STATE OF MICHIGAN
IN THE SUPREME COURT

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

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

Appellants,

v.

MICHIGAN PUBLIC SERVICE COMISSION, et al.,

Appellees.

MSC No. 168335

COA Nos. 369156, 369159, 369161, 369162, 369165 (consolidated)

MPSC Case No. U-20763

BRIEF ON APPEAL – APPELLANTS

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STATEMENT OF JURISDICTION

This is an appeal of a decision of the Michigan Court of Appeals. Appellants Bay Mills Indian Community ("Bay Mills"), Little Traverse Bay Bands of Odawa Indians ("LTBB"), Grand Traverse Band of Ottawa and Chippewa Indians ("GTB"), Nottawaseppi Huron Band of the Potawatomi ("NHBP") (collectively, "Tribal Nations"), Environmental Law and Policy Center ("ELPC"), and Michigan Climate Action Network ("MiCAN") (all together collectively referred to as "Appellants") filed a timely Application for Leave to Appeal on April 2, 2025. This Court granted Appellants leave to appeal on September 19, 2025. The Court has jurisdiction pursuant to MCL 600.215(3) and MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err by applying a deferential standard of review rather than determining de novo whether the proposed conduct will pollute, impair, or destroy the air, water, or state's other natural resources or the public trust in these resources under MCL 324.1705(2) of the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 *et seq.*, in accordance with *West Michigan Environmental Action Council, Inc v Natural Resources Commission*, 405 Mich 741, 752-755; 275 NW2d 538 (1979)?

The Court of Appeals' answer: No.

Appellants' answer: Yes.

Appellees will answer: No.

2. Did the Court of Appeals err by affirming the Michigan Public Service Commission's limitation on the scope of evidence to be reviewed regarding its determinations under MCL 324.1705(2) of MEPA and its decision to exclude evidence of the history and risk of oil spills along the entire length of Line 5 in those determinations?

The Court of Appeals' answer: No.

Appellants' answer: Yes.

Appellees will answer: No.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Michigan Constitution of 1963, Article IV, § 52:

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

MCL 324.1705 (Michigan Environmental Protection Act):

> (1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.
>
> (2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.
>
> (3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

INTRODUCTION

The Michigan Environmental Protection Act ("MEPA") arose from the constitutional mandate to protect the State's air, water, natural resources, and the public trust in those resources. Over the years, this Court has recognized that MEPA—a first-of-its-kind statute—changed Michigan's environmental laws by: empowering citizens to protect the environment; requiring administrative agencies to consider the environmental effects of their decisions; strengthening judicial review of agency decisions; and directing Michigan courts to develop a common law of environmental quality. This appeal asks this Court to uphold MEPA's text and purpose once again.

In this case, Enbridge Energy applied to the Michigan Public Service Commission ("Commission") for approval to construct a massive tunnel beneath the Straits of Mackinac to house a new segment of its Line 5 pipeline (the "Project"). The Project would extend the life of this pipeline by up to 99 years, enabling Enbridge to continue transporting more than half a million barrels of oil per day across the Great Lakes. Enbridge attempts to characterize the proposed tunnel as a "safety improvement" and "environmentally protective" compared to the existing pipeline, which crosses along the lakebed. In reality, however, the Project is likely to have the effect of polluting the air, water, and other natural resources. Those likely effects include continued or even increased greenhouse gas ("GHG") emissions from the hydrocarbon products transported through the tunnel and continued or even increased oil spills along the length of the pipeline secured by the tunnel—chronic wrongdoing for which Enbridge is well known.

Michigan's Constitution makes assessing those environmental impacts and risks a "paramount public concern." MEPA implements this constitutional priority by requiring agencies and courts to independently determine a proposed project's likely pollution,

impairment, or destruction of Michigan's air, water, and natural resources and analyze feasible and prudent alternatives.

In this case, the Court of Appeals erred in two ways when it affirmed the Commission's decision. *First*, the Court of Appeals applied a deferential standard of review instead of determining de novo the Project's likely environmental effects under MCL 324.1705(2) of MEPA, in accordance with *West Michigan Environmental Action Council, Inc. v Natural Resources Commission*, 405 Mich 741, 752-55; 275 NW2d 538 (1979) ("*WMEAC*"). As a result, the Court of Appeals did not independently review either the Commission's preliminary decision to constrain the scope of its MEPA analysis, or the Commission's ultimate assessment of environmental effects and alternatives within that limited analysis. *Second*, the Court of Appeals erred when it upheld the Commission's exclusion at the outset of the proceeding of all evidence regarding the likelihood of more oil spills from Line 5 if the Project secures the pipeline's continued operation for decades to come. The Commission's threshold legal ruling eliminated consideration of entire categories of evidence on pollution, impairment, and destruction of the environment from the statutorily-required determinations. Nothing in MEPA authorizes an agency or court to refuse to determine whether broad categories of alleged environmental effects are likely or not.

These legal errors have critical consequences. The refusal to consider the likelihood of more oil pollution resulting from the Project imposes unvetted risks on everyone who depends on the Great Lakes for drinking water, recreation, or economic benefit. It also infringes on Tribal economic and cultural interests and treaty-protected rights, including "the usual privileges of occupancy," such as the inherent rights to fish, hunt, gather, and conduct ceremonies in perpetuity. Additionally, the likely effects of more GHG pollution from the Project have not been

independently determined by any Michigan court. And by extending the life of Line 5, the Project would also cause more GHG pollution, exacerbating the impacts of climate change in the Great Lakes region.

With so much at stake, Appellants respectfully request that this Court reverse the Court of Appeals and remand this case to the Commission with appropriate instructions.

STATEMENT OF FACTS

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

Line 5 was originally constructed in 1953, prior to Michigan's 1963 Constitution, and before the enactment of MEPA and virtually all state and federal environmental laws. It was built without consultation with the Tribal Nations whose treaty-protected territory the pipeline traverses and threatens. Line 5 runs from Superior, Wisconsin to Sarnia, Ontario, crossing hundreds of interconnected waters along its path. COA Opinion, p 7 (Appendix A at 10) (citing the Commission's December 2023 Final Order). It can carry up to 540,000 barrels of oil per day. *Id*. Where it crosses the Great Lakes in the Straits of Mackinac (the "Straits"), it splits into the Dual Pipelines: two 20-inch wide pipelines that sit on the lakebed or, in many places, are suspended in the water. Notice of Revocation & Termination of Easement ("Notice of Revocation"), pp 1, 6 (Appendix H at 689, 694). Since their construction, the Dual Pipelines have been struck by anchors of passing vessels and have not been sufficiently maintained or inspected. See *id*. at 5-7, 15 (Appendix H at 693-95, 703).

On April 17, 2020, Enbridge filed with the Commission its "Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac." The Commission's jurisdiction is based on its authority to regulate oil pipelines under Act 16, MCL 483.1 *et seq*., and its rules governing construction of

pipeline facilities, Mich Admin Code, R 792.10447(1)(c). COA Opinion, p 6 (Appendix A at 9). Enbridge sought approval to replace the 20-inch-wide Dual Pipelines with a new single 30-inch-wide pipeline that would be housed within a 21-foot-wide tunnel to be constructed underneath the lakebed crossing the Straits. *Id*. at 6-7 (Appendix A at 9-10). The new pipeline segment would be connected to Line 5 on each side of the Straits, securing the pipeline's future and continuing the flow of oil across the Great Lakes for another 99 years. *Id*. at 8 (Appendix A at 11) (citing December 2023 Final Order).

B. Appellants Intervene to Oppose the Project.

On August 12, 2020, an Administrative Law Judge ("ALJ") for the Commission granted the petitions to intervene in the proceeding by the Tribal Nations. December 2023 Final Order, p 3 (Appendix B at 38); see Petitions to Intervene (Appendix I to L).[1] All of the Tribal Nations are Anishinaabe, a cultural and linguistic group comprising the Ottawa, Chippewa, and Potawatomi peoples. The Anishinaabe have inhabited what is today the State of Michigan since time immemorial. The Straits are at the center of the Anishinaabe creation story and remain a place of great spiritual, cultural, and economic significance for these Tribal Nations. See Testimony of Pres. Whitney Gravelle, p 1417 (Appendix N at 803). Tribal Nations identified a critical interest in protecting their traditional lifeways from harm caused by the Project.[2] As described in Bay Mills' Petition: The existing Dual Pipelines and the proposed Project are "the most obvious and most preventable risk to the fishery resources throughout northern Lakes Michigan and Huron."

[1] Pursuant to MEPA, the intervenors asserted that the Commission's consideration of Enbridge's application involved "conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources." See MCL 324.1705(1).

[2] Critical fishery resources—including whitefish—have already suffered harm and been made vulnerable due to climate change impacts. See Testimony of Pres. Whitney Gravelle, pp 1428-30 (Appendix N at 814-16).

Bay Mills Petition to Intervene, p 4 (Appendix I at 727) (quoting affidavit of Pres. Bryan Newland).

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 signed the 1836 Treaty in which they transferred to the United States almost half of the land and water that would become the State of Michigan: about 14 million acres of land and inland waters and 13 million surface acres in Lakes Michigan, Huron, and Superior. Treaty of 1836, 7 Stat 491; see also Bay Mills Petition to Intervene, pp 1-2 (Appendix I at 724-25).[3] In ceding the lands and waters, these Tribal Nations reserved the rights to hunt, fish, gather, and exercise all of the usual privileges of occupancy throughout the ceded territory. 7 Stat 491. These rights have been confirmed by state and federal courts. See *People v LeBlanc*, 399 Mich 31, 57-58; 248 NW2d 199 (1976); *United States v Michigan*, 471 F Supp 192, 278-81 (WD Mich, 1979), aff'd 653 F2d 277 (CA 6, 1981); *Grand Traverse Band of Chippewa & Ottawa Indians v Dir, Mich Dep't of Natural Resources*, 971 F Supp 282, 288-89 (WD Mich, 1995), aff'd 141 F3d 635 (CA 6, 1998).

On August 12, 2020, the ALJ also granted the petition to intervene filed by ELPC, a not-for-profit environmental organization that works to protect the Midwest's vital natural resources and the Great Lakes, and MiCAN, a not-for-profit organization that works to address climate change issues in Michigan. December 2023 Final Order, p 3 (Appendix B at 38).

[3] Bay Mills, GTB, and LTBB (as well as Sault Ste. Marie Tribe of Chippewa Indians and Little River Band of Ottawa Indiana) are successors to the signatories of the 1836 Treaty and are collectively known as "the 1836 Treaty Tribes." Although not one of the 1836 Treaty Tribes, NHBP and its members consistently maintain their culture and way of life through many of the same natural resources. NHBP Petition to Intervene, p 1 (Appendix L at 770).

C. The Commission Significantly Limits Its MEPA Review at the Outset of the Case.

At the beginning of the contested case, before the parties had the opportunity to conduct discovery and develop evidence, Enbridge filed a Motion In Limine to limit the scope of the case. Enbridge preemptively sought to preclude entire categories of evidence and issues that it argued were legally irrelevant, including the construction of the tunnel and its environmental impact, the public need for and continued operation of Line 5 and its environmental impact, and climate change. COA Opinion, p 10 (Appendix A at 13). Regarding the Project's environmental impact, the intervenors countered that these issues and categories of evidence were legally relevant under MEPA because extending and securing Line 5's operation for decades would be likely to result in more oil spills along its length. Joint Response to Motion In Limine by Michigan Environmental Council ("MEC"), GTB, Bay Mills, et al., pp 26-28 (Appendix O at 820-22). On October 23, 2020, the ALJ issued a ruling on Enbridge's Motion In Limine. (Appendix F). The ALJ denied the motion as it pertained to issues of tunnel construction and its environmental impact but granted the motion in all other respects. The ALJ ruled that "any evidence concerning the current and future operational aspects of the entirety of Line 5, including the public need and safety issues, is outside the scope of this case." *Id*. at 16 (Appendix F at 519).

On November 6, 2020, the Appellants and other intervenors appealed the ALJ's ruling to the Commission. December 2023 Final Order, p 4 (Appendix B at 39). Intervenors included an offer of proof in their applications for leave to appeal. Application of MEC, GTB, et al., pp 8-9 (Appendix P at 826-27); Application of Bay Mills, p 11 (Appendix Q at 830). The offer of proof explained that they sought to submit expert testimony establishing, among other things, that:

> Line 5 has a history of crack failures, such that extending the life of the pipeline by replacing the Straits segment into a tunnel will expose inland waters near segments

> of the pipeline outside the tunnel to extended risks of ruptures based on the condition of the pipeline and its integrity and method of operation. [Application of MEC, GTB, et al., p 9 (Appendix P at 827).]

The Attorney General filed a brief supporting and joining the applications for leave to appeal. (Appendix R).

On November 13, 2020, while the applications for leave to appeal were pending, the State of Michigan notified Enbridge that it was in violation of the 1953 Easement for the Dual Pipelines and that the easement itself was void since its inception. COA Opinion, pp 10-11 (Appendix A at 13-14); Notice of Revocation (Appendix H). The Governor and the Michigan Department of Natural Resources found that Enbridge "breached or violated the standard of due care and its obligations to comply with the conditions of the Easement" by: (1) ignoring the requirement that each pipeline be physically supported at least every 75 feet for "virtually the entire time the Easement has been in place"; (2) failing to "inspect, timely repair, and disclose exceedances of pipe spans to the State"; (3) failing to timely investigate the condition of the pipeline coating despite its poor condition; and (4) ignoring exceedances of pipeline curvature standards. Notice of Revocation, pp 12-16 (Appendix H at 700-04).

On December 9, 2020, the Commission remanded Enbridge's Motion In Limine to the ALJ in light of the Notice of Revocation. (Appendix E). The Commission's remand order described the Notice of Revocation of the easement as a "significant development" because the ALJ's ruling and the Motion In Limine were premised on continued existence of that easement and continued operation of the Dual Pipelines. *Id*. at 5 (Appendix E at 497). The Commission recognized that "the facts have changed," which "may significantly affect" Enbridge's arguments. *Id*. at 5-6 (Appendix E at 497-98). After additional briefing, the ALJ issued a second decision on Enbridge's Motion In Limine on February 23, 2021 that was substantially the same

as the first. (Appendix D). On March 9, 2021, the parties opposing the Motion In Limine again appealed. December 2023 Final Order, p 6 (Appendix B at 41).

On April 21, 2021, the Commission ruled on the Motion In Limine. (Appendix C). The Commission reversed the ALJ's ruling with respect to GHG emissions. COA Opinion, p 14 (Appendix A at 17). It found that the allegations of GHG pollution fit within Section 1705 of MEPA and must be reviewed. April 2021 Order, p 66 (Appendix C at 454). The Commission explained: "It defies both well accepted principles of statutory interpretation as well as common sense to apply MEPA to a pipeline *but not to the products being transported through it.*" *Id*. at 64 (Appendix C at 452) (emphasis added). The Commission further found that, "[w]hile the project under consideration is limited to the 4-mile section of the pipeline described in the application, this pipeline section would involve hydrocarbons that may result in GHG pollution that must be subject to MEPA review." *Id*. at 66-67 (Appendix C at 454-55).

Despite recognizing the need to consider the product in the pipeline, the Commission upheld the exclusion of evidence related to the history of oil spills from Line 5 and the risks of future spills resulting from the Project—concluding that those issues were outside the scope of its MEPA review. *Id*. at 64 (Appendix C at 452). The intervenors had argued that such evidence was crucial in evaluating the likely environmental effects of the Project because "Line 5 crosses over 290 rivers and streams—many of which the Tribes have treaty rights to, which are interconnected and, which flow to the Great Lakes." Joint Response to Motion In Limine by MEC, GTB, Bay Mills, et al., p 29 (Appendix O at 823). Thus, the Commission set different geographic limits in the MEPA analysis for the same pollutant transported through Line 5—oil.

D. The Commission's Narrow MEPA Scope Precludes Evidence of the Project's Likely Environmental Effects.

Constrained by the Commission's April 2021 Order, the parties conducted discovery and submitted evidence, including testimony describing the negative impacts that the construction, operation, and maintenance of the Project would have on the Tribal Nations and their treaty-protected resources. See, e.g., Gravelle Testimony, pp 1415-21 (Appendix N at 801-07); Hemenway Testimony, pp 1192-93 (Appendix S at 841-42); Wiatrolik Testimony, pp 1181-86 (Appendix T at 846-51); LeBlanc Testimony, p 1514 (Appendix U at 856). However, the ALJ struck large portions of that evidence, stating that it was "outside the scope" of the Commission's Order. January 2022 Order (Appendix V). The ALJ even struck evidence related to oil spills in the Straits, despite that evidence being within the limited scope allowed by the Commission. See Gravelle Testimony, p 1419 (Appendix N at 805).[4]

Striking this evidence muted Tribal concerns about the Project, including impacts to fisheries, wild rice, and Tribal Nations' economic interests. Excluded evidence included testimony from Jacques LeBlanc, a Tribal fisherman, pertaining to the Project's impact on fisheries—which are vital to the cultural and economic stability of Tribal Nations—from the pollution and impairment caused by the "continued operation of Line 5." January 2022 Order, p 6 (Appendix V at 872); LeBlanc Testimony, p 1521-22 (Appendix U at 863-64). Also stricken was testimony by John Rodwan, NHBP's former Environmental Director regarding the negative effects on wild rice and other Tribal resources suffered following a catastrophic oil spill from a

[4] The stricken testimony referenced the "dual pipelines" and Line 5 "at the Straits of Mackinac." Despite initially moving to strike this evidence, Commission Staff orally amended that motion to rescind parts of it and clarify that it "inadvertently supported a request to strike testimony related to a spill from the Straits." January 13, 2022 Transcript, p 437 (Appendix W at 892). The ALJ struck it anyway. January 2022 Order, pp 7-8 (Appendix V at 873-74).

different Enbridge pipeline (as evidence of the potential harm that a spill from Line 5 could cause). Rodwan Testimony, pp 1283-86 (Appendix X at 895-898).

An exhibit sponsored by Bay Mills President Whitney Gravelle's testimony was also stricken, even though it included critical information about Tribal concerns related to the tunnel and evaluation of alternatives. The exhibit, on behalf of several Tribal Nations, critiqued the alternatives analysis in the Dynamic Risk Report, which analyzed certain alternatives to Line 5 crossing the Straits,[5] including: (1) the report's failure to consider the harm that the existing pipelines and the tunnel could cause to Tribal interests; (2) a flawed economic analysis that gave preference to Enbridge's interests over Michigan's and Tribal interests; and (3) an inadequate consideration of Tribal economic and other interests. Stricken Exhibit Testimony of Pres. Whitney Gravelle, pp 5-9 (Appendix Y at 907-11); see *id*. at 6 (noting the Draft Dynamic Risk report's acknowledgment that it "does not provide a separate valuation estimate for subsistence, commercial or cultural values associated with the use of resources by tribes."). The Commission largely adopted the reasoning and analysis in the Dynamic Risk report after excluding evidence critiquing that report. December 2023 Final Order, p 300 (Appendix B at 335); see MCL 24.272(3) and (4).

[5] Dynamic Risk Alternatives Systems, a contractor hired by several agencies of the State of Michigan (the Attorney General's office, Department of Environmental Quality, Department of Natural Resources, and Agency for Energy) prepared a report in 2017 to assist the State of Michigan to evaluate the risks associated with the existing Dual Pipelines and possible alternatives. The Dynamic Risk report, now over eight years old, examined six alternatives to the existing Dual Pipelines and compared the alternatives across safety, environmental, and economic considerations. The report included a closed annulus tunnel alternative, which would have been substantially smaller and cost substantially less than the Project. The Dynamic Risk report compared that closed annulus tunnel design to other alternatives such as different pipeline routes and other modes of transporting the oil. December 2023 Final Order, pp 292-293, 295, 334, 339-340 (Appendix B at 327-28, 330, 369, 374-75).

E. The Commission Approves Enbridge's Application.

On December 1, 2023, the Commission issued an order ("Final Order") approving Enbridge's application. (Appendix B at 382-83). The Commission's Final Order again acknowledged its obligation to review the Project under MEPA. *Id.* at 37 (Appendix B at 72). The Commission adopted the same interpretation and narrow application of MEPA from its April 2021 Order on the motion in limine, which precluded evidence about pollution, impairment, and destruction of natural resources from increased risk of oil spills. *Id*. at 40 (Appendix B at 75). The Commission also rejected the Tribal Nations' Joint Petition for Rehearing on the decision to exclude evidence regarding oil spill risks. *Id.* at 43-52 (Appendix B at 78-87).

Even with its self-imposed, limited scope of analysis, the Commission concluded that the Project would likely "pollute, impair and destroy natural resources." It nonetheless determined that "there are no feasible and prudent alternatives to the Replacement Project pursuant to MEPA." *Id*. at 331, 347 (Appendix B at 366, 382). To reach this conclusion, the Commission assessed oil spill risk for the *full length* of various alternative transportation routes, including an alternative pipeline route and rail transportation, and assessed the natural resources such as rivers and wetlands that could be at risk from these alternatives. *Id.* at 338. The Commission then compared that risk to the oil spill risk for only the *short length* of Line 5 that would run through the tunnel. *Id*. The Commission did not address whether the Project was consistent with public health, safety and welfare. However, when considering the no-action alternative of keeping the Dual Pipelines in place, the Commission determined that no action was inconsistent with these requirements due to the potential for long-lasting health, environmental, and cultural damages from the possibility of an oil spill. MCL 324.1705(2); December 2023 Final Order, p 347 (Appendix B at 382).

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

Tribal Nations, ELPC, MiCAN, and other intervenors filed timely appeals of the Commission's Final Order. Appellants each argued that the Commission erred by failing to satisfy its MEPA responsibilities when it granted Enbridge's motion to exclude evidence about risks of, and likely pollution from, oil spills along the length of Line 5, and then conducting an alternatives analysis that considered the impairments from the entire lengths of the alternative routes but not those associated with Line 5. They also argued that while the Commission correctly determined that GHG pollution should be considered in the MEPA analysis, it then violated MEPA by assuming away any such pollution, based on Staff testimony adopting the baseline assumption that the Project would have no effect on this pollution despite evidence that the Project would increase GHG emissions, and by not considering evidence concerning other likely effects of the Project.

The Court of Appeals consolidated the appeals and held oral argument on January 14, 2025. On February 19, 2025, in a published opinion, the Court of Appeals affirmed the Commission's Final Order approving Enbridge's application. COA Opinion, p 31 (Appendix A at 34).

Although both Appellants and Enbridge agreed in their respective appellate briefs that MEPA claims must be reviewed de novo by a reviewing court, COA Brief of Appellee Enbridge, p 27 (Appendix Z at 921), the Court of Appeals instead applied a deferential standard of review. Despite this Court's decision in *WMEAC*, which recognized a de novo standard is appropriate, *WMEAC*, 405 Mich 741, the Court of Appeals distinguished *WMEAC* by characterizing it as having been made "in the context of 'an environmental protection act case . . . filed in a circuit court.'" COA Opinion, p 23 (Appendix A at 26); see also *WMEAC*, 405 Mich at 749, 754. The Court of Appeals reasoned that it "serves a different role from that of a circuit court and is not a

finder of fact." COA Opinion, p 23 (Appendix A at 26). The Court of Appeals then determined that it should review the Commission's MEPA analysis under the deferential standard set by MCL 462.25 and MCL 462.26, rather than make de novo determinations under *WMEAC*, because, according to the Court's reasoning, "[i]n this case, there was no 'suit' under MEPA." *Id*.

Applying that deferential standard of review, the Court of Appeals affirmed the Commission's decision and adopted its interpretation of the scope of effects that must be considered under MEPA. *Id*. Regarding the Commission's finding that Line 5's oil spill risks and the resulting pollution were outside the scope of its inquiry under MCL 324.1705(2), the Court of Appeals did not address Appellants' arguments about the meaning and import of the phrase "has or is likely to have such an effect," and what that requires of the Commission's MEPA determinations. It held that the Commission correctly looked only to the "desired 'conduct'" proposed by Enbridge. *Id*. at 24 (Appendix A at 27).

The Court of Appeals then rejected the argument that the Commission's failure to consider oil spills from Line 5's continued operation led to a flawed alternatives analysis. It stated, "[w]e acknowledge that it is concerning that the [Commission], when discussing rail transport, looked to the effect of rail being used for the entire transport system," observing that "the Commission mentioned, for example, how many rivers and wetlands a rail system would cross but then did not mention the same statistics for Line 5 as a whole." *Id*.; see, e.g., December 2023 Final Order, pp 339, 341 (Appendix B at 374, 376). However, despite recognizing the inconsistency at the core of the Commission's alternatives analysis, the Court of Appeals affirmed the Commission's analysis.

The Court of Appeals also rejected the arguments regarding GHG pollution. The Court once again deferred to the Commission: (1) stating that the Commission performed "what it was tasked with doing" because it cited certain testimony to support its conclusion; and (2) acknowledging the Commission's failure to explain why it referred only to short-term effects of GHG pollution and not long-term effects, but nonetheless acquiescing in the Commission's conclusion. COA Opinion, pp 28-29 (Appendix A at 31-32).

ARGUMENT

I. THE COURT OF APPEALS ERRED BY APPLYING A DEFERENTIAL STANDARD OF REVIEW RATHER THAN MAKING DE NOVO DETERMINATIONS UNDER MEPA.

The Court of Appeals applied an incorrect standard of review to the Commission's decision addressing Appellants' MEPA claims. The Court of Appeals reasoned that it must "give[] due deference to the [Commission's] administrative expertise and is not to substitute its judgment for that of the PSC." COA Opinion, pp 18, 23, 27 (Appendix A at 21, 26, 30) (quoting *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999)). But this Court in *WMEAC* held that "such deference constituted error." *WMEAC*, 405 Mich at 752. The Court of Appeals' deferential standard of review contravenes the plain text of MCL 324.1705, this Court's precedent, the Legislature's intent behind MEPA, and established legal principles for standards of review. As a result of this legal error, the Court of Appeals did not independently determine environmental effects or alternatives in accordance with MEPA. This Court should reverse and remand.

A. This Court's Standard of Review

"As a general proposition, this Court reviews de novo questions of law." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 97; 754 NW2d 259 (2008). The appropriate standard of judicial review of an agency action is a question of law, which is reviewed de novo on appeal.

See *Palo Grp Foster Care, Inc v Mich Dep't of Social Servs*, 228 Mich App 140, 145; 577 NW2d 200 (1998).

B. Section 1705's Plain Text Requires De Novo Determinations.

The Court of Appeals applied a deferential standard of review even though the plain text of Section 1705 requires independent, de novo determinations in any judicial review. "The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most reliable evidence of that intent is the plain language of the statute." *South Dearborn Environmental Improvement Ass'n v Dep't of Environmental Quality*, 502 Mich 349, 360-61; 917 NW2d 603 (2018). The Court "must give effect to every word, phrase, and clause," construing nontechnical words and phrases "according to their plain meaning, taking into account the context in which the words are used," and consulting dictionary definitions "[w]hen a word or phrase is not defined by the statute in question." *Id.* at 361 (quotation marks and citation omitted).

MEPA authorizes actions in circuit courts under MCL 324.1701-1704, and intervention in administrative proceedings under MCL 324.1705, to protect the air, water, or other natural resources, or the public trust in these resources, from pollution, impairment, or destruction. In this case, Appellants intervened at the Commission, asserting that the proceeding involved conduct that was likely to have the effect of polluting, impairing, or destroying the air, water, or other natural resources. Section 1705(2) states:

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

Critically, Section 1705(2) applies "in *any* judicial review" of administrative proceedings in which parties have intervened. MCL 324.1705(2) (emphasis added). This Court has recognized that "any" means "every; all." *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010) (citing *Random House Webster's College Dictionary* (1997)); see also *In re Forfeiture of $5,264*, 432 Mich 242, 249-50; 439 NW2d 246 (1989) (declining to define "any" as being less than "every"). Thus, Section 1705(2) applies to *all* judicial review of such proceedings and makes no distinction between review in a circuit court or the Court of Appeals.[6] Further, the language is mandatory, not discretionary, using "shall" and "shall not." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002).

Thus, Section 1705(2) requires reviewing courts to "determine" the alleged pollution, impairment, or destruction on the air, water, or natural resources, or the public trust in these resources, and prohibits reviewing courts from authorizing conduct that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of public health, safety, and welfare. "Determine" means "fix conclusively or authoritatively" or "find out or come to a decision about by investigation, reasoning, or calculation." See Merriam-Webster, *Determine* <http://www.merriam-webster.com/dictionary/determine> (accessed November 13, 2025). This Court has interpreted the word "determine" similarly in other contexts. In a statute requiring a magistrate to "determine" whether there was probable cause that a defendant committed a crime, this Court concluded that "[t]he relevant definitions of 'determine' are 'to settle or decide by choice of alternatives or possibilities' and 'to find out or come to a decision about by investigation, reasoning, or calculation.'" *People v*

[6] The Court of Appeals implied that circuit courts must review Section 1705 determinations de novo while appellate courts must apply a deferential standard of review. See COA Opinion, p 23 (Appendix A at 26). There is no textual basis for this distinction.

Anderson, 501 Mich 175, 183-84; 912 NW2d 503 (2018) (quoting *Merriam-Webster's Collegiate Dictionary* (11th ed)).

Section 1705(2) does *not* say that the reviewing court shall apply a substantial evidence standard of review or otherwise defer to the agency's findings. Rather, the statute says that reviewing courts themselves shall "*determine[]*" the alleged pollution or destruction and whether feasible and prudent alternatives exist. This plain text—which imposes the same obligation on agencies and "any" judicial review to make the specified determinations—leaves no room for an implication that reviewing courts should defer to agency decisions on alleged environmental effects and alternatives. The Legislature knows how to provide for deferential judicial review in a statutory scheme (see later discussion in Part I.E.1), but it chose not to do so in Section 1705(2). This Court "do[es] not read requirements into a statute where none appear in the plain language and the statute is unambiguous." *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125; 894 NW2d 552 (2017) (quoting *People v Feeley*, 499 Mich 429, 439, 885 NW2d 223 (2016)).

In sum, the plain text of Section 1705(2) requires courts to determine likely environmental effects and alternatives in any judicial review of agency proceedings in which parties have intervened under 1705(1). Reviewing courts must conclusively decide based on their own evaluation, reasoning, and calculation the pollution, impairment, or destruction of the air, water, or other natural resources. Determine means decide independently—not defer to the agency's decision. The Court of Appeals therefore erred when it applied a deferential standard of review constitutes reversible error.

C. This Court Held in *WMEAC* that MEPA Requires De Novo Determinations by Courts and Prohibits Deference to Agencies.

This Court, in its seminal *WMEAC* decision, held that a lower court "erred in deferring to [a state agency's] conclusions as to the likelihood of impairment of natural resources rather than

exercising [its] own totally independent judgment" under MEPA. 405 Mich at 747-48. *WMEAC* involved environmental groups' efforts under MEPA to stop the issuance of permits for ten exploratory oil and gas wells in a state forest. The groups first sought to intervene in an administrative proceeding before the Michigan Department of Natural Resources and subsequently filed an action in circuit court. After both the circuit court and the Court of Appeals denied injunctive relief, this Court granted an injunction and leave to appeal. *Id.* at 747-50. The environmental groups argued that the circuit court erred by deferring to the Department's conclusion that no environmental harm would result from the contemplated drilling, rather than independently determining whether such harm would occur.

This Court agreed. *Id.* at 752. It held that, "the Legislature specifically addressed the relationship between suits brought under the environmental protection act and administrative proceedings" in the sections of the statute that now appear at MCL 324.1704(2)-(4) and MCL 324.1705(2). *Id.* at 752-53 (citing those sections' previous location in the code, MCL 691.1204(2)-(4) and MCL 691.1205(2)). Interpreting those sections of MEPA, including the language of Section 1705(2) at issue in this appeal, this Court concluded that MEPA assigns to courts that review agency decisions the responsibility to make determinations regarding environmental impairment and adequate protection. *Id.* at 753. This Court held that "[c]ourts can discharge their responsibility to make such determinations only if they make independent, de novo judgments." *Id.*; see also *id.* at 763 (FITZGERALD, RYAN & WILLIAMS, JJ., concurring) (MEPA "provides for a separate, independent determination by a court" under which "[a] judge has a responsibility to determine independently whether pollution, impairment or destruction is likely to occur.").

In this case, the Court of Appeals sought to distinguish *WMEAC* as being confined to circumstances involving "a circuit court using an administrative tribunal to conduct certain proceedings" under MCL 324.1704. See COA Opinion, p 23 (Appendix A at 26). But the word "determine" was a linchpin of the *WMEAC* Court's holding that de novo review applies, and both Sections 1704(2) and 1705(2) use that word to prescribe the reviewing court's obligation. Section 1704(2) says that on completion of the administrative proceeding to which a MEPA case has been directed, "the court retains jurisdiction of the action pending completion of the action to determine whether adequate protection from pollution, impairment, or destruction is afforded." MCL 324.1704(2). Similarly, Section 1705(2) requires that in any judicial review of an administrative proceeding in which parties have intervened under Section 1705(1), "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare." MCL 324.1705(2).

There is no principled reason to interpret the word "determine" differently in Sections 1704(2) and 1705(2). "[U]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute." *Robinson v City of Lansing*, 486 Mich 1, 17; 782 NW2d (2010). In holding that MEPA requires de novo review of agency determinations, the *WMEAC* Court quoted the predecessor versions of both Sections 1704(2) and 1705(2). 405 Mich at 752-754.

Subsequent decisions have recognized the primacy of de novo review of agency decisions under MEPA. In *Nemeth v Abonmarche Development, Inc*, this Court reaffirmed that MEPA "provides for de novo review in Michigan courts, allowing those courts to determine any adverse

environmental effect and to take appropriate measures." 457 Mich 16, 30; 576 NW2d 641 (1998). Citing *WMEAC*, this Court reasserted Michigan courts' "responsibility to independently determine the existence of actual or likely pollution, impairment, or destruction." *Id.* at 32-34. Moreover, "'Michigan courts are not bound by any state administrative finding.'" *Id.* at 31 (quoting *Her Majesty the Queen v Detroit*, 874 F2d 332, 341 (CA 6, 1989)).

This Court's holding in *WMEAC*—that MEPA requires courts reviewing agency decisions to make independent, de novo determinations of environmental effects and prohibits deference—applies to judicial review of administrative proceedings under Section 1705(2). This Court in *WMEAC* interpreted and applied MEPA's sections "as a whole," including the language of Section 1705(2) to reach its holding. *WMEAC*, 405 Mich at 752-53; see also *Jostock v Mayfield Twp*, 513 Mich 360, 372; 15 NW3d 552 (2024) (quotation marks and citation omitted). As a result, courts have recognized that *WMEAC* requires de novo judicial review of agencies' MEPA decisions under Section 1705(2). See, e.g., *Thomas Twp v John Sexton Corp*, 173 Mich App 507, 511; 434 NW2d 644 (1988) (citing *WMEAC* for the proposition that appellate courts review de novo MEPA determinations made under Section 1705(2)).[7] Prior to the Court of Appeals' decision in this case, this issue was considered so settled that even Enbridge agreed below that *WMEAC* held that the Court of Appeals under Section 1705 here "reviews de novo [agency] determinations under MEPA." COA Brief on Appellee Enbridge, p 27 (Appendix Z at 921).

[7] This proposition has been recognized by practitioners, including the State Bar of Michigan Environmental Law Section. See Haynes, ed., State Bar of Michigan, *Michigan Environmental Law Deskbook*, Michigan Environmental Protection Act, § 14.38 (2018), available at <https://connect.michbar.org/envlaw/reports/deskbook> (hereinafter "MEPA Deskbook") ("If MEPA is raised in the administrative process, subsequent review under RJA § 631 should be de novo rather than the narrow standard ordinarily used under RJA § 631, based on agencies' duties to consider MEPA pursuant to MCL 324.1705(2) . . . .").

D. Interpreting Section 1705 to Require De Novo Determinations by Courts Fulfills the Legislative Intent of MEPA.

Interpreting Section 1705 to require de novo determinations by courts in any judicial review of agency decisions concerning MEPA fulfills the Legislature's intent. See *South Dearborn*, 502 Mich at 360-61 ("The principal goal of statutory interpretation is to give effect to the Legislature's intent."). This Court has recognized that MEPA enacted "a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies." *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 305; 224 NW2d 883 (1975). The Legislature "set the parameters for the standard of environmental quality . . . and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality." *Id.* at 306.

Indeed, in *WMEAC*, this Court emphasized the chief legislative sponsor's statement that under MEPA, "'courts may inquire directly into the merits of environmental controversies, rather than concern themselves merely with reforming procedures or with invalidating arbitrary or capricious conduct.'" 405 Mich at 754 & n 2 (quoting July 2, 1970 press release of State Representative Thomas Anderson); see also *Ray*, 393 Mich at 306 n 10 (quoting Representative Anderson). Professor Joseph Sax, "author of the document that became MEPA," *Lakeshore Group v State*, 510 Mich 853, 857; 977 NW2d 789 (2022) (WELCH, J. dissenting), explained MEPA's "significant departure" from an agency-driven approach to environmental protection by "enlarg[ing] the role of courts":

> In taking this step, the legislature reduced the broad discretion that regulatory agencies formerly had. Previously these agencies had been given a sweeping mandate to enforce environmental standards as they thought best, and their decisions were subject to judicial review only for arbitrary and abusive use of their authority or for violation of explicit statutory language. Now these agencies must be prepared to defend themselves against charges that their decisions fail to protect natural resources from pollution, impairment, or destruction. [Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L

Rev 1003, 1005 (1972), <https://repository.law.umich.edu/mlr/vol70/iss6/2/> (partially quoted in *Nemeth*, 457 Mich at 47 n 7 (CAVANAGH, J., concurring in part and dissenting in part)).]

Like Professor Sax, this Court observed that, prior to MEPA's enactment, "[n]ot every public agency proved to be diligent and dedicated defenders of the environment." *Ray*, 393 Mich at 305. MEPA solved this problem by requiring independent de novo determinations by reviewing courts, as *WMEAC* held. See earlier Part I.C. Professor Sax explained that "section [170]5 of the EPA is designed to give the [reviewing] court ample authority to see that *somewhere* the requirements of the EPA are considered—in an administrative proceeding if one be available—with *ultimate determination* left to the [reviewing] court." Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 Ecology L Q 1, 20 (1974), available at <https://lawcat.berkeley.edu/record/1110762> (second emphasis added).

Deferential judicial review of agency MEPA determinations under Section 1705 would undermine MEPA's legislative scheme. See *Jostock*, 513 Mich at 372 (noting that statutes must be interpreted "in the context of the entire legislative scheme" (quotation marks and citation omitted)). Under MEPA, litigants challenging conduct that otherwise requires administrative evaluation may sue the actor directly (Sections 1701 to 1704) or intervene and raise MEPA claims in the administrative proceeding (Section 1705). As Professor Sax explained, "[t]he purpose of [Section 1705] was to 'equalize' the law by permitting anyone who could have filed an original suit under the EPA to intervene in a proceeding in which the same type of issues might arise—that is, in an administrative proceeding or in a court case brought to review an administrative decision." Sax & Conner, 70 Mich L Rev at 1070. Submitting MEPA determinations under Section 1705 to deferential judicial review would frustrate this equalizing purpose. It would also disincentivize intervention in administrative proceedings and instead

compel plaintiffs to file parallel circuit court suits and seek to have them transferred to agency proceedings to obtain de novo review when they returned to court.

This Court recognized in *WMEAC* that MEPA "would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands." 405 Mich at 754. Applying a deferential standard of review to agency decisions concerning MEPA, as the Court of Appeals did here, contravenes the legislative design. Indeed, such deference reverts back to the pre-MEPA paradigm that the Legislature overturned when it enacted MEPA. Only independent de novo determinations by courts can fulfill MEPA's legislative intent.

E. Requiring De Novo Review Under MEPA Comports with Other Statutes and Established Standard of Review Principles.

Section 1705's plain text, this Court's decision in *WMEAC*, and the Legislature's intent all support requiring de novo review by courts of agency decisions concerning MEPA. This conclusion further comports with other statutes and established standard of review principles.

1. *De Novo Review Under MEPA Comports with Other Statutes Governing Review of Commission Proceedings.*

De novo review under MEPA comports with the Commission's enabling statutes. The Commission's approval of the proposed tunnel is required because it regulates oil pipelines under Act 16, MCL 483.1 *et seq*., and the rules governing construction of pipeline facilities, Mich Admin Code, R 792.10447(1)(c). COA Opinion, p 6 (Appendix A at 9). But neither Act 16 nor the Commission's rules address environmental protection.

In *State Highway Commission v Vanderkloot*, this Court held that, while Michigan's Constitution makes conservation of natural resources a "paramount public concern," "the Legislature need not specifically incorporate environment provisions in each and every pertinent act but may properly respond to the Constitution with general legislation, and has done so in"

MEPA. 392 Mich 159, 166; 220 NW2d 416 (1974). The appellants in that case had argued that a statute governing the Highway Commission violated Michigan's Constitution by not addressing environmental protection, but this Court upheld the statute's constitutionality *because* the Highway Commission was required to comply with MEPA. This Court did so based on the fundamental premise that MEPA is "generally applicable legislation," which "must be read in concert with" other state statutes. *Id.* at 182-83. Thus, the statutes governing the Commission here must be read in concert with MEPA. The Commission itself recognized in this case that it "must perform a MEPA review in pipeline siting cases" and that "courts have repeatedly found that these MEPA obligations are supplementary to other statutes and regulations and should be read *in pari materia* with other laws." December 2023 Final Order, p 37 (Appendix B at 72) (citing *Vanderkloot*, 392 Mich at 189-90, and *Mich Oil Co v Natural Resources Comm*, 406 Mich 1, 32-33; 276 NW2d 411 (1979)).

The Court of Appeals did not read Act 16 and other enabling statutes in concert with MEPA. In declining to review the Commission's MEPA determinations under a de novo standard, the Court of Appeals mistakenly assumed that in all instances, "judicial review of [Commission] decisions is set forth by way of" MCL 462.25 and MCL 462.26, which provide a "deferential standard of review" for certain types of Commission decisions. COA Opinion, pp 18-19, 22-23 (Appendix A at 21-22, 25-26). By their own terms, however, MCL 462.25 and MCL 462.26 apply to a specific list of Commission decisions: the fixing of "rates, fares, charges, classification and joint rates," and the prescription of "regulations, practices and services." This does *not* extend to environmental determinations made under MEPA. Accordingly, because MCL 462.25 and MCL 462.26 do not conflict with MCL 324.1705, these statutes must be read in

concert. Whereas the former provide for deferential judicial review of certain enumerated Commission decisions, the latter requires de novo review of MEPA determinations.

De novo review under MEPA is also consistent with the Michigan Constitution, Article 6, Section 28, and the Michigan Administrative Procedures Act, MCL 24.201 *et seq*. ("APA"). "[N]othing in the APA or the Michigan Constitution precludes the Legislature from providing for review de novo" because "the constitution merely establishes the *minimum* review to be applied, without forbidding more stringent review, and the standard of review set forth at § 106 of the APA, expressly does not apply 'when a statute . . . provides for a different scope of review.'" *Palo Grp Foster Care*, 228 Mich App at 145 (quoting MCL 24.306); see also *WMEAC*, 405 Mich at 754 ("[T]he usual standards for review of administrative actions under the [APA] are inapplicable" to MEPA claims because MEPA would not accomplish its purpose if courts did not apply "strict scrutiny" to agency decisions concerning environmental protection.); *Thomas Twp*, 173 Mich App at 511 (applying de novo review to MEPA issues in Section 1705 case); MEPA Deskbook, § 14.37 ("Review for a MEPA claim is de novo even if the action is originally brought to review an administrative action under [the APA].").

2. *De Novo Review Under MEPA Comports with Established Standard of Review Principles.*

The Court of Appeals also based its decision not to review the Commission's MEPA determinations de novo on the ground that the Court "serves a different role from that of a circuit court and is not a finder of fact." COA Opinion, p 23 (Appendix A at 26). The Court of Appeals' reasoning on this point is also flawed. De novo review by the Court of Appeals here is consistent with the "well-established" rule of Michigan law that, when reviewing a "mixed question of law and fact," factual findings of a trial court are reviewed by an appellate court for clear error, while the application of law to facts is reviewed de novo. See *People v Knight*, 473 Mich 324, 342; 701

NW2d 715 (2005). "Whether the facts, as found, are adequate to satisfy [a statutory standard], i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). The determinations required by MEPA Section 1705—the environmental effects of proposed conduct and the existence of a feasible and prudent alternative—are not determinations of simple historical fact, but rather ultimate legal determinations arrived at by applying law to fact. See *WMEAC*, 405 Mich at 760 (explaining that the "real question" under MEPA is whether environmental impacts "rise to the level of impairment or destruction"). Applying de novo review of the two-part test under Section 1705 would not require a new trial or appellate fact-finding, but rather an independent weighing of the facts on the record and an independent application of the "common law of environmental quality." *Ray*, 393 Mich at 306.

De novo review is particularly appropriate here because the MEPA determinations under Section 1705 implicate legal standards that will be clarified on a case-by-case application of the law to the facts. See, e.g., *Ornelas v United States*, 517 US 690, 697-98; 116 S Ct. 1657; 134 L Ed 2d 911 (1996) (explaining that "*de novo* review tends to unify precedent" and is useful to prevent "varied results" on the application of legal standards). As this Court has explained, MEPA "allows the courts to fashion standards in the context of actual problems as they arise in individual cases." *Ray*, 393 Mich at 306-07.

Importantly, this Court's analysis in *WMEAC* demonstrates that appellate courts can and should review Section 1705 determinations de novo. After concluding "that the trial judge erred in failing to exercise his own totally independent judgment," 405 Mich at 754, the Court did not simply remand the case for further proceedings. Instead, the Court itself conducted a de novo review of the record, ultimately concluding that the environmental organizations demonstrated a

likelihood of impairment or destruction of natural resources as a result of the proposed drilling. *Id.* at 754-60. The Court therefore "conclude[d] that a judgment in favor of [the environmental organizations] is required on the record presented." *Id.* at 754.

F. Applying a Deferential Standard of Review Prevented the Court of Appeals from Independently Determining Likely Environmental Effects and Alternatives.

The Court of Appeals' error, applying a deferential standard of review, prevented it from determining de novo whether Enbridge's project would likely pollute, impair, or destroy the air, water, or other natural resources, and whether there is a prudent and feasible alternative to the proposed conduct. As one consequence of the deferential standard, the Court of Appeals failed to independently determine the proper scope of the likely environmental effects that must be determined in this case and instead deferred to the Commission's decision to exclude broad categories of likely effects from the proceeding. This constitutes an independent legal error, requiring reversal and remand to the Commission. See Part II of the Argument section, below. Another consequence is that the Court of Appeals failed to independently determine the limited set of environmental effects and alternatives that the Commission did not exclude. For example, the Court of Appeals did not independently review and determine the effects of GHG pollution.

The Commission concluded that "allegations of GHG pollution" made by several intervenors "fit within the statutory language of Section 5 of MEPA, and therefore must be reviewed in this case." April 2021 Order, pp 66 (Appendix C at 454). Appellants presented four experts' testimony and analysis quantifying the GHG pollution and associated social costs that would result from Enbridge's proposed Project. See December 2023 Final Order, pp 114-26, 140-43, 188-92, 202-07 (Appendix B at 149-61, 175-78, 223-27, 237-42). These experts concluded that constructing the tunnel would lead to net incremental increases of 87 million metric tons of GHG pollution each year, *id.* at 114-18 (Appendix B at 149-53); the social cost of

this pollution would total at least $41 billion, *id.* at 118-22 (Appendix B at 153-57); this pollution would exacerbate climate change's impacts on Michigan, the Great Lakes, and human health, *id.* at 122-23 (Appendix B at 157-58); and this pollution could be avoided through alternatives, *id.* at 124-26 (Appendix B at 159-61). Enbridge neglected to rebut this evidence. See *id.* at 61-67, 126-35 (Appendix B at 96-102, 161-70). The Commission's staff simply adopted a circular "baseline assumption" that, with or without the tunnel, there would be no change in the demand for oil, no change in the volume of oil transported, and therefore no change in GHG pollution. See *id.* at 76-84 (Appendix B at 111-19); Testimony of Alex Morese, pp 8-13 (Appendix AA at 931-36) ("Staff provided [outside consultants] with baseline assumptions for their evaluation of GHG emissions," including assumptions that a "Line 5 shutdown would not alter the demand at market end points for the product transported on Line 5," and "[v]olumes shipped would remain consistent with historical averages," and "[t]herefore, emissions . . . are assumed to remain relatively unchanged for this analysis.").

In short, all of the GHG pollution that Appellants' experts showed through analysis and calculation, Enbridge chose to ignore entirely, and the Commission's staff just assumed away. See Morese Testimony (Appendix AA at 932-33) (explaining the baseline assumption that market demand for product and volumes shipped would remain unchanged in alternative scenarios). The Commission relied on its staff's testimony. See December 2023 Final Order, pp 345-46 (Appendix B at 380-81). Because it deferred to the Commission's MEPA analysis, the Court of Appeals concluded that it needed only to ensure the Commission "cited to transcript pages" that "supported its conclusions." COA Opinion, p 28 (Appendix A at 31). The Court of Appeals stated that "[t]he bottom line is that the Commission considered the evidence . . . which is what it was tasked with doing." *Id.* at 29 (Appendix A at 32).

Merely stating that the Commission "considered" certain evidence supporting its conclusion, however, does not independently determine the effects and alternatives, particularly where that evidence is a circular assumption from agency staff. See *Nemeth*, 457 Mich at 34 ("[S]imply because [an agency] witness testified that issuance of the permit did not have any MEPA implications does not make it so," and "it [is] error . . . to defer to the [agency's] conclusion that no pollution . . . was likely to result."); *Ray*, 393 Mich at 311-12 & n 12 (noting that "field studies, actual tests, and analyses" showing that the environment will not be polluted "become necessary when the impact . . . cannot be ascertained . . . absent empirical studies or tests"). Applying a deferential standard of review prevented the Court of Appeals from fulfilling its responsibility to independently determine environmental effects and alternatives under MEPA.

II. THE COURT OF APPEALS ERRED BY AFFIRMING THE COMMISSION'S NARROW INTERPRETATION OF MEPA.

As discussed above, Section 1705(2) of MEPA requires agencies and reviewing courts to evaluate alleged pollution, impairment, or destruction of natural resources, or the public trust in those resources, and prohibits approval of conduct that is likely to have such effects if there is a feasible and prudent alternative. MCL 324.1705(2). The Court of Appeals and the Commission failed to follow MCL 324.1705(2) in at least two ways.

First, in a legal ruling at the outset of the proceeding, the Commission incorrectly held that only a *subset* of the Project's likely effects would be determined, and that certain categories of effects would be excluded from consideration entirely. The statute, however, requires that the alleged pollution, impairment, or destruction of natural resources "shall be determined," which requires agencies to fully evaluate and determine whether those effects are likely. MCL 324.1705(2). The only limit that the statute places on the scope of this inquiry is that it must

focus on the "likely" effects of the conduct under review, as determined by the agency. The Commission's interpretation of MEPA failed to give force to this "likely effects" test and instead focused only on a subset of the effects in a single location: the Straits. Based on that flawed interpretation, the Commission prevented the intervenors from taking discovery, developing and introducing evidence, and presenting arguments regarding likely effects of the conduct under review—including the risk of oil spills along Line 5 in Michigan if its operation is prolonged for up to 99 years as a result of the tunnel project. April 2021 Order, pp 63-64 (Appendix C at 451-52). Both the Commission's ruling, and the Court of Appeals' decision deferring to and affirming it, interpreted Section 1705 too narrowly and improperly limited the scope of likely effects to be determined under MEPA.

Second, the Commission's interpretation underpinned an inconsistency in its analysis of alternatives. The Commission refused to consider information about the oil spill risks from the Project, while at the same time giving great weight to the oil spill risks from the alternatives. The Court of Appeals then upheld that error under the wrong standard of review. These decisions threaten the Great Lakes and Tribal interests, and they erode Michigan's bedrock environmental protection statute. This Court should overturn them and remand this case to the Commission to correct these deficiencies.

A. This Court's Standard of Review

The Commission's In Limine decision interpreting Section 1705(2) of MEPA was a threshold legal ruling "involv[ing] a preliminary question of law," and its exclusion of evidence based on that interpretation is subject to de novo review. *Barnett v Hidalgo*, 478 Mich 151, 159, 732 NW2d 472 (2007). Like all questions of statutory interpretation, the Commission's interpretation of MEPA and the Court of Appeals' affirmance of that interpretation are reviewed de novo. *Midland Cogeneration Venture LP v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011).

The primary goal of statutory interpretation is to effectuate the Legislature's intent. *South Dearborn*, 502 Mich at 360-61.

B. MEPA Requires an Agency to Fully Evaluate and Determine the Alleged Pollution and Environmental Impairments of the Conduct at Issue in an Administrative Proceeding.

MEPA requires a broad assessment of a project's alleged polluting effects to determine whether and to what extent those effects are likely. Section 1705(2) of MEPA provides:

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

MEPA therefore prohibits approval of conduct "that has or is likely to have" the "effect" of "pollution, impairment, or destruction of the air, water, or other natural resources" "if there is a feasible and prudent alternative." *Id*. These determinations must be "consistent with the reasonable requirements of the public health, safety, and welfare." *Id.*; see also April 2021 Order, p 68 (Appendix C at 456).

Administrative agencies must "determine" the "alleged" likely environmental effects of the proposed conduct and alternatives. *Id*. As the word "alleged" is not defined in the statute, it must be given its plain meaning, "taking into account the context" in which it is used. *South Dearborn*, 502 Mich at 360-61. Alleged means "asserted to be true as described." *Black's Law Dictionary* (12th ed). As discussed earlier in Part I.B., "determine" means "fix conclusively or authoritatively" or "find out or come to a decision about by investigation, reasoning, or calculation."

The statutory language "likely to have such an effect" requires an agency to undertake a comprehensive consideration of the alleged potential effects of the conduct under review. MCL

324.1705(2). As the words "effect" and "likely" are not defined in the statute, they too must be given their plain meaning. "Effect" means "something produced by an agent or cause; a result, outcome, or consequence." *Black's Law Dictionary* (12th ed). The plain meaning of the term "effect" in Section 1705(2) thus includes the results or consequences of the Project on natural resources. "Likely" means "reasonably expected" or "probable." *Black's Law Dictionary* (12th ed). Although the directive to determine alleged effects is broad, MEPA provides a limiting principle in the phrase "has or is likely to have," which modifies the term "effect." MCL 324.1705(2). The statute thus prescribes that the agency must consider alleged effects and determine whether they are reasonably expected.[8]

Nothing in Section 1705(2) authorizes an agency to remove categories of alleged effects from a proceeding without ever determining whether they are likely. This Court has found that the scope of likely effects to be determined under MEPA is "not restricted to actual environmental degradation but also encompasses probable damage to the environment as well." See *Nemeth*, 457 Mich at 25 (quoting *Ray*, 393 Mich at 309). Consistent with MEPA's directive that courts "develop[] a common law of environmental quality," *Ray*, 393 Mich at 306, factfinders are required to determine the alleged impairments of the conduct under review and their likely effects based on the facts of specific cases, *Nemeth*, 457 Mich at 25. Under Section 1703, it is circuit courts that must make these "likely effects" determinations in the first instance; Section 1705(2) requires agencies to undertake this task.

[8] This plain-language reading of the statute is reinforced by MEPA's purpose and its constitutional roots—which support interpreting broadly the effects that agencies must consider in evaluating a project's alleged pollution, impairment, or destruction. *Vanderkloot*, 392 Mich at 184.

Case law further supports the conclusion that an agency must review alleged effects and not remove categories of them from consideration based on their location or what an applicant has listed in a permit application. For example, in *WMEAC*, this Court's MEPA determinations extended beyond the physical boundaries of the conduct specifically outlined in the permit application—the ten exploratory oil wells. This Court also considered the impact on wildlife populations in the state forest from new road construction, because without the permit the roads would not be built. *WMEAC*, 405 Mich at 756-57.

When an agency determines that a project will or is likely to pollute, impair, or destroy natural resources or the public trust in those resources, it must then evaluate and determine the existence of feasible and prudent alternatives. MCL 324.1705(2); see also *Vanderkloot*, 392 Mich at 183-85. A full evaluation and determination of the likely effects of the proposed conduct is integral to the alternatives analysis and MEPA's framework because it is critical to compare the likely effects of a project to the likely effects of the alternatives on the same footing. MEPA demands a fair comparison to "prevent or minimize degradation of the environment which is caused or is likely to be caused" by a project. *Ray*, 393 Mich at 306 (explaining the purpose and importance of MEPA).

C. MEPA's Broad Scope Requires Consideration of Oil Spills in the Commission's Determinations.

The Court of Appeals erred when it affirmed the Commission's interpretation of MEPA. The Commission's threshold In Limine ruling limited its scope of review of alleged polluting effects to be determined and excluded evidence of the risk of more oil spills from Line 5 if the tunnel was built. April 2021 Order, pp 63-64 (Appendix C at 451-52). Contrary to MEPA's directive to evaluate and determine the alleged likely environmental effects of proposed conduct, the Commission decided it would not even consider an entire category of effects. It focused only

on the effects *within the Straits* of building a tunnel and a new pipeline. This narrow focus ignored the fact that approving the construction of the tunnel and new pipeline segment within the tunnel would likely have the effect of extending the life of the pipeline for up to 99 years. Section 1705 allows the intervenors to put in evidence that securing operation of the pipeline in this way will likely have the effect of more oil spilling into Michigan waterbodies in the decades to come. Nothing in MEPA allows agencies to exclude certain categories of alleged pollution, impairment, or destruction from being determined at all.

The Commission's narrow interpretation conflicts with this Court's precedent and case law from a neighboring jurisdiction. This approach also conflicts with the way the Commission determined the likely effects of GHG emissions that result from the Project's transportation of the same oil which is likely to spill. The Commission's interpretation of the scope of its determinations was internally inconsistent and incorrect.

1. *The Commission Was Required to Determine the Alleged Likely Effects of Pollution, Impairment, and Destruction from Line 5 Oil Spills.*

The Project poses a grave threat to natural resources and the Tribal Nations that rely upon them. Line 5 has leaked and spilled oil numerous times.[9] As the intervenors below would have demonstrated if allowed to present such evidence, continued operation of the pipeline poses a grave threat to waterways along its route due to its "history of crack failures," the "condition of the pipeline[,] and its integrity and method of operation." Application of MEC, GTB, et al. for Leave to Appeal Ruling on Motion in Limine, p 9 (Appendix P at 827) (providing offer of proof); Application of Bay Mills for Leave to Appeal Ruling on Motion in Limine on Remand,

[9] National Wildlife Federation Petition to Intervene, Affidavit of Bruce Wallace, p 4 (Appendix M at 789); Ellison, *Enbridge Line 5 Has Spilled at Least 1.1M Gallons in Past 50 Years*, MLive (April 26, 2017) <https://www.mlive.com/news/2017/04/enbridge_line_5_spill_history.html> (accessed November 13, 2025).

pp 13-14 (Appendix BB at 952-53). As long as Line 5 continues to operate, future leaks and spills are likely and will pollute, impair, and destroy Michigan's air, water, and other natural resources.

This pollution is a likely effect of the conduct at issue for at least two reasons. First, the conduct is likely to prolong the operation of Line 5. According to Enbridge, the pipeline tunnel would have a service life of 99 years, enabling oil transport through Line 5 for another century. December 2023 Final Order pp 100, 307 (Appendix B at 135, 342). Second, in absence of the Commission's approval of the Project, it is unreasonable to conclude that Enbridge will be able or permitted to operate Line 5 indefinitely—and certainly not for 99 years. The Attorney General is currently in court seeking to shut down the Dual Pipelines,[10] and the Governor revoked and terminated the easement that authorized Enbridge to operate them. Notice of Revocation (Appendix H). As the Commission aptly recognized, the dubious future of the Dual Pipelines makes *this* Project "the lynchpin providing the company with the ability to ship product on this 4-mile stretch," which would enable Enbridge to continue operating Line 5. April 2021 Order, p 68 (Appendix C at 456). These circumstances demonstrate that the Commission's approval of the Project would extend or secure Line 5's operation, necessitating consideration of the serious effects of allowing the Project to proceed—including the likely effect of oil spills.

MEPA's "likely effects" test is not confined to the precise limits of a project's physical footprint. Indeed, the alleged likely effects of conduct under review can—and often do—go beyond the immediate footprint. Yet here, the Commission ignored the likely effect of oil spills and ruled that the application of MEPA does not extend to sections of the pipeline beyond the

[10] Attorney General Dana Nessel is seeking to have the Dual Pipelines shut down on public trust and MEPA grounds. See *Nessel v Enbridge Energy, Ltd*, No. 19-474-CE (Ingham Co Cir Ct, 2019).

Straits. April 2021 Order, pp 63-64 (Appendix C at 451-52). With this restriction, which is not grounded in the statutory text, the Commission only considered potential environmental impacts from the tunnel's construction and some categories of potential GHG emissions. See December 2023 Final Order, pp 328-29 (Appendix B at 363-64).[11]

2. *The Commission's Consideration of GHG Pollution from the Project Supports the Need for a Determination Regarding the Effects of Oil Spills.*

In setting the scope of its MEPA review, the Commission treated oil spills inconsistently with the way it treated GHG pollution. The Commission recognized that it is appropriate to evaluate and determine GHG pollution[12] from combusting Line 5 products long after they are shipped through the Straits and have exited the pipeline: "it defies both well accepted principles of statutory interpretation as well as common sense to apply MEPA to a pipeline but not to the products being transported through it." April 2021 Order, p 64 (Appendix C at 452). Yet the Commission reached opposite results with respect to one pollutant—oil flowing through the Project—in its decision. The Commission reasoned that oil spill risk can only "result[] from" the segment of pipeline where the spill physically occurs, and so the only oil spill risk causally connected to the proposed conduct here, based on the Commission's test, would be within the 4-

[11] The Commission acknowledged the following set of impairments described by a Staff witness: "increased noise, dust/particulates, and light from construction, and impacts to surface water, local residents, flora, fauna, air quality, groundwater, surface soils, and vegetation." *Id*. Importantly, the Commission excused itself from considering other environmental impacts on the grounds that other agencies would consider them in their permitting processes. *Id*. at 328 (Appendix B at 363). MEPA does not allow agencies to abdicate their obligations to consider environmental impacts. Indeed, the permit conditions upon which the Commission relied are now subject to change because Enbridge was required to reapply for its permits, and those applications remain pending before EGLE. Mich Dep't of Environment, Great Lakes, and Energy, *Line 5: Applicable Permits* <https://www.michigan.gov/egle/about/featured/line5/permits> (accessed November 13, 2025).

[12] Although the Commission correctly recognized the need to evaluate alleged GHG pollution from the Project, it did not make a proper determination of that pollution, see Part I.F. above.

mile pipeline segment crossing the Straits. *Id.* at 64 (Appendix C at 452). The Commission got this wrong.

MEPA contains no such "physical locus" test; instead, the statute applies a "likely effects" test. When it is alleged that conduct under review is likely to have the effect of pollution, impairment, or destruction of natural resources, this test demands that the Commission determine those effects. The Commission recognized that the Project's likely GHG pollution effects must be considered under MEPA, but it refused to even allow intervenors below to present evidence concerning the Project's likely effects of oil spill pollution. The statute does not allow the Commission to restrict the scope of a Section 1705 proceeding in this way.

3. *For the Same Reason that the Dual Pipelines Are Inconsistent with Public Health, the Project Is Also Inconsistent with Public Health.*

The Commission also failed to make the required MEPA determination under Section 1705(2) of whether the Project is consistent with public health, safety, and welfare—even though it did so for the no-action alternative. The Commission expressly acknowledged that it needed to determine whether the Project is consistent with the promotion of public health. April 2021 Order, p 68 (Appendix C at 456); see also *Ray*, 393 Mich at 306 (applying the same language in Section 1703); *Oscoda Chapter of PBB Action Comm v Dep't of Natural Resources*, 403 Mich 215, 252; 268 NW2d 240 (1978) (explaining that the Michigan legislature intended to require consideration of both whether conduct and its alternatives are feasible and prudent and if they are consistent with public health, safety, and welfare). Yet the Commission failed to do so. This is reason alone to overturn and remand its decision.

In contrast, the Commission assessed the no-action alternative's consistency with public health, safety and welfare. It reasoned that the potential rupture of the Dual Pipelines would be catastrophic, "resulting in long-lasting health, environmental, and cultural damages." December

2023 Final Order, p 347 (Appendix B at 382). It concluded that the no-action alternative was inconsistent with public health. The same logic—that an oil spill would be catastrophic to public health—applies equally to the Project itself. But the Project's consistency with public health was never considered under the limited scope of MEPA review that the Commission adopted.

The same catastrophic threat from an oil spill at the Straits is posed across the remainder of the Line 5 pipeline. As would have been clear from stricken NHBP testimony, as one example, the impacts to public health and safety of a massive oil spill near waterways would be devastating. The Project would enable this ongoing risk to public health. If the Commission had properly understood that "likely effects" extend beyond the immediate footprint of the proposed conduct, it would have had no choice but to determine that the Project is also inconsistent with public health, safety, and welfare.[13]

4. *The Court of Appeals' Adoption of the Commission's MEPA Interpretation Is Contrary to the Statute and this Court's Precedents.*

The Court of Appeals incorrectly adopted the Commission's MEPA interpretation, with little analysis and no interpretation of "likely effects," and affirmed the Commission's limitation of the scope of effects considered in its MEPA determinations. See COA Opinion, p 24 (Appendix A at 27). The Court of Appeals noted that "the 'conduct' sought to be 'authorized or approved' was the Replacement Project." *Id*. (quoting Section 1705(2)). Thus, the Court reasoned, "[t]he Commission, by looking to the desired 'conduct,' was following the plain language of [the statute]." *Id*. In support, the Court of Appeals cited *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007), for the

[13] Even considering the Project's impact on the Straits area alone, Appellants maintain that the Project is inconsistent with public health and welfare, not only due to the resulting GHG emissions, but also due to the threats to public health and cultural resources from with the untested tunnel construction plans.

proposition that courts cannot read something into a statute that does not appear in the text and can only go beyond the words of a statute to ascertain the Legislature's intent when the statute is ambiguous. *Id*. To the contrary, no appellants asked the Court of Appeals to go beyond the text of Section 1705(2). Instead, they asked the Court of Appeals to give force to the phrase "has or is likely to have such an effect," which appears in the plain text of the statute. Pursuant to the statutory text and *WMEAC*, "conduct" that is under review can have likely effects that extend beyond the immediate footprint of that conduct. Whether those alleged polluting, impairing, or destroying effects are "likely" is a fact-specific inquiry to be determined on case-by-case based on the evidence presented, not something to be excluded from consideration at the outset of a proceeding (see earlier discussion in Part II.B).

Not only does the Court of Appeals' affirmation and adoption of this narrow interpretation conflict with this Court's analysis in *WMEAC* and other MEPA precedent, it is also inconsistent with decisions regarding similar issues in a neighboring jurisdiction. The Minnesota Supreme Court has interpreted the phrase "likely to cause materially adverse environmental effects" broadly under the Minnesota Environmental Rights Act, which is similar to and based on Michigan's MEPA.[14] *See State by Smart Growth v City of Minneapolis*, 954 NW2d 584 (Minn, 2021). In *Smart Growth*, the defendant argued that alleged effects from a "full build-out" of what was allowed under a land use plan were too speculative and tenuous because future conduct would need to occur in order for that build-out to come to fruition. *Id*. at 595. The court rejected this notion, holding that the allegations based on the projected effects of a "full build-out" of everything allowed for under that plan were sufficient because that is what the plan

[14] *People for Environmental Enlightenment & Responsibility (PEER), Inc. v Minn Environmental Quality Council*, 266 NW2d 858, 866-67 n 7 (Minn, 1978) (recognizing that "Michigan was the first state to enact a statute like MERA, and Minnesota's statute is modeled after it.").

allowed for. *Id*. at 596. Here, the Commission's approval of the conduct under review allows Line 5 to operate for 99 years, and the pollution consequences of what is being allowed are environmental effects that must be considered and determined under MEPA.

In sum, the Court of Appeals erred in adopting the Commission's incorrect interpretation of MEPA that precluded proper analysis of the likely effects of the Project. MEPA's requirements must be given force here. Oil spills from the continued operation of Line 5 in Michigan should be deemed an alleged effect of the Project, and the Commission must determine whether that effect is likely and whether there are less risky alternatives under MCL 324.1705(2). If let stand, the Court of Appeals' decision would improperly limit the scope of MEPA. This interpretation is contrary to the statute's plain language, its constitutional underpinnings, and its stated goal of protecting the state's resources and the environment. Moreover, it enables Michigan agencies to artificially constrain the scope of their review under MEPA. The statute does not allow agencies to decide that entire categories of alleged pollution will be excluded from consideration and not determined.

D. The Commission's Narrowed MEPA Scope Prevented Consideration of Impacts to Resources that Hold Immense Cultural and Economic Importance to Tribal Nations.

The Commission's MEPA interpretation barred Tribal Nations from presenting evidence about pollution, impairment and destruction of their Treaty-protected resources of immense cultural and economic importance—silencing their voices and omitting these critical considerations altogether. Before the parties even had the opportunity to conduct discovery and develop expert testimony, the Commission limited the scope of its MEPA determinations.

Because the Project will extend Line 5's operation for decades, the Commission erred by excluding key evidence about likely pollution and impairments posed by the Project from its determinations under MCL 324.1705(2). For example, the intervenors below should have been

allowed to conduct discovery and introduce expert evidence establishing how long Line 5 will operate in the absence of the Project and compare that to how long it will operate if the Project is completed. Those additional decades of operation are an effect of the Project.[15] A project's potential to have polluting and impairing effects is a factual issue in a contested case permitting proceeding that cannot be artificially limited by a permitting agency where those facts are critical to the legal determinations required under MCL 324.1705(2).

Just as the excluded evidence about the oil spill risks presented by Line 5 is central to the required analysis of likely environmental effects, so is evidence about the devastating harms that these spills unleash. Tribal Nations have staff scientists who were prepared to testify about the critical resources threatened by an oil spill from Line 5. Tribal Intervenors' Application for Leave to Appeal Motion in Limine on Remand, pp 13-14, 27-28 (Appendix BB at 952-53, 966-67). Indeed, the threat that spills pose to fishery resources is one of several concerns that motivated Tribal Nations to intervene in this proceeding. See, e.g., LTBB Petition to Intervene, p 3 (Appendix K at 761) (explaining that "the exercise of subsistence and commercial fishing rights reserved in the Treaty of 1836 . . . remain central to LTBB's culture, economy, and physical and spiritual well-being" and an oil spill would "devastate LTBB beyond any economic valuation."); GTB Petition to Intervene, p 3 (Appendix J at 747) (explaining that the treaty-reserved fishing rights and fishery resources are of great historical and modern-day cultural and economic significance, and describing the Tribe's "strong interest in protecting themselves, their

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

way of life, and Michigan's natural resources from harm caused by Enbridge's proposed project.").

Yet even where Appellants did attempt to put forth evidence speaking to the harms of an oil spill in conformance with the narrowed scope, they were thwarted. For example, John Rodwan, former Environmental Director at NHBP, provided testimony about wild rice restoration and the challenges posed by climate change that were exacerbated by a prior Enbridge oil spill in the Kalamazoo River watershed. The ALJ struck parts of his testimony that merely provided basic descriptions of how an oil spill has impacted natural resources and his work, including the statement 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." Rodwan Testimony, p 12 (Appendix X at 895). Thus, the practical application of the Commission's limited MEPA interpretation led to a record where most critical evidence from Tribal Nations was never put forward, and the evidence that was presented was stricken to the point that it was devoid of critical context or its full meaning.

Tribal Nations should have been able to provide testimony about the likelihood of pollution from an oil spill and how that pollution would impact natural resources and Tribal Nations that rely upon them. First, their pipeline safety expert Richard Kuprewicz should have been able to testify about the likelihood of an oil spill and the safety of the pipeline along its route through Michigan—including at various water crossings where a spill would threaten tributaries to the Great Lakes. Next, Tribal Nations should have been able to put forth expert testimony including modeling that shows the extent of oil spill plumes depending on severity and location—such as the proximity to the Great Lakes, rivers, streams, and wetlands. Then, Tribal Nations should have been allowed to put forth expert scientists, including biologists and cultural

resource experts, to demonstrate the oil spill impact to natural resources. Finally, they should have been allowed to present testimony from Tribal representatives to explain the harm from that pollution and the destruction of the treaty-protected natural resources that are integral to the cultural and economic well-being of the Tribal Nations. A record including this type of information would make it possible for the Commission to make a valid determination of pollution under MCL 324.1705(2), and the full assessment of effects of the Project necessary for a proper comparison to alternatives.

E. The Commission's Alternatives Analysis Failed to Comply with MEPA and Was Fundamentally Flawed.

The consequences of the Commission's errors are significant. The Commission conducted an arbitrary, inconsistent, and unlawful alternatives analysis, which is a standalone error requiring reversal. The Court of Appeals upheld that analysis while applying the wrong standard of review. This Court law should reverse and remand this case to the Commission to correct these significant errors.

Proper consideration of alternatives to conduct that pollutes, impairs, or destroys natural resources is a required determination under MCL 324.1705(2). The Commission's exclusion of evidence about critical effects of the Project contributed to a lopsided alternatives analysis. The Commission's evaluation of alternatives took an improperly narrow view of the likely polluting effects of the Project, while taking a broader view of likely polluting effects of alternatives. Despite barring intervenors from submitting evidence regarding the statewide risk of oil spill from the Project and likely effects on natural resources, the Commission evaluated the risk of

statewide spills posed by various alternatives along their entire routes. See December 2023 Final Order, pp 303, 331-34, 338-41 (Appendix B at 338, 366-369, 373-76).[16]

For example, when discussing an "alternative southern pipeline route," the Commission stated that this alternative "would cross 8 rivers, 24 streams, 5 drainage canals, 231 miles of wetlands, 13 protected areas, . . . and could expose 11 well-head protection areas and two community drinking water well areas to a potential oil spill." *Id*. at 338 (Appendix B at 373). In contrast, Appellants were not allowed to present similar evidence about Line 5's proximity to these natural features, including 290 water crossings, or the integrity of the aging pipeline that may actually increase the impairment of these and other natural resources—including the Great Lakes—when compared to the alternative southern pipeline route. Unsurprisingly, given the terms of the comparison, the Commission concluded that this southern pipeline route (i.e., 762 miles of pipeline) exhibits a greater failure frequency and safety risk when compared with the tunnel alternative (i.e., four miles of pipeline). *Id*. A proper analysis would have compared the threats to rivers, streams, drainage canals, wetlands, protected areas, drinking water sources, and the Great Lakes along the hundreds of miles of the alternative southern pipeline route with the hundreds of miles of Line 5 in Michigan.

The Commission committed the same error regarding the alternative involving rail transportation, noting that it "is not prudent as it carries a greater likelihood of environmental harm" because it would "cross 11 rivers, 11 streams, 6 drainage canals, 6-7 miles of wetlands, 14

[16] In addition to its erroneous comparison and determination of environmental effects posed by alternatives, the Commission's baseline assumptions regarding the economic and practical feasibility of alternatives were flawed. As explained by the Attorney General, the Commission's improperly narrow scope of review prevented it from considering the best and most current evidence regarding the viability alternative methods of transporting Line 5 products. *See* Brief of Amicus Curiae Michigan Attorney General Dana Nessel in Support of Appellants submitted to the Court of Appeals in this matter.

protected areas, and 72 miles of highly populated areas in Michigan." *Id*. The Commission further determined that alternative methods including rail or truck "will likely increase environmental impairment and may increase the threat of spills that could significantly damage the Great Lakes, the state's terrestrial environment, and more than 1,000 other aquatic environments in Michigan." *Id*. at 303 (Appendix B at 338). The Commission did *not* consider, and the Appellants were *not* allowed to present, comparable evidence about the risks of an oil spill from Line 5 enabled by the Project. Yet Line 5 is an aging pipeline that poses a grave threat to treaty-protected resources along its route, including fishery resources in the interconnected rivers, streams, and the Great Lakes.

The Commission's arbitrary and unreasonable analysis requires reversal. It looked at just one side of an important issue: oil spill risks posed to natural resources by transporting oil from Superior, Wisconsin to Sarnia, Ontario using alternate methods. Yet, it refused to consider the inverse: oil spill risks posed to natural resources by transporting oil on Line 5. This is grounds for vacating the Commission's decision and remanding for further proceedings. See, e.g., *Mich Consol Gas Co v Mich Pub Serv Comm*, 389 Mich 624, 640; 209 NW2d 210 (1973) ("In this case, the company showed that the commission, by refusing to consider increases in costs in the future while taking into account future reductions, acted arbitrarily and unreasonably."). Although intertwined, this error is separate from the Commission's In Limine decision because if the Commission had ignored evidence of similar oil spill risks and pollution posed along the length of Line 5 in Michigan—rather than preventing its development and submission altogether—its arbitrary analysis would still violate MEPA. MEPA requires the Commission to make an informed comparison of the environmental impacts of a proposed project with the environmental impacts of alternatives to "prevent or minimize degradation of the environment

which is caused or is likely to be caused" by the project. *Ray*, 393 Mich at 306 (explaining the purpose and importance of MEPA).

Although the Court of Appeals recognized the inconsistencies in this alternatives analysis, it upheld the Commission's decision while applying the incorrect standard of review. COA Opinion, pp 23-24 (Appendix A at 26-27). The Court of Appeals recognized that "it is concerning that the [Commission], when discussing rail transport, looked to . . . how many rivers and wetlands a rail system would cross but then did not mention the same statistics for Line 5 as a whole." *Id*. at 24 (Appendix A at 27). Nevertheless, the Court deferred to the Commission, concluding that "ultimately it reached a decision that was supported by the evidence in the record." *Id*. at 25 (Appendix A at 28). This reliance on an "adequately supported by the record" standard of review, see *id*. at 23-25 (Appendix A at 26-28), was incorrect and set the bar far too low. The Commission's comparison of this improperly narrow assessment of impairments and pollution from the Project with a broader view of impairments and pollution presented by alternatives violated MEPA. So too did the Court of Appeals' failure to apply MEPA's required de novo standard of review and overturn the Commission's unlawful and unreasonable decision.

The Court of Appeals further suggested, without support, that the Commission's lopsided alternatives analysis was acceptable because the Commission could have looked only at alternatives that transport product "*through the Straits*," but chose to examine all presented alternatives. *Id*. at 24 (Appendix A at 27). This rationale must also be rejected. As explained above, MEPA requires a comparison of the likely polluting effects of a Project to those of alternatives. MCL 324.1705(2). The Commission seemed to recognize its obligation to look at alternatives to the Project for shipping Line 5 products from Superior, Wisconsin to Sarnia, Ontario, but failed to do a proper comparison of alternatives. A robust alternatives analysis is

critical to "prevent or minimize degradation of the environment which is caused or is likely to be caused by" a project. *Ray*, 393 Mich at 306. The Court of Appeals' statement regarding what alternatives must be considered is unsupported by law and not grounded in the facts of this case.

CONCLUSION

It is critical that this Court ensures the proper application of MEPA here. The Project involves a massive tunnel that would be bored through the Straits of Mackinac. This is a place that is central to the Anishinaabe, a place of ongoing cultural and economic significance to Tribal Nations, and the heart of the Great Lakes that provide drinking water for more than 40 million people. The Court of Appeals' twin errors—applying the incorrect deferential standard of review and allowing an agency to narrow the proper scope of determinations under MCL 324.1705(2)—contravenes the statute's plain language, the Legislature's intent, and the "common law of environmental quality" developed by this Court over the course of decades. *Ray*, 393 Mich at 306. Agency decisions affecting the environment must include a determination of alleged pollution, and agencies making those decisions cannot evade the judicial scrutiny that the Legislature intended by enacting MEPA. This Court's reversal of the Court of Appeals' decision is necessary to provide and preserve clarity in the law.

Further, this Court must vacate the Commission's approval of the Project and remand this case back to the Commission for further proceedings consistent with a lawful interpretation of MEPA's scope. As discussed above, the Commission unlawfully barred intervenors below from taking discovery and presenting evidence concerning all of the Project's likely effects. This resulted in a deficient record that left the Commission unable to fully determine the alleged pollution, impairment, and destruction of natural resources, as MEPA requires. The only way that this Court can cure these deficiencies in the Commission's order below is to order its vacatur and return the case to the Commission with instructions that these deficiencies be corrected.

RELIEF REQUESTED

Appellants respectfully request that this Court reverse the decision of the Court of Appeals, vacate the Commission's Final Order approving Enbridge's application, and remand this matter to the Commission with the following instructions:

(1) The Commission must allow the intervening parties to conduct discovery and submit evidence about the likely effects of the Project, including but not limited to the history of and risk of oil spills along Line 5 in Michigan, and the resulting pollution, impairment, and destruction of the state's natural resources;

(2) The Commission must conduct a complete MEPA analysis consistent with MCL 324.1705(2), this Court's opinion in this appeal, and this Court's precedent. The Commission's MEPA analysis must include determinations of:

   a. All pollution, impairment, or destruction of air, water, or other natural resources of the public trust in those resources, likely to result from the Project;

   b. All feasible and prudent alternatives to the Project and comparison of the likely environmental effects of the alternatives versus the likely environmental effects of the Project; and

   c. Whether the Project itself is consistent with the requirements of public health, safety, and welfare.

In addition, Appellants respectfully request that this Court rule that, in any subsequent appeal of the Commission's MEPA decision, the Court of Appeals must make independent, de novo determinations in accordance with MCL 324.1705(2) and this Court's *WMEAC* decision.

Dated: November 14, 2025

Respectfully submitted,

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STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of MCR 7.312(A)(1) and MCR 7.212(B)(1) because, excluding the parts of the document exempted, it contains 15,480 words.

Dated: November 14, 2025 /s/ Christopher M. Bzdok