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**STATE OF MICHIGAN**
**IN THE SUPREME COURT**
**APPEAL FROM THE COURT OF APPEALS**
The Honorable Megan K. Cavanagh, Brian K. Zahra, Richard H. Berstein, Elizabeth M. Welch, Kyra H. Bolden, Kimberly A. Thomas, Noah P. Hood

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LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, BAY MILLS INDIAN COMMUNITY, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, and ENVIORMENTAL LAW & POLICY CENTER And MICHIGAN CLIMATE ACTION NETWORK,
Appellants,

Supreme Court No. 168335

Court of Appeals No. 369156, 369159, 369161, 369162, 369165

MPSC Case No. U-20763

v.

MPSC, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPSANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,
Appellees,
and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,
Petitioner-Appellee

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# AMICUS CURIAE BRIEF ON BEHALF OF THE GREAT LAKES ENVIRONMENTAL LAW CENTER IN SUPPORT OF APPELLANTS

Scott Troia (P82986)
Nicholas Leonard (P79283)
313-782-3372
scott.troia@glelc.org
nicholas.leonard@glelc.org

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## STATEMENT OF JURISDICTION

*Amicus Curiae*, Great Lakes Environmental Law Center, accepts and adopts Plaintiff/Appellant's jurisdictional statement.

## STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying a deferential standard of review, rather than independently determining de novo under MCL 324.1705(2) of the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 *et seq.*, whether the proposed Line 5 tunnel project is likely to pollute, impair, or destroy the air, water, or other natural resources of the State or the public trust in those resources, as required by *W. Michigan Envtl. Action Council, Inc. v. Nat. Resources Comm'n*, 405 Mich 741, 752-755 (1979)?

| | |
|---|---|
| Appellant Answer: | Yes |
| Appellee Answer: | No |
| Court of Appeals Answer: | No |
| Amicus Curiae, Answer: | Yes |

2. Did the Court of Appeals err in affirming the Michigan Public Service Commission's limitation on the scope of evidence considered under MCL 324.1705(2) of MEPA, by excluding evidence concerning the history and risk of oil spills along the entire Line 5

pipeline system, rather than considering all foreseeable environmental impacts associated with the continued operation of the pipeline enabled by the proposed tunnel project?

| | |
|---|---|
| Appellants' Answer: | Yes |
| Appellees' Answer: | No |
| Court of Appeals Answer: | No |
| Amicus Curiae, Answer: | Yes |

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## INTEREST OF AMICUS

The Great Lakes Environmental Law Center submits this brief in support of the Appellants. The Great Lakes Environmental Law Center is a nonprofit corporation exempt from corporate taxation pursuant to section 501(c)(3) of the Internal Revenue Code whose mission includes protecting Michigan's natural resources from pollution, impairment, or harm by providing pro bono legal services to individuals and organizations.

## I. STATEMENT OF FACTS

The Michigan Public Service Commission ("MPSC" or "Commission") approved the original application to "construct, operate and maintain" the pipeline in 1953 after reviewing its technical specifications, the proposed route, and determining it was in the public interest. March 1953 Order (Exhibit 1). These were different times. The nation had recently emerged from World War II, was still engaged in the Korean War, and the modern infrastructure of the nation was still being built out. The Commission reflected this when they determined the construction of Line 5 was in the public interest because "[t]he Petroleum Administration for Defense has given priority for materials for this pipeline" to be available for "national emergency delivery of crude oil for joint defense purposes." *Id*. at 4 (Exhibit 1). No laws relevant to the original authorization of Line 5 required any consideration for potential environmental impacts from oil spills. That changed in 1963.

In the 1963 Michigan Constitution, constitutional delegates and Michigan voters adopted Article IV, § 52 which established that the conservation and development of the natural resources of natural resources of Michigan are "of paramount public concern" and directed the legislature to "provide for the protection of the air, water, and other natural resources…from pollution, impairment, or destruction." Const 1963, art 4, § 52. Seven years later, the legislature made good on this Constitutional mandate by adopting the Michigan Environmental Protection Act ("MEPA").

As this Court has acknowledged, MEPA was widely regarded as a groundbreaking environmental protection statute. *Ray v. Mason County Drain Comm'r.,* 393 Mich 294, 304-305;

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224 NW2d 883 (1975) (describing the widespread attention MEPA received upon enactment). MEPA was regarded as groundbreaking in large part because it "did not attempt to set forth an elaborate scheme of detailed provisions to cover every conceivable type of environmental pollution or impairment" as many detailed and technocratic federal and state environmental statutes do. *Id.* at 306. Instead, MEPA established two broad and substantive statutory provisions aimed at fulfilling the Michigan Constitution's requirement to provide for the protection of Michigan's natural resources: first, it prohibits any person from polluting, impairing, or destroying the air, water, or other natural resources, and; second, it requires the state of Michigan to hold and preserve and protect the air, water, and other natural resources in a public trust. MCL 324.1701.

MEPA was also groundbreaking because of who it entrusted with implementing the broad provisions it contained. The statute decentralizes the authority of administrative agencies, which had been the primary entities in charge of both enforcing environmental protection laws and developing environmental protection standards. *Ray,* 393 Mich at 305 (noting that "[n]ot every public agency proved to be diligent and dedicated defenders of the environment"). MEPA invested the public with "a sizable share of the initiative for environmental law enforcement" by allowing any person to enforce MEPA's substantive statutory provisions. *Id.* It also invested the courts with the "important task of…developing a common law of environmental quality" by fashioning environmental protection standards in the context of actual disputes as they arise in individual cases. *Id.* By authorizing courts to develop a common law of environmental quality, MEPA sought to ensure that the environmental rights it enshrined remained a "flexible body of principles" that "develops incrementally through judicial decisions to resolve individual disputes." *Beech Grove Inv. Co. v Civil Rights Com.,* 380 Mich 405, 430; 157 NW2d (1968) (quoting 15A CJS, Common Law, § 2, pp 43, 44); *Woodman v. Kera LLC,* 486 Mich 228, 267-268; 785 NW2d 1 (2010) (Markman, J. concurring).

Despite decentralizing the role of agencies in environmental enforcement and rulemaking, such agencies are still important actors under MEPA. Many state agencies oversee a wide variety of administrative proceedings that involve assessing proposed conduct that may impact Michigan's natural resources before it occurs. The purpose of such proceedings is to prevent unlawful injuries to the environment, which are widely regarded as irreparable harms.

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See *Amoco Prod. Co. v. Vill. Of Gambell,* 480 U.S. 531, 545; 107 S Ct 1396; 94 L Ed2d 542 (1987) (noting that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable"). As such, while citizens are the enforcers of MEPA and courts are responsible for developing the rights enshrined by MEPA, state agencies are still the first line of defense and play the important role of preventing MEPA violations in the administration proceedings they oversee. The Legislature made this role clear in MCL 324.1705(2), which establishes a broad requirement for all agencies in any administrative proceedings to determine whether proposed conduct may pollute, impair, or destroy natural resources. However, the judiciary is mandated to determine whether agencies are properly executing this role and do so utilizing a de novo standard of review.

## II. ARGUMENT

The Court of Appeals decision to both limit the scope of its MEPA review to the section of Line 5 that is being replaced and to afford the MPSC deference in its MEPA analysis work in tandem to significantly limit the key role of the judiciary in developing a common law of environmental quality. As evidenced by the Legislature's plain language and this Court's long standing precedent, MEPA's purpose was to expand the role of the judiciary in environmental protection, not to limit it.

### A. The Court of Appeals Erred by Reviewing MPSC's MEPA Determinations with the Deferential Standard.

The Court of Appeals' conclusion that the Railroads Public Act, in particular MCL 462.25 and MCL 462.26, establishes the standard of review for the Commission's MEPA decision is unlawful because it ignored the plain language and the legislative intent of MEPA, which clearly states that the Commission's determination that Enbridge will not impair, pollute, or destroy Michigan's natural resources is subject to de novo review. Even if MEPA's standard of review conflicts with the standard of review in the Railroads Public Act, canons of statutory interpretation still required the Court of Appeals to apply MEPA's standard of review.

#### *1. The Court of Appeals decision conflicts with the statutory text.*

As with all questions of statutory interpretation, the proper first step in determining whether MEPA provides a standard of review for appeals of agency decisions is the text of the statute.

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*State Farm Fire & Cas. Co. v. Old Republic Ins. Co.,* 466 Mich 142, 146; 644 NW2d 715 (2002). MCL 324.1705(2) describes the proper standard of review for any appellate court called upon to review an administrative proceeding that included an analysis regarding the potential pollution, impairment, or destruction of Michigan's natural resources.

Section 1705(2) of MEPA states:

> 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) (emphasis added)].

The Legislature's use of the phrase "*any* judicial review" demonstrates its intent that MEPA's substantive safeguards apply across all forums of review—trial, agency, or appellate—where environmental determinations are subject to judicial consideration. Appellants duly noted this Court's recognition that "any" means "every; all." Joint Appellants' Brief, p 16 (citing *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010)). It is a settled principle that statutory language must be given its full effect. See *People v Pinkney*, 501 Mich 259, 283; 912 NW2d 535 (2018) ("Courts must avoid interpretations that render statutory language surplusage."). The Court of Appeals ignored the modifier "any" when it attempted to distinguish MEPA's judicial review standards for circuit courts compared to appellate courts and therefore erred by not giving the statutory language its full effect.

Likewise, the use of the word "and" in "*and* any judicial review of such a proceeding" (emphasis added) supports Appellants' analysis and conclusion that the language of Section 1705(2) does not allow for a deferential standard to be afforded to MPSC MEPA determinations. See Joint Appellants' Brief, pp 15-17. The plain rules of grammar hold the word "and" is a conjunctive term and "[t]he literal meanings of the terms 'and' and 'or' should be followed if they do not render the statute dubious." *White v Harrison-White*, 280 Mich App 383, 389; 760 NW2d 691 (2008). The use of the conjunctive "and" between the enumeration of administrative hearings and judicial reviews in Section 1705(2) - a provision mandating substantive material findings - is further plain text evidence that the judiciary needs to make independent MEPA determinations without deferring to agency findings. This comports with the intent of the legislature to have MEPA determinations made with a de novo standard of review, discussed

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below. "Nothing may be read into a clear statute 'that is not within the *manifest intent* of the Legislature as derived from the words of the statute itself.'" *Sietsema Farms Feeds, LLC v Dep't of Treasury*, 296 Mich App 232, 237; 818 NW2d 489 (2012) (emphasis added) (quoting *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010)).

Appellees contend 1705(2) does not impose the same de novo standard of review present in 1701. Appellee Enbridge's Brief, p 22. In support of its argument, Appellees attempt to twist MEPA's reference to "judicial review" to mean appellate review that is bound by the traditional standards under which the agency's factual determinations are entitled to deference. *Id*. at 18-19. However, the traditional standards of review for agency decisions "merely establishes the minimum review to be applied, without forbidding more stringent review." *Palo Group Foster Care v Department of Soc. Servs.,* 228 Mich. App 140, 145; 577 NW2d 200 (1998). The legislature is free to amend that standard of review and contrary to the Appellees' assertion it need not use the phrase "de novo" to specify such a standard. *Id*. (concluding that statutory language stating that a court "shall have jurisdiction to hear and determine the questions of fact or law involved in the appeal" is sufficient to require courts to engage in a de novo standard of review).

*2. The Court of Appeals decision conflicts with established precedent recognizing MEPA's independent judicial review requirement.*

As this Court has noted, "[n]ot every public agency proved to be diligent and dedicated defenders of the environment." *Ray*, 393 Mich at 305. To address this problem, MEPA invested the courts with power to give substance to MEPA's standards by developing a common law of environmental quality. *Id*. Such standards may be developed both in civil actions brought under MCL 324.1701 and reviews of agency actions under MCL 324.1705. One procedural method for empowering the courts to develop more stringent protection for the environment was enacting a de novo standard of review. By eliminating a deferential standard, "the legislature reduced the broad discretion that regulatory agencies formerly had. . . Now these agencies must be prepared to defend themselves against charges that their decisions fail to protect natural resources." Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1003, 1005 (1972), <https://repository.law.umich.edu/mlr/vol70/iss6/2/> (accessed January 20, 2026).

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Appellees' argument that this Court's *West Michigan Environmental Action Council* ("*WMEAC*") decision is inapplicable to the judicial review of an agency decision would undermine the mandated role of the judiciary in developing an environmental common law - and holding agencies accountable for their actions - as articulated in *Ray* and which the *WMEAC* Court emphasized. See *West Michigan Environmental Action Council, Inc. v Natural Resources Commission*, 405 Mich 741, 752-753; 275 NW2d 538 (1979). The *WMEAC* Court explicitly enumerated Section 1705 along with the other sections of MEPA when stating courts have the responsibility to determine whether the natural resources of the state are being properly protected. *Id* at 753. In the enumerations of the sections, the Court put emphasis on related phrases in each of the sections including "*and in any judicial review thereof*" and "*shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect*" in Section 1705. *Id*. Decisively, the Court held "[c]ourts can discharge their responsibility to make such determinations only if they make independent, de novo judgments." *Id*. The holding is clearly tying each of the sections of MEPA together in their roles to determine all MEPA controversies on their merits and with a de novo standard. *Id*. at 752-753. Otherwise, "[t]he environmental protection act would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands." *Id* at 754.

Notably, the Court of Appeals never analyzed this section of MEPA when determining the applicable standard of review. Instead, it sought to distinguish a number of cases in which Michigan courts have applied a de novo standard of review on the basis that such cases include findings of fact by the circuit court. Court of Appeals Opinion, p 23. Circuit courts appropriately applying the de novo standard of review does not obviate an appellate court's obligations pursuant to the *WMEAC* Court's inclusion and interpretation of the plain language of "any judicial review" and "shall be determined" in Section 1705.

*3. The Court of Appeals erred by applying the standard of review in MCL 462.25 and MCL 462.26 rather than the MEPA's standard of review.*

Rather than look to MEPA to identify the applicable standard of review for the Appellant's challenge to the MPSC's MEPA determination, the Court of Appeals referred to the Railroads Public Act, in particular MCL 462.26 and MCL 462.25, which generally applies to

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appeals of MPSC determinations. Court of Appeals Opinion, p 18. Typically, when two statutes are in conflict it is the court's duty to harmonize them. *TOMRA of N. Am., Inc. v Dep't of Treasury,* 505 Mich 333, 349; 952 NW2d 384 (2020) (quoting *Nowell v Titan Ins. Co.,* 466 Mich 478, 483; 648 NW2d 157 (2002)). In this instance, MEPA provides a de novo standard of review while the Railroads Public Act provides a deferential standard of review premised on the abuse of discretion.

When interpreting potentially conflicting provisions of distinct statutes, it is the court's duty to read the legislative text as a whole in view of its structure, to harmonize the distinct statutes, and to avoid rendering any legislative language as surplusage. *TOMRA,* 505 Mich at 349-350. As discussed by Appellants, the provisions in MCL 462.5 and MCL 462.26 do not apply to environmental determinations made under MEPA, so no conflict occurs. Joint Appellants' Brief, p 24. However, even if this Court determines the provisions of the two acts are in conflict, the MEPA standard of review prevails since MEPA is the act promulgated to address the substantive environmental issue in dispute. In contrast, MCL 462.25 and MCL 462.26 are part of the Railroads Public Act – unrelated to environmental issues - which has judicial review authority over the MPSC indirectly through the Michigan Public Service Commission, Act 3 of 1939, MCL 460.1 *et seq*. ("Act 3") – a general act also unrelated to environmental issues. MCL 460.4.

Two rules of statutory construction dictate the MEPA standard of review prevails. First, "[w]here there are two acts or provisions, one of which is special and particular, and certainly includes the *matter in question*, and the other general. . . the special must be taken as intended to constitute an exception to the general act." *Ex parte Landaal*, 273 Mich 248, 253; 262 NW 897 (1935) (emphasis added) (quoting *Crane v Reeder*, 22 Mich. 322, 334 (1871)). As discussed below, MEPA is the statute which particularly applies to whether the construction and operation of the proposed segment of Line 5 is likely to harm the environment. Second, when "two acts are in irreconcilable conflict, the later act would control." *People v Flynn*, 330 Mich 130, 141; 47 NW2d 47 (1951) (citing *Metropolitan Life Ins. Co. v Stoll*, 276 Mich 637, 641; 268 NW 763 (1936) ("where two laws *in pari materia* are in irreconcilable conflict, the one last enacted will control or be regarded as an exception to or qualification of the prior statute")). MEPA was enacted in 1970 with the legislative intent to have courts make independent determinations of environmental impacts whereas MCL 462.25 and MCL 462.26 were enacted in 1909, far before MEPA. Both rules of statutory construction favor applying the MEPA standard of review.

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The history of the Commission and case law support the determination that the deferential standard applied by the Court of Appeals is derived from a general statute. First, The MPSC was officially formed by Act 3 which this Court has consistently held is a "general law." See *Jackson v Consumers Power Co.* 312 Mich 437, 450; 20 NW2d 265 (1945) (holding "in 1939 the legislature passed a general law (Act No. 3, Pub. Acts 1939) . . . and municipal charters are "subject to the constitution and *general laws of this state*")) (emphasis added). The history of the MPSC supports this holding. The Commission began, in its first iteration, as the Michigan Railroad Commission established in 1873 (and expanded in 1909) "to regulate railroad rates and conditions of service." Department of Environment, Great Lakes, and Energy, *Michigan Public Service Commission – Commission History* <https://www.michigan.gov/mpsc/about/commission-history> (accessed January 20, 2026). Subsequent statutes abolished and reorganized the Commission twice, expanding its regulatory authority beyond just railroads to oversee steam and natural gas (Act 419 of 1919, MCL 460.51 *et seq.*), natural gas pipelines (Act 9 of 1929, MCL 483.101 *et seq*.), petroleum pipelines (Act 16 of 1929 MCL 483.1 *et seq*. - the licensing act at issue in this litigation), and motor carriers (Act 254 of 1933, MCL 475.1 *et seq*.) among other subsequent utilities such as water and telecommunications. Department of Environment, Great Lakes, and Energy, *Michigan Public Service Commission – Commission History* <https://www.michigan.gov/mpsc/about/commission-history> (accessed January 20, 2026). Act 3 then is a general law forming the MPSC and detailing its powers overseeing numerous different public utilities.

In contrast, MEPA is the *particular* statute substantively controlling the matter in question involved with the authorization process of Line 5. The matter in question before the Court of Appeals was whether the Commission erred by not allowing evidence relevant to whether conduct has or is likely to have the effect of polluting, impairing, or destroying natural resources. The matter in question relates to questions of law regarding environmental protection. MEPA's purpose is "protecting the environment." *Genesco, Inc. v Mich. Dep't of Envtl. Quality*, 250 Mich App 45, 53; 645 NW2d 319 (2002). While MEPA is typically determined to be a generally applicable statute, the nature of the matter in question is pivotal when applying the general/specific rule of construction. *State Hwy Comm v Vanderkloot,* 392 Mich 159, 182; 220 NW 416 (1974). For example, in *Genesco,* the matter in question was procedural review of

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efforts to remediate toxic sites which pitted two parts of the Natural Resources and Environmental Protection Act ("NREPA") against each other: Part 17 "MEPA" and Part 201 "Environmental Remediation." *Genesco*, 250 Mich App at 52. The *Genesco* Court determined that MEPA was "only generally applicable to" the matter in question – remediating toxic sites – because *both* parts had the same purpose of "protecting the environment" and Part 201 specifically dealt with remediation. *Id.* at 52-53. Here, however, the two acts are both generally applicable statutes, but they do not have the same purpose. MEPA is the act which is particular to the substantive matter in question – whether conduct may adversely impact the environment. Act 3, in contrast, is a general law outlining MPSC's authority which deferred the "manner provided" for judicial review to the Railroads Public Act 300 - the substantive subject matter of which is wholly unrelated to the issues at bar. MCL 460.4; MCL 462 *et. seq*.

The Commission acknowledged the MEPA analysis is a new and particular issue for review beyond the traditional three-part test required of the Commission in Act 16 authorizations. "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. . . Thus, Section 5(2) of MEPA requires . . . an agency [to] determine whether the conduct under review ill pollute, impair, or destroy natural resources." April 2021, MPSC Order, p 55 (Exhibit 2) (citing *Vanderkloot*, 392 Mich at 189-190; *Buggs v Mich Pub Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2015 (Docket Nos. 315058 and 315064) p. 9). Notably, the two cases the Court of Appeals cited justifying its application of the Railroad Public Act standard of review are easily distinguishable since neither required a MEPA analysis. Court of Appeals Opinion, p 18 (citing *Mich Consol Gas Co v Pub Serv Comm, 389 Mich 624, 635-636; 209 NW2d 210 (1973).* (gas rates case); *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999) (local telecommunications carrier was required to provide intraLATA toll dialing parity).

### B. The Court of Appeals erred by affirming MPSC's limitation on the scope of MEPA.

In determining the proper scope of a MEPA review, the Court of Appeals considered both the text of Section 1705(2) and the 1953 order authorizing the construction and operation of Line 5 to conclude that it was proper for the MPSC to refuse to consider the risk of oil spills from Line 5 as a whole. This determination was unlawful for numerous reasons.

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*1. Line 5 has never undergone a MEPA review.*

MPSC and the Court of Appeals abdicated their responsibility to conduct a full "substantive" review by excluding evidence of historic and potential oil spills from Line 5 in Michigan. The ALJ denied evidence of oil spills along the entirety of Line 5 holding the Replacement Project does not "allow[] for a reexamination of the public need for Line 5, or its operational and safety aspects, under Act 16." February 2021, ALJ Order, p 21 (Exhibit 3). MPSC upheld the ALJ's decision stating "[i]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 provided a public need. April 2021, MPSC Order, p 60 (Exhibit 2). Using a deferential standard, the Court of Appeals affirmed the MPSC's final order which incorporated its previous support for the ALJ's analysis that the "already-established public need" for Line 5 preempted consideration of evidence of historic and potential oil spills along the entirety of Line 5. Court of Appeals Opinion, pp 21-22. The reasoning through each of these decisions conflates the traditional Act 16 3-prong analysis with the distinct MEPA review of the "likely effects" of conduct polluting the environment. Traditional MPSC policy has been the "Commission will grant application[s] pursuant to Act 16 when it finds that (1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and routed in a reasonable manner, and (3) the construction of the pipeline will meet or exceed current safety and engineering standards." *In re Enbridge Energy Limited Partnership*, Case No. U-17020, Final Order dated January 31, 2013, at 22 (Exhibit 4) (citing *Wolverine Pipeline order*, Case No. U-13225, dated July 23, 2002). The 1953 Order determined Line 5 satisfied each of these requirements. It did not include any MEPA analysis. Construction meeting current technical and engineering safety standards for the design and equipment of a pipeline is not the equivalent of full MEPA review of all the "likely effects" of the project. The MPSC acknowledged the 3-prong assessment now must contain an additional fourth prong: "(4) the project complies with the requirements of MEPA." April 2021, MPSC Order, p 57 (Exhibit 2). Any argument that the Appellants are somehow estopped from arguing that the MPSC must conduct a full MEPA analysis of all the Replacement Projects' potential "likely effects" of pollution along the full length of Line 5 based on a previous authorization that occurred 17 years before MEPA was even enacted is erroneous. See *Storey v Meijer, Inc.,* 431 Mich 368, 373; 429

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NW2d 169 (1988) (noting a party may only be estopped from raising a claim in litigation if the question of fact essential to the judgment has already been actually litigated and determined).

*2. MEPA's text and legislative history require the MPSC to conduct a MEPA analysis for the entirety of Line 5.*

The conduct being authorized by the MPSC requiring MEPA review is the construction *and operation* of the proposed replacement pipeline segment. Enbridge's application for the Straits Line 5 Replacement Segment project is pursuant to Act 16 and the Commission's Rules of Practice and Procedure, Mich Admin Code, R 792.10447 ("Rule 447"). December 2023, MPSC Order, p 1 (Exhibit 5). Act 16 grants the MPSC power to regulate the transportation of "crude oil or petroleum, or any of the products thereof. . . by or through pipe line[s]" and "[a] person . . . does not have or possess the right *to conduct* or engage in the business or operations, or have the right to locate, maintain, or *operate the necessary pipe lines.* . . except as authorized by and subject to this act." MCL 483.1(2) (emphasis added). Rule 447 states a "corporation, association, or person *conducting oil pipeline operations* within the meaning of 1929 PA 16, MCL 483.1 to 483.11, that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier" must file an application with MPSC for the authority to do so. Mich Admin Code R 792.10447(1)(c) (emphasis added). The plain language of these legal authorities makes clear the approval of an Act 16 license to construct a pipeline, or segment thereof, is de facto a license *to operate* the pipeline as a common carrier. The MPSC original Opinion and Order of 1953 concluded the "operation and maintenance" of the pipeline is "reasonably implied" by an Act 16 authorization to construct a pipeline. March 1953, MPSC Order, p 3 (Exhibit 1). Thus, the MEPA review of the Replacement Project must determine whether impairment, pollution, or destruction of the environment is a likely effect of the conduct of constructing and operating the new pipeline segment.

The operation of any fossil fuel pipeline has potential environmental impacts both upstream and downstream of any given segment. The oil is going to be discharged somewhere. If that discharge is likely to occur at any point other than the designed termination point, environmental damage will certainly follow. MEPA requires MPSC to determine if operating the proposed segment makes that likely to occur. MPSC acknowledged "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." April 2021, MPSC

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Order, p 66 (Exhibit 2). Thus, MPSC determined pollution from GHG emissions are a likely effect of operating the new pipeline segment since "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." *Id*. at 64 (Exhibit 2). However, MPSC somehow failed to recognize that spills *anywhere* along the pipeline of the "product being transported through" would pollute the environment. Oil spills are a direct result of operating a pipeline. GHG production is an indirect result of constructing and operating a pipeline. It is nonsensical to consider the pollution from the burning of oil by an intervening third party as a likely effect of operating the pipeline but not consider the likelihood of potential spills from oil flowing through upstream or downstream segments of the pipeline itself a likely effect.

*3. Requiring a full MEPA analysis will not create a chilling effect for the repair or replacement of pipelines.*

The "chilling effect" argument that applying MEPA appropriately on operators from repairing or replacing existing pipelines is meritless. The Commission noted not all repairs and replacements "trigger the need for an Act 16 application," rather, only projects that either increase pipeline diameter (carrying capacity) or a relocation of the pipeline warrant an Act 16 application. April 2021, MPSC Order, p 70 fn 27 (Exhibit 2). Certainly these two substantive alterations to an existing pipeline warrant Act 16 authorization and corresponding MEPA review. However, operators will continue to be able to maintain, repair, and replace existing pipelines without this additional regulatory burden. The alternative result – applying MPSC's rationale – would be that pipelines predating MEPA may operate in perpetuity and yet never undergo the statutorily mandated full review of whether they will likely cause harm to our natural resources. Only the newest updated segments of a pipeline would be subject to MEPA review, exactly where a spill is least likely to occur. The aging pipelines would only be subject to MEPA after a spill occurs. This would contravene the duty MEPA placed on private and public entities to "*prevent* or minimize degradation of the environment which is caused or *likely to be caused* by their activities." *Ray* at 393 Mich at 306 (emphasis added). The plain language of MEPA shows it

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is a preventative statute as well as a punitive one. Defendants can be found liable – and agencies must determine – if conduct "is likely to" cause environmental damage. MCL 324.1701 *et. seq*. Preventing damage before it occurs comports with the Constitution's proclamation that the health and well-being of the state's natural resources is of "paramount public concern."

## III. Conclusion

The Michigan Constitution lays out the protection of the natural resources of the state are of "paramount" concern. MEPA mandates courts to play the vital role of determining if pollution standards and licensing actions are sufficient to prevent environmental harm. At issue in this case is a rather remarkable request by Enbridge to the MPSC. Enbridge, a company that has a historically shoddy record regarding oil spills, is seeking permission to utilize the Great Lakes to transport crude oil for the foreseeable future. Given the seriousness of both the request and Michigan's duty as trustee of the myriad natural resources of the state, one would expect the MPSC and the Court of Appeals to conduct a thorough examination of Enbridge's conduct and how it may impact those resources. The failure of these entities to conduct such analysis is a serious abdication of their mandated obligations and as such, this case should be remanded.

Respectfully Submitted,

Date: January 23, 2026

By: /s/ Scott Troia
/s/ Nicholas Leonard

Scott Troia (P82986)
Nicholas Leonard(P79283)
*GREAT LAKES ENVIRONMENTAL LAW CENTER*
4444 Second Avenue
Detroit, MI 48201
313-782-3372
scott.troia@glelc.org
nicholas.leonard@glelc.org

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## STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of MCR 7.212(B), *amici curieae's* brief contains 5109 words.

Dated: January 23, 2026 /s/ Scott Troia

## MCR 7.312(H) ATTESTATION

Pursuant to MCR 7.312(H), *amici curiae* attests that it is a tax exempt nonprofit corporation under section 501(c)(3) of the Internal Revenue Code, 26 USC 5601, and as such is not required to file a motion for leave to file an *amicus curiae* brief.

Dated: January 23, 2026 /s/ Scott Troia