

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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
(e-file paperless)

**THE MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S REPLY
BRIEF ON THE MICHIGAN PUBLIC SERVICE COMMISSION'S
REMAND OF THE ADMINISTRATIVE LAW JUDGE'S RULING ON
MOTION IN LIMINE**

I. Introduction

Governor Gretchen Whitmer and the Department of Natural Resources' ("DNR") Notice of Revocation and Termination of Easement ("Notice") should not change the scope of this case. In their briefs on remand, several parties ask the ALJ to revise his ruling ("Ruling") on the scope, considering the Notice, to include issues unrelated to Enbridge Energy, LLC's ("Enbridge") request to replace and relocate the four-mile segment of Line 5 crossing the Straits of Mackinac ("Straits"). These parties want the Commission to consider the need for the remaining 641 miles of Line 5, the indirect impact that continuing or resuming Line 5 operations will have on greenhouse gas emissions, and even factors as far removed from this case as growth in the electric vehicle market and disinvestment trends in the fossil

fuel industry. They explicitly or implicitly assume that the Notice will lead to the revocation and termination of Enbridge's 1953 Easement to operate the existing dual pipelines on the Straits' lakebed. Staff does not dispute the validity of the Notice, but given the uncertainty surrounding ongoing litigation, Staff does not assume that Line 5 will be shut down. And even if Line 5 is temporarily decommissioned until the pipeline can be relocated in the proposed tunnel—assuming Enbridge acquires all necessary regulatory approvals—the parties have not pointed to any caselaw or Commission precedent that a temporary decommissioning would automatically terminate the prior Act 16 authorization for Line 5 or require it to be reevaluated.

In the same way that a temporary decommissioning of Line 5 would not affect the Ruling on the scope of this case, the public-trust doctrine would not affect the scope either. For Love of Water, or FLOW, argues that the State of Michigan has not satisfied its obligations, under the common-law, public-trust doctrine, to ensure that Line 5 and the easements granted to Enbridge for Line 5 are in the public's interest. The authority to fulfill these obligations, to the extent they apply, has been delegated to the Governor and DNR. Indeed, the Governor and DNR's authority to revoke the 1953 Easement is currently being tested in state and federal courts. Even if this authority is upheld, however, and the 1953 Easement is terminated, it would not require changing the scope of this proceeding. Because while the Governor and DNR have determined that the 1953 Easement does not satisfy the public-trust doctrine, they did not reach the same conclusion for the 2018

Easement that was granted, in accordance with 2018 Public Act 359, to the Mackinac Straits Corridor Authority for the tunnel at issue in this case.

Finally, the arguments made by the intervening parties about the Michigan Environmental Protection Act (“MEPA”) should not change the Ruling regarding the scope in this case. Despite attempts to distinguish the factual and legal footing of MEPA in light of the Governor’s Notice, the Ruling remains correct. The language of MEPA controls—not federal precedent applying the National Environmental Policy Act (“NEPA”) or other state precedent applying similar state laws. MEPA focuses on the conduct proposed in Enbridge’s application to determine whether it will pollute, impair, or destroy the natural resources, or the public trust in those resources. If so, MEPA requires the Commission to evaluate whether feasible and prudent alternatives exist that would eliminate such harms. Evidence of impacts from activities beyond this conduct, such as global climate change and greenhouse gas emissions, are not appropriate for consideration in this case.

II. Argument

1. Several parties overstate the impact of the Notice on this case by relying on faulty assumptions.

Staff acknowledges that the Notice raises important questions about the legality of the existing dual pipelines, however, disagrees that it changes the appropriate scope of review for this Act 16 application case in any way. The legality of the dual pipelines has been contested since before Enbridge filed its application

in U-20763 and is not a new development. See, e.g., *Attorney General of Michigan v Enbridge Energy Co, Inc et al*, No. 19-000474-CE (Ingham County Cir Ct, 2019). In order to expand the scope of this Act 16 case from what was originally envisioned by the ALJ, several parties ask that the ALJ and the Commission take a leap in logic and assume the Notice is *per se* enforceable and the decommission of the dual pipelines, and indeed Line 5, a foregone conclusion. In reality, the Notice is no different from an evidentiary perspective than previous or ongoing attempts to shut down or decommission Line 5.

Several parties argue that any assumption that the dual pipelines will continue to operate into the future can no longer be sustained, but the alternative assumption they advocate is untenable. For example, the Michigan Environmental Council, Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council, National Wildlife Federation, Bay Mills Indian Community, and Nottawaseppi Huron Band of the Potawatomi (collectively, the “MEC”) assume that given the Notice, “[i]n the absence of the Project, the dual pipelines *will* be decommissioned and no oil will be flowing.” MEC Remand Br, p 24 (emphasis added.) Furthermore, MEC contends that there is a “substantial likelihood” that the proposed project is the “only” option for long-term continued use of Line 5. *Id.* at 11.” “[S]ubstantial likelihood” is too strong a term to use when predicting what any court will do, let alone a court faced with such complex legal and factual questions. These questions are many but include: (1) whether the case was properly removed to federal court; (2) whether the common-law, public-trust

doctrine applies or whether it has been subsumed by statute; (3) if the public-trust doctrine does apply, whether the 1953 Easement violates the public trust; and (4) whether Enbridge has satisfied the terms of the 1953 Easements or has violated it as the Governor and DNR allege. Given the uncertainty surrounding these complex legal and factual questions, the only conclusion that can be reached with any certainty is that the dual pipelines may—or may not—be decommissioned. Presuming that the dual pipelines will be shut down requires the Commission to make a conclusion by delving into the merits of an ongoing legal dispute and ignoring that the dual pipelines are currently operating.

Likewise, the Environmental Law & Policy Center and the Michigan Climate Action Network (“ELPC” or “Climate Organizations”) rely on the assumption that the “Governor’s actions should be assumed enforceable” and “but for the Commission granting Enbridge’s Application, Line 5 would not operate.” ELPC Remand Br, p 8, 20. With these assumptions, ELPC argues that the conduct to be considered by the application is not to replace a four-mile segment of an existing pipeline within a utility tunnel below the Straits, but rather to “restart a decommissioned pipeline.” *Id.* at 20. ELPC remarks, however, that the “Commission must not make assumptions about the legality of the State’s action.” *Id.* at 8. Yet, requiring the Commission to make an assumption about the state’s actions is exactly what ELPC advocates. Even if one assumes that the dual pipelines will be shut down pursuant to the Notice, ELPC fails to cite any authority that restarting a pipeline automatically requires Act 16 reapproval. Pipelines are

routinely decommissioned temporarily for repairs, change of ownership or service, upgrades, or other maintenance activities. Once those activities are completed, the pipeline is allowed to “restart” under its original approval. Nothing in Act 16 requires a pipeline operator to continuously operate a pipeline or risk having to re-justify the need for the entire pipeline and the parties have not pointed to any caselaw or Commission precedent that states otherwise.

As stated in its brief on remand, Staff does not contest the validity of the Notice but does not assume its legality (or illegality) either. Respectfully, neither should the Commission. One cannot assume, with any degree of legal certainty, that Line 5 will cease to operate (or continue to not operate) if the Commission denies the application. Likewise, one cannot assume that if the Commission grants the application, Line 5 will be restarted, or its operational life extended into the future further than the existing dual pipelines. Therefore, any evidence that a ruling on the application will affect current and future operations of the entire Line 5 pipeline is speculative, and as the Notice illustrates, potentially contingent on an extrinsic legal matter not before the Commission. The ALJ correctly ruled that such evidence should be excluded.

The danger in expanding the scope of this case based on doubtful assumptions can be seen by some parties’ briefs and just how far they want to expand the scope of this case. FLOW, for example, talks about BP restructuring its business model, oil and gas producers filing for bankruptcy, cancellation of tar sand projects, electric vehicle growth, and foreign countries’ oil and gas policies. FLOW

Remand Br, p 16–18. These issues go far afield of the question at issue in this case, which is whether Enbridge can relocate an existing pipeline underneath the Straits.

2. The Notice and the additional briefing on remand about the public-trust doctrine do not change the ALJ's Ruling on the scope of this proceeding.

The Commission's obligations under Act 16 do not require review of state-granted easements under the public-trust doctrine or any other legal doctrine. The issues considered in an Act 16 proceeding are well-established. The Commission considers whether: (1) the applicant has demonstrated a public need for the proposed pipeline and associated fixtures and facilities; (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. MPSC Case No. U-13225, 7/23/2002 Order, pp 4-5. The Commission also considers whether (4) a project impairs the environment under MEPA and, if so, whether there are reasonable and prudent alternatives to the impairment. MCL 324.1701, *et seq.* By comparison, as the Governor and DNR have described the public-trust doctrine, it requires the State of Michigan to find, before granting an easement, that “the Easement: (1) would improve navigation or another public trust interest; or (2) could be conveyed without impairment of the public trust.” (11/13/20 Notice of Revocation and Termination of Easement, p 4.)

When reviewing an Act 16 application, the Commission is focused on siting a pipeline and associated fixtures and facilities in a reasonable manner, see MCL 483.6, while the Governor and DNR, when reviewing an easement, are focused on

conveying property interests with just and reasonable terms and conditions. See MCL 324.2129. Although Act 16 addresses condemnation and easements to the extent that an easement is required from a private landowner, MCL 483.2, 483.2a, it does not address easements crossing state land (with the exception of highways). The power to grant easements for pipelines crossing state lands was given to the Conservation Commission, through 1953 Public Act 10, and its successor the DNR through the Natural Resources and Environmental Protection Act. MCL 324.2129. FLOW has not cited any cases applying the public-trust doctrine to a state agency other than DNR and its predecessor. And as the agency tasked with granting easements over state lands, it makes sense that DNR would assume primary responsibility for ensuring that easements are granted consistent with the public trust and on just and reasonable terms.

The Governor and DNR have exercised their obligations under the public-trust doctrine, as they interpret the doctrine, and have found that the 1953 Easement violated the public trust. Staff does not dispute the validity of the state's actions, but as Staff explained above and in its Initial Brief on Remand, the state's actions are subject to judicial review. Staff's position throughout the course of this proceeding has consistently been that it is premature to speculate about what will or will not happen to the existing pipeline if the Commission denies Enbridge's Act 16 application. And while the state's actions have fueled the argument that Line 5 will be shut down, it is still inappropriate to assume that this will happen given the uncertainty that surrounds ongoing litigation. Moreover, even if Line 5 is

decommissioned, it could later be recommissioned when the replacement segment is complete. As discussed above, the parties have not pointed to any caselaw or Commission precedent that a temporary decommissioning would automatically terminate the prior Act 16 authorization for Line 5 or require it to be reevaluated.

Regardless of the outcome of court proceedings evaluating the Governor and DNR's findings, one thing is clear: The Governor and DNR did *not* reach the same conclusion for the 2018 Easement granted to the Mackinac Straits Corridor Authority under 2018 Public Act 359. The most that was said about the 2018 easement was that it did not "preclude revocation of the 1953 Easement." 11/13/20 Notice, pp 9–11, 17–19. Yet, FLOW argues that the 2018 Easement "suffer[s] from the same fatal flaw as the 1953 Easement." FLOW Remand Br, p 6. If the Governor and DNR had agreed, they surely would have sought to revoke the 2018 Easement in the same instrument they used to challenge the 1953 Easement. The Commission is under no obligation to do what the Governor and DNR declined to do. Indeed, the Commission's statutory authority stems from different statutes with different statutory prerogatives.

Unlike FLOW, MEC does not take issue with the 2018 Easement. Instead, MEC argues that the Governor and DNR's Notice places the question of the public need for the Line 5 tunnel project, and Line 5 as a whole, more squarely at issue. MEC further argues that the Notice calls the Commission's 1953 Orders into question for the same reasons the Notice challenges the 1953 Easement. MEC Remand Br, pp 7-17. Staff has already explained why the state's actions do not

require expanding the scope of this proceeding to evaluate the need for Line 5 in its entirety. MEC's challenge to the 1953 Orders, however, is a new argument to which Staff has a three-fold response.

First, although the Governor and DNR noted that the 1953 Orders did not make any findings with respect to the public trust, they did not suggest that it was the Commission's responsibility to make such findings or that the Commission violated the public-trust doctrine. Concerning the 1953 Easement, the Notice specifically alleges it "violated the public trust doctrine from its inception," (Notice, p 5), but when characterizing the Commission's 1953 Orders, the Notice is far more guarded. All the Notice says about these Orders is that "contemporaneous ***approval of the construction*** of what is now Enbridge's Line 5 in Michigan by the Michigan Public Service Commission ("PSC") [in the 1953 Orders] lacked any such public trust findings and determinations." *Id.* (emphasis added.) They acknowledge that the primary purpose of the Commission's 1953 review was to approve construction of the pipeline. The Notice refers to the 1953 Orders as an aside, noting that they did not cure the Conservation Commission's alleged failure to consider the public trust. This does not undermine the 1953 Orders for the purpose they were intended: Approving the construction of Line 5 and otherwise fulfilling Act 16 obligations.

Second, the Commission considered the public's interest in the 1953 Orders. For example, it explicitly rejected the claim that Line 5 was "not in the public interest." *In re Application of Lakehead Pipeline Co*, MPSC Case No. D-3903-53.1,

3/31/1953 Opinion and Order, p 8. Also, in a concurring opinion, Commissioner John Veale concluded that Lakehead's "operations in Michigan are affected with a public interest" and that the case was "of considerable import to the United States, the Dominion of Canada, the Province of Ontario, and the State of Michigan." *In re Application of Lakehead Pipeline Co*, MPSC Case No. D-3903-53.1, 3/31/1953 Concurring Opinion, p 1. The Michigan Supreme Court even affirmed the public's interest in the project when it held that "[t]he private benefit, if such there is, is merely incidental to the main [public] purpose." *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 40 (1954).

Finally, through Act 359, the Legislature has reaffirmed the public need for Enbridge's project. The Act provides that the tunnel is "for the benefit of the people of this state and constitute[s] a public purpose." MCL 254.324a(5). Thus, whatever can be concluded about the 1953 Easement, or even the 1953 Orders, the Michigan Legislature has conclusively determined that the limited project at issue in this case is within the public interest. As explained above, the Governor's and DNR's Notice does not undermine this conclusion. Revisiting the 1953 Orders approving the construction and siting of Line 5 within Michigan to determine if Line 5 still serves a public interest is beyond what the Commission is called to do in response to an Act 16 replacement and relocation project.

3. The Notice and the additional briefing on remand about MEPA do not undermine the ALJ's Ruling on the scope of this proceeding.

The applicability and scope of MEPA has been well-examined in this case. The Commission must evaluate whether conduct proposed in Enbridge's application will pollute, impair, or destroy the natural resources, or the public trust in those resources and whether there is a feasible and prudent alternative that prevents such harm, if any. MCL 324.1705(2); *Michigan State Highway Commission v Vanderkloot*, 392 Mich 159, 185–186, 190–191 (1974). The Ruling correctly states that while “examining the environmental impacts of [the proposed] conduct under MEPA” is a component of the Commission's jurisdiction, “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.” Ruling, p 19. As discussed above, the Notice need not change the assumptions made about the continued operation of Line 5. Nor should the arguments the parties made in their initial briefs on remand change the Ruling regarding the scope of MEPA in this case.

Although ELPC indicates that the Commission should consider both the direct and indirect greenhouse gas emissions of operating Line 5, the argument is not rooted in the text of MEPA or binding precedent. ELPC Remand Br, 5, 12–14. As Staff has stated previously, MEPA does not discuss direct or indirect environmental impacts. Instead, it requires that an administrative body consider the effects that the proposed conduct “has or is likely to have.” MCL 324.1705(2). ELPC cites a Court of Appeals' decision as support for its indirect impact argument. ELPC Remand Br, 13 (citing *Preserve the Dunes, Inc v Dep't of Environmental*

Quality and Technisand, Inc, 264 Mich App 257, 265 (2004)). In addition to the statute itself lacking any mention of direct or indirect environmental impacts, the *Preserve the Dunes* court made no finding about the consideration of indirect impacts from conduct outside of the proposed project.

The plaintiffs in *Preserve the Dunes* challenged a permit issued by the Department of Environmental Quality¹ (“DEQ”) to a mining operation in an area protected under the Sand Dune Mining Act (“SDMA”). *Id.* at 259–260. The plaintiffs argued that the trial court erred by considering the effect of the permitted activities on the “total critical dune area in the state because each and every critical dune area must be protected unless one of the two exceptions [] applies.” *Id.* 263. The court applied an opinion by the Michigan Supreme Court explaining that the MEPA challenge should be evaluated under the SDMA section requiring DEQ to deny such permits if “the proposed sand dune mining activity is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources, as provided by [MEPA].” *Id.* at 265–266 (citing MCL 324.63709; *Preserve the Dunes, Inc v Dep’t of Environmental Quality*, 471 Mich 508, 521

¹ The Department of Environmental Quality is the predecessor organization to the Department of Environment, Great Lakes, and Energy. Executive Order No. 2019-02.

(2004)).² As a result, the court found that “in a MEPA action involving the SDMA . . . the statute requires the trial court to use an approach that assesses the total effect of the sand dune mining on the environment, not just the effect on the particular location from which sand is to be removed.” *Id.* The “total effect” language used by the court referred specifically to cases involving the SDMA. But more importantly, the court did not state that MEPA required the review of indirect environmental impacts arising out of actions beyond the proposed conduct. It merely found that it would not stop its review of the proposed conduct’s impact at the borders of the project site.

The parties also cite multiple federal cases addressing NEPA in an effort to provide analogous, though nonbinding, decisions regarding the review of indirect greenhouse gas emissions in administrative proceedings. *ELPC Remand Br*, 10–13; *FLOW Remand Br*, 27. This case law fails to justify overturning the ALJ’s Ruling for two reasons. First, these decisions do not address MEPA. See *In re Reliability Plans of Elec Utilities for 2017-2021*, 505 Mich 97, 119 (2020) (“Statutory interpretation begins with examining the plain language of the statute. When that language is clear and unambiguous, no further judicial construction is required or permitted.”). These decisions address the separate federal environmental

² The *Preserve the Dunes* court also noted that a related statute at issue in the case, the Sand Dune Protection and Management Act, “refers collectively to the critical dune areas of Michigan as a natural resource. The individual dunes themselves are apparently not contemplated.” As a result, the court found it appropriate to consider the impact of the proposed mining activity on these critical dunes areas, rather than considering the impact on the individual project site. *Preserve the Dunes*, 264 Mich App at 266 (citing MCL 324.35302(a)).

protection framework and are, therefore, not binding in the present case. Second, the underlying conduct at issue in these cases is distinguishable from the conduct proposed in Enbridge's application. The determinations of specific impacts to be considered are inapplicable here.

ELPC and FLOW both cite to the NEPA review in *Sierra Club v Federal Energy Regulatory Comm'n*, 867 F3d 1357 (D.C. Cir 2017) to support their arguments that the Commission's review should include evidence regarding the greenhouse gas emissions resulting from the oil transported in Line 5. ELPC Remand Br, 13; FLOW Remand Br, 27. In addition to being conducted under the separate framework of NEPA, *Sierra Club* addressed the "construction and operation of three new interstate natural-gas pipelines in the southeastern United States" the primary purpose of which was "to serve Florida's growing demand for natural gas and the electric power that natural gas can generate." *Sierra Club*, 867 F3d at 1363–1364. The decision specifically notes that the motivation for creating the three new pipelines, and a concern of the environmental organizations, was an increase in supply and use of natural gas in Florida. *Id.* at 1364. This is quite different from an application to replace a four-mile segment of an existing pipeline within a utility tunnel below the Straits, regardless of the parties' arguments regarding the Notice addressed above. Even if the D.C. Circuit's decision addressed the environmental protection law at issue in this case, which it does not, the decision would not demand the Commission address the same environmental impacts given the difference in conduct at issue in this case.

Even less persuasive are the arguments regarding what ELPC refers to as the “Liberty case.” ELPC Remand Br, 11. Not only did the Liberty case address the separate federal framework of NEPA, it also dealt with the approval of an offshore oil drilling and production facility located at a site that contained “about 120 million barrels of recoverable oil.” *Center for Biological Diversity v Bernhardt*, 982 F3d 723, 731 (9th Cir 2020). The proposed conduct consisted of extracting oil for consumption. *Id.* As the ALJ stated in his Ruling, “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.” Ruling, p 19. A federal case finding that greenhouse gas emissions should be considered when extracting millions of barrels of oil for consumption falls well short of providing a decision analogous to the determination of appropriate environmental considerations for the proposed project in this case.

An attempt to use other state environmental review processes as support for expanding the scope of this case also suffers from a lack of likeness. MEC cites to an ongoing review of another proposed reroute of Line 5 in Wisconsin and states that “Wisconsin’s permitting agency plans to review Greenhouse Gas Emissions – Climate Change.” MEC Remand Br, 33–34 (internal quotation marks omitted). Yet, the Wisconsin Department of Natural Resources (“WDNR”) webpage cited as support for this assertion specifically notes that “[n]o agency in Wisconsin has authority to determine need for and/or siting of petroleum pipelines.” Wisconsin Department of Natural Resources, Enbridge Projects in Wisconsin,

<https://dnr.wisconsin.gov/topic/EIA/Enbridge.html> (accessed on Jan 26, 2021).

Moreover, the draft environmental impact statement outline indicating that the WDNR will review greenhouse gas emissions is being prepared pursuant to Wisconsin administrative regulations that specifically define “environmental impact” as “a direct, indirect, secondary, or cumulative change to the quality of the human environment.” *Id.*; Wis Admin Code NR § 150.03(9). Staff does not dispute that greenhouse gas emissions should be an appropriate consideration in certain regulatory contexts. However, the review of secondary and indirect impacts of a pipeline reroute pursuant to Wisconsin law by the WDNR, a Wisconsin agency more akin to EGLE than the MPSC, cannot be the basis for expanding the statutory authority and role of the Commission in this case.

Despite attempts to distinguish the factual and legal footing of the scope of MEPA in light of the Governor’s Notice, the ALJ’s initial Ruling remains correct. The conduct proposed in Enbridge’s application should be reviewed to determine whether it will pollute, impair, or destroy the natural resources, or the public trust in those resources. If so, the Commission should consider whether feasible and prudent alternatives exist that would eliminate such harms. Evidence of impacts from activities beyond this conduct such as global climate change and greenhouse gas emissions, however, are not appropriate for consideration in this case.

III. Conclusion

For the above reasons, Staff maintains that the Notice does not have a material effect on the appropriate disposition of Enbridge's Motion in *Limine*. Staff respectfully requests its positions made in its Initial Brief on Remand and this Reply Brief be adopted and the ALJ's original Ruling be affirmed in its entirety.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE
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De Ann Payne

Subscribed and sworn to before me
this **29th** day of **January, 2021**.

Pamela A. Pung, Notary Public
State of Michigan, County of Clinton
Acting in the County of Eaton
My Commission Expires: 5-7-2025