

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.

APPELLANTS' RESPONSE TO AMICUS BRIEFS

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

INTRODUCTION 1

I. MEPA Requires Consideration on a Complete Record of Feasible and Prudent Alternatives, Not Just the Tunnel and the Dual Pipelines. 1

II. A Proper MEPA Determination Is Needed to Protect Michigan’s Natural Resources and Is Limited to Likely Effects. 3

III. Federal Case Law Has No Application to This Court’s Interpretation and Application of MEPA. 4

CONCLUSION..... 6

STATEMENT OF COMPLIANCE 8

TABLE OF AUTHORITIES

Cases

Nemeth v Abonmarche Dev, Inc,
 457 Mich 16; 576 NW2d 641 (1998).....5

Ray v Mason Co Drain Comm'r,
 393 Mich 294; 224 NW2d 883 (1975).....4

Seven Co Infrastructure Coalition v. Eagle Co, Colo,
 605 US 168; 145 S Ct 1497; 221 L Ed 2d 820 (2025).....5

State Hwy Comm v Vanderkloot,
 392 Mich 159; 220 NW2d 416 (1974).....5

Statutes

42 USC 4321 *et seq.* (National Environmental Policy Act)4, 5

Const 1963, art IV, § 52.....5

MCL 324.1701 *et seq.* (Michigan Environmental Protection Act)..... *passim*

MCL 324.1705.....5

MCL 324.1705(2)2, 5

Other Authorities

MCR 7.312(A)(2)1

INTRODUCTION

In this appeal, the Court directed the parties to address whether the Court of Appeals erred by applying a deferential standard of review under the Michigan Environmental Protection Act (“MEPA”) and by affirming the Michigan Public Service Commission’s (the “Commission”) limitation on the scope of environmental review and exclusion of evidence of oil spill risks. Appellants have shown that the Court of Appeals erred in both respects, and that its decision should be reversed, the Commission’s Final Order vacated, and this matter remanded. Four amicus curiae briefs have been filed advocating a ruling that is contrary to Appellants’ position,¹ but Adverse Amici offer no valid arguments supporting a different outcome.

I. MEPA Requires Consideration on a Complete Record of Feasible and Prudent Alternatives, Not Just the Tunnel and the Dual Pipelines.

Adverse Amici argue that continued, indefinite operation of the existing Dual Pipelines should be treated as the “status quo” or “baseline” for MEPA review and present the false choice that approval of Enbridge’s proposed project should be upheld as less environmentally risky than their presumed status quo. Chamber Br at 8-9; SBA Br at 2. This is misleading both as a factual matter and because it ignores that MEPA requires an analysis of whether there are feasible and prudent alternatives to conduct that will pollute, impair, or destroy natural resources.

First, Adverse Amici ask the Court to assume that the Dual Pipelines will continue to operate indefinitely, even though this is *not* in evidence and the Commission specifically precluded Appellants from taking discovery and presenting evidence on the remaining lifespan of the Dual Pipelines. See Appellants’ Reply at 8-9. Not only is the continued operation of the

¹ These four briefs were filed by the Michigan Chamber of Commerce (“Chamber”), the Small Business Association of Michigan (“SBA”), the Association of Business Advocating Tariff Equity (“ABATE”), and International Transmission Company, Michigan Electric Transmission Company, and Consumers Energy Company (“ITC”) (collectively, “Adverse Amici”). Appellants submit this response pursuant to MCR 7.312(A)(2).

Dual Pipelines still subject to legal challenges—as Appellants and Amicus Attorney General Dana Nessel have shown (Appellants’ Br at 35; AG Br at 8-9)—but also it defies common sense to assume that an aging pipeline that runs across the bottomlands of the Straits of Mackinac and presents a known risk of a catastrophic spill will operate in perpetuity. The Commission should have allowed discovery and presentation of evidence on the remaining lifespan of the Dual Pipelines, but it foreclosed inquiry into that topic. Adverse Amici’s assertion that the Dual Pipelines will continue to operate indefinitely is merely an assumption, unsupported by any record evidence and contradicted by the Attorney General.

Second, Adverse Amici’s focus on the Dual Pipelines as a “status quo” or “baseline” mischaracterizes the analysis that MEPA required of the Commission. MEPA required the Commission to determine if Enbridge’s proposed project would pollute, impair, or destroy natural resources and then deny the permit if feasible and prudent alternatives existed. See Appellants’ Br at 33, 43-47 (discussing the alternatives analysis required by MCL 324.1705(2)).² In other words, the alternatives analysis required by MEPA does not turn on how a proposed project compares to the status quo. Rather, as noted by Amicus Attorney General Dana Nessel, the Commission should have considered “all available evidence regarding the potential environmental impacts of the Replacement Project and any feasible and prudent alternatives to the Replacement Project so as to ensure that the [Commission’s] analysis was based on a full and fair record.” AG Br at 10. The Commission’s improper constraints on intervenors’ ability to develop and submit evidence prevented consideration of alternatives based on a complete record.

² MEPA also required the Commission to determine whether the project and alternatives are “consistent with the reasonable requirements of the public health, safety, and welfare.” MCL 324.1705(2); Appellants’ Br at 37-38. The Commission’s failure to make this determination for the project is another reason to overturn and remand its decision.

II. A Proper MEPA Determination Is Needed to Protect Michigan's Natural Resources and Is Limited to Likely Effects.

Adverse Amici make further unsupported contentions that requiring proper MEPA determinations in this case would set a precedent imposing new “system-wide environmental review” burdens on other permitting processes, ITC Br at 6, and require agencies to engage in “pointless academic exercises,” Chamber Br at 5. This is hyperbole. Adverse Amici’s exaggerations mischaracterize Appellants’ position: that MEPA required the Commission to consider the likely effects of the conduct at issue, and that the parties below should have been allowed to present evidence on these likely effects. See Appellants’ Br at 31-37; Appellants’ Reply at 7-8. Conduct can have likely effects that extend beyond the immediate footprint of that conduct, and a court or agency must determine whether alleged effects are likely through a case-by-case inquiry based on the evidence presented. See Appellants’ Br at 31-36; Appellants’ Reply at 7-8.

Enbridge’s proposed project involves boring a tunnel that is 21 feet wide and 4 miles long under the Straits of Mackinac, destroying the resting place of Tribal ancestors, and installing within it a pipeline to move oil through the Great Lakes. This project is not minor or routine; it proposes an untested design and involves at least six years of major construction followed by 99 years of pipeline and tunnel operation. Whether this conduct will result in an increased risk of oil spills is not a “pointless academic exercise[],” as suggested by the Chamber. Chamber Br at 5. Appellants offered below to present evidence that a likely effect of the project would be the increased and prolonged risk of oil leaks and spills that would pollute, impair, and destroy Michigan’s natural resources. Appellants’ Br at 34-35; Appellants’ Reply at 8-9. In

violation of MEPA, the Commission refused to determine, and prevented Appellants from submitting evidence to show, whether these effects are likely.³

The hypothetical example offered by ITC similarly misses the mark. ITC warns that, in an Act 30 proceeding governing the siting and construction of a major transmission line, MEPA could be interpreted to require a “system-wide environmental review” that includes the environmental effects of new electricity generation or new customers that a new transmission line may accommodate, “regardless of whether the [Commission] or the applicant has any control of the resources or customers.” ITC Br at 6. This hypothetical straw man, however, goes well beyond what Appellants are arguing for here. Appellants are *not* arguing that the Commission must determine the environmental effects of separate or future projects, which could be undertaken by third parties and would potentially be the subject of future approval processes by separate agencies. Rather, Appellants want the Commission to make the MEPA determinations that the statute’s plain language requires: the likely environmental effects of *this* project, which include an increased and prolonged risk of oil spills.

III. Federal Case Law Has No Application to This Court’s Interpretation and Application of MEPA.

Adverse Amici point to federal case law regarding the scope of review under the National Environmental Policy Act (“NEPA”), see ABATE Br at 8-10; Chamber Br at 6-7, but those cases interpret a federal law, with a different purpose, and are inapposite. MEPA requires Michigan agencies and courts to deny approval of conduct that will lead to “pollution,

³ MEPA requires these types of case-by-case determinations of likely effects as part of “developing a common law of environmental quality.” *Ray v Mason Co Drain Comm’r*, 393 Mich 294, 306-07; 224 NW2d 883 (1975). In this way, MEPA entrusts courts to make determinations in particular cases, consistent with the statute’s environmental protection mandate, to prevent the types of undue burdens on minor or routine projects that Adverse Amici raise as hypothetical concerns.

impairment, or destruction” of natural resources if there is a feasible and prudent alternative. MCL 324.1705(2). This Court has repeatedly held that MEPA’s mandate is for Michigan courts to develop substantive environmental law. E.g., *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 42; 576 NW2d 641 (1998); *State Hwy Comm v Vanderkloot*, 392 Mich 159, 184; 220 NW2d 416 (1974). In contrast, “NEPA imposes no substantive environmental obligations or restrictions. NEPA is a purely procedural statute that, as relevant here, simply requires an agency to prepare an EIS—in essence, a report.” *Seven Co Infrastructure Coalition v. Eagle Co, Colo*, 605 US 168, 173; 145 S Ct 1497; 221 L Ed 2d 820 (2025) (discussing 42 USC 4332). This distinct federal standard should not inform this Court’s application or interpretation of MEPA. The language of the Michigan Constitution recognizing the “paramount public concern” of protecting the natural resources of Michigan further supports a plain-language reading of Section 1705’s requirement to determine likely effects as extending to *all* likely effects of a project, not just those within a project’s immediate physical footprint. See Const 1963, art IV, § 52; see also Appellants’ Br at 31-37; Appellants’ Reply at 7-8.

Moreover, even if federal NEPA case law did apply here, which it does not, it would not support this Court artificially limiting the likely effects that MEPA requires Michigan agencies to consider. For example, in the *Seven County* decision cited by ABATE, the Supreme Court of the United States recognized that federal agencies must consider the impacts of a project, including indirect effects, but opined that agencies need not consider future or completely separate projects. 605 US at 187 (“[T]he environmental *effects* of the project at issue may fall within NEPA even if those *effects* might extend outside the geographical territory of the project or might materialize later in time—for example, run-off into a river that flows many miles from the project and affects fish populations elsewhere, or emissions that travel downwind and

predictably pollute other areas.”). Here, Appellants are not arguing that the Commission should have considered future or separate projects, but rather that it should consider the likely effects of the project before it, including those along the very same pipeline.

CONCLUSION

For the reasons set forth in Appellants’ Brief and Reply Brief, 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 review Enbridge’s proposal on a complete record. See Appellants’ Br at 48.

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STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of MCR 7.312(A)(2)(c) because, excluding the parts of the document exempted, it contains 1,701 words.

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