permits and approvals. Significant changes to the design of the tunnel that are completed subsequent to this approval, including the addition of third-party utilities, shall be considered by the Commission to be inconsistent with the approval of this application and would require further application to, and approval by, the Commission.

C. Prior to construction of the tunnel, Enbridge Energy, Limited Partnership shall provide the Mackinac Straits Corridor Authority with a detailed risk management plan. The plan shall include a description of the planned geotechnical test bores and frequency of probe-hole testing ahead of the tunnel boring machine and should include reporting of both test-bore data and probe-hole data in real time so that the State of Michigan can assess risks and construction plan modifications based on the data. The plan should also include inspections for concrete cast sections prior to

moving them into the tunnel and after being put into place, placement of gaskets, regular analyses of bentonite mix properties, and changes in slurry pressure. Deviations from and modifications to the plan during the construction process should be reported by Enbridge Energy, Limited Partnership and available for public review.

D. Enbridge Energy, Limited Partnership shall implement procedures for low-hydrogen welding for all mainline girth welds, shall ensure that the procedures require both preheat and inter-pass temperature requirements, and shall ensure that the mainline girth welds are nondestructively tested using automatic phased array ultrasonic testing methods as proposed by the Commission Staff.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Daniel C. Scripps, Chair

I abstain.

Katherine L. Peretick, Commissioner

Alessandra R. Carreon

By its action of December 1, 2023.

Lisa Felice, Executive Secretary

PROOF OF SERVICE

STATE OF MICHIGAN)

Case No. U-20763

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on December 1, 2023 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).

Brianna Brown

Subscribed and sworn to before me
this 1st day of December 2023.

Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2024

Service List for Case: **U-20763**

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Attachment 3

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

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.	)	Case No. U-20763

At the April 21, 2021 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Tremaine L. Phillips, Commissioner
Hon. Katherine L. Peretick, Commissioner

ORDER

I. HISTORY OF PROCEEDINGS

On April 17, 2020, Enbridge Energy, Limited Partnership (Enbridge), filed an application (application) and supporting exhibits pursuant to Public Act 16 of 1929, MCL 483.1 *et seq*. (Act 16) and the Commission's Rules of Practice and Procedure, Mich Admin Code, R 792.10447 (Rule 447) requesting that the Commission grant Enbridge the authority for its project known as the Straits Line 5 Replacement Segment (Replacement Project), which involves constructing a replacement segment of the Line 5 pipeline (Line 5) that crosses the Straits of Mackinac (Straits). Enbridge sought *ex parte* approval of the application. In the alternative, Enbridge requested a

declaratory ruling confirming that it already has the requisite authority to construct the Replacement Project pursuant to the March 31, 1953 order in Case No. D-3903-53.1 (1953 order).

On April 22, 2020, the Commission issued an order in this case seeking comments on the threshold issue presented in the declaratory ruling request. The Commission also decided to hold Enbridge's full application in abeyance while it considered the request for a declaratory ruling.

On June 30, 2020, the Commission issued an order in this case denying both *ex parte* approval of the application and the requested declaratory relief (June 30 order). The Commission also decided to read the record. June 30 order, p. 70. The Commission set this matter for a contested proceeding, and invited the continued submission of comments.

On August 12, 2020, a prehearing conference was held before Administrative Law Judge Dennis W. Mack (ALJ), at which intervention was granted to the Michigan Department of Attorney General (Attorney General); For Love of Water (FLOW); the Michigan Environmental Council (MEC), Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council, and the National Wildlife Federation (together, the MEC Coalition); Bay Mills Indian Community (Bay Mills); Environmental Law & Policy Center (ELPC) and Michigan Climate Action Network (MiCAN) (together, ELPC/MiCAN); Little Traverse Bay Band of Odawa Indians; Nottawaseppi Huron Band of the Potawatomi; Michigan Laborers' District Council (MLDC); Michigan Propane Gas Association and the National Propane Gas Association (together, the Associations); and the Mackinac Straits Corridor Authority (MSCA).[1] The Commission Staff (Staff) also participated. On August 13, 2020, the ALJ adopted a schedule for the case.

[1] The ALJ and the parties have used various shortened names. In order to reduce confusion, when reproducing a quote in this order the shortened names or acronyms designated herein are used (in brackets).

On September 2, 2020, Enbridge filed a motion in limine. On September 23, 2020, responses to the motion were filed by the Staff, ELPC/MiCAN and Bay Mills (jointly), FLOW, the Attorney General, the Associations, and the MEC Coalition. On September 30, 2020, the ALJ held a hearing on the motion.

On October 23, 2020, the ALJ issued a ruling granting the motion in part, and denying it in part (the initial ruling). On November 6, 2020, Bay Mills, the MEC Coalition, ELPC/MiCAN, FLOW, and the Attorney General[2] filed applications for leave to appeal the initial ruling under Mich Admin Code, R 792.10433 (Rule 433). On November 20, 2020, Enbridge, the Associations, the Staff, and MSCA filed responses to the applications for leave to appeal.

On December 9, 2020, the Commission issued an order remanding the motion in limine to the ALJ in light of Governor Gretchen Whitmer's November 13, 2020 issuance of a notice of revocation of the existing Line 5 easement in the Straits, which took place during the briefing on the applications for leave to appeal (December 9 order). The ALJ thereafter set a revised schedule.

Initial briefs on the remanded motion in limine were filed on January 15, 2021, and reply briefs were filed on January 29, 2021.[3] The ALJ held a hearing on the remanded motion on February 5, 2021.

On February 23, 2021, the ALJ issued a ruling granting the motion in part and denying it in part, consistent with the initial ruling (the ruling on remand). On March 9, 2021, ELPC/MiCAN,

[2] The Attorney General did not file her own application, but filed a notice that she joins in the other four filed applications.

[3] At the time of the briefing on remand, the alignment of certain parties changed. At the time of the filing of the second round of applications for leave to appeal, the alignment of certain parties changed again, as described below.

FLOW, Bay Mills,[4] and the MEC Coalition[5] filed applications for leave to appeal the ruling on remand under Rule 433. On March 23, 2021, MLDC, Enbridge, the Associations, the Staff, and MSCA filed responses to the applications for leave to appeal the ruling on remand.

After providing a brief background, this order moves chronologically through the ALJ's two rulings and the associated applications for leave to appeal and responses, organized by issue.

II. BACKGROUND

In its application, Enbridge explains that Line 5 was constructed by Lakehead Pipe Line Company (Lakehead)[6] in 1953 and that it is a 645-mile interstate pipeline that traverses Michigan's Upper and Lower Peninsulas, originating in Superior, Wisconsin, and terminating near Sarnia, Ontario, Canada. Application, p. 5. Enbridge states that Line 5 was built to transport light crude oils and natural gas liquids (NGLs). While the vast majority of product shipped through Line 5 travels through Michigan to Canada, Enbridge explains that Line 5 delivers NGLs to a propane production facility in Rapid River, Michigan, and delivers light crude oil to facilities which interconnect with other pipelines in Lewiston and Marysville, Michigan. Application, pp. 5-6. Line 5 has an annual average capacity of 540,000 barrels per day (bpd), and Enbridge states

[4] At this stage of the proceeding, Bay Mills was joined by the Grand Traverse Band of Ottawa and Chippewa Indians, the Little Traverse Bay Band of Odawa Indians, and the Nottawaseppi Huron Band of the Potawatomi.

[5] At this stage of the proceeding, the MEC Coalition includes MEC, Tip of the Mitt Watershed Council, and the National Wildlife Federation.

[6] Enbridge states that, in 1991, Lakehead transferred Line 5 to Lakehead Pipe Line Company, Limited Partnership, which changed its name to Enbridge Energy, Limited Partnership, in 2002. Enbridge's reply comments, p. 4. *See also,* November 8, 1991 order in Case No. U-9980.

that the Replacement Project will not impact its annual average capacity or the nature of the service provided by Line 5. Application, pp. 5, 8, 13.[7]

Enbridge explains that, where Line 5 crosses the Straits, it currently consists of two, 20-inch-diameter pipes referred to as the dual pipelines. Enbridge states that, pursuant to the Replacement Project, the four mile segment of the dual pipelines will be replaced with a single, 30-inch-diameter pipe, which will be located within a concrete-lined tunnel beneath the lakebed of the Straits (the tunnel). Application, pp. 2, 8. Enbridge asserts that, because the pipeline will be located in a tunnel deep beneath the lakebed, the aquatic environment will be protected from any release of liquid petroleum caused by a vessel anchor strike. Enbridge notes that the construction of the tunnel is the subject of separate applications before other state and federal agencies, including the Department of Environment, Great Lakes, and Energy (EGLE) and the U.S. Army Corps of Engineers (USACE).

[7] Enbridge witness Marlon Samuels states that, for the past 10 years, Line 5 has operated at about 90% of its annual average capacity of up to 540,000 bpd. Samuels testimony, p. 5. Ninety percent of average capacity is about 486,000 bpd or 20,400,000 gallons per day of crude oil and NGLs transported though Line 5. The Upper Peninsula Energy Task Force estimates that the Rapid River facility produces approximately 30,660,000 gallons per year of propane. *Upper Peninsula Energy Task Force Committee Recommendations, Part I, Propane Supply*, Department of Environment, Great Lakes, and Energy, April 17, 2020, p. 48. *See,* https://www.michigan.gov/documents/egle/Upper_Peninsula_Energy_Task_Force_Committee_Recommendations_Part_1_Propane_Supply_with_Appendices_687642_7.pdf (accessed March 25, 2021).

Enbridge states that it entered into a series of agreements[8] with the State of Michigan relating to the relocation of the Line 5 pipe segment within the tunnel. Enbridge notes that the Michigan Legislature enacted Public Act 359 of 2018 (Act 359), which created the MSCA and delegated to the MSCA the authority to enter into agreements pertaining to the construction, operation, and maintenance of the tunnel to house the replacement pipe segment.[9] Enbridge explains that its request for Commission approval of the Replacement Project does not include "authorization to design, construct, or operate the tunnel" because "[t]he tunnel will be designed, constructed, and maintained pursuant to the 'Tunnel Agreement' entered between the MSCA and Enbridge pursuant to Act 359." *Id*., p. 3.[10] Enbridge states that the tunnel will be constructed in the subsurface lands beneath the lakebed of the Straits within the easement issued by the Michigan Department of Natural Resources (DNR) to the MSCA (the 2018 easement), and pursuant to the assignment of certain rights under that easement by the MSCA to Enbridge. Enbridge states that

[8] *See,* Agreement Between the State of Michigan and Enbridge Energy, Limited Partnership and Enbridge Energy Company, Inc. (First Agreement) (Exhibit A-8); Second Agreement Between the State of Michigan, Michigan Department of Environmental Quality, and Michigan Department of Natural Resources and Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc. and Enbridge Energy Partners, L.P. (Second Agreement) (Exhibit A-10); Third Agreement Between the State of Michigan, Michigan Department of Environmental Quality, and Michigan Department of Natural Resources and Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc. and Enbridge Energy Partners, L.P. (Third Agreement) (Exhibit A-1); and Tunnel Agreement (Tunnel Agreement) (Exhibit A-5). Required terms of the Tunnel Agreement are contained in MCL 254.324d(4). In this order, the First, Second, Third, and Tunnel Agreements are referred to collectively as the Agreements.

[9] On October 31, 2019, the Michigan Court of Claims held that Act 359 is constitutional and confirmed the validity and enforceability of the Agreements. *Enbridge Energy, LP v Michigan*, Case No. 19-000090-MZ (Oct. 31, 2019). The Michigan Court of Appeals affirmed the Michigan Court of Claims' order in *Enbridge Energy, LP v Michigan*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 351366). That order was not appealed.

[10] In the initial ruling, the ALJ found that the construction of the utility tunnel is within the Commission's jurisdiction under Act 16. Initial ruling, pp. 8-10; *see also,* June 30 order, pp. 59, 67.

the tunnel will be constructed in accordance with all required governmental permits and approvals. Enbridge explains that it will enter into a 99-year lease with MSCA for the use of the tunnel to operate and maintain the replacement pipe. Application, pp. 13-14. Enbridge seeks Commission approval to operate and maintain the replacement pipe segment located within the tunnel as part of Line 5 under Act 16. Enbridge states that once the new 4-mile pipe segment is placed into service within the tunnel, service on the dual pipelines will be discontinued. *Id.*, p. 3.

On November 13, 2020, Governor Whitmer and the DNR revoked and terminated the 1953 easement and directed Enbridge to cease operations of the dual pipelines no later than 180 days from the date of the termination notice, or approximately May 13, 2021.[11] The Notice of Revocation and Termination of Easement (Notice), p. 1, states:

> [T]he State of Michigan hereby provides formal notice to Enbridge . . . that the State is revoking and terminating the 1953 Easement . . .. The revocation and termination each take legal effect 180 days after the date of this Notice to provide notice to affected parties and to allow for an orderly transition to ensure Michigan's energy needs are met. Enbridge must cease operation of the Straits Pipelines 180 days after the date of this Notice.

Also on November 13, 2020, the Attorney General filed an action in the Ingham County Circuit Court on behalf of the State of Michigan, Governor Whitmer, and the DNR, seeking declaratory and injunctive relief to acknowledge and enforce the revocation (Case No. 20-646-CE). On November 24, 2020, Enbridge filed an action against the State of Michigan in the U.S. District

[11] *See,* https://content.govdelivery.com/attachments/MIEOG/2020/11/13/file_attachments/1600920/Notice%20of%20%20Revocation%20and%20Termination%20of%20%20Easement%20%2811.13.20%29.pdf (accessed February 5, 2021).

Court for the Western District of Michigan for declaratory and injunctive relief seeking a determination that the revocation is not lawful (Case No. 1:20-CV-1141).[12]

On January 29, 2021, EGLE granted Enbridge a set of permits relating to the construction of the utility tunnel.[13]

III. THE INITIAL RULING

In its motion in limine, Enbridge argued that certain evidence and issues should be found to be beyond the scope of this proceeding.

> Specifically, Enbridge seeks an order directing that the following issues be excluded as legally irrelevant to this proceeding: (1) the construction of the utility tunnel, (2) the environmental impact of the tunnel construction, (3) the public need for and continued operation of Line 5, (4) the current operational safety of Line 5, (5) whether Line 5 has an adverse impact on climate change, and (6) the intervening parties' climate change agendas.

Motion in limine, pp. 1-2. Enbridge argued that the listed issues are outside of the Commission's jurisdiction and irrelevant to this pipeline siting proceeding under Act 16.

The ALJ began the initial ruling by noting that in the June 30 order the Commission found as follows:

> The Commission notes that, as set forth in its title, the purpose of Act 16 "is to regulate the business of carrying or transporting, buying, selling, or dealing in crude

[12] The State's declaratory relief action has been removed to the federal court and consolidated with Enbridge's action, and both cases are set for mediation. Enbridge's response to the applications for leave to appeal the ruling on remand, Attachment A. *See,* U.S. District Court for the Western District of Michigan, Case Nos. 1:20-CV-1141 and 1:20-CV-1142. The Notice has also been the subject of testimony by Canadian officials before the Michigan Senate Natural Resources Committee and the Energy and Technology Committee. *See,* https://www.mlive.com/public-interest/2021/03/canadian-officials-testify-line-5-shutdown-would-have-big-impact-on-the-region-during-michigan-senate-committee.html (accessed March 26, 2021).

[13] *See,* https://www.michigan.gov/line5/0,9833,7-413-99507-550860--,00.html and https://www.michigan.gov/documents/line5/2021-01-29-Draft-Permit-for-Countersignature_714718_7.pdf (accessed March 27, 2021).

> oil or petroleum or its products" and "to provide for the control and regulation of all corporations, associations, and persons engaged in such business, by the Michigan public service commission . . . ." In addition, Section 1(2) of Act 16 states, in relevant part:
>
> > A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof . . . by or through pipe line or lines . . . or exercising or claiming the right to engage in the business of piping, transporting, or storing crude oil or petroleum, or any of the products thereof . . . does not have or possess the right to conduct or engage in the business or operations, in whole or in part, or have or possess the right to locate, maintain, or operate the necessary pipe lines, fixtures, and equipment belonging to . . . except as authorized by and subject to this act.
>
> MCL 483.1(2) (emphasis added). Based on the above language, the Commission finds that it has broad jurisdiction over the construction and operation of pipeline facilities and has the "authority to review and approve proposed pipelines, and to place conditions on their operations." March 7, 2001 order in Case No. U-12334 (March 7 order), p. 13, citing *Dehn*, 340 Mich at 41; see also, January 31, 2013 order in Case No. U-17020 (January 31 order), p. 5. Moreover, "[i]nherent in that jurisdiction is the power to make a qualitative evaluation regarding whether a proposed system would be safe and in the public interest." March 7 order, p. 14.

Initial ruling, pp. 2-3, quoting the June 30 order, p. 59 (citing *Lakehead Pipe Line Co v Dehn*, 340 Mich 25; 64 NW2d 903 (1954). The ALJ goes on to find that:

> [t]he Parties also agree that in prior decisions the Commission has established the general criteria for deciding an application filed under Act 16: whether the applicant has established a public need for the proposed pipeline; whether the proposed pipeline is designed and routed in a reasonable manner; and whether the construction of the pipeline will meet or exceed current safety and engineering standards.

Initial ruling, p. 3, n. 1, citing the July 23, 2002 order in Case No. U-13225, pp. 4-5, and the January 31, 2013 order in Case No. U-17020, p. 5. The ALJ found that Enbridge's motion addresses three issues: (1) the Commission's jurisdiction over the tunnel under Act 16; (2) review of the operation of, and need for, Line 5 in its entirety; and (3) the application of the Michigan Environmental Protection Act (MEPA), specifically MCL 324.1705, to the Replacement Project,

including whether climate change must be considered in making a determination under Act 16 and MEPA. Initial ruling, pp. 4-20.

A. The Tunnel

While no party sought leave to appeal the decision in the initial ruling on this issue, the Commission includes it here as a necessary part of the background of this order.

Enbridge argued that the tunnel is within the exclusive jurisdiction of MSCA under Act 359, specifically MCL 254.324a(1) and MCL 254.324d(1), and that the Commission is precluded from considering any aspect of the construction or operation of the tunnel.

Citing the Black's Law Dictionary meaning of "fixture," the Staff argued that the tunnel is a fixture under Act 16 because it is an irremovable component of real property. Citing a three-part definition of "fixture" from case precedent, the MEC Coalition also argued that the tunnel is a "fixture" because "(1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty." Initial ruling, p. 6, quoting *Wayne Cty v Britton Trust*, 454 Mich 608, 611; 563 NW2d 674 (1997).

The Staff, the MEC Coalition, and FLOW also argued that the Commission has authority over the tunnel under administrative rules promulgated pursuant to Act 16, specifically Rule 447(1)(c), which provides that the Commission has authority to consider projects "to construct facilities to transport crude oil or petroleum products as a common carrier for which approval is required by statute." These parties argued that the tunnel is a "facility," because it serves numerous functions associated with the operation of the pipeline.

Finally, the Staff contended that the Commission exercises authority over the tunnel under MCL 483.2b, which provides that "[a] pipeline company shall make a good-faith effort to

minimize the physical impact and economic damage that result from the construction and repair of a pipeline." The Staff posited that the tunnel is inseparable from the pipeline replacement project, and it is impossible to review how the pipeline will be constructed, maintained, or repaired without considering the design of the tunnel.

The ALJ found that Act 359 does not divest other agencies of regulatory oversight of the tunnel, citing MCL 254.324d(4)(g), which provides:

> Except as provided in subdivision (a), no later than December 31, 2018, the Mackinac Straits corridor authority shall enter into an agreement or a series of agreements for the construction, maintenance, operation, and decommissioning of a utility tunnel, if the Mackinac Straits corridor authority finds all of the following: . . . (g) That the proposed tunnel agreement does not exempt any entity that constructs or uses the utility tunnel from the obligation to obtain any required governmental permits or approvals for the construction or use of the utility tunnel.

The ALJ noted that Enbridge is seeking regulatory approvals for the tunnel from EGLE and USACE. Turning to Act 16, the ALJ noted that Section 1(2) of that act defines the Commission's jurisdiction, and provides:

> A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof . . . through pipe line . . . does not have or possess the right to conduct or engage in the business or operations, in whole or in part, or have or possess the right to locate, maintain, or operate the necessary pipe lines, fixtures, and equipment . . . except as authorized by and subject to this act.

MCL 483.1(2); initial ruling, p. 5.

The ALJ rejected Enbridge's argument that the tunnel is a standalone structure subject solely to Act 359, finding that "Enbridge is seeking to have the Commission undertake its Act 16 review of the project as if the Utility Tunnel has been designed, constructed, and placed into operation, which is obviously not the case." Initial ruling, p. 8. The ALJ found that the relocation of the pipeline into the tunnel is the reason for the Replacement Project, and the pipeline and tunnel are inextricably connected. The ALJ stated:

> As the Commission held in this case, the purpose of Act 16 is to ensure that pipelines are designed, routed, constructed, and operated in a safe and economical manner. See Case No. U-20763, June 30, 2020 Order, pg. 59; see also Case No U-13225, July 23, 2002 Order, pgs. 4-5. The only way to make that determination is for the Commission to have a record that contains all relevant information concerning the proposal to relocate the existing pipelines into the Utility Tunnel. That necessarily requires the development of a record on the design, construction, and operational aspects of both the pipeline and Utility Tunnel. Counsel for the Corridor Authority indicated during Oral Argument the plans for the Utility Tunnel will be completed while this case is pending and will be offered as evidence in this case. 2 TR 205-207. To exclude that evidence under Enbridge's Motion would effectively preclude the Commission from performing its statutorily mandated review of a project under Act 16. Having said that, Staff's contention that this case does not entail the "approval" of the Utility Tunnel is accurate. Rather this case entails a review of the proposal to relocate the pipeline into the Utility Tunnel that necessarily requires consideration of the design, construction, and operational features of both so as "to make a qualitative evaluation regarding whether a proposed system would be safe and in the public interest." [June 30 order], pg. 59, citing Case No. U-17020, January 31, 2013 Order, pg. 5. Finally, undertaking the inquiry required under Act 16 does not usurp the Corridor Authority's role under Act 359, but rather is entirely consistent that the requirement that the Utility Tunnel obtain all necessary regulatory approvals. MCL 254.324d(4)(g).

Initial ruling, pp. 9-10 (notes omitted). Applying rules of statutory construction, the ALJ found that the tunnel is a "fixture" under both the "irremovable" test cited by the Staff and the three-part test posed by the MEC Coalition for purposes of Act 16, and is also a "facility" as that term is used in Rule 447. Finally, the ALJ also found that in order for the Commission to determine whether a good faith effort was made to limit the physical impact and economic damage from the construction of the pipeline, it is necessary to consider the tunnel under MCL 483.2b. Initial ruling, p. 10. Thus, the ALJ denied Enbridge's motion in limine as it pertains to review of the tunnel.

No party sought leave to appeal this decision.

In response to a request from the Staff, on December 23, 2020, Enbridge filed supplemental direct testimony and exhibits addressing aspects of the design and construction of the tunnel.

B. Public Need for Line 5/Operation of Line 5

In its motion, Enbridge contended that any issue pertaining to the operation of Line 5 in its entirety, including the public need for the pipeline, is outside the scope of this proceeding, based on the fact that the finding of public need was already made by the Commission in the 1953 order and affirmed by the Michigan Supreme Court in 1954 in *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 37; 64 NW2d 903 (1954) (*Lakehead*). Enbridge argued that Act 359 establishes the continued need for Line 5, and that federal law preempts state law with respect to the issues of pipeline safety and operations for an interstate pipeline like Line 5. *See,* 49 USC 60104(c). Finally, Enbridge argued that Act 16 does not allow for another determination as to whether the pipeline should continue in operation. The Staff supported Enbridge's position, and the MEC Coalition and FLOW opposed it.

The ALJ disagreed with Enbridge's view of the 1953 order and the *Lakehead* decision, noting that the Commission already found that the Replacement Project differs significantly from the project proposed in 1953 and requires an independent review. June 30 order, pp. 38, 58. The ALJ explained that the scope of this case is dictated by two factors: (1) the activity proposed in the application, namely replacement of the existing four miles of dual pipelines located on the bottomlands with a pipeline located in a tunnel, as contemplated in Act 359 and various agreements with the State; and (2) the Commission's jurisdiction over that proposal under Act 16, the administrative rules promulgated under its authority, and MEPA. Initial ruling, p. 14. He found that it is not in dispute that the Tribal nations have treaty rights in the Straits and, under Executive Directive (ED) 2019-17, have a right to be consulted when their interests are affected.

However, the ALJ determined that neither FLOW nor the MEC Coalition provided any substantive legal basis for finding that a review of the operation of Line 5 in its entirety or a re-

determination of the public need is required. The ALJ found that these intervenors did not show that Enbridge is a public utility seeking a certificate of necessity or a certificate of public convenience and necessity. Initial ruling, p. 15, n. 7. The ALJ stated that "the standards of Act 16 are well established and must be applied in this case." *Id.,* p. 15; *see* June 30 order, pp. 59, 65-67. He held:

> Based on those standards, this case involves a review of the proposed pipeline relocation under Act 16 to determine whether a public need exists for it, whether it is designed and routed in a reasonable manner, and whether its construction will satisfy applicable safety and engineering standards. Accordingly, any issues concerning the current or future operational aspects of the entirety of Line 5, including the public need for the 645-mile pipeline that was approved by the Commission in 1953 and affirmed in *Lakehead Pipe Line Co., supra*., is outside the scope of this case.

Initial ruling, p. 15 (note omitted). The ALJ granted the motion in limine regarding the operation of Line 5 in its entirety.

The MEC Coalition, Bay Mills, the Attorney General, and FLOW seek leave to appeal this decision in the initial ruling.

In its application for leave to appeal, the MEC Coalition asserts that the exclusion of relevant evidence is an error of law. *See,* MRE 401. Rule 433(3) provides that "An offer of proof shall be made in connection with an appeal of a ruling excluding evidence. The offer of proof shall be made on the hearing record." While noting that this subsection does not apply at this stage of the case because there is no hearing record, the MEC Coalition nevertheless makes an offer of proof under Rule 433. The MEC Coalition provides information regarding two witnesses who could testify about the economics of fossil fuel pipelines and the risks associated with such pipelines.

The MEC Coalition notes that the Commission has already established the approval criteria for Act 16 cases, and one of those three approval criteria is whether there is a "public need" for the project. March 7, 2001 order in Case No. U-12334 (2001 order), p. 13; July 23, 2002 order in

Case No. U-13225, p. 4 (2002 order); January 31, 2013 order in Case No. U-17020, p. 5 (2013 order). The MEC Coalition begins by arguing that, in order to determine whether there is a public need for the Replacement Project, the Commission must determine whether there is a public need to extend the life of Line 5. The MEC Coalition contends that Enbridge has alleged that there is a public need for the services of Line 5, and that the Replacement Project will eliminate environmental risk to the Straits. Application, p. 3. Enbridge also states that it will have the right to occupy the tunnel with Line 5 for 99 years. Against this background, the MEC Coalition argues there are two distinct issues: "The first issue is whether there is a public need to replace the dual pipelines with a new pipeline in a tunnel so as to perpetuate Line 5 for decades to come. The second issue is whether perpetuating Line 5 for decades to come by building the project would perpetuate other environmental risks." The MEC Coalition's application for leave to appeal the initial ruling, p. 10. The MEC Coalition argues that the ALJ merged these two issues into a single misstated issue of whether the operational aspects of the entirety of Line 5 could be considered in this Act 16 review.

The MEC Coalition contends that no party denies that Line 5 will operate longer with approval of the Replacement Project. In answer to Enbridge's assertion that Line 5 will continue in operation indefinitely whether the project is approved or not, the MEC Coalition argues that this is a question of fact and the parties should be allowed to develop the record on this question. While stating that there is no need to revisit the Commission's 1953 determination of public need, the MEC Coalition also contends that Enbridge's application requires a determination of whether there is a public need to extend the life of Line 5. The MEC Coalition notes that the Michigan Administrative Procedures Act of 1969 (APA), specifically MCL 24.272, provides that in an administrative proceeding the parties are entitled to the opportunity to present evidence and

argument on the issues of law, policy, and fact. The MEC Coalition claims that Enbridge submitted testimony on the issue of the public need for Line 5 from two witnesses. The MEC Coalition asserts that the other parties are entitled, under the APA, to do the same.

The MEC Coalition further argues that a review under Act 16 must consider whether the proposed pipeline is routed in a reasonable manner, and this involves looking at risk. The MEC Coalition asserts that in Act 16 cases the Commission examines all risks that will foreseeably result from the proposed project, and evaluates the risks of the proposed project against the risks of other available alternatives. The MEC Coalition further notes that Enbridge has alleged that the project will protect the aquatic environment and eliminate the risk of releases into the Straits, and argues that this issue must also be examined.

The MEC Coalition posits that the Commission must also independently consider the safety of Line 5 in performing its MEPA analysis. Section 5(2) of MEPA provides:

> In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

MCL 324.1705(2). The MEC Coalition asserts that this statutory language places two duties upon the Commission: "(1) to determine whether the proposed course of conduct will pollute, impair, or destroy natural resources; and (2) not authorize the proposed conduct if it is likely to have that effect and there are feasible and prudent alternatives." The MEC Coalition's application for leave to appeal the initial ruling, p. 22. The MEC Coalition contends that this involves consideration of both the conduct (what is proposed) and the likely effect of the conduct (which goes beyond the proposal). Positing that the purpose of the Replacement Project is to extend the life of Line 5, the MEC Coalition contends that this evidence is relevant. The MEC Coalition argues that failure to

consider this evidence constitutes the basis for finding an abuse of discretion by the agency. *See, State Hwy Comm v Vanderkloot*, 392 Mich 159, 185; 220 NW2d 416 (1974) (*State Hwy Comm*); *Buggs v Mich Pub Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2015 (Docket Nos. 315058 and 315064) (*Buggs I*), p. 8; *Buggs v Mich Pub Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2017 (Docket Nos. 329781 and 329909) (*Buggs II*).

Anticipating Enbridge's response, the MEC Coalition notes that the federal Pipeline Safety Act (PSA), specifically 49 USC 60104(c), provides that "[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." The MEC Coalition contends that this language does not preempt the Commission's consideration of safety in its MEPA review. The MEC Coalition argues that this preemption provision is limited to pipeline safety standards, and does not preempt the requirements of MEPA, which address environmental impacts. The MEC Coalition asks the Commission to clarify that federal law does not preempt the required safety review under MEPA.

Finally, the MEC Coalition argues that the Commission must consider the impact that extending the life of Line 5 will have on Tribal treaty-reserved rights to natural resources in the ceded territories, and indicates that it supports the arguments made by Bay Mills. The MEC Coalition asserts that "[t]he Commission cannot satisfactorily meet its obligation to consult and adequately assess the potential harm to the Tribes' property rights if evidence of public need and safety is excluded." The MEC Coalition's application for leave to appeal the initial ruling, p. 27.

In its application for leave to appeal, Bay Mills contends that evidence concerning the risk of an oil spill from both the 4-mile segment and from elsewhere on Line 5 is relevant to this proceeding. Bay Mills states that Enbridge has introduced evidence on this issue, and contends

that the other parties are entitled to present evidence on this issue under the APA. MCL 24.272(3), (4). Bay Mills argues that this is also consistent with the Commission's broad authority under Act 16 and the comprehensive environmental review that is required under MEPA. Additionally, Bay Mills asserts that its treaty-protected rights require consideration of evidence on the risk of oil spills and the potential effect on natural resources in all of the ceded territories. Bay Mills asserts that public need and safety must be examined as separate issues.

Bay Mills points out that Enbridge has alleged in its application and its proffered testimony that the Replacement Project will alleviate the risk of an oil spill from Line 5 into the Great Lakes. Bay Mills contends that the initial ruling deprives the parties of this right to challenge Enbridge on this central issue, stating:

> [i]f the purpose of the Line 5 [Replacement] Project is to address the significant risk of a catastrophic oil spill, then all of the risks along the length of Line 5 must be evaluated to determine whether the tunnel will actually achieve its stated purpose. A spill in another part of the pipeline can reach or harm the Straits and or Great Lakes because of the hydrological connections of waterways that Line 5 crosses in the region. . .. [I]t would make little sense—and would not serve the public—to construct a tunnel to alleviate the risk of an oil spill from one segment of Line 5 if the same or similar risks are left unaddressed throughout the pipeline's length.

Bay Mills' application for leave to appeal the initial ruling, pp. 9-10. If evidence regarding the risk of an oil spill on the entirety of Line 5 is barred, Bay Mills asserts that Enbridge's allegations will have been accepted without examination. Citing the 2001, 2002, and 2013 orders, Bay Mills argues that, under Act 16, the Commission has historically undertaken a broad review of potential risks associated with the route, feasibility, and environmental impact of pipeline projects.

Like the MEC Coalition, Bay Mills notes that Rule 433(3) does not apply here because no specific evidence has been excluded from the proceeding and there is no hearing record; however, Bay Mills also offers a description of the evidence that it would provide on the risk issue and the effect of the Replacement Project on fisheries and other natural resources.

Bay Mills argues that MEPA also requires an analysis of the environmental risk posed by the entire pipeline, and including the dual pipelines, during construction of the tunnel. Like the MEC Coalition, Bay Mills emphasizes the breadth of the MEPA statute and the Commission's duty to perform an independent MEPA review. Bay Mills urges the Commission to consider the environmental effects from the entirety of the conduct proposed in Enbridge's direct evidence, including the extension of the life of Line 5. Bay Mills points out that MEPA requires the consideration of feasible and prudent alternatives, and argues that these alternatives must include operation using the dual pipelines, operation of the pipeline in the tunnel, operation of pipeline that lies outside the tunnel, operation using a different route, and operation for a shorter duration than that proposed in Enbridge's application. *Id.*, p. 17.

Like the MEC Coalition, Bay Mills argues that federal law does not preempt any aspect of the Commission's review under Act 16 or MEPA. Bay Mills notes that, under federal law, the location or routing of a pipeline facility is left to the states. 49 USC 60104(e). Bay Mills also points to the Staff's status as a certified agent for the Pipeline Hazardous Materials Safety Administration (PHMSA) under 49 USC 60105 and 49 USC 60117. Bay Mills contends that the preemption power is limited to interstate pipeline safety standards and does not affect the Commission's Act 16 or MEPA review in this case.

Bay Mills then turns to the treaty-protected resources in the ceded territories, arguing that the Commission must give full consideration to the impacts of the Replacement Project on these resources. Bay Mills explains that the 1836 Treaty between Bay Mills' predecessors and the United States (1836 Treaty), in which Tribal Nations ceded territory to the United States for the creation of the State of Michigan, is the supreme law of the land under US Const, art VI. Bay Mills explains that, in the 1836 Treaty, Tribal Nations reserved the right to hunt, fish, and gather

throughout the ceded lands and waters, including the right of commercial and subsistence fishing in the Great Lakes. Bay Mills explains that only the U.S. Congress can abrogate the 1836 Treaty.

Bay Mills argues that the ALJ misunderstood the role of these treaty rights, contending that the Tribe does not seek to expand the Commission's authority under Act 16 but rather seeks proper consideration of the Replacement Project's effects on its treaty rights. Bay Mills states that it "would submit evidence about the consequences of a potential oil spill from the dual pipelines in the Straits—and the continued spills into waterways that are hydrologically connected to the Great Lakes—on plants, fisheries, and cultural resources in the Straits and the Great Lakes relied on by Bay Mills." *Id.*, p. 22. Bay Mills describes its treaty rights as "antecedent and superior to any rights Enbridge may have." *Id.*, p. 26.

Bay Mills goes on to describe additional legal authority for the requested review, including the 2002 Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan (the 2002 Accord) and ED 2019-17. Bay Mills states that the 2002 Accord requires the opportunity for input and recommendations from a Tribal government to the State government regarding state actions. ED 2019-17 provides that: "Each department and agency must adopt and implement a process for consulting on a government-to-government basis with Michigan's federally recognized Indian tribes. The department or agency must engage in this consultation process before taking an action or implementing a decision that may affect one or more of these tribes." ED 2019-17, p. 2. Bay Mills indicates that the Staff and Bay Mills have begun consultation, and argues that the initial ruling incorrectly limits the scope of that consultation.

Bay Mills next argues that a finding of public need is necessary, and that the ALJ erred in barring evidence addressing the public need issues related to the current and future operational

aspects of the entirety of Line 5. Bay Mills contends that Act 359 does not control the public need determination and does not revise Act 16 in any way or displace the Commission's required analysis. Bay Mills contends that Enbridge introduced the issues of continued operation and longevity, and that parties must be allowed to present evidence as to whether the public will actually need to transport fuels through Line 5 for decades to come. Like the MEC Coalition, Bay Mills notes that Enbridge claims that Line 5 will continue to operate whether or not the Replacement Project is approved, but argues that this is a question of fact that the parties should be allowed to explore through discovery.

FLOW echoes many of the arguments made by the MEC Coalition and Bay Mills. FLOW contends that the ALJ improperly restricted the scope of review in this case, and that the initial ruling does not comport with findings the Commission already made in the June 30 order. FLOW notes that in the 2013 order, p. 5, the Commission adopted the following criteria for an Act 16 review: "(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." FLOW argues that, under the language of Act 16, any issue concerning the current or future operational aspects of the entirety of Line 5 is relevant, and that these issues involve questions of fact that can only be decided after a hearing. MCL 483.1(2). Citing the APA, FLOW argues that the parties have a right to present evidence on issues including the public need for the Replacement Project, and the operation of transporting crude oil through Line 5 itself for the next 99 years. FLOW argues that the true purpose of the tunnel and the 99-year lease should be fully developed on the record, noting that the 2018 easement created by Act 359 is different from the 1953 easement.

FLOW contends that the Commission must examine whether it is in the public interest to authorize new or expanded pipeline service, and must consider whether there is a market for this service. FLOW asserts that the Act 16 review must "entail thorough analyses that evaluate and model future demand for fossil fuel-based technologies and infrastructure, including the market, financial, and regulatory risks such technologies and infrastructure may present, as well as their potential to become stranded investments." FLOW's application for leave to appeal the initial ruling, p. 15. FLOW contends that determining whether a project represents a financial risk to ratepayers is a core function of the Commission. FLOW asserts that the Commission needs to have a full record, including forecasts of all types, in order to probe the issue of whether a public need for Line 5 exists and whether the Replacement Project is in the public interest.

Turning to the responses to the applications for leave to appeal, MSCA expresses support for the initial ruling in its response.

In their response, the Associations also contend that the initial ruling should be affirmed. They argue that Enbridge is not seeking, and does not require, approval to continue to operate Line 5. The Associations contend that the Legislature confirmed the continued need for Line 5 when it authorized the construction of the tunnel through Act 359, and the initial ruling properly limits review by the Commission to the Replacement Project itself. They further argue that the initial ruling "is correct not only as a matter of law, but as a practical matter; requiring an applicant to re-justify the need for their entire facility whenever they seek Commission approval for improvements on one aspect of that facility will discourage future applicants from pursuing such improvements." The Associations' response to the applications for leave to appeal the initial ruling, pp. 5-6. The Associations argue that Enbridge has not put the lifespan of Line 5 at issue, and that only future consumer demand and market economics will determine how long Line 5

operates. They point out that, whatever the outcome of this proceeding, Enbridge will have the legal right to operate Line 5. Finally, the Associations contend that the initial ruling comports with the limits of the Commission's jurisdiction, which does not extend to interstate pipelines or interstate pipeline safety.

In its response, Enbridge contends that the parties opposing the motion have no interest in addressing the actual issue in this case which is whether relocation of the pipeline within the tunnel will serve a public purpose by better safeguarding the Great Lakes.[14] Enbridge points to the Agreements as evidence of what the State of Michigan finds to be in the public interest, and notes that the Staff supported the motion on this issue.

Enbridge contends that the initial ruling properly found that the public need for Line 5 and the issue of its continued operation are both outside the scope of this proceeding, and states that the parties opposing the motion have conceded that there is a public benefit to deactivating the dual pipelines. Enbridge argues that the requirement to relocate the pipeline within the Straits was generated by the State of Michigan, and that the company has a legal duty to relocate the 4-mile pipeline segment to the tunnel. Enbridge avers that the public need for Line 5 was conclusively decided in the 1953 order and the *Lakehead* case and is not subject to re-litigation in this proceeding. Enbridge states that the Replacement Project seeks to fulfill the purpose of Act 359, and that the project proposed in the application has nothing to do with Line 5's lifespan. The company avers that Bay Mills cites no statutory basis for arguing that the Commission must review the operation of Line 5, and that, in any case, the procedural requirements included in the APA and in case law for terminating a license or permit have not been met. Like the Associations,

[14] Enbridge notes that it did not seek leave to appeal the portion of the initial ruling denying the motion in limine with respect to review of the construction and operation of the tunnel, but reserves its right to later challenge that decision. *See,* Rule 433(5).

Enbridge asserts that any arguments about the longevity of Line 5 are based on speculation because only economic realities such as customer demand will determine the lifespan of the pipeline. Enbridge also argues that the 1953 order authorizes Enbridge to operate and maintain Line 5 in perpetuity, and thus evidence regarding the 99-year lease is irrelevant as well, noting that no party disputes Enbridge's legal right to continue to operate the other 641 miles of Line 5. Enbridge posits that a re-review of the public need for Line 5 would assert a chilling effect on pipeline owners' willingness to pursue major repairs on pipelines in the future.

Enbridge contends that its statements in the application and testimony simply provide necessary background and do not open the door to a new examination of public need. The company points out that the initial ruling affirms the ability of all parties to present evidence about whether the Replacement Project satisfies a public need and meets all applicable standards. Enbridge states "To the extent the Commission believes that this background information in Enbridge's prefiled testimony opens the door to an analysis of the continuing need for Line 5, Enbridge will withdraw the testimony." Enbridge's response to the applications for leave to appeal the initial ruling, p. 11, n. 9. Enbridge notes that PHMSA has exclusive jurisdiction to regulate the safety of interstate pipelines under the PSA. 49 USC 60104(c); 49 USC 60102(b)(1); 49 USC 60117(1). Enbridge maintains that, simply because it asserts that the Replacement Project will better safeguard the Great Lakes does not mean that every risk potentially associated with the entirety of Line 5 is in dispute. Finally, Enbridge argues that Tribal rights cannot be used to expand the Commission's statutory jurisdiction, and the initial ruling correctly adhered to the limits of that jurisdiction.

In its response, the Staff urges the Commission to affirm the initial ruling. The Staff notes that the criteria for making a determination on an Act 16 application were set by the Commission in the

2002 order, pp. 4-5, and they include whether: (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. The Staff urges the Commission to reject the opposing parties' invitation to review anything other than the application, arguing that:

> [b]eyond the lack of a procedural, statutory, and precedential basis to review the operational aspects, including the public need and safety, of an entire pipeline system, evidence concerning the propriety of Line 5 as a whole is irrelevant and unnecessarily confuses the issues. Even if the Commission were to deny Enbridge's Act 16 application, one cannot assume, with any certainty, that Line 5 will cease operating in its current state. Therefore, the only evidence that the Commission's determination will impact ongoing Line 5 operations is speculative and should therefore be excluded. MRE 402; MRE 602.

Staff's response to the applications for leave to appeal the initial ruling, p. 6 (note omitted).

The Staff argues that Act 16 requires review of the proposed project and not the entire pipeline, and that, in any case, review of the entire pipeline has not been properly noticed in the application. The Staff asserts that the Commission's approach to Act 16 determinations was set in the 2002 order, where Wolverine Pipeline Company (Wolverine) sought permission to construct, operate, and maintain a 26-mile pipeline segment. The Staff notes that at no point in that case did the Commission examine "(1) any portion of Wolverine's existing pipeline system not related to the proposed route; (2) how the pipeline could extend the life of the existing pipeline system or; (3) how the pipeline should be considered in light of Wolverine's prior dealings with the state." *Id.*, p. 8. The Staff contends that the ALJ correctly found that, in that case, "the Commission applied the Act 16 standards to the portion of the pipeline proposed to be replaced." Initial ruling, p. 15, n. 8. Thus, the Staff argues that consideration of the entirety of Line 5 would depart from Commission precedent. The Staff notes that the Tunnel Agreement discusses the possibility of an oil release from the dual pipelines, and does not discuss that threat with respect to any other

portion of Line 5. The Staff also maintains that long-term trends in the fossil fuel industry are irrelevant to this Act 16 case.

The Staff argues that the Commission must consider the public need for the Replacement Project, and not the public need for Line 5 or whether the Replacement Project will extend the lifespan of Line 5. The Staff contends that the opposing parties can cite to no law supporting such an extension of the Commission's review, and notes that the issue of the authorization of Line 5 has not been noticed as required under the APA. The Staff, like the other parties in support of the motion, contends that such an extension would have a chilling effect on future applicants seeking to improve, relocate, or reinforce pipeline segments. The Staff notes that maintenance can extend the life of any asset, but argues that proposed maintenance should not automatically trigger review of the public need for the entire pipeline system.

The Staff further contends that the initial ruling was correct with respect to treaty rights. The Staff indicates that it has already initiated consultation with Bay Mills and other Tribes, but argues that treaty rights cannot expand the Commission's jurisdiction. The Staff states that it agrees with Bay Mills "that the Commission should consider reasonable and prudent alternatives to the proposed pipeline project, including the impact of the tunnel, the public need for the project, and how the project impacts relevant treaty-impacted rights, such as fishing rights in the Straits of Mackinac." *Id.*, p. 22.

C. The Michigan Environmental Protection Act Review

In its motion, Enbridge argued that MEPA does not apply to the activity of constructing the tunnel proposed in the application, and does not allow for the consideration of climate change in determining whether to approve the Replacement Project under Act 16. *See,* MCL 324.1705. The Staff agreed with Enbridge that MEPA does not allow consideration of climate change in

examining the impact of the proposed activity, but disagreed regarding the applicability of MEPA to construction of the tunnel. The MEC Coalition, ELPC/MiCAN, Bay Mills, and FLOW opposed the request to limit evidence regarding climate change.

The ALJ found that, in light of his conclusion that the tunnel is a fixture under MCL 483.1(2), is a facility under Rule 447, and is a necessary component of the duties imposed by MCL 483.2b, MEPA is applicable to the tunnel activities proposed in the application. Initial ruling, p. 17. The ALJ stated that, "[b]ecause the Utility Tunnel must be considered in determining whether the project can be approved under Act 16, it is necessarily part of the 'conduct' in a licensing proceeding subject to review under MEPA." *Id.* The ALJ acknowledged that the Commission will also be able to rely on the expertise of EGLE and USACE as part of its MEPA review. *See,* 2 Tr 197-201. The ALJ denied the motion in limine on the issue of the applicability of MEPA to the tunnel activities proposed in the application. No party sought leave to appeal this decision.

Turning to the issue of climate change, the ALJ noted that MEPA requires an examination of the "conduct" proposed in the license application, and found that the "conduct in this case is the activity proposed in the Application and subject to the Commission's jurisdiction under [the] Act: the replacement of the existing pipelines on the bottomlands with a pipeline in a Utility Tunnel." Initial ruling, p. 18. The ALJ found that "consideration of the environmental effect of the oil transported on the pipeline after it is refined and placed in the market for consumption would also extend the conduct to the extraction and refinement processes." *Id.* He found that the parties opposing the motion failed to show any legal support for such a broad construction of MEPA. The ALJ concluded that the "Commission lacks jurisdiction over greenhouse gas emissions that may result from oil shipped on Line 5 after it is refined and consumed." Initial ruling, p. 19. The ALJ

granted the motion in limine on the issue of whether the review under MEPA requires an examination of evidence of climate change.

FLOW, Bay Mills, the MEC Coalition, and ELPC/MiCAN seek leave to appeal this decision in the initial ruling.

In its application, the MEC Coalition argues that the Commission must consider climate change as part of its MEPA analysis. Distinguishing this case from the *Buggs* cases, in which the appellants argued that the Commission's pipeline approval decision might encourage the construction of more gas wells utilizing hydraulic fracturing, the MEC Coalition posits that:

> unlike hydraulic fracturing, there is no regulatory body in Michigan that has exclusive authority to regulate climate change issues. Instead, it is an issue that all state agencies with regulatory powers that impact the environment must consider at some level, and would inform an agency's MEPA analysis if evidence of climate change-related pollution, impairment, or destruction of natural resources tied to conduct the agency authorizes is presented.

The MEC Coalition's application for leave to appeal the initial ruling, p. 28. The MEC Coalition notes that the Commission has previously considered the issue of climate change in adopting weather normalized sales, and in the filing requirements for integrated resource plan (IRP) filings. *See,* June 3, 2010 order in Case No. U-15985, p. 39; November 21, 2017 order in Case No. U-18418, p. 72. The MEC Coalition contends that it is unreasonable to argue that the Commission may not consider climate change in its MEPA analysis simply because it does not regulate greenhouse gas (GHG) emissions.

In its application, Bay Mills notes that Governor Whitmer has recently set decarbonization goals for Michigan in Executive Order (EO) 2020-182 and ED 2020-10, which articulate the public need to move away from fossil fuels and thereby mitigate the worst harms associated with GHG emissions. Bay Mills argues that, because the fuels transported by Line 5 contribute to GHG emissions, the Replacement Project and the assessment of the public need for the project must be

viewed in light of the state's climate goals. Bay Mills notes that ED 2020-10 finds that climate change is already degrading Michigan's environment and hurting the state's economy, and further finds that the state needs to eliminate its dependence on out-of-state fossil fuels. Bay Mills contends that, in order for the Commission to make a determination on the public need for the Replacement Project, "evidence must be permitted on how the Project, which would transport fossil fuels from out of state, relates to Michigan's public need to eliminate dependence on out of state fossil fuels and their downstream impacts on the health and well-being of Michigan residents." Bay Mills' application for leave to appeal the initial ruling, p. 36.

Bay Mills further argues that the Commission's MEPA analysis must examine whether GHGs will contribute to "pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in those resources." MCL 324.1705(2). Bay Mills states it this way:

> The Project will transport fuels so that they can be refined for petroleum products, including gasoline and aviation fuels, which emit greenhouse gases when combusted. Greenhouse gas emissions contribute to "pollution, impairment, or destruction" of natural resources. Thus, the greenhouse gas emissions that will result from fuels transported by the Project must be considered in a MEPA analysis.

Bay Mills' application for leave to appeal the initial ruling, p. 38 (notes omitted). Bay Mills posits that there is no dispute that fossil fuels will be transported through Line 5 and will be combusted, and argues that foreseeable GHG emissions are a typical consideration in doing an environmental impact analysis. Bay Mills urges the Commission to avoid a decision that is based only on immediate concerns and the Replacement Project.

FLOW also points to the State of Michigan's new commitments to address climate change, noting that Michigan joined the U.S. Climate Alliance in February 2019. FLOW avers that state agencies are integrating climate assessments into their departmental programs, and notes that in Section 6t of Public Act 341 of 2016 the Legislature required the consideration of environmental

factors in utility IRPs. *See,* MCL 460.6t(5)(m). FLOW encourages the Commission to reject the ALJ's finding that the conduct at issue in this case does not include the environmental effects of extraction, refinement, and consumption of crude oil. FLOW maintains that this finding is contrary to the purposes of MEPA and Act 16, and is short-sighted. FLOW argues that:

> [a]s the tunnel is proposed to extend the operable life of Line 5 for 99 years, the MPSC must determine the evaluate [sic] the environmental and health consequences of approving the tunnel. When gasoline and diesel fuel are burned they produce carbon dioxide a greenhouse gas (GHG), carbon monoxide, nitrogen oxides, particulate matter, and unburned hydrocarbons. Scientific consensus holds that these unavoidable byproducts of petroleum combustion have profound environmental, climactic, and public health consequences that are now quantifiable and monetizable. Line 5 transports approximately 8.4 billion gallons of crude oil and natural gas liquids per year (23 million gallons per day). The combustion of these petroleum fuels will yield approximately 57 million tons of atmospheric carbon annually.

FLOW's application for leave to appeal the initial ruling, pp. 23-24 (note omitted). FLOW contends that climate change is already affecting Michigan, and that MEPA imposes additional environmental review requirements that are supplemental to other administrative and statutory schemes. MCL 324.1706.

In their application, ELPC/MiCAN begin by noting that the Commission has already highlighted the importance of a well-developed record in this proceeding. *See,* June 30 order, p. 69. ELPC/MiCAN argue that the primary function of a motion in limine at such an early stage in a proceeding is to limit discovery, which thereby also limits the record. Like the other appellants, ELPC/MiCAN make an offer of proof regarding the environmental effects associated with the Replacement Project, arguing that the information that they will provide will assist the Commission in its decisionmaking. The offered information will include total GHG emissions from the project; the environmental, public health, and social welfare costs associated with the GHG emissions; and the placement of the estimated emissions within the context of global and

state policy goals. ELPC/MiCAN argue that they are entitled to discover relevant information from Enbridge, including:

> information on the materials and methods used in construction of the tunnel and pipeline, the known sources of the petroleum to be transported through the Proposed Project, the known end-uses of that petroleum, the operational and economic life of the Proposed Project, and whether the Proposed Project is expected to extend the time period over which petroleum products will be transported by Enbridge through the Straits of Mackinac.

ELPC/MiCAN's brief in support of its application for leave to appeal the initial ruling, p. 5.

ELPC/MiCAN argue that the language of MEPA clearly requires examination of both the direct and indirect effects of the Replacement Project. They posit that GHG emissions are pollutants that threaten Michigan's natural resources and must be considered under MEPA. They argue that it is clear legal error to fail to determine the magnitude of the impact of this pollutant in the MEPA analysis. ELPC/MiCAN contend that the ALJ erred when he found that GHG emissions that result both directly from the construction of the tunnel and indirectly from the project's "likely and quantifiable upstream and downstream impacts" are not relevant to this case. *Id.*, p. 8. ELPC/MiCAN argue that this finding does not make sense given the ALJ's first finding that MEPA clearly applies to the Replacement Project.

ELPC/MiCAN assert that the environmental effects at issue in this case are not speculative. They contend that the fact that the Commission does not have authority to regulate GHG emissions does not mean that such emissions play no role in the Commission's MEPA determination, and argue that "MEPA requires analysis of both direct and indirect environmental impacts, because it instructs agencies to consider both conduct that ***has*** and conduct that is ***likely to have*** the effect of polluting, impairing, or injuring the environment." *Id.*, p. 11 (emphasis in original). ELPC/MiCAN argue that the initial ruling overlooks this statutory directive, stating:

> [w]hile the Commission does not have jurisdiction over under [sic] Act 16 over the extraction of oil in Canada, or the refinement of oil in Detroit, the Commission does have the discretion under MEPA and Act 16 to evaluate credible expert testimony on the likely impact the Proposed Project will have on the amount of greenhouse gas emissions resulting from the known uses of the petroleum products that are transported through the replaced section of pipeline in the Straits of Mackinac.

Id., p. 12. Regarding Enbridge's argument that it will transport the same amount of oil whether the project is approved or not, ELPC/MiCAN, like the other appellants, assert that this is a question of fact. ELPC/MiCAN contend that there is little dispute that the Replacement Project will extend the useful life of Line 5. Finally, ELPC/MiCAN argue that the scope of discovery is broad. *See,* MCR 2.302(B).

Turning to the responses, MSCA again expresses support for the initial ruling.

In their response, the Associations argue that the initial ruling correctly found that MEPA does not require a review of the environmental effects of GHG emissions with respect to the Replacement Project, because the "conduct" at issue is the replacement of the dual pipelines with the single pipeline and tunnel. They argue that, in all MEPA actions, the focus is on the applicant's actual conduct and actions. *See, Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 517; 684 NW2d 847 (2004). The Associations point out that Enbridge's application does not seek approval for consumers' consumption of fossil fuels, but seeks only to relocate the existing pipeline.

The Associations contend that the Michigan Court of Appeals has not required the Commission to carry out an independent investigation or conduct a contested hearing under MEPA, and has held that the Commission need not consider speculative arguments (such as arguments about whether a pipeline would encourage the growth of new production wells in the future). *See, Buggs I* and *Buggs II*. Rather, the Associations argue, the court has affirmed that the Commission may make a MEPA determination under Section 5(2) based on whatever materials

are presented in the record. The Associations note that such materials may include the determinations made by other agencies that are also conducting reviews, such as, in this case, EGLE and USACE. The Associations explain that Enbridge must obtain a wetlands protection permit, a Great Lakes Submerged Lands Act disturbance permit (MCL 324.32501 *et seq.*) and a National Pollutant Discharge Elimination System permit from EGLE,[15] as well as permits under the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act from USACE. The Associations posit that these materials may provide information for the Commission in making its MEPA determination.

In its response, Enbridge contends that the parties opposing the motion are simply opposed to the use of fossil fuels; but argues that the MEPA review is confined to the Replacement Project. Enbridge argues that the ALJ properly applied the plain language of MEPA and the opposing parties have pointed to no case where the Commission considered climate change in the context of an Act 16 application. Enbridge notes that Act 16 does not contain the extensive environmental mandates contained in MCL 460.6t, the statute governing IRPs. Enbridge offers that the Commission has already rejected an expansive interpretation of the term "conduct" as that word is used in Section 5 of MEPA in the September 23, 2015 order in Case Nos. U-17195 *et al.*, where the Commission found that it lacked jurisdiction to examine whether a pipeline would encourage future new production wells utilizing hydraulic fracturing.

Addressing EO 2020-182, which created the Council on Climate Solutions, Enbridge reminds the Commission that it has only the statutory powers granted to it by the Legislature, and argues that the EO does nothing to expand the Commission's authority. Enbridge argues that issues such as the causes of climate change and potential changes in consumer behavior are outside the scope

[15] These permits were granted after the briefing had been filed.

of this proceeding. The company further argues that "the issue of whether greenhouse gases generated by the construction activity to relocate the Straits crossing within a tunnel need not be considered by the Commission," and reminds the Commission that it is not required to conduct an independent investigation, or even a contested case, under Section 5(2) of MEPA. *Buggs I*, pp. 9-10**;** *Buggs II*, pp. 10-11. Finally, Enbridge argues that MEPA does not require the submission of evidence regarding alternatives, and that, in any case, alternatives to the operation of Line 5 are irrelevant to this case. With respect to the Replacement Project, Enbridge contends that the only relevant scenarios are the status quo or the proposed relocation of the 4-mile segment in the Straits.

In its response, the Staff urges the Commission to affirm the initial ruling. The Staff avers that the Commission must conduct its own analysis of the proposed project, and that that analysis must focus on the conduct proposed in the application. *State Hwy Comm*, 392 Mich at 185-186, 190-191. The Staff contends that the ALJ properly found that the conduct at issue herein does not involve the extraction, refinement, or consumption of fossil fuels, and that the Commission lacks jurisdiction over GHG emissions that may result from products shipped on Line 5. The Staff argues that the Commission's review involves the replacement and relocation of the 4-mile segment beneath the Straits and the construction and operation of the utility tunnel that will house the new pipeline segment.

The Staff also notes that Act 16 and Section 5 of MEPA do not contain the same environmental requirements as MCL 460.6t, and the opposing parties have not cited any statute or other precedent authorizing the Commission to consider indirect emissions, or upstream or downstream impacts, from the proposed project under MEPA. The Staff avers that the Commission's decision on the application is "unrelated to the consumption habits of the public."

Staff's response to the applications for leave to appeal the initial ruling, p. 19. The Staff argues that the Commission has no statutory authority to include a climate change analysis in rendering licensing or permitting approvals, and has never made the consideration of GHG emissions a part of an Act 16 case. Regarding EO 2020-10 and its commitment to include considerations of climate change in government decisionmaking, the Staff posits that GHG emissions from electric generation are driven by IRPs.

IV. THE RULING ON REMAND

The ALJ began the remanded decision by noting that the December 9 order was issued by the Commission in response to issuance of the Notice.[16] The ALJ stated that the initial ruling rejected the arguments of those opposing the motion in limine regarding the necessity of inquiring into the public need for Line 5, and the arguments favoring a review of the environmental impacts of the consumption of petroleum products that are transported on Line 5. He noted that both of these issues were appealed to the Commission. The ALJ stated that the December 9 order "did not reach the merits of the Appeals, but rather directed rehearing and reconsideration of the scope of the Act 16 and MEPA inquiry relative to the Notice." Ruling on remand, p. 4. The ALJ describes the issues on remand as follows:

> Enbridge, the Associations, [MLDC], [MSCA], and Staff argue the Notice cannot expand the Commission's jurisdiction under Act 16 and MEPA, and the holding in the Initial Ruling on the scope of this case is proper. Further, these Parties contend the litigation concerning the Notice is in its early stages and will likely take years before the issue is decided and appeals are exhausted. Conversely, the [MEC Coalition], ELPC, FLOW, and the Attorney General . . . contend the Notice necessarily requires the scope of the case include a determination of whether a

[16] In response to arguments from Enbridge and the Staff about its admissibility, the ALJ found that the Notice is on the record in this case because the Commission relied upon it in the December 9 order, and, additionally, because it is admissible as the type of evidence that a reasonable person would rely on in the conduct of their affairs. Ruling on remand, p. 13, n. 6; *see,* MCL 24.276, MCL 24.275.

> public need exists for Line 5, consideration of the safety and operational aspects of Line 5, and development of a record of the environmental effects of the petroleum products transported on Line 5. To these Parties, the litigation is of no moment, and as of May 13, 2021, the dual pipelines can no longer legally transport petroleum products and Line 5 will be decommissioned.

Ruling on remand, p. 5 (note omitted).

A. Public Need for Line 5/Operation of Line 5

The ALJ began with the Act 16 analysis. He noted that the motion in limine argued that the Commission's review of the Replacement Project does not encompass consideration of the public need for, or operational and safety aspects of, Line 5 in its entirety. The initial ruling granted this part of the motion, finding that "under Act 16 the proper inquiry for a proposal involving a segment of an existing pipeline is on that segment, as opposed to the entire pipeline system." Ruling on remand, p. 13. The ALJ stated that this holding remains "before the Commission under the pending Appeals, but under the Order of Remand is to be reconsidered in light of the subsequent issuance of the Notice." *Id.* The ALJ found that, with respect to the Notice, "the only definitive point is that as of May 13, 2021, the State will consider the easement withdrawn and revoked and Enbridge will consider the easement valid." Ruling on remand, p. 14 (note omitted). Noting that Enbridge has been issued the requisite permits by EGLE, the ALJ found that any issues regarding the public trust have been resolved. *Id.,* pp. 11-12.

The ALJ explained that the parties opposing the motion argue that the Notice serves as a basis for expanding the scope of this proceeding to include an examination of the entirety of Line 5. The ALJ disagreed. He noted that the 1953 order is still in effect and found that the pipeline meets a public need and serves the public interest, and authorized the construction, operation, and maintenance of Line 5 under Act 16. Thus, he determined, to accept that the Notice requires another finding of public need means that the 1953 order is being revisited, and therefore that the

Commission is taking steps toward the possible "suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license" under MCL 24.292(1), MCL 24.205(a), and *Rogers v Mich State Bd of Cosmetology*, 68 Mich App 751; 244 NW2d 20 (1976) (*Rogers*). The ALJ found that, in order for the Commission to undertake such a review, first, the "agency shall give notice . . . to the licensee of facts or conduct which warrant the intended action;" second, "the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license" through a hearing that complies with *Rogers*; and third, a second notice of hearing commences the contested case. Ruling on remand, p. 16; MCL 24.292(1); *Rogers,* 68 Mich App at 754. The ALJ noted that the Commission did not provide this type of notice to the permittee, and that this is not an agency-initiated proceeding but rather a proceeding based on the Act 16 application filed by Enbridge.

The ALJ observed that all parties have the right to offer relevant evidence regarding the public need for the activity proposed in the application, but found that the public need for Line 5, as established by the 1953 order, is not relevant to this proceeding. He found that the Notice has no effect on Enbridge's existing authorization for Line 5 as established in the 1953 order. The ALJ noted that the Commission has, in its discretion, the authority under Act 16 to revoke a license previously granted, if it chooses to commence that type of proceeding based upon the Notice. *See,* MCL 483.3(1). But, he found, that proceeding must comply with the requirements of the APA and *Rogers*.

The ALJ further found that, even if the Notice is given presumptive effect and Enbridge loses the right to operate the dual pipelines on May 13, 2021, this does nothing to extinguish the legal right to operate Line 5 under the 1953 order, stating:

> as Enbridge and Staff note if the operation of Line 5 ceases for whatever reason, under Act 16 it can be restarted in the future under the existing license without first

> having to obtain Commission approval. See Enbridge Reply Brief, pg. 15; Staff Reply Brief, pgs. 2, 9; 5 TR 337-338, 400-401. While the practical effect of the Notice on Line 5 on May 13, 2021, is unknown, its legal effect does not extend to revoking the Act 16 license issued in the 1953 Order or nullifying the public need/public interest determination embodied in that license. Based on the foregoing, to accept the Notice as requiring a reexamination of the public need of Line 5 under Act 16, along with its operational and safety aspects, would result in a diminishment of its existing license under §92(1) of the APA [MCL 24.292(1)] without providing the procedural due process protections afforded a licensee. Accordingly, the Notice cannot be used to expand the scope of this case to include an examination or determination of the public need for Line 5, or any aspect of its operation and safety.

Ruling on remand, pp. 18-19.

FLOW, the MEC Coalition, and Bay Mills filed applications for leave to appeal the ruling on remand.

In its second application for leave to appeal, FLOW focuses on the easements. FLOW contends that the ALJ misapplied the public trust doctrine, and that Enbridge has not been granted authorization for the 2018 easement from the DNR, the MSCA easement assignment, or the 99-year leaseback. FLOW argues that, in the absence of a finding by the DNR that the public trust in the lake waters will not be impaired, the easement, the assignment, and the lease are all void. FLOW charges the DNR with not having made the necessary determinations, and contends that this requires reversal of the ALJ's determinations in the ruling on remand. FLOW further alleges that the 1953 easement suffers from the same lack of authorization because the required findings regarding the public trust were never made. *See,* MCL 324.32512, MCL 324.32502 through MCL 324.32508. FLOW contends that the Commission's prior findings cannot form a basis for narrowing the review in the instant case to an examination of the public need for the Replacement Project.

In its second application for leave to appeal, the MEC Coalition argues that the Notice means that it is likely that Line 5 will not operate in the Straits until the tunnel is approved and

constructed. The MEC Coalition points to Enbridge's repeated claims, in its motion in limine and in the subsequent briefing, that the company will continue to operate Line 5 in perpetuity whether or not the Replacement Project is approved. After the Notice, the MEC Coalition posits that this is simply posturing, because the State has ended the operation of Line 5 and the pipeline is decommissioned. The MEC Coalition argues that, "[u]nder these precepts, because the foundation of Enbridge's motion is a factual assertion that is contested or in doubt, that precludes the granting of the motion. There is no factual basis on which to assume that the tunnel is irrelevant to the remaining longevity of Line 5." The MEC Coalition's application for leave to appeal the ruling on remand, p. 10.

The MEC Coalition repeats some of the arguments made in its first application, stating that Enbridge has put the issue of public need into play in this case, that this determination must consider the entire pipeline system, and that, under the APA, the intervenors are entitled to counter the assertions made by Enbridge. The MEC Coalition highlights the "need for evidence on the underlying assumption of perpetual future operation." *Id.,* p. 12. With respect to the need for the Replacement Project, the MEC Coalition asserts that Enbridge has addressed the issue of fuel demand, as well as the issue of alternatives to the dual pipelines, by including its alternatives analysis with the application.

The MEC Coalition asserts that the Commission has, in past Act 16 cases, looked at the entire pipeline and not just the segment addressed in the application, in the sense that the Commission has made note of changes in demand that drive requests to increase capacity. *See,* 2001 order, p. 15; 2013 order, p. 23. The MEC Coalition maintains that in these prior Act 16 cases the Commission "reviewed the public need for replacement segments under Act 16 by considering the need for the pipeline system of which the segments were a part." The MEC Coalition's

application for leave to appeal the ruling on remand, p. 20. The MEC Coalition argues that, because the 4-mile segment at issue here is the linchpin of the Line 5 system, such a review is even more important in this case because approval will allow a decommissioned pipeline to restart.

The MEC Coalition contends that the 1953 order made no findings with respect to public need for Line 5, nor did the *Lakehead* case, stating that:

> neither the 1953 Orders nor *Lakehead* decided the issue explicitly. The standard had not been articulated yet and the 1953 Orders and *Lakehead* were responding to a different question. It would be quite a stretch indeed to conclude that the 1953 Orders and *Lakehead* made findings on a standard that had not been articulated yet at that time and that these findings should be deemed conclusive for all time and for all related future projects.

Id., p. 23. The MEC Coalition reiterates that it is not seeking to alter any prior findings, but rather simply to contest the public need for a new project that would extend the use of Line 5 by decades. Thus, they argue, there are no notice or due process issues in the instant case because the intervenors do not seek to revoke any prior permits or licenses. The MEC Coalition avers that this is a new license that will have the effect of restarting a closed pipeline.

In its second application for leave to appeal, Bay Mills repeats many of the arguments made in its first application, and indicates that it incorporates by reference the briefing of the MEC Coalition and ELPC/MiCAN. Bay Mills states that, following issuance of the Notice, the Staff has paused its consultation with the Tribal intervenors. Bay Mills provides more detail respecting its offer of proof.

Bay Mills argues that the Notice makes the determination of whether there is a public need for Line 5 more exigent, arguing "If Michiganders will not need the fuels that would be transported by the Project, then there is no need for the Project." Bay Mills' application for leave to appeal the ruling on remand, pp. 16-17 (note omitted). Bay Mills notes that Governor Whitmer, in ED 2020-10, has indicated a public need to "move away from the very fuels that would be transported by

the Project." *Id.,* n. 41. ED 2020-10 includes an explicit commitment to reduce greenhouse gas emissions by 2025 and achieve carbon neutrality by 2050; and because of this, Bay Mills argues, the Commission must look at whether approval of the Replacement Project will extend the life of Line 5. Bay Mills posits that a court may issue a permanent injunction against operation of the dual pipelines. Bay Mills again asserts that Enbridge has put the issue of the public need for Line 5 into question, as well as the length of its future operation, and the parties have the right to test this evidence.

As it did in its first application for leave, Bay Mills asserts that the Commission must also examine the safety of Line 5, under obligations imposed by Tribal treaty rights, MEPA, and Act 16. Bay Mills points out that the Notice acknowledges the Tribal Nations' interests in the habitat of the Straits. Bay Mills states that "Treaty resources would be impacted by the approval of a Project that would allow Line 5 to operate well into the future." *Id.*, p. 24. Bay Mills argues that, under *State Hwy Comm*, the Commission must conduct an independent analysis of the evidence presented in this case, as well as consider the evidence embodied in other agencies' determinations. Bay Mills also contends that the Commission must consider alternatives, including:

> evidence regarding the risk of oil leaks and spills to the Great Lakes and inland waters and resources from Line 5 if the Project is constructed. The Commission should also consider the risks from either an alternative method of delivering the commodities carried by Line 5 or the existing pipeline operating for a shorter duration than if the Project is allowed and constructed (as it almost certainly will be, in light of the Revocation and Termination).

Id., p. 28. Bay Mills again argues that, under the APA, the parties must be allowed to rebut Enbridge's assertion that the Replacement Project will reduce the risk of an oil spill into the Great Lakes. Bay Mills wishes to present evidence regarding hydrologically connected waterways and potential environmental damage. Like the MEC Coalition, Bay Mills describes the Replacement

Project as reinstating a nonoperational pipeline. Bay Mills again avers that nothing in federal law limits the Commission's authority to review Line 5's safety, stating "[b]ecause the Commission's obligations under Tribal Treaties, MEPA, Act 16, and the APA are not safety standards covered by Section 60104(c) of the PSA, none of those authorities are preempted by the PSA." *Id.,* p. 33.

In its response, MSCA supports the ALJ's findings in the ruling on remand.

In its response, MLDC also supports the ruling on remand, arguing that the Notice does not expand the scope of this case or the Commission's jurisdiction. MLDC argues that the Replacement Project will address the environmental and operational problems associated with the dual pipelines and will generate nearly two million work hours providing collectively-bargained jobs, and will help maintain jobs at regional refineries. MLDC contends that the actual effect of the Notice cannot be ascertained at this time, and urges the Commission to act expediently.

The Associations also argue that the Notice does nothing to expand the scope of this case or the Commission's jurisdiction, and that the Replacement Project is the conduct at issue. The Associations aver that the Commission can prevent needless delay in this case by firmly establishing the appropriate scope. The Associations repeat their arguments regarding the 1953 order and the public interest, and assert that the continued need for Line 5 has been reaffirmed in Act 359, which finds that the tunnel "is for the benefit of the people of this state." MCL 254.324a(5). The Associations point out that the Notice does not challenge the public need for Line 5, and that the press release announcing the Notice explicitly stated that the Notice did not prevent Enbridge from constructing the tunnel. The Associations contend that the Notice was not intended to affect the progress of the Replacement Project. The Associations argue that, if the Notice in fact decommissioned the whole pipeline, then it violated the due process requirements contained in the APA and *Rogers.*

In its response, the Staff also supports the ruling on remand. Addressing some of the arguments and offers of proof, the Staff states that:

> [w]ithout reasonable and legally sound limitations, the Joint Appellants' anything-goes-approach would expand and weigh down the evidentiary record until it buckles. For example, proposed topics of consideration include BP restructuring its business model, oil and gas producers filing for bankruptcy, cancellation of tar sand projects, global climate change impacts related to the use of petroleum, electric vehicle industry growth, and the oil and gas policies of foreign countries.

Staff's response to applications for leave to appeal the ruling on remand, p. 7. The Staff notes that the Commission itself described the application as proposing the "replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel" in the June 30 order, p. 68.

The Staff maintains that the Commission's three Act 16 criteria are well established, and notes that, after the issuance of *Buggs I*, the Commission must also conduct a MEPA review. The Staff notes that the Commission is a creature of statute, and the scope of breadth of the agency's authority is limited by legislative mandate. *See, Union Carbide Corp v Pub Serv Comm*, 431 Mich 135; 428 NW2d 322 (1988). The Staff argues that the key word in the Act 16 review criteria is "pipeline," and that "[n]otably the latter two considerations about the design, route, and whether the pipeline meets or exceeds industry standards leaves no doubt what pipeline is in question." Staff's response to applications for leave to appeal the ruling on remand, p. 9. The Staff notes that in the 2002 order, the Commission's review was limited to the 26-mile segment at issue in the case, and at no point in that order did the Commission consider any other part of Wolverine's pipeline system, or whether the proposed segment would extend the operation of the rest of the system. Likewise, the Staff notes, in the 2013 order the Commission reviewed the proposed five, noncontiguous pipeline segments, and did not revisit the public need for the remainder of Line 6B or any other part of the Lakehead pipeline system. The Staff contends that the appellants are

insisting on a new requirement that the applicant demonstrate the public need for a previously authorized pipeline to continue to operate. The Staff also notes that Enbridge is required to maintain Line 5 for as long as it chooses to operate Line 5. The Staff again contends that simply because a project has a beneficial long-term effect should not result in an automatic review of the entire pipeline system. The Staff notes that the litigation surrounding the Notice gives rise to uncertainty.

The Staff argues that government-to-government consultation does not expand the Commission's Act 16 jurisdiction. The Staff states that consultation with the Tribes was briefly delayed in order to allow time to evaluate the impact of the Notice, but is scheduled to resume in April 2021.[17]

The Staff repeats its arguments regarding the finding of public need in the 1953 order and in *Lakehead.* The Staff argues that the appellants may not simply reverse a Commission determination and require an applicant to relitigate a final order. Like the Associations, the Staff contends that the Notice does not revoke or rescind the 1953 order, and notes that EGLE has already found that the adverse effects to the public trust are minimal and has issued the permits for which that finding must be made. The Staff posits that Act 16 is focused on the siting of a pipeline and its associated fixtures and facilities, whereas the Governor and the DNR are concerned with the conveyance of property interests. MCL 483.6; cf. MCL 324.2129. The Staff notes that all of the cases cited by FLOW apply the public trust doctrine to the DNR (and its predecessor, the Conservation Commission), and not to the Commission. The Staff argues that Act 359 reaffirmed the public need for Line 5 and found that the tunnel is for the benefit of the people of Michigan. MCL 254.324a(5). In the Staff's view, the Legislature has conclusively determined that the

[17] The Commission notes that this consultation took place on April 15, 2021.

Replacement Project is in the public interest. The Staff goes on to repeat its argument that, even if the 1953 order were deficient, the APA and *Rogers* set certain requirements for making such a determination.

In its response, Enbridge also argues that the Notice has no effect on either its application or the Commission's jurisdiction. Enbridge contends that the effect of the Notice will be decided by the courts, and states that, in its complaint for declaratory relief, the State acknowledged that actual controversies exist between the parties. Like the other responses, Enbridge notes that the Notice does not address the public need for Line 5 or undermine the approval given in the 1953 order. The company argues that, in any case, if the Notice attempted to do so then the procedural safeguards provided by Section 92 of the APA and the *Rogers* case would need to be satisfied. Enbridge points out that Act 359, the 2018 easement grant, the assignment of the easement by MSCA, and the Agreements are all unaffected by the Notice. Enbridge states that "the Notice simply initiated an additional round of litigation over the validity of the 1953 Easement and Enbridge's compliance with its terms. In the meantime, Enbridge will continue to operate Line 5, including the Dual Pipelines." Enbridge's response to the applications for leave to appeal the ruling on remand, p. 6.[18]

Enbridge argues that the outset of this proceeding is the proper time to hear a motion determining the scope of the case. Mich Admin Code, R 792.10421(1)(d). Enbridge claims that its purpose in filing its application is to further the State's established decision to relocate the Straits crossing into a tunnel, as illustrated by the language of Act 359 and the Agreements.

[18] Enbridge points out that the validity of the 1953 easement is also the subject of an ongoing 2019 action brought by the Attorney General. *See, Nessel v Enbridge Energy, Limited Partnership, et al.*, Ingham County Circuit Court, Case No. 19-474-CE. *Id.*

Enbridge again asserts that the background information provided by its proffered witnesses changes nothing about the determinations made by the Legislature in Act 359, and repeats its intent to withdraw any testimony that is found to open the door to an examination of the need for Line 5. Enbridge avers that there is no expiration date on the 1953 order, and no basis in Act 16 for extinguishing an existing pipeline approval every time an improvement project is proposed. Enbridge contends that the 2002 and 2013 orders support these conclusions because, in those cases, the Commission never evaluated the need for the entire pipeline, whether the proposed segment would extend the life of the entire pipeline, or any environmental effects that could occur beyond the location of the replacement segment. Noting that these cases involved lengthy new segments (20 and 42 miles, and 110 and 50 miles), Enbridge contends that it seeks to relocate only 4 miles of pipeline, and that, unlike these cases, the relocation will add no new capacity. Enbridge argues that, in the 2013 order, the Commission rejected as irrelevant evidence pertaining to a portion of Line 6B that was not being replaced.[19]

Enbridge further argues that Tribal rights do not change the scope of this case under Act 16 or the Commission's jurisdiction, and, as a creature of statute, the Commission's jurisdiction is not changed by the Notice. Enbridge again argues that, as an interstate pipeline, the federal PSA preempts a state's examination of the safety of an interstate pipeline, and any allegations that go to the alleged safety of the operations of Line 5 in its entirety are outside the scope of this

[19] The Commission rejected as irrelevant proposed Exhibit I-19, a National Transportation Safety Board Report on the July 25, 2010 failure of Line 6B in Marshall, Michigan. The Commission approved Enbridge's application to replace the compromised segment of Line 6B in the December 6, 2011 order in Case No. U-16856. In the 2013 order, the Commission found "The segment of Line 6B that failed was the subject of Case No. U-16856. Proposed Exhibit I-19 does not address Enbridge's current application to replace the remaining segments of Line 6B." 2013 order, p. 27 (notes omitted).

proceeding. Enbridge notes that the ALJ's rulings did not preclude any evidence addressing safety issues related to the siting proposed in the Replacement Project.

B. Michigan Environmental Protection Act Review

The ALJ began his analysis by noting that in the initial ruling he found that the conduct subject to review under MEPA is the proposal to relocate the dual pipelines into the tunnel, and thus found the "environmental effects of both the Line 5 system, and the extraction, refinement and ultimate consumption of the oil shipped on that system as being beyond the scope of the Commission's MEPA review." Ruling on remand, p. 19. Here, also, the ALJ rejected the argument that the Notice serves to expand the MEPA review to the entirety of Line 5 and the environmental effects of the products that are transported on Line 5. The ALJ found that the Notice does not change the activity proposed in the application, which is the "conduct" as that term is used in Section 5(2) of MEPA. He further found that the Notice does not change any aspect of the Commission's jurisdiction over this matter, or his initial analysis. The ALJ found that MEPA's focus is on the conduct which is subject to the agency's review, which he found is the proposal to relocate the dual pipelines into the tunnel. *See*, *Preserve the Dunes,* 417 Mich at 517.

In conclusion, the ALJ found that Enbridge's license to operate and maintain Line 5 remains in effect, and that:

> the Notice is relevant under the proper Act 16 review of the project: whether a public need exists to replace the existing dual pipelines on Great Lakes bottomlands in the Straits of Mackinac with a single pipeline in a proposed Utility Tunnel. . . . The issuance of the Notice does not expand the MEPA inquiry to include the environmental effects of the operation and safety of Line 5, or those arising from the production, refinement, and consumption of the oil transported on Line 5.

Ruling on remand, p. 21.

In its second application for leave to appeal, FLOW contends that the Commission's authority under Act 16 and MEPA is broad, and is not limited by any findings in the 1953 order. FLOW asserts that Act 16 explicitly applies to the transport of crude oil, and that "the transport of oil necessarily cannot be separated from its consumption." FLOW's application for leave to appeal the ruling on remand, p. 25.[20] FLOW notes that MCL 324.1706 provides that MEPA is supplementary to other existing regulatory and administrative procedures, and argues that the Commission is required under MCL 324.1705(2) to consider the likely environmental effects of the proposed project and the full range of alternatives to the proposed project. FLOW argues that, in *State Hwy Comm*, the statute in question (the state highway condemnation law) had no express environmental review provision, but the court found the environmental review to be mandatory under MEPA. *State Hwy Comm,* 392 Mich at 189-190. FLOW contends that the Commission may only fulfill its mandate by performing a public need review that looks at "the crude oil markets today and over the course of the Project, the effects and risks associated with operating Line 5, and the critical impacts to dams, shoreline infrastructure, lakes, and Great Lakes and public trust in these waters within the State of Michigan from climate change." FLOW's application for leave to appeal the ruling on remand, p. 29.

In their second application for leave to appeal, ELPC/MiCAN repeat many of the arguments put forth in the first application. ELPC/MiCAN state that GHGs are widely recognized as pollutants, and that they are pollutants that result in environmental and societal damage. Thus, they argue, these pollutants fall under the plain and ordinary meaning of the language in MEPA regarding conduct that may "pollute, impair, or destroy." ELPC/MiCAN note that the

[20] FLOW's application for leave to appeal the ruling on remand is not paginated. The page numbers indicated herein correspond to the Table of Contents provided by FLOW.

Intergovernmental Panel on Climate Change has determined that some natural resources are permanently damaged by GHG emissions. ELPC/MiCAN's brief in support of application for leave to appeal the ruling on remand, p. 12, n. 30, 32, and 34. ELPC/MiCAN argue that:

> While the ALJ concluded that GHG gas emissions are outside the scope of an environmental assessment, the plain language of the statute, the dictionary definition of MEPA's terms and the available caselaw all support that it is within the scope of this contested case for the Commission to consider whether GHG emissions from Enbridge's proposed project will or are likely to pollute, injure, or destroy Michigan's natural resources.

Id., p. 14. ELPC/MiCAN charge the Commission with a duty to examine both direct and indirect GHG emissions, including a review that "is 'not restricted to actual environmental degradation but also encompasses probable damage to the environment as well.'" *Id.,* p. 17, quoting *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975).

ELPC/MiCAN argue that Line 5 is now a decommissioned pipeline, and that therefore the Replacement Project is actually an application to restart a closed pipeline. Thus, ELPC/MiCAN state, Enbridge's application requires the full review under MEPA that would be required for a new Line 5. ELPC/MiCAN assert that this review must include consideration of upstream and downstream GHG emissions. ELPC/MiCAN argue that the ALJ's ruling on remand puts "the most exigent environmental issue of our time . . . beyond the scope of Michigan's most significant environmental protection statute." *Id.,* p. 18. Noting Enbridge's repeated claim that it will operate Line 5 indefinitely whether or not the tunnel is built, ELPC/MiCAN argue that the Notice calls this claim into question, and they offer proof regarding the amount of GHG emissions that will result when the pipeline is restarted after construction of the tunnel is complete. ELPC/MiCAN point out that the Commission is not required to strictly follow the Michigan Rules of Evidence. They also point out that Enbridge will be able to avail itself of motions to strike.

In its second application for leave to appeal, the MEC Coalition posits that, due to the Notice, continued operation of Line 5 is now less likely, and the Commission has a duty under Act 16 and MEPA to review the environmental effects of the project and to consider available alternatives. The MEC Coalition asserts that Line 5 cannot continue to operate because the Notice requires no further action in order to be implemented. The MEC Coalition repeats its arguments regarding the "conduct" proposed by the application and the alleged pollution, impairment, or destruction that may result from that conduct. The MEC Coalition urges the Commission to take a broad view when conducting its environmental analysis.

In its second application for leave to appeal, Bay Mills contends that issuance of the Notice means that, without approval of the Replacement Project, Line 5 is even more likely to cease operations. Bay Mills argues that GHG emissions fall squarely within MEPA and the Commission is required to evaluate environmental conditions both with and without approval of the Replacement Project. Bay Mills argues that the environmental effects of transporting fuels are not as speculative as the possibility of incentivizing future additional gas wells, as was at issue in *Buggs II*. Bay Mills states that GHG emissions are concrete and will be a direct result of approval of the Replacement Project because that project will allow for the continued and extended operation of Line 5. Bay Mills posits that it is irrelevant that the Commission is not empowered to regulate GHG emissions themselves. Bay Mills notes that ED 2020-10 sets a goal of carbon neutrality by 2050 for Michigan, and requires that "[a]ll departments and agencies must follow the policies and procedures developed in connection with this directive." ED 2020-10, p. 1. Bay Mills asserts that GHG emissions have become a standard consideration in environmental reviews for federal agencies, and in some states.

In its response, MSCA supports the ALJ's findings in the ruling on remand.

In their response, the Associations also support the ruling on remand, arguing that the MEPA review must be limited to the conduct proposed in the application. The Associations contend that Line 5 is not a decommissioned pipeline, and argue, moreover, that Enbridge would not need approval to restart the pipeline even if it were. The Associations maintain that nothing in Act 16 requires "a pipeline operator to secure Commission approval to restart a pipeline that was previously approved," and they note that the appellants have provided no authority to support this argument. Associations' response to applications for leave to appeal the ruling on remand, p. 14. The Associations repeat their arguments regarding GHG emissions, and they contend that MEPA is far more limited than the federal law that governs environmental impact statements. The Associations note that the language of MEPA is limited to the effects that the "conduct" at issue "has or is likely to have." MCL 324.1705(2). They aver that ED 2020-10 is unrelated to the Notice and that discussion of the ED exceeds the scope of the question that the Commission designated for remand in the December 9 order. The Associations also argue that FLOW's discussion of the public trust doctrine goes well beyond the scope of the remand order and is not within the Commission's authority under Act 16, in any case.

In its response, the Staff argues that the appellants have not cited a single Commission case where GHG emissions were considered in the context of Act 16 or Public Act 9 of 1929 (Act 9), even though MEPA has been in effect for decades; and the Staff points out that Michigan has no legislative directive requiring that agencies consider GHG emissions when making determinations on permits, licenses, or other approvals. The Staff points out that Enbridge is not seeking authorization to operate Line 5 in this case. The Staff also asserts that the legal effect of the Notice remains unclear, the pipeline has not been shut down or decommissioned, and Enbridge retains the legal right to operate Line 5. The Staff contends that the language of Section 5(2) of

MEPA does not extend to considering the indirect emissions associated with the extraction, refinement, or consumption of petroleum products transported through Line 5, and the statute makes no reference to indirect emissions. The Staff states:

> Staff does not dispute that greenhouse gas emissions could be an appropriate consideration in certain regulatory contexts. Indeed, the Commission has encouraged utilities to document their greenhouse gas emissions in integrated resource planning. . . . However, Staff agrees with the ALJ's Rulings that irrespective of the environmental harm the Joint Appellants contend is caused by greenhouse gas emissions, "MEPA requires an examination of the 'conduct' to determine its effect on natural resources" and "the conduct at issue in this case does not include the extraction, refinement, or consumption of the oil transported on Line 5."

Staff's response to applications for leave to appeal the ruling on remand, pp. 29-30, citing the November 21, 2017 order in Case No. U-18418, p. 5, and quoting the ruling on remand, pp. 18-19.

In its response, Enbridge maintains that the Notice does not serve to expand the Commission's MEPA review to the entirety of Line 5. Enbridge also reminds the Commission that neither Act 16 nor Rule 447 require the pipeline operator to apply to the Commission to approve the restart of a pipeline that holds an existing approval, noting that Act 16 provides the Commission with the authority to approve construction and operation but says nothing about the services provided over the pipeline once it is constructed, or about approvals required to stop or start a pipeline.

Enbridge also argues that the Notice does not extend the Commission's MEPA review to GHG emissions, and the conduct at issue in this case does not include the environmental effects of the extraction, refinement, or consumption of petroleum products. Enbridge notes that the "Commission does not authorize or approve of the use of fossil fuels by consumers which may create GHG," and argues that an agency's grant of authority must be conferred by clear and unmistakable language. *Id.,* p. 27, citing *Union Carbide,* 431 Mich at 151. Enbridge also argues that ED 2020-10 is outside the scope of this remand, which, in the December 9 order, sought only

a review of the impact of the Notice. Enbridge points out that no prior Commission order in an Act 16 proceeding has considered GHG emissions in its MEPA review, and argues that an ED cannot expand the agency's jurisdiction or change the statute's language. Finally, Enbridge contends that FLOW's arguments regarding the public trust are well outside the scope of the Commission's jurisdiction and the Great Lakes Submerged Lands Act provides no authority to the Commission.

V. DISCUSSION

Rule 433 establishes the standards for reviewing applications for leave to appeal. Not every application merits immediate review. An appellant must establish one of the following conditions before the Commission will grant review:

> (a) A decision on the ruling before submission of the full case to the Commission for final decision will materially advance a timely resolution of the proceeding.
>
> (b) A decision on the ruling before submission of the full case to the Commission for final decision will prevent substantial harm to the appellant or the public-at-large.
>
> (c) A decision on the ruling before submission of the full case to the Commission for final decision is consistent with other criteria that the Commission may establish by order.

Rule 433(2)(a)-(c). If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate. June 5, 1996 order in Case No. U-11057, p. 2; May 19, 2020 order in Case No. U-20697, p. 9.

In their applications for leave to appeal, FLOW, the MEC Coalition, Bay Mills, and ELPC/MiCAN argue that the Commission should grant the applications because a decision on the initial ruling and ruling on remand before submission of the full case to the Commission will

materially advance a timely resolution of the proceeding and will prevent substantial harm to each appellant and to the public.

The Commission notes that discovery is ongoing, and that testimony from the Staff and the intervenors is due on May 18, 2021. The Commission grants the applications for leave to appeal the initial ruling and the ruling on remand (the rulings). The Commission finds that a timely resolution of the full proceeding will be advanced by granting both rounds of applications and addressing the important issues presented therein.

A. Requirements for Commission Approval of an Act 16 Application

The starting point in the Commission's evaluation of the arguments presented is rooted in the requirements for approval of an application submitted under Act 16. As set forth in its title, the purpose of Act 16 is "to regulate the business of carrying or transporting . . . crude oil or petroleum or its products through pipe lines; . . . [and] to provide for the control and regulation of all corporations, associations and persons engaged in such business" by the Commission. Section 1(2) of Act 16 provides:

> A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines, for hire, compensation or otherwise, or exercising or claiming the right to engage in the business of piping, transporting, or storing crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, or engaging in the business of buying, selling, or dealing in crude oil or petroleum or carbon dioxide substances within this state, does not have or possess the right to conduct or engage in the business or operations, in whole or in part, or have or possess the right to locate, maintain, or operate the necessary pipe lines, fixtures, and equipment belonging to, or used in connection with that business on, over, along, across, through, in or under any present or future highway, or part thereof, or elsewhere, within this state, or have or possess the right of eminent domain, or any other right, concerning the business or operations, in whole or in part, except as authorized by and subject to this act.

MCL 483.1(2). Section 3(1) of Act 16 provides:

> Subject to subsection (2), the commission is granted the power to control, investigate, and regulate a person doing any of the following:
>
> (a) Exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines, for hire, compensation, or otherwise within this state.
>
> (b) Exercising or claiming the right to engage in the business of piping, transporting, or storing crude oil or petroleum, or any of the products thereof, or carbon dioxide substances within this state.
>
> (c) Engaging in the business of buying, selling, or dealing in crude oil or petroleum or carbon dioxide substances within this state.

MCL 483.3(1).[21]

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. 2001 order, pp. 13-17; 2002 order, pp. 4-5; 2013 order, p. 5.

In addition to this three-part test, courts have found that state agencies have an obligation to apply the requirements of MEPA to its decisions, including to Commission pipeline siting cases. *State Hwy Comm,* 392 Mich at 189-190; *Buggs I*, p. 9. Section 5 of MEPA, MCL 324.1705, provides, in pertinent part:

> (1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.

[21] To assist in carrying out this authority, Rule 447(1)(c) provides for the filing of an application with the Commission.

> (2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

Thus, Section 5(2) of MEPA requires that, in an administrative permitting proceeding, an agency must determine whether the conduct under review will pollute, impair, or destroy natural resources, and, if likely so, the proposed conduct shall not be approved if a feasible and prudent alternative exists that is consistent with the reasonable requirements of the public health, safety, and welfare. The substantive duty that is placed on administrative agencies and courts by Section 5(2) is separate from the procedural rights afforded under Section 5(1). *State Hwy Comm,* 392 Mich at 185-186, 190-191; *Buggs I*, p. 9.

In *Buggs I* – a pipeline approval case brought under Act 9 – the Michigan Court of Appeals found that the Commission had duties under MEPA: namely, it had to consider whether the proposed project would impair the environment, whether there was a feasible and prudent alternative to the impairment, and whether the impairment was 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. *Buggs I*, p. 9, citing *State Hwy Comm*, 392 Mich at 185-186; *see also,* September 23, 2015 order in Case Nos. U-17195 *et al.*

Finally, courts have repeatedly found that these MEPA obligations are supplementary to other statutes and regulations and should be read *in pari materia* with other laws. *See, Mich Oil Co v Natural Resources Comm*, 406 Mich 1, 32-33; 276 NW2d 411 (1979). The U.S. Court of Appeals for the Sixth Circuit has similarly held that:

> MEPA is supplementary to existing administrative and regulatory procedures provided by law. It specifically authorizes the court to determine the validity, applicability, and reasonableness of any standard for pollution or pollution control

> equipment set by state agency *and* to specify a *new* or *different* pollution control standard if the agency's standard falls short of the substantive requirements of MEPA.

Her Majesty the Queen v Detroit, 874 F2d 332, 337 (CA 6, 1989) (emphasis in original, internal citation omitted). And the Michigan Supreme Court has held that MEPA "allows the courts to fashion standards in the context of actual problems as they arise in individual cases and to take into consideration changes in technology which the Legislature at the time of the Act's passage could not hope to foresee." *Ray v Mason Cty Drain Comm,* 393 Mich 294, 306-307; 224 NW2d 883 (1975).

Against this backdrop, 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, (3) the construction of the pipeline will meet or exceed current safety and engineering standards, and (4) the project complies with the requirements of MEPA.

B. Applicability of Act 16 Requirements to the Replacement Project

In applying these statutory provisions, the Commission considers the conduct at issue in this case, which is the Replacement Project proposed by Enbridge in the application. The impetus for Enbridge's application is Act 359, which provides an informative background for this discussion. Act 359 is, among other things, "[a]n act authorizing the Mackinac bridge authority to acquire a bridge and a utility tunnel connecting the Upper and Lower Peninsulas of Michigan, . . . [and] authorizing the operation of a utility tunnel by the [Mackinac bridge authority] or the Mackinac Straits corridor authority." Title, Act 359. A "utility tunnel" means "a tunnel joining and connecting the Upper and Lower Peninsulas of this state at the Straits of Mackinac for the purpose of accommodating utility infrastructure, including, but not limited to, pipelines . . .." MCL

254.324(e). Section 14a(1) of Act 359 provides that the "Mackinac bridge authority may acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel." MCL 254.324a(1). Section 14a further provides that:

> (3) . . . The Mackinac bridge authority has the right to use and full easements and rights-of-way through, across, under, and over any lands or property owned by this state or in which this state has any right, title, or interest, without consideration, that may be necessary or convenient to the construction and efficient operation of the utility tunnel.
>
> (4) The Mackinac bridge authority may perform all acts necessary to secure the consent of any department, agency, instrumentality, or officer of the United States government or this state to the construction and operation of a utility tunnel and the charging of fees for its use, and to secure the approval of any department, agency, instrumentality, or officer of the United States government or this state required by law to approve the plans, specifications, and location of the utility tunnel or the fees to be charged for the use of the utility tunnel.
>
> (5) The carrying out of the Mackinac bridge authority's purposes, including a utility tunnel, are for the benefit of the people of this state and constitute a public purpose, and the Mackinac bridge authority is performing an essential government function in the exercise of the powers conferred upon it by this act.

MCL 254.324a(3)-(5). These rights and duties of the Mackinac bridge authority are transferred to MSCA, as follows: "All liabilities, duties, responsibilities, authorities, and powers related to a utility tunnel as provided in section 14a and any money in the straits protection fund shall transfer to the corridor authority board upon the appointment of the members of the corridor authority board under section 14b(2)." MCL 254.324d(1).

Section 14b of Act 359 provides:

> The Mackinac Straits corridor authority is created within the state transportation department. . . . The creation of the Mackinac Straits corridor authority and the carrying out of the Mackinac Straits corridor authority's authorized purposes are public and essential governmental purposes for the benefit of the people of this state and for the improvement of the health, safety, welfare, comfort, and security of the people of this state, and these purposes are public purposes.

MCL 254.324b(1). Upon its creation, and:

> no later than December 31, 2018, the Mackinac Straits corridor authority shall enter into an agreement or a series of agreements for the construction, maintenance, operation, and decommissioning of a utility tunnel, if the Mackinac Straits corridor authority finds all of the following:
>
> (a) That the governor has supplied a proposed tunnel agreement to the Mackinac Straits corridor authority on or before December 21, 2018. . . .
>
> (b) That the proposed tunnel agreement allows for the use of the utility tunnel by multiple utilities, provides an option to better connect the Upper and Lower Peninsulas of this state, and provides a route to allow utilities to be laid without future disturbance to the bottomlands of the Straits of Mackinac.

MCL 254.324d(4)(a)-(b). The Agreements referenced in MCL 254.324d(4) have been duly entered into and affirmed by the courts. *See,* notes 8 and 9, *supra.* Under Act 359, the 2018 tunnel easement has been assigned to Enbridge by MSCA. Exhibit A-6; Application, p. 13.

In its application, consistent with the Agreements executed with the State of Michigan and the easement it has been assigned by MSCA, Enbridge proposes to construct a replacement segment of Line 5 that crosses the Straits, to be housed in the utility tunnel. In its June 30 order, the Commission previously described the Replacement Project as the "replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel." June 30 order, p. 68. As such, the Commission must consider how both the three-part test under Act 16 and the requirements of MEPA apply to the Replacement Project. However, as described more fully below, the application of these provisions do not extend to the remainder of the line approved in the 1953 order.

1. Public Need for Line 5/Operation of Line 5

Enbridge seeks approval for the Replacement Project under Act 16. The appellants argue that the Commission's determination in this Act 16 proceeding must go beyond the bounds of the Replacement Project and must include an examination of whether there is a public need for Line 5, and whether Line 5 may be safely operated. FLOW, Bay Mills, and the MEC Coalition argue that

the ALJ's rulings on the motion in limine and its remand result in the exclusion of relevant evidence from this proceeding and must be reversed.

In his October 23, 2020 initial ruling, the ALJ explained that the scope of this case is dictated by two factors: (1) the activity proposed in the application, namely replacement of the existing 4-miles of dual pipelines located on the bottomlands with a pipeline located in a tunnel, as contemplated in Act 359 and various agreements with the State; and (2) the Commission's jurisdiction over that proposal under Act 16, the administrative rules promulgated under its authority, and MEPA (initial ruling, p. 14), and that "the standards of Act 16 are well established and must be applied in this case." *Id.,* p. 15. As such, the ALJ held:

> Based on those standards, this case involves a review of the proposed pipeline relocation under Act 16 to determine whether a public need exists for it, whether it is designed and routed in a reasonable manner, and whether its construction will satisfy applicable safety and engineering standards. Accordingly, any issues concerning the current or future operational aspects of the entirety of Line 5, including the public need for the 645-mile pipeline that was approved by the Commission in 1953 and affirmed in *Lakehead Pipe Line Co., supra*., is outside the scope of this case.

Initial ruling, p. 15 (note omitted). The Commission agrees.

In the 1953 order, the Commission approved the construction, maintenance, and operation of Line 5, finding that Line 5 was fit for the purpose of carrying and transporting crude oil and petroleum as a common carrier in interstate and foreign commerce. In the 1953 order the Commission stated "[i]t appears to this Commission that in times of national emergency delivery of crude oil for joint defense purposes would be greatly enhanced by operation of the proposed pipe line." 1953 order, p. 4. Denmark Township moved for denial of the application on grounds that the pipeline was not in the public interest. The Commission found the motion to be without merit, and it was denied. *Id.,* p. 8. The Commission found that the proposed Line 5 met the requirements of Act 16, and Lakehead (Enbridge's predecessor) received permission to construct

and operate the pipeline.[22] Subsequently, in *Lakehead*, 340 Mich at 37, the Michigan Supreme Court held that construction and operation of Line 5 was "for a public use benefiting the people of the State of Michigan." Neither Act 16, nor Rule 447, nor Commission precedent require the Commission to make findings with respect to the length of time that an approved pipeline may operate, and such findings are not made in this order. Indeed, while intervenors argue that the issue of whether Line 5 will continue in operation indefinitely (as Enbridge has alleged) is a question of fact that should be tested, what is ignored by these parties is that whether Enbridge holds the legal right to operate the other 641 miles of Line 5 is not a question of fact but rather of law. Nothing in the Commission's 1953 order set a termination date for the operation of Line 5, and no party disputes Enbridge's legal authority to continue to operate the other 641 miles not at issue in this proceeding.

Furthermore, a focus on the need for the Replacement Segment – as opposed to a reconsideration of the need for the entire pipeline – is strongly supported by the Commission's precedent in this area. In the 2001 order, for example, Wolverine sought approval of discrete 12- and 16-inch petroleum products pipeline systems (those which remained after Wolverine's motion to withdraw its application respecting a particular segment was granted). 2001 order, p. 9. The Commission granted approval under Act 16 for Wolverine to construct, operate, and maintain the proposed segments. In granting this approval, the Commission did not examine the remainder of Wolverine's pipeline system that interconnected with the proposed segments, nor did it consider the potential lifespan of any part of Wolverine's system.

[22] It is important to note that the 2014 amendments to Act 16 contained in Public Act 85 of 2014 did not amend the provisions of Act 16 that are at issue in this case. *See,* http://www.legislature.mi.gov/documents/2013-2014/billanalysis/House/pdf/2013-HLA-4885-4DE9C223.pdf (accessed March 17, 2021). The same provisions were in place at the time of the 1953 order. Additionally, Act 359 does not revoke or otherwise affect the provisions of Act 16.

Similarly, in the 2002 order, the Commission examined a 12-inch, 26 mile pipeline segment proposed by Wolverine, under Act 16. Again, the Commission did not consider other interconnected pipeline systems in its decision to approve the 26-mile segment, nor did it consider the potential lifespan of any part of Wolverine's system.

Finally, in the 2013 order, the Commission examined a proposal under Act 16, filed by Enbridge, to construct, operate, and maintain 110 miles of new 36-inch pipeline, and 50 miles of new 30-inch pipeline, which replaced certain 30-inch pipeline segments on Line 6B. The application sought approval to replace five separate, noncontiguous pipeline segments. 2013 order, p. 2, n. 2. Again, the Commission did not examine the remainder of Enbridge's pipeline system that interconnected with the five proposed segments, nor did it consider the potential lifespan of any part of Enbridge's system including Line 6B.

As Commission precedent under Act 16 shows, when deciding an application to construct or relocate pipeline, the Commission has never examined any portion of existing pipeline that is interconnected with the segment that is proposed in the applicant's project but not within the proposed route; nor has it examined how the proposed pipeline segment could affect the lifespan of an existing interconnected pipeline system. The Commission has similarly never considered the projected length of usage of a pipeline system in its review of the public need for the replacement or relocation of a segment of the system. For this reason, the Commission is unpersuaded by the MEC Coalition's argument that the first issue in this case is "whether there is a public need to replace the dual pipelines with a new pipeline in a tunnel so as to perpetuate Line 5 for decades to come." The MEC Coalition's application for leave to appeal the initial ruling, p. 10.

In determining public need, the Commission has instead looked at whether the applicant has explained the need for the construction or relocation of the segment or segments being proposed,

and, where alleged, has considered the capacity and safety issues presented by the use of the existing pipeline segment that is proposed for improvement.

In the instant case, the Commission finds that the first issue is whether there is a public need to carry out the Replacement Project, a project to replace the dual pipelines with a new pipeline in a tunnel, and does not concern approved, existing pipeline that is merely interconnected with the segment that is the subject of the application. The public need for the existing portions of Line 5 has been determined. The public need for the Replacement Project has yet to be determined.

The alleged purpose of the Replacement Project is to improve the safety of the 4-mile segment that crosses the Straits. This is a question of fact that the parties may contest, and that is relevant to all three criteria that are considered in an Act 16 case: whether there is a public need for the Replacement Project, whether the Replacement Project is designed and routed reasonably, and whether the Replacement Project meets or exceeds current safety and engineering standards.

Finally, the Commission also agrees with the ALJ that the Tribal treaty-reserved rights asserted by Bay Mills do not serve to expand the scope of the Commission's Act 16 jurisdiction. The treaty-reserved rights do not confer on the Commission the ability to review the authority to own and operate the segments of an approved pipeline system that are not the subject of the Act 16 application before the agency.

The applications for leave to appeal the rulings on this issue are granted, and the requested relief is denied.

2. Michigan Environmental Protection Act Review

Similar to the analysis in applying the three-factor test on project need, whether the proposed project's design and route is reasonable, and whether it meets or exceeds current safety and engineering standards, the application of MEPA is limited to the conduct at issue in this case. As

such, the Commission's MEPA review does not extend to the entirety of Line 5, including the 641 miles of Line 5 outside of the proposed Replacement Project, but only to the "replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel." June 30 order, p. 68. Issues raised by Bay Mills and other intervenors on potential pollution, impairment, and destruction of Michigan's natural resources resulting from existing sections of Line 5 are therefore outside the scope of the Commission's MEPA review as it relates to the Replacement Project.

However, the Commission also cannot separate the construction of the Replacement Project from the reason for doing so. Such a finding is grounded in the plain language of Act 16, which defines "pipeline" in relation to the product being shipped: a pipeline under Act 16 is one "used or to be used to transport crude oil or petroleum or carbon dioxide substances." MCL 483.2a. Similarly, section 1(2) of Act 16 states that the Act's provisions apply to "A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines …" MCL 483.1(2). 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. As the Commission finds that conduct at issue in constructing the Replacement Project is indistinguishable from the purpose behind it or its result, the Commission's obligations under MEPA must also extend to the products being shipped through the Replacement Project.

As noted above, Section 5(1) of MEPA allows an agency to "permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding . . . involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources." Several parties have intervened in this proceeding and have made assertions about the conduct at issue and its likelihood to have the effect of polluting, impairing, or destroying natural resources in their petitions to intervene, the briefs on this motion, and the offers of proof. The Commission must evaluate these assertions as provided under Section 5(2). Thus, in this proceeding, "the alleged pollution, impairment, or destruction of the air, water, or other natural resources . . . shall be determined" by the Commission. MCL 324.1705(2). Further, as discussed above, courts have held that the Commission does not have a duty to independently investigate whether the project complied with MEPA, but rather could rely on the record presented in the case.

Statutory interpretation begins with the plain language of the statute. The word "pollution" should be understood as it is ordinarily used. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 159; 615 NW2d 702 (2000) (words should be given "their common and ordinary meaning."). The ordinary meaning of "pollution" is "the action of polluting especially by environmental contamination with man-made waste."[23] As noted by ELPC/MiCAN and others, GHGs are widely recognized as pollutants that trap heat in the atmosphere and contribute to climate change, thereby polluting, impairing, and destroying natural resources. *See, e.g.*, ELPC/MiCAN Opposition to

[23] *Merriam- Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/pollution (accessed March 26, 2021).

Enbridge's Motion in Limine, p. 4-6.[24] Nothing in MEPA limits the types of "pollution" that can be asserted by an intervenor as resulting from the "conduct," and, as the history of both environmental degradation and regulation show, new pollutants continue to be identified. The Commission finds that MEPA is broadly written to apply to all "administrative, licensing, or other proceedings" conducted by an "agency" or a "court," and is not limited to agencies that act as environmental regulators.[25] Further, both the statutory language of MEPA and the language of MEPA case law support a broad interpretation of whether "conduct . . . has or is likely to have" the effect of pollution, impairment, or destruction.

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 disagrees with the ALJ's rejection of the inclusion of GHG emissions in such a review where intervenors have introduced the allegation of pollution consistent with Section 5(1) of MEPA.[26] 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. MCL 324.1705(2); MCL 24.272. While the project under

[24] *See also, Massachusetts v Environmental Protection Agency*, 549 US 497, 528-535; 127 S Ct 1438; 167 L Ed 2d 248 (2007); and Greenhouse Gas Emissions: Sources of Greenhouse Gas Emissions, U.S. Environmental Protection Agency, available at https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (accessed March 28, 2021).

[25] However, the Commission agrees with parties that argued that an ED does not expand an agency's jurisdiction under MEPA, finds that the Attorney General has opined definitively on this point, and notes the parties have not cited any case that holds otherwise. Op. Att. Gen. 2009, No. 7224.

[26] The Commission notes that Enbridge also refers to the potential for GHG emissions from construction equipment as part of its air quality analysis in Exhibit A-11, p. 338 (the EGLE/USACE permit application), and Exhibit A-12, p. 14 (the Environmental Impact Report).

consideration is limited to the 4-mile section of the pipeline described in the application, this pipeline section would involve hydrocarbons that may result in GHG pollution that must be subject to MEPA review.

The Commission finds that consideration of the Notice is unnecessary to making the findings about MEPA's applicability to the product being flowed through the Replacement Project, or for GHGs to be considered "pollution" under MEPA. However, the existence of the Notice – and the uncertainty surrounding it – does inform the basis of comparison between the Replacement Project and the potentially non-operational segments crossing the Straits. The Commission finds that it cannot ignore the possibility that Enbridge will cease to operate the 4-mile dual pipeline segment of Line 5 in the Straits if the State succeeds in its action to enforce the Notice; and, should the Commission at this point in the proceeding exclude evidence simply on the basis of the uncertainty surrounding the validity of the Notice, it would lose the ability to consider evidence related to the loss of the use of the 4-mile dual pipeline segment in the Straits should the State ultimately prevail. As such, the Commission is unwilling to exclude evidence under MEPA that compares the pollution, impairment, or destruction attributable to an operating 4-mile pipeline segment in the Straits with non-operational 4-mile dual pipeline segments.

It is true that Act 359, the 2018 easement grant, the assignment of the easement by MSCA, and the Agreements are all unaffected by the Notice. However, as the Commission has already stated in the June 30 order, the need for a robust record in this case is crucial. June 30 order, p. 69. The Commission notes that the scope of discovery in Michigan is broad, as is the definition of relevant evidence. MCR 2.302(B)(1); MRE 401. Under MRE 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Section 75 of the APA provides:

> In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent [persons] in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded.

MCL 24.275.

The Commission finds that evidence related to the potential shutdown of the 4-mile dual pipeline segment is not irrelevant or immaterial to the MEPA review. If the State prevails in its action to enforce the Notice, the conduct at issue in this case – the Replacement Project – would be the lynchpin providing the company with the ability to ship product on this 4-mile stretch of Line 5. In other words, while Enbridge would retain the right to operate the other 641 miles of Line 5, it may not be able to ship product through the Straits by pipeline once the Notice is in force without the authorization that is sought in this case.

Finally, MEPA requires a determination by the administrative agency of "feasible and prudent alternatives" to the proposed project and a determination of whether 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 324.1705; *State Hwy Comm,* 392 Mich at 159; *Buggs I,* p. 9. At this early stage of the proceeding, the Commission is not persuaded that it should prohibit arguments and evidence addressing what the appropriate point of comparison is for any pollution, impairment, or destruction of Michigan's natural resources resulting from the proposed Replacement Project. Such questions on the feasibility and prudence of alternatives – both in terms of alternative pipeline and non-pipeline shipping arrangements and alternatives to the products being shipped – are inherently questions of

fact well suited to the development of record evidence. However, while allowing evidence to be considered on this point, the Commission notes that this is only the beginning of the inquiry, and the Commission must ultimately determine, consistent with its responsibilities under MEPA, whether there is any pollution, impairment, or destruction as a result of the Replacement Project – including in comparison to the possible closure of the dual pipeline segments currently in the Straits if the Notice is enforced; whether any pollution, impairment, or destruction is consistent with the protection of Michigan's natural resources; and whether there are feasible and prudent alternatives to any pollution, impairment, or destruction that is found as a result of the Replacement Project. Given the many considerations involved in the production, transportation, and ultimate refining and consumption of the products being transported, evidence addressing how to account for GHG pollutant impacts attributable to the proposed Replacement Project, where the proper boundaries of GHG pollutants should be drawn, and the correct alternative(s) for comparison would be helpful to the Commission in making this determination.

The applications for leave to appeal the rulings on this issue are granted, and the requested relief is partially granted.

3. Other Issues

Finally, the Commission finds it appropriate to address the concerns of parties who argued that to allow consideration of the public need for Line 5 and its applicability to the Replacement Project would produce a chilling effect on future efforts to maintain, improve, or repair pipeline infrastructure. These parties proclaimed that a pipeline operator who knows that hundreds of miles of approved, existing, and reliable pipeline will be put at risk through the filing of an application to improve a few miles of that pipeline may be unlikely to decide to make those improvements, and such a finding in this case would prove a disservice to the public.

The Commission recognizes this concern, and notes that the factual situation at issue in this case is distinguishable from other cases involving repairs or even replacements of existing pipelines. As noted in the Commission's June 30 order, many instances involving repairs or replacements on existing lines do not trigger the need for an Act 16 application. However, in the present case:

> Enbridge proposes to relocate the portion of Line 5 that crosses the Straits from atop the lakebed to a tunnel 60 to 250 feet below the lakebed, which will be constructed in a new easement issued by the State of Michigan. As discussed above, this is a significant change in location and route of the Line 5 pipeline. Therefore, based on the factors listed above and relevant Commission precent, the Commission finds that an Act 16 application is required to obtain approval for the Line 5 Project.

June 30 order, p. 67.[27] However, the Commission reiterates that it is only the conduct at issue in the application – the construction of the proposed Replacement Project – that is subject to both the three-part test under Act 16 and MEPA review.

Finally, from the perspective of what evidence can be considered to inform this alternatives comparison, the present case is distinguishable in light of the uncertainty over Enbridge's current easement to operate the existing 4-mile segment through the Straits as a result of the Notice. In other pipeline cases, even those requiring applications under Act 9 or Act 16, the pipeline operator

[27] In the June 30 order, after reviewing a series of relevant cases, the Commission found that there are two factors that require the filing of a new application pursuant to Rule 447: (1) a change in pipeline diameter (i.e., capacity) and (2) a relocation of the pipeline. June 30 order, p. 63. The Commission further found that "it is sufficient that the proposed activity meet only one of the two factors [to trigger the Rule 447 application requirement]; it is not necessary that it meet both." *Id.* Finally, as noted in the June 30 order, the replacement of the current 20-inch-diameter dual pipelines with a new 30-inch-diameter pipeline represents a change "that is capable of increasing the volume of the pipeline." *Id.* at 65. As this case involves "significant factual and policy questions and complex legal determinations that can only be resolved with the benefit of discovery, comprehensive testimony and evidence, and a well-developed record," *id.* at 69, the Commission expresses its expectation that factual questions surrounding any potential future capacity increases resulting from the Replacement Project will also be developed as part of the record evidence in this case.

retains the right to restart the entire line without any additional approvals. Indeed, even were the state to be successful in enforcing the Notice, it remains uncontradicted that Enbridge would enjoy the same rights in restarting or continuing to operate the other 641 miles of Line 5 not subject to the application in this case. However, should the State be successful in enforcing the Notice, the existing section of Line 5 between the Upper Peninsula and the Lower Peninsula could become dormant, as early as next month. While, again, no party disputes Enbridge's right to operate the remainder of the line, without the approval being sought in this case for the Replacement Segment, Enbridge may lose its ability to ship product across the Straits by pipeline if the Notice is enforced.

Notably, the Commission finds that the outcome of the litigation surrounding the Notice has no impact on the approvals granted in the 1953 order. The Commission agrees with the ALJ that the 1953 order remains in effect, and the Commission is expressly not seeking to re-examine or reconsider the approvals granted in that case, nor is it taking steps toward the possible "suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license" under MCL 24.292(1), MCL 24.205(a), and *Rogers.* Rather, as noted by the Staff, the Notice involves not Enbridge's rights under the 1953 order, but the ongoing property interest to continue to operate in its current location under the easement granted by the predecessor to the DNR. Staff's response to the applications for leave to appeal the ruling on remand, p. 19. As such, the notice and other procedural protections provided by the APA and *Rogers* are not at issue in this case.

Finally, the other offers of proof described in the applications for leave to appeal focus on the economics of fossil fuel pipelines, the risk of stranded costs, and the safety issues arising from leaks on any part of the pipeline system. These are not issues in this case.

The Commission acknowledges that today's order likely changes the nature and scope of the testimony to be submitted in this proceeding, and authorizes the ALJ to modify the case schedule as needed to accommodate any additional time needed by the parties in this regard.

THEREFORE, IT IS ORDERED that the applications for leave to appeal the October 23, 2020 and February 23, 2021 rulings on Enbridge Energy, Limited Partnership's motion in limine filed by the Michigan Department of Attorney General, For Love of Water, the Michigan Environmental Council, the Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council, National Wildlife Federation, Bay Mills Indian Community, Environmental Law & Policy Center, Michigan Climate Action Network, the Little Traverse Bay Band of Odawa Indians, and the Nottawaseppi Huron Band of the Potawatomi, are granted, and the requested relief is granted in part and denied in part, as described in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

_____

Daniel C. Scripps, Chair

_____

Tremaine L. Phillips, Commissioner

_____

Katherine L. Peretick, Commissioner

By its action of April 21, 2021.

_____

Lisa Felice, Executive Secretary

PROOF OF SERVICE

STATE OF MICHIGAN)

Case No. U-20763

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on April 21, 2021 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).

Brianna Brown

Subscribed and sworn to before me
this 21st day of April 2021.

Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2024

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Attachment 4

STATE OF MICHIGAN
IN THE COURT OF APPEALS

In the matter of the Application of **Enbridge Energy, Limited Partnership** for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if approval is Required Pursuant to 1929 PA 16, MCL 483.1, et seq., and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief.	Court of Appeals No. 369156, consolidated with Nos. 369157, 369159, 369161, 369162, 369163, and 369165, 369231 Lower Court: MPSC Case No. U-20763

BRIEF ON APPEAL OF PETITIONER-APPELLEE ENBRIDGE ENERGY, LIMITED PARTNERSHIP

ORAL ARGUMENT REQUESTED

August 29, 2024

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alternatives are properly compared, though, it becomes clear that there was no feasible and prudent alternative to the Replacement Project consistent with the public health, safety, and welfare. The Commission's MEPA analysis was correct and should be affirmed.

A. Standard of Review

This Court reviews de novo the Commission's determinations under MEPA. *West Mich Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741, 754; 275 NW2d 538 (1979).

B. MEPA Step 1: The Commission correctly found that the Replacement Project was the "conduct" at issue and correctly limited its evaluation to the environmental effects of the Replacement Project.

Under the first step of the MEPA analysis, the Commission was required to determine whether the "conduct" that was to be "authorized or approved" by the "proceeding" "has, or is likely to have, the effect of polluting, impairing, or destroying the air, waters, or other natural resources of the public trust in these resources." MCL 324.1705. To do so, the Commission needed to determine which conduct to consider and which effects to analyze.

1. The Commission correctly determined that the "conduct" at issue was the Replacement Project—not the operation of Line 5 as a whole.

MEPA only requires the Commission to conduct an environmental effects analysis of the *conduct* that the Commission has authority to *authorize or approve* in *this proceeding*. MCL 324.1705; MCL 324.1706 (MEPA "is supplementary to existing administrative and regulatory procedures provided by law"). Since the conduct that the Commission may authorize or approve is determined by Act 16 in this case, the required scope of the Commission's MEPA analysis is coextensive with that of its Act 16 analysis. As explained in Section I, the Commission's Act 16 review was limited to Enbridge's proposal to replace the Dual Pipelines, *not* the ongoing operation of Line 5 as a whole since that operation is unaffected by the Commission's decision here.

Attachment 5

2024 WL 3587935

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Only the Westlaw citation is currently available.

Supreme Court of Michigan.

Nawal DAHER and Mohamad Jomaa, Co-Personal Representatives of the Estate of Jawad Jumaa, also known as the Estate of Jawad Jomaa, Plaintiffs-Appellees,

v.

PRIME HEALTHCARE SERVICES-GARDEN CITY, LLC, doing business as Garden City Hospital, Kelly W. Welsh, D.O., and Meagan Shady, D.O., Defendants-Appellants.

Docket No. 165377

|

Calendar No. 2

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Argued April 16, 2024

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Decided July 30, 2024

Synopsis

Background: Parents of deceased minor patient, as co-personal representatives of patient's estate, brought wrongful death action against hospital and medical providers, alleging claims for medical malpractice based on alleged failure to diagnose and treat patient's bacterial meningitis. The Circuit Court, Wayne County, Martha M. Snow, J., denied defendants' motion for summary disposition. Hospital and providers appealed. The Court of Appeals, 344 Mich.App. 522, 1 N.W.3d 405, affirmed, holding that damages for lost future earnings were recoverable under wrongful death act (WDA). Defendants' application for leave to appeal was granted.

The Supreme Court, Viviano, J., held that damages for a decedent's lost earning capacity are not recoverable under the WDA; overruling *Denney v. Kent County Road Com'n*, 317 Mich.App. 727, 896 N.W.2d 808, *Thorn v. Mercy Memorial Hosp. Corp.*, 281 Mich.App. 644, 761 N.W.2d 414, and *Palomo v. Dean Transportation, Inc.*, 2023 WL 6520812.

Judgment of Court of Appeals vacated in part and reversed; remanded.

Procedural Posture(s): On Appeal; Motion for Summary Disposition.

BEFORE THE ENTIRE BENCH

OPINION

Viviano, J.

***1** The issue in this case is whether the wrongful death act (WDA), MCL 600.2922, allows recovery of damages for lost future earnings absent a showing that a beneficiary is entitled to those earnings as financial support. This Court held in *Baker v Slack*, 319 Mich. 703, 30 N.W.2d 403 (1948), that an earlier version of the statute did not provide such damages. In *Denney v Kent Co. Rd. Comm.*, 317 Mich App 727, 732, 896 N.W.2d 808 (2016), the Court of Appeals held that "damages for lost earnings are allowed under the [WDA]" but did not address our holding in *Baker*. In the present case, the Court of Appeals concluded that *Denney* is controlling and that our holding in *Baker* "has clearly been overruled or superseded, and ... [is] no longer 'good law' ...." *Daher v Prime Healthcare Servs.-Garden City, LLC*, 344 Mich App 522, 530, 1 N.W.3d 405 (2022). We disagree that *Baker* has been overruled or superseded, and we hold that, like the earlier version of the WDA, the current version does not allow for recovery of lost future earnings. Therefore, we reverse the Court of Appeals' holding on this issue and vacate the remainder of its opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs [1] brought this medical malpractice action under the WDA, alleging that defendants committed medical malpractice by failing to diagnose and treat bacterial meningitis in their 13-year-old son, Jawad Jumaa, leading to his death. The night before he died, Jawad's mother, Nawal Daher, took him to the emergency room at defendant Garden City Hospital, where he was diagnosed with and received care for torticollis [2] before being discharged. The next morning, Jawad was found dead at home. An autopsy revealed the cause of death to be acute purulent (i.e., bacterial) meningitis.

***2** Plaintiffs' complaint seeks damages for, among other things, decedent's lost future earnings.[3] Plaintiffs' expert estimated that those damages are between $11,000,000 and $19,000,000, depending on the level of education that Jawad would have received. Defendants moved for summary disposition, arguing that damages for lost future earnings are not permitted under the WDA and that, even if such damages were recoverable, plaintiffs failed to prove any lost future earnings beyond mere speculation. The trial court denied the motion.

Defendants sought leave to appeal in the Court of Appeals, which affirmed in a published opinion. Following *Denney*, the majority held that damages for lost earnings are allowed under the WDA. *Daher*, 344 Mich App at 531, 1 N.W.3d 405. While the majority recognized that this Court held in *Baker* that lost future earnings were not recoverable under an earlier version of the WDA, the majority held that "*Baker* has clearly been overruled or superseded, and ... was no longer 'good law' long before [the Court of Appeals] decided *Denney*." *Id.* at 530, 1 N.W.3d 405. The Court gave two reasons for its conclusion: (1) its belief that *Wesche v Mecosta Co. Rd. Comm.*, 480 Mich. 75, 746 N.W.2d 847 (2008), "implicitly ... overruled the fundamental principle underlying the analysis and holding in *Baker*," and (2) the Legislature's subsequent insertion of the word "including" into MCL 600.2922(6) means that "the enumerated list of the kinds of damages available ... is not exhaustive[.]" *Daher*, 344 Mich App at 527, 530, 1 N.W.3d 405.[4] Judge SWARTZLE concurred dubitante[5] and agreed with the majority that *Denney* is controlling, but he questioned whether *Denney* was correctly decided.

***3** Defendants then sought leave to appeal in this Court. We granted the application and directed the parties to address whether: "(1) the estate of a child may recover damages for the child's lost future earnings; and (2) to what specificity future earnings need be shown."[6] *Daher v Prime Healthcare Servs-Garden City, LLC*, 512 Mich. 959, 959, 994 N.W.2d 789 (2023).

II. STANDARD OF REVIEW

Whether a particular kind of damages is recoverable for a given cause of action is a question of law, which we review de novo. See *Price v High Pointe Oil Co, Inc*, 493 Mich. 238, 242, 828 N.W.2d 660 (2013). The interpretation and application of a statute is reviewed de novo. *Estes v Titus*, 481 Mich. 573, 578-579, 751 N.W.2d 493 (2008).

III. DISCUSSION

***4** Pursuant to MCL 600.2921, "[a]ll actions and claims survive death." However, "[a]ctions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to [the WDA, MCL 600.2922]." *Id.* Subsection (6) of the WDA sets forth the damages that are permitted by the act. It provides, in relevant part, that

> [i]n every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. [MCL 600.2922(6).]

When interpreting a statute, our purpose is to ascertain and effectuate the legislative intent at the time it passed the act. See *In re Certified Question from United States Court of Appeals for the Ninth Circuit*, 499 Mich. 477, 482, 885 N.W.2d 628 (2016). We have previously explained our approach to statutory interpretation as follows:

> We interpret statutes to discern and give effect to the Legislature's intent, and in doing so we focus on the statute's text. Undefined terms are presumed to have their ordinary meaning, unless they have acquired a peculiar and appropriate meaning in the law, in which case we accord

> them that meaning. The statute must be considered as a whole, reading individual words and phrases in the context of the entire legislative scheme. Unambiguous statutes are enforced as written. [*Clam Lake Twp. v Dep't of Licensing & Regulatory Affairs*, 500 Mich. 362, 373, 902 N.W.2d 293 (2017) (quotation marks and citations omitted).]

***5** "If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Tryc v Mich. Veterans' Facility*, 451 Mich. 129, 135, 545 N.W.2d 642 (1996). Because " '[c]ontext is a primary determinant of meaning,' " "we must always read the text as a whole, 'in view of its structure and of the physical and logical relation of its many parts.' " *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich. 333, 349, 952 N.W.2d 384 (2020) (citations omitted; alteration in original). [7] "A statute's history—the narrative of the statutes repealed or amended by the statute under consideration—properly form[s] part of [its] context ...." *Dep't of Talent & Economic Dev./Unemployment Ins. Agency v Great Oaks Country Club, Inc.*, 507 Mich. 212, 227, 968 N.W.2d 336 (2021) (citations omitted; alterations in original); see also *Ray v Swager*, 501 Mich. 52, 80 n 68, 903 N.W.2d 366 (2017) (distinguishing "legislative history" from "statutory history"). [8] Indeed, " 'courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute.' " *Ray*, 501 Mich. at 80, 903 N.W.2d 366, quoting *Bush v Shabahang*, 484 Mich. 156, 167, 772 N.W.2d 272 (2009).

For the reasons that follow, we reject the Court of Appeals' holdings in *Denney* and in this case that damages for a decedent's lost future earnings are recoverable under the WDA. Relatedly, we disagree with the Court of Appeals in this case that *Baker* was superseded by the 1971 amendments to the WDA and that *Wesche* implicitly overruled *Baker*.

A. THE PREDECESSOR ACTS AND THE STATUTORY AMENDMENT THAT COMBINED THEM IN 1939

To understand the damages provision of the current WDA, "[a] proper understanding of the history of the [WDA] is essential ...." *Hawkins v Regional Med. Laboratories, P.C.*, 415 Mich. 420, 428, 329 N.W.2d 729 (1982). The common law did not recognize a cause of action for the death of a human being caused by a wrongful act and did not permit the survival of actions for personal injuries. See *In re Olney's Estate*, 309 Mich. 65, 72, 14 N.W.2d 574 (1944) (SHARPE, J., dissenting in part) (citations omitted); see also *Hawkins*, 415 Mich. at 428-429, 329 N.W.2d 729. However, early in our state's history, the Legislature adopted two acts "under which an action could be brought in cases of injury resulting in death: the survival act and the wrongful death act." *Id.* at 428, 329 N.W.2d 729.

The survival act was enacted "to preserve causes of action which, under common law, were terminated by the death either of the person injured or the tortfeasor." *Id.* at 428-429, 329 N.W.2d 729. [9] Under the survival act, as amended by 1885 PA 113, a decedent's cause of action survived his or her death and the death of the defendant and entitled the decedent's estate to whatever damages the decedent could have recovered. See, for example, *Lincoln v Detroit & Mackinac R Co*, 179 Mich. 189, 196, 200-202, 146 N.W. 405 (1914). That included damages for the loss of the decedent's future earnings. See *Walker v McGraw*, 279 Mich. 97, 102-103, 271 N.W. 570 (1937) ("[T]he plaintiff might recover for the loss of earnings which the evidence fairly shows that deceased would have made during the period which he would have lived, but for the injury.") (quotations marks and citation omitted).

***6** The Legislature adopted Michigan's death act in 1848. See 1848 PA 38. The death act was "a typical 'Lord Campbell's Act' " that limited the estate's recovery "to actual pecuniary loss suffered by one entitled to or receiving support from the deceased ...." *Olney's Estate*, 309 Mich. at 73, 76, 14 N.W.2d 574 (SHARPE, J., dissenting in part). [10] In contrast to the survival act, the cause of action created by the death act was for the survivors whom the decedent was obligated to support and was limited to the losses they sustained due to the decedent's death. *Baker*, 319 Mich. at 715, 30 N.W.2d 403. [11]

The interplay between these two statutes was examined in *Ford v Maney's Estate*, 251 Mich. 461, 232 N.W. 393 (1930), and again in *Hawkins*. " 'The line of cleavage between them is whether the death is instantaneous.' " *Hawkins*, 415 Mich. at 430, 329 N.W.2d 729, quoting *Ford*, 251 Mich. at 465, 232 N.W. 393. " '[T]he Legislature did not intend to give two remedies for death by negligent act, but ... the death act and the survival act is each exclusive within its sphere.' " *Hawkins*, 415 Mich. at 430, 329 N.W.2d 729, quoting *Ford*, 251 Mich. at 464-465, 232 N.W. 393. "This distinction was crucial since the claims were mutually exclusive and the measure of damages was substantially different." *Hawkins*, 415 Mich. at 430, 329 N.W.2d 729. Indeed, as noted, an estate could recover for future earnings under the survival act but was limited to a beneficiary's loss of support under the death act.

Then, in 1939, a thunderbolt struck: the Legislature created "a new wrongful death act, 1939 PA 297, [which] combined the two acts, requiring that all actions for injuries resulting in death be brought thereunder." *Id.* at 431, 329 N.W.2d 729. The new wrongful death act "took the form of an amendment to the existing wrongful death act and provided for the repeal of any inconsistent provisions of the 'survival act'." *Id.* [12] As we made "unmistakably clear" in *Olney's Estate*, "the survival act was not repealed but was incorporated into the new death act *to form a single ground of recovery* in cases where tortious conduct caused death." *Hawkins*, 415 Mich. at 432, 329 N.W.2d 729 (discussing the holding of *Olney's Estate*) (emphasis added). Thus, following the 1939 amendments, actions "based on injuries resulting in non-instantaneous death must simply be brought under the present wrongful death act rather than under the survival act." *Id.* at 434, 329 N.W.2d 729.

***7** Questions very quickly arose concerning the scope of damages available under the newly combined WDA. In *Baker*, the plaintiff argued that "under the 1939 act, as under the old survival act, recovery may be had for loss of probable future earnings without diminution for maintenance costs and without a showing that those seeking recovery sustained a pecuniary loss." *Baker*, 319 Mich. at 709, 30 N.W.2d 403. This Court soundly rejected that argument based on several aspects of the 1939 amendments:

> The effect of the 1939 act on the old survival act becomes abundantly clear upon a reading of its provisions. Legislative language could hardly be made more explicit on the subject. Four times the legislative intent on this matter is expressed in the 1939 act:
>
> (1) the title proclaims that for wrongful death or injuries resulting in death the statute is enacted "to prescribe the measure of damages recoverable* * *and to repeal inconsistent acts;"
>
> (2) section 1 reads in part: "all actions for such death, or injuries resulting in death, shall hereafter be brought only under this act;"
>
> (3) section 2 limits damages to (a) what the court or jury shall deem fair and just with reference to pecuniary injuries to the surviving spouse or next of kin, (b) reasonable medical, hospital, funeral and burial expenses, (c) reasonable compensation for conscious pain and suffering;
>
> (4) section 3 expressly repeals the survival act insofar as its provisions are inconsistent with this act.
>
> The conclusion is inescapable that it was precisely in the field of damages, in those cases in which decedent survived his injuries, that the legislature attempted to effectuate a change, not only as to the distribution but, particularly, as to what shall constitute the elements thereof. [*Id.* at 713, 30 N.W.2d 403 (emphasis omitted).]

In other words, the Legislature unequivocally repealed the statutory grounds for an estate to recover anything that was not specifically included in the damages provision of the post-1939 WDA. See also *Hawkins*, 415 Mich. at 433 n 4, 329 N.W.2d 729 (observing that, in *Baker*, this Court "decided that the repeal of inconsistencies went only to the measure of damages"). Thus, after the 1939 amendment, this Court held that the WDA's damages provision provided an exclusive list of the types of damages that could be recovered for injuries resulting in death, regardless of whether the decedent's death was instantaneous or sounded as a survival action. The newly combined WDA "specifically divide[d] the damages recoverable into three classes": (1) "pecuniary injury;" (2) "reasonable medical, hospital, funeral and burial expenses;" and (3) "the pain and suffering" of the decedent before death. *Baker*, 319 Mich. at 710, 30 N.W.2d 403, quoting *Olney's Estate*, 309 Mich. at 83-84, 14 N.W.2d 574 (quotation marks omitted).

The Court then asked whether the damages that the plaintiff sought—the decedent's future earnings—fit into any of those classes. It found an easy answer:

> Assuredly not. In the *Olney Case* we recognized that, beyond compensation to a husband for loss of his wife's services, the right to recover for pecuniary loss must be predicated upon the existence of some next of kin having a legally enforceable claim to support or maintenance by [the] deceased. [*Baker*, 319 Mich. at 714, 30 N.W.2d 403.]

Rather, with respect to the decedent's possible future income, only the damages associated with the pre-1939 death act were recoverable, i.e., loss of financial support. [13]

B. LATER AMENDMENTS AND THE COURT OF APPEALS' DECISION IN *DENNEY*

***8** The Legislature added the word "including" to the WDA in 1971, and it made several other changes to the statute that are shown in boldface and strikethrough, below:

> [I]n every [survival or death] action the court or jury may give such damages, as, the court or jury, shall deem fair and just, ~~with reference to the pecuniary injury resulting from such death,~~ **under all of the circumstances** to those persons who may be entitled to such damages when recovered ~~and also~~ **including** damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. **The amount of damages recoverable by civil action for death caused by the wrongful act, neglect or fault of another may also include recovery for the loss of the society and companionship of the deceased.** [See MCL 600.2922(2), as amended by 1971 PA 65.]

The Legislature amended the WDA again in 1985, bringing it substantially into its current form and adding "loss of financial support" as a type of recoverable damages. See MCL 600.2922(6), as amended by 1985 PA 93. [14]

But it was not until 2016 that the Court of Appeals expanded the categories of damages available under the current version of the WDA, holding in *Denney* that damages for lost future earnings are recoverable. *Denney*, 317 Mich App at 732, 896 N.W.2d 808. *Denney* concerned an action to recover damages stemming from a motorcycle accident. The plaintiff argued that damages for lost wages and lost earning capacity were recoverable under the highway exception to the governmental tort liability act (GTLA), MCL 691.1401 *et seq. Id.* at 729, 896 N.W.2d 808. The panel agreed, but its reasoning was scant and relied heavily on *Thorn v Mercy Mem. Hosp. Corp.*, 281 Mich App 644, 761 N.W.2d 414 (2008), which held that the word "including" in MCL 600.2922(6) " 'indicates an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case.' " *Denney*, 317 Mich App at 731, 896 N.W.2d 808, quoting *Thorn*, 281 Mich.App. at 651, 761 N.W.2d 414. *Denney* reasoned that "economic damages include 'damages incurred due to the loss of the ability to work and earn money ....' " *Denney*, 317 Mich App at 732, 896 N.W.2d 808, quoting *Hannay v Dep't of Transp*, 497 Mich. 45, 67, 860 N.W.2d 67 (2014). [15] The panel therefore concluded that damages for lost future earnings are allowed under the WDA. *Id.* [16] *Denney* did not provide any meaningful additional analysis to support its holding that lost future earnings are recoverable under the WDA. And neither *Thorn* nor *Denney* discussed this Court's opinion in *Baker*. This Court denied leave in *Denney*. See *Denney v Kent Co. Rd. Comm.*, 500 Mich. 997, 894 N.W.2d 608 (2017). [17]

C. *BAKER* HAS NOT BEEN SUPERSEDED BY INTERVENING CHANGES IN THE LAW

***9** In this case, the Court of Appeals panel held that *Baker* was superseded by an intervening change in the law. In particular, the Court of Appeals observed that the version

of the WDA in effect when *Baker* was decided "lacked the 'including' language in the current statute." *Daher*, 344 Mich App at 530, 1 N.W.3d 405. The Court of Appeals noted its previous holding in *Denney* that "although lost earnings are not explicitly specified in MCL 600.2922(6), the Legislature's use of the word 'including' before the enumerated list of the kinds of damages available meant that the list is not exhaustive[.]" *Id.* at 527, 1 N.W.3d 405, citing *Denney*, 317 Mich App at 731-732, 896 N.W.2d 808. [18] Believing it was bound by *Denney*, the Court of Appeals therefore held that "plaintiffs may recover for Jawad's lost future earnings to the same extent Jawad could have recovered those damages had he survived." *Daher*, 344 Mich App at 531, 1 N.W.3d 405.

In order to determine the impact of the 1971 and 1985 amendments of the WDA, it is important to recall its statutory history as interpreted by this Court over the past 175 years. See *Great Oaks*, 507 Mich. at 227, 968 N.W.2d 336. As noted above, the common law did not allow for recovery of any damages following death. The survival act and death act each abrogated the common-law rule, but the claims under each act "were mutually exclusive and the measure of damages was substantially different." *Hawkins*, 415 Mich. at 430, 329 N.W.2d 729. As it pertained to the decedent's earnings, a survival action allowed damages for "loss of earnings sustained by deceased from the time of the accident until death and prospective loss from the date of death throughout the life expectancy of the deceased," while a death action only allowed damages for "actual pecuniary loss suffered by one entitled to or receiving support from the deceased ...." *Olney's Estate*, 309 Mich. at 76-77, 14 N.W.2d 574 (SHARPE, J., dissenting in part). And when the Legislature combined the acts in the 1939 amendments, it made a clear policy choice to allow only death act damages. *Baker*, 319 Mich. at 713, 30 N.W.2d 403. In doing so, the Legislature revived the common-law rule barring recovery of damages for survival actions to the extent that they were not included in the 1939 amendments, such as loss of future earnings. See *People v Reeves*, 448 Mich. 1, 8, 528 N.W.2d 160 (1995) ("The repeal of a statute revives the common-law rule as it was before the statute was enacted.").

***10** Thus, for the 1971 amendments to abrogate the common-law rule and thereby allow damages for future earnings in both survival actions and death actions, the amendments must be clear on this point and "speak in no uncertain terms." *Hoerstman Gen. Contracting, Inc. v Hahn*, 474 Mich. 66, 74, 711 N.W.2d 340 (2006). [19] As this Court explained long ago:

> In all doubtful matters, and where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law, farther or otherwise than the act expressly declares. Therefore, in all general matters the law presumes the act did not intend to make any alteration; for, if the parliament had had that design, they would have expressed it in the act. [*Bandfield v Bandfield*, 117 Mich. 80, 82, 75 N.W. 287 (1898) (quotation marks and citation omitted).]

We first address plaintiffs' argument that the deletion of the "pecuniary injury" phrase undermined the holding in *Baker*. That is, plaintiffs argue that the deletion of the phrase "with reference to the pecuniary injury resulting from such death" in the 1971 amendment demonstrates the Legislature's intent to transform the WDA's exclusive list of damages, as described in *Baker*, into a nonexhaustive list. As an initial matter, we believe that argument takes a constricted view of the analysis in *Baker*. While it is true that *Baker* rejected the plaintiff's claim for future-earnings damages because they were not a "pecuniary injury," the threshold determination in *Baker* was that the WDA only provides for enumerated damages. And that threshold determination was based on the Legislature's policy decision to establish a single provision setting forth the damages available for claims under the survival act and death act, which had the effect of limiting the damages available for survival actions. See *Baker*, 319 Mich. at 713, 30 N.W.2d 403 ("The conclusion is inescapable that it was precisely in the field of damages, in those cases in which decedent survived his injuries, that the legislature attempted to effectuate a change, not only as to the distribution but, particularly, as to what shall constitute the elements thereof."). In the 1939 amendments that was accomplished by the requirement in § 1 that "all actions for such death, or injuries resulting in death, shall hereafter be brought only under this act," and § 3 of the act, which "expressly repeal[ed] the survival act insofar as its provisions are inconsistent with [the newly combined WDA]." *Id.* (quotation marks, citation, and emphasis omitted). The requirement that survival actions

be brought pursuant to the provisions of the WDA was in effect when the 1971 amendments were adopted and continues to be the law in our state. See MCL 600.2921 (stating that "[a]ll actions and claims survive death" and that "[a]ctions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to [MCL 600.2922]"). And that is why this Court has continued to describe the WDA as "essentially a 'filter' through which the underlying claim may proceed." *Wesche*, 480 Mich. at 88, 746 N.W.2d 847.

***11** The removal of the "pecuniary injury" phrase was not intended to change the relationship between survival actions and the WDA, i.e., that survival actions were subject to the damages limitations and other requirements of the WDA. Instead, we have held that the deletion of this phrase and the addition of the provision allowing damages for "loss of ... society and companionship," which we described as "[t]he major revision" of the 1971 amendments, "can only be viewed as a clear rejection of" this Court's holding in *Breckon v Franklin Fuel Co*, 383 Mich. 251, 174 N.W.2d 836 (1970), that damages for loss of companionship were not allowed under the WDA because they did not qualify as a "pecuniary injury." *Crystal v Hubbard*, 414 Mich. 297, 322, 324 N.W.2d 869 (1982). [20]

Plaintiffs next argue that the addition of "under all of the circumstances" [21] in the 1971 amendments in place of the "pecuniary injury" phrase shows that the Legislature intended to broaden the types of damages that could be recovered. But that argument is also unavailing. The phrase "under all of the circumstances" appeared after the phrase "in every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just," which invokes the jury's role of determining the *amount* of damages, not the *type* of damages. MCL 600.2922(2), as amended by 1971 PA 65. See *Kelly v Builders Square, Inc*, 465 Mich. 29, 36, 632 N.W.2d 912 (2001) ("We cannot substitute our opinion for that of the jury as to the proper amount of damages to allow plaintiff for pain and suffering.") (quotation marks and citation omitted). In contrast, it is the role of the court to determine what type of damages are available under a statute. See *Price*, 493 Mich. at 242, 828 N.W.2d 660 ("Whether noneconomic damages are recoverable for the negligent destruction of real property presents a question of law ...."). Indeed, when this Court interpreted the meaning of the phrase "under all of the circumstances," it did so in the context of deciding which evidence the jury could consider in determining the amount of damages for loss of society and companionship. *Wood v Detroit Edison Co*, 409 Mich. 279, 286, 294 N.W.2d 571 (1980) (holding that evidence of a surviving spouse's remarriage may not be used to determine damages for loss of society and companionship). And, even in this context, the Court did not believe the phrase superseded *Bunda v Hardwick*, 376 Mich. 640, 656, 138 N.W.2d 305 (1965), a prior decision holding that such evidence was inadmissible. See *Wood*, 409 Mich. at 286-287, 294 N.W.2d 571. Thus, we have previously rejected the notion that the addition of this phrase broadly negated previous limitations on the damages that could be recovered under the WDA.

That brings us to the addition of the word "including," which the Court of Appeals majority held means that the types of damages listed in the statute are nonexhaustive. Although the 1971 amendments have been closely scrutinized, the word "including" received little attention until the Court of Appeals opinion in *Thorn*. To be sure, as "we have stated previously, 'including' is a term of enlargement, not limitation." *NACG Leasing v Dep't of Treasury*, 495 Mich. 26, 31, 843 N.W.2d 891 (2014); see also *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p. 132 ("[T]he word *include* does not ordinarily introduce an exhaustive list ...."). But we have also held that "[w]hen used in the text of a statute, the word 'includes' can be used as a term of enlargement or of limitation, and the word in and of itself is not determinative of how it is intended to be used." *Frame v Nehls*, 452 Mich. 171, 178-179, 550 N.W.2d 739 (1996). [22]

***12** Given the extensive statutory history of the survival act and the WDA and the caselaw interpreting them, we are not persuaded that, by inserting the word "including" into the statute as part of the 1971 amendments, the Legislature intended to convert what had long been an exhaustive list into an open-ended list of damages types left entirely to the discretion of the jury. To effect such a sea change in the WDA—one that would amount to a further abrogation of the common law (as noted above)—the Legislature must be clear and "speak in no uncertain terms." *Hoerstman Gen. Contracting*, 474 Mich. at 74, 711 N.W.2d 340. The Legislature knows how to speak with clarity when it wants to add a type of damages to the WDA, and it did so in 1971 when it added damages for "loss of ... society and companionship," 1971 PA 65, and again in 1985 when it added damages for "the loss of financial support," 1985 PA 93. The addition of the word "including" is obviously not a similarly clear indication of the Legislature's intent.

As discussed above, the 1939 amendments clearly limited damages for survival-act claims to those damages expressly included in the WDA. Despite the addition of "including," that structure remained in place with the 1971 amendments. "[T]he word ['including'] in and of itself is not determinative of how it is intended to be used." *Frame*, 452 Mich. at 178-179, 550 N.W.2d 739. In light of the statutory history and caselaw discussed above, we do not believe that the insertion of "including" demonstrates that the Legislature acted with sufficient clarity to overrule *Baker* and abrogate the common law. [23]

A few additional points support our conclusion. First, the fact that the Legislature explicitly added damages for loss of the society and companionship of the deceased in the 1971 amendments undercuts plaintiffs' argument that the Legislature added "including" at the same time to make the statute open-ended. Why, one wonders, would the Legislature go to this trouble of specifying this new damages category if the word "including" already accomplished the task? Next, plaintiffs' argument proves too much. As noted above, in our legal system, the jury determines the amount of damages, *Kelly*, 465 Mich. at 36, 632 N.W.2d 912, and the court determines what types of damages are available. See *Price*, 493 Mich. at 242, 828 N.W.2d 660. Allowing the jury to have complete discretion as to the types of damages that are available would be quite a departure from this legal norm.

Finally, our reading of the statute also finds support in the 1985 amendments, which, as noted above, added another specific type of damages to the WDA: loss of financial support. "Under [the negative-implication] canon of statutory construction, the express mention of one thing implies the exclusion of other similar things." *Comerica, Inc v Dep't of Treasury*, 509 Mich. 204, 218, 984 N.W.2d 1 (2022). The canon "does not apply without a strong enough association between the specified and unspecified items." *Id.*

Here, such an association exists between "loss of financial support" and "loss of future earnings." Both types of damages involve money that the decedent would have made, but damages for "loss of financial support" based on those earnings are limited to the "actual pecuniary loss suffered by one entitled to or receiving support from the deceased ...." See *Olney's Estate*, 309 Mich. at 76, 14 N.W.2d 574 (SHARPE, J., dissenting in part). These two categories of damages have been the subject of a long-simmering dispute under the survival act and WDA. The fact that the Legislature adopted only one of them in the 1985 amendments indicates that it was doing so to the exclusion of damages for a decedent's future earnings (or at least to clarify that they were not permitted).

***13** For all of these reasons, we conclude that *Baker* was not superseded by intervening changes in the law.

D. THE *WESCHE* DECISION DID NOT IMPLICITLY OVERRULE *BAKER*

Lastly, we have little trouble dispensing with the Court of Appeals' finding that *Wesche* "necessarily—if implicitly—overruled the fundamental principle underlying the analysis and holding in *Baker*." *Daher*, 344 Mich App at 530, 1 N.W.3d 405. The Court of Appeals reasoned that the WDA "used to be construed [at the time that *Baker* was decided] as providing a new cause of action for the benefit of the beneficiaries." *Id.* (emphasis omitted). In *Wesche*, this Court held that this was "a repudiated understanding of the [WDA]" and that "it is now clear that the underlying claim survives by law and that the limitations in the underlying cause of action apply to the wrongful-death action." *Wesche*, 480 Mich. at 91, 746 N.W.2d 847. [24]

Other than its conclusory assertion that *Baker* was more aligned with the prior understanding of the WDA—an assertion that is subject to some doubt [25]—the Court of Appeals never explained why it believed that this new understanding affected the validity of *Baker*'s holding. Nor is it apparent to us. Regardless of whether the WDA provides a new action or only one that survives by law, the WDA serves as a "filter" through which the underlying action must proceed, *Wesche*, 480 Mich. at 88, 746 N.W.2d 847, and controls which damages are available. *Wesche* did not undermine our holding in *Baker.*

IV. CONCLUSION

***14** The Court of Appeals erred by failing to apply *Baker*. *Baker*'s holding was never explicitly superseded by the Legislature or clearly overruled by this Court. Therefore, the Court of Appeals was bound to follow it. [26] We reaffirm *Baker*'s holding that lost-earning-capacity damages are not available under the WDA. We overrule *Denney* and *Thorn* to the extent that they are inconsistent with this opinion. [27] We reverse the Court of Appeals' judgment, vacate Part II(B) of its opinion, and remand this case to the Wayne Circuit

Court for further proceedings that are not inconsistent with this opinion.

Elizabeth T. Clement, C.J., Brian K. Zahra, Richard H. Bernstein, Megan K. Cavanagh, Elizabeth M. Welch, Kyra H. Bolden, JJ., concur.

All Citations

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Footnotes

1 Plaintiffs are Jawad Jumaa's parents, who are also the co-personal representatives of Jawad's estate.

2 Torticollis is "a twisting of the neck that causes the head to rotate and tilt at an odd angle." Johns Hopkins Medicine, *Torticollis (Wryneck)*, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/torticollis-wryneck> (accessed July 8, 2024) [https://perma.cc/A8UL-EB8P].

3 Plaintiffs' complaint seeks damages for loss of earning capacity. In *Hannay v Dep't of Transp*, 497 Mich. 45, 80-81, 860 N.W.2d 67 (2014), we explained that "damages for work loss consist of wages that a person 'would' have earned but for the accident, whereas loss-of-earning-capacity damages are wages a person 'could' have earned but for the accident." (Citation omitted.)

4 The majority also held that plaintiffs' claim for damages was not so speculative as to preclude recovery. *Id.* at 536, 1 N.W.3d 405.

5 A concurrence "dubitante" means that a judge has doubts about the soundness of the outcome but is unwilling, given the issues and arguments before the court, to conclude it is wrong. See *Black's Law Dictionary* (11th ed.).

6 Because we reverse the Court of Appeals on the first issue, we do not reach the second issue and instead vacate the Court of Appeals' holding on that issue.

7 "This critical word *context* embraces not just textual purpose but also (1) a word's historical associations acquired from recurrent patterns of past usage, and (2) a word's immediate syntactic setting ...." *Id.* at 349 n 35, 952 N.W.2d 384 (quotation marks and citation omitted).

8 We emphasize that this type of statutory history is also categorically different from "legislative acquiescence," in which the Legislature takes *no action* in response to a decision from this Court. Interpreting a statute through inaction " 'is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence.' " *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich. 42, 97 n 166, 921 N.W.2d 247 (2018) (citations omitted).

9 Michigan's first survival act was enacted in 1838. See *Olney's Estate*, 309 Mich. at 72, 14 N.W.2d 574 (SHARPE, J., dissenting in part), citing Rev Stat 1838, p. 428, pt. 3, tit 2, ch. 3, § 7. It was amended in 1885 to include an action for "negligent injuries to the person" among those actions expressly surviving. *Olney's Estate*, 309 Mich. at 72, 14 N.W.2d 574 (SHARPE, J., dissenting in part).

10 As a typical Lord Campbell's Act, the relevant pecuniary interests were the replacement value of wages and household services the decedent would have provided to dependents had he lived. See *Blake v Midland R Co*, 118 Eng Rep 35; 18 QB 93 (1852).

11 See also *Olney's Estate*, 309 Mich. at 76-77, 14 N.W.2d 574 (SHARPE, J., dissenting in part) ("[W]here the action was brought under the death act, recovery was limited by the act to actual pecuniary loss suffered by one entitled to or receiving support from the deceased and funeral expenses. And where action was brought under the survival act ..., recovery was permitted of such damages as the deceased could have recovered had he lived to bring an action, such as conscious pain and suffering, loss of earnings sustained by [the] deceased from the time of the accident until death and prospective loss from the date of death throughout the life expectancy of the deceased.") (citations omitted).

12 The 1939 amendment read, in pertinent part, as follows:

> An Act requiring compensation for causing death and injuries resulting in death by wrongful act[:] ...
>
> Sec. 1.... [W]henever the death of a person or injuries resulting in death, shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. All actions for such death, or injuries resulting in death, shall hereafter be brought only under this act.
>
> Sec. 2. Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and in every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered and also damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death[.] ...
>
> Sec. 3. Insofar as the provisions thereof are inconsistent with the provisions of act number 38 of the public acts of 1848 as amended by this act, section 32 of chapter 12 of act number 314 of the public acts of 1915, being section 14040 of the compiled laws of 1929 is hereby repealed. [1939 PA 297 (headings omitted).]

13 The dissenting justice in *Olney's Estate* apparently agreed that damages under the newly combined WDA were limited to the damages expressly provided and, accurately predicting the holding in *Baker* a few years later, observed that "[t]he [1939] amendment makes no provision for recovery of the loss of earnings of the deceased either prior to his death or afterwards." *Olney's Estate*, 309 Mich. at 77, 14 N.W.2d 574 (SHARPE, J., dissenting in part).

14 The WDA was also amended in 2000 and 2005, but neither party argues that these amendments are substantive or otherwise impact the proper resolution of this case. See 2000 PA 56 and 2005 PA 270.

15 Following *Thorn*, the Court of Appeals in *Denney* relied heavily on *Hannay* to determine what type of damages are available under the WDA. See *Denney*, 317 Mich App at 733-735, 896 N.W.2d 808. That reliance, however, was misplaced because *Hannay* did not involve a claim under the WDA.

16 The Court of Appeals further held that the highway exception to the GTLA permitted the derivative lost-earnings claim. *Denney*, 317 Mich App at 736, 896 N.W.2d 808.

17 Although we denied leave to appeal in *Denney*, we note that "the defendants [in *Denney*] did not address *Baker* until their reply brief in this Court and did not present the historical tensions in the statute that help to explain the potential conflict between *Denney* and *Baker*." *Touma v McLaren Port Huron*, 508 Mich. 976, 976 n 1, 965 N.W.2d 550 (2021) (VIVIANO, J., dissenting).

18 As discussed previously, *Denney* relied on *Thorn*'s observations about the addition of the word "including" in the 1971 amendment. *Denney*, 317 Mich App at 731, 896 N.W.2d 808. Plaintiffs echo this argument. But while *Thorn* did discuss several decisions from this Court, it did not meaningfully consider the statutory history of the WDA and its relationship with the common law.

Quoting *Wesche*, 480 Mich. at 91, 746 N.W.2d 847, *Thorn* also explained that "[f]or symmetry and continuity, if 'the limitation on damages ... must apply in [a] wrongful-death action,' so too must the damages that are available in the underlying claim be recognized." *Thorn*, 281 Mich App at 659, 761 N.W.2d 414 (second alteration in *Thorn*). However, *Thorn* provided no support for its assertion that "symmetry and continuity" are valid reasons to expand the types of damages that are recoverable under the WDA. As *Wesche* recognized, the WDA is a filter through which the action must pass, which includes the damages provision. See *Wesche*, 480 Mich. at 88, 746 N.W.2d 847 (explaining that the WDA "is essentially a 'filter' through which the underlying claim may proceed").

Thorn further justified its conclusion on the ground that "[c]ommon sense would dictate the opposite—the more egregious the injury, the greater the damages." *Thorn*, 281 Mich App at 660, 761 N.W.2d 414. Regardless of whether one agrees with that proposition, the Legislature made a policy decision to preclude such damages for survival actions in 1939 and has never allowed such damages for death actions.

In any event, *Thorn* did not even pertain to future earnings; rather, it held that the children of the decedent in a wrongful death action could recover loss-of-services damages.

19 We note that, if the 1971 amendments provided for future-earnings damages, they would have effectively abrogated the common law for purposes of both the survival act and the death act—in the latter case providing such damages under the death act for the first time ever.

20 See also *Crystal*, 414 Mich. at 322, 324 N.W.2d 869 ("Legislative reaction to the *Breckon* opinions, majority and dissenting, was swift and decisive and is embodied in 1971 PA 65, now codified in MCL 600.2922 ..., the statutory provision presently at issue."); *Wood v Detroit Edison Co*, 409 Mich. 279, 286, 294 N.W.2d 571 (1980) ("The amendments followed closely this Court's decision in *Breckon* ..., which held that loss of companionship was not a pecuniary injury for purposes of the wrongful death act."). Indeed, one justice described *Breckon* as "[t]he *complete* focus" of the amendments because "[t]he legislation clearly and unambiguously provided a remedy that this Court refused to provide." *Id.* at 294-295, 294 N.W.2d 571 (opinion by BLAIR MOODY, JR., J.) (emphasis added).

21 This language was revised to provide "under all the circumstances" in the 1985 amendments. See MCL 600.2922(6), as amended by 1985 PA 93.

22 See also *Reading Law*, p. 133 ("Even though the word *including* itself means that the list is merely exemplary and not exhaustive, the courts have not invariably so held.") (quotation marks and citation omitted); 2A Singer, Sutherland Statutory Construction (7th ed.), § 47.7 (November 2023 update) ("A statutory definition declaring what something 'includes' is more susceptible to extension by construction than a definition declaring what a term 'means.' The word 'includes' is usually a term of enlargement, and not of limitation, and conveys the conclusion that there are other items includable, though not specifically enumerated.").

23 In order to show that a previously exhaustive list is now to be construed as nonexhaustive, we would expect the Legislature to use more definitive language, such as "*including but not limited to*—or either of two variants,

including without limitation and *including without limiting the generality of the foregoing.*" *Reading Law*, p. 132. Our opinion should not be interpreted to mean that these "longer, more explicit variations" are always required, *id.* at 133; only that more explicit language is required in this case given its unique facts and the extensive statutory history of the WDA and the caselaw interpreting it.

24 *Wesche* overruled *Endykiewicz v State Hwy. Comm.*, 414 Mich. 377, 382, 324 N.W.2d 755 (1982), but never discussed or even cited *Baker*.

25 For example, *Baker* extensively cited *Olney's Estate* and noted its holding that "*there is survival under the survival act* regardless of whether the death be that of the injured party or of the tortfeasor or of both; *that this is in no wise inconsistent with the 1939 act* and that, therefore, in that respect at least, the survival act continues in force." *Baker*, 319 Mich. at 710, 30 N.W.2d 403 (emphasis added).

26 See *Associated Builders & Contractors v Lansing*, 499 Mich. 177, 191-192, 880 N.W.2d 765 (2016) ("The Court of Appeals is bound to follow decisions by this Court except where those decisions have *clearly* been overruled or superseded *and is not authorized to anticipatorily ignore our decisions where it determines that the foundations of a Supreme Court decision have been undermined.*").

27 We also overrule *Palomo v Dean Transp., Inc.*, —— Mich App ——; —— N.W.3d ——, 2023 WL 6520812 (2023) (Docket No. 357285), to the extent it is inconsistent with this opinion because it is a published opinion that followed the holding of *Denney* that damages for lost earnings are recoverable under the WDA.

Attachment 6

2018 WL 6624870
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

LAKESHORE GROUP, Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga, Kenneth Altman, Dawn Schumann, George Schumann, Marjorie Schumann, and Lakeshore Camping, Plaintiffs-Appellants,
v.
STATE of Michigan, Defendant,
and
Department of Environmental Quality, Defendant-Appellee.

No. 341310
|
December 18, 2018

Court of Claims, LC No. 17-000140-MZ

Before: Riordan, P.J., and Ronayne Krause and Swartzle, JJ.

Opinion

Per Curiam.

***1** In this case involving a claim under the Michigan Environmental Protection Act (MEPA), plaintiffs appeal as of right the order of the Court of Claims granting summary disposition to the Michigan Department of Environmental Quality (MDEQ) under MCR 2.116(C)(8). We affirm.

I. Background

Dune Ridge SA LP (Dune Ridge), a nonparty in this case but a defendant in related lawsuits, sought and received development permits from the MDEQ under the Sand Dunes Protection and Management Act (SDPMA), MCL 324.35301 *et seq.*, to transform a critical sand dunes area into a residential subdivision. Plaintiffs are the owners of land adjacent to the sand dunes who challenged the permits in an administrative contested-case hearing under MCL 324.35305. Plaintiffs' administrative challenge was initially dismissed on standing grounds by the administrative law judge. Plaintiffs appealed the dismissal, however, and the Ingham Circuit Court reversed the decision of the administrative law judge. The administrative challenge was subsequently reopened and is not part of this appeal.

At the same time plaintiffs appealed the dismissal of the administrative proceedings, they filed a lawsuit against both the MDEQ and Dune Ridge in Ingham Circuit Court, arguing that the MDEQ's issuance of the permits to Dune Ridge violated MEPA. The claims against the MDEQ were severed from those against Dune Ridge and the former were subsequently transferred to the Court of Claims. The claims against Dune Ridge remained in the Ingham Circuit Court action, and these are also not at issue here.

In the instant case, the Court of Claims granted the MDEQ's motion for summary disposition under MCR 2.116(C)(8), concluding that our Supreme Court's decision in *Preserve the Dunes v. Dep't. of Environmental Quality*, 471 Mich. 508; 684 N.W.2d 847 (2004), precluded plaintiffs from filing a direct judicial challenge to the MDEQ's permitting decision.

This appeal followed.

II. ANALYSIS

"We review de novo a trial court's grant or denial of summary disposition." *Tomra of North America, Inc. v. Dep't. of Treasury*, —— Mich. App. ——, ——; —— N.W.2d —— (2018) (Docket No. 336871); slip. op. at 2. "Summary disposition pursuant to MCR 2.116(C)(8) tests the legal basis of the claim and is granted if, considering the pleadings alone, the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery." *PIC Maint, Inc., v. Dep't. of Treasury*, 293 Mich. App. 403, 407; 809 N.W.2d 669 (2011) (cleaned up). We review issues involving statutory interpretation de novo. *Estes v. Titus*, 481 Mich. 573, 578-579; 751 N.W.2d 493 (2008).

The Natural Resources and Environmental Protection Act (NREPA) is composed of several subsidiary provisions, including MEPA and SDPMA. MEPA grants the public a right to bring an action in circuit court for "declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."

MCL 324.1701(1). To prevail on a MEPA claim, the plaintiff must show "that the *conduct* of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources." MCL 324.1703 (emphasis added). "MEPA provides for immediate judicial review of allegedly harmful conduct" and "does not require exhaustion of administrative remedies before a plaintiff files suit in circuit court." *Preserve the Dunes*, 471 Mich. at 514, citing MCL 324.1701(2).

***2** SDPMA governs land areas that have been designated as "critical dune areas." See MCL 324.35301(c). Under SDPMA, a person seeking to use a critical dune area must first obtain a permit. See MCL 324.35304. The MDEQ is required to issue a permit unless it determines that the proposed use "will significantly damage the public interest" in the area. MCL 324.35304(1)(g).

Unlike under MEPA, the public generally does not have a right to challenge the issuance of a permit under SDPMA. Rather, SDMPA provides aggrieved owners of property immediately adjacent to the proposed use the right to challenge the issuance of a permit via an administrative contested-case hearing under the Administrative Procedures Act. MCL 324.35305(1); MCL 24.201 *et seq.* If the property owner does not prevail after all administrative remedies are exhausted, then the property owner may seek judicial review of the administrative decision. MCL 324.35305(2). This judicial review is limited, and the administrative decision will only be reversed if the decision is statutorily or constitutionally impermissible; arbitrary, capricious, or clearly an abuse of discretion; or is not supported by competent, material, and substantial evidence. MCL 24.306.

As noted *supra*, there are two other challenges involving the proposed sand-dune project. At issue in this appeal is whether plaintiffs can sue the MDEQ under MEPA for issuing the permit to Dune Ridge. Contrary to plaintiff's position, we find the Supreme Court's decision in *Preserve the Dunes* [1] dispositive here.

Our Supreme Court held in *Preserve the Dunes*, 471 Mich. at 519, that "MEPA provides no private cause of action in circuit court for plaintiffs to challenge the DEQ's determination of permit eligibility." Plaintiffs acknowledge this holding, but argue that the holding is limited to challenges to a permit based on procedural, not substantive matters. According to plaintiffs, *Preserve the Dunes* does not preclude an action under MEPA when the plaintiff alleges that the issuance of the permit will cause imminent environmental harm. We do not read *Preserve the Dunes* so narrowly.

In *Preserve the Dunes*, the MDEQ issued a permit to a mining company to mine in a critical dune area. *Id.* at 511. The plaintiffs—"an ad hoc organization of local citizens"—sued the MDEQ alleging that the department violated MEPA when it approved the mining permit. *Id.* at 512. The trial court analyzed the claim under MEPA, but found that plaintiffs had failed to make a prima facie showing that the adverse impact of the permit would impair or destroy natural resources. *Id.* at 513. This Court reversed the trial court, concluding that the MDEQ permitting decision could be challenged under MEPA and that the MDEQ's permit was invalid. *Id.* The Supreme Court then granted leave to appeal and reversed the Court of Appeals. *Id.*

The Supreme Court reasoned that the "focus of MEPA is on the defendant's *conduct*." *Id.* at 514 (emphasis added). It noted that MEPA controls the MDEQ's permitting decisions because the MDEQ is prohibited from approving a permit if the *applicant's conduct* violates MEPA. *Id.* at 515-516, citing MCL 324.63709. The Supreme Court distinguished MDEQ's conduct in approving a permit from the applicant's conduct in carrying out the permitted action. The Supreme Court noted that, to violate MEPA, the challenged conduct must "be likely to pollute, impair, or destroy" natural resources. *Id.* at 518. It then reasoned that an administrative decision, such as the issuance of a permit, "standing alone, does not harm the environment"; rather, only the applicant's conduct (permitted by the administrative decision) actually harms the environment. *Id.* at 519.

***3** The *Preserve the Dunes* Court rejected the notion that factual causation is enough to offend MEPA. Rather, the Supreme Court focused on the Legislature's use of the word "conduct" in MCL 324.1703. "Conduct" is not defined by MEPA or NREPA. The Oxford English Dictionary (2d ed), p. 690, defines "conduct" to mean the "action or manner of conducting, directing, managing, or carrying on." Thus, it is clear that, to be actionable under MEPA, the defendant's *actions* must pollute, impair, or destroy natural resources. As our Supreme Court pointed out, the "action" of an administrative decision does not pollute, impair, or destroy natural resources; at most, the "action" of an administrative decision authorizes conduct that does so. Simply put, the issuance of a permit is too far removed from

the environmental harm to be actionable as "conduct" under MEPA.

Our Legislature created a bifurcated scheme for challenging a project like the one at issue here. A plaintiff can challenge the MDEQ's permitting decision at the administrative level with limited judicial review. MCL 324.35305(1); MCL 24.201 *et seq*. A plaintiff can also challenge the permit holder's actual conduct in a separate lawsuit without having to go through any administrative review. MCL 324.1701. What a plaintiff cannot do, however, is challenge the MDEQ's permitting decision in a lawsuit without first going through the administrative review process. With this lawsuit, plaintiffs tried to by-pass the administrative review process, and, accordingly, the Court of Claims properly granted summary disposition to the MDEQ under MCR 2.116(C)(8).

Affirmed.

Ronayne Krause, J. (dissenting).

I respectfully dissent. The majority accurately sets forth the background facts and relevant law. However, I disagree with the majority's reading of critical binding case law.

As we and the parties agree, the outcome of this appeal turns on how to read *Preserve the Dunes v. Dep't. of Environmental Quality* (*Preserve the Dunes II*), 471 Mich. 508; 684 N.W.2d 847 (2004).[1] Specifically, this matter turns on our Supreme Court's statement that "[a]n improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Preserve the Dunes II*, 471 Mich. at 519. When that statement is considered in context, I conclude that our Supreme Court did not hold that an improper administrative decision cannot constitute wrongful conduct under MEPA. Rather, it held that an improper administrative decision does not *necessarily* constitute wrongful conduct under MEPA.

In *Preserve the Dunes*, an entity called TechniSand possessed a pre-existing sand mining permit set to expire in 1993; TechniSand applied for, and the DEQ granted, an amended permit in late 1996. *Preserve the Dunes II*, 471 Mich. at 511-512. The amended permit allowed TechniSand to expand its mining operation from "a noncritical dune area into an adjacent critical dune area." *Preserve the Dunes v. Dep't. of Environmental Quality* (*Preserve the Dunes I*), 253 Mich. App. 263, 266; 655 N.W.2d 263 (2002). The plaintiff, Preserve the Dunes (PTD), sued TechniSand and the DEQ nineteen months later, alleging, in relevant part, "that the DEQ violated MEPA when it approved TechniSand's amended mining permit." *Preserve the Dunes II*, 471 Mich. at 512. Notably, the trial court had held a seven-day bench trial and specifically determined that TechniSands's mining operation would not adversely affect the environment sufficiently to constitute a violation of MEPA. *Id.*, 471 Mich. at 513, 518-519, 522, 524.

Furthermore, the analysis on appeal concerned TechniSands's *eligibility* for a permit. Eligibility is determined pursuant to MCL 324.63702(1) and MCL 324.63704(2), both of which "are unrelated to whether the applicant's proposed activities on the property violate MEPA." *Preserve the Dunes II*, 471 Mich. at 519. More specifically, MCL 324.63702(1) merely inquires into the nature of the permit already held by the operator, and MCL 324.63704(2) enumerates certain documents that an applicant must submit. *Id.*, 471 Mich. at 514-515. Thus, an eligibility assessment is strictly procedural and has nothing at all to do with the environment. The DEQ must *subsequently* make a determination of the applicant's environmental impact, which does implicate MEPA, under MCL 324.63709. *Id.* at 515-516. As noted, the trial court specifically determined that TechniSands's conduct would not harm the environment within the meaning of MEPA; consequently, there could be no implication of MCL 324.63709. *Id.*at 521. The Court of Appeals did not address the issue of actual environmental harm, and neither did our Supreme Court. *Id.*

Consequently, *in context*, the DEQ's permit eligibility determination did not have an effect on the environment. Our Supreme Court's statement that an "improper administrative decision, standing alone, does not harm the environment" *in that context* clearly means only what it literally says: a technicality is not an environmental harm. This becomes especially apparent in the Court's subsequent explanation that "any undotted 'i' or uncrossed 't' " should not be grounds for invalidating permits under MEPA. *Preserve the Dunes II*, 471 Mich. at 522. In contrast, the Court implied that the issuance of TechniSands's permit might contravene MCL 324.63709 if it were determined that TechniSands's mining would harm the environment. *Id.* at 521, 524. Again, the *eligibility* determination was merely the first procedural step in the permitting process; the DEQ was required to conduct an environmental impact analysis as the next step in the process. *Id.* at 515-516. A technical error in the eligibility analysis could not proximately cause any eventual environmental harm, because that second step

would constitute an intervening and superseding cause. See *McMillian v. Vilet*, 422 Mich. 570, 576-577; 374 N.W.2d 679 (1985).

I agree with the majority that MEPA requires an analysis of a defendant's conduct. *Preserve the Dunes II*, 471 Mich. at 514, 517-519. However, I conclude that our Supreme Court in *Preserve the Dunes II* established nothing more remarkable than a traditional proximate causation analysis. Our Supreme Court did not hold that challenged conduct must be the single immediate and direct cause of the alleged environmental harm. It also did not hold that the issuance of a permit is necessarily too far removed from any environmental harm. Rather, it held that an administrative decision with no relevance to or impact on the environment cannot be challenged under MEPA merely because that decision is part of the cause-in-fact of some alleged environmental harm. I do not find support for the DEQ's contention that *Preserve the Dunes II* insulates all administrative determinations from MEPA challenges *per se*.

However, I caution that I find no "bright line" distinction between procedural and substantive administrative decisions. I take from *Preserve the Dunes II* that any particular challenged decision must be individually considered in its own unique factual and legal context to determine whether it has a proximate causal relationship to the alleged environmental harm. If the decision lacks such a proximate connection, or if there is in fact no environmental harm, then it is not subject to challenge under MEPA, even if the decision is clearly wrong. The trial court should have evaluated each of the DEQ's alleged errors to determine whether they had a proximate causal connection to the alleged environmental harm. I would hold that the trial court erred by concluding that plaintiffs were absolutely barred from bringing the instant claims under MCR 2.116(C)(8). I would reverse and remand for further consideration of the details of plaintiff's arguments.

All Citations

Not Reported in N.W. Rptr., 2018 WL 6624870

Footnotes

1 *Preserve the Dunes* was overturned by the Supreme Court in *Anglers of the AuSable, Inc. v. Dep't. of Environmental Quality*, 488 Mich. 69; 793 N.W.2d 596 (2010). Subsequently, the Supreme Court vacated its decision in *Anglers*, thereby reviving *Preserve the Dunes. Anglers of AuSable, Inc. v. Dep't. of Environmental Quality*, 489 Mich. 884; 796 N.W.2d 240 (2011). Accordingly, *Preserve the Dunes* is binding precedent on this Court. MCR 7.315.

1 Considerable emphasis was placed at oral argument on *Anglers of the AuSable, Inc. v. Dep't. of Environmental Quality*, 488 Mich. 69; 793 N.W.2d 596 (2010). Because that case was subsequently vacated, I decline to consider it. *Anglers of the AuSable, Inc. v. Dep't. of Environmental Quality*, 489 Mich. 884; 769 N.W.2d 240 (2011). In light of my dissenting posture, I also need not consider the significance of the Court of Appeals decision in that matter.

Attachment 7

S T A T E OF M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

*** * * ***

In the matter of the application of Enbridge Energy, Limited Partnership for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 Of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447	)	Case No. U-20763

QUALIFICATIONS AND DIRECT TESTIMONY OF

ALEX MORESE

MICHIGAN PUBLIC SERVICE COMMISSION

September 14, 2021

QUALIFICATIONS OF ALEXANDER MORESE
CASE NUMBER U-20763
PART I

Q. Please state your name, business address, and occupation?

A. My name is Alexander A. Morese and my business address is 7109 W. Saginaw Highway, Lansing, MI 48917. I am employed by the Michigan Public Service Commission (MPSC) as a State Administrative Manager of the Energy Security Section of the Energy Operations Division.

Q. On whose behalf are you testifying?

A. I am testifying on behalf of MPSC Staff (Staff).

Q. Will you briefly describe your educational background?

A. I earned a dual-major Bachelor of Arts degree from Florida State University in December of 1991 where I studied Economics and International Affairs. I also attended graduate school at Michigan State University from 1993-1999 in the Resource Development Department, pursuing studies in environmental policy and management. I departed the program with coursework completed but without completion of a thesis.

Q. Please explain your professional experience during your employment with MPSC.

A. In 2002 I began working as an economic analyst within what is now called the Energy Security section of the MPSC. From 2002 to 2008 my responsibilities included maintaining and supporting the MPSC website and associated online applications and monitoring state and regional energy supplies to maintain situational awareness for potential energy shortages and emergencies. In 2008 I accepted a position in the newly formed Renewable Energy Section created to facilitate implementation of PA 295 of 2008. In 2010 I accepted the manager

position of the Energy Security Section. This section's responsibilities included: energy supply monitoring, energy emergency planning and response, petroleum sector monitoring, critical infrastructure protection, cybersecurity, and website and online application support. In May 2015 the Energy Security Section was transferred to the newly created Michigan Agency for Energy (MAE). Section responsibilities remained similar, with the addition of policy related research in support of MAE's mission and the transferring of all internet technology related responsibilities to the MAE/MPSC Administration Division. In September of 2015 I began working with the Pipeline Safety Advisory Board (PSAB) assisting the MAE Executive Director who served as the co-chair of the PSAB. Additionally, I and several colleagues formed what was referred to as the State Technical Team, a multi-departmental support group that provided technical research, review, and facilitation assistance to State leadership. My work with PSAB ended in late 2018 with the release of the final PSAB report and the dissolution of the PSAB. In 2019 the MAE was deconstructed by executive order and the Energy Security Section was moved back into the MPSC.

Q. What are your responsibilities in your current position?

A. As Manager of the Energy Security section within the Energy Operations Division at the MPSC, I am responsible for guiding a team of highly qualified individuals in our role of preparing for, responding to, recovering from, and helping to mitigate or head off energy emergencies in the State of Michigan. This entails a myriad of duties including but not limited to: monitoring and forecasting energy supplies, engaging with private sector energy emergency personnel

through training and exercises, authoring and maintaining the Michigan Energy Assurance Plan and the Petroleum Shortage Response Plan, conducting the State Heating Oil and Propane Program survey, serving as petroleum sector liaison, monitoring utility cyber and physical security plans, and lastly, serving as the State Emergency Management Coordinator (SEMC) for energy at the State Emergency Operations Center (SEOC) of the Michigan State Police. As SEMC I coordinate an energy emergency response team at the Commission, ensuring members are adequately trained and prepared to provide support to the SEOC during emergencies, as needed.

Q. Have you had any additional training?

A. I have completed the two-week long "Annual Regulatory Studies Program" sponsored by the National Association of Regulatory Utility Commissioners at Michigan State University.

Q. Describe your professional experience specific to Enbridge's Line 5, including the Straits crossing.

A. In 2015, I was asked to join an interagency team composed of technical staff from the Department of Natural Resources (DNR), the Department of Environmental Quality (DEQ), the Michigan Public Service Commission (MPSC), the Michigan Agency for Energy (MAE), and the Office of the Attorney General (AG) (the Technical Team). This team was originally tasked with the review of proposals submitted to complete two studies recommended by the Michigan Petroleum

QUALIFICATIONS OF ALEXANDER MORESE
CASE NUMBER U-20763
PART I

Pipeline Task Force Final Report,[1] an Alternatives Analysis and Risk Analysis, and provide recommendations for hire to the State. In the following years, the Technical Team provided administrative support to the PSAB and supported State leadership with oversight and review of ongoing research, collection and dissemination of pertinent data, and collaborated with Enbridge and outside contractors on additional reports required by the First Agreement. Some of the specific topics relevant to my participation included alternatives analysis of Line 5, propane and petroleum market analysis, risk analysis of the Straits water crossing, severe weather warnings, and identification of higher risk Line 5 water crossings in Michigan. The Technical Team also participated in negotiations with Enbridge on the three agreements with the State.

[1] Michigan Petroleum Pipeline Task Force Report - https://mipetroleumpipelines.org/document/michigan-petroleum-pipeline-task-force-report

DIRECT TESTIMONY OF ALEXANDER MORESE
CASE NUMBER U-20763
PART II

Q. What is the purpose of your testimony in this proceeding?

A. The purpose of my testimony is to submit information on behalf of Staff relating to greenhouse gas (GHG) emissions associated with Enbridge's Line 5 Straits Replacement Project and alternatives under review.

Q. Are you sponsoring any exhibits and were they prepared by you?

A. Yes, I am sponsoring four exhibits which are listed below.

- Exhibit S-12: Plains Midstream letter to circuit court, is a four-page letter submitted to Judge Jamo of the Ingham County Circuit Court to express support for Line 5.

- Exhibit S-13: Enbridge Mainline System pipeline map, is a one-page document containing a map captured from Enbridge's website.

- Exhibit S-14: EIA's Updated Buildings Sector Appliance and Equipment Costs and Efficiencies, is an 11-page excerpt of specific data tables from an over 740-page document, that provide estimates for purchase and installation costs of common household appliances.

- Exhibit S-15: Addressing an Electrification Roadblock: Residential Electric Panel Capacity, is a 14-page report analyzing the electrical readiness of U.S. homes in preparedness for increased electrification.

Q. Why is Staff providing testimony about the GHG emissions?

A. The Commission, in its April 21, 2021 order[2] (April Order) responding to Enbridge's Motion in Limine, requested the scope of this case be expanded to

[2] Case U-20763 Commission Order, April 21, 2021 - https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t000000MOSVDAA5

include an alternative should the Strait's portion of Line 5 (Dual Pipelines) cease operation due to a Notice of Revocation (of easement), thus providing for a scenario where this Act 16 case could result in not only the replacement of a segment of pipeline into a tunnel but also a restart of a pipeline system idled by the loss of easement rights. The Commission stated that restarting the pipeline after a closure of the Straits segment should result in a broader Michigan Environmental Protection Act (MEPA) review that includes GHG emissions.

"If the State prevails in its action to enforce the Notice, the conduct at issue in this case – the Replacement Project – would be the lynchpin providing the company with the ability to ship product on this 4-mile stretch of Line 5. In other words, while Enbridge would retain the right to operate the other 641 miles of Line 5, it may not be able to ship product through the Straits by pipeline once the Notice is in force without the authorization that is sought in this case." (p. 68)

"..the Commission must ultimately determine, consistent with its responsibilities under MEPA, whether there is any pollution, impairment, or destruction as a result of the Replacement Project – including in comparison to the possible closure of the dual pipeline segments currently in the Straits if the Notice is enforced; whether any pollution, impairment, or destruction is consistent with the protection of Michigan's natural resources; and whether there are feasible and prudent alternatives to any pollution, impairment, or destruction that is found as a result of the Replacement Project." (p. 69)

Q. Does your testimony's relevancy depend on whether the Dual Pipelines are ultimately shutdown via the current legal challenge?

A. Yes, in so much that the Commission has stated the case's expanded scope to include GHG emissions is dependent on a potential closure.

Q. What is your interpretation of what the Commission is seeking in regard to GHG emissions for this case, and particularly the Commission's MEPA review?

A. Based on the guidance provided on page 69 of the April Order, the Commission is asking for assistance in determining how GHG pollutants should be framed or bounded for consideration and how this affects the evaluation of reasonable and prudent alternatives.

> "Given the many considerations involved in the production, transportation, and ultimate refining and consumption of the products being transported, evidence addressing how to account for GHG pollutant impacts attributable to the proposed Replacement Project, where the proper boundaries of GHG pollutants should be drawn, and the correct alternative(s) for comparison would be helpful to the Commission in making this determination." (p. 69)

In this testimony Staff provides a framework for this evaluation and the reasoning behind said framework.

Q. Did Commission Staff rely on any outside consultants to assist their GHG investigation?

A. Yes, Staff retained the services of Weston Solutions Inc. (Weston) to provide support to Staff relating to the environmental impacts of the proposed tunnel and pipeline replacement, including an analysis of GHG emissions.

Q. What analyses completed by Weston will you be referencing in your testimony?

A. Staff is referencing Exhibit S-24, Greenhouse Gas Emissions Evaluation, sponsored by Phil Ponebshek that summarizes the GHG analysis completed by Weston.

Q. How is your testimony organized?

A. My testimony is organized into the following parts:

1. Discussion of baseline assumptions and background information.

2. Economic and logistical considerations of petroleum product supply and demand in relation to alternative scenarios.

3. Staff analysis of feasibility of product switching over short to medium time frame.

4. Review of research and analysis by Weston.

5. Summary of conclusions.

Part 1. Discussion of baseline assumptions and background information.

Q. Are there boundaries to how you evaluated the question of GHG emissions?

A. Yes, Staff evaluated the GHG emissions associated with two primary scenarios. These include 1) combined pipeline operation and tunnel construction, and 2) GHG emissions resulting from rail and truck transportation in a scenario where the pipeline is no longer operational or has been shut down.

Q. Will you be providing testimony on the ecological impacts of burning fossil fuels or the resulting impacts of global climate change in your testimony?

A. No, Staff acknowledges that the burning of fossil fuels is a major source of GHGs in the atmosphere, thus contributing to global climate change. Staff also acknowledges that global climate change may have a deleterious effect on the Great Lakes ecosystem.

However, the environmental impacts associated with fossil fuels and climate change, while vitally important topics, should not determine the outcome of the case at hand because the transportation alternatives in this case will likely result in no significant change to consumption of the primary end products (gasoline,

diesel, jet fuel, propane, etc.) thus resulting in no material decrease in GHG emissions from the products being consumed.

Q. Define the time frame over which Staff has analyzed alternative modes of transportation and product alternatives.

A. Staff has decided to focus on a short to medium term timeframe of approximately 5-30 years for our evaluation and assumptions. It is very difficult to speculate what the future holds in regard to technological developments/improvements, availability of energy infrastructure, or petroleum prices within regional markets or on an international scale.

Q. Describe the scope that Staff requested Weston to complete relating to GHG emissions.

A. Staff requested that Weston evaluate the GHG emissions associated with the:

1) current pipeline operation,

2) construction of the Line 5 Tunnel Project, and

3) alternatives to transporting the volumes of petroleum products shipped on Line 5 if the pipeline were unavailable.

Q. Describe the assumptions that Staff made in developing the scope for GHG emissions associated with alternative transportation modes.

A. Staff provided Weston with baseline assumptions for their evaluation of GHG emissions associated with the alternatives to transporting the volumes of petroleum product shipped on Line 5 over a 5 to 30-year timeframe as described above. These baseline assumptions included that:

1) A Line 5 shutdown would not alter the demand at market end points for the product transported on Line 5.

a. Volumes shipped would remain consistent with historical averages and be required in those markets where refining and storage infrastructure resides.

b. GHG emissions will only be calculated between primary beginning and end points of the supply chain.

2) Natural Gas Liquids (NGLs) would not flow on Enbridge Line 1 from western Canada to Superior, Wisconsin (Superior) following a Line 5 shutdown.

a. NGL or purity propane would be shipped via rail from western Canada to Sarnia, Ontario (Sarnia) and Rapid River, Michigan (Rapid River).

3) Crude oil would still flow on Enbridge Line 1 from western Canada to Superior.

a. Crude oil would be transported via rail from Superior to Marysville, Michigan (Marysville).

4) The primary mode of transportation for crude oil and NGL would be rail.

a. Trucking the volumes transported on Line 5 would not be feasible, except for the Michigan-produced crude oil volumes currently injected into Line 5 at Lewiston, Michigan (Lewiston).

b. Trucking may be used to supplement propane transportation.

The basis for the above stated scope and assumptions provided to Weston will be addressed in Part 2.

Part 2. Economic and logistical considerations of petroleum product supply and demand in relation to alternative scenarios.

Q. If throughput for Line 5 is eliminated, does Staff expect a reduction in fossil fuel consumption and therefore GHG emissions?

A. No. It is reasonable to assume that halting a primary petroleum transportation route/method to the region will not result in a demand reduction for products currently carried by Line 5. Existing and operational liquid pipelines serve solely as a transportation mode and not a determinate of demand. The only way to materially affect the GHG emissions from these products is to alter the demand for these products, the very consumption of them, by the end-user. Below, I explain that demand is unlikely to significantly change due to the price inelasticity of demand. Thus, if a particular transportation pathway is shut, consumption of the transported products is unlikely to change assuming alternate transportation modes are available.

Q. How were the transportation and supply chain beginning and end points selected for the GHG emissions evaluation?

A. Staff has attempted to select the most feasible routes to transport these products based on current market locations, availability of supply, refining and distribution infrastructure, configuration of the Lakehead system, and previous studies by Dynamic Risk Assessment Systems, Inc. (Dynamic Risk)[3] and Public Sector

[3] Alternatives Analysis for the Straits Pipelines (Section 7), https://drive.google.com/file/d/18NpC61Gfrbup43U0T3FtHy11ew2j5Nn6/view

Consultants.[4] Additionally, by selecting these routes it allows for a more consistent comparison between the pipeline and other transportation modes. However, the analysis has also determined a per barrel-mile emission value for each transportation mode (i.e., pipeline, truck, rail) which provides flexibility in analyzing potential routes.

Q. Why do you assume NGL will no longer be carried on Line 1 if throughput on Line 5 is eliminated?

A. Enbridge in their presentation to the Upper Peninsula Energy Task Force (UPETF) stated that there was "No NGL storage or transport ability on any south routes"[5] of the Lakehead system. Based on public statements by Plains Midstream (Exhibit S-12), "...shutting down Line 5 would result in the inevitable shutdown of Plains facilities at Sarnia, Rapid River, and Superior," the economic viability of the Superior fractionator is in question should NGL shipments no longer pass through to Rapid River and Sarnia. Due to the lack of properly configured infrastructure to transport NGL via pipeline south of Superior, it was assumed purity propane would arrive via rail to markets supplying the Upper Peninsula. However, even if this conjecture is incorrect, due to the flexibility of the analysis conducted by Weston, we can estimate the GHG emissions associated with trucking propane from Superior or other regional terminals to the UP. We can

[4] Analysis of Propane Supply Alternatives for Michigan (p. 47-53), https://www.michigan.gov/documents/egle/Upper_Peninsula_Energy_Task_Force_Committee_Recommendations_Part_1_Propane_Supply_with_Appendices_687642_7.pdf

[5] Enbridge Line 5 Discussion to the U.P. Energy Task Force (p. 10), https://www.michigan.gov/documents/egle/egle-exe-upetf-Enbridge_Presentation_666523_7.pdf

also estimate and compare the associated GHG emissions for transportation of NGL from Superior to Sarnia via rail. See Part 5's Summary of Conclusions.

Q. Why didn't you request that Weston evaluate the GHG emissions associated with the crude oil and NGL extraction process or their ultimate end use?

A. As stated previously, Staff assumed a negligible change in consumption of these products in the hypothetical loss of Line 5 throughput. Staff has seen no indication of a major shift in consumption by end users due to a change in transportation route or methodology. Therefore, emissions associated with extraction and end use are assumed to remain relatively unchanged for this analysis.

Q. What are the most likely alternative transportation modes for products currently shipped on Line 5?

A. According to research by Dynamic Risk[6] and Public Sector Consultants,[7] the most likely alternate mode(s) of transportation are by rail for the largest volumes and distances, and truck for shorter volumes and distances. Dynamic Risk considered rail "the most practical and cost-effective" of alternative transportation methods and deemed a truck-only alternative "nonviable." A quick analysis of the sheer volume of crude oil (approximately 440,000 bbl/day or 18,480,000 gal/day) transported on Line 5 from Superior would require nearly 1,800 additional tanker trucks on interstate highways each day and transload facilities

[6] Alternatives Analysis for the Straits Pipelines (Section 7), https://drive.google.com/file/d/18NpC61Gfrbup43U0T3FtHy11ew2j5Nn6/view

[7] Analysis of Propane Supply Alternatives for Michigan – https://www.michigan.gov/documents/egle/Upper_Peninsula_Energy_Task_Force_Committee_Recommendations_Part_1_Propane_Supply_with_Appendices_687642_7.pdf

Attachment 8

STATE OF MICHIGAN
IN THE COURT OF APPEALS

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE & RELOCATE LINE 5

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

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, *et al*.,

Appellees.

Supreme Court No. _____

Court of Appeals No. 369156, 369159, 369161, 369162, 369165 (consolidated)

MPSC Case No. U-20763

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NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

Please take notice that on April 2, 2025 Bay Mills Indian Community, Little Traverse Bay Bands of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatomi, Environmental Law and Policy Center, and Michigan Climate Action Network filed an Application for Leave to Appeal the Court of Appeals' February 19, 2025 Opinion in Docket Nos. 369156, 369157, 369159, 369161, 369162, 369163, 369165 and 369231 (consolidated) with the Michigan Supreme Court. A copy of the Application for Leave to Appeal is attached.

April 2, 2025

Respectfully submitted,

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the Matter of the Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief	Case No. U-20763

NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

Please take notice that on April 2, 2025 Bay Mills Indian Community, Little Traverse Bay Bands of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatomi, Environmental Law and Policy Center, and Michigan Climate Action Network filed an Application for Leave to Appeal the Court of Appeals' February 19, 2025 Opinion in Docket Nos. 369156, 369157, 369159, 369161, 369162, 369163, 369165 and 369231 (consolidated) with the Michigan Supreme Court. A copy of the Application for Leave to Appeal is attached.

April 2, 2025

Respectfully submitted,

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