ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

March 11, 2022

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

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following is attached for paperless electronic filing:

Reply Brief on Behalf of the Environmental Law and Policy Center and Michigan Climate Action Network

Proof of Service

Sincerely,

Margrethe Kearney
Environmental Law & Policy Center
mkearney@elpc.org

cc: Service List, Case No. U-20763

STATE OF MICHIGAN
MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of **ENBRIDGE ENERGY, LIMITED PARTNERSHIP** application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief	)	Case No. U-20763

REPLY BRIEF

ON BEHALF OF

THE ENVIRONMENTAL LAW & POLICY CENTER AND THE MICHIGAN CLIMATE ACTION NETWORK

March 11, 2022

Table of Contents

The Environmental Law & Policy Center ("ELPC") and the Michigan Climate Action Network ("MiCAN") (collectively, "Climate Organizations") submit this Reply Brief in response to the Opening Briefs of Enbridge Limited Partnership ("Enbridge" or the "Company" with citations to "Enbridge Br."), the Michigan Propane Gas Association and the National Propane Gas Association (the "Propane Associations" with citations to "PA Br."), and the Michigan Public Service Commission Staff ("Staff" with citations to "Staff Br.").[1]

I. INTRODUCTION

Enbridge, Staff, and the Propane Associations fail to rebut the Climate Organizations prima facie MEPA case. The Proposed Project will exacerbate climate change through the direct and indirect emission of greenhouse gases. Increased warming will intensify the impacts of climate change on Michigan's air, water, and natural resources. A feasible and prudent alternative to the Proposed Project is to shut down the Dual Pipelines and not replace them with a pipeline crossing the Straits. Under no circumstances can the Commission find that the Proposed Project is in the interests of public health, safety, and welfare. The Commission must deny Enbridge's application because the construction of a tunnel and pipeline below the Straits of Mackinac pollutes, impairs, and destroys Michigan's natural resources by contributing to climate change. No party successfully rebuts this finding of environmental harm, and the Climate Organizations' witnesses demonstrate that a no-pipeline alternative is feasible and prudent.

[1] The Climate Organizations note that the Michigan Laborers' District Council ("MLDC") filed a brief that is styled largely as comments in support of Enbridge's Application. The comments made many factual assertions that were not supported by citations to the record. Even assuming MLDC's conclusions about employment and commerce are supported by the record, they are not relevant to the Commission's determinations in this case.

II. THE STATE AGREEMENTS ARE IRRELEVANT TO THE COMMISSION'S MEPA ANALYSIS

Enbridge, Staff, and the Propane Associations recite the development and content of various agreements between the State of Michigan and Enbridge in an effort to establish the necessity and propriety of the Proposed Project. These lengthy recitations are immaterial to the Commission's decision in this case. The State Agreements are not relevant to the Commission's evaluation of environmental harm or feasible alternatives under MEPA. MEPA is supplementary to other administrative and regulatory procedures provided by law. *Her Majesty the Queen v. Detroit*, 874 F.2d 332, 337 (6th Cir. 1989). When a Court reviews conduct under MEPA, its review is *de novo*. *Id.* Courts do not defer to agency expertise. *West Michigan Envtl. Action Council*, 405 Mich. 741, 753–54 (1979). Courts exercise independent judgment as to whether there is pollution, impairment or destruction of natural resources under MEPA. *Id.* Likewise, the Commission should exercise its independent judgment to determine whether the Proposed Project violates MEPA. The Commission should not defer to agreements struck by Enbridge in its effort to protect a profitable pipeline route.

The State Agreements document Enbridge's long-term endeavor to narrow the scope of alternatives to Line 5. For over five years, Enbridge negotiated itself out of analyzing the impacts of discontinuing the flow of oil across the Straits of Mackinac. The State Agreements do not represent the State's chosen outcome from a thorough alternatives analysis. (Enbridge Br. at 4). Rather, the Agreements are negotiated outcomes, reflect compromised positions, and cannot be used to avoid meeting the requirements of state law.

On November 27, 2017, the State of Michigan, the Michigan Department of Natural Resources, and the Michigan Department of Environmental Quality (collectively, "the State") entered into the "First Agreement" with Enbridge. The First Agreement included measures to increase coordination between the State and Enbridge concerning the operation and maintenance

of Line 5 in Michigan. (Ex. A-8 at 2). The First Agreement does not, as Enbridge implies in its opening brief, direct the Company to conduct a true analysis of alternatives for eliminating the risk of an oil spill in the Great Lakes from Line 5. The First Agreement requires Enbridge to "at minimum" assess three new pipeline configurations across the Straits. The First Agreement does not describe this assessment as an alternatives analysis. The First Agreement does not mention the alternatives analysis completed one month prior by Dynamic Risk, which found that decommissioning Line 5 is a feasible alternative to the line's continued operation. (Ex. ELP-24). The First Agreement does not explain why it requires no assessment of the feasibility of discontinuing the flow of oil across the Straits. Ultimately, Enbridge did the minimum required. The Company limited its assessment to the three pipeline configurations explicitly identified by the First Agreement. (Ex. A-9). The First Agreement cannot be read as representing the State's "selection" of an appropriate alternative after a thorough analysis. (Enbridge Br. at 4). The First Agreement was merely the entry point for crafting the outcome Enbridge offers as a "solution" in this case.

In the fall of 2018, the outgoing administration of Governor Rick Snyder moved quickly to cement this solution for Enbridge. On October 3, 2018, the State entered into the "Second Agreement," which (again) outlined measures to increase coordination between the State and Enbridge and to reduce the risk of adverse impacts from a release of oil from Line 5 in the Straits. (Ex. A-10). The Second Agreement purports to strike a deal with Enbridge: if Enbridge builds a tunnel under the Straits, the State will allow the Company to operate the Dual Pipelines—with some additional precautions—until the tunnel is completed. But more action was needed for this deal to come to fruition. The Second Agreement also required creation of the Mackinac Straits Corridor Authority ("Corridor Authority"), which was established under Act 359, passed by a lame

duck legislature on December 11, 2018, one month after its initial introduction as Senate Bill 1197. In these final days of the Snyder administration, Enbridge entered into an agreement with the newly created Corridor Authority outlining the development and construction of a tunnel under the Straits with a 99-year design life. (Ex. A-5).

On December 19, 2018, Enbridge entered into a "Third Agreement" with the State, under which Enbridge commits to taking extra precautions for the Dual Pipelines, and to shutting the Dual Pipelines down once the Tunnel is constructed. The Third Agreement has an important lever for Enbridge: if Enbridge does not obtain the government approvals it needs to build the tunnel—including this Act 16 Application—its performance under the Third Agreement is "excused." (Ex. A-1 at 8).

Staff's intimate involvement in crafting these agreements does not require the Commission to defer to their terms. Staff describes the agreements in an effort "to frame the issues already addressed by other State and federal agencies." (Staff Br. at 11). The agreements did not and cannot address the Commission's MEPA obligations. MEPA requires the Commission to take its own hard look at the Proposed Project. The Commission cannot rely on agreements struck by other agencies to satisfy MEPA review, even if Staff was involved in the negotiations.[2] The Michigan Supreme Court's observation in *Ray* stands: not every public agency proves to be diligent and dedicated defenders of the environment. *Ray v. Mason Cty. Drain Comm'r*, 393 Mich. 294, 305; 224 N.W.2d 883, 887 (1975). That is why the Commission must base the MEPA

[2] This is not to say that the Commission must make any finding regarding the legal effect of the State Agreements. The Commission should assume that the State Agreements – like the Notice of Revocation and Termination—are valid unless a court finds otherwise. But the State Agreements cannot take the place of the Commission's independent MEPA review. Common law does not allow private actors to enter into contracts with the State to avoid the application of MEPA.

determination on the record in this case, not on assertions and assumptions that the State has already achieved the best bargain it can get.

III. RESPONSE TO STAFF'S OPENING BRIEF

A. The no-pipeline alternative is reasonable and relevant to this case

Staff argues that the no pipeline alternative is unreasonable and superfluous to this case. Staff offers four theories in support of this argument. First, Staff argues that the no-action scenario—referred to in Climate Organizations' Opening Brief as the no-pipeline scenario—is not a true no-action alternative. Second, Staff argues that shutting down the Dual Pipelines is not a likely outcome if the replacement project is not approved. Third, Staff argues that the underlying purpose of the project is to continue operating Line 5 while reducing the risk of an oil spill in the Great Lakes. Fourth, Staff argues that shutting down the Dual Pipelines and Line 5 is "not an option" in this case. (Staff Br. at 87-90). Each of Staff's arguments fail.

Staff's first argument that the Climate Organizations improperly define a "no action" scenario is semantics, not substance. Staff argues that a true "no action" alternative would maintain the status quo—which Staff interprets as the continued operations of the Dual Pipelines and not their closure. Climate Organizations agree that Staff's "no action" alternative could be considered under MEPA. However, it is not the alternative that Mr. Erickson and Dr. Stanton recommended and evaluated in their expert testimony. Because Staff defined "no-action" differently than the Climate Organizations, the Climate Organizations referred to the scenario considered by Mr. Erickson and Dr. Stanton as the "no-pipeline" alternative, to avoid confusion. To clarify for the Commission:

- Dr. Stanton defines "no action" as "not constructing the tunnel and ***not*** continuing to operate the existing dual pipelines."[3] (Stanton Direct, 9 TR 942:9–11). Mr. Erickson adopts this same definition. (Erickson Direct, 9 TR 1061). The Climate Organizations' Opening Brief ("CO Br.") refers to this as the "no-pipeline" alternative.

- Staff Witness Warner defines "no action" as not constructing the tunnel and continuing to operate the existing pipelines.[4] (Warner Rebuttal, 1742). The Climate Organizations did not submit testimony about this alternative.

- Enbridge defined a "no action" alternative as "maintaining the status quo, which means the continued operation of the Dual Pipelines and not their closure." (Pastoor Rebuttal, 575:13-15). This is consistent with the "no action" alternative defined by Staff. The Climate Organizations did not submit testimony about this alternative.

Regardless of its name, Enbridge failed to consider an alternative where it discontinued operation of the Dual Pipelines and did not build a tunnel. Consideration of this alternative would require analysis by Enbridge of how oil would get to market. Enbridge could have analyzed that alternative in this case, but did not. Mr. Earnest testified that he has access to and has used in the past a Market Optimization Model that assesses crude oil market implications of changes in logistical infrastructure, such as Line 5, that enables crude oil to reach the global market. (Earnest Cross, 7 TR 731–32). Enbridge did not ask Mr. Earnest to employ that model here.

Staff's second argument, that MPSC Staff predicts the Governor will not be successful in shutting down the Dual Pipelines, cannot define the scope of the MEPA analysis. The Commission must assume the Governor's actions are lawful and that her efforts to shut down the Dual Pipelines are genuine. MEPA requires the Commission to compare the current environmental situation with the probable condition of the environment after the construction of the Proposed Project. *Nemeth v. Abonmarche Dev., Inc.*, 457 Mich. 16, 31; 576 N.W.2d 641, 648 (1998). Staff argues that

[3] Dr. Stanton explains in her testimony why she calls this alternative the "no-action" alternative. "In short, the "no-action" alternative is to eliminate the environmental risk to the Great Lakes by shutting down the existing pipeline, but take "no action" to construct a new pipeline segment through the Straits." (Stanton Direct, 9 TR 946:14–17)
[4] Staff does discuss a "Line 5 shutdown scenario" that is consistent with the no-pipeline scenario. For reasons discussed in Section II.B, Staff's analysis of this scenario is flawed.

because the Dual Pipelines are currently operational, it is inappropriate to use a "no-pipeline" scenario to reflect the current environmental situation. (Staff Br. at 88). Although Staff recognizes that the Governor has taken official actions to shut down the Dual Pipelines, Staff asserts that the Commission should not assume those actions are legal. Staff is oversimplifying the current environmental situation, and inappropriately asks the Commission to assume an executive action to be *ultra vires*. Staff is asking the Commission to publish an official order assuming that another Michigan agency, the Department of Natural Resources, has illegally terminated and revoked an easement it issued in 1953. This request is inappropriate and must be denied.

The Commission is an administrative agency that is part of the executive branch of Michigan's state government. The executive power of the state is vested exclusively in the governor. Const. 1963, art. 5, § 1. The Framers of the Michigan Constitution desired to give the Governor "real control over the executive branch," *House Speaker v. Governor*, 443 Mich. 560, 562; 506 N.W.2d 190 (1993), including the power to appoint the members of Commissions like the Michigan Public Service Commission, Const. 1963, art. 5, § 3, and to supervise the affairs of each principal department, Const. 1963, art. 5, § 8. For Michigan's constitutional framework to operate as the Framers intended, governors must possess "the power and ability to manage the bureaucracy, to supervise the administrative agencies, and to influence those agencies' rulemaking decisions through his or her appointments and directives." *Michigan Farm Bureau v. Dep't of Envtl Quality*, 292 Mich. App. 106, 144; 807 N.W.2d 866, 891 (2011). If the Commission issues an order in this case based on an assumption that the Governor's Revocation and Termination of

the 1953 Easement is invalid, it does so in direct contradiction of the constitutional framework established in the 1963 Constitution.[5]

Staff's third argument mischaracterizes the purpose of the Proposed Project. Staff argues that the purpose of the project is to eliminate the threat of an oil spill in the Great Lakes *while continuing to operate Line 5*. Even if the purpose of the project includes continued transport of oil by Enbridge, Staff improperly narrows the purpose to specifically include continued operation of Line 5. Staff seeks to define Enbridge's purpose to include the need for a pipeline through the Straits, even though Enbridge has explicitly argued that the need for Line 5 is outside the scope of this case. Climate Organizations asked Enbridge if Mr. Earnest had conducted "any analysis of how costs to refiners and their customers will be impacted if Line 5 shuts down." (Ex. ELP-34). Mr. Earnest ***has*** conducted this analysis, but Enbridge did not produce that analysis in discovery "because the need for Line 5 is outside the scope of this case and, therefore, the information sought is irrelevant." (Ex. ELP-34). Staff cannot now argue that the need for Line 5 crossing the Straits is an implicit component of the purpose of the Proposed Project, and use that purported need to define the purpose of the Proposed Project.

Enbridge is the applicant in this case, and Enbridge clearly stated the purpose of the Proposed Project: "The purpose of the Project is to alleviate an environmental concern to the Great Lakes raised by the State of Michigan relating to the approximate four miles of Enbridge's Line 5 that currently crosses the Straits of Mackinac." (Pastoor Direct, 7 TR 555–556). As Dr. Stanton's

[5] Absent judicial resolution of Enbridge's challenges to the Notice, the Commission must assume the State of Michigan has acted lawfully. If the Commission determines that definitive resolution of legal questions surrounding the Notice is necessary before the Commission can meet its obligations under MEPA, the Commission should issue an order so stating. This order should define the legal question and explain why the Commission does not have the power to resolve legal issues regarding the Governor's Notice. The legal question raised in the Commission's order would then be appealable to Michigan courts, who do have the power to decide such legal issues. *See Consumers Power Co. v. Ass'n of Businesses Advocating Tariff Equity,* 205 Mich. App. 571, 575; 518 N.W.2d 514, 516 (1994).

testimony demonstrates, Enbridge does not "need" to operate a pipeline in any location across the Straits to achieve that purpose. Enbridge needs to shut down the Dual Pipelines. The method Enbridge has chosen to achieve that purpose—building a tunnel to house a new pipeline—will impair, pollute, and destroy Michigan's air, water, and natural resources. Therefore, Enbridge must consider feasible and prudent alternatives to the Proposed Project. Enbridge has not considered the no-pipeline alternative, even though it has the expertise and technical ability to do so. Enbridge doesn't explain why it could not transport oil through the abundant pipeline capacity its experts argue exist. Dr. Stanton has considered the no-pipeline alternative, and found it to be reasonable and prudent. Staff cannot pervert Enbridge's own stated purpose to avoid consideration of the no-pipeline alternative.

Staff's fourth argument fails, because the Commission does not need the authority to shut down the Dual Pipelines for a no pipeline scenario to be part of an alternatives analysis in this case. Staff argues that, because the Commission concluded that the operation of Line 5 outside the Straits is outside the scope of the case, shutting down the Dual Pipeline is not "within the purview of a final order in this case." (Staff Br. at 90). Once a *prima facie* case is made, MEPA requires the Commission to evaluate feasible and prudent alternatives. MEPA does not require the Commission to have statutory jurisdiction over the alternatives considered. Rather, the Michigan Supreme Court recognized that "MEPA is supplementary to other administrative and regulatory procedures provided by law." *Nemeth*, 457 Mich. at 30. In *Nemeth*, the Michigan Supreme Court concluded that MEPA obligates courts to look beyond statutory directives to Michigan's common law of environmental quality. The Supreme Court found that "[i]t is proper for the trial court to independently determine whether these pollution control standards are valid, applicable, and reasonable in accordance with the courts' development of the common law of

environmental quality." *Id.* at 35. The Court went on to explain that "the MEPA's mandate that Michigan courts develop the common law of environmental quality does give the courts tremendous discretion in developing the *substantive law* of the MEPA." *Id.* at 42 (emphasis in original).

Staff's argument that the Commission cannot consider a no-pipeline scenario because it does not have explicit statutory authority to shut down the Dual Pipelines is contrary to the Court's findings in *Nemeth*. MEPA does not constrain agency or court determinations on environmental impairment to the statutory jurisdiction of the agency authorizing the conduct. Instead, MEPA mandates that agencies and courts look to actual or probable environmental impairment caused by an applicant's proposed conduct. *See id.* at 25, 34 – 35. In this case, the Commission does not need the authority to shut down the Dual Pipelines to evaluate whether Enbridge's Act 16 Application violates MEPA. Nor would a Commission determination that the Proposed Project violates MEPA require Enbridge to shut down the Dual Pipelines. The Commission should reject Enbridge's Application because the Proposed Project will cause significant greenhouse gas emissions causing tens of billions of dollars in damages to Michigan's natural resources, and the no-pipeline alternative is reasonable and prudent.

B. Staff's evaluation of GHG emissions is inadequate and flawed

Staff does not adequately evaluate greenhouse gas emissions as required by MEPA. First, Staff brushes aside direct GHG emissions from the Proposed Project by asserting that they are "typical for a project of this scope." (Staff Br. at 82). MEPA does not ask whether pollution is "typical" for the activity at issue. The statute asks whether the conduct at issue pollutes, impairs, or destroys the air water or other natural resources, or the public trust in those resources. MCL 324.1705(2). If the proposed conduct does have such an effect, it ***shall not be approved*** if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health,

safety, and welfare. *Id.* (emphasis added). The Climate Organizations make a *prima facie* case of impairment under MEPA from greenhouse gas emissions. Staff does not rebut this *prima facie* showing. Staff's brief does not argue that the 64,217 metric tons CO_2e Mr. Erickson estimates or the 43,356[6] metric tons CO_2e its own expert estimates will result from construction of the Proposed Project will not contribute to climate change and harm Michigan's natural resources. (Staff Br. 82–85).

Climate change is already impairing Michigan's natural resources, and emissions of more greenhouse gases will speed the rate at which climate change occurs and exacerbate the damage it causes Michigan's natural resources. Dr. Howard separately calculated the social cost of carbon dioxide emissions from just the construction of the tunnel and found it could be as high as $8 million. (Howard Direct, 9 TR 1128:8–1129:4, ELP-9 at 30). That cost includes air quality and water quality changes and associated impacts to human health; fresh water supply losses; impacts to forestry, fisheries, and agriculture; biodiversity losses and ecosystem service impacts; impacts to outdoor recreation and other non-market amenities; and catastrophic impacts. (Howard Direct, 9 TR 1117). Dr. Howard explained "it does not matter whether a ton of carbon dioxide is emitted by construction, operation, or downstream combustion of transported products—all those emissions will cause climate damages." (Howard Direct, 9 TR 1130:20–23). The increase in GHG emissions from construction of the tunnel will exacerbate climate change, because GHG emissions need to be substantially reduced to limit the impacts of climate change.

Dr. Overpeck testified that climate change is already impacting Michigan's natural resources, and that these impacts will only become stronger as the scale of the warming grows. (Overpeck Direct, 9 TR 1146–47). Dr. Overpeck testifies that the "ability to attribute an increase

[6] Climate Organizations' Opening Brief explains why Mr. Ponebshek's use of baseload emissions factors was incorrect. (CO Br. at 16).

in the occurrence of extreme temperatures and heat waves to human activities that emit greenhouse gases appears to be robust at the scale of North America, and emerging in the Great Lakes region; there is also growing confidence that the severity of extreme hot temperatures and heat waves is linked to the human-driven warming of the region." (Overpeck Direct, 9 TR 1147–48, *see also* Exhibit ELP-14 at Chapters 2 and 11).

The Climate Organizations have established a *prima facie* case under MEPA. The *Portage* case identified a number of factors that would demonstrate impairment under MEPA sufficient to establish a *prima facie* case. *City of Portage v. Kalamazoo Cnty. Rd. Comm'n*, 136 Mich. App. 276, 280; 355 N.W.2d 913, 914 (1984). Emissions of GHGs from construction of the Proposed Project constitute impairment under each of the Portage factors. The non-exhaustive list in *Portage* finds impairment under MEPA where (1) the natural resource involved is rare, unique, endangered, or has historical significance, (2) the resource is not easily replaceable, (3) the proposed action will have significant consequential effect on other natural resources, or (4) the direct or consequential impact on animals or vegetation will affect a critical number. *Id.* at 280.

The exacerbation of climate change by construction of the Proposed Project will impact rare, unique, endangered, culturally, and historically significant natural resources in Michigan. Expert witnesses for the Bay Mills Indian Community described the impact climate change has already had on fish, wild rice, loons, and sugar maple. (Bay Mills Br. at 33–37). These resources are important to all Michiganders, but they also have historical and cultural significant unique to Tribal Nations. *Id.* Emissions of greenhouse gas emissions will increase warming, exacerbate climate change, and cause further damage to these historically and culturally significant natural resources. (Overpeck Direct, 9 TR 1152).

The exacerbation of climate change by construction of the Proposed Project will prevent the replacement of natural resources because it increases risks of environmental "tipping points." Dr. Overpeck explains that "warming beyond 1.5ºC increases the likelihood of crossing one or more of many climate thresholds, or 'tipping points,' that would accelerate warming and/or its impacts beyond a point that is irreversible on human time scales." (Overpeck Direct, 9 TR 1152:5–9).

The exacerbation of climate change by construction of the Proposed Project will have significant consequential effect on other natural resources. The direct and consequential impact on animals or vegetation will affect a critical number. Dr. Overpeck explains:

> This dependence of impacts on the degree of warming highlights the imperative to reduce emissions as much as possible, as fast as possible. Consistent with this observation, we are now experiencing increasing climate change impacts that are in agreement with IPCC projections and that are certain to intensify in a warmer world. As these impacts become more common and more extreme, they are also likely to co-occur and compound in ways that multiply their costs to humans, society, and natural systems.

(Overpeck Direct, TR 1152:1–7). Mr. Erickson explains that use and production of all three major fossil fuels—coal, gas, and oil—must decline dramatically to meet the 1.5 °C limit. (Erickson Direct, 9 TR 1047).

Mr. Erickson estimates greenhouse gas emissions from the construction of the tunnel. Dr. Howard monetizes those emissions. Dr. Overpeck testifies that greenhouse gas emissions are contributing to climate change and that increases in the scale of warming will impair and destroy Michigan's natural resources. Staff's fails to support its assertion that the greenhouse gas emissions from construction of the Proposed Project do not impair the environment because they are "typical" of this type of project and fails to counter the Climate Organization's *prima facie* case. Dr. Overpeck is clear that increases in greenhouse gas emissions matter, even if they—and

perhaps especially if they—are "typical." The magnitude of the harm Michigan experiences from climate change is directly related to the degree of warming. This is why it is "imperative to reduce emissions as much as possible, as fast as possible." (Overpeck Direct, 1152:1–3). Staff, Enbridge, and the Propane Associations fail to rebut this *prima facie* case.

Second, Staff inappropriately excludes indirect, or "Scope 3," emissions. While the construction alone establishes a *prima facie* case, indirect emissions from the Proposed Project should also be considered. Climate Organizations Opening Brief explained why relying on the Scope 1/2/3 construct is inappropriate for evaluating infrastructure projects. (CO Br. at 15–16). Even if the Commission were to adopt the Scope 1/2/3 construct here, it should include Scope 3 emissions. Staff argues that Scope 3 emissions should not be included because they are optional under the Greenhouse Gas Protocol for corporate accounting and reporting. (Staff Br. at 83). The document cited by Staff was not developed to guide decisionmakers in assessing environmental impacts of infrastructure projects that cause greenhouse gas emissions. The GHG Protocol Corporate Standard was developed to allow companies to manage GHG risks in a competitive business environment. The protocol was developed to "serve several business goals."[7] Because the protocol is focused on GHG emission reductions as a business tool, it recommends consideration of Scope 3 emissions only where it achieves business goals. The protocol provides examples of situations where there may be business-related reasons to develop a corporate strategy around Scope 3 emissions. MEPA does not limit consideration of pollution to situations serving business goals. Under MEPA, the question is whether GHG emissions are the result of the conduct at issue. The protocol recognizes that "Scope 3 emissions are a consequence of the activities of the company, but occur from sources not owned or controlled by the company."[8] This language

[7] https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf
[8] https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf at 27.

supports including Scope 3 emissions in a MEPA analysis, even though the protocol's Scope 1/2/3 construct intended for business use is not a useful guide for evaluating environmental harm from greenhouse gases under MEPA.

Furthermore, other GHG assessment standards, including others published by the GHG Protocol effort relied on by Staff, were designed (unlike the Corporate Protocol) for infrastructure projects. Namely, the GHG Protocol's Policy and Action standard was designed for assessing the GHG emissions consequences of "policies and actions," which specifically include "Provision of (or granting a government permit for) infrastructure."[9] That standard says that GHG emissions evaluated should include indirect effects such as "changes in supply and demand" and "changes in upstream and downstream activities, such as extraction and production of energy and materials,"[10] which is what Climate Organizations' expert Mr. Erickson did. Had Staff used this correct standard—rather than the inappropriate Corporate Standard—they would have evaluated such indirect effects of the pipeline replacement project, much like Mr. Erickson did.

The Commission has already concluded that its MEPA analysis must "extend to the products being shipped through the Replacement Project." (April 21, 2021, Order at 64). The Commission's conclusion is consistent with how federal courts have treated greenhouse gas emissions under the federal NEPA statute. Federal courts have often concluded that it is both possible and necessary to include indirect emissions. *See Ctr. For Biological Diversity v. Bernhardt*, 982 F.3d 723, 738 (9th Cir. 2020); *Sierra Club v. FERC*, 867 F.3d 1357, 1371–74 (D.C. Cir. 2017); *Friends of the Earth v. Haaland*, No. CV 21-2317 (RC), 2022 WL 254526, at *14 (D.D.C. Jan. 27, 2022); *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt*., No. 3:20-CV-00290-SLG, 2021 WL 3667986, at *20 n. 201 (D. Alaska Aug. 18, 2021); *San Juan Citizens*

[9] https://ghgprotocol.org/sites/default/files/standards/Policy%20and%20Action%20Standard.pdf at 27.
[10] https://ghgprotocol.org/sites/default/files/standards/Policy%20and%20Action%20Standard.pdf at 52.

All. v. United States Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1242–43 (D.N.M. 2018) (citing "several persuasive cases that have determined that combustion emissions are an indirect effect of an agency's decision to extract those natural resources").

Finally, Staff argues that if the Dual Pipelines are shut down, Enbridge will continue to transport the same amount of oil, from the same oil fields, to the same refiners and end-users, regardless of the price of that oil. Enbridge adopts Staff's position in its own opening brief. Staff's position is that "the only way to materially affect the GHG emissions from [petroleum] products is to alter the demand for these products—the very consumption of them by the end-users." (Staff Br. 97–98). Climate Organizations opening brief describes the substantial body of literature establishing that demand for oil is responsive to price, especially in the long-run, and that not replacing the Dual Pipelines with the Proposed Project would affect price and, by extension, oil consumption and GHG emissions. (CO Br. at 32–38). Staff's flawed assumption undermines its argument that alternative transportation methods such as rail or truck would increase GHG emissions. As discussed more fully below, Mr. Erickson's testimony acknowledged the fact that rail transport emits more greenhouse gases than pipeline transport. But because rail is more expensive, and less oil is therefore transported, the net effect is a reduction in GHG emissions. (Erickson Direct, 9 TR 1075).

IV. RESPONSE TO ENBRIDGE'S OPENING BRIEF

Enbridge first attempts to limit the Commission's MEPA analysis to the act of "locating the replacement pipe segment within the state-owned utility tunnel." (Enbridge Br. at 31). Enbridge argues that putting the pipe inside an already-constructed tunnel will have no impact on the environment and satisfies MEPA. Enbridge's overly simplistic argument fails. As explained

in the lengthy footnote on page 31 of the Company's brief, the tunnel is a pipeline fixture pursuant to Act 16, and the construction of the tunnel must be considered in the MEPA analysis.

Enbridge next argues that, even if the Commission considers the construction of the tunnel, there are no MEPA concerns. With respect to GHG emissions, Enbridge simply asserts that capacity will not be increased due to the project. (Enbridge Br. at 33). Enbridge does not address or rebut Mr. Erickson and Mr. Ponebshek's testimony that construction of the proposed project will cause greenhouse gas emissions. Enbridge does not deny that greenhouse gas emissions exacerbate climate change. Nor does Enbridge rebut the impact greenhouse gas emissions have on climate change or the damage exacerbation of climate change will have on Michigan's natural resources. As explained above, a *prima facie* case is established on that testimony alone, which Enbridge fails to rebut. Furthermore, as discussed above, the Commission should not assume that the Governor's Notice revoking and terminating the easement for the Dual Pipelines is not valid, or that her other efforts to shut down the Dual Pipelines have been abandoned. The Governor has committed to shutting down the Dual Pipelines.

Enbridge argues that a temporary shutdown of the Dual Pipelines is unlikely because the Governor voluntarily dismissed a civil action to enforce the Notice. Enbridge incorrectly states that "the State has abandoned its effort to enforce its Notice." (Enbridge Br. at 36). Yet Enbridge acknowledges that the Notice remains in effect. (6 TR 492:2–5). And the Governor and Attorney General continue to pursue a shutdown of the Dual Pipelines through multiple pathways. The Governor's press release announcing her dismissal of the federal lawsuit stated that "[t]he governor's goal remains protecting the Great Lakes, which means shutting down the Line 5 dual oil pipelines in the Straits of Mackinac as soon as possible. By clearing the way for the lawsuit filed by Attorney General Dana Nessel to go forward in Michigan state court, today's action seeks to

protect the Great Lakes and our state's natural resources, which support 1.3 million jobs, including 350,000 jobs in Michigan, and generate $82 billion in wages annually."[11] The AG's press release stated: "I fully support the Governor in her decision to dismiss the federal court case and instead focus on our ongoing litigation in state court. The state court case is the quickest and most viable path to permanently decommission Line 5. The Governor and I continue to be aligned in our commitment to protect the Great Lakes and this dismissal today will help us advance that goal."[12] Circumstances have not changed. The Governor and the Attorney General remain committed to shutting down the Dual Pipelines, and therefore a shutdown of the Dual Pipelines is the most appropriate outcome against which to judge the environmental effects of the Proposed Project.

Enbridge argues that transporting Line 5 oil by rail or truck would produce more GHGs than transporting the oil by pipeline. Enbridge's argument is flawed because the Company assumes that the volume of oil transported will remain the same regardless of the method of transportation. (Enbridge Br. at 36). Enbridge does not address the fact that transporting oil by rail, especially from Western Canada, is more expensive than transporting that oil by pipeline. (Earnest Cross, 7 TR 734). Enbridge incorrectly states that no evidence was introduced to suggest that an alternative transportation method would produce less GHGs than transportation on Line 5. (Enbridge Br. at 37). Mr. Erickson testified that, if rail was the only option for transporting Line 5 oil, that less oil would be produced and consumed, and that would result in less GHG emissions. Mr. Erickson properly opined that, because rail is a more expensive alternative, less oil would be produced from oil fields and less oil ultimately consumed by end-users. (Erickson Direct, 9 TR 1065). Mr. Erickson factored into his analysis the fact that rail transport emits more GHGs than pipeline transport. (Erickson Direct, 9 TR 1075). His ultimate conclusion was that the net effect

[11] https://www.michigan.gov/whitmer/0,9309,7-387-90499-573181--,00.html
[12] https://www.michigan.gov/ag/0,4534,7-359-92297_47203-573159--,00.html

of more expensive rail transport was that overall GHG emissions would go up if Line 5 were not available to transport oil by pipeline.

Enbridge unsuccessfully sets forth a variety of reasons that a shutdown of Line 5 will not reduce demand. (Enbridge Br. at 37). The Company's repetition of Staff's argument on demand elasticity is addressed above and in the Climate Organizations' Opening Brief at 32–38. Enbridge alone argues that the closure of Line 5 will not result in a shortage of pipeline capacity for crude oil, relying solely on the testimony of its expert consultant, Mr. Earnest. Mr. Earnest bases this conclusion on an eyeballed estimate of a figure representing available pipeline capacity in Western Canada. However, the Company's argument is undermined by the Government of Canada's amicus briefing in support of Enbridge in U.S. federal court and by official testimony of the Alberta Ministry of Energy. Both warn of significant capacity constraints if Line 5 is shut down. (Earnest Cross, 721:8–725:17, 726:22–727:13). Enbridge persists in misinterpreting Mr. Erickson's identification of this capacity shortfall to rest on completion of the Trans Mountain Expansion Project. (Enbridge Br. at 39). As explained in the Climate Organization's opening brief at page 26, Mr. Erickson's conclusion that capacity will be constrained is not dependent on any assumption about the Trans Mountain Expansion Project. Mr. Erickson simply points out, in a parenthetical, that further constraints to capacity in other pipelines in Earnest Figure 1 could result in even greater rail costs than assumed in his core analysis. (Erickson Direct, 9 TR 1070:8–17). Finally, Enbridge's focus on capacity constraints for Bakken crude is poorly placed, as the Company admits that very little Bakken oil is transported on Line 5. (Enbridge Br. at 40).

The Climate Organizations address the errors in Enbridge witness Mr. Earnest's testimony in great detail in their opening brief. To summarize, Mr. Erickson's estimate that rail transport would increase cost $6 per barrel is reasonable and supported by a variety of sources. (CO Br. at

22). This increased cost applies to the marginal cost of transporting oil, and it is improper to average this cost against all barrels, as Mr. Earnest does. Mr. Erickson's Figure 1 supports his conclusion that if the Proposed Project is not approved, increases in the marginal cost of rail combined with pipeline capacity constraints will strand 290,000 barrels of oil per day.

Enbridge cites to Staff testimony to argue that fundamental principles of economics do not apply because Saudi Arabia and Russia sometimes engage "in a production dance with the international crude oil market by increasing or decreasing production at will." (Enbridge Br. at 42). In *Ctr. for Biological Diversity*, the Ninth Circuit expressly rejected the notion that complexities in global oil markets could excuse failure to consider the impact a given fossil fuel infrastructure project could have on greenhouse gas emissions. *Bernhardt*, 982 F.3d at 738. In response to that same vague and unsupported claim Staff and Enbridge make here, the Ninth Circuit found that "[e]ven if the extent of the emissions resulting from increased foreign consumption is not foreseeable, the nature of the effect is." *Id.* The Ninth Circuit specifically noted that studies in the record—some of which were performed by experts in this case—confirmed the effect of increasing domestic oil supply on foreign consumption and the feasibility of its estimation. *Id.* Despite its clear ability to do so, Enbridge provides no quantitative analysis of the impact a closure of Line 5 would have on global oil markets. Instead, the Company asserts that it would be "naïve and an oversimplification to suggest that world oil prices and world oil production will turn on whether Line 5 is operational." (Enbridge Br. at 42). Yet the federal government has conducted exactly such an analysis of world oil prices and world oil production in oil and gas leasing cases, and courts have rejected the government's failure to make use of that quantitative analysis in greenhouse gas emissions accounting. In a case involving the rescission of oil and gas leases, the United States District Court for the District of Columbia found it appropriate for the

Bureau of Ocean Energy Management to translate an estimate of the reduction in barrels of oil at various price point into greenhouse gas emissions by "[u]sing standard energy contents (from the U.S. Department of Energy) and carbon contents (from the U.S. Environmental Protection Agency), and discounting the oil used in products and not combusted." *Friends of the Earth,* 2022 WL 254526 at *14. That is the analysis Mr. Erickson conducted here. The reduction in barrels of oil in *Haaland* was of the same magnitude as this case. The one, four, and six-billion barrel scenarios in *Haaland* were over the life of the leases. Here, the 150,000 barrels per day in reduced oil consumption amounts to approximately 54 million barrels per year.[13] In twenty years, this exceeds the one-billion-barrel "low" price scenario contemplated in *Haaland*, and in the 99-year life span of the proposed project well exceeds the mid and high price scenarios. *Id.* at *11.

In *Sovereign Iñupiat,* the federal government attempted to argue, without supporting data, that a negligible impact and a purported lack of information on foreign energy consumption and emissions patterns justified not calculating foreign greenhouse gas emissions. 2021 WL 3667986 at *10–11. The federal court rejected that explanation because the government did not provide or describe research it relied upon to reach those conclusions. Staff and Enbridge similarly make sweeping assertions and conclusions about foreign oil consumption without providing data and research to support those conclusions.

In *WildEarth Guardians*, the U.S. District Court for the District of Columbia rejected a blanket assertion by the federal government in an oil and gas leasing case that is strikingly similar to Enbridge and Staff's arguments in this case. The Bureau of Land Management argued, without any supporting data analysis, that emissions from federal oil and gas leasing represented only an

[13] Mr. Erickson estimates that global oil consumption would increase by 148,000 barrels per day if the Proposed Project is constructed. (Erickson Direct, 9 TR 1074, where it was rounded up to 150,000), which is equivalent to a 148,000 barrel per day decrease if Line 5 does not operate. 148,000 barrels per day multiplied by 365 days in a year equals 54,020,000.

incremental contribution to the total regional and global GHG emission level. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 76 (D.D.C. 2019). The court recognized that quantification of greenhouse gas emissions based on global market models posed inherent uncertainties that should be discussed. *Id.* at 70. But those uncertainties did not entitle the government to "simply throw up its hands and ascribe any effort at quantification to a crystal ball inquiry." *Id.* This is precisely the strategy Enbridge and Staff employ here. The Commission must reject Enbridge and Staff's arguments and require an actual analysis of market impacts and resulting greenhouse gas emissions.

V. RESPONSE TO THE PROPANE ASSOCIATIONS

The Propane Associations repeat Enbridge and Staff's arguments that the Proposed Project does not pollute, impair, or destroy natural resources. The Climate Organizations addressed the flaws in those arguments in their opening brief and in reply to Enbridge and Staff's opening briefs, above.

The Propane Associations argue that the no-pipeline alternative is not feasible and argue that it is not consistent with the public health, safety, and welfare. (PA Br. at 20–21). The Propane Associations argue that if Line 5 were to shut down propane supply "would disappear." (PA Br. at 22). The Propane Associations argue that the recommendations of the Michigan Pipeline Task Force are insufficient to address the short-term price increases that would occur if Line 5 shut down. The Propane Associations make no effort to quantify those price increases, but Dr. Stanton does. Dr. Stanton estimates that the continued use of the same amount of propane in a no-pipeline scenario would cost the average Michigan propane-using household $55 to $209 per year. (Stanton Direct, 9 TR 968:3–7). The Propane Associations do not address the cost of the Proposed Project's climate impacts, which Dr. Howard estimates are $41 billion.

The Propane Associations also argue that a transition to heat pumps is implausible and unaffordable. They criticize Dr. Stanton's testimony predicting that over time more and more Michigan households will find it cost-effective to switch to electric heat-pumps—especially if the cost of heating with propane increases. (PA Br. at 23). The Propane Associations and Staff both argue that it would cost more than $1.1 billion to convert households from propane to electric heat pumps. But the Propane Associations do not even mention the recent study contributed to by an Upper Peninsula academic, specifically addressing Michigan as a cold-weather state, that concludes that the total life cycle cost favors heating electrification in all cases. As the authors so clearly explained: "no one in the region should be continuing to use propane for heating based on economics alone." (Ex. ELP-29 at 8).

The Propane Associations argue that the Governor's MI Healthy Climate Plan is not relevant to this case, because it arises from an executive directive rather than a statute. (PA Br. at 25). Dr. Stanton does not cite to the Governor's Executive Directive because it has force of law. The MI Healthy Climate Plan is evidence that the no-pipeline alternative discussed by Dr. Stanton is consistent with the public health, safety, and welfare. The Executive Directive stated that "Carbon-neutrality is needed not only for the environment and public health, but also for the resilience of our economy." (Ex. ELP-19). Governor Whitmer's directive is consistent with an editorial published by the editors of health journals worldwide, including in the New England Journal of Medicine, explaining that: "The greatest threat to global public health is the continued failure of world leaders to keep the global temperature rise below 1.5° C and to restore nature." (Ex. ELP-16). The Intergovernmental Panel on Climate Change found the following with respect to the Midwest specifically: "Climate change is expected to worsen existing conditions and introduce new health threats by increasing the frequency and intensity of poor air quality days,

extreme high temperature events, and heavy rainfalls; extending pollen seasons; and modifying the distribution of disease-carrying pests and insects (*very likely, very high confidence*)." (Ex. ELP-3 at 42). The Propane Associations do not address these costs, or discuss how reducing GHG emissions and moving away from fossil fuels is consistent with the public health, safety, and welfare. Instead, the Propane Associations would have this Commission determine that increasing fossil fuel use is in the interests of our public health, safety, and welfare.

The Commission cannot approve conduct that is contrary to the public health, safety, and welfare, even if there are no feasible alternatives. The Propane Associations, Enbridge, and Staff all suggest that the Commission must approve an alternative route through the Straits because otherwise the Dual Pipelines may continue to operate. Climate Organizations agree that the Dual Pipelines should be shut down. But MEPA does not require the Commission to approve actions that further impair the environment simply to alleviate existing pollution. In *Dwyer v. City of Ann Arbor*, 79 Mich. App. 113, 125; 261 N.W.2d 231, 237 (1977), *rev'd on other grounds*, 402 Mich. 915; 387 N.W.2d 926 (1978), the court recognized that there was no alternative to the operation of an existing sewage treatment plant, but found that allowing the expansion of the plant would aggravate existing environmental pollution. The court recognized that there is no alternative to sewage treatment, but still found that expansion of a plant that polluted the environment was not "consistent with the promotion of public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction." *Id.* and MCL 324.1703(1). *Dwyer* makes clear that Enbridge may not pollute, impair, and destroy Michigan's natural resources indefinitely, even if there is no alternative pipeline route through the Straits consistent with MEPA.

VI. CONCLUSION

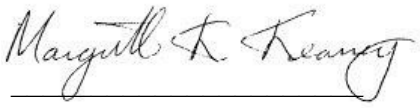
Neither Enbridge, Staff, nor the Propane Associations can rebut the Climate Organizations' *prima facie* case under MEPA. The Climate Organizations' witnesses provide evidence that the construction of the tunnel emits significant amounts of greenhouse gases. The indirect greenhouse gas emissions, which the Commission must take into account when evaluating an oil pipeline project, exceed 27 million metric tons CO_2e. The impacts of these emissions, when monetized using the social cost of carbon, exceed $41 billion. These emissions contribute to increasing climate change impacts that harm Michigan's natural resources and push us towards a tipping point that is irreversible on human time scales.

Staff and Enbridge brush these climate impacts off as "typical" or refuse to consider them because an analysis of global oil markets and prices is complicated and out of their control. But multiple federal court decisions demonstrate that these market analyses can be conducted and they do provide valuable information for greenhouse gas accounting. Enbridge pays its own experts handsomely to conduct such analyses. The Commission must not back away from that analysis here.

Enbridge proposes this tunnel to eliminate the risk of an oil spill in the Great Lakes. But the action Enbridge proposes to eliminate the risk of an oil spill only creates another environmental harm—the exacerbation of climate change. Shutting down the Dual Pipelines and not building the tunnel is a feasible alternative Enbridge should have analyzed. On the record evidence before it, this Commission must conclude that the Proposed Project violates MEPA and deny Enbridge's Act 16 application.

March 11, 2022

Respectfully Submitted,



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STATE OF MICHIGAN
MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of **Enbridge Energy, Limited Partnership's** declaratory request that it has the requisite authority needed from the Commission for the proposed Line 5 pipeline Project.	)))))	Case No. U-20763

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief on Behalf of the Environmental Law and Policy Center and Michigan Climate Action Network** was served by electronic mail upon the following Parties of Record, this 11th day of March, 2022.

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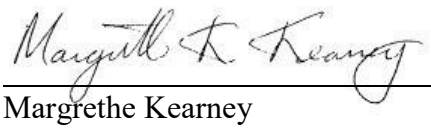

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