



Protecting the Common Waters of the Great Lakes Basin
Through Public Trust Solutions

September 23, 2020

Via E-filing

Ms. Lisa Felice
Michigan Public Service Commission
7109 W. Saginaw Hwy.
P. O. Box 30221
Lansing, MI 48909

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following is attached for paperless electronic filing:

Response to Enbridge Energy, Limited Partnership's Motion in Limine by For Flow
of Water (FLOW)

Proof of Service

Sincerely,

James Olson
olson@envlaw.com

xc: Parties to Case No. U-20763

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of Enbridge Energy, Limited Partnership for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief

U-20763

ALJ Dennis Mack

**RESPONSE TO ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S
MOTION IN LIMINE
BY FOR LOVE OF WATER (FLOW)**

September 23, 2020

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I. INTRODUCTION AND OVERVIEW.

Intervenor For Love of Water (“FLOW”) submits this response to the motion *in limine* and arguments by Enbridge Energy Limited Partnership (Enbridge).

Enbridge’s motion *in limine* attempts to harshly restrict if not strip both the jurisdiction of the Commission and scope of evidence in this proceeding. Its attempt is contrary to the regulatory charge of the Michigan Public Service Commission (“Commission”) under Act 16¹ and Rule 447,² the Commission’s decisions and orders to consider and determine the following question: Whether its Tunnel Project—consisting of the new location, massive construction, and operation of a utility tunnel and its intended a crude oil tunnel pipeline³ through the public trust bottomlands beneath the Straits of Mackinac—establishes (1) a “necessity;” (2) “in the public interest;” and (3) a “reasonable alternative.”⁴ In addition, the Commission must consider whether there exist feasible and prudent alternatives under the Michigan Environmental Protection Act (“MEPA”).⁵

Notwithstanding, the massive and complex nature and magnitude of the proposed Tunnel Project, including the location and construction of a large tunnel and pipeline in and through the public trust bottomlands of the State,⁶ Enbridge seeks to pass off the Tunnel Project as merely removing aged Dual Pipeline and replacing them with a new pipeline in the tunnel. In short, Enbridge would have the Commission treat the Tunnel Project as a routine plumbing project.

¹ 1929 PA 16, MCL 483.1 et seq. (“Act 16”).

² R 792.10447 et seq. (“Rule 447”).

³ The Applicant Enbridge’s (“Applicant”) “Tunnel Project” consists of a 3.6 mile 18-foot wide tunnel with massive upland, nearshore, and in-water and bottomland soils construction to house a new 30-inch crude oil pipeline.

⁴ *In re Enbridge Energy Limited Partnership*, Case No. U-17020, Final Order, Jan. 31, 2013, p 5.

⁵ Part 17, NREPA, MCL 324.1701 et seq.

⁶ The waters and bottomlands of the Great Lakes, including the Straits of Mackinac, are subject to the state’s sovereign title and public trust and solemn duty to protect the public’s rights, as the legal beneficiaries of this trust, in navigation, fishing, boating, sustenance, bathing, drinking water, swimming. *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); *Obrecht v National Gypsum Co.*, 361 Mich 399 (1960).

In its Application Enbridge avers that it seeks approval under Act 16 of

- (1) [T]he “Project,” which will *replace the current crossing*—consisting of two, 20-inch diameter pipes [dual pipelines—with a single, 30-inch diameter pipe (the ‘*replacement pipe segment*’) located within a concrete-lined tunnel below the lakebed of the Straits.
- (2) In addition to *relocating the replacement pipe segment within the tunnel*, the Application seeks *approval to operate and maintain the replacement pipe segment* as part of Line 5.
- (3) Enbridge also proposes to *tie-in, operate, and maintain approximately 0.4 to 0.8 miles of pipe to connect the replacement pipe segment to Enbridge existing Line 5* on both sides of the Straits.
- (4) The Project will *also include all the associated fixtures, structures, systems, coating, ... protective measures, equipment and appurtenances* relating to the replacement segment and connection to the existing Line 5 pipeline.⁷ (Emphasis ours)

Enbridge argues in its motion that the Tunnel Project is not subject to Act 16 and Rule 447, because (1) only the tunnel pipeline and not the tunnel is subject to Act 16 and Rule 447, (2) that Act 359 of the Public Act of 2018 (“Tunnel Law”) somehow deprives or narrows the jurisdiction of the Commission under Act 16, and (3) the tunnel for the new crude oil pipeline is not a fixture or appurtenant under Section 1(2) of Act 16.⁸

Nothing could be farther from the truth. The Tunnel Project consists of a 18-foot diameter concrete \$500,000 or more million tunnel and new pipeline 65 to 250 feet below the Straits.⁹ The Tunnel Project would grant Enbridge an easement assigned to it by the Mackinac Straits Authority (“MSCA”) to own, construct, and lease-back to exclusively possess and control the tunnel and new pipeline for at least 99 years.¹⁰ The Tunnel Law and Tunnel Agreement expressly require that the

⁷ These four elements of the “Project” are described in paragraph 3, Enbridge Application, April 17, 2020, for Commission Approval (hereafter “Application”), dated April 17, 2020; see also, Application, VI., paragraphs 17-22, pp. 8-10.

⁸ MCL 483.1(2).

⁹ Application, pp. 1-2.

¹⁰ 2018 DNR Easement to the Mackinac Straits Authority (“MSCA”), 2018 MSCA Assignment to Enbridge, Application, paragraph 45, p. 17, and 99-year Lease Agreement to Enbridge from MSCA. Tunnel Agreement, Application, paragraph 33, fn. 6; Ex. A-5, paragraphs 7-9, A-6.

Line 5 Project must comply with all of the permits, approvals, and consents required by federal and state law.¹¹ Section (3) of Act 16 grants specific authority to the Commission to regulate any entity that “transports crude oil or petroleum.”¹² Rule 447(1)(c) requires approval to construct “facilities” that “transport crude oil or petroleum.”¹³ Clearly, the tunnel is a facility and a fixture that is appurtenant or affixed to a crude oil pipeline.

On its face, the easement assigned to Enbridge by the Mackinac Straits Corridor Authority (“MSCA”) states that it is granted pursuant to Section 2129, Part 21, NREPA. Section 2129, Part 21, NREPA, delegates authority to the DNR to grant “*public utility* easements” “through, under, and upon” the public land, including bottomlands belonging to or held in trust by the state.”¹⁴ While public utility easements and structures in, under, or through Great Lakes bottomlands also require authorization under the Great Lakes Submerged Lands Act,¹⁵ for purpose of siting and constructing the new tunnel and pipeline, they are treated as a single “public utility” pipeline project.¹⁶

The evaluation and determination by the Commission of the Tunnel Project involves a request for the commitment by the State of Michigan for a massive privately leased and operated tunnel and tunnel pipeline for the transport of 8.39 billion gallons of crude oil and natural gas liquids per year for the next 100 years—839 billion or nearly a trillion gallons of fossil fuels. The

¹¹ 2018 PA 359, Sec. 14a(1)(4); Tunnel Agreement, Application Ex A-5, paragraphs 7-9; see also the Second Agreement, Oct. 2018: “... the Authority [MSCA] shall (a) obtain or support Enbridge in obtaining necessary permits, authorizations, or approvals for the Tunnel and the Line 5 Straits Replacement Segment.” Application, paragraphs 27-29, pp. 11-12.

¹² MCL 483.3.

¹³ R 792.10447(1)(c).

¹⁴ MCL 324.2129. (Emphasis ours).

¹⁵ MCL 324.32502-32505.

¹⁶ It should be noted that Enbridge and the Mackinac Straits Corridor Authority have not applied for or obtained the required authority and determinations under public trust law and the Great Lakes Submerged Land Act, MCL 32502-32505. See *FLOW Public Comments on Enbridge’s Request for Declaratory Relief*, May 13, 2020, pp. 21-25.

Commission faces a decision over one of the largest if not the largest decisions in its history, despite the declining demand for crude oil and fossil fuels, the existence of clear alternatives for crude oil transport within the Enbridge or larger Northern American pipeline system. It is the only pending application in over 60 years to transport crude oil on, under, or through the waters and public trust bottomlands of the Great Lakes.

This is not the first time in this proceeding that Enbridge has sought to restrict the Commission's authority and scope of review in this matter. Along with its Application Enbridge filed a motion for declaratory ruling under Rule 448 for the following relief:

- (1) The Project as described to the Commission does not include the tunnel itself, which is the subject of separate applications addressed to other state and federal agencies described below.¹⁷
- (2) Enbridge requests a declaratory ruling pursuant to Section 263 of the Administrative Procedures Act, MCL 24.263, and Rule 448, R 792.10448 or other finding, that Enbridge already has the requisite authority needed from the Commission for the Project based on the Commission's grant of authority for Line 5 in its 1953 Order, because the Project involves no more than continuing to operate Line 5 by replacing and relocating one four-mile segment across the Straits.
- (3) [T]he project does not involve a proposed new construction or extension of a pipeline that has not already been authorized by the 1953 Order pursuant to Rule 447, R 792.10447.¹⁸

After a thorough analysis and discussion of all of the arguments in the public comments, on June 30, 2020, the Commission flatly rejected Enbridge's attempt to thwart this proceeding and entered its decision and order *inter alia*:

1. "The Line 5 Project [Tunnel Project] differs significantly from what was approved in the 1953 orders and the 1953 easement and its amendment."¹⁹

¹⁷ Application, VI, paragraphs 17-22, pp. 8-10.

¹⁸ Application, IX, paragraphs 38-45, pp. 15-17, Relief, subparagraph G, p. 19.

¹⁹ Commission Decision and Order, June 30, 2020, pp. 57-58.

2. “The language of Rule 447 does not distinguish between a new construction of a pipeline facility and construction that replaces, maintains, or relocates an existing facility. Therefore, the Commission finds that, pursuant to Rule 447(1) (c), Enbridge is required to file an Act 16 Application for approval of the Line 5 Project.”²⁰
3. “[T]he Line 5 Project is not simple maintenance or equivalent replacement of an existing pipeline. Rather, Line 5 Project proposes to replace the 20-inch diameter Dual Pipelines with a new, 30-inch diameter, single pipeline to be relocated within a new concrete-lined tunnel 60 to 250 feet beneath the lakebed of the Straits” and” decommissioning the Dual Pipelines.”²¹. The Commission finds that the Line 5 Project is new construction pursuant to Rule 447(2)(c).”²²
4. “In addition, the proposed project would not utilize an existing easement, but would be relocated to a new tunnel with a new easement of its own... .”²³
5. “In this case, the Commission finds that Enbridge’s Line 5 Project involves significant factual and policy questions and complex legal determinations that can only be resolved with the benefit of discovery, comprehensive testimony, and a well-developed record in a contested case proceeding.”²⁴

To the extent the motion *in limine* seeks to rehash and contradict the express findings and conclusions of the Commission’s June 30 Decision and Order, the motion should be denied. Moreover, for the reasons described below, Enbridge’s motion should be denied because (1) the new tunnel and new pipeline are one and the same and subject to Act 16 and Rule 447, (2) the

²⁰ *Id.*, p. 61.

²¹ *Id.*, p. 68, 3 lines from bottom of page.

²² *Id.*, p. 62.

²³ *Id.*, pp. 65, 67.

²⁴ *Id.*, p. 69.

attempt to limit the scope of evidence required to determine the necessity, in the public interest, and reasonable alternative criteria under Act 16, its Rules, and fulfill the mandatory legal duty to consider and/or determine the likely effects of and feasible and prudent alternatives to the Proposed Tunnel Project under the MEPA.²⁵

In any event, the motion should be denied because of the specific finding and directive by the Commission that the “Enbridge’s Line 5 Project involves significant factual and policy questions and complex legal determinations that can only be resolved with the benefit of discovery, comprehensive testimony, and a well-developed record in a contested case proceeding.”²⁶

II. The Commission Has Specific and Full Authority under Act 16 and Rule 447(1)(c) over the Crude Oil Line 5 Tunnel Pipeline Facility and Pipeline.

Under Section 3 of Act 16 the Commission reviews, evaluates, and determines the following criteria:

- (1) the applicant has demonstrated a public need for the proposed pipeline,
- (2) the proposed pipeline is designed and routed in a reasonable manner, and
- (3) the construction of the pipeline will meet or exceed current safety and engineering standards.²⁷

These determinations under Act 16(3) and these criteria cannot be made without consideration of the tunnel facility. Further, the tunnel and tunnel pipeline are fixtures and appurtenant and, therefore, subject to Rule 447(1)(c). To avoid duplication, the Arguments at II, A through E of the

²⁵ Section 1705(2) of the MEPA, MCL 324.1705(2), requires both consideration and determination of effects and alternatives. In addition, in the development of the common law of environmental quality under the MEPA, the Supreme Court and Court of Appeals have consistently ruled that state and local agencies have a legal duty to consider the likely effects and feasible and prudent alternatives to proposed conduct subject to a permit, licensing, or approval proceeding. *State Highway Comm’n. v Vanderkloot*, 392 Mich 159, 185-187 (1974); *Genesco, Inc. v Michigan Department of Environmental Quality*, 250 Mich App 45, 645 NW2d 319 (2002); *Buggs v Michigan Public Service Commission*, No. 315058, 2015 WL 159795 (Mich Ct App, 2015) (unpublished opinion, attached hereto as Ex 1). See Argument III, *infra*.

²⁶ *Id.*

²⁷ *In re Enbridge Energy Limited Partnership*, Case No. U-17020, Final Order, Jan. 31, 2013, p 5.

Response Brief to Enbridge’s Motion in Limine filed by Intervenor Michigan Environmental Council et al., dated September 23, 2020, are incorporated and adopted by reference.

Moreover, the Line 5 tunnel pipeline and tunnel pipeline are one public utility Tunnel Project.

Comparison of the 1953 MPSC Order and 2020 Enbridge MPSC Application

Express Terms and Conditions of 1953 Easement & MPSC Order	1953 MPSC Order Incorporating 1953 Easement	2020 MPSC Application
Nature of Pipeline Infrastructure	two, 20-inch diameter pipes in specific location	single, 30-inch diameter pipe in a 21-foot diameter tunnel
Location of Pipeline Infrastructure	On lakebed floor of public trust bottomlands owned by the State of Michigan as trustee; pipelines are 1,200 foot apart from each other.	60 to 250 feet below the lakebed floor in public trust soils owned by the State of Michigan as trustee (NOTE: Map on page 7 of Application illustrates that this single pipeline is not in the exact same location as the 1953 Order)

Table 1. Description of 1953 Commission and Easement for Line 5 and 2020 Proposed Tunnel and Tunnel Pipeline.

Enbridge readily admits that the tunnel easement and pipeline fall outside the 1953 Easement: “[T]he replacement pipe segment will not be placed within the precise easement that existed in 1953.”²⁸ Moreover, the .4 to .8-mile tie-ins on the north and south sides of the Straits constitute new locations and extensions for construction of the new 30-inch pipeline extension to the existing 30-inch diameter pipeline. Moreover, the 2018 DNR Easement to the Mackinac Straits Corridor Authority (hereinafter “2018 DNR Easement” or “DNR Easement”) that was assigned to Applicant different longitudinal and latitudinal locations along with different horizontal locations

²⁸ Application, paragraph 45, p. 17.

since the new proposal oil pipeline is far beneath the lakebed floor, ranging between 60 and 250 feet. Clearly, this application requests certification and approval for the siting of a new public utility crude oil tunnel pipeline facility and pipeline.

Further, Applicant relies on the Second Agreement, Third Agreement, Tunnel Agreement, and Act 359 of 2018 as the basis for the property interests, construction, and operation of the tunnel and tunnel pipeline,²⁹ including the tunnel easement, assignment, and 99-year lease.³⁰ Applicant further alleges that all of these property interests, location of the tunnel, construction and operation were expressly subject to state and federal law.

The Second Agreement, requires Enbridge to obtain all authorizations, approvals, and permits for the *location, construction, and operation* of the tunnel and new tunnel pipeline segment:

The Tunnel Project Agreement shall include provisions under which the Authority will provide property necessary for the construction of the Straits Tunnel...Such agreement *shall* also provide that *the Authority shall: (a) obtain or support Enbridge in obtaining the necessary permits, authorizations, or approvals for the construction and operation of the Tunnel and the Line 5 Straits Replacement Segment; and (b) upon completion of the construction of the Straits Tunnel, the Authority shall assume ownership of the Straits Tunnel.* Simultaneous with the execution of such agreement, the Authority would execute a lease or other agreements to: (a) *authorize Enbridge's use of the Straits Tunnel for the purpose of locating the Line 5 Straits Replacement Segment for as long as the Line 5 Straits Replacement Segment shall be in operation by Enbridge.* (emphasis ours)³¹

Act 359 established the MSCA Corridor Authority as a separate state entity to implement the corridor tunnel and new tunnel pipeline segment. Act 359 explicitly requires that the MSCA and/or Enbridge

²⁹ See Application, paragraphs 27-29, pp. 11-12.

³⁰ Application, paragraph 33.

³¹ Second Agreement, Oct. 4, 2018, Applicant Ex A-10.

to secure the approval of any department, agency, instrumentality, or officer of the United States government or this state required by law to approve the plans, specifications, and *location of the utility tunnel*...³²

The tunnel agreement expressly stated that it

does not exempt any entity that *constructs or uses* the utility tunnel from the *obligation to obtain any* required governmental *permits or approvals* for the *construction or use* of the utility tunnel.³³

In short, the Second Agreement and Act 359 unequivocally require MSCA and/or Enbridge to apply for and obtain all authorizations, approvals, and permits for the tunnel easement to MSCA, the assignment of the easement by MSCA to Enbridge, the 99-year-lease, and for the location, use, construction, and operation of the tunnel. To underscore these requirements, the tunnel agreement explicitly obligates the MSCA and/or Enbridge to obtain all required governmental permits, approvals, and authorizations required for the tunnel and pipeline under the Straits of Mackinac.³⁴

The foregoing agreements demonstrate the inseparable and direct physical and operational relationship for the location, use, construction, and operation of the tunnel and tunnel pipeline. The Applicant Enbridge admits this throughout its Application that the description includes both Applicant's allegations of the need for the tunnel and pipeline to be located in the tunnel, the alternative analysis of the tunnel pipeline in the tunnel, the impact and risk analysis related to both the tunnel and tunnel pipeline, the economic benefit of the construction of the tunnel and pipeline recognize the direct connection between the tunnel and tunnel pipeline.

Finally, the MDNR conveyed the 2018 tunnel easement³⁵ to the MSCA under Part 21, NREPA, Section 2129, MCL 324.2129, which delegates authority and legal obligation to review

³² 2018 PA 359, Section 14a(1)(4).

³³ *Id.*, Section 14d(4)(g).

³⁴ Tunnel Agreement, **Applicant Ex A-5**, paragraph 7.9.

³⁵ Application, Tunnel Agreement, **Ex A-6**.

and determine whether it can and should grant *public utility easements* on an individual-by-individual request basis for “the purpose of constructing, laying, and operating pipelines, electric lines...., including pipes... and structures usable in connection with the lines” upon any lands belonging to the state... and over, through, under, and upon any and all of the *unpatented overflowed lands, made lands, and lake bottomlands belonging to or held in trust by this state.*” The MSCA assigned the *public utility easement* for both the tunnel and tunnel pipeline to Applicant Enbridge.³⁶ While Enbridge has not obtained authorization for the public utility easement under public trust law and the Great Lakes Submerged Lands Act,³⁷ it cannot deny that both the tunnel and tunnel pipeline are treated as a public utility easement. Therefore, Enbridge cannot claim the tunnel is not part of a crude oil pipeline facility subject to Act 16 and Rule 447.

III. Enbridge’s Attempt to Narrow the Scope of Review and Decision of the Commission is Contrary to the Required Scope of Review under Act 16 and the Michigan Environmental Protection Act.

A. The Review and Determination of Necessity of the Line 5 Tunnel and Pipeline Utility Project Require a Full and Comprehensive Review on the Need for and Alternatives.

Enbridge seeks to exclude from the Commission’s evaluation and decision as to whether “there a public need to replace the existing Line 5 crossing of the Straits with a pipe segment relocated in a utility tunnel beneath the Straits.” This is contrary to the Commission’s fundamental evaluation and determination of the “necessity” element for siting crude oil pipelines under Act 16 and the Commission’s decisions and orders.³⁸

³⁶ Application, Assignment, **Ex A-6**.

³⁷ See FLOW Public Comment on Enbridge Energy, Limited Partnership’s Request for Declaratory Relief on its Application for Approval Under Public Act 16 of 1929, May 13, 2020, pp. 21-25; see also n. 16, *supra*.

³⁸ See *In re Enbridge Energy*, MPSC Case No. U-17120, Pre-Filed Direct Testimony of Mark Sitek (V.P., Enbridge), Transcript, pp. 11-14; FLOW Public Comments on Dynamic Risk Draft Alternatives Analysis

Enbridge's motion *in limine* is an attempt to delimit the Commission's inquiry into the need, reasonability and prudence of its proposed \$500 million capital expenditure³⁹ because market trends strongly suggest that the project presents serious financial risks for Enbridge's investors and consumers who will ultimately bear the cost of the project. Examination of basic and reliable market trends suggest the "public need" for the tunnel is in serious question.

Under 1929 PA 16, MCL 483.1 et seq., a "business of carrying or transporting, buying, selling, or dealing in crude oil or petroleum or its products" must obtain a certificate of necessity from the MPSC authorizing the project.⁴⁰ The purpose of the tunnel is to extend the operable life of Line 5 for 99 years. The determination of public need must take into account demand forecasts for the transport of oil and natural gas liquids. The analysis should include an evaluation of these forecasts and trends and modeling that examines probability distributions for resource planning variables specifically including future demand curves for fossil fuels.

Given the increasingly well documented environmental, health, and climatic impacts that result from the combustion of fossil fuels, project proponents seeking certificates of necessity should be required to undertake thorough analyses that evaluate and model future demand for fossil

Report, Aug. 4, 2017, pages 6-7, see <https://forloveofwater.org/wp-content/uploads/2016/04/Final-FLOW-comments-Alternatives-Analysis-8-4-17.pdf>. While Enbridge testified that doubling the capacity of Line 6b would meet all of its future needs, the record does not disclose any effort by Enbridge that it had also nearly doubled its capacity by adding the anti-friction fluid devices to Line 5.

³⁹ The estimated \$500 million projected cost also needs to be examined by the Commission given that the original cost estimate was based upon a tunnel with a ten-foot diameter. Enbridge now indicates that the tunnel will have a diameter of 18-21 feet. It is logical that a tunnel four times as large as originally planned will cost considerably more than the original estimate.

⁴⁰ Additionally, R 460.17601 under 1929 PA 16 governing new constructions of public utilities, including pipelines, provides in pertinent part: (1) An entity listed in this subrule shall file an application with the commission for the necessary authority to do the following:

(c) A corporation, association, or person conducting oil pipeline operations within the meaning of the provisions of Act No. 16 of the Public Acts of 1929, being §483.1 et seq. of the Michigan Compiled Laws, that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier for which approval is required by statute.

fuel-based technologies and infrastructure, including the market, financial and regulatory risks such technologies and infrastructure may present, as well as their potential to become stranded investments.

The analyses should also include projections of electric vehicle penetration including OEM transitions to EVs, sovereign prohibitions on future internal combustion vehicle sales, tar sand disinvestment trends, and fossil fuel disinvestment trends by fund managers and insurer fossil fuel policy. Recent petroleum sector forecasts by firms specializing in energy trends like Bloomberg, Navigant, and Goldman Sachs, predict that the transition to electric vehicles will accelerate quickly with a corresponding, precipitous drop in the demand for transportation fuels.⁴¹

In determining whether a Certificate of Necessity should issue for a pipeline project, the Commission's evaluation of the economic impact and risk to ratepayers is required. Determining whether a project may present a financial risk to ratepayers is a core function of the commission. The National Association of Regulatory Utility Commissioners' (NARUC) guidance is explicit on the need to assess financial risk:

“Rather than comparing expected return to perceived risk, utility regulators typically want to minimize rates or cost of service or both, while taking into account the degree of risk that ratepayers will face, as well as the risks to investors. Thus, there is a need to balance the expected cost of a resource, or a portfolio of resources, with the risk that the actual cost of the resource may be more or less than expected at various times over the planning horizon.”⁴²

⁴¹ Reuters, *Past its peak? Battered oil demand faces threat from electric vehicles*, May 19, 2020. <https://www.reuters.com/article/us-data-esg-autos/past-its-peak-battered-oil-demand-faces-threat-from-electric-vehicles-idUSKBN22V1HY>.

⁴² *Energy Portfolio Management: Tools & Resources for State Public Utility Commissions*, <https://pubs.naruc.org/pub.cfm?id=536E43E4-2354-D714-51C4-DAD3C6A8D5B3>.

The U.S. Environmental Protection Agency’s guidance is in accord, indicating that public utility commissions must develop and examine key analysis factors, such as demand forecasts, commodity price forecasts, and available alternative resource options.⁴³

Long-term market trends and recent events strongly suggest the need for fossil fuel-related infrastructure is decreasing significantly. Petroleum industry economists are warning that peak oil demand is near or may have already arrived. BP’s (British Petroleum) chief economist recently explained why BP will undertake a fundamental restructuring of its business model to invest in zero-carbon energy sources.

“The advent of electric vehicles and the growing pressures to decarbonise the transportation sector means that oil is facing significant competition for the first time within its core source of demand. This has led to considerable focus within the industry and amongst commentators on the prospects for peak oil demand – the recognition that the combined forces of improving efficiency and building pressure to reduce carbon emissions and improve urban air quality is likely to cause oil demand to stop increasing after over 150 years of almost uninterrupted growth.”⁴⁴

The energy sector has lost hundreds of billions in market value and future production will be reduced as the number of active oil rigs have plummeted.⁴⁵ The Wall Street Journal reported

⁴³ EPA’s guidance to public utility commissions, *Electricity Resource Planning and Procurement*, https://www.epa.gov/sites/production/files/2017-06/documents/gta_chapter_7.1_508.pdf.

⁴⁴ BP, Peak oil demand and long-run prices, <https://www.bp.com/en/global/corporate/energy-economics/spencer-dale-group-chief-economist/peak-oil-demand-and-long-run-oil-prices.html>.

⁴⁵ Business Insider, *The battered \$700 billion US energy industry is now worth roughly half of Microsoft amid oil's record plunge, April 21, 2020*. <https://markets.businessinsider.com/commodities/news/us-energy-industry-worth-half-microsoft-oil-price-crash-record-2020-4-1029113811#>.

that the oil development industry lost \$280 billion between 2007 and 2018.⁴⁶ Since 2015, more than 200 North American oil and gas producers have filed for bankruptcy protection, leaving \$130 billion in debt. Oil and gas bankruptcies have accelerated in 2020, which now include oil giant Chesapeake Energy Corporation.⁴⁷

Other market indicators suggest that investment in new pipeline infrastructure is highly questionable in light of clear trends indicating a precipitous drop in oil consumption in future years.

- Analysis released August 9th by world's 8th largest bank, BNP Paribas reports "that the economics of oil for gasoline and diesel vehicles versus wind-and solar-powered EVs are now in relentless and irreversible decline, with far-reaching implications for both policymakers and the oil majors."⁴⁸
- Seventeen major tar sands projects have been cancelled in the last several years. Seven international oil companies – Exxon Mobil, Conoco Phillips, Statoil, Koch Industries, Marathon, Imperial Oil and Royal Dutch Shell – have divested their interests in Alberta tar sands and will not need Enbridge's future pipeline services.⁴⁹ The conveyance of tar sand oils represents utilizes a large increment of Enbridge's ongoing carrying capacity and a major revenue source.

⁴⁶ WSJ, *Wall Street Tells Frackers to Stop Counting Barrels, Start Making Profits*, December 13, 2017. <https://www.wsj.com/articles/wall-streets-fracking-frenzy-runs-dry-as-profits-fail-to-materialize-1512577420>.

⁴⁷ World Oil, *Chesapeake joins more than 200 other bankrupt U.S. shale producers*, June 29, 2020. <https://www.worldoil.com/news/2020/6/29/chesapeake-joins-more-than-200-other-bankrupt-us-shale-producers>.

⁴⁸ PNB Paribas, *Wells, Wires and Wheels*, August 2019. <https://docfinder.bnpparibas-am.com/api/files/1094E5B9-2FAA-47A3-805D-EF65EAD09A7F>

⁴⁹ Grist, *This could be the end of Canadian tar sands*, January 12, 2017. <https://grist.org/article/this-could-be-the-end-of-canadian-tar-sands/>.

- The International Energy Agency (IEA) projects *Global EV Outlook 2020* that adoption of electric vehicles (EVs) will result in reduced oil demand of 2.5 – 4.2 million barrels per day by 2030.⁵⁰
- The world’s major auto manufacturers are transitioning away from gas and diesel-powered vehicles. General Motors, Ford, Toyota, VW, Volvo, and others are making clear that petroleum-free electric drivetrains will dominate their future manufacturing investments and that future product offerings will not use transportation fuels.
- 18 countries, including England, France, Israel, Norway, Netherlands, Slovenia, India, Egypt, and China have announced their intention to ban future sales and, in some cases, the use of vehicles with internal combustion engines. 25 cities and metropolitan areas intend to prohibit the use of gas and diesel-powered vehicles.⁵¹
- The purchase price of electric vehicles will be less than vehicles with internal combustion engines by 2022 reducing the demand for petroleum products.⁵²

Examination of current and future demand forecasts for the transport of crude oil suggests that a large capital expenditure on pipeline-related infrastructure is imprudent and inconsistent with the Commission’s responsibility to protect consumers. The future need of Enbridge’s carrying capacity and crude oil are directly related to the question of necessity. In the proceeding on necessity before the Commission on the relocation and replacement of Line 6b, future need was

⁵⁰ IEA, *Global EV Outlook 2020*, <https://www.iea.org/reports/global-ev-outlook-2020>.

⁵¹ Center for Climate Protection, *Survey of Global Activity to Phase Out Internal Combustion Engine Vehicles*, September 2018. <https://theclimatocenter.org/wp-content/uploads/2018/09/Survey-on-Global-Activities-to-Phase-Out-ICE-Vehicles-FINAL.pdf>.

⁵² Yale Environment 360, *Electric Cars Could Be as Affordable as Conventional Vehicles in Just Three Years*. April 18, 2019. <https://e360.yale.edu/digest/electric-cars-could-be-as-affordable-as-conventional-vehicles-in-just-three-years>.

expressly part of the decision and order.⁵³ In fact, Enbridge's Sitek testified under oath that the new replacement pipeline for Line 6b would meet the future needs of Enbridge and Michigan.⁵⁴

Enbridge's motion must be denied, because the failure to fully consider necessity and related market demand, trends, and capacity within the existing crude oil pipeline and transport system violate Act 16, its rules, and the decisions and orders of the Commission.

B. The Commission Must Examine the Environmental, Health, and Climatic Risks of the proposed Tunnel Under the Analytical Framework of the Michigan Environmental Protection Act.

With respect to pipelines, the MPSC has specifically determined that it must identify and determine environmental impacts associated with pipeline projects.

“Neither Act 9 nor Act 16 provide guidance relating to specific criteria for the Commission to consider in its decisions relating to pipeline applications. In 2012, the Commission issued an order in Docket No. U-17020 which stated, ‘...the Commission will grant an application pursuant to [Act 9 and] Act 16 when it finds that (1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and routed in a reasonable manner, and (3) the construction of the pipeline will meet or exceed current safety and engineering standards.’ *The Commission is also required by law to determine if there are environmental impacts from the proposed project and whether those can be appropriately mitigated.*” (emphasis added).⁵⁵

As the tunnel is proposed to extend the operable life of Line 5 for 99 years, the MPSC must determine the evaluate the environmental and health consequences of approving the tunnel. When gasoline and diesel fuel are burned that produce carbon dioxide a GHG, carbon monoxide, nitrogen oxides, particulate matter, and unburned hydrocarbons.⁵⁶ According to the Michigan Department

⁵³ See n. 37, *supra*.

⁵⁴ *Id.*

⁵⁵ MPSC, Facility Siting, https://www.michigan.gov/mpsc/0,9535,7-395-93309_93606_93615---,00.html.

⁵⁶ EIA, Gasoline and the Environment, <https://www.eia.gov/energyexplained/gasoline/gasoline-and-the-environment.php#:~:text=Gasoline%20use%20contributes%20to%20air%20pollution&text=The%20vapors%20given%20off%20when,carbon%20dioxide%2C%20a%20greenhouse%20gas.>

of Health and Human Services, GHG emissions have already resulted in the impairment of Michigan's natural resources – effects that will get worse unless CO2 emissions are abated.⁵⁷

Michigan has experienced measurable increases in temperature since 1951 ranging from 0.6°F in the southeastern Lower Peninsula to 1.3°F in the northwestern Lower Peninsula.⁵⁸ The Great Lakes, like the oceans, are absorbing heat, but at a faster rate, affecting limnologic health and altering ecosystems. Lake Superior's summer (July–September) surface water temperatures increased approximately 4.5°F (2.5°C) since 1980, warming twice as fast as air temperature. Great Lakes ice cover has decreased by 71% in the past 40 years.⁵⁹

The overwhelming scientific consensus holds that these unavoidable byproducts of petroleum combustion have profound environmental, climactic, and public health consequences that are quantifiable and monetizable. The Commission cannot make a determination of necessity or prudence without taking account of the long-term consequences of projects that have, or are likely to have, the effect of impairing the environment or public health.

The Commission is required by law to consider certain state and federal laws and regulations, including the Michigan Environmental Protection Act (MEPA), which imposes

⁵⁷ Present and future climate impacts in Michigan according to MI Dept of Health and Human Services and National Climate Assessment:

- Increased severity and frequency of storm events,
- Water-borne diseases from flooding, sewage overflows, septic failures, and development of harmful algal blooms,
- Increased heat wave intensity and frequency, increased humidity, degraded air quality, and reduced water quality will increase public health risks,
- Increased heat stress causing ecosystem disturbance, crop failures and reduced yields,
- More frequent flooding with associated soil erosion, declining water quality and beach health,
- More numerous late spring freezes detrimental to fruit crops,
- Increased aquatic invasive species and harmful blooms of algae, and declining beach health,
- Negative impacts on transportation, agriculture, human health, and infrastructure.

MDHHS, Michigan Climate and Health Profile, 2015.

https://www.michigan.gov/documents/mdhhs/MI_Climate_and_Health_Profile_517517_7.pdf.

⁵⁸ International Association for Great Lakes Research, The Great Lakes at a Crossroads Preparing for a Changing Climate, http://iaglr.org/scipolicy/factsheets/iaglr_crossroads_climatechange.pdf.

⁵⁹ <http://absolutemichigan.com/michigan/great-lakes-ice-coverage-down-71-in-past-40-years/>

separate substantive legal requirements upon the MPSC. Michigan courts have consistently recognized that MEPA imposes additional environmental review requirements that are supplemental to existing administrative and statutory requirements. “It is most important to note that [M]EPA does not, as both parties imply, merely provide a separate procedural route for protection of environmental quality, it also is a source of supplementary substantive environmental law.” In *State Highway Commission v Vanderkloot*, 392 Mich 159 (1974).

Interpreting MEPA, the Court found that the statute “is designed to accomplish two distinct results:”

- (a) to provide a *procedural* cause of action for protection of Michigan's natural resources;
and
- (b) to prescribe the *substantive* environmental rights, duties, and functions of subject entities (court’s emphasis).

MEPA requires a state agency or commission to undertake a two-part inquiry:

- 1) determine whether the project proponent has demonstrated that “*there is no feasible and prudent alternative to [the polluting, impairing, or destroying entity's] conduct*”;
and
- 2) whether “*such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction*” (court’s emphasis).

The *Vanderkloot* court found that even though the statute at issue - the Highway Condemnation Act - had no provisions requiring environmental review, the failure of the State Highway Commission to apply MEPA and examine feasible and prudent alternatives when a highway project involves environmental “pollution, impairment [or] destruction” would constitute an abuse of discretion.

“We additionally hold that the substantive environmental duties placed on the State Highway Commission by the Environmental Protection Act of 1970, MCLA 691.1201 *et seq.*; MSA 14.528(201) *et seq.*, are relevant to [the Highway Condemnation Act] judicial review in that failure by the Commission to reasonably comply with those duties may be the basis for a finding of fraud or abuse of discretion.”

In accord is *Ray v Mason County Drain Commissioner*, 393 Mich 294 (1975). There, the court held that MEPA “does more than give standing to the public and grant equitable powers to the circuit courts, it also imposes 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.... [MEPA] allows the courts to fashion standards in the context of actual problems as they arise in individual cases and to *take into consideration changes in technology* which the Legislature at the time of the Act's passage could not hope to foresee.” 393 Mich at 307⁶⁰ (emphasis added).

In *Her Majesty the Queen v Detroit*, 874 F2d 332 (1989), a case challenging the siting of the Detroit municipal incinerator, the Sixth Circuit followed *Ray*, finding that, “In addition to creating procedural rights, MEPA imposes a substantial duty on all persons and entities, public and private, to prevent or minimize environmental degradation caused by their activities.” The court further found that “MEPA is supplementary to existing administrative and regulatory procedures provided by law. It specifically authorizes the court to determine the validity, applicability, and reasonableness of any standard for pollution or pollution control equipment set

⁶⁰ Speaking to whether MEPA is in *pari materia* with the Oil Conservation Act, the court stated: “Having concluded that 1939 PA 61 and 1921 PA 17 provide statutory authority for denial of the drilling permit in the instant case, it is unnecessary to decide whether the Michigan environmental protection act, MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.*, must be read *in pari materia* with the oil conservation act. Nevertheless, if an answer to this question were required, we would hold that the Michigan environmental protection act should be read *in pari materia* with all legislation relating to natural resources.”

by state agency *and* to specify a *new* or *different* pollution control standard if the agency's standard falls short of the substantive requirements of MEPA” (court’s emphasis, internal citations omitted).⁶¹

More recently, in *Buggs v Michigan Public Service Commission*, COA No. 315058, (2015) (unpublished opinion), a case involving construction of a proposed natural gas pipeline, the court found that MEPA “established a substantive standard prohibiting the impairment of natural resources, which applies to an agency's determinations.” Following *Vanderkloot*, the court held that the MPSC

“had to consider whether the proposed project would impair the environment, whether there was a feasible and prudent alternative to the impairment, and whether the impairment was consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction.”

The *Buggs* court stated that “although the Commission found in a cursory manner that the pipelines would serve the public convenience and necessity, it did not otherwise *expressly speak to necessity, practicability, feasibility, or prudence in its orders.*” Remanding the case back to the MPSC, the court stated that the Commission “failed to follow the *independent statutory requirement* imposed under MEPA. Because its orders approving the pipelines were unlawfully issued, we vacate those orders and remand for a new necessity determination in both dockets.” (emphasis added). See also, *Mich Oil v. Natural Resources Commission*, 406 Mich 1, 32-33 (Mich 1979). (“The environmental protection act, by its terms, is substantively supplementary to existing laws and administrative and regulatory procedures provided by law.”); *West Michigan Environmental Action Council v Natural Resources Commission*, 405 Mich 741 (1979), (under

⁶¹ See MEPA, Sec. 1706, MCL 324.1706.

MEPA, courts have a responsibility to independently adjudicate and determine whether there is adequate protection from pollution, impairment and destruction).

Buggs holds that the Commission must examine the “necessity, practicability, feasibility, and prudence of pipeline projects. Although the Commission’s has not in the past evaluated health and environmental externalities when considering projects and regulatory approvals, more state and federal regulatory bodies are now examining the amount of carbon emissions associated with projects.

Public service commissions in ten states already evaluate the health, environmental and climate impacts of new electric generation resources in the IRP process⁶² and federal agencies that review major projects such as pipeline proposals must take a “hard look” at the environmental consequences of the proposed action including carbon emissions in applying the National Environmental Policy Act (NEPA).⁶³

In *Sierra Club v FERC*, 867 F3d 1357 (DC Cir 2017), the D.C. Circuit held that “FERC must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.” The court found that NEPA requires FERC to balance “the public benefits against the adverse effects” of natural gas pipelines and evaluate the reasonably foreseeable downstream emissions and climate impacts resulting from its approval of expanded natural gas pipeline infrastructure.

In accord, is *Birckhead v FERC*, No. 18-1218 (DC Cir 2019), the court followed *Sierra Club v FERC*, stating that FERC has the responsibility to attempt to obtain information necessary

⁶² California, Colorado, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, and Washington. https://policyintegrity.org/files/publications/Valuing_Climate_Impacts.pdf.

⁶³ See FERC, *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042, 2018. (NEPA and its implementing regulations require that review of major projects such as pipeline proposals demand a “hard look” at the environmental consequences of the proposed action and identification of possible alternatives).

to evaluate the downstream environmental effects of a proposed interstate pipeline project.⁶⁴ Similarly, in *WildEarth Guardians v Zinke*, 368 F Supp 3d 41, (DDC 2019), the court held that the Bureau of Land Management did not sufficiently consider climate change when leasing federal lands for oil and gas development.

In summary, both state and federal appellate courts have held that state agencies and commissions must apply an independent and supplementary analytical review to determine whether a project 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, and as described below, whether there exist feasible and prudent alternative.

1. MEPA requires an evaluation of feasible and prudent alternatives, including a “no action” alternative.

MEPA requires an analysis of “feasible and prudent alternatives” when considering pipeline projects that have, or are likely to have, detrimental effects on public health and the environment. Evaluating feasible and prudent alternatives is complementary to the determination of public need. Both ask the question, “Is there an alternative that results in more public benefit or less potential public harm?”

The Commission should require Enbridge to provide the means of obtaining an independent third-party review tasked with evaluating alternatives to the tunnel that would examine the following:

⁶⁴ FERC’s reviews should “ensure that pipeline infrastructure additions occur only if they: are required by the public interest after considering all relevant factors; produce greater benefits than costs (including through consideration of environmental externalities); do not impose undue burdens on landowners and communities; and enable the orderly development of infrastructure.” Testimony of Susan F. Tierney, before the U.S. House Subcommittee on Energy of the Committee on Energy and Commerce Subcommittee Hearing on “Modernizing the Natural Gas Act to Ensure It Works for Everyone” February 5, 2020. <https://docs.house.gov/meetings/IF/IF03/20200205/110468/HHRG-116-IF03-Wstate-TierneyS-20200205.pdf>.

- Whether the carrying capacity of the existing network of North American pipelines is sufficient to meet future needs.
- To what extent did the 2010 catastrophic failure of Line 6b and the more recent temporary partial closure of Line 5 result in constriction of supply, market disruption, or price increases to end users.
- Does Line 6b, now reconstructed as Line 78, have the capacity to meet market demand if Line 5 closes.
- Whether cessation of Line 5 would result in a new pipeline system equilibrium capable of meeting existing and future demand for oil and natural gas liquids.
- What is the potential for the tunnel project to become a stranded asset and liability to the State of Michigan in the event market trends play out as predicted?

In 2019, the Energy Information Agency released an inventory of new constructed or expansion of existing pipelines.⁶⁵ The inventory listed 230 new or expanded pipeline projects with 21 projects attributed to Enbridge. The Commission should consider whether these new or expanded pipelines are capable of meeting future market demand.

Given the strong market trends favoring the transition to zero carbon energy generation resources and the abundant and growing evidence of the environmental, economic, and public health impacts associated with the development and combustion of fossil fuels, the Commission must require Enbridge to provide sufficient analytical data and information in order to make an informed determination on whether a Certificate of Necessity should issue.

⁶⁵ The Energy Information Administration's new pipeline database lists 230 new pipeline projects and expansions that are underway. https://www.eia.gov/petroleum/xls/EIA_LiqPipProject.xlsx.

In conclusion, the MPSC has the authority and responsibility to evaluate projects and determine the “necessity, practicability, feasibility, or prudence” of a project in its orders” and “to take into consideration changes in technology” which the Legislature at the time of the Act's passage could not hope to foresee.” The MPSC should require project applicants to evaluate future market, financial and regulatory trends to demonstrate that projects are necessary and prudent in light of environmental, climactic and public health concerns, and the energy transition that is underway.

C. The Commission Cannot Determine Whether the Tunnel Project is in the Public Interest without Fulfilling its Legal Duties Under the Public Trust Doctrine, Article 4, Section 52 of the Michigan Constitution, and the MEPA.

Two of the most critical facts and legal principles in this proceeding involve the undisputed proposed location, construction, and operation of the new tunnel and tunnel pipeline in, under, and through the public trust bottomlands and waters of the Straits of the Straits of Mackinac.

First, the bottomlands and waters of the Straits are protected by the perpetual duty of the State to protect its sovereign title and interest held in public trust for citizens for navigation, fishing, drinking water, sustenance, boating, swimming, and other trust related purpose.⁶⁶ The state and its agencies and officials have an affirmative and solemn duty to protect the public trust in the bottomlands and waters of the Straits for these paramount trust purposes,⁶⁷ and to assure that the public trust title and interests, and uses are not alienated or subordinated to primarily private purposes and uses.⁶⁸

⁶⁶ *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580, 595-596; *State v Venice of America Land Co.*, 160 Mich 680, 702 (1910); *Obrecht v National Gypsum Co.*, 31 Mich 399 (1960), adopting the public trust doctrine in the Great Lakes and navigable waters pronounced in *Illinois Central R Rd*, 146 US 387 (1892).

⁶⁷ *Collins v Gerhard*, 237 Mich 237 Mich 38 (1926); *Glass v Goeckel*, 473 Mich 667, 703 (2005).

⁶⁸ *Illinois Central, Glass, and Obrecht, supra*.

Second, Article 4, Section 52 of the Michigan Constitution declares that the “air, waters, and natural resources” of the State are of “paramount public concern;” Article 4, Section 52 also directed the legislature to enact laws to protect these paramount natural resources from “pollution, impairment, or destruction.”⁶⁹ In the words of the Michigan Supreme Court, the Michigan Environmental Protection Act is the legislature’s response to this constitutional mandate.⁷⁰ In *Ray v Mason County Drain Comm’r, supra*, the Court expressly held that the MEPA imposed a substantive duty on public entities like the MPSC to “prevent and minimize degradation of the environment.”⁷¹ In addition, the MEPA requires an agency’s decision to be made “in light of the State’s paramount public concern” for the protection of its air, water and natural resources.⁷² And, section 1705(2) requires the MPSC, that is any state agency or other entity, in any “permit, licensing, or other similar proceeding” to consider and determine the likely effects and existence of feasible and prudent alternatives before approving or authorizing a proposal like the Enbridge Tunnel Project.⁷³

As described above, one of the primary issues in the instant proceeding before the Commission is whether the Tunnel Project can be certified “in the public interest.” This presents a considerable challenge, given the impacts and threats to the air, water, natural resources and the public trust in the waters, bottomlands, and aquatic resources and paramount inalienable rights of the public. The Commission cannot fully evaluate and determine whether the Enbridge Tunnel Project is “in the public interest” unless it conducts a full and comprehensive review and consideration of the effects and alienation or subordination of these public trust interests.

⁶⁹ Mich Const. 1963, art. 4, sec. 52.

⁷⁰ *Ray v Mason County Drain Comm’r, supra*, 393 Mich at 304.

⁷¹ *Id.*, at 304.

⁷² MEPA, Section 1703(1), MCL 324.1703(1).

⁷³ MEPA, MCL 324.1705(2); see also *State Highway Comm’n v Vanderkloot*, Argument III, B, *supra*.

For example, what are the impacts and risks of boring and constructing a tunnel and transporting crude oil 50 feet or more below the lakebed? What are the risks and threats to fishing, navigation, drinking water of the City of Mackinac Island, or Mackinac Island, or St. Ignace? What are the impacts from construction to the fishing and fishery tribal rights of the Bay Mills Band, Grand Traverse Band, or Little Traverse Band protected by the Treat of 1836? To what extent is the public interest really served if the Commission commits to the risk of this Tunnel Project and the transport of fossil fuels for 99 more years, especially by what is essentially a private project controlled by Enbridge for primarily private purposes? Is the proposal to commit the Commission and the State of Michigan to nearly a trillion gallons of fossil fuel consumption from Line 5 in the public interest? Is a commitment to continued consumption of more crude oil given the declining market demand in the public interest? Are the severe decline of wild and plant species, flooding and erosion, including the shorelines along the Great Lakes and the recent dam failure in Midland County attributable in part to climate change in the public interest? Is the flooding and damage to near-shore wetlands in the public interest? Enbridge's motion in limine must be denied, because the Commission cannot fulfill the mandatory and affirmative duties to determine whether the project is in the public interest as required by Act 16, the public trust doctrine, and Article 4, Section 52 of the Constitution, and the MEPA.

IV. CONCLUSION.

For the reasons discussed above, Enbridge's motion in limine should be denied in its entirety.

FOR LOVE OF WATER (FLOW)

Date: September 23, 2020

By: _____

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EXHIBIT 1

2015 WL 159795

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UNPUBLISHED OPINION. CHECK
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UNPUBLISHED
Court of Appeals of Michigan.

John BUGGS and Daniel
Bonamie, Appellants,

v.

MICHIGAN PUBLIC SERVICE
COMMISSION, Appellee,

and

DTE Michigan Gathering Holding
Company, assignee of Encana Oil &
Gas (USA), Inc., Petitioner–Appellee.

John Buggs and Daniel
Bonamie, Appellants,

v.

Michigan Public Service
Commission, Appellee,

and

DTE Michigan Gathering Holding
Company, assignee of Encana Oil &
Gas (USA), Inc., Petitioner–Appellee.

Docket Nos. 315058, 315064.

|

Jan. 13, 2015.

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

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

Opinion

PER CURIAM.

*1 In this dispute over the construction and use of gas pipelines, appellants, John Buggs and Daniel Bonamie, appeal by right the ex parte orders issued by appellee,

Michigan Public Service Commission, which gave petitioner, DTE Michigan Gathering Holding Company, as the successor in interest to Encana Oil & Gas (USA), Inc. (Encana Oil),¹ permission to construct, own, and operate two natural gas pipelines: the Garfield 36 Pipeline (Docket No. 315058) and the Beaver Creek 11 Pipeline (Docket No. 315064). For the reasons more fully explained below, we conclude that the Commission's orders were unlawful. Accordingly, we vacate those orders and remand for a new determination of necessity on each application.

I. BASIC FACTS

1. THE GARFIELD 36 PIPELINE

In January 2013, Encana Oil applied for a certificate of public convenience and approval to construct, own, and operate a 1.9 mile long natural gas pipeline under 1929 PA 9 (Act 9), [MCL 483.101 et seq.](#) Encana Oil referred to the pipeline as the Garfield 36 Pipeline. Encana Oil represented it would use the pipeline to transport gas recovered from a single well with a recoverable reserve of 2 to 3 billion standard cubic feet of gas. However, it also stated that it anticipated drilling additional wells into the Collingwood formation. It stated that the pipeline would be constructed with anticipated easements and permits “adjacent to the well pad access road” on land owned by the Michigan Department of Natural Resources (the Department) and within the county's right of way to the point where it would connect with Michigan Consolidated Gas Company's Saginaw Bay Pipeline. Encana Oil provided a map of the proposed route and engineering specifications which provided that the pipeline would be capable of transporting up to 40 million standard cubic feet of gas per day. Encana Oil further represented that the pipeline was necessary for its business, that the gas would ultimately be available to Michigan consumers, that without the pipeline there would be no public access to gas reserves in that area, and that the pipeline was “the most efficient and cost-effective means to bring these gas reserves to the public.”

Encana Oil also filed an environmental impact assessment with its application. Dean Farrier prepared the assessment and stated that he was a consulting biologist. He represented that the proposed pipeline would be constructed entirely on land owned by the Department and along existing corridors such that there would be “minimal impact to the local ecosystems and land use,” and that no alternatives reviewed had less

impact. He noted that the route crossed some wetlands and that the pipeline would “be directionally drilled under the series of wetlands for 1027 feet” to “minimize the impact to that feature.” He represented that the wetland crossing was exempt from the Natural Resources and Environmental Protection Act, [MCL 324.101 et seq.](#) Farrier also indicated that clearing would be limited to “the minimum area required for safe and efficient construction,” and that to the best of his knowledge there were no threatened or endangered species within the proposed easement or along the proposed route. Finally, he represented that underground pipelines were the safest way to transport petroleum products, and that the potential for release was low and, in any event, unlikely to “significantly harm surrounding plants, wildlife, or soils.” Further, although the possibility of ignition and fire was a danger, the human population density in the vicinity was “extremely low.”

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

2. BEAVER CREEK 11 PIPELINE

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

Farrier prepared an environmental impact assessment for this project as well. Farrier again stated that the route was along existing corridors on the Department's land except for a small percentage of the route, which was on land owned by the Department of Transportation; however, he acknowledged that the route crossed privately-owned land and that there were five residences within 1/8th of a mile, but that the route was within the county right-of-way. Again, he represented that to the best of his knowledge there were no threatened or endangered species within the proposed

easement or route and that “[c]learing, removal of topsoil, and grading will be limited to the minimum area required for safe and efficient construction.” He also said the route “offers the minimal impact to the local ecosystems and land use,” and that “[a]lternatives were reviewed and none appeared to have less impact....” As with the other assessment, he asserted that underground pipelines were the safest way to transport petroleum products, that the potential for release was low and unlikely to “significantly harm surrounding plants, wildlife or soils,” and that although the possibility of ignition and fire was a danger, the human population density in the vicinity was “extremely low.”

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

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

3. PROCEEDINGS

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

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

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

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

(2) that the interest allegedly damaged falls within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

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

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

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

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

Although the Petitioners are correct that, in Case No. U-9138, the Staff conducted its own environmental review in order to conclude that construction would not constitute a "major site activity," that case has no bearing on the matter presently before the Commission. Moreover, the

Petitioners cite no legal authority to support their assertion that, because the Staff conducted an independent review of an issue in one Act 9 pipeline case, it must do so in each case. The criteria that the Commission is statutorily authorized to consider in an Act 9 pipeline construction application includes the map of the proposed line, the route, the type of construction and the necessity and practicability of the pipeline so that the Commission may determine whether the proposed construction serves the convenience and necessity of the public. [MCL 483.109](#).

*4 Here, the Petitioners have chosen the wrong forum in which to bring their claims. If they want to protect the natural habitats of the Kirtland's warbler or other wildlife from diminution, or protect the environment from forest fragmentation, they need to file a lawsuit in a court with proper jurisdiction to consider the issues. The Commission is unable to grant the Petitioners' motion for reconsideration because they have chosen the wrong forum in which to seek redress.

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

Petitioner's argument that appellants are not parties in interest within the meaning of [MCL 462.26](#) because they were not parties to the ... [administrative] proceedings must be rejected because, by equating the phrase "party in interest" used in that statutory provision with the term "party," petitioner would improperly render the words "in interest" nugatory or mere surplusage. See, e.g., *Whitman v. City of Burton*, 493 Mich. 303, 311-312; 831 [NW2d 223] (2013). Rather, by using the broader phrase "party in interest," the Legislature has necessarily allowed persons or entities who are not parties to the relevant [Commission] case to file an appeal of right from the relevant types of [Commission] orders. Further, contrary to petitioner's argument that one needs to be a party to a case to be an aggrieved party under [MCR 7.203\(A\)](#), there are situations where a non-party to a case is an aggrieved party with standing to appeal. See *Abel v. Grossman Investments Co.*, [302 Mich.App 232; 838 NW2d 204 (2013)]. Also, *Federated Ins Co v. Oakland Co Rd Comm*, 475 Mich. 286; 715 NW2d 846 (2006), is inapplicable. Contrary to petitioner's discussion of that case, its holding was not based on the Attorney General not being a named party. See *id.*, 296 n. 10. Rather, the Attorney General was manifestly not an aggrieved party in that case because he was not

pursuing an appeal based on an interest in the outcome of the particular case but merely to dispute this Court's construction of a statute. See *id.*, 290. Thus, we need not consider whether *Federated Ins Co* has been undermined by *Lansing Schools Ed Ass'n v. Lansing Bd of Ed*, 487 Mich. 349; 792 NW2d 686 (2010). However, we note that review of the June 28, 2013 ... order is not in the scope of the present appeals from January 31, 2013 orders of the [Commission]. Rather, appellants may only challenge the January 31, 2013 [Commission] orders....³

We now consider the issues on appeal.

II. THE ORDERS

A. STANDARDS OF REVIEW

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

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

In order to prevail, Buggs and Bonamie must demonstrate by clear and convincing evidence that the Commission's orders were unlawful or unreasonable. *MCL 462.26(8)*. An order

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

B. ANALYSIS

The Commission is a “creature of the Legislature” possessing only the “authority bestowed upon it by statute”; it “possesses no ‘common law’ powers.” *Union Carbide Corp v. Pub Serv Comm*, 431 Mich. 135, 146; 428 NW2d 322 (1988). “Thus, a determination of the commission's powers requires an examination of the various statutory enactments pertaining to its authority.” *Id.*

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

Anyone proposing to pipe or transport natural gas in Michigan must comply with Act 9. *MCL 483.101*. Moreover, before constructing a pipeline to transport natural gas, the person proposing to construct the line must apply to the Commission for permission to construct the pipeline. *MCL 483.109*. The application must include “a map or plat of [the] proposed line or lines which it desires to construct, showing the dimensions and character of such proposed pipe line or lines, its compression stations, control valves, and connections....” *Id.* And the Commission must “examine and inquire into the necessity and practicability of such transmission line or lines and to determine that such line or lines will when constructed and in operation serve the convenience and necessities of the public” before it may approve the construction of the proposed pipeline. *MCL 483.109*. Thus, although *MCL*

483.109 does not specifically require the Commission to consider the environmental impact, it plainly permits the Commission to deny permission if after investigating the matter the Commission determines that the new pipeline would not serve the public convenience and necessity.

*6 Since the enactment of Act 9, our Supreme Court has considered whether an agency must consider the environmental impact of a proposed project before granting permission to proceed. In *State Hwy Comm v. Vanderkloot*, 392 Mich. 159, 167–168; 220 NW2d 416 (1974) (opinion by Williams, J.), landowners opposed the condemnation of land for a highway, arguing in part that it was a swamp area with “increasingly rare or even unique ecological characteristics,” and that the duties of the highway commission conflicted with Const 1963, art 4, § 52, relating to the protection of natural resources. In considering this argument, our Supreme Court held that the Legislature has an affirmative duty to enact legislation to protect the environment, but was not required to fulfill this duty by enactment of a specific provision in the highway condemnation act, MCL 213.361 *et seq.*, or every other piece of relevant legislation; instead, the Court explained, it had fulfilled its duty by enacting the environmental protection act.⁴ *State Hwy Comm*, 392 Mich. at 182–183 (opinion by Williams, J.), 194 (opinion by Levin, J.) (conceding that the environmental protection act provides substantive protections as well as procedural protections, but declining to consider the issue on the record before the Court). The Court explained that the Legislature accomplished this goal through two distinct methods: it provided a cause of action for the protection of Michigan's natural resources, and it provided that subject agencies had certain environmental obligations. *Id.* at 184. The Court determined that the environmental protection act specifically proscribed “pollution, impairment, or destruction” of natural resources “unless it is demonstrated that ‘there is no feasible and prudent alternative to [the polluting, impairing, or destroying entity's] conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction,’” and that “[t]his substantive environmental guideline is applicable to the [highway] Commission's administrative condemnation determinations.” *Id.* at 185–186 (emphasis removed), citing MCL 691.1203, which has been replaced by MCL 324.1703; see also *Genesco, Inc v. Dep't of Environmental Quality*, 250 Mich.App 45, 55–56; 645 NW2d 319 (2002). Thus, although the specific provision of the environmental protection act cited by the court addressed the burden of proof for the

cause of action created by that act, a plurality of our Supreme Court held that the act also established a substantive standard prohibiting the impairment of natural resources, which applies to an agency's determinations. *State Hwy Comm*, 392 Mich. at 186, 190 (opinion by Williams, J.). The Court, however, went on to state that the declaration of necessity in the condemnation proceeding would be *prima facie* evidence of necessity and that a person challenging the agency's determination of necessity would have the burden to prove fraud or abuse of discretion, but that the commission's failure to reasonably comply with its duties could be a basis for finding fraud or an abuse of discretion. *State Hwy Comm*, 392 Mich. at 189–190 (opinion by Williams, J.).

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

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

The Commission, however, mistakenly characterized the nature of the obligation. Buggs and Bonamie did not ask the Commission to enforce the MEPA or another environmental law. They asked the Commission to comply with its duty to examine and inquire into the necessity and practicability of the pipelines and determine that the pipelines would serve the convenience and necessity of the public. And, under the decision in *State Hwy Comm*, that duty includes an obligation to consider the environmental effect that the proposed pipeline would have. Namely, it had to consider whether the proposed project would impair the environment, whether there was a feasible and prudent alternative to the impairment, and whether the impairment was consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. *State Hwy Comm*, 392 Mich. at 185–186 (opinion by Williams, J.).

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

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

assessments had been attached to the applications. However, it did not discuss the contents or expressly adopt Farrier's representation that alternatives were reviewed and none appeared to have less impact, i.e., that there was no feasible and prudent alternative to the impairment, and did not address whether the impairment was consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. *State Hwy Comm*, 392 Mich. at 185 (opinion by Williams, J.). Accordingly, it is necessary to remand this case for the Commission to expressly make such a determination.

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

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

Although Buggs and Bonamie's claims that the Kirtland Warbler is protected or endangered and that its habitat would be affected are troubling, allegations to this effect were not before the Commission at the time it reviewed the applications. Moreover, allegations that Encana Oil

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

Although the Commission minimally complied with the requirements for approving the applications under Act 9, it failed to follow the independent statutory requirement imposed under MEPA. Because its orders approving the pipelines were unlawfully issued, we vacate those orders and remand for a new necessity determination in both dockets. In making its new determinations of necessity, the Commission shall specifically address the environmental impact as required under the MEPA and the decision in *State Hwy Comm*, 392 Mich. at 184–190 (opinion by Williams, J.).

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

All Citations

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

III. CONCLUSION

Footnotes

- 1 During the pendency of this appeal, Encana Oil moved to substitute DTE Holding as the party in interest after it assigned all of its interests in the pipelines to DTE Holding. This Court granted the motion. However, because all proceedings below occurred while Encana Oil was still a party, for ease of reference we shall refer to Encana Oil, rather than its successor, DTE Holding.
- 2 See *In re Application of Encana Oil & Gas Inc re Garfield 36 Pipeline*, unpublished order of the Court of Appeals, entered March 25, 2013 (Docket Nos. 315058, 315064); *In re Application of Encana Oil & Gas Inc re Garfield 36 Pipeline*, unpublished order of the Court of Appeals, entered April 3, 2013 (Docket Nos. 315058, 315064).
- 3 *In re Application of Encana Oil & Gas Inc re Garfield 36 Pipeline*, unpublished order of the Court of Appeals, entered September 25, 2013 (Docket Nos. 315058 & 315064). Although Buggs and Bonamie have restricted the issues presented on appeal to those involved in the January 2013 order, they have referred to and incorporated pleadings and documents from subsequent proceedings; they refer to affidavits, pleadings, and documents to establish that they live in the area, were not given notice of the applications, and understand that Encana Oil (or DTE Holding) plans to add 500 to 1,700 wells and associated pipelines to the system. Buggs and Bonamie also state their belief that the gas exploration and development activity can have an extreme effect on the landscape, that the habitat of the Kirtland Warbler will be adversely affected, and relate accounts of dead birds. Because these issues were not before the Commission when it issued its orders, we will not consider them in determining whether the Commission erred when it issued those orders. Nonetheless, the Commission's decision on reconsideration of the denial of the motion to intervene is pertinent to understanding the basis of its refusal to allow intervention.
- 4 The original environmental protection act was repealed by 1994 PA 451, and replaced by the Natural Resources and Environmental Protection Act, [MCL 324.101 et seq.](#), Part 17 of which is titled the Michigan Environmental Protection Act. The MEPA set forth in Part 17 is substantially similar to the original act.

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of Enbridge Energy, Limited Partnership for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief

U-20763

ALJ Dennis Mack

PROOF OF SERVICE

On the date below, an electronic copy of **Response to Enbridge Energy, Limited Partnership's Motion in Limine by For Love of Water (FLOW)** was served on the following:

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The statements above are true to the best of my knowledge, information and belief.

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