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STATE OF MICHIGAN
IN THE SUPREME COURT

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE & RELOCATE LINE 5

BAY MILLS INDIAN COMMUNITY, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI,

Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellees.

SC: 168335
Court of Appeals Nos. 369156 369157, 369159, 369161, 369162, 369163, 369165, 369231 (consolidated)

MPSC Case No. U-20763

BRIEF OF AMICUS CURIÆ THE MICHIGAN CHAMBER OF COMMERCE, IN SUPPORT OF DEFENDANTS-APPELLEES

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RECEIVED by MSC 1/23/2026 6:50:09 PM

TABLE OF CONTENTS

STATEMENT OF BASIS OF JURISDICTION **1**

STATEMENT OF QUESTION PRESENTED **1**

STATEMENT OF INTEREST FOR AMICUS CURIÆ MICHIGAN CHAMBER OF COMMERCE **1**

INTRODUCTION **2**

ARGUMENT **3**

1. THE MPSC CORRECTLY SELECTED THE STATUS QUO AS THE BASELINE FOR ITS ENVIRONMENTAL ANALYSIS. 3

CONCLUSION **8**

RECEIVED by MSC 1/23/2026 6:50:09 PM

INDEX OF AUTHORITIES

Cases

Ass'n of Pub Agency Customers, Inc v Bonneville Power Admin, 126 F3d 1158, 1188 (CA 9, 1997) 4
City of Portage v. Kalamazoo Cty Rd Comm'n, 136 Mich App 276, 282; 355 NW2d 913 (1984) 3
Custer Cnty. Action Ass'n v. Garvey, 256 F.3d 1024, 1040 (10th Cir. 2001) 4
In re Enbridge Energy to Replace & Relocate Line 5, No. 369156, 2025 WL 554844, at *15 (Mich Ct App, February 19, 2025) 8
Kent Co. Rd. Comm. v. Hunting, 170 Mich App 222, 428 NW2d 353 (1988) 3
Minisink Residents for Envtl Pres & Safety v FERC, 762 F3d 97, 115; 412 US App DC 97 (2014) 6, 7
Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of the Interior, 929 F. Supp. 2d 1039, 1054–55 (E.D. Cal. 2013) 4
Sierra Club v US Army Corps of Engineers, 803 F3d 31, 46; 419 US App DC 416 (2015) 6
Sierra Club v US Army Corps of Engineers, 990 F Supp 2d 9, 37 (DDC, 2013) 7
Trout Unlimited, Muskegon White River Chapter v. City of White Cloud, 195 Mich App 343, 350, 489 NW2d 188, 191 (1992) 3
Trout Unlimited, Muskegon-White River Chapter v. City of White Cloud, 209 Mich App 452, 455, 532 NW2d 192, 194 (1995) 4

Statutes

1969 PA 306 1
46 FedReg at 18027 4
MCL 24.301 to MCL 24.306 1
MCL 324.1705 8
MCL 460.59 1
MCL 462.26 1
MCL 691.1203 8
Michigan Natural Resource and Environmental Protection Act ("NREPA"), MCL 324.101 et seq. 1, 2, 3, 5, 6, 7
20 USC 501(c) 1

Other Authorities

In re Application of Enbridge, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763) 3, 6
Revesz and Lienke, *Learning from the Clean Air Act's Tragic Flaw*, Power Magazine, June 1, 2016, available at <https://www.powermag.com/learning-clean-air-acts-tragic-flaw> 7,8

Rules

MCR 7.02(6)(a)(i) 1
MCR 7.312(H) 1

Constitutional Provisions

Const 1963, art 6, § 28 1

RECEIVED by MSC 1/23/2026 6:50:09 PM

STATEMENT OF BASIS OF JURISDICTION[1]

The Supreme Court of Michigan has jurisdiction in this appeal under Const 1963, art 6, § 28; the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.301 to MCL 24.306; MCL 462.26; MCL 460.59; MCR 7.312; and MCR 7.02(6)(a)(i).

STATEMENT OF QUESTION PRESENTED

1. Does the Michigan's Natural Resource and Environmental Protection Act ("NREPA"), MCL 324.101 et seq., require state agencies to use as a baseline in environmental assessments a condition that does not exist and may never exist?

APPELLANTS' ANSWER: Yes
APPELLEES' ANSWER: No
AMICUS' ANSWER: No

STATEMENT OF INTEREST FOR AMICUS CURIÆ MICHIGAN CHAMBER OF COMMERCE

The Michigan Chamber of Commerce ("the Chamber") is Michigan's leading state-wide business advocacy organization, representing approximately 5,000 members and customers that together do business in all 83 Michigan counties and employ more than a million Michiganders. Its membership undertakes a wide variety of projects that require permits or other actions by governmental entities. The potential for this case to drastically alter the interpretation of the Michigan Natural Resource and Environmental Protection Act ("NREPA"), MCL 324.101 et seq. by changing the way a baseline is determined in ways that complicate the ability to conduct

[1] The Michigan Chamber of Commerce attests that it is exempt from taxation under 20 USC 501(c)(6). See MCR 7.312(H)(2)(F). Additionally it discloses this brief was authored by Rivenoak Law Group, P.C. No monetary contributions intended to fund its preparation or submission were made by any parties or any individual or entity other than members of the *amicus curiæ*. See MCR 7.312(H)(3).

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predictable environmental assessments and vastly increase the risk of arbitrary and capricious governmental actions.

Additionally, the Chamber and its members have a direct interest in the relocation of the segment of Enbridge's Line 5 petroleum pipelines ("Line 5") from the bottomlands of the Great Lakes at the Straits of Mackinac (the "Straits") into the proposed bedrock tunnel, because its members depend on the waters of the Great Lakes, the environment of Michigan, and reliable and affordable energy supplies to prosper. Accordingly, the Chamber filed multiple comments during the MPSC process and an *amicus* brief in the Michigan Court of Appeals.

INTRODUCTION

The Chamber supports the Commission's approval of the application at issue for many reasons well-articulated by others, notably including the value of governmental action that facilitates safety improvements to vital energy infrastructure and the great benefit to Michigan of essentially eliminating the risk of an oil spill in the Straits of Mackinac (sooner rather than later). There is a specific aspect of the MPSC's decision in its application of NREPA in this matter that the Chamber wishes to highlight because of the importance not only to the decision on Line 5, but because of the potential impact a contrary determination would have on other permitting regimes and other voluntary safety improvements. Specifically, the MPSC was correct both in its selection of a baseline from which to perform its analysis, and the decision to limit the scope of that analysis to the project application and not the hundreds of miles of the entirety of Line 5. Because it did so in line with both the statutory language of NREPA and longstanding precedent, the degree of deference accorded to the MPSC would not change the outcome in this matter, as explained below.

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ARGUMENT

1. The MPSC Correctly Selected the Status Quo as the Baseline for its Environmental Analysis.

Much of this case's discussion regarding the consideration of various evidence in the application of NREPA assumes that the MPSC was required to depart from the statutorily mandated baseline condition in the NREPA analysis. Specifically, many arguments against upholding the MPSC's decision boil down to the assertion that the NREPA analysis should have assumed that all of Line 5 will cease to operate if the project does not go forward, and thus the proposed project must be evaluated as if Line 5 did not exist and oil was not currently flowing through operating pipelines. This assertion is contrary to law.

The Commission considered contrasting testimony regarding whether the replacement project should be compared to the current condition, in which petroleum pipelines are operating in the waters of the Straits, or an imagined present in which there are no such pipelines. The Commission was correct in finding that the appropriate baseline was the current condition, namely, the existence of operating petroleum pipelines in the Straits. *In re Application of Enbridge*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), p. 38.

Michigan law requires that the "environmental situation prior to the proposed action" should be compared to "the probable condition of the particular environment afterwards." *City of Portage v. Kalamazoo Cty Rd Comm'n*, 136 Mich App 276, 282; 355 NW2d 913 (1984); *Kent Co. Rd. Comm. v. Hunting*, 170 Mich App 222, 428 NW2d 353 (1988); *Trout Unlimited, Muskegon White River Chapter v. City of White Cloud*, 195 Mich App 343, 350, 489 NW2d 188, 191 (1992). Today, the environmental situation is that the dual pipelines are operating in the waters of the Straits. Noting that the primary purpose of NREPA is to protect existing natural resources, not to create new resources, the Michigan Court of Appeals found no violation of NREPA when a lower

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court allowed the reconstruction of a failed dam because the project would not cause deterioration from the "condition that existed." *Trout Unlimited, Muskegon-White River Chapter v. City of White Cloud*, 209 Mich App 452, 455, 532 NW2d 192, 194 (1995).

These cases are consistent with the approach taken by the federal government in conducting required environmental evaluations. Courts have generally held that, when evaluating alternatives, agencies must compare the potential impacts of the proposed major federal action against the known impacts of maintaining the status quo. *E.g.*, *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1040 (10th Cir. 2001) ("[A]gencies compare the potential impacts of the proposed major federal action to the known impacts of maintaining the status quo. [. . .] In other words, the current level of activity is used as a benchmark.")[2] That court cited the Federal Register, which stated that a "no action" scenario for a management plan should assume "'no change' from current management," because to perform an analysis that assumed no management at all would be a "useless academic exercise." 46 FedReg at 18027. Other federal courts have come to similar conclusions when faced with the same question regarding a proposed baseline. The Ninth Circuit noted that the "status quo" should be the assumed no active alternative, noting that the term "may be thought of in terms of continuing with the present course of action until that action is changed." *Ass'n of Pub Agency Customers, Inc v Bonneville Power Admin*, 126 F3d 1158, 1188 (CA 9, 1997). *See also Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of the Interior*, 929 F. Supp. 2d 1039, 1054–55 (E.D. Cal. 2013) (noting that "continuing with the present course of action" is the proper "no action" or baseline alternative, as opposed to circumstances in which the site "was a site without energy development").

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The Commission in this case appropriately compared the environmental impact of having operating petroleum pipelines on the Straits bottomlands to the probable condition of the Straits environment with the proposed replacement pipeline located in a tunnel deep in the bedrock. When it did so, it unsurprisingly found that essentially eliminating a current risk of a release to the surface waters of the Straits from the current dual pipelines is protective of existing natural resources. This decision, cogently reasoned and in line with both state and federal precedent, should be respected and upheld regardless of the level of deference that is given to the MPSC, because it is in accordance with the law.

If this court were to overturn the Commission's decision, it would be problematic for more than the permit at issue. NREPA analysis must be done before the issuance of virtually every permit in the state. If applicants for permits had to perform an environmental analysis that used something other than current conditions as a baseline, it would be incumbent on permit seekers not just to predict the likely environmental outcome of the proposed project or action, but to correctly guess what imaginary conditions the government would like those impacts evaluated against. The risk of arbitrary and capricious decision-making would increase greatly if every environmental analysis had to begin by deciding what existing facilities, infrastructure, or elements should be assumed not to exist – and what the ecosystem would look like in their absence – so that the project's probable impacts could be applied to this non-existent present. Such exercises would expensive, pointless academic exercises, which the federal government found would not aid governmental decision making. Such an interpretation would increase permitting cost and time, as applications would need to be amended or altered if the permit granter had different assumptions about the imagined baseline conditions. Ultimately, requiring this level of effort would take up additional government resources, and would likely give rise to more disputes regarding whether

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the decision making was arbitrary or capricious. Agencies and courts have regularly resisted requirements to add this level of speculation to decision-making processes, and this court should affirm the MPSC's decision to continue that uniform application of NREPA.

Here, the necessary assumed baseline to make the appellants' evidentiary arguments relevant would have to go beyond imaging that there was no set of pipelines currently operating in the Straits; this Court would have to assume the law requires the MPSC to assume away the entirety of the existence of Line 5 when evaluating a proposal to replace approximately 4-miles of twin pipelines in the Straits with a pipeline in a tunnel in the bedrock under the Straits. Appellants contended that the proper application of NREPA would have been to evaluate the environmental impact of all 645-miles of Line 5, not the impact of only the segment that was the subject of the application. E.g. *In re Application of Enbridge*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), p. 26. Essentially, Appellants argue that when evaluating the approval to increase the safety of an existing, operating petroleum pipeline, NREPA requires the Commission to treat the pipeline as if it did not exist and was being proposed for the first time. The Commission was correct that such an approach would be contrary to statute and precedent, as well as good public policy.

The Chamber can find no application for permission under Act 16 in which relocation of a portion of a pipeline required an environmental assessment of the entirety of the pipeline absent a plan that affected the entire pipeline. This is consistent with precedent on the federal level. When an action is limited in area and scope to a particular pipeline segment, as the application in this case was, in general environmental review is not required of the entirety of the pipeline. See *Sierra Club v US Army Corps of Engineers*, 803 F3d 31, 46; 419 US App DC 416 (2015) (federal action of limited scope did "not require NEPA review of the whole pipeline"); *Minisink Residents for*

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Envtl Pres & Safety v FERC, 762 F3d 97, 115; 412 US App DC 97 (2014) (addition of compressor station on a pipeline did not require NEPA review of any of the pipeline itself when there was "no firm present or future intention" to alter that pipeline); *see also Sierra Club v United States Army Corps of Engineers*, 990 F Supp 2d 9, 37 (DDC, 2013) ("the Court notes its general reluctance to conclude that federal action with respect to small portion of the pipeline […] is sufficient to federalize the entire project.").

The law and precedent finding that examining the entirety and existence of an existing pipeline when evaluating a project that effects only a small portion of the pipeline is consistent with the right public policy. Voluntary safety improvements are unlikely to ever be proposed if voluntarily seeking to make safety improvements to a pipeline – for instance by burying a water crossing or relocating to avoid an area subject to erosion – triggers a review that requires assuming away the existence of a pipeline in the first place. Pipeline owners would have to weigh their desire to improve the safety of a small part of their infrastructure against the risk of essentially re-opening the certificate for public convenience and necessity that was granted and relied upon in the construction of the pipeline in the first place. It is unlikely that pipeline owners would decide to move forward if they faced that potential as well as the costs of undertaking such a sweeping environmental study. Discouraging infrastructure owners from proposing such improvements in the first place, and thus likely increase the risk to Michigan's environment and economy alike.

The impact of discouraging incremental improvement via high regulatory burdens has been demonstrated in other contexts. Commentators have noted that the Clean Air Act (unintentionally) created a "perverse incentive" to extend the life of existing infrastructure (notably coal-fired power plants) with minimal changes, rather than replace those plants with newer, cleaner options. *See, e.g., Revesz and Lienke, Learning from the Clean Air Act's Tragic Flaw*, Power Magazine, June

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1, 2016, available at <https://www.powermag.com/learning-clean-air-acts-tragic-flaw> (accessed January 22, 2026) (discussing 42 USC 7411, in which certain environmental regulations apply only after "modification" to existing sources is made). This court should be wary of departing from precedent and creating a similarly chilling disincentive for pipeline owners to take proactive, protective measures to lower risk.

CONCLUSION

In its consideration of the question, the Michigan Court of Appeals found that the Commission, "by looking to the desired 'conduct,' was following the *plain language* of MCL 324.1705(2) when it declined to look at the potential impacts of oil spills from parts of Line 5 that were not proposed for change." *In re Enbridge Energy to Replace & Relocate Line 5*, No. 369156, 2025 WL 554844, at *15 (Mich Ct App, February 19, 2025), app gtd 25 NW3d 319 (Mich, 2025), and app den 25 NW3d 326 (Mich, 2025), reconsideration den 27 NW3d 108 (Mich, 2025), and app gtd 25 NW3d 327 (Mich, 2025) (emphasis added). The Michigan Court of Appeals did not, therefore, rely on any level of deference to the MPSC in making that determination.

Under Michigan's NREPA, the MPSC was required to determine whether proposed actions are "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." MCL 691.1203. The MPSC followed that law, correctly weighing whether it is better for the promotion of public health, safety, and welfare to essentially eliminate the risk of an oil spill in the Great Lakes compared to continuing the current status quo. Said another way, the MPSC was asked whether it is better for Michigan's natural resources to put operating petroleum pipelines in a self-contained, concrete-lined tunnel in bedrock or leave pipelines operating in the waters of the Great Lakes indefinitely, and it picked the tunnel. Its decision regarding the proper baseline condition for that environmental

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analysis – the status quo – was compelled by the plain language of the statute as well as numerous precedents from state and federal courts that considered the question. The MPSC's decision to use existing conditions as a baseline was necessary to carry out its statutory mandate to ensure its decisions were not arbitrary or capricious, and by applying the plain language of the law, it avoided creating a precedent that would discourage voluntary safety improvements in the future. Its decision should be upheld regardless of the level of deference that the decision is granted.

Respectfully submitted,

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STATEMENT OF COUNTABLE WORDS

Pursuant to MCR 7.312(A), I certify that this brief is compliant with the formal limitations of MCR 7.212(B) and contains 2,460 words, exclusive of the statement of questions presented, the table of contents, the table of authorities, the signature block, and this word count statement. The word count was determined using the word count function of Microsoft Word.

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