

February 18, 2022

Via E-filing

Ms. Lisa Felice Michigan Public Service Commission 7109 W. Saginaw Hwy. P. O. Box 30221 Lansing, MI 48909

RE: MPSC Case No. U-20763

Dear Ms. Felice:

Attached please find a Proof of Service evidencing service of Initial Brief of the 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 on all parties, for filing in the above-referenced matter.

If you have any questions, please feel free to contact my office. Thank you.

Sincerely,

Christopher R. Clark cclark@earthjustice.org

Christoph R. Clark

cc: All counsel of record

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 Michigan Public Service Commission's Rules of Practice and Procedure, R. 792.10447, or the Grant of other Appropriate Relief

U-20763

ALJ Dennis Mack

INITIAL BRIEF OF THE 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

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INTRODUCTION

The Straits of Mackinac represents the center of the Anishinaabe creation story and is a place of ongoing cultural, spiritual, and economic significance to Tribal Nations. Enbridge asks the Commission for approval to construct and operate a pipeline project unlike any that has ever been built—a liquids pipeline encased in a tunnel—beneath the Straits. Because the project threatens this sacred area and the resources within it, Enbridge's application should be denied.

The evidence in the record demonstrates that Enbridge's untested proposal is neither reasonably routed nor designed, and therefore Enbridge cannot satisfy Act 16. The route of the proposed tunnel project is not reasonable because it runs through an area that is replete with cultural and historical sites. It is a deep affront to Michigan tribes to construct a fossil fuels pipeline through this landscape. Furthermore, the concept and design of the tunnel is unreasonable and unsafe. The evidence establishes that transporting liquid propane and crude oil through an enclosed underground tunnel creates the conditions for a catastrophic explosion that could cause irreparable harm to the Great Lakes.

The proposed pipeline also fails to satisfy the requirements of the Michigan Environmental Protection Act because it will pollute, impair, and destroy natural resources and a prudent and feasible alternative that is less environmentally-damaging is available. The proposed long-term investment in fossil fuel infrastructure will contribute to the production of the greenhouse gases at a time when Michigan, the United States, and the global community must shift away from fossil fuels and toward clean energy to avert the climate crisis. The evidence shows the unique effects that climate change will have—and, indeed, is already having—on treaty-protected natural resources of critical economic and cultural importance to Tribal Nations in Michigan. For example, the fishery and wild rice resources are threatened by climate change,

which, in turn, threatens the Tribal Nations' abilities to preserve their traditional lifeways and economies.

The Tribal Nations bear the brunt of the pollution and risk associated with Enbridge's experiment. Enbridge claims that the purpose of its proposal is to reduce the considerable risk of an oil spill associated with its operation of the dual pipelines through the waterways of the Straits. There is an obvious way to remove that risk. Enbridge can cease operating the dual pipelines and not construct a new pipeline in a tunnel that threatens the Tribal Nations' cultural lands and treaty-protected resources.

LEGAL STANDARD

The Project must meet the requirements of Public Act 16 of 1929, MCL 483.1 et seq. ("Act 16") and the Michigan Environmental Protection Act ("MEPA"), MCL 324.1705, in order for the Commission to approve it.

Act 16 provides the Commission with "broad jurisdiction" over the construction, maintenance, operation, and routing of pipelines delivering liquid petroleum products. A project must satisfy three Act 16 criteria to be eligible for the Commission's approval: (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. As the applicant, Enbridge bears the burden of proving these three factors by the preponderance of the evidence.

The Commission also must consider environmental impacts of the Project as part of its MEPA obligation. Specifically, MEPA states:

¹ MCL § 483.1(2); In Re Wolverine Pipe Line Co., Case No. U-13225 Order dated July 23, 2002, at 4.

² In Re Wolverine Pipe Line Co., No. U-13225 Order dated July 23, 2002, at 4-5.

³ BCBSM v Governor, 422 Mich 1, 88-89, 367 N.W.2d 1 (1985); Aquilina v General Motors Corp, 403 Mich 206, 210, 267 N.W.2d 923 (1978).

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.⁴

Thus, under MEPA, the Commission cannot approve a project that will pollute, impair, or destroy natural resources, or the public trust in those resources, if a feasible and prudent alternative exists.

Furthermore, no project can satisfy Act 16 or MEPA if, in approving it, the Commission will run afoul of its obligation to protect tribal Treaty rights and resources. Treaties are the supreme law of the land,⁵ and states and state agencies are bound to honor tribal treaty rights.⁶ State agencies cannot act to render treaties meaningless, such as by causing the destruction of resources upon which a treaty right depends.⁷

FACTUAL AND PROCEDURAL BACKGROUND

This case concerns Enbridge's application for approval to route a segment of the Line 5 oil pipeline crossing the Straits of Mackinac through a tunnel to be constructed beneath the Straits (the "Proposed Project" or "Project").

The Commission ordered that this matter proceed as a contested case. As a rationale for its decision, the Commission specifically cited the impact of Line 5 on the Great Lakes and the need for a robust record:

⁴ MCL § 324.1705(2).

⁵ People v Jondreau, 384 Mich 539 (1971) (interpreting U.S. Const., Art. VI, cl.2. and the Treaty of 1836).

⁶ *Id.* at 543-44.

⁷ See United States v Washington, 853 F 3d 946 (9th Cir 2017), aff'd by Washington v United States, 138 S Ct 1832 (2018) (holding that where state-owned culverts located under state roads obstructed fish passage, diminishing the supply of fish, the state had violated its duty owed to tribes under treaties that guaranteed fishing rights.) Only an act of Congress can diminish a treaty. People v LeBlanc, 399 Mich 31, 58 (1976) (citing Menominee Tribe v United States, 391 US 404, 413 (1968)); see also Minnesota v Mille Lacs Band of Chippewa Indians, 526 US 172, 202 (1999).

[T]he Commission finds that Enbridge's Line 5 Project 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 in a contested case proceeding. Moreover, due to the significant public interest and concern regarding the Line 5 Project's potential environmental impact on the Great Lakes, the Commission finds that it is in the public interest to conduct a contested case proceeding.⁸

The Bay Mills Indian Community ("Bay Mills"), Little Traverse Bay Bands of Odawa Indians ("LTBB"), Grand Traverse Band of Ottawa and Chippewa Indians ("GTB"), and Nottawaseppi Huron Band of the Potawatomi ("NHBP") (collectively, the "Tribal Nations" or "Tribal Intervenors") are four sovereign nations that petitioned to intervene in the contested case. The Tribal Nations have inhabited the lands of present-day Michigan and have fished, hunted and gathered in the lands and waters surrounding the Proposed Project since time immemorial. In the contested case, the Tribal Nations described the natural resources at issue in Enbridge's application as important to their cultures, ways of life, and Tribal citizens' incomes and livelihoods.

Three of the four Tribal Nations—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 a treaty in Washington, D.C. on March 28, 1836 (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 acres in

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⁸ U-20763, June 30, 2020, Order at 69-70

⁹ Petition to Intervene by Bay Mills Indian Community (May 11, 2020) ("Bay Mills Petition"); Petition to Intervene by Grand Traverse Band of Ottawa and Chippewa Indians (May 27, 2020) ("GTB Petition"); Petition to Intervene by the Little Traverse Bay Bands of Odawa Indians (Aug 3, 2020) ("LTBB Petition"); Petition to Intervene by Nottawaseppi Huron Band of Potawatomi Indians (Aug 4, 2020) ("NHBP Petition").

Lakes Michigan, Huron, and Superior. ¹⁰ This area is known as the ceded territory. ¹¹ In ceding the lands and waters, the Tribal Nations reserved the rights to hunt, fish, and gather throughout the ceded territory. ¹² These rights have been confirmed by state and federal courts. ¹³

In August 2020, the ALJ granted as of right the Petitions to Intervene of the Tribal Nations, among others.

The ALJ also set a schedule for the contested case that included the opportunity for the parties to file motions in limine early in the proceeding. Enbridge filed such a motion on September 2, 2020. This motion was subject to two rounds of briefing before the ALJ and appeals to the Commission. While the issue was pending, Governor Gretchen Whitmer and the Michigan Department of Natural Resources ("DNR") revoked and terminated the 1953 easement under which Enbridge had been operating Line 5 through the Straits of Mackinac. ¹⁴ The Governor's Notice of Revocation and Termination of the Easement states: "[T]he Easement is being revoked for violation of the public trust doctrine, and is being terminated based on Enbridge's longstanding, persistent, and incurable violations of the Easement's conditions and standard of due care."¹⁵

On April 21, 2021, the Commission resolved the motion in limine. First, the Commission determined, that, for this Project, the Act 16 review must be made for both the pipeline segment

¹⁰ Treaty of March 28, 1836, 7 Stat 491; *see also* Bay Mills Petition, at 1-2. 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 NHBP is 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, at 1.

¹¹ The ceded territory is depicted in Exhibit BMC-6.

¹² Treaty of March 28, 1836, 7 Stat 491.

¹³ See People v LeBlanc, 248 NW2d 199 (Mich 1976); United States v Michigan, 471 F Supp 192 (WD Mich 1979) aff'd 653 F2d 277 (6th Cir 1981), cert denied, 454 US 1124 (1981); Grand Traverse Band of Chippewa & Ottawa Indians v Dir., Michigan Dep't of Nat. Res., 971 F Supp 282, 288-89 (WD Mich 1995), aff'd sub nom. Grand Traverse Band of Ottawa & Chippewa Indians v Dir., Michigan Dep't of Nat. Res., 141 F3d 635 (6th Cir. 1998).

¹⁴ Case No. U-20763, December 9, 2020, Order, at 5 (remanding the motion in limine for rehearing and reconsideration in light of the Revocation and Termination).

¹⁵ ELP-18 at 1 (Notice of Revocation and Termination of Easement, November 13, 2020).

and the proposed tunnel through which it would be routed. The Commission held that the tunnel is subject to Act 16 and MEPA review in this proceeding as it is inextricably connected to the pipeline. As the Commission noted, the tunnel is a "fixture" for purposes of Act 16 and also a "facility" as that term is used in Mich Admin Code R 792.10447. The construction and operation of the tunnel must be considered along with the pipeline for purposes of considering the physical impact and economic damage from construction of the pipeline under MCL 483.2b. 18

Second, the Commission determined that the "public need" factor under Act 16 turns on the issue of whether there is a public need "to replace the dual pipelines with a new pipeline in the tunnel," and did not concern the public need for other existing portions of Line 5.¹⁹ The Commission noted: "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."

Third, the Commission recognized that greenhouse gases are pollutants that "contribute to climate change thereby polluting, impairing, and destroying natural resources," and "fit within the statutory language of MEPA," and, therefore, "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."²¹

¹⁶ U-20763, April 21, 2021 Order. at 12-13.

¹⁷ *Id.* at 13 (citing ALJ Mack's initial ruling on motion in limine and noting that no party sought leave to appeal this determination).

¹⁸ *Id*.

¹⁹ *Id*. at 63.

²⁰ *Id*.

²¹ *Id.* at 65-66.

The Tribal Nations petitioned for a partial rehearing of the Commission's decision.²² That petition remains pending.

On September 14, 2021, Staff, Tribal Intervenors, and other intervening parties filed direct testimony, and on December 14, 2021, Staff, Tribal Intervenors, other intervening parties, and Enbridge filed rebuttal testimony. On December 21, Enbridge moved to strike portions of the testimony and exhibits of several witnesses. On January 13, 2022, the ALJ granted five of Enbridge's motions directed at testimony sponsored by the Tribal Intervenors, striking portions of the testimony of four tribal leaders, and one ethnohistorian.²³

Cross examination of witnesses and the binding in of testimony occurred between January 14 and January 24, 2022.

The record evidence describes the negative impacts the construction, operation, and maintenance of the Project would have on the Tribal Nations, cultural resources, and natural resources. This evidence includes testimony sponsored by Bay Mills, LTBB, and/or NHBP from the following witnesses:

• Bay Mills Indian Community President Whitney B. Gravelle: President Gravelle is the elected leader of Bay Mills and a water keeper. ²⁴ In her direct testimony, she explains Bay Mills' interests in protecting treaty rights and cultural and natural resources from risk and harm associated with Line 5. Specifically, she testified that the proposed route for the Project "is unreasonable because it would be constructed through and operate in an environmentally sensitive area of profound cultural and spiritual significance to Bay Mills." As she explained, Bay Mills recognizes the Straits as the center of creation and as part of one cohesive traditional cultural landscape. ²⁶ The waters of the Straits are part of the tribal fishery—a fishery that over half of Bay Mills' citizens' households rely on for some or all of their income. ²⁷

²² Joint Petition for Rehearing on behalf of Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little Traverse Bands of Odawa Indians, and Nottawaseppi Huron Band of the Potawatomi (May 21, 2021).

²³ Case No. U-20763, January 13, 2022 Ruling on Motions to Strike.

²⁴ Gravelle Direct, 10 Tr. 1415.

²⁵ Gravelle Direct, 10 Tr. 1417.

²⁶ Gravelle Direct, 10 Tr. 1421, 1422, 1427.

²⁷ Gravelle Direct, 10 Tr. 1421.

The fishery holds deep cultural importance to the Tribe beyond its economic value. ²⁸ President Gravelle also testified that, because of the Project's contributions to climate change, it "is likely to impair, pollute, and/or destroy natural resources and species," including "species that hold economic, subsistence, and cultural significance to Bay Mills," such as lake whitefish, walleye, loons, wild rice, and sugar maple, and she explained the significance of those species to Bay Mills. ²⁹

In rebuttal testimony, President Gravelle responded to Staff witnesses regarding the attempted consultation process in this case and the review of the Proposed Project by two other government agencies: the U.S. Army Corps of Engineers and the State Historic Preservation Office.³⁰

- Dr. Charles E. Cleland: Dr. Cleland is an ethnohistorian, independent consultant, and distinguished professor emeritus at Michigan State University.³¹ For decades, the focus of his academic work has been on the cultures and histories of the native people of the Upper Great Lakes area.³² In his testimony, Dr. Cleland explains the significance of the area to the tribes, the cultural and historical features located within and around the Straits and Proposed Project area, and how the Project could impact and harm those features.³³
- Eric Hemenway: Mr. Hemenway is an Odawa Indian of Cross Village, Michigan, a professional historian, and the Director of Archives and Records for LTBB.³⁴ He testified that there are significant native burial sites at the Straits of Mackinac that would be disturbed by the construction of the Project, and that disturbance of burials would demonstrate a disregard for and violate Odawa traditions, religious beliefs, culture, and way of life.³⁵
- Melissa Wiatrolik: Ms. Wiatrolik is a tribal citizen of LTBB and LTBB's 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.³⁶ She testified about the relationship of the Odawa to the Straits of Mackinac, the plants and animals in and near the Straits, and the cultural significance of the Straits.³⁷ She testified that the construction of the Project would disturb Odawa cultural sites, disrupting the Anishinaabe's spiritual relationship with the Manido, or spirits in the water, and potentially disturb burials in the water, such as those of people of the Sturgeon Clan.³⁸

²⁸ Gravelle Direct, 10 Tr. 1421.

²⁹ Gravelle Direct, 10 Tr. 1417, 1428.

³⁰ Gravelle Rebuttal, 10 Tr. 1432-1443.

³¹ Cleland Direct, 10 Tr. 1526-1530, Exh. BMC-31, and Exh. BMC-32.

³² Cleland Direct, 10 Tr. 1527- 1529.

³³ Cleland Direct, 10 Tr. 1540-1564.

³⁴ Hemenway Direct, 9 Tr. 1189-1191.

³⁵ Hemenway Direct, 9 Tr. 1192-1193.

³⁶ Wiatrolik Direct, 9 Tr. 1181.

³⁷ Wiatrolik Direct, 9 Tr. 1183-1184.

³⁸ Wiatrolik Direct, 9 Tr. 1185-1186.

- Frank Ettawageshik: Mr. Ettawageshik is an Odawa Indian, a citizen and former Tribal Chairman of LTBB, and the current Executive Director of the United Tribes of Michigan, an organization founded by the federally recognized tribes in Michigan to advance, protect, preserve, and enhance the mutual interests, treaty rights, sovereignty and cultural way of life of the sovereign tribes of Michigan throughout the next seven generations. He testified that tribes are deeply concerned about climate change and explained why it is important to address climate change for the wellbeing of the State's ecosystem.
- John Rodwan: Mr. Rodwan has been the Environmental Director at NHBP since 2006, and prior to working at NHBP he worked as a private sector environmental consultant and in the public sector as a geologist for the State of Michigan Department of Environmental Quality. 40 His work at NHBP includes restoration work for wild rice in the face of climate change and the Line 6b oil spill in the Kalamazoo River watershed, 41 and he explains the impacts that climate change has on wild rice and associated traditional cultural resources and tribal foods. 42 With this background and experience, Mr. Rodwan testified that the Proposed Project will cause direct and indirect environmental impacts unique to tribal people, such as through contributing greenhouse gases to the atmosphere and climate change and releasing drilling fluids into the Straits. 43
- Kevin Donner: Mr. Donner is the Great Lakes Fisheries Program Manager in the Department of Natural Resources of LTBB. 44 Mr. Donner explained why the Project is likely to impair fisheries resources in the northern areas of Lakes Michigan and Huron.
- Bay Mills Indian Community Vice President Jacques LeBlanc, Jr.: Mr. LeBlanc is a tribal citizen of Bay Mills and a fisherman. 45 His testimony detailed the economic, cultural, and traditional importance of fishing to Bay Mills and its people, as well as Bay Mills' interests in protecting its treaty rights and natural resources from risk and harm associated with the Project.
- Dr. Karen M. Alofs: Dr. Alofs is an Assistant Professor in the School for Environment and Sustainability at the University of Michigan, and her research includes the study of environmental change on freshwater biodiversity, primarily in fish communities. 46 She explained the effects of climate change on walleye, a fish species that is important to the tribal fishery. Specifically, climate change directly threatens walleye—a cool water fish species—in inland lakes in Michigan through

³⁹ Ettawageshik Direct, 10 Tr. 1568, 1569.

⁴⁰ Rodwan Direct, 10 Tr. 1272.

⁴¹ Rodwan Direct, 10 Tr. 1273-1275.

⁴² Rodwan Direct, 10 Tr. 1275, 1277-1283, 1284-1285, 1285-1286.

⁴³ Rodwan Direct, 10 Tr. 1287.

⁴⁴ Donner Direct, 9 Tr. 1172.

⁴⁵ LeBlanc Direct, 10 Tr. 1514.

⁴⁶ Alofs Direct, 10 Tr. 1447-1448; Exh. BMC-8.

warming waters and in the Great Lakes by reducing food sources available to walleye and improving the habitat for predator species.⁴⁷

- Dr. Daniel Larkin: Dr. Larkin is an associate professor and extension specialist in the Department of Fisheries, Wildlife, and Conservation Biology at the University of Minnesota Twin Cities, and his research includes working to predict the impact of climate change on freshwater ecosystems in general and on wild rice in particular. He explained the effects of climate change on wild rice, a traditional cultural resource that is important to the Tribal Nations. Specifically, wild rice is sensitive to changes in temperature and precipitation, and climate change is associated with increased precipitation and flood conditions at the time of year when such conditions are most damaging to developing wild rice, as well as with warmer winters that damage rice seeds. It is Dr. Larkin's opinion that climate change "will have catastrophic effects on wild rice in the coming decades." 50
- Dr. Alec R. Lindsay: Dr. Lindsay is a Professor of Biology at Northern Michigan University, and his research includes animal behavior and conservation. ⁵¹ He explained the effects of climate change on the common loon, an important species to Bay Mills. Specifically, climate change is associated with the loss of breeding habitats and breeding range for loons, as well as more frequent and intense botulism outbreaks in loon populations. ⁵² According to Dr. Lindsay, climate change "will drastically reduce the abundance of, and may even eliminate, common loons in Michigan." ⁵³
- Dr. Inés Ibáñez: Dr. Ibáñez is a Professor for the School for Environment and Sustainability at the University of Michigan, and her research includes the study of tree species' responses to climate change in the forest ecosystems of the Great Lakes region. 54 She explained the effects of climate change on sugar maple, an important species to the Tribal Nations. Specifically, she testified that climate change is "the major threat to sugar maple" because of how changes in temperature and precipitation affect the survival and growth rates of existing trees and the recruitment of new trees. 55
- Richard B. Kuprewicz: Mr. Kuprewicz is the president of Accufacts Inc. and a chemical engineer with nearly fifty years of experience in the oil and gas industry.⁵⁶ His experience includes serving, by appointment, on state and federal committees concerning pipeline safety.⁵⁷ He testified that Enbridge, Staff, and the Mackinac

⁴⁷ Alofs Direct, 10 Tr. 1449-1462.

⁴⁸ Larkin Direct, 10 Tr. 1481-1482; Exh. BMC-12.

⁴⁹ Larkin Direct, 10 Tr. 1481-1494.

⁵⁰ Larkin Direct, 10 Tr. 1494.

⁵¹ Lindsay Direct, 10 Tr. 1498-1499; Exh. BMC-14. 1:3-2:7.

⁵² Lindsay Direct, 10 Tr. 1507.

⁵³ Lindsay Direct, 10 Tr. 1508.

⁵⁴ Ibanez Direct, 10 Tr. 1466-1467; Exh. BMC-10.

⁵⁵ Ibanez Direct, 10 Tr. 1472; see also id. at 1471-1475.

⁵⁶ Kuprewicz Rebuttal, 10 Tr. 1321-1322; Exh. BMC-37.

⁵⁷ Kuprewicz Rebuttal, 10 Tr. 1321-1322; Exh. BMC-37.

Straits Corridor Authority ("MSCA") inappropriately minimize the inherent risks associated with the Project.⁵⁸ He testified that the design plan for transporting oil and propane in a pipeline through a confined space – here, the tunnel – presents the risk of a catastrophic explosion.⁵⁹ Due to this inherent risk, Mr. Kuprewicz testified that, in his experience, the Project is atypical and he was not aware of any similar projects.⁶⁰

The Tribal Intervenors also rely on, and direct the Commission's attention to, the testimony of two additional witnesses presented by ELPC and MiCAN (one of whom, Dr. Stanton, was co-sponsored by Bay Mills):

• Peter A. Erickson: Mr. Erickson is a Senior Scientist and the Climate Policy Program Director at the Stockholm Environment Institute, a non-profit organization affiliated with Tufts University. ⁶¹ He has testified before a Congressional committee, the Washington State Pollution Control Hearings Board, and federal courts. ⁶² Mr. Erickson estimated, quantified, and explained the amount of greenhouse gas emissions associated with the Proposed Project. He testified that the Project is associated with 87 million metric tons of carbon dioxide equivalent annually, that these emissions will contribute to climate change, and that they exceed the amount of emissions associated with a scenario in which the existing dual pipelines cease to operate and Enbridge does not construct a new pipeline route through the Straits. ⁶³

In rebuttal, Mr. Erickson testified regarding flaws in the greenhouse gas emissions quantification of Staff witnesses.⁶⁴

• Dr. Elizabeth Stanton: Dr. Stanton is the Director and Senior Economist at the Applied Economics Institute, and a widely published economist who has also testified in public utility and other related dockets in Massachusetts, New Hampshire, South Carolina, District of Columbia, Pennsylvania, Indiana, Minnesota, Louisiana, Florida, Vermont, Puerto Rico, and Illinois, in addition to submitting comments to federal dockets before the U.S. Environmental Protection Agency. In this matter, she concluded that an alternative in which the existing dual pipelines cease to operate and Enbridge does not construct a new pipeline route through the Straits is feasible and prudent. She explained that such an alternative would achieve the purpose of

⁵⁸ Kuprewicz Rebuttal, 10 Tr. 1325, 1326-1327; Kuprewicz Sur-Sur-Rebuttal, 10 Tr. 1339-40; Kuprewicz Cross 10 Tr. 1371-1373.

⁵⁹ Kuprewicz Rebuttal, 10 Tr. 1326, 1335-1336.

⁶⁰ Kuprewicz Rebuttal, 10 Tr. 1329.

⁶¹ Erickson Direct, 9 Tr. 1038.

⁶² Erickson Direct, 9 Tr. 1039-1040.

⁶³ Erickson Direct, 9 Tr. 1038-1080, 1083-1084.

⁶⁴ Erickson Rebuttal, 9 Tr. 1085-1103.

⁶⁵ Stanton Direct, 9 Tr. 939-941.

⁶⁶ Stanton Direct, 9 Tr. 942-963.

removing the threat of an oil spill from pipelines in the Straits and is feasible because Michigan's energy needs can be met without the Project.⁶⁷

In rebuttal, Dr. Stanton testified regarding flaws in the alternatives analyses of Staff witnesses. ⁶⁸

ARGUMENT

There are three independent reasons for the Commission to deny Enbridge's application. First, it is unreasonable to route, construct, and operate a fossil fuels pipeline in the Straits of Mackinac, an important cultural landscape and, for the Tribal Nations the center of creation. To do so would be an affront to the Tribal Nations. Enbridge has not—and cannot—carry its burden under Act 16 to show that its project is *routed* in a reasonable manner.

Second, Enbridge has not met its burden of proving that the pipeline is *designed* in a reasonable manner. Instead, the record shows that Enbridge has designed an unsafe pipeline in a tunnel that creates the conditions for a catastrophic explosion.

Third, evidence about the Project's destructive impact on the environment demonstrates that the Project fails the review required under MEPA. Pursuant to MEPA, the Commission "shall not authorize[] or approve[]" Enbridge's application because the Project will pollute, impair, and destroy natural resources and there is a feasible and prudent alternative that is both less likely to cause such pollution, impairment, and destruction, and that is consistent with the reasonable requirements of the public health, safety, and welfare. ⁶⁹ The record is replete with evidence that this Project will pollute, impair, and destroy important natural resources that are critically important to the Tribal Nations. If approved, the Project will pollute the atmosphere with greenhouse gas emissions, leading to the impairment and destruction of fish, wild rice,

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⁶⁷ Stanton Direct, 9 Tr. 942-963.

⁶⁸ Stanton Rebuttal, 9 Tr. 965-975.

⁶⁹ MCL § 324.1705 (2).

loons, sugar maple, and other natural resources. Moreover, for the reasons discussed in sections I and II, *infra*, and because of the Project's discharges to the Straits, the Project threatens to pollute, impair, and destroy resources in the Straits.

There is an available alternative—an alternative where the dual pipelines cease to operate in the Straits and that this Project is not constructed. This alternative is technically feasible and overwhelmingly the more prudent alternative. Michiganders can switch fuel sources away from Line 5. And, in the face of a climate crisis, it is prudent *not* to authorize the construction of new fossil fuel infrastructure that would harm treaty-protected resources.

I. THE PROPOSED PROJECT CANNOT BE APPROVED PURSUANT TO ACT 16
BECAUSE IT IS UNREASONABLE TO ROUTE THIS PROJECT THROUGH
THE STRAITS OF MACKINAC AREA, AN IMPORTANT CULTURAL
LANDSCAPE.

The waters and lands of the Straits of Mackinac area constitute an important Traditional Cultural Property, or traditional cultural landscape, and it is unreasonable to construct a massive, first-of-its-kind tunnel and pipeline project through the area. The Commission cannot grant this application under Act 16 because the proposed pipeline is not "designed and routed in a reasonable manner."

The route of the Project is unreasonable because (1) the Project will negatively impact the Straits area as a cultural landscape, and (2) the Project poses an unacceptable risk to specific cultural and historical sites within the cultural landscape. For those reasons and because the requisite investigation into the Project's effects on cultural resources is incomplete and ongoing, Enbridge cannot meet its burden of establishing that the route is reasonable at this time.

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⁷⁰ Case No. U-20763, April 21, 2021 Order at 55 (citing Case No. U-12334, Order dated March 7, 2001 at 13-17; Case No. U-13225, Order dated July 23, 2002 at 4-5; Case No. U-17020, Order dated January 31, 2013 at 5).

A. The Straits of Mackinac Area is a Cohesive Cultural Landscape That Must Be Protected.

No party disputes that the Straits of Mackinac area is a place of deep spiritual and cultural meaning to the Tribal Nations and the Anishinaabe people. The entire Straits area constitutes an integrated cultural landscape, and the damage, destruction, or contamination of one part of this cultural landscape damages the entire landscape. Accordingly, the Commission's Act 16 analysis should reflect that the impacts and risk involved in construction and operation of the Project will be placed in this important environment. As President Gravelle testified: "[t]he Straits are more than a waterway; they are a place of ongoing spiritual significance to the way of life of Bay Mills since time immemorial." It is the center of the creation story for Bay Mills and other Anishinaabe people. According to oral histories:

The creation of North America began with a flooded Earth. The animals received instructions from the Creator to swim deep beneath the water and collect soil that would be used to recreate the world. All of the animals failed, but the body of the muskrat, the last animal that tried, resurfaced carrying a small handful of wet soil in its paws. It is believed that the Creator used the soil collected and rubbed it on the Great Turtle's back, forming the land that became known as Turtle Island, the center of creation for all of North America. According to history, the Great Turtle emerged from the flood in the Straits of Mackinac. The word "Mackinac" is derived from the original name of the Great Turtle from the Ojibwe story of Creation. 75

The lands and waters of the Straits area are also part of the ceded territory and an important area for the exercise of Treaty-protected fishing rights.⁷⁶

⁷¹ Gravelle Direct, 10 Tr. 1419; Wiatrolik Direct, 9 Tr. 1183.

⁷² Gravelle Direct, 10 Tr. 1427.

⁷³ Gravelle Direct, 10 Tr. 1421.

⁷⁴ Gravelle Direct, 10 Tr. 1421; Wiatrolik Direct, 9 Tr. 1183; Cleland Direct, 10 Tr. 1540.

⁷⁵ Gravelle Direct, 10 Tr. 1421.

⁷⁶ See Exh. BMC-6; Leblanc Direct, 10 Tr. 1515, 1516; Donner Direct. 9 Tr. 1173.

The Tribal Nations view the Straits of Mackinac as one cohesive traditional cultural landscape or Traditional Cultural Property. 77 Due to its cultural significance, the Michigan State Historic Preservation Office ("SHPO") has recognized that the Straits area:

is sensitive for the presence of terrestrial and bottomland archaeological sites (including historic aircraft and shipwrecks), submerged paleo landscapes, cemeteries and isolated human burials, significant architecture and objects, and historic districts. Numerous previously reported cultural resources eligible for or listed in the National Register of Historic Places (NRHP) and four National Historic Landmarks are immediately present in the Straits. Survey for significant cultural resources in the Straits is incomplete and we expect numerous additional resources to be present that have yet to be reported, documented, and evaluated. Additionally, the Straits is an important cultural area for regional Tribes and other communities, and it is possible that the Straits is NRHP-eligible as a Traditional Cultural Property and/or Traditional Cultural Landscape encompassing tangible and intangible values such as cultural resources, culturally significant natural resources, and traditional place-based beliefs and practices. ⁷⁸

Indeed, Bay Mills has recognized the Straits area as a cultural landscape or Traditional Cultural Property and is currently pursuing its protection as such.⁷⁹

Dr. Cleland's testimony further recognizes that "[b]y all measures the Straits of Mackinac and Mackinac Island are of deep religious and cultural significance to the Odawa and Ojibwe people and eligible for protection under the [National Historic Preservation Act]." The construction and operation of the Project, including ground disturbance, work activity, excavation, blasting, and operation of the tunnel boring machine, will cause an unacceptable degradation of the integrity and related values associated with this cultural landscape or

⁷⁷ See, e.g., Gravelle Direct, 10 Tr. 1422; see 54 U.S.C. § 302706; see also National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1990) (discussing Traditional Cultural Properties and defining "traditional cultural significance").

⁷⁸ Exh. BMC-40 at 1.

⁷⁹ Gravelle Direct, 10 Tr. 1427.

⁸⁰ Cleland Direct, 10 Tr. 1542.

Traditional Cultural Property.⁸¹ As a result, the Commission should find that the route of the proposed Project is unreasonable and deny the application.

B. The Route of the Project is Unreasonable Because It Will Disturb and Degrade Cultural and Historic Resources.

In addition to the Project's unacceptable detrimental effects on the Straits of Mackinac area as a cultural landscape or Traditional Cultural Property, the route of the proposed Project is unreasonable because the construction and operation of the Project will damage specific cultural sites, their associated values, and the ability of Tribal Intervenors and their people to experience these sites. Reference are contains a remarkable concentration of sites and resources that are culturally and historically significant. Reference are "Native American occupation sites" which "collectively contain a record of thousands of years of tribal history. Reference are non-renewable so that once they are damaged or destroyed, there are no alternative means of learning about the lives of the native people who first settled and developed unique adaptions to the natural environment in what is today northern Michigan. The Straits area contains 141 recorded sites, and SHPO has explained that more are likely to be present. This includes culturally significant

⁸¹ See Gravelle Direct, 10 Tr. 1427 (explaining that damage, destruction, or contamination of one part of the cultural landscape constitutes damage to the entire landscape); Cleland Direct, 10 Tr. 1531-1532 (recognizing that "earth moving construction is often detrimental to our understanding and appreciation of our common heritage due to the destruction of elements that have survived from the past and by which we are able to learn and appreciate the contribution of our ancestors."); Hemenway Direct, 9 Tr. 1193 (stating that "the proposed construction activity location" would "disturb Odawa and other Native burials.").

⁸² See e.g., Wiatrolik Direct, 9 Tr. 1185-1186.

⁸³ See Exh. BMC-40 at 1; CONFIDENTIAL Exh. BMC-34 (showing the 141 recorded historic and cultural sites on file with the Michigan State Historic Preservation Office). (Exhibit BMC-34 is also referred to in the docket as Exhibit BMC-34C, to identify that it is a CONFIDENTIAL exhibit.).

⁸⁴ Cleland Direct, 10 Tr. 1535.

⁸⁵ Id.

⁸⁶ See CONFIDENTIAL Exh. BMC-34; Exh. BMC-40 at 1 (explaining that SHPO "expect[s] numerous additional resources to be present that have yet to be reported, documented, and evaluated.").

burial and village sites.⁸⁷ The Proposed Project will disturb and degrade these sites and resources, ⁸⁸ which makes the route of this Project plainly unreasonable. To hold otherwise would sanction a grave threat to the cultural traditions, practices, and beliefs of the Tribal Nations.

Construction activities and disturbances on and near Point La Barbe, including construction of proposed outfalls, operation of the tunnel boring machine, and 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 Project area and within the limits of disturbance. ⁸⁹ There will be similar disturbances on McGulpin Point where excavation and blasting to construct the tunnel boring machine entrance portal and operation of the tunnel boring machine will disturb and degrade nearby cultural sites, including those that overlap with or are directly adjacent to the Project area. There, a prehistoric village, recorded in the SHPO files as 20EM11, and a Woodland period mound group, recorded in the SHPO files as 20EM12, among other sites of note, are mapped as intersecting with the Project area. ⁹⁰

Vibratory impacts from the operation of the massive tunnel boring machine may cause further damage to cultural and archaeological sites, and Enbridge's plan to monitor vibratory impacts fails to mitigate this risk. Enbridge witness Paul Turner relied on a McMillen Jacobs Associates report prepared for the Michigan Department of Transportation ("McMillen Jacobs Vibrations Report") to arrive at 0.1 inches per second peak particle velocity ("PPV") as a "conservative estimate" for vibrations that "may cause impacts to very sensitive structures."

⁸⁷ Hemenway Direct, 9 Tr. 1192; CONFIDENTIAL Exh. BMC-34; CONFIDENTIAL Exh. BMC-42. (Exhibit BMC-42 is also referred to as Exhibit BMC-42C as it is a CONFIDENTIAL exhibit.)

⁸⁸ Hemenway Direct, 9 Tr. 1193 (stating that "the proposed construction activity location" would "disturb Odawa and other Native burials.").

⁸⁹ See CONFIDENTIAL Exh. BMC-42 at 10; Id. at 21; CONFIDENTIAL Exh. BMC-34 at 5.

⁹⁰ See CONFIDENTIAL Exh. BMC-34 at 4; CONFIDENTIAL Exh. BMC-42 at 11; *Id.* at 31.

⁹¹ Turner Rebuttal, 7 Tr. 636; Exhibit BMC-41, Enbridge Response to Bay Mills Discovery Request No. 15.

The threat of vibratory damage is heightened in the near-shore areas where the tunnel boring machine is operating at a shallower depth of cover. 92 Enbridge has no plans to adhere to a vibratory limit that is protective of sensitive structures and archaeological or cultural resources, not even the "conservative threshold" of 0.1 inches/second advanced by Mr. Turner. In response to a discovery request, Enbridge explained that it will adhere to a "Review Level" of 1.0 inches per second PPV—a full order of magnitude higher than Enbridge's "conservative threshold"—and an "Alert Level" of 2.0 inches per second PPV. 93 However, even in the event that vibrations do exceed the "Review Level" of 1.0 inches per second PPV, there are no protocols to stop construction or reduce the vibrations below the "Review Level." Instead, the "Review Level Actions" merely state that Enbridge shall take all necessary steps to ensure that the "Alert Level" of 2.0 is not exceeded. This is entirely insufficient to protect nearby cultural resources and historic structures which, according to Enbridge's own witness, may require a vibration limit of 0.1 inches per second PPV to avoid damage. 95

C. The Commission Cannot Determine That The Route is Reasonable Because The Requisite Cultural and Historical Resources Investigation is Incomplete.

On the record before it, the Commission must conclude that the route of the proposed Project is not designed and routed in a reasonable manner. Additionally, there is agreement by the Staff witnesses⁹⁶ and the SHPO that further studies are required to fully understand the cultural and historic resources that will be impacted by this Project. Because this Proposed

⁹² *See* Exhibit BMC-41 at 19-21.

⁹³ Exhibit BMC-41, Enbridge Response to Bay Mills Discovery Request No. 16(a)-(d) (explaining that Enbridge will adhere to certain "Review Levels" and "Alert Levels," and setting forth the plan for responding to such levels of vibrations.).

⁹⁴ *Id*.

⁹⁵ Turner Rebuttal, 7 Tr. 636.

⁹⁶ Yee Direct, 12 Tr. 1655 (identifying "impacts from project activities to cultural or historical resources due to incomplete cultural or archaeological resources surveys" as a "potential impairment."); Exh. S-25 at 3-4 (recommending that the Commission monitor the conclusions of the Section 106 review process).

Project will be constructed in an area so rich in historic and culturally significant resources, the SHPO made a clear recommendation to "not mov[e] forward with permit approvals until further research is completed to provide baseline cultural resources data." This recommendation is based on the SHPO's expert opinion that the "[survey] for significant cultural resources" is incomplete and the SHPO's expectation that "additional resources" are present and "have yet to be reported, documented, and evaluated." The investigations, surveys, and reports necessary to provide that "baseline cultural resources data" are ongoing and incomplete. Without these surveys, Enbridge can neither meet its burden of establishing that the route is reasonable, nor rebut the Tribal Nations' showing that the route is in fact unreasonable. Regardless of what these additional impacts surveys ultimately reveal, it is plain to see that the unacceptable impacts already in the record demand a denial of this Application pursuant to Act 16.

II. THE PROPOSED PROJECT, WHICH HAS NEVER BEEN IMPLEMENTED ANYWHERE ELSE IN THE WORLD, CANNOT BE APPROVED PURSUANT TO ACT 16 BECAUSE ITS DESIGN IS UNREASONABLE AND UNSAFE.

Enbridge's plan to build a liquids pipeline in a concrete tunnel underneath a culturally sensitive and significant waterway has never been implemented before. This experimental design has several fatal flaws. First, the transportation of liquid propane and crude oil through an enclosed underground tunnel creates conditions that could trigger a chain of events resulting in a catastrophic explosion. Second, Enbridge's use of a specific grade of pipe that has a well-documented history of failure makes such a catastrophe even more likely. Finally, the safety features of Enbridge's proposed project are all vulnerable to the unique failure that Enbridge's design makes possible—namely, a release of product from the pipeline that creates a potentially

⁹⁷ Exhibit BMC-40 at 1.

⁹⁸ Id.

⁹⁹ See Turner Rebuttal 7 Tr. 625; Exhibit BMC-41, Enbridge Response to Bay Mills Discovery Request No. 8.

explosive heavier-than-air vapor cloud within the confines of the tunnel. Enbridge's design does not adequately address this risk.

A. Transporting Liquid Propane and Crude Oil Through an Enclosed Underground Tunnel Has The Potential To Result In An Explosion

Enbridge plans to run a pipeline of liquid propane and crude oil, two highly volatile and flammable substances, ¹⁰⁰ through an enclosed underground tunnel. It is undisputed that this type of project has never been implemented anywhere else in the world. ¹⁰¹ 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. ¹⁰²

Enbridge's proposal fails to reconcile its design with the very real possibility that a hydrocarbon release will occur in the tunnel. Based on decades of experience in pipeline safety management, Mr. Kuprewicz articulated a "credible scenario" in which the X70 pipe used by Enbridge in the Project fails, and that failure leads to an explosion; in short, Mr. Kuprewicz testified that without proper heat treatment and testing of the pipeline's girth welds and associated heat affected zones, the X70 pipeline will crack or rupture resulting in a catastrophic explosion that has the potential to leak Line 5 product into the Straits of Mackinac. ¹⁰³

Enbridge's design of the Project has unique attributes that are cause for serious concern.

A hydrocarbon release from a crack or rupture of the X70 pipeline will mix with the air to form a heavier than air vapor cloud. ¹⁰⁴ The heavier than air vapor cloud will sink to the low spots of the

¹⁰² Kuprewicz Rebuttal, 10 Tr. 1327-1328; Dennis Cross, 8 Tr. 807.

¹⁰⁰ Kuprewicz Rebuttal, 10 Tr. 1327; Dennis Surrebuttal, 8 Tr. 803.

¹⁰¹ Kuprewicz Rebuttal, 10 Tr. 1329.

¹⁰³ Kuprewicz Rebuttal, 10 Tr. 1336; Kuprewicz Cross, 10 Tr. 1372.

¹⁰⁴ Kuprewicz Rebuttal, 10 Tr. 1327; Kuprewicz Cross, 10 Tr. 1368.

tunnel elevation. ¹⁰⁵ This differs from a natural gas pipeline, which is known to operate through underground tunnels, ¹⁰⁶ and which would result in a lighter than air vapor cloud following a pipeline rupture. A vapor cloud that is lighter than air in an enclosed tunnel, will rise and be more likely to settle in closer proximity to gas detection systems and away from electrical equipment. A leak from a liquids pipeline in an enclosed tunnel also stands in marked contrast to a leak from a pipeline operated in an open field. The resulting vapor cloud that forms following a pipeline failure there, whether heavier or lighter than air, will more likely be dispersed by air flow in the open environment. Simply put, Enbridge's "never been done before" design creates a unique and particular risk that the vapor cloud that results from a leak will sink to the low spots of the tunnel and stay there, unmoving and undetected, until ignited by an electrical spark. ¹⁰⁷

As Mr. Kuprewicz testified, once ignited, an explosion within the tunnel will cause a high-pressure event, usually followed by multiple fires and explosions, such as the 36-hour long fire that was the result of the ignition of a vapor cloud released from Line 5 in Crystal Falls, Michigan in 1999. Blast forces of this magnitude have 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 from Line 5 into the Straits.

¹⁰⁵ Kuprewicz Cross, 10 Tr. 1368.

¹⁰⁶ See Exhibit BMC-41 at No. 18 (identifying natural gas pipelines that operate in tunnels but stating that no other pipeline transporting liquid NGL operates through a tunnel).

¹⁰⁷ Kuprewicz Cross, 10 Tr. 1369 ("this is an area where heavier-than-air gas release can possibly be ignited in a confined area where the forces will go up exponentially.")

¹⁰⁸ One major Line 5 spill occurred near Crystal Falls in 1999 when more than 220,000 gallons of oil and natural gas liquids were spilled. When responders ignited the vapor cloud that formed it resulted in a 36-hour fire. See Kuprewicz Rebuttal, 10 Tr. 1330 (citing https://www.mlive.com/news/2017/04/enbridge-line-5-spill-history.html)

¹⁰⁹ Kuprewicz Rebuttal, 10 Tr. 1330.

¹¹⁰ Kuprewicz Rebuttal, 10 Tr. 1330.

¹¹¹ Kuprewicz Rebuttal, 10 Tr. 1330.

This high-risk occurrence is contrary to the purpose of constructing a tunnel to "serve as a secondary containment vessel in the event of a spill." Mr. Kuprewicz testified that Enbridge's design:

fails to recognize that both propane and crude oil are highly hazardous and volatile substances and there is always a risk of explosion when handling these substances. When transporting these substances through a pipeline enclosed in a tunnel, the risk of an explosion is enhanced which in turn enhances the probability that the secondary containment vessel will fail. 113

Enbridge's design for the Project amounts to a liquid pipeline experiment through the Straits of Mackinac—an environment with deep historical and cultural significance to the Tribal Nations. The fact that not one witness in these proceedings can point to a similarly designed Tunnel Project *anywhere else in the world* should alone indicate that Enbridge's proposal is both unreasonable and unsafe. The Commission should deny Enbridge's permit application pursuant to Act 16 on this basis alone.

B. The Specific Grade of Pipe to be Used in the Tunnel Project has a Known and Demonstrated History of Failure

As stated, the first factor necessary for an explosion to occur is a failure of the pipeline resulting in a hydrocarbon release. The most likely point of failure, as Mr. Kuprewicz explained, is at the X70 pipeline's girth welds or heat affected zones.

The specific grade of pipe Enbridge plans to use for the Project—5L X70 pipe—has a known and demonstrated risk of failure at those areas. ¹¹⁴ Enbridge's assertion that the replacement pipeline will not fail, because a hydrocarbon release has a "one in a million" chance of occurring, is thus not credible. ¹¹⁵ Indeed, the Commission need only look to the numerous

¹¹³ Kuprewicz Rebuttal, 10 Tr. 1327.

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¹¹² Warner Direct, 12 Tr. 1717.

¹¹⁴ Exhibit BMC-43 (RBK-2)- Joint Industry Report titled *Enhanced Girth Weld Performance for Newly Constructed Grade X70 Pipeline* dated May 29, 2020

¹¹⁵ Kuprewicz Sur-Sur-Rebuttal, 10 Tr. 1339-1340.

other X70 pipeline failures in recent years¹¹⁶ to understand that Enbridge is overselling the safety of the pipeline.

Mr. Dennis, the Lead Engineer on the Project, testified that Enbridge intentionally followed the API 1104 standard to ensure that girth welds are never a weak point in a pipeline. However, X70 pipeline has a risk of failure *despite* following all applicable safety standards including those set forth under API 1104. By way of rebuttal, Bay Mills introduced into the record a Joint Industry Report ("JIR") dated May 29, 2020, 118 which "was initiated to address several recent pipeline failures that have occurred at girth welds in pipelines that were constructed using API 5L X70 line pipe, and field welded using API 1104 qualified welding procedures." 119

Although an MSCA witness asserts that Enbridge has implemented the suggested response to the issues raised in the report, and therefore the warnings in the report should be disregarded by the Commission¹²⁰, the JIR recognizes that "it does not provide a perfect solution that meets all needs and provides complete assurance from further failures." Indeed, the JIR is characterized as "interim guidance" and recognizes the need for "parallel research on this topic" to further refine the recommendations. ¹²²

In addition, "meeting or exceeding" the applicable regulations that Enbridge is touting, including API 1104 and 49 CFR § 195.234, was shown in the JIR to *not* be a solution to the problem of girth weld failures. The JIR states that, "[t]he three failures that are most concerning

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¹¹⁶ Exh. BMC-43 at 11-14.

¹¹⁷ Dennis Rebuttal 8 Tr. 794.

¹¹⁸ Exh. BMC-43.

¹¹⁹ Exh. BMC-43 at iv.

¹²⁰ Cooper Sur-Sur-Rebuttal, 12 Tr. 1887.

¹²¹ Exh. BMC-43 at iv; *See also id.* at 12 (identifying a failure that occurred in a girth weld and that was compliant with API 1104, but that was not "fully understood and will be further evaluated").

¹²² Exh. BMC-43 at iv.

are those where failure occurred in nominally sound Grade X70 girth welds that were fabricated using: pipe that that was compliant with American Petroleum Institute (API) 5L; and weld procedures that met the requirements of API 1104."¹²³

Meeting or exceeding PHMSA standards simply does not address the concerning aspects of Enbridge's proposal. As Mr. Kuprewicz testified, failures of pipelines that "meet or exceed" PHMSA's regulations occur because the regulations provide the *minimum* pipeline safety requirements:

By way of example, 49 CFR § 195.234 requires that *at least* 10 percent of all girth welds be nondestructively tested. Prudent pipeline operators will often exceed PHMSA's minimum pipeline safety regulations. PHMSA has the authority to regulate only that percentage. However, the pipeline associated with the Tunnel Project should have 100 percent of all girth welds (both within the tunnel and the tie-ins) radiologically tested, and all girth welds properly heat treated to avoid cracking in weld heat affected zones (HAZs) that can result in a pipeline failure and release. ¹²⁴

In fact, "most new liquid pipeline construction exceeds minimum federal pipeline safety regulation in this girth weld nondestructive testing and heat treatment areas, carefully spelling out additional requirements in written Quality Administration/Quality Control ("QA/QC") girth weld procedures that can be independently field verified and audited"—and which are not part of Enbridge's proposal. ¹²⁵

MSCA Witness Daniel Cooper testified that the JIR "should not be a concern" because the replacement pipe segment in the tunnel will not experience the same longitudinal strain as a pipeline buried in the ground. ¹²⁶ This testimony misses the mark. Longitudinal strain is irrelevant to the issue of whether the X70 pipe will crack at its girth welds or heat associated zones, and

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¹²³ Exh. BMC-43 at vii.

¹²⁴ Kuprewicz Rebuttal, 10 Tr. 1336.

¹²⁵ Kuprewicz Rebuttal, 10 Tr. 1336.

¹²⁶ Daniel Cooper Sur-Sur-Surrebuttal, 12 Tr. 1886-1887.

which the JIR makes clear that X70 pipe is prone to do. The 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 JIR recognizes, stress on the girth welds and heat affected zones leads to failure.

Despite the history of X70 pipe failure, Enbridge claims that the risk of a hydrocarbon release from a crack or leak in the pipe's girth welds or heat affected zones is "one in a million." As explained by Mr. Kuprewicz, assigning 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. The data used in such calculations can too easily be manipulated, which makes the outcome subjective and unreliable. 129

Enbridge bears the burden of proof in this proceeding, ¹³⁰ and Enbridge's QRA of a 0.000001 chance of an explosion is wholly unreliable and unverified. Despite Bay Mills serving a discovery request for all work papers from Aaron Dennis, the Lead Engineer on the Tunnel Project and the witness who sponsored testimony on this issue, Enbridge presented no work product in support of how the probability asserted in his testimony was calculated. ¹³¹ Additionally, during cross examination, Mr. Dennis could not provide a foundation for his testimony that there was a "one in a million" chance of a hydrocarbon release within the tunnel. He could not testify who calculated the number, when it was calculated, or crucially, what data points or equations were used to determine the probability. ¹³² He could not provide any other example of a pipeline project, despite working on numerous other projects, in which Enbridge

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¹²⁷ Dennis Surrebuttal, 8 Tr. 800.

¹²⁸ Kuprewicz Cross, 10 Tr. 1404-1405.

¹²⁹ Kuprewicz Cross, 8 Tr. 1405.

¹³⁰ BCBSM v Governor, 422 Mich 1, 88-89; 367 N.W.2d 1 (1985); Aquilina v General Motors Corp, 403 Mich 206, 210; 267 N.W.2d 923 (1978).

¹³¹ Exh. BMC-45 at Request No. 2.

¹³² Dennis Cross, 8 Tr. 812, 815, 817-818.

engaged in a QRA.¹³³ The Commission has absolutely no information as to the veracity of the "one in a million" probability asserted by Enbridge. In short, the number is just that—a number. It is meaningless and should be given no weight by this Commission.

C. Multiple Aspects of Enbridge's Design System are All Vulnerable to a Common Failure

Enbridge's design system 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.

If a hydrocarbon release occurs from the pipeline, Enbridge identified ways that its design system will be alerted to avoid a catastrophic explosion: Computation Pipeline Monitoring ("CPM"), gas detectors, automatic shutoff valves, and utilizing Class 1, Division 2 electrical equipment. However, all of Enbridge's "safety" features are vulnerable to the same, unique risk created by Enbridge's design.

Mr. Kuprewicz testified that the Staff witnesses and Enbridge were relying too heavily on CPM-based detection approaches to justify their minimization of an explosion risk. As he testified based on his 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 or placement within the tunnel." Human error alone has a demonstrated history of causing Enbridge's CPM-based detection approach to fail. 135 If a hydrocarbon release occurs

¹³⁴ Kuprewicz Rebuttal, 10 Tr. 1332.

¹³³ Dennis Cross, 8 Tr. 813-814.

¹³⁵ Kuprewicz Rebuttal, 10 Tr. 1333.

and the leak detection system does not kick in or generates an alarm that is assumed to be false, it will not work to prevent an explosion. CPM-based release detection is not foolproof.

So too with its proposed gas detection system. Enbridge fails to include critical details in its proposal including the type, location, independency, calibration, maintenance frequency, and reliability of the gas detection approach. ¹³⁶ If, for example, the gas detection system is installed at higher elevation points in the tunnel, it will not detect a hydrocarbon release that is heavier than air and sinks to the lowest elevation. Enbridge's proposal fails to recognize that the gas detection system needs to be adequately designed and placed so that it will quickly identify possible heavier-than-air vapor clouds, especially in the low spots of the tunnel.

Independency is also lacking from the proposed electrical and ventilation system. It is undisputed that equipment, instruments, vehicles, and people—all potential sources of electricity—which will be either maintained within or permitted to enter the tunnel. Enbridge's claim that there are "no sources of ignition" within the tunnel rests solely on its reliance that the ventilation system will operate to sweep any released fuel vapor out of the tunnel or reduce the amount of released fuel vapor so that it is out of the flammability range, such that an electrical source will not act as a point of ignition. ¹³⁷ This design proposal, however, 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. ¹³⁸

Last, what is noticeably absent from Enbridge and Staff testimony relating to the probability of a pipeline failure is any acknowledgement that human error alone creates a risk

¹³⁶ Kuprewicz Rebuttal, 10 Tr. 1333.

¹³⁷ Dennis Cross, 8 Tr. 854-856.

¹³⁸ Kuprewicz Cross, 10 Tr. 1368.

that propane and/or crude oil will be released in the tunnel, that there will be a delay in recognizing that a release occurred, and that the released crude oil or propane will ignite. ¹³⁹ This chain of events has the potential to result in a catastrophic pipeline failure.

In summary, several aspects of Enbridge's design for the tunnel are all vulnerable to a common failure—namely, a hydrocarbon release resulting from a crack or leak at the girth welds or heat affected zones. And Enbridge is proposing to use a grade of pipe that has historically exhibited this very failure. Mr. Kuprewicz likened Enbridge's minimization of the catastrophic risk to what he coined the "Space Shuttle Syndrome." As Mr. Kuprewicz testified:

It goes back to what I call the space shuttle syndrome, where people understate risk to the point where they ignore it. And the Challenger space shuttle launch, we lost eight -- I forget how many -- heroes. The space shuttle Challenger had two redundant seals to prevent seal blowback that would cause catastrophic failure of the space shuttle; the decision-makers assumed that that redundancy was such that it would work, and they ignored engineers telling them there's a common link here, and so while you have two, that's, you know, redundant, you've missed the linkage between independency. Cold temperature made both seals not work and resulted in that terrible tragedy. ¹⁴⁰

Although the Challenger had redundant levels of protection, neither safety feature was independent and, as a result, both features failed for the same reason. Here, Enbridge's design proposal highlights redundancy but misses the necessary independency of each design feature. The Commission should not succumb to Space Shuttle Syndrome and be deceived by Enbridge's false narrative that it has designed a system that will "virtually eliminate" Line 5 product from ever being released into the Straits. The consequences associated with the risk from failure are simply too high.

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¹³⁹ Kuprewicz Rebuttal, 10 Tr. 1333; *Id.* at 1335.

¹⁴⁰ Kuprewicz Cross, 10 Tr. 1388-1339.

III. THE PROPOSED PROJECT WILL POLLUTE, IMPAIR, AND DESTROY IMPORTANT NATURAL RESOURCES OF PROFOUND IMPORTANCE TO THE TRIBAL NATIONS THROUGH ITS CONTRIBUTIONS TO CLIMATE CHANGE.

When the Commission is reviewing an application to permit a pipeline, MEPA requires a determination of "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources." The evidence in the record here establishes that the Proposed Project will contribute greenhouse gas ("GHG") emissions that cause the pollution, impairment, and destruction of natural resources – including, fish, wild rice, loon, and sugar maple species. These impacts harm the Tribal economies, cultural practices, and traditional knowledge that depend on those treaty-protected natural resources.

A. The Proposed Project Will Cause Greenhouse Gas Emissions.

The Proposed Project will cause a significant amount of greenhouse gas emissions. The Commission already has recognized it must assess GHGs in this case, ¹⁴² because GHGs "are widely recognized as pollutants that trap heat in the atmosphere and contribute to climate change, thereby polluting, impairing, and destroying natural resources." ¹⁴³

There are two main ways that the Project will cause GHG emissions. First, the equipment used to build and operate the tunnel will cause greenhouse gas emissions. ¹⁴⁴ Emissions sources during construction include the use of a tunnel-boring machine and other electric- and diesel-powered equipment, as well as the production and installation of construction materials such as

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¹⁴¹ MCL 324.1705(2); see also State Hwy Comm v Vanderkloot, 329 Mich 159, 185-87 (1974) (requiring agencies to apply the substantive requirements of MEPA); Buggs v Michigan Pub Serv Comm'n, No. 315058, 2015 WL 159795, at *7 (Mich Ct App Jan 13, 2015) (confirming that the holding of Vanderkloot applies to MPSC determinations of public convenience and necessity in pipeline permitting decisions), aff'd sub nom In re Application of Encana Oil & Gas re Garfield 36 Pipeline, No. 329781, 2017 WL 2130276 (Mich Ct App May 16, 2017).

¹⁴² U-20763 Order, April 21, 2021, at 66-67.

¹⁴³ U-20763 Order, April 21, 2021, at 65; see also *Massachusetts v Environmental Protection Agency*, 549 US 497, 528-535; 127 S Ct 1438; 167 L Ed 2d 248 (2007).

¹⁴⁴ Erickson Direct, 9 Tr. 1048.

steel and concrete. ¹⁴⁵ There will be annual GHG emissions from the energy required to operate the Project's ventilation fans, sump pump, tunnel service vehicle, and lighting. To evaluate the combined effects of emissions from different greenhouse gases, where each gas causes different amounts of warming, climate scientists combine GHG emissions into a single metric of carbon dioxide equivalent ("CO2e"). ¹⁴⁶ Construction will cause 87,000 metric tons of CO2e emissions, and operation will cause at least 520 metric tons of CO2e annually. ¹⁴⁷

Second, the products transported by the Project will release GHG emissions when produced, processed, and combusted. ¹⁴⁸ Based on the amount of crude oil and natural gas liquids that the Project will transport, the Project is associated with an additional 87,000,000 metric tons of CO2e annually. ¹⁴⁹

Testimony discussing and quantifying the GHG emissions associated with the Project was offered by ELPC/MiCAN expert witness Peter A. Erickson. His calculation is based on a method consistent with those used in other GHG assessments of oil pipelines, as well as in peer-reviewed, scientific literature, and standards for life-cycle assessments and oil market analysis. ¹⁵⁰ Information provided by Enbridge and published information about energy use and the activities involved in the Project was used in the GHG accounting. ¹⁵¹

In contrast, other witnesses' calculations of GHG emissions from the Project are less reliable, depend on faulty assumptions, and merit little weight. For example, Staff erred in not

¹⁴⁵ Erickson Direct, 9 Tr. 1049, 1051.

¹⁴⁶ Erickson Direct, 9 Tr. 1048-1049 (defining CO2e and noting that the Intergovernmental Panel on Climate Change ("IPCC") makes calculations in CO2e).

¹⁴⁷ Erickson Direct, 9 Tr. 1048, 1051; *see also id.* at 9 Tr. 1051-1055 (regarding construction); *id.* at 9 Tr. 1055-1056 (regarding operation and noting that this is a "conservative estimate" of the amount of energy needed to operate the Project).

¹⁴⁸ Erickson Direct, 9 Tr. 2048, 1057.

¹⁴⁹ Erickson Direct, 9 Tr. 1057; see also id. at 9 Tr. 1057-1060 (explaining calculation).

¹⁵⁰ Erickson Direct, 9 Tr. 1042, 1043.

¹⁵¹ Erickson Direct, 9 Tr. 1049-1050.

including other large sources of GHG emissions caused by the Project's construction: the emissions associated with the tunnel boring machine and concrete for the tunnel. Another, and more significant error, is that, contrary to the Commission's April 21, 2021 Order in which the Commission stated that its "obligations under MEPA . . . extend to the products being shipped through the Replacement Project," neither Staff nor Enbridge assessed emissions from the products being shipped through the project. Staff opted not to calculate emissions from the products handled by the Project because of their erroneous assumption that the construction of the Project, relative to a scenario where the Project is not built, would have no effect on consumption of oil and the emissions associated with producing, processing, and burning that oil. Mr. Erickson explained that the testimony of Staff and other witnesses demonstrates that this assumption is internally inconsistent and flawed; in fact, oil infrastructure does affect oil prices and, in turn, consumption. When federal agencies have made the same assumption in the context of other oil infrastructure, courts have found their calculations to be inaccurate, not credible, and arbitrary and capricious. 156

Ultimately, the Proposed Project is associated with the release of approximately 87 million metric tons CO2e annually. ¹⁵⁷ These emissions will contribute to worsening climate change impacts that will harm Michiganders and the Tribal Intervenors.

¹⁵² Erickson Direct, 9 Tr. 1041.

¹⁵³ U-20763, April 21, 2021 Order at 64.

¹⁵⁴ Morese Direct, 12 Tr. 1772, 1774; Erickson Rebuttal, 9 Tr. 1087; *see also* Bennett Rebuttal at 7 Tr. 765 (making the same faulty assumption).

¹⁵⁵ Erickson Rebuttal, 9 Tr. 1088-1093 (explaining flaws in Mr. Morese's and Mr. Ponebshek's analyses, including how Mr. Morese inconsistently testifies both that a shift from transporting fuels by pipeline to transporting them by rail and truck would lead to an increase in prices and that whether the Project goes forward or not will have no impact on fuel prices).

¹⁵⁶ Center for Biological Diversity v Bernhardt, 982 F.3d 723, 736-40 (9th Cir. 2020); Friends of the Earth v Haaland, 2022 WL 254526 at *17 (D.D.C. 2022); see also Erickson Rebuttal, 9 Tr. 1093, 1094-1095; see also Indigenous Envtl. Network v U.S. Dep't. of State, 2019 WL 652416, *4-5 (D. Mont. Feb. 15, 2019) (recognizing that omitting an analysis of greenhouse gas emissions from pipelines in an EIS was an "error [that precluded informed decision-making and public participation based on complete information").

¹⁵⁷ Erickson Direct, 9 Tr. 1043.

B. Greenhouse Gas Emissions Cause Climate Change, and Climate Change Pollutes, Impairs, and Destroys Natural Resources.

GHG emissions—including those associated with the Project—cause climate change. ¹⁵⁸ Climate change has had, and will have, dramatic environmental impacts. Climate change is rendering serious harms around the world already. These include increasing flooding, wildfires, droughts, heat waves, expanding impacts of pests and pathogens, and other effects that pollute, impair, and destroy natural resources. ¹⁵⁹ As the scale of the warming from GHG emissions grows, events (like flooding) "will intensify, and adapting to these changes will become even more difficult." ¹⁶⁰

In Michigan, and across the Midwest, "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." One very serious pollution impact of climate change is that there will be more algal blooms in freshwaters in the Midwest, which, in turn, can cause serious drinking water concerns and be lethal for fish. ¹⁶²

Limiting climate impacts requires a substantial reduction in GHG emissions ¹⁶³ Even if other means of removing CO2 are developed and applied at large scale, the Intergovernmental

¹⁵⁸ Overpeck Direct, 9 Tr. 1142. "In the new, most recent assessment of the science behind climate change, the Intergovernmental Panel on Climate Change described the observed rate of climate change as both "unprecedented" and "unequivocally" caused by human activities." Erickson Direct, 9 Tr. 1045; see also IPCC report (ALJ noted no objection to taking administrative notice, 9 Tr. 1034-1036).

¹⁵⁹ Overpeck Direct, 9 Tr. 1144-1145; Erickson Direct, 9 Tr. 1044; *see also id.* n. 11 (citing Holdren, J. P. (2018, September). The Science & Policy of Climate Change: An Update on the Challenge and the Opportunity. Presented at the Low-emissions Solutions Conference, San Francisco, CA, https://lowemissions.solutions/static/uploads/180911 GCAS Holdren.pdf).

¹⁶⁰ Overpeck Direct, 9 Tr. 1146.

¹⁶¹ Erickson Direct, 9 Tr. 1045; see also Exh. ELP-3.

¹⁶² Overpeck Direct, 9 Tr. 1155.

¹⁶³ Erickson Direct, 9 Tr. 1046. The U.S. Government's Fourth National Climate Assessment describes findings consistent with the international scientific community that climate risks can only be addressed with substantial and sustained reductions in GHGs, and the decisions made today determine future risks from climate change. Erickson Direct, 9 Tr. 1046.

Panel on Climate Change ("IPCC") found that between 2020 and 2050, gross global CO2 emissions from fossil fuel combustion and industry would need to decline by about 70% to reach the international goal—in the Paris Agreement—of limiting warming to 1.5 degrees Celsius (to limit environmental impacts). 164

C. Climate Change Imposes Unique Burdens on Tribal Nations and Culturally Important Natural Resources.

Climate change is uniquely burdensome for the Tribal Nations because of its impact on treaty-protected natural resources that are culturally and economically important to the Tribal Nations. The record evidence shows the unacceptable pollution, impairment, and destruction effects that climate change will have on several species, and that those effects will be devastating for the Tribal Nations here.

1. Fish

"Fishing is an engrained tradition within the Bay Mills Indian Community" and "a traditional and cultural practice" for Michigan Tribal Nations, including the Intervenors here. 165 Protecting treaty fishing rights is necessary to preserve traditional lifeways and to support commercial and subsistence fishing. 166 The Project threatens to impair fish species and habitats, and corresponding cultural and economic practices of the Tribal Nations, through both its contributions to climate change and discharges into the Straits.

Tribally-licensed commercial and subsistence fishers fish for yellow perch, walleye, lake trout, whitefish, and other fish species in or near the Straits of Mackinac. ¹⁶⁷ Fishing is a source of

¹⁶⁴ Erickson Direct, 9 Tr. 1-47.

¹⁶⁵ LeBlanc Direct, 10 Tr. 1517; ("[Fishing] is not just part of my history; it is who I am."); LeBlanc Direct, 10 Tr. 1519-1520 (describing his grandfather's legacy in fighting against state policies that denied tribes their fishing rights).

¹⁶⁶ LeBlanc Direct, 10 Tr. 1520; see also Gravelle Direct, 10 Tr. 1424-1426.

¹⁶⁷ Donner Direct, 9 Tr. 1173.

employment for tribal citizens and supports tribal families financially. ¹⁶⁸ In fact, over half of Bay Mills' households rely on fishing for some or all of their income. ¹⁶⁹

Already, climate change is having an effect of depleting fish stocks, rendering year-round fishing "hard and expensive," a burden that tribal commercial fishermen like Witness Jacques LeBlanc, Jr. bear. ¹⁷⁰ "Fish habitats are already being impacted by warming waters, and a weakened natural ecosystem creates opportunities for invasive species," which, in turn, leads to more problems for native fish species. ¹⁷¹

Lake Whitefish, for example, is a species held in sacred regard and is part of Tribal Nations' oral histories. This fish is one of the primary commercial and subsistence fish for tribal fishers. ¹⁷² But Lake Whitefish is a cold water species, and "[i]t is widely recognized that climate change leads to the warming of their habitat." ¹⁷³

Walleye, a cool water fish, are also harmed by climate change. Walleye support tribal commercial and subsistence fisheries. ¹⁷⁴ As the climate warms, walleye populations will become less sustainable. ¹⁷⁵ As the warming climate has increased the water temperatures of inland lakes, walleye populations are already declining, ¹⁷⁶ and additional population losses are expected under projected climate scenarios. ¹⁷⁷ Climate change will likely also indirectly impair walleye

¹⁶⁸ LeBlanc Direct, 10 Tr. 1517.

¹⁶⁹ Gravelle Direct, 10 Tr. 1421.

¹⁷⁰ LeBlanc Direct, 10 Tr. 1516; *see also id.* at 1518 (noting that his children will struggle economically if they take over his fishing operation in the future because of climate change).

¹⁷¹ Overpeck Direct, 9 Tr. 1162.

¹⁷² Gravelle Direct, 10 Tr. 1429.

¹⁷³ Gravelle Direct, 10 Tr. 1430.

¹⁷⁴ Alofs Direct, 10 Tr. 1449; Donner Direct, 9 Tr. 1173. In addition to being important to tribal fisheries, walleye are an important part of Michigan's 2.3 billion dollar recreational fishing economy. Alofs Direct, 10 Tr. 1449.

¹⁷⁵ Alofs Direct, 10 Tr. 1453.

¹⁷⁶ Alofs Direct, 10 Tr. 1454.

¹⁷⁷ Alofs Direct, 10 Tr. 1457.

populations in the Great Lakes by improving habitat conditions for predator species and diminishing habitat conditions for prey species.¹⁷⁸

Because this Project will contribute GHGs and add to climate change, it will cause impairment of the fisheries. Harm to the fisheries would be devastating to tribal subsistence and commercial fishers.

GHGs are also only one way that this Project will impair fish resources in the Straits. Water discharges from the project into Lake Michigan during construction and regular operations are also likely to have direct and indirect effects on fish. The chemical composition of those discharges has not been disclosed, and "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 can "caus[e] ecological harm, present a health hazard to those that want to eat fish, present a marketing challenge to the operation of fisheries, affect the reproductive organs of fish, and reduce population size. An experienced Great Lakes Fisheries Program Manager Kevin Donner expects Project activities "to result in long term reduction of biomass of Lake Whitefish and other species in the northern areas of Lakes Michigan and Huron."

2. Wild Rice

Wild rice—or manoomin—"is central to many Native people throughout the Upper Midwest and Great Lakes region, for whom it is an irreplaceable cultural, spiritual, nutritional,

¹⁷⁸ Alofs Direct, 10 Tr. 1458.

¹⁷⁹ Donner Direct, 9 Tr. 1177-1178.

¹⁸⁰ Donner Direct, 9 Tr. 1178.

¹⁸¹ Donner Direct, 9 Tr. 1177.

¹⁸² Donner Direct, 9 Tr. 1179. Additionally, given that the Project, as designed, threatens to explode, there is further potential impairment or destruction of fish resources in the Straits and surrounding waters in the event of an explosion and release. *See* Kuprewicz Rebuttal, 10 Tr. 1326, 1335-1336.

and commercial resource and sacred relative."¹⁸³ It is a traditional food source, and has been a staple in the diet of native people for over 1000 years. ¹⁸⁴ And manoomin "is much more than a food, it is a culture, it is a history, and it is a livelihood . . . [it] is a traditional gift of appreciation."¹⁸⁵ Bay Mills, along with other tribes, has worked to revitalize wild rice beds. ¹⁸⁶ Wild rice also is an aquatic natural grass that is a critical component of aquatic ecosystems, where it contributes to nutrient cycling, habitat structure, and is a food source for a range of wildlife. ¹⁸⁷

Climate change will impair and destroy wild rice. ¹⁸⁸ Climate stressors on wild rice have increased in frequency and intensity over the past 15 years. ¹⁸⁹ Future climate change-induced changes in temperature and precipitation will have direct, negative impacts on wild rice. ¹⁹⁰ Warmer temperatures are likely to harm wild rice and contribute to population reductions. ¹⁹¹ Climate change induced alterations in precipitation regimes will likely lead to flooding and high water levels in the spring when wild rice is vulnerable to flooding, and drought conditions later in the season that can impede harvesting. ¹⁹² Climate change will also indirectly impair wild rice by improving habitat conditions for species that damage wild rice waters and worsening pathogen and pest infestations. ¹⁹³

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¹⁸³ Rodwan Direct, 10 Tr. 1277; *see also id.* at 10 Tr. 1279-1280 (describing traditional harvesting practices for wild rice of the NHBP).

¹⁸⁴ Gravelle Direct, 10 Tr. 1430; Exh. NHB-2 at 1.

¹⁸⁵ Gravelle Direct, 10 Tr. 1430; see also Larkin Direct at 4:9-12.

¹⁸⁶ NHBP Ex. 2 at 2-5; *see also* Gravelle Direct, 10 Tr. 1430 (wild rice continues to be harvested near tribal nations reservations in Michigan).

¹⁸⁷ Larkin Direct, 10 Tr. 1482; Rodwan Direct, 10 Tr. 1277.

¹⁸⁸ So too would any oil release. Rodwan Direct, 10 Tr. 1286.

¹⁸⁹ Rodwan Direct, 10 Tr. 1278-1279; *see also id.* at 10 Tr. 1286 (describing how climate change impacts, including storms and the humid weather that influences Brown Spot Disease, have already affected wild rice).

¹⁹⁰ Larkin Direct, 10 Tr. 1488.

¹⁹¹ Larkin Direct, 10 Tr. 1489.

¹⁹² Larkin Direct, 10 Tr. 1490-1491.

¹⁹³ Larkin Direct, 10 Tr. 1491-1492.

In the coming decades, the projected changes will be "catastrophic" for wild rice and the tribal practices that depend upon a healthy wild rice species, especially if "the severe effects of future climate change that have been predicted are not prevented." The Project's GHG emissions are a preventable contribution to these climate impacts.

3. Loons

Loons—or maang—are one of the seven primary clans of the Anishinaabe. ¹⁹⁵ Loons also are ecologically important as top trophic-level predators in lake habitats. ¹⁹⁶ Already, climate change has caused or contributed to loon population loss. ¹⁹⁷ Climate change is projected to have further negative effects on loons by reducing breeding habitats in Michigan and increasing the frequency and intensity of botulism outbreaks. ¹⁹⁸ As a result, climate change will drastically reduce the loon population in Michigan. Three degrees of global warming, by 2080, for example, likely will extirpate (i.e., eliminate or, in MEPA terms, "destroy") loons from the state of Michigan. ¹⁹⁹ The Project's GHG emissions contribute to such warming.

4. Sugar Maple

The sugar maple—or zhiiwaagamizigan—are another important natural resource of profound cultural and traditional importance to the Tribal Nations. Harvesting maple syrup is a traditional practice, and maple syrup is considered a medicine, a traditional food, and a gift that brings about a new season of life.²⁰⁰ Sugar maple is also an important part of the health of

¹⁹⁴ Larkin Direct, 10 Tr., 1494.

¹⁹⁵ Gravelle Direct, 10 Tr. 1431.

¹⁹⁶ Lindsay Direct, 10 Tr. 1500.

¹⁹⁷ Lindsay Direct, 10 Tr. 1504.

¹⁹⁸ Lindsay Direct, 10 Tr. 1507-1509.

¹⁹⁹ Lindsay Direct, 10 Tr. 1508. Loons will not fare much better elsewhere as, with three degrees of warming, they will lose 97% of their breeding habitat in the continental U.S. *Id*.

²⁰⁰ Gravelle Direct, 10 Tr. 1431.

Michigan forests, providing ecosystem benefits such as healthy soil that can support other species, water filtration and purification, and landslide protection.²⁰¹

Climate change, which this Project would contribute to through its GHG emissions, is the current "major threat" to sugar maple. Warming will cause large-scale shifts in forest tree species and other vegetation, including greater tree mortality. Climate change will cause changes in temperature and precipitation that will threaten the tree species. Increasing aridity due to climate change will hurt the sugar maple, and it will compound other forest stresses such as invasive species, insect pests and plant disease, and the likelihood of severe wildfire.

Sugar maple, along with the fishery, wild rice, and loons, are simply examples of the myriad ways that GHG emissions pollute, impair, and destroy not only natural resources, but cultural practices and lifeways. In Michigan and across the world, "[t]he indigenous way of life that has persisted for thousands of years will be undermined as current and projected climate change impacts take their toll. Key vulnerabilities include the loss of traditional knowledge in the face of rapidly changing ecological conditions, increased food insecurity due to reduced availability of traditional foods," and others. ²⁰⁶ The Project only compounds those climate impacts.

²⁰¹ Ibanez Direct, 10 Tr. 1468.

²⁰² Ibanez Direct, 10 Tr. 1472; see also id. at 1475.

²⁰³ Overpeck Direct, 9 Tr. 1161.

²⁰⁴ Ibanez Direct, 10 Tr. 1473, 1474.

²⁰⁵ Overpeck Direct, 9 Tr. 1162.

²⁰⁶ Gravelle Direct, 10 Tr. 1428; *see also* Ettawageshik Direct, 10 Tr. 1580 ("Climate change has a direct impact on the foods we eat and whether we will be able to continue to consume our traditional foods."). Indeed, the harms climate change is already inflicting on the Great Lakes and related fisheries and ecosystems have "a negative impact on tribal sovereignty, economies, and cultures the Great Lakes now sustain and have sustained since time immemorial." Gravelle Direct, 10 Tr. 1428.

IV. BECAUSE THERE IS A FEASIBLE AND PRUDENT ALTERNATIVE TO THE PROJECT THAT WILL CAUSE LESS IMPAIRMENT AND DESTRUCTION OF NATURAL RESOURCES THAN THE PROPOSED PROJECT, THE PROJECT CANNOT BE APPROVED PURSUANT TO MEPA.

"[A]n examination of alternatives that avoid or limit the impact to a resource is a hallmark of Michigan environmental law."²⁰⁷ Pursuant to MEPA, "conduct shall not be authorized or approved that has or is likely to have [an effect of polluting, impairing, or destroying the air, water, or other natural resources, or the public trust in those resources] if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare."²⁰⁸ Here, an appropriate and complete examination of alternatives demonstrates that there *is* a feasible and prudent alternative to the Project: an alternative where neither the Project nor the dual pipelines operates in the Straits. This alternative is more consistent with the reasonable requirements of public health, safety, and welfare than the Project. Therefore, the Proposed Project cannot be authorized or approved pursuant to MEPA.

A. The Commission Must Consider The Alternative Where the Dual Pipelines Do Not Operate and the Project Is Not Constructed.

The Commission's April 21, 2021 Order recognized the importance of considering an alternative where the dual pipelines do not operate and therefore the Project would be "the lynchpin providing the company with the ability to ship product on this 4-mile stretch of Line 5."²⁰⁹ That alternative—a "no action" or "no pipeline" alternative—exists and must be part of the Commission's MEPA analysis.²¹⁰ There are two independent reasons that the Commission must

²⁰⁷ Petition of Dune Harbor Estates, LLC, 2005 WL 3451406, at *5 n 8 (Mich Dept Nat Res Dec 7, 2005).

²⁰⁸ MCL 324.1705(2); see also Vanderkloot, 392 Mich at 183-85; Buggs, 2015 WL 159795, at *7. Even if there is no feasible and prudent alternative, nowhere in the statute does it state that absent a finding of pollution, impairment, or destruction, the project must be authorized. Schmude Oil Inc. v Dep't of Envtl. Quality, 306 Mich App 35, 48 (2014).

²⁰⁹ U-20763, April 21, 2021 Order at 68.

As described by Dr. Stanton, the "no-action" alternative would be "not constructing the tunnel and not continuing to operate the existing dual pipelines," making it a "no pipeline" alternative. Stanton Direct, 9 Tr. 942.

consider a no pipeline alternative: (1) because the no pipeline alternative would achieve the purpose of the Project; and, (2) because the Governor has revoked and terminated the easement to operate the dual pipelines.

1. Available Alternative to Achieve the Purpose of the Project

First, the "no action" or "no pipeline" alternative exists *independent* of the Governor's Revocation of the Easement. When assessing alternatives, agencies look to what the applicant identifies as the Project's purpose in their application.²¹¹ For example, in *Harkins v Department of Natural Resources*, 206 Mich App 317, 321 (1994), the DNR denied a permit application to fill wetlands, and the Court of Appeals affirmed, "because a feasible and prudent alternative existed to accomplish petitioner's purpose of gaining access to the lake." The petitioner wanted to fill wetlands on his property so that he could access a lake; however, he could access the lake by alternative means, "namely, a public-access route," so the permit was denied.²¹² Whether he refused to use the public access route did not matter to the DNR or the court's MEPA analyses.

At the outset of this proceeding, Enbridge defined the purpose of the project as alleviating environmental risk to the Great Lakes.²¹³ The Commission recognized this as the

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²¹¹ Harkins v Dep't of Natural Resources, 206 Mich App 317, 321 (1994) (denying petition to fill wetlands where the permit application listed lake access as the project's purpose because the petitioner could access the lake through a public access route, rather than through filled wetlands on his own property). In addition to being how agencies apply MEPA, this focus on the project's purpose is part of how federal agencies conduct alternatives analyses. See, e.g., 40 CFR. § 230.10(a)(2). At the same time, however, an "applicant may not define the alternatives in a manner so as to exclude feasible alternatives." Wayne County Dep't of Health v Olsonite Corp., 79 Mich App 668, 703-04 (1977); see also In Re: Wetlands Act Appeal of Kuras Properties, Inc., 1990 WL 299409, at *5 (Dep't of Natural Resources, Nov 14, 1990).

²¹² Harkins, 206 Mich App at 321. The DNR did issue a modified permit allowing the petitioner to construct a tenfoot-wide path on his property, but the petitioner continued to challenge the denial of his application to fill more wetlands after receiving the modified permit. *Id*.

²¹³ Pastoor Direct, 7 Tr. 555-556; *see also* Warner Direct 12 Tr. 1702 ("According to Enbridge's application, the Replacement Project is intended to alleviate an environmental concern to the Great Lakes raised by the State of Michigan due to the Dual Pipelines that currently lie in the Straits"). In rebuttal, the same Enbridge and Staff witnesses who previously state the purpose was to alleviate an environmental risk appear to revise their testimony. Enbridge Witness Amber Pastoor changed the statement of the project's purpose, to state that the purpose is about alleviating risk *and* also "to allow for the continuing operation of Line 5." Pastoor Rebuttal, 7 Tr. 576. Staff witness Warner claims to reject the "implication" that the purpose of the Project is to alleviate the risk of an oil spill. Warner

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.

It does not matter to an alternatives analysis whether Enbridge wants to stop operating the dual pipelines; it is implicit in the application process that the most desirable alternative to the applicant is the Project the applicant seeks approval for. And Michigan courts have recognized that the most feasible and prudent alternative may be one that "adversely affects" a polluter, such as by reducing their profit margin. ²¹⁷ The MEPA analysis exists so that the agency can consider if there are other options that will have fewer environmental impacts. Whether the alternative will help Enbridge maximize its profits or strengthen its litigation position in other forums is irrelevant to the Commission's alternatives analysis under MEPA.

It also does not matter that the Commission is not re-examining the approval for the dual pipelines granted in 1953. While that 1953 Order may have bearing on the Commission's Act 16

Rebuttal, 12 Tr. 1741. If any part of the purpose of the Project is to allow for the continued operation of Line 5, then this case must be remanded and the record reopened so that evidence can be developed about the continued operation of Line 5, and whether, pursuant to Act 16, there is a public need for the continued operation of Line 5. Such a record has not been developed *because* the purpose of the Project was narrowly defined as alleviating environmental risk and the Commission prohibited testimony on continued operation. U-20763, April 21, 2021 Order at 63. Moreover, agencies can look past self-serving statements by applicants to determine the basic purpose" of a project. *See Smereka v Glass*, 945 F2d 405 (6th Cir 1991) (determining that the Corps did not act irrationally when it "implicitly rejected" an applicant's characterization of a home construction project when considering alternatives).

²¹⁴ U-20763, April 21, 2021 Order at 63.

²¹⁵ Erickson Direct, 9 Tr. 1061

²¹⁶ Temporary Restraining Order, *Nessel v Enbridge Energy*, *Ltd.*, *et al*, No. 19-474-CE (Ingham County Cir. Ct. Michigan, June 25, 2020).

²¹⁷ Wayne County Dep't of Health v Olsonite Corp., 79 Mich App 668, 706 (1977).

analysis, ²¹⁸ it does not affect the Commission's MEPA analysis. Nothing in the statute constrains a permitting agency's review of alternatives, to alternatives that the permitting agency has the power to require. An agency can and should consider multiple possible alternatives. In cases like this one, there may be multiple alternatives that could occur in the absence of agency action, i.e., multiple "no action" alternatives.

An alternatives analysis under MEPA turns on whether there are alternative means for achieving the purpose of the application, and whether the alternative is feasible and prudent.²¹⁹ The alternative of ceasing dual pipeline operations and not constructing a tunnel would achieve the purpose, and as discussed below in Section IV.B, it is feasible and prudent.

2. Revocation and Termination of the Easement

Second, the necessity of considering the "no action" or "no pipeline" alternative is underscored by the Governor's Revocation of the Easement. Governor Whitmer revoked and terminated the easement on which Enbridge operates the dual pipelines, requiring Enbridge to cease operating the dual pipelines.²²⁰ That Enbridge is fighting the revocation in court does not matter; the alternative exists that Enbridge could comply with the order of the State willingly or, after litigation, unwillingly.

Staff mistakenly suggests Enbridge's litigation strategy against the Governor restricts the Commission's alternative analysis. The Staff notes that Enbridge is refusing to comply with the Revocation and is instead challenging it in court. According to the Staff, because that litigation may not be resolved before the Commission issues a decision in this case, the Commission must

²¹⁸ The Tribal Nations have asked the Commission to reconsider its April 21, 2021, decision that the 1953 Order constrains its Act 16 analysis. Joint Petition for Rehearing on behalf of Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little Traverse Bands of Odawa Indians, and Nottawaseppi Huron Band of the Potawatomi (May 21, 2021).

²¹⁹ MCL 324.1705(2).

²²⁰ Exh. ELP-18.

assume for the purposes of a no action alternative that the Revocation has no effect and will not have an effect in the future. However, the Commission should not accept the notion that an applicant can dictate the range of considered alternatives by refusing to comply with an order from the State's chief executive. Dr. Stanton, a noted economist who has decades of experience with alternatives analyses, accurately characterized Enbridge's actions when she testified that, by refusing to comply with the Governor's order, Enbridge attempts to "set[] up a false choice between a pipeline within the tunnel and a pipeline without a tunnel." 222

The possibility that the ongoing litigation concerning the pipeline is not completed before the Commission renders its decision is no reason for the Commission to exclude the no pipeline alternative from its review. According to Enbridge, it will take approximately four years to construct the Project.²²³ The Project cannot be constructed until all agency review processes and approvals are complete, including the approximately two-year preparation of a federal Environmental Impact Statement (a process which is still in its early stages).²²⁴ Thus, if the litigation is resolved in favor of the Revocation and Termination at any point within the next approximately six years, the Project would be "the lynchpin providing the company with the ability to ship product on this 4-mile stretch of Line 5."²²⁵

Furthermore, if the Commission deems the litigation relevant to its analysis of the alternatives, then it can and should consider multiple no action alternatives—including one in which Enbridge is forced to comply with the Governor's Revocation. Dr. Stanton testified that when completing an alternatives analysis, "the analyst looks both at related analyses that have

²²¹ See Warner Direct 12 Tr. 1709 (making "a baseline assumption . . . that the Dual Pipelines are allowed to continue operating into the future indefinitely"); Warner Rebuttal, 12 Tr. 1743.

²²² Stanton Direct, 9 Tr. 947 (acknowledging that Enbridge is fighting the Revocation in court).

²²³ Exh. BMC-41.

²²⁴ Exh. BMC-41.

²²⁵ U-20763, April 21, 2021 Order at 68.

already been performed, [and] at current state of policy and regulation in the jurisdiction."²²⁶ The analyst then proceeds by constructing multiple scenarios, including both those that "follow current conditions as closely as possible", and alternatives that look at other "possible futures."²²⁷ Indeed, in the federal context, uncertainty regarding what would happen in the absence of an agency action *supports* the discussion of multiple no action alternatives.²²⁸ To ignore a scenario where no pipeline is operating in the Straits is to look at only a "partial set of the possible futures."²²⁹

B. The No Pipeline Alternative Is Feasible and Prudent.

The no action or no pipeline alternative is feasible. "A 'feasible' alternative is one that is "capable of being put into effect or accomplished; practicable" or "capable of being successfully utilized; suitable." Michigan courts and agencies have also discussed feasibility in terms of whether something is "technically" possible and "economically feasible," where an alternative that is costly and burdensome to the polluter is not infeasible. ²³¹ Enbridge is capable of not spending several years constructing a first-of-its-kind tunnel with a pipeline in it, and Enbridge is capable of refraining from transporting oil and gas products through the Straits. Indeed, Enbridge has done the latter when a court ordered it to shut down the pipeline because "the severe risk of harm" from an oil spill was "so substantial and irreparable, and endangers so many communities

²²⁶ Stanton Redirect, 9 Tr. 1021.

²²⁷ *Id*.at 9 Tr. 1022.

²²⁸ *Indigenous Envtl. Network v U.S. Dept. of State*, 347 F. Supp. 3d 561, 575 (D. Mont. 2018) (recognizing the appropriateness of considering *three* no action alternatives in the absence of the Keystone pipeline). ²²⁹ Stanton Redirect 9 Tr. 1023.

²³⁰ Stanton Direct, 9 Tr. 948 (relying on a dictionary for the common usage of words not defined in MEPA, as is consistent with *Nelson v Grays*, 209 Mich App 661, 664 (1995)).

²³¹ Wayne County Dep't of Health v Olsonite Corp., 79 Mich App 668, 703-04 (1977); see also In Re: Wetlands Act Appeal of Kuras Properties, Inc., 1990 WL 299409, at *40 (Dep't of Natural Resources, Nov 14, 1990) ("Costs may be burdensome or adversely affect profits. To show an alternative is not feasible or prudent, truly unusual factors or costs of an extraordinary magnitude are necessary").

and livelihoods and the natural resources of Michigan, the danger far exceeds the risk of financial loss to the defendants."²³²

The no pipeline alternative is also practicable because Michiganders can and will shift their energy sources away from the fuels that would be transported by the Project.²³³ Without Line 5 in the Straits, current consumers of propane would purchase fuels transported by other means or would switch energy sources, such as through electrification.²³⁴ And, more broadly, "[c]limate forecasts, regulations, and policies . . . suggest that it is not sensible to assume that fossil fuel demand will be the same or higher in future years."²³⁵

The no action or no pipeline alternative also is prudent. An alternative is "prudent" if it represents the "exercise of sound judgment." Ceasing to run a pipeline through or under the Straits would represent sound judgment for at least three reasons. First, it would eliminate an environmental risk to the Straits from an oil spill and achieve the express purpose of the Project. 237

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²³² Temporary Restraining Order, *Nessel v Enbridge Energy*, *Ltd.*, *et al*, No. 19-474-CE (Ingham County Cir. Ct. Michigan, June 25, 2020). This case remains pending, and it is possible that the court will again order—as temporary or permanent relief—that the dual pipelines be shut down. This case involves claims of public trust violations and predates the Governor's Revocation and Termination of the easement, and thus provides a *third* reason that the Commission should consider the no pipeline alternative, in addition to the two outlined in Section IV.A. Indeed, in another MEPA case, *Wayne County Dep't of Health v Olsonite Corp.*, 79 Mich App 668, 700 (1977), the court rejected a polluter's "myopic" disregard for the possibility that an event that occurred in the past—in that case, an energy shortage that caused the polluter to use odor-causing chemicals in its processes—could recur. ²³³ Stanton Direct, 9 Tr. 942 ("Michigan's energy needs can be met without propane through electrification."). Even Staff agree that it would be "technically possible" for Michiganders to shift energy sources. Morese Direct, 12 Tr. 1791.

²³⁴ Stanton Direct, 9 Tr. 948, 950, 952-953; see also Stanton Cross, 9 Tr. 1017-1018.

²³⁵ Stanton Direct, 9 Tr. 960. Enbridge specifically sought to exclude most evidence about whether there is a public need for the fuels transported by Line 5 from this case, the ALJ granted that motion, and the Commission affirmed it. U-20763, April 21, 2021 Order at 63. To the extent that Enbridge or Staff now argue that there is and will continue to be a public need for such fuels, the Commission should reconsider its scope decision, reopen the record, and remand for additional evidence on this issue.

²³⁶ Stanton Direct, 9 Tr. 948-949 (relying on a dictionary for the common usage of words not defined in MEPA, as is consistent with *Nelson*, 209 Mich App at 664).

²³⁷ Shutting down the Line 5 pipeline likely also would eliminate other oil spill risks to other lands and waters along the course of the pipeline; however, the record is restricted in this case such that a full comparison of the alleviation of that environmental risk has not been possible.

Second, the no action or no pipeline alternative would represent sound judgment because it would further Michigan's climate goals and policies. Pursuant to Executive Order 2020-182, Michigan is pursuing plans "to reduce greenhouse gas emissions and transition towards economywide carbon neutrality." Executive Directive 2020-10 requires a statewide reduction in GHG emissions by 28 percent, as compared to 2005 levels, by 2025 and carbon neutrality no later than 2050. A reduction in GHG emissions is also consistent with national and international climate goals. When compared to the Project, the no pipeline alternative reduces GHGs by about 27 million metric tons of CO2e annually. Also consistent with national and compared to the Project, the no pipeline alternative reduces GHGs by about 27 million metric tons of CO2e annually.

Additionally, a comparison of the timeline on which Michigan aims to reduce GHGs with the construction and operation timeline for this Project underscores how *imprudent* anything other than the no pipeline alternative would be. Michigan aims for dramatic GHG emissions reductions within the decade.²⁴² However, based on the periods of time it will take the Corps to complete an Environmental Impact Statement and Enbridge to construct the Project, it will be approximately 2028, or later, before the Project begins operating.²⁴³

Third, the no action or no pipeline alternative would represent sound judgment because it honors and respects the Tribal Nations' cultures, economies, and express position regarding whether a pipeline operates in lands and waters at the center of their oral traditions and ways of life. As explained in Section I.A, the Straits, where the Project is routed, consists of "lands and waters that are central to our existence as indigenous people" and as Tribal Nations. Therefore, an alternative where there is no pipeline operating near the Straits is far more prudent.²⁴⁴ As

²³⁸ ELP-25.

²³⁹ ELP-19.

²⁴⁰ Stanton Direct, 9 Tr. 961; Erickson Direct, 9 Tr. 1046-47.

²⁴¹ Erickson Direct, 9 Tr. 1043; see also id. at 9 Tr. 1063.

²⁴² ELP-19.

²⁴³ BMC-41.

²⁴⁴ Gravelle Direct, 10 Tr. 1419-1420; see also 10 Tr. 1421-1422.

explained in Section V.C, climate change is also "of paramount concern to native people" for many reasons, including that it threatens resources that tribes rely on for food, medicine, cultural practices, and businesses, as well as that climate change disrupts the reciprocal relationship between native people and the natural world.²⁴⁵

The no action or no pipeline alternative will result in fewer GHGs and therefore less impairment of the air, water, other natural resources, or the public trust therein, and it is a feasible and prudent alternative. The reasons that the no pipeline alternative is feasible and prudent also demonstrate how it is consistent with public health, safety, and welfare. Because this alternative is available, MEPA requires that the Project not be authorized or approved.

APPEAL OF ALJ'S RULING ON MOTIONS TO STRIKE

The Commission must exercise its jurisdiction under Act 16 and MEPA with full consideration of the interests of Tribal Nations and their citizens. Indeed, at the outset of this proceeding, the Commission concluded: "[D]ue to the significant public interest and concern regarding the Line 5 Project's potential environmental impact on the Great Lakes, the Commission finds that it is in the public interest to conduct a contested case." Specifically, in reaching that decision, the Commission stated "that Enbridge's Line 5 Project 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 in a contested case proceeding.*" The Commission recognized that parties should be permitted to intervene in this matter to "bring a unique perspective to the issues raised by the case." And, the creation of a comprehensive and robust record could have, and should

²⁴⁵ Ettawageshik Direct, 10 Tr. 1579-1581.

²⁴⁶ Case No. U-20763, June 30, 2020 Order, at 69-70.

²⁴⁷ Case No. U-20763, June 30, 2020 Order, at 69 (emphasis added).

²⁴⁸ Case No. U-20763, June 30, 2020 Order, at 71 (internal citations omitted).

have, been accomplished through the application of the Commission's broad and relaxed evidentiary standard.²⁴⁹

The Commission has publicly stated that it "is committed to ensuring Tribal voices are heard." To fulfill its commitment to ensuring tribal voices are heard, the Commission should apply its broad evidentiary standard in a manner that creates a truly robust record that prevents the voices of the Tribal Nations from being silenced.

Yet, the perspectives of the Tribal Nations have been stricken in this matter. On January 13, 2022, the ALJ improperly granted several motions to strike filed by Enbridge, striking portions of the testimony and sponsored exhibits of five witnesses presented by the Tribal Nations. The witnesses whose testimony and sponsored exhibits were excluded from the record include four tribal leaders and a distinguished ethnohistorian whose decades of work has been focused on studying the cultures and histories of the native people of the Upper Great Lakes area. The specific portions of testimony and exhibits that were stricken are:

- Direct Testimony of Whitney Gravelle President of the Bay Mills Indian Community:
 - o Page 6, lines 3 through 20
 - o Page 12, line 13 through page 13, line 5
 - o Sponsored Exhibits BMC-1 through BMC-5
- Direct Testimony of Jacques LeBlanc Vice President of Bay Mills Indian Community and Tribal Fisherman:
 - o 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:
 - o Page 7, line 3 through page 8, line 10
 - o Page 8, line 11 through page 10, line 14
 - o Page 10, line 15 through page 12, line 12

²⁴⁹ Mich Admin Code, R 792.10427(1); *see also* Mich Admin Code R 24.275. *In Re Ameritech Michigan*, No. U-11830, 2006 WL 64441 (Jan. 10, 2006)("[T]he rules of evidence, as applied to the Commission, are relaxed, and the presiding officer has discretion to allow any evidence that is of a type that may be commonly relied upon."). ²⁵⁰ When appointing the current Tribal Liaison, Reka Holley Voelker, Commission Chair Dan Scripps stated: "The MPSC is committed to ensuring Tribal voices are heard and their concerns addressed." Press release, "MPSC names Reka Holley as agency's Tribal Liaison," July 29, 2020, available at https://www.michigan.gov/mpsc/0,9535,7-395-93307 93313 17280-535072--,00 html, last visited January 10, 2022.

- o Page 14, line 2 through page 15, line 8
- o 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:
 - o Page 12, line 11 through page 13, line 4
 - \circ Page 14, lines 12-13
 - \circ Page 16 lines 9 18
 - o 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:
 - \circ Page 7, lines 16-20
 - Page 14, lines 11 15
 - \circ Page 15, lines 3 7
 - o Page 17, line 15 through page 20, line 10
 - o Page 23, line 16 through page 24, line 2
 - o Page 24, line 19 through page 25, line 20
 - \circ Page 28, lines 5 8
 - o Page 32, line 15 through page 34, line 22
 - o Page 35, line 8 through page 36, line 10
 - o Page 37, line 11 through page 39, line 9
 - Sponsored Exhibit BMC-35

As described in detail below, the stricken testimony and exhibits relate directly to the Commission's review of Enbridge's application under Act 16 and MEPA. Therefore, the ALJ's ruling on the motions to strike must be reversed.

I. THE ALJ ERRED IN GRANTING THE MOTION TO STRIKE PORTIONS OF THE DIRECT TESTIMONY AND SPONSORED EXHIBITS OF BAY MILLS' PRESIDENT WHITNEY GRAVELLE.

The stricken portions of President Gravelle's direct testimony support her opinions that this Proposed Project is not routed reasonably, risks spilling oil into the Straits, and will "contribut[e] to climate change." This testimony is relevant to the Commission's Act 16 and MEPA analyses. The stricken exhibits sponsored by President Gravelle—including two tribal

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²⁵¹ Gravelle Direct, 10 Tr. 1427.

resolutions, two letters to the Governor, and two official comment letters—are also relevant to the Commission's Act 16 analysis because they cast doubt on the safety and reasonableness of the proposed route in this sensitive area.²⁵²

For example, Exhibit BMC-3 is an August 1, 2017, letter to then-Governor Snyder and other Michigan officials transmitting the comments of all twelve federally-recognized tribal nations in Michigan (including the four Tribal Intervenors here) on the "Dynamic Risk Draft Alternatives Report." The Tribal Nations reviewed and provided comments on a report addressing alternatives to the dual pipelines, including the alternative of constructing a tunnel. Consideration of these alternatives is central to the Commission's alternatives analysis under MEPA and relevant here. The final version of this very same report is discussed in the direct testimony of Staff witness Travis Warner²⁵³ and the direct testimony of Staff witness Alexander Morese.²⁵⁴ In addition, the exhibit should be admitted pursuant to the Administrative Procedures Act ("APA").²⁵⁵ Exhibit BMC-3 provides important context for the Commission when it reviews (and assesses the weight of) other testimony about the report.

Despite the fact that the stricken testimony and exhibits provide critical information about tribal concerns central to this case, the ALJ summarily dismissed it all by stating 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."²⁵⁶ But such a characterization is not accurate because President Gravelle's testimony specifically refers to the "dual pipelines" and

²⁵² Exh. BMC 17 – Exh. BMC 30.

²⁵³ Warner Direct Testimony, 12 Tr. 1714-1715 (describing the Dynamic Risk Report and how it led up to the Tunnel Agreements that are Enbridge Exhibits A-8, A-9, and A-1), 12 Tr. 1716-1717 (describing his interpretation of the conclusions of the Dynamic Risk Report).

²⁵⁴ Morese Direct, 12 Tr. 1778.

²⁵⁵ Under Section 72 of the APA, parties shall have an opportunity to present evidence and submit rebuttal evidence on legal and factual issues in a case. MCL 24.272(3)-(4).

²⁵⁶ Ruling on Motions to Strike, at 7.

Line 5 "at the Straits of Mackinac" at least four times within the space of thirteen lines of stricken testimony. 257 Exhibits BMC-1 and BMC-2 are also explicitly about the "dual pipelines," the "Straits of Mackinac," and "Enbridge Line 5 Oil Pipeline under the Straits of Mackinac"; each of those phrases refers to the four-mile stretch of pipeline at issue in this case. Similarly, Exhibit BMC-3, BMC-4, and BMC-5 are all explicitly about plans to replace the dual pipelines in the Straits with a new pipeline—what is now the Proposed Project. Thus, it is incorrect to describe President Gravelle's stricken testimony as about the entirety of Line 5. 258

The ALJ's ruling on the motion to strike also inaccurately states that Staff supports

Enbridge's motion and argues that all of the portions of President Gravelle's direct testimony and exhibits that Enbridge sought to strike are outside the scope of the case. During the oral argument on the motion, Staff revised their earlier filed response to the motion to strike and instead stated that Staff did not support striking any of President Gravelle's direct testimony about the risk of an oil spill into the Straits. Indeed, alleviating the risk that Line 5 poses to the Straits is the stated purpose of the Proposed Project. Here, the double standard is apparent.

Numerous other witnesses were permitted to discuss the risk of an oil spill in the Straits, but the

²⁵⁷ Gravelle Direct, 10 Tr. 1419.

²⁵⁸ A stricken portion of President Gravelle's testimony does use the phrase, "[t]he continued operation of Line 5." However, neither in moving to strike the testimony nor in striking it was Enbridge or the ALJ so targeted as to only strike that phrase, as is clear from the discussion, supra, of the relevance of the stricken testimony. Instead, it appears Enbridge cherry-picked the phrase and disregarded that the phrase might be used for a purpose other than what was prohibited by the April 21, 2021 Order. In this portion of testimony, President Gravelle used the phrase to refer to the continued existence and operation of the pipeline in the Straits. This is both (1) the very thing that the Commission is considering – whether to authorize Enbridge's construction of a tunnel and routing of a pipeline through it, so that Line 5 can continue to operate in the Straits – and (2) what Enbridge and Staff witnesses discuss as an alternative to the Project – the continued operation of Line 5. See, e.g., Pastoor Direct 7 Tr. 559 (noting that the Project will allow Line 5 to "continue" to operate in the same manner); Pastoor Rebuttal 7 Tr. 575-76 (asserting that the "no action" alternative that the Commission should consider is "the continued operation of the Dual Pipelines); *see also* Warner Rebuttal 12 Tr. 1727 (discussing continued operation of the dual pipelines). This is yet another example of Enbridge trying to have it both ways, where Enbridge witnesses can opine about a subject, but Tribal witnesses have been prohibited from doing so.

²⁵⁹ Order on Motion to Strike at 7.

²⁶⁰ Jan. 13, 2022, Transcript at 437 ("And to that end, I want to clarify that Staff is not seeking to strike testimony about the risk of an oil spill from the tunnel . . . and for this reason, I want to revise our response to President Gravelle which inadvertently supported a request to strike testimony related to a spill from the Straits.").

President of an intervening Tribal Nation was not.²⁶¹ This is inconsistent with the dictates of the APA.²⁶²

For these reasons, and for the reasons discussed in Bay Mills' response to Enbridge's motion to strike, the decision of the ALJ striking portions of President Gravelle's testimony and sponsored exhibits should be reversed.

II. THE ALJ ERRED IN GRANTING THE MOTION TO STRIKE PORTIONS OF THE DIRECT TESTIMONY OF JACQUES LEBLANC.

The ALJ erred in excluding portions of Jacques LeBlanc Jr.'s testimony because the stricken testimony is probative of whether the tunnel project is reasonably routed and what environmental impacts may result from the project.

An issue in this case that is relevant to the MEPA analysis is whether – and to what extent – both the existing dual pipelines and the Project are likely to pollute, impair, or destroy natural resources, including those in the Straits of Mackinac. This issue is also relevant to the Act 16 inquiries of whether there is a need for the Project, whether it is reasonably designed and routed, and whether the Project will be safe. Enbridge and Staff witnesses provide testimony on this issue, in addition to witnesses sponsored by the Tribal Nations. ²⁶³ Moreover, because

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²⁶¹ See Warner Direct, 12 Tr. 1717-26 (discussing risk of an oil spill to the Straits from the dual pipelines and potential alternatives); Warner Direct, 12 Tr. 1736-37 (discussing risk of an oil spill to the Straits from the Project); Adams Direct, 12 Tr. 1814-19 (addressing whether the Proposed Project maintains or decreases the risk of an oil spill to the Straits and introducing Exh. S-16, which addresses the risk of an oil spill to the Straits from the Project in greater detail); Pastoor Direct, 7 Tr. 555-56 (stating that the Proposed Project will address the risk of an oil spill to the Straits); Dennis Rebuttal, 8 Tr. 795-96 (discussing vibratory impacts on the dual pipelines and whether there will be "a release from the dual pipelines."

²⁶² Under Section 72 of the APA, parties shall have an opportunity to present evidence and submit rebuttal evidence on legal and factual issues in a case. MCL 24.272(3)-(4).

²⁶³ Enbridge Witness Dennis and Staff witnesses Adams and Warner testified about the potential risk of an oil spill or catastrophic event in the Straits. *See*, *e.g.*, Dennis Surrebuttal, 8 Tr. 799-802; Adams Direct, 12 Tr. 1814, 1818 (and Exh. S-16); Warner Direct, 12 Tr. 1723, 1736-37. So too does Bay Mills Witness Kuprewicz. *See generally* Kuprewicz Rebuttal, 10 Tr. 1326-33.

Enbridge presented issues of fact regarding the potential impairment of fisheries resources from the Project, so too can the Tribal Nations, pursuant to the APA.²⁶⁴

Nevertheless, the ALJ granted Enbridge's motion to strike²⁶⁵ testimony from Mr. LeBlanc about what pollution to the Straits and impairment of fisheries resources in the Straits would mean to tribal fishers. For example, the ALJ erred in striking the following testimony from Mr. LeBlanc:

If the Great Lakes ecosystem is harmed, I will have no means to continue supporting my family through treaty subsistence and commercial fishing, or harvesting of medicines and animals.²⁶⁶

Beyond the harm that an oil spill or other event would have on the health of lake trout and whitefish, any disruption of the fishery for an extended period of time would stifle the transfer of fishing knowledge to younger generations. This could be devastating.²⁶⁷

Given that Mr. LeBlanc's family has a long history of fishing, he has been a commercial fisherman since age 12, and he fishes in the Straits of Mackinac, few people, if any, are better situated to testify to these potential harms.²⁶⁸

The rest of Mr. LeBlanc's excluded testimony is foundational to his conclusions that the pipeline is not reasonably routed or the least environmentally impactful alternative to achieve the Project's purpose. ²⁶⁹ For these reasons, and for the reasons stated in Bay Mills' response to

²⁶⁴ Enbridge Witness Turner opined that the Project would have no impacts on fish resources, Turner Rebuttal, 7 Tr. 628-29; in contrast to credible testimony from LTBB Witness Donner and Bay Mills Witness Alofs about the Project's impacts on fish, Donner Direct, 9 Tr. 1179, *see generally* Alofs Direct, 10 Tr. 1456-62. Under the APA, "[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 arguments on issues of fact." MCL 24.272(3). Also, "[a] party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for the use of the agency and offered into evidence. A party may submit rebuttal evidence." MCL 24.272(4).

²⁶⁵ Although Staff initially supported Enbridge's motion, in oral argument Staff acknowledged that portions of Mr. LeBlanc's testimony that Enbridge moved to strike, "may also relate to the tunnel project and not just Line 5 as a whole," Staff Argument, 6 Tr. 437, and Staff did *not* agree with striking testimony about the risk of an oil spill from the tunnel, *id*.

²⁶⁶Stricken LeBlanc Direct at 9:6-8.

²⁶⁷ Stricken LeBlanc Direct at 9:11-13.

²⁶⁸ LeBlanc Direct, 10 Tr. 1515-1516.

²⁶⁹ Stricken LeBlanc Direct at 8:6-9:19.

Enbridge's motion to strike, the Commission should reverse the ALJ's decision to strike portions of Mr. LeBlanc's testimony.

III. THE ALJ ERRED IN GRANTING THE MOTION TO STRIKE PORTIONS OF THE DIRECT TESTIMONY AND SPONSORED EXHIBITS OF FRANK ETTAWAGESHIK.

Mr. Ettawageshik's stricken testimony and sponsored exhibits provide the Commission with information directly related to a central issue in this matter—the effect the Proposed Project will have on climate change. ²⁷⁰ Specifically, Mr. Ettawageshik provided testimony and sponsored exhibits about 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. ²⁷¹ For example, in his stricken testimony, Mr. Ettawageshik discusses the Intergovernmental Panel on Climate Change ("IPCC") and BMC-14, the headline statements from an August 2021 report issued by an IPCC working group. The IPCC working group "concluded that it is unequivocal that human influence has warmed the atmosphere, ocean and land and that recent changes across the climate system are unprecedented over many centuries to many thousands of years." Mr. Ettawageshik explained how this scientific report reflected the tribal concerns:

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²⁷⁰ April 14, 2021, Order, MPSC, U-20763 at 66 ("The Commission finds . . . GHG pollution . . . fit[s] within the statutory language of Section 5 of MEPA, and therefore must be reviewed in this case. . . 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.") (emphases added).

²⁷¹ See Stricken Ettawageshik Direct at 7:3-8:10 and Stricken Exh. BMC-17 through BMC-20 (discussing how climate change has been a priority for the National Congress of American Indians and sponsoring exhibits consisting of NCAI's resolutions in that regard); Stricken Ettawageshik Direct at 8:11-10:14 and Stricken Exh. BMC-21 through BMC-23 (describing international climate change advocacy efforts by indigenous people and sponsoring exhibits related to those efforts); Stricken Ettawageshik Direct at 10:15-12:12 and Stricken Exh. BMC-24 through BMC-28 (describing Michigan Tribes' efforts to combat climate change, the concerns they have about the impact of climate change on treaty-protected resources and sponsoring exhibits related to those concerns); Stricken Ettawageshik Direct at 14:2-15:8 and Stricken Exh. BMC-29 (discussing the Intergovernmental Panel on Climate Change ("IPCC") and a recent report from an IPCC working group discussing the physical science basis for climate change); and Stricken Ettawageshik Direct at 15:9-16:9 and Stricken Exh. BMC-30 (describing LTBB's efforts to combat climate change under Mr. Ettawageshik's leadership).

²⁷² Stricken Ettawageshik Direct at 14:11-16.

The recent report underscores why native people are so alarmed about climate change. This report is yet another example of how Western science is recording what native people have observed for decades—that our climate is changing to the detriment of our planet and all its inhabitants. We are seeing the concerns that native people have had for decades confirmed in increasingly alarming scientific reports.²⁷³

This testimony and exhibit provide information relevant to the Commission's understanding of climate change and would help to inform how the Commission views the polluting effect of the Proposed Project.

Furthermore, the ALJ incorrectly discounted the relevance of Mr. Ettawageshik's testimony and sponsored exhibits by mischaracterizing it all as focused on "climate change on a global level and the advocacy by the tribes on that issue" and, therefore, outside the scope of the Commission's April 2021 Order. According to the ALJ, the April 2021 Order limited the scope to the GHG emissions associated with the 4-mile section of the pipeline that is the subject of the application.²⁷⁴ But, the ALJ misunderstood the purpose of the evidence. In offering this evidence, the Tribal Nations are not seeking to expand the geographic scope of the Commission's review. Rather, the Tribal Nations are offering information that puts the harm threatened by the Proposed Project into context. Indeed, it would be impossible for the Commission to evaluate the harm that the project threatens to inflict without understanding the nature of the problem—including its global effects—and the impact those effects will have on the Tribal Nations. For example, another stricken exhibit, BMC-27, is the Inland Consent Decree negotiated between the State of Michigan and five sovereign Michigan tribes that are signatories to the 1836 Treaty of Washington, and the United States. The Decree defines the extent of tribal rights—including the right to hunt, fish and gather—on land and inland waters ceded to the United

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²⁷³ Stricken Ettawageshik Direct at 15:4-8.

²⁷⁴ Ruling on Motions To Strike, at 8.

States in 1836. In stricken testimony, Mr. Ettawageshik describes how climate change influenced the negotiations between Michigan and the tribes about the nature of the tribes' treaty-protected rights.²⁷⁵

For these reasons, and for the reasons stated in Bay Mills' opposition to the motion to strike, the Commission should reverse the ALJ's decision and admit Mr. Ettawageshik's direct testimony and sponsored exhibits in their entirety.

IV. THE ALJ ERRED IN GRANTING THE MOTION TO STRIKE PORTIONS OF THE DIRECT TESTIMONY AND SPONSORED EXHIBITS OF JOHN RODWAN.

The ALJ erroneously excluded portions of John Rodwan's testimony and one exhibit relating to the Line 6b oil spill as irrelevant. However, the excluded evidence is relevant and admissible because it assists the Commission's determination under Act 16.²⁷⁶ Mr. Rodwan's stricken testimony and sponsored exhibit provide important information for the Commission to determine how much weight and credibility should be given to Enbridge's statements about the safety of the Proposed Project.

As an example, Mr. Rodwan's stricken testimony states that "[i]n the case of the July 2010 Enbridge Line 6b release of oil . . . NHBP's Wild Rice restoration program was essentially halted for five years within a 35-mile segment of the main channel."²⁷⁷ This describes the impacts of Enbridge's inadequate safety protocol, which caused the Line 6b oil disaster. That disaster polluted many important tribal natural resources, as Mr. Rodwan describes. NHBP's experiences help the Commission decide whether the tunnel project is safe enough to protect the

²⁷⁵ Stricken Ettawageshik Direct at 11:20-12:12.

²⁷⁶ April 14, 2021, Order, MPSC, U-20763 at 63 (holding tunnels purpose is to "*improve the safety* of the 4-mile segment that crosses the Straits. This is a question of fact . . . relevant . . . in an Act 16 case.") (emphasis supplied). ²⁷⁷ Stricken Rodwan Direct at 12:11-14.

natural resources in the Straits and Michigan Tribes' interest in them. The ALJ also erred in excluding other portions of Mr. Rodwan's testimony for the same reason.²⁷⁸

Additionally, the ALJ erroneously struck Exhibit NHPB-3, "MOU regarding Natural Resources Damage assessment and Restoration for the Enbridge Kalamazoo River Oil Spill." This exhibit is relevant to the Commission's Act 16 safety analysis because it speaks to the environmental impacts that can result from Enbridge's inadequate pipeline safety standards.

For these reasons, and for the reasons stated in NHBP's opposition to Enbridge's motion to strike, the Commission should reverse the ALJ's decision and admit Mr. Rodwan's testimony and exhibits in their entirety.

V. THE ALJ ERRED IN GRANTING THE MOTION TO STRIKE PORTIONS OF THE DIRECT TESTIMONY AND SPONSORED EXHIBITS OF DR. CHARLES CLELAND.

The ALJ erred in granting Enbridge's motion to strike portions of Dr. Cleland's Direct Testimony and Exhibit BMC-35 because the material is relevant to the Commission's evaluation of the Project under Act 16 and MEPA.

One of Bay Mills' central arguments in this case is that the Commission should not approve the Project because the route of the project is unreasonable in that it has the potential to harm a culturally significant area in the Straits of Mackinac. There is evidence in the record, Exhibit BMC-34, that identifies 141 terrestrial archaeological sites in the Straits. Bay Mills also offered the testimony of a renowned ethnohistorian, Dr. Charles E. Cleland, who described the importance of these 141 terrestrial archaeological sites and explained how the Project poses a potential risk to those sites. Much of this testimony was stricken.

²⁷⁸ Stricken Rodwan Direct at 12:11 – 13:4 (discussing impacts of safety failure of Line 6b); Stricken Rodwan Direct at 14:12-13 (same); Stricken Rodwan Direct at 16:9-18 (discussing impacts of the project's GHGs); Stricken Rodwan Direct at 16:19-17:2 (discussing the tunnel project's climate impacts).

The ALJ made two mistakes in reaching the decision to strike large portions of Dr. Cleland's testimony. First, the ruling omits *any* explanation about why the descriptions and expert analysis²⁷⁹ of the list of 141 terrestrial archaeological sites²⁸⁰ in the Straits of Mackinac were outside the scope of the case or beyond Dr. Cleland's expertise. The 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." The ALJ's ruling was wrong. Dr. Cleland's expert description and analysis of the terrestrial archaeological sites are exactly the type of evidence the Commission needs to understand the cultural richness of the Straits area, the unreasonableness of the route, and the importance of considering alternatives to accomplish the purpose of the proposed Project. Accordingly, the stricken testimony fits within the scope of this case. This testimony is also well within his qualifications. ²⁸² Nothing in Enbridge's motion or the ALJ's ruling indicates otherwise. Without the context of the stricken testimony, the Commission cannot fully evaluate the significance of the 141 sites to its Act 16 and MEPA analysis; ²⁸³ the Commission should allow the stricken testimony into the record.

Second, the ALJ erred when he struck Dr. Cleland's testimony regarding the potential impact of the Project on the culturally significant area of the Straits. He also adopted Enbridge's misleading argument that "Dr. Cleland lacks any basis to opine on the actual or potential impact to the physical world from the proposed project." Contrary to the conclusions of the ALJ, Dr.

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²⁸⁴ Ruling on Motions to Strike, at 4.

²⁷⁹ See Cleland Revised Public Direct 10 Tr. 1542, 1545. As Dr. Cleland explains in the stricken testimony, he compiled "a complete listing of terrestrial archaeological sites in the Straits of Mackinac" by asking acting State Archaeologist, Stacy Tchorzynski for lists of relevant sites. Stricken Cleland Direct at 17:20-18:18:8.

²⁸⁰ See CONFIDENTIAL Exhibit BMC-34.

²⁸¹ Rulings on Motion to Strike, at 3.

²⁸² Exhibit BMC-31 Resume (or CV) of Dr. Charles E. Cleland.

²⁸³ This stricken testimony provides important information about the source of the information in the exhibit and adds to the weight of the evidence, because the source of the information is the State Historic Preservation Office, the agency responsible for keeping records of known archaeological sites "as a means of protecting and managing these non-renewable resources for the public benefit." Cleland Revised Public Direct, 10 Tr. 1533.

Cleland did not testify as to the cause or likelihood or the nature of a catastrophe, but rather to the potential impact of such an event on non-renewable sites and Bay Mills' lifeway. For instance, Dr. Cleland testified that "[i]f any environmental catastrophe renders fish unconsumable, it will strike a blow to the very social fabric of the native people who are holders of unique cultural traditions with long standing cultural practices." Further, Dr. Cleland is an expert about the characteristics of archaeological sites, which are very much part of the physical world. Again, this language fits squarely in Dr. Cleland's expertise regarding the Anishinaabe traditions.

Similarly, other portions of Dr. Cleland's testimony that were stricken should be admitted because they address the need for further study to determine the nature and existence of underwater archaeological sites. ²⁸⁶

The ALJ granted the above-referenced five motions to strike evidence offered by the Tribal Nations in error. The ALJ's decision should be reversed to allow the Commission to have the Tribal Nations' perspectives on critical and relevant issues.

CONCLUSION

For the reasons discussed above, the Tribal Intervenors respectfully request that the Commission **deny** Enbridge's application to construct and operate the Project.

The Tribal Intervenors further request that the Commission **reverse** the ALJ's orders granting Enbridge's motions to strike portions of the testimony and exhibits of witnesses President Gravelle, Mr. LeBlanc, Mr. Ettawageshik, Mr. Rodwan, and Dr. Cleland.

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²⁸⁵ Stricken Cleland Direct Public Direct at 33:4-9; see also id. at 17:15-17.

²⁸⁶ Stricken Cleland Direct Public Direct at 32:15-34:22, 35:8-36:10, 37:11-39:9.

In the alternative, the Tribal Intervenors request the Commission **grant** their outstanding petition for rehearing of the April 21, 2021 Order and remand for the development of a complete record.

Respectfully Submitted Date: February 18, 2022

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STATE OF MICHIGAN

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, or the Grant of other Appropriate Relief

U-20763

ALJ Dennis Mack

PROOF OF SERVICE

On February 18, 2022, an electronic copy of Initial Brief of the 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 was served on the following parties:

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