



Protecting the Common Waters of the Great Lakes Basin  
Through Public Trust Solutions

November 6, 2020

*Via E-filing*

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

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following is attached for paperless electronic filing:

For Love of Water (FLOW) Application for Leave to Appeal the Ruling by  
Administrative Law Judge on Scope of Review of Evidence and

Proof of Service

Sincerely,

James Olson  
[jim@flowforwater.org](mailto:jim@flowforwater.org)

xc: Parties to Case No. U-20763

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of Enbridge  
Energy, Limited Partnership for the Authority to  
Replace and Relocate the Segment of Line 5  
Crossing the Straits of Mackinac into a Tunnel  
Beneath the Straits of Mackinac, if Approval is  
Required Pursuant to 1929 PA 16; MCL 483.1 et  
seq. and Rule 447 of the Michigan Public Service  
Commission's Rules of Practice and Procedure, R  
792.10447, or the Grant of other Appropriate Relief

U-20763

ALJ Dennis Mack

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**APPLICATION FOR LEAVE TO APPEAL LEGAL RULING BY ADMINISTRATIVE  
LAW JUDGE ON THE SCOPE OF REVIEW OF EVIDENCE  
BY INTERVENOR FOR LOVE OF WATER (FLOW)**

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## APPLICATION FOR LEAVE

Pursuant to Rule 433,<sup>1</sup> Intervenor For Love of Water (“FLOW”) submits this Application for Leave to Appeal the decision on October 23, 202 by Administrative Law Judge (“ALJ”) Dennis W. Mack, attached as Exhibit A, granting in part Enbridge Energy Limited Partnership’s (“Enbridge”) Motion in Limine that would exclude critical evidence from the hearing and submission of a full case to the Commission int his matter.

On October 23, 2020, the ALJ granted in part, and denied in part, Enbridge’s Motion in Limine to narrow the scope of review or exclude significant evidence to the exercise of authority and duties by the Commission under Act 16, the Michigan Environmental Protection Act (“MEPA”),<sup>2</sup> and the common law public trust doctrine in the Great Lakes.

Based on the foregoing, consistent with Act 16 and as it pertains to MEPA, the conduct at issue in this case does not include the environmental effects from the extraction, refinement, or consumption of the oil transported on Line 5. Therefore, any evidence in that regard, including the environmental effect of greenhouse gas emissions and climate change, is irrelevant. RULING Consistent with the foregoing, Enbridge’s Motion in Limine is:

1. Denied as it pertains to the Utility Tunnel.
2. Granted regarding the operational aspects, including the public need and safety, of the entirety of Line 5. U-20763 Page 20 Issued: October 23, 2020.
3. Granted as it pertains to the review of the project under MEPA does not entail the environmental effects of greenhouse gas emissions and climate change.<sup>3</sup>

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<sup>1</sup> Mich. Admin. Code R 792.10433.

<sup>2</sup> MCL 324.1701 et seq.; *State Highway Commission v Vanderkloot*, 392 Mich 159 (1974); *Ray v Mason County Drain Commissioner*, 393 Mich 294, 370 (1975).

<sup>3</sup> ALJ Decision and Order, Oct. 23, 2020, pp. 19-20.

The Commission should grant this Application for Leave and decide the issues presented by the ALJ's October 23, 2020 decision and order before the evidentiary hearing in this matter because:

(1) a decision on the ruling on scope of review concerning critical evidence of public need and necessity, under Act 16 and its rules, the MEPA, and the public trust interests of citizens in the Great Lakes, before the full case is submitted to the Commission will materially advance a timely and full submission and resolution of the case; and/or:

(2) a decision on the ruling before submission of the full case to the Commission will avoid and prevent substantial harm or prejudice to all parties involved and the public at large;

(3) a reversal and appropriate response to the ruling below is consistent with the Commission's finding in its Order, June 30, 2020 that this case involves "significant factual and policy questions and complex legal determinations that can only be resolved with the benefit of discovery, comprehensive testimony, and a well-developed record in a contested case proceeding."<sup>4</sup>

If the Commission does not grant leave and decide the legal questions involving the scope of review that has excluded evidence essential to the development of a full record now, it will deprive the Commission of the exercise of its full authority, result in inefficiency and duplication of proceedings, costs and resources, and result in a manifest injustice to all parties. For example, should the Commission reverse the ALJ's scope of review ruling that unlawfully excludes evidence after this hearing, the matter would be remanded for discovery and yet another hearing on the excluded evidence.

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<sup>4</sup> Commission's Order, June 30, 2020, p. 69.

A decision on the ALJ ruling now will assure that the full case is submitted to the Commission after the completion of the hearing in August, 2021, and will avoid the unnecessary expense, time, burden and injustice on all involved. A reversal of the ruling and entry of an appropriate order requiring a full consideration and determination of the inseparable and complex facts involving Michigan's future, the waters and lands of the Great Lakes, and the environment will promote the interests of the public at large. FLOW submits the following brief in support of the Application.

## **BRIEF IN SUPPORT OF APPLICATION FOR LEAVE**

### **I. INTRODUCTION**

The ALJ correctly ruled that the proposed construction of a utility tunnel that will lease public trust bottomlands from the State to Enbridge for 99 years for its exclusive use and operation of a newly constructed crude oil pipeline are subject to the authority of the Commission under Act 16<sup>5</sup> and Rule 447.<sup>6</sup> In doing so, the ALJ recognized the Commission's broad authority under Act 16, and that matters falling within Act 16(1)2 and bearing on the standards for exercising that authority to prevent the separation of the new tunnel easement, new tunnel and tunnel pipeline.

However, in ruling on Enbridge's Motion in Limine to limit the scope of review and exclude evidence on the intended use and purpose of the project that will commit the State and its citizens to a new \$500 million tunnel<sup>7</sup> and tunnel pipeline and, necessarily, the extended use of the existing 67-yearold Line 5, the ALJ severed the intended purpose of a new tunnel and pipeline that will

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<sup>5</sup> 1929 PA 16, MCL 483.1 et seq. ("Act 16").

<sup>6</sup> R 792.10447 et seq. ("Rule 447").

<sup>7</sup> Enbridge's estimate of \$500 million was for the construction of a tunnel with 10 ft diameter. Now 18 -21 ft in diameter, the volume of geological material to be removed has quadrupled. Enbridge has not revised its tunnel cost estimates.

extend Enbridge's business and operations to transport crude oil and natural gas liquids in the tunnel and pipeline far beyond its current status.

The ALJ's ruling improperly excludes critical and complex evidence concerning these related and inseparable components of the proposed project: to engage in the business and operate the new tunnel and pipeline to transport 8.4 billion gallons of crude oil a year for up to 99 years. Enbridge and Staff, in their arguments below, stated or assumed that the existing 67-year old Line 5 dual pipelines will continue to operate indefinitely. This is untrue; historical failure of the original structure, strong currents, the substantial structural change of the dual pipelines suspended into the waters above the Straits, and reported anchor strikes point to an end of the existing Line 5. A commitment by the State to a \$500 million or more new tunnel and pipeline necessarily implies or assumes the continued use of Line 5 beyond its useful life, which is tied to the new tunnel project.

The ALJ's ruling deprives the Commission and the parties of a fully developed record to determine (1) public need or "necessity;" (2) "the public interest;" and (3) a "reasonable alternatives"<sup>8</sup> In addition, as noted above, the ruling limits the Commission's legal duty to consider and/or determine, fully, the nature and extent of likely effects and alternatives related to the proposed tunnel and pipeline and its intended purpose, as described above, contrary to the duties imposed on the Commission by the MEPA<sup>9</sup> and public trust law.

## **II. STATEMENT OF FACTS AND PROCEEDINGS**

In December 2018, Enbridge entered into a "tunnel agreement" with former Governor Richard Snyder, the Michigan DNR, and former Michigan DEQ for the construction of a tunnel

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<sup>8</sup> *In re Enbridge Energy Limited Partnership*, Case No. U-17020, Final Order, Jan. 31, 2013, p 5.

<sup>9</sup> *State Highway Commission v Vanderkloot*, 392 Mich 159 (1974); *Ray v Mason County Drain Commissioner*, 393 Mich 294, 370 (1975).

bored under the Straits of Mackinac, a new oil pipeline in the tunnel, and decommissioning the existing dual pipelines across the lakebed of the Straits of Mackinac once the tunnel and new pipeline obtain all governmental approvals and permits and are completed—estimated to take 5-7 years. Along with the tunnel agreement, the DNR granted a new 2018 public utility easement for the new tunnel and pipeline to the Mackinac Straits Corridor Authority (“MSCA” ),<sup>10</sup> and the MSCA assigned the easement to Enbridge<sup>11</sup> and entered into a 99-year lease<sup>12</sup> to Enbridge of the tunnel for its pipeline and continued operation of Line 5. To date, the former DEQ and current Department of Environment, Great Lakes, and Energy (“EGLE”) have not authorized the deed, assignment, or lease as required by the Great Lakes Submerged Lands Act (“GLSLA”).<sup>13</sup>

Enbridge filed the instant application under Act 16 in April, 2020, stating that it requested authority to “relocate” the existing dual 20-inch diameter pipelines in the 4.1-mile Straits of Mackinac by building and operating the tunnel and new pipeline.<sup>14</sup> Along with its Application Enbridge filed a motion for declaratory ruling that the project (1) does not include the tunnel itself and (2) involves a mere relocation of the 4.1 mile dual pipeline segment of Line 5 across the Straits, arguing that the Commission’s 1953 Order, 67 years ago, that Line 5 was fixed in time without authority over the dramatic changes of public need, safety, public interest and reasonable alternatives in 2020. After extensive briefing, public comment, and review, the Commission by its June 30, 2020 Order denied and deferred the request based on the following findings:

1. “The Line 5 Project [Tunnel Project] differs significantly from what was approved in the 1953 orders and the 1953 easement and its amendment.”<sup>15</sup>

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<sup>10</sup> Ex A-6, Enbridge Application (hereafter the exhibits to the Application will be denoted as “Ex A-\_\_\_”)

<sup>11</sup> *Id.*

<sup>12</sup> Ex A-5.

<sup>13</sup> Part 325, sections 32502-32508, MCL 324.32502-32508.

<sup>14</sup> Application, paragraph 3.

<sup>15</sup> Commission Decision and Order, June 30, 2020, pp. 57-58.



2. “The language of Rule 447 does not distinguish between a new construction of a pipeline facility and construction that replaces, maintains, or relocates an existing facility. Therefore, the Commission finds that, pursuant to Rule 447(1)(c), Enbridge is required to file an Act 16 Application for approval of the Line 5 Project.”<sup>16</sup>
3. “[T]he Line 5 Project is not simple maintenance or equivalent replacement of an existing pipeline. Rather, Line 5 Project proposes to replace the 20-inch diameter Dual Pipelines with a new, 30-inch diameter, single pipeline to be relocated within a new concrete-lined tunnel 60 to 250 feet beneath the lakebed of the Straits” and “decommissioning the Dual Pipelines.”<sup>17</sup> The Commission finds that the Line 5 Project is new construction pursuant to Rule 447(2)(c).<sup>18</sup>
4. In addition, the proposed project would not utilize an existing easement, but would be relocated to a new tunnel with a new easement of its own...<sup>19</sup>
5. “In this case, the Commission finds that Enbridge’s Line 5 Project involves significant factual and policy questions and complex legal determinations that can only be resolved with the benefit of discovery, comprehensive testimony, and a well-developed record in a contested case proceeding.”<sup>20</sup>

After a prehearing conference, on August 12, 2020, Enbridge filed the instant Motion in *Limine*<sup>21</sup> to exclude evidence on: (1) the tunnel because it is unrelated; (2) public need or necessity as to Line 5, as opposed to the 4.1 mile Straits segment, because the public need for Line 5 as a whole was decided by the Commission’s order in 1953; (3) any likely environmental effects, including global warming and climate change; and (3) alternatives, including using existing capacity in the Enbridge Lakehead and connected oil pipeline systems, could not be considered.<sup>22</sup>

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<sup>16</sup> 20 *Id.*, p. 61.

<sup>17</sup> *Id.*, p. 68, 3 lines from bottom of page.

<sup>18</sup> *Id.*, p. 62.

<sup>19</sup> *Id.*, pp. 65, 67.

<sup>20</sup> *Id.*, p. 69.

<sup>21</sup> Enbridge Motion in *Limine*, Sept 2, 2020.

<sup>22</sup> The 2018 DNR easement assigned to Enbridge by the Mackinac Straits Corridor Authority is a “public utility easement” granted under Section Part 21, NREPA, “through, under, and upon... bottomlands belonging to or held in trust by the state.”

The ALJ denied Enbridge's motion to limit the Commission's review to simply "relocate" the existing Line 5.

Therefore, *Enbridge's argument that the Utility Tunnel and pipeline are somehow separate and distinct considerations cannot be sustained.*<sup>23</sup>

\* \* \*

*... the purpose of Act 16 is to ensure that pipelines are designed, routed, constructed, and operated in a safe and economical manner.*<sup>24</sup> *The only way to make that determination is for the Commission to have a record that contains all relevant information concerning the proposal to relocate the existing pipelines into the Utility Tunnel... that necessarily requires consideration of the design, construction, and operational features of both so as "to make a qualitative evaluation regarding whether a proposed system would be safe and in the public interest."*<sup>25</sup> (Emphasis added)

On the other hand, the ALJ granted Enbridge's motion to exclude any evidence on "any evidence "on "any issues" of fact regarding the inseparable business and operational aspects of the existing Line 5 with the new tunnel project, including the public need and safety.

As noted, the standards of Act 16 are well established and must be applied in this case [citation omitted] Based on those standards, *this case involves a review of the proposed pipeline relocation under Act 16 to determine whether a public need exists for it, whether it is designed and routed in a reasonable manner, and whether its construction will satisfy applicable safety and engineering standards.* Accordingly, *any issues concerning the current or future operational aspects of the entirety of Line 5, including the public need for the 645-mile pipeline that was approved by the Commission in 1953 and affirmed in Lakehead Pipe Line Co., supra., is outside the scope of this case.*

\* \* \*

Based on the foregoing, *any evidence concerning the current and future operational aspects of the entirety of Line 5, including the public need and safety issues, is outside the scope of this case.* Therefore, Enbridge's Motion in Limine concerning the current operational aspects of Line 5 is granted.<sup>26</sup> (Emphasis added)

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<sup>23</sup> ALJ Decision and Order, p. 8.

<sup>24</sup> See Case No. U-20763, June 30, 2020 Order, pg. 59; see also Case No U13225, July 23, 2002 Order, pgs. 4-5.

<sup>25</sup> ALJ Decision and Order, p. 9.

<sup>26</sup> ALJ Decision and Order, pp. 15-16.

Further, the ALJ also granted Enbridge’s motion and limited the application of the duty to consider effects and alternatives under MEPA to just those related to the tunnel and “replacement” pipeline; at the same time the ALJ excluded any evidence on the likely effects and alternatives related to the intended purpose of the project—build a new tunnel, new pipeline, decommission the old dual lines, and build, control, lease-back and operate the tunnel and pipeline in conjunction with Line 5 for up to 99 years.

Because the Utility Tunnel must be considered in determining whether the project can be approved under Act 16, it is necessarily part of the “conduct” in a licensing proceeding subject to review under MEPA.<sup>27</sup>

\* \* \*

This leaves the issue of whether the “conduct” reviewed under MEPA entails the environmental effects of the use of the fossil fuels, specifically greenhouse gas emissions that the intervening parties contend contribute to climate change. The [Intervenor] ELPC, along with FLOW and the Joint Response, argues that greenhouse gases contribute to climate change that results in the pollution, impairment, and destruction of the air, water... and other natural resources, and thus are proper considerations under MEPA.

\* \* \*

... MEPA requires an examination of the “conduct” to determine its effect on the natural resources. *The conduct in this case is the activity proposed in the Application and subject to the Commission’s jurisdiction under Act: the replacement of the existing pipelines on the bottomlands with a pipeline in a Utility Tunnel.*<sup>28</sup>

\* \* \*

*FLOW also argues that MEPA and public trust doctrine requires (sic) an examination of the entirety of Line 5... Consistent with the ruling that the scope of this case is controlled by Act 16, and it cannot by implication be constricted or expanded by other authority, this argument is rejected.*

\* \* \*

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<sup>27</sup> The ALJ noted that “However, it is recognized that EGLE and the Army Corps of Engineers will also review the construction of the Utility Tunnel under the respective substantive resource protection statutes they administer, and some degree of deference must be afforded those determinations. This, in turn, allows the Commission to rely on the expertise of those agencies as part of its MEPA review, and avoids the potential for conflicting results between the agency decisions.” In fact, in instructing the public at a public meeting on the process of Enbridge’s application to EGLE to locate and construct the tunnel and pipeline in the Straits, officials for EGLE stated, to the effect that, it would not conduct a full assessment under MEPA and other laws of the impacts and alternatives to the tunnel, because the MPSC would do that.

<sup>28</sup> ALJ Decision and Order, p. 18.

*Rather, the Commission's jurisdiction under Act 16 is over the proposal to relocate the existing pipelines into the Utility Tunnel, and a component of that jurisdiction is examining the environmental impacts of that conduct under MEPA.*

\* \* \*

*... the conduct at issue in this case does not include the environmental effects from the extraction, refinement, or consumption of the oil transported on Line 5. Therefore, any evidence in that regard, including the environmental effect of greenhouse gas emissions and climate change, is irrelevant.<sup>29</sup> (Emphasis added)*

### **III. STANDARD OF REVIEW**

Rule 433(2) sets establishes the standard of review for deciding an interlocutory appeal. The Commission will grant an application for leave to appeal and review the presiding officer's ruling if any of the following provisions apply:

- (a) A decision on the ruling before submission of the full case to the commission for final decision will materially advance a timely resolution of the proceeding.
- (b) A decision on the ruling before submission of the full case to the commission for final decision will prevent substantial harm to the appellant or the public-at-large.
- (c) A decision on the ruling before submission of the full case to the commission for final decision is consistent with other criteria that the commission may establish by order.

If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate.<sup>30</sup> Applications for leave to appeal should be granted because a decision on the ALJ's ruling before the submission of the full case to

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<sup>29</sup> ALJ Decision and Order, pp. 18-19,

<sup>30</sup> Case No. U-18091, February 21, 2019, Order, p. 11.

the Commission will advance the timely resolution of this proceeding, will prevent substantial harm to the appellants and other parties, and promote the interests of the public at large.<sup>31</sup>

#### **IV. ARGUMENTS IN SUPPORT OF APPLICATION FOR LEAVE AND REVERSAL OF THE ALJ RULINGS ON SCOPE AND EXCLUSION OF EVIDENCE.**

##### **A. The ALJ erroneously restricted the Broad Authority of the Commission under Act 16 by excluding review of the new or extended business and operations to transport Crude oil through the new tunnel and pipeline.**

The ALJ stated that “the Commission’s statutory authority will control the determination of whether the issues raised in the Motion are proper for consideration in this case.”<sup>32</sup> This applies to the scope of review on the issues of public need, safety and public interest, and reasonable alternative locations,” and provides ample reasons for reversal of the ALJ excluding any evidence on any issue concerning public need for the parties to introduce evidence and the Commission’s ultimate authority to decide. As will be seen below, the ALJ improperly limited the scope of review under Act 16 and the MEPA.

On June 30, the Commission noted:

The Commission notes that, as set forth in its title, *the purpose of Act 16 “is to regulate the business of carrying or transporting, buying, selling, or dealing in crude oil or petroleum or its products” and “to provide for the control and regulation of all corporations, associations, and persons U-20763 Page 3 Issued: October 23, 2020 engaged in such business, by the Michigan public service commission....”* In addition, Section 1(2) of Act 16 states, in relevant part:

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<sup>31</sup> Consumers Energy’s 2018 Integrated Resource Planning, Case No. U-20165, October 5, 2018, Order, p. 17; Michigan Const., art. 4, sec. 52 (duty to protect paramount public concern in the air, water, and natural resources).

<sup>32</sup> ALJ Decision and Order, p. 3.

A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof . . . by or through pipe line or lines . . . or *exercising or claiming the right to engage in the business of piping, transporting, or storing crude oil or petroleum, or any of the products thereof . . . does not have or possess the right to conduct or engage in the business or operations, in whole or in part, or have or possess the right to locate, maintain, or operate the necessary pipe lines, fixtures, and equipment* belonging to . . . except as authorized by and subject to this act. MCL 483.1(2)

Based on the above language, the Commission finds that it has *broad jurisdiction over the construction and operation of pipeline facilities . . .*” March 7, 2001 order in Case No. U-12334 (March 7 order), p. 13, citing Dehn, 340 Mich at 41; see also, January 31, 2013 order in Case No. U-17020 (January 31 order), p. 5. Moreover, “[i]nherent in that jurisdiction is the power to make a qualitative evaluation regarding whether a proposed system would be safe and in the public interest.” March 7 order, p. 14. Case No. U-20763, June 30, 2020 Order,” pg. 59. (emphasis added)

It is clear from the plain language of Act 16 that the Commission’s “broad authority” extends to both “the business” and “operations” of “transporting crude oil” and “location, construction and operation of pipelines.” And, both include the inherent authority to determine if a “proposed system” would be “safe and in the public interest.” The ALJ’s narrow interpretation of the Commission’s authority on all of these matters present in this case, especially as to the “proposed system” as a whole or in part is contrary to law. The Commission has established long-standing standards the exercise of its authority under Act 16:

- (1) the applicant has demonstrated a public need for the proposed pipeline,
- (2) the proposed pipeline is designed and routed in a reasonable manner, and
- (3) the construction of the pipeline will meet or exceed current safety and engineering standards.<sup>33</sup>

The ALJ limited the application of these standards to the replacement of the existing pipelines on the bottomlands with a pipeline in a Utility Tunnel. Act 16 applies to both the “business of

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<sup>33</sup> *In re Enbridge Energy Limited Partnership*, Case No. U-17020, Final Order, Jan. 31, 2013, p 5.

transporting crude oil” “in whole or in part” and the actual “location, construction, and maintenance” of the pipelines and facilities. By excluding evidence on “*any issues concerning the current or future operational aspects of the entirety of Line 5,*”<sup>34</sup> the ALJ committed legal error.

Further, similar to the questions of fact surrounding the tunnel and new tunnel pipeline and the connection to the extended use of Line 5 in its entirety, the business and operations of extending the use of Line 5 and the tunnel pipeline to transport crude oil through Michigan involve questions of fact that can only be decided at the hearing. Enbridge has made statements and attached exhibits in its application on public needs and benefits, yet the ALJ’s ruling prohibits FLOW and other parties from presenting evidence on these same questions that are necessarily relevant to the standards under Act 16. FLOW and Intervening Parties have a right to present evidence on the public need and other standards related to the question of the nature and extent of Enbridge’s intended purpose to engage in the business and operation of transporting crude oil through the tunnel and new pipeline and Line 5 for the next 99 years.<sup>35</sup>

First, the ALJ relied on the word “relocation” of the existing Line 5 into the tunnel based solely on Enbridge’s statement of purpose in its application; this, in turn, is based on the Tunnel Agreement and the other agreements entered into by the Governor Snyder and the State and Enbridge in December 2018. The purpose of the project is to expand and construct a new tunnel and pipeline, necessarily tied to all of Line 5. In any event, this is a material question of fact to be determined by the hearing, not the self-serving statement of Enbridge or the contractual wording of the tunnel agreements. While those statements may be evidence of purpose, they cannot limit the

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<sup>34</sup> The MPSC has always been involved when Enbridge wanted to increase the volume of oil and its pump stations along Line 5. This is why Enbridge is operating Line 5 at 80% over original design capacity (120,000 bbd to 540,000 bbd). This is clear example of how the MPSC is expected to evaluate the current and future operational aspects of the entirety of Line 5.

<sup>35</sup> Administrative Procedures Act (“APA”), MCL 24.272.

scope of review of the hearing and the review or full case submitted to the Commission. The true and intended purpose of the massive tunnel and pipeline and the 99-year lease to Enbridge to continue to engage in the business of transporting crude oil, which should be fully developed in the record.

Second, the ALJ erroneously relied on the Commission's 1953 Order that approved the location and need for Line 5, including the Straits crossing, 67 years ago. The 2018 DNR easement (hereinafter "2018 DNR Easement" or "DNR Easement") assigned to Enbridge and the 99-year lease are directly connected to the location, business, and operations for transporting oil as part of extending the use of Line 5 Michigan. The tunnel project, the 2018 easement, and 99-year lease, and the intended purpose of the tunnel project in Enbridge's application are new and completely different than the 1953 easement or the Commission's 1953 Order for locating and operating in the Straits and the existing Line 5.

Enbridge readily admits that the tunnel easement and pipeline fall outside the 1953 easement: "[T]he replacement pipe segment will not be placed within the precise easement that existed in 1953."<sup>36</sup> The Commission found in its June 30, 2020 Order that, "In addition, the proposed project would not utilize an existing easement, but would be relocated to a new tunnel with a new easement of its own... ."<sup>37</sup> Moreover, the 2018 DNR Easement to the Mackinac Straits Corridor Authority that was assigned to Enbridge is a new *public utility easement* that has not yet been authorized by the Public Service Commission as a "public utility" facility and new pipeline under Section 2129, MCL 324.2129, *supra*; the new public utility easement is in a different longitudinal and latitudinal locations along with different horizontal locations since the new proposal oil pipeline is far beneath

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<sup>36</sup> Application, paragraph 45, p. 17.

<sup>37</sup> *Id.*, pp. 65, 67.



the lakebed floor, ranging between 60 and 250 feet. Clearly, the Commission’s authority over the tunnel, new pipeline, and the public need, location, and safety and public interest for the continuing business of transporting crude oil beneath the Straits involves Line 5; and, the parties have a right to introduce evidence on these material questions of fact.

Third, the ALJ refused to consider the facts surrounding the 99-year lease of the tunnel and necessarily implied commitment to extend the use of all of Line 5. By excluding “any issues concerning the current or future operational aspects of the entirety of Line 5,” the ALJ erroneously excluded material evidence surrounding questions of fact on the nature and extent of the 99-year lease to the tunnel project and related agreements and the inextricably related questions around the continuing use of Line 5. In any event, once again, the parties have a right to submit evidence on these questions.<sup>38</sup>

**B. The Exclusion of Evidence of “Public Need” under Act 16 is contrary to law and deprives the parties the right to introduce evidence on questions of fact related to public need.**

The ALJ ruled that “any evidence concerning the current and future operational aspects of the entirety of Line 5, including the public need and safety issues, is outside the scope of this case.”<sup>39</sup> As noted in Argument A, above, ascertaining “public need” is the essential function of whether there is a lawful basis for Enbridge to engage in or continue to engage in the business and operations of transporting crude oil in connection with its proposed system—the new tunnel project and extended new or expanded uses and services or whether it is in the “public interest” to authorize a new or expanded service.<sup>40</sup> For example, this involves the issue of the new or expanded use of Line 5

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<sup>38</sup> Section 272, APA, *supra*.

<sup>39</sup> Ruling on Motion in Limine, p 16.

<sup>40</sup> W.K. Jones, Columbia Law Review, *Origins of the Certificate of Public Convenience and Necessity*, Vol. 79, No. 3 (April 1979), p. 427

through or for party of the term of the of the lease to Enbridge of the tunnel as part of Line 5 for 99 years; this includes the current revocable agreement between Enbridge and Governor Snyder to prohibit the transport of heavy crude through the tunnel and new line, because of the prospect of the extended use or replacement of the line at some time in the future..

Accordingly, even if the applicant fulfills all other requirements, the application should be denied if after a fully developed record the Commission's analysis determines there is no market or public need or the services are not in the public interest.<sup>41</sup> To consider public need and the inherent questions of safety and public interest and reasonable alternatives, essential to the proper exercise of authority under Act 16, Enbridge's application for this tunnel and Line 5 project must entail thorough analyses that evaluate and model future demand for fossil fuel-based technologies and infrastructure, including the market, financial, and regulatory risks such technologies and infrastructure may present, as well as their potential to become stranded investments.

It should be noted that Pursuant to Rule 433, an offer of proof is made through statement of undersigned counsel as to the witness and existing facts, data, and reports that address the factual matters in this Argument IV, B., IV, C., and IV, D. below.<sup>42</sup>

The analyses should include projections of electric vehicle penetration including OEM transitions to EVs,<sup>43</sup> sovereign prohibitions on future internal combustion vehicle sales, tar sand disinvestment trends, and fossil fuel disinvestment trends by fund managers and insurer fossil fuel policy. Recent petroleum sector forecasts by firms specializing in energy trends like Bloomberg,

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<sup>41</sup> *Id.*

<sup>42</sup> FLOW through its undersigned counsel states that it makes an offer of proof under Rule 433 on the facts and data contained in Arguments IV, B. and C. of this brief. If called to testify, Stanley "Skip" Pruss, a professional and recognized expert on energy and renewable energy will testify and introduce exhibits.

<sup>43</sup> "OEM" refers to "Original Equipment Manufactures;" "EV" refers to Electric Vehicles.

Navigant, and Goldman Sachs, predict that the transition to electric vehicles will accelerate quickly with a corresponding, precipitous drop in demand for transportation fuels.

In determining whether there is a “public need” for a pipeline business, operations, pipeline facilities project, the Commission’s evaluation of the economic impact and risk to ratepayers is required. Determining whether a project may present a financial risk to ratepayers is a core function of the commission.

The National Association of Regulatory Utility Commissioners’ (“NARUC”) guidance is explicit on the need to assess financial risk:

“Rather than comparing expected return to perceived risk, utility regulators typically want to minimize rates or cost of service or both, while taking into account the degree of risk that ratepayers will face, as well as the risks to investors. Thus, there is a need to balance the expected cost of a resource, or a portfolio of resources, with the risk that the actual cost of the resource may be more or less than expected at various times over the planning horizon.”<sup>44</sup>

The U.S. EPA’s guidance is in accord, indicating that public utility commissions must develop and examine key analysis factors, such as demand forecasts, commodity price forecasts, and available alternative resource options.<sup>45</sup> Such data and information is probative of “public need” and the determination of whether a project is in the “public interest.”

Examination of current and future demand forecasts for the transport of crude oil suggests that a large capital expenditure on pipeline-related infrastructure is imprudent and inconsistent with the Commission’s responsibility to protect the public interest.

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<sup>44</sup> *Energy Portfolio Management: Tools & Resources for State Public Utility Commissions*, <https://pubs.naruc.org/pub.cfm?id=536E43E4-2354-D714-51C4-DAD3C6A8D5B3>

<sup>45</sup> EPA’s guidance to public utility commissions, *Electricity Resource Planning and Procurement*, [https://www.epa.gov/sites/production/files/2017-06/documents/gta\\_chapter\\_7.1\\_508.pdf](https://www.epa.gov/sites/production/files/2017-06/documents/gta_chapter_7.1_508.pdf)

## 1. Market forecasts indicate reduced need for pipeline capacity.

Enbridge indicates that it operates the “world’s longest and most complex crude oil and liquids transportation system, with approximately 17,127 miles (27,564 kilometers) of active crude pipeline across North America—including 8,627 miles (13,883 km) of active pipe in the United States, and 8,500 miles (13,681 km) of active pipe in Canada.”<sup>46</sup> In 2019, the Enbridge indicates its pipeline system delivered more than 3.98 billion (3,980,194,221) barrels of crude oil.<sup>47</sup>

Long-term market trends and recent events strongly suggest the need for fossil fuel-related infrastructure is decreasing significantly. Petroleum industry economists are warning that peak oil demand is near or may have already arrived. BP’s (British Petroleum) chief economist recently explained why BP will undertake a fundamental restructuring of its business model to invest in zero-carbon energy sources.

“The advent of electric vehicles and the growing pressures to decarbonize the transportation sector means that oil is facing significant competition for the first time within its core source of demand. This has led to considerable focus within the industry and amongst commentators on the prospects for peak oil demand – the recognition that the combined forces of improving efficiency and building pressure to reduce carbon emissions and improve urban air quality is likely to cause oil demand to stop increasing after over 150 years of almost uninterrupted growth.”<sup>48</sup>

The energy sector has lost hundreds of billions in market value and future production will be reduced as the number of active oil rigs have plummeted.<sup>49</sup> The Wall Street Journal reported that the oil

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<sup>46</sup> <https://www.enbridge.com/about-us/liquids-pipelines>

<sup>47</sup> *Id.*

<sup>48</sup> BP, Peak oil demand and long-run prices, <https://www.bp.com/en/global/corporate/energy-economics/spencer-dale-group-chief-economist/peak-oil-demand-and-long-run-oil-prices.html>

<sup>49</sup> Business Insider, *The battered \$700 billion US energy industry is now worth roughly half of Microsoft amid oil's record plunge, April 21, 2020.* <https://markets.businessinsider.com/commodities/news/us-energy-industry-worth-half-microsoft-oil-price-crash-record-2020-4-1029113811#>

development industry lost \$280 billion between 2007 and 2018.<sup>50</sup> Since 2015, more than 200 North American oil and gas producers have filed for bankruptcy protection, leaving \$130 billion in debt. Oil and gas bankruptcies have accelerated in 2020, which now include oil giant Chesapeake Energy Corporation.<sup>51</sup>

Other market indicators suggest that investment in new pipeline infrastructure is highly questionable in light of clear trends indicating a precipitous drop in oil consumption in future years.

- Analysis released August 9th by world's 8<sup>th</sup> largest bank, BNP Paribas reports "that the economics of oil for gasoline and diesel vehicles versus wind-and solar-powered EVs are now in relentless and irreversible decline, with far-reaching implications for both policymakers and the oil majors."<sup>52</sup>
- Seventeen major tar sands projects have been cancelled in the last several years. Seven international oil companies – Exxon Mobil, Conoco Phillips, Statoil, Koch Industries, Marathon, Imperial Oil and Royal Dutch Shell – have divested their interests in Alberta tar sands and will not need Enbridge's future pipeline services.<sup>53</sup> The conveyance of tar sand oils represents utilizes a large increment of Enbridge's ongoing carrying capacity and a major revenue source.

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<sup>50</sup> WSJ, *Wall Street Tells Frackers to Stop Counting Barrels, Start Making Profits*, December 13, 2017. <https://www.wsj.com/articles/wall-streets-fracking-frenzy-runs-dry-as-profits-fail-to-materialize-1512577420>

<sup>51</sup> World Oil, *Chesapeake joins more than 200 other bankrupt U.S. shale producers*, June 29, 2020. <https://www.worldoil.com/news/2020/6/29/chesapeake-joins-more-than-200-other-bankrupt-us-shale-producers>

<sup>52</sup> PNB Paribas, *Wells, Wires and Wheels*, August 2019. <https://docfinder.bnpparibas-am.com/api/files/1094E5B9-2FAA-47A3-805D-EF65EAD09A7F>

<sup>53</sup> Grist, *This could be the end of Canadian tar sands*, January 12, 2017. <https://grist.org/article/this-could-be-the-end-of-canadian-tar-sands/>

- The International Energy Agency (“IEA”) projects *Global EV Outlook 2020* that adoption of electric vehicles (“EVs”) will result in reduced oil demand of 2.5 – 4.2 million barrels per day by 2030.<sup>54</sup>
- The world’s major auto manufacturers are transitioning away from gas and diesel-powered vehicles. General Motors, Ford, Toyota, VW, Volvo, and others are making clear that petroleum-free electric drivetrains will dominate their future manufacturing investments and that future product offerings will not use transportation fuels.
- 18 countries, including England, France, Israel, Norway, Netherlands, Slovenia, India, Egypt, and China have announced their intention to ban future sales and, in some cases, the use of vehicles with internal combustion engines. 25 cities and metropolitan areas intend to prohibit the use of gas and diesel-powered vehicles.<sup>55</sup>

It should also be of concern to the Commission that members of the global insurance industry are announcing that they will no longer invest in or insure tar sands related projects and pipelines. Zurich Insurance Group join announced an updated fossil fuel policy which commits to cutting both insurance and investment support for companies significantly involved in tar sands or oil shale.<sup>56</sup> Global leader AXA indicated that it is “phasing out of insurance coverage for new coal construction projects and oil sands businesses.”<sup>57</sup> Finally, in response to reduced global oil demand, in part

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<sup>54</sup> IEA, *Global EV Outlook 2020*, <https://www.iea.org/reports/global-ev-outlook-2020>

<sup>55</sup> Center for Climate Protection, *Survey of Global Activity to Phase Out Internal Combustion Engine Vehicles*, September 2018. <https://theclimatcenter.org/wp-content/uploads/2018/09/Survey-on-Global-Activities-to-Phase-Out-ICE-Vehicles-FINAL.pdf>

<sup>56</sup> Zurich Insurance Group Becomes First Primary Insurer to Commit to Not Underwriting Tar Sands Companies, June 25, 2019. <https://www.insureourfuture.us/updates/2019/6/25/zurich-insurance-group-becomes-first-primary-insurer-to-commit-to-not-underwriting-tar-sands-companies>

<sup>57</sup> *AXA accelerates its commitment to fight climate change*, December 12, 2017. <https://www.axa.com/en/press/press-releases/axa-accelerates-its-commitment-to-fight-climate-change>

attributable to the SARS-CoV-2 crises, Enbridge has begun to use excess pipeline capacity to store excess crude oil.<sup>58</sup>

All of these market trends put the question of whether there is a future market need for Enbridge's current carrying capacity in its pipeline system. It is incumbent upon the Commission to conduct its own analysis of market trends to ascertain the extent to which there is a "public need" for the tunnel or whether the tunnel is in the public interest.

### **C. The State of Michigan has made new commitments to integrate climate change into government decision-making**

Addressing climate change and abating greenhouse gas emissions has become a policy priority for Governor Whitmer's Administration. Recognizing the existential threat of continued use of fossil fuels and the scientific imperative of adopting a long-term plan to decarbonize the energy system, Michigan joined the United States Climate Alliance in February 2019.<sup>59</sup> In September 2020, Governor Whitmer issued Executive Order 2020-182 creating the Council on Climate Solutions, finding that "Michigan must take comprehensive, coordinated, and aggressive action" to "combat the climate crisis."<sup>60</sup> In concert with the Executive Order, Governor Whitmer issued Executive Directive 2020-10, which states in no uncertain terms the consequences of failing to take into account greenhouse gas emissions.

"The science is clear, and message urgent: the earth's climate is now changing faster than at any point in the history of modern civilization, and

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<sup>58</sup> *Enbridge makes deal to store oil in Mainline pipeline as oil glut grows*, May 4, 2020.

<https://www.cbc.ca/news/canada/calgary/enbridge-mainline-1.5555509>

<sup>59</sup> United States Climate Alliance, <https://www.usclimatealliance.org/publications/2019/2/4/michigan-governor-gretchen-whitmer-joins-us-climate-alliance>

<sup>60</sup> Preamble, Executive Order 2020-182, [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-540277--,00.html#:~:text=Executive%20Order%202020%2D182%3A%20Council%20on%20Climate%20Solutions%20EXECUTIVE%20ORDER&text=The%20science%20is%20clear%2C%20and,largely%20responsible%20for%20this%20change.](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-540277--,00.html#:~:text=Executive%20Order%202020%2D182%3A%20Council%20on%20Climate%20Solutions%20EXECUTIVE%20ORDER&text=The%20science%20is%20clear%2C%20and,largely%20responsible%20for%20this%20change.)

human activities are largely responsible for this change. Climate change already degrades Michigan's environment, hurts our economy, and threatens the health and well-being of our residents, with communities of color and low-income Michiganders suffering most. Inaction over the last half-century has already wrought devastating consequences for future generations, and absent immediate action, these harmful effects will only intensify. But we can avoid some of the worst harms by quickly reducing greenhouse gas emissions and adapting nimbly to our changing environment. “<sup>61</sup>

State agencies are integrating climatic assessments into their departmental programs. The Michigan Department of Health and Human Services Climate and Health Adaptation Program (“MDHHS”) in partnership with the Great Lakes Integrated Sciences Assessments Program (“GLISA”) has issued the *Michigan Climate and Health Profile Report*<sup>62</sup> assessing potential climate impacts to assist state and local government in developing climate adaptation plans. MDHHS and GLISA are using the Centers for Disease Control and Prevention's (“CDC”) Building Resilience Against Climate Effects (“BRACE”) framework to evaluate and assess public health related vulnerabilities, disease burden and recommended interventions.

With the enactment of 2016 PA 341, the Commission now requires the consideration of environmental factors including, specifically, greenhouse gas inventories and air toxics in utility integrated resource plans.<sup>63</sup> As indicated, supra, federal courts are now requiring assessments of long-term greenhouse gas emissions in conjunction with oil and gas pipelines and the leasing and development of federal lands and waters.

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<sup>61</sup> Preamble, Executive Order 2020-10, [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90704-540278--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90704-540278--,00.html)

<sup>62</sup> Cameron, L., A. Ferguson, R. Walker, D. Brown, & L. Briley, 2015: Climate and health adaptation profile report: Building resilience against climate effects on Michigan's health. <http://glisa.umich.edu/media/files/MI-Climate-Health-Profile.pdf>

<sup>63</sup> The MPSC developed the *Michigan Integrated Resource Planning Parameters* report which provided an inventory of applicable environmental statutes and rules that should be considered in the IRP process.



Given the abundant and growing evidence of the environmental, economic, and public health impacts associated with the development and combustion of fossil fuels and the strong market trends favoring the transition to zero carbon energy generation resources, it is time for the MPSC to require applicants for certificates of necessity to demonstrate the public need of their proposed projects and that they advance the public interest.

**D. The Duty to Consider and/or Determine the Likely Effects and Alternatives under the Michigan Environmental Protection Act and its Case Law Applies to the new tunnel and tunnel pipeline, and the intended purpose to extend the business and operations of Enbridge to the Straits and all of Line 5.**

The ALJ has ruled that although an analysis under MEPA must be applied to the proposed construction of the tunnel, “the conduct at issue in this case does not include the environmental effects from the extraction, refinement, or consumption of the oil transported on Line 5.”<sup>64</sup> Such a limited and constricted application of MEPA is contrary to MEPA’s purpose and tenets. The ALJ’s ruling is also contrary to the application of the National Environmental Policy Act (“NEPA”), the federal cognate to MEPA, by federal agencies reviewing the environmental impacts of pipelines transporting fossil fuels.

As a threshold matter, the MPSC has specifically determined that it must identify and determine environmental impacts associated with pipeline projects.

“Neither Act 9 nor Act 16 provide guidance relating to specific criteria for the Commission to consider in its decisions relating to pipeline applications. In 2012, the Commission issued an order in Docket No. U-17020 which stated, ‘...the Commission will grant an application pursuant to [Act 9 and] Act 16 when it finds that (1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and routed in a reasonable manner, and (3) the construction of the pipeline will meet or exceed current safety and engineering standards.’ *The Commission is also required by law to determine if there are environmental impacts from the*

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<sup>64</sup> Ruling on Motion in Limine, p 19.

*proposed project and whether those can be appropriately mitigated.”*  
(Emphasis added).<sup>65</sup>

In 1970, the legislature enacted the Michigan Environmental Protection Act (“MEPA”),<sup>66</sup> implementing the Constitutional requirements of Article 4, Section 52 which prohibits likely pollution, impairment, or destruction of the air, water, natural resources or the public trust, except where it is considered and determined by a state or local governmental body or court that there exists no feasible and prudent alternative.<sup>67</sup>

The MEPA imposes a duty on government agencies, commissions and private entities to prevent and minimize environmental degradation or impairment of air, water, or natural resources or the public trust in those resources.<sup>68</sup> Effective implementation of MEPA requires as complete an understanding of environmental threats and conditions as possible, given the available information at the time. Central to the purpose of MEPA is that its application be informed by the best information, data, and science available.

The overwhelming scientific consensus holds that these unavoidable byproducts of petroleum combustion have profound environmental, climactic, and public health consequences that are quantifiable and monetizable. Under MEPA, conduct may be challenged if it “is likely to” pollute, impair, or destroy the environment, *Preserve the Dunes v DEQ*, 471 Mich 508 at 518 (2004). The Commission cannot make a determination of necessity or prudence without taking account of the long-term consequences of projects that have, or are likely to have, the effect of impairing the environment or public health. As the tunnel is proposed to extend the operable life of Line 5 for 99 years, the MPSC must determine the evaluate the environmental and health consequences of

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<sup>65</sup> MPSC, Facility Siting, [https://www.michigan.gov/mpsc/0,9535,7-395-93309\\_93606\\_93615---,00.html](https://www.michigan.gov/mpsc/0,9535,7-395-93309_93606_93615---,00.html)

<sup>66</sup> Part 17, NREPA, MCL 324.1701 *et seq.*

<sup>67</sup> *Id.*, MCL 324.1703(1); MCL 324.1705; *Ray v Mason Co Drain Comm’r*, 393 Mich 294; 224 NW2d 883 (1975); *State Hwy Comm’n v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974).

<sup>68</sup> *Id. Ray*, 393 Mich at 294.

approving the tunnel. When gasoline and diesel fuel are burned they produce carbon dioxide a greenhouse gas (GHG), carbon monoxide, nitrogen oxides, particulate matter, and unburned hydrocarbons.<sup>69</sup> Scientific consensus holds that these unavoidable byproducts of petroleum combustion have profound environmental, climactic, and public health consequences that are now quantifiable and monetizable. Line 5 transports approximately 8.4 billion gallons of crude oil and natural gas liquids per year (23 million gallons per day). The combustion of these petroleum fuels will yield approximately 57 million tons of atmospheric carbon annually.

According to the Michigan Department of Health and Human Services, GHG emissions have already resulted in the impairment of Michigan's natural resources – effects that will get worse unless CO2 emissions are abated.<sup>70</sup> Michigan has experienced measurable increases in temperature since 1951 ranging from 0.6°F in the southeastern Lower Peninsula to 1.3°F in the northwestern Lower Peninsula.<sup>71</sup> The Great Lakes, like the oceans, are absorbing heat, but at a faster rate, affecting limnologic health and altering ecosystems. Lake Superior's summer (July–September)

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<sup>69</sup> EIA, Gasoline and the Environment, [rb.gy/ubelo6](http://rb.gy/ubelo6)

<sup>70</sup> Present and future climate impacts in Michigan according to MI Dept of Health and Human Services and National Climate Assessment:

- Increased severity and frequency of storm events
- Water-borne diseases from flooding, sewage overflows, septic failures, and development of harmful algal blooms.
- Increased heat wave intensity and frequency, increased humidity, degraded air quality, and reduced water quality will increase public health risks
- Increased heat stress causing ecosystem disturbance, crop failures and reduced yields
- More frequent flooding with associated soil erosion, declining water quality and beach health.
- More numerous late spring freezes detrimental to fruit crops
- Increased aquatic invasive species and harmful blooms of algae, and declining beach health.
- Negative impacts on transportation, agriculture, human health, and infrastructure

MDHHS, Michigan Climate and Health Profile, 2015. [https://www.michigan.gov/documents/mdhhs/MI\\_Climate\\_and\\_Health\\_Profile\\_517517\\_7.pdf](https://www.michigan.gov/documents/mdhhs/MI_Climate_and_Health_Profile_517517_7.pdf)

<sup>71</sup> International Association for Great Lakes Research, The Great Lakes at a Crossroads Preparing for a Changing Climate, [http://iaglr.org/scipolicy/factsheets/iaglr\\_crossroads\\_climatechange.pdf](http://iaglr.org/scipolicy/factsheets/iaglr_crossroads_climatechange.pdf)

surface water temperatures increased approximately 4.5°F (2.5°C) since 1980, warming twice as fast as air temperature. Great Lakes ice cover has decreased by 71% in the past 40 years.<sup>72</sup>

Clearly, the damaging and destructive effects of fossil fuel combustion are demonstrative and irrefutable. The extension of the service life of Line 5 will most certainly result in impacts and impairments that invoke scrutiny under MEPA. The Commission cannot evade its responsibility under the Michigan Constitution and MEPA to evaluate the activity and take into account the “likely” environmental effects of the “conduct” that will result in the inevitable harm.

**1. MEPA imposes additional environmental review requirements that are supplemental to existing administrative and statutory requirements**

Michigan courts have consistently recognized that MEPA imposes additional environmental review requirements that are supplemental to existing administrative and statutory requirements. “It is most important to note that [M]EPA does not, as both parties imply, merely provide a separate procedural route for protection of environmental quality, it also is a source of supplementary substantive environmental law.” *In State Highway Commission v Vanderkloot*, 392 Mich. 159 (1974). Interpreting MEPA, the *Vanderkloot* court found that the statute “is designed to accomplish two distinct results:”

- (a) to provide a *procedural* cause of action for protection of Michigan's natural resources; and
- (b) to prescribe the *substantive* environmental rights, duties, and functions of subject entities (court’s emphasis).

MEPA also requires a state agency or commission to undertake a two-part inquiry:

- 1) determine whether the project proponent has demonstrated that “*there is no feasible and prudent alternative to [the polluting, impairing, or destroying entity's] conduct*”; and

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<sup>72</sup> <http://absolutemichigan.com/michigan/great-lakes-ice-coverage-down-71-in-past-40-years/>

- 2) whether “*such conduct is consistent with the promotion of the 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*” (court’s emphasis).

The *Vanderkloot* court found that even though the statute at issue - the Highway Condemnation Act had no provisions requiring environmental review, the failure of the State Highway Commission to apply MEPA and examine feasible and prudent alternatives when a highway project involves environmental “pollution, impairment [or] destruction” would constitute an abuse of discretion.

“We additionally hold that the substantive environmental duties placed on the State Highway Commission by the Environmental Protection Act of 1970, MCLA 691.1201 *et seq.*; MSA 14.528(201) *et seq.*, are relevant to [the Highway Condemnation Act] judicial review in that failure by the Commission to reasonably comply with those duties may be the basis for a finding of fraud or abuse of discretion.” In accord is *Ray v Mason County Drain Commissioner*, 393 Mich 294 (1975). There, the court held that MEPA “does more than give standing to the public and grant equitable powers to the circuit courts, it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities.... [MEPA] allows the courts to fashion standards in the context of actual problems as they arise in individual cases and to *take into consideration changes in technology* which the Legislature at the time of the Act's passage could not hope to foresee.” 393 Mich at 307<sup>73</sup> (emphasis added). *Ray* teaches that MEPA, properly applied, requires an understanding an application of scientific principles and evolving technologies if relevant to the issue at hand.

In *Her Majesty the Queen v Detroit*, 874 F.2d 332 (1989), a case challenging the siting of the Detroit municipal incinerator, the Sixth Circuit followed *Ray*, finding that, “In addition to creating procedural rights, MEPA imposes a substantial duty on all persons and entities, public and private, to prevent or minimize environmental degradation caused by their activities.” The court

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<sup>73</sup> Speaking to whether MEPA is *in pari materia* with the Oil Conservation Act, the court stated: “Having concluded that 1939 PA 61 and 1921 PA 17 provide statutory authority for denial of the drilling permit in the instant case, it is unnecessary to decide whether the Michigan environmental protection act, MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.*, must be read *in pari materia* with the oil conservation act. Nevertheless, if an answer to this question were required, we would hold that the Michigan environmental protection act should be read *in pari materia* with all legislation relating to natural resources.”

further found that “MEPA is supplementary to existing administrative and regulatory procedures provided by law. It specifically authorizes the court to determine the validity, applicability, and reasonableness of any standard for pollution or pollution control equipment set by state agency *and* to specify a *new* or *different* pollution control standard if the agency's standard falls short of the substantive requirements of MEPA” (court’s emphasis, internal citations omitted).

More recently, in *Buggs v. Michigan Public Service Commission*, COA No. 315058, (2015) (unpublished opinion), a case involving construction of a proposed natural gas pipeline, the court found that MEPA “established a substantive standard prohibiting the impairment of natural resources, which applies to an agency's determinations.” Following *Vanderkloot*, the court held that the MPSC:

“had to consider whether the proposed project would impair the environment, whether there was a feasible and prudent alternative to the impairment, and whether the impairment was consistent with the promotion of the 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.”

The *Buggs* court stated that “although the Commission found in a cursory manner that the pipelines would serve the public convenience and necessity, it did not otherwise *expressly speak to necessity, practicability, feasibility, or prudence in its orders*.” Remanding the case back to the MPSC, the court stated that the Commission “failed to follow the *independent statutory requirement* imposed under MEPA. Because its orders approving the pipelines were unlawfully issued, we vacate those orders and remand for a new necessity determination in both dockets.” (emphasis added). *See also, Mich Oil v. Natural Resources Commission*, 406 Mich. 1, 32-33 (Mich. 1979). (“The environmental protection act, by its terms, is substantively supplementary to existing laws and administrative and regulatory procedures provided by law.”); *West Michigan Environmental Action Council v. Natural Resources Commission*, 405 Mich 741 (1979), (under MEPA, courts have a responsibility to

independently adjudicate and determine whether there is adequate protection from pollution, impairment and destruction). Buggs holds that the Commission must examine the “necessity, practicability, feasibility, and prudence of pipeline projects. Although the Commission’s has not in the past evaluated health and environmental externalities when considering projects and regulatory approvals, more state and federal regulatory bodies are now examining the amount of carbon emissions associated with projects.

In addition to the duty imposed by Vanderkloot on agencies to comprehensively consider the effects and alternatives to prevent likely environmental effects, Section 1705 of the MEPA provides:

Sec. 1705. (1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.

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

FLOW and other Intervenors have been granted intervention in this case, and, therefore, the Commission “shall” determine the “alleged pollution, impairment, or destruction of the air, water, natural resources or the public trust in those resources, including the undisputed public trust waters, bottomlands, and fishery and aquatic habitat and resources in the Straits of Mackinac and connected public trust waters. And, once the Commission has determined that such effects will occur or are likely, it cannot authorize or approve the tunnel and tunnel pipeline project if “there is a feasible and

prudent alternative” that is “consistent with the reasonable requirements of the public health, safety, and welfare.”<sup>74</sup>

Finally, the MEPA expressly states in Sec. 1706 that “This part is supplementary to existing administrative and regulatory procedures provided by law.”<sup>75</sup> Nothing in Section 1705(2) or the case law allows an agency to limit the duties imposed by *Vanderkloot* and the MEPA by segmenting or narrowing the purpose of a project to avoid the considerations required by *Vanderkloot* or the determinations required by Section 1705(2) of likely effects alternatives related to conduct and its intended purpose.

## **2. Federal agencies courts review the environmental impacts and alternatives of pipelines transporting crude oil and other fossil fuels**

Climate science concerning the adverse and injurious effects of GHG emissions has become clearly evident. As a result, the courts now require federal agencies that review major projects such as pipeline proposals to take a “hard look” at the environmental consequences of the proposed action, including carbon emissions, in applying the National Environmental Policy Act (NEPA).<sup>76</sup>

In *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), the D.C. Circuit held that “FERC must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.” The court found that NEPA requires FERC to balance “the public benefits against the adverse effects” of natural gas pipelines and evaluate the reasonably foreseeable downstream emissions and climate impacts resulting from its approval of expanded natural gas

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<sup>74</sup> MCL 324.1703; 1705(2).

<sup>75</sup> MCL 324.1706.

<sup>76</sup> See FERC, *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042, 2018. (NEPA and its implementing regulations require that review of major projects such as pipeline proposals demand a “hard look” at the environmental consequences of the proposed action and identification of possible alternatives).



pipeline infrastructure. In accord, is *Birckhead v. FERC*, No. 18-1218 (D.C. Cir. 2019), the court followed *Sierra Club v FERC*, stating that FERC has the responsibility to attempt to obtain information necessary to evaluate the downstream environmental effects of a proposed interstate pipeline project.<sup>77</sup> Similarly, in *Wild Earth Guardians v. Zinke*, 368 F. Supp 3d 41, (D.D.C. 2019), the court held that the Bureau of Land Management did not sufficiently consider climate change when leasing federal lands for oil and gas development.

The scientific and jurisprudential trends are clear – the courts are requiring regulatory agencies to exercise their fiduciary responsibilities and evaluate the long-term effects the proposed permitted activities on the natural resources for which they are required by law to protect.

**E. MEPA requires an evaluation of feasible and prudent alternatives, including a “no action” alternative.**

MEPA requires an analysis of “feasible and prudent alternatives” when considering pipeline projects that have, or are likely to have, detrimental effects on public health and the environment. Evaluating feasible and prudent alternatives is complementary to the determination of public need. Both ask the question, “Is there an alternative that results in more public benefit or less potential public harm?”

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<sup>77</sup> FERC’s reviews should “ensure that pipeline infrastructure additions occur only if they: are required by the public interest after considering all relevant factors; produce greater benefits than costs (including through consideration of environmental externalities); do not impose undue burdens on landowners and communities; and enable the orderly development of infrastructure.” Testimony of Susan F. Tierney, before the U.S. House Subcommittee on Energy of the Committee on Energy and Commerce Subcommittee Hearing on “Modernizing the Natural Gas Act to Ensure It Works for Everyone” February 5, 2020. <https://docs.house.gov/meetings/IF/IF03/20200205/110468/HHRG-116-IF03-Wstate-TierneyS-20200205.pdf>

The Commission should require Enbridge to provide the means of obtaining an independent third-party review tasked with evaluating alternatives to the tunnel that would examine the following:

- Whether the carrying capacity of the existing network of “common carrier” North American pipelines is sufficient to meet future needs.
- To what extent did the 2010 catastrophic failure of Enbridge’s Line 6b and the more recent temporary partial closure of Line 5 result in constriction of supply, market disruption, or price increases to end users.
- Does Line 6b, now reconstructed as Line 78, have the capacity to meet market demand if Line 5 closes.
- Whether cessation of Line 5 would result in a new pipeline system equilibrium capable of meeting existing and future demand for oil and natural gas liquids.
- What is the potential for the tunnel project to become a stranded asset and liability to the State of Michigan in the event market trends play out as predicted?

In 2019, the Energy Information Agency released an inventory of new constructed or expansion of existing pipelines.<sup>78</sup> The inventory listed 230 new or expanded pipeline projects with 21 projects attributed to Enbridge. The Commission should consider whether these new or expanded pipelines are capable of meeting future market demand. Given the strong market trends favoring the transition to zero carbon energy generation resources and the abundant and growing evidence of the environmental, economic, and public health impacts associated with the development and combustion of fossil fuels, the Commission must require Enbridge to provide sufficient analytical

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<sup>78</sup> The Energy Information Administration’s new pipeline database lists 230 new pipeline projects and expansions that are underway; hyperlink [Liquids pipeline projects database](#).

data and information in order to make an informed determination on whether a Certificate of Necessity should issue.

In conclusion, based on MEPA and its binding case law, the MPSC has the authority and substantive duty responsibility to evaluate projects and determine the “necessity, practicability, feasibility, or prudence” of a project in its orders” and “to take into consideration changes in technology” which the Legislature at the time of the Act's passage could not hope to foresee.” The MPSC should require project applicants to evaluate future market, financial and regulatory trends to demonstrate that projects are necessary and prudent in light of environmental, climactic, and public health concerns, and the energy transition that is underway.

### **CONCLUSION AND RELIEF**

Based on the foregoing reasons, FLOW requests the Commission to grant its Application for Leave and enter an order that

- (1) reverses the ALJ’s granting of Enbridge’s motion to exclude evidence of public need and likely environmental effects and alternatives related to the new tunnel and tunnel pipeline and the intended purpose of the tunnel project to engage in business and operations to transport crude oil as part of the tunnel project and the existing Line 5 in Michigan; and
- (2) remands to the ALJ to take appropriate action to incorporate the excluded evidence into the discovery and evidentiary hearing that will be submitted as a full case to the Commission for final decision and order.

FOR LOVE OF WATER (FLOW)

Date: November 6, 2020

By: \_\_\_\_\_

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STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of Enbridge Energy, Limited Partnership for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief

U-20763

ALJ Dennis Mack

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**PROOF OF SERVICE**

On the date below, an electronic copy of **For Love of Water (FLOW) Application for Leave to Appeal the Ruling by Administrative Law Judge on Scope of Review of Evidence** was served on the following:

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The statements above are true to the best of my knowledge, information and belief.

Counsel for FLOW

Date: November 6, 2020

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