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STATE OF MICHIGAN
IN THE COURT OF APPEALS

In the matter of the Application of **Enbridge Energy, Limited Partnership** for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if approval is Required Pursuant to 1929 PA 16, MCL 483.1, et seq., and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief.	Supreme Court Nos. 168335, 168336, 168337, 168338, 168339, 168342, and 168346 Court of Appeals No. 369156, consolidated with Nos., 369159, 369161, 369162, 369163, and 369165, 369231 Lower Court: MPSC Case No. U-20763

ANSWER OF PETITIONER-APPELLEE ENBRIDGE ENERGY, LIMITED PARTNERSHIP TO APPLICATIONS FOR LEAVE TO APPEAL

April 30, 2025

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

This case concerns a Michigan Public Service Commission (PSC) Act 16 administrative decision that authorized Enbridge to replace a discrete, four-mile-long segment of Line 5 from the bed of the Straits of Mackinac with a segment in an underground tunnel, a safety improvement known simply as "the Replacement Project." The Court of Appeals upheld that decision. The Joint Appellants' applications for leave raise the following questions:

1. The PSC is responsible for issuing a decision supported by record evidence. The Michigan Environmental Protection Act (MEPA) does not specify a de novo standard of review, an appellate court is not a finder of fact, and precedent does not directly address the appropriate standard of review for any agency's MEPA Section 1705 analysis. Given all this, did the Court of Appeals correctly apply a deferential standard of review to the PSC's MEPA Section 1705 environmental-effects analysis, made in connection with the PSC's Act 16 administrative proceeding to authorize the Replacement Project?

The Court of Appeals answer: Yes.
Joint Appellants answer: No.
Enbridge answers: Yes.

2. The Court of Appeals and PSC properly interpreted MEPA's plain language as limiting the scope of the PSC's effects analysis to the "conduct" sought to be "authorized or approved" by the PSC under Act 16, i.e., the Replacement Project. The PSC's Act 16 proceeding has no potential to shutdown Line 5. Did the Court of Appeals reversibly err in nonetheless choosing to assess non-pipeline alternatives in a hypothetical scenario that Line 5 is ordered to be shut down through separate legal challenges?

The Court of Appeals answer: No.
Joint Appellants answer: Yes.
Enbridge answers: No.

3. Applying this Court's precedent, the Court of Appeals held that the PSC's powers are limited to those authorized by statute. Act 16 says nothing about considering the common law public-trust doctrine. Did the Court of Appeals correctly affirm the PSC's public-need determination without requiring the PSC to consider the common law public-trust doctrine?

The Court of Appeals answer: Yes.
Appellant FLOW answer: No.
Enbridge answers: Yes.

4. Appellant Mr. Matthew S. Borke is not a party with an appeal as of right because he failed to intervene in the PSC's contested case proceeding, offered only two public comments with no legal arguments in the PSC proceeding, and was one of hundreds of commenters. Did the Court of Appeals properly decline to consider Mr. Borke's arguments?

The Court of Appeals answer: Yes.
Appellant Borke answers: No.
Enbridge answers: Yes.

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INTRODUCTION

This case involves a straightforward PSC Act 16 proceeding that authorized Enbridge to replace a discrete, four-mile-long segment of Line 5 from the bed of the Straits of Mackinac with a segment in an underground tunnel. This safety improvement is known as "the Replacement Project." If the courts overturn that decision, Line 5 will not be shutdown. Instead, it will continue to operate across the lakebed. While the existing four-mile segment is safe and has been determined to be fit for service by the exclusive federal pipeline safety regulator, everyone agrees the segment would be safer still in the underground tunnel. Thus, it is mystifying why Appellants[1] are trying to turn this straightforward—and limited—proceeding into a reevaluation of the PSC's 1953 approval of the entire 645-mile pipeline. If Appellants succeed, they will have defeated the Replacement Project and disincentivized every PSC-regulated entity from seeking to improve the safety of Michigan's energy infrastructure. This Court should summarily deny the applications for leave to appeal.

Since 2017, and as reflected in multiple agreements, Enbridge and the State have agreed that Enbridge is to replace the existing four-mile Line 5 Dual Pipelines' crossing the Straits with an even more environmentally protective pipeline segment located in an underground, ultimately State-owned tunnel that Enbridge will pay for and construct beneath the lakebed. Those agreements required Enbridge to seek and obtain approval from the PSC under Public Act 16 of 1929 to proceed with the Replacement Project.

[1] Appellants are: (1) the Bay Mills Indian Community, Little Traverse Bay Bands of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, and Nottawaseppi Huron Band of the Potawatomi), the Environmental Law & Policy Center, and the Michigan Climate Action Network ("Joint Appellants"); (2) For Love of Water ("FLOW"); and (3) appellant *pro se*, Mr. Matthew S. Borke, who did not intervene to participate in the proceedings before the PSC and therefore lacks standing on appeal; his complaint in this Court is that the Court of Appeals agreed that he did not have standing. Appellants' separate applications substantially overlap with one another, so this answer responds to them collectively, except as specified.

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The State—as reflected in its agreements with Enbridge and the Legislature's enactment of 2018 Public Act 359—believes that the Replacement Project will virtually eliminate the potential for any release into the waters of the Great Lakes, better protecting and serving the environment and the public's interest in the Great Lakes. The PSC's options are limited: either (a) approve the Replacement Project or (b) deny the Replacement Project and leave the status quo (i.e., Dual Pipelines continue to operate).

The PSC and Court of Appeals correctly rejected Appellants' attempt to turn this limited approval process for the Replacement Project into a reevaluation of Line 5 in its entirety. Both Act 16 and MEPA limit the scope of the proceeding and consideration of environmental effects exclusively to the Replacement Project. Indeed, that's the only PSC approval Enbridge sought. Michigan law does not allow for the reevaluation of environmental effects of the entire Line 5 several decades after it was built and placed into service. The PSC and Court of Appeals applied well-settled legal principles and clear statutory directives in rejecting Appellants' collateral attacks on Line 5's 1953 approval. In so doing, those bodies honored the State's more recent legislation and multiple agreements concluding that the Replacement Project is in furtherance of the public interest. A contrary result would thwart the State's efforts to protect the environment.

In sum, there are no compelling reasons to review this administrative case and further delay the Replacement Project.

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REASONS FOR DENYING LEAVE TO APPEAL

The Court should summarily deny Appellants' applications for leave because none of the grounds required by MCR 7.305(B) are present here, as addressed in detail in the Argument, below, and summarized briefly here.

First, Joint Appellants attempt to turn appellate courts into finders of fact by asserting that the Court of Appeals was required to apply a de novo review standard to the PSC's MEPA Section 1705 effects analysis, conducted in connection with an Act 16 administrative proceeding for the Replacement Project. The Court of Appeals' decision is not clearly erroneous, does not cause material injustice, and is consistent with decisions of this Court.

As the Court of Appeals correctly reasoned, a de novo standard of review is inapplicable when reviewing an agency's MEPA Section 1705 analysis because, unlike a lawsuit filed under MEPA Section 1701—which is the sole subject of *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741; 275 NW2d 538 (1979) (*WMEAC*)— a reviewing court under Section 1705 does *not* have original jurisdiction over the matter and is *not* required to independently adjudicate the project's environmental effects. Neither MEPA's text nor this Court's decisions require otherwise, so there is no conflict. Nor have Joint Appellants raised an issue of significant public interest; their only goal is to persuade a court to reach a different result.

Notably, even if a de novo standard of review were applied, Joint Appellants would not be satisfied. They want a review of Line 5 in its entirety, far beyond the scope of the Replacement Project, and hence, unlawfully beyond the scope of the MEPA "conduct" at issue. Under no scenario would a de novo standard of review result in a different outcome under MEPA. Granting leave would be futile.

Second, Joint Appellants urge this Court to grant leave because they say MEPA *requires* an analysis of the environmental effects of the entirety of Line 5. Consistent with MEPA's

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unambiguous language and this Court's decisions, the Court of Appeals correctly concluded that the scope of the PSC's MEPA analysis was coextensive with the "conduct" the PSC could authorize or approve under Act 16, i.e., the Replacement Project. Again, there are no conflicts.

Joint Appellants nonetheless contend that the Court of Appeals' decision is clearly erroneous because it wrongfully excludes evidence regarding Line 5's potential environmental impacts or an analysis of Line 5 alternatives. But doing so unlawfully expands MEPA beyond the PSC's Act 16 proceeding for the Replacement Project in a way that the Act and appellate precedents have never contemplated. The fact that the Straits may be "iconic" or that Line 5 may arouse political passions does not give courts *carte blanche* to rewrite statutes and reevaluate a PSC authorization that occurred in 1953.

Third, Appellant FLOW alone argues that this Court's review is warranted because the Court of Appeals' decision was clearly erroneous and ignored this Court's decisions concerning application of the State's public-trust doctrine. Not so. FLOW asks this Court to judicially expand the power of the PSC to allow it to unlawfully consider the common law public-trust doctrine. The Court of Appeals correctly concluded—in full accord with this Court's decisions—that the PSC only possesses the authority bestowed on it by statute, and Act 16 does not authorize the PSC to consider the common law public-trust doctrine. The public-trust doctrine is also inapplicable to the PSC because this Court's decisions require the State to account for the public trust only when alienating state-owned lands, which the PSC cannot and did not do through authorization of the Replacement Project under Act 16. Nor has FLOW identified any issues of significant public interest or resulting material injustice because the State separately and independently fulfilled its public-trust obligations for the tunnel in enacting Act 359 and entering into multiple agreements

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with Enbridge that specifically found the Replacement Project to be consistent with, and in furtherance of, the public's trust in the Great Lakes.

Finally, Appellant Matthew S. Borke raises no grounds under MCR 7.305(B) that require this Court's review. As the Court of Appeals recognized, Mr. Borke was merely a public commenter who submitted two, short e-mails during the PSC proceeding. He failed to advance or support any legal arguments before the PSC and Court of Appeals, and the PSC never granted him intervenor status. On this basis, the Court of Appeals correctly held that a party in interest with a right to appeal "cannot include each and every person who happened to offer comments, but nothing more, in a contested case." Court of Appeals' Opinion ("Op") at 30. The Court of Appeals' decision to "decline to consider Borke's arguments" is in full accord with Michigan law. See MCR 7.203(A)(2); MCL 462.26.

For these reasons, and those set forth in more detail in the Argument below, this Court should summarily decline to grant leave to appeal. There are no significant jurisprudential issues, no conflicts among appellate decisions, and no errors in the Court of Appeals' opinion. Appellants simply dislike the result below and desire to turn this routine, one-off Act 16 approval into something it is not—a referendum on Line 5 itself. There are mechanisms for pursuing such relief; this appeal simply is not one of them.

Accordingly, this Court should let stand the Court of Appeals' opinion, which correctly concluded that the PSC's decision to authorize the Replacement Project is amply supported by record evidence. That result is proper under any reading of Michigan law. And it is the only result that gives effect to the Michigan legislative- and executive-branch decisions that the Replacement Project is the best way to preserve and protect the Great Lakes ecosystem.

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STATEMENT OF FACTS AND PROCEEDINGS

I. Enbridge's Application to the PSC for Approval of the Replacement Project in Accordance with 2018 State of Michigan Agreements and State Legislation

On April 17, 2020, Enbridge filed an application with the PSC pursuant to Act 16 and Rule 447 of the Commission's Rules of Practice and Procedure, Mich Admin Code R 792.10447. Dkt. 0001 ("Application," Enbridge App'x 134, Case No. U-20763; Enbridge Appellee Brief Appendix page ENBAPX001023). Enbridge sought authorization to replace Line 5's Dual Pipelines—a discrete, four-mile segment that currently traverses the Mackinac Straits lakebed—with a new, single pipeline segment constructed in a state-owned utility tunnel running under the Straits. (*Id.*; see also Enbridge App'x 8, Tunnel Agreement at p 1 (Recital C(c), Authority to accept ownership of the utility tunnel); ENBAPX000551). Over 70 years ago, on March 31, 1953, the PSC granted Enbridge approval "to construct, operate and maintain [Line 5] as a common carrier" within Michigan. (Enbridge App'x 1, *In re Application of Lakehead Pipe Line Co, Inc*, opinion and order of the Public Service Commission entered March 31, 1953, Case No. D-3903-53.1 at p 9; Dkt. 1038 (Enbridge App'x 4, First Agreement, Exhibit A-8; ENBAPX000411); Enbridge Application Exhibit A-3; ENBAPX000009). Because the PSC already authorized Line 5 in the 1953 order, Enbridge did not seek any approval for the existing Line 5 as part of its PSC application for the Replacement Project.

Enbridge sought the PSC's authorization for the Replacement Project in accord with a series of agreements that Enbridge previously entered with the State, as well as State legislation. On November 27, 2017, the State and Enbridge entered the First Agreement (of three) regarding the Dual Pipelines. Dkt. 1038 (Enbridge App'x 4, First Agreement, Exhibit A-8; ENBAPX000411). The First Agreement recognized that "the continued operation of Line 5 through the State of Michigan serves important public needs by providing substantial volumes of

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propane to meet the needs of Michigan citizens, supporting businesses in Michigan, and transporting essential products, including Michigan-produced oil to refineries and manufacturers." (Enbridge App'x 4, First Agreement, Exhibit A-8 at 1; ENBAPX000411). To "further protect ecological and natural resources held in public trust by the State of Michigan," Enbridge agreed to conduct an evaluation of alternatives to replace the Dual Pipelines. (Enbridge App'x 4, First Agreement, Exhibit A-8 at 2, 5; ENBAPX 000412, ENBAPX00415). Enbridge performed this analysis, which concluded that, although the Dual Pipelines' existing risk is very low, the risk of a release reaching the Straits from a pipeline within a utility tunnel in the bedrock under the Straits would be "[n]egligible—considered virtually zero." Dkt. 1038 (Enbridge App'x 5, June 15, 2018 Report to the State of Michigan: Alternatives for replacing Enbridge's dual Line 5 pipelines crossing the Straits of Mackinac, Exhibit A-9 at 14; ENBAPX000433).

On October 3, 2018, the State and Enbridge entered into the Second Agreement, which again found that "the continued operation of Line 5 through the State of Michigan serves important public needs." Dkt. 1038 (Enbridge App'x 6, Second Agreement, Exhibit A-10 at 1; ENBAPX000520). The Second Agreement stated that "the evaluations carried out pursuant to the First Agreement have identified near-term measures to enhance the safety of Line 5, and a longer-term measure – the replacement of the Dual Pipelines – that can essentially eliminate the risk of adverse impacts that may result from a potential release." (Enbridge App'x 6, Second Agreement, Exhibit A-10 at 3; ENBAPX000522). Enbridge and the State agreed to "promptly pursue further agreements" concerning the construction and operation of a tunnel to house a replacement for the Dual Pipelines. *Id*. at 5-6. The Second Agreement recognized that the tunnel is "a feasible alternative." (*Id*.)

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On December 12, 2018, the Michigan Legislature passed Act 359, which called for the creation of a utility 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 254.314(e). (Enbridge App'x 7, Mackinac Bridge Authority Act, Act 214 of 1952, as amended; ENBAPX000540)). Act 359 transferred the "duties, responsibilities, authorities, and powers related to a utility tunnel" to the newly created Mackinac Straits Corridor Authority, or MSCA. MCL 254.324d (Enbridge App'x 7; ENBAPX000547). The Legislature stated that the MSCA's 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 254.314b(1). (Enbridge App'x 7; ENBAPX000546).

The next week, on December 19, 2018, the MSCA and Enbridge entered into the Tunnel Agreement. Dkt. 1038 (Enbridge App'x 8, Tunnel Agreement, Exhibit A-5; ENBAPX000551). Among other things and subject to various terms and conditions, the Tunnel Agreement required Enbridge, at its own expense, to construct the utility tunnel. (*Id.* at 1; ENBAPX000551). The MSCA acquired an easement from the Michigan Department of Natural Resources to construct and operate the utility tunnel under state-owned bottomlands, and the Authority assigned certain rights to Enbridge to enter and use the public property to construct the utility tunnel. (*Id.*)

Also on December 19, 2018, the State and Enbridge entered the Third Agreement, which provides that the Dual Pipelines may continue to operate and serve the public need until Enbridge places the Replacement Project and tunnel into service. Dkt. 1038 (Enbridge App'x 9, Third Agreement, Exhibit A-1 at 4; ENBAPX000615). Accordingly, the continued operation of the Dual Pipelines was not before the PSC, only approval (or not) of the Replacement Project.

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II. Proceedings Before the PSC

Anticipating an effort to thwart the State's interests and its agreements with Enbridge, Enbridge filed a motion in limine with the PSC seeking to exclude as legally irrelevant several issues raised by certain intervenors. Dkt. 0296 ("Motion," Enbridge App'x 14; ENBAPX001042). These issues included: (i) the public need for and continued operation of Line 5 as a whole; (ii) the existing operational safety of Line 5; and (iii) whether Line 5 has an adverse impact on climate change. (Motion, Dkt. 0296 at 1-2; ENBAPX001043-ENBAPX001044). On October 23, 2020, the Administrative Law Judge ruled that existing and future operational aspects of the entire Line 5, including public need and safety issues, were well outside the case's scope. Dkt. 0396 at 15-16 ("Motion Ruling," Enbridge App'x 15, ENBAPX001088-ENBAPX001089). The ALJ also excluded evidence of greenhouse gas emissions and climate change as irrelevant under MEPA. (Motion Ruling, Dkt. 396 at 17; ENBAPX001090).

The Michigan Environmental Council, Bay Mills Indian Community, and FLOW sought leave to appeal the ALJ's decision. (Enbridge Appendices 16, 17, and 18; Dkts. 0419, 0420, and 0421; ENBAPX001101-ENBAPX001280). On December 9, 2020, the PSC remanded. During the previous month, the Governor and her Department of Natural Resources issued a purported notice of revocation of the 1953 easement ("Notice"). So, the PSC directed rehearing on the question of whether and, if so, to what extent, the Notice changed the scope of review. Dkt. 0480 (Enbridge App'x 19, Dec. 9, 2020 Commission Order at 6; ENBAPX001286).

The ALJ reached the same decision on remand. Dkt. 0602 ("Remand Ruling," Enbridge App'x 20; ENBAPX001291). The ALJ ruled that "any evidence concerning the entirety of Line 5 is irrelevant." (Remand Ruling at 13, Dkt. 0602; ENBAPX001303). The ALJ also found that the Notice did not broaden the proceeding's scope to include a reexamination "of the public need for line 5 or any aspect of its operation and safety." (Remand Ruling at 17-19, Dkt. 0602;

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ENBAPX001307-ENBAPX001309). The ALJ further determined that the Notice did not expand the MEPA inquiry to include environmental effects from operation or safety of Line 5 in its entirety, or from the production, refinement, and consumption of the products Line 5 transports. (Remand Ruling at 21, Dkt. 0602; ENBAPX001311).

On April 21, 2021, after another appeal, the PSC agreed with the ALJ that "any issues concerning the current or future operational aspects of the entirety of Line 5, including the public need for the 645-mile pipeline . . ., [are] outside the scope of this case." Dkt. 0713 at 60 ("April 21 Order") (Enbridge App'x 21; ENBAPX001377). The PSC would only determine if there is a public need for the Replacement Project. (April 21 Order at 60-61; ENBAPX001377-ENBAPX001378). As the PSC explained, the Replacement Project does not concern the "approved, existing pipeline that is merely interconnected with the segment that is the subject of the application," because "[t]he public need for the existing portions of Line 5 has [already] been determined." (April 21 Order, at 63; ENBAPX001380). In other words, a safety upgrade does not require a reexamination of the entire pipeline.

At the same time, the PSC clarified that the Replacement Project's purpose—improving the safety of the Straits crossing—"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." (April 21 Order at 63; ENBAPX001380). The PSC also found that, because the "conduct at issue . . . is indistinguishable from the purpose behind it or its result, the [PSC]'s obligations under MEPA must also extend to the products being shipped through the Replacement Project." (April 21 Order at 64; ENBAPX001381). The PSC recognized greenhouse gas emissions as pollutants and allowed evidence of their effects. (April 21 Order at 66; ENBAPX001383).

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The record accumulated before the PSC during the nearly four years of the Act 16 proceeding is colossal. It consists of, but is not limited to, over 1,400 docket filings; 2,800 pages of hearing transcripts and testimony, rebuttal testimony, sur-rebuttal testimony, sur-sur-rebuttal testimony, sur-sur-sur-rebuttal testimony, and cross-examination; over 11,000 pages of official exhibit filings; over 2,000 pages of briefing-related filings; and scores of public comments.

III. The PSC's Decision Authorizing the Replacement Project

On December 1, 2023, the PSC issued its final order approving Enbridge's Replacement Project with conditions. Dkt 1454 ("December 1 Order," Enbridge App'x 22; ENBAPX001393). The PSC found "that . . . the First, Second, and Third Agreements and Act 359 demonstrate that there is a public purpose and public need to replace the dual pipelines with the Replacement Project." (December 1 Order at 300; ENBAPX001692). It concluded that the Replacement Project "'essentially eliminates the risk of adverse impacts that may result from a potential release from Line 5 at the Straits' and protects 'unique ecological and natural resources that are of vital significance to the State and its residents, to tribal governments and their members, to public water supplies, and to the regional economy.'" (December 1 Order at 305; ENBAPX001697). Accordingly, "Enbridge has established both the public need for the products to be shipped through the Replacement Project and the need to relocate the Straits Line 5 segment inside the tunnel, and as such, has established the public need for the Replacement Project." (December 1 Order at 305; ENBAPX001697).

Concerning MEPA, the PSC held that several potential environmental impairments from construction would fall within the regulatory purview of other agencies. (December 1 Order at 328; ENBAPX001720). Regarding feasible and prudent alternatives, the PSC examined the "no-action" and "no-pipeline" alternatives and found them to be inconsistent with the project purpose or the reasonable requirements of public health, safety, and welfare. (December 1 Order at 343-

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346; ENBAPX001735-ENBAPX00001738). The PSC concluded that there are no feasible and prudent alternatives that would result in less environmental impact than the Replacement Project. (December 1 Order at 347; ENBAPX001739).

IV. Appeals of the PSC's Order Authorizing the Replacement Project

On December 26, 2023,[2] Appellants appealed the PSC's order authorizing the Replacement Project to the Court of Appeals. They challenged the PSC's public need finding under Act 16 and its MEPA analysis; Appellant FLOW also argued that the PSC's 2023 order failed to account for the common law public-trust doctrine.

For its part, the PSC argued that its decision properly followed Act 16, its environmental analysis complied with MEPA, and Act 16 did not require it to assess the common law public-trust doctrine.[3] Enbridge agreed, arguing that the PSC properly found a public need for the Replacement Project, satisfied MEPA by performing a thorough, two-step environmental effects and alternatives analysis, and correctly determined that the common-law nature of the public-trust doctrine places it outside the PSC's statutory jurisdiction.

The Court of Appeals consolidated the appeals and held oral argument on January 14, 2025. On February 19, 2025, the Court of Appeals issued a published, per curiam decision ("Opinion" or "Op") affirming the PSC's "comprehensive and detailed opinion," as consistent with the PSC's

[2] Appellant Mr. Borke filed his appeal on January 2, 2024.

[3] The PSC's authority is limited by Act 16, and Act 16 gives the PSC no power to consider common-law doctrines. Nor does the PSC's Act 16 proceeding result in the alienation of submerged bottomlands. *Obrecht v Nat'l Gypsum Co*, 361 Mich 399, 413; 105 NW2d 143 (1960) (this Court has held that a public-trust finding is only necessary where submerged lands are "alienat[ed]" for a "[private or] non-public use."). To the extent that the State had any obligation to comply with the public trust doctrine with respect to the tunnel, it did so at the time that it entered into the 2018 Agreements with Enbridge and the Michigan Department of Natural Resources issued a bottomlands easement to the MSCA to authorize it to own and operate the tunnel.

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obligations under both Act 16 and MEPA. Op at 31. The Court of Appeals' consideration of the issues presented in Appellants' Applications for Leave to Appeal are summarized as follows:

With respect to the correct standard of review for an agency's Section 1705 MEPA determination made in connection with an Act 16 proceeding, the Court of Appeals determined that, "[t]o establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment." Op at 18, 23 (citing *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999)). The court also explained that "[a] final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. *Id*. at 18 (citing Const 1963, art 6, § 28; *In re Consumers Energy Co*, 279 Mich App 180, 188-189; 756 NW2d 253 (2008)). The Court of Appeals determined that a de novo standard of review does not apply to Appellants' MEPA challenges because those challenges arise under Section 1705 of MEPA. Op at 23. The court explained that this Court's holding in *WMEAC* only requires de novo review for a lawsuit initiated under Section 1701 of MEPA, whereas here, Appellants' challenge was limited to a review of the PSC's effects analysis under Section 1705, made in connection with the PSC's Act 16 administrative proceeding. *Id*. The Court of Appeals reasoned that a de novo standard is inapplicable under a Section 1705 challenge because the statute places no obligation on reviewing courts to adjudicate environmental issues, take additional evidence, or act as a fact finder. *Id*.

With respect to Joint Appellants' argument that the PSC's MEPA analysis should have extended to the entirety of Line 5 or was otherwise flawed, the Court of Appeals concluded "that the [PSC's] general MEPA decision was adequately supported by the law and evidence." Op at 23. To begin, the Court of Appeals held, based on rules of statutory construction articulated in *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125

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(2007), that the "conduct" the PSC is to assess under Section 1705 was limited to the Replacement Project—the only activity for which Enbridge sought Act 16 authorization. Op at 24. Because Enbridge sought no authorization for the entirety of Line 5, the effects from the existing 645-mile pipeline—approved by the PSC in 1953—were beyond the scope of "conduct" required to be assessed under MEPA. *Id*.

While the PSC *chose* to assess the entirety of non-pipeline alternatives to Line 5, the Court of Appeals concluded that the PSC could have declined to do so and limited its alternatives analysis to the four-mile Replacement Project. Op at 25. Even though the PSC assessed impacts associated with the entirety of non-pipeline alternatives without assessing impacts for the entirety of Line 5, the Court of Appeals concluded that "PSC's MEPA decision is adequately supported by the record," Op at 24, because Line 5 will continue to operate with or without approval of the Replacement Project. And the Court of Appeals concluded that the record supported PSC's reasonable determination that other, non-pipeline alternatives would result in greater adverse environmental effects than the Replacement Project. *Id*. at 24-25.

With respect to FLOW's common law public-trust argument, the Court of Appeals concluded that because "the [PSC] is a 'creature of the Legislature' and has no common-law powers," Act 16 prohibits the PSC from considering the common law public-trust doctrine. Op at 22 (citing *Union Carbide Corp v. Pub Serv Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988)). As such, FLOW's reliance "on the public trust doctrine is misplaced." *Id*. In the alternative, the Court of Appeals held that the PSC satisfied any public-trust obligations derived from MCL 324.1705(2) because it "considered this statutory reference to the 'public trust in [the] resources' by way of its overall MEPA review." Op at 26.

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Turning to Mr. Borke's appeal, the Court of Appeals noted that Borke "filed an appeal as of right in this case" but did not formally intervene in the contested case proceedings before the PSC. Op at 30. While Mr. Borke submitted "two short e-mails complaining generally" about Enbridge, those comments did not allow him to be a "party in interest" to the appeal as of right under MCL 426.26. *Id*. The only basis for a right to appeal cited by Mr. Borke was MCL 460.6g(4), which the Court of Appeals correctly noted is "inapposite because it deals with appeals from certain types of rate-setting." *Id*. Because the term "party in interest" "cannot include each and every person who happened to offer comments, but nothing more, in a contested case," the Court of Appeals declined to consider Mr. Borke's arguments. *Id*.

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ARGUMENT

I. The Court of Appeals applied the correct, deferential standard of review for a MEPA analysis conducted as part of a PSC Act 16 proceeding.

No grounds under MCR 7.305(B) warrant this Court's review of the standard-of-review issue. The Court of Appeals reviewed de novo the PSC's statutory interpretation of MEPA. Op at 18 (citing *In re Complaint of Rovas*, 482 Mich 90, 102; 754 NW2d 259 (2008)). As explained in Section II below, the Court of Appeals resolved the substantive MEPA issues against Joint Appellants because MEPA's scope precludes the expansive environmental review Joint Appellants seek covering the entirety of Line 5, since the entirety of Line 5 is not at issue here.

Joint Appellants argue that the Court of Appeals should have also reviewed the *facts* underlying the PSC's Section 1705 MEPA analysis under a de novo standard of review. They maintain that MEPA's text, this Court's prior decisions, and the Court of Appeals' own decisions all require that courts review MEPA cases de novo. Not so. As the Court of Appeals demonstrated in its meticulous analysis, a de novo standard of review does not apply to judicial review of a PSC determination under MEPA Section 1705 that is conducted in connection with an Act 16 proceeding. That conclusion aligns with the statutory regime and the long-established principle that an appellate court "serves a different role from that of a circuit court and is not a finder of fact." Op at 23; see also *People v James*, 32 Mich App 278, 279; 188 NW2d 164 (1971) ("Appellate courts do not constitute reviewing fact finders").

For the reasons set forth below, the Court of Appeals' application of a deferential standard of review of the PSC's factual determination under MEPA Section 1705 was not clearly erroneous and did not harm Joint Appellants in any event. Nothing justifies granting leave on this issue.

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A. MEPA's plain language does not mention or require a de novo standard of review in this unique context.

MEPA's text does not direct a court to apply a de novo standard for review of an agency's Section 1705 analysis. MCL 324.1701, *et seq*. Where the Legislature intended a de novo standard of review for certain types of claims, it said so in the pertinent statute. E.g., MCL 37.2606 ("An appeal before the circuit court shall be reviewed de novo"); MCL 28.425d(1) (specifying that an "appeal of [a] notice of statutory disqualification, failure to provide a receipt, or failure to issue a license shall be determined by a review of the record for error"). MEPA does not contain similar language. See generally MCL 324.1701, *et seq.*

Joint Appellants try to manufacture a de novo standard because MEPA Section 1705(2) uses the word "determination." Joint Appellants Br at 17-18. They argue that the term "determination" does not allow for judicial deference and requires a reviewing court itself to assess a project's environmental effects. But the definition of "determine" that Joint Appellants cite requires merely that the court "come to a decision" about the PSC's determination of environmental effects under Section 1705. That's what the Court of Appeals did here. *Id.* The word "determination" does not require the Court of Appeals to become a fact finder, and it does not preclude that court from analyzing whether the PSC's evidentiary decision was supported by the record. Op at 18 (citing *Nat'l Wildlife Federation v Dep't of Environmental Quality (No. 1)*, 306 Mich App 336, 342; 856 NW2d 252 (2014)). Nor does use of the term "determination" purport to rewrite or abrogate the settled standards of review for agency orders set by the Michigan Constitution, which requires reviewing courts to determine whether agency orders are authorized by law and "supported by competent, material and substantial evidence on the whole record." Const 1963, art 6, § 28. In sum, there is no statutory basis for concluding that the Court of Appeals' standard-of-review analysis is clearly erroneous, much less in need of this Court's review.

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B. The Court of Appeals' decision is not in conflict with this Court's governing decisions.

Joint Appellants cite no precedent of this Court that is in conflict with the Court of Appeals' decision. They say that this Court's decision in *WMEAC* requires a de novo standard of review in *all* challenges involving MEPA. But as the Court of Appeals explained, *WMEAC* applies *only* to a MEPA lawsuit initiated under Section 1701. This is a case challenging an agency's MEPA review under Section 1705 in connection with an administrative proceeding. Op at 23.

The Legislature established a two-pronged approach under MEPA. First, MEPA Section 1701 authorizes a plaintiff to file suit in the circuit court to challenge a private party's conduct that is allegedly causing pollution of the state's natural resources and obtain declaratory and equitable relief. MCL 324.1701(1), 324.1704(1). Upon the filing of a Section 1701 lawsuit, the circuit court may direct the parties to resolve their issues before the relevant agency. MCL 324.1704(2). But even then, the circuit court retains jurisdiction and, after completion of the agency proceedings, the case returns to the circuit court, which must "adjudicate the impact of the defendant's conduct" and take additional evidence as necessary. MCL 324.1704(3). *WMEAC*'s analysis is thus limited to a MEPA lawsuit that is initiated under Section 1701 and is remitted to an administrative agency under Section 1704. Because of this "statutory scheme," under which a circuit court retains jurisdiction over a Section 1701 lawsuit remitted to an administrative agency, a de novo standard of review applies. Op at 23 (citing *WMEAC*, 405 Mich at 752, 754). This case is not such a proceeding.

Second, MEPA Section 1705 imposes a separate obligation on administrative agencies conducting administrative, licensing or other proceedings to evaluate whether the conduct at issue in the proceeding will cause environmental effects. MCL 324.1705(2). Joint Appellants have not filed a Section 1701 lawsuit; they challenge only the PSC's MEPA determinations made pursuant

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to Section 1705. And the Court of Appeals correctly distinguished *WMEAC* on this basis, concluding that "[a]t issue here is not a separate MEPA action [under Section 1701] but a MEPA analysis made in the context of a PSC permitting decision." Op at 23. Accordingly, while *WMEAC* states that it is a court's "responsibility to make [MEPA] determinations" through "independent" judgments, that responsibility only extends to a circuit court reviewing a MEPA Section 1701 action, not judicial review of the PSC's Section 1705 effects determination.[4] *WMEAC*, 405 Mich at 753.

Joint Appellants argue that the Court of Appeals' explication of *WMEAC* is unpersuasive because both MEPA Sections 1704 and 1705 require courts to "determine" environmental effects. Joint Appellants Br at 22-23. Again, Joint Appellants focus myopically on the word "determine," failing to acknowledge that Section 1704 expressly requires the circuit court to independently "adjudicate" the environmental impacts, which includes taking additional evidence. MCL 324.1704(3). Conversely, Section 1705 does *not* place any obligation on reviewing courts to adjudicate environmental issues, take additional evidence, or otherwise act as a fact finder. That's because the agency conducting the Section 1705 review—here, the PSC—is obligated to perform that role. See MCL 324.1705(2); Op at 23. Joint Appellants' over-reliance on the term "determine"

[4] Joint Appellants cite Justice Welch's dissent in *Lakeshore Group v Michigan*, 510 Mich 853, 858-62; 977 NW2d 789 (2022), and to *Nemeth v Abonmarche Development, Inc*, 457 Mich 16, 32-35; 576 NW2d 641 (1998), in support of their claim that MEPA requires de novo review. Joint Appellants Br at 20. Joint Appellants' reliance on these cases is misplaced because, while they discuss *WMEAC*, neither opinion purports to identify the appropriate standard of review for MEPA determinations *under Section 1705*; both merely invoke *WMEAC* while addressing unrelated issues. See *Lakeshore Grp*, 510 Mich at 858-62 (Welch, J, dissenting) (arguing that this Court's decision in *Preserve the Dunes, Inc v Dep't of Env't Quality*, 471 Mich 508; 684 NW2d 847 (2004), is inconsistent with the decision in *WMEAC*); *Nemeth*, 457 Mich at 32-35 (1998) (discussing *WMEAC*'s effects analysis and finding that "each alleged MEPA violation [in a Section 1701 case] must be evaluated by the trial court using the pollution control standard appropriate to the alleged violation").

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ignores MEPA's clear distinction between lawsuits filed under Sections 1701 and1704 and judicial review of an agency's effects determinations under Section 1705.

Nor does this Court's decision in *Ray v Mason Co Drain Comm'r*, 393 Mich 294; 224 NW2d 883 (1975), require de novo review in Section 1705 cases. In *Ray*, this Court said that administrative agencies alone – without opportunity for *citizen participation* – could not adequately protect the environment. *Ray*, 393 Mich at 305. Except to authorize the development of common law in furtherance of MEPA, this Court did not opine on the standard of review that MEPA requires, let alone under Section 1705. The Court only found the critical element of MEPA's process to be citizen involvement in agency and court proceedings. *Id.* The *Ray* Court likewise did not examine the role and obligations of agencies in a MEPA Section 1705, but rather set procedural standards for a circuit court's adjudication of MEPA Section 1701 disputes. Given Joint Appellants' extensive involvement in the PSC proceeding, and the fact that they exercised their opportunity to challenge the PSC's MEPA Section 1705 analysis through judicial review, no aspect of this case conflicts with *Ray*.

Joint Appellants say there is no logical basis for the Court of Appeals' distinction because circuit courts and the Court of Appeals can both be the court of first review for cases arising under Section 1705. Joint Appellants Br at 22. But the Court of Appeals did not hold that circuit courts and appellate-courts-of-first-review should review Section 1705 agency actions differently. The Court of Appeals simply made clear that *any* reviewing court should review an agency's MEPA Section 1705 effects analysis conducted as part of a separate administrative proceeding for an abuse of discretion. Again, Joint Appellants misunderstand that a lawsuit under Section 1701 (to which a de novo standard applies) is distinct from Section 1705, and this Court has never held that Section 1705 requires an independent de novo investigation by a reviewing court. See *Buggs v*

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Pub Serv Comm, unpublished per curiam opinion of the Court of Appeals, issued Jan. 13, 2015 (Docket Nos. 315058, 315064), 2015 WL 159795, p *8 (explaining that MEPA does not contain any language to suggest that the PSC has an obligation "to conduct an independent investigation"), Attachment 1.[5] Indeed, under Joint Appellants' theory, the Court of Appeals is obligated to take new evidence and re-weigh witness testimony in *any* agency decision that also involves MEPA. And if that decision is appealed, *this* Court would have to take new evidence and re-weigh testimony, too. Nothing in MEPA's text suggests that this Court, too, is a trial court when it comes to agency fact-finding in a MEPA context.

C. The Court of Appeals' decision does not conflict with other decisions and ensures that lower courts properly discharge their responsibility under MEPA.

Joint Appellants contend that the Court of Appeals' decision conflicts with its own past decisions. Joint Appellants Br at 22. They ask this Court to provide guidance to prevent confusion in the lower courts. *Id.* at 23-24. But the contention is wrong and the request unnecessary.

Joint Appellants cite several Court of Appeals cases they say establish a de novo standard of review in *all* MEPA cases. Two of those cases arose under MEPA Section 1701 and are irrelevant here. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 484-85; 608 NW2d 531 (2000) (reviewing a trial judge's disposition of MEPA claims in an action filed in the circuit court under Section 1701); *Friends of Crystal River v Kuras Props*, 218 Mich App 457, 471-72; 554 NW2d 328 (1996) (circuit court adequately reviewed de novo a case it had remitted to an administrative agency under Sections 1701 and 1704).

While *Thomas Twp v John Sexton Corp of Mich*, 173 Mich App 507, 510-11; 434 NW2d 644 (1988), arose under MEPA Section 1705, the Court of Appeals there did not consider or

[5] Enbridge cites this unpublished case because it is the only Michigan appellate authority directly addressing the issue for which it is cited.

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analyze the difference between appellate review of a separate MEPA-action decision versus a MEPA analysis made in the context of an agency permitting decision. There, the appellants challenged a Natural Resources Commission's MEPA Section 1705 determination. *Thomas Twp*, 173 Mich App at 510-11. Recognizing that the MEPA issues arose under a different procedural posture, the circuit court applied traditional APA standards in reviewing the Commission's order. *Id.* at 511.

The Court of Appeals reversed and said that the circuit court should have reviewed the MEPA issues de novo. *Id.* But the Court of Appeals adopted *WMEAC*'s standard without engaging in any analysis about whether *WMEAC* extended to a circuit court's appellate review of an agency effects determination made under Section 1705 in connection with an administrative proceeding. *Id.* Despite the circuit court identifying the differences in procedure, the Court of Appeals relied exclusively on cases involving independent MEPA actions and failed to examine the statutory difference between review of a Section 1705 proceeding and review of an independent MEPA action. *Id.* Then, inexplicably, the Court of Appeals proceeded to review the MEPA issues under the substantial evidence standard, concluding that the Commission's MEPA determination "withstands the substantial evidence standard of review." *Id.* at 517. The Court of Appeals in this case was not required to follow a rule that the *Thomas Twp* court itself did not even follow.

In any event, since these unreasoned and inconsistent statements came in a decision issued before November 1, 1990, it has no binding effect, MCR 7.215(J)(1). The Court of Appeals' decision in this case thus creates no conflict. *Hairston v LKU*, ___ Mich ___; ___ NW3d ___, (2025) (Docket No. 166473), 2025 WL 1014229, at *8 (Apr 4, 2025) (explaining that "subsequent panels [of the Court of Appeals] are not bound under MCR 7.215(J)(1) to follow a rule established in a published opinion against their better judgment if it predates November 1, 1990" (quoting

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Schaumann-Beltran v Gemmete, 509 Mich 979, 980 n1; 973 NW2d 308 (2022) (alterations in original)).

In stark contrast, the Court of Appeals here carefully examined MEPA and this Court's precedent and explained why the de novo standard of review cannot apply to an appellate review of a Section 1705 determination. Op at 23. Contrary to Joint Appellants' arguments (see Br at 23-24), the Court of Appeals' decision fully reconciles its prior decisions and provides any needed clarity, ensuring no inconsistences moving forward. See *People v Masi*, 346 Mich App 1, 12 n4; 11 NW3d 521 (2023) (declining to follow an unreasoned conclusion in a prior case).

The remaining cases Joint Appellants cite do not change that. While *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541, 546-47; 432 NW2d 315 (1988), appears to have arisen under Section 1705 (the opinion isn't clear), the Court of Appeals' unexplained assertion that *WMEAC*'s standard of review controls is dicta because neither the circuit court nor the Court of Appeals addressed the parties' MEPA issues and instead affirmed the agency's permit denial on the basis of a different statute. *Id.* at 546-47. The case was also decided before November 1, 1990, so there's not even an argument that its dicta is binding. MCR 7.215(J)(1). See also *Allison v AEW Cap Mgmt, LLP*, 481 Mich 419, 436-37; 751 NW2d 8 (2008) ("A statement that is dictum does not constitute binding precedent under MCR 7.215(J)(1).").

Similarly, *Mich Waste Sys v Dep't of Natural Resources*, 147 Mich App 729; 383 NW2d 112 (1985), involved a complaint filed in a circuit court challenging a permit denial. *Id.* at 733-34. There, the Court of Appeals concluded that the plaintiff's MEPA claims were not subject to de novo review because the plaintiff did not allege that the agency's permit denial would damage the environment in violation of MEPA. *Id.* at 735-36.

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In sum, the Court of Appeals' decision below clarifies the differing form of judicial review for challenges brought under MEPA Sections 1701 and 1705. That decision does not conflict with any reasoned or binding precedent. And it provides clear guidance to lower courts going forward. Finally, the decision makes sense and prevents this Court from becoming a de facto trial court in any case involving an agency and MEPA.

D. Reversing the Court of Appeals' standard-of-review decision would not change anything here.

Joint Appellants spill much ink arguing that the Court of Appeals applied an incorrect, overly deferential standard of review in evaluating the PSC's MEPA analysis, which they assert causes them a material injustice. Joint Appellants Br at 16-28. Displeased with the PSC's factual findings, Joint Appellants seek another bite of the apple, hoping that a different Court of Appeals panel will eschew the PSC's MEPA fact-finding for the Replacement Project and find new facts instead.

The problem is that Joint Appellants' grievances are fully resolved through MEPA's *statutory* interpretation, not any possible new facts. Joint Appellants argue primarily that the Court of Appeals failed to conduct an independent inquiry into the greenhouse gas ("GHG") impacts from the Replacement Project and the non-GHG impacts *from the entirety of Line 5*. Joint Appellants Br at 26-33. But that argument is entirely dependent on expanding the PSC's Section 1705 environmental effects analysis beyond the limited scope of the PSC's Act 16 proceeding. And as explained in Section II below, the Court of Appeals correctly concluded that a MEPA analysis is limited to the relevant proposed "conduct"—the Replacement Project—*not* the entirety of Line 5. Even under a de novo standard of review for facts, the environmental effects that Joint Appellants allege are outside of the Replacement Project's scope and therefore legally irrelevant. Applying a different standard of review would change nothing.

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Joint Appellants fear that material injustice will occur because no court will make an "independent" determination of the Replacement Project's environmental impacts. Joint Appellants Br at 24-25. But the environmental effects of the Replacement Project have been fully vetted, and they are far outweighed by the benefit of replacing the Dual Pipelines that lay on the Straits lakebed with a single pipeline contained in an underground tunnel. While Joint Appellants say that the PSC cannot be an appropriate expert to assess a project's environmental effects under Section 1705 (see Joint Appellants Br at 26), the Legislature intended just that by requiring a MEPA 1705 effects analysis for *any* agency in an "administrative, licensing, or other proceeding[]," such as the PSC's Act 16 process. MCL 324.1705(2). And the Michigan Constitution requires the PSC's order to be authorized by law and "supported by competent, material and substantial evidence on the whole record." Const 1963, art 4, § 28. A court's only role is to confirm that the PSC's Section 1705 factual determination is supported by record evidence; the Court of Appeals fulfilled that role.

Joint Appellants also assert a material injustice because the Court of Appeals' unpublished decision in *Lakeshore Group v Michigan*[6] forecloses their ability to file a separate lawsuit challenging the PSC's authorization of the Replacement Project on MEPA grounds. Joint Appellants Br at 24-25. As the Court of Appeals recognized in *Lakeshore Group*, in MEPA, the Legislature "created a bifurcated scheme" for challenging the environmental impacts of projects like the Replacement Project. *Lakeshore Group* at *3. Under this scheme, plaintiffs may either "challenge the [agency's] permitting decision at the administrative level *with limited judicial review*," as here, *or* they can challenge the permit holder's "actual conduct" in a separate lawsuit.

[6] *Lakeshore Group v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued Dec. 18, 2018 (Docket No. 341310), 2018 WL 6624870, p *3, attached as Attachment 2. Enbridge cites this unpublished opinion because the Appellants relied on it.

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Id. (emphasis added). Joint Appellants chose to challenge the PSC's permitting decision at the administrative level; having done so, they foreclosed themselves from bringing a separate lawsuit now. That consequence is entirely attributable to Joint Appellants, not the Court of Appeals.

Any alleged error by the Court of Appeals was also harmless. Joint Appellants say that a reviewing court would have reached a different conclusion than the PSC under a de novo review of the GHG evidence for the Replacement Project. Joint Appellants Br at 26-28. That's incorrect. As the Court of Appeals determined, "the PSC supported its conclusions regarding GHGs by direct reference to the testimony in evidence." Op at 28. And Joint Appellants had ample opportunity to submit evidence in the PSC's proceeding on GHG impacts and did so. Even then, the PSC's "ultimate conclusions regarding GHGs ha[ve] support in" contrary evidence put forward by the PSC's staff and other parties. *Id*. at 28 (finding record support for the PSC to "dispute[ ] [the Joint Appellants'] conclusion that a shutdown of Line 5 would result in "reduced demand, and thus reduced GHG emissions"). This analysis is more than sufficient to satisfy the Court of Appeals' obligations under the Michigan Constitution and MEPA. See Const 1963, art 4, § 28; MCL 324.1705(2).

In sum, there is no confusion and no split of authority. And Joint Appellants have not shown it is more probable than not that the Court of Appeals' alleged error was outcome determinative. There is no basis for this Court's review under MCR 7.305(B). See *Barnett v Hidalgo*, 478 Mich 151, 172; 732 NW2d 472 (2007) (error is harmless where the appellant has "failed to show that it was more probable than not that the alleged error was outcome determinative").

II. No grounds warrant this Court's review of the Court of Appeals' interpretation of MEPA's scope.

No grounds in MCR 7.305(B) warrant this Court's review of the Court of Appeals' decision concerning whether MEPA required the PSC to assess the environmental effects and risks for the

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entirety of Line 5. Joint Appellants ask this Court to expand MEPA's plain language to convert the PSC's narrow, Act 16 proceeding for the four-mile Replacement Project into a proceeding examining the environmental effects of the entire 645-mile pipeline that has been operating for over 70 years. The Court of Appeals correctly determined that the MEPA "conduct" at issue was limited to Enbridge "seeking approval for the [four-mile] Replacement Project;" "not [ ] approval for the construction of Line 5" itself. Op at 19, 24. Indeed, the PSC "was following the plain language of MEPA." *Id*. at 24. This plain reading of the statute is not in conflict with any of this Court's decisions.

A. The Court of Appeals' properly applied MEPA to the "conduct" at issue—the Replacement Project.

If a "statute's language is clear and unambiguous, then [courts must] assume that the Legislature intended its plain meaning and the statute is enforced as written." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The Court of Appeals and PSC both properly concluded that MEPA is unambiguous and enforced its plain meaning.

MEPA states that "*conduct* shall not be *authorized or approved* that has or is likely to have [environmental effects]." MCL 324.1705(2) (emphasis added); see also MCL 324.1706 (MEPA "is supplementary to existing administrative and regulatory procedures provided by law"). The PSC previously authorized the entirety of Line 5 in 1953. *In re Application of Lakehead Pipe Line Co, Inc*, order of the Public Service Commission, entered March 31, 1953 (Case No. D-3903-53.1)[7]; see also *Lakehead Pipe Line Co, Inc v Dehn*, 340 Mich 25, 27; 64 NW2d 903 (1954) (confirming public need for Line 5). Enbridge's application here was thus limited to the Replacement Project alone, *not* the entirety of Line 5. And it follows that the PSC's MEPA analysis

[7] Enbridge App'x 01, ENBAPX000001.

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was properly limited to the conduct that Enbridge requested be approved, not conduct that had previously been approved. Op at 19-20.[8]

Joint Appellants ignore the natural limits of the word "conduct." Instead, they focus on the subsequent statutory language that reads "has or is likely to have such an effect." Joint Appellants Br at 31. According to Joint Appellants, this language mandates consideration of environmental risks from the entirety of Line 5 because pipeline operation has effects along the entire line. *Id.* But the phrase "has or is likely to have such an effect" is connected to the word "conduct": "*conduct* shall not be authorized or approved that has or is likely to have such an effect." MCL 324.1705(2) (emphasis added). And the phrase does not expand the "conduct" under a MEPA Section 1705 review. While the "effect" of the entirety of Line 5 would be a MEPA consideration in a proceeding to approve Line 5's initial installation and operation, it is not part of the "conduct" at issue in Enbridge's Act 16 application for the Replacement Project. Reading the phrase "has or is likely to have such an effect" to require PSC's MEPA analysis to extend beyond the Replacement Project ignores the Legislature's unambiguous intent that the MEPA analysis be limited to the "conduct" subject to the PSC's authorization. See Op at 19-20 (citing *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007)).

B. The Court of Appeals' MEPA construction conflicts with no case.

The Court of Appeals' MEPA interpretation is consistent with *WMEAC*, 405 Mich at 750-51. Joint Appellants contend (wrongly) that the entirety of Line 5 will cease operating without the

[8] The PSC's decision to limit the Act 16 proceeding to the Replacement Project is consistent with multiple PSC precedents approving construction of a pipeline segment without considering the rest of the pipeline. E.g., *In re Application of Wolverine Pipe Line Co*, order of the Public Service Commission, entered March 7, 2001 (Case No. U-12334) (2001 WL 306697) (Enbridge App'x 27), *In re Application of Wolverine Pipe Line Co*, order of the Public Service Commission, entered July 23, 2022 (Case No. U-13225) (2002 WL 31057451) (Enbridge App'x 28). Joint Appellants do not challenge this decision in their application for leave to appeal.

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Replacement Project, and *WMEAC* therefore required the PSC and Court of Appeals to consider the spill risk for Line 5's entire length. Joint Appellants Br at 32-34. But Line 5 is in compliance with applicable federal safety regulations, is safe, and is regularly audited by the federal safety regulator; it will continue with or without the Replacement Project. In any event, *WMEAC* requires no such thing.

In *WMEAC*, the very first step this Court took was to identify the *conduct* subject to agency approval; the conduct determined the environmental effects for which MEPA required review. *WMEAC*, 405 Mich at 750-51. This Court found the conduct at issue in *WMEAC* to be a consent order authorizing exploratory wells plus subsequent permits to construct the wells. *Id.* at 751. This conduct also included construction of new roads needed to access the exploratory wells because they were part of (and would occur as a result of) the proposed project. *Id.* at 756.

Joint Appellants say that, because the new roads were given MEPA review in *WMEAC*, the PSC was required to assess effects from the entirety of Line 5 because the Replacement Project extends Line 5's operational life. Joint Appellants Br at 33. That's demonstrably false; Line 5 will continue to operate, with or without the Replacement Project. Equally important, the new roads in *WMEAC* were part of the proposed project; they occurred as a direct result of the agency action at issue. Here, the Court of Appeals correctly concluded that operation of the entirety of Line 5 is outside the scope of Enbridge's Act 16 application for the Replacement Project. See Op at 20. Because Line 5's operation is unaffected by the PSC's Act 16 decision for the Replacement Project, MEPA does not require the PSC to assess the effects of the entire Line 5.

In support, Joint Appellants cite the Attorney General's pending lawsuit to shutdown Line 5 and Governor Whitmer's purported revocation and termination of the 1953 Easement authorizing the Dual Pipelines' crossing of the Straits. Joint Appellants Br at 32. Joint Appellants

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argue that, because Line 5 will be shut down through these actions, the PSC's authorization for the Replacement Project extends its operational life, thereby warranting a MEPA analysis on the entirety of Line 5's environmental effects. Nonsense. Line 5 remains in operation and these other actions do not affect the scope of the PSC's jurisdiction and scope of Act 16 "conduct" subject to MEPA review. The only thing that matters is that the PSC's Act 16 proceeding creates no potential for a Line 5 shutdown. Full stop. That's why the Court of Appeals has rejected similar attempts to expand the scope of MEPA review before. E.g., *Buggs*, 2015 WL 159795, p *9 (concluding MEPA requires an agency to consider environmental effects of the proposed pipeline; not future applications or activities), Attachment 1.

The only conflict with precedent is Joint Appellants' novel legal theory. And again, granting their applications would not give Joint Appellants the relief they want: to shutdown Line 5. With or without the Replacement Project, Line 5 will continue to operate safely, in accordance with applicable federal safety regulations. This Court's review is not necessary.

C. The Court of Appeals' and PSC's MEPA interpretation did not lead to the improper exclusion of evidence or a faulty analysis.

This Court's review is also unnecessary to provide clarity as to the proper scope of a MEPA alternatives analysis. Joint Appellants argue that the PSC erred by assessing the environmental effects of transporting all of Line 5's products by alternative means (e.g., rail and truck) while limiting MEPA review of the Replacement Project to the approximate four-mile crossing of the Straits. Joint Appellants Br at 34-36. Similarly, Joint Appellants contend that the PSC's analysis should not have excluded evidence concerning environmental risks of the entirety of Line 5. *Id.*

That's wrong for several reasons. To begin, as noted, Line 5's continued operation is the status quo. The only environmental impact of approving the Replacement Project is the environmental impact of the Replacement Project itself. But when a proposed alternative involves

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shutting down Line 5 and replacing it with rail or truck transport, the *entirety* of Line 5's volume is now at issue. As the PSC concluded, it would be silly—and absurdly dangerous to the environment—to deny the Replacement Project and then move all of Line 5's product by rail or truck.

Moreover, the fact that the PSC undertook a *more* expansive alternatives analysis than MEPA requires does not render the PSC's analysis faulty or otherwise violate MEPA. As the Court of Appeals put it, the "Commission acted appropriately because it *could* have limited its 'comparisons' analysis to just alternatives for the Straits segment of the pipeline" because that was the only MEPA "conduct" at issue. Op at 24-25. MEPA did not require the PSC to assess the entirety of non-pipeline alternatives, but it voluntarily chose to examine all the alternatives presented by intervenors in the PSC's Act 16 proceeding, including those that are only relevant in the event of a hypothetical Line 5 shutdown. *Id*. The Court of Appeals went on to explain that the "the Commission also relied heavily on the presented evidence that using rail as transport would produce significantly *more* GHGs, for the same amount of product, than using Line 5 as a whole for transport." *Id*. at 24. As a result, the PSC reasonably found that the no-pipeline alternatives would have a more significant environmental effect, as compared to the existing Line 5. *Id.* at 24-25. The "PSC's MEPA decision is adequately supported by the record" and nothing more is required by MEPA. *Id*. at 24.

That common-sense conclusion did not lead to the improper exclusion of evidence. Quite the opposite, as the Court of Appeals recognized, "Intervenors were *allowed* to present evidence of alternatives," and "[s]ome . . . presented evidence regarding alternative scenarios." Op at 26 (emphasis in original). While Joint Appellants assert that they should have been allowed to introduce evidence about environmental effects from the entirety of Line 5 (Joint Appellants Br at

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33), MEPA precludes that evidence because those effects are beyond the conduct at issue in the PSC's Act 16 proceeding. The scope of MEPA, commensurate with the PSC's Act 16 jurisdiction, dictated that the scope of evidence be limited to the Replacement Project; not extending to Line 5's 645-mile length. Joint Appellants' proposed evidence is legally irrelevant.

D. No significant public interest warrants review.

Joint Appellants also claim a "significant public interest" in this case's outcome. Joint Appellants Br at 36-37. Again, they misunderstand this proceeding's purpose. While Line 5's operation may be a matter of public interest, approval of *the Replacement Project* is undeniably in the public interest. The Legislature has said so under Act 359. The Governor has said so in the State's 2018 agreements with Enbridge. And Joint Appellants do not deny so. Yes, it is undisputed that the Straits are important to Michigan and its citizens. That's why Enbridge and the State want to make the Straits *safer*. And no matter how "iconic" a project's location, Act 16 and MEPA's requirements do not change. Where the statutory text is clear, there is nothing more for a court to do than apply it. *People v Schaefer*, 473 Mich 418, 430-31; 703 NW2d 774 (2005) ("Judicial construction is neither necessary nor permitted [when the text is unambiguous] because it is presumed that the Legislature intended the clear meaning it expressed.").

There is no reason to review the Court of Appeals' straightforward interpretation of MEPA.

III. The Court of Appeals correctly interpreted the scope of PSC's statutory authority to exclude the common law public-trust doctrine.

Appellant FLOW does not identify any grounds under MCR 7.305(B) that warrant this Court's review of the Court of Appeals' decision concerning the common law public-trust doctrine. Simply put, "the PSC is a 'creature of the Legislature' and has no common-law powers; it 'possesses only that authority bestowed upon it by statute.'" Op at 22 (citing *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988) (a grant of statutory authority

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"must be conferred by clear and unmistakable language, since a doubtful power does not exist")). Because the PSC's authority is limited by Act 16, and Act 16 gives the PSC no power to consider common-law doctrines, the Court of Appeals correctly concluded that FLOW's reliance on the common law "public trust doctrine is misplaced." Op at 22.

Like the other Appellants, FLOW claims conflict with other appellate decisions. FLOW Br at 6-9. Like the other Appellants, FLOW is flat-out wrong. This Court's past decisions unambiguously hold that the PSC does not possess authority to assess common law doctrines. E.g., *In re Reliability Plans of Elec Utils for 2017-2021*, 505 Mich 97, 119; 949 NW2d 73 (2020) ("[t]he MPSC has no common-law powers; it has only the authority granted to it by the Legislature"); *G & A Truck Line, Inc v Pub Serv Comm*, 337 Mich 300, 305; 60 NW2d 285 (1953) ("The Commission can do only those things authorized by statute"). This Court has long been reluctant to confer power to administrative agencies absent legislative support, *Mason Co Civ Research Council v Mason Co*, 343 Mich 313, 326-27; 72 NW2d 292 (1955), and it should not start now.

Anyway, this Court has held that a public-trust finding is only necessary where submerged lands are "alienat[ed]" for a "[private or] non-public use." *Obrecht v Nat'l Gypsum Co*, 361 Mich 399, 413; 105 NW2d 143 (1960). That is not what the PSC's Act 16 order does here; the PSC's order approves Enbridge's application to operate and maintain the Replacement Project segment in a tunnel pursuant to Act 16 without alienation of any state-owned submerged lands. Underscoring this point is the fact that Act 16 only gives the PSC the authority to *regulate* persons transporting "crude oil . . . by or through pipe line or lines" within the State; not authority to alienate state-owned lands through an Act 16 process. MCL 483.3(a). While FLOW cites *Ill Cent RR Co v Illinois*, 146 US 387; 13 SCt 110; 36 LEd 1018 (1892) and *Glass v Goeckel*, 473 Mich 667, 681; 703 NW2d 58 (2005), those cases do not hold that the PSC has authority on behalf of

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the State to resolve disputes regarding the common law public-trust doctrine or to police the State's obligation to comply with that doctrine. Instead, FLOW asks this Court to overrule these prior decisions and *obligate* the PSC to regulate the common law public trust doctrine even though the unambiguous terms of Act 16 provide it with no such authority. See *Schaefer*, 473 Mich at 430-31; *Food & Drug Admin v Brown & Williamson Tobacco Corp*, 529 US 120, 125; 120 S Ct 1291; 146 L Ed 2d 121 (2000).

FLOW alternatively argues that the Court of Appeals' decision bars the State from *ever* considering the public-trust doctrine. FLOW Br at 7-9. Not even close. The Court of Appeals' ruling is limited to the PSC's statutory authority. Op at 22. The Court of Appeals said nothing about other agencies, and certainly did not purport to give the State itself a pass on its public-trust obligations.

Like the other Appellants, FLOW also requests relief that will make no difference. To the extent that the State has any obligation to comply with the common law public trust doctrine with respect to the tunnel, the Court of Appeals' decision recognizes that the State satisfied the public-trust in multiple ways. The First Agreement was "intended to further protect ecological and natural resources held in public trust by the State of Michigan." Op at 8. The Second Agreement provides that the Replacement Project "would essentially eliminate the risk of adverse impacts that may result from a potential spill in the Straits." *Id*. at 8-9. The Third Agreement says the same thing. *Id*. at 9-10. The Court of Appeals' decision also notes that the Legislature enacted Act 359, which found an underground tunnel and creation of the MSCA to be "public and essential governmental purposes for the benefit of the people of this state and for the improvement of health, safety, welfare, comfort, and security of the people of this state." *Id*. at 10. Even under a common law public-trust theory, the State has made more than the requisite findings.

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IV. There is no basis to review Mr. Borke's standing argument.

Appellant Mr. Borke seeks this Court's review of the Court of Appeals' decision not to consider his appeal. The Court of Appeals declined to do so because Mr. Borke merely offered in the PSC proceeding "two short e-mails complaining generally about" Enbridge. Op at 30. He advanced "[n]o supported legal arguments." *Id.* On this basis, the Court of Appeals correctly concluded that any party in interest "cannot include each and every person who happened to offer comments, but nothing more, in a contested case." *Id*. Further, Mr. Borke never states that he "was granted intervention" by the PSC to allow for appeal by right. *Id*. And, as a basis for his right to appeal, he cites MCL 460.6g(4), which the Court of Appeals correctly notes is "inapposite because it deals with appeals from certain types of rate-setting." *Id*.

Like the other Appellants, Mr. Borke claims conflict with another Court of Appeals decision; this time it's *In re Filing Requirements for Complaints & Applications Filed Under the Michigan Telecommunications Act*, 210 Mich App 681; 534 NW2d 234 (1995). There is no conflict. First, the PSC order at issue there was a rulemaking under the Michigan Telecommunications Act, not a contested case, so there was no similar opportunity for the parties to intervene. *In re Filing Requirements*, 210 Mich App at 685-86. Second, the issue the Court of Appeals addressed was whether two associations had standing to appeal on behalf of their members, not whether any commenter to a contested case proceeding may appeal a PSC order as of right. *Id.* at 691-92.

The Court of Appeals decision to "decline to consider Borke's arguments" is fully in accord with Michigan law. See MCR 7.203(A)(2); MCL 462.26. This Court should also decline to entertain Mr. Borke's arguments.

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CONCLUSION

There are no grounds that warrant leave to appeal here. There are no true conflicts. There are no errors. Granting the relief Appellants seek will make no practical difference. And in Appellants' best-case scenario, the PSC's approval of the Replacement Project would be set aside, and the Dual Pipelines will continue to operate on the Straits lakebed. If Appellants want to shutdown Line 5, they need to bring a different proceeding to do that. The Court shouldn't pretend that a safety upgrade is the vehicle to do so.

Accordingly, Enbridge respectfully requests that this Court summarily deny Appellants' applications for leave to appeal.

Respectfully submitted, April 30, 2025,

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STATEMENT OF COUNTABLE WORDS

Pursuant to MCR 7.212(B)(3), the undersigned certifies that the number of countable words in the foregoing brief, as determined by MCR 7.212(B), is 9,858, according to the word count provided by the word processing software used to create the foregoing brief. The name and version of that software is Microsoft® Word for Microsoft 365 MSO, Version 2503 Build 16.0.18623.20178), 64-bit.

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Attachment 1

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2015 WL 159795
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

John BUGGS and Daniel Bonamie, Appellants,
v.
MICHIGAN PUBLIC SERVICE COMMISSION, Appellee,
and
DTE Michigan Gathering Holding Company, assignee of Encana Oil & Gas (USA), Inc., Petitioner–Appellee.
John Buggs and Daniel Bonamie, Appellants,
v.
Michigan Public Service Commission, Appellee,
and
DTE Michigan Gathering Holding Company, assignee of Encana Oil & Gas (USA), Inc., Petitioner–Appellee.

Docket Nos. 315058, 315064.
|
Jan. 13, 2015.

Public Service Commission; LC No. 00–017195, LC No. 00–017196.

Before: M.J. KELLY, P.J., and CAVANAGH and METER, JJ.

Opinion

PER CURIAM.

***1** In this dispute over the construction and use of gas pipelines, appellants, John Buggs and Daniel Bonamie, appeal by right the ex parte orders issued by appellee, Michigan Public Service Commission, which gave petitioner, DTE Michigan Gathering Holding Company, as the successor in interest to Encana Oil & Gas (USA), Inc. (Encana Oil), [1] permission to construct, own, and operate two natural gas pipelines: the Garfield 36 Pipeline (Docket No. 315058) and the Beaver Creek 11 Pipeline (Docket No. 315064). For the reasons more fully explained below, we conclude that the Commission's orders were unlawful. Accordingly, we vacate those orders and remand for a new determination of necessity on each application.

I. BASIC FACTS

1. THE GARFIELD 36 PIPELINE

In January 2013, Encana Oil applied for a certificate of public convenience and approval to construct, own, and operate a 1.9 mile long natural gas pipeline under 1929 PA 9 (Act 9), MCL 483.101 *et seq.* Encana Oil referred to the pipeline as the Garfield 36 Pipeline. Encana Oil represented it would use the pipeline to transport gas recovered from a single well with a recoverable reserve of 2 to 3 billion standard cubic feet of gas. However, it also stated that it anticipated drilling additional wells into the Collingwood formation. It stated

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that the pipeline would be constructed with anticipated easements and permits "adjacent to the well pad access road" on land owned by the Michigan Department of Natural Resources (the Department) and within the county's right of way to the point where it would connect with Michigan Consolidated Gas Company's Saginaw Bay Pipeline. Encana Oil provided a map of the proposed route and engineering specifications which provided that the pipeline would be capable of transporting up to 40 million standard cubic feet of gas per day. Encana Oil further represented that the pipeline was necessary for its business, that the gas would ultimately be available to Michigan consumers, that without the pipeline there would be no public access to gas reserves in that area, and that the pipeline was "the most efficient and cost-effective means to bring these gas reserves to the public."

Encana Oil also filed an environmental impact assessment with its application. Dean Farrier prepared the assessment and stated that he was a consulting biologist. He represented that the proposed pipeline would be constructed entirely on land owned by the Department and along existing corridors such that there would be "minimal impact to the local ecosystems and land use," and that no alternatives reviewed had less impact. He noted that the route crossed some wetlands and that the pipeline would "be directionally drilled under the series of wetlands for 1027 feet" to "minimize the impact to that feature." He represented that the wetland crossing was exempt from the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.* Farrier also indicated that clearing would be limited to "the minimum area required for safe and efficient construction," and that to the best of his knowledge there were no threatened or endangered species within the proposed easement or along the proposed route. Finally, he represented that underground pipelines were the safest way to transport petroleum products, and that the potential for release was low and, in any event, unlikely to "significantly harm surrounding plants, wildlife, or soils." Further, although the possibility of ignition and fire was a danger, the human population density in the vicinity was "extremely low."

***2** The Commission approved the proposed pipeline project in an ex parte order issued later that same month.

2. BEAVER CREEK 11 PIPELINE

In January 2013, Encana Oil also filed an application for approval and a certificate of public convenience and necessity to construct, own, and operate a 3.1 mile long natural gas pipeline that it referred to as the Beaver Creek 11 Pipeline, which was also to collect gas from the Collingwood formation and connect to Michigan Consolidated Gas Company's Saginaw Bay Pipeline over land belonging to the Department. The pipeline was to service a single well with 2 to 3 billion standard cubic feet of gas but, again, Encana Oil anticipated that it would add "a significant number of wells" in the future. It also again represented that the pipeline was necessary for its business, that without it the public would not have access to gas reserves in the area, and that it was the most efficient and cost-effective means of delivering the gas.

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Farrier prepared an environmental impact assessment for this project as well. Farrier again stated that the route was along existing corridors on the Department's land except for a small percentage of the route, which was on land owned by the Department of Transportation; however, he acknowledged that the route crossed privately-owned land and that there were five residences within 1/8th of a mile, but that the route was within the county right-of-way. Again, he represented that to the best of his knowledge there were no threatened or endangered species within the proposed easement or route and that "[c]learing, removal of topsoil, and grading will be limited to the minimum area required for safe and efficient construction." He also said the route "offers the minimal impact to the local ecosystems and land use," and that "[a]lternatives were reviewed and none appeared to have less impact...." As with the other assessment, he asserted that underground pipelines were the safest way to transport petroleum products, that the potential for release was low and unlikely to "significantly harm surrounding plants, wildlife or soils," and that although the possibility of ignition and fire was a danger, the human population density in the vicinity was "extremely low."

The Commission approved the project in an ex parte order issued in January 2013.

The parties do not dispute that both pipelines have since been constructed and have begun transporting gas.

3. PROCEEDINGS

In March 2013, Buggs and Bonamie applied for permission to intervene in both of Encana Oil's applications. Specifically, they asked the Commission to consolidate the proceedings, vacate its previous orders, and hold a hearing to receive additional evidence.

That same month Buggs and Bonamie appealed in this Court and moved to hold the appeals in abeyance pending a decision by the Commission on whether to allow additional evidence. This Court issued an order consolidating the appeals and issued an order staying appellate proceedings and holding the appeals in abeyance until the Commission "disposes of the petition to receive additional evidence and, if additional evidence is received, issues a final order after consideration of the additional evidence." [2]

***3** In April 2013, the Commission denied the petitions to intervene by Buggs and Bonamie on the ground that they were not proper intervenors:

> Mere interest in a proceeding's outcome is insufficient to support intervention. The Commission has long held that prospective intervenors must generally satisfy the two-prong test established in *Association of Data Processing Services Organizations, Inc v. Camp,* 397 U.S. 150; 90 S. Ct 827; 25 L. Ed 2d 184 (1970).... This test requires the party in question to show: (1) that it suffered an injury in fact and (2) that the interest allegedly damaged falls within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

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> ... Petitioners have failed to satisfy either criterion. Specifically, Petitioners' allegation that protected wildlife and the environment may be harmed as the result of future drilling does not establish that Petitioners have suffered any concrete or discernible injury in fact. In addition, Petitioners' allegations that the plans interfere with their or the public's future use and enjoyment of the area likewise fail to establish that they suffered an injury in fact or that the "damaged interest" falls within the zone of interests Act 9 was designed to protect or regulate.

The Commission later denied Buggs and Bonamie's motion for reconsideration. In denying reconsideration, the Commission rejected the contention by Buggs and Bonamie that it had an obligation to consider the environmental impact of the proposed pipelines:

> [D]espite the Petitioners' assertion that modern law has "overtaken" Act 9, the Commission is required to apply the law as written. Amendments or additions to the Act must come from the Legislature. The Commission lacks the authority to amend the Act or to expand its reach simply because the Petitioners ask it to. Similarly, contrary to the Petitioners' argument that the Michigan Environmental Protection Act "imposes a duty on the state and on agencies like this commission to consider the likely environmental effects of the proposed conduct," the Commission lacks statutory authority to enforce that law or other environmental laws. Further, the Petitioners have failed to identify any specific duties that the law imposes on the Commission.

The Petitioners also argue that the Commission Staff's (Staff) failure to investigate Encana [Oil]'s environmental impact assessment (EIA), as compared to the Staff's independent environmental review in Case No. U–9138, warrants reconsideration and approval of the petition. Having reviewed the matter, we conclude that there was no legal error or other basis to warrant reversal of our initial decision denying the Petitioners intervention.

Although the Petitioners are correct that, in Case No. U–9138, the Staff conducted its own environmental review in order to conclude that construction would not constitute a "major site activity," that case has no bearing on the matter presently before the Commission. Moreover, the Petitioners cite no legal authority to support their assertion that, because the Staff conducted an independent review of an issue in one Act 9 pipeline case, it must do so in each case. The criteria that the Commission is statutorily authorized to consider in an Act 9 pipeline construction application includes the map of the proposed line, the route, the type of construction and the necessity and practicability of the pipeline so that the Commission may determine whether the proposed construction serves the convenience and necessity of the public. MCL 483.109.

***4** Here, the Petitioners have chosen the wrong forum in which to bring their claims. If they want to protect the natural habitats of the Kirtland's warbler or other wildlife from diminution, or protect the environment from forest fragmentation, they need to file

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> a lawsuit in a court with proper jurisdiction to consider the issues. The Commission is unable to grant the Petitioners' motion for reconsideration because they have chosen the wrong forum in which to seek redress.

In August 2013, Encana Oil moved to dismiss the appeal by Buggs and Bonamie for lack of jurisdiction. A majority of this Court denied the motion because Encana Oil failed to establish that the Court of Appeals lacked jurisdiction:

> Petitioner's argument that appellants are not parties in interest within the meaning of MCL 462.26 because they were not parties to the ... [administrative] proceedings must be rejected because, by equating the phrase "party in interest" used in that statutory provision with the term "party," petitioner would improperly render the words "in interest" nugatory or mere surplusage. See, e.g., *Whitman v. City of Burton,* 493 Mich. 303, 311–312; 831 [NW2d 223] (2013). Rather, by using the broader phrase "party in interest," the Legislature has necessarily allowed persons or entities who are not parties to the relevant [Commission] case to file an appeal of right from the relevant types of [Commission] orders. Further, contrary to petitioner's argument that one needs to be a party to a case to be an aggrieved party under MCR 7.203(A), there are situations where a non-party to a case is an aggrieved party with standing to appeal. See *Abel v. Grossman Investments Co,* [302 Mich.App 232; 838 NW2d 204 (2013)]. Also, *Federated Ins Co v. Oakland Co Rd Comm,* 475 Mich. 286; 715 NW2d 846 (2006), is inapplicable. Contrary to petitioner's discussion of that case, its holding was not based on the Attorney General not being a named party. See *id.,* 296 n. 10. Rather, the Attorney General was manifestly not an aggrieved party in that case because he was not pursuing an appeal based on an interest in the outcome of the particular case but merely to dispute this Court's construction of a statute. See *id.,* 290. Thus, we need not consider whether *Federated Ins Co* has been undermined by *Lansing Schools Ed Ass'n v. Lansing Bd of Ed,* 487 Mich. 349; 792 NW2d 686 (2010). However, we note that review of the June 28, 2013 ... order is not in the scope of the present appeals from January 31, 2013

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> orders of the [Commission]. Rather, appellants may only challenge the January 31, 2013 [Commission] orders.... [3]

We now consider the issues on appeal.

II. THE ORDERS

A. STANDARDS OF REVIEW

Buggs and Bonamie argue that the Commission erred when it issued the orders approving the pipelines without following the requirements stated under Act 9. Specifically, they maintain that, under Michigan's Environmental Protection Act (MEPA), MCL 324.1701 *et seq.*, the Commission had to conduct an environmental review before making its decision concerning the convenience and necessity of the proposed pipelines, which it did not do. Moreover, they argue, Encana Oil's environmental assessments did not provide a sufficient basis for evaluating the environmental impact. Given these defects, Buggs and Bonamie argue that the Commission should have rejected the applications.

***5** Buggs and Bonamie were not parties to the proceedings below and, for that reason, were not able to raise these issues before the Commission before it issued its orders. Thus, this issue was not properly preserved for review. Nevertheless, this Court has the discretion to consider the issue for the first time on appeal. *Bailey v. Schaaf (On Remand),* 304 Mich.App 324, 345; 852 NW2d 180 (2014). And, because this claim of error concerns a question of law and all the facts necessary for our review have been presented by the parties, and because the failure to consider the claim may result in a miscarriage of justice, we elect to exercise our discretion to consider the issue. See *Autodie, LLC v. City of Grand Rapids,* 305 Mich.App 423, 431; 852 NW2d 650 (2014).

In order to prevail, Buggs and Bonamie must demonstrate by clear and convincing evidence that the Commission's orders were unlawful or unreasonable. MCL 462.26(8). An order is unlawful if the Commission failed to follow a statutory requirement or abused its discretion. *In re Application of Consumers Energy Co for Rate Increase,* 291 Mich.App 106, 109–110; 804 NW2d 574 (2010). The Commission's orders must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. This Court reviews de novo whether the Commission exceeded the scope of its authority. *In re Application of Consumers Energy Co,* 291 Mich.App at 110. This Court also reviews de novo the proper interpretation of statutes. *Huntington Nat'l Bank v. Daniel J Aronoff Living Trust,* 305 Mich.App 496, 507; 853 NW2d 481 (2014).

B. ANALYSIS

The Commission is a "creature of the Legislature" possessing only the "authority bestowed upon it by statute"; it "possesses no 'common law' powers." *Union Carbide Corp v. Pub Serv Comm,* 431 Mich. 135, 146; 428 NW2d 322 (1988). "Thus, a

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determination of the commission's powers requires an examination of the various statutory enactments pertaining to its authority." *Id.*

The Legislature vested the Commission with the power to control and regulate "corporations, associations and persons engaged, directly or indirectly, in the business of purchasing or selling or transporting natural gas for public use" under Act 9. MCL 483.103. The Commission is further required to "investigate any alleged neglect or violation of the laws of the state by any corporation, association or person purchasing or selling natural gas and transmitting or conveying the same by pipe line or lines for public use...." *Id.*

Anyone proposing to pipe or transport natural gas in Michigan must comply with Act 9. MCL 483.101. Moreover, before constructing a pipeline to transport natural gas, the person proposing to construct the line must apply to the Commission for permission to construct the pipeline. MCL 483.109. The application must include "a map or plat of [the] proposed line or lines which it desires to construct, showing the dimensions and character of such proposed pipe line or lines, its compression stations, control valves, and connections...." *Id.* And the Commission must "examine and inquire into the necessity and practicability of such transmission line or lines and to determine that such line or lines will when constructed and in operation serve the convenience and necessities of the public" before it may approve the construction of the proposed pipeline. MCL 483.109. Thus, although MCL 483.109 does not specifically require the Commission to consider the environmental impact, it plainly permits the Commission to deny permission if after investigating the matter the Commission determines that the new pipeline would not serve the public convenience and necessity.

***6** Since the enactment of Act 9, our Supreme Court has considered whether an agency must consider the environmental impact of a proposed project before granting permission to proceed. In *State Hwy Comm v. Vanderkloot,* 392 Mich. 159, 167–168; 220 NW2d 416 (1974) (opinion by Williams, J.), landowners opposed the condemnation of land for a highway, arguing in part that it was a swamp area with "increasingly rare or even unique ecological characteristics," and that the duties of the highway commission conflicted with Const 1963, art 4, § 52, relating to the protection of natural resources. In considering this argument, our Supreme Court held that the Legislature has an affirmative duty to enact legislation to protect the environment, but was not required to fulfill this duty by enactment of a specific provision in the highway condemnation act, MCL 213.361 *et seq.,* or every other piece of relevant legislation; instead, the Court explained, it had fulfilled its duty by enacting the environmental protection act.[4] *State Hwy Comm,* 392 Mich. at 182–183 (opinion by Williams, J.), 194 (opinion by Levin, J.) (conceding that the environmental protection act provides substantive protections as well as procedural protections, but declining to consider the issue on the record before the Court). The Court explained that the Legislature accomplished this goal through two distinct methods: it provided a cause of action for the protection of Michigan's natural resources, and it provided that subject agencies had certain environmental obligations. *Id.* at 184. The Court determined

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that the environmental protection act specifically proscribed "pollution, impairment, or destruction" of natural resources "unless it is demonstrated that 'there is no feasible and prudent alternative to [the polluting, impairing, or destroying entity's] conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction," and that "[t]his substantive environmental guideline is applicable to the [highway] Commission's administrative condemnation determinations." *Id.* at 185–186 (emphasis removed), citing MCL 691.1203, which has been replaced by MCL 324.1703; see also *Genesco, Inc v. Dep't of Environmental Quality,* 250 Mich.App 45, 55–56; 645 NW2d 319 (2002). Thus, although the specific provision of the environmental protection act cited by the court addressed the burden of proof for the cause of action created by that act, a plurality of our Supreme Court held that the act also established a substantive standard prohibiting the impairment of natural resources, which applies to an agency's determinations. *State Hwy Comm,* 392 Mich. at 186, 190 (opinion by Williams, J.). The Court, however, went on to state that the declaration of necessity in the condemnation proceeding would be *prima facie* evidence of necessity and that a person challenging the agency's determination of necessity would have the burden to prove fraud or abuse of discretion, but that the commission's failure to reasonably comply with its duties could be a basis for finding fraud or an abuse of discretion. *State Hwy Comm,* 392 Mich. at 189–190 (opinion by Williams, J.).

***7** Buggs and Bonamie argue the Commission did not perform the requisite Act 9 review because, in determining public necessity, it did not sufficiently consider the environmental effect of the pipelines. As noted above, in rejecting the motion for reconsideration, the Commission stated that it had no obligation to consider the environment impact under MEPA, but instead stated that it was required to look to Act 9 alone:

> [C]ontrary to the Petitioners' argument that the Michigan Environmental Protection Act "imposes a duty on the state and on agencies like this commission to consider the likely environmental effects of the proposed conduct," the Commission lacks statutory authority to enforce that law or other environmental laws. Further, the Petitioners have failed to identify any specific duties that the law imposes on the Commission.

The Commission, however, mistakenly characterized the nature of the obligation. Buggs and Bonamie did not ask the Commission to enforce the MEPA or another environmental law. They asked the Commission to comply with its duty to examine and inquire into the necessity and practicability of the pipelines and determine that the pipelines would serve the convenience and necessity of the public. And, under the decision in *State Hwy Comm,* that duty includes an obligation to consider the environmental effect that the proposed pipeline would have. 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

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paramount concern for the protection of its natural resources from pollution, impairment, or destruction. *State Hwy Comm,* 392 Mich. at 185–186 (opinion by Williams, J.).

As required by Act 9 itself, Encana Oil submitted applications, maps of the proposed gas lines, and specifications for the projects as required by the statute. The Commission's orders make it clear that it reviewed these materials. Both applications, when coupled with the assessments, indicated that the pipelines were necessary for access to the gas reserves in the Collingwood formation and that the proposed routes were those causing the least impact. Thus, Encana Oil provided proof of necessity and practicability, and that there was no feasible and prudent alternative. However, although the Commission found in a cursory manner that the pipelines would serve the public convenience and necessity, it did not otherwise expressly speak to necessity, practicability, feasibility, or prudence in its orders. Moreover, it did not address whether any 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." *State Hwy Comm,* 392 Mich. at 185 (opinion by Williams, J.). Thus, the Commission failed to follow the substantive requirement of MEPA, a statutory requirement independent of Act 9, and accordingly, its orders were unlawful.

***8** Although MCL 324.1705(2) required a determination that took an environmental element into account, appellants incorrectly suggest that it required the Commission to conduct an independent investigation. There is no language in the statute to suggest that the Commission had any such duty. Moreover, *State Hwy Comm* indicated that the environmental effect of conduct had to be considered in making a determination, but it did not suggest that an agency had an independent duty to investigate. Thus, to the extent that the materials in Encana Oil's applications would allow the Commission to make a determination consistent with Act 9 and MCL 324 .1705(2), the Commission could base its determination on those materials. In this regard, it is noted that the motions to intervene were not before the Commission at the time it made its determinations regarding Encana Oil's applications. Thus, the allegations in those petitions did not have to be considered. However, Farrier indicated that there would be impairments to natural resources in his environmental impact assessments. He indicated that there would be, among other impairments, clearing of vegetation, but that the route would offer minimal impact because it would be along existing corridors. He further indicated that alternatives were reviewed and none appeared to have less impact. The Commission noted that these environmental assessments had been attached to the applications. However, it did not discuss the contents or expressly adopt Farrier's representation that alternatives were reviewed and none appeared to have less impact, i.e., that there was no feasible and prudent alternative to the impairment, and did not address 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. *State Hwy Comm,* 392 Mich. at 185 (opinion by

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Williams, J.). Accordingly, it is necessary to remand this case for the Commission to expressly make such a determination.

Buggs and Bonamie argue that Farrier's environmental impact assessments were insufficient to allow the Commission to make the requisite findings required by the MEPA. They claim that the assessments themselves should have caused the Commission to realize that they were inadequate on their face: Farrier analyzed the impact within the proposed easement, but did not include the impact on the environment in the vicinity; Farrier professed not to know of protected or endangered species, but did not certify that there were none; and Farrier claimed to be a biologist, but listed no supporting credentials. They also assert that the assessments were not signed or dated. However, the cover pages bore a date of January 2013 and indicated that they were prepared by Farrier. Buggs and Bonamie cite no authority that speaks to the requisite sufficiency of proofs on which the Commission must base its decision. The assessments described the routes along existing corridors, indicated that to the best of Farrier's knowledge "there were no threatened or endangered species within the proposed easements" or "along the proposed routes," described the clearing that would take place, and represented that the

> ***9** workspace will be graded as near as possible to pre-construction contours and/or restored in accordance with Kalkaska County Road Commission permit requirements, and natural runoff and drainage patterns will be restored. All existing improvements, such as fences, gates, bar ditches, and beaver deceivers, will be maintained and repaired to as good as or better than pre-construction conditions. Permanent erosion control measures will be installed, and all disturbed workspace will be reseeded.

Although Buggs and Bonamie's claims that the Kirtland Warbler is protected or endangered and that its habitat would be affected are troubling, allegations to this effect were not before the Commission at the time it reviewed the applications. Moreover, allegations that Encana Oil intended to add more pipelines that would create new corridors would seem to be pertinent to future applications for pipeline approval, but not to the lines at issue. While the Commission might have been inclined to seek more information if cognizant of the requirement that it assess whether there were feasible and prudent alternatives and whether the conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction, the representations made by Farrier in the Assessments were not inherently suspect such that they could not be deemed substantial evidence on the whole record to support the Commission's findings.

III. CONCLUSION

Although the Commission minimally complied with the requirements for approving the applications under Act 9, it failed to follow the independent statutory requirement imposed under MEPA. Because its orders approving the pipelines were unlawfully issued, we

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vacate those orders and remand for a new necessity determination in both dockets. In making its new determinations of necessity, the Commission shall specifically address the environmental impact as required under the MEPA and the decision in *State Hwy Comm,* 392 Mich. at 184–190 (opinion by Williams, J.).

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. We further order that none of the parties may tax their costs. MCR 7.219(A).

All Citations

Not Reported in N.W.2d, 2015 WL 159795

Footnotes

1 During the pendency of this appeal, Encana Oil moved to substitute DTE Holding as the party in interest after it assigned all of its interests in the pipelines to DTE Holding. This Court granted the motion. However, because all proceedings below occurred while Encana Oil was still a party, for ease of reference we shall refer to Encana Oil, rather than its successor, DTE Holding.

2 See *In re Application of Encana Oil & Gas Inc re Garfield 36 Pipeline,* unpublished order of the Court of Appeals, entered March 25, 2013 (Docket Nos. 315058, 315064); *In re Application of Encana Oil & Gas Inc re Garfield 36 Pipeline,* unpublished order of the Court of Appeals, entered April 3, 2013 (Docket Nos. 315058, 315064).

3 *In re Application of Encana Oil & Gas Inc re Garfield 36 Pipeline,* unpublished order of the Court of Appeals, entered September 25, 2013 (Docket Nos. 315058 & 315064). Although Buggs and Bonamie have restricted the issues presented on appeal to those involved in the January 2013 order, they have referred to and incorporated pleadings and documents from subsequent proceedings; they refer to affidavits, pleadings, and documents to establish that they live in the area, were not given notice of the applications, and understand that Encana Oil (or DTE Holding) plans to add 500 to 1,700 wells and associated pipelines to the system. Buggs and Bonamie also state their belief that the gas exploration and development activity can have an extreme effect on the landscape, that the habitat of the Kirtland Warbler will be adversely affected, and relate accounts of dead birds. Because these issues were not before the Commission when it issued its orders, we will not consider them in determining whether the Commission erred when it issued those orders. Nonetheless, the Commission's decision on reconsideration of the denial of the

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motion to intervene is pertinent to understanding the basis of its refusal to allow intervention.

4 The original environmental protection act was repealed by 1994 PA 451, and replaced by the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.*, Part 17 of which is titled the Michigan Environmental Protection Act. The MEPA set forth in Part 17 is substantially similar to the original act.

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Attachment 2

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2018 WL 6624870
Only the Westlaw citation
is currently available.

UNPUBLISHED OPINION. CHECK
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UNPUBLISHED
Court of Appeals of Michigan.

LAKESHORE GROUP, Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga, Kenneth Altman, Dawn Schumann, George Schumann, Marjorie Schumann, and Lakeshore Camping, Plaintiffs-Appellants,
v.
STATE of Michigan, Defendant,
and
Department of Environmental Quality, Defendant-Appellee.

No. 341310
|
December 18, 2018

Court of Claims, LC No. 17-000140-MZ

Before: Riordan, P.J., and Ronayne Krause and Swartzle, JJ.

Opinion

Per Curiam.

***1** In this case involving a claim under the Michigan Environmental Protection Act (MEPA), plaintiffs appeal as of right the order of the Court of Claims granting summary disposition to the Michigan Department of Environmental Quality (MDEQ) under MCR 2.116(C)(8). We affirm.

I. Background

Dune Ridge SA LP (Dune Ridge), a nonparty in this case but a defendant in related lawsuits, sought and received development permits from the MDEQ under the Sand Dunes Protection and Management Act (SDPMA), MCL 324.35301 *et seq.*, to transform a critical sand dunes area into a residential subdivision. Plaintiffs are the owners of land adjacent to the sand dunes who challenged the permits in an administrative contested-case hearing under MCL 324.35305. Plaintiffs' administrative challenge was initially dismissed on standing grounds by the administrative law judge. Plaintiffs appealed the dismissal, however, and the Ingham Circuit Court reversed the decision of the administrative law judge. The administrative challenge was subsequently reopened and is not part of this appeal.

At the same time plaintiffs appealed the dismissal of the administrative proceedings, they filed a lawsuit against both the MDEQ and Dune Ridge in Ingham Circuit Court, arguing that the MDEQ's issuance of the permits to Dune Ridge violated MEPA. The claims against the MDEQ were severed from those against Dune Ridge and the former were subsequently transferred to the Court of Claims. The claims against Dune Ridge remained in the Ingham Circuit Court action, and these are also not at issue here.

In the instant case, the Court of Claims granted the MDEQ's motion for summary disposition

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under MCR 2.116(C)(8), concluding that our Supreme Court's decision in *Preserve the Dunes v. Dep't. of Environmental Quality*, 471 Mich. 508; 684 N.W.2d 847 (2004), precluded plaintiffs from filing a direct judicial challenge to the MDEQ's permitting decision.

This appeal followed.

II. ANALYSIS

"We review de novo a trial court's grant or denial of summary disposition." *Tomra of North America, Inc. v. Dep't. of Treasury*, —— Mich. App. ——, ——; —— N.W.2d —— (2018) (Docket No. 336871); slip. op. at 2. "Summary disposition pursuant to MCR 2.116(C)(8) tests the legal basis of the claim and is granted if, considering the pleadings alone, the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery." *PIC Maint, Inc., v. Dep't. of Treasury*, 293 Mich. App. 403, 407; 809 N.W.2d 669 (2011) (cleaned up). We review issues involving statutory interpretation de novo. *Estes v. Titus*, 481 Mich. 573, 578-579; 751 N.W.2d 493 (2008).

The Natural Resources and Environmental Protection Act (NREPA) is composed of several subsidiary provisions, including MEPA and SDPMA. MEPA grants the public a right to bring an action in circuit court for "declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." MCL 324.1701(1). To prevail on a MEPA claim, the plaintiff must show "that the *conduct* of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources." MCL 324.1703 (emphasis added). "MEPA provides for immediate judicial review of allegedly harmful conduct" and "does not require exhaustion of administrative remedies before a plaintiff files suit in circuit court." *Preserve the Dunes*, 471 Mich. at 514, citing MCL 324.1701(2).

***2** SDPMA governs land areas that have been designated as "critical dune areas." See MCL 324.35301(c). Under SDPMA, a person seeking to use a critical dune area must first obtain a permit. See MCL 324.35304. The MDEQ is required to issue a permit unless it determines that the proposed use "will significantly damage the public interest" in the area. MCL 324.35304(1)(g).

Unlike under MEPA, the public generally does not have a right to challenge the issuance of a permit under SDPMA. Rather, SDMPA provides aggrieved owners of property immediately adjacent to the proposed use the right to challenge the issuance of a permit via an administrative contested-case hearing under the Administrative Procedures Act. MCL 324.35305(1); MCL 24.201 *et seq.* If the property owner does not prevail after all administrative remedies are exhausted, then the property owner may seek judicial review of the administrative decision. MCL 324.35305(2). This judicial review is limited, and the administrative decision will only be reversed if the decision is statutorily or constitutionally impermissible; arbitrary, capricious, or clearly an abuse of discretion; or is not supported by

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competent, material, and substantial evidence. MCL 24.306.

As noted *supra*, there are two other challenges involving the proposed sand-dune project. At issue in this appeal is whether plaintiffs can sue the MDEQ under MEPA for issuing the permit to Dune Ridge. Contrary to plaintiff's position, we find the Supreme Court's decision in *Preserve the Dunes* [1] dispositive here.

Our Supreme Court held in *Preserve the Dunes*, 471 Mich. at 519, that "MEPA provides no private cause of action in circuit court for plaintiffs to challenge the DEQ's determination of permit eligibility." Plaintiffs acknowledge this holding, but argue that the holding is limited to challenges to a permit based on procedural, not substantive matters. According to plaintiffs, *Preserve the Dunes* does not preclude an action under MEPA when the plaintiff alleges that the issuance of the permit will cause imminent environmental harm. We do not read *Preserve the Dunes* so narrowly.

In *Preserve the Dunes*, the MDEQ issued a permit to a mining company to mine in a critical dune area. *Id.* at 511. The plaintiffs —"an ad hoc organization of local citizens"— sued the MDEQ alleging that the department violated MEPA when it approved the mining permit. *Id.* at 512. The trial court analyzed the claim under MEPA, but found that plaintiffs had failed to make a prima facie showing that the adverse impact of the permit would impair or destroy natural resources. *Id.* at 513. This Court reversed the trial court, concluding that the MDEQ permitting decision could be challenged under MEPA and that the MDEQ's permit was invalid. *Id.* The Supreme Court then granted leave to appeal and reversed the Court of Appeals. *Id.*

The Supreme Court reasoned that the "focus of MEPA is on the defendant's *conduct*." *Id.* at 514 (emphasis added). It noted that MEPA controls the MDEQ's permitting decisions because the MDEQ is prohibited from approving a permit if the *applicant's conduct* violates MEPA. *Id.* at 515-516, citing MCL 324.63709. The Supreme Court distinguished MDEQ's conduct in approving a permit from the applicant's conduct in carrying out the permitted action. The Supreme Court noted that, to violate MEPA, the challenged conduct must "be likely to pollute, impair, or destroy" natural resources. *Id.* at 518. It then reasoned that an administrative decision, such as the issuance of a permit, "standing alone, does not harm the environment"; rather, only the applicant's conduct (permitted by the administrative decision) actually harms the environment. *Id.* at 519.

***3** The *Preserve the Dunes* Court rejected the notion that factual causation is enough to offend MEPA. Rather, the Supreme Court focused on the Legislature's use of the word "conduct" in MCL 324.1703. "Conduct" is not defined by MEPA or NREPA. The Oxford English Dictionary (2d ed), p. 690, defines "conduct" to mean the "action or manner of conducting, directing, managing, or carrying on." Thus, it is clear that, to be actionable under MEPA, the defendant's *actions* must pollute, impair, or destroy natural resources. As our Supreme Court pointed out, the "action" of an administrative decision does not pollute, impair, or destroy natural resources; at most, the "action" of an administrative decision

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authorizes conduct that does so. Simply put, the issuance of a permit is too far removed from the environmental harm to be actionable as "conduct" under MEPA.

Our Legislature created a bifurcated scheme for challenging a project like the one at issue here. A plaintiff can challenge the MDEQ's permitting decision at the administrative level with limited judicial review. MCL 324.35305(1); MCL 24.201 *et seq*. A plaintiff can also challenge the permit holder's actual conduct in a separate lawsuit without having to go through any administrative review. MCL 324.1701. What a plaintiff cannot do, however, is challenge the MDEQ's permitting decision in a lawsuit without first going through the administrative review process. With this lawsuit, plaintiffs tried to by-pass the administrative review process, and, accordingly, the Court of Claims properly granted summary disposition to the MDEQ under MCR 2.116(C)(8).

Affirmed.

Ronayne Krause, J. (dissenting).

I respectfully dissent. The majority accurately sets forth the background facts and relevant law. However, I disagree with the majority's reading of critical binding case law.

As we and the parties agree, the outcome of this appeal turns on how to read *Preserve the Dunes v. Dep't. of Environmental Quality* (*Preserve the Dunes II*), 471 Mich. 508; 684 N.W.2d 847 (2004).[1] Specifically, this matter turns on our Supreme Court's statement that "[a]n improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Preserve the Dunes II*, 471 Mich. at 519. When that statement is considered in context, I conclude that our Supreme Court did not hold that an improper administrative decision cannot constitute wrongful conduct under MEPA. Rather, it held that an improper administrative decision does not *necessarily* constitute wrongful conduct under MEPA.

In *Preserve the Dunes*, an entity called TechniSand possessed a pre-existing sand mining permit set to expire in 1993; TechniSand applied for, and the DEQ granted, an amended permit in late 1996. *Preserve the Dunes II*, 471 Mich. at 511-512. The amended permit allowed TechniSand to expand its mining operation from "a noncritical dune area into an adjacent critical dune area." *Preserve the Dunes v. Dep't. of Environmental Quality* (*Preserve the Dunes I*), 253 Mich. App. 263, 266; 655 N.W.2d 263 (2002). The plaintiff, Preserve the Dunes (PTD), sued TechniSand and the DEQ nineteen months later, alleging, in relevant part, "that the DEQ violated MEPA when it approved TechniSand's amended mining permit." *Preserve the Dunes II*, 471 Mich. at 512. Notably, the trial court had held a seven-day bench trial and specifically determined that TechniSands's mining operation would not adversely affect the environment sufficiently to constitute a violation of MEPA. *Id.*, 471 Mich. at 513, 518-519, 522, 524.

Furthermore, the analysis on appeal concerned TechniSands's *eligibility* for a permit. Eligibility is determined pursuant to MCL 324.63702(1) and MCL 324.63704(2), both of

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which "are unrelated to whether the applicant's proposed activities on the property violate MEPA." *Preserve the Dunes II*, 471 Mich. at 519. More specifically, MCL 324.63702(1) merely inquires into the nature of the permit already held by the operator, and MCL 324.63704(2) enumerates certain documents that an applicant must submit. *Id.*, 471 Mich. at 514-515. Thus, an eligibility assessment is strictly procedural and has nothing at all to do with the environment. The DEQ must *subsequently* make a determination of the applicant's environmental impact, which does implicate MEPA, under MCL 324.63709. *Id.* at 515-516. As noted, the trial court specifically determined that TechniSands's conduct would not harm the environment within the meaning of MEPA; consequently, there could be no implication of MCL 324.63709. *Id.*at 521. The Court of Appeals did not address the issue of actual environmental harm, and neither did our Supreme Court. *Id.*

Consequently, *in context*, the DEQ's permit eligibility determination did not have an effect on the environment. Our Supreme Court's statement that an "improper administrative decision, standing alone, does not harm the environment" *in that context* clearly means only what it literally says: a technicality is not an environmental harm. This becomes especially apparent in the Court's subsequent explanation that "any undotted 'i' or uncrossed 't' " should not be grounds for invalidating permits under MEPA. *Preserve the Dunes II*, 471 Mich. at 522. In contrast, the Court implied that the issuance of TechniSands's permit might contravene MCL 324.63709 if it were determined that TechniSands's mining would harm the environment. *Id.* at 521, 524. Again, the *eligibility* determination was merely the first procedural step in the permitting process; the DEQ was required to conduct an environmental impact analysis as the next step in the process. *Id.* at 515-516. A technical error in the eligibility analysis could not proximately cause any eventual environmental harm, because that second step would constitute an intervening and superseding cause. See *McMillian v. Vilet*, 422 Mich. 570, 576-577; 374 N.W.2d 679 (1985).

I agree with the majority that MEPA requires an analysis of a defendant's conduct. *Preserve the Dunes II*, 471 Mich. at 514, 517-519. However, I conclude that our Supreme Court in *Preserve the Dunes II* established nothing more remarkable than a traditional proximate causation analysis. Our Supreme Court did not hold that challenged conduct must be the single immediate and direct cause of the alleged environmental harm. It also did not hold that the issuance of a permit is necessarily too far removed from any environmental harm. Rather, it held that an administrative decision with no relevance to or impact on the environment cannot be challenged under MEPA merely because that decision is part of the cause-in-fact of some alleged environmental harm. I do not find support for the DEQ's contention that *Preserve the Dunes II* insulates all administrative determinations from MEPA challenges *per se*.

However, I caution that I find no "bright line" distinction between procedural and substantive administrative decisions. I take from *Preserve the Dunes II* that any particular challenged decision must be individually

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considered in its own unique factual and legal context to determine whether it has a proximate causal relationship to the alleged environmental harm. If the decision lacks such a proximate connection, or if there is in fact no environmental harm, then it is not subject to challenge under MEPA, even if the decision is clearly wrong. The trial court should have evaluated each of the DEQ's alleged errors to determine whether they had a proximate causal connection to the alleged environmental harm. I would hold that the trial court erred by concluding that plaintiffs were absolutely barred from bringing the instant claims under MCR 2.116(C)(8). I would reverse and remand for further consideration of the details of plaintiff's arguments.

All Citations

Not Reported in N.W. Rptr., 2018 WL 6624870

Footnotes

1 *Preserve the Dunes* was overturned by the Supreme Court in *Anglers of the AuSable, Inc. v. Dep't. of Environmental Quality*, 488 Mich. 69; 793 N.W.2d 596 (2010). Subsequently, the Supreme Court vacated its decision in *Anglers*, thereby reviving *Preserve the Dunes. Anglers of AuSable, Inc. v. Dep't. of Environmental Quality*, 489 Mich. 884; 796 N.W.2d 240 (2011). Accordingly, *Preserve the Dunes* is binding precedent on this Court. MCR 7.315.

1 Considerable emphasis was placed at oral argument on *Anglers of the AuSable, Inc. v. Dep't. of Environmental Quality*, 488 Mich. 69; 793 N.W.2d 596 (2010). Because that case was subsequently vacated, I decline to consider it. *Anglers of the AuSable, Inc. v. Dep't. of Environmental Quality*, 489 Mich. 884; 769 N.W.2d 240 (2011). In light of my dissenting posture, I also need not consider the significance of the Court of Appeals decision in that matter.

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