

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,

MSC No. 168335

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

MPSC Case No. U-20763

Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION,
et al.,

Appellees.

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

Christopher M. Bzdok
(P53094)
TROPOSPHERE LEGAL, PLC
420 E Front St
Traverse City, MI 49686
(231) 709-4000

*Attorney for Appellants
Bay Mills Indian Community,
Grand Traverse Band of
Ottawa and Chippewa
Indians, and Nottawaseppi
Huron Band of the
Potawatomi*

Adam Ratchenski
(pro hac vice)
Thomas Cmar
(pro hac vice)
Debbie Chizewer
(pro hac vice)
Julie Goodwin
(pro hac vice)
EARTHJUSTICE
311 S Wacker Dr Ste 1400
Chicago, IL 60606
(312) 800-2200

*Attorneys for Appellant Bay
Mills Indian Community*

David C. Scott
(pro hac vice)
Chad Hughes
(pro hac vice)
Nicholas N. Wallace (P85745)
ENVIRONMENTAL LAW &
POLICY CENTER
35 E Wacker Dr Ste 1600
Chicago, IL 60601
(312) 673-6500

*Attorneys for Appellants
Environmental Law & Policy
Center and Michigan Climate
Action Network*

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INTRODUCTION

This case involves the Michigan Public Service Commission’s (the “Commission”) application of the Michigan Environmental Protection Act (“MEPA”) to a massive tunnel project with immense environmental consequences in a place of critical importance to Tribal Nations and all Michiganders. Appellees argue that the Court of Appeals properly deferred to the Commission’s MEPA decision and its unduly constricted scope of analysis. They are incorrect. MEPA requires a thorough evaluation of the project’s likely environmental effects and independent review by courts in order to fulfill the constitutional mandate to protect Michigan’s air, water, and other natural resources. Appellants request that this Court reverse the Court of Appeals’ decision, vacate the Commission’s Final Order, and remand this matter back to the Commission, requiring that it scrutinize on a complete record Enbridge’s proposal to construct a four-mile oil pipeline tunnel beneath the Straits of Mackinac.

I. Section 1705 Requires Independent, De Novo Review of Agency MEPA Decisions.

Appellees argue for a deferential standard of review by urging an interpretation of Section 1705 that contradicts MEPA’s text, the Legislature’s intent, and this Court’s decision in *West Michigan Environmental Action Council, Inc v Natural Resources Commission*, 405 Mich 741; 275 NW2d 538 (1979) (“*WMEAC*”). In *WMEAC*, this Court held that MEPA requires courts to make “independent, de novo judgments.” *Id.* at 753. 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.” *Id.* at 754.

A. MEPA’s Text and Statutory History Contradict Appellees’ Position.

MEPA requires de novo judicial review of agency decisions no matter whether MEPA claims are alleged in a direct suit, under Sections 1701–1704, or through intervention in an administrative proceeding under Section 1705. Enbridge is right that “the Legislature created two

different means under MEPA for accomplishing the state’s environmental goals.” Enbridge Br at 17. The Legislature recognized that some MEPA claims would originate in court, while others would reach court upon judicial review of agency action. Consistent with the purpose of MEPA, the Legislature ensured that in both scenarios courts must make independent, de novo determinations. This is evident in MEPA’s text and statutory history.

Appellees concede that de novo review of agency MEPA decisions is required under Sections 1701–1704 but contend that deferential review applies under Section 1705. See Enbridge Br at 16-29; Commission Br at 41-52; Propane Br at 25-35. They argue that, rather than requiring de novo review, Section 1705 incorporates “traditional deferential standards of review of agency orders.” Enbridge Br at 16-22. Appellees’ position is incorrect.

Under both Sections 1701–1704 and Section 1705, courts must determine whether proposed conduct is likely to harm the environment, and if so, they must not authorize the conduct unless the proponent shows there is no feasible and prudent alternative consistent with public health, welfare, and safety. MCL 324.1703(1); MCL 324.1705(2).¹ Section 1705 does not permit deference to agencies; it mandates that courts themselves shall “determine[]” the environmental effects and shall not “authorize[]” harmful conduct “in any judicial review of [an administrative] proceeding.” MCL 324.1705(2). In *WMEAC*, this Court emphasized that statutory language and read MEPA Sections 1704 and 1705 harmoniously in support of its holding that courts reviewing agency MEPA decisions must make independent, de novo

¹ Certain Appellees differentiate between the determination of harms and the evaluation of alternatives, and argue that the latter requires deference. See Commission Br at 42-46; Propane Br at 36-37. There is no textual basis for applying different standards of review to the judgments that Section 1705 requires courts to make.

judgments. 405 Mich at 748, 752-54. Appellees' interpretation imagines discord between those sections where there is none.

Appellees' interpretation also renders meaningless the very words found in Section 1705 that this Court emphasized in *WMEAC*: “and in any judicial review thereof, any alleged pollution . . . shall be determined, and no conduct shall be authorized” 405 Mich at 753 (emphases in original). If the statute required deferential review, then it would not mandate that reviewing courts make their own determinations and authorizations. Similarly, if “traditional” standards of review under other laws applied, then the phrase “and in any judicial review” would serve no purpose because the “traditional” review standards are the default. This Court “strive[s] to avoid constructions that would render any part of the Legislature’s work nugatory.” *Jostock v Mayfield Twp*, 513 Mich 360, 372; 15 NW3d 552 (2024) (internal quotation omitted). But Appellees’ construction does precisely that.

MEPA’s statutory history confirms that Appellees’ interpretation is wrong.² During the drafting process, the Legislature revised the bill to require that courts apply Section 1705 using the same MEPA standards as under Sections 1701–1704. The draft bill was rewritten to add the phrases “and in any judicial review” and “shall be determined” to Section 5(2) of the enacted statute. See Attachment 1 (Comparison of March 25, 1970 draft bill with July 27, 1970 final bill in FLOW Appendix Vol 2 at 573-78, 624-26). That draft bill was also revised to remove language from Sections 4(2) and 4(3) referring to whether “the agency’s decision is supported by

² The drafting history of a bill constitutes “legitimate legislative history” because, “by comparing alternative legislative drafts, a court may be able to discern the intended meaning for the language actually enacted.” *In re Certified Question from the US Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n5; 659 NW2d 597 (2003).

competent material and substantial evidence on the whole record.” See *id.* Those revisions were contemporaneously explained by the bill’s author, Professor Joseph Sax:

In section 5(2) I think it is quite important to add the phrase “and in any judicial review thereof made available by law” for the following reason. In some instances no lawsuit will have been filed under this Act at the outset. Administrative procedures will simply have gone forward and the question may first reach judicial attention upon an appeal for judicial review under the existing structure of the Administrative Procedure Act or other state laws. It is essential to assure that if the case comes up in this context the reviewing court shall apply standards of this Act. Otherwise we may have different standards for judicial review—as to the interests recognized in [MEPA]—depending on the manner in which the case first reaches a court. I consider this change most important and I am sure everyone will agree that it needs to be made in order to guarantee consistency. [Attachment 2 (April 2, 1970 Letter in FLOW Appendix Vol 2 at 595).]

The Legislature enacted Professor Sax’s recommended language in Section 1705 to ensure a *consistent* standard of judicial review under MEPA, no matter the original forum.

Appellees’ position also finds no support in Section 1706 of MEPA or the *in pari materia* doctrine. See Enbridge Br at 26-27. Section 1706 states that MEPA “is supplementary to existing administrative and regulatory procedures provided by law,” MCL 324.1706, which means that it is “additional,” not subordinate. See *Lakeshore Group v State*, 510 Mich 853, 854 n2; 977 NW2d 789 (2022) (BERNSTEIN, J., concurring) (noting that supplementary in Section 1706 means “additional”); *id.* at 861 n8 (WELCH, J., dissenting) (agreeing that supplementary means “being an addition to”). Section 1705’s de novo review requirement does not conflict with other laws. See Appellants’ Br at 23-27.

Appellees’ arguments about jurisdiction and factfinding fare no better. They argue that different standards of review apply because under Sections 1701–1704 courts exercise original jurisdiction and find facts, whereas under Section 1705 courts exercise appellate jurisdiction and review an administrative record. For purposes of the standard of review, this is a distinction without a difference because courts exercising appellate jurisdiction frequently apply de novo

review without receiving new evidence as a factfinder. See *Johnson v Silver Dollar Cafe*, 441 Mich 110, 113-16; 490 NW2d 337 (1992) (holding that under a “review de novo” standard an appellate court does not receive new evidence but reviews the administrative record “afresh” and “anew” without deference); see also *infra* note 3 (citing cases involving de novo review of applications of law to facts). In *WMEAC*, this Court did precisely that: reviewing de novo the MEPA claim “on the record presented” and finding a violation. 405 Mich at 754-60. Appellees claim that de novo review under Section 1705 would require this Court to “amend its rules and undertake facilities renovations” to accommodate trials. Enbridge Br at 28-29. That dramatically misrepresents the issue. Section 1705 requires review de novo of the record presented, not trial de novo or taking new evidence. Appellate courts are well equipped to conduct such review.

Finally, Appellees incorrectly argue that only those statutes explicitly using the words “de novo” can require de novo review. See Enbridge Br at 19; Commission Br at 41; Propane Br at 26. However, Appellees concede that Section 1704 requires de novo review, as held in *WMEAC*, even though “de novo” does not appear in the statute.

In sum, MEPA’s text and statutory history show that Section 1705 requires de novo review. Presently, Section 1705 is the only available means of seeking courts’ independent, de novo review of agency MEPA decisions. See *Lakeshore Group*, 510 Mich 853, 859-60 (WELCH, J., dissenting) (observing courts’ application of a “blanket rule” “foreclos[ing] all direct MEPA challenges” to agency permitting decisions under Sections 1701–1704 (emphasis in original)). Exempting agencies from such judicial scrutiny would undermine MEPA’s purpose. *WMEAC*, 405 Mich at 754.

B. Traditional Review Standards Would Still Require De Novo Review Here.

MEPA’s text and statutory history contradict Appellees’ interpretation of Section 1705. But even under Appellees’ position that “traditional” review standards apply, Section 1705

determinations involve applications of law to facts, which are traditionally reviewed de novo. See *Regents of Univ of Mich v Mich Employment Relations Comm*, 389 Mich 96, 102-03; 204 NW2d 218 (1973) (de novo review of agency’s application of law to facts); *Beason v Beason*, 435 Mich 791, 804-05; 460 NW2d 207 (1990) (de novo review of trial court’s application of law to facts).³

Appellees concede that “appellate courts [are] obligated to review the [Commission]’s interpretation *and application* of MEPA de novo.” Enbridge Br at 28 (emphasis added) (citing *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-18; 754 NW2d 259 (2008)). However, Appellees err because they “merely assume[.]” this dispute “deal[s] with a purely factual question.” *Regents*, 389 Mich at 102-03; see Enbridge Br at 16-24 (characterizing this case as a review of factfinding); Commission Br at 43-49 (same). That assumption is incorrect: this case involves the *application* of MEPA’s legal standard to a factual record, determining whether environmental harm “rise[s] to the level of impairment or destruction,” *WMEAC*, 405 Mich at 760, whether “feasible and prudent alternatives do or do not exist,” and whether “conduct is or is not consistent with the promotion of public health, safety and welfare,” *Ray v Mason Co Drain Comm’r*, 393 Mich 294, 312-13; 224 NW2d 883 (1975) (quotation marks omitted). This Court has cautioned that the “convergence” of fact and law in agency proceedings must not “obscure the principle that courts have primary authority to determine questions of

³ See also, e.g., *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009) (whether two offenses are “related” for joinder purposes is reviewed de novo); *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008) (whether an insurer acted “reasonably” under MCL 500.3148 is reviewed de novo); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002) (whether counsel has been constitutionally “effective” is reviewed de novo); *Rouch v Enquirer & News of Battle Creek*, 440 Mich 238, 258; 487 NW2d 205 (1992) (whether a statement is a “material falsity” under defamation law is reviewed de novo).

law.” *Macenas v Village of Michiana*, 433 Mich 380, 395; 446 NW2d 102 (1989). Thus, “traditional” review standards would still require de novo review.

II. MEPA Requires Full Evaluation and Determination of the Alleged Pollution and Environmental Impairments of the Conduct at Issue.

Appellees’ arguments defending the Commission’s unlawfully narrow MEPA review are equally unpersuasive. First, “conduct” does not limit consideration of likely effects. Second, the Commission improperly precluded consideration of likely effects of the tunnel project extending Line 5’s operational life. Third, the Pipeline Safety Act (“PSA”) does not preempt an environmental review in the Commission’s siting decision.

A. The Word “Conduct” Does Not Limit Consideration of Likely Effects.

Section 1705(2) states that in administrative proceedings and subsequent judicial review, environmental harm “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. MCL 324.1705(2) (emphasis added). Appellees interpret the word “conduct” as restricting the consideration of likely effects to only the project’s direct impacts at its location. They argue that the Commission therefore properly focused only on tunnel and pipeline construction at the Straits and properly chose not to examine whether the project would prolong Line 5’s operational life and thereby increase oil spill risks. See Enbridge Br at 30-33; Commission Br at 49-55.

Appellees’ argument is incorrect. The word “conduct” does not limit environmental effects considered under Section 1705(2). “Conduct” does not modify “effect.” “Conduct” is the action under review. “Likely” modifies “effect.” The statute requires determination of effects that intervenors allege are likely. MEPA case law affirms that the limiting principle is whether environmental effects are “likely.” *Oscoda Chapter of PBB Action Comm, Inc v Dep’t of Natural Resources*, 403 Mich 215, 231-233; 268 NW2d 240 (1978). Effects are determined by comparing

the situation before and after the conduct. *Kent Co Rd Comm v Hunting*, 170 Mich App 222, 233; 428 NW2d 353 (1988). Nothing in Section 1705(2) authorizes a court or agency to rule potential effects out of consideration in advance without taking evidence on whether they are likely—as the Commission did here.

B. The Commission Should Have Determined the Project’s Effect on Line 5’s Lifespan and Oil Spill Risks.

The Commission argues that Line 5 was approved in 1953 with no expiration or renewal requirement, so likely effects of prolonging the pipeline’s lifespan should not be considered. See Commission Br at 56-57. Enbridge argues that a recent federal district court decision makes it “entirely implausible” that Line 5 will cease operations if the tunnel is not constructed. Enbridge Br at 37-39, discussing *Enbridge Energy, LP v Whitmer*, Case No. 1:20-cv-01141, 2025 WL 3707609 (WD Mich, December 17, 2025). The upshot of these arguments is that, according to Appellees, prolonged risks of oil spills from Line 5 are the status quo, not effects of the project. What Appellees’ arguments demonstrate, however, is that these facts should have been determined by the Commission, not eliminated from consideration at the outset of the case.

The tunnel has a projected service life of 99 years. Appendix B at 135, 342. The dual pipelines, which are over 70 years old, could reach end-of-life far sooner without the tunnel. Appellants sought to present to the Commission testimony of a pipeline engineer describing Line 5’s history of failures and how placing the Straits segment in a tunnel would expose nearby waters to increased oil spill risks due to the pipeline’s condition and Enbridge’s operational methods. Appendix P at 826-27; Appendix Q at 830. The Commission’s threshold ruling prevented Appellants from conducting discovery or developing evidence on these topics, such as how much longer the dual pipelines can operate and how long Line 5 would have to continue operating for Enbridge to recoup its investment in the project, which is undoubtedly higher now

than the \$350 to \$500 million estimated when this proceeding began. Application of Enbridge, Exhibit A-9 (PSC Doc No. U-20763-0003), p 25.

Enbridge also places too much reliance on the recent *Enbridge v Whitmer* decision. That decision is one in a long-running series of decisions in cases between Enbridge and the State of Michigan over the Straits pipelines. It is not the final word: the State has already appealed that decision to the Sixth Circuit. Notice of Appeal, Case No. 1:20-cv-01141, Dkt 166 (WD Mich, January 6, 2026). *Enbridge v Whitmer* was wrongly decided for several reasons: First, it misinterpreted the PSA, which explicitly provides an ongoing state role.⁴ Second, it incorrectly concluded that the PSA preempts the public trust doctrine, substantially infringing upon Michigan's sovereignty and ability to fulfill its trust obligations to Tribal Nations. See States' Amici Br, Case No. 1:20-cv-01141, Dkt 145, at 9; Tribal Amici Br, Case No. 1:20-cv-01141, Dkt 75, at 12. Third, it incorrectly concluded that the foreign affairs doctrine preempts Michigan's enforcement of its easement, while ignoring the Transit Pipeline Treaty language, which carves out a role for the non-discriminatory regulation of pipelines. United States and Canada Agreement Concerning Transit Pipelines art IV, January 28, 1977, 28 UST 7449. Accordingly, *Enbridge v Whitmer* should not be given any weight here.

⁴ "PHMSA continues to support and encourage all three levels of government—federal, state, and local—working collaboratively to ensure the nation's pipeline systems are constructed and operated in a manner that protects public safety and the environment." Letter from Alan Mayberry, Assoc. Admin. for Pipeline Safety, PHMSA, to David Giles, Pres. and COO, Navigator CO2 (September 15, 2023), <<https://perma.cc/9HEQ-U5UW>>. Importantly, location decisions require the landowner's consent. See DOJ Br, *Bad River Band v Enbridge*, No. 23-2309, Dkt 94 at 10-22 (CA 7, April 10, 2024). This requirement applies equally to a private landowner or a sovereign government.

Furthermore, the Michigan Attorney General’s separate action against Enbridge to decommission the dual pipelines remains pending. *Nessel v Enbridge Energy, Ltd*, No. 19-474-CE (Ingham Co Cir Ct, 2019).

C. The PSA Does Not Preempt Consideration of Environmental Effects, Including Oil Spills, in Pipeline Siting Proceedings.

Enbridge also argues that the PSA preempts the Commission and state courts from considering prolonged oil spill risks as a likely effect of the tunnel project. See Enbridge Br at 39, citing 49 USC 60104(c). On the contrary, the PSA states that it does *not* authorize the governing federal agency “to prescribe the location or routing of a pipeline facility.” 49 USC 60104(e). Instead, it leaves this to state and local governments, and courts have interpreted this reservation broadly. See *Tex Midstream Gas Servs LLC v City of Grand Prairie*, 608 F3d 200, 210-11 (CA 5, 2010); *Wash Gas Light Co v Prince George’s Co Council*, 711 F3d 412, 420-21 (CA 4, 2013).

The PSA reserves siting authority to the State of Michigan, which delegates it to the Commission in Act 16, MCL 483.1(2), subject to other legal requirements—including MEPA. See Appendix B at 324-25. The PSA therefore does not preempt the Commission from considering the likely environmental effects of the project, and Section 1705 requires it to do so. Appellants asked the Commission to deny the application because of environmental effects—they did not ask the Commission to impose safety standards.

CONCLUSION

This Court should reverse the Court of Appeals’ decision, vacate the Commission’s Final Order, and remand this matter back to the Commission with instructions to scrutinize Enbridge’s proposal on a complete record. See Appellants’ Br at 48.

Dated: January 23, 2026

Christopher M. Bzdok (P53094)
TROPOSPHERE LEGAL, PLC
420 E. Front Street
Traverse City, MI 4968
(231) 709-4000
chris@tropospherelegal.com

*Attorney for Appellants Bay Mills Indian
Community, Grand Traverse Band of Ottawa
and Chippewa Indians, and Nottawaseppi
Huron Band of the Potawatomi*

David L. Gover (Pro Hac Vice)
NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Ave.
Boulder, CO 80302
(303) 447-8760
dgover@narf.org

*Attorney for Appellant Bay Mills Indian
Community*

James Bransky (P38713)
9393 Lake Leelanau Dr.
Traverse City, MI 49684
(231) 946-5241
jim@jimbranskyllaw.com

*Attorney for Appellant Little Traverse Bay
Bands of Odawa Indians*

William Rastetter (P26170)
OLSON & HOWARD, PC
520 S. Union Street
Traverse City, MI 49684
(231) 946-4000
bill@envlaw.com

*Attorney for Appellant Grand Traverse
Band of Ottawa and Chippewa Indians*

Respectfully submitted,

By: /s/ Christopher M. Bzdok

Adam Ratchenski (*Pro Hac Vice*)
Thomas Cmar (*Pro Hac Vice*)
Debbie Chizewer (*Pro Hac Vice*)
Julie Goodwin (*Pro Hac Vice*)
EARTHJUSTICE
311 S. Wacker Dr. Ste. 1400
Chicago, IL 60606
(312) 800-2200
aratchenski@earthjustice.org
tcmar@earthjustice.org
dchizewer@earthjustice.org
jgoodwin@earthjustice.org

*Attorneys for Appellant Bay Mills Indian
Community*

/s/ David C. Scott

David C. Scott (*Pro Hac Vice*)
Nicholas N. Wallace (P85745)
Chad Hughes (*Pro Hac Vice*)
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
(312) 673-6500
dscott@elpc.org
nwallace@elpc.org
chughes@elpc.org

Douglas Shapiro (P39827)
Law Office of Douglas Shapiro
2744 Kimberley Road
Ann Arbor, MI 48104
shapirofacilitation@gmail.com
(734) 216-6516

*Attorneys for Appellants Environmental Law &
Policy Center and Michigan Climate Action
Network*

Amy Wesaw (P79995)
Pine Creek Indian Reservation
1485 Mno-Bmadzewen Way
Fulton, MI 49052
(269) 704-8378
amy.wesaw@nhbp-nsn.gov

*Attorney for Appellant Nottawaseppi
Huron Band of the Potawatomi*

STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of MCR 7.312(A)(1) and MCR 7.212(G) because, excluding the parts of the document exempted, it contains 3,193 words.

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/s/ Christopher M. Bzdok