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STATE OF MICHIGAN
IN THE SUPREME COURT

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

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

Appellants,

v.

MICHIGAN PUBLIC SERVICE COMISSION, et al.,

Appellees.

Supreme Court No. 168335

Court of Appeals Nos. 369156, 369159, 369161, 369162, 369165 (consolidated)

MPSC Case No. U-20763

JOINT REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

BY BAY MILLS INDIAN COMMUNITY, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, ENVIRONMENTAL LAW AND POLICY CENTER, AND MICHIGAN CLIMATE ACTION NETWORK

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INTRODUCTION

Respondents Michigan Public Service Commission and Enbridge Energy do not seriously contest that this case is of fundamental importance to the people of Michigan. Enbridge proposes a massive Project to bore an oil pipeline tunnel beneath the Straits of Mackinac, which would significantly impact the Great Lakes, Tribal interests and rights, and Michigan's natural resources. Respondents characterize the proposed tunnel as a "safety improvement" and "environmentally protective" compared to the existing 70-year-old dual pipelines crossing the lakebed. This framing is misleading.

Respondents assume a false binary choice between either approving this Project or accepting the dual pipelines' operation in perpetuity. Both involve unacceptable environmental risks. The Michigan Environmental Protection Act ("MEPA"), however, requires courts and agencies to independently determine the Project's likely environmental effects and analyze feasible and prudent alternatives, including utilizing available capacity in other pipelines and alternate means of transport. The entire point of MEPA is to ensure that decisions with potential to pollute, impair, or destroy Michigan's natural resources are fully evaluated and not just compared to the status quo. Contrary to Respondents' rhetoric, Applicants do not seek a "shutdown" or reassessment of "the entirety" of Line 5. What Applicants *do* seek is that MEPA be correctly applied to this enormous Project, so that all likely environmental effects and alternatives are determined through independent, de novo judgments.

This Court's review is essential to correct two broadly important legal errors made by the Commission and the Court of Appeals and to provide guidance to agencies and lower courts to abide by the crucial environmental protections enacted in MEPA and enshrined in the Michigan Constitution. First, the Court of Appeals erroneously applied a deferential standard of review instead of making the independent, de novo determinations required by MEPA, as recognized by this Court in *West Michigan Environmental Action Council, Inc v Natural Resources Commission*, 405 Mich 741, 752-53; 275 NW2d 538 (1979), cert den 444 US 941 (1979) ("*WMEAC*"). Second, the Court of Appeals erred by ratifying the Commission's decision to exclude some of the tunnel's likely environmental effects, including prolonged risk of oil spills and other pollution due to extending the pipeline's operation by several decades, which skewed MEPA's required alternatives analysis. If left uncorrected, the decision below will create conflict with precedents and uncertainty in the state's MEPA jurisprudence, cause material injustice to

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Applicants and other parties challenging agency permitting decisions, and open the door to agencies and courts disregarding their responsibilities under MEPA to protect Michigan's air, water, and natural resources.

I. RESPONDENTS' ARGUMENTS CONFIRM THE NEED FOR THIS COURT'S REVIEW.

The Application satisfies the grounds for leave to appeal. Respondents offer no persuasive counterarguments and instead reinforce the need for this Court's review.

A. Issues of Significant Public Interest

This case presents issues of significant public interest, including: (1) Michigan's constitutional duty to protect the environment for its citizens; (2) Tribal treaty rights and interests; and (3) the preservation of the Great Lakes and mitigation of the effects of climate change. See MCR 7.305(B)(2). Respondents do not and cannot refute this. Both the Commission and Enbridge ignore that this case implicates the Michigan Constitution's declaration that the conservation of natural resources is a "paramount public concern in the interest of the health, safety and general welfare of the people." Const 1963, art IV, § 52. They also fail to recognize that this case impacts Tribal Nations' treaty-protected rights. Further, while the Commission discusses the dual pipelines' grave risk to the Great Lakes, it disregards the significant public interest in protecting this massive freshwater system. Enbridge misinterprets the language of MCR 7.305(B)(2) when it argues that because, in its view, the tunnel is a good idea, the case does not involve an issue of significant public interest. Enbridge Answer, p 32. Enbridge also misleadingly suggests that 2018 Public Act 359 and its own 2018 agreements with the State conclusively determine that the proposed tunnel is in the public interest, omitting that they expressly preserve MEPA review as part of the permitting process.

Respondents Propane Gas Associations, for their part, fail to acknowledge the centrality of MEPA to the protection of the Great Lakes and other critical natural resources. The Associations' argument that the Supreme Court cannot review every high-profile case simply has no bearing on the merit of the Application here, nor do the cases they cite even address the significant public interest factor (let alone issue definitive holdings on the matter). MPGA/NPGA Answer, pp 3-4 (citing cases denying leave to appeal without analyzing significant public interest factor).

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In short, Respondents minimize the issues to obscure what is at stake: the need for the Supreme Court to ensure that agencies and courts consistently fulfill their responsibilities under Michigan's Constitution and MEPA to protect the State's precious natural resources.

B. Legal Principles of Major Significance

This case involves significant legal principles. See MCR 7.305(B)(3). The incorrect interpretation of MEPA in proceedings below, and the Court of Appeals' failure to review the Commission's MEPA determinations de novo, undermine the legislative framework, existing jurisprudence, and the Constitution's requirement to protect natural resources.

The Commission argues that, "[w]ith respect to demonstrating that the issue is of major legal significance, this Court has stated that the Commission's statutory interpretations are entitled to respectful consideration and cannot be overturned without cogent reasons." MPSC Answer, p 24 (citing *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103 (2008)). But, in *SBC Michigan*, this Court accepted the appeal and then reversed the Court of Appeals in part because it inappropriately deferred to the Commission's interpretation of a statute. This Court resolved an issue of major legal significance in that case and should do so here.

Enbridge argues that the Court of Appeals' decision "clarifies" the law. Enbridge Answer, p 24. That argument actually reinforces Applicants' point that the decision below made new law that departs from this Court's precedents. Moreover, Enbridge's own shifting positions on the standard of review illustrate the jurisprudential confusion created by the decision below. See *infra* Section II.

The Propane Gas Associations tie themselves in knots trying to argue that this case does not involve issues of major legal significance, claiming that some applicants' appeal of one issue and others' focus on another issue somehow diminishes the significance of all issues. MPGA/NPGA Answer, p 4. This defies common sense: all applicants need not raise the same issue for this Court to accept an appeal. The Associations also incorrectly argue that this case only "involves a 'narrow dispute' of the Commission's application of MEPA." *Id.* at 5 (quoting *Gulf Underwriters Ins Co v McClain Indus, Inc*, 483 Mich 1010 (2009) (YOUNG, J, concurring)). The Court of Appeals' erroneous interpretations of MEPA in this case have broad implications for future agency permitting decisions and for judicial review of those decisions.

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C. Material Injustice and Conflict with Other Decisions

The Court of Appeals' decision applying an improper, deferential standard of review is clearly erroneous and will cause material injustice if not reversed. This decision conflicts with MEPA's plain language and this Court's precedents. See MCR 7.305(B)(5).

In *WMEAC*, this Court unequivocally held that courts have a responsibility to make independent, de novo judgments when reviewing agency MEPA decisions. 405 Mich at 752-53. MEPA "provides for de novo review in Michigan courts, allowing those courts to determine any adverse environmental effect." *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 30; 576 NW2d 641 (1998). The Court of Appeals itself previously rejected the argument that de novo review applies only to MEPA suits originating in circuit court. *Thomas Twp v John Sexton Corp of Mich*, 173 Mich App 507, 510-11; 434 NW2d 644 (1988); see also *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 489-90; 608 NW2d 531 (2000); *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541, 546; 432 NW2d 315 (1988). The Court of Appeals' decision in this case fundamentally conflicts with these consistent precedents. This Court's review is needed to provide clear guidance to agencies and lower courts so that decisions affecting the environment do not evade the judicial scrutiny the Legislature intended by enacting MEPA.

II. THE DECISION BELOW APPLIED THE WRONG STANDARD OF REVIEW.

Respondents urge this Court to ignore the Court of Appeals' erroneous application of a deferential standard of review to the MEPA claims below. This deferential standard is contrary to MEPA's plain language and this Court's precedents. Application, pp 16-23. This legal error, unless corrected, will introduce conflict and uncertainty in the State's jurisprudence and cause material injustice by preventing judicial scrutiny of agency permitting decisions. *Id.* at 23-26. Respondents' arguments actually reinforce why this Court's review is necessary.

The decision below makes new law. Before that decision altered the legal landscape, Enbridge agreed that MEPA requires de novo review: "This Court reviews de novo the Commission's determinations under MEPA." Application Attachment 4, p 27 (citing *WMEAC*). Without acknowledging its own shifting position, Enbridge concedes that "the Court of Appeals' decision below *clarifies*"—makes new law on—what Enbridge now calls "the differing form of judicial review for challenges brought under MEPA Sections 1701 and 1705." Enbridge Answer, p 24 (emphasis added).

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Respondents disregard MEPA's plain language and depart from this Court's precedents. MEPA Section 1705 mandates that "in *any* judicial review" of an agency proceeding, the environmental effects "shall be determined" by the reviewing court, and conduct "shall not be authorized or approved" if it has or likely will have negative effects and a "feasible and prudent alternative" exists. MCL 324.1705(2) (emphasis added). The Commission does not offer any interpretation of this statutory language, while Enbridge isolates a single word—"determine," which it defines as "come to a decision"—while overlooking the rest of the statute's text. Enbridge Answer, p 17. Enbridge then declares: "A court's *only role* is to confirm that the PSC's Section 1705 factual determination is supported by record evidence." *Id.* at 25 (emphasis added). That is not just an extreme position; it is the *opposite* of the position Enbridge took below, where it advocated for de novo review. Enbridge's about-face illustrates the jurisprudential uncertainty created by the decision below. And the newfound interpretation advanced by Respondents violates multiple core legal principles.

First, by ignoring the rest of the statutory language, particularly "in *any* judicial review," Respondents fail "to give meaning to every word in a statute without rendering other parts of a statute surplusage." *Dine Brands Global, Inc v Eubanks*, ___ Mich ___; ___ NW3d ___ (2025) (Docket Nos. 165391, 165392), slip op at 25. This Court in *WMEAC* construed all of MEPA's sections together as a whole—including the language that now appears in Section 1705(2)—and held that MEPA "requires independent, de novo determinations by the courts." 405 Mich at 752-53.

Second, although Enbridge suggests that "determine" in Section 1705(2) signals deference while the word "adjudicate" in Section 1704(3) requires de novo review (Enbridge Answer, pp 18-19), it overlooks that "determine" also appears in Section 1704. In *WMEAC*, this Court construed both words together, concluding that according to MEPA, "the court has a responsibility to 'adjudicate' *and* 'determine' whether 'adequate protection from pollution, impairment or destruction has been afforded.' Courts can discharge their responsibility to make *such determinations* only if they make independent, de novo judgments." 405 Mich at 753 (emphases added); see also *Robinson v City of Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010) (when the Legislature "uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute").

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Third, Respondents' invention of "a two-pronged approach" (Enbridge Answer, p 18) or "two silos of cases involving MEPA" (Commission Answer, pp 27-29) flouts the primary goal of statutory interpretation "to discern and give effect to the Legislature's intent." *Daher v Prime Healthcare Servs-Garden City, LLC*, ___ Mich ___; ___ NW2d ___ (2024) (Docket No. 165377), 2024 WL 3587935, at *4 (quoting *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs*, 500 Mich 362, 373; 902 NW2d 293 (2017)) (Application Attachment 5); see also *Dine Brands*, slip op at 18. Contrary to Respondents' argument, MEPA's statutory language does not establish one form of judicial review for challenges originating in circuit court under Sections 1701-1704, and another for challenges in agency proceedings under Section 1705. Indeed, the Legislature enacted MEPA to make "a dramatic change" by shifting responsibility for "the important task of environmental law enforcement" away from agencies and to the courts. *Ray v Mason County Drain Comm'r,* 393 Mich 294, 305; 224 NW2d 883 (1975). MEPA "would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands." *WMEAC*, 405 Mich at 754. Respondents' argument for deferential review of agency decisions defies the Legislature's intent.

Fourth, the decision below creates a problematic conflict with precedents. Embracing the distinction drawn by the Court of Appeals, Respondents claim that "*WMEAC* applies *only* to a MEPA lawsuit initiated [in circuit court] under Section 1701." Enbridge Answer, p 18; see also Commission Answer, pp 30-33. This Court's own analysis in *WMEAC* flatly refutes that contention—this Court first found that the lower court's failure to exercise its "own totally independent judgment" under MEPA constituted reversible error, and then made the statutorily-required independent, de novo determinations "on the record presented." 405 Mich at 753-55. *WMEAC* demonstrates that appellate courts *can* conduct "review de novo," negating Respondents' off-point argument that circuit courts are best situated to take additional evidence when conducting "trial de novo." See *Walker v Wolverine Fabricating & Mfg Co, Inc*, 425 Mich 586, 600, 616-18; 391 NW2d 296 (1986) (distinguishing "review de novo" from "trial de novo"); Application, pp 19-23 (anticipating Respondents' argument). *WMEAC* is not distinguishable—the decision below creates a clear conflict.

Fifth and finally, this conflict will produce jurisprudential confusion and bad public policy. What Respondents advocate for, and the decision below incorrectly allows, is a regime where courts review MEPA claims under fundamentally different legal standards, depending on

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if a case involves the Railroad Act versus other statutes or claims; if it initiates before a circuit court versus an agency; or if it gets appealed first to the Court of Appeals versus a circuit court. That does not comport with MEPA's plain language or this Court's precedents. It will result in bad public policy, inconsistent judicial oversight of environmental reviews, and confusion among lower courts trying to apply MEPA. Accordingly, this Court's review in this case is warranted and necessary.

III. THE COMMISSION IMPROPERLY LIMITED THE SCOPE OF MEPA.

Applicants agree with the Commission that Line 5 in its current configuration poses an unacceptable risk to Michigan's natural resources. Commission Answer, pp 34-35. However, the pipeline tunnel will perpetuate many of those risks—not solve them—and cause additional environmental impairments. Contrary to Respondents' mischaracterizations (Enbridge Answer, pp 24; Commission Answer, pp 38-40), Applicants' MEPA claims do not collaterally attack Line 5 or its 1953 license. Applicants instead seek a legally compliant, proper MEPA review of Enbridge's *new* Project, which would extend the life of a failing pipeline. The mere fact that the Project would prolong the operation of existing infrastructure does not excuse the Commission or Enbridge from fully analyzing the likely effects of that choice or its feasible and prudent alternatives.

Respondents' interpretation of Section 1705 ignores the phrase "likely to have such an effect" and focuses too narrowly on the word "conduct." Commission Answer, pp 36-38; Enbridge Answer, pp 27-30. The effects of conduct can, and often do, go beyond the immediate footprint of a given project, and MEPA calls for a "statewide perspective." *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich App 495, 507; 320 NW2d 668 (1982). The Project here will prolong the operation of Line 5, particularly in the face of ongoing legal challenges to the dual pipelines crossing the Straits, thereby causing *significant* effects beyond the Project footprint. Application, pp 32-34. Enbridge and the Commission wrongly assume that the dual pipelines would operate indefinitely without the Project, continuing the impairments from Line 5 regardless of the tunnel's approval. Yet Enbridge is not building a billion-dollar pipeline tunnel out of the goodness of its heart; without it, the pipeline's continued operation is in doubt, as even

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the Commission acknowledges. Commission Answer, p 34-35.[1]

Respondents rely on *Buggs v Public Service Commission*, an unpublished Court of Appeals opinion, issued January 13, 2015, 2015 WL 159795 (Enbridge Answer, Attachment 1), but nothing in it supports circumscribed MEPA analysis. *Buggs* simply found that the Commission must follow MEPA and evaluate the environmental effects of a proposed pipeline.[2] *Id*. at *7-8. In fact, the *Buggs* court remanded to the Commission for a proper MEPA review of the allegations before the Commission, while at the same time recognizing in dicta that a later proceeding would address the effects of future pipeline projects. *Id.* at *9. Here, the pollution risk from oil spills flows directly from *this* Project's perpetuation of *this* pipeline's operation, which is an effect the Commission was required to analyze under MEPA. This risk does not flow from "future, tangential or unrelated conduct." See Commission Answer, pp 36-37. The plain language of MEPA and this Court's decision in *State Highway Commission v Vanderkloot*, 392 Mich 159, 183-85; 220 NW2d 416 (1974), make clear that agencies must consider these types of effects when evaluating a project.

The Commission wrongly excluded oil spill risk along the pipeline when considering the tunnel's likely environmental effects, while at the same time assessing oil spill risk along the entire route of rail transport alternatives. This improperly skewed MEPA's required alternatives analysis because the Commission compared the oil spill risks for only a four-mile segment of pipeline in the tunnel to alternative methods of transportation stretching hundreds of miles.[3] *See* Application, pp 35-36. The Court of Appeals called this obvious inconsistency "concerning," but deferred to it nonetheless. COA Opinion, p 24 ("[I]t is concerning that the PSC, when discussing rail transport, looked to … how many rivers and wetlands a rail system would cross but then did

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[1] Moreover, Enbridge's overly narrow interpretation of MEPA, Answer, pp 28-30, conflicts with this Court's decisions in *WMEAC* and *Nemeth*. Application, pp 33-34.

[2] Here, the Court of Appeals noted that "'the Commission has *never* … examined how [a] proposed pipeline segment could affect the lifespan of an existing interconnected pipeline system.'" COA Opinion, p 13 (quoting April 21, 2021 In Limine Order (emphasis added)). *Buggs* reveals why: prior to 2015, the Commission did not even believe MEPA applied to pipeline decisions.

[3] The Commission's alternatives assessment also failed to properly account for the feasibility of alternate methods of transporting Line 5 products, such as existing pipeline infrastructure, as noted in the amicus curiae brief of Michigan Attorney General Dana Nessel before the Court of Appeals.

not mention the same statistics for Line 5 as a whole."). This arbitrary analysis is not just concerning, however. It violates MEPA, which requires an informed comparison of the Project and its alternatives to "prevent or minimize degradation to the environment." *Ray*, 393 Mich at 306.

CONCLUSION

For the reasons above and in their Application, Applicants respectfully request that the Court grant them leave to appeal.

Dated: May 21, 2025

Respectfully submitted,

By: /s/ *Adam Ratchenski*

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STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of MCR 7.305(E)(3) because, excluding the parts of the document exempted, it contains 3,195 words.

Dated: May 21, 2025 /s/ *Adam Ratchenski*