

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)
ENBRIDGE ENERGY, LIMITED PARTNERSHIP,)
for 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 Commission’s Rules of Practice)
and Procedure, R 792.10447, or the grant of other)
appropriate relief.)
_____)

Case No. U-20763

At the April 21, 2021 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Tremaine L. Phillips, Commissioner
Hon. Katherine L. Peretick, Commissioner

ORDER

I. HISTORY OF PROCEEDINGS

On April 17, 2020, Enbridge Energy, Limited Partnership (Enbridge), filed an application (application) and supporting exhibits pursuant to Public Act 16 of 1929, MCL 483.1 *et seq.* (Act 16) and the Commission’s Rules of Practice and Procedure, Mich Admin Code, R 792.10447 (Rule 447) requesting that the Commission grant Enbridge the authority for its project known as the Straits Line 5 Replacement Segment (Replacement Project), which involves constructing a replacement segment of the Line 5 pipeline (Line 5) that crosses the Straits of Mackinac (Straits). Enbridge sought *ex parte* approval of the application. In the alternative, Enbridge requested a

declaratory ruling confirming that it already has the requisite authority to construct the Replacement Project pursuant to the March 31, 1953 order in Case No. D-3903-53.1 (1953 order).

On April 22, 2020, the Commission issued an order in this case seeking comments on the threshold issue presented in the declaratory ruling request. The Commission also decided to hold Enbridge's full application in abeyance while it considered the request for a declaratory ruling.

On June 30, 2020, the Commission issued an order in this case denying both *ex parte* approval of the application and the requested declaratory relief (June 30 order). The Commission also decided to read the record. June 30 order, p. 70. The Commission set this matter for a contested proceeding, and invited the continued submission of comments.

On August 12, 2020, a prehearing conference was held before Administrative Law Judge Dennis W. Mack (ALJ), at which intervention was granted to the Michigan Department of Attorney General (Attorney General); For Love of Water (FLOW); the Michigan Environmental Council (MEC), Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council, and the National Wildlife Federation (together, the MEC Coalition); Bay Mills Indian Community (Bay Mills); Environmental Law & Policy Center (ELPC) and Michigan Climate Action Network (MiCAN) (together, ELPC/MiCAN); Little Traverse Bay Band of Odawa Indians; Nottawaseppi Huron Band of the Potawatomi; Michigan Laborers' District Council (MLDC); Michigan Propane Gas Association and the National Propane Gas Association (together, the Associations); and the Mackinac Straits Corridor Authority (MSCA).¹ The Commission Staff (Staff) also participated. On August 13, 2020, the ALJ adopted a schedule for the case.

¹ The ALJ and the parties have used various shortened names. In order to reduce confusion, when reproducing a quote in this order the shortened names or acronyms designated herein are used (in brackets).

On September 2, 2020, Enbridge filed a motion in limine. On September 23, 2020, responses to the motion were filed by the Staff, ELPC/MiCAN and Bay Mills (jointly), FLOW, the Attorney General, the Associations, and the MEC Coalition. On September 30, 2020, the ALJ held a hearing on the motion.

On October 23, 2020, the ALJ issued a ruling granting the motion in part, and denying it in part (the initial ruling). On November 6, 2020, Bay Mills, the MEC Coalition, ELPC/MiCAN, FLOW, and the Attorney General² filed applications for leave to appeal the initial ruling under Mich Admin Code, R 792.10433 (Rule 433). On November 20, 2020, Enbridge, the Associations, the Staff, and MSCA filed responses to the applications for leave to appeal.

On December 9, 2020, the Commission issued an order remanding the motion in limine to the ALJ in light of Governor Gretchen Whitmer's November 13, 2020 issuance of a notice of revocation of the existing Line 5 easement in the Straits, which took place during the briefing on the applications for leave to appeal (December 9 order). The ALJ thereafter set a revised schedule.

Initial briefs on the remanded motion in limine were filed on January 15, 2021, and reply briefs were filed on January 29, 2021.³ The ALJ held a hearing on the remanded motion on February 5, 2021.

On February 23, 2021, the ALJ issued a ruling granting the motion in part and denying it in part, consistent with the initial ruling (the ruling on remand). On March 9, 2021, ELPC/MiCAN,

² The Attorney General did not file her own application, but filed a notice that she joins in the other four filed applications.

³ At the time of the briefing on remand, the alignment of certain parties changed. At the time of the filing of the second round of applications for leave to appeal, the alignment of certain parties changed again, as described below.

FLOW, Bay Mills,⁴ and the MEC Coalition⁵ filed applications for leave to appeal the ruling on remand under Rule 433. On March 23, 2021, MLDC, Enbridge, the Associations, the Staff, and MSCA filed responses to the applications for leave to appeal the ruling on remand.

After providing a brief background, this order moves chronologically through the ALJ's two rulings and the associated applications for leave to appeal and responses, organized by issue.

II. BACKGROUND

In its application, Enbridge explains that Line 5 was constructed by Lakehead Pipe Line Company (Lakehead)⁶ in 1953 and that it is a 645-mile interstate pipeline that traverses Michigan's Upper and Lower Peninsulas, originating in Superior, Wisconsin, and terminating near Sarnia, Ontario, Canada. Application, p. 5. Enbridge states that Line 5 was built to transport light crude oils and natural gas liquids (NGLs). While the vast majority of product shipped through Line 5 travels through Michigan to Canada, Enbridge explains that Line 5 delivers NGLs to a propane production facility in Rapid River, Michigan, and delivers light crude oil to facilities which interconnect with other pipelines in Lewiston and Marysville, Michigan. Application, pp. 5-6. Line 5 has an annual average capacity of 540,000 barrels per day (bpd), and Enbridge states

⁴ At this stage of the proceeding, Bay Mills was joined by the Grand Traverse Band of Ottawa and Chippewa Indians, the Little Traverse Bay Band of Odawa Indians, and the Nottawaseppi Huron Band of the Potawatomi.

⁵ At this stage of the proceeding, the MEC Coalition includes MEC, Tip of the Mitt Watershed Council, and the National Wildlife Federation.

⁶ Enbridge states that, in 1991, Lakehead transferred Line 5 to Lakehead Pipe Line Company, Limited Partnership, which changed its name to Enbridge Energy, Limited Partnership, in 2002. Enbridge's reply comments, p. 4. *See also*, November 8, 1991 order in Case No. U-9980.

that the Replacement Project will not impact its annual average capacity or the nature of the service provided by Line 5. Application, pp. 5, 8, 13.⁷

Enbridge explains that, where Line 5 crosses the Straits, it currently consists of two, 20-inch-diameter pipes referred to as the dual pipelines. Enbridge states that, pursuant to the Replacement Project, the four mile segment of the dual pipelines will be replaced with a single, 30-inch-diameter pipe, which will be located within a concrete-lined tunnel beneath the lakebed of the Straits (the tunnel). Application, pp. 2, 8. Enbridge asserts that, because the pipeline will be located in a tunnel deep beneath the lakebed, the aquatic environment will be protected from any release of liquid petroleum caused by a vessel anchor strike. Enbridge notes that the construction of the tunnel is the subject of separate applications before other state and federal agencies, including the Department of Environment, Great Lakes, and Energy (EGLE) and the U.S. Army Corps of Engineers (USACE).

⁷ Enbridge witness Marlon Samuels states that, for the past 10 years, Line 5 has operated at about 90% of its annual average capacity of up to 540,000 bpd. Samuels testimony, p. 5. Ninety percent of average capacity is about 486,000 bpd or 20,400,000 gallons per day of crude oil and NGLs transported though Line 5. The Upper Peninsula Energy Task Force estimates that the Rapid River facility produces approximately 30,660,000 gallons per year of propane. *Upper Peninsula Energy Task Force Committee Recommendations, Part I, Propane Supply*, Department of Environment, Great Lakes, and Energy, April 17, 2020, p. 48. See, https://www.michigan.gov/documents/egle/Upper_Peninsula_Energy_Task_Force_Committee_Recommendations_Part_1_Propane_Supply_with_Appendices_687642_7.pdf (accessed March 25, 2021).

Enbridge states that it entered into a series of agreements⁸ with the State of Michigan relating to the relocation of the Line 5 pipe segment within the tunnel. Enbridge notes that the Michigan Legislature enacted Public Act 359 of 2018 (Act 359), which created the MSCA and delegated to the MSCA the authority to enter into agreements pertaining to the construction, operation, and maintenance of the tunnel to house the replacement pipe segment.⁹ Enbridge explains that its request for Commission approval of the Replacement Project does not include “authorization to design, construct, or operate the tunnel” because “[t]he tunnel will be designed, constructed, and maintained pursuant to the ‘Tunnel Agreement’ entered between the MSCA and Enbridge pursuant to Act 359.” *Id.*, p. 3.¹⁰ Enbridge states that the tunnel will be constructed in the subsurface lands beneath the lakebed of the Straits within the easement issued by the Michigan Department of Natural Resources (DNR) to the MSCA (the 2018 easement), and pursuant to the assignment of certain rights under that easement by the MSCA to Enbridge. Enbridge states that

⁸ *See*, Agreement Between the State of Michigan and Enbridge Energy, Limited Partnership and Enbridge Energy Company, Inc. (First Agreement) (Exhibit A-8); Second Agreement Between the State of Michigan, Michigan Department of Environmental Quality, and Michigan Department of Natural Resources and Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc. and Enbridge Energy Partners, L.P. (Second Agreement) (Exhibit A-10); Third Agreement Between the State of Michigan, Michigan Department of Environmental Quality, and Michigan Department of Natural Resources and Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc. and Enbridge Energy Partners, L.P. (Third Agreement) (Exhibit A-1); and Tunnel Agreement (Tunnel Agreement) (Exhibit A-5). Required terms of the Tunnel Agreement are contained in MCL 254.324d(4). In this order, the First, Second, Third, and Tunnel Agreements are referred to collectively as the Agreements.

⁹ On October 31, 2019, the Michigan Court of Claims held that Act 359 is constitutional and confirmed the validity and enforceability of the Agreements. *Enbridge Energy, LP v Michigan*, Case No. 19-000090-MZ (Oct. 31, 2019). The Michigan Court of Appeals affirmed the Michigan Court of Claims’ order in *Enbridge Energy, LP v Michigan*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 351366). That order was not appealed.

¹⁰ In the initial ruling, the ALJ found that the construction of the utility tunnel is within the Commission’s jurisdiction under Act 16. Initial ruling, pp. 8-10; *see also*, June 30 order, pp. 59, 67.

the tunnel will be constructed in accordance with all required governmental permits and approvals. Enbridge explains that it will enter into a 99-year lease with MSCA for the use of the tunnel to operate and maintain the replacement pipe. Application, pp. 13-14. Enbridge seeks Commission approval to operate and maintain the replacement pipe segment located within the tunnel as part of Line 5 under Act 16. Enbridge states that once the new 4-mile pipe segment is placed into service within the tunnel, service on the dual pipelines will be discontinued. *Id.*, p. 3.

On November 13, 2020, Governor Whitmer and the DNR revoked and terminated the 1953 easement and directed Enbridge to cease operations of the dual pipelines no later than 180 days from the date of the termination notice, or approximately May 13, 2021.¹¹ The Notice of Revocation and Termination of Easement (Notice), p. 1, states:

[T]he State of Michigan hereby provides formal notice to Enbridge . . . that the State is revoking and terminating the 1953 Easement The revocation and termination each take legal effect 180 days after the date of this Notice to provide notice to affected parties and to allow for an orderly transition to ensure Michigan's energy needs are met. Enbridge must cease operation of the Straits Pipelines 180 days after the date of this Notice.

Also on November 13, 2020, the Attorney General filed an action in the Ingham County Circuit Court on behalf of the State of Michigan, Governor Whitmer, and the DNR, seeking declaratory and injunctive relief to acknowledge and enforce the revocation (Case No. 20-646-CE). On November 24, 2020, Enbridge filed an action against the State of Michigan in the U.S. District

¹¹ *See*,

https://content.govdelivery.com/attachments/MIEOG/2020/11/13/file_attachments/1600920/Notice%20of%20%20Revocation%20and%20Termination%20of%20%20Easement%20%2811.13.20%29.pdf (accessed February 5, 2021).

Court for the Western District of Michigan for declaratory and injunctive relief seeking a determination that the revocation is not lawful (Case No. 1:20-CV-1141).¹²

On January 29, 2021, EGLE granted Enbridge a set of permits relating to the construction of the utility tunnel.¹³

III. THE INITIAL RULING

In its motion in limine, Enbridge argued that certain evidence and issues should be found to be beyond the scope of this proceeding.

Specifically, Enbridge seeks an order directing that the following issues be excluded as legally irrelevant to this proceeding: (1) the construction of the utility tunnel, (2) the environmental impact of the tunnel construction, (3) the public need for and continued operation of Line 5, (4) the current operational safety of Line 5, (5) whether Line 5 has an adverse impact on climate change, and (6) the intervening parties' climate change agendas.

Motion in limine, pp. 1-2. Enbridge argued that the listed issues are outside of the Commission's jurisdiction and irrelevant to this pipeline siting proceeding under Act 16.

The ALJ began the initial ruling by noting that in the June 30 order the Commission found as follows:

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

¹² The State's declaratory relief action has been removed to the federal court and consolidated with Enbridge's action, and both cases are set for mediation. Enbridge's response to the applications for leave to appeal the ruling on remand, Attachment A. *See*, U.S. District Court for the Western District of Michigan, Case Nos. 1:20-CV-1141 and 1:20-CV-1142. The Notice has also been the subject of testimony by Canadian officials before the Michigan Senate Natural Resources Committee and the Energy and Technology Committee. *See*, <https://www.mlive.com/public-interest/2021/03/canadian-officials-testify-line-5-shutdown-would-have-big-impact-on-the-region-during-michigan-senate-committee.html> (accessed March 26, 2021).

¹³ *See*, <https://www.michigan.gov/line5/0,9833,7-413-99507-550860--,00.html> and https://www.michigan.gov/documents/line5/2021-01-29-Draft-Permit-for-Countersignature_714718_7.pdf (accessed March 27, 2021).

oil or petroleum or its products” and “to provide for the control and regulation of all corporations, associations, and persons engaged in such business, by the Michigan public service commission” In addition, Section 1(2) of Act 16 states, in relevant part:

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) (emphasis added). Based on the above language, the Commission finds that it has broad jurisdiction over the construction and operation of pipeline facilities and has the “authority to review and approve proposed pipelines, and to place conditions on their operations.” 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.

Initial ruling, pp. 2-3, quoting the June 30 order, p. 59 (citing *Lakehead Pipe Line Co v Dehn*, 340 Mich 25; 64 NW2d 903 (1954)). The ALJ goes on to find that:

[t]he Parties also agree that in prior decisions the Commission has established the general criteria for deciding an application filed under Act 16: whether the applicant has established a public need for the proposed pipeline; whether the proposed pipeline is designed and routed in a reasonable manner; and whether the construction of the pipeline will meet or exceed current safety and engineering standards.

Initial ruling, p. 3, n. 1, citing the July 23, 2002 order in Case No. U-13225, pp. 4-5, and the January 31, 2013 order in Case No. U-17020, p. 5. The ALJ found that Enbridge’s motion addresses three issues: (1) the Commission’s jurisdiction over the tunnel under Act 16; (2) review of the operation of, and need for, Line 5 in its entirety; and (3) the application of the Michigan Environmental Protection Act (MEPA), specifically MCL 324.1705, to the Replacement Project,

including whether climate change must be considered in making a determination under Act 16 and MEPA. Initial ruling, pp. 4-20.

A. The Tunnel

While no party sought leave to appeal the decision in the initial ruling on this issue, the Commission includes it here as a necessary part of the background of this order.

Enbridge argued that the tunnel is within the exclusive jurisdiction of MSCA under Act 359, specifically MCL 254.324a(1) and MCL 254.324d(1), and that the Commission is precluded from considering any aspect of the construction or operation of the tunnel.

Citing the Black's Law Dictionary meaning of "fixture," the Staff argued that the tunnel is a fixture under Act 16 because it is an irremovable component of real property. Citing a three-part definition of "fixture" from case precedent, the MEC Coalition also argued that the tunnel is a "fixture" because "(1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty." Initial ruling, p. 6, quoting *Wayne Cty v Britton Trust*, 454 Mich 608, 611; 563 NW2d 674 (1997).

The Staff, the MEC Coalition, and FLOW also argued that the Commission has authority over the tunnel under administrative rules promulgated pursuant to Act 16, specifically Rule 447(1)(c), which provides that the Commission has authority to consider projects "to construct facilities to transport crude oil or petroleum products as a common carrier for which approval is required by statute." These parties argued that the tunnel is a "facility," because it serves numerous functions associated with the operation of the pipeline.

Finally, the Staff contended that the Commission exercises authority over the tunnel under MCL 483.2b, which provides that "[a] pipeline company shall make a good-faith effort to

minimize the physical impact and economic damage that result from the construction and repair of a pipeline.” The Staff posited that the tunnel is inseparable from the pipeline replacement project, and it is impossible to review how the pipeline will be constructed, maintained, or repaired without considering the design of the tunnel.

The ALJ found that Act 359 does not divest other agencies of regulatory oversight of the tunnel, citing MCL 254.324d(4)(g), which provides:

Except as provided in subdivision (a), no later than December 31, 2018, the Mackinac Straits corridor authority shall enter into an agreement or a series of agreements for the construction, maintenance, operation, and decommissioning of a utility tunnel, if the Mackinac Straits corridor authority finds all of the following: . . . (g) That the proposed tunnel agreement does not exempt any entity that constructs or uses the utility tunnel from the obligation to obtain any required governmental permits or approvals for the construction or use of the utility tunnel.

The ALJ noted that Enbridge is seeking regulatory approvals for the tunnel from EGLE and USACE. Turning to Act 16, the ALJ noted that Section 1(2) of that act defines the Commission’s jurisdiction, and provides:

A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof . . . through pipe line . . . 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 . . . except as authorized by and subject to this act.

MCL 483.1(2); initial ruling, p. 5.

The ALJ rejected Enbridge’s argument that the tunnel is a standalone structure subject solely to Act 359, finding that “Enbridge is seeking to have the Commission undertake its Act 16 review of the project as if the Utility Tunnel has been designed, constructed, and placed into operation, which is obviously not the case.” Initial ruling, p. 8. The ALJ found that the relocation of the pipeline into the tunnel is the reason for the Replacement Project, and the pipeline and tunnel are inextricably connected. The ALJ stated:

As the Commission held in this case, the purpose of Act 16 is to ensure that pipelines are designed, routed, constructed, and operated in a safe and economical manner. See Case No. U-20763, June 30, 2020 Order, pg. 59; see also Case No U-13225, July 23, 2002 Order, pgs. 4-5. 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 the development of a record on the design, construction, and operational aspects of both the pipeline and Utility Tunnel. Counsel for the Corridor Authority indicated during Oral Argument the plans for the Utility Tunnel will be completed while this case is pending and will be offered as evidence in this case. 2 TR 205-207. To exclude that evidence under Enbridge's Motion would effectively preclude the Commission from performing its statutorily mandated review of a project under Act 16. Having said that, Staff's contention that this case does not entail the "approval" of the Utility Tunnel is accurate. Rather this case entails a review of the proposal to relocate the pipeline 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." [June 30 order], pg. 59, citing Case No. U-17020, January 31, 2013 Order, pg. 5. Finally, undertaking the inquiry required under Act 16 does not usurp the Corridor Authority's role under Act 359, but rather is entirely consistent that the requirement that the Utility Tunnel obtain all necessary regulatory approvals. MCL 254.324d(4)(g).

Initial ruling, pp. 9-10 (notes omitted). Applying rules of statutory construction, the ALJ found that the tunnel is a "fixture" under both the "irremovable" test cited by the Staff and the three-part test posed by the MEC Coalition for purposes of Act 16, and is also a "facility" as that term is used in Rule 447. Finally, the ALJ also found that in order for the Commission to determine whether a good faith effort was made to limit the physical impact and economic damage from the construction of the pipeline, it is necessary to consider the tunnel under MCL 483.2b. Initial ruling, p. 10. Thus, the ALJ denied Enbridge's motion in limine as it pertains to review of the tunnel.

No party sought leave to appeal this decision.

In response to a request from the Staff, on December 23, 2020, Enbridge filed supplemental direct testimony and exhibits addressing aspects of the design and construction of the tunnel.

B. Public Need for Line 5/Operation of Line 5

In its motion, Enbridge contended that any issue pertaining to the operation of Line 5 in its entirety, including the public need for the pipeline, is outside the scope of this proceeding, based on the fact that the finding of public need was already made by the Commission in the 1953 order and affirmed by the Michigan Supreme Court in 1954 in *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 37; 64 NW2d 903 (1954) (*Lakehead*). Enbridge argued that Act 359 establishes the continued need for Line 5, and that federal law preempts state law with respect to the issues of pipeline safety and operations for an interstate pipeline like Line 5. *See*, 49 USC 60104(c). Finally, Enbridge argued that Act 16 does not allow for another determination as to whether the pipeline should continue in operation. The Staff supported Enbridge's position, and the MEC Coalition and FLOW opposed it.

The ALJ disagreed with Enbridge's view of the 1953 order and the *Lakehead* decision, noting that the Commission already found that the Replacement Project differs significantly from the project proposed in 1953 and requires an independent review. June 30 order, pp. 38, 58. The ALJ explained that the scope of this case is dictated by two factors: (1) the activity proposed in the application, namely replacement of the existing four miles of dual pipelines located on the bottomlands with a pipeline located in a tunnel, as contemplated in Act 359 and various agreements with the State; and (2) the Commission's jurisdiction over that proposal under Act 16, the administrative rules promulgated under its authority, and MEPA. Initial ruling, p. 14. He found that it is not in dispute that the Tribal nations have treaty rights in the Straits and, under Executive Directive (ED) 2019-17, have a right to be consulted when their interests are affected.

However, the ALJ determined that neither FLOW nor the MEC Coalition provided any substantive legal basis for finding that a review of the operation of Line 5 in its entirety or a re-

determination of the public need is required. The ALJ found that these intervenors did not show that Enbridge is a public utility seeking a certificate of necessity or a certificate of public convenience and necessity. Initial ruling, p. 15, n. 7. The ALJ stated that “the standards of Act 16 are well established and must be applied in this case.” *Id.*, p. 15; *see* June 30 order, pp. 59, 65-67.

He held:

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.

Initial ruling, p. 15 (note omitted). The ALJ granted the motion in limine regarding the operation of Line 5 in its entirety.

The MEC Coalition, Bay Mills, the Attorney General, and FLOW seek leave to appeal this decision in the initial ruling.

In its application for leave to appeal, the MEC Coalition asserts that the exclusion of relevant evidence is an error of law. *See*, MRE 401. Rule 433(3) provides that “An offer of proof shall be made in connection with an appeal of a ruling excluding evidence. The offer of proof shall be made on the hearing record.” While noting that this subsection does not apply at this stage of the case because there is no hearing record, the MEC Coalition nevertheless makes an offer of proof under Rule 433. The MEC Coalition provides information regarding two witnesses who could testify about the economics of fossil fuel pipelines and the risks associated with such pipelines.

The MEC Coalition notes that the Commission has already established the approval criteria for Act 16 cases, and one of those three approval criteria is whether there is a “public need” for the project. March 7, 2001 order in Case No. U-12334 (2001 order), p. 13; July 23, 2002 order in

Case No. U-13225, p. 4 (2002 order); January 31, 2013 order in Case No. U-17020, p. 5 (2013 order). The MEC Coalition begins by arguing that, in order to determine whether there is a public need for the Replacement Project, the Commission must determine whether there is a public need to extend the life of Line 5. The MEC Coalition contends that Enbridge has alleged that there is a public need for the services of Line 5, and that the Replacement Project will eliminate environmental risk to the Straits. Application, p. 3. Enbridge also states that it will have the right to occupy the tunnel with Line 5 for 99 years. Against this background, the MEC Coalition argues there are two distinct issues: “The first issue is whether there is a public need to replace the dual pipelines with a new pipeline in a tunnel so as to perpetuate Line 5 for decades to come. The second issue is whether perpetuating Line 5 for decades to come by building the project would perpetuate other environmental risks.” The MEC Coalition’s application for leave to appeal the initial ruling, p. 10. The MEC Coalition argues that the ALJ merged these two issues into a single misstated issue of whether the operational aspects of the entirety of Line 5 could be considered in this Act 16 review.

The MEC Coalition contends that no party denies that Line 5 will operate longer with approval of the Replacement Project. In answer to Enbridge’s assertion that Line 5 will continue in operation indefinitely whether the project is approved or not, the MEC Coalition argues that this is a question of fact and the parties should be allowed to develop the record on this question. While stating that there is no need to revisit the Commission’s 1953 determination of public need, the MEC Coalition also contends that Enbridge’s application requires a determination of whether there is a public need to extend the life of Line 5. The MEC Coalition notes that the Michigan Administrative Procedures Act of 1969 (APA), specifically MCL 24.272, provides that in an administrative proceeding the parties are entitled to the opportunity to present evidence and

argument on the issues of law, policy, and fact. The MEC Coalition claims that Enbridge submitted testimony on the issue of the public need for Line 5 from two witnesses. The MEC Coalition asserts that the other parties are entitled, under the APA, to do the same.

The MEC Coalition further argues that a review under Act 16 must consider whether the proposed pipeline is routed in a reasonable manner, and this involves looking at risk. The MEC Coalition asserts that in Act 16 cases the Commission examines all risks that will foreseeably result from the proposed project, and evaluates the risks of the proposed project against the risks of other available alternatives. The MEC Coalition further notes that Enbridge has alleged that the project will protect the aquatic environment and eliminate the risk of releases into the Straits, and argues that this issue must also be examined.

The MEC Coalition posits that the Commission must also independently consider the safety of Line 5 in performing its MEPA analysis. Section 5(2) of MEPA provides:

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.

MCL 324.1705(2). The MEC Coalition asserts that this statutory language places two duties upon the Commission: “(1) to determine whether the proposed course of conduct will pollute, impair, or destroy natural resources; and (2) not authorize the proposed conduct if it is likely to have that effect and there are feasible and prudent alternatives.” The MEC Coalition’s application for leave to appeal the initial ruling, p. 22. The MEC Coalition contends that this involves consideration of both the conduct (what is proposed) and the likely effect of the conduct (which goes beyond the proposal). Positing that the purpose of the Replacement Project is to extend the life of Line 5, the MEC Coalition contends that this evidence is relevant. The MEC Coalition argues that failure to

consider this evidence constitutes the basis for finding an abuse of discretion by the agency. *See, State Hwy Comm v Vanderkloot*, 392 Mich 159, 185; 220 NW2d 416 (1974) (*State Hwy Comm*); *Buggs v Mich Pub Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2015 (Docket Nos. 315058 and 315064) (*Buggs I*), p. 8; *Buggs v Mich Pub Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2017 (Docket Nos. 329781 and 329909) (*Buggs II*).

Anticipating Enbridge's response, the MEC Coalition notes that the federal Pipeline Safety Act (PSA), specifically 49 USC 60104(c), provides that "[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." The MEC Coalition contends that this language does not preempt the Commission's consideration of safety in its MEPA review. The MEC Coalition argues that this preemption provision is limited to pipeline safety standards, and does not preempt the requirements of MEPA, which address environmental impacts. The MEC Coalition asks the Commission to clarify that federal law does not preempt the required safety review under MEPA.

Finally, the MEC Coalition argues that the Commission must consider the impact that extending the life of Line 5 will have on Tribal treaty-reserved rights to natural resources in the ceded territories, and indicates that it supports the arguments made by Bay Mills. The MEC Coalition asserts that "[t]he Commission cannot satisfactorily meet its obligation to consult and adequately assess the potential harm to the Tribes' property rights if evidence of public need and safety is excluded." The MEC Coalition's application for leave to appeal the initial ruling, p. 27.

In its application for leave to appeal, Bay Mills contends that evidence concerning the risk of an oil spill from both the 4-mile segment and from elsewhere on Line 5 is relevant to this proceeding. Bay Mills states that Enbridge has introduced evidence on this issue, and contends

that the other parties are entitled to present evidence on this issue under the APA. MCL 24.272(3), (4). Bay Mills argues that this is also consistent with the Commission's broad authority under Act 16 and the comprehensive environmental review that is required under MEPA. Additionally, Bay Mills asserts that its treaty-protected rights require consideration of evidence on the risk of oil spills and the potential effect on natural resources in all of the ceded territories. Bay Mills asserts that public need and safety must be examined as separate issues.

Bay Mills points out that Enbridge has alleged in its application and its proffered testimony that the Replacement Project will alleviate the risk of an oil spill from Line 5 into the Great Lakes. Bay Mills contends that the initial ruling deprives the parties of this right to challenge Enbridge on this central issue, stating:

[i]f the purpose of the Line 5 [Replacement] Project is to address the significant risk of a catastrophic oil spill, then all of the risks along the length of Line 5 must be evaluated to determine whether the tunnel will actually achieve its stated purpose. A spill in another part of the pipeline can reach or harm the Straits and or Great Lakes because of the hydrological connections of waterways that Line 5 crosses in the region. . . . [I]t would make little sense—and would not serve the public—to construct a tunnel to alleviate the risk of an oil spill from one segment of Line 5 if the same or similar risks are left unaddressed throughout the pipeline's length.

Bay Mills' application for leave to appeal the initial ruling, pp. 9-10. If evidence regarding the risk of an oil spill on the entirety of Line 5 is barred, Bay Mills asserts that Enbridge's allegations will have been accepted without examination. Citing the 2001, 2002, and 2013 orders, Bay Mills argues that, under Act 16, the Commission has historically undertaken a broad review of potential risks associated with the route, feasibility, and environmental impact of pipeline projects.

Like the MEC Coalition, Bay Mills notes that Rule 433(3) does not apply here because no specific evidence has been excluded from the proceeding and there is no hearing record; however, Bay Mills also offers a description of the evidence that it would provide on the risk issue and the effect of the Replacement Project on fisheries and other natural resources.

Bay Mills argues that MEPA also requires an analysis of the environmental risk posed by the entire pipeline, and including the dual pipelines, during construction of the tunnel. Like the MEC Coalition, Bay Mills emphasizes the breadth of the MEPA statute and the Commission's duty to perform an independent MEPA review. Bay Mills urges the Commission to consider the environmental effects from the entirety of the conduct proposed in Enbridge's direct evidence, including the extension of the life of Line 5. Bay Mills points out that MEPA requires the consideration of feasible and prudent alternatives, and argues that these alternatives must include operation using the dual pipelines, operation of the pipeline in the tunnel, operation of pipeline that lies outside the tunnel, operation using a different route, and operation for a shorter duration than that proposed in Enbridge's application. *Id.*, p. 17.

Like the MEC Coalition, Bay Mills argues that federal law does not preempt any aspect of the Commission's review under Act 16 or MEPA. Bay Mills notes that, under federal law, the location or routing of a pipeline facility is left to the states. 49 USC 60104(e). Bay Mills also points to the Staff's status as a certified agent for the Pipeline Hazardous Materials Safety Administration (PHMSA) under 49 USC 60105 and 49 USC 60117. Bay Mills contends that the preemption power is limited to interstate pipeline safety standards and does not affect the Commission's Act 16 or MEPA review in this case.

Bay Mills then turns to the treaty-protected resources in the ceded territories, arguing that the Commission must give full consideration to the impacts of the Replacement Project on these resources. Bay Mills explains that the 1836 Treaty between Bay Mills' predecessors and the United States (1836 Treaty), in which Tribal Nations ceded territory to the United States for the creation of the State of Michigan, is the supreme law of the land under US Const, art VI. Bay Mills explains that, in the 1836 Treaty, Tribal Nations reserved the right to hunt, fish, and gather

throughout the ceded lands and waters, including the right of commercial and subsistence fishing in the Great Lakes. Bay Mills explains that only the U.S. Congress can abrogate the 1836 Treaty.

Bay Mills argues that the ALJ misunderstood the role of these treaty rights, contending that the Tribe does not seek to expand the Commission’s authority under Act 16 but rather seeks proper consideration of the Replacement Project’s effects on its treaty rights. Bay Mills states that it “would submit evidence about the consequences of a potential oil spill from the dual pipelines in the Straits—and the continued spills into waterways that are hydrologically connected to the Great Lakes—on plants, fisheries, and cultural resources in the Straits and the Great Lakes relied on by Bay Mills.” *Id.*, p. 22. Bay Mills describes its treaty rights as “antecedent and superior to any rights Enbridge may have.” *Id.*, p. 26.

Bay Mills goes on to describe additional legal authority for the requested review, including the 2002 Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan (the 2002 Accord) and ED 2019-17. Bay Mills states that the 2002 Accord requires the opportunity for input and recommendations from a Tribal government to the State government regarding state actions. ED 2019-17 provides that: “Each department and agency must adopt and implement a process for consulting on a government-to-government basis with Michigan’s federally recognized Indian tribes. The department or agency must engage in this consultation process before taking an action or implementing a decision that may affect one or more of these tribes.” ED 2019-17, p. 2. Bay Mills indicates that the Staff and Bay Mills have begun consultation, and argues that the initial ruling incorrectly limits the scope of that consultation.

Bay Mills next argues that a finding of public need is necessary, and that the ALJ erred in barring evidence addressing the public need issues related to the current and future operational

aspects of the entirety of Line 5. Bay Mills contends that Act 359 does not control the public need determination and does not revise Act 16 in any way or displace the Commission's required analysis. Bay Mills contends that Enbridge introduced the issues of continued operation and longevity, and that parties must be allowed to present evidence as to whether the public will actually need to transport fuels through Line 5 for decades to come. Like the MEC Coalition, Bay Mills notes that Enbridge claims that Line 5 will continue to operate whether or not the Replacement Project is approved, but argues that this is a question of fact that the parties should be allowed to explore through discovery.

FLOW echoes many of the arguments made by the MEC Coalition and Bay Mills. FLOW contends that the ALJ improperly restricted the scope of review in this case, and that the initial ruling does not comport with findings the Commission already made in the June 30 order. FLOW notes that in the 2013 order, p. 5, the Commission adopted the following criteria for an Act 16 review: "(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." FLOW argues that, under the language of Act 16, any issue concerning the current or future operational aspects of the entirety of Line 5 is relevant, and that these issues involve questions of fact that can only be decided after a hearing. MCL 483.1(2). Citing the APA, FLOW argues that the parties have a right to present evidence on issues including the public need for the Replacement Project, and the operation of transporting crude oil through Line 5 itself for the next 99 years. FLOW argues that the true purpose of the tunnel and the 99-year lease should be fully developed on the record, noting that the 2018 easement created by Act 359 is different from the 1953 easement.

FLOW contends that the Commission must examine whether it is in the public interest to authorize new or expanded pipeline service, and must consider whether there is a market for this service. FLOW asserts that the Act 16 review 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.” FLOW’s application for leave to appeal the initial ruling, p. 15. FLOW contends that determining whether a project represents a financial risk to ratepayers is a core function of the Commission. FLOW asserts that the Commission needs to have a full record, including forecasts of all types, in order to probe the issue of whether a public need for Line 5 exists and whether the Replacement Project is in the public interest.

Turning to the responses to the applications for leave to appeal, MSCA expresses support for the initial ruling in its response.

In their response, the Associations also contend that the initial ruling should be affirmed. They argue that Enbridge is not seeking, and does not require, approval to continue to operate Line 5. The Associations contend that the Legislature confirmed the continued need for Line 5 when it authorized the construction of the tunnel through Act 359, and the initial ruling properly limits review by the Commission to the Replacement Project itself. They further argue that the initial ruling “is correct not only as a matter of law, but as a practical matter; requiring an applicant to re-justify the need for their entire facility whenever they seek Commission approval for improvements on one aspect of that facility will discourage future applicants from pursuing such improvements.” The Associations’ response to the applications for leave to appeal the initial ruling, pp. 5-6. The Associations argue that Enbridge has not put the lifespan of Line 5 at issue, and that only future consumer demand and market economics will determine how long Line 5

operates. They point out that, whatever the outcome of this proceeding, Enbridge will have the legal right to operate Line 5. Finally, the Associations contend that the initial ruling comports with the limits of the Commission's jurisdiction, which does not extend to interstate pipelines or interstate pipeline safety.

In its response, Enbridge contends that the parties opposing the motion have no interest in addressing the actual issue in this case which is whether relocation of the pipeline within the tunnel will serve a public purpose by better safeguarding the Great Lakes.¹⁴ Enbridge points to the Agreements as evidence of what the State of Michigan finds to be in the public interest, and notes that the Staff supported the motion on this issue.

Enbridge contends that the initial ruling properly found that the public need for Line 5 and the issue of its continued operation are both outside the scope of this proceeding, and states that the parties opposing the motion have conceded that there is a public benefit to deactivating the dual pipelines. Enbridge argues that the requirement to relocate the pipeline within the Straits was generated by the State of Michigan, and that the company has a legal duty to relocate the 4-mile pipeline segment to the tunnel. Enbridge avers that the public need for Line 5 was conclusively decided in the 1953 order and the *Lakehead* case and is not subject to re-litigation in this proceeding. Enbridge states that the Replacement Project seeks to fulfill the purpose of Act 359, and that the project proposed in the application has nothing to do with Line 5's lifespan. The company avers that Bay Mills cites no statutory basis for arguing that the Commission must review the operation of Line 5, and that, in any case, the procedural requirements included in the APA and in case law for terminating a license or permit have not been met. Like the Associations,

¹⁴ Enbridge notes that it did not seek leave to appeal the portion of the initial ruling denying the motion in limine with respect to review of the construction and operation of the tunnel, but reserves its right to later challenge that decision. *See*, Rule 433(5).

Enbridge asserts that any arguments about the longevity of Line 5 are based on speculation because only economic realities such as customer demand will determine the lifespan of the pipeline. Enbridge also argues that the 1953 order authorizes Enbridge to operate and maintain Line 5 in perpetuity, and thus evidence regarding the 99-year lease is irrelevant as well, noting that no party disputes Enbridge's legal right to continue to operate the other 641 miles of Line 5. Enbridge posits that a re-review of the public need for Line 5 would assert a chilling effect on pipeline owners' willingness to pursue major repairs on pipelines in the future.

Enbridge contends that its statements in the application and testimony simply provide necessary background and do not open the door to a new examination of public need. The company points out that the initial ruling affirms the ability of all parties to present evidence about whether the Replacement Project satisfies a public need and meets all applicable standards. Enbridge states "To the extent the Commission believes that this background information in Enbridge's prefiled testimony opens the door to an analysis of the continuing need for Line 5, Enbridge will withdraw the testimony." Enbridge's response to the applications for leave to appeal the initial ruling, p. 11, n. 9. Enbridge notes that PHMSA has exclusive jurisdiction to regulate the safety of interstate pipelines under the PSA. 49 USC 60104(c); 49 USC 60102(b)(1); 49 USC 60117(1). Enbridge maintains that, simply because it asserts that the Replacement Project will better safeguard the Great Lakes does not mean that every risk potentially associated with the entirety of Line 5 is in dispute. Finally, Enbridge argues that Tribal rights cannot be used to expand the Commission's statutory jurisdiction, and the initial ruling correctly adhered to the limits of that jurisdiction.

In its response, the Staff urges the Commission to affirm the initial ruling. The Staff notes that the criteria for making a determination on an Act 16 application were set by the Commission in the

2002 order, pp. 4-5, and they include whether: (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 Staff urges the Commission to reject the opposing parties' invitation to review anything other than the application, arguing that:

[b]eyond the lack of a procedural, statutory, and precedential basis to review the operational aspects, including the public need and safety, of an entire pipeline system, evidence concerning the propriety of Line 5 as a whole is irrelevant and unnecessarily confuses the issues. Even if the Commission were to deny Enbridge's Act 16 application, one cannot assume, with any certainty, that Line 5 will cease operating in its current state. Therefore, the only evidence that the Commission's determination will impact ongoing Line 5 operations is speculative and should therefore be excluded. MRE 402; MRE 602.

Staff's response to the applications for leave to appeal the initial ruling, p. 6 (note omitted).

The Staff argues that Act 16 requires review of the proposed project and not the entire pipeline, and that, in any case, review of the entire pipeline has not been properly noticed in the application. The Staff asserts that the Commission's approach to Act 16 determinations was set in the 2002 order, where Wolverine Pipeline Company (Wolverine) sought permission to construct, operate, and maintain a 26-mile pipeline segment. The Staff notes that at no point in that case did the Commission examine "(1) any portion of Wolverine's existing pipeline system not related to the proposed route; (2) how the pipeline could extend the life of the existing pipeline system or; (3) how the pipeline should be considered in light of Wolverine's prior dealings with the state." *Id.*, p. 8. The Staff contends that the ALJ correctly found that, in that case, "the Commission applied the Act 16 standards to the portion of the pipeline proposed to be replaced." Initial ruling, p. 15, n. 8. Thus, the Staff argues that consideration of the entirety of Line 5 would depart from Commission precedent. The Staff notes that the Tunnel Agreement discusses the possibility of an oil release from the dual pipelines, and does not discuss that threat with respect to any other

portion of Line 5. The Staff also maintains that long-term trends in the fossil fuel industry are irrelevant to this Act 16 case.

The Staff argues that the Commission must consider the public need for the Replacement Project, and not the public need for Line 5 or whether the Replacement Project will extend the lifespan of Line 5. The Staff contends that the opposing parties can cite to no law supporting such an extension of the Commission's review, and notes that the issue of the authorization of Line 5 has not been noticed as required under the APA. The Staff, like the other parties in support of the motion, contends that such an extension would have a chilling effect on future applicants seeking to improve, relocate, or reinforce pipeline segments. The Staff notes that maintenance can extend the life of any asset, but argues that proposed maintenance should not automatically trigger review of the public need for the entire pipeline system.

The Staff further contends that the initial ruling was correct with respect to treaty rights. The Staff indicates that it has already initiated consultation with Bay Mills and other Tribes, but argues that treaty rights cannot expand the Commission's jurisdiction. The Staff states that it agrees with Bay Mills "that the Commission should consider reasonable and prudent alternatives to the proposed pipeline project, including the impact of the tunnel, the public need for the project, and how the project impacts relevant treaty-impacted rights, such as fishing rights in the Straits of Mackinac." *Id.*, p. 22.

C. The Michigan Environmental Protection Act Review

In its motion, Enbridge argued that MEPA does not apply to the activity of constructing the tunnel proposed in the application, and does not allow for the consideration of climate change in determining whether to approve the Replacement Project under Act 16. *See*, MCL 324.1705. The Staff agreed with Enbridge that MEPA does not allow consideration of climate change in

examining the impact of the proposed activity, but disagreed regarding the applicability of MEPA to construction of the tunnel. The MEC Coalition, ELPC/MiCAN, Bay Mills, and FLOW opposed the request to limit evidence regarding climate change.

The ALJ found that, in light of his conclusion that the tunnel is a fixture under MCL 483.1(2), is a facility under Rule 447, and is a necessary component of the duties imposed by MCL 483.2b, MEPA is applicable to the tunnel activities proposed in the application. Initial ruling, p. 17. The ALJ stated that, “[b]ecause 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.” *Id.* The ALJ acknowledged that the Commission will also be able to rely on the expertise of EGLE and USACE as part of its MEPA review. *See*, 2 Tr 197-201. The ALJ denied the motion in limine on the issue of the applicability of MEPA to the tunnel activities proposed in the application. No party sought leave to appeal this decision.

Turning to the issue of climate change, the ALJ noted that MEPA requires an examination of the “conduct” proposed in the license application, and found that the “conduct in this case is the activity proposed in the Application and subject to the Commission’s jurisdiction under [the] Act: the replacement of the existing pipelines on the bottomlands with a pipeline in a Utility Tunnel.” Initial ruling, p. 18. The ALJ found that “consideration of the environmental effect of the oil transported on the pipeline after it is refined and placed in the market for consumption would also extend the conduct to the extraction and refinement processes.” *Id.* He found that the parties opposing the motion failed to show any legal support for such a broad construction of MEPA. The ALJ concluded that the “Commission lacks jurisdiction over greenhouse gas emissions that may result from oil shipped on Line 5 after it is refined and consumed.” Initial ruling, p. 19. The ALJ

granted the motion in limine on the issue of whether the review under MEPA requires an examination of evidence of climate change.

FLOW, Bay Mills, the MEC Coalition, and ELPC/MiCAN seek leave to appeal this decision in the initial ruling.

In its application, the MEC Coalition argues that the Commission must consider climate change as part of its MEPA analysis. Distinguishing this case from the *Buggs* cases, in which the appellants argued that the Commission's pipeline approval decision might encourage the construction of more gas wells utilizing hydraulic fracturing, the MEC Coalition posits that:

unlike hydraulic fracturing, there is no regulatory body in Michigan that has exclusive authority to regulate climate change issues. Instead, it is an issue that all state agencies with regulatory powers that impact the environment must consider at some level, and would inform an agency's MEPA analysis if evidence of climate change-related pollution, impairment, or destruction of natural resources tied to conduct the agency authorizes is presented.

The MEC Coalition's application for leave to appeal the initial ruling, p. 28. The MEC Coalition notes that the Commission has previously considered the issue of climate change in adopting weather normalized sales, and in the filing requirements for integrated resource plan (IRP) filings. *See*, June 3, 2010 order in Case No. U-15985, p. 39; November 21, 2017 order in Case No. U-18418, p. 72. The MEC Coalition contends that it is unreasonable to argue that the Commission may not consider climate change in its MEPA analysis simply because it does not regulate greenhouse gas (GHG) emissions.

In its application, Bay Mills notes that Governor Whitmer has recently set decarbonization goals for Michigan in Executive Order (EO) 2020-182 and ED 2020-10, which articulate the public need to move away from fossil fuels and thereby mitigate the worst harms associated with GHG emissions. Bay Mills argues that, because the fuels transported by Line 5 contribute to GHG emissions, the Replacement Project and the assessment of the public need for the project must be

viewed in light of the state's climate goals. Bay Mills notes that ED 2020-10 finds that climate change is already degrading Michigan's environment and hurting the state's economy, and further finds that the state needs to eliminate its dependence on out-of-state fossil fuels. Bay Mills contends that, in order for the Commission to make a determination on the public need for the Replacement Project, "evidence must be permitted on how the Project, which would transport fossil fuels from out of state, relates to Michigan's public need to eliminate dependence on out of state fossil fuels and their downstream impacts on the health and well-being of Michigan residents." Bay Mills' application for leave to appeal the initial ruling, p. 36.

Bay Mills further argues that the Commission's MEPA analysis must examine whether GHGs will contribute to "pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in those resources." MCL 324.1705(2). Bay Mills states it this way:

The Project will transport fuels so that they can be refined for petroleum products, including gasoline and aviation fuels, which emit greenhouse gases when combusted. Greenhouse gas emissions contribute to "pollution, impairment, or destruction" of natural resources. Thus, the greenhouse gas emissions that will result from fuels transported by the Project must be considered in a MEPA analysis.

Bay Mills' application for leave to appeal the initial ruling, p. 38 (notes omitted). Bay Mills posits that there is no dispute that fossil fuels will be transported through Line 5 and will be combusted, and argues that foreseeable GHG emissions are a typical consideration in doing an environmental impact analysis. Bay Mills urges the Commission to avoid a decision that is based only on immediate concerns and the Replacement Project.

FLOW also points to the State of Michigan's new commitments to address climate change, noting that Michigan joined the U.S. Climate Alliance in February 2019. FLOW avers that state agencies are integrating climate assessments into their departmental programs, and notes that in Section 6t of Public Act 341 of 2016 the Legislature required the consideration of environmental

factors in utility IRPs. *See*, MCL 460.6t(5)(m). FLOW encourages the Commission to reject the ALJ's finding that the conduct at issue in this case does not include the environmental effects of extraction, refinement, and consumption of crude oil. FLOW maintains that this finding is contrary to the purposes of MEPA and Act 16, and is short-sighted. FLOW argues that:

[a]s the tunnel is proposed to extend the operable life of Line 5 for 99 years, the MPSC must determine the evaluate [sic] the environmental and health consequences of 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. 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.

FLOW's application for leave to appeal the initial ruling, pp. 23-24 (note omitted). FLOW contends that climate change is already affecting Michigan, and that MEPA imposes additional environmental review requirements that are supplemental to other administrative and statutory schemes. MCL 324.1706.

In their application, ELPC/MiCAN begin by noting that the Commission has already highlighted the importance of a well-developed record in this proceeding. *See*, June 30 order, p. 69. ELPC/MiCAN argue that the primary function of a motion in limine at such an early stage in a proceeding is to limit discovery, which thereby also limits the record. Like the other appellants, ELPC/MiCAN make an offer of proof regarding the environmental effects associated with the Replacement Project, arguing that the information that they will provide will assist the Commission in its decisionmaking. The offered information will include total GHG emissions from the project; the environmental, public health, and social welfare costs associated with the GHG emissions; and the placement of the estimated emissions within the context of global and

state policy goals. ELPC/MiCAN argue that they are entitled to discover relevant information from Enbridge, including:

information on the materials and methods used in construction of the tunnel and pipeline, the known sources of the petroleum to be transported through the Proposed Project, the known end-uses of that petroleum, the operational and economic life of the Proposed Project, and whether the Proposed Project is expected to extend the time period over which petroleum products will be transported by Enbridge through the Straits of Mackinac.

ELPC/MiCAN's brief in support of its application for leave to appeal the initial ruling, p. 5.

ELPC/MiCAN argue that the language of MEPA clearly requires examination of both the direct and indirect effects of the Replacement Project. They posit that GHG emissions are pollutants that threaten Michigan's natural resources and must be considered under MEPA. They argue that it is clear legal error to fail to determine the magnitude of the impact of this pollutant in the MEPA analysis. ELPC/MiCAN contend that the ALJ erred when he found that GHG emissions that result both directly from the construction of the tunnel and indirectly from the project's "likely and quantifiable upstream and downstream impacts" are not relevant to this case. *Id.*, p. 8. ELPC/MiCAN argue that this finding does not make sense given the ALJ's first finding that MEPA clearly applies to the Replacement Project.

ELPC/MiCAN assert that the environmental effects at issue in this case are not speculative. They contend that the fact that the Commission does not have authority to regulate GHG emissions does not mean that such emissions play no role in the Commission's MEPA determination, and argue that "MEPA requires analysis of both direct and indirect environmental impacts, because it instructs agencies to consider both conduct that *has* and conduct that is *likely to have* the effect of polluting, impairing, or injuring the environment." *Id.*, p. 11 (emphasis in original). ELPC/MiCAN argue that the initial ruling overlooks this statutory directive, stating:

[w]hile the Commission does not have jurisdiction over under [sic] Act 16 over the extraction of oil in Canada, or the refinement of oil in Detroit, the Commission does have the discretion under MEPA and Act 16 to evaluate credible expert testimony on the likely impact the Proposed Project will have on the amount of greenhouse gas emissions resulting from the known uses of the petroleum products that are transported through the replaced section of pipeline in the Straits of Mackinac.

Id., p. 12. Regarding Enbridge's argument that it will transport the same amount of oil whether the project is approved or not, ELPC/MiCAN, like the other appellants, assert that this is a question of fact. ELPC/MiCAN contend that there is little dispute that the Replacement Project will extend the useful life of Line 5. Finally, ELPC/MiCAN argue that the scope of discovery is broad. *See*, MCR 2.302(B).

Turning to the responses, MSCA again expresses support for the initial ruling.

In their response, the Associations argue that the initial ruling correctly found that MEPA does not require a review of the environmental effects of GHG emissions with respect to the Replacement Project, because the "conduct" at issue is the replacement of the dual pipelines with the single pipeline and tunnel. They argue that, in all MEPA actions, the focus is on the applicant's actual conduct and actions. *See, Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 517; 684 NW2d 847 (2004). The Associations point out that Enbridge's application does not seek approval for consumers' consumption of fossil fuels, but seeks only to relocate the existing pipeline.

The Associations contend that the Michigan Court of Appeals has not required the Commission to carry out an independent investigation or conduct a contested hearing under MEPA, and has held that the Commission need not consider speculative arguments (such as arguments about whether a pipeline would encourage the growth of new production wells in the future). *See, Buggs I and Buggs II*. Rather, the Associations argue, the court has affirmed that the Commission may make a MEPA determination under Section 5(2) based on whatever materials

are presented in the record. The Associations note that such materials may include the determinations made by other agencies that are also conducting reviews, such as, in this case, EGLE and USACE. The Associations explain that Enbridge must obtain a wetlands protection permit, a Great Lakes Submerged Lands Act disturbance permit (MCL 324.32501 *et seq.*) and a National Pollutant Discharge Elimination System permit from EGLE,¹⁵ as well as permits under the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act from USACE. The Associations posit that these materials may provide information for the Commission in making its MEPA determination.

In its response, Enbridge contends that the parties opposing the motion are simply opposed to the use of fossil fuels; but argues that the MEPA review is confined to the Replacement Project. Enbridge argues that the ALJ properly applied the plain language of MEPA and the opposing parties have pointed to no case where the Commission considered climate change in the context of an Act 16 application. Enbridge notes that Act 16 does not contain the extensive environmental mandates contained in MCL 460.6t, the statute governing IRPs. Enbridge offers that the Commission has already rejected an expansive interpretation of the term “conduct” as that word is used in Section 5 of MEPA in the September 23, 2015 order in Case Nos. U-17195 *et al.*, where the Commission found that it lacked jurisdiction to examine whether a pipeline would encourage future new production wells utilizing hydraulic fracturing.

Addressing EO 2020-182, which created the Council on Climate Solutions, Enbridge reminds the Commission that it has only the statutory powers granted to it by the Legislature, and argues that the EO does nothing to expand the Commission’s authority. Enbridge argues that issues such as the causes of climate change and potential changes in consumer behavior are outside the scope

¹⁵ These permits were granted after the briefing had been filed.

of this proceeding. The company further argues that “the issue of whether greenhouse gases generated by the construction activity to relocate the Straits crossing within a tunnel need not be considered by the Commission,” and reminds the Commission that it is not required to conduct an independent investigation, or even a contested case, under Section 5(2) of MEPA. *Buggs I*, pp. 9-10; *Buggs II*, pp. 10-11. Finally, Enbridge argues that MEPA does not require the submission of evidence regarding alternatives, and that, in any case, alternatives to the operation of Line 5 are irrelevant to this case. With respect to the Replacement Project, Enbridge contends that the only relevant scenarios are the status quo or the proposed relocation of the 4-mile segment in the Straits.

In its response, the Staff urges the Commission to affirm the initial ruling. The Staff avers that the Commission must conduct its own analysis of the proposed project, and that that analysis must focus on the conduct proposed in the application. *State Hwy Comm*, 392 Mich at 185-186, 190-191. The Staff contends that the ALJ properly found that the conduct at issue herein does not involve the extraction, refinement, or consumption of fossil fuels, and that the Commission lacks jurisdiction over GHG emissions that may result from products shipped on Line 5. The Staff argues that the Commission’s review involves the replacement and relocation of the 4-mile segment beneath the Straits and the construction and operation of the utility tunnel that will house the new pipeline segment.

The Staff also notes that Act 16 and Section 5 of MEPA do not contain the same environmental requirements as MCL 460.6t, and the opposing parties have not cited any statute or other precedent authorizing the Commission to consider indirect emissions, or upstream or downstream impacts, from the proposed project under MEPA. The Staff avers that the Commission’s decision on the application is “unrelated to the consumption habits of the public.”

Staff's response to the applications for leave to appeal the initial ruling, p. 19. The Staff argues that the Commission has no statutory authority to include a climate change analysis in rendering licensing or permitting approvals, and has never made the consideration of GHG emissions a part of an Act 16 case. Regarding EO 2020-10 and its commitment to include considerations of climate change in government decisionmaking, the Staff posits that GHG emissions from electric generation are driven by IRPs.

IV. THE RULING ON REMAND

The ALJ began the remanded decision by noting that the December 9 order was issued by the Commission in response to issuance of the Notice.¹⁶ The ALJ stated that the initial ruling rejected the arguments of those opposing the motion in limine regarding the necessity of inquiring into the public need for Line 5, and the arguments favoring a review of the environmental impacts of the consumption of petroleum products that are transported on Line 5. He noted that both of these issues were appealed to the Commission. The ALJ stated that the December 9 order “did not reach the merits of the Appeals, but rather directed rehearing and reconsideration of the scope of the Act 16 and MEPA inquiry relative to the Notice.” Ruling on remand, p. 4. The ALJ describes the issues on remand as follows:

Enbridge, the Associations, [MLDC], [MSCA], and Staff argue the Notice cannot expand the Commission's jurisdiction under Act 16 and MEPA, and the holding in the Initial Ruling on the scope of this case is proper. Further, these Parties contend the litigation concerning the Notice is in its early stages and will likely take years before the issue is decided and appeals are exhausted. Conversely, the [MEC Coalition], ELPC, FLOW, and the Attorney General . . . contend the Notice necessarily requires the scope of the case include a determination of whether a

¹⁶ In response to arguments from Enbridge and the Staff about its admissibility, the ALJ found that the Notice is on the record in this case because the Commission relied upon it in the December 9 order, and, additionally, because it is admissible as the type of evidence that a reasonable person would rely on in the conduct of their affairs. Ruling on remand, p. 13, n. 6; *see*, MCL 24.276, MCL 24.275.

public need exists for Line 5, consideration of the safety and operational aspects of Line 5, and development of a record of the environmental effects of the petroleum products transported on Line 5. To these Parties, the litigation is of no moment, and as of May 13, 2021, the dual pipelines can no longer legally transport petroleum products and Line 5 will be decommissioned.

Ruling on remand, p. 5 (note omitted).

A. Public Need for Line 5/Operation of Line 5

The ALJ began with the Act 16 analysis. He noted that the motion in limine argued that the Commission's review of the Replacement Project does not encompass consideration of the public need for, or operational and safety aspects of, Line 5 in its entirety. The initial ruling granted this part of the motion, finding that "under Act 16 the proper inquiry for a proposal involving a segment of an existing pipeline is on that segment, as opposed to the entire pipeline system."

Ruling on remand, p. 13. The ALJ stated that this holding remains "before the Commission under the pending Appeals, but under the Order of Remand is to be reconsidered in light of the subsequent issuance of the Notice." *Id.* The ALJ found that, with respect to the Notice, "the only definitive point is that as of May 13, 2021, the State will consider the easement withdrawn and revoked and Enbridge will consider the easement valid." Ruling on remand, p. 14 (note omitted). Noting that Enbridge has been issued the requisite permits by EGLE, the ALJ found that any issues regarding the public trust have been resolved. *Id.*, pp. 11-12.

The ALJ explained that the parties opposing the motion argue that the Notice serves as a basis for expanding the scope of this proceeding to include an examination of the entirety of Line 5. The ALJ disagreed. He noted that the 1953 order is still in effect and found that the pipeline meets a public need and serves the public interest, and authorized the construction, operation, and maintenance of Line 5 under Act 16. Thus, he determined, to accept that the Notice requires another finding of public need means that the 1953 order is being revisited, and therefore that the

Commission is taking steps toward the possible “suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license” under MCL 24.292(1), MCL 24.205(a), and *Rogers v Mich State Bd of Cosmetology*, 68 Mich App 751; 244 NW2d 20 (1976) (*Rogers*). The ALJ found that, in order for the Commission to undertake such a review, first, the “agency shall give notice . . . to the licensee of facts or conduct which warrant the intended action;” second, “the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license” through a hearing that complies with *Rogers*; and third, a second notice of hearing commences the contested case. Ruling on remand, p. 16; MCL 24.292(1); *Rogers*, 68 Mich App at 754. The ALJ noted that the Commission did not provide this type of notice to the permittee, and that this is not an agency-initiated proceeding but rather a proceeding based on the Act 16 application filed by Enbridge.

The ALJ observed that all parties have the right to offer relevant evidence regarding the public need for the activity proposed in the application, but found that the public need for Line 5, as established by the 1953 order, is not relevant to this proceeding. He found that the Notice has no effect on Enbridge’s existing authorization for Line 5 as established in the 1953 order. The ALJ noted that the Commission has, in its discretion, the authority under Act 16 to revoke a license previously granted, if it chooses to commence that type of proceeding based upon the Notice. *See*, MCL 483.3(1). But, he found, that proceeding must comply with the requirements of the APA and *Rogers*.

The ALJ further found that, even if the Notice is given presumptive effect and Enbridge loses the right to operate the dual pipelines on May 13, 2021, this does nothing to extinguish the legal right to operate Line 5 under the 1953 order, stating:

as Enbridge and Staff note if the operation of Line 5 ceases for whatever reason, under Act 16 it can be restarted in the future under the existing license without first

having to obtain Commission approval. See Enbridge Reply Brief, pg. 15; Staff Reply Brief, pgs. 2, 9; 5 TR 337-338, 400-401. While the practical effect of the Notice on Line 5 on May 13, 2021, is unknown, its legal effect does not extend to revoking the Act 16 license issued in the 1953 Order or nullifying the public need/public interest determination embodied in that license. Based on the foregoing, to accept the Notice as requiring a reexamination of the public need of Line 5 under Act 16, along with its operational and safety aspects, would result in a diminishment of its existing license under §92(1) of the APA [MCL 24.292(1)] without providing the procedural due process protections afforded a licensee. Accordingly, the Notice cannot be used to expand the scope of this case to include an examination or determination of the public need for Line 5, or any aspect of its operation and safety.

Ruling on remand, pp. 18-19.

FLOW, the MEC Coalition, and Bay Mills filed applications for leave to appeal the ruling on remand.

In its second application for leave to appeal, FLOW focuses on the easements. FLOW contends that the ALJ misapplied the public trust doctrine, and that Enbridge has not been granted authorization for the 2018 easement from the DNR, the MSCA easement assignment, or the 99-year leaseback. FLOW argues that, in the absence of a finding by the DNR that the public trust in the lake waters will not be impaired, the easement, the assignment, and the lease are all void. FLOW charges the DNR with not having made the necessary determinations, and contends that this requires reversal of the ALJ's determinations in the ruling on remand. FLOW further alleges that the 1953 easement suffers from the same lack of authorization because the required findings regarding the public trust were never made. *See*, MCL 324.32512, MCL 324.32502 through MCL 324.32508. FLOW contends that the Commission's prior findings cannot form a basis for narrowing the review in the instant case to an examination of the public need for the Replacement Project.

In its second application for leave to appeal, the MEC Coalition argues that the Notice means that it is likely that Line 5 will not operate in the Straits until the tunnel is approved and

constructed. The MEC Coalition points to Enbridge's repeated claims, in its motion in limine and in the subsequent briefing, that the company will continue to operate Line 5 in perpetuity whether or not the Replacement Project is approved. After the Notice, the MEC Coalition posits that this is simply posturing, because the State has ended the operation of Line 5 and the pipeline is decommissioned. The MEC Coalition argues that, "[u]nder these precepts, because the foundation of Enbridge's motion is a factual assertion that is contested or in doubt, that precludes the granting of the motion. There is no factual basis on which to assume that the tunnel is irrelevant to the remaining longevity of Line 5." The MEC Coalition's application for leave to appeal the ruling on remand, p. 10.

The MEC Coalition repeats some of the arguments made in its first application, stating that Enbridge has put the issue of public need into play in this case, that this determination must consider the entire pipeline system, and that, under the APA, the intervenors are entitled to counter the assertions made by Enbridge. The MEC Coalition highlights the "need for evidence on the underlying assumption of perpetual future operation." *Id.*, p. 12. With respect to the need for the Replacement Project, the MEC Coalition asserts that Enbridge has addressed the issue of fuel demand, as well as the issue of alternatives to the dual pipelines, by including its alternatives analysis with the application.

The MEC Coalition asserts that the Commission has, in past Act 16 cases, looked at the entire pipeline and not just the segment addressed in the application, in the sense that the Commission has made note of changes in demand that drive requests to increase capacity. *See*, 2001 order, p. 15; 2013 order, p. 23. The MEC Coalition maintains that in these prior Act 16 cases the Commission "reviewed the public need for replacement segments under Act 16 by considering the need for the pipeline system of which the segments were a part." The MEC Coalition's

application for leave to appeal the ruling on remand, p. 20. The MEC Coalition argues that, because the 4-mile segment at issue here is the linchpin of the Line 5 system, such a review is even more important in this case because approval will allow a decommissioned pipeline to restart.

The MEC Coalition contends that the 1953 order made no findings with respect to public need for Line 5, nor did the *Lakehead* case, stating that:

neither the 1953 Orders nor *Lakehead* decided the issue explicitly. The standard had not been articulated yet and the 1953 Orders and *Lakehead* were responding to a different question. It would be quite a stretch indeed to conclude that the 1953 Orders and *Lakehead* made findings on a standard that had not been articulated yet at that time and that these findings should be deemed conclusive for all time and for all related future projects.

Id., p. 23. The MEC Coalition reiterates that it is not seeking to alter any prior findings, but rather simply to contest the public need for a new project that would extend the use of Line 5 by decades. Thus, they argue, there are no notice or due process issues in the instant case because the intervenors do not seek to revoke any prior permits or licenses. The MEC Coalition avers that this is a new license that will have the effect of restarting a closed pipeline.

In its second application for leave to appeal, Bay Mills repeats many of the arguments made in its first application, and indicates that it incorporates by reference the briefing of the MEC Coalition and ELPC/MiCAN. Bay Mills states that, following issuance of the Notice, the Staff has paused its consultation with the Tribal intervenors. Bay Mills provides more detail respecting its offer of proof.

Bay Mills argues that the Notice makes the determination of whether there is a public need for Line 5 more exigent, arguing “If Michiganders will not need the fuels that would be transported by the Project, then there is no need for the Project.” Bay Mills’ application for leave to appeal the ruling on remand, pp. 16-17 (note omitted). Bay Mills notes that Governor Whitmer, in ED 2020-10, has indicated a public need to “move away from the very fuels that would be transported by

the Project.” *Id.*, n. 41. ED 2020-10 includes an explicit commitment to reduce greenhouse gas emissions by 2025 and achieve carbon neutrality by 2050; and because of this, Bay Mills argues, the Commission must look at whether approval of the Replacement Project will extend the life of Line 5. Bay Mills posits that a court may issue a permanent injunction against operation of the dual pipelines. Bay Mills again asserts that Enbridge has put the issue of the public need for Line 5 into question, as well as the length of its future operation, and the parties have the right to test this evidence.

As it did in its first application for leave, Bay Mills asserts that the Commission must also examine the safety of Line 5, under obligations imposed by Tribal treaty rights, MEPA, and Act 16. Bay Mills points out that the Notice acknowledges the Tribal Nations’ interests in the habitat of the Straits. Bay Mills states that “Treaty resources would be impacted by the approval of a Project that would allow Line 5 to operate well into the future.” *Id.*, p. 24. Bay Mills argues that, under *State Hwy Comm*, the Commission must conduct an independent analysis of the evidence presented in this case, as well as consider the evidence embodied in other agencies’ determinations. Bay Mills also contends that the Commission must consider alternatives, including:

evidence regarding the risk of oil leaks and spills to the Great Lakes and inland waters and resources from Line 5 if the Project is constructed. The Commission should also consider the risks from either an alternative method of delivering the commodities carried by Line 5 or the existing pipeline operating for a shorter duration than if the Project is allowed and constructed (as it almost certainly will be, in light of the Revocation and Termination).

Id., p. 28. Bay Mills again argues that, under the APA, the parties must be allowed to rebut Enbridge’s assertion that the Replacement Project will reduce the risk of an oil spill into the Great Lakes. Bay Mills wishes to present evidence regarding hydrologically connected waterways and potential environmental damage. Like the MEC Coalition, Bay Mills describes the Replacement

Project as reinstating a nonoperational pipeline. Bay Mills again avers that nothing in federal law limits the Commission's authority to review Line 5's safety, stating "[b]ecause the Commission's obligations under Tribal Treaties, MEPA, Act 16, and the APA are not safety standards covered by Section 60104(c) of the PSA, none of those authorities are preempted by the PSA." *Id.*, p. 33.

In its response, MSCA supports the ALJ's findings in the ruling on remand.

In its response, MLDC also supports the ruling on remand, arguing that the Notice does not expand the scope of this case or the Commission's jurisdiction. MLDC argues that the Replacement Project will address the environmental and operational problems associated with the dual pipelines and will generate nearly two million work hours providing collectively-bargained jobs, and will help maintain jobs at regional refineries. MLDC contends that the actual effect of the Notice cannot be ascertained at this time, and urges the Commission to act expediently.

The Associations also argue that the Notice does nothing to expand the scope of this case or the Commission's jurisdiction, and that the Replacement Project is the conduct at issue. The Associations aver that the Commission can prevent needless delay in this case by firmly establishing the appropriate scope. The Associations repeat their arguments regarding the 1953 order and the public interest, and assert that the continued need for Line 5 has been reaffirmed in Act 359, which finds that the tunnel "is for the benefit of the people of this state." MCL 254.324a(5). The Associations point out that the Notice does not challenge the public need for Line 5, and that the press release announcing the Notice explicitly stated that the Notice did not prevent Enbridge from constructing the tunnel. The Associations contend that the Notice was not intended to affect the progress of the Replacement Project. The Associations argue that, if the Notice in fact decommissioned the whole pipeline, then it violated the due process requirements contained in the APA and *Rogers*.

In its response, the Staff also supports the ruling on remand. Addressing some of the arguments and offers of proof, the Staff states that:

[w]ithout reasonable and legally sound limitations, the Joint Appellants' anything-goes-approach would expand and weigh down the evidentiary record until it buckles. For example, proposed topics of consideration include BP restructuring its business model, oil and gas producers filing for bankruptcy, cancellation of tar sand projects, global climate change impacts related to the use of petroleum, electric vehicle industry growth, and the oil and gas policies of foreign countries.

Staff's response to applications for leave to appeal the ruling on remand, p. 7. The Staff notes that the Commission itself described the application as proposing the "replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel" in the June 30 order, p. 68.

The Staff maintains that the Commission's three Act 16 criteria are well established, and notes that, after the issuance of *Buggs I*, the Commission must also conduct a MEPA review. The Staff notes that the Commission is a creature of statute, and the scope of breadth of the agency's authority is limited by legislative mandate. *See, Union Carbide Corp v Pub Serv Comm*, 431 Mich 135; 428 NW2d 322 (1988). The Staff argues that the key word in the Act 16 review criteria is "pipeline," and that "[n]otably the latter two considerations about the design, route, and whether the pipeline meets or exceeds industry standards leaves no doubt what pipeline is in question." Staff's response to applications for leave to appeal the ruling on remand, p. 9. The Staff notes that in the 2002 order, the Commission's review was limited to the 26-mile segment at issue in the case, and at no point in that order did the Commission consider any other part of Wolverine's pipeline system, or whether the proposed segment would extend the operation of the rest of the system. Likewise, the Staff notes, in the 2013 order the Commission reviewed the proposed five, noncontiguous pipeline segments, and did not revisit the public need for the remainder of Line 6B or any other part of the Lakehead pipeline system. The Staff contends that the appellants are

insisting on a new requirement that the applicant demonstrate the public need for a previously authorized pipeline to continue to operate. The Staff also notes that Enbridge is required to maintain Line 5 for as long as it chooses to operate Line 5. The Staff again contends that simply because a project has a beneficial long-term effect should not result in an automatic review of the entire pipeline system. The Staff notes that the litigation surrounding the Notice gives rise to uncertainty.

The Staff argues that government-to-government consultation does not expand the Commission's Act 16 jurisdiction. The Staff states that consultation with the Tribes was briefly delayed in order to allow time to evaluate the impact of the Notice, but is scheduled to resume in April 2021.¹⁷

The Staff repeats its arguments regarding the finding of public need in the 1953 order and in *Lakehead*. The Staff argues that the appellants may not simply reverse a Commission determination and require an applicant to relitigate a final order. Like the Associations, the Staff contends that the Notice does not revoke or rescind the 1953 order, and notes that EGLE has already found that the adverse effects to the public trust are minimal and has issued the permits for which that finding must be made. The Staff posits that Act 16 is focused on the siting of a pipeline and its associated fixtures and facilities, whereas the Governor and the DNR are concerned with the conveyance of property interests. MCL 483.6; cf. MCL 324.2129. The Staff notes that all of the cases cited by FLOW apply the public trust doctrine to the DNR (and its predecessor, the Conservation Commission), and not to the Commission. The Staff argues that Act 359 reaffirmed the public need for Line 5 and found that the tunnel is for the benefit of the people of Michigan. MCL 254.324a(5). In the Staff's view, the Legislature has conclusively determined that the

¹⁷ The Commission notes that this consultation took place on April 15, 2021.

Replacement Project is in the public interest. The Staff goes on to repeat its argument that, even if the 1953 order were deficient, the APA and *Rogers* set certain requirements for making such a determination.

In its response, Enbridge also argues that the Notice has no effect on either its application or the Commission's jurisdiction. Enbridge contends that the effect of the Notice will be decided by the courts, and states that, in its complaint for declaratory relief, the State acknowledged that actual controversies exist between the parties. Like the other responses, Enbridge notes that the Notice does not address the public need for Line 5 or undermine the approval given in the 1953 order. The company argues that, in any case, if the Notice attempted to do so then the procedural safeguards provided by Section 92 of the APA and the *Rogers* case would need to be satisfied. Enbridge points out that Act 359, the 2018 easement grant, the assignment of the easement by MSCA, and the Agreements are all unaffected by the Notice. Enbridge states that "the Notice simply initiated an additional round of litigation over the validity of the 1953 Easement and Enbridge's compliance with its terms. In the meantime, Enbridge will continue to operate Line 5, including the Dual Pipelines." Enbridge's response to the applications for leave to appeal the ruling on remand, p. 6.¹⁸

Enbridge argues that the outset of this proceeding is the proper time to hear a motion determining the scope of the case. Mich Admin Code, R 792.10421(1)(d). Enbridge claims that its purpose in filing its application is to further the State's established decision to relocate the Straits crossing into a tunnel, as illustrated by the language of Act 359 and the Agreements.

¹⁸ Enbridge points out that the validity of the 1953 easement is also the subject of an ongoing 2019 action brought by the Attorney General. *See, Nessel v Enbridge Energy, Limited Partnership, et al.*, Ingham County Circuit Court, Case No. 19-474-CE. *Id.*

Enbridge again asserts that the background information provided by its proffered witnesses changes nothing about the determinations made by the Legislature in Act 359, and repeats its intent to withdraw any testimony that is found to open the door to an examination of the need for Line 5. Enbridge avers that there is no expiration date on the 1953 order, and no basis in Act 16 for extinguishing an existing pipeline approval every time an improvement project is proposed. Enbridge contends that the 2002 and 2013 orders support these conclusions because, in those cases, the Commission never evaluated the need for the entire pipeline, whether the proposed segment would extend the life of the entire pipeline, or any environmental effects that could occur beyond the location of the replacement segment. Noting that these cases involved lengthy new segments (20 and 42 miles, and 110 and 50 miles), Enbridge contends that it seeks to relocate only 4 miles of pipeline, and that, unlike these cases, the relocation will add no new capacity. Enbridge argues that, in the 2013 order, the Commission rejected as irrelevant evidence pertaining to a portion of Line 6B that was not being replaced.¹⁹

Enbridge further argues that Tribal rights do not change the scope of this case under Act 16 or the Commission's jurisdiction, and, as a creature of statute, the Commission's jurisdiction is not changed by the Notice. Enbridge again argues that, as an interstate pipeline, the federal PSA preempts a state's examination of the safety of an interstate pipeline, and any allegations that go to the alleged safety of the operations of Line 5 in its entirety are outside the scope of this

¹⁹ The Commission rejected as irrelevant proposed Exhibit I-19, a National Transportation Safety Board Report on the July 25, 2010 failure of Line 6B in Marshall, Michigan. The Commission approved Enbridge's application to replace the compromised segment of Line 6B in the December 6, 2011 order in Case No. U-16856. In the 2013 order, the Commission found "The segment of Line 6B that failed was the subject of Case No. U-16856. Proposed Exhibit I-19 does not address Enbridge's current application to replace the remaining segments of Line 6B." 2013 order, p. 27 (notes omitted).

proceeding. Enbridge notes that the ALJ's rulings did not preclude any evidence addressing safety issues related to the siting proposed in the Replacement Project.

B. Michigan Environmental Protection Act Review

The ALJ began his analysis by noting that in the initial ruling he found that the conduct subject to review under MEPA is the proposal to relocate the dual pipelines into the tunnel, and thus found the “environmental effects of both the Line 5 system, and the extraction, refinement and ultimate consumption of the oil shipped on that system as being beyond the scope of the Commission’s MEPA review.” Ruling on remand, p. 19. Here, also, the ALJ rejected the argument that the Notice serves to expand the MEPA review to the entirety of Line 5 and the environmental effects of the products that are transported on Line 5. The ALJ found that the Notice does not change the activity proposed in the application, which is the “conduct” as that term is used in Section 5(2) of MEPA. He further found that the Notice does not change any aspect of the Commission’s jurisdiction over this matter, or his initial analysis. The ALJ found that MEPA’s focus is on the conduct which is subject to the agency’s review, which he found is the proposal to relocate the dual pipelines into the tunnel. *See, Preserve the Dunes*, 417 Mich at 517.

In conclusion, the ALJ found that Enbridge’s license to operate and maintain Line 5 remains in effect, and that:

the Notice is relevant under the proper Act 16 review of the project: whether a public need exists to replace the existing dual pipelines on Great Lakes bottomlands in the Straits of Mackinac with a single pipeline in a proposed Utility Tunnel. . . . The issuance of the Notice does not expand the MEPA inquiry to include the environmental effects of the operation and safety of Line 5, or those arising from the production, refinement, and consumption of the oil transported on Line 5.

Ruling on remand, p. 21.

In its second application for leave to appeal, FLOW contends that the Commission's authority under Act 16 and MEPA is broad, and is not limited by any findings in the 1953 order. FLOW asserts that Act 16 explicitly applies to the transport of crude oil, and that "the transport of oil necessarily cannot be separated from its consumption." FLOW's application for leave to appeal the ruling on remand, p. 25.²⁰ FLOW notes that MCL 324.1706 provides that MEPA is supplementary to other existing regulatory and administrative procedures, and argues that the Commission is required under MCL 324.1705(2) to consider the likely environmental effects of the proposed project and the full range of alternatives to the proposed project. FLOW argues that, in *State Hwy Comm*, the statute in question (the state highway condemnation law) had no express environmental review provision, but the court found the environmental review to be mandatory under MEPA. *State Hwy Comm*, 392 Mich at 189-190. FLOW contends that the Commission may only fulfill its mandate by performing a public need review that looks at "the crude oil markets today and over the course of the Project, the effects and risks associated with operating Line 5, and the critical impacts to dams, shoreline infrastructure, lakes, and Great Lakes and public trust in these waters within the State of Michigan from climate change." FLOW's application for leave to appeal the ruling on remand, p. 29.

In their second application for leave to appeal, ELPC/MiCAN repeat many of the arguments put forth in the first application. ELPC/MiCAN state that GHGs are widely recognized as pollutants, and that they are pollutants that result in environmental and societal damage. Thus, they argue, these pollutants fall under the plain and ordinary meaning of the language in MEPA regarding conduct that may "pollute, impair, or destroy." ELPC/MiCAN note that the

²⁰ FLOW's application for leave to appeal the ruling on remand is not paginated. The page numbers indicated herein correspond to the Table of Contents provided by FLOW.

Intergovernmental Panel on Climate Change has determined that some natural resources are permanently damaged by GHG emissions. ELPC/MiCAN's brief in support of application for leave to appeal the ruling on remand, p. 12, n. 30, 32, and 34. ELPC/MiCAN argue that:

While the ALJ concluded that GHG gas emissions are outside the scope of an environmental assessment, the plain language of the statute, the dictionary definition of MEPA's terms and the available caselaw all support that it is within the scope of this contested case for the Commission to consider whether GHG emissions from Enbridge's proposed project will or are likely to pollute, injure, or destroy Michigan's natural resources.

Id., p. 14. ELPC/MiCAN charge the Commission with a duty to examine both direct and indirect GHG emissions, including a review that "is 'not restricted to actual environmental degradation but also encompasses probable damage to the environment as well.'" *Id.*, p. 17, quoting *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975).

ELPC/MiCAN argue that Line 5 is now a decommissioned pipeline, and that therefore the Replacement Project is actually an application to restart a closed pipeline. Thus, ELPC/MiCAN state, Enbridge's application requires the full review under MEPA that would be required for a new Line 5. ELPC/MiCAN assert that this review must include consideration of upstream and downstream GHG emissions. ELPC/MiCAN argue that the ALJ's ruling on remand puts "the most exigent environmental issue of our time . . . beyond the scope of Michigan's most significant environmental protection statute." *Id.*, p. 18. Noting Enbridge's repeated claim that it will operate Line 5 indefinitely whether or not the tunnel is built, ELPC/MiCAN argue that the Notice calls this claim into question, and they offer proof regarding the amount of GHG emissions that will result when the pipeline is restarted after construction of the tunnel is complete. ELPC/MiCAN point out that the Commission is not required to strictly follow the Michigan Rules of Evidence. They also point out that Enbridge will be able to avail itself of motions to strike.

In its second application for leave to appeal, the MEC Coalition posits that, due to the Notice, continued operation of Line 5 is now less likely, and the Commission has a duty under Act 16 and MEPA to review the environmental effects of the project and to consider available alternatives. The MEC Coalition asserts that Line 5 cannot continue to operate because the Notice requires no further action in order to be implemented. The MEC Coalition repeats its arguments regarding the “conduct” proposed by the application and the alleged pollution, impairment, or destruction that may result from that conduct. The MEC Coalition urges the Commission to take a broad view when conducting its environmental analysis.

In its second application for leave to appeal, Bay Mills contends that issuance of the Notice means that, without approval of the Replacement Project, Line 5 is even more likely to cease operations. Bay Mills argues that GHG emissions fall squarely within MEPA and the Commission is required to evaluate environmental conditions both with and without approval of the Replacement Project. Bay Mills argues that the environmental effects of transporting fuels are not as speculative as the possibility of incentivizing future additional gas wells, as was at issue in *Buggs II*. Bay Mills states that GHG emissions are concrete and will be a direct result of approval of the Replacement Project because that project will allow for the continued and extended operation of Line 5. Bay Mills posits that it is irrelevant that the Commission is not empowered to regulate GHG emissions themselves. Bay Mills notes that ED 2020-10 sets a goal of carbon neutrality by 2050 for Michigan, and requires that “[a]ll departments and agencies must follow the policies and procedures developed in connection with this directive.” ED 2020-10, p. 1. Bay Mills asserts that GHG emissions have become a standard consideration in environmental reviews for federal agencies, and in some states.

In its response, MSCA supports the ALJ’s findings in the ruling on remand.

In their response, the Associations also support the ruling on remand, arguing that the MEPA review must be limited to the conduct proposed in the application. The Associations contend that Line 5 is not a decommissioned pipeline, and argue, moreover, that Enbridge would not need approval to restart the pipeline even if it were. The Associations maintain that nothing in Act 16 requires “a pipeline operator to secure Commission approval to restart a pipeline that was previously approved,” and they note that the appellants have provided no authority to support this argument. Associations’ response to applications for leave to appeal the ruling on remand, p. 14. The Associations repeat their arguments regarding GHG emissions, and they contend that MEPA is far more limited than the federal law that governs environmental impact statements. The Associations note that the language of MEPA is limited to the effects that the “conduct” at issue “has or is likely to have.” MCL 324.1705(2). They aver that ED 2020-10 is unrelated to the Notice and that discussion of the ED exceeds the scope of the question that the Commission designated for remand in the December 9 order. The Associations also argue that FLOW’s discussion of the public trust doctrine goes well beyond the scope of the remand order and is not within the Commission’s authority under Act 16, in any case.

In its response, the Staff argues that the appellants have not cited a single Commission case where GHG emissions were considered in the context of Act 16 or Public Act 9 of 1929 (Act 9), even though MEPA has been in effect for decades; and the Staff points out that Michigan has no legislative directive requiring that agencies consider GHG emissions when making determinations on permits, licenses, or other approvals. The Staff points out that Enbridge is not seeking authorization to operate Line 5 in this case. The Staff also asserts that the legal effect of the Notice remains unclear, the pipeline has not been shut down or decommissioned, and Enbridge retains the legal right to operate Line 5. The Staff contends that the language of Section 5(2) of

MEPA does not extend to considering the indirect emissions associated with the extraction, refinement, or consumption of petroleum products transported through Line 5, and the statute makes no reference to indirect emissions. The Staff states:

Staff does not dispute that greenhouse gas emissions could be an appropriate consideration in certain regulatory contexts. Indeed, the Commission has encouraged utilities to document their greenhouse gas emissions in integrated resource planning. . . . However, Staff agrees with the ALJ’s Rulings that irrespective of the environmental harm the Joint Appellants contend is caused by greenhouse gas emissions, “MEPA requires an examination of the ‘conduct’ to determine its effect on natural resources” and “the conduct at issue in this case does not include the extraction, refinement, or consumption of the oil transported on Line 5.”

Staff’s response to applications for leave to appeal the ruling on remand, pp. 29-30, citing the November 21, 2017 order in Case No. U-18418, p. 5, and quoting the ruling on remand, pp. 18-19.

In its response, Enbridge maintains that the Notice does not serve to expand the Commission’s MEPA review to the entirety of Line 5. Enbridge also reminds the Commission that neither Act 16 nor Rule 447 require the pipeline operator to apply to the Commission to approve the restart of a pipeline that holds an existing approval, noting that Act 16 provides the Commission with the authority to approve construction and operation but says nothing about the services provided over the pipeline once it is constructed, or about approvals required to stop or start a pipeline.

Enbridge also argues that the Notice does not extend the Commission’s MEPA review to GHG emissions, and the conduct at issue in this case does not include the environmental effects of the extraction, refinement, or consumption of petroleum products. Enbridge notes that the “Commission does not authorize or approve of the use of fossil fuels by consumers which may create GHG,” and argues that an agency’s grant of authority must be conferred by clear and unmistakable language. *Id.*, p. 27, citing *Union Carbide*, 431 Mich at 151. Enbridge also argues that ED 2020-10 is outside the scope of this remand, which, in the December 9 order, sought only

a review of the impact of the Notice. Enbridge points out that no prior Commission order in an Act 16 proceeding has considered GHG emissions in its MEPA review, and argues that an ED cannot expand the agency's jurisdiction or change the statute's language. Finally, Enbridge contends that FLOW's arguments regarding the public trust are well outside the scope of the Commission's jurisdiction and the Great Lakes Submerged Lands Act provides no authority to the Commission.

V. DISCUSSION

Rule 433 establishes the standards for reviewing applications for leave to appeal. Not every application merits immediate review. An appellant must establish one of the following conditions before the Commission will grant review:

- (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.

Rule 433(2)(a)-(c). 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. June 5, 1996 order in Case No. U-11057, p. 2; May 19, 2020 order in Case No. U-20697, p. 9.

In their applications for leave to appeal, FLOW, the MEC Coalition, Bay Mills, and ELPC/MiCAN argue that the Commission should grant the applications because a decision on the initial ruling and ruling on remand before submission of the full case to the Commission will

materially advance a timely resolution of the proceeding and will prevent substantial harm to each appellant and to the public.

The Commission notes that discovery is ongoing, and that testimony from the Staff and the intervenors is due on May 18, 2021. The Commission grants the applications for leave to appeal the initial ruling and the ruling on remand (the rulings). The Commission finds that a timely resolution of the full proceeding will be advanced by granting both rounds of applications and addressing the important issues presented therein.

A. Requirements for Commission Approval of an Act 16 Application

The starting point in the Commission's evaluation of the arguments presented is rooted in the requirements for approval of an application submitted under Act 16. As set forth in its title, the purpose of Act 16 is "to regulate the business of carrying or transporting . . . crude oil or petroleum or its products through pipe lines; . . . [and] to provide for the control and regulation of all corporations, associations and persons engaged in such business" by the Commission. Section 1(2) of Act 16 provides:

A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines, for hire, compensation or otherwise, 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, or carbon dioxide substances, or engaging in the business of buying, selling, or dealing in crude oil or petroleum or carbon dioxide substances within this state, 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, or used in connection with that business on, over, along, across, through, in or under any present or future highway, or part thereof, or elsewhere, within this state, or have or possess the right of eminent domain, or any other right, concerning the business or operations, in whole or in part, except as authorized by and subject to this act.

MCL 483.1(2). Section 3(1) of Act 16 provides:

Subject to subsection (2), the commission is granted the power to control, investigate, and regulate a person doing any of the following:

(a) Exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines, for hire, compensation, or otherwise within this state.

(b) 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, or carbon dioxide substances within this state.

(c) Engaging in the business of buying, selling, or dealing in crude oil or petroleum or carbon dioxide substances within this state.

MCL 483.3(1).²¹

In its implementation of these statutory requirements, the Commission has developed and repeatedly applied a three-part test in its consideration of applications submitted under Act 16. In order to grant an application under Act 16, the Commission must find 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. 2001 order, pp. 13-17; 2002 order, pp. 4-5; 2013 order, p. 5.

In addition to this three-part test, courts have found that state agencies have an obligation to apply the requirements of MEPA to its decisions, including to Commission pipeline siting cases.

State Hwy Comm, 392 Mich at 189-190; *Buggs I*, p. 9. Section 5 of MEPA, MCL 324.1705,

provides, in pertinent part:

(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.

²¹ To assist in carrying out this authority, Rule 447(1)(c) provides for the filing of an application with the Commission.

(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.

Thus, Section 5(2) of MEPA requires that, in an administrative permitting proceeding, an agency must determine whether the conduct under review will pollute, impair, or destroy natural resources, and, if likely so, the proposed conduct shall not be approved if a feasible and prudent alternative exists that is consistent with the reasonable requirements of the public health, safety, and welfare. The substantive duty that is placed on administrative agencies and courts by Section 5(2) is separate from the procedural rights afforded under Section 5(1). *State Hwy Comm*, 392 Mich at 185-186, 190-191; *Buggs I*, p. 9.

In *Buggs I* – a pipeline approval case brought under Act 9 – the Michigan Court of Appeals found that the Commission had duties under MEPA: namely, it 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. *Buggs I*, p. 9, citing *State Hwy Comm*, 392 Mich at 185-186; *see also*, September 23, 2015 order in Case Nos. U-17195 *et al*.

Finally, courts have repeatedly found that these MEPA obligations are supplementary to other statutes and regulations and should be read *in pari materia* with other laws. *See, Mich Oil Co v Natural Resources Comm*, 406 Mich 1, 32-33; 276 NW2d 411 (1979). The U.S. Court of Appeals for the Sixth Circuit has similarly held 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.

Her Majesty the Queen v Detroit, 874 F2d 332, 337 (CA 6, 1989) (emphasis in original, internal citation omitted). And the Michigan Supreme Court has held that 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.” *Ray v Mason Cty Drain Comm*, 393 Mich 294, 306-307; 224 NW2d 883 (1975).

Against this backdrop, in order to grant an application under Act 16, the Commission must find 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, (3) the construction of the pipeline will meet or exceed current safety and engineering standards, and (4) the project complies with the requirements of MEPA.

B. Applicability of Act 16 Requirements to the Replacement Project

In applying these statutory provisions, the Commission considers the conduct at issue in this case, which is the Replacement Project proposed by Enbridge in the application. The impetus for Enbridge’s application is Act 359, which provides an informative background for this discussion. Act 359 is, among other things, “[a]n act authorizing the Mackinac bridge authority to acquire a bridge and a utility tunnel connecting the Upper and Lower Peninsulas of Michigan, . . . [and] authorizing the operation of a utility tunnel by the [Mackinac bridge authority] or the Mackinac Straits corridor authority.” Title, Act 359. A “utility tunnel” means “a tunnel joining and connecting the Upper and Lower Peninsulas of this state at the Straits of Mackinac for the purpose of accommodating utility infrastructure, including, but not limited to, pipelines . . .” MCL

254.324(e). Section 14a(1) of Act 359 provides that the “Mackinac bridge authority may acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel.” MCL 254.324a(1).

Section 14a further provides that:

(3) . . . The Mackinac bridge authority has the right to use and full easements and rights-of-way through, across, under, and over any lands or property owned by this state or in which this state has any right, title, or interest, without consideration, that may be necessary or convenient to the construction and efficient operation of the utility tunnel.

(4) The Mackinac bridge authority may perform all acts necessary to secure the consent of any department, agency, instrumentality, or officer of the United States government or this state to the construction and operation of a utility tunnel and the charging of fees for its use, and to secure the approval of any department, agency, instrumentality, or officer of the United States government or this state required by law to approve the plans, specifications, and location of the utility tunnel or the fees to be charged for the use of the utility tunnel.

(5) The carrying out of the Mackinac bridge authority’s purposes, including a utility tunnel, are for the benefit of the people of this state and constitute a public purpose, and the Mackinac bridge authority is performing an essential government function in the exercise of the powers conferred upon it by this act.

MCL 254.324a(3)-(5). These rights and duties of the Mackinac bridge authority are transferred to MSCA, as follows: “All liabilities, duties, responsibilities, authorities, and powers related to a utility tunnel as provided in section 14a and any money in the straits protection fund shall transfer to the corridor authority board upon the appointment of the members of the corridor authority board under section 14b(2).” MCL 254.324d(1).

Section 14b of Act 359 provides:

The Mackinac Straits corridor authority is created within the state transportation department. . . . The creation of the Mackinac Straits corridor authority and the carrying out of the Mackinac Straits corridor authority’s authorized purposes are public and essential governmental purposes for the benefit of the people of this state and for the improvement of the health, safety, welfare, comfort, and security of the people of this state, and these purposes are public purposes.

MCL 254.324b(1). Upon its creation, and:

no later than December 31, 2018, the Mackinac Straits corridor authority shall enter into an agreement or a series of agreements for the construction, maintenance, operation, and decommissioning of a utility tunnel, if the Mackinac Straits corridor authority finds all of the following:

(a) That the governor has supplied a proposed tunnel agreement to the Mackinac Straits corridor authority on or before December 21, 2018. . . .

(b) That the proposed tunnel agreement allows for the use of the utility tunnel by multiple utilities, provides an option to better connect the Upper and Lower Peninsulas of this state, and provides a route to allow utilities to be laid without future disturbance to the bottomlands of the Straits of Mackinac.

MCL 254.324d(4)(a)-(b). The Agreements referenced in MCL 254.324d(4) have been duly entered into and affirmed by the courts. *See*, notes 8 and 9, *supra*. Under Act 359, the 2018 tunnel easement has been assigned to Enbridge by MSCA. Exhibit A-6; Application, p. 13.

In its application, consistent with the Agreements executed with the State of Michigan and the easement it has been assigned by MSCA, Enbridge proposes to construct a replacement segment of Line 5 that crosses the Straits, to be housed in the utility tunnel. In its June 30 order, the Commission previously described the Replacement Project as the “replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel.” June 30 order, p. 68. As such, the Commission must consider how both the three-part test under Act 16 and the requirements of MEPA apply to the Replacement Project. However, as described more fully below, the application of these provisions do not extend to the remainder of the line approved in the 1953 order.

1. Public Need for Line 5/Operation of Line 5

Enbridge seeks approval for the Replacement Project under Act 16. The appellants argue that the Commission’s determination in this Act 16 proceeding must go beyond the bounds of the Replacement Project and must include an examination of whether there is a public need for Line 5, and whether Line 5 may be safely operated. FLOW, Bay Mills, and the MEC Coalition argue that

the ALJ's rulings on the motion in limine and its remand result in the exclusion of relevant evidence from this proceeding and must be reversed.

In his October 23, 2020 initial ruling, the ALJ explained that the scope of this case is dictated by two factors: (1) the activity proposed in the application, namely replacement of the existing 4-miles of dual pipelines located on the bottomlands with a pipeline located in a tunnel, as contemplated in Act 359 and various agreements with the State; and (2) the Commission's jurisdiction over that proposal under Act 16, the administrative rules promulgated under its authority, and MEPA (initial ruling, p. 14), and that "the standards of Act 16 are well established and must be applied in this case." *Id.*, p. 15. As such, the ALJ held:

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.

Initial ruling, p. 15 (note omitted). The Commission agrees.

In the 1953 order, the Commission approved the construction, maintenance, and operation of Line 5, finding that Line 5 was fit for the purpose of carrying and transporting crude oil and petroleum as a common carrier in interstate and foreign commerce. In the 1953 order the Commission stated "[i]t appears to this Commission that in times of national emergency delivery of crude oil for joint defense purposes would be greatly enhanced by operation of the proposed pipe line." 1953 order, p. 4. Denmark Township moved for denial of the application on grounds that the pipeline was not in the public interest. The Commission found the motion to be without merit, and it was denied. *Id.*, p. 8. The Commission found that the proposed Line 5 met the requirements of Act 16, and Lakehead (Enbridge's predecessor) received permission to construct

and operate the pipeline.²² Subsequently, in *Lakehead*, 340 Mich at 37, the Michigan Supreme Court held that construction and operation of Line 5 was “for a public use benefiting the people of the State of Michigan.” Neither Act 16, nor Rule 447, nor Commission precedent require the Commission to make findings with respect to the length of time that an approved pipeline may operate, and such findings are not made in this order. Indeed, while intervenors argue that the issue of whether Line 5 will continue in operation indefinitely (as Enbridge has alleged) is a question of fact that should be tested, what is ignored by these parties is that whether Enbridge holds the legal right to operate the other 641 miles of Line 5 is not a question of fact but rather of law. Nothing in the Commission’s 1953 order set a termination date for the operation of Line 5, and no party disputes Enbridge’s legal authority to continue to operate the other 641 miles not at issue in this proceeding.

Furthermore, a focus on the need for the Replacement Segment – as opposed to a reconsideration of the need for the entire pipeline – is strongly supported by the Commission’s precedent in this area. In the 2001 order, for example, Wolverine sought approval of discrete 12- and 16-inch petroleum products pipeline systems (those which remained after Wolverine’s motion to withdraw its application respecting a particular segment was granted). 2001 order, p. 9. The Commission granted approval under Act 16 for Wolverine to construct, operate, and maintain the proposed segments. In granting this approval, the Commission did not examine the remainder of Wolverine’s pipeline system that interconnected with the proposed segments, nor did it consider the potential lifespan of any part of Wolverine’s system.

²² It is important to note that the 2014 amendments to Act 16 contained in Public Act 85 of 2014 did not amend the provisions of Act 16 that are at issue in this case. *See*, <http://www.legislature.mi.gov/documents/2013-2014/billanalysis/House/pdf/2013-HLA-4885-4DE9C223.pdf> (accessed March 17, 2021). The same provisions were in place at the time of the 1953 order. Additionally, Act 359 does not revoke or otherwise affect the provisions of Act 16.

Similarly, in the 2002 order, the Commission examined a 12-inch, 26 mile pipeline segment proposed by Wolverine, under Act 16. Again, the Commission did not consider other interconnected pipeline systems in its decision to approve the 26-mile segment, nor did it consider the potential lifespan of any part of Wolverine's system.

Finally, in the 2013 order, the Commission examined a proposal under Act 16, filed by Enbridge, to construct, operate, and maintain 110 miles of new 36-inch pipeline, and 50 miles of new 30-inch pipeline, which replaced certain 30-inch pipeline segments on Line 6B. The application sought approval to replace five separate, noncontiguous pipeline segments. 2013 order, p. 2, n. 2. Again, the Commission did not examine the remainder of Enbridge's pipeline system that interconnected with the five proposed segments, nor did it consider the potential lifespan of any part of Enbridge's system including Line 6B.

As Commission precedent under Act 16 shows, when deciding an application to construct or relocate pipeline, the Commission has never examined any portion of existing pipeline that is interconnected with the segment that is proposed in the applicant's project but not within the proposed route; nor has it examined how the proposed pipeline segment could affect the lifespan of an existing interconnected pipeline system. The Commission has similarly never considered the projected length of usage of a pipeline system in its review of the public need for the replacement or relocation of a segment of the system. For this reason, the Commission is unpersuaded by the MEC Coalition's argument that the first issue in this case is "whether there is a public need to replace the dual pipelines with a new pipeline in a tunnel so as to perpetuate Line 5 for decades to come." The MEC Coalition's application for leave to appeal the initial ruling, p. 10.

In determining public need, the Commission has instead looked at whether the applicant has explained the need for the construction or relocation of the segment or segments being proposed,

and, where alleged, has considered the capacity and safety issues presented by the use of the existing pipeline segment that is proposed for improvement.

In the instant case, the Commission finds that the first issue is whether there is a public need to carry out the Replacement Project, a project to replace the dual pipelines with a new pipeline in a tunnel, and does not concern approved, existing pipeline that is merely interconnected with the segment that is the subject of the application. The public need for the existing portions of Line 5 has been determined. The public need for the Replacement Project has yet to be determined.

The alleged purpose of the Replacement Project is to improve the safety of the 4-mile segment that crosses the Straits. This is a question of fact that the parties may contest, and that is relevant to all three criteria that are considered in an Act 16 case: whether there is a public need for the Replacement Project, whether the Replacement Project is designed and routed reasonably, and whether the Replacement Project meets or exceeds current safety and engineering standards.

Finally, the Commission also agrees with the ALJ that the Tribal treaty-reserved rights asserted by Bay Mills do not serve to expand the scope of the Commission's Act 16 jurisdiction. The treaty-reserved rights do not confer on the Commission the ability to review the authority to own and operate the segments of an approved pipeline system that are not the subject of the Act 16 application before the agency.

The applications for leave to appeal the rulings on this issue are granted, and the requested relief is denied.

2. Michigan Environmental Protection Act Review

Similar to the analysis in applying the three-factor test on project need, whether the proposed project's design and route is reasonable, and whether it meets or exceeds current safety and engineering standards, the application of MEPA is limited to the conduct at issue in this case. As

such, the Commission's MEPA review does not extend to the entirety of Line 5, including the 641 miles of Line 5 outside of the proposed Replacement Project, but only to the "replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel." June 30 order, p. 68. Issues raised by Bay Mills and other intervenors on potential pollution, impairment, and destruction of Michigan's natural resources resulting from existing sections of Line 5 are therefore outside the scope of the Commission's MEPA review as it relates to the Replacement Project.

However, the Commission also cannot separate the construction of the Replacement Project from the reason for doing so. Such a finding is grounded in the plain language of Act 16, which defines "pipeline" in relation to the product being shipped: a pipeline under Act 16 is one "used or to be used to transport crude oil or petroleum or carbon dioxide substances." MCL 483.2a. Similarly, section 1(2) of Act 16 states that the Act's provisions apply to "A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines ..." MCL 483.1(2). While some would narrowly constrain the review of pollution to the construction of the tunnel and pipeline, such an interpretation is untenable. It seems clear the Legislature intended for Act 16 to cover not just the construction of pipelines for the sake of building pipelines, but also that their purpose and the products flowing through them were inherently part of the regulatory framework established in Act 16. It defies both well accepted principles of statutory interpretation as well as common sense to apply MEPA to a pipeline but not to the products being transported through it. As the Commission finds that conduct at issue in constructing the Replacement Project is indistinguishable from the purpose behind it or its result, the Commission's obligations under MEPA must also extend to the products being shipped through the Replacement Project.

As noted above, Section 5(1) of MEPA allows an agency to “permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding . . . involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources.” Several parties have intervened in this proceeding and have made assertions about the conduct at issue and its likelihood to have the effect of polluting, impairing, or destroying natural resources in their petitions to intervene, the briefs on this motion, and the offers of proof. The Commission must evaluate these assertions as provided under Section 5(2). Thus, in this proceeding, “the alleged pollution, impairment, or destruction of the air, water, or other natural resources . . . shall be determined” by the Commission. MCL 324.1705(2). Further, as discussed above, courts have held that the Commission does not have a duty to independently investigate whether the project complied with MEPA, but rather could rely on the record presented in the case.

Statutory interpretation begins with the plain language of the statute. The word “pollution” should be understood as it is ordinarily used. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 159; 615 NW2d 702 (2000) (words should be given “their common and ordinary meaning.”). The ordinary meaning of “pollution” is “the action of polluting especially by environmental contamination with man-made waste.”²³ As noted by ELPC/MiCAN and others, GHGs are widely recognized as pollutants that trap heat in the atmosphere and contribute to climate change, thereby polluting, impairing, and destroying natural resources. *See, e.g.*, ELPC/MiCAN Opposition to

²³ *Merriam- Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/pollution> (accessed March 26, 2021).

Enbridge's Motion in Limine, p. 4-6.²⁴ Nothing in MEPA limits the types of "pollution" that can be asserted by an intervenor as resulting from the "conduct," and, as the history of both environmental degradation and regulation show, new pollutants continue to be identified. The Commission finds that MEPA is broadly written to apply to all "administrative, licensing, or other proceedings" conducted by an "agency" or a "court," and is not limited to agencies that act as environmental regulators.²⁵ Further, both the statutory language of MEPA and the language of MEPA case law support a broad interpretation of whether "conduct . . . has or is likely to have" the effect of pollution, impairment, or destruction.

On this basis, the Commission finds that the allegations of GHG pollution made by several intervenors to this case fit within the statutory language of Section 5 of MEPA, and therefore must be reviewed in this case. The Commission disagrees with the ALJ's rejection of the inclusion of GHG emissions in such a review where intervenors have introduced the allegation of pollution consistent with Section 5(1) of MEPA.²⁶ The Commission finds that GHGs are pollutants within the scope of the clear language of MEPA, and thus the parties are free to introduce evidence addressing the issue of GHG emissions and any pollution, impairment, or destruction arising from the activity proposed in the application. MCL 324.1705(2); MCL 24.272. While the project under

²⁴ See also, *Massachusetts v Environmental Protection Agency*, 549 US 497, 528-535; 127 S Ct 1438; 167 L Ed 2d 248 (2007); and Greenhouse Gas Emissions: Sources of Greenhouse Gas Emissions, U.S. Environmental Protection Agency, available at <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (accessed March 28, 2021).

²⁵ However, the Commission agrees with parties that argued that an ED does not expand an agency's jurisdiction under MEPA, finds that the Attorney General has opined definitively on this point, and notes the parties have not cited any case that holds otherwise. Op. Att. Gen. 2009, No. 7224.

²⁶ The Commission notes that Enbridge also refers to the potential for GHG emissions from construction equipment as part of its air quality analysis in Exhibit A-11, p. 338 (the EGLE/USACE permit application), and Exhibit A-12, p. 14 (the Environmental Impact Report).

consideration is limited to the 4-mile section of the pipeline described in the application, this pipeline section would involve hydrocarbons that may result in GHG pollution that must be subject to MEPA review.

The Commission finds that consideration of the Notice is unnecessary to making the findings about MEPA's applicability to the product being flowed through the Replacement Project, or for GHGs to be considered "pollution" under MEPA. However, the existence of the Notice – and the uncertainty surrounding it – does inform the basis of comparison between the Replacement Project and the potentially non-operational segments crossing the Straits. The Commission finds that it cannot ignore the possibility that Enbridge will cease to operate the 4-mile dual pipeline segment of Line 5 in the Straits if the State succeeds in its action to enforce the Notice; and, should the Commission at this point in the proceeding exclude evidence simply on the basis of the uncertainty surrounding the validity of the Notice, it would lose the ability to consider evidence related to the loss of the use of the 4-mile dual pipeline segment in the Straits should the State ultimately prevail. As such, the Commission is unwilling to exclude evidence under MEPA that compares the pollution, impairment, or destruction attributable to an operating 4-mile pipeline segment in the Straits with non-operational 4-mile dual pipeline segments.

It is true that Act 359, the 2018 easement grant, the assignment of the easement by MSCA, and the Agreements are all unaffected by the Notice. However, as the Commission has already stated in the June 30 order, the need for a robust record in this case is crucial. June 30 order, p. 69. The Commission notes that the scope of discovery in Michigan is broad, as is the definition of relevant evidence. MCR 2.302(B)(1); MRE 401. Under MRE 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.”

Section 75 of the APA provides:

In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent [persons] in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded.

MCL 24.275.

The Commission finds that evidence related to the potential shutdown of the 4-mile dual pipeline segment is not irrelevant or immaterial to the MEPA review. If the State prevails in its action to enforce the Notice, the conduct at issue in this case – the Replacement Project – would be the lynchpin providing the company with the ability to ship product on this 4-mile stretch of Line 5. In other words, while Enbridge would retain the right to operate the other 641 miles of Line 5, it may not be able to ship product through the Straits by pipeline once the Notice is in force without the authorization that is sought in this case.

Finally, MEPA requires a determination by the administrative agency of “feasible and prudent alternatives” to the proposed project and a determination of whether the project “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.” MCL 324.1705; *State Hwy Comm*, 392 Mich at 159; *Buggs I*, p. 9. At this early stage of the proceeding, the Commission is not persuaded that it should prohibit arguments and evidence addressing what the appropriate point of comparison is for any pollution, impairment, or destruction of Michigan’s natural resources resulting from the proposed Replacement Project. Such questions on the feasibility and prudence of alternatives – both in terms of alternative pipeline and non-pipeline shipping arrangements and alternatives to the products being shipped – are inherently questions of

fact well suited to the development of record evidence. However, while allowing evidence to be considered on this point, the Commission notes that this is only the beginning of the inquiry, and the Commission must ultimately determine, consistent with its responsibilities under MEPA, whether there is any pollution, impairment, or destruction as a result of the Replacement Project – including in comparison to the possible closure of the dual pipeline segments currently in the Straits if the Notice is enforced; whether any pollution, impairment, or destruction is consistent with the protection of Michigan’s natural resources; and whether there are feasible and prudent alternatives to any pollution, impairment, or destruction that is found as a result of the Replacement Project. Given the many considerations involved in the production, transportation, and ultimate refining and consumption of the products being transported, evidence addressing how to account for GHG pollutant impacts attributable to the proposed Replacement Project, where the proper boundaries of GHG pollutants should be drawn, and the correct alternative(s) for comparison would be helpful to the Commission in making this determination.

The applications for leave to appeal the rulings on this issue are granted, and the requested relief is partially granted.

3. Other Issues

Finally, the Commission finds it appropriate to address the concerns of parties who argued that to allow consideration of the public need for Line 5 and its applicability to the Replacement Project would produce a chilling effect on future efforts to maintain, improve, or repair pipeline infrastructure. These parties proclaimed that a pipeline operator who knows that hundreds of miles of approved, existing, and reliable pipeline will be put at risk through the filing of an application to improve a few miles of that pipeline may be unlikely to decide to make those improvements, and such a finding in this case would prove a disservice to the public.

The Commission recognizes this concern, and notes that the factual situation at issue in this case is distinguishable from other cases involving repairs or even replacements of existing pipelines. As noted in the Commission’s June 30 order, many instances involving repairs or replacements on existing lines do not trigger the need for an Act 16 application. However, in the present case:

Enbridge proposes to relocate the portion of Line 5 that crosses the Straits from atop the lakebed to a tunnel 60 to 250 feet below the lakebed, which will be constructed in a new easement issued by the State of Michigan. As discussed above, this is a significant change in location and route of the Line 5 pipeline. Therefore, based on the factors listed above and relevant Commission precedent, the Commission finds that an Act 16 application is required to obtain approval for the Line 5 Project.

June 30 order, p. 67.²⁷ However, the Commission reiterates that it is only the conduct at issue in the application – the construction of the proposed Replacement Project – that is subject to both the three-part test under Act 16 and MEPA review.

Finally, from the perspective of what evidence can be considered to inform this alternatives comparison, the present case is distinguishable in light of the uncertainty over Enbridge’s current easement to operate the existing 4-mile segment through the Straits as a result of the Notice. In other pipeline cases, even those requiring applications under Act 9 or Act 16, the pipeline operator

²⁷ In the June 30 order, after reviewing a series of relevant cases, the Commission found that there are two factors that require the filing of a new application pursuant to Rule 447: (1) a change in pipeline diameter (i.e., capacity) and (2) a relocation of the pipeline. June 30 order, p. 63. The Commission further found that “it is sufficient that the proposed activity meet only one of the two factors [to trigger the Rule 447 application requirement]; it is not necessary that it meet both.” *Id.* Finally, as noted in the June 30 order, the replacement of the current 20-inch-diameter dual pipelines with a new 30-inch-diameter pipeline represents a change “that is capable of increasing the volume of the pipeline.” *Id.* at 65. As 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 evidence, and a well-developed record,” *id.* at 69, the Commission expresses its expectation that factual questions surrounding any potential future capacity increases resulting from the Replacement Project will also be developed as part of the record evidence in this case.

retains the right to restart the entire line without any additional approvals. Indeed, even were the state to be successful in enforcing the Notice, it remains uncontradicted that Enbridge would enjoy the same rights in restarting or continuing to operate the other 641 miles of Line 5 not subject to the application in this case. However, should the State be successful in enforcing the Notice, the existing section of Line 5 between the Upper Peninsula and the Lower Peninsula could become dormant, as early as next month. While, again, no party disputes Enbridge's right to operate the remainder of the line, without the approval being sought in this case for the Replacement Segment, Enbridge may lose its ability to ship product across the Straits by pipeline if the Notice is enforced.

Notably, the Commission finds that the outcome of the litigation surrounding the Notice has no impact on the approvals granted in the 1953 order. The Commission agrees with the ALJ that the 1953 order remains in effect, and the Commission is expressly not seeking to re-examine or reconsider the approvals granted in that case, nor is it taking steps toward the possible "suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license" under MCL 24.292(1), MCL 24.205(a), and *Rogers*. Rather, as noted by the Staff, the Notice involves not Enbridge's rights under the 1953 order, but the ongoing property interest to continue to operate in its current location under the easement granted by the predecessor to the DNR. Staff's response to the applications for leave to appeal the ruling on remand, p. 19. As such, the notice and other procedural protections provided by the APA and *Rogers* are not at issue in this case.

Finally, the other offers of proof described in the applications for leave to appeal focus on the economics of fossil fuel pipelines, the risk of stranded costs, and the safety issues arising from leaks on any part of the pipeline system. These are not issues in this case.

The Commission acknowledges that today's order likely changes the nature and scope of the testimony to be submitted in this proceeding, and authorizes the ALJ to modify the case schedule as needed to accommodate any additional time needed by the parties in this regard.

THEREFORE, IT IS ORDERED that the applications for leave to appeal the October 23, 2020 and February 23, 2021 rulings on Enbridge Energy, Limited Partnership's motion in limine filed by the Michigan Department of Attorney General, For Love of Water, the Michigan Environmental Council, the Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council, National Wildlife Federation, Bay Mills Indian Community, Environmental Law & Policy Center, Michigan Climate Action Network, the Little Traverse Bay Band of Odawa Indians, and the Nottawaseppi Huron Band of the Potawatomi, are granted, and the requested relief is granted in part and denied in part, as described in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel.

Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungpl@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Daniel C. Scripps, Chair

Tremaine L. Phillips, Commissioner

Katherine L. Peretick, Commissioner

By its action of April 21, 2021.

Lisa Felice, Executive Secretary

PROOF OF SERVICE

STATE OF MICHIGAN)

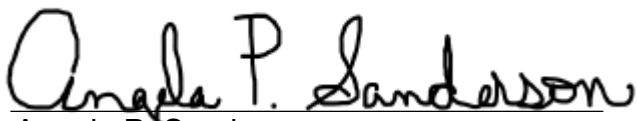
Case No. U-20763

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on April 21, 2021 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).


Brianna Brown

Subscribed and sworn to before me
this 21st day of April 2021.



Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2024

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