STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN FARM BUREAU, et al.,

Plaintiffs-Appellees,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant-Appellant.
_____/

Supreme Court No. [#]

Court of Appeals No. 356088

Court of Claims No. 20-000148-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S APPLICATION FOR LEAVE TO APPEAL

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

Elizabeth Morrisseau (P81899)
Jennifer Rosa (P58226)
Assistant Attorneys General
Attorneys for Defendant-Appellant
Michigan Department of
Environment, Great Lakes,
and Energy
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48933
(517) 335-7664
morrisseaue@michigan.gov
rosaj4@michigan.gov

Dated: December 29, 2022

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

STATEMENT OF JURISDICTION

On September 15, 2022, in a published decision, the Court of Appeals affirmed the lower court's determination that there was no subject matter jurisdiction for judicial review of challenged permit conditions in the 2020 National Pollutant Discharge Elimination System (NPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs) (referred to herein as 2020 General Permit) (contained in its entirety at Appellants' App'x pp 88–131.) The Court of Appeals held that Plaintiffs failed to exhaust their administrative remedies, but on different grounds than those asserted by the Department. Instead of finding that the remedy to exhaust was the pending contested case, the Court of Appeals found that the remedy to exhaust was a request for a declaratory ruling. This ruling was based on the mistaken conclusion that the permit conditions were unpromulgated rules that exceeded the Department's authority. Through granting the Department's motion for dismissal, the Court of Appeals' novel reasoning was tantamount to a decision against the Department on the merits. As a result, the Department is an aggrieved party for purposes of this appeal.

The Department seeks leave to appeal under MCR 7.305. This Court has jurisdiction under MCL 600.215(3) and may review a case after a decision by the Court of Appeals. MCR 7.303(B)(1). The Department asks this Court to vacate the reasoning of the Court of Appeals' opinion and reinstate the reasoning of the Court of Claims, or, in the alternative, grant leave to appeal to address the merits.

STATEMENT OF QUESTIONS PRESENTED

1. The Department has no rulemaking authority but is authorized to issue permits under existing rules. The Administrative Procedures Act lays out a clear statutory framework that distinguishes between licenses, which include permits, and rules, which do not. The Act also sets forth different paths to challenge each one, with permits challenged through a contested case and rules challenged through a declaratory ruling. Did the Court of Appeals err in determining that the Department should have promulgated the challenged permit conditions as rules?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: No.

2. Under MCL 324.3106, and to maintain its federally delegated authority to issue NPDES permits, the Department is required to issue NPDES permits that assure compliance with state water quality standards. Did the Court of Appeals err by determining that the Department could not issue the challenged permit conditions, in effect prohibiting the Department from considering water quality standards when issuing new permit conditions?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: No.

3. In the alternative, did the Court of Appeals err by determining that existing rules do not authorize the challenged permit conditions?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: No.

STATUTES AND RULES INVOLVED

MCL 324.3103

> The department shall protect and conserve the water resources of the state and shall have control of the pollution of surface or underground waters of the state and the Great Lakes, which are or may be affected by waste disposal of any person. . ..
>
> The department shall enforce this part and may promulgate rules as it considers necessary to carry out its duties under this part. However, notwithstanding any rule-promulgation authority that is provided in this part, except for rules authorized under section 3112(6), the department shall not promulgate any additional rules under this part after December 31, 2006.

MCL 324.3106

> The department shall establish pollution standards for lakes, rivers, streams, and other waters of the state in relation to the public use to which they are or may be put, as it considers necessary. The department shall issue permits that will assure compliance with state standards to regulate municipal, industrial, and commercial discharges or storage of any substance that may affect the quality of the waters of the state. The department may set permit restrictions that will assure compliance with applicable federal law and regulations. . . The department shall take all appropriate steps to prevent any pollution the department considers to be unreasonable and against public interest in view of the existing conditions in any lake, river, stream, or other waters of the state.

MCL 324.3112

> (1) A person shall not discharge any waste or waste effluent into the waters of this state unless the person is in possession of a valid permit from the department. . ..
>
> (5) A person who is aggrieved by an order of abatement of the department or by the reissuance, modification, suspension, or revocation of an existing permit of the department executed pursuant to this section may file a sworn petition with the department setting forth the grounds and reasons for the complaint and requesting a contested case hearing on the matter pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL

24.201 to 24.328. A petition filed more than 60 days after action on the order or permit may be rejected by the department as being untimely.

Mich Admin Code, R 323.2101

(1) A These rules are being processed to implement the 1972 amendments to part 31 of the act which authorized the initiation of a waste or waste effluent discharge permit system compatible with the national pollutant discharge elimination system (NPDES). The NPDES has been initiated by the federal Congress through the enactment of the federal water pollution control act amendments of 1972 (33 U.S.C. §1251 *et seq*.). In general, the rules outline all of the following:

(a) The procedures by which all persons discharging wastes into the waters of the state shall apply for waste or waste effluent discharge permits as required by part 31 of the act.

(b) Exceptions to procedural requirements.

(c) Public participation procedures and hearings on permit applications.

(d) Procedures by which permits are issued or denied by the department.

(e) Appeals procedures.

(f) Permit conditions and monitoring of waste or wastewater discharges.

(2) The promulgation of these rules, in association with part 31 of the act, provides sufficient authority to the state, upon approval by the United States environmental protection agency, to issue permits for waste or wastewater discharges under the NPDES pursuant to section 402(b) of the United States Public Law 92-500 (33 U.S.C. §1251 *et seq*.). The department is the state agency designated by state law to administer this program.

Mich Admin Code, R 323.2137

When applicable, a permit issued by the department shall contain terms and conditions deemed necessary by the department to ensure compliance with at least the following effluent standards and limitations: . . .

(d) Any other more stringent limitation deemed necessary by the department to meet applicable water quality standards, treatment standards, or schedules of compliance established pursuant to part 31 of the act or rules promulgated pursuant thereto, or necessary to meet other federal law or regulation enacted or promulgated subsequent to these rules, or required to meet any applicable water quality standards, including applicable requirements necessary to meet maximum daily loads established by and incorporated into the state's continuing planning process required pursuant to section 303 of the federal act.

MCL 24.203

(1) A "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation. . ..

(3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are considered a continuous proceeding as though before a single agency.

MCL 24.205

(a) "License" includes the whole or part of an agency permit, certificate, approval, registration, charter, or similar form of permission required by law.

MCL 24.207

"Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. Rule does not include any of the following: . . .

(j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

MCL 24.264

Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, may be determined in an action for declaratory judgment if the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. . . . An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously. . ..

MCL 24.301

When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

Mich Admin Code, R 323.2189(h) (incorporated from 40 CFR 122.44 (2005))

[E]ach NPDES permit shall include conditions meeting the following requirements when applicable.

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318, and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality. . ..

INTRODUCTION AND REASONS FOR GRANTING THE APPLICATION

The gravity of this appeal cannot be overstated. This jurisdictional dispute undermines the Department's ability to safeguard Michigan's water quality. It is impossible to determine which permit conditions are necessary to safeguard water quality without data about the current condition of the receiving waters. Yet, the Court of Appeals' ruling removes the Department's ability to consider water quality data when developing permit conditions by characterizing the permit conditions as unpromulgated rules. If the lower court's ruling stands, the Department will be unable to develop permits consistent with its own rules or the Clean Water Act, which each require the Department to develop permit conditions more stringent than industry-specific requirements when necessary to safeguard water quality. This leaves the Department, an agency with extensive permitting regulations but no present rulemaking authority, unable to satisfy its statutory mandate to issue permits that assure compliance with state water quality standards. As a result, the United States Environmental Protection Agency (EPA) could revoke Michigan's delegated authority to issue NPDES permits entirely.

The erroneous reasoning upholding the lower court's jurisdictional ruling injects uncertainty into well-established procedures for challenging agency action laid out in the Administrative Procedures Act (APA), MCL 24.201 *et seq.*—especially since the decision is published and thus precedential. Under the APA, a permit condition must be challenged by a contested case before judicial review can occur. But a rule must first be challenged administratively by a request for a declaratory ruling, and then by judicial review. Agencies without rulemaking authority need

not comply with inapplicable rulemaking procedures. Instead of following this statutory relief, the Court of Appeals created a new avenue outside of the plain text of the APA—the kind of "potent change" that should not be created through judicial action. See *Parsonson v Constr Equip Co*, 18 Mich App 87, 90 (1969).

Moreover, this case warrants further appellate review under MCR 7.305(B):

- The case against a state agency has significant public interest. MCR 7.305(B)(2); Const 1963, art 4, § 52 (public concern in environmental protection).

- The interpretation of the APA is "of major significance to the State's jurisprudence," MCR 7.305(B)(3), because that statute establishes distinct rulemaking and licensing requirements for executive branch agencies; changing those clear requirements through judicial interpretation impacts most, if not all, of those state agencies and the people and entities they serve.

- The Court of Appeals' ruling conflicts with existing precedent that general permits are not generally applicable because they cannot authorize CAFOs to discharge without review of individualized effluent limitations contained in each CAFO's comprehensive nutrient management plan (CNMP). MCR 7.305(B)(5)(a); see *Sierra Club Mackinac Chapter v Dep't of Environmental Quality*, 277 Mich App 531, 555 (2008).

- The Court of Appeals' erroneous ruling creates material injustice because premature judicial review of water quality permits, absent facts regarding the relationship between water quality and permit conditions, hinders the Department's ability to meet its statutory mandate to issue permits that safeguard water quality. MCR 7.305(B)(5)(b).

This Court should vacate the Court of Appeals' decision and reinstate the lower court's reasoning for the lack of subject matter jurisdiction: Plaintiffs may not challenge NPDES permits under MCL 24.264 because they are "licenses," and Plaintiffs may not *yet* seek judicial review of the 2020 General Permit because of the ongoing contested case. Alternatively, this Court should grant leave to appeal, and allow supplemental briefing on the challenged permit conditions themselves.

STATEMENT OF FACTS AND PROCEEDINGS

The Clean Water Act

The purpose of the Clean Water Act, 33 USC 1251 *et seq.*, is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Catskill Mountains Chapter of Trout Unlimited, Inc v EPA*, 846 F3d 492, 501 (CA 2, 2017), citing 33 USC 1251(a). The Clean Water Act relies on federal oversight to ensure minimum standards are met, with explicit acknowledgement of states' rights to control pollution more stringently. 33 USC 1251(b). The Clean Water Act "provides a federal floor, not a ceiling, on environmental protection." *Dubois v USDA*, 102 F3d 1273, 1300 (CA 1, 1996). But when states set water quality standards more stringent than the federal floor, the Clean Water Act requires compliance with those more stringent standards instead. *Id.*

Two of the Clean Water Act's most powerful water quality protection programs are the National Pollutant Discharge Elimination System (NPDES) permitting program and the water quality standard planning and assessment program. Only the EPA and states that satisfy the EPA's requirements may issue NPDES permits. 33 USC 1342(a)(3) and (b). If the EPA determines that a state is not administering a program "in accordance with requirements," it can withdraw approval of the state program. 33 USC 1342(c)(3). NPDES permits authorize "point sources," 33 USC 1362(14), to discharge pollutants into regulated surface water, but only in amounts and manners that safeguard state-established, federally approved water quality standards. 33 USC 1342(a)(1). NPDES permits must

contain effluent limitation guidelines, which are federally developed standards for specific industries, as well as "any more stringent pollutant release limitations necessary for the waterway receiving the pollutant" to meet water quality standards." *American Paper Institute, Inc v USEPA*, 996 F2d 346, 349 (CA Fed, 1993), citing 33 USC 1311(b)(1)(C). Developing NPDES permits is no easy task, requiring permit writers to use scientific judgment to develop permit conditions that ensure authorized discharges maintain broadly applicable water quality standards. *Id*. at 351.

The water quality planning and assessment program, laid out in sections 301 through 305 of the Clean Water Act, 33 USC 1311 through 1315, requires states to establish water quality standards to safeguard specified designated uses. Once a state develops a water quality standard, if the EPA approves it, it becomes "applicable" federal law, 33 USC 1313(c), for the purposes of the NPDES permitting program. *Arkansas v Oklahoma*, 503 US 91, 105 (1992) (explaining how 40 CFR 122.44(d) incorporates state water quality standards into federal law).

After water quality standards are established, states must monitor state waters to determine whether they are meeting those standards. 33 USC 1313; 33 USC 1315. When a particular water body fails to meet a water quality standard, the state must list it as impaired and then develop a Total Maximum Daily Load (TMDL) to bring the water body into attainment, i.e., meeting state water quality standards. 40 CFR 130.7. TMDL planning is "a process with several layers, each placing primary responsibility for pollution controls in state hands with 'backstop

authority' vested in the EPA." *American Farm Bureau Federation v USEPA*, 792 F3d 281, 289 (CA 3, 2015). One of the purposes of this macro-level analysis of pollution and water quality is to "develop long-range, area-wide programs to alleviate and eliminate existing pollution." *Arkansas v Oklahoma*, 503 US at 108.

Michigan Water Quality Standards

Pursuant to both Part 31 and section 303(c) of the Clean Water Act, 33 USC 1313(c), the Department duly promulgated water quality standards that are intended to ensure that state water resources are suitable for a variety of uses, including fishing, swimming, and drinking. Relevant here, those include water quality standards that limit the amount of nutrients (including phosphorus), harmful microorganisms, and characteristics associated with excess nutrients. See Mich Admin Code, R 323.1060(1), (2) (plant nutrients, including phosphorus); R 323.1062(1), (2) (microorganisms); R 323.1050 (physical characteristics); R 323.1055 (taste- or odor-producing substances); R 323.1064(1); R 323.1065 (1), (2); and R 323.1043(r) (dissolved oxygen).

Among others, the EPA reviewed those water quality standards and determined that they are in effect for the purposes of section 303(c)(3) of the Clean Water Act.[1]

---

[1] EPA, *Water Quality Standards Regulations: Michigan*, https://www.epa.gov/wqs-tech/water-quality-standards-regulations-michigan#state (accessed on December 29, 2022); see also Attachment 7 (Dec 21, 2005 Letter from EPA Region 5 Director Traub to DEQ Water Division Chief Powers.)

Michigan TMDLs

Because not all state surface water meets those standards, the Department has developed (and the EPA has approved) TMDLs that are intended to return impaired waters back to meeting the state water quality standards.[2] For example, the Department developed a statewide *Escherichia coli* (*E. coli*) TMDL[3], as well as numerous nutrient TMDLs.[4] The Court of Appeals recited Plaintiffs' objection to new permit conditions specific to TMDLs, (9/15/22 Court of Appeals' Opinion, p 5), but had nothing in the record to review regarding how much, and what type of pollutants CAFOs discharge into watersheds subject to TMDLs, and when. (*Id.*)

Since at least 2010, the Department has included a permit condition in its general permit that requires CAFOs located in certain TMDL watersheds to "evaluate operations and determine additional pollutant control measures." (Compare 2010 General Permit (Attachment 5, p 20) and 2015 General Permit (Attachment 1, p 20), with 2020 General Permit (Appellants' App'x p 119).) The Department released the TMDL guidance document referenced in the 2010 and 2015 General Permits when it issued the 2020 General Permit. The Court of Appeals was not presented with, and did not review, that document.

---

[2] EGLE, *EPA-Approved Total Maximum Daily Loads (TMDLs)*, available at https://www.michigan.gov/egle/about/organization/water-resources/tmdls/epa-approved-tmdls (accessed on December 29, 2022).

[3] EGLE, *Michigan's Statewide E. coli Total Maximum Daily Load*, available at https://attains.epa.gov/attains-public/api/documents/actions/21MICH/MI-2020-003/196744 (accessed on December 29, 2022).

[4] See, supra, at n 2.

NPDES Permits

Under section 402 of the Clean Water Act, all point sources must have NPDES permits. 33 USC 1342. States may issue NPDES permits in lieu of the EPA, so long as the EPA determines a state has adequate authority to do so. 33 USC 1342(b). The Department implements Michigan's NPDES permit program under Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq*. (Part 31), and its Part 4 Rules, which contain state water quality standards, Mich Admin Code, R 323.1041 *et seq*., and its Part 21 Rules, which contain its requirements for issuing NPDES permits that safeguard those standards, Mich Admin Code, R 323.2101 *et seq*. "Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Fla Water Mgt Dist v Miccosukee Tribe of Indians*, 541 US 95, 102 (2004). These requirements are referred to as effluent limitations, and the Clean Water Act "sets progressively more stringent technological standards that the EPA must use in setting those discharge limits." *Citizens Coal Council v EPA*, 447 F3d 879, 883 (CA 6, 2006), citing 33 USC 1311(b)(1). All NPDES permits must contain either treatment technology effluent limitations or water quality-based effluent limitations, whichever is more stringent. 33 USC 1311(b)(1). "An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations . . . of the individual discharger." *EPA v Cal ex rel State Water Resources Control Bd*, 426 US

200, 205 (1976). Further, all NPDES permits must assure compliance with state water quality standards. 33 USC 1311(b)(1)(C); 40 CFR 122.4(d).

The EPA promulgated generally applicable rules for NPDES permits, which the Department duly incorporated by reference into its own regulations. Mich Admin Code, R 323.2189. Relevant here, incorporated federal regulations state that all NPDES permits "shall include," specific to state water quality standards and state requirements, "any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards . . . necessary to achieve water quality standards . . . including State narrative criteria for water quality." 40 CFR 122.44 (2005) (incorporated by reference in Mich Admin Code, R 323.2189(2)(h)).

NPDES permits may be issued as general permits or individual permits. Under the Part 21 Rules, a general permit is defined as "a national permit issued authorizing a category of similar discharges." Mich Admin Code, R 323.2103(a). The Part 21 Rules do not define the term "individual permit." Under the Part 21 Rules, the Department "may" issue a general permit for a "category of discharge" after determining that "certain discharges are appropriately and adequately controlled by a general permit." Mich Admin Code, R 323.2191(1). A general permit "may" cover discharges from a category of point source discharges if the following four conditions are met: the sources (1) involve "the same or substantially similar types of operations;" (2) discharge "the same types of wastes;" (3) "require the same effluent limitation or operating conditions;" and (4) "require the same or

similar monitoring." *Id*. In certain circumstances, the Department "may" require a permittee that has applied for a general permit to apply for an individual permit instead. Mich Admin Code, R 323.2191(3) and (4). Similarly, any permittee that is or may be covered by a general permit may request to be covered under an individual permit, although the Department retains the discretion to determine whether an individual or general NPDES permit is more "appropriate." Mich Admin Code, R 323.2191(5). Generally speaking, general permits are a convenience to the regulated industry. Terence J. Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 Envtl L 1215, 1222 (2008).

CAFOs

CAFOs are industrial agricultural operations with two distinct locations of operation—one is the production area, which is where animals are housed and fed, and the other is the land application area, which is where the CAFO waste is eventually land applied. Mich Admin Code, R 323.2104(e); R 323.2103(f). The production area includes animal housing, waste containment structures that hold thousands of gallons of liquid waste, and raw materials storage. Mich Admin Code, R 323.2104(d); see also Mich Admin Code, R 323.2189(2)(m) (incorporating 40 CFR 412.2(h) (2003) by reference). Unlike classic point sources that have discrete pipes that discharge pollutants into surface waters, CAFO production areas have many potential points of discharge. Most obviously, waste storage structures can overflow and discharge pollutants into surface water or leach pollutants into groundwater. See, e.g., *Food & Water Watch v USEPA*, 20 F4th 506, 509, 511 (CA 9, 2021).

Controlling runoff from production areas is challenging because once precipitation or snowmelt contacts polluting substances, that storm water becomes contaminated wastewater as well. As a result, one of the most basic methods of containing production area waste is to prevent clean storm water from contacting polluted waste and wastewater, and to route storm water that has contacted pollutants to waste storage structures. Mich Admin Code, R 323.2196(5)(a)(i), (ii), (iii), and (v); (Appellants' App'x p 99 (requirement to divert clean water)); see also Mich Admin Code, R 323.2189(2)(m) (incorporating 40 CFR 412.37(a)(1)(i) (2003) by reference.)

CAFOs produce waste that contains harmful constituents, including pathogens, nutrients, heavy metals, and antibiotics, all of which can harm water quality. *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 126 (2011). Every year, CAFOs must dispose of all the collected waste and wastewater from their production areas, typically by land-applying it to what the regulations define as the "land application area." The Department's definition of the term "land application area" is broader than the federal counterpart, which does not include land subject to access agreements that CAFO owners use to apply CAFO waste. Compare Mich Admin Code, R 323.2103(f) with 40 CFR 412.2(e) (2003). Like the production area, the land application area presents risk of water pollution through both surface runoff and infiltration through groundwater. 68 Fed Reg 7181, 7196 (February 12, 2003). Conservation practices such as buffers and setbacks reduce the risk of surface runoff reaching surface water and decreasing the

concentration of phosphorus in fields reduces the risk of phosphorus infiltration through groundwater. 68 Fed Reg 7211 (February 12, 2003).

There are just under 300 permitted CAFOs in Michigan that self-reported producing over 3.9 billion gallons of liquid waste in 2020.[5] Fewer than half of them are named Plaintiffs in this action. When the Department first began issuing NPDES permits to CAFOs, there were fewer than 100.

Federal NPDES Requirements for CAFOs

CAFOs are point sources under the Clean Water Act and have been required to obtain and comply with NPDES permits since the 1970s. *Mich Farm Bureau,* 292 Mich App at 112. Two decades ago, the EPA promulgated effluent limitation guidelines and standards for that sector. 68 Fed Reg 7269 (February 12, 2003) (codified at 40 CFR 9, 122, 123, 412) (2003). Relevant here, those federal regulations include requirements for land application of CAFO waste, which the Department has incorporated by reference into its own regulations. See generally 40 CFR 412.4 (2003), incorporated by reference into Mich Admin Code, R 323.2189(2)(m).

Among other things, those requirements prohibit CAFOs from land applying CAFO waste closer than 100 feet from "down-gradient surface waters, open tile line

---

[5] EGLE, *Interactive map of regulated CAFOs*, available at https://egle.maps.arcgis.com/apps/webappviewer/index.html?id=0fae269e1c45485f876c99391403bd3e (accessed on December 29, 2022).

intake structures, sinkholes, agricultural wellheads, or other conduits to surface waters" and allow them instead to maintain a 35-foot vegetated buffer. 40 CFR 412.4(c)(5) (2003). The regulations also require CAFOs to develop nutrient management plans "based on a field-specific assessment of the potential for nitrogen and phosphorus transport from the field and that addresses the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters." 40 CFR 412.4(c)(1) (2003).

The effluent limitation guidelines do not set specific soil test levels for land application areas. 68 Fed Reg 7209 (February 12, 2003) ("The permitting authority has the discretion to determine which of these three [phosphorus risk assessment methods], or other State-approved alternative method, is to be used.") Nor do they set winter requirements. (*Id.* at 7212) ("EPA believes that requirements limiting the application of manure, litter, or other process wastewaters to frozen, snow-covered, or saturated ground are more appropriately addressed through NPDES permit limits established by the permitting authority.")

Michigan's CAFO NPDES Permitting Program

Michigan has had delegated authority over NPDES permits since 1973.[6] The EPA most recently inspected and approved this delegation in the fall of 2006. *Id.* As required by the Clean Water Act to obtain that delegation, the Legislature authorized the Department to issue permits "that will assure compliance with [water quality] standards." MCL 324.3106; see also 33 USC 1342(a). The Department may issue general permits, so long as they can "appropriately and adequately" control the proposed discharges. Mich Admin Code, R 323.2191(1); see also 40 CFR 122.28(b) and 122.23(h) (describing requirements for NPDES general permits, including for CAFOs).

Even though the Department has had no rulemaking authority since 2006, the agency has issued thousands of NPDES permits since then, including individual and general permits, within the confines of its duly promulgated rules. See MCL 324.3103(2). Those duly promulgated rules, the Part 21 Rules, lay out a generally applicable NPDES permitting framework, with industry-specific requirements.

Specific to CAFOs, the Part 21 Rules incorporate by reference federal requirements and include more strict state requirements. "Michigan is perfectly free to adopt NPDES permitting and discharge standards that are more stringent than the federal requirements." *Mich Farm Bureau*, 292 Mich App at 137.

---

[6] United States EPA, *NPDES State Program Authority*, available at https://www.epa.gov/npdes/npdes-state-program-authority (accessed on December 29, 2022).

Relevant here, those more stringent requirements make CAFOs responsible for potential discharges associated with land application on land that they do not own or lease. Mich Admin Code, R 323.2103(f); Mich Admin Code, R 323.2189(2)(m).

CAFOs may seek authorization to discharge to Michigan surface waters either by applying for an individual NPDES permit, or by applying for coverage under a general NPDES permit. Mich Admin Code, R 323.2191(1) and (3). To apply for coverage under a general NPDES permit, a CAFO must first develop a comprehensive nutrient management plan (CNMP), which is an individualized plan for managing wastewater. The Department must review that CNMP and put it out for public notice before issuing the CAFO a certificate of coverage under the general permit. See generally *Sierra Club*, 277 Mich App at 530. Even with the efficiencies provided by issuing a general permit, permitting remains an individualized process, to ensure that the Department does not authorize the discharge of pollution contrary to its obligations under MCL 324.3106 and the Clean Water Act. Because individual CAFOs manage production areas and land application areas differently, the CNMP is a crucial mechanism that ensures the Department reviews each CAFO's potential discharges before authorizing them under a general permit.

Proceedings Below

The Department issued the 2020 General Permit on March 27, 2020, within five years of the issuance of the 2015 General Permit on April 30, 2015, as mandated by Mich Admin Code, R 323.2150. The EPA conditionally approved the

permit.[7] Any CAFO that applied for coverage under the 2020 General Permit had its permit coverage extended as a matter of law under Mich Admin Code, R 323.2108(1) (referencing 40 CFR 122.21(d) (2005)). Plaintiffs subject to the 2015 General Permit have duly applied for coverage under the 2020 General Permit.

Within weeks of the 2020 General Permit's issuance, Michigan Farm Bureau, along with half a dozen other industry groups and over 100 individual CAFOs, fewer than half of Michigan's permitted CAFOs, filed a petition for a contested case hearing, challenging certain new conditions in the 2020 General Permit under MCL 24.291. Soon thereafter, the Environmental Law and Policy Center, the Michigan Environmental Council, the Environmentally Concerned Citizens of South Central Michigan, Freshwater Future, For Love of Water, Food and Water Watch, Michigan League of Conservation Voters, and the Alliance for the Great Lakes, successfully moved to intervene in the contested case to support the Department. Parties pre-filed direct and rebuttal testimony, and the Tribunal presided over two and half weeks of live testimony, including both cross- and redirect examination. In total, 29 witnesses presented testimony accompanied by well over 300 exhibits. The Tribunal sought supplemental briefing on the effect of the Court of Appeals' decision on the contested case, which is not yet complete. It is not expected that the Tribunal will issue a decision within the next six months.

[7] See USEPA Agency Review Letter (Attachment 2.)

Approximately two and a half months after the contested case was initiated, Michigan Farm Bureau led an overlapping, but not identical, group of parties (collectively "Plaintiffs") in filing the 73-page complaint in the Court of Claims. (Appellants' App'x pp 12–133.) That complaint included the same allegations contained in the contested-case petition—including the claim that certain permit conditions were unlawfully promulgated rules—but was styled as a complaint for a declaratory judgment under MCL 24.264.

The Department timely moved the Court of Claims to dismiss the complaint under MCR 2.116(C)(4) and MCR 2.116(C)(8) because Plaintiffs had not yet exhausted their administrative remedies and, as the Department argued, "[a]bsent subject matter jurisdiction, any action a court takes on a case, besides outright dismissal, is void as a matter of law." (Appellants' App'x p 148.) Without holding oral argument, the Court of Claims granted the Department's motion, finding that there was no subject-matter jurisdiction while the contested case was pending, and that "[c]omparing the statutory goals to the permitting conditions and determining whether the permitting conditions further those goals" required development of a factual record in the Tribunal. (Appellants' App'x p 222.) The Court of Claims stated, as an initial matter, "The manner for seeking declaratory judgment under MCL 24.264 does not apply to the instant case." (Appellants' App'x p 219.)

Plaintiffs then appealed that final decision to the Court of Appeals. By the time the Court of Appeals held oral argument on May 4, 2022, the administrative

record had been fully developed through the contested case proceedings, and only briefing remained.

After merits briefing concluded in the contested case, but before the Tribunal had time to issue a decision and order, the Court of Appeals issued a published decision on September 15, 2022, affirming the Court of Claims' decision to dismiss Plaintiffs' case for failure to exhaust administrative remedies. But instead of affirming that the administrative remedy to exhaust was the pending *contested case*, the Court of Appeals decided that Plaintiffs had to file a request for a *declaratory ruling* with the Department under MCL 24.263. The Court of Appeals agreed with Plaintiffs that the new permit conditions should have been promulgated as rules and that a declaratory action under MCL 24.264 could not proceed before a declaratory ruling request. (9/15/22 Court of Appeals' Opinion, p 13.)

The Court of Appeals began its opinion by stating that MCL 324.3106 authorized the Department to promulgate "numerous administrative rules[.]" (*Id.*, p 11.) The Court of Appeals identified Mich Admin Code, R 323.2137 as one of those rules, but not the incorporated federal regulations. (*Id.* at 8, n3.) Similarly, the Court of Appeals did not identify the applicable water quality standards, which the Department also duly promulgated pursuant to MCL 324.3106. (*Id.*); see Mich Admin Code, R 323.1041 (explaining that the Part 4 Rules were "minimum water quality requirements" promulgated, among other things, under Part 31.)

In its analysis of the permit conditions, the Court of Appeals compared the text of portions of the 2010 and 2015 permits to portions of the text of the 2020 General Permit, with reference to portions of Mich Admin Code, R 323.2196(5)(a), which includes minimum requirements for the contents of a CNMP. (9/15/22 Court of Appeals' Opinion, pp 11–13).[8] The Court of Appeals did not refer to either the state or incorporated federal requirements to develop more stringent permit conditions when necessary to maintain water quality standards. (*Id.* (no mention of Mich Admin Code, R 323.2137(d) or Mich Admin Code, R 323.2189(2)(h) (incorporating 40 CFR 122.44 (2005) by reference)).) The Court of Appeals similarly did not refer to the Part 4 Water Quality Standards. (*Id.* (failing to mention Mich Admin Code R, 323.1041 *et seq*.)) In its holding, the Court of Appeals addressed only four of the eleven challenged permit conditions and stated that the conditions "go beyond the scope of the promulgated rule, Mich Admin Code, R 323.2196." (*Id.* at 13; but see *id*. at 5, listing all contested conditions.)

Plaintiffs filed a Motion for Reconsideration based in part on their argument that seeking a declaratory ruling would be futile. (10/6/22 Plaintiffs' Mot to Reconsider, p 9.) The Department concurred with the motion, but for different reasons. Specifically, the Department argued that the opinion conflicted with the plain language of the APA, which establishes contested-case proceedings as the

[8] The 2020 General Permit is included at Appellants' App'x pp 88–133, but neither the 2010 nor the 2015 General Permits are contained therein. They are both included as Attachments 5 and 1, respectively, for this Court's convenience.

exclusive remedy to challenge permit conditions. Further, the Department argued that the panel first wrongly determined that the permit conditions were generally applicable rules, and then wrongly determined that they exceeded the scope of existing rules. (Dept's Answer Concurring with Appellants' Request for Reconsideration of Sept 15, 2022 Opinion for Different Reasons, pp 2, 6–7.)

The Court denied the motion, ruling that the conditions of the 2020 General Permit "were not promulgated as rules, but should have been" and that the Department "sidestepped its statutory obligation to promulgate them as required under the APA." (11/17/22 Court of Appeals' Order Denying Mot for Reconsideration, p 1.) The Court also stated, without analysis, that the Department had not demonstrated "palpable error." (*Id.*, p 2.)

After the Court of Appeals issued its ruling, the Tribunal requested supplemental briefing to determine its effect on the contested case.

Shortly thereafter, Plaintiffs submitted a request for declaratory ruling to the Department under MCL 24.263 and Mich Admin Code, R 324.81, based on the reasoning of the Court of Appeals, and seeking the Department's declaratory ruling whether the new conditions of the 2020 General Permit are invalid administrative rules. On the same day of this filing, the Department denied that request because it may not issue a declaratory ruling where "relevant facts necessary to issue a declaratory ruling are contested." Mich Admin Code, R 324.81.

STANDARD OF REVIEW

This Court reviews *de novo* a trial court's decision to grant a motion for summary disposition. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720 (2005); *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205 (2001). Although this case was determined on a motion for summary disposition and appealed by Plaintiffs on that basis to the Court of Appeals, the Court's opinion raised questions of law regarding the process to contest the conditions of a permit, as well as questions of statutory interpretation and application. As such, these reasons also warrant a *de novo* review. See *Christenson v Sec of State*, 336 Mich App 411, 417 (2021); *Johnson v Johnson*, 329 Mich App 110, 118 (2019); *Makowski v Governor*, 317 Mich App 434, 441 (2016).

ARGUMENT

I. The Court of Appeals wrongly concluded that the Department should have promulgated the challenged permit conditions as rules because the permit conditions are licenses, not rules, and the Department remains obligated to issue permits that protect water quality.

The Court of Appeals erroneously concluded that the challenged permit conditions are rules requiring promulgation. First, the Department has no current rulemaking authority under Part 31. Thus, the Court of Appeals wrongly directed the Department to exercise an authority it lacks. Second, under the plain language of the APA, the 2020 General Permit is a license, which is subject to contested case proceedings, not a declaratory ruling request. Finally, this wrong decision on the merits, at the jurisdictional phase, results in material injustice by interfering with pending fact-intensive contested case proceedings. MCR 7.305(B)(5)(a).

A. The challenged permit conditions are not rules because the Department lacks rulemaking authority but must issue permits that safeguard water quality under the Clean Water Act.

The lower court's ruling that the Department should have promulgated the challenged permit conditions as rules is predicated on the incorrect assumption that the Department has such authority. (9/15/22 Court of Appeals' Opinion, p 13.) But in this case, the Department could not have issued the challenged permit conditions as rules because the Legislature removed its rulemaking authority nearly two decades ago. MCL 324.3103(2). It was clearly erroneous to require an agency to exercise an authority it does not have. Moreover, the ruling creates material injustice by prohibiting the Department from exercising plain statutory authority to

issue permits under MCL 324.3106, subject to an extensive regulatory framework in effect at the time the Legislature eliminated the Department's rulemaking authority. MCR 7.305(B)(5)(a).

This Court previously reviewed standards issued by an agency lacking rulemaking authority, and found them to be interpretative rules, not subject to the APA. *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 248 (1993). In that case, the Department of Education published nonpublic and home school compliance procedures under the Nonpublic School Act, which gave it no rulemaking authority. *Id.* at 235–236. The published compliance procedures listed specific information the regulated entities must provide to the Department of Education, specified requirements for teacher certification and curriculum, and explained when the Department of Education could initiate enforcement proceedings under the Nonpublic School Act. *Id*. This Court found that those requirements could not have been rules subject to the APA because the Department of Education had no rulemaking authority under the Nonpublic School Act. *Id.* at 246. This Court then distinguished those circumstances from cases where executive branch agencies with rulemaking authority failed to formally promulgate the rules. *Id*. at 246–247 (discussing *Coalition for Human Rights v DSS,* 431 Mich 172 (1988) and *Mich Farm Bureau v Bureau of Workmen's Comp, Dep't of Labor*, 408 Mich 141 (1980)). Crucially, this Court held that "an agency that has not been granted rule-making authority is not obliged to follow rule-making procedures." *Id.* at 246. See also *Co of Wayne v Mich State Tax Comm*, unpublished per curiam opinion of the Court of

Appeals, issued April 2, 2002 (Docket No 227236), p 3 (Attachment 3), citing *Clonlara*, 442 Mich 230 at 233–236, 244–245 (finding that the Michigan State Tax Commission did not unlawfully promulgate rules when it published multiplier tables in its Assessor's Manual, considering both the agency's lack of express statutory authority to do so, and the fact that applicants could deviate from the values in the multiplier tables.)

The same logic applies here. The Department has lacked rulemaking authority since December 31, 2006. MCL 324.3103(2). At that time, however, the Department had already promulgated 72 pages of water quality standards and 53 pages of rules specific to NPDES permitting, in addition to incorporating by reference at least as many pages of federal regulations by reference. Mich Admin Code, R 323.1041 *et seq.*; Mich Admin Code, R 323.2101 *et seq*. The purpose of the Part 21 Rules is that their promulgation "provides sufficient authority to the state, upon approval by the [EPA], to issue [NPDES] permits." Mich Admin Code, R 323.2101(2). Because the Legislature is presumed "to be aware of the existence of the law in effect at the time of its enactments," it follows that the Legislature is presumed to have been aware of the Department's then-existing, federally approved rules when it prohibited the Department from further rulemaking. *Farris v McKaig*, 324 Mich App 349, 363 (2018), quoting *Malcolm v City of East Detroit*, 437 Mich 132, 139 (1991) (quotation marks omitted). Additionally, the Legislature is "presumed to be familiar with the rules of statutory construction" and to be "aware of the consequences" of how it uses or omits statutory language, and further, "to

have considered the effect of new laws on all existing laws." *Yachcik v Yachcik*, 319 Mich App 24, 32–33 (2017) (citations omitted.)

In addition, the Legislature is presumed to have revoked the Department's rulemaking authority without removing the agency's express authority to develop and issue permits that assure compliance with state water quality standards contained in other statutory provisions. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 491–492 (2000). That is because repeal by implication is strongly disfavored. *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 651–652 (2014). Several sections of Part 31 relate to the Department's permitting requirements and reference the legislative directive for the Department to maintain its federally delegated authority to issue NPDES permits. For example, MCL 324.3106 requires the Department to issue permits that "will assure compliance" with state water quality standards. More practically, MCL 324.3121 creates an NPDES fund for the Department's use in administering the NPDES program, including "permit development and issuance." MCL 324.3121(4)(b). That section also requires the Department to report to the Legislature annually on its administration of the NPDES permitting program. MCL 324.3121(5).

Moreover, the Legislature is presumed to be aware of how executive branch agencies interpret applicable statutes, and "legislative silence in the face of an agency's construction of a statute can only be construed as a consent to the accuracy of that interpretation." *Dykstra v Dir, Dep't of Natural Resources*, 198 Mich App 482, 490 (1993) (quotation marks omitted). Since 2006, the Department has issued

thousands of NPDES permits, both individual and general, that contain permit conditions with text not contained in the Part 21 Rules and has reported on an annual basis to the Legislature every year, under MCL 324.3121(5). Nearly two decades of legislative silence over the Department's successful implementation of the NPDES permitting program, absent rulemaking, speaks volumes.

In short, the Court of Appeals should not have found the permit conditions to be unlawfully promulgated rules because the Department has no rulemaking authority under Part 31. Further, canons of statutory construction counsel that the Legislature would not have eliminated the Department's clear statutory obligation to issue and develop NPDES permits that safeguard water quality through repeal by implication when it prohibited the agency from further rulemaking. The Court of Appeals should not be allowed to do so now.

B. The Court of Appeals' determination that the challenged permit conditions are rules was erroneous because the conditions fit within the APA's definition of "license" and are excluded from its definition of "rule."

The Court of Appeals' opinion conflicts with the plain language of the APA for the following three reasons: First, the 2020 General Permit fits within the definition of "license," MCL 24.205(a), and not the definition of "rule," found at MCL 24.207. Second, the 2020 General Permit cannot be a rule because rules are generally applicable, and for the terms of any general permit to apply, they must first be individualized and put out for public notice and review. Finally, even if the 2020 General Permit is generally applicable, it is excluded from the APA's definition

of "rule" because issuing it was an exercise of permissive statutory power, which is excluded from the statutory definition of "rule" under MCL 24.207(j).

1. The 2020 General Permit is a "license" under the APA.

A court "must enforce clear and unambiguous statutory provisions as written." *In re Certified Question (Preferred Risk Mut Ins Co v Mich Catastrophic Claims Ass'n*), 433 Mich 710, 721 (1989). Importantly, when the Legislature uses different words, they mean different things. *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 14 (2009).

The Court of Appeals' opinion conflicts with the plain language of the APA. The Legislature, in developing the APA, laid out a framework specifying how to challenge various types of final agency action. In doing so, the Legislature defined "rule" and "license" as mutually exclusive terms. A "license" includes permits, but a "rule" does not. Courts must adhere to statutory definitions because the Legislature is presumed to intend the meaning it expresses, particularly when the ordinary meaning of the language is clear. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 573 (2000).

The APA defines the term "license" as "the whole or part of an agency permit . . . required by law." MCL 24.205(a). Though the APA does not define the term "permit," the provisions specific to contested cases reference MCL 324.1301(g). MCL 24.288. That referenced subsection of the NREPA defines "permit" as any permit or operating license the Department issues to a non-state permittee under the NREPA and rules promulgated thereunder. MCL 324.1301(g).

This definition encompasses the 2020 General Permit, issued under Part 31 and rules promulgated thereunder, specifically the Part 21 Rules, and with reference to the Part 4 Water Quality Standards.

In contrast, the APA defines the term "rule" as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency[.]" MCL 24.207. The definition expressly excludes a "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j). See, e.g., *Greenfield Const Co Inc v Mich Dep't of State Hwys*, 402 Mich 172, 191 (1978) (holding that Standard Specifications for Highway Construction that included allocation of duties between the contractor and the state, payment terms, and highly technical and detailed information concerning construction methods and techniques, soil composition requirements, and technical details touching almost every conceivable aspect of highway construction work, were not rules that needed to be promulgated, but rather, were contract terms and specifications governing the contractual relationship between the state and contractors engaged in state highway work.)

Relatedly, because "rules" are different from "permits," the Legislature established two distinct administrative bodies to oversee the Department's rulemaking (The Environmental Rules Review Committee), MCL 24.265, and permitting (The Environmental Permit Review Commission), MCL 324.1313(1).

Here, each challenged permit condition is a "license" because they are all "part" of a "permit" issued by the Department under Part 31 of the NREPA and associated regulations. MCL 24.205(a); MCL 324.1301(g). The Court of Appeals erroneously found them to be "rules" instead, which is a clear error that this Court should correct.

2. Rules are generally applicable, but the 2020 General Permit is not generally applicable because the Department cannot use it to authorize discharges from CAFOs without first reviewing and publicly noticing individual applications for coverage.

The Court of Appeals also wrongly found that the challenged permit conditions are generally applicable standards. (9/15/22 Court of Appeals' Opinion, p 13.) For standards to be generally applicable, they must apply to all similarly situated entities with equal force. See, e.g., *American Federation of State, Co & Muni Employees (AFSCME), AFL-CIO v Dep't of Mental Health*, 452 Mich 1, 10 (1996) (finding that an "all or nothing" form contract for regulated entities was a generally applicable standard that should have been promulgated as a rule); see also *Spear v Mich Rehab Servs*, 202 Mich App 1, 5 (1993) (finding that a manual describing standards to be used for a statutorily permissive "benefits needs test" listed generally applicable standards that should have been promulgated as a rule).

The challenged permit conditions are not generally applicable because they do not apply to CAFOs without individual decision-making by prospective permittees, subject to additional Department review and public notice. Because this legal challenge did not include a developed discussion of *how* NPDES

permitting works, including how permittees must each develop individual CNMPs, the Court of Appeals wrongly concluded that the challenged permit conditions are generally applicable. (9/15/22 Court of Appeals' Opinion, p 13; but see *id.* at 5.) This Court should correct this error because it conflicts with another Court of Appeals decision. MCR 7.305(B)(5)(b). In *Sierra Club*, the Court of Appeals held that the Department was not administering the CAFO permitting program in accordance with public notice requirements of the Clean Water Act by authorizing CAFOs to discharge under a general permit without public notice review of individual effluent limitations, laid out in each permittee's CNMP. 277 Mich App at 555. *Sierra Club* was predicated on the holding that the CNMP, and not the general permit, contains "effluent limitations" within the meaning of 33 USC 1362(11). *Id.* Otherwise, the Court of Appeals could not have held that the Department had failed to issue permits in accordance with the public notice requirements of the Clean Water Act.

In this case, most of the challenged permit conditions relate to what may be included within each permittee's individual CNMP. (Compl, ¶ 222, Appellants' App'x pp 56–57.) As a result, under *Sierra Club*, they are not generally applicable standards that authorize discharges from CAFOs without additional, individualized decision-making by the CAFOs, and review by the Department and the public. *Sierra Club*, 277 Mich App at 551 ("While the general permit provides numerical targets for determining whether land application of waste is a threat to local water supplies, General Permit II delegated to CAFOs the authority to determine and

adopt application rates for disposal of waste.") This is distinct from the "all or nothing form" at issue in *AFSCME*. 452 Mich at 10. The lower court wrongly determined that the challenged permit conditions are generally applicable, even though each CAFO must first develop individual effluent limitations, as the Court of Appeals previously determined in *Sierra Club*.

3. Even if any of the challenged permit conditions are generally applicable, they are still excluded from the APA's definition of "rule" because permitting decisions are within an agency's decision to exercise a permissive statutory power.

The definition of "rule" specifically excludes an agency's decision to exercise a "permissive statutory power, although private rights or interests are affected." MCL 24.207(j). This permissive power includes permitting decisions. For example, in *City of Romulus v Mich Dep't of Environmental Quality*, the Department decided not to consider, for the purpose of issuing permits for underground injection wells for waste disposal, whether there was a market-driven need for a well. 260 Mich App 54, 82 (2003). The court determined that Part 111, Hazardous Waste Management, of the NREPA, MCL 324.11101 *et seq.*, did not require the Department to promulgate a rule reflecting its decision not to consider the need for a proposed facility when making permitting decisions. The court then concluded that the Department's decision *not* to promulgate such a rule was an exercise of a permissive statutory power and thus was not a rule under MCL 24.207. *Id*. The court astutely observed that if the agency had to promulgate a rule for every action or nonaction before issuing a permit, it would never be able to take any action. *Id.*

at 83. Thus, the permit was properly issued even though the agency did not promulgate a rule when making its permitting decision. *Id.* at 84.

Outside of the permitting context, in *Michigan Trucking Ass'n v Mich Pub Serv Comm*, 225 Mich App 424, 430 (1997), a statute "directly and explicitly" authorized the Public Service Commission to establish a safety rating system for motor carriers. The court determined that the Commission was not required to promulgate the rating system before implementation and was exempt from the formal rulemaking process under the APA. *Id.* It noted that although any safety rating system "would be hotly contested by the regulated carriers," subjecting the system to the formal hearing and promulgation requirements of the APA "would make it impossible" for the Commission to have the system in place within the time frame prescribed by statute, and when construing a statute, "unreasonable results are to be avoided wherever possible." *Id.,* quoting *In re Telecom Tariffs*, 210 Mich App 533, 541 (1995) (quotation marks omitted); see also *Village of Wolverine Lake v Mich State Boundary Comm*, 79 Mich App 56, 60 (1977) (determining that the Commission's adoption of a policy disfavoring the expansion of small cities within a county was not a rule that needed to be promulgated under the APA because it followed from the Commission's statutory authority and was thus an exercise of a permissive statutory power); *Pyke v Dep't of Social Servs*, 182 Mich App 619, 630 (1990) (holding that the agency's policy of considering one spouse's receipt of benefits to assess the other spouse's eligibility for benefits was an exercise of the agency's permissive statutory power and not a rule requiring formal adoption,

particularly in light of the "explicit or implicit authorization for the actions in question.")

Here, the conditions of the 2020 General Permit are excluded from the definition of "rule" in the APA because they represent the Department's decision to "exercise a permissive statutory power." MCL 24.207(j). The Department is charged with statutory authority to protect the waters of the state and to issue permits in accordance with its legislative mandate. MCL 324.3106. The Department promulgated expansive regulations describing how and when to issue, renew, and update NPDES permits, in relation to state water quality standards. Mich Admin Code, R 323.2101 *et seq*. and Mich Admin Code, R 323.1041 *et seq*. The new permit conditions in the 2020 General Permit reflect the Department's exercise of its permissive authority under MCL 324.3106, in accordance with those duly promulgated, extensive rules.

Further, assuming *arguendo* that the Department has rulemaking authority, because it must renew NPDES permits every five years, doing so via rulemaking "would make it impossible" to timely reissue permits, much like the court in *Michigan Trucking* found that mandated rulemaking would cause the Public Service Commission to fail to develop the motor carriers' safety rating system within the time frame dictated by the statute. *Mich Trucking Ass'n*, 225 Mich App at 430. For these reasons, the Court of Appeals wrongly found that the challenged permit conditions are not excluded from the APA's definition of "rule" as permissive

agency action. MCL 24.207(j). This Court should correct this clearly erroneous ruling.

C. The Court of Appeals' erroneous requirement that Plaintiffs exhaust the inapplicable administrative remedy for a rule, instead of allowing the administrative contested case proceeding for a license to continue unimpeded, will cause the material injustice of premature judicial review, without the factual record developed through a contested case proceeding.

The Court of Appeals wrongly directed Plaintiffs to seek a declaratory ruling from the Department regarding the challenged permit conditions, even though the applicable rules prohibit it from doing so, given the relevant contested facts. Mich Admin Code, R 324.81(4). To reach this wrong conclusion, the Court of Appeals improperly weighed in on the merits of a pending contested case. The lower court's erroneous determination that the challenged permit conditions are "rules" creates a material injustice justifying this Court's involvement under MCR 7.305(B)(5)(a).

The Legislature established distinct pathways for challenging "rules" and "licenses." Licenses may only be challenged via contested cases. MCL 24.291. The 2020 General Permit, like all Part 31 permits, must be preceded by notice and an opportunity for a hearing under Mich Admin Code, R 323.2117, and challenges to it are controlled by the provisions of the APA governing contested cases, which are found at MCL 24.271 to MCL 24.288; MCL 24.291. The contested case is an extension of the initial application process and builds upon the administrative record through evidentiary development and fact-finding before the final agency

decision can issue. *Nat'l Wildlife Federation v Dep't of Environmental Quality*, 306 Mich App 369, 379 (2014); see also *Kassab v Acho*, 150 Mich App 104, 111 (1986).

The APA states that in contested cases regarding "permits" as defined in MCL 324.1301(g), MCL 324.1315 and 324.1317 control the "availability of other administrative remedies." MCL 24.288. Those subsections describe the processes for administrative review of issued permits, after the conclusion of a contested case, MCL 324.1317, as well as before the Department makes a final decision on a pending permit application, MCL 324.1315. Neither authorizes a request for a declaratory ruling. Thus, a contested case is the exclusive administrative remedy for Plaintiffs who challenge a "permit," as defined in MCL 324.1301(g).

In contrast, the APA establishes a process to challenge promulgated rules by administrative review under MCL 24.263, and then by judicial review under MCL 24.264. MCL 24.264 expressly does not apply here, as it is only available where there is no exclusive remedy under law. MCL 24.264 ("Unless an exclusive procedure or remedy is provided by a statute governing the agency . . . .").

MCL 24.263 applies broadly to "the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency." MCL 24.263. See, e.g., *Pletz v Secretary of State*, 125 Mich App 335, 373 (1983) (expressing a belief that seeking a declaratory ruling from the Secretary of State who promulgated the rules was appropriate when the party was uncertain whether activities which were incidentally related to lobbying activities were subject to the reporting and recordkeeping requirements of an act). But no declaratory rulings

may issue where there are contested facts. Mich Admin Code, R 324.81(4); see also *Long v Norton Twp, Muskegon Co*, 327 Mich 627, 633 (1950) (suggesting that the subject of the declaratory action did not depend upon a disputed factual issue).

Unlike declaratory actions under MCL 24.264, requests for declaratory rulings do not encompass challenges to the "validity" of a rule. MCL 24.263 ("[A]n agency may issue a declaratory ruling as to the *applicability* to an actual state of facts") (emphasis added). Here, where Appellants challenge a permit, without reference to an actual state of uncontested facts, MCL 24.263 does not apply. And there are many contested facts underlying Plaintiffs' challenge. For example:

- Plaintiffs contend that manure "is a complete nutrient." (Compl, ¶ 173, Appellants' App'x p 49.) The Department, however, contends that scientific data demonstrate that manure contains an imbalance of the nutrients that crops need, causing CAFOs to overapply CAFO waste to fertilize crops, resulting in preventable discharges of phosphorus to surface waters. The Department further contends that Plaintiffs' focus on the nutrient content of CAFO waste is irrelevant to the threat of pollution from harmful microorganisms it also, undisputedly, contains.

- The Department contends that substantial scientific data justify its position that allowing land application of CAFO waste on fields with more than 150 parts per million of phosphorus presents an unreasonable risk of water pollution, but Plaintiffs disagree. (Compl, ¶ 273, Appellants' App'x p 55.)

- The Department contends that vegetated buffers can be used to grow economically valuable crops like timothy and alfalfa, but Plaintiffs assert that buffers are "economically unusable wilderness." (Compl, ¶ 279, Appellants' App'x p 67.)

This small sample of contested facts, each pertaining to some of the CNMP requirements laid out in the challenged permit conditions, demonstrates the difficulty of determining whether the challenged permit conditions are "necessary"

to safeguard Michigan's water quality, absent the thorough, adversarial fact-finding that occurs through contested case proceedings. They are provided for example, and not to suggest that this Court should address them at this time.

Courts in other jurisdictions have had opportunity to review whether new permit conditions are necessary to maintain water quality standards, and those reviews have typically been fact-driven. For example, when the Washington State Court of Appeals determined that the Washington Department of Ecology's NPDES General Permit for CAFOs did not protect state water quality standards, it did so with reference to a factual record, developed through an adversarial contested case. *Wash State Dairy Federation v State*, 18 Wash App 2d 259, 314 (2021).

Further, the Court of Appeals was wrong to address the merits of a pending contested case. See *Ameritech Mich v Pub Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued November 26, 1996 (Docket No. 181394) (Attachment 6) (finding that it would be premature to perform judicial review of an argument that the agency lacked authority to prohibit service bundling, when the statute itself prohibited service bundling, and when the same question was pending in a contested case); see also Const 1963, art 6, § 28 (requiring judicial review of an agency action, when a hearing is required, to determine whether the administrative record supports the agency action.)

In the contested case challenging the 2020 General Permit, the tribunal thoughtfully presided over two and a half weeks of live testimony, received hundreds of pages in briefing from the Department, the industry challengers, and

the environmental intervenors. Presumably, it then began the arduous process of analyzing the administrative record so that it could issue findings of fact and conclusions of law, in accordance with MCL 24.285.

But once the Court of Appeals published its opinion, the tribunal sought supplemental briefing on the import of the appellate court's jurisdictional ruling to the contested case. The challengers argued that the opinion meant that they should prevail in the contested case. The Department argued that the Court of Appeals was wrong, and, moreover, that the tribunal was not bound by the appellate court's dicta regarding the merits of the case, which did not address water quality standards, and were not informed by the extensive factual record developed through the contested case. Once the Court of Appeals denied Plaintiffs' motion for reconsideration and confirmed that it *had* ruled on the merits and found the challenged permit conditions were unlawfully promulgated rules, the tribunal again sought supplemental briefing from the parties.

Vacating the reasoning of the Court of Appeals will allow the tribunal to freely consider all factual and legal arguments pending before it, based on the extensive factual record it developed through the contested case proceedings, so that it may issue findings of fact and conclusions of law under MCL 24.85. If the Court of Appeals' erroneous decision stands, it will cause a material injustice by driving a wrong outcome to the contested case.

II. The Court of Appeals nullified the Department's ability to issue permits under duly promulgated rules, including the requirement to issue more stringent permit conditions to safeguard water quality.

When the Court of Appeals determined that the Department's existing regulations did not authorize the new permit conditions, it failed to review all the applicable regulations. This legal error will result in material injustice because the rules that the lower court failed to review are both required under MCL 324.3106 and necessary for the Department to maintain its NPDES permitting program delegation from the EPA. This Court should grant leave under MCR 7.305(B)(5)(a) and vacate the Court of Appeals' reasoning to ensure that the Department can continue issuing NPDES permits as the Legislature intended.

Regulations are interpreted using the familiar canons of statutory construction. *People v Fosnaugh*, 248 Mich App 444, 451 (2001). Where the statutory language is unambiguous, "statutory interpretation begins and ends with the words of the statute." *Scugoza v Metro Direct Prop & Cas Ins Co*, 316 Mich App 218, 223 (2016). So too for regulations. *Fosnaugh*, 248 Mich App at 451. Courts may not treat portions of a statute as "surplusage." *Apsey v Mem Hosp*, 477 Mich 120, 127 (2007). This means that courts may not selectively read out a portion of statutes and fail "to give it meaning or effect." *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 507 Mich 498, 509 (2021). Similarly, courts may not ignore portions of regulations. *Fosnaugh*, 248 Mich App at 451. But that is precisely what the Court of Appeals did in this case, resulting in the incorrect conclusion that existing rules do not authorize the challenged permit conditions.

Under the Part 21 Rules, the Department may include "more stringent" permit conditions when "necessary to achieve water quality standards." Mich Admin Code, R 323.2189(2)(h) (incorporating 40 CFR 122.44 (2005) by reference); see also Mich Admin Code, R 323.2137(d) (authorizing the Department to include more stringent limitations "deemed necessary" to meet water quality standards). This is one of the requirements that the EPA laid out in its regulations on delegating permitting authority to states. 40 CFR 122.4(d) ("No permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.")

When the Court of Appeals determined that the Department was not authorized to issue the new, more stringent permit conditions, it gave no meaning to this section of the regulations at all. "Deems necessary" is the "language of discretion." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 181–182 (2000). This kind of regulatory language allows an administering agency to exercise its judgment. *Id.* Here, it means a reviewing court must determine whether the Department's decision that more stringent permit conditions are necessary was arbitrary and capricious. See, e.g., *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 336 Mich App 490, 519–520 (2021), lv den 509 Mich. 915 (2022) (upholding the Department's decision to issue an air pollution permit to install, with detailed analysis of agency discretion under an arbitrary and capricious standard of review.) Ruling that the new, more stringent permit conditions exceed the Department's existing regulatory authority without

citing, let alone analyzing, the applicable water quality standards, gave no meaning to Mich Admin Code, R 323.2137(d) or R 323.2189(2)(h).

The Court of Appeals' erroneous regulatory interpretation comes with great costs because the Department has no rulemaking authority. Holding that Mich Admin Code, R 323.2137(d) and Mich Admin Code, R 323.2189(2)(h) do not allow the Department to issue more stringent permit conditions to safeguard water quality standards prohibits the Department from meeting its obligation under MCL 324.3106 to only issue permits that "assure compliance" with state water quality standards. It also implicates Michigan's ability to retain its delegated authority to issue NPDES permits under the Clean Water Act. This threat to Michigan's continued administration of its delegated permitting program is an issue of significant public interest warranting review by this Court under MCR 7.305(B)(2).

Recently, the Minnesota Legislature passed a law with a similar effect by prohibiting the Minnesota Pollution Control Agency from, among other things, issuing NPDES general permits with conditions banning wintertime application of land application by CAFOs. See Environment and Natural Resources Policy, Minnesota Session Laws, 1st Special Session, ch 6, art 2 (2021) (Attachment 4, pp 9–11.) But that law had a savings clause—it would not go into effect if the EPA disapproved. (*Id.* at 11.) And the EPA did just that. (*Id.* at 1–3.) Because the law sought to limit the contents of NPDES permits without public notice or judicial review, the EPA determined that it improperly precluded the federal oversight agency from reviewing and potentially objecting to the changes. (*Id.* at 2)

(discussing 33 USC 1342(d) and 40 CFR 123.44.) Here, the Court of Appeals determined that the Department could not issue new permit conditions without rulemaking, even though the Department has no rulemaking authority to issue new permit conditions. This is the same thing as prohibiting the Department from issuing new permit conditions, which could cause the EPA to determine that Michigan's NPDES permitting program does not meet federal requirements. Refusing to give meaning to existing regulatory language authorizing more stringent permit conditions to protect water quality has the effect of prohibiting the Department from performing its statutory obligations under MCL 324.3106.

This Court should vacate the Court of Appeals' determination that the permit conditions were unlawfully promulgated rules without reviewing the relationship between the new permit conditions and applicable water quality standards.

III. In the alternative, this Court should grant leave to correct the Court of Appeals' erroneous decision that existing regulations do not authorize the new permit conditions.

A reviewing court may not substitute its own judgment for that of an administrative agency, so long as substantial evidence supports the agency's decision. *Glennon v State Employees' Retirement Bd*, 259 Mich App 476, 478–479 (2003). Here, the reviewing court had no record to review because the underlying contested case had not concluded, and it was improper for the court to reach the merits of a case over which it lacked subject matter jurisdiction. *Mich State Chamber of Commerce v Secretary of State*, 122 Mich App 611, 616–617 (1983) (finding that ruling on the merits of a challenge to the Secretary of State's non-

binding interpretation of a statute was improper due to the lack of subject matter jurisdiction.) Moreover, it was *also* improper to review the agency action in isolation, without the extensive factual record developed through the contested case proceedings. Const 1963, art 6, § 28 (judicial review of agency action, where a hearing is required, must include whether the agency's final action is "supported by competent, material and substantial evidence on *the whole record*.") (emphasis added).

But even without a factual record to support its legal analysis of the challenged permit conditions, the reviewing court's analysis was *still* erroneous because the plain text of the Department's extensive permitting regulations authorizes the challenged permit conditions. This Court should vacate the Court of Appeals' reasoning, or in the alternative, allow supplemental briefing on the question of whether, on their face, existing rules authorize the challenged permit conditions.

Reserving the right to argue that all the disputed permit conditions are lawful, the Department focuses its argument on the source and transport condition, which is laid out in conditions 3(c) and 3(h)(1). (Appellants' App'x pp 104, 110.) The Department refers to this condition thusly because it addresses both the source of the pollution (the amount of potential pollution in land-applied CAFO waste) and the transport of that pollution to surface waters (prevented by conservation practices and field-specific assessments). Reducing the source is making the pile of garbage smaller; reducing the transport is placing a fence around the garbage pile.

First, the Part 21 Rules state, in relevant part:

> At a minimum, a CNMP shall include best management practices and procedures necessary to implement applicable effluent limitations and technical standards established by the department including all of the following: . . . (vi) Identify specific conservation practices to control runoff of pollutants to waters of the state; (vii) Identify protocols for testing of production area waste, CAFO process wastewater, and soil; (viii) Conduct a field-by-field assessment of land application areas and address the form, source, amount, timing, rate, and method of application of nutrients to demonstrate that land application of production area waste or CAFO process wastewater is in accordance with field-specific nutrient management practices that ensures proper agricultural utilization of the nutrients in the production area waste or CAFO process wastewater.

Mich Admin Code, R 323.2196(5)(a). In other words, CNMPs must include practices that control runoff, waste testing protocols, and site-specific land application area assessment to ensure that crops need the waste that is land applied. The rule does not specify which conservation practices permittees must use, nor does it detail how they must test the waste, nor does it explain how to assess each field to ensure nutrients will be properly utilized.

The 2010 and 2015 General Permits each allowed permittees to choose between conservation practices (buffers or setbacks). (2010 General Permit (Attachment 5), p 14); (2015 General Permit (Attachment 1), p 14.) The 2010 General Permit required permittees to use the Bray P-1 soil phosphorus test, but the 2015 General Permit introduced the choice of soil testing *or* field assessment through the Michigan Phosphorus Risk Assessment (MPRA). (Attachment 5, p 11; Attachment 1, p 10.) The 2020 General Permit retained the choice between soil testing and field assessment, but explicitly linked that decision to specified

conservation practices. (Appellants' App'x p 104) (permit condition (c) regarding maximum land application rates.) Permittees who use the Bray P-1 soil test must use both buffers and setbacks unless they can demonstrate alternate conservation practices. (Appellants' App'x p 110) (permit conditions (h)(1) and (h)(2) regarding setbacks and exception for alternative practices.) On the other hand, permittees who use the MPRA field assessment have more parameters to analyze that will assist them in determining whether, or how, to use buffers and setbacks. (*Id.*) (permit condition (h)(3) regarding setbacks or buffers.)

But the Court of Appeals did not analyze the permit condition in this manner, instead it only referred to the "buffer and setback requirement" contained in 3(h)(1). This was wrong. Mich Admin Code, R 323.2196(5)(a) authorizes the Department to issue general permits requiring CAFOs to draft CNMPs that identify conservation practices, waste testing protocols, and land application area assessments, without specifying which types, or how. The rule announces what will be contained within this class of NPDES permits, and the Department may use its judgment and discretion through permitting to clarify specific conservation practices and land application methodologies.

A similarly lawful permit condition, not contested here, relates to how permittees must store waste at production areas. Under the Part 21 Rules, CNMPs must have practices and procedures that "[e]nsure adequate storage of production area waste and CAFO process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities." Mich Admin Code, R

323.2196(5)(a)(i). Nothing in the Part 21 rules defines "adequate storage" or "proper operation and maintenance." The general permits, on the other hand, do just that. The 2020 General Permit, like earlier iterations, has requirements for constructing, maintaining, and operating waste storage structures, in far greater detail than the related regulatory language. (See Appellants' App'x pp 96–99) (condition 1 titled CAFO Waste Storage Structures); (See also Attachment 1, pp 6–9 (condition 1)). The 2020 General Permit specifies design requirements, describes how permittees must inspect the structures, details operation and maintenance requirements, and requires permittees to empty out waste storage structures annually. (*Id.*)

The regulatory requirement for adequate storage, compared to the specific details in the general permits, demonstrates how permit conditions relate to, without mirroring, regulatory text. The source and transport condition is similarly authorized by existing rules. If this Court wishes to address the merits of Plaintiffs' complaint, it should find that the Court of Appeals wrongly determined that the existing regulatory framework does not authorize the challenged permit conditions.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals erroneously reached the merits of the contested case. Its ruling was wrong as a matter of administrative procedure, harmful to the Department's ability to control water pollution, and risks undermining state agencies' permitting authority. If left alone, the Court of Appeals' decision will have drastic and permeating consequences with respect to matters of significant public interest.

For these reasons, the Department respectfully requests that this Court vacate the Court of Appeals' reasoning and reinstate the reasoning of the lower court. Alternatively, the Department requests that this Court grant leave to appeal and allow supplemental briefing to address the legal question of whether the challenged permit conditions exceed the Department's authority.

Respectfully submitted,

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

/s/ *Elizabeth Morrisseau*
Elizabeth Morrisseau (P81899)
Jennifer Rosa (P58226)
Assistant Attorneys General
Attorneys for Defendant-Appellant
Michigan Department of
Environment, Great Lakes,
and Energy
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48933
(517) 335-7664
morrisseaue@michigan.gov
rosaj4@michigan.gov

Dated: December 29, 2022

WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.305(A)(1) and 7.212(B) because, excluding the part of the document exempted, this **application for leave to appeal** contains no more than 16,000 words. This document contains 11,316 words.

Respectfully submitted,

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

/s/ *Elizabeth Morrisseau*
Elizabeth Morrisseau (P81899)
Jennifer Rosa (P58226)
Assistant Attorneys General
Attorneys for Defendant-Appellant
Michigan Department of
Environment, Great Lakes,
and Energy
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48933
(517) 335-7664
morrisseaue@michigan.gov
rosaj4@michigan.gov

Dated: December 29, 2022

LF: Michigan Farm Bureau, et al (v EGLE) MSC/AG# 2020-0297963-C/Application for Leave to Appeal 2022-12-29