STATE OF MICHIGAN
IN THE COURT OF APPEALS

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 AND POLICY CENTER, and MICHIGAN CLIMATE ACTION NETWORK,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, *et al*.,

Appellees.

Supreme Court No. _____

Court of Appeals No. 369156, 369159, 369161, 369162, 369165 (consolidated)

MPSC Case No. U-20763

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NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

Please take notice that on April 2, 2025 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 filed an Application for Leave to Appeal the Court of Appeals' February 19, 2025 Opinion in Docket Nos. 369156, 369157, 369159, 369161, 369162, 369163, 369165 and 369231 (consolidated) with the Michigan Supreme Court. A copy of the Application for Leave to Appeal is attached.

April 2, 2025

Respectfully submitted,

Digitally signed by Christopher M. Bzdok
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JOINT 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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STATEMENT IDENTIFYING ORDER APPEALED

This is an application for leave to appeal a published opinion of the Court of Appeals dated February 19, 2025.[1] The Court of Appeals affirmed the Michigan Public Service Commission's December 1, 2023 Final Order in Case No. U-20763, which granted the application of Enbridge Energy, Limited Partnership ("Enbridge") pursuant to 1929 PA 16, MCL 483.1 *et seq*. ("Act 16") and Rule 447 of the Commission's Rules of Practice and Procedure.[2]

[1] *In re Application of Enbridge Energy to Replace and Relocate Line 5*, ___ Mich App ___; ___ NW3d ___ (2025) (Docket Nos. 369156, 369159, 369161, 369162, 369163, 369165, 369231) (hereinafter "COA Opinion"). The opinion of the Court of Appeals is Attachment 1.

[2] The Commission's December 1, 2023 Final Order is Attachment 2.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals misconstrue and misapply the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 *et seq*. by failing to conduct a de novo review of an agency's MEPA analysis determinations?

The Court of Appeals answered: No.

The Applicants answer: Yes.

2. Did the Court of Appeals and Michigan Public Service Commission misconstrue and misapply MEPA's requirement that administrative agencies assess whether proposed conduct "has or is likely to have such an effect" of causing the pollution, impairment or destruction of natural resources, or the public trust in those resources, which thereby led them to improperly exclude the Intervenors' testimony on the effects of the Line 5 tunnel project and to conduct a faulty comparison of feasible and prudent alternatives to the tunnel project?

The Commission answered: No.

The Court of Appeals answered: No.

The Applicants answer: Yes.

INTRODUCTION

This case is of fundamental importance to the people of Michigan, the state's natural resources, and the bedrock protections laid out in the Michigan Constitution and the Michigan Environmental Protection Act. It involves the protection of the state's natural resources from Enbridge Energy's plan to construct a massive tunnel beneath the Straits of Mackinac to house and extend the life of its 70-year-old Line 5 pipeline, enabling the daily transport of more than half a million barrels of oil across the Great Lakes—the largest freshwater system on Earth—for the next century. The unprecedented project has significant environmental consequences, including heightened risks of oil spills and increases in greenhouse gas pollution, affecting areas of special importance to Michigan's Tribal Nations and the natural resources of all Michiganders. As a result, this is a case of significant public interest and importance that has engaged the Governor, Attorney General, state administrative agencies, Tribal Nations, environmental and conservation organizations, and businesses taking different positions.

Despite the magnitude of this project affecting an environmentally sensitive and culturally significant area, the Michigan Public Service Commission (the "Commission") disregarded clear constitutional mandates and statutory provisions—and this Court's precedents—that require state agencies to prioritize the protection of Michigan's air, water, and other natural resources when deciding whether to issue permits. In affirming the Commission's decision to issue a permit to Enbridge, the Court of Appeals made two legal errors of major significance to this State's jurisprudence that require correction by this Court:

First, the Court of Appeals applied the wrong standard of review under the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 *et seq*. The Court erroneously deferred to the Commission's decision rather than making its own independent, de novo determinations as mandated by MEPA's plain language and this Court's precedents. See MCL 324.1705(2); *West Mich Environmental Action Council, Inc v Natural Resources Comm*, 405 Mich 741, 752; 275 NW2d 538 (1979), cert den 444 US 941 (1979) ("*WMEAC*"); *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 30-31; 576 NW2d 641 (1998). The Court of Appeals' decision explicitly narrows this Court's holding in *WMEAC*, incorrectly asserting that it applies to only circuit courts rather than all courts. Moreover, the decision conflicts with other decisions of the Courts of Appeals.

Second, the Court of Appeals either misunderstood or disregarded MEPA's twin commands that administrative agencies and reviewing courts "shall determine the alleged

pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources" from a proposed project, and forbids the approval of a project "that has or is likely to have such an effect if there is a feasible and prudent alternative." MCL 324.1705(2). MEPA requires agencies and courts to review the *full* range of likely effects from the issuance of a permit and determine whether feasible and prudent alternatives would prevent or minimize those effects. *Ray v Mason County Drain Comm'r,* 393 Mich 294, 30; 224 NW2d 883 (1975); *State Hwy Comm v Vanderkloot*, 392 Mich 159, 183; 220 NW2d 416 (1974). By affirming the Commission's in limine ruling excluding evidence of oil spill risk from Line 5 and, in turn, limiting the alternatives analysis, the Court of Appeals violated these statutory requirements.

The Court of Appeals' failure to properly enforce and apply MEPA's environmental review and determination framework contravenes the statute's plain language, the Legislature's intent, and the "common law of environmental quality" developed by this Court over the course of decades. *Ray,* 393 Mich at 888. Review by this Court is critical to preserving clarity in the law and to ensuring that state agencies and courts engage in the rigorous review required by the Act.

These failures jeopardize the sanctity of the Great Lakes and the Tribal economic and cultural interests and treaty-protected rights, which are inherent rights, including "the usual privileges of occupancy"—such as the rights to fish, hunt, and gather, in perpetuity. They also threaten to harm everyone who depends on the Great Lakes for drinking water, recreation, or economic benefit because all likely effects of the proposed project, including oil spills, have not been considered. The Environmental Law and Policy Center and the Michigan Climate Action Network, along with Tribal Nations, have been grappling with the way climate change has already begun to impact the Great Lakes basin, and this massive tunnel project will only exacerbate these harms by causing an annual net increase of 27 million metric tons of carbon dioxide emissions.

Accordingly, the Applicants respectfully request that this Court accept this application for leave to appeal the Court of Appeals' decision, reverse that decision, and vacate the Commission's Final Order. Applicants also support the application for leave to appeal submitted by For the Love of Water.

GROUNDS FOR GRANTING THIS APPLICATION FOR LEAVE TO APPEAL

Ample grounds exist for this Court to grant this application for leave to appeal pursuant to MCR 7.305(B)(2), (3), and (5). These are summarized below and discussed in the Argument.

MCR 7.305(B)(2): This case against a state agency, the Michigan Public Service Commission, involves matters of significant public interest, including the preservation of the Great Lakes, and Michiganders' constitutional right to environmental protection, the safeguarding of treaty-protected rights and Tribal interests, and the mitigation of climate change. Additionally, this case involves a proposed tunnel and pipeline under the Straits of Mackinac to transport 540,000 barrels of oil each day through the Great Lakes for the next 99 years, which has been the subject of extensive public interest and engagement.

MCR 7.305(B)(3): This case involves legal principles of great significance to the State's jurisprudence. These include the principles embedded in Article IV, Section 52 of the Michigan Constitution, MEPA, and this Court's jurisprudence applying those laws, all of which reflect the paramount public interest that the people of Michigan and their Legislature place on environmental protection and preservation of the State's natural resources. The Commission's and the Court of Appeals' incorrect interpretation of MEPA, and the Court of Appeals' failure to review the Commission's MEPA determinations de novo, undermine the Constitutional and legislative framework, and existing jurisprudence, designed to protect the Great Lakes and Michigan's other natural resources from pollution, impairment, and destruction.

MCR 7.305(B)(5): The Court of Appeals' decision applies an incorrect, unduly deferential standard of review, and conflicts with decisions of this Court and other decisions of the Courts of Appeals holding that MEPA requires de novo review. As discussed in detail below, the Court of Appeals' decision explicitly purports to narrow the holding of this Court's decision in *WMEAC*, 405 Mich at 752-55.

Further, the Court of Appeals' decision also conflicts with other decisions of the Courts of Appeals applying de novo review to MEPA claims. See, e.g., *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 487-90; 608 NW2d 531 (2000); *Friends of Crystal River v Kuras Props,* 218 Mich App 457, 470-72; 554 NW2d 328 (1996); *Thomas Twp v John Sexton Corp of Mich*, 173 Mich App 507, 510-11, 515-17; 434 NW2d 644 (1988); *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541, 546; 432 NW2d 315 (1988); *Mich Waste*

Sys v Dep't of Natural Resources, 147 Mich App 729, 735; 383 NW2d 112 (1985). By accepting review of this case, this Court can bring clarity to these conflicting decisions.

Moreover, additional decisions of the Courts of Appeals have indicated that a "clearly erroneous" standard of review applies to a trial court's factual findings, even in MEPA cases. See *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 264 Mich App 257, 259; 690 NW2d 487 (2004); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 8-9; 596 NW2d 620 (1999); *Trout Unlimited, Muskegon-White River Chapter v White Cloud*, 209 Mich App 452, 456; 532 NW2d 192 (1995); *City of Portage v Kalamazoo Co Rd Comm*, 136 Mich App 276, 279; 355 NW2d 913 (1984). Those decisions apply a standard of review that is different from the standard applied by the Court of Appeals' decision in this case. This Court can clarify the proper standard of review applicable to courts' determinations required by MEPA, including when those determinations involve factual findings. Similarly, the Court can correct the Commission's improper interpretation of MEPA's operative language.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. Enbridge Proposed to Build a Pipeline and Tunnel Under the Straits of Mackinac.

The Line 5 pipeline ("Line 5") was originally constructed in 1953, prior to Michigan's 1963 Constitution, and the enactment of MEPA and virtually all state and federal environmental laws, and without consultation with the Tribal Nations whose treaty-protected territory the pipeline traverses and threatens. Line 5 runs from Superior, Wisconsin to Sarnia, Ontario, crossing hundreds of interconnected waters along its path. COA Opinion, p 7 (citing December 1, 2023 Final Order). It can carry 540,000 barrels of oil per day. *Id*. Where it crosses the Great Lakes in the Straits of Mackinac, Line 5 splits into the Dual Pipelines that are located on the lakebed or, in many places, suspended in the water (the "Dual Pipelines"). Since their construction, the Dual Pipelines have been struck by anchors of passing vessels and have not been maintained or inspected in a sufficient manner. See Notice of Revocation & Termination of Easement, Exhibit ELP-18, pp 5-7, 15 (Doc No. U-20763-1046) (TI Appendix[3] N at 717-19, 727).

[3] "TI Appendix" refers to Tribal Intervenors-Appellants' Appendix in Court of Appeals Docket No. 369159 (April 11, 2024).

On April 17, 2020, Enbridge filed with the Commission an Application 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. The Commission's jurisdiction over the permit application is based on its authority to regulate oil pipelines under Act 16, MCL 483, 483.1(2), and the Commission's Rule 447 governing construction of pipeline facilities, Mich Admin Code, R 792.10447(1)(c). COA Opinion, p 6. In its permit application, Enbridge sought approval to completely replace the existing Dual Pipelines, consisting of two 20-inch-wide pipelines, with a new 30-inch-wide pipeline to be housed within a tunnel to be constructed underneath the lakebed crossing the Straits (the "Project"). *Id*. at 6-7. Enbridge proposed that the new pipeline would then be connected to other segments of Line 5 on each side of the Straits of Mackinac, to continue the flow of oil through Line 5 for another century. COA Opinion, p 8 (citing December 1, 2023 Final Order).

B. The Intervenors Opposed Enbridge's Proposed Project

Following the submission of Enbridge's permit application, Bay Mills Indian Community ("Bay Mills"), the Grand Traverse Band of Ottawa and Chippewa Indians ("GTB"), the Little Traverse Bay Bands of Odawa Indians ("LTBB") the Nottawaseppi Huron Band of the Potawatomi ("NHBP") filed Petitions to Intervene, with supporting affidavits, in opposition to the proposed project. See Petitions to Intervene (Doc Nos. U-20763-0059, -0110, -0165, -0167). The Straits is a place of great spiritual, cultural, and economic significance for Tribal Nations. See Revised Direct Testimony of Pres. Whitney Gravelle, 10 Tr 1417 (Doc No. U-20763-1049) (TI Appendix H at 650). The Tribal Intervenors expressed strong interest in protecting their traditional lifeways (including their treaty-protected right to hunt, fish, and gather) from harm caused by Enbridge's proposed Project.[4] As described in Bay Mills' Petition:

> The operation of current Line 5, and the prospect of the siting and construction of a tunnel in the Straits of Mackinac for the transport of petroleum products, is the most obvious and most preventable risk to the fishery resources throughout northern Lakes Michigan and Huron. [Affidavit of Pres. Bryan Newland, Bay Mills' Petition to Intervene, p 4 para 11 (Doc No. U-20763-0059) (TI Appendix O at 750).]

[4] Critical fishery resources—including whitefish—have already suffered harm and been made vulnerable due to climate change impacts. See Revised Direct Testimony of Pres. Whitney Gravelle, 10 Tr 1428-30 (Doc No. U-20763-1049) (TI Appendix H at 661-63).

Three of the four Tribal Intervenors—Bay Mills, GTB and LTBB—have interests in the Great Lakes and Straits of Mackinac that are protected by a treaty with the United States. Threatened with removal from their homeland, the Ottawa (alternatively "Odawa") and Chippewa concluded the 1836 Treaty in which they transferred to the United States almost half of the land and water that would become the State of Michigan: about 14 million acres of land and inland waters and 13 million surface acres in Lakes Michigan, Huron, and Superior. Treaty of 1836, 7 Stat 491; see also Bay Mills Petition to Intervene, pp 1-2 (Doc No. U-20763-0059).[5] In ceding the lands and waters, the Tribal Nations reserved the rights to hunt, fish, and gather throughout the ceded territory. 7 Stat 491. These rights have been confirmed by state and federal courts. See *People v LeBlanc*, 399 Mich 31; 248 NW2d 199 (1976); *United States v Michigan*, 471 F Supp 192, 278-81 (WD Mich, 1979), aff'd 653 F2d 277 (CA 6, 1981), cert den 454 US 1124 (1981); *Grand Traverse Band of Chippewa & Ottawa Indians v Dir, Mich Dep't of Natural Resources*, 971 F Supp 282, 288-89 (WD Mich, 1995), aff'd 141 F3d 635 (CA 6, 1998).

On August 13, 2020, the ALJ granted the petitions to intervene of the Tribal Intervenors, Environmental Law & Policy Center ("ELPC"), Michigan Climate Action Network ("MiCAN"), and other parties, and set a schedule for the contested case proceedings. See Scheduling Memo (Doc No. U-20763-0222). Pursuant to MEPA, MCL 324.1705(1), the intervenors asserted that the Commission's consideration of Enbridge's permit application involved "conduct that has, or is likely to have, the effect of polluting, impairing or destroying the air, water, or other natural resources or the public trust in these resources."

C. The Commission's In Limine Order Constrained the Scope of Its MEPA Analysis.

At the beginning of the contested case, before the parties had the opportunity to conduct discovery and develop evidence, Enbridge filed a motion in limine (the "Motion In Limine") to exclude six categories of evidence and issues that it argued were legally irrelevant. COA Opinion, p 10. The six categories were: (1) the construction of the tunnel, (2) the environmental impact of the tunnel construction, (3) the public need for and continued operation of Line 5, (4)

[5] Bay Mills, GTB, and LTBB (as well as Sault Ste. Marie Tribe of Chippewa Indians and Little River Band of Ottawa Indiana) are successors to the signatories of the 1836 Treaty and are collectively known as "the 1836 Treaty Tribes." Although not one of the 1836 Treaty Tribes, NHBP and its members consistently maintain their culture and way of life through many of the same natural resources. NHBP Petition to Intervene, p 1 (Doc No. U-20763-0167).

the current operational safety of Line 5, (5) climate change, and (6) the Intervenors' "climate agendas." *Id.*

Enbridge argued that evidence about the public need for, current operational safety, and continued operation of Line 5 was outside the scope of the case. *Id*. The Intervenors countered that this evidence was relevant under MEPA because pollution risk from extending the operation of Line 5 for additional decades would be a likely effect of the Project. Joint Response to Motion In Limine by Michigan Environmental Council ("MEC"), GTB, Bay Mills, et al., pp 26-28 (Doc No. U-20763-0326).

On October 23, 2020, the ALJ issued a ruling on the Motion In Limine. (Doc No. U-20763-0396) (TI Appendix B). The ALJ denied the motion as it pertained to issues of tunnel construction and its environmental impact but granted the motion in all other respects. The ALJ explained that the parties did have the right to submit evidence about the public need for the proposed tunnel project, but that "any evidence concerning the current and future operational aspects of the entirety of Line 5, including the public need and safety issues, is outside the scope of the case." *Id*. at 16 (TI Appendix B at 369).

On November 6, 2020, the parties who had opposed the Motion In Limine filed applications for leave to appeal pursuant to Rule 433 of the Commission's Administrative Hearing Rules. (Doc Nos. U-20763-0419, -0420, -0421, -0423). The Attorney General filed a brief indicating her support for, and joinder in, the four applications for leave to appeal. (Doc No. U-20763-0422).

On November 13, 2020, while the applications for leave to appeal were pending, the State of Michigan notified Enbridge that it was in violation of its 1953 Easement for the Dual Pipelines, and that the Easement itself was void since its inception. COA Opinion, pp 10-11; Notice of Revocation & Termination of Easement (Doc No. U-20763-1046) (TI Appendix N). The Governor and the Michigan Department of Natural Resources found that Enbridge "breached or violated the standard of due care and its obligations to comply with the conditions of the Easement" by: (1) ignoring the requirement that each pipeline be physically supported at least every 75 feet "virtually the entire time the Easement has been in place"; (2) failing to "inspect, timely repair, and disclose exceedances of pipe spans to the State of Michigan"; (3) failing to timely investigate the condition of the pipeline coating/wrap despite its poor condition; and (4) ignoring exceedances of pipeline curvature standards. COA Opinion, pp 12-16; Notice,

pp 12-16 (TI Appendix N at 724-28). The Notice of Revocation and Termination further noted that Enbridge "produced few contemporaneous records and little evidence that it conducted a pipeline inspection and maintenance program from 1953 to the late 1990s or early 2000s—i.e., during most of the Easement's existence." *Id*. at 2 n 1 (TI Appendix N at 714).

On December 9, 2020, the Commission remanded Enbridge's Motion In Limine to the ALJ in light of the Notice of Revocation and Termination. (Doc No. U-20763-0480). After additional briefing from the parties, the ALJ issued a second decision on Enbridge's Motion In Limine on February 23, 2021. (Doc No. U-20763-0602) (TI Appendix C). This second ruling was substantially the same as the first. On March 9, 2021, the parties opposing the Motion In Limine again filed petitions for leave to appeal. (Doc Nos. U-20763-0620, -0622, -0624, -0625).

On April 21, 2021, the Commission issued its ruling on Enbridge's Motion In Limine. (Doc No. U-20763-0713) (TI Appendix D) (Attachment 3). The Commission reversed the ALJ's ruling with respect to greenhouse gas emissions. COA Opinion, p 14. It found that "the allegations of GHG [greenhouse gas] pollution made by several intervenors to this case fit within the statutory language of Section 5 of MEPA, and therefore must be reviewed in this case." Order on Motion In Limine, p 66 (TI Appendix D at 471). In reaching this conclusion, the Commission stated: "It defies both well accepted principles of statutory interpretation as well as common sense to apply MEPA to a pipeline *but not to the products being transported through it.*" *Id*. at 64 (TI Appendix D at 469) (emphasis added). The Commission further explained: "While the project under consideration is limited to the 4-mile section of the pipeline described in the application, this pipeline section would involve hydrocarbons that may result in GHG pollution that must be subject to MEPA review." *Id*. at 66-67 (TI Appendix D at 471-72).

However, despite these statements, the Commission upheld the exclusion of evidence related to the history of oil spills from Line 5 and the risks of future spills resulting from the Project, stating: "Issues raised by Bay Mills and other intervenors on potential pollution, impairment, and destruction of Michigan's natural resources resulting from existing sections of Line 5 are . . . outside the scope of the Commission's MEPA review . . . ." *Id*. at 64 (TI Appendix D at 469). The Intervenors had argued that such evidence was crucial in evaluating the likely environmental effects of the Project because "Line 5 crosses over 290 rivers and streams—many of which the Tribes have treaty rights to, which are interconnected and, which flow to the Great

Lakes." Joint Response to Motion In Limine by MEC, GTB, Bay Mills, et al., p 29 (Doc No. U-20763-0326).

D. The Evidence Was Substantially Limited by the Commission's In Limine Order.

Following the Commission's April 2021 Order on Enbridge's Motion In Limine, the parties submitted evidence, subject to the constraints set by the Order, including testimony that described the negative impacts that the construction, operation, and maintenance of the Project would have on the Tribal Nations and their treaty-protected resources. See, e.g., Gravelle Direct, 10 Tr 1415-21 (TI Appendix H at 648-54); Hemenway Direct, 9 Tr 1192-93 (TI Appendix I at 669-70); Wiatrolik Direct, 9 Tr 1181-86 (TI Appendix J at 673-78); LeBlanc Direct, 10 Tr 1514 (TI Appendix K at 682). However, the ALJ struck entire passages of that evidence, stating that it was "outside the scope" of the Commission's Order. See January 13, 2022 Order (Doc No. U-20763-1009).

The stricken evidence included testimony from Jacques LeBlanc, a Tribal fisherman, pertaining to the impact on fisheries—which are vital to the cultural and economic stability of Tribal Nations—from the pollution and impairment caused by the "continued operation of Line 5 and reliance on fossil fuels." *Id*. at 6. The ALJ characterized Mr. LeBlanc's testimony, as "a generalized concern over the effects of climate change," and granted Enbridge's motion to strike. *Id*. at 6-7. Also stricken was testimony offered by John Rodwan, NHBP's Environmental Department Director, which included the only evidence offered in this matter regarding the demonstrated effects on wild rice and other Tribal resources that Tribal Nations suffered following a catastrophic oil spill from an Enbridge pipeline. *Id.* at 15-16. Bay Mills President Whitney Gravelle's testimony was also stricken, even though it articulated critical information about Tribal concerns, including the alternatives analysis in the Dynamic Risk Report—a report that analyzed alternatives to Line 5 crossing underneath the Straits and the very report that the Commission later determined was "particularly informative in determining public need for the Replacement Project." *Id*. at 7-8; December 1, 2023 Final Order, p 300 (Doc No. U-20763-1454) (TI Appendix A at 301) (Attachment 2).

On July 7, 2022, the Commission issued an order reopening the contested case to receive additional evidence but did not admit the previously excluded evidence. Order, p 47 (Doc No. U-20763-1257). The parties submitted pre-filed direct and rebuttal testimony, and in April 2023 the

ALJ presided over a five-day hearing. Following the hearing, the parties submitted written briefs to the Commission and the record was again closed for review.

E. The Commission Approved Enbridge's Permit Application.

On December 1, 2023, the Commission issued an order approving Enbridge's permit application. (Doc No. U-20763-1454) (TI Appendix A). In this Final Order, the Commission again acknowledged its obligation to review Enbridge's permit application in light of the requirements imposed by MEPA: "In addition, pursuant to MCL 324.1705, the Commission must perform a MEPA review in pipeline siting cases." *Id.* at 37. Despite this acknowledgement, the Commission's Final Order referenced and incorporated its interpretation of MEPA from its April 21, 2021 In Limine Order, which barred the Intervenors from submitting evidence about pollution, impairment, and destruction of natural resources from an increased risk of oil spills. *Id*. at 39. The Commission also rejected the Tribal Intervenors' Joint Petition for Rehearing on the decision to exclude evidence regarding oil spill risks. *Id.* at 43-52.

Ultimately, and even with its self-imposed limited scope of analysis, the Commission concluded that the proposed project would likely "pollute, impair and destroy natural resources," but it then determined that "there are no feasible and prudent alternatives to the Replacement Project pursuant to MEPA." *Id*. at 331, 347 (TI Appendix A at 332, 348). To reach this conclusion, the Commission assessed oil spill risk for the *full length* of various alternative transportation routes, against the oil spill risk for only the *short length* of Line 5 that would run through the tunnel (roughly four miles rather than the hundreds of miles of Line 5 that the oil would traverse if the tunnel is constructed).

F. The Court of Appeals Deferred to the Commission's MEPA Determinations.

Bay Mills, GTB, LTBB, and NHBP, ELPC, MiCAN, Michigan Environmental Council ("MEC"), Tip of the Mitt Watershed Council, National Wildlife Federation, and For Love of Water filed timely appeals of the Commission's December 1, 2023 Final Order with the Michigan Court of Appeals. These Appellants argued that the Commission erred by failing to satisfy its MEPA responsibilities by granting Enbridge's motion to exclude evidence about risks of, and likely pollution from, oil spills along the length of Line 5, and then conducting an alternatives analysis that considered the impairments from the entire length of the alternatives but not those associated with Line 5. They also argued that while the Commission correctly

determined that greenhouse gases should be considered in the MEPA analysis, it then failed to follow MEPA in rendering its Final Order. The Court of Appeals consolidated the appeals and held oral argument on January 14, 2025. On February 19, 2025, the Court of Appeals, in a published opinion, affirmed the Commission's Final Order approving Enbridge's permit application. COA Opinion, p 31.

When discussing the appropriate standard of review for evaluating the MEPA claims, the Court of Appeals distinguished this Court's seminal decision in *WMEAC*, 405 Mich 741, by characterizing it as made "in the context of 'an environmental protection act case . . . filed in a circuit court.'" COA Opinion, p 23; see also 405 Mich at 749. The Court of Appeals reasoned that it, "of course, serves a different role from that of a circuit court and is not a finder of fact . . . ." COA Opinion, p 23.

Regarding the exclusion of evidence about oil spill risks and the resulting pollution, impairment, and destruction of natural resources under MEPA, the Court of Appeals focused on the word "conduct" when it stated that several appellants "contend that the Commission erred by failing to consider the risks of oil spills from Line 5 as a whole when making its environmental findings. But the proceedings at issue involved an application for the Replacement Project, and the 'conduct' sought to be 'authorized or approved' was the Replacement Project." *Id*. at 24. The Court did not address arguments raised by Appellants regarding the meaning and import of the phrase "has or is likely to have such an effect," and what that requires of the Commission in its MEPA analysis. The Court affirmed the Commission's decision and adopted its interpretation of the scope of effects that must be considered under MEPA. *Id*. It held that the Commission correctly looked only to the "desired 'conduct'" proposed by the applicant pursuant to the plain language of MCL 324.1705(2). *Id*.

The Court of Appeals went on to reject the argument that the Commission's failure to consider oil spills—likely to result from the Project—led to a flawed alternatives analysis. Notably, the Court of Appeals stated, "We acknowledge that it is concerning that the PSC, when discussing rail transport, looked to the effect of rail being used for the entire transport system . . . the Commission mentioned, for example, how many rivers and wetlands a rail system would cross but then did not mention the same statistics for Line 5 as a whole." *Id*. at 24; see, e.g., December 1, 2023 Final Order, pp 339, 341.

The Court of Appeals also rejected the arguments about the Commission's improper consideration of greenhouse gases. The Court once again deferred to the Commission, (1) stating that the Commission supported its conclusions with reference to certain testimony; and (2) acknowledging the Commission's lack of explanation for why it did not emphasize certain effects over others but concluding that sufficient support existed. COA Opinion, p 28.

The Court of Appeals also stated that the Commission considered the evidence submitted in the case, but did not reference the evidence that was excluded and not considered.

STANDARD OF REVIEW

This Application presents two legal issues that are subject to de novo review by this Court. The first issue is whether the Court of Appeals applied the appropriate standard of review under MEPA. "As a general proposition, this Court reviews de novo questions of law." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 97; 754 NW2d 259 (2008). A lower court's choice of the appropriate standard of review, including whether a statute requires one in particular, is a question of law, which is reviewed de novo on appeal. See *Palo Grp Foster Care, Inc v Mich Dep't of Social Servs*, 228 Mich App 140, 145; 577 NW2d 200 (1998). The second issue addresses the Commission's interpretation of MEPA—where it misinterpreted and then incorrectly applied Section 1705(2) by reviewing the Project and its alternatives on vastly different terms—and the Court of Appeals' affirmance of that statutory interpretation. Questions of statutory interpretation are reviewed de novo. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011).

HISTORY AND SCOPE OF MEPA

The case rests on Michigan's bedrock constitutional and statutory environmental protection framework. Michigan's Constitution expressly prioritizes environmental protection and obligates the Legislature to advance that goal:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. [Const 1963, art IV, § 52.]

This Court has held that this constitutional declaration imposes a "mandatory legislative duty to act to protect Michigan's natural resources." *Vanderkloot*, 392 Mich at 178-79. "[F]ollowing its constitutional mandate, the Legislature led the national conservation and

environmental protection movement by enacting the Michigan Environmental Protection Act" in 1970. *Lakeshore Group v Michigan*, 510 Mich 853, 856; 977 NW2d 789 (2022) (WELCH, J., dissenting).

Section 1705(2) of MEPA sets forth the requirements for agencies and reviewing courts in connection with administrative proceedings:

> In administrative, licensing, or other proceedings, *and in any judicial review of such a proceeding*, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, *shall be determined*, and conduct *shall not be authorized or approved* that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare. [MCL 324.1705(2) (emphasis added)].

MEPA provides that administrative agencies and reviewing courts must determine "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources," and forbids the approval of a project "that has or is likely to have such an effect if there is a feasible and prudent alternative." *Id.* Soon after MEPA's enactment, this Court recognized that it "represents a comprehensive effort on the part of the legislature to preserve, protect and enhance the natural resources so vital to the well being of this State." *Vanderkloot*, 392 Mich at 183. This Court further described the significance and purpose of MEPA as implementing "a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies," in recognition that "[n]ot every public agency proved to be diligent and dedicated defenders of the environment." *Ray v Mason Co Drain Comm'r*, 393 Mich at 305; 224 NW2d 883 (1975). In sum, through the enactment of MEPA pursuant to its constitutional mandate, the Legislature "impose[d] a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities." *Id.* at 306.

ARGUMENT

This case presents the Supreme Court with an opportunity to clarify its MEPA precedent. See *Lakeshore Group*, 510 Mich at 862 (WELCH, J., dissenting from order denying application for leave to appeal, joined by MCCORMACK, C.J., and CAVANAGH, J.) ("The Court has missed an opportunity to clarify its precedent and the applicability of MEPA to final administrative decisions authorizing conduct that will or is likely to harm our state's natural resources or the

public trust in those resources."). The Court of Appeals' decision in this case introduces the risk of uncertainty and inconsistency in lower courts' interpretation and application of MEPA. The Court of Appeals erred in two important ways. First, it applied a deferential standard of review rather than independently determining environmental impacts de novo, as MEPA and this Court's precedents require. Second, the Court of Appeals affirmed the Commission's narrow interpretation of MEPA's scope to exclude evidence of oil spill risk and thereby improperly restricted the requisite alternatives analysis. If left uncorrected, these legal errors will muddy the waters of the State's MEPA jurisprudence. This Court's review is necessary to clarify how lower courts must discharge their responsibility to fulfill MEPA's mandate. See *id.* (WELCH, J., dissenting) (recognizing a need for courts "to analyze the intricacies of how MEPA interacts with an agency's duties under specific permitting statutes"); *id.* at 853 (BERNSTEIN, J., concurring) ("Like Justice Welch, I am troubled by some of the uncertainty and inconsistency in the interpretation of MEPA."). Accordingly, we respectfully request that this Court grant this application in order to correct an appellate decision in conflict with this Court's precedents, to reinforce the Legislature's intent and goals in enacting MEPA, and to uphold the Michigan Constitution's "paramount public concern" for protecting the air, water, and natural resources that are so vital to Tribal Nations and all Michiganders.

I. THIS CASE WARRANTS REVIEW TO CORRECT THE COURT OF APPEALS' APPLICATION OF THE WRONG STANDARD OF REVIEW UNDER MEPA.

Both the Applicants, as Intervenors below, *and Enbridge* urged the Court of Appeals that it must review the Commission's MEPA determinations de novo under this Court's decision in *WMEAC*, 405 Mich at 752-55. See Excerpt from Enbridge's Brief (Attachment 4). The Court of Appeals, however, expressly declined to follow *WMEAC*, instead adopting a deferential standard of review. That decision contravenes the plain language of MEPA, which mandates that "in any judicial review" of an administrative proceeding, the environmental impacts of the proposed conduct "shall be determined." MCL 324.1705(2). This Court, in *WMEAC*, held that "[c]ourts can discharge their responsibility to make such determinations" under MEPA "only if they make independent, de novo judgments." 405 Mich at 753. The Court of Appeals' attempt to distinguish *WMEAC* makes new law and does not withstand scrutiny. This Court can correct the Court of Appeals' legal error and provide clear direction on the standard of review applicable to MEPA

claims to ensure that lower courts properly and consistently discharge their responsibility under MEPA.

A. MEPA Requires Independent De Novo Determinations by Courts.

This case involves the obligations that MEPA imposes upon administrative agencies and the courts reviewing administrative proceedings. MEPA requires that courts make independent de novo determinations of a proposed project's actual and likely environmental impacts.

1. *MEPA's Plain Language Reflects the Legislature's Intent that Courts Make Independent De Novo Determinations of Environmental Impacts.*

The plain language of Section 1705(2) of MEPA, quoted in full above, sets forth the requirements for agencies and reviewing courts in connection with administrative proceedings: It directs that both in the underlying administrative proceedings and in judicial review of those proceedings, the environmental impacts of proposed conduct "shall be determined," and then directs that the conduct "shall not be authorized or approved" if it has or likely will have negative impacts and a "feasible and prudent alternative" exists. MCL 324.1705(2).

This Court "interpret[s] statutes to discern and give effect to the Legislature's intent" by "focus[ing] on the statute's text" where "undefined terms are presumed to have their ordinary meaning" and the statute is "considered as a whole, reading individual words and phrases in the context of the entire legislative scheme. Unambiguous statutes are enforced as written." *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)) (Attachment 5). The ordinary meaning of to "determine" is "to fix conclusively or authoritatively" or "to find out or come to a decision about by investigation, reasoning, or calculation." See Merriam-Webster, *Determine* <https://www.merriam-webster.com/dictionary/determine> (accessed April 1, 2025).[6] Moreover,

[6] See *People v. Wood*, 506 Mich 114, 122; 954 NW2d 494 (2020) (recognizing that the Supreme Court consults dictionary definitions to determine the plain and ordinary meaning of words). The Minnesota Supreme Court has ascertained the plain meaning of "determine" by consulting dictionary definitions, which it summarized as follows:

> One definition ascribed to the word "determine" is "to find out or come to a decision about by investigation, reasoning, or calculation." Merriam–Webster's Collegiate Dictionary 340 (11th ed. 2014). Another source defines "determine" as "to settle or

"[t]he Legislature's use of the word 'shall' . . . indicates a mandatory and imperative directive." *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014); see also *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002) ("The phrases 'shall' and 'shall not' are unambiguous and denote a mandatory, rather than discretionary action."). The statutory text of Section 1705(2) thus plainly and unambiguously places a mandatory obligation on a reviewing court, as well as on the administrative agency, to determine—i.e., to conclusively decide based on investigation, reasoning, and calculation—any "pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources." MCL 324.1705(2).

This does not allow for judicial deference to the agency. While an agency must make its own determination during the administrative proceeding, the statutory text separately imposes upon a court "in any judicial review of such a proceeding" an independent and distinct obligation to itself determine the environmental impacts. Section 1705(2) does not direct or allow a court to defer to an agency's determination of those impacts; instead, it directs the court to make its own independent determination. Moreover, "[w]hen interpreting a statute," as this Court recently explained, the Court's "purpose is to ascertain and effectuate the legislative intent at the time it passed the act." *Daher*, 2024 WL 3587935, at *4. The Legislature enacted MEPA to make "a dramatic change" in how "the important task of environmental law enforcement" functions in the State by shifting this responsibility away from the administrative agencies to the courts. *Ray*, 393 Mich at 305. MEPA reflects the legislative intent to remove deference to agency environmental determinations and, instead, require independent de novo environmental determinations by courts.

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decide (a dispute, question, etc.) by an authoritative or conclusive decision." The Random Dictionary of the English Language 542 (2d ed. 1987). Lastly, Black's Law Dictionary defines "determine" as "[t]he act of finding the precise level, amount, or cause of something." Determine, Black's Law Dictionary (11th ed. 2019). To summarize, these unambiguous and synonymous definitions of "determine" mean the process of making a decision. [*Hibbing Taconite Co, J.V. v. Comm'r of Revenue*, 958 NW2d 325, 329 (Minn, 2021).]

2. *This Court's Precedents Hold that MEPA Requires Independent, De Novo Determinations of Environmental Impacts by Courts.*

Consistent with MEPA's plain language and the statutory purpose, this Court has recognized that "the Michigan environmental protection act requires independent, de novo determinations by the courts." *WMEAC*, 405 Mich at 752. "The environmental protection act would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands." *Id.* at 754. Accordingly, MEPA "provides for de novo review in Michigan courts, allowing those courts to determine any adverse environmental effect and to take appropriate measures." *Nemeth*, 457 Mich at 30. "'Michigan courts are not bound by any state administrative finding.'" *Id.* at 31 (quoting *Her Majesty the Queen v Detroit*, 874 F2d 332, 341 (CA 6, 1989)); see also *Her Majesty the Queen*, 874 F2d at 338 (finding MEPA requires courts to exercise "independent judgment" and "[t]his de novo review feature of MEPA is based on the fact that, as recognized by Michigan's Supreme Court, 'not every public agency proved to be diligent and dedicated defenders of the environment'" (citing *WMEAC*, 405 Mich at 753-54; quoting *Ray*, 393 Mich at 305)); *Nemeth*, 457 Mich at 30-31 (citing with approval the discussion of MEPA in *Her Majesty the Queen*, 874 F2d at 337, 341).

In *WMEAC*, this Court held that the trial court erred under MEPA by deferring to the Michigan Department of Natural Resources' ("DNR") conclusion that no pollution, impairment, or destruction of the environment would result from drilling oil and gas wells in a state forest. 405 Mich at 751-54. The DNR initiated an administrative proceeding to grant drilling leases and permits to oil companies. Environmental groups intervened, invoking MEPA, and separately filed suit to enjoin DNR from issuing the permits. *Id.* at 748-50. After both the trial court and the Court of Appeals denied injunctive relief, this Court granted the environmental groups' application for leave to appeal. *Id.* at 750.

The environmental groups in that case argued that the trial court erred by deferring to the DNR's conclusion that no environmental harm would result from the contemplated drilling, rather than independently determining whether such harm would occur. *Id.* at 752. This Court addressed that argument by considering each section of MEPA, including the language presently

contained in Section 1705(2),[7] and recognized that in the statute, "the Legislature specifically addressed the relationship between suits brought under the environmental protection act and administrative proceedings." *Id.* at 752-53. The Court emphasized that under MEPA, Michigan courts have "a responsibility to 'adjudicate' and 'determine' whether 'adequate protection from pollution, impairment or destruction has been afforded.'" *Id.* at 753. The Court then stated that Michigan "[c]ourts can discharge their responsibility to make such determinations only if they make independent, de novo judgments." *Id.* The Court observed that, "[s]hortly after the environmental protection act was passed, its chief legislative sponsor stated that 'under the new statute, courts may inquire directly into the merits of environmental controversies, rather than concern themselves merely with reforming procedures or with invalidating arbitrary or capricious conduct.'" *Id.* at 754 (quoting State Representative Thomas Anderson).

Based on this analysis, the Court in *WMEAC* "conclude[d] that the trial judge erred in failing to exercise his own totally independent judgment." *Id.* But rather than remand the case to the lower courts, *this Court itself proceeded to perform the independent, de novo review of the record that MEPA requires*, ultimately finding that the environmental organizations demonstrated a likelihood of impairment or destruction of natural resources as a result of the proposed drilling. *Id.* at 754-760. The Court therefore "conclude[d] that a judgment in favor of [the environmental organizations] is required on the record presented." *Id.* at 754.

This Court's decision in *WMEAC* remains good law and is the seminal analysis of what MEPA requires of Michigan courts in cases involving environmental impacts, including when reviewing MEPA claims challenging agency decisions. See *Lakeshore Group*, 510 Mich at 858-62 (WELCH, J., dissenting from order denying application for leave to appeal, joined by MCCORMACK, C.J., and CAVANAGH, J.) (discussing *WMEAC*); *Nemeth*, 457 Mich at 32-35 (discussing *WMEAC*). Panels of the Michigan Court of Appeals have repeatedly recognized *WMEAC* as the controlling precedent regarding the standard of review for claims brought under MEPA. See *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 487-90; 608 NW2d 531 (2000) ("In a MEPA case, it is error requiring reversal for the trial court to defer to an administrative agency's conclusion that no pollution, impairment, or destruction of a natural resource will occur." (citing *Nemeth*, 457 Mich at 34; *WMEAC*, 405 Mich at 752-54)); *Friends of*

[7] At that time, this section of MEPA, MCL 324.1705, was located at MCL 691.1205.

Crystal River v Kuras Props, 218 Mich App 457, 470-72; 554 NW2d 328 (1996) (rejecting the trial court's use of the "substantial evidence test" and holding that trial court was required to review the case de novo (citing *WMEAC*, 405 Mich at 752-53)); *Thomas Twp v John Sexton Corp of Mich*, 173 Mich App 507, 510-11, 515-17; 434 NW2d 644 (1988) (where the trial court "declined to engage in a de novo review of the [agency's] decision under MEPA," holding that "[t]o the extent this case involves MEPA issues, we will use a de novo standard of review" (citing *WMEAC*, 405 Mich at 752-54)); see also *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541, 546; 432 NW2d 315 (1988) ("However, the Supreme Court has clarified that 'the Michigan environmental protection act requires independent, de novo determinations by the courts.'" (quoting *WMEAC*, 405 Mich at 752)); *Mich Waste Sys v Dep't of Natural Resources*, 147 Mich App 729, 735; 383 NW2d 112 (1985) ("Under the Michigan Environmental Protection Act (MEPA), . . . review by the circuit court is de novo." (citing *WMEAC*)).

B. The Court of Appeals Misinterpreted *WMEAC* and Contravened the Legislature's Intent Reflected in MEPA's Plain Language.

Even though the Court of Appeals recognized that this Court's *WMEAC* decision requires de novo review in MEPA cases (COA Opinion p 23), it purported to distinguish *WMEAC* as "an environmental protection act case . . . filed in a circuit court" requiring simply "that a circuit court must look at the evidence de novo in a MEPA case." *Id.* The Court of Appeals reasoned that, whereas a circuit court must independently review an agency's MEPA determinations de novo, the Court of Appeals need not apply that standard of review when *it* considers an agency's MEPA determinations. *Id.* This distinction does not withstand scrutiny and puts the Court of Appeals in conflict with decisions of this Court and of other Court of Appeals' panels. This Court's intervention is required to restore jurisprudential uniformity to this critical issue for lower courts' interpretation and application of MEPA in this case and other cases.

First, this Court itself demonstrated in *WMEAC* that the "responsibility to make [MEPA] determinations" by "mak[ing] independent, de novo judgments" *extends to all "courts,"* not just to circuit courts. 405 Mich at 753. After concluding that a court's "fail[ure] to exercise [its] own totally independent judgment" under MEPA constituted reversible legal error, this Court itself then proceeded to make the required independent, de novo judgment "on the record presented," ultimately finding "a likelihood of impairment or destruction of natural resources … as a result

of the proposed drilling." *Id.* at 753-755. It is not surprising, then, that in citing and discussing *WMEAC* in other opinions since having decided it more than forty years ago, this Court has never limited *WMEAC's* holding solely to circuit courts. This Court's own resolution of *WMEAC* evidences conclusively that the obligation to make independent, de novo determinations under MEPA applies equally to appellate and trial courts.

Second, the Court of Appeals' errant interpretation of *WMEAC* puts it in conflict not only with that decision but with prior decisions of the Courts of Appeals. The Applicants have not located any other decision of the Courts of Appeals concluding that *WMEAC* applies only to judicial review by circuit courts. Indeed, the Court of Appeals previously rejected that very distinction in *Thomas Township*, where the reviewing court had "declined to engage in a de novo review of the [agency's] decision under MEPA, reasoning that de novo review would only have been appropriate if petitioner had filed an original action in circuit court." 173 Mich App at 511. Relying on *WMEAC*, the Court of Appeals rejected the trial court's reasoning as legally incorrect and "use[d] a de novo standard of review" for the MEPA issues. *Id.* (citing *WMEAC*, 405 Mich at 741, 752-54).

Third, there is no legal or logical basis for the Court of Appeals' distinction. Section 26 of the Railroad Commission Act provides that judicial review of orders of the Public Service Commission occurs in the first instance in the Court of Appeals. MCL 462.26(1). Other statutory schemes like the Administrative Procedures Act provide for initial judicial review of agency decisions at the circuit court level. See, e.g., MCL 24.303(1). There is no rational reason why the mandatory determinations of environmental impacts required under MEPA should be made differently depending on which court has been assigned the responsibility for reviewing an agency decision in the first instance. Put differently, it makes no sense that a Court of Appeals would defer to an agency's MEPA determinations, but a circuit court would make its own, independent, de novo determinations without deferring to an agency.

The Court of Appeals' observation that, in contrast with a circuit court, it "is not a finder of fact" (COA Opinion, p 23), makes the attempted distinction no more sensible, because *WMEAC* shows that independent, de novo determinations under MEPA are not the sole province of an agency or a trial court, but also must be made by appellate courts "on the record presented." *WMEAC*, 405 Mich at 754-55; see also *Friends of Crystal River*, 218 Mich App at 472 ("analyzing the MEPA claim" requires "a thorough review de novo of the entire record"

(citing *WMEAC*, 405 Mich at 741, 752-53)). This Court has recognized the difference between, on the one hand, "review de novo" based on "an examination of the entire record below and weighing of all the evidence presented there as if there had been no prior determination," and on the other hand, "trial de novo" involving an entirely new evidentiary proceeding before a fact-finder with new and original evidence. *Walker v Wolverine Fabricating & Mfg Co, Inc*, 425 Mich 586, 600, 616-618; 391 NW2d 296 (1986). In *WMEAC*, this Court performed the required independent review de novo, but it did not conduct a trial de novo or engage in new fact-finding. This refutes the Court of Appeals' reasoning that it "is not a finder of fact."

Finally, the Court of Appeals also attempts to distinguish a court's role under Section 1705(2) of MEPA, as in this case, from "factual circumstances" where "a circuit court us[es] an administrative tribunal to conduct certain proceedings" under Section 1704 of MEPA. COA Opinion, p 23 (citing MCL 324.1704). This is a distinction without a difference. In fact, in *both* sections of the statute, the Legislature used the same language requiring that courts "determine" environmental impacts. Just like Section 1705(2), Section 1704 also requires that "the court *shall adjudicate* the impact . . . on the air, water, or other natural resources," and "the court retains jurisdiction . . . *to determine* whether adequate protection from pollution impairment, or destruction is afforded." MCL 324.1704(2), (3) (emphasis added). "[U]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute." *Robinson v City of Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010) (citing *Paige v Sterling Hts*, 476 Mich 495, 520; 720 NW2d 219 (2006)). Rather than supporting the Court of Appeals' reasoning, comparison of these two sections of MEPA undermines it. Both Section 1704 and Section 1705(2) reflect the Legislature's intent that courts make independent, de novo determinations of environmental impacts under MEPA.

C. Clarification of the Standard of Review Is Needed to Ensure Lower Courts Properly and Consistently Discharge Their Responsibility Under MEPA.

This Court has the opportunity to clarify its precedent on the proper standard of review under MEPA. The Court of Appeals' decision in this case, applying the wrong standard of review, conflicts with decisions of this Court and other Courts of Appeals and introduces risk of uncertainty and inconsistency in other lower courts' MEPA decisions. Absent correction by this Court, lower courts will lack the necessary guidance on when and how, consistent with this Court's *WMEAC* decision, they must "discharge their responsibility" under MEPA to

"'determine' whether 'adequate protection from pollution, impairment or destruction has been afforded" by "mak[ing] independent, de novo judgments." 405 Mich at 753. This Court's review and clarification are needed for several reasons.

First, only this Court can resolve the conflict between the Court of Appeals' decision and this Court's decision in *WMEAC*. The Court of Appeals' attempt to distinguish *WMEAC* does not withstand scrutiny, as discussed above, but so long as its published opinion stands uncorrected, lower courts will lack direction on reconciling the Court of Appeals' reasoning and this Court's precedent. Moreover, this Court's review can also bring clarity to inconsistencies between the Court of Appeals' decision in this case and other decisions where the Courts of Appeals reviewed MEPA claims de novo, and still other decisions where the Court of Appeals applied a clearly erroneous standard of review to trial courts' factual findings under MEPA. See cases cited above at pages 5-6. This Court can, and should, eliminate uncertainty and inconsistency in lower courts' interpretation and application of MEPA by reviewing, and reversing, the Court of Appeals' erroneous decision in this case.

Second, a material injustice will occur, and a fundamental failure of the state's jurisprudence effectuating MEPA will persist, if this Court does not accept this appeal and correct the Court of Appeals' use of the wrong standard of review. Even though this case involves the permit decision for an unprecedented Project with enormous environmental consequences, ***no court has*** independently determined the Project's environmental impacts de novo under MEPA, and ***no court will*** do so unless this Court requires such review. This results from the combination of two strands of the State's MEPA jurisprudence developing in the Courts of Appeals: (1) the Court of Appeals' decision in *Lakeshore Group v Michigan*,[8] and (2) the decision at issue here. As Justices of this Court have pointed out, "[t]he Court of Appeals' decision in [*Lakeshore Group*] demonstrates that" the Supreme Court's decision in "*Preserve the Dunes*[9] has been read to foreclose *all* direct MEPA challenges against government agencies that are based on the issuance of a permit or license authorizing third-party conduct that will or is

[8] See *Lakeshore Group v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued December 18, 2018 (Docket No. 341310), 2018 WL 6624870 (cited for reference and not for a proposition of law; a copy of the opinion is Attachment 6).

[9] *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004).

likely to harm the state's natural resources." *Lakeshore Group,* 510 Mich at 860 (WELCH, J., dissenting) (emphasis in original). This is "a matter of practical and jurisprudential importance." *Id.* It means that the Court of Appeals "applie[s] *Preserve the Dunes* as a blanket rule that denies the ability of persons to sue a state agency when the person claims that the issuance of a permit or license violates MEPA." *Id.* at 859. The only option to challenge a permitting decision is "to utilize the administrative appeal process." *Id.*

As a result of this "blanket rule," here, the Applicants could not have obtained judicial review of the Commission's issuance of a permit in the circuit court by filing a direct MEPA lawsuit. The Court of Appeals has foreclosed that option. The only option available to the Applicants was the administrative appeal process. Yet, despite the Applicants' engagement in that process, the Court of Appeals has now decided that it defers to the Commission's MEPA determinations; the Court does not make its own independent, de novo determinations. In short, the Applicants cannot obtain independent, de novo judicial review from the Court of Appeals, or from any other court. Thus, ***no court*** will fulfill MEPA's requirements here. Unless this Court corrects it, this material injustice not only affects the Applicants here but also threatens to prejudice other persons desiring to challenge agency permit decisions and to undermining MEPA's salutary goals.

Finally, without this Court's review and direction, the Court of Appeals' decision risks opening the door to other lower courts erroneously applying agency enabling statutes, as the Court of Appeals did here, to effectively override the requirements of MEPA by replacing independent, de novo judicial review with deference to the agency. In this case, the Court of Appeals adopted a deferential standard of review applicable to Public Service Commission orders fixing rates, fares, charges, classifications, regulations, practices, or services. COA Opinion, p 18 (citing MCL 462.25 and MCL 462.26). The Court of Appeals ruled that "[i]n all appeals" of those types of orders "the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." *Id.* (citing MCL 462.26(8)). It further ruled that "practices and services prescribed by the [Commission] are presumed, prima facie, to be lawful and reasonable." *Id.* (citing MCL 462.25). The Court explained that, in its view, the Commission is given "a broad range or zone of reasonableness within which [it] may operate" and "the hurdle of unreasonableness is high." *Id.* (internal quotations omitted). The Court of Appeals concluded that

it "gives due deference to the PSC's administrative expertise and is not to substitute its judgment for that of the PSC." *Id.* (internal quotations omitted).

These strong statements of deference to the Commission, which the Court grounded in the Commission's enabling statute, are contrary to MEPA's plain language, the Legislature's intent in enacting the statute, and the "common law of environmental quality" developed by the courts applying MEPA's mandate. The Court of Appeals' decision sets a precedent that other lower courts could follow to interpret other agency enabling statutes to allow courts to defer to agencies' MEPA determinations. Moreover, the Court of Appeals' deference to the Commission here cannot be grounded in any specific agency expertise related to MEPA, the purpose of which is "the protection of the air, water, and other natural resources ... from pollution, impairment, or destruction." MCL 324.1701(1). The Legislature's intent in enacting MEPA was to *remove* deference to agency environmental determinations and, instead, to require independent, de novo environmental determinations by courts. The Court of Appeals' decision defeats that legislative purpose. This Court can correct that error and prevent other lower courts from repeating it.

D. The Court of Appeals' Error Was Not Harmless.

The Court of Appeals' erroneous application of a deferential standard of review was not a harmless error. Rather, while MEPA and this Court's precedents required the Court of Appeals to make independent, de novo determinations, the Court of Appeals explicitly acknowledged that the standard of review it chose prevented the Court of Appeals from "substitut[ing] its judgment for that of the PSC." COA Opinion, p 18. The Court of Appeals' position runs counter to what MEPA requires. This Court explained in *WMEAC* that, while a court might be "reluctan[t] to substitute [its] judgment for that of an agency . . . the Michigan environmental protection act requires independent, *de novo* determinations by the courts." 405 Mich at 752. As a result of applying the wrong, deferential standard of review, the Court of Appeals did not review with any rigor, much less grapple with, the limited subset of evidence that the Commission had allowed the Applicants, as Intervenors below, to present regarding the Project's actual and likely pollution, impairment, and destruction of the environment.

For example, although the record contained evidence showing the likely effects of greenhouse gas pollution that would result from the Project, the Court of Appeals did not evaluate the merits of that evidence because it determined that, under its deferential standard of review, the Court need only ensure that the Commission "cited to transcript pages" that

"supported its conclusions." COA Opinion, p 28. The Court of Appeals stated that "[t]he bottom line is that the Commission considered the evidence presented in the contested case, which is what it was tasked with doing." *Id.* at 29. In other words, the Court of Appeals did not review the substance of the evidence cited by the Commission, or the rest of the record; instead, the Court merely satisfied itself that the Commission had "considered" certain evidence.[10] If the Court of Appeals had reviewed the evidence of greenhouse gas pollution de novo, it would have recognized that neither Enbridge nor the Commission presented an analysis of the likely effects of greenhouse gas pollution that would result from constructing the tunnel beneath the Straits of Mackinac and thereby extending the life of the pipeline crossing the Straits to enable the transport of oil through it for another 99 years (versus the existing pipeline crossing along the lakebed either being decommissioned or reaching the end of its useful life). Only the Applicants, as Intervenors below, presented such an analysis, and it showed that the tunnel will increase carbon emissions by tens of millions of tons each year. COA Opinion, pp 27-28. Although the Court of Appeals pointed to the Commission's assertion that its staff member's testimony "disputed" the Intervenors' expert evidence, the "cited evidence" actually confirms that staff simply adopted a "baseline assumption" that, with or without the tunnel, there would be no change in the demand for oil, no change in the volume of oil transported, and therefore no

[10] The Court of Appeals' review—far from de novo—does not come close to a clearly erroneous standard of review either. Nor did the Court of Appeals purport to apply that standard, for the words "clearly erroneous" do not appear in its opinion. As this Court has held, applying a clearly erroneous standard requires the reviewing court to conduct "a review of the entire record of th[e] case," utilizing a "judicial sieve" that in a non-jury case "is of finer mesh" than on review of a jury's verdict. *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976). After conducting this review, a court may conclude that a finding is clearly erroneous only if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* The Court of Appeals did not even attempt to apply that standard in this case. Yet, as noted above, some other panels of the Court of Appeals considering MEPA claims have applied a clearly erroneous standard of review to factual findings made by a trial court, though not to findings made by an administrative agency. See *Preserve the Dunes*, 264 Mich App at 259; *Cipri*, 235 Mich App at 8-9; *Trout Unlimited*, 209 Mich App at 456; *City of Portage*, 136 Mich App at 279. These decisions are inconsistent with the Court of Appeals' decision in this case, and also with this Court's decision in *WMEAC*, further demonstrating the need for the Supreme Court to clarify the proper standard of review under MEPA.

change in greenhouse gas pollution from that oil. COA Opinion, p 28 (citing December 1, 2023 Final Order, p 345 (citing 12 Tr 1771-77, 1791-92)).[11]

All of the greenhouse gas pollution that the Intervenors' experts showed through analysis and calculation, the Commission's staff just assumed away. The Court of Appeals' deferential standard of review caused it to overlook this fundamental flaw.

II. THIS CASE WARRANTS REVIEW TO CORRECT THE COMMISSION'S AND THE COURT OF APPEALS' IMPROPERLY NARROW INTERPRETATION OF MEPA.

MEPA mandates that administrative agencies and courts effectuate its critical purpose and support the constitutional underpinnings of the statute to avoid destruction of the State's irreplaceable natural resources. MEPA prescribes an evaluation of *all* likely effects of the conduct at issue in an administrative proceeding through the statutory language "has or is likely to have such an effect." See MCL 324.1705(2). An administrative agency and a reviewing court must analyze those effects to make the requisite determination of whether a project will result in the pollution, impairment, or destruction of natural resources. In this case, the stakes could not be higher. Line 5 has spilled many times since its construction, and it threatens waterways throughout the state, yet intervening parties were not even allowed to submit evidence about the extent and ramifications of this threat. The Project involves boring a massive and unprecedented tunnel under the Straits which will extend the life of Line 5 for 99 years. This is exactly the kind of undertaking that will affect Michigan's Great Lakes, their tributaries, inland streams, shorelines, fisheries, and numerous other resources, and that requires a thorough MEPA review.

Instead, the Commission failed to follow MEPA in three ways. First, it improperly limited the meaning of the phrase "has or is likely to have such an effect" and barred the Applicants, as Intervenors below, from submitting critical evidence about impairments that flow from the Project, including those the impacts of an oil spill. Second, even though the pipeline

[11] The Commission staff member's testimony confirming staff's "baseline assumption" is contained in Attachment 7. Direct Testimony of Alex Morese, 12 Tr 1770-71, 1774 (Doc No. U-20763-1070) ("Staff provided [its outside consultants] with baseline assumptions for their evaluation of GHG emissions," including the assumption that a "Line 5 shutdown would not alter the demand at market end points for the product transported on Line 5," and "[v]olumes shipped would remain consistent with historical averages," and "[t]herefore, emissions associated with extraction and end use are assumed to remain relatively unchanged for this analysis").

will operate far longer if the tunnel is approved and the perpetuation of known oil spill risks is a direct effect of the proposed Project, the Commission excluded this entire category of pollution and impairments from the record. Third, the Commission's flawed interpretation of MEPA contaminated its alternatives analysis by omitting information about the oil spill risks from the Project but while including information about oil spill risks from the alternatives.

The Court of Appeals erroneously affirmed the Commission's decision and narrowed MEPA in a way that threatens to undermine or confuse legal principles of great significance to the state's jurisprudence and MEPA's goal of protecting the state's resources and the environment. MCR 7.305(B)(3). Moreover, despite acknowledging that the Commission's irrational alternatives analysis was concerning, the Court of Appeals upheld it anyway—in part because it was applying the wrong standard of review. These improper decisions that erode Michigan's bedrock environmental protection statute must be reviewed and overturned.

A. MEPA Requires an Agency to Evaluate the Full Scope of Pollution and Environmental Impairments of the Conduct at Issue in a Permit Proceeding.

MEPA requires a thorough assessment of the likely effects of a project at issue in an administrative permit proceeding to determine whether, and to what extent, it will pollute, impair, or destroy water and other natural resources in Michigan. MCL 324.1705(2). In *Vanderkloot*, this Court recognized that MEPA "is a source of supplementary substantive environmental law" and not just a procedural statute. 392 Mich at 184. MEPA "imposes a duty" on the Commission to prevent or minimize degradation of the environment. See *Ray*, 393 Mich at 306.

The statutory language "likely to have such an effect" requires an agency to undertake a comprehensive consideration of the potential effects of the conduct under review. MCL 324.1705(2). Although the word "effect" is not defined, it must be given its common and ordinary meaning. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 159; 615 NW2d 702 (2000), citing *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). "Effect" means "something produced by an agent or cause; a result, outcome, or consequence." *Black's Law Dictionary* (11th ed 2019). Nothing in Section 1705(2) of MEPA limits or circumscribes the scope of what should be considered as likely effects.

MEPA further requires agencies to consider the existence of feasible and prudent alternatives when it determines that the project will impair natural resources. MCL 324.1705(2);

see also *Vanderkloot*, 392 Mich at 183-85. A proper evaluation of the potential effects of the proposed project is integral to the MEPA alternatives analysis because it is critical to compare the likely effects of the conduct under review to the likely effects of the alternatives.

B. The Commission and Court of Appeals' Failure to Consider Oil Spills Along Line 5 that Will Result from the Project Warrants This Court's Review to Correct Their Erroneous Interpretation and Further Develop the Law Related to the Scope of MEPA's Requirement to Consider Likely Effects of the Project.

The Court of Appeals improperly affirmed the Commission's decision related to whether oil spills outside of the Straits should be considered in a MEPA analysis. The Commission improperly interpreted MEPA in its April 2021 In Limine Order granting Enbridge's motion to exclude evidence of the history and risks of oil spills from Line 5. April 21, 2021 In Limine Order, pp 63-64. The Applicants, as Intervenors below, explained that evidence about the risk of oil spills from Line 5 in Michigan was relevant pursuant to the MEPA analysis because the risk of oil polluting the State from the continued operation of Line 5 is a likely effect of the Project.[12] Indeed, Line 5 has had numerous leaks and spills, posing a grave threat to waterways along its route.[13] Future leaks and spills are likely.[14]

The Commission, however, ruled that "the application of MEPA is limited to the conduct at issue . . ." and it considered only potential environmental impacts from the tunnel's construction (such as noise, dust, and particulate emissions)[15] and greenhouse gas emissions but

[12] See, e.g., Joint Response to Motion In Limine by MEC, GTB, Bay Mills, et al., pp 26-28 (Doc No. U-20763-0326).

[13] In Wisconsin, as a result of the oil spill threat Line 5 poses to the Bad River and the Bad River Band reservation, Enbridge is proposing a reroute of its pipeline. See Wisconsin Dep't of Natural Resources, *Enbridge Pipeline Projects in Wisconsin* <https://dnr.wisconsin.gov/topic/EIA/Enbridge.html> (accessed April 1, 2025).

[14] See Joint Petition for Rehearing by Tribal Intervenors, p 5 (Doc No. U-20763-0767), citing National Wildlife Federation's Petition to Intervene, Affidavit of Bruce Wallace, p 4 (Doc No. U-20763-0126) and Garrett Ellison, *Enbridge Line 5 has spilled at least 1.1M gallons in past 50 years*, MLive (April 26, 2017), <https://www.mlive.com/news/2017/04/enbridge_line_5_spill_history.html> (accessed April 1, 2025).

[15] Importantly, the Commission excused itself from considering other environmental impacts on the grounds that other agencies would consider them in their permitting processes. December 1, 2023 Final Order, at 328. MEPA does not allow agencies to abdicate their obligations to consider

did not consider the likely effect of oil spills from the continued operation of Line 5 in Michigan. See December 1, 2023 Final Order, pp 328-29. This reasoning and interpretation is unsupported by the law.

The Court of Appeals affirmed the Commission's holding with little analysis and, tellingly, no interpretation of what the phrase "has or is likely to have such an effect" means in MEPA. See COA Opinion, p 24. The Court merely noted that "the proceedings at issue involved an application for the Replacement Project, and the 'conduct' sought to be 'authorized or approved' was the Replacement Project." *Id*. at 24 (quoting Section 1705(2)). Thus, the Court reasoned, "[t]he Commission, by looking to the desired 'conduct,' was following the plain language of [the statute]." *Id*. In reaching its conclusion, the Court cited *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007), for the proposition that, when interpreting a statute, courts cannot read something into a statute that does not appear in the text and they can only go beyond the words of statute to ascertain the Legislature's intent when the statute is ambiguous. *Id*. But no appellants asked the Court of Appeals to go beyond the text of Section 1705(2). Instead, they asked the Court of Appeals to give force to the phrase "has or is likely to have such an effect," which appears in the plain text of the statute. The Court of Appeals failed to do so. Its brief analysis did not analyze, or even restate, the arguments made by various appellants that pursuant to MEPA, the "conduct" that is under review can have or is likely to have an "effect" that extends beyond the immediate footprint of that conduct.

Under the plain language of MEPA, the risk of oil spilling from Line 5 in Michigan is an effect of the Project that must be considered because oil is a pollutant that can negatively impact air, water, and other resources. Indeed, the threat that oil spills pose to fishery resources is one of several concerns that motivated the Tribal Intervenors to intervene in this permit proceeding. See, e.g., LTBB Petition to Intervene, pp 3-5 (Doc No. U-20763-0165); GTB Petition to Intervene, pp 3-5 (Doc No. U-20763-0110). Citing researchers from Michigan Technological University, the Notice of Revocation and Termination of Easement recognizes, "[c]rude oil

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environmental impacts. Indeed, the permit conditions upon which the Commission relied are now subject to change because Enbridge was required to reapply for its permits and only submitted its new application on March 3, 2025. Mich Dep't of Environment, Great Lakes, and Energy, *MiEnviro Portal* <https://mienviro.michigan.gov/nsite/map/results/detail/2746869251480183093/documents> (accessed April 1, 2025).

contains toxic compounds that would cause both short- and long-term harm to biota, habitat, and ecological food webs." Notice of Revocation & Termination of Easement, Exhibit ELP-18, p 8 (Doc No. U-20763-1046) (TI Appendix N at 720), citing Mich Tech Univ, *Independent Risk Analysis for the Straits Pipelines* (September 15, 2018), pp 166-69, 176, 181-85 <https://www.michigan.gov/psab/-/media/Project/Websites/psab/archive/media/Straits_Independent_Risk_Analysis_Final.pdf> ("Michigan Tech Report"). The Michigan Tech Report recognizes that an oil spill threatens natural resources, "including fish, wildlife, beaches, coastal sand dunes, coastal wetlands, marshes, limestone cobble shorelines, and aquatic and terrestrial plants, many of which are of considerable ecological and economic value." *Id.* at 165.

Tribal Intervenors have staff scientists who were prepared to testify about the critical resources threatened by an oil spill from Line 5. Tribal Intervenors' Petition for Leave to Appeal, pp 13-14, 27 (Doc No. U-20763-0622). The Tribal Intervenors should have been permitted to develop these points and present evidence on them in the contested case. Evidence about the oil spill risks presented by Line 5 is central to the required analysis of likely environmental effects under Section 1705(2) of MEPA.

The Commission's failure to consider significant, likely impairments, including oil spills, prevented it from understanding fully the Project's effects and contaminated its alternatives analysis and fulfilling its MEPA obligations.

C. This Court Can Clarify the Scope of MEPA by Recognizing that the Pipeline Segment's Precarious Future Demands that Pollution and Impairment from Future Operation of the Pipeline Be Considered as an Effect of the Project Under MEPA.

The Commission's issuance of a permit to Enbridge's Application will secure and extend the operation of Line 5 in Michigan for decades and the likely effects of its continued operation include oil spills. It is unreasonable to conclude that Enbridge will be able or permitted to operate the 71-year-old Dual Pipelines in the Straits of Mackinac indefinitely. Indeed, the existing lakebed segment to be replaced is subject to ongoing litigation, where the Attorney General is seeking to have it shut down on public trust and MEPA grounds. *Nessel v Enbridge Energy, Ltd*, No. 19-474-CE (Ingham Co Cir Ct, 2019). In addition, Governor Whitmer revoked and terminated the easement that authorized Enbridge to operate the Dual Pipelines across the Straits. Notice of Revocation & Termination of Easement, Exhibit ELP-18 (Doc No. U-20763-1046). These circumstances not only show the likelihood that the proposed Project would extend

the operational life of Line 5 in Michigan but also necessitate consideration of the effects of allowing the Project to proceed.[16]

MEPA mandates that "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, *shall be determined*." MCL 324.1705(2) (emphasis added). This Court has interpreted this statutory mandate broadly. See *Nemeth*, 457 Mich 16, at 25 (explaining that the showing of harm "is not restricted to actual environmental degradation but also encompasses probable damage to the environment as well") (quoting *Ray*, 393 Mich at 309). In *WMEAC*, this Court considered the impact of new road construction on the wildlife population in the Pigeon River Country State Forest as part of its MEPA review of a permit for exploratory oil wells, even though issuance of the permit for the wells was the conduct at issue before the circuit court, because without the permit the roads would not be built. *WMEAC*, 405 Mich at 741, 756-57.

Contrary to this Court's precedent, neither the Commission nor the Court of Appeals properly considered how a shutdown of the Dual Pipelines would alter the effects of the proposed conduct under MEPA. See COA Opinion, p 24. Because the Project is likely to have the effect of extending Line 5's operation for decades, the Commission erred by excluding key evidence about impairments and pollution posed by the Project. For example, if the Applicants, as Intervenors below, had been allowed to conduct discovery and introduce evidence showing that Enbridge will operate Line 5 in its current condition only for three to five more years if it does not undertake the Project but will operate Line 5 for another 80 years if the Project is completed, then an additional 75+ years of operation is an effect of the conduct in this proceeding.[17] The Commission's interpretation of MEPA to preclude this analysis of likely effects was legally incorrect, as was the Court of Appeals' decision upholding it. This legal error prevented the Applicants from developing and presenting evidence regarding the risk of oil spills to the Great Lakes, inland waters, and other natural resources from the extended operation of Line 5 in Michigan.

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[16] Notably, the Project will take at least five years to construct and will not immediately resolve the risks of the Dual Pipelines.

[17] Evaluation of the effects of a project under MEPA requires an agency or court to "evaluate the environmental situation before the proposed action and compare it with the probable condition of the environment after." *Kent Co Rd Comm v Hunting*, 170 Mich App 222, 233; 428 NW2d 353 (1988).

The narrow interpretation and approach adopted by the Commission and the Court of Appeals conflicts with this Court's analysis in *WMEAC* and requires correction. Beyond this case, the scope of effects to be considered in a MEPA analysis is an issue of major significance for Michigan jurisprudence, and the exclusion of oil spills here not only violates MEPA's requirements, it also puts Michigan out of step with other jurisdictions.[18] MEPA's requirements should be given force here and oil spills from the continued operation of Line 5 in Michigan should be deemed an effect of the project that must be considered under MEPA.

D. This Court Can Provide Clarity to Agencies and Reviewing Courts by Correcting the Commission's Improper Interpretation of MEPA and Exclusion of Oil Spill Evidence that Led to a Flawed and Unlawful Alternatives Analysis.

The Commission's exclusion of evidence about risks of oil spills from Line 5, in turn, led to an alternatives analysis that contravened MEPA. When an agency or a reviewing court determines that a project will impair natural resources, that project "shall not be authorized or approved . . . if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare." MCL 324.1705(2); see also *Vanderkloot*, 392 Mich at 185-87. An informed comparison of the environmental impacts of a proposed project with the environmental impacts of alternatives is necessary to "prevent or minimize

[18] Courts in other jurisdictions interpreting parallel environmental review statutes have required agencies to consider the likelihood and effects of an oil spill when conducting an environmental review for projects that involve the transport of oil. For example, in Minnesota, a court of appeals deemed the risk of an oil spill reaching Lake Superior from Enbridge's planned Line 3 to be an essential part of its environmental analysis. *In re Enbridge Energy, LP*, 930 NW2d 12, 17 (Minn App, 2019); see also Tribal Intervenors' Petition for Leave to Appeal, p 31 n 88 (Doc No. U-20763-0622), citing the Line 3 case. Recently, in *Standing Rock Sioux Tribe v US Army Corps of Engineers*, the court ruled that even if the risk of a pipeline leak may be low, its potential consequences must be considered as part of the environmental review of the pipeline's placement. 985 F3d 1032, 1049-50 (CA DC, 2021). In *Sierra Club v Sigler*, the court struck down a federal environmental impact statement for a dredging project that would allow increased oil tanker access in a port because its oil-spill analysis did not analyze the "worst case" scenario of an oil tanker spill. 695 F2d 957, 968-75 (CA 5, 1983). Similarly, *Ocean Advocates v US Army Corps of Engineers* held that the Corps was required to analyze risks of oil tanker spills before issuing a Section 404 permit for a dock extension, because "a 'reasonably close causal relationship' exists between the Corps' issuance of the permit, the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills." 402 F3d 846, 868 (CA 9, 2004), quoting *Dep't of Transp v Pub Citizen*, 541 US 752, 767 (2004).

degradation of the environment which is caused or is likely to be caused" by the project. *Ray*, 393 Mich 294, 306. Put simply, the agency must make an "apples to apples" comparison between the effects of a proposed project on Michigan's environment and natural resources and the effects of alternatives. Otherwise, the agency cannot make a rational and informed decision as to whether any such alternatives are feasible, prudent, and consistent with reasonable requirements of public health, safety, and welfare.

The Commission's alternatives analysis in this case was fundamentally flawed. It assessed environmental risk and potential impairment due to an oil spill from alternate methods of transport—including an alternate pipeline route and rail transportation—along the entire length of their route. See December 1, 2023 Final Order, pp 338-39 (Doc No. U-20763-1454) (TI Appendix A at 339-40). This included an assessment of how many rivers, streams, drainage canals, wetlands, and drinking water sources the alternate pipeline route would threaten with impairment and pollution along its entire length. *Id.* But the Commission did *not* consider, and the Applicants were *not* allowed to present, comparable evidence about environmental risk and potential impairment due to an oil spill from the 645 miles of Line 5 enabled by the Project. Instead, the Commission compared the oil spill risk for just the four-mile pipeline segment to be housed in the proposed tunnel with the risk for a 762-mile-long potential alternative route. *Id.* at 331-32, 338 (TI Appendix A at 332-33, 339), citing Exhibit ELP-24. This is not apples-to-apples, it is an utterly incongruent comparison, which led to an improper finding under MEPA.

The Court of Appeals' attempts to gloss over this flaw in the Commission's MEPA analysis are unpersuasive. The Court of Appeals concluded that "the Commission acted appropriately because it *could* have limited its 'comparisons' analysis to just alternatives for the Straits segment of pipeline . . . but instead decided to look to *all* presented alternatives, and ultimately it reached a decision that was supported by the evidence in the record." COA Opinion, p 25. At the same time, however, the Court of Appeals also "acknowledge[d] that it is concerning that the PSC, when discussing rail transport, looked to the effect of rail being used for the entire transport system and at first compared it to just the tunnel project; the Commission mentioned, for example, how many rivers and wetlands a rail system would cross but then did not mention the same statistics for Line 5 as a whole." COA Opinion, p 24.

As discussed above, however, the Court of Appeals unlawfully applied a deferential standard of review, when it should have reviewed the Commission's MEPA findings de novo

(see Part I above).[19] The Court of Appeals relied on the deferential standard of review to excuse the Commission's order as "adequately supported by the record" despite the irrationality at the core of this analysis. Moreover, even if a deferential standard of review were appropriate (which it is not), the Commission's lopsided alternatives analysis looked at one side of an important issue while refusing to consider the inverse. See, e.g., *Mich Consol Gas Co v Mich Pub Serv Comm*, 389 Mich 624, 640; 209 NW2d 210 (1973) ("In this case, the company showed that the commission, by refusing to consider increases in costs in the future while taking into account future reductions, acted arbitrarily and unreasonably."). The Commission's legal error in excluding evidence about a critical category of effects of the Project resulted in an alternatives analysis with an improperly narrow view of the pollution and impairment at issue. The Commission's comparison of this improperly narrow assessment of impairments and pollution from the Project with a broader view of impairments and pollution presented by project alternatives was a violation of MEPA.

Proper consideration of alternatives to conduct that pollutes, impairs, or destroys natural resources is a critical component of an agency's duty under MEPA. The Court of Appeals' unwarranted deference to the Commmission's flawed analysis—despite the acknowledgement that its lopsided comparison was concerning—is illustrative of why it is critical for this Court to step in and ensure that reviewing courts are applying the proper standard of review.

E. This Court's Review Can Further Develop the Common Law of Environmental Quality as to the Scope of Effects that Must Be Considered Under MEPA.

This Court has an important opportunity to uphold the words and purpose of the Michigan Constitution and MEPA that recognize the "paramount public concern" for the state's natural resources and the requirement that agencies and courts review the *full* range of likely effects from the issuance of a permit and determine whether feasible and prudent alternatives would prevent or minimize those effects. *Ray,* 393 Mich 294, 30; *Vanderkloot*, 392 Mich at 183. This case holds significant public interest for two reasons. MCR 7.305(B)(2).

[19] Moreover, the Court of Appeals did not determine, in "judicial review" of the Commission's decision and on the record before it, whether there are "feasible and prudent alternatives" as mandated by MCL 324.1705(2).

First, it threatens to undermine MEPA and the Michigan Constitution's environmental protection framework. In this case, the Commission and the Court of Appeals imposed improper constraints on MEPA by misinterpreting the words "has or likely has the effect." The exclusion of oil spills from the analysis of effects of the Project also led to an invalid alternatives analysis, which omitted effects, particularly oil spills, of the Project outside the Straits, but considered the effects of the alternatives outside the Straits. These decisions invite Michigan agencies to shirk their responsibilities under MEPA with the comfort of the flawed precedent of the Court of Appeals' decision. Thus, these errors are significant because they have the potential to shape MEPA jurisprudence, which has developed over many decades, and its goal of protecting the state's resources and the environment. MCR 7.305(B)(3). It is critical that the Court review these improper decisions that diminish Michigan's bedrock environmental protection statute.

Second, it threatens to harm an iconic place in Michigan and in the nation. This case involves a massive tunnel that will sit under the Great Lakes in the Straits of Mackinac—a place that is the center of the Anishinaabe creation story, a place of ongoing cultural and economic significance to Tribal Nations, a source of drinking water for more than 40 million people and a place for recreation and tourism. Ensuring the proper application of MEPA could not be more important than in a case involving the protection of the Great Lakes.

This Court also has the opportunity to correct a clearly erroneous decision of the Court of Appeals and ensure that other courts and agencies know how to determine the effects of a proposed project and conduct a proper alternatives analysis. MCR 7.305(B)(5).

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Applicants respectfully request that this Court grant this application for leave to appeal, reverse the decision of the Michigan Court of Appeals, vacate the Commission's December 1, 2023 Final Order approving Enbridge's permit application, and remand this matter to the Commission with instructions to allow the intervening parties to conduct discovery and submit evidence about the oil spill risks along the length of Line 5 in Michigan as a consequence of the Project.

Dated: April 2, 2025

Respectfully submitted,

By: Digitally signed by Christopher M. Bzdok Date: 2025.04.02 16:48:48 -04'00'

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of MCR 7.305(A)(1) and 7.212(B) because, excluding the parts of the document exempted, it contains 14,697 words.

Dated: April 2, 2025

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