STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LAKESHORE GROUP AND ITS MEMBERS, LAKESHORE CHRISTIAN CAMPING, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KEN ALTMAN, DAWN SCHUMANN & MARJORIE SCHUHAM,
Plaintiffs-Appellants,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
Defendant-Appellee.

Supreme Court No. 159033

Court of Appeals No. 341310

Court of Claims No. 17-000140-MZ

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF

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APPELLANTS' APPENDIX

APPELLANTS' APPENDIX
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STATE OF MICHIGAN
IN THE 30TH CIRCUIT COURT

LAKESHORE GROUP AND ITS MEMBERS, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KENNETH ALTMAN, DAWN AND GEORGE SCHUMANN, MARJORIE SCHUHAM AND LAKESHORE CAMPING,
Plaintiffs,

v.

STATE OF MICHIGAN, DEPARTMENT OF ENVIRONMENTAL QUALITY, and DUNE RIDGE SA LP,
Defendants.

Case No. 17-_____-CE

HON. _____

COMPLAINT

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STATEMENT PURSUANT TO MCR 2.113(C)(2)(b): A civil action between these parties arising out of related transactions and occurrences to those alleged in this complaint has been previously filed in Ingham County Circuit Court, where it was given case number 17-176-AA and assigned to Hon. Rosemarie E. Aquilina. The action remains pending.

COMPLAINT

Lakeshore Group and its members Kenneth Altman, Lucie Reininga Hoyt, William Reininga Jr., Marjorie Schuham, Dawn and George Schumann, Jane Underwood, Charles Zolper and Lakeshore Camping, by counsel, file this complaint pursuant to the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 et seq., and the Sand Dunes Protection and Management Act ("Part 353"), MCL 324.35301 et seq., as follows.

PARTIES

1. Plaintiff Kenneth Altman owns property in the same municipality of Saugatuck/ Douglas, Michigan in the same area of the protected critical sand dunes where the Dune Ridge development is located.

2. Plaintiff Lucie Reininga Hoyt owns property in Saugatuck/Douglas, Michigan in the same area of the protected critical sand dunes where the Dune Ridge development is located and immediately adjacent to the property in question.

3. Plaintiff William Reininga Jr. owns property in Saugatuck/Douglas, Michigan in the same area of the protected critical sand dunes where the Dune Ridge development is located and immediately adjacent to the property in question.

4. Plaintiff Marjorie Schuham owns property in Saugatuck/Douglas, Michigan in the same area of the protected critical sand dunes where the Dune Ridge development is located.

5. Plaintiffs Dawn and George Schumann own property in Saugatuck/Douglas, Michigan in the same area of the protected critical sand dunes where the Dune Ridge development is located.

6. Plaintiff Jane Underwood owns property in Saugatuck, Michigan in the same area of the protected critical sand dunes where the Dune Ridge development is located and immediately adjacent to the property in question.

7. Plaintiff Charles Zolper owns property in Saugatuck, Michigan in the same area of the protected critical sand dunes where the Dune Ridge development is located and immediately adjacent to the property in question.

8. Plaintiff Lakeshore Camping is an Illinois non-profit authorized to do business in the state of Michigan whose purpose is to protect the sand dunes at issue in this case.

9. Plaintiff Lakeshore Group is an unincorporated association of all the other plaintiffs.

10. Defendants State of Michigan and its agency Department of Environmental Quality (collectively "MDEQ") are charged with protecting the environment and natural resources of Michigan from impairment and with regulating critical dunes development by reviewing, approving and/or denying permits to construct, develop or otherwise "use" portions of state-designated critical sand dunes in Michigan according to standards and procedures set forth in state law.

11. Defendant Dune Ridge SA LP recently purchased a 130-acre critical sand dunes property that had been used for a century as a limited purpose camp and took actions to develop it for commercial purposes, namely to make a profit from the property, including (a) the sale of portions, (b) development of lots for 21 or more homes on portions, (c) road construction, (d) cutting and building retaining walls in steep slopes, (e) utility installation, (f) planning for additional utilities such as septic systems and drain fields, (g) construction of paths and additional driveways and roads, and (h) more actions affecting the dunes. Dune Ridge has applied for at least

four sets of Part 353 permits from MDEQ, none of which are final as the administrative/appellate review process is still underway.

JURISDICTION

12. This Court has jurisdiction to grant relief in this Complaint and venue is proper pursuant to MCL 324.1701(1) and based on the location of MDEQ's main offices in Ingham County and the pendency of a related case in this Circuit Court.

GENERAL ALLEGATIONS

A. Part 17 (Michigan Environmental Protection Act)

13. The Michigan Environmental Protection Act ("MEPA"), Part 17 of Michigan's Natural Resources and Protection Act ("NREPA"), MCL 324.1701 et seq., provides that "any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the . . . natural resources and the public trust in these resources from . . . impairment . . . ." MCL 324.1701(1).

14. Where there is a pending related action in Ingham County circuit court and the headquarters of MDEQ, the agency whose actions are at issue and alleged to be in violation of MEPA in this case, is located in Ingham County, jurisdiction and venue are proper in Ingham County circuit court.

15. MEPA authorizes the circuit court to "determine the validity, applicability, and reasonableness of [a] standard" or "device or procedure" "fixed by rule or otherwise by the state" to protect against "pollution, impairment or destruction" of natural resources and, if the court finds it "to be deficient, direct the adoption of a standard approved and specified by the court." MCL 324.1701(1) & (2)(a&b).

16. The Sand Dunes Protection and Management Act, Part 353 of NREPA ("Part 353"), MCL 324.35301 et seq., sets forth procedures and standards established by the state for the protection of identified critical sand dunes as a natural resource of the State of Michigan. Examples of these procedures and standards in Part 353 are set forth below.

17. Failure by MDEQ to apply the procedures and standards of MEPA and Part 353 is likely to result in the pollution, impairment and/or destruction of the critical sand dunes and that failure constitutes a prima facie case in this action. MCL 324.1703.

18. Failure by Dune Ridge to comply as a developer seeking Part 353 permits with the procedures and standards of Part 353 is likely to result in the pollution, impairment and/or destruction of the critical sand dunes and that failure constitutes a prima facie case in this action. MCL 324. 1703.

19. It may be necessary to impose conditions on either or both defendants in order to protect the sand dunes as natural resources and/or the public trust in them. MCL 324. 1704(1).

20. If the permit review process and/or the contested case process is determined to be "required or available to determine the legality of the defendant's conduct" and the court remands this matter for relief in such proceedings, that remand should confirm the applicability of MEPA to such proceedings and retain jurisdiction of this action pending completion of that administrative review. MCL 324. 1704(2). Thereafter, "the court shall adjudicate the impact of the defendant's conduct on the . . . natural resources, and on the public trust in these resources . . . ." MCL 324.1704(3).

21. The "alleged pollution, impairment, or destruction of . . . natural resources, or the public trust in these resources, shall be determined" pursuant to MEPA as well as according to other applicable authority such as Part 353 in any administrative proceeding. MCL 324. 1705(2);

MCL 324.1706 ("This part [Part 17 or MEPA] is supplementary to existing administrative and regulatory procedures provided by law").

B. Part 353 (Sand Dunes Protection and Management Act)

22. As illustrated with examples set forth below, Part 353 sets forth a number of standards and procedures to protect against the impairment of sand dunes. *Cf.* MEPA, at MCL 324.1701(2), and paragraphs 15-16, above.

23. Part 353 was drafted to authorize local municipal implementation and includes a legislative scheme that focuses on effects in a municipality containing protected critical sand dunes where a development is located. See*, e.g.,* MCL 324.35303 and .35304.

24. A proposed use with a "commercial purpose" is a "special use project," MCL 324.35301(j), and requires special review procedures and approvals. See, *e.g.,* MCL 324.35313, .35316-17, .35320 and .35322. The Dune Ridge project has the commercial purpose of making money for the owner and developer of the 130-acre property and therefore the whole project is a special use project and must be reviewed as such. Dune Ridge did not apply for Part 353 permits for the project as a whole and MDEQ did not review the project as a whole under Part 353.

25. A proposed use involving a "multi-family use of more than 3 acres" is a "special use project," MCL 324.35301(j), and requires special review procedures and approvals. MCL 324.35313, .35316-17 and .35322. The Dune Ridge project involves a multi-family use on over 20 acres of the 130-acre property and is collectively a special use project and must be evaluated as such. It was not.

26. The state has explicitly identified specific, limited areas of sand dunes in Michigan, including those at issue here, as an "irreplaceable . . . resource that provide significant

. . . benefits"; and enumerated as the purpose of Part 353 the balancing of the protection of these designated dunes with their development and use. MCL 324.35302(a & b).

27. State standards and procedures in Part 353 are "intended to do all of the following:

(i) Ensure and enhance the diversity, quality, functions, and values of the critical dunes in a manner that is compatible with private property rights.

(ii) Ensure sound management of all critical dunes by allowing for compatible [development and uses; and] . . .

(iii) Coordinate and streamline governmental decision-making affecting critical dunes through the use of the most comprehensive, accurate, and reliable information and scientific data available." MCL 324.35302(b)(i-iii).

28. The application to develop Dune Ridge did not contain meaningful information about the "diversity, quality, functions or values" of the dunes, much less "comprehensive . . . and reliable information and scientific data" on these state-mandated standards.

29. The state has established the standard and procedure that an applicant for Part 353 permits such as Dune Ridge must "include information necessary to conform with the requirements of" Part 353 in an application. MCL 324.35304(1)(a). Thus, failure to include "comprehensive . . . scientific" information on the development's effects on "diversity, quality, functions and values" makes a permit application incomplete and not approvable.

30. In reviewing the application to develop Dune Ridge, MDEQ did not have and did not consider meaningful information about the "diversity, quality, functions or values" of the dunes, much less "comprehensive . . . and reliable information and scientific data" on these state-mandated standards. MCL 324.35302(b). It is not MDEQ's duty or function to supply

"comprehensive . . . and reliable information and scientific data" on "diversity, quality, functions or values" of the dunes where the applicant fails to include it. Where required information is lacking, MDEQ must reject the application as incomplete or take other action consistent with the state mandate to include and evaluate such information before making a decision on such an application; and MDEQ may not lawfully approve it.

31. MDEQ has not provided written notice of certain Part 353 applications in the 130-acre Dune Ridge property as a whole to plaintiffs despite counsel's written request for notification of pending applications. MCL 324.35304(1)(b).

32. MDEQ cannot approve an application based on failure to determine that the proposed use "will significantly damage the public interest . . . by significant and unreasonable depletion or degradation of . . . diversity . . . quality . . . [or] functions of the critical dune areas" where the applicant did not provide to MDEQ the required information that it needed to conduct such an assessment. MCL 324.35304(1)(g). Dune Ridge did not provide the necessary complete, scientific information.

33. MDEQ cannot comply with the state standard and procedure requiring MDEQ to make its Part 353 permit decision "based upon evidence that would meet" hearing standards when the applicant has not provided such information. MCL 324.35304(2). Dune Ridge did not provide such information to MDEQ as part of its applications.

34. A Part 353 permit seeking to construct a dwelling on a post-1989 lot "on the first lakeward facing slope" cannot be granted. MCL 324.35304(3).

35. To approve construction of a structure, it must be located "behind the crest of the first landward ridge of a critical dune area that is not a foredune." MCL 324.35304(4). Thus,

allowing construction just behind the "crest" of a foredune is prohibited. The permits for Lots 5-11 violate these provisions.

36. Continuation of "existing nonconforming uses" may be allowed on terms consistent with Part 353. Thus, expansion of, or other changes to, pre-existing structures in prohibited locations and other uses that are not consistent with the mandates, standards and procedures of Part 353 are not authorized by it. MCL 324.35306.

37. An environmental impact statement is required for a special use project. MCL 324.35313(2). The Dune Ridge project as a whole is special use project, as noted above at paragraphs 24-25.

38. Dune Ridge did not prepare or provide an environmental impact statement for the project as a whole.

39. MDEQ did not require an environmental impact statement for the project as a whole and was not provided one by the developer. See also, MCL 324. 35320.

40. Dune Ridge prepared a study of threatened and endangered species that did not cover the project as a whole and was not conducted in a scientifically appropriate or complete manner.

41. MDEQ relied on Dune Ridge's study of threatened and endangered species that did not cover the project as a whole and was not conducted in a scientifically appropriate or complete manner, and did not require a study that was complete or scientific.

42. At least some of the Dune Ridge applications were reviewed and approved without their including on-site sewage disposal plans, much less plans that "met or exceeded" applicable codes. See, *e.g.,* MCL 324.35319(i) and .35320(i & m).

43. Variances allowing uses on areas with 3:1 slopes were granted despite failure to meet the standards for issuance of such variances. MCL 324.35316-.35317. Showings by the applicant and findings by MDEQ that a "practical difficulty will occur to the owner" and/or that "the use will [not] significantly damage the public interest" were not supported by credible evidence and specifically failed to address or determine that (a) there would be no significant or unreasonable degradation of the diversity, quality and functions of the critical dunes or (b) the cumulative effects of all such changes would comply with state standards and procedures. MCL 324.35317(1)(a-c).

44. Decisions by MDEQ were not based on the required type of "evidence" and could not be made on "sufficient facts or data" and "reliable scientific principles and methods . . . applied . . . to the facts" where, as here, such facts and other required information were not provided or "recorded in the file." MCL 324. 35317(2)(a-e).

45. The plans to develop or "use" the property as a whole within the meaning of Part 353 should have been proposed and reviewed together for their cumulative impacts on the protected dunes that are included in the entire 130-acre property in question. Instead, Dune Ridge divided its permit applications into smaller portions of the overall development plan and MDEQ reviewed those subsets of the development as a whole separately and without consideration of the cumulative impacts on the critical sand dunes.

46. The state has not promulgated regulations to define terms such as "diversity, quality, functions and values" of the critical sand dunes or other requirements of Part 353. Such regulations should be promulgated.

47. Until such regulations are promulgated, policies and practices should be put in place to define, to identify for applicants and the public and to apply the usual and ordinary

meaning of these terms, together with their scientific meaning, in order to provide the public with an understanding of how they will be applied and in order to inform the review of Part 353 permit applications by MDEQ so that those standards are applied as required by Part 353 and MEPA to protect these natural resources through a reasoned balancing as required by statute.

C. The Dune Ridge Development

48. Dune Ridge purchased the 130-acre property, which had been used for a century as a camp involving small structures and minimal impacts upon the sand dunes with no paved roads or driveways, in order to develop it into a fully and permanently altered suburban environment with only portions preserved in a more natural state to a limited extent.

49. Dune Ridge developed plans to make a profit from the multi-family use and other development of the 130-acre property as a whole.

50. The 130-acre property at issue in this case is located entirely within state-designated critical sand dunes.

51. Dune Ridge is in the process of taking steps to achieve its commercial purpose for and multi-family use of the property as a whole, including but not limited to:

A. Apply for MDEQ sand dunes permits for building lots 5-12 to facilitate the subdivision and development of eight or more lots for sale and construction of homes, garages, other outbuildings and other site development;

B. Negotiate the sale of an unbuildable parcel north of Perryman Road to the Oval Beach Preservation Society for a substantial payment;

C. Apply to MDEQ for sand dunes permits for construction of paved roadways and utilities to support and service further development of the property as a whole;

D. Apply for MDEQ sand dunes permits for the remainder of lots 1-21 for additional residential, multi-family lots and structures of substantial size and impact;

E. Apply for MDEQ sand dunes permits to provide for septic tank and drain field placement and construction at numerous locations, and the construction of additional paved roads and pathways through the dunes to support the development as whole;

F. Negotiate the sale of certain acreage on or near Vine Street to a separate developer/broker to make a profit and for further development and use;

G. Negotiate the sale of certain acreage in the back dunes to another developer to make a profit and for further development and use;

H. Negotiate the application of a conservation easement on certain portions of the back portions of the dune properties to buffer and enhance the value of the multi-family building lots for the developer's purchasers;

I. Negotiate settlements with individual neighbors; and

J. Apply for marina permits to develop a former naturally-maintained canoe launch along the Kalamazoo River at the eastern side of the Property into a multiple-berth sailboat marina to serve the multi-family development of the property as a whole.

D. The Part 353 Permit Process

52. The Part 353 permit review process is an administrative proceeding within the meaning of MEPA.

53. The contested case review of a Part 353 permit decision is an administrative proceeding within the meaning of MEPA.

54. MEPA applies to all such administrative proceedings.

55. Dune Ridge applied for permits piecemeal and without final plans in place for key utilities and services (water and sewer, for example).

56. MDEQ reviewed and approved the Dune Ridge permits piecemeal and without final plans in place for key utilities and services and without review or assessment of the cumulative impacts of the whole development on the protected critical dunes.

57. Dune Ridge sought approval of a "special use permit" for a limited portion of its first application but did not acknowledge that the project as a whole was a "special use project." requiring review and approval on that basis, notwithstanding the fact that the project as a whole falls within two separate provisions in the definition of special use and must be treated as such.

58. MDEQ reviewed and approved the permit applications without recognizing or treating the project as a whole as a "special use project" requiring review and approval on that basis.

59. MDEQ's policies and procedures are not designed to comply with or satisfy the state standards and regulations created to protect the critical sand dunes and therefore violate Part 353 and MEPA.

60. MDEQ's review of Part 353 permits generally, and in the case of the applications of Dune Ridge specifically, does not comply with or satisfy the state standards and regulations created to protect the critical sand dunes.

61. Each plaintiff has sufficient interest to ensure sincere advocacy in this case for several reasons, including but not limited to their location in the same affected sand dunes, their location in the same municipality, their experience using the same 130-acre property, their unique interests in the protection of the public interest in these natural resources, their substantial interests in these dunes and their use and protection that are detrimentally affected in a manner

different from the citizenry at large and their role as parties intended by the statutory scheme of Parts 17 and 353 to serve a role to protect these sand dunes, in addition to and apart from the proximity of their properties to the 130-acre property in question.

COUNT I
DECLARATORY JUDGMENT UNDER THE MICHIGAN ENVIRONMENTAL PROTECTION ACT

62. Plaintiffs incorporate here as if set forth fully the allegations of all of the preceding paragraphs.

63. MEPA authorizes "any person" to "maintain an action . . . for declaratory and equitable relief" for the protection of natural resources, MCL 324.1701(1), and authorizes the court to "grant temporary and permanent equitable relief . . . to protect the . . . natural resources or the public trust in these resources from pollution, impairment or destruction." MCL 324.1704(1).

64. MEPA authorizes the circuit court to "determine the validity, applicability, and reasonableness of [a] standard" or "device or procedure" "fixed by rule or otherwise by the state" to protect against "pollution, impairment or destruction" of natural resources. If the court finds any such standard or procedure "to be deficient, [it may] direct the adoption of a standard approved and specified by the court." MCL 324.1701(1) & (2)(a&b).

65. MDEQ's practices and procedures for the review and decision-making regarding Part 353 permits fail to comply with the mandates of Part 353 and MEPA.

66. MDEQ's practices and procedures for the review and decision-making regarding Part 353 permits, as followed specifically with regard to the Dune Ridge permit applications, fail to comply with the mandates of Part 353 and MEPA.

67. Dune Ridge's Part 353 permit applications failed to comply with the mandates of Part 353 and MEPA because, among other reasons, the applications were submitted piecemeal, the applicant did not submit complete scientific information to MDEQ to enable it to review the applications properly under the statutes or to reach determinations required by the statutes, and other defects.

68. As a direct result of the failures of Dune Ridge in its applications and MDEQ's failures in its practices and procedures, both MEPA and Part 353 have been violated because (a) the actions of MDEQ and Dune Ridge do not comply with the statutory mandates and (b) the natural resources of the state have been put at risk of impairment and are being impaired in violation of state standards and procedures, to the detriment of plaintiffs and to the public trust and public interests they represent.

69. Plaintiffs are entitled to declaratory relief against MDEQ and Dune Ridge setting forth this Court's order requiring compliance with the standards and procedures set forth in and mandated by Part 353 and MEPA.

70. This relief should include review and, where necessary, modification by this Court of the practices and procedures established and followed by MDEQ for the consideration and decision making concerning Part 353 permits in order to ensure their compliance with the legislative mandates.

COUNT II
INJUNCTIVE RELIEF UNDER THE MICHIGAN ENVIRONMENTAL PROTECTION ACT

71. Plaintiffs incorporate here as if set forth fully the allegations of all of the preceding paragraphs.

72. MEPA authorizes the circuit court to grant equitable relief to protect the natural resources of the state against pollution, impairment or destruction. MCL 324.1701.

73. The Dune Ridge permits are still not final permits because their issuance by MDEQ is under review on appeal. Thus, any action taken to date by Dune Ridge and its successors, assigns, agents and purchasers has been taken at their own risk while the review of the permits has been pending.

74. Plaintiffs are entitled to injunctive relief against MDEQ and Dune Ridge requiring that the sand dune development permits be held in abeyance and all development action ceased and/or reversed until all necessary steps have been taken to comply fully with this Court's order mandating compliance with the standards and procedures set forth in and required by Part 353 and MEPA, which may include standards specified by this Court.

REQUEST FOR RELIEF

For the reasons stated above, Plaintiffs respectfully request that this Court:

a. Grant declaratory relief against Defendants necessary to protect the sand dunes, including but not limited to requiring full compliance with the standards and procedures of MEPA and Part 353 to protect the public interest in the sand dunes, and requiring MDEQ to develop and adopt rules or practices and procedures to apply fully the standards and procedures mandated by Part 353 and MEPA;

b. Grant declaratory relief holding that MEPA applies to MDEQ's review of permits under Part 353 and must be considered substantively, procedurally and as a basis for standing in permit review and contested case proceedings;

c. Enjoin action of any kind by MDEQ to approve Part 353 permits, including the Dune Ridge permits at issue here and on appeal in the related action noted above, without full compliance with this Court's orders; and

d. Enjoin action of any kind by Dune Ridge or its agents, purchasers or other affiliated parties with regard to development of the 130-acre property in question prior to the final resolution of this case or without full compliance with the requirements of the standards and procedures of MEPA and Part 353 and the orders and opinions of this Court.

Respectfully Submitted,

Date: April 11, 2017

/s/ Dustin P. Ordway

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

Lakeshore Group and its members, Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga, Kenneth Altman, Dawn and George Schumann, Marjorie Schuham, and Lakeshore Camping,

Plaintiffs,

v

State of Michigan, Department of Environmental Quality, and Dune Ridge SA LP,

Defendants.

Court of Claim No. 2017-_____-MZ

Ingham Circuit Court No. 17-292-CE

NOTICE OF TRANSFER

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---/

To: Plaintiffs' Attorney
Co-Defendants' Attorney
Clerk of the Circuit Court
Clerk of the Court of Claims

NOTICE OF TRANSFER

PLEASE TAKE NOTICE the claims against the State in the above-captioned case are transferred to the Court of Claims. This transfer is effective immediately. MCL 600.6404(3).

This Transfer does not dispose of all claims in the Circuit Court case. Claims against the co-Defendants Dune Ridge SA LP remain pending in Ingham Circuit Court, docket no. 17-292-CE.

Respectfully submitted,

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Attorney General

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Dated: May 18, 2017

LF: Lakeshore Group and its Members v DEQ (CC)/AG# 2017-0180324-AL/Notice of Transfer – to Court of Claims (CoC) 2017-05-18

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

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BILL SCHUETTE
ATTORNEY GENERAL

May 24, 2017

Court of Claims
Hall of Justice
925 W. Ottawa Street
Lansing, MI 48909

Re: *Lakeshore Group and its members, et al v State of Michigan and Michigan Department of Environmental Quality*
Court of Claims Case No. 17-000140-MZ

Dear Clerk:

Enclosed for filing in the above-referenced matter is the State Defendants' 5/24/2017 Motion for Summary Disposition with Brief in Support (original and Judge's copy), and Proof of Service. Also enclosed is the Cover Sheet for Department of Attorney General Request for Electronic Payment

If you have any questions, please contact me. Thank you for your assistance.

Sincerely,

Daniel P. Bock
Assistant Attorney General
Environment, Natural Resources,
and Agriculture Division
(517) 373-7540

DPB/amm
Enclosures
c: Dustin P. Ordway (w/ Enclosures)
LF: Lakeshore Group and its Members v DEQ (CoC)/AG# 2017-0180324-BL/Letter – Clerk 2017-05-24

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

Lakeshore Group and its members, Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga, Kenneth Altman, Dawn and George Schumann, Marjorie Schuham, and Lakeshore Camping,

Plaintiffs,

v

State of Michigan and Department of Environmental Quality,

Defendants.

Court of Claim No. 17-000140-MZ

Ingham Circuit Court No. 17-292-CE

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---/

PROOF OF SERVICE

On May 24, 2017, I sent by first class mail a copy of the State Defendants' 5/24/2017 Motion for Summary Disposition with Brief in Support to:

Dustin P. Ordway
Ordway Law Firm, PLLC
3055 Shore Wood Drive
Traverse City, MI 49686

I declare that the statements above are true to the best of information, knowledge, and belief.

Amy M. Mitosinka, Legal Secretary

LF: Lakeshore Group and its Members v DEQ (CoC)/AG# 2017-0180324-BL/POS to Motion and Brief for Summary Disposition 2017-05-24

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

Lakeshore Group and its members, Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga, Kenneth Altman, Dawn and George Schumann, Marjorie Schuham, and Lakeshore Camping,	Court of Claim No. 17-000140-MZ Ingham Circuit Court No. 17-292-CE
Plaintiffs, v State of Michigan and Department of Environmental Quality, Defendants.	**STATE DEFENDANTS' 5/24/2017 MOTION FOR SUMMARY DISPOSITION**

Dustin P. Ordway (P33213)
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/

STATE DEFENDANTS' 5/24/2017 MOTION FOR SUMMARY DISPOSITION

The Defendants, the State of Michigan and the Michigan Department of Environmental Quality (DEQ)[1], through their attorneys, Bill Schuette, Attorney

[1] The Plaintiffs have filed their complaint against two State entities, the State of Michigan itself and the DEQ. The proper State defendant is only the DEQ, as it is unclear what authority the Plaintiffs rely on in suing the State of Michigan as a whole.

General for the State of Michigan, and Daniel P. Bock, Assistant Attorney General, move for summary disposition pursuant to MCR 2.116(C)(8). In support of this motion, the DEQ states:

1. The claims asserted by the Plaintiff fail as a matter of law because they are not properly before the Court, and because they seek relief that the Court is unable to grant.

2. The Plaintiffs seek equitable relief, specifically injunctive and declaratory relief, under the Michigan Environmental Protection Act, MCL 324.1701 *et seq.* (MEPA).

3. The Plaintiffs' claims arise from the DEQ's decision to issue a series of permits to an entity known as Dune Ridge SA LP. These permits were issued pursuant to Part 353, Critical Dunes, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.35301 *et seq.*

4. The Plaintiffs ask the Court to review the DEQ's decisions to issue these permits under MEPA, and to grant various injunctive and declaratory relief including, but not limited to, declaring that the DEQ's process for reviewing and determining whether to grant or deny Part 353 permit applications violates MEPA and Part 353, inventing a new process for the DEQ to use in reviewing and granting or denying Part 353 permit applications, overruling the Legislature on the standing requirements for challenging Part 353 permitting decisions in administrative hearings, and enjoining the DEQ from issuing any such permits to any applicant until the Court has prescribed this new process.

5. As set forth more fully in the DEQ's brief in support of this motion, the Plaintiffs have failed to state a claim upon which relief can be granted because, as a matter of law, an administrative agency's decision to issue or deny a permit does not violate MEPA. *Preserve the Dunes, Inc v Michigan Dep't of Environmental Quality*, 471 Mich 508, 518-520 (2004).

6. The Michigan Supreme Court has specifically held that MEPA allows courts to enjoin conduct that will, or is likely to, pollute, impair, or destroy natural resources or the public trust in those resources and that an administrative decision, such as issuing a permit, does not pollute, impair, or destroy natural resources. *Id.* Rather, only the actual harmful conduct (actually polluting, impairing, or destroying natural resources, as opposed to making an administrative decision to issue a permit) is actionable under MEPA. *Id.*

7. Because the Plaintiffs seek relief that has been specifically forbidden by the Michigan Supreme Court, the Plaintiffs have failed to state a claim upon which relief can be granted, and summary disposition is appropriate under MCR 2.116(C)(8).

8. Additionally, even if the Plaintiffs had stated a claim upon which relief can be granted, they have sought relief that is outside the scope of the Court's authority to grant.

9. First, the Plaintiffs have asked the Court to declare that the DEQ's entire process for reviewing Part 353 permit applications is illegal, and to prescribe a new process that the Plaintiffs believe will comport with the law. (Comp, ¶¶ 17,

20, 69, 70, 74, and Request for Relief ¶¶ a, b, and c.) However, the function of the courts in reviewing administrative permitting decisions is to hear appeals from those decisions, not to proactively invent processes for administrative agencies to follow in the future.

10. Second, the Plaintiffs have asked the Court to enjoin the DEQ from issuing *any* permits under Part 353 (not merely limited to the permits issued to Dune Ridge SA LP) until such time as the Court can invent a new review process for the DEQ to use. (Comp, Request for Relief ¶ c.) Again, this is not the proper function of the courts in reviewing administrative permitting decisions.

11. Third, the Plaintiffs have raised the prospect that, under MEPA, a court can remand a matter for an administrative hearing before an agency and enjoin action on a permit until such time as that administrative hearing is resolved. (Comp, ¶ 20.) Unfortunately for the Plaintiffs, an administrative hearing has *already been held* in this matter, and the Plaintiffs' petition for hearing was dismissed for lack of standing. (DEQ's Brief in Support of this Motion, Ex A.) The Plaintiffs have appealed that dismissal to the Ingham County Circuit Court. (DEQ's Brief in Support of this Motion, Ex B.) A matter cannot be remanded for a hearing which has already occurred and been decided, and which is now on appeal to a different court. This lawsuit is nothing more than an improper collateral attack on the administrative hearing process that did not go the Plaintiffs' way, and is therefore improperly before the Court.

12. Fourth, the Plaintiffs have asked the Court, if it remands this matter to the DEQ for an administrative hearing, to declare that the DEQ must ignore the standing requirements of Part 353 and allow petitioners who lack standing under the statute to challenge DEQ permitting decisions in administrative hearings. (Comp, Request for Relief ¶ b.) In Part 353, the Legislature has spoken as to who has standing to challenge a permitting decision, and neither the courts nor the DEQ have the authority to disregard that legislative requirement.

CONCLUSION AND RELIEF REQUESTED

The DEQ is entitled to summary disposition of this matter under MCR 2.116(C)(8) because the Plaintiffs have failed to state a claim upon which relief can be granted. Specifically, the Plaintiffs have sued the DEQ under a statute that the Michigan Supreme Court has specifically held does not apply to situations such as this because an administrative permitting decision cannot, as a matter of law, violate MEPA. Therefore, the DEQ respectfully requests that the Court grant this motion for summary disposition.

Respectfully submitted,

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Dated: May 24, 2017

LF: Lakeshore Group and its Members v DEQ (CoC)/AG# 2017-0180324-BIL/Motion – for Summary Disposition 2017-05-24

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

Lakeshore Group and its members, Charles Zolper, Jane Underwood, Lucie Hoyt, William Reininga, Kenneth Altman, Dawn and George Schumann, Marjorie Schuham, and Lakeshore Camping,

Plaintiffs,

v

State of Michigan and Department of Environmental Quality,

Defendants.

Court of Claim No. 17-000140-MZ

Ingham Circuit Court No. 17-292-CE

BRIEF IN SUPPORT OF STATE DEFENDANTS' 5/24/2017 MOTION FOR SUMMARY DISPOSITION

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BRIEF IN SUPPORT OF STATE DEFENDANTS' 5/24/2017 MOTION FOR SUMMARY DISPOSITION

STATEMENT OF FACTS

This matter arises from the administrative decision of the Michigan Department of Environmental Quality (DEQ) to issue a series of permits to Dune

Ridge SA LP (Dune Ridge) under Part 353, Critical Dunes, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.35301 *et seq.*

Beginning in 2014, Dune Ridge applied for and received three sets of permits under Part 353. (Ex A, p 1.) The Plaintiffs, Lakeshore Group and its members (Lakeshore), filed three different petitions to challenge each set of permits in administrative contested case hearings under the Michigan Administrative Procedures Act, MCL 24.301 *et seq.* Such administrative challenges are authorized under Part 353. MCL 324.35305.

These three contested case hearings were consolidated and, on February 13, 2017, the administrative law judge presiding over the consolidated hearings granted a motion for summary disposition filed by Dune Ridge and supported by the DEQ. (Ex A.) The basis for dismissing Lakeshore's contested cases was lack of standing. (*Id.*)

Part 353 clearly provides that, in order to have standing to bring a contested case hearing to challenge a DEQ sand dune permitting decision, one must be either the permit applicant or "the owner of the property immediately adjacent to the proposed use." MCL 324.35305. Neither Lakeshore nor its members owned property immediately adjacent to the proposed project, and thus the administrative law judge correctly dismissed the contested case hearings for lack of standing. (Ex A.)

Lakeshore and its members have since appealed that dismissal to the Ingham County Circuit Court. (Ex B.)

In a misguided attempt to mount a collateral attack on the very same permits that have already been challenged and are already on appeal, Lakeshore filed the instant complaint in the Ingham County Circuit Court on April 11, 2017. (4/11/2017 Complaint) The complaint seeks purely equitable relief under Part 17, Michigan Environmental Protection Act, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.1701 *et seq.* (MEPA). (*Id.*)

Because equitable claims against the State of Michigan or its agencies or officers must be brought in the Court of Claims, and not in the circuit courts, the DEQ filed a notice of transfer on May 18, 2017. (DEQ's 5/18/17 Notice of Transfer.) Lakeshore has since responded with an opposition to notice of transfer, which the DEQ will address in a separate filing. (Lakeshore's 5/22/17 Opposition to Notice of Trasfer.)

The DEQ now brings this motion for summary disposition pursuant to MCR 2.116(C)(8) because Lakeshore has failed to state a claim upon which relief can be granted. Specifically, as set forth below, Lakeshore has sued the DEQ under MEPA for actions that the Michigan Supreme Court has expressly held are not actionable under MEPA. Additionally, Lakeshore's complaint seeks various items of relief that are not available under any statutory or common law regime.

ARGUMENT

I. The DEQ is entitled to summary disposition because Lakeshore has premised its entire complaint on a cause of action that the Michigan Supreme Court has held does not exist.

Lakeshore's entire complaint is premised on the notion that the DEQ violated MEPA by issuing permits that are likely to result in the pollution, impairment, or destruction of natural resources or the public trust in those resources. (Comp, ¶¶ 17, 20, 69, 70, 74, and Request for Relief ¶¶ a, b, and c.) These claims fail as a matter of law, because the Supreme Court has expressly held that there is no such cause of action available under MEPA.

In *Preserve the Dunes, Inc. v Michigan Department of Environmental Quality*, the Supreme Court considered a challenge to permits issued by the DEQ under the Sand Dune Mining Act, which is Part 637 of the Michigan Natural Resources and Environmental Protection Act, MCL 324.63701 *et seq*. The Supreme Court held that the proper method for challenging permits issued by an administrative agency is through the administrative review process (which Lakeshore has done and is currently on appeal to the Ingham County Circuit Court), and not via a collateral attack in a MEPA lawsuit. *Preserve the Dunes, Inc. v Michigan Dep't of Environmental Quality*, 471 Mich 508, 518-520 (2004).

The Supreme Court framed the issue before it as, "whether MEPA authorizes a collateral challenge to the DEQ's decision to issue a sand dune mining permit . . . in an action that challenges flaws in the permitting process unrelated to whether

the conduct involved has polluted, impaired, or destroyed, or will likely pollute, impair, or destroy natural resources protected by MEPA." *Id.*, p 511.

Preserve the Dunes concerned a challenge to a sand dune mining permit issued by the DEQ, which the plaintiffs alleged would result in the pollution, impairment, or destruction of natural resources. *Id.*, pp 512-513. After a seven day bench trial, the trial court held that the activities authorized in the permit would not pollute, impair, or destroy natural resources. *Id.* The Court of Appeals then reversed and remanded. *Id.*

On appeal, the Supreme Court held that an administrative decision, such as issuing a permit, does not pollute, impair, or destroy natural resources, and that MEPA does not provide an avenue for a collateral attack on a DEQ decision to issue a permit.

Specifically, the Supreme Court held that:

> As previously discussed, the DEQ's determinations of permit eligibility . . . are unrelated to whether the applicant's proposed activities on the property violate MEPA. Therefore, MEPA provides no private cause of action in circuit court for plaintiffs to challenge the DEQ's determinations of permit eligibility . . . .
>
> An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA.
>
> In general, judicial review of an administrative decision is available under the following statutory schemes: (1) the review process prescribed in the statute applicable to the particular agency, (2) an appeal to circuit court pursuant to the Revised Judicature Act (RJA), MCL 600.631, and the Michigan Court Rules 7.104(A), 7.101, and 7.103, or (3) the review provided in the Administrative Procedures Act (APA), MCL 24.201 *et seq.* [*Id.*, p 519.]

The Supreme Court went on to hold that:

> MEPA affords no basis for judicial review of agency decisions under MCL 324.63702(1) because that inquiry is outside the purview of MEPA. The focus of MEPA is to protect our state's natural resources from harmful conduct. It offers no basis for invalidating an issued permit for reasons unrelated to the permit holder's conduct. To hold otherwise would broaden by judicial fiat the scope of MEPA and create a cause of action that has no basis in MEPA's language or structure. [*Id.*, p 524.]

Here, just like in *Preserve the Dunes*, Lakeshore has the opportunity to seek judicial review of the DEQ's permitting decision under the Administrative Procedures Act. It has, in fact, done so. (Exs A and B.) And, just like in *Preserve the Dunes*, Lakeshore has mounted a collateral attack on the permits at issue by challenging the DEQ's decision-making process in issuing those permits.

Because Lakeshore's complaint against the DEQ is premised entirely on a cause of action that does not exist, Lakeshore has failed to state a claim upon which relief can be granted, and the DEQ is entitled to summary disposition of the claims against it.

II. Lakeshore's complaint seeks relief that the Court lacks authority to grant.

Even if Lakeshore had stated a valid cause of action in its complaint (which it did not), the relief sought by Lakeshore against the DEQ is outside the scope of the Court's authority to grant. Specifically, Lakeshore has asked the Court to declare that the DEQ's processes for reviewing Part 353 permit applications are illegal, prescribe a new process for the DEQ to use, enjoin the review of *all* Part 353 permit applications by the DEQ until the Court's new process is in place, and, potentially,

to remand this matter back to the DEQ for a contested case hearing (which has already been held, and which Lakeshore lost and is currently appealing) with the requirement that the DEQ ignore Part 353's standing requirements. (Comp, ¶¶ 17, 20, 69, 70, 74, and Request for Relief ¶¶ a, b, and c.) For the reasons set forth below, the Court lacks authority to grant *any* of the relief sought by Lakeshore against the DEQ.

A. Michigan law provides for judicial review of the final decisions of administrative agencies. In this case, it allows the appropriate circuit court to hear an appeal from the administrative law judge's decision dismissing Lakeshore's contested case hearing. Michigan law does not allow courts to proactively dictate to administrative agencies how they should process and review permit applications.

Circuit courts have the power to review the final decisions of administrative agencies. Const 1963, art 6 § 28; MCL 24.301; MCL 600.631. As noted earlier in *Preserve the Dunes*, judicial review of agency decisions is available in three possible ways: the relevant statute may provide a review process, the decision is reviewable under the Administrative Procedures Act if the final decision is the result of a contested case hearing, or the decision is reviewable under § 631 of the Revised Judicature Act if the final decision is not the result of a contested case hearing. *Preserve the Dunes*, 471 Mich at 519, citing MCL 24.301 and MCL 600.631; *Morales v Michigan Parole Bd*, 260 Mich App 29, 33 (2004).

Here, Part 353 provides that DEQ permitting decisions are reviewable under the Administrative Procedures Act. MCL 324.35305. If an aggrieved party wishes to challenge a DEQ decision under Part 353, that party may file a petition for a contested case hearing before an administrative law judge. *Id.*; MCL 24.301. The final decision in the contested case hearing can then be appealed to the appropriate circuit court (and then, potentially, on to the Court of Appeals and the Supreme Court). *Id.*

The decision to issue a permit is an agency decision that is subject to judicial review *only* after other administrative remedies have been exhausted. Const 1963 art 6, § 28; MCL 24.301; MCL 300.631; *WA Foote Mem Hosp v Dep't of Pub Health*, 210 Mich App 516, 521; 534 NW2d 206 (1995). Unless the available administrative remedies have been exhausted, an agency decision is not final, and courts lack subject matter jurisdiction to review it. *Id.* And, when a circuit court lacks subject matter jurisdiction, any action it takes on a case, other than outright dismissal, is void as a matter of law. *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992).

Here, Lakeshore has challenged the permits in a contested case hearing. (Ex A.) Lakeshore lost that contested case hearing, and has appealed the result to the Ingham County Circuit Court. (Ex B.) Therefore, the Ingham County Circuit Court has subject matter jurisdiction to review that contested case hearing.

However, Lakeshore has *also* brought this action, asking this Court to declare the DEQ's entire permit review process illegal, enjoin the DEQ from processing or reviewing any new Part 353 permit applications, and create an entirely new process for the DEQ to use in reviewing Part 353 permit applications. (Comp, ¶¶ 17, 20, 69, 70, 74, and Request for Relief ¶¶ a, b, and c.) These are not challenges to final (and thus reviewable) agency decisions. Rather, they are requests that the Court proactively order the DEQ how to make future permitting decisions.

Simply put, Lakeshore is attempting an end-run around the well-established administrative review process, and is asking this Court to grant relief which the Court lacks jurisdiction to grant. Michigan law does not allow the circuit courts or this Court to proactively dictate how administrative agencies are allowed to perform their day-to-day functions. Rather, Michigan law contemplates that aggrieved parties may appeal specific final agency decisions to the courts for review.

Lakeshore's appeal to the Ingham County Circuit Court from a specific decision in a contested case hearing is the appropriate way to challenge the actions of an administrative agency. But Lakeshore's misguided attempt to convince this Court to commandeer the regulatory authority of the DEQ and enjoin the review of an entire class of permit applications is an inappropriate attempt to avoid following the appropriate judicial review process.

B. MEPA does not allow this Court to remand this matter for an administrative contested case hearing because such a hearing *has already taken place* and is currently on appeal before the Ingham County Circuit Court. Moreover, even if this Court could remand this matter for a contested case hearing, it could not require the administrative law judge to disregard Part 353's statutory standing requirements.

Lakeshore's complaint references the possibility that this Court could remand this matter to the DEQ to hold a contested case hearing. (Comp, ¶ 20.) MEPA does provide for a court to hold a MEPA lawsuit in abeyance and remand the matter for a contested case hearing if there is a legal process for such a hearing. MCL 324.1704(2). Lakeshore's reference to this provision of MEPA is erroneous, however, because a contested case hearing *has already been held* in this matter. (Exs A and B.)

The fact is that Lakeshore is not happy with the result of that contested case hearing, and apparently does not want to wait for the appropriate appeal process to unfold in the Ingham County Circuit Court, so it has raised the prospect of this Court remanding to the DEQ for *another* contested case hearing. Even worse, Lakeshore has asked this Court to declare that the standing provisions of MEPA (which are different from the standing provisions of a Part 353 contested case hearing) should apply on remand. (Comp, ¶ 20.)

Part 353 is clear that, in order to challenge a permitting decision under Part 353, one must either be the permit applicant or the owner of property immediately adjacent to the proposed project. MCL 324.35305. Lakeshore is neither, and thus its contested case hearing was dismissed for lack of standing. Lakeshore now asks

this Court to remand for another contested case hearing without the pesky statutory standing requirement.

This request fails, first and foremost, because the contested case hearing Lakeshore requests has already been adjudicated. Lakeshore cannot re-litigate the very same issues that it has already lost, and which it is currently appealing.

Second, this request fails because neither the Court nor the DEQ may simply ignore the statutory standing requirements of Part 353. Lakeshore has not challenged the Part 353 standing requirement itself, nor has Lakeshore cited any authority to support the notion that this Court can remand for an administrative hearing that has already taken place *and* waive any provision of the controlling statute that Lakeshore does not like.

CONCLUSION AND RELIEF REQUESTED

Lakeshore has failed to state a claim upon which relief can be granted because it has sued the DEQ to challenge a permitting decision under MEPA, a cause of action which the Supreme Court has expressly barred. Additionally, by attempting to avoid the appropriate judicial review process and asking this Court to usurp command of the DEQ and invent new permit review processes for it to follow, Lakeshore has requested relief which this Court is unable to grant. For these reasons, Lakeshore has failed to state a claim upon which relief can be granted. The DEQ respectfully requests that the Court grant its motion pursuant to MCR 2.116(C)(8).

Respectfully submitted,

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Dated: May 24, 2017

LF: Lakeshore Group and its Members v DEQ (CoC)/AG# 2017-0180324-BL/Brief – in Support of Motion for Summary Disposition 2017-05-24

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

IN THE MATTER OF:

Lakeshore Camping, Gary Medler, and Shorewood Association on the permit issued to Dune Ridge SA LP (Consolidated Cases)
_____/

Docket No.: 14-026236

Agency No.: 14-03-0020-P through 14-02-0028-P

Agency: Department of Environmental Quality

Case Type: Water Resources Division

Part(s): 353, Sand Dune Protection and Management
323, Shorelands Protection and Management

Issued and entered
this 13th day of February, 2017
by: Daniel L. Pulter
Administrative Law Judge

OPINION AND ORDER

This contested case concerns applications submitted by Dune Ridge SA, LP (Dune Ridge), under Part 353, Sand Dune Protection and Management, and under Part 323, Shorelands Protection and Management, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended. MCL 324.35301, *et seq.*; MCL 324.32301, *et seq.* There are three sets of Petitions for Contested Case Hearing challenging various aspects of the project. The original Petitions challenged the permits and special exception issued by the Department of Environmental Quality, Water Resources Division (WRD), in phase 1 of the project. The second Petition challenged modifications made to the permits issued in phase 1 of the project. The third Petition challenged the permits issued with respect to phase 2 of the project.

The parties challenging the permits and special exception have been in a state of flux under the provision of Part 353 that limits the right to a contested case only to a person that is "the owner of the property immediately adjacent to the proposed use...." MCL 324.35305(1). See Orders entered on September 10, 2015, October 28, 2015, January 26, 2016, and July 7, 2016. As it now stands, the remaining Petitioners are Charles Zolper and the Lakeshore Group, which has representational standing based on Mr. Zolper's membership.

On November 18, 2016, Dune Ridge filed a Motion for Summary Disposition, seeking to dismiss the remaining Petitions. As grounds for its Motion, Dune Ridge argues the Petitioners have no standing to challenge the permits and special exception issued by the WRD, because it has sold the property immediately adjacent to Mr. Zolper. In support, the Motion includes a copy of a Conveyance Deed dated September 30, 2016, given by Dune Ridge in favor of Vine Street Cottages, LLC (Vine Street). The Motion also includes the Affidavit of Paulus C. Heule, the managing member of Dune Ridge, who avers that the 15 acres sold to Vine Street includes the property immediately adjacent to Mr. Zolper. Dune Ridge's filing also includes a map showing the location of the property sold to Vine Street in relation to Mr. Zolper's property. Finally, Dune Ridge's filing includes the Affidavit of Brad Rottschafer, the managing member and owner of Vine Street, who avers that "[t]he Vine Street Parcel abuts and is immediately adjacent to Charles Zolper's property." Relying on § 35305(1), Dune Ridge argues that Mr. Zolper and Lakeshore Group no longer have standing to challenge the permits and special exception issued by the WRD.

A basic tenant of administrative law is that an agency has only those powers provided to it by statute. See *York v Detroit*, 438 Mich 744; 475 NW2d 346 (1991); *Coffman v State Board of Examiners in Optometry*, 331 Mich 582; 50 NW2d 322 (1951). In fact, Dune Ridge is correct when it argues that administrative agencies have no common law powers. Citing *Herrick District Library v Library of Michigan*, 293 Mich App 571, 582; 810 NW2d 110 (2011). Further, the *Herrick* court held that the powers of administrative agencies "must hew to the line drawn by the Legislature." *Id.* As noted, the Legislature has expressly hewn a line limiting contested cases under Part 353 only to "the owner of property immediately adjacent to the proposed use." MCL 324.35305(1). Without question, Mr. Zolper no longer is the owner of property immediately adjacent to the proposed use and, therefore, no longer has standing under Part 353. Because Lakeshore Group's standing is representational standing through Mr. Zolper's membership in the association, its standing must fail in this contested case as well. *Trout Unlimited v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992).

The Petitioners do not raise any factual issue concerning the conveyance to Vine Street, or its legal effect. Rather, they contend they have standing under *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 355; 792 NW2d 686 (2010):

> [A] litigant has standing whenever there is a legal cause of action.... Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

487 Mich at 372. Based on this language, the Petitioners contend that standing may be conferred by either (i) a legal cause of action; (ii) a substantial interest; or (iii) a statutory scheme. In essence, the Petitioners argue that, although their standing fails under §35305(1), they still have standing due to a "substantial interest" or due to a "statutory scheme" contained within Part 353.

However, it should be recalled that the right to challenge a permit issued by the WRD is governed by the NREPA. Under its express terms, Part 353 limits challenges to the issuance of a permit to the owner of the property immediately adjacent to the proposed use. MCL 324.35305(1). While *Lansing Schools* does set forth a standing analysis, it does not allow for an administrative agency to disregard an express statutory provision and look at standing under a "substantial interest" and/or "statutory scheme" analysis.

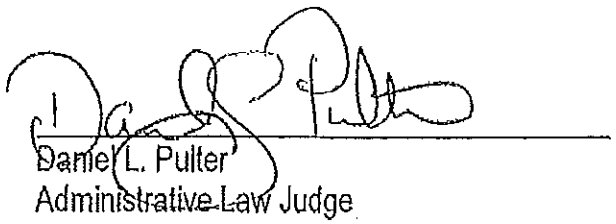
Perhaps in recognition of the deficiency of the reliance on *Lansing Schools*, the Petitioners also posit that standing cannot be defeated by any action of Dune Ridge through the sale of the adjacent lands, but only by their actions, *i.e.*, the sale of Mr. Zolper's property. First, it must be recalled that Michigan law provides that questions of justiciability, such as standing, "may be raised at any stage in the proceedings, even sua sponte, and may not be waived by the parties." *Chiropractic Council v Insurance Comm'r*, 475 Mich 363, 370-374; 716 NW2d 561 (2006). Second, the governing statute requires ownership, but is not concerned with how ownership is vested or divested. Third, the 15 acres sold to Vine Street removed such acreage from the project. Therefore, Mr. Zolper's rights are protected, because no development is occurring on property immediately adjacent to his residence. In the event that Vine Street files an Application seeking a permit under Part 353, Mr. Zolper certainly would have standing to challenge any agency action related to such Application.

Finally, the Petitioners contend that the Petitions of Lucie Reininga Hoyt and William Reininga Jr., which were dismissed in an Order entered on January 26, 2016, should be reinstated. Rule 135 of the Administrative Hearing Rules provides that, "[i]f the decision or order of an administrative law judge is final, a party may file a request for reconsideration ... within 14 days after the issuance of a decision or order...." R 792.10135(1) & (3). Such a Motion should have been filed by February 9, 2016. Otherwise, any relief for Ms. Hoyt and Mr. Reininga must be sought in circuit court. See MCR 7.105. Accordingly, the Petitioners' request to reinstate the Petitions of Ms. Hoyt and Mr. Reininga is denied as untimely.

NOW, THEREFORE, IT IS ORDERED:

1. The request to reinstate the Petitions of Lucie Reininga Hoyt and William Reininga Jr., is **DENIED**.

2. The Motion for Summary Disposition seeking the dismissal of the Petition of Charles Zolper and the Lakeshore Group is **GRANTED**, and this contested case is **DISMISSED**.



Daniel L. Pulter
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed below this 13th day of February, 2017.

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STATE OF MICHIGAN
IN THE 30TH CIRCUIT COURT
INGHAM COUNTY

LAKESHORE GROUP AND GROUP MEMBERS CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, ET AL., Appellants, v. STATE OF MICHIGAN, DEPARTMENT OF ENVIRONMENTAL QUALITY, Appellee.	Circuit Court Case No. 17-176 -AA Hon. Aquilina **NOTICE OF APPEAL** MAHS/MDEQ Contested Case Permit File Nos. 14-03-0020-P through 14-03-0028-P; 14-03-0020-P v2.0 through 14-03-0028-P v2.0; and WRP001152 on Applic'n 29G-9TJ7-04S3 and related permits

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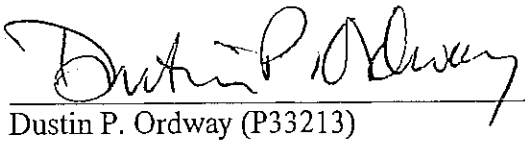
NOTICE OF APPEAL

Please take notice that Appellants Lakeshore Group and its members individually, including but not limited to Charles Zolper, Jane Underwood, Lucie Hoyt and William Reininga,

by counsel, hereby appeal pursuant to applicable authorities, including but not limited to MCR 7.103(A), MCL 324.35305(2), MCL 24.285, R 324.74(5) and R 792.10137, from the final agency action by the Michigan Administrative Hearing System regarding Department of Environmental Quality permits dated February 13, 2017 dismissing the contested case concerning sand dunes development permits pursuant to Part 353 of NREPA for the Dune Ridge development in Saugatuck, Michigan, and decisions made while the contested case was pending, including those concerning standing and the applicability of the Michigan Environmental Protection Act, Part 17 of NREPA. Please see enclosed copies of Opinions and Orders of the administrative tribunal dated February 13, 2017, July 1, 2016, January 26, 2016 and October 28, 2015.

Respectfully Submitted,

Date: February 27, 2017



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STATE OF MICHIGAN
IN THE 30TH CIRCUIT COURT
INGHAM COUNTY

LAKESHORE GROUP AND GROUP MEMBERS CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, ET AL.,
Appellants,

v.

STATE OF MICHIGAN, DEPARTMENT OF ENVIRONMENTAL QUALITY,
Appellee.

Circuit Court
Case No. _____

Hon. _____

CERTIFICATE OF SERVICE

MAHS/MDEQ Contested Case Permit File Nos. 14-03-0020-P through 14-03-0028-P; 14-03-0020-P v2.0 through 14-03-0028-P v2.0; and WRP001152 on Applic'n 29G-9TJ7-04S3 and related permits

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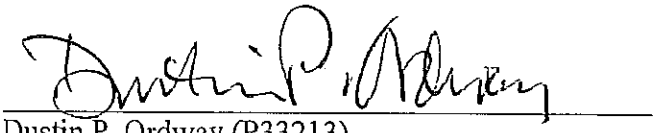
CERTIFICATE OF SERVICE

On the date indicated below, I caused to be served on counsel and the Michigan Administrative Hearing system a copy of Appellants' Notice of Appeal placing a copy in the United States mail. I declare that these statements are true.

Respectfully Submitted,

Date: February 27, 2017



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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

LAKESHORE GROUP AND ITS MEMBERS, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KENNETH ALTMAN, DAWN AND GEORGE SCHUMANN, MARJORIE SCHUHAM AND LAKESHORE CAMPING, Plaintiffs, v. STATE OF MICHIGAN, DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant.	Case No. 17-000140-MZ HON. CYNTHIA D. STEPHENS **PLAINTIFFS' RESPONSE BRIEF TO DEFENDANT'S 5/24/2017 MOTION FOR SUMMARY DISPOSITION (stipulated to be filed by 6/14/2017 with order provided for Court to sign)** **ORAL ARGUMENT REQUESTED**

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STATEMENT PURSUANT TO MCR 2.113(C)(2)(b): A civil action between these parties arising out of related transactions and occurrences to those alleged in this complaint has been previously filed in Ingham County Circuit Court, where it was given case number 17-176-AA and assigned to Hon. Rosemarie E. Aquilina. The action remains pending.

PLAINTIFFS' RESPONSE BRIEF TO DEFENDANT'S 5/24/2017 MOTION FOR SUMMARY DISPOSITION

Plaintiffs respond to the Defendant's Motion for Summary Disposition as follows:

INTRODUCTION

Plaintiffs' complaint alleges violations of two environmental protection statutes, MEPA and Part 353, in connection with the residential development plan for a 130-acre property located

entirely within protected critical dunes and MDEQ's review of the permit applications for that development.[1]

Defendant State Department of Environmental Quality ("DEQ" or "MDEQ") seeks summary disposition dismissing this case in misplaced reliance on a 2004 Supreme Court decision in *Preserve the Dunes v Mich Dep't of Envtl Quality,* 471 Mich 508 (2004) ("*Preserve the Dunes*").[2] In *Preserve the Dunes*, the Supreme Court rejected a challenge to a mining permit eligibility determination[3] as time-barred, while remanding the case for further review under MEPA. The State relies on *obiter dicta* and words taken out of context from the decision to ask this Court to conclude that MEPA can never be used to challenge a decision by MDEQ and, specifically that this case brought under MEPA and Part 353 must be dismissed. In fact, however, the Court's statements in *Preserve the Dunes* focused on a different issue and the decision does not support dismissing this case.

Additionally, the facts alleged in the complaint, which must be taken as true for purposes of this motion, support findings of violations of MEPA and Part 353. The complaint's reliance

[1] "MEPA" is the Michigan Environmental Protection Act, promulgated in 1970 and codified as Part 17 of Michigan's Natural Resources and Environmental Protection Act or "NREPA." MCL 324.1701 et seq. "Part 353" is Part 353 of NREPA, the Sand Dunes Protection and Management Act. MCL 324.35301 et seq. Each of these statutes was promulgated to fulfill a constitutional mandate to protect the environment. See Const. 1963, Art. IV, § 52, which states, "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."

[2] We will use this shortened case name for the cited Supreme Court decision throughout this response. There are also two published Court of Appeals decisions of the same name. The first, reported at 253 Mich App 263, is the decision that the Supreme Court overturned in *Preserve the Dunes*. The second, reported at 264 Mich App 257, provides the Court of Appeals' consideration of MEPA compliance on remand, as directed in *Preserve the Dunes*. References to these two decisions will include reference to the Court of Appeals and citations, rather than the case name.

[3] The Sand Dune Mining Act at issue in *Preserve the Dunes* is Part 637 of NREPA ("Part 637"). MCL 324.63701 et seq. Part 637 is not at issue in this case.

jointly on both Part 353 and MEPA makes dismissal of the case based on a MEPA argument alone unjustified, even if the "rule" put forward by Defendant were supported by the decision. Defendant's motion must be denied for this reason as well as the fact that the *Preserve the Dunes* decision does not stand for the proposition that MEPA can never be used to seek review of a permit decision by MDEQ.

STATEMENT OF FACTS

Plaintiffs accept the facts provided by Defendant in its Statement of Facts. We note, however, that after the first three paragraphs of Defendant's Statement of Facts, the rest of that section offers argument and not facts. Plaintiffs disagree with and do not adopt Defendant's legal positions set forth in its Statement of Facts. In addition to the facts offered by Defendant, Plaintiffs have provided numerous facts in the complaint. These facts are relevant to this motion because they allege actions and/or decisions that do or would violate MEPA and/or Part 353.

Some of these facts are summarized here from the complaint by way of example but without limitation. All individual plaintiffs own property "in the same area of the protected critical sand dunes where the Dune Ridge development is located" and four own property "immediately adjacent to the property in question." Plaintiffs' Complaint, at para's. 1-7. Each plaintiff has property in the affected sand dunes and in the same municipality. They have used the 130-acre property at issue, have unique and substantial interests in the protection of these dunes that will be detrimentally affected in a manner different from the citizenry at large. *Id.* at para. 61.

A developer purchased a 130-acre critical sand dunes property that had been used for a century as a limited purpose camp and took actions to develop it to make a profit, including (a) the sale of portions, (b) development of lots for 21 or more homes, (c) road construction, (d) cutting and building retaining walls in steep slopes, (e) utility installation, (f) planning additional utilities

such as septic systems, (g) construction of paths, driveways and roads, and (h) more. The developer has applied for at least four sets of Part 353 permits from MDEQ, none of which are final as the administrative/appellate review process is still underway. *Id.* at para. 11.

"Failure by MDEQ to apply the procedures and standards of MEPA and Part 353 is likely to result in the pollution, impairment and/or destruction of the critical sand dunes." *Id.* at para. 17.

The development project at issue "has the commercial purpose of making money for the owner and developer of the 130-acre property and therefore the whole project is a special use project and must be reviewed as such." The developer "did not apply for permits for the project as a whole and MDEQ did not review the project as a whole under Part 353." *Id.* at para. 24. The development "project involves a multi-family use on over 20 acres, is collectively a special use project and must be evaluated as such. It was not." *Id.* at para. 25.

The application of the developer "did not contain meaningful information about the 'diversity, quality, functions or values' of the dunes, much less 'comprehensive . . . and reliable information and scientific data' on these state-mandated standards. *Id.* at para. 28. "MDEQ did not have and did not consider meaningful information about the 'diversity, quality, functions or values' of the dunes, much less 'comprehensive . . . and reliable information and scientific data' on these state-mandated standards." *Id.* at para. 30. The developer "did not provide the necessary complete, scientific information." *Id.* at para. 32.

"The permits for Lots 5-11 violate" the provisions of Part 353 requiring setback behind the crest of a dunes that is not a foredune. *Id.* at para. 35. The developer "did not prepare or provide an environmental impact statement for the project as a whole." *Id.* at para. 38. The developer "prepared a study of threatened and endangered species that did not cover the project as a whole and was not conducted in a scientifically appropriate or complete manner." *Id.* at para. 40. "MDEQ

relied on Dune Ridge's study of threatened and endangered species . . . and did not require a study that was complete or scientific." *Id.* at para. 41.

"Decisions by MDEQ were not based on the required type of 'evidence' and could not be made on 'sufficient facts or data' and 'reliable scientific principles and methods . . . applied . . . to the facts' where, as here, such facts and other required information were not provided or 'recorded in the file."' *Id.* at para. 44. "The state has not promulgated regulations to define terms such as 'diversity, quality, functions and values' of the critical sand dunes . . . . Such regulations should be promulgated." *Id.* at para. 46.

The developer "divided its permit applications into smaller portions of the overall . . . plan and MDEQ reviewed those subsets of the . . . whole separately and without consideration of the cumulative impacts on the critical sand dunes." *Id.* at para. 45. "MDEQ reviewed and approved the . . . [developer's] permits piecemeal and without final plans in place for key utilities and services and without review or assessment of the cumulative impacts of the whole development." *Id.* at para. 56. MDEQ "approved the permit applications without . . . treating the project as a whole as a 'special use project' requiring review and approval on that basis." *Id.* at para. 58.

Plaintiffs respectfully refer the Court to the complaint for a more complete statement of facts, and reserve their right to develop the facts in support of their complaint further as this case proceeds.

STANDARD OF REVIEW

MCR 2.116(C)(8) tests the legal sufficiency of Plaintiff's claims. *Spiek v Department of Transp*, 456 Mich 331, 337 (1998) ("*Spiek*"). The motion should be granted if the claim is so clearly unenforceable that no factual development could justify plaintiff's claim for relief. *Id.*; *Stott v Wayne County*, 224 Mich App 422, 426 (1997), *aff'd,* 459 Mich 999 (1999). When deciding a

motion under MCR 2.116(C)(8), the court must accept as true all factual allegations contained in the complaint as well as any reasonable inferences that may be drawn from those allegations. *Singerman v Municipal Serv Bureau*, 455 Mich 135, 139 (1997).

ARGUMENT

POINT I. THE FACTUAL ALLEGATIONS IN THE COMPLAINT SUPPORT CLAIMS UNDER BOTH MEPA AND PART 353. SUMMARY DISPOSITION IS NOT APPROPRIATE.

When deciding a motion under MCR 2.116(C)(8), the court must accept as true all factual allegations contained in the complaint as well as any reasonable inferences that may be drawn from those allegations. *Singerman v Municipal Serv Bureau*, 455 Mich 135, 139 (1997); *Peters v Department of Corr*, 215 Mich App 485, 486 (1996). Here, the facts support the claims that assert violations of both MEPA and Part 353. The request for dismissal of the complaint must be denied.

The factual allegations in the complaint state that the developer's plans will harm the environment in violation of both MEPA and Part 353, and that MDEQ has not complied with its obligations to protect the environment under both statutes. The complaint sets forth numerous examples of specific actions that would harm natural resources. The complaint also alleges as facts that the process followed by MDEQ violated the statutory standards designed to protect the environment and natural resources. These facts may be challenged at trial but must be accepted as true for purposes of this motion.

A limited review of some of the facts in the complaint in the context of some of the environmental protection standards of MEPA and Part 353 illustrate that Defendant cannot meet the standard that Plaintiffs' claims are so clearly unenforceable that "no factual development could justify plaintiff's claim for relief." *Spiek, supra*, 456 Mich at 337. For example:

A. MEPA provides that "any person" may maintain an action "against any person" to protect natural resources from impairment. MCL 324.1701(1). The above Statement of Facts demonstrates these plaintiffs are well-suited to bring this action under MEPA. They also establish that they satisfy the narrowest ground for standing under Part 353. MCL 324.35305 ("the owner of the property immediately adjacent to the proposed use . . . may request a formal hearing" to challenge it).[4]

B. MEPA authorizes the court to "[d]etermine the validity, applicability, and reasonableness" of any "standard" to protect against pollution or impairment of natural resources. MCL 324.1701(2). Part 353 contains numerous such "standards." For example, the permit applicant must provide all "necessary" information, MCL 324.35304(1)(a); MDEQ must consider "the most comprehensive, accurate, and reliable information and scientific data" to make a permit determination, MCL 324.35302(b)(iii); and MDEQ's decision must take into account the "diversity, quality, functions, and values" of the protected dunes, MCL 324.35302(b)(i), and avoid the "significant and unreasonable depletion or degradation of any of" those characteristics. MCL 324.35304(1)(g).[5]

The facts alleged in this case plainly support Plaintiffs' claims. Even if there were some uncertainty, Defendant cannot and does not support a position that "no factual development could justify plaintiff's claims" under both MEPA and Part 353. Instead, Defendant argues that "a contested case hearing *has already been held* in this matter" (emphasis in original). Defendant's Brief, at page 10. See also, Defendant's Brief, at page 8 ("Lakeshore lost that contested case hearing, and has appealed. . ."). In truth, no evidentiary hearing was ever held; the administrative

[4] These issues, including standing under Part 353 and MEPA, are also at issue in the related case.
[5] The scope and applicability of standards promulgated to protect the environment and natural resources in MEPA and Part 353 are also at issue in the related case.

tribunal dismissed the petitioners' contested case after finding petitioners had standing but then rejecting their standing as a result of the developer's sale of property. The administrative tribunal also rejected the applicability of MEPA, among other decisions at issue in the related case. There was no factual development in the contested case process and the administrative record supplied by MDEQ in the related case contains neither the permit applications nor any evidence taken at hearing, as there was none.

This action is not part of an "end-run," as Defendant claims at page 9 of its Brief, but rather something far more basic and natural in our common law system: Plaintiffs seek judicial action to protect the natural resources of the state, as the common law of environmental protection under MEPA prescribes. MEPA authorizes judicial review of standards to protect the environment and, if necessary, authorizes the court to "direct the adoption of a standard approved and specified by the court." MCL 324.1701(2)(b). See also, discussion of development of common law of environmental protection in Michigan under MEPA, below at Point II.D.

Defendant's motion for summary disposition must be denied.

POINT II. DEFENDANT'S RELIANCE ON *PRESERVE THE DUNES* IS MIS-PLACED AS THAT SUPREME COURT DECISION DOES NOT INSULATE MDEQ PERMIT DECISIONS FROM JUDICIAL REVIEW.

Where a rule of law requires judgment in Defendant's favor, summary disposition may be appropriate. Here, however, Defendant's argument that there is such a rule of law is in error. The motion must be denied.

Defendant asserts as such a rule that "an administrative agency's decision to issue or deny a permit does not violate MEPA" and cites the Michigan Supreme Court's decision in *Preserve the Dunes v. Michigan Department of Environmental Quality,* 471 Mich 508 (2004) ("*Preserve the Dunes*") to support that proposition. Defendant's Motion, at page 3, paragraph 5. See also,

Defendant's Motion, at page 3, paragraph 6 ("an administrative decision, such as issuing a permit, does not pollute . . . [and] only the actual harmful conduct . . . is actionable under MEPA"); conclusion to Defendant's Motion, at page 5 (an "administrative permitting decision cannot, as a matter of law, violate MEPA"); and Brief in Support of Defendant's Motion, Argument I, at page 4, initial paragraph ("the Supreme Court has expressly held there is no such cause of action under MEPA" as "DEQ violated MEPA by issuing permits"). In short, DEQ argues that no person may ever challenge MDEQ's permitting decisions using MEPA.

This asserted rule is in error. Defendant's reliance on *Preserve the Dunes* to support this proposed rule of law is misplaced. That decision does not stand for this rule, which is also contrary to the legislature's mandates in MEPA pursuant to constitutional authority and to the body of common law of environmental protection developed by the courts under MEPA through *Preserve the Dunes* and other judicial decisions.[6]

There are several reasons why Defendant's Motion to Dismiss based on *Preserve the Dunes* is wrong,[7] including the following five points, each of which is addressed in more detail in sections A-E of this Point II, below: (1) The *Preserve the Dunes* decision overturned a Court of Appeals ruling that a challenge to the mining permit was timely, holding instead that the challenge was "time-barred"; much of the decision was dicta and cannot support Defendant's position in this case. (2) The statements Defendant relies on from *Preserve the Dunes* were made in the context

[6] There is a large body of legislative history, law review articles and other material addressing MEPA's purpose of allowing the public to use the courts to develop a body of common law to protect the environment, in addition to that set forth in judicial decisions themselves. See, *e.g.*, Mendelson, Nina, Joseph L. Sax: The Realm of the Legal Scholar, 4 Mich. J. Env'l. and Admin. Law 175, 176 (2014); Sax, Joseph L. and Conner, Roger L., Michigan's Environmental Protection Act of 1970: A Progress Report, 70 Mich. L. Rev. 1003 (1971); and commentary provided at http://quod.lib.umich.edu/b/bhlead/umich-bhl-85292?view=text.

[7] The applicability of MEPA to the Part 353 permitting and contested case process is also at issue in the related case.

of a challenge to eligibility for a mining permit under specific statutory language. The Supreme Court's statements Defendant seeks to rely on from the decision did not deal with using MEPA to protect natural resources, and have no bearing on the central issue in this case. (3) The final sentence of *Preserve the Dunes* remands the case to the Court of Appeals for further review of the MEPA challenge to the permit, making plain that the ability to rely on MEPA to challenge a permit based on harm to the environment was not rejected but upheld. (4) The Supreme Court in *Preserve the Dunes* cited key decisions implementing MEPA with approval, clearly not overturning them, as Defendant's position would imply it had done. Read as a whole, the *Preserve the Dunes* decision actually supports and extends the development of environmental common law under MEPA and does not, as Defendant proposes, effectively disembowel the statute by preventing any use of it to challenge to a permit decision by MDEQ. (5) In *Preserve the Dunes,* the use of MEPA to protect the environment, as with Part 353 here, was upheld. The trial court had found there was no negative environmental impact and the Supreme Court in *Preserve the Dunes* directed the Court of Appeals on remand to review the trial court's findings. In sum, as explained in more detail in the discussion of these points below, *Preserve the Dunes* does not state or stand for the proposition put forward by Defendant that DEQ's decisions are insulated from judicial review under MEPA.

A. The Central Issue in *Preserve the Dunes* was Timeliness:

The decision in *Preserve the Dunes* was based on the Court's over-ruling the Court of Appeals decision as to timeliness based on a concern with finality. All other statements in the *Preserve the Dunes* decision are *obiter dicta.* It is a "well-settled rule that statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication, *McNally v Wayne County Canvassers*, 316 Mich 551 (1947)." *Roberts v Auto-Owners Ins. Co*, 422 Mich. 594, 597 (1985).

The Court of Appeals had decided that a challenge was timely and rejected the mining permits on the ground that the applicant was not eligible for a permit under Part 637. See first Court of Appeals decision, at 253 Mich App 263, 291-304 (2002) (the challenge to the permittee's eligibility "qualifications under MCL 324.63702 is not time-barred"). The Supreme Court overruled this decision based on a holding that the MEPA challenge to eligibility was time-barred due to being filed 19 months after the permit was finalized.[8] In the immediately following paragraph after the language upon which Defendant relies at page 519 of *Preserve the Dunes*, see Defendant's Brief at 5, the Court noted the mining statute "does not expressly establish procedures **for disputing a DEQ determination** in a contested case **unrelated to MEPA.** We need not decide here whether PTD's[9] challenge to the DEQ's permit decision is governed by the RJA or the APA because the challenge is time-barred under either statute" (emphasis supplied). *Preserve the Dunes, supra*, 471 Mich at 519-520. See also, the Supreme Court's description of the trial court's decision "that PTD's claim . . . was indeed time-barred." *Id.,* at 512-513.

The Supreme Court discussed at length its concern that "[t]he time for challenging . . . a permit is long past." *Id.,* at 521. The Court rejected interpretations that would allow challenges without regard to time, expressing concern about "endless collateral attacks" and the need for "finality." *Id.,* at 523. The Court spoke out against allowing a permit to "be challenged at any time under MEPA," but specifically ruled that it was error to treat the challenge to eligibility as a MEPA claim and remanded the case for MEPA review after ruling that the claim on eligibility "is time-barred." *Id*., at 524-525. By rejecting the Court of Appeals' finding of timeliness, the Supreme

[8] This MEPA case does not suffer that defect. The related case, an appeal from the contested case dismissal, is still pending and, therefore, the permit review process is still underway and the permits are not yet final.

[9] The Court used the acronym "PTD" for the Preserve the Dunes plaintiff group after which the decision is named.

Court overruled the challenge to the permit and remanded the case to the Court of Appeals for expedited review of the MEPA challenge. *Id.*, at 524-525.

In short, the Supreme Court decision cannot be fairly characterized as a ruling rejecting MEPA review of MDEQ actions. To the contrary, the Court's focus was on timeliness and the non-MEPA issue in subsection B, below, the eligibility of the applicant to apply for a permit, and not on the use of MEPA to protect the environment, which it upheld.

B. The Primary Subject was Eligibility, not Environmental Protection:

The statements Defendant emphasizes about not allowing a collateral attack were made in the context of a challenge to eligibility, not protection of natural resources, and have no bearing on the latter. See, for example, Defendant's Brief, at pages 5-6, which provides a lengthy (but incomplete) quote from the Supreme Court decision. These statements which Defendant argues confine MEPA's scope were made specifically in the context of and with regard to an analysis of the statutory standard for eligibility in the mining statute. That standard is found at MCL 324.63702(1)(a & b).[10] The Supreme Court referred specifically to the "determinations of permit eligibility" in the material Defendant quotes. Defendant's Brief at 5. However, the Supreme Court also supplies the specific citation to the eligibility criteria at issue, namely that in section 63702(1). *Preserve the Dunes, supra* at 519. It is only then and in that context that the Court says, "An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Id.* None of this discussion concerns protection of the environment

[10] The eligibility language pertains not to mining sand generally but to mining sand in a protected critical dune area. It allows such mining based only on two limited grandfathering exceptions arising out the existence of "a sand dune mining permit that was issued prior to July 5, 1989." MCL 324.63702(1)(a).

under MEPA, but rather the Supreme Court's rejection of the use of MEPA to challenge an eligibility determination (not an environmental issue) 19 months after the fact.

The decision in *Preserve the Dunes* makes the point in several other places that its focus is the dispute over permittee eligibility under Section 63702, not environmental concerns. It rejects arguments from the dissent to overturn the permit on the basis of ineligibility on the ground that the challenge to that "decision [as to eligibility] is time-barred." *Preserve the Dunes,* at 522. When the conclusion of the opinion notes that agency decisions are "outside the purview of MEPA" it is with specific reference to the eligibility standard of MCL 324.63702(1). *Preserve the Dunes,* at 524. The Court specifically concludes that the "Court of Appeals erred by treating PTD's challenge to TechniSand's eligibility for a permit under MCL 324.63702(1) as a MEPA claim." *Id*. The decision could not be clearer that the Court rejected the MEPA action as inapposite to the eligibility analysis, not because the MEPA claim could not be brought to protect the environment.

C. MEPA Review Upheld; No Impairment of Natural Resources:

The final sentence of the Supreme Court decision in *Preserve the Dunes* makes doubly clear that the Supreme Court was not issuing the ruling that Defendant proposes, namely that a MEPA claim cannot be brought to challenge a permit decision by MDEQ. To the contrary, the final sentence of the decision remands the case to the Court of Appeals for further review of the MEPA challenge to the mining permit in that case. *Preserve the Dunes, supra*, at 525 ("We remand the case to the Court of Appeals to review the circuit court's findings that [permittee] TechniSand's mining conduct does not violate MEPA"). Defendant's arguments that the *Preserve the Dunes* decisions stands for rejection of any MEPA challenge to a decision by MDEQ represents an erroneous misreading of the decision.

On remand, in part because the trial court had found as a matter of fact that there was no impairment of the environment, the Court of Appeals upheld the permit. See Court of Appeals decision on remand at 264 Mich App 257, 259 (2004) ("In general, we review de novo the proper application of MEPA. But we will not overturn a trial court's findings of fact unless they are clearly erroneous" [citations omitted]). The decision goes on to describe that "[t]he trial court heard testimony over seven days, viewed the site with representatives of all parties to the suit, and made . . ." findings of fact. *Id.* The trial court heard expert testimony and made "its ultimate findings under MEPA." *Id.* at 260-261. The trial court concluded that the mining "will not implicate a scarce . . . resource," and the Court of Appeals found "no legal error in the trial court's reasoning." *Id.* at 265.[11] The Court of Appeals concluded, "In sum, we find no clear error by the trial court's application of MEPA in the context of the" mining permit. *Id.* at 268-269.

In the *Preserve the Dunes* decision Defendant relies on, the Supreme Court had also noted in passing that, "After a seven-day bench trial on the MEPA claim alone, the court . . . specifically found that 'any adverse impact . . . from the sand mining will not rise to the level of impairment . . . within the meaning of MEPA." *Preserve the Dunes, supra* at 513. And later in the decision, the Supreme Court declined to address MEPA compliance as "not ripe for this Court's review" because the Court of Appeals never reviewed the circuit court's decision that there was no MEPA violation. That issue is what led to the remand of the case to the Court of Appeals for just that review of the MEPA issue. *Id.* at 521. See also, the final sentence of the decision remanding the

[11] The trial court's reasoning was that, since the area of critical dunes at issue in that case was only 0.1% of the total area of protected critical sand dunes in Michigan and the rest would be exempt from mining in the future, "this court cannot conclude that the critical dune areas as a whole in this state will be destroyed or impaired within the meaning of MEPA" as a result of allowing the mining in that case to proceed. Court of Appeals decision on remand, 264 Mich App 257, 265 (2004).

case to the Court of Appeals for expedited review of the circuit court's findings that the proposed mining conduct "does not violate MEPA." *Id*. at 525.

In short, there was no issue of a possible violation of MEPA's mandate to protect the environment in the *Preserve the Dunes* decision. The trial court had made a finding. The Court of Appeals had not reviewed it because it rejected the permit on other grounds. And the Supreme Court did not review it but remanded the issue to be reviewed. There was no holding in the *Preserve the Dunes* decision that MEPA does not apply to the proposed activity or to MDEQ's review of a permit application, but rather recognition that a MEPA review of environmental concerns is appropriate. While Defendant does not misquote the Supreme Court decision, the language Defendant proffers to dismiss this case simply does not stand for that proposition. When read in the context of the case as a whole, it rather explains the Supreme Court's rejection of the use of MEPA to overcome a time bar and collaterally attack a decision that did not involve a question of environmental protection.

D. *Preserve the Dunes* Did Not Overrule Key MEPA Decisions and Upheld the Michigan Common Law of Environmental Protection:

The Supreme Court in *Preserve the Dunes* cited key decisions implementing MEPA with approval, clearly not overturning them. It discussed *Nemeth v Abonmarche Development, Inc*, 457 Mich 16 (1998) with favor. *Preserve the Dunes,* at 516-517. The Court noted that *Nemeth* involved violation of a soil erosion standard and its applicability under MEPA. *Id*. It distinguished the use of the soil erosion standard as "a pollution control standard" under MEPA from the mining statute at issue in *Preserve the Dunes*, which it said "does not contain an antipollution standard." *Id*. The Court went on to explain that "erosion *is* a form of pollution" (emphasis in original), citing to *Nemeth*. *Id*.

The Supreme Court decision in *Nemeth* discussed why a MEPA claim in court concerning standards for protection of the environment and natural resources would not be a collateral attack, as Defendant here argues. To the contrary, the Court said, "At the heart of the Court of Appeals error in this case was its failure to consider subsection 1701(2) [of MEPA] . . . . This is a vital part of our courts' development of the 'common law of environmental quality.' . . ." *Nemeth, supra*, at 29-30. The Court went on to state that although "the development of the common law in this area certainly does not preclude the Legislature or the DNR [now DEQ] from further entering the arena of environmental law . . . , the courts must still determine whether such legislative and administrative enactments are the appropriate 'pollution control' standards to be applied to a claim under MEPA . . . ." *Id*. at 30. The *Nemeth* decision goes on to cite with favor a federal court decision on "[t]his function of the Michigan courts . . . ." *Id., citing Her Majesty the Queen in Right of Province of Ontario v Detroit*, 874 F2d 332 (CA 6, 1989) ("*Her Majesty the Queen*"). "Michigan courts are not bound by any state administrative finding . . . [and] are still empowered to determine whether the standards applied . . . are appropriate." *Nemeth, supra*, at 31, citing as support *Her Majesty the Queen, supra* 874 F2d at 341. The *Nemeth* decision then proceeds to continue its discussion of MEPA and the developing Michigan common law of environmental protection with favor. *Nemeth, supra* at 31-37.

The Supreme Court in *Preserve the Dunes* then went on to discuss *Ray v Mason County Drain Commissioner*, 393 Mich 294 (1975) ("*Ray*") with approval, as well. It discussed the explanation in *Ray* as to the process through which the trial court finds facts that "*conduct* has *or is likely* to pollute, impair or destroy . . . natural resources" (emphasis in original). *Preserve the Dunes, supra*, at 518. The Court then went on to distinguish the permit applicant's eligibility in *Preserve the Dunes* from conduct that impairs the environment. *Id*. at 518-519 (declining to

consider the permit applicant's "predecessor's allegedly deficient past relationship to the mining property" as a MEPA issue).

Notably, the decision in *Ray* stated twice in the space of three paragraphs that MEPA authorizes "private individuals and other legal entities" to sue for the protection of the environment "against anyone," *Ray, supra* at 305, and specifically imposes a duty on "organizations both in the public and private sectors" to protect natural resources. *Id*. at 306. MDEQ is just such a public sector organization and its decisions and actions are subject to judicial review under MEPA as part of "developing a common law of environmental quality." *Id.*

The Supreme Court's decision in *Preserve the Dunes* did not suggest, much less state, that it was overruling these or other decisions that implement MEPA and that support the development of a common law of environmental protection under MEPA. If the *Preserve the Dunes* Court had intended to issue the rule that Defendant proffers in this case, it would have had to overrule these and other precedents. Instead of stating it was undertaking such a change of direction, however, the Court cited them with approval. The cases cited and others, as well, uphold the use of MEPA to challenge actions and decisions that may harm the environment, including the actions and decisions of MDEQ. See, *e.g*., *W. Mich. Envtl. Action Council v Natural Res. Comm'n.,* 405 Mich 741, 748 & 752-754 (1979) ("*WMEAC*") ("the trial judge erred in deferring to the Department of Natural Resources conclusions as to the likelihood of impairment of natural resources rather than exercising his own independent judgment" under MEPA); *Eyde v State*, 393 Mich 453, 454 (1974) (reinstating a trial court finding of a MEPA violation and noting the significance of the then-new MEPA statute as "significant legislation which gives the private citizen a sizable share of the initiative for environmental enforcement . . . against anyone . . . ").

If *Preserve the Dunes* stood for the proposition asserted by Defendant, that would have constituted overruling prior leading authority like *Ray* and *Nemeth* and *WMEAC*, which relied on and discussed applying MEPA to challenge actions and decisions in order to protect the environment. The *Preserve the Dunes* decision did not overrule any of those prior decisions but rather cited and discussed *Ray* and *Nemeth* with approval. Defendant's assertion that *Preserve the Dunes* stands for the proposition that MEPA cannot be used to challenge a permit decision by MDEQ conflicts with the decision as a whole and, for this reason, as well as the points made above, reflects an erroneous reading of the decision.

E. Rejection of Use of MEPA was With Regard to Non-Environmental Issue:

Preserve the Dunes dealt with a permit under a mining statute that it noted has no antipollution standard, *Preserve the Dunes* at 516, except an environmental impact statement requirement. Further, in that case, the trial court took testimony for a week and made undisturbed findings of fact that there was no impairment of the environment. The focus of *Preserve the Dunes* was on eligibility under a grandfathering provision, not environmental protection. The statement in the Supreme Court's decision that objected to allowing use of MEPA to bring a collateral attack was about its use on a non-environmental issue (eligibility based on grandfathering) and not about using MEPA to protect the environment and natural resources. *Preserve the Dunes*, at 511 ("The only issue properly before us is whether MEPA authorizes a collateral challenge . . . unrelated to whether the conduct involved has polluted . . . natural resources protected by MEPA"); 519 ("DEQ determinations of permit eligibility under §§ 63701(1) and 63704(2) are unrelated to whether the applicant's proposed activities on the property violate MEPA"); and 524 (the Court concludes that "MEPA affords no basis for judicial review of agency decisions under MCL 324.63702(1) [the eligibility criteria] because that inquiry is outside the purview of MEPA," and does not say MEPA

does not authorize review of agency decisions on protection of the environment). In contrast to the mining statute and the way it was addressed in *Preserve the Dunes*, the provisions of Part 353 at issue in this case create and require standards for protecting the environment in the evaluation of proposals to develop protected critical sand dunes. This statutory framework is closer to *Nemeth* with its sedimentation standard. If anything, the standards here are more extensive. See Complaint, Statement of Facts and examples described in Point I, above.

In sum, even if the decision in *Preserve the Dunes* had not centered on the case being time-barred in connection with an eligibility determination unrelated to environmental concerns or had not arisen from a trial court finding that there was no negative environmental impact and a remand to the Court of Appeals to review that trial court's MEPA ruling, the focus of *Preserve the Dunes* on disallowing MEPA to be used to challenge a non-environmental agency decision contrasts sharply with this case and does not support the application Defendant asks this Court to make now.

CONCLUSION

The facts alleged in the Complaint support the claims under both MEPA and Part 353. *Preserve the Dunes* was decided on the ground that a challenge to eligibility (not environmental concerns) was time-barred and that MEPA should be utilized to address environmental concerns rather than an eligibility determination, with the court remanding for further consideration of compliance with MEPA. The decision does not stand for the proposition put forward by Defendant that no one may ever use MEPA to challenge a DEQ decision that threatens to result in pollution or impairment of natural resources.

This case involves exactly the situation contemplated by MEPA and the Court in *Preserve the Dunes* as a legitimate use of MEPA. The administrative tribunal rejected the application of MEPA, yet MEPA supplements and reinforces the permitting statute at issue, Part 353, and its

standards for protection of sand dunes. Granting Defendant's motion for summary disposition would be contrary to Supreme Court precedent and would prevent any review of proposed development of protected sand dunes and DEQ's approval of same. Defendant opposes the application of MEPA in the administrative setting (see related case) and now opposes it use here. Dismissal would contravene the legislative mandates of both MEPA and Part 353, and of the Michigan Constitution. Judicial review is a proper exercise of the court's authority under MEPA in the development of Michigan's common law of environmental protection.

Wherefore, Plaintiffs respectfully request that the State's motion be denied.

Respectfully Submitted,

Date: June 13, 2017

/s/ Dustin P. Ordway

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STATE OF MICHIGAN

COURT OF CLAIMS

LAKESHORE GROUP *et al*, Plaintiffs, v STATE OF MICHIGAN and DEPARTMENT OF ENVIRONMENTAL QUALITY , Defendants.	**OPINION AND ORDER** Case No. 17-000140-MZ Hon. Cynthia Diane Stephens

Pending before the Court is defendants' motion for summary disposition under MCR 2.116(C)(8). For the reasons stated herein, the motion is GRANTED.

According to the allegations in plaintiffs' complaint, this case arises out of four permit applications under MCL 324.35301 *et seq.* (Part 353) by non-party Dune Ridge SA, LP. Plaintiffs allege that defendant Michigan Department of Environmental Quality (MDEQ) approved the permits and employed policies and procedures that violated Part 353. The same or substantially similar group of plaintiffs filed petitions to challenge the issuance of the permits in contested case hearings authorized under the Administrative Procedures Act (APA), MCL 24.301 *et seq.* On February 13, 2017, the administrative law judge presenting over the contested case hearings granted summary disposition to MDEQ and dismissed the petitions for the reason that plaintiffs—petitioners in that case—lacked standing. Following the dismissal of their

petitions, plaintiffs appealed the dismissal in Ingham Circuit Court. By all accounts, that appeal remains pending.[1]

Plaintiffs now ask this Court to declare that MDEQ be required to comply with the standards and procedures set forth in Part 353. Plaintiffs ask this Court to review, and modify, if necessary, MDEQ's decision-making procedures under Part 353 in order to ensure that MDEQ complies with its statutory authority. In Count II of their complaint, plaintiffs ask this Court to grant them injunctive relief and to hold all of the permits in abeyance until MDEQ complies with all of the standards set forth in Part 353.

Defendants now move for summary disposition under MCR 2.116(C)(8), arguing that the outcome of this case is controlled by our Supreme Court's decision in *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004). Plaintiffs contend that the portion of the *Preserve the Dunes* decision on which defendants rely is either dicta or that it does not stand for the proposition defendants espouse.

The Court agrees with defendants that the decision in *Preserve the Dunes* is controlling and, because the Court is bound by the doctrine of stare decisis to apply the decision, concludes that summary disposition is warranted. Plaintiffs allege a violation of MCL 324.1701 of the Michigan Environmental Protection Act (MEPA) by way of MDEQ's decision to approve certain permits. MCL 324.1701(1) creates a cause of action "against any person for the protection of the

[1] In addition to that appeal, the Court notes there is an action pending in Ingham Circuit Court against non-party Dune Ridge. Plaintiffs' complaint in this case initially named Dune Ridge and the state defendants, whereafter the state defendants transferred the claims against them to this Court.

air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." However, as the Supreme Court noted in *Preserve the Dunes*, 471 Mich at 519, "[a]n improper administrative decision, standing alone," does not harm the environment. Only wrongful conduct offends MEPA." Plaintiffs' collateral attack on the permitting process cannot proceed in this Court. *Id.* at 522-523. Accordingly, under the decision issued in *Preserve the Dunes*, the Court is bound to conclude that plaintiffs have failed to state a cause of action against these defendants.[2]

IT IS HEREBY ORDERED that defendants' motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(8).

This order resolves the last pending claim and closes the case.

Dated: November 13, 2017

Hon. Cynthia Diane Stephens
Court of Claims Judge

[2] Plaintiffs go to lengths to argue that the *Preserve the Dunes* decision is not controlling in this case. However, these arguments and theories do not find support in the *Preserve the Dunes* decision.

STATE OF MICHIGAN
IN THE COURT OF APPEALS

LAKESHORE GROUP, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, ET AL., Plaintiffs/Appellants,	Court of Appeals Case No. _____
v.	Court of Claims Case No. 17-000140-MZ HON. CYNTHIA D. STEPHENS
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant/Appellee.	**CLAIM OF APPEAL**

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CLAIM OF APPEAL

Plaintiffs/Appellants Lakeshore Group and its members claim an appeal from a final judgment dated November 13, 2017 in the Court of Claims of the State of Michigan by Court of Claims judge Hon. Cynthia Diane Stephens. A copy of the decision is attached as Exhibit 1.

Bond is not required.

No record was made, and so no transcript has been ordered.

The Register of Actions in the Court of Claims is attached as Exhibit 2.

The completed Jurisdictional Checklist is attached as Exhibit 3.

THIS CASE INVOLVES A RULING THAT A PROVISION OF A MICHIGAN STATUTE IS INVALID. The Michigan Environmental Protection Act ("MEPA"), Part 17 of the Natural Resources and Environmental Protection Act, MCL 324.1701 *et seq*., provides "any person may maintain an action . . . against any person for the protection" of natural resources. The decision being appealed here accepts an argument by Defendant MDEQ that, notwithstanding this language, there is no right to judicial review of a decision by MDEQ to authorize development of protected sand dunes. That position and the result in the final order being appealed would invalidate portions of MEPA.

Respectfully Submitted,

Date: December 1, 2017

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

LAKESHORE GROUP, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, ET AL.,
Plaintiffs/Appellants,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant/Appellee.

Court of Appeals Case No. 341310

Court of Claim Case No. 17-000140-MZ
Hon. Cynthia Diane Stephens

APPELLANTS' BRIEF
IN SUPPORT OF APPEAL

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ORAL ARGUMENT REQUESTED

APPELLANTS' BRIEF IN SUPPORT OF APPEAL

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BASIS OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to MCR 7.203(A)(1). The final judgment of the Court of Claims dated November 13, 2017, is attached as Exhibit 1. Plaintiffs filed their Claim of Appeal by mail on December 1, 2017, and it was received by the Clerk on December 4, 2017.

QUESTIONS INVOLVED

1. Does the Supreme Court decision in *Preserve the Dunes, Inc. v MDEQ*, 471 Mich 508 (2004), attached as Exhibit 2, require summary disposition in this case under the doctrine of *stare decisis*?

THE COURT BELOW ANSWERED: YES

APPELLANTS ANSWER: NO

2. Is a complaint under the Michigan Environmental Protection Act or MEPA, attached as Exhibit 3, which seeks judicial review of MDEQ conduct under the Sand Dunes Protection and Management Act or Part 353, attached as Exhibit 4, a "collateral attack on the permitting process [that] cannot proceed"?

THE COURT BELOW ANSWERED: YES

APPELLANTS ANSWER: NO

3. Can administrative actions by MDEQ constitute "wrongful conduct [that] offends MEPA"?

THE COURT BELOW ANSWERED: NO

APPELLANTS ANSWER: YES

INTRODUCTORY STATEMENT

This case centers on the precedential effect of the Michigan Supreme Court decision in *Preserve the Dunes, Inc. v Mich Dep't of Envtl Quality [MDEQ],* 471 Mich 5008 (2004) ("*Preserve the Dunes*").[1] Copy of decision attached as Exhibit 2. The Court below in this case decided that the *Preserve the Dunes* decision required it to dismiss this case. Plaintiffs/Appellants respectfully disagree and submit to this Court that the decision in *Preserve the Dunes* is narrow, is clear and does not support that result. It holds that it is an improper use of Michigan's Environmental Protection Act or MEPA to challenge a non-environmental decision by MDEQ. "MEPA" is the Michigan Environmental Protection Act, promulgated in 1970 and codified as Part 17 of Michigan's Natural Resources and Environmental Protection Act or "NREPA." MCL §324.1701 *et seq.* A copy of MEPA is attached as Exhibit 3. The *Preserve the Dunes* decision does not support or require dismissing the Complaint in this case, which alleges that conduct of MDEQ violated environmental protection standards the legislature established in both MEPA and Part 353.[2] "Part 353" or Part 353 of NREPA, is a common reference for the Sand Dunes Protection and Management Act. MCL §324.35301 *et seq.* A copy of Part 353 is attached as Exhibit 4.

[1] Appellants will use this shortened case name ("*Preserve the Dunes*") to refer to the cited Supreme Court decision throughout this brief. There are also two published Court of Appeals decisions of the same name. The first, reported at 253 Mich App 263 (2002), is the decision that the Supreme Court overturned in *Preserve the Dunes*. The second, reported at 264 Mich App 257 (2004), provides the Court of Appeals' consideration of MEPA compliance on remand, as directed in *Preserve the Dunes*.

[2] Both MEPA and Part 353 were promulgated to fulfill a constitutional mandate to protect the environment. See Const. 1963, Art. IV, §52, which states, "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."

MDEQ's arguments (and the Court of Claims decision, attached as Exhibit 1) ascribe a different and far broader scope to the *Preserve the Dunes* decision. MDEQ would effectively render much of MEPA meaningless by its extension of the decision, as it would bar any use of MEPA to obtain judicial review of any MDEQ permit decision – even those that affect the environment. The conduct of MDEQ in overseeing, processing and deciding on environmental permits such as the sand dunes development permits at issue here has a real effect upon the environment and natural resources of this State. Its conduct therefore is subject to MEPA review by the courts.

The 2004 decision of the Supreme Court in *Preserve the Dunes,* Exhibit 2, did not say MDEQ permit decisions are immune from judicial review under MEPA; it did not mean that; and it should not be misused toward that end. These Appellants request that this Honorable Court reject that unsupported extension of *Preserve the Dunes*, reverse the decision below dismissing the complaint, and remand the case for full proceedings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 2015 and thereafter, MDEQ granted a series of sand dune development permits pursuant to Part 353 to a developer, Dune Ridge SA LP. See Complaint, attached as Exhibit 5, at pages 3-4, paragraph 11, and at pages 11-12, paragraphs 48-51. The permits authorized transformation of a century-old wooded camp on 130 acres into over 20 luxury home sites in a gated community with paved roads, utilities and septic fields. *Id.* Plaintiffs/Appellants filed contested case petitions. Complaint, at paragraph 11.[3]

[3] See also, the records in three applications for leave to appeal in this Court, Court of Appeals Case Numbers 340620, 340623 and 340647, in which the developer and/or MDEQ seek to overturn the Ingham County Circuit Court's rulings on venue and standing in Ingham County Circuit Court Case No's. 17-292-CE and 17-176-AA, respectively.

The administrative law judge handling the contested case ruled that MEPA does not apply in a Part 353 contested case proceeding; rejected the standing of all petitioners, and dismissed the contested case. See records in three Court of Appeals applications for leave to appeal cases, Case Numbers 340620, 340623 and 340647. Petitioners appealed the dismissal of the contested case and also filed the underlying MEPA action at issue here. *Id*.; see also, Complaint, Exhibit 5.

Plaintiffs/Appellants filed the Complaint below against both the developer and MDEQ. Exhibit 5. The case was assigned to the same judge in the Ingham County Circuit Court who had the administrative appeal. MDEQ then severed the MEPA cases against the developer and MDEQ by transferring the case against it to the Court of Claims. Record in this case, Court of Claims Case No. 17-000140-MZ. MDEQ refused to consent to allow the judge with the identical developer case in Ingham County Circuit Court to handle the case against it. *Id*.

The Complaint alleges that the Michigan Environmental Protection Act or MEPA authorizes the filing of the action. Complaint, Exhibit 5, at page 4, paragraph 13. The Complaint alleges that MEPA authorizes the Circuit Court to review and rule on laws or "standards" legislated to protect the environment and natural resources of Michigan. *Id*., at paragraph 15; see also, MEPA, Exhibit 3, at MCL §324.1701. The Complaint alleges that the Sand Dunes Protection and Management Act, MCL §324.35301 et seq., ("Part 353"), Exhibit 4, includes legislatively mandated standards that MDEQ must follow and implement to protect natural resources when an applicant seeks a Part 353 permit to build on the protected sand dunes. *Id*. at page 5, paragraph 16. The Complaint alleges that MDEQ's conduct with regard to enforcing such standards could constitute a violation of MEPA. *Id*., at paragraph 17.

The Complaint alleges that Part 353 "sets forth a number of standards and procedures to protect against the impairment of sand dunes." *Id*. at page 6, paragraph 22. The Complaint alleges

that these standards include, for example: (A) a focus on the municipality where the development is planned, *Id*. at paragraph 23; (B) special rules governing permit proposals that have a commercial purpose and/or involve multi-family use of more than three (3) acres, *Id*. at paragraphs 24-25 (and page 9, paragraph 37-38); (C) a legislative mandate identifying the protected sand dunes as an "irreplaceable resource" and requiring MDEQ to balance the public interest against private rights, *Id*., at pages 6-7, paragraph 26; (D) identification of key characteristics of sand dunes and a mandate to MDEQ to "ensure and enhance" those characteristics, *Id*., at paragraph 27; (E) a direction to MDEQ to "use the most comprehensive, accurate, and reliable information and scientific data available," *Id*.; and more.

The Complaint alleges MDEQ's conduct in overseeing the permit application process, reviewing the applicant's information and making decisions under Part 353 did not comply with the standards set forth in Part 353, *Id*., at pages 7-13, paragraphs 29-30, 32, 33, 39, 41, 42, 43, 44, 45, 56 and 58, among others.

MDEQ moved for summary disposition in the Court of Claims, arguing the complaint failed to state a claim upon which relief could be granted pursuant to MCR 2.116(C)(8) and relying upon the Supreme Court decision in *Preserve the Dunes.* MDEQ Motion and Brief, attached as Exhibit 6. Plaintiffs/Appellants opposed dismissal. Plaintiffs/Appellants' Brief in Opposition to MDEQ's motion to dismiss, attached as Exhibit 7.

On November 13, 2017, the Court of Claims granted MDEQ's motion to dismiss, ruling that it was required by *stare decisis* to dismiss the case under the authority cited by MDEQ. Exhibit 1. Plaintiffs/Appellants now appeal.

ARGUMENT

THE COURT OF CLAIMS' DISMISSAL OF THE COMPLAINT MUST BE OVERTURNED. THE SUPREME COURT DECISION IN *PRESERVE THE DUNES* SUPPORTS THE RIGHT TO JUDICIAL REVIEW IN THIS CASE AND DOES NOT MANDATE DISMISSAL AS THE COURT BELOW ERRONEOUSLY CONCLUDED.

A. STANDARD OF REVIEW

"A motion for summary disposition under MCR 2.116(C)(8) tests the legal basis of the claim and is granted if the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). Motions for summary disposition are examined on the pleadings alone, absent consideration of supporting affidavits, depositions, admissions, or other documentary evidence, and all factual allegations contained in the complaint must be accepted as true. *Id.* at 654." *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381 (1997). See also, *Straus v Governor*, 459 Mich 526 (1999), citing *G & A, Inc v Nahra*, 204 Mich App 329, 330 (1994) (a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(8) is reviewed *de novo*).

B. CONCISE SUMMARY OF ARGUMENT

MDEQ argues emphatically – and the Court below erred in holding – that the *Preserve the Dunes* decision rejects all judicial review under MEPA of MDEQ permit decisions. To support that argument, MDEQ takes words of the decision out of context and ignores the true scope of the decision. Specifically, it argues that:

1. Any MEPA complaint against MDEQ's permit decisions is an unlawful "collateral attack" (when the "collateral attack" in *Preserve the Dunes* was the use of MEPA to challenge a non-environmental issue of eligibility);

2. The only "defendant's conduct" that can harm the environment is that of a private defendant and not of MDEQ (when the distinction in *Preserve the Dunes* was between an applicant's eligibility and its actions under the permit, and the Court plainly upheld the use of MEPA to obtain judicial review of permit decisions affecting the environment); and
3. The Court's statement that "an improper administrative decision, standing alone, does not harm the environment" means that all MDEQ administrative decisions are immune from judicial review under MEPA (whereas the challenge to an administrative decision the Supreme Court was rejecting was to the non-environmental question of eligibility to apply for a permit and not to MDEQ's conduct in overseeing and deciding on permit application matters that affect the environment).

The truth is that the language from the *Preserve the Dunes* decision that MDEQ uses and the Court below relies on is *dictum* and does not support insulating all MDEQ permit decisions from judicial review. This appeal is about correcting the flawed proposition by MDEQ, accepted in error by the Court below in dismissing this case, that agency decisions regarding environmental permits are immune from judicial review under MEPA and can only be challenged through the administrative contested case process.

MDEQ takes language from the *Preserve the Dunes* decision out of context. Plaintiffs/ Appellants will address that language in section C, below. Then, this brief will discuss the *Preserve the Dunes* decision and the errors of the Court below in misapplying it according to MDEQ's arguments in the following sections that:

- Section D. Address the doctrine of *stare decisis* and why it does not require or support the Court of Claims dismissal of the Complaint;

- E. Explain that the Supreme Court's use of the term "collateral attack" was focused on the improper use of MEPA to challenge a non-environmental decision, not on the use of MEPA to challenge MDEQ conduct concerning the environment;
- F. Discuss the Supreme Court's statement that "an improper administrative decision does not harm the environment" referred to the eligibility decision it was saying was a non-environmental decision; it was not saying that no administrative decision can ever have an impact on the environment that could implicate the protections of MEPA;
- G. Explain that the Supreme Court's emphasis on applying MEPA to "defendant's conduct" distinguished the status of eligibility from conduct and did not state and was not intended to bar review of MDEQ's conduct in reviewing and deciding on permit applications;
- H. Summarize some of the ways in which the Complaint alleges that Part 353 regulates MDEQ's conduct to protect the environment;
- I. Explain why the Supreme Court's remand to the Court of Appeals in *Preserve the Dunes* demonstrates that the Court was upholding rather than rejecting the use of MEPA;
- J. Note that the Supreme Court's discussion of MEPA precedent also supports the conclusion that the Court was not barring MEPA review of MDEQ conduct and decisions; and
- K. Address the point that the MDEQ position that there can be no judicial review under MEPA of the agency's decision making is not only contrary to MEPA but also the separation of powers doctrine as it would insulate executive action from judicial review authorized by the legislature.

Each of these points calls for the reversal of the decision below dismissing the case. Collectively, they demonstrate that the decision in *Preserve the Dunes* had a very different focus and more limited ruling that does not support dismissal of the complaint.

It is important to reject the untenable conclusion that the judiciary is barred from review of MDEQ permit decisions under both MEPA and Part 353 except through a narrow administrative review process. That conclusion and practice would destroy the intended function of MEPA to empower citizens to seek and the judiciary to continue the development of Michigan's common law of environmental protection. MDEQ takes certain statements out of context to reach a result that the Supreme Court did not support in *Preserve the Dunes*. That misguided effort must be rejected and the decision below to grant the motion for summary disposition must be reversed.

C. THE COURT OF CLAIMS AND MDEQ ERR BY TAKING CERTAIN WORDS AND PHRASES FROM THE SUPREME COURT DECISION IN *PRESERVE THE DUNES* OUT OF CONTEXT TO SUPPORT A CONCLUSION THAT IS NEITHER REQUIRED BY NOR CONSISTENT WITH THE DECISION.

Introduction: The Court of Claims held that principles of *stare decisis* required it to dismiss this case pursuant to *Preserve the Dunes.* That ruling is based on arguments by MDEQ that misstate what the Supreme Court was ruling by taking words out of context that do not actually stand for the conclusion the agency asked the Court of Claims to draw. Specifically, MDEQ argues that the Supreme Court's rejection of the use of MEPA to "collaterally attack" a non-environmental decision in *Preserve the Dunes* means that MEPA can never be used to challenge MDEQ's conduct. The Court below erred in adopting that interpretation and granting the motion for summary disposition in this case.

Court Ruling Below: The Court of Claims ruling being appealed here is granting a motion for summary disposition and dismissing the Complaint based on the Court's finding that it was "bound by the doctrine of stare decisis" to apply the decision in *Preserve the Dunes* to do

so. Court of Claims decision, attached as Exhibit 1, at page 2. Specifically, the Court of Claims went on to say:

> . . . as the Supreme Court noted in *Preserve the Dunes*, 471 Mich at 519, "[a]n improper administrative decision, standing alone," does not harm the environment. Only wrongful conduct offends MEPA." Plaintiffs' collateral attack on the permitting process cannot proceed in this Court. *Id.* at 522-523. Accordingly, under the decision issued in *Preserve the Dunes*, the Court is bound to conclude that plaintiffs have failed to state a cause of action against these defendants.

Court of Claims decision, Exhibit 1, at page 3.

Based on the wording of this ruling, the Court of Claims decision assumes that MDEQ's decision making on these Part 353 permit applications must be an "administrative decision . . . [that] does not harm the environment . . . [and does not constitute] wrongful conduct [that] offends MEPA." And the decision appears to characterize the Complaint below, Exhibit 5, as a "collateral attack on the permitting process . . . ." These conclusions concerning MEPA challenges to "administrative decisions," "wrongful conduct," and "collateral attacks" are incorrect and are addressed below.

MDEQ Assertions in Its Motion to Dismiss: The Court of Claims granted MDEQ's motion for summary disposition based on assertions by MDEQ in its motion and brief about the legal effect of the *Preserve the Dunes* decision and claiming that the MEPA Complaint here violated the rulings in that decision. In doing so, MDEQ used some of the Supreme Court's words but also added its own. MDEQ repeatedly and emphatically asserted in its motion and brief to the Court of Claims that the Supreme Court decision in *Preserve the Dunes* bars any judicial review of MDEQ decision making regarding permits using MEPA. MDEQ Motion and Brief, attached as Exhibit 6. See, for example, MDEQ's Motion at page 3, paragraph 5 (". . . as a matter of law, an administrative agency's decision to issue or deny a permit does not violate MEPA.

Preserve they Dunes, Inc. v Michigan Dep't of Environmental Quality, 471 Mich 508, 518-520 [2004]"); and page 3, paragraph 7 ("Plaintiffs seek relief [judicial review under MEPA] that has been specifically forbidden by the Michigan Supreme Court"). See also, MDEQ's Brief at page 5, second full paragraph ("On appeal, the Supreme Court held that an administrative decision, such as issuing a permit, does not pollute, impair, or destroy natural resources, and that MEPA does not provide an avenue for a collateral attack on a DEQ decision to issue a permit" [emphasis supplied of language of MDEQ that the Supreme Court did not state]); and at page 9, third paragraph (MDEQ characterizes the MEPA/Part 353 complaint here as an "attempt to convince this [trial] Court to commandeer the regulatory authority of the DEQ and . . . is an inappropriate attempt to avoid following the appropriate judicial review process").

MDEQ repeats its assertions numerous times in its motion and brief, sometimes leaving out words or adding its own variation on what the Court actually held. Exhibit 6. See, for example, MDEQ assertions in its Motion at page 3, paragraph 6 ("an administrative decision, such as issuing a permit, does not pollute, impair, or destroy natural resources. *Id.* [*i.e.,* citing *Preserve the Dunes*] Rather, only the actual harmful conduct (actually polluting, impairing, or destroying natural resources, as opposed to making an administrative decision to issue a permit) is actionable under MEPA. *Id.*") (emphasis supplied); page 4, paragraph 11 ("This lawsuit is nothing more than an improper collateral attack on the administrative hearing process")[4]; and at the Conclusion

[4] Notably, the administrative hearing process was truncated when the administrative law judge granted motions by the developer and MDEQ to reject standing for petitioners it had previously ruled did have standing. No evidentiary hearing was held and the contested case was dismissed. MDEQ opposed the application of MEPA in the context of the contested case, leaving Petitioners there (Plaintiffs/Appellants here) no avenue except the filing of this MEPA complaint while their appeal from the dismissal was pending. See records regarding applications for leave to appeal in Court of Appeals Case Numbers 340620, 340623 and 340647, in which the developer and/or MDEQ seek to overturn the Ingham County Circuit Court's rulings on venue and standing.

paragraph on page 5 ("an administrative permitting decision cannot, as a matter of law, violate MEPA").

MDEQ makes many similar assertions attempting to extend the Supreme Court's ruling from a narrow ruling into a complete bar on judicial review of MDEQ permit decisions in its Brief. Exhibit 6. See, for example, MDEQ Brief, at page 3, first paragraph, where MDEQ characterizes the complaint in this matter as "a misguided attempt to mount a collateral attack"; at page 4, second paragraph ("The Supreme Court held that the proper method for challenging permits issued by an administrative agency is through the administrative review process . . . , and not via a collateral attack in a MEPA lawsuit." [citing *Preserve the Dunes* at pages 518-520]); and at pages 4-5, carryover paragraph ("The Supreme Court framed the issue before it as, 'whether MEPA authorizes a collateral challenge to the DEQ's decision to issue a sand dune mining permit . . . in an action that challenges flaws in the permitting process unrelated to whether the conduct involved has polluted, impaired, or destroyed, or will likely pollute, impair, or destroy natural resources protected by MEPA.' *Id.,* p 511.").

In its Brief, included in Exhibit 6, at page 5, bottom half of page, first indented quotation paragraph, MDEQ quotes the Supreme Court's language that specifically references the permit eligibility issue, but without acknowledging that the eligibility issue is different – and the Supreme Court noted it was different – from decisions that affect the environment.[5] MDEQ then quotes two short sentences of the Supreme Court decision that – taken out of context – are at the heart of this controversy, but without explaining how they refer to the eligibility issue rather than environmental concerns, Brief at page 5: "An improper administrative decision, standing alone,

[5] MDEQ's ellipsis at the end of this quotation referencing "eligibility" is where MDEQ leaves out the Supreme Court's citation to the section of the Sand Dune Mining Act that contains the non-environmental, eligibility criteria that is the subject of this text, MCL §324.63701(1).

does not harm the environment. Only wrongful conduct offends MEPA." The statements of the Supreme Court quoted and referred to here are at page 519 of the *Preserve the Dunes* decision. Exhibit 2, 471 Mich at 519.

The MDEQ Brief, at page 5, then quotes another paragraph from the *Preserve the Dunes* decision at 519 setting forth non-MEPA ways to obtain judicial review of a DEQ decision, namely contested case and administrative review proceedings that do not depend on or arise out of MEPA (but fails to acknowledge that the Supreme Court explicitly notes "a challenge under MEPA may be filed in circuit court . . . without any requirement that a litigant exhaust administrative remedies" in its decision at page 521). Immediately thereafter, at the top of page 6 of its Brief, MDEQ quotes language from five pages later in the *Preserve the Dunes* decision, at page 524, that circles back to eligibility – but MDEQ does not point that out:

> MEPA affords no basis for judicial review of agency decisions under MCL 324.63702(1) [which is the grandfathering eligibility provision] because that inquiry is outside the purview of MEPA. The focus of MEPA is to protect our state's natural resources from harmful conduct. It offers no basis for invalidating an issued permit **for reasons unrelated to the permit holder's conduct**[6] [emphasis supplied]. To hold otherwise would broaden by judicial fiat the scope of MEPA and create a cause of action that has no basis in MEPA's language or structure. [citing *Preserve the Dunes* decision at 524]

MDEQ's point, at page 7 of its Brief, first full paragraph under Section A, would bar any review of MDEQ conduct except in the three ways which focus on administrative appeals. That would read Section 1701 out of existence insofar as any person seeks judicial review of MDEQ

[6] This sentence may present the crux of the issue for this Court to address. MDEQ argues that it means only conduct of a permittee can be challenged. But in truth, the MDEQ decisions about whether to grant a Part 353 permit and what scope of change to the dunes is permissible are not "unrelated"; they do affect "the permit holder's conduct" and, thus, the environment. Under this core standard, while eligibility does not affect conduct, the scope of actions allowed does. That distinction goes to the heart of this case and the reason why the dismissal below must be overturned.

conduct. Similarly, MDEQ's statement at page 9, second full paragraph, that Plaintiffs are "attempting an end-run around the well-established administrative review process, and is [are] asking this Court to grant relief which the Court lacks jurisdiction to grant" ignores MEPA's authorization to go to court. MCL §324.1701. Finally, in the Conclusion to its Brief, at page 11, MDEQ asserts that the Plaintiffs are "asking this Court to usurp command of the DEQ and invent new permit review processes." This again ignores MEPA's authorization to file suit and misstates the goal of this litigation.

It is important to distinguish between what MDEQ claims the *Preserve the Dunes* decision means, on the one hand, and, on the other hand, what the Supreme Court actually says and rules in the decision. Exhibit 2. The Supreme Court does not say – as MDEQ claims – that its rejection of using MEPA to challenge eligibility means that MEPA could never be used to challenge any MDEQ decision. MDEQ seeks to extend the ruling and its *dicta* to create a bar on judicial review through MEPA of MDEQ permit decision making generally.

In sum, when MDEQ relied on phrases taken out of context from the Supreme Court decision in *Preserve the Dunes*, Exhibit 2, it misled the Court below and created a false impression of the focus and scope of that decision. The Court below accepted that misinterpretation and erroneously dismissed the Complaint. However, what the Supreme Court ruled in the *Preserve the Dunes* decision was that the MEPA claim in that case was time-barred. Moreover, the Supreme Court's focus was on a statutory eligibility issue, not environmental protection; that is why the use of MEPA in that case was a "collateral attack." All else (besides rejecting the MEPA challenge there as [i] wrongly brought against a non-environmental decision and [ii] time-barred) is *dicta*. In addition, the Court explicitly recognized that MEPA can be used to challenge MDEQ permit

decisions – it merely rejected using it for a non-environmental purpose such as challenging eligibility. These points are addressed in more detail below.

D. THE DOCTRINE OF *STARE DECISIS* DOES NOT SUPPORT DISMISSAL WHERE THE STATEMENTS RELIED ON ARE *OBITER DICTA*. THE HOLDING IN *PRESERVE THE DUNES* IS THAT 'THE USE OF MEPA TO ATTACK ELIGIBILITY IS TIME-BARRED.' ALL ELSE IS *DICTA*.

The Court of Claims erred in ruling that precedential rules and the decision in *Preserve the Dunes* required it to dismiss the complaint against MDEQ. Exhibit 1, at page 2 ("because the Court is bound by the doctrine of *stare decisis*, summary disposition is warranted"). The doctrine of *stare decisis* requires courts to reach the same result when the same or substantially similar issues are presented. *WA Foote Mem Hosp v City of Jackson,* 262 Mich App 333, 341 (2004), citing *inter alia*, *Nawrocki v Macomb Co Rd Comm,* 463 Mich. 143, 180 (2000). This case challenges actions and decisions that affect the environment and does not involve a non-environmental eligibility issue. Complaint, Exhibit 5. Moreover, the precedential imperative of *stare decisis* does not arise from a point addressed in *obiter dictum*. *Cheron, Inc v Don Jones, Inc,* 244 Mich App 212, 216 (2000). As the Supreme Court had previously explained in 1947:

> In *People* v. *Case,* 220 Mich. 379, 382, 383 (27 A.L.R. 686), we say: "It is a well-settled rule that any statements and comments in an opinion concerning some rule of law or debated legal proposition not necessarily involved nor essential to determination of the case in hand are, however illuminating, but *obiter dicta* and lack the force of an adjudication."

McNally v Wayne County Canvassers, 316 Mich 551, 558, 25 NW2d 613 (1947). The Court reiterated *McNally's* point in 1985: " '[S]tatements concerning a principle of law not essential to determination of the case are *obiter dictum* and lack the force of an adjudication,' [citing *McNally*.]" *Roberts v. Auto-Owners Ins. Co*., 422 Mich. 594, 597-598 (1985). See also, *People v Borchard-Ruhland*, 460 Mich. 278, 286 n 4; 597 N.W.2d 1 (1999) ("*Obiter dicta* lacks the force of an adjudication and is not binding under the principle of *stare decisis*"); *Griswold Properties,*

LLC v Lexington Ins Co, 276 Mich App 551, 563; 741 NW2d 549 (2007) ("*Stare decisis* does not arise from a point addressed in *obiter dictum*").

The Supreme Court ruled in *Preserve the Dunes* that an attempt to use MEPA to challenge a non-environmental finding on eligibility was time-barred. *Preserve the Dunes, supra,* 471 Mich at 521-522. The Court's focus was not on environmental protection or MDEQ decision making that affects the environment. The Supreme Court stated explicitly that its focus was on a decision by MDEQ that did not involve conduct that might impair natural resources:

> "**The only issue properly before us** is whether MEPA authorizes a collateral challenge to the DEQ's decision to issue a sand dune mining permit . . . **unrelated to whether the conduct involved has polluted . . . natural resources protected by MEPA**. Because MEPA does not authorize **such** a collateral attack, we reverse . . . ." (emphasis added)

Preserve the Dunes, supra, 471 Mich at 511. Later in the decision, the Supreme Court again stated its narrow focus:

> "The dissent initially contends that it is undisputed that . . . [the applicant] is 'ineligible for a permit.'. . . We disagree. The time for challenging . . . [the applicant's] eligibility for a permit is long past. . . . That decision is time-barred."

Preserve the Dunes, supra, 471 Mich at 521-522; and, at 471 Mich at 524:

> "The Court of Appeals erred by treating [the plaintiff group] PTD's[7] challenge to [the applicant] TechniSand's eligibility for a permit under . . . [the eligibility criteria of the mining act] as a MEPA claim. . . . PTD's claim is time-barred. We reverse the decision of the Court of Appeals **on that issue**" (emphasis supplied).

Defendant/Appellee MDEQ has sought to extend the *Preserve the Dunes* court's statements in the context of a challenge to eligibility so that they have new reach and insulate MDEQ decisions that affect natural resources. However, MDEQ does not acknowledge it is seeking to extend the *Preserve the Dunes* decision but rather attempts to argue that that is what the

[7] The Court used the acronym "PTD" to abbreviate the name of the "Preserve the Dunes, Inc. plaintiff group" after which the decision is named.

decision stood for. See, for example, Exhibit 6, MDEQ Brief, at pages 5-6, which quotes at length from the Supreme Court decision. As noted above, the Court made these statements in the context of and with regard to its analysis of the non-environmental statutory standard for eligibility in the mining statute. That standard is found in the mining statute at MCL §324.63702(1)(a & b). The eligibility language there pertains not to mining sand generally but to whether an applicant for a mining permit is eligible to apply to mine sand in a protected critical dune area. It allows such mining based only on two limited grandfathering exceptions arising out the existence of "a sand dune mining permit that was issued prior to July 5, 1989." MCL §324.63702(1)(a). It is precisely these "determinations of permit eligibility" to which the Supreme Court refers in the text from which MDEQ quotes. Exhibit 6, MDEQ Brief at 5. However, the Supreme Court also supplies the specific citation to the eligibility criteria at issue, namely that in the Sand Dune Mining Act or SDMA, MCL §324.63701 *et seq.,* ("Part 637") at section 63702(1). *Preserve the Dunes, supra,* 471 Mich at 519; see also text of Part 637 quoted by the Court at pages 514-515 of its decision. 471 Mich at 514-515. It is only in the context of discussing the non-environmental mining eligibility challenge that the Court says, "An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Id.* at 519. The Court's discussion and holding do not reject protection of the environment under MEPA, but rather reject the use of MEPA to challenge a non-environmental eligibility determination.

Later, when the conclusion of the opinion notes that agency decisions are "outside the purview of MEPA" it is with reference to the eligibility standard of MCL §324.63702(1). *Preserve the Dunes*, *supra,* 471 Mich at 524. The Court specifically concludes that the "Court of Appeals erred by treating **PTD's challenge to TechniSand's eligibility** for a permit under MCL §324.63702(1) as a MEPA claim" (emphasis supplied). *Id*. The decision could not be clearer that

the Court rejected the MEPA action as inapposite as to the eligibility issue; the Supreme Court's holding does not say or stand for the conclusion MDEQ proffers that a MEPA claim could not be brought against agency decisions that affect the environment.

Before the Supreme Court received the case in *Preserve the Dunes*, the Court of Appeals had decided that plaintiff's challenge was timely and had rejected the mining permits on the ground that the applicant was not eligible for a permit under Part 637. See first Court of Appeals decision, 253 Mich App 263, 291-304 (2002) (the challenge to the permittee's eligibility "qualifications under MCL 324.63702 is not time-barred"). As just discussed, the Supreme Court decision in *Preserve the Dunes* overruled that decision based on a holding that the MEPA challenge to eligibility was not only an inappropriate use of MEPA but also that it was time-barred because it was filed 19 months after the permit was finalized. In the immediately following paragraph after the language upon which MDEQ relies at page 519 of *Preserve the Dunes*, see MDEQ's Brief at 5, the Court noted the mining statute

> "does not expressly establish procedures **for disputing a DEQ determination** in a contested case **unrelated to MEPA.** We need not decide here whether PTD's challenge to the DEQ's permit decision is governed by the RJA or the APA because the challenge is time-barred under either statute" (emphasis supplied).

Preserve the Dunes, supra, 471 Mich at 519-520. See also, the Supreme Court's description of the trial court's decision "that PTD's claim . . . was indeed time-barred." *Id.,* at 512-513. At its conclusion, the Supreme Court specifically ruled that it was error to treat the challenge to eligibility as a MEPA claim and remanded the case for MEPA review after ruling that the claim on eligibility "is time-barred." *Id*., at 524-525. In other words, the use of MEPA to challenge the permit was acceptable while the use of the statute to challenge the non-environmental eligibility issue was not.

Appellants submit that it is important for the Court of Appeals to address and reject MDEQ's argument and overturn the erroneous decision of the court below. When the decision in

Preserve the Dunes has been discussed in other cases, it appears to have focused on other aspects of the case or involved a different procedural history. For example, in *Citizens for Envtl. Inquiry v Dep't of Envtl. Quality*, an unpublished decision from 2010, 2010 Mich App LEXIS 295, attached as Exhibit 8, MDEQ denied the plaintiffs' request to promulgate certain air rules governing carbon dioxide emissions. The Court of Appeals held that, "[i]n light of our conclusion that plaintiffs failed to establish that they had a clear legal right to the promulgation of specific rules . . . , we need not consider . . . whether DEQ had a clear legal duty to promulgate specific rules . . . ." 2010 Mich App LEXIS 295 at *5-6. The decision then discusses the plaintiffs' attempt to rely on MEPA, quotes the language from *Preserve the Dunes* that "MEPA provides no private cause of action . . . to challenge DEQ's determination of permit eligibility . . . ," and notes, "Here, plaintiffs' proposed second amended complaint failed to allege that 'conduct of the [DEQ] has . . ." violated MEPA (emphasis supplied).[8] *Id*., at *8. The Court held that MDEQ's refusal to promulgate rules "does not constitute 'wrongful conduct' within the contemplation of the MEPA . . . [and therefore the] complaint did not state a claim under the MEPA . . . ." *Id*. The Court did not go farther and state that MDEQ conduct can never be subject to judicial review under MEPA.

It is also notable that when the Supreme Court vacated the decision in *Anglers of the AuSable, Inc. v Dep't of Envtl Quality*, 488 Mich 69 (2010) ("*Anglers I*") after rehearing in *Anglers of the AuSable, Inc. v Dep't of Envtl Quality*, 488 Mich 884 (2011) ("*Anglers II*"), the *Anglers II* Order vacated the prior opinion on the ground that the case was moot. *Anglers II*, 488 Mich at 884. The concurring and dissenting opinions in *Anglers II* dealt mostly with issues concerning rehearings and reconsideration. However, they also disagreed on the effect of the decision on

[8] The Complaint in this case contrasts with that because it contains explicit allegations that the conduct of MDEQ is implicated under MEPA. See discussion at section H, below.

Preserve the Dunes because the original *Anglers I* decision had overruled *Preserve the Dunes* and the dissent to that opinion had discussed *Preserve the Dunes* at some length. Appellants submit that the debate contained in these opinions did not resolve and certainly could not be said to extend the scope of the decision in *Preserve the Dunes* to the issue presented here.[9] See also, *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co,* 471 Mich 608 (2004) (Markman, J. for the Court), reversed on other grounds in *Lansing Schools Education Association et al v Lansing Board of Education et al*, 487 Mich 349 (2010), in which the majority opinion of the Court rejected the characterization that *Preserve the Dunes* "assaulted MEPA" because the decision in *Preserve the Dunes* only addressed a "specific legal question – whether MEPA authorizes a . . . challenge [to] flaws in the permitting process *unrelated* to whether the conduct . . ." affects the environment (emphasis in original). 471 Mich at 648-649. The erroneous decision below accepting the extraordinary claim of MDEQ in this case that its actions and decision are immune from judicial review under MEPA even when they affect the environment merits this Court's consideration and should be clearly rejected.

In sum, the *Preserve the Dunes* ruling addressed a misuse of MEPA to challenge a non-environmental eligibility decision by MDEQ; it did not address the use of MEPA to challenge decisions that affect the environment. The Supreme Court decision cannot be fairly characterized as a ruling rejecting MEPA review of MDEQ actions generally. It certainly does not stand for the proposition that a decision that affects the environment – in contrast to the eligibility decision in

[9] Appellants respectfully submit that the Court of Appeals decision addressed in *Anglers I* made the same mistake the Court of Claims made in this case, namely rejecting a MEPA challenge based on the overly broad use of the statement that "[a]n improper administrative decision, standing alone, does not harm the environment." *Anglers of the AuSable, Inc v Dep't of Envtl Quality*, 283 Mich App 115, 128 (2009). The decision did not note that the rejection in *Preserve the Dunes* of "broaden[ing] by judicial fiat the scope of MEPA" referred to the use there of MEPA to challenge a non-environmental decision on eligibility under MCL §324.63702(1). *Id.; Preserve the Dunes, supra*, 471 Mich at 524.

Preserve the Dunes – is outside the environmental protection purview of MEPA. To the contrary, the Court's focus was on timeliness and the non-MEPA eligibility issue, and not on the use of MEPA to protect the environment. The Court held that using MEPA to challenge a non-environmental eligibility issue of grandfathering was time-barred. In contrast, this case raises issues of MDEQ's compliance with environmental protection standards of both MEPA and Part 353. See section H, below. Therefore, it was error to dismiss the complaint on the ground that principles of *stare decisis* required it to do so under *Preserve the Dunes.*

E. IN *PRESERVE THE DUNES,* THE SUPREME COURT REJECTED USING MEPA TO CHALLENGE A NON-ENVIRONMENTAL DECISION ON ELIGIBLITY AS A "COLLATERAL ATTACK," BUT IT ALSO UPHELD THE USE OF MEPA TO PROTECT THE ENVIRONMENT AS AN INDEPENDENT JUDICIAL REMEDY.

The Court below accepted MDEQ's argument that the MEPA complaint against its permit decision making is an unlawful "collateral attack" on the agency and the permit process. MDEQ argues that the *Preserve the Dunes* decision bars this case as a "collateral attack" and the only citizen right to judicial review of MDEQ decisions is through administrative remedies. This is a misapplication of the Supreme Court's statements and rulings in *Preserve the Dunes,* Exhibit 2, and the Court below erred in accepting and adopting MDEQ's misinterpretation.

What the Supreme Court in *Preserve the Dunes* called an "improper collateral attack" was the use of MEPA, an environmental protection statute, to challenge a non-environmental grandfathering eligibility decision. It did not bar the use of MEPA against MDEQ as a defendant or to challenge MDEQ's conduct as an alleged MEPA violation. In fact, it explicitly said MEPA could be used both to intervene in administrative proceedings and to undertake independent actions outside the scope of the administrative proceedings. *Preserve the Dunes*, *supra*, 471 Mich at 520 ("Parties who wish to intervene during the permit process . . . may intervene . . . under the procedures . . . governed by MEPA" and "MEPA provides another procedure for intervention in

permit proceedings"); 471 Mich at 514 ("MEPA provides for immediate judicial review of allegedly harmful conduct. The statute does not require exhaustion of administrative remedies before the plaintiff files suit in circuit court."); and 471 Mich at 521 ("a challenge under MEPA may be filed in circuit court . . . without any requirement that a litigant exhaust administrative remedies").

Early in the decision, the Court defined the issue before it very specifically to focus on whether MEPA authorizes what it characterized as a "collateral" challenge to a decision "unrelated to" protecting the environment:

> "The only issue properly before us is whether MEPA authorizes a collateral challenge to the DEQ's decision to issue a sand dune mining permit under the sand dune mining act (SDMA), MCL 324.63701 *et seq*., in an action that challenges flaws in the permitting process **unrelated to whether the conduct involved has polluted, impaired, or destroyed**, or will likely pollute, impair, or destroy natural resources protected by MEPA. **Because MEPA does not authorize such a collateral attack**, we reverse . . ." (emphasis supplied).

Preserve the Dunes, *supra*, 471 Mich at 511.

The Court made the same point again at page 519:

> "DEQ determinations of **permit eligibility** under §§ 63702(1) and 63704(2) are **unrelated to whether the applicant's proposed activities on the property violate MEPA**. Therefore, MEPA provides no private cause of action in circuit court for plaintiffs to challenge the DEQ's determinations of permit eligibility under" these sections of the SDMA" (emphasis supplied).

The Court also made the point that the PTD group's MEPA challenge to environmental aspects of the mining permit process "was properly before the circuit court. The circuit court ruled against PTD." *Preserve the Dunes, supra*, 471 Mich at 521. Thus, the Supreme Court was not rejecting the use of MEPA to challenge decisions that could affect the environment.

F. THE STATEMENT THAT "AN IMPROPER ADMINISTRATIVE DECISION, STANDING ALONE, DOES NOT HARM THE ENVIRONMENT" DOES NOT EXCLUDE JUDICIAL REVIEW OF MDEQ DECISION MAKING CONDUCT UNDER MEPA, AS IT IS DISTINGUISHING THE NON-ENVIRONMENTAL "ELIGIBILITY" ISSUE FROM DECISIONS ON ENVIRONMENTAL MATTERS.

Perhaps MDEQ's most misleading use of the text from the *Preserve the Dunes* decision in an attempt to insulate itself from any judicial review of its permit decisions is the use of the statement by the Supreme Court that "[a]n improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Preserve the Dunes, supra*, 471 Mich at 519. The Court below made the error of accepting that misapplication of *Preserve the Dunes*. Exhibit 1, at page 3. However, in contrast to the erroneous use of the quoted language by the Court below, the Supreme Court makes this statement in *Preserve the Dunes* immediately following and with reference to the "administrative decision" on the permit applicant's eligibility – which the Supreme Court makes clear it considers NOT to be an environmental decision within the purview of MEPA.

The *Preserve the Dunes* decision should not be extended to creating a bar against judicial review of MDEQ's "administrative decisions" that affect the environment. MDEQ's use of the statement presents a false and misleading impression of what the Court was focused on; and to accept the argument would extend the words' meaning beyond the scope of the decision in a way that would alter them and make key portions of MEPA a nullity. While the Supreme Court was actually holding that MEPA does authorize judicial review of MEPA compliance, MDEQ would transform it into using these words out of context to bar the use of MEPA to challenge MDEQ conduct impacting the environment. And that error is exactly the mistake that the Court below made in dismissing this case.

In its section "B. Overview of SDMA Permit Process," at pages 514-515 of *Preserve the Dunes*, the Court sets forth the eligibility provisions of MCL §324.63702(1)(a) and (b) as the initial inquiry: Does the ban on mining apply or does the operator/permit applicant "fall within one of these limited exceptions to the SDMA ban on mining in critical dune areas . . . ." The Court then points out that, "Nowhere in this initial inquiry is the DEQ required to evaluate the permit seeker's proposed conduct." Exhibit 2*, Preserve the Dunes, supra,* 471 Mich at 515. The court goes on to explain that only if MDEQ determines the applicant is eligible does the applicant submit an environmental impact statement for review. The point is that the initial eligibility determination is NOT an environmental decision. *Id.*

Later, at page 519, the Supreme Court rejects the dissent's position that the eligibility status (the applicant's "predecessor's allegedly defective past relationship to the mining property") affects the environment. The Court concludes, "Where a defendant's conduct itself [as opposed to the party's eligibility] does not offend MEPA, no MEPA violation exists." *Preserve the Dunes, supra,* 471 Mich at 519. The Court goes on to explain specifically, with the language discussed above, that:

> "DEQ determinations **of permit eligibility** under . . . [the mining act eligibility exceptions] are unrelated to whether the applicant's proposed activities on the property violate MEPA. Therefore, MEPA provides no private cause of action in circuit court for plaintiffs to challenge the DEQ's **determinations of permit eligibility** made under [SDMA] §§ 63702(1) and 63704(2). **An improper administrative decision** [such as this non-environmental, eligibility decision], **standing alone, does not harm the environment. Only wrongful conduct offends MEPA"** (emphasis supplied).

Preserve the Dunes, supra, 471 Mich at 519. This is the context and provides the meaning of this key phrase MDEQ tries to use for its purposes. The Court is rejecting using MEPA to challenge a non-environmental eligibility decision, not rejecting the use of MEPA to challenge decisions and actions ("conduct") that affect the environment.

This is demonstrated once again by the Court's statement just before its conclusion at page 524 of the decision: "Moreover, the Court of Appeals never reached the issue of whether [the permit applicant] TechniSand's actual conduct is likely to harm natural resources." Exhibit 2, *Preserve the Dunes, supra,* 471 Mich at 524. Thus, the issue of compliance with MEPA was not even before the Supreme Court, much less ruled on by it. After noting that the trial court held "extensive testimony" and ruled the conduct did not violate MEPA, the Supreme Court decision pointed out that "The Court of Appeals did not explicitly reject the trial court's findings," and remanded the case for the Court of Appeals "to review the circuit court's findings that TechniSand's conduct does not violate MEPA." *Preserve the Dunes, supra,* 471 Mich at 524-525. The Court was saying that the eligibility decision under section 63702 of the SDMA is an inquiry that "is outside the purview of MEPA. The focus of MEPA is to protect our state's natural resources from harmful conduct. It offers no basis for invalidating an issued permit for reasons unrelated to the permit holder's conduct."[10] *Id*., 471 Mich at 524. In fact, the court made its narrow conclusion explicitly clear: "The Court of Appeals erred by treating PTD's challenge to TechniSand's eligibility for a permit under MCL 324.63702(1) as a MEPA claim." *Id*.

In sum, the Court was clear that by an 'improper administrative decision not harming the environment' it meant the eligibility decision. To attempt to use these words for a far broader proposition and bar all judicial review of all MDEQ permit decisions is improper and should be rejected. The decision below granting the motion for summary disposition must be reversed.

[10] Plainly, MDEQ decisions and actions that regulate and/or allow a permittee to act are related, not "unrelated," to that conduct.

G. THE SUPREME COURT'S EMPHASIS IN *PRESERVE THE DUNES* ON "DEFENDANT'S CONDUCT" DISTINGUISHED ACTIONS THAT COULD AFFECT THE ENVIRONMENT FROM STATUS – ELIGIBILITY. THE DECISION DOES NOT STAND FOR MDEQ'S ASSERTION THAT MDEQ PERMIT DECISIONS CANNOT CONSTITUTE CONDUCT LIKELY TO AFFECT THE ENVIRONMENT AND, THEREFORE, BE REGULATED BY MEPA.

The focus of *Preserve the Dunes* was on an applicant's eligibility status under a grandfathering provision, not on environmental protection. The references by the Supreme Court to "defendant's conduct" are a verbal mechanism to distinguish actions that could affect the environment from the non-environmental eligibility status issue. See *Preserve the Dunes*, *supra,* 471 Mich at 511 ("The only issue properly before us is whether MEPA authorizes a collateral challenge . . . **unrelated to whether the conduct involved has polluted** . . . natural resources protected by MEPA"); 471 Mich at 519 ("DEQ determinations **of permit eligibility** under §§ 63701(1) and 63704(2) are **unrelated to whether the applicant's proposed activities on the property violate MEPA**"); and 471 Mich at 524 (the Court concludes that "MEPA affords no basis for judicial review of agency decisions under MCL 324.63702(1) [the eligibility criteria] because **that inquiry is outside the purview of MEPA**") (emphasis supplied). These statements of the Court do not say MEPA does not authorize review of agency decisions related to protection of the environment or natural resources. Clearly, MDEQ actions that set (or do not set) limits on a permittee's permanent alteration of sand dunes are related to the later actions by the permittee and therefore related to impacts on the environment. It cannot reasonably be argued that they are "unrelated" to effects on the environment. Without MDEQ's decisions, the impacts would not occur. MDEQ's conduct affects the environment.

Where the Court says, at page 514, "The focus of MEPA is on the defendant's conduct," 471 Mich at 514, the Court does not say this means only the applicant defendant; it does not reject including MDEQ as a defendant (as MDEQ argues). Rather, the point is to contrast something that

affects the environment from something (mere eligibility status) that does not. In fact, the Court specifically deals with this point when it rejects what, at page 519, it calls the dissenting opinion's "fuzzy logic" for considering eligibility to be something that can negatively affect the environment. 471 Mich at 519. The Court's distinction is particularly clear because it remands the case for review of the MEPA rulings of the trial court. 471 Mich at 524-25. MDEQ's argument that the references to "defendant's conduct" exclude review of MDEQ conduct was contrary to the decision there and must be rejected here. The decision below to dismiss the complaint must be reversed.

H. AS THE COMPLAINT STATES, PART 353 ESTABLISHES STANDARDS OF CONDUCT FOR MDEQ TO FOLLOW TO PROTECT THE ENVIRONMENT AS IT OVERSEES AND MAKES DECISIONS ON SAND DUNES PERMITS. THIS CONDUCT IS SUBJECT TO JUDICIAL REVIEW UNDER MEPA.

Part 353 sets forth an overall scheme and specific requirements that applicants and MDEQ must comply with for a dunes development permit to be issued. The statute includes numerous standards that govern MDEQ's conduct in overseeing the application process and making decisions that will affect the environment and natural resources. See Complaint, Exhibit 5, and Part 353, MCL §324.35301 *et seq*., attached as Exhibit 4, generally. These standards and MDEQ's compliance with them is subject to judicial review under MEPA, MCL §324.1701 *et seq*., attached as Exhibit 3.

The Complaint alleges that the Michigan Environmental Protection Act or MEPA authorized the filing of the action. Complaint, Exhibit 5, at page 4, paragraph 13. The Complaint alleges that MEPA authorizes the Circuit Court to review and rule on laws or "standards" legislated to protect the environment and natural resources of Michigan. *Id*., at paragraph 15. The Complaint alleges that the Sand Dunes Protection and Management Act, MCL §324.35301 et seq., ("Part 353"), Exhibit 4, includes such legislatively mandated standards that MDEQ must follow to protect

natural resources when an applicant seeks a Part 353 permit to build on the protected sand dunes. *Id*. at page 5, paragraph 16. The Complaint alleges that MDEQ's conduct with regard to enforcing such standards could constitute a violation of MEPA. *Id*., at paragraph 17.

The Complaint alleges that Part 353 "sets forth a number of standards and procedures to protect against the impairment of sand dunes." *Id*. at page 6, paragraph 22. The Complaint alleges that these standards include, for example, a focus on the municipality where the development is planned, *Id*. at paragraph 23; special rules governing permit proposals that have a commercial purpose and/or involve multi-family use of more than three (3) acres, *Id*. at paragraphs 24-25 and page 9, paragraphs 37-38; a legislative mandate identifying the sand dunes as an "irreplaceable resource" and requiring MDEQ to balance the public interest against private rights, *Id*., at pages 6-7, paragraph 26; identification of key characteristics of sand dunes and a mandate to "ensure and enhance" those characteristics, *Id*., at paragraph 27; and a direction to "use the most comprehensive, accurate, and reliable information and scientific data available." *Id.*

The Complaint alleges MDEQ's conduct in overseeing the permit application process, reviewing the applicant's information and making decisions under Part 353 did not comply with the standards set forth in Part 353, *Id*., at pages 7-13, paragraphs 29-30, 32, 33, 39, 41, 42, 43, 44, 45, 56 and 58, among others.

MDEQ staff meet with Part 353 permit applicants and discuss what information is required for a complete application that complies with Part 353's requirements. The agency oversees the process of obtaining public input and considering whether the proposed actions are permissible under the Sand Dunes Protection Act, Part 353. Each of these actions and decisions by MDEQ "is likely to affect the natural resources" because they go to the compliance of the entire application process with the legislated protections, and because they require MDEQ to make determinations

about the permittee's actions that transform the environment. If MDEQ gets it wrong, the agency's decision not only allows but authorizes impairment that should be barred or restricted. MDEQ's conduct cannot be said to "unrelated" to the effects on the environment.

One provision of Part 353 mandates that to reject a project MDEQ must make certain onerous decisions. See, *e.g.*, Exhibit 4, MCL §324.35304(1)(g) (MDEQ must evaluate whether the proposed actions "will significantly damage the public interest on the privately owned land . . . by significant and unreasonable depletion or degradation of any of" three key characteristics of the dunes).[11] The legislative purpose section requires MDEQ not only to "ensure and enhance" these characteristics and "ensure sound management of all critical dunes" but also to "coordinate and streamline governmental decision-making affecting critical dunes through the use of the most comprehensive, accurate, and reliable information and scientific data available." Exhibit 4, MCL §324.35302(b)(i-iii).

These legislative directives govern MDEQ's conduct with regard to managing dunes permit applications under Part 353. And yet MDEQ is dependent on the applicant to provide all necessary information. MCL §324.35304(1)(a) ("A person proposing a use within a critical dune area shall file an application . . . [that] shall include all information necessary to conform with the requirements of this part [353]"). A process like this plainly sets MDEQ up so that any failure on its part to require the applicant to provide all necessary information or in any other way fail to enforce the statutory protections is likely to impair the environment. Whether that conduct is

[11] The statute enumerates those characteristics as the "diversity," "quality" and "functions" of "the critical dune areas with the local unit of government." MCL §324.35304(1)(g)(i-iii). It is the protection of these same characteristics that the "legislative findings" section describes as the purpose of the statute. MCL §324.35302(b) ("to balance for present and future generations the benefits of protecting, preserving, restoring, and enhancing the diversity, quality, functions, and values of the state's critical dunes").

professional, competent and protective of the environment – or the opposite – makes a difference to the future of the critical sand dunes and the public interest in them. All such conduct is legitimately reviewed under MEPA by the judiciary.

These concerns with MDEQ's decision making conduct become especially important where, as here, the permits at issue are for a large project on 130 acres and not just one homeowner's proposed new deck or garage. The Part 353 concerns go to the core purpose of MEPA and the constitutional mandate that is its foundation, protecting Michigan's environment, which is important not only for the protection of natural resources, health and safety but also for economic purposes. See also, discussion of separation of powers in Section K, below. In short, a "defendant's conduct" that can affect the environment must be subject to MEPA review. See Exhibits 2-5.

Here, the conduct of MDEQ in its review and decision-making does affect the environment as the agency assesses impairment and allows or limits impairment in reviewing and granting or denying Part 353 permits. This distinguishes this case from the "PTD" group's challenge to TechniSand's eligibility in *Preserve the Dunes*. The Supreme Court explicitly distinguished that non-environmental status issue from conduct that could affect the environment. Here, not only will the developer's conduct directly affect the environment; MDEQ's conduct in overseeing, reviewing and deciding on the application to alter natural resources also affects the environment. The Complaint in this case under MEPA and Part 353 sets forth grounds based on allegations regarding conduct of MDEQ that will affect or be likely to affect the environment. The right to judicial review of such conduct is upheld, not barred, by any reasoned reading of the *Preserve the Dunes* decision. Exhibit 2. The decision below dismissing the complaint must be reversed.

I. THE SUPREME COURT'S REMAND TO THE COURT OF APPEALS IN *PRESERVE THE DUNES* TO REVIEW THE TRIAL COURT'S FINDINGS ON MEPA COMPLIANCE DEMONSTRATES THAT THE SUPREME COURT UPHELD THE USE OF MEPA TO CHALLENGE ENVIRONMENTAL DECISIONS.

The final sentence of the Supreme Court decision in *Preserve the Dunes* makes doubly clear that the Court was not issuing the ruling Defendant proposes, namely that a MEPA claim cannot be brought to challenge a permit decision by MDEQ. To the contrary, the final sentence remands the case to the Court of Appeals for further review of the MEPA challenge to the mining permit in that case. *Preserve the Dunes, supra,* 471 Mich at 525 ("We remand the case to the Court of Appeals to review the circuit court's findings that [permittee] TechniSand's mining conduct does not violate MEPA").[12] Defendant's arguments that the *Preserve the Dunes* decisions stands for rejection of any MEPA challenge to a decision by MDEQ represents an erroneous misreading of the decision that ignores the remand entirely.

On remand, in part because the trial court had found as a matter of fact that there was no impairment of the environment, the Court of Appeals upheld the permit. See Court of Appeals decision on remand, 264 Mich App 257, 259 (2004) ("In general, we review *de novo* the proper application of MEPA. But we will not overturn a trial court's findings of fact unless they are clearly erroneous" [citations omitted]). The decision goes on to describe that "[t]he trial court heard testimony over seven days, viewed the site with representatives of all parties to the suit, and made . . ." findings of fact. *Id.* The trial court heard expert testimony and made "its ultimate findings under MEPA." *Id.,* at 260-261. The trial court concluded that the mining "will not implicate a scarce . . . resource," and the Court of Appeals found "no legal error in the trial court's reasoning,"

[12] The decision also makes clear the Court was not rejecting the use of judicial review of an agency decision under MEPA when the Court explained that it declined to address MEPA compliance as "not ripe for this Court's review" because the Court of Appeals had not reviewed the circuit court's decision that there was no MEPA violation. *Preserve the Dunes, supra,* 471 Mich at 521.

upholding the MDEQ decision to grant the permit. *Id.,* at 265. The Court of Appeals concluded, "In sum, we find no clear error by the trial court's application of MEPA in the context of the" mining permit. *Id.,* at 268-269.

In short, MEPA's mandate to protect the environment and its empowerment of the circuit/trial court to assess compliance were alive and well in the *Preserve the Dunes* decision. The trial court had made a finding. The Court of Appeals had not reviewed it because it rejected the permit on the unrelated ground of ineligibility. When the Supreme Court overturned the eligibility decision, it remanded the case for the Court of Appeals to review the trial court's assessment of MEPA compliance. There was no holding in the *Preserve the Dunes* decision that MEPA does not apply to the proposed activity or to MDEQ's review of a permit application, but rather recognition that a MEPA review of environmental concerns is appropriate. If the decision stood for the proposition MDEQ asks this Court to accept, the Supreme Court would not have had any reason to remand the case; it would have simply said that MEPA played no role in review of the permit decision of MDEQ. The Court's reliance below on an erroneous interpretation of *Preserve the Dunes* must be overturned.

J. LIKE ITS REMAND DECISION, THE SUPREME COURT'S DISCUSSION IN *PRESERVE THE DUNES* OF OTHER MEPA DECISIONS DEMONSTRATES THE COURT DID NOT INTEND TO RULE, AS MDEQ ARGUES, THAT MEPA PROHIBITS JUDICIAL REVIEW OF MDEQ DECISIONS.

The holding of the *Preserve the Dunes* decision was that a challenge to the eligibility decision was time-barred. Had the Court truly meant to bar all judicial review of MDEQ decision making that can or does affect the environment under MEPA, it would have had to overrule long judicial precedent interpreting and applying MEPA. It did not do so, but rather cited several of those many decisions with favor.

Among the key decisions implementing MEPA that the Supreme Court discussed with approval was *Nemeth v Abonmarche Development, Inc*, 457 Mich 16 (1998). *Preserve the Dunes, supra,* 471 Mich at 516-517. The Court noted that *Nemeth* involved violation of a soil erosion standard and its applicability under MEPA. *Id*. It distinguished the use of the soil erosion standard as "a pollution control standard" under MEPA from the eligibility issue in *Preserve the Dunes and* went on to explain that "erosion *is* a form of pollution" (emphasis in original), citing to *Nemeth*. *Id*.

The Supreme Court decision in *Nemeth* discussed why a MEPA claim in court concerning standards for protection of the environment and natural resources would not be a collateral attack, as MDEQ here argues. To the contrary, the Court said, "At the heart of the Court of Appeals error in this case was its failure to consider subsection 1701(2) [of MEPA] . . . . This is a vital part of our courts' development of the 'common law of environmental quality.' . . ." *Nemeth, supra*, at 29-30. The Court went on to state that although "the development of the common law in this area certainly does not preclude the Legislature or the DNR [now DEQ] from further entering the arena of environmental law . . . , the courts must still determine whether such legislative and administrative enactments are the appropriate 'pollution control' standards to be applied to a claim under MEPA . . . ." *Id*. at 30. The *Nemeth* decision goes on to cite with favor a federal court decision on "[t]his function of the Michigan courts . . . ." *Id.,* citing *Her Majesty the Queen in Right of Province of Ontario v Detroit*, 874 F2d 332 (CA 6, 1989) ("*Her Majesty the Queen*"). "Michigan courts are not bound by any state administrative finding . . . [and] are still empowered to determine whether the standards applied . . . are appropriate." *Nemeth, supra*, at 31, citing as support *Her Majesty the Queen, supra,* 874 F2d at 341. The *Nemeth* decision then continues its

discussion of MEPA and the developing Michigan common law of environmental protection with favor. *Nemeth, supra* at 31-37.

The Supreme Court in *Preserve the Dunes* also discussed *Ray v Mason County Drain Commissioner*, 393 Mich 294 (1975) ("*Ray*") with approval. Exhibit 2, 471 Mich at 518. Notably, the decision in *Ray* stated twice in the space of three paragraphs that MEPA authorizes "private individuals and other legal entities" to sue for the protection of the environment "against anyone," *Ray, supra,* 393 Mich at 305, and specifically imposes a duty on "organizations both in the public and private sectors" to protect natural resources. *Id*. at 306.

If the *Preserve the Dunes* Court had intended to issue the rule that Defendant proffers in this case, it would have had to overrule these and other precedents. Instead, the Court cited them with approval. The cases cited and others, as well, uphold the use of MEPA to challenge actions and decisions that may harm the environment, including the actions and decisions of MDEQ. See, *e.g*., *W. Mich. Envtl. Action Council v Natural Res. Comm'n.,* 405 Mich 741, 748 & 752-754 (1979) ("*WMEAC*") ("the trial judge erred in deferring to the Department of Natural Resources conclusions as to the likelihood of impairment of natural resources rather than exercising his own independent judgment" under MEPA); *Eyde v State*, 393 Mich 453, 454 (1974) (reinstating a trial court finding of a MEPA violation and noting the significance of the then-new MEPA statute as "significant legislation which gives the private citizen a sizable share of the initiative for environmental enforcement . . . against anyone . . . ").

K. MDEQ'S POSITION AND THE SUMMARY DISPOSITION RULING BELOW ARE CONTRARY TO THE SEPARATION OF POWERS DOCTRINE.

The MDEQ argument that its permit decisions are immune from judicial review under MEPA is not only contrary to the express terms of MEPA and the *Preserve the Dunes* decision; it

also violates fundamental principles of separation of powers. The effect would be for the agency to 'regulate' itself without judicial oversight.

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Const. 1963, Art. III, §2, Eff. Jan. 1, 1964. See also, Art. VI (concerning powers and duties of the judicial branch).

"The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. [citing *Massachusetts v Mellon*, 262 U.S. 447, 488; 43 S Ct 597; 67 L Ed 1078 (1923)]" *Schwartz v. Flint*, 426 Mich. 295, 306 (1986).

The Michigan Constitution requires the legislature to enact environmental protection measures:

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

Const. 1963, Art. IV, §52. The legislature has fulfilled its duty under the constitution by enacting a number of environmental protection statutes, including statutes focused on specific resources

such as inland lake and streams, MCL §324.30101 *et seq*., wetlands, MCL §324.30301 *et seq.,* and certain protected sand dunes, MCL §324.35301 *et seq.,* for example.[13]

MEPA is one of these environmental statutes but in the broad sense that it supplements the resource-specific statutes and authorizes "any person" to seek judicial assistance in protecting the environment and natural resources of Michigan. Exhibit 3, MCL §324.1701 ("The attorney general or any person may maintain an action . . ."); MCL §324.1706 ("This part is supplementary to existing administrative and regulatory procedures provided by law"). In MEPA, the legislature created a clear and important role not only for its citizens but also for the judiciary in the continually-evolving Michigan common law of environmental protection. See, for example, MCL §324.1701(2) (if there is a standard or procedure to protect the environment, the court may "determine the validity, applicability, and reasonableness of the standard"). Appellants respectfully submit that this charge to and empowerment of the judiciary by the legislature, in particular the reference to "applicability," carries with it the power to review the conduct of MDEQ which the law regulates. The legislative history of the statute also speaks to its purpose.[14]

When MDEQ argues that there is no judicial review of its permit decisions under MEPA, it is attempting to insulate – and the Court decision below does insulate – this agency of the executive branch from the judicial branch's oversight. Both also reject the authority of the legislature which created the protective standards of MEPA and Part 353. To do so by attempting

[13] For a longer list of statutes governing protection of the environment and natural resources that MDEQ administers, see http://www.michigan.gov/deq/0,4561,7-135-3307_4132---,00.html.

[14] There is a large body of legislative history, law review articles and other material addressing MEPA's purpose of allowing the public to turn to the courts to continue the process of developing a body of common law to protect the environment, in addition to that set forth in judicial decisions themselves. See, *e.g*., Mendelson, Nina, Joseph L. Sax: The Realm of the Legal Scholar, 4 Mich. J. Env'l. and Admin. Law 175, 176 (2014); Sax, Joseph L. and Conner, Roger L., Michigan's Environmental Protection Act of 1970: A Progress Report, 70 Mich. L. Rev. 1003 (1971); and commentary provided at http://quod.lib.umich.edu/b/bhlead/umich-bhl-85292?view=text.

to extend the holdings of the Supreme Court decision in *Preserve the Dunes* compounds the violation of the separation of the powers of, and the checks and balances among, the three branches of government.

The Supreme Court in *Preserve the Dunes* narrowly held that the environmental protection authority of MEPA could not be used to challenge a non-environmental decision (eligibility) by MDEQ while also upholding the use of MEPA to challenge an environmental permit decision. Exhibit 2, *Preserve the Dunes, supra*, 471 Mich at 524-525. Now, MDEQ attempts to transform that narrow ruling into a wholesale exclusion of any judicial review of its conduct. The Court below erroneously followed the agency's guidance and granted its request to reject judicial review of permit decision making affecting a 130-acre property of protected critical sand dunes. This outcome would violate the constitutional doctrine of separation of powers by ignoring legislative direction, handcuffing the judiciary and granting nearly free license to MDEQ.

CONCLUSION

This case involves exactly the situation contemplated by the legislature and the drafters of MEPA and Part 353. It involves issues that the Court in *Preserve the Dunes* saw as a legitimate use of MEPA. MEPA supplements and reinforces the permitting statute at issue, Part 353, and its standards for protection of sand dunes; and MEPA empowers the judiciary to review and enforce these standards.

Granting MDEQ's motion for summary disposition was contrary to rather than required by the Supreme Court precedent of *Preserve the Dunes.* The dismissal of the case by the Court below violated the legislative mandates of both MEPA and Part 353, as well as those of the Michigan Constitution. Judicial review is a proper exercise of the court's authority under MEPA in the development of Michigan's common law of environmental protection and that review extends to

analysis and judgment on the decision making MDEQ undertakes when considering a sand dunes permit under Part 353, such as those at issue here.

REQUEST FOR RELIEF

Wherefore, Plaintiffs/Appellants respectfully request that this Honorable Court reverse the decision below, hold that the Supreme Court decision in *Preserve the Dunes* does not reject judicial review under MEPA of MDEQ permit decision-making that affects, will affect or is likely to affect the environment, and remand the case for a full hearing.

Respectfully Submitted,

Date: January 25, 2018

/s/ Dustin P. Ordway

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

LAKESHORE GROUP, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REINENGA, et al.,

Plaintiffs-Appellants,

v

THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellee.
_____/

Court of Appeals No. 341310

Court of Claims No. 17-000140-MZ

BRIEF OF APPELLEE THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

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STATEMENT OF JURISDICTION

The Defendant-Appellee the Michigan Department of Environmental Quality (DEQ) concurs with the statement of jurisdiction provided by the Plaintiffs-Appellants Lakeshore Group, et al. (Lakeshore).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The Michigan Supreme Court has clearly held that environmental permitting decisions must be challenged under the permitting statute, the Administrative Procedures Act, or the Revised Judicature Act, and not under the Michigan Environmental Protection Act. *Preserve the Dunes, Inc v Michigan Dep't of Environmental Quality*, 471 Mich 508 (2004). Here, Lakeshore appealed a series of DEQ permitting decisions under the Administrative Procedures Act, but then filed an improper collateral attack on those same decisions under the Michigan Environmental Protection Act. Did the Court of Claims correctly grant the DEQ's motion for summary disposition on the grounds that Lakeshore failed to state a claim upon which relief could be granted under the Michigan Environmental Protection Act?

   Appellants' answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Yes.

INTRODUCTION

This appeal arises from Lakeshore's attempt to sue the DEQ under an inapplicable statute, in direct violation of binding precedent set by the Michigan Supreme Court.

Michigan law is clear that the permitting decisions of administrative agencies must be challenged under the provisions of the permitting statute, the Administrative Procedures Act (APA), MCL 24.201 *et seq*., or § 631 of the Revised Judicature Act (RJA), MCL 600.631, and may not be collaterally challenged in lawsuits filed under the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq*. *Preserve the Dunes, Inc v Michigan Dep't of Environmental Quality*, 471 Mich 508, 519 (2004).

Here, Lakeshore sought to challenge a series of sand dune permits issued by the DEQ. It did so at first by filing a petition for a contested case hearing and subsequent appeal to the appropriate circuit court under the APA. Unfortunately, not content with only one lawsuit, Lakeshore then filed an improper collateral attack under MEPA which sought the exact same relief as its APA appeal. The Court of Claims correctly dismissed Lakeshore's MEPA lawsuit on the grounds that it plainly violated the Supreme Court's holding in the above-referenced *Preserve the Dunes* case.

Lakeshore now appeals that decision based on a reading of *Preserve the Dunes* that is strained well beyond the breaking point. As set forth more fully below, this Court should affirm the Court of Claims decision granting the DEQ's

motion for summary disposition because it was correctly decided, and because Lakeshore's arguments to the contrary are plainly without merit.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

This appeal is one of four actions currently pending in this Court related to the same series of transactions and occurrences. In order to fully understand the facts that gave rise to this appeal, some limited discussion of the underlying dispute and the related appeals is necessary.

The heart of this dispute is that a real estate development company known as Dune Ridge SA LP (Dune Ridge) applied for and obtained a series of permits from the DEQ to build a real estate development in a sand dune area.[1] These permits were issued under Part 353, Critical Dunes, of the Michigan Natural Resources and Environmental Protection Act (NREPA), MCL 324.35301 *et seq*.

Initial contested case hearings and appeals.

Lakeshore first challenged the issuance of these permits in the procedurally proper way, by filing a total of three petitions for administrative contested case hearings under the APA and Part 353. (DEQ's 10/16/17 Application for Leave to Appeal in Case No. 340623, pp 4–5.)

[1] The specifics of the permits issued by the DEQ are not germane to the issues in this appeal, because this appeal deals with the decision of the Court of Claims to dismiss a collateral attack on those permitting decisions on purely legal grounds. However, the facts of that underlying permit dispute are set forth in detail in the DEQ's application for leave to appeal in Case No. 340623, which was filed with this Court on October 16, 2017. For the purposes of this brief, undisputed statements of facts will simply cite to the DEQ's application for leave to appeal in that matter.

Those contested case hearings were consolidated by the administrative law judge and, ultimately, dismissed for lack of standing. (*Id.*) Lakeshore appealed that dismissal to the Ingham Circuit Court, which reversed the administrative law judge's standing determinations and remanded the matter back for contested case proceedings. (*Id.*, p 8.) Both the DEQ and Dune Ridge have filed applications for leave to appeal to this Court from that Ingham Circuit Court decision. (*Id.*; Dune Ridge's 10/17/17 Application for Leave to Appeal, Docket No. 340647.)

Lakeshore's MEPA action in the Ingham Circuit Court.

While its appeal to the Ingham Circuit Court was going on, Lakeshore filed a collateral lawsuit under MEPA, which has given rise to this appeal. (4/11/17 Complaint.) Lakeshore filed this lawsuit in the Ingham Circuit Court against both the DEQ and Dune Ridge. (*Id.*) The claims against the DEQ alleged that the DEQ's decisions to issue permits to Dune Ridge, as well as the manner in which the DEQ reviews and processes *all* sand dune permit applications under Part 353, violate MEPA. (*Id.* at ¶¶ 17, 20, 69, 70, 74 and Request for Relief, ¶¶ a, b, and c.)

Additionally, Lakeshore asked the Ingham Circuit Court to "remand" the matter to the administrative law judge for a contested case hearing (even though this was an original action and not an appeal from an administrative law judge's decision, and therefore remand to the administrative law judge was not an available remedy), and asked the circuit court to declare the DEQ's procedures for reviewing Part 353 permit applications invalid and prescribe a new permit review process to the DEQ. (*Id.*)

The DEQ's transfer to the Court of Claims.

The DEQ responded to this lawsuit by filing a notice of transfer to the Court of Claims. (DEQ's 5/18/17 Notice of Transfer.) Michigan law requires that all lawsuits seeking equitable relief against the State government or its departments or officers must be filed in the Court of Claims, therefore the Ingham Circuit Court lacked subject matter jurisdiction over the claims against the DEQ. MCL 600.6419(1)(a). Michigan law does not require a motion to transfer claims against the State to the Court of Claims; the State defendant simply files a notice of transfer, and the file is sent to the Court of Claims.[2] MCL 600.6404(3). Additionally, Michigan law requires the claims against the State to remain in the Court of Claims unless transfer to a different court is consented to by all parties (including the State). MCL 600.6421(3); *Buckner v Dep't of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2016 (Docket No. 326564) (Ex A).

Lakeshore apparently mistook the DEQ's notice of transfer for a motion, because it first filed a brief in opposition to the notice of transfer in the Court of Claims. (Lakeshore's 5/22/17 Opposition to Notice of Transfer.) When this was

[2] Only Lakeshore's claims against the DEQ were transferred to the Court of Claims. The claims against Dune Ridge remained in the Ingham Circuit Court. After the DEQ transferred Lakeshore's claims against it out of the Ingham Circuit Court, Dune Ridge filed a motion for change of venue on the grounds that the DEQ had been the only party with any presence in Ingham County. The property at issue, the transaction and occurrence, and Lakeshore and all of its members were all located in Allegan County. The Ingham Circuit Court denied this motion for change of venue, which gave rise to Dune Ridge's application for leave to appeal to this Court in Docket No. 340647.

rejected by the court, Lakeshore then filed a motion for joinder, asking the Court of Claims to force the DEQ to consent to having the claims against it heard in the Ingham Circuit Court. (Lakeshore's 8/11/17 Motion for Joinder.) This motion was, of course, also rejected for the same reason that Lakeshore's opposition to the DEQ's notice of transfer had been rejected. (8/31/17 Order of the Court of Claims Denying Motion for Joinder.)

While this procedural wrangling was going on, the DEQ filed a motion for summary disposition in the Court of Claims pursuant to MCR 2.116(c)(8). (DEQ's 5/24/17 Motion for Summary Disposition.) In this motion, the DEQ argued that Lakeshore failed to state a claim upon which relief could be granted because it had done exactly what the Supreme Court forbade in *Preserve the Dunes*: used a MEPA lawsuit to collaterally attack the DEQ's administrative decisions to issue permits while simultaneously seeking the same relief in a separate APA appeal. (*Id.*)

The Court of Claims granted the DEQ's motion and dismissed the case on November 15, 2017. (11/15/17 Court of Claims Opinion and Order Granting DEQ's Motion for Summary Disposition.) It is from this order of the Court of Claims that Lakeshore now appeals.

STANDARD OF REVIEW

This Court's review of a lower court's grant of summary disposition is *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118 (1999).

A motion for summary disposition under MCR 2.116(c)(8), alleging that a party fails to state a claim upon which relief can be granted, tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129–130 (2001). Such a motion can be granted when, accepting all factual allegations in the complaint as true, no factual development could possibly justify granting the relief requested. *Id.*

ARGUMENT

I. The Court of Claims correctly held that Lakeshore failed to state a claim upon which relief can be granted, because this lawsuit is an improper collateral attack on an environmental permit that seeks relief that is unavailable under MEPA.

A. Analysis

Lakeshore's appeal is based entirely on a misreading of the Supreme Court's holding in *Preserve the Dunes*. There, the Supreme Court clearly held that MEPA does not provide a mechanism for challenging agency permitting decisions. Rather, the Supreme Court held that agency decisions must be challenged under the proper procedures set forth in the APA, the RJA, or the relevant permitting statute (in this case, Part 353). *Preserve the Dunes*, 471 Mich at 519. In spite of this, Lakeshore argues that the Supreme Court did not mean what it clearly said. Lakeshore even goes so far as to invent a distinction between "environmental" permitting decisions

and non-environmental permitting decisions. Lakeshore's arguments should be rejected by this Court because they have no basis in the text of *Preserve the Dunes*.

1. Administrative permitting decisions may not be challenged in original actions under MEPA. Rather, such decisions must be challenged in appeals pursuant to either the applicable statute, the APA, or the RJA.

The final decisions of administrative agencies are subject to judicial review. Const 1963, art 6, § 28. Michigan law is clear that there are three ways to obtain judicial review of administrative agency decisions: the review procedures of the statute that applies to that type of decision, the APA, or § 631 of the RJA. *Preserve the Dunes*, 471 Mich at 519, citing MCL 24.301 and MCL 600.631; *Morales v Michigan Parole Bd*, 260 Mich App 29, 33 (2004).

Generally speaking, there are two types of agency decisions: those that can be challenged in a contested case hearing, and those that cannot be challenged in a contested case hearing. *Id.* Decisions resulting from contested cases are appealed pursuant to the APA, while decisions that do not result from contested cases are appealed pursuant to the RJA. *Id.* In this matter, the applicable statute is Part 353, which provides that challenges to permitting decisions are made pursuant to the APA. MCL 324.35305.

As mentioned previously, Lakeshore is fully aware that the procedurally proper method of challenging the sand dune permits at issue here is a contested case hearing and subsequent appeal under the APA. Lakeshore knows this, because it has filed three contested case hearings, and successfully appealed the

results of those hearings to the Ingham Circuit Court. (DEQ's 10/16/17 Application for Leave to Appeal in Docket No. 340623.)

Throughout its brief on appeal, Lakeshore argues that *Preserve the Dunes* does not actually stand for the proposition that administrative decisions cannot be challenged under MEPA. Rather, Lakeshore argues, administrative decisions that are environmental in nature *can* actually be challenged under MEPA, whereas non-environmental decisions cannot. (Lakeshore's 1/25/18 Brief on Appeal, pp 20–22.) In making this argument, Lakeshore ignores the Supreme Court's reasoning in *Preserve the Dunes*.

To establish a claim under MEPA, the plaintiff must allege and prove that "the *conduct of the defendant* has polluted, impaired, or destroyed or is likely to pollute, impair or destroy the air, water, or other natural resources or the public trust in these resources…" MCL 324.1703 (emphasis added). The Supreme Court specifically held that, "An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Preserve the Dunes*, 471 Mich at 519. In its brief on appeal, Lakeshore repeatedly accuses the DEQ of taking this quote out of context. (Lakeshore's 1/25/18 Brief on Appeal, pp 8–14.) One need look no further than the very next sentence to fully understand how wrong Lakeshore is on that issue. The Supreme Court went on to state:

> In general, judicial review of an administrative decision is available under the following statutory schemes: (1) the review process prescribed in the statute applicable to the particular agency; (2) an appeal to circuit court pursuant to the Revised Judicature Act (RJA), MCL 600.631, and Michigan Court Rules 7.104(A), 7.101, and 7.103; or (3) the review provided in the Administrative Procedures Act (APA),

> MCL 24.201 *et seq*. [*Preserve the Dunes*, 471 Mich at 519, citing *Palo Group Foster Care, Inc v Dep't of Social Servs*, 228 Mich App 140, 145 (1998).]

Moreover, Lakeshore ignores the entirety of section G of *Preserve the Dunes*, which is titled "Response to the Dissent." *Id*. at 521–523. In that section, the Supreme Court clearly stated:

> The dissent's conclusion that the permitting process is subject to collateral attack is not defensible on the basis of MEPA's language, structure, or purpose. Countless entities apply for and receive permits for conduct that affects Michigan's natural resources. Under the dissent's regime, the permitting process can never be final. Were we to adopt the dissent's extreme understanding of MEPA, every permit that has ever been issued would be subject to challenge; any undotted "i" or uncrossed "t" could potentially invalidate an existing permit. We do not believe the Legislature intended MEPA to destabilize the state's permitting system in this manner . . . . The dissent's regime would render the permitting process a useless exercise . . . . No one would invest money to obtain a permit that is subject to endless collateral attacks. [*Id*. at 522–523.]

The Supreme Court explained that, "MEPA nowhere strips the permitting process of finality . . . . MEPA does not impose the radical requirement that courts indefinitely police administrative agencies' permit procedures and decisions." *Id*. at 523.

Contrary to Lakeshore's assertions, *Preserve the Dunes* does not include any distinction between an "environmental" administrative decision and a non-environmental administrative decision. This is a distinction that Lakeshore has invented to support its improper attempt to seek identical relief based on the same exact transactions and occurrences in two separate lawsuits.

In short, in *Preserve the Dunes*, the Supreme Court held that MEPA does not provide a mechanism for collateral attacks on permits issued by state agencies. Rather, administrative agency decisions (including the issuance of permits) must be challenged through the judicial review mechanisms of the applicable permitting statute, the APA, or the RJA.

2. Lakeshore's MEPA lawsuit is an improper collateral attack on the DEQ's permitting decisions. On its face, it fails to state a claim on which relief can be granted because it is a cause of action expressly forbidden by the Supreme Court. Additionally, it seeks relief which is only available in an administrative appeal under the APA.

Lakeshore's MEPA action is the textbook definition of a collateral attack. To prove this, one need look no further than the relief requested in the complaint.

The relief sought by Lakeshore is all directly related to its challenges to the DEQ's Part 353 permitting decisions. Specifically, Lakeshore asks the court to require the DEQ to comply with Part 353 and MEPA when reviewing sand dune permit applications, invent new policies and procedures for reviewing sand dune permit applications, allow a Part 353 contested case petitioner to assert standing under MEPA instead of the Part 353 contested case standing provisions, and enjoin the DEQ from issuing *any* Part 353 permits (not merely those challenged here by Lakeshore). (3/11/17 Complaint, pp 16–17, ¶¶ a–c.)

Lakeshore has already challenged the DEQ's issuance of these permits, as well as whether its permit review procedures comply with Part 353 and MEPA, in its contested case hearings and subsequent appeal under the APA.

When the Supreme Court said that the proper method of challenging these permits is an APA appeal, and a collateral attack under MEPA is improper, this is exactly what it was referring to. Lakeshore appropriately sought judicial review under the APA, but then inappropriately filed a second lawsuit under MEPA seeking the exact same relief.

3. In its brief on appeal, Lakeshore cites authority that supports the DEQ's position and directly undercuts Lakeshore's position.

In its brief on appeal, Lakeshore cites to a series of opinions from both this Court and the Supreme Court that are commonly referred to as the *Anglers of the Au Sable*, or simply *Anglers*, cases. (Lakeshore's 1/25/18 Brief on Appeal, pp 18–19.) These cases directly support the DEQ's position in this matter, and provide yet another reason why this Court should affirm the order of the Court of Claims granting the DEQ's motion for summary disposition.

In the first *Anglers* case, this Court specifically held that a DEQ permitting decision could not be challenged in a MEPA lawsuit because an administrative decision does not pollute, impair, or destroy natural resources and therefore cannot violate MEPA. *Anglers of the Au Sable v Dep't of Environmental Quality*, 283 Mich App 115, 128–129 (2009). This holding was expressly based on *Preserve the Dunes*. *Id*.

That decision was subsequently reversed by the Supreme Court, which overruled *Preserve the Dunes*. *Anglers of the Au Sable v Dep't of Environmental Quality*, 488 Mich 69, 76 (2010). In that case, the Supreme Court noted that this

Court had interpreted *Preserve the Dunes* correctly—there was no dispute about that whatsoever. The Supreme Court simply overruled *Preserve the Dunes* and held that, in fact, DEQ permitting decisions may be reviewed under MEPA because the conduct that would pollute, impair, or destroy natural resources cannot legally take place without a permit. *Id*. at 76–80. In fact, in overruling *Preserve the Dunes*, the Supreme Court specifically held that, "Until *Preserve the Dunes*, this Court had never ruled that a permit decision was insulated from a MEPA action." *Id*. at 78.

It is worth noting that, in these two *Anglers* cases, both this Court and the Supreme Court interpreted *Preserve the Dunes* exactly as the DEQ and the Court of Claims have here. In arguing that the Supreme Court never meant to insulate DEQ permitting decisions from judicial review under MEPA, Lakeshore completely ignores the fact that, in the very cases that it cites in its brief, both the Court of Appeals and the Supreme Court expressly acknowledge that the holding of *Preserve the Dunes* was that DEQ permitting decisions are not reviewable under MEPA.

If these two *Anglers* cases were the last word on this issue, then *Preserve the Dunes* would have been overruled and DEQ permitting decisions could be reviewed under MEPA. But, upon rehearing, the Supreme Court vacated its own opinion which had overruled *Preserve the Dunes*. *Anglers of the Au Sable v Dep't of Environmental Quality*, 489 Mich 884 (2011). In so doing, Justice Zahra, in a concurring opinion, noted that the Supreme Court was restoring precedent by restoring the effect of *Preserve the Dunes*. Justice Zahra wrote:

> In my view, the order granting rehearing and vacating the December 29, 2010 opinion does not undo precedent; it restores precedent. Simply stated, the Court disregarded the mootness doctrine so that it could overrule *Preserve the Dunes, Inc. v. Dep't of Environmental Quality* . . . and change the course of over a century of established Michigan water law. Rehearing is properly granted here, not only because the underlying dispute is moot, but also because *Preserve the Dunes* properly interprets Michigan law. [*Id*. at 889, internal citations omitted.]

In a misguided attempt to explain away the fact that the Supreme Court and this Court have repeatedly interpreted *Preserve the Dunes* to mean exactly what it says, and exactly what the Court of Claims and the DEQ have interpreted it to mean, Lakeshore simply states that it, "respectfully submits that the Court of Appeals decision addressed in *Anglers I* made the same mistake the Court of Claims made in this case, namely rejecting a MEPA challenge based on the overly broad use of the statement that '[a]n improper administrative decision, standing alone, does not harm the environment.'" (Lakeshore's 1/25/18 Brief on Appeal, p 19 fn 9.) This argument is clearly without merit.

The truth is that, in *Anglers I*, this Court interpreted *Preserve the Dunes* correctly to mean exactly what it says: that an administrative decision by the DEQ may not be challenged in a MEPA lawsuit. *Anglers*, 283 Mich App at 128–129.

Then, in *Anglers II*, the Supreme Court interpreted *Preserve the Dunes* the *exact same way* but overruled it. *Anglers*, 488 Mich at 76. The Supreme Court could have clarified that *Preserve the Dunes* did not mean what this Court had interpreted it to mean in *Anglers I*, but it did not do so. Rather it expressly acknowledged that the holding of *Preserve the Dunes* was that DEQ permitting decisions are not reviewable under MEPA. *Id*. at 77–78.

Finally, in *Anglers III*, the Supreme Court vacated its overruling of *Preserve the Dunes* and, in a concurring opinion, noted that it was doing so specifically to restore the precedent that DEQ permitting decisions are not reviewable under MEPA. *Anglers*, 489 Mich 889.

Simply put, there has never been any legitimate dispute whatsoever about what *Preserve the Dunes* says. Lakeshore's arguments to the contrary have no basis in the text of MEPA, and are directly contradicted by *Preserve the Dunes* and each subsequent case considering this issue.

II. In its brief on appeal, Lakeshore improperly raises a new argument that was not raised in the lower court. This argument should not be considered here. Additionally, even if this Court was to consider it, Lakeshore's new argument does nothing to cure the fatal flaws in its complaint.

A. Issue Preservation

In its brief on appeal, Lakeshore argues, for the first time, that it would offend the separation of powers for the Court of Claims to refrain from hearing its MEPA claims. (Lakeshore's 1/25/18 Brief on Appeal, pp 33–36.) This argument was not raised in the Court of Claims, and therefore was not preserved for appeal. *Dep't of Transp v Robinson*, 193 Mich App 638, 641 (1992).

B. Analysis

It is improper for Lakeshore to raise new issues on appeal that were not raised in the lower court. *Id*. Therefore, this Court should disregard Lakeshore's separation of powers argument.

Additionally, this argument is legally meritless. Lakeshore alleges that the DEQ violates the separation of powers doctrine by claiming that its permit decisions are "immune from judicial review under MEPA." (Lakeshore's 1/25/18 Brief on Appeal, pp 33–36.) Similarly, throughout its brief on appeal, Lakeshore accuses the DEQ of trying to "extend" *Preserve the Dunes* into "a *complete bar* on judicial review" and "mislead" the courts in an attempt to "insulate itself from *any* judicial review of its permit decisions." (*Id.* at p 11 and p 22, emphasis added.)

This is a mischaracterization of the DEQ's argument. The DEQ does not argue that its permitting decisions are immune from judicial review. Rather, the DEQ argues that judicial review of its permitting decisions is obtainable in the manner prescribed by the Legislature in the applicable statute. Here, as noted above, Part 353 provides for challenges to DEQ permit decisions via a contested case hearing and appeal under the APA. Under Part 353 and *Preserve the Dunes,* it is improper is to file a second lawsuit in the circuit courts or the Court of Claims and collaterally attack a DEQ permitting decision under MEPA.

The irony of Lakeshore's position should not be overlooked. In its complaint, Lakeshore asks the Court of Claims to disregard the legislatively prescribed procedures, intrude into the administrative decision-making process and actually *throw out an administrative agency's permit review process and dictate an entirely new process*. (Complaint, ¶ 20.) In other words, Lakeshore asks the judicial branch to usurp the authority of (a) the executive branch and proactively dictate its day-to-day operations, and (b) the legislative branch to define the statutory scheme for

judicial review of final agency decisions under Part 353 and the APA. If the Court of Claims had granted the relief Lakeshore seeks, *that* would have been a plain violation of the separation of powers doctrine. And yet, Lakeshore argues that it offends the separation of powers for the Court of Claims to *not* commandeer the decision-making functions of the executive branch.

As noted previously, Michigan law has been clear for decades how the judicial branch reviews the administrative decisions of the executive branch. It is done through appeals to the courts from final agency decisions under the provisions of the applicable statute, the APA, or the RJA. The judicial branch does not have the authority to exercise the legislative function of prescribing procedures for agency permitting and judicial review of such decisions. See Const 1963, art 3, § 2. Nor may the judiciary commandeer the authority of the executive branch and proactively dictate how day to day government operations are carried out. Therefore, even if Lakeshore had properly preserved this argument by raising it below (which it did not), the argument would still be meritless.

CONCLUSION AND RELIEF REQUESTED

The Court of Claims correctly held that Lakeshore failed to state a claim upon which relief could be granted, because its MEPA lawsuit was nothing more than an improper collateral attack on an administrative permitting decision, which is precisely what the Supreme Court forbade in *Preserve the Dunes*. For this reason, the DEQ respectfully requests that this Court affirm the order of the Court of Claims that granted the DEQ's motion for summary disposition.

Respectfully submitted,

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LF: Lakeshore Group and its Members v DEQ (COA)/AG# 2017-0180324-C/Brief on Appeal 2018-03-01

STATE OF MICHIGAN
IN THE COURT OF APPEALS

LAKESHORE GROUP, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, ET AL.,
Plaintiffs/Appellants,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant/Appellee.

Court of Appeals Case No. 341310

Court of Claims Case No. 17-000140-MZ

APPELLANTS' REPLY BRIEF

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ORAL ARGUMENT REQUESTED

APPELLANTS' REPLY BRIEF IN SUPPORT OF APPEAL

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INTRODUCTION

This appeal is from the Court of Claims' dismissal of a case in which plaintiff neighbors of a large, multi-home development of protected critical sand dunes sought judicial review pursuant to the Michigan Environmental Protection Act ("MEPA") of the Michigan Department of Environmental Quality's ("MDEQ" or the agency) oversight and decision making regarding permits for the development.

MDEQ had sought the dismissal of the administrative contested case review of MDEQ's conduct regarding sand dunes permits and won that dismissal before a hearing could be held. When the circuit court overturned the dismissal, MDEQ sought leave to appeal to this Court to reinstate the dismissal of the contested case – all without any hearing or other review of the permitting process or decisions. MDEQ's conduct affects the environment and MEPA authorizes citizen suits to seek judicial review of that conduct. Yet MDEQ fought against and – thus far – has successfully barred any *administrative* review.

Now MDEQ asks this Court to rule that there can never be any *judicial* review of its conduct using MEPA, arguing the parties are limited to administrative review. MDEQ relies on a decision in which the Supreme Court stated in a specific context that "an improper administrative decision, standing alone, does not harm the environment." *Preserve the Dunes, Inc. v MDEQ*, 471 Mich 508, 519 (2004). MDEQ asks the Court to interpret and apply these words taken out of context as a high court bar to any independent judicial review of agency action. But the decision in *Preserve the Dunes* does not stand for that extraordinary position; and every argument MDEQ makes misconstrues the decision in order to support an untenable agency position. There is no fair reading of the *Preserve the Dunes* decision that would conclude that the Supreme Court intended or held that judicial review of MDEQ conduct under MEPA is barred.

Appellants have addressed several aspects of the *Preserve the Dunes* decision in their prior brief that rebut the State's position. A careful reading of the Court's decision as a whole demonstrates decisively that, while certain words of the Court taken out of context may appear to support MDEQ's extreme position, the Court ruled otherwise. The Court was not barring all review of MDEQ conduct using MEPA; rather, it was rejecting as untimely and collateral the use of MEPA many months after a permit was issued to argue against the permittee's eligibility, not the environmental effects of the permitting process or decision.[1] Simply put, the decision makes clear that it was holding the use of MEPA in that situation was time-barred and improperly focused on an issue that is not the subject of MEPA. On the question of MEPA compliance regarding appropriate subject matter, the Court upheld the use of MEPA and remanded the case back to this Court to review the trial court's rulings on MEPA compliance. See Appellants' Brief, at pages 30-31. To suggest to this Court, as MDEQ argues, that this 2004 decision stands for a conclusion that MEPA can never be used to obtain judicial review of agency conduct is incredible. The only way MDEQ makes the argument is by taking words out of context and presenting them as if the Court meant to say something it plainly did not say or mean.

These Appellants have sought at great expense to obtain review of the agency's conduct with regard to a transformative development of a large (130 acres) property in protected critical dunes. MDEQ's efforts have delayed review substantially and cost these concerned parties

[1] MDEQ argues in passing that Appellants are trying "to invent a distinction between 'environmental' permitting decisions and non-environmental permitting decisions." MDEQ Response Brief at pages 6-7. MEPA is an environmental protection statute; and this is exactly the distinction that the Supreme Court was making: The Court rejected the late and collateral use of MEPA to attack a non-environmental criterion of grandfathering to be eligible to apply for a mining permit and then distinguished that non-environmental administrative issue from the real concern of MEPA, protection of the environment and natural resources. Appellants' Brief addresses this point and quotes from the *Preserve the Dunes* decision in three consecutive argument sections at pages 20-26. MDEQ's claim of "inventiveness" is merely a distraction.

tremendously. This procedural avoidance is not what the legislature intended in passing MEPA. And the un-reviewed conduct of the agency is not what the legislature intended in placing an important burden on the agency in Part 353, the statute written to protect carefully defined and mapped portions of the majestic sand dunes that the legislature said MDEQ must help protect as part of Michigan's natural heritage.

Appellants respectfully request that this Court reject MDEQ's extreme position and remand the case for full proceedings pursuant to MEPA.

ARGUMENT

I. MDEQ Falsely Rejects the Supreme Court Explanation that MEPA is an Alternative to an Administrative Appeal by Erroneously Asserting the Decision holds that There are No Alternatives. Appellee MDEQ claims the *Preserve the Dunes* decision states that the ONLY way to obtain review of a permit decision by MDEQ is by using one of three designated alternatives, such as the contested case appeal process. See, for example, the first sentence of MDEQ's "Counter-Statement of Questions Presented" at page vi of its Response Brief in which MDEQ states this conclusion as its premise. See also, MDEQ Response Brief at page 1, second paragraph ("permitting decisions . . . must be challenged . . . [using only the permitting statute, the APA or the RJA] and may not be collaterally challenged in lawsuits filed under the Michigan Environmental Protection act [MEPA]" [citing *Preserve the Dunes*]); page 7, point 1 of Appellee's argument (reciting how use of those other procedures can work but ignoring the independent application of MEPA); and page 11 (arguing that "the Supreme Court said the proper method of challenging these permits is an APA appeal" and not the use of MEPA). See also, MDEQ argument generally at pages 6-10 of its Response Brief.

In fact, the *Preserve the Dunes* decision did not state or hold that an administrative appeal under the APA or the RJA is the only path citizens may take to obtain judicial review of an agency decision. Rather it discussed those as alternative options and explicitly said that MEPA is also an option. "**MEPA** provides for immediate judicial review of allegedly harmful conduct. The statute **does not require exhaustion of administrative remedies** . . ." (emphasis supplied). *Preserve the Dunes*, *supra,* 471 Mich at 514. "[A] challenge under MEPA may be filed . . . without any requirement that a litigant exhaust administrative remedies." *Id.,* 471 Mich at 521. This point was covered in Appellants' brief in support of this appeal, at pages 20-21. MDEQ's argument that the administrative process it has so far blocked is the only allowed avenue to obtain review of its conduct is wrong; and the *Preserve the Dunes* decision does not support MDEQ's effort to insulate itself from independent review by the judiciary. Its argument must be rejected.

II. MDEQ's Labeling Every MEPA Action Against it a "Collateral Attack" is Based on the Above False Premise of Its Misreading *Preserve the Dunes.* Appellee uses its false premise (its argument addressed in the prior point that the only avenue to review of MDEQ conduct is an administrative appeal) as a spring board to the erroneous conclusion that every MEPA suit naming it as a defendant is inherently an improper collateral attack. See MDEQ Response Brief at page 1, paragraph 2, and page 5 (arguing that Plaintiffs/Appellants "had done exactly what the Supreme Court forbade in *Preserve the Dunes"*). See also MDEQ Response Brief at pages 10-11 (arguing that any attempt to use MEPA to obtain independent judicial review outside the administrative appeal process is automatically an improper "collateral attack").

MDEQ argues that a permittee's conduct can be considered by the courts because what the permittee will do to the environment affects it, but that the agency's conduct as the gatekeeper assigned to protect Michigan's environment and natural resources cannot be overseen, reviewed

or judged by the courts. This attempt by MDEQ to insulate its conduct despite MDEQ's natural resource protection function and legislated duties is troubling; even if there were no MEPA statute, the argument would be extreme. Where MEPA explicitly authorizes suit against "any person" and was enacted to protect natural resources from impairment, it is entirely unacceptable and, on its face, contrary to law.

A cursory review of Part 353 makes clear that the legislature gave MDEQ a heavy burden to manage permit applications so as to protect the public interest in protected sand dunes even as it balances that protection against the rights of the private property owner. MCL 324.35301 *et seq*. See also, discussion in Appellants' Brief in Support of Appeal, at pages 26-29. MDEQ's argument is extraordinary and must be rejected as contrary to the explicit authority the legislature granted in MEPA to supplement other regulatory authorities, MCL 324.1706, and to empower the courts to review and rule on conduct by "any person" that may impair the environment. MCL 324.1701.

MDEQ would bar all use of MEPA except against a permittee or other private party, never allowing any private citizen action to obtain review of the permitting process or permitting decisions. The effect of this proposal would be to nullify significant portions of MEPA and Part 353. Basing the argument on *Preserve the Dunes*, where the Court made clear that it was upholding MEPA, not undermining or nullifying its terms, is insupportable and must be rejected.

III. MDEQ Seeks to Nullify MEPA's Authorization for Citizen Suits. MDEQ's arguments would nullify MEPA in more ways than simply by insulating agency conduct. The question of standing presents another concern. MEPA was enacted to encourage citizen participation in the development of a common law of the environment in Michigan and one key provision is MEPA's broad citizen standing. MCL 324.1701(1) ("The attorney general **or any person** may maintain an action . . .") (emphasis supplied). MDEQ has argued in this very case for

an extremely narrow standing criterion for any citizen to be able to pursue a contested case review of a sand dunes permit. In fact, MDEQ and the developer succeeded in blocking any hearing to review the permit terms and MDEQ's conduct by convincing the ALJ to reject every petitioner's standing and dismiss the contested case. To accept MDEQ's argument that MEPA must be rejected is not simply requiring the citizens of Michigan to use other remedies like the contested case; it is telling most of them they have no remedy whatsoever, no right to an independent judicial third-party's review of MDEQ's conduct.

The effective bar on judicial review MDEQ seeks by limiting the involvement of the courts solely to review of appeals from the extremely restrictive contested case process would stymie or even nullify the process MEPA was explicitly enacted to promote – the continuing development of a common law of the environment in Michigan. See, *e.g.,* discussion of cases in *Preserve the Dunes, supra,* 471 Mich at 516-517 & 534-536. See also, discussion in Appellants' Brief in Support of Appeal at pages 31-33; authorities cited in Appellants' Brief at page 35, footnote 14; and Note at 69 U Det Mercy L Rev 55, 58-59 (1991) ("The purpose of the statute was to remove the procedural roadblocks thereby getting the trial court directly into balancing the competing interests of the alleged harm . . . [and] to provide citizen initiated lawsuits in order to further the system of checks and balances for the benefit of the environment").

MDEQ's effort to prohibit any judicial role except as appellate reviewer of MDEQ's administrative record is contrary to the intent and terms of MEPA and longstanding interpretation by the courts of Michigan. This extreme argument is not supported by the decision in *Preserve the Dunes* and must be rejected.

IV. This Court May Consider the Separation of Powers Doctrine and Should Use it to Reverse the Dismissal Below. There is no bar to Appellants' arguing – and this Court's

ruling – that the separation of powers doctrine supports a decision to reject Appellee's argument that its conduct is not subject to judicial review. See Appellants' Brief, at pages 33-36; and MDEQ Response Brief, at pages 14-16. This Court reviews *de novo* the legal decision below to dismiss the case. The facts set forth in the complaint must be taken as true, so there are no disputed material facts. The essence of the argument was made below, namely that dismissing the case and insulating MDEQ permit decisions from any judicial review would be contrary to law. Elaborating on that argument in terms of the separation of powers doctrine is simply explaining the same position in terms of another aspect of applicable constitutional and legal support for what is essentially the same argument Appellants made below.

MDEQ argues that words from a judicial decision should be taken out of context to bar all judicial review of the executive agency's conduct. Appellants have pointed out that MDEQ's position is not only a misuse of the *Preserve the Dunes* decision and but is also inherently contrary to applicable law, including the Michigan Constitution and the legislature's mandates set forth in MEPA, MCL 324.1701 *et seq.,* as well as Part 353, MCL 324.35301 *et seq.* In pointing out that the position MDEQ espouses is contrary to separation of powers principles, Appellants make essentially the same argument they have been making all along: An executive agency cannot insulate itself from judicial review, especially where that result would be contrary to positions the legislature has set forth concerning authorizing judicial review when it enacted MEPA. See, *e.g.*, MCL 324.1701. To do so would undermine the roles of the legislative and judicial branches by granting complete deference to this executive branch agency.

An argument is preserved so long as it is essentially the same argument made below. *Res. At Heritage Vill. Ass'n. v Warren Fin. Acquisition, LLC*, 305 Mich App 92, 104 (2014). See also, *Steward v Panek,* 251 Mich App 546, 554 (2002). Even if it were not essentially the same

argument, the Court can consider it because the case involves no disputed material facts, the issue of the propriety of barring all judicial review of MDEQ conduct must be resolved for a proper determination of the case, and failure to do so would result in manifest injustice. *Id.*

MDEQ's argument that this Court is disabled from considering the separation of powers doctrine simply carries forward its argument in the lower court that its agency conduct is immune from judicial review. The concept is not only contrary to the legislature's directives in MEPA (and wholly unsupported by the language it takes out of context from this one key prior decision) but is also anathema to our system of government as it would insulate executive action from any meaningful review by our courts and deny citizen input into the protection of natural resources as required by the Constitution and the legislature's enactments.

CONCLUSION

The MEPA complaint in this case seeks judicial review of MDEQ's conduct in overseeing Part 353 sand dunes development permit applications and making decisions on the permits to transform a 130-acre property into a gated community of over 20 luxury homes. The allegations in the complaint explain how MDEQ's conduct violated its statutory duties. The administrative review of these permits that MDEQ argues is the ONLY path to review its conduct was stymied and dismissed based on arguments that no one – not a single person – had standing to seek review of the permits. In sharp contrast, MEPA gives standing to "any person." This case represents a costly, years-long saga in which MDEQ has sought to bar all review of its conduct and to expand the cost for Michigan citizens seeking protection of the state's natural resources.

In Part 353, the legislature requires MDEQ to balance competing interests and to protect the dunes. MEPA was enacted to supplement such authority as Part 353 and authorizes judicial review of the conduct of "any person," not only the conduct of private developers.

Appellee MDEQ moved to dismiss this case on the theory that its conduct is never subject to judicial review under MEPA. This argument would nullify significant portions of MEPA. And it is based on a misreading of the Supreme Court's decision in *Preserve the Dunes*.

In *Preserve the Dunes*, the Court rejected the use of MEPA (A) as time-barred and (B) because the attempt to use MEPA to challenge a non-environmental, grandfathering criteria for eligibility was found to be an improper use of MEPA. The Court's decision includes language saying that such an administrative decision (*i.e.,* on eligibility) does not affect the environment and using the environmental protection act (MEPA) to challenge that decision was a "collateral attack" (as well as being time-barred). MDEQ would have this Court extend this narrow rejection of an improper use of MEPA to the conclusion that none of MDEQ's decisions can ever be subjected to judicial review under MEPA – even those that deal with environmental protection and are mandated by the legislature in the Sand Dunes Protection and Management Act, Part 353. This MDEQ argument is akin to asking this court to "Affirm" without regard to facts or law simply because a prior court in an unrelated case ruled that a lower court decision in that case should be "Affirmed." To take words out of context in this fashion is an affront to the common law. It denigrates the role of the courts, ignores the logic and meaning of the doctrine of *stare decisis*, insulates an executive branch agency from judicial review and rejects legislative mandates that (A) require MDEQ to protect the environment in specific ways (in Part 353) and (B) authorize the judiciary to review conduct to protect the state's environment and natural resources from impairment (in MEPA).

Appellants respectfully request that this Court call a halt to MDEQ's outrageous attempt to misuse the *Preserve the Dunes* decision to make agency action unreviewable. MDEQ's position is unconstitutional. MEPA and Part 353 mean what the legislature plainly stated in furtherance of

the constitutional protection of the environment: MDEQ has a heavy burden to protect the environment under Part 353 and its actions are subject to judicial review under MEPA.

The time and cost borne by these Appellants has been considerable. It should not be necessary to return to the Supreme Court in order to reject MDEQ's indefensible misreading of the *Preserve the Dunes* decision. The time and expense of seeking the basic right of judicial review of unlawful agency action should not have to be extended further simply because MDEQ so emphatically wishes that the *Preserve the Dunes* decision as a whole stands for what a few words taken out of context appear to say.

The decision below should be reversed and the case remanded.

REQUEST FOR RELIEF

Wherefore, Plaintiffs/Appellants respectfully request that this Honorable Court reverse the decision below, hold that the Supreme Court decision in *Preserve the Dunes* does not reject judicial review under MEPA of MDEQ conduct, and remand the case for a full hearing.

Respectfully Submitted,

Date: March 21, 2018

/s/ Dustin P. Ordway

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STATE OF MICHIGAN

COURT OF APPEALS

LAKESHORE GROUP, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KENNETH ALTMAN, DAWN SCHUMANN, GEORGE SCHUMANN, MARJORIE SCHUMANN, and LAKESHORE CAMPING, Plaintiffs-Appellants,	UNPUBLISHED December 18, 2018
v	No. 341310 Court of Claims
STATE OF MICHIGAN, Defendant,	LC No. 17-000140-MZ
and	
DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant-Appellee.	

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

PER CURIAM.

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

I. BACKGROUND

Dune Ridge SA LP (Dune Ridge), a nonparty in this case but a defendant in related lawsuits, sought and received development permits from the MDEQ under the Sand Dunes Protection and Management Act (SDPMA), MCL 324.35301 *et seq*., to transform a critical sand dunes area into a residential subdivision. Plaintiffs are the owners of land adjacent to the sand dunes who challenged the permits in an administrative contested-case hearing under MCL 324.35305. Plaintiffs' administrative challenge was initially dismissed on standing grounds by

the administrative law judge. Plaintiffs appealed the dismissal, however, and the Ingham Circuit Court reversed the decision of the administrative law judge. The administrative challenge was subsequently reopened and is not part of this appeal.

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

In the instant case, the Court of Claims granted the MDEQ's motion for summary disposition under MCR 2.116(C)(8), concluding that our Supreme Court's decision in *Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004), precluded plaintiffs from filing a direct judicial challenge to the MDEQ's permitting decision.

This appeal followed.

II. ANALYSIS

"We review de novo a trial court's grant or denial of summary disposition." *Tomra of North America, Inc v Dep't of Treasury*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 336871); slip op at 2. "Summary disposition pursuant to MCR 2.116(C)(8) tests the legal basis of the claim and is granted if, considering the pleadings alone, the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery." *PIC Maint, Inc*, *v Dep't of Treasury*, 293 Mich App 403, 407; 809 NW2d 669 (2011) (cleaned up). We review issues involving statutory interpretation de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

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

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

Unlike under MEPA, the public generally does not have a right to challenge the issuance of a permit under SDPMA. Rather, SDMPA provides aggrieved owners of property immediately adjacent to the proposed use the right to challenge the issuance of a permit via an administrative contested-case hearing under the Administrative Procedures Act. MCL 324.35305(1); MCL 24.201 *et seq*. If the property owner does not prevail after all administrative remedies are exhausted, then the property owner may seek judicial review of the administrative decision. MCL 324.35305(2). This judicial review is limited, and the administrative decision will only be reversed if the decision is statutorily or constitutionally impermissible; arbitrary, capricious, or clearly an abuse of discretion; or is not supported by competent, material, and substantial evidence. MCL 24.306.

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

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

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

The Supreme Court reasoned that the "focus of MEPA is on the defendant's *conduct*." *Id*. at 514 (emphasis added). It noted that MEPA controls the MDEQ's permitting decisions because the MDEQ is prohibited from approving a permit if the *applicant's conduct* violates MEPA. *Id*. at 515-516, citing MCL 324.63709. The Supreme Court distinguished MDEQ's conduct in approving a permit from the applicant's conduct in carrying out the permitted action. The Supreme Court noted that, to violate MEPA, the challenged conduct must "be likely to

[1] *Preserve the Dunes* was overturned by the Supreme Court in *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 488 Mich 69; 793 NW2d 596 (2010). Subsequently, the Supreme Court vacated its decision in *Anglers*, thereby reviving *Preserve the Dunes*. *Anglers of AuSable, Inc v Dep't of Environmental Quality*, 489 Mich 884; 796 NW2d 240 (2011). Accordingly, *Preserve the Dunes* is binding precedent on this Court. MCR 7.315.

pollute, impair, or destroy" natural resources. *Id*. at 518. It then reasoned that an administrative decision, such as the issuance of a permit, "standing alone, does not harm the environment"; rather, only the applicant's conduct (permitted by the administrative decision) actually harms the environment. *Id*. at 519.

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

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

Affirmed.

/s/ Michael J. Riordan
/s/ Brock A. Swartzle

STATE OF MICHIGAN

COURT OF APPEALS

LAKESHORE GROUP, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KENNETH ALTMAN, DAWN SCHUMANN, GEORGE SCHUMANN, MARJORIE SCHUMANN, and LAKESHORE CAMPING, Plaintiffs-Appellants, v STATE OF MICHIGAN, Defendant, and DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant-Appellee.	UNPUBLISHED December 18, 2018 No. 341310 Court of Claims LC No. 17-000140-MZ

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

RONAYNE KRAUSE, J. *(dissenting)*.

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

As we and the parties agree, the outcome of this appeal turns on how to read *Preserve the Dunes v Dep't of Environmental Quality* (*Preserve the Dunes II*), 471 Mich 508; 684 NW2d 847 (2004).[1] Specifically, this matter turns on our Supreme Court's statement that "[a]n improper

[1] Considerable emphasis was placed at oral argument on *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 488 Mich 69; 793 NW2d 596 (2010). Because that case was subsequently vacated, I decline to consider it. *Anglers of the AuSable, Inc v Dep't of*

administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Preserve the Dunes II*, 471 Mich at 519. When that statement is considered in context, I conclude that our Supreme Court did not hold that an improper administrative decision cannot constitute wrongful conduct under MEPA. Rather, it held that an improper administrative decision does not *necessarily* constitute wrongful conduct under MEPA.

In *Preserve the Dunes*, an entity called TechniSand possessed a pre-existing sand mining permit set to expire in 1993; TechniSand applied for, and the DEQ granted, an amended permit in late 1996. *Preserve the Dunes II*, 471 Mich at 511-512. The amended permit allowed TechniSand to expand its mining operation from "a noncritical dune area into an adjacent critical dune area." *Preserve the Dunes v Dep't of Environmental Quality* (*Preserve the Dunes I*), 253 Mich App 263, 266; 655 NW2d 263 (2002). The plaintiff, Preserve the Dunes (PTD), sued TechniSand and the DEQ nineteen months later, alleging, in relevant part, "that the DEQ violated MEPA when it approved TechniSand's amended mining permit." *Preserve the Dunes II*, 471 Mich at 512. Notably, the trial court had held a seven-day bench trial and specifically determined that TechniSands's mining operation would not adversely affect the environment sufficiently to constitute a violation of MEPA. *Id*., 471 Mich at 513, 518-519, 522, 524.

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

Consequently, *in context*, the DEQ's permit eligibility determination did not have an effect on the environment. Our Supreme Court's statement that an "improper administrative decision, standing alone, does not harm the environment" *in that context* clearly means only what it literally says: a technicality is not an environmental harm. This becomes especially apparent in the Court's subsequent explanation that "any undotted 'i' or uncrossed 't' " should not be grounds for invalidating permits under MEPA. *Preserve the Dunes II*, 471 Mich at 522. In contrast, the Court implied that the issuance of TechniSands's permit might contravene MCL 324.63709 if it were determined that TechniSands's mining would harm the environment. *Id*. at 521, 524. Again, the *eligibility* determination was merely the first procedural step in the

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Environmental Quality, 489 Mich 884; 769 NW2d 240 (2011). In light of my dissenting posture, I also need not consider the significance of the Court of Appeals decision in that matter.

permitting process; the DEQ was required to conduct an environmental impact analysis as the next step in the process. *Id*. at 515-516. A technical error in the eligibility analysis could not proximately cause any eventual environmental harm, because that second step would constitute an intervening and superseding cause. See *McMillian v Vilet*, 422 Mich 570, 576-577; 374 NW2d 679 (1985).

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

However, I caution that I find no "bright line" distinction between procedural and substantive administrative decisions. I take from *Preserve the Dunes II* that any particular challenged decision must be individually considered in its own unique factual and legal context to determine whether it has a proximate causal relationship to the alleged environmental harm. If the decision lacks such a proximate connection, or if there is in fact no environmental harm, then it is not subject to challenge under MEPA, even if the decision is clearly wrong. The trial court should have evaluated each of the DEQ's alleged errors to determine whether they had a proximate causal connection to the alleged environmental harm. I would hold that the trial court erred by concluding that plaintiffs were absolutely barred from bringing the instant claims under MCR 2.116(C)(8). I would reverse and remand for further consideration of the details of plaintiff's arguments.

/s/ Amy Ronayne Krause

Exhibit 1

Citizens for Envtl. Inquiry v. Dep't of Envtl. Quality

Court of Appeals of Michigan

February 9, 2010, Decided

No. 286773

Reporter
2010 Mich. App. LEXIS 295 *; 40 ELR 20049; 2010 WL 446047

CITIZENS FOR ENVIRONMENTAL INQUIRY, BYRON DELONG, THOMAS HARKLEROAD, WILLIAM LEWIS, JOHN PLATH, JEAN VESELENAK, and CHARLES WINTERS, Plaintiffs-Appellants, v DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant-Appellee, and MID MICHIGAN ENERGY, LLC, WOLVERINE POWER SUPPLY COOPERATIVE, INC., and CONSUMERS ENERGY COMPANY, Intervening Defendants-Appellees.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *Citizens for Envtl. Inquiry v. Dep't of Envtl. Quality, 2010 Mich. LEXIS 1767 (Mich., Sept. 9, 2010)*

Prior History: **[*1]** Ingham Circuit Court. LC No. 08-000114-AW.

Core Terms

plaintiffs', emissions, promulgate, mandamus, air, pollution, amended complaint, impair, clear legal right, natural resources, specific rule, legal duty

Judges: Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right the circuit court's grant of summary disposition in favor of defendants. We affirm.

On August 27, 2007, as authorized by *MCL 24.238* of the Administrative Procedures Act (APA), counsel for plaintiffs sent a letter to the director of defendant Department of Environmental Quality (DEQ) requesting that the DEQ promulgate a rule regulating emissions of CO[2]. After the 90-day period set forth in the statute had elapsed, plaintiffs filed this case.

Plaintiffs' amended complaint contained three counts. The first count sought mandamus relief requiring the DEQ to promulgate rules regulating CO[2] emissions as set forth under MCL 324.5512 of the Natural Resources and Environmental Protection Act (NREPA), which mandates that the DEQ "promulgate rules for purposes of . . . [c]ontrolling or prohibiting air pollution." *Id.* The second count sought mandamus relief requiring the DEQ to comply with MCL 24.238 of the APA, either by initiating the rulemaking requested, or by issuing "a concise written statement of its principal reasons for denial of the request." The **[*2]** third count sought to enjoin the DEQ from issuing any air quality permits until they had complied with either MCL 324.5512 of the NREPA or MCL 24.238 of the APA.

Shortly after the lawsuit was filed, the DEQ sent a letter to plaintiffs' counsel denying the rulemaking request, and explaining why. The DEQ then moved for summary disposition under MCR 2.116(C)(4). The DEQ argued that they had complied with MCL 24.238, rendering the second and third counts of the complaint moot. Further, the DEQ argued that the first count should be dismissed because it was effectively an effort by plaintiffs to seek judicial review of the DEQ's denial of the rulemaking request, which is explicitly disallowed under MCL 24.238.

Subsequently, the motion for summary disposition was granted. With regard to the first count of plaintiffs' complaint, the trial court held that plaintiffs failed to state a valid claim for mandamus because (1) plaintiffs did not demonstrate a clear legal right to the promulgation of specific rules regarding CO[2] emissions, (2) MCL 324.5512 does not impose upon the DEQ a "clear legal duty" to regulate CO[2] emissions, (3) MCL 324.5503(a) grants the DEQ discretion as to whether to promulgate **[*3]** rules controlling and prohibiting various emissions, and (4) plaintiffs were given what they were entitled to under the APA.

With regard to the second and third counts of plaintiffs' complaint, the court noted that MCL 24.238 unambiguously provides that the agency's denial of a request to promulgate a rule "is not subject to judicial review." Because the DEQ denied the request with a concise written statement of the principle reasons, the counts that sought compliance with MCL 24.238 were moot and the court lacked jurisdiction to review the DEQ's denial. Thus, the DEQ's motion for summary dismissal was granted and plaintiffs' complaint was dismissed. Plaintiffs moved for reconsideration, and sought leave to amend the complaint a second time, seeking declaratory and injunctive relief under MCL 324.1701 of the Michigan Environmental Protection Act (MEPA). The motion was denied and this appeal followed.

Plaintiffs argue that the trial court's summary dismissal of their complaint was erroneous because they were entitled to a writ of mandamus. We disagree. A trial court's decision on a motion for summary disposition is reviewed de novo. Potter v McLeary, 484 Mich 397, 410; 774 NW2d 1 (2009). **[*4]** Whether a defendant has a clear legal duty to perform, and whether a plaintiff has a clear legal right to that performance present legal questions subject to de novo review. Carter v Ann Arbor City Attorney, 271 Mich App 425, 438; 722 NW2d 243 (2006).

To establish a right to mandamus relief, the plaintiffs must prove that (1) they have a clear legal right to the performance of the specific duty sought to be compelled, (2) the defendant has a clear legal duty to perform it, (3) the act is ministerial in nature, and (4) the plaintiffs have no other adequate legal or equitable remedy. *Inglis v Public School Employees Retirement Bd, 374 Mich 10, 13; 131 NW2d 54 (1964)*; *White-Bey v Dep't of Corrections, 239 Mich App 221, 223-224; 608 NW2d 833 (1999)*. As a general rule, mandamus only lies when the plaintiffs have "a specific right . . . not possessed by citizens generally." *Wilson v Cleveland, 157 Mich 510, 511; 122 NW 284 (1909)*. Thus, the plaintiffs generally have to demonstrate some special injury beyond what would be suffered by the public at large. *Inglis, supra at 12*.

Here, as the trial court held, plaintiffs did not establish that they have a clear legal right to the promulgation of **[*5]** specific rules regarding CO[2] emissions. The only injury alleged in plaintiffs' amended complaint arising from unregulated CO[2] emissions is "[g]lobal warming and/or climate change," which, in plaintiffs' own words, "imposes upon all the people of Michigan a severity of injury that is indivisible and at once a substantial concrete injury personal to every citizen." Thus plaintiffs have not alleged a special injury distinct from the injury suffered by the general public; in fact, they have alleged the opposite. And in their brief on appeal plaintiffs have not set forth any such special injury. "[I]t has long been the policy of the courts to deny the writ of mandamus to compel the performance of public duties by public officials unless the specific right involved is not possessed by citizens generally." *Univ Medical Affiliates, PC v Wayne Co Executive, 142 Mich App 135, 143; 369 NW2d 277 (1985)*, citing *Inglis, supra.* Accordingly, we affirm the trial court's summary dismissal of plaintiffs' request for a writ of mandamus.

In light of our conclusion that plaintiffs failed to establish that they had a clear legal right to the promulgation of specific rules regarding CO[2] emissions, we **[*6]** need not consider (1) whether the DEQ had a clear legal duty to promulgate specific rules regarding CO[2] emissions, and (2) whether *MCL 24.238* prohibited plaintiffs' claim for mandamus.

Next, plaintiffs challenge the trial court's denial of their motion for reconsideration. A motion for reconsideration should be granted only when the court has made "a palpable error by which the court and parties have been misled," and when correction of that error would have led to a different disposition of the motion. *MCR 2.119(F)(3)*. Plaintiffs argue that the trial court's error was in overlooking plaintiffs' claim under *MCL 324.1701* of the MEPA as set forth in their proposed second amended complaint. We disagree. Because plaintiffs did not state a claim under MEPA, the trial court did not abuse its discretion in denying plaintiffs' motion. See *In re Beglinger Trust, 221 Mich App 273, 279; 561 NW2d 130 (1997)*.

In their proposed second amended complaint, plaintiffs alleged that the DEQ air permit regulatory regime was deficient under the MEPA because it "includes no standard for the protection of natural resources against likely pollution, impairment, or destruction resulting from unregulated CO[2] **[*7]** emissions." Plaintiffs further alleged that the DEQ's "consideration of air permit applications under a regime that does not consider CO[2] emissions at all is contrary to the Department's mandatory obligation under MEPA to determine the likely pollution, impairment, and destruction of

air, water, and other natural resources, or the public trust in those resources." Thus, plaintiffs sought to enjoin the issuance of air quality permits until the DEQ complied with its legal duties set forth in the MEPA.

In *Preserve the Dunes, Inc v Dep't of Environmental Quality, 471 Mich 508; 684 NW2d 847 (2004)*, our Supreme Court, held:

> To prevail on a MEPA claim, the plaintiff must make a "prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources . . . ." [*Id. at 514*, quoting *MCL 324.1703(1)*.]

In that case, the plaintiff sued the DEQ alleging that the DEQ violated the MEPA when it approved a sand dune mining permit for a sand mining operation. *Preserve the Dunes, Inc, supra at 511-512*. Our Supreme Court rejected that claim, holding that the "MEPA **[*8]** provides no private cause of action in circuit court for plaintiffs to challenge the DEQ's determination of permit eligibility. . . . An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Id. at 519*. In other words, the MEPA authorizes suits against regulated or regulable actors who are specifically engaged in "wrongful conduct" that harms the environment.

Here, plaintiffs' proposed second amended complaint failed to allege that "conduct of the [DEQ] has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources." See *Preserve the Dunes, Inc, supra at 514*. Instead plaintiffs have challenged the DEQ's decision not to promulgate specific rules regarding the regulation of CO[2] emissions. This administrative decision does not constitute "wrongful conduct" within the contemplation of the MEPA. See *id. at 519*; see, also *Anglers of Ausable, Inc v Dep't of Environmental Quality, 283 Mich App 115, 128-129; 770 NW2d 359 (2009)*. Because plaintiffs' proposed second amended complaint did not state a claim under the MEPA, the trial **[*9]** court did not abuse its discretion in denying plaintiffs' motion for reconsideration. See *In re Beglinger Trust, supra.*

Affirmed.

/s/ Mark J. Cavanagh

/s/ E. Thomas Fitzgerald

/s/ Douglas B. Shapiro

End of Document

Exhibit 2

STATE OF MICHIGAN

Executive Office ★ Lansing

EXECUTIVE ORDER

NO. 1965 - 21

ESTABLISHING THE DEPARTMENT OF CONSERVATION

Pursuant to the provisions of Article V, Sec. 2 of the Constitution of 1963, and the authority vested in me by Sec. 504 of Chapter 21 of the Executive Organization Act of 1965 (Public Act 380, P. A. 1965, as amended):

I, George Romney, Governor of the State of Michigan, do hereby order and direct that:

1. Sections 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, and 260 of Chapter 11 of the Executive Organization Act of 1965 shall be effective January 1, 1966.

2. There is hereby created in the Executive Branch of Government the Department of Conservation.

3. The head of the Department of Conservation is the Commission of Conservation.

4. The principal executive officer of the Department is the Director of the Department of Conservation.

5. The Commission of Conservation is hereafter responsible for carrying out the functions, duties and responsibilities of the Department of Conservation in accordance with the Constitution and the statutes of this state.

6. From and after January 1, 1966.

   (a) All records, property, personnel and unexpended balances of appropriations, allocations, and other funds used, held, employed, available or to be made available to the Boating Control Committee are transferred to the Department of Conservation.

Given under my hand and the Great Seal of the State of Michigan this Third Day of December, in the Year of our Lord, One Thousand Nine Hundred and Sixty-Five

GOVERNOR

BY THE GOVERNOR

SECRETARY OF STATE

Exhibit 3

STATE OF MICHIGAN

JOHN ENGLER
GOVERNOR

EXECUTIVE ORDER
1991-31

COMMISSION OF NATURAL RESOURCES
DEPARTMENT OF NATURAL RESOURCES
MICHIGAN DEPARTMENT OF NATURAL RESOURCES

EXECUTIVE REORGANIZATION

NOW, THEREFORE, I, John Engler, Governor of the State of Michigan, pursuant to the powers vested in me by Article V, Section 1, Article V, Section 2 and Article V, Section 8, of the Constitution of the State of Michigan of 1963 and the laws of the State of Michigan, do hereby order the following:

I. GENERAL

A. New Michigan Department of Natural Resources

1. All the statutory authority, powers, duties, functions and responsibilities of the Commission of Natural Resources and of the Department of Natural Resources, created under Sections 1 and 2 of Act No. 17 of the Public Acts of 1921, as amended, being Sections 299.1 and 299.2 of the Michigan Compiled Laws, and under Sections 250 - 254 of Act No. 380 of the Public Acts of 1965, as amended, being Sections 16.350 to 16.354 of the Michigan Compiled Laws, and of the director of the Department of Natural Resources and of the agencies, boards and commissions contained therein, including the functions of budget, procurement and management-related functions, and the functions set out more particularly in Part II below relating to natural resources management and the functions set out more particularly in Part III below relating to environmental protection are hereby transferred to the director of a new Michigan Department of Natural Resources, by a Type II transfer, as defined by Section 3 of Act No. 380 of the Public Acts of 1965, being Section 16.103 of the Michigan Compiled Laws, unless otherwise specified in Part II below or in Part III below and with the following exceptions:

a. Pursuant to Article V, Sections 1, 2 and 8, of the Constitution of the State of Michigan of 1963, the power to designate a member of the Commission of Natural Resources as chairperson is hereby transferred to and vested in the Governor and such member appointed by the Governor shall serve as chairperson at the pleasure of the Governor.

b. The director of the new Michigan Department of Natural Resources shall continue to be appointed by the Commission of Natural Resources and shall continue to serve at its pleasure.

c. The Commission of Natural Resources may promulgate rules, not inconsistent with the law and with this Order, governing its organization and procedure.

d. The Commission of Natural Resources shall, pursuant to Article V, Section 3, of the Constitution of the State of Michigan of 1963, be the head of the new Michigan Department of Natural Resources and may establish general policies relating to natural resources management and environmental protection for the guidance of the Director of the new Michigan Department of Natural Resources. Pursuant to Article V, Section 8, of the Constitution of the State of Michigan of 1963, the Commission of Natural Resources and the new Michigan Department of Natural Resources shall be under the supervision of the Governor.

e. A final decision of the director of the new Michigan Department of Natural Resources or persons to whom the director has lawfully delegated decision-making authority pursuant to this Order relating to the issuance of a permit or operating license is subject to direct review by the Commission of Natural Resources as provided in Part IV, B below.

2. The director of the new Michigan Department of Natural Resources shall provide executive direction and supervision for the implementation of the transfer. The functions transferred to the new Michigan Department of Natural Resources by this Order, with the exception of those functions set out in Section A(1) a, b, c, d and e above, shall be administered under the direction and supervision of the director of the new Michigan Department of Natural Resources and all prescribed functions, unless otherwise specified herein, of rule making, licensing and registration, including the prescription of rules, regulations, standards and adjudications shall, unless otherwise specified herein, be transferred to the director of the new Michigan Department of Natural Resources.

4. All rules, orders, contracts and agreements relating to the functions transferred to the new Michigan Department of Natural Resources lawfully adopted prior to the effective date of this Order shall continue to be effective until revised, amended or repealed.

5. Any suit, action or other proceeding lawfully commenced by, against or before any entity affected by this Order shall not abate by reason of the taking effect of this Order. Any suit, action or other proceeding may be maintained by, against or before the appropriate successor of any entity affected by this Order.

B. Department of Natural Resources

By virtue of this Order, the Department of Natural Resources is hereby abolished and its functions, duties and responsibilities transferred as set out herein.

III. ENVIRONMENTAL PROTECTION

A. Air Quality

1. The Vehicle Emissions Inspection and Maintenance Act, Act No. 83 of the Public Acts of 1980, as amended, being Section 257.1051 et seq. of the Michigan Compiled Laws.

2. The Air Pollution Act, Act No. 348 of the Public Acts of 1965, as amended, being Section 336.11 et seq. of the Michigan Compiled Laws, the Air Pollution Control Commission created thereby is transferred by a Type III transfer, as defined by Section 3 of Act No. 380 of the Public Acts of 1965, being Section 16.103 of the Michigan Compiled Laws and the Air Pollution Control Commission is hereby abolished.

D. Other

1. All the statutory authority, powers, duties and functions of the Commission of Natural Resources, the Department of Natural Resources and the director of the Department of Natural Resources and of the agencies, boards and commissions contained therein under the Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, Act No. 127 of the Public Acts of 1970, being Section 691.1201 et seq. of the Michigan Compiled Laws.

2. Except as otherwise provided herein, all the statutory authority, powers, duties and functions of the Commission of Natural Resources, the Department of Natural Resources and the director of the Department of Natural Resources and of the agencies, boards and commissions contained therein relating to environmental protection under the Public Health Code, Act No. 368 of the Public Acts of 1978, as amended, being Section 333.1001 et seq. of the Michigan Compiled Laws.

IV. MISCELLANEOUS

A. Delegations

1. The director of the new Michigan Department of Natural Resources may perform a duty or exercise a power conferred by law or this Order upon the director at the time and to the extent the duty or power is delegated to the director by law or by this Order.

2. The director of the new Michigan Department of Natural Resources may by written instrument delegate a duty or a power conferred by law or this Order and the person to whom such duty or power is so delegated may perform such duty or exercise such power at the time and to the extent that such duty or power is delegated by the director.

3. Decisions made by the director of the new Michigan Department of Natural Resources or persons to whom the director has lawfully delegated decision-making authority pursuant to this Order relating to natural resources management or environmental protection shall be final when reduced to writing and delivered to all affected persons, unless otherwise provided by law.

B. Adjudications

1. General

a. When a person is aggrieved by a final decision of the director of the new Michigan Department of Natural Resources or persons to whom the director has lawfully delegated decision-making authority pursuant to this Order relating to natural resources management or environmental protection, except for a decision relating to the issuance of a permit or operating license, whether such decision is affirmative or negative in form, the decision is subject to direct review by the courts as provided by law and in accordance with the general court rules. A preliminary, procedural or intermediate action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the final decision would not provide an adequate remedy.

b. Judicial review of a final decision shall be as provided by law and in accordance with the general court rules.

2. Permits and Operating Licenses

a. When a person is aggrieved by a decision of the director of the new Michigan Department of Natural Resources or persons to whom the director has lawfully delegated decision-making authority pursuant to this Order relating to functions, duties and responsibilities for the issuance of a permit or operating license transferred by this Order, whether such decision is affirmative or negative in form, the person may seek to direct review by the Commission of Natural Resources of such decision within the time period provided by law or rule. A preliminary, procedural or intermediate action or ruling is not immediately reviewable, except that the Commission of Natural Resources may grant leave for review of such action.

b. The Commission of Natural Resources may utilize administrative law judges or hearing officers employed by the new Michigan Department of Natural Resources to conduct such reviews as contested cases and to issue proposals for decisions as provided by law or rule.

c. When a person is aggrieved by a final decision of the Commission of Natural Resources relating to the issuance of a permit or operating license, whether such decision is affirmative or negative in form, the decision is subject to direct review by the courts as provided by law. A preliminary, procedural or intermediate action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the final decision would not provide an adequate remedy.

d. Judicial review of a final decision shall be as provided by law and in accordance with the general court rules

C. Rescissions

1. Executive Order 1969-1 (Advisory Council on Environmental Quality), Executive Order 1973-9 (Establishing the Michigan Environmental Review Board), Section 54 of Executive Order 1980-1A (Executive Branch Reorganization), Executive Order 1989-3 (Establishment of the Governor's Council on Environmental Quality), and Executive Order 1989-6 (Amending Executive Order 1989-3), are hereby rescinded.

2. The rescissions of Executive Order 1974-4 (Establishing the Michigan Environmental Review Board), and Executive Order 1983-14 (Establishment of the Cabinet Council on Environmental Protection), are hereby ratified.

4. Section 5 of Executive Order 1973-2 (Transfer and Consolidation of Environmental Functions), transferring certain statutory authority, powers, duties, functions and responsibilities from the Department of Public Health to the Department of Natural Resources and Section 6 of such Executive Order, as modified by Section 2c of Executive Order 1976-8 (Modifying Executive Order 1973-2), transferring certain statutory authority, powers, duties, functions and responsibilities from the Department of Agriculture to the Department of Natural Resources are retained in effect insofar as such sections transferred such authority, powers, duties, functions and responsibilities to the Department of Natural Resources, subject to and to the extent not inconsistent

with the provisions of this Order. The remaining Sections of Executive Order 1973-2 and Executive Order 1976-8 are hereby rescinded. The recision of Executive Order 1973-2a is hereby ratified.

D. Validity

The invalidity of any portion of this Order shall not affect the validity of the remainder thereof.

In fulfillment of the requirement of Article V, Section 2, of the Constitution of the State of Michigan of 1963, the provisions of this Executive Order shall become effective 60 days after the filing of this Order.

Given under my hand and the Great Seal of the State of Michigan this 8th day of November, in the Year of our Lord, One Thousand Nine Hundred Ninety-One, and of the Commonwealth, One Hundred Fifty-Five.

John Engler

GOVERNOR

BY THE GOVERNOR:

Richard H. Austin

SECRETARY OF STATE

Filed with Secretary of State
on 11-8-91 at 10:30 am

Exhibit 4

STATE OF MICHIGAN

JOHN ENGLER
GOVERNOR

EXECUTIVE ORDER
1991-32

NATURAL RESOURCES MANAGEMENT AND ENVIRONMENTAL CODE COMMISSION

WHEREAS, recent decades have witnessed precipitous change and monumental growth in the areas of natural resources management and environmental protection; and

WHEREAS, as a consequence of such change and growth, and significant legislative activity, much of Michigan law relating to natural resources management and environmental protection has become archaic, fragmented and disorganized; and

WHEREAS, such fragmentation constitutes a significant barrier to understanding and to compliance, fosters litigation and provides wide latitude for conflicting interpretation; and

WHEREAS, the law relating to natural resources management and environmental protection must provide a sound, effective method for handling the increasingly complex problems and issues in these important fields; and

WHEREAS, it is imperative that Michigan have a natural resources management and environmental protection code that is cognizant of and responsive to the needs of the state and which does not limit itself to isolated problems, issues or programs; and

WHEREAS, such a comprehensive natural resources management and environmental protection code can only be achieved through a coordinated, in-depth review, clarification and substantial reorganization of existing statutes; and

WHEREAS, the proper functioning of state government, including the functioning of the Department of Natural Resources, can best occur when the organization of state government, including the Department of Natural Resources, is aligned with and responsive to the provisions of such a comprehensive natural resources management and environmental protection code; and

WHEREAS, a comprehensive natural resource management and environmental protection code will serve to facilitate compliance with the law, protect the environment and create greater public understanding, thereby increasing support for the proper activities of state government in this vitally important area; and

WHEREAS, I have by Executive Order reorganized the Department of Natural Resources to focus its operations and to provide for more efficient performance of its authority, powers, duties, functions and responsibilities; and

WHEREAS, Article IV, Section 52, of the Constitution of the State of Michigan of 1963 declares the conservation and development of the natural resources of the state to be of paramount public concern in the interest of the health, safety and general welfare of the people.

NOW, THEREFORE, I, John Engler, Governor of the State of Michigan, pursuant to the powers vested in me by the Constitution of the State of Michigan of 1963, do hereby establish within the Executive Office of the Governor the Natural Resources Management and Environmental Code Commission (the "Commission").

1. The Commission shall perform the following functions and responsibilities:

   a. To review, analyze and recommend statutory language, in the form of a draft bill or bills, for a Michigan Natural Resources Management and Environmental Protection Code in the form of a single, comprehensive body of law designed to implement Michigan's entire natural resources management and environmental protection program; and to recommend the same to the Governor and the Legislature on or before January 1, 1993, with an interim report to be similarly presented on or before June 1, 1992; provided, however, that the Commission may seek, and the Governor may approve, extension of these time periods if warranted by the circumstances.

   b. To review, analyze and recommend changes in the organization of the Michigan Department of Natural Resources, in order that such organization will closely correspond and correlate to the proposed Natural Resources Management and Environmental Code.

2. Governmental members of the Commission shall include the director of the Michigan Department of Natural Resources, the director of the Department of Commerce, the director of the Department of Public Health and the director of the Department of Agriculture, or their designees.

3. The Governor shall appoint the members of the Commission and such members shall serve at the pleasure of the Governor. The Governor shall appoint one member of the Commission as chairperson and such member shall serve as chairperson at the pleasure of the Governor. The Governor may appoint other members of the Commission as officers and such members shall serve as officers at the pleasure of the Governor. The Commission shall be administered by an executive director who shall be appointed by the Governor.

4. As soon as practicable after the appointment and qualification of the members of the Commission, the Commission shall meet in Lansing for the purposes of organization. The Commission may adopt its own rules of procedure and may, as appropriate, make inquiries, studies and investigations, hold hearings and receive comments from the public.

5. All departments, boards, commissions or officers of the state, or of any political subdivision thereof, shall give to the Commission, or to any member or representative thereof, any necessary assistance required by the Commission, or any member or representative thereof, in the performance of the duties of the Commission so far as is compatible with its, his or her duties; free access shall also be given to any books, records or documents in its, his or her custody, relating to matters within the scope of the inquiry, study or investigation of the Commission.

6. The Commission shall meet and cooperate with members of the Legislature and legislative committees with jurisdiction over natural resources and environmental protection.

The provisions of this Executive Order shall become effective upon 60 days after the filing of this Order.

Given under my hand and the Great Seal of the State of Michigan this 8th day of November, in the Year of our Lord, One Thousand Nine Hundred Ninety-One, and of the Commonwealth, One Hundred Fifty-Five.

GOVERNOR

BY THE GOVERNOR:

SECRETARY OF STATE

Filed with Secretary of State
on 11-8-91 at 10:02 am

Exhibit 5

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR

JOHN ENGLER
GOVERNOR

EXECUTIVE ORDER
No. 1995 - 18

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

MICHIGAN DEPARTMENT OF NATURAL RESOURCES

EXECUTIVE REORGANIZATION

WHEREAS, Article V, Section 1, of the Constitution of the State of Michigan of 1963 vests the executive power in the Governor; and

WHEREAS, Article V, Section 2, of the Constitution of the State of Michigan of 1963 empowers the Governor to make changes in the organization of the Executive Branch or in the assignment of functions among its units which he considers necessary for efficient administration; and

WHEREAS, Article V, Section 8, of the Constitution of the State of Michigan of 1963 provides that each principal department shall be under the supervision of the Governor, unless otherwise provided in the Constitution; and

WHEREAS, the people of the State of Michigan have consistently demonstrated the importance they place on both natural resource management and protection of Michigan's unique environmental qualities; and

WHEREAS, maintaining a quality environment and sound management of our unique natural resources are of paramount importance to the Governor of the Great Lakes State; and

WHEREAS, natural resource management and environmental regulatory programs face a growing number of challenges to ensure that Michigan's quality of life is enhanced for current and future generations; and

WHEREAS, events have demonstrated the need to address environmental issues on a watershed basis and place additional focus on nonpoint sources of pollution; and

WHEREAS, environmental protection and resource management often have competing priorities that can best be addressed if these critical functions have cabinet level status as separate departments; and

WHEREAS, certain functions, duties and responsibilities currently assigned to the Michigan Department of Natural Resources can be more effectively carried out by the director of a new principal department; and

WHEREAS, it is necessary in the interests of efficient administration and effectiveness of government to effect changes in the organization of the Executive Branch of government.

NOW, THEREFORE, I, John Engler, Governor of the State of Michigan, pursuant to the powers vested in me by the Constitution of the State of Michigan of 1963 and the laws of the State of Michigan, do hereby order the following:

1. The Michigan Department of Environmental Quality is created as a principal department within the Executive Branch.

2. The Director of the Michigan Department of Environmental Quality shall be appointed by the Governor and shall serve at the pleasure of the Governor.

3. All the statutory authority, powers, duties, functions and responsibilities of the:

a. Air Quality Division, including but not limited to the authority, powers, duties, functions and responsibilities set forth in Act No. 451 of the Public Acts of 1994, as amended, being Section 324.5501 et seq. of the Michigan Compiled Laws;

b. Environmental Response Division, including but not limited to the authority, powers, duties, functions and responsibilities set forth in Act No. 451 of the Public Acts of 1994, as amended, being Section 324.20101 et seq. of the Michigan Compiled Laws;

c. Environmental Assistance Division, including but not limited to the authority, powers, duties, functions and responsibilities set forth in Act No. 451 of the Public Acts of 1994, as amended, being Sections 324.3101 et seq., 324.4101 et seq., 324.4901 et seq., 324.5301 et seq., 324.5701 et seq., 324.14301 et seq. and 324.14501 et seq. of the Michigan Compiled Laws;

d. Surface Water Quality Division, including but not limited to the authority, powers, duties, functions and responsibilities set forth in Act No. 451 of the Public Acts of 1994, as amended, being Section 324.3101 et seq., 324.4101 et seq., 324.4301 et seq. and 324.5101 et seq. of the Michigan Compiled Laws;

e. Underground Storage Tank Division, including but not limited to the authority, powers, duties, functions and responsibilities set forth in Executive Order 1994-4 and Act No. 451 of the Public Acts of 1994,

as amended, being Sections 324.21101 et seq., 324.21301 et seq. and 324.21501 et seq. of the Michigan Compiled Laws;

f. Waste Management Division, including but not limited to the authority, powers, duties, functions and responsibilities set forth in Act No. 451 of the Public Acts of 1994, as amended, being Sections 324.3101 et seq., 324.5101 et seq., 324.11101 et seq., 324.11301 et seq., 324.11501 et seq., 324.11701 et seq., 324.12101 et seq., 324.14701 et seq., 324.16101 et seq., 324.16301 et seq., 324.16501 et seq., 324.16701 et seq., 324.16901 et seq., 324.17101 et seq. and 324.19101 et seq. of the Michigan Compiled Laws;

g. Office of Administrative Hearings, including but not limited to the authority, powers, duties, functions and responsibilities set forth in Executive Order 1995-4;

h. Office of the Great Lakes, including but not limited to the authority, powers, duties, functions and responsibilities set forth in Act No. 59 of the Public Acts of 1995, being Sections 324.32903, 324.32904 and 324.33101 et seq. of the Michigan Compiled Laws;

I. Coordinator of Environmental Education, including but not limited to the authority, powers, duties, functions and responsibilities set forth in Act No. 310 of the Public Acts of 1994, being Section 299.34 of the Michigan Compiled Laws; and

j. Environmental Education Advisory Committee, including but not limited to the authority, powers, duties, functions and responsibilities set forth in Act No. 310 of the Public Acts of 1994, being Section 299.35 of the Michigan Compiled Laws

of the Michigan Department of Natural Resources, are hereby transferred to the Director of the Michigan Department of Environmental Quality by a Type II transfer, as defined by Section 3 of Act No. 380 of the Public Acts of 1965, being Section 16.103 of the Michigan Compiled Laws.

4. All the statutory authority, powers, duties, functions and responsibilities of the Environmental Investigations Unit of the Law Enforcement Division of the Michigan Department of Natural Resources are transferred to the Director of the Michigan Department of Environmental Quality by a Type II transfer, as defined by Section 3 of Act No. 380 of the Public Acts of 1965, being Section 16.103 of the Michigan Compiled Laws.

5. All the statutory authority, powers, duties, functions and responsibilities of the Geological Survey Division, including but not limited to the relevant authority, powers, duties, functions and responsibilities set forth in Chapter 3 of Act No. 57 of the Public Acts of 1995, with the exception of the geological resource evaluation and mapping program and the groundwater database program of the

Michigan Department of Natural Resources, are transferred to the Director of the Michigan Department of Environmental Quality by a Type II transfer, as defined by Section 3 of Act No. 380 of the Public Acts of 1965, being Section 16.103 of the Michigan Compiled Laws.

6. All the statutory authority, powers, duties, functions and responsibilities of the Land and Water Management Division, including but not limited to the authority, powers, duties, functions and responsibilities set forth in Act No. 59 of the Public Acts of 1995, being Sections 324.30101 et seq., 324.30301 et seq., 324.30701 et seq., 324.32301 et seq., 324.32501 et seq., 324.33701 et seq. and 324.35301 et seq., of the Michigan Compiled Laws, with the exception of the farmland and open space preservation program, natural rivers program, and the Michigan information resource inventory system of the Michigan Department of Natural Resources, are transferred to the Director of the Michigan Department of Environmental Quality by a Type II transfer, as defined by Section 3 of Act No. 380 of the Public Acts of 1965, being Section 16.103 of the Michigan Compiled Laws.

7. All authority to make decisions regarding administrative appeals associated with the transfers referred to in paragraphs 3, 5 and 6 above, which reside with the Commission of Natural Resources or the Michigan Department of Natural Resources, are transferred to the Director of the Michigan Department of Environmental Quality. In the event the Director is directly involved in an initial decision which is subsequently appealed through the Office of Administrative Hearings and to the Director for a decision, the Director shall appoint an individual within or outside the Michigan Department of Environmental Quality to decide the appeal.

8. All authority to establish general policies associated with the functions transferred in paragraphs 3, 4, 5 and 6 above, which reside with the Commission of Natural Resources or the Michigan Department of Natural Resources, are transferred to the Director of the Michigan Department of Environmental Quality.

9. All authority related to paragraphs 3, 4, 5 and 6 above, which reside with the Director, the Office of Director, the Deputy Director of Environmental Protection or the Office of the Deputy Director of Environmental Protection of the Michigan Department of Natural Resources, are transferred to the Director of the Michigan Department of Environmental Quality. This transfer shall specifically include the authority, duties, powers, functions and responsibilities of the Director of the Department of Natural Resources and/or the Department of Natural Resources set forth in Act No. 57 of the Public Acts of 1995, being Section 324.61501 et seq. of the Michigan Compiled Laws.

10. The Director of the Michigan Department of Environmental Quality shall provide executive direction and supervision for the implementation of the transfers. The assigned functions shall be administered under the direction and supervision of the Director of the Michigan Department of Environmental Quality, and all related prescribed functions of rule-making, licensing and registration, including the prescription of rules, regulations, standards and adjudications,

shall be transferred to the Director of the Michigan Department of Environmental Quality consistent with Executive Order 1995-6.

11. The Director of the Michigan Department of Environmental Quality may perform a duty or exercise a power conferred by law or this Order upon the Director of the Michigan Department of Environmental Quality at the time and to the extent the duty or power is delegated to the Director of the Michigan Department of Environmental Quality by law or by this Order.

12. The Director of the Michigan Department of Environmental Quality may by written instrument delegate a duty or a power conferred by law or this Order and the person to whom such duty or power is so delegated may perform such duty or exercise such power at the time and to the extent that such duty or power is delegated by the Director.

13. Decisions made by the Director of the Michigan Department of Environmental Quality or persons to whom the Director has lawfully delegated decision-making authority, pursuant to this Order relating to natural resource management or environmental protection, shall be final when reduced to writing and delivered to all affected persons, unless otherwise provided by law.

14. All records, personnel, property and unexpended balances of appropriations, allocations and other funds used, held, employed, available to or to be made available to the activities, powers, duties, functions and responsibilities transferred to the Michigan Department of Environmental Quality by this Order are transferred to the Michigan Department of Environmental Quality.

15. The Directors of the Michigan Department of Natural Resources and the Michigan Department of Environmental Quality shall make internal organizational changes as may be administratively necessary to complete the realignment of responsibilities prescribed by this Order.

16. The Director of the Michigan Department of Natural Resources and the Deputy Director for Environmental Protection of the Michigan Department of Natural Resources shall immediately initiate coordination to facilitate the transfers and develop a memorandum of record identifying any pending settlements, issues of compliance with applicable federal and state laws and regulations, or other obligations to be resolved by the Michigan Department of Environmental Quality.

17. All rules, orders, contracts and agreements relating to the assigned functions lawfully adopted prior to the effective date of this Order shall continue to be effective until revised, amended or repealed.

18. Any suit, action or other proceeding lawfully commenced by, against or before any entity affected by this Order shall not abate by reason of the taking effect of this Order. Any suit, action or other proceeding may be maintained by, against or before the appropriate successor of any entity affected by this Order.

In fulfillment of the requirement of Article V, Section 2, of the Constitution of the State of Michigan of 1963, the provisions of this Executive Order shall become effective October 1, 1995, at 12:01 a.m.

Given under my hand and the Great Seal of the State of Michigan this 31st day of July, in the Year of our Lord, One Thousand Nine Hundred Ninety-Five.

GOVERNOR

BY THE GOVERNOR:

SECRETARY OF STATE

Filed with Secretary of State
on 8-1-95 at 10:35 AM

Exhibit 6

EXECUTIVE ORDER
No. 2009 — 45

DEPARTMENT OF AGRICULTURE
DEPARTMENT OF ENERGY, LABOR, AND ECONOMIC GROWTH
DEPARTMENT OF ENVIRONMENTAL QUALITY
DEPARTMENT OF NATURAL RESOURCES
DEPARTMENT OF TREASURY

CREATING THE
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT

EXECUTIVE REORGANIZATION

WHEREAS, Section 1 of Article V of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the Governor;

WHEREAS, Section 2 of Article V of the Michigan Constitution of 1963 empowers the Governor to make changes in the organization of the executive branch or in the assignment of functions among its units that the Governor considers necessary for efficient administration;

WHEREAS, Section 8 of Article V of the Michigan Constitution of 1963 provides that each principal department of state government shall be under the supervision of the Governor, unless otherwise provided in the Constitution;

WHEREAS, Section 52 of Article IV of the Michigan Constitution of 1963 declares the conservation and development of the natural resources of this state to be of paramount public concern in the interest of the health, safety, and general welfare of the people;

WHEREAS, the people of the State of Michigan have consistently demonstrated the importance of both natural resource management and protection of Michigan's unique environmental qualities; and

WHEREAS, the conservation and development of the natural resources of this state can best be achieved through efficient and coordinated management of state policies, programs, and functions, including, but not limited to, the

implementation of an ecosystem-based strategy for resource management aimed at protecting and enhancing the sustainability, diversity, and productivity of the natural resources of this state;

WHEREAS, the consolidation of state government functions related to the natural resources and environment of this state will eliminate unnecessary duplication and facilitate more effective and efficient coordination of policies, programs, and functions related to natural resources and protecting the environment;

WHEREAS, the consolidation of state government functions related to the natural resources of this state and protection of the environment will better enable this state to conserve, manage, protect, and promote Michigan's environmental, natural resource, and related economic interests for current and future generations;

WHEREAS, the consolidation of state government functions related to the natural resources of the state will facilitate the effective use of our natural resources in a sustainable manner, preserve Michigan's rich outdoor heritage, provide quality and accessible public outdoor recreation, restore the Great Lakes and other degraded natural systems to ensure resiliency and sustainability, and promote stewardship of Michigan's natural resources through education, awareness, and action;

WHEREAS, it is necessary in the interests of efficient administration and effectiveness of government to change the organization of the executive branch of state government and to reduce the number of principal state departments;

NOW THEREFORE, I, Jennifer M. Granholm, Governor of the State of Michigan, by virtue of the power and authority vested in the Governor by the Michigan Constitution of 1963 and Michigan law, order the following:

I. DEFINITIONS

As used in this Order:

A. "Civil Service Commission" means the commission required under Section 5 of Article XI of the Michigan Constitution of 1963.

B. "Commission of Agriculture" means the commission created under Section 1 of 1921 PA 13, MCL 285.1 and continued under Section 179 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.279.

C. "Commission of Natural Resources" means the commission created under Section 1 of 1921 PA 17, MCL 299.1, continued under Section 254 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.354, transferred to the Department of Natural Resources under Executive Order 1991-22, MCL 299.13, and

continued under Section 501 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.501.

D. "Department of Agriculture" means the principal department of state government created under Section 1 of 1921 PA 13, MCL 285.1, and Section 175 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.275.

E. "Department of Energy, Labor, and Economic Growth" means the principal department of state government created by Section 225 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.325, and renamed by Executive Order 1996-2, MCL 445.2001, by Executive Order 2003-18, MCL 445.2011, and by Executive Order 2008-20, MCL 445.2025.

F. "Department of Environmental Quality" means the principal department of state government created under Executive Order 1995-18, MCL 324.99903.

G. "Department of Management and Budget" means the principal department of state government created under Section 121 of The Management and Budget Act, 1984 PA 431, MCL 18.1121.

H. "Department of Natural Resources" means the principal department of state government provided for by Section 250 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.350, Executive Order 1991-22, MCL 299.13, and Section 501 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.501, as modified by Executive Order 1995-18, MCL 324.99903.

I. "Department of Natural Resources and Environment" or "Department" means the principal department of state government created under Section II of this Order.

J. "Department of Treasury" means the principal department of state government created under Section 75 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.175.

K. "Environmental Science Review Boards" means the boards provided for under Section II.C. of this Order.

L. "Executive Director of the Michigan Gaming Control Board" or "Executive Director" means the position created under Section 4 of the Michigan Gaming Control and Revenue Act, 1996 IL 1, MCL 432.204.

M. "Michigan Gaming Control Board" means the board created under Section 4 of the Michigan Gaming Control and Revenue Act, 1996 IL 1, MCL 432.204.

N. "Michigan Trails Advisory Council" or "Council" means the council created under Section II.D. of this Order.

O. "Natural Resources Commission" or "Commission" means the commission provided for by Section II.B. of this Order.

P. "State Budget Director" means the individual appointed by the Governor pursuant to Section 321 of The Management and Budget Act, 1984 PA 431, MCL 18.1321.

Q. "Type I transfer" means that phrase as defined in Section 3 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.103.

R. "Type II transfer" means that phrase as defined in Section 3 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.103.

S. "Type III transfer" means that phrase as defined in Section 3 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.103.

II. CREATION OF THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT

A. Establishing the Department of Natural Resources and Environment as a Principal Department of State Government

1. The Department of Natural Resources and Environment is created as a principal department of state government. The Department shall protect and conserve the air, water, and other natural resources of this state.

2. The Director of the Department of Natural Resources and Environment shall be the head of the Department. Consistent with Section 3 of Article V of the Michigan Constitution of 1963, the Director of the Department shall be appointed by the Governor, subject to disapproval under Section 6 of Article V of the Michigan Constitution of 1963, and shall serve at the pleasure of the Governor.

3. The Director of the Department of Natural Resources and Environment shall establish the internal organization of the Department and allocate and reallocate duties and functions to promote economic and efficient administration and operation of the Department.

4. The Director of the Department of Natural Resources and Environment may promulgate rules and regulations as may be necessary to carry out functions vested in the Director under this Order or other law in accordance with the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

5. The Director of the Department of Natural Resources and Environment may perform a duty or exercise a power conferred by law or executive order upon the Director of the Department at the time and to the extent the duty or power is delegated to the Director of the Department by law or order.

6. The Director of the Department of Natural Resources and Environment may appoint 1 or more deputy directors and other assistants and employees as are necessary to implement and effectuate the powers, duties, and functions vested in the Department under this Order or other law of this state. Deputies may perform the duties and exercise the duties as prescribed by the Director. The Director may delegate within the Department a duty or power conferred on the Director of the Department by this Order or by other law, and the person to whom the duty or power is delegated may perform the duty or exercise the power at the time and to the extent that the duty or power is delegated by the Director of the Department.

7. Decisions made by the Director of the Department of Natural Resources and Environment or persons to whom the Director has lawfully delegated decision-making authority shall be subject to judicial review as provided by law and in accordance with applicable court rules.

8. The Director of the Department of Natural Resources and Environment may utilize administrative law judges and hearing officers employed by the State Office of Administrative Hearings and Rules created by Executive Order 2005-1, MCL 445.2021, to conduct contested case hearings and to issue proposals for decisions as provided by law or rule.

9. The position of the Director of the Department of Natural Resources as a member or chairperson of all of the following boards or commissions is transferred to the Director of the Department of Natural Resources and Environment:

a. *Ex officio* member of the Michigan Historical Commission under Section 1 of the Michigan Historical Commission Act, 1913 PA 271, MCL 399.1.

b. Member of the Michigan Freedom Trail Commission under Section 3 of the Michigan Freedom Trail Commission Act, 1998 PA 409, MCL 399.83.

c. *Ex officio* member of the Michigan Public Safety Communications System Advisory Board created under Executive Order 2005-8.

d. Member and Chairperson of the Michigan Commission on the Commemoration of the Bicentennial of the War of 1812 created by Executive Order 2007-51.

e. Member and Chairperson of the Michigan Center for Innovation and Reinvention Board created under Section IV of Executive Order 2009-36.

10. The position of the Director of the Department of Environmental Quality as a member or chairperson of all of the following boards or commissions is transferred to the Director of the Department of Natural Resources and Environment:

a. Member of the Michigan Supply Chain Management Development Commission created within the Department of Treasury under Section 3 of 2008 PA 398, MCL 125.1893. Nothing in this paragraph shall be construed to authorize the use of state funds for the operations of the Michigan Supply Chain Management Development Commission.

b. Member and Chairperson of the Brownfield Redevelopment Board created under Section 20104a of the Natural Resources and Protection Act, 1994 PA 451, MCL 324.20104a, as modified by Executive Order 2003-18, MCL 445.2011, and Executive Order 2006-13, MCL 125.1991.

c. *Ex officio* member of the State Plumbing Board created within the Department of Energy, Labor, and Economic Growth under Section 13 of the State Plumbing Act, 2002 PA 733, MCL 338.3523.

d. Member of the Michigan Homeland Protection Board created within the Department of State Police under Executive Order 2003-6.

e. Member of the Michigan Citizen-Community Emergency Response Coordinating Council created within the Department of State Police under Executive Order 2007-18.

f. Member of the Great Lakes Wind Council created within the Department of Energy, Labor, and Economic Growth under Executive Order 2009-1.

11. The position as an *ex officio* member of the State Plumbing Board held by an employee of the Department of Environmental Quality designated by the Director of the Department of Environmental Quality under Section 13 of the State Plumbing Act, 2002 PA 733, MCL 338.3523, is transferred to a qualified employee of the Department of Natural Resources and Environment designated by the Director of the Department of Natural Resources and Environment.

12. Subject to available funding, the Director of the Department of Natural Resources and Environment shall continue efforts to reduce the time for the processing and issuance of environmental permits and related customer service practices with the objective of achieving best-in-class permit processing time and improved customer service. As used in this paragraph, "environmental permits" means all permits and operating licenses issued by the Department. Environmental permits do not include hunting, fur harvester, or fishing licenses or other licenses or permits issued under any of the following:

a. Part 401 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.40101 to 324.40120.

b. Part 413 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.41301 to 324.41325.

c. Part 421 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.42101 to 324.42106.

d. Part 427 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.42701 to 324.42714.

e. Part 435 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.43501 to 324.43561.

f. Part 441 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.44101 to 324.44106.

g. Part 445 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.44501 to 324.44526.

h. Part 457 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.45701 to 324.45711.

i. Part 459 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.45901 to 324.45908.

j. Part 473 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.47301 to 324.47362.

k. Part 515 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.51501 to 324.51514.

l. Part 741 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.74101 to 324.74126.

m. Part 761 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.76101 to 324.76118.

n. Part 801 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.80101 to 324.80199.

o. Part 811 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.81101 to 324.81150.

p. Part 821 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.82101 to 324.82160.

q. Section 509 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.509.

13. The Director of the Department of Natural Resources and Environment may establish advisory workgroups, advisory councils, or other ad hoc committees to provide citizen and other public input and to advise the Director or the Department on the exercise of the authority, powers, duties, functions, responsibilities vested in the Department of Natural Resources and Environment.

B. Natural Resources Commission

1. Except as otherwise provided in this Order, the Commission of Natural Resources is transferred by Type II transfer from the Department of Natural Resources to the Department of Natural Resources and Environment. The Commission of Natural Resources is renamed the Natural Resources Commission. Members of the Commission shall be knowledgeable about conservation and committed to the scientific management of natural resources. This paragraph does not affect the continued service or terms of office of the Commission of Natural Resources.

2. The Governor shall designate a member of the Natural Resources Commission to serve as its Chairperson at the pleasure of the Governor. The Commission may select a member of the Commission to serve as Vice-Chairperson of the Commission.

3. The Natural Resources Commission shall have and continue to exercise the authority, powers, duties, functions, and responsibilities previously vested in the Commission on Natural Resources under all of the following:

a. Part 435 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.43501 to 324.43561.

b. Section 40111a of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.40111a.

c. Section 40113a of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.40113a.

4. Except as otherwise provided in this Order, the final decision of the Natural Resources Commission in any of the matters assigned to it under Section II.B.3. of this Order shall be made by the Natural Resources Commission or a person to whom the Commission has lawfully delegated such authority. Decisions by the Natural Resources Commission shall be subject to judicial review as provided by law and in accordance with applicable court rules.

5. Except as otherwise provided in this Order, the Natural Resources Commission may utilize administrative law judges and hearing officers employed by the State Office of Administrative Hearings and Rules created by Executive Order 2005-1, MCL 445.2021, to conduct contested case hearings and to issue proposals for decisions as provided by law or rule.

6. The Natural Resources Commission shall provide advice to the Director of the Department of Natural Resources and Environment on matters related to natural resources and conservation and may perform additional duties as provided by this Order, other law, or as requested by the Director or the Governor.

7. The Natural Resources Commission shall be staffed and assisted by personnel from the Department of Natural Resources and Environment, subject to available funding. Any budgeting, procurement, or related management functions of the Commission shall be performed under the direction and supervision of the Director of the Department.

8. The Natural Resources Commission shall adopt procedures consistent with Michigan law and this Order governing its organization and operations.

9. A majority of the members of the Natural Resources Commission serving constitutes a quorum for the transaction of the Commission's business. The Commission shall act by a majority vote of its serving members.

10. The Natural Resources Commission shall meet at the call of the Chairperson and as may be provided in procedures adopted by the Commission.

11. The Natural Resources Commission may, as appropriate, make inquiries, studies, and investigations, hold hearings, and receive comments from the public. Subject to available funding, the Commission may also consult with outside experts in order to perform its duties, including, but not limited to, experts in the private sector, organized labor, government agencies, and at institutions of higher education.

12. Members of the Natural Resources Commission shall serve without compensation. Members of the Commission may receive reimbursement for necessary travel and expenses consistent with relevant statutes and the rules and procedures of the Civil Service Commission and the Department of Management and Budget, subject to available funding.

13. The Natural Resources Commission may accept donations of labor, services, or other things of value from any public or private agency or person.

14. Members of the Natural Resources Commission shall refer all legal, legislative, and media contacts to the Department.

C. Environmental Science Review Boards

1. The Director of the Department of Natural Resources and Environment may from time to time create one or more environmental science review boards to advise the Department of Natural Resources and Environment and the Governor on scientific issues affecting the protection and management of Michigan's environment and natural resources, or affecting a program administered by the Department of Natural Resources and Environment.

2. A board created under Section II.C.1. of this Order shall consist of 7 members appointed by the Director, each of whom shall have expertise in one or more of the following areas: biological sciences; chemistry; ecological science; engineering; geology; physics; risk assessment; and other related disciplines.

3. A board created under Section II.C.1. of this Order shall assess the scientific issue before the board and shall determine whether the board has sufficient expertise to fully review the issue. Should that board determine that additional expertise would aid the board in its review, the board may request assistance from 1 or more persons with knowledge and expertise related to the subject of the specific scientific inquiry.

4. The Director of the Department of Natural Resources and Environment shall designate a member of a board created under Section II.C.1. of this Order to serve as the chairperson of that board at the pleasure of the Director. The board may select a member of the board to serve as Vice-Chairperson of the board.

5. A board created under Section II.C.1. of this Order shall be staffed and assisted by personnel from the Department of Natural Resources and Environment, subject to available funding. Any budgeting, procurement, or related management functions of the board shall be performed under the direction and supervision of the Director of the Department.

6. A board created under Section II.C.1. of this Order shall adopt procedures consistent with Michigan law and this Order governing its organization and operations.

7. A majority of the members serving on a board created under Section II.C.1. of this Order constitutes a quorum for the transaction of the board's business, and such a board shall act by a majority vote of its serving members.

8. A board created under Section II.C.1. of this Order shall meet at the call of its chairperson and as may be provided in procedures adopted by the board.

9. A board created under Section II.C.1. of this Order may, as appropriate, make inquiries, studies, investigations, hold hearings, and receive

comments from the public. The board may also consult with outside experts in order to perform its duties, including, but not limited to, experts in the private sector, government agencies, and at institutions of higher education.

10. Members of a board created under Section II.C.1. of this Order shall serve without compensation. Members of a board created under Section II.C.1. of this Order may receive reimbursement for necessary travel and expenses consistent with relevant statutes and the rules and procedures of the Civil Service Commission and the Department of Management and Budget, subject to available funding.

11. A board created under Section II.C.1. of this Order may hire or retain contractors, sub-contractors, advisors, consultants, and agents, and may make and enter into contracts necessary or incidental to the exercise of the powers of the Board and the performance of its duties as the Director of the Department of Natural Resources and Environment deems advisable and necessary, in accordance with this Order, the relevant statutes, the rules and procedures of the Civil Service Commission and the Department of Management and Budget, subject to available funding.

12. A board created under Section II.C.1. of this Order may accept donations of labor, services, or other things of value from any public or private agency or person.

D. Michigan Trails Advisory Council

1. The Michigan Trails Advisory Council is created as an advisory body within the Department of Natural Resources and Environment.

2. The Council shall advise the Director of the Department of Natural Resources and Environment and the Governor on the creation, development, operation, and maintenance of motorized and non-motorized trails in this state, including, but not limited to, snowmobile, biking, equestrian, hiking, off-road vehicle, and skiing trails. In advising the Director and the Governor on the creation and development of motorized and non-motorized trails in this state, the Council shall seek to have the trails linked where ever possible. The Council may perform additional related duties as provided by this Order, other law, or as requested by the Director or the Governor.

3. The Council shall consist of 7 members appointed by the Governor. Members of the Council shall be appointed for a term of 4 years. A vacancy on the Council occurring other than by expiration of a term shall be filled by the Governor in the same manner as the original appointment for the balance of the unexpired term. A vacancy shall not affect the power of the remaining members to exercise the duties of the Council.

4. The Governor shall designate a member of the Council to serve as the Chairperson of the Council at the pleasure of the Governor. The Council may select a member of the Council to serve as Vice-Chairperson of the Council.

5. The Council shall be staffed and assisted by personnel from the Department of Natural Resources and Environment, subject to available funding. Any budgeting, procurement, or related management functions of the Council shall be performed under the direction and supervision of the Director of the Department.

6. The Council shall adopt procedures consistent with Michigan law and this Order governing its organization and operations.

7. A majority of the members of the Council serving constitutes a quorum for the transaction of the Council's business. The Council shall act by a majority vote of its serving members.

8. The Council shall meet at the call of the Chairperson and as may be provided in procedures adopted by the Council.

9. The Council may, as appropriate, make inquiries, studies, investigations, hold hearings, and receive comments from the public. The Council may also consult with outside experts in order to perform its duties, including, but not limited to, experts in the private sector, government agencies, and at institutions of higher education.

10. The Council may establish advisory workgroups, including, but not limited to, an advisory workgroup on snowmobiles, as deemed necessary by the Council to assist the Council in performing the duties and responsibilities of the Council.

11. Members of the Council shall serve without compensation. Members of the Council may receive reimbursement for necessary travel and expenses consistent with relevant statutes and the rules and procedures of the Civil Service Commission and the Department of Management and Budget, subject to available funding.

12. The Council may hire or retain contractors, sub-contractors, advisors, consultants, and agents, and may make and enter into contracts necessary or incidental to the exercise of the powers of the Council and the performance of its duties as the Director of the Department of Natural Resources and Environment deems advisable and necessary, in accordance with this Order, the relevant statutes, the rules and procedures of the Civil Service Commission and the Department of Management and Budget, subject to available funding.

13. The Council may accept donations of labor, services, or other things of value from any public or private agency or person.

14. Members of the Council shall refer all legal, legislative, and media contacts to the Department of Natural Resources and Environment.

III. DEPARTMENT OF NATURAL RESOURCES

A. Transfers from the Department of Natural Resources

1. Except as otherwise provided in this Order, all of the authority, powers, duties, functions, responsibilities, personnel, equipment, property, and budgetary resources of the Department of Natural Resources are transferred by Type II transfer to the Department of Natural Resources and Environment, including, but not limited to, the authority, powers, duties, functions, and responsibilities of the Department of Natural Resources under all of the following:

a. 1974 PA 359, MCL 3.901 to 3.910 ("Sleeping Bear Dunes National Lakeshore").

b. The Executive Organization Act of 1965, 1965 PA 380, MCL 16.350 to 16.360.

c. The Property Rights Preservation Act, 1996 PA 101, MCL 24.421 to 24.425.

d. Section 2 of the Methamphetamine Reporting Act, 2006 PA 262, MCL 28.192.

e. Section 7 of the Hazardous Materials Transportation Act, 1998 PA 138, MCL 29.477.

f. Section 4c of 1913 PA 172, MCL 32.224c ("Crawford County land").

g. Section 48 of State Employees' Retirement Act, 1943 PA 240, MCL 38.48.

h. Section 8b of the Township and Village Public Improvement and Public Service Act, 1923 PA 116, MCL 41.418b.

i. Section 26 of The Home Rule Village Act, 1909 PA 278, MCL 78.26.

j. Section 10 of 1957 PA 185, MCL 123.740 ("county department and board of public works").

k. 1990 PA 182, MCL 141.1301 to 141.1304 ("county redistribution of federal payments").

l. Sections 7g and 7jj of The General Property Tax Act, 1893 PA 206, MCL 211.7g and MCL 211.7jj.

m. 1943 PA 92, MCL 211.371 to 211.375 ("withholding lands from sale").

n. Section 18 of 1909 PA 283, MCL 224.18 ("public highways and private roads").

o. Sections 3 and 4 of 1927 PA 341, MCL 247.43 and 247.44 ("discontinuation of highway bordering lake or stream").

p. Section 4 of 1941 PA 359, MCL 247.64 ("noxious weeds").

q. Sections 602a and 660 of the Michigan Vehicle Code, 1949 PA 300, MCL 257.602a and 257.660.

r. Section 4 of the Michigan Aquaculture Development Act, 1996 PA 199, MCL 286.874.

s. 1976 PA 308, MCL 287.251 to 287.258 ("disposal of livestock").

t. Section 14 of the Animal Industry Act, 1988 PA 466, MCL 287.714.

u. Privately Owned Cervidae Producers Marketing Act, 2000 PA 190, MCL 287.951 to 287.969.

v. 1986 PA 109, MCL 300.21 to 300.22 ("conservation officers").

w. The Right to Forest Act, 2002 PA 676, MCL 320.2031 to 320.2036.

x. The Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.101 to 324.90106.

y. The Clean Michigan Initiative Act, 1998 PA 284, MCL 324.95101 to 324.95108.

z. 2008 PA 290, MCL 324.95151 to 324.95155 ("control of gray wolves").

aa. 2008 PA 318, MCL 324.95161 to 324.95167 ("removal, capture, or lethal control of gray wolf").

bb. The Great Lakes Water Quality Bond Authorization Act, 2002 PA 396, MCL 324.95201 to 324.95208.

cc. The Michigan Civilian Conservation Corps Act, 1984 PA 22, MCL 409.301 to 409.314.

dd. Sections 167a and 167c of The Michigan Penal Code, 1931 PA 328, MCL 750.167a and 750.167c.

ee. Executive Order 1973-2, MCL 299.11.

ff. Executive Order 1973-12, MCL 125.241.

gg. Executive Order 1988-4, MCL 299.12.

hh. Executive Order 1991-31, MCL 299.13.

ii. Executive Order 1995-7, MCL 324.99901.

jj. Executive Order 2004-3, MCL 287.981.

kk. Executive Order 2007-14, MCL 324.99910.

ll. Executive Order 2009-14, MCL 324.99916.

mm. Executive Order 2009-15, MCL 324.99917.

2. The powers, duties, functions, responsibilities, personnel, equipment, and budgetary resources of the Department of Natural Resources transferred to the Department of Natural Resources and Environment under Section III of this Order shall include, without limitation, the powers, duties, functions, responsibilities, personnel, equipment, and budgetary resources of the Department of Natural Resources relating to invasive species management.

3. Except as otherwise provided in this Order, all of the authority, powers, duties, functions, responsibilities, rule-making authority, personnel, equipment, and budgetary resources of the Director of the Department of Natural Resources are transferred to the Director of the Department of Natural Resources and Environment.

4. The Department of Natural Resources is abolished.

5. After the effective date of this Order, statutory and other legal references to the Department of Natural Resources shall be deemed references to the Department of Natural Resources and Environment.

B. Citizens Committee for Michigan State Parks

1. The powers, duties, functions, responsibilities, personnel, equipment, and budgetary resources of the Citizens Committee for Michigan State Parks created under Section 74102a of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.74102a, are transferred from the Department of Natural Resources to the Natural Resources Commission provided for under Section II of this Order.

2. The Citizens Committee for Michigan State Parks is abolished.

C. Mackinac Island State Park Commission

1. The Mackinac Island State Park Commission provided for under 1958 PA 201, MCL 318.201 to 318.208, transferred under Section 256 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.356, and created by Section 76503 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.76503, and transferred to the Department of Natural Resources under Executive Order 2009-36, is transferred by Type I transfer from the Department of Natural Resources to the Department of Natural Resources and Environment, including, but not limited to, the authority, powers, duties, functions, and responsibilities of the Commission under all of the following:

a. Sections 76501 to 76509, 76701 to 76709, 76901 to 76903, 77101, 77301, 77302, 77701 to 77704, and 77901 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.76501 to 324.76509, 324.76701 to 324.76709, 324.76901 to 324.76903, 324.77101, 324.77301, 324.77302, 324.77701 to 324.77704, and 324.77901.

b. Section 511 of the Michigan Liquor Control Code of 1998, 58 PA 1998, MCL 436.1511.

D. Michigan Forest Finance Authority

1. The Michigan Forest Finance Authority created under Section 50503 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.50503, is transferred by Type I transfer from the Department of Natural Resources to the Department of Natural Resources and Environment.

2. The position of the Director of the Department of Natural Resources or his or her designee from within that Department as a member of the Board of Directors of the Michigan Forest Finance Authority under Section 50504 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.50504, is transferred to the Director of the Department of Natural Resources and Environment or his or her designee from within that Department.

E. Michigan Natural Resources Trust Fund Board

1. The Michigan Natural Resources Trust Fund Board, created under Section 1905 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.1905, is transferred by Type I transfer from the Department of Natural Resources to the Department of Natural Resources and Environment.

2. The position of the Director of the Department of Natural Resources or a member of the Commission on Natural Resources as a member of the Michigan Natural Resources Trust Fund Board under Section 1905 of the Natural Resources

and Environmental Protection Act, 1994 PA 451, MCL 324.1905, is transferred to the Director of the Department of Natural Resources and Environment or his or her designee from within the Department, including, but not limited to, a member of the Natural Resources Commission.

F. Michigan Snowmobile Advisory Committee

1. The powers, duties, functions, responsibilities, personnel, equipment, and budgetary resources of the Michigan Snowmobile Advisory Committee created within the Department of Natural Resources under Section 82102a of the Natural Resources and Environmental Protection Act of 1994, 1994 PA 324.82102a, are transferred to the Michigan Trails Advisory Council created under Section II.D. of this Order.

2. The Michigan Snowmobile Advisory Committee is abolished.

G. Michigan Trailways Advisory Council

1. The powers, duties, functions, responsibilities, personnel, equipment, and budgetary resources of the Michigan Trailways Advisory Council created within the Department of Natural Resources under Section 72110 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.72110, are transferred are transferred to the Michigan Trails Advisory Council created under Section II.D. of this Order.

2. The Michigan Trailways Advisory Council is abolished.

H. Water Resources Conservation Advisory Council

1. The Water Resources Conservation Advisory Council created within the Department of Natural Resources under Section 32803 of the Natural Resources and Environmental Protection Act of 1994, 1994 PA 324.32803, which was required to complete its final report by August 8, 2009, is transferred by Type III transfer from the Department of Natural Resources to the Natural Resources Commission provided for under Section II of this Order.

2. The Water Resources Conservation Advisory Council is abolished.

IV. DEPARTMENT OF ENVIRONMENTAL QUALITY

A. Transfers from the Department of Environmental Quality

1. Except as otherwise provided in this Order, all of the authority, powers, duties, functions, responsibilities, personnel, equipment, and budgetary resources of the Department of Environmental Quality are transferred by Type II transfer to the Department of Natural Resources and Environment, including, but

not limited to, the authority, powers, duties, functions, and responsibilities of the Department of Environmental Quality under all of the following:

a. Sections 2b and 2d of 1855 PA 105, MCL 21.142b and 21.142d ("surplus funds in treasury").

b. The Property Rights Preservation Act, 1996 PA 101, MCL 24.421 to 24.425.

c. Fire Prevention Code, 1941 PA 207, MCL 29.1 to 29.34.

d. The Hazardous Materials Transportation Act, 1998 PA 138, MCL 29.472 to 29.480.

e. Section 8a of the Urban Cooperation Act of 1967, 1967 (Ex Sess) PA 7, MCL 124.508a.

f. Sections 7, 9, and 10 of the Land Bank Fast Track Act, 2003 PA 258, MCL 124.757, 124.759, and 124.760.

g. Section 10 of the Water Resource Improvement Tax Increment Finance Authority Act, 2008 PA 94, MCL 125.1780.

h. The Mobile Home Commission Act, 1987 PA 96, MCL 125.2301 to 125.2349.

i. The Brownfield Redevelopment Financing Act, 1996 PA 381, MCL 125.2651 to 125.2672.

j. The Safe Drinking Water Financial Assistance Act, 2000 PA 147, MCL 141.1451 to 141.1455.

k. Section 437 of the Michigan Business Tax Act, 2007 PA 436, MCL 208.1437.

l. Sections 9, 24, 34c, 34d, 53, 78g, and 78m of The General Property Tax Act, 1893 PA 206, MCL 211.9, 211.24, 211.34c, 211.34d, 211.53, 211.78g, and 211.78m.

m. Section 4 of 1951 PA 77, MCL 211.624 ("tax on low grade iron ore").

n. Sections 5 to 8 of 1963 PA 68, MCL 207.275 to 207.278 ("iron ore tax").

o. Section 811i of the Michigan Vehicle Code, 1949 PA 300, MCL 257.811i.

p. Section 204 of the Aeronautics Code of the State of Michigan, 1945 PA 327, MCL 259.204.

q. Section 423 of The Drain Code of 1956, 1956 PA 40, MCL 280.423.

r. Section 3 of the Julian-Stille Value-Added Act, 2000 PA 322, MCL 285.303.

s. Section 3 of 2008 PA 330, MCL 285.343 ("publication of information establishing alternative fuels facilities").

t. Section 4 of the Michigan Right to Farm Act, 1981 PA 93, MCL 286.474.

u. Section 14 of the Animal Industry Act, 1988 PA 466, MCL 287.714.

v. Sections 3, 6, 7, and 14 of the Privately Owned Cervidae Producers Marketing Act, 2000 PA 190, MCL 287.953, 287.956, 287.957, and 287.964.

w. Section 20 of the Grade A Milk Law of 2001, 2001 PA 266, MCL 288.490.

x. Sections 2 and 4 of the Michigan Agricultural Processing Act, 1998 PA 381, MCL 289.822 and 289.824

y. Section 7107 of the Food Law of 2000, 2000 PA 92, MCL 289.7107.

z. Sections 9j and 10d of the Motor Fuels Quality Act, 1984 PA 44, MCL 290.649j and 290.650d.

aa. The Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.101 to 324.90106.

bb. The Safe Drinking Water Act, 1976 PA 399, MCL 325.1001 to 325.1023.

cc. Sections 9601, 12103, 12501 to 12563, 12701 to 12771, 13501 to 13536, 13716, 13801 to 13831, and 16631 of the Public Health Code, 1978 PA 368, MCL 333.9601, 333.12103, 333.12501 to 333.12563, 333.12701 to 333.12771, 333.13501 to 333.13536, 333.13716, 333.13801 to 333.13831, and 333.16631.

dd. Low-Level Radioactive Waste Authority, 1987 PA 204, MCL 333.26201 to 333.26226.

ee. Section 3f of 1976 Initiated Law 1, MCL 445.573f ("beverage containers").

ff. Sections 27 and 77 of the Clean, Renewable, and Efficient Energy Act, 2008 PA 295, MCL 460.1027 and 460.1077.

gg. Sections 71 and 71a of the Condominium Act, 1978 PA 59, MCL 559.171 and 559.171a.

hh. Sections 105, 116 to 118, 194, and 254 of the Land Division Act, 1967 PA 288, MCL 560.105, 560.116 to 560.118, 560.194, and 560.254.

ii. Executive Order 1995-18, MCL 324.99903.

jj. Executive Order 1996-1, MCL 330.3101.

kk. Executive Order 1996-2, MCL 445.2001.

ll. Executive Order 1997-2, MCL 29.451.

mm. Executive Order 1997-3, MCL 324.99904.

nn. Executive Order 1998-2, MCL 29.461.

oo. Executive Order 2007-6, MCL 324.99905.

pp. Executive Order 2007-7, MCL 324.99906.

qq. Executive Order 2007-8, MCL 324.99907.

rr. Executive Order 2007-10, MCL 324.99908.

ss. Executive Order 2007-13, MCL 324.99909.

tt. Executive Order 2007-21, MCL 324.99911.

uu. Executive Order 2007-29, MCL 324.99912.

vv. Executive Order 2007-33, MCL 324.99913.

ww. Executive Order 2007-34, MCL 324.99914.

xx. Executive Order 2009-13, MCL 324.99915.

yy. Executive Order 2009-17, MCL 333.26365.

zz. Executive Order 2009-26, MCL 324.99918.

aaa. Executive Order 2009-28, MCL 333.26367.

bbb. Section 11117 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.11117, as transferred under Section IV.D. of this Order.

2. The powers, duties, functions, responsibilities, personnel, equipment, and budgetary resources of the Department of Environmental Quality transferred to the Department of Natural Resources and Environment under Section IV of this Order shall include, without limitation, the powers, duties, functions, responsibilities, personnel, equipment, and budgetary resources of the Department of Environmental Quality relating to invasive species management.

3. Except as otherwise provided in this Order, all of the authority, powers, duties, functions, responsibilities, rule-making authority, personnel, equipment, and budgetary resources of the Director of the Department of Environmental Quality are transferred to the Director of the Department of Natural Resources and Environment.

4. The Department of Environmental Quality is abolished.

5. After the effective date of this Order, statutory and other legal references to the Department of Environmental Quality shall be deemed references to the Department of Natural Resources and Environment.

B. Office of the Great Lakes

1. The Office of the Great Lakes created under Section 32903 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.32903, and subsequently transferred to the Department of Environmental Quality by Executive Order 1995-18, MCL 324.99903, is transferred by Type I transfer from the Department of Environmental Quality to the Department of Natural Resources and Environment.

2. The Director of the Office of the Great Lakes shall continue to serve as a member of the Governor's Cabinet.

C. Low-Level Radioactive Waste Authority

1. The Low-Level Radioactive Waste Authority, created within the Department of Management and Budget under Section 3 of the Low-Level Radioactive Waste Authority Act, 1987 PA 204, MCL 333.26203, and transferred to the Department of Commerce under Executive Order 1991-23, MCL 333.26251, and to the Department of Environmental Quality under Executive Order 1996-2, MCL 445.2001, is transferred by Type I transfer from the Department of Environmental Quality to the Department of Natural Resources and Environment.

2. The authority, powers, duties, and functions of the Commissioner of the Low-Level Radioactive Waste Authority are transferred by Type III transfer to

the Department of Natural Resources and Environment. The Director of the Department of Natural Resources and Environment, or his or her designee from within the Department, may perform the functions of the Commissioner of the Low-Level Radioactive Waste Authority or may administer the assigned functions of the Commissioner of the Low-Level Radioactive Waste Authority in other ways to promote efficient administration.

D. Site Review Board

1. The Site Review Board created within the Department of Environmental Quality under Section 11117 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.11117, is transferred by Type III transfer to the Department of Environmental Quality.

2. The Site Review Board is abolished.

V. DEPARTMENT OF AGRICULTURE

A. Michigan Commission of Agriculture

1. The Michigan Commission of Agriculture is transferred by Type II transfer to the Department of Agriculture. This paragraph does not affect the continued service or terms of office of the Michigan Commission of Agriculture.

2. Upon the effective date of this Order, the Director of the Department of Agriculture shall be the head of the Department. Consistent with Section 3 of Article V of the Michigan Constitution of 1963, after the effective date of this Order, any vacancy in the office of Director of the Department of Agriculture shall be filled by appointment of the Governor, subject to disapproval under Section 6 of Article V of the Michigan Constitution of 1963, and the Director of the Department of Agriculture shall serve at the pleasure of the Governor.

B. Agricultural Preservation Fund Board

1. The Agricultural Preservation Fund Board created within the Department of Agriculture under Section 36204 of the Natural Resources and Environmental Protection Act 1994 PA 451, MCL 324.36204, is transferred by Type III transfer to the Department of Agriculture.

2. The Agricultural Preservation Fund Board is abolished.

C. Michigan Family Farm Development Authority

1. The Michigan Family Farm Development Authority created within the Department of Agriculture under Section 3 of the Michigan Family Farm

Development Act, 1982 PA 220, MCL 285.253, is transferred by Type III transfer to the Department of Agriculture.

2. The Michigan Family Farm Development Authority is abolished.

D. Pesticide Advisory Committee

1. The Pesticide Advisory Committee created within the Department of Agriculture under Section 8326 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.8326, is transferred by Type III transfer to the Department of Agriculture.

2. The Pesticide Advisory Committee is abolished.

3. The Director of the Department of Agriculture may establish advisory workgroups, advisory councils, or other ad hoc committees to provide citizen and other public input and to advise the Director or the Department on the exercise of authority, powers, duties, functions, responsibilities vested in the Department of Agriculture, including, but not limited to, authority, powers, duties, functions, responsibilities vested in the Department of Agriculture under this Section V.D.

E. Office of Racing Commissioner

1. All of the authority, powers, duties, functions, records, personnel, property, unexpended balances of appropriations, allocations, or other funds of the Office of Racing Commissioner created within the Department of Agriculture under Section 3 of the Horse Racing Law of 1995, 1995 PA 279, MCL 431.303, are transferred from the Department of Agriculture to the Michigan Gaming Control Board, including, but not limited to, the authority, powers, duties, functions, records, personnel, property, independent balances of appropriations, allocations, or other funds under all of the following:

a. The Horse Racing Law of 1995, 1995 PA 279, MCL 431.301 to 431.336.

b. 1951 PA 90, MCL 431.252 to 431.257.

c. Section 12 of the Michigan Gaming Control and Revenue Act, 1996 IL 1, MCL 432.212.

d. Sections 4 and 5 of the Compulsive Gaming Prevention Act, 1997 PA 70, MCL 432.254 and 432.255.

2. The Office of Racing Commissioner and the position of Racing Commissioner are abolished.

3. The authority, powers, duties, functions, and personnel transferred under Section V.E. of this Order shall be performed under the direction and supervision of the Executive Director of the Michigan Gaming Control Board.

4. The Executive Director of the Michigan Gaming Control Board shall perform all the functions and exercise the powers of the Racing Commissioner, including, but not limited to, possessing the final authority over contested cases, licensing, and rule promulgation.

5. Except as otherwise provided in Section V.E. of this Order, the Executive Director of the Michigan Gaming Control Board shall provide executive direction and supervision for the implementation of all transfers under Section V.E. of this Order.

6. Internal organizational changes shall be made as may be administratively necessary to complete the realignment of responsibilities necessary under Section V.E. of this Order.

7. The authority, powers, duties, functions, and responsibilities transferred under Section V.E. of this Order shall be administered by the Executive Director of the Michigan Gaming Control Board in such ways as to promote efficient administration.

8. The Executive Director of the Michigan Gaming Control Board may in writing delegate a duty or power conferred on the Executive Director under Section V.E. of this Order or by other law, and the person to whom the duty or power is delegated may perform the duty or exercise the power at the time and to the extent that the duty or power is delegated by the Executive Director.

9. All records, property, grants, and unexpended balances of appropriations, allocations, and other funds used, held, employed, available, or to be made available to the Office of Racing Commissioner for the activities, powers, duties, functions, and responsibilities transferred under Section V.E. of this Order are transferred to the Michigan Gaming Control Board.

10. The State Budget Director shall determine and authorize the most efficient manner possible for handling financial transactions and records in the state's financial management system necessary for the implementation of Section V.E. of this Order.

11. Departments, agencies, and state officers within the executive branch of state government shall fully and actively cooperate with the Executive Director of the Michigan Gaming Control Board in the implementation of Section V.E. of this Order. The Executive Director may request the assistance of other departments, agencies, and state officers with respect to personnel, budgeting, procurement,

telecommunications, information systems, legal services, and other issues related to implementation of the transfers under Section V.E. of this Order, and the departments and agencies shall provide the assistance requested.

VI. DEPARTMENT OF ENERGY, LABOR, AND ECONOMIC GROWTH

A. Upon the effective date of this Order, the State Interagency Council on Spanish-Speaking Affairs created under Section 6 of 1975 PA 164, MCL 18.306, transferred to the Director of the Department of Career Development by Type III transfer under Executive Order 2000-5, MCL 18.311, and restored within the Department of Energy, Labor, and Economic Growth under Executive Order 2003-18, MCL 445.2011, shall consist of all of the following members:

1. The Attorney General or his or her designee from within the Department of Attorney General.

2. The Director of the Department of Agriculture or his or her designee from within the Department of Agriculture.

3. The Director of the Department of Civil Rights or his or her designee from within the Department of Civil Rights.

4. The Director of the Department of Community Health or his or her designee from within the Department of Community Health.

5. The Director of the Department of Corrections or his or her designee from within the Department of Corrections.

6. The Director of the Department of Human Services or his or her designee from within the Department of Human Services.

7. The Director of the Department of Information Technology or his or her designee from within the Department of Information Technology.

8. The Director of the Department of Energy, Labor, and Economic Growth or his or her designee from within the Department of Energy, Labor, and Economic Growth.

9. The Director of the Department of Management and Budget or his or her designee from within the Department of Management and Budget.

10. The Director of the Department of Natural Resources and Environment or his or her designee from within the Department of Natural Resources and Environment.

11. The Executive Director of the Women's Commission.

12. The Executive Director of the Michigan State Housing Development Authority or his or her designee from within the Michigan State Housing Development Authority.

13. The President of the Michigan Strategic Fund or his or her designee from within the Michigan Strategic Fund.

14. The State Personnel Director or his or her designee from within the Civil Service Commission.

15. The State Treasurer or his or her designee from within the Department of Treasury.

16. The Secretary of State or his or her designee from within the Department of State.

17. The Superintendent of Public Instruction or his or her designee from within the Department of Education.

VII. IMPLEMENTATION OF TRANSFERS TO DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT

A. The Governor shall designate an individual to serve as the Transition Manager for the implementation of transfers to the Department of Natural Resources and Environment. The Transition Manager shall immediately initiate coordination with departments and agencies within the executive branch of state government to facilitate the transfers to the Department under this Order. State departments and agencies shall actively cooperate with the transition manager as the Transition Manager performs duties and functions relating to the implementation of this Order. Except as otherwise provided in this Order, the transition manager shall provide executive direction and supervision for the implementation of the transfers to the Department under this Order.

B. The functions transferred to the Department of Natural Resources and Environment under this Order shall be administered under the direction and supervision of the Director of the Department.

C. The Director of the Department of Natural Resources and Environment shall administer the assigned functions transferred to the Department under this Order in such ways as to promote efficient administration and shall make internal organizational changes as may be administratively necessary to complete the realignment of responsibilities under this Order based upon initial recommendations from the transition manager.

D. Except as otherwise provided in this Order, any authority, duties, powers, functions, and responsibilities transferred to the Department of Natural

Resources and Environment under this Order, and not otherwise mandated by law, may in the future be reorganized to promote efficient administration by the Director of the Department.

E. Any records, personnel, property, and unexpended balances of appropriations, allocations, and other funds used, held, employed, available, or to be made available to any entity for the authority, activities, powers, duties, functions, and responsibilities transferred to the Department of Natural Resources and Environment under this Order are transferred to the Department of Natural Resources and Environment.

VIII. MISCELLANEOUS

A. The State Budget Director shall determine and authorize the most efficient manner possible for handling financial transactions and records in this state's financial management system necessary to implement this Order.

B. Any suit, action, or other proceeding lawfully commenced by, against, or before any entity affected by this Order shall not abate by reason of the taking effect of this Order. Any suit, action, or other proceeding may be maintained by, against, or before the appropriate successor of any entity affected by this Order.

C. All rules, regulations, orders, contracts, and agreements relating to the functions transferred under this Order lawfully adopted prior to the effective date of this Order shall continue to be effective until revised, amended, repealed, or rescinded.

D. This Order shall not abate any criminal action commenced by this state prior to the effective date of this Order.

E. The invalidity of any portion of this Order shall not affect the validity of the remainder of the Order, which may be given effect without any invalid portion. Any portion of this Order found invalid by a court or other entity with proper jurisdiction shall be severable from the remaining portions of this Order.

In fulfillment of the requirements of Section 2 of Article V of the Michigan Constitution of 1963, the provisions of this Executive Order, except for Section IV.D. of this Order, are effective January 17, 2010 at 12:01 a.m. Section IV.D of this Order is effective 60 calendar days after the filing of this Order, consistent with Section 2 of Article V of the Michigan Constitution of 1963.

Given under my hand and the Great Seal of the State of Michigan this 8th day of October in the year of our Lord, two thousand nine.

_____

JENNIFER M. GRANHOLM
GOVERNOR

BY THE GOVERNOR:

_____

SECRETARY OF STATE

Exhibit 7

RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
EXECUTIVE OFFICE
LANSING

BRIAN CALLEY
LT. GOVERNOR

EXECUTIVE ORDER
NO. 2011-1

EXECUTIVE REORGANIZATION
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT

CREATING THE
DEPARTMENT OF NATURAL RESOURCES AND
DEPARTMENT OF ENVIRONMENTAL QUALITY

WHEREAS, Section 1 of Article V of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the Governor; and

WHEREAS, Section 2 of Article V of the Michigan Constitution of 1963 empowers the Governor to make changes in the organization of the executive branch or in the assignment of functions among its units that the Governor considers necessary for efficient administration; and

WHEREAS, Section 8 of Article V of the Michigan Constitution of 1963 provides that each principal department of state government shall be under the supervision of the Governor, unless otherwise provided in the Constitution; and

WHEREAS, Section 52 of Article IV of the Michigan Constitution of 1963 declares the conservation and development of the natural resources of this state to be of paramount public concern in the interest of the health, safety, and general welfare of the people; and

WHEREAS, it is necessary in the interests of efficient administration and effectiveness of government to change the organization of the executive branch of state government by dividing the functions of the Department of Natural Resources and Environment between two newly created departments;

NOW THEREFORE, I, Richard D. Snyder, Governor of the state of Michigan, by virtue of the power and authority vested in the Governor by the Michigan Constitution of 1963 and Michigan law, order the following:

I. DEFINITIONS

As used in this Order:

A. "Civil Service Commission" means the commission required under Section 5 of Article XI of the Michigan Constitution of 1963.

B. "Department of Environmental Quality" means the principal department of state government created under Section IV of this Order.

C. "Department of Technology Management and Budget" means the principal department of state government created under Section 121 of The Management and Budget Act, 1984 PA 431, MCL 18.1121, as amended by Executive Order 2001-3 and Executive Order 2009-55.

D. "Department of Natural Resources" means the principal department of state government created under Section III of this Order.

E. "Department of Natural Resources and Environment" or "Department" means the principal department of state government created under Section II of Executive Order 2009-45.

F. "Department of Treasury" means the principal department of state government created under Section 75 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.175.

G. "Environmental Science Review Boards" means the boards provided for under Section II.C. of Executive Order 2009-45.

H. "Natural Resources Commission" means the commission provided for under Section II.B. of Executive Order 2009-45.

I. "State Budget Director" means the individual appointed by the Governor pursuant to Section 321 of The Management and Budget Act, 1984 PA 431, MCL 18.1321.

J. "Type I transfer" means that phrase as defined in Section 3 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.103.

K. "Type II transfer" means that phrase as defined in Section 3 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.103.

L. "Type III transfer" means that phrase as defined in Section 3 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.103.

II. ABOLISHMENT OF THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT

A. The Department of Natural Resources and Environment created by Section II of Executive Order 2009-45 is abolished.

B. The powers, duties, functions, responsibilities, personnel, equipment, and unexpended appropriations of the Department of Natural Resources and Environment are transferred as provided in this Order.

III. CREATION OF THE DEPARTMENT OF NATURAL RESOURCES

A. Establishment of the Department of Natural Resources as a Principal Department in the Executive Branch

1. The Department of Natural Resources is created as a principal department in the executive branch. The Department shall protect, conserve and manage the natural resources of this state.

2. The Director of the Department of Natural Resources shall be the head of the Department.

B. Natural Resources Commission

1. The Natural Resources Commission is transferred by Type II transfer from the Department of Natural Resources and Environment to the Department of Natural Resources. This paragraph does not affect the continued service or terms of office of the current members of the Natural Resources Commission.

2. The Governor shall designate a member of the Natural Resources Commission to serve as its Chairperson at the pleasure of the Governor. The Commission may select a member of the Commission to serve as Vice-Chairperson of the Commission.

3. The Natural Resources Commission shall have and continue to exercise the authority, powers, duties, functions, and responsibilities previously vested in it under all of the following:

a. Part 435 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.43501 to 324.43561.

b. Section 40111a of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.40111a.

c. Section 40113a of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.40113a.

4. The Natural Resources Commission shall utilize administrative law judges and hearing officers employed by the State Office of Administrative Hearings and Rules created by Executive Order 2005-1, MCL 445.2021, to conduct contested case hearings and to issue proposals for decisions as provided by law or rule.

5. The Natural Resources Commission shall advise the Director of the Department of Natural Resources on matters related to natural resources and conservation and may perform additional duties as provided by this Order, other law, or as requested by the Governor.

6. Members of the Natural Resources Commission shall serve without compensation. Members of the Commission may receive reimbursement for necessary travel and expenses consistent with relevant statutes and the rules and procedures of the Civil Service Commission and the Department of Technology Management and Budget, subject to available funding.

C. Director of the Department of Natural Resources

1. The Director of the Department of Natural Resources shall be appointed by the Governor and shall serve at the pleasure of the Governor.

2. The Director of the Department of Natural Resources shall establish the internal organization of the Department and allocate and reallocate duties and functions to promote economic and efficient administration and operation of the Department. The Director of the Department of Natural Resources shall supervise the staff of the Department and shall be responsible for its day-to-day operations.

3. The Director of the Department of Natural Resources may promulgate rules as may be necessary to carry out functions vested in the Director under this Order or other law in accordance with the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

4. The Director of the Department of Natural Resources shall utilize administrative law judges and hearing officers employed by the State Office of Administrative Hearings and Rules created by Executive Order 2005-1, MCL 445.2021, to conduct contested case hearings and to issue proposals for decisions as provided by law or rule.

5. The position of the Director of the Department of Natural Resources and Environment as a member or chairperson of all of the following boards or commissions is transferred to the Director of the Department of Natural Resources:

a. Ex officio member of the Michigan Historical Commission under Section 1 of the Michigan Historical Commission Act, 1913 PA 271, MCL 399.1.

b. Member of the Michigan Freedom Trail Commission under Section 3 of the Michigan Freedom Trail Commission Act, 1998 PA 409, MCL 399.83.

c. Ex officio member of the Michigan Public Safety Communications System Advisory Board created under Executive Order 2005-8.

d. Member and Chairperson of the Michigan Commission on the Commemoration of the Bicentennial of the War of 1812 created by Executive Order 2007-51.

e. Non-voting member of the Complete Streets Advisory Council, 2010 PA 135, MCL 247.660p(6)(q).

D. Transfers from the Department of Natural Resources and Environment to the Department of Natural Resources

1. Except as otherwise provided in this Order, all of the authority, powers, duties, functions, responsibilities, personnel, equipment, property, and unexpended appropriations of the Department of Natural Resources and Environment that were transferred to it from the former Department of Natural Resources by Executive Order 2009-45, are transferred by Type II transfer to the Department of Natural Resources, including, but not limited to, the authority, powers, duties, functions, and responsibilities under all of the following:

a. 1974 PA 359, MCL 3.901 to 3.910 ("Sleeping Bear Dunes National Lakeshore").

b. The Executive Organization Act of 1965, 1965 PA 380, MCL 16.350 to 16.360.

c. The Property Rights Preservation Act, 1996 PA 101, MCL 24.421 to 24.425.

d. Section 4c of 1913 PA 172, MCL 32.224c ("Crawford County land").

e. Section 48 of the State Employees' Retirement Act, 1943 PA 240, MCL 38.48.

f. Section 8b of the Township and Village Public Improvement and Public Service Act, 1923 PA 116, MCL 41.418b.

g. Section 26 of The Home Rule Village Act, 1909 PA 278, MCL 78.26.

h. Section 10 of 1957 PA 185, MCL 123.740 ("county department and board of public works").

i. 1990 PA 182, MCL 141.1301 to 141.1304 ("county redistribution of federal payments").

j. Sections 7g and 7jj of The General Property Tax Act, 1893 PA 206, MCL 211.7g and MCL 211.7jj.

k. 1943 PA 92, MCL 211.371 to 211.375 ("withholding lands from sale").

l. Section 18 of 1909 PA 283, MCL 224.18 ("public highways and private roads").

m. Sections 3 and 4 of 1927 PA 341, MCL 247.43 and 247.44 ("discontinuation of highway bordering lake or stream").

n. Section 4 of 1941 PA 359, MCL 247.64 ("noxious weeds").

o. Sections 602a and 660 of the Michigan Vehicle Code, 1949 PA 300, MCL 257.602a and 257.660.

p. Section 4 of the Michigan Aquaculture Development Act, 1996 PA 199, MCL 286.874.

q. 1976 PA 308, MCL 287.251 to 287.258 ("disposal of livestock").

r. Section 14 of the Animal Industry Act, 1988 PA 466, MCL 287.714.

s. Privately Owned Cervidae Producers Marketing Act, 2000 PA 190, MCL 287.951 to 287.969.

t. 1986 PA 109, MCL 300.21 to 300.22 ("conservation officers").

u. The Right to Forest Act, 2002 PA 676, MCL 320.2031 to 320.2036.

v. The Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.101 to 324.90106.

w. The Clean Michigan Initiative Act, 1998 PA 284, MCL 324.95101 to 324.95108.

x. 2008 PA 290, MCL 324.95151 to 324.95155 ("control of gray wolves").

y. 2008 PA 318, MCL 324.95161 to 324.95167 ("removal, capture, or lethal control of gray wolf").

z. The Michigan Civilian Conservation Corps Act, 1984 PA 22, MCL 409.301 to 409.314.

aa. Sections 167a and 167c of The Michigan Penal Code, 1931 PA 328, MCL 750.167a and 750.167c.

bb. Section 7 of the Hazardous Materials Transportation Act, 1998 PA 138, MCL 29.477.

cc. Executive Order 1973-2, MCL 299.11.

dd. Executive Order 1973-12, MCL 125.241.

ee. Executive Order 1988-4, MCL 299.12.

ff. Executive Order 1991-31, MCL 299.13.

gg. Executive Order 1995-7, MCL 324.99901.

hh. Executive Order 2004-3, MCL 287.981.

ii. Executive Order 2007-14, MCL 324.99910.

jj. Executive Order 2009-14, MCL 324.99916.

kk. Executive Order 2009-15, MCL 324.99917.

2. **Mackinac Island State Park Commission.** The Mackinac Island State Park Commission provided for under 1958 PA 201, MCL 318.201 to 318.208, transferred under Section 256 of the Executive Organization Act of 1965, 1965 PA 380, MCL 16.356, and created by Section 76503 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.76503, transferred to the Department of Natural Resources under Executive Order 2009-36, and transferred to the Department of Natural Resources and Environment by Executive Order 2009-45, is transferred by Type I transfer to the Department of Natural Resources. This transfer includes, but is not limited to, the authority, powers, duties, functions, and responsibilities of the Commission under all of the following:

a. Sections 76501 to 76509, 76701 to 76709, 76901 to 76903, 77101, 77301, 77302, 77701 to 77704, and 77901 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.76501 to 324.76509, 324.76701 to 324.76709, 324.76901 to 324.76903, 324.77101, 324.77301, 324.77302, 324.77701 to 324.77704, and 324.77901.

b. Section 511 of the Michigan Liquor Control Code of 1998, 58 PA 1998, MCL 436.1511.

3. **Michigan Forest Finance Authority.** The Michigan Forest Finance Authority created under Section 50503 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.50503, and transferred to the Department of Natural Resources and Environment by Executive Order 2009-45, is transferred by Type I transfer to the Department of Natural Resources. The position of the Director of the Department of Natural Resources and Environment or his or her designee from within that Department as a member of the Board of Directors of the Michigan Forest Finance Authority under Section 50504 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.50504, is transferred to the Director of the Department of Natural Resources or his or her designee from within that Department.

4. **Michigan Natural Resources Trust Fund Board.** The Michigan Natural Resources Trust Fund Board, created under Section 1905 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.1905, and transferred to the Department of Natural Resources and Environment by Executive Order 2009-45, is transferred by Type I transfer to the Department of Natural Resources. The position of the Director of the Department of Natural Resources and Environment as a member of the Michigan Natural Resources Trust Fund Board under Section 1905 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.1905, is transferred to the Director of the Department of Natural

Resources or his or her designee from within the Department, including, but not limited to, a member of the Natural Resources Commission.

IV. CREATION OF DEPARTMENT OF ENVIRONMENTAL QUALITY

A. Establishment of the Department of Environmental Quality as a Principal Department in the Executive Branch

1. The Department of Environmental Quality is created as a principal department in the executive branch. The Department shall protect the environment of this state.

2. The head of the Department of Environmental Quality shall be the director, who shall be appointed by the Governor with the advice and consent of the Senate, and shall serve at the pleasure of the Governor.

B. Director of the Department of Environmental Quality

1. The Director of the Department of Environmental Quality shall establish the internal organization of the Department and allocate and reallocate duties and functions to promote economic and efficient administration and operation of the Department. The Director of the Department of Environmental Quality shall supervise the staff of the Department and shall be responsible for its day-to-day operations.

2. The Director of the Department of Environmental Quality may promulgate rules as may be necessary to carry out functions vested in the Director under this Order or other law in accordance with the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

3. The Director of the Department of Environmental Quality shall utilize administrative law judges and hearing officers employed by the State Office of Administrative Hearings and Rules created by Executive Order 2005-1, MCL 445.2021, to conduct contested case hearings and to issue proposals for decisions as provided by law or rule.

4. The Director of the Department of Environmental Quality may from time to time create one or more environmental science review boards to advise the Department of Environmental Quality and the Governor on scientific issues affecting the protection and management of Michigan's environment and natural resources, or affecting a program administered by the Department of Environmental Quality.

5. The position of the Director of the Department of Natural Resources and Environment as a member or chairperson of all of the following boards or commissions is transferred to the Director of the Department of Environmental Quality:

a. Member of the Michigan Supply Chain Management Development Commission created within the Department of Treasury under Section 3 of 2008 PA 398, MCL 125.1893. Nothing in this paragraph shall be construed to authorize the use of

state funds for the operations of the Michigan Supply Chain Management Development Commission.

b. Member and Chairperson of the Brownfield Redevelopment Board created under Section 20104a of the Natural Resources and Protection Act, 1994 PA 451, MCL 324.20104a, as modified by Executive Order 2003-18, MCL 445.2011, and Executive Order 2006-13, MCL 125.1991.

c. Ex officio member of the State Plumbing Board created within the Department of Energy, Labor, and Economic Growth under Section 13 of the State Plumbing Act, 2002 PA 733, MCL 338.3523.

d. Member of the Michigan Homeland Protection Board created within the Department of State Police under Executive Order 2003-6.

e. Member of the Michigan Citizen-Community Emergency Response Coordinating Council created within the Department of State Police under Executive Order 2007-18.

f. Member of the Great Lakes Wind Council created within the Department of Energy, Labor, and Economic Growth under Executive Order 2009-1.

C. Transfers from the Department of Natural Resources and Environment to the Department of Environmental Quality

1. Except as otherwise provided in this Order, all of the authority, powers, duties, functions, responsibilities, personnel, equipment, and unexpended appropriations of the Department of Natural Resources and Environment that were transferred to it from the former Department of Environmental Quality by Executive Order 2009-45, are transferred by Type II transfer to the Department of Environmental Quality, including, but not limited to, the authority, powers, duties, functions, and responsibilities under all of the following:

a. Sections 2b and 2d of 1855 PA 105, MCL 21.142b and 21.142d ("surplus funds in treasury").

b. The Property Rights Preservation Act, 1996 PA 101, MCL 24.421 to 24.425.

c. The Fire Prevention Code, 1941 PA 207, MCL 29.1 to 29.34.

d. The Hazardous Materials Transportation Act, 1998 PA 138, MCL 29.472 to 29.480.

e. Section 8a of the Urban Cooperation Act of 1967, 1967 (Ex Sess) PA 7, MCL 124.508a.

f. Sections 7, 9, and 10 of the Land Bank Fast Track Act, 2003 PA 258, MCL 124.757, 124.759, and 124.760.

g. Section 10 of the Water Resource Improvement Tax Increment Finance Authority Act, 2008 PA 94, MCL 125.1780.

h. The Mobile Home Commission Act, 1987 PA 96, MCL 125.2301 to 125.2349.

i. The Brownfield Redevelopment Financing Act, 1996 PA 381, MCL 125.2651 to 125.2672.

j. The Safe Drinking Water Financial Assistance Act, 2000 PA 147, MCL 141.1451 to 141.1455.

k. Section 437 of the Michigan Business Tax Act, 2007 PA 436, MCL 208.1437.

l. Sections 9, 24, 34c, 34d, 53, 78g, and 78m of The General Property Tax Act, 1893 PA 206, MCL 211.9, 211.24, 211.34c, 211.34d, 211.53, 211.78g, and 211.78m.

m. Section 4 of 1951 PA 77, MCL 211.624 ("tax on low grade iron ore").

n. Sections 5 to 8 of 1963 PA 68, MCL 207.275 to 207.278 ("iron ore tax").

o. Section 811i of the Michigan Vehicle Code, 1949 PA 300, MCL 257.811i.

p. Section 204 of the Aeronautics Code of the State of Michigan, 1945 PA 327, MCL 259.204.

q. Section 423 of The Drain Code of 1956, 1956 PA 40, MCL 280.423.

r. Section 3 of the Julian-Stille Value-Added Act, 2000 PA 322, MCL 285.303.

s. Section 3 of 2008 PA 330, MCL 285.343 ("publication of information establishing alternative fuels facilities").

t. Section 4 of the Michigan Right to Farm Act, 1981 PA 93, MCL 286.474.

u. Section 14 of the Animal Industry Act, 1988 PA 466, MCL 287.714.

v. Sections 3, 6, 7, and 14 of the Privately Owned Cervidae Producers Marketing Act, 2000 PA 190, MCL 287.953, 287.956, 287.957, and 287.964.

w. Section 20 of the Grade A Milk Law of 2001, 2001 PA 266, MCL 288.490.

x. Sections 2 and 4 of the Michigan Agricultural Processing Act, 1998 PA 381, MCL 289.822 and 289.824.

y. Section 7107 of the Food Law of 2000, 2000 PA 92, MCL 289.7107.

z. Sections 9j and 10d of the Motor Fuels Quality Act, 1984 PA 44, MCL 290.649j and 290.650d.

aa. The Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.101 to 324.90106.

bb. The Safe Drinking Water Act, 1976 PA 399, MCL 325.1001 to 325.1023.

cc. Sections 9601, 12103, 12501 to 12563, 12701 to 12771, 13501 to 13536, 13716, 13801 to 13831, and 16631 of the Public Health Code, 1978 PA 368, MCL 333.9601, 333.12103, 333.12501 to 333.12563, 333.12701 to 333.12771, 333.13501 to 333.13536, 333.13716, 333.13801 to 333.13831, and 333.16631.

dd. The Low-Level Radioactive Waste Authority Act, 1987 PA 204, MCL 333.26201 to 333.26226.

ee. Section 3f of 1976 Initiated Law 1, MCL 445.573f ("beverage containers").

ff. Sections 27 and 77 of the Clean, Renewable, and Efficient Energy Act, 2008 PA 295, MCL 460.1027 and 460.1077.

gg. Sections 71 and 71a of the Condominium Act, 1978 PA 59, MCL 559.171 and 559.171a.

hh. Sections 105, 116 to 118, 194, and 254 of the Land Division Act, 1967 PA 288, MCL 560.105, 560.116 to 560.118, 560.194, and 560.254.

ii. Executive Order 1995-18, MCL 324.99903.

jj. Executive Order 1996-1, MCL 330.3101.

kk. Executive Order 1996-2, MCL 445.2001.

ll. Executive Order 1997-2, MCL 29.451.

mm. Executive Order 1997-3, MCL 324.99904.

nn. Executive Order 1998-2, MCL 29.461.

oo. Executive Order 2007-6, MCL 324.99905.

pp. Executive Order 2007-7, MCL 324.99906.

qq. Executive Order 2007-8, MCL 324.99907.

rr. Executive Order 2007-10, MCL 324.99908.

ss. Executive Order 2007-13, MCL 324.99909.

tt. Executive Order 2007-21, MCL 324.99911.

uu. Executive Order 2007-29, MCL 324.99912.

vv. Executive Order 2007-33, MCL 324.99913.

ww. Executive Order 2007-34, MCL 324.99914.

xx. Executive Order 2009-13, MCL 324.99915.

yy. Executive Order 2009-17, MCL 333.26365.

zz. Executive Order 2009-26, MCL 324.99918.

aaa. Executive Order 2009-28, MCL 333.26367.

bbb. Section 7 of the Hazardous Materials Transportation Act, 1998 PA 138, MCL 29.477.

ccc. The Great Lakes Water Quality Bond Authorization Act, 2002 PA 396, MCL 324.95201 to 324.95208, to the extent that functions under or related to that act are currently performed by the Department of Natural Resources and Environment.

2. Office of the Great Lakes. The Office of the Great Lakes created under Section 32903 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.32903, subsequently transferred to the Department of Environmental Quality by Executive Order 1995-18, MCL 324.99903, and transferred by Type I transfer to the Department of Natural Resources and Environment by Executive Order 2009-45, is transferred by Type I transfer to the Department of Environmental Quality. The Director of the Office of the Great Lakes shall continue to serve as a member of the Governor's Cabinet.

3. Low-Level Radioactive Waste Authority. The Low-Level Radioactive Waste Authority, created within the Department of Management and Budget under Section 3 of the Low-Level Radioactive Waste Authority Act, 1987 PA 204, MCL 333.26203, transferred to the Department of Commerce under Executive Order 1991-23, MCL 333.26251, and to the Department of Environmental Quality under Executive Order 1996-2, MCL 445.2001, and

transferred to the Department of Natural Resources and Environment by Executive Order 2009-45, is transferred by Type I transfer to the Department of Environmental Quality.

V. MISCELLANEOUS TRANSFERS

A. References to the Department of Natural Resources and Environment in the following public acts adopted since Executive Order 2009-45 became effective shall be to the Department of Natural Resources created by this Order:

1. 2010 PA 35

2. 2010 PA 46

3. 2010 PA 70

B. References to the Department of Natural Resources and Environment in the following public acts adopted since Executive Order 2009-45 became effective shall be to the Department of Environmental Quality created by this Order:

1. 2010 PA 229

2. 2010 PA 231

3. 2010 PA 232

VI. IMPLEMENTATION OF TRANSFERS TO THE DEPARTMENT OF NATURAL RESOURCES AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY

A. The Director of the Department of Natural Resources and Environment shall immediately initiate coordination with departments and agencies within the executive branch of state government to facilitate the transfers made under this Order. State departments and agencies shall actively cooperate with the Director of the Department of Natural Resources and Environment as the Director performs duties and functions relating to the implementation of this Order. Except as otherwise provided in this Order, the Director of the Department of Natural Resources and Environment shall provide executive direction and supervision for the implementation of the transfers made by this Order.

B. The Director of the Department of Natural Resources shall administer the assigned functions transferred to that Department under this Order in such ways as to promote efficient administration and shall make internal organizational changes as may be administratively necessary to complete the realignment of responsibilities under this Order.

C. The Director of the Department of Environmental Quality shall administer the assigned functions transferred to that Department under this Order in such ways as to promote efficient administration and shall make internal organizational changes as may be administratively necessary to complete the realignment of responsibilities under this Order.

D. Any records, personnel, property, and unexpended balances of appropriations, allocations, and other funds used, held, employed, available, or to be made available to any entity for the authority, activities, powers, duties, functions, and responsibilities transferred by this Order are transferred to the Department of Natural Resources and the Department of Environmental Quality along with the transferred functions.

E. The State Budget Director shall determine and authorize the most efficient manner possible for handling financial transactions and records in this state's financial management system necessary to implement this Order.

F. Any suit, action, or other proceeding lawfully commenced by, against, or before any entity affected by this Order shall not abate by reason of the taking effect of this Order. Any suit, action, or other proceeding may be maintained by, against, or before the appropriate successor of any entity affected by this Order.

G. All rules, regulations, orders, contracts, and agreements relating to the functions transferred under this Order lawfully adopted prior to the effective date of this Order shall continue to be effective until revised, amended, repealed, or rescinded.

H. This Order shall not abate any criminal action commenced by this state prior to the effective date of this Order.

I. The invalidity of any portion of this Order shall not affect the validity of the remainder of the Order, which may be given effect without any invalid portion. Any portion of this Order found invalid by a court or other entity with proper jurisdiction shall be severable from the remaining portions of this Order.

This Executive Order shall become effective on March 13, 2011, consistent with Section 2 of Article V of the Michigan Constitution of 1963.

Given under my hand and the Great Seal of the state of Michigan this 4th day of January in the year of our Lord, two thousand eleven.

RICHARD D. SNYDER
GOVERNOR

BY THE GOVERNOR:

SECRETARY OF STATE

FILED WITH SECRETARY OF STATE
ON 01-04-11 AT 2:34 pm

Exhibit 8

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2019-02

Department of Environmental Quality
Department of Licensing and Regulatory Affairs
Department of Natural Resources
Department of Technology, Management, and Budget

Department of Environment, Great Lakes, and Energy

Executive Reorganization

Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.

Section 2 of article 5 of the Michigan Constitution of 1963 empowers the governor to make changes in the organization of the executive branch of state government or in the assignment of functions among its units that the governor considers necessary for efficient administration.

State government needs a principal department focused on improving the quality of Michigan's air, land, and water, protecting public health, and encouraging the use of clean energy. That department should serve as a full-time guardian of the Great Lakes, our freshwater, and our public water supplies.

Michigan state government can better administer the implementation of administrative rules and the conduct of administrative hearings—particularly those that protect Michigan's air, land, and water, and the public health—by consolidating state functions and responsibilities relating to administrative hearings and rules.

Overly bureaucratic organizations within state government can hinder the state's response to threats to the environment and public health and detract from good government.

It is necessary in the interests of efficient administration and effectiveness of government to change the organization of the executive branch of state government.

Acting pursuant to the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Establishing the Department of Environment, Great Lakes, and Energy

(a) Renaming the Department of Environmental Quality

(1) The Department of Environmental Quality is renamed the Department of Environment, Great Lakes, and Energy (the "Department").

(2) After the effective date of this order, a reference to the Department of Environmental Quality will be deemed to be a reference to the Department.

(3) After the effective date of this order, a reference to the director of the Department of Environmental Quality will be deemed to be a reference to the director of the Department.

(b) Interagency Environmental Justice Response Team

(1) The Interagency Environmental Justice Response Team (the "Response Team") is created as an advisory body within the Department, consisting of the following members:

(A) The director of the Department, or the director's designee from within the Department.

(B) The director of the Department of Agriculture and Rural Development, or the director's designee from within that department.

(C) The executive director of the Department of Civil Rights, or the executive director's designee from within that department.

(D) The director of the Department of Health and Human Services, or the director's designee from within that department.

(E) The director of the Department of Natural Resources, or the director's designee within that department.

(F) The president of the Michigan Strategic Fund, or the president's designee from within the Michigan Strategic Fund.

(G) The director of the Department of Transportation, or the director's designee from within that department.

(H) The chairperson of the Public Service Commission, or the chairperson's designee from within the Public Service Commission.

(2) The members of the Response Team are ex officio members.

(3) The director of the Department, or the director's designee from within the Department, is designated as the chairperson of the Response Team.

(4) The Response Team shall act in an advisory capacity with the goal of assuring that all Michigan residents benefit from the same protections from environmental hazards, and do all the following:

(A) Assist the Department in developing, implementing, and regularly updating a statewide environmental justice plan (the "Plan").

(B) Identify and make recommendations to address discriminatory public health or environmental effects of state laws, regulations, policies, and activities on Michigan residents, including an examination of disproportionate impacts.

(C) Develop policies and procedures for use by state departments and agencies, including collaborative problem-solving, to assist in assuring that environmental justice principles are incorporated into departmental and agency decision-making and practices.

(D) Recommend mechanisms for members of the public, communities, tribal governments, and groups, including disproportionately-burdened communities, to assert adverse or disproportionate social, economic, or environmental impact upon a community and request responsive state action.

(E) Make recommendations to ensure consistency with federal environmental justice programs and recommend specific mechanisms for monitoring and measuring the effects of implementing the Plan.

(F) Identify state departments and agencies that could benefit from the development of a departmental or agency environmental justice plan.

(G) Assist in the development of departmental or agency environmental justice plans and review the plans for consistency with the state environmental justice plan.

(H) Recommend measures to integrate and coordinate the actions of state departments to further the promotion of environmental justice in this state.

(I) Recommend environmental justice performance goals and measures for the Department and other state departments and agencies with departmental or agency environmental justice plans.

(J) Review the progress of the Department and other departments and agencies with environmental justice plans in complying with the plan and promoting environmental justice.

(K) Interact with tribal governments regarding environmental justice issues.

(L) Work to achieve Michigan's goal of becoming a national leader in achieving environmental justice.

(M) Make recommendations to improve environmental justice training for state and local officials and employees.

(N) Review best practices to enhance community environmental quality monitoring.

(O) Recommend changes in Michigan law.

(P) Perform other advisory duties as requested by the director of the Department or the governor.

(5) The following provisions apply to the operations of the Response Team:

(A) The Department shall assist the Response Team in the performance of its duties and provide personnel to staff the Response Team, subject to available funding. The budgeting, procurement, and related management functions of the Response Team will be performed under the direction and supervision of the director of the Department.

(B) The Response Team shall adopt procedures, consistent with this order and applicable law, governing its organization and operations. The Response Team should actively solicit public involvement in its activities.

(C) A majority of the members of the Response Team serving constitutes a quorum for the transaction of the business of the Response Team. The Response Team must act by a majority vote of its serving members.

(D) The Response Team shall meet at the call of its chairperson and as otherwise provided in procedures adopted by the Response Team.

(E) The Response Team may establish advisory workgroups composed of individuals or entities participating in Response Team activities or other members of the public as deemed necessary by the Response Team to assist the Response Team in performing its duties and responsibilities. The Response Team may adopt, reject, or modify any recommendations proposed by an advisory workgroup.

(F) The Response Team may, as appropriate, make inquiries, studies, investigations, hold hearings, and receive comments from the public. The Response Team also may consult with outside experts in order to perform its duties, including experts in the private sector, organized labor, government agencies, and at institutions of higher education.

(G) The Response Team may hire or retain contractors, sub-contractors, advisors, consultants, and agents, and may make and enter into

contracts necessary or incidental to the exercise of the powers of the Response Team and the performance of its duties as the director deems advisable and necessary, consistent with this order and applicable law, rules and procedures, subject to available funding.

(H) The Response Team may accept donations of labor, services, or other things of value from any public or private agency or person. Any donations shall be received and used in accordance with law.

(6) All departments, committees, commissioners, or officers of this state shall give to the Response Team, or to any member or representative of the Response Team, any necessary assistance required by the Response Team, or any member or representative of the Response Team, in the performance of the duties of the Response Team so far as is compatible with their duties and consistent with this order and applicable law. Free access also must be given to any books, records, or documents in their custody relating to matters within the scope of inquiry, study, or review of the Response Team, consistent with applicable law.

(7) Executive Directive 2018-3 is rescinded in its entirety. The Environmental Justice Interagency Work Group described in Executive Directive 2018-3 is abolished. The position of Environmental Justice Ombudsman described in Executive Directive 2018-3 is abolished.

(c) Office of the Clean Water Public Advocate

(1) The Office of the Clean Water Public Advocate is created as a Type I agency within the Department.

(2) The director of the Department shall appoint the Clean Water Public Advocate, who will be the head of the Office of the Clean Water Public Advocate.

(3) The Clean Water Public Advocate shall do all the following:

(A) Accept and investigate complaints and concerns related to drinking water quality within the State of Michigan.

(B) Establish complaint, investigatory, informational, educational, and referral procedures and programs relating to drinking water quality, coordinating with existing programs where feasible.

(C) Establish a statewide uniform reporting system to collect and analyze complaints about drinking water quality for the purpose of publicizing improvements and significant problems, coordinating with existing programs where feasible.

(D) Assist the Department, or other departments or agencies, in the resolution of complaints where necessary or appropriate.

(E) Assist in the development, and monitor the implementation, of state and federal laws, rules, and regulations relating to drinking water quality.

(F) Recommend changes in state and federal law, rules, regulations, policies, guidelines, practices, and procedures relating to drinking water quality.

(G) Cooperate with persons and public or private agencies and undertake or participate in conferences, inquiries, meetings, or studies that may lead to improvements in drinking water quality in this state.

(H) Publicize the activities of the Office of the Clean Water Public Advocate, as appropriate.

(I) Identify issues related to drinking water quality that transcend state departmental jurisdictions and work with the director of the Department, the director of the Department of Health and Human Services, and other state departments and agencies to seek solutions.

(J) Report matters relating to drinking water quality to the governor and the director of the Department, as the Clean Water Public Advocate deems necessary.

(4) All departments, committees, commissioners, or officers of this state shall give to the Office of the Clean Water Public Advocate, or to any member or representative of the Office of the Clean Water Public Advocate, any necessary assistance required by the Office of the Clean Water Public Advocate, or any member or representative of the Office of the Clean Water Public Advocate, in the performance of the duties of the Office of the Clean Water Public Advocate so far as is compatible with their duties and consistent with this order and applicable law. Free access also must be given to any books, records, or documents in their custody relating to matters within the scope of inquiry, study, or review of the Office of the Clean Water Public Advocate, consistent with applicable law.

(d) Office of Climate and Energy

(1) The Office of Climate and Energy is established within the Department.

(2) The Office of Climate and Energy shall exercise the authorities, powers, duties, functions, and responsibilities transferred from the Michigan Agency for Energy to the Department under section 5(b) of this order.

(3) The Office of Climate and Energy also shall do all the following:

(A) Coordinate activities of state departments and agencies on climate response.

(B) Provide insight and recommendations to state government and local units of government on how to mitigate climate impact and adapt to climate changes.

(C) Provide guidance and assistance for the reduction of greenhouse gas emissions, renewable energy and energy efficiency, and climate adaptation and resiliency.

(D) Perform other functions and responsibilities as requested by the director of the Department.

(e) Office of the Great Lakes

(1) A new Office of the Great Lakes is established within the Department.

(2) The Office of the Great Lakes shall exercise the authorities, powers, duties, functions, and responsibilities transferred from the former Office of the Great Lakes to the Department under section 6(a) of this order, as allocated or reallocated by the director of the Department to promote the economic and efficient administration and operation of the Department.

(f) Office of the Environmental Justice Public Advocate

(1) The Office of the Environmental Justice Public Advocate is created as a Type I agency within the Department.

(2) The director of the Department shall appoint the Environmental Justice Public Advocate, who is the head of the Office of the Environmental Justice Public Advocate.

(3) The Environmental Justice Public Advocate shall do all the following:

(A) Accept and investigate complaints and concerns related to environmental justice within the state of Michigan.

(B) Establish complaint, investigatory, informational, educational, and referral procedures and programs relating to environmental justice, coordinating with existing investigatory programs where feasible.

(C) Establish a statewide uniform reporting system to collect and analyze complaints about environmental justice for the purpose of publicizing improvements and significant problems, coordinating with existing programs where feasible.

(D) Assist the Department, or other departments or agencies, in the resolution of complaints where necessary or appropriate.

(E) Assist in the development, and monitor the implementation of, state and federal laws, rules, and regulations relating to environmental justice.

(F) Recommend changes in state and federal law, rules, regulations, policies, guidelines, practices, and procedures relating to environmental justice.

(G) Cooperate with persons and public or private agencies and undertake or participate in conferences, inquiries, meetings, or studies that may lead to improvements in environmental justice in this state.

(H) Publicize the activities of the Office of the Environmental Justice Public Advocate.

(I) Identify issues related to environmental justice that transcend state departmental jurisdictions and work with the director of the Department and the Interagency Environmental Justice Response Team created under section 1(b) of this order to seek solutions.

(J) Report matters of environmental injustice involving state departments and agencies to the governor and the director of the Department, as the Environmental Justice Public Advocate deems necessary.

(K) Attend and participate in meetings of the Interagency Environmental Justice Response Team created under section 1(b) of this order.

(4) All departments, committees, commissioners, or officers of this state shall give to the Office of the Environmental Justice Public Advocate, or to any member or representative of the Office of the Environmental Justice Public Advocate, any necessary assistance required by the Office of the Environmental Justice Public Advocate, or any member or representative of the Office of the Environmental Justice Public Advocate, in the performance of the duties of the Office of the Environmental Justice Public Advocate so far as is compatible with their duties and consistent with this order and applicable law. Free access also must be given to any books, records, or documents in their custody relating to matters within the scope of inquiry, study, or review of the Office of the Environmental Justice Public Advocate, consistent with applicable law.

(g) Science Review Boards

(1) The director of the Department may create one or more science review boards to advise the Department and the governor on scientific issues relating to the authorities, powers, duties, functions, and responsibilities of the Department,

including those relating to protecting Michigan's environment, the Great Lakes, and the safety of drinking water.

(2) A board created under section 1(g)(1) of this order will consist of 7 members appointed by the director of the Department, each with scientific expertise in one or more of the following areas: biology, chemistry, ecology, climatology, hydrology, hydrogeology, toxicology, human medicine, engineering, geology, physics, risk assessment, or other related disciplines.

(3) A board created under section 1(g)(1) of this order shall assess the scientific issue before the board and determine whether the board has sufficient expertise to fully review the issue. If the board determines that additional expertise would assist the board in its review, the board may request assistance from one or more persons with knowledge and expertise related to the subject of its scientific inquiry.

(4) The director of the Department shall designate a member of a board created under section 1(g)(1) of this order to serve as the chairperson of that board at the pleasure of the director. The board may select a member of the board to serve as its vice-chairperson.

(5) A board created under section 1(g)(1) of this order will be staffed and assisted by personnel from the Department, subject to available funding. The budgeting, procurement, and related management functions of the board will be performed under the direction and supervision of the director of the Department.

(6) A board created under section 1(g)(1) of this order shall adopt procedures, consistent with this order and applicable law, governing its organization and operations.

(7) A majority of the members serving on a board created under section 1(g)(1) of this order constitutes a quorum for the transaction of the board's business. The board shall act by a majority vote of its serving members.

(8) A board created under section 1(g)(1) of this order will meet at the call of its chairperson and as may be provided in procedures adopted by the board.

(9) A board created under section 1(g)(1) of this order may make inquiries, studies, investigations, hold hearings, and receive comments from the public relating to its functions and responsibilities under this order. A board also may consult with outside experts in connection with the performance of its duties, including experts in the private sector, at government agencies, and at institutions of higher education.

(10) Members of a board created under section 1(g)(1) of this order serve without compensation, but may receive reimbursement for necessary travel and expenses consistent with applicable law, rules, and procedures, and subject to available funding.

(11) A board created under section 1(g)(1) of this order may hire or retain contractors, sub-contractors, advisors, consultants, and agents, and may make and enter into contracts necessary or incidental to the exercise of the powers of the board and the performance of its duties as the director of the Department deems advisable and necessary, consistent with applicable law, rules, and procedures, and subject to available funding.

(12) A board created under section 1(g)(1) of this order may accept donations of labor, services, or other things of value from any public or private agency or person. Any donations shall be received and used in accordance with law.

(13) All departments, committees, commissioners, or officers of this state shall give to a board created under section 1(g)(1) of this order, or to any member or representative of a board created under section 1(g)(1) of this order, any necessary assistance required by the board created under section 1(g)(1) of this order, or any member or representative of a board created under section 1(g)(1) of this order, in the performance of a board created under section 1(g)(1) of this order so far as is compatible with their duties and consistent with this order and applicable law. Free access also must be given to any books, records, or documents in their custody relating to matters within the scope of inquiry, study, or review of a board created under section 1(g)(1) of this order, consistent with applicable law.

(h) State Plumbing Board

(1) The position on the State Plumbing Board designated for the director of the Department of Environmental Quality or his or her authorized representative is transferred to the director of the Department or the director's designated representative from within the Department, as a voting, ex officio member of the State Plumbing Board.

(2) The position on the State Plumbing Board designated for a member or employee of the Department of Environmental Quality selected by the director of the Department of Environmental Quality is transferred to an individual with expertise in hydrology or clean drinking water appointed by the director of the Department and serving at the pleasure of the director of the Department. The individual appointed by the director of the Department under this section 1(h)(2) may be an employee of the Department.

2. Administering the Department

(a) The director of the Department is the head of the Department.

(b) The director of the Department shall establish the internal organization of the Department and allocate and reallocate duties and functions to promote the economic and efficient administration and operation of the Department.

(c) The director of the Department may promulgate rules and regulations as necessary to carry out functions vested in the director under this order or other law in accordance with the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

(d) The director of the Department may perform a duty or exercise a power conferred by law or executive order upon the director of the Department at the time and to the extent the duty or power is vested in the director of the Department by law or order.

(e) The director of the Department may appoint one or more deputy directors and other assistants and employees as necessary to implement and effectuate the powers, duties, and functions vested in the Department under this order or other law.

(f) Deputies may perform the duties and exercise the duties as prescribed by the director of the Department. The director of the Department may delegate within the Department a duty or power conferred on the director of the Department by this order or other law, and the person to whom the duty or power is delegated may perform the duty or exercise the power at the time and to the extent that the duty or power is delegated by the director of the Department.

(g) Decisions made by the director of the Department, or by persons to whom the director has lawfully delegated decision-making authority, are subject to judicial review as provided by law and in accordance with applicable court rules.

(h) The director of the Department may utilize administrative law judges and hearing officers employed by the Michigan Office of Administrative Hearings and Rules to conduct contested case hearings and to issue proposals for decisions as provided by law or rule.

(i) The director of the Department is the chief advisor to the governor regarding the development of energy policies and programs.

(j) The director of the Department is the chief advisor to the governor regarding the development of policies and programs relating to freshwater and the Great Lakes.

(k) The director of the Department is designated as the governor's designee as a commissioner on the Great Lakes Commission under section 32202 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.32202.

(l) The director of the Department may establish advisory workgroups, advisory councils, or other ad hoc committees to provide citizen and other public input and to advise the director or the Department on the exercise of the authorities, powers, duties, functions, and responsibilities vested in the Department.

3. Establishing the Michigan Office of Administrative Hearings and Rules

(a) The Michigan Office of Administrative Hearings and Rules ("Office") is created as a Type I agency within the Department of Licensing and Regulatory Affairs. The director of the Department of Licensing and Regulatory Affairs shall appoint an executive director of the Office to head the Office. The executive director of the Office must administer the personnel functions of the Office and be the appointing authority for employees of the Office.

(b) As a Type I agency, the Office shall exercise its prescribed powers, duties, responsibilities, functions, and any rule-making, licensing, and registration, including the prescription of any rules, rates, and regulations and standards, and adjudication, including those transferred to the Office under this order, independently of the director of the Department of Licensing and Regulatory Affairs. The budgeting, procurement, and related management functions of the Office shall be performed under the direction and supervision of the director of the Department of Licensing and Regulatory Affairs.

(c) After the effective date of this order, a reference to the Michigan Administrative Hearing System or the Michigan Office of Regulatory Reinvention will be deemed to be a reference to the Michigan Office of Administrative Hearings and Rules created under section 3 of this order. The position of executive director of the Michigan Administrative Hearing System is abolished.

(d) The executive director of the Office is the chief regulatory officer of the State of Michigan.

4. Transfers from the Department of Environmental Quality

(a) Environmental Permit Review Commission

(1) The Environmental Permit Review Commission (the "Commission") established within the Department under section 1313 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.1313, including any environmental permit panels of the Commission provided for by section 1315 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.1315, is transferred by Type III transfer to the Department.

(2) The Commission is abolished.

5. Transfers from the Department of Licensing and Regulatory Affairs

(a) Michigan Public Service Commission

(1) The Michigan Public Service Commission is transferred by Type I transfer from the Michigan Agency for Energy to the Department of Licensing and Regulatory Affairs.

(b) Michigan Agency for Energy

(1) The Energy Security section of the Michigan Agency for Energy is transferred to the Michigan Public Service Commission.

(2) The Michigan Agency for Energy, excluding any authorities, powers, duties, functions, and responsibilities transferred under section 5(a) or 5(b)(1), is transferred by Type III transfer from the Department of Licensing and Regulatory Affairs to the Department. The director of the Department may allocate authority, power, duties, functions and responsibilities transferred under this section 5(b)(2) within the new Office of Climate and Energy created by section 1(d) of this order.

(3) The Michigan Agency for Energy is abolished.

(4) The position of executive director of the Michigan Agency for Energy is abolished.

(c) Michigan Administrative Hearing System

(1) The authorities, powers, duties, functions, and responsibilities of the Michigan Administrative Hearing System created by Executive Order 2011-4, MCL 445.2030, are transferred to the Michigan Office of Administrative Hearing and Rules created by section 3 of this order.

(2) The Michigan Administrative Hearing System is abolished.

6. Transfers from the Department of Natural Resources

(a) Office of the Great Lakes

(1) The Office of the Great Lakes is transferred by Type III transfer from the Department of Natural Resources to the Department.

(2) The Office of the Great Lakes is abolished.

(3) The position of director of the Office of the Great Lakes is abolished.

7. Transfers from the Department of Technology, Management, and Budget

(a) Office of Performance and Transformation

(1) The Office of Good Government created within the Office of Performance and Transformation under section III of Executive Order 2016-4, MCL 18.446, is transferred by Type III transfer to the Department of Technology, Management, and Budget and is abolished.

(2) The Office of Reinventing Performance in Michigan, also known as the Office of Continuous Improvement, created within the Office of Performance and Transformation under section IV of Executive Order 2016-4, MCL 18.446, is transferred by Type III transfer to the Department of Technology, Management, and Budget and is abolished.

(3) Except as otherwise provided in section 7(a)(4), the authorities, powers, duties, functions, and responsibilities of the Office of Interagency Initiatives within the Office of Performance and Transformation are transferred to the Executive Office of the Governor and the Office of Interagency Initiatives is abolished.

(4) All the authorities, powers, duties, functions, and responsibilities vested in the Office of Performance and Transformation under section V of Executive Order 2016-4, MCL 18.446, are transferred by Type III transfer to the Department of Technology, Management and Budget.

(5) The Environmental Rules Review Committee created within the Office of Performance and Transformation under section 65 of the Administrative Procedures Act of 1969, 1969 PA 306, as amended, MCL 24.265, is transferred by Type III transfer to the Department and is abolished. The authorities, powers, duties, functions, and responsibilities of the Office of Performance and Transformation under section 66 of the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.266, are transferred by Type III transfer to the Department.

(6) The authorities, powers, duties, functions, and responsibilities of the Office of Performance and Transformation transferred from the Office of Regulatory Reinvention under section II of Executive Order 2016-4, MCL 18.446, and the authorities, powers, duties, functions, and responsibilities of the Office of Performance and Transformation under the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 to 24.328, not transferred to the Department under this order are transferred to the Michigan Office of Administrative Hearings and Rules created by section 3 of this order. The Office of Regulatory Reinvention is abolished.

(7) Any remaining authorities, powers, duties, functions and responsibilities of the Office of Performance and Transformation not otherwise transferred under this section 7(a), including the Office of Internal Audit Services, which remains intact, are transferred to the State Budget Office and the Office of Performance and Transformation is abolished.

(b) Environmental Science Advisory Board

(1) The Environmental Science Advisory Board is transferred by Type III transfer from the Department of Technology, Management, and Budget to the Department.

(2) The Environmental Science Advisory Board is abolished.

8. **Definitions**

As used in this order:

(a) "Civil Service Commission" means the commission required under section 5 of article 11 of the Michigan Constitution of 1963 and includes the State Personnel Director.

(b) "Department of Environment, Great Lakes, and Energy" or "Department" means the principal department of state government originally created as the Department of Environmental Quality under section IV of Executive Order 2011-1, MCL 324.99921, and renamed by this order.

(c) "Department of Environmental Quality" means the principal department of state government created under section IV of Executive Order 2011-1, MCL 324.99921.

(d) "Department of Health and Human Services" means the principal department of state government created by Executive Order 2015-4, MCL 400.227.

(e) "Department of Licensing and Regulatory Affairs" means the principal department of state government originally created as the Department of Commerce under section 225 of the Executive Organization Act of 1965, 1965 PA 380, as amended, MCL 16.325, renamed as the Department of Consumer and Industry Services by Executive Order 1996-2, MCL 445.2001, renamed the Department of Labor and Economic Growth by Executive Order 2003-18, MCL 445.2011, renamed the Department of Energy, Labor, and Economic Growth by Executive Order 2008-20, MCL 445.2025, and renamed the Department of Licensing and Regulatory Affairs by Executive Order 2011-4, MCL 445.2030.

(f) "Department of Natural Resources" means the principal department of state government created under section III of Executive Order 2011-1, MCL 324.99921.

(g) "Department of Technology, Management, and Budget" means the principal department of state government originally created as the Department of Management and Budget by section 121 of The Management and Budget Act, 1984 PA 481, as amended, MCL 18.1211, and renamed the Department of Technology, Management, and Budget by Executive Order 2009-55, MCL 18.441.

(h) "Environmental Science Advisory Board" means the board created within the Department of Technology, Management, and Budget under section 2603 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 2603.

(i) "Michigan Administrative Hearing System" means the agency created within the Department of Licensing and Regulatory Affairs by section IX of Executive Order 2011-4, MCL 445.2030.

(j) "Michigan Agency for Energy" means the agency created within the Department of Licensing and Regulatory Affairs by Executive Order 2015-10, MCL 460.21, as modified by Executive Order 2018-1, MCL 460.22.

(k) "Michigan Office of Administrative Hearings and Rules" means the office created within the Department of Licensing and Regulatory Affairs under section 3 of this order.

(l) "Michigan Public Service Commission" means the commission created under the Michigan Public Service Commission Act of 1939, as amended, 1939 PA 3, MCL 460.1.

(m) "Office of the Great Lakes," as used in section 6(a) of this order, means the office created under section 32903 of the Natural Resources and Environmental Protection Act, as amended, 1994 PA 451, MCL 324.32903, transferred to the former Department of Environmental Quality by Executive Order 1995-18, MCL 324.99903, transferred to the former Department of Natural Resources and Environment by Executive Order 2009-45, MCL 324.99919, transferred to the Department of Environmental Quality by Executive Order 2011-1, MCL 324.99921, and transferred to the Department of Natural Resources by Executive Order 2017-9, MCL 324.99922, including all of the authorities, powers, duties, functions, responsibilities transferred with the Office of the Great Lakes under Executive Order 2017-9, MCL 324.99922.

(n) "Office of Performance and Transformation" means the office created within the State Budget Office by Executive Order 2016-4, MCL 18.446.

(o) "State Budget Office" means the office within the Department of Technology, Management, and Budget created originally as the Office of the State Budget Director by section 321 of The Management and Budget Act, 1984 PA 431, as amended, MCL 18.1321, and renamed as the State Budget Office by Executive Order 2009-55, MCL 18.441.

(p) "State Budget Director" means the individual appointed by the governor under section 321 of The Management and Budget Act, 1984 PA 431, as amended, MCL 18.1321.

(q) "State Personnel Director" means the administrative and principal executive officer of the Civil Service Commission provided for under section 5 of article 11 of the Michigan Constitution of 1963 and section 204 of the Executive Organization Act of 1965, 1965 PA 380, as amended, MCL 16.304.

(r) "State Plumbing Board" means the board provided for by section 1105 of the Skilled Trade Regulation Act, 2016 PA 407, MCL 339.6105.

(s) "Type I agency" means an agency established consistent with Section 3(a) of the Executive Organization Act of 1965, 1965 PA 380, as amended, MCL 16.103.

(t) "Type II transfer" means that phrase as defined under Section 3 of the Executive Organization Act of 1965, 1965 PA 380, as amended, MCL 16.103.

(u) "Type III transfer" means that phrase as defined under Section 3 of the Executive Organization Act of 1965, 1965 PA 380, as amended, MCL 16.103.

9. Implementation

(a) The director of any department receiving a transfer under this order shall provide executive direction and supervision for the implementation of all transfers to that department under this order.

(b) The functions and responsibilities transferred to a department under this order will be administered under the direction and supervision of the director of the department receiving a transfer under this order.

(c) Any records, personnel, property, and unexpended balances of appropriations, allocations, and other funds used, held, employed, available, or to be made available to any entity for the authority, activities, powers, duties, functions, and responsibilities transferred to a department receiving a transfer under this order are transferred to that same department receiving a transfer under this order.

(d) The director of any department receiving a transfer under this order shall administer the functions and responsibilities transferred to the department receiving a transfer under this order in such ways as to promote efficient administration and must make internal organizational changes as administratively necessary to complete the realignment of responsibilities under this order.

(e) State departments, agencies, and state officers shall fully and actively cooperate with and assist the director of a department with implementation responsibilities under this order. The director of a department with implementation responsibilities under this order may request the assistance of other state departments, agencies, and officers with respect to personnel, budgeting, procurement, telecommunications, information systems, legal services, and other management-related functions, and the departments, agencies, and officers shall provide that assistance.

(f) The State Budget Director shall determine and authorize the most efficient manner possible for handling financial transactions and records in this state's financial management system necessary to implement this order.

(g) A rule, regulation, order, contract, or agreements relating to a function or responsibility transferred under this order lawfully adopted before the effective date of this order will continue to be effective until revised, amended, repealed, or rescinded.

(h) This order does not abate any criminal action commenced by this state before the effective date of this order.

(i) This order is not intended to abate a proceeding commenced by, against, or before an entity affected by this order. A proceeding may be maintained by, against, or before the successor of any entity affected under this order.

(j) If any portion of this order is found to be unenforceable, the unenforceable provision should be disregarded and the rest of the order should remain in effect as issued.

(k) Consistent with section 2 of article 5 of the Michigan Constitution of 1963, this order is effective April 7, 2019 at 12:01 a.m.

Given under my hand and the Great Seal of the State of Michigan.

Date: February 4, 2019

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

FILED WITH SECRETARY OF STATE
ON 2/4/19 AT 1:00 pm

SECRETARY OF THE SENATE
2019 FEB -4 P 1:37

Exhibit 9

Department of Environment, Great Lakes, and Energy

MI ENVIRONMENT

EGLE unveils new mission, vision, and values statements

Date: August 12, 2019
Time: All Day Event
Add to Calendar: iCalendar Google Yahoo MSN/Hotmail/Live

August 12, 2019

Director Liesl Clark unveiled the Michigan Department of Environment, Great Lakes, and Energy's (EGLE) new mission, vision, and values statements to department staff on Aug. 12.

The new mission, vision, and values were strongly shaped by more than 40 total hours of staff "listening sessions" Clark hosted in her first six months at EGLE. That total included 18 sessions held at the department's Lansing headquarters and visits to EGLE's 10 district offices across the state, its laboratory, and Filley Street facility in north Lansing.

The mission statement reflects the collective spirit shared by the staff that EGLE's "work is hard, but our mission is simple."

To protect Michigan's environment and public health by managing air, water, land, and energy resources.

"Our vision statement puts people at the center of what we do," Clark said. "It's about where we live, it's about how we treat each other, and it's about leaving a better Michigan for future generations."

A Michigan that respects people, treasures natural resources, and fosters thriving communities throughout our two peninsulas.

The five values statements "describe the kind of organization we want to be in our daily actions big and small."

EGLE makes reasoned decisions. *Within the bounds of state and federal laws and informed by science, EGLE delivers solutions that reflect our mission and equitably serve the interests of Michigan residents.*

EGLE serves the public. *EGLE is accountable and responsive to all Michigan residents. We hold ourselves to the highest standards of government ethics and vigilantly steward public funds.*

EGLE communicates. *EGLE proactively collaborates and engages the public to make informed decisions. We tell our story, so people understand what we do, why we do it, and how our work benefits their lives.*

EGLE leads. *EGLE takes a strategic approach that accounts for the impacts of today's actions on future generations.*

EGLE invests in our team. *Recognizing the knowledge and dedication of EGLE staff drive success, we provide a positive workplace with effective leadership and professional development opportunities.*

The mission, vision and values statements were developed by Clark, EGLE's nine division directors, and leaders of the department's executive office team. They are part of the new EGLE strategic plan that the department will wrap up and release later this year.

Take a short survey and let us know what you think about MI Environment.

Exhibit 10

Dep't of Envtl. Quality v. Sancrant

Court of Appeals of Michigan

June 24, 2021, Decided

No. 351904

Reporter
2021 Mich. App. LEXIS 3936 *; 2021 WL 2599666

DEPARTMENT OF ENVIRONMENTAL QUALITY, Plaintiff-Appellee, v GARY SANCRANT and TONYA SANCRANT, Defendants-Appellants.

Notice: THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE MICHIGAN COURT OF APPEALS REPORTS.

Prior History: **[*1]** Ingham Circuit Court. LC No. 18-000223-CE.

Dep't of Envtl. Quality v. Sancrant, 2020 Mich. App. LEXIS 4335 (Mich. Ct. App., July 13, 2020)

Core Terms

wetland, restoration, res judicata, trial court, privity, collateral estoppel, county prosecutor, fine, same offense, Dictionary, civil proceeding, neighbors, protects, invoice, parties, double jeopardy, fill material, present case, credibility, proceedings, quotation, easement, dredged, lawsuit, cabin, marks, double-jeopardy, Environmental, defendants', destruction

Case Summary

Overview

HOLDINGS: [1]-Where a married couple dredged and filled wetland on their property, and the husband pleaded guilty to a misdemeanor violation of MCL 324.30304, a subsequent civil proceeding brought by the environmental department under MCL 324.30316 did not violate double jeopardy because the civil penalty served a purpose distinct from any punitive purpose; [2]-The prior conviction did not bar the civil judgment under collateral estoppel and res judicata principles because, inter alia, restoration of the wetlands was not determined in the criminal proceeding, and privity was lacking between the county prosecutor and the environmental department; [3]-Although the husband did the dredging and fill work, the wife was also liable because there was evidence she gave him leave to do the work on their jointly owned property.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > State Constitutional Operation

HN1[] Standards of Review, De Novo Review

The court will review a constitutional issue de novo.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

HN2[] Procedural Due Process, Double Jeopardy

The United States Constitution and Michigan Constitution protect a person from being twice placed in jeopardy for the same offense. *U.S. Const. amend. V*; *Const. 1963, art 1, § 15*. Interpretations of the federal double-jeopardy clause apply also to the state double-jeopardy clause. The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

HN3[] Procedural Due Process, Double Jeopardy

Double-jeopardy protections only apply to multiple criminal punishments. The constitutional provision against double jeopardy is not violated when a civil penalty serves a purpose distinct from any punitive purpose. One consideration is whether the Legislature has designated a particular penalty as civil or criminal.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN4[] Natural Resources & Public Lands, Wetlands Management

MCL 324.30316 provides for both civil actions, in subsection (1), and criminal actions, in subsection (2), and then, in subsection (4), it indicates that the court—i.e., the civil or criminal court—can issue an order of restoration. *MCL 324.30316*. Accordingly, an order to restore can be issued in either a

criminal or a civil proceeding. In addition, an order to restore a wetland has been historically viewed as an equitable remedy.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Enforcement

Civil Procedure > Remedies > Damages > Punitive Damages

HN5 **Clean Water Act, Enforcement**

It seems clear that the purpose of an order to restore issued in a civil proceeding is not punitive in nature but is related to ecological concerns and restoring the environment to what is fair and right.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

HN6 **Procedural Due Process, Double Jeopardy**

The United States Supreme Court has set forth the following factors to analyze in determining whether a remedy in a civil case should be considered a punishment for double-jeopardy purposes:(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

HN7 **Procedural Due Process, Double Jeopardy**

The prohibition against double jeopardy protects against a second prosecution for the same offense after conviction.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN8 **Estoppel, Collateral Estoppel**

The court will review issues of collateral estoppel and res judicata de novo.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN9[] Estoppel, Collateral Estoppel

Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel. Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN10[] Preclusion of Judgments, Res Judicata

Crossover estoppel, which involves the preclusion of an issue in a civil proceeding after a criminal proceeding and vice versa, is permissible. However, there has never been anything close to a ringing endorsement of the concept by any Michigan court. Instead, the Michigan Supreme Court has cautioned against its use.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN11[] Estoppel, Collateral Estoppel

In the context of res judicata and collateral estoppel, a question has not been actually litigated until put into issue by the pleadings, submitted to the trier of fact for a determination, and thereafter determined.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN12[] Preclusion of Judgments, Res Judicata

As for res judicata, this doctrine is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. The Court has taken a broad approach to the doctrine

of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. In general, to be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. The outer limit of the doctrine traditionally requires both a substantial identity of interests' and a working functional relationship in which the interests of the nonparty are presented and protected by the party in the litigation.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN13[] **Preclusion of Judgments, Res Judicata**

The Michigan Supreme Court, addressing the issue of res judicata, has stated that courts have generally found that no privity exists between state and federal governments, between the governments of different states, or between state and local governments. The Court stated that there may be specific circumstances under which the state may be bound by a judgment to which a subordinate political division was a party and the state was not, such as when the subordinate political subdivision is found to have been acting as a trustee for the state. Such circumstances are not present here. The Court indicated that the general definition of privity applicable to private parties does not apply to state subdivisions.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN14[] **Natural Resources & Public Lands, Wetlands Management**

MCL 324.30304 prohibits the placing of fill material in a wetland and prohibits dredging in a wetland.

Governments > Legislation > Interpretation

HN15[] **Legislation, Interpretation**

It seems clear that *MCL 324.1705(3)* is designed to prevent a multiplicity of lawsuits in light of the broad language of subsection (1).

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN16 **Standards of Review, Clearly Erroneous Review**

Findings of fact by the trial court may not be set aside unless clearly erroneous. A finding of fact is not clearly erroneous unless there is no evidence to support it or the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. To the extent this issue involves statutory construction, review is de novo.

Governments > Legislation > Interpretation

HN17 **Legislation, Interpretation**

The court will accord to every word or phrase of a statute its plain and ordinary meaning, unless a term has a special, technical meaning or is defined in the statute. In ascertaining the plain and ordinary meaning of undefined statutory terms, the court may rely on dictionary definitions.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN18 **Jury Trials, Province of Court & Jury**

The appellate court affords great deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN19 **Reviewability of Lower Court Decisions, Preservation for Review**

A mere statement without authority is insufficient to bring an issue before the court. It is not sufficient for a party simply to announce a position or assert an error and then leave it up to the court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN20 **Complaints, Requirements for Complaint**

MCR 2.111(B)(1) states that a complaint must contain a statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.

Counsel: For DEPARTMENT OF ENVIRONMENTAL QUALITY, Plaintiff-Appellee: ELIZABETH MORRISSEAU.

For GARY SANCRANT, TONYA SANCRANT, Defendants-Appellants: MICHAEL H. PERRY.

Judges: Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ. RONAYNE KRAUSE, J. (concurring in part and dissenting in part).

Opinion by: Kathleen Jansen

Opinion

JANSEN, P.J.

In this case involving the *Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 et seq.*, defendants, Gary Sancrant (Gary) and Tonya Sancrant (Tonya), appeal as of right a judgment for plaintiff, the Department of Environmental Quality,[1] entered following a bench trial. We affirm.

I. BACKGROUND

Defendants, a married couple, live and work in West Branch but own property, including a hunting cabin, in Schoolcraft County in the Upper Peninsula. A road—often referred to in the record as the "easement road"—exists on defendants' property; it allows defendants and their neighbors to reach their respective cabins. It is undisputed that defendants had many problems with their neighbors and did not like the fact that the easement road passes very close to defendants' cabin.

The central issue in this case is that Gary installed a new road, and in doing so he dredged from a wetland and placed fill in a wetland, **[*2]** contrary to Part 303 of the NREPA—specifically, *MCL 324.30304*. Plaintiff theorized that he installed the road solely because of the neighbor issues,[2] although Gary claimed that he also needed the new road because the easement road was being repeatedly flooded by beavers. Gary pleaded guilty to a misdemeanor for violating the statute, but the plea agreement did not require restoration of the wetland. Plaintiff commenced this action and obtained an order of restoration and a fine. Defendants contend on appeal that, in light of Gary's criminal matter, the restoration order was barred by principles of double jeopardy, collateral estoppel, and res judicata. They also contend that the trial court erred by finding Tonya liable after the bench trial because she was not involved in building the road and did not "permit" Gary to build it in accordance with the language of *MCL 324.30304(a)* and *(b)*.

II. DOUBLE JEOPARDY

[1] Plaintiff's name is now the Department of Environment, Great Lakes, and Energy. However, the final order being appealed contains plaintiff's prior name.

[2] Gary admitted that he wanted the neighbors to use the new road.

First, defendants argue that plaintiff's lawsuit and the wetland-restoration order violated Gary's double-jeopardy protections. HN1[↑] We review this constitutional issue de novo. *People v Miller, 498 Mich 13, 16-17; 869 NW2d 204 (2015)*.

MCL 324.30304 states:

> Except as otherwise provided in this part or by a permit issued by the department under this part and pursuant to part 13, a person **[*3]** shall not do any of the following:
> (a) Deposit or permit the placing of fill material in a wetland.
> (b) Dredge, remove, or permit the removal of soil or minerals from a wetland.
> (c) Construct, operate, or maintain any use or development in a wetland.
> (d) Drain surface water from a wetland.[3]
> *MCL 324.30316* states, in part:
> (1) The attorney general may commence a civil action for appropriate relief, including injunctive relief upon request of the department under *section 30315(1)*. An action under this subsection may be brought in the circuit court for the county of Ingham or for a county in which the defendant is located, resides, or is doing business. The court has jurisdiction to restrain the violation and to require compliance with this part. In addition to any other relief granted under this section, the court may impose a civil fine of not more than $10,000.00 per day of violation. A person who violates an order of the court is subject to a civil fine not to exceed $10,000.00 for each day of violation.
> (2) A person who violates this part is guilty of a misdemeanor punishable by a fine of not more than $2,500.00.
> * * *
>
> (4) In addition to the civil fines and penalties provided under subsections (1), *(2)*, and *(3)*, the court may order a person **[*4]** who violates this part to restore as nearly as possible the wetland that was affected by the violation to its original condition immediately before the violation. The restoration may include the removal of fill material deposited in the wetland or the replacement of soil, sand, or minerals.[4]

Gary pleaded guilty to a misdemeanor violation of *MCL 324.30304* on the basis of the building of the road in the wetland. The Schoolcraft County Prosecutor stated that he was only seeking a suspended sentence and fine and was not seeking restoration. The prosecutor said that the building of the road

> shouldn't have been done [the] way it was, but I understand why it was done. . . . If the [Department of Environmental Quality] who I've spoken with, wishes to get restoration . . . , they have options through the Attorney General's office, through the Court of Civil Claims, and stuff in Lansing, and or [sic] the option of filing here. But that's up to them. But from my perspective, I don't think that's the appropriate direction to proceed on this case. . . .

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[3] A minor amendment of this statute enacted by way of 2018 PA 631, effective March 29, 2019, did not materially impact the language pertinent to the present appeal.

[4] The amendment of this statute enacted by way of 2018 PA 631 did not materially impact the language pertinent to the present appeal.

The district court imposed a three-month suspended sentence[5] and ordered Gary to pay $1,000, as well as a "state fee" of $125 and a probation oversight fee.

Defendants **[*5]** contend that, in light of these criminal proceedings, a double-jeopardy violation occurred. ***HN2***[↑] The United States Constitution and Michigan Constitution protect a person from being twice placed in jeopardy for the same offense. *US Const, Am V*; *Const 1963, art 1, § 15*. Interpretations of the federal *double-jeopardy clause* apply also to the state *double-jeopardy clause*. See *Miller, 498 Mich at 17 n 9*. "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt, 469 Mich 565, 574, 594; 677 NW2d 1 (2004)*.

Defendants contend that the restoration order violated the protection against multiple punishments for the same offense.[6] ***HN3***[↑] Double-jeopardy protections only apply to multiple *criminal* punishments. *Hudson v United States, 522 US 93, 99; 118 S Ct 488; 139 L Ed 2d 450 (1997)*. This Court has stated that "the constitutional provision against double jeopardy is not violated when a civil penalty serves a purpose distinct from any punitive purpose." *People v Artman, 218 Mich App 236, 246; 553 NW2d 673 (1996)*. One consideration is whether the Legislature has designated a particular penalty as civil or criminal. See, generally, *Dawson v Secretary of State, 274 Mich App 723, 733; 739 NW2d 339 (2007)*. Defendants contend that *MCL 324.30316* facially designates a restoration order as a criminal punishment. This is not **[*6]** the case, however. ***HN4***[↑] The statute provides for both civil actions, in subsection (1), and criminal actions, in subsection (2), and then, in subsection (4), it indicates that "the court"—i.e., the civil or criminal court—can issue an order of restoration. *MCL 324.30316*.

Accordingly, an order to restore can be issued in either a criminal or a civil proceeding, and here, it was issued in a civil proceeding. In addition, an order to restore a wetland has been historically viewed as an equitable remedy. See *Dep't of Environmental Quality v Gomez, 318 Mich App 1, 32; 896 NW2d 39 (2016)*. *Black's Law Dictionary* (11th ed) defines "equitable," in part, as "[e]xisting in equity; available or sustainable by an action in equity, or under the rules and principles of equity." It defines "equity," in part, as "[t]he body of principles constituting what is fair and right; natural law[.]" *Black's Law Dictionary* (11th ed). ***HN5***[↑] It seems clear that the purpose of an order to restore issued in a civil proceeding is not *punitive* in nature but is related to ecological concerns and restoring the environment to what is "fair and right."

HN6[↑] In *Hudson, 522 US at 99-100*, the United States Supreme Court set forth the following factors to analyze in determining whether a remedy in a civil case should be considered a punishment for double-jeopardy purposes:

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[5] The district court stated that, "at the end of 90 days, the [p]rosecutor will file a dismissal if there's [sic] no further violations."

[6] Defendants are not making an argument about the fine imposed by the Ingham Circuit Court.

> (1) whether the sanction **[*7]** involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. [Citation, quotation marks, and brackets omitted.]

As for factor (1), the restoration order did not involve a "disability" or "restraint" approaching *something like imprisonment*. See *id. at 104*. It involved an affirmative action, but the action was merely to restore the wetland to its original state. Regarding factor (2), there is no indication that a restoration order has historically been regarded as a punishment; instead, it has been viewed, as noted, as an equitable remedy. *Gomez, 318 Mich App at 32*. Regarding factor (3), a restoration order does not come into play only on a finding of scienter. As for factor (4), while a restoration order could promote the traditional "punishment" goal of deterrence, **[*8]** deterrence can promote both criminal and civil purposes. *Hudson, 522 US at 105*. In *Hudson*, *id.*, the Court stated that the sanctions at issue in that case (a banking case) served to promote the stability of the banking industry; it added, "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' for double jeopardy purposes would severely undermine the [g]overnment's ability to engage in effective regulation of institutions such as banks." Similarly, in the present case, disallowing the restoration order would undermine plaintiff's goal of protecting wetlands. Concerning factor (6), there is very clearly an alternative purpose, aside from punishment, to assign to a restoration order—i.e., the maintenance of wetlands and the maintenance of a healthy ecological environment. As for factor (7), in *Dawson, 274 Mich App at 736*, the Court, in evaluating an assessed fine for a driving offense, stated that the fine was not excessive in light of the alternative goal of raising revenue. Here, the restoration order was not excessive in light of the alternative purpose of maintaining healthy wetlands.

Factor (5) could be viewed in defendants' favor, because a violation of *MCL 324.30316* is a crime. But in *Hudson, 522 US at 105*, the Court stated: "[T]he **[*9]** conduct for which . . . sanctions are imposed may also be criminal (and in this case formed the basis for petitioners' indictments). This fact is insufficient to render the money penalties and debarment sanctions criminally punitive, particularly in the double jeopardy context[.]" (Citations omitted.)

In sum, a review of all the factors and analogous caselaw reveals that the wetland-restoration order in the present civil proceeding did not violate the double-jeopardy protection against multiple punishments for the same offense.

Defendants also contend that plaintiff's lawsuit violated the protection against a second prosecution for the same offense after conviction. *HN7*[↑] However, "[t]he prohibition against double jeopardy . . . protects against a second *prosecution* for the same offense after conviction[.]" *Nutt, 469 Mich at 574* (emphasis added). There was no second prosecution here. Plaintiff initiated a civil lawsuit after the criminal proceedings. Defendants refer to *People v Spicer, 216 Mich App 270; 548 NW2d 245 (1996)*, but that case is inapposite because it involved an analysis of whether two *criminal prosecutions* related to

the same transaction, see *id. at 273*. Defendants' reference to *Bravo-Fernandez v United States, US ; 137 S Ct 352; 196 L Ed 2d 242 (1996)*, is similarly misplaced because that case involved whether the defendants could **[*10]** be *criminally retried* for certain issues, see, generally, *137 S Ct at 356-357*.

III. COLLATERAL ESTOPPEL AND RES JUDICATA

Defendants contend that principles of collateral estoppel and res judicata indicate that Gary's criminal conviction barred the present lawsuit against Gary and the wetland-restoration order. ***HN8***[⬆] We review these issues de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co, 460 Mich 372, 379; 596 NW2d 153 (1999)*; *Barrow v Pritchard, 235 Mich App 478, 480; 597 NW2d 853 (1999)*.

HN9[⬆] "Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co, 469 Mich 679, 682-684; 677 NW2d 843 (2004)* (quotation marks, citation, and brackets omitted).[7] "Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Id. at 684-685* (quotation marks, citations, and brackets omitted).

HN10[⬆] "Crossover estoppel, which involves the preclusion of an issue in a civil proceeding after **[*11]** a criminal proceeding and vice versa, is permissible." *Barrow v Pritchard, 235 Mich App 478, 481; 597 NW2d 853 (1999)*. However, "there has never been anything close to a ringing endorsement of the concept by any Michigan court. Instead, the Supreme Court has cautioned against its use." *People v Ali, 328 Mich App 538, 542; 938 NW2d 783 (2019)*.

HN11[⬆] In *In re Application of Indiana Mich Power Co to Increase Rates, 329 Mich. App. 397, 408; 942 N.W.2d 639 (2019)*, the Court stated that "[a] question has not been actually litigated until put into issue by the pleadings, submitted to the trier of fact for a determination, and thereafter determined." (Quotation marks and citation omitted.)

As noted, the Schoolcraft County Prosecutor stated that, under the terms of the plea agreement, he was only seeking a suspended sentence and fine and was not seeking restoration. The prosecutor said that the building of the road

> shouldn't have been done [the] way it was, but I understand why it was done. . . . If the [Department of Environmental Quality] who I've spoken with, wishes to get restoration . . . , they have options through the Attorney General's office, through the Court of Civil Claims, and stuff in Lansing, and or [sic] the option of filing here. But that's up to them. But from my perspective, I don't think that's the appropriate direction to proceed on this case. . . .

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[7] There are some exceptions to the mutuality requirement. *Id. at 687-688*.

The issue of restoration of the wetlands was never subject **[*12]** to a determination by the district court because the prosecutor was not seeking restoration. Accordingly, under *In re Application of Indiana Mich Power Co, 329 Mich App at 408*, defendants' argument about collateral estoppel is not persuasive.[8]

HN12[↑] As for res judicata, this doctrine

> is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Adair v State, 470 Mich 105, 121; 680 NW2d 386 (2004)*.]

In general, "[t]o be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Id. at 122*. "The outer limit of the doctrine traditionally requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected **[*13]** by the party in the litigation." *Id.* (citations omitted).[9] Defendants contend that plaintiff and the Schoolcraft County Prosecutor were either the same parties or were in privity with one another.

In *Baraga Co v State Tax Comm, 466 Mich 264, 266-267; 645 NW2d 13 (2002)*, two townships entered into a consent judgment regarding a tax issue. Later, the State Tax Commission (STC) determined that certain tax exemptions allowed by way of the consent judgment were not, in fact, permissible, and litigation ensued. *Id. at 268*. The Court of Appeals concluded "that defendant [i.e., the STC] was in privity with the local units of government in regard to property tax appeals before the tribunal and, as such, the doctrine of res judicata applied to bind defendant to the terms of consent judgments entered by the Tax Tribunal in matters where defendant was not a party." *Id.*

HN13[↑] The Michigan Supreme Court, addressing the issue of res judicata, stated, "Courts have . . . generally found that no privity exists between state and federal governments, between the governments of different states, or between state and local governments." *Id. at 270* (quotation marks and citation omitted.) The Court stated that "there may be specific circumstances under which the state may be bound by a judgment to **[*14]** which a subordinate political division was a party and the state was not, such as when the subordinate political subdivision is found to have been acting as a trustee for the state. Such circumstances are not present here." *Id. at 270-271*. The Court indicated that the general definition of privity applicable to private parties does not apply to state subdivisions. See *id.* The Court went on to state:

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[8] In addition, as discussed *infra* in connection with res judicata, the parties were not the same in the criminal and civil proceedings.

[9] As discussed *infra*, these definitions of privity applicable to private parties are not necessarily applicable to divisions of the state.

> [W]e fail to see, even using the definition of privity [for private parties] applied by the Court of Appeals, how the parties could have a "substantial identity of interests" and represent the same legal right when defendant is empowered to intervene if it concludes that municipalities have failed to place taxable property on the tax rolls and defendant is specifically charged with exercising general supervision over local assessors. [*Id. at 272*.]

It also stated:

> Further, we reject the Court of Appeals reasoning that this is all somewhat academic because "[t]he townships secured that interest [the interest in proper payment of taxes] when they negotiated to have the KBIC make payments in lieu of the taxes that normally would have been assessed." Whether the taxes effectively got paid is important, of course, but **[*15]** it is not to this alone that the statute is directed. . . . [D]efendant is charged with ensuring that all taxable properties are placed on the assessment rolls. Plaintiffs and defendant cannot be representing the same legal right or have a substantial identity of interests if the townships purposefully did not place taxable properties on the assessment rolls, an action that defendant is required to ensure. [Citation omitted; brackets in original.]

We find that *Baraga* is controlling in the present case. The most significant fact is that the Schoolcraft County Prosecutor was not acting as a trustee for plaintiff. Indeed, the prosecutor, as noted, explicitly stated that plaintiff could seek restoration of the wetland in a separate proceeding. If the prosecutor had been acting as plaintiff's trustee in setting forth the plea agreement, he would not have made this statement.

Moreover, *MCL 324.30315(1)* states, "If, on the basis of information available to the department, the department finds that a person is in violation of this part . . . , the department *shall issue an order requiring the person to comply with the prohibitions* or conditions or the department *shall request the attorney general to bring a* ***[*16]*** *civil action under section 30316(1).*" (Emphasis added.) ***HN14***[↑] Again, *MCL 324.30304* prohibits the placing of fill material in a wetland and prohibits dredging in a wetland. Plaintiff was required to take action to protect the wetland. This is further support for the finding that, under *Baraga*, plaintiff and the Schoolcraft County Prosecutor were not in privity for purposes of res judicata. The interests of plaintiff and the Schoolcraft County Prosecutor were not the same because plaintiff is specifically charged with protecting the environment and must take action if evidence of environmental damage is apparent, whereas the transcript of the plea proceeding makes clear that the prosecutor was more concerned with looking at Gary's subjective motivations in building the road.

Defendants contend that privity existed here under *People v Gates, 434 Mich 146; 452 NW2d 627 (1990)*, overruled in part on other grounds by *Monat, 469 Mich 679*. In that case, involving whether a finding of "no jurisdiction" in a child-protective proceeding applied in a criminal prosecution,[10] the Court stated:

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[10] The Court ruled that the defendant's guilt or innocence was not determined in the child-protective proceeding and that collateral estoppel did not apply. *Id. at 165*.

> Although the named-party plaintiff in the instant case is the People of the State of Michigan, in practical terms the party against whom collateral estoppel is asserted is the Jackson County Prosecutor, who also **[*17]** represented the Department of Social Services in the probate court proceeding. Defendant argues that even though the Department of Social Services was the nominal party in the earlier proceeding, both the department and the prosecutor's office are creatures of the state and thus should be considered to be the same party. We agree. A functional analysis of the role of the prosecutor in both proceedings is appropriate in this case, and leads us to conclude that privity is sufficient to satisfy the "same party" requirement. [*Id.* at 156.]

We conclude that *Gates* is distinguishable because (1) *Baraga*, setting forth the test for privity between state and local governments, was issued after *Gates*; and (2) the present case is different from *Gates* in that in *Gates*, the county prosecutor was the attorney in both cases. As discussed above, in the present circumstances, the Schoolcraft County Prosecutor had different aims than plaintiff and was not involved in the present lawsuit.

Defendants cite *MCL 324.1705(3)* to argue that Michigan has a public policy to avoid multiple actions for a violation of environmental laws. *MCL 324.1705* states:

> (1) If administrative, licensing, or other proceedings and judicial review of such proceedings **[*18]** are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.
> (2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.
> (3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

HN15[⬆] It seems clear that subsection (3) is designed to prevent a multiplicity of lawsuits in light of the broad language of subsection (1). At any rate, even assuming, without deciding, that *MCL 324.1705(3)* applies to a violation of Part 303, all this **[*19]** subsection states is that collateral estoppel or res judicata "may be applied[.]" There may be some actions during which various plaintiffs have such a sharing of interests that the doctrines are, indeed, applicable. What the lower court did was analyze whether collateral estoppel or res judicata was applicable under the specific circumstances of the present case. Its finding that neither doctrine applied was not, as discussed, erroneous.

IV. TONYA'S LIABILITY

Defendants argue that the trial court erred by finding that Tonya "permitted" Gary to build the road within the meaning of *MCL 324.30304*.

HN16[↑] "Findings of fact by the trial court may not be set aside unless clearly erroneous. A finding of fact is not clearly erroneous unless there is no evidence to support it or the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Townsend v Brown Corp of Ionia, Inc, 206 Mich App 257, 263; 521 NW2d 16 (1994)* (citations omitted). To the extent this issue involves statutory construction, review is de novo. *Guardian Environmental Servs, Inc v Bureau of Construction Codes & Fire Safety, Dep't of Labor & Economic Growth, 279 Mich App 1, 5; 755 NW2d 556 (2008)*.

Once again, *MCL 324.30304* states, in part:

> Except as otherwise provided in this part or by a permit issued by the department under this part and pursuant to part 13, a person shall not do any of the following:
>
> (a) Deposit or permit the **[*20]** placing of fill material in a wetland.
> (b) Dredge, remove, or permit the removal of soil or minerals from a wetland.

The trial court, in its findings after the bench trial, stated, "Having observed the witness testimony and assessed the credibility of both [d]efendants, the [c]ourt finds that . . . Tonya . . . permitted [Gary] to carry out acts prohibited under the NREPA. This is sufficient to subject her to liability under *MCL 324.30304(a)* and *(b)*."

Defendants contend that to "permit" something must be construed to mean assist or otherwise take an active role. ***HN17***[↑] However, this Court "accord[s] to every word or phrase of a statute its plain and ordinary meaning, unless a term has a special, technical meaning or is defined in the statute. In ascertaining the plain and ordinary meaning of undefined statutory terms, we may rely on dictionary definitions." *Guardian Environmental Servs, 279 Mich App at 6-7* (citations omitted).[11] "Permit" is not defined in the statute, and there is no indication that it has a special, technical meaning. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "permit," in part, as "to consent to expressly or formally," "to give leave," or "to make possible[.]"

Defendants contend that under *People v Tenerowicz, 266 Mich 276, 282; 253 NW 296 (1934)*, and *People v O'Hara, 278 Mich 281, 301; 270 NW 298 (1936)*, "permit" must be interpreted as **[*21]** requiring affirmative action. The former case involved interpreting the words in an indictment in a criminal case involving the maintenance of "houses of ill fame." *Tenerowicz, 266 Mich at 282*. The Court was concerned with whether "the criminality of the acts contemplated by the conspirators [was] clear" in a criminal-conspiracy indictment using the word "permit." *Id.* In *O'Hara*, the Court, relying on *Tenerowicz*, was again concerned with criminal scienter. *O'Hara, 278 Mich at 301*. The trial court in the present case concluded that these criminal cases were inapposite in this civil strict-liability case. We agree that because the present case was a civil proceeding involving a strict-liability statute, the cases cited by defendants provide no basis for interpreting the word "permit" differently from its ordinary,

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[11] This rule of construction belies defendants' argument that because the words surrounding "permit" in the statute involve affirmative action, "permit" must also involve affirmative action. The word is to be interpreted according to its plain meaning.

dictionary definition. At any rate, we note that in *O'Hara*, the Court interpreted "permit" as meaning "assist *or* "enable." *Id. at 301*. "Enable" is quite similar to the dictionary definition, noted above, of "make possible."

Defendants contend that plaintiff presented insufficient evidence to demonstrate Tonya's liability. A review of pertinent evidence, however, fails to show clear error in the trial court's findings.

A friend of Gary's, **[*22]** Kurt Zettel, testified about loaning a mini-excavator and a bulldozer to Gary because Gary was working on a road. Zettel testified, "I told him when he told me he was going to build a road, I said, [i]t would be cheaper to bake your neighbors a pie" to try to make peace with them. Gary had told Zettel that he built the road to get the neighbors to stop using the easement road. Tonya testified that she was "leery" of the neighbors passing by close to the cabin on the easement road because it made her feel unsafe.

Gary stated that what led him to buy, from a timber company, the land on which the new road was situated[12] was the need to have a new road to eliminate problems with the easement road. He *and Tonya* bought this property; it was owned jointly by them, and Tonya stated that defendants had joint bank accounts.

As early as July 2010, Gary knew that he was going to be needing equipment, such as an excavator, to build the road, because he was in the planning stages of buying the property from the timber company. Zettel testified about loaning Gary equipment in exchange for work that Gary did on Zettel's truck. An invoice demonstrates that Gary's business did some work for Zettel, and **[*23]** it states, "(No charge) Exchange for use of equipment—U.P. Cabin." Zettel's signature on the invoice is dated July 23, 2010, and Zettel stated in his testimony that instead of paying for the work performed on his truck, he was going to loan equipment to Gary "over the next year or so." Zettel stated that Gary borrowed Zettel's mini-excavator "probably [in] 2011" and "said he was working on a road up there." Tonya admitted writing the invoice. Although she claimed that Gary told her to write it because he was busy and that she did not really understand it, the trial court's opinion makes clear that it did not find credible any allegations that Tonya had no knowledge of the building of the road. ***HN18***[↑] "This Court affords great deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Lumley v Bd of Regents for Univ of Mich, 215 Mich App 125, 135; 544 NW2d 692 (1996)*.

All this evidence supports a finding that Tonya gave leave to Gary for the building of the road and made possible Gary's building of the road on their jointly owned property. Indeed, the evidence supported that defendants bought the property jointly to attempt to address problems with their neighbors. There is no basis for a definite and firm conclusion **[*24]** that the trial court made a mistake in its findings. *Townsend, 206 Mich App at 263*.

Defendants contend that the theory of Tonya's having permitted Gary to build the road in the wetland was not alleged in the complaint. However, defendants set forth no authorities in support of

[12] Defendants acquired their various parcels of property over time.

their argument that the complaint was inadequate. ***HN19***[↑] As stated in *Wilson v Taylor, 457 Mich 232, 243; 577 NW2d 100 (1998)*, "[A] mere statement without authority is insufficient to bring an issue before this Court. It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." (Citation and quotation marks omitted.) At any rate, the complaint stated that "[d]efendants dredged and placed fill material in a regulated wetland on the [p]roperty without a permit or otherwise allowed by Part 303 of NREPA, in violation of *MCL 324.30304*." Because the complaint was addressed to both defendants, we conclude that the complaint was adequate. In other words, plaintiff was alleging that together, by way of Gary's physical work and Tonya's permitting Gary to do that work, defendants, as a couple, "dredged **[*25]** and placed fill material in a regulated wetland," contrary to *MCL 324.30304*. ***HN20***[↑] *MCR 2.111(B)(1)* states that a complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." The wording and the citation to *MCL 324.30304* was adequate to inform defendants of the claim against Tonya.

Affirmed.

/s/ Kathleen Jansen

/s/ Michael J. Kelly

Concur by: Amy Ronayne Krause (In Part)

Dissent by: Amy Ronayne Krause (In Part)

Dissent

RONAYNE KRAUSE, J. *(concurring in part and dissenting in part)*

I concur entirely with the majority's analysis and determination that this proceeding and order are not precluded by the 2018 criminal proceeding and misdemeanor judgment. I respectfully disagree with the majority that Tonya can be found liable on this record. I would affirm as to Gary and reverse as to Tonya.

I need not repeat most of the majority's discussion of the facts or the relevant law, because my disagreement pertains only to how the majority treats the word "permit" in the context of *MCL 324.30304*. As the majority observes, the word is not defined in the statute. The courts "generally **[*26]** give[] undefined terms their plain and ordinary meanings and may consult dictionary definitions in giving such meaning," but those words must also be considered in context and "in light of the overall statutory scheme." *Honigman Miller Schwartz and Cohn LLP v City of Detroit, 505 Mich 284, 305-307; 952 NW2d 358 (2020)*. The statute unambiguously uses "permit" as a verb, which *Merriam-*

Webster's Collegiate Dictionary (11th ed) defines as "to let through," "to let go," "to consent to expressly or formally," "to give leave," "to make possible," or "to give an opportunity." I do not necessarily disagree with the majority that the criminal cases upon which defendants rely are of doubtful applicability as to *MCL 324.30304*. I also do not disagree with the majority that permitting something does not require actively facilitating it.

However, presuming the statute imposes "strict liability," under which an actor's *mens rea* is obviated, an *actus reus* remains mandatory. *People v Likine, 492 Mich 367, 392-393; 823 NW2d 50 (2012)*. It is therefore not enough for Tonya to have known about the road construction and wetlands destruction, nor is it enough for Tonya to have benefitted. Implicitly, it was necessary for Tonya to do something more than merely fail to intercede. Even if *MCL 324.30304* were to impose strict liability for a mere failure to act, the principle of strict liability **[*27]** is founded upon the defendant having the actual power to engage in that act. *Likine, 492 Mich at 393-398*. Although *Likine* involved criminal penalties, I would find its reasoning equally applicable to a civil proceeding involving a non-trivial penalty. Therefore, "permitting" the placement of material in a wetland or the removal of material from a wetland under *MCL 324.30304* necessarily requires, at a minimum, that the person had the realistic power to *prevent* that placement or removal.

Put simply, there is no evidence in this record that Tonya had the power to prevent Gary from engaging in the road construction and wetlands destruction project. Like the majority, I find no clear error in the trial court's findings that Tonya knew about the project and benefitted from the project. Furthermore, it is inherently within the trial court's purview to evaluate the credibility of the witnesses who appeared before it. *McGonegal v McGonegal, 46 Mich 66, 67; 8 NW 724 (1881)*; *In re Loyd, 424 Mich 514, 535; 384 NW2d 9 (1986)*. Nevertheless, "doubt about credibility is not a substitute for evidence of guilt." *People v Wolfe, 440 Mich 508, 519; 489 NW2d 748 (1992)*. Although the trial court correctly recognized that a husband and wife may both be found liable for violating the act, the trial court failed to note that in the case it cited, both the husband and wife engaged in filling the wetlands. **[*28]** *DEQ v Gomez, 318 Mich App 1, 6-8; 896 NW2d 39 (2016)*. There is no dispute here that Tonya was not physically involved in any of the construction or destruction, and being married to someone confers no right of control over that person.

It appears that the evidence in fact revealed that Tonya was not involved in Gary's project at all, with the *sole* exception of drafting an invoice for West Branch Collision at Gary's request. The invoice, proclaiming itself a "Statement & Repair Order" with a West Branch Collision letterhead, reflects that several repairs were performed to a Ford F-350 truck owned by Kurt Zettel, in exchange for "(No charge) Exchange for use of equipment — U.P. Cabin." As the majority notes, this is a reference to Zettel having loaned Gary an excavator for construction of the road. As discussed, I take no issue with the trial court's credibility assessment and conclusion that Tonya understood the significance of the invoice. Nevertheless, Gary explained that West Branch Collision was his and his mother's business, not Tonya's. Tonya did some clerical work and ran errands for the shop, but also "t[ook] care of bowling and church stuff" while at the shop. There is no evidence Tonya had any control over Gary or how Gary ran **[*29]** his own business; she was essentially just a scrivener. The invoice itself is merely a memorialization of a business decision made by Gary, and to hold otherwise would

be the inverse of *respondeat superior*: holding a low-level employee liable for a decision made by the business owner.

Knowledge of an activity or proposal is a necessary prerequisite to being able to grant permission or to interfere with that activity or proposal. However, it is not enough. The Legislature can impose strict liability for a failure to act, but it cannot generally punish a person for failing to undertake an act, or failing to stop an act, that the person had no power to effectuate. The trial court made no finding that Tonya had any practical ability to prevent Gary's road construction and wetlands destruction project, nor would any such finding appear warranted on this record. Therefore, I am definitely and firmly convinced that the trial court made a mistake by imposing liability upon Tonya based on her mere knowledge of and benefit from the project. I would reverse as to Tonya.

/s/ Amy Ronayne Krause

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