STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

IN THE MATTER OF:	**Docket No.: 18-010802**
Petitions of Straits of Mackinac Alliance, Grand Traverse Band of Ottawa and Chippewa Indians, and the City of Mackinac Island on the permits issued to Enbridge Pipelines (Lakehead), LLC (consolidated cases)	**Agency No.: WRP008225V1,014208V1** **Part(s): 325, Great Lakes Submerged Lands** **Agency: Department of Environment, Great Lakes & Energy** **Case Type: Water Resources Division**

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Issued and entered
this 7th day of February 2020
by: Daniel L. Pulter
Administrative Law Judge

ORDER ON MOTIONS FOR SUMMARY DISPOSITION

This contested case concerns three Applications submitted by Enbridge Pipelines (Lakehead), L.L.C. (Permittee) for permits under Part 325, Great Lakes Submerged Lands, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended. MCL 324.32501, *et seq.* The Water Resources Division (WRD) of the Department of Environment, Great Lakes, and Energy (EGLE)[1] issued permits on March 22, 2018; November 30, 2018; and February 22, 2019. The permits were timely challenged by Straits of Mackinac Alliance (Alliance), the Grand Traverse Band of Ottawa and Chippewa Indians (Grand Traverse Band), and the City of Mackinac Island (City) (collectively Petitioners). In accordance with the Initial Scheduling Order entered in this case, each of the Parties have filed Motions for Summary Disposition. Each of such Motions will be addressed *infra.*

[1] The permits in this case were issued by the Department of Environmental Quality (DEQ). Pursuant to Executive Order 2019-06, effective April 22, 2019, the name of the agency was changed to the Department of Environment, Great Lakes, and Energy. All citations in the record to DEQ shall be treated as a reference to EGLE. In addition, Executive Order 2019-06 also abolished the Michigan Administrative Hearing System (MAHS) and created the Michigan Office of Administrative Hearings and Rules (MOAHR). In that Executive Order, the authorities, powers, duties, functions, and responsibilities of MAHS were transferred to MOAHR.

I. Relevant Facts

From the Motions of the Parties, the following relevant facts have been ascertained. Enbridge is the owner of a 645-mile international pipeline, known as Line 5, which extends southeast from Superior, Wisconsin, through both Michigan peninsulas to the Bay City area of Michigan, and then southeast to the Marysville area and across the United States-Canada international border to Sarnia, Canada. Permittee's Motion at p 2. The relevant portion of Line 5 for this contested case is that segment which resides on the lake-bottom for 4.09 miles across the Straits of Mackinac. *Id.* Line 5 at this location consists of two 20-inch diameter seamless pipes (sometimes referred to as the Dual Pipelines). *Id.*

By an Easement dated April 23, 1953 (1953 Easement), the State of Michigan authorized the installation of Line 5 across the Straits. Exhibit A attached to EGLE's Motion; Exhibit 1 attached to the Permittee's Motion. The 1953 Easement contemplates that water currents could move soil from beneath the pipeline. Permittee's Motion at p 4; EGLE's Motion at p 6; Petition at p 11.[2] As a result, Paragraph A(10) of the 1953 Easement provides that "[t]he maximum span or length of pipe unsupported shall not exceed seventy-five (75) feet." Exhibit A attached to EGLE's Motion at p 5; Exhibit 1 attached to the Permittee's Motion at p 5. Similarly, a federal Consent Decree between the United States and the Permittee provides the following:

> Enbridge shall also assure that each of the Dual Pipelines is well-supported in areas where the pipeline is suspended above the lake bed ("spans").... For uncovered portions of the pipelines in water deeper than 65 feet, Enbridge shall at all times support and anchor the pipelines with a series of screw-anchor pipe supports ("Screw Anchors") that are placed so that the maximum distance between adjacent Screw Anchors shall not exceed 75 feet.

Exhibit 2 attached to Permittee's Motion at pages number 74 and 75.

In order to satisfy the requirements of the 1953 Easement and the federal Consent Decree, the Permittee filed an Application with EGLE on May 9, 2017. In this Application, the Permittee sought a permit for the installation of 22 Screw Anchors. This Application recites that "[t]he purpose of the project is to install 22 anchor supports on the dual pipelines to decrease the span distance at these locations." Exhibit 4 attached to Permittee's Motion at p 2. A substantially identical Application was filed by the Permittee on March 15, 2018, seeking a permit for the installation of 48 Screw Anchors. A substantially identical Application was filed by the Permittee on September 21, 2018,

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[2] All five Petitions filed by the Petitioners herein contain substantially similar language. Therefore, all references to the Petitions herein will be to the Petition originally filed by the Alliance on May 21, 2018.

seeking a permit to install 3 Screw Anchors. Three permits were issued by EGLE on March 22, 2018; November 30, 2018; and February 22, 2019.[3]

II. EGLE's and the Permittee's Motions

A. Standard of Review

In their Motion, EGLE and the Permittee contend that the Petitions filed by the Petitioners fail to state a claim for which relief may be granted and exceed the subject matter jurisdiction of this Tribunal. Citing R 792.10129(1)(b) & (c). It is important to recall that a motion for summary disposition for failure to state a claim for which relief may be granted tests only the legal sufficiency of the Petition on the basis of the pleadings alone. See, e.g., *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). Such a motion is granted where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify a decision in the non-movant's favor. See *Maiden v Rozewood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

A motion based on lack of subject matter jurisdiction under Rule 129(1)(c) similarly raises an issue of law. See *McCleese v Todd*, 232 Mich App 623, 627; 591 NW2d 375 (1998). Such a motion may be raised at any time in the proceedings. *Id.* When an administrative agency lacks subject matter jurisdiction, "any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox v Board of Regents of the University of Michigan*, 375 Mich 238, 242; 134 NW2d 146 (1965).

To the extent that EGLE and the Permittee seek summary disposition on claims raised in the Petitions as a Matter of Law, this Tribunal need not review any evidence proffered by any party in ruling on these Motions.

However, in its Motion, the Permittee also seeks summary disposition on the grounds elucidated in Rule 129(1)(a), *i.e.*, that there is no genuine issue of material fact. R 792.10129(1)(a). To be entitled to summary disposition under this subsection, the movant must demonstrate that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Trepanier v National Amusements, Inc.*, 250 Mich App 578, 583; 649 NW2d 754 (2002). Hence, the burden of production is upon the party moving for summary disposition by supporting his or her position with affidavits, depositions, admissions, or other documentary evidence. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314, 317 (1996).

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[3] According to EGLE's Briefs, its predecessor agency permitted the installation of 155 Screw Anchors on the Dual Pipelines in response to prior applications filed by the Permittee. EGLE's Response to Petitioners' Motion for Summary Disposition at p 4; EGLE's Motion for Summary Disposition at p 7.

In support of its Motion under Rule 129(1)(a), the Permittee submitted the following evidence with its Motion: (1) the 1953 Easement; (2) excerpts of the federal Consent Decree; (3) the Third Modification of Consent Decree; (4) the Application filed on May 9, 2017; (5) EGLE's Request for Additional Information dated September 13, 2017; and (6) the Permittee's Response to EGLE's Request for Additional Information. Notably absent from the Permittee's submission is the following documentation: (a) the Application filed by the Permittee on March 15, 2018, seeking a permit for the installation of 48 Screw Anchors; (b) the Application filed by the Permittee on September 21, 2018, seeking a permit to install 3 Screw Anchors; (c) EGLE's project review report for the three Applications; and (d) any other documentation from EGLE indicating that the Permittee has satisfied the requirements in Rule 15. R 322.1015. The Permittee's Motion does not indicate or describe how the installation of the 73 Screw Anchors will not cause "existing and potential ... adverse effects to the environment, public trust, and riparian interests of adjacent owners" and that "there is no feasible and prudent alternative to the applicant's proposed activity which is consistent with the reasonable requirements of the public health, safety, and welfare." R 322.1015. Therefore, from the evidence presented in its Motion, this Tribunal is unable to grant summary disposition in accordance with Rule 129(1)(a). R 792.10129(1)(a). For such reason, the Permittee's Motion for Summary Disposition under Rule 129(1)(a) is **DENIED**.

Accordingly, this Tribunal will address the arguments in the Motions filed by the Parties under Rule 129(1)(b) & (c). R 792.10129(1)(b) & (c).

B. Failure to State a Claim

Both EGLE and the Permittee have asserted that the five Petitions filed in this contested case fail to state a claim upon which relief can be granted. Essentially, the Petitioners have alleged a spectrum of claims. On one end of the spectrum, the Petitioners assert that this Tribunal's decision on the permits should include a review of the continued operation of Line 5. In the middle of this spectrum, the Petitioners assert that they are entitled to challenge the permits on the grounds that they constitute a change in the design of the Dual Pipelines. Finally, the Petitioners allege that they are entitled to challenge the environmental effects of the installation of the Screw Anchors under Rule 15. Each of the claims of the Petitioners will be discussed *infra*.

1. Continued Operation of Line 5 and Re-Design of the Pipeline

The three permits in this contested case were issued by EGLE under the authority of Part 325. MCL 324.32501, *et seq.* Section 32512(1)(c) provides that a permit is necessary before any party may "[d]redge or place spoil or other material on bottomland." MCL 324.32512(1)(c). Any determination by EGLE to issue such a permit must be consistent with the strictures of Rule 15. R 322.1015. Pursuant to § 32512(1)(c) and Rule 15, the Permittee filed three applications seeking permits to install 73 Screw Anchors on the bottomlands at the Straits of Mackinac. After review of such applications, EGLE issued three permits on March 22, 2018; November 30, 2018; and February 22, 2019.

The Petitioners challenged these permits under various legal and factual theories. Among these theories, the Petitioners claim that EGLE erred when it failed to consider the potential environmental impacts of "the continued operation of Line 5" when it reviewed the applications. See Petition at p 19. In its Motion, EGLE contends that this Tribunal does not have jurisdiction to consider the environmental impacts of the continued operation of Line 5. EGLE's Motion at p 12. The Permittee similarly argues that Rule 15 does not authorize the Petitioners to challenge in this contested case the continued operation of Line 5. Permittee's Motion at p 12.

In response, the Petitioners contend that the use of Screw Anchors amounts to a de facto re-design of Line 5 that was not contemplated in the original plans for the Dual Pipelines. They argue that the proposed installation of Screw Anchors would reduce the design of the pipeline to an underwater suspension bridge. The Petitioners also argue that EGLE failed to review "the risks associated with lifting Line 5 off the lakebed." Petitioners' Combined Response Brief at p 7.

In order to determine the appropriate limits of this Tribunal's subject matter jurisdiction, a review of Rule 15 is appropriate. That Rule provides in total:

> Rule 15. In each application for a permit, lease, deed, or agreement for bottomland, existing and potential adverse environmental effects shall be determined. Approval shall not be granted unless the department has determined both of the following:
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> (a) That the adverse effects to the environment, public trust, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible.

(b) That there is no feasible and prudent alternative to the applicant's proposed activity which is consistent with the reasonable requirements of the public health, safety, and welfare.

R 322.1015. This Rule requires EGLE to make determinations of "existing and potential adverse environmental effects." However, Rule 15(b) makes it clear that EGLE's analysis is limited to the "proposed activity." The proposed activity in this contested case is the installation of 73 Screw Anchors. Indeed, the May 9, 2017, Application recites that "[t]he purpose of the project is to install 22 anchor supports on the dual pipelines to decrease the span distance at these locations." Exhibit 4 attached to Permittee's Motion at p 2. Hence, before EGLE could issue permits for the installation of the Screw Anchors, it was required to determine the environmental effects of such installation. It was not required to determine the environmental effects of the continued operation of Line 5. Nor was it obligated to determine if the installation were to cause a re-design of the existing pipeline. Because this proceeding is "an extension of the initial application process for the purpose of arriving at a single final agency decision on the application," *National Wildlife Fed'n v Department of Envtl Quality (No. 2)*, 306 Mich App 369, 379; 856 NW2d 394 (2014), this contested case is similarly limited to a review of the environmental effects of the installation of the 73 Screw Anchors.

The Petitioners nevertheless further argue that the nonsegmentation principle prevents "the division of one project into multiple smaller projects, 'each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" Petitioners Combined Response at p 7. In support of the application of the nonsegmentation principle to this case, the Petitioners cite to *K & K Constr v Department of Natural Resources*, 456 Mich 570, 578; 575 NW2d 531 (1998); *Natural Resources Defense Counsel v Hodel*, 275 US App DC 69; 865 F2d 288 (1988); *Delaware Riverkeeper Network v FERC*, 410 US App DC 137; 753 F3d 1304 (2014); and *Appeal of Gary Flaska*, 1993 WL 537744 (Mich.Dept.Nat.Res.). Each of such decisions will be reviewed.

First, *K & K Constr* involved a claim that the denial of a permit to fill wetlands constitutes a regulatory taking of the property without just compensation. In the case, the Supreme Court applied the nonsegmentation principle which it described as "one of the fundamental principles of taking jurisprudence." 456 Mich at 578. The Court explained that the nonsegmentation principle "holds that when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole." 456 Mich at 578. The Supreme Court further noted that it had "previously found the nonsegmentation principle was applicable to two adjoining parcels of property with unity of ownership." 456 Mich at 579. Hence, the Court refused to address, in isolation, only one of the parcels owned by the developer when three of the

parcels were subject to a "comprehensive development scheme." 456 Mich at 581. The Court also quoted its prior decision in *Bevan v Brandon Township*, 438 Mich 364, 395; 475 NW2d 37 (1991), wherein it held that "contiguous lots under the same ownership are to be considered as a whole for purposes of judging the reasonableness of zoning ordinances...."[4]

Second, in *Hodel*, the decision of the court was written by Judge Ruth Bader Ginsburg. However, *Hodel* did not apply the nonsegmentation principle. Rather, in *Hodel* the court construed the National Environmental Policy Act of 1969 (NEPA), 42 USC § 4321, *et seq.*, and addressed the issue of whether the Secretary of the Interior failed to perform an adequate analysis of the cumulative impacts of a five-year schedule of offshore oil and gas leasing. The decision noted that, under NEPA, "proposals for ... related actions that will have cumulative or synergistic environmental impact upon a region concurrently pending before an agency must be considered together." 865 F2d at 297, quoting *Kleppe v Sierra Club*, 427 US 390, 410; 96 S Ct 2718, 2730; 49 L Ed 2d 576 (1976). The court further noted that "[t]he purpose of this requirement is to prevent agencies from dividing one project into multiple individual actions 'each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" 865 F2d at 298, quoting *Thomas v Peterson*, 753 F2d 754, 758 (CA 9 1985).

Third, the *Delaware Riverkeeper* case similarly fails to utilize the nonsegmentation principle but instead applied the principles of NEPA. The court first noted that judicial review of agency action under NEPA is to ensure that the agency has adequately considered the environmental impact of its action. 753 F3d at 1312-1313. The court held that "[a]n agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." 753 F3d at 1313.

Finally, in *Appeal of Gary Flaska*, the contested case involved an application for construction of an access drive and a parking area in a wetland. The case concerned a parcel of property that was to be subdivided into four lots. Only one of the four lots contained any uplands. The Natural Resources Commission held that "[t]he subdivision of a parcel of land cannot create greater rights than existed at the time of purchase." Slip Opinion at 2. The Commission further held:

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[4] In *Petition of Saugatuck Dunes Coastal Alliance*, Docket No 14-011402 (August 21, 2015), this Tribunal applied the nonsegmentation principle by analogy to a claim that the Petitioner did not have standing to challenge a permit under Part 353, Sand Dunes Protection and Management, of NREPA. MCL 324.35301, *et seq.* This Tribunal held that "contiguous lots under unity of ownership should be considered as a whole for purposes of determining whether the challenging party is 'immediately adjacent' to the proposed use, particularly when the adjoining lands are part of a comprehensive development scheme." Slip Opinion at 5.

> [A]n applicant who makes three separate "minor" applications for fill on one parcel of land cannot defeat the purpose of the Act by segmenting the applicant's proposal. It is a proper consideration in the permit review process to take into account the cumulative nature of applications for activities on any given parcel of land.

Slip Opinion at 2.

Applying these decisions to the case at bar, it should first be noted that the applicability of *K & K Constr* is in question, because this case does not involve a claim of regulatory taking of property without just compensation. Nevertheless, the nonsegmentation principle announced in *K & K Constr* has, in fact, been applied in this case. Rather than separately addressing three applications filed by the Permittee, the entirety of the project, *i.e.*, the environmental impact of the installation of all 73 Screw Anchors, will be addressed in a single contested case. However, the nonsegmentation principle does not allow the Petitioners to bootstrap a challenge to the operation of Line 5 in this contested case. The environmental impact of the continued operation of Line 5 is not at issue. Nor is the allegation that the Screw Anchors amounts to a re-design of the Dual Pipelines. Rather, this contested case concerns the environmental impact of the installation of the 73 Screw Anchors.[5]

While the principles espoused in *Hodel* and *Delaware Riverkeeper* are salutary, they are not binding on this Tribunal since they apply to the application of NEPA. Nevertheless, these principles are, in fact, being applied in this case as well. Similar to *Hodel*, the three applications for permits will be jointly decided in this consolidated case to prevent one project from being divided into multiple individual actions, each of which individually could have an insignificant environmental impact, but which collectively could have a substantial impact. 865 F2d at 298. As in *Delaware Riverkeeper*, the proposed activity will not be divided into separate projects which fail to address the true scope and impact of the activities under consideration. 753 F3d at 1313. Rather, all three permit applications will be addressed in a single contested case. However, the Petitioners seek to add the environmental effects of the continued operation of Line 5 to the decision on the applications. The principles established in *Hodel* and *Delaware Riverkeeper* do not allow an agency to "add" to the scope of the project under consideration. For such reason, the environmental impact of the continued operation of Line 5 will not be an issue that is added to this contested case. Nor will the allegation that the installation of the Screw Anchors amounts to a re-design of the Dual Pipelines.

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[5] Similarly, the nonsegmentation principle does not allow the litigation in this contested case of the permit applications for the 155 Screw Anchors previously installed pursuant to permits on the Dual Pipelines. Challenges to permits for installation of such Screw Anchors are barred by limitation. See, e.g., R 322.1017(2) ("Persons aggrieved by an action or inaction of the department may request a formal hearing on the matter ... within 60 days of the notice of the department's decision").

Finally, the facts of the *Appeal of Gary Flaska* are not relevant to this case. There has been no subdividing of a parcel, and no subdividing of a project for the purpose of obtaining permits. Rather, in this case, a single project will be reviewed, *i.e.*, the environmental impact of the installation of all 73 Screw Anchors. Therefore, it is clear that none of the authorities cited by the Petitioners requires this Tribunal to address the environmental impacts of the continued operation of Line 5 or the allegation that the installation of the Screw Anchors amounts to a re-design of the Dual Pipelines.

For such reasons, EGLE's Motion and the Permittee's Motion on the environmental effects of the continued operation of Line 5 are **GRANTED**. Moreover, EGLE's Motion and the Permittee's Motion are also **GRANTED** with respect to the allegation that the installation of the Screw Anchors amounts to a re-design of the Dual Pipelines.

2. Installation of the Screw Anchors

EGLE and the Permittee both assert that this contested case should be dismissed, because a fair reading of the Petitions only contains allegations challenging (a) the continued operation of Line 5 or (b) the so-called re-design of Line 5. EGLE and the Permittee both contend that the Petitioners never allege a challenge to the environmental effects of the installation of the Screw Anchors under Rule 15. Such allegations by EGLE and the Permittee require a review of the notice pleading principles for contested cases.

Consistent with Michigan jurisprudence, a petition for a contested case filed under the Administrative Procedures Act (APA) is properly considered notice pleading. MCL 24.201, *et seq.* "[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 305; 788 NW2d 679 (2010). Hence, the purpose of notice pleading is to prevent surprise. For such reason, this Tribunal has previously held that a Petition must merely provide sufficient information for this Tribunal to open a file. *Petition of Tom Boerner*, Docket No. 17-005710 (November 20, 2017). In this case, the Petitions identified the agency action being challenged and the party raising the challenge. From that, a file was opened, and the Permittee was advised of its right to become a party to this case. See MCL 24.205(6). Neither EGLE nor the Permittee alleged at oral argument (nor can they allege) that they were unfairly surprised by a challenge to the permits under the limitations of Rule 15.

Nevertheless, even if, *arguendo*, specific language must be contained within the Petitions filed in this case, the averments therein are broad enough to bring a contested

case under Rule 15. Specifically, the first Petition filed in this case[6] asserted, *inter alia*, the following:

- "6. Furthermore, the proposed activity ... pose significant threats to all of the riparian property owners along the Straits of Mackinac that are members of the SMA, in a manner that is separate and apart from that of the general public." Petition at p 3.

- "51. Long spans of unsupported pipeline are susceptible to movement and shifting from the Straits' strong currents, which in turn creates concerns that abrasion will occur, compromising the pipeline coating. Damage to the outer coating increases the risk of bare pipe being exposed, which is vulnerable to corrosion due to its underwater location." *Id* at p 11.

- "55. ...[T]he Applicant was aware that its newly implemented anchor design (with saddle supports, as suggested for implementation in this instance) was actually causing damage to the Line 5 pipeline coating and the overall integrity of the pipelines themselves...." *Id.*

- "86. The Applicant's request in this matter ... must meet the requirements of the GLSLA, both under the express statutory terms thereof, but also as a legislative expression of the State's public trust duties...." *Id* at p 16.

- "95. Under the public trust doctrine, the State of Michigan has an affirmative, perpetual, and inalienable duty to protect the Great Lakes and their bottom lands from pollution, impairment, or destruction, and to protect the public's rights of navigation, fishing, commerce, swimming, recreational, ecological and aquatic resources, and other public purposes." *Id* at pp 17-18.

- "104. **As described above with respect to Rule 15 (R. 322.1015), the DEQ is required to determine the 'existing and potential adverse environmental effects' related to this Application. However, although the DEQ is now aware that the Applicant's previous installations of this exact anchor support design caused damage to the pipeline coating and to the overall integrity of the pipelines, the DEQ has unfortunately failed to analyze the potential adverse environmental effects related to these proposed 22 anchor supports....**" *Id* at p 19 (emphasis supplied).

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[6] It is assumed that the four other Petitions in this contested case make similar allegations.

- "110. The Applicant's Application and accompanying materials do not include information that would fulfill the requirements of Rule 15, and the Department has not made any of the requisite findings or reached a determination(s) as to both the required issues set forth in Rule 15." *Id* at p 20.

- "113. As a result of the preceding paragraphs, it is clear that, at a minimum, the DEQ has improperly approved this Application without completing the necessary reviews and reaching all required affirmative determinations...." *Id.*

- "116. Petitioner contends that the Application and Permit record does not meet Part 325 standards because ... there are feasible and prudent alternatives...." *Id* at p 21.

- "127. The DEQ failed to fully analyze the potential for impairment or substantial injury to the public trust as a result of the Applicant's proposed activity." *Id* at p 24.

To the extent that the Petitioners were required to allege specific language challenging the installation of the Screw Anchors under Rule 15, I conclude, as a Matter of Law, that the Petitions are broad enough to put EGLE and the Permittee on notice of the allegations against them in order for them to take a responsive position. *Dalley v Dykema Gossett PLLC*, *supra*. Therefore, the Petitioners may proceed in this contested case with their challenge to the permits, limited to the "existing and potential ... adverse effects to the environment, public trust, and riparian interests of adjacent owners" of the installation of the 73 Screw Anchors.

As noted *supra*, the right to go forward in this case does not include a challenge to the ongoing operation of Line 5 or a challenge to the so-called re-design of the pipeline that may result from such installation. Nevertheless, the Petitioners' challenge is not limited to the environmental effects of screwing two bolts per Screw Anchor into the lakebed, as initially asserted by EGLE at oral argument. Tr at pp 32-41. Rather, the Petitioners may bring any claim related to "existing and potential ... adverse effects to the environment, public trust and riparian rights of adjacent owners" that is causally related to the installation of the 73 Screw Anchors. Moreover, it should be recalled that, "in contested cases under the APA, the proponent of an order or petition has the burden of proof and the burden of going forward." *Bunce v Secretary of State*, 239 Mich App 204, 216; 607 NW2d 372 (2000) (citations omitted). See also *National Wildlife Fed'n v Department of Envtl Quality*, 306 Mich App 369, 382; 856 NW2d 394 (2014). Hence, it is the Petitioners' burden to go forward at the hearing with evidence demonstrating that

the Application should be denied on the grounds elucidated *supra*. For these reasons, the Petitions satisfied the requirements of the APA, and summary disposition is **DENIED**.

C. The Terms of the 1953 Easement

The Petition alleges that the Permittee "has operated its pipeline under the authorization granted in the 1953 Agreement ... [and] has failed to meet the requirements of that Agreement in several respects...." Petition at ¶ 118 on p 22. The Permittee sought summary disposition on the grounds that its compliance with the 1953 Easement is outside the scope of this proceeding. Permittee's Motion at p 5. In its Motion, EGLE similarly asserts that both "EGLE and this Tribunal are forbidden from considering the terms of the 1953 easement." EGLE's Motion at p 16. Its argument asserts that the Petitioners' claims of breach of the 1953 Easement are outside this Tribunal's jurisdiction. During oral argument, the Petitioners agreed with these assertions. Tr at p 13. Accordingly, summary disposition is appropriate.

However, EGLE's Motion may be construed as a motion in limine to prevent the admission of the 1953 Easement into evidence in this contested case. The 1953 Easement is, in fact, admissible in this case. Specifically, it is unquestioned that this Tribunal does not have jurisdiction to adjudicate title to real property. Nevertheless, this Tribunal is obligated to determine whether the applicant is a proper applicant. In general, "the question is whether the applicant has a colorable interest in the real property sufficient to carry out the project for which a permit is sought." *Petition of Eldon E. Johnson*, 2009 WL 3380309, at *4 (Mich.Dept.Nat.Res.); *Petition of Kevin and Sharon Moore*, 2019 WL 2052805, at *6 (Mich.Dept.Nat.Res.). Because the 1953 Easement provides this Tribunal with evidence of the Permittee's colorable interest in the real property sufficient to carry out the project for which a permit is sought, the 1953 Easement is relevant evidence in this contested case and will not be precluded from admission into evidence. During oral argument, EGLE agreed to the admissibility of this agreement into evidence. Tr at p. 28. Therefore, to the extent that EGLE's Motion may be treated as a motion in limine, EGLE's Motion is **DENIED**. To the extent that EGLE's Motion may be treated as a motion seeking to preclude this Tribunal assuming jurisdiction over breach of contract claims, the Motion is **GRANTED**. Similarly, the Permittee's Motion – arguing that the Permittee's compliance with the terms of the 1953 Easement is outside the scope of this proceeding – is **GRANTED**.

D. Applicability of §§ 32503 and 32504.

As its next ground for summary disposition, the Permittee contends that the Petitioners have relied on inapplicable provisions of Part 325. In its Motion, EGLE similarly contends that the Petitioners have relied upon inapplicable provisions of Part 325. The Permittee and EGLE both argue that the Petitioners' reliance upon §§ 32503 and 32504 is improper. MCL 324.32503; MCL 324.32504. Both the Permittee and EGLE argue that §§ 32503 and 3204 are inapplicable in this contested case because they relate to deeds or leasing of Great Lakes bottomlands, but not permits regarding bottomlands. They argue that the Screw Anchors are being placed on an existing pipeline within an existing easement, thus requiring no new lease or conveyance. In response, the Petitioners argue that these provisions of Part 325 apply to more than just leases of bottomlands.

To address these arguments, it is helpful to review the respective statutory provisions. By its own language, § 32503 provides that "the department ... may enter into agreements pertaining to waters over and the filling in of submerged patented lands, or to lease or deed unpatented lands...." MCL 324.32503(1). Hence, this statute concerns "agreements pertaining to waters over and the filling in of submerged patented lands...." *Id.* A patent is an instrument by which the State of Michigan conveys an interest in real estate. See, e.g., Black's Law Dictionary (7 ed 1999) at p 1147 (A "land patent" is "[a]n instrument by which the government conveys a grant of public land to a private person"). Therefore, if a party requests EGLE to enter into an agreement covering previously conveyed bottomlands, such an agreement is subject to the strictures of § 32503. Similarly, this statutory provision also pertains to a lease or deed of unpatented bottomlands or bottomlands that are still owned by the State of Michigan.

This contested case does not involve an agreement pertaining to waters over and the filling in of submerged patented lands. The Permittee does not purport to own a patent covering any bottomlands of the Straits of Mackinac. Similarly, the Permittee has not sought to obtain either a lease of or deed of unpatented bottomlands. As a result, § 32503 is inapplicable herein and summary disposition as to such statutory provision is appropriate.

With respect to § 32504, the statute provides that it relates to an "Application for a deed or lease to unpatented lands or agreements for the use of water areas over patented lands...." MCL 324.32504. As noted *supra*, this contested case does not involve an application for a deed or lease to unpatented lands. Similarly, this contested case does not relate to agreements for the use of water areas over patented lands. For such reason, summary disposition is appropriate with respect to the Petitioners' claims under

§ 32504. Therefore, the Permittee's and EGLE's Motions for summary disposition as to §§32503 and 32504 are **GRANTED**.

E. Extraordinary Relief

In EGLE's Motion, it next contends that the Petitioners seek extraordinary relief which is not within this Tribunal's jurisdiction. Specifically, EGLE seeks summary disposition with respect to the following requested relief in the Petitions:

> 2. Require the Applicant to submit all required GLSLA analyses and materials as set forth in the Permit Application Deficiencies section above;
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> 3. Require the DEQ to undertake an affirmative review and analysis of:
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> a. The risks involved in the continued operation of the Line 5 pipeline(s) as presently constituted; and
>
> b. Feasible and prudent alternatives to the Applicant's operation of Line 5.
>
> 4. Order a temporary shut-down, or – at a minimum – a restriction of the product that the Applicant can transport through Line 5 at this location for such time as the DEQ requires in order to conduct and complete the reviews/analyses required by law and requested above.
>
> 5. Grant or order such other relief as is authorized by law, including costs and attorney fees.

Petition at pp 24-25.

As noted above, this proceeding is "an extension of the initial application process for the purpose of arriving at a single final agency decision on the application." *National Wildlife Fed'n v Department of Envtl Quality (No. 2)*, 306 Mich App 369, 379; 856 NW2d 394 (2014). As a result of its limited jurisdiction, this Tribunal has the jurisdiction only to (a) deny the Applications, (b) grant the permits as previously issued by EGLE, or (c) modify the permit previously issued by EGLE. Under §§ 1301(f) and 1317(1), the undersigned shall issue the final decision and order for the department. MCL 324.1301(f); MCL 324.1317(1).

Nevertheless, this Tribunal does not have jurisdiction to grant extraordinary relief, such as the issuance of an injunction because administrative agencies lack judicial power. *Wikman v. City of Novi,* 413 Mich 617, 647-648; 322 NW2d 103 (1982). Therefore, this Tribunal does not have jurisdiction to "require" EGLE to take any action and does not have jurisdiction to order a temporary shut-down of Line 5. In fact, during oral argument, the Petitioners withdrew their request for extraordinary relief. Tr at p 17.

However, with respect to the Petitioners' request for attorney fees, an award of costs and fees is controlled by § 123 of the APA. MCL 24.323. Under that provision, the APA has established a procedure for such recovery. To the extent that the Petitioners believe that they are entitled to such an award of costs and fees, they must follow the procedure set forth in the APA. Such a Motion is not ripe, however, until the conclusion of the merits of this contested case.

Therefore, based on the foregoing, EGLE's motion for summary disposition on the Petitioners' request for costs and attorney fees is **DENIED**. In all other respects, EGLE's request for summary disposition as to the Petitioners' request for extraordinary relief is **GRANTED**.

III. The Petitioners' Motion

A. Characterization of the Screw Anchors as Maintenance

In its Motion, the Petitioners argue that the Permittee improperly characterized the installation of the 73 Screw Anchors as "maintenance." In support of this assertion, they cite to the language of Rule 8, which provides, in part:

> Rule 8. (1) A riparian owner shall obtain a permit from the department before dredging, filling, or placing spoil or other materials on bottomlands; dredging, altering, or maintaining an existing upland channel; or constructing a new upland channel.
>
> * * *
>
> (3) Placing spoil or other material on bottomlands does not include either of the following:
>
> (a) Seasonal, private, noncommercial docks and boat hoists.

> (b) Maintenance of a structure constructed under a permit issued pursuant to the act, if the maintenance is in place and in kind with no design or materials modification.

R 322.1008.

As noted in Rule 8(1), riparian owners must obtain a permit before they can dredge, fill, or place spoil or other materials on Great Lakes bottomlands. Rule 8(3), however, provides an exception for the need to acquire a permit, when "[m]aintenance of a structure constructed under a permit issued pursuant to the act, if the maintenance is in place and in kind with no design or materials modification." Hence, Rule 8(3) provides an exception to the need to obtain a permit.

The Petitioners cite to Rule 8(3) and seem to contend that the Permittee's use of the word "maintenance" in the Applications was an attempt to avoid review by EGLE in this case. However, the Permittee did not seek to avoid filing applications for permits to install Screw Anchors. In fact, the Permittee filed three Applications to install 73 Screw Anchors. Whether the proposed activity is treated as "maintenance" or new construction, it must nevertheless satisfy the strictures of Rule 15. Therefore, the Petitioners' request for summary disposition on the Permittee's use of the word "maintenance" is **DENIED**.

B. Failure to Satisfy Part 325

As its next ground for summary disposition, the Petitioners contend that the permits authorizing the installation of 73 Screw Anchors fail to comply with the strictures of §§ 32503 and 32504. As noted *supra*, §§ 32503 and 32504 are inapplicable to this contested case. Because the Permittee has no obligation to satisfy these statutory provisions, the Petitioners' motion for summary disposition on such grounds is **DENIED**.

C. Rule 15

The Petitioners next assert that they are entitled to summary disposition under Rule 15. In essence, they contend that the Permittee failed to submit, and EGLE failed to substantively address, evidence related to the requirements of Rule 15. Hence, rather than seeking summary disposition as a Matter of Law, they seek summary disposition as a Matter of Fact. In *National Wildlife Fed'n (No. 2)*, *supra*, the Court of Appeals held that this proceeding – which is litigated under Michigan's APA, – is "an extension of the initial application process for the purpose of arriving at a single final agency decision on the application." 306 Mich App at 379. As such, this contested case is not an appeal so

additional evidence outside of the application may be submitted into the record. The Permittee, therefore, is not precluded from submitting into evidence new or additional evidence in support of its Applications. It is for this reason that, at this point in the proceedings, this Tribunal is unwilling to issue summary disposition as a Matter of Fact based on the facts (or the lack of facts) in the record. Therefore, the Petitioners' final ground for summary disposition is **DENIED**.

IV. Summary

For the reasons expressed above, EGLE's Motion for Summary Disposition is **GRANTED**, in part, and **DENIED**, in part. Similarly, the Permittee's Motion for Summary Disposition is **GRANTED**, in part, and **DENIED**, in part. Finally, the Petitioners' Motion for Summary Disposition is **DENIED**.

V. Pre-Hearing Conference

Because this contested case will require a hearing on the merits, a Pre-Hearing Conference is scheduled for **February 28, 2020 at 10:00 a.m.** The Pre-Hearing Conference will be held by telephone conference call, with the Administrative Law Judge as the host. In order to participate, follow the instructions below:

You will be participating as a "guest"
Dial In: 877-820-7831
Access Code: 272737#

Daniel L. Pulter
Administrative Law Judge

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, to their last-known addresses in the manner specified below, this 10th day of February 2020.

E. Cussans
Michigan Office of Administrative Hearings and Rules

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